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Public international law, international taxation and tax dispute resolution

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ABSTRACT
International tax law has not been discussed much by the lawyers involved in public international law. Due to this, there exists a gap, as presently, developments in international law do not correspond to the constant developments in international tax law. This article seeks to highlight the challenges that would arise from the normative expansion of taxation law. Scholars have highlighted the need for a multilateral tax treaty. However, such attempts made by the UN and OECD have failed due to difficulties in ensuring the distribution of taxation power between the source and residence states. This issue becomes more prominent for digital economy taxation, as the digital firms may trade and operate without any physical presence in a state. The present set of proposals suggests introducing new rules for fair allocation of taxing rights and duty on the part of states to tax at a minimum rate. To this end, OECD has introduced the BEPS Inclusive Framework that would include even non-OECD members in decision making. This article underlines the impact of international tax law on different areas of international law and further points out the best practices in trade, investment, and international law so as to bring them in line with the developments in international tax law.

KEYWORDS
Customary international law; BEPS; DTTs; digital economy; tax sovereignty

I. Introduction

A multilateral tax treaty has not been possible so far, but there are proposals to tackle base erosion and profit shifting by multinationals (Base Erosion and Profit Shifting (BEPS) Project) and to tax highly digitalized businesses which may influence the fair allocation of taxing rights.[1] These proposals include the BEPS Project,[2] new rules for the alignment of taxing rights between states regarding taxation of the digital economy (Pillar 1) and the duty of states to tax at a minimum tax rate in the global anti-base erosion (GLOBE)

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[1]V Thuronyi, 'International Tax Co-operation and a Multilateral Treaty' (2001) 26 *Brooklyn Journal of International Law* 1641; D Ring, 'Prospects for A Multilateral Tax Treaty' (2001) 26 *Brooklyn Journal of International Law* 1699.

[2]The BEPS Project contains 4 Minimum standards that deal with harmful tax competition, tax treaty abuse, transfer pricing documentation, and dispute resolution (Actions 5, 6, 13, and 14), 10 Best Practices and 1 Multilateral Instrument. On the content of the BEPS Project see OECD website at <www.oecd.org/tax/beps/>.

proposal (Pillar 2). The OECD is using the BEPS Inclusive Framework to ensure that all jurisdictions, whether OECD or non-OECD countries, participate in the decision making process.[3]

In the same vein, multilateral initiatives addressing measures to enhance the tax information exchange have also been introduced that gradually modify the structure of international tax law (ITL).[4] These multilateral initiatives have resulted in the development of new international tax law rules and the creation of a new institutional framework with new actors.[5]

Consequently, ITL is evolving as a dynamic field of public international law (PIL).[6] However, little has been discussed by the lawyers involved in PIL of the consequences of the ITL developments, and therefore there is a gap between these two disciplines. The existing gap, however, has been identified by the International Law Association Study Group on ITL in one of its reports. It has provided a worldwide analysis of taxpayer's rights and introduced several 'innovative proposals' to secure effective *ex ante* protection for taxpayers.[7] ITL is evolving from guidelines and models adopted by countries bilaterally to multilateral instruments that can be subjected to signature and ratification by countries.[8]

The normative expansion of ITL however creates new challenges for trade, investment and PIL. The main challenge is to allow international taxation to cope with the increasing digitalization of the global economy while maintaining the integrity of the international order. For instance, the recent digital service tax introduced by some countries has also resulted in the US threatening to introduce trade tariffs to exports from these countries. In addition, some international tax disputes are being addressed not only from a tax law but also from a trade and investment perspective.[9]

Moreover, the introduction of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Hereinafter, 'MLI') aims to modify simultaneously

[3]Presently, BEPS Inclusive Framework has 141 jurisdictions. Non-OECD countries can now participate on equal footing on the implementation of the BEPS 4 Minimum Standards and in the process of monitoring and peer review of these standards. See on the BEPS Inclusive Framework, A Christians and L van Apeldoorn, 'The OECD Inclusive Framework' (2018) 72 *Bulletin for International Taxation*.

[4]See for example the BEPS MLI that modifies bilateral tax treaties that has been signed by 99 jurisdictions. See <www.oecd.org/tax/treaties/beps-mli-signatories-andparties.pdf>.

[5]One example of this institutional framework is the role of the G20 and the BEPS Inclusive Framework in the development of international tax law making. See IJ Mosquera, 'Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism' (2015) 7 *World Tax Journal*; W Schön, 'Is There Finally an International Tax System?' (2021) 13 *World Tax Journal*.

[6]I Grinberg and J Pauwelyn, 'The Emergence of a New International Tax Regime: The OECD's Package on BEPS' (2015) 19 (4) *ASIL's Insights*; J Chaisse and X Ji, 'Soft Law in International Law-Making: How Soft International Taxation Law in Reshaping International Economic Governance' (2018) 13 *Asian Journal of WTO & International Health Law & Policy* 463; W Alschner, 'Shifting Design Paradigms: Why Tomorrow's International Economic Law May Look More Like the Tax Regime than the WTO' (2020) 114 *AJIL Unbound* 270.

[7]J Kokott, P Pistone and R Miller, 'Public International Law and Tax Law: Taxpayer's Rights, The International Law Association's Project on International Tax Law-Phase 1' (2021) 52 *Georgetown Journal of International Law* 382.

[8]See on the content of the BEPS Project and its implementation by countries IBFD, J Goede and G Verheul, *Implementing OECD/G20 BEPS Package in Developing Countries* (German Cooperation, 2018); K Sadiq, A Sawyer and B McCredie, 'Jurisdictional Responses to BEPS: A Study of 19 Key Domestic Tax Systems' 16 *Journal of Tax Research* 737.

[9]WTO dispute settlement Body has had to adjudicate a number of trade cases which were essentially about taxation (see e.g. Monica Victor, 'On the Fragility of the International Taxation Legal System' (2019) 22 *Florida Tax Review* 796 and Christian L Neufeldt, 'The WTO and Direct Taxation: Direct Tax Measures and Free Trade' (2018) 59 *Harvard International Law Journal* 3) while international investment tribunals have been dealing with tax-related disputes (J Chaisse, 'Investor-State Arbitration in International Tax Dispute Resolution: A Cut above Dedicated Tax Dispute Resolution' (2016) 41 (2) *Virginia Law Review* 149).

bilateral tax treaties. MLI may result in new challenges for PIL regarding international tax dispute mechanisms.[10] The MLI makes it possible for countries to use mutual agreement procedure and/or arbitration, including baseball arbitration.[11] The MLI is a multilateral instrument, which means that each country has to choose between the bilateral tax treaties covered by it and the choice for arbitration. Each country's choice needs to match with the choice made by the other country, and only then can the treaty be amended.[12] The mismatches may also result in a 'fragmentation' of international tax disputes[13] that will require the attention of international public law scholars.

The expansion of ITL has resulted in the emergence of a new paradigm in the relationship between ITL and PIL that affects the substantive rules and the way to address judicial disputes in international taxation. This new normative paradigm is conceptualized in this article and further analysed throughout these special section articles on 'the future of international tax disputes'. The second section of this article will focus on the changes in the (normative) relationship between ITL and PIL, including the role of new actors, and multilateralism in international taxation. The third section will focus on the changes in this relationship in respect of international tax disputes. The final section provides some conclusions and outline of the articles in this special section on 'the future of international tax disputes'.

II. The normative dialogue between international taxation and public international law

The relationship between PIL and ITL has to be understood by addressing how past and current developments in ITL influence public law and how the latter influences the former area of law. In this section, attention is given to the traditional reliance on models for international tax treaties applicable to cross-border transactions and their interpretation applying the Vienna Convention on the Law of Treaties (VCLT). In addition, in absence of tax treaties, attention is given to the relevance of customary international law and use of domestic rules to prevent double taxation in cross-border transactions. Furthermore, in light of ongoing developments, this section will address implications for PIL of the current BEPS project and the recent (October 2021) adopted approach to tax the digital economy (Pillar 1) and to introduce a minimum tax to curtail tax competition (Pillar 2).[14]

[10]Few countries like the Netherlands favour mandatory arbitration in their tax treaties. See N Bravo, 'Mandatory Binding Arbitration in the BEPS Multilateral Instrument' (2019) 47 *Intertax* 693.

[11]In the MLI, countries may introduce mandatory binding arbitration which can be either panel arbitration or baseball arbitration. Unlike panel arbitration, in baseball arbitration the arbitrator decides between the two offers proposed by conflicting parties. See David Kleist, 'The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS—Some Thoughts on Complexity and Uncertainty' (2018) 1 *Nordic Tax Journal* 201831.

[12]See R Garcia Anton, 'Multilateral Dynamics in Bilateral Settings: Back to Realpolitik' (2019) 4 *British Tax Review* 462; DW Blum, 'The Relationship Between the OECD Multilateral Instrument and Covered Tax Agreements: Multilateralism and the Interpretation of the MLI' (2018) 72 *Bulletin International Taxation* 131.

[13]See AW Oguttu, 'Resolving Treaty Disputes: The Challenges of Mutual Agreement Procedures with a Special Focus on Issues for Developing Countries in Africa' (2016) 70 *Bulletin for International Taxation* 12, sec 9, Journals IBFD. And Julien Chaisse, 'Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?' (2016) 35 Virginia Tax Review 149, 160.

[14]Both proposals have been approved by 136 of the 141 jurisdictions of the BEPS Inclusive Framework. At the time of writing, the countries that have not endorsed these proposals are Nigeria, Kenya, Sri-Lanka and Pakistan. OECD/G20, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (2021).

A. The public international law foundation of international taxation

International taxation is not a definite concept, but an aspect of PIL. International taxation can, however, be described as an area of knowledge pertaining to the international aspects of cross-border activities which can be regulated throughout domestic law or throughout (bilateral and regional-multilateral) tax treaties. As a consequence of the national/international and bilateral/multilateral nature of international taxation norms, the field of international taxation is neither unified nor codified.

In sharp contrast, major differences remain in the norms and the policies that drive each government's position on international taxation which lead to discrepancies, gaps and contradictions, especially as there is no unique world court in charge of interpreting these increasingly important rules. The only parameter that contributes to a certain convergence in international tax rulemaking is the existence and widespread reliance on model tax treaties (i.e. 'Model Conventions') and their commentaries developed and offered by various international bodies to states.[15] As a matter of practice, model tax treaties form the basis for a large number of treaties.

B. The influence of public international law on international tax law

There are many origins and types of influence of public international law on ITL. Firstly, Double taxation treaties (DTTs) have been developed for decades in order to prevent the income (or wealth) of natural persons or legal persons fulfilling the criteria of attachment abroad from being doubly subject to the tax.[16] These DTTs are therefore an important element in the promotion of economic activities on the international scene. The phenomenon of double taxation has been understood and denounced for a long time, but there is no unconditional obligation on states to resolve the problem of double taxation. They are in fact free to organize the distribution of their taxing power as they see fit. It then becomes essential for states, individually or within a bilateral or regional-multilateral framework, to put in place instruments aimed at reducing or eliminating double taxation, in order to encourage trade. It is to solve these problems, which are highly harmful to the world economy, that the drafting of model tax treaties has been initiated within the framework of international organizations such as the OECD, and the UN.

The internationalization of tax matters and the rise of international tax treaties create mechanisms for a concerted exercise of the sovereign power of the states to be imposed, taking into account the situation of people caught between two fiscal sovereignties and

[15]There are two widely accepted models (the OECD and UN model treaties): Some differences with the OECD Model are the division of taxing rights in the UN Model between residence and source country in the case of royalties (Art 12(1)), source taxation of fees for technical services (Art 12A) and the recent 2020 introduction of source taxation of capital gains on the Offshore Indirect Transfer of Shares (Art 13) and the 2021 introduction of source taxation of income from the rendering of automated digital services (Art 12B). P Pistone, 'General Report' in M Lang et al (eds), *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* (2014). For a survey on the use of the UN Model see W Wijnen and J de Goede, 'The UN Model in Practice 1997–2013' (2014) *Bulletin for International Taxation* 118. M Nieminen, 'Dual Role of the OECD Commentaries – Part 1' (2015) 43 *Intertax* 639; C West, 'References to the OECD Commentaries in Tax Treaties: A Steady March from "Soft" Law to "Hard" Law?' (2017) 9 *World Tax Journal* 117. Additionally, countries have also introduced their own models, such as the US Model Convention. R Avi-Yonah, 'Full Circle? The Single Tax Principle, BEPS, and the New US Model' (2016) 1 *Global Taxation* 12.

[16]Double taxation occurs when two States levy taxes on the same items of income or capital of a taxable person. Most of DTT provisions aim to avoid double taxation in that they give States the right to tax a type of income or capital. See generally Michael Lang, *Introduction to the Law of Double Taxation Conventions* (2021) 268.

the fight against evasion/tax avoidance to prevent some from taking advantage of this situation to avoid the obligation to pay tax. Through DTTs, states have in effect laid the foundations for a cooperative environment which should promote the intensification of international exchanges that are conducive to growth and development.

Secondly, despite a certain *a priori* imprecision compared to treaty law, international custom constitutes a set of fundamental rules of international law.[17] The role of customary international law has a great potential for international taxation, because of the relative low number of DTT; in fact, states tax relationships are quantitatively more regulated by custom than DTT.[18] The topic of ITL as customary law (CIL) has been addressed in the early 2000s by tax scholars such as Avi-Yonah,[19] with some dissenting opinions at the time.[20] More recently, this relationship has been revisited by tax scholars mainly due to the introduction of the Standard of Exchange of Information, and the BEPS Project 4 Minimum Standards. These standards are, in principle, regarded as soft law; however, countries are implementing and incorporating these standards in their domestic laws and tax treaties. Therefore, scholars have analysed these standards, whilst taking into account state practice and *opinio juris*, to find out whether there are indications that public international tax law is arising (or not).[21]

C. The influence of international tax law on public international law

The impact of ITL on PIL is an understudied issue despite the rapid growth and spread of business operations to various states. This discussion becomes even more crucial as presently, the international taxation framework does not fully account for the digital economy. The OECD would play a pivotal role in this regard, which seeks to include non-OECD countries including developing countries in the decision making process. This section further discusses the role of US and EU with respect to introducing a unified approach for taxation of digital economy and the unilateral steps taken by several nations to tax digital economy. It also becomes imperative to address the

[17]See e.g. G Norman and J Trachtman, 'The Customary International Law Game' (2005) 99 *American Journal of International Law* 541; O Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 *European Journal of International Law* 235; A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2021) 95 *American Journal of International Law* 757.

[18]As explained by Céline Braumann 'if every relationship between the 193 UN member states was governed by a bilateral treaty, the number of bilateral treaties in force would add up to 18,528 treaties. Currently, about 3,000 DTTs are said to be in force – in other words, only about 16%, i.e. one out of six of all possible, bilateral relationships is dictated by a DTT. The remaining 84% of all bilateral relationships are subject to CIL on cross-border taxation'. Céline Braumann, 'Taxes and Custom: Tax Treaties as Evidence for Customary International Law' (2020) 23 *Journal of International Economic Law* 748.

[19]R Avi-Yonah, 'International Tax as International Law' (2004) 57 *Tax Law Review* 483. In this article, Avi-Yonah addressed the question of the existence of CIL taking into account the 'international tax practices that are widely followed by countries, including the methods to prevent double taxation, and the use in the more than 2,000 bilateral tax treaties (either using the OECD or the UN model)'. See for this analysis, I Mosquera, 'BEPS Principal Purpose Test and Customary International Law' (2020) *LJIL* 7 at 8.

[20]D Rosenbloom, 'International Tax Arbitrage and the International Tax System: The David R. Tillinghast Lecture' (2000) 53 *Tax Law Review* 137 at 164.

[21]D Broekhuijsen and I Mosquera, 'Revisiting the Case of Customary International Tax Law' (2021) 23 *International Community Law Review* 79 at 103; R Codorniz Leite Pereira, 'The Emergence of Transparency and Exchange of Information for Tax Purposes on Request as an International Tax Custom' (2020) 48 *Intertax* 624; Braumann (n 18) 747; Mosquera, 'BEPS Principal Purpose Test' (n 19) 1; S Gadžo, 'The Principle of "Nexus" or "Genuine Link" as a Keystone of International Income Tax Law: A Reappraisal' (2018) 46 *Intertax* 194; García Antón, 'The 21st Century Multilateralism in International Taxation: The Emperor's New Clothes?' (2016) 8 *World Tax Journal* 148; P Pistone, 'Exchange of Information and Rubik Agreements: The Perspective of an EU Academic' (2013) 67 *Bulletin for International Taxation* 219.

importance of tax and regulatory environment of nations to attract foreign investment[22] and the need for adopting a regional approach to prevent harmful and unfair competition with respect to tax incentives.

1. Taxation of the digital economy: the OECD as an agent of change

The emergence of the digital economy is posing fundamental challenges to taxation. The regulatory foundations of taxation presuppose a permanent establishment (i.e. physical presence) to levy taxes on business profits whereas, in sharp contrast, the digital economy promotes sellers of goods or services to reach out an ever-increasing volume of buyers without any need of physical interaction and presence. The digital economy is developing with the paradigm of borderless trade and a number of other features (e.g. taxpayers identity, national tax status, etc.) with calls for a redefinition of international taxation.

The OECD has spearheaded the reflection and work to modernize international tax rules in light of the digital economy with the important milestones of the BEPS Project in 2013 and the BEPS Action Plan in 2015. The former is made of 15 recommendations (Actions) among which the Action 1 calls for governments to address the tax challenges of the digital economy without imposing pre-defined solutions. Nonetheless, regarding Action 1 and due to the lack of agreement, the content of this proposal was postponed. Since the introduction of the BEPS Project, a new project (so-called BEPS 2.0) has been proposed by the OECD, which aims to address the taxation of highly digitalized business (Pillar 1) and tax competition through the introduction of a minimum tax rate (Pillar 2).

Pillar 1 deals with the allocation of additional taxing rights to market jurisdictions (such as revising the notion of nexus as part of the definition of a ‘permanent establishment’, allowing the taxing rights of the source country to be defined and revising the ‘arm's length’ standard with regard to the distribution of profits); Pillar 2 aims to require a global minimum tax to prevent the shifting of profits to states with low tax rates.

2. New actors US, EU and unilateralism

The objective of the OECD while discussing the Pillar 1 and Pillar 2 proposals is to reach a global consensus on the revisions to be made to the international tax system in order to prevent countries from taking unilateral measures to tax the income of multinational enterprises (in particular, those which operate highly digitalized activities). At that time, the EU stated that if consensus was not reached, the EU will also introduce its own proposal for taxation of the digital economy.[23]

In the meantime, countries such as Australia, India, Kenya, and EU countries such as France, Spain, and Austria have introduced unilateral measures to tax the digital economy (so-called ‘digital service tax’).[24] However, these moves have raised questions by businesses, including the Digital Economy Group (DEG).[25] Regarding the digital

[22]Prabhash Ranjan and Suranjali Tandon in this *Asia Pacific Law Review* special section ‘The future of international tax disputes’. See also V Vasudev, ‘Interactions between Taxation Measures and IIAs’ in J Chaisse, L Choukroune and S Jusoh (eds), *Handbook of International Investment Law and Policy* (2020).

[23]A Fair and Competitive Digital Economy – Digital Levy, European Commission (2021).

[24]See S Geringer, ‘National Digital Taxes – Lessons from Europe’ (2021) 35 *South African Journal of Accounting Research* 1 at 1.

[25]Digital Economy Group (DEG). The DEG's current membership comprises the following companies: Airbnb, Inc., Amazon.com, Inc.; Expedia, Inc.; Facebook, Inc.; Google, Inc.; Microsoft Corporation; Netflix, Inc.; RELX Group PLC.; Salesforce.com Inc.; Spotify AB; and Stripe, Inc.

service tax in Australia, the DEG has previously addressed its concerns that this tax can be regarded as an extraterritorial tax collection obligation, which cannot be imposed unless there are conditions that lead to voluntary compliance.[26]

In June 2021, the US Biden administration presented a proposal that included the introduction of a 15 per cent minimum tax rate, which had consequences for both Pillar 1 and Pillar 2 proposals. This proposal was adopted by G7 countries. In October 2021 136 of the 140 jurisdictions participating in the BEPS Inclusive Framework agreed to the OECD proposals on Pillar 1 and Pillar 2 including the 15 per cent minimum tax rate.[27] The number has raised to 137 jurisdictions with Mauritania that recently became the 141 jurisdiction joining the BEPS Inclusive Framework. Mauritania has also committed to implement Pillar 1 and Pillar 2 proposals. These two pillars, represent a fundamental reform of the entire international tax system, and could increase taxes and fees collected by national administration from multinational enterprises.

However, this consensus has several obstacles mainly due to the introduction of the Digital Service Tax by countries and the recently adopted UN Art.12B to tax automated digital services. According to the OECD-G20 Statement on Pillar 1 and Pillar 2, countries have committed to sign a multilateral convention that in addition to the introduction of the provisions agreed on Pillar 1 and Pillar 2, it requires the removal of all Digital Service Taxes and other relevant similar measures on all companies.[28]

Therefore, the fundamental question is whether these unilateral tax measures will be removed or will coexist with the multilateral initiatives (Pillar 1 and Pillar 2) and the bilateral treaties that adopt the Article 12B of the UN Model. Therefore, the scope of the treaty, the type of tax (digital services, source tax Article 12B, or the formulaic approach of Pillar 1) will raise issues of interpretation and application of rules that require further analysis not only by international tax lawyers but also by public international lawyers.

3. Tax competition ramifications on international law

Among all BEPS Actions, the regulatory objective to tame effectively harmful tax practices (i.e. Action 5) has considerable relevance for international law because it calls for taking transparency and substance into account.[29] In general, 'any preferential tax regime of a country that provides for a low tax rate or a (temporary) tax exemption and can be accessed by mobile types of businesses (such as financial services) is in scope of a review'.[30] Countries including developing countries use preferential regimes in order to attract foreign direct investment.

[26] <https://treasury.gov.au/sites/default/files/2019-03/C2015-026_Digital_Economy_Group.pdf>.

[27] OECD/G20 (n 14).

[28] It states 'The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC'. Ibid at 3.

[29] The content of Action 5 is based to some extent in the OECD's initiative on Harmful Tax Competition and it mandates countries to eliminate their preferential tax regimes that can be regarded as harmful tax practices, to increase transparency of rulings and to review substantial activities requirements to ensure a level playing field. OECD, *Harmful Tax Competition: An Emerging Global Issue* (1998).

[30] F Heitmüller and I Mosquera, 'Special Economic Zones Facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future' (2021) 24(2) *Journal of International Economic Law* 473 at 480. This review is made in accordance with the peer review terms of reference.

Action 5 will have deep normative ramifications both on domestic tax law and international law because it fundamentally requires overhauling the work on harmful tax practices through the priority given to the improvement of transparency. The normative changes will be achieved via the compulsory and spontaneous exchange of information on decisions relating to preferential regimes, as well as through the requirement of a substantial activity prior to the establishment of any preferential regime which will oblige governments to cooperate and to some extent, share sovereignty on tax matters.

However, the use of these regimes is now under scrutiny due to Action 5 that deals with harmful tax practices. Furthermore, the introduction of a minimum tax that aims to tackle tax competition (Pillar 2) will also reduce these (harmful or not) preferential regimes which will be required to introduce a minimum tax of 15 per cent among other measures.[31]

To conclude, it can be stated that ITL is a field which can no more be ignored or avoided, looking at the global integration and expansion of businesses over multiple nations. International taxation is the need of the hour and is a major part of, and influences PIL, along with other areas of law (e.g. trade and investment).

III. The evolving international judicial function in tax disputes: overlapping, disjoint, or complementary roles?

The modern era of ITL and dispute resolution requires multiple courts and tribunals to get engaged in 'pure' tax and 'tax-related' dispute resolution.[32] As a result, it is important to scrutinize the consequences of the internationalization of tax dispute resolution on the traditional concept of 'sovereignty', which is a cornerstone of international law. The analysis in this section can be used for further analysis by scholars regarding the different standing requirements (*state v taxpayers*), varying jurisdictions and applicable rules.

A. Conceptualizing international tax disputes

An international tax dispute is part of the international taxation regime, wherein incoherence between domestic tax rules and international rules affects cross-border transactions. In the sphere of international taxation regime,[33] the characterization of an international tax dispute can emerge from the three essential rules, namely domestic rules which govern the periphery of taxation of non-residents, the periphery of taxation of residents whose income is generated abroad and rules fermented from international treaty regimes.[34] Fundamentally, international tax disputes unfold in two general contexts:[35]

[31] See I Mosquera, 'Can SEZs Survive a Global Minimum Tax? New International Tax Rules Could be the Start of the End for SEZs' (FDI Intelligence, 18 June 2021).

[32] Tony Marzal and Ricardo Garcia Anton, Prabhash Ranjan, Suranjali Tandon, and Luca Rubini in this *Asia Pacific Law Review* special section 'The future of international tax disputes'.

[33] A regime is a 'set of principles or rules which accumulate the expectations of different actors in a given area of international relations'. S Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *International Organisation* 185 at 186.

[34] Y Brauner, 'An International Tax Regime in Crystallisation' (2004) 56 *Tax Law Review* 259 at 265.

[35] C Irish, 'Private and Public Dispute Resolution in International Taxation' (2011) 4 *Asian International Arbitration Journal* 121.

either taxpayers are pitted against the government, wherein the former resist the imposition of tax by the latter, or inter-governmental disagreement over allocation of tax revenues from cross-border transactions.

There are certain fundamental precepts to an international tax dispute which require discussing questions of tax sovereignty, nationality-based jurisdiction, tax arbitrage and CIL, and tax avoidance. Firstly, the idea of tax sovereignty stems from the belief that a country has the authority to define its tax laws on transactions within its territory or those involving its citizens anywhere in the world.[36] Within the domain of international taxation disputes, sovereignty assumes a central role. Within the larger sphere of domestic tax sovereignty, ITL aims to supplement the policies and interests of states. However, largely, tax sovereignty converges with the conflict between domestic rules and international rules as the primary incentive to drive taxation policies of states rests on their sovereign entitlement to do so. Consequently, the application of international rules is caricatured as being antithetical to sovereignty.

Secondly, a corollary to tax sovereignty is the conceptualization of nationality as a residence. The Supreme Court of the USA in *Cook v Tait* ruled that: 'the state has the right to tax its citizens' income regardless of their subsisting place of residence'.[37] This principle has been recognized in international taxation, as it addresses the infirmity of tax havens, wherein citizens would abandon their state and attain the same in tax havens abroad. Consequently, the residence-based taxation principle has reached the status of CIL.[38] In essence, a state can either exercise source-based taxation, wherein territory is the avenue to tax individuals, or residence-based taxation wherein territory plays second-fiddle to the residence.[39]

Thirdly, international tax co-operation focuses on the reduction of double tax. The foundational basis of tax arbitrage is utilizing the difference between tax laws to achieve double non-taxation. The existence of an international tax regime and consolidation of disputes thereof largely revolves around tax arbitrage.

Fourthly, international tax disputes are often helmed by the strain of corporate tax avoidance. Beyond the dismissive possibility of engaging with tax havens, multinationals use loopholes in the domestic and international regulatory framework to minimize the global effective tax rate.[40] To militate against tax avoidance through the misuse of treaties, Avi-Yonah identified the scheme of 'constructive unilateralism' as a common thread between countries.[41] Constructive unilateralism was exercised by the US for the evaluation of income of foreign subsidiaries controlled by US shareholders as deemed dividend under the CFC rules. The US also introduced 'thin capitalisation rules' which involved the use of debt instruments to limit interest deduction.[42] Both facets of constructive unilateralism were adopted by other countries.

[36]P Musgrave, 'Sovereignty, Entitlement, and Co-operation in International Taxation' (2000) 26 *Brooklyn Journal of International Law* 1335 at 1341.
[37]*Cook v Tait*, 265 US 47 (Sup Ct 1924).
[38]Avi-Yonah, 'Full Circle?' (n 15) 15.
[39]Braumann (n 18) 5.
[40]R Azam, 'Minimum Global Effective Tax Rate as General Anti Avoidance Rule' (2016) 8 *Columbia Journal of Tax Law* 5 at 19–20. Gabriel Zucman notes: 'US loses approximately $130 a year in tax revenue'. G Zucman, *The Hidden Wealth of Nations: The Scourge of Havens* (2015).
[41]R Avi-Yonah, 'Constructive Unilateralism: US Leadership and International Taxation' (2016) 42 *International Tax Journal* 17.
[42]R Azam, 'Ruling the World: Generating International Tax Norms in the Era of Globalisation and BEPS' (2017) 50(1) *Suffolk University Law Review* 517 at 537.

B. By design: solving international tax disputes under tax treaties

International taxation is modelled on the footsteps of treaties – more specifically, the DTTs. DTTs aim to co-ordinate the tax disputes between two states which exercise individual tax sovereignty through source or residence-based mechanisms. They introduce a Mutual Agreement Procedure (MAP) which establishes an individual's right to raise a dispute. However, the international taxation regime lacks certain bright-line rules to solve tax disputes. This leads to a lack of identified source for international tax law making and mechanisms of enforcement.

As envisioned under BEPS Project and its Action Plan, the MLI was adopted to allow countries to introduce substantial changes to complete and improve agreements contained in DTTs. They introduced MAP which establishes an individual's right to raise a dispute. In addition, in the MLI mandatory arbitration was introduced. However, only 30 jurisdictions of the more than 90 jurisdictions that have signed the MLI have committed to mandatory arbitration in the MLI.[43]

Mandatory arbitration for tax treaty disputes is also part of the BEPS Action Plan (Pillar 1) which aims to address concerns about the taxation of the digital economy.[44] In Pillar 1, the primary concern has been the artificial separation of taxable income from the activities by which it was generated on account of the conduct of business without physical presence. In the absence of international taxation, domestic taxation would have been incoherent to deal with the digital economy. However, despite BEPS, the nexus test, based on which the source country taxes active income if it finds an economic nexus defined by a permanent establishment in its jurisdiction, continues to remain incongruent. Digitalization does not entail a permanent establishment and therefore, the definition of such a nexus remains undefined.[45]

C. By default: rationalizing the settlement of tax disputes by non-tax tribunals

In the post-2008 global economic crisis, developing nations were reluctant to accept the unilateral imposition and collection of taxes. States formed an umbrella understanding of tax policies and linked it to their self-determination and survival. Consequently, interstate tax disputes fell onto an effective, persuasive, and mutually agreed dispute resolution process. This triumvirate can only be satisfied by international courts and tribunals. The primary function of international courts and tribunals is the 'peaceful settlement of disputes'. This is a general principle of international law under Article 38 (1)(c) of the Statute of the ICJ. ICJ acts as a windfall court, and settles disputes, in congruence with the consent of the parties.

As the international taxation regime is formulated through DTTs and multiple other treaties, the court attempts to achieve uniformity of application, to induce universality of adherence through a centralized interpretative mechanism.[46] The courts and tribunals balance the sovereignty of the states with the international concomitant of rules. This role prominently alludes to the function of settlement of interstate tax disputes.

[43]The OECD has published the profile of the 30 jurisdictions applying arbitration under the multilateral Convention. See Arbitration Profiles at OECD website <www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>.
[44]OECD/G20 (n 14).
[45]Howard Mann in this *Asia Pacific Law Review* special section 'The future of international tax disputes'.
[46]L Sohn, 'Settlement of Disputes Relating to the Interpretation and Application of Treaties' (1976) 150 *RdC* 205.

The evident internationalization of taxation has led to multidimensional conflicts: tax holidays, tax avoidance, transfer pricing, and prominently – the Foreign Sales Corporation (FSC) dispute between EU and US before the WTO.[47] The internationalization of taxation through the use of DTTs has evaporated taxation agreements from within multiple other non-tax-related treaties like the European Convention on Human Rights (ECHR).

Tax measures have the potential to interfere with foreign investors activities while, at the same time, enhance the socio-economic rights of an underprivileged class. There may also be intersections with the state's foreign relations and obligations under general international law. For instance, within the WTO, the restriction on tariffs and internal taxes are meant to restrict undue advantages to domestic products.[48] These treaty regimes are concatenated within the larger domain of taxation. Therefore, international courts and tribunals that derive their power from within the scope of such treaties function as a means to settle the disputes arising thereof.

Therefore, the settlement of tax disputes by non-tax tribunals should be also addressed jointly by tax and PIL scholars since the outcome of these disputes may have consequences for ITL and PIL in general.

IV. Conclusion and outline of the special section 'the future of international tax disputes'

ITL has become one of the fastest evolving areas of PIL. Disagreements in ITL are being viewed not only from a tax but also a trade and investment lens. The articles in this special issue address the interactions between tax, investment and trade law in the development of international tax rules to deal with cross-border transactions. Some of the articles in this special issue look at the future, by addressing the challenges that countries face when introducing rules to ensure fair taxation of multinational enterprises (MNEs) and the consequences of the (October 2021) adoption of the Pillar 1 and Pillar 2 proposals by most of the countries participating in the BEPS Inclusive Framework.

In 'The Settlement of Tax Disputes by WTO', Luca Rubini analyses the relationship between tax law, which is typically a domestic matter, and trade laws, particularly those codified in the WTO, which have an international scope. The article provides a brief overview of the regulatory framework applicable to tax measures. Further the article examines the various tax concerns that have arisen and may arise in 'tax and trade' disputes. At last, the interaction between subsidy disciplines with tax measures and interpretation of the national treatment carve-out for producer subsidies under Article III:8(a) of the GATT is studied. In 'Investor-State Dispute Settlement and Tax Matters: Limitations on State's Sovereign Right to Tax', Prabhash Ranjan analyses the tax-related investment disputes. Further the paper focuses on the interpretation of the carve-out provision for taxation matters in tax-based ISDS claims, which enables the tribunals to decide on the jurisdiction of the matter. The paper closes by outlining some key principles including bona fide taxation measures that states should consider as they evaluate international tax reforms together. In 'Issues and challenges with applying

[47]Luca Rubini in this *Asia Pacific Law Review* special section 'The future of international tax disputes'.

[48]I Bantekas, 'Interstate Arbitration in International Tax Disputes' (2017) 8 *Journal of International Dispute Settlement* 1 at 20.

investment agreements to tax matters in the context of India's experience', Suranjali Tandon takes the Indian case of retroactive tax legislation to demonstrate how tax policy may be constrained by the rights afforded to the foreign investor that are superior to those guaranteed under international tax and domestic law. Further, the paper reflects on whether the exclusion of tax-related disputes explicitly from investment agreements may not be enough. In 'Proportionality and the fight against international tax abuse: comparative analysis of judicial review in EU, international investment and WTO law', Tony Marzal and Ricardo Garcia Anton explain that the tax abuse by multinationals has become a major concern of states in the last ten years. States have a valid claim to resist abusive practices and to enforce tax equity, however taxpayers have often raised objection to this broad power of the tax authorities with the legal certainty principle. In such cases the international courts apply the principle of proportionality – i.e. if the anti-tax avoidance measures do not go beyond the state's proper 'territorial' borders and are consistent with certain 'good governance' norms. Finally, in 'The OECD International Tax Dispute Settlement Proposals: Moving to the Privatization of International Tax Disputes?', Howard Mann explains the less discussed proposals of dispute settlement contained in the October 2020 OECD report, Tax Challenges Arising from Digitalisation – Report on Pillar 1 Blueprint: Inclusive Framework on BEPS. This essay mainly relies on previous experiences with international arbitration in the context of investor-state dispute settlement. The paper focuses on the interpretation of the carve-out provision for taxation matters in tax-based ISDS claims, which enables the tribunals to decide on the jurisdiction of the matter. However, it is a well-established principle that any changes in the legal framework through taxes must be reasonable and appropriate to the public welfare. The host states, while exercising their sovereign right to tax should adopt bona fide taxation measures.

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