AN INTERNAL CONSISTENCY TEST FOR EUROPE: A COMPARATIVE ANALYSIS SHOWING A GAP IN HARMONIZATION OF E.U. LAW FOR DOUBLE TAX RELIEF

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ABSTRACT 448

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the Byzantine Empire, to the Age of Discovery all the way to the modern era of tax law and transfer pricing. From that first meeting, I've been enthralled with tax law. Professor Byrnes's guidance has been a constant and invaluable beacon, shaping my understanding and approach in the complex realm of taxation. Without Professor Byrnes, my life's journey and my journey in the law would have been much different.

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ABSTRACT

This article analyzes the effectiveness of double tax relief within the jurisdiction of the European Union ("E.U.") as compared to the United States ("U.S."). First*, this article outlines the history of taxation in both the U.S. and the E.U. Second, this article analyzes how both the U.S. and the E.U. resolve double taxation. In this part, the article focuses on the internal consistency test, U.S. Supreme Court case law, the U.S. tax treaty system, and the European Court of Justice ("ECJ") case law within the E.U. This article shows that a lack of harmonization in the E.U.'s tax laws leads to the occurrence of double taxation and sometimes double non-taxation resulting from distortions.*

This research aims to fill a gap that exists in the academic literature in the study of double tax relief within the U.S. and the E.U. As the academic literature stands, a divide exists. European academics frequently discuss E.U.-centered approaches to resolving double tax relief within the context of disparities within the field of European tax law and international tax law. American academics focus on resolving double tax relief through the U.S. Commerce Clause within the field of state and local taxation.

I. INTRODUCTION

This article has two aims. The first aim is to contribute to the theory of methods preventing double taxation by examining existing U.S. domestic tax law and European Union (E.U.) supranational law frameworks and mechanisms for preventing double taxation. The second aim is to contribute to the theoretical comparison of constitutional law between a federal state—the United States—and a supranational organization—the European Union. Specifically, this article combines the two aims to focus on the differences between the Commerce Clause—a mechanism used in the U.S. federation to regulate commerce and prevent double taxation—and the lack of a similar mechanism in the E.U. supranational organization.

The relevance of this research lies in the potential impact adoption of the Commerce Clause would have on double taxation in the E.U. If the E.U. were to adopt a clause similar to the U.S. Commerce Clause, the E.U. would ostensibly move closer to being a federal union rather than a supranational organization. This shift would have symbolic and important implications for the protection of E.U. citizen rights.

As such, this article explores the question of whether a type of commerce clause limited to relieving double taxation could be suited for the supranational organization of the E.U. Moreover, the research

presented adds to the theoretical understanding of constitutional law in relation to double taxation and informs policymakers of the potential benefits or drawbacks of adopting a type of commerce clause to resolve the problem of double taxation in the E.U.

While the focus of this article relates to the differences between federalism and supranationalism in the context of the U.S. and E.U., it is part of a larger series that delves deeper into the issue of international double taxation. Overall, this research hopes to contribute to a better understanding of the complexities of international double taxation.

A. Background

This article deals with an overarching issue at the intersection of whether the E.U. can maximize its efficacy of creating free trade by reducing both juridical and economical double taxation. Double taxation hampers the free market. Therefore, it is important to understand the background of such rules.[1] The rule the U.S. currently employs to prevent double economic taxation is the internal consistency test that originates from Article 1, Section 8, Clause 3 of the U.S. Constitution, known as the Commerce Clause. The Commerce Clause prohibits U.S. states from imposing double taxation on other residents of other U.S. states.[2] Legislation reading similar to the Commerce Clause could provide a way to resolve double taxation arising from disparities in the E.U.

Similar legislation preventing all forms of both juridical and economic double taxation does not exist at the E.U. level.[3] Nor does ECJ case law prevent such double taxation, referred to by the ECJ as disparity. The U.S. Supreme Court and the ECJ have reached different conclusions on cases that have similar facts. An example is the ECJ case *Kerckhaert-Morress*,

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1. The phenomenon of "[i]nternational juridical double taxation can be generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods." ORG. FOR ECO. COOP. & DEV., MODEL TAX CONVENTION ON INCOME AND ON CAPITAL 7 (1992). In contrast, in international economic double taxation, the taxpayer lacks identity. Roland Ismer & Julia Ruß, *What Is International Double Taxation?*, 48 INTERTAX 555 (2020).

2. Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992).

3. The E.U. Parent Subsidiary Directive prevents specific forms of double taxation. Filip Debelva & Joris Luts, *The General Anti-Abuse Rule of the Parent-Subsidiary Directive*, 55 EUROPEAN TAX'N, 223 (2015). The E.U. Interest and Royalty Directive also resolves specific forms of double taxation. Ivan Lazarov, *(Un)tangling Tax Avoidance Under the Interest and Royalties Directive: The Opinion of Ag Kokott in N Luxembourg 1*, 46 INTERTAX 873 (2018).

which had similar facts as the U.S. Supreme Court case *Wynne v. Maryland*, but nonetheless was decided differently.[4]

One of the key causes contributing to double taxation in the E.U. is the concept of distortions in tax law.[5] Distortions in the E.U. tax law scheme can create situations where the same economic activity is taxed twice.[6] This often occurs when two or more member states apply different tax rules to the same transaction.[7] This results in the taxpayer being taxed twice for the same income.[8] In such situations, distortions would lead to the same income being taxed twice for the same taxpayer.

E.U. corporate income tax laws and rules are only harmonized to a very limited extent, and the supranational authority of the E.U. has no way to coordinate Member State tax rules.[9] This is due to the fact that each of the Member States of the E.U. maintains sovereignty over its respective domestic tax law.[10] The only existing treaty to compel E.U. states to harmonize and coordinate their corporate income tax law is Article 115 of the Treaty on the Functioning of the European Union (TFEU).[11] Article 115 TFEU, in relevant part, provides:

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4. This article outlines the difference between *Wynne* and *Kerckhaert-Morress*. Charles Edward Andrew Lincoln IV, *A New Deal for Europe? The Commerce Clause as the Solution to Tax Discrimination and Double Taxation in the European Union*, 11 J. BUS. ENTREPRENEURSHIP & L. 115 (2018).

5. If the E.U. replaced current "tax regimes with a single E.U. tax, [that were] levied on EU-wide profit would eliminate the distortions." Michael P Devereux, *Debating Proposed Reforms of the Taxation of Corporate Income in the European Union*, 11 INT'L TAX & PUB. FIN. 71 (2004).

6. Such as "sales tax, levied in the E.U. on all stages of business activity, . . . would involve massive tax induced distortions of business." Michael Keen et al., *The Future of Value Added Tax in the European Union*, 11 ECON. POL'Y 375 (1996), http://www.jstor.org/stable/1344708 [https://perma.cc/LBL2-7KSD].

7. *See* Lawrence H. Summers & Victoria P. Summers, *When Financial Markets Work Too Well: A Cautious Case for a Securities Transactions Tax*, 3 J. FIN. SERVS. RSCH. 261 (1989).

8. G. H. Partington & R. H. Chenhall, *Dividends, Distortion and Double Taxation*, 19 ABACUS 3 (1983).

9. Philipp Genschel & Markus Jachtenfuchs, *How the European Union Constrains the State: Multilevel Governance of Taxation*, 50 EUR. J. POL. RSCH. 293–314 (2011).

10. "When coupled with the political reality of widespread reluctance by most countries to give up any sovereignty whatsoever in regard to tax policy, as well as the virtual certainty that some" will not, then tax harmonization is unlikely occur. George R Zodrow, *Tax Competition and Tax Coordination in the European Union*, 10 INT'L TAX & PUB. FIN. 651, 665 (2003).

11. "No express provision exists concerning the interrelationship between E.U. law and the national laws of the Member States." MARJAANA HELMINEN, E.U. TAX LAW: DIRECT TAXATION (2nd ed. 2022).

> Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.[12]

Indeed, the E.U. Treaty does not contain any specific legislative competences in the field of direct taxation.[13] However, Art. 115 of the TFEU enables the E.U. to adopt directives on "the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market."[14] Thus, legislative rules from the E.U. can be established if there is unanimity for an E.U. directive in accordance with Art. 115 of the TFEU.

B. Structure of the Article

This article is divided into four parts. The first part is an introduction to the terms, an exploration of the situation of double taxation, an analysis of the problems caused by double taxation, and an explanation of how to effectively resolve double taxation can be effectively resolved.

The second part discusses how the U.S. resolves double taxation. It will begin with a background of double taxation in the U.S., followed by a summarization of the U.S. intra-state taxation system. The section will continue discussing the Constitutional limitations on double taxation focusing primarily on the Commerce Clause and the judicial doctrines of the Dormant Commerce Clause and internal consistency test.

The third part discusses how the E.U. resolves double taxation. It will begin with a brief history to explain the background of the framework of the E.U. tax system. This section will go into detail about the effectiveness of the E.U. tax treaty system on relieving double taxation. This will show that the current system has many problems including: that many Member States of the E.U. do not have double tax treaties with each other; the treaties that exist may not be effective because they may refer to domestic

12. Consolidated Version of the Treaty on the Functioning of the European Union art. 115, Mar. 3, 2010, 2010 O.J. (C 83) 47, 172.

13. The European "Treaty does not contain a comparable provision for the harmonization of direct taxes." Georg Kofler, *Chapter 2: E.U. Power to Tax: Competences in the Area of Direct Taxation*, *in* RESEARCH HANDBOOK ON EUROPEAN UNION TAXATION LAW 11 (2020).

14. Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 12.

law that has been superseded; the occurrence of double taxation from scope and allocation issues; the Multilateral Instrument may not be enough; classic double taxation when two states claim to be the source state; and possible artificially manipulated prices. The third section will then show how there could potentially already be a basis for harmonization of E.U. tax law through judicial decisions in the ECJ. The third section also summarizes the representation of source and residence case law rules found in ECJ case law. The fourth part is a conclusion of the findings and suggested avenues for further research.

C. Introduction to State and Local Taxation in the United States

The United States is a federation.[15] This means that no centralized government exists to control all aspects of public finance and revenue.[16] Indeed, the United States Census Bureau has estimated that there are more than 90,000 government units in the United States apart from the Federal Government.[17] These 90,000 government units include states, localities, counties, cities, townships, villages, and other similar polity organizations.[18] Not all of these government units levy taxes,[19] but many have the authority to do so.

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15. "The United States is a federation, created by thirteen independent democracies who had found, in joint action, strength to win their freedom." Stanley F. Reed, *State Responsibility in a Federal System: Introduction*, 34 N.Y.U. L. Rev. 991, 991 (1959). *Cf.* Ernst B. Haas, *The United States of Europe*, 63 POL. SCI. Q. 528, 528 (1948).

16. The decentralized function of governmental public revenue is known as fiscal federalism, which deals with "understand[ing] which functions and instruments are best centralized and which are best placed in the sphere of decentralized levels of government." Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LIT., 1120, 1120 (1999).

17. This information is from the 2012 Census of Governments in the United States. It is frequently difficult "to distinguish it as separate from the administrative structure of any other government unit. . . . of all 50 state governments and over 90,000 local governments." Jeffrey L. Barnett, et al., *2012 Census of Governments: Finance-State and Local Government Summary Report,* U.S. CENSUS BUREAU (Dec. 17, 2014), https://www2.census.gov/govs/local/summary_report.pdf [https://perma.cc/8Y4N-B5JU].

18. OSBORNE M. REYNOLDS JR., LOCAL GOVERNMENT LAW (3d ed. 2009).

19. "Texas, which has no state income tax, once relied heavily on severance tax payments from the oil and gas industries to finance state-supported services." Donald I. Price & E. Shawn Novak, *The Tax Incidence of Three Texas Lottery Games: Regressivity, Race, and Education*, 52 NAT'L TAX J. 741, 741 (1999).

Such state and local tax rules can appear in various forms, such as property tax,[20] sales tax,[21] and income tax.[22] The income tax in particular appears to frequently mirror the federal rules of income tax. Moreover, the computation of such income mirrors the federal rules of computing income tax in many ways.

Most state tax rules come from state statutes. And, like every other law in the United States, such legislation must comply with the requirements of the U.S. Federal Constitution. The main limitations of state and local taxation on double taxation of out of state income and out of state taxation come from the following clauses in the U.S. Constitution:

- Commerce Clause (Article I, Section 8, Clause 3).[23]
- Import-Export Clause (Article I, Section 10, Clause 2).[24]
- Privileges and Immunities Clause (Article IV, Section 2, Clause 1).[25]
- Due Process and Equal Protection Clause of the Fourteenth Amendment.[26]
- Supremacy Clause (Article VI, Clause 2).[27]

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20. Glenn W. Fisher, *History of Property Taxes in the United States,* ECON. HIST. ASS'N (2022), http://eh.net/encyclopedia/history-of-property-taxes-in-the-united-states/ [https://perma.cc/2HP7-AHGV].

21. LeAnn Luna, *Local Sales Tax Competition and the Effect on County Governments' Tax Rates and Tax Bases*, 26 J. AM. TAX'N. ASS'N., 43–61 (2004).

22. MEG WIEHE ET AL., WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES (2018), https://itep.sfo2.digitaloceanspaces.com/whopays-ITEP-2018.pdf [https://perma.cc/2Y8D-ZSE4].

23. Chief Justice Marshall writing for the Supreme Court majority in 1824 stated that the power to regulate commerce "can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant." Gibbons v. Ogden, 22 U.S. 1, 71 (1824).

24. The Supreme Court discussed the purpose of this clause in 1976. Michelin Tire Corp. v. Wages, 423 U.S. 276, 285–286 (1976). For a discussion of the Import-Export Clause in relation to the Commerce Clause, *see* Boris I. Bittker & Brannon P. Denning, *The Import-Export Clause*, 68 MISS. L.J. 521, 522 (1998). For the historical policy from the 1787 debates of the Constitutional Convention, *see* FEDERALIST NO. 12 (Alexander Hamilton).

25. On the relation between this clause and the Dormant Commerce Clause, *see* United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208 (1984).

26. "The equal protection clause guarantees the right of "similarly situated" people to be treated the same way by the law." Marie Failinger, *Equal Protection of the Laws*, *in* THE ENCYCLOPEDIA OF AMERICAN LAW 152–53 (David Schultz ed., 2009).

27. The latest edition of Black's Law Dictionary defines the Supremacy Clause as "[t]he clause in Article VI of the U.S. Constitution declaring that the Constitution, all laws made in furtherance of the Constitution, and all treaties made under the authority of the United States are the "supreme law of the land," and enjoy legal superiority over any

Scholars have devoted entire books to each one of these clauses.[28] The most litigated clauses, both in general and in specific relation to taxation, are the Commerce Clause and the Due Process Clause.[29]

Additionally, Congress can pass acts that affect state and local taxation, though they rarely pass acts that do so directly.[30] More frequently, U.S. Supreme Court cases can affect state and local taxation. Finally, there can also exist state constitutional limits on state taxation.

Several crucial organizations and entities may affect state and local taxation, namely:

- State departments of revenue: these are usually state tax authorities like the IRS, but different organizations can exist for income taxes and property tax organizations within a state. There are many differences between these state departments and the IRS.[31]
- Organizations adjusting the tax adjudication rules and procedure: these are similar to the federal legal rules of civil procedure and

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conflicting provision of a state constitution or law." *Supremacy Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

28. For the Commerce Clause, see FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE (2013). For the Due Process Clause, see E. THOMAS SULLIVAN & TONI MARIE MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW (2013). For the Equal Protection Clause, *see* WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW (2016). For the Supremacy Clause *see* JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021).

29. Indeed, "[t]he absence of nexus guidelines for all taxes except net income taxes has led to a great expansion in the area of permissible taxation and often to diverse and inequitable court-litigated results." Charles F. Printz Jr., *Constitutional Law--State Taxation of Interstate Commerce--Commerce Clause Analysis*, 76 W. VA. L. REV. 380, 398 (1973).

30. The American Recovery and Reinvestment Act of 2009 had a direct impact on state and local taxes. American Recovery And Reinvestment Act of 2009, 111 P.L. 5, 123 Stat. 115. A proposed bill that never became law was the H.R.429 - Mobile Workforce State Income Tax Simplification Act of 2021, H.R. 429, 117th Cong. (2021), which would have had a direct impact on state and local taxes. *H.R.429 - Mobile Workforce State Income Tax Simplification Act of 2021*, CONGRESS.GOV https://www.congress.gov/bill/117th-congress/house-bill/429 (last visited Dec. 21, 2023) [https://perma.cc/6ZJG-EX8F].

31. For an example of discussions in tax law from a state tax law revenue authority perspective, *see* Kuo-Wei Hsu et al., *Data Mining Based Tax Audit Selection: A Case Study of a Pilot Project at the Minnesota Department of Revenue*, REAL WORLD DATA MINING APPLICATIONS (Mahmoud Abou-Nasr et al. eds., 2015), https://link.springer.com/10.1007/978-3-319-07812-0_12 [https://perma.cc/UQ65-YANK] (last visited Aug 5, 2023).

similar to the federal rules governing how the IRS deals with tax issues.[32]

- State tax courts: these operate analogously to the IRS methods of resolution and the U.S. Tax Court.[33]
- The Multistate Tax Commission (MTC): the MTC is not a governmental agency,[34] but the MTC operates an authority to help draft uniform laws, regulations, and similar practical rules for dealing with tax issues.[35] Then, state legislatures or taxing authorities can adopt these rules while considering and perhaps taking ideas from academic and practical commentary originating in other states.

D. The Analogy Between the U.S. Intra-State Double-Taxation State and Local Scheme of Taxation and the Scheme of International Inter-State Double Taxation

In many ways, the scheme of state and local taxation in the United States is like the design of international taxation that includes similar use of taxes, rates, bases, and methods of collecting taxes. One immediate similarity is that states are analogous to countries in the way each state imposes taxation: each country has its own tax scheme, and each state has its own tax scheme. Frequently, to promote cross-border commerce and trade, a state or country may want to relieve double taxation. If a company or individual were subject to double taxation or triple taxation, then that individual or company would have less incentive to do business in that jurisdiction–whether it be a state or country. To promote harmonious commerce in the free-trade zone within the U.S., the U.S. Constitution does not allow double taxation.[36]

The U.S. state and local provisions for double tax relief themselves are, in the author's view, analogous to other countries' domestic rules for international double tax relief, particularly with respect to aspects such as permanent establishments and residence. However, specific provisions relating to deductions and thin capitalization rules vary among countries. Such rules of deductions and thin capitalization are not always uniform.

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32. For a comparative approach of such procedures, *see* John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 546 (1995).

33. This article discusses reform for state tax courts. Richard D. Pomp, *State Tax Reform for the Eighties: The New York Tax Study Commissi*on, 16 CONN. L. REV. 925 (1983).

34. United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

35. *Id.* at 457.

36. Comptroller of Treasury of Maryland v. Wynne, 575 U.S. 542, 565-67 (2015).

As tax treaties may not directly address the interpretation of laws and tax principles, countries often rely on domestic law to define these terms.[37] Still, the systems for defining sources of income in a state and local domestic context are like how countries internationally define income. Such rules operate analogously to how countries deal with international tax issues in an international context.

The conclusion that U.S. state and local provisions for double tax relief operate analogously to how countries resolve and deal with international double taxation relies on three premises.

The first premise is that the U.S. state and local provisions have many similarities and commonalities in comparison with the international tax system. Between the U.S. state and local systems of taxation and the international tax system – as in the domestic rules of other countries – there are many similarities as to how double taxation is resolved in terms of jurisdiction.

The second premise is that the systems for defining sources of income in the U.S. at the state and local level are similar to how other countries define income in their respective laws. As such, there are similar principles and guidelines to determine taxable income between the U.S. state and local system and the international tax system.

The third premise is that when cross-border transactions occur, countries may use rules such as the rules for residence, citizenship, permanent establishments, branches, business profits, thin capitalization,[38] withholding taxes, and credits from other jurisdictions to determine and calculate the appropriate tax treatment of these cross-border transactions. These rules used in the international context present the same issues that arise in the domestic context. Moreover, the international context operates analogously to how countries deal with international tax issues in an international context.

In short, the first premise is that the U.S. state and local and the international tax system deal with double tax relief similarly. The second premise is that the two systems define income similarly. The third premise is that deductions and calculations of income after the gross income are similar between the two systems.

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37. Rebecca M. Kysar, *Interpreting Treaties*, 101 IOWA L. REV. 1387, 1389 (2016).

38. "Most European countries covered have interest-to-pretax-earning limits in place. Most commonly, the limit is set at 30 percent of EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization). For example, assume that a parent company takes a $100 loan from its subsidiary requiring interest payments of $5." Thomas Locher, *Thin-Cap Rules in Europe*, TAX FOUND. (July 15, 2021, 10:55 AM) https://taxfoundation.org/ data/all/global/thin-cap-rules-in-europe-2021/ [https://perma.cc/7FLK-F94C] (last visited Aug 5, 2023).

Thus, in the international tax system, tax treaties play a crucial role. Tax treaties often encompass provisions relating to the personal scope and material scope,[39] allocation of income and capital,[40] non-discrimination rules,[41] mutual agreement, arbitration rules,[42] and assistance rules. However, tax treaties do not typically contain specific rules regarding the calculation of income after gross income.[43] The key features of the

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39. Patricia Brandstetter, The Substantive Scope of Double Tax Treaties – a Study of Article 2 of the OECD Model Conventions, (Jan. 1. 2010) (Doctoral Thesis, WU Vienna) (on file with author).

40. "Tax treaties provide the legal framework through which countries might bilaterally bargain a different allocation of taxing rights than the allocation that they could achieve through unilateral legislation." 1. Kim Brooks & Richard Krever, *The Troubling Role of Tax Treaties*, 51 TAX DESIGN ISSUES WORLDWIDE, SERIES ON INT'L TAX'N 159, 162 (2015).

41. Bruno da Silva wrote, "[t]he non-discrimination principle in tax treaties which aims at guaranteeing a fair treatment to foreigners and foreign businesses by treating them no less favourably than domestic ones is also a manifestation of equity. Equity considerations are therefore also relevant from an international tax policy perspective, and are traditionally analysed considering the principles of residence and source taxation." BRUNO FARHINHA ANCIETO DA SILVA, THE IMPACT OF TAX TREATIES AND E.U. LAW ON GROUP TAXATION REGIMES (2016).

42. Michelle Andrea Markham, *Arbitration and Tax Treaty Disputes*, 35 ARB. INT'L. 473 (2019).

43. This statement highlights the distinction made by the U.S. Supreme Court in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955). In *Glenshaw Class Co.*, the court indicated the Constitutional reliance on *Eisner v. Macomber*, 252 U.S. 189 (1920) and that case's Constitutional interpretation was not necessary. *Id.* at 431. In *Glenshaw Glass Co.*, Court decided that Constitutional principles are not needed to determine gross income. *See id.* at 429. Likewise, at the U.S. Constitutional level, treaties are secondary to the Constitution. David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2230 (2010). Treaties have a similar status to statutes. Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 302–05 (1999). Statutes deal with calculation of gross income. Heather D. Schafroth, *"Cui Bono Fuisset": Coordinating U.S. Tax Statues with U.S. Tax Treaties*, 40 VA. TAX REV. 371, 393 n.117 (2021). *See* I.R.C. § 7852(d) and I.R.C. § 894. But in the international tax treaty context, the treaties do not usually provide a means to calculate gross income. David Hardesty, *U.S. Foreign Tax Credit* ¶11.04 (2023). As a result, tax treaty interpretation methodology is analogous to Constitutional interpretation in the US. Ryan D. Newman, *Treaty Rights and Remedies: The Virtues of A Clear Statement Rule*, 11 TEX. REV. L. & POL. 419, 456 (2007); Alexander J. Kasner, *The Original Meaning of Constitutional Inventors: Resolving the Unanswered Question of the Madstad Litigation*, 68 STAN. L. REV. ONLINE 24, 32 n.22 (2015); David Sloss, *Legislative Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 FORDHAM INT'L L.J. 445, 476 (2012); Oscar I. Roos & Anita Mackay, *The Evolutionary Interpretation of Treaties and the Right to Marry: Why Article 23(2) of the Iccpr Should Be Reinterpreted to Encompass Same-Sex Marriage*, 49 GEO. WASH. INT'L L. REV. 879, 903 (2017); Jorge Cicero, *International Law in Mexican Courts*, 30 VAND. J. TRANSNAT'L L. 1035, 1084 (1997); Carlos Vasan Kesavan & Michael Stokes

international tax system are definition of income, calculation of income after gross income, and provisions for how double tax relief is resolved. Because the U.S. state and local system contains all these key features, it is analogous to the international tax system.

In other words, taken together, these premises lead to the conclusion that the U.S. state and local tax provisions for double tax relief operate in analogous ways to how countries in the international context deal with tax issues. Thus, there are similarities and commonalities between the U.S. system and other countries' systems when it comes to dealing with double taxation and resolving double taxation.

E. Defined Terms in This Article

The following table defines commonly used terms in this article:

Term	Definition
Juridical international double taxation	In general, this refers to when an individual or entity has the same item of income taxed in two countries.[44] This occurs when a taxpayer operates in more than one country, is taxed on income from one country in addition to its own income, leading to an income being doubly taxed.[45]
US intra-double taxation (SALT)	This term refers to when two states (the source state and the residence state) both tax an item of income.[46] It is analogous to the situation where one item of income is taxed in one country as well as in

Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1214 (2003); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2176–77 (1999).

44. KEVIN J HOLMES, INTERNATIONAL TAX POLICY AND DOUBLE TAX TREATIES: AN INTRODUCTION TO PRINCIPLES AND APPLICATION (2d ed. 2014).

45. Definitionally, "double taxation occurs where income with a source in one jurisdiction is derived by a taxpayer who is resident in another, and both jurisdictions assess the income." John Prebble, *Ectopia, Tax Law and International Taxation*, 5 BRIT. TAX REV., 383, 397 (1997); *see* Martin Norr, *Jurisdiction on Tax and International Income*, 17 TAX L. REV. 431 (1961).

46. This type of double taxation "was due to New Hampshire's choice to tax all business entities at the entity level and noting that Wynne itself held that double taxation caused by the interrelationship of two states." Daniel N. Kidney, *Gone with the Wynne: Exploring the Creditability of Income Taxes Imposed upon Passthroughs at the Entity Level*, 38 J. ST. TAX'N 35 (2019).

	another country, leading to international double taxation.[47]
Double taxation	This is a general term referring to a situation involving the taxation of one item of income more than once. National double taxation occurs when both the federal government and a state government tax the same income. This occurs when there is a federal government separate from the state government. Intrastate double taxation occurs when two jurisdictions (whether internationally or in a domestic system of provinces and states) within a state – such as a county or city – tax the same income or profits, leading to double taxation. Another situation when double taxation occurs is when a taxpayer may be subject to corporate taxation in one member state and withholding tax on dividends paid to shareholders in another member state.[48] International double taxation occurs when two different countries tax the same income.[49] This can occur when a multinational corporation operates in another country, earns profits in that other country, and then repatriates profits to the home country.[50] In that case, both countries could levy taxation leading to double taxation. To alleviate this burden, countries can enter into double tax arrangements.[51]
Juridical double taxation	This refers to the situation when two jurisdictions tax an item of income in the hands of the same taxpayer. It frequently comes up in the context of international double taxation. Juridical double taxation is where the same income is subject to tax

47. "This paper examines U.S. state experience with a similar . . . in the field of state income taxation is the unitary business . . . affiliated entities and the analogous question of the mandatory." Walter Hellerstein & Charles E McLure, *The European Commission's Report on Company Income Taxation: What the E.U. Can Learn from the Experience of the U.S. States*, 11 INT'L TAX AND PUB. FIN. 199 (2004).

48. Arnaud de Graaf, *Advance of International Double Taxation: Community or Joint Policy*, 7 EC TAX REV. 258 (1998).

49. Thomas Horst, *A Note on the Optimal Taxation of International Investment Income*, 94 Q. J. ECON. 793, 794 n. 3 (1980).

50. *Id.*

51. *Id.*

	in more than one jurisdiction.[52] This occurs when a single individual – or corporate entity – has multiple sources of income from different jurisdictions.[53]
Economic double taxation	Economic double taxation is when the same income is taxed at different legal levels.[54] For example, frequently in corporate income tax law, income is taxed at the corporate level when profits are made.[55] Then the same income is taxed in the hands of shareholders when the company distributes the income in the form of dividends to its shareholders.[56] That second level is personal income tax level or corporate income tax[57]
Distortions leading to double taxation	"Distortions leading to double taxation" refers to the situations that occur when differences in tax rules, laws, rates, and procedures across different E.U. member states lead to unequal or unfair competition in the single market.[58] Such distortions often can occur due to a lack of harmonization in tax laws and policies in the E.U.[59] In short, distortions in E.U. tax law lead to double taxation where the same income or profits are taxed twice due to the existence of different rules in member states. Because the E.U. has not harmonized these rules, the supranational authority of the E.U. has no way to coordinate such, what is referred to as "disparate tax rules "[60] The E.U. cannot coordinate such tax laws because the

52. Michael Lang wrote that juridical taxation occurs when the "same income in two or more states" is taxed. MICHAEL LANG, INTRODUCTION TO THE LAW OF DOUBLE TAXATION CONVENTIONS (2d ed. 2013).

53. *See* Norr, *supra* note 45.

54. KEVIN HOLMES, INTERNATIONAL TAX POLICY AND DOUBLE TAX TREATIES: AN INTRODUCTION TO PRINCIPLES AND APPLICATION (2007). This refers to the situation where an item of income is taxed at two levels regardless of jurisdiction. An example is when profits are taxed at the company level and then in the hands of shareholders. "Economic double taxation occurs when corporate income is taxed twice: once to the corporation that earns the income and again to its shareholders who receive the income." Walter Hellerstein, Georg W. Kofler & Ruth Mason, *Constitutional Restraints On Corporate Tax Integration*, 62 TAX. L. REV. 1, 2 (2008).

55. *See* Hellerstein et al., *supra* note 54, at 23.

56. *Id.*

57. *Id.*

58. Schön Wolfgang, *Taxation and State Aid Law in the European Union*, 36 COMMON MKT. L. REV. (1999).

59. Genschel & Markus Jachtenfuchs, *supra* note 9.

60. Zodrow, *supra* note 10.

	Member States of the E.U. maintain sovereignty over their domestic tax law.[61] No requirement exists to compel E.U. states to harmonize and coordinate their tax law.[62]

F. Why Is International Double Taxation Troublesome from an Economic, Political, Social, and Moral Perspective?

International double taxation occurs when more than one country taxes the same income. This creates an economic burden on companies and individuals investing abroad. From a personal and a corporate perspective, it affects the economic, political, social outlook, and moral frame of reference. The main reasons that double taxation is bad from an economic perspective is because it:

- Reduces competitiveness
- Reduces cross-border investment[63]
- Can lead to increased compliance complexity for taxpayers to navigate multiple tax systems
- Reduces tax revenue in the countries causing double taxation because such double taxation can discourage foreign investment and economic activity.[64]
- Increases social and psychological dissonance regarding taxation and tax compliance and thus affects the economic perspective as well.

From a competitive economic perspective, international double taxation can have negative economic impacts that affect the country imposing the tax.[65] Countries can enact unilateral domestic double tax relief rules and enter into tax treaties to mitigate such negative economic impacts.

From a political perspective, double taxation can create diplomatic tensions between countries especially if one country feels that another

61. Genschel & Markus Jachtenfuchs, *supra* note 9.

62. HELMINEN, *supra* note 11.

63. *Double Taxation*, CORP. FIN. INST. https://corporatefinanceinstitute.com/resources/accounting/double-taxation/ (last visited Dec. 21, 2023).

64. Julie Kagan, *What Double Taxation Is and How It Works*, INVESTOPEDIA (June 9, 2022),https://www.investopedia.com/terms/d/double_taxation.asp#:~:text=International%20businesses%20are%20often%20faced,business%20too%20expensive%20to%20pursue.

65. KARL P. SAUVANT & LISA E. SACHS, THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS (2009).

country is unfairly taxing its citizens.[66] This can damage international political relationships and lead to increased political tensions.[67]

From a social perspective, double taxation can appear unfair, unequal, and a form of discrimination against others from another country. From a moral perspective, such international double taxation imposed on a person can be unfair or seen as unfair when they have paid taxes already in another country.[68] Then, that person would be subject to taxes in another country in a way unequal with people only taxed in one country. Such unfairness, whether real or perceived, can erode public trust in the tax system.[69] Moreover, it can lead to resentment towards other countries.

International double taxation can also lead to discriminatory results.[70] This can be especially true if a country levies it against citizens of countries that are smaller or less developed. Indeed, less developed countries that have more resources can seek to negotiate favorable tax treaties that relieve double taxation. However, smaller countries or those without many resources may lack the bargaining power to achieve such a treaty.[71] In that sense, such international double taxation can result in a type of discrimination.

Finally, from a social perspective, double taxation can be inefficient and create dissonance.[72] Such inefficiencies can lead to long compliance, and delay humans from participating in other activities that they would normally engage in.[73]

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66. Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939 (2000).

67. I. J. J Burgers & I. J. Mosquera Valderrama, *Fairness: A Dire International Tax Standard with No Meaning?,* 45 INTERTAX 767 (2017).

68. Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL'Y 221 (1995).

69. *See generally*, G20 PUBLIC TRUST IN TAX, INT'L FED'N OF ACCTS. 16 (2017), https://www.ifac.org/_flysystem/azure-private/publications/ files/G20-Public-Trust-in-Tax.pdf (noting that survey respondents in G20 nations valued "governments setting clear expectations for how much tax is paid and by whom, and earning the public's trust in the tax system.").

70. Michael J. Graetz & Alvin C. Warren Jr., *Income Tax Discrimination and the Political and Economic Integration of Europe*, 115 YALE L. J., 1186 (2006); *see also* Francisco Alfredo Garcia Prats, *Triangular Cases and Residence As a Basis for Alleviating International Double Taxation. Rethinking the Subjective Scope of Double Tax Treaties*, 22 INTERTAX 473 (1994).

71. Martin Hearson, *When Do Developing Countries Negotiate Away Their Corporate Tax Base?*, 30 J. INT'L DEV. 233, 250-51 (2018).

72. Regarding the problems of dissonance in the law see generally Charles Edward Andrew Lincoln IV, *A Literary Lens into Constitutional Interpretation and a Possible Synthesis of Natural and Positive Law: The Silmarillion*, 41 MITCHELL HAMLINE L. J. PUB. POL'Y & PRAC. 101 (2019).

73. There is extensive literature on the psychology of taxation. ERICH KIRCHLER, THE ECONOMIC PSYCHOLOGY OF TAX BEHAVIOUR (2007). The topic of the psychology relating

G. A Proposed Definition of Effective Double Tax Relief

Does it seem reasonable to think that complete double non-taxation could occur? This might seem akin to the concept of single taxation, developed in the context of Peter Wattel's research of *Taxation in The Internal Market*.[74] The notion of single taxation is beyond the scope of this article. However, it seems likely that some form of double taxation will continue to occur.

This article proposes a definition that efficient double tax relief is the ability to resolve double taxation to the extent that the overall tax burden on an individual or an entity does not exceed 100%. However, in the author's perspective, a more preferable definition would be where an individual is taxed less than 50% of what the total taxation would normally be in one jurisdiction in question as if that person or entity only conducted income-generating activities in that jurisdiction. This viewpoint minimizes the tax burden to the extent that it would promote fairness and encourage economic activities as well. This definition is preferable for four reasons:

- Tax optimization
- Simplicity and clarity
- Comparative analysis effectiveness
- Consistency

First, this is tax optimal because it allows individuals and entities to find a threshold that acts as a benchmark: 50%. Moreover, this threshold acts as a specific, easily defined target: 50%.

Second, this leads to simplicity and clarity because it defines the criteria for a favorable tax treatment as whether a taxpayer is at that 50%.[75]

Third, this 50% figure functions well to allow for easy and effective comparative academic analysis between different jurisdictions.[76]

Fourth, and finally, this definition allows for consistency that can apply across different situations – both international and jurisdictional.[77]

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to social compliance and the individual psychological stresses of taxation are beyond the scope of this article.

74. Peter J. Wattel, *Taxation in the Internal Market, in* RESEARCH HANDBOOK ON THE LAW OF THE EU'S INTERNAL MARKET 319 (Panos Koutrakos & Jukka Snell eds., 2017); *see also* Reuven S. Avi-Yonah, *Who Invented the Single Tax Principle? An Essay on the History of U.S. Treaty Policy*, 59 N.Y.L. SCH. L. REV. 305 (2015).

75. Raymond Luja, *State Aid Benchmarking and Tax Rulings: Can We Keep it Simple?, in* STATE AID LAW AND BUSINESS TAXATION 111 (Isabelle Richelle et al. eds., 2016).

76. George Abuselidze, *Optimality of Tax Policy on the Basis of Comparative Analysis of Income Taxation*, 9 EUR. J. SUST. DEV. 272 (2020).

77. "[C]onsideration of existing tax policies and principles is critical to maintaining both neutrality between the various forms of engaging in commerce and consistency in tax laws." Maricel P. Montano, *Can Widening the Scope of Information Reporting to Include*

In short, this definition is a heuristic to be used for analysis. It does not intend to include double taxation of income from a federal and a state perspective. Arguably taxation at two levels of a government does not result in efficient double taxation. Indeed, in the U.S., taxpayers are subject to tax at the federal and state level. This, in a sense, is a form of double taxation. But both jurisdictions usually consider the other jurisdiction's right to tax. Therefore, the taxing right exists but does provide for effective double tax relief.

II. HOW DOUBLE TAXATION IS RESOLVED WITHIN THE U.S.: THE RULE OF DOUBLE TAX RELIEF IN THE U.S.

Although there are similarities between countries in an international context and states in the U.S. domestic context, there are also key differences. Some of those differences relate to issues such as state sovereignty, constitutional limits on taxation, transfer pricing, and allocation of profits derived by groups of companies. The following sections will discuss how the U.S. Constitution limits the taxation of states.

A. United States Background and Experience with Double Taxation

Prior to the current U.S. Constitution, which went into effect in 1789, the United States was governed by the Articles of Confederation.[78] The Articles of Confederation viewed the United States as a type of confederation or "League of Friendship"[79] where each state could tax other state residents with hardly any limits from the Articles of Confederation.[80] This taxation of other states within the same "country" caused many problems.[81] One of the main incentives for the Framers of the 1789 Constitution of the United States was to reduce harmful tariffs and taxation

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Income Derived from Online Sales Help to Narrow the Expanding Tax Gap?, 83 S. CAL. L. REV. 379 (2010).

78. "The result was the Articles of Confederation, drafted in 1776-1777 and finally ratified on March 1, 1781, which remained in effect until 1789 and represented the first American experiment with a written national charter." Eric M. Freedman, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J., 142, 142 (1978).

79. *See generally* CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 72 (2005).

80. Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249 (1997).

81. JOHNSON, *supra* note 79; *see also* Donald S. Lutz, *The Articles of Confederation as the Background to the Federal Republic*, 20 PUBLIUS 55 (1990).

between states and promote economic harmony.[82] In relation to the system of international tax treaties that exist to allocate income and capital between states fairly, modern countries operate similarly to the states prior to the 1789 Constitution.[83] Most countries recognize that in the absence of rules allocating income in international taxation, harmful double taxation occurs. When such rules of international taxation are absent, there can be a harmful economic result.

Regarding tax treaties, there is no direct analogy as states do not sign treaties with each other. Some agreements exist between states, where states have dense population clusters close to each other. Examples of such agreements exist among New York, New Jersey, and Connecticut or the District of Columbia with Maryland and Virginia.[84] However, such multi-state agreements among more than two states is not a common practice.[85] Instead of using such agreements, the provisions for double tax relief usually exist within state law.[86]

Indeed, there is no uniform way for how all states should relieve double taxation of income. Some ways that states can relieve double taxation of income are:

- Credits for taxes paid for income earned in other states
- Exemptions of income for income earned in other states
- Apportionment formulas to allocate business income
- Reciprocal tax agreements with other states that provide those certain states agree not to tax income.

An example of the credit method is a New York State law providing for credits for New York state residents.[87] New York State allows credits

82. Regarding the Commerce Clause especially in the Constitution of 1789 "Professor Collins concludes that the primary purpose behind the commerce clause is the promotion of economic integration and interstate harmony." Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988); *see also To Form A More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842, 857 (1989).

83. *See generally* Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. OF INT'L LAW 1 (2013).

84. Jason Nicholas Juffras, A Comparative Case Study of Tax Policy Decisions in the District of Columbia, Maryland, and Virginia (May 17, 2015) (Ph.D. dissertation, George Washington University).

85. An example on sales and use tax includes the Streamlined Sales and Use Tax Agreement. Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement ("Ssuta")*, 40 U.C. DAVIS L. REV. 1381, 1387 (2007).

86. An example of such an attempt is the Multistate Tax Commission (MTC) Compact. R. Bruce Johnson, *The Multistate Tax Commission - Its History and Its Future*, 6 ST. & LOC. TAX LAW. 45 (2001).

87. *Credits for New York State residents*, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, https://www.tax.ny.gov/help/taxpayer-education/financial/4-tax-credits-2.htm [https://perma.cc/ZYV6-S4J4] (last visited Aug 5, 2023).

for taxes of income earned in other states.[88] Minnesota also offers credits for taxes paid in other states that a taxpayer can apply to Minnesota state tax liability.[89]

An example of the exemption of out-of-state income earned exists in California.[90] California state law allows taxpayers to exclude from their taxable income certain amounts of out-of-state income by putting a cap on the amount of deductions.[91] The amount depends on the taxpayer's bracket and potentially other considerations. Another example of the exemption method exists in Oregon state law that is almost identical to the California rule.[92]

An example of apportionment exists in Texas. Texas state law provides for a three-factor apportionment formula considering a business' property, payroll, and other sales taxes in the state.[93] Texas state law has a policy of attempting to prevent double taxation on the exact same income from other different states.[94] Another example of apportionment in state and local tax law exists in Colorado that is nearly identical to the Texas rule.[95]

Examples of reciprocal tax agreements between states include:

- An agreement between Arizona and New Mexico where Arizona residents are not subject to New Mexico tax if the Arizona resident lives in Arizona and works in New Mexico.[96] Likewise, the inverse is true for New Mexico residents.[97]

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88. NICHOLAS JOHNSON, A HAND UP: HOW STATE EARNED INCOME TAX CREDITS HELP WORKING FAMILIES ESCAPE POVERTY IN 2001 (2001).

89. STEPHEN COLEMAN, MINNESOTA DEP'T OF REVENUE, THE MINNESOTA INCOME TAX COMPLIANCE EXPERIMENT: STATE TAX RESULTS, (1996); *See also* JOHNSON, *supra* note 79.

90. *Taxation of Nonresidents and Individuals Who Change Residency*, STATE OF CALIFORNIA FRANCHISE TAX BOARD, https://www.ftb.ca.gov/forms/misc/1100.html [https://perma.cc/5R5Q-32S5] (last visited Aug 5, 2023).

91. Jeffrey Schoenblum, *Strange Bedfellows: The Federal Constitution, Out-Of-State Nongrantor Accumulation Trusts, and the Complete Avoidance of State Income Taxation*, 67 VAND. L. REV. 1945 (2014).

92. OR. REV. STAT. ANN. § 307.175 (West, 2023).

93. This website on the Texas Comptroller website provides a definition of apportionment. *Franchise Tax Frequently Asked Questions,* TEXAS COMPTROLLER, https://comptroller.texas.gov/taxes/franchise/faq/apportionment.php [https://perma.cc/5KN4-J5TM].

94. Teresa Lightner, *The Effect of the Formulary Apportionment System on State-Level Economic Development and Multijurisdictional Tax Planning*, 21 J. AM. TAX'N ASS'N 42 (1999).

95. *Id.*

96. *Determining Filing Status for Nonresidents and Part-Year Residents*, ARIZONA DEPARTMENT OF REVENUE https://azdor.gov/individuals/income-tax-filing-assistance/ determining-filing-status-nonresidents-and-part-year [https://perma.cc/HUU4-Q88S] (last visited Aug 5, 2023).

97. *Withholding Exceptions*, ARIZ. DEP'T OF REVENUE, https://azdor.gov/business/

- An agreement between Kentucky and Ohio providing for a similar arrangement where the residents of one state are not subject to taxation in the source of their income if they work across the border.[98]
- An agreement between North Dakota and Minnesota for cross-border workers that only subjects them to taxation in the state of residence.[99]
- An agreement between Illinois and Indiana provides a similar reciprocal tax arrangement to tax residents – and thus the source state does not have the right to tax.[100]
- An agreement between Maryland and Pennsylvania provides a similar provision for cross-border workers on state income tax.[101]
- An agreement between New Jersey and Pennsylvania also has a similar reciprocal tax arrangement on the taxation of income.[102] Some academic commentary refers to this agreement as a tax treaty, "New Jersey and Pennsylvania have a reciprocal tax treaty under which employment income is taxed where people live, not where they earn it."[103]

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withholding-tax/withholding-exceptions (last visited Aug 5, 2023) [https://perma.cc/CZ78-WFX5].

98. *Certificate of Nonresidence*, KY. DEP'T OF REVENUE, https://revenue.ky.gov/Forms/42A809.pdf (last visited Aug 5, 2023) [https://perma.cc/75U5-GL64]; *see also* Donald Bruce et al., *Base Mobility and State Personal Income Taxes*, 63 NAT'L TAX J. 945 (2010).

99. *Reciprocity Exemption/Affidavit of Residency for Tax Year 2023: For Michigan and North Dakota residents who work in Minnesota*, MINN. DEP'T. OF REVENUE (2023), https://mn.gov/mmb/assets/mwr_form_tcm1059-128581.pdf [https://perma.cc/9Z5W-P8ZK]. Shawn Rohlin et al., *Tax Avoidance and Business Location in a State Border Model*, 83 J. URB. ECON. 34, 34 (2014)("State-specific reciprocal agreements require workers to pay income tax to their state of residence as opposed to their state").

100. "Indiana employees working in any of those states will not be . . . Residents of Illinois are not subject to Iowa income tax " Kathleen K. Wright, *Multistate Workers and Their State Tax Liabilities*, 10 ATA J. LEGAL TAX RSCH. 62 (2012).

101. *Maryland Form MW507*, MD. TAXES (May 2022), https://www.marylandtaxes.gov/forms/current_forms/mw507.pdf [https://perma.cc/TF69-6RB3]; *See* Rohlin, *supra* note 99, at 34 ("State-specific reciprocal agreements require workers to pay income tax to their state of residence as opposed to their state").

102. "Likewise, employees were able to work for employers . . . , states like Pennsylvania do not withhold Pennsylvania tax . . . been collecting and remitting her income tax to New Jersey." Michael Kraich, *The Chilling Realities of the Telecommuting Tax: Adapting Twentieth Century Policies for Twenty-First Century Technologies*, 15 PITT. J. TECH. L. & POL'Y 224, 226 (2015).

103. Cristobal Young & Charles Varner, *Millionaire Migration And State Taxation Of Top Incomes: Evidence From A Natural Experiment*, 64 NAT'L TAX J. 255, 263 (2011).The article goes on, "Though many of New Jersey's richest residents live in the northern part of the state and have ties to New York City, the potential for regional tax competition around the Philadelphia metropolitan area is very strong." *Id.*

B. Table Summarizing the U.S. Experience of Intra-State Taxation

The U.S. consists of 50 individual states. Each state has its own tax law and regulations—separate from the U.S. federal government tax law and regulations. When an individual or company earns income in another state – and is taxed in the home state – double taxation can result. To resolve the issues of double taxation, states can enter into reciprocal tax agreements or provide state-specific tax law provisions to resolve those issues. These reciprocal tax agreements are analogous to double tax treaties that individual countries create in the international context. Although the U.S. Constitution limits how much the source state can tax, the reciprocal tax agreements provide practical solutions to avoid double taxation.

To summarize these U.S. intra-state taxation (SALT) rules regarding the relief of double taxation, the following table outlines such rules. This table indicates that many states—indeed, more than are listed here—have agreements in place to provide double tax relief on income earned in other states. In general, these agreements apply to employment income and employment taxes. In all of these cases, the resident state has the right to tax income. However, the source state is still allowed to tax insofar as the U.S. Constitution allows the source state to tax. Moreover, some states allow the use of exemptions when calculating income tax. This exemption helps avoid double taxation in the resident state. However, the table shows how complicated intrastate taxation technicalities operate. The table also shows that such intrastate taxation and double tax relief within constitutional limits is possible.

Resident State	**Source State**	**Income Tax Type**	**Credit/Exemption/ Apportionment Rules**
Arizona	New Mexico	Employment	An agreement between Arizona and New Mexico where Arizona residents are not subject to the laws of New Mexico taxation if the Arizona resident lives in Arizona and works in New Mexico.

Kentucky	Ohio	Employment	An agreement between Kentucky and Ohio providing for a similar arrangement where the residents of the residence state are not subject to taxation in the source of their income if they work across the border
North Dakota	Minnesota	Employment	An agreement between North Dakota and Minnesota for cross-border workers having them only subject to taxation in the state of residence
Illinois	Indiana	Employment	An agreement between Illinois and Indiana provides a similar reciprocal tax arrangement to only tax residents – and thus the source state does not have the right to tax
Maryland	Pennsylvania	Employment	An agreement between Maryland and Pennsylvania has a similar provision for cross-border workers on state income tax.
New Jersey	Pennsylvania	Employment	An agreement between New Jersey and

			Pennsylvania also has a similar reciprocal tax arrangement on the taxation of income.
New York	All other states	Income	An agreement between New York State allows credits for taxes of income earned in other states. Avoidance of double taxation in the residence state – source state can still tax insofar as the Constitution allows.
Minnesota	All other states	Income	Minnesota also offers credits for taxes paid in other states that can be applied to Minnesota state tax liability. Avoidance of double taxation in the residence state – source state can still tax insofar as the Constitution allows.
California	All other states	Income	California state law allows taxpayers to exclude from their taxable income certain amounts of out-of-state income by putting a cap on the amount of deductions. The amount depends on the taxpayer's bracket – and

			potentially other considerations. Avoidance of double taxation in the residence state – source state can still tax insofar as the Constitution allows.
Oregon	All other states	Income	Another example of the exemption method exists in Oregon state law. Avoidance of double taxation in the residence state – source state can still tax insofar as the Constitution allows.
Texas	All other states	Employment Income	Texas state law provides for a three-factor apportionment formula considering a business's property, payroll, and other sales taxes in the state. (An employee's domicile is where they are taxed. So, if an employee lives in Texas, they will be subject to Texas income tax law. But note, there is no state income tax in Texas). This method allows for allocating the

			business and employment income between the source and resident states.[104]

In conclusion, this table shows that the resident state has the right to tax income. However, in accordance with the U.S. Constitution, the source state still has a right to tax the income. Some states allow for credits, exemptions, or apportionment formulas to avoid double taxation in the resident state. Moreover, the above table shows that the mechanisms for relieving double taxation in the intra-state context can be complicated. Although the technicalities can be complicated, double tax relief is possible.

C. Due Process Clause Limitations on Taxation

The two main limitations on a state's ability to tax are the Due Process Clause and the Commerce Clause. This section will briefly discuss the Due Process Clause in relation to the ability to have jurisdiction to tax.

The Due Process Clause is found in two places of the U.S. Constitution. First, the Due Process Clause is found in the Fifth Amendment to the U.S. Constitution, as part of the Bill of Rights, enacted and ratified on December 15, 1791.[105] Second, it is found in the Fourteenth Amendment, which was adopted after the U.S. Civil War on July 9, 1868. The Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[106] The Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."[107]

When dealing with a tax issue on a state and local level, the first question to answer is whether the state has jurisdiction to tax. Historically,

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104. An employer in New Mexico would be obligated to share this information with Texas. An employee's domicile is where they are taxed. So, if an employee lives in Texas, they will be subject to Texas income tax law. But note, there is no state income tax in Texas.

105. The Bill of Rights was "[r]atified on December 15, 1791, the Fifth Amendment grandly proclaims that no person shall "be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." Douglas W Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 367 (1991).

106. U.S. CONST. amend. V.

107. U.S. CONST. amend. XIV, § 1.

jurisdiction depends on the concept of "nexus."[108] Nexus was defined as a physical presence.[109] The physical nexus requirement originated from the Due Process Clause of the U.S. Constitution.[110] To be taxable, nexus requires some sort of established connection, because there is a guarantee of due process where individual rights are respected.[111] The physical presence rule mirrors the Due Process requirement from the U.S. Constitution.[112] Generally, due process is the idea that states must respect the legal rights of individuals.[113] In a taxing sense, a state cannot tax out-of-state residents who have absolutely no connection to the state. This state connection that is established through physical presence is a nexus. The requirement to have a connection to the state is a notion of due process. This physical presence nexus rule had been most recently articulated by the U.S. Supreme Court in *Quill Corp v. North Dakota By and Through Heitkamp*.[114]

Until 2018, there was no way to establish a nexus without physical presence, thus, states had no way to tax an individual with no physical presence in that state. So, for example, if a major online retailer only made sales online to a state and had no physical presence, then states could not, as a matter of due process, tax that individual or company. However, given the rise of online commerce in the past 20 years, the U.S. Supreme Court reviewed a case dealing with a major online retailer in *South Dakota v. Wayfair*, *Inc.*[115]

The facts of the case dealt with an online furniture company called Wayfair.[116] Wayfair sold furniture online but did not have a physical presence in South Dakota.[117] All sales were online. South Dakota wished to tax this massive source of income. Wayfair argued that it had no nexus in South Dakota. Indeed, under the physical presence nexus rule, Wayfair

108. Quill Corp v. North Dakota, 504 U.S. 298, 310–13 (1992).

109. *Map of Physical Presence Nexus*, AVALARA (June 1, 2019), https://www.avalara.com/us/en/learn/guides/state-by-state-physical-presence-nexus-guide.html.

110. *Id.* at 312.

111. *Id.*

112. *Id.*

113. The Supreme Court wrote in 1884, "In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." Hurtado v. California, 110 U.S. 516, 535 (1884).

114. 504 U.S. 298, 312 (1992), *overruled by* S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

115. S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

116. *Id.* at 2089.

117. *Id.*

did not have a presence. The Supreme Court modified its 1992 rule, reasoning that a "substantial nexus" existed with online sales because Wayfair made so much income from South Dakota sales.[118] This was not a traditional nexus with a physical presence. In this case, "substantial nexus" would not have existed but for South Dakota residences and income. Wayfair would not make sales without the nexus of the internet coupled with individuals making purchases on the computer to be delivered for the purpose of use in South Dakota. In this way, *Wayfair* radically changed the idea of nexus and reformed the notion of due process.

Thus, a new rule for taxing jurisdiction based on nexus arose. Online sales qualify as a "substantial nexus." This means, inter alia, that states may tax based on online sales within the meaning of due process guarantees under the U.S. Constitution. Because of *Wayfair,* businesses can be—and indeed are—more easily taxed. Now, a business would not need a physical presence in the state to be taxed fairly under the Due Process Clause. In a way, this lowers the threshold for taxation. It could also increase the risk of double taxation for those selling goods online if the income has been taxed in the home state and the state where the purchase was made.

In a sense, the Due Process analysis for jurisdiction to tax is clearer than the Commerce Clause's analysis. The Commerce Clause has created a somewhat complex system of case law. The following section will discuss the Commerce Clause as a limitation on state taxation.

D. Commerce Clause

The source of the Commerce Clause in the U.S. Constitution is in the original document effective March 4, 1789.[119] Article I, Section 8, Clause 3 provides that the U.S. Congress shall have the power:"[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[120]

Like the Due Process Clause, the Commerce Clause has limitations on taxation within the U.S. Whereas the Due Process Clause is the way in which a state has the right to tax someone – thus limiting the rights of states to tax out-of-state individuals and corporations, the Commerce

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118. *Id.* at 2092.

119. Delegates debated the U.S. Constitution in the summer of 1787. It was created September 17, 1787. Then it was presented on September 28, 1787. Finally, it was ratified by all states in the Union on June 21, 1788. *See* Owings v. Speed, 18 U.S. 420, 420 (1820). (stating that "the present Constitution of the United States did not commence its operation until the first Wednesday in March, 1789."); *see generally*, JOHNSON, *supra* note 79.

120. U.S. CONST. art. 1, § 8, cl. 3.

Clause provides the direct and explicit power that Congress has the right to regulate commerce. However, the Supreme Court has interpreted inferred rights from the Commerce Clause.[121] The main goal of the Supreme Court's Dormant Commerce Clause interpretation is to ban state protectionist[122] measures.[123] The effect of this doctrine is to ensure that state taxation does not interfere with interstate commerce and international commerce.[124] The Supreme Court has interpreted this right to regulate commerce as including a right to regulate taxation among the states.[125] The Supreme Court has also held that even where Congress has not legislated on certain issues explicitly – alternately termed as "positively" – there still exists a negative prohibition on states regulating commerce, especially in the field of taxation.[126] Interpretation and case law seeks to see whether there is a practical effect on interstate taxation.[127]

The Commerce Clause is a single sentence in the U.S. Constitution granting power to the federal government to regulate commerce. The clause states that the U.S. Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[128] Commerce is a broad term. As such, the Supreme Court has interpreted it to include issues of taxation. Specifically, the Supreme Court has interpreted it to govern the rules regarding double

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121. Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV., 153 (2005).

122. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988) (defining "protectionist as regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors").

123. U.S. Supreme Court Justice Anthony Kennedy's writing for the Supreme Court wrote that the purpose of the doctrine is to fulfill "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 390 (1994) (quoting FEDERALIST NO. 22 at 143–145 (C. Rossiter ed. 1961) (A. Hamilton); Madison, Vices of the Political System of the United States, in 2 Writings of James Madison 362–363 (G. Hunt ed. 1901)).

124. Japan Lines, Ltd. v. Cnty. of Los Angeles, 441 U.S. 434, 451 (1979) (stating that state double taxation must not interfere with the U.S. federal government from "speaking with one voice when regulating commercial relations with foreign governments").

125. Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) (stating that states are prohibited from taxing — and therefore regulating — interstate commerce).

126. Quill Corp v. North Dakota, 504 U.S. 298, 298 (1992).; Northwestern States Portland Cement Co. v. Minn., 358 U.S. 450, 458 (1959); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949).

127. "This rule looks only to the fact that the incidence of the tax is the "privilege of doing business"; it deems irrelevant any consideration of the practical effect of the tax." Complete Auto Transit, Inc v. Brady, 430 U.S. 274, 278 (1977).

128. U.S. CONST. art. I, § 8, cl. 3.

taxation. A double taxation circumstance is an economic event where two instances of taxation occur on the same item of income.

E. The Four Test Analysis on Double Taxation in the U.S.

The current test in U.S. jurisprudence to identify whether double tax burdens exist comes in the form of the *Complete Auto* (1977) test.[129] In that case, the U.S. Supreme Court applied the Commerce Clause to analyze whether a state and local tax ordinance violated the negative command of the Commerce Clause to cause double taxation.[130] The *Complete Auto* test has four distinct prongs:[131]

- **First Prong – Substantial nexus requirement:** the commercial activity subject to the tax must have a substantial nexus to the jurisdiction taxing.
- **Second Prong – Fair appointment requirement:** the tax must be fairly apportioned.
- **Third Prong – Nondiscrimination requirement: t**he tax must not discriminate against interstate commerce.
- **Fourth Prong – Fair relation to services provided by the state requirement:** a reasonable relationship between the tax imposed by the state on the taxpayer and the services provided by the taxing jurisdiction must exist.

F. Internal Consistency Test

The first prong deals with the nexus requirement found in the Due Process Clause.[132] The second prong interchangeably is nondiscrimination or fair apportionment.[133] In *Complete Auto*, the court analyzed the third prong–the nondiscrimination prong–second.[134] The key question in the non-discrimination prong is whether a state's scheme would pass the internal consistency test.[135]

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129. *Complete Auto Transit,* 430 U.S. at 279.
130. *Id.*
131. *Id.*
132. Quill Corp v. North Dakota, 504 U.S. 298, 298 (1992) *overruled by* S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).
133. *Complete Auto Transit*, 420 U.S. at 279.
134. *Id.*
135. Professor Walter Hellerstein connects the notion of internal consistency with tax discrimination in writing that the Supreme "Court noted that a tax must have "what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade. In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face

The internal consistency test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."[136] This test allows a court examining a state tax regime to identify whether tax discrimination exists explicitly, or if double taxation – as analyzed through the internal consistency test – implicitly violates the regulations of interstate commerce.[137] The court tests for internal consistency by asking if double taxation would occur if every state adopted the same uniform tax regime.[138] For a court to allow the state tax regime, it must find that intrastate and interstate commerce are treated equally.[139] In other words, interstate commerce must not be subject to another layer of taxation compared to in-state commerce.[140]

Stated differently, the internal consistency test is a hypothetical examination that asks if every state were to adopt an identical tax structure, would interstate commerce be taxed at a higher rate than intrastate commerce. If, because of this hypothetical test, the State tax scheme is shown to be inherently discriminatory and operates as an unequal tax – thereby discriminating against interstate commerce – then that tax would violate the Commerce Clause.[141]

So far, this article has not discussed the fourth prong. No U.S. Supreme Court case has discussed the fourth prong because most cases usually fail at the third prong. Moreover, the fourth prong has not been

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discriminates against interstate commerce." JEROME R. HELLERSTEIN, WALTER HELLERSTEIN, & JOHN A. SWAIN, STATE TAXATION 4.16 (3rd ed. 1998); *see* Comptroller of Treasury of Maryland v. Wynne, 575 U.S. 542 (2015); *see.* Charles Edward Andrew Lincoln IV, *A New Deal for Europe? The Commerce Clause as the Solution to Tax Discrimination and Double Taxation in the European Union*, 11 J. J. BUS. ENTREPRENEURSHIP & L. 115 (2018).

136. *See Wynne*, 575 U.S. 542.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. As Judge Finley wrote in a dissenting opinion in 1973 regarding a Washington state tax, "[t]hus, key factors for determining whether a discriminatory burden is placed upon interstate commerce are whether the tax Uniformly regulates sales to utilities for resale, and affords Equal opportunity and treatment among the states involved. With these factors and the discriminatory burden test in mind, I must conclude as follows: (1) when a public utility district sells power to an Oregon utility for resale in the state of Oregon it must pay a 3.6 percent tax upon the gross income received therefrom; when it sells power to a Washington utility for resale in the state of Washington it pays no tax; (2) this method of tax assessment does not uniformly tax otherwise identical interstate and intrastate transactions; (3) by placing a tax burden upon interstate transactions which is not borne by intrastate commerce, this unequal taxing structure affords an unconstitutional economic barrier upon out-of-state sales, and therefore violates U.S. Const. art. 1, s 8—the commerce clause." Pub. Util. Dist. No. 2 of Grant Cnty. v. State, 510 P.2d 206, 213 (1973).

discussed in the context of taxation at the Supreme Court or any published U.S. appellate court case. Furthermore, it does not seem that this fourth prong has been discussed in any U.S. case law in the context of other types of regulations or levies. To pass this test, one must meet all of the prongs. This means if the first prong fails, then there is no need for a court to analyze subsequent prongs. Thus, since most cases fail before the fourth prong, there are no examples of U.S. Supreme Court cases discussing the fourth prong.

G. Internal Consistency Test Does Not Resolve All State and Local Double Taxation Within the U.S.

However, just because the Commerce Clause and Dormant Commerce Clause case law works to reduce instances of double taxation, it does not eliminate it entirely. Consider the following hypothetical situation: State A has a single-factor – and internally consistent – sales factor formula. In *Moorman v. Bair,* the Supreme Court approved this type of single factor sales factor formula.[142] This means that State A uses only sales income as the way to apportion a taxpayer's income. Consequently, State A does not use the traditional three factors of property, payroll, and sales. State B has the traditional three-factors of property, payroll, and sales. This three-factor formula is an internally consistent formula. The Supreme Court has approved this three-factor formula in several decisions.[143]

However, in this hypothetical situation, assume the taxpayer has all property and payroll in State B and makes no sales in State A. This means that State B will calculate the taxpayer's tax liability due to State B based on that taxpayer's property and payroll existing in State B. But because the taxpayer has no sales in State A, then State A sales will not factor into the State B calculation. Because of this calculation the State B tax will be based solely on taxpayer's property and payroll in State B. Therefore, the taxpayer will be subject to tax in State B on an amount equal to 100% of its income. The apportionment formula for State B will be:

(0 x sales factor) + (1 x property factor) + (1 x payroll factor) = 2

Based on this scenario, this means that 100% of the taxpayer's income will be attributed to State B, because the sales factor is zero. However, the taxpayer is not only subject to 100% taxation. An additional tax is due as

142. 437 U.S. 267 (1978).

143. *See* Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1983); Allied-Signal, Inc. v. Div. of Tax'n, 504 U.S. 768, 781–88 (1992); Fulton Corp. v. Faulkner, 516 U.S. 325, 325–26 (1996).

well, because the total of the property and payroll factors is 2. This calculation is achieved by taking the sum of the property and payroll factors, which equals 2. Then, you subtract 1, which represents the sales factor that is zero. Thus, the remaining number of factors that count to the taxpayer's apportionment in State B results in 2 – 1 = 1. The result would be a tax of 167% of the taxpayer's income.

III. HOW THE E.U. RESOLVES DOUBLE TAXATION

The goal of E.U. tax law is to make sure that businesses and individuals pay their fair share of tax law while also maintaining state sovereignty.[144] This represents a balancing act at the E.U. level.[145] Other considerations include promoting economic growth and preventing tax evasion.[146]

Some of the key principles of the law in the E.U. that govern E.U. tax rules are free movement of capital and goods within the E.U., non-discrimination of taxpayers based on nationality, and to a lesser extent the coordination of tax rules and policies within the E.U. Generally, the E.U.

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144. "Although direct taxes are still the prerogative of Member States, their sovereignty over them has been to some extent restricted by E.U. Law, especially with the enactment of Interest and Royalties Directive and the Parent Subsidiary Directive. The objective is to maintain the effective functioning of the common market through the approximation of the conditions within the European Union to those of a domestic market." Marc Morris, *United in Diversity, Divided by Sovereignty: Hybrid Financing, Thin Capitalization, and Tax Coordination in the European Union*, 31 ARIZ. J. INT'L & COMP. L. 761, 806 (2014).

145. "One of the E.U.'s most challenging tasks, the process of enlargement, has required a balancing act to maintain the political, geographic, demographic, and economic symmetry of the E.U., bringing with it the need to absorb new languages and national perspectives. E.U. membership has grown from twelve states in 1992, to twenty-eight by 2013, leading to large regional differences within the union. In Northern Europe, production is capital-intensive, using skilled labor; in Southern Europe, production is more labor intensive, using low-skilled labor. Germany, Holland, Denmark, and the United Kingdom instinctively favor free trade in open markets; Spain and France mistrust market forces they cannot influence. To date, real signs of convergence between North and South have not occurred as predicted." *Id.* at 774–75.

146. "The question of the balance of sovereign power in this particular case is whether Ireland has ceded ultimate tax authority to the E.U. This begs the question: what does sovereignty actually mean? Sovereignty itself is a notoriously difficult term to define, but one commonly accepted definition is that sovereignty has two dimensions: internal and external sovereignty. It might be said a State is 'internally sovereign if it enjoys a monopoly as the ultimate authority regulating a range of social activities, including economic policies, within its country's borders.'" Theodore F. DiSalvo, *The Apple-Ireland Tax Case: Three Stories on Sovereign Power*, 28 DUKE J. COMP. & INT'L L. 371, 376 (2018).

as a whole works to prevent "race to the bottom" tactics.[147] Such a policy allows the E.U. to prevent member countries from offering exceedingly low tax rates to "attract" business.[148]

A. A Brief History to Explain the Background of the E.U. Framework of Taxation and Former Proposals – Before Outlining the Current E.U. Framework

The E.U. had its origins in the 1950s.[149] In the 1960s, the E.U. began to produce reports on the issue of double taxation in Europe.[150] In 1963, the European Economic Community (EEC) established the Fiscal and Financial Committee to study the issue of double taxation within the EEC.[151] The EEC tasked the Committee with the goal of producing potential solutions to double taxation within the EEC.[152] Additionally, the Committee had the task of suggesting approaches to harmonizing taxation in the EEC.[153]

This Committee produced "The EEC Reports on Tax Harmonization" (Neumark Report) that discussed the issue of double taxation.[154] This

147. Andre Fourcans & Thierry Warin, *Can Tax Competition Lead to a Race to the Bottom in Europe? A Skeptical View*, MIDDLEBURRY COLL. ECON. DISCUSSION PAPER 1 (2006).

148. *See* Christian Bellak & Markus Leibrecht, *Do Low Corporate Income Tax Rates Attract FDI?–Evidence from Central-and East European countries*., 41 APPLIED ECON. 2691, 2703 (2009).

149. *History of the European Union, 1945-1959*, EUR. UNION, https://european-union.europa.eu/principles-countries-history/history-eu/1945-59_en#:~:text=9%20May%201950%20%E2%80%93%20A%20plan,Union%20as%20'Europe%20Day' (last visited Dec. 21, 2023).

150. "European Commission, as far back as the 1960s, to muster support among national tax authorities for the harmonization of intra-EU corporate income tax rates attracted no interest." Lorraine Eden & Robert T. Kudrle, *Tax Havens: Renegade States in the International Tax Regime?*, 27 LAW & POL'Y 105, 122 (2005).

151. EEC Fiscal and Fin. Comm., *Tax Harmonization in the Common Market* (Neumark Report) (July 8, 1962), reprinted in *Tax Harmonization in the Common Market* 40 (Commerce Clearing House, Inc. ed. & trans., 1963).

152. ANDREAS HAUFLER, COMMODITY TAX HARMONIZATION IN THE EUROPEAN COMMUNITY: A GENERAL EQUILIBRIUM ANALYSIS OF TAX POLICY OPTIONS IN THE INTERNAL MARKET (2012); *see* Bernd Genser & Andreas Haufler, *Tax Competition, Tax Coordination and Tax Harmonization: The Effects of EMU*, 23 EMPIRICA 59 (1996).

153. Bernd Genser, et al., *Indirect Taxation in an Integrated Europe: Is There a Way of Avoiding Trade Distortions without Sacrificing National Tax Autonomy?*, 10 J. ECON. INTEGRATION 178 (1995); *see* ASSAF RAZIN & HANS-JÜRGEN VOSGERAU, TRADE AND TAX POLICY, INFLATION AND EXCHANGE RATES: A MODERN VIEW (2012).

154. EEC Comm General Report, *The EEC Reports on Tax Harmonization, The Report of The Fiscal and Financial Committee and The Reports of the Sub-Groups A,B and C* (July 8, 1962), Dr. H. Thurston unofficially translated this report. EEC COMM'N, FISCAL AND FIN. COMM., REPORT ON TAX HARMONIZATION IN THE COMMON MARKET (July 8,

report was prepared by the Fiscal and Financial Committee that was tasked with finding the specific aspects needed to harmonize tax in the EEC. However, this report did not result in any permanent changes in positive law in the EEC to resolve double taxation.

In 1966, a group of experts appointed by the EEC Commission produced a report titled "The Development of a European Capital Market."[155] This report suggested that the countries in the EEC create a single European capital market. Part of this unified single European capital market would include a harmonized tax system that would eliminate tax barriers to cross-border investments.

In 1968, a report titled "Tax Harmonization in the European Community" discussed the issues of tax harmonization and the elimination of double taxation.[156] This report proposed measures that would ensure tax harmonization in the EEC.[157] Among the proposals was a mandatory elimination of double taxation within the EEC.[158]

These publications and reports in the 1960s produced insight into reducing double taxation.[159] Indeed, the EEC did not focus on tax harmonization issues until the 1980s.[160] In part, the lack of discussions was due to the United Kingdom (U.K.) joining the EEC in 1973 as well as the 1973 oil crisis, both of which shifted the EEC's taxation discussions to issues other than tax harmonization and reduction of double taxation.[161]

1962), *reprinted in* EEC REPORT OF THE FISCAL AND FINANCIAL COMMITTEE AND THE REPORTS OF THE SUBGROUPS A, B, AND C (H. Thurston trans., 1963).

155. *Report of a Group of Experts Appointed by the EEC Commission – The Development of a European Capital Market*, EEC COMM'N (1966).

156. TAX HARMONIZATION IN THE EUROPEAN COMMUNITY, EURO. COMMUNITY INFO. SERV. (July 29, 1968), https://aei.pitt.edu/34508/1/A677.pdf.

157. George Kopits, *Tax Harmonization in the European Community: Policy Issues and Analysis*, *in* TAX HARMONIZATION IN THE EUROPEAN COMMUNITY 10 (1992), https://elibrary.imf.org/openurl?genre=book&isbn=9781557752253 [https://perma.cc/54PS-QLNR].

158. *Id.* at 12.

159. *Id.*

160. "And it was not until the 1980s that a new willingness to cooperate started being seen. This was partly thanks to politicians demonstrating vision, but also to the appointment of a strong Commission President in the shape of Jacques Delors who, in his White Book, outlined the path to be taken to complete the internal market." Henk van Arendonk, *The European Cooperation Project, Tax & Sovereignty*, 25 EC TAX REV. 242, 242 (2016).

161. "[T]he 1973 oil crisis shifted priorities to other policy issues. With rising unemployment and inflation rates throughout Europe, the focus moved from plans to harmonize taxation." KNUD ANDRESEN & STEFAN MÜLLER, CONTESTING DEREGULATION: DEBATES, PRACTICES AND DEVELOPMENTS IN THE WEST SINCE THE 1970S 31 (2017); *see* LAURENT WARLOUZET, GOVERNING EUROPE IN A GLOBALIZING WORLD: NEOLIBERALISM AND ITS ALTERNATIVES FOLLOWING THE 1973 OIL CRISIS (2017).

B. Introduction to the E.U. Framework for Taxation

As discussed in the section on the U.S. intra-double taxation (US SALT rules), the division of taxing power in the U.S. is between the U.S. federal government and the state and local levels of government. This allows for a balance of taxing powers between the federal government and the state governments. Similarly, the E.U. divides the ability and right to tax among the various states.[162] However, unlike the U.S., the states in the E.U. maintain more sovereign power to tax rather than the E.U. supranational government.[163] This sovereignty gives more power to the states but poses problems with respect to the harmonization of tax rules.[164] The legal basis for the U.S. division of taxing powers comes from the U.S. Constitution.[165] Likewise, the legal basis for the division of taxing powers in the E.U. comes from the Treaty on the Functioning of the European Union (TFEU).[166]

There are four principles within the E.U. that provide the basis of E.U. law related to taxation.[167] The origin of these four freedoms comes from the TFEU. The TFEU is one of the two main E.U. treaties that form the

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162. John Peterson, *Decision-making in the European Union: Towards a Framework for Analysis*, 2 J. EUR. PUB. POL'Y 69 (1995).

163. "EU ruling practices of supranational delegation and shared sovereignty, and the historically formed legitimation story of popular sovereignty used to make sense of political authority within Member States. . . . One might well argue that delegation is a particular form of pooling sovereignty." Jan Pieter Beetz & Enzo Rossi, *The EU's Democratic Deficit in a Realist Key: Multilateral Governance, Popular Sovereignty and Critical Responsiveness*, 8 TRANSNAT'L LEGAL THEORY 22, 23, 35 (2017).

164. "We note that within the U.S. system the states are "sovereign": The federal government does not mandate balanced budgets nor, since the 1840s, does it bail out states in fiscal trouble." C RANDALL HENNING & MARTIN KESSLER, FISCAL FEDERALISM: U.S. HISTORY FOR ARCHITECTS OF EUROPE'S FISCAL UNION (2012).

165. "[T]axing powers as to those two types of levies — the sole instance of a tax assignment provision in the U.S. Constitution. . . . [T]he exclusive power over imposts and duties, and the states would . . . ." Kirk J Stark, *Wayfair in Constitutional Perspective: Who Sets the Ground Rules of U.S. Fiscal Federalism?*, 74 NAT'L TAX J. 221 (2021).

166. "[T]he state-suprastate division of tax powers is often surrounded by legal uncertainties caused by the unspoken character of European tax competence, in addition to political challenges . . . Article 293 of the Treaty establishing the European Community comprised four sub-parts (paragraphs or indents) that persuaded Member States to negotiate with each other to integrate . . . taxation within or outside the E.U. framework." Shafi U Niazi & Richard Krever, *Romance and Divorce between International Law and E.U. Law: Implications for European Competence on Direct Taxes*, 53 STAN. J. INT'L L. 129, 131 n.3 (2017).

167. *See* Catherine Barnard, *Competence Review: The Internal Market*, DEP'T FOR BUSINESS, INNOVATION & SKILLS, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/226863/bis-13-1064-competence-review-internal-market.pdf (last visited Aug 6, 2023). [https://perma.cc/2U5Q-PBA3].

basis for E.U. governance. The four freedoms are considered an essential part of the E.U. single market. These freedoms function as a limitation on taxation analogous to the Clauses in the U.S. Constitution that affect state and local tax rules on double taxation. The four freedoms are:

- Freedom of movement of goods (TFEU Article 34) (formerly Article 30 of the EC Treaty)[168]
- Freedom of movement of persons (TFEU Article 45) (former Article 39 of the EC Treaty)[169]
- Freedom of movement of services (TFEU Article 56) (formerly Article 56 of the EC Treaty)[170]
- Freedom of movement of capital (TFEU Article 63) (formerly Article 56 of the EC Treaty)[171]

The freedom of movement of goods provides that there should be no barriers to the movement—including tariffs or other tax barriers—of goods within the E.U.[172] Therefore there can be a free trade of goods within the E.U.

The freedom of movement of persons guarantees that all E.U. citizens may live and work in any other E.U. state without any discrimination.[173] This allows for freedom of movement of workers, students, self-employed individuals, and pensioners within the E.U.[174]

The freedom of movement of services guarantees that service providers can offer services to any customer within the E.U.[175] Such services include banking, insurance, and professional services such as law and accounting.[176]

168. Consolidated Version of the Treaty on the Functioning of the European Union art. 34, 2008 O.J. (L 115) 0061.

169. Consolidated Version of the Treaty on the Functioning of the European Union art. 45, 2008 O.J. (L 115) 0065.

170. Consolidated Version of the Treaty on the Functioning of the European Union art. 56, 2008 O.J. (L 115) 0070.

171. Consolidated Version of the Treaty on the Functioning of the European Union art. 63, 2008 O.J. (L 115) 0071.

172. *See* Gabriel A Moens, *Freedom of Movement of Goods in the European Community*, 17 MELB. UNIV. L. REV. 733 (1989).

173. *See* Willem Maas, *Free Movement and Discrimination: Evidence from Europe, the United States, and Canada*, 15 EUR. J. MIGRATION & L. 91 (2013).

174. A PIETER VAN DER MEI, FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN COMMUNITY: CROSS-BORDER ACCESS TO PUBLIC BENEFITS (2003).

175. Case C-371/10, Nat'l Grid Indus. V. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam, 2011 E.C.R. I-12273.

176. *See* Case C-208/00, Überseering BV v. Nordic Constr. Co. Baumanagement GmbH(NCC), 2001 E.C.R. I-9943.

The freedom of the movement of capital guarantees that there are no barriers for capital movement within the E.U.[177] That means that citizens of the E.U. can move their money, financial assets, and investments freely without any hinderance of any sort within the E.U.[178]

C. Intranational Double Taxation Relief at E.U. Level

This section will summarize and discuss E.U. tax law.

1. State Aid Rules at the E.U. Level

Generally, state aid rules in the E.U. prohibit Member States from giving tax benefits to taxpayers – usually multinational corporations – or economic sectors operating in the country that would distort competition in the E.U.'s single market.[179] The goal of the state aid rules is to ensure and provide a level playing field for all businesses in the E.U.[180] Moreover, such tax benefits could prevent fair competition and in some cases harm competition and trade between Member States of the E.U.[181]

Administratively, the European Commission holds the responsibility of enforcing state aid rules.[182] The European Commission has the investigatory authority to determine whether a tax measure constitutes state aid.[183] If a country has granted stated aid, then the Commission can

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177. *See* Case C-281/98, Roman Angonese v Cassa di Risparmio di Bolzano S.p.A., 1999 E.C.R. I-4142.

178. *See* Cases 267/91 & 268/91, Keck and Mithouard, 1993 E.C.R I-06097

179. *Competition Policy*, EUR. PARLIAMENT (Oct. 2023), https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy.

180. *Id.*

181. *Id.*

182. David G. Chamberlain, *Apple, State Aid, and Arm's Length: EU General Court's Failure of Imagination*, TAX NOTES TODAY FED., 1179, 1180 (Sept. 16, 2020) https://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1031&context=acct_fac [https://perma.cc/RSY3-ND2P]. The European Commission is the executive wing of the European Union, and, among other things, is in charge of enforcing the European Union's laws. *European Commission*, EUR. UNION, https://www.europa.eu/european-union/about-eu/institutions-bodies/european-commission_en (last visited July 5, 2020) [https://perma.cc/8GPP-9VEV]. Beckett Cantley & Geoffrey Dietrich, *Apple v. European Commission: Losing the War on Corporate International Transfer Pricing*, 45 LOY. L.A. INT'L & COMP. L. REV. 1, 18 n.12 (2022). For a general references to the law on the European Commission on state aid investigations see EUR. COMM'N, COMPETITION: STATE AID PROCEDURES (2013), https://ec.europa.eu/competition/publications/factsheets/state_aid_procedures_en.pdf [https://perma.cc/6L9M-7FPY].

183. "Generally, the preliminary procedural steps for state aid cases depend on the type of aid involved. For 'notified aid'—aid that Member States plan to grant—Article 108 of the TFEU requires all Member States to notify the European Commission. Notification of plans to grant aid triggers a preliminary investigation, but the Commission can also approve

order the Member State to recover the aid granted.[184] Such recovery may include unpaid taxes plus interest.[185] Such penalties can amount to significant financial liabilities for the company that participated in the violation of the state aid rules.[186]

The E.U. policy on state aid comes from the TFEU's Article 107, paragraph 1 that states:

> Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.[187]

This can be summarized to mean that five criteria must be simultaneously met for state aid to exist:

1. "The use of state resources"[188]
2. The measure must confer an advantage to a certain undertaking[189]

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the Member State's plans after applying the 'simplified procedure.' After the preliminary investigation, the Commission either decides that there is no aid within the meaning of E.U. rules, that the aid is compatible with the internal market, or that 'serious doubts' remain as to the aid's compatibility with the internal market." Patrick Hasson, *Is Sunlight the Best Disinfectant? Reassessing Beps Action 5's Tax Ruling Transparency*, 169 U. PA. L. REV. 1545, 1596–97 (2021) (alteration in original).

184. "The OECD BEPS Project's tax ruling transparency increases the likelihood that the Member State who issued the ruling must recover, and consequently the recipient MNE must surrender, the tax concession afforded. Increased transparency enables the European Commission—the body responsible for enforcing state aid law—to more productively identify unlawful state aid." *Id.* at 1552.

185. "Following the formal investigation procedure, the Commission renders a decision with three possible outcomes. The Commission issues a positive decision upon determining that there is no aid within the meaning of E.U. law or that the aid is compatible with the internal market. The second type of decision, a conditional decision, is issued where the Commission finds the state measure is compatible with the internal market, but its implementation is subject to one or more conditions. The Commission issues the third type of decision, a negative decision, where the Commission finds the state measure is incompatible with the internal market and, as a result, prohibits its implementation. If the Member State has already implemented the measure, then it must recover the aid plus interest." *Id.* at 1597–98. *See generally* EUR. COMM'N, *supra* note 182.

186. EUR. COMM'N, *supra* note 182.

187. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, 2008 O.J. (L 115) 91–92; *See also* Michael Lang, *State Aid and Taxation: Recent Trends in the Case Law of the ECJ*, 11 EUR. ST. AID LQ 411 (2012).

188. *See* Axel Cordewener, *Asymmetrical Tax Burdens and E.U. State Aid Control*, 21 EC TAX REV. 288 (2012).

189. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, 2008 O.J. (L 115) 91–92.

3. "The advantage must be selective"
4. The measure must "distort competition"[190]
5. "Affect trade between member states".[191]

More specifically, TFEU Article 107's application to whether a Member State's tax law measures constitute state aid, four criteria must be met:

1. Favorable tax treatment[192]
2. Through State resources[193]
3. Affecting competition and trade between member states,[194] and
4. Selectivity.[195]

For a Member State's tax treatment to be selective:

1. There must be a deviation from the general tax system[196]
2. Some discrimination, and[197]
3. The taxpayer has an advantage.[198]

When a state aid issue comes before the ECJ, the ECJ employs a two-step approach to determine whether a measure by a Member State constitutes state aid and whether such a measure is compatible with the E.U. state aid rules and E.U. tax law.[199] The first step is to determine whether a Member State has indeed given state aid.[200] This is done using the criteria outlined for what constitutes state aid. The second step is an ECJ assessment as to whether the state aid is compatible with E.U. state aid and E.U. tax law.[201] This includes multiple criteria, such as how the

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190. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, 2008 O.J. (L 115) 91–92.

191. "[t]he criteria of Article 107(1) TFEU are cumulative." Phedon Nicolaides, *Do Member States Grant State Aid When They Act as Regulators?*, 17 EUR. STATE AID L. Q. 2, 16 (2018).

192. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, 2008 O.J. (L 115) 91–92.

193. *See* Cordewener, *supra* note 188.

194. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, 2008 O.J. (L 115) 91–92.

195. BEN TERRA & PETER WATTEL, EUROPEAN TAX LAW–STUDENT EDITION 153–55 (3d ed. 2012).

196. *Id.*

197. *Id.*

198. *Id.*

199. Lang, *supra* note 187.

200. Andreas Bartosch, *Is There a Need for a Rule of Reason in European State Aid Law? Or How to Arrive at a Coherent Concept of Material Selectivity?*, 47 COMMON MKT. L. REV. 729 (2010).

201. Lang, *supra* note 187.

state aid affects competition and how such state aid affects the E.U. as a whole.[202]

If the ECJ finds the state aid incompatible with E.U. law, it has the authority to require the Member State to recover the lost tax with interest from the beneficiary of the state aid.[203] If the ECJ finds the state aid compatible with E.U. law, then the ECJ may allow the state aid to continue.

2. *Harmonization and Lack of Harmonization at the E.U. Level*

The following two sections will discuss what the E.U. has harmonized with respect to taxation and what remains unharmonized.

a. Harmonization of Tax Law at the E.U. Level

Indeed, there are some uniformities and harmonization in existing tax law. One example is the Value Added Tax (VAT) through the VAT Directive. But this VAT level of harmonization still allows latitude in implementation and the VAT rates within each respective country. Other examples of harmonization at the E.U. level through Directives are:

- Excise Duties Directive[204]
- Energy Taxation Directive[205]
- Parent-Subsidiary Directive[206]
- Merger Directive[207]
- Interest and Royalties Directive[208]
- Anti-Tax Avoidance Directive[209]

Proposals that are not in effect in E.U. tax law include:

- Common Consolidated Corporate Tax Base (CCCTB)[210]
- Common Corporate Tax Rate

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202. Claire Micheau, *Tax Selectivity in State Aid Review: A Debatable Case Practice*, 17 EC TAX REV. 276 (2008).

203. Emily Forrester, *Is the State Aid Regime a Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition?*, 27 EC TAX REV. 19 (2018).

204. Council Directive 2008/118, 2008 O.J. (L9/12) (EC).

205. Council Directive 2003/96, 2003 O.J. (L283) (EC).

206. Council Directive 2011/96, 2011 O.J. (L345) (EU).

207. Council Directive 2009/133, 2009 O.J. (L310) (EC).

208. Council Directive 2003/49, 2003 O.J. (L157) (EC).

209. Council Directive 2016/1164, 2016 O.J. (L193) (EC).

210. Proposal for a Council Directive 2016/0683, 2011 (COM).

- Digital Services Tax at the E.U. level[211]
- Business in Europe: Framework for Income Taxation (BEFIT)[212]

While these proposals are still under discussion, it is unclear whether they will become law at any time in the near future. Moreover, this research does not focus on these proposals. These are just examples of attempted harmonization. Indeed, such harmonization – even of the existing directives in place – is limited. The main reason for this limited harmonization is due to the competencies of taxation remaining within the individual states of the EU.

b. Lack of Harmonization at the E.U. Level

There is not extensive harmonization of rules in the EU. There is only harmonization on a few issues in taxation, such as VAT. In short, international double tax relief is done by double tax conventions. The E.C.J has stated that there are no obligations for states in the E.U. to relieve double taxation. Moreover, there is no obligation to conclude tax treaties. As a result, even if there is a double tax treaty, there may be no double tax relief as in *Kerckhaert-Morress,* discussed *supra*.

E.U. states are free to conclude bilateral or multilateral tax agreements to help taxpayers avoid double taxation,[213] but there is no obligation for states to engage in such agreements.[214]

Thus, harmonization of tax law at the E.U. level is incomplete.[215] States can maintain their own tax laws provided they do not infringe E.U. substantive law and E.U. principles – especially those relating to state aid, anti-avoidance measures, and non-discrimination rules.[216] Moreover, there is no requirement for uniformity in tax laws across the E.U.[217]

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211. Relatedly see the rules for digital services taxation Council Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance). E.C. Regulation, 2022/2065, 2022 O.J. (L277) (E.C.), amending.

212. *Business in Europe: Framework for Income Taxation (BEFIT) Proposal,* EUR. COMM'N,. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13463-Business-in-Europe-Framework-for-Income-Taxation-BEFIT-_en (last accessed Aug 6, 2023) [https://perma.cc/4FUQ-39JR].

213. The Nordic Multilateral Tax Treaty is an example of such a multilateral instrument involving Member States of the EU. MARJAANA HELMINEN, THE NORDIC MULTILATERAL TAX TREATY AS A MODEL (2014).

214. *Id.*

215. Mihaela Göndör, E.U. *Fiscal Harmonization Policy vs. National Fiscal Systems*, 9 STUDIA UNIVERSITATIS PETRU MAIOR. HISTORIA 331 (2009).

216. Each "member state of the European Union freely determines its own tax system, as long as it respects the basic rules of the European Union." Narcisa Roxana Mosteanu & Mihaela Mitroi, *European Tax Models*, 3 ECON. WORLD 18, 18–19 (2015).

217. Currently, for any E.U. level tax change, all member states must agree because "of the requirement that tax provisions be approved unanimously by all Member States, as it

D. Testing the Effectiveness of the E.U. Tax Treaty System for Relieving Double Taxation – Showing the Ineffectiveness of the Current System: How Does Double Taxation Continue to Occur in the E.U.?

This section will show the effectiveness of the tax treaty network in the E.U. and attempt to show certain areas where the E.U. tax treaty network does not provide double tax relief. This section hopes to prove that there are many areas where double tax relief could continue to occur; however, this does not attempt to provide a holistic account of the ineffectiveness of the current tax treaty system.

1. Some Member States of the E.U. Do Not Have Double Tax Treaties with Each Other

Some countries within the E.U. do not have tax treaties with each other. Admittedly, most E.U. Member States have tax treaties with each other.

The Netherlands and Cyprus only recently concluded a treaty in 2021.[218] This is striking because the Netherlands has one of the most extensive tax treaty networks in the world.[219] Admittedly, there could be political reasons for the Netherlands not having a tax treaty with certain countries.[220] But given that all the countries in the E.U. are part of the same supranational organization, such political differences would hopefully be overcome with membership in the E.U.[221]

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would be mandatory and would involve complete uniformity of taxation throughout the EU." Walter Hellerstein & Charles E McLure, *The European Commission's Report on Company Income Taxation: What the E.U. Can Learn from the Experience of the U.S. States*, 11 INT'L TAX AND PUB. FIN. 199, 200 (2004).

218. Granted, this was the last E.U. Member State with which the Netherlands did not have a tax treaty.

219. *See* Francis Weyzig, *Tax Treaty Shopping: Structural Determinants of Foreign Direct Investment Routed through the Netherlands*, 20 INT'L TAX & PUB. FIN. 910, 911 (2013).

220. "The lack of policy coherence is therefore unintended, which is related to the lack of institutional arrangements to align tax and development policies. However, the causes of policy incoherence are also structural and political in nature." Francis Weyzig & Michiel Van Dijk, *Incoherence between Tax and Development Policies: The Case of the Netherlands*, 30 THIRD WORLD Q. 1259, 1274 (2009).

221. "But more importantly perhaps, the move of organized interests onto the European scene was expected to be further accelerated by European bureaucrats who, in their search for a constituency, would be more than willing to promote interest organization on a scale coterminous with their supra-national jurisdiction." Wolfgang Streeck & Philippe C. Schmitter, *From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market*, 19 POL. & SOC'Y 133, 134 (1991).

Thus, relying on tax treaties and the tax treaty network within the E.U. can prove insufficient, as directives themselves do not cover all instances of double taxation. Moreover, E.U. directives usually only deal with economic double taxation. One example of such a directive is the Parent-Subsidiary Directive providing relief across the E.U. on dividends sent from one entity in the E.U. to another entity in the E.U.[222] This is an example of a directive dealing with economic double taxation. Likewise, the Mergers & Acquisitions Directive dealing with the taxation of amalgamation activity only deals with economic double taxation.[223]

2. Even If There Is a Double Tax Treaty Between Member States, Such a Treaty May Not Be Enough Because the Treaty Refers to Domestic Law

Even if there is a tax treaty, double taxation may still exist. Such a dynamic was evidenced in *Kerckhaert-Morress,* discussed *supra,* where the taxpayer had income going from France to Belgium and was subject to double taxation despite the existence of a French-Belgian tax treaty. The reason that the double tax treaty did not provide relief for double taxation is because the mechanism for providing double tax relief referred to a provision in Belgian domestic law. However, the Belgian legislature had subsequently changed the law that the tax treaty referenced. Because of that domestic legislative change, the tax treaty did not reference any law. Thus, there was no double tax relief despite the existence of a tax treaty. Therefore, even if there exists a tax treaty, the treaty may not provide double tax relief.

Jasper Korving in his Ph.D. dissertation wrote that double taxation could continue to exist in the E.U. for the following reasons:[224]

- Each of the 28 E.U. Member States are allowed to create its own direct tax system based on territoriality.[225]
- In cross-border situations, distortions occur where neutrality of taxation is lost due to the parallel application of territoriality. The CJEU favors this approach.[226]

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222. Marjaana Helminen, *Dividend Equivalent Benefits and the Concept of Profit Distribution of the EC Parent-Subsidiary Directive*, 9 EC TAX REV. 161 (2000).

223. Andreas Benecke & Arne Schnitger, *Final Amendments to the Merger Directive: Avoidance of Economic Double Taxation and Application to Hybrid Entities, Two Conflicting Goals*, 33 INTERTAX 170 (2005).

224. Jasper Korving, Internal Market Neutrality (2017) (Ph.D. dissertation, Maastricht University), https://cris.maastrichtuniversity.nl/en/publications/internal-market-neutrality (last visited Aug 6, 2023) [https://perma.cc/ZGL5-2QDH].

225. *Id.*

226. *Id.*

- The supranational law of the internal market does not coordinate tax policy in the EU.[227]
- E.U. law only requires member states to create tax neutral laws from a unilateral approach.[228]

Thus, double taxation can still exist because, as Jasper Korving has discussed in his Ph.D. dissertation, each member state of the E.U. can create its own tax system.[229] The lack of supranational coordination means that distortions cannot be mitigated or resolved easily. Moreover, just because there is a tax treaty system in the EU, does not mean that the treaty system can resolve distortions and double taxation.

3. Double Taxation Can Occur Due to Allocation Issues That Are Personal in Scope — Such as Differences in Tax Rates

Double taxation can occur due to allocation issues that are personal in scope.[230] If a taxpayer earns cross-border income in two states where each state has different tax rates, then the taxpayer may be subject to double taxation.[231] If each country claims a right to tax the entire income in their jurisdiction, again the taxpayer may be subject to double taxation.[232] Moreover, if the countries do not provide the requisite amount of double tax relief, then the taxpayer could be subject to unrelieved double taxation.[233]

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227. *Id.*

228. *Id.*

229. *Id.*

230. "Moreover, treaty rules do not "allocate" jurisdiction to tax to the contracting states. States have original jurisdiction to tax, and by concluding tax treaties they agree to restrict their substantive tax law reciprocally." Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 INT'L TAX & BUS. LAW 4, 22 (1986).

231. "When a taxpayer makes two investments, he or she has the option to choose different states for these investments or to concentrate these investments within a single state." Wolfgang Schön, *Losing Out at the Snooker Table: Cross-Border Loss Compensation for PE's and the Fundamental Freedoms, in* A VISION OF TAXES WITHIN AND OUTSIDE EUROPEAN BORDERS 813 (L. Hinnekens, P. Hinnekens eds. 2008).

232. Income that "is subject to double taxation because all countries exert their right to tax to the full . . . . Double taxation results from an overlap of jurisdiction to tax between a residence state, where a recipient of income lives, and a source state, where that recipient's income was generated. . . . state claimed the right to tax the same income. . . ." Thomas Rixen, *From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance*, 18 REV. INT'L POL. J. ECON. 197, 200–13 (2011).

233. Especially in "the absence of an ultimate authority on this interpretation and application of the treaties results in a steadily rising number of cases of unrelieved double taxation." Kees Van Raad, *International Coordination of Tax Treaty Interpretation and Application*, 29 INTERTAX (2001).

Another allocation issue can arise when the same type of income is categorized differently in different countries. Such a scenario can occur when a business is taxed on its worldwide income and another country taxes that same income to the extent that income was earned within that second country's borders. Thus, this can result in double taxation where the same income is taxed twice in different ways.

Granted, often double tax treaties can relieve such double tax burdens, but even if such tax treaties exist, there is no guarantee that double taxation relief will result.

4. Limitations of the Multilateral Instrument ("MLI") in Coordinating Tax Policy in the EU: Opaque vs. Transparent Entities Leading to Double Taxation or Double Non-Taxation

The MLI is a legal agreement that was created as a result of the OECD's Base Erosion and Profit Shifting ("BEPS") project.[234] The goal of the MLI was to produce a swift change to tax treaties to more easily achieve the objectives of the BEPS project.[235] The MLI required that countries agree to the MLI and assent to certain provisions in the MLI.[236] Many of the provisions of the MLI are beyond the scope of this article.[237] However, the key aspect of the MLI is that it is entirely voluntary.[238] No country within the E.U. or elsewhere in the world is obligated to join the MLI.[239] Thus, the effectiveness of the MLI depends on the voluntary nature of the countries assenting to the MLI and the provisions within it.[240]

Despite the excellent conception and administration of the MLI, the MLI has limitations. Among those limitations is the ability of tax treaty partners to recognize transparent entities. For example, only a third of the

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234. *See* Bartosz Bacia & Patryk Toporowski, *OECD Multilateral Instrument: The New Era in International Tax Law*, 9 J. ADVANCED RSCH. L. AND ECON. 386 (2018).

235. David Kleist, *The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS—Some Thoughts on Complexity and Uncertainty*, 2018 NORDIC TAX J. 31 (2018).

236. Nathalie Bravo, *Mandatory Binding Arbitration in the BEPS Multilateral Instrument*, 47 INTERTAX 693 (2019).

237. *See generally* Alexander Bosman, *General Aspects of the Multilateral Instrument*, 45 INTERTAX 649 (2017) (discussing the MLI).

238. *See* Joseph Morley, *Why the MLI Will Have Limited Direct Impact on Base Erosion Profit Shifting*, 39 NW. J. INT'L L. & BUS. 225, 226–227 (2018).

239. Yariv Brauner, *McBEPS: The MLI–The First Multilateral Tax Treaty That Has Never Been*, 46 INTERTAX 6 (2018).

240. Juan Manuel Vazquez, *Indirect Taxation of Digital Services after BEPS: An Multilateral Instrument to Achieve Harmonization and Effective Enforcement*, 43 INT'L TAX J. 19, 21–22 (2017).

Netherlands' tax treaty partners have assented to the clause that recognizes transparent entities – as opposed to opaque entities.[241]

An opaque entity is similar to a company and is taxed at the corporate level.[242] A transparent entity is similar to a partnership where the partners are taxed rather than the "entity" of the partnership.[243] Different countries have different rules for taxing opaque and transparent entities. Given the mismatch of rules, tax planners can take advantage of such tax planning to create "hybrid-mismatch" arrangements. In a hybrid-mismatch arrangement, one country may recognize an opaque entity as transparent, and another country may recognize a transparent company as opaque thereby receiving the opposite tax treatment than was intended in the original country.[244] This could lead to stateless income in some cases. Or such an arrangement could lead to tax arbitrage where income taxes are significantly reduced.

Returning to the MLI, even though the Netherlands agreed to the MLI provisions on recognizing transparent entities, many countries within the E.U. did not agree to that provision. In that case, a situation could occur where the entity may be subject to taxation in both countries resulting in double taxation. Not just double non-taxation, but double taxation because both countries may recognize a specific entity as opaque – even if the taxpayer intended for the company to not be opaque. Regardless of whether the result leads to double non-taxation or double taxation based on mismatched opaque and transparent definitions, such mismatches show the inherent limitations of the MLI for coordinating tax policy in the EU.

Thus, the MLI is only so effective. Only a third of the Netherlands' tax treaty partners have such a clause to recognize a transparent entity. Transparent entities may be transparent in one country and not another. Therefore, such entities would be subject to double taxation.

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241. "Of those jurisdictions [that] . . . have indicated a specific reservation against article 3(1) in respect of those . . . treaties . . . which 'address whether income derived by or through entities or arrangements that are treated as fiscally transparent under the tax law of either Contracting Jurisdiction' and two (Australia and the Netherlands) have indicated such reservation where a treaty contains such a provision which also 'identifies in detail the treatment of specific types of entities or arrangements.'" Mark Brabazon, *After the Flood: Transparent and Hybrid Entities in Australian Tax Treaties after the MLI*, 17 EJTR 1, 11 (2019).

242. Anne Fairpo, *Entity Classification,* TOLLEY (2023), https://www.lexisnexis.co.uk/tolley/tax/guidance/entity-classification#:~:text=Implications%20of%20entity%20classification&text=A%20subsidiary%20may%20either%20be,taxed%20in%20its%20own%20right.

243. *Id.*

244. *See generally* HYBRID MISMATCH ARRANGEMENTS: TAX POLICY AND COMPLIANCE ISSUES, ORG. ECON. CO-OPERATION & DEV. 5–7 (Mar. 2012), https://www.oecd.org/ctp/aggressive/HYBRIDS_ENG_Final_October2012.pdf.

5. When Two States Claim to Be the Source State: The Challenge of the Source State - A Classic Case of International Double Taxation Occurring Within the E.U.

A classic case of international double taxation that could occur within the E.U. is when both states claim the income as the source state. For example, what if the income from State C is sent as a dividend to states A and B? Then State A and B claim to be the source state. This is a classic example of international taxation that can occur outside the E.U. scenario. C is the resident.

In general, tax treaties work to prevent double taxation by providing uniform rules that tax treaty partners can follow to levy taxes on cross-border income.[245] Consider an example where three hypothetical states –

245. In general, "[g]reater integration and expansion of cross-border economic activity since World War II has led states to enter into an increasing range of sophisticated international coordination and harmonisation arrangements. In the area of taxation , a worldwide network of bilateral treaties, known as double tax agreements (or DTAs), are now well established to prevent double taxation on cross-border transactions and to stem fiscal evasion and avoidance. In the area of social security, another type of bilateral treaty, known as a social security convention (or SSC), plays a similar role in cross-border social security harmonisation and coordination as DTAs do for tax." Andrew Smith, *New Zealand's Social Security Conventions: A Critical Analysis with A Tax Focus*, 17 NEW ZEALAND J. TAX'N & POL'Y 87 (2011). Indeed, "[t]he history of international taxation dates back to the early 1900s. In the aftermath of World War I many governments were concerned that international trade, which was vital for generating revenue in a postwar period, would cease because of "double taxation." Double taxation occurs when more than one country levies a tax on the same item of income from a single taxpayer. In order to prevent double taxation and encourage cross-border transactions, governments entered into bilateral tax treaties and enacted unilateral relief mechanisms, such as foreign tax credits, exemptions, and deductions." Sarah Beaudoin, *Death & Taxes, or Lack Thereof: Conflicting Views of Multinational Corporate Digital Tax Between the United States and European Union*, 43 SUFFOLK TRANSNAT'L L. REV. 129, 139–40 (2020). Specifically, "[a]s with tax treaties in general, the principle purpose of the U.S.-Mexico Treaty is to prevent double taxation by providing a variety of tax reductions and exemptions for income from cross-border trade and investment. The Treaty provisions directly related to determining the source of income and those offering relief from double taxation are discussed below." Michael S. Schadewald & Tracy A. Kaye, *Source of Income Rules and Treaty Relief from Double Taxation Within the NAFTA Trading Bloc*, 61 LA. L. REV. 353, 405 (2001). But sometimes problems can arise: "[i]n situations where countries use different domestic source rules, bilateral income tax treaties may resolve conflicts in source rules. U.S. treaties typically provide that for the purposes of the U.S. foreign tax credit limitation, income that may be taxed by the other country under the treaty will be sourced in that country. Sometimes treaties even provide explicit source rules in separate articles. Thus, for example, treaties may prevent double taxation in the situation where a U.S. resident is subject to a source tax on the sale of foreign corporate stock. However, existing treaties fail to comprehensively deal with potential conflicts in domestic source rules. In this regard, treaties often lack specific details with regard to attributing business profits to permanent establishments, and countries may interpret such provisions differently.

State A, State B, and State C – have a potential claim to income. In theory, a tax treaty should allocate the right to tax. However, even if all these three hypothetical states have a tax treaty with each other, double taxation can still exist. Consider even if the tax treaty does specify which state has the primary right to tax the income in question, what would be the result if States A and B claim to be the source state? In such a scenario, a conflict may arise leading to double taxation.

6. Artificially Manipulated Prices and Double Non-Taxation: How Such a Lack of Tax Coordination Undermines the E.U. Tax System

Artificial manipulation of prices based on transfer pricing mispricing could lead to double non-taxation.[246] This manipulation shows the dilemma of how the E.U. Tax system can be undermined without central tax organization.

Based on the scenario of States A, B, and C just discussed, double non-taxation related to pricing problems may occur if a company in State C manipulates the prices with its transfer pricing methodology by not following the arm's length standard to low tax jurisdictions. For example, a company operating in State C might sell a product to a related company operating in State B for a price that is lower than an arm's length price. This artificially lowered price would reduce the profits in State C. This price also shifts the profits to State B. If State B has a lower tax rate, then the overall corporation would pay fewer taxes. As a result, the company operating in State C could potentially claim the deductions for the costs of the goods sold to the related party in State A. This deduction for costs of goods sold shows how even if tax treaties exist, artificial manipulation of transfer pricing can lead to double non-taxation through a lack of tax coordination.

Without a central coordinated policy or system, it is feasible to imagine that such arrangements within the E.U. without a central coordinated policy or system could occur.

Moreover, in limiting source taxation and guaranteeing that countries use foreign tax credit or exemption systems, treaties aim to avoid double taxation, and thus do not prevent the non-taxation of cross-border income that results when countries' varying source rules create under lapping tax jurisdiction. Furthermore, a bilateral treaty-based solution to the problem of double taxation or non-taxation stemming from source rule conflicts is an incomplete solution, because treaties between countries may not always exist." Fred B. Brown, *An Equity-Based, Multilateral Approach for Sourcing Income Among Nations*, 11 FLA. TAX REV. 565, 585 (2011).

246. Tomislav Krmek, *E.U. Tax Probe, State Aid & the Case of Amazon,* 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 40, 66 (2017).

E. ECJ Case Law and Harmonization of Tax Law at the E.U. Level

This section delves into the topic of double taxation in the context of E.U. tax law. Specifically, this section focuses on the most cited case law of the ECJ regarding an explicit or implicit discussion of the non-existence of an obligation to avoid double taxation in E.U. tax law. For example, the *Biehl* case does not explicitly deal with double taxation, but its discussion of residency[247] and tax rates[248] makes it one of the most widely cited cases in the ECJ.[249] As such, the avoidance of double taxation within the E.U. depends entirely on the existence of a tax treaty network between Member States of the E.U.[250] Moreover, this section will discuss how double tax conventions help with the avoidance of international juridical double taxation. However, E.U. Directives address economic double taxation in certain circumstances.[251]

Double taxation continues to create a significant burden and concern for businesses operating in multiple jurisdictions.[252] In the E.U., partial double taxation is partly resolved, but there are still issues that need to be addressed. In the context of ECJ case law, the E.U. freedoms, such as the freedom of movement and the freedom of the movement of capital have only resolved double taxation to the extent that any double taxation violates those freedoms.[253] Where the freedoms are not violated, the ECJ cannot resolve double taxation.[254] One of the main areas of double taxation in E.U. tax law is distortions.[255]

Distortions occur in the E.U. because there is no supranational authority in the E.U. that can harmonize tax law.[256] As a result, E.U. tax law does not have total harmonization. Thus, each country is allowed and still maintains the sovereignty to create its own tax law.[257]

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247. Case C-175/88, Biehl v. Administration des Contributions of the Grand-Duchy Luxembourg, 1990 E.C.R. I–1779.

248. *Id.*

249. *See* Ruth Mason, *Flunking the ECJ's Tax Discrimination Test*, 46 COLUM. J. TRANSNAT'L L. 72, 95–97 (2007).

250. *See id.* at 10–11.

251. *See id.* at 16.

252. *Id.* at 45.

253. *See* Case C–336/96, Gilly v. Directeur des services fiscaux du BasRhin, 1998 E.C.R. I–02793, ¶ 49 (holding that a tax "disparity" that resulted from differences between the non-discriminatory tax laws of two Member States did not violate the EC Treaty).

254. Mason, *supra* note 249 at 16 n.59 (2007).

255. *See id.* at 15.

256. *Id.*

257. *Id.* at 16; *see* Case C–80/94, Wielockx v. Inspecteur der Directe Belastingen, 1995 E.C.R. I–02493, ¶ 16 ("direct taxation falls within the competence of the Member States").

This section will summarize ECJ case law that focuses on violations of freedoms. The ECJ case law provides a non-existing obligation for Member States to avoid double taxation.[258] Thus, the avoidance of double taxation depends on the existence of tax treaties between Member States.[259] E.U. law does not require countries to enter into tax treaties.[260] Moreover, even if there are double tax treaties, those tax treaties can be limited to the avoidance of international juridical taxation.[261] On the other hand, European Directives avoid economic double taxation in many circumstances.[262]

The following section discusses the current state of ECJ case law that indicates the limits of tax law harmonization at the E.U. level. Specifically, the following section summarizes the facts, legal reasoning, and interpretation methods of the ECJ case law that provide rules for how far the ECJ will go to harmonize or forbid harmonization. This discussion thereby will shed light on the balance the ECJ fosters within the E.U.

The goal is to distinguish case law between existing tax rules in relation to the fundamental freedoms to show how the rules as they exist now somewhat provide a basis to lead to double tax relief. The following cases are discussed in further detail in this section:

- *Biehl v. Administration des Contributions of the Grand-Duchy Luxembourg*[263]
- *Bachmann v. Belgian State*[264]
- *Finanzamt Köln-Altstadt v. Schumacker*[265]
- *Marks & Spencer PLC v. David Halsey*[266]
- Procureur du Roi v. Dassonville *v. Dassonville*[267]
- *Gilly v. Directeur des services fiscaux du Bas-Rhin* [268]

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258. Mason, *supra* note 249 at 16 n.59 (2007).
259. *Id.* at 10.
260. *Id.* at 15.
261. Brian J. Arnold, *An Introduction to Tax Treaties*, UNITED NATIONS, https://www.un.org/esa/ffd/wp-content/uploads/2015/10/TT_Introduction_Eng.pdf [https://perma.cc/5VHG-WBBN].
262. *Id.* at 15–16.
263. Case C-175/88, Biehl v. Administration des Contributions of the Grand-Duchy Luxembourg, 1990 E.C.R. I–1779.
264. Case C-204/90, Bachmann v. Belgian State, 1992 E.C.R. I-00249.
265. Case C-279/93, Finanzamt Köln-Altstadt v. Schumacker, 1995 E.C.R. I–00225.
266. Case C-446/03, Marks & Spencer PLC v. David Halsey, 2005 E.C.R. I-10837.
267. Case 8-74, Procureur du Roi v. Dassonville, 1974 E.C.R. I-00837, 1.
268. Case C-336/96, Gilly v. Directeur des services fiscaux du Bas-Rhin, 1998 E.C.R. I-02793.

1. Biehl Case — Extending the Definition of a "National" to "Resident"

For the court's reasoning in *Biehl*, the freedom of movement refers to "nationals," but the Luxembourg law referred to "residents."[269] The court extends the protections of freedom of movement to residents and non-residents of member states.[270]

In the following sentence from *Biehl*, the court equivocates the term "resident" and "national" here:

> that Article 48(2) of the Treaty precludes a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and are resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the tax year are to remain the property of the Treasury and are not repayable.[271]

Article 48(2) provides for freedom of movement of nationals of the E.U., but it does not explicitly reference "residents."[272] Admittedly, this determination is conclusory in the court's decision. The court does not offer evidence why the definition of "national" should extend to "resident." Therefore, the court's reasoning implies that certain definitions of words can have extended or equivalent meanings.

2. Bachmann Case — Cohesion of the Tax System

The *Bachmann* case took place in the source state.[273] In the *Bachmann* case, a German national named Bachmann used to work and live in Germany.[274] Bachmann took up unemployment in Belgium.[275] Later, Bachmann, while still living in Germany, made payments to an insurance

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269. Case C-175/88, Klaus Biehl v. Administration des contributions du grand-duché de Luxembourg*,* 1990 E.C.R. I-01779; *see.* Kees Van Raad, *Non-Discriminatory Income Taxation of Non-Resident Taxpayers by Member States of the European Union: A Proposal*, 26 BROOK. J. INT'L L. 1481, 1486 (2001).

270. Case C-175/88 *Biehl,* 1990 E.C.R. I-01779.

271. *Id.*

272. *Id.*

273. Peter Wattel has written, "Bachmann, the Court accepted that tax discrimination . . . allocated by international tax law to the source State, in this case the German tax jurisdiction." Peter J Wattel*, The EC Court's Attempts to Reconcile the Treaty Freedoms with International Tax Law*, 33 COMMON MKT. L. REV. 223 (1996).

274. Case C-204/90, Bachmann v. Belgian State, 1992 E.C.R. I-00249, ⁋ 2.

275. *Id.*

plan outside of Belgium.[276] Belgium denied a deduction to Bachmann for insurance payments made to Germany.[277] Belgium denied these deductions because the Belgian tax law provided that in order to get a deduction in Belgium, the insurance company must be based in Belgium.[278] Moreover, the Belgian system did not tax the proceeds from the insurance payments.[279] Thus, Belgian law also provided that pensions that were set up without deductions were not subject to tax.[280]

Belgium argued before the court that in order to promote the cohesion of the tax system, Belgium had to maintain the non-deductibility status of the insurance.[281] The cohesion is shown by the Belgian state having deductibility and non-deductibility provisions at the same time.[282]

The court agreed with Belgium and reasoned that the fiscal cohesion of the tax system could permit discrimination on a non-resident.[283] The court allowed the national court to decide if other less restrictive measures could still protect public interest.[284] Conversely, in the *Kerckhaert* case the court does not give a justification because the court did not detect a violation.[285] The issue of the "cohesion of the tax system" was not relevant in the *Kerckhaert* case analysis.[286]

3. Schumacker Case — At Least a Single State Must Provide Tax Benefits

The *Schumacker* case took place in the resident state.[287] In *Schumacker*, the taxpayer named Schumacker lived in Belgiu, but he earned the entirety of his income in Germany.[288] Germany denied Schumacker certain tax benefits available to those living in Germany.[289] Specifically, Germany denied marital income splitting, automatic refunds of tax over-withholdings, and other personal and family deductions.[290] Schumacker argued Germany discriminated against him in violation of the

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276. *Id.*
277. *Id.* at ¶ 3.
278. *Id.* at ¶ 10.
279. *Id.*
280. *Id.*
281. *Id.* at ¶ 17.
282. *Id.* at ¶ 22.
283. *Id.* at ¶ 27.
284. *Id.* at ¶¶ 28–30.
285. Case C-513/04, Kerckhaert v. Belgische Staat, 2006 E.C.R. I-10967, ⁋ 24.
286. *Id.* at 15–24.
287. Case C-279/93, Finanzamt Köln-Altstadt v. Schumacker, 1995 E.C.R. I–00225.
288. *Id.* at ¶ 15.
289. *Id.* at ¶ 18.
290. *Id.* at ¶ 17.

freedom of movement because Germany placed him in a "less advantageous position than residents" of Germany. The ECJ reasoned that member states do not always need to tax residents and non-residents in the exact same way despite being "similarly situated."[291] The court reasoned in the following way:

In the case of a non-resident who receives a major part of his income and almost all his family income in a Member State other than that of his residence, discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment.[292]

In other words, the court reasoned that when a non-resident worker earns most of his income in outside of his resident state, the source state must tax that taxpayer as a resident taxpayer.[293] The court's reasoning is distinctively different from tax treaty reasoning.

Normally, tax treaties do not provide non-resident tax benefits. Indeed, tax treaties frequently work to prevent non-residents from gaining tax benefits, such as through limitations on benefits provisions.[294]

Ultimately, the court in the *Schumacker* case reasoned that taxpayers in general should be able to claim tax benefits in at least one state.[295]

4. Marks & Spencer Case — Exhausting All Other Available Relief

The *Marks & Spencer* case was in the source state.[296] This case deals with a company named Marks & Spencer (M&S).[297] M&S was a company registered and incorporated in England and Wales.[298] M&S in England and

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291. *Id.* at ¶ 37.
292. *Id.* at ¶ 38.
293. *Id.* at ¶ 41.
294. "Bilateral income tax treaties between EU member states and the United States now routinely contain 'limitations on benefits' clauses, which are intended to limit the treaties' benefits to tax residents of the contracting state. The treaty between the United States and the Netherlands, for example, allows its reduced withholding tax rates on dividends, interest, and royalties to companies only if 'more than 30 percent of the aggregate vote and value . . . is owned, directly or indirectly, by qualified persons resident in the Netherlands.' While their purposes are generally the same, the details of these limitations clauses vary, depending on when the treaty was negotiated and sometimes on specific bilateral considerations. The ECJ's Open-Skies decisions suggest that these clauses may have to be renegotiated to permit benefits to nationals of other member states." Michael J. Graetz & Alvin C. Warren, Jr., *Income Tax Discrimination and the Political and Economic Integration of Europe*, 115 YALE L.J. 1186, 1249 (2006).
295. Case C-279/93, *Schumacker*, 1995 E.C.R. I-00225, ¶¶ 40–41.
296. Case C-446/03, Marks & Spencer PLC v. David Halsey, 2005 E.C.R. I-10837.
297. *Id.* at ¶ 18.
298. *Id.*

Wales was the parent company of many other subsidiaries.[299] Many of these subsidiaries were in other states of the E.U.[300] Over the years in question, several of the E.U. subsidiaries in Member States underwent several mergers and acquisitions.[301] If the subsidiaries operated in a country, the subsidiary had a registered office in that member state.[302] The subsidiaries had no permanent establishments in the UK.[303] Moreover, the subsidiaries did not do business in the UK or with the UK.[304] For the years in question, M&S in England and Wales claimed group relief in the UK for losses incurred by the subsidiaries in other member states.[305] The UK tax administration rejected the group relief claim, because UK law only allowed group relief for losses incurred in the UK.[306]

The issue before the court was whether the UK tax law system violated the freedom of establishment by preventing M&S from claiming losses incurred by subsidiaries in other member states – especially within the context of UK law allowing deductions of losses of resident member states.[307]

The court reasoned that as a matter of comparison, the restriction of group relief to losses from foreign subsidiaries was a type of discrimination.[308] Moreover, the court reasoned that although the UK did not tax the gains of the foreign subsidiaries, this did not, by itself, justify restricting the group relief that the foreign subsidiaries could have given.[309]

The court examined three justifications that the UK provided for its discriminatory restriction.[310] Those three justifications the court looked at were: balanced allocation of taxing powers, double deduction, use of multiple losses, and tax avoidance prevention measures.[311] The court reasoned that these justifications by themselves were not enough to uphold such a restriction on stopping group relief for subsidiaries.[312]

The court ultimately concluded that a member state cannot prohibit a parent company from deducting losses of a foreign subsidiary if the parent

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299. *Id.* at ¶ 19.
300. *Id.* at ¶ 19–21.
301. *Id.* at ¶ 21.
302. *Id.* at ¶ 23.
303. *Id.*
304. *Id.*
305. *Id.* at ¶ 22.
306. *Id.* at ¶ 24.
307. *Id.* at ¶¶ 27–28.
308. *Id.* at ¶¶ 31–32.
309. *Id.* at ¶ 40.
310. *Id.* at ¶ 43.
311. *Id.*
312. *Id.* at ¶ 51.

company can show that it exhausted all available possibilities available in the state of residence.[313] Thus, the UK could not prohibit M&S from deducting foreign losses if M&S could show that it exhausted all other possibly remedies of group relief. Otherwise, such a restriction by UK law would violate the freedom of establishment.[314]

Thus, the cornerstone rule of this case shows that the freedom of establishment allows a company to take advantage of a group relief system that otherwise prohibits deduction of losses from foreign subsidiaries – only if that company can show it exhausted all possible remedies of group relief.[315] In other words, the freedom of establishment guarantees that group relief is available if the taxpayer exhausts all other remedies of group relief regarding foreign subsidiaries.[316]

5. Dassonville Case — Restrictions on Freedom of Trade, or Equivalents, Are Not Allowed

In *Dassonville*, a seller named Dassonville in Belgium sold Scotch whisky.[317] Dassonville sold the Scotch whisky without a certificate of origin.[318] Belgian law required that such products be sold with a government approved certificate.[319] Moreover, certain importers and sellers of Scotch whisky could more easily access a certificate than others.[320] Dassonville fell into the category of sellers who could not easily get a certificate. Belgium prosecuted Dassonville.[321] Dassonville argued that such a rule and prosecution violated the European treaty guarantee of no quantitative restriction on trade – or such equivalent measures.[322] The Belgian government argued that the rule was not to regulate trade but to protect customers.[323] Therefore, the Belgian government contended that such a rule fell outside the treaty freedoms which prohibited quantitative restriction of trade.[324] Furthermore, the Belgian government argued that the restriction was not equivalent to a quantitative restriction on trade.[325]

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313. *Id.* at ¶ 59.
314. *Id.*
315. *Id.*
316. *Id.*
317. Case 8-74, Procureur du Roi v. Dassonville, 1974 E.C.R. I-00837, 1.
318. *Id.*
319. *Id.*
320. *Id.* at 2.
321. *Id.*
322. *Id.* at 1.
323. *Id.* at 2.
324. *Id.* at 2–3.
325. *Id.* at 4.

The Court of Justice held that Belgian law violated the guarantee of no quantitative or equivalent measures to restrict trade.[326] The court reasoned that the Belgian rule requiring a certificate violated the free trade provision because certificates were more easily accessible for certain importers than for other importers and sellers.[327] Thus, since Dassonville could not easily get a certificate–and fell into a category of such sellers and importers–such a restriction by Belgian law violated the free trade provision in the European treaties.

In reflecting upon the reasoning in this case the law is unclear. If the law were immediately clear, the question would have likely not arisen in court. The gap in law seems to indicate that there was a question in the scope and teleological—in other words, purpose—of E.U. law. In a general sense, the court examined the purpose of the treaty guarantees.[328] In a specific sense, the court looked at the freedom of trade rule outlined in the European treaties.[329]

In interpreting the legal reasoning rule that comes from this case, the court indicates that in looking at a law, a court must not only look at the law as stated but also the purpose of the law.[330] The law's purpose is to ensure that the goals of the E.U. are met.[331] Among these E.U. goals are the prohibitions on restrictions on trade.[332]

6. Gilly Case — Distortions in Taxation Do Not Violate the European Treaties

In the *Gilly* case, the ECJ held that when the differences between two Member States' non-discriminatory tax laws that led to a "disparity," they do not violate the EC Treaty.[333]

The facts of the case involved a cross-border "disparity," that led to a difference in taxation caused by Gilly's residence.[334] Gilly's residence limited the foreign tax credit available.[335] However, this "disparity" that led to a disadvantage that did not violate the EC Treaty "in the absence of any Community harmonisation of scales of direct taxation."[336] The ECJ

326. *Id.* at 7.
327. *Id.* at 6.
328. *Id.* at 3.
329. *Id.* at 4.
330. *See id.* at 2–6.
331. *See id.* at 7–9.
332. *See id.* at 7.
333. Case C-336/96, Gilly v. Directeur des services fiscaux du Bas-Rhin, 1998 E.C.R. I-02793, ¶¶ 53–54.
334. *Id.* at ¶ 44.
335. *Id.* at ¶ 3–12.
336. *Id.* at ¶ 34.

reasoned that the two "reduce its tax in respect of the remaining income, which would entail a loss of tax revenue for it and would thus be such as to encroach on its sovereignty in matters of direct taxation."[337]

This shows that the ECJ is unwilling to impinge on the sovereignty of E.U. Member States in the field of taxation. As European tax Professors Terra and Wattel wrote, "the [c]ourt is a balancing artist between the interests of the single internal market and the 2[8] legitimate interests of separate Member States to protect their tax bases, rather than Montesquieu's *bouche qui pronnce les paroles de la loi*."[338] In other words, the French political philosopher argues for a balance of the three parts of government – executive, legislative, and judiciary.[339] Each branch of government for a successful polity must adhere to its given role.[340]

IV. CONCLUSION

This article's main goal was to compare the differences between the E.U. and U.S. with respect to double taxation. To fulfill this aim, this article has analyzed the issues of double taxation amongst different sovereign entities within two systems: the U.S. and EU. In the U.S., the sovereign entities of the states have a constitutionally diminished capacity to the federal sovereign. In the supranational organization of the E.U., the sovereignty of the member states means that E.U. supranational law does not have supremacy over member state tax law.[341]

This article has attempted to outline and legally show why the U.S. and E.U. have different results–even when the judicial decisions have similar facts. The E.U.'s allowance of Member States to retain competencies in tax law leads to double taxation. In contrast, the US's system based on the Commerce Clause leads to double tax relief.

The article analyzed the E.U.'s framework for taxation and highlighted limitations that lead to double taxation with no relief. Despite efforts to harmonize taxation within the E.U., such as through tax treaties, double taxation continues to occur. In general, this article has demonstrated the complexities and challenges of resolving double taxation

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337. *Id.* at ¶ 48.

338. *See* TERRA & WATTEL, *supra* note 195, at 33.; *see* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIS LIVRE XI CHAPITRE VI (1748).

339. For a general discussion of the function three branches of government see Charles Edward Andrew Lincoln IV, *A Structural Etiology of the U.S. Constitution*, 43 J. LEGIS. 122 (2016).

340. *See generally* Charles Edward Andrew Lincoln IV, *Hegelian Dialectical Analysis of U.S. Voting Laws*, 42 U. DAYTON L. REV. 87, 91 (2017).

341. *See* Justin Lindeboom, *Why E.U. Law Claims Supremacy*, 38 OXFORD J. LEGAL STUD. 328 (2018).

within the E.U. Specifically, this article has showed some key areas where double taxation could occur egregiously.

As outlined at the beginning of this article, the main research question of this article is to analyze the effectiveness of double tax relief in the E.U. and the U.S. To fulfill the main end of this research, the main research objectives are to:

- Outline the historical background of taxation in both the U.S. and E.U.
- Examine separately how double taxation is resolved in the U.S. and E.U.
- Provide an explanation and investigate the internal consistency test based on the U.S. Constitution's Commerce Clause and its effectiveness in relieving double taxation.
- Demonstrating a lack of harmonization in E.U. direct tax law and a lack of harmonization of double tax relief rules.
- Fill the gap existing in the academic literature that does not discuss U.S. and E.U. double tax relief in depth.

In conclusion, the answer to the research question is that the U.S. Commerce Clause, the Dormant Commerce Clause, and the judicially created internal consistency test demand that states within the U.S. coordinate tax policy so as to not lead to double taxation. In other words, the Commerce Clause acts as the basis for coordinating double tax relief in the US.

On the other hand, the E.U. does not have such a harmonized tax policy. There is no function in the TFEU mandating harmonization of tax law. Arguably, the confluence and entirety of several ECJ tax cases taken together call for harmonization but the ECJ has not judicially mandated this yet.

Regarding future research, this article is the first in a series as part of research focusing on international double taxation in the E.U. compared to the U.S. with reference to the Commerce Clause. The two future articles will focus on "acting as a judge" and testing whether the Commerce Clause's Dormant Commerce Clause's internal consistency would lead to contrasting results in the E.U.

APPENDIX

Case Law in Source US	**Case Law in Residence US**	**Case Law in Source EU**	**Case Law in Residence E.U.**

South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).	Maryland v. Wynne, 575 U.S. 542 (2015).	Case C-379/05, Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam, 2007 E.C.R. I-9569.	Case C-513/04, Kerckhaert v. Belgische Staat. 2006 E.C.R. I-10967.
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).	Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue and Fin., 505 U.S. 71, 80 (1992) (taxing an international source of income in Iowa).	Case C-403/03, Schempp v. Finanzamt München V, 2005 E.C.R. I-06421	Case C-279/93, Finanzamt Köln-Altstadt v. Schumacker, 1995 E.C.R. I-00225.
Quill Corp. v. North Dakota, 504 U.S. 298 (1992)		C-128/08 Damseaux v Belgian State, 2009 E.C.R. I-06823.	
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 276–277 (1977) (levying Mississippi tax on a Michigan company engaged in business shipping cars to		Case C-204/90, Bachmann v. Belgian State, 1992 E.C.R. I-00249.	

dealerships in Mississippi).			
Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 178–179 (1995) (levying taxes on a Minnesota corporation that provided bus services as a carrier in Oklahoma for the services in connection with Oklahoma).		Case C-336/96, Gilly v. Directeur des services fiscaux du Bas-Rhin, 1998 E.C.R. I-02793.	
		Case C-196/04, Cadbury Schweppes plc v. Comm'rs of Inland Revenue, 2006 E.C.R. I-7995.	
		C-446/03, Marks & Spencer plc v. Halsey, 2005 E.C.R. I-10837.	