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BEAT as an Element of the Evolving Global Tax Environment

Cym H. Lowell* and Christopher H. Hanna*

The Tax Cuts and Jobs Act (the “2017 Tax Act”)¹ provides a rather amazing step forward in the world of international taxation. Our longstanding treaty and transfer pricing regimes evolved from the work of the League of Nations shortly after World War I to achieve the perceived needs of the capital-exporting victor countries (including debt repayment). A foundational element was a distinction between countries of residence (“Residence”) of a multinational enterprise (“MNE”) and the source of income (“Source”). This historic distinction has been controversial for many years.

The most recent effort of the global tax community to update its models was in the G-20/Organization for Economic Cooperation and Development (“OECD”) Base Erosion and Profit-Shifting process (“BEPS”). It intentionally did not address the Residence versus Source issue. In the interim, an increasingly wide range of countries (including leaders of the BEPS process) have either adopted or considered so-called unilateral measures to achieve their own base protection needs.

The United States took a drastic step in this unilateral process in the 2017 Tax Act. Interestingly, the overall structure reflects an evolutionary interpretation of the current OECD/United Nations (UN) Model Tax Treaties and OECD Transfer Pricing Guidelines from the Congressionally perceived need for U.S. tax base protection. The role of the Base Erosion and Anti-Abuse Tax (“BEAT”) is certainly an important element of such base protection framework.

In this brief comment, we explore the background of a century of global efforts to prevent tax base abuse and double taxation and how the BEAT fits within the range of both historic and current efforts to address those issues.

A. Background

The structure of global tax treaties has been critical in the twentieth century and is likely to be even more important in the twenty-first century. The current OECD and UN Model Tax Treaties are based on the concept that residual income should be allocated to the country of Residence of a MNE, not the country of Source. Transfer pricing and other principles are elements of this conceptual framework.

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¹ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017). The 2017 Tax Act is generally referred to as the “Tax Cuts and Jobs Act” although the official title is “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.”

In the pre-BEPS period, the debate over Residence versus Source was largely (but not entirely) between Source Countries, on the one hand, and the OECD and UN on the other, with MNEs (the payors of tax to finance the budgets of all countries) in the middle. Some Source Countries rejected the OECD/UN model concepts. Others generally expressed support, though their actual practice of transfer pricing and related matters suggested otherwise. The underlying reality was a desire to tax income based on the Source of the underlying economic activity not on the Residence of the MNE parent company.² Essential explanations for this posture included:

1. The Residence concept had, from its inception, a serious flaw: it did not take into account interim holding companies in low-tax jurisdictions.
2. The imposition of Residence as an allocation criteria was largely a product of post-World War I international politics. The world changed dramatically in the interim and former “colony” countries emerged to become economic powerhouses.

As a result of these factors, many MNEs experience the following attitude of tax authorities in Source Countries: “If you want to do business in my country, you will pay tax on my terms. If you do not like my terms, do not come to my country; others will take your place.”

1. International Chamber of Commerce (1920-1923)

The origins of the treaty models can be traced to the work of the International Chamber of Commerce (“ICC”) immediately following the cessation of hostilities in World War I in November 1918. The ICC was formed in Paris in 1919 to promote trade and investment, open markets for goods and services, and facilitate the free flow of capital. One of the foundational elements of the ICC was the elimination of double taxation.³

The first ICC Congress was held in London from June 27 to July 1, 1921.⁴ Double taxation was one of the first subjects addressed.⁵ The ICC considered a set of principles that were debated and ultimately revised.⁶ The Second Congress was held in Rome in 1923. In these early discussions, the bedrock principle was that where a company does business in more than one country:⁷

² See Lee A. Sheppard, *News Analysis: Transfer Pricing Rubric Questioned*, TAX NOTES, 2012 WTD 117-1 (June 18, 2012).

³ See INTERNATIONAL CHAMBER OF COMMERCE, CONGRESS OF LONDON (1921), Brochures No. 1–16 (ICC Paris Archives) [Hereinafter 1921 ICC PROCEEDINGS], Brochure No. 11, at 3. See generally Michael J. Graetz & Michael M. O’Hear, *The “Original Intent” of US International Taxation*, 46 Duke L.J. 1021 (1997).

⁴ The proceedings are contained in the 1921 ICC PROCEEDINGS. Contemporaneous news accounts explained the significance of the meetings. See *Favor World Board to Facilitate Trade*, N.Y. TIMES, June 20, 1921, <https://timesmachine.nytimes.com/svc/tmach/v1/refer?res=990CE1D9163EEE3ABC4851DFB066838A639EDE&pdf=true> [<https://perma.cc/EN2R-BAGM>] (attendees to create “a permanent International Committee charged with ironing our difficulties arising in the exchange of goods between nationals of different countries”).

⁵ 1921 ICC PROCEEDINGS, Brochure No. 11 (Part I), at 3.

⁶ *Id.* at 4.

⁷ See INTERNATIONAL CHAMBER OF COMMERCE, SECOND CONGRESS ROME (March 18-25, 1923), PROGRAMME OF THE CONGRESS AND DRAFT RESOLUTIONS, [hereinafter 1923 ICC PROCEEDINGS], Brochure No. 23, ¶¶ 8-10, at 34–35.

1. The profits should be taxed in each country in proportion to the profit realized therein (source).
2. If the countries cannot agree, the allocation would be presumed to be proportional to sales (turn-over).
3. However, in no case should such proportions exceed the total fixed by the “competent authority in the country of domicile” (residence).

In the discussion of the proposed resolutions, it was recognized that the fundamental problem was the creation of separate fiscal regimes in each country. While the problem could be resolved by the introduction of uniform fiscal legislation, this was viewed as “utopian.” The principle to be observed was that income should only be taxed once. The issue, then, was to determine “what constitutes the right of one country to tax the income of a taxpayer in preference to any other country.”⁸ The following statement at the time framed the issue:

It does not seem probable that there would be serious difference of opinion on this matter. A widespread view considers that the country from whose territories the income is derived should in every case have the right to levy a tax thereon. At the same time, it is agreed that as regards income derived elsewhere, the country of domicile should have the privileged position.⁹

It was hoped that a set of regulations would be developed by an “international fiscal commission,” along with the availability of an administrative appeal in the country or by an international commission with national or international court or arbitration review.¹⁰ Interestingly, the proceedings included a copy of the 1921 Austro-Hungarian treaty, which explicitly provided for (1) taxation by the Residence Country; and (2) where there was a presence in another country, the right of each country to tax the portion of the income produced in its borders.¹¹

As the ICC work evolved, the League of Nations was getting organized. The ICC was in continuing contact with the League, “which is carrying on its work [in these matters], but which has not yet succeeded in collecting the reports which it has entrusted to all known economists.”¹²

⁸ *Id.*

⁹ *Id.*

¹⁰ See 1923 ICC PROCEEDINGS, Brochure No. 25, at 12–13.

¹¹ See Convention for the Purpose of Avoiding Double Taxation Between Austria, Hungary, Italy, Poland, Romania and the Kingdom of the Serbs, Croats and Slovenes, art. 4, Apr. 1922, *id.* at 50, which provided as follows:

Income derived from the exercise of any kind of trade or industry is taxed by the State in whose territory the industrial or commercial undertaking has its registered office, even when the latter extends its activities into the territory of another contracting State. If the enterprise has its registered office in one of the contracting States, and in another has a branch, an agency, an establishment, a stable commercial organization, or a permanent representative, each one of the contracting States, shall tax that portion of the income produced in its own territory. Therefore, the financial authorities of the interested states shall be able to request the taxpayer to hand in general balance-sheets, special balance sheets, and all other documents required by the laws of the said States.

¹² See 1923 ICC PROCEEDINGS, Brochure No. 25, at 16-17. The League's economic experts were appointed in February 1921. See 1925 ICC Proceedings at 10.

2. Entry of League of Nations.¹³

The Fiscal Committee of the League of Nations commissioned four economists to study the double taxation problem. The experts faced the same conundrum as had the ICC: the allocation of taxing jurisdiction between countries. They framed the issue more specifically than had the ICC, advising that the issue involved a conflict of interest between debtor (capital importing) and creditor (capital exporting) countries (or, often, imperial versus colony countries; today, perhaps, as developed versus developing or emerging countries).¹⁴

Members of the group argued in favor of residence-based taxation. In the end, there was a compromise such that the Source Country should have the right to impose “impersonal taxes” (that is, withholding taxes) on the various classes of income while the Residence Country should provide a foreign tax credit for such taxes.¹⁵ Several experts also championed a proposal that a foreign enterprise should not be considered to have a permanent establishment (PE) in a Source Country simply because it transacts business in the Source Country through an independent agent, which position was adopted.¹⁶ Further, the Fiscal Committee made it clear that a Source Country would have no right to tax business profits from industrial and commercial activities on a net basis unless the foreign parent had a PE in the Source Country.

In October 1928, the League of Nations’ technical experts met again and issued a final report.¹⁷ The 1928 Model Conventions became the benchmark for treaty negotiations in Europe, and were instrumental in the development of the earliest U.S. tax treaties.¹⁸ Once this treaty framework was in place, the balance of power between Source and Residence Countries was significantly changed through a continuing redefinition of the scope of activities that would fall within the purview of a PE and through continuing efforts to minimize the amount of source-based withholding taxes that would apply to cross-border payments.

In short, the League of Nations rejected the approach of the ICC in favor of the allocation of residual profits of an MNE to the Residence versus the Source Country as opposed to a balance taking into account the overall (or combined) income and respective functional activities.

¹³ The following discussion is drawn from Bret Wells & Cym Lowell, *Tax Base Erosion and Homeless Income: Collection at Source Is the Linchpin*, 65 TAX. L. REV. 535 (2012).

¹⁴ Econ. & Fiscal Comm., *Report on Double Taxation Submitted to the Fin. Comm.*, League of Nations Doc. E.F.S.73.F.19, at 39–41, 48–49(1923).

¹⁵ *See Report Presented by the Comm. of Technical Experts on Double Taxation and Tax Evasion*, League of Nations Doc. C.216M.85 1927 II.A, at 11 (1927) [hereinafter *1927 Technical Expert Report*].

¹⁶ *See* Comm. on Double Taxation and Fiscal Evasion, *Minutes of the Third Meeting Held at London on April 6, 1927, at 3:30 p.m.*, League of Nations DT/8th Session, P.V.3.(1), at 9-10 (proposal made by M. Julliard representing the ICC and endorsed by Adams), available in T.S. Adams Collection, Yale University, Box 16, League of Nations Apr. 4–6, 1927 folder.

¹⁷ *Report Presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion*, League of Nations Doc. C.562M.178 1928 II (1928) [hereinafter *League 1928 Report*].

¹⁸ *See* H. David Rosenbloom & Stanley I. Langbein, *United States Tax Treaty Policy: An Overview*, 19 COLUM. J. TRANSNAT'L L. 359, 365 (1981).

3. Way Forward

As noted, Source Countries have increasingly rejected the Residence versus Source model. In addition, the posture of Residence and Source countries has changed in the interim in dramatic ways, in many cases reversing—creditor countries have become debtors of former colonies. In other words, the tension inherent in the evolution of the world from the 1920s has long suggested the need for global dialogue to update the foundational concepts of model income tax treaties.¹⁹ In this connection, a thoughtful person might want to contemplate the consequences of a Source Country effort to develop their own model treaty and transfer pricing concepts, perhaps along the lines of the original ICC proposals in 1923.

This process also created one-sided transfer pricing methodologies,²⁰ continued in the OECD and UN model treaties.

B. BEPS

It is rare that the global transfer pricing strategies of MNEs find their way onto the front pages of financial center newspapers and magazines. This was certainly the case in the pre-BEPS period,²¹ with criticism growing in volume and intensity. Indeed, much of the spread of transfer pricing documentation requirements to more than seventy countries over the years has been a result of tax base defense considerations relating to MNE transfer pricing policies.

As a result of these various elements, the G-8 and G-20 countries directed the OECD to study the tax-paying posture of MNEs in the BEPS process. On July 17, 2013, it released the BEPS Action Plan,²² identifying fifteen topics to be addressed. Sadly, it declared that it was “not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income”²³ – i.e., not addressing the foundational Residence versus Source issue.

¹⁹ See Cym Lowell & Bret Well, *Tax Base Defense: Time to Update the Model Treaties?*, 39 INT'L TAX J. 5 (Jan.-Feb. 2013).

²⁰ By “one-sided,” we mean transfer pricing methodologies that test the financial results of related-party transactions by focusing on one party to the transactions and the financial results of that party, as opposed to “two-sided” analysis that would focus on the parties to the transaction (two or more) and their combined income relating to such transactions.

²¹ See, e.g., Jesse Drucker, *OECD Enables Companies to Avoid \$100 Billion in Taxes*, BLOOMBERG, Mar. 18, 2013, <https://www.bloomberg.com/news/articles/2013-03-18/oecd-enables-companies-to-avoid-100-billion-in-taxes>; John Gapper, *Politicians Should Stop Posturing on Corporate Tax*, FIN. TIMES, Jan. 30, 2013, <https://www.ft.com/content/a3e73d20-6a2d-11e2-a7d2-00144feab49a>; *UK's Top Companies Condemned for Prolific Use of Tax Havens*, THE GUARDIAN, May 15, 2013; Scott Thurm & Kate Linebaugh, *More U.S. Profits Parked Abroad, Saving Taxes*, THE WALL ST. J., Mar. 10, 2013; *The Missing \$20 Trillion*, THE ECONOMIST, Feb. 16, 2013, at 13; *Wake Up and Smell the Coffee*, THE ECONOMIST, Dec. 15, 2012, at 66; *Pressure Mounts for Radical Rethink to End 'Tax Bonanza' for Companies*, FIN. TIMES, Jan. 4–5, 2014.

²² See OECD (2013), ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 11 (OECD Pub. 2013), <https://www.oecd.org/ctp/BEPSActionPlan.pdf> [<https://perma.cc/M6MZ-N6AV>].

²³ *Id.*

At the time, there was concern that if the issues surrounding these issues were not addressed, countries could simply undertake unilateral actions in the exercise of their sovereign authority, resulting in global policy disintegration as opposed to the anticipated harmony.²⁴

BEPS final reports were issued in 2015,²⁵ with several Action Plans receiving broad support (country-by-country transfer pricing reporting and mandatory exchange of information) and a multilateral instrument ultimately adopted by a wide range of countries.²⁶ While these elements suggest potential successes of the BEPS project, other forces plainly underway suggest a potentially different evolution that envisioned by BEPS. The popular press regularly addresses what is often described as globalism versus populism,²⁷ which reflects an apparent trend of voters and governments to focus less on the global good and more on local needs.

The same phenomenon appears to be developing in the world of cross-border taxation: idealistic visions of a globalized tax order (BEPS) versus realism-populism on a country specific basis. Countries seem to be reacting to the former (BEPS) as they did to the League of Nations in 1926. The League assumed there would be consistent adoption of tax policy throughout the world, but countries pursued agendas to achieve their respective objectives. In contrast to the policies incorporated in the BEPS Final Actions, countries, including leaders of the BEPS process, are currently pursuing their own unilateral policies.²⁸ Several adopted, or are considering, an incremental tax on what are deemed excessive profits in other countries (the diverted profits tax in the U.K.,²⁹ equalization levy to address specific concerns in India,³⁰ a digital services tax in the EU³¹ and other countries,³² and so on), often declaring that taxes so collected are not subject to treaty relief.

In short, a critical failing of the BEPS process was a determination not to address the fundamental Residence versus Source issue. This failure is plainly apparent in the unilateral actions underway throughout the world, including the United States.

²⁴ See Bennett, *BEPS Proposals Face Hurdles in Congress as Other Countries Act*, *NFTC Official Says*, 23 TAX MGMT. TRANSFER PRICING REP. 1204 (Jan. 22, 2015).

²⁵ See Lowell & Martin, *International Transfer Pricing: OECD Guidelines* ¶ 2.08[2][c] (Thomson Reuters 2018) (“OECD Transfer pricing”).

²⁶ See OECD Transfer Pricing ¶¶ 10.02 (country-by-country reporting), 10.01[6] (multilateral instrument), and 12.02[8](information exchange).

²⁷ See, e.g., Ip, *We Are Not the World*, *THE WALL ST. J.*, Jan. 6, 2017, <https://www.wsj.com/articles/we-arent-the-world-1483728161> [<https://perma.cc/JD6Z-GZY2>].

²⁸ See Herzfeld, *The Year in Review: Whither the International Tax System?*, 85 TAX NOTES INT’L 22 (Jan. 2, 2017) (suggesting that “[i]ncreasingly the OECD’s BEPS work looks like a castle built on sand”); Herzfeld, *Implementing BEPS: The Official Version and the Reality: Part 2*, TAX NOTES INT’L 1125 (June 25, 2017); Spencer, *BEPS: The Allocation of Taxing Rights: Part 3*, J. OF INT’L TAX’N 46 (June 2017).

²⁹ See OECD Transfer Pricing ¶ 14.64[1][d].

³⁰ *Id.* at ¶ 14.26[6][e].

³¹ *Id.* at ¶ 9.08[1][b][iii].

³² See *UK Budget 2018 – Digital Services Tax* (to be legislated in the 2019-2020 Finance Bill, effective April 2020; October 29, 2018); Martin & Schechner, *Tech Firms Face More Taxes Overseas*, *THE WALL ST. J.*, Oct. 29, 2018, <http://news.morningstar.com/all/dow-jones/us-markets/201810291916/tech-firms-face-more-taxes-overseas-wsj.aspx> [<https://perma.cc/9CEW-W3ZZ>].

C. 2017 Tax Act

Ink of the BEPS final reports was not yet dry when the United States took its own path enacting a dynamically new domestic tax regime, which could be viewed as establishing a global combined income profit split with a roughly 50:50 ratio between U.S. and foreign source income.³³ Its pertinent provisions dramatically alter the nature of the U.S. cross-border tax system, including a new, standard U.S. tax rate of 21 percent (which could be reduced to 13.125 percent for location of qualifying economic activity in the U.S.).

With respect to non-U.S.-based MNE groups, the 2017 Tax Act established the BEAT regime to protect its tax base from reduction via outbound payments.³⁴ Under new Section 59A(a) an “applicable taxpayer” is required to pay an additional U.S. tax with respect to “base erosion payments” (noted below). The tax is equal to the base erosion minimum tax amount which is the excess of 10 percent (5 percent for years beginning in 2018; 12.5 percent beginning in 2026) of its modified taxable income over its regular tax liability reduced by the excess of credits allowed against such regular tax liability over the sum of certain credits.³⁵ The respective elements are discussed in the main article in this issue.³⁶

The critical definitional element of the BEAT will be of a “base erosion payment,” which includes any amount paid or accrued by a taxpayer to a foreign person that is a related party. The precise inclusiveness is open-ended, but would seem to include at least the following:

- Interest.
- Royalties.³⁷
- Payments under a qualified cost-sharing agreement.
- Service payments (other than as excluded for cost only under the Section 482 regulations definition of the service cost method (“SCM”).³⁸
- Items disguised as derivatives (as discussed below).
- Purchase of depreciable/amortizable property.

³³ An interesting element in this regard is that this roughly 50:50 global profit-split mechanism is consistent with the long-term results of transfer pricing litigation in the U.S. courts. *See* Lowell & Martin, U.S. International Transfer Pricing ¶¶ 2.03 and Appendix B.03 (Thomson Reuters 2018) (“U.S. International Transfer Pricing”). *See also* Wells, *Get with the BEAT*, 158 TAX NOTES 1023 (Feb. 19, 2018).

³⁴ *See* New Section 59A.

³⁵ New Section 59A(b). Other rates are provided for certain taxpayers, such as banks and regulated securities dealers. The calculation is made without the benefit of net operating loss carryovers.

³⁶ *See* Rebecca M. Kyser, *Will Tax Treaties and WTO Rules ‘Beat’ the Beat*, TAX MATTERS, 10 COLUM. J. TAX. L. (Aug. 7, 2019).

³⁷ While interest, royalties, and service payments are not explicitly noted in the broadly inclusive language of Section 59A(d)(1), they are mentioned in the disguised derivative context of Section 59A(h)(3)(A).

³⁸ *See* U.S. International Transfer Pricing ¶ 6.07[2]. An interesting debate has evolved as to whether the exclusion applies in situations where there is a markup on the services. For example, if the costs incurred are \$100 and there is a \$10 markup, is the \$100 eligible for exclusion via bifurcation of the service cost versus markup? Compare Sullivan, *Marked-Up Services and the BEAT, Part II*, 158 TAX NOTES 1169 (Feb. 26, 2018) (review of the legislative history and concluding that the \$100 would not be eligible for exclusion, as it is not literally within the SCM; comparison to views of others declaring that such bifurcation is appropriate); Sullivan, *Can Marked-Up Services Skip the BEAT*, 158 TAX NOTES 705 (Feb. 5, 2018) with Corwin, Dabrowski, Plowgan, Rolfes & Wessell, *A Response to an Off-BEAT Analysis*, 158 TAX NOTES 933 (Feb. 12, 2018). *See also* H.R. Rep. (Conf. Rep.) No. 115-466, 115th Cong., 1st Sess. 657-658 (2017).

- Reinsurance premiums.
- Payments to inverted groups (“surrogate foreign corporation” inverting after November 9, 2017).
- Other payments identified in future regulations to be issued pursuant to broad discretionary authority to “carry out the provisions of this section.”
- Cost of goods sold (“COGS”) exclusion: Any amount constituting a reduction in gross receipts, including payments for COGS (not applicable in the case of “surrogate foreign” groups).
- SCM exclusion.
- Qualified derivative payment exclusion: Any payment on a derivative meeting certain requirements.
- Taxed amounts and withholding exclusion: Any tax benefit subject to Sections 871 of 881 with respect to which tax has been withheld.

As noted the practical impact of BEAT is to impose, in essence, a 10 percent minimum tax (calculated at a rate of approximately 52.3 percent less than the new 21 percent regular tax rate). It also fits into a model of imposing a 50-50 or so profit split on the combined income arising from certain other U.S. economic activities.³⁹

The BEAT will potentially have a material impact on inbound groups, as well as on certain outbound groups. It is inevitable that material characterization issues will arise, as the authorization for future regulations specifically includes matters relating to characterization of specific types of payment. There will be an inevitably long list of additional issues to be addressed, including:

- Will it be necessary, or appropriate, to segregate COGS payments to determine whether there are potential “royalty” or other BEAT-covered elements embedded in COGS?
- Will BEAT determinations be made on a group-wide or individual company bases?
- Inbound versus outbound.
- Policing the \$500 million BEAT floor (e.g., segregation of activities into separate corporations), as well as the other issues framed in the new law.
- Aggregation or disaggregation of specific payments.
- Netting of payments.
- Coordination with the new 2017 Tax Act provisions adding categories of subpart F and other international tax regimes.
- How will BEAT be applied with respect to digital or cloud transactions?
- How should BEAT (and other new provisions) be addressed in transfer pricing documentation (including country-by-country local, master and CbC files)?
- BEAT’s impact on U.S. groups that earn foreign income through branches.
- BEAT’s impact on foreign groups that earn U.S. income through branches.
- Should BEAT (and other new provisions) be addressed in new or renewed advance pricing and related agreements?

³⁹ See Wells, *Get with the BEAT*, 158 TAX NOTES 1023 (Feb. 19, 2018) (providing a series of illustrations of application of the BEAT).

Reaction to the BEAT spans the spectrum. For MNE groups having serious problems with its provisions, reaction is understandably critical.⁴⁰ In this regard, there is an active debate underway as to whether the BEAT violates the anti-discrimination provisions of U.S. treaties or international trade agreements, as addressed in other articles in this issue.⁴¹ Nonetheless, there are also indications that other countries are studying the overall framework of the 2017 Tax Act, including the BEAT, as a model of tax base protection.

Conclusion

Our global tax world is plainly in a state of transition. While certain elements of BEPS have been broadly embraced (especially the country-by-country reporting and exchange of information provisions), individual countries, including leaders of the BEPS process, are undertaking unilateral actions to protect their own domestic tax bases. The ultimate reality may not be an outcome that was anticipated when the BEPS process was announced with great fanfare.

In the case of the 2017 Tax Act, it provides a means of achieving a global profit split (at roughly 50:50) of combined income as defined. While the mechanics of the pertinent provisions are materially different from those enunciated by the International Chamber of Commerce in 1923, they achieve a roughly similar result, including essentially eliminating the Residence versus Source paradigm that the OECD consciously failed to address in BEPS.

The BEAT is a critical element in this regard and contains sufficient flexibility to, depending upon regulations to be issued currently or in the future, become a seriously effective or dangerous (depending upon point of view) domestic tax base protection mechanism. It will be interesting to see how threatened challenges to the BEAT will evolve. In the event that other countries continue enacting unilateral base protection measures (whether similar in nature to the 2017 Tax Act or otherwise), it is evident that there will be danger of double taxation with an inevitable surge in cross-border tax disputes. These were issues that the ICC and League of Nations sought to avert in the 1920s, as did the BEPS process in the 2010s.

⁴⁰ See, e.g., Armitage, *Will Border Adjustment Tax End Transfer Pricing as We Know It?* 25 TAX MGMT. TRANSFER PRICING REP. No. 20 (Feb. 23, 2017); Kassam, *Chevron Tax Chief: U.S. Base Erosion Anti-Abuse Tax a 'Disaster'*, BNA DAILY TAX REP., Feb. 26, 2018, at 10.

⁴¹ See Open Executive Session to Consider an Original Bill Entitled the *Tax Cuts and Jobs Act* (Cont'n Nov. 14, 2017): Hearing on H.R. 1 Before the S. Comm. on Finance, 115th Cong. 163-164 (2017) (question from Sen. Benjamin L. Cardin, D-Md.) (Joint Committee on Taxation Chief of Staff Thomas Barthold responding that the BEAT is not a treaty override); Wells, *Get with the BEAT*, 158 TAX NOTES 1023 (Feb. 19, 2018) (reviewing the background of Article 24 and related provisions, concluding that there is no discrimination); Avi-Yonah, *BEAT It: Tax Reform and Tax Treaties*, Univ. of Mich. Public Law Research Paper No. 587, Univ. of Mich. Law & Econ Research Paper No. 18-003 (March 2018) (BEAT does not violate the nondiscrimination provision in Article 24). Cf. Rosenbloom & Shaheen, *The BEAT and the Treaties*, 92 TAX NOTES INT'L 53 (Oct. 1, 2018).

