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Finding the meaning of nexus for taxes – past, present and future

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Table of contents

Summary and conclusions	17
1. Introduction	19
2. Income Taxes	20
2.1. Overview of Main Jurisdictional Bases to Tax	20
2.2. Personality Basis	21
2.2.1. Natural Persons	21
2.2.2. Corporate Entities	24
2.3. Territoriality Basis	27
2.3.1. General Design Features and Evolution	28
2.3.2. Dividend Income	33
2.3.3. Interest Income	34
2.3.4. Royalty Income	40
2.3.5. Income from Services	45
2.3.6. Income from Pensions	47
2.3.7. Taxation of Employment and/or Director Fees	49
2.3.8. Taxation of Capital Gains	50
2.4. Summative Comment	53
3. VAT and/or Sales Taxes	54
4. Real Estate Taxes	56
5. Natural Resources, Environmental and Energy Taxation	58
5.1. Hard Rock Minerals and Hydrocarbon Taxes	58
5.2. Taxes Addressing Environmental Degradation and Carbon Emissions	59
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5.2.1.	Carbon Emission Taxes	59
5.2.2.	Other Taxes Focussing on Environmental Harm	60
5.3.	Taxes on Energy Consumption	61
5.4.	Summative comment	62
6.	Financial Transfer Taxes	62
7.	Stamp Duty (incl. Taxes on Insurance Premiums)	64
8.	Inheritance Taxes	67
9.	Wealth Taxes	69
10.	Taxes on Shipping	70
11.	Taxes on Digital Services or Activities	73
11.1.	Digital Service Taxes	73
11.2.	Equalisation Levies and Other Taxes	77
11.3.	Income Taxes: Significant Economic Presence	78
11.4.	Value Added and Sales Taxes	78
11.5.	Targeted Tax Avoidance Measures	79
11.6.	Summative Comment	80
12.	Transactions between Foreign Parties	81
13.	Legal Orders and Jurisdiction to Tax	82
13.1.	(Non-tax) Legal Instruments and Tax Nexus	82
13.1.1.	Treaties of Friendship, Commerce and Navigation, and of Peace and Friendship	82
13.1.2.	Other Treaty Regimes (Bilateral Investment Protection, Continental Shelf, Diplomatic Relations, European Union Law)	83
13.2.	Constitutional Law and Tax Nexus	84
13.2.1.	Legality (Discretionary Tax Regimes)	84
13.2.2.	The Constitutional Position of International Law	86

13.2.3.	Reasonableness and Proportionality as General Principles of Law and the Limits on Tax Nexus	90
14.	General Conclusions	92
14.1.	Is there an ideal tax nexus rationale from a policy perspective?	92
14.2.	Are there trends in how jurisdictional tax regimes developed or were reformed?	93
14.3.	Can tax nexus be divorced from the economic structure of a country?	94
14.4.	The way tax residence is defined can look like source tax nexus – why?	95
14.5.	What is the legal limit on tax jurisdiction?	96

Summary and conclusions

Nexus is a term commonly used in international law to determine whether there is sufficient connection between a person, property, or an activity with a State so that the State has prescriptive jurisdiction to legislate. The goal of the branch reports and the general report is to assess what nexus means, as well as its rationale, in the context of the main tax obligations in the various States.

The general report is organised by focusing on different taxes, based on the same organisation of branch reports. The key findings of the general report fall into five categories, as follows.

First, is there an ideal tax nexus rationale from a policy perspective? The general conclusion from the comparative review is there is no ideal because the justifications used by States for statutory nexus rules are informed by the objectives for fiscal instruments, as well as relevant economic and development policies. International law principles expressly inform jurisdictional rule design only in limited fields, but can have an important limiting effect when invoked by domestic courts when reviewing tax legislation of every kind.

Second, are there trends in how jurisdictional tax regimes developed or were re-formed? It is concluded that in general terms, both in civil law and common law countries, nexus rules have been gradually developed, be it either through legislative reform measures or courts creating detailed guidance on an ad-hoc basis over a long period of time. Nexus definitions highly depend on how each tax is designed. Legislators, but also courts, might refer to other legal fields to develop new nexus definitions. The influence of (international) private law to define nexus is, however, decreasing. There are still some areas where private law elements are important (e.g., inheritance taxation or stamp duty). However, in other areas, more economic or substantive approaches have been applied both by courts but also by legislators (e.g., significant economic presence). Consumption related nexus definitions have proven to be effective tools in other fields, but also in tax matters. Therefore, it is not surprising that Value Added Tax (VAT) revenues have gained importance over the past decades but also that consumption will become increasingly important as a corporate income tax nexus, for instance, through Amount A of the OECD's Pillar One or a significant economic presence test as applied in some countries. Measures to address tax avoidance have been relevant for nexus definitions at least in some areas. Besides anti-avoidance concerns, societal developments such as automation but also digitalisation have also had a significant impact on how countries define nexus.

Third, can tax nexus be divorced from the economic structure of a country? The general conclusion is that throughout the branch reports evidence can be seen that countries consider

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their economic structure and relative position to others when defining jurisdictional tax rules. The general report elaborates on these examples in the field of capital (dividend and interest income), and intellectual property (royalty income), showing that significant overlap in jurisdictional rules is possible. The analysis illustrates the importance of double tax treaties to resolve jurisdictional source overlaps.

Fourth, the way tax residence is defined can look like source tax nexus – why? The evidence presented by branch reports shows that the line between source and residence tax nexus rule regimes has been blurred around the globe due to a variety of developments. It is evident that the reality of how most countries establish the income tax residence of a natural person concerns, in fact, territory linked assets (e.g., a home, an abode) and more broadly territory linked social and/or economic relations and activities, including a trend to increasingly rely on days spent physically in the territory. Similarly, reference to the place of effective management to determine the residency of corporate taxpayers also relies on territorial elements. The difference is locked in the rationale for why comprehensive as opposed to limited income tax liability should flow from similar connecting factors.

Finally, what is the legal limit on tax jurisdiction? Future and current developments in international taxation raise the question of where the limit of State jurisdiction is and what are excessive and even unlawful nexus definitions. The general conclusion based on the extensive evidence of legislative rules, state practices, and court decisions presented by the branch reports is that jurisdictional tax capacity of States is in fact limited and predominantly grounded in the orthodox territoriality basis. Therefore, the real debate is not whether a residence or source-base should inform a jurisdictional tax rule, but whether there is a limit derived from the effect of a nexus rule in the territory of other sovereign States. In the view of the general reporters, taxation law does not provide the tools to establish whether the limit is exceeded. The evidence from the reviewed countries reveals that international customary law principles for prescriptive State jurisdiction are applied by apex courts to derive the limit in countries where international law is constitutionally entrenched. These cases are still limited in number as taxpayers do not often invoke international law, but they represent considered analysis by senior law courts. In the absence of any contrary decisions, they represent significant evidence of consistent State practice. Moreover, the general reporters suggest that in a domestic setting, jurisdictional tax rules ought to be designed and assessed also based on a standard of reasonableness and the proportionality test when evaluating the level of interference in the territories of other States. The preferred legal approach to whether the limit on a jurisdictional tax rule is exceeded may be revealed by applying these general principles of law in combination with the international customary law of prescriptive State jurisdiction.

1. Introduction³

Nexus is a term commonly used in international law to determine whether there is sufficient connection between a person, property, or an activity with a State so that the State has prescriptive jurisdiction to legislate. The goal of the branch reports and the general report is to assess what nexus means, as well as its rationale, in the context of the main tax obligations in the various States.

The general report is organised by focusing on different taxes. The reason for this basic organisation is to highlight discrepancies and commonalities among the reviewed countries, and potentially also among the various taxes. Comparisons of this nature are underdeveloped.

Besides a traditional comparative analysis, the general report aims to assess trends in the development of tax nexus definitions. For this purpose, selected references to historical developments are made to understand how more recent phenomena such as globalization, automation, or digitalisation might erode traditional conceptions of “sufficient” or “genuine” connection. This may also assist in developing suggested future directions of how jurisdictional tax rule design might be approached.

This general report is accompanied by an international law report with a particular focus on the contextualization of the debate among tax lawyers into a broader international law debate about the limits of State jurisdiction and the question of when a nexus definition is excessive or even unlawful.⁴

In general, in international law, different types of bases are recognised for States to assert prescriptive jurisdiction. Some of these bases include so-called derivative doctrines. Branch reporters were requested to classify the income tax nexus rules found in their jurisdiction using the following broad categories:

- (1) Territoriality: The territoriality base can include the ‘effects doctrine’, which refers to situations when jurisdiction is founded over a foreign party based on “conduct outside a State’s borders that has consequences within its borders”.⁵ Territoriality may also serve as a rationale for the extension of domestic law. For example, a local law that pressurises home State regulators in other countries with stronger nexus to foreign economic operators.⁶
- (2) Personality: This base includes the so-called passive personality approach whereby foreign persons may suffer consequences for acts committed abroad that are harmful to nationals.

³ The authors thank Olha Honko for her much-appreciated assistance in the preparation of the general report. The authors would also like to thank participants at various events in London, Munich, Amsterdam, and Vienna, where drafts of this report were discussed for in-depth and most helpful feedback. Finally, this general report would not have been possible without the well-founded, interestingly written and scientifically innovative branch reports developed by the branch reporters.

⁴ See Cedric Ryngaert, “Nexus and International Tax Jurisdiction” in this volume.

⁵ *United States v. Aluminum Corp of America* (2nd Cir 1945) 148 F 2d 416, at 443. Another but related approach would be to assess whether digital investments by a foreign party are a sufficient nexus. See, for example, Scott Wilkie and Lorraine Eden, “Public Finance in the Real World: Through the Lens (Down the Rabbit Hole?) of Transfer Pricing”, (2022) 70 *Canadian Tax Journal* (supp.) 257, at 279-281, or Wolfgang Schön, “Ten Questions about Why and How to Tax the Digitalized Economy”, (2018) 72 *Bulletin for International Taxation*, at 289-290; and Wolfgang Schön, “One Answer to Why and How to Tax the Digitalized Economy” (2019) 47 *Intertax* 1003-1022.

⁶ See Cedric Ryngaert, *Jurisdiction in International Law* (2e Ed., Oxford 2015), at 94-99.

- (3) The protection principle (self-defence): This base concerns the assertion of jurisdiction over acts committed abroad that may jeopardize the State's sovereignty or political independence. This may include anti-abuse doctrines or rules, boycotts and/or embargos.
- (4) Universal jurisdiction: This base is relevant when global issues are at stake such as war crimes, torture, and genocide, as well as quasi-universal jurisdiction based in treaty regimes, in terms of which bystander States can assert jurisdiction in the absence of a territorial link.

As will be explained under the relevant headings, nexus rules used for the variety of tax types found in the reviewed countries fit into these bases. We found strong evidence that the rationale for tax nexus is linked to the nature of each tax, and the purpose and aims at which it is directed. The justification for and purpose of a fiscal instrument often reveals which of the international law jurisdictional bases are engaged.

2. Income Taxes

The leading principle that the branch reporters had to analyse is the factors, from a State jurisdictional perspective, that trigger income taxation under domestic tax law, which had to be contextualised by providing background to the justification, evolution, reform (if any) and current understanding of these factors. Branch reporters were explicitly asked to refer to domestic law only (with very few exceptions) and not to focus on taxation after applying income tax treaties. The general report therefore refrains from outlining any jurisdictional tax allocation ideas that could be based on, for example, the OECD or UN Model Tax Conventions, or on a national double tax treaty network. The departure point of this general report is that model-based income tax treaties have a bilateral limiting effect on the jurisdictional features of two State's national tax laws in relation to each other, and do not as such provide the primary source that enumerates a State's tax nexus rules in general. As a result, the presentation of the results of the comparative review of national tax laws do not follow the order of provisions that may be found in model-based income tax treaties.

2.1. Overview of Main Jurisdictional Bases to Tax

Nearly all branches reported that the main income tax nexus rules fall within the personality or territoriality bases for State jurisdiction. There are homogeneities but also variations in how these rules have developed and are filled out, as will be summarised in sections 2.2 and 2.3 below.

It is axiomatic that residence-based income taxes refer to the personality basis for State jurisdiction. By this, we mean that formal tax legislation requires that features of a person, as opposed to a transaction, asset, or payment, should be assessed to establish whether jurisdiction is founded. Within this broad truth, considerable variation exists in what precisely States mean by the concept of 'tax residence' and how it is established in practice. As will be revealed, despite the formality of focusing on a person (whether natural or artificial), the detail of how this is done in tax law often means territorial features are determinative, so that lines are blurred whether one is, in reality, dealing with personhood or territoriality as the factual basis for State jurisdiction to assert comprehensive income tax liability.

2.2. Personality Basis

2.2.1. *Natural Persons*

The first finding is that there is considerable variation in tax residence rules for individuals that concern their person, but strands of rules and a trend overall can be observed. There is a broad divide between tax residence purely as a tax notion or one that relies partly or wholly on other areas of law. This divide affects how State jurisdiction to assert comprehensive income tax liability may be justified.

The reliance on citizenship by countries such as the United States⁷ and Argentina,⁸ or the holding of a permanent visa to remain in Brazil⁹ or a permit to lawfully remain permanently in the United States (a green card) are examples of perhaps the more unusual non-tax criteria attaching to personhood that States use to assert jurisdiction to tax worldwide income.¹⁰ These are ‘unusual’ tax nexus proxies because they do not in fact require the person to be physically present in the territory or to presumably make use of public goods, but to be a mere status holder in law, thereby leading to questions as to what is their link with the country. The rationale for these nexus rules was not reported, so one is left to speculate.

Presumably, justification for imposing comprehensive income tax is to contribute to the cost of political allegiance to a country. In the case of the United States, such a justification probably concerns the protection that may be afforded to US citizens by their government wherever they may be in the world.¹¹ Similarly, assertions of global income tax liability due to the holding of visas to permanently remain in a country could be justified based on offering economic opportunity, access to public goods within the territory, and political rights.

There are quite a few countries that rely on the legal domicile of natural persons¹² to assert jurisdiction over worldwide income. This non-tax connecting factor harks back to the 19th and the beginning of the 20th century when legislation introducing income taxes commonly relied on ‘fiscal domicile’ without stating whether the general law or a tax-specific meaning was implied.¹³

Domicile can be connected to the benefits theory for income taxes because in law a person cannot have no domicile, and legal systems would assign one in the absence of a domicile of choice so that there is a legal system that governs and protects a person. Indeed, the branch reporters for Austria consider that domicile establishes:

⁷ See the branch report for the United States, 3.2.1.

⁸ See the branch report for Argentina, 2.2.1.

⁹ See the branch report for Brazil, 2.2.

¹⁰ Until 2012, Ireland relied on citizenship as a connecting factor only for purposes of the so-called ‘domicile levy’. This was a limited charge on so-called ‘tax exiles’ who were “Irish individuals who are not resident in Ireland for tax purposes but who retain a significant connection to Ireland” (see the branch report for Ireland, 2.2.1). Sweden removed citizenship as a basis for income tax residence in 1928 because the government considered that it had no legitimate interest “to tax individuals who only lived abroad solely because of their Swedish citizenship” (see the branch report for Sweden, 2.2.1). Mexico uses citizenship only as a presumptive basis to assert tax residence (see the branch report for Mexico, 2.2.1).

¹¹ See *Cook v. Tait* 265 U.S. 47 (1924).

¹² See the branch reports for Australia, 2.2.1, Austria, 2.2.1, Chile, 2.2.1, Chinese Taipei, 2.2.1, Germany, 2.2.1., Ireland, 2.2.1, Italy, 2.2.2., Japan, 2.2.1.1., Mauritius, 2.2.1, Peru, 2.2.1, and Republic of Korea, 2.2.1.a).

¹³ In Japan domicile as a basis for tax residence was introduced in 1899 and was borrowed from the Prussian income tax of 1891 (see the branch report for Japan, 2.2.1.1).

“a social contract between the individual and the Republic of Austria. Having a domicile at his disposal, living and working in Austria is a key indicator of an individual's economic activities within the domestic territory. Because such individuals benefit from economic opportunities, they are expected to contribute to the Austrian tax revenue. In exchange for infrastructure, services, free education and other benefits provided by the government individuals are required to contribute through taxes.”¹⁴

In the case of Ireland and the United Kingdom, the rationale for using domicile in connection with tax residence is based on historical reasons.¹⁵ In both jurisdictions, domicile as a connecting factor is the subject of ongoing reform.¹⁶

In nearly all the reviewed jurisdictions, non-tax criteria are either combined with or have been replaced by tax-specific concepts such as asking whether a person ‘resides within’,¹⁷ is ‘ordinarily resident within’,¹⁸ has a ‘place of abode’¹⁹ or ‘habitual place of abode within’,²⁰ has a ‘dwelling house’ (*casa habitation*),²¹ has his/her ‘centre of vital interest’²² or ‘centre of economic interest within’,²³ a ‘permanent home’ or ‘permanent abode within’,²⁴ a ‘household’ (*foyer*) or a ‘principal abode within’ (*séjour principal*),²⁵ or the intention to remain and ‘the centre of one's life interests within’²⁶ a country. Establishing tax residence

¹⁴ See the branch report for Austria, 2.2.1.

¹⁵ The branch reporter for Ireland explains the origins of the ‘remittance basis of income tax’, citing Lloyd George, Chancellor of the Exchequer, when this measure was debated in the House of Commons on 22 July 1914: “This beneficial treatment was introduced in the UK and Ireland in 1916, with the intention of ensuring that the unremitted income of any individual who was ‘Colonial born’ and who had the intention of ‘returning to the Colonies’, but who was temporarily resident in the UK ‘for a few years, either to educate his children or for some other temporary purpose’ should not be subject to tax on income from the Colonies that was not remitted to the UK (see the branch report for Ireland, 2.2.1).

¹⁶ For reform developments in Ireland, see the branch report, 2.2.1. On 6 March 2024, the Chancellor of the Exchequer announced that in the United Kingdom the remittance basis of tax will be abolished from 6 April 2025.

¹⁷ See the branch reports for Australia, 2.2.1., Ireland, 2.2.1., and Japan, 2.2.1.1. Up to 6 April 2013 the same approach applied in the United Kingdom, after which a new statutory regime was introduced that predominantly relies on physical presence. The judicial approach to establish an individual's tax residence under case law before 2013 is explained in *R (on the application of Gaines-Cooper) v. HMRC* [2011] UKSC 47, [13]–[14], as requiring a ‘usual or settled abode’ and a multifactor analysis must be carried out to establish if a ‘distinct break’ in the pattern of life in the United Kingdom has occurred to cease tax residency (at [20]). The 2013 statutory residence test is explained in HM Revenue & Customs, Guidance Note, RDR3.

¹⁸ See the branch reports for Australia, 2.2.1, Canada, 2.2.1, Ireland, 2.2.1, and South Africa, 2.2.1.

¹⁹ See the branch report for Portugal, 1.1.

²⁰ See the branch reports for Austria, 2.2.1, Germany, 2.2.1., Italy, 2.2.2, and Switzerland, 2.2.1.

²¹ See the branch report for Mexico, 2.2.1.

²² See the branch report for Colombia, 2.2.1.

²³ See the branch report for Spain, 2.2.1.

²⁴ See the branch reports for Czech Republic, 2.2.1, and New Zealand, 2.2.1.1. Ireland until 1994 had a ‘place of abode’ tax residence test, which was abolished for two reasons. The first was to “facilitate wealthy people who wish to visit Ireland and spend money here but do not wish to be regarded as resident for tax purposes”, which was understood to refer to foreign persons wanting to own holiday houses. The second aim was to “close off exploitation possibilities” (see the branch report for Ireland, 2.2.1).

²⁵ See the branch report for France, 2.2.1.1. The French approach is noteworthy because beyond personal ties with France, financial and economic activities and assets in the territory are appraised as stand-alone criteria to establish tax residence, similar to traditional source of income analysis.

²⁶ See the branch report for Switzerland, 2.2.1.

in this manner entails fact-intensive enquiries of a substantive nature and clearly concerns assets, and social and economic relations anchored within the territory of a country.

Several justifications for substantive tax nexus criteria applicable to natural persons were reported. These range from considerations based on equity and fairness, ability to pay to anti-avoidance. For example, the Swiss reporters explain that the habitual abode proxy was introduced in the aftermath of the First World War as a subsidiary nexus criterion to bolster fairness and horizontal equity in the income tax regime. This was because, during the time of the First World War, several foreigners who had established a habitual home in Switzerland were able to make a fortune without being subject to income taxation because their tax residence was abroad.²⁷ In Sweden, similar reasons were advanced for introducing the 'continuous stay' test in 1928.²⁸ More contemporary rationale is offered by the German reporters who refer to a global equivalence theory. Because the territorial nature of the modern nation State spatially delineates the provision of public goods, a geographic element limits taxation rights, and therefore it is appropriate to base comprehensive income tax nexus on territory-based concepts such as having a permanent home or habitual residence (*Wohnsitz*). They argue that this is augmented by the ability-to-pay principle because having a residence in a country is generally an "essential precondition for the generation of income and thus for his or her economic ability-to-pay".²⁹

Most reviewed jurisdictions operate, in parallel to or in combination with the formal and/or substantive tax residence tests mentioned above, time-based statutory tests that consider the number of days a natural person is physically present in a territory over the course of a single and/or multiple fiscal years. Generally, a 183-day threshold features in these bright-line physical presence tests, but there are an array of nuances and qualifications to these tests in the reviewed jurisdictions. Physical presence tests are on the rise as several countries have been introducing them as a primary, secondary, or alternate tax nexus test. They may be easier to administer than highly fact-intensive criteria and serve as a back stop to address stratagems to avoid tax residence. A good example is found in Australia where the government explained that the purpose was "obviating the difficulties in establishing if a person is a resident in any country".³⁰ In Ireland, where in 1994 case law guidance to establish 'residence within' or 'ordinarily resident within' was replaced by physical presence tests, the Minister explained that the aim was "to simplify, as far as possible, existing rules of residence and to place them on a statutory footing for the first time", and to put in place "a more transparent and equitable set of rules with more certainty and less complexity for the taxpayer and the administration".³¹ In 2004, Norway introduced time-based tests exclusively, and did away with an intention-test that obtained a "discretionary character" due to the complexity of applying such a test in practice.³²

An addition of 2020 to the French tax residence regime for individuals should be noted because it involves an unusual blend of corporate and individual tax nexus, for which the rationale is unclear. A statutory tax residence rule concerning so-called "non-accessory

²⁷ See the branch report for Switzerland, 2.2.1, citing a Dispatch of the Federal Council to Parliament concerning New Extraordinary War Tax of 2 August AB 1919, at 324.

²⁸ See the branch report for Sweden, 2.2.1.

²⁹ See the branch report for Germany, 2.2.1.

³⁰ See the branch report for Australia, 2.2.1, citing Commonwealth, Explanatory Notes, Bill to Amend the Income Tax Assessment Act 1922-1929 (Cth) (Explanatory Notes), at 11.

³¹ See the branch report for Ireland, 2.2.1.

³² See the branch report for Norway, 2.2.1.

professional activity” determines that any director of a company that has its ‘seat’ in France and with a turnover of more than Euro 250 million is deemed to be a tax resident of France.³³

2.2.2. *Corporate Entities*

As was the case for natural persons, there is a broad divide in nexus rules for corporate entities between proxies relying partly or wholly on other fields of law, and tax-specific notions.

The exclusive use of formal, non-tax criterions to establish corporate tax residence is found in Argentina,³⁴ Brazil,³⁵ Chile,³⁶ the United States,³⁷ and Sweden where the formation or incorporation of an entity under corporate law is relied on and, additionally in the case of Sweden, the registered office of a company’s board of directors.³⁸ These countries do not have backup tax nexus rules that require a substantive enquiry into, say, management, administration, or business conduct to establish worldwide income tax liability. The branch report for Chile indicates that the rationale for its regime concerns the competitive position of the country and attaining corporate investment.³⁹

However, in the rest of the reviewed countries, corporate tax residence nexus is established by combining a formal rule such as whether the entity was legally established or incorporated in the country, with a substantive back-up, tax-only test applicable to foreign incorporated entities. It has become ubiquitous that generally these substantive tax nexus tests consider whether the management of an entity occurs within the country’s territory. Yet, on close inspection, there is much variation about what level and type of management matters, as well as whether other factors such as administration and/or business conduct in the territory are relevant or not. Historically, the approach in common law countries to management tests to establish tax nexus was more homogenous than in other cohorts. This homogeneity appears to have influenced a notable trend in terms of which several of the reviewed countries have introduced the concept of a company’s place of effective management in its territory as a sufficient nexus.⁴⁰ A trend is clearly visible that regardless of the legal system, the place of effective management test is increasingly used as subsidiary or back stop test to address tax residence avoidance (this is alike the rise of physical presence tests used to establish tax residence of individuals – see section 2.2.1 above).

Most of the reviewed countries that refer to a company’s place of effective management generally would consider the place where top-level management decisions were in fact

³³ See the branch report for France, 2.2.1.1, citing Finance Law 2020, art. 13.

³⁴ See the branch report for Argentina, 2.2.1.

³⁵ See the branch report for Brazil, 2.2.

³⁶ See the branch report for Chile, 2.2.1.

³⁷ See the branch report for the United States, 3.2.2.

³⁸ See the branch report for Sweden, 2.2.1. Between 1933 and 1993 the so-called ‘Luxembourg rule’, a substance test, applied in terms of which regard was had to whether a foreign incorporated company had its place of effective management in Sweden.

³⁹ See the branch report for Chile, 2.2.1.

⁴⁰ See the branch reports for the Czech Republic, 2.2.1. (introduced in 2001), Denmark, 2.2.1 (introduced in 1995), India, 2.11. (introduced 2016), Italy, 2.2.4 (introduced in 2024), Portugal, 1.2, Spain, 2.2.1 (introduced in 2014), South Africa, 2.2.1 (introduced in 2001), Republic of Korea, 2.2.1.b), and Switzerland, 2.2.1.

made as relevant, if not decisive.⁴¹ But there is by no means a universal and overall consistent understanding. For example, in Colombia, the place of effective management is understood to refer to the place where “administrators of the company usually or frequently exercise their functions and where the day-to-day activities” occur.⁴² Several of the reviewed countries do not use the place of effective management concept as a one-country test to establish tax nexus, but a variant such as the place of ‘central management and control’,⁴³ ‘place of management’,⁴⁴ ‘centre of management’,⁴⁵ ‘genuinely managed from’⁴⁶ or the location of the ‘seat’,⁴⁷ or ‘main seat of the administration’ or ‘the effective direction seat’.⁴⁸

The originator of the idea that income tax residence is connected to the location of the intellectual control of a company as opposed to where its business was conducted, is British case law, notably the landmark decision in 1906 by the House of Lords in the *De Beers* case.⁴⁹ That approach became highly influential for income tax nexus over corporate entities in countries with a common law heritage (but not all, notably the United States) and, as explained above, has been exported worldwide through the place of effective management concept. Historical research into the origins of the British judicial approach helps to understand why intellectual control of a company by its directors, as opposed to the business operations became the focus of corporate income tax nexus.⁵⁰ When developing this idea in foundational cases, English judges borrowed from the work of Savigny, the celebrated German jurist, who grappled with the question of how to establish the civil law forum for (non-tax) jurisdiction over railway, steamboat or bridge building companies that operated over several federal territories. Savigny proposed that when the relevant legislation did not specify a criterion for jurisdiction, one must proceed on the analogy of a natural person’s directing mind, which as a last resort meant that, “the judge must endeavour to discover by construction the centre of its affairs [*Mittelpunkt der Geschäfte*]”. The analogy was transposed

⁴¹ This is also the position advocated by the Commentary on the OECD Model before its amendment in 2017 for a treaty autonomous meaning of place of effective management, although in the context of tax treaties this is a tie-breaker test to resolve overlapping claims to comprehensive income tax nexus and not a one-country rule to establish nexus. See in general Guglielmo Maisto, *et al.*, *Dual Residence of Companies under Tax Treaties*, IBFD International Tax Studies 1 (2018), 3-84, at 4, 27.

⁴² See the branch report for Colombia, 2.2.1, where it is furthermore pointed out that “a place of effective management is not triggered by the fact that the board of directors meets in Colombia or if among the shareholders of the entity there are Colombian nationals”.

⁴³ See the branch reports for Australia, 2.2.1, Canada, 2.2.1, and Ireland, 2.2.1. This test originates from the United Kingdom where it is still used. The UK Court of Appeal in the case of *Wood v. Holden* [2006] EWCA Civ 26 held that in the factual context of that case, there was “no difference between central management and control and the place of effective management” (at [19]) even though these were tests with different functions.

⁴⁴ See the branch report for Germany, 2.2.1.

⁴⁵ See the branch report for New Zealand, 2.2.1.2.

⁴⁶ See the branch report for Norway, 2.2.1. Before 2019, this concept was interpreted in terms of case law, but in 2019 the law was amended “widening the scope and factors to consider when determining the ‘genuinely managed’ criterion to align better with the ‘place of effective management’ rule”.

⁴⁷ See the branch reports for Austria, 2.2.1, and Portugal, 1.2. What is meant by a company’s ‘seat’ varies across jurisdictions and is not easy to determine (see *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe* (Brussels, 4 November 2002), 153).

⁴⁸ The latter two criteria are both used in Mexico (see the branch report for Mexico, 2.2.1).

⁴⁹ *De Beers Consolidated Mines Ltd v. Howe* [1906] AC 455.

⁵⁰ See John Avery Jones and Johann Hattingh, *De Beers Consolidated Mines Ltd v. Howe* (1906) Corporate Residence: An Early Attempt at European Harmonisation, in Dominic de Cogan and John Snape (Eds), *Landmark Cases in Revenue Law* (Hart, Oxford, 2019) 67-90.

in the British tax cases to mining and industrial companies conducting business across borders so that it was initially assumed⁵¹ that they only had one place where the centre (the ‘*Mittelpunkt*’) of their management and control (the directing mind) was located because the location of their business operations would point to several countries. In the *De Beers* case, Lord Loreburn explained the rationale for residence taxation in England was because the foreign incorporated company in that case in fact received the “protection of English law” for its “centre of trading” and “chief seat of management”.⁵² This was logically founded on the benefits theory, and meant that overlapping claims of comprehensive income tax residence jurisdiction quickly took root because countries also view the place of incorporation as equally indicative of the provision of legal protection for the entity.⁵³

The historical rationale based on the lofty ideal that the protection of a legal system was a great commercial benefit justifying the imposition of comprehensive income tax nexus, is not commonly seen at present when corporate tax residence rules are reformed or amended. Rather, rules aimed at preventing stratagems to avoid tax residence nexus and the idea that corporate tax must be paid somewhere at an acceptable level, have become popular. A good example of this apparent shift in paradigm is Spain’s anti-tax haven, rebuttable deemed corporate tax residence rule. This rule applies to any company located in a zero-taxation jurisdiction provided such a firm’s main assets are located or core business is performed in Spain.⁵⁴ A textbook illustration of how the paradigm about corporate income tax nexus is shifting is the recent history of Ireland’s jurisdictional rules. These rules enabled cross-border tax arbitrage for United States corporations resulting in so-called ‘stateless income’ in the form of the much-maligned ‘double Irish structure’.⁵⁵ Ireland’s jurisdictional corporate tax residence rules were one of the focal points of the G20/OECD Base Erosion and Profit Shifting (BEPS) Project. According to a ministerial explanation, the reputational damage caused to Ireland was the reason to change the corporate tax residence regime in 2013.⁵⁶ In other words, the cause for changing the law was external to Ireland. It does not require much imagination to identify this externality as the collective protest by participating governments in the BEPS Project, but only against Ireland. The tax avoidance arising from the so-called

⁵¹ After the *De Beers* case, this assumption of one central place became problematical in the English cases about corporate tax residence for companies with two equal centres of management. See *The Swedish Central Railway Co Ltd v. Thompson* [1925] 1 AC 495, 509-10, and *Avery Jones and Hattingh*, above at note 50, 81. The indirect reference to Savigny’s reasoning about civil law jurisdiction therefore quickly faded and no longer influenced how tax law developed.

⁵² *De Beers Consolidated Mines Ltd v. Howe* [1906] AC 455, 458. The facts concerned a diamond mining company incorporated in South Africa where all its mining extraction business was situated. The company operated a central diamond selling syndicate in London under a dual board of management structure split between South Africa and the United Kingdom. In 1939, South Africa’s then apex court expressed a similar view about the rationale for residence-based income tax nexus: “a resident, for the privilege and protection of residence, can justly be called upon to contribute towards the cost of good order and government of the country that shelters him.” (*Kerguelen Sealing & Whaling Co., Ltd v. CIR*, 1939 AD 487).

⁵³ This was in fact the case for the *De Beers* company, which had to wind down its London board by 1907 to resolve the double taxation of its mining profits by South Africa and the United Kingdom (see *Avery Jones and Hattingh*, above at note 50, 86-88).

⁵⁴ A company may refute this deemed residence rule by proving that it is effectively managed and administered in another country, or that the incorporation and operation in such other country is due to valid economic reasons (see the branch report for Spain, 2.2.1).

⁵⁵ For the details of how the income tax jurisdictional rules enabled the stateless income outcome, see the branch report for Ireland, 2.2.1.

⁵⁶ *Ibid.*, with reference to comments made by Ireland’s Minister of Finance on 12 November 2013.

'stateless income' was, however, not solely caused by how Ireland's jurisdictional rule for corporate tax residence was designed but by a combination with the jurisdictional rules for the United States.⁵⁷ Protest by countries, whether declared individually or indirectly via intergovernmental grouping, to jurisdictional rules to tax (or not tax) carry much weight from an international law perspective to establish the genuineness of a link to a territory.⁵⁸

There is no complete consistency between the reviewed countries to establish corporate tax nexus over business entities other than companies or corporations. Standard substance-based tests focussing on place of management are often but not always applied to entities such as partnerships, foundations or trusts used to conduct business, especially when they are tax opaque.⁵⁹ Some countries have specific statutory tax nexus rules for such entities, which can be driven by avoidance concerns.⁶⁰ Others will apply the ordinary rules for tax residence of natural persons to, say, establish the tax residence of partners when a partnership is treated as fiscally transparent.⁶¹ It should be obvious that the position here can be incoherent when one country would apply, say, a physical presence and another a place of management test in respect of the same partnership activity present in both jurisdictions.⁶²

2.3. Territoriality Basis

Tax nexus grounded on a genuine link within the spatial boundaries of the State is the most traditional jurisdictional base. In this part, we commence with general observations about the design of territorial tax nexus rules in the reviewed countries, which in some instances are linked to evolutionary processes.

The remainder of this part is dedicated to a detailed review of how content is given to territorial tax nexus rules for specific types of income. Based on the branch reports, we consider if there are relevant historical advances in rule design or reform, the coherence or not of existing rules with any known rationale and emphasise if there are situations where such rules may not be grounded on a genuine link.

⁵⁷ For the details of how the income tax jurisdictional rules of Ireland and the United States in combination enabled the stateless income outcome, see the branch report for Ireland, 2.2.1.

⁵⁸ See Cedric Ryngaert, "Nexus and International Tax Jurisdiction" in this volume, 3.

⁵⁹ A good example can be found in Canada where income tax residence for trusts is determined by applying judicial guidance. The branch reporters note that for a long period "courts recurrently considered a trust to reside where its trustee resides. This test allowed, for many years, Canadian taxpayers to avoid Canadian tax on trust income by appointing a trustee residing elsewhere. This changed after *Garron Family Trust v R*, where the Supreme Court of Canada established that 'a trust resides [...] where its real business is carried on [...] which is where the central management and control of the trust actually takes place'" (see the branch report for Canada, 2.2.1).

⁶⁰ See, for example, the branch report for New Zealand, 2.2.1.3, for a rule in terms of which the tax residence of a trust settlor is used as a nexus for the taxation of trust income. This rule was enacted "as an anti-avoidance measure against the use of trusts by New Zealand tax residents ... to supplement the CFC and FIF regimes of New Zealand (which play a role in counteracting the deferral of dividend distribution from non-resident entities to New Zealand shareholders)" and the "choice of the tax residence of a settlor as a nexus for trustee income was justified on the basis that the trust is a purposeful outcome of the settlor's will" (citing the Valabh Committee that proposed the rule).

⁶¹ See, for example, the branch report for Ireland, 2.2.1. The same approach applies in South Africa.

⁶² The problem of overlapping tax jurisdiction of cross-border partnerships has been the subject of a study by the OECD's report *The Application of the OECD Model Tax Convention to Partnerships*, Issues in International Taxation, No. 6, (1999, OECD Publishing, Paris).

2.3.1. General Design Features and Evolution

There is a clear cohort of States where, at the onset of introducing income tax, and for some still to this day, no definitions appear in the statute of what is meant by income of any non-resident person from 'property in', 'sources within' or 'arising in' the territory of the country.⁶³ Judicial decisions about how to apply these undefined statutory concepts on a case-by-case basis established bodies of guidance to geographically situate the source of specific types of income, which for some jurisdictions like Australia,⁶⁴ South Africa,⁶⁵ the

⁶³ Apart from the United Kingdom, this approach is seen in several countries with a common law heritage, such as Australia (branch report, 2.2.2), Ireland (branch report, 2.2.2) and South Africa (branch report, 2.2.2) (both Ireland and South Africa partly abandoned the case law approach by enacting statutory source rules for a limited number of income items). New Zealand is somewhat of a rarity among the common law countries because detailed statutory source rules operated from the start of income tax in 1916 (branch report, 2.2.2). Switzerland followed this approach until 1990 (branch report, 2.2.2). In the United States, this approach applied from 1916 up to 1936 for business income, after which the statutory language focussed on persons "engaging in a trade or business in the United States" as the basis for determining the taxability of United States source income. The Foreign Investors Tax Act of 1966 significantly altered the source regime for non-resident by, among other, introducing the concept of 'effectively connected' business income to remove a force of attraction regime that lumped US source investment income with business profit (see Stanford G. Ross, "United States Taxation of Aliens and Foreign Corporations: The Foreign Investors Tax Act of 1966 and Related Developments" (1967) 22 *Tax Law Review* 277, 296, and Editorial Board, "The Bases for Taxing Foreign Corporations and Nonresident Alien Individuals on Income from Sources within and without the United States" (1968) *Minnesota Law Review*, 1261).

⁶⁴ In Australia, two leading authorities include *Nathan v. FCOT* (1918) 25 CLR 183, 189 in which the High Court held that: "The legislature in using the word source meant, not a legal concept, but something which a practical man would regard as a real source of income. Legal concepts must, of course, enter into the question when we must consider to whom a given source belongs. But the ascertainment of the actual source of a given income is a practical hard matter of fact" and in *Spotless Services Limited and Spotless Finance Pty Limited v. COT* [1993] FCA 276, [83] the High Court stated it was "a matter of judgment and relative weight in each case to determine the various factors to be taken into account in reaching the conclusion as to source of income."

⁶⁵ In South Africa, the "practical hard matter of fact" approach in *Nathan's* case from Australia (above at note 64) was initially followed but later ameliorated after it was held in the leading case of *CIR v. Lever Bros* 1946 AD 441 by Chief Justice Watermeyer that "I have some difficulty in differentiating the reasoning of the practical man from that of the theoretical lawyer for this purpose" and that the "[t]he first problem is to determine what is the source from which [the income] has been received and when that has been determined, the second problem is to locate it in order to decide whether it is or is not within [South Africa] ... source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income, and that this originating cause is the work which the taxpayer does to earn them, the *quid pro quo* which he gives in return for which he receives them. The work which he does may be a business which he carries on, or an enterprise which he undertakes, or an activity in which he engages, and it may take the form of personal exertion, mental or physical, or it may take the form of employment of capital either by using it to earn income or by letting its use to someone else. Often the work is some combination of these" (see also *First National Bank of Southern Africa Ltd v. CIR* (3) SA 375 (SCA), 383). The rationale for the so-called activities test to establish the geographical source of income can be seen in another South African case, *Kerguelen Sealing & Whaling Co., Ltd v. CIR* 1939 AD 487 where it was stated that "the equity of the levy rests on the assumption that a country that produces wealth by reason of its natural resources or the activities of its inhabitants is entitled to a share of that wealth, wherever the recipient may live." Evidently, as a general guide the judicial thinking in South Africa points to the spatial locations where wealth producing activities or natural resource production take place in a Haig-Simons understanding of income (i.e. as adding to the store of wealth between two points in time).

United Kingdom,⁶⁶ and the United States⁶⁷ reveal general guiding principles. There has been and continues to be cross-reading among common law courts, which contributes to some coordination.⁶⁸ To gather universal principles from judicial approaches remains a complex landscape because in some of these jurisdictions, steps were taken to either codify or abandon the judicial guidelines.⁶⁹ Yet, various common law courts consistently

⁶⁶ The foundational English cases concerning the geographical source of trading profits mostly deal with sale of goods in the United Kingdom by non-residents, often acting through local agents. The test is a factual one, with the basic approach being that the place where the contract of sale is made is “the most important, and indeed the crucial, question” (*Maclaine v. Eccott* [1926] A.C. 424, 432) but not decisive “if there are other circumstances present that outweigh its importance” (*Firestone Tyre & Rubber Co. Ltd. v. Llewellyn (HM Inspector of Taxes)* (1957), 37 TC 111 (HL), 471). In the sphere of manufacturing the place of contract has been held to be less appropriate to locate the geographical source and the emphasis is rather to establish whether the operations from which profits arise are within the United Kingdom (*FL Smidth & Co v. Greenwood* (1921) 3 KB 583). The policy behind the English law was explained in *Whitney v. IRC* [1926] AC 37, 54: “The policy of the Act is to tax the person resident in the United Kingdom upon all his income whencesoever derived and to tax the person not resident in the United Kingdom upon all income derived from property in the United Kingdom. The former is taxed because (whether he be a British subject or not) he enjoys the benefit of our laws for the protection of his person and his property. The latter is taxed because in respect of his property in the United Kingdom he enjoys the benefit of our laws for the protection of that property.” The approach of the English courts is also followed in Ireland (see the branch report for Ireland, 2.2.2). The Privy Council has extended the reasoning found in the English cases to locate the source of other types of income such as royalties leading this judicial body to state “the broad guiding principle” as follows in the case of *CIR v. HK-TVB International Ltd* [1992] 2 AC 397, 409: “The proper approach is to ascertain what were the operations which produced the relevant profits and where those operations took place”. This has come to be called the “operations test” (*CIR v. Orion Caribbean Ltd* [1997] STC 923, 930).

⁶⁷ In the United States courts historically favoured less open-ended approaches to establish the geographical source of income in the interest of legal certainty. For example, in a case concerning trading profits of an Argentine partnership arising from the local sale of goods acquired and imported from the United States, the so called ‘passage of title’ rule was affirmed. In *U.S. v. Balanovski*, 131 F.Supp. 898, 901 (D.C.N.Y. 1955) the approach was set out: “the place of contract, the place of delivery and of payment, the terms of the agreement, and the extraneous circumstances may each have a bearing. But the ultimate goal of the examination of all such considerations is to ascertain when and where the title to the goods passes from the seller to the buyer. It is then and there a sale is consummated—when and where property in the goods passes, when and where the incidents of ownership vest in the vendee”. On appeal, this approach was criticised as incoherent and susceptible to tax avoidance, but it was upheld by the United States Court of Appeals Second Circuit in *U.S. v. Balanovski*, 236 F.2d 298, 306 (C.A.2 1956): “Although the ‘passage of title’ rule may be subject to criticism on the grounds that it may impose inequitable tax burdens upon taxpayers engaged in substantially similar transactions, such as upon exporters whose customers require that property in the goods pass in the United States ... no suitable substitute test providing an adequate degree of certainty for taxpayers has been proposed. Vague ‘contacts’ or ‘substance of the transaction’ criteria would make it more difficult for corporations engaged in Western Hemisphere trade to plan their operations” and “[o]f course this test may present problems, as where passage of title is formally delayed to avoid taxes. Hence it is not necessary, nor is it desirable, to require rigid adherence to this test under all circumstances. But the rule does provide for a certainty and ease of application desirable in international trade. Where, as here, it appears to accord with the economic realities (since these profits flowed from transactions engineered in major part within the United States), we see no reason to depart from it” (at 306–07).

⁶⁸ A contemporary example is the decision of 2018 by the Court of Appeal in the United Kingdom in *Ardmore Construction Ltd v. HMRC* [2018] EWCA Civ 1438 concerning the geographical source of interest income, in which Australian and South African cases were considered. The Australian and South African cases cited in notes 64 and 65 contain many references to English cases in addition to citing cases from across these two countries.

⁶⁹ See the branch report for India, 2.C, for numerous examples of legislative interventions, the commentaries in note 63 above about the legislative development of the United States’ statutory source regime and note 99 below for an example of statutory override of the judicial approach in South Africa to locate the source of interest income.

explain the rationale, or legal policy for territory-based income tax jurisdiction in terms of the benefits theory.⁷⁰ Other theories about the basis for territorial tax jurisdiction such as State power or ethical obligation were not encountered in judicial thought.⁷¹ No cases were reported where courts took the position that income tax jurisdiction is essentially unbounded and such theory has been expressly rejected by the Supreme Court of India.⁷²

In most of the reviewed countries, statutory source rules of varying types and degrees of specificity are found. Often, these rules link up to scheduler features of the income tax charging provisions,⁷³ but this is not always so.⁷⁴ Some jurisdictions have exhaustive lists of specific sourcing rules,⁷⁵ while others have residual⁷⁶ or more open-ended categories.⁷⁷

It was not possible to see alignment between geographical sourcing categories found in the legislation of the reviewed countries. What can be observed is a degree of correspondence with the large number of categories of income found in the three double taxation models developed in the 1920s by the League of Nations,⁷⁸ which is greater than

⁷⁰ See the cases cited at notes 65 and 66 above.

⁷¹ For an overview of the various theories see E.P. Ketchemin, *A comparative analysis of the concept of fiscal jurisdiction in income tax law*, unpublished PhD Thesis, 2002 (University of Cape Town, Faculty of Law, Department of Commercial Law), 31.

⁷² See the *GVK Industries* case discussed at section 13.2.2 below.

⁷³ For examples, see the branch reports for Argentina, Austria, Czech Republic, France, Germany, India, Italy, the Netherlands, Portugal, and Spain.

⁷⁴ For examples of countries with a globular concept of income for tax, but schedule like statutory source rules, see the branch reports for Chile, Japan, New Zealand, Norway, South Africa, and Switzerland.

⁷⁵ For example, see the branch reports for Austria, Denmark, the Netherlands, Portugal, and Spain.

⁷⁶ In several jurisdictions with a common law heritage such as Ireland and South Africa, case law guidance applies residually if income is not covered by a statutory source rule. Japan has a residual statutory source rule if source rules for itemised income items are not applicable.

⁷⁷ For example, a rule such as “any acts or activities performed in Argentina capable of yielding profits” (See the branch report for Argentina, 2.2.2).

⁷⁸ The three models are published in *Double Taxation and Tax Evasion: Report presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion* (League of Nations, Geneva 1928), document C.562.M.178.1928.II. Model 1a., intended for countries with both impersonal taxes and personal taxes, drew such a distinction for twelve subcategories of income, as well as covering tax on capital; Model 1b., intended for use between two states with only personal taxes, covered eight categories of income and omitted capital; Model 1c., forthcoming from a co-operation between the French and German representatives at the League, covered nine categories of income, as well as capital. The categories of income that were used across all three models were: “income from immovable property” (art. 2 Model 1a.; art. 2.A. Model 1b.; and art. 2 Model 1c.); “income from any industrial, commercial or agricultural undertaking” (art. 5 Model 1a.; art. 2.B. Model 1b.; and art. 3 Model 1c.); “income from maritime shipping and air navigation” (art. 5 Model 1a.; art. 2.B. Model 1b.; and art. 3 Model 1c.); “fees of managers and directors of joint-stock companies” (art. 6 Model 1a.; art. 2.C. Model 1b.; and art. 4 Model 1c.); “salaries, wages or other remuneration” (art. 7 Model 1a.; art. 2.D. Model 1b.; and art. 5 Model 1c.); “salaries of officials and public employees” (art. 7 Model 1a.; art. 2.D. Model 1b.; and art. 5 Model 1c.); and “public pensions” (art. 8 Model 1a.; art. 2.E. Model 1b.; and art. 6 Model 1c.). Categories of income used in two of the three models were: “private pensions” (art. 8 Model 1a.; and art. 6 Model 1c.); “annuities” (art. 9 Model 1a.; and art. 8 Model 1c.); and “total wealth, capital, or increments of wealth” (art. 12 Model 1a.; and art. 10 Model 1c.). The following categories were used in only one of the three models: “personal tax on total income” (art. 10 Model 1a.); “income” (art. 1 Model 1b.); “income from movable assets” (art. 7 Model 1c.); “income from public funds, bonds, including mortgage bonds, loans and deposits or current accounts” (art. 3 Model 1a.); “income from shares or similar interests” (art. 4 Model 1a.); “income from sources not referred to” (art. 9 Model 1a.); and “income from other claims not referred to” (art. 8 Model 1c.).

the correspondence with the more limited categories used in the 1963 Draft OECD Model Tax Convention and its subsequent iterations.⁷⁹

The only shift that could be observed from the comparison of statutory source regimes is the addition of the permanent establishment concept to pre-existing or new statutory source rules of several countries⁸⁰ that do not share historical tax law links with the originator of the concept, Germany. The rationale offered by New Zealand's lawmakers is noteworthy because they relied on the idea of a "sufficient" nexus. It was argued that New Zealand's statutory source rules, enacted in 1916, had to be aligned with "our taxing rights under our DTAs" because:

"income attributable to a PE is internationally recognised as being sufficiently connected with the source state to be taxable there. Accordingly, we consider that our source rules would be deficient if they did not allow for such income to be taxed here"⁸¹

This reasoning suggests that the permanent establishment concept might be the only proxy that could be universally seen as a one-country test to establish a sufficient link for income tax jurisdiction over a non-resident. Indirectly, it also points to a harmonising effect of model-based income tax treaties on domestic income tax design. The timelines whereby this concept has been introduced in the domestic tax legislation in some of the reviewed countries suggest this is a slow and gradual process.

The introduction in 1966 of the well-known territorial jurisdictional test of income being 'effectively connected' to a United States business has a specific background based on a mix of economic circumstances of the time,⁸² and removing an earlier

⁷⁹ The reason is that the income categories used in foundational income tax treaties concluded by the United States since 1932 were more influential for the 1963 Draft OECD Model than any other, as historical analysis of the 1945 United Kingdom-United States income tax treaty has shown (see J. F. Avery-Jones, "The history of the United Kingdom's first comprehensive double taxation agreement" (2007) *British Tax Review* 211-254, 254). It is therefore not surprising that to this day, the League's models better reflect the categorisation found in income tax bases.

⁸⁰ See the branch reports for Chile, 2.2.2 (introduced in 2012), Japan, 2.2.2.5 (introduced in 1962, re-defined in 2018), New Zealand, (introduced in 2018) and South Africa (introduced in 2011). In the United Kingdom, in 2003 all references to 'branch' or 'agency' in the corporate income tax legislation was replaced by 'permanent establishment' (Glen Loutzenhiser, *Tiley's Revenue Law*, 9th ed. (Oxford, 2019), 1357). In Ireland, the concepts of a branch or agency is understood to be like a permanent establishment (see the branch report for Ireland, 2.2.2).

⁸¹ Inland Revenue (New Zealand), Policy and Strategy, "Taxation (Neutralising Base Erosion and Profit Shifting) Bill": Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill" (March 2018), 166, and the branch report for New Zealand, 5.1.

⁸² The United States had considerable balance of payments deficits since the late 1950s through the 1960s, causing a rapid depletion in gold stocks. The response was as follows: "The Kennedy, Johnson and Nixon Administrations resorted to a series of indirect policy initiatives - differential tax treatment of domestic and foreign investments, reductions in the value of the goods American tourists could bring into the country, tied foreign aid, and finally an across-the-board import surcharge - in an effort to remedy the balance of payments problem and free up monetary and fiscal policies for the pursuit of domestic objectives" (Barry Eichengreen, *From Benign Neglect to Malignant Preoccupation: U.S. Balance-of-Payments Policy in the 1960s*, in George Perry and James Tobin, Eds., *Economic Events Ideas and Policies: The 1960s and After* (Brookings Institution Press 2000, 1). Ross, note 63 above, 294, indicates the motivation for the 1966 reform of the income tax jurisdictional rules for non-residents "was undoubtedly the balance of payments situation and the desire to make investment in the United States more attractive".

jurisdictional problem from the US income tax regime for non-residents.⁸³

Generally, it was difficult for branch reporters to establish the rationale of lawmakers for statutory source rules. Yet, despite such difficulties, several reporters offered theoretical explanations or criticism of their legislative source regime.

The branch reporters for Austria comment that the general rationale for that country's statutory source rules is the benefits theory.⁸⁴ In respect of Chile, the branch reporters question the theoretical coherence of the statutory source rules that established liability when payment originates in Chile for services rendered outside the territory by non-residents, and in respect of offshore indirect transfer of assets:

"it is uncertain whether the rationale ... responds to the "benefit theory" since it is uncertain whether the taxable income was created from the utilization of public goods, e.g. infrastructure, property protection, etc. Similarly, it is unlikely to argue that it responds to the "origin theory" since the taxable income was not necessarily originated in the country, and neither that the taxable value was created within the country"⁸⁵

The German source rules are theorised into an overarching basic principle based on the original legislative intent. The branch reporters opine that the basic idea found in historical legislative materials was to capture the extraction of any economic benefit or earnings from within the German territory and that "there must be an economic connection between what is being taxed and Germany".⁸⁶

In Italy, the criteria for the statutory source rules have been categorised to fall into three types of connecting factors: (1) the *locus rei sitae* (the location of the 'thing') applicable to income from real estate, Italian ships on the high seas and Italian aircrafts being in a place or space not subject to the sovereignty of any other State; (2) the residence of the payor, applicable to income from capital, some items of the income from employment and royalties; and (3) the place where the activity generates the income, applicable to employment and self-employment income and business income.⁸⁷ A very similar categorisation is reported for Norway's statutory source rules.⁸⁸ Here one can see underlying thinking pointing to the place where the yield of capital, whether in the form of labour, money or assets, arises.

France is notable for only relying on a statutory source regime for all business income since tax residence nexus for corporate income tax is not used. The branch reporters indicate that the rationale is based on history because the nexus for business income arose from

⁸³ Before 1966, the jurisdictional income tax rules for non-residents caused all income from sources within the United States to be taxed at progressive corporate rates if the foreign person was engaged in trade or business, regardless of whether the income was associated with the trade or business. Ross records that in Europe, where business and investment income was treated separately and which was reflected in the early income tax treaty network, the United States' rules were regarded as a "force of attraction" regime. The result was that "[u]nder the influence of the Europeans, the OECD [in 1963] adopted the position that force of attraction principles would not apply. Under pressure from its treaty partners and the OECD process, the United States in its most recent treaties had begun to abandon its traditional position on this matter, and FITA [the 1966 tax reform] largely carried this development to a more clear-cut conclusion." (Ross, note 63 above, 294-295).

⁸⁴ "that the non-resident taxpayer shall participate in financing the Austrian infrastructure that is used to generate the non-resident taxpayer's income" (see the branch report for Austria, 2.2.2).

⁸⁵ See the branch report for Chile, 2.2.2.

⁸⁶ See the branch report for Germany, 2.2.2.

⁸⁷ See the branch report for Italy, 2.3.

⁸⁸ See the branch report for Norway, 2.2.2.

the time of an agricultural and industrial economy that aimed to tax business profits at the location where they were materially realised.⁸⁹

It is noteworthy that, at the general level, the coherence of an income tax system is not offered as a rationale for source-based nexus. As the discussion below of sourcing regimes for specific types of income such as royalties or pensions will show, the matching of income tax deductions with assertions of jurisdiction to impose tax on non-residents does, on occasion, feature in some of the reviewed jurisdictions.

2.3.2. Dividend Income

In the great majority of reviewed countries, the tax residence of a company paying a dividend is used as the connecting factor to establish tax jurisdiction over non-residents. In many cases this jurisdictional rule is connected to a source-based charge on dividends such as a flat-rate withholding tax. There is some variation in how such statutory rules are designed. Most refer to the “payor” of a dividend but several focus on the company declaring a dividend.⁹⁰

Very few other jurisdictional connecting factors were reported. For example, Australia relies, as a fall back when the withholding tax nexus is not satisfied, on dividends “paid out of profits derived by the company from sources in Australia”.⁹¹ In South Africa, the local listing on a stock exchange of foreign securities can attract tax nexus for local shareholders for a flat rate source tax in specified circumstances.⁹²

Most branch reporters indicated that considerations based on where profits declared as dividends were spatially derived, or the location of the share register,⁹³ or whether securities were listed on a local stock exchange or not, were not relevant to their statutory nexus rules.

Not many branch reporters were able to establish the rationale for jurisdictional rules from legislative materials. The rationale for Switzerland’s rule that focuses on the issuer of

⁸⁹ See the branch report for France, 2.2.2.3.

⁹⁰ This can affect the timing of tax liability as well as potential misalignment between the tax residence of declaring companies using paying agents.

⁹¹ Non-share dividends, for example in respect of interest on debt instruments recharacterised as equity, are assessable to the extent to which they are “derived from sources in Australia” (see the branch report for Australia, 2.3).

⁹² For this nexus rule it is not relevant whether the profits out of which the dividends arise, are domestic or foreign profits of the non-resident company. The rationale for this nexus rule was lack of administrative enforcement capability to collect a flat rate tax from non-resident companies declaring dividends: “... foreign dividends cannot become part of the new Dividends Tax because South Africa does not have the ability to generally impose a withholding tax on foreign companies paying a dividend. Therefore, foreign dividends (*except foreign dividends in respect of JSE listed shares*) will remain within normal income tax system.” (italic supplied) (see the branch report for South Africa, 2.3).

⁹³ Judicial guidance about the source of dividends regarded the location of the share register as the decisive and important factor. In the case of *Boyd v. CIR* 1951 (3) (SA) 525 (A) South Africa’s apex court held that the evidence of title to shares was the share register and that once a dividend has been declared, there is a debt owing by the company that is enforceable at the location of the share register. This legal approach rejected the theory that in economic terms a shareholder is a continuation of the company and therefore the source of dividends is the profits declared to the shareholder, which would mean the geographical location of the profit generating activity is the geographical source of the dividend.

security (including bonds) was as follows when in the late 1930s and early 1940s a federal withholding tax was introduced:

“the relevant legislative documents explain that the tax was imposed on foreign investors as a form of consideration for the opportunity to invest in the Swiss market: it was felt that it was only fair that such foreign investors should pay taxes because of the security offered to their funds by the possibility of investing in Swiss securities or making deposits in Swiss banks”⁹⁴

This explanation refers to the benefits received from investing in a local and secure capital market as the basic rationale. It does not regard the location of the underlying profit-generating activity as the direct cause for receiving dividends. This thinking points towards the totality of a legal framework that makes a capital market function (e.g. company, securities, and corporate laws) as the proximate public good supplied to enable the realisation of dividends. It accords with judicial reasoning elsewhere.⁹⁵

2.3.3. *Interest Income*

A single rule to locate the geographical source of interest for income tax purposes could not be identified from the branch reports.

It appears that about half of the reviewed countries refer to the place of tax residence of the debtor⁹⁶ as either a predominant or secondary proxy to establish geographical income tax jurisdiction over non-residents. This commonality should not be overstated. As will be explained, this nexus proxy appears to be primarily driven by administrability and enforcement, and often operates in parallel with other nexus rules applicable to interest earned by non-residents. Furthermore, there are important capital exporting jurisdictions such as Germany where the debtor's tax residence is not relevant, and the United Kingdom where it is not decisive, but just one of a multitude of factors to locate the geographical source of interest.⁹⁷

As far as tax history is concerned, in several of the reviewed countries, the debtor's tax residence was not always the decisive or exclusive nexus used, or even a relevant consideration. Historically, in some countries, legislation did not define how to locate the 'source within' a country of interest earned by non-residents, or when interest 'arises from' their territories; this was left to courts to work out on a case-by-case basis.⁹⁸ The judicial

⁹⁴ See the branch report for Switzerland, 2.3.

⁹⁵ See the case at note 93 above.

⁹⁶ The debtor is not necessarily the payor, whom may have a tax residence different to that of the debtor. Interest paying agents are commonly used in cross-border commercial lending arrangements, for example, in syndicated loans, the issuing of bonds, promissory notes, short-term commercial finance paper, etc.

⁹⁷ The approach in Ireland is thought of to be the same as that in the United Kingdom, although the matter has not been litigated (see the branch report for Ireland, 2.4).

⁹⁸ See the branch reports for Australia, Ireland, and South Africa. This approach still prevails to this day in the United Kingdom (see the cases at note 109 below).

guidance later informed statutory law reform to either codify the case law position or change it.⁹⁹

The position in Ireland requires special mention because the charging legislation for interest is based on the Income Tax Act of 1853, which had no territorial limit expressed in the legislative text. Significantly, it was only through judicial reasoning about the meaning of this legislation that a limit was established in tax cases, initially by applying the logic of connecting factors found in private international law.¹⁰⁰

In other countries, legislation and/or administrative guidance used (and some still use) a different nexus such as the place where interest-bearing credit was made available¹⁰¹ or loan capital was used.¹⁰² Surprisingly, few countries have specific statutory nexus rules for interest earned by a non-resident on debt attributable to business conducted through a permanent establishment.¹⁰³ In Germany or Switzerland, connecting factors focus also on whether securitisation of debt draws on German and/or Swiss situated assets such as real estate or equivalent rights, or certain assets such as ships flying the German flag or Swiss parent company guarantees and repatriation of funds.¹⁰⁴ Japan has a specific statutory source rule for interest on loans provided to resident corporations for the purchase of ships or aircrafts.¹⁰⁵

It is quite common for countries to use a combination of rules. Switzerland combines some of the orthodox geographical source rules (e.g., loan capital used within, or debtor's tax residence within) with more uncommon rules. For example, a commercially registered branch is treated as a "tax resident debtor" or interest on debt secured by a Swiss parent entity through, for example, a guarantee is sourced at the location of the guarantor.¹⁰⁶ The rationale for these less common nexus rules concerns economic features such as that Switzerland is seen as a safe haven for investment. As will be discussed later, reflecting on local economic considerations often reveals why a certain set of nexus rules for interest income are combined.

⁹⁹ For example, see the branch report for South Africa, 2.4 for the statutory source rules introduced in 2011. The intention of the 2011 law reform was to "remove any current law focus on the credit provider" (National Treasury, Explanatory Memorandum on the Taxation Laws Amendment Bill, 2011 (27 January 2012), para. 4.2 II, p. 97). This wording implied overriding the leading cases of *CIR v. Lever Brothers and Unilever* 1946 AD 441, 14 SATC 44 and *First National Bank of Southern Africa Ltd v. CIR* 2002 (3) SA 375 (SCA), 64 SATC 471, in which the location of credit lending activities was highly relevant to establish whether interest earned by non-residents was geographically sourced in South Africa.

¹⁰⁰ In terms of the early cases a debt was located where the debtor was resident or where it could be legally enforced for private international law purposes, which was taken to also geographically locate the source of the interest earned for income tax purposes. See the branch report for Ireland, 2.4.

¹⁰¹ See the branch report for New Zealand, 2.2.2.2.

¹⁰² See the branch reports for Argentina, 2.4; Chile, 2.4; Colombia, 2.4; India, 4.3; Japan, 2.3.2; New Zealand, 2.2.2.2; Peru, 2.4; South Africa, 2.4; Spain, 2.4; and Switzerland, 2.4. Some countries do not generally rely on the place where loan capital was used to fix the geographical source, except when the interest-bearing debt is connected to a permanent establishment (see for example, the branch reports for Czech Republic, 2.4 and Denmark 2.4). All these nexus rules would not necessarily coincide with the tax residence of the debtor, for example, if the debtor uses the loan capital to fund an acquisition in another country, or to fund operations carried on elsewhere, or the credit was made available at such other locations.

¹⁰³ See the branch report for Mexico, 2.4, and Japan, 2.3.2.

¹⁰⁴ See the branch reports for Germany, 2.4 and Switzerland, 2.4.

¹⁰⁵ See the branch report for Japan, 2.3.2.

¹⁰⁶ See the branch report for Switzerland, 2.4.

As far as the status quo is concerned, the movement towards geographically locating the source of interest at the debtor's tax residence can be explained by several factors reported by branches. Foremost, collecting income tax from non-residents through a flat-rate, gross-based withholding mechanism has become widely acceptable regardless of a country's tax enforcement capacity or level of development.¹⁰⁷ When these collection mechanisms were introduced, on top of the existing income tax nexus rule for interest, in some instances a new nexus for withholding tax aligned with the collection procedure was created. Placing the obligation to withhold tax on behalf of a non-resident creditor on the debtor means that the tax nexus rule will be too complicated if the debtor would need to assess information other than his own tax residence status. Moreover, several countries maintain a dual regime, in terms of which a pure nexus rule (e.g., the place of employment of capital, a multi-factor approach weighing up the whole factual matrix, the place where the credit was granted, or the country that registers a mortgage interest bond) play a residual and back-up function when the withholding tax nexus rule is not applicable.¹⁰⁸

Another observation from the branch reports is that national disputes continue to arise about the geographical source of interest despite a long history of judicial guidance, especially in countries that use more open-ended tests such as a multifactor approach reliant on the whole conspectus of relevant facts.¹⁰⁹

It is evident from the reviewed jurisdictions that there is scope for overlap of State jurisdiction to tax interest income. The most remarkable example concerns interest from mortgage bonds and collateralised loans. An example of a statutory rule with broad, but precise scope can be found in Germany where income from capital assets (such as money loans) that are secured by domestic real estate or equivalent contractual rights is geographically sourced at the location of the real estate that serves as collateral.¹¹⁰ A more indirect rule is found in other jurisdictions such as Argentina or Colombia where the geographical source over the interest may be asserted if the loan is 'economically linked' to the territory.¹¹¹

The German branch reporters point out that the sourcing rule for interest in respect of collateralised real estate means that both the debtor and the creditor of the interest can be non-residents. The tax nexus rule therefore may reach outside the German territory to a payment of mortgage interest between two non-residents. Evidently, the ubiquitous use by jurisdictions of the debtor's tax residence to fix the geographical source of any interest means

¹⁰⁷ Some type of gross-based withholding mechanism on interest is found among most OECD member countries in respect of which a branch report was considered for this study.

¹⁰⁸ This is the case in, for example, in Australia, the Netherlands, and South Africa.

¹⁰⁹ In the United Kingdom, see for example *Hargreaves Property Holdings Ltd v. Revenue And Customs* [2023] UKUT 00120 (TCC), [73]-[85] and *Ardmore Construction Ltd v. HMRC* [2018] EWCA Civ 1438, and in South Africa, *First National Bank of Southern Africa Ltd v. CIR* 2002 (3) SA 375 (SCA).

¹¹⁰ See the branch report for Germany, 2.4. Similar statutory source rules were reported in the branch reports for Switzerland, 2.4, and New Zealand, 2.2.2.2. Austria had such a rule up to 2015 (branch report for Austria, 2.4).

¹¹¹ See the branch reports for Argentina, 2.4 and Colombia, 2.4.

that chances for three-country jurisdictional overlaps are very high for mortgage interest.¹¹² The ostensible extraterritorial effect may be justified by the fact that the collateralisation means the creditor of the capital claim is the holder of a mortgage protected under, in this example, German law. If the creditor is a non-resident taxpayer, the economic substance contained in the security right over real property is 'extracted' from Germany for as long as the real estate serves as security. As the branch reporters argue, "the taxpayer makes use of the German legal infrastructure through the domestic collateralisation".¹¹³ The collateral value of the property is abroad for the duration of the collateralisation because the property is worth less because of the collateralisation. The economic extraction from the domestic territory therefore can be viewed as a reasonable justification for the taxation of interest payments made solely between foreigners. It can also be linked to the benefit theory as the local legal infrastructure is used. Evidently, such a tax regime will be challenging to administer by the tax authorities of the state of the collateralised property. Yet, the case of sourcing mortgage interest eloquently illustrates that the ubiquitous use of the debtor's tax residence to fix the geographical source of interest income is a blunt proxy that does not necessarily capture the exchange of economic values reflected in securitised interest-bearing lending arrangements. It is therefore understandable that countries may choose to operate alternate proxies in addition to the debtor's tax residence to geographically source interest earned by non-residents.

At the level of theory and policy and ignoring administrability and collection considerations for the moment, several questions arise from the information reported by the branches.

It seems that the rationale for tax nexus for interest is most clearly found in countries where courts had to grapple with a general theory to geographically locate the source of income. The economics of interest-bearing lending arrangements appear to be a guiding consideration in a variety of jurisdictions where courts had to consider the matter on the basis of first principles. For example, the economic allegiance doctrine holds strong sway over Canadian courts¹¹⁴ when faced with questions of jurisdictional tax nexus or, for South African courts, the assumption that the equity of tax nexus arises from the production of

¹¹² The jurisdictional tax overlap is not obviously resolved by model-based tax treaties when two source tax claims arise due to the debtor's tax residence being in a country other than the real estate that serves as collateral. There is little guidance in model tax treaties about clear solutions to resolve double tax arising from so-called source-source double income tax claims (see para 29 of the Commentary on art. 11(5) of the 2017 OECD Model Tax Convention where it is suggested that multilateral solutions are needed for these types of triple taxation cases). In Switzerland, an alternate approach is to re-interpret mortgage interest in these circumstances as falling within the scope of "other income" governed by art. 21 type tax treaty clauses, and not as falling within arts. 11 or 6 (Stefan Oesterhelt & Maurus Winzap, "Quellensteuern bei hypothekarisch gesicherten Kreditverträgen", (2008) *Forum für Steuerrecht*, 28 et seq., 41).

¹¹³ See the branch report for Germany, 2.4.

¹¹⁴ See the branch report for Canada, 2.2.1., and especially *Canada v. Alta Energy Luxembourg SARL*, 2021 SCC 49, para. 151, where it was held that "The allocation of taxing powers follows the theory of 'economic allegiance', under which an economic connection between the state and the taxpayer serves as the basis of taxation"; as well as *Garcia v. The Queen*, 2007 TCC 548, para. 15: "The theory underlying the use of residence is that a person should owe economic allegiance to the country with which he or she is currently most closely connected in economic and social terms. Thus, the obligation to pay tax on the basis of residence derives from the principle that persons who benefit from their economic and social affiliation with a country have an obligation to contribute to its public finances".

wealth through a country's resources or the activities of its inhabitants.¹¹⁵ Argentine courts have reasoned that from an economic perspective, the place where borrowed capital is used is where the financed activity is located, and not where the finance is granted.¹¹⁶ The rationale adopted by English courts is not always apparent.¹¹⁷

Some legislators have also articulated the rationale for statutory nexus rules with reference to economic considerations. For example, in Germany the original legislative intent was for source-based income tax "to cover everything that was 'extracted' from within Germany or earned within Germany."¹¹⁸ Apart from isolated examples, it appears from the branch reports that tax policy makers or tax administrators do not have a culture to explain or state the rationale for introducing or reforming interest nexus rules but despite such untransparent practices, the evidence in its totality points to the importance of economic considerations above all else.

It can be questioned what may be the justification or rationale for the ubiquitous and exclusive use of a debtor's tax residence to geographically locate the source of interest income? As mentioned earlier, it is a blunt proxy that does not always accurately capture exchanges of value inherent in, for instance, securitisation. None of the branches reported evidence that international law was considered in the design of geographical nexus rules for interest. Some branch reports note that the switch to a debtor's tax residence from a case law or multifactor approach overrides current law that emphasises creditor-side activities such as where a bank's credit lending activities are performed.¹¹⁹ Evidently, if the emphasis is no longer on the credit lending activities, it must mean that the focus shifts away from credit/capital exporting countries. This points to the important shifting of source tax claims to capital importing countries precipitated by focusing on the debtor's place of tax residence. Yet, other factors are reported by branches. For example, in Chile introducing a tax nexus rule based on the debtor's tax residence coincided with the introduction of a withholding tax charged at a low rate on interest earned by non-residents, which was motivated by competitive considerations to attract foreign capital to meet development needs.¹²⁰ This

¹¹⁵ See the branch report for South Africa, 1, and *Kerguelen Sealing & Whaling Co., Ltd v. CIR*, 1939 AD 487, 10 SATC 363, at 380 where it was held "the equity of the levy [income tax] rests on the assumption that a country that produces wealth by reason of its natural resources or the activities of its inhabitants is entitled to a share of that wealth, wherever the recipient may live".

¹¹⁶ See the branch report for Argentina, 2.4, and *Ernesto Tornquist y Cia Ltda c/Fisco Nacional, ASC*, 6/18/1938, in respect of which the following criterion was extrapolated "since interest constitutes the civil product of the principal as it stems from it, the source is inevitably determined by the place where this principal is applied. This reasoning implies that the economic use of the principal occurs where the financed activity takes place and not where the financing is granted".

¹¹⁷ See for the income tax cases note 109 above. In respect of other British taxes dealing with the location of interest-bearing debt, Lord Buckmaster in the case of *English Scottish and Australian Bank Ltd v. CIR* [1932] A.C. 238, 242, said "that for purposes of probate and estate duty a simple contract debt is assumed to be situated where the debtor resides is established by a long series of authorities that stretch far back into the mists of antiquity".

¹¹⁸ See the branch report for Germany, 2.2.2. The German reporters further state that "according to a genuinely German understanding, there should be a state-economic connection between the taxable good and the tax jurisdiction".

¹¹⁹ See note 99 above.

¹²⁰ See the branch report for Chile, 2.4, referring to a circular by the revenue authority that explained that the reason for reform of a withholding regime for interest, which included a new tax nexus rule, was to "benefit operations that give access to financing from abroad and attract capital for the development of project and investments in the country" (Circular 56 of 2020, point 3.1).

shows that considerations based on the relative economic development position of a country can be a driving policy consideration. For other countries such as Austria, introducing an interest withholding mechanism and its associated nexus rule based on the debtor's tax residence was motivated by European Union law developments around removing banking secrecy.¹²¹ The evidence presented by the branch reports suggests that fiscal policy makers do not overtly consider legal policy or theory drawn from international law when reforming this area of tax law. Rather, the structure of the local economy, its state of development and/or its relative capital attractiveness regionally and internationally are important background considerations for opting to introduce or solely rely on the debtor's tax residence.

At the legal theoretical level, it can be argued that the debtor's tax residence could coincide with the place where the debt is legally enforceable for private international law purposes. This would establish a precise link to the benefits principle because income tax is then charged in the jurisdiction that legally secures the income stream for the benefit of the creditor. But this argument only holds water if the tax residence of the debtor is established with reference to the debtor's domicile (for natural persons) or place of incorporation and/or legal seat (for corporate entities) or the choice of law rule that contractually governs the debt instrument. As reported by the branches, tax residence can be established by connecting factors that are unrelated to private international law connecting factors. For example, tax residence tests that rely on the numbers of physical days present for natural persons or the place of management of corporate entities are not connecting factors under private international law to establish which legal system governs the contractual debt instrument. In the view of the general reporters, it seems artificial to suggest that justification can be founded on the place of legal enforcement of interest-bearing debt because the reality appears to be that tax law reform in this area is more driven by economic and non-tax regulatory considerations.

There are several implications from the above findings. The variety in primary or secondary tax nexus rules to geographically locate interest income earned by non-residents means that jurisdictional overlaps occur resulting in double taxation. The multiplicity of nexus rules reported by the branches underlines the need for model-based income tax treaties to offer relief for taxpayers suffering double tax when jurisdictional overlaps are of a residence and/or source nature.¹²² It is therefore otherworldly to consider the current international income tax treaty regime as wholly "outdated" or no longer serving a purpose, or that double tax concerns are overstated, as is claimed in popular discourse of the past decade and in literature. In fact, double taxation arising from source-source jurisdictional overlaps for interest income of non-residents is not expressly addressed by model tax treaty solutions at all and has not enjoyed the attention of fiscal policy makers for a long time. This is an unsatisfactory situation, but perhaps not unsurprising given that so much attention has been focused on the base eroding possibilities arising from cross-border interest-lending arrangements.

¹²¹ See the branch report for Austria, 2.4.

¹²² Unilateral double tax relief in tax credit countries is often qualified to not apply when income is sourced within the relieving country, according to that country's source nexus rules. Therefore, unilateral double tax relief may not be of assistance.

2.3.4. *Royalty Income*

The comparison of statutory rules to establish territorial income tax jurisdiction over royalty income revealed two broad approaches, as well as a third minority position.

On the one hand, there is a cohort of countries that employ substantive place of use tests to geographically situate royalty income. On the other end of the spectrum, a group of countries relies solely, or in the alternate, on a proxy, namely the tax residence of the payor, or the debtor owing a royalty.

A minority of countries use the formal criteria of the place of registration of legally protected intellectual property to geographically situate the source of a royalty in their territory.¹²³

None of the reviewed countries reported statutory rules that regard the place where intellectual property has been produced as the location of the source of a royalty. This test can only be seen in court decisions,¹²⁴ and has been mentioned in revenue guidance.¹²⁵

Substantive ‘place of use’ tests aim to establish if factually, the location where income yielding capital in the form of immaterial intellectual property was used or exploited, is within the territory of a country. Generally, for this group of countries most branch reporters indicate that the formal legal registration of the intellectual property in the country is irrelevant. The rule design can involve wide, open-ended,¹²⁶ or more narrowly targeted criteria.¹²⁷ Mexico and the United States employ a substantive place of use test exclusively.¹²⁸

¹²³ See the branch reports for Austria, 2.5, Ireland, 2.5, and Germany, 2.5, and the discussion about their approaches to tax nexus later in the text.

¹²⁴ The place of production of intellectual property as connection factor is illustrated in a leading South African case about the geographical source of author royalties. In *Millin v. CIR* 1928 AD 207, 3 SATC 170, the royalty income of a South African authress for books written in South Africa and printed and sold in the United Kingdom and the United States under a publishing contract negotiated in London by an agent, was held to be sourced at the location where she employed her “wits and labour”, in other words, human faculties, both in writing the novels and in dealing with her agent and publishers. The approach of the courts in Australia is not as categoric but may result in a similar outcome. In *Resource Capital Fund IV LP v. FCOT* [2018] FCA 41, [51], the general approach was summarised as follows, namely the “factors that will be relevant to the ascertainment of the source of income will vary from case to case, and will vary as between different kinds of income ... The location of the property will be significant when the income is derived from property (see *FCOT v. United Aircraft Corp* [1943] HCA 50; *FCOT v. United Aircraft Corp* (1943) 68 CLR 525; 17 ALJ 339; 7 ATD 318; [1944] ALR 23), and the place where a taxpayer has performed income earning operations will be significant where the income is derived from a service of operations (see *CIR v. HK-TVB International Ltd* [1992] 2 AC 397).” The active or passive nature of an endeavour to earn royalties could therefore make a difference to where it may be geographically sourced.

¹²⁵ See the discussion of guidance issued by the revenue authority of Ireland later in the text and the branch report for Ireland, 2.5.

¹²⁶ For example, in Argentina a royalty will be locally sourced if “the asset that generates it is located, placed or economically used in the country” (see the branch report for Argentina, 2.5 and for a similar approach the branch report for Peru, 2.5). The use, enjoyment, or exploitation of rights to use industrial and intellectual property attracts territorial income tax jurisdiction in Chile and Colombia (see the branch reports for Chile, 2.5, and Colombia, 2.5). In Ireland, royalty income is from a local source if derived from “any trade exercised in the State” or from “any property whatever in the State” (see the branch report for Ireland, 2.5).

¹²⁷ For example, in South Africa the connecting factor is “the use or right to use or permission to use” within its territory a closed list of immaterial assets or the provision of related knowledge (see the branch report for South Africa, 2.5). A similar approach is found in Spain (see the branch report for Spain, 2.5).

¹²⁸ See the branch reports for Mexico, 2.5, and the United States, 6.

Countries such as India, Spain, and South Africa employ this test as alternative to the tax residence of the payor.¹²⁹

The branch reporters for Colombia indicate that the rationale for the place of substantive use test is “[i]n line with the tax interests of a technology importing country” because it “allows taxing the licensing of intangibles by non-residents when those are used in the country, regardless of whether the intangible is registered in Colombia or elsewhere.”¹³⁰ As will be seen below, whether a country is a technology-creating and/or exporting, or user and/or importing jurisdiction can be relevant in the choice of the connecting factor, though this is not a consistent guide.

The debtor’s tax residence can be used as either the sole connecting factor or a primary consideration.¹³¹ In Brazil, a statutory source rule of this kind replaced the substantive place of use test. In Canada, the tax residence of the payor is decisive in determining nexus; however, the ultimate source of the payment, which is understood to refer to either the use of, or production from property in Canada may also be relevant.¹³² A similar regime applies in Australia where the primary withholding tax nexus rule is based on the payor’s tax residence. The secondary guidance from Australian case law regards the location of the intellectual property and, for know-how, the contract under which the rights give rise to the royalty as crucial factors in determining the geographical source.¹³³

Australia, New Zealand, India, and South Africa use the tax residence of the payor as a connecting factor only if the royalty is not connected to a foreign business.¹³⁴ These countries spatially limit the debtor’s tax residence as nexus to not encroach on other countries who will presumably assert income tax jurisdiction if royalty yielding intellectual property is used in connection with a local business.¹³⁵ This ‘territorial business use’ logic is taken a step further in Sweden where a statutory rule deems any non-resident licensor to have a permanent establishment because the granting of a licence for use within Sweden is considered to be a form of participation and contribution to Swedish business.¹³⁶ It is remarkable that similar territorial limitations on the debtor’s tax residence as nexus are not generally used in connection with interest or dividend income (see sections 2.3.2 and 2.3.3 above).

None of the branch reporters were able to report official explanations of the rationale

¹²⁹ See the branch reports for India, 5.3, Spain, 2.5, and South Africa, 2.5.

¹³⁰ See the branch report for Colombia, 2.5.

¹³¹ See the branch reports for the Czech Republic, Denmark, France, India, Italy, Netherlands, New Zealand, and Portugal.

¹³² See the branch report for Canada, 2.5.

¹³³ See the Australian cases at note 124 above.

¹³⁴ In Australia’s case, “an outgoing wholly incurred by a person in carrying on business in a country outside Australia” (see the branch report for Australia, 2.5); in New Zealand’s case, paid in connection with a business carried on outside New Zealand through a fixed establishment (see the branch report for New Zealand, 2.2.2.3); and in India and South Africa’s case, the royalty is not attributable to a permanent establishment situated outside the country (see the branch reports for India, 4.6, and South Africa, 2.5).

¹³⁵ Such an approach will in fact only line up in a case with a reverse nexus rule such as is found in Austria, Australia, Germany, and Spain, where royalties arising in connection with a permanent establishment within these countries establishes taxing jurisdiction over a non-resident recipient (see the branch reports for Austria, 2.5, Australia, 2.5, Germany, 2.5, and Spain, 2.5). Sweden has a deeming rule resulting in a permanent establishment for non-resident recipients with similar result (see the branch report for Sweden, 2.5, and the note below).

¹³⁶ See the branch report for Sweden, 2.5. The statutory deeming rule is based on decisions by Swedish courts in which it was decided that the earning of a royalty entailed a form of ownership of the business paying the royalty when the royalty depended on the size, or the results of the business conducted in Sweden.

for nexus based on the tax residence of the payor. As was noted earlier in respect of interest income (see section 2.3.3 above), the tax residence of a payor as a connecting factor is often conjoined with a gross-based withholding tax regime driven by ease of tax administration considerations. Apart from collection and enforcement considerations, it is evident that the tax residence of the payor may be a proxy to approximate the place where intellectual property was used or exploited, but it is a blunt surrogate. This can be seen especially in limitations placed by several countries on this nexus rule when the royalty arises in connection with a business or permanent establishment located outside the country of residence of the payor because the place of use would not be in that territory.¹³⁷

Since 1964, New Zealand has a noteworthy statutory source rule with an anti-base eroding function. Under this rule, royalty income “paid by a non-resident and the payment resulted in the availability of a deduction in New Zealand to this non-resident” is deemed to have a source within New Zealand.¹³⁸ This rule appears to be aimed at a non-resident carrying on a business in New Zealand in connection with which such a person incurred a tax-deductible royalty.

Excursus—income tax nexus and the place of registration of intellectual property

As mentioned earlier, a minority of reviewed countries can base income tax nexus on local legal registration of intellectual property that yields income somewhere in the world. The information reported for Austria, Ireland, and Germany about these so-called ‘register cases’ are therefore dealt with in more detail, also because the extraterritorial reach of these nexus rules has caused disputes to arise.

The branch reporters for Austria opine that this nexus rule means that:

“potentially all royalty income of a non-resident in connection with an IP right may be seen as taxable in Austria as long as the respective IP [Internet Protocol] right is registered in an Austrian public register even if that royalty was not paid as consideration for the use and exploitation of that IP right in the Austrian market”¹³⁹

They further point out that if the legislative source rule is:

“taken at face value this wording would allow for an assumption of a right to tax royalties stemming from that IP even if paid for the use of the IP outside of Austria and paid from one non-resident to another. The income tax guidelines issued by the Austrian MoF [ministry of finance] do not specify whether the MoF assumes such an extensive position. In Austrian tax literature the argument has been brought forward that for Austria to assume a legitimate right to tax royalty income, the IP not only has to be registered in an Austrian public registry, but the income also has to be paid for use of the IP in Austria. These voices hence demand an additional nexus beyond the mere registration. The key argument in favour of this position is that the justification of taxing royalty income lies in the legal protection accorded to the local registration which however is limited to the jurisdictional boundaries.”¹⁴⁰

¹³⁷ See the discussion in the text at note 134 above.

¹³⁸ See the branch report for New Zealand, 2.2.2.3.

¹³⁹ See the branch report for Austria, 2.5.

¹⁴⁰ Ibid., 2.11.

In Germany, a similar debate is ongoing with disputes pending before the Fiscal Courts. The branch reporters indicate that it has become “highly controversial” whether the literal dimension of the legislative source rule should “be supplemented by a further ‘unwritten’ characteristic that the income earned is part of domestic economic activity”.¹⁴¹ The statutory rule in question is nearly a century old but has only been applied since 2020 to royalty payments exclusively between non-residents. Germany’s ministry of finance published an official position in which it was concluded that there was no need for a domestic connection beyond the entry of intellectual property in the register.¹⁴² The branch reporters note that:

“Part of the legal and legal policy discussion is also whether a more sufficient nexus to Germany is necessary for reasons of international law, constitutional law, EU law and domestic law. Everything indicates that the historical legislature wanted to tax only profits ‘extracted’ out of Germany, meaning that a payment flow from within Germany is required.”¹⁴³

The absence of a local payment or like consideration in respect of domestic registration of an immaterial property right suggests a tenuous link with the granting of protection, and the use of the domestic legal infrastructure when extra-territorial use is the activity in respect of which consideration arises. Consideration would generally be a good indication of synallagmatic exchange of economic value arising from commercial exploitation in the territory.¹⁴⁴

The dispute pending before the German courts therefore raises the fundamental question whether there is an unstated but implied limit on a State’s jurisdiction to tax income reflected by a payment between two non-residents in respect of economic activity elsewhere.¹⁴⁵

Developments in Ireland suggest that an implied limit should be considered.

In Ireland, a royalty is received from a local source when derived from “any property whatever in the State”. There is no provision in the Irish income tax legislation of how to apply this jurisdictional rule to income such as royalties earned from immaterial property. The Irish branch reporter indicates that case law from the United Kingdom may assist.¹⁴⁶ In old English cases concerning the territorial location of intellectual property for Stamp

¹⁴¹ See the branch report for Germany, 2.11.2.

¹⁴² Ibid. The branch reporters note that subsequently, the scope of the legislation has been narrowed to license payers in tax havens. Initially, it was proposed to retroactively repeal the register nexus for extraterritorial cases because domestic taxation was not appropriate and was not intended by the historical legislature, but that proposal was never implemented.

¹⁴³ Ibid.

¹⁴⁴ In Japan’s Income Tax Act of 1899 source income tax liability arose in respect of assets situated within its territory. This rule was understood to encompass royalties when patents were registered in Japan. The statutory rules have been refined so that since 1962 domestic source income was generally defined as “income derived from business conducted in domestic areas, or income derived from utilization, holding or transfer of assets located in domestic areas.” A specific statutory rule for royalties was aligned with the general place of use criterion and requires that the underlying intellectual property provided by non-resident individuals or foreign corporations must be used for business in Japan. See the branch report for Japan, 2.2.2.1 and 2.3.3.

¹⁴⁵ On this topic see, for example, Johannes Frey & Florian Schmid, “Nexus Limitations on German-Source IP Taxation”, *Tax Notes International*, 23 November 2020, 1051 et seq.

¹⁴⁶ See the branch report for Ireland, 2.5.

Duty purposes, the view that such property had no territorial situs was rejected.¹⁴⁷ There do not appear to be English cases as to how to geographically locate intellectual property for income tax purposes, but English and Australian Stamp Duty cases provide guidance. The Australian Stamp Duty cases developed the rule, based on the English decisions, that intangible property was “situated in the place with which it is most definitely associated”.¹⁴⁸ What the ‘most definitive association’ test actually entails when applied to intellectual property is not always clear.¹⁴⁹ The ‘most definitive association’ can either refer to the place where the immaterial property rights can be effectively transferred,¹⁵⁰ or the area in which they are exploited to secure a commercial benefit such as a market monopoly.¹⁵¹ It is considered in Ireland that these cases may provide guidance for income tax purposes.¹⁵² Most interestingly, in April 2024 the Irish Revenue authority issued an update to a document offering the following guidance in respect to the geographical sourcing of patent royalties:

“Revenue accepts that a patent royalty paid to a non-resident company does not give rise to a charge to income tax ... on the payee where the payment is made—

- (a) in respect of a foreign patent, i.e. a patent originally registered outside the State in relation to an invention developed outside the State, [and]
- (b) under a licence agreement
 - (i) executed in a foreign territory, and
 - (ii) subject to the law and jurisdiction of a foreign territory”¹⁵³

Part (a) of the Irish Revenue’s guidance that refers to the place where an invention was developed aligns with judicial reasoning in a South African case about the geographical source of author royalties being the place where human faculties were employed in writing the copyrighted work.¹⁵⁴ The parallel between part (b) of the Irish Revenue’s guidance and the Stamp Duty case law test situating the source in the jurisdiction with which a patent is ‘most definitively associated’, meaning where the patent was effectively transferred for commercial use, is readily apparent.

¹⁴⁷ The idea that immaterial property could be assigned a physical location was developed in a minority decision of 1897 by the Court of Appeal in the case of *Smelting Company of Australia, Limited v. CIR* [1897] 1 Q.B. 175, 182. This proposition was later generally accepted by the House of Lords in *CIR v. Muller & Co.’s Margarine, Limited* [1901] A.C. 217, 237-238, where Lord Lindley suggested that the location of a sale agreement for a patent registered in England and Australia but exploited as a monopoly in Australia only, was Australia because the patent was “not assignable without registration in Australia” (approved in *English Scottish and Australian Bank Ltd v. CIR* [1932] A.C. 238, 249, 256).

¹⁴⁸ *McCaughey v. Commissioner of Stamp Duties* (1945) 46 SRNSW 192.

¹⁴⁹ See Scott Tyne, “Stamp Duty Implications of Taking Security over Intellectual Property” (1990) 2 *Bond Law Review* 1, 103, and Peter Green, “Stamp Duty - Intellectual Property Issues” (1996) 19 *University of New South Wales Law Journal* 1, 74.

¹⁵⁰ Based on Lord Lindley’s reasoning in *Muller & Co.’s Margarine*-case, note 147 above, at 238.

¹⁵¹ Based on Lord Warrington’s reasoning in the *English Scottish and Australian Bank*-case, note 147 above, at 249.

¹⁵² See the branch report for Ireland, 2.5.

¹⁵³ Revenue Commissioners, “Treatment of Certain Patent Royalties Paid to Companies Resident Outside the State”, April 2024, Tax and Duty Manual, part 08-01-04 (accessed online 30 April 2024) (<https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-08/08-01-04.pdf>).

¹⁵⁴ See *Millin v. CIR*, note 124 above.

2.3.5. *Income from Services*

The allocation of taxing rights concerning services has been one of the most disputed areas in the past years. There have been a variety of international initiatives. For instance, the UN Committee of Experts on International Cooperation in Tax Matters has introduced article 12A of the UN Model Tax Convention in its 2017 version. The threshold for source taxation (i.e. the nexus) in article 12A of the UN Model Convention is, in general, that the payor is a resident in a contracting State.¹⁵⁵ In treaties without an article 12A of the UN Model, the threshold for source taxation in treaty constellations is, in general, the permanent establishment.¹⁵⁶

With respect to the taxation of services, the main differences among the participating countries relate to whether they require the threshold of a permanent establishment or a lower nexus such as that the payor is resident in a country.

Some countries have implemented a specific nexus definition to tax foreign service providers – be it for corporate income or income taxes purposes. A very practical and common approach among the participating countries is to require that the services need to be rendered or performed within a jurisdiction.¹⁵⁷ Of course, the wording of the provisions can slightly deviate and the practices in the countries might differ. The most obvious approach, however, seems to tax services if these services are physically rendered in a jurisdiction – which means that people need to be present. As mentioned, other countries require not only physical presence but also that the permanent establishment threshold is met. For instance, Sweden but also other jurisdictions require that there is a permanent establishment, and the services are attributable to such permanent establishment.¹⁵⁸ This is in line with the allocation of taxing rights according to article 7 of the OECD Model (but not with article 12a of the UN Model).

Some countries define which services are subject to a specific kind of taxation – in particular subject to a withholding tax. For instance, in Poland the following services are subject to a withholding tax: “advising, accounting, market research, legal services, advertising, management and control, data processing, employees recruitment and personnel obtaining services, guarantees and suretyships, and performances of similar nature”.¹⁵⁹ Other jurisdictions also use different nexus definitions for different services. In Peru, a tax liability can arise in case of digital services and technical assistance if there is an “economic utilisation” of the services in Peru. This means the country applies a combined

¹⁵⁵ See article 12 paragraph 2 in connection with paragraph 5 of the UN Model. The situation is different in case the royalties are borne by a permanent establishment.

¹⁵⁶ Article 7 paragraph 1 of the OECD Model or UN Model.

¹⁵⁷ See, for example, the branch report for Argentina, 2.7.1, for services provided in Argentina and 2.7.2 for the services provided by non-residents from abroad. See also the branch report for Chile, 2.7., or the branch report for Mexico, 2.7, and similar the branch report for Israel, 2.7. In cases in which individuals provide services both in Israel and abroad, the tax authority has taken a position, that mixed-source income should be allocated between a foreign source and an Israeli source, based on the number of business days the individual spent in each jurisdiction. If an individual spent less than 60 business days outside of Israel in a tax year, the foreign source income shall be viewed as negligible and all mixed income will be Israeli source income. Taxpayers are also allowed to offer any other reasonable method to allocate mixed income. The approach of tax the authority extends to both services income, and employment income.

¹⁵⁸ See also the branch report for Switzerland, 2.7, or the branch report for Japan, 2.3.5. This also seems the general approach of Finland (see the branch report for Finland, 2.7).

¹⁵⁹ Article 21, section 1, point 2a of the Corporate Income Tax Act.

approach looking both at the supply side but also at the demand side.¹⁶⁰ Particularly interesting is the approach of Colombia, according to which not only services rendered within the boundaries of Colombia are subject to withholding taxation, but also certain specialised services¹⁶¹ rendered outside Colombia if they are consumed in Colombia. Germany uses the nexus of “exploited in” Germany but only for specific services.¹⁶² A very prominent example in practice is Brazil which applies a formal approach according to which the tax residence of the formal payor is sufficient to create a tax liability in Brazil.¹⁶³ Therefore, Brazil is one of the countries basically aligning its domestic approach with article 12A of the UN Model. In some circumstances, countries foresee a particular nexus for some very particular services.

India has an intriguing history concerning the definitions of taxable services of foreign service providers. Revenue agencies have tried to expand traditional nexus definitions not only to cover services physically rendered in India, but also exploited in India in general. First, the law used the term “business connection” but later “utilisation of a service” was added. However, the Supreme Court of India held in 2007¹⁶⁴ that this still requires that services must physically be rendered in India. This has (in simplified terms)¹⁶⁵ led to amendments to the law, which uses the following wording:

“Provided that the transactions or activities shall constitute significant economic presence in India, whether or not, (i) the agreement for such transactions or activities is entered in India; (ii) the non-resident has a residence or place of business in India; or (iii) the non-resident renders services in India.”¹⁶⁶

Therefore, physical presence in India is no longer required. According to the Indian branch reporters, this means that India has with reference to the report of the four economists (Bruins et al.) “gradually gravitated towards the economic allegiance principle”¹⁶⁷

Historically, services have been rendered by persons who needed to be present in the other jurisdiction. Therefore, it is not surprising that many States either refer to the physical presence of individuals or permanent establishments (which also requires physical presence). It is, however, also not surprising that the more automated services become, broader nexus definitions may be used. Such definitions may focus on the significant economic presence or on the mere fact that a payor is resident in a jurisdiction. More automation also means that services might be treated more like passive income which again means that new tax nexus definitions may no longer require physical presence as is the case for dividend, royalty or interest income.

¹⁶⁰ See the branch report for Peru, 2.7.

¹⁶¹ See for details the branch report for Colombia, 2.7. The following services are captured by such rule: (1) consultancy, (2) technical services, (3) technical assistance, and (4) administrative or management fees paid to foreign related parties. See also the branch report for Uruguay, 2.7.

¹⁶² See for details the branch report for Germany, 2.7.

¹⁶³ See the branch report for Brazil, 2.7.

¹⁶⁴ *Ishikawajima-Harima Heavy Industries Ltd v. DIT*, (2007) 288 ITR 408 (SC).

¹⁶⁵ See for a comprehensive outline of the developments both steered by the legislator but also the courts, the branch report for India, 2.17 f.

¹⁶⁶ See the Income Tax Act, 1961, s. 9 (1).

¹⁶⁷ See the branch report for India, 2.22.

2.3.6. *Income from Pensions*

The treatment of retirement savings under national tax systems varies greatly due to fundamental differences in tax policy about the nature of pensions (is it profit from investment or deferred remuneration?), as well as broader differences in cultural and social ideas about the role and responsibility of the State, the individual and family units in looking after the elderly. Yet, despite the macro complexity, jurisdictional rules to establish tax liability over retired non-resident recipients of pensions and like income, can be categorised broadly as being either formal or substantive in nature. For both types, clear justifications were reported that reverberate with the policy and other dichotomies.

Most of the reviewed countries use statutory rules to geographically locate the source of pension income. A minority of countries do not use statutory rules, as will be discussed.

Statutory sourcing regimes

Several of the reviewed countries have codified the so-called 'state of the fund' principle for pensions of civil servants, military personnel and other persons receiving State pensions.¹⁶⁸ Under these rules, the paying State asserts limited taxing jurisdiction over pension income of such persons regardless of where they may be tax residents after retirement. The principle, known as the *Kassenstaatsprinzip* has a long lineage where in the German federal states it was already in use when foundational double taxation instruments were developed in the mid-19th century.¹⁶⁹

For other types of pension income, statutory source rules in the reviewed countries can broadly be categorised into formal and substantive type tests.

Formal statutory source rules for pensions in turn fall into two versions. The first formal type of source rule regards a pension as sourced within the country in which the paying entity is established,¹⁷⁰ administered,¹⁷¹ or where the pension insurance contract is concluded.¹⁷² The second formal type of source rule is based on the tax residence of the

¹⁶⁸ See the branch reports for Austria, 2.8, (where the rule extends to persons employed at universities in Austria); Ireland, 2.8; Germany, 2.8; India, 8.1.; Japan, 2.3.6; New Zealand, 2.2.2.7; South Africa (section 9(2)(h)(iii) of the Income Tax Act, 58 of 1962); and Sweden, 2.7.

¹⁶⁹ As can be seen in art. 3 of the Convention between Prussia and Saxony, for the Elimination of Double Taxation of State Nationals of Both Sides, 16 April 1869; in s. 4 of Act (no. 475) for the Elimination of Double Taxation of 13 May 1870 (Prussia) and in s. 2 of the Prussian Income Tax Law of 24 June 1891 (translations in Johann Hattingh, "On the Origins of Model Tax Conventions: Nineteenth-Century German Tax Treaties and Laws Concerned with the Avoidance of Double Tax", in John Tiley, Ed., *Studies in the History of Tax Law*, Volume 6 (2013, London: Hart Publishing) 31, 72, 75 and 76).

¹⁷⁰ For example, see the branch reports for Argentina, 2.8 (local entities paying life annuities); Germany, 2.8 (domestic established pension institutions or paying agents); and New Zealand, 2.2.2.7 (paid out of locally established superannuation schemes). In South Africa, the pension fund must be established under law and approved by the revenue authority (definition of "pension fund" and "pension preservation fund" in s. 1 of the Income Tax Act, 58 of 1962).

¹⁷¹ See the branch report for Sweden, 2.7 (any pension business 'administered' in the country).

¹⁷² See the branch report for Japan, 2.3.6.

payor.¹⁷³ Generally, these formal rules require no further analysis of substantive links to a territory.¹⁷⁴

In Japan, the official rationale for its formal source rule is quite clear. According to the Ministry of Finance, the place of concluding a pension contract is appropriate as a criterion to locate income from pensions because the nature of the yield from such a contract is “investment profits”.¹⁷⁵ In a similar vein, the rationale for formal source rules of quite a few countries overtly concerns the coherence of the tax regime for income from retirement ‘savings’. In particular, the concern is to match pensionable tax benefits afforded to employees with taxation rights over income received post-retirement. Denmark provides a good example. The rationale for the formal jurisdictional rule was reported to be that pensions should be taxed when Denmark has financed part of the ‘savings’ by granting tax deductions for the pension contributions.¹⁷⁶ In Germany, source jurisdiction is asserted since 2010 over pensions received from foreign funds when the contributions on which the benefits are based were previously taken into account in full or in part as tax-reducing expenses. The branch reporters indicated that “according to the legislative will, the German taxing right is justified by the ‘*Förderstaatsprinzip*’. The State that has provided tax incentives for the development of pension law should be allowed to tax it”.¹⁷⁷ Similar justifications were reported for Sweden¹⁷⁸ and Switzerland.¹⁷⁹ Generally, these formal source rules do not consider where pensionable employment was performed, and therefore do not ostensibly align with nexus rules for employment income. The justifications for formal geographical jurisdictional rules reveal an old fault line in tax policy debates for retirement savings, namely whether pensions essentially are investment income or deferred employment income?

The second broad category of statutory source rules for pension income is substantive in nature because they require enquiry into (some of) the originating causes for pension income. This grouping of rules suggests a close link between pension income and the

¹⁷³ See the branch reports for Brazil, 2.8, Canada, 2.8, Chinese Taipei, 2.8, France, 2.3.6, the Netherlands, 2.6, Spain, 2.8, and Switzerland, 2.8. In the Czech Republic (2.8), Italy (2.3.2), Peru (2.8) and Portugal (1.1) in addition to the debtor’s place of tax residence, source jurisdiction is asserted over pensions attributable to a local permanent establishment.

¹⁷⁴ See later in the text the approach of a few countries where formal and substantive tests are combined.

¹⁷⁵ See the branch report for Japan, 2.3.6.

¹⁷⁶ See the branch report for Denmark, 2.8., where the regime is explained as follows: “It is not decisive for the Danish taxation of pensions whether the pension fund paying the pension is a tax resident of Denmark. It is possible for Danish taxpayers to deduct contributions paid to foreign pension funds. Danish taxation of pensions does not depend on whether the recipient of the pension was employed in Denmark prior to retirement.”

¹⁷⁷ See the branch report for Germany, 2.8.

¹⁷⁸ See the branch report for Sweden, 2.7. Jurisdiction is asserted over foreign pensions administered by a foreign insurance business when tax deductions for premiums were claimed in Sweden.

¹⁷⁹ See the branch report for Switzerland, 2.8. The rationale for this nexus is said to be “the so-called ‘*Waadtländer*’ tax system in Switzerland: contributions to occupational pension schemes and tied pension plans are generally tax deductible, while income from occupational pension schemes and tied pension plans is taxable”.

territory in which pensionable employment was exercised.¹⁸⁰ None of these types of rules require factual analysis of the investment activities that contribute to the build-up of a pension reserve. Evidently, this type of jurisdictional rule aligns with territory-based logic for taxing individual employment income in the location where the employment was exercised.¹⁸¹ These approaches seem to disregard investment activity as a contributing factor to the earning of pension income.

Few countries apply a mix of formal and substantive type nexus rules for pensions.¹⁸²

Other sourcing regimes

A small number of countries do not have specific statutory rules to establish jurisdiction over the pension income of non-residents. In Australia, case law provides guidance in terms of which the following factors would be relevant: the place or places where past personal services are rendered; the place where the pension is granted, or the place in which the contract was made which gave rise to the pension.¹⁸³ Similarly, in Ireland case law dealing with the general statutory source rule for income from property situated within Ireland is applied to pension income, the source being the place of residence of the payor or the place where the entitlement to the pension could be legally enforced.¹⁸⁴ For Colombia, the branch reporter opines that, based on Colombian social security regulation, the source of pension income depends on whether pension contributions were made to a Colombian pension fund.¹⁸⁵

2.3.7. Taxation of Employment and/or Director Fees

In most countries, one key nexus is the physical presence of employees (i.e., a territorial base) to justify income taxation of employees resident abroad.¹⁸⁶ This means income taxation is triggered if a person resident abroad is physically present in the other jurisdiction for the purpose of exercising his or her work. Some countries, however, use different nexus definitions. For instance, in New Zealand, a person resident abroad might become subject

¹⁸⁰ For example, in Austria and the Netherlands, pension income is locally sourced for self-employed entrepreneurs if the past activity of the individual has been exercised or used in the country (see the branch reports for Austria, 2.8, and the Netherlands, 2.6). In Chile, source jurisdiction is established *ex-tempore* if the exercise of the pensionable employment or service that generated the original retirement savings contribution was exercised in the country (see the branch report for Chile, 2.8). In New Zealand and Spain, the source rules apply when pension income is received in return for services that the recipient has provided in the country (see the branch reports for New Zealand, 2.2.2.7, and Spain, 2.8).

¹⁸¹ In India, the branch reporters note that there is no need for a specific rule because the statutory tax nexus rule for employment income is applied to pension income (see the branch report for India, 8.1).

¹⁸² For example, see the branch report for New Zealand, 2.2.2.7. In South Africa formal criteria about the place where a fund is legally organised and approved, are combined with substantive enquiry into the location where pensionable services were exercised (section 9(2)(h)(iii) of the Income Tax Act, 58 of 1962).

¹⁸³ See the branch report for Australia, 2.8.

¹⁸⁴ See the branch report for Ireland, 2.8.

¹⁸⁵ See the branch report for Colombia, 2.8.

¹⁸⁶ See, for example, the branch report for Democratic Republic of Congo, 2.9, or the branch report for Ireland, 2.9. Interestingly, Ireland had a remittance base nexus until 2006 but changed its system in the sense that the physical presence of the employee is key.

to income taxation if he or she is physically present in New Zealand, or if an employment contract was concluded in New Zealand, or if the payments should be made in New Zealand.¹⁸⁷ Similar to the last nexus definition in New Zealand, other countries follow a more formal approach in the sense that it is decisive for the taxation of employment income where the formal payer is a resident.¹⁸⁸

In several countries, there are different nexus definitions for employment income and director's fees. The former is often focused as mentioned on physical presence and the latter is often defined in a formal manner, i.e., it is decisive that the company (of which a taxpayer is a director) is resident in a jurisdiction. This means the domestic nexus in these countries is defined closely in line with article 15 (physical presence) and article 16 (place of residence of the company for which someone is a director) of the OECD Model.¹⁸⁹ Sometimes the domestic law will even be partly aligned with article 15 paragraph 2 of the OECD Model – i.e., the 183 days rule.¹⁹⁰ Finally, there are some countries where the physical presence is key both for employment income and director fees.¹⁹¹

As was already outlined in other sections of the general report, the design of the nexus might also depend on whether a country has chosen to implement a withholding mechanism or not. Therefore, the form of taxation has an impact on the nexus definition. For instance, a withholding mechanism is not able to ensure the taxation of foreign employees working in a jurisdiction, but not employed by a local company. Therefore, the nexus definition of the physical presence of an employee might require an additional levying mechanism beyond mere withholding taxation.¹⁹² For instance, in Chinese Taipei, there is a reporting obligation for the local subsidiary if the employee receives income in any form (including employee participation rights) from a foreign parent company (formal payor), and the employee must pay the income tax in Chinese Taipei.¹⁹³

Depending on the nexus definition the amount subject to taxation might be different. For instance, if a country uses physical presence, such as defining what part of employee stock but also, for instance, whether indemnity payments are subject to taxation.¹⁹⁴

2.3.8. Taxation of Capital Gains

With respect to capital gains taxation¹⁹⁵ countries often use similar approaches to the thresholds used in article 13 of the OECD Model. This means that capital gains are subject

¹⁸⁷ For details see the branch report for New Zealand, 2.2.2.8. The reporters refer to the following decision: *Federal Commissioner of Taxation v. Mitchum* (1965) 113 CLR 401. For a similar approach see the branch report for Turkey, 2.9. The following terms are used: "performance" in Turkey or "being accounted for" in Turkey.

¹⁸⁸ See the branch report for Brazil, 2.9 and the branch report for India, 9.3.

¹⁸⁹ See the branch report for Czech Republic, 2.9, the branch report for Portugal, 1.1, and the branch report for Switzerland, 2.9.

¹⁹⁰ See the branch report for Denmark, 2.9.

¹⁹¹ See the branch report for Colombia, 2.9, the branch report for France, 2.3.7, and the branch report for Austria, 2.9.

¹⁹² See also the historical development of the approach in Denmark (the branch report for Denmark, 2.9).

¹⁹³ See the branch report for Chinese Taipei, 2.9.

¹⁹⁴ See, for instance, the branch report for France, 2.3.7.

¹⁹⁵ In the following we will not distinguish between countries with a separate capital gains tax and other countries which include capital gains in their income and corporate income tax system. The focus is only on the definition of nexus.

to taxation if the party selling an asset is a resident in a country (see article 13, paragraph 5 of the OECD Model) or if the assets belong to a permanent establishment in such jurisdiction (see article 13, paragraph 2 of the OECD Model).¹⁹⁶ Moreover, it is not surprising that the location of real estate – i.e., *situs* – is a very common nexus for capital gains tax purposes.¹⁹⁷ Also, specific rights in relation to commodities (e.g., mining rights) are also treated as a nexus in some countries¹⁹⁸ or are treated as real estate from a capital gains tax perspective. Moreover, as foreseen in article 13, paragraph 4 of the OECD Model the sale of (domestic or foreign) real estate companies is also a common nexus, however, the exact definition of what a real estate company is and the minimum amount of share capital that needs to be sold can vary.¹⁹⁹ Defining nexus for capital gains tax purposes in line with article 13 of the OECD Model does not seem to be particularly disputed.

However, there are also many countries that go beyond the thresholds of article 13 of the OECD Model and foresee a capital gains nexus which is considerably broader. In general, there are two possible approaches to broaden the nexus for capital gains tax purposes. One is to develop an enumerative list of situations in which a nexus is given, and taxation is triggered; the second one is to define a generic concept of nexus (e.g. economic link to a jurisdiction or value creation in a jurisdiction) and leave it to the courts and the administration to develop a more detailed standard. In some countries both approaches might be used in parallel and can be combined. These approaches are considered in the following paragraph.

An interesting example of the first approach (i.e. the use of an enumerative list) is Japan. The Japanese legislator developed nine different asset categories that are subject to the capital gains tax including, for instance, income from the transfer of a golf club membership.²⁰⁰ In a few countries it is capital that is the trigger factor used as a nexus. For instance, capital gains from selling capital investments are subject to taxation in the Democratic Republic of Congo.²⁰¹ For some countries such an approach seems justified, however, in other countries with many intermediate holding companies, or top holding

¹⁹⁶ See for instance the branch report for the Czech Republic, 2.10.

¹⁹⁷ See also section 4 below.

¹⁹⁸ See section 5 below.

¹⁹⁹ For instance, in South Africa at least 20% of the equity shares need to be sold and at least 80% of the value must be attributable to real estate in South Africa.

²⁰⁰ See the branch report for Japan, 2.3.8. The nine categories are the following: (1) income from the transfer of real estate situated in Japan; (2) income from the transfer of surface rights, mining rights and quarrying rights situated in Japan; (3) income from deforesting or the transfer of timber situated in Japan; (4) income from the transfer of company shares but only if such income is derived from the following transactions: (a) certain transfer of shares by so-called greenmailers; and (b) transactions where (x) the seller owns at least 25% of shares in a domestic corporation at any time within three years preceding the transfer year, and (y) the seller transfers at least 5% of shares in the same domestic corporation in the transfer year (the “transfer of stock equivalent to business transfer”); (5) income from the transfer of shares in a real estate company; (6) income from the transfer of certain golf memberships (including shares in a corporation owning or managing a golf course in Japan provided that ownership of such shares represents membership in such golf course); (7) for non-resident individuals, income from the transfer of assets situated in Japan taking place while he/she stays in Japan; (8) income from the transfer of rights concerning techniques including industrial property rights, production methods based on special techniques and other equivalent items, but only if such income is received from business operators for their operations conducted in Japan; and (9) income from the transfer of copyrights (including publishing rights, neighbouring rights and other equivalent items), but only if such income is received from business operators for their operations conducted in Japan.

²⁰¹ At least this is our interpretation of the branch report for the Democratic Republic of Congo, 2.10.

companies it would be very difficult to really assess where the capital is invested. Is the capital of a holding company invested in the country of residence of the holding company or elsewhere?²⁰²

From a dogmatic perspective the second group of countries that uses generic nexus definitions is of interest. For instance, in Peru a capital gains tax is triggered if rights are sold and if there is an “economic use” of these rights within Peru.²⁰³ This is a vague criterion, but at least in Peru, there has not yet been any case law as far as it can be observed. In India, a capital gain is deemed to accrue or arise if the gain “arises, directly or indirectly, through or from any property or asset situated in India”.²⁰⁴ This broad wording has led to the dispute in the well-known *Vodafone* case in which the Supreme Court of India held that the transfer of a foreign company owning 67% of an Indian company (i.e., an indirect share transfer) is not sufficient to fall in the aforementioned nexus rule.²⁰⁵ The legislator has (retrospectively) implemented various clarifications, inter alia, stating that a capital asset “is deemed to be and is always deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the asset located in India”.²⁰⁶ One reason for such an expansion is that there is value creation within India. It was also further clarified that dividends of foreign companies do not fall under such approach, although their value might substantially stem from assets in India.²⁰⁷

This brings us to the next particular nexus problem which was also at the core of the *Vodafone* decisions in India. The question of whether the sale of shares or similar rights triggers capital gains taxation is solved differently around the world, both in countries with an enumerative list of trigger events and countries with a more generic approach. There are several countries that explicitly tax gains from the alienation of shares of a local company²⁰⁸ by a non-resident; even if it is not a real estate company and even if the shares do not belong to a permanent establishment in such a country. There is also variation between whether any share sale, or only the sale of the majority of the shares establishes tax nexus.²⁰⁹

Besides, it is a different question of what kind of transaction triggers source taxation in case there is a nexus to a jurisdiction. In particular, the question of whether an indirect sale of local assets triggers local taxation has resulted in disputes. Reference may again be made to the *Vodafone* case in India. Beyond India, indirect sales of assets are subject to income

²⁰² Similar problems arise for instance in relation to the Swiss withholding tax purposes if a foreign entity issues bonds. See section 2.3.2.

²⁰³ See the branch report for Peru, 2.10.

²⁰⁴ See the branch report for India 10.2. For the primary source see the Income Tax Act, 1961, s. 9 (1), (i).

²⁰⁵ *Vodafone International Holding BV v. Union of India* (2012) 341 ITR 1 (SC).

²⁰⁶ See the branch report for India, 10.4. For the primary source see the Income Tax Act, 1961, s. 9 (1), Explanation 5.

²⁰⁷ For more details see the branch report for India. The Supreme Court of India has rendered other decisions on the question of nexus for tax purposes (see section 2.3.5 above).

²⁰⁸ Of course, there are differences whether a local company is a company registered or incorporated under a certain law, or listed on the stock exchange. For instance, in Peru, reliance is placed on the domicile of the issuing company (see the branch report for Peru, 2.10). In Portugal, capital gains are also subject to taxation if the shares sold are those of a company effectively managed in Portugal (see the branch report for Portugal, 1.2).

²⁰⁹ For instance, the Netherlands uses the threshold of “a substantial interest in a Dutch company”. See the branch report for Netherlands, 2.8. Such a trigger event seems limited to abusive situation for the purpose of the corporate income tax.

and corporate income taxation in various jurisdictions.²¹⁰ A related interesting question is whether, in the case of an indirect sale, the whole or only a proportion of the capital gain is subject to taxation.²¹¹

The taxation of capital gains is an area where a variety of rationales meet. The focus on assets that are physically located in one jurisdiction could be linked to the benefit principle, for example, that assets have increased in value due to the protection of the local government.²¹² But as it was seen in India, the physical location of assets and the taxation of capital gains in relation to such assets could also relate to value creation occurring in such jurisdiction or, in more general terms, that the source country contributed to the value increase of an asset.²¹³ Finally, societal developments such as digitalisation or globalisation have not had a significant impact on the definition of nexus, however, fighting tax avoidance and abuse has led to both judicial but also legislative initiatives to reconsider tax nexus rules for capital gains taxation.

2.4. Summative Comment

The most important general conclusion emerging from the comparative review of both personality and territorial types of income tax nexus rules is that despite variances in the specificities of legislative design and judicial guidelines, completely arbitrary tax nexus rules are hard to identify. Overall, income tax nexus rules in the reviewed jurisdictions appear to operate against the background of a general but unstated constraint; they are not boundless or wholly divorced from some justification. The rationale for these rules is grounded in the modern nation State's spatial features of an economic and/or, at times, a social or political nature.

Several questions about coherence have arisen. For instance, there is a seeming contradiction between tax nexus regimes for dividends and royalties. In respect of dividends, we could broadly conclude that emphasis is placed on the legal framework establishing a capital market as the rationale for income tax nexus over the yield from investing in securities traded on such a market and protected by its regulators; most countries disregard the place where the underlying profit generation takes place that funds the return on investment. For royalties on the other hand, nearly all the reviewed countries do not regard the legal framework that protects and regulates immaterial intellectual property as the rationale for devising geographical jurisdictional income tax rules. Instead, the rationale underlying their tax nexus rules emphasises the location where the property is used or exploited to generate a yield (or proxies that may approximate such a location such as the debtor's place of tax residence). However, there is not a single rationale that is particularly persuasive and

²¹⁰ For instance, in Israel, the sale of shares of a foreign company may generate Israeli source gains if the majority of the value of the asset sold is attributable to assets (including shares in a subsidiary) located in Israel. The nexus rule for capital gains is focused then on determining which assets contributed the most value to a given transaction (for details see the branch report for Israel, 2.10).

²¹¹ See the branch report for Israel, 2.10, for an apportionment solution.

²¹² See for such a line of argumentation the branch report for Japan, 2.3.8.

²¹³ See in general on equity and efficiency considerations for introducing taxing rights concerning (offshore) indirect transfers, The Platform for a Collaboration on Tax, *The Taxation of Offshore Indirect Transfers - A Toolkit*, p. 17 et seq., available at: https://www.tax-platform.org/sites/pct/files/publications/PCT_Toolkit_The_Taxation_of_Offshore_Indirect_Transfers.pdf

should be followed in a consistent manner by all. The position as regards the tax nexus rules for interest-income does not fall into either category because a variety of approaches abounds. This ranges from treating interest as being geographically sourced at the place of enforcement of debtor liability, or the actual or putative place of use of interest-bearing capital, to places from which economic benefits are extracted through securitisation of debt or creditor activity.

3. VAT and/or Sales Taxes

VAT systems traditionally distinguish between the supply of goods and services. With respect to the former, it is generally decisive where the good is located at the moment of transfer to assess whether VAT is triggered. Naturally, the importing of goods is also subject to VAT. Such nexus does not seem to create fundamental problems in the assessed countries at least there are not a lot of changes to the law or specific court decisions in relation to the question of whether an asset is located in a jurisdiction or whether it is actually imported.

With respect to the sale of goods – in particular, if there is transport from the supplier to the consumer – countries need to define whether the place of supply is where the transport starts or where it ends. The former is, evidently, the common approach in most jurisdictions.²¹⁴ Further regulation might be required in very specific fields such as for the supply of natural resources and electricity.

More interesting is the question of how to define the nexus for the purpose of taxing services. Many VAT systems apply different determination factors depending on what kind of services are at hand often deviating from a general rule according to which the place of the recipient of a service is the decisive factor. These place of supply rules are nothing else than nexus definitions for VAT purposes, i.e., they determine whether it is a domestic service subject to VAT or not. For instance, specific factors may be used for services in relation to real estate, cultural, artistic, or similar services, restaurant services, or transport services.²¹⁵

Moreover, some countries might use very particular definitions of the location for specific services. For instance, according to Chinese Taipei tax law, domestic service is at hand if a foreign reinsurance company accepts reinsurance policies from domestic insurance companies.²¹⁶ Similarly, it is often stated that in case the service is provided to a fixed place of business, the place of such establishment is decisive.

The rationale behind these specific definitions is that in some cases the place of the recipient is not a persuasive proxy for the question of whether consumption happens within a jurisdiction. The latter is of course the main goal of a VAT, namely to tax domestic consumption. Deviations are as mentioned not unusual, but the place of the recipient is still very often the main proxy used in VAT laws around the world as it has proven to be a strong enforcement mechanism in business-to-business (B2B) transactions through the reverse charge mechanisms.

²¹⁴ See for instance article 32 of the VAT Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax).

²¹⁵ See, for example, article 43 et seq. of the VAT Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax).

²¹⁶ See the branch report for Chinese Taipei, 3.

There has also been case law on the question of when domestic consumption is at hand. For instance, in South Africa,²¹⁷ the Supreme Court of Appeal held that a practical approach is necessary and local consumption occurs if the recipient was a South African company, the head office was situated in South Africa and the meeting to appoint a foreign advisor and to consider and approve his recommendations was held in South Africa. In the Kenyan case of *Commissioner of Domestic Taxes v. Total Touch Cargo Holland*, the court held that:

“location where the service is provided does not determine the question of whether the service is exported or not. The test is the location (or place) of use or consumption of that service. Therefore, the relevant factor is the location of the consumer of the service and not the place where the service is performed.”²¹⁸

Besides these more traditional problems of defining a domestic supply of service, the digitalisation of the economy has led to a variety of VAT amendments across countries. The OECD reviewed whether VAT systems are fit for the challenges of an enhanced digitalisation of the economy during Action 1 of the BEPS Project.²¹⁹ That review in fact, not only concerned the question of nexus but questions of collection and the definition of the tax subject. In many countries, both before the BEPS Project and in the aftermath, VAT rules have been changed due to technological progress. However, it was often not the place of supply that needed to be changed but the enforcement mechanisms. For example, that the foreign supplier and not the recipient is subject to taxation in case of digital services – at least in the case of business-to-customer (B2C) transactions - or that a local withholding agent is responsible for levying the VAT (e.g., a financial institution).²²⁰

Some countries highlight explicit examples in which a digital service is indeed consumed locally. For instance, the Chilean VAT Act includes a presumption for domestic consumption, if at the time the services were contracted or the payments were made, at least two of the following situations concur:²²¹

- that the Internet Protocol (IP) address of the device used by the user or other geolocation mechanism indicates that it is in Chile;
- that the card, bank current account or other means of payment used for payment is issued or registered in Chile;
- that the address indicated by the user for billing, or the issuance of payment vouchers is in the national territory; and
- or that the identity module card of the subscriber of the mobile phone through which the service is received has a country code to Chile.

Other countries might use similar factors sometimes developed by the practice of the revenue agencies and not by law. India uses specific nexus rules for two kinds of services. Concerning so-called intermediary services, it is sufficient to have an Indian intermediary to trigger VAT, although the recipient might be abroad. With respect to online information

²¹⁷ See the case of *Commissioner of SARS v. De Beers Consolidated Mines Limited* (2012) 3 All SA 367 (SCA).

²¹⁸ *Commissioner of Domestic Taxes v. Total Touch Cargo Holland* (2018) eKLR, or see the country report for Kenya, B.

²¹⁹ See OECD, BEPS Project, Action 1 “Tax Challenges Arising from Digitalisation”.

²²⁰ See for example the regulation in Colombia (the branch report for Colombia, 3).

²²¹ See the branch report for Chile, 3.

and database access or retrieval (OIDAR), the reverse mechanism does not apply if the provider in B2C situations is abroad.²²²

The interpretation of the constitutional US commerce clause by the Supreme Court of the United States in the case of *South Dakota v. Wayfair* for sales tax purposes concerns the related question of what domestic consumption means. This case was challenging South Dakota's application of its sales tax to internet retailers who sell from a distance to buyers located in South Dakota. The physical presence standard was thereby challenged in the context of modern electronic (e)-commerce, established by the previous Supreme Court decision in *Quill Corp. v. North Dakota*.²²³ Traditionally, federal states could only require out-of-state retailers to collect sales tax if they had a physical presence. According to the *Wayfair* decision, however, a certain quantity of transactions with purchasers within the state is sufficient to meet the nexus requirement.²²⁴ The decision had a vast impact because all federal states that have a sales tax implemented a new nexus threshold based on sales and/or transaction volume alone.²²⁵ As highlighted by the United States branch report, this development has the effect that taxpayers may meet the nexus threshold for sales taxes but not for income tax purposes.²²⁶

In the future, it seems likely that there will be more cases in which VAT laws will deviate from the place of the recipient as a proxy to ensure that domestic consumption is subject to taxation and less competitive distortions occur. This is not only because consumers become more mobile but also because the supply of services requires less physical presence. Therefore, we assume new nexus definitions or changes will emerge requiring foreign suppliers to levy VAT in B2C situations. This seems a logical consequence of enhanced automation and an enhanced digitalisation of the economy.

4. Real Estate Taxes

This section considers how real estate taxes (or taxes on immovable property), other than income and/or capital gains taxes, define their jurisdictional reach. *Prima facie*, the inclusion of these types of taxes in the study might be surprising as the existence of real estate within a State's territory is per se "the" nexus.

In fact, the comparative analysis shows that real estate taxes such as real estate transfer taxes may, for instance, be triggered by factors which have, at first glance, no relation to the physical location of the real estate. This is in particular true with respect to a transfer of the economic interest in real estate by, to, or between non-residents.

There is a lot of variation in the types of legal rights, and rights representing the economic interests in real estate and/or immovable property that may establish a territorial

²²² See the branch report for India, 12, where there is even a third specific case on online gaming where the law foresees deviations, 12.5.

²²³ *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)

²²⁴ *South Dakota v. Wayfair, Inc.*, 585 U.S. ---- (2018), 22-23.

²²⁵ The branch report for United States refers to the following overview: Sales Tax Institute, Economic Nexus State by State Chart, available at: <https://www.salestaxinstitute.com/resources/economic-nexus-state-guide>

²²⁶ See the branch report for the United States, 20.1.7. A different nexus might apply for federal income tax purposes.

link. Furthermore, an incoherence in the jurisdictional rules for various layers of property taxes (and income taxes) that can apply to the same ownership structure in real estate can be observed, as will be discussed.

Of the reviewed countries that reported on property transfer taxes, the minority's jurisdictional rules concern only direct or derivative legal rights in the property and do not extend to indirect rights or other immaterial interests representing an economic stake in real estate.²²⁷ This may be due to land ownership by foreigners being regulated, as is the case in Chinese Taipei.²²⁸

Most reviewed countries include the transfer of some form of economic interest as a connecting factor.²²⁹ Such an inclusion is by no means consistent for all types of property related taxes one may find in these countries.²³⁰

Germany and Portugal appear to have the most elaborate jurisdictional rules to capture economic interests in real estate for property transfer tax purposes. The rationale for the nexus rules used in Germany's real estate transfer tax is to accurately measure the ability to pay expressed in the use of income (acquisition of real estate).²³¹ As is evident from the detail of these jurisdictional rules, they are highly elaborate to capture an economic link as well as to stop avoidance stratagems that involve the intermediation of (foreign) entities in ownership chains.²³² Portugal's property transfer tax includes a jurisdictional rule to

²²⁷ For example, Argentina's provincial real estate tax applies to indirect and derivative legal rights such as usufructuaries, holders of surface rights, and possessors (see the branch report for Argentina, 4). Direct legal ownership is used as the only connecting factor in Chile, Colombia, the Czech Republic, Denmark, Ireland, and Sweden.

²²⁸ See the branch report for Chinese Taipei, 4.

²²⁹ See the following branch reports: Australia where the Landholder Duty applies to an entity with an indirect interest in real estate that includes shares or units in another entity owning land, or it is associated with another entity that owns land (a linked entity); Austria for the real estate transfer tax that is levied on the transfer of shareholdings in a partnership/corporate entity holding Austrian real estate, with the economic share test being whether one party eventually gains control over the real estate holding company; Brazil for a municipal real estate tax applicable to the transfer of economic interest, also between non-residents, when "the economic ownership added to the acquirer's preponderant activity in the real estate market"; Canada for provincial or municipal land transfer taxes that may also apply to indirect interests; France for a real estate transfer tax that is levied on shares in non-resident entities that derive more than half their value from real estate in France; the Netherlands for a similar regime as France; South Africa for Transfer Duty on property-rich shares that derive more than 50% of their value from local immovable property regardless of the residence of the shareholder; and Switzerland for cantonal property transfer taxes applicable to economic changes of ownership, such as when power of disposal over real estate property changes hands.

²³⁰ None of the reviewed countries that reported the existence of multiple layers of real estate taxes that apply to the same property, reported that the nexus rules were harmonised. For example, France has four layers of property taxes, but only one covers transfer of economic ownership (see the branch report for France, 4).

²³¹ See the branch report for Germany, 4.

²³² Ibid. Germany's real estate transfer tax legislation (the *Grunderwerbsteuergesetz* – "GrEStG") includes three categories of jurisdictional rules of this nature: (1). s. 1 (2a) GrEStG covers changes of partners in partnerships with domestic real estate when the shareholder structure changes by at least 90% within 10 years; (2). S. 1 (2b) GrEStG covers the change of shareholders in corporations with domestic real estate under the same conditions. Indirect changes in the shareholder structure, including in non-resident entities, are also covered; (3). S. 1 (3) GrEStG contains a special provision covering mergers of shares when more than 90% of the shares in a company holding domestic real estate are directly or indirectly combined in the hands of one purchaser.

capture the acquisition of participation units in privately subscribed closed-end property investment funds, regardless of the location of the management company.²³³

5. Natural Resources, Environmental and Energy Taxation

This section considers a family of taxes that broadly concerns negative externalities of human conduct that harm the natural environment or compensate for the loss of finite resources.

5.1. Hard Rock Minerals and Hydrocarbon Taxes

Like taxes on real estate, it may appear obvious that the place where natural resources such as hard rock minerals or hydrocarbons used as energy sources are extracted, provides the territorial link for the imposition of special sector type taxes. And, indeed, this is often the case where such taxes were considered by branch reporters. Interesting nexus rules of this nature show that sometimes the geographical nexus must be more precise than the country of extraction, for example, in respect of natural resources located in contiguous zones²³⁴ or for countries with federal fiscal territories.²³⁵ Another example from France shows how extra-territorial reach may occur for a rule type that by nature appears to avoid territorial extension.²³⁶

There are jurisdictional rules for taxes on the extraction of hard rock minerals or hydrocarbons that concern not only the place of extraction, but also related activities that

²³³ See the branch report for Portugal, 3.2. In addition to the rule for property funds, the *Imposto Municipal sobre as Transmissões Onerosas de Imóveis* is levied on economic interests such as the acquisition of shares or quotas in general, limited, private or public limited companies, when cumulatively: (1) the value of the company's assets derive their value, directly or indirectly, from more than 50% of immovable property, taking into account the balance sheet value or, if higher, the taxable asset value; or (2) one of the shareholders becomes entitled to at least 75% of the share capital, or the number of shareholders is reduced to two married or *de facto* partners; or (3) a redemption, capital increase or reduction takes place that results in one of the holders, or two holders in privately subscribed closed-end property investment fund, who are married or unmarried, acquiring at least 75% of the participation units representing the fund's assets.

²³⁴ For example, Argentina's hydroelectric energy royalty applies to reservoirs located in bordering rivers between provinces, or that cross more than one of them, which requires that the nexus rule is expressed as a percentage to ensure equitable distribution. For similar reasons, the locations of individual mines and wells establish nexus for levies under Argentina's mining law or hydrocarbon royalties (see the branch report for Argentina, 5). Similarly in Chile, the location of individual mines or deposits establishes the link for the Mining Activity Specific Tax (*Impuesto Específico a la Minería*) (see the branch report for Chile, 5). Similar rules are found in Australia, Brazil, and the Czech Republic.

²³⁵ In Brazil, the Constitution entitles the federal states to a portion of the yield from the exploitation of petroleum or natural gas, water resources for the generation of electric power and other mineral resources in the State's territory. This constitutional guarantee therefore directly impacts how jurisdictional rules are designed to assert taxing rights between the federated territories (see the branch report for Brazil, 5).

²³⁶ In France, since 1810, a fixed monetary rate tax is charged on the tonnage of categories of minerals extracted within the country but with an additional nexus rule for coal extracted in a foreign territory and "brought to light" by wells and installations located in France (see the branch report for France, 5.1).

are considered to indicate a sufficient territorial link.²³⁷ Some of these nexus rules either conjoin or dissociate the place of extraction with the place of first sale or transfer of a mineral, which means the country of extraction and the country of first sale might not be the same.²³⁸

5.2. Taxes Addressing Environmental Degradation and Carbon Emissions

The jurisdictional rules for taxes seeking to address environmental degradation, or those taxes specifically aimed at achieving a state of net-zero carbon emissions, revealed some commonality in the design of connecting factors. Further study in this field is warranted to understand the reasons why ostensibly, these factors are not harmonised. For example, polluter activities developed by the Intergovernmental Panel on Climate Change²³⁹ may provide common ground for rule design for Carbon Taxes. None of the branch reporters could find evidence that any international standards were referenced for jurisdictional aspects of national carbon taxes or other taxes with similar aims.

5.2.1. Carbon Emission Taxes

Broadly speaking, the place within a country where any person ‘pollutes’ by releasing CO₂ emissions into the atmosphere is considered a sufficient link to impose a carbon tax. For example, in South Africa, the Carbon Tax is charged on any person who “conducts an activity in [South Africa] resulting in greenhouse gas emissions”.²⁴⁰

In Chinese Taipei, any owner, user, or manager of a local greenhouse gas emission source (*pai fang yuan*) is charged with carbon fees.²⁴¹

A similar but more indirect approach is described by the branch reporters for Austria in respect of a domestic CO₂ emissions certificate system:

“The key nexus criterion established by the Austrian carbon tax system is the place at which the energy resources leading to the CO₂ emissions are put into circulation, i.e. in case of mineral oils where they are made available for use and with regard to gas and coal where they are shipped to or used. If that place is Austria, then the party causing

²³⁷ For example, levies under Denmark’s Hydrocarbon Tax Act apply also to any non-resident “engaged in” listed activities such as “the preliminary investigation, exploration, and extraction of hydrocarbons and related activities, including the construction of pipelines, supply services, as well as ship and pipeline transportation of extracted hydrocarbons” (see the branch report for Denmark, 5).

²³⁸ For example, Spain’s excise duty on coal is levied when the first sale or supply of coal is made within the Spanish territory after the extraction, import, or intra-Community acquisition of coal with the result that “the tax does not apply when coal is extracted but when the first supply takes place” (see the branch report for Spain, 5). In South Africa, the opposite applies under the Mineral Petroleum and Resources Royalty, which is charged “in respect of the transfer of a mineral resource extracted from within” the country with “transfer” being defined to mean “disposal” (e.g. sale). The first sale may take place outside of the country but the value of such a transfer merely determines the tax base and therefore extraction within South Africa is the principal jurisdictional link that results in the mineral royalty applying to any first sale, wherever concluded.

²³⁹ The United Nations body for assessing the science related to climate change.

²⁴⁰ Section 3 of the Carbon Tax Act, 15 of 2019, and see the branch report for South Africa, 5.

²⁴¹ See the branch report for Chinese Taipei, 5.

the energy resource to be placed on the market has to purchase the respective emissions certificate”²⁴²

Some countries use indirect proxies to establish a territorial link pointing to a polluter being geographically present when levying taxes aimed at lowering CO₂ emissions. In Denmark, the jurisdictional link for a congestion tax aimed at lowering carbon emissions from vehicles is based on the registration of the vehicle in Denmark.²⁴³ In contrast, Sweden’s congestion tax is levied on the owners, both resident and non-resident of vehicles when driving on certain roads in large cities.²⁴⁴ Taxes on air travel provide further examples. These taxes can aim to encourage consumers to choose more environmental-friendly ways of travel. Thus, for example, in the Netherlands, an aviation tax (*vliegbelasting*) is charged to air operators with reference to the number of passengers departing by airplane from an airport located within the country regardless of the residence of a passenger.²⁴⁵

The European Union’s Carbon Border Adjustment Mechanism (CBAM) introduced in 2023 continues the theme of basing tax nexus rules for this family of taxes on orthodox territorial links. It is imposed in the traditional form of an import duty on listed goods originating in third countries upon their importation into the customs territory of the European Union.²⁴⁶ The importer who must be a registered CBAM declarant is liable for the duty. The stated aims for the CBAM are:

“to prevent the risk of carbon leakage, thereby reducing global carbon emissions and supporting the goals of the Paris Agreement, also by creating incentives for the reduction of emissions by operators in third countries”²⁴⁷

Because the CBAM aims to incentivise behaviours beyond the territory of European Union member states it may look like a variant of the territorial base, namely the so-called ‘effects doctrine’, which refers to situations when State jurisdiction is founded over a foreign party based on conduct outside a State’s borders that has consequences within its borders. However, we are of the view that because the CBAM takes the form of a traditional duty on goods paid by an importer, the nexus is not strictly effects based but founded on the action of importing a good into the customs territory. This is, however, a thin line. It could have been a case of the effects doctrine if, say, the nexus was based on the manufacture of carbon embedded goods outside the territory of the European Union by a subsidiary of an EU headquartered corporate group.

5.2.2. Other Taxes Focussing on Environmental Harm

There are other substances apart from CO₂ emissions that degrade the environment. The comparison between the reviewed countries unsurprisingly revealed that the place where polluting activity is conducted is sufficient to assert a jurisdictional link (regardless of who the polluter may be) for taxes that aim to stem environmental harm by other

²⁴² See the branch report for Austria, 5, with reference to the *Nationales Emissionszertifikate Handelsgesetz 2022*.

²⁴³ See the branch report for Denmark, 5.

²⁴⁴ See the branch report for Sweden, 5.

²⁴⁵ See the branch report for the Netherlands, 5.3. A similar regime applies in Sweden.

²⁴⁶ Articles 1.1 and 2.1 of Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism.

²⁴⁷ Ibid.

harmful emissions or substances. In some of the reviewed countries, the territorial link is extended beyond the place of releasing emissions to include other localised activities such as the place where harmful matter is produced,²⁴⁸ deposited,²⁴⁹ sold,²⁵⁰ or even irregularly possessed.²⁵¹ The importation²⁵² or export²⁵³ of harmful matter often triggers jurisdiction for these types of taxes too.

5.3. Taxes on Energy Consumption

Taxes on energy consumption tend to be founded on proxies to establish where the place of consumption might be.

In several of the reviewed European Union member states, branch reporters indicate that jurisdictional rules for excise taxes represent an origin or a destination approach to nexus. Origin based consumption proxies focussed on the place where energy goods are released as free circulating products within a country.²⁵⁴ On the other hand, destination focussed consumption proxies require identification of the location of the actual consumer (the end user) of energy products.²⁵⁵

²⁴⁸ For example, in Chile the so-called Tax on Polluting Fixed Sources is, as of 2023, levied on air emissions of particular matter including nitrogen oxides, sulphur dioxide and carbon dioxide when 'produced within' the country (see the branch report for Chile, 5). Similarly in Spain, the fluorinated greenhouse tax is levied if the place of manufacture is in Spain. Moreover, this Spanish tax is levied on the import, intra-Community acquisition, or irregular possession of fluorinated greenhouse gases (see the branch report for Spain, 5).

²⁴⁹ In Sweden waste tax is levied on any waste 'deposited' in Sweden (see the branch report for Sweden, 5). In the Netherlands, the waste disposal tax (*afvalstoffenbelasting*) is charged on waste originating in the Netherlands. The tax is collected from owners or operators of a waste processing plant with a landfill site or a waste incineration plant, as well as from exporters of waste to foreign landfill sites or incineration plants (see the branch report for the Netherlands, 5.3). These taxes aim to encourage recycling.

²⁵⁰ For example, Sweden imposes a tax on pesticides if they are sold or otherwise used within Sweden by persons producing or transferring them to Sweden or receiving them from abroad. Moreover, the Swedish tax on chemicals in electronics and on plastic bags is levied when such products are sold, delivered, produced, or imported (see the branch report for Sweden, 5).

²⁵¹ See the Spanish fluorinated greenhouse tax (note 248).

²⁵² See, for example, the Spanish fluorinated greenhouse tax (note 248) and the Swedish tax on pesticides and tax on chemicals in electronics and on plastic bags (note 250).

²⁵³ See the waste disposal tax in the Netherlands (note 249).

²⁵⁴ In France, an excise duty on energy is charged on a long list of products such as oil, gas, methanol, biodiesel, or electricity when such products are 'released for' consumption within France (see the branch report for France, 5.2). In the Netherlands, an energy tax (*energiebelasting*) is levied upon delivery of natural gas or electricity through a gas or electricity connection to immovable property situated in the Netherlands (see the branch report for the Netherlands, 5.3). In Spain, a tax introduced in 2012 is levied on the production within, or the incorporation of electricity into the energy grid in Spain (see the branch report for Spain, 5).

²⁵⁵ In the Czech Republic excise duty on the distribution of natural gas is charged if the place of delivery of the gas to the end user, or to a distributor supplying the end user, is within the country (see the branch report for the Czech Republic, 5).

5.4. Summative comment

What emerges from the comparative review of jurisdictional rules found in natural resources, environmental and energy consumption taxes is that these rules are largely rooted in orthodox territorial links. Furthermore, in the domain of taxes addressing global concerns about degradation of the environment and climate change, no fiscal instrument as yet embodies universal or quasi-universal jurisdictional rules (e.g., jurisdiction based in treaty regimes allowing bystander States to assert jurisdiction in the absence of a territorial link – see section 1 above).

6. Financial Transfer Taxes

Most of the analysed countries do not have a financial transfer tax. Those countries with financial transfer tax have chosen rather different ways on how to design it, and, depending on the main goal of such a tax, the nexus will be different.

One type of financial transfer tax applies only if the securities are issued by a domestic company. For instance, Finland applies an issuance principle according to which the financial transfer tax applies to securities issued by a Finnish entity (except for publicly traded securities).²⁵⁶ Therefore, transferring foreign securities does not trigger the financial transfer tax even if all other parties involved are residents of Finland (or at least a branch of a financial institution in Finland). Moreover, the transfer tax is only levied if one of the parties is resident in Finland.²⁵⁷ Spain has a similar system and according to the Spanish branch reporter using the issuance principle aims at minimising the risk of relocation of financial intermediaries abroad.²⁵⁸

India, on the other hand, applies a financial transfer tax on securities that are listed on stock exchanges in India.²⁵⁹ South Africa combines both approaches and levies a financial transfer tax if either the shares are issued by a company incorporated in South Africa or are listed on the South African stock exchange.²⁶⁰ France, in simplified terms, levies a financial transfer tax if the shares of a French company are sold, or if a foreign company is sold in case a deed is executed in France. Moreover, there is a specific tax for shares of French companies listed on a regulated market with a market capitalization of more than EUR 1 billion.²⁶¹

A rather different approach is to levy a transfer tax if a domestic intermediary is involved. For instance, according to Brazilian law, the financial transfer tax is levied if the financial institution is part of the national financial system.²⁶² In the insurance industry, the tax is triggered if the insurance company is part of the national insurance system.²⁶³ Or in

²⁵⁶ Section 15a of the Transfer Tax Act. For details see the branch report for Finland, 6.1.

²⁵⁷ See branch report for Finland, 6.1. There is, however, a decision by the Supreme Administrative Court (KHO 2019:156) according to which the financial transfer tax will be triggered if foreign entities were established only for the purpose of avoiding the financial transfer tax.

²⁵⁸ See the branch report for Spain, 6.1.

²⁵⁹ See the branch report for India, 15.A.

²⁶⁰ See the branch report for South Africa, 6.1.

²⁶¹ For further details see the branch report for France, 6.1.

²⁶² Law no. 4,595/1964. For further details see the branch report for Brazil, 6.1.

²⁶³ Decree-law no. 73/1966. For further details see the branch report for Brazil, 6.1.

Switzerland, the financial transfer tax requires that a domestic securities dealer either acts as an intermediary or be a party to a securities transaction.²⁶⁴

Another, but similar approach was chosen by the Belgium legislator. According to article 120 of the *Code de droits et taxes*, diverse stock market transactions are subject to a financial transfer tax if these transactions are “concluded or executed in Belgium”. Obviously, further explanations are necessary of what “concluded or executed in” means. It includes situations in which a professional Belgium intermediary is involved, the transaction is concluded in Belgium, for instance, at Euronext Brussels, or where the intermediary not being established in Belgium operates under the freedom to provide service according to a published list of the FSMA website.²⁶⁵ Moreover, since 2017 the nexus is even broader because transactions by Belgian residents are also covered if a foreign intermediary is involved but the securities are traded via accounts of a Belgian resident. In this case, it is the resident’s obligation to pay the tax.²⁶⁶

Financial transfer taxes can also function like foreign currency controls. For instance, according to the law of the Democratic Republic of Congo, a tax on outgoing money transfers is levied in case no bank account is involved.²⁶⁷ In Peru, a financial transfer tax is levied in general on all debits and credits made (including some cash transactions) with domestic financial institutions. Moreover, transactions through other organised payment systems can be covered as well.²⁶⁸

Disputes with respect to the various nexus definitions have been highlighted in the branch reports. Prima facie there should be less disputes as financial transfer taxes seem to be rather formal taxes, such as when it is sufficient that a company is registered or that the seat of an intermediary is in a certain country. But even when they are formal, issues arise whether there is a sufficient nexus from a tax law perspective. For instance, the Swiss Federal Supreme Court²⁶⁹ had to deal with the question of when there is a domestic intermediary involved in a transaction between two foreign parties: A Swiss pharmaceutical group entered into negotiations to acquire a publicly traded United States company. For reasons related to United States law, a local US subsidiary was incorporated to carry out the acquisition. This meant the seller, the sold company, and the buyer were foreign persons. Nevertheless, the Swiss tax authorities held that the engagement of three managers of the Swiss top holding company during the contract negotiations was sufficient so that the parent company qualified as an intermediary in the transaction, meaning that the financial transfer tax nexus was satisfied.²⁷⁰ Other disputes arose in the European Union as the United Kingdom claimed that the proposal for a financial transfer tax in eleven member states of the European Union was infringing international law as there was not a sufficient nexus for levying such a tax.

²⁶⁴ The tax is also triggered if an intermediary in Liechtenstein is involved. For details see the branch report for Switzerland, 6.1.

²⁶⁵ See the branch report for Belgium, e), para. 41.

²⁶⁶ This extension of tax jurisdiction was challenged in court. The question was mainly whether it was discriminatory. The Belgium Supreme Court (C.C., 8 November 2018, no. 149/2018) referred the question to the Court of Justice for the European Union (ECJ). However, the ECJ did not see an infringement (*Anton van Zantbeek VOF v. Ministerraad*, ECJ C-725/18).

²⁶⁷ See the branch report for Democratic Republic of Congo, 6.1.

²⁶⁸ For details see the branch report for Peru, 6.1.

²⁶⁹ FSC, 2C_638/2020 (25 February 2021).

²⁷⁰ See Peter Hongler & Ariane Menzer, Swiss Federal Supreme Court on Nexus for Financial Transaction Tax, *Tax Notes International* 2021, 1659 et seq.

However, due to procedural reasons, the Court of Justice of the European Union did not in detail deal with the international law limitations for the design of financial transfer taxes.²⁷¹

To conclude, the various definitions of nexus align with the purpose of the reviewed financial transfer taxes. However, the purpose can be very different. A financial transfer tax could, for instance, aim at taxing the transfer of local companies based on registration (the issuance principle), or it could aim to tax transactions on the local market (e.g., a stock exchange but also through a broader concept such as domestic intermediaries). The less formal the nexus is, the more disputes might arise. For instance, it might be a lot more challenging to assess whether there is a local intermediary compared to whether shares are issued by a locally registered company or in respect of shares listed on a local stock exchange.

7. Stamp Duty (incl. Taxes on Insurance Premiums)

Not all countries have stamp duty and/or taxes on insurance premiums. As the name indicates, one goal of stamp duty is to levy a tax if documents were “stamped” by governmental bodies. Therefore, it can, *prima facie*, be argued that a stamp duty is the payment for governmental service – i.e., the benefit of credibility that a specific document was approved by the government or a government official such as a notary. In Chile, for instance, the roots of the current stamp tax lie in colonial times with the use of sealed paper and the payment of the *alcabala*. The latter was a sales tax of the Spanish Crown during colonial times.²⁷²

The nexus for stamp duty purposes can vary significantly. For instance, Danish stamp duty is levied in case of registration in different Danish public registers. The most obvious is a cadastral register showing both ownership of, or a mortgage registered over immovable property but also registration of other pledges (e.g., in vehicles or aircraft) is subject to stamp duty.²⁷³ Stamp duty can also involve the registration of deeds or similar documents.²⁷⁴ Alternatively, in some countries, it is only levied on real estate transactions.²⁷⁵

An interesting example is Austria. The stamp duty is not triggered by the fact that a legal transaction is entered into a local register, but simply by signing some pre-defined contracts such as lease contracts for business premises or assignment of receivables.²⁷⁶ The stamp duty is not only triggered if one of the parties is Austrian, but also if the contract is signed abroad and there is a nexus to Austria such as may be the case of a lease agreement for assets located within Austria.²⁷⁷ Finland on the other hand, for instance, levies a stamp tax on open letters by which an honorary title is conferred.²⁷⁸

²⁷¹ ECJ, 30 April 2014, C-209/13. For a comprehensive analysis see Joachim Englisch, John Vella & Anzhela Yevgenyeva, The Financial Transaction Tax Proposal Under the Enhanced Cooperation Procedure: Legal and Practical Considerations, *British Tax Review* 2023, 240 et seq.

²⁷² For details see the branch report for Chile, 6.2.

²⁷³ For the full list see the branch report for Denmark, 6.2. A similar approach can be found in Sweden. See the branch report for Sweden, 6.2.

²⁷⁴ See e.g. the branch report for Belgium, c) paras 37, 38.

²⁷⁵ See the branch report for Colombia, 6.2.

²⁷⁶ See § 33 *Gebührengesetz* 1957.

²⁷⁷ For details see the branch report for Austria, 6.2.

²⁷⁸ Section 1 of the Title Tax Act.

A different nexus is applied in India, where it might vary across various federal states. In general, it is triggered if specific documents are “executed within” India, or in the case of foreign instruments, if the document is “received in” India.²⁷⁹ Similarly, in the Republic of Korea, the stamp duty is triggered if specified documents were prepared in the country, but also if the place of acceptance is there.²⁸⁰ The place of execution of documents as connecting factor is based on British stamp duty legislation, which was a model for several common law jurisdictions.

As it is highlighted by the Portuguese branch reporters, their country has a rather exotic stamp duty. It dates to 1660 and is levied on specified events that take place in the national territory. The latter understood in a broad manner. The branch report provides some examples such as:

“the place of payment or negotiation of credit securities, the place of payment of interest, or the place where the legal effects are verified, i.e., where documents, legal acts or agreements issued or concluded outside national territory are to be presented for any legal purpose”.²⁸¹

In Spain, the nexus is defined as official documents, which are ‘formalised in Spain’ but also in case they have an economic or legal effect in Spain.²⁸² A similar and interesting example can be found in Turkey. Its stamp duty applies, on one hand, to documents signed in Turkey, as well as to the documents signed abroad in the following situations:

- are presented to governmental agencies within Turkey;
- serve as a foundation for assignment and endorsement transactions that take place in Turkey; or
- their provisions are benefited from in Turkey by any means.

The latter situation has caused quite some disputes in Turkey, as can be seen in court decisions. The Council of State (the appellate body in the judicial system), held the following:

“Each paper to be subject to stamp tax is an instrument granting rights to its parties or burdening them with obligations and liabilities, therefore revealing the legal status of the parties or providing an opportunity for evidence. Benefiting from a provision of such papers may be described as utilizing it in connection with any legal, commercial, or similar purpose and bringing into force the rights and liabilities specified in the agreement. The taxable event occurs as a consequence of bringing into force in Turkey the paper issued abroad.”²⁸³

According to the Turkish branch report, by using such an approach, the court has adopted “the broadest interpretation” of the term benefited from a contract or a provision.²⁸⁴ Some countries apply the stamp duty on documents that were issued within the territory. This, for

²⁷⁹ See the branch report for India, 15.9.

²⁸⁰ See the branch report for the Republic of Korea, 6.2.

²⁸¹ See the branch report for Portugal, 5.1.

²⁸² See the branch report for Spain, 6.2.

²⁸³ Translation by the Turkish branch reporter – see the branch report for Turkey, 6.2.

²⁸⁴ See the branch report for Turkey, 6.2.

instance, is not only the case in Chinese Taipei,²⁸⁵ but also in Switzerland, where an issuance stamp duty is triggered, *inter alia*, on the issuance of shares and similar participation rights if the company issuing the shares is resident in Switzerland.²⁸⁶

It can be argued that some of these taxes are fees (and not taxes) depending on the categorisation as the amount of the tax might not go beyond the service received from the government. For instance, in the Czech Republic, there are stamp duties, *inter alia*, on services by domestic courts.²⁸⁷ These could also be understood as fees. The same is true for many notary fees.

It is not surprising that the logic behind most nexus definitions for stamp duty purposes is the benefit principle in the sense that you pay a “tax” to benefit from public authority such as the credibility of a registration into a cadastral register or simply for the work by the notary or another public body that certifies authenticity of documents and signatories. These stamp duties that use a link to direct benefits of the local law or law officers do not seem to create uncertainty about sufficient nexus. However, other broader approaches such as the Turkish ‘benefitted from a contract or a provision in Turkey’ can raise a variety of disputes. Moreover, in some instances, the question of whether jurisdiction is excessive (*i.e.*, not meeting the genuine link doctrine) for stamp duty purposes was also raised in some legal proceedings.²⁸⁸

Particular questions have been discussed in relation to stamp duty (or other taxes) on insurance premiums. In the European Union, member states are allowed to tax insurance premiums with respect to locally situated risks.²⁸⁹ Therefore, it is not surprising that, for example, according to the Austrian Insurance Tax Act, the payment of insurance premiums is in simplified terms subject to insurance tax if: (1) the insurance covers real estate and buildings located in Austria or (2) cars registered in Austria (3) but also if the insured person has its domicile or habitual place of abode in Austria.²⁹⁰ Similar laws can be found in many EU member states.²⁹¹ In Australia, there are statutory source rules according to which insurance with a foreign insurer is subject to stamp duty in case a property situated in Australia is insured against an event occurring only in Australia with a non-resident insurer. The same is true if an agent or representative in Australia of the insurer was in any way instrumental in

²⁸⁵ See the branch report for Taipei, 6.2.

Residency is understood in a formal sense. See the branch report for Switzerland, 6.2.

²⁸⁷ See the branch report for the Czech Republic, 6.2.

²⁸⁸ In two decisions by the Austrian Supreme Administrative Court, it was held that claiming a taxing right is not legitimate if there is neither a personal nor territorial link. However, the court held in both cases that “drawing up of the stamp duty relevant deed in Austria (although the transaction concerned shares in a German limited liability company) established a sufficient territorial connection” (the branch report for Austria, 1).

²⁸⁹ Article 157(1) of the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335, 17.12.2009 has the following wording: “1. Without prejudice to any subsequent harmonisation, every insurance contract shall be subject exclusively to the indirect taxes and parafiscal charges on insurance premiums in the Member State in which the risk is situated or the Member State of the commitment”. This was highlighted in the branch report for Finland, 6.2.

²⁹⁰ The branch report for Austria, 6.2. The tax is also triggered if certain traveling risks are insured, and the insurance contract was concluded in Austria.

²⁹¹ See *e.g.* the branch report for the Netherlands, 6.2.2. The German Federal Fiscal Court has ruled that taxing a foreign insurer is not unconstitutionally as it does not lead to a structural enforcement deficit although the taxpayer might not be subject to the German tax supervisions (see BFH of 11 March 1992, II R 129/88, Federal Tax Gazette II 1992, 707). For details see the branch report for Germany, 5.1.

inducing the entry into that contract.²⁹² Extending the stamp duty obligation also to foreign insurers as it was legislated in Switzerland in the 1970s aims at ensuring fair competition between foreign and domestic suppliers.²⁹³

8. Inheritance Taxes

With respect to inheritance and gift taxes,²⁹⁴ personal and other links to a country are used to justify taxation. Concerning personal links, it is not surprising that many countries apply their inheritance taxes in case a donor or testator is resident in their country. Japan applies a combination of the place of residency of the deceased and the beneficiary, by also looking at whether the two have been resident in Japan in the year before the death. Citizenship may also play a role in the final determination of whether the inheritance tax is applicable. Therefore, depending on the combination (e.g., residency of the deceased and the beneficiary including nationality) a sufficient nexus exists for the Japanese inheritance and gift tax to be triggered.²⁹⁵

Interestingly, citizenship plays a role in other countries as a justifying factor as well. This is true for the United States as it applies its estate tax, inter alia if the deceased has US citizenship,²⁹⁶ but also in Denmark, an estate duty may be levied if the deceased is a Danish citizen or even a former Danish citizen.²⁹⁷ Moreover, other countries might apply an inheritance tax if the beneficiary is a resident of a country.²⁹⁸

Besides these personal links, many States apply their inheritance tax if local real estate is transferred between foreign persons. Moreover, there are broader nexus definitions similar to the ones used for capital gains tax purposes.²⁹⁹ For instance, in some countries, the inheritance tax is levied in case movable assets belonging to a local permanent establishment are transferred or for instance if a company is transferred, the value of which is mainly related to immovable property in a country.³⁰⁰

Even a broader nexus definition is used in France as assets situated in France are subject to inheritance taxation if both the deceased and the beneficiary are non-residents. This requires a more detailed legal description of what “situated in France” means. It does not only include real estate or business assets in France (“*fonds de commerce*”) but also, for instance,

“claims on a debtor domiciled in France, securities (*valeurs mobilières*) issued by the French State, a French public-law entity or a company whose registered office or place

²⁹² See the branch report for Australia, 6.2.

²⁹³ See the branch report for Switzerland, 6.2.

²⁹⁴ The focus in the following is on inheritance tax. Of course, gift and inheritance taxes often go hand in hand.

²⁹⁵ See the table of potential combinations in the branch report for Japan, 6.1.

²⁹⁶ See the branch report for the United States, 17.

²⁹⁷ See the branch report for Denmark, 6.4, also highlighting some exceptions.

²⁹⁸ For instance, this is the case in Finland and in France. See also the design of the German inheritance and gift tax in the branch report for Germany, 5.2.

²⁹⁹ See above section 2.3.8.

³⁰⁰ This is, for instance, the case for the Finnish gift tax (see the branch report for Finland, 6.7, referring to s. 18 of the Inheritance and Gift Tax Act). In Switzerland, the practice of the cantons in this regard is not harmonised (see the branch report for Switzerland, 6.4). See also s. 121 of the German Valuation Act (the *Bewertungsgesetz*).

of effective management is located in France as well as patents and trademarks licensed or exploited in France.”³⁰¹

Similarly, South Africa applies its inheritance tax to non-residents if the asset is situated in South Africa, attached to a business presence in South Africa, or a right registered or enforceable in South Africa or in a South African Court.³⁰²

Particular interesting observations from a historical perspective were made by the Irish reporter. Under the Irish inheritance tax regime before 1976, the tax was triggered if either the domicile of the deceased or the location of the asset bequeathed was located in Ireland. Such an approach is derived from international private law. The purpose of the latter has been to avoid conflicts of competencies.³⁰³ Accordingly, for international private law purposes the following assets have been considered to be in Ireland:

“with shares being located where the share register is kept, debts being located in Ireland if the debtor is resident in Ireland or the debt is legally enforceable in Ireland, goodwill being located in Ireland if the business is carried on in Ireland and intellectual property such as trade marks, patents, etc being located where they are registered. [footnotes omitted].”

However, Ireland has changed its approach by the end of the last century and does not anymore rely on “domicile”, but on residency. It was highlighted by the Minister of Finance that this would ensure that

“an Irish resident who has lived here all his or her life” could not avoid “any liability on any gift or inheritance irrespective of its magnitude, provided the disponent is non-Irish domiciled and the assets given are foreign, for example, property located abroad or foreign currency assets.”³⁰⁴

In several jurisdictions, nexus definitions have been broadened in particular to counter avoidance schemes through the relocation of individuals to other jurisdictions.³⁰⁵ For instance, an extension can be achieved by also applying the inheritance tax if the beneficiary lives in a country or also if the death occurs within a certain time period after a person has left the country.³⁰⁶

Provincial inheritance and wealth transfer taxes are rare, but a tax imposed by the province of Buenos Aires in Argentina is noteworthy because its extra-territorial reach has caused disputes. The tax applies to gratuitous transfer of any wealth for no valuable consideration (inheritances, bequests, gifts, and any other transmission that involves equity enrichment for no valuable consideration) situated within the province. The tax applies to shares of Argentine companies owned by foreign shareholders, which has been the subject

³⁰¹ See the branch report for France, 6.3.2.

³⁰² See the branch report for South Africa, 6.4.

³⁰³ See the branch report for Ireland, 6.4.

³⁰⁴ Dáil Debates, Budget Statement, 1999, 1 December 1999.

³⁰⁵ See e.g. the branch report for Japan, 6.1.

³⁰⁶ For instance, the Netherlands deems a person to be resident in the Netherlands if she has left the country in the past ten years. But such a rule only applies to Dutch citizens (see the branch report for Netherlands, section 6.4.2.). See also the branch report for Germany, 5.2.

of disputes under Argentina's bilateral investment protection treaties for shareholders residing in signatory countries. The branch reporter notes that:

"[t]he case law has not been consistent, with results in favour of the taxpayer and of the tax bureau" [due to] "a series of non-uniform administrative and judicial rulings, and to date, there have been no rulings from our Supreme Court to conclusively resolve this debate."³⁰⁷

To sum up, more than for the purpose of other taxes, non-tax statutes play a role in the determination of a gift and inheritance tax liability at least in some jurisdictions. As mentioned in the beginning of this section, citizenship might be relevant in some countries but so is the fact that a probate proceeding is initiated.³⁰⁸ The reason behind this is probably that inheritances must be handled by the authorities and in the past more formal elements (e.g., citizenship) have been decisive for the question of which inheritance law shall apply and which authority is competent. It is therefore not surprising that non-tax connecting factors are also used for tax purposes. The future may show whether progress around allocation of jurisdiction for inheritance law purposes will also have an impact on the definition of nexus for inheritance tax law purposes.³⁰⁹

9. Wealth Taxes

Most countries have never had a wealth tax or have abolished such a tax in the last decades. The focus in the following is on those countries that still have a comprehensive wealth tax such as Norway and Switzerland. In Switzerland, the nexus definition is in simplified terms the same nexus definition as used for income tax purposes. This means that if someone is resident for income tax purposes that person is also resident for wealth tax purposes and subject to worldwide wealth taxation.³¹⁰ The same is in general true in Norway.³¹¹ However, also non-residents will become subject to wealth taxes in case assets are located in the country levying a wealth tax. Here countries might follow different approaches and these differences are particularly interesting for the purpose of the present general report.³¹²

Switzerland, for instance, taxes real estate and assets belonging to a permanent establishment or a business operation in Switzerland held by non-residents but not beyond. This means, for instance, that movable assets located in Switzerland not attributable to a permanent establishment or a business operation are not subject to the wealth tax (e.g.,

³⁰⁷ See the branch report for Argentina, 6.4 and 7.

³⁰⁸ See for the practice of some Swiss cantons the branch report for Switzerland, 6.4.

³⁰⁹ See, for example, the Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions, and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

³¹⁰ In Switzerland, however, wealth attributable to a foreign permanent establishment or foreign real estate is not subject to wealth taxation although these assets still need to be disclosed to calculate the tax rate (safeguarding progression proviso).

³¹¹ See the branch report for Norway, 6.4.

³¹² We will not particularly deal with the wealth tax in Spain. See for details the branch report for Spain, 6.4. In this section, we will also not discuss specific taxes and annual taxes on real estate (see e.g. the branch report for France, 4).

bank accounts of foreigners). Norway on the other hand taxes all movable assets located in Norway. This could mean art physically located in Norway will be subject to wealth tax unless a double tax treaty limits the taxing right of Norway in this regard.³¹³ However, with respect to the important wealth categories of shares, but also receivables, individuals resident abroad owning shares of a Norwegian company will not become subject to wealth taxation in Norway because such assets are not considered physical objects.³¹⁴

To conclude, if a country intends to tax wealth measured by all assets located in a jurisdiction, foreign residents should be liable to tax for assets physically located as well. This is particularly true for real estate. It may be more difficult to determine the physical location of investments such as shares and loans. This might be the reason why both Norway and Switzerland (but both for different reasons) do not levy a wealth tax on shares of local companies owned by a resident of another jurisdiction. It, of course, would also disincentive investments into the two countries.

10. Taxes on Shipping

The comparative review of countries that impose specific shipping or tonnage tax, or where special income tax rules apply for shipping activities, shows that international law has a direct impact, as well as a harmonising effect on jurisdictional rule design. The reason for international law's direct influence is that many of these tax types either rely on, or are heavily influenced by the regulation of traditional or national ship registers following a State's accession to the United Nations Convention on the Law of the Sea of 1982 (UNCLOS). None of the reviewed countries reported the use of so-called open ship registers (sometimes known as "flag of convenience" regimes) for tax nexus purposes.

Article 91(1) of the UNCLOS stipulates that:

"Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. **There must exist a genuine link between the State and the ship**" (emphasis supplied)

International tax law scholars often refer to the 'genuine link' doctrine articulated in 1955 by the International Court of Justice (ICJ) in the *Nottebohm*-case³¹⁵ as a general lodestar for jurisdictional tax rule design.³¹⁶ International law scholars have expressed a more reserved

³¹³ See article 22 of the OECD Model Tax Convention.

³¹⁴ For more details see the branch report for Norway, 6.4.

³¹⁵ *Nottebohm Case* (second phase), Judgement of 6 April 1955: I.C.J. Reports 1955, 4.

³¹⁶ See, for example, Stjepan Gadžo, *Nexus Requirements for Taxation of Non-Residents' Business Income* (2018 IBFD); Stjepan Gadžo, "The Principle of "Nexus" or "Genuine Link" as a Keystone of International Income Tax Law: A Reappraisal", 46 *Intertax* (2018), 194 to 209; Juliane Kokott, The "Genuine Link" Requirement for Source Taxation in Public International Law, in Haslechner, et al, Eds., *Tax and the Digital Economy* (2019 Kluwer), 9 to 23; Philip Baker, Some Thoughts on Jurisdiction and Nexus, in Guglielmo Maisto, Ed., *Current Tax Treaty Issues* (2020 IBFD), 441 to 465; Peter Hongler, *International Law of Taxation* (2021 Oxford).

position,³¹⁷ although in the context of article 91 of the UNCLOS, wide acceptance of the genuine link doctrine is beyond doubt.³¹⁸

The comparative review shows the requirement of a 'genuine link' is generally specified in relation to ships through domestic legislation that gives effect to a State's obligations under UNCLOS. Legislation aimed at domesticating the UNCLOS specify detailed nexus requirements for entry on a national ship register.³¹⁹ Several countries use the formal registration (i.e., the ship's flag) as a reference point for special income tax rules or incentives.³²⁰

Tonnage taxes are alternates to corporate income tax and are based on notional profit or tonnage being operated, instead of actual profit. In the European Union, tonnage tax regimes must be compliant with EU State Aid rules. The relevant EU guidelines prescribe that such tax relief should, as a rule, require a link between qualifying ships and the "Community flag" and that Member States must demonstrate "that the strategic and commercial management of all ships concerned is actually carried out from within the territory".³²¹ A comparison of how EU member states interpret the concept of 'strategic

³¹⁷ See Cedric Ryngaert, "Nexus and International Tax Jurisdiction" in this volume, 2; and Oliver Dörr, *Nottebohm Case*, in Max Planck Encyclopaedia of International Law (Oxford, on-line).

³¹⁸ UNCLOS has been signed by 157 States (May 2024) (available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#1) (accessed 17 May 2024).

³¹⁹ For typical examples, see the branch reports for Brazil, 6.6, and South Africa, 6.6. In Brazil, ships can only be registered in the Maritime Property Register if they are owned by an individual resident and domiciled in the country or by a company constituted in accordance with the provisions of Brazilian law, with its head office in the country, whose business purpose is water transport and which is authorised to operate by the competent body with its own or chartered ships (art. 2, V, of Law no. 9,432/1997). Under South Africa's Ship Registration Act, 58 of 1998, it is required that more than 50% of the fractional economic ownership in a ship must be held by South African nationals before the ship qualifies for registration and flying the country's flag (companies owning a ship must be established under South African law and maintain a place of business).

³²⁰ In Australia, since 2012, an income tax incentive designed to encourage investment by Australians in the Australian shipping industry relies on the concept of an Australian registered eligible vessel. Section 8 of the Shipping Reform (Tax Incentives) Act 2012 refers in part to the Shipping Registration Act 1981, which uses the ship owner's nationality, domicile, or place of incorporation as connecting factors with Australia (see the branch report for Australia, 6.6). In South Africa, an income tax exemption for shipping income, with similar aims to the Australian incentive, is available but only if economic ownership requirements for a 'genuine link' specified in the Ship Registration Act are satisfied (see note 319 for the fractional economic ownership test and the branch report for South Africa, 6.6). In Chile, the income tax source rule for cabotage relies by reference on the genuine link doctrine because the Law for the Promotion of the Merchant Navy D.L. 3,059 of 1979, restricts maritime cabotage to ships flying the national flag. Cabotage carried out in Chile by a national ship owned by persons without domicile or residence in the country is deemed to be an activity carried out in the country and, consequently, the income is of a Chilean source (see the branch report for Chile, 6.6).

³²¹ See Commission communication C(2004) 43 - Community guidelines on State aid to maritime transport, *Official Journal of the European Union* (2004/C 13/03), 3.1.

and commercial' ship management shows variations in approach.³²² Despite differences in detail, the branch reporters indicate that the jurisdictional rules for their tonnage taxes are expressions of the 'genuine link' requirement codified in the UNCLOS.³²³ Jurisdictional rules for tonnage taxes in the reviewed countries outside the European Union also rely on the genuine link doctrine,³²⁴ at times indirectly,³²⁵ including in the United States which signed but never ratified the UNCLOS.³²⁶ The same holds true for other taxes on shipping.³²⁷

Allegiance to a flag in terms of the regulatory regime envisioned by the UNCLOS may come with political and military benefits provided by States when merchant ships, for example, traverse the high seas. Moreover, nationally registered or flag flying ships may be regulated to, for instance, ensure satisfactory operational conditions, including

³²² Differences can be seen by comparing, for example, the jurisdictional rules for the tonnage tax regimes in Sweden and the Netherlands. In Sweden, a substantive approach is adopted. 'Strategic management' is defined as the upper management of the shipping company, with authority to conclude contracts or purchase and sell ships; 'economic management' is defined as authority to plan the course of the ship, technical management and the sale of shipments (see the branch report for Sweden, 6.6.3). The Netherlands in turn has highly elaborated rules with quantitative elements: i. at least 30% of the management of a sea ship as well as the ownership or co-ownership must be within the Netherlands; ii. at least 70% of the commercial management of a sea ship must be carried out within the Netherlands for another person, provided that the taxpayer also performs the management of one or more sea ships in a manner described under i.; iii. the management of one or more sea ships are carried out in a manner described under i. when a sea ship is time or voyage chartered; or iv. the full crew and technical nautical management of a sea ship is carried out in the Netherlands for another person (see the branch report for the Netherlands, 6.6).

³²³ See the branch reports for Denmark, France, Germany, Ireland, the Netherlands, Sweden, and Spain.

³²⁴ See, for example, the branch report for Japan, 6.2. The Japanese Ship Act is relied on to identify Japanese ships qualifying for tonnage tax. The same approach appears to be followed in Chinese Taipei (see the branch report, 6.6) and the Republic of Korea (see the branch report, 6.6).

³²⁵ In the United Kingdom, any ship may qualify for tonnage tax if the operating company is within the charge to UK corporation tax. Even so, HMRC published guidelines about how 'the strategic and commercial management' of such ships must be situated in the United Kingdom and how the test to establish a genuine link will be viewed in practice, as follows: Strategic management - Location of headquarters, including senior management staff; Decision-making of the company board of directors; Decision-making of operational board; UK stock exchange listing. Commercial management - Route planning, Taking bookings for cargo or passengers; Managing the bunkers, provisioning and victualling requirements; Personnel management; Training organisation; Technical management of vessels; Extent to which foreign offices/branches work under the direction of UK-based personnel; Support facilities in the UK (e.g. training centre, terminal, etc.); Other factors - Extent to which work is carried out in UK compared to elsewhere; Nature and extent of accommodation in UK; Number of employees in UK; Residence of key staff, including directors, in the UK; For an international group, a reasonable balance between UK activities and tonnage in the UK; Flagging, classing, insuring or financing of vessels in UK (see HM Revenue & Customs, Tonnage Tax Manual, 19 March 2016 (updated: 2 October 2023), TTMO3800).

³²⁶ In terms of the National Ship Register, a United States-flagged ship must be wholly owned by a United States citizen or company and must not be documented by another country. Under the American Jobs Creation Act of 2004 ship owners of nationally registered ships can elect to pay a fixed tonnage tax instead of paying a tonnage tax based on the ship's income (see the branch report for the United States, 19).

³²⁷ In Switzerland, cantons impose water transport tax on ships that are 'launched from their shores' onto international water bodies such as Lake Boden or the river Rhine in respect of ships on the national register. The jurisdictional rules for these taxes are therefore centrally regulated at the federal level. According to the Swiss Federal Act on Maritime Navigation under the Swiss Flag, the owner of the ship must be entered in the Swiss company register, and have its seat and place of effective management in Switzerland. In addition, requirements about the nationality or residency of the owner, partners or shareholders must be satisfied. For example, a simple majority of shareholders must be Swiss nationals and two-thirds of the board of directors and management must be Swiss nationals. See further the branch report for Switzerland, 6.6.

appropriate crewing, equipment, or maintenance. It is not difficult to see that regulatory or protective legislation at the national level providing for such benefits justify the linking of jurisdictional tax rules to the UNCLOS regulatory framework.

Based on the comparative review, it can be concluded that jurisdictional tax rules for shipping are highly homogenous and rationalised with reference to international law, and by name, with the genuine link doctrine formulated by the ICJ in the *Nottebohm*-case. Although there may be variations in how technical nexus rules are expressed in domestic laws, the unifying factor is that these rules require actual ownership, as well as management within a country by ship owning persons and entities. In broad terms, the focus on the territorial presence of owners and places of management as opposed to operations is perhaps not surprising because a similar focus was identified as a general trend in jurisdictional rules for corporate income tax residence (see section 2.2.2 above).

11. Taxes on Digital Services or Activities

This section summarises the findings from the comparative review of jurisdictional rules for taxes on digital services, as well as other taxes concerning digital social or economic activity such as digital advertising tax, diverted profit tax, and equalisation levies. Measures introduced within the framework of income, value added, or sales taxes are also considered.

An important finding emerged from the comparative review in that the rationale or justification is the same or similar, regardless of the type of fiscal instrument chosen to address digitised economic activity, because cohorts of countries are pursuing the same objectives. There are two main fiscal objectives, namely capturing previously untaxed profits arising from local production factors, as well as achieving neutrality for local market participants. These two aims are fundamentally different when it comes to tax policy design, which can be directly seen in the comparison of jurisdictional rules. The misalignment between the choice of fiscal instrument and policy aims, and sometimes obfuscation, is revealed through several countries using identical tax nexus rules. The seemingly incoherent position appears to be the result of the difficulty to adjust the large network of bilateral income tax treaties, and may contribute to economic and political conflict between countries.

11.1. Digital Service Taxes

The primary jurisdictional link under Canada's Digital Services Tax Act is "a user in respect of which it is reasonable to conclude [...] that the user is located in Canada".³²⁸ Legislative rules provide that the determination of a user's location will be based on the data associated with the user, including the "billing, delivery or shipping address, or the phone number area code most recently provided by the user; global navigation satellite systems data; and

³²⁸ See the branch report for Canada, 6.3.1. Canada's DST was activated in January 2024, with its effects retroactively applied to 1 January 2022, because of the failure of attempts to conclude a multilateral solution.

Internet Protocol address data”.³²⁹ The rationale for the Canadian Digital Service Tax (DST) was explained in the 2023 Federal Budget on the basis that the DST will:

“ensure that multinational corporations pay their fair share of tax wherever they do business. This is about putting Canadian workers and businesses on a level playing field with our global competitors” [and to] “ensure that Canadians’ interests are protected in any circumstance.”³³⁰

The bifurcated policy objectives for the DST should be noted as there is an apparent dissonance between the objective of “ensuring that multinational corporations pay their fair share of tax wherever they do business” and the jurisdictional rule that focusses on the geographic location of consumers. The branch reporters explain the contradiction as follows:

“For the purposes of the DST, nexus is not established based on factors related to the entity generating revenue from the pertinent digital activities or the entity contracting for the services. Instead, nexus is determined by the location of the individual who is the target of or interacts with the advertisement. Following the broad definition of “user”, a user of online advertising services will not be the person contracting the advertising services, but rather the person interacting with the online targeted advertisement.”³³¹

This observation is also broadly apposite for other DST regimes (as well as taxes such as equalisation levies) where governments pursue multiple objectives.

The jurisdictional rules for Kenya’s DST rely on proxies like those used in Canada to point towards local presence of users to establish a territorial link for a non-resident provider of digital services.³³² In 2020, the African Tax Administrators Forum (ATAF) published guidance for drafting DST legislation, in which these jurisdictional proxies can be found too.³³³

The nexus regime used under the United Kingdom’s DST³³⁴ differs from other DSTs in the reviewed countries because qualitative assessment is required instead of relying

³²⁹ Ibid.

³³⁰ Canada, *Federal Budget 2023* (Ch. 6: Effective Government and a Fair Tax System).

³³¹ See the branch report for Canada, 6.3.1.

³³² Section 5(2) of the Income Tax (Digital Service Tax) Regulations, 2020, deems a user of a digital service to be located within Kenya if (1) the user receives the digital service from a terminal (a computer, a tablet, or a mobile phone) located in Kenya; (2) the payment for the digital service is made using a debit or credit facility provided by a financial institution or company located in Kenya; (3) the digital service is acquired through an internet protocol address registered in Kenya or an international mobile phone country code assigned to Kenya; or (4) the user has a business, residential, or billing address in Kenya. See also the country report for Kenya.

³³³ See ATAF, *Suggested Approach to Drafting Digital Service Tax Legislation*, 2020, 5, with the only difference being that instead of using the proxies in the alternate, the proxy rules are arranged in a hierarchy. For example, the location of a user of online advertising services is first established with reference to user data stored by the provider (e.g. business, residential, or billing address), failing which the geolocation associated with the device at the time the user engaged the online platform is used, or in the last resort, the IP address at such time (see art. 7(a)). For digital content services, the location of the user’s bank or financial account is added to the list (art. 7(d)).

³³⁴ Introduced by Finance Act 2020 as a tax on turnover at the rate of 2% on business groups whose revenues from in-scope activities (digital services revenues) exceed £500 million, of which more than £25 million is attributable to users in or established in the United Kingdom.

on fallible proxies such as IP addresses associated with user devices. Key nexus concepts concern “online marketplace”³³⁵ revenues derived from “UK users”, both of which requires factual evaluation. The concept of a “UK user” is, for example, defined to mean:

“any user who it is reasonable to assume—

- (a) in the case of an individual, is normally in the United Kingdom;
- (b) in any other case, is established in the United Kingdom.”³³⁶

Online marketplace revenues derived from UK users are subject to the DST in the following circumstances: (a) they arise in connection with a marketplace transaction, and a UK user is a party to the transaction; (b) they arise in connection with particular accommodation or land in the United Kingdom; (c) they arise in connection with online advertising for particular services, goods or other property, and the advertising is paid for by a UK user; (d) the advertising is viewed or otherwise consumed by UK users; and (e) they arise in connection with UK users.³³⁷ Taken together, the jurisdictional rules for the UK’s DST regime may have extensive application.

New Zealand introduced a Digital Service Tax Bill with near identical jurisdictional rules to those in Canada and Kenya, and the ATAF DST model.³³⁸ According to an Impact Statement prepared by the New Zealand government, the motivation for proposing a DST is “that highly digitalised multinational enterprises do not pay tax commensurate with the revenue they derive from their markets” and therefore the “New Zealand DST is designed to tax multinationals that derive revenues from New Zealand users of search engines, social media platforms and online marketplaces”.³³⁹ This motivation is interesting as it does not mention DST as a protectionist fiscal instrument to achieve neutrality for local market actors, but does point to consequential market effects and risk of tariff disputes with trading partners:

“a DST may have tax and non-tax consequences. Prior consultation via the Government Discussion Document Options for taxing the digital economy (2019) indicates that many stakeholders may view a DST poorly. It should also be noted that the burden of the DST is likely to be passed on to some extent by the affected taxpayers to New Zealand customers of in-scope digital service providers [...] Further, it is considered likely to damage New Zealand’s relations with some international partners [...] While the exact scope and scale of possible retaliatory tariffs is hard to predict, they can be expected to

³³⁵ Defined to mean: “an online service that meets the following conditions (a) the main purpose, or one of the main purposes, of the service is to facilitate the sale by users of particular things, and (b) the service enables users to sell particular things to other users, or to advertise or otherwise offer particular things for sale to other users” (Finance Act 2020, s. 43(5)).

³³⁶ Finance Act 2020, s. 43(3).

³³⁷ Finance Act 2020, s. 41.

³³⁸ Clause 12 of the Digital Services Tax Bill (Government Bill 288—1). See also the branch report for New Zealand, 4.

³³⁹ Inland Revenue Department, *Regulatory Impact Statement: Digital Services Tax*, 9 August 2023, 1 (available at <https://www.taxpolicy.ird.govt.nz/-/media/project/ir/tp/publications/2023/2023-commentary-dst-bill/2023-ris-dst-bill-pdf.pdf?modified=20230831015405&modified=20230831015405#:~:text=The%20DST%20is%20designed%20to,physical%20presence%20in%20New%20Zealand>) (accessed 18 May 2024).

be proportionate to the DST. While we expect tariffs to be a small amount in the context of New Zealand's total trade, they will be significant for affected exporters"³⁴⁰

The rationale for DSTs found in the European Union is similar to those of Canada and New Zealand, although there are emphasis differences in the motivations, and therefore jurisdictional connecting factors based on payments are absent.

The most important difference is one of emphasis in that European DSTs must in essence be designed around the idea that value creation for providers of digital services is critically performed by users. The failed proposal for an EU DST of 2018 explained it thus:

"the participation of a user in a digital activity constitutes an essential input for the business carrying out that activity and which enable that business to obtain revenues therefrom. In other words, the business models captured by this Directive are those which would not be able to exist in their current form without user involvement. The role played by the users of these digital services is unique and more complex than that traditionally adopted by a customer. These services can be provided remotely, without the provider of the services necessarily being physically established in the jurisdiction where the users are and value is created. Therefore, such business models are responsible for the greatest difference between where profits are taxed and where value is created [...] what is subject to taxation are the revenues obtained from the monetisation of the user input, not the user participation in itself"³⁴¹

The jurisdictional rules for the European Union's failed DST therefore were designed "[i]n line with the concept of user value creation that underpins the objective scope of DST, [the nexus rule] determines that DST is due in the Member State or Member States where the users are located".³⁴² Furthermore, it was argued that the value creation logic meant that the location where payments for digital services originate would not be appropriate as a connecting factor.³⁴³ Under the EU proposal, the proxy to locate a user is the geo-location of a device within a EU member state at the time of use to access digital services.³⁴⁴

Whilst the proposal for the European Union's DST failed, several EU member states enacted DSTs modelled on the proposal. For example, in France, the DST imposed since 2019 targets two types of digital services supplied in France, namely intermediation services and advertising targeting services, including the sale of user's data for advertising purposes. The jurisdictional connecting factors to identify non-residents providing such digital services are based on the activity of users located in France.³⁴⁵ Like elsewhere outside the European

³⁴⁰ Ibid., 4.

³⁴¹ European Commission, *Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*, COM(2018) 148, 7.

³⁴² Ibid., 11.

³⁴³ Ibid. The reasoning is that "it is the user involvement in the digital activities of a company the one [sic] generating the value for that company, which may not necessarily entail a payment from the users' side (e.g. viewers of advertising on a digital interface); or which may involve payment from some users only (e.g. multi-sided digital interfaces where only certain users have to pay for accessing the interface, while other users have free access). Therefore, it is the Member State where the user is located the one with taxing rights in respect of DST, regardless of whether the user has contributed in money to the generation of revenue for the company".

³⁴⁴ See article 5(2), *Proposal for a Council Directive on the common system of a digital services tax*, note 341 above.

³⁴⁵ See the branch report for France, 6.4.

Union, the aim of the DST in France was explained in an official impact assessment to be an instrument that would capture undertaxed profits due to the possibility for a company to perform an activity in a country where there is no material presence and, following the logic of the failed EU DST, that “digital services typically imply a strong participation of the user in the value creation”.³⁴⁶

Other EU member states that implemented a DST include Austria,³⁴⁷ Italy,³⁴⁸ and Spain,³⁴⁹ while others are debating the matter.³⁵⁰ The proxies used as jurisdictional connecting factors in these countries all aim to geographically situate a user within a country but vary in detail of how that may be done. For example, the geographical jurisdiction rules for Italy and Spain’s DSTs are closely modelled on the failed EU DST.³⁵¹ Austria’s DST is more limited in the scope of service covered (only digital advertisements), as well as having a more restricted connecting factor, namely receipt of an online advertisement on a user’s device with a domestic IP address provided the advertisement is addressed to domestic users in terms of its design and content.³⁵² According to the branch reporters, the rationale for Austria’s DST is to create a level playing field for local market actors and they note that as a result, the “United States threatened to impose trade barriers and punitive tariffs on certain Austrian products”.³⁵³

The fact that a country is protesting the extra-territorial reach of DSTs is significant from an international law perspective because it signifies that doubt is being casted on States declaring that they have fiscal jurisdiction.³⁵⁴

11.2. Equalisation Levies and Other Taxes

India introduced an Equalisation Levy under the Finance Act 2016. As the name suggests, the rationale for this tax is to ensure a level playing field for domestic actors.³⁵⁵ The jurisdictional connecting factor is the geolocation of user devices within India established by IP addresses.

Denmark imposes a mandatory ‘cultural contribution’ on media service providers established in Denmark providing on-demand audiovisual media services since January 2024.³⁵⁶ The mandatory contribution is also imposed on media service providers established

³⁴⁶ Ibid.

³⁴⁷ As of 1 January 2020, Austria introduced a digital tax on revenues from online advertising services, regulated by the Digital Tax Act 2020 (*Digitalsteuergesetz*).

³⁴⁸ For purposes of Italy’s DST, the jurisdictional nexus is the location of the user, to be determined by reference to the Internet Protocol (IP) address of the device or, if more accurate, any other method of geolocation (see the branch report for Italy, 7).

³⁴⁹ In terms of Spain’s DST legislation, digital services are deemed to be supplied within Spain when a user is in Spain, regardless of whether the user has paid, and the presence of a user is established the geolocation of user devices (see the branch report for Spain, 6.5).

³⁵⁰ See, for example, the branch report for the Czech Republic, 6.5.

³⁵¹ See the branch reports for Italy, 7, and Spain, 6.5.

³⁵² See the branch report for Austria, 6.4.

³⁵³ See the branch report for Austria, 6.4.

³⁵⁴ See Cedric Ryngaert, “Nexus and International Tax Jurisdiction” in this volume, 3.

³⁵⁵ See the branch report for India, 16.4, 16.12.

³⁵⁶ See the branch report for Denmark, 6.5.

in another EU member state, if the on-demand audiovisual media service is aimed at a Danish audience. It is uncertain if this contribution is a DST.³⁵⁷

11.3. Income Taxes: Significant Economic Presence

In 2012, India introduced the concept of ‘Significant Economic Presence’ (SEP) to supplement the ‘business connection’ test that leads to an income tax liability at source for non-residents. The Indian SEP is defined in terms of ‘revenue’ and ‘user’ thresholds to, for example, capture the downloading of data or software in India for monetary consideration above a specified threshold, or systematic and continuous soliciting of business activities or interaction through digital means with a specified number of users within India.³⁵⁸ These connecting factors are very similar to those that are widely used in the United States for sales taxes (see section 11.4 below).

Colombia enacted a SEP-sourcing test for corporate income tax purposes with effect from 1 January 2024.³⁵⁹ The proxies used to establish whether a SEP is satisfied are identical to those used by some countries for DST purposes.³⁶⁰ They are (1) the domicile or habitual residence of the client or user is in Colombia; (2) the payment mechanism, including credit cards, debit cards, or other types of cards or vouchers, is in Colombia; (3) the credit or debit card through which payment for the transaction is made is issued in Colombia; (4) the shipping address for the sale of goods is in Colombia; or vi. Colombia’s international dialling code for the mobile telephone services is stored in a SIM card used by a client and/or user.³⁶¹

Chinese Taipei reformed its income tax source rules in 2009 to cater for digital transactions. The nexus rule appears to be the purchase of an electronic service within the country, which deems the non-resident provider to conduct a local business.³⁶²

11.4. Value Added and Sales Taxes

Most of the reviewed countries that impose VAT have adjusted or adopted rules for the supply of goods or services via digital means. The VAT jurisdictional rule developments were considered in detail in section 3. It is most striking that proxies used to establish the local supply of digital services by non-resident suppliers for VAT purposes can be very similar, if not identical, to jurisdictional proxy rules used for DSTs, equalisation levies and SEP-tests for corporate income tax purposes.³⁶³ These fiscal instruments pursue different aims and objectives leading to doubtful policy coherence because legislators are using the exact

³⁵⁷ Ibid.

³⁵⁸ See the branch report for India, 2.26, 2.27.

³⁵⁹ See the branch report for Colombia, 2.2.2. Art. 57 of Law 2277 of 2022 covers foreign service providers who maintain “deliberate and systematic interaction” with users of digital services in Colombia such as streaming, cloud computing, online advertising, subscriptions to digital media, search engines, and e-commerce.

³⁶⁰ Compare, for example, the tax nexus rules of the DSTs in Canada, Kenya, and New Zealand discussed at 11.1.

³⁶¹ Law 2277 of 2022 (Colombia) and Colombian Tax Office (DIAN), Tax Ruling No. 305[008717], 30 April 2024.

³⁶² See the branch report for Chinese Taipei, 2.

³⁶³ Compare, for example, the VAT place of supply rules for digital services in Chile (above in the text at note 221) with the nexus rules for DSTs in Canada, Kenya, and New Zealand (above at section 11.1), the Equalisation Levy in India (above at section 11.2) and the SEP test in Colombia (above at section 11.3).

same jurisdictional rules regardless of the tax type. The only discernible variation is in the European Union, where jurisdictional rules for DSTs have not used the presence of local payment methods as a proxy to geographically situate users due to the emphasis on the place of value creation as an idea that should be driving DST rule design (see section 11.1 above).

As far as general sales tax is concerned, the landmark decision by the Supreme Court of the United States in the *Wayfair*-case was discussed in section 3. This decision eliminated the requirement that a remote vendor should have a physical presence in a federal state to be able to collect sales tax. The decision was based on the assertion that modern e-commerce allows business to maintain a “substantial nexus” (the requirement under the Commerce Clause of the US Constitution) through virtual customer connections.³⁶⁴ The consequence is that federal states may collect sales tax from remote vendors in respect of sales to local customers via digital platforms for which the nexus is based on in-state receipts or transaction volume. The *Wayfair*-case paved the way for 54 federal states to adjust sales taxes to incorporate a so-called economic nexus to tax remote sellers, as well as on-line market facilitators, which has been spilling over to other United States transactional taxes.³⁶⁵ The United States Sales Tax proxies of measuring in-state receipts or transaction volume are the same as are used, for example, to establish nexus for the SEP-test under India’s income tax (above at section 11.3).

11.5. Targeted Tax Avoidance Measures

Several countries have been taking steps to address tax avoidance concerns in respect of stratagems used by firms and individuals engaged in digital economic activity. The nexus rules for these targeted anti-avoidance measures are considered below.

In 2015, the United Kingdom enacted a diverted profits tax. This levy is commonly referred to as the “google tax” given public concerns prevailing at the time it was enacted, but the legislation applies more broadly than digital economic activity. It is a separate tax from corporation tax with a regulatory purpose, namely, to deter multinational groups of companies from implementing tax planning techniques that divert profits away from the United Kingdom. The jurisdictional rules for the diverted profits tax indicate the types of tax avoidance of concern. Diverted profits tax applies to local entities or transactions lacking economic substance,³⁶⁶ or to arrangements involving multinationals avoiding a taxable presence. The nexus for the latter category is “carrying on activity in the United Kingdom” by any person, wherever resident, “in connection with supplies of services, goods or other property” by any foreign trading company.³⁶⁷ This connecting factor illustrates the so-called effects doctrine in the international law of prescriptive State jurisdiction, which is a variant

³⁶⁴ See the branch report for the United States, 20.1.

³⁶⁵ See Jennifer W. Jensen, et al., “*South Dakota v. Wayfair* — five years later”, *The Tax Adviser*, June 2023, which notes that the economic nexus basis has been relied on to expand jurisdictional tax rules to remote vendors and online marketplace facilitators for United States transactional taxes such as Chicago’s amusement tax; Indiana’s food and beverage tax; and various accommodation taxes such as the Wyoming lodging tax.

³⁶⁶ This basis applies only to United Kingdom tax resident companies or foreign tax resident companies with a permanent establishment within the UK (Finance Act 2015, ss. 80-81).

³⁶⁷ Finance Act 2015, s. 86(1)(c).

of territoriality. It refers to jurisdiction being founded over a foreign party based on conduct outside a State's borders that has consequences within its borders.³⁶⁸

Australia introduced a diverted profits tax in 2017. Like the case in the United Kingdom, the tax has a regulatory purpose to act as a deterrent, namely to “ensure that the Australian tax payable by significant global entities properly reflects the economic substance of the activities that those entities carry on in Australia” and “to prevent those entities from reducing the amount of Australian tax they pay by diverting profits offshore through contrived arrangements between related parties”.³⁶⁹ The jurisdictional basis for the diverted profits tax is both territorial (‘activities that those entities carry on in Australia’) and effects-based. This can be seen in the requirement that a covered scheme must include a foreign associated entity “who entered into or carried out the scheme or any part of the scheme” that caused profits to be diverted away from Australia.³⁷⁰ As was the case for the United Kingdom, this measure illustrates how the effects-doctrine is used in taxation.

In 2022, India introduced the concept of a ‘Virtual Digital Asset’, which is expansively defined to include, for example, digital tokens and crypto currencies.³⁷¹ Any gains arising from the transfer of a virtual digital asset are deemed to be from a source within India if the digital wallet in which cryptocurrency or virtual tokens is held, is situated in India.³⁷² The nexus rule operates within the context of income tax and a withholding tax regime.

11.6. Summative Comment

As has been indicated earlier above, there is remarkable similarity in the nexus rules for differing types of tax instruments that all seek to address digital services and activities. Fiscal instruments like income tax, VAT, sales tax, and excise tax all pursue different objectives and have differing economic effects. In devising new tax types like DSTs or equalisation levies using the same nexus rules appears like a tax policy muddle and obfuscation. The choice of proxy to establish a ‘genuine’ territorial link, such as a user’s IP address, mobile phone country coded SIM card, local delivery address for goods bought online, or bank cards issued locally, appear to be basic proxies if the rationale for a fiscal instrument is to capture the production factors contributing to the profits of a provider of digital services or goods. There is a distinction between a nexus rule and its tax consequences. As was seen in other situations, different taxes might use similar nexus definitions, but the consequences can still be very different.

It is also not surprising that similar nexus definitions have been used for the purpose

³⁶⁸ See the text and sources at note 5 above.

³⁶⁹ Income Tax Assessment Act 1936, Part IVA, s. 177H.

³⁷⁰ Income Tax Assessment Act 1936, Part IVA, s. 177(1)(e). Section 177(7) clarifies that the diverted profits tax applies “whether or not the scheme has been or is entered into or carried out in Australia or outside Australia or partly in Australia and partly outside Australia”.

³⁷¹ The definition is “any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account, including, its use in any financial transaction or investment, but not limited to, investment scheme, and which can be transferred, stored or traded electronically” (s. 2(47A) of the Income Tax Act, 1961).

³⁷² See the branch report for India, 16.19.

of different taxes aimed at digitised economic activity. The fact that it is nearly impossible to change the bilateral income tax treaty network to amend the permanent establishment threshold by using a digital nexus, has accelerated the reference to these user- or consumption-related nexus definitions for the purpose of other taxes. Countries have been able to raise tax revenue from parts of the digital economy by linking nexus to consumption, regardless of the kind of tax, and despite income tax treaties patterned on article 5 of the OECD Model requiring a fixed place of business.

Lastly, any debate about the coherence for tax nexus rules to address digital economic activity is not complicated by the overly of avoidance concerns because measures such as Australia and the United Kingdom's diverted profits taxes, or India's virtual digital asset concept have distinct nexus rules designed based on the purpose and aims of these fiscal instruments.

12. Transactions between Foreign Parties

The branch reporters were asked to provide examples in which both parties to a transaction are foreign persons, but, nevertheless, a nexus rule leads to taxation in a country in which neither resides. Some categories of examples were discussed in the reports but are also related to taxes which are discussed in other sections of this general report.

For instance:

If a foreign party sells a company to a foreign buyer and such a company owns assets in other States, this might trigger taxation of the capital gains in the country where the assets are located. We have discussed this case above in section 2.3.8. on capital gains taxation.

Real estate transactions are regularly subject to taxation in the situs State although both the seller and the buyer are foreign persons. This is dealt with above in section 4.

Some countries might levy a gift or inheritance tax if domestic property is transferred.³⁷³ For instance, in the United States, the estate tax is triggered for non-residents and non-citizens if the estate is "situated in the United States".³⁷⁴

Some States tax the income of employees residing abroad receiving their salary from abroad if the employment is physically rendered in a country.³⁷⁵

Lastly, with respect to sportspersons, it might be decisive if the activity is rendered in a jurisdiction regardless of whether the payment is made between two foreign parties.³⁷⁶

Controlled foreign company (CFC) legislation might lead to a situation in which transactions between foreign persons are subject to taxation in the country of the parent company. The only link is that a local taxpayer owns an investment in a foreign company.³⁷⁷ The rationale for CFC rules is in general to counter a type of tax avoidance (i.e., income deferral) or tax planning in more general terms.³⁷⁸ The debate concerning the Income Inclusion Rule (IIR) of the OECD's Pillar Two as part of the global minimum tax shows that

³⁷³ See above section 2.3.8.

³⁷⁴ See US Internal Revenue Code, s. 2101 and s. 2103.

³⁷⁵ See section 4 above.

³⁷⁶ See for instance the case of the Finnish Administrative Court *Case KHO 2005:31* of the Supreme Administrative Court (1 June 2005).

³⁷⁷ See for instance the branch report for Colombia, 2.11.

³⁷⁸ See on this topic, for example, the branch report for France, 2.4.1.

if CFC rules go beyond taxing income arising from avoidance situations, infringements of international law could be at hand. This will be discussed below in section 14.5, and has also been discussed in the international law report of Ryngaert in this volume.

Besides the above examples of rather common approaches, there are other more exceptional nexus definitions. With respect to real estate, for instance, a few countries do not only tax income if real estate is sold (directly or indirectly), but also if real estate is used as security to secure a loan between foreign parties. In this case, for instance, in Switzerland, a withholding tax is due on the interest payments on a loan between foreign parties.³⁷⁹ In regard to the taxation of royalties at source, the so-called intellectual property register cases that can lead to the taxation of royalties paid between foreign persons for use of protected immaterial property elsewhere than in the state of registration were discussed at section 2.3.4.

There are some nexus definitions in relation to foreign-to-foreign transactions aiming at limiting base erosion and profit shifting or avoidance schemes. For instance, in Norway, a withholding tax on pensions applies if the pension provider is resident in an European Economic Area (EEA) member state, and if the contributions were deductible in Norway although the recipient is not resident in Norway.³⁸⁰ Finally, countries with a generic approach to defining the source of income might levy income taxes if there is a link to their jurisdiction although all parties involved are foreign parties.³⁸¹

To sum up, it is more common than uncommon to tax transactions between foreign parties, in particular, if domestic real estate is involved or if assets are located in a country, and these assets are transferred. Here a territorial link seems to justify taxing transactions between foreign parties. Moreover, abusive situations or situations of avoidance might as well justify the taxation of foreign-to-foreign transactions in particular from income and corporate income tax perspective, for instance, in the case of CFC rules.

13. Legal Orders and Jurisdiction to Tax

13.1. (Non-tax) Legal Instruments and Tax Nexus

This section considers non-tax legal instruments found in the reviewed countries that contain provisions affecting questions of nexus for any of the taxes imposed.

13.1.1. *Treaties of Friendship, Commerce and Navigation, and of Peace and Friendship*

Non-tax treaties concluded at the end of war periods contain stipulations that affect the jurisdictional reach of the tax capacity of signatories.

The United States, for example, concluded bilateral treaties “of Friendship, Commerce and Navigation” after the Second World War. The preamble of the treaty concluded with Germany on 29 October 1954 indicates that the guiding principle for the treaty is “based

³⁷⁹ See also the branch report for Germany, 2.11.1, for a similar provision and the discussion at section 2.3.3.

³⁸⁰ At least this is our reading of the branch report for Norway, 2.11.

³⁸¹ See for instance the branch report for South Africa, 2.11.

in general upon the principles of national and of unconditional most-favoured-nation treatment reciprocally accorded". Article XI(4) stipulates that:

"4. In the case of companies and of nonresident nationals of either Party engaged in trade or other gainful pursuit, within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that *reasonably allocable or apportionable to its territories*, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories." (italics added)

Similar clauses appear in such bilateral treaties concluded by the United States with Belgium, Chinese Taipei, Israel, Japan, Luxembourg, the Netherlands, and the Republic of Korea.

The branch reporters for Germany opine that:

"Art. XI (4) can be understood as imposing an additional qualified nexus requirement that goes beyond what is necessary under international law. The provision would be superfluous if it merely repeated the standards already applicable under international law."

and that:

"extraterritorial taxation, for example, is likely to violate the Treaty. Accordingly, taxation may only take place in terms of the amount if there is also an act of value creation in Germany. Only in this situation does the required qualified nexus exist"³⁸²

In short, what this treaty regime requires is a 'reasonable territorial link' for a State to assert taxing jurisdiction over companies and nationals of signatory States. Reasonableness as a general legal standard to guide jurisdictional tax rule design is addressed in the General Conclusions.

Chile and Bolivia concluded a Treaty of Peace and Friendship on 20 October 1904, on occasion of the end of the War of the Pacific that began in 1879. This treaty establishes, among other provisions, the broadest exemption from taxes on Bolivian cargo in transit through Chile. The treaty therefore limits Chile's capacity to prescribe territorial-based taxation that may affect cargo coming from or destined for Bolivia.³⁸³

13.1.2. *Other Treaty Regimes (Bilateral Investment Protection, Continental Shelf, Diplomatic Relations, European Union Law)*

A variety of other international instruments were reported that affect State jurisdiction to tax.

³⁸² See the branch report for Germany, 6.

³⁸³ See the branch report for Chile, 7.

The position in Austria illustrates the range of instruments that can limit a State's jurisdiction to tax international organisations and their staff.³⁸⁴

In the Netherlands, the Convention on the Continental Shelf (Geneva, 29 April 1958) forms the legal basis for taxes levied under the Mining Act 2003 (*Mijnbouwwet*) as well as an extension of the territorial tax jurisdiction to the continental shelf for the income, corporate, wage and insurance tax.³⁸⁵

In Argentina, disputes under bilateral Investment Protection Instruments arose over the extra-territorial reach of a provincial transfer tax on inheritance and wealth (discussed at section 8 above).

In the Netherlands, the need for tax nexus has been debated in the context of the implementation of the European Union directive for country-by-country reporting. This directive obliges multinational corporations to annually report to revenue authorities information about their operations, revenues, profits, and taxes paid in the jurisdictions where they operate. The responsible Minister stated in parliament that a territorial nexus is needed to enforce this obligation on multinational parent companies situated outside the European Union.³⁸⁶ The branch reporters note that:

“The Minister concluded that there appears to be no territorial or personal nexus between the EU and the non-EU parent company and her tax obligations in third countries that are not the result of activities in the EU ... Therefore, he explained that he would in negotiations [about the] Directive advocate that globally disaggregate tax information that does not relate to EU-Member States nor to non-cooperative jurisdictions will take place according to the ‘comply or explain’ principle”³⁸⁷

The parliamentary debate in the Netherlands appears to be premised on an implied limit on State jurisdiction in tax compliance matters and seems to recognise that territoriality provides the minimum connection.

13.2. Constitutional Law and Tax Nexus

13.2.1. *Legality (Discretionary Tax Regimes)*

It may be thought of as self-evident that stipulations in legislation are required for the imposition of tax obligations in rule of law countries. Yet, this section considers situations described in the reviewed countries of other ways in which nexus for tax charges is established outside of statute law.

³⁸⁴ See the branch report for Austria, 6.6, which lists international agreements such as the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Protocol on the Privileges and Immunities of the European Union, and specific headquarter agreements such as for the United Nations, the UN Atomic Agency or OPEC.

³⁸⁵ See the branch report for the Netherlands, 7.

³⁸⁶ *Ibid.*, 7.

³⁸⁷ *Ibid.*

In France, a new tax measure (the so-called ‘google tax’) aimed at non-resident multinationals was struck down in 2016 for constitutional reasons.³⁸⁸ The purpose of the tax was to prevent the circumvention of the permanent establishment threshold by multinationals engaged in digital economic activity. The law gave discretion to the tax authorities whether to invoke certain presumptions against the taxpayer (e.g., that the taxpayer had a dependent agent permanent establishment within France) even though the tax was intended to apply based on a formal tax audit procedure. The French Constitutional Court held the provisions containing the discretion:

“grant the administration the power to choose, from among the taxpayers in the scope of application of Article 209 C, those who are effectively subject to be taxed”³⁸⁹

The Court held that such a discretionary power to choose who to tax or not, was unconstitutional because the French legislature had no competency to “subordinate” its power to “tax benefits made in France by companies established outside of French national territory” to any other body.³⁹⁰

The branch reporters for South Africa indicate that its Constitution, 1996, would not allow discretionary ‘tax’ regimes, but discretionary regulatory charges may be allowed under delegated powers afforded to regulators (i.e., government-imposed levies that are not directed to raise revenue, but to regulate conduct).³⁹¹

In Canada, the branch report raises concern about the extent to which jurisdictional aspects of a long list of tax charges, are dealt with outside primary legislation (e.g., in ministerial regulations not subject to parliamentary approval, and non-binding revenue agency guidelines).³⁹² The reporters indicate that especially agency guidelines “offer a detailed examination of specific topics in tax law and are intended to serve as references to statutory and case law. However, some of these documents have been noted to extend beyond the stipulations of the law” regarding jurisdiction to establish tax residence or the source of business profits in Canada.³⁹³ They conclude that:

“Despite not having the force of law, these CRA publications are generally followed by taxpayers. Courts have recognized that while administrative policy and interpretations are not determinative, they are given consideration and can play a crucial role in interpreting tax law.”³⁹⁴

In the case of Canada, legality concerns appear to be compounded by the fact that key jurisdictional tax concepts are not defined in the statute, which means in practice they are given content by the judiciary and through revenue guidance that appear to feed of each other without any upfront parliamentary scrutiny.

³⁸⁸ See the branch report for France, 7.

³⁸⁹ *Conseil Constitutionnel*, Decision no. 2016-744 DC of 29 December 2016, at [82].

³⁹⁰ *Ibid.*

³⁹¹ See the branch report for South Africa, 8.

³⁹² See the branch report for Canada, 7. The CRA documents include information circulars, interpretation bulletins, income tax folios, and informational guides.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

In Argentina, the Tax Procedure Law delegates powers to the tax authority to establish withholding and presumptive collection mechanisms.³⁹⁵ The delegation of these powers has led to a proliferation at the provincial level of discretionary collections mechanisms with extra-territorial reach. The branch report notes that the consequence is that “in practice, this has the impact of an increased tax, which has been established outside of the legal mechanisms intended for this purpose”.³⁹⁶

The significance of discretion-based tax imposing and collecting regimes is that obligations to, for instance, withhold tax on behalf of non-residents is not fixed by legislation. Rather, specific discretion, which is often open-ended, is given to a tax authority to determine when such obligation is desirable. This raises fundamental concerns from a rule of law perspective. Is there a rationale for how such discretionary powers should be exercised to establish tax nexus? Are there any constraining legal rules or principles that could limit how nexus is to be established under a discretionary tax regime? Can a legislature subordinate one of its key competences to prescribe jurisdiction to tax to other state organs like ministers or tax administrators? The answer to these questions is the subject of the General Conclusions of this study (see section 14 below).

Several branch reports indicate that slippages in tax law making standards caused by the award of discretion in tax legislation would not be possible in their countries for constitutional and other legal reasons.³⁹⁷

13.2.2. *The Constitutional Position of International Law*

Several of the branch reports indicate that the constitutional position afforded to international law in their legal systems mean that international customary law and treaties cannot be ignored when assessing jurisdictional tax rules. Furthermore, there are several landmark court decisions in some of these countries where international law principles have been applied as a limit on the jurisdictional tax capacity of these States.³⁹⁸ Importantly, no

³⁹⁵ See the branch report for Argentina, 8.

³⁹⁶ Ibid. Similar delegation of discretionary power for fiscal authorities to prescribe collection procedures exists in Germany and Italy. In Germany, the revenue authority may impose, by order, that a withholding obligation applies to certain taxpayers if ‘special reasons’ so require. A related but slightly different example can be seen in a ruling by the Italian Revenue Agency (Ruling no. 297 of 17 April 2021). The ruling indicates that non-resident companies without a permanent establishment in Italy ‘may’ apply withholding tax in Italy, even though they are not subject to specified withholding tax obligations under Italian legislation. For example, a non-resident company, without a permanent establishment in Italy, owning real estate in Italy engages professionals for the performance of technical services relating to the renovation of the Italian properties. In such a case it was found that the non-resident had to file an Italian tax return as a withholding agent because the non-resident person legitimately applied the withholding tax to the service payment (Ruling no. 8 of 12 February 2019).

³⁹⁷ See, for example, the branch report for Spain, 8, where it is explained that based on the Spanish Constitution that enshrines the principle of legality for tax matters, the General Tax Act requires that legislation determines the taxable event, which includes the nexus, the tax accrual, the tax base, the tax rate, and other elements (such as tax reliefs). It is understood that the taxable event must determine, in addition to a description of the nexus, those scenarios under which a withholding tax obligation arise as well as the obligation to file returns and self-assessments. In Sweden, the principle of legality, which operates as a general principle of law, is understood to mean “that tax may not be imposed without such imposition being stipulated in legislation” (see the branch report for Sweden, 8).

³⁹⁸ See also Stjepan Gazdo, *Nexus Requirements for Taxation of Non-Residents’ Business Income—A Normative Evaluation in the Context of the Global Economy* (2018, IBFD), s. 2.2.6.3.

court decisions were reported, nor were any discovered in which it is accepted that no limit whatsoever applies to the competence of national legislatures as far as jurisdictional tax nexus rules are concerned.

In Germany, the general rules of international law are part of federal law in accordance with article 25 of the Constitution. The branch report for Germany explains that, initially, commentators were opposed to the idea that international law set substantive limits on the enactment of tax laws in the sense of requiring a genuine link, and this was accepted in 1963 by the Federal Fiscal Court (*Bundesfinanzhof*).³⁹⁹ However, in a series of decisions starting in 1983, the Federal Constitutional Court (*Bundesverfassungsgericht*) reversed the earlier position by ruling that the levying of taxes requires sufficient appropriate connecting factors otherwise, in their absence, there would be interference in the sovereign territory of a foreign State, which would violate international law.⁴⁰⁰ The Court suggested that appropriate connecting factors could be nationality, establishment, domicile or residence in Germany, the realisation of a taxable event in Germany or the achievement of a significant result under tax law in Germany. The Court based the requirement for sufficient tax nexus on two principles of international law. The non-interference requirement and, based on the ICJ's decision in the *Nottebohm*-case, the implicit spatial demarcation of State sovereignty. Moreover, the branch reporters point out that the international law limit on tax nexus in German law is reinforced by the general prohibition against arbitrariness and that legislation should be reasonable (i.e., based on comprehensible reasoning). As recent as 2020, the Federal Fiscal Court recognised the general requirement for a genuine territorial link as a basic limit on tax sovereignty in Germany.⁴⁰¹

In India, the Supreme Court in the landmark case of *GVK Industries* in 2011 held that a territorial link and non-interference in the affairs of other sovereign States set the minimum requirement for India's parliament to legislate in tax matters with respect to events taking place outside of the country.⁴⁰² The facts concerned withholding tax on a payment from India for technical service fees where the services were utilised outside India. The Court held that tax legislation is expected to have some impact on, or effect in, or consequences for the territory of India or the interests of its inhabitants. Consequently, the relevant source rule for technical service fees no longer applies when a payment from India is the only territorial link and the service is utilised in a business or profession carried on outside India, or for the purposes of making or earning any income from any source outside India.⁴⁰³ In coming to its conclusion, the Court rejected a so-called 'strict territorial nexus'⁴⁰⁴ requirement as well as the "polar opposite of the territorial nexus theory", namely that there is no limit

³⁹⁹ See the branch report for Germany, 1. c).

⁴⁰⁰ *Bundesverfassungsgericht*, 22 March 1983, 2 BvR 475/78, BVerfGE 63, 343, para. 96 f.

⁴⁰¹ *Bundesfinanzhof*, 12 November 2020, V R 41/18, BFHE 271, 470, [27]. The case concerned the imposition of insurance tax on payments of insurance fees to a German broker of an insurance company resident elsewhere in the European Union, for the protection and indemnity of seagoing vessels registered in the Marshall Islands and owned by a third country resident. The Court held that the tax could not be imposed because it did not meet the thresholds specified in the legislation (i.e., registration in the local ship register), and for want of a genuine territorial link with Germany because the insurance risk was not within Germany.

⁴⁰² *GVK Industries Ltd v. Income Tax Officer* (2011) 332 ITR 130 (SC Const. Bench)

⁴⁰³ Section 9(1)(vii)(b) of the Income Tax Act, 1961.

⁴⁰⁴ *GVK Industries Ltd v. ITO*, above at note 402, at 3. The strict nexus version is that the Indian parliament has "competence to enact laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, solely within India".

whatever on the legislature to prescribe tax jurisdiction.⁴⁰⁵ The Court held that based on a modern understanding of State sovereignty and non-interference, in light of increasing inter-dependence of nation States and globalisation of social, economic, security and environmental matters, and in the interest of “international peace and security”, it was competent for the Indian legislature to enact tax laws with “extra-territorial aspects or causes, provided they have a nexus with India”.⁴⁰⁶ The Court concluded perceptively by stating that theories about State sovereignty enabling boundless tax legislation amounts to a claim:

“that India has the power to interfere in matters that have no nexus with India at all. To claim such powers, would be to make such powers available. Invariably available powers are used, and in this case with a direct impact on the moral force of India, and its interests, welfare and security, by shattering the very concepts that under-gird peace between nations ... To claim the power to legislate for some other territories, even though aspects or causes arising, occurring or existing there have no connection to India would be to demolish the very basis on which international peace and security can be premised”⁴⁰⁷

Decisions by the courts of Austria in the 1990s dealt with stamp duty on locally executed contracts for the sale of shares in German entities. These cases decided that taxation of situations without any personal or territorial link to Austria was not legitimate based on international customary law limits.⁴⁰⁸

In the unwritten constitutional dispensation of the United Kingdom, courts have the responsibility to declare the position and relevance of international law in disputes about the territorial application of statute law. In this regard, the so-called rebuttable presumptions of statutory interpretation play an important role when judges decide such questions.⁴⁰⁹ Courts in other countries sharing the common law tradition similarly rely on

⁴⁰⁵ The government position in the case was that the Indian parliament “has inherent powers to legislate ‘for’ any territory, including territories beyond India, and that no court in India may question or invalidate such laws on the ground that they are extra-territorial laws. Such a position incorporates the view that Parliament may enact legislation even with respect to extra-territorial aspects or causes that have no impact on, effect in or consequence for India, any part of it, its inhabitants or Indians, their interests, welfare, or security, and further that the purpose of such legislation need not in any manner or form be intended to benefit India.” (ibid.) The Court rejected this argument because to accept it would mean that India’s “Parliament would have powers to enact extra-territorial laws with respect to foreign territories that are devoid of justice i.e., they serve no benefits to the denizens of such foreign territories. Arguably India, as a nation-state, has not been established, nor has it developed, with an intent to be an expansionary or an imperialist power on the international stage [...] A valid argument can also be made that such an exploitative situation would be harmful to India’s moral stature on the international plane, and also possibly deleterious to international peace, and consequently damaging to India’s long run interests” (ibid., at 22, 42).

⁴⁰⁶ Ibid., 41, 47, 76.

⁴⁰⁷ Ibid., 47.

⁴⁰⁸ See the branch report for Austria, 1.

⁴⁰⁹ See in general D. Bailey, et al., *Bennion, Bailey and Norbury on statutory interpretation*, 8th edition, Michael Anderson et al. Eds., (2020, London: LexisNexis), 203-212; P. St. J. H. Langan, *Maxwell on the Interpretation of Statutes*, 12th edition (1969, London: Sweet & Maxwell), 183.

the presumptions.⁴¹⁰ The nature of the presumptions is that they are operative articulations of a legal system's foundational norms.⁴¹¹ Courts in common law countries treat them as principles (legal standards) that, unlike rules, do not operate in an all-or-nothing fashion. They exert normative influence to determine the choice of rules in any given situation and act as handrails. Two presumptions will be important in a dispute about statutory tax nexus rules in cases when there is uncertainty about the extent of application. First, it is presumed that statute law does not violate international law unless expressly directed; it has been said that the legislative intention to displace international law must be expressed with "irresistible clearness".⁴¹² The second presumption, that statute law does not have extra-territorial application unless clearly stated, is an outflow of the first because it is founded on the customary international law principle of non-interference and on respect for the territorial integrity of other States.⁴¹³ It has ancient lineage.⁴¹⁴ At times these principles are referred to as respecting the 'comity of nations'.⁴¹⁵ Of course, modern State practice no longer always conforms to these presumptions since States exercise prescriptive jurisdiction over extraterritorial acts and persons commonly with the cooperation of other States, though this does not mean the starting point no longer applies or that first principles may be ignored roughshod.

In South Africa, some of the presumptions have been codified such that it is constitutionally required that the courts 'must' follow any reasonable interpretation of legislation that is consistent with international law (including international custom). In the context of jurisdictional tax rules, the branch report comments that "the courts may apply

⁴¹⁰ For Canada, see R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th edition (2002, Butterworths), 592-594; and for South Africa, see L.M. du Plessis, "Statute Law and Interpretation" in *The Law of South Africa*, Volume 25(1), 2e edition (2023, LexisNexis: Online), [333]-[347].

⁴¹¹ Du Plessis, note 410 above, [333].

⁴¹² P.B. Maxwell, *On the Interpretation of Statutes*, 2e edition (1883, London: W. Maxwell), 173.

⁴¹³ The leading English tax case in which the presumption was used is *Clark (Inspector of Taxes) v. Oceanic Contractors* [1983] 2 AC 130 (HL) at 144-145, 152, which was approved by the UK Supreme Court in *Cox v. Ergo Versicherung AG* [2014] UKSC 22, at [27]: "Whether an English statute applies extra-territorially depends upon its construction. There is, however, a presumption against extra-territorial application which is more or less strong depending on the subject-matter. It arises from the fact that, except in relation to the acts of its own citizens abroad and certain crimes of universal jurisdiction such as torture and genocide, the exercise of extra-territorial jurisdiction is contrary to ordinary principles of international law governing the jurisdiction of states. It follows, as Lord Scarman observed in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 145, that "unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction". Early English cases expressly invoked international law as the base for the presumption – see, for example, *Ex parte v. Sawers* (1879) 12 Ch. Div. 522, at 526-528. In South Africa, the presumption was relied on as recently as 2008 in *Astral Operations Ltd v. Parry* (CA 8/05) [2008] ZALAC 29, at [9].

⁴¹⁴ Based on Justinian's *Digest* 2.1.20: "extra territorium jus dicenti impune non paretur" (one who gives a judgment outside his territory may be disobeyed with impunity) because "leges extra territorium non obligant" (laws do not bind outside the territory). See also Maxwell, *On the Interpretation of Statutes*, above at note 412, 168.

⁴¹⁵ In *Lawson v. Serco* [2006] UKHL 3, at [6], Lord Hoffman explained: "The general principle of construction is, of course, that legislation is prima facie territorial. The United Kingdom rarely purports to legislate for the whole world. Some international crimes, like torture, are an exception. But usually such an exorbitant exercise of legislative power would be both ineffectual and contrary to the comity of nations" and Bailey, *Bennion, Bailey and Norbury on statutory interpretation*, above at note 409, 204: "the principle [of the comity of nations] requires that each sovereign state should be exclusively allowed to govern its own territory".

domestic legislation restrictively if they contradict customary international law, for example, if there is no clear link with the territory or a residential link”.⁴¹⁶ Likewise, the branch report for Switzerland concludes that due to the constitutional position of international law, a person “cannot be subject to tax in a manner that obviously violates the general principles of international law”.⁴¹⁷

The position of international law in France provides an interesting juxtaposition with the countries discussed above because ordinary statutory law takes precedence over customary international law in the French domestic legal order.⁴¹⁸ As a result, the branch report notes that the genuine link doctrine would probably be toothless in France but that does not mean that tax legislation knows no limit and can have unbounded extraterritorial reach. This is because constitutional review by French courts of the reasonableness of a statutory nexus rules can be undertaken under the constitutional principle of equality that embeds the ability-to-pay principle. The branch report comments that:

“In establishing a tax the Parliament must use rational and objective criteria when evaluating a taxpayer’s ability-to-pay. It is submitted that a nexus rule, as any other taxing provision, must pass this threshold which is however not very demanding since only manifest errors of appreciation by the Parliament can provoke a declaration of unconstitutionality (In at least one instance the court undertook such review (Conseil Constitutionnel, 24 July 1991, n°91-298 DC, §28-30). The legislator established a provincial (departmental) income tax (which eventually never came into force). The court ruled that the Parliament was rational in subjecting to the tax the taxpayers having their fiscal domicile in France without distinguishing the situation of those who work in France and those who work abroad where they are also subject to an income tax.”⁴¹⁹

The prospects to apply reasonableness as a general legal standard when assessing the limit on a State’s prescriptive jurisdictional powers will be considered in the next sub-section.

13.2.3. *Reasonableness and Proportionality as General Principles of Law and the Limits on Tax Nexus*

It is axiomatic that the proportionality-test is a general principle of law that is both part of international customary law and very often, the constitutional law of a country.⁴²⁰ The legal argument under a proportionality analysis proceeds from the aims and purpose of legislation relative to its ends. It is therefore highly relevant in the analysis of whether jurisdictional tax rules may be excessive.

⁴¹⁶ See the branch report for South Africa, 1, 7.

⁴¹⁷ See the branch report for Switzerland, 7.

⁴¹⁸ See the branch report for France, 1.2.

⁴¹⁹ Ibid.

⁴²⁰ On the overarching nature of proportionality as a general principle of law, see the international law and other national authorities discussed by J.D. Rolim, *Proportionality and fair taxation*, Series on international taxation, 48 (2014, Kluwer), ch. 3 and João Dácio Rolim, “Proportionality and Fair Taxation”, (2015) 43 *Intertax* 5, 405-409, 406. It could also be argued that it is a general principle of international law according to article 38 (1) (c) of the ICJ Statute. Some norms might fulfil the requirements of custom but might also be qualified as a general principle of international law.

Reasonableness as a rule of international custom is sometimes contested by commentators. Yet, international tribunals have applied reasonableness in tandem with the proportionality test as a general principle of law,⁴²¹ it is often enshrined in national constitutional or administrative law and can form the basis for rules in treaty regimes.⁴²²

Therefore, as general rules, fiscal policy making in a national setting should be considering such legal sources and standards that are not confined to international law (but could also be present in international law). They provide a more detailed assessment tool to evaluate whether nexus rules are excessive and whether a level of interference in the territory of other sovereign States might be unlawful. To be concrete, we suggest engaging with these other non-tax principles of law that are present in domestic legal systems to demonstrate whether a nexus definition and a jurisdictional tax claim are excessive and unlawful.⁴²³ In applying these legal principles, the type of fiscal instrument, its purposes and its aims matter a great deal not at a general or global level, but in the context of the country that seeks to impose the tax.

For example, the analysis about a limit on nexus for an income tax would not be the same as for a VAT, a transactional tax, or an environmental levy because these fiscal instruments pursue different objectives and always have fundamentally different economic effects in a local market,⁴²⁴ which may extend to others, depending on the relative position of the country that seeks to impose the tax. New jurisdictional tax rules may have legal effects as well such as requiring other States to enact defensive or countervailing tax or non-tax measures into law.⁴²⁵ The economic and legal effects of a fiscal instrument are critical in this analysis.

Relevant factors to adjudicate whether a jurisdictional tax rule is proportionate are therefore:

- (1) The nature of the fiscal instrument, its purpose and its aim.
- (2) The nature and the extent (including the impact on other countries) of the nexus. In other words, its whole operation in reality.
- (3) The relation between the nature, aim and purpose of the fiscal instrument (1) and the extent of the nexus (2).
- (4) Are there less restrictive means to achieve the purpose?

The effect of a jurisdictional tax rule should be justified in the final analysis with reference to the Westphalian system founded on the equality of nations and the principle of non-interference. This means a country will not only consider the impact of a nexus rule on itself, but also the effects on other countries and whether it is a proportionate means to achieve the fiscal instrument's purpose.

⁴²¹ See Rolim, note 420 above, ch.3.

⁴²² See the quoted clause from a Treaty of Friendship, Commerce and Navigation at section 13.1.1 above.

⁴²³ This is also part of the international law debate; see Cedric Ryngaert, "Nexus and International Tax Jurisdiction" in this volume, 2.

⁴²⁴ For example, the economic incidence of a new corporate income tax may be that it increases the cost of labour, whereas the increase in VAT may be regressive because the burden on poor households would be felt more heavily than the well-off, and a hike in an environmental levy on, say, pesticides could be negative for economic growth.

⁴²⁵ See section 14.5 below for a discussion of the defensive legal tax measures that states are enacting in reaction to imposition of a Global Minimum Tax (Globe) of the OECD's Pillar Two by others.

14. General Conclusions

14.1. Is there an ideal tax nexus rationale from a policy perspective?

Our answer to the question whether there are ideal justifications for designing tax nexus rules from a policy perspective is that there is no ideal for the following reasons. The comparative review shows that the justifications used by states for statutory nexus rules are informed by the objectives for fiscal instruments, as well as relevant economic and development policies. The dynamic interrelation between these aspects means there can be no one answer for all countries about what may be an ideal nexus rule, even for the same type or family of taxes.

Furthermore, the evidence of the branch reports indicate that international law principles expressly inform jurisdictional rule design only in limited fields,⁴²⁶ but can have an important limiting effect when invoked by domestic courts when reviewing tax legislation of every kind.⁴²⁷ However, the extent of constitutional recognition and adherence to international law at the domestic level remains an uneven landscape, so that not all countries may craft tax nexus rules with reference to the limits derived from international law.

The comparative review in this study shows that the question of how open an economy is desired to be, has a key impact on nexus definitions. For instance, prioritising attracting foreign direct investment, or enhancing cross-border trade, can result in high thresholds being placed on the taxes imposed on non-residents (e.g., narrow nexus definitions,⁴²⁸ or nexus definitions preferencing the place of use as opposed to provision of capital).⁴²⁹ There may also be (competing) economic objectives such as to protect local industry through fiscal instruments, which directly impact how tax nexus rules would be designed for such a purpose.⁴³⁰

We furthermore conclude that both a formal and a substantive approach to establish tax nexus can be reasonably justified with reference to objectives a country might pursue with a fiscal instrument. For some taxes, formal tax nexus tests may be linked to relevant private international law connecting factors pointing to the country that legally protects assets or payments.⁴³¹ Moreover, for pensions, the choice of formal as opposed to substantive nexus rules is linked to the intractable policy debate as to whether pensions are income from investment or deferred employment income. Countries have fundamentally different viewpoints on this question, which we have found is reflected in how tax nexus rules are designed in this field.⁴³²

⁴²⁶ Taxation of shipping is the clearest field in which international law principles about prescriptive State jurisdiction are relied upon when tax nexus rules are designed by lawmakers (see the analysis at section 10 above).

⁴²⁷ See the discussion of the constitutional role of international law at section 13.2.2 above.

⁴²⁸ For example, see the discussion of nexus for corporate income tax residence at section 2.2.2 above.

⁴²⁹ See for example, the discussion of nexus and royalty income at section 2.3.4 above.

⁴³⁰ See for example, the discussion of nexus rules for digital service taxes, equalisation levies, the significant economic presence test for income taxes, and other indirect taxes on digital economic activity at section 11 above.

⁴³¹ See for examples, inheritance tax at section 8, securities transfer taxes at section 6, income taxes at section 2, and property taxes at section 4 above.

⁴³² See the analysis at section 2.3.6 above.

14.2. Are there trends in how jurisdictional tax regimes developed or were reformed?

An important task of the present general report has been to assess whether there are any specific trends in how tax nexus definitions have developed. The following are the main observations from the comparative exercise.

In general terms, both in civil law and common law countries nexus rules have been gradually developed be it either through legislative reform measures or courts creating detailed guidance on an ad-hoc basis over a long period of time.⁴³³ Changing or refining nexus definitions is not a very recent phenomenon but probably a necessary feature of multi-tax systems with a need to consider societal changes. Nexus definitions are highly dependent on how each tax is designed. We see, however, a trend that both in civil and common law countries it has become more common to describe the nexus requirements in detail either in legislation or ancillary guidance materials developed by government agencies, and not to derive these from general legal concepts.

Legislators, as well as courts, might refer to other legal fields to develop new nexus definitions. The influence of (international) private law to define nexus is, however, decreasing. There are still some areas where private law elements are important (e.g., inheritance taxation or stamp duty). However, in other areas, more economic or substantive approaches have been applied not only by courts but also by legislators (e.g., significant economic presence). The underlying logic of international private law – the goal of coordination of meta-law among different countries – does not seem to apply for the purpose of defining tax nexus.⁴³⁴ Consumption related nexus definitions have proven to be effective tools in other fields but also in tax matters to allow countries to “pursue their own visions of economic flourishing within a vibrant and cooperative world order”.⁴³⁵ Therefore, it is not surprising that VAT revenues have gained importance over the past decades but also that consumption will become increasingly important as a corporate income tax nexus, for instance, through Amount A of the OECD’s Pillar One or a significant economic presence test as applied in some countries.

Measures to address tax avoidance have been relevant for nexus definitions at least in some areas. This is true not only for the purpose of capital gains taxation,⁴³⁶ but also for the purpose of countering income deferral in corporate income tax systems through CFC legislation.⁴³⁷ It is not a recent new phenomenon, but nexus definitions have constantly been impacted by anti-avoidance concerns. When CFC regimes apply to income that is not associated with income deferral or tax avoidance, questions arise whether there may be

⁴³³ See in respect of income taxes the analysis at section 2.3.1, for Stamp Duty at section 7, for shipping at section 10 and for taxes on digital services or activities at section 11 above.

⁴³⁴ The rationale for nexus in tax is (or should be) based on tax specific reasons and one expects that tax policy will inform them to some degree. The considerations for the development of private international law connecting factors are different because they are mainly concerned with whether domestic courts have jurisdiction. Moreover, nexus in tax to found state jurisdiction is not of a subsidiary nature. Connecting factors in private international law are subsidiarily engaged when, for example, parties fail to specify the governing law and form part of a meta-law, pointing to other laws that ultimately determine the outcome of a case. Private international law connecting factors are therefore functionally different to nexus in tax laws, which is absolute and definitive in establishing tax liability.

⁴³⁵ Timothy Meyer, “Consumption Governance: The Role of Production and Consumption in International Economic Law”, (2024) 49 *Brigham Young University Law Review*, 1063.

⁴³⁶ See, in respect of capital gains, the analysis at section 2.3.8 above.

⁴³⁷ See the discussion of CFCs at section 12 above.

interference in the fiscal sovereignty of States. The branch reports do not indicate examples where States have taken reactive steps to protest such CFC regimes.

Besides, not only anti-avoidance concerns, societal developments such as automation, but also digitalisation have had a significant impact on how countries define nexus. Such an impact can, for instance, not only be seen in the area of VAT,⁴³⁸ but also in the area of the taxation of services.⁴³⁹ We expect that this trend will continue. Conceptually, both automation and digitalisation might blur the traditional distinction between active income and passive income, and therefore the traditional nexus rules for taxing passive income (e.g., the location of the payor or the place of use of capital) might also more often be used for taxing active income. Moreover, as it was highlighted already, consumption-linked regulation seems an effective tool to allow governments to act rather autonomous in a globalised world while at the same time not overtly interfering with the sovereignty of other countries.⁴⁴⁰ Naturally, it is recognised that consumption-linked taxes also have disadvantages that are well-known in tax policy literature.

Enhanced mutual assistance might have an impact on how countries design their jurisdictional claims. Jurisdictional claims might therefore be more often enforced through other means than just withholding taxes – be it through obliging foreign taxpayers to register (e.g., in B2C transactions) or to require notification.⁴⁴¹

14.3. Can tax nexus be divorced from the economic structure of a country?

Throughout the branch reports we have seen evidence that countries consider their economic structure and relative position to others when defining jurisdictional tax rules.

For example, with respect to royalty income, the following was observed.⁴⁴² For technology importing countries, statutory source rules tend to be based on the ‘use in’ country of intellectual property, wherever registered or created. The concern is how intellectual property developed elsewhere is being exploited in the territory making use of material local production factors such as a cheap but schooled labour force. To the contrary, an economy that is generally developed and exporting intellectual property might place a higher premium on legal registration and/or protection against other nations copying or exploiting the intellectual property.

Secondly, with respect to interest income, reliance on foreign capital for investment and/or development of local production factors or resources (e.g., minerals) might have an impact on how the nexus rule is defined.⁴⁴³ Statutory source rules appear to move towards regarding the place where loan capital is used as decisive, and less emphasis is placed on creditor-side factors such as where a bank conducts its lending business activity. Judicial approaches in countries, like Australia and the United Kingdom, that look at the overall factual matrix or follow a so-called ‘practical man’ factual test appear to place emphasis on creditor side activities, thus may be more geared to a capital exporting jurisdiction. Some

⁴³⁸ See in respect of VAT the analysis at section 3 above.

⁴³⁹ For taxation of services see the analysis at section 2.3.5 above.

⁴⁴⁰ See A.V. Lowe, “The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution”, (1985) *International and Comparative Law Quarterly*, 724 *et seq.*

⁴⁴¹ See section 3 above.

⁴⁴² See section 2.3.4 above.

⁴⁴³ See section 2.3.3 above.

countries rely on further nexus concepts such as the territory from which economic benefit is extracted via securitisation of debt. Overall, there is no consistency because often these approaches are combined or overlayed with the place of the debtor's tax residence as a connecting factor so that it is quite hard to discern what the underlying policy might be.

Economic differences do not offer a complete explanation for variation in source rules, but in some situations these differences might explain why a country may be more inclined for one type over the other, and why there will always be structural pressures that cause differences in legal rule design. We would therefore also be reluctant to propose that there can be a harmonisation of source rules across all jurisdictions - this masks the fact that these rules are essentially self-interested, and the fiscal needs and interests of countries differ.

Moreover, the analysis has shown the importance of double tax treaties to resolve jurisdictional source overlaps (residence and source; residence and residence). Overlapping tax jurisdiction is, *inter alia*, triggered by overlapping nexus definition. However, double tax treaties are not capable to solve all source-source overlaps. And, moreover, recent times have seen a move from classical income taxes to new forms of taxation such as DSTs but also the new tools created by the OECD's Pillar Two (i.e., the IIR, the undertaxed profits rule (UTPR) and the qualified domestic minimum top-up tax (QDMTT)). The future will tell whether new international agreements are necessary to mitigate cross-border investment obstacles through these new tax instruments, or whether the existing legal framework for the resolution of overlapping tax jurisdiction is sufficient.

It is well-known that legal certainty is a key factor for the attractiveness of a country towards foreign investors. Therefore, activism by revenue agencies to constantly expand existing nexus definitions might be detrimental in the long run for cross-border investments.

14.4. The way tax residence is defined can look like source tax nexus – why?

We have seen throughout all branch reports that the source versus residency dichotomy is still widely applied for income tax purposes. This means that some nexus definitions justify worldwide taxation whereas others justify a limited source taxing right only. However, the line between source and residence has been blurred around the globe due to a variety of developments.

For instance, it is evident that the reality of how most countries establish the income tax residence of a natural person concerns, in fact, territory linked assets (e.g., a home, an abode) and more broadly territory linked social and/or economic relations and activities, including a trend to increasingly rely on days spent physically in the territory.⁴⁴⁴ Similarly, reference to the place of effective management to determine the residency of a corporate taxpayer also relies on territorial elements. Depending on the activities these might even be very similar to the permanent establishment threshold (i.e., a place of management or a fixed place of business).

Thus, nexus for residence-based (corporate) income tax can appear to blur the line with source or territory linked income taxation because assets, activities such as management or being physically present in a territory are also decisive factors that can cause limited source-based income tax, as discussed in section 2.3 above. The difference seems to be locked in

⁴⁴⁴ See section 2.2.1 above.

the rationale for why comprehensive as opposed to limited income tax liability should flow from similar connecting factors.

Yet, most branch reporters had great difficulty to establish the formal rationale or justification for the specific income tax nexus rules when they were introduced, and, as they were amended or evolved through interpretive practices by judiciaries and administrators. Despite these challenges, the general impression emerging is that offering protection, economic opportunity, social benefit, and political rights to a person over several fiscal years may point to justified comprehensive income tax liability. On the other hand, offering economic opportunity for the performance of activities, or deployment of forms of capital at a yield, within one fiscal year, may point to limiting the extent of income tax liability to the yield from the economic source (i.e., the activity or use of capital) in that year. The enjoyment of social benefit and/or political rights by persons over several years was not part of the geographical source of income analysis in the reviewed countries and appears to be the differentiation with residence-based liability.⁴⁴⁵

The intermediate end of the 'eternal' discussion between source and residence nexus has been reached by the introduction of the model concept of the UTPR by the OECD to achieve a global minimum tax for multinational enterprises. The UTPR developed from an undertaxed-**payments** rule to an undertaxed-**profits** rule. The former had the appearance of a territory linked nexus for source taxation (i.e., the non-deductibility of payments sourced in a country), whereas the final design of the UTPR as an undertaxed-profits rule enables participating countries to tax the worldwide under-taxed profits of a multinational group based on an investment in a corporate member being in their jurisdiction. The UTPR has jeopardised the axiomatic claim that there is a difference between residence and source countries.

In the next general conclusion, we will explain that there is a legal limit to tax nexus and that tax jurisdiction can be exceeded. An important element of that analysis is to understand the effect of a jurisdictional tax rule on other countries because the law of prescriptive State jurisdiction at its core concerns co-existence of sovereign States and non-intervention.

14.5. What is the legal limit on tax jurisdiction?

The future and current developments that have been mentioned raise the question of where the limit of State jurisdiction is and what are excessive and even unlawful nexus definitions.⁴⁴⁶ In what follows, we frame our own understanding of the legal limits on State jurisdiction to tax with reference to the materials assessed for this report, although, the international law report provided by Ryngaert should be considered in conjunction.

⁴⁴⁵ A similar conclusion is reached by Mitchell Kane, "A Defense of Source Rules in International Taxation" (2015) 32 *Yale Journal on Regulation* 311, 314: "The political connection between taxpayer and state that undergirds the residence principle does not exist for the source principle".

⁴⁴⁶ The branch reporters were also asked to highlight potential international law concerns of the nexus rules they considered. Our impression is that in the assessed countries, discussions about international law's relevance are limited. One explanation is probably the strong disciplinary demarcation in the practice and teaching of international tax law and international law.

As it was demonstrated in detail in the international law report, there is a limit on the jurisdiction to tax derived from customary international law.⁴⁴⁷ The taxing rights of States are not unlimited from an international law perspective. Though, it would be too trivial to simply argue that nexus A is always sufficient and nexus B is not.⁴⁴⁸ A key element is to assess whether a State (by applying a tax claim based on a certain nexus) does “not unduly interfere in the affairs of other States”.⁴⁴⁹ Therefore, the principle of non-intervention means that it is not just the “nexus” that needs to be in line with international law but the whole functioning of a taxing right and in particular the level of intervention into another State’s territory is critical. The following examples taken from the global minimum tax proposal (GloBE) illustrate this cohesive impact of international law.

The analysis in sections 2.2.2. and 12 showed that the place of effective management (or the seat) of a company is a sufficient nexus to allow worldwide taxation of the income of separate entities and it might even be sufficient to allow States to apply CFC rules to address tax avoidance concerns arising from income deferral. However, using the place effective management of a subsidiary to allow taxation of the worldwide under-taxed profits of a multinational group through the UTPR seems excessive as will be explained further. Therefore, the same nexus (place of effective management/seat of a company) has a different impact on the taxing rights of States, depending on the whole operation of the fiscal instrument for which it is used.

In the traditional international tax regime, the permanent establishment nexus is often used to establish tax on income (such as capital gains or business income), which is connected to the permanent establishment.⁴⁵⁰ However, the UTPR relies on the permanent establishment nexus as well. The effect is that a traditional source tax nexus concept is transformed into a nexus concept that enables global taxation of a whole multinational group’s under-taxed profits, which is excessive and against international customary law.⁴⁵¹ By applying the UTPR (both as regards local subsidiaries but also permanent establishments), the charging State interferes in the affairs of other States and sovereignty concerns are triggered. This can be seen from the different types of defensive legislative measures that are needed to avoid the application of the UTPR, be it the introduction of a QDMTT, the reform of tax rules that give rise to low-taxed profits, or a new non-corporate tax incentive

⁴⁴⁷ See Cedric Ryngaert, “Nexus and International Tax Jurisdiction” in this volume, 2. For a slightly deviating position from a methodological perspective see Peter Hongler, *Justice in International Tax Law*, IBFD 2019, 62 et seq., arguing that state sovereignty in general and, therefore, the fact that fiscal sovereignty is limited, is a legal precondition of the international law regime.

⁴⁴⁸ See on this topic Peter Hongler, *Justice in International Tax Law*, (2019, IBFD), 87 et seq.

⁴⁴⁹ See Cedric Ryngaert, “Nexus and International Tax Jurisdiction” in this volume, 2, with reference to Milanovic.

⁴⁵⁰ What “connected to” means may be disputed. It could mean determining the profits of permanent establishment in line with the Authorized OECD Approach or a following a broader force of attraction mechanism.

⁴⁵¹ This concern has also been raised in the Swedish branch report, section 9. On the limits of jurisdiction for the permanent establishment state see Mann, “The Doctrine of Jurisdiction in International Law”, in *Collected Courses of the Hague Academy of International Law* (1964), 115.

such as subsidies or tax credits mooted by several countries.⁴⁵² The introduction of the UTPR has caused direct legislative effects in other jurisdictions as States are compelled to react to the threat of the application of the UTPR. The “devilish logic”⁴⁵³ of the UTPR can also be seen in the many reactions of commentators who have highlighted the far-reaching impact of the UTPR or even its infringement of various international law obligations including the customary rules of jurisdiction.⁴⁵⁴ Politicians from the United States have proposed countermeasures against the UTPR.⁴⁵⁵

New nexus definitions addressing the digitalisation of the economy appear to be less problematic. The amendment of VAT laws to cover in particular digital B2C transactions have, for instance, not resulted in concern about unlawful interference into the territory of other jurisdictions. It seems to be justified that countries tax local digital consumption through a VAT but also through a DST because consumption is evidently in the local territory. Income tax treaties but also the General Agreement on Trade in Services (GATS) might limit the legislative reform capacity of countries to address new digital business models. Therefore, taxing profits from digital consumption in market States may be a justified intervention. The same is true for new nexus definitions to address tax avoidance structures. Even those that are based on very far-reaching interventions by the tax authorities, such as the taxation of indirect share sales in India in the *Vodafone* case and other cases, appear to be less problematic under international law, as their impact on the tax systems of other States is not overtly discernible. One reason might be that such measures seem, *prima facie*, justified by the concern about the effects of corporate tax avoidance and profit shifting

⁴⁵² In addition to many countries that have enacted a QDMTT or plan to do so, examples of countries that are planning to introduce countermeasures of a different nature include Singapore (contemplating a corporate income tax cash grant and a refundable investment credit, see Ministry of Finance Singapore, “Public Consultation on Proposed Income Tax (Amendment) Bill 2024”, 10 Jun 2024, available at: [https://www.mof.gov.sg/news-publications/public-consultations/public-consultation-on-proposed-income-tax-\(amendment\)-bill-2024](https://www.mof.gov.sg/news-publications/public-consultations/public-consultation-on-proposed-income-tax-(amendment)-bill-2024) (accessed 14 June 2024)), Vietnam (contemplating investment incentives, see Socialist Republic of Vietnam, “Resolution, 6th Session, 15th National Assembly”, Resolution No. 110/2023/QH15, Hanoi, November 29, 2023, available at: <https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Nghi-quyet-110-2023-QH15-Ky-hop-thu-6-Quoc-hoi-khoa-XV-589929.aspx> (accessed 14 June 2024)); Barbados (contemplating qualified refundable tax credits, see “Barbados - Corporation Tax Reform 2024”, available at: <https://www.barbadosparliament.com/uploads/sittings/attachments/8548dbe944a97cd2acf2f78eade9f5.pdf> (accessed 14 June 2024)); and several Swiss cantons (contemplating qualified refundable tax credits, see, e.g., Grisons, “Partial revision of the tax law for the canton of Graubünden (BR 720.000) and partial revision of the law on the promotion of economic development in Graubünden (BR 932.100)”, 15 January 2024, available at: <https://www.gr.ch/DE/publikationen/vernehmlassungen/dvs/Seiten/Umsetzung-OECD-Mindeststeuer.aspx> (accessed 14 June 2024)).

⁴⁵³ Cees Peters, “The Legitimacy of the OECD’s Work on Pillar Two: An Analysis of the Overconfidence in a ‘Devilish Logic’”, (2023) *Intertax*, 545 *et seq.*

⁴⁵⁴ For instance, Sjoerd Douma, Alexia Kardachaki, Georg Kofler, P. Bräumann & M. Tumpel, “The UTPR and International Law: Analysis From Three Angles”, (2023) 110 *Tax Notes International*, 875; Filip Debelva & Luc de Broe, “Pillar 2: An Analysis of the IIR and UTPR from an International Customary Law, Tax Treaty Law and European Union Law Perspective”, (2022) 50 *Intertax* 12, 898 *et seq.*; Peter Hongler, Irma Mosquera, Filip Debelva, Vikram Chand, and Julien Chaisse, “UTPR — Potential Conflicts With International Law?” (2023) *Tax Notes International*, 141 *et seq.*

⁴⁵⁵ See United States House Committee on Ways and Means, “Ways and Means Republicans Introduce Bill to Combat Biden’s Global Tax Surrender”, 25 May 2023 (available at <https://waysandmeans.house.gov/2023/05/25/ways-and-means-republicans-introduce-bill-to-combat-bidens-global-tax-surrender/>).

on the country that acts.⁴⁵⁶ The *Vodafone*-case has not caused the same international law concerns as does the UTPR. The case has mainly triggered a rule of law debate about the extensive interpretation of domestic law and the question of unlawful retroactivity.

The same can be said about the US Foreign Account Tax Compliance Act (FATCA), which is aimed at minimising cross-border tax evasion and, therefore, the undermining of the United States' tax base.⁴⁵⁷ Whilst the FATCA has extraterritorial effect, the level of intervention into the tax systems of other States is significantly lower compared to the UTPR because they are not required to enact defensive legislative measures to counteract the effects in their territories (they merely need to cooperate). Moreover, the FATCA demonstrates that the purpose of a piece of legislation might justify a certain level of intervention. Addressing cross-border tax evasion and, therefore, criminal behaviour, might justify a different level of interference than the regulatory goals of the GloBE regime (setting a floor to tax competition, introducing a harmonised common corporate tax base, and forcing reform of certain types of corporate tax incentives).⁴⁵⁸

Interestingly, there is no strong evidence from the branch reports that international law and its theories about State jurisdiction are overtly considered or debated in tax policy making (this is different for the OECD's Pillar Two due to academic commentary, and in the field of shipping taxes due to the impact of the UNCLOS as set out in section 10 above). But the position is different when it comes to tax disputes before the highest courts.⁴⁵⁹ For example, in Germany and India the highest courts have expressly relied on international custom including the genuine link theory (in Austria the second highest court also did so) in deciding that State jurisdiction to tax was exceeded.⁴⁶⁰ Yet, there are not many tax cases noted by the branch reporters in which international law was pleaded or relied upon in tax nexus disputes before national courts. One reason might be that tax professionals are not used to refer to customary rules of international law and the methods to establish customary rules in the field of prescriptive State jurisdiction are dissimilar from tax law, and therefore difficult to grasp because it depends highly on forms of State practice such as the reactions of States and the level of interference into each other's territories. Both metrics are hard to measure and difficult to apply. Yet, it does not mean that international law may be ignored because it is hard for tax professionals to integrate into an analysis.

In our knowledge, other theories about the basis for tax jurisdiction such as State power or ethical obligation have not found favour in judicial thought. No decisions by national courts were noted by branch reporters, nor are we aware of any from our own research, in which courts took the position that the State's tax jurisdiction is essentially unbounded and not limited by international law. Such theory has been expressly rejected by the Supreme

⁴⁵⁶ We do not take a position on whether the legal basis in India was sufficient to tax the transactions at issue in the *Vodafone* case; we only comment on the potential limits under international law.

⁴⁵⁷ See also the branch report for Norway, 9, on the potential extraterritorial effect of third-party reporting obligations.

⁴⁵⁸ There are different estimates of the additional tax revenue. See, for example, OECD Taxation Working Papers No. 68, *The Global Minimum Tax and the taxation of MNE profit, 2024* – up to approximately EUR 200 billion, or Felix Reitz, "Revenue Effects of the OECD Corporate Tax Reform - An Updated Impact Assessment of Pillar Two", IFF-HSG Working Papers Working Paper No. 2023-17 July 2023 – up to approximately EUR 100 billion.

⁴⁵⁹ For a list of domestic court decisions confirming that there is a limit on the jurisdiction to tax in general, see Stjepan Gadzo, *Nexus Requirements for Taxation of Non-Residents' Business Income – A Normative Evaluation in the Context of the Global Economy*, (2018, IBFD), section 2.2.6.3.

⁴⁶⁰ See, for example, the branch report for Germany, 1. c., the branch report for India, 20.2 and our discussion in section 13.2.2 above.

Court of India and common law courts adhere to the presumption against the reading down or ignoring of international law when the extra-territorial limit of tax legislation is assessed.⁴⁶¹ Theories that the State's jurisdiction to tax is not limited by international law appear to be favoured only within the circles of tax commentators who seem to approach the matter as a global topic that can be assessed without regard to the position of international law in the constitutional frameworks of States, and as if court decisions to the contrary have no legal significance in assessing State practice. The comparative analysis of this study shows that these theoretical viewpoints are not supported in State practice, limited as it might be, but nonetheless emanating from senior law courts who consistently upheld the view that there is a limit that derives from international law. In our view, the theory that international law places no limit on a State's jurisdiction to tax ignores the capacity of taxation to upset the peaceful co-existence of sovereign States. Moreover, a full realisation of the international law of prescriptive State jurisdiction means that a decision-taker, whether as a policymaker, tax administrator, or judicial officer will not only consider the effect of the operation of a tax nexus rule on his or her own jurisdiction, but also on others. Such an approach implies self-control and consideration of more than self-interest and is emblematic of the central role the law envisions for State and non-State parties to act *bona fide* toward each other in the great effort needed to maintain the peaceful co-existence of nations.

To conclude, the extensive evidence of legislative rules, State practices and court decisions presented by the branch reports indicate that jurisdictional tax capacity of States is in fact limited and predominantly grounded in the orthodox territoriality basis (earlier we concluded that even personhood tax bases are gravitating towards territorial nexus factors – see section 14.4 above). Therefore, the real debate is not whether a residence or source-base should inform a jurisdictional tax rule, but whether there is a limit derived from the effect of a nexus rule in the territory of other sovereign States. Taxation law does not in our view provide the tools to establish whether the limit is exceeded because it does not, per definition, deal with the co-existence of sovereign States. The evidence from the reviewed countries reveals that international customary law principles for prescriptive State jurisdiction are applied by apex courts in countries where international law is constitutionally entrenched. Maybe there could be areas where a global jurisdictional base may be justified – for example in the field of cross-border tax evasion or climate change. We envisage that it will be up to apex courts to clarify the legal standard to determine when jurisdictional tax claims violate international law. The GloBE UTPR and the IIR, as well as the so-called intellectual property registration cases,⁴⁶² provide ample opportunity to deal with this international law issue.

Finally, we have suggested earlier that in a domestic setting, jurisdictional tax rules ought to be designed and assessed also based on a standard of reasonableness and the proportionality test when evaluating the level of interference in the territories of other States.⁴⁶³ In our view, the preferred legal approach to whether the limit on a jurisdictional tax rule is exceeded may be revealed by applying these general principles of law in combination with the international customary law of prescriptive State jurisdiction.

⁴⁶¹ See our discussion of the *GVK Industries* case in India and the statutory presumptions about the meaningfulness of international law for interpretation of tax legislation at section 13.2.2 above.

⁴⁶² See section 2.3.4 above.

⁴⁶³ See section 13.2.3 above.



International Fiscal Association

