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Pedro Schoueri

Conflicts of International Legal Frameworks in the Area of Harmful Tax Competition

The Modified Nexus Approach

14

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Conflicts of International Legal Frameworks in the Area of Harmful Tax Competition

Why this book?

This book sheds light on the complexity of the environment in which the BEPS Project operates. It contrasts the commands of the modified nexus approach (BEPS Action 5) with those of EU law, WTO law and international investment agreements. Though it is clear that, as soft law, the Actions of the BEPS Project should remain within the limits established by hard law, the book identifies several instances in which this line has been crossed by the modified nexus approach.

This conflict between hard and soft law frameworks is treated as analogous to the notion of fragmentation of international law and, against this backdrop, the book proposes that the notion of institutional dialogue could help build a pathway for a more productive relationship between these frameworks.

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Foreword

The introduction of the modified nexus approach by the BEPS Project has significantly changed the legal framework within which tax competition operates, steering the existing IP box regimes towards consistency with the overall goals of countering base erosion and profit shifting.

Various authors have addressed selected issues connected with this change, but this is the first book with a comprehensive study of the impact of this social norm on legal norms, such as the ones contained in EU law, World Trade Organization (WTO) law and international investment treaties.

The legal analysis contained in this book looks in various directions and questions the intrinsic validity of technical work done under the auspices of the OECD, thus filling an important scientific gap in international economic law and tax competition. By doing so, the book helps assess the output of the BEPS Project in light of the international law obligations accepted by various states.

The author conducts his analysis with empirical qualitative studies that reflect the methodology of his interdisciplinary doctoral studies on international business taxation (DIBT) at the WU Vienna University of Economics and Business, focusing on the interaction of taxation with other fields of law, business and economics. Furthermore, this book has benefitted from the involvement of the author in a broader research project, Transatlantic Tax Forum, coordinated under the auspices of IBFD and involving European and North American universities.

The book consists of five chapters, including an introduction and conclusion. Chapter 2 lays down the legal foundation of the analysis, providing a critical study of the relevant hard and soft law, supplemented by insight on the BEPS modified nexus approach as a norm. Chapter 3 focuses on the modified nexus approach as a normative hypothesis from the EU trade and investment law perspectives. It also contains an in-depth analysis of conflicts, which chapter 4 then addresses with more specific reference to the defensive measures. The book posits that such conflicts mutually undermine the approach of the said international legal frameworks to tax competition and analyses their implications. Chapter 5 presents fragmentation as the possible way to overcome such conflicts. In line with such theoretical reconstruction, the book uses the solutions to problems of horizontal fragmentation as possible tools to overcome vertical fragmentation. This brings soft law within a new dimension in which it can operate as an instrument

for institutional dialogue and coordination among the international regulatory players.

The approach adopted in this book reconciles the theoretical legal framework with the practical implications and looks at whether states can, in fact, introduce such changes, as requested by the BEPS soft law, without undermining their existing international and supranational legal obligations, which are hard law.

This approach is original and relies on the analysis of two main hypotheses. The first hypothesis regards whether measures compliant with the modified nexus approach are or may be compliant with the various EU law measures (namely the prohibition of State aid and the right to national treatment under the fundamental freedoms) and the WTO agreement on subsidies and countervailing duties. The second hypothesis is in respect of whether, in the case of tax measures not complying with the modified nexus approach prompting states to activate coordinated defensive measures, such measures are in line with the requirements of national and most-favoured-nation treatment under EU law, WTO law and investment treaties.

Research conducted by the author indicates that regimes complying with the modified nexus approach may, in fact, deviate from the reference framework and thus raise compatibility issues with the EU law prohibition of State aid, as well as with the requirements of the WTO Agreement on Subsidies and Countervailing Measures. Furthermore, insofar as they establish quasi-territorial requirements, there may be possible infringements of fundamental freedoms – both within the internal market and in relation to third countries – where EU law is applicable. Similar issues also arise from the perspective of the national treatment requirement under WTO law and international investment agreements.

Research also shows problems connected with the defensive measures adopted in connection with the modified nexus approach, which relate to controlled foreign corporation legislation, withholding taxes and non-deductibility of payments, but also to the compatibility of such measures with the justifications under EU law, the General Agreement on Tariffs and Trade and the General Agreement on Trade and Services, as well as the absence of justifications under the Agreement on Trade-Related Aspects of Intellectual Property Rights and international investment agreements.

The research output is of particular interest from a scholarly and practical perspective, since it gives evidence of structural deficiencies of the modified

nexus approach, which produce horizontal and vertical fragmentation effects, simply unknown in this context until present. This is a concrete contribution to predict possible needs for future reform in order to re-establish compatibility with sources of international and supranational law, which, in the author's view, can also be addressed through an institutional dialogue between the competent adjudicating bodies and soft law.

When supervising the author's work during the doctoral research period, I enjoyed sharing with him the academic progress of his research, which reflects thorough knowledge of international tax law and European tax law, but also of WTO law and international investment agreements.

All of this makes this book a very innovative source of scientific knowledge, made to last in the post-BEPS Project era of international taxation. For all of this and his deep involvement in the doctoral research, I wish to warmly congratulate the author.

Ekaterinburg, Russia, 10 June 2019
Pasquale Pistone

Preface

This book is based on the author's doctoral thesis, written at the Institute for Austrian and International Tax Law of the Vienna University of Economics and Business (WU) and defended in June 2018. The discussions herein are thus up to date as of that time.

The idea for the thesis was kick-started by discomfort with the BEPS Project – not with the goals or even with the results achieved, but with the form chosen to develop and implement the work. In the name of practicability, the BEPS Project was set up within a soft law framework, free of the constraints inherent to hard law. On the other hand, the high ambitions of the BEPS Project did not fit within the limitations of soft law. The outputs were meant to create obligations despite their lack of legal validity. This backdrop led to an existential conflict for the BEPS Project: while it is soft law, it purports to have effects analogous to hard law.

The author's discomfort is that this existential conflict would not be harmless – in fact, quite the opposite. By trying to impose a certain binding character on soft law, the BEPS Project runs the risk of undermining the hard law framework that is already applicable to the relevant situations. Besides being counterproductive, this outcome would carry serious legitimacy concerns.

In this framework, the discussion in this regard is quite broad and abstract. That is how the author came to select the area of harmful tax competition as a backdrop for discussing the interaction of different international legal frameworks. After all, tax competition is at the intersection of soft law tax standards and the hard law of trade and investment.

As soft law standards, the Actions of the BEPS Project should remain within the limits established by the hard law trade and investment framework. However, having studied BEPS Action 5 in depth, the author argues that this line has been crossed in connection with the modified nexus approach. Still, it is questionable whether the enforcement mechanisms of trade and investment treaties will be strong enough to drive compliance with the legal standards they set. Therefore, there is a real risk that, in practice, soft law would take precedence over hard law.

Seeking to find a solution for this conflict between the hard and soft law frameworks of tax competition, the author proposes that it may be regarded

as analogous to the notion of fragmentation of international law. From this angle, he proposes that the notion of institutional dialogue could make up for a more productive relationship between these frameworks and that soft law could actually pave the way for the continued development of hard law.

Chapter 1

Introduction

This introduction is primarily dedicated to presenting the hypothesis that the overlap of hard and soft law frameworks applicable to tax competition creates contradictions that are currently not properly addressed. The author will elaborate on the background issues that raised the hypothesis in the first place and underscore its importance for the international tax debate. Finally, he will discuss the method chosen to test the hypothesis.

1.1. General remarks

The field of international tax law is currently characterized by extreme fragmentation. Countries largely maintain their sovereignty in tax matters so that each domestic system deals with international tax issues according to its own rules. However, the OECD has significant influence on this process by means of soft law instruments, most prominently by means of its Model Convention and Commentary and its Transfer Pricing Guidelines, and, more recently, also through the outputs of the BEPS Project.

This already complex scenario gives the misleading impression that the OECD is the only international institution involved in the process, which is far from being true. At the EU level, even though direct taxation remains under the competence of each individual Member State,[1] international tax issues might still fall indirectly under EU competence. So is the case, for instance, of direct tax measures that violate State aid provisions or the fundamental freedoms. A similar phenomenon occurs with trade and investment law. While the World Trade Organization (WTO) rules are not directly linked to international taxation, the Appellate Body case law has already established its reach to direct tax measures.[2] Moreover, several arbitral bod-

1. Ł. Adamczyk & A. Majdańska, *The Sources of EU Law Relevant for Direct Taxation*, in *Introduction to European tax law on direct taxation*, 4th ed., p. 43 (M. Lang et al. eds., Linde 2015).
2. J.E. Farrell, *The Interface of International Trade Law and Taxation: Defining the Role of the WTO* sec. 4.3.2.3. (IBFD 2013).

ies composed pursuant to international investment agreements (IIAs) have recognized that tax measures may fall within their competence.[3]

Therefore, even though the frameworks of the OECD, EU, WTO and IIAs have been developed in parallel and are naturally governed by different sets of rules and principles, in specific instances, the scope of these rules and principles overlap – that is, the facts governed by international tax law are also within the scope of EU law as well as international trade and investment law. Ultimately, these overlapping jurisdictions can lead to contradictory results with potentially dire consequences for the international tax regime.[4] Take, for instance, the letter of the US Secretary of the Treasury[5] (followed up by a white paper of the US Department of the Treasury),[6] which suggests that the European Commission's use of EU State aid mechanisms cut short the objectives mutually pursued under the BEPS Project.

On the other hand, none of the frameworks involved seem to provide adequate solutions for the issue of fragmentation. First, the hard law trade and investment framework suffers from serious effectiveness drawbacks so that any conflicts run the risk of remaining theoretical. By contrast, soft law tax governance lacks the legitimacy to impose itself over the remaining frameworks, thus largely ignoring the existence of those issues.

Against this backdrop, the central concern of this book is to establish the existence of overlaps between the international tax soft law framework (largely developed at the OECD level) with other hard law frameworks initially addressed in other fields of international law. Moreover, it will seek to identify potential responses that would enable more harmonious coexistence of said frameworks.

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3. M. Davie, *Taxation-Based Investment Treaty Claims*, 6 J. Int. Dispute Settl. 1, pp. 202-227 (2015).
4. Arguing for the existence of such an international tax regime, *see* R. Avi-Yonah, *International Tax as International Law*, 57 Tax Law Rev. 4, pp. 483-501 (2004).
5. J.J. Lew, Letter of the US Secretary of the Treasury to the President of the European Commission (11 Feb. 2016), available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Letter-State-Aid-Investigations.pdf (accessed 30 Aug. 2016).
6. US: Department of the Treasury, White Paper, *The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings* (2016), available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf (accessed 30 Aug. 2016).

1.2. Scope

Drawing from the questions mentioned in section 1.1., this book will concentrate on the controversial area of tax competition. As its very name suggests, tax competition relates to both international tax law (tax) and international trade and investment law (competition). In particular, the OECD has worked on the issue at least since 1998,[7] seeking to identify the "harmful" elements of tax competition in order to pursue a minimum "level playing field". At around the same time, the European Union started to show interest in the area "in order to reduce distortions of competition in the single market".[8] On the other end of the spectrum, tax measures are also relevant for WTO and IIA purposes, to the extent that they might serve as means to implement barriers to free trade and capital flows, e.g. protectionist or discriminatory measures. Therefore, it is possible that the application of these different sets of rules create contradictory outcomes in the area of tax competition.

The interplay between these different frameworks could potentially impact several different tax competitive measures. In order to enable an in-depth investigation, the scope of this book focuses specifically on the case study of intellectual property (IP) regimes, which are regarded as a central point of pressure in the area of tax competition. For the OECD, "the 'race to the bottom' nowadays often takes less the form of traditional ring-fencing and more the form of across the board corporate tax rate reductions on particular types of income (such as income […] from the provision of intangibles)".[9]

Therefore, this book will focus on the OECD's reaction to this form of tax competition, formalized in the recent BEPS Action 5.[10] In particular, the analysis concentrates on the substantial activity requirement in connection to IP regimes (the so-called "modified nexus approach, or MNA), which,

7. OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD 1998), Primary Sources IBFD.
8. European Commission, Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, OJ C 384 (10 Dec. 1998), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998Y1210(01) (accessed 17 Aug. 2016).
9. OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013), Primary Sources IBFD, available at https://www.oecd.org/ctp/BEPSActionPlan.pdf (accessed 24 July 2017).
10. OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance – Action 5: 2015 Final Report* (OECD 2015), Primary Sources IBFD, available at http://www.oecd-ilibrary.org/taxation/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report_9789264241190-en (accessed 18 Aug. 2016).

in short, defines the outer limits of preferential IP regimes that would not have harmful effects.[11] In the case that the substantial activity requirement is met, the preferential IP regime in question is deemed not to be harmful.[12] However, in the case that the substantial activity requirement is not met, the preferential regime can ultimately be deemed harmful, and countries would be entitled to introduce defensive measures to counter it.[13] In this regard, the question arises as to the compatibility of both the substantial activity requirement (MNA) and of the defensive measures vis-à-vis EU law, WTO law and IIAs.

1.3. Hypothesis

The hypothesis of this research posits that the BEPS Action 5 MNA violates trade and investment law on two different levels. First, should a preferential IP regime be considered non-harmful in connection with the BEPS Action 5 MNA, in certain circumstances, it might still qualify as State aid under EU law and/or actionable subsidy under WTO law. Moreover, such a regime might violate the non-discrimination obligations assumed under EU law (fundamental freedoms), WTO law and IIAs (national treatment). Second, should a preferential regime be considered harmful in connection with the BEPS Action 5 MNA, the defensive measures suggested by the OECD reports on harmful tax practices and in connection with the EU list of non-cooperative jurisdictions might again violate the non-discrimination obligations assumed under EU law (fundamental freedoms), WTO law and IIAs (most-favoured-nation and national treatment).

The possible outcomes of this research are twofold. Should the hypothesis prove to be correct, the works developed by these different frameworks are contradictory, which hinders the full achievement of the projected goals (e.g. a level playing field, development of the EU single market, free trade and investment protection). On the other hand, should the hypothesis prove to be incorrect, the works developed by the different frameworks are actually aligned, which could be translated into synergies in terms of compliance and enforcement. Either way, these results will call for a discussion on solutions to improve the interaction between the (vertically) fragmented frameworks applicable to tax competition.

11. Id., at para. 26.
12. Id.
13. Id., at para. 22.

1.4. Justification

BEPS Action 5 has generated hot debates in the literature. Many policy arguments have been made in favour of research and development (R&D) tax incentives,[14] which seem to have been considered and endorsed by the OECD in conceiving the MNA.[15] In broad terms, the argument departs from an assumption of underinvestment in R&D due to its public goods nature, deriving therefrom the endorsement of R&D incentives due to the positive externalities they have in the economy.

While in many cases, this rationale might justify the use of R&D tax incentives, the debate, by and large, ignores the bigger policy concerns that remain hidden between the lines.[16] The OECD itself has already indicated that, due to the mobility of knowledge-based capital (KBC) and the tax-planning opportunities that arise in connection therewith, the overall tax relief for R&D "may be greater than governments intended when they designed support of R&D expenditure", and "the post-tax return on R&D spending may exceed the pre-tax return".[17] Essentially,[18] therefore, there is actually an excess of R&D incentives available.

The discussion should also consider the inability of countries to capture the R&D spillovers at the domestic level. Indeed, the high mobility of KBC economic ownership and associated production makes the spillover benefits from R&D "increasingly global".[19] In other words, the relocation of factors such as ownership, skilled staff and production would prevent the

14. For a review, *see* P. Arginelli, *Innovation through R&D Tax Incentives: Some Ideas for a Fair and Transparent Tax Policy*, 7 World Tax J. 1 (2015), Journal Articles & Papers IBFD.
15. "It is recognised that IP-intensive industries are a key driver of growth and employment and that countries are free to provide tax incentives for research and development (R&D) activities, provided that they are granted according to the principles agreed by the [Forum on Harmful Tax Practices]." *See* OECD, *supra* n. 10, at para. 26.
16. For a review of other policy considerations potentially pursued by IP boxes, *see* P. Arginelli, *The Interaction between IP Box Regimes and Compensatory Tax Measures: A Plea for a Coherent and Balanced Approach*, in E*U Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid* secs. 5.2. and 5.4. (D. Weber ed., IBFD 2017).
17. OECD, *Supporting Investment in Knowledge Capital, Growth and Innovation* p. 144 (OECD 2013), available at http://www.oecd-ilibrary.org/content/book/9789264193307-en (accessed 25 Aug. 2016).
18. This would be particularly true for multinational enterprises that have a competitive advantage over stand-alone R&D performers due to their increased ability to engage in tax planning. Additionally, early-stage firms might not be able to make use of R&D tax credits if they have not yet made taxable profits. *See* id., at p. 138.
19. OECD, *supra* n. 17, at p. 132.

realization of domestic spillover benefits,[20] which would ultimately drive economic growth.

This could be the origin of many R&D tax incentives (in particular of the output sort, i.e. so-called IP boxes). In an attempt to retain R&D spillovers domestically, patent boxes mimic the benefits of holding IP offshore by partly exempting the income associated therewith. In a way, the primary objective of these regimes could be to "discourage offshore migration of economic ownership of KBC".[21]

This point of view offers an additional perspective to that discussed in the tax literature which assumes that IP boxes are incentives designed to correct a market failure – namely, underinvestment in R&D. The rationale exposed herein rather highlights the possible competition element behind certain R&D policies. This argument becomes particularly appealing in the face of alternative measures that would be more effective in addressing underinvestment in R&D. In particular, input incentives are more effective (incentivizing not only successful R&D) and commensurate (benefits being proportional to the expenses, not to the income).[22] This challenge to the stated objectives of IP boxes, underscoring their competitive potential, opens the door for discussing their effects in terms of trade and investment law, applying EU, WTO and IIA concepts.

Therefore, while many R&D tax incentives might be justified, this book seeks to highlight the importance of considering the potential economic distortions caused by IP boxes, even if compliant with the MNA, vis-à-vis the EU, WTO and IIA frameworks. The literature has already covered important issues regarding the applicability of WTO law to tax issues,[23] as well as the parallel application of EU State aid and WTO subsidy regulations to tax

20. From the perspective of trade unions, for instance, "the relocation of valuable intangible assets such as patents or IP rights abroad for the purpose of exploiting preferential regimes weakens the balance sheet of the subsidiaries where intangible assets were created and hence may threaten the long term sustainability of the company". *See* Trade Union Advisory Committee (TUAC), *Trade union assessment package on corporate tax avoidance practices* p. 86 (TUAC 2016), available at http://members.tuac.org/en/public/e-docs/00/00/12/5E/telecharger.phtml?cle_doc_attach=6429 (accessed 25 Sept. 2019).
21. OECD, *supra* n. 17, at p. 145.
22. *Compare* with the arguments discussed in sec. 3.2.3.2.
23. Farrell, *supra* n. 2. However, close to nothing has been explored about the applicability of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to international tax law. Even though the scope of the TRIPS Agreement is narrower, given the close connection of this work to IP regimes, this area will be further developed.

incentives.[24] However, this interface between tax considerations and trade and investment law has not yet been tested against the MNA,[25] which is a gap that will be addressed in this research. This is a timely matter, especially in light of the strategy recently defined by the European Commission in relation to third countries, which generally acknowledges the protectionist effects of preferential regimes and highlights the importance of countering these measures, relying on the synergies between State aid and WTO measures.[26]

Besides, bringing the issue of trade and investment distortions into perspective will require the advancement of little explored areas of the interface between tax and trade and investment law. While the issue of tax incentives and subsidies have been explored in more detail, there is a need to review the European Union, WTO and IIAs' compatibility of the defensive measures endorsed by BEPS Action 5,[27] especially in light of the new developments of WTO case law.[28] Ultimately, the question is whether the protection against harmful tax competition justifies a cartelized answer.[29]

These results will then be discussed in connection with the issue of fragmentation, which raises well-established concerns in the field of international public law, but seems to gather little attention in the area of international tax. In particular, this book will consider the idea of fragmentation, taking into account the particularities of international tax governance, which relies heavily on soft law mechanisms and thus escapes the traditional

24. C. Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Wolters Kluwer Law & Business 2014).
25. The compatibility of the modified nexus approach with EU law has been put under scrutiny in the literature, albeit not from the perspective suggested herein. *See* R. Danon, *General Report*, in *Tax incentives on research and development (R&D)*, IFA Cahiers de Droit Fiscal International vol. 100a (IFA Cahiers 2015).
26. European Commission, Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, sec. 3.2, COM(2016) 24 final (28 Jan. 2016), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1454056581340&uri=COM:2016:24:FIN (accessed 1 Sept. 2016).
27. *See* R. Grynberg & B. Chilala, *WTO Compatibility of the OECD Defensive Measures against Harmful Tax Competition*, 2 J. World Invest. 3, pp. 507-528 (2001). *See also* J.B. Gross, *OECD Defensive Measures against Harmful Tax Competition Legality under WTO*, 31 Intertax 11, pp. 390-400 (2003).
28. WTO Appellate Body, 2016, WT/DS453/AB/R, *Argentina - Measures Relating to Trade in Goods and Services (DS453)*. WTO Appellate Body, *Argentina - Measures Relating to Trade in Goods and Services* (WTO 2016), available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=228158,228159&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (accessed 28 Aug. 2016).
29. T. Dwyer, *"Harmful" tax competition and the future of offshore financial centres*, 5 J. Money Laund. Control 4, pp. 302-317 (2002).

fragmentation analysis. In this regard, potential solutions will be proposed, giving priority to approaches that would not require a major overhaul of the frameworks involved.

1.5. Methodology

The initial concern of this book is related to the overlap of different frameworks in the area of international tax competition and the potential negative effects that this overlap could generate. In order to approach this concern more concretely, the scope of the work is narrowed down to the case study of the MNA and the hypothesis that it conflicts with trade and investment agreements. From this angle, the significance of this book can be more broadly regarded as a plausibility-probing case study[30] that intends to test the idea that the overlap of international tax soft law (largely developed by the OECD) and hard law frameworks initially addressed in other fields of international law might create negative effects for the regimes involved. Moreover, having tested for the existence of the conflicts contemplated in the hypothesis, this book will also seek to develop an appropriate theoretical framework for the issue, aiming at developing potential solutions. From this perspective, the present work can be regarded as a theory-testing case study,[31] in the sense that it will inductively allow a new theory to emerge.

More specifically, in order to test the hypothesis described above, the book will require the application of different fields of international law. Concepts of international tax law, EU law, international trade and investment law and international public law will be articulated to verify whether the MNA is in legal conflict with the other frameworks already in place.

In terms of structure, the first step will be establishing the overlap of scopes between the MNA and the competences of the European Union, WTO and IIAs. Many of these issues have already been covered in the literature, so the present work can build on existing blocks. Putting these elements side by side will highlight the qualities and deficiencies of each framework in dealing with IP tax competition from a systemic perspective.

Once it is established that an overlap exists, it must be tested whether the rules regarding preferential IP regimes issued under the different

30. A. Christians, *Case study research and international tax theory*, 55 St. Louis Univ. Law J. 1, pp. 331-367 (2010).
31. Id., at p. 345.

frameworks are aligned and reinforce each other or whether they are conflicting. This step will require an in-depth analysis of the MNA and of the relevant provisions of the European Union, WTO and IIAs. The goal will be to highlight the differences of the parallel systems in terms of rules and principles to determine whether a given situation is treated differently under BEPS Action 5, EU law, WTO law and IIAs. Of particular relevance will be the argumentation that the MNA follows a normative structure.

After analysing the potential conflicts in the normative premise (antecedent) of the MNA, the normative consequence will be discussed, i.e. the defensive measures. The discussion will focus on the non-discrimination provisions of EU law, WTO law and IIAs, especially in light of the development recently achieved within the WTO Appellate Body.[32]

Finally, the results will be summed up, and the potential existence of remaining conflicts not yet solved by traditional international public law mechanisms will be stressed. Against this backdrop, potential solutions will be proposed, seeking to consider the particularities of the current global tax governance while, at the same time, promoting a more coherent coexistence with the trade and investment framework.

32. WTO Appellate Body, *supra* n. 28.

Notes

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