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TAX COMPETITION AND E-COMMERCE

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ABSTRACT

Current data on tax competition present a puzzle: On the one hand, they indicate that effective corporate tax rates in most countries have been declining, and that the worldwide effective tax rate on multinational enterprises (MNEs) has been going down as well. On the other hand, macroeconomic revenue data show no significant decline in corporate tax revenues collected by OECD member countries. This paper suggests that one key to this puzzle may lie in the slow development of e-commerce. On the basis of discussions with informed tax planners, it turns out that in the current market conditions, it may be harder for MNEs to avoid having a "permanent establishment" in market countries than previously supposed. Thus, MNEs are still subject to tax in those countries even if their production takes place in low-tax jurisdictions. The paper then explores the implications of this suggestion for developed and developing countries, and what data are needed to further explore this hypothesis.

TAX COMPETITION AND E-COMMERCE

In the last four years, there has been increasing concern by developed countries about the potential erosion of the corporate income tax base by "harmful tax competition" (EU 1997, OECD 1998). However, the actual data on tax competition available to date present a mixed and somewhat puzzling picture. On the one hand, there is considerable evidence that effective corporate income tax rates in many countries have been declining, and that the worldwide effective tax rates on multinational enterprises (MNEs) have been going down as well. On the other hand, macroeconomic data from developed countries do not indicate a significant decline in corporate income tax revenues.

This paper suggests that part of the explanation for this phenomenon is that despite the advent of e-commerce, MNEs find it harder than some commentators (e.g., Avi-Yonah, 1997) have predicted to avoid having a "permanent establishment" (PE) in market jurisdictions. As a result, those jurisdictions are able to collect taxes from the MNEs and keep up their corporate tax revenues. The decline in effective corporate tax rates may therefore be attributable more to tax competition in jurisdictions where MNEs produce their goods (which are more likely to be developing countries, whose revenue data are less available). If this conjecture is correct, tax competition may be harming developing countries more than developed economies. However, developed economies may also face declining revenues from tax competition if methods are developed to use e-commerce to avoid a PE. The paper concludes by exploring the implications of this hypothesis and what data are needed in order to confirm or disconfirm it

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1. The Puzzle: Declining Effective Tax Rates/ Unchanged Corporate Tax Revenues.

There is a considerable body of data suggesting that world-wide effective corporate tax rates are declining. For example, Altshuler, Grubert and Newlon (2001) used U.S. Treasury data from corporate tax returns between 1984 and 1992 to calculate average effective tax rates for manufacturing affiliates of U.S. MNEs in about 60 countries. They find that average effective tax rates in manufacturing fell by more than 15% between 1984 and 1992. Similarly, Grubert (2001) calculated changes in effective corporate tax rates in a sample of 60 countries for the period from 1984 to 1992, supplemented by published financial data for the period after 1992. He found that average effective tax rates fell from 32.9% in 1984 to 23% in 1992. The decline was largest in countries with populations of less than 15 million.

Chennells and Griffith (1997) calculated effective marginal tax rates (EMTR) and effective average tax rates (EATR) for ten OECD countries for the period 1979-1994 on the basis of the Fullerton-King (1984) model. They also calculated average tax rates (ATR) based on published financial data for the same period. Chennells and Griffith find that domestic EMTRs declined from an average of 21.7% in 1979 to 20.5% in 1994, and that domestic EATRs (which may be more relevant to FDI) declined from 21.7% to 17.9% in the same period. ATRs based on accounting data for six countries (Australia, France, Germany, Japan, UK and US) declined from 40% in 1985 to 32.6% in 1994. Note that this last result is based on firm-level (Compustat) data, and therefore includes foreign affiliates of MNEs based on these countries.

All these data are consistent with the hypothesis that tax competition may be eroding the corporate income tax base. Grubert (2001) and Chennells and Griffith (1997) point out that the data do not indicate any tendency of tax rates to converge. However, as I have argued elsewhere (Avi-Yonah 2000), tax competition may be driving tax rates down in all countries as they respond to each other, so that there need be no convergence until rates reach 0%.

On the other hand, the available data on revenues from the corporate income tax in developed countries do not show any indication of significant erosion in the same period. Corporate income tax revenues as a percentage of total revenues in OECD members were 8% in 1975, 1980, 1985, 1990, 1994 and 1995 (Owens and Sasseville, 1997). This average masks considerable inter-country variation: for example, in New Zealand corporate tax revenues fell from 10.8% in 1975-80 to 8.3% in 1986-1992, and in the US they fell from 14.7% to 9.8% in the same period (IMF, 1995). But it can hardly be said that corporate tax revenues for OECD member countries are eroding. Thus, it is hard to see what concerns were driving the EU and the OECD in their anti-tax competition crusades (EU 1997, OECD 1998).

What can explain the phenomenon of declining effective corporate tax rates but stable corporate tax revenues? One possible explanation is that there has been a shift within the corporate tax from taxing MNEs to taxing purely domestic corporations, since most of the declining tax rate data reported above comes from tax returns and financial disclosures by MNEs, while the revenue data include all corporations. (The EMTR and EATR data reported by Chennels and Griffith apply to all corporations, but are based on theoretical models rather than actual tax returns). If that is the case, it would present an incentive for

all corporations to become MNEs, which is interesting given the current US debate on deferral (NFTC 1999, US Treasury 2000). Given this incentive, one would have expected by now to see some decline in the overall revenue figures. In addition, given the political clout of small business in most countries, one would have expected to hear something had it experienced a significant increase in effective tax rates.

An alternative hypothesis is as follows: MNEs can be taxed in three types of jurisdictions under currently prevailing tax rules. The first type is their residence jurisdiction (where the parent company is incorporated or managed and controlled). These jurisdictions typically do not tax their resident MNEs currently on active foreign-source income (NFTC 1999, US Treasury 2000). The second type is jurisdictions in which the MNEs produce goods, which are to an increasing extent developing countries. These jurisdictions, whether developed or developing, typically do not tax MNEs either because they wish to attract real investment (Avi-Yonah 2000, Vernon 1998). Finally, the third type are jurisdictions into which MNEs sell their goods- typically developed countries. These jurisdictions typically want to tax MNEs but can do so only if the MNE has a PE within their borders.

I have previously argued that e-commerce makes it relatively easy for MNEs to avoid having a PE in market jurisdictions (Avi-Yonah 1997, 2000). If so, no jurisdiction can tax the MNE on a current basis. But if MNEs are *not* able to avoid having a PE, they will be taxed in the market jurisdiction. If that is the case, the data above can be explained as follows: The Altshuler, Grubert and Newlon (2001) and Grubert (2001) data and the Chennells and Griffith (1997) ATR data all reflect worldwide operations of MNEs. These data therefore show declining effective tax rates due primarily to tax competition for

manufacturing activity (and the lack of residual residence-based taxation); recall that the two studies based on Treasury data focused on manufacturing affiliates, and that Grubert (2001) found the greatest decline in small countries. However, MNEs are still taxed (and may be taxed more heavily) in countries where they sell their goods (assuming a PE). These countries are largely developed countries and therefore it is not surprising that their revenue data show no decline in corporate tax revenues.

In effect, this hypothesis suggest that the corporate tax base has been shifted from exporters to importers, and that in countries which have market power and the ability to tax importers, the result has been no decline in overall corporate tax revenues. A similar phenomenon has been documented within the United States, where tax competition has led states to adjust their formulas for taxing corporate income from payroll and assets (production) to sales (consumption), thereby taxing importers more than exporters (Brunori, 2001).

In the international context, the key to this hypothesis is that MNEs are unsuccessful in avoiding having a PE in market jurisdictions. Given the rise of e-commerce, which on the face of things enables MNEs to sell into a jurisdiction and avoid a PE, why would this be the case? This question is explored in the next section.

2. Can MNEs Avoid Having a PE by Using E-Commerce?

The standard literature on international taxation of e-commerce routinely emphasizes that e-commerce makes it possible to avoid having a PE. As the U.S. Treasury noted in its path-breaking 1996 White Paper, a PE requires physical presence in a country and e-

commerce can be conducted without physical presence, ergo no PE (US Treasury 1996). Commentators have generally followed suit, some predicting the demise of source-based taxation (Horner and Owens 1996, Tillinghast 1996, Owens 1997, Economist 1997, Avi-Yonah 1997, Doernberg and Hinnekens 1998, Kessler 1999, Cockfield 1999, Sawyer 1999, Hardesty 1999, Chan 2000, Frieden 2000, Cockfield 2001).

But is this accurate under current conditions? A recent case study presented at the ABA tax section suggests that in practice it may not be so easy for MNEs to avoid having a PE in market jurisdictions, even if they sell in e-commerce (ABA 2001). The case study is as follows:

The International Roll-Out of an E-Commerce Business

OPTION I

ServerCo

I. Basic Background

Dot.com U.S. is a Delaware company that is engaged in e-commerce by providing content to subscribers over the internet. Dot.com U.S. also provides banner advertising to third parties and is paid on a per "click-through" basis. Under Option I (see attached), Dot.com U.S. would form a holding company in a tax-friendly jurisdiction ("Dot.com International"). This company would be an international holding company that would at some point engage in an IPO. Dot.com International would form ServerCo in a tax-friendly jurisdiction. ServerCo would be the owner of all foreign content and would serve that content to foreign users (subject to connectivity related limitations).

Dot.com International would form local subsidiaries to act as an agent for ServerCo. The subsidiaries would enter into content agreements with local providers and enter into banner, sponsorship, e-commerce and other arrangements with local companies as agent. However, these arrangements would be entered into by the local Dot.com companies on behalf of ServerCo. Dot.com U.S. would license existing content to ServerCo on an arm's-length basis. All new content and other intellectual property (the "IP") would be developed in the U.S. but ServerCo would own the foreign rights to the IP pursuant to a cost-sharing agreement.

II. Tax Issues

- What is the appropriate jurisdiction for International and for ServerCo?

- The primary disadvantage of this structure is that ServerCo would need to be managed in its country of residence, and would need to take care that it does not have a taxable presence (referred to as a "permanent establishment") in the operating countries. This may be difficult to achieve. There are also undesirable VAT implications of this structure.

- The taxation of the country of residence of Dot.com International needs to be considered.

- The purpose of this structure is to migrate profits into a lower tax jurisdiction, away from the high tax nets of Europe and the U.S. (where profits would be taxed at rates near 35%).

- How does ServerCo gain access to the US created IP? Is it a transfer of IP, or a license agreement between Dot.com U.S. and the ServerCo? What's the difference?

- How does the cost sharing agreement work into the transfer issues?

- What are the Subpart F consequences of the operation of the group? Would the US. anti-deferral rules under the "subpart F" regime apply to ServerCo?

- Could ServerCo and the operating companies could "check-the-box" to be treated as transparent for U.S. tax purposes. Would this allow for free movement of dividends without subpart F consequences?

OPTION II

Irish IP LicenseCo

I. Background

The basic structure of Option II (see attached) is similar to Option I. It is assumed that would be formed as a Dutch company. Dot.com International would form Irish IP LicenseCo, which would own the content but would license the content to the individual operating companies owned by Dot.com International. These companies would act as an agent to generate content on behalf of IP LicenseCo and would then license the content and other IP from IP LicenseCo. In contrast to Option I, the local operating companies would serve the content over the internet to consumers and practices and would enter into alliances, sponsorships, etc. for their own account.

As in Option I, Dot.com International would be treated as a corporation for U.S. tax purposes while the other entities would check-the-box to be treated as flow-through entities.

As in Option I, Dot.com U.S. would license any existing content and IP to IP LicenseCo at arm's-length.

II. Tax Issues

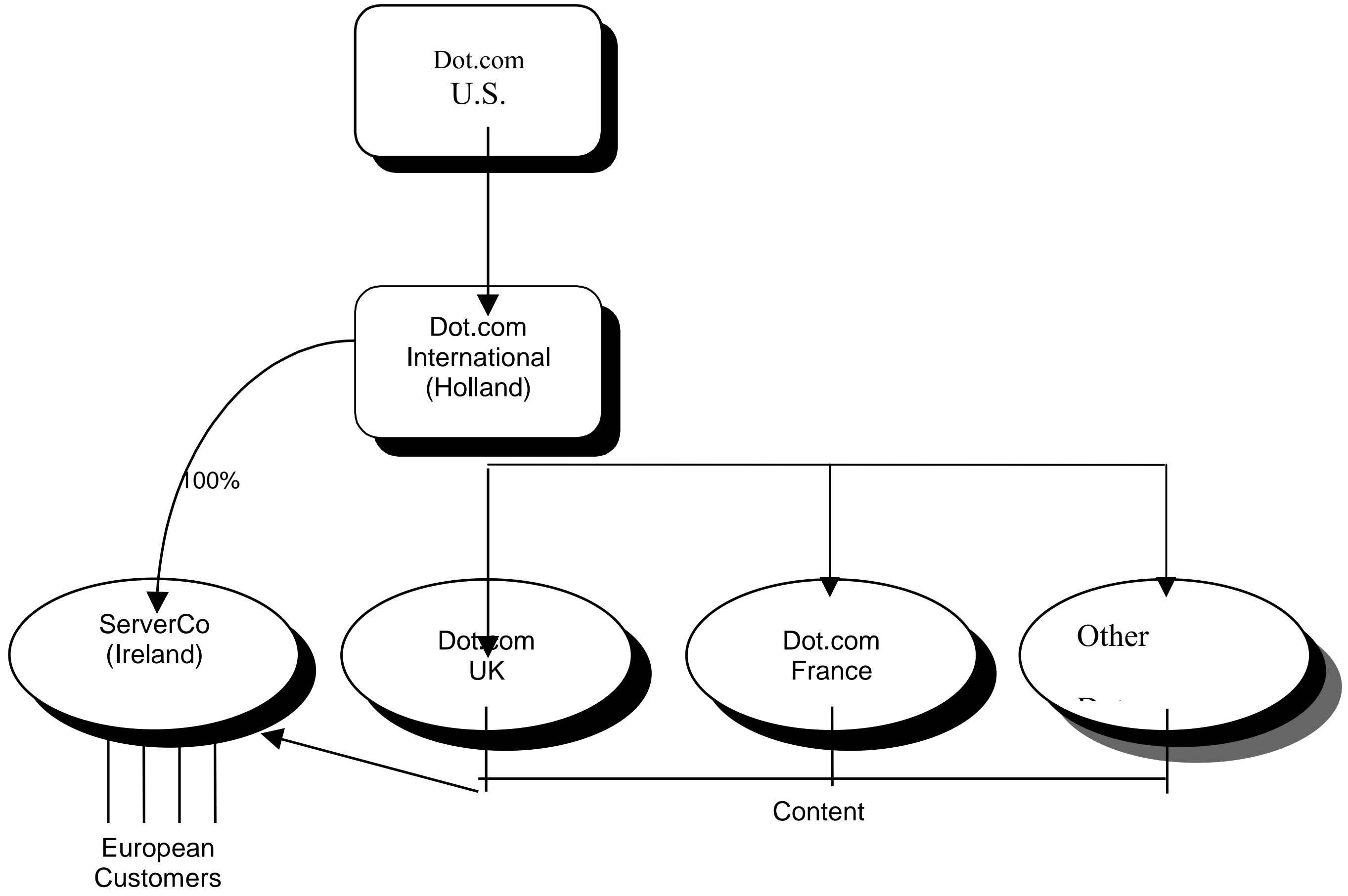
- The primary benefit of this structure is to allow the operating companies to act for their own account in their local jurisdictions. This avoids the risk that IP LicenseCo would have a permanent establishment in the local operating jurisdictions and is easier from a VAT standpoint. This would also provide the flexibility to manage the company from outside the country of incorporations.

- Does the structure achieves a deferral of tax in that the local operating companies would pay to IP LicenseCo royalties that would be deducted against local taxable income? Would this create Subpart F income

- What role would the check-the box rules play in the structure?

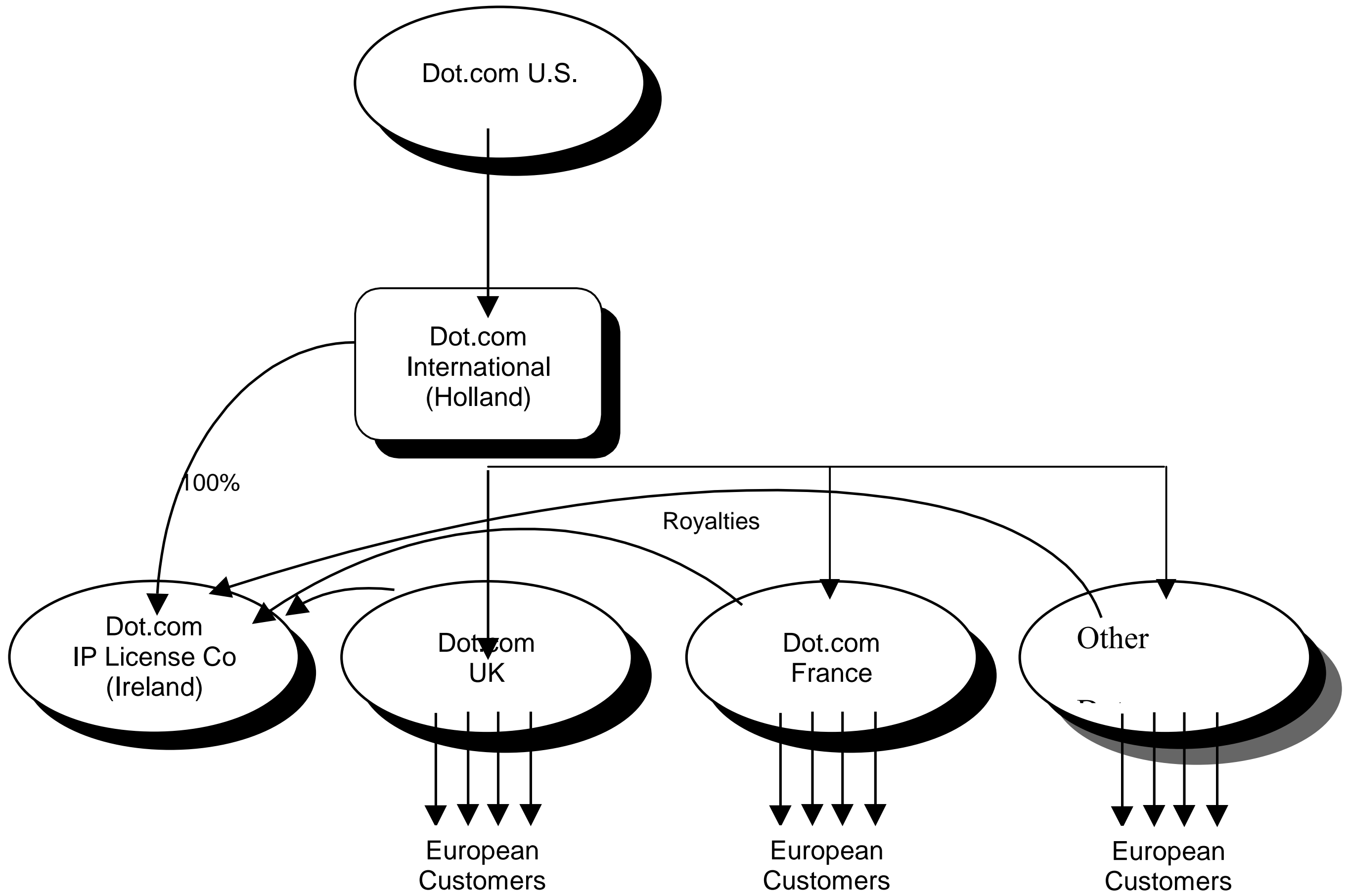
OPTION I

Irish ServerCo



OPTION II

Irish IP LicenseCo



What is striking about this example, developed by knowledgeable practitioners, is how difficult it is to avoid having a PE. The first option is designed to do so, because all content is delivered via ServerCo. However, because content has to be developed locally, there need to be local agents to do so, and as the case study indicates this means that avoiding a PE "may be difficult to achieve." The second option thus abandons the attempt altogether (the local companies deliver the content and are clearly taxable), preferring to reduce taxation via royalties. But this more conservative structure is subject to transfer pricing review of the royalty rate, and may not reduce taxes by much unless most of the value is inherent in the IP.

In general, if local agents are needed to develop content, PE may be impossible to avoid even when actual revenue comes from advertising. (In the classic Piedras Negras case, a radio station that broadcast in English from Mexico and derived all its revenues from advertising was held not to have a PE- but it developed its own content). The same result may occur if local agents are needed for marketing, distribution or servicing of the goods.

There are some MNEs, like Intel or Microsoft, whose products "sell themselves" and therefore do not need a PE (Intel boasted in full page ads of selling over a billion dollar worth of chips in e-commerce, and all its manufacturing operations outside the US benefit from tax holidays). But for other MNEs the ability to avoid a PE is less clear. Those MNEs are therefore much more likely to be taxed in market jurisdictions.

This reality may explain the relaxed attitude of the OECD toward modifying the PE concept in light of e-commerce, which contrasts sharply with the urgency characterizing the tax competition project. After over a year of deliberations, the

Committee on Fiscal Affairs adopted on December 22, 2000 a change to the commentary on Article 5 of the OECD Model Treaty (the PE article). This change clarifies that in some circumstances, a server may constitute a PE, while a web site by itself is not a PE (OECD, 2000). The Committee referred to a Technical Advisory Group (TAG) that is considering whether any broader changes are needed in the application of the business profits article to e-commerce. However, so far the TAG only came up with rules to classify various sources of income from e-commerce. Out of 28 categories of income, the TAG classified 25 as business profits and only 3 as royalties (Schickli, 2001). This means that for most types of income from e-commerce, there will be no source-based tax unless a PE exists, and the TAG made no changes in the PE definition. (For the categories classified as royalties, there is no source-based taxation either if a treaty based on the OECD model applies).

These recommendations fall far short of what is needed to adjust the PE concept to the reality of e-commerce. As the US Treasury noted already in 1996, making a server a PE is nonsensical because a server can be located anywhere (US Treasury 1996). Making a web site a PE would have been much more radical but would have eviscerated the PE concept because even a single sale into a jurisdiction via the web would give rise to a PE. What is needed, as I have previously argued (Avi-Yonah 1997), is some de minimis threshold of sales, rather than the current focus on physical presence. But the OECD is in no hurry to go there, which is understandable in light of the difficulties of avoiding a PE illustrated above.

3. Implications.

If the hypothesis outlined above is even partially correct, it has some interesting implications for both developing and developed countries. For developing countries, it means that tax competition is a very real and present danger, eroding their corporate tax revenues and resulting in significant windfalls for MNEs (on why this is bad as a normative matter, see Avi-Yonah 2000). This is particularly true given that the corporate income tax has been a more important source of revenue in developing countries than in OECD members, amounting to 15%-25% of revenues (IMF 1995). Most of these revenues come from MNEs, since the domestic corporate tax base is typically meager.

For developed countries, it means that for the time being, tax competition does not pose an immediate danger of corporate revenue base erosion. But this may be a temporary phenomenon, given the expected continued rise in e-commerce, the ingenuity of tax planners, and the reluctance of the OECD to change the PE threshold. In the longer run, more MNEs may be like Intel, and this may explain the urgency of the OECD tax competition initiative (although even that initiative does not focus on real investment) (OECD 1998).

4. Conclusion.

This paper has attempted to advance one explanation for a seemingly puzzling incongruence in the available data on tax competition: effective corporate tax rates on MNEs are going down, but corporate tax revenues in OECD member countries are stable.

One explanation may be that OECD members are successfully shifting their tax base from exporters to importers, and that importers are less able to avoid a PE (and therefore tax liability) than previous commentators have supposed. If that is the case, then tax competition may prima facie be mostly harming developing countries, which generally export more goods produced by MNEs than they import. However, in the long run tax competition may harm developed countries as well as MNEs find new ways of avoiding PEs through e-commerce. And even in the short run, a shift in the tax base from exporters to importers may have negative welfare implications (Slemrod, 1995).

It should be emphasized that the hypothesis advanced above is based on very limited data. In order to confirm or disconfirm it, much further work is needed. In particular, it would be helpful to know whether the data relied on by Altshuler, Grubert and Newlon (2001) and Grubert (2001) show greater declines in effective tax rates in developing than in developed countries. In addition, data for developing countries need to be explored to see whether these countries show a decline in revenues from the corporate income tax. Data from developed countries are needed to see whether there has been a shift in the corporate tax base from exporters to importers and what are the revenue trends from taxpayers engaged in electronic commerce. Hopefully, such data can become available in the near future.

REFERENCES

ABA (2001). American Bar Association Tax Section, The International Roll-Out Of an E-Commerce Business, Panel presentation for mid-year meeting, Scottsdale, Arizona.

Altshuler, Grubert and Newlon (2001). Roseanne Altshuler, Harry Grubert and T. Scott Newlon, Has U.S. Investment Abroad Become More Sensitive To Tax Rates?, in James R Hines, Jr. (ed.), International Taxation and Multinational Activity.

Avi-Yonah (1997). Reuven S. Avi-Yonah, International Taxation of Electronic Commerce, Tax Law Review 52:507.

Avi-Yonah (2000). Reuven S. Avi-Yonah, Globalization, Tax Competition, and The Fiscal Crisis of the Welfare State, Harvard Law Review 113:1573.

Brunori (2001). David Brunori, The Limits of Justice: The Struggle for Tax Justice In the States, in Joseph J. Thorndike and Dennis J. Ventry Jr. (eds.), Tax Justice: Reconsidering the Moral and Ethical Bases of Taxation.

Chan (2000). Clayton W. Chan, Taxation of Global E-Commerce and the Internet: The Underlying Issues and Proposed Plans, Minnesota Journal of Global Trade 9: 233.

Chennells and Griffith (1997). Lucy Chennells and Rachel Griffith, Taxing Profits In a Changing World.

Cockfield (1999). Arthur J. Cockfield, Balancing National Interests in the Taxation of Electronic Commerce Business Profits, Tulane Law Review 74: 133.

Cockfield (2001). Arthur J. Cockfield, Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation, Minnesota Law Review 85 (forthcoming).

Doernberg and Hinnekens (1998). Richard L. Doernberg and Luc Hinnekens, Electronic Commerce and International Taxation.

Economist (1997). The Economist, The Disappearing Taxpayer (May 31).

EU (1997). Conclusions of the ECOFIN Council Meeting on 1 December 1997 Concerning Taxation Policy, 1998 O.J. (C 2) 1.

Frieden (2000). Karl Frieden, Cybertaxation: The Taxation of E-Commerce.

Fullerton and King (1984). Mervyn King and Don Fullerton, The Taxation of Income from Capital: A Comparative Study.

Grubert (2001). Harry Grubert, Tax Planning by Companies and Tax Competition By Governments: Is There Evidence of Changes in Behavior?, in James R Hines, Jr. (ed.), International Taxation and Multinational Activity.

Hardesty (1999). David E. Hardesty, Electronic Commerce: Taxation and Planning.

Horner and Owens (1996). Frances M. Horner and Jeffrey Owens, Tax and the Web: Old Technology, New Problems, IBFD Bulletin 1996:516.

IMF (1995). International Monetary Fund, Tax Policy Handbook.

Kessler (1999). Wolfgang Kessler, Grundlagen der Besteuerung digitaler Transaktionen, Steuerberater-Jahrbuch 1999:333.

NFTC (1999). National Foreign Trade Council, The NFTC Foreign Income Project: International Tax Policy for the 21st Century, Part I: A Reconsideration

Of Subpart F.
OECD (1998). Organization for Economic Cooperation and Development, Harmful Tax Competition: An Emerging Global Issue.
OECD (2000). Organization for Economic Cooperation and Development, Committee For Fiscal Affairs, Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to the Commentary on Article 5.
Owens (1997). Jeffrey Owens, The Tax Man Cometh to Cyberspace, Tax Notes International 14: 1833.
Owens and Sasseville (1997). Jeffrey Owens and Jacques Sasseville, Emerging Issues in Tax Reform, paper presented at IFA Congress, New Delhi.
Sawyer (1999), Adrian Sawyer, Electronic Commerce: International Policy Implications for Revenue Authorities and Governments, Virginia Tax Review 19: 73.
Schickli (2001). Wright Schickli, Characterization of E-Commerce Revenue- The Final OECD Report Revealed, Tax Notes International 22:1671.
Slemrod (1995). Joel Slemrod, Free Trade Taxation and Protectionist Taxation, International Tax and Public Finance 2:471.
Tillinghast (1996). David R. Tillinghast, The Impact of the Internet on the Taxation Of International Transactions, IBFD Bulletin 1996:1.
U.S. Treasury (1996). U.S. Department of the Treasury, Office of Tax Policy, Selected Tax Policy Implications of Global Electronic Commerce.
U.S. Treasury (2000). U.S. Department of the Treasury, Office of Tax Policy, The Deferral of Income Earned through U.S. Controlled Foreign Corporations: A Policy Study.
Vernon (1998). Raymond Vernon, In the Hurricane's Eye: The Troubled Prospects Of Multinational Enterprises.