

LITERATURE REVIEW

A Global Analysis of Tax Treaty Disputes, E. Baistrocchi (editors), Cambridge University Press, 2017

Writing a book review about two volumes totalling 1588 pages and containing summaries and comments on 1610 international tax cases is not the most exciting task a tax lawyer would dream of. Yet after leafing through the two heavy volumes and reading here and there some chapters – and in particular the whole of Part V of the second volume, I was completely captivated by what I can only describe as one of the seven wonders of the international tax world.

Eduardo Baistrocchi, professor at Torcuato di Tella University in Buenos Aires and the London School of Economics, along with his team of colleagues and assistants, have created an original academic monument of colossal proportions. This project is indeed completely different from the old German and most recent English treaty commentary based on Klaus Vogel and also miles apart from the brand new International Bureau of Fiscal Documentation (IBFD) database in the Global Tax Treaty Commentary. So, what is it?

In the introductory chapter the author states that the primary aim of his Magnum Opus is 'to contribute to a critically important debate on whether the International Tax Regime (ITR) exists and [whether it] is binding upon states as a matter of international law'. The book contains a more or less standardized summary of the hallmarks of international tax rules and the way to deal with tax dispute resolution in twenty-seven major jurisdictions: fifteen OECD member countries (Part II), Hong Kong and the five BRICS countries (Part III) and six non-OECD and non-BRICS countries (Part IV). These jurisdictions represent 90% of the global economy, 80% of world trade and 66% of the world's population. There is also a chapter on tax disputes and the EU Arbitration Convention on Transfer Pricing. These reports are noteworthy because – in most cases – they also include a brief description on the international economic situation of each jurisdiction, which helps to explain some peculiarities in its national tax system and in its tax treaty policy. All the milestone cases in international taxation between 1923 and 2015 are presented and discussed. The collection of these chapters

is impressive and interesting, but similar worldwide attempts at mapping international taxation have already been made in the past, albeit on a less grandiose scale.

What is really innovative is Part V. In 195 pages it presents the conclusions of the analysis of the preceding chapters. These conclusions are divided into three chapters: (1) a global taxonomy with patterns of tax treaty disputes, presenting a qualitative analysis, (2) a presentation of cases of triple (!) non-taxation which are immune to the Base Erosion and Profit Shifting (BEPS) Action Plan and (3) a global quantitative analysis of tax treaty disputes, with final conclusions that will make every international tax lawyer stop and reflect. This method of analysis and presentation is not entirely novel and has already been applied to the much smaller number of direct tax cases decided by the EU Court of Justice,¹ but this is the first time that I have seen this method so rigorously applied to such a varied and worldwide pattern of court decisions.

The taxonomy rests on a double approach: top-down and bottom-up. The top-down approach classifies the mass of tax treaty disputes into three categories in line with the OECD Model and the Commentary thereon: (1) disputes on definitional articles (1–5), (2) disputes on substantive articles (6–23) and (3) disputes on procedural articles (24–31). The bottom-up approach also has three functions: (1) to identify the category of the most litigated areas in the 1,610 leading tax cases, (2) to identify trends of increasing judicial activism in tax treaty litigation and (3) to identify the geographical patterns of tax disputes between G20 countries, non-G20 countries and non-G20 so called 'hubs of the international tax regime' like the Netherlands, Switzerland and – to a lesser extent – Belgium. Although the cases are reported in a very succinct style, many reports do mention the essence of the factual and legal framework, so that the reader has a good view of the essential arguments in law and in fact that resulted in the reported decision. Finally, there is the 'Golden Bridge', which is a list classifying each tax dispute that has been discussed, per tax jurisdiction under a

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¹ See M. Schaper, *The Structure and Organization of EU Law in the Field of Direct Taxation*, Doctoral Series no. 27 (IBFD 2013).

Pattern of Tax Treaty Disputes and linking it to the relevant article and paragraph of the 2014 OECD Model Tax Convention.

In its final conclusion, the mass of data offered in these two volumes leads to a remarkable theory which I will share with you to whet your appetite to read – or at least to consult – these two volumes. That theory starts from the premise that at the international level all countries are competing through their tax systems for foreign investment. In this competition, tax treaties are not so much used as instruments to avoid or eliminate double taxation, but rather as instruments – in combination with national tax systems – to attract foreign investment in the arena of international tax competition:

The data presented in this book suggest that OECD countries, BRICS countries and non-G20 hubs are different key nodes of the same global network tax market: the International Tax Regime (ITR). The net effect of the ITR has evolved over time and space, from avoiding international double taxation to offering a two-sided platform that fosters international tax competition among jurisdictions. The two-sided platform of the ITR is currently the OECD Model. On one side of the platform, the central users are leading jurisdictions, particularly OECD countries, BRICS countries and non-G20 hubs, specifically Switzerland, the Netherlands and Belgium. On the other side of the platform, central users are international investors (such as Multinational Enterprises MNE's). All OECD and BRICS countries offer international investors different bundled products, including institutional quality, connectivity to markets (including connectivity to non-G20 hubs), talent clusters and regulations such as *a mix of domestic and treaty laws that may minimise both tax entry costs and tax exit costs for the relevant jurisdictions*.²

Central and provocative in this approach is that the main purpose of tax treaties is not to eliminate or avoid double taxation or double non-taxation, but that both taxpayers and national tax administrations are using and shaping tax treaties to their own advantage – the former to minimize their tax liabilities and the latter to minimize the tax liabilities of foreign investors.

In order to know what this title really covers, one should read the two volumes. So the final question concerns who may want to read this book. First, like most tax books, this is a work not to be read, but to be consulted. Tax practitioners may want to consult it in particular to catch an unorthodox view to resolve an international tax problem, or to obtain the high points of one of the 1,610 leading tax cases, without being obliged to read the whole case. Academics and researcher should have these volumes on their desk, whenever they are teaching an advanced course in international taxation, or at the outset of any research project on international tax treaty disputes, because these volumes will provide them with a completely new view on the role and the effect of tax treaties. For tax policy makers and treaty negotiators in all countries, except for the well-equipped major G20 powers, these volumes should be mandatory reading, as they reveal the real legal and economic effect of tax treaties and the policy goals for which they can be used.

Finally, these volumes are useful reading for proponents of tax justice organizations that are fighting international tax scandals, because this work takes a rather objective and dispassionate view of the various causes of shifts in taxable income between tax jurisdictions. Ultimately, I was very glad to have been asked to write this review.

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² A *Global Analysis of Tax Treaty Disputes*, vol. 2, 1540, 1541 (E. Baistrocchi ed., Cambridge University Press 2017) (emphasis added).