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Taxing Digitalized Space:

On the Roots and Reach of Claims to Global Tax Jurisdiction

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SUMMARY 1

SAMMANFATTNING 2

ABBREVIATIONS 3

PREFACE *4*

CHAPTER ONE: ON THE POWER TO TAX *5*

1.1 Introduction 5

1.1 Background 7

1.2 Research Questions and Purpose 9

1.3 Jurisdictional thinking 10

1.4 Sources, Limitations and Methodology 11

1.5 Contributions 16

PART I: ON THE POSSIBILITY OF GLOBE JURISDICTION *17*

CHAPTER TWO: SECOND PILLAR APPROACHING… *18*

2.1 Setting the Stage 18

Jurisdiction to Tax *18*

Global Tax Landscapes *20*

Introducing GLoBE *23*

2.2 The GLoBE proposal 25

Definitions of taxable entities *25*

Income subject to tax *26*

Low tax threshold *27*

Rule order *28*

Implementation *29*

2.3 On the Outlines of Tax Revolution 30

CHAPTER THREE: WORLDWIDE CLAIMS TO CFC INCOME ***31***

3.1 Understanding CFC legislation **32**

3.2 CFC regims around the world **34**

Definitions of taxable entities ***34***

Level of Control 34

De Facto Control 37

Low tax thresholds ***39***

3.2.1.1 Low tax approach 39

3.2.1.2 Designated jurisdiction approach 39

3.2.1.3 Global approach 40

Income subject to tax ***40***

De minimis and Substance carve-outs 41

Final comments on how and at what rates CFCs are taxed ***42***

3.3 The GILTI regime **43**

Definitions of taxable entities ***44***

Income subject to tax ***44***

Low tax thresholds ***45***

3.4 CFC rules and Jurisdiction **45**

Jurisdiction around the GLoBE? ***46***

CHAPTER FOUR: PRECONDITIONAL PRACTICE ***48***

4.1 Tax competition **49**

Multinational groups ***50***

4.2 Tax cooperation **51**

Curbing tax competition ***52***

Promoting access to information ***54***

Country by Country Reporting 54

Information exchange on Country by Country Reports 57

4.3 Conclusions **58**

CHAPTER FIVE: EMERGING (BOUNDARIES OF) TRANSNATIONAL TAXSCAPES *61*

5.1 On the emergence of GLoBE Jurisdiction 61

PART II: ON THE PRODUCTION OF CROSS-BORDER TAX JURISDICTION *64*

PREFACE *66*

CHAPTER ONE: JURISDICTIONAL THINKING *67*

6.1 Introduction 67

1.2 Losing Control: Abstraction of Space 69

6.2 Recoding Space: Legal Colonialization 71

6.3 Universal Code: Maps of Jurisdiction 73

CHAPTER TWO: JURISDICTION TO TAX *75*

7.1 Introduction 75

7.2 Losing Control: The growth of Multinationals 76

7.3 Recoding Space: Claims to Corporate Transparency 78

7.4 Universal Code: Futures of Unitary Taxation 80

CONCLUSIONS: EMERGENT (BOUNDRARIES OF) INTERNATIONAL TAXATION *82*

BIBLIOGRAPHY 88

TABLE OF CASES *98*

Summary

Facing a digitalized global economy, where almost half of multinational corporate profits go untaxed, we find ourselves on the verge of tax revolution. With its two-pillar solution, the OECD seeks to lay the first building blocks of a new system for cross-border corporate income taxation. To counter avoidance, states are presented with an international top up minimum tax, to be charged at multinational groups ultimate parent level. The *Pillar II* proposal entails a jurisdiction for rich countries to tax all the untaxed foreign income of all foreign entities of resident multinational groups – no matter where they are based. By describing the state and histories of existing regimes of Controlled Foreign Corporation (CFC) rules, and of the processes and practices that enable and engender these regimes, I will explain to what extent the global tax landscape is ready carry claims to global tax jurisdiction. Adding an extra layer of understanding, I use Jurisdiction theory in a broader discussion on how state taxing powers are produced.

Sammanfattning

Inför en digitaliserad, global ekonomi, vari nära hälften av multinationella företagsvinster går obeskattade, står vi på randen till en ny ordning för gränsöverskridande företagsbeskattning. Med sin tvåpelarlösning söker OECD lägga de första byggstenarna. Den första pelaren – en internationell minimiskatt, att krävas ut från stora multinationella gruppers slutliga moderbolag – föreslås att mota baseroderande skatteplanering. Förslaget, den andra pelaren, innebär en jurisdiktion för rika länder att beskatta all utländsk inkomst från alla utländska företag, som ingår i den slutliga förälderns företagsgrupp – och är till viss del redan verklighet. Genom att beskriva dels existerande regimer av Controlled Foreign Corporation (CFC) regler, dels de processer och praktiker som underbygger dessa regimer, beskriver jag möjligheterna för länder att hävda global jurisdiktion genom företagsbeskattning. Genom att sätta mina slutsatser i en bredare kontext av samtida jurisdiktionsteori avslutar jag med en bredare diskussion om hur gränsöverskridande beskattningsmakt produceras.

Abbreviations

AEOI	Automatic Exchange Of Information
BEPS	Base Erosion and Profit Shifting
CbCr	Country by Country Reporting
CFC	Controlled Foreign Corporation
CRC	Common Reporting Standards
CIT	Corporate Income Tax
DTT	Double Tax Treaty
GILTI	Global Intangible Low Taxed Income
GLoBE	GLobal anti Base Erosion
GDP	Gross Domestic Product
G20	The Group of 20 Finance Ministers and Central Banks Governors
G24	The Group of 24
IIR	Income Inclusion Rule
IF	Inclusive Framework
MNE	Multinational Enterprise
OECD	Organization of Economic Cooperation and Development
STTR	Subject To Tax Rule
SOR	Switch Over Rule
UN	United Nations
UTPR	Undertaxed Payments Rule

Preface

As digitalization of our global economy accelerate, great swaths of multinational corporate profit loosen from their territorial bounds. Like glaciers melting under the perpetual heat of humming machines, they join the rising high sea of the hidden profits of nations. Modern, highly digitalized business models can abstract solid brick and mortar business to the point where they literally melt into air. Above our heads, amongst the clouds, vast cities of sprawling shopping centers, joyous squares and deep halls of knowledge tower, stateless, upheld by servers around the world, forever accessible, unfathomably profitable. The thousandfold branching outs of large multinational enterprise are globally encysted like sewer systems of mobile capital, they procure, decode and recode flows of capital, bleaching their roots to oblivion.

Meanwhile, in October 2020, the detailed blueprints of the OECD/G20 Two Pillar Approach, designed and currently negotiated amongst 130 countries to tackle global tax challenges brought by digitalization of our global economy, were released for public comment. In OECD tax talks #17 presenting October's blueprints, Pascal Saint-Amans, the chief negotiator behind the Two Pillar Approach, correctly describes the Pillars as constituting a new international tax order. In the same talks, when Achim Pross turns to the slide of the Pillar II Blueprint, an ominous sound is played. Achim omits a minuscular smile, more a grimace maybe, a little embarrassed yet mostly amused, while proceeding his presentation without comment.

Chapter one: On the Power to Tax

1.1 Introduction

The tax overhaul of a century is afoot. The OECD aims to deliver international tax revolution; to place the first building blocks of a future international tax order.[1] With the digitalization of our global economy, the problem of tax evasion keeps reaching unprecedented heights – today, almost 40% of total corporate profits are shifted beyond state reach.[2] The OECD flagship solution, the *Pillar II proposal*, would entail a jurisdiction for high-income countries to tax the whole of global, known untaxed profits, by way of a top up minimum tax.[3] The *Global anti Base Erosion (GLoBE) rules* make up the heart of this minimum tax. The purpose of this thesis is a) to understand if and to what extent a global minimum tax could succeed and b) to deepen understanding on how tax Jurisdiction is produced. For these purposes, I apply a recently developed stream of theory, *Jurisdictional thinking*, on the power to speak the law, carrying certain assumptions; a) that transnational space is constructed through competing claims to Jurisdiction, b) that claims to Jurisdiction, to succeed, must be engendered by the landscape upon which they are asserted, c) that Jurisdiction anticipates the content of substantive law and d) that Jurisdiction, and the succeeding substantive law, can be studied as it originates.

[1] OECD (2020a), *OECD Tax Talks #17*, Monday, 12 October 2020 15:00 - 16:00 (CEST), available at https://www.oecd.org/tax/beps/tax-talks-webcasts.htm (Last visited 20/10-2020) Pascal Saint-Amans presents OECD/G20 IF Two Pillar Approach as a "new international tax system".

[2] Tørsløv, Thomas and Wier, Ludvig and Zucman, Gabriel (2020); *The Missing Profits of Nations*; NBER Working Paper No. w24701, Working paper and data available at SSRN: https://missingprofits.world/

[3] OECD (2020), Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, available at https://doi.org/10.1787/abb4c3d1-en.

In the first part of this thesis, I outline the OECD proposal to engage a global minimum tax. The conclusions of Part I stand on their own. In thinking with Jurisdiction, I presume that the implementation of GLoBE will rely, not on equal-footing debate and abstract ideas of value creation and tax justice, but on whether the current tax landscape can engender state claims to global tax Jurisdiction. I start by outlining the Pillar II proposal. This proposal builds on already existing regimes, taxing Controlled Foreign Companies (CFCs) in the hands of their corporate parents.[4] I continue by describing these CFC regimes, highlighting how Pillar II jurisdictional claims exceed CFC claims. In a third chapter, I describe Pillar II sensitivity to tax competition, possibilities of tax coordination to cushion this sensitivity and finally, if cross border information exchange is sufficient to realistically carry claims to worldwide Jurisdiction. A final chapter concludes this part.

With Part II, a second layer of understanding is added. Here I place my materials and conclusions within a wider context of contemporary Jurisdiction research. This second part draws on this research and on Part I conclusions to paint a bigger picture of how transnational Jurisdiction to tax is produced. While Part I is heavily empirical, Part II is more theoretical. The present chapter introduces both parts. Here, I start by laying down a short background of the Pillar II proposal and of the tax landscape within which it is presented. After presenting the research questions and the limitations of this thesis, I continue by explaining the Jurisdiction theory put to use. Finally, I describe the sources and materials I have worked with and provide methodological framework. The purpose and contributions of this thesis will also be outlined. In this thesis, I study a regime that haven't yet settled – that is still being negotiated. Jurisdictional thinking, with its underlying assumptions, make this study possible.

[4] Avi- Yonah, R. S. (2019), *Advanced Introduction to International Tax Law,* Edward Elgar Publishing lmt, Cheltenham p 84; OECD (2020) p 14; Group of 7; *Chair's Summary: G7 Finance Ministers and Central Bank Governors' Meeting;* G7/8 Finance meetings; Chantilly

1.1 Background

New business models brought by digitalization facilitate the already widespread base eroding practices of large multinationals.[5] In its work on tax issues of digitalization, the OECD Base Erosion and Profit Shifting (BEPS) project issued a Final Report, establishing that the digital economy is soon to become the economy itself.[6] To deal with tax issues of digitalization then, was to deal with the entire economy – a massive task. To face this task, and to administer Final Report implementation, BEPS gathered an Inclusive Framework (IF), today consisting of over 135 jurisdictions.[7] Since 2019, the BEPS IF has negotiated two broad solutions, outlined in *the Two Pillar Approach*. While the first Pillar aims at a limited reallocation of certain taxing rights, the second would expand the global tax base, appropriating those 40% of multinational profits that are presently hidden.[8] Its operational core, *the GLoBE rules*, entails a top up minimum tax, that would charge those largest multinational corporations, that produce 90% of global corporate profits, on their global income.[9] In doing this, it introduces the world, at unprecedented scale, to unitary taxation – something developing countries and tax justice movements has propagated for decades.[10] However, taxing rights on global group profit would not be allocated amongst all host nations; but simply be granted host countries for large multinational headquarters – e. g. rich countries.[11]

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[5] Ibid p 51, 142. A wide use of Information and Communications Technology (CIT) expands market reach and develops new business models, products and services that require to a lesser or to almost no extent require physical presence in market jurisdiction and whose global economic impact is difficult to isolate within separate jurisdictions. See also Zucman, G (2015), *The Hidden Wealth of Nations: the scourge of tax havens*, University of Chicago Press, Chicago
[6] OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241046-en, p 14, 144. See p 54; "*In other words, because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy.*"
[7] OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264293083-en, p 3.
[8] Tørsløv, Wier, and Zucman (2020); OECD (2020) p 10 ff
[9] OECD (2020) p 15
[10] ICRICT (2020), *ICRICT Response to the OECD consultation on the Pillar One and Pillar Two Blueprints*, ICRICT Documents
[11] OECD (2020). For information on where the largest multinationals are headquartered, check Forbes (2020), Global 2000, May 13, 2020, 6:00am, available at https://www.forbes.com/global2000/ (Last visited 210101), or chapter 4.

Initial OECD BEPS IF negotiations on tax revolution promised equal footing-debate towards consensus on global solutions realigning taxing powers with value creation.[12] In contrast, the Pillar II product has been described as the final building block for "direct transfer of revenue from developing countries, which are generally only hosts to foreign (multinational enterprise), to the rich home countries.".[13] It has been criticized as both invalidating state rights not to tax, and of triggering a global tax race to the bottom.[14] Some comment on how current "tax revolution" reproduces historical patterns expanding rich countries' taxing powers at the cost of weaker economies.[15] Given the current state of proposals and negotiations, these authors ask themselves, if the equal footing, value-creation oriented justice promised by initial negotiations, was ever an option to begin with.[16]

Notwithstanding criticism, it is equally true that the GLoBE proposal is revolutionary and that it might succeed.[17] In this thesis, I claim, crassly put, that a global minimum tax will be charged by rich countries simply because they can. I test and work this claim by asking if the current global tax landscape can engender a wave of state claims to Jurisdiction with glob(e)al reach – broad enough to appropriate the hidden wealth of nations. This means shifting focus from promises made by OECD deliverables towards the actual legal and material cross-border tax practices of states as they look today. Using a stream of *Jurisdictional thinking,* carrying certain assumptions on the constitutive role of Jurisdiction and on how Jurisdiction is produced, I claim to be able to study the Pillar II regime, that hasn't yet settled, and to deliver insight on broader issue of how global tax landscapes are formed.

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[12] OECD (2018)
[13] ICRICT (2020)
[14] Ibid
[15] Brauner, Yariv, *An Essay on BEPS, Sovereignty and Taxation,* Sergio André Rocha and Allison Christians (ed), Tax Sovereignty in the BEPS Era, Kluwer Law International, The Netherlands Avi-Yonah, Reuven S. "*All of a Piece Throughout: The Four Ages of U.S. International Taxation.*" Va. Tax Rev. 25, no. 2 (2005): 313-38. Sacchi, Andrea Riccardi (2020), *Implementing a (Global?) Minimum Corporate Income Tax: An Assessment from the Perspective of Developing Countries*, Copenhagen Business School, CBS LAW Research Paper No. 20-15, Available at SSRN: https://ssrn.com/abstract=3668096
[16] Riccardi (2020) p 30
[17] KPMG (2020), *Taxation of the digitalized economy – development summary,* last updated October 15, available at https://tax.kpmg.us/content/dam/tax/en/pdfs/2020/digitalized-economy-taxation-developments-summary.pdf (last visited 20/10-2020).

1.2 Research Questions and Purpose

My purpose with this thesis is twofold. First, I want to answer the question; *if, and to what extent, current negotiations on the GLoBE proposal could lead to successful claims to Jurisdiction implementing a global minimum tax*. I assert that the formation of GloBE minimum taxation will rely on the extent of state ability to successfully claim Jurisdiction to tax the global profits of multinational groups at the hands of corporate parents or ultimate parent entities. I further assert that this ability will depend on the extent that claims to Jurisdiction are engendered by the global tax landscape. Working these assertions, in order to answer the main research question, I explain: a) *how state and interstate practices enable the effective taxation of foreign entities' foreign income today*; and b) *if and to what extent current practices could engender state Jurisdiction to tax global profits of multinational groups, in the manner envisioned by the GLoBE proposal.* I answer these questions in the first part of this thesis.

Second, I want to deepen understanding on how Jurisdiction to tax is delimited and expanded and how sovereign power is consequently (un)bounded in transnational space. My assertions on the constitutive role of Jurisdiction and on how it is produced are backed up by a recent stream of theory, *jurisdictional thinking*. In the second part of this essay, I place my theoretical assertions and empirical conclusions within this broader theoretical stream. The GLoBE minimum tax would grant a handful of countries a prior right to extend their Jurisdictional reach, colonizing all hidden wealth of nations. In the first part I use certain assumptions on Jurisdiction to ask *if* a minimum tax could succeed; in the first part I expand on these assumptions to ask *why* a minimum tax could be possible. With this second part I pose the question of *how theoretical frameworks of jurisdictional thinking could explain processes by which cross border Jurisdiction to tax is delimited and expanded.* While part one conclusions stand on their own, the extra layer of understanding provided through part two does not. Both parts are necessary to deepen understanding on de- and reterritorialization of sovereign power through jurisdictional movement.

1.3 Jurisdictional thinking

"International lawyers look at the map and think they see the world."[18]. Sundhya Pahuja argues that the roots and reach of sovereign states are constituted by Jurisdiction, by the power to declare law.[19] Sovereignty, according to Pahuja, can be understood as a practice of Jurisdiction.[20] Through the work of Jurisdiction, sovereign power shifts and relates in ways not mirrored by world maps. As rich states are getting ready to assert truly global jurisdiction, I agree with Pahuja, that the "movement of the state form" seem "much more restless than one might imagine".[21] Pahuja is one of several authors turning to the concept of Jurisdiction to understand transnational legal regimes. These authors all share certain views on its role and operation. I adopt these views to the extent relevant for my study.

Questions of Jurisdiction precede every lawful act.[22] Every legislator, court or official, needs Jurisdiction to take legal action, lest their actions be void or ineffective.[23] Most times, legal relations are so well entrenched that they can almost be taken for granted.[24] When it comes to cross-border taxation, however, there is no consensus on principles limiting state Jurisdiction to tax – yet regimes of transnational taxation are highly uniform.[25] To understand state Jurisdiction to tax, one needs to adopt a broad understanding of Jurisdiction: to consider Jurisdiction as the spatiotemporally situated power to speak the law. While this power to speak the law might seem to belong to a certain actor, it's always granted her through external material orders.[26] As the actor asserts claims to Jurisdiction – external circumstance and preconditions will (dis)engender, delimit and expand Jurisdictional claims.

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[18] Pahuja, Sundhya (2013) *Laws of Encounter: a Jurisdictional Account of International Law*, London Review of International Law, Volume 1:1, Oxford University Press, p 75
[19] Ibid
[20] Pahuja, Sundhya (2013) p 94
[21] Ibid
[22] Orford, Anne (2009), *Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect*, Michigan Journal of International Law, vol 30:3. P 1003
[23] Dorsett, Shannaugh and McVeigh, Shaun (2012), *Jurisdiction,* Routledge p 44-51
[24] Orford, Anne (2009) p 1013
[25] Allison Christians, *BEPS and the Power to Tax,* Sergio André Rocha and Allison Christians (ed), Tax Sovereignty in the BEPS Era, Kluwer Law International, The Netherlands, p 24.
[26] Orford, Anne (2009) p 1013

In this thesis, I work certain assumptions on Jurisdiction and how it is produced. First, I understand Jurisdiction as the spatiotemporally situated practice of speaking law.[27] Jurisdiction precedes every lawful relation and brings these relations into existence. Second, I assert that transnational legal space is produced through (competing) jurisdictional claim, transformed into the successful performance of declaring law. The concept of claim highlights the relationships between the legal actor(s) and the law. Third, claims to Jurisdiction are effective to the extent they represent material orders.[28] This means two things; a) that the (un)successful transformation of claims will depend on the material landscapes upon which they are asserted and; b) that Jurisdiction governs not only who gets to speak the law, but also what law can be spoken. Together, these assumptions lead to the conclusion, that by studying the material orders engendering state Jurisdiction to tax, I can understand what Jurisdictional claims could be effective and why.

Jurisdictional thinking emphasizes how every claim to Jurisdiction will ultimately grow out of the material circumstances and practices - the global tax landscape - engendering the claim.[29] The reader might ask if such an emphasis is relevant to jurisprudence. She might argue that legal science purports to strict study of the meaning and application of legal texts. In the context of transnational taxation, however, there are no such legal texts. Still we observe, through OECD negotiations, and through the global minimum tax asserted by the US GILTI regime, the coming into being of a far-reaching legal order. By understanding how the speech of law is asserted, by whom and under what circumstance, one can study legal orders that hasn't yet settled.

1.4 Sources, Limitations and Methodology

Jurisdictional thinking sets this thesis methodological framework, complemented by legal geography. Thinking with jurisdiction means taking seriously laws' materiality, the orders or landscapes of law from which

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[27] Noll, Gregor (2016), *Theorizing Jurisdiction,* Orford, Anne, Hoffman, Florian (eds), The Oxford Handbook of the Theory of International Law, Oxford University Press, U.K., p 3.
[28] Dorsett, Shannaugh and McVeigh, Shaun (2012) p 122
[29] Loevy, Karin (2016), Emergencies in Public Law – the Legal Politics of Containment, Cambridge University Press, U.K.

Jurisdiction spring. Mapping the material preconditions of jurisdiction can mean, as shown by De Sousa Santos, drawing a map as vast and detailed as the world itself.[30] Certain limitations and exaggerations has to be made, for reality to be functionally reproduced. In his essay *Law: a Map of Misreading* De Sousa Santos show how the production of Jurisdiction be studied at different scales.[31] The concept of scale stems from Legal Geography.[32] Legal Geography, as jurisdictional thinking, considers a broader concept of Jurisdiction, as the spatiotemporally situated practice of speaking law, engendered by material orders. Considering scale, I study the material orders of law at different levels of complexity. At each level, I pose certain questions of Jurisdiction, regarding what claims are being asserted and how these claims could be engendered.

First, I study the low complexity order of the Pillar II proposal. I show how the minimum tax of Pillar II build on existing Controlled Foreign Corporations (CFC) regimes and certain state practices.[33] Second, I turn to the medium complexity order of CFC regimes. I outline the prevalence and scope of state practice to tax CFC regimes and compare the Jurisdictional claims of these regimes to those of the minimum tax of Pillar II. On the one hand, CFC taxation make a material practice, that could help engender Pillar II claims. At the same time, studied at a different scale, CFC regimes are themselves claims to Jurisdiction. Finally, I describe those material preconditions, the high complexity order, that engender CFC claims to Jurisdiction. I do this while minding the gap between GLoBE and CFC claims. The preconditions studied are a) the global conditions of tax competition and the scope and structure of multinational enterprise and b) state practices of transnational information exchange and tax coordination. In the final chapter, I describe whether the reality of CFC taxation and of transnational tax competition and cooperation will successfully engender GLoBE claims to Jurisdiction.

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[30] De Sousa Santos, Boaventura (1987), *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, Journal of Law and Society, vol 14:3 p 286
[31] Ibid
[32] Layard, Antonia and Bennet, Luke (2015) *Legal Geography: Becoming Spatial Detectives,* Geography Compass vol 7:9, p 410

[33]

I have limited my study to questions of tax competition and cooperation on tax co-ordination and administration. In OECD- and national reports, as in doctrine on cross-border taxation, solid tax cooperation on administration and coordination is generally discussed as necessary for the effective implementation and enforcement of CFC rules.[34] This view is mirrored in the October 2020 blueprint of the Pillar II proposal. The proposal justifies its top down approach as "limit(ing) the number of jurisdictions applying the (top down minimum tax), thereby reducing the need for co-ordination".[35] The number of jurisdictions applying the rules can be limited since the largest "MNE Groups (earn) over 90% of global corporate revenues".[36] The blueprint further states that the consolidated financial statements prepared by multinational groups, on their worldwide activity, are of fundamental importance for effective rule implementation.[37]

Since CFC regimes have evolved without the existence of a central governing, legally binding power, in order to speak generally of them, one needs to know the full picture. To this end I have put together a database, attached in Appendix A, on all CFC regimes in existence of all countries acknowledged by the UN. I have structured the data around a set of key operational features, inspired by those defined by Brian J Arnold in his work on CFC regimes.[38] These features regulate: (i) the definition of control; (ii) what low tax thresholds or low tax jurisdictions are to trigger taxation; and (iii) what types of CFC income are to be taxed. I have chosen these features since I agree with Arnold that they are fundamental in understanding the scope of CFC rules. They are key parameters in the sense that, although CFC can regimes differ widely among jurisdictions and can get extremely technical, most of these technicalities are ordered to answer the three questions of definition, low tax thresholds and income attributed. Furthermore, de minimis thresholds, regarding categories of income,

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[34] OECD (2015), Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241152-en ; OECD (1996); *Controlled Foreign Company Legislation*; Studies in Taxation of Foreign Source Income, OECD Publishing, Paris p 30
[35] OECD (2020) p 18
[36] OECD (2020) p 15
[37] OECD (2020) p 23
[38] Arnold, B. J. (2012) *The Evolution of Controlled Foreign Corporation Rules and Beyond*; Tax Law Review, 65(3), 479

and substance carve- outs are included, as they are closely related to the three key operational features.

To analyze CFC legislation around the globe, I have gathered data from: country surveys from IBFD; a recent IBFD publication of detailed country reports on CFC rules in 41 countries, called *Controlled Foreign Company Legislation* and; the OECD database on CFC-rules.[39] IBFD country surveys provide information on the existence and design of CFC regimes in every country. These surveys are updated continuously. *Controlled Foreign Company* hosts the knowledge of over a hundred tax policy experts to provide detailed analysis of CFC rules in 41 countries, updated up until January 2020. The OECD Controlled Foreign Corporations Database provide information on CFC legislation in 49 countries for the year 2019. It covers definitions on CFC income and substance carve-outs. My data survey covers all countries acknowledged by the UN. When data from different sources is lacking, or when data diverges between different sources, I have turned to the texts of domestic legislation. I have not found full data for Tanzania and Mongolia.[40]

Many features of CFC regimes fall outside the scope of this thesis. First, I haven't considered CFC regimes controlled by natural persons – only corporations. This is because, in the end, this thesis enquires on the emergence of an international minimum tax to be charged at ultimate corporate parent level. For the same reasons, the question whether CFC rules apply when the shareholder is a permanent establishment is disregarded. Another set of important questions that largely fall outside of scope regards what foreign tax can be credited against the CFC income, and what losses and gains are to be included in the foreign CFC income to be taxed. These issues all affect scope yet are subsidiary to questions on the nature of CFC income to be taxed. Lastly, it can be mentioned that industry specific carve-outs have been excluded from the collection of relevant data. My analysis focuses on the general scope of CFC

[39] Georg Kofler et al eds. (2020) *Controlled Foreign Company Legislation,* IBFD ; IBFD country surveys are available at IBFD (2020); *Tax Research Platform*; Country Surveys; available at https://research.ibfd.org/#/ (last checked 020120) ; OECD (2020b), *Dataset Controlled Foreign Company (CFC) Rules,* database, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, available at https://qdd.oecd.org/subject.aspx?Subject=CFC

[40] Appendix A, Mongolia and Tanzania

legislation. Limitations on data has been made to facilitate understanding of general scope.

In exploring transnational information exchange, tax co-ordination and tax competition, I primarily turn to OECD- and national reports and treaties. The OECD and G20 have developed, and monitor implementation of, among other things common standards for tax information reporting and exchange.[41] They collect, evaluate and present data on country by country rules for gathering information of large multinational enterprise, and on all current bilateral relationships for the exchange of such information.[42] The Pillar II is outlined on the basis of the blueprint released October 2020.[43] The Pillar II proposal consists of three different rules and one complementary rule.[44] Since this thesis enquires into the growth of a Jurisdiction to tax the foreign income of foreign entities, it will focus on the two core rules, jointly called the GLoBE proposal.[45] It is through this core proposal that a top up minimum tax, to be charged at ultimate parent level, would be effectively implemented. I have structured my presentation of the GLoBE around the same key features that define CFC regimes. These features are key also in the GLoBE case, a consequence of the minimum tax building on such regimes.

Constitutional, EU law and tax treaty obstacles to CFC- and GLoBE rules fall largely outside the scope of this essay, since I hold that they wouldn't hinder broad implementation. The OECD has deemed the GLoBE proposal, and CFC regimes, consistent with existing treaty networks.[46] EU law could, however, present implementation of the GLoBE proposal with some issues.[47] EU law already limit application of CFC regimes within the internal market.[48] Issues of EU law have been discussed at length by other authors.[49]

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[41] OECD (2020c), Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 3) : Inclusive Framework on BEPS: Action 13 , OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/fa6d31d7-en.
[42] Ibid
[43] See OECD (2020)
[44] OECD (2020) p 14
[45] Ibid
[46] See OECD (2020) p 173
[47] Nogueira, J. F. P. (2020) *European Union/International - GloBE and EU Law: Assessing the Compatibility of the OECD's Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market,* World Tax Journal, Volume 12 No 3
[48] Case C-196/04 (Cadbury Schweppes)
[49] Nogueira, J. F. P. (2020), Luc De Broe (2019) *OECD's Global Anti-Base Erosion Proposal ("GloBE") – Pillar Two Raises Fundamental Concerns of Compatibility with EU Law*

Incompatibility of EU law with certain parts of CFC regimes, as with potential incompatibility with some parts of the GLoBE rules, still allow or would still allow for full taxation of foreign entities in non-EU/EEA countries.[50] I argue that a broad GLoBE implementation is not dependent on full compatibility with EU law.

1.5 Contributions

This thesis contributes to jurisdictional research and research on cross border taxation of the foreign income of foreign entities. It purports to contribute to the understanding of the formation of an international minimum tax, to be charged at multinational enterprise ultimate parent level. It consolidates recent research on jurisdictional thinking and applies it to a new legal field, that of "international taxation". It entails a detailed, consolidated overview of all CFC legislation applied worldwide, to date, focusing on key operational features. Such an overview has not previously been presented. Finally, it enquires into the question of how consensus in "international taxation" is formed, using jurisdictional thinking. The epistemological assumptions of jurisdictional thinking presented in this thesis can be tailored for and applied to other legal fields. They can also be used to analyze the impact of other projects within "international taxation", such as the ongoing, widespread cooperative projects on taxing certain digital activity.[51]

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[50] Mindy Herzfeld (2019), Can GILTI + BEAT = GLOBE?, 47 INTERTAX 504

[51] The African Tax Administration Forum (2020), *ATAF Suggested Approach to Drafting Digital Services Tax Legislation,* ATAF's International Taxation and Technical Assistance Publication ; Committee of Experts on International Cooperation in Tax Matters (2019), *Tax Issues related to the Digitalization of the Economy: Report,* Eighteenth session, New York ; OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint*: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/beba0634-en.

Part I:

On the Possibility of GLoBE Jurisdiction

Chapter two: Second Pillar Approaching

In this section, I start by providing an outline of the transnational tax landscape. I describe how state Jurisdiction to tax is conceptualized and provide an overview of how corporate income taxing rights are globally allocated today. These steps are necessary for the reader to understand the role and operation of the proposed GLoBE rules. I continue by describing how the GLoBE proposal was put to the table and where negotiations at the OECD BEPS IF are today. Finally, I outline the proposal of the GLoBE rules. The overall purpose of this section is to provide a starting point in my examination on if and to what the GLoBE proposal could be realized. The realization of a top up minimum tax, charged at ultimate parent entity (UPE) level, would depend on whether UPE host state could claim Jurisdiction over the profits of all multinational subsidiaries, no matter where they are based. These claims, in turn, would have to be engendered by material orders of transnational taxation. In outlining the GLoBE proposal, I encounter those critical orders.

2.1 Setting the Stage

Jurisdiction to Tax

In the OECD/G20 2015 Final Report (the Final Report), the cornerstone for all current OECD work on tax evasion, the authors start out by elaborating on the conceptual background of Jurisdiction to tax.[52] It is commonly accepted, the OECD tells us, "that there are two aspects to a state's sovereignty: the power over a territory (…) and the power over a particular set of subjects". This binary nature of sovereignty, they continue, was strongly rooted in 19th and 20th century legal minds, leading to the fashioning of jurisdiction as connected to

[52] OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241046-en p 22

persons or territory under state control. "(T)he dual nature of sovereignty has", the section continues, "contributed to the formulation of the realistic doctrine, which is driven by concerns for the enforcement, administration, collection of taxes and came to limit the traditional notion of sovereignty.".[53] Enforcement Jurisdiction, according to this doctrine, is said to be different from Jurisdiction to impose tax, yet in a fundamental way constituent of it.[54]

The Final Report delivers on the OECD/G20 mandated task of *realigning* profit allocation to value creation, yet does not explicitly state what, if any, international principles guide the allocation of our global tax base today. This inability mirrors a similar confusion within current global academic debate. Broadly speaking, there are two sides to this debate. On the one side are those who speak of customary international tax law.[55] These people argue that sufficient nexus is required for Jurisdiction to tax to kick in. Nexus means a sufficient link between the state and the taxed income. Modern corporate income taxation is generally connected to the legal fictions of corporate residence, for worldwide income, and economic source, often represented by "Permanent Establishment", for locally sourced income.[56] These principles of allocating sufficient nexus date back a century and are incorporated through tax treaty networks and domestic law all over the globe.[57]

On the other side we find those who believe in the unlimited and inviolable sovereign power of nations to decide on their own tax laws.[58] According to this school, every nations' Jurisdiction to tax is unlimited to begin with. International law can never allocate jurisdiction, only limit it, in the way of agreement amongst states.[59] Furthermore, an agreement, such as a tax treaty or even an entire tax treaty network, is not necessarily legally binding for the legislator.[60] Talk of enforcement jurisdiction stems from this school, in the sense

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[53] OECD (2015) p 23
[54] Ibid
[55] Avi-Yonah, Reuven S. (2019), *Does Costumary International Law Exist?*, Public Law and Legal Theory Research Paper Series, Paper No 640
[56] Ibid
[57] Ibid
[58] Dahlberg, Mattias, *Internationell Beskattning,* fifth edition, Studentlitteratur AB, Lund: swedish law can be said to apply this view.
[59] Ibid
[60] RÅ 2008 ref 21, RÅ 2008 not. 61. Here the supreme court of Sweden establishes that the counties tax treaty network, incorporated as Swedish law, are to be treated as Swedish law, and can be overridden by the legislator.

that states' unlimited jurisdiction to prescribe tax law is said to be limited only by its power to enforce said prescriptions.[61] The final report seem to refer to both of these schools. In both schools, as in the final report, the concept of sovereignty takes center stage. Emphasis is put on sovereign control as either created and maintained by, or the creator of, the international.[62]

Global Tax Landscapes

The concept of international taxation can be misleading. "International taxation" is highly decentralized.[63] There is no formal, globally central power to produce and enforce binding tax policy.[64] There is no consensus on the existence of customary international tax law.[65] Disputes are normally handled by domestic courts or by mutual agreement procedures between states.[66] In this thesis, I refer to "international taxation" as transnational taxation, or simply cross-border taxation, stressing interstate dynamics over international universality. Excepting the importance of EU-law, international law consists of a vast network of primarily bilateral tax treaties – that make up its backbone – and the domestic international law of states.[67] Domestic international law is simply domestic law with an international connection.[68] In spite of the lack of central authority, all of the worlds effective tax treaties are, to an extent of 80%, *identical* to one another, a pattern mirrored in domestic laws.[69] Within the decentralized global tax landscape, a certain uniformity can be empirically observed. To truly grasp the legal makeup of this tax landscape, one needs to understand the roots of this uniformity.

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[61] Santos and Rocha (2017) p 33.
[62] OECD (2015) p 22 ; Brauner, Yariv, *An Essay on BEPS, Sovereignty and Taxation,* Sergio André Rocha and Allison Christians (ed), Tax Sovereignty in the BEPS Era, Kluwer Law International, The Netherlands
[63] Dagan, T. (2017). International Tax Policy: Between Competition and Cooperation (Cambridge Tax Law Series). Cambridge: Cambridge University Press. doi:10.1017/9781316282496
[64] Ash, E and Marian, O.Y. (2019), *The Making of International Tax Law: Empirical Evidence from Natural Language Processing.* UC Irvine School of Law Research Paper No. 2019-02, Available at SSRN: https://ssrn.com/abstract=3314310
[65] Dagan, T. (2017)
[66] Dahlberg, M (2020), *Internationell beskattning,* Studentlitteratur AB, Lund
[67] Ibid
[68] Ibid
[69] Ash and Marian (2019) Even domestic international tax rules are somewhat homogenous.[69]

Uniformity is sometimes explained as a product of global work against double taxation.[70] The idea is that countries laws have to be uniform, so that the same income is not taxed twice. This argument alone does not explain why taxing rights are allocated the way they are. It is furthermore unclear why double taxation is such a bad thing, where for example double non taxation is not. In her book, *International Tax Policy: Between Competition and Cooperation*, Tsilly Dagan shows how uniformity formed through uneven tax competition.[71] Dagans analysis is supported and deepened by other authors.[72] Miranda Stewart adds to it by showing how networks of information exchange are negotiated to benefit rich countries, creating an unleveled playing field.[73] Within the context of a digitalized, global economy, states tend to lax their domestic tax laws, competing with one another to attract highly mobile capital and strengthen local business.[74] The terms of tax competition force a natural harmonization of tax laws, gradually cemented through tax treaties negotiated on a predominantly bilateral basis, and with time through domestic tax law.[75] Through informal organizations – the OECD and the UN – harmonization is encouraged by way of model tax treaties. Today, 80% of all treaties are almost identical to either OECD or UN model treaties.[76]

Within regimes of transnational taxation, countries often tax residents on their worldwide income, and non-residents on their *active* income.[77] Active income is, generally, business income, as opposed to investment income. Resident countries normally enjoy a residual taxing right.[78] Ideally, this

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[70] *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241046-en ; OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris

[71] Dagan, T. (2017)

[72] Avi-Yonah, Reuven S. (2019), Brauner, Yariv (2017), Christians, Allison (2017)

[73] Stewart, Miranda (2013), *Global Tax Information Networks: Legitimacy in a Global Administrative State,* Tax Law and Development, Eds Brauner, Y and Stewart, M, Edward Elgar Publishing Limited, Cheltenham ; Christians, Allison (2013), *Tax Activists and the Global Movement to Development through Transparency;* Tax, Law and Development, Eds Brauner, Y and Stewart, M, Edward Elgar Publishing Limited, Cheltenham

[74] Dagan, T (2013), *The Tragic Choices of Tax Policy in a Globalized Economy,* Tax, Law and Development, Eds Brauner, Y and Stewart, M, Edward Elgar Publishing Limited, Cheltenham

[75] Avi-Yonah, Reuven S. (2019) p 3, *Advanced Introduction to International Tax Law,* Second edition, Edgar Elgar Publishing, UK, p 3

[76] Avi-Yonah, Reuven S. (2019) p 51

[77] Avi-Yonah, Reuven S. (2019) p 4

[78] Ibid

arrangement would lead to all income being taxed. In reality, 40% of multinational profit avoid taxation.[79] Countries will lower tax rates and enable, entertain or accept tax avoidance so as to not scare away investment or put resident business at competitive disadvantage. By structuring global corporate makeup and intragroup payments to minimize tax burdens, multinational groups can avoid or indefinitely defer taxation. Such structures are enabled by the *separate entity approach* and the global market dominance of large multinationals.[80] The separate entity approach means that every entity within a group is regarded as separate for tax purposes.[81] Today, 10-15% of multinational groups generate 90% of all of the worlds corporate profit.[82]

As multinational enterprises establish branches and subsidiaries in preferential tax regimes and in low tax jurisdictions, take advantage of discrepancies between countries tax laws, and plan their intragroup payments, in order to control taxation levels, a *veil* is said to be cast over the real economic activity of group entities. If multinational groups were taxed on a unitary basis, if the corporate veil was lifted, tax avoidance could be curbed. Developing countries and tax justice networks advocate unitary taxation by formulary apportionment, but are unable to enforce it.[83] However, with the help of Controlled Foreign Corporation (CFC) rules, stronger, capital exporting countries have started moving towards lifting the corporate veil. CFC rules assert jurisdiction to tax foreign profits of foreign companies directly at the hands of domestic shareholders. However, for reasons of tax competition and because of administrational difficulties, the scope of CFC claims to Jurisdiction are limited. With Pillar II, the reach of that Jurisdiction inherent in CFC rules could to be massively expanded. Pillar II would assert a top up, global minimum tax, ripping the veil of multinational groups, establishing, for the first time in history, a global, unitary tax base.[84]

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[79] Tørsløv, Thomas and Wier, Ludvig and Zucman, Gabriel (2020)
[80] Zucman, G (2020) Picciotto, Sol (2013); *International Business Taxation A Study in the Internationalization of Business Regulation;* Cambridge University Press, Cambrige
[81] Avi- Yonah, R. S. (2019) p 34
[82] OECD (2020) p 15
[83] Sadiq, K (2001), *Unitary taxation - the case for global formulary apportionment,* Bulletin for International Taxation, vol 55 nr 7,
[84] KPMG (2020)

Introducing GLoBE

The international minimum tax carries a long history. The first attempt at its creation came in US, 1962. As US export boomed, president Kennedy presented a proposal to tax all untaxed profit of foreign controlled entities.[85] After massive protests from US industry, a compromise was met, and the taxation of *Subpart F income* inaugurated the growth of modern CFC regimes. As states floated their currency, the regime grew, vigorously protested for extraterritoriality, and for overriding tax treaty networks.[86] In 2017, through the Tax Cuts and Jobs Act (TCJA), the regime was finally expanded to entail a minimum tax on Global Intangible Low Tax Income (GILTI).[87] Inspired by CFC rules in general and by the GILTI provision in particular, the international minimum tax presented at OECD negotiations was formally put on the table in 2019.[88] This proposal has been critiqued as disproportionally extending residence taxation, having rich countries benefit from global tax evasion, and effectively limiting states' rights not to tax.[89]

The Pillar II proposal rests on two core rules, commonly referred to as the *GLoBE proposal,* complemented by a rule allowing a switch towards the credit method where treaty situations normally demand exemption. [90] These rules – the *income inclusion rule (IIR)* and the *undertaxed payments rule (UTPR)*, converge to create a top up minimum tax, based on a common, global tax base, defined by consolidated financial statements provided by MNEs.[91] Where the IIR provides a primary right for jurisdictions hosting multinational enterprises ultimate parent entities, the UTPR works as a backstop, entailing a secondary taxing right for jurisdictions hosting entities further down the corporate chain.[92] A fourth rule, the Subject to Tax Rule, might provide taxation of certain

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[85] Picciotto, Sol (2013) p 111
[86] Avi - Jonah (2019) p 81 ; Arnold (2019) p 14
[87] Avi - Jonah (2019) p 75
[88] OECD (2020d), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy* – January 2020, OECD/G20 Inclusive Framework on B
[89] G24 (2019), *Proposal for Addressing Tax Challenges Arising from Digitalisation January 17, 2019,* G-24 Working Group on tax policy and international tax cooperation ; ICRIT (2020)
[90] OECD (2020) p 14
[91] Ibid ; KPMG (2020)
[92] Ibid

outbound, base eroding payment under certain circumstances, given applicable tax treaties allow for it.[93] As discussed in section 1.4, only the GLoBE rules fall inside the scope of this thesis.

An economic impact assessment of Pillar I, the GLoBE and of GILTI combined, made by the OECD, was released in October 2020 alongside the blueprints of the Two Pillar approach.[94] The assessment concludes a possible rise in global corporate income taxation revenue of 2,3 to 4%. The vast majority of these increases will stem from the second pillar.[95] The second pillar would mainly benefit high income countries, as defined by the world trade organization.[96] This is no surprise, since the core Pillar II rule would allocate the whole of global untaxed profits to those countries hosting the ultimate parent entities or headquarters of large multinationals. The GLoBE/ GILTI duo could create a globally uniform tax base, to be charged at ultimate corporate parent level. The goal of creating a single global tax base is a key innovation, introducing the global tax landscape to a form of top up unitary taxation.[97] This tax base would be created to the primary benefit of rich countries – extending their sovereign reach, in letting them tax all hidden profits of nations. Jurisdictional thinking considers transnational space to be constituted by successful claims to Jurisdiction – could global Jurisdiction as envisioned in GLoBE be asserted? The following chapter provides an overview on key features; definitions of taxable entites, nature of income taxed and low tax thresholds. The GILTI provision, forming a part of the US CFC regime already in force, is further discussed in chapter 3.

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[93] OECD (2020) p 18
[94] OECD (2020b), Tax Challenges Arising from Digitalisation – Economic Impact Assessment: Inclusive Framework on BEPS,
OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/0e3cc2d4-en.
[95] Tax talks (2020a); Ryan Finley (2020), *OECD's Pillars 1 and 2 Impact Assessments Open to Debate,* Tax notes int'l, nov. 9, 2020, p. 841100
[96] assessment
[97] KPMG (2020)

2.2 The GLoBE proposal

Together, the two GLoBE rules would create a common unified global tax base. The scope of this tax base is described in chapter two of the blueprint released by OECD in October 2020, as "build(ing) on the definitions and methodology currently used by Inclusive Framework on BEPS members under BEPS Action 13 for Country by Country Reporting (CbCR) purposes.".[98] This route was taken to simplify administrative burdens and to carve out small and medium sized business from scope.[99] The information provided by CbCR is essential for the effective implementation of global minimum taxation. Multinational groups are only required to file information under CbCR rules when their consolidated group revenue exceeds EUR 750 million.[100] Finally, some ultimate parent entities are excluded from taxation under the GLoBE rules.[101] These exclusions fall outside the scope of this essay.

Definitions of taxable entities

Under the GLoBE proposal, *Constituent Entities* of *Multinational Groups* would be taxed in the jurisdiction of their *Ultimate Parent Entities*. The term *group* is defined as a collection of enterprises required under applicable accounting principles to prepare consolidated financial statements for financial reporting services.[102] The term *multinational group* (MNE) entails any group including two or more enterprises resident, or entertaining permanent establishments, in different jurisdictions.[103] *Constituent entities* are the separate units included in the consolidated financial statements of an MNE group.[104] Finally, an *ultimate parent entity* exists where a constituent entity of an MNE group meets certain criteria, likewise connected with consolidated financial statements. Furthermore, an ultimate parent entity cannot be owned directly or indirectly by another constituent entity.

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98 OECD (2020) p 25
99 Ibid
100 OECD (2020) p 17
101 OECD (2020) p 30
102 OECD (2020)p 23 - 30
103 Ibid
104 Ibid

The definitions of taxable entities and groups (units), of the scope of the tax base, rest on the consolidated financial statements made by multinational groups for accounting purposes. Where such statements don't exist, but would be required, if the equity interests of units were traded on a public securities exchange in their residence jurisdiction, entities would still fall inside the scope.[105] Furthermore, an entity can be deemed a constituent entity even if excluded from the MNE Group's consolidated financial statements, granted exclusion is based solely on size or materiality grounds.[106] Finally, for a permanent establishment to be regarded as a constituent entity, the MNE business unit controlling the establishment must prepare a "separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes".[107]

The GLoBE proposal, resting on the requirements of Action 13 on country by country reporting, does not require any specific accounting standard to guide financial statements.[108] It does however state that standards must be *acceptable*.[109] Acceptable standards are the International Financial Reporting Standards (IFRS) or standards deemed equivalent.[110] Accounting standards are deemed equivalent to the IFRS based on the assessments of the International Accounting Standards Board (IASB) and on the reciprocal recognition of accounting standards by securities regulators of inclusive framework jurisdictions.[111] At present moment, the General Accepted Accounting Standards (GAAPs) of Australia, Hong Kong, Canada, Japan, the China, New Zealand, India, South Korea, Singapore, and the United States are deemed equivalent to the IFRS.[112]

Income subject to tax

When the multinational group, the constituent entities, and the ultimate parent entities have been defined – based on the financial accounts provided under

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[105] Ibid
[106] Ibid
[107] Ibid
[108] OECD (2020) p 51ff
[109] Ibid
[110] Ibid
[111] OECD (2020) p 56
[112] OECD (2020) p 51

Country by Country Reporting standards – they are ready to be taxed. Taxation is charged on a jurisdictional basis, meaning two things. First, minding the total effective taxation charged on all entities of a multinational group within the jurisdiction, in proportion to their profits, a common top up tax percentage is calculated.[113] Second, this top up tax percentage is applied to the income of all constituent entities in the jurisdiction on an entity to entity basis.[114] The introductory calculation of jurisdictional effective tax rate serves both to trigger group minimum tax liability within a given jurisdiction, and to calculate the top up minimum tax to be applied on an entity to entity basis.[115]

Before taxation, the income of the constituent entities is adjusted for losses of other entities for the same period, carry-forwards of losses, timing differences, and eventual substance related carve-out amount.[116] The substance carve-out takes into account two components; the payroll component and the tangible asset component. The payroll component will carve out a fixed routine return on eligible payroll costs.[117] The tangible asset component minds the depreciation and depletion of property, plant, equipment, land and natural resources, owned or leased. Investment properties of buildings and land are excluded from the carve-out. Assets held for sale, rather than use, are likewise excluded. The exact scope of the substance carve-out is yet to be decided but is described as "modest".[118]

Low tax threshold

The constituent entities of a given jurisdiction are only taxable if and to the extent they are found to have been taxed under a fixed effective minimum rate. This fixed rate is yet to be set. Estimates of 10-12,5% where used for illustrative purposes in the economic impact assessment mentioned at the beginning of this chapter.[119] Pascal Saint-Amans, the chief negotiator of the OECD two pillar

113 OECD (2020) p 51- 81
114 Ibid
115 Ibid
116 OECD (2020) p 112
117 OECD (2020) p 95
118 Ibid
119 OECD (2020b)

approach, has guessed the proposal to land a low tax threshold of 12,5%.[120] He furthermore voiced concerns that the Pillar II tax floor might become a roof.[121] The Independent Commission for the Reform of International Taxation (ICRIT) have long argued for a switch towards unitary taxation, albeit complemented by principled formulary appointment.[122] ICRIT holds that a rate lower than 25% might incentivize a "race to the minimum", hitting hard on the global south. A rate surpassing 25% could disincentivize tax planning of multinational groups and ease the pressure from tax competition that hinders effective taxation today.

Rule order

Taxation is carried out by two different interlocking rules. The Income Inclusion Rule (IIR) charges every ultimate parent entity on the global activities of the multinational group.[123] This is the main operative rule. Split ownership by two or more ultimate parent entities is accounted for. Where the ultimate parent entity resides in a jurisdiction that failed to apply the IIR, taxation is charged at sub-holding level. The function of the Undertaxed Payment Rule (UTPR) is to act as a backstop – to ensure that IIR taxation is carried out.[124] With the UTPR, remaining top up tax is allocated by formulary appointment amongst UTPR taxpayers. UTPR taxpayers are constituent entities of a multinational group resident in jurisdictions applying the UTPR rule. Formulary appointment is guided by the respective proportions of deductible payments made by UTPR taxpayers to an undertaxed constituent entity. OECD expects that in practice, and because of its subsidiary nature, the scope of application of the UTPR will be narrow.[125]

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[120] Expertgruppen för studier i offentlig ekonomi (ESO), Finansdepartementet and Svenska institutet för europapolitiska studier (SIEP) (2020), *Skattesuveränitet i en globaliserad och digitaliserad värld*, seminar in Lund, Sweden. available in english at https://eso.expertgrupp.se/seminarium/skattesuveranitet-en-globaliserad-och-digitaliserad-varld/ (last visited 20/10- 2020).
[121] Ibid
[122] ICRICT (2020)
[123] OECD (2020) p 112 - 122
[124] OECD (2020) p 122.- 141
[125] OECD (2020) p 122

Implementation

In the second pillar blueprint, the OECD asserts that the GLoBE rules "do not require changes to bilateral treaties and can be implemented by way of changes to domestic law".[126] Implementation could occur by way of OECD model legislation, implemented on a country by country basis.[127] Implementation through model legislation is possible since only an limited number of jurisdiction has to reach consensus on and implement the rules. However, further negotiations will ponder the possibility of a binding multilateral instrument, though which key Pillar II aspects could be regulated.[128] A multilateral instrument could ensure tax co-ordination, in an environment where every state have much to win by tax competition.

If or when the rules are implemented, they will have to coexist with the US GILTI- regime.[129] The blueprint tells us that there "are reasons for treating GILTI as a qualified income inclusion rule for purposes of the GloBE rules provided that the coexistence achieves reasonably equivalent effects.".[130] The treatment of GILTI as a qualified income inclusion rule would have to be reviewed continuously, especially if the GILTI scope were to be narrowed down.[131] The GILTI forms a *new category* of CFC income, applying in parallel to the old category, *Subpart F income*. As such, it will be further explored in the next chapter on CFC rules worldwide. A subsection of the next chapter will provide a short overview of key parts of the GILTI regime, focusing on key distinctions. Finally, the IIR has grown out of existing regimes taxing Controlled Foreign Corporations (CFCs) and will, as is the case with the GILTI, be implemented in parallel to these regimes.[132]

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[126] OECD (2020) p 16
[127] OECD (2020) p 17
[128] OECD (2020) p 171
[129] OECD (2020) p 177
[130] OECD (2020) p 19
[131] Ibid
[132] OECD (2020) p 14

2.3 On the Outlines of Tax Revolution

As mentioned in the introduction to this chapter, the concept of an international minimum tax carries a history, dating back to the first regime taxing Controlled Foreign Corporation, implemented in the US, year 1962. The global network of CFC regimes, grown into existence since then, form the basis on which claims of GLoBE would be furthered. The GLoBE would entail simply an expansion and a consolidation of these already existing practices. In the next chapter, I will describe how CFC regimes already entail a de facto minimum tax. I will enquire into the scope of CFC claims to Jurisdiction. In the fourth chapter, CFC regimes will themselves be regarded as claims to Jurisdiction, engendered through certain practices. Finally, in the last chapter, I will analyze if and how current practices of information exchange and tax coordination, engendering CFC regimes, could carry GLoBE Jurisdictional claims to tax the whole of hidden profits of nations.

The preconditions studied are a) the global conditions of tax competition and the scope and structure of multinational enterprise and b) state practices of transnational information exchange and tax coordination. I have limited my study to these conditions. Since the GLoBE rules operate by way of a top down approach, tax co-ordination and access to information will be greatly facilitated. For the GLoBE proposal to fly, only a few strong economies, host states to large multinational enterprise, need to participate. This will be further explained in chapter 4. As mentioned, in OECD- and national reports, as in doctrine on cross-border taxation, solid tax cooperation on administration and coordination is generally discussed as necessary for the effective implementation and enforcement of CFC rules. I argue that the global conditions of tax competition, the structure of multinational enterprise, together with transnational networks of information exchange and tax coordination, make CFC rules-, and will make Pillar II rules, possible.

Chapter three: Worldwide claims to CFC income

In 1962, the first Controlled Foreign Corporation (CFC) rules, judging by modern standards, were introduced by the US.[133] At the time, the US was the only country lacking strict currency controls. Given the lack of control, US controlled foreign business could freely plan their tax output by shifting profits to tax havens or preferential tax regimes. Back then, the US taxed their residents on worldwide profits, but since profits were never distributed all the way up corporate chains, taxation could get indefinitely deferred.[134] Such indefinite deferral amounted, in practice, to complete tax avoidance.[135] What CFC rules did, was to construct fictional dividends from certain profits of subsidiaries. Dividends were *deemed* to have been distributed and were taxed accordingly. As financial liberalization gathered real pace, CFC rules started popping up throughout high-income countries all over the world.[136] Most rules choose to tax CFCs, not through deemed dividends, but as if profits arise directly in the hands of domestically based shareholders.

As mentioned, CFC regimes has been said to already function as a de facto minimum tax. They lift the corporate veil, extending residence taxation in charging foreign controlled entities on certain low taxed income. CFC rules target both domestic and foreign base stripping, meaning they can tax profits shifted from countries worldwide.[137] In this chapter, I describe the existing CFC regime – as represented in the tax acts of countries around the world – that the OECD second pillar will be built on. I start by defining CFC taxation. Since CFC legislation has evolved in a largely decentralized manner on a country by country basis, a solid, common definition is key. I continue by describing how CFC

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[133] Picciotto (2013) p 106 ff
[134] Ibid
[135] Ibid
[136] Georg Kofler et al (2020) p 1
[137] OECD (2015), Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241152-en p 16

legislation is applied in countries around the world, underlining similarities and differences in the scope of national regimes. Special consideration is favoured the recently implemented US GILTI regime. GILTI is a category of CFC income taxed by the US since 2017. The GLoBE rules are built on CFC rules in general, but on the US GILTI regime in particular.[138] Finally, I conclude this chapter by discussing the limitations of current CFC regimes and comparing the Jurisdictional claims of these regimes to those of the GLoBE proposal presented by the OECD.

3.1 Understanding CFC legislation

Out of the 195 countries of the world, and as of 1 of January 2020, 65 has some sort of CFC regime installed.[139] Policy objectives for applying the regime differ.[140] Brazil and US use their CFC regimes to expand worldwide taxation.[141] Countries like Belgium state a policy rationale strictly limited to tackling tax deferral and avoidance.[142] For some countries, policy objectives of local CFC taxation are stated to be unclear.[143] CFC regimes always entail considerations on the balance of capital import neutrality (CIN), strengthening the local tax base while fostering inbound investment, and capital export neutrality (CEN), raising the competitiveness of outward investment.[144] Other policy objectives can entail creating CFCs as backstops for transfer pricing regimes, as raising domestic administrative capabilities by collecting information on taxpayers, or introduced basically to raise extra revenue.[145]

It is rather common to define CFC regimes along the lines of their function within a certain policy objective.[146] This has led to debate on the

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138 OECD (2020) p 14
139 See Appendix A
140 Arnold (2020) ; Kofler et al (2020) p 1
141 Appendix A, Brazil, US
142 Appendix A, Belgium
143 Appendix A, Japan
144 Arnold (2020)
145 Appendix A, Russia ; Kofler et al (2020), chapter 32 p 8; "the realistically anticipated tax policy and tax administration benefit from introducing CFC rules in Russia is the increased transparency."
146 See Kofler et al (2020) chapter 7 ; Fensby, Torsten, Neutralitet och beskattning av utländska dotterbolags bolagsinkomster, SN 1996, nr 5, s. 243ff., s. 261 ; Silfverberg, Christer, Bokanmälan av Weneheds avhandling - CFClagstiftning, SN 2001 nr 3, s. 58ff ; Wenehed, Lars-Erik, CFC-lagstiftning – En studie av CFC-beskattning i belysning av den internationella

definition of CFC regimes, on whether, for example, their principal essence is battling tax evasion and tax deferral or promoting capital import neutrality by making sure in- and outbound investment are taxed at the same rates.[147] This essay uses jurisdictional thinking as methodological and theoretical starting point. This means looking at claims to jurisdiction as techniques, defined by their operation; not so much by what they essentially "are" as by what they can do and how they operate. What CFC legislation does is tax foreign based entities by enforcing such tax on domestic shareholders.

For the purposes of this essay, every Specific Anti Abuse Rule (SAAR) regime that taxes foreign entities at shareholder or controller level is considered a CFC regime. General Anti Avoidance Measures, such as taxing certain outbound payments as dividends, or disregarding such payments, in following a substance over form approach, falls outside of this definition. Furthermore, even regimes that have no function as specific and general anti abuse measures, like the ones of US and Brazil, fall inside the scope of the definition, since they effectively tax entities based on foreign ground, at the hands of domestic shareholders or controlling entities.[148] Finally, certain regimes running parallel to, and installed to prevent abuse of, CFC regimes might fall within the definition. This is the case with New Zeeland's Foreign Investment Regime (FIF), targeting certain funds put in place to circumvent CFC rules.[149] Regimes designed to prop up anti-avoidance of local CFC rules will fall outside of the scope of this essay, as they operate in a subsidiary fashion to CFC- rules.

My definition of CFC legislation runs close to the one seemingly applied by the OECD in their 2015 final report. Although the OECD does not explicitly provide a definition of CFC rules, they describe them by stating that "CFC rules provide for the taxation of profits derived by non-resident companies in the hands of their resident shareholders."[150]. In their report, OECD continues to describe how CFC legislation "can be thought of as a category of anti-avoidance rules, or an extension of the tax base".[151] It is worth

beskattningsrättens utsträckning, den internationella skatterätten, neutral beskattning samt beskattning efter skatteförmåga, Lund 2000.
[147] Ibid
[148] Appendix A, Brazil, USA
[149] Kofler et al (2020), chapter 25
[150] OECD (2015) p 23
[151] ibid

mentioning that not just residents, but even for example permanent establishments can, as shareholders, have taxes on foreign companies enforced upon them – however, these cases fall outside the scope of my thesis. Furthermore, some CFC rules apply to domestic resident companies as well.[152] This sort of domestic application of CFC rules falls outside of what defines such rules. Around the world the technical details and scope of CFC rules differ, but their defining operational characteristics are always represented.

3.2 CFC regimes around the world

Since CFC regimes have evolved without the existence of a central governing, legally binding power, in order to speak generally of them, one needs to know the full picture. To this end I have collected certain data on all of the existing CFC regimes in the world. I have structured the data around a set of key operational features, inspired by those defined by Brian J Arnold in his work on CFC regimes.[153] For more information on the data and how it was collected, see section 1.4. Find the database attached in Appendix A.

Definitions of taxable entities

Level of Control

The wording of "controlled foreign corporation" suggest that the foreign entity to be taxed has to be controlled by the taxpayer on which the tax is enforced. This is not generally so. Many jurisdictions measure control held on aggregate by all resident shareholders, other only require significant influence or low thresholds of control. Generally, control can be said to measure either by *de jure* or *de facto* control. *The jure* control means looking at certain, country specific, established thresholds in percentage on ownership of voting or capital rights connected to shares, or rights to future profits.[154] *De facto* control can entail power to decide on significant positions and the disposal of assets of a foreign entity, the power to veto, contractual relationships in between entities, and more.

[152] Appendix A: Denmark
[153] Arnold, B. J. (2020), *The Evolution of Controlled Foreign Corporation Rules and Beyond* Tax Law Review, 65(3), 479
[154] Ibid

To simplify the data, prioritizing accessibility over detail, I will disregard technical differences in how different CFC rules define de facto and de jure control.

In many countries, tests on de facto and de jure control intertwine, and it is often the case that CFC regimes represent several different, alternative techniques of measuring control. Furthermore, many countries apply some sort of constructive ownership rule when measuring level of control. This means that the level of control of the taxpayer is added to that of associated or related entities, for example sister or parent companies or companies engaged in certain contractual relationships with the taxpayer. In this section, and again disregarding technical detail, concepts of constructive ownership, associated and related companies will be spoken of in general terms. It is worth mentioning that, depending on the rules of jurisdictions, associated companies do not have to be based in the same country as taxpayers.[155] Furthermore, most countries tax direct and indirect control, meaning that control is measured all the way down a corporate structure. All countries, except Venezuela, measure de jure control.

Regarding the level of control, as will be shown, some countries simply apply a low threshold of control, ranging from 10 to 25 percent, to trigger taxation. In some of these cases, constructive ownership is minded. Other countries trigger taxation when an unlimited number of domestic taxpayers, whether related or not, together control 50% or more of a foreign entity. For others, the unlimited number is narrowed down into a certain number of taxpayers or towards taxpayers holding an ownership level of a certain quality. These categories and more will be explained in this section.

The CFC rules of Sweden, Finland and Portugal are activated if a shareholder, directly or indirectly, alone or *with associated parties*, hold 25% of de jure control in foreign entities.[156] The same goes in New Zeeland, Australia and Pakistan, but at 40%, in which case taxpayers holding, alone or with associates, 10% de jure control are taxed on the CFC income.[157] In Azerbadjan, Kazakhstan, Russia, Tajikstan, Kazakhstan and Uzbekistan, control by one taxpayer, *without* related parties, of *more than* 20%, 25%, 25%, 10%, and *at least* 25% and 25%,

[155] Kofler et al (2020), chapter 41 ff
[156] See Appendix A, Sweden, Finland and Portugal
[157] Appendix A, New Zeeland, Australia and Pakistan

respectively, of capital or voting rights will trigger CFC taxation.[158] In Cabo Verde de jure control of 25% will trigger taxation and in Egypt the same goes at 10%.[159] Brazil define four different categories of CFCs as connected to two different sets of measuring control, one of them entailing simply a significant influence threshold, presumed to apply when 20% of company shares are connected to a taxpayer.[160]

In seventeen countries (Chile, China, Germany, Iceland, France, Indonesia, Japan, Mozambique, Norway, Pakistan, Russia, South Africa, San Tomé and Principé, Turkey, UK, USA and Uzbekistan) CFC taxation is triggered when resident taxpayers, directly or indirectly, as a whole control at least 50%, 51% or more than 50% of a foreign entity.[161] The number of taxpayers on aggregate fulfilling the control requirement can be unlimited. In the cases of the US and South Africa, however, only taxpayers holding, directly or indirectly, alone or with associated entities, at least 10% and 5% of rights, respectively, are included in the reaching of the 51% threshold.[162] Five countries (Australia, Canada, Maldives, Nepal and New Zeeland) apply a similar system, while limiting the number of taxpayers to be taken into account in aggregate, to five, or four in the case of Nepal.[163] In measuring aggregate resident control, at least seven countries take into account control held by entities associated to the taxpayers (Australia, Canada, Japan, New Zeeland, South Africa, UK, US) In all twenty-two countries, when CFC is defined by measuring control on aggregate, and except for Chile, Germany, Norway, Pakistan, only taxpayers with a certain percentage of interest, typically around 10%, are taxed.[164]

The biggest group of defining control thresholds is represented in the CFC rules of 31 jurisdictions. Here, typically, de jure control thresholds are considered met if a taxpayer by itself, or together with associated enterprises, holds a direct or indirect participation of more than 50% of voting rights, capital

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[158] Appendix A; Azerbadjan, Kazakhstan, Russia, Tajikstan, Kazakhstan and Uzbekistan
[159] Appendix A; Cabo Verde, Egypt
[160] Appendix A; Brazil
[161] Appendix A; Chile, China, Germany, Iceland, France, Indonesia, Japan, Mozambique, Norway, Pakistan, Russia, South Africa, San Tomé and Principé, Turkey, UK, USA and Uzbekistan
[162] Appendix A; US, South Africa
[163] Appendix A; Australia, Canada, Maldives, Nepal and New Zeeland
[164] Appendix A; Chile, Germany, Norway, Pakistan

and future profits.[165] Finally, some jurisdictions present unique thresholds of control. In UK, if a resident taxpayer has at least 40% of rights in a foreign entity, where at the same time a non-UK resident has at least a 40% but not more than a 55% of rights, this entity is regarded a CFC.[166] In some countries, regarding interest in foreign entities producing certain categories of income, control thresholds are drastically lowered or completely waivered.[167] In Venezuela, finally, control is not measured in percentage of held rights, but exclusively by de facto control tests.[168]

De Facto Control

Out of 65 countries with CFC legislation, at least 21 has some kind of de facto control test installed. A de facto control test can entail an holistic approach, considering an open ended list of multifactorial aspects of control, considering for example if the taxpayer has the right to decide on the appointment or dismissal of directors and members of administration boards; if the taxpayer has any relevant contractual relationship, concerning rights to benefits or decision-making, with the foreign entity; has the right to veto decisions or to change by-laws of a foreign entity; to change substantial managerial decisions, etc. It can also entail looking at a limited number of factors regarding control. Control can come in the form of substantial interest, or any power of the taxpayer to simply affect decisions of foreign entities. I have come across four different groups of de facto control tests. Some countries use them as alternative control tests to the more mechanical de jure tests. Other countries always look at de facto control, using de jure control tests to create presumptions of control. A third group uses de jure and de facto control tests in tandem without techniques of presumption. The last group considers de facto control exclusively.

At least ten countries apply a de facto control test as an alternative to more mechanical de jure tests.[169] In all of these countries, de facto control tests are applied if a certain percentage of ownership cannot be established. In Argentina, four accumulative requisites must be fulfilled – the taxpayer must

165 See for example Appendix A; the Netherlands
166 Appendix A; UK
167 See for example Appendix A; UK
168 Appendix A; Venezuela
169 Appendix A; Argentina, Chile, China, Italy, Korea, Lithuania, Mexico, New Zeeland, Russia and USA.

have final say regarding; appointment and removal of deciding members of administration boards and bodies; decisions on disposable assets and; rights to benefits from the foreign entity.[170] In sum, this is an example of a rather narrow control test. In contrast, US alternative de facto control tests are very broad. Control is triggered when any amount of US taxpayers, regardless of their relations, together hold the power to elect, appoint or replace the majority of the body of people having final say on major decisions of the foreign entity.[171] Russia uses an open-ended list to decide on de facto control.[172] Mexico, Italy, New Zeeland uses rather broad requisites concerning taxpayer(s) rights, directly or indirectly, to decide on the management and affairs of foreign entities.[173]

In four countries, Brazil, Denmark, Japan and Norway, de facto control is presumed to exist when de jure control can be established. Denmarks test considers whether "deciding influence" exists – understood as a certain right to control economic and operational decisions.[174] Japan measures "substantial control relationship", looking at whether any relevant contractual relationships exist and what control the taxpayer may have or claim over a foreign entities' assets and property.[175] Norway considers many factors; contractual relationships, appointment of important positions, power or claim veto…[176] In all of these cases, de facto control is presumed to exist if de jure exceeds 50%. In Brazil, significant influence, understood as power to take part in a foreign entities managerial and operational decision-making, triggering CFC taxation, is presumed to exist at a 20% threshold.[177] Brazil define two different categories of CFCs, *affiliated companies* and *controlled companies*, connected to two different sets of measuring control.[178] A controlled company is defined solely by a de facto test. In Venezuela, where company is situated in a low tax country, de facto control is presumed.[179]

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[170] See Appendix A; Argentina
[171] Appendix A; US
[172] Appendix A; Russia
[173] Appendix A; Mexico, Italy, New Zeeland
[174] Appendix A; Denmark
[175] Appendix A; Japan
[176] Appendix A; Norway
[177] Appendix A; Brazil
[178] Appendix A; Argentina, Brazil, France, Egypt, Finland (ETR lower than CIT), Iceland, Norway, Mexico, Mozambique (ETR lower than CIT), Pakistan, Peru, Russia, South Africa, Spain, Sweden, Sao Tomé and Principé, UK.
[179] Appendix A; Venezuela

Low tax thresholds

Almost every example of CFC legislation in existence looks at whether or not profits of a foreign entity are low taxed. Some countries simply compare the effective tax rate (ETR) or statuary tax rate applied in the foreign jurisdiction to that which would apply back home or to certain other more mechanical thresholds. Some make use of black-, grey- and whitelists and tax foreign entities depending on where they are based. Others tax CFCs regardless of location and level of taxation. Arnold discusses these categories as the *low tax-*, *designated jurisdiction-* and the *global approach*. More often than not, CFC rules represent a mix of these three techniques or categories.

3.2.1.1 Low tax approach

In many countries applying a low tax approach, taxation is triggered when the effective tax rate charged on the profits of a CFC is either equal to and less than or simply less than half of the ETR that would apply were the CFC based in the jurisdiction of the taxpayer(s).[180] About as many countries use the same method but with higher thresholds, ranging from 55 to 75%.[181] Among these, Egypt measure lay ETR aside, to measure instead relevant CIT rates, while Finland and Mozambique measure foreign ETR against domestic CIT rates. A smaller group measure foreign ETR against set thresholds ranging from 12,5 to 30%. Considering CIT rates worldwide, 30% is quite the high percentage. Finally, the US charges CFCs subject to taxation at 90% or lower than the highest US CIT rate.

3.2.1.2 Designated jurisdiction approach

At least 23 jurisdictions use the designated jurisdiction approach in some form or other. Generally, the approach entails the composing of blacklists and whitelists, affecting CFC taxation in different ways. These lists often take into account levels of taxation and existence of preferential tax regimes amongst jurisdictions worldwide. Whitelists can ringfence certain groups of jurisdictions such as members of the EEA or OECD countries. More often than not, these

[180] Appendix A; Belgium, Bulgaria, China, Croatia, Czeck Republic, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovak Republic, Slovenia.
[181] Appendix A; Argentina

lists take into account the existence of cooperation on information exchange in tax matters, without which administration is hampered.

In Argentina, CFCs based in blacklisted jurisdictions are presumed to be low taxed, with little possibility of proving the opposite.[182] Australia, Sweden, China, Finland, Italy and the UK use whitelists to exempt all or most categories of CFC income to be taxed.[183] In the Netherlands, Norway, Peru, Portugal and France, blacklists are used as alternatives to low tax tests, broadening scope and easing administrative burdens.[184] Poland uses a blacklist as an alternative to control requirements, and in Venezuela, CFCs in blacklisted jurisdiction are presumed to fulfil control requirements.[185] In Latvia and Lithuania, when a CFC is based in a blacklisted jurisdiction, substance carve-outs are considered void.[186] Russia and Tajikstan stands out in that a CFC must be both based in a blacklisted jurisdiction *and* taxed at a low level, in order for taxation to be triggered.[187] In Brazil, designated jurisdiction approach can set aside both substance carve outs and low tax thresholds.[188] In Japan, finally, a blacklist is used to raise the low tax threshold of certain CFCs.[189]

3.2.1.3 Global approach

Canada, Brazil, Cabo Verde, Chile, Cyprus, Denmark, Estonia, Indonesia, Mauritius, Maldives, Mongolia, Nepal and New Zeeland may tax CFCs regardless of where they are based and at what levels they are taxed.

Income subject to tax

Generally, CFC income can be divided into *tainted income* and *other income*.[190] Tainted income generally includes passive income and active income from transactions between related parties. Passive income can entail interest, royalties, dividends, income from financial activities. Active income is generally defined

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182 Appendix A; Argentina
183 Appendix A; Australia, Sweden, China, Finland, Italy and the UK
184 Appendix A; Netherlands, Norway, Peru, Portugal and France
185 Appendix A; Poland, Venezuela
186 Appendix A; Latvia and Lithuania
187 Appendix A; Russia and Tajikstan
188 Appendix A; Brazil
189 Appendix A; Japan
190 See for example Appendix A; Australia

negatively. Eleven countries only tax tainted income, regardless, and six countries always tax all of CFC income, regardless.[191] Other countries fall somewhere in the middle – here different approaches and tests will decide on what categories of income will be taxed. Most common is the *designated jurisdiction approach*, as explained above, and the *tainted income approach*. The tainted income approach usually looks at the nature of a CFCs business or transactions, generally employing some *de minimis test* or some sort of *substance carve-out*. In a de minimis test, a CFC has to produce a certain percentage of passive income in order for taxation, of tainted or total income, to kick in. Through substance carve-outs, CFCs or CFC income stemming from transactions of real economic activity can be disregarded for tax purposes.

De minimis and Substance carve-outs

In at least seven countries, CFCs that do not meet de minimis thresholds are taxed on only passive income, as opposed to full income.[192] De minimis thresholds vary aggressively. Peru requires 80% of CFC income to be tainted, in order for full taxation to be triggered, while New Zealand and Japan sets their thresholds at a measly 5%. Fourteen countries taxes either all or nothing of CFC income, depending on the fulfillment of active income tests.[193] Thresholds generally vary from 20 to 50%. A few countries have lower thresholds. In South Africa only 5% of gross income must be tainted.

Other countries take a more careful approach. In eight countries active income tests will tell if CFCs are to be taxed on passive income or be entirely exempt from taxation.[194] The US applies two distinct tests for two categories of income, Subpart F income and Global Intangible Low Taxed Income (GILTI) income. It is unclear if the GILTI was named deliberately to

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[191] Appendix A; Azerbadjan, Brazil, Bulgaria, Cabo Verde, Finland, Kasakhstan, Maldives, Mozambique, Nepal, Sao Tomé and Principé, Tajikstan and; Canada, Colombia, Croatia, Czeck Republic, France and Indonesia

[192] Appendix A; Argentina, Chile, Japan (5%), Korea, New Xeeland (5%), Peru (80%), US Subpart F (70%)

[193] Appendix A; Australien, Austria, Egypt, Greece (30%), Iceland (50% if treaty state), Mexico (20%), Norway (50% if tax treaty that applies) Pakistan (20%), Poland (33%), Portugal (25%), South Africa (5%), Turkey(25%), US GILTI (either 5% of its gross income or (2) USD 1 million.), Venezuela (20%)

[194] Israel, Korea (5%), Netherlands (30%), Peru (20%), Romania (1/3), Slovenia (1/3), Spain (15% of income 4% total turnover), US on Subpart F

sound cool.[195] GILTI can be taxed either on an all or nothing basis while Subpart F taxes passive, active or no income.[196] In South Korea, tainted income must exceed 5% to be taxed at all and active income must exceed 50% for all of CFC income to be taxed.[197]

Substance carve-outs are sometimes hard to distinguish from de minimis thresholds. Both approaches aim in some way to exempt active income business from taxation. In doing this, they strike a balance between capital import and export neutrality and keep domestic residents and foreign controlled business competitive. While de minimis exceptions can be seen as *de jure*, substance carve-outs consider CFCs and CFC income on a case to case basis, considering *de facto* factors such as a where a companys assets are, where risks are taken, where significant people functions carried out, and if transactions of a CFC can be seen as non-genuine, arising from arrangements put in place for essential purposes of obtaining tax advantages, etc.[198] Because of the fundamental freedoms and ECJ case law, most EU countries apply substance carve-outs in dealing with CFCs located in another EU/EEA member states or worldwide.[199] Latvia and Lithuania apply substance carve-out worldwide, exempt in blacklisted countries. Substance carve-outs exist outside EU/EEA but aren't very common.[200]

Final comments on how and at what rates CFCs are taxed

In all countries except Belgium and the US, when CFC rules apply, domestic shareholders will be taxed in proportion to their level of control, as is the profits of the CFC where acquired in the jurisdiction of the taxpayer. Belgian CFC rules are very narrow. Here, a CFC is taxed when a taxpayer, with associated entities, hold at least 50% of interest in a foreign entity – a rather strict control

[195] GILTI was introduced in 2017 together with a withholding tax on base-eroding payments called BEAT. (BEAT, the GILTI)
[196] Appendix A; US
[197] Appendix A; South Korea
[198] Case C-196/04 (the Cadbury Schweppes case)
[199] Appendix A; Bulgaria, Belgium, Austria, Croatia, Cyprus, Finland (EEA), Germany (EEA), Hungary, Italy, Norway (EEA if tax agreement) Lithuania, Poland (EEA), Slovenia, Spain (EEA), Sweden (EEA), UK (EEA), Estonia, Ireland, Latvia, Luxembourg, Netherlands, Slovak Republic
[200] Appendix A; Argentina, South Korea, Chile, Malta, Mauritius

requirement, not complemented by de facto control tests. Taxation is then limited by two different substance carve-outs, considered at CFC and CFC income levels, and by a low set threshold of minimum taxation. Belgium considers their CFC rules as being strictly anti deferral. Because of this, CFC income is taxed not proportionally but in full.

In comparison, US CFC rules carry a broad scope. If a foreign entity is considered controlled either de jure or de facto by an unlimited amount of US shareholders and their related parties, taxation is triggered. GILTI provisions work in a subsidiary fashion to Subpart F provisions in deciding what categories of CFC income are to be taxed. While Subpart F mainly targets tainted income, GILTI provisions cover all categories and is exempt only if foreign ETR exceeds 90% of the highest US statuary corporate tax rate, or if untainted categories of income exceed 95% of total profits, and even then, only when tainted income don't make up at least 1 million USD. GILTI income is taxed proportionally, but at an effective rate of 13,5%.[201]

3.3 The GILTI regime

An example of what a Pillar II order might eventually look like can be found in the US tax system.[202] With the Tax Cuts and Jobs Act (TCJA) from 2017, the US introduced a whole new category of CFC income – to be taxed in a subsidiary manner to old categories – called Global Intangible Low-Taxed Income (GILTI).[203] As mentioned, Controlled Foreign Corporations have originally been taxed on their Subpart F income, meaning mainly on passive income and limited categories of active income. GILTI taxation introduces an effective minimum tax of 13,5% on almost all the untaxed income of domestic multinationals' Controlled Foreign Corporations (CFCs), no matter where they are based.[204]

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[201] Appendix A; USA
[202] Group of 7 (2019)
[203] Appendix A; USA
[204] OECD (2020)

Definitions of taxable entities

GILTI income is charged from US shareholders on the tested income of their Controlled Foreign Corporations (CFC).[205] The definition of a CFC is explained in the following chapter. Generally speaking, A foreign entity owned by at least 50% by US taxpayers, on aggregate, is regarded a CFC.[206] At first glance, this sets it apart from the GLoBE, which refers to country by country reporting standards requirements to establish the scope of tax liability. However, these standards refer in turn to IFRS or equivalent accounting principles, stating that every entity *controlling* another entity is required to present consolidated financial statements. In the end, both the GLoBE and GILTI will be applied when a certain control threshold is met.

Income subject to tax

The US Internal Revenue Code, section 951A (a) state that "(e)ach person who is a United States shareholder of any controlled foreign corporation for any taxable year of such United States shareholder shall include in gross income such shareholder's global intangible low-taxed income (GILTI) for such taxable year.".[207] The GILTI is found, in turn, by calculating a Controlled Foreign Corporations net tested income over a modest, fixed return on certain tangible assets, as deemed *qualified business asset investment* (QBAI), set at 10%.[208] Net tested income, for purposes of the GILTI definition, means the excess of aggregate profits of all CFCs over aggregate loss and allocatable deductions.[209] The GILTI category does not, as does the GLoBE, exclude smaller multinationals nor allow loss carry-forward.[210] Finally, the GILTI sets a cap of 80% on the amount of covered taxes that can be credited against the profits of multinational groups.

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[205] 26 U.S.C.A. § 1.951A–1B
[206] Ibid
[207] 26 U.S.C.A. § 951A, I.R.C. § 951A (a)
[208] 26 U.S.C.A. § 951A, I.R.C. § 951A (b) ; 26 U.S.C.A. § 951A, I.R.C. § 951A (d)
[209] 26 U.S.C.A. § 951A, I.R.C. § 951A (c)
[210] OECD (2020)

Low tax thresholds

As described in the *Low tax thresholds* section of the subchapter on GLoBE, those rules calculate the effective tax rate applied to multinational groups on a jurisdictional basis. If the effective rate goes below a to-be-decided minimum rate, a top up tax rate is calculated. Finally, this top up rate is applied to all the constituent entities in the given jurisdiction on an entity to entity basis. This is method commonly referred to as *jurisdictional blending*, and its sets the rules apart from those of the US.[211] In calculating the GILTI, a *global blending* approach is used. This follows from the method of calculating the taxable income of MNE parents, described in the previous subsection. The total of tested profits from all the CFCs of a domestic parent, no matter where they are based, are aggregated. After covered, paid taxes have been credited, the GILTI is subject to a top up minimum tax. The top up minimum tax is set at 10,5% - half of the US corporate income tax rate.[212] Since only 80% of foreign taxes are creditable, the effective rate lands at 13,125%. In 2026, the effective rate will be raised to 16,4%.

3.4 CFC rules and Jurisdiction

Although CFC rules vary extensively in technique and in scope, de jure or de facto control of a foreign corporation is always considered and measured. At their base, CFC rules expand countries' tax bases by extending residence taxation and enforcing on shareholders taxation of foreign profits of foreign companies based on foreign ground. The force of these extraterritorial claims to jurisdiction is somehow softened by certain key operational features; limiting what foreign companies are to be considered for taxation, what categories of income of said companies are to be taxed, and below what levels of taxation. Every set of CFC-rules feature at least some version of either of these limitations. Some sets of CFC rules reach much further than others.

Before 1962, when CFC rules were first introduced, "no county taxed the foreign source income of subsidiaries of its multinationals, because

[211] OECD (2020)

[212] Really the halved rate is the consequence of a deduction, a Section 250 deduction of 50%, but this deduction is to be so commonly applied that it is rarely mentioned.

residence countries believed they lacked (…) jurisdiction over foreign source income of foreign corporations".[213] This is no longer the case. In considering CFC popularity and scope, scholars have regarded these regimes as already establishing a de facto minimum tax.[214] At the same time, a claim to jurisdiction, a claim on a minimum tax on the worldwide activity of domestic multinationals, alone, does not guarantee the existence of such a jurisdiction, or such a minimum tax. CFC rules are notoriously technical – some countries, as for example Russia, don't even expect CFC taxation to raise much revenue, due to administrational difficulties.[215] CFC rules are most effective in capital exporting countries, with many and strong resident MNEs.[216]

Jurisdiction around the GLoBE?

As a final step, this chapter considers differences in scope between existing CFC regimes and the proposed GLoBE minimum tax. The GLoBE acts as a top up minimum tax of constituent entities controlled by resident ultimate parent entities. This reminds one of definitions of taxable entities for CFC purposes – these definitions differ, but normally require some level of control. CFC rules, however, can be triggered when corporate taxpayers *in aggregate*, no matter their mutual relationships, own or control a foreign company, as is the case in the US. In GLoBE, on the other hand, the definition of control is tied to definitions requiring inclusion of constituent entities in ultimate parent consolidated financial statements under International Financial Reporting Standards (IFRS) or equivalent standards. In tying control to accounting standards, the GLoBE purports to establish a global, uniform tax base. The formation of a global tax base is a GLoBE novelty, setting the proposal apart from CFCs, and shifting focus from taxation based on collective ownership and toward unitary taxation.

[213] Avi-Yonah (2019) p 82
[214] Avi-Yonah (2019) p 84
[215] Koefler et al (2020) chapter 32
[216] Sebastian Dueñas (2019), *CFC rules around the world,* Fiscal Fact no 659, Tax Foundation Washington DC

The GLoBE proposal taxes all previously untaxed income of multinational groups, carving out a modest routine return on certain tangible assets. As a general trend, CFC rules tend to focus on the passive income of foreign indirectly or directly controlled entities. However, some CFC rules does in fact target the whole of CFC income. In these cases, however, scope is generally limited in other ways, for example by the use of jurisdiction white- and blacklists. Combining the effects of having control be connected to accounting principles, enforcing taxation on ultimate parent level, creating a global tax base, and the enhanced scope regarding income subject to tax, the GLoBE scope overall would exceed that of CFC rules to a real extent.

The enhanced scope could lead to GLoBE not being implemented by reasons connected to tax competition or by administrational difficulties. This scope, however, is softened by the lowered effective tax rate to be applied by GLoBE taxation. Where CFC income is taxed below a certain level, the taxing Jurisdiction charges domestic taxpayers as if income where generated in their hands, generally meaning full taxation. GILTI is of course an exception, applying an effective tax rate of 13,25%. The GLoBE would tax global income at a level between 10-12,5%, according to estimates at OECD level. Furthermore, in applying a comparatively high set de minimis rule, GLoBE only targets the largest 10-15% of the world's multinationals. At any rate, GLoBE rules would entail a considerate extension of certain states' Jurisdiction to tax. In the following chapter, the preconditions of an enhanced Jurisdiction to tax foreign income of foreign companies, as envisioned by the OECD, will be described and analyzed.

Chapter four:
Preconditional Practice

In thinking with Jurisdiction, I argue that the global tax landscape will inform both the claims to tax Jurisdiction made, and their transformation into the successful performance of laws declaration. This tax landscape itself will be formed by state and interstate practice. Every claim to jurisdiction is made within a certain set of specific spatiotemporal conditions. The law is always spoken by and towards the world. Many legal and non-legal factors will have driven state assertion of extraterritorial Jurisdiction to tax foreign income of foreign entities. I have directed my focus towards three main areas of practice. These are a) global frameworks of tax competition and b) global frameworks of tax cooperation in (i) curbing tax competition and in (ii) facilitating information exchange on tax matters. These areas are important for the effective assertion and systemic operation of far reaching CFC- regimes.[217]

Like CFC regimes, regimes of information exchange and state behaviour of tax cooperation or coordination grow over time. They can themselves be seen as hosting networks of Jurisdictional claim. For example, to qualify for automatic exchange of information today, countries have to uphold certain practices of information collection on the activity of entities based or active within their borders.[218] The same goes for the mutual exchange of country by country reports.[219] For public authorities to mobilize transnational legal regimes that bolster taxation of CFCs, a certain set of domestic practices on information collection must be in place. In the end, the words of law, asserting an effective Jurisdictional claim to tax CFCs, will find themselves engendered by a complex weave of legal and non- legal practice.

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[217] OECD (2015) ; OECD (1996) ; *Controlled Foreign Company Legislation*; Studies in Taxation of Foreign Source Income, OECD Publishing, Paris p 30

[218] Tavares, Romero (2017), *Country by Country over reporting? National Sovereignty, International Tax Transparency, and the inclusive framework on BEPS,* Allison Christians, *BEPS and the Power to Tax,* Sergio André Rocha and Allison Christians (ed), Tax Sovereignty in the BEPS Era, Kluwer Law International, The Netherlands, p 24.

[219] Ibid

4.1 Tax competition

The story of taxation of foreign companies' foreign income, by way of Controlled Foreign Corporation (CFC) rules, starts with tax competition. In a way, tax competition and the preferential tax regimes or tax havens that make them possible, have existed for as long as taxes themselves.[220] First, the primary role of preferential tax regimes was attracting investment to certain areas.[221] With time, these regimes evolved to, in a way, constitute global financial trade.[222] Countries lower taxes to foster investment and support resident multinationals. Today, in a time where 90% of private enterprise belong to multinational corporate groups (MNEs), capital is so mobile, and evasion so easy, that tax evasion can be seen as *necessary* for multinationals to keep up with competition.[223] This subsection shows how the structures of tax competition – as formed by domestic legislation, tax treaty networks and the reality of large multinational enterprise – enable top up minimum taxation.

As shown by Tsilly Dagan, the global tax treaty network – the backbone of cross-border taxation, has grown into existence as an effect of tax competition, over time cemented into regimes.[224] She shows how source taxation is generally heavily limited since source countries tend to naturally lower taxes, in order to attract foreign direct investment.[225] By limiting taxing rights through tax treaties, investment inflows are fostered.[226] As source country taxation rights are limited, the residual taxing rights of residence countries grow.[227] However, even residence countries tend to abstain from taxation, by for example accepting aggressive tax planning by their multinationals, in order to support their competitive strength.[228] This leads to a situation where residence jurisdiction taxing rights are never triggered, since taxes are evaded or indefinitely deferred through corporate structures set up for tax reasons by resident multinationals.[229]

[220] Picciotto (2013) ; Zucman (2015)
[221] Picciotto (2013) p 117 ff
[222] Picciotto (2013) p 116
[223] Ibid
[224] Dagan, Tsilly (2018)
[225] Ibid
[226] Ibid
[227] Ibid
[228] Ibid
[229] Ibid

In her article "Taxing multinationals beyond borders: financial and locational responses to CFC rules", Sarah Clifford shows how locational decisions of large multinational groups are affected by the implementation of CFC rules.[230] Her study shows that groups are discouraged to place profits in low tax jurisdictions and preferential tax regimes in ways that trigger CFC taxation. When multinationals structure locational decisions and internal payments to avoid CFC taxation, roughly half of profits fall under taxation of the country applying CFC rules. In "Designing Effective Controlled Foreign Company Rules" OECD shows that implementation of CFC rules can cause inversion of domestic companies, towards countries lacking such rules.[231] Moreover, CFC rules will affect negatively the competitive strength of resident multinationals and their foreign subsidiaries.[232]

Multinational groups

The GLoBE rules only target the largest 10-15% of multinational groups. Thanks to the macroeconomic dominance of large multinational groups, the rules are still robust: as mentioned, the Pillar II blueprint informs us that in scope MNEs collectively earn more than 90% of global corporate revenues. Furthermore, the GLoBE rules operate by way of a top down approach, taxing multinational groups at ultimate parent, or headquarter, level. This begs an enquiry into the specific tax sensitivity of large MNE headquarter locations.

In her article, *Does tax drive the headquarter decisions of the world's biggest companies?,* Kimberly Clausing concludes, from empirical analysis, that headquarter decisions are primarily informed by the sheer size of states' economies, as measured in GDP or GDP per capita.[233] Where tax competition affects headquarter locations, this competition is generally limited to occur between the strongest economies.[234] Clausing writes that "(h)igh tax rates may discourage multinational headquarters for small countries, but not for large

[230] Clifford, S (2018), *Taxing multinationals beyond borders: financial and locational responses to CFC rules,* EPRU Working Paper Series, 2017-02, Available at SSRN: https://ssrn.com/abstract=3066806
[231] Ibid
[232] Ibid
[233] Clausing (2018); *Does tax drive the headquarter decisions of the world's biggest companies?;* Transnational Corporations, Volume 25, Issue 2, Sep 2018, p. 37 - 65
[234] Ibid

ones.”.[235] Other authors argue that headquarter relocation decisions may consider network effects of the quality and concentration of advanced producer services, legal infrastructure, proximity of other MNE headquarters, Research and Development and human capital.[236] The networked effects leading to certain geographical areas of the world are often connected to very high country GDP, and are sometimes discussed as the defining features of what has been named Global Cities.[237] Clausings conclusion on the importance of country GDP is supported by recent data on the headquarter locations of large multinationals. IMF data tells us that the US, China, and Japan have the strongest economies today.[238] These countries host the headquarters of more than half of the world’s largest multinationals.[239]

4.2 Tax cooperation

The OECD has released several reports on CFC taxation. In all of these reports, as repeatably mentioned, the importance of administrative cooperation and tax co-ordination has been stressed. Tax coordination is important for states to preserve the competitive advantage of resident MNEs, and of their foreign subsidiaries. Thanks to the operational structure of large multinational companies, enforcement of taxation can be effectively carried within the borders of the taxing jurisdiction. The administrational crux of CFC regimes lies in collecting sufficient information of resident multinationals, in order to calculate the correct amount of tax to be charged. The top down approach chosen by the OECD is motivated as facilitating tax administration and co-ordination.[240] The implementation of a global, minimum tax by way of top up unitary taxation, is no modest project. This subsection enquires into whether current practices of

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235 Ibid
236 Sassen, Saskia (2002) *Global Networks, Linked Cities*, Routledge ; Csomós, György (2017), 'Cities as command and control centres of the world economy: an empirical analysis, 2006-2015' Bulletin of Geography. Socio-economic Series 38(38) ; Sassen S (1991) The Global Cities, Princeton Uni. Press, Princeton ; Sassen S (1995) 'On concentration and centrality in the global city' in Knox P L and Taylor P J (Eds) World Cities in a World System (CUP, Cambridge) 63-78 ; Sassen S (1996) 'Whose city is it? Globalization and the formation of new claims' Public Culture 8, 205-223
237 Ibid
238 IMF, IMF's World Economic Outlook Database, October 2019 (last checked 141220)
239 Forbes (2020), Global 2000, May 13, 2020, 6:00am, available at https://www.forbes.com/global2000/ (Last visited 210101)
240 OECD (2020) p 18

cross-border information gathering and exchange, as well as co-ordination will carry the weight of this project.

Curbing tax competition

As mentioned, the first Controlled Foreign Corporation (CFC) rules were the result of a compromise. The initial proposal was narrowed down, to mainly target tainted income, in order for the competitive strength of domestic multinationals to be preserved.[241] This balance between tax competition and revenue collection has driven the slow growth of CFC regimes worldwide. State reports on domestic CFC rules reveal how countries are wary of the impact on competitive strengths.[242] Thanks to tax co-ordination, even at times when global tax competition has raged at full strength, the taxation of tainted income through CFCs has continued and even expanded.[243] However, such taxation is normally designed in a way that opens up for avoidance, and taxation of the full income of subsidiaries is yet rare. It remains to be seen if the GLoBE proposal can inspire a co-ordinated compliance, extending global tax Jurisdiction to a wider extent not achieved by CFC regimes.

Successful coordination will depend on a number of variables. First, compliance will be easier if a low number of jurisdictions has to implement the rules. The top down approach chosen by the OECD limits the number of Jurisdictions applying the rules, facilitating compliance and co-ordination. The number is limited, since the largest multinational groups tend to cluster in a handful of strong economies.[244] Second, compliance will go smoother the smaller the differences in scope as compared to existing CFC regimes. A much larger scope means larger competitive risks. Here, as discussed in the previous chapter, the constructive unilateralism of GILTI implementation could prove decisive.[245] Third and finally, the efficiency of backstop mechanisms, such as

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[241]Kofler et al (2020), chapter 1

[242] Davis Tax Committee (2017), DTC Report on Action 3: Strengthening Controlled Foreign Company Rules, p. 35 ; Sebastian Dueñas (2019) ; D. Tickle (2013) *The taxation of foreign passive income for groups of companies*, IFA Cahiers vol. 98A, Books IBFD, p. 663,

[243] Avi-Yonah (2019) "even during the 1980s which has generally been a period of international liberalization, the business lobby has been unable to prevent measures to tax foreign retained earnings"

[244] Forbes (2020)

[245] Avi- Yonah (2019) p 74

subsidiary implementation of the Income Inclusion Rule (IIR) and the Undertaxed Payments Rule (UTPR) will be of key importance. This variable will be further discussed below.

The history of CFC regimes shows the efficiency of effective backstop mechanisms. The largest capital exporting economies have had CFCs in place since foreign exchange controls were eased across the eighties to nineties.[246] The growing prevalence of CFC regimes taxing tainted income didn't simply allow countries to adopt such regimes as currency was floated – it encouraged it. This is because CFC rules generally allow tax credit for tax assessed on intermediate parent level under another country's CFC regime. To not miss out on revenue that would be taxed either way, states implemented robust CFC regimes, the more such regimes are applied worldwide. Since profits of multinational groups are shifted from countries all over the world, CFC rules counter not only domestic base- stripping, but also third country base stripping.[247] If CFCs were to be widely implemented, and tax total income, source countries could tax more – knowing that income would be taxed either way – and thereby limit residual taxing powers of residence states. This fact has effectively hampered expansion of CFC regimes.[248]

If countries hosting the headquarters of large multinationals choose not to comply with GLoBE, multinational group revenue could, through subsidiary application of IIR and through the UTPR, be effectively taxed by other jurisdictions, hosting entities further down the corporate chain. Subsidiary application of IIR could still leave some companies untouched by GLoBE scope. This is the case, for example, if an ultimate parent based in the UK, has direct ownership of constituent entities in several different jurisdictions. Furthermore, at each level where IIR is not applied, profits go untaxed from the top down. To tackle these issues, the UTPR will act as a backstop. Through the UTPR, top up minimum taxed is charged from constituent entities further down corporate chains. To properly enforce UTPR and subsidiary IIR, states need sufficient data on MNE activities.

[246] Picciotto (2013) p 113 - 114
[247] OECD (2015b)
[248] Picciotto (2013) p 113 - 114

Promoting access to information

The access to information on the activities of large multinational groups is pivotal for the global implementation of a top up minimum tax. As discussed in the first chapter, definitions of GLoBE taxable entities refer to the definitions of entities required to supply Country by Country Reports (CbCR) in line with action 13 of the OECD 2015 final report. These reports are constitutive for the successful application of GLoBE minimum taxation. CbCr reports are required to be composed at ultimate corporate parent level for administrative reasons.[249] These reports are then handed solely to jurisdictions hosting such ultimate parents.[250] For the GLoBE rules to have an impact, jurisdictions hosting constituent entities further down the corporate chain must have access to these reports. To this end, the OECD administrates a growing network of CbCR information exchange, built on existing networks on Automatic Exchange Of Information (AEOI) for tax purposes.[251] This section will describe existing co-ordination of domestic CbCR requirements and transnational networks of automatic exchange of CbCR.

Country by Country Reporting

The 2015 Final Report established an OECD BEPS minimum requirement for member countries to demand Country by Country Reports from resident ultimate parents of large multinational groups.[252] This requirement stemmed from a consensus reached amongst OECD countries. The minimum standard is continuously reviewed at OECD level, and implementation is coordinated and facilitated by OECD model legislation.[253] Annual peer review processes covers all 131 members of the BEPS Inclusive Framework.[254] OECD model legislation on country by country reporting requirements state, that every large multinational group must report on their global activities, on a jurisdictional

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[249] OECD (2015c), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241480-en
[250] Ibid
[251] Ibid
[252] Ibid
[253] OECD (2020e)
[254] Ibid

basis, to the country of resident of their ultimate parent entity.[255] At present moment, 90 jurisdictions have legislated to demand CbCR filing.[256] An OECD peer review released October 2020 shows that all OECD countries have proper legislation in place.[257]

The road toward Country by Country Reporting have been long. Rich countries have historically resisted demanding and distributing information on the global economic activity of resident multinationals. This is understandable – if comprehensive and detailed information was available, host countries of subsidiaries could tax corporate profits more efficiently. For the same reasons, lower income countries, not hosting large multinationals, have long fought for CbCR. A wave of pressure came already in the late 1960s to early 1980, when the movement for a New International Economic Order (NIEO) and the rise of the Group of 1977 pushed for global financial transparency.[258] Despite pressure from a majority of UN countries, demands were never effective. In the wake of failed demands, a global network of transnational tax bureaucracy has grown into existence, built on bilateral negotiation and biased to the disproportional benefit of rich countries.[259]

During this time, information on the global activities of multinationals where collected on a Jurisdictional level.[260] Due to financial secrecy regulations of tax havens, and to the risks to competitive advantage inherent in strong jurisdictional information requirements, comprehensive data on activities was hard to come by.[261] To access and verify information, states negotiated, on bilateral basis, networks of agreements on the more or less mutual exchange on information for tax purposes. Informal, secretive groups between rich countries and between former colonial powers and their former colonies

[255] OECD (2017), BEPS Action 13 on Country-by-Country Reporting – Guidance on the appropriate use of information contained in Country-by-Country reports, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris.
[256] OECD (2020e), Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 3) : Inclusive Framework on BEPS: Action 13 , OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/fa6d31d7-en.
[257] Ibid
[258] Cobham, Janský and Meinzer (2018) *A half-century of resistance to corporate disclosure,* Transnational Corporations, Transnational Corporations Volume 25, 2018, Number 3, UNCTAD
[259] Stewart, Miranda (2013)
[260] Picciotto (2013) p 250 - 307
[261] Ibid

further facilitated information exchange.[262] With time, asymmetric networks of information exchange grew, forming the standards used today.[263] The success of OECD consensus on CbCR is in itself a story of rule co-ordination and the gradual growth of state practices.

All OECD reports on CFC legislation stress the fundamental importance of access to information. An OECD report from 1997 states that "(…) information-gathering is essential to the effective application of a CFC regime. With regard to the enforcement of the legislation, two types of information are necessary: the identity of the domestic shareholders subject to the regime; and financial information in respect of the CFC in order to compute tainted income.".[264] In a digitalized, global economy, constituted by the fluid ease of capital movements, countries need data on the number of constituent entities and on taxable income of resident groups. The CbC reports provide this data. Model legislation demands;

a) Aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE Group operates, and

b) An identification of each Constituent Entity of the MNE Group setting out the jurisdiction of tax residence of such Constituent Entity, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such Constituent Entity is organised, and the nature of the main business activity or activities of such Constituent Entity.[265]

[262] Ibid
[263] Stewart, Miranda (2013)
[264] OECD (1997) p 65
[265] OECD (2017)

With "consensus" reached at OECD level and subsequently mirrored in Action 13 of the OECD Final Report, CbCr was finally brought to the table in 2015. The information required for filings of CbC reports are sufficient for taxation of global MNE total profits within headquarter jurisdictions. CbCR have been implemented by 90 jurisdictions, including all OECD countries. CbCR data, however, is not for everyone. According to consensus, the reports where to be confidential, used only by tax administrations.[266] Furthermore, reports would be delivered directly and exclusively to tax authorities of the country hosting MNE ultimate parents.[267] Since filing is made exclusively at ultimate parent entities jurisdictions, and are subject to strict confidentiality, the countries that fought for CbCR are the ones excluded from CbCR information exchange today.

Information exchange on Country by Country Reports

Exchange of information on country by country reports (CbCR) can happen either through bilateral agreement or through bilateral agreement under multilateral frameworks provided by OECD multilateral instruments.[268] Today, and by these channels, over 2700 bilateral relationships for the exchange of CbCR reports are in force worldwide.[269] The sum of these relationships form a network of information exchange, by which claims to jurisdiction a global tax base will be engendered.

There are three channels for the exchange of CbC reports. Two of them are bilateral – they entail negotiating and entering Tax Information Exchange Agreements (TIEA) and adding information exchange provisions in Double Tax Treaties (DTT).[270] The OECD has compiled two model competent authority agreements that can be used exchanges of CbC Reports. A third channel is bilateral under a multilateral framework. This channel is open for signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports. This instrument is created and administered by the OECD. To be able to sign, countries must meet certain requirements on

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266 Ibid
267 Ibid
268 OECD (2020e)
269 Ibid
270 Ibid

domestic rules and practices. Signatories exchange information on CbCR reports bilaterally if and to the extent they have expressed mutual interest for such exchange.

At present moment, 2700 bilateral relationships enabling automatic exchange of CbCR are in force worldwide.[271] These relationships are in force either through bilateral OECD model competent authority agreements or through bilateral agreement engaged under the OECD Multilateral Competent Authority Agreement. 81 jurisdictions have a range of 40 – 70 mutual relationships in place. 114 states have no relationships in place. GLoBE Implementation only requires that a critical mass of the strongest economies, those states that might need to apply subsidiary IIR and UTPR, have access to information. Regarding the Pillar II key operational features, and the structure of multinational enterprise, the fact that 114 states are excluded from the massive benefits of accessing CbCR reports have little if no impact on the possibility of GLoBE taxation. All OECD- and G20- countries count themselves amongst the 81 jurisdictions with relationships for the automatic exchange of CbCR in place.

4.3 Conclusions

The GLoBE minimum tax proposal entails assertion of Jurisdiction over global profits of resident Ultimate Parent Entities (UPE) or multinational corporate headquarters. These UPEs are generally based in countries with high Gross Domestic Product (GDP). For the proposal to fly, consensus needs only the strongest economies onboard. This fact is mirrored in the Pillar II blueprint and in statements by OECD officials. Strong economies are sometimes referred to as developed economies, as compared to developing countries. Developing and developed countries can be defined in different ways.[272] In their article "Corporate Taxation and BEPS: A Fair Slice for Developing Countries?", Irene Burgers and Irma Mosquera define developed and developing countries as those countries that are and aren't members of either the OECD or the G20,

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[271] OECD (2020f) A*ctivated exchange relationships for Country-by-Country reporting* (database), OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris, available at https://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm (last checked 070121

[272] Riccardi Sacchi, Andrea (2020)

respectively.[273] I will use this definition, as I agree with Burgers and Mosquera that membership in these organisations imply a certain superior level of economic and political power.

GLoBE would be implemented through OECD model legislation, maybe propped up by multilateral binding agreement on key aspects. No matter how implementation is operated, for the minimum tax to succeed, a certain critical number of developed economies (OECD and G20 member states) must be ready and able to assert global Jurisdiction, imposing a minimum tax on resident ultimate parent entities. Following the implementation of the Anti-Avoidance Directive (ATAD) at EU level, every OECD and G20 jurisdiction, except for India and Saudi Arabia, already partially assert such Jurisdiction, by way of Controlled Foreign Corporation (CFC) regimes. The widespread prevalence of CFC regimes, and the recent entry of the GILTI in US, could make GLoBE implementation less dramatic for countries worried about their competitive strength. However, countries still have much to gain in deviating from GLoBE implementation.

The allure of strengthening competitive positions could be countered by the structure of GLoBE rules themselves. Just as the growth of CFC regimes inspired countries to implement their own, to not miss out on taxing profits that were to be taxed anyway, the "threats" of full taxation through foreign application of subsidiary IIR and UTPR would inspire ultimate parent entity hosts to tax global income. The low rate of GLoBE, expected to be set at 10-12,5%, softens the blow to competitive strength. Furthermore, considering the low rate of GLoBE, third countries would have to lower their rate considerably before base stripping activities of multinationals slow down, causing IIR jurisdictions to lose global revenue. In an economic impact assessment made by OECD, the organisation points to a risk of tax haven countries and preferential tax regimes raising their tax rates in a balance between closing in on the minimum rate while still attracting shifted profits. In this case,

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[273] Irene Burgers & Irma Mosquera (2017) Corporate Taxation and BEPS: A Fair Slice for Developing Countries?, Erasmus Law Review, vol 10 nr 1, Eleven international publishing, available at
http://www.erasmuslawreview.nl/tijdschrift/ELR/2017/1/ELR_2017_10_01_004.pdf

ultimate parent host countries will still enjoy a residual taxing rights on minimum taxation of worldwide profits, if not as large.

For the UTPR and the IIR to work properly, developed countries must have access to sufficient information on the global activities of the largest 10-15% of multinational groups. OECD peer reviews show that 90 jurisdictions demand consolidated financial statements on the global activities of their multinationals today. Since consolidated financial statements are put together using IFRS accounting standards or equivalent standards, if ultimate parent entities were to tweak information for tax purposes, by for example showing low profits, this could harm their market positions by for example scaring of investment. OECD data shows, furthermore, that these reports are shared through a network of 2700 bilateral relationships specifically entered into for the exchange of Country by Country Reports (CbCR). Every OECD and G20 country, except for Israel, has 40 – 70 mutual relationships in place.

Chapter five: emerging (boundaries of) Transnational Taxscapes

5.1 On the emergence of GLoBE Jurisdiction

As the law speaks, legal scholars can map the changing spatiality of cross-border taxation. Every court, presented with a case, will look towards what the law has previously said, to establish jurisdiction. In the same way the legislator, or the OECD, in considering sums of unilateral Jurisdictional practice, seen as placings of the law along material orderings, will distinguish patterns or regimes, informing them of how and by whom the law can be spoken. In this way, cross-border income taxation is productive, and it produces something, other than revenue. The sum of unilateral measures produces the ambits of sovereign state power or, from bird's-eye view, the totality of international order. In understanding international legal orders, jurisdictional thinking turns its eyes towards the sum of those (un)successful claims to jurisdiction that build them. In my case, to answer the main question of this thesis – if and to what extent, the GloBE minimum tax could succeed – this means understanding a) *how state and interstate practices enables the effective taxation foreign entities' foreign income*, *today*, and b) *if and to what extent current practices could enable an international minimum tax as envisioned in pillar II.*

In the second and third chapter of this thesis, I answer the question of how states tax foreign income of foreign companies today, comparing existing CFC regimes to the GLoBE proposal. CFC rules charge global income of groups at the hands of their resident shareholders, in a way very similar to the GLoBE rules. CFC rules are triggered at a certain threshold of shareholder control. In a similar way, – and this appears indirectly, through

the definitions in applicable accounting standards – GLoBE targets all entities under the direct or indirect control of multinational ultimate parent entities. Where control thresholds of CFCs are more or less arbitrary, and can be easily circumvented, the GLoBE rules charge all entities included in the consolidated financial statements, authored using IFRS or any equivalent accounting standard, of multinational groups. In having the GLoBE tax base build entirely on information provided at headquarter level, the OECD aims to create a globally uniform tax base – a key innovation of the proposal.[274]

In the fourth chapter, I studied those preconditions engendering current CFC rules, to answer the question of if and to what extent they could carry state claims to GLoBE jurisdiction. First, I saw that the structure and prevalence of multinational groups – where 10-15% of groups produce 90% of global corporate revenue – effectively enables the creation of a minimum tax by Jurisdictional claims on the global profits of only a few groups. Second, I saw that Jurisdictional claims need only be asserted by a limited amount of states, since locational choices of ultimate parent entities are tax sensitive only to a limited extent, and only in relation to other strong economies. Widespread taxation of CFC regimes, and the low GLoBE rate of minimum taxation, set at 10-15%, will further dedramatize coordinated implementation. Since the rate is low, implementing states risk to a lower extent that third country base-stripping profit shifting cease, thinning the GLoBE tax base. Finally, the structure of the GLoBE rules themselves will greatly facilitate taxation.

As described in the first chapter, the GLoBE proposal consists of two rules – the Income Inclusion Rule (IIR) and the Undertaxed Payments Rule (UTPR). Together, these rules create the GLoBE tax base. The IIR is the key operational rule – it is by this rule that the tax base is charged at ultimate parent entity level by, and to the benefit of, their host jurisdiction. If the ultimate parent entity does not charge global profits, or when ownership of constituent entities is split down corporate chains, then IIR can be charged at subsidiary level. The UTPR functions as a backstop rule, securing IIR taxation. It is not expected, by the OECD, to be much applied. Through the UTPR, global untaxed profits of

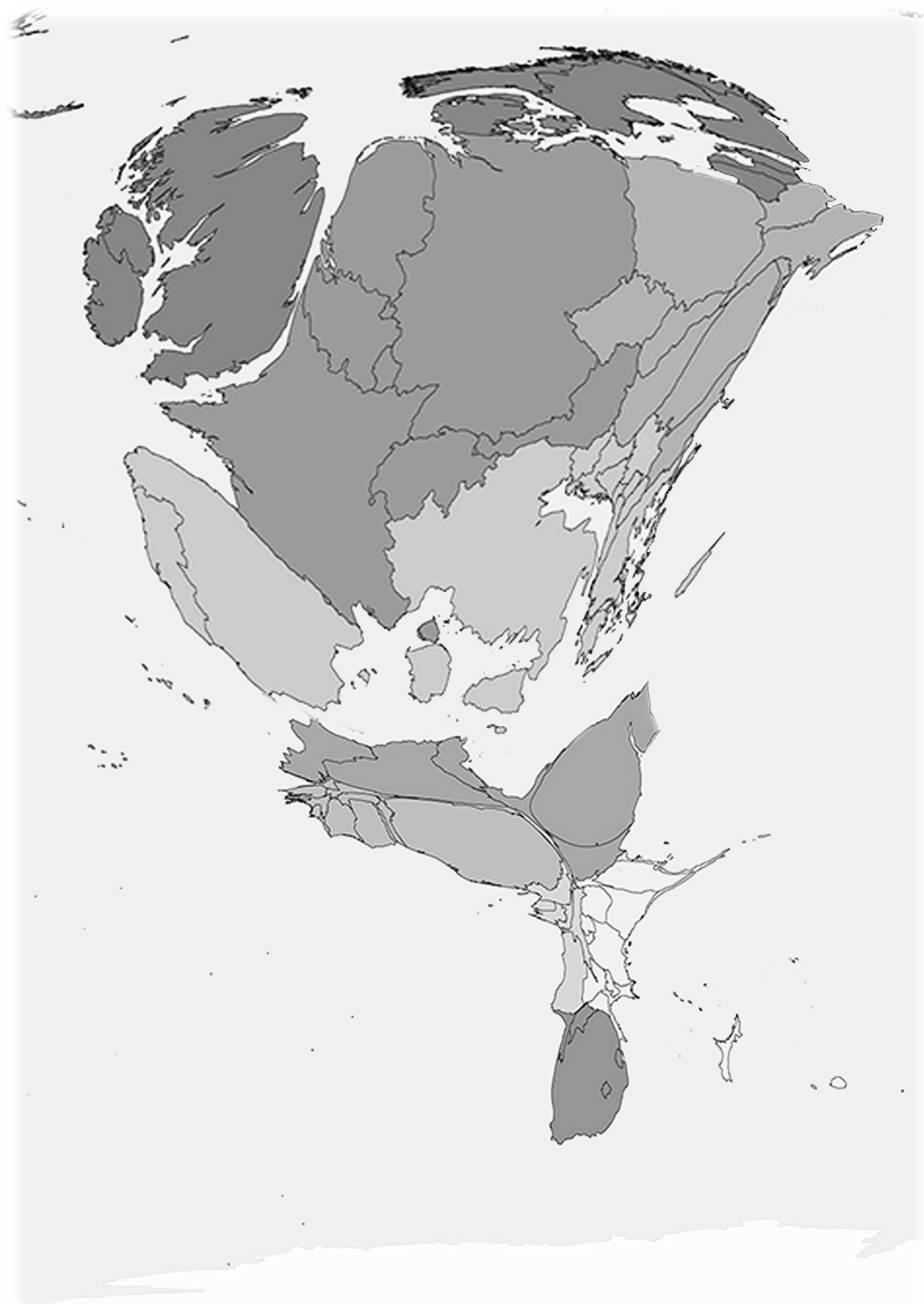
[274] KPMG (2020) *KPMG report: Summary and initial analysis of Pillar Two Blueprint,* KPMG, available at https://assets.kpmg/content/dam/kpmg/us/pdf/2020/10/tnf-kpmg-report-pillar-two-blueprint-oct12-2020.pdf

large multinational groups are taxed by Jurisdictions from which intragroup payments to undertaxed constituent entities have been made. If payments were made from several Jurisdictions, the tax base is allocated between these states by way of formulary appointment, in proportion to the respective payments made. Since multinational profits could potentially be taxed by subsidiary IIR and, or by the UTPR, host states of ultimate parent entities would have a strong incentive to effectively apply IIR. However – this is true only to the extent that other strong economies have access to information of the structure and scope of activities to be taxed.

The final chapter considers states' information gathering powers and networks of exchange of consolidated financial statements. As shown above, widespread access to consolidated financial statements is paramount to the successful implementation of a truly global minimum tax. However, since the largest multinational groups are headquartered in but a few strong economies, access is likewise required of but a few. Since the release of the 2015 Final Report, where Country by Country Reporting (CbCR) was made a minimum standard, the OECD has facilitated and reviewed global implementation of CbCR standards and bilateral exchange of CbC reports. Today, all OECD and G20 countries, except Israel, have implemented rules requiring CbC reporting from resident ultimate parent entities, and entertain solid networks of bilateral exchange of CbC reports, amongst each other. Most non- OECD and non- G20 countries are completely excluded from the exchange of reports. I argue that as long as the world's strongest economies have access to CbC reports, the GLoBE rules are still solid.

In conclusion, and considering the structure and prevalence of large multinational groups; variables factoring in the locational decisions of ultimate parent entities of such groups; widespread CFC regimes; uniform legislation on Country by Country reporting; efficient networks of exchange of CbC reports; and the structure and design of the GLoBE rules themselves, I argue that there is a solid material basis for developed states to assert global Jurisdiction. I conclude that, whether through multilateral agreement or by model legislation, the global minimum tax, as envisioned by the OECD BEPS IF, on a G20 mandate, will become a reality.

Part II:
On the production of cross-border tax jurisdiction



Part II: Preface

You and I are in the stateless space of the hidden profits of nations. 40% of the profits of the worlds' largest multinational enterprises is floating around here. These riches drip, trickle and flow in, not only from countries everywhere around the world; but from global commons as well, from outer space, from Antarctica, from the natural reserves of the High Seas and the world wide web. Lately, it seems like some of it is getting pumped up out of here – but how, and to where? The accumulated value of a world of toil gets in the way and obscures our sights. This is a strange place indeed.

Above is a map of Europe and Africa, sized in relation to the sizes of countries' total tax bases. It's based on a cartogram on country size to relative GDP. For some reason, European countries' tax bases, on average, are at a much larger percentage of GDP than those of their African equivalents. I am really trying to understand how it works, when in spite of geographical borders staying the same, countries still seem to keep growing. With recent developments in international taxation, the allocation of the global tax base is said to soon be turned on its head – but how will this play out? Who has the power to tax space, the digital, the commons, the stateless trillions – who has the jurisdiction?

Chapter one: Jurisdictional Thinking

1.1 Introduction

With the first part of this thesis, we found out that the global tax landscape is ripe for ultimate parent entity host states to assert Jurisdiction over the global profits of multinational groups, and that the GLoBE minimum tax will most probably become reality. We reached this conclusion by working certain assumptions on the importance of Jurisdiction and on how it is produced. These assumptions were a) that transnational space is constructed through competing claims to Jurisdiction, b) that claims to Jurisdiction, to succeed, must be engendered by the landscape upon which they are asserted, c) that Jurisdiction anticipates the content of substantive law and d) that Jurisdiction, and the succeeding substantive law, can be studied as it originates. All of these assumptions stem from a recent theoretical and methodological tradition of *Jurisdictional thinking*. In thinking with Jurisdiction, we encountered several key preconditions to engender GLoBE Jurisdictional claims, notably the structure and scope of large multinational enterprise, widespread CFC regimes and well entrenched networks of bilateral exchange of information.

In this second part of my thesis, I build on Part I findings and conclusions. I place and analyze them within a broader context of deepened understanding of jurisdictional thinking. The purpose of this second part is to provide broader conceptual insights on how cross border Jurisdiction to tax is produced. Whilst the first part asks *if,* and to what extent, GLoBE can be successfully implemented, this second part asks *why*. Through this introducing chapter I start by describing Jurisdictional thinking in greater detail – to the extent necessary for present purposes. In the second chapter I place Part I findings and conclusions within this broader theoretical context. I end this part and thesis with some final, concluding remarks.

Sundhya Pahuja, Anne Orford and Karin Loevy all turn to questions of Jurisdictional thinking to understand how trans- and international regimes, of their respective fields, gather form. They all consider the territorial sovereign state form as a representation of Jurisdiction. They all show how state ambits shift and transform over time, through the work of Jurisdiction – as the power to speak law expands and retreats. Orford tracks the emergence of the territorial state until present times, to argue that sovereign Jurisdiction is threatened by an emerging "international community" under the Responsibility to Protect doctrine of international humanitarian law.[275] Karin Loevy describes how Jurisdictional questions shift during states of exception, showing that sudden events can crack open sovereign control for foreign jurisdictional claim.[276] Pahuja describes how, under forces of international law, the sovereign power of colonized states was never actualized.[277] She shows the actualization of the state as a project of international law, and international trade law as constituted by conflicting claims of Jurisdiction.[278]

Rich countries are getting ready to tax global profits of resident multinational groups. The tax bases of OECD countries are already more than twice as large, in proportion to country GDP, as those of non- OECD countries. It's obvious that rich states enjoy far stronger taxing powers.[279] In this final part, I pose the question on how Jurisdiction is produced, by examining how ambits of state power are expanded and delimited through the work of Jurisdiction and the material orders that engender it. Looking at research on Jurisdictional thinking, this can be explained to occur in three steps. First, sovereign states lose factual control over real or abstract space. Second, new or decoded space is

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[275] Anne Orford: Orford, Anne (2011), *International authority and the responsibility to protect,* Cambridge University Press, U.K. ; Orford, Anne (2009), *Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect*, Michigan Journal of International Law, vol 30:3. ; Orford, Anne (2012), *In praise of description*, Leiden Journal of International Law, vol 25:03, p 615
Sundhya Pahuja: Pahuja, Sundhya (2013) *Laws of Encounter: a Jurisdictional Account of International Law*, London Review of International Law, Volume 1:1, Oxford University Press, p 75 ; Pahuja, Sundhya (2011), *Decolonizing International Law: Development, Economic Growth and the Politics of Universality,* Cambridge University Press, U.K.
Loevy, Karin (2016), *Emergencies in Public Law – the Legal Politics of Containment,* Cambridge University Press, U.K.
[276] Orford, Anne (2011)
[277] Loevy, Karin (2016)
[278] Pahuja, Sundhya (2011)
[279] Besley, Timothy, and Torsten Persson. 2014. "Why Do Developing Countries Tax So Little?" Journal of Economic Perspectives, 28 (4): 99-120.

colonialized through processes of competing claims to Jurisdiction. Third, and last, as the respective powers of different states are cemented through successful transformation of claims into the power to speak law, international regimes and order gather form, and the ambits of state powers crystallize.

1.2 Losing Control: Abstraction of Space

In their book, named simply *Jurisdiction*, Shannaugh Dorsett and Shaun McVeigh describe Jurisdiction as representation of authority.[280] Representation, as is Jurisdiction, is understood as ongoing practice.[281] From the universal power of the pope, to the lex mercatoria, to the sovereign power of nations – the authors explore the ways in which material orderings of authority have been engendered through and strengthened by legal fiction.[282] Through histories of legal authority, Jurisdiction, the speech of law, is always there – only spoken through different mouths. Jurisdictional technique – writing, mapping, other forms of representation – inaugurate and articulate law; in representation of the material orders of authority that they engender.[283] Dorsett and McVeigh pose the question, "how are representation of the orders of law engendered through jurisdiction?".[284]

Dorsett and McVeigh distinguish between language of author and authorization, of representative and representation; the author speaks, not in expression of abstract idea, but in authorization of material orders – in extension of institutional reality – through Jurisdictional technique.[285] Finally, "(t)he technologies of jurisdiction craft or shape lawful relations. They both bind us to the institutions of law and establish the repertoires of lawful relations."[286] At global scale, the ambits of sovereign power can be described as a practice of Jurisdiction, and legal transnational space as engendered through the meeting of

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280 Dorsett, Shannaugh and McVeigh, Shaun (2012), *Jurisdiction,* Routledge
281 Dosett and McVeigh (2012) p 4
282 Dosett and McVeigh (2012) pp 44- 51
283 Dosett and McVeigh (2012) p 10
284 Dosett and McVeigh (2012) pp 8-10
285 Dosett and McVeigh (2012) p 12
286 Dosett and McVeigh (2012) p 139

(conflicting) Jurisdictions.[287] As a final note, the authors stress "that the abstractness and immateriality of law is greatly exaggerated. It is important to take disputes over the material form of law seriously.".[288]

In this thesis I assert that legal space, and the assemblies of authority that inhabit it, is constituted by Jurisdiction. This means considering, like Dorsett and McVeigh the modern territorial state as a form or practice representing jurisdictional orderings. In her work, Anne Orford describe how "(t)he emergence of the singular conception of the state was the result of the correspondence of certain material preconditions (…) such as the centralization of authority, the growth of bureaucracies, and the consolidation of territories with defined boundaries".[289] Pahuja adds to this understanding, reminding us of the Montevideo Convention; where real, material power over territory and people form requisites for legal statehood.[290] Without the power to speak the law, there would be no sovereignty. Legal authority, and with time the territorial sovereign state, has grown into existence through conflicting claims of jurisdiction, (dis)engendered by material orderings.

Orford, Pahuja, Dorsett and McVeigh all agree that the sovereign territorial state has become so cemented, as a historical and political fact, that it is almost taken for granted – treated as a universal, political idea.[291] When one treats sovereign power as abstract idea and, as such, immaterial, one misses how the ambits of such power are drawn through ongoing material processes. There is a general perception, mirrored by the OECD, that with digitalization of an already global world, the actual, sovereign power of nations start to fray. Law, Jurisdiction, territory and state are all forms and representations of material orders, grounded in real power over real material space.[292] Gregor Noll shows us how when real material control over sovereign territory is lacking, human rights breaches might fall be deemed to fall outside of state Jurisdiction, even if breaches were made on state territory.[293]

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[287] Dosett and McVeigh (2012) p 122
[288] Ibid
[289] Orford (2009) p 108
[290] Pahuja (2013)
[291] Dosett and McVeigh (2012) Orford, Pahuja (2013), Orford (2009)
[292] Orford, Anne (2011) p 150: "jurisdiction (depends) upon de facto control over territory"
[293] Noll, Gregor (2016), *Theorizing Jurisdiction,* Orford, Anne, Hoffman, Florian (eds), The Oxford Handbook of the Theory of International Law, Oxford University Press, U.K., p 3.

As state control over territories waiver, unruled space is opened up. Stateless space – like that of the stateless missing profits of nations. When I talk space, I don't necessarily or exclusively refer to geographical space. I can talk cyberspace. I can speak of the global datasphere, where all the actions of the world gather like fossils, ready to be extracted. Pahuja shows that the territorial sovereign state form of former colonies where never actualized, since international space was such ordered, in colonial and then recently post-colonial times, to inhibit such actualization. Karin Loevy speaks of how, in moments of great crisis, abstract or real space can be unveiled as unruled, ready for jurisdictional claim. Finally, Orford, in writing on the material preconditions engendering the Right to Protect doctrine (a vaguely defined doctrine allowing for foreign military intervention for purposes of protection), that following widespread, institutionalized "practices of protection", the very idea of exclusive, territorial sovereign control is starting to dissolve.

1.2 Recoding Space: Legal Colonialization

Karin Loevy, in *Emergencies in Public Law* – engaged by the task of demystifying the mechanics of states of exception – tell us of how, in times of crisis, unruled space can be colonized.[294] She describes how, when the Nargis cyclone stroke Myanmar in 2008, big rifts in sovereign control where unveiled, uncovering territory as "humanitarian space."[295] Within this discourse of humanitarian space, the legitimacy of "the technical notion of Myanmars sovereign Jurisdiction (… was) challenged by actors who question(ed) Myanmars' exclusive authority to say *what the law is* with regards to its own disaster.".[296] A range of actors claimed Jurisdiction over the affected territory, among which the government of Myanmar themselves. However, only one organization, with strong regional presence, managed to take effective control. Under the great storm, the territorial sovereign power of Myanmar was effectively de- and reterritorialized.

[294] Loevy, Karin (2016)
[295] Ibid
[296] Ibid

Jurisdiction for Orford explains the outcome of a process by which "a worldly claimant to authority is transformed through the successful performance of the power to declare the law.".[297] It is through Jurisdiction, Orford writes, that a place before the law is constituted; that people and places are subjected to rule and occupation.[298] This Jurisdiction translates to the successful placing of the law in the world, to the juridification of power and fact. When space is opened up, conflicting claims to Jurisdiction will bring space under their rule; but only if and to the extent claims are engendered by the landscaped upon which they are asserted. Orford writes;

The practice of jurisdiction is now understood simply to involve determining in what circumstances a particular authority has power to declare the law in a particular territory. Yet as we watch the way that power, territory, control, and law shift and relate over time, we can see that jurisdiction is more than a technical question. When a lawful authority articulates the terms of its jurisdiction, it is forced to confront "in practice, the question of its competence over a given case."' The process of claiming jurisdiction is a form of alchemy. A successful claim of jurisdiction transforms power into authority, or fact into right.'[299].

As states claim Jurisdiction over the international, the crisis, or the hidden profits of nations, sovereign authority expands and retreat. In thinking with Jurisdiction, one can track the continuous rewrite of state ambits. In mapping the material preconditions of power – the true sources of Jurisdiction's alchemic like force – global furtherance of Jurisdictional claim can be analyzed. In her work, Orford analyzes how sovereign powers are granted Jurisdiction to control foreign territory.[300] She tells us that state practices of protection carry the central importance in the ongoing de- and reterritorialization of transnational space. As the UN moved from "static conference diplomacy" towards being a "dynamic instrument' for 'executive action, undertaken on behalf of all members", the practices carried out by states in executive action started carving out space for institutionalized foreign intervention.[301]

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[297] Ibid
[298] Orford, Anne (2009) p 1003, in quoting Dorsett and McVeigh, se below.
[299] Orford, Anne (2009) p 1013
[300] Orford, Anne (2011)
[301] Orford, Anne (2012), p 615: "While I gradually began to understand the responsibility to protect concept as a means of rationalizing and integrating already-existing practices of executive rule, when I tried to convey this, I was invariably frustrated by the response."

1.3 Universal Code: Maps of Jurisdiction

In her book *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* Pahuja describes how, when newly liberated states entered the international to demand permanent sovereignty over natural resources, they entered a space already regulated or already produced.[302] In this space, their sovereign claims to sovereign territory were morphed into the various duties of "development", to be administered by institutions of the international.[303] They were forced to deregulate financial and other key markets to pay back debts from colonial times.[304] They had to enter into networks of bilateral trade agreements to compete for foreign direct investment.[305] With time, waves of global deregulation turned into an international project of globalization. Key clauses in bilateral networks gained international customary trade law status as principles.[306] With time, an international order of trade law, asserting universal power, settled.

Gregor Noll, in his essay *Theorizing Jurisdiction*, tells us of how "(principles of Jurisdiction) offer a language to articulate delimitations, overlaps, competing claims, and white spots of jurisdictional exercise of state power, neither less nor more.".[307] In his essay, Noll considers dicere (speech) as prevalent jus (the law).[308] Speech, he tells us, is material; it engenders the inanimate bodies of law. Every time the law is spoken, it is spoken by someone, or something – The law is always spoken in, to and by the world. Written laws, maps of legal possibility, can be old, sometimes witheringly so – but when they are spoken, spoken law is always brand new. As the law speaks upon global landscapes, maps of Jurisdiction can be drawn, to crystallize ambits of state power. Thinking with jurisdiction, the jurisprudent is allowed to map transnational legal relations as they are, rather than passively accepting Westphalian ideals of sovereignty and international community.

302 Pahuja, Sundhya (2011)
303 Ibid
304 Pahuja, Sundhya (2011) p 44
305 Pahuja, Sundhya (2011) p 95
306 ibid
307 Noll, Gregor (2016) p 3.
308 Noll, Gregor (2016) p 6

Understanding sovereignty as constructed by jurisdiction shows us "how rival forms and accounts of political authority and ways of belonging to law are enacted and performed over the same people and the same places at the same time.".[309] For Pahuja, lawful space, sovereign and international, is produced through competition between Jurisdictions. As a world of necks turns toward the stateless, unclaimed space of the hidden profits of nations – how will this competition play out - what *consensus* on taxing powers will be formed, and why – will this space be found already regulated? Has the "restless movement of state forms" already expanded their reach? Through Part I of this thesis, and in thinking with jurisdiction, I concluded that the minimum tax of the GLoBE proposal can and will be implemented through claims to global residence jurisdiction by a handful of the economically strongest states. In the following second and final part, I aim to deepen understanding on how state ambits have been de- and reterritorialized within global tax landscapes.

[309] Pahuja, Sundhya (2011) p 72

Jurisdiction to tax

2.1 Introduction

The OECD paints sovereignty as the conceptual cornerstone of Jurisdiction, while also, in the context of global tax competition, describing sovereignty as turning almost nominal. On top of this, they claim that international consensus is a purely technical process, needing only the strongest sovereigns onboard. If sovereignty is turning nominal, and yet some sovereigns are stronger than others, we need to ask, what analytical value, if any, does the illusive concept of sovereignty bring?[310] In this thesis, I argue that the central player of transnational space, isn't sovereignty, but Jurisdiction. As shown, authors of jurisdictional thinking argue that sovereignty takes Jurisdiction for granted. This enables a highly technical, depoliticized approach to jurisdiction. In the contexts on cross-border taxation, lacking obvious, central power, we will have to remember that state sovereignty is in fact constituted by state jurisdiction. State Jurisdiction to tax cross-border income effectively expands and delimits sovereign power.

Noll speaks of Jurisdiction as a language and as a means of orientation.[311] Legal dogmatics are finding it notoriously hard to orient themselves in todays' climates of transnational taxation. Between our current situation and tomorrows order, to be drawn up by the OECD IF, there is nothing but an epistemological gap, a great big rift of unknowability. Legal dogmatic Jurisdiction, being a purely technical language, relies on legally defined mandates, deriving from sovereign or international rule. Reading Jurisdiction in its own right, as juridified authority – as the speech of law – abstracted from sovereign rule, delivers us from this dilemma. Jurisdiction seen as the pure, unbound representation of international authority, allows us to map and analyze the spaces of transnational law – as they emerge.

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[310] Brauner (2017) "This chapter demonstrated that the casual use of of the notion of sovereignty in the international tax discourse in general and the BEPS context in particular is useless."

[311] Noll (2016) p 3

In the previous chapter, I showed how, as the power to speak law shifts, sovereign state ambits continuously de - and reterritorialize. Conflicting claims to Jurisdiction, (dis)engendered by the material orders upon which they are asserted, work to colonize abstract and real space, to bring it before the law. As spatial conflicts play out, new orders emerge and crystallize. These processes can be seen to play out in three steps. First, sovereign control over real or abstract space is lost. Within cross border taxation, the growth and coming to life of massive multinational groups, coupled with weak regimes for cross border taxation, have made states lose control over 40% of global multinational corporate profits. Second, control over unruled space is reasserted, as such space is recolonized through (conflicting) claims to jurisdiction. The lost fight for global transparency, weighed between rich and poor countries, tells the story of how a burgeoning international bureaucracy, benefiting strong economies, enabling assertion of residence over source Jurisdiction through widespread CFC regimes. Finally, the structure and scope of multinationals, transnational bureaucracy and CFC regimes has prepared global grounds well enough to engender rich states' global claims to Jurisdiction.

2.2 Losing Control: The growth of Multinationals

Tax powers are a cornerstone of sovereignty. Saskia Sassen shows that the modern territorial state grew as consequence of among other things, a strengthened Jurisdiction to tax.[312] Taxing powers draw the limits of what can be done with sovereign political power.[313] In times of crisis, in times of war, taxing powers have been both strengthened, and weakened. The corporate income tax was introduced to the world to raise revenue for the first world war.[314] Through the latest decades, following economic crisis and accelerated digitalization and globalization, statuary corporate income tax rates have taken a worldwide plunge. The OECD Base Erosion and Profit Shifting (BEPS) project was born

[312] Sassen, Saskia (2006) *Territory, authority, rights : from medieval to global assemblages,* Princeton University Press, New Jesey p 20
[313] Brännström, Leila (2019) *När juridiken är politikens fortsättning med andra medel*, Gänta 3-4.19, Lund
[314] Sassen (2006)

in the ashes of a global financial crisis and of an explosion of recent leaks on the base eroding practices of multinational enterprise. Today, at the mercy of global corona pandemic, we could face a decline in global GDP of up to 3.9%.[315] At the same time states are in particularly desperate need of extra revenue, as healthcare is heavily strained worldwide. Due to the base eroding practices of multinationals, and the powerlessness of a world of sovereigns engaged in constant competition for investment and competitive strength of multinationals, 40% of profit escape sovereign reach – leading to OECD officials deeming sovereign taxing powers almost nominal.[316]

When corporate income tax was first introduced, transnational business was still in their infancy, foreign direct investment was low, and global financial markets was almost exclusively under state control, worldwide.[317] While transnational companies emerged during the turn of the century, pre-war period, "(s)tate policies, especially exchange controls, as well as the caution of investors, limited international capital movements.".[318] Sol Picciotto explains that, while foreign direct investment started picking up some pace in the aftermath of the second world war, it didn't really blossom until the 70;s going forward.[319] It was during the 70s that large multinational enterprise as they exist today, where the largest 10- 15% MNEs produce 90% of global income, started to gather form.[320] As Pahuja explains, when newly independent states gather to demand not only formal sovereignty but full sovereignty over natural resources, they walked into an international space already regulated. In this space, they were denied sovereign control, and forced to compete amongst each other and other low to middle income countries for foreign direct investment.

Trans- and later multinational enterprise pioneered modern tax planning, consciously branching out and planning inter-group payments solely for tax purposes.[321] Transnational tax regimes, that had grown into existence by

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[315] Maliszewska, M, Matoo, A and van der Mensbrugghe, D (2020); *The Potential Impact of COVID-19 on GDP and Trade: A Preliminary Assessment;* Policy Research Working Paper 9211; East Asia and the Pacific Region Office of the Chief Economist & Macroeconomics, Trade and Investment Global Practice
[316] (SIEP) (2020)
[317] Picciotto (2013) pp 1-38
[318] Picciotto (2013) p 3
[319] Picciotto (2013) pp 1-38
[320] Ibid
[321] Ibid

a delicate balance between state competition for taxing rights on the one hand, and for investment and strengthened competitive positions of resident multinationals on the other, were unable or rather, states were unwilling to counter the base eroding practises of multinationals. Today, profit shifting is so entrenched in the global economy, that multinationals have to plan tax output in order to stay competitive.[322] As shown by authors such as Allison Christians and Tsilly Dagan, the framework of global allocation of the tax base, broadly divided between source and residence taxing rights, have grown into existence through processes of tax competition. As long as profits were not taxed by residence states, source countries could not tax source income, lest they lose foreign direct investment. Meanwhile, resident states can abstain taxing rights to strengthen "their" multinationals. This way, shifted and digital profits avoid taxation, pooling a vast, unruled abstract space of the hidden profits of nations.

2.3 Decoding Space: Claims to Corporate Transparency

As profits were shifted out of state reach, countries and groups of countries came together to claim Jurisdiction of new, abstract spaces of the world's hidden treasure. The global tax base has always been allocated through legal fictions; fictions of source, residence and the arm's length principle. These fictions represent taxing powers of nations. At the forefront of tax wars on extending taxing powers, were played out the fight between rich and poor countries on the question of tax transparency. In his book, *Taxation of foreign Source income of Resident Individuals,* Vokhid Urinov shows two things about the rise of the exchange of tax information; a) that exchange was vital for residence taxation of Controlled Foreign Corporations and b) that networks of bilateral exchange excluded weaker economies at the cost of stronger ones.[323]

At an International Fiscal Conference held in 1976, long before the rise of bi- and multilateral networks of automatic exchange, professor Eddison Gnazzo Lima, then technical director of the Centro Americano de

322 Ibid
323 Urinov, Vokhid (2019), *Taxation of Foreign Source Income of Resident Individuals: A Structural Enforcement through Automatic Exchange of Tax Information*, IBFD Doctoral Series, vol 49

Administratores Tributarias (CIAT), held a speech on cross country tax information exchange.[324] He holds that although South and Central American countries are pressured by Canada and the US to enter into bilateral negotiations on exchange, they would greatly prefer a truly multilateral agreement, benefitting all countries equally. Until present times, solutions for exchange of tax information, although presented under multilateral vestige, are still found by countries strictly through bilateral negotiations.

The very first bilateral tax treaty was a treaty on the exchange of information for tax purposes.[325] However, the fight over the frameworks of burgeoning tax information exchange were truly actualized from the 70s and onwards, when currency was floated worldwide, and multinational enterprise started *really* growing. Back then, tax cooperation on exchange of information where primarily administered by informal, highly secretive organizations such as the Group of Four, and of more formal regional organisation such as for example CIAT.[326] From late 1960s to early 1980, the rising Group of 77, and a movement of developing countries and former colonies, New International Economic Order (NIEO), used the UN as platform to push for global financial transparency.[327] They demanded that information on the scope and structure global multinational economic activity be made both transparent and public. In *A half-century of resistance to corporate disclosure,* the authors describe how, for the NIEO movement, access to information on the activity of trans and multinational enterprise was paramount to effective taxation.[328]

After e few years on work within an UN Commission for Transnational Corporations (UNCTC) to establish bodies and standards for making publicly available financial reports of large multinational groups, progress was effectively blocked by a small number of OECD countries. These countries threatened to simply refuse to implement standards, and to leave the UNCTC altogether.[329] As a consequence, a principle of consensus decision-

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324 International Fiscal Association (1976), Statement made by E. Gnazzo, Work in intergovernmental organizations on transnational companies, Proceedings of a Seminar held in Jerusalem during the 30th conference of IFA
325 Stewart (2013)
326 Picciotto (2013) p 254
327 Cobham, Janský and Meinzer (2018)
328 Ibid
329 Ibid

making rather than decision by majority was implemented, leading to UNCTC continue a fruitless work until it was ultimately dissolved.[330] Parallel to the failure of UNCTC, an alternative organization, the International Accounting Standards Committee (IASC), was founded by auditing firms from 10 OECD countries and Mexico.[331] IASC is the old name of IASB. As mentioned in Part I, IASB is presently in charge of reviewing acceptable accounting standards for the effective implementation of CbCR. By CbCR and the bilateral exchange of CbC reports, the information demanded by NIEO is provided by all large multinational enterprise – but solely to the benefit of their rich ultimate parent entity host states.

In 1992, Sol Picciotto identified networks of exchange of tax information as forming the embryo of a world tax administration.[332] In 2013, in the midst of success implementation across rich countries of networks of automatic exchange of tax matters, Miranda Stewart argued that a networked tax bureaucracy was being successfully implemented from the ground up.[333] Today, with 2700 bilateral relationships on the exchange of consolidated financial statements of the largest multinationals, provide an even more solid ground for expanded assertion of residence taxation on global hidden profits. Through CFC regimes, stateless profits are slowly being colonialized. As the global cities of the world grab hold of global taxing rights of resident ultimate parent entities of multinational groups, the ambits of state power are being redrawn.

2.4 Universal Code: Futures of Unitary Taxation

In her contribution to the book *Tax, Law and Development*, Miranda Stewart writes that "(g)lobalization is perceived as reducing the role and capacity of nation states.".[334] This perception is mirrored in the assertions of OECD BEPS deliverables and by key OECD officials, that tax competition renders sovereignty almost nominal. Pascal Saint Amans, chief negotiatior of the Two

[330] Ibid
[331] Ibid
[332] Stewart, Miranda (2013),
[333] Ibid
[334] Stewart, Miranda (2013)

Pillar Approach, holds that only through tax cooperation can states draw up new and just global tax principles, realigning taxing powers with value creation. [335] However, Stewart continues, what globalization really does, is to effectively expand certain states capacity to govern, at the cost of others.[336] Multinational enterprise and bilateral networks of tax information exchange have engendered state claims to foreign income of foreign companies for the better half of a century, from when the first CFC regime were implemented in 1962, until today. Through history, rich states have successfully, on and again, advanced residence taxing rights at the cost of source taxing powers.[337] As shown in part I of this thesis – with GLoBE, the advancement of residence taxation is about to take the next big leap.

Sol Picciotto, chief coordinator of the BEPS monitoring group, and chair at the advisory group of Independent Commission for the Reform of International Corporate Taxation (ICRICT), has asserted that "tax evasion (... benefits) from a legal and political ecosystem that has been set up laboriously over decades by key governments in the western world, along with the backdrop of the liberalization and financialization of economies."[338] By fostering tax competition, asserting a wide residence country revenue bias through tax treaty networks, and tolerating MNE tax avoidance, strong economies have actively weakened global tax landscapes. Without aggressive tax competition, there would be no need for a top up minimum tax. A top up minimum tax would be profitable only to the extent other solutions fail. Finally, such a tax could only be effectively applied by host states of strong MNEs. ICRICT has long fought for international minimum taxation, but with allocation of revenue by formulary appointment – not by way of a top up tax – and at a rate of at least 25%, rather than 10 – 12,5%. In their critique of the second pillar, they assert that GLoBE would open a direct channel for revenue to flow from poor to richer states, invalidating the formers right to tax, and triggering a global race to the bottom.[339]

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[335] (SIEP) (2020)
[336] Ibid
[337] Avi- Yonah (2005) *All of a Piece Throughout: The Four Ages of U.S. International Taxation*, Va. Tax Rev. 25, no. 2 : 313-38.
[338] Picciotto (2013) p 333
[339] ICRICT (2020)

Conclusions:
Emergent (Boundraries of) International Taxation

Reading up on recent debates around the allegedly imminent reallocation of the global tax base, one quickly grows accustomed to certain prevailing narratives on the history of transnational taxation. First, one is told that a hundred years ago, in the year of 1920, four economists, representatives of four of the worlds' strongest economies at the time, met in Geneva, Switzerland, to draw up the basics of what came to inform a centuries' worth of development in the world of transnational taxation.[340] The principles that they laid out, allocating active income to host states, and passive income to residence states, are today enshrined not only through the around 3000 bilateral treaties that make up states' transnational treaty networks, but also in domestic law all over the globe.[341]

Second, one is informed that the ever-accelerating globalization and digitalization of the economy, may have rendered obsolete some of these ancient principles of allocating taxing rights.[342] The ease with which legal fictions can be manipulated and profits shifted today, was something the four economists, one is told, active as they were within the framework of an economy of smaller scale "brick and mortar businesses", could never have anticipated.[343]

[340] OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241046-en ; Avi-Yonah, Reuven S. (2019), *Advanced Introduction to International Tax Law,* Second edition, Edgar Elgar Publishing, UK, p 3
[341] Avi-Yonah, Reuven S. (2019), p 3
[342] OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264293083-en, p 3.
[343] Ibid p 168, 64 ; Santos, Ramon Tomazela and Rocha, Sergio André (2017), *Tax Sovereignty and Digital Economy in Post-BEPS Times*, Sergio André Rocha and Allison Christians (ed), Tax Sovereignty in the BEPS Era, Kluwer Law International, The Netherlands, p 39

Third, in a globalized world of race to the bottom tax competition, the sovereignty to tax is said to erode itself and turn almost nominal.[344] Under countries' constant imperative to compete for investment and for the strengthening of local big business, it is precisely the fact of states' sovereign freedom to tax that forces a steady fall of CIT rates worldwide.[345] This has been named the sovereignty paradox – and it is said, that only international tax cooperation can curb its' base eroding consequences; sovereignty can only be restored through the giving up of sovereignty through global agreement – through tax cooperation, states can draw up new, principled and just rules, in order to realign tax allocation to value creation.[346]

These lines of reasoning are all represented in ongoing work of the OECD/G20 BEPS project.[347] A project that – also according to popular narrative – has delivered us to the brink of tax revolution.[348] Yet current developments – the gradual crystallization of just short of a decades' hard work – tell of little more than international coordination of already existing unilateral measures.[349] In coming to terms with the anticlimax that has become of alleged transnational CIT overhaul, blame is put on negotiations' political bias.[350] This blame – as does, I would argue, prevalent narratives on the history of CIT – stems from the common, fundamental view of or the hope of the international as neutral meeting place of sovereigns and of sovereign agreement, and from the conceptual prevalence of idea over materiality within the cosmology of modern legal science.

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[344] Expertgruppen för studier i offentlig ekonomi (ESO), Finansdepartementet and Svenska institutet för europapolitiska studier (SIEP) (2020), *Skattesuveränitet i en globaliserad och digitaliserad värld*, seminar in Lund, Sweden. available in english at https://eso.expertgrupp.se/seminarium/skattesuveranitet-en-globaliserad-och-digitaliserad-varld/ (last visited 20/10- 2020). Pascal Saint-Amans, Director of Centre for Tax Policy and Administration, OECD, calls sovereignty nominal at ??.
[345] Tsilly Dagan (2018), *International Tax Policy: Between Competition and Cooperation*, Cambridge University Press, UK, p 23
[346] OECD (2018), p 169
[347] See references above.
[348] OECD (2020), *OECD Tax Talks #17*, Monday, 12 October 2020 15:00 - 16:00 (CEST), available at https://www.oecd.org/tax/beps/tax-talks-webcasts.htm (Last visited 20/10-2020) Pascal Saint-Amans presents OECD/G20 IF Two Pillar Approach as a "new international tax system".
[349] Sacchi, Andrea Riccardi (2020), *Implementing a (Global?) Minimum Corporate Income Tax: An Assessment from the Perspective of Developing Countries*, Copenhagen Business School, CBS LAW Research Paper No. 20-15, Available at SSRN: https://ssrn.com/abstract=3668096
[350] Avi- Yonah (2019)

In this thesis I assume that the legal spatiality of cross border taxation is dictated not by principled agreement amongst equal sovereigns, but by material power as translated into Jurisdiction. As conflicting claims on parts of the global tax base are laid out, power to tax is translated into Jurisdiction and crystallized into regimes. Regimes of cross border taxation are maps on the power to tax, a power perpetually unveiled through conflicting claims to Jurisdiction. Since the sixties countries have been able to tax foreign corporations by way of Controlled Foreign Corporation (CFC) regimes. Since 2017, the US use their CFC regime to enforce a de facto worldwide minimum tax by charging resident MNE parent corporations and headquarters. The OECD aims to install an international minimum tax, to be collected at Multinational Enterprise (MNE) headquarter or ultimate parent level, by expanding the scope of current CFC- regimes. In Part I of this thesis, I described how Jurisdictional claims of CFC-regimes, as represented in countries around the world, will come to expand into the form of an international minimum tax.

Current developments beg the rethinking of prevailing narratives. The gap between what was said and what was eventually done regarding the "international tax overhaul of a century", takes us back to the meeting of the four economists, mentioned in the beginning of this chapter.[351] Allison Christians point out that, like the OECD IF, the four economists met under the not entirely modest task of scientifically deriving the best way of allocating the global tax base, in line with value creation – yet in the end, they had to retort to practical questions of enforceability and power.[352] As Tsilly has shown, and contrary to popular narrative – international taxation can be described not as the fruit of the Fours intellectual labour, rather the gradual fulfillment of their prophecies.[353] A centuries' worth of growth of host- and residence taxation on an entity to entity basis has played out, is playing out in deliberation, informed by states' will to expand their national tax base whilst, perhaps more importantly, attracting and fostering out- and inbound investment.[354]

[351] Allison Christians (2017), *BEPS and the Power to Tax,* Sergio André Rocha and Allison Christians (ed), Tax Sovereignty in the BEPS Era, Kluwer Law International, The Netherlands, p 11

[352] Ibid

[353] Tsilly Dagan (2018)

[354] Tsilly Dagan (2018), p 73

If there is indeed a “rules-based international tax system”, as the OECD will have it to be, this regime has grown out of power – out of competition between jurisdictions – and not out of principled discourse. Furthermore, and again contrary to popular narrative, whilst this growing regime sure limits the sovereign power to tax, it also and in several ways unbounds it.[355] The rise of CFC legislation all over the global north – providing for the taxation of non-resident companies in the hands of their resident corporate shareholders – has been said to explain why developed countries failed to experience the same fall in CIT revenue, following widespread tax competition, as were otherwise recorded worldwide; and is described by the OECD as “an extension of the tax base”.[356] While, according to the OECD, “(the Pillar II proposal) is intended to respect the sovereign right of each jurisdiction to set its own tax rates, (whilst granting) tax sovereignty of all countries to “tax back” profits where other countries have not sufficiently exercised their primary taxing rights.”, the most recent report on the actual blueprint of the pillar, reveal that it is based on a top-down approach, in reality invalidating state rights not to tax.[357]

In their more honest moments, OECD officials describe their work as purely pragmatic, hands-on negotiation on reaching a consensus, any consensus, that in reality only require the most powerful nations support to fly.[358] Value creation is no longer discussed in recent official OECD deliverables.[359] Where OECD officials describe negotiations as purely technical, and academia as political, as in impossible to analyze, the underlying idea of sovereign, idealist agreement as driving force behind the growth of the international, leaves a gaping epistemological hole in the science of transnational CIT law – the gap of knowability between what used to be and what will come to be, between sovereign rule and the “rules-based international order”, itself.

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[355] A. Kaye, Tracy, *U.S. Tax Sovereignty and the BEPS Project,* Sergio André Rocha and Allison Christians (ed), Tax Sovereignty in the BEPS Era, Kluwer Law International, The Netherlands, p 291: ”(the BEPS project) was necessary in order for the U.S. to effectively wield its tax sovereignty.”

[356] Avi-Yonah (2019) p 83 ; OECD (2015) p 23. See also Avi-Yonah (2019) p 82 “Before 1961, no country taxed the foreign source income of subsidiaries of its multinationals, because residence countries believed they lacked both source and residence jurisdiction over foreign source income of foreign corporations (…)”.

[357] OECD (2020c)

[358] ESO SIEP (2020)

[359] See OECD (2020c) applied cover statement, establishing only that profit should *not* be taxed where *no value is created*, as in investment hubs (tax havens).

Drawing from burgeoning streams of legal research on Jurisdiction, the second part of this has attempted to fill this gap, by abstracting from sovereignty the concept of Jurisdiction. I have argued that ultimately Jurisdiction, not sovereignty, is best understood as constituting transnational legal space. In the first part of this essay I answered the question of *if, and to what extent, current negotiations on the GLoBE proposal could lead to successful claims to Jurisdiction implementing a global minimum tax*. In considering the state of several key preconditions to engender GLoBE Jurisdictional claims; notably the structure and scope of large multinational enterprise, widespread CFC regimes and well entrenched networks of bilateral exchange of information, I concluded that the minimum tax of the GLoBE proposal will be realized.

In this second part of the thesis, I answered the question of *how theoretical frameworks of jurisdictional thinking could explain processes by which cross border Jurisdiction to tax is delimited and expanded.* Rather than to bring exact answers, the purpose of this part has been to deepen understanding on how Jurisdiction to tax is delimited and expanded and how sovereign power is consequently (un)bounded in transnational space. As mentioned in the introduction of both parts, I add this extra layer of understanding by placing the findings and conclusions of Part one within a deepened theoretical framework of Jurisdictional thinking. The findings and conclusions of Part I are thus constituent for this second part. Deepened understanding of Jurisdictional thinking was played out in three steps. I started by recounting how sovereign states lose factual control over real or abstract space. I followed up in description on how new or decoded space is colonialized through processes of competing claims to Jurisdiction. Finally, I outlined how, as the respective powers of different states are cemented through successful transformation of claims into the power to speak law, international regimes and orders gather form, and the ambits of state powers crystallize.

OECD bias has led authors, such as Natalia Quinones, to assert that developing countries should leverage participation in the BEPS IF in order to achieve substantive inclusion.[360] The twin facts that GLoBE minimum

[360] Natalia Quinones (2017), *The Birth of a New International Tax Framework and the Role of Developing Countries,* Sergio André Rocha and Allison Christians (ed), Tax Sovereignty in the BEPS Era, Kluwer Law International, The Netherlands, p 165

taxation rests on the UTPR as backstop rule, and that non-OECD and G20 countries are to a great extent excluded from networks of information exchange in general, and almost fully excluded from exchange of CbC reports in particular, brings Quinones assertion to mind. However, in the first chapter, I conclude that such systemic exclusion is not really an issue for GLoBE. Considering the findings of this last chapter, I draw the conclusion, that CbC reports will only be made publicly available at the cost of further compromises being made by non-OECD and G20 taxing powers.

Throughout previous chapters, I have shown that the GLoBE negotiations, led by the OECD, have arisen from a network of deliberate historical processes strengthening the taxing powers of richer countries. The rise of large multinational enterprise abstracted the global tax base. Through competing claims of Jurisdiction, global space was recoded and transformed into exclusive networks of tax governance. By asserting Jurisdiction over the global activity of domestically based multinational headquarters, rich states around the world bring the world of tax, anew, before law.

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Annex A:
CFC legislation worldwide

Countries	What foreign entities qualify?	Below what rate?	What income is taxed?
Argentina	**De minimis:** only passive income is taxed if not (1) at least 50% of the earnings are passive income **Jurisdiction:** Blacklist affects income to be taxed. Blacklist as alternative to low tax approach. **Control**: taxpayer (1) holds voting or economic rights of 50% or more or (2) has the right, in any way, to dispose or decide on the disposal assets of the legal entity, has the right to appoint the majority of the directors, administrators or deciding members of the administration boards or bodies, and has the right to remove the majority of the directors or administrators, and has a current right on the benefits of the legal entity, **IF**, (i) CFC has financial assets producing Argentine-source passive income exempt from Argentine income tax and (ii) represents 30% or more of it total assets **substance carve- out:** worldwide	ETR is 75% or lower than ETR that would apply in Argentina. *(alternative approach: see Jurisdiction)*	Whole of CFC income if no substance, if substance then only passive income (see substance carve--out under category B)
Australia	**De minimis:** active income test affects what income is taxed **Jurisdiktion:** Whitelist affects what income is taxed. **Control:** if five or fewer residents have 50% associate-inclusive control, or a single resident has 40% associate-inclusive control, or a group of five or fewer residents has actual control, of the company. An attributable taxpayer must have at least 10% associate-inclusive control (or 1% if the taxpayer is one of the five or fewer residents controlling the CFC).	None	Tainted income. If passes active income test or resident in whitelisted country then only highly limited categories of income.
Austria	**De minimis:** Passive income must exceed a third of total income **Jurisdiction: Control:** directly or indirectly, with its affiliated companies, more than 50% of the voting rights or capital or is entitled to more than 50% of the profits of the foreign corporation. **significant economic activity:** worldwide	ETR is 50% lower than the ETR that would be paid in Austria	passive income or no income if below de minimis.
Azerbadjan	**De minimis: Jurisdiction:** Low tax according to black list made by president. **Control:** directly or indirectly more than 20% of share capital or voting rights in a foreign legal entity	None	Whole of CFC income
Belgium	**De minimis: Jurisdiktion: Controll:** holds, alone or with associates, directly or indirectly: (i) the majority of the voting rights, (ii) at least 50% of the participation or (iii) the right of the majority of the profits of the foreign entity. **Substance carve-out:** worldwide	ETR 1/2 or lower than what would have been applied in Belgium.	**Not proportional approach!** instead income is taxed to the extent it is connected to assets and risks.
Brazil	Brazil has four different sorts: *Regular controlled*, *Regular associated*, *legally differentiated controlled* and *legally differenciated associated.* *Associated companies* are *legally differentiated* if they: (1) are located in a blacklisted jurisdiction or (2) ETR is lower than 20% **or** (3) are controlled, directly or indirectly, by a legal entity subject to ETR below 20%. *Controlled companies* are also *legally differentiated* if they: (1) meet *one* of above listed criteria or (2) are located in a jurisdiction with which Brazil does not maintain a treaty or an act with a specific clause for the exchange of information for tax purposes; (3) are controlled, directly or indirectly, by a legal entity located in a blacklisted jurisdiction or (4) active income is less than 80% of the total income. **De minimis:** *see above* **Jurisdiktion:** *see above* **Control:** *controlled:* holds, directly or via related (read broadly) parties, rights that assure, on a permanent basis, the power to elect the majority of the directors and to win corporate decisions. *Associated:* significant influence, considered as power to take part in the definition of the company's financial and operating policy, without having control of the company. Significant influence is presumed when the investor owns 20% or more of the shares of the company	see column B.	Whole of CFC income (for *regular associated companies* through deemed-dividend) (for *legally differentiated controlled companies,* offsetting profits of one foreign company against losses of the other foreign company is not allowed.).
Bulgarien	**De minimis: Jurisdiktion: Control:** alone or together with its related parties, holds directly or indirectly more than 50% of the voting rights, capital or share in profits of the non-resident entity **substantive economic:** worldwide	ETR 1/2 than the ETR that would have been paid in Bulgaria, 4,99% (exception when no tax what so ever is payed!)	Whole of CFC income
Cabo Verde	**De minimis: Jurisdiction: Control:** holds, directly or indirectly, 25% of the share capital, voting rights, rights to income or rights to the assets of the CFC entity	None	Whole of CFC income
Canada	**De minimis: Jurisdiction: Control:** (1) holds, directly or indirectly, at least 1% of any class of the outstanding shares of the foreign corporation, and (2) alone or together with related persons, owns, directly or indirectly, at least 10% of any class of the outstanding shares of that foreign corporation. Foreign affiliate is a controlled foreign affiliate of the Canadian corporation if one or more (maximum 5) canadian taxpayers a) holds, directly or indirectly, alone or with associates, more than 50% of the voting shares	None	foreign accrual property income (FAPI) = mainly categories of passive income and limited active
Chile	**De minimis:** income over 2,400 UF (USD 92,735). Profits must consist of 10% passive income. Value of assets generating passive income must exceed 20% of value of total assets. **Jurisdiktion: Control:** directly or indirectly controlled by entities, (1) controlling more than 50% of the foreign entity's capital, profits or voting power or (2) having power to elect the majority of directors or administrators of the foreign entity or (3) having the unilateral power to amend the foreign entity's by-laws, or to change the majority of its directors or administrators	none	Passive income and limited active from transactions w/ chilean taxpayers. If the passive income is more than 80% of its total profits, 100% profits are deemed to be passive income.
China	**De minimis:** Total profit must exceed RMB 5 million. Exception if mainly obtains the income from active business activities. **Jurisdiction:** White list **Control:** directly or indirectly holds more than 10% of the voting shares of a foreign enterprise and jointly holding more than 50% of the shares of the foreign enterprise or; de facto control **Substance carve-out:** On undeclared profits kept without reasonable business reasons	ETR is 50% lower than the ETR that would be paid in China	**Passive**
Colombia	**De minimis: Jurisdiction:** blacklist for financial institutions **Control:** one or more taxpayers hold 50% of vote, value, or the right to receive profits. Only shareholders who hold at least 10 percent of the voting shares, or a 10 percent right over the profits, has to include the corresponding share of income of the CFC.	none	**Passive.**
Croatia (Kroatien)	**De minimis: Jurisdiktion: Control:** the taxpayer by itself, or together with its related parties holds a direct or indirect participation of more than 50% of the voting rights, or owns directly or indirectly more than 50% of capital or is entitled to more than 50% of the profits of the foreign company **substantive economic prescence:** worldwide	ETR is 50% lower than the ETR that would be paid in Croatia	passive income and limited active income from transactions between related parties.
Cyprus	**De minimis:** its accounting profits must exceed EUR 750,000 and its non-trading income EUR 75,000. its accounting profits must exceed 10% of its operating costs for the tax period. **Jurisdiction: Control:** the taxpayer, alone or with associated enterprises, holds directly or indirectly more than 50% of the voting rights in the CFC, or 50% of the capital, or is entitled to receive more than 50% of the CFC's profits **substantive economic prescence**: worldwide	none	**passive.** Only when connected to non-genuine arrangements.
Czech Republic	**De minimis: Jurisdiction: Control:** Czech controlling company holds directly or indirectly more than 50% of capital or voting rights by itself or together with associated persons; or is entitled to more than 50% of the profits.	ETR is 50% lower than the ETR that would be paid in Czech Republic	**passive.**
Danmark	**De minimis:** 50% of income must be tainted (passive + limited active from financial sector) and more than 10% of its assets must be of a financial nature. **Jurisdiction: Control:** "Deciding influence" - understood as the right to control the economic and operational decisions of the subsidiary. Deciding influence is presumed when a resident company with accosiates holds more than 50% of the voting power.	none	Whole of CFC income
Egypt	**De minimis:** 70% of the CFC income consists of passive income **Jurisdiction: Control:** the participation in the CFC's share capital exceeds 10%	CIT does not exceed 75% of the statuary corporate income tax rate applied in Egypt	Whole of CFC income
Estonia	**De minimis: Jurisdiction: Control:** resident company alone or together with affiliated companies holds more than 50% of the shares, profits or voting rights of the CFC, or the CFC is a permanent establishment. **Substance carve out:** worldwide	none	All income derived from artificial transactions
Finland	**De minimis: Jurisdiction:** C/ in White list excluded **Control:** the taxpayer by itself, or together with its associated enterprises holds a direct or indirect participation of at least 25% of the voting rights, or owns directly or indirectly at least 25% of capital or is entitled to receive at least 25% of the profits of the entity or of the yield of the entity's assets **Substantive economic activity:** EEA	ETR is less than three fifths of the Finnish statuary corporate income tax rate, currently 12% (60% of the Finnish tax rate of 20%)	Whole of CFC income
France	**De minimis: Jurisdiction:** CIT rate lower than 50% of french **Control:** directly or indirectly hold a participation of more than 50% in a non-resident entity or permanent establishment or 5% when more than 50% of the shares in the non-resident company are owned by French companies or by non-resident companies directly or indirectly controlled by a French company.	ETR is at least 60% lower than ETR that would be paid in France	Whole of CFC income when PE. When other entity, only passive income.
Germany	**De minimis:** (1) the passive income exceed 10% of the total gross income and (2) EUR 80,000 **Jurisdiction:** Control: unlimited amount of resident taxpayer hold, directly or indirectly, more than 50% of the entity. Threshold is lowered to 1% or completely waived for certain types of investment income. **substantive economic activity:** EEA	ETR below 25%	passive
Greece	**De minimis:** over 30% of net income before taxes must be passive income **Jurisdiction: Control:** the taxpayer, alone or with related parties, directly or indirectly holds at least 50% of the shares, participation, voting or capital rights in the CFC, or is entitled to receive at least 50% of the CFC's profits;	ETR is 50% lower than the ETR that would be paid in Greece	Whole of CFC income
Hungary	**De minimis:** (1) pre tax profit must exceed HUF 243,952,500 and the "income derived from non-commercial activities" must exceed HUF 23,495,250 and (2) must represent more than 10% of its operating costs for the tax year. **Jurisdiction: Control:** the taxpayer, alone or together with related entities (1) holds a direct or indirect participation of more than 50% of the voting rights or registered capital or is entitled to more than 50% of profits, if (i) holdings persists during the majority of the tax year. **Substantive economic prescence:** worldwide	ETR is 50% lower than the ETR that would be paid in Hungary	passive, when it arises from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.
Iceland	**De minimis:** the income must be more than 50% financial income if resident in treaty state. **Jurisdiction: Control:** owned or controlled, directly or indirectly, by at least 50% by resident taxpayers in aggregate **substance carve-out:** EEA/EU when exchange of information exists.	the statuary corporate income tax rate is less than two thirds of the ETR that would be paid in Iceland	Whole of CFC income

Indonesia	**De minimis: Jurisdiction: Control:** one or more companies own (directly or indirectly) 50% or more of its total shares or voting rights as at the end of the tax year of the Indonesian shareholders.	none	Whole of income
Ireland	**De minimis:** profits must be (i) at least €75,000 or, (ii) at least 10% of operating costs **Jurisdiction: Control:** holds more than 50% of the share capital, voting power or rights to distributions.	ETR is at least 50% of the ETR that would be paid in Ireland	passive, when it arises from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.
Israel	**De minimis:** either profits or income exceeds 50% of total **Jurisdiction: Control:** (1) unlimited amount of residents hold more than 50%, directly or indirectly or (3) one taxpayer has the right to change substantial managerial decisions	15%	passive (deemed dividend)
Italy	**De minimis:** one third of revenues must be from passive and limited active (transactions between associates) **Jurisdiction:** White list on EEA countries only **Control:** (1) holds, directly or indirectly, the majority of the votes at the shareholders' meeting or (2) sufficient votes to exert a decisive influence in the shareholders' meeting or (3) the entity is under the dominant influence of another person due to a special contractual relationship or (4) a person holds, directly or indirectly, more than 50% of its profits participation rights **substantive economic prescence:** worldwide	ETR lower than 50% of the ETR which would apply if it were resident in Italy. No lower than 24%.	CFC income as a whole
Japan	**De minimis:** passive income at least JPY 20 million and at least 5% of total taxable income. **Jurisdiction: Control:** a) more than 50% of the shares or interests are directly or indirectly owned by an unlimited amount of taxpayers and or foreign related entities and b) the taxpayer directly or indirectly hold at least 10%	(1) ETR must be less than 20% or (2) if regarded as *specified foreign related company* ("paper company", cashbox company", "blacklist company") less than 30%	(1) Income as a whole or (2) if passes economic activity test only passive income if not (3) regarded as *specified foreign related company*
Kazakhstan	**De minimis: Jurisdiction:** Blacklist by government **Control:** Resident company hold directly or indirectly at least 25% of the share capital or voting shares in a non-resident legal entity	ETR 20%	CFC income as a whole
Korea (rep)	**De minimis:** income earned must be more than KRW 200 million (aprox EUR 150 000). Passive income must exceed 5%. If income is at least 50% active, only passive income is taxed. **Jurisdiction:** Blacklist **Control:** taxpayer holds 10% of CFC defined as "related" to taxpayer if -(1)taxpayer, with related parties, holds (directly or indirectly) 50% or more of the total outstanding shares of the CFC (2) a third party holds, directly or indirectly, 50% or more shares in taxpayer and foreign entitiy (3) taxpayer and the CFC share certain "common interest" and either company, or a third party, has the capacity to effectively make business decisions of the other party **Substantive economic prescence:** worldwide with exceptions	average effective tax for the past three years is 15% or less	CFC income as a whole. Only passive income is passed activity test.
Latvia	**De minimis:** profits must exceed EUR 750,000 and passive income must exceed EUR 75,000, if foreign entity isnt located in a low-tax jurisdiction. **Jurisdiction:** Blacklist affecting categiries of income, derived by government **Control:** the taxpayer holds, either alone or with related persons, directly or indirectly more than 50% of the share capital of, or of the voting power in, or is entitled to more than 50% of profits of, the foreign company.	none	all income derived from artificial transactions
Lithuania	**De minimis:** passive income of a CFC (and active from transactions betwen related parties) exceeds one third of its total income, if not located in blacklisted jurisdiction **Jurisdiction:** Blacklist regarding income categories **Control:** holds by itself, or together with related persons, directly or indirectly more than 50% of shares, voting rights or rights to distributed profits or exclusive rights to acquire them. **substantive economis prescence:** worldwide except blacklisted	ETR is less than 50% of ETR that would have been paid in Lithuanian.	CFC income as a whole
Luxembourg	**De minimis:** profit must be at least EUR 750,000 or exceed 10% of operating profits during a taxable period. **Jurisdiction: Control:** a Luxembourg parent has a 50% direct (or indirect) participation, ownership, or entitlement to an interest in voting or capital rights or profits.	ETR lower than 50% of the Luxembourg statuary corporate income tax rate (17% in 2019 and therefore by reference to a rate of 8.5%).	CFC income as a whole, when it arises from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.
Maldives	**De minimis: Jurisdiction: Control:** five or fewer hold at least 50% of shares	n/a	CFC income as a whole
Malta	**De minimis:** profits above EUR 750,000 and passive income at least EUR 75,000, or profits at least 10% of operating costs. **Jurisdiction: Control:** holds, alone or together with associated entities, directly or indirectly, more than 50% of the voting rights or of the capital, or is entitled to receive more than 50% of the profits of such entity	ETR less than 50% of the ETR that would have been paid by in Malta	Whole of CFC income, to the extent it arises from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.
Mauritius	**De minimis:** profits above EUR 750,000 and passive income at least EUR 75,000, or profits at least 10% of operating costs **Jurisdiction: Control:** holds, alone or together with associated entities, directly or indirectly more than 50% of the voting rights or of the capital, or is entitled to receive more than 50% of the profits of such entity	statuary tax rate cannot exceed 50% the tax rate of Mauritius	Whole of CFC income, to the extent it arises from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.
Mexico	**De minimis:** passive income more than 20% of total income **Jurisdiction: Control:** (1) holds, alone or together with associated entities, directly or indirectly more than 50% of the voting rights or of the capital, or is entitled to receive more than 50% of the profits of such entity (2) the taxpayer and the foreign entity consolidate their financial statements based on applicable accounting standards; or (4) the taxpayer has de facto control, understood as the right, directly or indirectly, to decide on the management of the foreign company.	ETR is lower than 75% than ETR that would be paid in Mexico	Whole of CFC income
Mongolia	**De minimis: Jurisdiction: Control:** holds, a direct or indirect participation of more than 50% of the voting rights or of the capital, or is entitled to receive more than 50% of the profits of such entity	n/a	Lacks data
Mozambique	**De minimis: Jurisdiction: Control:** holds directly or indirectly: (1) 25% or more of capital or (2) 10% or more of capital if more than 50% of the capital is owned directly or indirectly by Mozambican taxpayers	ETR is equal to or less than 60% of the Mozambican annual CIT rate, which is 32%	Whole of CFC income
Nepal	**De minimis: Jurisdiction: Control:** holds an interest and controls or may benefit from 50% or more of the rights to income, capital or voting power alone or with other taxpayers (maximum 4)	n/a	Whole of CFC income
Netherlands	**De minimis:** (1) at least 30% of net income is tainted income or, (2) for financial institutions, more than 30% of tainted income must come from Netherlands or the jurisdiction where the foreign entity is based. **Jurisdiction:** blacklist: EU's list of non-cooperative jurisdiction - as alternative to low tax approach. **Control:** the taxpayer, alone or together with related persons, directly or indirectly holds an interest of more than 50% in the capital, voting rights or an entitlement to the profits **substance carve-out:** worldwide	CIT is less than 9% (alternative approach: see Jurisdiction)	passive income
New Zeeland	**De minimis:** for taxation of active income, passive income must be at least 5% (active income exemption) **Jurisdiction: Control:** Residents are taxed when, alone or together with associates, holding an income interest of 10% or more in a CFC, existing when (1) five or fewer residents have 50% associate-inclusive *control interest* (defined as (a) shareholdings in the foreign company; or (b) shareholder decision-making rights for the foreign company; or (c) rights to receive income from the foreign company; or (d) rights to receive distributions of the company's net assets.), or (2) a single resident has 40% associate-inclusive control interest, or (3) a group of five or fewer residents has actual control, of the company.	n/a	Whole of CFC income. If active income exemption applies - only passive income is taxed.
Norway	**De minimis:** the income of the foreign company must be mainly (mainly is not defined, but presumed when at least 50% of total gross income is passive) of a passive character (1) If there is a tax treaty between Norway and the foreign country and (2) to the extent that the foreign company is within the scope of the tax treaty **Jurisdiction:** blacklist, as alternative to low tax approach **Control:** Measured on a case by case basis factoring amongst other things contractual relations, power to elect board members or claim veto, entitlement to profits and ownership of capital, but control is automatically presumed when (1) If Norwegian taxpayers (unlimited) directly or indirectly own or control at least 50% of a foreign company control is presumed (2) A foreign company remains Norwegian-controlled for 1 year after the ownership and control dips below 50%. (3) If Norwegian shareholders own or control more than 60% of a foreign company at the end of the year. **Substance carve-out:** for residents within the EEA in so far as there is an agreement for the exchange of information between Norway and the other country.	ETR is less than two thirds of ETR that would be paid in Norway. (alternativa approach: see jurisdiction)	Whole of CFC income
Pakistan	**De minimis:** At least 20% passive income. Income must exceed PKR 10 million. Publically traded companies excluded. **Jurisdiction: Control:** (1) if more than 50% of the shares, rights to profits or voting rights of the non-resident company are held, directly or indirectly, by one or more persons (unlimited, without tresholds) resident in Pakistan, then (i) every taxpayer holding 10% is taxed, or (2) when more than 40% of the capital or voting rights of the non-resident company are held, directly or indirectly, by a single resident person in Pakistan	ETR is less than 60% of the tax payable in Pakistan.	Whole of CFC income
Peru	**De minimis:** net passive income must exceed 5 Tax Units (aprox 6750 USD). Passive income of the CFC must be equal to or less than 20% of the total income of the CFC. If the income that qualifies as passive income is equal to or higher than the 80% of the total income of the CFC, the total income will be deemed as passive income. **Jurisdiction:** blacklist, as alternative to low tax approach **Control:** holds, alone or with related parties, directly or indirectly participation in more than 50% in the (i) capital, (ii) results or (iii) voting rights of the analysed entity.	ETR lower than 75% than ETR that would be paid in Peru (alternative approach, see Jurisdiction)	passive and limited active income. Whole of CFC income if fails active income test.
Poland	**De minimis:** at least 33% of total income must be passive income. **Jurisdiction:** (a) Blacklist or (b) CFCs that are located in jurisdictions that do not have an exchange of information agreement with Poland or the European Union - as alternatives to control requirement! **Control:** (1) holds, for an uninterrupted period of a minimum of 30 days, directly or indirectly, at least 50% of the share capital, voting rights or share in profits of the non-resident company. **Substance carve-out:** EEA jurisdictions	ETR is 50% lower than the ETR that would be paid in Poland	Whole of CFC income
Portugal	**De minimis:** passive income must exceed 25% of total **Jurisdiction:** blacklist **Control:** holds, directly or indirectly, alone or together with related entities (constructive ownership rule), either 25% or more of shares, voting rights or rights over the income or assets of the foreign resident entity **Substance carve-out:** EEA	ETR is less than 50% of the tax that would be due in Portugal. Blacklist creates presumtion of low tax.	Whole of CFC income

Romania	**De minimis:** more than one third must be passive income. Revenue in previous year must exceed EUR 1 million. **Jurisdiction: Control:** the Romanian taxpayer by itself or together with its associated enterprises holds a direct or indirect participation of more than 50% of the voting rights or directly or indirectly owns more than 50% of capital or is entitled to receive more than 50% of the profits. **Substance carve-out:** EU/EAA	ETR is lower than half of ETR that would be paid in Romania	passive income
Russia	**De minimis:** passive income must exceed 20%. Profits must be at least RUB 10 million **Jurisdiction:** Blacklist based on whether a country effectively exchanges tax information with Russia. Whitelist for Eurasian Economic Union (EEU) Member States. Russian public companies are excluded. **Control:** holds direct and/or indirect *interest* (voting right) in a foreign entity exceeding 25%; or (2) direct and/or indirect interest in a foreign entity exceeding 10% provided that, overall, Russian taxpayers hold more than a 50% interest in this entity; or (3) exerts or may exert decisive influence over a foreign entity's decisions regarding its profit distribution, based on his direct or indirect participation in this entity, participation in a contract (agreement) on this entity management or other specific features of his relationships with the entity (open ended list).	ETR is is lower than 75% of the statuary tax rate under russian law	Whole of CFC income
Slovak republic	**De minimis: Jurisdiction: Control:** taxpayer by itself or together with its associated enterprises, holds a direct or indirect participation of more than 50% of the voting rights, or owns directly or indirectly more than 50% of the capital or is entitled to receive more than 50% of the profits of that entity	ETR lower than 50% of the ETR that the cfc would pay in the Slovak Republic	Whole of CFC income, to the extent it arises from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.
Slovenia	**De minimis:** at least one third of income must be passive. **Jurisdiction: Control**: holds by itself, or together with its related parties a direct or indirect participation of more than 50% of the voting rights, or owns directly or indirectly more than 50% of capital or is entitled to more than 50% of the profits of that company **Substance carve-out:** worldwide	ETR is lower than one half of the ETR that would apply in Slovenia	passive income
South Africa	**De minimis:** if not a bank, insurer or financial service privider, the total of the amounts arising from financial instruments must exceed 5% **Jurisdiction: Control:** every resident that, alone or together with their connected persons, holds at least 10% of the participation rights or exercise 10% or more of the voting rights in a CFC, as defined when (1) one or more taxpayerst, alone or together with connected persons, with at least 5% participation rights, directly or indirectly hold more than 50% of total participation rights or exercise directly or indirectly more than 50% of voting rights. Participation rights are defined as the right to participate in all or part of the benefits of the rights attaching to a share. **substance carve-out:** worldwide	ETR less than 67.5% of what would be payed in South Africa	Whole of CFC income
Spain	**De minimis:** Passive income must exceed 15% of income or 4% of the total turnover. at least 50% of CFC income must stem from intragroup transactions. **Jurisdiction: Control:** taxpayer holds, individually or together with other related/associated entities, at least 50% of CFC share capital, equity, profits or voting rights **substance carve-out:** EU/EEA	ETR less than 75% of spannish ETR	passive income
Sweden	**De minimis: Jurisdiction:** Complex whitelist exempting CFCs in certain jurisdictions, exept from certain categories of income **Control:** at least 25% of the capital of, or voting rights in, the foreign legal entity is controlled (de facto control on case by case basis.), directly or indirectly, by the taxpayer alone or together with accosiated companies. *Accosiated companies* : within common sphere of interest, directly or indirectly own or control at least 25% of the capital or voting rights in the foreign company **substance carve-out:** EU/EEA	ETR 55 % of, or less than, ETR that would be paid under Swedish law.	Whole of CFC. Except when whitelisted - then only certin categories.
São Tomé and Príncipe	**De minimis: Jurisdiction: Control:** (1) taxpayer owns directly or indirectly 25% or more of the CFC's capital or (2) 10% or more of the CFC's capital, where more than 50% of CFC capital is owned (directly or indirectly) by any number of taxpayers	ETR is lower than 60% of the ETR that would be paid in São Tomé and Príncipe	Whole of CFC income
Tajikstan	**De minimis: Jurisdiction:** blacklist **Control:** ownership, direct or indirect, of more than 10% of the share capital (or of the voting shares) of a foreign company.	foreign CIT is 30% lower that CIT in Tajikstan	Whole of CFC income
Tanzania	Lack data	Lack data	Whole of CFC income
Turkey	**De minimis:** 25% of the CFC's gross profits must be passive income. Turnover must exceed TRY 100,000. **Jurisdiction: Control:** taxpayers holds directly or indirectly at least 50% of the share capital or voting rights or of rights to the profits.	ETR is lower than 10%	Whole of CFC income
United Kingdom	**De minimis:** CFC's profits must exceed GBP 50,000. if profits from passive income does not exceed GBP 50,000, then total profits must exceed exceed GBP 500,000. Total profits must exceed 10% of operational expences. **Jurisdiction:** Whitelist with exceptions **Control:** taxpayer holding 25% of interest is charged when (1) resident persons (unlimited) have 51% control over a foreign company through shares, voting power or de facto control or (2) UK taxpayer holds 40% interest in an entity where a non-UK taxpayer holds 40% but not more than a 55% interest in the same entity **substance carve-out:** EU/EEA	ETR 75% or lower than ETR that would be paid in UK.	The CFC charge applies to such of the CFC's profits as pass through the so-called "CFC charge gateway" - five different tests decide what final income is taxed
United States	US has two systems of taxing CFCs that can apply simunltainiously, The Subpart F rules and the GILTI regime, see kolumn D. **De minimis:** gross tainted income must exceed (1) 5% of total gross income or (2) USD 1 million. **Jurisdiction: Control:** when US Taxpayers (unlimited) (1) control more than 50% **or** (2) have de facto control: (i) hold power over majority of seats in board of directors or equivalent bodies (ii) hold power to break deadlock in corporate decisions or (iii) hold power over teh seat of the voting trustee, when applicable, **then** every taxpayer holding directly, indirectly or constructively at least 10% gets taxed.	ETR 90% of or lower than highest US CIT rate	*Subpart F* : passive income and limited active, if not 70% of its gross income is tainted income, then whole of CFC income is taxed. *GILTI:* whole of CFC income minus modest return on certain tangible assets. (GILTI is taxed at a rate of 10.5% and after 2025 13.125%, and credit for foreign tax is limited at 80%)
Uruguay	n/a: CFC only for natural persons		
Uzbekistan	**De minimis:** income must exceed UZS 300 million (approximately USD 32,000) **Jurisdiction:** banks and insurance companies operating in tax treaty jurisdictions are excempt. **Control:** (1) direct and/or indirect interest in a foreign entity exceed 25% or (2) when Uzbek taxpayers in aggregate hold direct or indirect interest of at least 50%., (i) every taxpayer that holds, directly indirectly, more than 10% of the foreign entity is taxed	none, except *with jurisdictions that have a tax treaty with Uzbekistan:* if ETR less than the applicable Uzbek corporate income tax rate	Whole of CFC income
Venezuela	**De minimis:** assets producing only active income can not exceed 50% of total assets, except when more than 20% of total income is passive income **Jurisdiction:** blacklist **Control:** De facto control. Presumed when foreign entity is located in blacklisted orlow tax jurisidiction	CIT of 20% or lower	Whole of CFC income