Taxation of the digital economy and development

A critical assessment of Art. 12B UN-MTC

The baseline: Where do we depart from?

Status quo: PE
Nexus and profit allocation rules in international tax law rely on physical criteria. The PE concept is adapted to the economic reality of brick-and-mortar business models.

ICT service exports

New Economy
• Decreasing relevance of a physical presence
• Increasing reliance on intangible assets
• Change of the value creation chain: Reliance on data, user participation and network effects

Developing countries are typically market states.

Developing countries face structural challenges exacerbating BEPS risks.

Global ICT service exports

Data flows

Reform debate is primarily framed by fiscal and economic interests of developed countries.

OECD

Inclusive (?) Framework on BEPS

Tax challenges
• Existing tax (nexus) rules and principles outdated
• Increased BEPS risks
• Shift of tax revenue away from market states

Developing country's view

Does Art. 12B UN-MTC provide a reasonable, fair and inclusive system to tax profits of MNE in the digital era?

Methodology

Interdisciplinary approach
• Doctrinal analysis of Art. 12B UN-MTC
• Developing a normative framework with reference to principles and theories of public finance, economy and political philosophy from the perspective of developing countries

What principles should govern international tax law on a normative basis?
What are the specific needs of developing countries?
Is there a normative claim for global distributive justice?
What principles should govern a fair reallocation of taxing powers?

Art. 12B – Taxation of ADS
Allocation of taxing rights
(1) General rule: Taxing right of residence state
(2) Gross withholding taxation of income from ADS in source state
(3) Option to net taxation based on formulaic approach
(4) Definition of MNE group
Scope: Automated digital services
(5) Definition: Service provided on the Internet or another electronic network, requiring minimal human involvement from the service provider
(6) Exemplary positive list includes inter alia online advertising services, supply of user data, social media platforms
Subsidiarity
(7) Precedence of Art. 12 and 12A UN-MTC
(8) Permanent establishment reservation
Revenue sourcing rule
(8) Nexus: Location of the payer for ADS
(10) Exception to source rule
(11) Anti-abuse clause

Further issues...
• Implementation of Art. 12B UN-MTC in the tax treaty network
• Comparative analysis to the Pillar I Model
• Compatibility with unilateral DST, specifically the Indian Equalization Levy

Developing country's view

Art. 12B UN-MTC

Does Art. 12B UN-MTC provide a reasonable, fair and inclusive system to tax profits of MNE in the digital era?

Does Art. 12B UN-MTC provide a reasonable, fair and inclusive system to tax profits of MNE in the digital era?

Methodology

Interdisciplinary approach
• Doctrinal analysis of Art. 12B UN-MTC
• Developing a normative framework with reference to principles and theories of public finance, economy and political philosophy from the perspective of developing countries

What principles should govern international tax law on a normative basis?
What are the specific needs of developing countries?
Is there a normative claim for global distributive justice?
What principles should govern a fair reallocation of taxing powers?

Art. 12B – Taxation of ADS
Allocation of taxing rights
(1) General rule: Taxing right of residence state
(2) Gross withholding taxation of income from ADS in source state
(3) Option to net taxation based on formulaic approach
(4) Definition of MNE group
Scope: Automated digital services
(5) Definition: Service provided on the Internet or another electronic network, requiring minimal human involvement from the service provider
(6) Exemplary positive list includes inter alia online advertising services, supply of user data, social media platforms
Subsidiarity
(7) Precedence of Art. 12 and 12A UN-MTC
(8) Permanent establishment reservation
Revenue sourcing rule
(8) Nexus: Location of the payer for ADS
(10) Exception to source rule
(11) Anti-abuse clause

Further issues...
• Implementation of Art. 12B UN-MTC in the tax treaty network
• Comparative analysis to the Pillar I Model
• Compatibility with unilateral DST, specifically the Indian Equalization Levy

Methodology

Interdisciplinary approach
• Doctrinal analysis of Art. 12B UN-MTC
• Developing a normative framework with reference to principles and theories of public finance, economy and political philosophy from the perspective of developing countries

What principles should govern international tax law on a normative basis?
What are the specific needs of developing countries?
Is there a normative claim for global distributive justice?
What principles should govern a fair reallocation of taxing powers?

Art. 12B – Taxation of ADS
Allocation of taxing rights
(1) General rule: Taxing right of residence state
(2) Gross withholding taxation of income from ADS in source state
(3) Option to net taxation based on formulaic approach
(4) Definition of MNE group
Scope: Automated digital services
(5) Definition: Service provided on the Internet or another electronic network, requiring minimal human involvement from the service provider
(6) Exemplary positive list includes inter alia online advertising services, supply of user data, social media platforms
Subsidiarity
(7) Precedence of Art. 12 and 12A UN-MTC
(8) Permanent establishment reservation
Revenue sourcing rule
(8) Nexus: Location of the payer for ADS
(10) Exception to source rule
(11) Anti-abuse clause

Further issues...
• Implementation of Art. 12B UN-MTC in the tax treaty network
• Comparative analysis to the Pillar I Model
• Compatibility with unilateral DST, specifically the Indian Equalization Levy

Methodology

Interdisciplinary approach
• Doctrinal analysis of Art. 12B UN-MTC
• Developing a normative framework with reference to principles and theories of public finance, economy and political philosophy from the perspective of developing countries

What principles should govern international tax law on a normative basis?
What are the specific needs of developing countries?
Is there a normative claim for global distributive justice?
What principles should govern a fair reallocation of taxing powers?

Art. 12B – Taxation of ADS
Allocation of taxing rights
(1) General rule: Taxing right of residence state
(2) Gross withholding taxation of income from ADS in source state
(3) Option to net taxation based on formulaic approach
(4) Definition of MNE group
Scope: Automated digital services
(5) Definition: Service provided on the Internet or another electronic network, requiring minimal human involvement from the service provider
(6) Exemplary positive list includes inter alia online advertising services, supply of user data, social media platforms
Subsidiarity
(7) Precedence of Art. 12 and 12A UN-MTC
(8) Permanent establishment reservation
Revenue sourcing rule
(8) Nexus: Location of the payer for ADS
(10) Exception to source rule
(11) Anti-abuse clause

Further issues...
• Implementation of Art. 12B UN-MTC in the tax treaty network
• Comparative analysis to the Pillar I Model
• Compatibility with unilateral DST, specifically the Indian Equalization Levy

Methodology

Interdisciplinary approach
• Doctrinal analysis of Art. 12B UN-MTC
• Developing a normative framework with reference to principles and theories of public finance, economy and political philosophy from the perspective of developing countries

What principles should govern international tax law on a normative basis?
What are the specific needs of developing countries?
Is there a normative claim for global distributive justice?
What principles should govern a fair reallocation of taxing powers?

Art. 12B – Taxation of ADS
Allocation of taxing rights
(1) General rule: Taxing right of residence state
(2) Gross withholding taxation of income from ADS in source state
(3) Option to net taxation based on formulaic approach
(4) Definition of MNE group
Scope: Automated digital services
(5) Definition: Service provided on the Internet or another electronic network, requiring minimal human involvement from the service provider
(6) Exemplary positive list includes inter alia online advertising services, supply of user data, social media platforms
Subsidiarity
(7) Precedence of Art. 12 and 12A UN-MTC
(8) Permanent establishment reservation
Revenue sourcing rule
(8) Nexus: Location of the payer for ADS
(10) Exception to source rule
(11) Anti-abuse clause

Further issues...
• Implementation of Art. 12B UN-MTC in the tax treaty network
• Comparative analysis to the Pillar I Model
• Compatibility with unilateral DST, specifically the Indian Equalization Levy

Methodology

Interdisciplinary approach
• Doctrinal analysis of Art. 12B UN-MTC
• Developing a normative framework with reference to principles and theories of public finance, economy and political philosophy from the perspective of developing countries

What principles should govern international tax law on a normative basis?
What are the specific needs of developing countries?
Is there a normative claim for global distributive justice?
What principles should govern a fair reallocation of taxing powers?

Art. 12B – Taxation of ADS
Allocation of taxing rights
(1) General rule: Taxing right of residence state
(2) Gross withholding taxation of income from ADS in source state
(3) Option to net taxation based on formulaic approach
(4) Definition of MNE group
Scope: Automated digital services
(5) Definition: Service provided on the Internet or another electronic network, requiring minimal human involvement from the service provider
(6) Exemplary positive list includes inter alia online advertising services, supply of user data, social media platforms
Subsidiarity
(7) Precedence of Art. 12 and 12A UN-MTC
(8) Permanent establishment reservation
Revenue sourcing rule
(8) Nexus: Location of the payer for ADS
(10) Exception to source rule
(11) Anti-abuse clause

Further issues...
• Implementation of Art. 12B UN-MTC in the tax treaty network
• Comparative analysis to the Pillar I Model
• Compatibility with unilateral DST, specifically the Indian Equalization Levy

Methodology

Interdisciplinary approach
• Doctrinal analysis of Art. 12B UN-MTC
• Developing a normative framework with reference to principles and theories of public finance, economy and political philosophy from the perspective of developing countries

What principles should govern international tax law on a normative basis?
What are the specific needs of developing countries?
Is there a normative claim for global distributive justice?
What principles should govern a fair reallocation of taxing powers?

Art. 12B – Taxation of ADS
Allocation of taxing rights
(1) General rule: Taxing right of residence state
(2) Gross withholding taxation of income from ADS in source state
(3) Option to net taxation based on formulaic approach
(4) Definition of MNE group
Scope: Automated digital services
(5) Definition: Service provided on the Internet or another electronic network, requiring minimal human involvement from the service provider
(6) Exemplary positive list includes inter alia online advertising services, supply of user data, social media platforms
Subsidiarity
(7) Precedence of Art. 12 and 12A UN-MTC
(8) Permanent establishment reservation
Revenue sourcing rule
(8) Nexus: Location of the payer for ADS
(10) Exception to source rule
(11) Anti-abuse clause

Further issues...
• Implementation of Art. 12B UN-MTC in the tax treaty network
• Comparative analysis to the Pillar I Model
• Compatibility with unilateral DST, specifically the Indian Equalization Levy

Methodology

Interdisciplinary approach
• Doctrinal analysis of Art. 12B UN-MTC
• Developing a normative framework with reference to principles and theories of public finance, economy and political philosophy from the perspective of developing countries

What principles should govern international tax law on a normative basis?
What are the specific needs of developing countries?
Is there a normative claim for global distributive justice?
What principles should govern a fair reallocation of taxing powers?