Angharad Miller

Taxing Cross-Border Services

Current Worldwide Practices and the Need for Change

IBFD DOCTORAL SERIES 37
Why this book?
The tradability of services cross border has increased vastly since the provisions in the OECD and UN Model Tax Conventions were first developed. This book examines the factors used in these Models to connect an enterprise with the tax jurisdiction of a state for the purposes of allocating the tax base arising from cross-border enterprise services. It questions whether these factors produce an allocation of taxing rights which is acceptable to both multinational enterprises and tax authorities, in terms of satisfying any debt of economic allegiance and limiting base erosion. The connecting factors used, such as permanent establishment and location of the customer, are examined from theoretical and empirical standpoints: if they are considered acceptable, they should be found to be in widespread use, both in the domestic laws of states and in the network of bilateral double tax treaties.

The analysis reveals that most treaties do not follow the OECD Model with respect to cross-border enterprise services. Whilst many follow the UN Model in some respects, the provisions adopted lack a sound theoretical basis, and the use of a time threshold for source state taxation is a poor proxy, both for measuring any debt of economic allegiance to the source state and for measuring the degree of base erosion suffered by the source state. These two findings suggest that a fresh approach is needed. A proposal is offered which uses a better proxy for establishing the right of the source state to tax and which strives to produce an equitable division of the tax base. The proposal suggests an administrative mechanism which can be used even by states with poorly developed tax administrations.

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Chapter 3: The Theoretical Justification for the Use of the Source Principle in the Taxation of International Services

3.1. Introduction 41
3.2. Source and residence 41
3.3. The underlying rationale for the use of the source principle 42
3.4. Benefits provided by the host state as a justification for source taxation 45
  3.4.1. Ability to pay and the benefits principle in combination 48
3.5. The benefits principle as justification for taxing services provided by non-residents 49
3.6. Should the host state automatically have the right to tax profits arising from the use of imported factors of production? 50
  3.6.1. When is a host state justified in using the source principle to tax income from services? 50
3.7. Provision of a market as justification for source-state taxation 52
  3.7.1. Use of the benefits principle where no obvious use of host-state factors of production: Case law developments at state level in the United States 54
3.8. Base erosion as a justification for the taxation of services income of non-residents 56
3.9. The source principle and cross-border services: Developing country issues 57
3.10. Conclusions 59

Chapter 4: A History of the Treatment of Cross-Border Enterprise Services in the Model Tax Conventions

4.1. The origins of the OECD Model Tax Convention and its treatment of income from services 61
  4.1.1. The 1928 Models and the omission of references to services 63
  4.1.2. Post-Second World War developments – Services in the London and Mexico Drafts 64
  4.1.3. Services in the UK-US Treaty of 16 April 1945 66
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1.4. The development of the 1963 Draft OECD Model</td>
<td>67</td>
</tr>
<tr>
<td>4.1.5. The publication of the 1963 Draft OECD Model</td>
<td>68</td>
</tr>
<tr>
<td>4.1.6. Subsequent changes to taxation of services in the OECD Model</td>
<td>69</td>
</tr>
<tr>
<td>4.2. The UN Model</td>
<td>70</td>
</tr>
<tr>
<td>4.2.1. The standard of nexus: The definition of PE</td>
<td>71</td>
</tr>
<tr>
<td>4.2.2. Should profits from international services be treated as business profits?</td>
<td>72</td>
</tr>
<tr>
<td>4.2.3. Distinction between independent personal services and enterprise services</td>
<td>73</td>
</tr>
<tr>
<td>4.2.4. Supervisory services in connection with building sites, construction or assembly projects</td>
<td>74</td>
</tr>
<tr>
<td>4.2.5. The germination of the UN services PE concept</td>
<td>75</td>
</tr>
<tr>
<td>4.2.6. The distinction between royalties and technical service fees</td>
<td>77</td>
</tr>
<tr>
<td>4.2.7. The treatment of royalties in the published UN Model</td>
<td>79</td>
</tr>
<tr>
<td>4.3. Developments concerning services in the UN Model following its publication</td>
<td>80</td>
</tr>
<tr>
<td>4.3.1. Ongoing problems with the treatment of royalties and technical service fees</td>
<td>82</td>
</tr>
<tr>
<td>4.3.2. The scale of adoption of the UN Model provisions regarding services up to 1997</td>
<td>82</td>
</tr>
<tr>
<td>4.3.3. The 2001 and 2011 versions of the UN Model</td>
<td>83</td>
</tr>
<tr>
<td>4.4. Conclusions</td>
<td>84</td>
</tr>
<tr>
<td><strong>Chapter 5: Domestic Law on the Taxation of Inbound Services</strong></td>
<td>87</td>
</tr>
<tr>
<td>5.1. Objective and rationale of the chapter</td>
<td>87</td>
</tr>
<tr>
<td>5.2. The comparative legal research method</td>
<td>87</td>
</tr>
<tr>
<td>5.3. The problem stated</td>
<td>89</td>
</tr>
<tr>
<td>5.4. The states studied in depth</td>
<td>89</td>
</tr>
<tr>
<td>5.5. The sources used</td>
<td>93</td>
</tr>
<tr>
<td>5.6. The questions researched</td>
<td>95</td>
</tr>
<tr>
<td>5.6.1. The definition of services for tax purposes</td>
<td>95</td>
</tr>
<tr>
<td>5.6.2. How is the source of income from inbound services determined under domestic law?</td>
<td>97</td>
</tr>
<tr>
<td>5.6.3. Is there a PE threshold that applies explicitly to services activities?</td>
<td>104</td>
</tr>
<tr>
<td>5.6.4. Services provided by way of subcontractors</td>
<td>110</td>
</tr>
</tbody>
</table>
Table of Contents

5.6.5. Withholding taxes on income from services 111
5.6.6. Grossing-up clauses 114
5.7. The distinction between payments for services and payments for royalties 115
  5.7.1. Intellectual property brought into existence by the provision of services 118
  5.7.2. Mixed contracts 119
5.8. The distinction between independent personal services and other business activities 121
5.9. Enforcement 121
5.10. Congruence between domestic law provisions on services and treaty policy 122
5.11. Conclusions 128

Chapter 6: Survey of Treaty Practices 131

  6.1. Income from enterprise services in double tax treaties 132
  6.2. Survey method 133
  6.3. The use of a deemed services PE 135
  6.4. The treatment of independent personal services 140
  6.5. Services PEs and article 14 taken together 144
    6.5.1. State practices: Services PE and article 14 taken together 146
  6.6. Taxation of services income on the gross basis 147
    6.6.1. Particular provisions relating to technical and other service fees 151
  6.7. Country groupings 155
    6.7.1. The European Union 155
    6.7.2. The OECD members 162
    6.7.3. The BRIC countries 164
    6.7.4. Practices of the 20 leading economies 168
  6.8. Discussion 174

Chapter 7: The Application of the Fixed Place of Business Threshold to Non-Resident Service Providers 177

  7.1. Is a physical location threshold appropriate in determining jurisdiction to tax over income from services? 177
    7.1.1. Was the fixed place of business concept ever intended to apply to large-scale services trade? 178
    7.1.2. Fixed place of business: Necessary for enforcement purposes? 180
7.2. The application of the fixed place of business concept to services trades in the OECD Model 181
  7.2.1. “At the disposal of”: An implied temporal threshold? 183
  7.2.2. “At the disposal of”: The necessary range of business functions to be performed before a “fixed place of business” PE can arise 184
  7.2.3. “At the disposal of”: The 2012 Discussion Draft 185
  7.2.4. Fixed place of business: The implied temporal test 188
  7.2.5. Treaty interpretations of article 5 with respect to service enterprises 190

7.3. Premises of affiliate as fixed place of business 194
  7.3.1. Geographic and commercial coherence: Application to cross-border services 195
  7.3.2. Conclusions on the application for the fixed place of business concept to cross-border services 197

Chapter 8: The Services PE 201

8.1. The deemed services PE in the UN Model 202
  8.1.1. The temporal threshold in article 14 of the UN Model 203

8.2. The deemed services PE provisions in the 2008 Commentary on the OECD Model 204

8.3. The deemed services PE in the US-Canada DTT 209

8.4. Interpreting a deemed services PE 210
  8.4.1. The foreign subsidiary as PE of the parent or other affiliate 210
  8.4.2. Services provided to third parties or provided for the benefit of the enterprise itself? 212
  8.4.3. Do seconded employees create a services PE for the seconding company? 212
  8.4.4. Interpretation of temporal thresholds – Problems of measurement 214
  8.4.5. Temporal thresholds: The effect of different approaches to measurement 217
  8.4.6. Temporal thresholds: Who is providing the services? 219
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.4.7.</td>
<td>The interpretation and the implications of the “same or connected project” requirement</td>
<td>222</td>
</tr>
<tr>
<td>8.4.8.</td>
<td>Case law interpretation of “same or connected” in the context of services</td>
<td>223</td>
</tr>
<tr>
<td>8.4.9.</td>
<td>Theoretical shortcomings of the “same or connected project” rule</td>
<td>227</td>
</tr>
<tr>
<td>8.4.10.</td>
<td>Income-based thresholds</td>
<td>229</td>
</tr>
<tr>
<td>8.5.</td>
<td>Conclusions</td>
<td>231</td>
</tr>
<tr>
<td>9.1.</td>
<td>Source rules for services income</td>
<td>233</td>
</tr>
<tr>
<td>9.1.1.</td>
<td>How is the place of performance to be determined?</td>
<td>235</td>
</tr>
<tr>
<td>9.1.2.</td>
<td>Place of performance: Services provided remotely</td>
<td>237</td>
</tr>
<tr>
<td>9.1.3.</td>
<td>The utilization principle as an alternative to place of performance</td>
<td>239</td>
</tr>
<tr>
<td>9.1.4.</td>
<td>Conclusions on the source principle for services</td>
<td>243</td>
</tr>
<tr>
<td>9.2.</td>
<td>The classification of income from services for treaty purposes</td>
<td>244</td>
</tr>
<tr>
<td>9.2.1.</td>
<td>The 2011 UN proposals for a separate article dealing with technical service fees</td>
<td>245</td>
</tr>
<tr>
<td>9.2.2.</td>
<td>Uncertainty in the classification of income from services</td>
<td>249</td>
</tr>
<tr>
<td>9.2.3.</td>
<td>Brazilian treaty interpretations in treaties without specific provisions for services income</td>
<td>250</td>
</tr>
<tr>
<td>9.2.4.</td>
<td>The distinction between service fees and royalties</td>
<td>252</td>
</tr>
<tr>
<td>9.2.5.</td>
<td>Technical databases: Services or the use of IP?</td>
<td>256</td>
</tr>
<tr>
<td>9.3.</td>
<td>WHT and non-resident service providers</td>
<td>257</td>
</tr>
<tr>
<td>9.3.1.</td>
<td>Problems caused by the imposition of WHT</td>
<td>258</td>
</tr>
<tr>
<td>9.3.2.</td>
<td>Problems created by the use of grossing-up clauses</td>
<td>259</td>
</tr>
<tr>
<td>9.3.3.</td>
<td>The case for WHT</td>
<td>260</td>
</tr>
<tr>
<td>9.4.</td>
<td>Conclusions</td>
<td>261</td>
</tr>
</tbody>
</table>
Chapter 10: Conclusions

10.1. The need for equity in the allocation of taxing rights over income from services
10.2. Strengths of the current system
10.3. The need to deal with enterprise services explicitly in the Models
   10.3.1. The OECD Model as a tool for reducing the variety of treatments in DDTs
10.4. The unsuitability of the fixed place of business concept to cross-border service provision
10.5. Should there be a deemed services PE provision in the text of the OECD Model with a temporal threshold?
10.6. New thresholds considered by the OECD in the BEPS “digital economy” work
10.7. Thresholds as proxies for determining liability to source-state taxation of income from services: General considerations
10.8. Should source-state taxation of foreign service providers be abandoned in favour of consumption tax?
10.9. What should be the source rule for services income?
10.10. Time to revisit the supply/demand approach?
10.11. A modified supply/demand approach to taxing non-resident service providers
   10.11.1. The superiority of a monetary threshold over a temporal threshold
   10.11.2. The superiority of a monetary threshold over a base erosion approach
   10.11.3. A monetary threshold: Robust against artificial avoidance?
   10.11.4. The two-stage monetary threshold
   10.11.5. A higher threshold than for a fixed place of business?
   10.11.6. The determination of the value added in the source state
   10.11.7. How would “services” be defined?
   10.11.8. The end of WHT on payments for services?
   10.11.9. Is the proposal capable of being administered without WHT?
   10.11.10. The need for changes to domestic law
   10.11.11. The end of PE as the sole criterion for source-state taxation of business profits?
10.11.12. The effect on the balance of taxing powers between source and residence states 287
10.12. The wider application of the monetary threshold: A tool for dividing the tax base between states in the age of the digital economy 288
10.13. The role required of the OECD in developing principles for the division of the tax base from services income 289
10.13.1. The modernization of other aspects of international taxation 291
10.14. The dangers of the continued lack of specific treatment of services in the OECD Model 292
10.15. Future research 294

Appendix 1: Extracts from the Model Tax Conventions 297
Appendix 2: 2003 Additions to the OECD Commentary on Article 5 301
Appendix 3: Services Examples Introduced into Paragraph 5 of the Commentary on Paragraph 1 of Article 5 in 2003 303
Appendix 4: Comparison of the UN, OECD and US-Canada Services PE Provisions as at October 2011 305
Appendix 5: The Countries Surveyed in Chapter 6 307
Appendix 6: Treaties with no English or French Translation on the IBFD Database 309
Appendix 7: Example of Survey Source Data 313

Bibliography 315

Table of Figures 355
List of Tables 357
Table of Cases 359
Table of Statutes 363
Introduction

Services represent the fastest growing sector of the global economy and account for two thirds of global output, one third of global employment and nearly 20% of global trade.¹

The value of world trade in services exports was estimated at USD 4.2 trillion in 2011.² According to Pascal Lamy, former Director-General of the World Trade Organization,³ more than half of annual world foreign direct investment flows are in services and the growth in international trade in services has been more rapid than that in world production and merchandise trade. Whereas international services trade was once predominantly comprised of transport services, this is no longer the case.

As Lamy notes, modern business cannot function competitively without efficient services such as telecoms, transport, logistics, computing, accounting and legal services. Neither can it function properly without access to low-cost, high-quality financial services. An efficient service sector underpins other sectors of an economy by ensuring the provision of transport and communications and, through the existence of a well-developed financial services sector, the channelling of finance to those industries most likely to succeed. This thesis examines the allocation of taxing rights over income and profits arising from the provision of cross-border enterprise services for the purposes of direct taxation.

The term “enterprise services” is used to denote services performed by businesses, whether corporate or non-corporate. International services may be delivered in many forms. It is sometimes necessary for natural persons to cross physical borders in order to deliver or consume the service; however, other services can be delivered remotely. In some cases, production and consumption must take place simultaneously, e.g. repair of machinery. Thus some forms of trade in services differ significantly from trade in goods.

It might reasonably be assumed that all the tax rules on international services one could possibly want would be found in the Model Tax Conventions, but this is not so. Provisions covering international transport services and the services of sportspersons and entertainers are well established, but provisions governing the allocation of income and profits from services in general are not specifically dealt with in the text of the OECD Model Tax Convention (hereinafter OECD Model). The allocation of taxing rights over business profits of a non-resident are dealt with in article 5 of the OECD Model. Article 5 sets out two thresholds before a host state may tax the business profits of a non-resident: either there must be a fixed place of business or the non-resident must have a dependent agent in the territory of the taxing state. If either of these thresholds is breached, then the non-resident is said to have a permanent establishment (hereinafter PE) and the net profits attributable to the PE may be taxed by the host state. No matter how substantial the profits earned by a non-resident from the provision of services in a state, so long as there is neither a fixed place of business nor a dependent agent, the host state has no taxing rights over that service provider. The Commentary on the OECD Model offers some optional wordings relating to services for article 5. The United Nations Model Tax Convention (hereinafter UN Model) has always included provision for a services PE, effectively a third threshold which does not require a fixed place of business or a dependent agent. However, this Model is less widely used than the OECD Model. The OECD Model, the leading Model, defines the right to tax business profits of non-residents primarily by the existence of a fixed place of business for a certain length of time, a concept developed in an era when the way non-residents earned business profits in the territory of a host state was via the setting up of premises and the presence there of personnel. Arnold, who has been advising the UN on the 2011 update of the UN Model, has this to say:

In my view, the fixed-place-of-business threshold, i.e. PE or fixed base, that applies to the source country taxation of business profits generally is clearly insufficient for income from services. That threshold was adopted at a time when most cross-border business activity involved the manufacture or production and sale of goods. In a modern economy, cross-border services are much more important. Such services can often be performed without the need for any fixed place of business and the country in which services are performed

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should have the right to tax the income from those services in certain circumstances where there is no PE in the country.  

Those developing the OECD Model and its antecedents were responding to growth in international trade in goods and could not reasonably have foreseen the changes in the patterns, and the expansion, of international trade made possible by improvements in transport and communications. However, developments in international tax have tended to shadow developments in international trading practices: anti-haven legislation was developed starting with US Subpart F in the 1960s in response to the growth in the use of tax havens. As another example, the OECD Commentary on Article 5 was expanded significantly in 2005 in response to the growth in e-commerce, which led to the OECD’s policymakers being much exercised by the question of whether or not inanimate physical assets, of themselves, could be regarded as a fixed place of business. International trade in services, though, is not a particularly novel development: trade flows of services were significant in comparison to flows of goods throughout the 20th century. What has been changing with respect to international services in recent decades is the scale of international trade and the advent of supranational efforts to liberalize international trade in services. In the light of these changes, it may be expected that, in future, the OECD Model will undergo development to take account of international trade in enterprise services. The policy of the OECD has traditionally been to resist changes to the text of the OECD Model and to amend and expand the Commentary to accommodate the performance of services by non-residents within the concept of the fixed place of business and by providing the suggested wording for an optional services PE. There are signs that the OECD’s Base Erosion and Profit Shifting initiative (BEPS) may result in changes to this

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8. The General Agreement on Trade in Services (GATS) entered into force in January 1995 following the Uruguay round of negotiations of the WTO: while the GATS does not impose liberalization measures in respect of services trade, it provides a framework within which countries can enter into bilateral or multilateral agreements for the liberalization of trade in services. WTO, General Agreement on Trade in Services (WTO 15 Apr. 1994).
strategy. However, this initiative is aimed at curbing “tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid”, whereas this study is concerned principally with the effect on the division of the tax base between states caused by the general expansion of cross-border service trade rather than by the deliberate tax minimization strategies employed by MNEs that are the focus of the BEPS initiative.

The divergence between the types of international trade directly catered for in the text of the OECD Model as it reads at 2014 and the types of international trade now taking place has led to a plethora of diverse provisions concerning trade in services in double tax treaties. While the UN Model services PE is often adopted, so too are provisions permitting taxation of income from services on a gross, as opposed to a net, basis. This divergence is referred to in the BEPS Report:

The international common principles drawn from national experiences to share tax jurisdiction may not have kept pace with the changing business environment.

1.1. Research objectives and research questions

The objective of this thesis is to analyse the treatment of enterprise services within the OECD and UN Models in the light of the treatment of non-resident services providers under the domestic law of states and under the double tax treaties entered into by states in order to form a view as to the adequacy of the treatment of cross-border trade in enterprise services in the OECD and UN Models. The principal research question asked is:

Are the provisions found in the texts of the Models adequate and appropriate to deal with the scale of and the forms of present-day cross-border trade in enterprise services?

An important subsidiary question is whether or not the treatment of enterprise services in the Models may be explained by looking at the historical context of them and at historic patterns of world trade.

12. Supra n. 10 at p. 1.
“Adequate” is used in the sense of:

Fully satisfying what is required: quite sufficient, suitable or acceptable in quality or quantity.\textsuperscript{13}

“Appropriate” is taken to mean:

Specially fitted or suitable, proper.\textsuperscript{14}

To answer these questions, three primary sources are used:

(1) National statistics on flows of trade in goods and services from the inception of the Models to the present day.

(2) The provisions in the domestic law for taxation of non-resident service providers in a selection of countries.

(3) A comprehensive survey of treaty practices with respect to enterprise services.

The conclusions on the principal research question will be strongly influenced by two factors: Do double tax treaties (DTTs) follow the text of the OECD Model with respect to the treatment of income from services? To the extent that they do not, are the positions adopted in individual treaties likely to engender a favourable climate in which cross-border trade in services can flourish?

If it is found that the OECD is failing to provide leadership in the allocation of profits from cross-border services, then the implications for service providers and the OECD itself will need to be considered.

Having considered these questions the thesis will then formulate proposals for changes to the text of the OECD Model with respect to enterprise services.

1.1.1. The scope of the research

There are many pressing and interesting issues in the field of the taxation of services. This thesis is principally concerned with the division of rights between states over the direct tax base arising from cross-border enterprise services; thus indirect taxation is beyond the scope of this thesis. Equally, the thesis does not examine the mechanics of attribution of profits from services.

\textsuperscript{13} Oxford English Dictionary.
\textsuperscript{14} Id.
1.2. Thesis outline and methodology

Chapter 2 considers the definition of services and the importance of the definitions adopted in the GATS. If trade in services is not significant relative to trade in goods, then a lack of explicit provision for services in the Models may be considered appropriate. This chapter goes on to present some factual material on the changing patterns of world trade in order to provide a firm foundation for the belief that cross-border trade in services has grown considerably since the OECD Model was first developed and that such trade is continuing to grow. The material presented is drawn mainly from primary statistical sources produced by international organizations and by the governments of the United States and the United Kingdom, but also makes use of some appropriate secondary sources.

Chapter 3 examines the theoretical underpinnings of source-state taxation of the profits of non-resident service providers. A historical analysis is conducted into the theory of jurisdiction to tax, focusing on the benefits principle, the principles of economic and political allegiance, and that of base erosion. This historical analysis is then applied to the taxation of non-resident service providers, drawing distinctions between the reliance placed on source-state resources by traditional forms of cross-border trading and cross-border trade in services. Conclusions are drawn as to whether or not source-state taxation of non-resident service providers is justified.

Chapter 4 traces the history of the treatment of services in both the OECD and the UN Models in order to form conclusions as to the reasons for the present-day treatment, or lack of it, in the text of the Models. The history of the OECD Model is well documented and so no attempt is made at a comprehensive history of the Model. Rather, this analysis seeks to establish whether or not the omission of specific provisions on trade in services in the OECD Model was the result of reasoned analysis based upon known patterns of international trade. The reasons for the inclusion of a services PE in the UN Model are explored, as is the historical treatment of the distinction between services and royalties.

Chapter 5, recognizing that treaty practices are strongly influenced by the domestic laws of the states negotiating treaties and having input to the Models, presents an analysis of the provisions concerning non-resident service providers in the domestic laws of a selection of states. Given that the text of the OECD Model makes no mention of services in article 5, it might be expected that no distinction is made in the domestic laws of states between taxation of non-residents on income from trade in goods and trade
in services. The chapter also enquires into the source rules adopted for taxation of services income and into state practices concerning the levying of withholding tax (WHT) on payments made to non-residents in respect of services. If the domestic laws of many states in respect of taxation of cross-border services differ from the Model treatment, this may support a conclusion that the Model provisions are inappropriate.

Chapter 6 presents the results of an extensive survey of the provisions for enterprise services contained in all full double tax treaties in force where an English or French translation was available as at August 2012. This chapter supplies the principal evidence as to whether DTTs follow the Model with respect to the taxation of cross-border services. Taken together, chapters 5 and 6 reveal that there are widespread differences in the treatment of income from services and they provide a rich data seam that forms the basis for the analyses in the remaining chapters.

Chapter 7 examines whether the basic PE rule, the “fixed place of business” test, is capable of being used to determine the existence of a PE in the case of non-resident service providers. Is this rule adequate and appropriate for determining the allocation of profits from cross-border services? A critique is offered of the changes to the Commentary on Article 5 of the OECD Model, which have been made and which are proposed, to facilitate an interpretation of the fixed place of business test in a way which would permit a source state to find that a service provider has a PE, even where that service provider does not have its own premises in the source state. This chapter includes an assessment of the proposals for alteration of article 5 contained in the BEPS initiative.

Chapter 8 considers whether the services PE provisions in the Commentary to the OECD Model, the text of the UN Model and also that in the Fifth Protocol to the US-Canada treaty constitute an adequate and appropriate means of dealing with the allocation of the tax base from cross-border services. The temporal threshold in article 14 of the UN Model is also analysed. Problems in interpretation are examined, as are difficulties in determining whether a temporal threshold has been breached. More fundamentally, this chapter questions whether a temporal threshold is a good proxy for establishing whether any debt of economic allegiance is owed to the host state. The BEPS proposals for tackling artificial avoidance of breaching of the service PE thresholds are considered.

Chapter 9 builds on this analysis of the services PE provisions as they stand and questions the principles underlying them. Source rules for allocation
of the tax base arising from cross-border services are analysed. Place of performance is often assumed to be the source rule, but the review of state domestic law in chapter 5 and a review of some case law suggests that place of performance may not be the most appropriate rule. Some source rules can only be operated by means of levying WHT. WHT levied on the gross amount of payments for services may, at best, lead service providers to inflate their price and, at worst, lead to service providers withdrawing from particular markets altogether. No provisions exist in any of the Models for WHT on payments for enterprise services, yet the practice is quite widespread, either through explicit treaty provisions or through a failure to interpret article 7 as covering profits from services and is mooted in the BEPS work on the topic of the digital economy as a possible means of restoring taxation revenues to the market jurisdiction.\(^\text{15}\) The questions posed in this chapter are whether or not the OECD has established that place of performance possesses the necessary theoretical underpinnings to be the source rule for services income and whether the widespread imposition of WHT on services income, despite being contrary to the Models, indicates a fundamental failure of the Models with respect to services. The planned introduction of a new article on WHT on services payments in the UN Model is examined.

Chapter 10 presents conclusions based on the data generated and the issues analysed in the thesis. The role of the OECD Model in developing tax treaty policy is critically examined and conclusions on the principal research question are offered, as well as an assessment of the proposals within the BEPS initiative that are relevant to the taxation of cross-border services. The chapter puts forward a proposal for a new method of allocating the tax base with respect to cross-border enterprise services that might be incorporated into the OECD and UN Models.

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