Global Taxation of Cross Border E-commerce Income

Rifat Azam, Dr.
GLOBAL TAXATION OF CROSS-BORDER E-COMMERCE INCOME

Rifat Azam*

Amazon.com sells tangibles, intangibles, and services worldwide that totaled $34 billion USD in 2010. At eBay.com more than 97 million active users globally meet to sell and buy online in a total amount of $62 billion USD in 2010. Global clicks at Google.com contributed substantially to its $10.5 billion USD revenues in its fourth quarter, fiscal year 2011. In the year 2010 Americans spent around $173 billion USD shopping online. Global e-commerce turnover is expected to grow to up to $963 billion USD in 2013. These figures illustrate the importance of e-commerce in the global economy today and tomorrow. The taxation of e-commerce as well is very much an important and difficult issue.

This article examines the taxation challenges of e-commerce and discusses the current responses at the academic level, national level, and international level. This discussion concludes that a satisfactory answer to the challenges has not yet arisen, and the need for a different response is essential in this age of e-commerce.

The article argues for the imposition of a global e-commerce tax on cross-border e-commerce income and designs the details of the tax. Institutionally, this tax shall be levied and administered by a supranational institution called the Global Tax Fund, and the article sets forth a framework for the design of this new institution to be established by the countries in new international tax treaty. The proposal adds that the global e-commerce tax revenues shall be spent on funding global public goods, such as climate stability, global communication infrastructures, and so on.

A substantial normative work is done in the article to convince the

* Radzyner School of Law, Interdisciplinary Center Herzliya. Please contact me at razam@idc.ac.il. I would like to thank Professor Diane Ring, Professor Reuven Avi Yonah, Professor Aharon Barak, Professor David Glikberg, Dr. Asif Efrat and Dr. Daphné Richemond-Barak for their valuable comments and support. I specially thank and appreciate the Virginia Tax Review editorial team for their excellent work and final touch that contributed special contribution to this fine publication of the article.
reader that the proposed tax is a good tax from a tax policy point of view. The article makes the arguments that the global e-commerce tax to fund global public goods is legitimate, certain, efficient, fair, and contributes to the finance of a genuine global need, ultimately concluding that the global e-commerce tax would be a desirable and plausible resolution of the linked problems on both the income and the expenditure side of government functions.

Furthermore, the article responds to expected objections to the article’s novel idea. It argues that supranational taxation does not infringe tax theory. To the contrary, it goes hand-in-hand with the theory in the global era. As to state sovereignty objections, the article argues that sovereignty has changed and supranational regimes serve the new sovereignty.

This innovative article concludes by calling for thinking by open minds.

TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 641

II. E-COMMERCE TAXATION CHALLENGES ......................... 646
    A. The Current International Tax Regime .......................... 646
    B. The Global E-commerce Market ................................. 647
    C. The E-commerce Taxation Challenges .......................... 652
    D. The Current Responses to the Challenges .................... 655
       1. The Academic Level ............................................ 655
       2. The National Level ............................................ 655
       3. The International Level ...................................... 659
    E. The Need for a Different Response .............................. 662

III. THE PROPOSED GLOBAL E-COMMERCE TAX ................. 663
    A. Structure and Design of the Tax .............................. 663
    B. Structure and Design of the Global Tax Fund ............... 666
    C. Spending the Global E-commerce Tax Revenues to Fund
       Global Public Goods ............................................ 670

IV. THE NORMATIVE BASIS OF THE GLOBAL E-COMMERCE TAX... 671
    A. The Legitimacy Argument ....................................... 672
    B. The Certainty Argument ....................................... 675
    C. The Efficiency Argument ...................................... 677
    D. The Fairness Argument ....................................... 679
    E. The Finance Argument ......................................... 681
I. INTRODUCTION

Amazon.com sells toys, computers, books, e-books, digital games, software and other tangible and intangible products worldwide. This leading retail website is owned and operated by Amazon.com, Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware and traded on the NASDAQ. The corporate Net Sales in 2010 totaled $34,204,000,000 according to its 2010 annual report. At eBay.com more than 97 million active users globally meet to sell and buy online. In 2010 the total value of goods sold on eBay was $62 billion. The Delaware corporation increased its revenues to approximately $11.6 billion in 2011 and generated net income on a GAAP basis of approximately $3.2 billion.

These two examples clearly illustrate the world of e-commerce. It is an amazing world in which all kinds of products and services are bought and sold online globally. It is a dynamic and fast-growing marketplace. For example, in 2011 global e-commerce turnover is expected to grow by 19%, to $680 billion and to $963 billion in 2013. Roughly, about 15% of e-commerce is cross-border e-commerce, and it amounted to about $100 Billion USD in the year 2011 and is projected at about $150 billion USD in 2013. E-commerce presents almost 5% of retail sales in the USA according

to Forrester Research.\textsuperscript{6} The USA Central Bureau of Statistics gives a slighter lower figure, according to which the share of e-commerce of total retail sales in 2009 is 4%.\textsuperscript{7} But the figure is higher according to the Centre for Retail Research which estimates the share as being around 9%.\textsuperscript{8} In the year 2010 Americans spent around $176.2 billion USD shopping online.\textsuperscript{9}

E-commerce challenges the current international tax regime. Currently, the regime recognizes territorial taxation by the source country and personal taxation by the resident country.\textsuperscript{10} But, cross border e-commerce as a global commerce challenges these territorial and personal concepts and ties to a bordered country which makes it difficult to normatively justify and practically implement the current international tax regime on cross border e-commerce income.\textsuperscript{11} To cope with these challenges, it has been proposed to

\textsuperscript{9} See id. at fig. U.S. Online Sales 2008-2014.
globally implement personal taxation on e-commerce income, to levy withholding tax on e-commerce income by the demand jurisdiction where the consumers of e-commerce reside, to fix a formula for e-commerce taxation, and, in a previous article of my own, to adapt the existing international tax regime in accordance with the adaptations made in other fields of cyberspace law.

After a long debate and discussion within the framework of the Organization for Economic Cooperation and Development (OECD), countries agreed that the existing international tax regime and principles could and should apply to e-commerce with some modifications. Countries designed taxation framework principles that should apply to e-commerce taxation, which include: Neutrality; Efficiency; Certainty and Simplicity; Effectiveness and Fairness; and Flexibility. According to these principles, the OECD issued several working papers and guidelines. Most importantly, the OECD amended the Commentary of Article 5 of the OECD Model Tax Convention on Income and on Capital to set the conditions in which the server would be considered as “Permanent Establishment” for the purposes of the taxation of business income. But, these changes did not solve the challenges of e-commerce taxation and further new thinking is needed.

This article argues for the imposition of a global e-commerce tax on global e-commerce income for funding global public goods. The idea is...
to create an international body (the “global tax fund”), to vest it with the
authority to impose global tax on global e-commerce income, and to use the
tax revenues to fund global public goods, such as global climate stability,
global financial stability, global communications infrastructures, and so on.
The article presents an innovative outline for a concrete design and
structure of a global tax, global tax fund, and global spending. This article
attempts to stress that the model rests on two pillars: global taxation and
global spending. The article’s innovation lies in both.

A global e-commerce tax would handle the challenges of global e-
commerce taxation appropriately. Currently, individual countries cannot
effectively tax cross border e-commerce income and the proposed model
would enable the taxation of such income. The challenges derive from the
global nature of e-commerce and the irrelevance of territory and borders,
which constitute the mainstay of the current international tax regime. A
global e-commerce tax targets this source of the challenges and tailors the
tax regime to e-commerce by making it global. This will lead to the
effective taxation of global e-commerce — one that overcomes the
difficulty created by the need to identify the territory in which the income
was generated. In addition, a global e-commerce tax would advance
efficiency in the sense of neutrality, which subsequently leads to efficient
allocation of resources and maximizes welfare, and in the sense of
administrative efficiency. Furthermore, this article argues that a global e-
commerce tax is fair because it reduces the current gap in taxation between
e-commerce income and traditional income, thus increasing inter-individual
equity, and it achieves better inter-nation equity because it allocates the tax
jurisdiction on global income globally rather than to one country or another.
In addition, the spending of the tax revenues to fund global public goods
would serve a common interest and would improve the supply of needed
global public goods. In sum, the proposed Global E-commerce Tax presents
an opportunity to overcome the unsolved problem of distributing the tax
base on e-commerce between the countries efficiently and fairly.

It bears emphasis that any transformation of the tax jurisdiction to a
supranational authority is rife with difficulties and previous proposals for
global tax have failed. I have attempted to derive the appropriate lessons
from these failures and argue that this proposal for global e-commerce tax is
different and has better chances of success, despite the dismal track record
of proposals for global tax.

---

21 By “global public goods,” I mean goods that are nonrival and nonexcludable so that
their ongoing production is subject to a market failure — for example, combating global
warming or communication and internet infrastructures.
Needless to say, this proposal has numerous implications in terms of its effect on state sovereignty. More specifically, I am certainly aware of the fact that a global e-commerce tax would infringe state sovereignty, and this infringement is one of the main political difficulties confronting my normative argument. In refuting this argument, the claim is made that the normative scope of sovereignty has been transformed and even curtailed to meet the new world order of the twenty-first century. According to one of the contemporary conceptualizations, sovereignty means “. . . membership in . . . good standing in the regimes that make up the substance of international life.”

In compliance with this definition of sovereignty, it should be ensured that the “global tax fund” would be designed in a way that provides for membership in good standing for the different states. According to other new views of the role of sovereignty in the twenty-first century, global sovereignty is gradually evolving in the direction of an increasingly pivotal role in the global era of an inter-linked world. A global e-commerce tax is part of the evolution of global sovereignty. In addition, this article argues that e-commerce has already eroded the state’s ability to tax important segments of cross-border income, and that this represents a greater infringement on state sovereignty than this proposal for global e-commerce tax which restores the state’s ability to tax global e-commerce income through international cooperation and global institutions. Furthermore, the phenomenon and the nature of state sovereignty are actually the product and outgrowth of fiscal pressures, and the very same pressures are now changing the character of the nation-state and notion of state sovereignty in a natural process of economic and political evolution of the world.

Following this introduction, Part II shortly discusses the taxation challenges of cross-border e-commerce income. Part III presents the Global E-commerce Tax structure and design. Part IV sets forth the normative basis for the global e-commerce tax as a “good tax” from tax policy point of view. In Part V, the article will respond to the main counter-arguments. It will compare my proposed global tax to previous proposals of global taxation and make the argument for the potential success of my proposal. In addition, the issue of state sovereignty will be addressed. At the end of this ambitious article, the conclusion will be presented.

---


II. E-COMMERCE TAXATION CHALLENGES

A. The Current International Tax Regime

The international tax regime, which developed in the 1920s, recognizes two bases for tax jurisdiction. The first is source-based taxation, or territorial jurisdiction. In source-based taxation, the country has jurisdiction to tax income sourced to its territory. Source rules determine the source of the income for this purpose by distinguishing between different categories of income. Hence, income classification is the first necessary step in the imposition of source-based taxation. The justification for source taxation is that the source country has contributed infrastructure and other facilities to the process of income production.

The second basis for tax jurisdiction is resident or personal jurisdiction. In resident-based taxation, the country has jurisdiction to tax its residents on their worldwide income. In this system, the determination of residency for tax purposes is critical and is usually based on the personal, social, and economic ties of the person to his country. The justification for resident taxation stems from the contribution of the country of residence to the abilities of the income producer. It is alternatively justified by the notion of a social contract between the members of the country and the governing body.

These two bases of taxation occasionally lead to double taxation. The classic example of double taxation occurs when a resident of one country produces income in a different source country. In this case, he is taxed by the source country and by the resident country. To reduce double taxation, a network of bilateral treaties based on model tax treaties has developed over time to allocate tax jurisdiction between the countries that are parties to the treaty, based on different categories of income. According to the leading model treaty of the OECD, the jurisdiction to tax business income vests in

---

24 See Graetz & O’Hear, supra note 10, at 1066–89; Avi-Yonah, supra note 9, at 1303.
25 See supra note 10 for a general survey of the international tax regime.
the country that hosts the “permanent establishment” of the business whereas the privilege of taxing passive income is granted to the resident country. In this framework, Article 5 of the OECD Model Tax Convention defines “permanent establishment” as including a “[f]ixed place of business through which the business of an enterprise is wholly or partly carried on.”29 Under Article 4 of the OECD Model Tax Convention “residency” is determined by the internal laws of the contracting states, which generally use the substantive factual tests of social and economic life center. But Article 4 adds several “break rules” to solve cases of conflict of laws.

B. The Global E-commerce Market

The term “e-commerce” has several definitions. 30 According to the U.N. definition, it includes “[c]ommercial activities conducted through an exchange of information generated, stored, [or] communicated by electronic, optic, or analogous means.”31 The U.S. Department of the Treasury defines e-commerce as “the ability to perform transactions involving the exchange of goods or services between two or more parties using electronic tools and techniques.”32 In this article, “e-commerce” is defined as any commercial transaction conducted wholly or partly by using the Internet. For this purpose, e-commerce includes both business-to-business transactions (B2B) and business-to-consumer transactions (B2C). But, the article is limited to cross-border e-commerce, namely, e-commerce that involves more than one country in the transaction.

This article distinguishes between three types of e-commerce: e-commerce in tangible products,33 e-commerce in intangible products,34 and e-commerce in services.35 All three types of e-commerce are global, in the sense that e-commerce takes place on the globe without real meaning attaching to territorial borders between countries. E-commerce ignores or even destroys territorial borders.36 All types of e-commerce are virtual to

---

30 See DOERNBERG ET AL, supra note 10 at 37.
32 See DEP’T OF THE TREASURY, supra note 12, at 8.
33 For example, buying a hard copy of a book at Amazon.com.
34 For example, downloading a song at Apple.com/itunes.
35 For example, booking a hotel at Hotels.com.
some extent, in the sense that their existence is on the Internet and their physical existence outside the Internet is limited. The correct answer to the question of where e-commerce occurs is “on the Internet.” Any attempt to pinpoint the location of e-commerce in terms of a geographical location outside the Internet is artificial. The last feature of all types of e-commerce is its anonymity, in the sense that the e-commerce transaction, its parties, and its details are at least partially anonymous or require intensive investigation to discover its parties and details. However, the three types of e-commerce differ in terms of the extent to which each of them is global, virtual, and anonymous. Generally speaking, e-commerce in tangibles is less global and less virtual than e-commerce in intangibles, and e-commerce in services lies somewhere in between. This difference has tax ramifications — as the global or virtual component of the e-commerce increases, the tax challenges become more profound. Likewise, anonymity is always present to some extent but varies between the different types of e-commerce. The level of anonymity depends on the architecture of the Internet and on the available locations technologies. As the level of anonymity increases, the tax challenges become more complex.

The following data aims to present a picture of e-commerce markets, the subject matter of this article: It seems that the beginning of e-commerce dates back to 1994 when the first Sting CD was purchased online. In 2011 global e-commerce turnover is expected to grow by 19%, to $680 billion and to $963 billion in 2013 as mentioned earlier. The number of people who buy online is continually rising, with 38% buying at least once a month. The amount of people who do not shop online at all declined to 12% in 2010 compared to 20% in 2007. Roughly, about 15% of e-commerce is cross-border e-commerce, and it amounted to about $100 billion in the year 2011 and is projected to be about $150 billion in 2013.

Today, as mentioned in the introduction, according to Forrester Research, e-commerce represents almost 5% of retail sales in the United States. The U.S. Central Bureau of Statistics gives a slightly lower figure,

39 See BlueMind, supra note 5.
40 MULPURU, supra note 6.
according to which the share of e-commerce of total retail sales is 3.6%. But the figure is higher according to the Center for Retail Research, which estimates the share as being between 8–9%. In the year 2010 Americans spent around $176 billion shopping online. Sixty-eight percent of adult internet users said that they buy online, a slight increase over the 65% reported in 2009 and the highest figure reported thus far in the Digital Future Project. The percentage of users who report spending $1 to $100 per month increased to 58% of adult internet users, up from 54% in the previous study. On average, adult users conduct about 31 purchases online per year. A large percentage of both light users and heavy users said that their online buying has affected their purchasing in traditional retail stores. While the overwhelming majority of online shoppers in the United States purchase only from domestic websites, more than one quarter have purchased items from online retailers outside of the United States, and more than one third of those between the ages of eighteen to twenty-four have done so. Based on these figures, one study estimated that, by the year 2020, e-commerce will constitute approximately 27% of total retail sales (54% market penetration) in the United States and will exceed $1.6 trillion.

In the European Union (E.U.) the overall percentage of individuals who shopped online grew from 22% in 2004 to 34% in 2008. In some of the leading E.U. countries this figure exceeds 50%; such as the United Kingdom with 57% of individuals who ordered online in 2008, Denmark (59%), Netherland (56%) and Germany (53%). The European e-commerce market totaled €200 billion in 2011, while 71% of turnover is conducted in three key markets (the United Kingdom, Germany, and France) to present very high growth in comparison to 2008 when the market

42 See CENTRE FOR RETAIL RESEARCH, supra note 8.
43 Id. at Growth in U.S. Online Retail Sales 2008-2014.
45 Id. at 105.
46 Id. at 108.
47 Id. at 118.
49 Maguire, supra note 38.
51 Id. at annex 1, fig. 1.
totaled €117 billion. The European e-commerce market totaled €106 billion in 2006 while 70% of turnover is conducted in three key markets (the United Kingdom, Germany and France). The three product categories most purchased online are travel and holiday accommodation (42%); clothes, sports goods (41%); and books/magazines/e-learning material (39%). E-commerce constitutes around 8.8% of total retail sales in the European Union. In some E.U. member-states the online share of retail trade is very high, reaching 12% in the United Kingdom with €59.4 billion (£50.34 billion) online sales while in 2008 online sales made up 8.6% of retail sales and are expected to make 14% growth in 2012 to reach the sum of €67.74 billion (£57.39 billion), which would constitute 13.2% of retail sales in the United Kingdom in 2012. In Germany, online sales were €45.07 billion, 9% of retail sales, which is 13% over 2010 figures. In France, e-commerce grew dramatically in 2011 with 24% growth over 2010 to reach €38.66 billion, which constitutes 7.3% of retail sales in France. In the European Union, e-commerce is the second most commonly used retail channel after direct retail, and clearly ahead of mail order and telesales. Of even greater importance in this context is the exponential growth of the e-commerce channel in comparison to other channels. While e-commerce is growing in the European Union, it is still mainly national e-commerce rather than cross-border e-commerce. Cross-border e-commerce is quite stable and only 7% of individuals in the European Union purchased online from websites based outside their country. However, the figures vary between the different E.U. member-states, and in some countries the figure is much higher. In Luxemburg for instance, 38% of individuals conducted cross-border e-commerce in 2008.

As of December 2010, “the number of net citizens in China had reached 457 million, an increase of 73.3 million compared with the end of 2009. The popularity rate of internet climbed to 34.3% . . . [—] an increase

52 See CENTRE FOR RETAIL RESEARCH, supra note 8.
53 See COMM’N OF THE EUR. CMTYS., supra note 50 at annex 1, fig. 2.
54 See CENTRE FOR RETAIL RESEARCH, supra note 8.
55 Id.
56 Id.
57 Id.
58 See COMM’N OF THE EUR. CMTYS, supra note 50 at annex 1, fig. 4.
59 See id. at annex 1, fig. 1.
60 Id. at 7.
Global Taxation of Cross-border E-commerce Income

of 5.4% compared with the end of 2009.\textsuperscript{62} “By December 2010, the number of online shopping users had reached 161 million; the utilization rate had increased to 35.1%, by 7%.”\textsuperscript{63} The increase rate of users in 2010 reached 48.6%, topping that of the other applications.\textsuperscript{64} It is important to add that the rate of cross border e-commerce in China is exceedingly high and reaches 48.1%.\textsuperscript{65} In Japan, the scale of the B2B e-commerce market is about ¥131 trillion, and the B2C market amounts to about ¥6.7 trillion yen.\textsuperscript{66} The rate of cross-border e-commerce in Japan is about 17.8%.\textsuperscript{67} In India,\textsuperscript{68} “net commerce has evolved . . . over the past decade in terms of magnitude.”\textsuperscript{69} The market is estimated to be INR 31,598 Crores (about $7 billion) in the year 2010.\textsuperscript{70} The market “has come a long way since 2007 when the market size was only INR 8,146 Crores” (about $1.8 billion).\textsuperscript{71} “As of 2009, among Internet users, online travel leads the pack with [a] 76% share of net commerce (INR 14,953 Crores) [(about $3.3 billion),] while eTailing takes second position with 7.82% share (INR 1,550 crores) [(about $344 million)].”\textsuperscript{72} In Australia, online retail accounts for 4% of total retail,\textsuperscript{73} which is significantly lower than the figures in the United States and the United Kingdom.

The picture is different in other parts of the world, however. According to the World Internet Project (WIP) 2010 Report,\textsuperscript{74} which examined internet use in ten countries:

purchasing online is not yet a typical experience for internet users

\textsuperscript{62} Id.
\textsuperscript{63} Id. at 44.
\textsuperscript{64} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{74} See CTR. FOR THE DIGITAL FUTURE, WORLD INTERNET PROJECT: INTERNATIONAL REPORT 2010.
in most of the WIP countries and regions . . . .

. . . In seven of the reporting countries and regions, more than 60 percent of Internet users never go online to buy.

However, only 13 percent in the United States and 22 percent in Sweden report never buying online, compared to 87 percent in Colombia and 78 percent in Mexico. Even a region like Macao, which reported 61 percent of residents as internet users, found that 72% of them never buy online.  

C. The E-commerce Taxation Challenges

This brief description of the current international tax regime and of e-commerce marketplaces reveals the significant gap between them: they differ in their working presumptions, their perspectives, and their guiding conceptions. The lack of compatibility between the current international tax regime and the features of e-commerce presents tremendous problems in taxing global e-commerce income, as a result of which there is a serious undertaxation with respect to cross-border e-commerce income.

I would like to briefly illustrate these challenges by using some examples. Let us start by the example of Mark, an Israeli resident, who visited Amazon.com and purchased a hardcopy book written by a British author, which was stored and delivered from an Amazon warehouse in Germany. In addition, he purchased and downloaded an e-book authored by a Canadian. Furthermore, he subscribed to a three-month deal that gives him the right to download any e-book, music files, and software during the subscription and the right to get instructions and services for one year on the use of the digital products that he downloaded.

In this case it is clear that Amazon earned business income from the sale of a hardcopy book, but it is less clear whether the income from the e-book transaction or the subscription transaction derives from a trade or services, a distinction which might have some tax consequences. Generally speaking, the classification of income in e-commerce transaction, and mainly in intangibles, is becoming more challenging because e-commerce opened endless methods, designs, and models of transactions and doing business. It is true that income classification challenges exist and will

75 Id. at 3. The countries studied are Chile, Colombia, Cyprus, Czech Republic, Italy, Macao, Mexico, Portugal, Sweden, and the United States.
76 For detailed discussion of these challenges, see supra note 11.
77 For elaboration on this challenge, see Clayton Chan, *Taxation of Global E-
continue to exist and expand regardless of e-commerce. They stem from the
digitalization and globalization of the economy. Nevertheless, e-commerce
increases these challenges. In addition to income classification challenges in
this case, the implication of the source rules to the facts faces challenges.
First, the rationale and justification of source taxation is not clear in this
case. What is the special contribution of the source country that justifies its
tax jurisdiction? Second, the determination of the source country is
challenging because the income is tied to several locations without clear
contribution of one location over the other: the hardcopy transaction is
connected to the United States, Britain, Germany, and Israel; the e-book
transaction is connected to the United States, Canada, and Israel; the
subscription transaction is connected to the United States and Israel. The
determination of the source country in each transaction is neither easy nor
convincing. Third, and maybe most important, even if these questions were
answered and the source of the income determined, it is not normatively
clear that the conclusion sets the tax jurisdiction fairly and efficiently. For
example, if Amazon pays its taxes on the transactions to the United States
only, it is not certain that this is a fair and efficient sharing of the tax pie in
the twenty-first century. To put it in general terms, e-commerce challenges
the conceptual, practical, and normative basis of the current source rules.
Again, this article agrees that these challenges exist regardless of e-
commerce, but that e-commerce increases and complicates these challenges.

This article will now move forward in explaining the challenges
through a second example. It is the example of John, an American citizen
and resident, who sells and buys daily at eBay and makes considerable
profits in transactions with people from all over the world. In this example
it seems that John should have to pay U.S. taxes on his income to the
Internal Revenue Service (Service), although an argument could be made
that he should also pay taxes to other jurisdictions. The main difficulty,
however, is the enforcement of the Code on John. The Service faces
tremendous difficulties in discovering John’s transactions and profits on
eBay. The Service has no real means to measure the real income of John.

78 For detailed discussion on source rules challenges, see DOERNBERG ET AL. supra
note 11, at 169–300; John Sweet, Formulating International Tax Laws in the Age of
Electronic Commerce: The Possible Ascendancy of Residence-Based Taxation in an Era of
The possibilities available to John to evade taxation are numerous and easy to attain. In other words, the enforcement of tax laws on e-commerce needs special attention. Needless to say, enforcement difficulties and tax evasion exists in any case, but e-commerce makes tax evasion more widespread, easy, and considerable.

To illustrate this point clearly, this article invites the readers to think not only about the small John, but about the big gambling companies that make billions of dollars online while they incorporate in tax havens. Several other industries are clearly offshore-based, but make billions of dollars from transactions and services to Americans and other customers in developed countries without these countries collecting any tax revenue on these incomes. It is clear that the roots of the challenge here are planted on the existence and widespread availability of tax havens, but e-commerce makes these havens much more attractive.

The challenges identified in this article do not pertain solely to companies or taxpayers who intentionally skirt the law. The challenges are also significant for companies who obey the law. To make this point and some additional points, Google will be used as a final example. Google declares on its website that “Google’s mission is to organize the world’s information and make it universally accessible and useful.” Google generates billions of dollars from advertising globally. As Google’s Quarterly Earnings Summary for the fourth quarter of 2011 reveals, its revenues in the quarter reached the sum of $10,584,000,000, while 53% of revenues were from international sources and 47% of the revenues were from the United States. Google’s financial information also indicates that the share of Google’s international revenues is growing. But how are all these revenues taxed? It is not easy to answer this question. It is very difficult to classify Google’s income. It is not easy to determine the source country of the income which is generated through clicks by worldwide users. The sharing of the tax pie on Google revenues is very much problematic: while more than half of the revenues are international, Google does not really pay taxes to non-U.S. governments. Google declares that “Our effective tax rate was 22% for the fourth quarter of 2011.” This rate

79 For a discussion on e-commerce enforcement challenges, see generally McLure, supra note 11, at 354–55, and DOERNBERG ET AL., supra note 11, at 174–76.
83 Id.
84 See Press Release, Google Inc., Google Announces Fourth Quarter and Fiscal Year
is quite low in comparison to other companies. More important, however, is the fact that Google’s effective tax rate on its international income is 2.4%. This is because Google uses aggressive tax-planning strategies to reduce its effective tax rate. The strategies of Google depend on “transfer pricing” practices combined with low income jurisdictions and treaty holidays. These strategies are available to all kind of businesses but they are much more available and valuable to e-commerce businesses like Google.

D. The Current Responses to the Challenges

1. The Academic Level

At the academic level, different proposals have been discussed in the tax literature to cope with these challenges. Professor Reuven Avi-Yonah proposes to levy a withholding tax on e-commerce income by the demand jurisdiction where the consumers of e-commerce reside. Professor Jinyan Li proposes to fix a formula for e-commerce taxation. Professor Richard Doerenberg proposes the tax base erosion approach. Sweet proposes exclusive residence taxation on e-commerce income. These and other proposals were analyzed in previous writings, and those writings proposed the integrative adaptation model, which calls for the adaptation of the current international tax regime in an integrative manner with other fields of cyberspace law to cope with e-commerce taxation issues as other fields cope with internet law issues. Please refer to previous writings for that discussion.

2. The National Level

At the national level, governments and tax authorities have studied the 2011 Results (Jan. 19, 2012), available at http://investor.google.com/pdf/2011Q4_earnings_google.pdf.

87 See Avi-Yonah, supra note 11, at 510.
88 See Li, supra note 11.
89 See DOERNBERG ET AL., supra note 11.
91 See Azam, supra note 11.
issue of e-commerce taxation and published rich reports and guidelines. Generally speaking, governments have applied the existing tax laws on e-commerce with some adaptations and have increased the use of technology in the administration and enforcement of the tax system. In some countries, like the United States for example, some substantial change was made in tax laws to cope with e-commerce challenges. It is neither the time nor place for discussing these changes in detail, since our concern is at the international level rather than the national level. Still, this article will shortly outline the interesting changes in the internal U.S. tax laws to cope with e-commerce challenges.

Cross-state e-commerce in the United States challenges the states’ sales and use tax system. These challenges are similar to some extent to the


94 See Walter Hellerstein, State Taxation of Electronic Commerce, 52 Tax. L. Rev.
challenges of the taxation of cross-border e-commerce income.

According to the Center for Business and Economic Research at the University of Tennessee, in 2003 the estimated combined state and local revenue loss [in the United States] due to remote sales was between $15.5 billion and $16.1 billion. For electronic commerce sales alone, the estimated revenue loss was between $8.2 billion and $8.5 billion. The report from the University of Tennessee further estimates that the revenue loss will grow and that by 2008 the revenue loss for state and local governments could be as high as $33.6 billion, of which it is estimated that $17.8 billion would be from sales over the Internet.

Table 1 of their research is a detailed presentation of the losses of each state. In a more recent study the figures are clearly lower and they estimate uncollected taxes on e-commerce as equaling the sum of $7.26 billion in the year 2008 and projected to increase to $12.7 billion in 2012. However, Jeffrey Eisenach and Robert Litan have criticized these figures and have arrived at different estimates. Using a different methodology, they estimate the uncollected sales taxes on state and local e-commerce sales in 2008 as being in the vicinity of approximately $3.9 billion, and they estimate that the sum will increase to $4.7 billion in 2012.


96 The reasons behind the uncollected sales tax on e-commerce and the proposals to close the gap were clearly presented and discussed by Professor Annette Nellen in a presentation. *See Annette Nellen, E-commerce Taxation, California Municipal Revenue & Tax Association Meeting (Aug. 15, 2008), available at* http://www.cob.sjsu.edu/nellen_a/TaxReform/E-CommerceTax8-15-08.pdf.

97 I would like also to add that the Service conducted a small study in 2000 in which it reviewed 426 commercial sites and found that for the year 1997 10% of owners did not file and 12% of owners could not be identified. There was an estimated $1 billion tax gap for small internet businesses. Treas. Mem. For Comm’r, Small Business/Self-Employed Div. 2005-30-010 (Nov. 2004), available at http://www.treasury.gov/tigta/auditreports/2005 reports/200530010fr.html.


Different proposals were raised at the academic level to cope with these challenges. However, ultimately three main measures were taken to handle the issue: First, the enactment of the Internet Tax Freedom Act; second, the signing of the Streamlined Sales and Use Tax Agreement (SSUTA); and third, the introduction of “Amazon Laws.” The Internet Tax Freedom Act was enacted in 1998 for a limited period of three years, which was extended later several times until January 11, 2014. The Act gives a moratorium on internet taxes and forbids any tax on internet access and any multiple or discriminatory taxes on electronic commerce. The Streamlined Sales and Use Tax Agreement harmonizes states sales and use tax laws. It harmonizes the tax base (Section II), the source rules (Section III), and the tax rates. The agreement centralizes the administration of the tax (Section IV) and sets the rules for joining the agreement (Section VIII).


Global Taxation of Cross-border E-commerce Income

As one writer put it:

The SSUTA agreement explicitly identifies 10 points of focus. Uniformity and simplification are the primary themes with state level administration of the sales and use tax a critical element in achieving the “streamlining” goal. The 10 points of focus can be condensed into four general requirements for simplification: (1) state level administration, (2) uniform tax base, (3) simplified tax rates, and (4) uniform sales sourcing rules.104

Amazon Laws were introduced recently in New York, North Carolina, California, and other states to overcome the nexus rules as designed in Quill Corp. v. North Dakota105 by using affiliated nexus construction. According to these laws, the physical presence of the affiliated partner in the state justifies levying state taxes on e-commerce and out-of-state sales. However, the constitutionality of these laws is not clear yet.106

3. The International Level

At the international level, countries have recognized the limits on their taxation power of cross-border e-commerce income. For this article, this limitation is termed “The Code Restraint”107 because it stems from the code of the internet, which structures and designs the internet as a global virtual sphere in which people trade electronically and pay online anonymously. To overcome this restraint, countries participating in the

---

OECD 1997 Turku Conference entered into a process of negotiation to reach an international agreement to tax global e-commerce income.

In 1998, during the Ottawa Conference titled “Borderless World — Realizing the Potential of Electronic Commerce,” the OECD, its Committee of Fiscal Affairs (CFA) and participating countries concluded, “The taxation principles that guide governments in relation to conventional commerce should also guide them in relation to e-commerce. The CFA believes that . . . existing taxation rules can implement these principles.” The OECD designed broad taxation principles that should apply to electronic commerce as follows:

**Neutrality**

(i) Taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation.

**Efficiency**

(ii) Compliance costs for taxpayers and administrative costs for the tax authorities should be minimized as far as possible.

**Certainty and simplicity**

(iii) The tax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where and how the tax is to be accounted.

**Effectiveness and Fairness**

(iv) Taxation should produce the right amount of tax at the right time. The potential for tax evasion and avoidance should be minimized while keeping counter-acting measures proportionate to the risks involved.

**Flexibility**

(v) The systems for the taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial developments.

Following Ottawa, five Technical Advisory Groups (TAGs) continued
the research and dialogue and issued several important studies and guidelines. One report discusses the income classification challenges and classified twenty-eight e-commerce transactions. The report led to a change on the commentary of Article 12 of the OECD Model Tax Convention, which deals with the classification and taxation of royalties. Another report discussed the application of the “Permanent Establishment” threshold as defined in article 5 of the OECD Model Tax Convention to e-commerce. Based on this report the commentary of article 5 was changed in a manner that distinguishes between computer equipment, such as a server, which might constitute permanent establishment under certain circumstances, and computer data, such as a website, which cannot have a location and cannot be a fixed place of business as required by the definition of “Permanent Establishment.” The new commentary states that:

42.4 Computer equipment at a given location may only constitute a permanent establishment if it meets the requirement of being fixed. In the case of a server, what is relevant is not the possibility of the server being moved, but whether it is in fact moved. In order to constitute a fixed place of business, a server will need to be located at a certain place for a sufficient period of time so as to become fixed within the meaning of paragraph 1.

42.5. Another issue is whether the business of an enterprise may be said to be wholly or partly carried on at a location where the enterprise has equipment such as a server at its disposal. The question of whether the business of an enterprise is wholly or partly carried on through such equipment needs to be examined on a case-by-case basis, having regard to whether it can be said that, because of such equipment, the enterprise has facilities at its disposal where business functions of the enterprise are performed.

42.6 Where an enterprise operates computer equipment at a particular location, a permanent establishment may exist even though no personnel of that enterprise is required at that location for the operation of the equipment. The presence of personnel is

---


not necessary to consider that an enterprise wholly or partly carries
on its business at a location when no personnel are in fact required
to carry on business activities at that location. This conclusion
applies to electronic commerce to the same extent that it applies
with respect to other activities in which equipment operates
automatically, e.g. automatic pumping equipment used in the
exploitation of natural resources.112

A third report analyzes transfer pricing issues in the world of e-
commerce.113 This working paper analyzes four cases and gives important
guidelines for further cases.114 Additional reports of the OECD discuss and
contribute to the issues of the application of the residency breaking rule of
“place of effective management” on e-commerce corporations115 and the
administration of the tax system in the era of e-commerce.116

E. The Need for a Different Response

Despite the rich and intensive discussions on the taxation of cross-
border e-commerce income, it does not seem that the right answer has been
proposed thus far. The international tax regime is still struggling in the
efforts to tax cross-border e-commerce income. According to my
impression, the OECD changes did not solve the challenges substantially.
The OECD approach in my opinion is a very limited and weak political
compromise. On the ground, it is not clear that a real and full taxation is
levied on e-commerce income as on non-e-commerce income. The general
impression is that the challenges remain and a gap of taxation exists and
calls for a different solution.117

112 Id. at 6.
113 See OECD, TECHNICAL ADVISORY GROUP ON MONITORING THE APPLICATION OF
EXISTING TREATY NORMS FOR THE TAXATION OF BUSINESS PROFITS, ATTRIBUTION OF PROFIT
to a PERMANENT ESTABLISHMENT INVOLVED IN ELECTRONIC COMMERCE TRANSACTIONS
1923312.pdf.
114 Id.
115 See OECD, TECHNICAL ADVISORY GROUP ON MONITORING THE APPLICATION OF
EXISTING TREATY NORMS FOR THE TAXATION OF BUSINESS PROFITS, REVOLUTION ON THE
APPLICATION OF “PLACE OF EFFECTIVE MANAGEMENT” AS A TIE BREAKER RULE (Draft for
pdf.
116 See OECD, FORUM ON STRATEGIC MANAGEMENT, TAX ADMINISTRATION ASPECTS OF
ELECTRONIC COMMERCE: RESPONDING TO THE CHALLENGES AND OPPORTUNITIES (Draft for
pdf.
117 This impression could and should be supported by empirical data but such data is
It might be true that as a percentage of total tax revenues e-commerce tax losses are low, but it nonetheless represents a significant sum of money in absolute terms and it induced the state governments in the United States to search for a solution to the e-commerce taxation problems. This article estimates that a similar process will occur on an international level in the near future as result of the rapid growth of e-commerce. In this article, a revolutionary proposal is presented in the hope of spearheading, or at least outlining, the parameters of the necessary change at the international arena to tax cross-border e-commerce income.

To overcome the challenges posed by global e-commerce taxation and in order to levy “good tax” on global e-commerce income, supranational taxation is needed. This conclusion stems from the analysis of the problems and the experience of the last ten years in attempts to tax global e-commerce income. As a global income, e-commerce should be taxed globally by a supranational institution. This far-reaching conclusion is imminently logical, but states have difficulties in accepting it at this stage because it transfers their taxing power to a supranational institution. They are not yet ready to pay this price at this stage when the tax losses on global e-commerce income are not so significant when compared to the total tax revenues of the states. In the long run, however, if the losses become significant, countries may consent to this major change in their taxing powers.

III. THE PROPOSED GLOBAL E-COMMERCE TAX

This article suggests imposing a global e-commerce tax on global e-commerce income by means of a global tax fund, which will spend the tax revenues to fund global public goods. The global tax should be designed, collected, and spent in compliance with the canons of “good tax.” The global tax fund should be designed and founded so that it can function democratically. Now the article will proceed to elaborate on the Global E-commerce Tax.

A. Structure and Design of the Tax

The Global E-commerce Tax (GET) is global in three senses: First, the tax base is the global income, which derives from cross-border e-commerce activity. Internal e-commerce activity, conducted entirely within one
jurisdiction, is not a part of the GET base and will continue to be taxed by the relevant state according to its own tax laws; second, the tax is levied by a global institution rather than by territorial states and the details of the tax is set within this institution, which also runs the GET system; third, the GET revenues would be spent to fund global public goods. This model does not attempt to split the revenues between the countries. Instead, it aims to spend the revenues globally for the funding of global public goods. The need to establish a new funding source for global public goods is growing rapidly in our globalizing world. Just as the modern tax system emerged in response to the need to fund public goods within a territorial state, the GET represents a similar response to emerging need in the twenty-first century of globalization to fund global public goods. This is the novel goal that GET presumes to realize.

The GET is a tax on income.118 The taxpayers are the e-commerce corporations that gain income via their electronic sales and services on the global Internet. Income is defined for the purposes of the GET as any income arising from cross-border e-commerce transactions. The tax base is comprehensive insofar as it includes all increases in wealth without any distinction between the categories of income. These categories have lost their justification in the real world and have limited, if any, justification in the virtual world. For the purposes of the GET, there does not appear to be any reason for distinguishing between business income or services or royalties. It is all income. However, this article does distinguish between e-commerce income, which will be taxed according to the proposed model, and non-e-commerce income, which will continue to be taxed according to the current laws. In addition, this article differentiates between internal e-commerce income and cross-border e-commerce income, and I limit the scope of the proposed model to the latter. In other words, income for purposes of the GET means “any cross-border e-commerce income” only.

The first priority is to impose the tax on net basis income. Net taxation is clearly more fair and efficient than gross basis taxation. But, the difficulty in net taxation in the GET system arises when, in addition to cross-border e-commerce income, the company also receives national e-commerce income or non-e-commerce income. In these circumstances, the company incurs at least two liabilities: its national tax liability and its global tax liability. The costs should therefore be attributed and deducted adequately. The need to attribute and deduct costs creates loopholes and openings for tax evasion. However, the difficulty should not lead to taxation on gross income rather than on net income. Rather, it should lead to

---

118 It might be wise to levy a global value-added tax on cross-border e-commerce, but I leave this issue for further discussion in my future papers.
development of methods of coping with fake attributions. Today, issues of
deduction allocations and transfer pricing are part of the international tax
regime and practices have been developed that confront and even limit tax
evasion and abusive practices and techniques.\textsuperscript{119} Despite the costs
of attribution difficulty, a GET on net income is better than a GET on gross
income, for both equity and efficiency reasons. It also bears mention that,
anyway, the GET model will have to cope with attribution issues insofar as
it is imposed on global e-commerce income which should be distinguished
and separated from national e-commerce income and non-e-commerce
income. As such, the GET model will be compelled to develop attribution
rules on the income side, and the same rules will be applied on the costs
deduction side.

As to the tax rate, this article proposes a flat tax rate. The debate on
progressive taxation and flat taxation is rich and interesting.\textsuperscript{120} However,
this is neither the time nor the place to enter into this debate. This article
proposes the flat rate for the GET for reasons of simplicity. Progressive
taxation on the global level is difficult to implement and its justifications
are not particularly clear. Flat taxation, on the other hand, is very simple to
implement and intuitively, prima facie at least, appears to be justified. As to
the precise taxation rate, this article propose a fifteen percent tax rate, which
is close to the average current corporate tax rate and is low enough to be
accepted by the countries and the industry, and the low tax rate is similarly
likely to increase compliance. Obviously, this will leave a taxation gap in
many countries between e-commerce and brick and mortar businesses. But,
this is the price of the model and no model could be completely ideal. Each
model should be evaluated according to its advantages and disadvantages.

To increase compliance and efficient administration of the GET, the
global tax fund will utilize high technologies, as well as international
cooperation and information exchange. Technologies to secure payment and
enable transactions are an essential part of e-commerce and may be used by

\textsuperscript{119} See OECD, TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND
TAX ADMINISTRATIONS (2010); JENS WITTENDORFF, TRANSFER PRICING AND THE ARM’S
LENGTH PRINCIPLE IN INTERNATIONAL TAX LAW (2010).

\textsuperscript{120} See STAFF OF JOINT COMM. ON TAXATION, 104 CONG., DISCUSSION OF ISSUES
RELATING TO “FLAT” TAX RATE PROPOSALS (Joint Comm. Print 1995); WALTER J. BLUM &
HARRY KALVEN, JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION (1953); ROBERT E.
HALL & ALVIN RABUSHKA, THE FLAT TAX (2d ed. 1995); Richard L. Doernberg, A
Workable Flat Rate Consumption Tax, 70 Iowa L. Rev. 425 (1985);; John K. McNulty, Flat
Tax, Consumption Tax, Consumption-Type Income Tax Proposals in the United States: A
Tax Policy Discussion of Fundamental Tax Reform, 88 CALIF. L. REV. 2095 (2000); Charles
R. O’Kelley, Jr., Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the
Purpose and Ideal Structure of A Progressive Income Tax, 58 S. CALIF. L. REV. 727 (1985);
the global tax fund as a means of detecting e-commerce transactions. Intermediaries, such as credit card unions (VISA, MasterCard, Diners, etc.) and e-payment facilities (Paypal, BillMeLater, Optimal Payment, etc.) should be obligated under law to cooperate with the global tax fund in imposing the GET.

In addition, countries could and should cooperate and exchange information with the global tax fund and provide assistance if needed and requested to enforce the tax on noncompliant residents of a country. Because this article does not propose enforcement powers for the global tax fund within the territories of countries, their assistance is needed to enforce the GET. In this regard, it is also suggested that the national courts hear and decide legal disputes between the taxpayers and the global tax fund. These disputes would take place in the taxpayer’s country of residence. The reason behind this offer is to give taxpayers easy and fast access to courts in order to retain their property rights and pay the fair tax according to the GET treaty. In addition, this suggestion would eliminate the need on the part of the global tax fund to establish its own legal processes to handle tax disputes. Furthermore, this proposal confers appropriate weight to the national sovereignty consideration, striking an optimal balance between state sovereignty and taxation of global e-commerce income.

Finally, this article expects online administration of the global e-commerce tax. Taxpayers will meet the tax man online to report and pay the global e-commerce tax.

B. Structure and Design of the Global Tax Fund

The GET will be levied and run by the global tax fund (GTF). The GTF will be the main supranational institution to run the tax on cross-border e-commerce income. Countries shall establish the global tax fund by a treaty. The GTF shall be the main administrator of the GET: crystallizing the details of the tax; administering the tax; spending the revenues; and so on.

The GTF that this article proposes is a new international institution. It should be established by the countries themselves. Countries should agree to establish the fund and to confer the GTF full responsibility for collecting the GET and spending its revenues. This article proposes establishing a new international institution instead of using existing ones for several reasons. First, there is no existing international institution that has the features and powers needed for the global e-commerce tax. The idea is unique and innovative and requires a new institution. Second, it is not proposed that the OECD should administer the tax because it is not a worldwide organization but rather an organization of a limited number of developed countries. In
addition, the OECD has other goals that might be in conflict with those of the GTF. These factors point to the need for a new institution. Finally, a new institution would be designed specifically in accordance within the specific parameters of a global e-commerce tax infrastructure for the funding of global public goods. The particular design of such an institution would be a critical factor in increasing the political feasibility of the model and its potential success.

Countries would design the GTF and capitalize on their extensive experience in designing international institutions in the last decade. However, this article will present a preliminary framework based on the rich literature concerning the design of international institutions. In doing so, the article has relied primarily on the “rational design” of international institutions frameworks. Rational design makes the following assumptions: first, states and other international actors, acting for self-interested reasons, will design institutions purposefully to advance their joint interests; second, repeated and intensive interaction between the countries on the relevant issues is necessary to enhance cooperation and substantially affects the institutional design and its sustainability; third, establishing and participating in international institutions is costly; and fourth, states are risk averse and worry about possible adverse effects when creating or modifying international institutions. Based on these assumptions, rational design scholars attempt to handle the following problems: distribution problems in order to ensure that the institution does not favor one country over another; enforcement problems in order to reduce the possibilities of cheating by some countries; a large number of problems endemic to the mechanics of collective decision making and actions; and uncertainty problems. Most of their work is empirical work that analyzes existing institutions and their design and it attempts to draw general conclusions regarding optimal institutional design. This work will be used to offer a basic sketch of how the GTF might best be designed to fulfill its goal. In what follows, the article will briefly consider five main design questions:

MEMBERSHIP: The members of The GTF are countries. Each country should be entitled to a quota of the GTF according to its relative portion of the global e-commerce market. Under the current circumstances, a quota system is fairer than an equal membership system. The quota system of the

---

122 See The Rational Design of International Institutions, supra note 121.
123 See id.
124 See id.
International Monetary Fund is well-developed and could serve as an instructive example for building the quota system of the GTF. In addition, it is important to give membership status to a number of Nongovernmental Organizations (NGOs) that are principal players in global issues of e-commerce, global warming, and development and other concerns with ramifications for global public goods. These civil society players are becoming important players in the international arena that could and should contribute to the success of the GTF.

**SCOPE:** The scope parameter addresses the question of what issues should be addressed by the GTF. At the first stage of creation and development the activities of the GTF should be limited to its function as the recipient of global e-commerce tax and its spending to fund global public goods. In the future, the GTF might develop capacities to confront other global issues or global public goods issues.

**CENTRALIZATION:** The question here is whether certain cardinal institutional tasks should be performed by a single centralized entity. This article proposes that the GTF to be the single entity charged with the collection and expenditure of the tax. However, the GTF should be assisted by nation-states with respect to enforcement and legal litigation. Enforcement and legal litigation concerning the global e-commerce tax should be conducted at the national level by the national entities for reasons of simplicity and efficiency, as well as in the interests of their sovereignty concerns. This represents a workable balance and in any case can be negotiated between the countries in the process of creating the international treaty on global e-commerce taxation.

**CONTROL:** The control dimension is of crucial importance. Its concern is with putting in place the mechanisms for adopting collective decisions on tax collection and spending. Several factors affect the control of the GTF including: Governance structure, Election of Key Officials, Voting Procedures, and Accountability for and Transparency of its Actions.

Regarding *Governance Structure*, it seems that four main organs are needed in the governance system of the GTF. First, a *Board of Governors*: The governors should be the highest body of the GTF that makes the most important decisions and determines policy concerning the GET and the spending of the revenues from the tax. Second, an *Executive Board*: The Executive manages the system on daily basis. Third, *Administration and Staff* runs and performs the full range of activities needed in the GTF. The research team that examines the spending of the revenues is likewise a critical component of the staff. Fourth, *Supervising Board*: This board supervises the policies and the management of the GTF and issues evaluation reports on its activities.

As to the *Election of Key Officials*, this article considered the
possibility of delegated professionals from the different countries as compared with the possibility of professional officials to be chosen on a global basis and reached the conclusion that latter is preferable. The aim is to design the GTF as a real and independent global institution that serves the global interest exclusively. The key officials are central to achieve this goal and the best means of ensuring their professionalism and institutional independence is by appointing them on global basis irrespective of their national affiliation and belonging.

As to Voting Procedures, the different international institutions have adopted a variety of voting procedures. In the United Nations (U.N.) General Assembly, each member has one vote. In the U.N. Security Council, a veto right is given to the permanent members. At the IMF and World Bank a weighted voting rule is implemented. This article proposes using the weighted voting rule in the GTF according to the quota system of the fund which relies on the share of the country in the global e-commerce market. This voting system is fair under the circumstances and ensures a just balance of the competing countries, which, representing a larger proportion (and contribution) to the e-commerce income, should have greater voting rights. In this regard, it should be added that in measuring the share of the country, it is important to consider its sales as well as its consumption of e-commerce. Both production and consumption are important, thus necessitating equal consideration of both aspects in the determination of tax rules. Finally, this article proposes granting voting rights to the NGO members of the GTF especially on decisions concerning the spending of the revenues. The weight attaching to their vote should be decided according to their budget size as an indicator of their role in the field.

In regards to Accountability and Transparency, different measures are adopted in different international organizations to assure the adequacy of these foundation stones. Similar measures should be taken in the GTF. The GTF should be supervised objectively by an independent Supervising Board as mentioned. The collection of the GET and the spending of the revenues should be fully transparent. These and other measures would contribute to the realization of accountability and transparency. The existence of these measures is a central factor in evaluating the political feasibility and the potential success of the model.

FLEXIBILITY: this factor considers ways of handling new circumstances and changes nationally or internationally. One wide flexibility rule is the “escape clause” which exists in some international institutions. An escape clause enables the member country to withdraw from the international
institution partially or fully, permanently or temporarily. An escape clause as all other aspects of the GTF design should be discussed and negotiated by the countries. On the one hand, an escape clause would be a good idea as a means of encouraging countries to accept the model. On the other hand, it could spell the demise of the model if a number of leading countries decided to exercise their rights thereunder, whether for just cause or otherwise. After hesitation, I suggest the inclusion of an escape clause in the design of the Global tax fund, if indeed it contributes (this can be examined empirically) to wider participation of countries in the project.

Before moving forward, a difficult question comes up concerning the relations between the GTF and nonmember countries and the taxation of transactions across member and nonmember countries. In this regard, the GTF should limit its jurisdiction and give first priority to nonmember countries. Therefore, the GTF should tax the income of the resident of the member country only if it is not taxed by the nonmember country. This rule balances between the sovereignty of nonmember countries and the integrity of the GET and the GTF.

C. Spending the Global E-commerce Tax Revenues to Fund Global Public Goods

I propose spending global e-commerce tax revenues for the funding of global public goods such as climate stability, global communication networks and internet, financial stability, and global diseases. Global needs are manifold in a global world. Without global government these needs cannot be satisfied. Nation-states partially provide global public goods for their own selfish reasons, but the overall situation is one of under-provision. The demand for global public goods clearly exceeds their supply. This partial provision is currently financed by national contributions mainly via the channels of official development assistance programs. But new resources and methods of funding are being discussed and developed, such as global environmental taxes (Carbon Tax); currency transactions tax (Tobin Tax); the creation of new special drawing rights; the establishment of international finance facilities; increased private donations for development; and global lottery or global premium bond.

It is this article’s contention that the GET is a good resource for funding global public goods for several reasons: first, it introduces new money into the pool when compared to other resources that transfer funds


\[^{126}\text{See NEW SOURCES OF DEVELOPMENT FINANCE (A. B. Atkinson ed., 2005).}\]
from one pocket to another; second, e-commerce is a truly global activity that uses global infrastructures and it is natural, justified, and efficient to use global tax such activities as a means of funding global public goods; third, this usage overcomes the unsolved problem of sharing the global e-commerce tax pie and would therefore facilitate the tax on a political level; fourth, this usage advances inter-nation equity because it involves the aspect of distributing wealth from developed countries where e-commerce is really taking place to developing countries that benefit from global public goods; fifth, using global e-commerce tax to finance global public goods will generate economic activities and processes that serve welfare interest; and sixth, the revenue potential of this resource of finance seems promising and more importantly, it is growing and might well become a serious global tax base for filling the needs of the global world.

This article does not suggest spending the revenues on a specific global public good. This proposal is made on the level of principle and does not presume to establish any guidelines or priorities regarding the particular target of the revenues. As a matter of principle, the revenues should be spent on global public goods, and the decision-making authority regarding the details and specific spending of the revenues should be left to the GTF. Obviously, spending challenges and conflicts of interests will face the GTF on a daily basis and should be solved by a case-by-case approach. This is the right way to solve these issues. Guaranteeing effective and well-directed spending is very much a function of the structure of the GTF. Therefore, the structure of the GTF as a credible international institution is the key to good spending and solving spending challenges.

IV. THE NORMATIVE BASIS OF THE GLOBAL E-COMMERCE TAX

In the following subsections, this article will argue that the GET is a “good tax” on global e-commerce income, according to Adam Smith’s canons of “good tax” which have lead tax policy discussions since 1795, subject to certain modifications and additions introduced by writings on modern tax policy. Furthermore, this article will argue that the global tax is legitimate because it realizes the ideal of the consent of the governed, insofar as it levies global tax on global income through a global institutions and spends the global tax on global public goods. This model leads to feasible and effective taxation of e-commerce by imposing a single certain and simple tax that considers the taxpayer needs and financial position.

Furthermore, the tax is efficient in the sense that it simultaneously achieves both capital export neutrality and capital import neutrality;\(^{129}\) in addition, the tax is fair and achieves inter-individual equity and international equity. Finally, this article argues that the tax introduces a good source for financing global public goods.

A. The Legitimacy Argument

The philosophical discussion of the obligation to obey the law is ancient, diverse, and extremely interesting. It dates back to Socrates in ancient Athens and continues up until today.\(^ {130}\) Generally speaking, liberal theory posits three components that establish state legitimacy to govern: first, the state governs a defined territory; second, the people of the territory constitute a community; and third, this community consents to sovereign authority. However, the advent of the Internet has considerably diminished the relevance and hence the normative significance of these components, so much so that it is unclear whether the classical notion of state-based rule-making and taxation is really applicable to the Internet.

The concept of territory has no real meaning on the Internet. Internet traffic is a phenomenon that exists on a single global (market)place where physical borders are meaningless. Given this fundamental change regarding


the territorial component, it is no longer clear that territorial states possess the legitimate sovereignty to govern global online activity. The activity does not take place within their borders, and any governance by one state necessarily affects other states; the connection of one state to e-commerce income is a limited one that does not justify its ultimate taxation of the income.

As for the community component, it is argued that users of the Internet constitute a community in its own right. In their online activity people belong to this global community and express an online identity and affiliation rather than their national identity and affiliation. Sociological research supports the notion of “Internet Community” or “Virtual Community” as being the dominant identity of users in their online activity. Sociologists have researched this issue extensively and have clearly identified the development of social interaction on the Net, which has led to the emergence of social values, norms and rules governing these interactions. They have analyzed the virtual community as consisting of a single global community which is also supplemented by a countless number of sub communities according to the unlimited sphere of specific internet interactions. This fundamental social change has legal consequences. Law should take the new virtual community into account and adapt its basic concepts of authority to meet the needs of this new community.

Regarding the basic principle of “the consent of the governed,” it is not clear whether the people’s consent to their territorial state governance includes or even implies their consent to rule and control of their online activity on the global Internet. On the contrary, users conceive of the Internet as a free realm, not subject to state control. Several indicators support the notion of the freedom of the Internet. A particularly clear articulation of this freedom was provided by John Perry Barlow in his fascinating Declaration of the Independence of Cyberspace in these words:

. . . . Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions. . . . We are forming our own Social Contract. This governance will arise according to the conditions of our

world, not yours. Our world is different.\textsuperscript{132}

For all these reasons, Cyber-Libertarians argue against the legitimacy of state attempts to regulate and govern Cyberspace. They call for self-governance of Cyberspace.\textsuperscript{133} These arguments gain special strength in the tax field where state legitimacy and power is so fundamental. Global e-commerce income emerges as global income which does not recognize territorial borders. Downloading a book or song or computer program and paying for it online takes place on the Internet as one global place and not in any particular territory. The parties to this transaction do not recognize any state affiliation in this regard and they neither expect nor consent to any state taxation over such a transaction. Domestic legislature is highly limited in the taxation of income arising from global e-commerce, in terms of both power (political) and legitimacy. The income did not emerge in “their territory” and they did not make any unique contribution to the production of the income to justify any state taxation of the income.

Thus, a GET is therefore more legitimate than state taxation on global e-commerce income. A global tax coincides with the location in which the activity is taking place. It treats all the taxpayers as one community comprising subcommunities which express their will through their national representatives (the states) by crystallizing the tax treaty and participating in the GTF. I think that this congruence strengthens the legitimacy of the tax. Furthermore, the consent of the governed may be better expressed in this model of taxation rather than in a national taxation on e-commerce. There are sound reasons for assuming that sellers and buyers of e-commerce will be more ready to consent to a global tax to fund global public goods on their cross-border e-commerce transactions than to a national tax.

To illustrate this argument, return to the eBay example that opened the introduction of this article. The marketplace eBay.com is an obvious example of a global marketplace. Sellers and buyers at eBay act as residents of the global world rather than residents of one country or another. In my opinion, imposing global tax on the incomes at this global marketplace is more legitimate than imposing the tax by any individual country.

However, further empirical-social research is still required in order to


fully substantiate this hypothesis. This article raised the hypothesis for thinking and would immediately leave the legitimacy argument and dimension to move on and concentrate on more tax-policy-oriented arguments and criteria of good taxation and practical taxation.

B. The Certainty Argument

The nation-state lacks the practical ability to impose a certain tax on global e-commerce income. E-commerce is predicated on assumptions that are entirely different from the ones that underlie the existing international tax regime and this discrepancy poses severe problems for any attempt to apply the current regime to e-commerce. It is now abundantly clear that no one nation-state can apply its tax regime to global e-commerce income. This article argues that the GET could effectively impose a certain tax on global e-commerce income, thereby fulfilling the canon prescribed by Adam Smith according to which “The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person.”\footnote{Smith, supra note 127, at 452.} In substantiating this argument, the article briefly returns to the challenges confronting the attempt to apply the current international tax regime to e-commerce and explain why the GET neutralizes these problems and ensures a certain tax on global e-commerce income.

I begin with Income-Classification Challenges. The classic standard categories reflected and regulated commerce in products, services, and businesses that predated e-commerce, but the Cyber-age is different; e-commerce does not easily admit of classification in accordance with the old transactional categories.\footnote{See Pinto, supra note 11 at 140; Westin, supra note 11, at 211–81; Clayton W. Chan, Taxation of Global E-Commerce on the Internet: The Underlying Issues and Proposed Plans, 9 Minn. J. Global Trade 233, 255 (2000); Diane M. Ring, Exploring the Challenges of Electronic Commerce Taxation Through the Experience of Financial Instruments, 51 Tax L. Rev. 663, 666 (1996).} The proposed GET overcomes this difficulty by its intentional nondifferentiation between categories of income. As described earlier, for several reasons, the global e-commerce tax abolishes the distinction between the categories of income, thus enabling appropriate treatment of difficulty of income classification. Therefore, in the example\footnote{See example, supra p. 652.} of Mark who buys a book, e-book and subscription at Amazon.com, there is no need any more to classify the income produced in each transaction and all
income will be taxed the same.

As to Source Rules, their strongly territorial base creates a problem when attempting to apply them to e-commerce which is fundamentally nonterritorial. As three types of e-commerce (tangibles, intangibles, and services) — especially e-commerce in intangibles and services that are sometimes totally unrelated to any physical place outside the Internet — defy traditional notions of territoriality. In doing so, e-commerce likewise defies the basic justifications and concepts behind the source rules, even on the theoretical and conceptual levels. The same is true with respect to the Permanent Establishment source rule which gained special attention in the debate on e-commerce taxation. E-commerce enterprises can sell their products or services worldwide with very limited physical presence in any particular consumer’s country and can operate without agents because they can directly, easily, and cheaply contact customers worldwide.

Global e-commerce tax resolves this difficulty by making the tax regime indifferent to any particular source place, or more precisely by abolishing the normative significance of any “source place”. All global e-commerce income will be taxed globally. Therefore, Amazon Inc. will pay its global e-commerce tax on Marks purchases online to the Global Tax Fund and there is no need any more to struggle the source rules and determine source according to author, warehouse, consumer, or any other factor.

However, the new difficulty will be the distinguishing between local e-commerce which is taxed by the national country according to its own tax laws and global e-commerce which is taxed globally according to the global e-commerce tax treaty. My argument is that GET will overcome the difficulty and develop guidelines to distinguish between local and cross-border e-commerce income through the case law of the national courts.

As to Residency, the main challenge is to determine the residency of e-commerce corporations for personal taxation purposes, especially where it is easy to abuse the traditional definitions and locate an e-commerce corporation in a low-tax jurisdiction to reduce or even to escape taxation all together.

137 DOERNBERG ET AL., supra note 11, at 169–300; Li, supra note 11, at 516–19; Sweet, supra note 78, at 1960–72.


139 See DOERNBERG ET AL., supra note 11, at 301; Li, supra note 11, at 510.
The GET copes with this challenge successfully since all e-commerce corporations pay one tax to the GTF, based on their global e-commerce income, and thus, their residency is irrelevant in this regard. Therefore, gambling corporations, for example, should pay the GET to the GTF on their income, regardless of their location of incorporation in a tax haven. But to ensure this scenario, a wide range of consensus must exist. The involvement of leading e-commerce countries is therefore crucial to the success of the model. Concededly, tax havens will continue to exist regardless, and it is likely that no comprehensive consensus will be reached. But, to the extent that there is broader consensus and support of the global tax, the significance of tax havens diminishes and should not affect the basic framework and success of the model. Countries will fight tax havens and insist on paying the GET by using pressures on credit card companies and e-payment companies, for example.

Regarding Enforcement, it should come as no surprise that numerous difficulties are encountered in the attempt to enforce the current international tax regime on e-commerce as explained earlier. This is true of all three types of e-commerce but particularly of e-commerce in intangibles and services. In my opinion, enforcement problems will find their successful solution in a GET regime. As long as e-commerce corporations are registered in a country that has signed the GET treaty, then that country will presumably cooperate in enforcing the treaty and the global tax. Tax havens will continue to pose a problem even for the GET. But the detection and recognition of transactions will be better served, especially if credit card and payment companies are obliged to cooperate. Furthermore, new technologies of revealing e-commerce transactions will improve the enforcement of the tax. To be quite clear, I am not arguing that enforcement difficulties are nonexistent in the proposed global e-commerce tax, but that they would decrease significantly.

For all of the reasons mentioned above, the GET would clearly change the current uncertain taxation of global e-commerce and ensure a certain tax on global e-commerce.

C. The Efficiency Argument

There are two separate aspects of efficiency that derive from Adam Smith’s canons of taxation: economic efficiency and administrative efficiency. A tax system is considered economically efficient if it does

---


141 See LYMER & OATS, supra note 128, at 54–57.
not distort the economic decisions which are made based solely on economic considerations. Economic efficiency is sometimes referred to as fiscal neutrality, and the key idea is that taxes should, as far as possible, not interfere with the workings of the market. Two meanings of “neutrality” in the international tax regime have dominated the discussion competing for priority. The first, *Capital Export Neutrality (CEN)*, means the neutrality of the international tax regime regarding the location of the investor and his decision between investing in his home country or exporting his capital abroad. This neutrality is achieved if the investor faces the same effective tax rate no matter where he invests. This is the case, for example, when the investor is taxed on a personal basis and is credited for his source taxation abroad. In a regime characterized by capital export neutrality, the investor will invest in the most efficient location, which, in turn, maximizes the size of the global pie and advances global welfare. The second meaning of neutrality, *Capital Import Neutrality (CIN)*, concerns itself with the neutrality of the international tax regime regarding the import of capital into the country and the question of whether investments in the country will be made by resident or foreign investors. Capital import neutrality is actually achieved in territorial taxation. In a territory characterized by CIN, the investments in a given territory are made by the most efficient investor, thereby maximizing the welfare of the relevant country.

The current taxation of e-commerce income does not satisfy any of these efficiency criteria. It does not satisfy CEN because the taxation of the income varies depending on the countries relevant to the transaction and their attitudes towards the taxation of e-commerce income. It also does not satisfy CIN because the same income in one territory might be taxed differently based on connections to other countries which also claim taxation rights on that income.

In my opinion, the GET is an efficient tax according to both criteria. It fulfills CEN since the same tax is imposed on an e-commerce investor no matter where he bases and runs his e-commerce business. In each case the

---

investor will make his decisions according to considerations of cost and quality of infrastructure, knowledge, technology, employees, and so on. At the end of the day, he will locate his business in the most efficient location in terms of yielding the highest rates of return on his investment. At the same time, it also achieves CIN because local and foreign investors in a given place who compete in running e-commerce businesses will face the same tax rules on their cross-border e-commerce income and the most efficient of them will survive and succeed in running the business in the most efficient manner, thus maximizing global welfare. Until now, no international tax regime achieved both CEN and CIN and scholars are in dispute over which policy is more efficient and should be implemented by countries, given the assumption that it is impossible to achieve both in the absence of global government. However, the GET achieves both CEN and CIN which makes it highly efficient and unique because it is a global regime with no global government (albeit with global governance) and with a GTF.

Additional aspects of efficiency should also be considered in evaluating the GET. One of them is neutrality with respect to traditional commerce taxation and e-commerce taxation. In this regard, the GET reduces the current gap between the various current de facto regimes in which no full taxation is imposed on e-commerce income. This reduction of the gap increases efficiency. It is also important to consider efficiency in the administration of the tax regime. It seems clear that administration of the GET would be quite simple and cheap which makes the tax administration highly efficient.

D. The Fairness Argument

“The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities.”143 This statement expresses the “ability to pay” principle as the basis of tax fairness or equity. Legal writing on tax equity distinguishes between horizontal equity, which posits that two taxpayers with the same ability to pay should pay the same tax, and vertical equity, which posits that two taxpayers with different abilities to pay should pay different taxes in proportion to the difference in their abilities.144 These are two mainstays of

---

143 SMITH, supra note 107, at 451.
144 See RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 216 (2nd ed. 1976); RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY 160 (1959); Louis Kaplow, A Note on Horizontal Equity, 1 Fla. Tax Rev. 191 (1992); Louis Kaplow, Horizontal Equity: Measures in Search of a Principle, 42 Nat’l Tax J. 139, 139–140 (1989); Richard A. Musgrave, Horizontal
inter-individual equity. On the international scene fairness also means internation equity which aspires to share the international tax pie fairly between the involved nations.145

The current taxation of e-commerce income is not fair since it does not tax e-commerce income as classical income. This infringes inter-individual equity. Inter-nation equity is also infringed because all countries lose their potential share of the international tax pie from e-commerce. Recent OECD efforts to institute a new sharing method to replace the existing one have failed. No wide and serious consensus was achieved in the negotiation process and the limited agreement to consider the server as a “permanent establishment” under some circumstances did not achieve fair taxation of e-commerce. The negotiations did, however, highlight the importance of achieving a fair sharing of the tax pie on e-commerce and the difficulties in doing so.

The GET would reduce the current inter-individual equity gap between traditional commerce taxation and e-commerce taxation which to-date has not really been taxed, but that would be taxed under the proposed arrangement. This reduction makes taxation more fair although not totally fair since differentiated tax will continue to separate income derived from traditional commerce and income derived from e-commerce. In addition, the GET overcomes the difficulties of inter-nation equity by choosing a different allocation rule instead of the existing ones. Instead of attributing the revenues to countries and trying to split them fairly, the GET attributes the revenues to the global world as one unit and spends the revenues for the benefit of this unit to supply global public goods. This principle is fairer and more logical in the particular context of e-commerce. The global world, its market, infrastructure, and facilities, made the main contribution to the production of this income, so it seems only fair that this global world should receive and benefit from the tax on this income. However, the GTF is a critical factor in evaluating the fairness of the model. The fairness of the model depends very much on the performance of the GTF and its fair design. As long as the GTF acts professionally in a democratic and transparent manner to spend the revenues on global public goods for the benefit of all, the model will be considered fair or at least fairer than the

---

current case in which significant shares of cross-border e-commerce incomes are altogether tax-free.

To clarify this argument, return to the Google example as mentioned earlier. Google is currently under-taxed according to the existing international tax regime. This under-taxation infringes inter-individual equity as Google pays fewer taxes than similar brick and mortar business. This under-taxation clearly infringes inter-nation equity as Google mainly pays taxes to the United States while it produces income worldwide from customers who click and view advertisements on their desktops from their national businesses. According to this article’s proposal, Google would pay taxes to the United States on its U.S. income, but it would also pay the GET to the GTF on its international income. These revenues will be used to fund global public goods. This tax regime and tax-sharing will be fairer than the current state of the art. Google benefits and uses infrastructure in different countries and cannot and should not continue to free ride on these countries. Google should contribute and pay fair taxes on its worldwide income and this is achieved by the proposed GET.

E. The Finance Argument

Classical economic literature defines goods as public if they are “nonrival,” in the sense that, consumption of goods by one individual does not reduce their availability for consumption by others, and “nonexcludable,” in the sense that the goods are accessible for general consumption and no person can be effectively excluded. Modern definitions integrate the dimension of policy choice into the definition of public good and differentiate between potential public good (nonrival and nonexcludable) and de facto public good, which is a public good that has been politically considered so. As to global public goods, these are defined as public goods that benefit all countries, people, and generations. This general definition includes a wide range of global public goods, such as climate stability, financial stability, global diseases, global communication infrastructures, and so on.

146 See supra p. 15.
149 Id. at 95.
This definition of a public good involves three dimensions of publicity which differentiate between private and public good: publicity in consumption, in the sense of nonrival and nonexcludable consumption of the good; publicity in utility, in the sense that the public benefits from the good but the individual utility of each consumer is different (for example, financial stability benefits the whole public, but poor people benefit less than rich people); and publicity in decision-making, in the sense that the political decision to place the good in the public domain is made by the public through its representatives. These three dimensions of publicity were developed and thoroughly analyzed by Kaul and Mendoza, who call them the “Triangle of Publicness.”

In the era of globalization, the demand for global public goods is growing rapidly. Currently, global public goods are financed primarily by way of national aid and contributions. But this finance system does not meet the growing demand and the problem of under-provision and under-finance is growing steadily in scope and gravity. Tremendous challenges face the imperative of optimal production and finance of global public goods, calling for the development of new resources.

The GET is a good new source for financing global public goods. This argument is strengthened by distinguishing between the spending side and the collecting side. From the spending side, the global public goods differ. Some of them are more desirable, plausible, and appealing for the purposes of spending the GET revenues. However, this classification and rating of the global public goods for the purposes of spending should be made by the GTF. From the collecting side, the tax is desirable for several reasons.

First of all, this tax introduces new money into the overall pool of resources. More importantly, the GET revenues derive from an activity that should be taxed, just as any other income, but which currently escapes taxation as result of technical difficulties related to the structure and nature of the Internet and political obstacles related to international cooperation. Therefore, under these circumstances, the GET revenues are not coming

---

150 Id. at 92.
from the budget or tax revenues of any particular country. The GET revenues originate in the e-commerce industry, which is currently a tax-free industry.

In addition, the tax base is a genuinely global activity, which exploits global public resources such as the global communication network. It is only ‘natural’ that revenues of a tax on this base be allocated for the funding of global public goods. This finance allocation is justified from an equity perspective. It should be seen as a payment for using global public goods. This would also resolve the unsolved problem of distributing the GET pie between the countries, because no one country would receive the revenues, but the global world as a whole would receive the benefit of the genuinely global commerce. To some extent, this resource for funding global public goods involves a dimension of distributive justice, because the e-commerce industry is currently located in developed countries. Therefore, using the tax revenues to fund global public goods might reduce the inter-nation gaps and advance a policy of inter-nation distributive justice. This policy would also benefit developed countries since the e-commerce industry would be enlarged as a result of funding global public goods in the developing world. In sum, this finance tool is good because it would produce more than just a double dividend and could advance welfare in the developing world, the developed world, and globally.

Furthermore, this financial tool is good because it is not just another, albeit new, way of providing aid assistance. It is manifestly not a system predicted on assistance, but rather one which is based on a general and genuine concern for global public goods finance instead of being limited to development which has thus far been the central and almost exclusive preoccupation of existing literature and finance resources. The fact that this finance tool is governed by a global institution which allocates the resources on global bases would streamline the use of the finance resources.

As to the revenue potential of the GET, it looks promising despite the difficulties of measuring and estimating, which are the result of the limited global data on the market. Based on the existing data on e-commerce, the B2C e-commerce market in 2011 is anticipated as reaching the sum of about $700 billion, and taking into account 15% as the share of cross-border e-commerce approximately, it appears there will reach a cross border e-commerce market of about $100 billion. If a net profit rate of 20% and a tax of 15% is used, there should be $3 billion in tax revenues. This might sound like a small figure in global terms. But if B2B e-commerce is taken

into account, and more importantly, the future and the long-run are factored in, this sum will be much higher in the foreseeable future. Therefore, the potential of the future revenues is the issue here rather than the expected current revenues.

Based on all of the above, GET revenues should be captured as a source for funding global public goods in addition to other sources. There is no compelling reason to replace existing resources, and they can certainly coexist. Nonetheless, it would be beneficial to prioritize these sources (including the GET) in the interests of constructing a wiser and more efficient global public finance regime. In this regard, there is a big advantage of financing through the GET over other resources, given that e-commerce is growing fast and will continue to grow even faster. Therefore, the revenue potential will grow and could become a real and substantial resource for the provision of global public goods needs in the global twenty-first century.

F. Summary

Summing up this normative section, the proposed model is a “good tax” on global e-commerce income. The GET ensures effective, certain and substantial taxation on global e-commerce income; it is efficient because it simultaneously achieves capital export neutrality and capital import neutrality. It is also fair in the sense of inter-individual equity because it reduces the current gap between the tax regimes on e-commerce and traditional commerce; it is also fair in the sense of inter-nation equity because it taxes global income, and benefits the global world rather than one specific state and this could and should contribute to its political feasibility as well.

The tax would improve the current supply of global public goods which would advance the welfare of the global community. In other words, e-commerce tax would be a desirable and plausible resolution of linked problems on both the income tax and the expenditure side of government functions.

Amazon shall pay U.S. taxes on its U.S. income, but it shall also pay the GET on its cross-border e-commerce income. The Delaware corporation eBay.com, Inc. shall pay taxes to the United States and to the GTF on its national and cross-border income respectively. Similar taxation will be imposed on the traders at eBay.com. Google will no longer pay 2.4% on its international income and will be obliged to pay the full GET. These taxes are more legitimate than nontaxation or individual country taxation on worldwide income. These taxes are more certain, more justified, and easier to enforce and collect even on corporations that follow aggressive tax-
planning strategies or incorporate in tax havens. Such taxation on the mentioned corporations and on similar corporations and transactions is efficient from an economic perspective and from an administrative perspective and would maximize global welfare. Furthermore, this tax regime contributes to the fairness of the international tax regime and the sharing of the international tax pie. Finally, all these substantial tax revenues will be used to finance global public goods, a critical need of the twenty-first century.

V. THE RESPONSE TO COUNTER ARGUMENTS

There are undoubtedly objections to this revolutionary proposal. The counter-arguments are clearly expected and it is not surprising to be accused of being “optimistic.” In this section, there is included a response to the main counter-arguments. Namely, that supranational taxation is not justified or accepted and has failed in the past, and that the proposed GET infringes state sovereignty and therefore is not justified and could not be accepted politically.\footnote{In a separate article, I will respond in full details to the political challenges of my proposal. From a political science point of view, I will argue that governments as realist political institutions have good reasons to accept the GET to serve their own interests. I will support this analytical argument with an empirical argument that studies and compares similar cases in which governments cooperated, compromised, and accepted supranational regimes: (1) Global Tax on Financial Institutions; (2) Growing Trends of International Cooperation on Global Tax Issues; (3) Supranational role of International Institutions on Global Economic Issues; and (4) Harmonization of Tax Laws between the States of the USA in the Streamlines Sales and Use Tax Agreement (SSUTA).} 

A. Supranational Taxation: Global E-commerce Tax and other Global Taxes

In this proposal, there is introduced a substantial change to the existing international tax regime. This article advocates supranational taxation in a world of nation-states that conceive tax sovereignty as part of their DNA. However, this proposal is a limited change to a specific and unique tax base: global e-commerce income. This is a substantial change. But that is not something to fear in this world. A substantial change is not “bad” as such. A supranational tax may even be a “good” one. Supranational taxation does not contradict the basics of tax theory. The supranational dimension of my proposal existed to some extent in previous proposals for global taxation. But the proposed tax base is a good one that has advantages over the others. In addition, the proposed supranational tax is in a different era in which supranational taxation is imperative, and the time has come to
institute this change in the international tax regime and the political climate will now be more responsive and accepting of such a change.

According to the basics of tax theory, tax originates in the need to fund public goods. These goods cannot be supplied by the market as result of their nonrival and nonexcludable features, and a public authority was required to provide these goods. As a result, communities organized into groups on national bases that took the political shape of the current nation-state. The nation-state conceived the tax authority as a tool to collect revenues to fulfill the nation-state’s objective of providing public goods. In this scenario and understanding, nothing is ‘natural’ in national taxation. The nation-state is not the only possible tax authority. Theoretically, communities could consolidate themselves on an alternative basis and formulate an alternative political infrastructure, which could be conferred with tax jurisdiction. From the perspective of tax theory, the nation-state is just one possible tax-collecting framework. But the essence of taxation is the provision of public goods. In this sense, supranational taxation does not contradict the tenets of national taxation, because it is not axiomatic that taxation must of necessity be national. On the contrary, supranational taxation to fund global public goods goes hand-in-hand with the basics of tax theory. This is the natural evolution of tax theory in the twenty-first global century.

In the current global world, there is a rapidly growing demand for global public goods. Global public goods are underprovided as a result of their nonrival and non-excludable features. Nation-states free ride on each other in providing global public goods and therefore cannot function as the ideal public authority for the provision of these goods in appropriate manner. Therefore, a supranational authority is needed to provide these global public goods. This authority could be financed through several resources and supranational taxation is one of the most appropriate resources. Supranational taxation finance is needed to finance global public goods just as national taxation was needed to finance national public goods. Therefore, supranational taxation is the natural development of tax theory in global world. There is support for this argument in the writing of prominent theoretical scholars and this article quotes some of their perceptive comments in this regard:

The growth of international e-commerce will likely spur the movement toward international coordination of tax policy — or what I call the ‘globalization of taxation’ — for two reasons: first, because states will not allow an ever-increasing volume of international digital commerce to escape taxation, and second, because states cannot effectively tax this new form of commerce
without close cooperation with other states. The political implications of the globalization of taxation could be far-reaching . . . the modern state was able to survive and flourish because it made fiscal sense: it was a form of political organization that was particularly well-suited to taxing wealth and commerce. If new developments in the technology of commerce — including the communications revolution, the Internet, and the rise of international e-commerce — are undermining the efficiency of the state as an autonomous taxing entity, we should expect fiscal pressures once again to alter the relationship between the modern state and other political entities. This is not to suggest that the state faces a fiscal crisis similar to that which destroyed European feudalism, or that the modern state will disappear or be supplanted by rival actors. Rather, it points to a continuing shift of taxing authority away from the exclusive domain of states and toward international forums and institutions, which are likely to play an increasingly important role in the design, and perhaps the administration, of tax policy.¹⁵⁴

When there is no longer a territorial imperative, when the place of residence and the investment are no longer a given but a choice, when added value is generated in too abstract a fashion for its creation to be assigned a precise location, taxation is no longer a sovereign decision.¹⁵⁵

Proposals for global tax with varying levels of supranational power were raised in the past. The well-known Carbon Tax is one such proposal. It is a tax imposed on carbon emissions on global bases. It was argued that a carbon tax produces a double dividend because it reduces pollution and collects revenues.¹⁵⁶ But, the international community could not reach an agreement on this taxation due to several technical and political difficulties. This was similarly the fate of the widely debated Tobin Tax proposal. This tax is levied on currency transactions worldwide. It was originally intended to achieve monetary stability and later on developed as a revenue collection

tax. The Tobin Tax Version of Currency Transaction Tax (CTT) faced several technical and political obstacles. Tobin himself recognized these obstacles and suggested that the tax should be adopted by G7 countries and a few major financial centers in order for it to become an operative tax system.\footnote{James Tobin, \textit{Prologue, in The Tobin Tax: Coping with Financial Volatility} xv (Mahbub ul Haq et al. eds., 1996); see also Peter B. Kenen, \textit{The Feasibility of Taxing Foreign Exchange Transactions, in The Tobin Tax: Coping with Financial Volatility} 109 (Mahbub ul Haq et al. eds., 1996).} To overcome technical and political obstacles, new versions of the CTT with some modifications were proposed.\footnote{Rodney Schmidt, \textit{A Feasible Foreign Exchange Transaction Tax}, \textit{North-South Institute} (1999).} Mendez proposed the establishment of a global foreign currency exchange (FXE) under the U.N. system, which would comprise frequent users, brokers and dealers who would be obligated to pay a licensing fee as well as a commission on each transaction.\footnote{Ruben P. Mendez, \textit{Paying for Peace and Development}, \textit{100 Foreign Pol’y} 19, 19–31 (1995); Ruben P. Mendez, \textit{The Case for Global Taxes: An Overview} (United Nations ad hoc Expert Grp. Meeting on Innovations in Mobilizing Global Res. for Dev., Working Paper, 2001).} These fees and commissions would raise the revenues instead of the CTT. Mendez argued that FXE would generate revenues of considerable dimension but its chief advantage over CTT is that it is a market-based approach and would therefore gain more political support than Tobin Tax.

More recent proposals with some level of supranational reach include the following:\footnote{See Marjorie Ann Browne, \textit{Global Taxation and the United Nations: A Review of Proposals}, available at http://www.policyarchive.org/handle/10207/bitstreams/1415.pdf.} In 1996, the U.N. Secretary General Boutros Ghali, in the Cyril Foster Lecture at Oxford University, proposed the imposition of a global tax on different tax bases in order to finance the United Nations and cope with its difficult financial situation. The United States, however, strongly opposed this taxation. Moreover, several Acts of the U.S. Congress made it quite clear that no U.S. funds, regardless of their source, were to be transferred to the United Nations or to any other global use.\footnote{See id.} In 1999, the U.N. Development Program proposed to implement “a small tax on the amount of data sent through Internet.”\footnote{Human Development Report 1999 at 66 (1999), available at http://hdr.undp.org/en/media/HDR_1999_EN.pdf.} The United States again opposed this proposal and any global taxation. In 2002, the U.N. International Conference on Financing for Development (Monterrey, Mexico) recommended the implementation of a study of “innovative sources of...
finances,” and a High Level Panel on Financing for Development was appointed and its recommended was to “consider the potential benefits of an international tax organization,” but again the United States vetoed the recommendation. A similar proposal was discussed earlier by Vito Tanzi, who offered to establish a World Tax Organization for coordinating international tax policy and fulfill other roles in the global world. In 2009, a global tax proposal came not from direction of the United Nations, but from a leading industrial country, when the United Kingdom prime minister proposed to impose a global tax on financial institutions as a means of recovering from the financial crisis and ensuring future financial stability. The U.K. prime minister, joined by other important political leaders, actively promoted this proposal on the international arena.

This proposed global e-commerce tax to fund global public goods is different and has better chances of succeeding where the previous proposals failed. Above all, the tax base must obviously be a global activity, which is best suited to global taxation. No one country can currently tax this global income as a result of which it escapes taxation altogether. The difference between this proposal and the previous one is enormous because international mobile activities that cannot be controlled by one country are considered to be good candidates for global taxation. The global scope of the Carbon Tax or Tobin Tax is lower, and more importantly, individual countries can, at theoretically, impose these taxes on an individual basis as distinct from the GET which cannot be imposed by any individual country. Global e-commerce income is therefore a good candidate for serving as the first tax base of supranational taxation. It is also important to notice that

---

163 See Browne, supra note 162.
previous proposals did not reach the supranational level being proposed. They proposed international cooperation and coordination but not supranational collection of the tax. Concededly, the Carbon Tax and the Tobin Tax had a genuinely global tax base but their collection was given to the nation-state. In addition, using the tax revenues to fund global public goods should be pursued. This foundation of supranational taxation was not seriously developed in previous proposals and it could change the way in which countries and individuals think about supranational taxation. Finally, the world has changed since previous discussions on supranational taxation and the chances of supranational taxation in the new era are better. The world need for financing of global public goods has grown dramatically. The stakes are high. Politicians have had to learn the hard way that they have no choice other than to compromise. In any case, at the very least this article proposes this idea for serious discussion on the academic level.

B. State Sovereignty Concerns

It is obvious that concerns of state sovereignty stand against this article’s proposed GET. However, in this section, it is argued that state sovereignty concerns are exaggerated and outdated and should be evaluated in terms of their modern understanding when enlisted as arguments against the GET. Taking sovereignty seriously actually supports my proposed GET to fund global public goods.

First, sovereignty is not a natural concept. It was developed during the legal history, in special social and economical circumstances which served particular purposes. The concept, as law in general, is very linked to time, society, economy, world order, and other factors. All these have changed dramatically over the years and so changed the concept of sovereignty to meet the new world order of the twenty-first century.

One view argues that the new sovereignty is fulfilled through participation in decision-making processes within an international organization. To use the words of Chayes and Chayes: “Sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in good standing in regimes that make up the substance of international life.”

Sovereignty has been transformed and redefined to meet the new world order of the twenty-first century.

One view argues that the new sovereignty is fulfilled through participation in decision-making processes within an international organization. To use the words of Chayes and Chayes: “Sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in good standing in regimes that make up the substance of international life.”

According to this meaning, the proposed GET balances sovereignty concerns appropriately, because the establishment of the model is totally negotiable and requires the consent of

---


168 CHAYES & CHAYES, supra note 22; see also Burley, supra note 22.
the states, and the main decisions on the tax and the spending of the revenues are taken by the states themselves within the GTF as an international institution.

Another view transforms sovereignty to mean “global sovereignty.” To quote the source: “[T]he development of a global economy — rather than an international economy — and the associated reorganization of social power, has transformed this essentially territorial model of sovereignty.”169 The GET does not infringe this meaning of sovereignty. To the contrary, it strengthens sovereignty in its global sense.

Second, intensive scholarship has been devoted to analysis of the globalization process and the global village in which we are living in these days. The intensive relations and linkage between countries has changed the world we once knew. In the new world, the ability of one nation-state to unilaterally determine the rules has seriously declined. The ability of the nation state to impose an income tax on cross-border e-commerce income is very limited, for the reasons outlined above. This decline, as such, is the real threat to nation-state sovereignty. When the nation-state loses its ability to tax, it loses one of the defining aspects of its core existence and sovereignty. This proposal for a GET is an attempt to arrest this erosion of state sovereignty by restoring the states’ ability to tax. Nation-states will be able to exercise this ability anew by way of the GTF as an international organization created by nation-states to serve their common interest. When the current situation in which the individual nation-states are unable to tax cross-border e-commerce income is compared to the proposed model in which they agree to cooperate within a GTF which will enable full taxation of cross-border e-commerce income and the spending of the revenues gained in the service of a common interest, the proposed change strengthens sovereignty rather than weakens it. This way states are reasserting their sovereignty in a global world. This article agrees that:

Given a world in which largely irrevocable changes in the global economy have destroyed the ability of states to prosper under autarchy, and in which states must achieve social objectives to be legitimate, international institutions are now the primary means by which states may prosper and achieve social objectives. Consequently, they are the primary means by which states may reassert, or express their sovereignty. Institutions actively aid states in this reassertion of sovereignty. This is a fundamentally transformational argument: it rests on the claim that both the international system and state-society relations were transformed.

169 Jayasuriya, supra note 23.
by events of the twentieth century. As a result, the nature of sovereignty itself is said to be transformed.\textsuperscript{170}

Third, public finance concerns played a central role in the formation of the nation-state and have influenced the behavior of the nation-state throughout history. The modern state was originated, survived, and flourished as an effective tool to collect taxes and spend them on public goods. Public finance concerns, mainly economic pressures and crises, and the state’s ability to tax and the state’s ability to finance public goods, transformed political order and governance structures throughout history.\textsuperscript{171}

The advent of global e-commerce brought new economic pressures in its wake, destroyed the ability of the state to tax e-commerce, and depleted the state’s funds available for public spending. History tells us that developments of this kind are the harbingers of political change. This article is not arguing that these pressures will definitely cause immediate dramatic change and a totally new world order. Nonetheless, there is a consensus that that they stimulate and certainly contribute to political change. The pressures for political change grow in tandem with the pressures generated by the ubiquity of e-commerce and growing share of total commerce. As a result, this article surmises that in the not so distant future sovereign states should and will start negotiating a GET to fund global public goods.

In sum, sovereignty matters. This article does not call for the end of sovereignty as others have.\textsuperscript{172} But sovereignty has changed in the global village as happened in the past following other major economic upheavals. The new sovereignty compels international cooperation and participation in crystallizing the new world order to meet the new challenges. Negotiating and designing a GET to fund global public goods will enable taxation of e-commerce income to stop the diminishing ability of the individual nation-states to tax this income. On paper this seems like a proportionate diminishing and compromise of sovereignty, but substantively it means the promotion of sovereignty in the twenty-first century.


\textsuperscript{171} See Paris, supra note 154, at 153, 154; Gunther G. Schulze & Heinrich W. Ursprung, Globalisation of the Economy and the Nation State, 22 World Econ. 295 (1999).

VI. CONCLUSION

In this article, the aim was to challenge conservative thinking, existing regimes, and traditional politics. There should be the imposition of the GET to fund global public goods. This article attempted to convince the reader that such taxation is legitimate, certain, efficient, fair, and finances a real need of supplying global public goods. Obviously, it is not an ideal model and it has its disadvantages and difficulties as well. But, in comparison to the current regime and responses to e-commerce challenges, this proposal will bring substantial progress. These benefits should and would contribute in overcoming the expected difficulties of accepting supranational taxation and infringement of state sovereignty. But, this revolutionary change in the international tax regime is needed in the revolutionary world of cross-border e-commerce in the twenty-first century. Optimistic thinking brought amazing e-commerce to the world and hopefully optimistic thinking will bring a better tax regime for e-commerce. To conclude, this article calls for thinking in open minds.