

*Svitlana Buriak*

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# International Taxation of Global Value Networks

Market Power, Firm Boundaries and  
Excess Profits

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72



# International Taxation of Global Value Networks

## Why this book?

Among the main challenges of the digitalized and globalized economy that have made the current international tax architecture for taxation of business profits obsolete is the ability of multinationals to achieve cross-jurisdictional scale without physical mass in the host state. The recent OECD and UN responses to this challenge, the OECD's Pillar One proposal and article 12B of the UN Model, aimed at "fixing" the system. Yet, so far, neither of these solutions has gained sufficient support to be enforced globally.

One of the reasons for this is that, currently, tax policy discussions are dominated by narrow-scope topics like the inadequacy of the physical permanent establishment concept or the role of the consumer market in profit generation for multinationals. Constructive changes in the forms of global business governance of today's most successful multinationals are not in scope. These changes include novel modes of internationalization, the ability to employ labour in source countries non-conventionally, such as using platform labour and controlling its performance through algorithms and using intellectual property as a market entry barrier and a monopolization strategy.

In this contribution, the author seeks to understand the business configurations and modes of governance of scale-without-mass businesses. How can multinationals achieve scale without mass, and so economically control resources, people and assets, without legally employing or owning them? Multinationals can achieve cross-jurisdictional scale without mass by relying on new ways of expanding business abroad through non-equity forms of internationalization, mainly facilitated by intellectual property and technology solutions. Non-equity modes are a newly predominant form of the global organization of multinational enterprises which do not demand that businesses maintain a physical presence in the source state. Yet the lack of a physical presence does not mean that a multinational requires no substance in the host state to carry on business there. A multinational's economic boundaries are much broader than its legal boundaries: they are defined by the substance of the business assets that are under its control.

This book questions how international tax law can address non-equity modes of internationalization, including the rationale of allocating business profit of scale-without-mass multinational enterprises to the host country, as well as the effectiveness of the arm's length principle-based profit allocation rules, the OECD's Pillar One, article 12B of the UN Model and cash flow taxes to deal with the relevant challenges.

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# **International Taxation of Global Value Networks**

**Market Power, Firm Boundaries  
and Excess Profits**

**Svitlana Buriak**

This book is based on the thesis submitted for  
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Business (Wirtschaftsuniversität Wien, WU)



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## Abstract

This research uniquely contributes to the discussion on potential solutions to allocating taxing rights in a globalized and digitalized economy by establishing and deepening the links between international tax law, company law, competition law, labour law, multinational firm theory, economics and business administration.

First, the study is focused on the capabilities of international taxation to design a regulatory framework for non-equity modes of internationalization. Such internationalization modes comprise the predominant forms of carrying on business and establishing a physical-free presence in foreign jurisdictions on the part of asset-light multinational enterprises. The modes are argued to be a middle-ground, hybrid form of carrying on business between foreign direct investments and stand-alone trade. However, non-equity international modes currently do not have any regulatory treatment in the international tax system. To test whether carrying on business through non-equity modes of internationalization can give rise to source taxation, the research analyses what amounts to carrying on business under article 7 of the OECD Model Convention with Respect to Taxes on Income and on Capital (OECD Model). The analysis puts an emphasis on the interpretation of the notion of carrying on business rather than the concept of permanent establishment (PE), since the former is argued to be the key element that renders the source state a jurisdiction entitled to tax business income. The conclusion reached is that such characteristics of non-equity modes as control exercised by a foreign enterprise over its economically dependent partners in the source state and the economic dependency of the actors on the enterprise can result in classifying the enterprise as carrying on business in the source state even in the absence of an equity-based presence.

Second, based on the illustration of inequalities in the allocation of wealth in global value networks of non-equity-related economic actors, as well as the levers of market power and dominance, the author provides a holistic overview of the substance and sources of economic rents in intellectual property (IP)-intensive digitalized global businesses. Modern multinational enterprises (MNEs) can derive significant economic rents inter alia in relationships with non-equity partners in market states under specific market conditions. In this study, the author aligns the transfer pricing concept of residual profits with the concept of economic rents. The ultimate goal is to analyse how the international tax system has to be designed to guarantee the equitable allocation of residual profits among different countries based on the entitlement component of the inter-jurisdictional equity principle. The

author illustrates how the current transfer pricing methods aggravate inequitable allocation of resources in IP-enabled monopolistic and monopsonistic markets. In order to cure the system that endorses inequitable distribution of residual profits, this study tests several legal tax frameworks on their suitability for taxing such profits. The examined frameworks include the traditional system that is based on the arm's length principle (ALP) and separate-entity approach, the OECD's Pillar One, article 12B of the 2021 United Nations Model Double Taxation Convention between Developed and Developing Countries (UN Model) and effectively comparable turnover-based taxes, and cash-flow, origin-based and destination-based tax proposals. In conclusion, the author provides an overall assessment of the advantages and disadvantages of each system in respect of taxing residual profits.

In addition, in light of the predominant relevance of the OECD's Pillar One, the research provides different recommendations on the ways to improve the foundation of the framework that has the concept of residual profits at its core. Such recommendations include, for example, developing plus factors for the nexus rules, improving the two-step or four-step analysis for the determination of a paying entity, considering the possibility of preserving a bilateral scope in the allocation of residual profits to market jurisdictions and enhancing the qualitative value of such transfer pricing tools as value chain analysis, location-specific advantages and the profit split method.

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This study received an honourable mention in the 2022 IFA Best Thesis Mitchell B. Carroll Prize awards and won the 2022 Stephan Koren Prize, awarded by WU Full Professors' Association.



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## List of Abbreviations

AAI	Autonomous artificial intelligence
ADS	Automated digital services
AI	Artificial intelligence
ALP	Arm's length principle
AOA	Authorised OECD Approach
B2B	Business to business
B2C	Business to consumer
BEFIT	Business in Europe: Framework for Income Taxation
BEPS	Base Erosion and Profit Shifting
CCCTB	Common Consolidated Corporate Tax Base
CFB	Consumer-facing business
CFC	Controlled foreign corporation
CFT	Cash flow tax
CSR	Corporate social responsibility
CUP	Comparable uncontrolled price
DAE	Dependent agent enterprise
DAPE	Dependent agent permanent establishment
DBCFT	Destination-based cash flow tax
DEMPE	Development, enhancement, management, protection and exploitation
DST	Digital service tax
ECJ	Court of Justice of the European Union
FAR	Functions, assets, risks
FDI	Foreign direct investment
FSE	Functionally separate entity
GVC	Global value chain
GVN	Global value network
GST	Goods and services tax
ICT	Information communication technology
IF	OECD/G20 Inclusive Framework on BEPS
ILO	International Labour Organisation
IMF	International Monetary Fund
IP	Intellectual property
IT	Information technology
LSA	Location-specific advantage
LSR	Location-specific rent
MNE	Multinational enterprise
NEM	Non-equity mode
NPV	Net present value
OBCFT	Origin-based cash flow tax

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# Introduction

## 0.1. Background

### 0.1.1. The OECD and UN developments on addressing the tax challenges of the digitalization of the economy

The research that informs this book was inspired by the intense globalization and technological progress of business operations in the 21st century. Information technology (IT) innovations have reshaped the way multinational enterprises (MNEs) structure their business activities, operate global value chains and design monetization strategies. These changes have proved to be genuinely disruptive not only for the overall business environment but also for all legal fields.

Along the other legal disciplines, international tax law has faced significant challenges that are the result of the fact that traditional legal tax concepts could not effectively address the changing business environment. The first discussions about the need to reform the current rules to deal with digitalization had begun by 1995.<sup>1</sup> After 27 years, there is still no final solution on the table.

In 2021, the two leading international tax organizations, the OECD and the UN, developed regulatory frameworks for a new modern tax system. In July 2021, the OECD/G20 Inclusive Framework on BEPS (IF) released its Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy, which was agreed to by 142 member jurisdictions of the IF.<sup>2</sup> The statement endorsed a revised so-called

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1. G7 Ministerial Conference on the Information 1995 (Brussels 1995); European Ministerial Conference on Global Information Networks (Bonn 1997); OECD Conference on Dismantling the Barriers to Global Electronic Commerce (Turku 1997); and OECD Ministerial Conference on E-Commerce (Ottawa 1998). See OECD, *Unpacking E-Commerce: Business Models, Trends and Policies* ch. 1 (OECD 2019).

2. OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy* p. 5 (1 July 2021), available at <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf> (accessed 21 Sept. 2021).

two-pillar approach, the details of which were laid down in the Blueprints on Pillar One<sup>3</sup> and Pillar Two,<sup>4</sup> published in October 2020.

In October 2021, the OECD updated the July conceptual agreement by means of a new historical statement revealing that 136 out of 140 IF members agreed on the core design elements of Pillar One and Pillar Two.<sup>5</sup> Yet the work on finalizing the design of specific technical details continued.

In 2022, the OECD launched regular public consultations releasing separate Pillar One building blocks. In July 2022, the OECD published an extensive 96-page Progress Report on Pillar One that laid down the technical rules for the first part of the proposal.<sup>6</sup> In October 2022, rules for the second part were brought to the public's attention for the consultation procedure.<sup>7</sup>

In April 2021, the final version of the new article 12B of the United Nations Model Double Taxation Convention between Developed and Developing Countries (UN Model), on the tax treatment of payments for digital services, was approved.<sup>8</sup>

It is noteworthy that, for the first time in the history of double tax treaties, the solutions put forward by the OECD and the UN to address the taxation of the same type of income are so far away from each other. The OECD's solution establishes a formulary mechanism for a global split of a portion of the residual profits of an MNE. In contrast, the approach of the UN provides a withholding tax on income from payments for automated digital services (ADS).

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3. OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS* (OECD 2020).

4. OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS* (OECD 2020).

5. OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy* p. 5 (8 Oct. 2021), available at <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm> (accessed 21 Sept. 2021).

6. OECD, *Progress Report on Amount A of Pillar One – Two-Pillar Solution to the Tax Challenges of the Digitalisation of the Economy* (11 July 2022).

7. OECD, *Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One – Two-Pillar Solution to the Tax Challenges of the Digitalisation of the Economy* (6 Oct. 2022).

8. UN, *Tax Treatment of Payments for Digital Services – New Article 12B – Income from Automated Digital Services*, available at [https://www.dagtva.com/wp-content/uploads/documents/wstax/tax\\_treaty\\_digital\\_services\\_U\\_N.pdf](https://www.dagtva.com/wp-content/uploads/documents/wstax/tax_treaty_digital_services_U_N.pdf) (accessed 5 Aug. 2021).

The proposals are similar in their objectives, namely, to attribute a taxing right over business profits to a new type of entitled jurisdiction – the market jurisdiction. Nonetheless, they are totally different in the ways they attempt to achieve that goal. The aim of this book is to discuss whether the solutions proposed to address the conceptual limitations of the “old” international tax system in respect of the global allocation of profits, in particular with regard to scale-without-mass businesses, may be successful in achieving the goal.

However, in order to evaluate the appropriateness of the proposal to solve the tax challenges of the digitalized and globalized economy, it is first important to examine what has in fact changed in the way multinational companies globalize business activities and establish presence in a host country. As a second step, it is critical to be precise regarding what exactly did not work in the so-called old international tax system (i.e. the arm’s length principle (ALP) system) in relation to the identified changes in business governance.

An analysis of the actual substance of business activities and relations is the key element of building an effective legal system domestically and globally. Thereby, the reform of the profit allocation rules in the BEPS project’s agenda has relied upon the principle of “substance over form”.<sup>9</sup> Therefore, the first part of this book is devoted to analysing the economic substance of business operations and income in different types of industries, including scale-without-mass and highly digitalised ones, and the tax-relevant legal implications that arise from this analysis.

### 0.1.2. 2018 OECD interim report: The substance and features of the global operations of highly digitalized multinational enterprises

The key OECD document in the “OECD digital tax journey” dedicated to addressing the economic substance of value-creating processes in the digitalized economy is the 2018 OECD interim report on Tax Challenges

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9. According to the OECD BEPS webcast from 26 May 2014, the BEPS initiative pursues several goals: to ensure that international allocation of income follows the principles of coherence, substance and transparency. See P. Saint-Amans, R. Russo & M. Ruiters, *Update on BEPS Project*, Live Webcast, 26 May 2014, available at <https://www.oecd.org/ctp/OECD-BEPS-Webcast-26-May.pdf> (accessed 21 Sept. 2021); and O. Wehnert & I. Tankov, *Substance and Transparency in the Context of the BEPS Developments*, International Tax Review (22 June 2014), available at <https://www.internationaltaxreview.com/article/b1f9k18dlwlr01/substance-and-transparency-in-the-context-of-the-beps-developments> (accessed 21 Sept. 2021).

Arising from Digitalisation.<sup>10</sup> The report provides the most comprehensive discussion in the BEPS digital agenda on the different types of business models, the forms of value-creating processes' organization and value drivers, the characteristics that distinguish highly digitalized MNEs from vertically integrated firms, and the characteristics of the service economy in general.<sup>11</sup>

Thus, the OECD interim report listed “the most salient, common characteristics” of digitalized and globalized businesses, among which are *cross-jurisdictional scale without mass and reliance on intangible assets, including intellectual property (IP)*.<sup>12</sup> Nevertheless, the OECD report did not elaborate on how exactly MNEs can reach scale without mass and what the role of IP is in this process. This shortcoming is critical, because the failure to analyse the modes of doing business from a remote location in a host country resulted in a total shift of the regulatory perspective: the policy objective of attributing taxing rights to a *significant economic presence* transformed into allocating taxing rights to *the market jurisdiction*.

Is the market jurisdiction the same as the jurisdiction of a significant economic presence of an MNE? Does the outcome of the OECD and UN proposals concern the contribution of the market jurisdiction to the production process or does it remunerate only the consumption component? If consumption is a new nexus, has the contribution of the market jurisdiction to the production process already lost its relevance for the policy debate? If a significant economic presence is not the same as the market jurisdiction, what is it?

The notion of “scale without mass” does not only refer to the ability of MNEs to carry on sales functions in a host country through digital channels. Scalability can also require reliance on operational resources in the local market, such as labour and assets, to maintain the activities there. An analysis of global operations and new forms of conducting business abroad without a physical presence (i.e. achieving scale without mass) requires taking a holistic view of the global value chains (GVCs) of highly digitalized and scale-without-mass MNEs and their forms of governance.

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10. OECD, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS* (OECD 2018), Primary Sources IBFD.

11. *Id.*, at pp. 23-87.

12. *Id.*, at paras. 33-34; *See also* L. Eden, N. Srinivasan & S. Lalapet, *Transfer Pricing Challenges in the Digital Economy-Part 1: Hic Sunt Dracones?*, 48 *Tax Management International Journal*, p. 4 (2019).

One of the most insightful aspects of the interim report is its discussion of three concepts of value creation, namely value chain, value network and value shop.<sup>13</sup> The concept of GVC appears frequently in the policy documents that regulate global trade and investment relations. For example, in 2020, the World Bank Group published a flagship world development report, *Trading for Development in the Age of Global Value Chains*, which described the substance of the concept and operation of GVCs in detail.<sup>14</sup> The international profit allocation rules laid down in the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines) and the 2021 UN Practical Manual on Transfer Pricing for Developing Countries (UN Manual) also specify that the value chain analysis of global operations can be a crucial qualitative instrument for assessing how business profits have to be allocated.<sup>15</sup> However, somewhat limited attention is paid to the fact that the value chain is not the only type of configuration of the possible global organization of business activities of MNEs in the context of a globalized and digitalized economy. So why is it important to consider alternative forms of the global structuring of business activities for the purposes of international taxation, which were also presented in the interim report?

In the report, the OECD states the following:

The early 21st century is the era of mass production of services. One of the effects of digitalisation is that businesses are increasingly likely to be providing services rather than being engaged in the manufacture of tangible goods. This development challenges the suitability of the value chain ... as a one-size-fits-all

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13. OECD, *supra* n. 10, at sec.2.3.1. International tax literature has a largely controversial attitude towards a notion of value creation (*see* sec. 4.2.4.). Tax experts have been discussing whether the notion could create a positive or a negative principle of source taxation of business income. *See* M.A. Jiménez, *Value Creation: A Guiding Light for the Interpretation of Tax Treaties?* 74 Bull. Intl. Taxn. (4/5), p. 200 (2020), Journal Articles & Opinion Pieces IBFD. However, in this section, different concepts of value creation connote different ways an MNE can organize and structure its global activities, including the integration forms of foreign units of the entity, the levers of control, internationalization strategies, etc. Hence, the discussion here does not aim to answer whether value creation can be a guiding principle for the international allocation of taxing rights. Instead, it focuses on the substance of value creation as the process of the global organization of business commercial cycles.

14. The World Bank, *World Development Report 2020: Trading for Development in the Age of Global Value Chains* (World Bank 2020), available at <https://www.worldbank.org/en/publication/wdr2020> (accessed 21 Sept. 2021).

15. OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2017), Primary Sources IBFD; also available at <https://doi.org/10.1787/tpg-2017-en>.

framework for examining value creation. The concept of the value network is a more natural framework for many more highly-digitalised firms and, in particular, platform-based businesses such as multi-sided platforms.<sup>16</sup>

However, what is a value network, and how is it different from a value chain? As a spoiler to the analysis provided in chapter 1, it is important to define the term “value network” already at this stage to outline the scope of the research on the substance of the global organization of highly digitalized and/or scale-without-mass MNEs. The analysis of global value networks (GVNs) of MNEs focuses on certain specific elements of the configuration of global production processes, such as the stages of production and the relational nature of “inter- and intra-firm linkages between different economic actors” that participate in this process.<sup>17</sup> The value network framework is not limited to the analysis of linear, sequential stages of product development. Instead, it aims at understanding how independent economic partners working together can co-create value and how profits are captured in this process. Thus, value networks can be best described as ecosystems that, due to specific economic ties, can effectively maintain value-creating activities without necessarily having a financial connection between their economic participants.

The two elements of the GVN framework examined in this book are *forms of governance* and *levers of control*. Unfortunately, the interim report did not analyse these elements of the GVN framework for the purposes of regulating modern, IP-driven scale-without-mass businesses, which left significant practical gaps in understanding the substance of their business activities and organizational forms. In this book, the author aims to address these gaps by going deeper into the analysis of the three elements of value creation mentioned above and their implications for international taxation.

### 0.1.3. Non-equity forms of internationalization as a new form of international governance

Hence, the first element analysed in this book – forms of governance – focuses on the specific characteristics of the hybrid forms of internationalization and the features that distinguish them from arm’s length trade and foreign direct investment (FDI). The United Nations Conference on Trade and Development’s (UNCTAD’s) World Investment Report 2011 assigned

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16. OECD, *supra* n. 10, at para. 80.

17. See sec. 1.2.4.

a term to this third form of global investment activities, namely “non-equity forms of international production” (or non-equity modes (NEMs)).<sup>18</sup> In it, UNCTAD underlines that “international production, today, is no longer exclusively about FDI on the one hand and trade on the other”.<sup>19</sup> The report specifies that, traditionally, MNEs faced a “make or buy” decision for each specific business function: whether to perform an activity in-house (i.e. internalization) or to outsource it to third parties (i.e. externalization).<sup>20</sup>

In a cross-border context, internalization entails scaling through FDI, while externalisation entails doing so through arm’s length trade. Different multinational firm theories have primarily addressed the questions of why multinational firms emerge, what drives their decisions to internalize business functions in foreign jurisdictions and what defines the boundaries of multinational firms.<sup>21</sup> According to some of these theories, the decision to externalize business activities, while having some advantage, can come at the price of giving up control over the relevant stages in the value-creation process, which, in turn, might lead to hold-up problems, information asymmetries, increased cost of production, etc. However, the development of information communication technology (ICT) and stronger international trade regulations and investment business conduct standards has, to a significant extent, enabled MNEs to maintain effective and decisive control over cross-border independent partner firms without internalizing the partners’ production forces. MNEs can maintain such control through non-equity contractual modes of internationalization combined with strong bargaining power. The World Investment Report (2011) provides the following definition and examples of NEMs:

NEMs include contract manufacturing, services outsourcing, contract farming, franchising, licensing, management contracts, and other types of contractual relationships through which [MNEs] coordinate activities in their GVCs and influence the management of host-country firms without owning an equity stake in those firms.<sup>22</sup>

UNCTAD’s World Investment Report 2020, International Production Beyond the Pandemic, in comparison to the report of 2011, states the following:

18. UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* ch. IV, p. 123 et seq. (UNCTAD 2011), available at [https://unctad.org/system/files/official-document/wir2011\\_en.pdf](https://unctad.org/system/files/official-document/wir2011_en.pdf) (accessed 21 Sept. 2021).

19. *Id.*, at p. xviii.

20. *Id.*, at pp. xviii-xix.

21. *See* sec. 1.4.2.

22. UNCTAD, *supra* n. 18, at p. xvii.

Non-equity modes became firmly established, between arm's-length trade and FDI, as a governance mechanism in international production. NEMs allowed MNEs to access overseas markets through contracts rather than FDI while still exercising a significant degree of control over operations. Tech MNEs also became increasingly important. These firms can reach markets worldwide through digital channels and without the need for a significant physical presence.<sup>23</sup>

Among the contractual tools, IP – one of the most common characteristics of highly digitalized and globalized businesses according to the OECD – is one of the main instruments for MNEs to gain control over foreign activities without acquiring assets and employing labour resources. For example, a company can enter into a business format franchising agreement that stipulates strict control and compliance requirements for the franchisee. Thereby, the company expands the presence of its business to foreign markets without having an equity stake in the franchisee entity.

Another instrument for gaining control, which is also supported by IP, is IT solutions. Software algorithms can assume managerial functions and allow companies “to oversee myriads of workers in an optimised manner at a large scale”.<sup>24</sup> Cross-jurisdictional control of seemingly independent workers with the help of IT solutions can be achieved due to algorithmic management. Hence, a scale-without-mass company does not have to employ labour in foreign markets if it can control and integrate it into the business operations through algorithms.

Non-equity modes of internationalization allow MNEs to reach scale without mass, i.e. significant economic presence without physical presence. Therefore, international tax solutions to address digitalized and globalized scale-without-mass businesses have to be based on a proper understanding of the ways non-equity market entry modes function and the ways they derive profits from foreign controlled firms.

The absence of the need to have a significant physical presence has been one of the fundamental cornerstones in building an international tax policy for the digitalized economy. There have been numerous attempts to establish a so-called virtual, digital or significant economic taxable presence for MNEs that are seemingly present in a given jurisdiction but lack any establishment

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23. UNCTAD, *World Investment Report 2020: International Production beyond the Pandemic* p. 125 (UNCTAD 2020).

24. M.K. Lee et al., *Working with Machines: The Impact of Algorithmic and Data-Driven Management on Human Workers*, in *Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems* p. 1603 (ACM 2015).

that the MNEs would legally control.<sup>25</sup> However, to the author's best knowledge, there has been no study on which means modern MNEs use to gain significant economic (digital) presence. In particular, NEMs are not addressed in international tax law, tax policy or legal tax research.

This book aims to contribute to the policy work on regulating the digital economy by bridging the studies on different NEM forms of production to address the relevant tax issues and potential legal tax solutions to them. In this part of the analysis, the research on NEMs' tax implications is not limited to digital businesses. In the author's opinion, it is essential to illustrate the scope of the gap that arises from the lack of any tax policy action to regulate NEMs as one of the primary forms of investments in a globalized and digitalized economy, one which allows reaching scale without mass.

UNCTAD has indicated that the growth of NEMs creates not only new opportunities but also significant challenges, especially for developing countries, when it comes to capturing profits in GVCs that powerful, technology-driven MNEs govern.<sup>26</sup> Due to the absence of a taxable presence of such MNEs in developing countries and their powerful position in GVCs, they not only pay little tax on corporate profits there but can also shrink the amount of profits that their local economically dependent partners produce. Hence, UNCTAD has suggested several directions for policymakers in regard to dealing with the risks that NEMs pose, especially for developing countries. Among them were the following recommendations:

- “NEM policies need to be embedded in overall national development strategies, aligned with trade, investment and technology policies and addressing dependency risks.”<sup>27</sup>
- “Promotion and facilitation of NEMs require a strong enabling legal and institutional framework.”<sup>28</sup>
- “Policies need to address the negative consequences and risks posed by NEMs by strengthening the bargaining power of local NEM partners, safeguarding competition, protecting labour rights and the environment.”<sup>29</sup>

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25. OECD, *Public Consultation Document: Addressing the Tax Challenges of the Digitalisation of the Economy, 13 February-6 March 2019* (OECD 2019).

26. UNCTAD, *supra* n. 18, at p. 129.

27. *Id.*, at p. xi.

28. *Id.*

29. *Id.*

International tax law must establish a solid legal framework for addressing the issues of dependency and control, which are intrinsic characteristics of NEM forms of internationalization and governance. The first step in this direction would be to develop appropriate legal tax qualifications for the relations that can be classified as NEMs. In this book, the author addresses several relevant legal qualification issues. In particular, criteria are suggested for distinguishing when two legally stand-alone business are fully independent and when there is economic dependency between them.

A critical example of the need to develop appropriate legal qualifications that are separately dealt with in this book involves the status of digital platforms' business users (individuals). Intermediation digital platforms are used as an example of IP-driven, highly digitalized scale-without-mass forms of businesses. Digital platforms are a bright manifestation of the era of digitalization.

The importance of the issue of platform users is highlighted inter alia by the harmful economic and societal effects on working conditions and labour markets that digital platforms have proved to endorse. Thus, for example, the World Labour Organisation and the European Parliament are developing new legal frameworks to redefine/extend the category of "employee" or establish a third category for non-standard, mainly platform-enabled employment relationships.<sup>30</sup> Both the development of a third category and the expansion of the class of employee might have interesting domestic and international tax implications, starting from imposing on digital platforms an obligation to withhold payroll taxes to establishing corporate tax liability in the jurisdiction of "quasi-employees".

Following the analysis of different NEM forms, this study proceeds with an evaluation of potential tax responses to the changes in the substance of the global business governance. To bring the discussion on NEMs into the context of double tax treaties, the author analyses the notion of "carrying on business" to consider whether the new forms of international production could fall within its scope. The consequences of cross-border activities differ depending on whether they amount to carrying on trade or carrying on business. For example, article 7 of the OECD Model Convention

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30. A. Gawer & N. Srnicek, *Online Platforms: Economic and Societal Effects* p. 91 (European Parliament 2021), available at [https://kclpure.kcl.ac.uk/portal/files/149143202/EPRS\\_STU\\_2021\\_656336\\_EN.pdf](https://kclpure.kcl.ac.uk/portal/files/149143202/EPRS_STU_2021_656336_EN.pdf) (accessed 21 Sept. 2021); and ILO, *Digital Platforms and the World of Work in G20 Countries: Status and Policy Action*, June 2021, available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms\\_814417.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_814417.pdf) (accessed 21 Sept. 2021).





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