International Tax Law

TAXPAYERS IN INTERNATIONAL LAW

International Minimum Standards for the Protection of Taxpayers' Rights

Juliane Kokott and
Pasquale Pistone

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International Tax Law
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Taxpayers in International Law

International Minimum Standards for the Protection of Taxpayers' Rights

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PREFACE

The core of public international law regulates the relations between sovereign states and other entities, creating for them rights and obligations. The traditional view limits the boundaries of public international law to those rules, and this view is still largely predominant in international tax law.

However, when states regulate their relations under public international law in tax matters, they unavoidably produce important repercussions on non-state actors, such as individuals and other persons, ie taxpayers. Even though taxpayers are the holders of actual rights within each legal system, they are often treated by international tax law as mere objects of the exercise of powers by the states.

This book aims at overcoming this traditional view and at establishing a new global legal framework within which public international law may protect the fundamental rights of taxpayers in line with the standards that public international law applies to non-state actors.

The implications of public international law for non-state actors have become gradually clear not only in human rights law, but also in connection with international economic law. In such a context, non-state actors are the holders of international rights and obligations, which apply under public international law directly in the relations with states, such as for instance in the case of bilateral investment treaties.

Just like international economic law, tax law regulates relations between persons and states. However, unlike the former, the international dimension of the latter has so far never taken off, leaving international tax law mainly as a domain for regulating relations between states.

Three factors may have prevented the development of an international standard for the protection of taxpayers' rights as non-state actors within the framework of public international law. First, the absolute nature of national tax sovereignty; second, the collective right to secure the payment of taxes within each national community; third, the national dimension of disputes between taxpayers and the states.

In recent decades, international tax law has nonetheless undergone very relevant changes. When the core of international tax law really started, about 100 years ago, the main concern was to create an international set of limits on the exercising of tax sovereignty in the international context with a view to securing cross-border (especially economic) relations. More recently, the exponential growth of tax avoidance and international tax planning, especially by multinational enterprises, has prompted states to coordinate the exercise of their taxing powers with a view to avoiding that certain taxpayers legally escape taxation. The latter phenomenon pursues what is generally called single taxation and is of particular relevance for our research, as it implies the willingness to establish a coordinated system for the exercise of taxing powers across the globe. The political endorsement by the G20 Venice Summit, held in July 2021, may soon lead to the creation of an international minimum taxation of corporate income. Accordingly, if one state (for instance the source state) levies such tax at too low a rate, others (especially the state of residence of the investor) may be entitled to exercise their taxing powers in a way that achieves the minimum level of corporate income taxation.

This context shows the emergence of a new form of coordination among states, which may directly affect non-state actors, ie taxpayers. This book postulates that insofar as states have decided to pool the exercise of their taxing systems, they should also provide for an effective protection of the rights of taxpayers. More concretely, this protection requires that the fundamental rights of each and every taxpayer may not be unduly compressed by the need to secure the protection of collective rights. Public international law should effectively protect such rights in the framework of a coordinated system, as otherwise cross-border situations would be at a structural disadvantage as compared to domestic ones.

In line with this modern vision, this book focuses on the fundamental rights of taxpayers and creates an international standard with global validity regulated by public international law. The book identifies such rights and extracts their content from the common (including constitutional) principles of national tax systems across the world and from the general rules of law of the civilised nations, which are a source of public international law. The book has developed a standard for protecting the rights of taxpayers, which in fact also brings within its scope the protection of other private parties, such as private intermediaries, who are subject to an increased formal and substantive tax burden.

The authors envisage in this book that the international standard for the protection of taxpayers' rights operates as a kind of external implied limit to the exercise of taxing powers by states and sovereign entities. Therefore, it may also be used to question legislative choices (or their absence).

In doing so, this book overcomes a deficiency of international tax coordination, which has grown exponentially in connection with the fight against international tax avoidance, but has not correspondingly adjusted the legal remedies available to taxpayers to secure an effective protection of the rule of law in line with the maxim *ubi ius, ibi remedium*.

This research project has not been conducted in isolation from other research activities in the international tax law community. Rather, it has built on the research output of various other projects and initiatives in a way that integrates harmoniously with them and brings them forward with an original insight from the perspective of public international law.

Such projects include the one conducted by a group of researchers headed by Baker and Pistone in 2015 under the auspices of the International Fiscal Association on the practical protection of taxpayers' rights,[1] and another by a group of researchers headed by Pistone in 2019 for the European Association of Tax Law Professors on tax procedures.[2] Moreover, it has gathered information from other initiatives concerning taxpayers' rights, such as in particular the IBFD Observatory on the Protection of Taxpayers' Rights[3] and the International Taxpayers' Rights Conferences organised by Nina Olson (former US Taxpayers' Advocate).[4] Such information already had a broad global coverage, but was further enhanced by research focused on the perspective of public international law and by more granular content on national constitutions and judicial interpretation from a broad range of countries in all continents. The authors of this

[1] P Pistone and P Baker, *General Report – The Practical Protection of Taxpayers' Rights*, vol 100B (2015) 60 and ff.

[2] P Pistone, *General Report,* in Pistone, *Tax Procedures*, (IBFD, (2020) 1 and ff.

[3] The IBFD Observatory on the Protection of Taxpayers' Rights is a neutral, non-judgemental platform for monitoring developments concerning the effective protection of taxpayers' fundamental rights in the world. See IBFD, 'Observatory on the Protection of Taxpayers' Rights', www.ibfd.org/Academic/Observatory-Protection-Taxpayers-Rights.

[4] The International Taxpayer Rights conference is an annual event organised by the Center for Taxpayer Rights, directed by Nina E Olson. See https://taxpayer-rights.org/international-conference/.

book have therefore brought together a very large number of researchers in the framework of the project conducted under the auspices of the International Law Association (ILA). Researchers from around the world have allowed the authors of this book to single out the critical issues and verify, in line with the strictest scientific criteria, the existence and boundaries of principles and rules that states share on the protection of taxpayers' rights. This approach enhances the validity of the research output, namely the international standard for the protection of taxpayers' rights, and its legitimacy to reflect rules that protect what is commonly perceived as fair and just throughout the world.

Moreover, the classification of taxpayers' rights adopted by this book follows common usage by the tax community. Accordingly, the book differentiates between procedural and substantive rights and also singles out those related to the levying of sanctions. This classification allows the research to adopt a variable approach to taxpayers' rights according to context and the leeway that the legislator may enjoy in the framework of tax rules. Accordingly, if it is, on the one hand, reasonable to assume that national tax policy may allow some more discretionary margins to the taxing rules, on the other hand, procedural rules and the rules related to sanctions should pursue the postulates of the rule of law in the same way as in any other legal domain.

When the Study Group on International Tax Law was established under the auspices of the ILA, the authors, in their capacity as co-chairs, formulated the ambition to undertake an investigation into human rights challenges in times of global tax transparency. The authors sincerely hope that this book will be a gamechanger in securing international protection of taxpayers' rights under public international law. This is a necessary condition to bring new light to international tax law and contribute to a more balanced approach to the critical issues that arise in such a context. The authors do not question the importance of effectively countering tax avoidance and evasion. However, they think that the one-sided emphasis of the reaction to such practices over the past decade may lead the fundamental rights of taxpayers into oblivion. The fact that some taxpayers have been actively engaged in abusive practices is no valid justification for harshening the international rules without a corresponding effective protection of the rule of law and a system of legal remedies that operates across borders. Without both, no international tax fairness would in fact be possible.

All these goals reflect the ones pursued by the ILA, when it decided to re-incorporate the study of international tax law within its activities some 80 years after the International Fiscal Association split from it in 1938. This new interest in taxation within the ILA arose in recognition of the growing importance of international tax law for international relations, but also with a view to showing that the development of international tax law can no longer occur in isolation from that of public international law.

From this perspective, the establishment of a dedicated Study Group on International Tax Law first, and then of a Tax Committee, are the cornerstones of a comprehensive research activity on international tax law. This activity started with the establishment of the international framework for the protection of taxpayers' rights contained in this book and will continue over the years to come with a focus on tax nexus and enforcement.

The authors are truly committed to making this a reality and will pursue this goal with the widest possible involvement of all members of the public international law and international tax law communities. The authors hope that this book will be the starting point of a process that brings the two communities together within a new specialised interdisciplinary line of research to the service of the globalised economy, hopefully prompting international agreements along the lines proposed in this book.

The authors would like to express their most sincere gratitude to the colleagues who have supported the ILA research project on taxpayers' rights with their input as members of the Study Group.[5] Moreover, in several footnotes throughout the book, the authors also acknowledge the precious input by further colleagues with whom the authors have interacted in respect of specific countries (or parts)[6] of the book.[7] All such input has allowed the authors to process selected valuable information and to check the technical validity of the content of this book throughout the entire lifespan of the ILA research project underlying this book. The authors hope that it will enhance the validity and legitimacy of the book to establish an international minimum standard for the protection of taxpayers' rights which reflects their protection in the entire world rather than in a limited group of countries.

Finally, the authors are grateful to the IBFD – International Bureau of Fiscal Documentation (www.ibfd.org) – for the overall support given to this project during the past four years, and to all those who have facilitated the authors' work in technical and logistical aspects of the research project, including in particular Robin Miller, who has assisted us throughout. Our thanks also go to Judith Schamell, and to Mariya Serafimova and Sam van der Vlugt for reading the proofs of the final manuscript, as well as to Marco Luigi Bossi for working on the reviewing the book's footnotes and bibliography.

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[6] As in the cases of Andreas Kallergis and Panos Merkouris.

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AATM	Agreement on Assistance in Tax Matters
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AEoI	automatic exchange of information
AFIP	Federal Administration of Public Revenue
ALRC	Australian Law Reform Commission
ALS	arm's-length standard
APAs	Advance Pricing Agreements
ATAD	Anti-Tax Avoidance Directive
ATAF	African Tax Administration Forum
ATO	Australian Taxation Office
AU	African Union
BEPS	Base erosion and profit shifting
BITS	bilateral investment treaties
CARICOM	Caribbean Community
CbCR	country-by-country reporting
CDR	consumer data right
CFC	Controlled Foreign Company
CIL	customary international law
CITNA	Chartered Institute of Taxation of Nigeria Act
CJEU	Court of Justice of the European Union
CMAATM	Convention on Mutual Administrative Assistance in Tax Matters
COMMITEE	Commitee on International Tax Law
CRS	Common Reporting Standards
DACs	EU Directives on Administrative Cooperation
DPA	Data Protection Act

DRD	Dispute Resolution Directive
DTCs	Double Taxation Conventions
EATLP	European Association of Tax Law Professors
EC	European Commission
ECA	European Communities Act
ECHR	European Convention on Human Rights
ECOFIN	Economic and Financial Affairs Council
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EOI	exchange of information
EU	European Union
FATCA	Foreign Account Tax Compliant Act (US)
FATF	Financial Action Task Force (intergovernmental organisation set up by G7 to counter financial crime worldwide)
FC	Swiss Federal Constitution
FET	fair and equitable treatment
FOIA	Freedom of Information Act
G7	Political forum (Canada, France, Germany, Italy, Japan, the UK and the US)
G20	Forum for international economic cooperation
GAARs	General Anti-Avoidance Rules
GATT	General Agreement on Trade and Tarrifs
GDPR	General Data Protection Regulation
GLOBE	Global Anti-Base Erosion
IACHR	Inter-American Commission on Human Rights
IATJ	International Association of Tax Judges
IBA	International Bar Association
IBFD	International Bureau of Fiscal Documentation
ICAP	international compliance assurance programs
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IFA	International Fiscal Association

IFRS	International Financial Reporting Standards
IGAs	Inter-Governmental Agreements
IGT	Inspector-General of Taxation (Australia)
ILA	International Law Association
ILC	International Law Commission
IMF	International Monetary Fund
IRD	New Zealand Inland Revenue Department
IRS	Internal Revenue Service (US)
JITSIC	Joint International Taskforce on Shared Intelligence and Collaboration
MAP	Mutual Agreement Procedure
MFTC	Mexican Federal Tax Code
MLI	Multilateral Instrument
MoU	Memorandum of Understanding
MRA	Malawi Revenue Authority
NGOs	non-governmental organisations
NPC	National People's Congress of China
NAT	National Tax Authority of Japan
NDPR	Data Protection Regulation
NITDA	Nigerian Information Technology Development Agency
NTA	National Taxpayer Advocate (US)
NZ IR	New Zealand Inland Revenue
OAS	Organization of American States
OECD	Organisation of Economic Development and Co-operation
PCIJ	Permanent Court of International Justice
PoS	point of sale
PPT	Principal Purpose Test
PRODECON	*Procuraduría de la Defensa del Contribuyente* (Mexico)
SAARs	Specific Anti-Avoidance Rules
SARS	South African Revenue Authority
SMEs	small and medium enterprises
SVDP	Special Voluntary Disclosure Programme (South Africa)
TAA	Tax Administration Act

TAD	Taxpayer Advocate Directive (US)
TAO	Taxpayer Assistance Order (US)
TAS	Taxpayer Advocate Service (US)
TIEA	Tax Information Exchange Agreements
TIOPA	Taxation (International and Other Provisions)
UK	United Kingdom
UN	United Nations
US	United States
UT&FA	unitary taxation with formular apportionment
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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Introduction

The Internationalisation of Tax Law and the Importance of Taxpayers' Rights[1]

In recent years, an unprecedented internationalisation of tax law has taken place. Whereas half a century ago, Klaus Vogel was the only one to deal with international tax law (in particular, double taxation), tax lawyers today are connected worldwide: the International Fiscal Association (IFA) has existed since 1938;[2] since 2010, tax judges from all over the world have been meeting annually within the framework of the International Association of Tax Judges (IATJ); since 2002, the Vienna University of Economics and Business Administration has been holding annual conferences on the case law of the Court of Justice of the European Union in direct and indirect tax law, at which tax law experts from all over the world exchange views; since 1999, European tax law professors have been meeting annually under the auspices of the European Association of Tax Law Professors (EATLP). Especially with regard to taxpayers' rights, 2015 was an important year: the International Conference on Taxpayer Rights started being held annually at various locations around the world[3] and the International Bureau of Fiscal Documentation (IBFD) Observatory on the Protection of Taxpayers' Rights started documenting the worldwide development of taxpayers' rights, based on the standard of legal protection developed in the framework of the IFA. This list could be continued.

There is therefore no doubt that international tax law is becoming increasingly important. However, from the point of view of international tax law, taxpayers are often still treated as mere objects of the exercise of state sovereignty. This needs to change. In international law, states are still the primary subjects. In recent decades a significant number of states have shown an inclination to accept international standards, such as for instance the arm's-length principle, as well as to follow guidelines formulated by international organisations, such as the Organisation for Economic Co-operation and Development (OECD) transfer pricing guidelines. More recently, states have accepted further unwritten international constraints on the exercise of their sovereignty arising from international tax coordination conducted within

[1] *cf* also J Kokott et al, 'Public International Law and Tax Law: Taxpayers' Rights, The International Law Associations' Project on International Tax Law – Phase 1' (2021) 52(2) *Georgetown Journal of International Law* 381–426; 'La protection international des droits des contribuables – Le projet de l'association de droit international sur le droit fiscal international – Phase 1' (2021) 2 *Revue de droit international et de droit comparé* 157–208; 'Diritto internazionale pubblico e diritto tributario: i diritti del contribuente' (2020) 17 (2) *Diritto e Pratica Tributaria Internazionale* 454–502; 'Völkerrecht und Steuerrecht – Die Rechte der Steuerpflichtigen' (2020) 3 *Steuer und Wirtschaft (StuW)* 200–18; 'Direito Internacional Público e Direito Tributário. Projeto da International Law Association sobre Direito Tributário Internacional – Fase 1: Direito dos Contribuintes' (2020) 4 (8) *Revista Direito Tributário Internacional Atual* 173–213.

[2] Still in 1938, the International Bureau of Fiscal Documentation ('IBFD') was established as an independent documentation and research institution in support of the international dissemination of tax law.

[3] The International Taxpayers' Rights Conference was promoted by Nina Olson when she was the US National Taxpayers' Advocate. The goal of this conference is to provide a global forum for dialogue on the protection of taxpayers' rights.

the framework of the projects on tax transparency and the fight against base erosion and profit shifting (BEPS). These have then gradually evolved into actual treaty obligations.[4]

However, these projects must not violate taxpayers' rights. Besides being within the mandate of international tax coordination implemented by these projects, which mostly focus on the fight against aggressive tax planning and tax avoidance by multinational enterprises, the point remains that there is a subtle reluctance by states to duly take into account the fact that taxpayers may be rightholders at the international level. This is a possible consequence of the perception that international tax relations are matters between actors of public international law, which treaties regulate in a way that settles potential conflicts.

Even when states agree to include clauses in their tax treaties that produce an actual involvement of taxpayers, such as in the case of mutual agreement procedures and tax arbitration, state practice keeps taxpayers mostly as affected persons with no additional rights other than the ones that are applicable within the domestic legal system of each contracting state.[5] The same applies to treaty-based procedures of cross-border mutual assistance between tax authorities, such as those on exchange of information and assistance in the collection of taxes, where states hardly ever perceive the need to secure the immediate protection of the rights of the affected persons to have such assistance conducted in line with the rule of law.[6] This needs to change.

Since the end of the Second World War, individuals have joined the states as bearers of rights under international law, especially of human rights. The problem is that international tax law has developed disconnectedly from international law since the IFA split off from the International Law Association (ILA) in 1938. Since 2018, the ILA Study Group on International Tax Law, of which the authors were part, sought to reunite the perspectives of tax law and international law. In 2020, that group was transformed into the Committee on International Tax Law ('the Committee'). This development reflects the importance of the subject.

In 1990, the OECD conducted a global survey of taxpayers' rights and obligations.[7] The report noted that a clear statement of taxpayers' rights would be beneficial, not only

[4] See the evolution from the original text of the Council of Europe Multilateral Convention on Cross-Border Mutual Assistance, opened for ratifications on 25 January 1988, to the one resulting from the Protocol, open for ratifications on 27 May 2010. The Protocol reflected the growing concern of countries to enhance legal instruments for cross-border mutual assistance in tax matters, to effectively counter the rise in the financing of international terrorism. Under international pressure and a very wide global consensus, Switzerland gave up banking secrecy in tax matters; this was followed by similar measures from a number of tax havens.

Another good example is the soft law developed in connection with the BEPS project, conducted under the auspices of the OECD on political mandate by the G20. In such a context, the content of the BEPS standard has been perceived as reflecting the best practice to nudge international tax coordination and build up a worldwide consistent approach to counter aggressive tax planning and tax avoidance by multinational enterprises. A part of the content of the BEPS project was then converted into a multilateral convention (the so-called BEPS Multilateral Instrument), signed in Paris on 7 June 2017, which aims to steer bilateral tax treaties into convergence with the international standards adopted in the framework of the BEPS project. Another important part of the outcome of the BEPS project was then firmed up by states at a domestic level, thus showing the value of this project as catalyst of state practice.

[5] Examples of judgments acknowledging the right of taxpayers to inspect documents in the framework of such procedures are generally based on the need to secure an effective protection of their fundamental rights in national constitutions, rather than an expression of the state practice of recognising taxpayers' fundamental rights at an international level; see Belgian Raad van State, judgment of 2 June 2020, *X v Belgium*, case A.224.757/IX-9262, judgment no 247.694, (2020) 23 part 2 *International Tax Law Reports*, [2020], concerning access to information under the Belgium–United Kingdom Treaty, with comments by R Offermanns, 'Treaty between Belgium and the United Kingdom: Taxpayer Entitled to Inspect MAP Documents' (2020) *Tax News Service*, www.ibfd.org.

[6] This situation may change in the future in relation to the acknowledgment of the legal standing of private parties to protect the rule of law in connection with cross-border mutual assistance conducted in respect of EU tax directives; see CJEU, judgment of 16 May 2017, *Berlioz Investment Fund*, case C-682/15, ECLI:EU:C:2017:373, [2017]. Even though this judgment does not affect cross-border mutual assistance under international legal instruments, EU Member States may perceive the need to develop state practice that is in accordance with this standard of protection. Such development could also arise in connection with the need to secure equal treatment, inter alia.

[7] OECD, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries*, (OECD, 1990).

with respect to taxpayer compliance, but also to provide a mechanism for curtailing the ever-increasing power of tax administrations.[8] At present, however, the fight against tax avoidance and evasion dominates the development of international tax law. The reunion of tax and international law thus requires a comprehensive counterbalancing approach from the taxpayers' perspective. Academic research conducted within the tax law community has pointed out the importance of the establishment of a global dimension to the protection of taxpayers' fundamental rights.[9] The Committee has therefore, in a first phase, started to address taxpayers' rights. Based on a comparative legal study, the Committee is analysing their fundamental rights, which generally limit the exercise of tax sovereignty. The comparative survey underpinning this research is of particular importance for legitimising the establishment of an international legal standard for the protection of taxpayers' fundamental rights. The second phase will deal with the delimitation of tax sovereignty within the framework of a fair international tax order and the third phase with the enforcement of international tax law.

The purpose of the initial Study Group was 'to undertake a preliminary investigation into human rights challenges in times of global tax transparency'.[10] In order to undertake such an investigation, it is first necessary to reach an agreement on the definition of human rights in this context. What are the human rights at issue? Does the current Committee's reference to 'human rights challenges' mean that this investigation will consider both the individual rights of taxpayers and the collective rights of citizens affected by (non-)taxation? Or should this investigation focus only on one of those groups of rights – and, if so, which one?

In Phase 1, the research of the Committee has focused on the protection of individual rights through human rights. This contrasts with the view that invokes human rights in the fight against tax injustice. 'Unjust' tax revenue shortfalls can lead to human rights not being adequately protected in certain states. Therefore, some constitutions, especially in Africa, include an obligation to pay taxes,[11] and some even include a state obligation to levy taxes and to combat tax avoidance and evasion.[12] The 'collective right' to tax justice is therefore indeed fundamental. This is all the more true when it comes to developing a comprehensive perspective as a basis for recommendations by the ILA. Nevertheless, the protection of fundamental collective interests must not go so far as to infringe individual fundamental rights. Contrary to Machiavellianism, the end (namely the protection of 'collective rights') does not always justify the means (here, the violation of individual taxpayers' rights). Moreover, the fight against tax avoidance and for a fair distribution of international tax resources is already on the international agenda and, as previously mentioned, will be the subject of Phase 2 of the project.

However, especially now, there must be global minimum standards for the effective protection of taxpayers' rights (Phase 1). This is because tax authorities around the world are working together more and more closely in a common fight against tax avoidance. Even if tax avoidance does not always openly violate applicable tax regulations (such as in the case of tax evasion or fraud), it

[8] OECD, *Taxpayers' Rights and Obligations*, para 1.4.

[9] See P Pistone and P Baker, *General Report – The Practical Protection of Taxpayers' Rights*, vol 100B (2015) 60 and ff. The EATLP 2019 Congress added further analysis of the specific issues concerning tax procedures within the European region (see P Pistone, *Tax Procedures, General Report*, (IBFD, 2020) 1 and ff).

[10] www.ila-hq.org/index.php/study-groups at Internatinal Tax Law – Documents – Mandate.

[11] Art 64 of the Constitution of Algeria; arts 102 and ff of the Constitution of Angola; art 85g of the Constitution of Cape Verde; principle 23 of the preamble to the Constitution of Cameroon; art 20 of the Constitution of the Central African Republic; art 58 of the Constitution of Chad; art 65 of the Constitution of the Democratic Republic of Congo; arts 19 and 20 of the Constitution of Equatorial Guinea; art 22(4) of the Constitution of Guinea; art 20 of the Constitution of Mauritania; art 45c of the Constitution of Mozambique; art 40 of the Constitution of Niger; art 10 of the Constitution of Tunisia.

[12] Art 10 Constitution of Tunisia; *cf* also art 43 of the Constitution of the Ivory Coast; art 38(5) of the Constitution of Egypt.

nevertheless threatens to undermine tax sovereignty. States reasonably defend themselves against this through global coordination. However, there is an increased risk of undermining the effective protection of taxpayers. Taxpayers' rights belong on the global agenda, just as do the international fight against tax avoidance, evasion and fraud in the context of the OECD's BEPS project. The Committee's research project within the framework of the ILA will contribute to this.

We are combining research on international and national tax and constitutional law, as well as on public international law. In order to identify general principles of law, we studied the legal orders of as many countries as possible, to ensure that this book was representative as possible. Inevitably and for several reasons, some legal systems have been dealt with in greater depth than others. Some legal systems present richer material, case law, legislation and doctrine on the subject of taxpayers' rights than others; also we depend on the collaboration of colleagues from the various countries who are experts in the fields covered.

Part I on Taxation and International Human Rights Law prepares the ground, explaining the interrelations between public international law and taxation, as well as the interaction of national and international law in taxation. It ends with our approach to human rights and taxation, which is based on an individual rights perspective, rather than on the collective interest to fair and effective taxation.

Part II on Human Rights in Tax Matters first identifies the general principles that protect taxpayers' rights,[13] then sets out the special features of human rights in taxation.[14] We classify taxpayers' rights into procedural, sanctions related and substantive rights.

The effective protection of procedural rights, in particular, faces new challenges in the cross-border context, where taxpayers' fundamental rights often remain without an immediate effective protection.[15] However, it is a basic expression of the rule of law that where there is a law, there should be a remedy (*ubi ius, ibi remedium*) and vice versa.

As for sanctions, even though it is fair and just for them to determine negative consequences for those who violate the law, they may not go so far as to undermine taxpayers' fundamental rights.[16]

We then focus on the substantive rights to equality with its various expressions, to data protection – especially in the context of worldwide tax transparency – and property, also taking into account the rights of professionals. As to substantive rights, the legislator has more leeway to determine the applicable policy and rules. However, such discretion must not undermine effective protection of the international minimum standards of the rights of individual taxpayers.[17]

Part III focuses on the international tax regime containing international minimum standards for the protection of taxpayers' rights that results from our research. We first outline the emerging international tax regime,[18] followed by international minimum standards for the protection of taxpayers' rights.[19] Finally, we propose international instruments for the protection of the fundamental rights of taxpayers. In doing so, we discuss two alternative vehicles for conveying such an instrument, namely the 'soft law approach' and the 'hard law approach'.[20]

[13] See sec 4 of this book.
[14] See sec 5 of this book.
[15] See sec 6 of this book.
[16] See sec 7 of this book.
[17] See sec 8 of this book.
[18] See sec 9 of this book.
[19] See sec 10 of this book.
[20] See sec 11 of this book.

PART I

Taxation and International Human Rights Law

In Part I, we will outline the international tax regime, taking into account the sources of international law as listed in Article 38 of the Statute of the International Court of Justice, supplemented by 'soft law' which is becoming more important, especially in the field of international taxation.[1] Then, we will deal with the relationship between national and international law.[2] We will outline possible approaches to human rights and taxation. We narrow down our focus on taxpayers' rights (applicable to individuals and legal persons) as opposed to an approach challenging tax injustice through human rights.[3] In doing so, we recognise that the important collective interest in tax collection, enabling people to enjoy human rights, must be effectuated through effective measures against tax avoidance and all other similar practices that might undermine the effective levying of taxes.[4]

[1] See sec 1 of this book.
[2] See sec 2 of this book.
[3] *cf* eg UN, *Report of the UN Special Rapporteur on Extreme Poverty and Human Rights* (2014), International Bar Association, *Taxation as a Human Rights Issue* (2016), and Association of World Citizens, *Global Endorsement of the Declaration of Taxpayers' Human Rights*, www.taxpayerhumanrights.org/endorse/index.php.
[4] See sec 3 of this book.

1

Sources of International (Tax) Law

1.1. Introduction[5]

Taxpayers' rights may be enshrined in domestic law instruments of varying types, ranging from hard law (constitution, legislation or regulations) to soft law (charters or codes, depending on the legal system of reference). They may also be protected under public international law or legal systems of regional integration, such as EU law.

Article 38(1) of the Statute of the International Court of Justice (ICJ) enumerates the sources of public international law which the ICJ shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Reference to the protection granted by instruments of pure domestic law in international law-oriented research is not self-evident: the mere establishment by individual states or the recognition by a number of domestic courts of specific rights does not, as such, make the rights in question part of customary international law in the absence of international state practice and *opinio iuris*. Nevertheless, those domestic acts – if consistent and sufficiently widespread – can contribute to the formation of customary international law (CIL) or general principles of law.

While no doubt exists about the place of international conventions among the sources of international tax law, the existence of a body of customary international law applicable to tax matters, and a fortiori of tax-specific general principles of law recognised by civilised nations, is still open to question.

1.2. International Conventions

The most prominent source of international tax law is treaties between sovereign states and/or empowered dependent territories.[6] It is paramount that when defining the main rights in international tax law, both treaties and domestic laws are consulted. The authority of a treaty in each individual signatory nation depends on the domestic laws of that state and how the treaty is incorporated into domestic law.[7]

[5] We would like to thank Andreas Kallergis for his contribution.

[6] Such as overseas territories or Crown dependencies (FR, UK).

[7] *cf* JF Avery Jones, 'The Interaction between Tax Treaty Provisions and Domestic Law', in G Maisto (ed), *Tax Treaties and Domestic Law* (IBFD, 2006) 209 and ff (135 on 'treaty underride'); S Sachdeva, 'Tax Treaty Overrides: A Comparative Study of the Monist and the Dualist Approaches' (2013) *Intertax* 180 and ff.

1.2.1. Interpretation of International Conventions

If the parties to a tax treaty are parties to the Vienna Convention on the Law of Treaties (VCLT) and the VCLT entered into force for them before the conclusion of the tax treaty, then the VCLT applies directly. However, those rules are also followed in jurisdictions that have not ratified the VCLT (for example, France), given that the VCLT rules on interpretation codify customary international law. International courts and tribunals have accepted that the customary rules on interpretation are enshrined in the VCLT, although they are still being constantly refined and elaborated.

Most contemporary tax treaties lay down similar provisions to those of the OECD Model Tax Convention. However, many bilateral relationships between states do not fall within the ambit of a tax treaty. Is there nevertheless evidence of customary international law in this field? In other words, is there state practice consistently observed by a state because of a sense of obligation, regardless of any equivalent treaty obligations that might exist in parallel?

Taxpayers' rights could be found in double taxation conventions. To that extent, two interrelated questions have to be distinguished: (i) do double taxation conventions confer rights upon individuals? This depends not only on the interpretation of the convention provisions, but also on whether the respective country adopts a monist or a dualist approach to public international law;[8] and (ii) whether individuals can claim these rights at an international level.

1.2.2. Treaties Containing Taxpayers' Rights

Human rights treaties establish rights for individuals, including in tax matters.

From a regional perspective, even if not tax-specific, the African Charter on Human and Peoples' Rights (ACHPR), the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR) establish substantive and procedural rights and guarantees that are directly applicable. This may allow taxpayers to invoke them in the context of litigation with tax authorities.

1.2.2.1. Procedural Rights

With respect to procedural rights, Article 6 of the ECHR establishes the right to a fair trial in civil and criminal cases.[9] However, in the area of tax, only litigation for tax offences,[10] including tax surcharges and penalties,[11] is fully covered by this guarantee. By contrast, the non-recognition of the civil nature of tax litigation otherwise prevents a general right to fair trial in this context.[12] Moreover, the ECHR, as interpreted by the ECtHR, does not prohibit the accumulation of administrative and criminal penalties for the same taxpayer's conduct.[13] However, this does not automatically mean that the legislator has carte blanche to regulate matters of taxation. The legal constraints are somehow stronger within the European Union. The flow of legal values between

[8] This subject will be dealt with in sec 2.1.

[9] See in general G Marino, *Limitation of Administrative Penalties by the European Convention of Human Rights and the EU Charter of Fundamental Rights*, in R Seer and AL Wilms (eds), *Surcharges and Penalties in Tax Law*, (IBFD, 2016), 133-161.

[10] ECtHR, *Engel and others v the Netherlands* (Plenary), nos 5100/71, 5102/71, 5354/72 and 5370/72, (8 June 1976).

[11] ECtHR, *Jussila v Finland*, no 73053/01, (23 November 2006).

[12] ECtHR, *Ferrazzini v Italy*, no 44759/98, (12 July 2001), para 29.

[13] ECtHR, *A and B v Norway* (Grand Chamber), nos 24130/11 and 29578/11, (15 November 2016).

the ECHR and the EU legal system, established by Article 52 of the EU Charter, allow for a broadly common approach to the protection of fundamental rights, without preventing the EU from adopting a stronger protection. In such a context, Article 47 of the EU Charter grants a right to an effective remedy to '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated …'.

The ACHR establishes several procedural rights: the right to judicial protection (Article 25), according to which everyone has the right to a simple and prompt recourse to a competent court or tribunal. As opposed to eg Article 13 of the ECHR,[14] Article 25 of the ACHR also grants protection 'against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned' and not only against acts that violate the Convention. That Article emphasises that protection is guaranteed 'even though such violation may have been committed by persons acting in the course of their official duties.' The right to fair trial (Article 8 of the ACHR) comprises (1) the right to a hearing within a reasonable time by a competent, independent and impartial tribunal, previously established by law; that right explicitly extends to the determination of a person's rights and obligations of a fiscal nature; (2) the presumption of innocence; and (3) some minimum guarantees in criminal proceedings: the right to prior notification of charges, for protection against violations of the right to adequate time and means for preparation of defence, right to counsel, right not be compelled to be a witness against him/herself, right to appeal to a higher court.

1.2.2.2. Substantive Rights

As regards substantive rights, we focus on equality, data protection and the protection of property as well as the rights and obligations of professionals and intermediaries.

Double taxation conventions and human rights instruments overlap to the extent that they contain non-discrimination provisions. There is, of course, a wide difference in form and scope between the non-discrimination provisions in Article 24 of the OECD Model and non-discrimination provisions in the various human rights instruments. At the same time, the non-discrimination provisions in Article 14 of the ECHR[15] and Article 26 of the International Convenant on Civil and Political Rights (ICCPR) differ significantly in their form. Article 14 of the ECHR is a non-free-standing non-discrimination provision: that is, persons are not to be discriminated against with respect to the enjoyment of the various rights and freedoms secured by the ECHR. Article 1 of Protocol No 12 to the ECHR contains a general prohibition of discrimination not limited to equal enjoyment of ECHR rights. However, Protocol No 12 has only been ratified by 20 states to date.[16] Within the European Union, Articles 20 and 21 of the EU Charter recognise the non-discrimination principle, but it applies to the Member States only when they are implementing Union law (Article 51 of the EU Charter). Article 26 of the ICCPR is a broader non-discrimination guarantee.[17] Article 24 of the American Convention on Human Rights also contains a general equality protection clause which is not limited to the enjoyment of Convention rights.

[14] Similarly, art 47 of the EU Charter protects against violations of the 'rights and freedoms guaranteed by the law of the Union'.

[15] 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[16] www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177.

[17] P Baker, 'Double Taxation Conventions and Human Rights', in P Baker and C Bobbett (eds), *Tax Polymath: A Life in International Taxation* (*Essays in Honour of John F Avery Jones*), (IBFD, 2010) 63–76, 72.

Human rights treaties and national constitutions guarantee the protection of privacy which, in principle, also covers tax data. The exchange of information under double taxation treaties, tax information exchange agreements (TIEAs) or the Council of Europe/OECD Conventions on Mutual Administrative Assistance may give rise to situations in which violations of such privacy rights can be recorded.[18] In this book, recent case law in various jurisdictions which have been confronted with this issue will be analysed.

In general, double taxation conventions set out to relieve double taxation and thus ensure that taxpayers enjoy their property, which might be lost if they were doubly taxed.[19] The ECHR establishes the protection of property in Article 1 of Protocol 1. The ECtHR has confirmed that taxation interferes with the right to property,[20] even if it is part of acceptable limitations to the protection of the right to property under paragraph 2 of Article 1, Protocol 1 to the ECHR.[21] Notably, the right to property can be invoked in combination with Article 14 of the ECHR (prohibition of discrimination).[22]

The concept of property in the ECHR is given extensive interpretation and covers legitimate expectations which could exist when a taxpayer reasonably relies on legal acts that have a sound legal basis.[23] Thus, the refusal to reimburse unduly paid taxes has been identified as a violation of the peaceful enjoyment of a company's property.[24] However, no 'expectation' can be established when the challenged amounts are neither clear nor subject to a clear definition.[25] Generally, under the ECHR, taxation must strike a fair balance between the interests of the community and the fundamental rights of the individual, leaving a wide margin of appreciation to the legislator.[26] Therefore, the ECtHR follows a systematic approach in order to find whether the core of the right to property could have been violated by a specific tax, comparing the rate of such a tax to rates applied to other categories of income in a specific Member State.[27]

Other substantive rights contained in human rights treaties may find application in tax matters. For instance, the freedom of religion may imply that a different tax treatment of donations to a specific religious association[28] or the refusal to exempt a religious organisation from taxation on regular imports of donated religious literature[29] may violate Article 9 of the ECHR.

The American Convention on Human Rights establishes the right to humane treatment (Article 5), right to personal liberty and security (Article 7), right to compensation (Article 10), right to privacy (Article 11), freedom of conscience and religion (Article 12), right to property (Article 21), freedom of movement and residence (Article 22), and the right to equal protection (Article 24). These rights also apply in tax matters. There is, however, hardly any tax-specific case law in the context of the ACHR.

[18] *cf* V Wöhrer, *Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information* (IBFD, 2018).

[19] P Baker, 'Double Taxation Conventions' 63–76, 74.

[20] ECtHR, *Burden v the United Kingdom* (Grand Chamber), 13378/05, (29 April 2008), para 59.

[21] ECtHR, *Gasus Dosier- und Fördertechnik GmbH v The Netherlands*, no 15375/89, (23 February 1995), para 59.

[22] See further sec 8.1. on the principle of equality.

[23] See eg ECtHR, *SA Dangeville*, no 36677/97, (16 April 2012), with respect to VAT.

[24] See eg ECtHR, *Antonov v Bulgaria*, no 58364/10, (28 May 2020), paras 56–65.

[25] ECtHR, *Optim and Industerre v Belgium* (dec), no 23819/06, (11 September 2012), paras 34 and ff.

[26] *cf* ECtHR, *Imbert de Tremiolles v France* (dec), nos 25834/05 and 27815/05, (4 January 2008).

[27] ECtHR, *NKM v Hungary*, no 66529/11, (14 May 2013), paras 67, 68, 74 and 89.

[28] ECtHR, *Association Les Témoins de Jéhovah v France*, no 8916/05, (30 June 2011).

[29] ECtHR, *Christian Religious Organization of Jehovah's Witnesses v Armenia* (dec), no 73601/14, (29 September 2020), paras 30–38.

1.3. Customary International Law

1.3.1. The ILC's and ILA's Approaches

Article 38(1)(b) of the ICJ Statute defines customary international law as 'international custom, as evidence of a general practice accepted as law'.

The International Law Commission (ILC) worked on the question of the identification of CIL from 2012 and adopted its Draft Conclusions ('the Conclusions') and commentaries on second reading in May 2018.[30] The General Assembly welcomed and took note of the Conclusions in its Resolution 73/203 of 20 December 2018. The Conclusions focus on the 'the way in which the existence and content of rules of customary international law are to be determined'[31] and are intended to codify existing CIL practices. The Conclusions highlighted herein are those relevant to the of evaluation whether taxpayers' rights have now become embedded in CIL.

At the outset the Conclusions confirm the need to establish the two elements that constitute CIL – the objective element (state practice) and the subjective element (accepted as law – *opinio iuris*).[32] The Conclusions also encompass, in the traditional notion of regional customary international law, the possibility that a 'rule of particular customary international law'[33] may arise. This is defined as custom being 'regional, local or other' and which 'applies only among a limited number of States'. The significance of this is that the customary international law of taxation can develop between groups of states alone, as for example within a group of developed states or within the EU.

The ILA also issued a committee report on customary international law in 2000. One of the major differences between the ILC Conclusions and the ILA report is that the ILA report emphasises *opinio iuris* less than the ILC Conclusions do. In particular, the ILA report considers that 'it is not usually necessary to demonstrate the existence of the subjective element before a customary rule can be said to have come into being'.[34] For the ILA, the main point is that 'it is not necessary for an individual state to have consented (still less, to be proved to have consented) to a rule for it to be bound, provided the other conditions in Part II are satisfied'.[35] The ILC, on the other hand, stressed in its Conclusions that the objective and the subjective elements carry equal importance and that both must be ascertained separately and in each and every case.[36]

However, the ILC Conclusions and the ILA report overlap with regard to almost all other relevant questions of CIL theory. Thus, the following overview of CIL theory relies on both instruments simultaneously and only distinguishes those parts of the documents where there are significant differences. While neither the ILC's nor the ILA's output is legally binding for states (or for courts applying international law), both instruments are highly authoritative. With regard to the ILC, the adoption of the Conclusions was preceded by a painstaking process conducted by experts of international law who rank among the 'most highly qualified publicists of the various nations';[37]

[30] ILC, *Draft Conclusions on identification of customary international law*, with commentaries adopted by the International Law Commission of the United Nations at 124. The Report will appear in the Yearbook of the International Law Commission 2018, vol II, Part Two, legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.

[31] ILC, *Conclusion 1 of Draft Conclusions*.

[32] ILC, *Conclusion 2*, confirming art 38(1) of the ICJ Statute. The landmark case for these two elements is the ICJ, *North Sea Continental Shelf case (Germany v Denmark and Netherlands)*, ICJ Rep 1969, [1969]. See also Daniel M Bodansky, 'The Concept of Customary International Law' (1995) 16 *Mich J Int'l L* 667.

[33] ILC, *Conclusion 16*.

[34] International Law Association (ILA), *London Conference Statement of Principles Applicable to the Formation of General Customary International Law 2000*, 10.

[35] ILA 2000, Part II referred to state practice; ILA 2000, 31.

[36] ILC, *Conclusion 3(2)*.

[37] Art 38(1)(d) of the ICJ Statute.

thus, their findings constitute subsidiary means for the determination of international law under Article 38(1)(d) of the ICJ Statute.[38] Accordingly, the ICJ has relied on (and thus at least implicitly confirmed) the findings of the ILC repeatedly in its judgments and advisory opinions.[39] The ILA has been referred to in 18 individual ICJ opinions, which evinces the high esteem it enjoys as a non-governmental expert body.[40]

1.3.2. Objective Element: State Practice

Customary international law can be derived from the international and the parallel domestic practices of states. State practice can arise in the exercise of 'executive, legislative, judicial or other functions'.[41]

1.3.2.1. Quantitative and Qualitative Requirements for State Practice

International practice includes

> diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and judgments of national courts.[42]

The ICJ found in the *North Sea Continental Shelf* case that the state practice giving rise to custom must be uniform, extensive and representative in character.[43] Both the ILA and the ILC have reiterated this requirement, stating that 'the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent'.[44] These elements of state practice will be addressed in the following paragraphs.

a. Uniformity: the ICJ stated in the *Asylum* case[45] and the *Fisheries* case[46] that the uniformity of state practice should be internal and collective. For the ILA, 'internal uniformity means that each State whose behavior is being considered should have acted in the same way on virtually all of the occasions on which it is engaged in the practice in question. Collective uniformity means that different States must not have engaged in substantially different conduct, some doing one thing and some another'.[47]
b. Consistency: in the *Nicaragua* case, the ICJ stated that 'in order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given

[38] S Rosenne, *The Law and Practice of the International Court, 1920–2005*, vol 3, (Brill, 2006) 1560.

[39] See, eg, ICJ, *North Sea Continental Shelf case*, paras 48, 50 and 95; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United State)*, ICJ Rep 14, [1986] 14, 100, para 190; ICJ, *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, (Advisory Opinion), ICJ Rep 1999, [1999] 62, 87, para 62; ICJ, *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep 7, [1997] 7, 40, para 51.

[40] *cf* ST Helmersen, 'Finding 'the Most Highly Qualified Publicists': Lessons from the International Court of Justice' (2019) 30 *European Journal of International Law*, 509–35, 525.

[41] ILC, *Conclusion 5 of Draft Conclusions*.

[42] ILC, *Conclusion 6.2*.

[43] ICJ, *North Sea Continental Shelf case*, para 74.

[44] ILC, Conclusion 8; see also ILA 2000, 1 (ii).

[45] ICJ, *Asylum case*, ICJ Rep 1950.

[46] ICJ, *Fisheries case*, ICJ Rep 1951.

[47] ILA 2000, 21.

rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule'.[48]

c. Widespread and representative: these requirements mean that the state practice must reach a certain, quantitative threshold. It is unclear how many states have to engage in the practice to open the door to new custom; there is no set number or percentage.[49] Moreover, the ICJ stated in its *North Sea Continental Shelf* case that universal practice is not required and 'a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected'.[50] Three important points can be extracted from this famous passage. First, universal practice is not required – custom may still arise if some states do not engage in the practice. Second, the practice must be representative, 'which needs to be assessed in light of all the circumstances, including the various interests at stake and/or the various geographical regions'.[51] Third, the ICJ's statement has been read to mean that the practice of states that are specially affected by the potential customary rule might be more relevant for the identification of CIL. However, the meaning and relevance of specially affected states remains controversial in the doctrine. As stated by Heller, countries such as the United States have relied on the 'ICJ's doctrine of specially-affected states to claim that it and other powerful states in the Global North play a privileged role in the formation of customary international law'.[52] This argument was also a contentious point in the course of the drafting of the ILC Conclusions. Accordingly, the ILC did not explicitly include the specially-affected States doctrine in its Conclusions, but only addressed it in the Commentary and did not provide any further clarifications on the doctrine's meaning. It merely stated that it does not refer to the 'relative power of States' (thereby fleetingly addressing the concern expressed by Heller) and mentioned that the practice of specially affected states is relevant for practical reasons.[53]

State practice 'may, under certain circumstances, include inaction'.[54] Thus, inaction may have a bearing on evaluating the evidence for state practice. However, 'only deliberate abstention from acting may serve such a role; the State in question needs to be conscious about refraining from acting in a given situation'.[55]

ILC Conclusion 7 stresses that the practice of any particular state must be assessed as a whole. In the second paragraph, it addresses the issue of countervailing practice: 'Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.' This refers to instances where a state's practice is inconsistent, for example where the various branches or organs of the state adopt different policies and practices. However, the ICJ cautioned in its *Fisheries* case that 'too much importance need not be attached to the few uncertainties or contradictions, real or apparent … in Norwegian practice. They may be easily understood in the light of the variety of facts and conditions prevailing in the long period'.[56] Accordingly, the ILC's commentary to Conclusion 7 states that many apparent contradictions

[48] ICJ, *Nicaragua case*, 98 para. 186.

[49] ILA 2000 referred also to the *North Sea Continental Shelf* case, stating that 'given the inherently informal nature of customary law, it is not to be expected, neither is it, the case, that a precise number of percentage of States is required. Much will depend on circumstances, and, in particular, on the degree of representativeness of the practice' at 25.

[50] ICJ, *North Sea Continental Shelf case*, para 73, 43.

[51] ILC, *Commentary to Conclusion 8*, para 3.

[52] KJ Heller, 'Specially Affected States and the Formation of Custom' (2018) 112(2) *AJIL* 191.

[53] ILC, *Commentary to Conclusion 8*, para 4.

[54] ILC, *Conclusion 6.1*.

[55] ILC, *Commentary to Conclusion 6*, para 3.

[56] ICJ, *Fisheries case*, 116, 138.

within a state's practice might actually not constitute countervailing practice. A lower court's ruling that differs from a higher, or even the supreme, court's judgment will often not hamper the requisite consistency of court practice (as the lower court's practice has less weight) and the practice of the central government in a federal state weighs more than the practice of the constituent states.[57]

Conclusion 3 of the ILC Draft provides guidance for the assessment of state practice and *opinio iuris* in a three-pronged manner as follows:

> 1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

With reference to taxpayers' rights, the overall context also comprises both domestic and international practice, including states' practices within the OECD and UN fora directly concerned with cooperation in taxation; and indirectly the good governance focus of organisations like the IMF. Context would also include the specific questions of sovereignty and jurisdiction that arise in the sphere of taxation and how they relate to the development of taxpayers' rights.

1.3.2.2. State Practice and Treaties

State practice may also arise from treaties. International tax law is characterised by a dense network of highly similar double taxation treaties. Braumann calls treaty law 'the native tongue' of international tax law and the 'logical starting point' for the identification of customary international law in international tax law.[58]

Where inter-state relationships are governed by a bilateral double tax treaty, such treaty supersedes any existing customary international law as *lex specialis*. Therefore, it is important to find out whether and to what extent the tax treaty network has been contributing to the creation of customary international law. As customary international law constitutes the default absent a treaty rule, customary international law bears a 'framing effect' in treaty negotiations; if states believe that a particular rule of customary international law exists if they do not conclude a treaty, their reference point for treaty negotiations will differ from a baseline without customary default rules. Further, customary international law serves as a gap-filler for any issues that are not regulated by treaties. Finally, customary international law may inform the interpretation of treaties by judges or administrative agencies.[59]

Treaties may be relevant for the formation and/or the identification of customary international law.[60] However, the ICJ found that custom may only arise from a treaty rule if the provision is of 'fundamentally norm creating character'.[61] In other words, the rule must be 'articulated in general terms, so as to potentially be universally binding'.[62] Thus, taxpayers' rights based on broad, underlying principles that are expressed at a level of generality might be a more likely candidate for customary international law. For instance, it might be easier to establish the principle that 'taxation must be underpinned by due process' as part of customary law than a rule that 'the taxpayer has four weeks to appeal the tax assessment'.

[57] ILC, *Commentary to Conclusion 7*, para 5.

[58] C Braumann, 'Taxes and Custom: Tax Treaties as Evidence for Customary International Law' (2020) 23 *Journal of International Economic Law* 747 and ff, 752.

[59] C Braumann, 'Taxes and Custom' 747 and ff, 748 and ff.

[60] C Braumann, 'Taxes and Custom' 747 and ff, 749; K Doehring, '*Gewohnheitsrecht aus Verträgen*', (1976) 36, 77 and ff. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 77 and ff.

[61] ICJ, *North Sea Continental Shelf case*, 3 and ff; RB Bilder et al 'Disentangling Treaty and Customary International Law' (1987) 81 *Proceedings of the American Society of International Law* 157 and ff, 161 and ff; C Braumann, 'Taxes and Custom' 747 and ff, 760 and ff.

[62] C Braumann, 'Taxes and Custom' 747–69.

In relation to treaty practice, it is noteworthy that the ILC Conclusions affirm that 'conduct in connection with treaties' may constitute state practice; and that treaties may codify, crystallise or give rise to rules of customary international law.[63] 'Clearly expressed treaty provisions may offer particularly convenient evidence as to the existence or content of rules of customary international law when they are found to be declaratory of such rules.'[64] However, repetition of a provision in different treaties 'does not necessarily indicate that a rule of customary international law is reflected in such provisions'[65] as it might just as well indicate that the states included such provisions in the belief that there was no such rule already in existence in customary international law.

The reference to 'conduct in connection with treaties' covers all acts 'related to the negotiation and conclusion of treaties, as well as their implementation'. Does negotiation and conclusion of treaties include engagement in the development of model treaties, such as OECD Model Tax Conventions? Model treaties are one step removed from actual treaties, as defined by the VCLT. Thus, model tax conventions do not carry the same evidentiary value that Conclusion 11 assigned to international treaties. The mere repetition of the rule contained in model tax conventions in numerous double tax treaties also does not prove, in and of itself, the customary nature of the rule. However, the influence of model conventions on the actual content of international tax treaties is evident.

Model conventions are not treaties. They are by definition models, about which there is consensus among the states that adopted them. States are free to conclude treaties that disregard the model. In the field of international taxation, most treaties that are in force are bilateral and reflect the content of model conventions, mainly such as the one drafted by the OECD,[66] but also the one by the United Nations.[67] Such models operate as catalysts for tax treaty practice, steering it towards significant convergence as to its content. This is because a very large number of countries around the world use the model conventions as the starting point for their bilateral negotiations. Consequently, most tax treaties have the same structure and usually include similar criteria to determine the allocation of taxing powers and of the obligation to give relief for international double taxation. In line with such a common mould, most tax treaties include, for instance, the permanent establishment concept as criterion to single out the cases in which a different contracting state from that of residence of the enterprise may be allocated taxing powers. However, in a large number of cases around the world, the influence of model tax conventions on bilateral treaties goes beyond that, with the result that the clauses contained in such treaties closely resemble the ones in the models. In such circumstances, state practice also often endorses the interpretative relevance of the technical explanation attached to the model conventions, the so-called Commentaries. Based on the technical validity of the arguments contained therein, the Commentaries are generally given an authoritative value for the interpretation of the bilateral treaties which reflect the wording of the OECD Model Convention. Courts[68] and even legislation[69] often refer to these Commentaries. The Court of Justice of the

[63] ILC, *Conclusion 11.1*.

[64] ILC, *Commentary to Conclusion 11*, UN Doc A/73/10, 143, para 2.

[65] ILC, *Conclusion 11.2*.

[66] www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm.

[67] www.un.org/esa/ffd/tax-committee/ta-unmodel.html.

[68] Eg UK Supreme Court, judgment of 20 May 2020, *Fowler v Commissioners for HM Revenue and Customs*, UKSC 22, [2020], nos 17 and ff, 30; CJEU, judgment of 26 February 2019, *N Luxembourg 1 et al*, joined cases C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134, [2019], paras 90 and ff; critically G Bizioli, 'Le nuove "lenti" della Corte di Giustizia sul Mercato Interno: [...] danesi', (2019) LXXVIII *Rivista di diritto finanziario e scienza delle finanze*, 150 ff; Fiscal Court/FG Hamburg, order of 9 November 2017, 6 K 14/17, (on art 16 Model Convention), nos 77 and ff, 84, 98 and ff, 104, 107.

[69] *cf* Recital 13 of Council Directive 2014/107/EU: 'In implementing this Directive, Member States should use the Commentaries on the Model Competent Authority Agreement and Common Reporting Standard, developed by the

European Union (CJEU) also uses the OECD Model Convention and Commentaries when interpreting the concept of preserving a fair allocation of the power to tax between the Member States.[70] That concept serves as a justification for the infringment of fundamental freedoms.

1.3.2.3. Other Actors, International Organisations

The ILC Conclusions recognise that the practice of certain international organisations can 'contribute' to the formation of expression of a rule of CIL.[71] However, as the ILC Commentary clarifies: 'While international organizations often serve as arenas or catalysts for the practice of States, the paragraph deals with practice that is attributed to international organizations themselves, not practice of States acting within or in relation to them (which is attributed to the States concerned).'[72] In the context of customary international law binding for states, 'a resolution adopted by an international organisation or at an intergovernmental conference cannot, of itself, create a rule of customary international law'.[73] Hence, only the practice of states (accompanied by states' *opinio iuris*) can create customary international law legally binding for states.

Nevertheless, the OECD may foster indirect evidence or serve as a catalyst for customary international law with regard to taxation: 'A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development'.[74] 'A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).'[75]

Furthermore, the conduct of 'other actors' does not in itself constitute practice and it neither creates nor expresses customary international law.[76] However, it 'may have an indirect role in the identification of customary international law, by stimulating or recording the practice and acceptance as law (*opinio juris*) of States'.[77] Thus, 'other actors' such as the International Fiscal Association (IFA) and International Law Association (ILA) could be relevant in shedding light on evidence of state practice.

1.3.2.4. Internal Practice

As to domestic state practice as evidence of customary international law, the legal force of any existing domestic taxpayer charter is relevant. Are the instruments in which the taxpayers' rights are stipulated mere guidelines of a soft, non-binding nature or do they have legally binding

OECD, as a source of illustration or interpretation and in order to ensure consistency in application across Member States. Union action in this area should continue to take particular account of future developments at OECD level.'

[70] *cf* CJEU, judgments of 11 August 1995, *Wielockx*, case C-80/94, ECLI:EU:C:1995:271, [1995], para 24, of 23 March 2005, *FCE Bank*, case C-210/04, ECLI:EU:C:2006:196, [2005], para 39, of 19 January 2006, *Bouanich*, case C-265/04, ECLI:EU:C:2006:51, [2006], paras 51 and ff, of 7 September 2006, *N*, case C-470/04, ECLI:EU:C:2006:525, [2006] para 46, of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, case C-524/04, ECLI:EU:C:2007:161, [2007], paras 49 and ff, of 12 February 2009, *Cobelfret*, case C-138/07, ECLI:EU:C:2009:82, [2009], paras 51 and ff, 56: not relevant for indirect taxes, but for direct taxes.

[71] ILC, *Conclusion 4.2.*

[72] ILC, *Commentary to Conclusion 4.2.*

[73] ILC, *Conclusion 12.1.*

[74] ILC, *Conclusion 12.2.*

[75] ILC, *Conclusion 12.3.*

[76] ILC, *Commentary to Conclusion 4.3.*

[77] Ibid.

force? Finally, a separate and decisive question is whether these instruments reflect a sense of obligation under public international law, ie if the state implements them as a consequence of *opinio iuris*. Or are they merely a restatement of existing rights found in other domestic legal sources, such as general human rights law? In this case, one would have to determine whether these already existing rights have attained customary status and whether this particular status also covers the taxpayer context. At present, empirical evidence[78] suggests that there is no sufficiently widespread state practice that would allow evidence to be looked for only in taxpayer charters. While a number of countries have adopted taxpayer charters with considerable convergence, such domestic practice cannot be found in other countries. Moreover, it is also important to determine whether such charters have a merely declaratory nature, or if their provisions can be judicially enforced. But, of course, indications for the relevant practice and *opinio iuris* may be found in places other than taxpayer charters. General procedural, sanctions-related and substantive rights that (also) pertain to taxpayers, including when indirectly related to the implementation of constitutional rights, may also provide indications for customary international law, even if they are not specifically called taxpayers' rights.

1.3.2.5. The Persistent Objector Rule

The persistent objector rule is relevant when considering evidence for state practice, but has been particularly controversial in the literature. A state which persistently and openly objects to a rule that is in the process of evolving into CIL will not be bound by the rule, if it becomes custom. This is called the 'persistent objector rule'. Accordingly, any state can, by its persistent objection, which must be 'clearly expressed, made known to other States, and maintained persistently',[79] prevent an emerging rule of customary law from becoming binding on that state.[80] This does not prevent the rule from becoming CIL and the rule applying to all other states which have not acquired persistent objector status. However, the persistent objector rule 'applies only when the customary rule is in the process of emerging. It does not, therefore, benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage'.[81] Nevertheless, there is still uncertainty on the persistent objector rule in scholarship, as the ICJ has only referred to it in two dicta and has not actually applied it in any of its cases.[82]

1.3.3. Subjective Element: *Opinio Iuris*

Although customary international law manifests itself in instances of conduct that are accompanied by *opinio iuris*, the fact that certain acts form the relevant practice is not, as such, evidence that they are accepted as law. Moreover, acceptance as law (*opinio iuris*) is not only to be sought with respect to those taking part in the practice, but also to those in a position to react to it.

[78] See further sec 1.3.3.2.
[79] ILC, *Conclusion 15(2)*.
[80] ILA 2000, 27.
[81] ILA 2000, 27.
[82] For instance, in the ICJ *North Sea Continental Shelf* case, this doctrine was mentioned, but not applied. In the ICJ *Asylum case*, the ICJ mentioned the condition to apply the persistent objector rule only if the State objected during the emerging of the rule. There is not yet agreement in scholarship whether this doctrine is indeed part of international judicial practice. See P Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59(3) *ICLQ* 779–802 and O Elias, 'Some Remarks on the Persistent Objector Rule in Customary International Law' (1991) 6 *Denning LJ* 37.

No simple inference of acceptance as law may thus be made from the practice in question; in the words of the International Court of Justice, 'acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature'.[83]

1.3.3.1. The ILC's and ILA's Approaches

The subjective element of customary international law requires that state practice be accompanied by the conviction that the practice is 'permitted, required or prohibited'[84] as a consequence of customary international law. Thus, the states must believe they are submitting to a legal obligation emanating from CIL, as opposed to mere usage or habit. Therefore, states that engage in a certain practice with the sole intention of complying with a treaty obligation or with domestic law do not bear the *opinio iuris* needed for CIL.[85]

As mentioned above, the ILA and the ILC hold different views on the importance of the subjective element. On the one hand, the ILC states that the subjective element is a constituent element of customary international law and is equally as important as state practice. Accordingly, 'establishing that a certain practice is followed consistently by a sufficiently widespread and representative number of States does not in itself suffice in order to identify a rule of customary international law'.[86]

The ILA report of 2000, on the other hand, stated that the most important requirement for a rule to achieve customary status is state practice. For the ILA, 'it is not necessary to prove that such consent has been given by a State for it to be bound by the rule in question'.[87] Neither is it necessary to provide the consent of the generality of the states.[88] According to the ILA report, the main function of the subjective element (*opinio iuris sive necessitatis*),[89] 'is to indicate what practice counts (or more precisely does not count) towards the formation of a customary rule'.[90] Therefore, unlike the ILC, for the ILA the subjective element is not a constituent element to establish customary international law, and thus the threshold for a norm to be identified as CIL is lower.[91]

Since both the ILC Conclusions and the ILA report are non-binding, it could be argued that they have equal value. However, the ILC Conclusions are likely to be more authoritative: they have been elaborated by the expert body on public international law of the General Assembly of the United Nations in a painstaking process that was careful to identify some common ground within the collegial body whose 34 commissioners are elected to represent all regions of the world. Moreover, the views of states – ultimately the actors who have to consider that the output is valid in order to take it seriously – have been incorporated in the Conclusions through two rounds of comments by the UN's state parties; finally, the Conclusions were welcomed by the UN's state

[83] ICJ, *North Sea Continental Shelf case*, 3, 44, para 76.
[84] ILC, *Commentary to Conclusion 9*, para 2.
[85] ICJ, *North Sea Continental Shelf case*, no 41, para 76; ILC, *Commentary to Conclusion 9*, para 4.
[86] ILC, *Commentary to Conclusion 9*, 138.
[87] S 15, referring to the 'persistent objector rule'.
[88] ILA 2000, 38.
[89] The ILA, when referring to this subjective element, states that *opinio iuris sive necessitatis*, means literally 'belief of law or of necessity', and it (and especially its short form *opinio iuris*) is probably best rendered by 'belief in the legal permissibility or (as the case may be) obligatoriness of the practice'. ILA 2000, 33.
[90] ILA 2000, 10.
[91] ILA 2000, 30.

parties in the General Assembly in 2018 without any opposition, indicating that there is merit to the ILC's findings. The ILA, on the other hand, is an important forerunner – if not facilitator – for the work of the ILC, as it has repeatedly dealt with legal issues before the ILC officially put them on its docket and then referred heavily to the ILA's findings. Yet the ILA, as a non-profit organisation, operates without official, institutionalised state participation and cannot invest the same amount of resources in the preparation of its reports.[92] In any event, the differences between the ILC's and ILA's approaches are important for further analysis of norms of international tax law as customary law. This analysis is provided in the following section.

1.3.3.2. Taxpayers Charters as Evidence for Opinio Iuris*?*

With respect to the *opinio iuris*, 'the practice in question must be undertaken with a sense of international legal right or obligation'.[93] In other words, to prove that taxpayers' rights are part of customary international law, there must be evidence that the states implement such rights due to their conviction that customary international law obliges them to do so.

Yet, evidence suggests that, with some exceptions (notably the US), taxpayer charters generally tend to be non-binding as a matter of domestic law; typically, they are of a hortatory character, laying down the best practice in dealing with taxpayers.[94] Moreover, a state's sense of obligation to implement taxpayers' rights must not arise as a matter of compliance with a treaty obligation, i.e. as a consequence of the principle of *pacta sunt servanda*.[95] As such, adherence to treaty obligations does not count as evidence of *opinio iuris* 'for the purpose of identifying customary international law'.[96]

The evidence of *opinio iuris* can be found in the same material sources as that of state practice including 'conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference'.[97] Insofar as taxpayers' rights are concerned, this depends on the states' behaviour in connection with such resolutions and the terms of those resolutions. In line with the ILC's views on the significance of states' inaction as evidence of state practice, failure 'to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction'.[98]

Nevertheless, the fact that there are various regional charters of fundamental rights (largely applicable to taxpayers) around the world and that states felt the need to conclude them could arguably indicate a certain sense of obligation to secure an international legal framework for the protection of such rights.

[92] In this regard, Michael Wood in the ILC Annex when referring to the studies for the formation and evidence of customary international law states that the ILC 'given its composition and collegial working methods, and its close relationship with states through the General Assembly, may be able to make a useful contribution'. Therefore, the link to the United Nations General Assembly and the states' participation can provide more authority. See Report of the International Law Commission on the work of its sixty-third session, http://legal.un.org/ilc/reports/2011/english/annex.pdf.

Unlike the ILC, the ILA is a non-profit organisation. It focuses on 'the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law'. The ILA has consultative status as an international non-governmental organisation with a number of the United Nations specialised agencies, www.ila-hq.org/index.php/about-us/aboutus2.

[93] ILC, *Conclusion 9.1*.

[94] See OECD, Centre for Tax Policy and Administration, *Taxpayers' Rights and Obligations – Practice Note*, (2003), www.oecd.org/tax/administration/Taxpayers%27_Rights_and_Obligations-Practice_Note.pdf; and M Cadesky, I Hayes and D Russell, *Towards greater fairness in taxation A Model Taxpayer Charter* (IBFD, 2016).

[95] ILC, *Commentary to Conclusion 9*, para 4.

[96] ILC, *Commentary to Conclusion 9*, para 4.

[97] ILC, *Conclusion 10.2*.

[98] ILC, *Conclusion 10.3*.

1.3.4. The Role of National and International Courts in the Formation and Identification of Customary International Law[99]

National courts can contribute to the formation and identification of customary international law along two tracks, that of state practice and that of *opinio iuris*, which need to be examined separately. In addition to these, it needs to be underlined that judgments of national courts can play another different (and distinguishable) role which escapes the strict binary of state practice and *opinio iuris*. They can also function as 'subsidiary means' for the determination of CIL rules, as will be discussed in the following.

1.3.4.1. Decisions of National Courts as State Practice

ILC Conclusion 6 refers to decisions of national courts as a form of state practice. All decisions of national courts and tribunals (first instance, appeal, supreme court etc) may count as state practice, although judgments of higher courts may be considered as of a higher value for the purpose of revealing relevant state practice. In addition to this, and given that in domestic legal systems decisions of courts and tribunals are sometimes overturned either by a higher court or via subsequent jurisprudence or legislation, overturned decisions will, most likely, not be considered relevant.[100]

Although judgments of international courts and tribunals do not constitute state practice as such, the memorials and oral pleadings of the states in front of these international courts and tribunals may count as state practice or *opinio iuris*.[101]

1.3.4.2. Decisions of National Courts as Opinio Iuris

ILC Conclusion 10 includes decisions of national courts as form of evidence of acceptance as law (*opinio iuris*). The Conclusion raises some very interesting points. Decisions of national courts, apart from being a form of state practice, can also be evidence of *opinio iuris*. This does not mean that each domestic case is at the same time an example of state practice and *opinio iuris*. Although the two elements may at times be found in the same material, as is the case with decisions of national courts, even then, 'their identification requires a separate exercise in each case'.[102] The ILC considered the issue of 'double-counting' to be such a crucial point that it raised it also in the context of the commentary to Conclusion 3, which concerns the assessment of evidence for the two constituent elements.

There are many decisions of national courts concering the interpretation of bilateral tax treaties. More recently, tax authorities' powers in the framework of mutual assistance and data exchange have become a recurrent topic; the same is true with regard to the interpretation of general anti-abuse rules (GAAR) in light of the OECD's model conventions and commentaries. This is not only interesting with regard to the formation of practice or *opinio juris* on mutual

[99] We would like to thank Panos Merkouris for his contribution.

[100] See in more detail ILC, *Conclusions and Commentaries*, Commentary to art 6, para 6.

[101] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Conclusion 10; ILA, *Final Report of the Committee on Formation of Customary (General) International Law – Statement of Principles Applicable to the Formation of General Customary International Law* (2000), https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf, principle 4, para (a) of the Commentary (hereinafter ILA, Final Report).

[102] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Commentary to Conclusion 10, para 3.

assistance and abuse in the field of taxation, but also with regard to the growing importance of soft law.

1.3.4.3. Decisions of International Courts and Tribunals as Subsidiary Means for the Determination of CIL Rules

As mentioned above, judgments of international courts and tribunals do not count as state practice. Over two decades ago, the ILA was of a similar opinion to the ILC. In Principle 10 of its 2000 Final Report, the ILA stated that '[a]lthough international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice'.[103] Despite the ILA and ILC agreeing on this point, this approach has been contested. Some authors, like Wolfke, suggest that this is a form of delegated state practice, and since states accept these judgments, they should count as state practice.[104]

Although judgments of international courts and tribunals do not count as state practice, that is not to say that they are completely immaterial in the identification of customary international law. Quite the contrary: they have a significant role to play, but in the form of 'subsidiary means' for the determination of customary rules. Similarly, judgments by national courts can also play a role as 'subsidiary means'.

The ILC expounds this point in Conclusion 13:

> Decisions of courts and tribunals
>
> 1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.
> 2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

It needs to be clarified what is meant by international courts and tribunals. The ILC used the terms 'courts and tribunals' and 'decisions' *lato sensu*. Courts and tribunals cover any international judicial body that is called to consider rules of customary international law.[105] Similarly,

> the term 'decisions' includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters. Separate and dissenting opinions may shed light on the decision and may discuss points not covered in the decision of the court or tribunal, but they need to be approached with caution since they reflect the viewpoint of the individual judge and may set out points not accepted by the court or tribunal.[106]

There are no specialised international tax courts. Nevertheless, the ECtHR has developed a large body of case law concerning the human rights to privacy, judicial protection, double jeopardy and property in the area of taxation. Recently, there has also been more and more case law from the CJEU regarding judicial protection in the framework of mutual cooperation of the fiscal authorities and on human rights as applied in VAT law. Taxpayers' rights can also become relevant in

[103] ILA, *Final Report*, Principle 10.
[104] ILA, *Final Report*, Commentary to Principle 10, mentions Wolfke's comments at fn 42.
[105] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Commentary to Conclusion 13, para 4.
[106] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Commentary to Conclusion 13, para 5.

international arbitration proceedings and in investment arbitration. It can only be a matter of time before there are more human rights tax cases by international courts.

1.4. General Principles[107]

General principles of law constitute the third source of international law enshrined in Article 38(1) of the ICJ Statute. Just like customary international law, general principles of law are an informal source and encompass unwritten international law. However, it is far from settled what general principles of law actually entail. Compared to the other two traditional sources of international law, the role of general principles of law in the context of international taxation has received almost no attention in the literature.[108] General principles also remain the most obscure source of international law. Do general principles refer to principles derived from national legal systems, which are transposable to the international legal system? Or do they also encompass rules formed within the international legal system which are similar to customary law but of an even greater level of abstraction? Are general principles mere gap-fillers, or the last entry point for natural law to enter the international legal system? How are general principles distinct from customary international law? Various authors have taken different views on the matter.[109] Courts and tribunals have also come to diverging conclusions with regard to general principles.[110] Accordingly, general principles of law remain one of the most contentious and opaque issues of public international law.

However, a certain degree of consensus on the possible meanings of general principles has emerged, including that 'general principles of law may be derived from national legal systems'.[111] It is unclear how many national systems must exhibit the principle for it to become a binding general principle within the international legal order. In any event, the national systems must form a majority of nations and must encompass the 'principal legal systems of the world'.[112] Hence, the classic method of identifying general principles is by a thorough comparative study, including all legal families and as many national jurisdictions as possible.[113] This will be done in Part II of our report.

It is timely and a reason for renewed hope for some disentanglement that the ILC included general principles of law in its programme of work in 2018.[114] In 2018, the Sixth Committee of the UN General Assembly took note of the inclusion of this topic in the ILC's

[107] We would like to thank Céline Braumann for her contribution.

[108] An exception might be an unwritten anti-abuse principle; see P Hongler, *Justice in International Tax Law*, (IBFD, 2019), 189 and ff.

[109] A sober presentation of all the competing views and the concepts of principles with parallels in *foro domestico*, and without, can be found in C Bassiouni, 'Functional Approach to "General Principles of International Law"' (1989–1990) 11 *Michigan Journal of International Law* 768.

[110] See UN, *Reports of International Arbitral Awards*, Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy (Mount Fitzroy case), (2006), para 68; arbitration *BP Exploration Co (Libya) Ltd v Government of the Libyan Arab Republic*, Award of 10 October 1973, (1979), 53 ILR 297, 354; ICSID, judgment of 20 November 1984, *Amoco Asia Co v Republic of Indonesia*, case ARB/81/8, [1984], para 267.

[111] ILC, *First Report on general principles of law by Marcelo Vázquez-Bermúdez*, Special Rapporteur, UN Doc. A/CN.4/732, (5 April 2019), paras 190 and ff, 223.

[112] ICJ, *North Sea Continental Shelf case (Germany v Denmark and Netherlands)*, separate Opinion of Judge Ammoun, 134.

[113] See eg ICSID, decision on liability of 27 December 2010, *Total v Argentina*, case ARB/04/01, [2010], para 111; ICSID, Award of 7 June 2012, *Toto Costruzioni v Lebanon*, case ARB/07/12, [2012], para 166; see, however, Hongler, *Justice in International Tax Law* (IBFD, 2019), 191 and ff.

[114] ILC, *Report of the International Law Commission*, 70th session, UN Doc A/73/10, Chapter XIII, s A.

work programme.[115] The topic's Special Rapporteur appointed by the ILC, Mr Marcelo Vázquez-Bermúdez, presented his first report on the topic in 2019[116] and circulated his second report in 2020.[117] The Special Rapporteur plans to produce a set of conclusions on general principles of law, similar to the ILC's strategy with regard to customary international law. The only conclusion that was provisionally adopted during the ILC's 71st session in 2019 was on the scope of the Draft Conclusions, stating: 'The present draft conclusions concern general principles of law as a source of international law'.[118] Most recently, the ILC has adopted some of the Draft Conclusions in its 72nd session in 2021 and the general principles of law are still part of its work programme.[119] It remains to be seen how the ILC's work on general principles will turn out, but ILC conclusions may well be a useful point of reference for the analysis of general principles of law in international tax law in the future.

In his first two reports, Special Rapporteur Vázquez-Bermúdez laid down his view that general principles of law may either derive from a national legal system or may form within the international legal system. The latter type of general principles are far more contentious than the former. In fact, only a handful of international cases have (mostly implicitly) acknowledged the existence of such general principles formed within the international legal system; numerous states and ILC members have voiced scepticism with regard to their existence.[120] Due to the uncertain nature of this type of general principle, this report only refers to general principles emanating from national legal systems.

According to the two ILC reports, this type of general principle requires a two-step analysis: (a) the determination of the existence of a principle common to the principal legal systems of the world and (b) the ascertainment of the principle's transposition to the international legal system. Step (a) typically calls for a comparative legal analysis to show that the great majority of national legal systems 'recognise' the abstract principle by adhering to it domestically. The rest of this chapter and Part II engage in such a comparative analysis to flesh out common principles concerning taxpayers' rights. However, this comparative analysis might arguably fall short of the requirement of being sufficiently 'wide and representative, covering different legal families and the various regions of the world',[121] although this study group made an effort to include as many jurisdictions as possible.

Ascertaining step (b) is even more difficult than ensuring sufficient representativeness of the comparative analysis, as the second step asks whether the common principle is transposed to the international legal system. This transposition cannot be affirmed automatically, but occurs if '(a) the principle is compatible with fundamental principles of international law; and (b) the conditions exist for the adequate application of the principle in the international legal system'.[122] The latter prerequisite for transposition might cause difficulties for taxpayers' rights – it is hard to imagine that a 'structure that exists at the international level permits the adequate application of the [transposed] principle',[123] as there is no taxation at international level, ie taxation of states, the traditional subjects of international law.

[115] UN General Assembly, resolution of 22 December 2018, 73/265, para 7.

[116] UN, first report on general principles of law by Special Rapporteur Marcelo Vázquez-Bermúdez of 5 April 2019, UN Doc A/CN.4/732.

[117] UN, second report on general principle of law by Special Rapporteur Marcelo Vázquez-Bermúdez of 9 April 2020, UN Doc A/CN.4/741.

[118] Interim report by the Chair of the Drafting Committee, https://legal.un.org/docs/?path=./ilc/documentation/english/statements/2019_dc_chairman_statement_gpl.pdf&lang=E. See ILC, Report of the International Law Commission, 72nd session, UN Doc A/76/10, Chapter VIII.

[119] See ILC, Report of the International Law Commission, 72nd session, UN Doc A/76/10, Chapter VIII.

[120] Second report on general principle of law by Special Rapporteur Marcelo Vázquez-Bermúdez of 9 April 2020, paras 114–16.

[121] Second report on general principle of law by Special Rapporteur Marcelo Vázquez-Bermúdez of 9 April 2020, para 50.

[122] Second report on general principle of law by Special Rapporteur Marcelo Vázquez-Bermúdez of 9 April 2020, para 74.

[123] Second report on general principle of law by Special Rapporteur Marcelo Vázquez-Bermúdez of 9 April 2020, para 85.

Yet, principles at high levels of abstraction, eg good faith, might still govern taxpayers' rights as general principles of law. Such abstract principles may be adequately applied at international level even in the absence of any specific structures. Indeed, good faith (or even more specifically, the prohibition of abuse of process and abuse of rights) has already been invoked or applied as a general principle, albeit in different contexts such as trade or investment law.[124]

Such general principles as have already been widely recognised by courts and the literature may be relevant for taxpayers' rights as well. While it seems reasonable to apply these general principles in the tax context if they have already gained sufficient acceptance in the investment law context, empirical research might be necessary to confirm the validity of such a transplant.

1.5. Subsidiary Means for the Determination of Rules of Law

1.5.1. Judicial Decisions[125]

As analysed above, decisions of national and international courts and tribunals can be used as subsidiary means for the determination of CIL.[126] Article 38(1)(d) ICJ Statute refers to the 'subsidiary', 'material' sources of international law,[127] ie judicial decisions and teachings of the most highly qualified publicists.[128] It explicitly states that 'judicial decisions [can be applied] as subsidiary means for the determination of rules of law'.

Although, unlike the 'formal sources' such as treaties, customary law and general principles, jurisprudence and doctrine are not sources of law *stricto sensu*, one should not underestimate their importance. '[T]hey are documentary "sources" indicating where the Court can find evidence of the existence of the rules it is bound to apply by virtue of the [formal sources]'.[129] Or as Rosenne very succinctly put it, they are 'the storehouse from which the rules [emerging from the formal sources] can be extracted'.[130] This is also reaffirmed by a comparison of the English and the French texts of Article 38(1)(d) ICJ Statute. Whereas the English term 'subsidiary means' may give the erroneous impression that they are 'to be subordinated to others mentioned in the article, i.e., to be regarded only when sufficient guidance cannot be found in international conventions, international customs and general principles of law[,] the French word *auxiliaire* seems, however, to indicate that confirmation of rules found to exist may be sought by referring to jurisprudence and doctrine'.[131]

[124] ILC, commentary to guideline 3.1.5 of the *Guide to Practice on Reservations to Treaties, Yearbook of the International Law Commission*, 2011, vol II (Part Three), para 5, 213; WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, (3 December 2007), para 224; UNRIAA, *The North Atlantic Coast Fisheries Case (Great Britain v United States)*, Award, UNRIAA vol XI, [1910] 186–89; Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v United Kingdom*), Memorial of the Marshall Islands, para 182.

[125] We would like to thank Panos Merkouris for his contribution.

[126] See sec 1.3.4; although, as noted by the ILC, decisions of international courts and tribunals do not constitute state practice.

[127] G Fitzmaurice, notably, held that they were of great import and characterised them as 'quasi-formal' sources; G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in JH Verzijl and FM van Asbeck (eds), *Symbolae Verzijl: présentées au professeur JH Verzijl à l'occasion de son LXX-ième anniversaire*, (1958) 153, 173.

[128] The latter will be analysed in sec 1.5.2.

[129] A Pellet and D Müller, 'Article 38', in A Zimmermann and CJ Tams (eds), *The Statute of the International Court of Justice* (Oxford University Press, 2019) 819, [306].

[130] S Rosenne, *The Law and Practice of the International Court*, vol 3, (Brill, 2006) 1551.

[131] MO Hudson, *The Permanent Court of International Justice 1920–1942*, (1943) 603.

The proliferation of international courts and tribunals[132] 'has put an end to the long-lasting quasi-monopoly of the World Court in the matter of international judicial law-making'[133] and has led to a marked increase in 'judicial dialogue' and 'judicial cross-fertilisation' between different courts and tribunals.[134] This, in our context, particularly applies to the interchange of tax courts under the auspices of the International Association of Tax Judges[135] with its yearly meetings. Ideas, approaches and solutions to problems adopted by one international court are examined by other courts and tribunals (or sometimes by the same court at a later point in time) and weighed as to their persuasiveness and applicability in the cases at hand. Moreover, decisions from other jurisdictions are now easily available on the internet.[136] The lawmaking effect of a judicial decision hence rests not only on its *voluntas*, but also on its *ratio*: legal scholars, advisers, other courts, and certainly not least the deciding court itself at a later point in time must be convinced of the soundness – broadly defined – of a prior decision.[137]

Given the above-described increased international regulation, judicialisation and interaction, Paulsson is correct in asserting that international jurisprudence should not be viewed as the 'poor cousin' of the formal sources, but rather that

> its in-built limitations are a tribute to its potential potency. Treaties do not affect non-signatories, and 'customs' and 'general principles' evolve with glacial speed and, in most cases, at a level of considerable generality. The first three paragraphs of Article 38(1) are therefore relatively unthreatening. Precedents, on the other hand, may provide immediate and bold answers to highly specific questions.[138]

[132] R Higgins, 'A Babel of Judicial Voices?: Ruminations from the Bench', (2006) 55 *ICLQ* 791; A Gattini, 'Un regard procédural sur la fragmentation du droit international', (2006) 110 *RGDIP* 303; JI Charney, 'Is International Law Threatened by Multiple International Tribunals?', (1998) 271 *RdC* 101; S Schwebel, 'The Proliferation of International Tribunals: Threat or Promise?', in M Andenas (ed), *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International, 2000) 3; T Treves, 'Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?', in *Developments of International Law in Treaty Making* (Wolfrum/Röben, 2005) 587–620; B Chester, 'The Proliferation of International Courts and Tribunals: Finding your Way through the Maze', (2002) 3 *Melbourne Journal of International Law* 453; T Buergenthal, 'Proliferation of International Courts and Tribunals: Is it Good or is it Bad?' (2001) 14 *LJIL* 267; H Thirlway, 'The Proliferation of International Judicial Organs: Institutional and Substantive Issues: The International Court of Justice and other International Courts', in NM Blokker and HG Schermers (eds), *Proliferation of International Organizations: Legal Issues* (Kluwer Law International, 2000) 251.

[133] A Pellet and D Müller, 'Article 38' 322.

[134] OK Fauchald and A Nollkaemper (eds), *The Practice of International and National Courts and the (De-)fragmentation of International Law* (Hart Publishing, 2014); FG Jacobs, 'Judicial Dialogue and the Cross-fertilization of Legal Systems: the European Court of Justice' (2003) 38 (3) *Texas Intl LJ* 547; AM Slaughter, 'A Global Community of Courts', (2003) 44 (1) *Harv Int'l LJ* 191; Société française pour le droit international, *La juridictionalisation du droit international: colloque de Lille* (Pedone, 2003).

[135] www.iatj.net/.

[136] International courts, for instance, tend to have their own websites where their jurisprudence can be searched; see for instance: the International Court of Justice and its predecessor the Permanent Court of International Justice at www.icj-cij.org; the European Court of Human Rights at hudoc.echr.coe.int/; the Inter-American Court of Human Rights at www.corteidh.or.cr/cf/jurisprudencia2/index.cfm?lang=en; the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Residual Mechanism for Criminal Tribunals at cld.irmct.org/; investment tribunals at www.italaw.com. Free online databases that collect judgments from all international courts and tribunals are www.worldcourts.com and http://worldlii.org. As for domestic courts, the WorldLII also provides access and links to relevant domestic courts from a number of different domestic jurisdictions (www.worldlii.org/catalog/215.html).

[137] A von Bogdandy and M Jacob, 'The Judge as Law-Maker: Thoughts on Bruno Simma's Declaration in the Kosovo Opinion', in U Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP, 2011) 809, 822.

[138] J Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty, Arbitration and International Law', in AJ van den Berg (ed) *International Arbitration 2006: Back to Basics?* (Kluwer International Law, 2007) 879, 880.

1.5.2. Teachings of the Most Highly Qualified Publicists of the Various Nations[139]

In 2018, the ILC adopted Conclusion 14 on the identification of customary international law, entitled teachings:

> Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

This is an almost verbatim reproduction of the latter part of Article 38(1)(d) of the ICJ Statute. The term 'teachings' is often used interchangeably with 'writings' and is meant to include material both in written and in non-written form, such as for instance 'lectures and audiovisual materials'.[140]

This relaxed attitude to the form of the material to be used in the identification of customary international law (and of the content of legal rules in general under Article 38(1)(d) of the ICJ Statute) is counterbalanced by the use of the term 'may serve as' in Conclusion 14.[141] The teachings are not themselves a formal source of international law, but a subsidiary means for determining the content of the rules of law. They are not the rules but they colour our understanding of the content of these rules.[142]

This is even more critical, as one consideration to be always borne in mind is that the authors of such teachings may intend not merely to record the status quo of law (*lex lata*) but also to potentially lead to its progressive development (*lex ferenda*).[143] Even the ILC has this double mandate. According to Article 1(1) of its Statute:

> The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.[144]

It is, therefore, up to the judges to determine the value and usefulness of said teaching in the determination of the content of legal rules. In this context, Justice Gray's views in the US Supreme Court *Paquete Habana* case are oft-cited:

> [T]he works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[145]

As with the nature of the documents, the specialisation of the publicists is quite open, too. Although it stands to reason that in the vast majority of cases the expertise of the 'publicists' will lie in international law, there is nothing to preclude experts from other fields being taken into account as long as their writings can shed light on the content of a rule. What is of importance

[139] We would like to thank Panos Merkouris for his contribution.

[140] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Commentary to Conclusion 14, para 1.

[141] And similarly, in art 38 of the ICJ Statute, by the fact that 'teachings' are a material (subsidiary) source of law.

[142] Although the ICJ is generally reluctant to refer directly to 'teachings', this is not the case with the separate and dissenting opinions of judges, which would seem to indicate that these 'writings' were discussed among the judges although they have not been included *expressis verbis* in the main judgment (see Pellet and Müller, 'Article 38' 819, [338–40]). On academic writings on the value of 'teachings' see M Lachs, 'Teachings and Teaching of International Law' (1976/II) 151 *RdC* 151–252; G Schwarzenberger, 'The Province of the Doctrine of International Law' (1956) 9 *Current Legal Problems* 235–65.

[143] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Commentary to Conclusion 14, para 3.

[144] United Nations, Statute of the International Law Commission of 1947 (21 November 1947), UNGA Res 174 (II), art 1(1).

[145] US Supreme Court, *The Paquete Habana and The Lola*, 175 USCR 677, 700, [1900].

is 'the quality of the particular writing that matters rather than the reputation of the author'.[146] In this context, it is also important that the publicists should be 'of the various nations', ie that the writings should be representative of the various legal systems and the various geographic regions.[147]

Finally, certain particular bodies such as the ILC, the *Institut de droit international*, the ILA, as well as international expert bodies in particular fields and from different regions, merit separate mention. The output of these bodies, being engaged in the codification and progressive development of international law, may be extremely useful in the context of 'teachings'. Of course,

> The value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the extent to which the output seeks to state existing law, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body, and the reception of the output by States and others.[148]

The *Institut de droit international*, for instance, has adopted a number of resolutions connected to tax law.[149] Thirty-eight of its resolutions fall under the category 'Conflict of Laws (civil, commercial and tax)',[150] while a 1922 Resolution adopted during the Grenoble Session was devoted entirely to double taxation.[151]

The ILC has also on occasion dealt, albeit incidentally, with the intricacies of tax law.[152] More recently of note is the ILC's 'Final Report of the Study Group on the Most-Favoured-Nation Clause' of 2015,[153] which touched upon the fact that 'MFN provisions in investment agreements usually provide … for exceptions where the obligation to provide MFN treatment does not apply … [, t]he most common exceptions relate to taxation';[154] in its preparation, one of that Group's members was commissioned to submit an informal working paper on the topic of 'Bilateral Taxation Treaties and the MFN clause'.[155] This report has been often cited by tribunals in investment arbitrations, some of which pertain to disputes arising from tax reforms.[156]

The increasing tendency of international courts and tribunals and the ICJ in particular to refer to the work of the ILC demonstrates the influence of such bodies.[157] In a somewhat self-reflective mood, the ILC, musing on the influence of its work on the jurisprudence of courts and

[146] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Commentary to Conclusion 14, para 4.

[147] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Commentary to Conclusion 14, para 4. For a detailed overview of the complex landscape of international legal theory, as well as the schools of thought connected to specific geographic regions and legal systems, see E Roucounas, *A Landscape of Contemporary Theories of International Law* (Brill/Martinus Nijhoff, 2019).

[148] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Commentary to Conclusion 14, para 5.

[149] See the 1954 Aix-en-Provence session on the application of tax law in private international law, the 1969 Edinburgh session on the application of the most-favoured-nation clause and the 1975 Wiesbaden session on the application of foreign public law.

[150] Institut de droit international, *Overview of Resolutions*, www.idi-iil.org/app/uploads/2018/07/Overview-Resolutions-Website-Final-EN.xlsx.

[151] Institut de droit international, *Les doubles impositions*, www.idi-iil.org/app/uploads/2017/06/1922_greno_02_fr.pdf.

[152] See, for instance, ILC, *1978 Draft Articles on Most-Favoured-Nation Clauses with Commentaries*, reproduced in [1978/II – Part Two] YBILC 8.

[153] ILC, *Final Report of the Study Group on the Most-Favoured-Nation Clause* (29 May 2015), UN Doc A/CN.4/L.852.

[154] Ibid, para 66.

[155] Ibid, para 6, at fn 6.

[156] ICSID, decision on Preliminary Issues of Jurisdiction of 3 March 2016, *Le Chèque Déjeuner and CD Holding Internationale v Hungary*, case ARB/13/35, [2016] 5, 93, 126, 130–34, 198–202.

[157] For instance: ICJ, *North Sea Continental Shelf case*, paras 48–54; ICJ, *interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, (Advisory Opinion), ICJ Rep 73, [1980], [47]; ICJ, *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, [51]; ICJ, *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Rep 1045, [1999], [49]; ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits), ICJ Rep 40, [2001], [113]; ICJ, *Armed Activities (DRC v Uganda)* (Judgment), ICJ Rep 168, [2005], [160] and [293]; ICJ, *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, ICJ Rep 99, [2012], [56] and [69]; ITLOS, *Responsibilities and Obligations*

tribunals acknowledged that this may be due to a variety of factors, such as 'the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*), and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work)'.[158] Pellet and Müller note that the 'products' of the ILC have significant gravitas as they

> … are the result of a long process based on intense discussions, among the members of the Commission, the composition of which reflects an appropriate geographical balance, and between the ILC and the States which present the great advantage of mitigating the lawyers' tendency to idealism and/or abstraction with the lack of 'legal creativity' of the States' representatives … and reciprocally.[159]

Despite the general acknowledgment of the prima facie importance of the ILC's 'products', 'the work of the ILC, where members participate in a personal capacity, cannot be equated with State practice, or evidence an *opinio juris*'.[160] The ILC rather soberly acknowledged that the weight to be given to its determinations is highly situational, dependent on numerous factors such as 'the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output'.[161] Pellet has also suggested that the selective use by the ICJ of the authority argument, when it refers to the work of the ILC, may have less to do with a feeling of reverence to its 'little sister', and more with the convenience of hiding behind its work when the need arises to establish a rule. According to Pellet, this was an element of the ICJ's 'judicial policy', when it wishes not to appear as an international legislator.[162]

1.6. Soft Law

Soft law generally refers to 'principles, rules, and standards governing international relations which are not considered to stem from one of the sources of international law enumerated in Art. 38 (1) ICJ Statute'.[163] As it does not form part of any of the binding sources of international law, soft law does not create legally binding obligations and therefore cannot be enforced. The second defining feature refers to the actors that may create soft law. Non-binding instruments generated by states[164] or international organisations[165] may certainly constitute soft law.[166] However, the idea that non-state actors also contribute to the creation of soft law is gaining ground; such material could include agreements between private persons, eg codes of conduct

of States with Respect to Activities in the Area (Advisory Opinion), ITLOS Rep 10, [2011], [169]; ICTR, judgment of 13 December 2004, *Prosecutor v Elizaphan Ntakirutimana and Gérard Ntakirutimana*, ICTR-Appeals Chamber, cases nos ICTR-96-10-A and ICTR-96-17-A, 518, [2004], [518]. In more detail see: Pellet and Müller, 'Article 38' 231 and ff; see also S Schwebel, 'The Inter-active Influence of the International Court of Justice and the International Law Commission', in S Schwebel (ed) *Justice in International Law: Further Selected Writings* (CUP, 2011) 66–94.

[158] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Part 5, para 2.

[159] A Pellet and D Müller, 'Article 38' 341.

[160] H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Part Two', (1990) 61 no 1 *BYBIL* 59–60.

[161] ILC, *2018 Draft Conclusions on CIL with Commentaries*, Part 5, para 2.

[162] A Pellet, *L'adaptation du droit international aux besoins changeants de la société internationale* (2007), 329 *RdC* 3, 42.

[163] D Thürer, 'Soft Law', in *Max Planck Encyclopedia of Public International Law*, 2009; M Olivier, 'The relevance of "soft law" as a source of international human rights' (2002) 35 *The Comparative and International Law Journal of Southern Africa* 289.

[164] See, eg the Helsinki Final Act 1975; Basel Accord on Capital Adequacy 1988.

[165] See, eg, the Universal Declaration of Human Rights or the Friendly Relations Declaration, both UN General Assembly resolutions that are prominent examples of soft law. Another example for soft law are recommendations and opinions made by the European Parliament, the Council and the EU Commission.

[166] See eg, Thürer (n 163), 'Soft Law'.

adopted by corporations or documents adopted by NGOs.[167] The following section discusses the success stories and pitfalls of soft law in international tax law.

The term 'soft law' has established itself in modern international relations law and political science. Although soft law does not constitute a formal source of binding international law, it fosters a certain normative quality. However, soft law is a kind of normative category insofar as it suggests a specific model of conduct. In contrast to 'hard' law, 'soft' law lacks mechanisms of sanction. Yet, in public international law, which lacks a central enforcement mechanism and thus displays varying degrees of compliance, the distinction between 'soft' and 'hard' law is less important than in domestic law.[168] The exact definition and scope of soft law remain controversial. Nevertheless, there is universal agreement on its special role, especially due to its notable track record of effectiveness in governing international relations. The success of soft law mechanisms is based on effectiveness without coercion. Especially in the field of international financial and economic law,[169] including certain arrangements with regard to tax matters, soft law instruments have a remarkable track record of compliance.[170]

The increasing attention 'soft law' receives[171] is fuelled by globalisation. Experts working in informal organisations can react to changes more rapidly and issue regulations without delay. As a result, such bodies have taken the place of atomised state legislators in regulating, eg, international monetary or financial matters. International soft standards can be seen as a new form of regulation due to the fact that traditional lawmaking processes lack speed, flexibility, expert knowledge and the capacity to coordinate regulation in an increasingly interconnected world.[172] Or sometimes the executive branches may simply prefer non-binding commitments. Finally, there is a possible increase in quantitative and qualitative benchmarking of governance, which may be visible also in international tax law.

Apart from the non-legal effects of soft law that have induced remarkable compliance in many instances, there are at least five ways in which soft law carries legal relevance beyond its merely hortatory quality.[173] First, soft law may be incorporated into hard law. For example, in the EU, the non-binding guidelines of the VAT Committee are often incorporated into binding Council regulations.[174]

[167] See eg P Nobel (ed), *International Standards and the Law* (Stämpfli, 2005); B Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Powers and Lass Oppenheim's Positive International Law' (2002) 13 *European Journal of International Law* 401; A Giertl and T Lazorčáková, 'The Role of Non-Governmental Organizations in International Law-making', in A Bêlohlávek and N Rozehnalová (eds), (2018)g *cf* etc. *Czech Yearbook of International Law*, *International Organisations*, 47 and ff; see also C Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International & Comparative Law Quarterly* 850, 851.

[168] *cf* also J Kokott, 'Soft Law Standards under Public International Law (A Contribution on the Effects of the Transformation of International Law on the Sources of International Law)', in P Nobel (ed), *International Standards and the Law*, (2005) 15 and ff, 33 and ff: relativity of the distinction between binding and non-binding under public international law.

[169] *cf* also Kokott, 'Soft Law Standards' 15 and ff.

[170] See, eg, the OECD Guidelines for Multinational Enterprises with its special committee that is tasked with controlling compliance (although evidently there can be no enforcement due to the lack of any legally binding quality of the Guidelines); furthermore, a recent publication of the Swiss Federal Council lists examples for these informal rules, perhaps the best known being the Standards of the Basel Committee on Banking Supervision (see www.bis.org/list/bcbs_all/sdt_1/index.htm).

[171] In all areas of the law, *cf* eg J Basedow, 'Soft Law for Private Relations in the European Union', in Benicke and Huber (eds), *Festschrift für Herbert Kronke*, (2020) 659 and ff; S Huber, 'Überregionale Privatrechtsangleichung: weiches hard law als modernes Erfolgskonzept', *Festschrift für Herbert Kronke*, (2020) 907 and ff.

[172] P Nobel, 'Globalization and International Standards with an Emphasis on Finance Law', in P Nobel (ed), *International Standards*, (2005) 43 and ff, 65.

[173] Thürer (n 163), 'Soft Law'.

[174] See, for example, guidelines from the 93rd session of 1st of July 2011, document A – taxud.c.1(2012)400577 – 707, on the definition of services which, within the meaning of art 47 of the VAT Directive, have a sufficiently direct

Second, soft law may give rise to expectations that merit legal protection under the principle of good faith, and, in particular, estoppel.

Third, soft law instruments have often been the first step in the development of new international law, as it constitutes an initial testing ground in finding consensus and staking out the potential for future efforts of lawmaking. The non-binding Universal Declaration of Human Rights which formed the blueprint for the binding International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights is but one prominent example of this. Expert bodies and NGOs[175] regularly help in the creation of soft law by systematising state practice. The resulting instruments may later be adopted as international treaties.

Fourth, the content of soft law documents may ultimately transform into customary international law, if states display the requisite state practice and *opinio iuris*. The *Nicaragua case* is an example of this potential of soft law, as the ICJ used the states' attitude displayed in the adoption of the Friendly Relations Declaration by the UN General Assembly as evidence for *opinio iuris*.[176]

Fifth, soft law instruments are often consulted in the interpretation of 'hard' international and domestic law. The content of binding international law is often ambiguous and may be clarified by more concrete soft law documents. Furthermore, soft law may transcend into the domestic sphere to illuminate domestic law or in jurisdictions where judges interpret domestic law in harmony with international law.[177]

Courts worldwide have used non-legally binding materials from the US Restatement of the Law[178] to model laws written by experts – to explore the meaning of certain legal provisions.[179] For example, the CJEU, when interpreting what foreign direct investment (Article 207 TFEU) meant, rejected the Commission's view that the term covered all forms of investment, including portfolio investment, not least based on the analysis of how the term came into being.[180] All courts around the globe are now using the OECD's model conventions and commentaries. Consequently, these developments have to be taken into account in the field of tax law.[181]

Nevertheless, one should distinguish between preparatory work by experts (acting, for example, for states in governmental international organisations or acting in their individual capacities in learned societies such as the ILA) which may influence courts and legislators on the one hand, and genuine soft law instruments with which state organs aim to shape international relations without wanting to enter into a legally binding agreement, on the other. In any event, the effect of both categories is often very similar, as will be shown with regard to OECD soft law in the area of taxation.

connection with immovable property: numerous similarities with Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013, amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services, sub-s 6a, art 31a. For the incorporation of the International Organization for Standardization standards in EU legislation, *cf* CJEU, *Stichting Rookpreventie Jeugd and Others*, pending case C-160/20. See so far the Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, ECLI:EU:C:2021:618 [2021].

[175] Eg in the framework of the International Law Commission (ILC), the International Law Association (ILA) and the Institut de Droit International.

[176] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ Reports 14 [1986], paras 188, 191; see C Chinkin, 'The Challenge of Soft Law' (1989) 38 *ICLQ* 850.

[177] I Seidl-Hohenveldern, 'International Economic Soft Law' (1979) 163 *Receuil des Cours* 165 and ff, 200.

[178] US Supreme Court, decision of 21 March 2018, *Upper Skagit Indian Tribe v Lundgren, diss. Thomas and Alito*, case 17-387, 584 US, [2018]; for the area of private law, *cf* R Michaels, 'A Global Restatement of Private Law?', in C Benicke and S Huber, (eds), *Festschrift für Herbert Kronke*, (2020) 387 and ff.

[179] Courts all over the world let themselves be inspired by the OECD Model Conventions and commentaries. *Cf* eg Kolkata Income Tax Appellate Tribunal, decision of 19 March 2013, *Right Florist Pvt Ltd, Kolkata vs Department Of Income Tax*, ITA no 1336/Kol./2011, [2013], nos 11 and ff: giving more weight to the OECD commentaries than to a reservation expressed by the Government of India; Fiscal Court Rheinland-Pfalz, decision of 15 November 2017, 1 K 1763/17, [2017], nos 18 and ff; CJEU, judgments of 24 October 2018, *Sauvage and Lejeune*, case C-602/17, ECLI:EU:C:2018:856, [2018], para 25, and *N Luxembourg 1 et al*, paras 90 and ff.

[180] CJEU, Opinion 2/15 of 16 May 2017, paras 78 and ff.

[181] *cf* also J Kokott, *Das Steuerrecht der Europäischen Union*, (2018) 9 and ff, para 1 nos 29 and ff.

2

The Relationship between National and International Law

Whether taxpayers can invoke their international rights before national courts and administrative agencies depends on whether, how and to what extent international law is integrated into their national legal system.

2.1. Monism vs Dualism

Monism and dualism are two seemingly binary options governing the relationship between international and national law.

According to the monist understanding of the relationship between international and domestic law, these two legal regimes are but two sub-categories of 'the legal order'.[1] Thus, all international law applicable to a state (ie general international law and treaty law) will be part of the law of the land. This, however, does not necessarily mean that it is directly applicable, as that will only be the case if it meets the standards of direct applicability.[2] In contrast, the dualist approach considers national law and international law to be two separate, albeit interconnected, legal systems.[3] Because of this separation, international law, including human rights law, is never part of the domestic legal order as such, and cannot be directly invoked before domestic authorities. Rather, for international law to be applicable, the domestic legal order needs to allow the influx of international law. To illustrate this process, the picture of a bascule or drawbridge[4] is frequently used: the bridge master – that is, the domestic legal order – determines whether or not the bridge is lowered so that the international obligation may cross the divide and penetrate the domestic legal order. That legal command may be a general one[5] or a more specific one, such as the parliamentary acceptance of an international agreement.[6]

[1] H Kelsen, *Reine Rechtslehre* 2nd edn (Mohr Siebeck GmbH, 1960). Monist countries include Austria, Chile, China, Colombia, France, Japan, Mexico, the Netherlands, Poland, Russia, South Africa and Switzerland.

[2] See below under sec 2.2.

[3] Dualism goes back to H Triepel, *Völkerrecht und Landesrecht,* (Hirschfeld, 1899). Dualist countries include Germany, Israel, Italy, the Nordic countries, the UK and all Commonwealth countries.

[4] Tower Bridge in London is perhaps the most famous contemporary example of this kind of bridge.

[5] See, eg art 25 of the German Basic Law: 'The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the in-habitants of the federal territory'; s 232 of the South African Constitution: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'; *cf* also art 2(2) of the Greek Constitution: 'Greece, adhering to the generally recognized rules of international law, pursues the strengthening of peace and of justice, and the fostering of friendly relations between peoples and States'; art 10 of the Italian Constitution: 'The Italian legal order conforms to the generally recognized rules of international law'; art 94 of the Dutch Basic Law: 'Legal provisions in force

It is now accepted that there are not purely monist or dualist domestic legal systems. Instead, domestic legal orders often display a hybrid approach to the effect of international law, which allows states to claim that they adhere to either of those two approaches or both. A good example is the German Constitution, which makes the general rules of international law part of the law of the land in Article 25 Basic Law, whereas any Treaty obligation only becomes part of the law of the land through the 'bridge' of the parliamentary ratification statute. It should be added that even provisions like Article 25 German Basic Law or Article VI paragraph 2 US Constitution are legal commands of the respective domestic legal order, thus rendering the conceptual fundaments of the monism/dualism distinction questionable.

Nevertheless, some states are definitely more dualist and others more monist. Dualist states in which treaty override is possible include Canada,[7] India,[8] Sweden[9] and the United Kingdom.[10] The starting point for some of these dualist systems is the royal prerogative over foreign affairs. In the Anglo-Canadian tradition, foreign affairs, including treaty-making, is a purely executive function. There is no legal requirement that the legislative branch be consulted, or involved in any way, in the executive's decision to negotiate and conclude a treaty. The second essential Anglo-Canadian legal principle informing the Canadian approach to conventional international law is the English rule, according to which the Crown is not a source of law. Just as treaty-making is an exclusively executive act, lawmaking is an exclusively legislative act.[11]

Other states, by contrast, are closer to monism, such as France, where tax treaties take effect and become enforceable in domestic courts and can be relied upon by taxpayers immediately upon ratification. There, treaties prevail over domestic law, but treaty override is excluded.[12]

within the Kingdom shall not apply if such application is incompatible with any mandatory provisions of treaties and of acts of international organisations'; *cf* also art 10 of the Spanish Constitution: 'The norms related to fundamental rights and the freedoms acknowledged in the Constitution will be interpreted in conformity with the Universal Declaration on Human Rights and the conventions and international agreements ratified by Spain'.

[6] See, eg art 59 para 2 sentence 1 of the German Basic Law: 'Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment'; art 253 of the Indian Constitution: 'Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body'; art 11 of the Italian Constitution 'Italy … consents, at equal conditions, to the limitations of sovereignty that are necessary for securing peace and justice among nations'; s 231 no 2 of the South African Constitution: 'An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in sub-s (3) [referring to executive agreements]'. Other examples include the French Constitution, art 53, which specifically requires authorisation of approval of international agreements that impact the state's budget or modify the effect of domestic statutory laws. Thus, a law is required to authorise the approval of signed double taxation conventions.

[7] *cf* Supreme Court of Canada, decision of 28 September 1982, *R v Melford Developments Inc*, 2 SCR 504 [1982]. However, after some discussion and court cases, tax treaty override is also possible in Germany, *cf* German Federal Constitutional Court, decision of 15 December 2015, *Treaty Override*, 2 BvL 1/12 [2015], BVerfGE 141, 1–156.

[8] Art 246 Constitution of India.

[9] Swedish Supreme Administrative Court, judgment of 3 April 2008, case 2655-05 [2008].

[10] In the UK, there is treaty override and 'treaty underride', that is, insufficient implementation of tax treaties through, in particular, non-implementation of the non-discrimination clauses of tax treaties, see sec 2.3.4.3.

[11] *cf* G van Ert, 'Dubious Dualism: The Reception of International Law in Canada' (2010) 44 *Valparaiso University Law Review* 927 and ff.

[12] Art 55 Constitution of France; Council of State of France, judgment of 28 June 2002, *Ministre de l'économie, des finances et de l'industrie/Schneider Electric*, no 232276 [2002]; see also P Baker, 'Note Re Société Schneider Electric' (2002) 4 no 6 *International Tax Law Reports* 1077–130; *cf* also P Martin, 'Interaction between Tax Treaties and Domestic Law' (2010) 65 *Bulletin of International Taxation* 205 and ff; C de Pietro, 'Tax Treaty Override and the Need for Coordination between Legal Systems: Safeguarding the Effectiveness of International Law' (2015) 7(1) *World Tax Journal* 78; OECD, *Tax Treaty Override*, Paris (1989).

Other monist states include Japan,[13] the Netherlands,[14] Spain[15] and Switzerland.[16] Monist systems are generally better for the taxpayer because they enable them to claim their rights directly and oppose double taxation. However, the Dutch *Hoge Raad* even held that there was no authority to suggest that a tax treaty cannot increase the fiscal burden resulting from domestic fiscal legislation.[17]

Thus, from an operational perspective, both monist and dualist approaches – which, *nota bene*, are approaches entirely determined by the domestic legal order and not mandated by international law – tend to make international law 'part of the law of the land': in the former case, this is automatically the case; in the latter, this is either the case for a significant 'block' of international law (such as the general rules of international law) or the individual international agreement that becomes part of the law of the land, courtesy of the purpose-built drawbridge that is the parliamentary act of assent.[18]

2.2. Direct Effect

The term 'direct effect' is understood as the legal concept pursuant to which a natural or legal person may similarly invoke international human rights obligations to domestic law before authorities, and in particular before domestic courts and administrative organs.

In the first place, this presupposes that the norm is structured in such a way as to be directly invoked by private persons and applied by the courts. That means that the norm must be sufficiently precise in the sense that it prescribes the necessary and sufficient elements for its application. For instance, the European Charter of Local Self-Government is applicable (ie binding law and must be used for the interpretation of domestic rules) in Spain or Germany but cannot be directly invoked before domestic Courts in these countries.[19]

In the second place, the lawmaker must attribute the direct effect to that norm: where these two conditions are fulfilled, the pertinent state authority will have to 'directly' apply the international human rights norm. While such a norm with direct effect may emanate from general international law, it will regularly be a provision of an international agreement to which the state in question is a party. For this reason, this chapter will focus on the latter scenario.

[13] Art 98 Constitution of Japan; art 162 Income Tax Law of Japan.

[14] Art 93 and 94 Constitution of the Netherlands.

[15] Art 96 Constitution of Spain.

[16] According to art 5 (4) of the Swiss Constitution, Cantons must comply with international law, which binds all authorities applying the law under art 190 of the Swiss Constitution. Moreover, the monistic tradition is confirmed by the circumstance that a revision of the Swiss Federal Constitution may not infringe on the binding value of international law, as indicated by arts 193 (4) and 194 (2) of the Swiss Constitution.

[17] Supreme Court of the Netherlands, judgment of 12 March 1980, BNB 180/170 [1980].

[18] Art 59 para 2 of the German Basic Law reads in relevant parts: 'Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis'. Art VI para 2 of the US Constitution provides, inter alia, that 'all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'.

[19] Council of Europe, Chamber of Local Authorities, 21st Session, CPL (21)2, 28 September 2011, 'The European Charter of Local Self-Government in Domestic Law', Governance Committee, Rapporteur W Borsus, para 58, available at rm.coe.int/168071a4b6.

International treaties are normally silent as to the direct effect (or the 'invocability') of their provisions, unless they specifically exclude it. It is normally up to the domestic legal order to determine when an international legal provision benefits from that status.[20]

Direct effect does not mean that the international legal norm trumps all domestic law, including constitutional law. Rather, it is possible that an international human rights obligation has only direct effect in the same way as other law and, therefore, is only part of the law applicable in that state, all of which enjoys the same (sub-constitutional) rank.[21]

It is up to the state alone to decide how international law is incorporated in the domestic sphere. If the state fails to incorporate it, it violates international law,[22] but the international norm is still not part of the domestic legal system.

2.2.1. Direct Applicability of Double Tax Conventions

2.2.1.1. General Issues

The direct effect of international law is particularly relevant for the relationship between states and individuals. While it is uncontroversial in both monist and dualist traditions that rules of international law create binding obligations for and among states, it is less clear whether such international obligations create rights (or obligations) for *individuals* and whether a particular person can invoke international law provisions before a court or administrative agency, even if domestic law is silent on the matter. Furthermore, even if international law is directly applicable, a party might not be able to invoke it before a given domestic court because the international norm is not sufficiently precise and thus lacks self-executing character. The direct applicability of an international provision is only a necessary but not a sufficient condition for invoking it in the domestic legal order in a particular case.[23]

The following section primarily focuses on the direct application of treaties. This issue is relevant for this report to assess the legal value that domestic courts may give to double tax treaties. The question is whether taxpayers may assert individual rights that a double tax treaty provides for, but which is not specifically incorporated into the domestic system. Even in monist systems, courts do not automatically give full effect to all international treaties.

[20] See below under sec 2.2.1.

[21] According to the Brazilian Federal Supreme Court, the ACHR has a lower rank than the Brazilian Constitution but a higher rank than statutes since it was ratified by the National Congress before the enactment of art 5, para 3 of the Brazilian Constitution. See Supreme Federal Court of Brazil, extraordinary appeal of 5 June 2009, no 466.343-1/SP, [2009]. In Germany, the ECHR has the same rank as federal statutes but inspires the interpretation of the basic rights guaranteed by the German Constitution, *cf* eg German Federal Fiscal Court, judgment of 20 February 2019, XR 32/17 [2019] no 37 – rejecting the application of the presumption of innocence in case of tax surcharges for late payment; German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12, 2 BvR 1395/13, 2 BvR 1068/14 and 2 BvR 646/15, ECLI:DE:BVerfG:2018:rs20180612.2bvr173812 [2018]. In Italy, the Constitutional Court has recognised that the obligation to comply with international obligations, recognised under art 117 (1) of the Constitution (which implements fundamental rights of the Constitution, as enshrined in arts 10 and 11) determines that all domestic law conflicting with the European Convention on Human Rights and its Protocols also conflicts with the Constitution, see Constitutional Court of Italy, judgments of 22 October 2007, '*sentenze gemelle*' no 348/2007 and 349/2007, [2007].

[22] *cf* ICJ, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) ICJ Rep 12 [1988] 34, para 57.

[23] Swiss Federal Supreme Court, judgment of 22 September 2000, appeal against a Regulation of 15 September 1999 adopted by the Canton of Zurich on the Tuition at Schools of Higher Education, *A and B v Government of the Canton of Zurich*, 2P.273/1999, BGE 126 I 242 [2000], para 2b; see also K Kaiser, 'Treaties, Direct Applicability' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, para 2.

2.2.1.2. The Creation of Individual Rights or Obligations through International Treaties

In 1928, the Permanent Court of International Justice (PCIJ) discussed the creation of individual rights and obligations through treaties in its advisory opinion *Jurisdiction of the Courts of Danzig*.[24] It stated that whether a treaty creates rights or obligations for individuals depends on the parties' intention as enshrined in the text of the treaty. While the PCIJ stated that 'an international agreement, cannot, as such, create direct rights and obligations for private individuals',[25] it still found that the very object of a treaty, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts.

More recently, the ICJ famously confirmed in its 2001 *LaGrand* case that international treaties could indeed create direct rights for individuals, even if the treaty is not a human rights treaty and the specific provision does not explicitly state that it is meant to establish individual rights.[26] However, the existence of such individual rights must be determined according to the rules of interpretation under the Vienna Convention on the Law of Treaties (VCLT) (in other words, the ICJ did not assign as much importance to the parties' intention as its predecessor, the PCIJ). Furthermore, the existence of individual rights in international treaties does not render these rights directly applicable or invocable before domestic courts. In other words, treaties may (and often do) enshrine individual rights, but absent domestic validity and direct effect a violation of these rights can only be invoked by a state through diplomatic protection of its nationals (eg in the *LaGrand* case by the state of nationality of the detained persons).

This possible creation of individual rights through international treaties is also relevant in the context of double tax treaties: double tax treaties may create individual rights for taxpayers. Nevertheless, it is a different question whether aggrieved taxpayers have standing before domestic courts to assert those treaty rights; if they lack standing, their only avenue to relief is to urge their states of nationality to espouse their claims and take steps in the international arena against the state which committed the internationally wrongful act (of course, double tax treaties may facilitate this process by providing for MAPs).

While it is now uncontested that international law also contains and creates individual rights, whether international law may constitute the source for individual *obligations* – and to what extent these obligations are directly applicable in domestic systems in the absence of specific incorporation – are different questions. Exceptionally, according to scholars, certain individual obligations (usually discussed in the context of 'individual responsibility')[27] emanating from international law are directly applicable, and the fact that domestic legislation contradicts this or lacks such obligations will not spare the wrongdoer.[28] Such individual obligations are typically found in humanitarian or human rights law (ie genocide, war crimes and crimes against humanity).[29] For example, the Nuremberg trials after the Second World War were based on the premise that individuals could be held responsible for certain atrocities as a matter of international law, even if the relevant domestic law did not enshrine the

[24] PCIJ, *Jurisdiction of the Courts of Danzig* (Advisory Opinion), PCIJ Rep Series B n 15 [1928].

[25] PCIJ, *Jurisdiction of the Courts of Danzig* (Advisory Opinion), cited, para 37.

[26] ICJ, *LaGrand case (Germany v United States of America)*, ICJ Rep 2001 [2001], para 77.

[27] A Peters, 'International Individual Obligations' in J Huston (Trans), *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge Studies in International and Comparative Law, Cambridge University Press, 2016) 60–114, 61.

[28] A Cassese, *International Law* 2nd edn (Oxford University Press, 2005) 144; P Daillier and A Pellet, *Droit International Public* 7th edn (Paris, LGDJ, 2002) 650.

[29] Cassese, *International Law* 144; Peters, 'International Individual Obligations'.

respective obligations and prohibitions.[30] However, apart from this handful of grave international crimes, the field of criminal law is one where even monist countries will not accept that international law is part of 'the law of the land'; this would also create a conflict with the constitutional[31] principle of legality or *nulla poena sine lege scripta*.[32] In the same vein, dualist jurisdictions have generally insisted on the existence of domestic legislation in order to prosecute certain behaviour deemed criminal by the international community.[33] These exceptional cases of individual responsibility stemming from international law are of no further interest for international tax law. With regard to tax law, the principle of legality will generally require some legal basis within domestic law for international tax rules to create obligations for taxpayers.[34] General principles of European Union (EU) law, such as the prohibition of abuse, may, however, result in burdening the individual taxpayer even in the absence of national implementing legislation.[35]

More burdens for taxpayers and tax advisers result from the Standard for Automatic Exchange of Financial Account Information in Tax Matters, also known as the Common Reporting Standard (CRS), which the OECD published in 2014. This soft law document laid the ground for increased tax transparency. The Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures followed in 2018. Those soft law documents led to extensive reporting obligations for taxpayers, tax advisers and financial institutions. They do not create obligations for individuals for several reasons: first, they are not binding (soft law); second, they are not sufficiently precise to be self-executing; third, as mentioned above,[36] direct obligations on individuals resulting from international law are the exception. Nevertheless, states and the EU readily implement those standards through legislative measures. Such legislation is interpreted in the light of the Model rules as understood and possibly further developed by the commentaries. Moreover, the implementing of legislation is often not significantly more precise than the original Model rules.[37] Even though they do not create obligations for natural or legal persons, those standards significantly affect their professional life.

2.2.1.3. Direct Applicability of Individual Treaty Rights before Domestic Courts

This part of the analysis deals more specifically with the *direct applicability* of treaties (sometimes also discussed as 'self-executing treaties', a term that derives from domestic law[38]). A treaty is

[30] ILC, 'Nuremberg Principles, Report of International Law Commission covering its second session (5 June–29 July 1950)', *Yearbook of the International Law Commission II*, (GAOR, 5th session Suppl no 12 (A/1316), (1950), para 99, 374–78.

[31] The maxim can be enshrined as a principle of constitutional rank, but this is not necessarily the case in all states.

[32] Peters, (n. 25) 'International Individual Obligations' 79–81.

[33] See, eg UK House of Lords, *R v Jones (Margaret)*, UKHL 16 [2006], paras 23 and ff; UK House of Lords, *R (Gentle) v Prime Minister*, UKHL 20 [2008] para 49.

[34] V Thuronyi et al, *Comparative Tax Law* 2nd edn (Kluwer, 2016) 59–60; see, however, examples of jurisdictions that apply tax rules that have no basis within domestic law but are provided for in double tax treaties (although this permeation of international tax law into domestic law also derives from domestic law): France according to 7FRA CGI, paras 165 bis, 2091; Australia with regard to source rules contained in treaties according to s 4(2) of the International Tax Agreements Act 1953 and 6-5(3)(a) of the Income Tax Assessment Act 1997; *cf* R Vann, 'International Aspects of Income Tax' in V Thuronyi (ed), *Tax Law Design and Drafting* (IMF, vol 2, 1998) 718–810, 728.

[35] CJEU, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, cases C-131/13, C-163/13 and C-164/13, ECLI:EU:C:2014:2455 [2014], para 62, and CJEU, judgment of 22 November 2017, *Cussens*, case C-251/16, ECLI:EU:2017:881 [2017], para 33, regarding the direct effect of the concept of abuse and CJEU, judgment (Grand Chamber) of 8 September 2015, *Taricco and Others*, case C-105/14, ECLI:EU:C:2015:555 [2015], paras 35 and ff regarding direct effect in the area of criminal law.

[36] Above at sec 2.2.1.1.

[37] *cf* eg art 8 and ff read together with annexes I to IV Directive 2011/16/EU on administrative cooperation in the field of taxation.

[38] *cf* US Supreme Court, *Medellín v Texas*, 554 US 759 [2008].

'self-executing' or 'directly applicable' when its provisions can be applied by courts or executive agencies without the need for further legislative or administrative measures. However, direct applicability does not necessarily mean that a treaty provision can be invoked by a taxpayer in a specific case before a particular national court.

As stated above,[39] international treaties can enshrine individual rights. However, even if the treaty explicitly states that it shall be directly applicable, it still depends on the relevant domestic system whether and how this direct application is actually executed. If the respective state fails to ensure direct application before its courts, the consequence will be state responsibility on the international plane; this does not, however, affect the domestic situation where the treaty right remains non-applicable despite this treaty violation.

The domestic evaluation of the direct applicability of treaties depends in the first place on the domestic validity of the treaty – this is a necessary prerequisite for direct application.[40] If the treaty has not become part of the domestic law of the respective state, either automatically due to the state's monist system or through any other means of incorporation, the treaty cannot be directly applicable before domestic courts. Also, if the treaty has only been signed but not yet ratified, the state is not yet party to the treaty, and the treaty will thus also not be valid (and as a necessary consequence, also not directly applicable) within the domestic system.[41] If the treaty is valid within the domestic system, the question of its direct application may depend on several other factors which vary across domestic jurisdictions.

Of course, the contracting parties of an international agreement may explicitly determine that its provisions are directly applicable. This is what the Member States of the European Economic Community (EEC) did when they integrated into the text of the international agreement not only 'quasi-perfect' treaty provisions that lend themselves to being directly applied, but also a procedural provision, namely Article 177 EEC Treaty (now Article 267 TFEU). Article 267 TFEU makes clear that at least some provisions of the treaty may be determinative for the outcome of a dispute between parties before a domestic court, thus clearly indicating that EEC primary law could have 'direct effect' (the terminology generally used in EU law) between private parties and between public authorities and private parties.[42] In most cases, however, the treaty or the general international law obligations do not contain an explicit command with regard to its direct applicability. In these cases, it is for the domestic courts and administrative agencies to determine whether the treaty was intended to be directly applicable or not.

Whether individuals can invoke provisions of international treaties also depends on domestic procedural law: even if the treaty per se is directly applicable within the domestic system, the specific person trying to assert the treaty right might still lack standing before that specific court due to manifold procedural reasons: statutes of limitation, *forum non conveniens*, *lis pendens* or issues of legal personality or capacity are just a few examples of why a private person might fail to invoke a treaty right.

The direct effect is, first and foremost, given to treaties by the legislative branch: some constitutions explicitly state that international treaties are part of the domestic legal order.[43]

[39] Above at sec 2.2.1.2.

[40] Constitutional Court of Latvia, amendments to the Education Law of 13 May 2005, Re, *Cilevičs and ors v Latvia*, Constitutional Review, case 2004-18-0106, Latvian Herald, no 77, 3235, [2005]; Supreme Court of Poland, appeal judgment of 29 November 2005, *Stanisław v Zakład Techniczno-Budowlany P Spółka zoo*, II PK 100/05 [2005].

[41] *cf* eg Constitutional Court of Latvia, amendments to the Education Law, Re, *Cilevičs and ors v Latvia*, cited.

[42] See eg CJEU, judgment of 5 February 1963, *Van Gend en Loos*, case 26/62, ECLI:EU:C:1963:1 [1963]; CJEU, judgment of 15 July 1964, *Costa v ENEL*, case 6/64, ECLI:EU:C:1964:66 [1964].

[43] See eg art 93 of the Dutch Basic Law; art 6(1) of the South Korean Constitution; art VI of the US Constitution (although the US Supreme Court has increasingly narrowed the scope of this constitutional provision); art 5(4) of the Bulgarian Constitution.

By contrast, even where the legislature restates verbatim the international obligation, the international law obligation is only indirectly applicable as individuals invoke the respective domestic law transforming the international obligation.[44] Nevertheless, the courts will often interpret such domestic legal provisions as if they were a treaty and also invoke the international law of treaty interpretation under the VCLT.[45] Furthermore, domestic courts may give indirect effect to treaties that have not been incorporated by interpreting existing domestic law in harmony with the treaty.[46] Some courts even give an indirect effect to OECD soft law in the area of taxation, recognising its value as a source of technical interpretation.[47]

The next question is whether the treaty is directly applicable within the domestic legal order so that persons can then invoke its provisions before national authorities and courts. In answering that question, the courts might have to assess the intent of the legislative branch ratifying or transforming the treaty,[48] the intent of the executive body concluding the treaty,[49] the precision[50] or subject matter of the treaty text or the existence of pertinent domestic law.[51] While this assessment depends on the respective domestic legal system, many domestic courts give weight to international law for this determination. Some domestic courts, for example, follow the PCIJ's finding in *Jurisdiction of the Courts of Danzig* and tie the direct application to the contracting parties' intent.[52] Other courts found that the existence of an international procedure to implement the treaty, as in particular the dispute settlement mechanism of the World Trade Union (WTO), hints at the intent that the treaty shall not be directly applicable in domestic law.[53] On the other hand, US courts have come to the conclusion that the existence of pertinent domestic law indicates that the treaty is not directly applicable, as a directly applicable treaty would not

[44] See eg German Federal Supreme Court, judgment of 31 January 1966, III ZR 118/64 [1966], para 45.

[45] For an overview of references to the VCLT by courts in the context of international tax law, see M Lang et al (eds), *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* (Cambridge, CUP, 2012) 352, 426, 470, 502, 600, 797, 822, 918, 1027, 1059, 1108, 1150.

[46] eg UK Court of Appeal, *Derbyshire CC v Times Newspapers Ltd*, QB 770, 830 [1992]; Supreme Court of the Netherlands, administrative appeal of 29 November 2005, *A v Minister of Immigration and Integration*, 200505825/1 (JV) 2006, 23 [2005]; Supreme Court of Poland, *Stanisław v Zakład Techniczno-Budowlany P Spółka zoo*, cited, *cf* Kaiser, 'Treaties, Direct Applicability', para 27.

[47] See sec 9.4.1 of this book.

[48] US Supreme Court, Appeal Judgment, *Medellín v Texas*, Docket no 06-984, 552 US 491 [2008], 128 S.Ct. 1346 [2008], 170 L.Ed 2d 190 [2008].

[49] See eg US Court of Appeals (2nd Circuit), *Brzak and Ishak v United Nations and ors*, Docket no 08-2799-CV, 597 F 3d 107 [2010], citing Restatement of the Law, Third, Foreign Relations Law of the United States, para 326 (2).

[50] See eg US Supreme Court, *Asakura v City of Seattle*, case 211, 265 US 332 [1924]; Belgian Court of Cassation, cassation appeal of 11 May 2001, *Art Research & Contact naamloze vennootschap v BS*, Cassation Appeal, case C 00 0391 N, Arresten van het Hof van Cassatie (2001) 872, Pas (2001) 839, Intellectuele Rechten/Droits Intellectuels (2002) 165, Auteurs en Media/Auteurs et Media, (2001) 353, *Rechtskundig Weekblad* (2002–03) 658 [2001].

[51] See eg Swiss Federal Supreme Court, judgment of 29 May 1985, *X v Eidgenössisches Justiz- und Polizeidepartement* [1985], 111 Ib Entscheidungen des Schweizerischen Bundesgerichts, BGE 68, 72; German Federal Supreme Court, judgment of 31 January 1966, *S v Saarland Bundesgerichtshof*, 45 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ], [1966] 58, 73; for a summary of these typical domestic rules, see Kaiser, 'Treaties, Direct Applicability', paras 14–18, 20.

[52] See eg US Court of Appeals, *Frolova v Union of Soviet Socialist Republics*, 761 F 2d 370, 373, (7th Cir), [1985]; Belgian Court of Cassation, *Art Research & Contact Naamloze Vennootschap v BS*, cited; Supreme Administrative Court of Poland, final appeal judgment of 8 February 2006, *Patent Office of the Republic of Poland v BC Plc*, II GSK 54/05, ONSAiWSA 2006/4/96 [2006]; *cf* Kaiser, 'Treaties, Direct Applicability', in *Max Planck Encyclopedia of Public International Law*, A. Concept, para 13.

[53] Case concerning the Regulation of the Operation of Superstores, Supreme Court Republic of Korea, appeal judgment of 19 November 2015, *Lotte Shopping Company, Limited and ors v Mayor of Dongdaemun District of Seoul Special City and Mayor of Seongdong District of Seoul Special City*, 2015 Du 295 [2015]; Nagoya District Court, judgment of 29 June 1984, *Endo v Japan*, 530 Hanrei Taimuzu 265 [1984]; CJEU, judgment of 23 November 1999, *Portugal v Council*, case C-149/96, ECLI:EU:C:1999:574 [1999]; CJEU, judgment of 30 September 2003, *Biret International SA v Council*, case

require implementation through domestic law.[54] However, under specific circumstances, domestic legislation may render imperfect treaty provisions directly applicable. Individuals could then rely on the international obligation (to selectively eliminate national legislation) in conjunction with the remaining domestic legislation to reach the desired result of implementing their internationally guaranteed right.[55]

Whether direct application is affirmed in the specific case typically depends on a number of aspects, the most important one being that direct application was not contrary to the will of the legislature. Thus, in many jurisdictions, the respective higher or supreme courts have decided that direct applicability would be denied if this nullifies the wishes of the legislature, as implicitly or explicitly stated in the relevant law.[56] If no such will of the legislature is discernible, the courts sometimes interpret the treaty itself to establish whether its provisions are directly applicable or not.[57] If the provisions are 'quasi-perfect' (ie provisions that contain a command, leave no obvious margin of appreciation to the domestic legislature, are unconditional, etc), courts may be open to accepting direct applicability. Courts from monist jurisdictions, such as the Netherlands[58] and to a certain extent the EU,[59] seem more inclined to accept direct applicability than those from dualist jurisdictions, largely due to a historically more 'welcoming' attitude vis-à-vis direct application of international law.

However, this tendency towards direct applicability in monist traditions has never been consistent. The CJEU's well known *International Fruit Company* jurisprudence,[60] confirmed after the entry into force of the WTO Agreement,[61] rejects the direct applicability of any General Agreement on Tariffs and Trade (GATT) provision, despite some of its provisions being as precise and unequivocal as can be imagined. This can be explained, however, by the special character of WTO law and the special role of reciprocal negotiation in its implementation. The CJEU is not alone in its selective acceptance of direct applicability: the Swiss Federal Tribunal follows almost verbatim this jurisprudence regarding the direct applicability of the GATT, but also extends it to the provisions of the Swiss-EU FTA 1972[62]

C-93/02 P, ECLI:EU:C:2003:517 [2003]; CJEU, judgment of 1 March 2005, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)*, case C-377/02, ECLI:EU:C:2005:121 [2005]; *cf* Kaiser, 'Treaties, Direct Applicability', para 19.

[54] US Court of Appeals (2nd Circuit), *Bertrand v Sava*, 684 F 2d 204, 218 (2nd Cir 1982), [1986].

[55] Swiss Federal Supreme Court, 111 Ib Entscheidungen des Schweizerischen Bundesgerichts [BGE] 68, 72, cited.

[56] US Supreme Court, Appeal Judgment, *Medellín v Texas*, cited; Austrian Supreme Court of Justice, judgment of 30 September 2002 on final appeal, *S v Austria*, 1Ob149/02x, ECLI:AT:OGH0002:1960:RS0075712 [2002].

[57] German Federal Social Court, judgment of 10 May 2012, *Anonymous*, Complaint procedure, B 1 KR 78/11 B, SozR 4-2500, 140f no 1 [2012]; Constitutional Court of France, judgment of 7 June 2006, *Aid Association and ors v France*, Legal review of statutory orders, CE 285576 [2006]; Supreme Administrative Court of Bulgaria, decision of 8 May 2003, *Al-Nashif v National Police Directorate at the Ministry of the Interior*, Judicial Review, administrative case 11004/2002, decision no 4332 [2003].

[58] Arts 91 and 93 of the Dutch Basic Law.

[59] CJEU, judgments of 30 April 1974, *Haegeman v Belgian State*, case 181/73, ECLI:EU:C:1974:41 [1974]; of 22 November 2017, *Aebtri*, case C-224/16, ECLI:EU:C:2017:880 [2017], para 50; 27 February 2018, *Western Sahara Campaign UK*, case C-266/16, ECLI:EU:C:2018:118 [2018], paras 45–46.

[60] CJEU, judgment of 12 December 1972, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, cases 21/72 to 24/72, ECLI:EU:C:1972:115 [1972].

[61] CJEU, judgment of 5 October 1994, *Germany v Council*, case C-280/93, ECLI:EU:C:1994:367 [1994], para 110.

[62] In particular, the Swiss Federal Supreme Court, judgment of 26 January 2010, *X v Administration fiscale cantonale et Commission cantonale de recours en matière administrative du canton de Genève (recours en matière de droit public)*, 2C_319/2009 and 2C_321/2009, DTF 136 II 241 [2010], consideration 16.1 e 16.2, blocks the application of domestic rules conflicting with rules of human rights (also see Swiss Federal Supreme Court, judgment of 27 June 1996, *Schweizerischer Bund für Naturschutz*, ATF 122 II 234, consideration 4e, 239, and DTF 122 II 485, consideration 3a, 487 [1996]) and the prohibitions of arts 2 and 9, para 2 all I FTA, which have direct effect. However, Swiss courts do not recognise this effect to all provisions contained in the Free Trade Agreement with the EU, see C Kaddous, 'L'influence du droit communautaire

(whereas the CJEU came to different conclusions and accepted direct applicability of provisions of the EU-EFTA states FTAs concluded in 1972[63]).

Certain human rights treaties have received the rank of supreme and directly applicable law in some countries thanks to the respective constitutions of those countries. In some legal orders, such as Albania,[64] Austria,[65] Bosnia and Herzegovina,[66] the Netherlands[67] and Norway,[68] the European Convention on Human Rights (ECHR) has even attained constitutional status.[69] The question of the status or rank of an international law provision within the domestic legal order only arises where the international law provision has direct effect.

In conclusion, the respective approaches (monist or dualist) to international law do not necessarily determine whether a specific treaty is directly applicable, although monist jurisdictions seem more open and sympathetic to affirming the direct application of an international law provision. In other words, whether or not treaties are directly applicable essentially depends on the respective state's domestic law and the practice of its courts. Certain jurisdictions are quite receptive to attributing a direct application to treaties, in particular when it comes to human rights treaties; others only refer to international rules to interpret their jurisdictions' respective domestic laws. These determinations are, quite obviously, subject to policy preferences and policy changes. For example, while the US Constitution has remained unchanged, the attitude of the US Supreme Court has not, and direct application of international law has become increasingly rare before US courts.[70] Similarly, the CJEU's openness to direct effect in the 1970s and early 1980s has been replaced by a greater reluctance to grant direct effect.

This conclusion also applies in the context of taxpayers' rights: whether or not individual rights contained in double tax treaties are directly applicable before domestic courts depends on the respective domestic system and cannot be answered *in abstracto.*

2.2.1.4. Double Taxation Conventions (DTCs): Conferral of Rights upon Individuals?[71]

This sub-section discusses how rights could be conferred upon/invoked by individuals. One has to distinguish between two interrelated questions: do double taxation conventions (DTCs) confer rights upon individual persons that they may invoke within the national legal order? And can such persons claim these rights at an international level?

dans la jurisprudence du Tribunal fédéral suisse' in Mélanges en l'honneur de Philippe Léger, *Le droit à la mesure de l'homme* (Paris, A Pedone, 2006) 407 and ff.

[63] This interpretation reflects the vision that agreements concluded by the EU form an integral part of EU law and are binding upon EU institutions and the Member States. The evolution of this judicial interpretation started in CJEU, *Haegeman v Belgian State*, cited, continued in CJEU, judgment of 26 October 1982, *Hauptzollamt Mainz v Kupferberg & Cie*, case 104/81, ECLI:EU:C:1982:362 [1982]. It was then framed into art 216 TFEU. In essence, it is only subject to the conditions that the clauses of the agreement have a sufficiently precise and unconditional wording and no specific indication in the agreement precludes such direct effect.

[64] Art 17 of the Albanian Constitution.

[65] Austrian B-VG BGBl no 59/1964.

[66] Art II (2) of the Constitution of Bosnia and Herzegovina.

[67] Arts 91 and 93 of the Dutch Basic Law.

[68] Art 92 of the Norwegian Constitution.

[69] Cede, 'Report on Austria and Germany' in Martinico and Pollicino (eds), T*he National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (Groningen, 2010).

[70] *cf* eg the US Supreme Court, *Asakura v City of Seattle*, cited, with the more recent case US Supreme Court, Appeal Judgment, *Medellín v Texas*, cited *cf* also J Paust, *Self-Executing Treaties*, (1988) 82 AJIL 760 and ff.

[71] We would like to thank Andreas Kallergis and Katerina Perrou for their contribution.

2.2.1.4.1. Invocability of DTC Rights within the National Legal Order

That individuals may claim DTC rights before national courts and agencies is not evident, as double taxation conventions are international agreements, mainly binding entities with international lawmaking capacity. Therefore, their basic function is to allocate taxing powers between contracting parties. However, apart from being an inter-state commitment, the convention becomes part of a domestic law once a contracting party has implemented it in domestic law according to the procedures foreseen in its legal system. This way, it becomes applicable and invocable by natural or legal persons who are legal subjects in these states. The benefits agreed upon between the two contracting states in a double taxation treaty are transformed into hard law rights for the taxpayers once they become effective domestically. 'Benefits' enjoyed by persons in the ambit of a double taxation convention then become rights that taxpayers can enforce through the national court system.

However, such rights based on DTCs usually have the force of legislation (as opposed to notably constitutional rank). Consequently, the principle of *lex posterior derogat legi priori* applies, meaning that subsequent legislation can take away taxpayers' DTC rights. Thus, subsequent domestic legislation may 'override' tax treaties. For example, the German Federal Constitutional Court confirmed that overriding treaties is compatible with the Basic Law (*Grundgesetz*)[72] and thereby ended academic controversy.[73]

As a result, one can assume that double tax conventions lead to substantive rights that can be invoked before domestic courts *if* all conditions set by the convention *and* by domestic law are met (such as residence, effective submission to taxation to one of the two contracting states, nationality in some cases, formal requirements related to treaty applicability, incorporation into the domestic legal order where applicable).

2.2.1.4.2. Invocability of DTC Rights at International Level

The second question about invocability at international level has received a positive answer under human rights law. International human rights are enforced not only by domestic but also by international institutions and courts.

There is another area of interest with regard to legal protection in the field of taxation: in international commercial law and international investment law, the participation of private parties in dispute resolution mechanisms is a long-established practice, which could serve as an example for DTCs. According to some scholars, international tax law can be considered part of international investment law.[74] Indeed, in its origins, the elimination of double taxation is closely connected to the idea of eliminating barriers to the international flow of investments between states and has been identified as such since the 1920s. In 1921, the Financial Committee of the League of Nations, entrusted with the study of double taxation, decided to ask the economists Bruin, Einaudi, Seligman and Stamp[75] to prepare a report on the issue of double taxation and to

[72] German Federal Constitutional Court, decision of 15 December 2015 (*Treaty Override*), 2 BvL 1/12, cited (in German).

[73] *cf* eg W Vogel and J Zensus, 'German Court Examines Treaty Overrides' (2012) 67(1) *Tax Notes International* 16; M Lehner, 'Keine Verfügung des Parlaments über Seine Normsetzungsautorität. Zum Vorlagebeschluss des BFH' vom 11 December 2013, I R 4/13 zu para 50d Abs. 10 EStG' (2014) 6 *Internationales Steuerrecht* 189 and ff; also German Federal Fiscal Court, decision of 10 January 2012, I R 66/09 [2012], BFHE 236, 304, 236, 304.

[74] See the analysis in K Perrou, *Taxpayer Participation in Tax Treaty Dispute Resolution* (2014).

[75] See Report on Double Taxation submitted to the Financial Committee – Economic and Financial Commission Report by the Experts on Double Taxation – Document E.F.S.73. F.19, vol 4, s 1: League of Nations (5 April 1923). For its concrete implications on the developments of international taxation, see S Jogarajan, Stamp, 'Seligman and the Drafting of the 1923 Experts' Report on Double Taxation' (2013) 5(3) *World Tax Journal*, 372–92, 368.

state, inter alia, what the economic consequences of double taxation are from the point of view of the equitable distribution of financial burdens and the interference with economic intercourse and the free flow of capital.[76] Interestingly, in their report, the four experts examined the issue from the point of view of international commerce and cross-border investment and concluded that double taxation is a barrier to international investment. The proximity of international tax law to international commercial and investment law is a crucial element that shows the direction in which one should arguably look when trying to design a dispute resolution system for cross-border tax disputes.[77]

Under this approach, arbitration procedures established in tax treaties should be similar to procedures in international investment arbitration, in which the private parties are subjects. However, as it currently stands, the functioning of 'arbitration' in international taxation has little to do with individuals claiming rights at international level. First, unlike in several bilateral investment treaties,[78] international tax arbitration does not result in any enforceable arbitral award but in a resolution to be used in the mutual agreement procedure. In such a context, arbitration helps settle administrative disputes between the competent authorities of the contracting states. Second, and most importantly, taxpayers have only the right to submit their case before the competent authorities, but not a corresponding right to have the latter ones begin the mutual agreement procedure.[79] If the mutual agreement procedure fails, individuals can ask to proceed with an arbitration procedure. However, individuals are never party to the arbitration procedure. This also applies to the multilateral EU Tax Arbitration Convention for the settlement of transfer pricing disputes,[80] despite the fact that it recognises certain rights of taxpayers.[81]

A particular question that can be raised is whether individuals hold procedural rights in the course of treaty-based procedures patterned as purely inter-state, such as mutual administrative assistance procedures related to the exchange of tax-related information.[82] If these procedures are deemed to be conducted in respect of specific substantial rights, such as professional secrecy, there is a trend that seems to highlight that procedural protection of taxpayers in the course of an exchange of information request procedure, where it exists, belongs to the domestic law of the contracting states rather than to international treaty-based law. Therefore, the right to be informed of the launch of such a procedure may exist in domestic law, but it is usually not considered inherent in double tax conventions or in EU law. The EU case law concerning secondary law organising this kind of exchange of information[83] only grants the information holder, not the taxpayer, access to information subject to exchange,[84] limited to elements that are supposed to

[76] The terms of reference given to the experts are described in the introduction of the Report on Double Taxation submitted to the Financial Committee of the Economic and Financial Commission of the League of Nations on 5 April 1923.

[77] See the analysis in K Perrou, 'Chapter 3: International Double Taxation Disputes as Disputes Between the State(s) and the Taxpayer(s)', *Taxpayer Participation* (IBFD, 2014) s 3.2.1.

[78] Namely, those which do not include a tax carve-out clause; see further on this P Pistone, 'General Report' in M Lang et al, *The Impact of Bilateral Investment Treaties on Taxation* (IBFD, 2017) 17–22.

[79] Competent authorities keep discretionary powers as to the start of the preliminary phase of the procedure, as well as to whether they should continue it in the framework of a bilateral procedure with the other contracting state to achieve a mutual agreement that settles the case.

[80] Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (1990) OJ L 225, 10–24.

[81] See, in particular, art 10(2) of the EU Tax Arbitration Convention and the right to appear or be represented before the advisory commission.

[82] See in general Wöhrer, *Data Protection and Taxpayers' Rights*.

[83] CJEU, judgment (Grand Chamber) of 22 October 2013, *Sabou*, case C-276/12, ECLI:EU:C:2013:678 [2013].

[84] CJEU, judgment (Grand Chamber) of 6 October 2020, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [2020], paras 94 and ff; *cf* also CJEU, *Sabou*, cited, paras 39 and ff.

ensure that the information holder can exercise his right to an effective judicial remedy, enshrined in Article 47 of the EU Charter.

Thus, as they stand, DTCs as such do not provide for any procedural rights that can elevate taxpayers that who within their personal scope to direct subjects of the double tax convention.

However, even though clauses in DTCs on the exercise of taxing powers generally do not create rights for the affected persons, some very specific ones do. In particular, this is the case for clauses on cross-border dispute settlement contained in tax treaties, which give the latter persons an actual right to start arbitration when a mutual agreement fails to address a case within a given time period. Such clauses are sufficiently precise to enjoy direct effect.[85] The effective enforcement of these clauses, however, is hard when states refuse to submit their dispute to arbitration on a voluntary basis (two states are needed to 'implement' cross-border dispute settlement).

2.3. The Relationship between National and International Law in the Different Regions[86]

2.3.1. Africa[87]

The observations and comments that follow deal with the relationship between national and international law, international human rights instruments and the process of treaty lawmaking. Selected comments are also provided about observable differences in the heritage of Constitutions in Africa and the values they enshrine. Out of the 54 African countries reviewed,[88] it appears that 40 can be classified as following the monist approach to treaty lawmaking,[89]

[85] *cf* CJEU, *Hauptzollamt Mainz v Kupferberg & Cie*, cited.

[86] *cf* generally European Commission for Democracy through Law (Venice Commission), Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts adopted by the Venice Commission at its 100th plenary session (Rome, 10–11 October 2014) on the basis of comments by Ms V Bílkova (Member Czech Republic), Ms A Peters (Substitute Member, Germany), Mr P van Dijk (Expert, the Netherlands).

[87] We would like to thank Johann Hattingh and Attiya Waris for their contribution.

[88] Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cape Verde, Cameroon, Central African Republic (CAR), Chad, Comoros, Democratic Republic of the Congo, Republic of the Congo, the Ivory Coast, Djibouti, Egypt, Equatorial Guinea, Eritrea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tomé and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

[89] Algeria, arts 149 and 150 of the Constitution; Angola, arts 13 and 161 of the Constitution; Benin, arts 145 and 147 of the Constitution; Burkina Faso, arts 149 and 151 of the Constitution; Burundi, art 277 of the Constitution; Cape Verde, arts 11, 148 and 190 of the Constitution; Cameroon, arts 26, 43 and 45 of the Constitution; Central African Republic (CAR), arts 91 and 94 of the Constitution; Chad, arts 219 and 225 of the Constitution; Comoros, art 12 of the Constitution; Democratic Republic of the Congo, arts 213 and 214 of the Constitution; Republic of the Congo, arts 217 and 223 of the Constitution; the Ivory Coast, arts 120 and 123 of the Constitution; Djibouti, arts 62 and 70 of the Constitution; Egypt, art 151 of the Constitution; Equatorial Guinea, arts 8 and 81 of the Constitution; Eritrea, art 32(4) of the Constitution; Ethiopia, arts 55(12) and 71(2) of the Constitution; Gabon, art 113 of the Constitution; Gambia, s 79(1)(c) of the Constitution; Guinea-Bissau, arts 68 and 85(1)(h) of the Constitution; Kenya, Treaty Making and Ratification Act, 45 of 2012; Liberia, art 34(f) of the Constitution; Libya, art 17 of the Constitution; Madagascar, art 137 of the Constitution; Mali, arts 90 and 115 of the Constitution; Mauritania, arts 78 and 80 of the Constitution; Mauritius, common law; Morocco, art 55 of the Constitution; Mozambique, arts 18 and 179 of the Constitution; Namibia, arts 63(2)(e) and 144 of the Constitution; Niger, arts 169 to 171 of the Constitution; Rwanda, arts 189 and 190 of the Constitution; Sao Tomé and Principe, arts 13(2) and (3), 82 and 97 of the Constitution; Senegal, arts 95 and 97 of the Constitution;

while nine countries follow the dualist approach[90] and three have a hybrid approach containing elements of both.[91] The Constitution of France has had a striking influence on most Francophone African countries (countries that were under France's control at some point in history). At least 18 countries[92] adopt the same structure and legal procedures for treaty lawmaking in their Constitutions as is adopted in Articles 53 and 55 of the Constitution of France (1958). According to Article 55 of the French Constitution, treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party. Therefore, those African countries influenced by France all follow the monist approach to the status of ratified treaties in domestic law. Further, the constitutions of those countries describe the position of international law and international human rights instruments in a similar manner to that in the Constitution of France (1958). However, important variation occurs with respect to which international human rights instruments are constitutionally acknowledged, as well as the specific status each of them is given.

The Preamble to the Constitution of France (1958) proclaims attachment to Rights of Man and the principles of national sovereignty as defined by Lafayette's Declaration of 1789, which enshrined the ideas of the enlightenment and values of the French Revolution. Somewhat surprisingly, the constitutions of several Francophone African countries similarly cite in their preambles the 1789 declaration,[93] which is ironic given that they were colonised by France. What is of interest is that these preambles widen the scope for recognition of international human rights instruments. They all declare allegiance to the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights of 1981.[94] Some recite allegiance also to other international human rights instruments, including (1) the International Covenant on Civil and Political Rights of 1966; (2) the International Covenant on Economic, Social and Cultural Rights of 1966; (3) the Convention on the Elimination of all Forms of Discrimination against Women of 1 May 1980; (4) the Convention on the Rights of the Child of 20 November 1989; and (5) the Constitutive Act of the African Union of 2001.[95]

There are, however, important differences in the legal status given to these international human rights instruments in African Francophone constitutions when general allegiance was acknowledged in preambles. This varies from some constitutions declaring these instruments to

Somalia, s 90(q) of the Constitution; South Sudan, s 57 of the Constitution; Togo, art 138 of the Constitution; Tunisia, arts 20 and 67 of the Constitution; Uganda, art 123 of the Constitution and Zambia, art 44(d) of the Constitution.

[90] Common law in Botswana, s 75 of the Constitution of Ghana, common law in Lesotho, s 219 of the Constitution of Malawi, common law in Mauritius, art 12 of the Constitution of Nigeria, s 64 of the Constitution of the Seychelles, art 63(3)(e) of the Constitution of Tanzania and ss 34 and 327 of the Constitution of Zimbabwe.

[91] S 238 of the Constitution of Eswatini, s 40(4) of the Constitution of Sierra Leone and s 213 of the Constitution of South Africa.

[92] Arts 149 and 151 of the Constitution of Burkina Faso; art 277 of the Constitution of Burundi; arts 26, 43 and 45 of the Constitution of Cameroon; arts 91 and 94 of the Constitution of the Central African Republic; arts 219 and 225 of the Constitution of the Chad; art 12 of the Constitution of Comoros; arts 213 and 214 of the Constitution of the Democratic Republic of the Congo; arts 217 and 223 of the Constitution of the Republic of the Congo; arts 120 and 123 of the Constitution of the Ivory Coast; arts 62 and 70 of the Constitution of Djibouti; arts 8 and 81 of the Constitution of Equatorial Guinea; art 113 of the Constitution of Gabon; art 137 of the Constitution of Madagascar; arts 90 and 115 of the Constitution of Mali; arts 78 and 80 of the Constitution of Mauritania; art 55 of the Constitution of Morocco; arts 169 to 171 of the Constitution of Niger and arts 95 and 97 of the Constitution of Senegal. For Guinea and Sudan, no classification could be made as the texts were not available.

[93] *cf* eg in Gabon and Senegal.

[94] Available at: au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf.

[95] *cf* eg Preamble of the Constitution of Burundi, Preamble of the Constitution of the Central African Republic, Preamble of the Constitution of the Ivory Coast, Preamble of the Constitution of Niger, Preamble of the Constitution of Rwanda and Preamble of the Constitution of Senegal.

be an integral part of the law of the country,[96] which puts their status beyond any doubt, to vague language suggesting only a political obligation towards adherence.[97]

A desktop review of model-based constitutions in Francophone Africa leaves the impression that international human rights enjoy legal recognition in these countries. The fact that these constitutions were not drafted in an organic manner, reflective of local values and political, cultural, social and economic realities, coupled with an overt influence of the values of France in some of them,[98] provides cause for a further enquiry whether indeed the realisation of international human rights commitments can be observed in the daily working of the state and decisions by law courts.

It should be noted that it is not only Francophone African countries that affirm international human rights instruments in their constitutions. Under Angola's Constitution, for example, duly approved or ratified international treaties and agreements shall come into force in the Angolan legal system after they have been officially published and entered into force in the international legal system, for as long as they are internationally binding upon the Angolan state.[99]

Several constitutions in Africa provide no legal basis to recognised international human rights instruments or any bridge between basic rights and taxation. They can reflect the difficult and unfortunate history or present situation in some African countries where human rights abuses were and are unfortunately still being perpetuated by the state. For others, the paucity in written constitutions to deal with international law and international human rights instruments reflects difficult relationships between governments in seats of power and international relations, including international institutions. Some of the older constitutions paint a picture of their time, of what once were all too familiar arrangements encountered in Africa, such as constitutions granting near-omnipotent presidential powers and envisage more subservient roles for parliaments.[100] A small group of African constitutions, mostly older and based on the legal arrangements of the UK, and which, therefore, follow the dualist approach, say very little about the status of international law, international human rights instruments or even the treaty lawmaking process. For these countries, there are often separate pieces of domestic legislation that implement human rights instruments and/or govern the treaty lawmaking process.[101] Consideration of domestic law is, therefore, required in these jurisdictions.

In turning towards the issue of double taxation agreements, they represent international obligations to be implemented at a domestic level.[102] As of 2018, most countries in Africa had entered into multiple tax treaties. For example, South Africa had 58, Algeria had 29, Nigeria had 15 and Mauritius had 44.[103]

[96] *cf* eg art 13 of the Constitution of Angola, art 11(1) of the Constitution of Cape Verde, Preamble of the Constitution of the Congo, Preamble of the Constitution of Djibouti, art 9 of the Constitution of Ethiopia, art 9(3) of the Constitution of South Sudan and art 50 of the Constitution of Togo.

[97] *cf* eg art 216(3) of the Constitution of Gambia, s 37(3) of the Constitution of Ghana, Preamble of the Constitution of Rwanda, art 12(2) of the Constitution of Sao Tomé and Principe and Preamble of the Constitution of Senegal.

[98] The Constitution of Algeria, 2016 is a notable exception for African francophone countries as it is clearly not based on France's constitution but describes local values.

[99] Art 13 of the Constitution of Angola.

[100] *cf* eg art 95 of the Constitution of Senegal and art 44d of the Constitution of Zambia.

[101] *cf* eg s 75 of the Constitution of Ghana, s 219 of the Constitution of Malawi, s 64 of the Constitution of the Seychelles, s 63(3) of the Constitution of Tanzania and ss 34 and 327 of the Constitution of Zimbabwe.

[102] K Nakayama, 'Tax Policy: Designing and Drafting a Domestic Law to Implement a Tax Treaty', *IMF* (2011), www.imf.org/external/pubs/ft/tnm/2011/tnm1101.pdf.

[103] A Waris, *Financing Africa* (Langaa RPCIG, 2019) 123–4.

2.3.2. Americas

2.3.2.1. Regional Arrangements

2.3.2.1.1. The Inter-American System for the Protection of Human Rights

Most American states adopt a monist approach in respect of the protection of human rights even where they otherwise follow a dualist approach.[104] Moreover, during recent decades, there has been a tendency in the state parties to the American Convention on Human Rights (ACHR) and the institutions of the Inter-American System of Human Rights to create rules and principles that allow national authorities to increase the effectiveness of the American Convention and other sources of international law at the domestic level.[105] This has concretely occurred through constitutional amendments and judicial decisions, enforcing the position held by the Inter-American Court of Human Rights, ordering states to amend laws and to change practices identified as structural causes of human rights violations.[106]

Only the States Parties and the Commission have the right to submit a case to the Court.[107] Persons, groups of persons or non-governmental entities have to go through the Commission after the exhaustion of local remedies.[108] As in probably any other human rights system, the national authorities must have the possibility to investigate and put an end to the violation first.[109] Based on the information presented by the state on compliance with the recommendations formulated by the Commission, the latter will then decide whether to refer the state to the Inter-American Court in the framework of a contentious procedure for assessing the violation of public international law.[110]

In line with the concept of conventionality control, all ACHR Contracting States have an international legal obligation to interpret their domestic law in line with the Inter-American *corpus iuris*.[111] The Inter-American Court supports this construction, as it held *verbatim*:

> The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the

[104] The common mould for this recognition of human rights across Latin America may be due to work done by the Organisation of American States from 1948 onwards, which recognised the protection of the fundamental rights of the individual among its foundational values. See further on this M Blengio Valdés, *Manual de Derechos Humanos* (2016) 162–63. Accordingly, even when countries may otherwise follow a dualistic approach, as in Colombia (art 214 of the Constitution), the protection of human rights conforms with the monistic vision (art 93 of the said Constitution). In the same vein, Uruguay protects fundamental rights under art 7 of its Constitution in a way that allows a monistic approach to them but otherwise reflects dualism (see art 6 of that Constitution). Also, in Argentina, art 75.22 of the Constitution follows a monistic approach to human rights, which are recognised as of direct constitutional relevance.

[105] See on this P González Domínguez, 'The Doctrine of Conventionality Control', *Intersentia* (2018).

[106] These developments are connected first with the violation of basic human rights, perpetrated between the 1960s and 80s by non-democratically elected regimes in Latin America, and the re-establishment of democracy and the rule of law. In this context, the Inter-American Court of Human Rights has played a particularly important role with its interpretation of the ACHR, see IA Bazán Chacón, 'El Impacto de la Jurisprudencia de la Corte Interamericana de Derechos Humans en el Perú. Una Evaluación Preliminar' (2011) 7(2) *Ars Boni et Aequi* 283 and ff.

[107] Art 61 ACHR.

[108] Arts 44, 46 ACHR.

[109] Art 48 ACHR.

[110] Arts 48, 50 and 61 ACHR.

[111] The Inter-American *corpus iuris* includes the American Convention, treaties of similar nature (ie the Inter-American Convention to Prevent and Punish Torture), the interpretations of these treaties made by the Inter-American Court and other sources of soft law in the Inter-American System (ie the Inter-American Democratic Charter).

> Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the judiciary must exercise a sort of 'conventionality control' between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[112]

This doctrine is very friendly to international law, since it was developed with regard for the most serious violations of fundamental human rights like forced disappearances, crimes against humanity and amnesties for such crimes.[113] It is not evident whether it can be transferred to tax cases.

2.3.2.1.2. The Andean Community

The Andean Community is based on the Andean Subregional Integration Agreement (Cartagena Agreement).[114] That agreement establishes several institutions, including Councils, the Andean Community Commission, a General Secretariat and the Andean Community Court of Justice.[115] The creation of the subregional Andean market has been carried out by means of, among other things, the harmonisation of 'foreign exchange, monetary, financial and fiscal policies, including the treatment of subregional or foreign capital'.[116]

The Andean Community Commission has adopted two decisions in the field of taxation.

Its decision 40[117] has two annexes on taxation: Annex I contains approval of the agreement to avoid double taxation between the Member Countries; Annex II establishes a Standard Agreement for avoiding double taxation between the Member Countries and other states outside the Andean Subregion.[118]

The decision obliges the Member Countries to take the necessary measures before 30 June 1972, to put into effect the Agreement to avoid double taxation among Member Countries[119] (Annex I). If any difficulties or doubts exist as a result of the application of the Agreement to avoid double taxation among Member Countries that cannot be resolved through the consultation and mutual agreement procedure,[120] the respective facts of the case shall be submitted to the Fiscal Policy Council for consideration. The Fiscal Policy Council may meet at the request of any Member Country. If the Council's intervention fails to lead to the settlement of the problem, the Member Countries may avail themselves of the procedures established in the Cartagena Agreement.[121] Such procedures do not establish binding rules for the settlement of such disputes.

[112] IACHR, judgment of 26 September 2006, *Almonacid-Arellano et al v Chile*, no 124, Preliminary Objections, Merits, Reparations and Costs [2006].

[113] *cf* eg IACHR, judgment of 24 February 2011, *Gelman v Uruguay* [2011] no 193 and ff.

[114] Andean Subregional Integration Agreement (Cartagena Agreement) of 1969 between Bolivia, Colombia, Ecuador and Peru. Argentina, Brazil, Paraguay, Uruguay and Chile are associate members.

[115] Art 6 Cartagena Subregional Integration Agreement.

[116] Art 54(e) Cartagena Subregional Integration Agreement.

[117] www.sice.oas.org/Trade/Junac/decisiones/dec040e.asp.

[118] Standard Agreement for avoiding double taxation between Member Countries and other states outside the Subregion, Annex II to Decision 40 of the Commission of the Cartagena Agreement, Approval of the Agreement among Member Countries to avoid double taxation and of the Standard Agreement for executing agreements on double taxation between Member Countries and other states outside the Subregion.

[119] Art 3 Decision 40 of the Andean Community Commission.

[120] *cf* art 20 of the Agreement to Avoid Double Taxation.

[121] Art 4 Decision 40 of the Andean Community Commission; Ch II, s D, art 29 and ff of the Andean Subregional Integration Agreement (Cartagena Agreement) on the Andean Community General Secretariat.

The Standard Agreement to avoid double taxation between the Member Countries and other states outside the subregion[122] (Annex II) contains mainly definitions regarding its scope of application and a clause on consultation, information and mutual agreement (Article 19). Such agreements to avoid double taxation as the Member Countries may sign with other states outside the subregion shall be guided by the Standard Agreement. Each Member Country shall consult with the others, within the Fiscal Policy Council, before signing those agreements. Member Countries that have signed agreements to avoid double taxation prior to the date of this decision shall seek to harmonise the provisions of those agreements with the Standard Agreement.[123]

The Commission of the Andean Community has also concluded a multilateral agreement to avoid double taxation and prevent tax evasion. The '2004 Andean Community Income and Capital Tax Convention' has been in force since 1 January 2005. It contains specific rules on the allocation of taxing rights between Bolivia, Colombia, Ecuador, Peru and Venezuela.[124]

2.3.2.2. Latin American Countries

2.3.2.2.1. Argentina[125]

Article 27 of the Argentine Constitution, enacted in 1853, states that international treaties must be in conformity with the principles of public law established in the Constitution.[126] Pursuant to Article 31, treaties with foreign powers are the supreme law of the Nation and the authorities of every Province are bound to conform to it, notwithstanding any provision to the contrary which the Provincial laws or Constitutions may contain.[127] Article 75.22 establishes that treaties have a higher standing than laws.[128] That provision lists some international human rights instruments which are granted the same level as the constitution. However, they do not repeal any article in the First Part of Argentina's Constitution and must be understood as complementary to the rights and guarantees recognised therein. These international instruments are: the American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the ACHR; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the [International] Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. They may only be denounced, if such is to be the case, by the National Executive Power, after prior approval by two-thirds of the totality of the members of each Chamber. After approval

[122] Standard Agreement for avoiding double taxation between Member Countries and other states outside the Subregion, Annex II to Decision 40 of the Commission of the Cartagena Agreement, Approval of the Agreement among Member Countries to avoid double taxation and the Standard Agreement for executing agreements on double taxation between Member Countries and other states outside the Subregion.

[123] Art 5 and 6 Decision 40 of the Commission of the Cartagena Agreement, Approval of the Agreement among Member Countries to avoid double taxation and of the Standard Agreement for executing agreements on double taxation between Member Countries and other states outside the Subregion.

[124] *cf* art 20 Andean Community Income and Capital Tax Convention, signed on 5 May 2004, entered into force on 1 January 2005, Decision 578 Commission of the Andean Community.

[125] We would like to thank Edoardo A Baistrocchi for his contribution.

[126] In the English translation, 'The Federal Government is obliged to strengthen its relations of peace and trade with foreign powers by means of treaties that are in conformity with the principles of public law set out in this Constitution'.

[127] There are some special rules regarding the Province of Buenos Aires.

[128] In the English translation, 'Treaties and concordats take precedence over laws'.

by the Congress, other treaties and conventions on human rights shall require the vote of two-thirds of the totality of the members of each Chamber in order to enjoy standing on the same level as the constitution.

With regard to the hierarchical relationships between domestic laws and the norms of international law in Argentina, the interpretation of the Constitution has gone through several stages in the jurisprudence of the Supreme Court: 1) in the first stage (1853–1963), the pre-eminence of constitutional rules over international law was not discussed. The only exception to this rule was established by the Nation's Supreme Court of Justice in the case *Merck Química Argentina v Gobierno de la Nación*,[129] in which the pre-eminence of treaties over the constitutional order in times of war was provided for; 2) the second stage (1963–92) began with the case *Martín y Cía SA v Administración General de Puertos*,[130] which established equality instead of hierarchy regarding domestic laws and treaties. Consequently, the Supreme Court crystallised the principle of *leges posterior priores contrarias abrogant*; 3) the third stage (1992–94) began with the case of *Ekmekdjian, Miguel v Sofovich, Gerardo and others*.[131] This ruling recognised the primacy of treaties over domestic laws; 4) the fourth stage gave constitutional status to the aforementioned *Ekmekdjian* doctrine. Article 75, paragraph 22, incorporated into the Constitution in 1994, establishes the supremacy of international treaties over domestic laws.[132]

In this regard, the 1994 constitutional reform addresses issues such as the incorporation of international law into domestic law (both treaties and general principles, custom and even the application of the principle of *jus cogens*), the compatibility of the Argentine Constitution and domestic laws with international rules of various kinds and the constitutional supremacy of human rights treaties.

On the other hand, in the area of taxation, the Argentine state has ratified 26 conventions to avoid double taxation, of which 20 are in force. In addition, Argentina signed the OECD Multilateral Convention on Mutual Assistance in September 2012. That Convention has been in force in Argentina since January 2013.

In summary, Argentina adheres to the principle of the supremacy of international treaties over domestic law.[133] Its network of agreements to avoid international double taxation is made up of 20 treaties.

2.3.2.2.2. Brazil[134]

In Brazil, tax treaties and conventions enter into force after a complex process:[135] 1) the President signs the treaty or convention;[136] 2) National Congress approves it;[137] 3) Brazil informs its

[129] Argentine Supreme Court, *Merck Química Argentina v Gobierno de la Nación*, judgment, 211:297 [1948].

[130] Argentine Supreme Court, *Martín y Cía SA v Administración General de Puertos*, judgment, 257:99 [1963].

[131] Argentine Supreme Court, *Ekmekdjian, Miguel v Sofovich, Gerardo and others*, judgment, 315:1492 [1992].

[132] 'It falls to Congress: Article 75 paragraph 22. To approve or reject treaties concluded with other nations and international organizations and concordats with the Holy See. Treaties and concordats have a higher status than laws' (translation by the author).

[133] Art 75(22) of the Argentine Constitution provides as follows. '[Federal] Congress must approve or reject treaties concluded with other nations and international organizations and concordats with the Holy See. Treaties and concordats have a higher status than laws' (translation by the author).

[134] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[135] *cf* also G Soares, 'The Treaty-Making Process under the 1988 Federal Constitution of Brazil – Latin America' (1991) 67 *Chicago – Kent Law Review* 495 and ff; JC Francisco, 'Prevalence of International Treaties in the Brazilian Tax Law', *Revista Direito Tributário Internacional Atual*, (2016), Special Edition: International tax principles in BRICS and OECD countries – with a comparative law part 1.3. on international law in the constitutional systems of Latin American and European countries.

[136] Art 84 (VIII) of the Constitution of Brazil.

[137] Arts 84 (VIII) and 49 (I) of the Constitution of Brazil.

partner(s) of the approval and, therefore, confirms its commitment to fulfil the agreement, as does the partner(s), if not done before; 4) the President promulgates and publishes a Decree internalising the treaty or convention. At this moment, the treaty or convention enters into force in Brazil. Executive agreements,[138] however, have a simple procedure: there is no approval by the legislative. Under Article 49(1) of the Brazilian Constitution, the National Congress 'shall have exclusive powers: to decide definitively on international treaties, agreements or acts that result in charges or commitments encumbering the national patrimony'. Such international treaties, agreements or acts should not, hence, be created as executive agreements. The DTCs, as they limit the power to tax, cannot be concluded without parliamentary approval, in line with the aforementioned constitution provision.

Brazil adopts a moderate position[139] regarding the interaction between domestic and international law. The Brazilian Constitution does not contain a supremacy clause according to which international treaties would be the (supreme) law of the land. Thus, Brazil has a mixed system. Moreover, the treaty or convention must respect the Brazilian Constitution.[140] As a consequence, the Decree enacted by the President may be subject to the control of constitutionality.

According to Article 98 of the National Tax Code of Brazil, 'international treaties and conventions revoke or modify domestic tax legislation, and will be respected by the subsequent statutory norms'. The Supreme Federal Court of Brazil initially decided that tax treaties and conventions could have (a) a normative nature – if they state general clauses – or (b) a contractual one – when the contracting parties have specific obligations.[141] In the view of the Supreme Federal Court of Brazil, Article 98 of the National Tax Code of Brazil is only applicable to contractual treaties and conventions. These overcome other sub-constitutional norms. Conversely, subsequent legal acts may change normative treaties and conventions. This is so because Article 178 of the National Tax Code of Brazil determines that tax exemptions – as granted for a specific period and in return for taxpayers' financial obligations – cannot be modified or cancelled by governments once granted to taxpayers.[142] This interpretation is subject to criticism, as it does not derive from a literal reading of Article 98 of the Brazilian Tax Code and creates a false hierarchy between normative treaties and conventions, and contractual ones, besides allowing treaty override in the case of the former ones.[143] Furthermore, the relationship between domestic (sub-constitutional) law and treaties and conventions is not based on a speciality criterion, as they do not regulate the same subject. The latter ones do not create taxes; they only limit tax jurisdiction.[144]

After an amendment to the Constitution of Brazil,[145] the Supreme Federal Court of Brazil[146] confirmed that treaties and conventions on human rights, if approved in accordance with the aforementioned constitutional amendment, have constitutional status, being able to modify the constitution and other sub-constitutional norms.[147] Human rights treaties and conventions which do not fulfil this requirement have sub-constitutional status but are higher in the hierarchy

[138] These do not create financial costs for Brazil.

[139] See Supreme Federal Court of Brazil, direct action of unconstitutionality of 4 September 1997, no 1480/DF [1997].

[140] Supreme Federal Court of Brazil, decision of 5 August 2020, *DTA Brazil-Sweden, Volvo*, extraordinary appeal no 460320/PR, [2020] 13 and ff.

[141] See Supreme Federal Court of Brazil, extraordinary appeal of 29 December 1977, no 80.004/SE [1977].

[142] See Superior Court of Justice of Brazil, special appeal of 17 May 2012, no 1161467/RS [2012].

[143] See A Xavier, *Direito Tributário Internacional do Brasil* (2015) 105–10.

[144] See LE Schoueri, *Direito Tributário* (2019) 118–29.

[145] Constitutional Amendment no 45/2004, introducing art 5 (3): 'The international treaties and conventions on human rights that are approved, in each House of the National Congress, in two shifts, by three-fifths of the votes of the respective members, shall be equivalent to constitutional amendments.'

[146] See Supreme Federal Court of Brazil, extraordinary appeal of 3 December 2008, no 466343/SP [2008].

[147] See Supreme Federal Court of Brazil, direct action of unconstitutionality of 22 May 2013, no 903/MG [2013].

than other statutory norms. Conversely, non-human rights treaties and conventions have the same hierarchical status as domestic legal acts and, therefore, could be modified.

A recent case discussed how to reconcile this understanding with Article 98 of the National Tax Code of Brazil.[148] The reporting judge defended the position whereby tax treaties or conventions generally are higher in norm hierarchy than sub-constitutional law. This position derives from the particularities of the tax treaty and convention negotiation, the importance of *pacta sunt servanda* and good faith, the risk of treaty overriding, and avoiding double taxation of income.[149] In addition, human rights comprised in tax treaties or conventions have constitutional status according to Article 5(3) of the Constitution of Brazil. Nevertheless, the majority of the Justices did not agree with this understanding, defending, in an obiter dictum, the absence of prescription of human rights in tax conventions on income and capital.

2.3.2.2.3. Chile[150]

From a constitutional point of view, even when many rules refer to international conventions or treaties, there is no clear definition of the legal relationship that must exist between national and international sources of rules. For example, Article 5(2) of the Chilean Constitution reads:

> The exercise of sovereignty recognizes as a limitation the respect for the essential rights which emanate from human nature. It is the duty of the organs of the State to respect and promote such rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force.

Nevertheless, the relationship between conventional international law and domestic law in Chile has evolved greatly over recent decades, particularly after the return to democracy in 1990. In fact, Chile has concluded several free trade agreements: 26 commercial agreements with over 50 countries; and in tax matters, 36 agreements have been filed to avoid double taxation, including international exchange of tax data agreements and the Multilateral Agreement on Automatic Exchange of Tax Information. Similarly, on human rights matters, Chile has concluded many treaties, such as the International Covenant on Civil and Political Rights and the ACHR, among others.

There are more and more Chilean state organs directly applying international rules in concrete cases.[151] However, there is still no consensus on the doctrine in terms of the hierarchy of regulations that the Constitution grants to the international agreements ratified by Chile, since in the decisions referring to those agreements,[152] none explains the hierarchy of the agreements in the regulatory system. On the one hand, there are those who place agreements in the same hierarchical field as domestic laws.[153] Others consider agreements at a superior hierarchical level than laws.[154]

[148] Supreme Federal Court of Brazil, *DTA Brazil-Sweden, Volvo*, cited.

[149] Superior Court of Justice of Brazil, special appeal of 24 April 2014, no 1325709/RJ [2014].

[150] We would like to thank Yuri Varela for his contribution.

[151] Comptroller General of Chile (General Accounting Office), Ruling no 16.520-29.06.2019; Chilean IRS, Ruling no 1.096-23.04.2019; Chilean Office of Labor Inspection, Ruling no 4.670-03.10.2019; Chilean Transparency Council, Decision no C3941-19.

[152] Arts 5 (2), 32 no 15, 54 no 1 and 93 no 1 and 3 of the Chilean Constitution.

[153] E Aldunate Lizanan, 'La Posición de los Tratados Internacionales en el Sistema de Fuentes del Ordenamiento Jurídico Chileno a la Luz del Derecho Positivo' (2010) 16(2) *Ius et Praxis* 185–210, scielo.conicyt.cl/scielo.php?script=sci_arttext&pid=S0718-00122010000200007&lng=es&nrm=iso.

[154] X Fuentes Torrijo and D Perez Farias, 'El Efecto Directo del Derecho Internacional en el Derecho Chileno' (2018) 25(2) *RDUCN* 119–56, scielo.conicyt.cl/scielo.php?script=sci_arttext&pid=S0718-97532018000200119&lng=es&nrm=iso.

In turn, some authors grant agreements a constitutional rank.[155] Finally, there are those who acknowledge that international agreements have a supra-constitutional rank.[156]

Thus, both the national doctrine and the courts' case law have evolved from a vision in which the international law was rather subsidiary to domestic law towards a vision in which there is a complementary relationship, especially in human rights matters. Chile is a monist jurisdiction where domestic judges may apply international human rights law as domestic law. In 2014, the Supreme Court of Chile even declared itself an Inter-American tribunal. National judges, according to that approach, are part of the Inter-American System for the protection of human rights. Thereby, the Chilean Supreme Court enhanced the power of the Inter-American Court of Human Rights as well as its own power. Accordingly, Chilean courts have a duty to provide remedies whenever an individual's rights are at risk. The Chilean Supreme Court added that courts may never waive their responsibility to provide redress on grounds of a lack of a specific mechanism. According to the Supreme Court, to do so would inevitably result in a 'denial of justice to victims who legitimately expect that the decision be implemented in their own country'.[157] However, that case did not concern tax, but criminal convictions against indigenous leaders obtained under Chile's terrorist statute. Those 'have ceased to have effect' as a direct result of a judgment of the Inter-American Court of Human Rights.[158]

There are a few cases on the application of human rights in tax matters. For example, after quoting Articles 7 and 93 lit g) of the Chilean Code of Criminal Procedure, Article 8 (2) lit. g) of the Pact of San Jose and Article 14 (3) (g) of the International Covenant on Civil and Political Rights, a court agreed with the taxpayer and decided that he was entitled to remain silent based on the understanding that any statement given in the administrative proceeding, via the compilation of background before the Chilean tax administration, might be used against him in criminal proceedings.[159]

2.3.2.2.4. Peru[160]

The Peruvian Constitution recognises that ratified international treaties are part of national legislation and have the rank of law.[161] To date, Peru has ratified nine DTCs, of which eight are bilateral[162] and one is multilateral with Bolivia, Colombia, Ecuador, Peru and Venezuela.[163] The multilateral Andean Community Income and Capital Tax Convention[164] is based on the Andean

[155] C Nash Rojas, *Derecho Internacional de Los Derechos Humanos en Chile*, Recepción y Aplicación en el Ámbito Interno, Universidad de Chile, Facultad de Derecho, (Santiago, 2012) 24, repositorio.uchile.cl/bitstream/handle/2250/142503/Derecho-internacional-de-los-derechos-humanos-en-Chile.pdf.

[156] M Henriquez Viñas, 'Jerarquía de los Tratados de Derechos Humanos: Amálisis Jurisprudencial Desde el Método de Casos' (2008) Año 6(2) *Estudios Constitucionales* 73–119.

[157] Supreme Court of Chile, decision of 16 May 2019, AD 1386/14, [2019] 10 and 12; see J Contesse, 'The Supreme Court of Chile as an inter-American Tribunal', *Int'l J Cons L Blog* (2019), at www.iconnectblog.com/2019/05/the-supreme-court-of-chile-as-an-inter-american-tribunal.

[158] *cf* IACHR, judgment of 29 May 2014, *Norin Catrimán et al – Leaders, Members and Activist of the Mapuche Indigenous People v Chile*, Merits, Reparations and Costs [2014].

[159] 4° Tax and Customs Court of Santiago de Chile, www.sii.cl/normativa_legislacion/jurisprudencia_judicial/tribunales_tributarios/2015/jj4230.htm.

[160] We would like to thank Cecilia Delgado Ratto for her contribution.

[161] Arts 55 and 56 of the Peruvian Constitution.

[162] Art 2 of the Conventions for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and capital (OECD Model) signed by Peru with Brazil, Canada, Chile, Korea, Mexico, Portugal, Japan and Switzerland. The convention with Japan came into force on 1 January 2022.

[163] Art 1 of Decision 578 of the Andean Commission.

[164] Andean Community Income and Capital Tax Convention, signed on 5 May 2004, entered into force on 1 January 2005, Decision 578 of the Andean Commission.

Subregional Integration Agreement (Cartagena Agreement).[165] Additionally, Peru signed the OECD Multilateral Convention on mutual assistance in June 2017, which has been in force in Peru since September 2018. Peru has also signed the BEPS Multilateral Convention in June 2018 but has not yet ratified it.

Regarding potential conflicts between an international treaty and internal Peruvian law, unlike the previous Constitution of 1979, the current Constitution of 1993 does not establish exhaustively that in case of conflict between a treaty and a law, the former should prevail. This situation led the Peruvian Tax Court to interpret in a mandatory ruling[166] that the modification of the international treaties incorporated by Peru through an internal law would imply a violation of the principle of *pacta sunt servanda* established by Article 27 of the Vienna Convention, by virtue of which no state can evade an international legal obligation invoking its contradiction with domestic law. Therefore, in the event of a conflict between a treaty and domestic law, the former should be preferred. These criteria are still in force to date.[167]

2.3.2.3. The Caribbean[168]

The Caribbean Region comprises a group of sovereign and dependent countries with mixed civil and common law systems derived from the Spanish, Dutch, French and British systems of law through colonialism. Thus, depending on the particular jurisdiction, there would be either monist or dualist approaches to the implementation of treaties into domestic law. For example, in relation to the Anglophone Caribbean, which primarily comprises the Caribbean Community (CARICOM), such as Trinidad and Tobago, Jamaica, Barbados and Guyana, among others, the dualist system of law prevails. International treaties must be laid in and approved by Parliament and signed into law by the Head of State, such as a non-executive President or Governor-General, who is the British Monarch's representative. Suriname subscribes to the Dutch civil law tradition, and in St Lucia elements of the French Civil Code still subsist. Important tax jurisdictions, such as the Cayman Islands and the British Virgin Islands, subscribe to the English common law and are thus impacted by laws passed in the UK but also have their own local assemblies. The Dutch civil law system would generally prevail with respect to former Dutch islands, such as St Martin, Saba or St Eustatius.

2.3.2.4. United States[169]

The scope of international law in the US depends on its form. Generally, the US enters into international agreements by way of treaties or executive agreements.[170] Under the US Constitution, treaties must receive the 'advice and consent' of the Senate, with approval by at least a two-thirds vote of the Senate, and then be ratified by the president.[171] Properly enacted treaties occupy a hierarchical

[165] Andean Subregional Integration Agreement (Cartagena Agreement) *cf* above at sec 2.3.2.1.2.

[166] Peruvian Tax Court, Resolution of 14 May 2004, no 03041-A-2004 [2004].

[167] IFA Peru developed the following in 2008: '(…) in case of conflict between internal law and an Agreement to Avoid Double Taxation (CDI), the provisions of the latter prevail, according to the principles "Pacta Sunt Servanda" and "Primacy of International Law" that govern Public International Law, without this implying the repeal of the national norm (…)'. Resolution of the IX National Tax Days, (2008) 7, available at www.ifaperu.org/docs/RESOLUCION_IXJorIFA.pdf.

[168] We would like to thank Anthony Gafoor for his contribution.

[169] We would like to thank Jeremiah Coder for his contribution.

[170] See Congressional Research Service, *International Law and Agreements: Their Effect on U.S. Law* (2018), fas.org/sgp/crs/misc/RL32528.pdf.

[171] Art II, s 2, sub-s 2 US Constitution.

status as primary sources of law along with the constitution and congressionally-enacted statutes.[172] Should a treaty provision conflict with the constitution, the constitution prevails, but for a conflict between a treaty provision and federal statute with equal legal standing,[173] then the 'last in time' doctrine[174] is applied so that the treaty or statute which takes effect later in time is given precedence in controlling effect.[175] That doctrine was developed in an early Supreme Court case affirming the US right to tax certain tobacco in the territory of the Cherokee nation in the face of a prior treaty between that nation and the US that such tobacco should be exempt from taxation.[176]

In tax matters, the US has entered into several dozen treaties with other countries.[177] Most follow the OECD's Model Tax Convention, which the US has adapted to its own purposes and revises on a regular basis.[178] Should, for example, the provisions of the Tax Cuts and Jobs Act conflict with such treaties, courts will have to adopt the 'later-in-time' rule.[179] However, the later-in-time doctrine must not be applied too easily, but only if there is a true conflict between a (tax) treaty and an act of Congress calling for resolution.[180]

2.3.3. Asia

2.3.3.1. China[181]

China's Constitution has no provision with regard to the status or hierarchy of treaties in the Chinese legal order. Academics have debated for many years on whether China is monistic or dualistic in terms of the relationship between international and national law.[182] However, with regard to tax treaties, both the Law on Tax Administration and Collection and the Law of the Enterprise Income Tax specifically provide that '(w)here the provisions of a tax treaty concluded between the government of the People's Republic of China and a foreign government are inconsistent with the provisions of this Law, the provisions of the treaty shall prevail'.[183]

[172] US Constitution, art 6, para 2 ('[T]he laws of the United States [and] all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land').

[173] See, eg, art 26 USC 7852(d).

[174] *cf* J Ku, 'Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes' (2005) 80 *Indiana Law Journal* 319 and ff.

[175] For more analysis, particularly regarding conflicts between tax treaties and the Internal Revenue Code, see Congressional Research Service, *What Happens if H.R.1 Conflicts with U.S. Tax Treaties?*, (2017), fas.org/sgp/crs/misc/LSB10047.pdf.

[176] US Supreme Court, *The Cherokee Tobacco*, 78 US 616 [1870]; see also US Supreme Court, decision of 9 July 2020, *McGirt v Oklahoma*, no 18-9526, 140 S.Ct. 2452 [2020] denying criminal jurisdiction of the US over the Indian reservation in Oklahoma as there was not sufficient evidence of Congress revoking the treaty establishing the Indian reservation.

[177] For a list of tax treaties to which the US is a party, see Internal Revenue Service, United States Income Tax Treaties – A to Z, www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z.

[178] See www.irs.gov/businesses/international-businesses/united-states-model-tax-treaty-documents; www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx.

[179] *cf* also E Lunder, 'What Happens if H.R. 1 Conflicts with U.S. Tax Treaties?', *Congressional Research Service* (2019).

[180] Denying such conflict between the Tax Cuts and Jobs Act and US tax treaties: see HD Rosenbloom and F Shaheen, 'The TCJA and the Treaties' (2019) 95 *Tax Notes International* 1057 and ff; differently M Horowitz, 'Tax Cuts and Jobs Act's BEAT Provision May Violate International Treaties' (2017–18) 37 *Review of Banking & Financial Law* 592 and ff.

[181] We would like to thank Na Li for her contribution.

[182] See P Che, 'Application of Treaties in China' (2005) 3 *Juridical Science Journal* 96–99. Y Tang, 'The Relationship between Domestic Law and International Law' , (2003) 1 *Social Science Front* 179. X Zhang, 'Application of International Treaties in China' (2001) 6 *Law Review* 73–79.

[183] Art 91 of the Law on the Levying and Collection of Taxes, art 58 of the Enterprise Income Tax Law, and art 28 of the Foreign Enterprise Income Tax Law.

2.3.3.2. India[184]

The Indian Parliament has the power to enact laws to implement any treaty.[185] Generally, treaties do not take effect automatically but need to be implemented through legislation.

However, there is a specific carve-out for tax treaties. The Central Government is empowered to enter into tax treaties that have automatic effect without the need for parliamentary approval. Treaties have automatic effect only if made for (a) granting relief from double taxation to promote economic relations, trade and investment, (b) avoiding double taxation, (c) exchange of information for the prevention of evasion or avoidance or (d) recovery of income tax.[186] Therefore, all Indian tax treaties and limited tax information exchange agreements are covered.

The provisions of tax treaties apply to the extent that they are more beneficial to the taxpayer.[187] Hence, in case of a conflict between a domestic tax law provision and the applicable tax treaty, the more beneficial provision applies to the taxpayer.[188] However, the domestic tax law provisions comprising the General Anti-Avoidance Rules apply to taxpayers even if '*not beneficial*' in comparison to tax treaties.[189] Thus, there is a unilateral overriding effect given to the General Anti-Avoidance Rules.

2.3.3.3. Israel[190]

There is no explicit legislation in Israeli law on the relationship between international law and domestic law. The courts have ruled that international law is not part of Israeli law unless adopted or legislated by the Israeli Parliament. However, customary international law is respected domestically unless it is incompatible with parliamentary legislation.[191] The Israeli Supreme Court established the primacy of parliamentary legislation in the *Steinberg*[192] and *Eichman.* cases[193]

Besides the primacy of parliamentary legislation, the Supreme Court established the automatic incorporation of customary international law into the domestic legal system. In the *Shimshon* case,[194] the reason given was the tradition of English common law, incorporated into the law of the land during the British Mandate. By contrast, in the *Stampfer* case, the Court explained that his status was a direct consequence of Israel's standing as an independent sovereign state.[195] However, international treaties must be incorporated into Israeli legislation to be enforced by Israeli courts. As the court put it:

> The Rhodes Agreement is a treaty between the State of Israel and another state. Whatever the power and validity of such a treaty from the point of view of international law, it is not a statute to which the courts will resort or give any force. The rights which it grants and the obligations that it imposes are the rights and obligations of the states that made the agreement and their enforcement is only in their hands in the special ways that exist for achieving performance of international treaties.[196]

[184] We would like to thank Ashrita Prasad Kotha for her contribution.
[185] Art 253 of the Indian Constitution.
[186] S 90(1), Indian Income-tax Act, 1961.
[187] S 90(2), Indian Income-tax Act, 1961.
[188] *cf* also Supreme Court of India, judgment of 26 May 2004, *Commissioner of Income Tax v PVAL Kulandagan Chettiar*, case 5752/97 [2004].
[189] S 90(2A), Indian Income-tax Act, 1961.
[190] We would like to thank Rifat Azam for this contribution.
[191] R Lapidoth, 'International Law within the Israeli Legal System' (1990) 24(3–4) *Israel Law Review* 451–84; D Kretzmer, 'Israel' in D Sloss and D Jinks (eds), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, (2010), ssrn.com/abstract=1290714.
[192] Israeli Supreme Court, judgment of 19 July 1951, *Steinberg v Attorney General*, Cr.A. 5/51, 5 PD 1061 [1951].
[193] Israeli Supreme Court, judgment of 29 May 1962, *Eichmann v Attorney General*, Cr.A. 366/61, 16 PD 2033 [1968].
[194] Israeli Supreme Court, judgment of 12 April 1950, *Shimshon v Attorney General*, C.M. 41/49, 9 P'sakim 16 [1950].
[195] Israeli Supreme Court, judgment of 4 January 1956, *Stampfer* v *Attorney General*, Cr.A. 174/54, 21 P'sakim 298 [1956].
[196] Israeli Supreme Court, judgment of 12 December 1956, *Custodian of Absentee Property v Samara*, C.A. 22/55, 10 PD 1825 [1956].

In tax matters, Article 196 of the Israeli Income Tax Ordinance provides that:

(a) When the Minister of Finance has given notice by Order, that an agreement specified in the Order was concluded with a certain state to afford double taxation relief on income tax and on every other tax of a similar character imposed by the Laws of that state (hereafter: reciprocating state) and that it is expedient to give that agreement effect in Israel, then that agreement (hereafter: agreement) shall have effect in relation to income tax, notwithstanding any provision of any statute.
(b) An Order made under this section may be revoked by a subsequent Order.

Accordingly, Israel's tax treaties are part of the Israeli domestic law by orders of the Minister of Finance.

2.3.3.4. Japan[197]

Article 98(2) of the Japanese Constitution provides that 'the treaties concluded by Japan and the established laws of nations shall require faithful compliance with them'. Traditionally, this provision has been described as automatically incorporating international norms into domestic law and recognising the domestic legal force of international law,[198] similar to Article 2 of Part 6 of the US Constitution.

In addition to Article 98(2), treaties have the force of laws in Japan for the following reasons: 1) international law was given the force of law under the Meiji Constitution of 1889; 2) Article 73(3) of the Constitution of 1946 requires approval of all treaties by the Diet; and 3) Article 7(1) of the Constitution of 1946 requires promulgation of treaties by the Emperor.[199] The government has consistently taken the position that treaties have the force of laws in Japan by means of Article 98(2) of the Constitution. Japanese courts have endorsed that view as well. Those 'executive agreements' published in the Official Gazette also acquire domestic legal force by virtue of Article 98(2).[200]

Customary international law is also considered to fall under the category of 'established international law' under Article 98(2) of the constitution. On the basis of this provision, it is recognised as having a domestic legal effect that is superior to law. In this way, Japan's domestic legal system is considered to recognise the order of effect of the constitution, international law and domestic law.[201]

On the other hand, with regard to the treatment of tax treaties under domestic law, the National Tax Agency explains as follows:

> Japan takes the position of a so-called 'general recipient' of tax treaties with regard to their domestic effect. Treaties that Japan has concluded have domestic effect in principle, but whether or not the individual provisions of the treaties can be directly applied or not should be determined on an individual basis in line with the purpose and wording of the provision. In addition, some of the provisions of the Conventions cannot be directly applied as-is because the relationship of application is unclear, etc. In such cases, supplementation by domestic law is necessary to make the provisions work.[202]

[197] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.
[198] Y Iwasawa, 'Constitution and International Law' (2011) 370 *Hogakukyoshitsu* 28, 30.
[199] Y Iwasawa, *International Law in the Japanese Legal Order: Recent Developments*, 91, Proceedings of the Annual Meeting (American Society of International Law) Implementation, Compliance and Effectiveness (9–12 April 1997) 301–07.
[200] Ibid.
[201] T Ueki, 'Constitution and Treaty' no 1378 (2009) *Jurist* 81, 88–91.
[202] National Tax Agency, *All about Tax Law Reform in 1986* (1985) 193.

The criteria for determining which provisions in a tax treaty have automatic enforcement power, and which do not, are not clear.[203]

2.3.4. Europe

2.3.4.1. European Union

2.3.4.1.1. Introduction

'Some would say that taxation and human rights is an oxymoron', observed Philip Baker in a paper back in 2001,[204] quickly pointing out that, on the contrary, taxation and human rights are not in any way irreconcilable or conflicting, but that, rather, human rights are a fundamental aspect of taxation. He went on to emphasise that at that time, one could witness a shift towards the extension of human rights principles into the tax field, with a view to providing limits to what governments can do to taxpayers. Today it is without doubt that the fundamental values, guaranteed by human rights law apply to taxation to a great extent in the same way as in other fields. The expansion of this protection has taken place gradually, and the phenomenon of constitutional pluralism, especially in Europe, has contributed to it.

Constitutional pluralism can be defined as the presence of multiple constitutional authorities within a given geographical area that apply to the same legal relationships.[205] Pluralism implies a lack of clearly defined hierarchy. Whereas under the hierarchical approach, one system enjoys absolute supremacy over the other, and whenever there is a conflict in norms, the supreme system prevails, under the pluralist approach, the question of supremacy is deliberately left open. Under the pluralist approach, supremacy is not absolute but determined on a case-by-case basis.[206]

Traditionally, the hierarchical model is found in federal states and also in the relationship between international law and domestic legal orders. In this model, competences are clearly delineated by the supremacy of the federal[207] or the international level. But the supremacy of the international or supranational level can also be limited. If the institutions of the higher level then exceed their competence, their decisions are not vested with supremacy.[208] It is, of course, important who decides whether the competences are exceeded, an international, supranational or national institution. For example, both the CJEU and the German Federal Constitutional Court theoretically claim to decide whether the EU acts within its competences or ultra vires.[209] On 5 May 2020, the German Federal Constitutional Court decided that the

[203] T Hara, 'Considerations on the Automatic Enforcement Power of Tax Treaties in Japan', (in Japanese), in *Collection of Awarded Papers of the Institute of Tax Research and Literature* (2012) 6–7.

[204] P Baker, 'Taxation and Human Rights' (2001) 1(1) *GITC Review* 1, available at taxbar.com/wp-content/uploads/2016/01/gitc_review_v1_n1.pdf.

[205] See the definition in P Pistone, 'Soft Law: Steering Legal Pluralism Towards International Tax Coordination' in D Weber (ed), *Traditional and Alternative Routes to European Tax Integration* (IBFD, 2010) 97 and ff.

[206] N Petersen, 'The Concept of Legal and Constitutional Pluralism in International Tax Law: New Challenges to and from Constitutional and Legal Pluralism' in J Englisch (ed), *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (IBFD, 2016). For a detailed discussion on issues concerning constitutional pluralism, see M Avbelj and J Komárek (eds), 'Four Visions of Constitutional Pluralism' *EUI Working Paper LAW*, no 21/2008, (2008).

[207] *cf* eg art 31 of the German Grundgesetz, according to which federal law shall take precedence over the law of each German *Land* (or State).

[208] N Petersen, 'The Concept of Legal and Constitutional Pluralism in International Tax Law', s 1.2.1.

[209] *cf* eg German Federal Constitutional Court, order of 6 July 2010, 2 BvR 2661/06, ECLI:DE:BVerfG:2010:rs20100706.2bvr266106 [2010]; CJEU, judgment of 17 December 1970, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, case 11/70, ECLI:EU:C:1970:114 [1970]. See, however, K Lenaerts, 'No Member State is

Court of Justice of the European Union, in its judgment of 11 December 2018,[210] had acted ultra vires.[211] In that ultra vires judgment, the CJEU had approved the secondary market public sector purchase programme of the European Central Bank without, according to the German Federal Constitutional Court, testing its proportionality.

Under the pluralism model, no one legal order has a priori absolute supremacy over other orders. Instead, pluralism is characterised by shared supremacy and also shared authority of the institutions of the competing legal orders. Moreover, there is not a clear delimitation of the competences, but rather the question of 'who decides what' is to be answered in each specific case. Not having a clear delimitation of competences does not mean that the relationship of the competing legal orders is left completely undetermined; there is one legal order that enjoys prima facie supremacy, however, only a relative one, and not an absolute one as under the hierarchical approach.[212] The relationship between the EU and the legal systems of the various Member States has to be understood in that way as a pluralistic system.[213] While the supremacy of EU law is generally accepted, there are still areas of residual authority saved for the Member States.[214]

Direct taxation falls within the exclusive competence of the Member States.[215] However, as the CJEU consistently holds, as far as the exercise of the power of taxation is concerned, the Member States are not allowed to disregard Union law. In particular, according to the settled case law of the CJEU, 'although direct taxation is a matter for the Member States, they must nevertheless exercise their taxation powers consistently with Community law'.[216]

This means that the Member States, when exercising their power to tax, have to observe Union law, which includes the general principles recognised by the CJEU as general principles of Union law.[217] From the wording of Article 6(3) TFEU, it appears that the notion of general principles of Union law is a broad one that includes but is not limited to the fundamental

More Equal than Others – The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties', *Verfassungsblog* (2020). In the same vein, J L da Cruz Vilaça, *The Judgment of the German Federal Constitutional Court and the Court of Justice of the EU – Judicial Cooperation or Dialogue of the Deaf?* www.cruzvilaca.eu/pt/noticias/2/; C Timmermans, 'Wie handelt er ultra vires?' (2020) 95 *Nederlands Juristenblad* 1791. Also, see the Opinion of Advocate General Tanchev of 17 December 2020, *A.B. and others (Nomination des juges à la Cour suprême – Recours)*, case C-824/18, ECLI:EU:C:2020:1053 [2020], paras 76 and ff.

[210] CJEU, judgment of 11 December 2018, *Weiss ua*, case C-493/17, ECLI:EU:C:20218:1000 [2018].

[211] German Federal Constitutional Court, judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915 [2020].

[212] But *cf* K Lenaerts, 'No Member State is More Equal than Others'.

[213] *cf* eg C Grabenwarter, PM Huber, R Knez and I Ziemele, 'The Role of the Constitutional Courts in the European Judicial Network' (2021) 27(1) *European Public Law* 43–62.

[214] *cf* eg CJEU, judgment (Grand Chamber) of 5 December 2017, *MAS and MAB*, case C-42/17, ECLI:EU:C:2017:936 [2017]; CJEU, judgment (Grand Chamber) of 14 December 2021, *Stolichna obshtina, rayon "Pancherevo"*, case C-490/20, ECLI:EU:C:2021:1008 [2021] and the Opinion of Advocate General Kokott of 15 April 2021, C-490/20, ECLI:EU:C:2021:296, but see also Opinion of Advocate General Tanchev, *AB and others (Nomination des Juges à la Cour Suprême – Recours)* cited, paras 76 and ff.

[215] For this reason, the EU Member States have the power to conclude DTCs.

[216] Settled case law of the CJEU on fundamental freedoms, *cf*, eg CJEU, judgment of 21 September 1999, *Saint-Gobain ZN*, case C-307/97, ECLI:EU:C:1999:438 [1999] para 57; more recently adopted by the General Court in its judgments on tax state aid: General Court, judgment of 24 September 2019, *Luxembourg/Commission (FIAT)*, joined cases T-755/15 and T-759/15, ECLI:EU:T:2019:670 [2019], para 107 of the judgment, where the Court clarified that intervention by the Member States in areas which have not been harmonised in the EU, such as direct taxation, is not excluded from the scope of the rules on the monitoring of state aid. Accordingly, the Commission can classify a tax measure as state aid provided that the conditions for that classification are met (see, to that effect, CJEU, judgments of 2 July 1974, *Italy v Commission*, case 173/73, ECLI:EU:C:1974:71 [1974], para 28; and of 22 June 2006, *Belgium and Forum 187 v Commission*, joined cases C-182/03 and C-217/03, ECLI:EU:C:2006:416 [2006], para 81). Therefore, the GC pointed out that, since the Commission has the power to monitor compliance with art 107 TFEU, it cannot be accused of having exceeded its powers when it examined the tax ruling at issue to determine whether it constituted state aid and, if it did, whether it was compatible with the internal market, within the meaning of art 107(1) TFEU.

[217] See also art 6(3) TEU.

rights guaranteed by the ECHR and by the constitutional traditions common to the Member States.[218]

The development of the protection of fundamental rights within the EU is an example of how the fundamental values have flowed upwards, from the constitutional traditions of the Member States to the EU legal order.[219] This situation generates a new transnational framework, which protects essentially common fundamental values and operates in the EU between the national and supranational levels. The EU legal order presents itself as a plurality of sources of fundamental rights. The provision of Article 6(3) TEU guarantees that the Court will still be able, even after the entry into force of the EU Charter of Fundamental Rights, to have recourse to the ECHR and the constitutional traditions common to the Member States for inspiration. Even though the EU Charter, according to Article 6(1) TEU is recognised as having the same legal value as the treaties, in fact, it appears that the codification of fundamental values in the Charter[220] was not meant to freeze the future development of general principles of Union law by the Court.[221]

At the same time, human rights law is an area where legal pluralism is often considered a natural phenomenon. In the absence of a clear hierarchy between these guarantees, the multi-level and multi-sourced guarantees of human rights have been said to give rise to a legal pluralism of their own. This perception is enhanced by the fact that there are multiple courts and bodies interpreting the human rights guarantees in Europe, which, in turn, may trigger jurisdictional conflicts over the correct interpretation of those rights.[222] This perception does not seem accurate, though.

Indeed, as Besson points out, the mere plurality of legal norms does not necessarily create legal pluralism.[223] In fact, the case of human rights regimes, developed after the Second World War on the basis of the Universal Declaration of Human Rights, presents coherence. Human rights systems do not conflict with each other but rather complement each other since they share the same abstract content, independent of their domestic or international source.[224]

Therefore, as far as human rights instruments are concerned and the positive rules they create, it appears that describing it as a case of constitutional pluralism would be misleading. The expression constitutionalism perhaps better reflects a common transnational dimension in the protection of fundamental values.

However, pluralism also exists in the area of international taxation. Indeed, rules specific to international taxation are found either in national law or in international double tax treaties. In this context, the combination of taxation rules and human rights rules takes place at three separate but intertwined levels:

- The international law level, which includes the rules contained in double tax treaties and in human rights treaties such as the ECHR, the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights.

[218] According to P Pistone, 'The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation' in B Terra and P Wattel, *European Tax Law*, VII ed. (Wolters Kluwer, 2018), 154, this reduces the potential for national constitutional courts to question the full supremacy of European over national law in order to preserve effective protection of core fundamental principles in national constitutions while anchoring EU fundamental rights to the ones protected by the European Convention of Human Rights.

[219] N Petersen, 'The Concept of Legal and Constitutional Pluralism', s 1.2.2.

[220] P Pistone, 'The EU Charter and Fundamental Rights', refers to the 'declaratory function' of the Charter in respect of the rights that it enshrines; since the Charter reaffirms many already existing principles of Union Law, the Charter neither constitutes the immediate source of such rights nor does it exclude the existence of rights that are not contained in it.

[221] See on this point, X Groussot, '"European Rights" and Dialogues in the Context of Constitutional Pluralism' (2010) 55 *Scandinavian Studies in Law*, s 2.1.

[222] See S Besson, 'European Human Rights Pluralism' in M Maduro, K Tuori and S Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (2014) 170–205, 173.

[223] S Besson, 'European Human Rights Pluralism' 178.

[224] S Besson, 'European Human Rights Pluralism' 187.

- The European Union level, which includes the fundamental freedoms, the rules contained in the EU Charter of Fundamental Rights and also the general principles of EU law.
- The national level, which includes the national constitutional rules and the national tax legislation of a state.

Although soft law instruments are becoming increasingly important in the area of taxation, this section focuses only on hard law instruments and their interplay within the EU.[225]

2.3.4.1.2. The Free Flow of Fundamental Values between National, Supranational and International Legal Orders and its Impact on Taxation: The Specific Case of the European Union

2.3.4.1.2.1. The Impact of the Member States' Domestic Constitutional Orders on EU Law and Vice Versa

2.3.4.1.2.1.1. The Enrichment of the EU Legal Order by the National Legal Orders The most prominent example of constitutional pluralism in the EU is the reaction of the EU institutions to the reservations of competence of the national constitutional courts to protect the fundamental guarantees provided in the national Constitutions in cases governed by EU law.[226] The culmination of this approach was the adoption of the EU Charter of Fundamental Rights.

As established in the *Stauder* case, decided in 1969, respect for the fundamental rights forms an integral part of the general principles of law protected by the Court.[227] The CJEU elaborated on the foundations of the protection of such rights in the *Internationale Handelsgesellschaft* case delivered in 1970.[228] The Court held, on the one hand, that the validity of EU measures cannot be challenged on the grounds of national law rules or concepts, even if there were a violation of fundamental human rights provisions in a Member State's Constitution; on the other hand, however, it confirmed that, in any case, European Community law did respect fundamental rights. Indeed, as the Court put it, recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the EU institutions would have an adverse effect on the uniformity and efficacy of EU law. The validity of such measures can only be judged in the light of Community law.

The Court concluded that the protection of fundamental rights must be ensured within the framework of the structure and objectives of the EU and is closely connected with the national fundamental rights system since it is inspired by the constitutional traditions common to the Member States.

[225] The discussion in this section is limited to hard law instruments only. In recent years, a growing number of soft law instruments (on which see sec 1.6 of this book) have dealt with tax issues and play an increasingly significant role in the evolution of national tax law. There are three main sources of such soft law instruments in the area of taxation: the EU, the OECD and the UN. Indeed, one cannot underestimate the impact of the OECD BEPS Action Plan on the development of international tax law and its guiding force behind the adoption of hard law rules both at the level of the EU and the Member States. However, since these instruments either do not or only marginally deal with and affect the application of fundamental values to taxation, this aspect will not be further explored in this section. However, soft law instruments will be dealt with in the context of the formation of international tax law, where they play an important role (see sec 9.4 of this book). For an analysis of the impact of soft law, see P Pistone, 'Soft Law' 97–116.

[226] *cf* the so-called 'Solange' case law of the German Federal Constitutional Court: German Federal Constitutional Court, order of 29 May 1974, *Solange I*, BvL 52/71 [1974], BVerfGE 37, 271; German Federal Constitutional Court, order of 22 October 1986, *Solange II*, 2 BvR 197/83 [1986], BVerfGE 73, 339.

[227] See CJEU, judgment of 12 November 1969, *Stauder v Stadt Ulm*, case 29/69, ECLI:EU:C:1969:57 [1969], para 7.

[228] CJEU, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, cited, paras 3 and ff.

In the *Nold* case,[229] the CJEU stated that, in safeguarding fundamental rights, it is bound to draw inspiration from the constitutional traditions common to the Member States, and it cannot uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those states. In addition, the Court stated that international treaties for the protection of human rights, on which the Member States have collaborated or are signatories, can supply guidelines, which should be followed within the framework of EU law.

In particular, as far as the protection of proprietary rights is concerned, the CJEU held that it constitutes without any doubt one of the guarantees recognised by EU law. In this connection, the protection of property ownership is based on the constitutional traditions of the Member States and instruments of public international law, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court concluded that, within the EU, since the concept of ownership varies from one Member State to another, its practical application must be viewed in the light of the social function of the property and activities protected thereunder.[230]

On 1 December 2009, the EU Charter of Fundamental Rights entered into force. According to Article 6(1) TEU, the Union recognises the rights, freedoms and principles set out in the EU Charter of Fundamental Rights ('the Charter'), which shall have the same legal value as the treaties. Furthermore, and consistently with the established case law of the Court, Article 6(3) TEU provides that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions, common to the Member States, shall constitute general principles of Union law.

2.3.4.1.2.1.2. The Enrichment of the National Legal Orders by the EU Legal Order: Limitations

The impact of the EU legal order on the level of the protection provided to taxpayers is limited by the scope of application of the EU law rules. As far as the EU Charter is concerned, its Article 51 specifically provides that the Charter applies to the Member States when implementing Union law. The EU Charter reflects the EU general principles of law.

An example of the limitations that the EU law rules present can be found in the procedures for cross-border tax dispute resolution mechanisms. The MAP and arbitration procedures that are provided for in double tax treaties between the Member States or in the EU Tax Arbitration Convention[231] are not likely to be affected by the expansion of the EU Charter fair trial guarantees to tax cases, as the EU itself is not a signatory to the EU Tax Arbitration Convention. However, the fair trial guarantees and other fundamental rights guaranteed by the Charter are relevant under the more recent Council Directive (EU) 2017/1852 of 10 October 2017 on dispute resolution mechanisms in the EU.[232]

Indeed, in dealing with cases under the applicable tax treaty, the Member States are not implementing Union law. Even if the fundamental freedoms may be affected and relied upon in a case governed by a double tax treaty, this aspect does not amount to the implementation of Union law. This is because the rules that the taxpayer primarily relies on (that is, the particular double tax treaty) are not EU rules.

Similar considerations apply to the EU Tax Arbitration Convention. It is an international multilateral convention and, as such, it has the same status as DTCs. Although it is signed by all EU Member States, it is not part of EU law and, therefore, its subject matter is not relevant

[229] CJEU, judgment of 14 May 1974, *Nold v Commission*, case C-4/73, ECLI:EU:C:1974:51 [1974], para 13.
[230] CJEU, *Nold v Commission*, cited, para 14.
[231] Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, (90/436/EEC), (1990) OJ L225, 10, as amended by Council Decision 2014/889/EU (9 December 2014) OJ L358, 19.
[232] (2017) OJ L265, 1.

for the Charter of Fundamental Rights of the European Union. When applying the Arbitration Convention, the Member States are, therefore, not implementing Union law in the sense of Article 51(1) of the Charter. However, it is sometimes more difficult to draw a precise dividing line between situations where the EU Member States implement EU law or a tax treaty obligation. In particular, this can be the case in anti-abuse legislation, where the national rule can simultaneously implement the obligation contained in both.[233]

2.3.4.1.2.1.3. The Enrichment of the National Legal Orders by the EU Legal Order: New Rights for Taxpayers under the Dispute Resolution Directive? Contrary to what happens with the MAP and arbitration under DTCs and the Arbitration Convention, the MAP and arbitration under the Dispute Resolution Directive[234] is a procedure provided for by EU law. The Member States are obliged to implement the Directive and adopt a series of complementary measures in order to make the Directive effective. In this context, when a taxpayer requests the initiation of the MAP and arbitration under the Dispute Resolution Directive (DRD), he relies directly on EU law. Under these circumstances, applying the DRD will consist of the implementation of Union law by the Member States, as per Article 51 of the EU Charter. Consequently, it can be argued that the EU Charter applies in cases where the mechanism provided for in the DRD is used. In such a case, the procedural guarantees for taxpayers are likely to be expanded even beyond what the DRD currently provides.[235] However, the right to an effective remedy and a fair trial only applies insofar as taxpayers can claim that their 'rights and freedoms guaranteed by the law of the Union are violated' (Article 47 of the EU Charter).

2.3.4.1.2.1.4. Beyond the EU Charter: Further Development of Fundamental Values as General Principles of Union Law The EU Charter itself presents a plurality of sources upon which it was based. Point five of the Preamble to the EU Charter enumerates

i. the constitutional traditions and international obligations common to the Member States,
ii. the European Convention for the Protection of Human Rights and Fundamental Freedoms,
iii. the Social Charters adopted by the Union and by the Council of Europe, and
iv. the case law of the Court of Justice of the European Union and of the European Court of Human Rights.

It is clear from this that the function of the EU Charter is not the creation of rights but the 'reaffirmation' of the rights that are already recognised in the EU, as they result from the sources mentioned. However, it does not prohibit the future development of general principles of Union law by the Court.

This, in turn, results in giving most national constitutional principles an EU dimension, reducing the potential of interpretation by national courts that would jeopardise the supremacy of EU law.

However, the limited scope of the EU Charter that applies to the Member States only when they are implementing Union law is liable to create a dichotomy: the distinction between tax cases within the scope of the EU Charter on the one hand and tax cases outside the scope of the EU Charter on the other hand. When they both involve the application of the same right,

[233] See, for instance, the obligation to include a general anti-avoidance clause under art 6 of the EU Anti-Tax Avoidance Directive, art 29 (9) OECD Model Convention and art 7 of the BEPS Multilateral Instrument.

[234] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the EU, 2017, OJ L 265, 1.

[235] See J Kokott, 'Taxpayers' Rights' (2020) 60 *European Taxation* 3–7 and J Kokott, 'Grundrechte des Steuerzahlers im Kontext der Streitbeilegungs-RL' (2019) 12 *Internationale Steuer-Rundschau ISR* 1–4.

that may lead to an undesirable gap in the protections provided in the EU and the Member States' legal orders (so-called 'reverse discrimination of nationals'). First, the standard may be different: the EU may grant a higher level of protection than the domestic order or the ECHR. Second, even if the standard may ultimately be the same, the time of reaching the CJEU or the ECtHR, depending on whether EU law is implemented or not, may differ significantly, especially as domestic remedies have to be exhausted before a case reaches the ECtHR.

A brief analysis of three fundamental principles can help achieve a more precise dimension of the common values.

First, the equality principle appears as a fundamental value for most national Constitutions and EU law, requiring the same treatment for similar situations and a different one for different cases. It is particularly important in the area of taxation. However, its application at the national and supranational level operates in different contexts and can lead to different results, including, in particular, at the level of justifications developed at the interpretative level by courts.[236]

Second, the equality principle also interacts with one of its specifications, better known as the 'ability-to-pay' principle. The latter principle operates at the level of national Constitutions, sometimes through specific provisions[237] and sometimes derived at the interpretative level from the principle of equality,[238] but has also developed at the interpretative level by the courts.[239]

The application of the ability-to-pay principle at national level essentially constitutes a benchmark for the levying of taxes, linking it up with events that directly or indirectly reflect the personal situation of taxpayers and their capacity to contribute to funding the state budget through the payment of taxes.[240]

The existence of this ability-to-pay principle at national level neither automatically makes it a general principle of Union law nor prevents EU law from taking it into account with possible different nuances. The ability to pay under Union law has initially focused on a reference to personal and family circumstances and is now expanding also to business-related matters and beyond. However, the question remains whether the ability to pay as such can apply to situations involving more than one jurisdiction.[241]

Third, there is also a possible connection between the principle of equality and the prohibition of abusive practices. The latter constitutes a general principle of EU law, which judicial

[236] For instance, unlike the general adversity of CJEU case law to the use of irrebuttable presumptions in countering tax avoidance, national constitutional courts may consider them proportionate to pursue an effective protection of the interest to secure tax collection.

[237] Art 4(5) of the Greek Constitution frames the ability-to-pay principle within the more general principle of equality, requesting all Greek citizens to contribute without distinction to public charges in proportion to their means. Art 24(1) of the Constitution of Cyprus, art XXX of the Hungarian Constitution, art 53(1) of the Italian Constitution, art 107(1) of the Portuguese Constitution and art 31 of the Spanish Constitution include express provisions regulating this principle in a similar way, though without a reference to citizenship. However, a different nexus with the national sovereignty may lead to a different obligation to pay taxes. For references to the ability-to-pay principle under national constitutional law, see J Kokott, *Das Steuerrecht der Europäischen Union* 104, fn 161.

[238] This is, for instance, the case in Austria and Germany, see Austrian Constitutional Court, judgments of 16 June 1987, *Austria and Germany*, G 52/87, VfSlg 11.368/1987 [1987]; of 12 December 1991, G 188, 189/91, VfSlg 12.940/1991 [1991]; of 17 October 1997, G 168/96, G 285/96, VfSlg 14.992/1997 [1997] (all concerning family expenses); *cf* also R Beiser, 'Das Leistungsfähigkeitsprinzip – Irrweg oder Richtschnur?' 53 (2000) *Österreichische Steuerzeitung*, 806 and ff; German Federal Constitutional Court, decision of 15 January 2014, 1 BvR 1656/09, ECLI:DE:BVERFG:2014:rs20140115.1bvr165609 [2014], BVerfGE 135, 126, paras 55 and ff.

[239] See, for instance, CJEU, judgment (Grand Chamber) of 12 June 2018, *Bevola and Jens W Trock*, case C-650/16, ECLI:EU:C:2018:424 [2018].

[240] See further in sec 8.1.4 of this book.

[241] See further on this in sec 8.1.4 of this book.

interpretation has particularly developed in tax matters.[242] However, it also has a pre-eminent role at national level, since when a taxpayer is using schemes in order to avoid paying the tax that he would otherwise be liable to pay, this creates an inequality in the treatment of taxpayers that cannot be tolerated. Tax statutes must comply with the principle of equality not only with regard to their wording but also concerning their enforceability and implementation. Where a formally even-handed tax law allows for circumvention or abuse so that a critical mass of taxpayers are not effectively taxed, that also violates the principle of equality.[243] While the concept of abuse is already firmly recognised as a directly applicable general principle of Union law, the recognition of the ability to pay and its content under Union law are still *in statu nascendi*.

2.3.4.1.2.2. The Relationship between the European Union and the European Human Rights System: Its Impact on Taxation

2.3.4.1.2.2.1. The Possible Consequences of the Accession of the EU to the ECHR The EU, as a separate and autonomous legal order, has an obligation to respect fundamental rights as reflected in the ECHR. This is true even though the Union has not acceded to the ECHR.

There are two aspects to that obligation: one substantive and one institutional. The EU not only very quickly recognised the application of the rights reflected in the ECHR in the EU legal order without further conditions (the substantive aspect); in addition, the EU has undertaken the obligation to become itself a party to the ECHR, as is every EU Member State (the institutional aspect). Article 6(2) TEU provides for the accession of the EU itself to the ECHR. The draft Accession Agreement of the EU to the ECHR was finalised on 5 April 2013. Asked by the Commission to deliver an opinion, pursuant to Article 218(11) TFEU, on the compatibility of the draft agreement with EU law, the CJEU identified problems and gave a negative response in its opinion of 18 December 2014.[244] Upon accession, if and when it happens, the ECHR will become a legal instrument formally incorporated in the EU legal order, forming an integral part of EU law. As such, the ECHR will, by virtue of Article 216(2) TFEU, be binding upon the institutions of the EU. Accordingly, the EU, like any other contracting party, would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 of the ECHR. In that context, the EU and its institutions, including the CJEU, would be subject to the control mechanisms provided by the ECHR and, in particular, to the judgments of the ECtHR.

The ECHR is already binding for the Member States, and the EU Charter has already ensured the application of the ECHR and relevance of the ECHR case law of the ECtHR for the interpretation of the corresponding provisions of the EU Charter (Article 52(3) of the EU Charter). Therefore it appears that the impact of the accession of the EU to the ECHR on tax issues would not be significant.

This relationship, however, will fall under the hierarchical model and not under the pluralism model. Accession of the EU to the ECHR would result in the possibility of individual recourse against the actions of the Union, similar to that already existing against the actions of the Member States. This means that, in case of a conflict between the two legal orders, the ECHR would take precedence unless, of course, the protection guaranteed by the EU is more extensive.

[242] See CJEU, *Cussens*, cited, para 17; CJEU, *N Luxembourg 1 et al*, cited, paras 96 and 97, and CJEU, judgment of 26 February 2019, *T Danmark and Y Denmark*, cases C-116/16 and C-117/16, ECLI:EU:C:2019:135 [2019], paras 70 and 71.

[243] *cf* German Federal Constitutional Court, judgment of 9 March 2004, 2 BvL 17/02, ECLI:DE:BVerfG:2004:ls20040309.2bvl001702 [2004].

[244] See Opinion 2/13 of the CJEU (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454, and the Opinion of Advocate General Kokott of 13 June 2014, ECLI:EU:C:2014:2475 [2014].

2.3.4.1.2.2.2. Protection of Taxpayers under the ECHR and the EU Charter The scope of application of the EU Charter to the Member States when compared to the ECHR can be viewed as both wider and narrower than the one offered by the latter.

For the EU Charter to apply, it is always required that a link with EU law be established first.[245] It is controversial to what extent the transposition of EU law by the Member States that goes beyond what is required by EU legislation can still be considered 'implementing Union law' under Article 51(1) of the EU Charter, that is when the Member States implement EU law without being obliged to do so.[246] The solution to the latter problem may have some repercussions in tax matters, especially if the transposition of a directive beyond what is required creates unfavourable effects for taxpayers.

Once the link with EU law is established, and, therefore, once it is established that the EU Charter applies, the protection offered by the Charter cannot be narrower than the protection granted under corresponding rights by the ECHR, as explicitly provided for in Article 52(3) last sentence of the EU Charter.

The EU Charter applies to taxpayers in the same way and under the same conditions as in any other case within its scope of application. Indeed, it would be contrary to the very substance of the Union, as a legal order governed by the rule of law, to maintain that certain categories of cases, such as tax cases were excluded from the scope of the protection guaranteed by the EU Charter.

The application of the principle of *ne bis in idem* in tax cases has been the subject of alternately consecutive judgments of the CJEU and the ECtHR.[247] The ECtHR has for some time applied the *ne bis in idem* principle to tax cases.[248] Taking that case law into account, the CJEU followed on the same path and, in its judgment of 26 February 2013 in the case *Åkerberg Fransson*, held that the *ne bis in idem* principle enshrined in Article 50 of the EU Charter applies to VAT cases, where a tax penalty which is criminal in nature and a criminal sanction were imposed for the same set of facts. Otherwise, penalties may take the form of administrative penalties, criminal sanctions or a combination of the two.[249] In 2016, the ECtHR departed from its previous case law,[250] changing for the first time the standard of review it had used so far. The CJEU followed soon after. In its judgment of 20 March 2018 in the *Menci* case,[251] the CJEU distinguished its earlier case law on *Åkerberg Fransson* despite the plea of Advocate General Campos Sanchez-Bordona who proposed that the Court maintain its previous case law without reservations.[252]

[245] In CJEU, judgment of 24 October 2019, *IN and JM v Belgische Staat*, joined cases C-469/18 and C-470/18, ECLI:EU:C:2019:895 [2019], the CJEU held that the transfer of information concerning taxes did not implement EU law. Such information was gathered abroad and transferred without prior judicial authorisation, thus in breach of the applicable mutual assistance treaty.

[246] In the negative sense, see CJEU, judgment of 19 November 2019, *TSN*, joined cases C-609/17 and 610/17, ECLI:EU:C:2019:981 [2019]; in the affirmative see CJEU, judgment of 18 July 2013, *Alemo Herron and Others*, case C-426/11, ECLI:EU:C:2013:521 [2013]. For an analysis of both theories and their applications, see the Opinion of Advocate General Bot of 4 June 2019, *TSN*, joined cases C-609/17 and C-610/17, ECLI:EU:C:2019:981 [2019], paras 78–90.

[247] The principle of *ne bis in idem* is in art 50 of the EU Charter, which corresponds to art 4 of Protocol no 7 of the ECHR. According to the Explanations, it is one of those articles of the EU Charter where the meaning is the same as the corresponding articles of the ECHR, but where the scope is wider. See the analysis on the *ne bis in idem* principle in sec 6.3.1.1.5 (*ne bis vexari*) and sec 7.1 (*ne bis puniri*) of this book.

[248] See eg ECtHR, *Ruotsalainen v Finland*, no 13079/03 (16 June 2009), and ECtHR, *Lucky Dev v Sweden*, no 7356/10 (27 November 2014).

[249] CJEU, judgment of 26 February 2013, *Åkerberg Fransson*, case C-617/10, ECLI:EU:C:2013:105, [2013], paras 34 and 50.

[250] ECtHR, *A and B v Norway* (Grand Chamber), nos 24130/11 and 25798/11, cited.

[251] CJEU, judgment (Grand Chamber) of 20 March 2018, *Menci*, case C-524/15, ECLI:EU:C:2018:197 [2018].

[252] See the Opinion of Advocate General Campos Sánchez-Bordona of 12 September 2017, *Menci*, case C-524/15, ECLI:EU:C:2017:667 [2017], in particular para 77.

Accordingly, criminal proceedings against a person who 'has already been made subject, in relation to the same acts, to a final administrative penalty of criminal nature' are not excluded where they meet the conditions laid down by the ECtHR.[253]

This judicial dialogue between the ECtHR and the CJEU is particularly relevant for national courts, which are bound by the judgments of the two courts and have to follow them. Therefore, it is important that there is convergence on this matter between the two courts. Otherwise, legal uncertainty would increase exponentially.

The Greek Supreme Administrative Court claims in a recent interim decision that the interpretation and the scope of application of the *ne bis in idem* principle in relation to penalties imposed for customs code violations have been blurred. It points out that the *ne bis in idem* principle has been interpreted differently by other national courts (both in the EU and in third countries), by the ECtHR and by the CJEU; it also notes that there are divergent positions in the case law of the CJEU and the ECtHR regarding the issues under examination by the Greek Court.[254]

In the case at stake, the Greek Court is bound by the ECtHR case law, as the ECHR enjoys a high ranking in the domestic legal order. It is also bound by the case law of the CJEU, as the case before it relates to the application of Union law (customs code). In such a case, one might argue that the substantive scope of the right of *ne bis in idem* should not be disputed: since the case related to the application of Union law, the standard to be followed is that of the EU Charter, as the latter generally provides for a higher level of protection. Had the case not been related to the implementation of Union law, only the (limited in comparison to the EU Charter) standard of the ECHR would apply. Had the level of protection of the EU Charter been limited in comparison to the level of protection of the respective right under the ECHR, even if the case related to the implementation of Union law, the ECHR standard should be applicable.[255] The case is pending before the Greek Supreme Administrative Court.

2.3.4.2. Switzerland[256]

Switzerland is a monist state and, therefore, international agreements are immediately applicable without any implementation into national law. According to Article 190 of the Swiss Federal Constitution, '[t]he Federal Supreme Court and the other judicial authorities shall apply the federal acts and international law'. Hence, even if provisions of international agreements or federal law provisions prove to be unconstitutional, the Swiss courts have to apply them. At least pre-emptory norms of international law prevail over conflicting constitutional provisions.[257] Also, neither cantonal nor federal laws will, in general, be applied if they infringe rights contained in the ECHR. According to the '*Schubert*' case law,[258] however, there are limits to the primacy of international law over Swiss (constitutional) law. Thus, there is no strict hierarchy, but rather constitutional pluralism.[259]

[253] CJEU, *Menci*, cited, paras 61 and ff.
[254] Greek Supreme Administrative Court, interim decision of 30 April 2019, no 1771/2019, [2019] (only available in Greek).
[255] *cf* art 53 of the EU Charter.
[256] We would like to thank Peter Hongler for his contribution.
[257] *cf* art 139(3), 193(4) and 194(2) of the Constitution of Switzerland.
[258] Swiss Federal Supreme Court, judgment of 2 March 1973, *Schubert*, BGE 99 Ib 39 [1973].
[259] *cf* above at sec 2.3.4.1.1.

2.3.4.3. United Kingdom[260]

The UK has no written Constitution, and consequently, no written statement in a Constitution about the relationship between domestic law and international law.[261] However, adherence to the dualist theory, and the requirement for incorporation of international treaties into domestic law, is well established. The UK is indeed a prime example of a dualist country. Under the constitutional doctrine of parliamentary sovereignty, treaties are concluded by the administration in the exercise of the Crown prerogative, but only Parliament can provide for their implementation in domestic law. Therefore, international treaties need to be incorporated into domestic law to have an effect on the domestic legal system. This is usually done by an Act of Parliament or statutory instrument under authority delegated through an Act of Parliament. In many respects, the UK is the paradigm example of a dualist state, and this approach to international law has influenced the position in many common law or Commonwealth countries around the world.

Even where a treaty has not been incorporated into domestic law, it may nevertheless be implemented through an indirect route. When interpreting domestic legislation, various principles are recognised by the UK courts. One of those principles is that Parliament is assumed (unless the contrary appears clear from the wording of the legislation) to legislate consistently with the UK's international law obligations. Thus, for example, when interpreting a statute, it is appropriate to have regard to international treaties – even those not incorporated into domestic law – and ensure that any interpretation adopted is consistent with the UK's international obligations under those treaties. International human rights instruments that have not been incorporated into domestic law, for example, can nevertheless be referred to in this indirect fashion as an aid to interpretation of enactments of Parliament.

One consequence of the fact that international treaties, in principle, need to be incorporated through domestic legislation is that the legal effect of the treaty depends upon the terms of that legislation. Thus, for example, the legislation may provide that a treaty overrides other domestic law,[262] or provide that the treaty does not override domestic law, or that the treaty is to be implemented in domestic law in some other fashion. The fact that treaties require implementation through domestic law also has the consequence that domestic law may subsequently deprive a treaty of legal effect or may override the effect of a treaty by providing that the subsequently-enacted domestic law operates notwithstanding anything contained in the treaty. Thus, domestic law override of treaties is possible in the UK. The UK was one of the first signatories to the ECHR, having been very largely instrumental in the drafting and conclusion of that Convention.[263] When the UK ratified the ECHR, however, a decision was taken that it was not necessary to incorporate the terms of the ECHR into domestic law. It was not until 1998 that the Human Rights Act was enacted, which makes explicit provision for the application of the ECHR in domestic law. Thus, for example, courts in the UK are required to have regard to the Convention (or, more specifically, those provisions of the ECHR that are given domestic effect by the Human Rights Act) when determining cases. The principle of parliamentary sovereignty is respected, however, in that UK courts are not permitted to strike down legislation on the grounds of incompatibility with the ECHR. Instead, certain UK courts may issue a 'Declaration of Incompatibility', which,

[260] We would like to thank Philip Baker for his contribution.

[261] This does not mean that the UK has no constitutional law – it does have constitutional law, as evidenced by the very learned books written on constitutional law. It simply has no single written document that contains its Constitution, and many of the rules of UK constitutional law remain unwritten.

[262] Which is the case for DTCs.

[263] The UK signed the Convention on 4 November 1950, ratified it on 8 March 1951, and it entered into effect for the UK on 3 September 1953.

in principle, triggers a speedy process of parliamentary amendment of the legislation so as to ensure conformity.

In a similar fashion, the treaties establishing the European Economic Communities, and subsequently the EU, took effect in UK domestic law as a result of Section 2 of the European Communities Act 1972. The UK's withdrawal from the EU is given effect to by the EU (Withdrawal) Act 2018 (as amended in 2020): broadly, Section 2 of the 1972 Act remains in force with respect to periods while the UK was a member of the EU, and to the extent that EU law constitutes retained law (as defined in the 2018 Act to cover, inter alia, regulations and case law applicable before 31 December 2020) after the UK's withdrawal.[264]

The UK has also signed and ratified most of the major international human rights instruments. In the case of those instruments, however, they have not generally been incorporated into domestic law. Thus, for example, the UK signed and ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, but neither has been incorporated into domestic law.

So far as tax treaties are concerned, they are given effect in UK domestic law by virtue of section 6 of the Taxation (International and Other Provisions) Act 2010 ('TIOPA 2010'), but only for the very specific purposes identified in that section.[265] Outside the specific purposes in DTCs that are given effect by section 6, any other provisions in tax treaties may not have effect in domestic law. That is the origin of the concept of 'treaty underride' by which the UK may enter into a commitment in a double taxation convention, but that commitment is not given effect in domestic law because it is not within the scope of the operation of section 6 TIOPA.

2.3.5. Oceania[266]

2.3.5.1. Australia

A discussion of the relationship between national and international law in Australia concerns the alternative doctrines of transformation and incorporation. The doctrine of transformation (also referred to as adoption) holds that international law only becomes part of national law when formally adopted or recognised by Parliament through legislation or by the national courts through common law. Under the incorporation doctrine, international law automatically becomes part of national law unless it is inconsistent with pre-existing legislation or common law.

The position in relation to international agreements is quite clear: the provisions of a treaty do not form part of Australian law unless and to the extent that they are implemented through legislation.[267] This principle is based on the separation of powers in the Australian Constitution, where the Executive exercises the prerogative power in the negotiation and ratification of treaties, while the power to alter the law is held by Parliament.[268] So, by way of example, the Racial

[264] Critical issues might arise in connection with taxes, such as, for instance, VAT, introduced in the UK in connection with its accession to the then EEC, which have been retained after the termination of EU membership. Issues may, in particular, arise for judicial interpretation in respect of principles underpinning the VAT tax system, developed during the UK EU membership and which keep influencing the functioning of the UK VAT system after Brexit. Considering the role of judicial interpretation in a common law system, such as that of the UK, a certain degree of indirect influence of CJEU case law cannot be entirely excluded.

[265] This relates to the direct taxes, income tax, capital gains tax and corporation tax – treaties that relate to inheritance tax, for example, are given effect by separate legislation.

[266] We would like to thank Celeste Black for her contribution.

[267] High Court of Australia, *Dietrich v The Queen*, 177 CLR 292 [1992].

[268] High Court of Australia, *Minister of State for Immigration & Ethnic Affairs v Teoh*, 183 CLR 273 [1995], at [25] (per Mason CJ and Deane J).

Discrimination Act 1975 (Cth) gives effect to the International Convention on the Elimination of all Forms of Racial Discrimination. In the context of tax, bilateral tax treaties and the Multilateral Instrument to implement the BEPS measures are given legal effect by way of incorporation by reference into the International Tax Agreements Act 1953 (Cth).

The position is less clear in relation to customary international law. Persuasive analysis of the relevant authorities has been provided by Sir Anthony Mason (former Chief Justice of the High Court of Australia). Although noting that neither approach has been clearly adopted, Mason concludes that 'the difficulties associated with the incorporation theory and proof of customary international law suggest that, in Australia, the transformation theory holds sway'.[269] The preference for the transformation approach is based on a judgment of the High Court of Australia from 1948.[270] Although the statements made by the Court in this case have been criticised by some commentators, the Court has not resiled from them.

2.3.5.2. New Zealand

As New Zealand law also maintains the basic principle of separation of powers, provisions of treaties or other international agreements are given effect beyond the obligations of the parties to the agreement by Parliament through legislation. In relation to tax treaties, double tax agreements are given overriding effect (with some limitations) by way of section BH 1 of the Income Tax Act 2007 (NZ) upon a declaration by the Governor-General by Order in Council (which Order incorporates the text of the agreement). The term 'double tax agreement' is defined for these purposes as an agreement between one or more governments and New Zealand, such as the Multilateral Convention on the BEPS measures which was incorporated into New Zealand law by the same mechanism. In contrast, customary international law is considered to be part of the common law of New Zealand.[271] It is effective both by way of direct application and as part of the 'wider context' within which statutory interpretation is undertaken.[272]

[269] A Mason, 'International Law as a Source of Domestic Law' in D Rothwell and B Opeskin (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997), 210–231.

[270] High Court of Australia, *Chow Hung Ching v The King*, 77 CLR 449 [1948].

[271] T Dunworth, 'Hidden Anxieties: Customary International law in New Zealand' (2004) 2 *New Zealand Journal of Public and International Law* 67, 69.

[272] Court of Appeal of New Zealand, *Sellers v Maritime Safety Inspector*, 2 NZLR 44 [1999], 62 (Keith J for the Court).

3

Possible Approaches to Human Rights and Taxation

There are three possible ways to address human rights in taxation: an exclusive focus on individual rights, an exclusive focus on collective rights, or a study that incorporates both approaches.

The individual rights method reflects a legal approach to human rights that protect the enforceable rights of individual persons, that is, mainly taxpayers (either natural or legal persons). The collective rights approach addresses the interests of the community[1] and focuses on the need to raise sufficient revenue to provide citizens with basic services. The international implications of the latter vision have two components: first, fighting base erosion and profit shifting. This is a priority accepted within the Organisation of Economic Development and Co-operation (OECD) framework by OECD countries, and is better known as BEPS. The second component is achieving fairness in the inter-nation allocation of taxing powers and its possible redistributive effects between countries.

Our work will consider both individual rights and the legitimate collective interest in tax collection. The following Part I of our study focuses on individual taxpayers' rights, whereas Part II will consider more deeply the distribution issues connected with reconsidering nexus in the framework of a fair international tax order. But even in Part I, the collective interest in effective tax collection underlies the justifications for limiting or curtailing taxpayers' rights, namely fighting tax evasion and abuse. However, we will not look at the effects of taxation or non-taxation on general human rights issues within a given society (such as the obligation of states to mobilise resources in order to fund governments' obligations to fulfil human rights and development commitments). This is explained in the immediately following subsection.

3.1. Two Groups of Taxpayers' Rights: Individual Rights and 'Collective Rights'

This subsection considers the arguments for defining rights to include both individual human rights and 'collective human rights', as well as the arguments for defining judicially enforceable rights more narrowly to include just individual human rights. There is disagreement in the international community over which rights should be included within the scope of discussion of taxpayers' rights. The following is a brief overview of the debate. It ends with an explanation of the definition used in the remainder of the report.

[1] Binding legal instruments, such as the African Charter on Human and Peoples' Rights, contain collective rights.

In different contexts, there are two general definitions of human rights as those rights apply in the realm of taxation. The first definition is restricted to individual rights as applicable in taxpayers' interactions with the government ('individual rights' referring to the rights of all taxpayers so that it would include corporate taxpayers etc[2]). These include the rights laid down in human rights conventions around the world, such as the American and European Conventions on Human Rights and the International Covenant on Civil and Political Rights, and some taxpayer charters issued by tax administrations or taxpayer bills of rights. Such individual rights comprise the right to a fair trial in respect of tax matters, the right to privacy and data protection, protection from confiscatory and discriminatory taxation and similar individual rights.[3] They also include protection against egregious conduct on the part of tax authorities in the form of protection against inhuman and degrading treatment, prohibited under all human rights conventions.[4] In recent years, there has been a growing number of cases before the European Court of Human Rights (ECtHR) alleging inhuman and degrading treatment by tax authorities, for example, when tax authorities raid a taxpayer's home.[5] In this respect, we are mostly dealing with generally negative rights in the sense that they are limits to the actions that tax administrations can take against taxpayers. But individual rights also have positive aspects: for example, the obligation on states to provide adequate forms of appeal against tax assessments and the obligation to safeguard the confidentiality of personal information supplied by taxpayers both imply positive duties on the state.

The second definition includes 'collective rights' based on the rights of citizens to have their government raise sufficient revenue from taxation and spend that revenue on improving the rights and lives of the population generally. These could theoretically lead to the inclusion of the right to have the government raise minimum revenue for basic services, the right not to have the government engage in tax competition that hollows out the tax base (including the tax base of other countries), the right to have the government require other beneficiaries of services also to pay taxes. Such 'rights' are collective in that they refer to the situation of people[6] in general rather than to the particular individual affected. These are generally positive 'rights', requiring governments to take certain steps in relation to taxation (and to refrain from certain steps).[7] NGOs may use the collective human rights terminology to argue against aggressive tax planning or tax evasion by corporate or high-income individuals or argue against tax competition by countries.

[2] There are various arguments for including, eg, corporate taxpayers: a simple argument is that they are taxed ultimately as representatives of the human beings who are their stakeholders – shareholders, workers, customers – and to deny corporate taxpayers the protection of human rights law indirectly denies those rights to their stakeholders. A separate issue is whether all rights apply equally to non-human taxpayers as to humans, eg does the right to family life and security of correspondence (ie the right to privacy) apply equally to corporate entities and to individuals?

[3] There is some general literature on these individual taxpayers' rights. This includes D Bentley, *Taxpayers' Rights: Theory, Origin and Implementation* (Kluwer, 2007); W Nykiel and M Sęk (eds), *Protection of Taxpayer's Rights: European, International and Domestic Tax Law Perspective* (Warszawa, Oficyna, 2009); IFA, *The Practical Protection of Taxpayers' Fundamental Rights* (100B Cahiers de Droit Fiscal International, 2015) – General report by P Baker and P Pistone; G Kofler, M Poiares Maduro and P Pistone (eds), *Human Rights and Taxation in Europe and the World* (IBFD, 2011); D Bentley (ed), 'Taxpayers' Rights: An International Perspective', (1998) 8 *Revenue Law Journal* 394; Confederation Fiscale Europeenne (CFE), *Taxpayer Protection* (1989); D Albregtse and H van Arendonk, *Taxpayer Protection in the European Union* (EFS (Series), 5) (Kluwer, 1998); OECD, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (OECD, 1990).

[4] Such as art 7 of the International Covenant on Civil and Political Rights, art 5 of the American Convention on Human Rights and art 3 of the European Convention on Human Rights; see also art 5 of the Universal Declaration of Human Rights.

[5] See, eg ECtHR judgments *Kozinets v Ukraine*, no 75520/01 (6 December 2007) (insufficient evidence of torture), *Lewandowski and Lewandowska v Poland*, no 43457/98 (13 January 2009); *Boze v Latvia*, no 40927/05 (18 May 2017), ECtHR decision, *Vinks and Ribicka v Latvia*, no 28926/10 (7 February 2012) and ECtHR judgment, *Vaeriy Fuclev v Ukraine*, no 6318/03 (16 January 2014).

[6] *cf* African Charter on Human and Peoples' Rights.

[7] See later discussion in sec 3.3 for consideration of how such rights may, in fact, be different versions of negative individual rights.

Support for the collective vision could even be found in human rights documents that contain a duty to pay taxes, as found in African countries (*cf* below at sec 3.3.1.) and in Article XXXVI of the American Declaration of Human Rights. Thereafter, '[i]t is the duty of every person to pay the taxes established by law for the support of public services'.

3.2. The Individual Rights Vision

There are strong arguments in favour of reserving the term human rights for individual (largely negative) rights. As already mentioned, that does not preclude discussion of legitimate collective interests.[8]

First, taxpayers enjoy individual rights, for example, the right to a fair trial or privacy. These rights often find concrete expression in the wording of existing conventions, charters and bills of rights: there is the linguistic basis, therefore, for a discussion of the application of these rights in the context of tax. In some cases, there are extremely interesting and practical issues on which the Committee on International Tax Law can make a real contribution to the discussion: for example, while recognising the right to privacy, there is real scope for debate as to the circumstances in which taxpayers must disclose confidential information to the tax authorities. There are also very real questions for discussion about the practical protection of taxpayers' rights; these are topics on which the Committee is well equipped to make contributions to a global debate.

These issues, relating to the meaning and securing of individual rights in the tax area, are new and well suited to the Committee. The Committee will find more than enough material to engage its time on taxpayers' rights without straying into the wide zone of collective rights.

Second, many 'collective rights' are not precise, and their link with taxation is not evident. Take, for example, the right to a healthy and safe environment.[9] No one would deny that this is a highly desirable objective, but what exactly does it mean in relation to taxpayers, and what are the policies that best achieve that goal? Does it require a publicly funded national health service, or can the goal be achieved by private providers? More to the point, what is the role of taxation? Must states impose taxes to fund health care, and, if so, at what level?

Third – and the discussion in the previous paragraph demonstrates this – linking these collective rights with taxation takes one firmly into the realm of politics. Taxation is a highly political issue, and states zealously defend their sovereignty over tax policies. Linking collective rights and taxation takes the discussion even more into these political realms and may clash with government policies. Unquestionably, some who seek to link taxation with collective rights do so specifically because they wish to advance a political agenda. They believe that certain governments are not taking adequate steps to redistribute wealth or have adopted the wrong policies towards health or education or tax measures that may be harmful to other countries. It is perfectly correct to discuss these issues, but rather as political questions and not as human rights issues.

Some of those who seek to enlist collective rights to challenge the tax policies of governments also display both an ignorance of how taxes work in practice and some naivety about how governments use tax revenues. One cannot easily assume, for example, that governments are unable to improve health care or education provision because they are being frustrated in their attempts to raise revenue by the tax avoidance activities of taxpayers (and that the real causes

[8] See above at sec 3.1.

[9] Pursuant to art 12(2) of the International Convention on Economic, Social and Cultural Rights, the 'State Parties … recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Pursuant to art 24 of the African Charter, '[a]ll people shall have the right to a general satisfactory environment favourable to their development'.

are not governments' decisions to commit resources to other purposes, or the misuse or loss of revenue through corruption). Sometimes the collection of additional tax revenue can even be potentially damaging to the economy as a whole, and may not be used for desirable purposes. Some proponents of the collective rights approach fail to recognise that the real issue is often not the supply side (raising of revenue) but how governments use or misuse existing tax revenues.

Fourth, one may ask what is gained (and potentially lost) by labelling these issues as human rights issues. In modern discourse, labelling an issue as a human rights issue can have an almost magical result: it can trump any counter-argument. This is, no doubt, why some groups seek to hijack the human rights label in support of the policies they wish to advance. However, it would be wrong to lend support to this process, particularly when those policies advance a political agenda and one cannot be objectively certain that those policies will achieve the desired results.

By contrast, there is much to be lost by bringing the human rights label into debates over broader tax policy issues. There is a danger that if one starts to link human rights with, for example, redistributive taxation policies, it will be said – by politicians opposed to the policies and the public in general – that taxation has nothing to do with human rights. We will lose the right, potentially, to argue that governments and tax administrations must respect the individual rights of taxpayers.[10]

All this might be illustrated by two examples.

First, certain multinational corporations have the opportunity and the motive to engage in tax avoidance, and no doubt some do. One may deplore this activity and may seek to counter it by appropriate governmental and international policies. However, can these multinationals truly be branded as *human rights abusers* on the grounds that they deny governments the resources which those governments would have allegedly spent on improving the lives of their citizens? The multinationals will, no doubt, counter this suggestion by showing that in many cases, they are the largest suppliers of revenue to the governments concerned (collecting indirect taxes, excise and taxes on their employees) and that they pay all the taxes that the law demands. They cannot be responsible for what governments do or do not do with the revenue collected. Introducing the human rights label into a debate about the line between acceptable tax mitigation and unacceptable tax avoidance adds nothing and risks confusing the debate. If pushed to the extreme, it raises a real dilemma for multinationals (and all taxpayers) operating or living in countries with repressive regimes. Is there a human rights obligation in those circumstances to deny the government the resources it would use to repress its people? Is there a human rights obligation to evade taxes?[11]

The last point neatly illustrates why it is best to focus on the protection of individual taxpayers' rights and not to risk confusing the debate about taxation with issues of collective rights.

Second, one may assume that a government acts rationally and adopts a tax policy appropriate for its country. This may include policies to attract mobile capital – virtually all governments do this. Such a policy may have a negative impact on the tax revenues of other countries, both neighbouring and further afield, and potentially deny those other governments the resources they would ostensibly spend on improving the lives of their citizens. It may be appropriate to challenge the tax measures adopted by the first government as harmful tax competition, but is it really a human rights abuse? Not only does this bring the human rights label wrongly into a debate on the limits of tax competition, but it makes huge assumptions about the ability and

[10] There is already something of a reluctance among human rights bodies and well-respected human rights organisations to take taxpayers' rights seriously. After all, taxpayers generally face no more than a higher tax charge as opposed to disappearance, arbitrary detention or summary execution.

[11] There is something of an echo of this discussion in the frequent attempt by various groups – Quaker groups in particular – to challenge taxes on the grounds that expenditure on military purposes breaches their freedom of religion. Such challenges have always failed both before the European Court of Human Rights (see, eg ECtHR, *C v UK*, no 10358/83 (1983)) and before the UN's Human Rights Committee (see, eg UN's Human Rights, judgment of 8 November 1991, *Dr J P v Canada*, CCPR/C/43/D/446/1991 [1991]) on the grounds that the obligation to pay taxes is universal, and the use made of some taxes cannot be deemed to infringe the freedom of thought or religion.

willingness of other countries to collect the revenue it is alleged they have lost, and their willingness to spend those resources wisely and well for the good of their citizens.

All these reasons support the argument that the focus of this discourse should be on the individual rights of taxpayers. This does not preclude this Committee from dealing with issues of tax avoidance, evasion or fraud,[12] nor with issues of a fair distribution of taxing rights in the second part of our study, which concerns nexus.

3.3. The 'Collective Rights' Vision

3.3.1. Background of the 'Collective Rights' Vision

There are several arguments in favour of including both individual rights and collective rights in the definition of taxpayers' rights. These include i) the fact that some non-governmental organisations (NGOs) and international organisations consider collective rights to be an integral part of taxpayers' rights; ii) the interaction between collective and individual rights; iii) some constitutions, particularly in Africa, state the duty to pay taxes[13] and some a duty to levy taxes and combat tax evasion and fraud;[14] iv) the role of collective rights in ensuring that governments have sufficient revenue to provide basic support, in leading to income redistribution necessary to offset extreme inequality, and contributing to accountability and participation; and v) the role collective rights play in ensuring that all interested stakeholders have a voice in debates over taxation. Each of these arguments is described in greater detail below.

First, putting aside the substantive value of including these collective rights, it is necessary to at least discuss collective rights in the context of taxpayers' rights, given the discussion of these issues by several prominent organisations and scholars.[15] For some NGOs and international organisations, the rights of taxpayers include collective rights. The United Nations (UN) Special Rapporteur on Extreme Poverty and Human Rights,[16] the International Bar Association (IBA),[17] and some NGOs are among these organisations.[18]

[12] See in sec 4.3 of this book.

[13] Art 64 of the Constitution of Algeria; arts 102 and ff of the Constitution of Angola; art 85g of the Constitution of Cape Verde; principle 23 of the preamble to the Constitution of Cameroon; art 20 of the Constitution of the Central African Republic; art 58 of the Constitution of Chad; art 65 of the Constitution of the Democratic Republic of Congo; arts 19 and 20 of the Constitution of Equatorial Guinea; art 22(4) of the Constitution of Guinea; art 20 of the Constitution of Mauritania; art 45c of the Constitution of Mozambique; art 40 of the Constitution of Niger; art 10 of the Constitution of Tunisia.

[14] Art 43 of the Constitution of Ivory Coast; see also art 38(5) of the Constitution of Egypt.

[15] eg R Avi-Yonah, *Taxation and Business: The Human Rights Dimension of Corporate Tax Practices*, Michigan Law, University of Michigan, Public Law and Legal Theory Research Paper no 678, Law & Economics Research Paper no 20-014 (2020); P Alston and N Reisch (eds), *Tax, Inequality, and Human Rights* (Oxford University Press, 2019).

[16] In 2014, the UN Special Rapporteur on Extreme Poverty and Human Rights drafted a report that argued that 'fiscal policy, particularly taxation policies' are 'a major determinant in the enjoyment of human rights'. Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, UN General Assembly Human Rights Council, A/HRC/26/28 (22 May 2014).

[17] IBA, *Human Rights Law Committee, Taxation as a human rights issue* (Human Rights Law Committee, *Newsletter article*, February 2016), (hereinafter 'IBA, *Human Rights Law Committee newsletter article*'). To be fair, the IBA takes no concluded view on this point but rather discusses some of the issues potentially involved.

[18] See, eg NGO's Global Declaration of Taxpayers' Human Rights, available at www.taxpayerhumanrights.org/endorse/index.php; The Center for Economic and Social Rights, *Challenging Fiscal Injustice through Human Rights*, available at www.cesr.org/human-rights-taxation. Again, to be fair, the 'Global Declaration' is promoted by the Association of World Citizens, a Taiwan-based NGO which is not perhaps a mainstream NGO. The Centre for Economic and Social Rights has a strong association with Philip Alston, the UN Special Rapporteur on Extreme Poverty, some of whose views have proved highly controversial. See, for example, Adam Smith Institute, '*Why We Shouldn't Believe a Word of Philip Alston's*

Even for those who disagree with substantive arguments in favour of including collective rights in the definition of taxpayers' rights, there is a strong argument for at least acknowledging that the terms 'taxpayers' rights' and 'human rights' in the context of taxation include collective rights in at least some policy circles. A report on taxpayers' rights and the human rights challenges of taxation that does not mention these rights and consider the reasons for protecting them risks failing to capture the international discussions surrounding taxpayers' rights.[19]

Second, the protection of these collective interests is arguably necessary for the protection of individual rights. If a jurisdiction does not raise revenue from all of the beneficiaries of its

UN Report on Poverty in the UK', at www.adamsmith.org/blog/why-we-shouldnt-believe-a-word-of-philip-alstons-un-report-on-poverty-in-the-uk. See also 'Hayley rejects "Patently Ridiculous" UN Criticism of US Poverty', at www.mercurynews.com/2018/06/22/haley-rejects-patently-ridiculous-un-criticism-of-us-poverty/.

[19] The basis for the new approach comes chiefly from certain reports by UN Special Rapporteurs on various human rights topics. The principal reports are as follows:

Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona (May 2014, UN Doc no: A/HRC/26/28), which contains a detailed discussion of fiscal policies to reduce inequality and poverty;
Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston (May 2015, UN Doc no: A/HRC/29/31);
Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas (August 2016, UN Doc no: A/71/286), which has a very strongly-worded denunciation of tax evasion and tax havens;
The most recent report, in relation to the US, (and which has prompted considerable controversy) is Report of the Special Rapporteur on Extreme Poverty and Human Rights on his mission to the United States of America, (May 2018, UN Doc no: A/HRC/38/33/Add.1).

Two of the UN Human Rights Treaty Bodies have also addressed issues of domestic and/or international taxation from a collective rights perspective in their recommendations in the context of periodic reviews:

CESCR, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*, E/C.12/GBR/CO/6, 14 July 2016;
CEDAW Committee, *Concluding observations on the combined fourth and fifth periodic reports of Switzerland*, CEDAW/C/CHE/CO/4-5, 18 November 2016.

There is also a recent report of the Inter-American Commission on Human Rights (IACHR). As a contribution to the analysis of the emerging issues at the intersection of international tax law and human rights protection, in May 2018, the IACHR held a regional hearing with 12 organisations to assess regressive fiscal policies, poverty and inequality. In the joint report, the Commission and NGOs emphasised the responsibility of the state in the implementation of fiscal policy and protection of human rights. The report acknowledges the role of the IACHR, in particular, guaranteeing that human rights standards and principles fully apply to the monitoring and oversight of fiscal policies.

In particular, in the report, the Commission and the relevant stakeholders:

recommended the drafting of a thematic report on fiscal policy and human rights in the Americas, led by the Special Rapporteur on Economic, Social, Cultural and Environmental Rights and based on the considerations and recommendations adopted by the IACHR in the 'Report on Poverty and Human Rights in the Americas', aimed at contextualising and operationalising the human rights principles that arise from regional norms;
underlined the need for an analysis of the fiscal dimension underpinning the various human rights violations addressed by the IACHR in a number of reports and in case law;
analysed how certain fiscal policies compromise the principles and obligations recognised by the IACHR and other authorised bodies;
highlighted the obligation of states to integrate their human rights duties across the fiscal policy cycle: from the design and implementation of tax policies, including budget allocations, expenditure monitoring and the implementation of human rights impact assessments;
underlined the protection of the right to property in taxation, following equality criteria protecting low-income households across the region which have suffered disproportionately as a result of austerity measures and regressive tax policies;
determined the need to involve corporations in compliance with human rights obligations in the field of taxation; and recommended the incorporation of the duty of the states to protect against tax abuse into the standards being developed in the area of business and human rights.

There are other reports and documents on this issue that NGOs have produced.

services and instead targets only a limited number of taxpayers (eg resident taxpayers earning wage income), then those taxpayers will be particularly in need of individual rights, such as the right against confiscatory taxation. It could, in fact, be argued that although the collective rights of the second definition appear to be positive rights, they are negative rights protecting individuals against becoming the targets of a government campaign to raise revenue from only a small group of taxpayers.

Third, some Constitutions, particularly in Africa, expressly recognise the duty to pay taxes[20] and/or levy taxes and combat tax evasion and fraud.[21] In these countries, the legal connection between taxation and the state's fiscal capacity to deliver on its public mandate is beyond doubt. Part of that mandate includes protection of constitutionally enshrined rights as well as meeting constitutional goals. Of interest to the collective rights perspective are several modern, decolonised[22] constitutions in Africa that overtly reflect local values and challenges, including recognition of the development goals of the African Union and the UN as legal imperatives. For example, South Sudan's constitution entrenches the UN Development Goals under its economic objectives.[23] These UN Development Goals, inter alia, aim to 1) eradicate extreme poverty and hunger; 2) achieve universal primary education; 3) promote gender equality and empower women; 4) reduce child mortality; 5) improve maternal health; 6) combat HIV/AIDS, malaria and other diseases; 7) ensure environmental sustainability and 8) develop a global partnership for development. Under South Africa's constitution, when adopting Money Bills (tax legislation), Parliament and its committees are required, inter alia, to consider equity, regional and international tax trends, the impact on development, investment, employment and economic growth.[24] The Constitution of Egypt contains highly aspirational aspects such as that the tax system must achieve social justice and economic development while human rights instruments are affirmed. Ethiopia's constitution requires that all treaties, including those dealing with taxes, protect and ensure the nation's right to sustainable development. The Constitutions of Gambia and Ghana require that when laws are made to give effect to human rights, the state must give preference to those basic human rights that favour development processes.

These more modern, decolonised and grassroots approaches to human rights in African Constitutions have important implications for conceptualising taxpayer rights in such countries. These types of Constitutions provide the legal framework to link tax, human rights, development and the eradication of poverty and disease, education, improving the position of women, etc. The impact of the UN Development Goals in directing state resources towards the implementation of taxpayers' rights in such countries, therefore, needs to be understood as it will impact the way taxpayers' rights are conceived and prioritised. For example, when an African country wants to achieve its constitutionally mandated development goals by redistribution through the tax base (eg for poverty alleviation purposes) instead of through sovereign debt finance, enhancing taxpayers' rights – in a strategic and holistic manner – is a key component to ensure sustainability in achieving this constitutional goal.

That said, the emphasis on the collective vision of taxpayers' rights has not been on this approach; rather, the emphasis in public discourse is often on tax avoidance by multinational

[20] Art 64 of the Constitution of Algeria; arts 102 and ff of the Constitution of Angola; art 85g of the Constitution of Cape Verde; principle 23 of the preamble to the Constitution of Cameroon; art 20 of the Constitution of the Central African Republic; art 58 of the Constitution of Chad; art 65 of the Constitution of the Democratic Republic of Congo; arts 19 and 20 of the Constitution of Equatorial Guinea; art 22(4) of the Constitution of Guinea; art 20 of the Constitution of Mauritania; art 45c of the Constitution of Mozambique; art 40 of the Constitution of Niger; art 10 of the Constitution of Tunisia.

[21] Art 43 of the Constitution of Ivory Coast; see also art 38(5) of the Constitution of Egypt.

[22] See sec 2.3.1 for a description of African Constitutions based on those of their former colonial powers.

[23] Art 37(1)(b) of the Constitution of South Sudan.

[24] Money Bills and Related Matters Act, 9 of 2009, s 11(3)–(4).

taxpayers operating in developing countries. The background is that tax bases in Africa are generally small compared to developed countries. Most of the respective population could be outside the base covered by direct taxes (taxes on income, property or wealth), particularly in low-income countries. In South Africa, which has the most industrialised economy on the African continent, only approximately 11 per cent of the population contributed to the income tax base in 2018; in other African countries, the proportion is even lower, often much lower. It is well-documented that reliance on corporate income tax is very high in most African countries compared to more developed economies. Often, this over-reliance on corporate tax refers to foreign investors who operate locally. Therefore, the reality is that taxpayers' rights in Africa concern a small group that are generally wealthy compared to the overall continental population. This small taxpayer base, in most circumstances, operates in less stable and less clear legal systems than may be the norm in developed countries. Their tax contributions have the potential to be highly redistributive if the expenditure side of providing public goods is directed according to development goals and social justice, as is clearly required under some constitutions. From this perspective, viewing taxpayers' rights as collective could be considered a key adjunct to stabilise and protect narrow tax bases because they are essential to sustainable funding of development goals.

Fourth, as reports from the IBA, the UN Special Rapporteur on Extreme Poverty and Human Rights, and other organisations highlight, there are a variety of substantive arguments in favour of defining taxpayers' rights to include collective rights. These organisations have pointed out that, since revenue is necessary for providing basic social support, a jurisdiction that chooses not to raise sufficient revenue, by engaging in tax competition or allowing tax evasion, cannot fulfil one of its fundamental roles.[25] These organisations have also highlighted the role progressive taxation plays in redistributing income and the link between increasing redistribution and reducing income inequality.[26] They also explain that taxation can both strengthen the accountability of a government to citizens and increase the participation of citizens in a government.[27] All of these substantive arguments support the inclusion of collective rights in the definition of taxpayers' rights.

Finally, n including the collective definition of taxpayers' rights, is necessary to include all stakeholders in debates over taxation. Often, the vocabulary of individual taxpayers' rights is used by some advocates to argue against taxation entirely, effectively turning these rights into an overarching right not to be taxed. In the US, many of the terms such as 'confiscatory taxation' are used by politicians and lawmakers to oppose any type of progressive taxation and withhold funding from the tax administration. Adding collective rights to the definition of taxpayers' rights may serve to offset the political uses of individual rights when these latter rights are interpreted to support an overarching right not to be taxed. Not including collective rights and only protecting the rights of taxpayers who want to lower their tax burden creates a one-sided debate without

[25] See IBA, *Human Rights Law Committee newsletter article* ('If States do not take strong measures against tax abuses, they will not have resources to fund social programs for the poorest and most vulnerable strata of the society'); Special Rapporteur Report para 42 ('The most straightforward way in which government revenues can facilitate compliance with human rights obligations is by providing resources for public goods').

[26] See IBA, *Human Rights Law Committee newsletter article* ('A well implemented fiscal policy could … contribut[e] to the social transfers from the high-income to the low-income strata of society'); Special Rapporteur Report para 45 ('Transferring and redistributing wealth through taxation has the potential to redress systemic discrimination … and to spur progress towards substantive equality'). Note that, although other organisations have not made this argument, this may be particularly true in the context of countries such as the US, where the tax administration is responsible for administering tax credits and other social spending and, therefore, engages in both raising revenue and overseeing certain expenditures.

[27] Special Rapporteur Report para 51 ('States that do not have to rely on tax contributions … tend to exhibit lower levels of accountability and participation in public affairs').

the representation of all interested stakeholders, including low-income and impoverished citizens who could benefit from the public goods funded by government-raised revenue. Defining taxpayers' rights to include collective rights can balance this debate and consider the interests of all stakeholders.

3.3.2. Function of the Collective Rights' Vision

Finally, the concept of collective rights can help to better balance community interests and commitments with taxpayers' individual rights. In an era of BEPS, where the emphasis is on preserving a state's tax base, there is indeed a case for a discourse from an individual human rights perspective, in particular in terms of taxpayer procedural rights. In other words, individual taxpayers have the fundamental right to have immediate and effective legal remedies that protect their legal sphere against tax measures that can adversely affect it.

However, it is important to keep the human rights discourse in a holistic setting (taking all the perspectives into account), especially in tax. The development of human rights both in the domestic and international setting is to be found in a continuum of contestation between human rights and community interests. This balancing of community and individual interests at international level may well have a spectrum of varying equilibria different from the one that is emerging, for example, in Europe. Thus, the focus on procedural taxpayers' rights (and the rule of law) in the context of fundamental human rights is found in the European context, both academically and under the jurisprudence of the European courts. This discourse, set within the specifics of the normative framework in Europe, cannot without further ado be transplanted to an international context. Hence, including collective rights may counterbalance a Europe-centred approach and contribute to the fairness of the international tax system. What is important, however, is to duly take account of those fairness concerns as expressions of legitimate public interest, and not the label of 'collective rights', when addressing their impact on the protection of individual rights.

3.4. The Approach of Our Committee to Individual and Collective Rights

Our work will thus consider the protection of individual rights without ignoring legitimate public interests related to what are generally also known as collective rights. As already mentioned, we will expand on issues of fairness in the international tax regime at a later stage of our research.[28]

Part I of our research, covered by this book, will focus primarily on the specific content of taxpayers' individual rights towards the state. We will address them as the expression of fundamental rights of mankind, which apply to taxation as to all other areas unless specific reasons require otherwise. This approach reflects our goal to consider that a modern state should exercise taxing powers in line with the requirements of the rule of law and the legal principles recognised by civilised nations. In this respect, a taxpayer is, in principle, no different from any other person.

[28] Whereas Part I of our research project deals with taxpayers' rights, Part II will concern the nexus and distribution of taxing rights and, finally, Part III, will focus on their enforcement across borders in the global context.

We are considering the effective protection of individual rights with a view to establishing a comprehensive legal framework for the protection of such individual rights across the globe. In this a context, our work aims to identify minimum standards for preserving legal certainty and enforcing the rule of law in tax matters, which on the one hand, require consistency with the rules established by each legal system and, on the other hand, question their legitimacy if they depart from the internationally accepted standards of protection.

The report will not ignore the concept of 'collective rights'. However, such rights are hardly justiciable as it is not the task of courts to (re)distribute public money. Individuals or communities cannot go to court asking for minimum tax revenue. Also, states have the power to tax, not the obligation to do so. This is another reason why we generally prefer the term legitimate public interest to 'collective rights'. The power of the purse rather is the parliaments' prerogative. Moreover, it is perfectly possible to cover public expenditures by means other than taxation and even to have state models other than a '*Steuerstaat*', ie a tax state (eg the Monaco public economy – in the past – was basically financed through tourism services fees). The collective aspects of international tax law and policy cannot be ignored when it comes to developing a comprehensive perspective as a basis for recommendations and treaty making. Using the terminology of 'legitimate public interests' instead of collective rights is in no way meant to decrease the importance of these community interests. However, our work will clarify that the protection of 'collective rights' may not go as far as infringing the basic fundamental rights of individuals, which are the cornerstones for a global society based on the rule of law. They should be recognised as having superior legitimacy and legal validity across legal systems and on top of their positive legal dimension established in the various regional human rights charters across the world. In this sense, unlike Machiavelli,[29] this study holds the view that the ends (of protecting collective rights) may not justify the means (ie violating individual taxpayers' rights).

3.5. The Scope of Protection of Fundamental Human Rights in Tax Matters from the Perspective of Public International Law

Since the Second World War, the protection of fundamental human rights has become a core domain of public international law, hence our concern to protect taxpayers' rights under public international law, considering taxpayers as a specific category of non-state actors.[30]

Taxpayers' rights are in need of effective protection with a global minimum standard due to the ever increasing and ever closer cooperation of tax authorities worldwide and their common and legitimate fight against non-legitimate forms of tax savings, such as tax avoidance and similar practices eroding tax sovereignty, or in open violation of the applicable tax rules (such as tax evasion or fraud).[31] In this context, states have strengthened their reaction to such undesirable practices in the framework of global coordination with an increased risk of undermining the effective protection of taxpayers' rights. Moreover, states have increased the involvement of other

[29] N Machiavelli, *Il principe* (1513), Ch XVIII: '*nelle azioni di tutti gli uomini, e massime de' Principi, dove non e giudizio a chi reclamare, si guarda al fine. Facci adunque un Principe conto di vivere e mantenere lo Stato; i mezzi saranno sempre giudicati onorevoli, e da ciascuno lodati*'.

[30] L Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 *American University Law Review* 1–64.

[31] Despite the technical differences among these phenomena, for reasons of simplicity, this Report will hereinafter refer to them as tax avoidance and evasion.

private persons in the collection of tax, such as withholding agents, intermediaries and professionals. For this reason, when dealing with taxpayers' fundamental rights in Part II of this book, we will also analyse whether and to what extent the tax system must protect the rights of those other private persons.

The research project conducted in the framework of the International Law Association (ILA) Committee on International Tax Law is a concrete way of counterbalancing the global fight against BEPS, putting taxpayers' rights on the global agenda and outlining a concrete approach to secure the effective protection of such rights. This is the reason for selecting 'The Protection of Taxpayers' Rights in International Law' as the object of Part I of our ILA research project on public international law and taxation. From our perspective, this now has priority over redesigning the tax nexus and the allocation of taxing powers between states and their enforcement for the establishment of global tax fairness. That priority and the focus on taxpayers' rights in this book reflect the development in public international law of the rights of non-state actors, which materialised in international economic law over several decades and has incredibly been unperceived in international tax law. Even though international tax law is primarily a matter for states to regulate, the impact of the exercise of tax sovereignty on non-state actors, which are persons and right holders (also under international economic law), must be the object of international tax coordination, with a view to preserving the effective protection of fundamental rights also in tax matters.

This book's collection of principles, legal values and instruments of legal protection of individual taxpayers' rights from throughout the world will thus serve as a basis for a legitimate establishment of a global standard of taxpayer protection. This can support a new vision of international tax law in the framework of a globally coordinated exercise of taxing powers that also secures the effective protection of the rights of taxpayers and other private persons as non-state actors.

PART II

Human Rights in Tax Matters

International protection of taxpayers' rights is needed. Constitutional protection runs dry in view of the high mobility of persons and assets in the context of worldwide tax competition.[1] As Wolfgang Schön puts it, the congruence of voting on tax legislation, payment of taxes, and the enjoyment of public expenditure is today more myth than reality.

We will identify general legal principles relevant to tax matters,[2] set forth special features of human rights in taxation, followed by a classification[3] and then focus on the generally recognised rights that may protect taxpayers under international law differentiating procedural rights,[4] rights related to sanctions,[5] and substantive rights.[6]

[1] W Schön, 'Taxation and Democracy' (2019) 72 *Tax Law Review* 235 and ff, 302 and ff.
[2] See sec 4.
[3] See sec 5.
[4] See sec 6.
[5] See sec 7.
[6] See sec 8.

4

General Principles Protecting Taxpayers' Rights

This section provides a comprehensive analysis of the general principles that should guide the protection of taxpayers' rights. Such principles include the rule of law,[7] including legal certainty,[8] proportionality,[9] the prohibition of abusive and fraudulent practices, which in tax matters raise significant issues in connection with the phenomena of tax avoidance, evasion and fraud,[10] and the legal dimension of fairness.[11]

4.1. Rule of Law

4.1.1. Introduction

Under the rule of law, any limitation to the exercise of rights must be established by law (principle of legality) and the exercise of any official power, be it at the national, supranational or international level, must be governed by law (primacy of law).[12] Furthermore, the rule of law secures the protection of legal certainty, protecting everyone's right to know in advance the consequences of their behaviour.[13] The rule of law addressed to lawmaking applies to administrative bodies and is controlled by the courts.

The principle of legality sets the precise boundaries within which the state may exercise its taxing sovereignty, requiring that this take place on the basis of and in accordance with the law.

[7] See below sec 4.1.

[8] See below sec 4.1.2.

[9] See below sec 4.2.

[10] See below sec 4.3. Tax avoidance, evasion and fraud have a common core related to non-compliance, but otherwise present specific different features. For the purposes of our book, such features should be analysed in connection with the measures that tax systems adopt when countering them. In tax avoidance, the reaction of the tax system to such phenomena is generally framed within the concept of prohibition of abusive practices. Therefore, even if the phenomenon of circumvention of the liability to pay tax is generally understood within the international tax community as tax avoidance, reference to abuse is becoming, in fact, more frequent among tax experts, especially in the European region. This means describing a tax category by referring to the legal measure countering it. An additional preliminary clarification is needed to explain why this book (following the terminology used when interpreting the supranational law of the EU) refers to abusive practices. In the specific case of tax avoidance, the object of protection is the correct application of the tax norm, which is the object of abuse. In German legal terminology, this is commonly described by reference to the expression *Rechtsmissbrauch*. In the context of tax, this expression could therefore be translated as 'abuse of law' to emphasise the conceptual difference more clearly as to the norm being the object of the abusive practice. However, such expression is not in common usage in the English language, which instead generally refers to 'abuse of rights', thus emphasising the exercise of a right for purposes not accepted within a legal system.

[11] See below at sec 4.4.

[12] For comprehensive coverage, see T Bingham, *The Rule of Law* (Penguin, 2010).

[13] See also BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 91–113.

It is, in fact, a fundamental democratic principle that requires the consent of the people to taxation, also known as 'no taxation without representation'. The implications of this principle are that tax authorities may not exercise their powers in a way that exceeds the boundaries established by the Parliament. The principle of legality can also be understood as requiring that the authorities act in accordance with public international law.[14] In common law countries, the broader powers of the judiciary may exceed the function of clarifying what the law says. However, this should not stretch beyond the reconciliation of the scope of tax law with the general principles of common law. In civil law countries, the judiciary has a more limited leeway. However, it is not uncommon in some civil law countries that the search for applicable principles often ends up affecting the application of tax law in a way that can, to some extent, interfere with the actual wording of the statutes.[15] This is usually done in order to secure consistency with the principles of national Constitutions and supranational law. In the European Union (EU), for example, the general concept of abuse may render inapplicable national statutes.[16]

4.1.2. Legal Certainty

Legal certainty is a foundational element of the rule of law and includes among its corollaries the right for persons to know with a reasonable degree of certainty the likelihood of legal consequences for their behaviour at the time in which they act.

Legal certainty has several dimensions.[17] In particular, legal rules must be sufficiently precise[18] and not retroactive.[19]

The requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail burdens, including financial consequences. Those concerned must be given a clear and precise understanding of their rights and obligations.[20] Consequently, all taxing rules that leave taxpayers in a state of uncertainty about the tax consequences of their behaviour are infringing this principle.

4.1.2.1. Sufficient Precision of the Law

Legal certainty requires sufficient precision in lawmaking. In particular, tax statutes must allow interpreters to have clarity on what is covered by them and what falls outside. Legal certainty prohibits tax norms that are vaguely formulated or impossible to understand.[21] In this respect, countering abusive and fraudulent practices has become particularly problematic in tax matters.

[14] Fiscal Court Rheinland-Pfalz, decision of 15 November 2017, cited, nos 18 and ff: Legal protection against an information order violating the principle of territoriality.

[15] This is, for instance, the case in Italy and Spain, where reconciliatory interpretation can sometimes have far-reaching results. In the case of Italy, this may have developed as an attempt to secure compliance with international law obligations and the primacy of supranational law without expressly recognising the subordination of constitutional norms to them in the presence of common legal values. See Constitutional Court of Italy, judgment of 1 February 1982, no 15/1982 [1982]; Constitutional Court of Italy, no 348/2007 and 349/2007, cited, commented by M Cartabia, *La Costituzione Italiana 60 anni dopo: i Diritti Fondamentali. Letta al Convegno della Accademia dei Lincei su La Costituzione Italiana 60 anni dopo* (Rome, 28–29 febbraio 2008), available at www.astrid-online.it. In other civil law countries, such as Germany, this may go too far.

[16] *cf* eg CJEU, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others,* cases C-131/13, C-163/13 and C-164/13, ECLI:EU:C:2014:2455 [2014].

[17] *cf* A von Arnauld, *Rechtssicherheit: Perspektivische Annäherungen an Eine 'Idée Directrice' des Rechts*, (Tubingen, Mohr Siebeck, 2006) 101–02; H Ávila, *Certainty in Law* (Springer, 2016) 207–458.

[18] See sec 4.1.2.1 below.

[19] See sec 4.1.2.2 below.

[20] *cf* eg J Kokott, *Das Steuerrecht der Europäischen Union* 26, para 28; CJEU, judgment of 9 July 2015, *Salomie*, case C-183/14, ECLI:EU:C:2015:454 [2015], para 32.

[21] See, for instance, art 3(21) of DAC 6 and Annex IV to DAC 6.

On the one hand, it is often impossible to react to such practices with narrowly worded statutes that provide tax authorities sufficient leeway to counter atypical and innovative constructions. On the other hand, the wide powers secured through general anti-abuse techniques (be they of statutory or judicial nature) can threaten legal certainty insofar as it is not possible for the affected persons to predetermine the actual boundaries within which their structures can be recharacterised. Accordingly, the problem lies not in striking down cases of abuse and fraud, but rather in the borderline situations, that is when it is unclear whether some practices are acceptable or not, or when the interpretative standards for applying the reaction to abusive and fraudulent practices evolve dramatically in a short space of time.

The practice in different countries shows that the approach to countering tax abuse and tax avoidance by means of General Anti-Avoidance Rules (GAARs) and the need for legal certainty have been addressed differently. For instance, the application of GAARs in Canada has been limited by the judiciary (courts),[22] whereas in Japan these limitations have been introduced in legislation.[23] India has introduced procedural safeguards on the application of GAARs,[24] whereas in New Zealand the use of binding rulings is regarded as the solution that provides legal certainty in the application of GAARs.[25]

4.1.2.2. Non-retroactivity of Legal Rules

The principle of legal certainty sets limits to retrospective changes and the retroactive application of tax law and – in principle – prohibits them. Retroactive laws alter the framework within which the affected person took its decisions. This may be particularly problematic for business decisions, which usually take a couple of years to be implemented.

Persons with legitimate expectations relying on the wording of the applicable law, statutes or agreements are in need of protection in respect of legislative changes that can undermine legal certainty. The core value of the protection of legitimate expectations is that the affected persons can rely on the law as it stands and, in case of changes, that there may be a reasonable timeframe for accommodating their situations or even, in more restricted cases, avoiding changes.[26]

Although the retroactive application of legislative changes cannot be entirely excluded in tax law, its admissibility with regard to substantive rights generally raises considerable problems since it changes the rules of the game at a later moment than that in which the taxpayer has acted. Therefore, in principle, it is to be excluded.[27] In some jurisdictions, including South Africa[28] and the EU,[29] there appears to be tolerance by the judiciary under certain circumstances for the use of retroactive tax legislation when it addresses tax avoidance arrangements.

[22] See sec 4.1.3.2.4.2 below.

[23] See sec 4.1.3.3.4 below.

[24] See sec 4.1.3.3.2 below.

[25] See sec 4.1.3.5.2 below.

[26] *cf* sec S Calmes, *Du principe de protection de la confiance légitime en droits allemand, communautaire et français* (2001) 448–460.

[27] See on retroactivity EATLP 2010 and on the boundaries between substantive and procedural rules EATLP 2019.

[28] *cf* eg High Court of South Africa, *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service*, case 87760/2014, 20 ITLR 284 [2017]. The case raised the difficult marginal situation where the ultimately retroactive law, in addition to preventing the avoidance arrangement, also changed the tax outcome for bona fide business transactions associated with the avoidance arrangement. Ultimately, the retroactive legislation was found not to breach the Rule of Law and the fundamental right to property: the court held that Parliament acted within the Rule of Law when it approved retroactive laws based on 'reasonable inferences unsupported by empirical data' concerning the tax avoidance arrangement. This decision is perhaps unorthodox but not unexpected in the current climate.

[29] CJEU, judgment of 26 April 2006, *Goed Wonen*, case C-376/02, ECLI:EU:C:2005:251 [2006].

4.1.2.3. Tax Rulings

Tax rulings are made to provide taxpayers with legal certainty. They are frequently used in complex domestic and cross-border situations, the latter also with different forms of unilateral, bilateral and multilateral binding agreements, often in the field of transfer pricing between related companies. They basically consist of written interpretation of the applicable tax laws issued by tax authorities to corporations and individuals as a basis for their investments. Tax rulings have recently come under the spotlight in the EU after the European Commission (EC) accused some Member States of using them for the purpose of giving selective tax advantages in breach of the prohibition of state aids (Article 107 TFEU).[30] In the context of international tax law, consistency with generally applicable international tax practice standards, such as the so-called arm's length principle, could be questioned. Even if widely diffused, the application of the arm's length principle may lead to different results in different contexts. This indicates that the arm's length principle is not sufficiently precise. Nevertheless, it can be used as an instrument for singling out possibly abusive practices with procedural repercussions, that is, reversal of the burden of proof connected with the evidence of such practices.[31]

4.1.2.4. Stabilisation Agreements

The object of the so-called stabilisation agreements, often applicable to large investments by foreign companies, is to preserve a reasonably stable legal framework for the investment. These agreements aim to create a sort of legal immunity from legislative changes, but this often ends up being difficult to implement, especially when their constitutional side effects are considered.[32]

[30] See General Court, judgment of 24 September 2019, *Netherlands v Commission (Starbucks)*, cases T-760/15 and T-636/16, ECLI:EU:T:2019:669 [2019]; and on tax rulings, P Schumacher, *Europäisches Beihilferecht und Advanced Pricing Agreements* (Lang Ltd, Int'l Academic Publishers, 2021).

See CJEU, judgment of 16 September 2021, *Commission/Belgium and Magnetrol International*, case C-337/19 P, ECLI:EU:C:2021:741 [2021] – appeal against GC, judgments of 14 February 2019, *Belgium/Commission*, cases T-131/16 and T-263/16, ECLI:EU:T:2019:91 [2019] – with Opinion of Advocate General Kokott of 3 December 2020, ECLI:EU:C:2020:990 [2020]; pending case C-885/19 P, *Fiat Chrysler Finance Europe* with Opinion of Advocate General Pikamäe of 16 December 2021, ECLI:EU:C:2021:1028 [2021] and C-898/19 P, *Ireland v Commission* with Opinion of Advocate General Pikamäe of 16 December 2021, ECLI:EU:C:2021:1029 [2021] (appeal against GC, judgment of 24 September 2019, *Luxembourg/Commission (FIAT)*, joined cases T-755/15 and T-759/15, ECLI:EU:T:2019:670 [2019]); pending case C-465/20 P, *Commission v Ireland and Others* (appeal against GC, judgment of 15 July 2020, *Ireland/Commission*, case T-778/16 and, *Apple Sales International and Apple Operations Europe/Commission*, case T-892, ECLI:EU:T:2020:338 [2020]).

See General Court, judgment of 12 May 2021, *Luxembourg/Commission*, case T-816/17, ECLI:EU:T:2021:252 and pending case T-318/18, *Amazon EU and Amazon.com/Commission* (Negative Decision with Recovery of 4 October 2017, C(2017) 6740, Aid to Amazon – Luxembourg); judgment of 12 May 2021, *Luxembourg/Commission*, case T-516/18, ECLI:EU:T:2021:251; see also pending cases T-525/18, *ENGIE Global LNG and Others/Commission* (Negative decision with recovery of 20 June 2018, C(2018) 3839, Aid to ENGIE – Luxembourg); T-363/19 *United Kingdom/Commission*, T-456/19, *ITV/Commission*, T-457/19, *Synthomer/Commission*, T-470/19, *Essentra and Others/Commission*, removed from the register of the General Court by order of 27 August 2021, ECLI:EU:T:2021:533 [2021] T-471/19, *Eland Oil & Gas/Commission*, T-473/19, *Diageo and Others/Commission*removed from the register of the General Court by order of 20 October 2021, T-474/19, *Halma and Others/Commission*, T-475/19, *Bunzl and Others/Commission*, removed from the register of the General Court by order of 7 September 2021, T-476/19, *AstraZeneca and Others/Commission*, T-482/19, *BT Group and Communications Global Network Services/Commission*, removed from the register of the General Court by order of 7 September 2021, T-483/19, *Meggitt and Cavehurst/Commission*, T-484/19 *Pearson Loan Finance and Others/Commission*, T-485/19, *Babcock International Group and Others/Commission*, T-486/19, *Spectris and Spectris Group/Commission*, T-490/19, *Weston Investment and Others/Commission*, T-491/19, *Vodafone Group and Others/Commission*, removed from the register of the General Court by order of 16 November 2021, T-492/19, *GlaxoSmithKline Finance and Setfirst/Commission*, removed from the register of the General Court by order of 27 August 2021, ECLI:EU:T:2021:535 [2021], T-493/19, *International Personal Finance Investments/Commission* (Negative Decision with recovery of 2 April 2019, UK CFC Group Finance Exemption).

[31] See CJEU, judgment of 21 January 2010, *SGI*, case C-311/08, ECLI:EU:C:2010:26 [2010], para 71.

[32] Bilateral investment agreements present this type of issue, in some cases (namely in the absence of the so-called tax carve-outs) also affecting tax law. Recently, their application has raised significant legal controversies, especially in the

4.1.3. Different Regions

4.1.3.1. Africa[33]

4.1.3.1.1. Law in Context

Two important principles that must be taken into account to ensure the rule of law are public participation and access to information. These principles are interdependent. Public participation is not effective or possible without access to information. Lack of public participation in the enactment of laws leads to skewed understanding by the public and politicians and laws that are not holistic.[34] The laws of African countries around access to information and public participation in the legislative process for tax laws often show a disconnection. How can there be effective public participation if access to information rights are not in place or vice versa?[35]

Moreover, what is written on paper is often not the whole truth. Where the rule of law is not explicitly enshrined in a Constitution, that does not mean that the rule of law is not adhered to. Nor should it be assumed that the practical workings of the state in relation to the taxpayer adhere to the rule of law merely because it has been affirmed in a written constitution. This is because the nature of the rule of law is such that it:

> can function and achieve its purpose without a precise, comprehensive or universal definition. The absence of a written definition for the Rule of Law in a particular legal system does not mean that the principle is not present in that system, nor that it does not apply to the tax law of a country. In fact, the Rule of Law is almost never defined in legislation, as is the case for most key principles of law. In some legal systems, the principle is expressed by different terms, such as 'government under law' or 'governments of laws and not of men'; they all seek to achieve similar results.[36]

Moreover, some legal scholars such as Dicey hold the view that:

> the task of judges was to ensure that the Rule of Law pervaded a constitution, whether it was written or unwritten. The rule of law is not a mere adornment of a constitution, but has to be realized in the actual workings of the law. This approach means that the Rule of Law as a principle turns into legal reality for citizens and taxpayers when laws are interpreted and applied on a daily basis.[37]

4.1.3.1.2. Tax Certainty in African Constitutions

A survey of the constitutional arrangements of the 55 African countries reveals that the rule of law is expressly acknowledged in many written Constitutions,[38] in a few only in the preamble.[39]

European region, including with constitutional and supranational law of the EU (see for instance CJEU, judgment (Grand Chamber) of 6 March 2018, *Achmea*, case C-284/16, ECLI:EU:C:2018:158 [2018]), which may lead to them being phased out within the EU. See also sec 4.1.3.2.2.4.4. on stabilisation contracts in Colombia.

[33] We would like to thank Johann Hattingh and Attiya Waris for their contribution.

[34] Waris, *Financing Africa* 36.

[35] Waris, *Financing Africa* 13–15.

[36] J Hattingh, 'Rule of Law', in P Pistone et al (eds.), *Fundamentals of Taxation: An Introduction to Tax Law, Tax Policy and Tax Administration* (IBFD, 2019), sec 2.3.2.

[37] Hattingh, 'Rule of Law', sec 2.3.5.

[38] Constitutions of Algeria, art 158: principle of legality; Angola, art 2, 6 and 11; Cape Verde, art 2: rule of law; Chad, art 1; Comoros, art 4; Egypt, art 94 and art 126 for the collection and disbursement of public funds; Equatorial Guinea, art 106(e); Kenya, art 10(2)(a); Malawi, art 12(6) – fundamental principle; Mozambique, art 3; Namibia, art 1(1); Niger, art 117; Sao Tomé and Principe, art 6, see also art 98(h); Sierra Leone, art 6(4); South Africa, Foundational Principle 1(c); Sudan, art 6; Uganda, mentioned in XXIX as one of the duties of the citizen to promote; Zambia, art 199, especially for the imposition of tax; and Zimbabwe, art 3(1)(b).

[39] Eritrea, Eswatini, Ethiopia, Ghana, The Ivory Coast, Liberia, Mauritania, Rwanda, Senegal, Seychelles and South Sudan.

A general observation is that most Constitutions in Africa affirm that taxes can be imposed only by legislation lawfully enacted, and some prescribe special constitutional procedures for tax laws.[40] For instance, in Kenya, there shall be openness and accountability, including public participation in financial matters.[41] Article 71 of the Moroccan Constitution provides for Parliament's competence to create laws regarding the fiscal regime and tax collection. Article 77 allows the government to oppose law reform where it would impact public expenditure.[42]

Several African Constitutions emphasise the necessity of a precise legal basis for taxes and the prohibition of retroactivity. Under Article 199 of the Constitution of Zambia, a tax shall not be imposed, except as prescribed. Where legislation confers power on a person or an authority to waive or vary a prescribed tax, that power shall be exercised through a statutory instrument. A report explaining the waiver or variation of a tax shall be submitted to the National Assembly within 21 days of the publication of the statutory instrument. Article 126 of the Constitution of Egypt, by contrast, merely provides that the 'basic rules for collection of public funds and the procedure for their disbursement are regulated by the law'. The Constitution of Cape Verde explicitly provides that taxes 'shall be created by law, which shall determine the basis, the rate, and guarantees to taxpayers', that no 'one may be forced to pay taxes which have not been created under provisions of the Constitution or whose payment and collection are not provided by law', that '[w]ithin the same fiscal year, the basis and rate of taxes may not be increased' and that '[t]ax laws may not be applied retroactively unless retroactivity would be more favorable to the taxpayer'.[43]

Several Constitutions contain specific requirements for so-called money bills,[44] particularly tax legality. Money bills include bills imposing taxes or granting exemptions.[45] In principle, money bills are not supposed to deal with any other matter.[46] According to Article 114 of the Constitution of Kenya, in the case of money bills, the National Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance.

South Africa's Constitution clarifies that the ordinary legislative procedure also applies to money bills. However, only the Cabinet member responsible for national financial matters may introduce money bills in the Assembly.[47] Money bills are any proposed legislation that may affect tax, including any legislation domesticating treaties with budgetary impact.[48] At the same time, South Africa's Constitution defines the permissible content of money bills. 'A money Bill may not deal with any other matter except – (a) a subordinate matter incidental to the appropriation of money, (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges, (c) the granting of exemption from national taxes, levies, duties or surcharges or (d) the authorisation of direct charges against the National Revenue Fund'.[49]

An Act of Parliament must provide for a procedure to amend money bills before Parliament.[50]

[40] Waris, *Financing Africa* 50.
[41] Constitution of Kenya, art 201(a).
[42] Constitution of Morocco (2011); see also Waris, *Financing Africa* 51.
[43] Art 95 and 96 Constitution of Cape Verde; *cf* also art 102 and 103 Constitution of Angola; art 173 Constitution of the Democratic Republic of Congo; art 171 Constitution of Malawi; art 57, 100 and 127 Constitution of Mozambique.
[44] Or finance bills, *cf* art 68 of the Constitution of Senegal.
[45] *cf* eg art 71(1) of the Constitution of South Africa.
[46] *cf* eg art 71(2) of the Constitution of South Africa.
[47] Art 73 of the Constitution of South Africa.
[48] Constitution of South Africa, 1996, art 75.
[49] Art 75 and 77 Constitution of South Africa.
[50] Art 71(3) of the Constitution of South Africa.

4.1.3.2. Americas

4.1.3.2.1. The Inter-American System for the Protection of Human Rights

Article 9 ACHR provides for freedom from ex post facto laws in criminal cases. Accordingly,

> No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Prima facie, that provision does not cover non-criminal tax cases. Thus far, there has been no relevant case law of the Inter-American Court of Human Rights.

The Inter-American Court has, however, developed the doctrine of the integrity of reparations. Accordingly, the compensation payments for human rights violations shall be exempt from any tax currently in force or any that may be decreed in the future.[51] This principle of the integrity and intangibility of compensation implies a limitation to the taxing power. It is meant to constitute a brake on the state's abuse of the tax law system and the activity of the public bodies in charge of applying it.[52]

4.1.3.2.2. Latin America

4.1.3.2.2.1. Argentina[53]

The principle of tax legality[54] is a constitutional guarantee for the taxpayer which establishes that only the legislator can issue the key elements of tax regulations. The scope of this principle covers the key tax elements: the taxable event, tax base and tax rate. Consequently, the Executive Branch cannot issue these elements, even in cases of necessity and urgency, except within the framework of a delegated exercise by the legislature.

The firm jurisprudence of the Argentine Supreme Court on the principle of legality is clear: there is no tax without a law establishing it. For this reason, the Supreme Court established in a wide jurisprudential line the necessary guidelines for the Argentine Congress to issue tax laws in the light of the constitutional guarantee enjoyed by the taxpayer.

One of the first rulings where the principle of tax legality was discussed is the case *Doncel de Cook, Sara v the Province of San Juan*[55] on non-retroactivity of taxation, resolved by the Argentine Supreme Court in 1929. At that time, the content of this taxpayer guarantee was not defined as it is today, and the judges limited the scope of the principle of tax legality exclusively to the taxable base. Nevertheless, since the first rulings by the Argentine Supreme Court on the principle of legality, the Court has been inclined to consider the unconstitutionality of the decrees of necessity and urgency issued by the Executive Branch in tax matters.

[51] eg IACHR, judgments of 19 September 1996, *Neira-Alegría et al v Peru*, reparations and costs [1996], no 67; of 14 September 1996, *El Amparo v Venezuela*, reparations and costs [1996], no 48; of 30 August 2019, *Álvarez Ramos v Venezuela*, preliminary objection, merits, reparations and costs [2019], no 247.

[52] *cf* P Masbernat and G Fuente, 'Asuntos Tributarios en la Jurisprudencia de la Corte Interamericana de Derechos Humanos' (July/December 2019) 28 *Díkaion Revista de Fundamentación Jurídica*, under 2.

[53] We would like to thank Edoardo A Baistrocchi for his contribution.

[54] EA Baistrocchi, *Leading Supreme Court Case Law: Constitutional Tax Law (Máximos Precedentes. Derecho Constitucional Tributario)*, (Reuters, 2013).

[55] Argentine Supreme Court, *Doncel de Cook, Sara v the Province of San Juan*, judgment: 155:290 [1929].

The next ruling in time that contributed to the formation of the content of the principle of tax legality was *Gutiérrez Manuel Arturo v Province of San Juan*.[56] It was resolved by the highest Court of Justice in 1938. The Court discussed a new element of the principle of legality: the aliquot. After the resolution of this ruling, the Supreme Court established that in order for a tax rule to be consistent with the principle of tax legality, it must specify the percentage of the total value of the tax base that must be paid and, therefore, the Executive Branch cannot modify the rate of a tax rule, since only Congress has such power.

In the *Georgalos Hnos SAICA*[57] case, a specific element of the principle of legality was discussed: the taxable event. The Supreme Court ruled that for a tax to be in accordance with the principle of tax legality, the law must typify the fact that it is considered taxable, that is, the event that originates the tax obligation. In turn, it is necessary that the event generating the tax be explicitly mentioned in the law so that the Executive Branch cannot make analogical extensions of the taxable events.

The leading case on the principle of tax legality is *Video Club Dreams v National Film Institute*.[58] It was resolved after the reform of the Argentine Constitution in 1994. This ruling sets the tone on how to approach the principle of tax legality. As it derives from that ruling, the Executive Branch does not have legislative powers in tax matters. Enacting laws in tax matters is a power that corresponds solely and exclusively to the Argentine Congress. Section 99 subsection 3 of the Argentine Constitution grants the Executive Branch the extraordinary power to sanction decrees of necessity and urgency when circumstances so warrant. Said section 3, however, expressly provides for the absolute prohibition to issue decrees of necessity and urgency regulating tax matters.

To sum up, in light of the jurisprudence of the Argentine Supreme Court on the principle of tax legality, it is established that such guarantee is contained in sections 4, 17, 19, 52, 75 (paras 1 and 2) and 99 (para 3) of the Argentine Constitution. This principle has been effective in limiting the powers of the Executive Branch in the tax area and avoiding any possibility of abuse regarding taxpayer's rights. Over the years, the content of the principle of legality has been extended until it is now a principle that includes different elements: 1) the taxable event, 2) the taxable base and 3) the tax rate. As we analysed in the previous sections, the Court's jurisprudence on the principle of tax legality has in most cases been favourable to the taxpayer in tax litigation.

Recently, Argentina enacted the Law on Social Solidarity and Productive Reactivation.[59] Its constitutionality is controversial.[60] That law declares an emergency in economic, financial, fiscal and other matters and, in this context, delegates certain tax powers to the National Executive based on Article 76 of the Argentine Constitution.[61] The Law amends income tax, personal assets tax, an excise tax on certain goods, tax on debits and credits in local bank accounts, and social security rules. It also establishes a new tax on certain purchases of foreign currency, a new tax debt settlement plan for certain taxpayers and new rates on exports of goods and services and the 'statistical fee'. A presidential decree contains regulations implementing that tax reform.[62]

[56] Argentine Supreme Court, *Gutiérrez Manuel Arturo v Province of San Juan*, judgment: 180:384 [1938].

[57] Argentine Supreme Court, *Georgalos Hnos SAICA case*, judgment: 303:245 [1981].

[58] Argentine Supreme Court, *Video Club Dreams c/ Instituto Nacional de Cinematografía y otro s/Amparo*, judgment: 318:1154 [1995].

[59] Law No 27.541 of 21 December 2019.

[60] eg N Noriega, *Appreciaciones Jurídicas Sobre la ley 27.541, de Solidaridad social y Reactivación Productiva en el Marco de Emergencia Pública y Reglementación de la Ley 27541. Su Impacto Economicó y Social*, open edition search (4 May 2021).

[61] 'The legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress […]'.

[62] Decree 99/2019, DCTO-2019-99-APN-PTE-Ley No 27.541 Reglamentación, published in the Official Gazette/ Boletín Oficial de la República Argentina.

4.1.3.2.2.2. Brazil[63]

Under the principle of legality, a fundamental sub-principle of the rule of law, the law is the source of authority. According to the Brazilian Constitution, 'no one shall be obliged to do or refrain from doing something except by virtue of law'.[64] Therefore, the state's officials are bound by and apply the law.

4.1.3.2.2.2.1. The Principle of Legality and its Relations with the Rules on Competence The principle of legality also requires observance of the rules of competence in tax matters laid down in the Brazilian Constitution. These rules give the power (1) to an authority (the National Congress, States Legislative Assemblies or municipal chambers), (2) to introduce taxes levied on certain realities (eg income), (3) by an ordinary act or a complementary one and (4) subject to a procedure of proposal, deliberation, promulgation and publication, while (5) complying with some limits (eg selectivity is required when imposing the federal VAT). In other words, constitutional rules prescribe a specific taxing power. With respect for the principle of federalism, there is a rigid model of attribution of taxing powers to federal governments due to the enumeration of the realities on which the tax is levied (exclusive taxing power), besides the prohibition of double taxation as a result of the principle of ability to pay.[65] This is to ensure the financial independence of the federal government, states and municipalities, a major goal behind the constitutional reform of 1988. As a result, however, all kinds of rules (laws, provisional measures, decrees, regulations, ordinances, etc) are enacted by the Federal District, state and municipal governments almost every day. That leads to a considerable normative density and complexity in the tax rules and calls for the simplification and reform of the tax system.

National complementary acts[66] shall establish general rules on taxing events, taxpayers, tax bases, tax rates, tax obligations, tax assessments, tax credits, statutes of limitations for tax notices and collection.[67] Ordinary acts can change taxes that are within the competence of the federal government, including individual income tax, corporate income taxes, excise tax and social contributions. The exceptions determined by the Brazilian Constitution usually concern regulatory taxes.[68]

4.1.3.2.2.2.2. The Scope and Boundaries of the Principle of Legality The legislator must define all essential elements of taxes, namely the taxable event, the taxpayers, tax liability, tax bases, tax rates, as well as the penalties applicable in cases of violations. Moreover, all tax benefits and preferential tax treatments must be established by law, and the same applies to the reasons for suspension of the enforceability of tax liability. However, judicial interpretation has determined that the principle of legality should not also cover the definition of payment terms[69] and the ancillary obligations (eg sending tax statements).[70] The Brazilian Federal Supreme Court has held that a general and unlimited delegation of normative power from the legislator to the tax administration

[63] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[64] Arts 5 (II), 37 and 150 (I) of the Brazilian Constitution.

[65] See Supreme Federal Court of Brazil, extraordinary appeal of 15 September 1974, no 77131/AM [1974]; precautionary measure in the direct action of unconstitutionality of 07 April 2011, no 4565/PI [2011]; direct action of unconstitutionality of 17 September 2014, no 4628/DF [2014]; direct action of unconstitutionality of 20 May 2015, no 4171/DF [2015]; *cf* also sec 8.1.4.2.2.1.2.

[66] These acts bind not only the federal government but also states and municipalities.

[67] Art 146 (III) (a, b) of the Brazilian Constitution.

[68] See arts 153 (1) and 177 (4) (I) (b) of the Brazilian Tax Code.

[69] Supreme Federal Court of Brazil, extraordinary appeal of 20 May 1997, no 182971/SP [1997].

[70] Superior Court of Justice of Brazil, special appeal of 12 September 2006, no 724779/RJ [2006].

is unconstitutional.[71] Hence, any law that delegates the normative power must specify the boundaries within which the executive may exercise power to legislate. Nevertheless, in a recent judgment, the Brazilian Federal Supreme Court[72] has confirmed that the definition of the tax rate of regulatory taxes may be delegated to the executive power, even in the absence of express authorisation in the Constitution.

Brazilian tax legislation implements the principle of legality, establishing a presumption *juris tantum* of conformity with the law for all extrajudicial enforcement by the tax administration.[73] However, judicial interpretation has concluded that taxpayers are allowed to rebut this presumption, thus giving rise to a reversal in the burden of proof.[74] However, this presumption does not apply to every official act. Tax authorities may use all available legal mechanisms to identify the taxable event, taxpayer, tax base and tax rate, in line with the necessity to justify the decision to collect tax.[75]

Another specific corollary of the principle of legality is that tax authorities are obliged to enforce the tax due without any possibility of granting waivers. Therefore, not only must the tax authorities observe the administrative procedural rules without having the power to create new ones, but also their power of discretion depends on specific legal acts that regulate such discretionary power alone. In summary, unless a specific law provides for an exception, there is no power of discretion involving tax payment.[76]

4.1.3.2.2.2.3. The Principles of Non-retroactivity and the Protection of Legitimate Expectation
Taking into account the three dimensions of the principle of legal certainty,[77] the Brazilian Constitution also prohibits retroactive tax laws and requires that transitional periods apply[78] when taxes are created or increased.[79]

The protection of legitimate expectations is not (expressly) mentioned in the Brazilian Constitution.[80] Nevertheless, many scholars derive it from legal certainty and/or the rule of law as a fundamental right,[81] that is the protection of individuals against the state. There are three requirements for applying the protection of legitimate expectations: (i) a reliable source (an official act that supports individuals' expectations of stability or alterability of a situation), (ii) legitimate expectations (when an individual behaves in accordance with this official act) and (iii) abuse of power (when the modification of the official act is (legally) unjustifiable). Thus, it requires a concrete and individual examination. In other words, for every case, a different conclusion can be reached, depending on the particular circumstances.[82]

[71] Supreme Federal Court of Brazil, extraordinary appeal of 20 March 2003, no 343446/SC [2003].

[72] Supreme Federal Court of Brazil, direct action of unconstitutionality of 10 December 2020, no 5277/DF 2020] and extraordinary appeal of 10 December 2020, no 1043313/RS [2020].

[73] According to art 204 of the Brazilian Tax Code 'A dívida regularmente inscrita goza da presunção de certeza e liquidez e tem o efeito de prova pré-constituída. A presunção a que se refere este artigo é relativa e pode ser ilidida por prova inequívoca, a cargo do sujeito passivo ou do terceiro a que aproveite.'

Also, see art 3 of the Brazilian Act of Enforcement Action in Tax Matters.

[74] See Supreme Federal Court of Brazil, interlocutory appeal of 27 November 2012, no 782205/RJ [2012]; and Superior Court of Justice of Brazil, special appeal of 23 May 2012, no 1298407/DF [2012].

[75] See Supreme Federal Court of Brazil, interlocutory appeal in the extraordinary appeal of 14 September 2010, no 599194/CE [2010].

[76] Art 150 (VI) of the Brazilian Constitution.

[77] See above at sec 4.1.2.

[78] Not before the following fiscal year and in a term of 90 days, if applicable.

[79] Art 150 (III) of the Brazilian Constitution.

[80] See C Gomes Moreira, *Proteção da Confiança e Direito Tributário*, (IBDT, 2018) 116–21.

[81] Art 5 (2) of the Brazilian Constitution.

[82] See Gomes Moreira, *Proteção da Confiança e Direito Tributário* 116–21.

However, the Brazilian Federal Supreme Court generally does not analyse these elements (at least not in a written or oral form[83]). The justices simply argue for or against legitimate expectations without explaining the reasons for their decisions.[84] Additionally, in spite of it being a fundamental right, the Brazilian Federal Supreme Court applies the protection of legitimate expectations also to the benefit of the state against individuals, mainly while modulating the effects[85] of its decision. It should be noted that this argumentation especially involves cases in which there is a revenue loss by the state.

4.1.3.2.2.3. Chile[86]

The principle of legality is recognised in Articles 6 and 7,[87] complemented by Article 19 N°20, Article 63 and Article 65 (2) and (4) of the Chilean Constitution. When it comes to legal reserve, the principle of legality implies that only the legislative branch may create taxes, not the executive or judiciary powers. Articles 6 and 7 of the Chilean Constitution establish, on the one hand, the activities of state organs and, on the other hand, limit the exertion of the legal authority regarding the Constitution and the law as a manner of guarantee for individuals.[88] In taxation, this is translated into the principle that taxes may be established, modified and/or have their elements or effects altered only by law.[89]

Thus, Article 19 N°20 of the Chilean Constitution expressly states that taxes are a matter of law. It assures all persons:

> The equal distribution of taxes in proportion to income or in the progression or form that the law establishes, and equal distribution of the other public charges. In no case can the law establish manifestly disproportionate or unjust taxes. The taxes collected, whatever their nature may be, will be deposited to the patrimony of the Nation and will not be set aside for a specific purpose.

The aforementioned is complemented by Articles 63 and 65 of the Chilean Constitution. These prescribe that the legal initiative to impose, suppress, reduce and/or condone taxes is exclusive to the President of the Republic, and the laws shall only come from the Lower Chamber.[90]

[83] The trial sessions of the Brazilian Federal Supreme Court are public and broadcast live on television and radio.

[84] See A Couto e Silva, *Conceitos Fundamentais do Direito no Estado Constitucional* (2015) 58–62.

[85] eg the Supreme Federal Court of Brazil, in extraordinary appeal of 15 March 2017, no 574706/PR [2017], found a tax base unconstitutional. This decision has *erga omnes* effect (ie it does not solely affect the served interested parties of the lawsuit), and therefore, the tax administration presented an interlocutory appeal (*embargos de declaração*) asking for the modulation of the effects of this decision. Otherwise, according to the tax administration, (1) it would have an economic impact of BRL 250,294 million (data until 2015), (2) it would be necessary to increase taxes in order to cover the revenue loss (which could violate tax justice) and (3) there were practical problems in the Secretariat of the Federal Revenue of Brazil's system with regard to responding to all taxpayers' claims. This case is pending final judgment, but the modulation of effects, in this case, inverts the fundamental rights ratio and awards abuse of power, incentivising similar unconstitutionality caused by the state.

[86] We would like to thank Yuri Varela for his contribution.

[87] Art 6: 'The organs of the State must subject their action to the Constitution and to the norms adopted in conformity with it, and guarantee the institutional order of the Republic. The precepts of this Constitution obligate both the titular [officials] or members of said organs, as well as any person, institution or group. The infraction of this norm will generate the responsibilities and penalties that the law determines'.

Art 7: 'The organs of the State act validly, with the prior regular investiture of their members, within their field of competence, and in the form that the law prescribes. No magistrature, no person or group of persons may arrogate, even on the pretext of extraordinary circumstances, any other authority or rights than those expressly conferred upon them by virtue of the Constitution or the laws'.

[88] Chilean Constitutional Court, judgment of 26 November 2007, case 759/07, whereas 14º [2007].

[89] P Massone Parodi, *Principios de Derecho Tributario, vol I, Aspectos Generales* 4th ed (Chile, Reuters, 2016) 146.

[90] Art 63: 'Matters of law only, are: 14) The others which the Constitution specifies as laws of the exclusive initiative of the President of the Republic …'; art 65: 'The laws concerning taxes, whatever their nature is, concerning the budgets of the public administration and concerning recruiting, may only originate in the Chamber of Deputies …. To the President of the Republic will likewise correspond the exclusive initiative to: 1°.- Impose, suppress, reduce or waive taxes of any

Thus, it may be observed that the principle of legality in taxation matters is so broad that even in the core of tax obligation – that is, its calculation basis, the applicable rate, including assets and liabilities – may only be established in our legal system by laws issued by the legislative branch, as it is only the law which shall contain the facts of tax obligation.[91] The same happens with exemptions, reductions and other tax benefits. These constitute an essential requirement, and guarantee security and certainty for taxpayers.

In this same sense, the Chilean Constitutional Court has stated that

> the Constitution, respectful of the essential rights issued by the human nature, has been extremely careful regarding tax regulation, requiring not only that the essential elements of a tax obligation are comprehended in the same law, but also that it is generated in accordance with the requirements that the Constitution itself specifies.[92]

4.1.3.2.2.4. Colombia[93]

4.1.3.2.2.4.1. Legality, the Distribution of Competences and Democracy The principle of legality is enshrined in Article 150(12) of the Colombian Constitution. Accordingly, Congress is in charge of 'establishing tax contributions and, exceptionally, non-tax contributions in the cases and under the conditions established by law'. Therefore, there is one single legislative body in charge of issuing and enacting the laws. Article 338 of the Colombian Constitution – which relates to the competency reserved to formal law – establishes an absolute reserve for taxes and a relative reserve for 'fees' and 'contributions', taking into account the classification of 'taxes', 'fees' and 'contributions'. The latter two have their own limitations, set by the value of the public function or service sought to be financed (the cost criterion) and the benefit that the same provides to the obligor making the payment (benefit criterion).

The method and system fixed to delegate the definition of the service rate must be clear so that the principle is observed in the phase of predetermination of the rate. In other words, it must be made easy to understand how it is that different criteria combine in a system to arrive at a technical but methodical rate that is legally viable. This has not always been accomplished by the legislature, which abandons this task frequently and delegates the entire method upon the authority to exercise discretionary powers that it does not have. Exceptionally, the law deals with the matter of making the allocation. The task of allocating entails a certain weight to each factor that reveals paying capacity or enjoyment of public property or public goods. It is clear that the law permits the value of the service rate to be determined by administrative regulation or resolution, according to the authorisation, provided that 'the system and the method to define such costs and benefits and the manner of allocation thereof are fixed by the law'. However, this constitutional restriction has not been complied with in an orthodox way.[94]

class or nature, [to] establish exemptions or to modify the existing ones and [to] determine their form, proportionality or progression …'.

[91] P Massone Parodi, *Principios de Derecho Tributario* 170.

[92] Chilean Constitutional Court, judgment of 14 October 1996, case 247/96, whereas 19° [1996].

[93] We would like to thank Lucy Cruz for her contribution.

[94] Constitutional Court of Colombia, judgment of 26 May 2010, case C-402 [2010] (Justice Maria Victoria Calle): 'According to constitutional jurisprudence, the principle of tax legality may be understood at least in three different ways. In the first place, as the requirement that the reserve of competency of plural representative popular bodies be respected – the competency to establish, modify or suppress taxes; in the second place, as an order addressed to the popular representative bodies that are in charge and have the power to establish tax and non-tax contributions, that seeks to guarantee that every act of imposition predetermines in due manner the minimum elements of tax obligations; and, taking into account the three types of levies: taxes, fees and contributions, the Constitution provides that the law, the department and city ordinances must fix "directly" the active and passive subjects (revenue collecting authority and taxpayers), the taxable events and taxable bases of all taxes and also "the tax rates"; and that in the case of fees or contributions, the law

The reservation of competences draws a line between the power of the legislature and those of the executive. That also relates to the procedures laid down in the Constitution for the adoption of fiscal legislation. The reason for this is clear: popular sovereignty today is expressed, to a large extent, through deliberations and decisions that are subject to procedural rules, which seek to ensure the formation of a democratic will of the representative assemblies. The result has to be the product of a public discussion, which has allowed for the participation of minorities. The various reasons for the decision must have been debated, weighed up and made known to the citizens. Furthermore, minorities must have been able to participate in these debates. In a constitutional democracy, collective decisions must be deliberated and discussed in public as this results in more rational, fair and impartial decisions. The legislative process should not be merely a system of aggregating preferences or simply legitimising private agreements or hidden negotiations. As mentioned above, it should be constituted by public deliberation, in which the representatives of the citizens, without forgetting the interests of the voters who elected them, nevertheless discuss publicly and give reasons as to what is the best decision to be taken on a given point. This is even more important when it comes to the imposition of taxes. Democratic representation in the imposition of taxes is a consequence of the postulate of liberal constitutionalism 'no taxation without representation'. At this point, it should be reiterated that the principle of legality in tax matters has deep historical roots and is still valid in our current constitutional designs.[95] As a general rule, therefore, the state authority can only decree tax obligations if the popular representation has been consulted, has deliberated and expressed its consent at the decision-making stage of the legislative process. This is particularly important as taxes affect the private sphere of citizens by taking part of the taxpayers' private property. Thus, this act of the state cannot be unilateral, no matter how much it aims to guarantee a certain degree of redistribution for the improvement of social and collective conditions. Such deliberation and subsequent consent by the citizens' representatives have no other purpose than to avoid equating taxes with confiscation. It is for this reason that, as a general rule, taxes can only be adopted within the representative body: the Congress. This constitutional body enjoys greater democratic legitimacy, given its pluralistic composition and the obligation to deliberate with equal respect and consideration for the various interests of those represented.[96]

The parliamentarian debate has to be public and transparent. Publicity as a logical outcome of the debate must also be analysed in light of the nature of the rules it applies. This is because the specific rules that guide the way in which the publicity requirement is satisfied become more or less strict for certain types of rules, given their content and the constitutional values and principles that guide them. For example, the Colombian Constitutional Court has concluded that, in the case of tax rules, the debate and, in particular, the requirement of all those principles

and the department and city ordinances may allow the authorities to set the rates […] that they charge to taxpayers as a recovery of the cost of the services that they provide or as a share in the benefits that they provide to them, provided that the corresponding act that creates the levy establishes the system and the method to define such costs and benefits and the manner of allocation. This is why the jurisprudence has interpreted that whomever is creating the levy must fix the rate directly in the case of "taxes"; and that when the law refers to fees and contributions, the obligation of the popular pluralist bodies does not go as far as fixing the rate precisely and clearly, but only as far as determining the system and the method by which other authorities will set the rate of those other levies. And finally, the principle of tax legality is understood, in the context of a unified state, as the prohibition for territorial entities to establish any contributions in contravention of the provisions of the Constitution and the law.'

[95] Constitutional Court of Colombia, judgment of 16 October 2019, case C-481/19, nos 115 and ff, D-13207, *Demanda de Inconstitucionalidad Contra la Ley* 1943 *de* 2018, '*Por la Cual se Expiden Normas de Financiamiento para el Restablecimiento del Equilibrio del Presupuesto general y se Dictan Otras Disposiciones*' [2019].

[96] Constitutional Court of Colombia, case C-481/19, cited, nos 117 and ff, *Demanda de Inconstitucionalidad Contra la Ley* 1943 *de* 2018, '*Por la Cual se Expiden Normas de Financiamiento para el Restablecimiento del Equilibrio del Presupuesto General y se Dictan Otras Disposiciones*'.

instituted to guarantee democracy – including that of publicity – take on a particular dimension, given the object and subject matter on which they are based. In fact, when studying the constitutionality of Article 364 of Law 1819 of 2016, which imposed a special contribution to arbitration awards for alleged formal defects in their processing, the Court concluded that

> The constitutional jurisprudence has peacefully and repeatedly recognised the importance of the democratic principle, by virtue of which the creation of public contributions and their structural elements can only be at the head of the organs of popular representation. This conception is based on one of the first political guarantees, which later acquires normative force in the Magna Carta of 1215, according to which there can be no taxation without representation.[97]

That judgment also reiterated the importance of forms and rules of procedure as democratic guarantees, which are particularly important when the subject of the deliberation relates to tax matters:

> Thus, in the context of parliamentary debate, the maxim of political representation presupposes a set of procedural rules. Procedural rules are essential conditions in the free formation of the will of the legislative chambers and constitute a guarantee of transparent, impartial and reflexive debate and deliberative processes. Therefore, in the tax sphere, where the demands of the democratic principle are maximised, the principles of consecutivity and flexible identity allow the introduction, in the second of debate, of additions and deletions to the draft laws, only if such modifications do not involve a separable, autonomous or independent matter of regulation.[98]

It is precisely the particular democratic component in matters of taxation that is reflected in the fact that the principles instituted for that purpose, such as that of publicity, must be more demanding. It should thus be emphasised that the abovementioned rules on publicity apply in full, even in the case of financing laws dealt with by urgent message and in extraordinary sessions. The formality with which publicity is displayed during debates, particularly with regard to proposals, under the conditions described above, does not in any way stand in the way of the speed of this procedure, and in general, does not hinder the speed of any bill which is studied in extraordinary sessions or under the pressure of an urgent message. Due publicity does not interfere with the timing and dynamics of the debates, nor do other alternative means that jurisprudence has deemed valid for due publicity.[99]

In its judgment of 2019, the Colombian Constitutional Court finally declared invalid Law 1943 of 2018.[100] That law was one of those adopted in South America in 2018 in order to create more tax justice by reducing tax avoidance and stimulating investment. According to the Colombian Constitutional Court, that reform law had not been adopted in accordance with the special constitutional requirements for tax legislation with regard to democratic participation and publicity. That contrasts with the situation in Chile, where similar legislation could be introduced by presidential decree.

In the Colombian Constitution, such a division of competences is useful only for so-called 'autonomous regulations' that relate to customs duties and the competence for which pertains to

[97] *cf* Constitutional Court of Colombia, case C-481/19, cited, nos 130 and ff, *Demanda de Inconstitucionalidad contra la Ley* 1943 *de* 2018, '*Por la Cual se Expiden Normas de Financiamiento para el Restablecimiento del Equilibrio del Presupuesto General y se Dictan Otras Disposiciones*' with references.

[98] Constitutional Court of Colombia, judgment of 27 February 2019, case C-084 [2019].

[99] *cf* Constitutional Court of Colombia, decision C-481/19, cited, nos 132 and ff, *Demanda de Inconstitucionalidad contra la Ley* 1943 *de* 2018, '*Por la Cual se Expiden Normas de Financiamiento para el Restablecimiento del Equilibrio del Presupuesto General y se Dictan Otras Disposiciones*'.

[100] '*Por la Cual se Expiden Normas de Financiamiento para el Restablecimiento del Equilibrio del Presupuesto General y se Dictan Otras Disposiciones*'.

the executive power or the duties fixed for reasons of trade policy that derive from general guidelines established in customs duties or foreign trade general framework laws.[101]

For this very reason, the Colombian Constitutional Court declared Articles 274 and 275 of Law 1995 of 2019[102] unconstitutional.[103] This law imposed customs duties to products classified under chapters 61 and 62 of the National Customs Duties Tariff Classification – garments and accessories. The Colombian Constitutional Court reiterated that the enactment of every general framework law entails the allocation of legislative powers between Congress and the national government and that the current wording of Article 150 (19) (c) of the Colombian Constitution expressly establishes that any modifications that the government may introduce in point of customs duties, tariffs and other regulations of customs law are to be made for trade policy reasons only – and in accordance with the general guidelines set by the respective general framework law.

For the rest of national taxes and even for territorial taxes, the definition of the taxable events and taxable bases and the taxpayers is reserved for the law. This is based on the unifying principle, which is manifested especially because the Constitution recognises that one single legislature is indispensable.

Likewise, Article 338 of the Colombian Constitution (as it adopts the triple classification of levies) demands a greater or lesser intervention of the legislature depending upon the type of levy regulated. In this manner, 'taxes' must be established by the legislature directly, which must stipulate the essential elements of the tax directly: active subject, passive subject, taxable event and taxable base. Competency can be delegated to the executive authorities for them to fix the rates in the case of associated levies: fees and contributions. Legal doctrine has admitted application

[101] Constitutional Court of Colombia, judgment of 11 September 2007, case C-723 [2007] (Justice Jaime Triviño-Córdoba). By this judgment, the Constitutional Court reiterated that customs duties laws and regulations seek two purposes: on the one hand, trade policy goals, and on the other, fiscal or tax policy goals. Based upon this, the Colombian Constitutional Court held that 'constitutional jurisprudence has indicated that the Constitution only gives power to the government to regulate – through decrees that spell out general framework laws – those aspects of customs law that seek to accomplish trade policy goals. Contrariwise, the legislature holds exclusive competence to enact customs duties laws that seek to accomplish revenue collection or tax policy goals by virtue of the principle of legality of taxes'.

In this judgment, the Colombian Constitutional Court reiterated the decision of 3 September 1992, case C-510 [1992]: '6.4.1.2. Customs duties … accomplish a twofold function: a fiscal function (public revenue collection instrument) and an economic function (economic development and stability instrument). Normally, these two elements go hand-in-hand, and, depending upon the historical time, one has prevailed over the other. For the fiscal aspect, customs duties provide fiscal revenue to the State, and it operates to the exclusive benefit of it. For the economic aspect, customs duties are not used as a source of collecting public revenue but as an instrument of policies that seek to favor national production (given its capacity to discriminate by manipulation of the tariff and the system or fields of national and foreign production) and promote economic stability (the increase or reduction of customs duties, the contraction or amplification of imports [that] may affect the general level of prices and supply and demand movements)'.

[102] Whereby the National Development Plan 2018–22 was issued.

[103] Constitutional Court of Colombia, judgment of 29 January 2020, case C-026 [2020] (Justice Alejandro Linares-Cantillo): arts 274 and 275 of the Plan Law disregarded the constitutional allocation of competences for the following reasons: the legislature regulated comprehensively a matter that pertains to trade policy; the challenged arts determined the components of customs duties with such precision that they in no way are 'general precepts' that would allow the executive power to issue regulations on changing matters in an agile and timely way, applying technical knowledge and pertinent information; the legislature curbed the competency of the executive power because it violated the allocation of competences under the share legislation technique provided for by the Constitution in these matters; arts 274 and 275 of Law 1955 of 2019 did not fix any general parameters or criteria for the government to regulate customs trade rules in an agile manner and in response to market dynamics; to the contrary, the legislature, applying high levels of precision and detail, fixed a trade policy, thus precluding the executive power from reforming this policy through the expeditious manner of regulations provided for in the Constitution and arts 150 (9) and 189 (25); the executive branch of power is the competent authority to regulate trade policy duties in accordance with the general principles set by the general framework law. On the other hand, where the imposition of such duties corresponds to fiscal or tax policy, this must be done by the legislature. According to the jurisprudence of this court, imposition of customs duties that seek to favor national production is precisely an example of the fixing of a trade policy; and, as indicated in this decision, this falls within the area of competency of the national government acting in observance of general parameters set by the legislature.

of this same rule for associated territorial levies, but with the following difference: in certain cases that impact the economy to a lesser degree, it is acceptable that the departmental legislature and the municipal councils fix the taxable base. This slight flexibility allows the equality of treatment for all Colombians to be guaranteed, while recognising that the remainder of the elements may be delegated to local bodies so that their own interests and needs are better served; and also to reconcile the autonomous spaces of these bodies at the time when they vote upon and regulate the taxes assigned to them.

The same stipulation of a general reserve of competency to Congress assigns it the power – and the related duty – to establish tax and non-tax levies and prohibits Congress from bestowing any extraordinary powers upon the Executive Branch for the latter to create levies or issue codes. The Colombian Constitutional Court has recognised the principle of legality and refers to it as 'predetermination or self-imposition', 'sufficient deliberation', 'certainty for the realization of the value of legal security', 'foreseeability of the legal determination of the elements of tax obligations' and 'prohibition of excess for regulations'.[104]

At the territorial level, the reserve of competency for the legislature allows the fixing of the rules indicated below. This is so under the principle of legality and the principle of limited autonomy of territorial entities, and under a systematic interpretation of Articles 1, 150-12, 287-3, 300-4, 313-4 and 338 of the Colombian Constitution. These Articles subordinate the products of regulation and legislation of departmental legislatures and municipal councils to formal law, within a general framework of a unified state with relative autonomy of territorial entities, and treat these products as general administrative acts. The mentioned rules are as follows:

a) The creation or institution of a levy corresponds to Congress legislature; and for this levy to be viewed as 'created' or instituted, the law must define the taxable base and the subjects of the tax obligation directly;
b) To guarantee autonomy in the management of their own affairs, and the realisation of the goals and ends of each territory, by means of their own or 'endogenous' levies, they are given an institutional guarantee to complete the aspects that define the levy, and that relate to the amount of it, such as the taxable base and the rate; notwithstanding, in respect of those levies whose economic impact is greater, such as the property tax and the industry and commerce tax, the definition of the taxable base is reserved to Congress, to guarantee general and equal treatment for all inhabitants, and fiscal unity as a macroeconomic value;
c) For national levies that have been assigned or 'exogenous' levies, the competency still pertains to Congress, even in point of exemptions (although it is worth noting that the revenue raised from income taxes pertains to the departments fundamentally, and districts to a lesser extent); and in point of exemptions, the competency pertains to the territories in the case of their own levies under the rules of Article 294 of the Colombian Constitution.[105]

[104] Constitutional Court of Colombia, judgment of 6 May 2015, case C-260 [2015] (Justice Gloria Stella Ortiz Delgado): the possibility that territorial entities, based upon their autonomy, regulate tax aspects within the framework set by the law.

[105] In Constitutional Court of Colombia, judgment of 13 August 2014, case C-587 [2014], the Colombian Constitutional Court clarified that despite the restriction set by art 294 of the Colombian Constitution, Congress has the power to delimit the tax, in other words, to define the scope of territorial levies (or taxes), and especially to delimit their essential elements, such as defining the taxable events and bases. 'The distinction between exemption and delimitation depends upon the following: "if the territorial levy (or tax) exists already and has been clearly delimited, then the law cannot exonerate certain subjects from payment of the tax; if it does so, it would be establishing an exemption from a territorial tax, and this violates the mentioned constitutional precept." On the contrary, if the law is not exonerating certain taxpayers, but is only delimiting the essential elements of the levy (or tax) in an abstract way, then there is no violation of the cited constitutional precept, but rather the autonomous exercise of the power of legal delimitation by Congress.'

4.1.3.2.2.4.2. Certainty – Reasonable Precision of the Law In view of the lack of precision, the gaps and the contradictions of Colombian law, the Colombian Constitutional Court has established a reasonable but diffuse rule to assess certainty. It refers to interpretation techniques used to overcome the ambiguities and gaps of the law and includes an interpretation that extends and corrects the wording of the law: If there is a reasonable interpretation, the law is constitutional; but it is not so if there is 'invincible obscurity'.[106]

The Colombian Constitutional Court has correctly indicated that the risk of the lack of certainty lies in transferring the very conception of the levy to the authorities, but it held that such a risk might be mitigated through interpretation.[107] The legislator has to establish the essential elements of levies, avoiding any stark imprecision in their design. In particular, the essential elements are the active and passive subjects (ie respectively the state and its subdivisions entitled to levy the tax, on the one hand, and the persons with the obligation to pay the tax, on the other hand), the taxable event, the tax base and the tax rate.

Imprecise tax statutes could raise critical issues, as they might force tax authorities to intervene in filling the gaps in a way that could undermine the correct functioning of the principle of legality. Thus, to ensure that there is a sufficient degree of certainty in every levy, judicial interpretation has indicated that any imprecision in the regulation of the essential elements of levies is unconstitutional only 'if these cannot be resolved in the end, for the invincible obscurity of the legal wording makes it impossible to find a reasonable interpretation about which may be in the end their essential elements'. In other words, the principle of tax legality is not being violated where one of such elements is not determined in the law but may be determined based upon the law.[108] Therefore, as in the field of criminal law and tax law, the Colombian Constitutional Court has accepted the admittance of the use of 'open texture' terms, allowing for indeterminate legal concepts in conformity with the language used by the Constitution. Nevertheless, it has set some limits to this when the degree of indetermination affects a freedom irrationally, such as the freedom of expression, the freedom to unionise, the freedom to practise a profession or occupation and to avoid jeopardising the rights of the people.[109]

When assessing the compatibility of Article 121 of Law 488 of 1998 with the Colombian Constitution, the Court had to find out whether the tax base of the surcharge on gasoline and

[106] *cf* eg Constitutional Court of Colombia, judgment of 22 February 2006, *Impuesto de Industria e Commercio*, case C-121, D-5927 [2006], nos 3.1. and ff.

[107] See Constitutional Court of Colombia, judgments of 14 February 2019, case C-059, [2019] of 8 September 2015, case C-585, [2015] and of 19 March 2014, case C-169, [2014]. In these judgments, the Court stressed the three connotations of the principle of legality in tax matters, namely that representative popular pluralist bodies hold exclusive competency and power to create, modify or suppress taxes (Arts 150-12 and 338 of the Constitution); that these representative popular bodies must determine clearly the minimum elements of tax obligations (Art 338 of the Constitution); and that there is the prohibition for territorial entities of establishing contributions that contravene the rules of the Constitution or the law (Arts 30-4 and 313-4 of the Constitution). Accordingly, an imprecise determination of the essential elements may infringe the principle of legality, but not any type of imprecision. Settled case law of the Colombian Constitutional Court indicates that every legal rule, including in the field of tax law, may sometimes remain ambiguous and general. Constitutional Court of Colombia, judgment of 24 January 2007, case C-018, [2007] held that 'the principle of predetermination of taxes cannot be interpreted with excessive rigor, to the point of demanding that the legal act that imposes a contribution cannot give way to any diverging understanding, as is the case of any human conception. This is so because "tax laws, as any other laws, may create a variety of interpretation problems at the time of execution and application, and this may not per se cause their unconstitutionality"; and unconstitutionality should be declared only where it is not possible to find a reasonable interpretation about which may be in the end their essential elements'.

[108] Constitutional Court of Colombia, judgment of 31 October 2012, case C-891 [2012]. In the same sense, see Constitutional Court of Colombia, judgments of 11 May 2011, case C-368 [2011], of 10 September 2013, case C-621 [2013] and of 16 July 2015, case C-449 [2015].

[109] Constitutional Court of Colombia, judgment of 19 March 2014, case C-167 [2014], para 3.6.

diesel fuel could leave the reference value to the Ministry of Mines and Energy without the law stating any guideline or parameter for that. In that case, the Colombian Constitutional Court held that the principle of tax certainty was violated not only by the omission in the determination of the essential elements of the tax but also where the law resorts to using confusing expressions when defining the tax. Notwithstanding, a declaration of unconstitutionality was only possible in such events where the lack of clarity was *insurmountable*, that is to say, when it is not possible to establish the meaning and the breadth of the rule of law according to the general rules of legal hermeneutics.[110]

4.1.3.2.2.4.3. Legal Security According to the Colombian Constitutional Court, legal security is one of the purposes of the principle of legality in order to halt abuse by government officials, which is necessary for the validity of every levy. The Colombian Constitutional Court highlights the popular representation of the body that enacts the law and so makes national fiscal policy coherent:

> The primordial objective of the principle of legality is to strengthen legal security and to avoid the taxing abuse of government officials. This is so because the legal act that imposes a levy must establish previously its essential elements for the same to be valid, based upon a democratic discussion or debate. In this sense, the principle of legality, as a requirement for the creation of a levy, has several functions. Of these, the following stand out: (i) it materialises the requirement that there is popular representation; (ii) it answers the need of guaranteeing a minimum space of security for the citizens in respect of their obligations; and (iii) it represents the importance of a coherent design of the fiscal policy of a State.[111]

An initial conclusion is unavoidable. By virtue of the principles of legality and legal security, the taxpayer is shielded against any arbitrary actions by the administration because it is the legislative body in charge of determining the essential elements of the levy, whether the tax is national or territorial, and whether it is a fair contribution. This also allows accomplishing a coherent system.[112] This first aspect of legal security is more closely related to the certainty of the essential elements of tax law. Legal security is also related to the stability of the laws, to respect for consolidated legal situations and their ongoing effects, which are not always protected. The foregoing is so because it is almost always that the sub-principle of a law having been enacted prior to the taxable period is made to prevail over a more complete notion of the prohibition of retrospective

[110] Constitutional Court of Colombia, judgment of 30 January 2019, case C-030 [2019].

[111] Constitutional Court of Colombia, case C-891/12, cited: The imposition of levies entails that the legislature is the only power that may establish taxable events; and that it shares with the other representative corporate bodies the function of fixing the active and passive subjects directly, determining the taxable bases and the tax rates. In the case of fees and contributions, the mentioned public corporations may allow governmental authorities to fix the rates on the condition that they have defined the criteria, the method and the system to calculate the rates.

[112] Constitutional Court of Colombia, case C-621/13, cited.

> 'Notwithstanding the importance of the democratic origin of levies, the purpose of the principle of legality is not exhausted by ensuring the legitimacy of the rule of the law that delimits the elements of the levy.'

A fundamental content of the mentioned principle is legal security as well in respect of the elements of the levy. This aspect requires that the representative bodies 'determine in a manner which is sufficiently clear and precise each and every one of the essential elements of the same; otherwise, you get not only legal insecurity, but at the time of applying the rules "taxing abuse by government officials is allowed", or tax evasion is promoted "because the taxpayers required to pay the taxes are not able to do so, which has serious repercussions on the public treasury and therefore on the furthering of the ends of the State".

In art 338, the very Constitution determines which elements must be defined directly by Congress, by the departmental legislatures or by the municipal or district councils: the active subject, the passive subject, the taxable event, the taxable base and the rate. Jurisprudence has called these the essential elements of the tax (or levy).'

application of the law; this prohibition requires that there is a law prior to any taxable or exempt events which may occur over more than a single taxable period. This is the case, for example, for the treatment of tax losses that originated under former law and are amortised under a new law over a shorter period of time, or the case where an exemption or differential treatment that was subject to a term or a condition is eliminated or shortened. It is worth recalling that it is a part of the principle of legality and its aspect of knowing beforehand the tax consequences of every act or deed carried out by the taxpayer voluntarily, such as establishing a company, distributing dividends, rearranging patrimony management schemes, investing in certain instruments or businesses that are protected or fostered, etc by the law that is in force at the time of making the investment signing the contract or earning the recognition of the underlying benefit.

The ample and sufficient debate of a tax modification or creation also guarantees representation and consented approval. These pertain to the principle of legality and its aspect of legal security given that the representatives of the taxpayers cast their votes being duly informed about the conception, dimension and duration of the levy, and every stakeholder can put forth his objections in the debates [of the legislature].

4.1.3.2.2.4.4. Non-Retrospective Application of the Law The violation of taxpayers' rights regarding the retrospective application of tax laws is not confined only to the making of laws which – in respect of any of the so-called *period taxes* – seek to modify the elements of the tax obligation explicitly with respect to events that happened prior to the entry into force of the law.[113] But this hypothesis – described in Article 338 of the Colombian Constitution – is the best example of the lack of respect for the principle of legality and its aspect of certainty and legal security. It is just one of the events by which applying a legal provision to past events may violate the taxpayers' rights to know with certainty about the tax effects that several of his economic positions may have before choosing which to adopt. Indeed, the classic theory was normally concerned only with the maximum-degree retrospective application of the law, such as the one described above. However, contemporary theory admits that taxpayers' rights may also be violated by medium-degree retrospective application of the law, where the law affects taxpayers that have already consolidated their economic position, beyond the fact that the effects have not materialised entirely.

If taxpayers have decided to invest to qualify for treatment under a special set of tax rules, they must carry out a series of economic transactions (capital investments and investments in labour) to comply with the requirements or conditions to qualify for the special treatment and also carry out an administrative qualification procedure. It seems inadmissible that a tax law enacted after all these events have been followed substantially alters the rules of tax law that would apply to this type of taxpayer over the years in which the qualification for the differential treatment would continue to apply. This issue is hazy for the Colombian Constitutional Court. Sometimes, it has established respect for special legal systems, such as the set of rules that applies to hotels, but not for free trade zones systems. In many cases, there is a lack of differentiation between the status of a taxpayer and the effects and consequences during the time in which the administrative circumstances that triggered the adoption of that status persist – even where the circumstances did not provide for the duration of the tax treatment attached to accessing the special system. This topic is complicated in Colombia despite the fact that it has been addressed in case law on multiple occasions. That case law has set many prerequisites requiring that a new law cannot modify a tax benefit during the period that it was foreseen that the benefit would be applicable. Moreover, the legislator does not have a single guideline to apply, but rather a series

[113] *cf* also Constitutional Court of Colombia, judgment of 28 November 2018, case C-129 [2018], no 28 – anti-tax avoidance legislation.

of circumstances that are difficult to understand. This should be taken into consideration when making decisions about tax incentives with a fixed term. These incentives may be found in tax law or special laws creating economic development vehicles. They may comprise one or more stimuli – without this meaning, they are no longer special – that remunerate the activity that society expects the business to develop.

In some cases, like the CIT exemption for hotels,[114] the Colombian Constitutional Court set clearer rules. In particular, the Court acknowledged the ample liberty of the legislator to configure tax rules but reiterated the obligation for the legislator to abide by the applicable superior legal mandates. Consequently, when it decides to eliminate an exemption, it must take into account the rights of the taxpayers affected by this decision, who may, for instance, have undertaken an investment (as in the case of hotels). The Court indicated that such taxpayers had assumed a legitimate burden to avail themselves of the income tax exemption for the period of time determined by Law 788 of 2002 and its Decree. Based on this interpretation, the Court concluded that the abolition of the exemption was incompatible with the non-retroactivity of tax law and vested rights of taxpayers acting in good faith before the issuing of Law 1819 of 2016.

The Constitutional Court also added that the abolition ignored the effects that Law 788 of 2002 produced when it was derogated and lacked a reasonable perspective for its change. Therefore, it was an abrupt, unforeseeable and unexpected change in relation to the reasons for which the tax incentive had been granted. This allowed the Court to protect *pro futuro* the vested rights of taxpayers who had met the conditions for the tax incentives until its abolition while rejecting it for others.

However, the Court took a different view in respect of other tax incentives, such as the ones favouring job creation,[115] or in free trade areas.[116] In particular, in relation to benefits under the free trade areas, the Court indicated that a consolidated legal situation exists whenever the taxpayer at the time of the legislative amendment meets all the requirements for the tax incentive. However, even in such cases, the legislator has the right to make the required amendments corresponding to the tax policy goals pursued after the end of the period for which the benefit was granted. In such a context, the Court rejected the existence of a consolidated legal situation for all generic incentives, the incentives that were not subject to conduct in a specific time (and requiring permanent accreditation in each tax period), the failure to meet the requirements of the incentive before the introduction of the new law and the tax incentives lacking a direct effect. In the free trade area, the tax incentives are more the outcome of a general policy of fostering the economy than a specific regime. Therefore, the intervention by the legislative power may freely make amendments to the applicable tax incentive rules as long as they do not affect the overall framework, taking into proper consideration the implications of the principles of reasonableness and proportionality.[117]

Indeed, there is no such thing as a generic right to the immutability of tax law. This is so because, beyond the fact that the hyperproduction of laws and regulations that is a hallmark of Colombia entails a serious problem in legal security, the regular taxpayer understands that tax law may change within limits set by the prohibition of retrospective application. Notwithstanding, there are events in which taxpayers have the right to expect that the legislature will not change the tax rules that apply to them or that, if it does so, it will be with respect for any situations consolidated under the current rules. We cannot forget that the state has induced taxpayers to commit to

[114] Constitutional Court of Colombia, judgment of 29 May 2019, case C-235 [2019].
[115] Constitutional Court of Colombia, judgment of 14 November 2018, case C-119 [2018].
[116] Constitutional Court of Colombia, judgment of 10 July 2019, case C-304 [2019].
[117] Constitutional Court of Colombia, judgment of 10 July 2019, case C-304 [2019].

making a series of economic transactions with effects in the medium and long terms, in exchange for the promise that they can access a special tax treatment where a special income tax rate is one of the main components.

Regular taxpayers are not tied to a medium and long-term plan of investments and are flexible enough to alter their economic transactions according to the changes of tax law (within, of course, the limits of the protection against changes in the so-called period taxes). Unlike this regular taxpayer, taxpayers who accepted the invitation of the state to participate in a certain investment with a certain favourable tax treatment have no flexibility to alter their economic transactions without serious harm, because they have committed to carry out and maintain a series of investments in capital and human resources over the medium term.

Likewise, the point is clear that regular taxpayers who do not participate in any particular tax system operate under the perspective where the applicable tax laws may change from one taxable period to the next. This is so because none of the rules that apply to calculate their tax liability is tied to any exact period of time other than the regular calendar year.

In view of legitimate trust, even where there are no legal situations consolidated when the tax law changes, the constitutional value that we seek to protect is the value of legal security in transactions according to current law and the principle of good faith. This combination is not to protect the predictability of the rules in an isolated fashion but, instead, to guarantee that trust in the relationships between the state and the private citizen prevails, as in most developed states.

By contrast, numerous court judgments[118] have protected the rights to a certain tax status secured under the legal authorisation of signing tax stability contracts, which are quite appealing given the prevailing insecurity in these matters. In this way, those who have signed stability contracts where the term of duration is the term of the contract have specific rights which are contractual in nature, with respect to the rules of the law of different kinds stabilised by means of the contract and for which they have paid a monetary premium.

4.1.3.2.2.5. Peru[119]

The rule of law in tax matters is typified in Article 74 of the Peruvian Constitution, which establishes the principle of the legal reserve. This principle means that the creation, modification, derogation or exoneration of taxes must be established solely by means of a law or norm of equivalent rank.

According to the Peruvian Constitutional Court,[120] this principle is based on the historical formula 'no taxation without representation'; that is, the taxes must be issued by the representatives of those subject to the payment of these obligations. Furthermore, this principle implies that the essential elements of tax – those that represent a minimum requirement for the creation of a tribute – constitute a matter that can only be established by law and, therefore, must be contained in the law that creates the tax and cannot be later regulated by a norm of lower rank.

These essential elements of the tax obligations have been defined by the Peruvian Constitutional Court[121] as the following: (i) the taxable event, (ii) the tax base, (iii) the taxable person and (iv) the tax rate.

[118] Council of State of Colombia, judgment of 23 February 2017, no 20442, PJ Jorge Octavio Ramírez [2017]; Council of State of Colombia, judgment of 30 August 2016, no 18636, PJ Hugo Fernando Bastidas [2016]; Council of State of Colombia, judgment of 2 March 2017, no 22145, PJ Stella Jeannette Carvajal Basto [2017]; Constitutional Court of Colombia, judgments of 29 March 2006, case C-242 [2006] (Justice Clara Inés Vargas Hernández), of 24 April 2006, case C-320 [2006] (Justice Humberto Sierra Porto) and of 22 November 2006, case C-961 [2006] (Justice Rodrigo Escobar Gil).

[119] We would like to thank Cecilia Delgado Ratto for her contribution.

[120] Peruvian Constitutional Court, judgment no 0042-2004-AA/TC [2014].

[121] Peruvian Constitutional Court, judgment no 01902-2013-AA/TC [2013]; no 02835-2010-AA/TC [2010] no 34.

4.1.3.2.3. The Caribbean[122]

The rule of law is enshrined in the Constitutions of the Anglophone Caribbean, with the Constitution being expressed as the supreme law. Thus, unlike the UK, which recognises the principle of Parliamentary Supremacy, the Caribbean is governed by the doctrine of constitutional supremacy. Therefore, any tax laws incompatible with the respective Constitutions may be judicially reviewed and ultimately struck down by the Supreme Court. This applies insofar as they do not comply with the requirements of the Constitution and particularly where the requisite special majority has not been obtained. In Trinidad and Tobago, for example, during 2019, an attempt was made to implement a new Revenue Authority, but the legislation did not succeed because it required a special majority of both Houses of Parliament as it impacted the human rights provisions in the Constitution. Apart from the respective constitutional requirements of the Member States of the Caribbean Community (CARICOM) region, primary legislation, including tax law, is made by Parliament. Another recent example, also emanating from Trinidad and Tobago is updating land and building tax laws, replaced by new property tax legislation. However, a parallel valuation tribunal has been established with the specific remit to deal with valuation disputes, and such assessments will be based on a percentage of the rental value of various types of property. Such matters would normally have been dealt with by the Tax Appeal Court, which is, therefore, now restricted to dealing purely with appeals to such assessments as opposed to the valuation of property.

4.1.3.2.4. North America

4.1.3.2.4.1. United States[123]

Congress enacts statutes concerning federal taxation. Such laws may directly provide for the Treasury and Internal Revenue Service to issue administrative rules concerning aspects of the law (sometimes referred to as 'specific authority' regulations), but Treasury and the Internal Revenue Service also have 'general authority' to issue regulations needed to effectuate federal tax laws.[124] In issuing regulations, the Treasury and Internal Revenue Service, like all federal government agencies, must generally comply with the Administrative Procedure Act.[125] The US Supreme Court has confirmed that the Administrative Procedure Act specifically applies to tax regulations.[126] Federal courts have spent more time over the past decade considering various limitations on Treasury's rule-making authority in light of the Administrative Procedure Act. For example, most rules having a binding legal effect on taxpayers must offer the opportunity for notice and comment.[127] Treasury's policymaking must not run counter to the statutory text.[128] It cannot make decisions that are 'arbitrary and capricious'.[129] As the Anti-Injunction Act[130]

[122] We would like to thank Anthony Gafoor for his contribution.

[123] We would like to thank Jeremiah Coder for his contribution.

[124] 26 USC s 7805(a) gives the Secretary of the Treasury authority to 'prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue'.

[125] 5 USC, ss 500 and ff.

[126] See US Supreme Court, *Mayo Found. for Med Educ & Research v United States*, 562 US 44, 55 [2011] ('[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly [r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action').

[127] 5 USC s 553 (requiring notice of proposed rulemaking and opportunity for the public to participate).

[128] See US Supreme Court, *Chevron, USA, Inc v Nat Res Def Council, Inc*, 467 US 837, 842–43 [1984].

[129] See US Supreme Court, *Motor Vehicle Mfrs. Ass'n v State Farm Mut Auto Ins Co*, 463 US 29, 46, [1983].

[130] 26 USC s 7421(a).

generally prevents taxpayers from seeking a judicial review to stop the Internal Revenue Service from assessing tax – meaning that a taxpayer must first pay the tax and then seek an administrative refund before filing suit – there is ongoing debate regarding the ability of taxpayers to obtain judicial review of pre-enforcement actions that might not involve traditional tax collection measures, such as information reporting not involving a tax liability.[131]

4.1.3.2.4.2. Canada

Notoriously, GAARs raise problems regarding legal certainty. In this respect, the Supreme Court of Canada held that despite the enactment of GAAR within the statute, it was imperative for the Court to adopt an interpretation that resulted in 'consistent, predictable and fair results'. Dealing with the claim of tax authorities to apply GAAR on tax deferral benefits obtained by the taxpayer by adopting a 'sale and lease-back' transaction, the Court extensively examined the principle of the literal interpretation of fiscal statutes. Noting the setting of the enactment of GAAR, and of the explanatory notes to the legislation and despite acknowledging that 'the GAAR's purpose is to deny the tax benefits of certain arrangements that comply with a literal interpretation of the provisions of the Act, but amount to an abuse of the provisions of the Act' the Canadian Supreme Court went on to reject the projection of the tax administration. The Court inter alia observed:

> 1. … The Act continues to permit legitimate tax minimisation; traditionally, this has involved determining whether the taxpayer brought itself within the wording of the specific provisions relied on for the tax benefit. Onto this scheme, the GAAR has superimposed a prohibition on abusive tax avoidance, with the effect that the literal application of provisions of the Act may be seen as abusive in light of their context and purpose. The task in this appeal is to unite these two approaches in a framework that reflects the intention of Parliament in enacting the GAAR and achieves consistent, predictable and fair results.
>
> 41. … The courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue. First, such a search is incompatible with the roles of reviewing judges. The Income Tax Act is a compendium of highly detailed and often complex provisions. To send the courts on the search for some overarching policy and then to use such a policy to override the wording of the provisions of the Income Tax Act would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped. … to search for an overriding policy of the Income Tax Act that is not anchored in a textual, contextual and purposive interpretation of the specific provisions that are relied upon for the tax benefit would run counter to the overall policy of Parliament that tax law be certain, predictable and fair, so that taxpayers can intelligently order their affairs. Although Parliament's general purpose in enacting the GAAR was to preserve legitimate tax minimisation schemes while prohibiting abusive tax avoidance, Parliament must also be taken to seek consistency, predictability and fairness in tax law.[132]

4.1.3.3. Asia

4.1.3.3.1. China[133]

The Legislation Law of China provides that the National People's Congress of China (NPC) has the legislative power to promulgate a law with regard to the establishment of any category of

[131] See, eg US Court of Appeals, District of Columbia Circuit, *Florida Bankers Ass'n v Treasury*, 1799 F 3d 1065, DC Cir 2015, vacating 19 F Supp.3d 111 [2014].

[132] Supreme Court of Canada, *Queen v Canada Trustco Mortgage Company*, 2 SCR 601, [2005], nos 41 and ff; T Jain, '"GAAR" and the Rule of Law: Mutually Incompatible?', *Manupatra* (4 October 2019).

[133] We would like to thank Na Li for her contribution.

tax, determination of tax rates, tax collection administration, and other basic taxation rules.[134] However, in fact, China's tax law now consists of multi-level and diverse norms,[135] including (i) laws promulgated by the NPC or its Standing Committee, (ii) administrative legislation promulgated by the State Council in the form of implementing rules on the laws or the provisional regulations before the formal laws are enacted, (iii) departmental rules in the form of a 'notice' or 'circular' issued by the State Administration of Taxation and/or the Ministry of Finance, (iv) local level laws enacted by the provincial or municipal level People's Congress and their Standing Committees, and (v) local level regulations enacted by the provincial or municipal governments. The tax legislation process is different for each of these legal norms.

The laws promulgated by the NPC or its Standing Committee are of the highest level of legal norm, while secondary laws (ie administrative legislations, departmental rules, local level laws and regulations) play an important role in China's tax legislation. The State Council can enact tax regulations in the form of administrative regulations in accordance with the legislative power delegation from the NPC and its Standing Committee. The State Administration of Taxation and/or the Ministry of Finance also have the power to issue departmental rules with regard to the specific issues in implementing the tax laws and the regulations. And at the local, provincial or municipal level, the People's Congress and their Standing Committees and governments all have the power to enact local laws and regulations applicable in their jurisdictions.

4.1.3.3.2. India[136]

The rule of law is a cornerstone of the Indian legal system and belongs to the basic structure of the Constitution of India.[137] In respect of taxes, the Indian Constitution lays down that 'no tax shall be levied or collected except by authority of law'.[138] The term taxation is defined as the imposition of any tax or impost, whether general, local or special.[139] This embodies the idea of 'no taxation without representation'.

The reference to the authority of law means that a tax may only be imposed by legislation and not by executive orders or subordinate rules. The charging legislation must identify the character of the imposition, taxable event, taxable person, tax rate and the measure or value to which the rate will be applied for computing tax liability.[140] There has been some discussion about the rule of law in connection with GAAR. According to the Indian Supreme Court, 'where a statute confers wide powers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being exercised in a manner which can be said to be procedurally fair'.[141] It was, therefore, imperative for the Indian legislature to provide detailed rules discerning stipulating fairness and controlling the discretion of the area authorities entrusted with the administration of GAAR. Failure to provide such restrictions may evince a violation of constitutional norms with a high degree of probability of

[134] Art 8 (6) of the Legislation Law of the People's Republic of China, promulgated by the NPC on 15 March 2000.
[135] W Cui, 'What Is the "Law" in Chinese Tax Administration?' (2011) 19(1) *Asia Pacific Law Reviews* 73–92.
[136] We would like to thank Ashrita Prasat Kotha for her contribution.
[137] Supreme Court of India, judgment of 2007, *I, R Coelho v State of Tamil Nadu*, MANU/SC/0595/2007: 2 SCC 1 [2007].
[138] Art 265 of the Indian Constitution; see also Supreme Court of India, judgment of 6 May 1959, *The Lord Krishna Sugar Mills vs the Union of India and* Another, AIR 1124, 1960 SCR (1) 226 [1959]; and Manipur High Court, judgment of 9 May 1960, *Ruiweinao Kahasoan Tangkhul v Ruiweinao Simirei* [1960].
[139] Art 366(28) of the Indian Constitution.
[140] Supreme Court of India, judgment of 26 April 1985, *Govind Saran Ganga Saran v Commissioner of Sales Tax*, AIR 1985 SC 1041 [1985].
[141] Supreme Court of India, judgment of 1994, *Rash Lal Yadav v State of Bihar*, MANU/SC/0792/1994: 5 SCC 267 [1994], no 6.

being declared arbitrary and thus unenforceable.[142] Against this background, the Indian Income Tax Act was changed in 2013 to include some procedural safeguards regarding the application of GAAR: The assessing officer cannot act alone in applying GAAR but needs the approval of the principal officer or principal commissioner or an approving panel. The assessee is heard in the different stages of the procedure. The chairperson of the Approving Panel shall be a person who is or has been a judge of a High Court, one member shall be a high-ranking member of the Indian Revenue Service and one member shall be an academic or scholar having special knowledge of matters such as direct taxes, business accounts and international trade practices.[143] Given the quasi-federal structure, the Federal/Union government and the state governments are both competent to levy taxes. The Constitution delineates the areas over which the Federal/Union government and the state governments have respective legislative competence.[144] Tax legislation can thus be passed by either the Union Parliament or the State Legislature.

Once passed, tax statutes are subject to judicial review and are to be interpreted strictly. In the event that any provision is found to be unconstitutional, it may be struck down or read down by the courts. If a charging provision of a tax law is ambiguous, the benefit is given to the taxpayer. On the other hand, if an exemption provision is vague, the benefit is given to the state.[145]

There are two pending Indian cases before BIT arbitration tribunals on the fairness of retroactive provisions, *Vodafone*[146] and *Cairn.*[147] In 2012, the Indian government introduced extensive retrospective amendments to the Indian Income-tax Act, 1961, to bring indirect transfers of shares within the tax base. This was done after the Indian Supreme Court had denied the claims of the tax department. The Indian government has argued that the amendments only seek to clarify the law. The taxpayers have argued that the amendments created a new charge retrospectively, which amounts to arbitrary and unfair state action.[148]

4.1.3.3.3. Israel[149]

The rule of law is one of the foundational principles of the State of Israel and the Israeli legal system. In taxation, the rule of law is guaranteed constitutionally in the Basic Law: The State Economy. According to Article 1 of that Basic Law:

(a) Taxes, compulsory loans and other compulsory payment shall not be imposed, and their amounts shall not be varied, save by or under Law; the same shall apply with regard to fees;
(b) Where the amounts of any taxes, compulsory loans or other compulsory payments, or fees, payable to the Treasury are not prescribed in the Law itself, the amounts prescribed therefor by regulations shall require approval – in advance or within the period prescribed by the Law – by a decision of the Knesset or of a committee of the Knesset empowered by it in that behalf.

[142] Supreme Court of India (Constitutional Bench), judgment of 1975, *Khemka & Co (Agencies) Pvt Ltd v State of Maharashtra*, MANU/SC/0442/1975: 2 SCC 22 [1975].
[143] Art 144BA Indian Income Tax Act, *cf* Jain *'GAAR' and the Rule of Law*.
[144] Seventh Schedule of the Indian Constitution.
[145] Supreme Court of India, judgment of 30 July 2018, *Commissioner of Customs (Import) v Dilip Kumar and Co*, Civil Appeal no 3327/17 [2018].
[146] Supreme Court of India, *Vodafone v India (II)*, see http://investmentpolicy.unctad.org/investment-dispute-settlement/cases/819/vodafone-v-india-ii- [2017].
[147] PCA, *Cairn v India*, PCA case 2016-7 [2015], see http://investmentpolicy.unctad.org/investment-dispute-settlement/cases/691/cairn-v-india.
[148] See Expert Committee Draft Report on Retrospective Amendments Relating to Indirect Transfers, 2012 available at www.internationaltaxreview.com/pdfs/Report_on_Retrospective_Amendments.pdf.
[149] We would like to thank Rifat Azam for his contribution.

This reflects the principle of no taxation without representation. The representatives in the Parliament are the only authority to impose taxes through legislation.

All tax legislation is subject to judicial review according to the basic laws of Israel and mainly the basic laws on human rights: Basic Law Human Dignity & Liberty and Basic Law Freedom of Occupation. All actions and assessments of the tax authorities are subject to judicial review through civil and criminal appeals on substantive issues of taxation and administrative petitions against any action of the authority as the executive. Tax authorities implement tax laws, but their implementation and understanding of the law, which are taken into account seriously, are subject to judgment by the courts. The courts are the only authority to interpret all laws, including tax laws. In their interpretation, courts follow the purposive interpretation methodology, which starts with the words of the law but continues to examine the subjective and objective purpose of the law, which reflects the general purposes of the system and the rule of law and human rights.

To enhance certainty, the Income Tax Ordinance regulated the pre-ruling procedures: taxpayers could submit a request for pre-ruling before or after any transaction.[150] Taxpayers have the option to submit anonymously at the beginning of the process and are required to pay an application fee. All pre-rulings are published anonymously.

4.1.3.3.4. Japan[151]

The current Constitution of Japan[152] contains two articles on taxation: Article 30 provides that the people have the duty to pay tax according to statutory provisions, and Article 84 prevents the government from imposing new taxes or modifying existing ones unless permitted by statute or under such conditions as a statute may prescribe. These articles are expressions of the Western idea of the rule of law. Article 84 is recognised as the so-called 'principle of statute-based taxation', which can be characterised in Japan as a concept similar to the rule of law in tax matters.

One of the most disputed issues in tax litigations was whether provisions of tax law complied with Article 84 of the Constitution. In this regard, the Supreme Court of Japan repeatedly held in obiter dicta that the principle of statute-based taxation required legislators to clearly lay down the prerequisites for tax liability, tax assessment procedures and tax collection in an Act of Parliament.[153]

It was argued in the literature that the principle of statute-based taxation originated from two different but related values and, therefore, should serve these two values at the same time:[154] First, the traditional constitutional value of 'no taxation without representation', which demands the supreme role of Parliament in tax legislation; second, predictability in taxation. Since tax today is imposed on almost every economic activity, and the tax burden is pretty heavy, it is indispensable for a reasonable person making any economic decision to take into account its tax effect.[155]

[150] Art 158D of the Israeli Income Tax Ordinance, as of amendment 147 from 2006.

[151] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.

[152] Enacted in 1946 and promulgated in 1947.

[153] For instance Supreme Court of Japan, judgments of 23 March 1965 [1965], Supreme Court Civil Cases Reporter (9)3, 336, and of 27 March 1985 [1985], Supreme Court Civil Cases Reporter, 39(2), 247.

[154] H Kaneko, 'Citizen and Tax' in I Kato (ed), *Iwanami Lectures on Modern Law*, 8 (1967) 307; H Kaneko, 'Basic Principle of Tax Law' in H Kaneko et al (ed), *Lectures on Tax Law*, 1 (1974) 195. *cf* H Kaneko, 'The Principle of Statute-Based Taxation in Japan' in K van Raad (ed), *International and Comparative taxation: Essays in Honour of Klaus Vogel* (2002) 53–74. With regard to these two values, he divided the principle of statute-based taxation into the five sub-principles; (1) the principle of reservation to statutes, (2) the principle of preciseness, (3) the principle of non-retroactivity, (4) the principle of legality, (5) the principle that taxpayers' rights should be protected by a formal litigation system.

[155] H Kaneko, *Tax Law* (2019) 80.

The purpose of the principle of statute-based taxation is to give citizens protection from arbitrary taxation by tax authorities and assure them of certainty or predictability in taxation. Therefore, from the perspective of tax fairness, this principle would be threatened if tax avoidance was permitted without limits.[156]

The relationship of the principle of statute-based taxation and tax avoidance was addressed by the Japanese Supreme Court in a case involving the Japanese gift tax, which imposed high rates of tax on gifts received by donees domiciled in Japan.[157] However, if a donee did not have his domicile in Japan and the gifted assets were not considered to be located in Japan, the Japanese gift tax would not apply, based on the law at the time of gifting.[158] The donee was a Japanese individual who owned a Japanese consumer finance company. After moving his domicile to Hong Kong, he received a gift of shares in a Dutch company from his parents, which were treated as assets located outside Japan. The Dutch company held the shares of the consumer finance company in Japan. The donee then moved back from Hong Kong. Japanese tax auditors concluded that the donee failed to transfer his domicile from Japan to Hong Kong. They considered not only objective factors (he often returned to Japan during the period) but also subjective factors, in particular his intention to avoid Japanese gift tax. As a result, an assessment of about 204 million US dollars plus penalties was issued. The Supreme Court of Japan decided unanimously in favour of the donee, based on its reading of the definition of the Civil Code concept of domicile,[159] which was a precondition for taxation based on the gift tax. It held that unless there are special reasons for a contrary interpretation, the term domicile means the centre of livelihood where a person has the closest links with his life. It was, therefore, appropriate to determine whether a specific place is a person's domicile according to whether he had objectively created the substance of a centre of livelihood. The Supreme Court concluded that the objective factors indicated the donee had established his domicile in Hong Kong by the time of the gift. Even if there were tax avoidance motives, this did not eliminate the objective substance of his livelihood. The Supreme Court stated that if it were considered inappropriate to allow the avoidance of the gift tax due to long-term absence from Japan, this must be dealt with through legislation because there are limits to interpretation of the law. The court also pointed out that tax reforms implemented in 2000 already contained necessary measures to deal with this issue. It is worth noting that Justice Sudo wrote an extensive supplemental opinion in which he directly referred to Articles 30 and 84 of the Constitution. He noted that Article 84 requires the preconditions for taxation to be set forth in the law and asserted that these preconditions be clearly stated and then strictly interpreted. He argued that it was not acceptable to impose taxes easily by denying tax avoidance through special legal interpretations or special recognition of facts, such as expansive interpretations, interpretations by analogy, or application of the abuse of rights theories, even if no clear basis for taxation was found.[160]

In the aftermath of the case, some argued that it was necessary to introduce GAAR in Japan.[161]

[156] T Nagato, 'A General Anti-Avoidance Rule (GAAR) and the Rule of Law in Japan' (2017) 13(1) *Public Policy Review* 35–70.

[157] Japanese Supreme Court, decision of 18 February 2011 [2011].

[158] After revision in 2002, the Japanese Inheritance and Gift Tax takes into account the nationality of the donee for the determination of the taxable person.

[159] There is no specific definition of 'domicile' in the tax law in Japan.

[160] G Thomas, *Japan: Supreme Court affirms Rule of Law in Japanese Taxation*, www.internationaltaxreview.com/article/b1fbs3bmnst7f9/japan-supreme-court-affirms-rule-of-law-in-japanese-taxation.

[161] H Suzuki, 'Considerations on Denying Tax Avoidance; The Necessity of Introduction of GAAR' (in Japanese) (2018) 94 *The Journal of National Tax College* 17–128; S Motinobu, 'BEPS and Response to Tax Avoidance' (in Japanese) (2016) 126 *Financial Review* 5–16.

4.1.3.4. Europe

4.1.3.4.1. European Union and Council of Europe

The fight against base erosion and profit shifting (BEPS) leads to legal uncertainty in some areas of tax law in the EU. However, the implementation of EU tax directives must be in accordance with the principle of legal certainty and, in principle, not retroactive to the taxpayer's detriment.[162] For instance, in the EU legal system, secondary legislation seems to refer to stricter standards of tolerance of abusive tax practices compared to those reflected the former case law of the Court of Justice of the European Union (CJEU) on fundamental freedoms. On the one hand, the wording of Article 6 of the Anti-Tax Avoidance Directive (ATAD)[163] and similarly drafted direct tax directives mention 'one of the main reasons' as indicative of abusive tax practices. On the other hand, the judicial interpretative trend confines abusive practices to situations where undue tax saving constitutes the essential reason for choosing a transaction. Problems could arise in cases that may be justified in light of genuine reasons, including a tax saving ground among the relevant reasons for choosing a given transaction. Convergence in the form of reconciliatory interpretation might be the best way to reduce the effects of legal uncertainty, which can undermine a predictable tax burden for businesses.

Similar issues of legal uncertainty may arise when combating VAT fraud, which is an extremely serious problem within the EU. According to the CJEU, tax exemptions and deductions are denied when the taxpayer knew or should have reasonably known about the fraudulent scheme or the involvement of a fraudster in the upstream or downstream chain of transactions.[164] From the perspective of legal certainty, risks arise for taxpayers unwittingly involved in such schemes. Mandatory disclosure in line with DAC 6[165] and equivalent additional measures applicable within the EU on VAT matters may reduce the scope for such situations but still do not entirely remove the possible discomfort for third parties not actively – or not at all – participating in the fraudulent scheme. The massive size of VAT fraud explains the adoption of measures that accept some level of indicia. However, it is also true that the combined effect of denied deductions, denied exemptions and the levying of severe sanctions (often also of criminal relevance) should also lead to a questioning of the balanced and proportionate impact of such solution on the rights of persons who may have wanted to genuinely exercise them.

Further notable problems arise in the EU in connection with the recovery of illegal state aid granted through tax rulings and tax legislation. The dramatic increase of such recovery decisions by the European Commission (EC) create an exponential uncertainty for the affected persons, who may have relied in good faith on the obligation to abide by the applicable domestic legislation. Such applicable domestic legislation may become inapplicable ex post facto as violating superior EU Treaty law (the prohibition of state aid[166]). The resulting uncertainty may affect investment decisions and will last until the CJEU reaches final judgments on such matters and clarifies the correct interpretation of EU law. However, this potential risk for legal uncertainty should not prevent action by the EC to secure fair competition and a level playing field within the EU internal market, not least from a tax perspective. In May 2021, the EC tabled a proposal for a Regulation on foreign subsidies distorting the internal market, which aims to address distortive foreign subsidies by non-EU countries, including tax measures.[167]

[162] Constitutional Court of Luxembourg, decision of 22 January 2021, no 00152 [2021].

[163] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (2016) OJ L 193/1.

[164] CJEU, judgments of 6 December 2012, *Bonik*, case C-285/11, ECLI:EU:C:2012:774 [2012], paras 38–40, of 13 February 2014, *Maks Pen*, case C-18/13, ECLI:EU:C:2014:69 [2014], paras 27–28, and of 6 October 2019, *Glencore Agriculture Hungary*, case C-189/18, ECLI:EU:C:2019:861 [2019], para 35.

[165] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic EoI in the field of taxation in relation to reportable cross-border arrangements, (2018) OJ L 139, 1.

[166] Art 107 TFEU.

[167] EC, Proposal for a Regulation on foreign subsidies distorting the internal market, COM(2021) 223 final.

Furthermore, in exceptional circumstances (for example, related to austerity measures during the financial crisis), the European Court of Human Rights (ECtHR) has accepted very wide margins of appreciation for the legislator, concluding that 'the public interest may override the interest of the individual in knowing his or her liabilities in advance, provided that there are specific and compelling reasons for this'.[168] This tolerance even went so far as endorsing retrospective legislation, which limited the repayment of tax after a case was decided in favour of a taxpayer and preventing the effects of such judgment from being invoked by other persons affected by the same legal measure, but who had not instituted legal action.[169]

In some cases, issues of protection of legitimate expectations can also arise in the absence of a legislative change, such as, for instance, when there is a change to the established administrative practice of tax authorities, as previously made public in guidelines, or even a new and unexpected judgment. Legal certainty may even be invoked by states aiming to avoid budgetary repercussions arising from the obligation to make a massive repayment of taxes. Such results can be achieved by exceptionally limiting the temporal effects of a judgment so that it only covers situations *ex nunc*.[170]

4.1.3.4.2. Russia[171]

Under Article 57 of the Russian Constitution, everyone is liable to pay taxes and duties established by law. This constitutional obligation implies that (i) anyone lawfully residing within the territory of the Russian Federation has to pay taxes, including foreign citizens, and (ii) the legislator has exclusive power to design the tax system.

This constitutional provision is unfolded in more detail in the Russian Tax Code, in particular in Article 3. It provides that no one may be obliged to pay taxes, levies or other contributions or payments which have the characteristics of taxes and levies as established in the Tax Code and which are not provided for in the Code, or which are established in a manner other than that prescribed by this Code.

The same article further contains the requirement that when designing taxes, all elements of taxation must be clearly defined. Legislative acts concerning taxes and levies must be formulated in such a way that every person knows precisely which taxes and levies they must pay, and when and how they must pay them (Article 3 § 6 Tax Code).

Article 5 § 2 of the Russian Tax Code prohibits retroactive laws which (i) introduce new taxes or levies, (ii) raise tax rates, (iii) introduce or increase liability for breach of tax legislation and (iv) introduce new obligations or otherwise worsen the situation of taxpayers. The Russian Constitutional Court defined the conditions for introducing such legislative changes: they should ensure the maintenance of citizens' confidence in laws and the state's actions. That implies safeguarding the stability of legal regulation and the unacceptability of making arbitrary changes to existing laws as well as establishing a reasonable transition period. Such period should exclude any contradictory interpretation of the new tax regulations by the law-enforcement agencies.[172]

[168] ECtHR, *Plaisir v The Netherlands*, no 46184/16 (14 November 2017), para 84.

[169] ECtHR, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v the United Kingdom*, nos 21319/93, 21449/93 and 21675/93, (23 October 1997), paras 80-81; for another type of special situation where retroactive tax legislation is justified see ECtHR, *Vegotex International SA/Belgium*, no 49812/09 (10 November 2020), paras 70 and ff.

[170] See inter alia CJEU, judgments of 9 March 2000, *Evangelischer Krankenhausverein Wien*, case C-437/97, ECLI:EU:C:2000:110 [2000], paras 57–59; and of 30 March 2006, *Uudenkaupungin Kaupunki*, case C-184/04, ECLI:EU:C:2006:214 [2006], para 55; moreover, the conditions for limiting the effects of judgments to the future are strict, and normally the CJEU rejects such an approach, *cf* eg CJEU, judgment of 6 March 2007, *Meilicke*, case C-292/04, ECLI:EU:C:2007:132 [2007], paras 32 and ff.

[171] We would like to thank Karina Ponomareva and Natalia Vorobyeva for their contribution.

[172] Constitutional Court of the Russian Federation, judgment of 12 May 2005, no 163-O [2005].

However, the Russian Tax Code allows retroactive application of legislative changes that abolish or reduce liability for breach of tax legislation or introduce additional guarantees for the protection of taxpayers' rights.[173]

4.1.3.5. Oceania[174]

4.1.3.5.1. Australia

The Parliament of Australia is granted the power to make laws with respect to taxation under section 51(ii) of the Constitution, and a law that purports to impose a tax but is not in fact with respect to taxation will be invalid as it will be beyond Parliament's legislative power. The High Court of Australia nominated a number of criteria that represent the usual description of a tax. Taxes are compulsory to raise money for governmental purposes, but they do not constitute a payment for services rendered and are not penalties.[175] A purported tax law that imposes an obligation which does not meet these criteria will be invalid unless it falls within one of the other constitutional heads of power.

The requirement of legal certainty has been applied in the context of tax, again in relation to the constitutional validity of tax legislation:

> For an impost to satisfy the description of a tax it must be possible to differentiate it from an arbitrary exaction and this can only be done by reference to the criteria by which liability to pay the tax is imposed. Not only must it be possible to point to the criteria themselves, but it must be possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner.[176]

Further, an incontestable tax would be invalid:

> under the Constitution liability for tax cannot be imposed upon the subject without leaving open to him some judicial process by which he may show that in truth he was not taxable or not taxable in the sum assessed, that is to say, that an administrative assessment could not be made absolutely conclusive upon him if no recourse to the judicial power were allowed.[177]

The Australian Law Reform Commission (ALRC) recently considered the issue of the impact of retrospective laws on traditional rights and freedoms.[178] Pursuant to the principle of legality, the courts will presume that Parliament did not intend a retrospective change to a civil law unless such an intention is reasonably certain.[179] The ALRC notes that 'the common law does not condemn retrospective civil laws with the vigour reserved for retrospective criminal laws and that retrospective civil laws are reasonably common, particularly in the taxation context'.[180] However, given that the retrospective operation of taxation laws ordinarily relates back to the time of the relevant government announcement, this is unlikely to disappoint legitimate expectations, and the justification for such retrospectivity in the tax area is often based on this earlier notice.[181]

[173] Art 5, para 3 of the Russian Tax Code.
[174] We would like to thank Celeste Black for her contribution.
[175] High Court of Australia, *MacCormick v Federal Commissioner of Taxation*, 158 CLR 622 [1984] 639.
[176] High Court of Australia, *MacCormick v Federal Commissioner of Taxation*, cited 640.
[177] High Court of Australia, *Deputy Federal Commissioner of Taxation v Brown*, 100 CLR 32 [1958] 40 (Dixon J), cited with approval in *MacCormick*, 640.
[178] ALRC, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, Final Report (ALRC Report 129, 2016).
[179] ALRC Report 129, 368 citing High Court of Australia, *Maxwell v Murphy*, 96 CLR 261 [1957].
[180] ALRC Report 129, 362.
[181] ALRC Report 129, 360, 370–1.

As a matter of practice, the Australian Revenue Authority, the Australian Taxation Office (ATO), provides practical guidance as to its approach to the administration of the law between the time of the announced change and when the new law is enacted.[182]

The ATO has an important role to play in providing taxpayer certainty through the provision of tax rulings. Under the tax administration legislation, tax rulings issued by the ATO are binding on the ATO.[183] Through the public ruling system, the ATO provides its interpretation of the taxation laws in the circumstances described in the ruling. Public rulings generally relate to issues that are relevant to broad groups of taxpayers or industries. The tax administration legislation also provides a mechanism for individual taxpayers to apply for a ruling specific to their circumstances, referred to as a private ruling.[184] A taxpayer can object against and thereby directly challenge a private ruling that has been issued to them, but the approach taken by the ATO in a public ruling can only be challenged indirectly through the assessment process. The ATO also offers Advance Pricing Agreements (APAs) that allow taxpayers to mitigate transfer pricing risks through this cooperative compliance approach.[185] Additional guidance and certainty are provided by the ATO's Practical Compliance Guidelines, which outline the ATO's administrative approach to certain issues and how it assesses compliance risk in those contexts.

4.1.3.5.2. New Zealand

There is rich case law by the Supreme Court of New Zealand accompanied by an academic discussion concerning the rule of law and the operation of general anti-tax avoidance clauses. There seems to have been a shift towards more judicial tolerance of the vague anti-abuse clauses from 2009.[186] The main test is whether taxpayers used legal provisions against Parliament's intentions, but the concepts of economic substance versus artificiality are also relevant.

The intention or scheme purpose test by its nature implies some vagueness which the Supreme Court justifies, holding that 'the courts should not strive to create greater certainty than Parliament has chosen to provide'.[187] When considering the corresponding general anti-avoidance provision of the Goods and Services Tax, the Supreme Court stated:

> that uncertainty is inherent where transactions have artificial features combined with advantageous tax consequences not contemplated by the scheme and purpose of the Act'. There will also inevitably be uncertainty whenever a taxing statute contains a general anti-avoidance provision intended to deal with and counteract such artificially favourable transactions. It is simply not possible to meet the objectives

[182] See www.ato.gov.au/General/New-legislation/Administrative-treatment-of-retrospective-legislation/.
[183] Taxation Administration Act 1953 (Cth) sec 357–60.
[184] Taxation Administration Act 1953 (Cth) div 359.
[185] ATO, PS LA 2015/4, *Advance Pricing Arrangements* (2015).
[186] See ss BG 1 and YA 1 of the Income Tax Act 2007 (NZ). Supreme Court of New Zealand, *Glenharrow Holdings Ltd v Commissioner of Inland Revenue*, 2 NZLR 359 (2008) NZSC 116 [2009], no 48; Supreme Court of New Zealand, *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, 2 NZLR 289 [2009]; Supreme Court of New Zealand, *Accent Management Ltd & Ors v Commissioner of Inland Revenue*, 2 NZLR 289 (2009) 24 NZTC 23, 188 (SC) [2009]; Supreme Court of New Zealand, *Penny v Commissioner of Inland Revenue* (2011) NZSC 95 (2010) NZTC 24 [2011]. For a discussion of the impact of the *Ben Nevis* decision, see J Prebble and H McIntosh, 'Predication: The Test for Tax Avoidance in New Zealand from Newton to Ben Nevis' (2015) 46(3) *Victoria University of Wellington Law Review* 1011–34. See also C Atkinson, 'General Anti-avoidance Rules: Exploring the Balance Between the Taxpayer's Need for certainty and the Government's Need to Prevent Tax Avoidance' (2012) 14(1) *Journal of Australian Taxation* 1–56. Justice of the Supreme Court S Glazebrook, *Statutory Interpretation, Tax Avoidance and the Supreme Court: Reconciling the Specific and the General*, Paper prepared for the New Zealand Institute of Chartered Accountants 2013 Tax Conference held in Auckland, (7–9 November 2013); C Jenkins, 'Avoidance: Penny v Commissioner of Inland Revenue' (2011) 17 *Auckland University Law Review* 277 and ff; MA Littlewood, 'Tax Avoidance, the Rule of Law and the New Zealand Supreme Court' (2011) *New Zealand Law* Review 35 and ff.
[187] Supreme Court of New Zealand, *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, cited, para [112].

> of a general anti-avoidance provision by the use, for example, of precise definitions, as may be able to be done where an anti-avoidance provision is directed at a specified type of transaction.[188]

As in other countries, due to the vagueness of the test, the existence (or not) of tax avoidance will depend significantly on the judicial evaluation of parliamentary contemplation.[189]

In order to provide enhanced certainty to taxpayers, a binding rulings system operates in New Zealand. The NZ Inland Revenue (NZ IR) also issues non-binding statements that can relate to interpretation as well as practice and operational matters. In relation to the general anti-avoidance provisions discussed above, the NZ IR is currently working on an updated Interpretation Statement to replace the statement in place, issued in 2013.[190]

Taxpayers can rely on public rulings and can apply for a private ruling specific to their circumstances.[191] Both of these types of rulings are binding on the Commissioner.[192] With effect from October 2019, individuals and smaller businesses can apply for a 'short-process ruling', a type of private ruling issued under an expedited process.[193] The NZ IR may also issue APAs in relation to transfer pricing matters in the form of binding rulings. APAs may be unilateral or bilateral, with most bilateral APAs to date having been developed with Australia.

Another feature of the rule of law particularly relevant in the context of tax is the principle of prospectivity. Retrospective legislation offends the rule of law, but there may be circumstances, as determined by Parliament, where such legislation is still desirable, especially in relation to laws designed to close tax loopholes.[194] New Zealand has enacted specific legislative provisions that prohibit retrospective criminal laws,[195] but the principle of parliamentary sovereignty allows for retrospective legislation in the civilian sphere. That said, there is a presumption against retrospectivity when interpreting statutes.[196]

4.2. Proportionality

4.2.1. The Principle

The principle of proportionality establishes a link between the goals identified and the means chosen to achieve them.[197] This requires that a measure must be suitable to reach its goal,

[188] Supreme Court of New Zealand, *Glenharrow Holdings Ltd v Commissioner of Inland Revenue*, cited, para 48. For an overview of the case law of the Supreme Court of New Zealand, see Justice Glazebrook, 'Statutory Interpretation' (www.courtsofnz.govt.nz/assets/speechpapers/1hjg1t.pdf).

[189] C Elliffe and M Keating, 'Tax Avoidance – Still Waiting for Godot?', (2009) 23(3) *New Zealand Universities Law Review* 368–92, 369; J Cameron, *The Test for Tax Avoidance in New Zealand: A Judicial Sea-Change* (2010) 440 and ff, 458, ssrn.com/abstract=1625604.

[190] NZ IR has issued for public comment a draft interpretation statement PUB00305, which will replace IS 13/01: Tax Avoidance and the Interpretation of section BG 1 and GA 1 of the Income Tax Act 2007 (August 2013).

[191] Part 5A, Tax Administration Act 1994 (NZ).

[192] Ss 91DB and 91EA, Tax Administration Act 1994 (NZ).

[193] Ss 91EK-91ET, Tax Administration Act 1994 (NZ).

[194] For a comprehensive discussion of these and related issues, see J Prebble, R Prebble and C Vidler Smith, 'Legislation with Retrospective Effect, with Particular Relevance to Tax Loopholes and Avoidance' (2006) 22(1) *New Zealand Universities Law Review* 17–49, and J Prebble, R Prebble and C Vidler Smith, 'Retrospective Legislation: Reliance, The Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation' (2006) 22(2) *New Zealand Universities Law Review* 271–99.

[195] Ss 25(g) and 26(1) of the New Zealand Bill of Rights Act 1990 (NZ).

[196] Court of Appeal of New Zealand, *R v Pora*, 2 NZLR 37 [2001]. This presumption is now enshrined in section 7 of Interpretation Act 1999 (NZ).

[197] A Barak, *Proportionality, Constitutional Rights and Their Limitations* (Cambridge, 2012) 132.

necessary for such purpose and not have overkill effects. The three components of this principle have far-reaching implications. Suitability requires an analysis of adequacy to advance a given goal. Necessity has to be taken into account from the perspective of the goal, thus indicating that there is no less intrusive measure that is equally suitable to achieve such a goal. The negative component of the overkill effect relies on the absence of collateral undesired, undesirable, disproportionate effects.

In other words, the principle of proportionality establishes a requirement for a rational and reasonable exercise of state powers.[198] A proportionate exercise of taxing powers can limit the impact of taxation on the legal sphere of the affected persons to those measures which are suitable and necessary to pursue legitimate goals and do not produce a further impact on the exercise of the rights of the affected persons.

The application of this principle to presumptions, frequently used in tax matters, can be of particular importance for excluding, on the one hand, the irrefutable ones,[199] and for also questioning the validity of rebuttable presumptions and the reversal of the burden of proof, when the latter presumptions are not based on a sufficient rule of experience that justifies their usage.[200]

The principle of proportionality applies not only to the imposition of direct and indirect taxation[201] but also to how taxes may be levied. In other words, the principle of proportionality constitutes a guarantee of the protection of taxpayers' rights in respect of procedural and substantive tax rules, as well as of penalties levied in case of violations of such rules. The application to tax procedures means that tax authorities can only exercise their powers to the extent required for the purpose of achieving the legitimate goal of levying taxes.

In the framework of cross-border tax procedures, the right to a hearing read together with the principle of proportionality could be invoked to question the validity of the exclusion of taxpayers from mutual agreement procedures and international tax arbitration.[202]

As for sanctions, there should be a difference between the reaction to open violations of the law (fraud, evasion) and the practices that frustrate its spirit (abusive practices). Legal certainty particularly matters in the area of sanctions. For such reasons, a proportionate reaction to abusive practices should not necessarily include the levying of penalties, but only in the presence of specific circumstances established by law that reflect a serious problem.

As for the impact on substantive tax measures, problems of proportionality may arise in connection with how automatic exchange of information (AEoI) operates and affects the data protection of the taxpayers. Although, in principle, we support full transparency towards tax

[198] E Crawford, 'Proportionality', in *Max Planck Encyclopedia of Public International Law* (2011).

[199] CJEU, judgment of 18 December 1997, *Garage Molenheide Others v Belgische Staat*, joined cases C-286/94, C-340/95, C-401/95 and 47/96, ECLI:EU:C:1997:623 [1997].

[200] CJEU, judgment of 28 October 1999, *Bent Vestergaard*, case C-55/98, ECLI:EU:C:1999:533 [1999], in which the use of the rebuttable presumption was combined with discriminatory features and the more severe measure in cross-border situations was not related to a higher risk of non-compliance.

[201] *cf* German Federal Constitutional Court, order of 18 January 2006, 2 BvR 2194/99, ECLI:DE:BVerfG:2006:rs 20060118.2bvr219499 [2006], (*Halbteilungsgrundsatz*); CJEU, judgments of 13 December 2005, *Marks & Spencer*, case C-446/03, ECLI:EU:C:2005:763 [2005], paras 53 and ff (right to export so-called final losses); of 15 September 2016, *Senatex*, case C-518/14, ECLI:EU:C:2016:691 [2016], paras 41 and ff (substance over form approach in VAT law); *cf* also A Mudrecki, *The Principle of Proportionality in Value Added Tax, with References to Polish Constitutional and Administrative Jurisprudence*, DOI 10.15290/*oolscprepi*.2018.46 (2018); A Mudrecki, 'Impact of the Principle of Proportionality in Tax Law on the Jurisprudence of the Court of Justice of the European Union and the Supreme Administrative Court in Poland' (2018) 3 *Public Governance, Administration and Finances Law Review* 46 and ff; J F Pinto Nogueira, 'Direito Fiscal Europeu – O Paradigma da Proporcionalidade' (Coimbra, 2010).

[202] See further under sec 6.3.1.2 and 6.3.2 below.

authorities, we also think that this standard should only operate in the presence of adequate protection of the data.

4.2.2. Its Application in Different Regions

4.2.2.1. Africa[203]

Out of the 55 African countries surveyed, the written Constitutions of eight countries expressly refer to the possibility that laws may be enacted to limit fundamental human rights but only to the extent that the limits will be proportional.

The limitation clause found in South Africa's Constitution is like those found in neighbouring countries such as Namibia[204] and Zimbabwe.[205] It is the most elaborate articulation of the proportionality principle and determines that:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> a. the nature of the right;
> b. the importance of the purpose of the limitation;
> c. the nature and extent of the limitation;
> d. the relation between the limitation and its purpose; and
> e. less restrictive means to achieve the purpose.[206]

Proportionality as a general principle of international law,[207] even when not expressly acknowledged in a written Constitution, can still be brought into operation provided that international law is recognised as part of the law of a country.[208] The fact that only a few African Constitutions contain explicit proportionality clauses[209] should, therefore, not be understood to mean that the principle of proportionality does not enjoy wide recognition in Africa.

[203] We would like to thank Johann Hattingh for his contribution.

[204] Art 22 of the Namibian Constitution, 1990, as amended through 2014 (www.lac.org.na/laws/annoSTAT/Namibian%20Constitution.pdf).

[205] Art 86 of the Constitution of Zimbabwe Amendment, 2013 (www.parlzim.gov.zw/component/k2/download/1290_da9279a81557040d47c3a2c27012f6e1).

[206] S 36 of the Constitution of the Republic of South Africa, 1996.

[207] See ICJ, *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, cited; ICJ, *Case Concerning the United States Diplomatic and Consular Staff in Tehran* [1980]; ICJ, *Eletronica Sicula*, Rep 1989 [1989], 76; PCIJ, *Minority Schools in Albania* (Advisory Opinion), PCIJ Rep Series A/B, n 64 [1935], 19; and generally JD Rolim, *Proportionality and Fair Taxation* (Kluwer, 2014).

[208] See sec 2.3.1. above on the general status and recognition of international law under the Constitutions and legal systems of African countries.

[209] Explicit proportionality clauses can only be found in the following African Constitutions: art 57 of the Constitution of the Republic of Angola, 2010 (www.extwprlegs1.fao.org/docs/pdf/ang72591ENG.pdf); art 24 of the Constitution of Kenya, 2010 (www.wipo.int/edocs/lexdocs/laws/en/ke/ke019en.pdf and see also Treaty Making and Ratification Act, 45 of 2012); art 44 of the Constitution of the Republic of Malawi, 1994 (www.publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Malawi_Constitution_1994_(as%20amended)_en.pdf); art 22 of the Namibian Constitution, 1990, as amended through 2014 (www.lac.org.na/laws/annoSTAT/Namibian%20Constitution.pdf); art 45 of the Constitution of the Federal Republic of Nigeria 1999 (www.wipo.int/edocs/lexdocs/laws/en/ng/ng014en.pdf and see also Treaties (Making Procedure Etc.) Act of 2004; s 36 of the Constitution of the Republic of South Africa, 1996 (www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf); art 43 of the Constitution of Uganda, 1995 (www.ilo.org/dyn/natlex/docs/ELECTRONIC/44038/90491/F206329993/UGA44038.pdf); and art 86 of the Constitution of Zimbabwe Amendment of 2013 (www.parlzim.gov.zw/component/k2/download/1290_da9279a81557040d47c3a2c27012f6e1).

4.2.2.2. Americas

4.2.2.2.1. The Inter-American System for the Protection of Human Rights

There is ample case law of the Inter-American Court of Human Rights on the proportionality of sanctions, including defamation charges imposed on journalists[210] and lawyers' fees,[211] but there is less case law regarding the proportionality of the tax burden.

Any interference must comply with the following requirements to conform with the American Convention. First, it must be established by law; second, it must have a legitimate purpose and third, it must be appropriate, necessary and proportionate. Consequently, the absence of any of these requirements implies that the interference is contrary to the Convention.[212] The first requirement of legality is particularly relevant for taxation. It means that the general conditions and circumstances under which a restriction to the exercise of a specific human right is authorised must be clearly established by law.[213] The norm laying down the restriction must be a law in the formal and substantial sense.[214]

4.2.2.2.2. Latin America

4.2.2.2.2.1. Argentina[215]

The principle of tax proportionality is implicitly provided for in Articles 4 and 17 of the Argentine Constitution. This principle establishes that the tax burden must be proportional in light of quantitative and qualitative elements.

Two representative examples of the scope of the proportionality principle are the following. First, according to the jurisprudence of the Argentine Supreme Court in the leading case *Fundación Navarro Viola*, the state must establish income taxes taking into account the taxpayers' ability to pay. Laws cannot tax wealth that has ceased to exist. This would violate the ability-to-pay principle, as the claimant does not possess the financial asset that the tax in question was intended to tax as it had been donated to a third party before the law under examination entered into force.[216]

Second, the Argentine Supreme Court held that tax confiscation is an example of a lack of proportionality. It implies a takeover by the state of a substantial portion of the taxpayer's income. An objective test established by the Argentine Supreme Court of when the application of tax results in the confiscation of property is when the effective income tax rate is equal to or higher than 62 per cent.[217]

[210] eg IACHR, judgment of 2 July 2004, *Herrera-Ulloa v Costa Rica* [2004], nos 123 and ff; of 31 August 2004, *Ricardo v Paraguay* [2004], nos 95 and ff; of 2 May 2008, *Kimel v Argentina* [2008], nos 83 and ff; of 20 November 2009, *Usón Ramírez v Venezuela* [2009], nos 46 and ff.

[211] IACHR, judgment of 28 November 2002, *Cantos v Argentina* [2002], www.worldcourtp.com/iacthr/eng/decisions/202.11.2028_Cantos_v_Argentina.pdf.

[212] IACHR, judgment of 6 July 2009, *Escher et al v Brazil*, [2009], nos 129 and ff.

[213] Art 30 of the American Convention establishes: 'The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.'

[214] *cf* IACHR, advisory opinion of 9 May 1986 – OC-6/86 [1986], 27 and 32 – The Word 'Laws' in art 30 of the American Convention on Human Rights, Series A no 6; IACHR, judgment of 27 January 2009, *Tristán Donoso v Panama*, no 77, preliminary objection, merits, reparations and costs, Series C no 193 [2009].

[215] We would like to thank Eduardo A Baistrocchi for his contribution.

[216] Argentine Supreme Court, *Navarro Viola de Herrera Vegas, Marta v Dirección General Impositiva s/ Repetición*, judgment: 319:1500 [1989].

[217] Argentine Supreme Court, *Candy S.A. c/ AFIP y otro s/ acción de amparo*, judgment: 332:1572 [2009].

4.2.2.2.2.2. Brazil[218]

The principle of proportionality is a four-phase test, in which a negative answer given in one phase prevents the interpreter from continuing with it. Regarding its structure, firstly, we ask about the end/purpose of the analysed norm and its compatibility with the legal system; secondly, we ask about its suitability, that is, whether the norm concretely stimulates or concretises this end; thirdly, we ask about its necessity: this is a comparative analysis in which the norm is compared with another possible means that equally (or even more) stimulates or concretises this end, but is less restrictive to the fundamental right; fourthly, we ask about the proportionality *stricto sensu*, in which we balance the conflicting norms according to their legal relevance and factual effects. Depending on the intensity of the application of the principle of proportionality, it is a more or less intense interference by the judicial arm with the power of the legislative or executive.

The Brazilian courts largely apply, implicitly or explicitly, the principle of proportionality. The Supreme Federal Court, especially, does so in its control of restrictions to fundamental rights.[219] Nevertheless, the justices normally do not clarify the arguments employed to justify the conclusion about it, limiting themselves with propositions like 'it is proportionate' or 'it is disproportionate'. This, however, is incompatible with the structure and even *ratio* of this principle, which also works as a way to measure the weight of norms in a specific conflict as a way to bring transparency (and awareness) to legal reasoning.

Thus, it is not clear whether the Brazilian Federal Supreme Court intensively uses the principle of proportionality. There is no clarity in the arguments employed during its application. In the light of the principle of separation of powers, however, a less intense application of the principle of proportionality is recommended to maintain the balance between these powers and guarantee that just in case of (1) clear unconstitutionality of the end/purpose, (2) clear unsuitability of the norm to stimulate/concretise the end, (3) a clearly better way to do it and/or (4) if there is a serious restriction to a fundamental right, the norm is declared unconstitutional once disproportionate.

Moreover, it can be argued that the application of this principle should not occur in every case, particularly in tax matters. It should be emphasised that the Brazilian constitutional tax system is based on constitutional prescriptions,[220] not leaving much space for sub-constitutional legislators' innovation. The constituents in these cases already balanced the potentially conflicting norms, establishing the prevalence of the constitutional rules. This does not mean that there is no margin of discretion on the level of interpretation. However, the principle of proportionality should be restricted to regulatory tax norms.[221]

4.2.2.2.2.3. Chile[222]

The principle of tax proportionality is established in Article 19 N°20 of the Chilean Constitution. It states: 'In no case can the law establish manifestly disproportionate or unjust taxes'.

The principle of proportionality implies that the tax charge has to be adequate, reasonable to the asset or activity affected by it, considering quantitative factors or elements to verify such

[218] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[219] See Supreme Federal Court of Brazil, extraordinary appeal of 1 December 2010, no 405579/PR [2010], direct action of unconstitutionality of 10 April 2013, no 2588/DF [2013] and extraordinary appeal of 10 April 2013, no 541090/SC [2013], extraordinary appeal of 22 May 2013, no 550769/RJ [2013], direct actions of unconstitutionality of 24 February 2016, nos 2390/DF, 2386/DF, 2397/DF and 2859/DF [2016], and extraordinary appeals of 24 February 2016, nos 389808/PR and 601314/SP [2016].

[220] See sec 2.3.2.2.2 above.

[221] See H Ávila, *Proporcionalidade e Direito Tributário* (2003).

[222] We would like to thank Yuri Varela for his contribution.

reasonability.[223] But furthermore, the Chilean Constitution demands that the tax – in order to violate such principle – be manifestly disproportionate, that is, that the lack of adequation between the encumbrance and the asset or activity affected by it shall appear manifestly, in an evident or almost crude manner.

Regarding the principle of proportionality, the Constitutional Court of Chile decided that trials on manifestly disproportionate or unjust taxes are 'eminently of value' and shall be 'weighed according to the taxpayer's ability to pay and not in relation to the previous amount of the tax being modified'.[224] Therefore, drastic tax increases are not excluded. The Constitutional Court further stated that the legislator is merely limited by the Constitution. Such constitutional prohibition only attempts to prevent 'tax disproportions and injustices that surpass all limits within the reasonable and prudent'. For a requirement to be accepted, the 'disproportion or injustice must be as evident that, regardless the facts, it is clear and glaring'.[225]

4.2.2.2.2.4. Colombia

4.2.2.2.2.4.1. The Discretionary Powers of Law making and their Limits The legislator has a wide margin to regulate income tax, but this margin is not absolute. Among the limitations to the legislator's taxing power are equity, justice, and progressiveness. When these principles conflict with others, that collision must be settled according to criteria of reasonableness. While the legislator may determine the defining elements of a tax and, therefore, for example, consider the dividends as income subject to income tax, he must also observe the principles governing the tax system and respect the other constitutional provisions.[226] The justification for a tax always has to include criteria that allow the reasonableness of the measure to be identified, along with its suitability to pursue the ends established in the Constitution and its effectiveness of acting in that way and no other. The tool used to decide whether or not a measure violates the principle of tax equity is the reasonableness or proportionality test, by means of which the following are studied: (i) the end sought by the legislator when establishing the tax has been studied, (ii) the means used for that end and (iii) the relationship between the means and the end. The analysis of equity has shown specific features derived from the regulatory content examined in each specific case and also the conceptual relationship with the principle of tax justice. The latter principle serves as a synthesis of all constitutional requirements that frame the exercise of the state's tax power. For this reason, case law has specified the method and admitted different levels of intensity that take into account these particularities and allow for a comprehensive study of the tax rules.

The Colombian Constitutional Court has thus used the reasonableness or proportionality test to verify whether or not a tax rule violates the principles of tax equity and the principle of equality. However, the intensity of the scrutiny differs in each case. As a general rule, a mild proportionality test has been used to assess the constitutionality of legislative measures in economic, tax or international policy matters.[227] However, an intermediate test has been used when there is a possibility of inequity or arbitrariness in the rule charged. Exceptionally, the Court has used a strict proportionality test to evaluate tax amnesties, as these involve differential treatment between taxpayers who are in the same factual situation, which may lead to a violation of the right to equality and

[223] Supreme Court of Chile, ruling of 28 January 1992, case 16293/92 [1992]; *cf* also MA Fernández, 'Principios Constitucionales do Proporcionalidad y Justicem Materia Tributaria' (2000) 27 *Revista Chileno de Derecho* 357 and ff.

[224] Chilean Constitutional Court, decision of 6 December 1994, case 203/94 [1994].

[225] Chilean Constitutional Court, judgment of 20 October 1998, case 280/98 [1998].

[226] Constitutional Court of Colombia, case C-129/18, cited, no 28 – dividend taxation.

[227] Constitutional Court of Colombia, judgments of 17 May 2017, case C-333 [2017], and 28 June 2001, case C-673 [2001].

the principles of tax justice and equity that govern the tax system, thus affecting the fair order. The Colombian Constitutional Court explains the applicable standards each time.[228] This is important, as a low level of scrutiny usually leads to an upholding of the law, whereas strict scrutiny may easily lead to a finding of unconstitutionality. Modifying the choice of a particular standard of judicial scrutiny thus contributes to the transparency of decision-making.

In light of the separation of powers between the legislator and the courts, the Colombian Constitutional Court has developed those three standards of judicial scrutiny: low, strict and intermediate, which will be illustrated in the following.

4.2.2.2.2.4.2. Strict Judicial Scrutiny for Tax Amnesties The Colombian Constitutional Court generally applies strict scrutiny to tax amnesties. These compromise, prima facie, the principles of equality, equity and tax justice since the incentives provided to taxpayers who fail to keep up with their tax obligations could end up unbalancing the equitable distribution of public burdens, to the detriment of those who have fully and timeously met their obligations. This situation would lead to unequal treatment of persons with the same economic capacity.[229] Nevertheless, tax amnesties sometimes pass that more intensive judicial scrutiny.[230] The Colombian Constitutional Court sees both sides of the coin, discussing their disadvantages and advantages instead of just deferring to the legislator:

> If amnesties allow valuable tax policy objectives to be achieved in the short term, insofar as they facilitate collection and broaden the tax base without incurring the costs generated by control and sanction mechanisms, when they become a constant practice they may discourage taxpayers from complying with their tax obligations in time, in the expectation of waiting until the next amnesty and thus benefiting from a more lenient tax treatment than that provided to those who comply.[231]

Like other courts around the globe, the Constitutional Court of Colombia uses OECD material and recognises the importance of fighting BEPS in the process of the constitutional balancing of legal certainty and equity on the one hand and effective tax collection on the other. Sometimes, fiscal amnesties or anti-avoidance laws pass that Court's strict scrutiny test under the heading of combating tax avoidance; sometimes they do not,[232] but amnesties will only be permitted after a strict and detailed proportionality test.

4.2.2.2.2.4.3. Intermediate Scrutiny in Case of Potential Inequity On other occasions, the Constitutional Court has used an intermediate test when there is an 'indication of inequity or arbitrariness'[233] and a fundamental right is not affected. For example, it declared a rule conditionally constitutional that provided for a tax exemption for court judges, and not for the auxiliary judges of the Constitutional Court, the Supreme Court of Justice, the Council of State and the Superior Council of the Judiciary, nor the judges of the Sectional Councils of the Judiciary, even though all were historically on the same level or in the same factual situation. On that occasion, the Plenary Chamber of the Constitutional Court established that this exemption should be extended to those mentioned last, as this was required by the principle of horizontal equity.[234]

[228] *cf* eg Constitutional Court of Colombia, case C-129/18, cited, nos 45 and ff – dividend taxation.

[229] Constitutional Court of Colombia, judgment of 7 June 2019, case C-60 [2019]; but see judgment of 26 August 2015, case C-551 [2015] – a tax law may pass the strict scrutiny test in a specific situation.

[230] *cf* eg Constitutional Court of Colombia, case C-551/15, cited – a tax law may pass the strict scrutiny test in a specific situation.

[231] Constitutional Court of Colombia, judgment of 2 December 2015, case C-743 [2015].

[232] eg Constitutional Court of Colombia, judgment of 20 November 2013, case C-833 [2013].

[233] Constitutional Court of Colombia, judgments of 6 May 1998, case C-183 [1998], 4 December 2002, case C-1074 [2002] and 20 October 2009, case C-748 [2009], among others, cited by Constitutional Court of Colombia, case C-333/17, cited.

[234] Constitutional Court of Colombia, case C-748/09 cited.

Many more examples can be given,[235] including in the field of VAT. Thus, the Constitutional Court of Colombia has also declared a rule granting an exclusion from VAT on the sale of a financial service, without any reason why services of a similar nature should not also be covered by that benefit, to be unconstitutional.[236]

4.2.2.2.2.4.4. Low Scrutiny as the Regular Standard Where there is neither a tax amnesty nor indication of inequity or arbitrariness, a low level of scrutiny or a rational basis test applies (proportionality light[237]). Thus, the Court decided on a rule that limited the tax recognition of costs, deductions, liabilities and discounted taxes paid in cash. The Court considered that the legislature did not infringe tax equity when it limited the tax recognition of costs, deductions, liabilities and deductible taxes paid in cash, and instead gave full tax recognition to those paid by the means established in the rule, other than cash, among which banking means were predominant. In the Court's view, this regulation was in line with the principle of equity for the following reasons: (i) taxpayers were, in principle, given the opportunity to enter the financial system voluntarily, (ii) they were given time to do so, (iii) the costs involved in the use of financial products and services tended to be partially dismantled, and those that remained could be managed in a weighted manner, (iv) the rule pursued a constitutionally valid purpose and was effective in achieving it and (v) the realisation of that purpose made it possible to improve tax collection.[238] Many more examples can be given here too.[239] For example, the Constitutional Court also used a light proportionality test to study provisions of a law, which excluded from the possibility of applying for a refund or offsetting of balances in favour of all those persons responsible for sales tax who were not exporters, producers of exempt goods, or subject to withholding tax. The Court established that the existence of an objective and sufficient reason justifying the different tax treatment was enough. It determined: (i) whether the purpose sought by the rule in establishing the said difference in treatment was legitimate, (ii) whether the means employed were not expressly prohibited and (iii) whether the means were adequate to achieve the purpose sought. On the basis of this test, it concluded that the accused rules aimed at a legitimate end by stimulating the production or provision of goods or services considered to have priority. Similarly, they did not infringe the principle of tax equity, since

> the challenged norms foresaw that for certain identifiable groups, the permanent and unavoidable causation of balances in favour justified exceptionally allowing their return or compensation given the economic stimulus purposes that guided the legislator's decision to create an exception to the prohibition of the use of such mechanisms.[240]

4.2.2.2.2.5. Peru[241]

Article 200 of the Peruvian Constitution provides for the principle of proportionality. The Peruvian Constitutional Court has held[242] that this principle cannot be limited in its application but rather constitutes a general principle applicable to all areas of the law.

[235] References in Constitutional Court of Colombia, case C-129/18, cited, nos 35 and ff – dividend taxation, eg to Constitutional Court of Colombia, case C-183/98, cited.

[236] Constitutional Court of Colombia, judgment of 9 August 1995, case C-349 [1995].

[237] Constitutional Court of Colombia, case C-129/18, cited, no 38 – anti-tax avoidance legislation.

[238] Constitutional Court of Colombia, judgment of 24 April 2013, case C-249 [2013].

[239] eg Constitutional Court of Colombia, judgment of 14 March 2012, case C-198 [2012].

[240] Constitutional Court of Colombia, judgment of 2 December 2003, case C-1149 [2003] quoted by Constitutional Court of Colombia, case C-129/18, cited, no 38 – dividend taxation, extensive overview on proportionality as applied to tax legislation in the latter judgment nos 35 and ff.

[241] We would like to thank Cecilia Delgado Ratto for her contribution.

[242] Peruvian Constitutional Court, judgment no 0010-2000-AI/TC [2000].

According to the Peruvian Constitutional Court, the principle of proportionality contains the following three sub-principles:

- Suitability: the established measure must be adequate to contribute to obtaining the legitimate purpose that it seeks to obtain or protect;
- Necessity: there must be no other alternative means that, being more benign in relation to the rights of the affected party, shows the same suitability to reach the constitutional goal sought; and
- Proportionality in the strict sense: the degree of intensity of the measure must be equivalent to the legitimate purpose that it seeks to achieve.

Compliance with these sub-principles must be analysed when determining the proportionality of a specific measure with respect to the affectation of the rights of private parties in what is called the proportionality test.[243]

With regard to tax matters, the Peruvian Constitutional Court has, for instance, applied the principle of proportionality to determine whether the intensity of the tax burden imposed on taxpayers is reasonable when deciding upon the constitutionality of the Net Assets Tax.[244] Furthermore, it applied the principle of proportionality to verify whether tax penalties imposed on taxpayers by municipal tax administration are reasonable.[245] Finally, the Peruvian Constitutional Court analysed whether the special VAT withholding regime for imports was proportional or violated taxpayers' rights.[246]

4.2.2.2.3. The Caribbean[247]

The doctrine of proportionality applies to all civil litigation pursuant to various updated court rules in respect of Trinidad and Tobago and the wider Anglophone Caribbean region. This is part of the general civil jurisdiction[248] to dispose of cases expeditiously having regard to the use of alternative dispute resolution and appropriate case management so as to reduce the issues which are not supported evidentially as well as dealing with cases justly having regard to existing cases so that a particular civil case does not take up a disproportionate amount of judicial resources.

As far as we are aware, there is, however, no specific application of this doctrine to tax cases as opposed to general civil cases. There is, therefore, no general judicial recognition of the principle of proportionality in the Caribbean region in terms of ascertaining the capacity of taxpayers to meet their obligations to the state or to apply means testing to the ability to pay.

4.2.2.2.4. United States[249]

The application of tax penalties – both civil and criminal – may run into proportionality issues if seen as so draconian as to run afoul of the Constitution's Eighth Amendment prohibition

[243] Peruvian Constitutional Court, judgments no 2192-2004-AA/TC [2004], no 3567-2005-AA/TC [2005], no 760-2004-AA/TC [2004], no 2868-2004-AA/TC [2004], no 090-2004-AA/TC and no 3778-2004-AA/TC [2004].
[244] Peruvian Constitutional Court, judgment no 03797-2006-PA/TC [2006].
[245] Peruvian Constitutional Court, judgment no 01767-2007-AA/TC [2007].
[246] Peruvian Constitutional Court, judgment no 06089-2006-AA/TC [2006].
[247] We would like to thank Anthony Gafoor for his contribution.
[248] eg Civil Proceedings Rules 1998 Trinidad and Tobago, as amended.
[249] We would like to thank Jeremiah Coder for his contribution.

on excessive fines. In *United States v Bajakajian*, the Supreme Court struck down forfeiture of $ 357 144 for violation of a mere reporting obligation without resulting harm for the public purpose. This was considered grossly disproportional and a violation of the Eighth Amendment's prohibition on excessive fines. Proportionality is central to the excessiveness inquiry of the Excessive Fine Clause.[250] However, that was the first time the US Supreme Court struck down a fine as excessive under the Eighth Amendment.[251] The *Bajakajian* case has generally resulted in courts looking at a two-step process to determine if a tax penalty is unconstitutional: (1) whether the penalty provision constitutes punishment for an offence, and (2) whether the punishment is grossly disproportional to the gravity of the offence. If these two criteria are met, then the penalty at issue may be viewed as unconstitutional. However, although raised by taxpayers in numerous civil cases seeking to characterise a tax penalty as grossly disproportionate, courts generally have found civil tax penalties to survive scrutiny.[252]

The principle of proportionality also applies when imposing the burden of proof on litigants. In tax cases, an IRS notice of deficiency is presumed correct,[253] placing the burden on the taxpayer to demonstrate otherwise. However, IRC section 7491(a)(1) allows for burden shifting. Accordingly, when a 'taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer …, the Secretary shall have the burden of proof with respect to such issue'. The IRS also carries the burden of proof regarding all asserted penalties.[254]

4.2.2.3. Asia

4.2.2.3.1. China[255]

The principle of proportionality is used in designing the punishment regimes for non-compliance with tax laws in China. Administrative fines and surcharges shall be imposed on taxpayers based on the amounts of unpaid taxes, and criminal liabilities will occur when the amounts of unpaid taxes reach certain thresholds.[256] The tax authorities shall take into account the taxpayers' non-compliance behaviours, the amounts involved, purpose and intentions, as well as the taxpayers' attitude with regard to the investigation and punishments.[257] In contrast, for tax avoidance activities under investigations by the four Specific Anti-Avoidance Rules (SAAR) and one GAAR, taxpayers do not face any criminal or administrative penalties but shall pay taxes according to the tax adjustments conducted by Chinese tax authorities on the basis of the economic substance of the arrangements.[258]

[250] US Supreme Court, *dissent Kennedy, Chief Justice Rehnquist and Scalia*, 524 US 321 [1998] 334 ('The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish').

[251] *cf* US Supreme Court, *dissent Kennedy, Chief Justice Rehnquist and Scalia*, cited 344 and ff.

[252] See eg US Tax Court, *Thompson v Commissioner*, 148 TC no 3 [2017].

[253] US Supreme Court, *United States v Janis*, 428 US 433, 440 [1976]; Tax Court Rule 142(a).

[254] IRC sec 7491(c).

[255] We would like to thank Na Li for her contribution.

[256] Ch 5, Tax Collection Administration Law of the People's Republic of China, promulgated by the National People's Congress on 4 September 1992, and latest amended on 24 April 2015.

[257] The State Administration of Taxation, SAT Notice on Further Improving Work on Investigating Non-compliance Cases (Shui Zong Fa no 30 [2017]).

[258] Ch 6 of the Enterprise Income Tax Law of the People's Republic of China, promulgated by the National People's Congress on 16 March 2007 with effect from 1 January 2008.

4.2.2.3.2. India[259]

In India, any state action resulting in the infringement of a fundamental right may be justified only if it is proportional. As explained by the Indian Supreme Court, the following needs to be demonstrated for the test of proportionality: (a) the measure adopted by the state is for a proper purpose, (b) the measure adopted is rationally connected to the purpose sought to be fulfilled, (c) there are no alternative and less intrusive measures available to the state for achieving the same purpose with a lesser degree of limitation and (d) there is a proper relation between the importance of achieving the aim and the social importance of preventing the limitation on the constitutional right.[260]

Most recently, in a case concerning '*Aadhaar*', the unique biometric identification number introduced in 2009, the Indian Supreme Court, while upholding the right to privacy within the right to life of individuals, reiterated the test of proportionality and held that the standard of judicial review for testing any violation of the right was determined by the test of proportionality. The Indian Supreme Court slightly reformulated the four limbs of the test in the following manner: (a) the measure restricting a right must serve a legitimate goal (legitimate goal stage), (b) the measure must be a suitable means of furthering the goal (suitability or rational connection stage), (c) there must not be any less restrictive but equally effective alternative (necessity stage) and (d) the measure must not have a disproportionate impact on the right holder (balancing stage).[261]

In these last two stages, one sees that the Indian Supreme Court is required to judge the efficacy of any alternatives available to the state and whether the adopted measure has a disproportionate impact on the individual. In the right to privacy judgment,[262] this test was also applied in the specific context of taxpayers. The Indian Supreme Court had to decide whether section 139AA of the Indian Income Tax Act, 1961 mandating linkage of the 'Permanent Account Number' with the '*Aadhaar*' for filing tax returns was proportional. Despite arguments that the linkage was against the right to privacy, the Indian Supreme Court held that the measure was proportional as it was perceived to be the best method to tackle tax evasion, black money, money laundering, etc.

4.2.2.3.3. Israel[263]

The principle of proportionality became one of the most important principles of the Israeli legal system in all fields after the enactment of the Basic Law Human Dignity and Liberty (1992) and the Basic Law Freedom of Occupation (1994), which constitute the Bill of Rights. Since the Constituent Assembly and the First Knesset were unable to put a Constitution together, the Knesset, as a Constituent Authority, started to legislate basic laws on various subjects. After all the basic laws are enacted, they will constitute, together with an appropriate introduction and several general rulings, the Constitution of the State of Israel. The Israeli Bill of Rights includes several rights, and the most relevant ones in the context of taxpayer rights include freedom of occupation, dignity, equality, property and privacy. According to Article 8 of the Basic Law Human Dignity and Liberty,

> there shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such Law.

[259] We would like to thank Ashrita Prasad Kotha for her contribution.
[260] Supreme Court of India, judgment of 2 May 2016, *Modern Dental College v State of Madhya Pradesh*, reported in (2016) 7 SCC 353 [2016].
[261] Supreme Court of India, judgment of 26 September 2018, *KS Puttaswamy (Retd) v Union of India*, Writ Petition Civil no 494/12 [2018].
[262] Supreme Court of India, *KS Puttaswamy (Retd) v Union of India*, cited.
[263] We would like to thank Azam Rifat for his contribution.

This limitation clause, and the similar limitation clause in Article 4 of the Basic Law Freedom of Occupation, set proportionality as the main criterion in examining the constitutionality of tax legislation and any other legislation.

The Israeli Supreme Court, in an unorthodox 'constitutional revolution', awarded constitutional status to these basic laws while also establishing its own power of judicial review by the invalidation of unconstitutional legislation.[264] The judicial review consists of three stages: (1) the court examines whether the law infringes constitutional rights, (2) the court determines whether the infringement fulfils the limitation clause and (3) the court grants the appropriate remedy if the law is unconstitutional.[265] Accordingly, since the *Mizrahi Bank* case,[266] the Israeli Supreme Court has played a particularly dominant role in constructing fundamental constitutional concepts, and the proportionality concept in particular.

The meaning and scope of proportionality in Israel have developed substantially with the dominant influence of the German understanding of proportionality. The Israeli Supreme Court followed the three sub-tests of proportionality, which require that state action serving an appropriate purpose, including taxation: (1) has a rational connection between the means and the ends, (2) the means are necessary and there is no alternative measure that may achieve the same end with a less onerous limitation of the right and (3) a balancing of the benefits to the purpose of the measure and the detriments of the limitation of the right.[267] The Supreme Court of Israel has applied the principle of proportionality to hold that any government action that limits human rights must be proportional to the detriment to human rights; in other words, 'a decision of an administrative authority must reach a reasonable balance between communal needs and the damage done to the individual'.[268]

Legislation is viewed as serving an appropriate purpose under the limitation clause if the legislation reflects an intention to achieve important public aims. Similarly appropriate would be legislation designed to promote human rights, including by determining a reasonable and fair balance between rights of individuals who have contradictory interests, in a manner that will lead to a reasonable compromise by granting optimal rights to every individual.[269] The objectives of increasing international cooperation to combat tax evasion by establishing mechanisms for transparency and information exchange are appropriate objectives for evaluating Israeli legislation implementing the US Foreign Account Tax Compliant Act (FATCA). Ensuring compliance with FATCA is essential to prevent the imposition of sanctions on financial institutions in Israel under FATCA's provisions.[270] An additional objective of such legislation is to enable the State of Israel to take part in the automatic information exchange among countries to fight tax evasion and comply with the OECD Protocol on this issue. The Amendment Law would enable Israeli tax authorities to receive information from US tax authorities on taxable income gained by US

[264] Israeli Supreme Court, judgment of 9 November 1995, *United Mizrahi Bank v Migdal Cooperative Village*, CA 6821/93 [1995], www.versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-bank.

[265] Israeli Supreme Court, judgment of 16 May 2005, *Kaniel v The Government of Israel (Minister of Finance)*, HCJ 9333/03 [2005].

[266] Israeli Supreme Court, judgment of 9 November 1995, *United Mizrahi Bank v Migdal Cooperative Village*, CA 6821/93 [1995].

[267] See A Barak, *Proportionality* 175–210.

[268] Israeli Supreme Court, judgment of 30 June 2004, *Beit Sourik Village Council v The Government of Israel*, HCJ 2056/04 [2004] 1, 23.

[269] Israeli Supreme Court, judgment of 2 January 2018, *Foreign Republicans in Israel v the Government of Israel*, HCJ 8886/15 [2008], citing Israeli Supreme Court, judgment of 4 December 2002, *Menachem v Minister of Transportation*, HCJ 4769/95, 57(1) PISKE DIN (PD) [2002] 235, 264 (both in Hebrew); *cf* on the judgment R Levush, Global Legal Monitor.

[270] Israeli Supreme Court, judgment of 2 January 2018, *Foreign Republicans in Israel v the Government of Israel*, HCJ 8886/15 [2018], para 66.

account holders and strengthen Israel's ability to pursue tax evaders outside its borders. It would also enable Israel to comply with its international commitments.[271]

The Supreme Court of Israel then examined whether the FATCA implementation law was necessary or exceeded what was required to reach its goal. The Court held that that law was narrower than the general FATCA's agreement as it applies to a smaller percentage of accounts in comparison with other countries' agreements with the US.[272] In negotiating with the US, Israel had managed to exclude a number of bodies and financial products from FATCA's purview, including pension funds, mutual funds, accounts held by lawyers and accountants, etc. Additionally, the implementation of FATCA under the Amendment Law would be carried out by authorised Israeli authorities, thereby enabling the State of Israel to participate in, supervise and benefit from the process.[273] Pursuant to the judgment, there was no alternative to the implementation law, as non-compliance with FATCA would cause greater harm to the Israeli financial system and public than compliance. The Constitutional Court explained that Israeli financial institutions refraining from implementing FATCA provisions would prevent such institutions from maintaining financial relationships with foreign financial institutions. Under such circumstances, Israeli financial institutions would be categorised as 'noncompliant' and subject to a general deduction of 30 per cent at the source. It is reasonable to believe, the Court concluded, that if Israel had not signed the bilateral agreement for FATCA's implementation and adjusted its laws accordingly, significant harm would be inflicted on all account holders in Israel and likely cause serious damage to the Israeli economy and the image of the State of Israel, which would be identified as a country that encourages tax evaders.[274] Therefore, the benefit offered by the Amendment Law exceeded the harm it allegedly causes and was proportional in accordance with the limitation clause requirements. The Amendment Law was, therefore, valid.[275]

In applying proportionality tests on tax cases, the Supreme Court of Israel also found, for example, that the gap in tax rates between ordinary income and capital gains is proportionate even if it infringes equality rights as part of the constitutional right of dignity.[276] The Court examined the new tax law that imposed for the first time capital gains tax of around 15 per cent on capital profits from the capital markets and found that it aims to collect the tax while keeping the international tax competitiveness of the country and the stability of the capital markets. The Supreme Court of Israel ruled that the lower rates are appropriate means to achieve these two ends because taxes affect investment locations, and this rate is close to the global average and is also appropriate to protect the stability of capital markets after the first taxation. The Supreme Court of Israel trusted and accepted the argument of the Treasury that there are no alternative means with less harmful infringements because there is no other evidence, and the Supreme Court granted special weight to the professionality of the authority. Finally, the Supreme Court of Israel ruled that the measures used are balanced and, therefore, proportionate.

The Supreme Court of Israel ruled that a tax benefit without any criteria is disproportionate.[277] In this case, the Supreme Court overruled section 11(b) of the Israeli Income Tax Ordinance,

[271] Israeli Supreme Court, judgment of 2 January 2018, *Foreign Republicans in Israel v the Government of Israel*, HCJ 8886/15 [2018].

[272] Israeli Supreme Court, judgment of 2 January 2018, *Foreign Republicans in Israel v the Government of Israel*, HCJ 8886/15 [2018], paras 80–81.

[273] Israeli Supreme Court, judgment of 2 January 2018, *Foreign Republicans in Israel v the Government of Israel*, HCJ 8886/15 [2018], paras 78–82.

[274] Israeli Supreme Court, judgment of 2 January 2018, *Foreign Republicans in Israel v the Government of Israel*, HCJ 8886/15 [2018], para 85.

[275] Israeli Supreme Court, judgment of 2 January 2018, *Foreign Republicans in Israel v the Government of Israel*, HCJ 8886/15 [2018].

[276] Israeli Supreme Court, judgment of 15 November 1999, Kaniel v. The Government of Israel (Minister of Finance), HCJ 3975/95 [1999].

[277] Israeli Supreme Court, judgment of 22 May 2012, *Gadban Naser v The Government of Israel*, HCJ 8300/02 [2012].

which granted tax benefits to the residents of the municipalities included in the section because the list of municipalities was set without any criteria and discriminated between Jewish and Arab municipalities and between municipalities in similar socioeconomic circumstances. In another important case on tax proportionality, the court analysed the proportionality of a law that increased the car licence fee to transfer the additional fee in order to finance the broadcasting of public radio stations, even if the taxpayer did not have a radio in his car.[278] The majority opinion concluded that the law is proportionate and constitutional because it achieves the goal of collecting the fee and reducing evasion efficiently with the least harmful measures in a balanced manner between the infringement and the gains of efficient finance of public broadcasting. In *Sigal*, the Supreme Court tried to interpret the law so that it does not apply to 'no radio' circumstances, but the words of the law did not enable that interpretation, and therefore, the Supreme Court had to examine the constitutionality of the law. However, the minority opinion concluded that imposing a radio tax on no radio is totally unreasonable and cannot be in line with the purpose of the law, the intention of the legislator and the constitutional principles, and therefore, the minority excluded the application of the fee in no radio circumstances.

These relations between constitutionality and interpretation play an important role in the Israeli jurisprudence to protect human rights while keeping the separation of powers between the branches of government. A good example of this interplay is the *Zandberg* case, in which the court succeeded in giving the law a different meaning to reduce its retroactivity and keep it within the constitutional boundaries of proportionality.[279] In *Zandberg*, the law was enacted in 1992 to confirm the collection of increased broadcasting fees from 1985 to 1992, together with interest and fines on late payments. Through interpretation, the Supreme Court limited the retroactivity of the law and applied it to the collection of the fee itself in current value without any additional real interest or fines. The Supreme Court of Israel emphasised that the law cannot impose late payment fines retroactively because, at the time of non-payment taxpayers acted according to the relevant law. According to the Supreme Court of Israel, a different interpretation that imposed fines retroactively would probably fail the proportionality tests and constitutionality scrutiny. The Supreme Court of Israel justified the active interpretation, which limited the retroactivity of the law. Under the new interpretation of the law, the Supreme Court confirmed the retroactive collection of the fees themselves in current values to guarantee the financial stability of the public broadcasting authority as proportionate and constitutional measures.

4.2.2.3.4. Japan[280]

The proportionality principle was not a traditionally preferred method of evaluating breaches of constitutionality in Japan (especially in the 1950s and 1970s).[281] In general, Japanese lawmakers and the judiciary paid much more attention to the US legal approaches to judicial review with more deference to the legislator.

The reasons for this are as follows. First, the current Japanese Constitution was drafted by the US Occupation Forces based in Japan during the occupation (1945–51) and came into force in 1947. Since then, the Japanese Constitution has been generally interpreted in accordance with American legal theory. Second, given the political situation throughout the 1960s, the levels of judicial review that derived from US constitutional theory are more suitable for Japanese

[278] Israeli Supreme Court, judgment of 1 September 1997, *Liliy Sigal v The Head of the Knesset*, HCJ 5503/94 [1997].

[279] Israeli Supreme Court, judgment of 2 June 1996, *KM Eliezer Zandberg v The Broadcasting Authority*, HCJ 4562/92 [1996].

[280] We would like to thank Yuri Matsubara and Sake Urushi for their contribution.

[281] Y Matsubara, 'Chap. 12 Japan', in FB Yavaslar and J Hey, *Tax Transparency*, (IBFD, 2019), 698, and *Tax Transparency, National Report in Japan*, (IBFD, 2019), 683 and ff.

constitutional law. Those theories were developed in Japan mainly through several important lawsuits relating to the constitutionality of the Japanese Self-Defence Forces in the 1970s and 1980s. In the field of tax law, throughout the mid to late 1960s, some taxpayers filed petitions because the Japanese Income Tax Act partially permitted the schedular system, namely differential treatment between self-employed people and normal employees.[282] However, the Japanese Supreme Court decided it was constitutional – with conditions.[283]

Nevertheless, some Japanese academics now consider the principle of proportionality the more appropriate method of interpreting and protecting human rights.[284] The matter is disputed. It is unclear whether the aforementioned two foreign constitutionality theories have been considered explicitly by the Supreme Court of Japan. In general, Japanese judges cite prominent academics.[285]

4.2.2.4. Europe

4.2.2.4.1. European Union

The principle of proportionality is largely used in the European region both at national and supranational level. The national dimension of this principle in the German legal system[286] has particularly influenced its development by means of interpretation in the supranational legal context of the EU.

The application of this principle as applied to taxation in the EU has often been related to the reaction against abusive and fraudulent practices. Accordingly, if it is desirable to counter abusive practices, the CJEU has generally shown a preference for a case-by-case approach that targets the actual abusive practices rather than their mere risk.[287] This has brought the CJEU to exclude the admissibility of irrebuttable presumptions[288] and question the validity of the rebuttable ones in cases where the rule of experience did not indicate the likelihood of abusive practice.[289] However, the steady occurrence of very serious undesirable phenomena, such as carousel fraud,[290] has gradually led to harsh reactions from the judiciary. The earlier interpretations by the CJEU were more lenient towards the taxpayer[291] than the more recent ones.[292] Now, traders who 'knew or should have known' about the existence of such fraud some way

[282] H Itoh, 'Judicial Review and Judicial Activism in Japan', (1990) 53(1) *Law and Contemporary Problems* 169.

[283] Supreme Court of Japan (Grand Chamber), judgment of 27 March 1985, *Prof Oshima v NTA*, S55, Gyo-Tsu 15 [1985], Minshu 39(2), 247, available in English at www.courts.go.jp/app/hanrei_en/detail?id=81.

[284] See M Jestaedt and H Suzuki, *Verfassungsentwicklung* (More Siebeck, 2017).

[285] See A Ejima, 'A Gap between the Apparent and Hidden Attitudes of the Supreme Court of Japan Towards Foreign Precedents' in T Groppi et al (eds), *The Use of Foreign Precedents by Constitutional Judges* (2013) 273–99.

[286] *cf* eg German Federal Constitutional Court, cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16, cited, nos 124 and ff – ultra vires acts of CJEU and ECB.

[287] CJEU, judgment of 16 July 1998, *Imperial Chemical Industries/Colmer*, case C-264/96, ECLI:EU:C:1998:370 [1998], ICI, paras 26 and ff.

[288] CJEU, *Garage Molenheide Others v Belgische Staat*, cited, para 52; CJEU, judgment of 27 September 2007, *Teleos and Others*, case C-409/04, ECLI:EU:C:2007:548 [2007], para 58.

[289] CJEU, judgment of 28 October 1999, *Bent Vestergaard*, case C-55/98, ECLI:EU:C:1999:533 [1999], para 29.

[290] Carousel frauds are an undesirable collateral effect of the so-called EU transitional VAT regime for cross-border transactions, which seriously undermine the collection of taxes. They consist of importing goods VAT free from a different EU Member State, then selling those to domestic buyers (charging them VAT) and then disappearing without paying the output VAT to the government. This type of fraud is particularly serious with regard to electronic devices.

[291] In CJEU, judgment of 12 January 2006, *Optigen and Others*, case C-354/03, ECLI:EU:C:2006:16 [2006], para 55 and CJEU, judgment of 21 February 2008, *Netto Supermarkt*, case C-271/06, ECLI:EU:C:2008:105 [2008], para 26; the protection of third persons still excluded any liability for anyone who acted in good faith. However, the Court then gradually started taking into account a number of indicia to gather objective evidence and determine whether such persons should be held liable for the fraud. See CJEU, judgment of 6 July 2006, *Axel Kittel*, joined cases C-439/04 and C-440/04, ECLI:EU:C:2006:446 [2006], para 56; CJEU, judgment of 6 December 2012, *Bonik*, case C-285/11, ECLI:EU:C:2012:774 [2012], para 39.

[292] CJEU, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, cases C-131/13, C-163/13 and C-164/13, ECLI:EU:C:2014:2455 [2014], para 48; for direct taxation *cf* CJEU, *N Luxembourg 1 et al*, cited, paras 96 and ff, and CJEU, *T Danmark and Y Denmark*, cited, paras 70 and ff.

upstream or downstream in the supply chain are denied the right to deduction of input VAT, exemptions and may, in addition, be subject to sanctions. This has a triple negative impact on the exercise of rights by all persons not directly involved in the fraudulent scheme but who traded with those who had produced it. There is a thin line between the position held by the Court of Justice in respect of presumptions and the one held in respect of carousel fraud. Except for the fact that the interpretation of the latter is limited to such a serious phenomenon, one may wonder whether that interpretation, especially given how often it is invoked and applied by national judicial instances, ends up in a mechanism similar to a presumption that may make the exercise of rights at least more burdensome for genuine holders of rights.[293]

The principle of proportionality also affects the right to provide evidence, which requires that taxpayers have the actual possibility to provide evidence in their favour in order to exercise the right to obtain a tax advantage. This interpretation is in line with the overall position of the CJEU to secure the effective exercise of rights granted under EU law.[294]

Another interesting application of the principle of proportionality by the CJEU is in connection with the circumstance that the failure to fulfil formal requirements cannot lead to losing a right insofar as its substantial conditions are fulfilled. This line of reasoning was used in respect of the right to input VAT deduction. In such a context, even though Article 178 of the VAT Directive 2006/112/EC[295] regards the invoice with the VAT identification number as a condition for exercising the right to such deduction, the CJEU considered this disproportionate and adopted a substance over form approach.[296]

Furthermore, the CJEU has applied the principle of proportionality as the legal basis for the taxpayers' rights to export 'final losses' to the other Member States.[297]

4.2.2.4.2. Russia[298]

The multi-step proportionality test includes checking the validity of the goal, and its suitability, necessity and balance. The results of this analysis, according to scholars, point to two facts. First,

> having a right does not confer much on the right holder; that is to say, the fact that he or she has a *prima facie* right does not imply a position that entitles him/her to prevail over countervailing considerations of policy. Second, the court in resolving the case focuses on the reasons justifying the violation of the right. Thus, the proportionality analysis provides little more than a check-list for the individually necessary and collectively sufficient conditions that determine whether the reasons marshaled to justify an infringement of a right are a good reason under the circumstances.[299]

The Russian judicial authorities analyse the principle of proportionality in a similar way. For example, the Constitutional Court of the Russian Federation declared inadmissible a claim for

[293] More recent case law from the CJEU also shows that the strict limitation to the application of this line of reasoning is not open-ended, excluding therefore cases in which there was either no real awareness or no actual attempts of tax authorities to give evidence of this situation, see CJEU judgments of 14 February 2019, *Vetsch*, C-531/17, ECLI:EU:C:2019:114 [2019], and CJEU, *Glencore Agriculture Hungary*, cited.

[294] CJEU, judgment of 27 September 2007, *Twoh International*, case C-184/05, ECLI:EU:C:2007:550 [2007], para 25.

[295] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, p. 1–118.

[296] CJEU, judgments of 27 September 2007, *Collée*, case C-146/05, ECLI:EU:C:2007:549 [2007], para 42, of 15 September 2016, *Barlis*, C-516/14, ECLI:EU:C:2016:690 [2016], paras 42–44, and CJEU, *Senatex*, cited, para 38; 20 October 2016, *Plöckl*, case C-24/15, ECLI:EU:C:2016:791 [2016], para 37. The CJEU has also applied the same line of reasoning to losses, see *Marks & Spencer*, cited, para 55.

[297] CJEU, *Marks & Spencer*, cited, para 55, and CJEU, *Bevola and Jens W Trock*, cited, paras 55 and ff.

[298] We would like to thank Karina Ponomareva for her contribution.

[299] M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice, A Review Essay on A Theory of Constitutional Rights' (2004) 2(3) *International Journal of Constitutional Law* 574–96.

the violation of constitutional rights and freedoms by paragraphs 2, 3 and 4 of Article 269 of the Tax Code of the Russian Federation. It considered that the contested legal provisions, containing additional requirements for the taxpayer to account for the payment of corporate income tax interest on loans granted to it by a foreign participant, aim at countering abuses in tax relations. They cannot be considered as violating constitutional rights and freedoms of the applicant, in particular by being disproportionate.[300] The Constitutional Court of the Russian Federation also explained that the federal legislator is bound by the requirement to ensure the constitutional principles of fairness and proportionality in tax relations and, at the same time, has a sufficient degree of discretion in setting specific taxes when implementing tax regulations.[301]

Therefore, national measures that hinder the exercise of fundamental freedoms or make them less attractive can only be justified if they pursue a legitimate aim in the public interest, meet this aim and do not exceed the measures necessary to achieve it.

4.2.2.5. Oceania[302]

4.2.2.5.1. Australia

The principle of proportionality usually applies to interferences with (human) rights. However, the Australian Constitution protects only a limited set of human rights. It does not contain specific taxpayers' rights. The Australian Constitution protects, for example, the right to free exercise of religion and (implicitly) the right to vote. Australia's apex court, the High Court of Australia, has invoked the principle of proportionality in a sophisticated way in only limited contexts to date,[303] the main ones being in relation to laws burdening the explicit constitutional guarantee of free trade between the Australian states[304] and laws impinging upon the implied freedom of political communication.[305] The common law of Australia also recognises a limited number of rights, such as the rights to a fair trial and freedom of movement, but such common law rights and freedoms can be overridden by legislation. However, under the 'principle of legality', there is a presumption that Parliament would not be taken to have had the intention to interfere with common law rights unless clear and unequivocal language is used.[306] This test requires neither justification nor consideration of the impact of the new law on rights. These principles have not been applied in relation to the impact of taxation measures on basic rights.

The other use of a principle of proportionality in Australia is in determining whether a law is within the power granted by the Constitution (so whether it is valid), the test being whether the provisions are proportionate or reasonably appropriate and adapted to achieve the law's intended purpose. This use of the principle of proportionality has been adopted in relation to laws enacted under the so-called 'purpose powers' under the Constitution (that is, where there is a power granted to the federal legislature to make laws with a specific purpose) but not in relation to legislation more generally. The Australian High Court considered the extent to which proportionality is a relevant consideration when determining the validity of legislation in the *Leask* case,[307] which involved a challenge to financial transaction reporting legislation enacted under either the

[300] Constitutional Court of the Russian Federation, judgment of 17 July 2014, no 1578-O [2014].
[301] Constitutional Court of the Russian Federation, judgment of 17 June 2008, no 498-O [2008].
[302] We would like to thank Celeste Black for her contribution.
[303] J Kirk, 'Constitutional Guarantees, Characterization and the Concept of Proportionality' (1997) (21)1 *Melbourne University Law Review* 1–64.
[304] High Court of Australia, *Castlemaine Tooheys Ltd v State of South Australia*, 169 CLR 436 [1990].
[305] High Court of Australia, *Australian Capital Television Pty Ltd v Cth*, 177 CLR 106 [1992].
[306] High Court of Australia, *Momcilovic v The Queen*, 245 CLR 1 [2011].
[307] High Court of Australia, *Leask v Cth*, 187 CLR 579 [1996].

currency power or the taxation power, but the issue of proportionality ultimately played no role in this particular case.

The principle of proportionality also appears in Australian law as a fundamental sentencing principle under common law, whereby a sentence of imprisonment cannot exceed what is appropriate or proportionate to the gravity of the crime viewed objectively.[308] This principle applies most obviously in the context of tax in relation to sentencing decisions for tax-related crimes but can also be seen in the tax penalty system that applies different levels of administrative penalty depending upon the taxpayer's culpability. When expressed as a more general notion of fairness, proportionality is reflected in the progressive income tax rate scale applicable to individuals,[309] though this is not a legal requirement but rather a policy decision. Unreasonableness or lack of proportionality is also a recognised basis for reviewing delegated legislation (such as regulations).

4.2.2.5.2. New Zealand

New Zealand has no single written Constitution. Rather, its Constitution consists of an amalgam of written and unwritten sources and laws. This might be one of the reasons that the principle of proportionality as applied by courts to control legislation infringing upon constitutional rights seems to play a lesser role in New Zealand than in most other jurisdictions.

4.3. Anti-Tax Avoidance and Evasion Measures Limiting Taxpayers' Rights

4.3.1. The International Scenario

Until a few years ago, 'aggressive tax planning' was to some extent tolerated at the international level, especially in connection with the exploitation of tax disparities geared at obtaining otherwise unintended tax advantages. More recently, in the framework of the BEPS project, the latter type of situations have been more clearly identified by reference to their base eroding and profit shifting effects and included in the category of aggressive tax planning. This kind of aggressive tax planning is one of the possible species of tax avoidance that can only happen in a cross-border situation. International tax coordination introduced in the framework of the BEPS project has now reduced the harmful effects of aggressive tax planning and, more in general, of international tax avoidance.[310]

4.3.1.1. Distinguishing Tax Planning and Tax Avoidance

States may counter practices that might undermine the effectiveness of their tax jurisdiction. However, taxpayers acting in good faith have the right to a legal remedy that effectively protects their legal sphere against tax measures that can adversely affect them. The reaction of tax systems to such practices should vary along with the intensity of their harm to tax revenue. Therefore, a stronger reaction should be opposed to phenomena such as tax evasion and tax fraud since,

[308] High Court of Australia, *Hoare v The Queen*, 167 CLR 348 [1989].

[309] Australian Income Tax Rates Act 1986 sch 7.

[310] See further on this in P Pistone, 'The Meaning of Tax Avoidance and Aggressive Tax Planning in European Union Tax Law: Some Thoughts in Connection with the Reaction to Such Practices by the European Union', in AP Dourado (ed), *Tax Avoidance Revisited in the EU BEPS Context*, (IBFD, 2017) 73–100.

in such circumstances, there is an open violation of the letter of the law and, in the former case, the taxpayer even tries to hide such violation by wilful behaviour. However, there are additional dangerous phenomena that may undermine the effective collection of taxes. Such phenomena consist in the circumvention of the liability to tax by creating friction between form and substance that frustrates the spirit of the law. The main conceptual reference for this type of situation is tax avoidance.[311] However, many states, especially in the European region, refer to this phenomenon by reference to the technique often used to counter it and which is connected with the conceptual framework of abusive tax practices, that is, practices that invoke a right against its spirit and for the essential purpose of obtaining a tax advantage.[312]

In line with this conceptual framework, it is important to differentiate among all such phenomena by reference to how seriously these measures violate or frustrate the law. From such a perspective, even if abuses (that is avoidance, evasion and fraud) are all dangerous for the collection of tax, they are not the same. Therefore, the reaction to such different practices should be proportionate to their detrimental impact on the correct levying of taxes. On the one hand, tax evasion and fraud are open violations of the law; on the other hand, abuse formally respects the law but frustrates its spirit. Therefore, if it is evidently legitimate to levy sanctions in the presence of an open violation of the law, it is questionable whether it is equally legitimate to do the same in cases of the circumvention of its spirit.

This distinction is, in our view, the cornerstone for a proportionate reaction to such practices, which considers the need for an effective reaction and a limited impact on all genuine situations.[313] Some countries secure effective legal remedies at national level but do not provide them in cross-border situations under the applicable treaties. This occurs under Article 29 OECD Model Convention (2017), which gives states the power to counter tax avoidance but does not mention any legal protection for the affected persons, based on the assumption that they may activate domestic legal remedies in each state. In line with the goals of addressing the legal protection of non-state actors, this report questions the proportionality of an approach that gives states powers to counter such practices but does not achieve an equivalent level of protection for taxpayers. This is problematic, especially in cases of persons acting in good faith, who should be entitled to the protection of their legitimate expectations.

4.3.1.2. An Obligation to Counter BEPS?

4.3.1.2.1. Problems of Definition

It has long been discussed whether there is an obligation to counter abusive and fraudulent practices. The answer to such a question is complex and must differentiate between each of them and between the national and the international level.

[311] For a comprehensive analysis of this topic, see the book resulting from the EATLP 2016 Munich Congress, AP Dourado (ed), *Tax Avoidance Revisited in the EU BEPS Context*, (IBFD, 2017) 73–100.

[312] This may initially be due to the terminology used in EU law, including in particular by the Court of Justice in its tax case law on direct taxes and VAT, starting from CJEU, judgment of 21 February 2006, *Halifax and Others*, case C-255/02, ECLI:EU:C:2006:121 [2006], and judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, case C-196/04, ECLI:EU:C:2006:544 [2006]. However, the common use of this terminology is also due to the interpretation of tax treaties since the turn of the millennium (initially indicated as the improper use of tax treaties) and especially in the framework of the measures of international tax coordination introduced in connection with the implementation of the BEPS project, also shared in secondary law of the EU (see ATAD 2016/1164 of 12 July 2016, laying down rules against tax avoidance practices that directly affect the functioning of the internal market).

[313] See further under sec 4.3. of this book.

In general terms, all states generally commit in one way or the other to counter tax evasion or at least fraud, applying more severe sanctions to the latter phenomenon.

At the national level, it is, of course, in the interest of each state to counter the open violation of its law and thus protect the integrity of its tax revenues. Generally, the principle of equality requires equal application and enforcement of tax laws and prohibits favouring those who do not comply with their wording or spirit.

At the international level, the same should hold true, especially considering the fact that many countries have meanwhile agreed to cooperate administratively to counter such phenomena and that there is an overall consensus for the boundaries of tax fraud, which are identifiable by reference to the wilful behaviour of a taxpayer in the presence of an open violation of the law. However, when it comes to tax evasion, notable differences still arise as to how the various systems detect such phenomena, thus making it more complex to determine whether there is an international obligation to counter tax evasion. Furthermore, there are different standards with regard to the subjective element of tax evasion. Some countries even formulate the concept of tax evasion in their statutes in a way that could be understood as not requiring a subjective element or as a mere consequence of the failure to pay taxes due.[314] Other countries specify that subjective element.[315] Such differences as to the tax systems and boundaries of tax evasion could be eliminated if some common rules were agreed upon at international level.

When it comes to tax avoidance, the abusive practice also includes aggressive tax planning and is even more problematic to determine whether there is an international obligation to counter such phenomena. The problems here start with the definition of tax avoidance, since different states may well have different levels of tolerance for behaviours targeting tax advantages and thus different rules for identifying the existence of such phenomena.[316]

4.3.1.2.2. Treaty Shopping

The BEPS project has aggregated some degree of consensus among states[317] on the obligation to counter undue tax treaty benefits. The outcome of this international tax coordination is visible in Article 29 OECD Model Convention and Article 7 of the Multilateral Instrument (MLI). Such clauses have a broad mirroring scope, which expresses the minimum standards that the signatory states of the MLI have agreed to secure in the fight against tax avoidance and to amend the existing bilateral treaties as well as to include in the new ones.

[314] This is, for instance, the case of Greece, Italy and Malta, see further in sec 7.2, 7.3.4.1.3, 7.3.4.1.4 and 7.3.4.1.5. below.

[315] This is, for instance, the case of Austria and Germany, see further below at ss 7.2, 7.3.4.1.1 and 7.3.4.1.2.

[316] The problem is that the boundaries of tax avoidance are defined by the general, sectoral (or targeted) and specific rules that counter it, since such rules single out the types of non-compliance and non-open violations that the tax systems are unwilling to tolerate. Tax systems generally share the common features of a subjective (intention and absence of valid economic reasons) and objective element (tax saving in connection with the exploitation of the friction between form and substance of a tax norm), but the latter has often not been detected in a cross-border context. In other words, until the OECD singled out the need to counter phenomena of aggressive tax planning, the exploitation of cross-border tax disparities that such phenomena produce, has been often tolerated by various tax systems, also as a consequence of the failure of domestic anti-avoidance rules to detect the objective element, when the tax benefit was not entirely gained within one country. More recently, the introduction of the ATAD in the EU has partially reduced the range of this diversity in the European region. The same effect is becoming gradually visible worldwide in connection with the implementation of the BEPS project, which sets the boundaries of international tax avoidance in a context that obliges tax authorities to verify whether the unintended tax advantages arise from the exploitation of cross-border tax disparities, giving rise, for instance, to two deductions in respect of one single payment, or the unintended combination of a deduction with an exemption.

[317] As of 20 April 2021, 95 states have signed their MLI, 48 of whom have ratified it.

Taking into account all these elements, tax avoidance arises in the latter context when it is reasonable to conclude that obtaining the tax advantage is, directly or indirectly, 'one of the principal purposes' of an arrangement or transaction. The taxpayer is not entitled to tax treaty benefits unless they prove that such advantage was in line with the object and purpose of the provision. The spirit of this clause clearly reflects the goal of an effective and much stronger reaction to tax avoidance that secures tax collection. However, its vagueness opens up notable discretionary powers for tax authorities,[318] which can undermine legal certainty. This shows that the current international tax developments are underestimating the importance of a balanced reaction to such practices, which preserves the right to legal certainty and protection of rights of the affected persons, based upon a possible wrong assumption that non-state actors do not exist under public international law. For this reason, we expect a significant number of disputes concerning the impact of this type of clause on the protection of the fundamental rights of taxpayers.

These clauses mostly cover one particular aspect of cross-border abusive practices, namely treaty shopping. It can also apply to other types of cross-border tax planning involving tax treaties, such as using tax sparing clauses, avoiding PE status, etc. For all others, there are no such clauses, even though most countries include different types of anti-avoidance clauses in their national tax legislation. Therefore, it is clear that the MLI and related measures establish an obligation to counter treaty shopping as one of its minimum standards, but it is very unclear whether there is a more general international obligation to counter tax avoidance in all other cases and for all other countries.

4.3.1.2.3. Minimum Taxation and Controlled Foreign Company Legislation

An interesting development connected with the worldwide prevention of tax avoidance concerns the establishment of minimum levels of taxation (Pillar 2 of the so-called BEPS 2.0 Project).[319] Minimum taxation means coordinated Controlled Foreign Company (CFC) taxation. CFC regimes trigger additional taxation of the parent company by its residence state when there has been (in the parent company's state's view) insufficient taxation of the foreign controlled company in that company's residence state. Minimum taxation determines a tax rate that is considered 'insufficient' internationally. It will be more difficult for multinationals to avoid such coordinated legislation than a particular state's CFC regime.[320] However, a non-coordinated tax base still leaves room for tax planning. Therefore, a harmonised tax base would be very useful.

Although CFC legislation can be a legal instrument for pursuing capital export neutrality even in the presence of controlled foreign subsidiaries, in some areas of the world, such as the EU, only its function as an anti-avoidance measure appears to be accepted.[321] Whether the same would apply to internationally agreed minimum taxation, possibly implemented by EU secondary law, remains an open question.[322] Minimum taxation inhibits competition by clawing back the benefit of low tax rates or tax holidays.[323] On the other hand, one could see this effect as contributing to a fair international tax regime.

[318] OECD, *Commentary of the OECD Model Convention* (2017), para 184 of the Commentary to art 29(9) contains an add-on clause that expressly proposes a discretionary relief clause.

[319] See further on this proposal in J Englisch and J Becker, 'International Effective Minimum Taxation – The GLOBE Proposal' (2019) 11(4) *World Tax Journal* 483 and ff.

[320] R Mason, 'The Transformation of International Tax' (2020) 114 *American Journal of International Law*, 353 and ff, under 3. Fiscal Fail-Safes.

[321] See further at sec 4.3.2.4. below.

[322] *cf* J Englisch and J Becker, 'International Effective Minimum Taxation' available at ssrn.com/abstract=3370532 or dx.doi.org/10.2139/ssrn.3370532.

[323] R Mason, 'The Transformation of International Tax' 353 and ff, under 3. Fiscal Fail-Safes.

However, implementing such a concept may require thorough studies that apply such minimum taxation to differentiate between a low taxation connected with harmful tax practices and one resulting from regulatory measures (tax incentives) for cases of genuine investments. Furthermore, in order to protect taxpayers against double taxation, this type of measure should secure consistency with CFC legislation, according to which the state of residence of the parent company taxes controlled foreign subsidiaries subject to low taxation in their country of residence.

Finally, minimum or low taxation is a way to exercise sovereignty; a duty to tax underlying the concept of minimum taxation would restrict that sovereignty.[324] However, states are not legally obliged to impose taxes; they can always agree not to accept double (non-) taxation.

From a policy perspective, the development of international tax coordination targeting tax avoidance should, therefore, continue – in order to avoid 'beggar thy neighbour' situations and achieve more transparent and fair competition worldwide. International tax coordination of the fight against abusive practices is also desirable from the perspective of global tax competition in order to enhance transparency and prevent a race to the bottom, as such a race can be detrimental to 'collective human rights'.[325]

However, such developments should not exclusively consider the goal of securing effective tax collection without any due international consideration of the rights of the affected persons, which are not mere objects of taxing powers but holders of their own rights under international law. The fight against abusive practices should not be limited to countering what taxpayers do in order to obtain undue tax advantages but should also be conducted against abusive behaviours by states in their reaction to abusive practices, which can undermine the core value of the rule of law. This is one more reason to stress the importance of an effective system of legal remedies.

4.3.2. Different Regions

4.3.2.1. Africa[326]

4.3.2.1.1. Different Contexts and Approaches to Abuse

As a vast continent of 55 countries, there are varying approaches in Africa to deal with tax avoidance, tax evasion and, where the doctrine is recognised, tax abuse.

In several African countries, paying taxes and contributing towards public expenditure within a fair and equitable system are constitutional obligations.[327]

The Constitutions of some African countries include clauses that regulate the framework for the exercise of taxing powers by indicating that the state shall put in place the necessary mechanisms for collecting taxes and combating tax evasion and fraud.[328]

[324] *cf* FD Martínez Laguna, 'Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives – The Dividing Line between Intended and Unintended Double Non-Taxation' (2017) 9 *World Tax Journal*; E. Gil García, 'OECD/International – The Single Tax Principle: Fiction or Reality in a Non-Comprehensive International Tax Regime?' (2019) 11(3) *World Tax Journal*, under sec 3.2.1.3.

[325] *cf* in secs 4.3 and 4.4. below.

[326] We would like to thank Attiya Waris and Johann Hattingh for their contribution.

[327] *cf* art 64 of the Constitution of Algeria; art 102 and ff of the Constitution of Angola; art 85(g) of the Constitution of Cape Verde; Principle 23 of the Preamble to the Constitution of Cameroon; art 20 of the Constitution of the Central African Republic; art 58 of the Constitution of the Republic of Chad; art 65 of the Constitution of the Democratic Republic of Congo; art 19 and 20 of the Constitution of Equatorial Guinea; art 22(4) of the Constitution of Guinea; art 20 of the Constitution of Mauritania; art 45(c) of the Constitution of Mozambique; art 40 of the Constitution of Niger; art 10 of the Constitution of Tunisia.

[328] Art 10 Constitution of Tunisia; *cf* also art 43 of the Constitution of the Ivory Coast; art 38(5) of the Constitution of Egypt.

Also, in African countries, legal doctrinal approaches to tax avoidance are usually tied to some extent to the general legal systems, reflecting different historical backgrounds. Accordingly, the approaches of courts to tax avoidance in countries with common law, civil law or mixed law systems can be quite different.

As a general trend, tax evasion is criminalised, and enforcement is undertaken by criminal prosecuting authorities. The capacity to enforce all these measures differs greatly from country to country in Africa, showing a more significant gap than in other parts of the world between law in theory and law in practice. At one end of the spectrum, some industrialised countries have modern technology-based tax administrative systems, including criminal enforcement and prosecution. At the other end of the spectrum, there are countries in Africa that are failed states with greatly diminished administrative capacity and criminal prosecuting and enforcement capability. In between, there are a range of modernised and semi-modernised tax administrations.

An effective reaction to such practices should be a priority in the drafting of tax law, also when considering whether to adapt the level of sophistication that characterises legislative anti-avoidance rules and doctrines. Their design is often tied to the state's capacity to enforce them, as well as the approach of the general state administration to corruption and maladministration. For example, discretion-based and open-ended anti-avoidance rules have for a long time not been favoured in Africa due to the risk of corruption and lack of administrative capacity required to ensure efficient and timely decision-making. This is one of the main reasons why relatively few African countries have enacted GAAR, because these types of measures usually contain open-ended norm-laden language that requires the overt exercise of discretion by civil servants.

It is important to emphasise that tax avoidance can also be addressed, even when a country has a GAAR, through other avenues that can affect the rights of taxpayers. For example, tax authorities may choose to invoke general principles of law, such as the sham doctrine or *fraus legis*, when these are part of the legal system. The sham transaction doctrine is 'judge-made law'. Similar to the principle of abuse, it will deny advantageous tax treatment where transactions are carried out primarily for tax avoidance purposes and lack a bona fide business purpose.[329]

Most critically, the success or failure of tax avoidance before courts in Africa is often also tied to the prevailing approach of the judiciary to the interpretation of tax legislation. The approach to the interpretation of tax legislation in tax avoidance cases can differ greatly between African countries. In recent years, under the influence of NGOs, apparent tax avoidance has also been addressed through so-called naming-and-shaming campaigns or exposés led by such organisations. In some African countries, such advocacy measures caused regulatory authorities to impose non-tax punitive measures on named taxpayers, such as revocation or suspension of a business or other licence.

The focus of the discussion that follows is mainly on the presence and form of tax avoidance legislation and measures addressing taxpayer rights under such laws in African countries. Where relevant, the attitude of courts to the interpretation of tax legislation in tax avoidance cases will be noted.

Botswana focused on tackling tax avoidance by identifying multinational tax avoiders and has joined OECD's framework on BEPS.[330] In addition, Botswana has entered into different bilateral agreements,[331] which allow countries to curb tax avoidance and abuse of tax laws.

[329] For cases from South Africa, see Supreme Court of Appeal of South Africa, *Commissioner for South African Revenue Service v NWK Ltd*, (27/10), ZASCA 168 [2010]; Supreme Court of Appeal of South Africa, *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service*, (923/2017), ZASCA 153 [2018], with comment by J Hattingh and A Titus, 'Sasol Oil v CSARS: Judicial Reinterpretation of Legal Doctrine to Address Tax Avoidance in South Africa' (2020) 2 *British Tax Review* 174–83.

[330] Tax Avoidance and Evasion in Africa (ROAPE, 1 March 2018), www.roape.net/2018/03/01/tax-avoidance-evasion-africa/.

[331] Income tax: subsidiary legislation | Subsidiary Alphabetical List, www.botswanalaws.com/subsidiary-alpabetical-list/income-tax-subsidiary-legislation.

Ghana's measures to combat tax evasion and avoidance are instigated by the Ghana Investment Promotion Council to develop a beneficiary ownership regime intended to detect owners of companies, particularly in the extractives industries.[332] Additionally, the Ghana Revenue Authority planned to use Point of Sale devices to strengthen tax collection and improve the monitoring of revenue.[333]

Kenya's efforts in curbing abuse of laws focus on Small and Medium Enterprises (SMEs), where the Kenya Revenue Authority seeks to address the issue at the grassroots level and work closely with county authorities to integrate the SMEs into the taxation system.[334]

Tanzania has come up with various strategies aimed at curbing fraud and abuse of tax law, for example, in registering taxpayers at the district level in an effort to address the problem at the grassroots level.[335]

Some other countries have adopted systems and laws to curb tax avoidance, fraud and abuse of laws. For example, Rwanda adopted Electronic Billing Machines,[336] and South Africa amended its legislation to tackle tax avoidance specifically.[337] Nigeria's Federal Inland Revenue Service has threatened to deny access to banking facilities for those companies that do not join the taxation register.[338]

4.3.2.1.2. African Countries with Statutory GAARs

Apart from South Africa, at least 16 other African countries have statutory GAARs.[339] These GAARs fall into clear categories.

Both Namibia and Botswana, whose legal systems as neighbouring countries to South Africa have been influenced by the latter's tax laws, utilise arm's length notions in their GAARs to identify and disregard arrangements entered into solely or mainly for the avoidance of tax. The statutory GAARs of Nigeria, Liberia, Seychelles and Gambia are very similar and provide for the recharacterisation of a transaction entered into as part of a tax avoidance scheme or which has no economic effect or does not reflect the substance of the transaction. These GAARs have probably been suggested to these countries by the International Monetary Fund (IMF).

Francophone African countries have a discernible and different type of GAAR. The form of their statutory GAARs is very brief. Algeria's GAAR allows the administration to question the sincerity of arrangements designed to avoid or reduce tax burdens. Benin's GAAR also enables consideration of the real characteristics of a contract or legal operation that hides a realisation or transfer of benefits or income. Of note is how Cameroon places the onus on the administration to prove the nature of the operation. The GAARs of Burkina Faso, Burundi, Cameroon, Chad, Comoros, Niger and Senegal are all similar in allowing the tax administration to reclassify operations disguising a realisation or transfer of profits or income. All these GAARs of Francophone

[332] Ibid.
[333] Ibid.
[334] Ibid.
[335] Tax Avoidance and Evasion in Africa.
[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Most of the GAARs in Africa discussed here have been collected in J Prebble QC, *General Anti-Avoidance Rules: Enactments from the World*, Victoria University of Wellington Legal Research Paper no 170/2017, (14 December 2017); WU International Taxation Research Paper Series no 2018–01, ssrn.com/abstract=3088222, to which reference can be made for the actual text of the legislation. African countries with statutory GAARs of which the authors are aware include Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Comoros Islands, Gambia, Ivory Coast, Kenya, Namibia, Niger, Nigeria, Senegal, Seychelles and South Africa.

African countries have a common feature, in that they codify the sham doctrine and confirm its application to tax. These GAARs do not attempt to address more norm-laden questions such as enquiring into the purpose of tax avoidance arrangements or notions about 'abuse' of law.

In 2020, the Zambian Supreme Court held that the Tax Commissioner-General under GAAR[340] can direct an adjustment of tax liability upon his reasonable belief and that there can be no objectively reasonable belief, only reasonable grounds for having such belief. However, the belief must be informed or inspired by something. Non-compliance with arm's length's standards raises reasonable suspicion, triggering the application of the GAAR.[341]

Kenya has a rather different GAAR from other African countries due to its scope being exclusively focused on business carried on between non-residents with residents. The GAAR is triggered when business between non-resident and resident persons produces no profits or fewer profits than would arise in an arm's-length dealing. The arm's-length profits will be deemed the amount accrued in the arrangement, and the taxpayer will be taxed accordingly.

Tax avoidance is also addressed in Kenya through judicial doctrine. A review of case law in Kenya reveals that judicial approaches to tax avoidance are conservative, compared to the approach today in the UK and neighbouring countries.[342] For example, older UK cases such as *Cape Brandy Syndicate v IRC,*[343] which espouse a strict approach (literal interpretation only) to the construction of tax legislation, are still regularly encountered in Kenya High Court judgments.[344] Moreover, the approach to tax avoidance in *IRC v Duke of Westminster*,[345] clearly no longer followed by courts in the UK,[346] is still approved in the courts of Kenya.[347]

As far as could be established, apart from South Africa, the GAARs of the 16 African countries reviewed do not provide express procedural safeguards for taxpayers. This might suggest a real lack of awareness and protection of taxpayer rights in the exercise of administrative powers under GAARs. It should also be noted that there appears to be a paucity of case law in Africa in which the application of statutory GAARs is contested by taxpayers.[348] Except in the case of Kenya and South Africa, there is no indication whether the GAARs reviewed may not apply to cases involving tax treaties. A handful of these 16 countries have signed the OECD's BEPS MLI and will implement the principal purpose test to address tax treaty abuse.[349]

[340] S 95 of the Income Tax Act of Zambia.

[341] The Supreme Court of Zambia, judgment of 3 March 2020, *Mopani Copper Mines Plc./Zambia Revenue Authority*, appeal n. 24/17, SCZ/*/269/2016, [2020], nos 9.27 and ff.

[342] Compare, eg the approach in Tanzania Tax Revenue Appeals Tribunal of Tanzania, *African Barrick Gold Mine PLC v Commissioner General*, Tax Appeal no 16/2015 [2016] and Court of Appeal of Tanzania, *Tullow Tanzania BV v Commissioner General, Tanzania Revenue Authority*, Civil Appeal no 24 of 2018, TZCA 82 [2018].

[343] *Cape Brandy Syndicate v Inland Revenue Commissioner*, 1 KB 64 [1921], in which J Rowlatt famously held that: '[i]n a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'.

[344] See, eg High Court of Kenya, *Panalpina Airflo Limited v Commissioner of Domestic Taxes*, eKLR [2019].

[345] UK House of Lords, *Inland Revenue Commissioners v Duke of Westminster*, 1936 AC 1 [1936], in which it was held that '(e)very man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be' and '[t]his so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable'.

[346] See UK Supreme Court, *UBS AG v HMRC*, UKSC 13 [2016] 61–62.

[347] See High Court of Kenya, *Primarosa Flowers Limited v Commissioner of Income Tax*, eKLR [2017]; Court of Appeal of Kenya, *KRA v Fintel Ltd*, eKLR, civil appeal no 311/2013 [2019].

[348] There may be several reasons. Generally, apart from countries such as South Africa and Kenya, it is hard to obtain consistent and complete publication of court decisions. Many courts in Africa do not have websites, and commercial publications of law reports tend to be underdeveloped.

[349] Countries with a statutory GAAR that have signed the MLI include Burkina Faso, Cameroon, Kenya, Nigeria, Senegal, Seychelles and South Africa. The only country in Africa without a statutory GAAR to have signed the MLI is Mauritius.

4.3.2.1.3. South Africa

South Africa has the most extensive system of anti-tax avoidance legislative provisions in Africa, including GAAR[350] and a range of specific and targeted anti-avoidance rules. The GAAR generally applies to arrangements lacking commercial substance or not normally employed for bona fide business purposes other than obtaining a tax benefit or resulting in an abuse of the provisions of tax legislation. The GAAR utilises arm's a length notions to assess these arrangements, complemented by a large range of statutory criteria that lead to prima facie detection of a lack of commercial substance. In 2006, the GAAR was amended by the introduction of an alternate basis to trigger application, namely if a taxpayer's tax avoidance arrangement caused an 'abuse' of domestic tax legislation. In its mixed legal system, the general abuse doctrine, while recognised, is not developed and has not been applied in tax cases. The abuse test for the GAAR was borrowed from Canada's GAAR, but South African courts have not decided on its meaning and operation. The onus lies upon the taxpayer to show that a tax avoidance arrangement was not entered into for the 'sole or main' purpose of gaining a tax benefit. A notable feature of the South African GAAR, when it was overhauled in 2006, was the introduction of a distinction between permissible and impermissible tax avoidance arrangements; particularly aggressive tax shelter arrangements that have little or no commercial substance were targeted through a series of statutory criteria used to identify the impermissible nature thereof. In a guidance document about the GAAR, its aim at 'impermissible' tax avoidance arrangements was described as concerning 'arrangements that fall in the category between tax evasion, on the one hand, and legitimate tax-planning, on the other' and further that impermissible tax avoidance broadly refers to 'artificial or contrived arrangements, with little or no actual economic impact upon the taxpayer, that are usually designed to manipulate or exploit perceived "loopholes" in the tax laws in order to achieve results that conflict with or defeat the intention of Parliament'.[351] The revenue agency has a limited period in which to confirm or withdraw the application of the GAAR. The purpose of the procedural safeguards has been described as follows:

> to ensure that the new GAAR would not be applied lightly or "automatically" by [tax agency] auditors … while at the same time warning taxpayers, at a relatively early stage in the proceedings, that the application of the new GAAR was under consideration. The purpose of the response was to provide taxpayers with an opportunity to address the Commissioner's concerns, again at a relatively early stage in the proceedings before both sides were forced to incur the time and expense typically involved in a full-blown investigation under the new GAAR. Finally, the purpose of the action requirements was to ensure that audits would proceed in an expeditious fashion and put an end to situations in which taxpayers were faced with multi-year delays.[352]

The tax agency has the power to impose a penalty on a taxpayer if it eventually decides to invoke the GAAR. The imposition of the penalty is subject to the dispute resolution procedures before the Tax Court available to all taxpayers.

The position in South Africa is that the GAAR appears to apply to bilateral tax treaties, but no cases have yet been contested before the courts. The GAAR's application to treaties is based on the fact that, from a constitutional perspective, treaties rank equally with other tax laws of South Africa. There is also nothing in the GAAR itself that prevents its application to treaties. Consequently, the procedural safeguards for taxpayers would also apply in cases where the

[350] Income Tax Act, 58 of 1962, s 80A-L.

[351] South African Revenue Service, *Draft Comprehensive Guide to the General Anti-Avoidance Rule* (2010) 3. Income Tax Act, 58 of 962, s 80J.

[352] E Liptak, 'Failure, More Failure and Some Success: GAAR Ten Years On' (2016) 60 *TaxTalk* 58–61, 61.

application of the GAAR involves tax treaty benefits. It does not matter for the purposes of the procedural safeguards that taxpayers may be non-resident.

South Africa has agreed to implement Article 7 of the MLI as regards the OECD minimum standard to deny granting of tax treaty benefits based on the so-called principal purpose test (reflected in Article 29(9) of the OECD Model Convention). It is understood that the view of the South African Ministry of Finance was that the principal purpose test was comparable to the GAAR and, therefore, agreeing to Article 7 MLI would be in accordance with existing policy about measures to address tax avoidance. It is expected that, on this basis, South Africa would afford the same procedural safeguards to taxpayers when the principal purposes test is applied under the country's tax treaties. However, the tax agency has not made any public statement in this regard.

A notable adjunct to the South African GAAR is upfront disclosure obligations on anyone, including taxpayers, organisers, designers or promoters, involved in arrangements with certain specified features falling under the GAAR. These rules about so-called 'reportable arrangements' were designed to lead to early detection by the tax agency of aggressive tax planning arrangements and are in essence akin to what is elsewhere known as 'mandatory disclosure'. They apply equally to any arrangement under which tax treaty benefits may be claimed. The information that must be disclosed and by whom, the time and the format, as well as penalties for non-compliance, are described clearly in the law.[353]

Specific anti-avoidance rules are designed to complement the South African GAAR. They address a wide array of aspects such as transfer pricing, thin capitalisation, use of controlled foreign entities, low interest loans to trusts, dividend stripping arrangements, tax loss trafficking and the use of hybrid equity and debt instruments. Tax fraud and evasion are criminal offences in South Africa, as elsewhere, that can result in a fine or imprisonment.

While the discussion of South Africa's GAAR indicates that taxpayer rights are considered and receive protection, the reality is that tax avoidance cases in South Africa are primarily *not* addressed under the GAAR. Rather, the approach of the South African tax agency is to address tax avoidance cases before the South African courts based on common law principles such as the sham doctrine or to argue for specific statutory interpretation outcomes that deny tax benefits.[354] The implication for taxpayers assessed on the basis of the sham doctrine in a tax avoidance case is that the line between legitimate and legal tax planning is blurred with fraud (a criminal offence) because a sham involves a finding of dishonesty. When the South Africa tax agency assesses taxpayers based on sham, none of the procedural protection mechanisms under the GAAR apply, which means there is no enhanced fair process, and none of the checks on tax agency auditors apply to lower the risk of potential misuse of power. The current approach to the interpretation of tax legislation and tax treaties in South Africa also makes it less obvious that the abuse of law element of the statutory GAAR is necessary, as courts will, in any event, need to purposively construe the meaning of legislation or tax treaties. This is because the highest courts have held that all legal interpreters 'should now follow' the 'correct' approach to construe statutory language, which involves a unitary exercise to interpret tax laws contextually, purposively and literally.[355]

[353] Income Tax Act, 58 of 1962, ss 35–39.

[354] See J Hattingh and A Titus, *Sasol Oil v CSARS*.

[355] Supreme Court of Appeal of South Africa, *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*), ZASCA 13 [2012]; Supreme Court of Appeal of South Africa, 2 All SA 262 (SCA), [2012] 273–74; Supreme Court of Appeal of South Africa, *Telkom SA SOC Ltd v Commissioner for the South African Revenue Service* (*Telkom*), (239/19) ZASCA 19 [2020] 8–21.

4.3.2.2. Americas

4.3.2.2.1. Latin America

4.3.2.2.1.1. Argentina[356]

Argentine criminal tax law establishes sanctions for actions by the taxpayer that constitute tax fraud, tax evasion and tax avoidance.[357]

The Argentine Supreme Court has held that the so-called principle of economic reality[358] is a parameter for interpreting the law. It enables the collecting body to determine the real taxable event in all cases where non-compliance with the alleged taxable event is established. The principle of economic reality includes the legal forms used by the taxpayer that do not coincide with the structures that the applicable law offers to implement the taxpayer's intention. This principle is compatible with the taxpayer's right to limit his taxes to the legal minimum possible.

In the *Parke Davis* case, a resolution by the *Dirección General Impositiva* (Argentine tax administration) had determined *ex officio* the tax liability of Parke Davis Argentina. The question that gave rise to this case was whether the deduction that Parke Davis Argentina had made in its tax balance sheet for royalties for the service and use of medical formulas, which were to be credited to Parke Davis USA, was in accordance with certain local regulations. Parke Davis USA owned 99.95 per cent of the shares of Parke Davis Argentina. The collecting body held that Parke Davis Argentina could not validly make this deduction as an expense because any royalty contract presupposes independence between the firms involved. Such independence did not exist since, in this case, there was a community of interest between Parke Davis Argentina and its parent company, Parke Davis USA. In light of the principle of economic reality, the Argentine Supreme Court recognised that Parke Davis Argentina and Parke Davis USA were two distinct companies with different personalities. However, both companies built an effective economic unity. Therefore, the Argentine Supreme Court prohibited such deduction of royalties since the firms belonged to the same corporate group.[359]

The Federal Administration of Public Revenue (AFIP), the Argentine tax agency, has mechanisms that seek to counter tax avoidance, evasion and fraud using various tools. Such tools include generic anti-avoidance rules such as the principle of economic reality and the use of criminal tax sanctions. This seeks to improve taxpayer compliance with tax payments and to provide public agencies with effective tools to act against such non-compliance.

4.3.2.2.1.2. Brazil[360]

Brazil has adopted several measures to combat tax avoidance and tax evasion. Among these are the introduction of worldwide taxation rules,[361] transfer pricing rules,[362] thin capitalisation rules,[363] rules on disguised distribution arrangements,[364] differentiated tax treatment for tax heavens and other beneficial taxing regimes conferred by other tax jurisdictions,[365] high administrative

[356] We would like to thank Eduardo A Baistrocchi for his contribution.
[357] Law No 24,769.
[358] Included in ss 1–3 of Law 11,683.
[359] Argentine Supreme Court, *Parke Davis y Cía SA*, judgment: 286:97 [1973]. The same doctrine was applied in Argentine Supreme Court, *Kellogg Co Argentina SA case*, judgment: 307:118 [1985].
[360] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.
[361] See arts 76–90 of Act No 12973/2014.
[362] See arts 18, 19-A and 22 of Act No 9430/1996.
[363] See art 24 of Act No 12249/2010.
[364] See art 60 of Act No 1598/1977.
[365] See art 8 of Act No 9779/1999, arts 78, 81 and 83 of Act No 12973/2014, arts 24 and 24-A of Act No 9430/1996 and art 25 of Act No 12249/2010.

penalties[366] and criminal sanctions,[367] as well as transparency measures considering reports delivered to the tax administration and the central bank about foreign transactions.[368]

However, there is no Brazilian GAAR. Article 116 of the Brazilian Tax Code authorises the tax administration to 'disregard acts or legal transactions done to dissimulate the occurrence of the triggering event or the elements of the tax liability'. This provision, nevertheless, has not produced any effect since 2001 because it depends on statutory provisions that should implement it.[369] According to the reporting judge of the Brazilian Federal Supreme Court in a pending case,[370] this rule was designed to control unlawful acts, which do not include tax avoidance.

Despite that, the administrative courts have already and without legal basis decided some cases as if this rule were effective, mainly using the so-called doctrine of business purpose.[371] Still, the judicial courts have not yet examined it. This condition is especially serious if one considers that governments frequently create or extend instalment plans for tax payment, which essentially reduce penalties and interest in exchange for renunciation of judicial procedures and the withdrawal of judicial and administrative appeals by taxpayers. Therefore, when taxpayers face the decision to apply or not apply for an instalment plan, a rational decision will usually conclude that the taxpayers should apply for it, rather than bringing a claim before the court where the uncertainty (eg tax planning has not yet been analysed by the courts) and the sums involved are too high (eg in cases of tax planning, generally large sums are involved). As a consequence, the last word regarding important subjects (eg with respect to tax planning) does not belong to courts, despite their being the guardians of the law. This vicious cycle is even more complicated when time passes, since the complete silence of the courts increases uncertainty about the subject and gives governments more power to commit new unconstitutionalities, violating taxpayers' rights. In this case, an illegal position of the administrative court also remains immune.

4.3.2.2.1.3. Chile[372]

There was no GAAR in force in Chile until September 2015. However, some judgments of the Chilean Courts of Justice ruled in general terms on these matters, appealing to some general norms or principles of Chilean law to resolve the validity of certain taxpayer operations in uncertain matters.[373]

Article 4bis of the Chilean Tax Code of 2014 then introduced a GAAR. Accordingly, the taxable event cannot be circumvented by the abuse of legal forms. There shall be tax abuse where the taxable event is totally or partially circumvented or where the tax base or tax liability is diminished or changed by acts which, taken separately or together, have no legal or economic effects on the taxpayer or third parties and are based on mere tax reasons. The underlying idea is the lack of legitimate business reasons.

[366] See arts 71 and 72 of Act No 4502/1964.

[367] See Act No 8137/1990.

[368] See art 1 of Act No 1060/1969.

[369] See LE Schoueri, 'Planejamento Tributário e Garantias dos Contribuintes entre a Norma Geral Antielisão Portuguesa e Seus Paralelos Brasileiros' in D Almeida et al (eds), *Garantias dos Contribuintes no Sistema Tributário. Homenagem a Diogo Leite de Campos* (Saraiva, 2012).

[370] Supreme Federal Court of Brazil, direct action of unconstitutionality of 12 June 2020, no 2446/DF [2020].

[371] See Administrative Tax Appeals Council, decision of 16 January 2020, no 9101-004.658 [2020], decision of 15 October 2019, no 1402-004.100 [2019], decision of 14 May 2019, no 1402-004.100 [2019] and decision of 09 July 2019, no 9101-004.223 [2019].

[372] We would like to thank Yuri Varela for his contribution.

[373] Supreme Court of Chile, judgment of 28 January 2003, *Bahía vs Chilean IRS*, case 4038/01 [2003]; of 23 July 2013, *Coca-Cola Embonor vs Chilean IRS*, case 5118/12 [2013].

Article 4 states there shall also be avoidance in the act or operation when there is simulation. In these cases, taxes shall be applied to the actions made by all parties, independent of the acts or operations simulated. It shall be considered a simulation, for the tax system, when the legal acts or operations disguise the taxable event or the nature of the constituent parts of the tax liability, or its real amount or date of origin.

At the same time, Article 4 of the Chilean Tax Code states that the fiscal authorities have to recognise taxpayers' good faith. That includes the legal consequences of taxpayers' legal acts and transactions attached to the forms in which they were performed. Moreover, Article 4 explicitly states that the rational choice of conduct and alternatives laid down in the Chilean Tax Code is legitimate.

Thus, on the one hand, Article 4 of the Chilean Tax Code purports to counter tax avoidance or abuse. On the other hand, it emphasises taxpayers' legitimate choices. This could explain why, to date, there are no known concrete cases where the tax authority has applied the aforementioned anti-avoidance rules. Hence, the Chilean GAAR has to date had more of a preventive than a real practical effect. In any case, the courts have, of course, relied on the concepts of abuse and avoidance.[374] The Chilean Supreme Court defines tax avoidance as follows:

> tax avoidance does not involve the lawful choice within certain options that the tax legislator himself provides, but in the behaviour of the taxpayer consisting in avoiding the weight of any tax obligation, or in reducing the tax burden through a legally anomalous means, indirectly infringing the applicable legal provisions, under an appearance of legality.

These acts (activities, contracts, operations, etc) may be 'lawful but illegal in light of the unusual context surrounding such granting or awarding'.[375]

4.3.2.2.1.4. Mexico

Mexico introduced a detailed GAAR by January 2020. The tax effects generated in the terms of GAAR shall in no case give rise to consequences in criminal matters.[376]

4.3.2.2.1.4.1. Application of the Mexican GAAR According to Article 5A of the tax code (*Código fiscal*) '[l]egal acts that lack a business reason and that generate a direct or indirect tax benefit, will have the tax effects corresponding to those that would have been carried out in order to obtain the economic benefit reasonably expected by the taxpayer'. In exercising its powers of verification, the tax authority may even presume that the acts do not have a business reason based on the facts and circumstances of the taxpayer. However, the tax authorities can only ignore the legal consequences of the arrangement chosen by the taxpayer after informing him and giving him the possibility to come forward with evidence and show that he is nevertheless entitled to those legal consequences. The taxpayers must have a real and effective chance to rebut the abovementioned presumption. There are also procedural safeguards: Before issuing the last partial record, the letter of observations or the provisional resolution containing such negative assessment against the taxpayer, the tax authority must submit the case to a collegiate body made up of officials from the Ministry of Finance and Public Credit and the Tax Administration, and obtain a favourable opinion for the application of the GAAR.

[374] *cf* P Masbernat and G Fuente, 'The General Anti-Avoidance Rule in Chile and Its Application' (2019) 9 *Studi Tributari Europei* 51 and ff.

[375] Supreme Court of Chile, judgment of 14 September 2015, *Key Market vs Chilean IRS*, case 22382/14 [2015].

[376] Art 5A Fiscal Code (*codigo fiscal*) Mexico *in fine*.

In the event of not receiving the opinion of the collegiate body within two months of the presentation of the case by the tax authority, it will be understood that the GAAR does not apply.

The tax authority may presume, in the absence of proof to the contrary, that there is no business reason when the reasonably expected quantifiable economic benefit is less than the tax benefit. In addition, the tax authority may presume, in the absence of evidence to the contrary, that a series of legal acts do not provide for a business reason when the reasonably expected economic benefit could be achieved through fewer legal acts and the fiscal effect of these would have been more burdensome.

4.3.2.2.1.4.2. Definitions in the Mexican GAAR The Mexican GAAR also contains definitions: Tax benefits are considered to be any reduction, elimination or temporary deferral of a contribution. This includes those achieved through deductions, exemptions, non-taxation, non-recognition of a profit or taxable income, adjustments or absence of adjustments of the tax base, tax credits, the recharacterisation of payment or activity, a change of tax regime, inter alia.

A reasonably expected economic benefit is deemed to exist when operations of the taxpayer seek to generate income, reduce costs, increase the value of goods that are their property, improve their market positioning, among other cases. The authorities assess contemporary information related to the operation under analysis to quantify the benefit reasonably expected, including the projected economic benefit, to the extent that such information is supported and reasonable. For the purposes of the GAAR, the tax benefit will not be considered as part of the reasonably expected economic benefit. The expression business reason shall apply irrespective of the laws governing the economic benefit reasonably expected by the taxpayer.

Article 69-B Bis of the Mexican Federal Tax Code[377] allows the tax authorities to ignore the transfer of net operating losses through a corporate restructuring if the only reason for such restructuring was to benefit from such net operating losses, that is that there was no business reason aside from the tax benefit. A similar rule currently exists in the Mexican Income Tax Law for international corporate restructurings when entities located in tax havens participate in a restructure.[378]

4.3.2.2.1.5. Peru[379]

The Peruvian Tax Code (*Código Tributario*) typifies the general anti-avoidance clause in Norm XVI, paragraphs 2 to 5, of its preliminary title. This general anti-avoidance clause is very similar to a principal purpose test in the terms established by the OECD provisions. However, it is only applicable to fraud and not to simulation scenarios. Regarding simulation scenarios, Norm XVI, paragraphs 1 and 6, contains the (previously) established economic qualification criteria, which was previously typified in Norm VIII of the same tax code and is only applicable to relative and absolute simulations.

By the application of this anti-avoidance clause, the Peruvian tax administration (SUNAT) is legally empowered to requalify legal acts if it considers that their sole or main motivation is to produce improper tax advantages for the taxpayer and, in reality, they do not produce any other benefit for the companies or individuals involved beyond the tax savings they may obtain.

[377] Art 69-B Bis was introduced by amendment of 25 April 2018 to the Mexican Federal Tax Code.
[378] We would like to thank Diana Bernal for her contribution on art 69-B Bis.
[379] We would like to thank Cecilia Delgado Ratto for her contribution.

In this sense, the Peruvian tax administration can qualify as elusive any transaction or structure when three conditions are met simultaneously:

i. That the transactions can be considered artificial or improper in order to obtain the result sought by the intervening parties.
ii. That the economic or legal effects of these transactions are the same or similar to those that would have been obtained with more usual or proper acts to obtain the result sought by the intervening parties.
iii. That the transactions are carried out with the sole or main purpose of avoiding the application of the Peruvian tax, producing improper tax advantages or generating tax credits in favour of the taxpayer. The latter, according to the norm, must be evaluated determining whether the tax advantage obtained by the taxpayer is greater than the advantages of a different nature (economic, commercial, organisational, etc.) that the operation has generated in his favour.

If the Peruvian tax administration identifies the concurrence of these circumstances, it is legally empowered to classify the operations as elusive and treat them, for tax purposes, as if they were the taxable legal acts that the taxpayers intended to substitute through these artificial or improper transactions with the purpose of generating a corresponding tax benefit.

4.3.2.2.2. The Caribbean[380]

Various Caribbean jurisdictions have anti-avoidance provisions that enable the state to treat such perceived transactions as invalid and thus as attracting the full rate of tax. One such provision is section 67 of the Income Tax Act of Trinidad and Tobago. That provision specifies that

> [w]here the Board is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious, or that full effect has not in fact been given to any disposition or settlement … the Board [of Inland Revenue] may disregard any such transaction or disposition or settlement … and the persons concerned shall be assessable accordingly.[381]

The onus is on the taxpayer, in general, to disprove the tax assessment. However, the state will also have an evidential burden to establish that it acted appropriately in treating the transaction in question as being artificial and/or fictitious once the taxpayer can establish on a prima facie basis that the purpose of the transaction was not to evade its tax obligations but arose during the course of its business. It is also arguable that any such transactions, whereby the avoidance of tax may arise incidentally – as opposed to purposefully – may escape the tax net.

4.3.2.2.3. United States[382]

The US federal tax laws are in part enforced by civil penalties and in part by the possibility of criminal prosecutions. As indicated below, criminal prosecutions deriving from federal tax compliance issues may occur for many reasons. Penalties can include incarceration and/or fines.

The long list of partly overlapping crimes under US law arising from the tax system include tax evasion, wilful failure to collect or pay over tax, failure to file, supply information or pay tax,

[380] We would like to thank Anthony Gafoor for his contribution.
[381] Income Tax Act of Trinidad and Tobago, Ch 75:01, Laws of Trinidad and Tobago.
[382] We would like to thank Charles H. Gustafson and Jeremiah Coder for their contribution.

fraudulent withholding exemption or failure to supply information, fraud and false statements, fraudulent returns, statements of other documents, attempts to interfere with the administration of federal tax laws, aiding and abetting, conspiracy to defraud the government with respect to claims, false, fictitious, or fraudulent claims, and conspiracy to commit offence or to defraud the US.

Some of these are defined in the Internal Revenue Code, which is the basic source of federal tax law in the US.[383] Others are set forth in statutory provisions dealing specifically with federal criminal offences.[384] There is obviously a substantial degree of overlap in the definition of various tax crimes. It might be noted that, while civil tax disputes may be heard in three federal court systems, criminal prosecutions are undertaken only in US District Courts, which are courts of general federal jurisdiction with respect to both civil and criminal matters.

The government has the burden of proof in criminal prosecutions. Criminal (tax) penalties require evidence beyond a reasonable doubt, whereas to impose a civil tax fraud penalty, clear and convincing evidence is sufficient. In addition, taxpayers are entitled to a jury trial in criminal matters if they so choose. Even in such cases, however, any sentence based upon a criminal conviction will be determined by the presiding judge.

Historically, the US has not had a statutorily imposed general anti-avoidance rule applicable with respect to non-criminal tax enforcement and administration. However, for more than 80 years courts have developed and applied principles intended to thwart unacceptable forms of tax avoidance. The result is a series of doctrines potentially applicable to deny tax benefits otherwise available to taxpayers in particular circumstances.

These doctrines include the business purpose test (a transaction must have a purpose other than the qualification for a tax benefit), the sham transaction doctrine (a transaction will not qualify for a tax benefit if the reality of the transaction is different from its economic substance despite the form of the transaction), the step transaction doctrine (a series of interrelated steps may be disregarded so that tax consequences will depend upon a comparison of the beginning and end of the related steps), the economic substance doctrine (the transaction must have identifiable and measurable economic consequences for the taxpayer) and the thin capitalisation doctrine (what is treated as 'debt' may be more appropriately characterised as equity with tax consequences deriving from the recharacterisation).

In most instances, the establishment and application of these doctrines to deny tax benefits otherwise available has been explained as a judicial interpretation of the legislative purposes reflected in the applicable statutory provisions.

In some instances, the judicially created doctrines have been wholly or partially codified. For example, the economic substance doctrine was adopted as part of the Internal Revenue Code in 2010.[385] The thin capitalisation doctrine was effectively codified many years ago[386] (although that term was not expressly used in the statutory provision) in legislation prescribing the criteria to be used in its application.

In addition to judicially created principles of general application, the Internal Revenue Code is punctuated with scores of qualifications that must be satisfied if a taxpayer is to enjoy the benefits of a particular provision. In a number of provisions, specific tax benefits will not be available unless the taxpayer demonstrates that 'the' or 'a principal purpose' of the transaction was not the evasion or avoidance of federal taxes.

[383] eg 26 USC s 7206 (fraud and false statements).
[384] eg 18 USC s 1028(a)(7) (identity theft); 18 USC s 371 (conspiracy to commit offense or defraud the US).
[385] 26 USC s 7701(o).
[386] 26 USC s 163(j).

The Internal Revenue Code imposes specific financial penalties in certain situations. For example, transfer pricing arrangements are almost always appropriate targets for a possible challenge by tax authorities in most countries, including the US. When such challenges result in additional tax liability exceeding statutorily defined amounts, additional substantial penalties are imposed.[387]

As is well known, entire taxing regimes have been established to defend against unacceptable degrees of tax avoidance in the context of international transactions. Subpart F of the Internal Revenue Code established the regime for defending against the realisation of profits in low- or no-tax jurisdictions in circumstances suggesting that tax avoidance was the main motivation in the establishment of foreign corporations (called 'controlled foreign corporations') and the structuring of transactions by them. The regime, when applied, taxes domestic shareholders on certain undistributed foreign income of foreign corporations, which is not normally subject to US taxes. The basic mechanism, modified periodically since its establishment in the early 1960s, is an important element in the defence against tax avoidance under US law. It has served as a kind of prototype adopted by many other countries and was included as one of the areas of concern addressed in the BEPS project.

The Tax Cuts and Jobs Act of 2017 included several particularly complex measures intended to defend against the loss of revenues through the use of affiliated corporations established in low- or no- tax jurisdictions. The Base Erosion and Anti-Abuse legislation denies deductions for certain payments made by US corporations to foreign affiliates. The Global Intangible Low-Taxed Income provisions tax certain US taxpayers on undistributed profits of foreign corporations deemed attributable to the exploitation of intangible property interest. While the purpose of the provisions is to deter such behaviour, the provisions might not technically be described as penalties but rather as a set of rules defining tax liabilities in a way that advances the objectives of the legislation.

4.3.2.3. Asia

4.3.2.3.1. China[388]

Before the BEPS project was launched in 2013, China already had its own anti-tax avoidance regime, consisting of four SAARs and a GAAR. The four SAARs, on the one hand, are (1) a transfer pricing rule, (2) a cost-sharing arrangement rule, (3) a CFC rule and (4) a thin capitalisation rule. On the other hand, the GAAR is designed as the Chinese tax authorities' last resort, which tests whether transactions have a 'reasonable business purpose'.[389] When taxpayers fail to demonstrate such a purpose, Chinese authorities may disregard the legal form and tax the transaction according to its economic substance.

In connection with the BEPS project, China took actions to comply with the minimum standards of Actions 6 and 14[390] under the BEPS project and has joined in the BEPS' Inclusive

[387] 26 USC s 6662(a), (e) and (h).

[388] We would like to thank Na Li for her contribution.

[389] Ch 6 of the Enterprise Income Tax Law of the People's Republic of China, promulgated by the National People's Congress on 16 March 2007 with effect from 1 January 2008.

[390] Namely (i) art 6 (Purpose of a Covered Tax Agreement), reflecting the Action 6 minimum standard that contracting states should include in their tax treaties an express statement that the common intention of the parties to the treaty is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements, (ii) art 7 (Prevention of Treaty Abuse), reflecting the Action 6 minimum standard of choosing the PPT and (iii) art 16 (MAP), reflecting the Action 14 requirement to improve the efficiency of its mutual agreement procedure with other contracting states.

Framework. China has signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting in 2017, committing to include the preamble statement to prevent double non-taxation and the PPT clause into its 102 bilateral tax treaties.

4.3.2.3.2. India[391]

The Indian Courts have traditionally adopted a form over substance approach, following the so-called *Duke of Westminster* principle.[392] This principle means that 'every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be'. Over the years, there was some doubt whether tax avoidance was to be analysed through a substance over form approach. However, the Indian Supreme Court has now clarified in *Vodafone International Holdings v Union India and Anr* that ordinarily, the *Westminster* principle applies. A substance over form approach may be applied only if the transaction were sham or constitutes a colourable device. Evidence of a commercial purpose could be used to rebut the conclusion that the transaction is colourable.[393] A colourable transaction is a sham transaction which appears to be authentic. Subsequent to the Supreme Court ruling, holding that Vodafone International Holdings was not liable to pay taxes relating to indirect transfer, the Indian government introduced retrospective amendments to nullify the judgment. Vodafone International Holdings invoked the Netherlands-India Bilateral Investment Treaty, arguing that the retrospective amendments breached the protection promised to investors. The Singapore seat of the Permanent Court of Arbitration ruled in favour of Vodafone International Holdings.[394] This arbitral award has been challenged by the Indian government before the competent court in Singapore.[395]

Since the assessment year of 2018, the Income-tax Act, 1961 has been amended to include a statutory GAAR[396] that incorporates the substance over form approach. These anti-abuse rules override the beneficial provisions of tax treaties.[397]

Any transaction, the main purpose of which is to obtain a tax benefit, not at arm's length, lacking commercial substance, designed for non bona fide purposes or resulting in abuse or misuse of income tax provisions is termed an impermissible avoidance arrangement. A tax benefit may be a reduction, avoidance, deferral of tax, increase in a tax refund, increase in loss, reduction in total income, etc. Proof of the time period for which an arrangement exists, payment of taxes under an arrangement and inclusion of an exit route for the investor (such as transfer of business or operations) by an arrangement are by themselves not sufficient to determine whether or not an arrangement lacks commercial substance. When a transaction is found to be an impermissible avoidance arrangement, the arrangement may be disregarded, recharacterised, looked through, etc.[398]

[391] We would like to thank Ashrita Prasad Kotha for her contribution.

[392] UK House of Lords, *Inland Revenue Commissioners v Duke of Westminster*, cited.

[393] Supreme Court of India, judgment of 20 January 2012, *Vodafone International Holdings v Union India and Anr*, civil appeal no 733/12, [2012].

[394] S Goel and A Goel, 'The Vodafone-India Capital Gains Tax Controversy: The Past and the Future', *Tax Notes*, (12 October 2020), available at www.taxnotes.com/tax-notes-international/capital-gains-and-losses/vodafone-india-capital-gains-tax-controversy-past-and-future/2020/10/12/2d1pj.

[395] A Aryan, 'India challenges Vodafone Retrospective tax case verdict in Singapore Tribunal', *Indian Express*, available at www.indianexpress.com/article/business/india-challenges-vodafone-retrospective-tax-case-verdict-in-singapore-tribunal-7117981/.

[396] Ch X-A, (Indian) Income-tax Act, 1961.

[397] S 90(2A), (Indian) Income-tax Act, 1961.

[398] Ss 95–102, (Indian) Income-tax Act, 1961.

4.3.2.3.3. Israel[399]

The Israeli tax system follows the well-established distinction between tax evasion, which constitutes a criminal offence and tax avoidance, which usually leads to administrative intervention and civil tax assessments to overrule the tax benefits of the avoidance scheme. Israeli tax legislation includes intensive General and Specific Anti-Avoidance Rules.[400]

The Israeli courts developed a rich common law doctrine to fight tax avoidance. Article 86 of the Income Tax Ordinance (ITO) is the Israeli Income Tax GAAR which grants tax authorities the power to ignore any tax benefits as a result of an 'artificial transaction'. Israeli courts construed this term to mean a transaction that lacks a substantive business purpose. In applying this norm, courts must balance the public interest in collecting tax revenues fairly and the taxpayer right to tax planning, as derived from his property rights.[401] The safeguards on taxpayer rights to counter this power include the imposition of the burden of proof on tax authorities to justify and establish their intervention and the right to appeal against the use of these powers.

Courts applied this GAAR in international tax schemes, including the well-known case of *Horowitz*, the former CEO of Teva Pharmaceutical Industries Ltd, which involved criminal and civil litigation, on international tax planning scheme of one subsidiary (Promediko) that tried to exploit tax treaties and lower withholding taxes on royalties.[402] Today, some international tax planning schemes are subject to advanced reporting requirements. Transfer pricing schemes are subject to special scrutiny under section 85A of the ITO, which is considered a special anti-avoidance norm that adopts the international arm's length norm. Israeli CFC rules follow the international best practices to combat dividend tax avoidance and most recent international norms to combat international tax avoidance, including AEoI, country by country reporting, the BEPS project and the MLI. As to the digital economy, Israel is waiting for the outcomes of Pillar I & Pillar II. At the same time, the Israeli tax authorities are litigating tax assessments of leading digital giants.

However, in parallel to all these actions to fight tax evasion and avoidance, Israel legislated in 2008 one of the most dangerous international tax shelters.[403] This legislation gives new immigrants and returning residents to Israel a complete exemption from paying taxes on income earned abroad and even reporting that income for ten years. This legislation effectively turned Israel into one of the world's best tax shelters.

4.3.2.3.4. Japan[404]

Historically, there were only special anti-avoidance clauses in Japanese tax statutes. The first domestic quasi-GAAR provision was introduced in 1923, but it was applied only to family-owned/closely held corporations to prevent intentional profit shifting among family members.[405]

In 1961, the government proposed introducing a more sophisticated GAAR provision. However, taxpayers criticised this move so heavily that it was withdrawn immediately. The

[399] We would like to thank Rifat Azam for his contribution.

[400] S 86 of the Israeli Income Tax Ordinance and s 84 of the Israeli Real Estate Tax Law; there are also such rules in the Israeli VAT Law.

[401] Israeli Supreme Court, judgment of 31 July 2003, *Tax Assessment officer for large enterprises v Yoav Rubenstein Ltd*, CA 3415/97 [2003].

[402] Israeli Supreme Court, judgment of 7 September 2000, *Horowitz v the State of Israel*, CA 1182/99 [2000].

[403] Amendment No 168 of the ITO.

[404] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.

[405] S 17(3) of the Japanese Income Tax Act (1923). *cf* M Yoshimura, 'Branch Report Japan: Anti-Avoidance Measures of General Nature and Scope – GAAR and Other Rules' (2018) 103A *Cahiers de Droit Fiscal International* 10.

private sector's main criticism was that the new GAAR might cause legal uncertainty and grant tax authorities excessively broad discretion.[406] Moreover, most Japanese taxpayers have generally been relatively docile/subservient to their authority, namely the National Tax Authority of Japan (NTA). They tended to accept taxation.

Meanwhile, lawmakers in Japan adopted an objective test to define targeted tax avoidance arrangements. They authorised tax authorities to invoke the GAAR rules 'when they recognise that any acts or calculations made by a corporation will unreasonably reduce the burden of corporation tax'. Such a vague requirement has been interpreted as meaning that the contested act is unreasonable or abnormal, 'as an act of a purely rational economic person'.[407]

In 2001, the Japanese domestic quasi-GAAR regulation was expanded to corporate reorganisation.[408] Shortly thereafter, two very famous precedents were set by the Japanese judiciary in the cases of *IBM v NTA*[409] and *Yahoo/IDCF v NTA*.[410] While the taxpayer won in the *IBM* case, the justices of the Supreme Court dismissed the taxpayers' petition in the *Yahoo/IDCF* case.[411] In the *TPR v NTA* case, the Tokyo District Court and the Tokyo High Court decided in favour of NTA.[412] Presumably, before implementing the new GAAR legislation in Japanese tax statutes, the Japanese judiciary will pave the way in terms of GAAR.

4.3.2.4. Europe

4.3.2.4.1. European Union

The reaction to tax avoidance and tax evasion has been the object of considerable attention in the European region at various levels, including repeated legislative changes and a vast body of case law, both at the national and supranational levels. The OECD's BEPS project, in particular, has had a significant impact on the European tax legal framework.

From the perspective of EU law, the starting point is the prohibition on invoking EU law in respect of abusive and fraudulent practices, which dates back to the 1970s.[413] The expression 'abusive practices' has gradually become a synonym for what international tax law normally refers to as 'tax avoidance'. For this reason, the two expressions can be regarded in the EU as broad synonyms from a tax perspective. Case law from the CJEU defined the concept of abusive tax practices[414] and then identified the elements that characterise them, also establishing a general principle that obliges the Member States to counter them in respect of situations that are relevant for EU law purposes.[415]

[406] M Yoshimura 'Branch Report Japan' 5.

[407] Tax Reform Act, 1950. See further Supreme Court of Japan, judgment of 29 May 1958 [1958].

[408] S 132-2 of the Japanese Corporate Income Tax Act, 2001.

[409] Supreme Court of Japan, judgment of 18 February 2016, H27 Gyou-Hi [2016], no 304, Tokyo High Court, judgment of 25 March 2015, H26 Gyou-Ko [2015], no 208, Tokyo District Court, judgment of 9 May 2014, H23 Gyou-U [2014], no 407.

[410] Supreme Court of Japan, judgment of 29 February 2016, H27 Gyou-Hi [2016], no 75; Tokyo High Court, decision of 5 November 2014, H26 Gyou-Ko [2014], no 157; Tokyo District Court, judgment of 18 March 2014, H23 Gyou-U, [2014], no 228.

[411] M Yoshimura 'Branch Report Japan' 6–9.

[412] Tokyo High Court, judgment of 11 December 2019, R1 Gyou-Ko [2019], no 198, Tokyo District Court, judgment of 27 June 2019, H28 Gyou-U [2019], no 508.

[413] CJEU, judgment of 3 December 1974, *van Binsbergen*, case 33/74, ECLI:EU:C:1974:131 [1974].

[414] CJEU, *Halifax and Others*, cited, ruling no 2, and CJEU, *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited, para 55.

[415] See recently judgments CJEU, *N Luxembourg 1 et al*, cited, paras 96 and ff, and CJEU, *T Danmark and Y Denmark*, cited, paras 70 and ff.

The immediate repercussion of the BEPS Project on EU legislation has been the issuing of the so-called Anti-Tax Avoidance Directive (also known as ATAD),[416] whose Article 6 includes a general anti-avoidance clause, according to which the Member States must counter those transactions that have tax avoidance as 'the main purpose or one of the main purposes'.[417] This standard for defining abusive practices fully reflects the one contained in Article 7 of the Multilateral BEPS Instrument. However, it does not entirely match the wording that the case law from the CJEU has followed since the *Halifax* and *Cadbury Schweppes* cases,[418] which instead admits tax avoidance only in cases where the undue tax advantage constitutes the essential purpose of a transaction. Therefore, the issue of incompatibility or conforming interpretation of Article 6 of the ATAD with the CJEU's case law had been raised.[419] However, taking into account more recent judgments, it appears that the CJEU has further developed its case law in a direction that converges with international tax standards.[420]

In any case, it is clear that for EU law purposes, a case-by-case analysis is always required in order to avoid the reaction to abusive practices exceeding what is strictly needed to counter such practices, that is, being disproportionate. Accordingly, presumptions, especially when irrefutable, create problems of compatibility with EU law.[421]

4.3.2.4.2. Russia[422]

After developing the concept of 'unjustified tax benefit' at the judicial level[423] as a reaction to tax avoidance practices and endorsing it also in the practice of tax authorities,[424] Russia has introduced it in its legislation as a general anti-avoidance rule.[425]

This rule prevents taxpayers from reducing the tax base and/or the amount of tax payable according to their proposed characterisation of facts, insofar as this distorts them. Therefore, taxpayers have the right to reduce the tax base and/or the amount of tax due, but only insofar as transactions do not pursue the non-payment (or the reduced payment) of tax or a tax offset (refund) as their main goal, and that taxpayers perform the obligations connected with such transactions in conformity with the requirements established under the applicable contract and/or law.

Russian tax authorities bear the burden of proof with regard to the application of the general anti-avoidance rule.[426]

[416] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, (2016) OJ L 193/1.

[417] Art 1(2) of the EU Parent-Subsidiary Directive 2011/96 includes a similar formulation of the same type of clause.

[418] *cf* eg CJEU, judgments of 20 December 2017, *Deister Holding*, joined cases C-504/16 and C-613/16, ECLI:EU:C:2017:1009 [2017], paras 70 and ff, and of 7 September 2017, *Eqiom and Enka*, case C-6/16, ECLI:EU:C:2017:641 [2017], para 31.

[419] *cf* eg B Kuzniacki, 'The CJEU Case Law Relevant to the General Anti-Avoidance Rule (GAAR) under the Anti-Tax Avoidance Directive (ATAD)' (2019) 4 *University Bologna Law Review* 261 and ff.

[420] See CJEU, *N Luxembourg 1 et al*, cited, and CJEU, *T Danmark and Y Denmark*, cited, on the one hand and CJEU, judgment (Grand Chamber) of 26 February 2019, *X (Sociétés intermédiaires établies dans des pays tiers)*, case C-135/17, ECLI:EU:C:2019:136 [2019], on the other.

[421] See above in sec 4.2.2.4.1. below.

[422] We would like to thank Karina Ponomareva for her contribution.

[423] Supreme Commercial Court of the Russian Federation, decision of the Plenum of 12 October 2006, no 53 [2006]. This interpretation has gradually evolved into settled case law. See Supreme Court of the Russian Federation, judgment of 27 July 2018, N 305-КГ18-7133, case A40-32793/2017 [2018]; Chamber for Economic Disputes of the Supreme Court of the Russian Federation, judgment of 11 April 2016, N 308-КГ15-16651, case A63-11506/2014 [2016].

[424] Letter of the Ministry of Finance of the Russian Federation of 25 April 2016, no 03-03-06/1/23681, and letter of the Federal Tax Service of 24 June 2016, no ЕД-19-15/104.

[425] Federal Law No 163-FZ of 18 July 2017 in art 54. 1 of the Tax Code of the Russian Federation.

[426] Evidence must not include primary documents signed by unidentified or unauthorised persons, the counterparty's failure to pay taxes and the fact that the taxpayer could have obtained the same economic result through transactions not prohibited by law.

The law leaves open several questions and includes ambiguous terms that may be subject to different interpretations, including how to assess the main goal of a transaction and whether the taxpayer may incidentally pursue tax avoidance goals in the framework of a transaction with a genuine economic purpose.[427] Judicial interpretation does not endorse the application of the domestic general anti-avoidance rule in the presence of tax treaties.[428] This line of reasoning also reflects the circumstance that treaties contain special anti-avoidance clauses, such as those on beneficial ownership, which should be taken into account.[429]

4.3.2.5. Oceania

4.3.2.5.1. Australia

Australia has an extensive system of SAARs and GAARs in both direct and indirect tax legislation. More recently, Australia enacted a Multinational Anti-Avoidance Law[430] and a Diverted Profits Tax[431] (directed at large multinational entities), as well as complex hybrid mismatch rules, to complement the GAAR. The Australian tax law also contains penalty provisions that apply to the promoters of tax exploitation schemes in relation to any of the federal taxes. The ATO has extensive information-gathering powers and Australia engages in cross-border EOI with foreign revenue agencies through its extensive network of bilateral tax treaties, multilateral conventions and information exchange agreements.[432]

In addition, transparency measures have been introduced with respect to large corporate taxpayers. Specifically, the ATO is required to publish a corporate tax transparency report[433] which contains certain high-level taxpayer information. It includes the total taxable income and total tax payable for Australian public and foreign-owned entities with income of more than $100 million and Australian-owned resident private entities with income of more than $200 million. The relevant taxpayers are identified in the data, and the ATO prepares a separate transparency report, but it does not specifically comment on the tax affairs of any of the reported entities. Many companies have also adopted the voluntary Tax Transparency Code, which requires more detailed disclosures. These reports are hosted on the internet by the ATO.[434]

Tax fraud is not a specific offence but is prosecuted under the federal criminal code, ordinarily as either obtaining financial advantage by deception or dishonesty.[435] Assets identified as the

[427] In a circular letter, the Federal Tax Service of the Russian Federation has interpreted such issues by presuming that taxpayers act in good faith, see 11 October 2019 (no ЕД-4-1/20992).

[428] Supreme Commercial Court of the Russian Federation, decision of the Plenum no 53. See further on this in Russian literature DV Vinnitskiy, 'Good faith, Justification of a Benefit, Limitations on the Exercise of Rights or How the Russian Tax Law Found itself on the Borders of Fighting the Evil of Taxpayers', (2018), 5 (11), *Zakon*, 56 (in Russian).

[429] KA Ponomareva, 'Legal Regulation of Combating Abusive Tax Practices in the European Union and the Russian Federation' (2019) 45 *Vestnik Permskogo Universiteta. Juridicheskie Nauki* (*Perm University Herald. Juridical Sciences)* 432 (in Russian); SA Arakelov, 'Anti-avoidance Norms in International Practice. New legislative Anti-tax Avoidance Tools in (2018), 5 (11), *Zakon*, 56 (in Russian).

[430] S 177DA of Income Tax Assessment Act 1936 (Cth) (applicable to schemes from 1 January 2016).

[431] Ss 177H–177R of Income Tax Assessment Act 1936 (Cth) (with effect from 1 July 2017) and Diverted Profits Tax Act 2017.

[432] The ATO's specific powers to obtain information are granted by ss 353-10 and 353-15 of Sch 1 to the Taxation Administration Act 1953 (Cth). Australia is a party to 45 comprehensive double tax treaties and 36 tax information exchange agreements and is a signatory to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as well as the Multilateral Convention

[433] S 3C of Taxation Administration Act 1953 (Cth).

[434] These reports can be accessed by way of the following: www.ato.gov.au/Business/Large-business/In-detail/Tax-transparency/Voluntary-Tax-Transparency-Code/.

[435] Divisions 134 and 135 of the Criminal Code, Sch 1 to the Criminal Code Act 1995 (Cth).

proceeds of serious crime, including tax fraud, are forfeited to the state under the proceeds of crime legislation.[436]

4.3.2.5.2. New Zealand

In *Penny v Commissioner of Inland Revenue*,[437] the Supreme Court of New Zealand did not deny a company's right to make commercial decisions that reduce its tax liability. However, if salary payments are made solely in order to reduce its tax bill, those payments must be commercially realistic. If they are not, then the Commissioner and the courts have the power to adjust the payments so that they are commercially realistic.

4.4. Fairness

4.4.1. General Introduction

Countries,[438] international organisations (eg the OECD)[439] and supranational organisations (eg the EU)[440] have often referred to the concept of fairness in taxation. However, the concept of fairness has been used without a proper definition of what fairness is in the context of their arguments and how fairness can be achieved.[441] It implies broad concepts such as justice and legitimacy. Therefore, fairness in taxation is a blurred concept, particularly its legal dimension.

> Another question that is relevant for the interpretation of what is meant in the international tax discussion on fairness is whether what is referred to is fairness perceived from a domestic perspective (fairness within the State) or (also) from an international perspective (fairness between states); from the perspective of the State (taxpayers should not evade or aggressively avoid taxation; taxpayers should pay their fair share; harmful tax competition is not fair; taxation rights should be allocated fairly between states, legitimacy); or from that of the taxpayer (horizontal and vertical equity, justice, legal certainty, legal procedural fairness, legitimacy)?[442]

The differences in approaches to fairness can be seen in this report. In Part I of our report, we describe fairness in a juridical sense, addressing equality, non-discrimination and procedural fairness. The instruments used are the respective Constitutions, domestic legislation and taxpayer charters.

In economic theory, the principle of fairness is addressed from two perspectives: horizontal and vertical equity. According to horizontal equity, individuals with similar income and assets should pay the same amount of taxes. According to vertical equity, those who are able to pay more should pay higher taxes.[443] Vertical equity can be achieved by proportional taxation (already then those with higher income or assets pay more) or by progressive taxation. Both perspectives can

[436] Part 2-3 of Ch 2 of Proceeds of Crime Act 2002 (Cth).

[437] Supreme Court of New Zealand, *Penny v Commissioner of Inland Revenue*, cited and case note by C Jenkins, 'Avoidance: Penny v Commissioner of Inland Revenue' 277 and ff.

[438] See further on this in sec 4.4.2 below.

[439] Notably OECD, *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, (2013), www.oecd.org/ctp/BEPSActionPlan.pdf, 8.

[440] See further on this in sec 4.4.2.4. below.

[441] IJJ Burgers and IJ Mosquera Valderrama, 'Fairness: A Dire International Tax Standard with No Meaning?' (2017) 45(12) *Intertax* 767–83.

[442] IJJ Burgers and IJ Mosquera Valderrama, 'Fairness: A Dire International Tax Standard'.

[443] For the ability-to-pay principle, see further in sec 8.1.4. below.

also be addressed from the perspective of combating non-compliance, tax avoidance, evasion and fraud, which in fact alter fair contributions to funding the state budget in conformity with the principles and rules that apply within a tax system.

A purely national approach to fairness is, however, largely unsuitable for covering all the implications of such a principle in the current globalised scenario. This becomes clear if we consider, for instance, that attracting multinational enterprises to a small economy can severely alter the funding of public finance and the extent to which all other taxpayers, already established in such a country, may have to contribute.

The international implications of fairness in taxation are, therefore, an essential component of our search for the fundamental rights of taxpayers. For this reason and also in order to properly address the implications related to collective interests, this book will go beyond the traditional visions that link fairness to constitutional principles in a purely national dimension.

At international level, the discussion goes further than economic or juridical fairness[444] and involves issues to be addressed in Part II of our report. Countries are also addressing fair tax competition (among countries) and fair taxation (between countries and taxpayers).[445] This constitutes an approach not only from an economic perspective (ie fair economic competition is harmed; equitable distribution of tax burden; competitiveness issues; to pay taxes where profits are generated; level-playing field[446]) but also from a political and juridical perspective (ie fair share and justice).[447] The different approaches to fairness may have implications for tax competition and the reaction to abusive and fraudulent practices by taxpayers as well as states.

Over the past few years, the BEPS project has drawn the attention of the international tax law community of experts and the overall public opinion by stating that aggressive tax planning has notably reduced the tax burden of multinationals and that this situation has 'led to a tense situation in which citizens have become more sensitive to tax fairness issues'.[448] The OECD also stated that all parties, governments and individual taxpayers are harmed, including business, since 'fair competition is harmed by the distortions induced by BEPS'.[449] The practice of BEPS, i.e. base erosion and profit shifting, has resulted in an overall reduction in the taxes paid by multinational enterprises, mainly by using aggressive tax planning structures. The measures included in the so-called BEPS project have addressed the concerns of citizens and NGOs[450] about this kind of practice and their negative implications for the fair distribution of tax burdens among taxpayers (ie fair share). The EU has followed these developments by introducing the EU Action Plan for fair and efficient corporate taxation in the EU.[451] The concept of fairness also underlies the EU's competition and anti-state aid policy.[452]

[444] In economic theory, the seminal research on inter-nation equity was done by RA Musgrave and PB Musgrave, 'Inter-Nation Equity', in RM Bird and JG Head (eds), *Modern Fiscal Issues: Essays in Honor of Carl S Shoup* (1972) 85 and ff.

[445] See on this K Brooks, 'Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Policy Objective' in JG Head and R Krever (eds), *Tax Reform in the 21st Century, A Volume in Memory of Richard Musgrave* (2009) 471 and ff; T Dagan, *International Tax Policy, Between Competition and Cooperation* (2018) 189 and ff; and, in respect of the more recent proposals by the OECD, P Pistone et al, 'The 2019 OECD Proposals for Addressing the Tax Challenges of the Digitalization of the Economy: An Assessment' (2019) 2 *International Tax Studies* (ITAXS) 1 and ff.

[446] IJJ Burgers and IJ Mosquera Valderrama, 'Fairness: A Dire International Tax Standard' 780.

[447] T Dagan *International Tax Policy* 43 and ff.

[448] OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, 2013), www.oecd.org/ctp/BEPSAction Plan.pdf, 8.

[449] OECD, *Action Plan on Base Erosion and Profit Shifting*, www.oecd.org/ctp/BEPSActionPlan.pdf, 8.

[450] Examples of these NGOs are Oxfam, Tax Justice Network, Christian Aid and FairTaxMark. See for their approaches to fairness IJJ Burgers and IJ Mosquera Valderrama, 'Fairness: A Dire International Tax Standard' 774.

[451] See sec 4.4.2.4.1.3. below.

[452] CJEU, judgment (Grand Chamber) of 21 December 2016, *Commission v World Duty Free Group*, joined cases C-20/15 P, ECLI:EU:C:2016:981 [2016]; J Kokott, 'Der EuGH als Garant fairen Steuerwettbewerbs' (2017) 6 *Internationale Steuer-Rundschau* 395–401; *cf* for fairness in competition law, see J Kokott and D Dittert, 'Das Konzept der Fairness im Europäischen Wettbewerbsrecht' in J Kokott, P Pohlmann and R Polley (eds), *Festschrift Dirk Schroeder* (2018) 407–13.

In addition to seeking fairness between taxpayers and countries (ie fair share), the OECD and the EU have addressed harmful tax competition (ie fairness between countries). In the framework of the OECD BEPS project, countries have amended (or are currently doing so) their harmful tax regimes following the peer review of these regimes by the Forum on Harmful Tax Practices in the framework of BEPS Action 5. The EU has also addressed harmful tax competition in the EU package to tackle tax competition and the external strategy for effective taxation applicable to EU and third (non-EU) countries.[453] Most recently, the Commission has also proposed a regulation on distortive foreign subsidies by non-EU countries.[454]

Furthermore, fairness (ie to pay taxes where profit is generated and find an equal level-playing field) has been addressed in light of the current proposals to tax highly digitalised business. These proposals include the introduction of a new set of rules for the alignment of taxing powers 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) proposal (Pillar 2).[455] These proposals are still being discussed at the time of writing this book.

4.4.2. Different Regions

4.4.2.1. Africa

4.4.2.1.1. General[456]

Fairness in taxation implies that the tax system should be fair to different individuals.[457] This principle is a common thread across the legislation of many African countries. In Kenya, for instance, the public finance system shall promote an equitable society, and in particular, the burden of taxation is to be shared fairly. Moreover, the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations.[458] Another example is Southern Sudan. Section 110 of the Taxation Act provides that the Ministry of Finance and Economic Planning shall 'ensure coordination, fairness, equity, transparency and avoid excessive tax burden of the citizens, private sector and investors'.[459]

In Malawi, as a further example, the administrative principle of procedural fairness in rule-making, implementation and adjudication is enshrined in section 43 of the Constitution.[460] In this regard, the Malawi Revenue Authority (MRA) has a duty to abide by fairness in decision-making, and failure to do so renders the MRA's decisions and actions null and void. The Malawi Revenue Policy also provides for fairness. However, the fact that people affected by revenue decisions are not involved in decision-making is seen as unfair, considering that the Malawi Revenue Policy advocates fairness and voluntary compliance by the general citizenry.[461]

[453] See EC, Proposal for a Regulation on foreign subsidies distorting the internal market, COM(2021) 223 final.

[454] See sec 4.4.2.4.1.2. below.

[455] Pillar 1 deals with the taxation of highly digitalised business where there is not a physical presence in order to align taxation with value creation. Pillar 2 deals with rules to prevent global undertaxation of corporate profits by introducing an income inclusion rule and an undertaxed payments rule.

[456] We would like to thank Attiya Waris for her contribution.

[457] A Waris, 'Taxation without Principles: A Historical Analysis of the Kenyan Taxation System' (2007) 1 *Kenyan Law Review*, 272, 276.

[458] Constitution of Kenya, art 201(b)(i) and (c).

[459] Taxation Act 2009 (Southern Sudan).

[460] Constitution of Malawi, s 43.

[461] H Kaluwa Soko, *Administrative Law and Governance in East Africa Project Case Study: Taxation in Malawi*, www.idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/56965/IDL-56965.pdf?sequence=2&isAllowed=y.

One key component of fairness with regard to tax is giving the taxpayers a say in budget participation, which is dependent on access to information. Despite the provision of fairness in legislation, many African countries do not provide for freedom of information and budget participation.[462] Considering the case of Malawi discussed in the previous paragraph, for example, although the country has robust provisions on fairness, it does not provide for budget participation and freedom of information, which casts doubt on the actual state of fairness in taxation.[463] By contrast, the Constitution of Kenya states that there shall be openness and accountability, including public participation in financial matters.[464]

4.4.2.1.2. South Africa[465]

South Africa's Constitution (1996) has introduced a special mandatory procedure requiring both Houses of Parliament to actually scrutinise so-called money bills, which are any proposed legislation that may affect tax.[466] The special constitutional procedure affords each member of both Houses of Parliament an individual vote on money bills (generally members of the National Council of Provinces do not enjoy individual votes on any other legislation). It gives the National Council of Provinces the power to propose amendments and force a reconsideration by the National Assembly (a power that the National Council of Provinces does not have otherwise). In scrutinising money bills, Parliament and its committees are required, inter alia, to 'take into account the principles of equity, efficiency, certainty and ease of collection', 'consider … regional and international tax trends', 'consider the impact on development, investment, employment and economic growth' and hold public hearings, consult and report on these matters.[467] These procedures can be said to enhance fairness from the perspective of heightened democratic scrutiny of tax legislation, enhanced public participation and a legal requirement to consider equity in tax (ie that individuals with similar income and assets should pay the same amount of tax; and that those who are able to pay more should pay higher tax). Furthermore, it is also legally required that legislators consider regional and international tax trends.

As can be seen from the description above, the South African legal framework is progressive in enhancing fairness in taxation. It operates within a context of approximately 11 per cent of the population contributing to the income tax base (as of 2018). It is well-documented that reliance on corporate income tax is very high in most African countries compared to more developed economies. This combination of a small number of the population within the tax base and over-reliance on corporate taxes means that, in reality, taxpayers' rights concern a minority of the population who are generally the wealthiest in a society struggling with poverty and having the most unequal wealth distribution in the world. The factual context does not mean to question the legitimacy of the entitlement to basic rights that ensure fairness in taxation. On the contrary, direct tax contributions have the potential to be highly redistributive if public goods expenditure is directed to those development goals specified for tax laws in South Africa's Constitution, 1996.

[462] Committee on Fiscal Studies, *Africa Revenue and Expenditure Map* (2020), www.cfs.uonbi.ac.ke/Africa%20Revenue%20%26%20Expenditure%20Map.
[463] Ibid.
[464] Constitution of Kenya, art 201(a).
[465] We would like to thank Johann Hattingh for his contribution.
[466] Constitution of the Republic of South Africa, 1996, s 75.
[467] Money Bills and Related Matters Act, 9 of 2009, s 11(3)–(4).

From this perspective, the protection of taxpayers' rights is key to ensuring sustainable funding of development goals and, ultimately, achieving social justice.

4.4.2.2. Americas

4.4.2.2.1. The Inter-American System for the Protection of Human Rights

Along with the Inter-American Court of Human Rights, only established in 1979, the IACHR, founded in 1959, protects and promotes human rights in the Americas.[468] The Inter-American Commission has two functions, which are to juridically protect and promote human rights. To promote human rights, the Inter-American Commission has, from its beginnings, regularly issued thematic and country reports.

The Inter-American Commission's thematic report on Fiscal Policy and Human Rights, presented in 2015,[469] rather falls into that category of promoting human rights. It aims at more fairness in taxation and underlines the importance of robust public resources in order to provide for equal chances for all parts of society. The report contends that the standards and principles contained in international and regional human rights instruments, as well as many Constitutions, provide a compelling normative framework under which states can be held accountable for their fiscal policy decisions. Accordingly, human rights standards provide a set of parameters and operational principles to guide all phases of the design, development, implementation and evaluation of fiscal policy. The IACHR states that of all the existing duties, five human rights principles are especially relevant:

(1) The principle of equality and non-discrimination is one of the central tenets of human rights law. Despite the broad normative recognition and international consensus on its importance, many states in the region deploy fiscal policies that either directly or indirectly discriminate. In this regard, the report contains interesting elements possibly to be taken into account in the second part of our study on nexus and a fair international taxation system, for example, that taxation is skewed against labour and in favour of capital.
(2) Access to information, transparency, accountability and participation are principles with determinative impact on the quality and legitimacy of fiscal policy. Human rights, by definition, require mechanisms to enforce them, allow people access to fiscal information and participate in decisions that may affect them.
(3) According to the IACHR, states also have a duty to use and generate the maximum available resources – especially through sufficient and sustainable taxation – in efficient, equitable and non-discriminatory ways. This duty extends beyond the task of allocating limited resources effectively and involves the obligation to increase the availability of resources through domestic revenue mobilisation. This implies a duty to combat tax avoidance which is being introduced into the tax systems of the world, sometimes even on the constitutional level, as can be seen from this report.

[468] *cf* J Kokott, *Das Interamerikanische System zum Schutz der Menschenrechte* (Springer, 1986), and CM Quiroga (former president of the Inter-American Court of Human Rights), *The Battle for Human Rights: Gross, Systematic Violations and the Inter-American System* (Kluwer, 1988).

[469] Fiscal Policy and Human Rights in the Americas, Mobilizing resources to secure rights, Thematic report Executive summary, Prepared on the occasion of the Thematic Hearing on Fiscal Policy and Human Rights, 156 Session of the IACHR, Washington DC, October 2015.

(4) In the same context, the Commission's report also stresses the obligations of progressive realisation and the prohibition of retrogression in the realisation of economic and social rights as recognised in regional and international human rights treaties. The Commission is concerned about budget cuts and illegal financial flows out of countries.
(5) Finally, the IACHR supports the idea that each state has an obligation to ensure the satisfaction of at least minimum essential levels of economic, social and cultural rights. This means that the state has the immediate and binding duty to ensure that people enjoy a basic minimum standard of living, and reaching this minimum floor must be a priority in allocating public resources.

4.4.2.2.2. Latin America

4.4.2.2.2.1. Argentina[470]

The principle of tax fairness is recognised in the Constitution of Argentina as one of the fundamental principles in tax matters. Article 4 of the Constitution orders the equitable and proportional application of taxes according to the taxpayer's economic capacity.

The Argentine Supreme Court established that tax fairness in Argentina functions as a limit linked to reasonable and equitable taxation of taxpayers. It is not within the jurisdiction of the judges to rule on the appropriateness or fairness of taxes or contributions created by the Argentine Congress unless the limits established in the Argentine Constitution are neglected. Consequently, the Argentine Congress is empowered to legislate on tax matters, determine the purposes of tax collection and decide on the methods of evaluation of the goods or things subject to taxation, provided that constitutional limits are not infringed.[471]

Argentine legislation on tax matters establishes a set of guarantees, procedures and resources, both administrative and jurisdictional, for the due protection and safeguarding of taxpayers' rights against actions of the tax authority. In this sense, the constitutional principles of tax legality, equality before the law and due process are highlighted.

4.4.2.2.2.2. Brazil

There is no agreement in Brazil between scholars or in practice about the concept of tax fairness. Moreover, there is no statutory provision establishing it. Nevertheless, it should be emphasised that Article 108(IV) of the Brazilian National Tax Code allows for the application of tax norms following equity – it expressly prohibits tax waiving and creating new taxes on the basis of equity.[472] Under the Constitution of Brazil, equity works like a mechanism for statutory interpretation.[473] When applying equity, although having a margin of discretion, the interpreters are limited by the principle of legality. Moreover, in the light of the principles concretised, there is essentially a balancing reasoning in order to bring about the fairest decision. It should be admitted that the application of tax fairness, in these cases, comes very close to the tests of equality,[474] proportionality[475] and reasonableness.

[470] We would like to thank Eduardo A Baistrocchi for his contribution.
[471] Argentine Supreme Court, *Hermitage SA c/ Poder Ejecutivo Nacional – Ministerio de Economía y Obras y Servicios Públicos – Titulo 5 – ley 25.063 s/ Proceso de Conocimiento*, judgment: 333:993 [2010].
[472] See art 150 (I) of the Brazilian Constitution.
[473] See CG Moreira, 'Equidade como Razão de Decidir em Matéria Tributária' (RDT Atual, 2016) 122, 132–37.
[474] See below sec 8.1.2.2.2.2.
[475] See above sec 4.2.2.2.2.2.

Against that background, fairness is a guiding constitutional principle.[476] Tax fairness is a factor in all taxing activities: from the enactment of acts in tax matters to tax collection. In some cases, it seems like a mandatory rule that prescribes the obligation to interpret the positive law in a way that would bring about the fairest decision.[477] In other cases, fairness as equity corrects the positive law.[478] In such cases, its content normally comprises the equality principle, due process of law, the rule of law and proportionality. In this sense, it is a metanorm,[479] a norm about other norms as a guide to their interpretation and application. These features are identified in several judicial decisions in which the argument of tax fairness was used to bring normative force to a more concrete norm, such as the aforementioned ones.[480]

4.4.2.2.2.3. Chile[481]

The principle of tax fairness or tax justice is acknowledged in Chile as one of the fundamental principles of the tax system. It has not, however, been explicitly defined by the legislator.

At the constitutional level, there is a close relationship between the guarantees of justice and equality, as the principle of equality derives from the idea of justice. Article 19 N°20 of the Chilean Constitution assures every person of the equal distribution of taxes proportionately to the income or in the progression (vertical equity) or form set by the law and the equal distribution of other public charges. In addition, laws must not establish manifestly disproportionate or unjust taxes. Neither the laws nor any authority may establish arbitrary differences. Moreover, Article 19 N°3 of the Chilean Constitution ensures equal protection in law for all persons in exercising their rights.

Thus, the equality of taxpayers' tax charges is safeguarded by the Constitution by an imperative of justice and a prohibition on arbitrary action. The principle of equality requires all persons in similar circumstances to pay similar taxes (horizontal equity). Vertical equity requires that those with higher income pay proportionately higher taxes.[482] Moreover, it is held that such equity is important in countries where wealth is concentrated in the hands of a few. Tax progression is established by law, but it is not ordered by the Constitution.

Similar to Argentina, Chile introduced a tax reform in 2020 aiming at more tax efficiency and vertical equity.[483] The tax reform takes into account the needs of small income taxpayers as well as of small and medium-sized enterprises. Moreover, it created a mechanism for taxpayers with small incomes to enable them to defend themselves before the tax authorities (*defensoría del Contribuyente*). The new law also simplifies the taxation of large enterprises and digital platforms providing services in Chile. Such tax reform was also promoted by social unrest in Chile from 2018 onwards.

Tax justice also refers to a mixture of guarantees, procedures and resources, both administrative and jurisdictional, for the due protection and safeguarding of taxpayers rights when facing tax auditing acts. This will prevent potential inaccuracies, mistakes or abuses. In this regard, the constitutional principles of tax lawfulness, equality before the law and due process

[476] See arts 3(1) and 170 of the Brazilian Constitution.
[477] See Supreme Federal Court of Brazil, extraordinary appeal no 574706/PR, cited.
[478] See Supreme Federal Court of Brazil, extraordinary appeal no 601314/SP, cited.
[479] H Ávila, *Theory of Legal Principles* (Springer, 2007) 104.
[480] See Supreme Federal Court of Brazil, extraordinary appeals no 574706/PR, cited, 29 June 2016, no 651703/PR [2016] and no 601314/SP, cited.
[481] We would like to thank Yuri Varela for his contribution.
[482] *cf* M Cominetta, 'Chile' in L Bernardi et al (eds), *Tax Systems and Tax Reforms in Latin America*, (Routledge, 2007) 14.
[483] Law No 21210 of 24 February 2020.

must be highlighted. However, independent tax and customs courts were created only ten years ago. There are still a few legal changes to be introduced to improve tax fairness, to make it faster, more efficient and able to properly safeguard taxpayers' rights.

4.4.2.2.2.4. Colombia[484]

There is extensive case law on equality and equity[485] and the protection of property[486] as well as on procedural requirements and the rule of law[487] in tax legislation, dealt with in the respective chapters of this study. The Colombian Constitution moreover contains various provisions to ensure that the budget is adopted so that the institution representing the people is sufficiently informed and able to deliberate.[488] That concerns the rule of law, as explained in the relevant chapter. At the same time, those provisions and case law, however, aim at fair tax legislation that integrates all stakeholders and is, therefore, acceptable for the taxpayers. Stressing the requirements of the legal reserve and public debate in the area of tax legislation, the Colombian Supreme Court had declared unconstitutional for procedural reasons the 2018 tax reform, which aimed to reduce tax avoidance and attrac investments.[489]

4.4.2.2.2.5. Mexico[490]

According to Article 31(4) of the Mexican Federal Constitution, a tax must be proportional, equitable and imposed by a law issued by Congress; the destination of the tax must be the public budget. These principles may ultimately be seen as a human right to fair taxation. The Mexican Supreme Court of Justice has described the fundamental right of equity as equality, namely the right of all citizens to receive the same treatment as those in the same situation.[491]

4.4.2.2.2.6. Peru[492]

The concept of tax fairness is not expressly established in Peruvian tax legislation, but its recognition is implicitly derived from the following constitutional principles that govern the national tax system: legality, equality and non-confiscatory taxation.

The Peruvian Constitutional Court has defined the principle of non-confiscatory taxation as the guarantee that the exercise of the state's tax power in creating taxes cannot unreasonably and disproportionately affect taxpayers' assets.[493]

The principle of equality has a double dimension:[494] First, to ensure that taxation generally applies to all taxpayers in view of the same manifestation of wealth. Second, the intensity of the tax burden must respect taxpayers' economic capacity. The principle of equality supports

[484] We would like to thank Lucy Cruz for her contribution.
[485] *cf* below sec 8.1.2.2.2.4.
[486] *cf* below sec 8.4.2.2.2.4.
[487] *cf* above sec 4.1.3.2.2.4.
[488] Art 151 and ff and art 346 and ff of the Constitution of Colombia; Constitutional Court of Colombia, decision C-481/19, cited, nos 115 and ff, *Demanda de Inconstitucionalidad contra la Ley* 1943 *de* 2018, '*Por la Cual se Expiden Normas de Financiamiento para el Restablecimiento del Equilibrio del Presupuesto general y se Dictan Otras Disposiciones*'.
[489] Constitutional Court of Colombia, decision C-481/19, cited, nos 115 and ff, *Demanda de Inconstitucionalidad contra la Ley* 1943 *de* 2018, '*Por la Cual se Expiden Normas de Financiamiento para el Restablecimiento del Equilibrio del Presupuesto General y se Dictan Otras Disposiciones*'.
[490] We would like to thank Diana Bernal for her contribution.
[491] See Mexican Supreme Court of Justice, Pleno, *Equidad Tributaria. Sus Elementos*, Semanario Judicial de la Federación y su Gaceta, Tomo V, PJ 41/97 [1997] 43.
[492] We would like to thank Cecilia Delgado Ratto for her contribution.
[493] Peruvian Constitutional Court judgment no 00041-2004-AI/TC [2004].
[494] Peruvian Constitutional Court, judgment no 04014-2005-PA/TC [2005].

the principle of contributive capacity as an objective relationship with the taxpayers' economic capacity (ability-to-pay principle).

The Peruvian Constitutional Court[495] has established a direct relationship between the taxpayers' contributive capacity and compliance with the concept of fair taxation. The limits of the taxpayers' economic capacity in the exercise of the state tax powers will respect the concept of tax fairness by which the legislator must be inspired, always seeking a balance between general welfare and the constitutional tax framework when regulating each tax figure.

In this sense, according to the interpretation given by the Peruvian Constitutional Court, the concept of tax fairness in Peru is inevitably linked to reasonable and equitable taxation of taxpayers based on objective criteria as to their economic capacity and with respect to a reasonable impact on their property.

4.4.2.2.3. United States[496]

Although the US does not provide a statutory right of tax fairness to taxpayers, the IRS has administratively adopted a 'Taxpayer Bill of Rights'[497] that encompasses ten fundamental rights taxpayers have in dealing with the IRS. The tenth right – 'the right to a fair and just tax system' – offers taxpayers the right to an administrative process that 'consider[s] facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely', as well as to receive assistance from the Taxpayer Advocate Service in situations involving financial difficulty or a lack of timely IRS resolution.[498]

At a sub-national level within the US, many states have either constitutional, statutory or administrative rights regarding the uniformity of taxation among similarly situated taxpayers (particularly with regard to the taxation of real property).[499]

However, there is no notion of establishing fair tax competition among the various states, as the US generally views state tax policy as an example of the phrase 'laboratories of democracy',[500] and encourages (or at least does not discourage) the use of tax incentives or competing tax structures among the various states.

4.4.2.3. Asia

4.4.2.3.1. China[501]

Chinese tax laws do not expressly provide for tax fairness. According to the Constitution of China, it is the duty of every Chinese citizen to pay taxes in accordance with the law.[502] Although the Constitution does not expressly impose a duty on the legislators and administrative authorities to make tax laws or collect taxes fairly, it could still be found that the concept of 'fairness' is a hidden

[495] Peruvian Constitutional Court, judgment no 0033-2004-AI/TC [2004].

[496] We would like to thank Jeremiah Coder for his contribution.

[497] See IRS Taxpayer Bill of Rights, www.irs.gov/taxpayer-bill-of-rights.

[498] See www.irs.gov/newsroom/taxpayer-bill-of-rights-10-the-right-to-a-fair-and-just-tax-system-1.

[499] See, eg Pennsylvania Constitution, art VIII, s 1; 35 New Jersey Register (NJR) 4850(a).

[500] See US Supreme Court, *New State Ice Co v Liebmann*, 285 US 262 [1932] (in which Justice *Brandeis* referred to state autonomy within the federal framework as 'a state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country').

[501] We would like to thank Na Li for her contribution.

[502] Art 56 of the Constitution of the People's Republic of China, promulgated by the National People's Congress on 4 December 1982 and latest amended on 11 March 2018.

principle in many Chinese laws relevant to tax issues. For example, procedural fairness could be found in due process, with which Chinese tax authorities must comply when collecting taxes or imposing surcharges or fines against taxpayers. Similarly, the concept of fair tax competition could be found in the law and practice according to which the central government strictly controls the power to establish any category of tax, determine of tax rates, rules concerning the fiscal authorities and other basic taxation rules[503] to prevent local governments from engaging in harmful tax competition. Furthermore, China has actively participated in the BEPS project, taking quite a number of measures against tax avoidance by multinational enterprises.[504]

4.4.2.3.2. India[505]

In India, the concept of equality is enshrined in the Constitution. Article 14 guarantees equality before the law and equal protection of laws within the Indian territory. As tax laws must treat taxpayers equally, arbitrary and unfair state action is prevented. The Indian Supreme Court has invoked the principle of fairness to hold that, ordinarily, a law has prospective operation unless rectifying an obvious omission or explaining an earlier provision.[506]

Moreover, as per the Indian Constitution, tax can only be levied or collected by the valid authority of law.[507] This provision represents the idea of 'no taxation without representation'. Thus, a tax cannot be imposed through executive orders or subordinate legislation. Additionally, legislation imposing a tax must lay down the character of the imposition, the taxable event, the person liable to pay the tax, the tax rate and the measure or value to which the rate will be applied for computing tax liability.[508] This ensures the uniform implementation of tax laws without room for any arbitrary executive discretion.

4.4.2.3.3. Israel[509]

The principle of tax fairness is an important and complex principle in the Israeli tax law and legal system. It is not written explicitly in any law or basic law. However, it is an important component in examining the proportionality of any tax legislation that infringes the constitutional rights of property, freedom of occupation, or other rights according to the Basic Law: Human Dignity and Liberty & Basic Law Freedom of Occupation, which constitutes the main Israeli Bill of Rights. The basic laws subject any tax legislation to judicial review, and the principle of fair taxation, as part of property rights and equality, affects the constitutionality of tax laws and their meaning. Obviously, tax fairness plays an important role in interpreting Israeli tax law, especially after the enactment of the basic laws. Israeli jurisprudence has adopted a purposive interpretation in tax law as well as all other fields of law.[510] Courts interpret tax laws according to subjective purposes,

[503] Art 8(6) of the Legislation Law of the People's Republic of China, promulgated by the National People's Congress on 15 March 2000, and latest amended on 15 March 2015.

[504] N Li, 'Status of the Implementation of the OECD/G20 BEPS Initiative in China and Future Developments' (2017) 71(2) *Bulletin for International Taxation*.

[505] We would like to thank Ashrita Prasad Kotha for her contribution.

[506] Supreme Court of India, judgment of 15 September 2014, *Commissioner of Income-tax v Vatika Township Private Limited* [2014], reported in 2014, 49 taxmann.com 249.

[507] Art 265, Constitution of India.

[508] Supreme Court of India, *Govind Saran Ganga Saran v Commissioner of Sales Tax*, cited.

[509] We would like to thank Rifat Azam for his contribution.

[510] Israeli Supreme Court, judgment of 6 May 1985, *Kibbutz Hatsur v Assessing Officer Rehovot*, CA 165/82 [1985].

which are the purposes and values that the legislator aims to achieve in the legislation, and the objective purposes are the purposes and values of the legal system, in general. One of the influential objective presumptions of interpretation is that one of the objective purposes of any tax law is achieving fair taxation. The meaning of fair taxation developed substantially upon enacting the Israeli Bill of Rights in the basic laws, to include constitutional rights of property and equality as part of understanding and applying fair taxation.

Accordingly, Israeli courts try to interpret tax legislation to achieve tax fairness as long as such interpretation is possible according to the wording of the law and meets all its purposes. Based on the presumption of fair taxation, among additional considerations of interpretation, the Israeli courts ruled, for example, that, despite the absence of an explicit and specific provision in VAT law at the time, VAT payments must be returned to the taxpayer on bad debt transactions, where he fails to collect the price including VAT from the consumers.[511] The court emphasised that the objective purposes of protecting taxpayer property rights and achieving fair taxation lead to this interpretation. In another case, the court explained that 'fair taxation is a basic principle of tax law' that requires deducting the costs incurred in the process of producing the income.[512] In the *Bank Continental* case, the principle of fair taxation prevailed over principles of administrative efficiency in the interpretation of a provision in the real estate tax law.[513] In the context of international tax, the court ruled that international tax competition justifies the gap between taxing ordinary income and capital gains, even if that infringes equality rights and fair taxation.[514]

4.4.2.3.4. Japan[515]

In Japan, the notion of (tax) fairness is usually discussed together with those of (tax) neutrality and equity,[516] which are derived directly from Article 14(1) of the Japanese Constitution. The article states: 'All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status and family origin.'[517]

4.4.2.4. Europe

4.4.2.4.1. European Union[518]

In the EU, fairness can have three dimensions, (i) procedural fairness regarding the position of persons (physical or legal) vis-à-vis the administration, (ii) fairness in terms of an equal level playing field among countries in order to prevent harmful tax competition (fair tax competition) and (iii) fairness in terms of equitable distribution of tax burdens (fair share).[519] Unlike other

[511] Israeli Supreme Court, judgment of 1 December 1999, *Department of Customs and VAT v Elka Holdings Ltd*, CA 2112/95 [1999].

[512] Israeli Supreme Court, judgment of 13 July 2011, *Erez v Ministry of Finance*, HCJ 1878/09 [2011].

[513] Israeli Court, judgment of 6 July 2010, *Bank Continental Ltd v Tel Aviv Real Estate Tax Director*, CA 2343/05 [2010].

[514] Israeli Supreme Court, judgment of 15 November 1999, *Kaniel v. The Government of Israel (Minister of Finance)*, HCJ 3975/95 [1999].

[515] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.

[516] See sec 8.1.2.3.4 below.

[517] See www.japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html.

[518] We would like to thank Irma Mosquera for her contribution.

[519] For the approaches to fairness, see IJJ Burgers and IJ Mosquera Valderrama, 'Fairness: A Dire International Tax Standard' 767–83.

countries mentioned in this report, at the EU level, the Charter of Fundamental Rights of the European Union does not contain a section on fair taxation.[520] However, European countries often have such principles either directly enshrined in their Constitutions or derived at the interpretative level from constitutional principles.[521]

4.4.2.4.1.1. Procedural Fairness

Regarding procedural fairness, in 1977, the Council of Europe promoted in its Resolution 77(31)[522] the adoption of principles of good administration[523] to ensure fairness between the citizen and the administrative authorities with a special focus on the 'protection of persons, whether physical or legal, in administrative procedures with regard to any individual measure or decision which is taken in the exercise of public authority and which is of such nature as directly to affect the rights, liberties or interests of persons'.[524]

In a 2005 study under Luxembourg's Presidency on the principles of good administration in the Member States of the EU,[525] reference was made to the right to have one's affairs handled impartially, fairly and within a reasonable time by the institutions of the EU. This right 'includes: a) The right of every person to be heard, before any individual measure which would affect him or her adversely is taken; b) The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; c) The obligation of the administration to give reasons for its decisions'.[526] The study concluded that this right is recognised in most of the Member States either in the Constitution or statutes, most often in an Administrative Procedure Act.[527] The principles of good administration also

[520] 2000, OJ C 364, 1. Some references that can influence taxation are, for instance, fair processing of personal data (art 8), fair compensation regarding the right to property (art 17), right to good administration consisting of the right to handle a person's affairs impartially, fairly and within a reasonable time (art 41), right to an effective remedy and a fair trial (art 47).

[521] This seems to be more of a concern for those European countries that either have a federal structure or allow for an effective exercise of taxing powers at the subnational level. eg, art 106 (3) (2) of the Basic Law of Germany reads: 'The financial requirements of the Federation and of the Länder shall be coordinated in such a way as to establish a fair balance, avoid excessive burdens on taxpayers and ensure uniformity of living standards throughout the federal territory'. Similar needs are reflected in art 135 of the Swiss Federal Constitution and other federal countries, such as Austria and Belgium. In the case of Italy, similar concerns have been addressed with the establishment of an equalisation fund and its recognition in art 119 of the constitution, which supplements and implements the general principles of solidarity established by art 2, and the principle of substantive equality, established in art 3.2. However, tax fairness is also derived from the interaction of the latter provision with art 53.2 on the progression of the tax system and the use of art 53.1 (ability to pay) as a benchmark for the determination of the obligation to pay taxes. Spain follows a similar approach, insofar as it recognises fairness among all Spanish citizens and establishes an obligation to solidarity (art 2 of the Constitution), supplementing it in art 158.2 with an equalisation fund across its different regions (*comunidades autónomas*).

[522] Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities. Adopted by the Committee of Ministers on 28 September 1977 at the 275th Meeting of the Ministers' Deputies, www.rm.coe.int/16804dec56.

[523] These principles are (i) Right to be heard, (ii) Access to information, (iii) Assistance and representation, (iv) Statement of reasons and (v) Indication of remedies.

[524] In this way, administrative acts of general applicability, acts that indirectly (but not directly) affect the person and judicial procedures are outside the scope of this Resolution and the principles of good administration.

[525] Study on Principles of Good Administration in Member States, www.circabc.europa.eu/webdav/CircaBC/eupan/dgadmintest/Library/6/1/2/luxembourg_presidency/ipsg_meeting_2005/IPSG-EVENT_APRIL-2005_DOCUMENT_2005-04-28_principels-of-good-administration-se_en_V01.pdf.

[526] Appendix to Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities. Adopted by the Committee of Ministers on 28 September 1977 at the 275th Meeting of the Ministers' Deputies, www.rm.coe.int/16804dec56.

[527] Study on Principles of Good Administration in Member States, 25–31, www.circabc.europa.eu/webdav/CircaBC/eupan/dgadmintest/Library/6/1/2/luxembourg_presidency/ipsg_meeting_2005/IPSG-EVENT_APRIL-2005_DOCUMENT_2005-04-28_principels-of-good-administration-se_en_V01.pdf.

apply to the activities of the tax administration.[528] At EU level, Articles 41 and 42 of the EU Charter guarantee the rights to good administration and access to documents. Article 42 of the EU Charter applies only to 'the institutions, bodies, offices and agencies of the Union'. However, the CJEU has ruled that access to documents, as a general principle of EU law, also binds the Member States in internal VAT procedures.[529]

4.4.2.4.1.2. Fair Tax Competition

Regarding fairness in terms of an equal level playing field among countries, the reference to fair tax competition has been used since the 1996 informal Economic and Financial Affairs Council (ECOFIN) Council meeting in Verona to distinguish between harmful and non-harmful tax competition.[530]

A year later, in 1997, the EU Package to tackle Harmful Tax Competition referred to the positive effects of fair competition, but also noted 'that unrestrained tax competition for mobile forms of business increasingly threatens to cause economic distortions and to erode tax bases within the Community'. As a result, one of the measures introduced by the EU to achieve fair competition was the approval of the Code of Conduct of Business Taxation. In this Code, the EU identifies 'tax measures that are potentially harmful and provides a framework within which Member States can commit themselves to follow the principles of fair competition'.[531]

An EC Communication of January 2016 on an External Strategy for Effective Taxation introduced the use of the criteria in the Code of Conduct of Business Taxation to assess whether a tax measure in a third (non-EU) country could be considered as a harmful tax measure. These criteria are currently used for the list of non-cooperative jurisdictions and, if on the black list, the EU will introduce additional tax and non-tax countermeasures.[532]

Since 2008, the ECOFIN Council[533] has used the criterion of fair tax competition as part of the Standard of Good Tax Governance to be introduced in agreements concluded by the EU or EU countries with third (non-EU) countries.[534] Under this Standard, third (non-EU) countries will be (or have been) assessed in respect of compliance with the criteria of

[528] One example is the Netherlands, where the principle of good (proper) administration (behoorlijk bestuur) contains the principle of fair play in the activities of the tax administration, including the collection of evidence. See IFA 2015 the Netherlands, www.ifa-nl.org/asset/document/55aba1882ee66f30.pdf and H Gribnau, 'Voluntary Compliance Beyond the Letter of the Law: Reciprocity and Fair Play' (2016) in B Peeters, H Gribnau and J Badisco (eds), *Building Trust in Taxation* (Cambridge, Antwerp, Portland, Intersentia, 2017).

[529] CJEU, judgment of 9 November 2017, *Ispas*, case C-298/16, ECLI:EU:C:2017:843 [2017], para 27, with Opinion of Advocate General Bobek of 7 September 2017, ECLI:EU:C:2017:650 [2017].

[530] EC, Taxation in the European Union. Report on the Development of Tax Systems, COM 96 (546) final, 5.

[531] EC, A package to tackle Harmful Tax Competition in the European Union, 5 November 1997, COM (97) 564 final, Annex 1 at 7.

[532] Following the blacklisting, 'the Council adopted defensive measures against the blacklisted jurisdictions, both non-tax countermeasures (related to the European Fund for Sustainable Development) and tax countermeasures (reinforced monitoring of certain transactions, increased audit risks for taxpayers investing or using structures or arrangements involving the black-listed jurisdictions, and several anti-BEPS measures)'. PJ Wattel and AP Dourado, 'Third States and External Relations, in European Tax Law: General Topics and Direct Taxation' in PJ Wattel, O Marres and H Vermeulen (eds), *Fed Fiscale Studieserie*, 1 (2018) 214. Council of the European Union, 'Criteria and Process Leading to the Establishment of the EU List of Non-Cooperative Jurisdictions for Tax Purposes' (8 November 2016) 1014 *Fisc 187 ECOFIN*, www.data.consilium.europa.eu/doc/document/ST-14166-2016-INIT/en/pdf. Annex. See also AP Dourado, 'The EU Black List of Third-Country Jurisdictions' (2018) 46(3) *Intertax* 179.

[533] ECOFIN Council Meeting, (14 May 2008), Ref 8850/08.

[534] See IJ Mosquera Valderrama, 'The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries' (2019) 47(5) *Intertax* 454–67. See also C Panayi, 'Europeanization of Good Tax Governance' (2017) 36(1) *YB Eur L* 442 and ff, 461–62.

good tax governance, which includes transparency, EoI and fair tax competition. Insofar as fair tax competition is concerned, this assessment includes consideration of whether the country engages in harmful tax competition and whether real economic activity is being carried out in the country. In 2018, the ECOFIN Council changed the criterion of fair tax competition to fair taxation and introduced the additional requirement for third (non-EU) countries to implement the four Minimum Standards of the BEPS Project.[535]

The Commission also aims at creating a fair level playing field by recourse to state aid proceedings. There are now numerous proceedings before the Commission and the Courts of the EU (GC and CJEU) which concern tax rulings and legislation as applied to the so-called 'GAFA' enterprises, Google, Amazon, Facebook, Apple and the like. Countries may try to attract investments by such enterprises granting them favourable tax treatment, which then may turn out to be impermissible state aid prohibited under Article 107 TFEU.[536]

4.4.2.4.1.3. Fair and Efficient Taxation of Corporate Profits (Fair Share) and the Problem of Tax Avoidance

The approach to fair and efficient taxation for direct taxation was first[537] addressed by the CJEU in the 2006 *Cadbury Schweppes* case.[538] In this case, the Court referred to the use of anti-avoidance rules to counter wholly artificial cross-border arrangements. Even though the word fairness was not mentioned in the case nor the opinion of the Advocate General,[539] the use of anti-avoidance rules as restrictive measures was regarded as essential to guarantee fairness among taxpayers in the EU. However, the CJEU referred to the limitation in the application of this rule, taking into account the principle of proportionality. Therefore, the anti-avoidance rule would be applicable only if the taxpayer set up a 'wholly' artificial arrangement to avoid taxes. If not directed against wholly artificial arrangements, CFC rules violate fundamental freedoms.[540] This is interesting with regard to the projected 'fair' minimum taxation based on CFC rules.[541]

[535] ECOFIN Council Meeting (26 April 2018), Ref 8644/18.

[536] *cf* eg judgments of GC, judgment of 14 February 2019, *Belgium/Commission (Magnetrol)*, cases T-131/16 and T-263/16, ECLI:EU:T:2019:91 [2019] which was set aside by the CJEU, judgment of 16 September 2021, *Commission/Belgium and Magnetrol International*, case C-337/19 P, ECLI:EU:C:2021:741 [2021], see also Opinion of Advocate General Kokott of 3 December 2020, ECLI:EU:C:2020:990 [2020]; *Luxembourg/Commission (FIAT)*, cited; *Ireland/Commission*, cited and, *Apple Sales International and Apple Operations Europe/Commission*, cited; *Netherlands v Commission (Starbucks)*, cited; T-516/18, *Luxembourg/Commission (Engie)*, cited, and T-816/17, *Luxembourg/Commission (Amazon)*, cited. Furthermore, see Commission decision of 19 September 2018 on tax rulings SA.38945 (2015C) (ex2015NN) (ex 2014/CP) granted by Luxembourg in favour of McDonald's Europe, C(2018) 607 final: not state aid; *Netherlands v Commission (Starbucks)*, cases T-760/15 and T-636/16, cited; SA.46470 (2017/C) (ex 2017/NN) – Possible State aid in favour of Inter IKEA, investigation ongoing (Netherlands); GC, order of 23 January 2018, *QG / Commission (Spain)*, case T-845/16, ECLI:EU:T:2018:36 [2018]; SA.44896 (2017/C ex 2017/NN) (UK CFC group Financing Exemption); *cf* also CJEU, order of 17 May 2018, *United States/Apple*, C-12/18P. Commission decision of 19 December 2018 on the State aid SA.34914 (2013/C) implemented by the UK as regards the Gibraltar Corporate Income Tax Regime; *cf* also J Kokott, 'Der EuGH als Garant Fairen Steuerwettbewerbs' 395 and ff; J Blumenberg, 'Aktuelle Entwicklungen des EU-Beihilferechts im Bereich der Deutschen Unternehmensbesteuerung' (2017) 516 *Ifst-Schrift* 32.

[537] The concept of fairness has been addressed by the CJEU also outside of direct taxation. For instance, Hemels in 2014 addressed five categories of cases in which the CJEU has referred to fairness. Hemels provided examples from tax law but also outside of tax law to demonstrate the different approaches of the CJEU to fairness. These categories are (i) fairness and good faith where fraudulent behaviour existed, (ii) fairness as justification ground for commercial transactions, (iii) fairness as unspecified justification ground, (iv) fairness as justification ground for not favouring a non-compliant company and (v) fairness as a justification ground to different treatment of taxpayers according to their contribution to a problem. See S Hemels, 'Chapter 18', in C Brokelind (ed), *Principles of Law: Function, Status and Impact in EU Tax Law*, (IBFD, 2014).

[538] CJEU, *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited.

[539] Opinion of Advocate General Léger of 2 May 2002, *de Groot*, case C-385/00, ECLI:EU:C:2002:750 [2002].

[540] CJEU, *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited, para 75 and ruling.

[541] *cf* GLOBE pillar II.

The EC has also addressed fairness in the 2012 Action Plan to strengthen the fight against tax avoidance, evasion and fraud. It stated that

> there is a need to ensure that the burden of taxation is shared fairly in line with the choices made by individual governments. Currently, some taxpayers may use complex, sometimes artificial, arrangements which have the effect of relocating their tax base to other jurisdictions within or outside the Union. In doing this, taxpayers take advantage of mismatches in national laws to ensure that certain items of income remain untaxed anywhere or to exploit differences in tax rates. By paying taxes businesses can have an important positive impact on the rest of society.[542]

For this purpose, several measures were recommended to prevent aggressive tax planning,[543] including the creation of a Platform for Good Tax Governance.

In 2015, the EU adopted the Action Plan for fair and efficient corporate taxation. The aim of this plan is to distribute the tax burden equitably, promote sustainable growth and investment, diversify funding sources of the European economy and strengthen the competitiveness of Europe's economy. For the EC, 'the fact that certain profitable multinationals appear to pay very little tax in relation to their income, while many citizens are heavily impacted by fiscal adjustment efforts, has caused public discontent. This perceived lack of fairness threatens the social contract between governments and their citizens and may even impact overall tax compliance'.[544] In order to introduce a fair, simple and more effective corporate taxation in the EU, in January 2016, the EU introduced an Anti-Avoidance Package with 'concrete measures to prevent aggressive tax planning, to boost transparency and create a level playing field for all business in the EU'.[545] The Chapeau Communication for this Anti-Tax Avoidance Package refers to the priority of the Commission to 'develop a deeper and fairer Internal Market, which is fundamental to delivering a thriving economy that benefits all'.[546]

The EC has stated that it aims to meet demands for social justice and economic growth, and will ensure fair and effective tax coordination to help achieve that aim.

In May 2021, the EC reiterated this objective and published a communication, which sets out its long-term vision to provide a fair and sustainable business environment and EU

[542] Communication from the Commission to the European Parliament and the Council, An Action Plan to strengthen the fight against tax fraud and tax evasion, COM/2012/722 final, 6. Even though the official title of this communication in the English language refers to 'fraud and evasion', the measures envisaged in the document, in fact, relate to the fight against tax avoidance, evasion and fraud. Problems of linguistic and conceptual consistency can be recorded across the official languages. The use of '*fraude et évasion*' in the French language is certainly suitable to address all three phenomena since the French expression '*évasion*' corresponds to the English 'avoidance' and the French '*fraude*' covers both the English 'evasion and fraud'. Similar problems to those described in the English language also arise in other languages, such as at least German ('*Steuerbetrug und Steuerhinterziehung*', without including a reference to '*Steuerumgehung*'), Italian ('*frode ed evasione fiscale*', without a reference to '*elusione fiscale*'), Portuguese ('*fraude e evasão fiscais*') and Spanish ('*fraude fiscal y evasión fiscal*').

[543] See also 2012/772/EU: Commission Recommendation of 6 December 2012 on aggressive tax planning, (2012) OJ L 338, 41–43.

[544] Communication from the Commission to the European Parliament and the Council, A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final, 2.

[545] See EU Commission Website on the anti-avoidance package at www.ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm.

[546] Communication from the Commission to the European Parliament and the Council, Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater transparency in the EU, COM(2016) 23 final, 28 January 2016, 2.

tax system.[547] Against this background, the EC's approach is to ensure that taxpayers in and outside the EU pay their fair share for economic activities carried out in the EU, and that countries do not engage in harmful tax competition.

This fair share has also been mentioned in the preamble of the ATAD.[548] Recital 2 states that for the good functioning of the Internal Market, the Member States should 'implement their commitments under BEPS and more broadly, take action to discourage tax avoidance practices and ensure fair and effective taxation in the Union in a sufficiently coherent and coordinated fashion'. The ATAD was amended in 2017 to include also hybrid mismatches with third (non-EU) countries.[549] One of the reasons for this amendment, as stated in the first recital, is to follow up on the BEPS project introduced in order 'to restore trust in the fairness of tax systems and allow governments to effectively exercise their tax sovereignty'.

The dimension of fairness developed in this section will also be addressed in the second part of this research project, expected to start in 2022. This second part will deal with the tax nexus as a basis for delineating the tax jurisdictions of states in the framework of a fair international tax system.

4.4.2.4.2. Russia[550]

The principle of fairness is not set out in the Russian tax legislation. However, the Russian Tax Code contains all elements of the principle of fairness, including the universality of taxation (paragraph 1 of Article 3 of the Tax Code of the Russian Federation), equality of taxation (paragraph 2 of Article 3 of the Russian Tax Code), taking into account the actual ability to pay taxes (paragraph 1 of Article 3 of the Tax Code of the Russian Federation) and tax proportionality (paragraph 3 of Article 3 of the Tax Code of the Russian Federation).

The universality of taxation is expressed by imposing on everyone the obligation to pay legally established taxes and fees. As part of the principle of equality of all before the law, equality of taxation is expressed in the equal legal status of taxpayers and the equal burden of taxation. The principle of proportionality is applied by taking into account the actual ability of the taxpayer to pay tax. According to paragraph 1 of Article 3 of the Tax Code of the Russian Federation, the principle of equality is adequately supplemented by the requirement of proportionality of taxation, taking into account the actual ability of the taxpayer to pay tax.

The application of the principle of fairness in tax law is reflected in the corresponding relationship between the property status of the taxpayer and the amount of tax collected. The requirement to take into account the actual ability of the taxpayer to pay tax will be a necessary condition for the implementation of the principle of fairness in tax law. As provided for in paragraphs 1 and 3 of Article 3 of the Tax Code of the Russian Federation, it is prohibited to establish a tax without taking into account the economic grounds and the actual ability of the taxpayer to pay it.

[547] '… the EU needs a robust, efficient and fair tax framework that meets public financing needs, while also supporting the recovery and the green and digital transition by creating an environment conducive to fair, sustainable and job rich growth and investment': EC, Communication on Business Taxation for the 21st Century, COM(2021) 251 final, p 2.

[548] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, (2016) OJ L 193, 1.

[549] Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, (2017) OJ L 144, 1.

[550] We would like to thank Karina Ponomareva for her contribution.

Despite the fact that the principle of tax fairness is not directly defined in the text of the Tax Code of the Russian Federation, the Constitutional Court of the Russian Federation has repeatedly applied this concept in its reasoning.[551] It considers fairness as an element of the principle of legal equality. As already noted, the principle of tax fairness has always been correlated with the achievement of universality and equality. At the same time, tax fairness is related to the distribution and redistribution of taxpayers' income in society. Therefore, equality in taxation means, first and foremost, uniformity, which implies compliance with taxation and the ability to pay tax.

4.4.2.5. Oceania[552]

4.4.2.5.1. Australia

The non-binding Australian Taxpayer Charter[553] identifies fairness as one of the key expectations for taxpayers in their dealings with the ATO. That expectation is further expanded to include the ATO 'acting impartially', using its powers 'fairly and professionally' and 'making fair and equitable decisions'. Guarantees of natural justice and procedural fairness before the courts as well as in relation to administrative decision-making are found in common law principles, while the Australian Human Rights Commission provides avenues for raising concerns and making complaints about discrimination, bullying or harassment based on race, age, disability, sex, gender, identity, intersex status, sexual orientation or marital or relationship status.

There does not appear to be any legislative right to fair taxation. Australia has not adopted a Bill of Rights at a national level, but human rights charters have been enacted at the sub-national level in three out of eight jurisdictions,[554] however, none of these charters refers specifically to tax fairness. The ATO reports its performance against the Taxpayer Charter in its annual report based on results of a client and community confidence survey.

The duty of the Commissioner to assess income tax is enshrined in legislation and has been recognised as a positive obligation in case law that tested the ability of the Commissioner to use information that had been released without authorisation by a legal adviser. The court found that the Commissioner was required to discharge his statutory obligations to assess tax irrespective of the source of its intelligence.[555]

Australian tax legislation generally protects the integrity of notices of assessment issued by the ATO. This protection has been well-recognised by the courts. However, where there has been conscious maladministration, deliberate failure to comply with provisions of the legislation, fraud, bribery or misfeasance in public office, the assessment will be invalid.[556] In other circumstances, such as a genuine mistake or unintentional oversight, the integrity of the tax assessment is likely to prevail, and any challenges in the court would be limited to the correctness of the amount assessed.

[551] See the Constitutional Court of the Russian Federation, judgments of 30 November 2016, no 27-P [2016]; of 13 March 2008, no 5-P [2008] and 24 February 1998, no 7-P [1998].

[552] We would like to thank Celeste Black and Ali Noroozi for their contribution.

[553] *cf* sec 5.1.2.5.1.

[554] These jurisdictions are the States of Victoria and Queensland and the Australian Capital Territory.

[555] Full Federal Court of Australia, *Federal Commissioner of Taxation v Donoghue*, FCR 316 [2015]. See also Full Federal Court of Australia, *Denlay v Federal Commissioner of Taxation*, FCAFC 63 [2011].

[556] High Court of Australia, *Federal Commissioner of Taxation v Futuris Corp Ltd*, 237 CLR 146 [2008].

4.4.2.5.2. New Zealand

In New Zealand, a Tax Working Group, an advisory body established by the government in late 2017, had to assess the structure, fairness and balance of the tax system. In its final report of 2019,[557] that group recommended the extension of the taxation of capital gains (as compared to labour income) in order to improve the fairness, integrity and fiscal sustainability of the tax system. The report also stresses the fundamental unfairness of tax avoidance because it means that compliant taxpayers must pay more to make up for the lost revenue.

[557] New Zealand Government, Tax Working Group. Future of Tax, Final Report vol I, Recommendations.

5

Special Features of Human Rights in Taxation

Part II of the study focuses on certain national practices of safeguarding basic taxpayers' rights, for example by introducing taxpayer charters – a topic that has been on the OECD agenda at various times at least since 1990. But taxpayers' rights as found in national practices have been the subject of deliberation not only in the OECD, but also elsewhere.[1] There have now been a couple of country surveys, in this study and elsewhere,[2] which have resulted in a clearer picture of the nature of these rights in state practice. The rights to due process and good governance, including the rights to be informed, assisted and heard and further procedural rights; sanctions-related rights and substantive rights – as the rights to equality, to data protection and privacy including the right to confidentiality and secrecy in a world of tax transparency, professional rights of intermediaries and finally taxpayers' property rights will be examined.

Such has been the interest that it has now prompted a focus on whether certain basic taxpayers' rights – as in the practice of certain states, and envisioned in the idea of a taxpayer charter in the OECD and elsewhere – have become embedded in customary international law.[3] It is worthwhile discussing whether some of these notions might constitute general principles of law and thus be binding on states even in the absence of treaties.

5.1. The Emergence of Taxpayer Bills of Rights

5.1.1. Introduction

Apart from international conventions, taxpayers' rights emanate from non-binding taxpayer charters[4] or from domestic law (including constitutions).[5] These sources may be more useful

[1] See for example OECD, *Taxpayers' Rights and Obligations*; OECD, *Taxpayers' Rights and Obligations – Practice Note*, www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf; M Cadesky, I Hayes and D Russell, *Towards Greater Fairness in Taxation A Model Taxpayer Charter* (IBFD, 2016); and www.taxpayercharter.com/.

[2] See OECD, *Taxpayers' Rights and Obligations – Practice Note*, www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf.; P Baker, P Pistone et al. (eds.), *General Report on the Protection of Taxpayers' Rights*, (IBFD, 2018).

[3] *cf* P Alston and N Reisch, *Tax, Inequality, and Human Rights*; D Broekhuijsen and IJ Mosquera Valderrama, 'Revisiting the Case of Customary International Tax Law' (2021) 23 *International Community Law Review* 79–103.

[4] Eg *Charte des droits et obligations du contribuable vérifié*, France; Taxpayer's Charter, Hong Kong; Taxpayer Bill of Rights, Canada; Taxpayers' Charter, Malta; *Carta de Derechos del Contribuyente*, Mexico; Taxpayers' Charter, Pakistan; *Carta de Derechos del Contribuyente*, Peru; Your Charter, United Kingdom; Taxpayers' Bill of Rights, United States; *Carta de Derechos de los Contribuyentes*, Spanish Region Catalonia; Taxpayers' Charter, India; see also *Carta de derechos del*

for the identification of customary taxpayers' rights than DTCs, as state practice implementing taxpayer charters or domestic law does not merely embody states' compliance with treaty law. However, finding sufficiently clear evidence to show that states honour taxpayers' rights due to *opinio iuris* remains the core issue, and is a burdensome exercise that has not yet been accomplished. There are numerous other reasons why states might grant taxpayers' rights other than *opinio iuris*, such as considerations of reputation or the aim to attract foreign investment.

A Model Taxpayer Charter, which was 'derived from a survey of Taxpayer Rights and Responsibilities in 41 countries, representing over 80 % of world GDP',[6] is of course significant in terms of the credibility of an empirical study. However, the fact that the subject countries command 80 per cent of world GDP does not mean that the model charter is 'representative' for the purposes of identifying customary international law of taxpayers' rights. Taxpayers' rights are relevant to all states and therefore no one group of states is in principle more representative than others.

There are 'Taxpayer Bills of Rights' and 'Taxpayer Charters'. A Charter may be binding as supreme law, like the Canadian Charter of Rights and Freedoms[7]. Further bills of rights around the world have binding value, including in particular the US Taxpayers' Bill of Rights (TBoR)[8] and the Mexican Federal Law of Taxpayers' Rights.[9] The Italian Taxpayers' Bill of Rights has binding value in respect of its provisions with direct effect.[10] Interestingly, the Italian Bill of Rights is an organic law that implements constitutional principles and contains a comprehensive approach to the protection of taxpayers' rights. It lacks, however, a special rank in law hierarchy. Nevertheless, its object and purpose make it replaceable by a *lex posterior* that presents the similar features only.

However, those bills of rights and charters are often not legally binding, but mere declarations of rights otherwise secured through constitutional principles and legal norms,[11] or simple expressions of what the taxpayers may expect in connection with the levying of taxes.[12] The fundamental difference is not the terminology, but whether such documents are legally binding or not. Both types of documents are relevant with regard to the identification of general principles. But the probative value of a legally binding document would in most circumstances be much higher than a non-legally binding one. However, there are instances where the legally binding text is somewhat vague, and the non-binding one not only explains the interpretation of the terms in the legally binding one, but is nevertheless generally followed in the application of the vague, binding document. Then, the gravitas for the purposes of identification of general principles can be somewhat reversed.

contribuyente para los paises miembros del Instituto Latinoamericano de Derecho Tributario (ILADT); Confédération fiscale européenne, 'Towards greater fairness in taxation, A Model Tax Payer Charter', *Presentation to the Members of the Platform for Tax Good Governance* (2014); Australian Government, Inspector-General of Taxation, Review into the Taxpayers' Charter and Taxpayer Protections, 2016; Cadesky, Hayes and Russell D, *Towards greater fairness in taxation*; and www.taxpayercharter.com/.

[5] ILC, *Conclusions 5 with commentaries 3 and 4*: 'the relevant practice of States is not limited to conduct vis-à-vis other States or other subjects of international law. Conduct within the State, such as State's treatment of its own nationals, may also relate to matters of international law.' That practice must, however, be known to other states.

[6] See M Cadesky, I Hayes and D Russell, *Towards greater fairness in taxation*; and www.taxpayercharter.com/.

[7] See below sec 5.1.2.2.3.1. of this book.

[8] See below sec 5.1.2.2.3.2. of this book.

[9] *Ley Federal de los Derechos del Contribuyente*, Mexican Federal Official Journal of 23 June 2005; see below sec 5.1.2.2.1.5. of this book.

[10] See Law 212/2000 *Statuto dei diritti dei contribuenti*, below sec 5.1.2.4.1.2.5. of this book.

[11] In the case of Morocco, on which see below sec 5.1.2.1.3., the Charter merely summarises those rights.

[12] These are the so-called service charters, such as, for instance, the one of Nigeria, on which see also below sec 5.1.2.1.3.

5.1.2. Taxpayers' Bills of Rights in the Different Regions

5.1.2.1. Africa[13]

5.1.2.1.1. General

The African Charter on Human and People's Rights provides certain rights that may be construed as taxpayers' rights. The authority of this Charter is particularly strong for reasons related to its capacity to convey the fundamental values that should protect the rights of the people. These include the principle of equality,[14] the right to ownership of property,[15] the right to natural resources,[16] and the right to a fair trial,[17] but also the duty to pay taxes imposed by law in the interest of society.[18]

In most cases, countries have provided for taxpayers' rights through various pieces of legislation or service charters. In Tanzania, for example, the Taxpayer's Service Charter sets out the rights of taxpayers. These include the right to impartial treatment, the right to privacy and confidentiality for information supplied to the Tanzania Revenue Authority (TRA), the right to be presumed innocent unless there is evidence to the contrary, and the right to object to an assessment or decision made by the TRA.[19]

In Nigeria, there is no specific law or policy instrument on the 'taxpayers' bill of rights'. However, the country does have a Service Charter. Although the Service Charter does not expressly provide for taxpayers' rights, it sets out the obligations of the Federal Inland Revenue Service (FIRS), which may be construed as taxpayers' rights. These obligations include treating clients with courtesy and respect, giving prompt service to all Nigerians at all times, displaying competence and professionalism in the discharge of duties, recognising the individual needs of each client and observing clients' right to privacy and confidentiality. In addition to the Service Charter, certain provisions in a variety of legal instruments provide for taxpayers' rights. These include the Constitution of the Federal Republic of Nigeria (1999) and the tax laws – including the Federal Inland Revenue Service (Establishment) Act 2007 (FIRSA), the Companies Income Tax Act (CITA), the Personal Income Tax Act (PITA), the Petroleum Profits Tax Act (PPTA) and the Value Added Tax (VAT) Act which contain a number of taxpayers' rights. Nigeria has also ratified the African Charter on Human and People's Rights (ACHPR) 1983 and the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (2004). Overall, the taxpayers' rights provided by these instruments include the right to ownership of property,[20] right to natural resources and property,[21] right to refund of excess tax,[22] right to a fair trial,[23] right to private life,[24] right to a court order before sale of immovable property,[25]

[13] We would like to thank Attiya Waris and Johann Hattingh for their contribution.
[14] Arts 2, 3 and 19 of the African Charter on Human and People's Rights (ACHPR).
[15] Art 14 of the African Charter on Human and People's Rights (ACHPR).
[16] Art 21(1) of the African Charter on Human and People's Rights (ACHPR).
[17] Art 7 of the African Charter on Human and People's Rights (ACHPR).
[18] Art 29 no 6 of the African Charter on Human and People's Rights (ACHPR).
[19] Tanzania Revenue Authority, Taxpayer's Service Charter (2017).
[20] Ss 43 and 44 of the Constitution of Nigeria 1999; art 14 of the African Charter on Human and People's Rights.
[21] Art 21 of the African Charter on Human and People's Rights.
[22] Federal Inland Revenue Service Act (FIRSA) 2007 (Nigeria), s 23; Petroleum Profits Tax Act (PPTA) 2004 (Nigeria), ss 49(1) and 50(1); Companies Income Tax Act (CITA) 2007 (Nigeria), s 90; Value Added Tax Act 1993 (Nigeria), s 16(1)(b).
[23] Constitution of Nigeria 1999, art 36(1); African Charter on Human and People's Rights, art 7.
[24] Constitution of Nigeria 1999, art 37; FIRSA, s 29(5).
[25] Federal Inland Revenue Service Act (FIRSA) 2007 (Nigeria), s 33(6); Companies Income Tax Act (CITA) 2007 (Nigeria), s 86(6); Personal Income Tax Act (PITA) 1993, s 104.

right to be searched by a person of the same gender upon suspicion of tax abuses,[26] right to object to a revised assessment and the right not to be subjected to punitive assessment.

Apart from South Africa, 13 other African countries appear to have accessible published taxpayer charters or a 'Taxpayer Bill of Rights'. Of these countries, only in Angola are taxpayers' rights expressly set out in primary legislation.[27] Morocco's Taxpayer Charter states that it summarises rights and obligations legally recognised in the general Tax Code. For the remainder of African countries, 'rights' are couched as service guarantees to taxpayers as 'clients' of the tax administrations rather than legally enshrined assurances in legislation.

Taxpayer charters surveyed deal mostly with similar rights, which range from substantive guarantees such as the right to fair and impartial treatment, protection of privacy and confidentiality and the right to challenge an administrative decision by way of appeal and review. The charters also typically cover procedural rights such as the right to procedural fairness, access to one's own information, the right to a presumption of honesty and the right to insist on the identification of tax authority officials.

5.1.2.1.2. South Africa

In South Africa, the concepts of 'Taxpayer Bill of Rights' and 'Taxpayer Charter' are distinct. The former refers to constitutionally entrenched fundamental rights as they apply to taxpayers and a host of other subjects.[28] The 'Charter' refers to non-binding unilateral publications by the tax administration, which deal with an array of issues including recognition of the fundamental rights of taxpayers enshrined in the Constitution (1996) and practical application of some of them. The South African tax administration has published two charters, the first in 1997 and retracted sometime in 2012, and the second on 1 July 2018.[29] The 2018 version, for example, contains a section setting out conditions and specific timeframes within which tax refunds will be paid, which can be claimed to address the right to property and due process. Such a commitment was not contained in the first charter. It was inserted following remedial action recommended by the Tax Ombud.[30] The 2018 Charter does not contain an extensive list of rights available to the taxpayer. Of the substantive rights, the Charter protects the right to fair treatment, right to privacy and generally to respect for a taxpayers' constitutional rights. The Charter also protects the taxpayers' right to due process.

Questions arise from the use by states of taxpayer 'charters' when state practice is to be established from an international law perspective. Based on the experience in South Africa, the following questions can be posed:

i. What is the implication for establishing state practice if there are differences between versions of unilateral documents (the charters) declaring what rights will be effectively protected? This is particularly relevant where a later version retracts a commitment contained in an earlier version.
ii. What is the implication for the stability of the practice if new commitments affecting the practical realisation of fundamental rights are added in new versions?
iii. What is the implication if an interval arises during which no charter exists? For example, South Africa had no charter between 2012 and 2018.

[26] Federal Inland Revenue Service Act (FIRSA) 2007 (Nigeria), s 36(4).
[27] Art 23 of the General Tax Code of 2014.
[28] Chapter 2, Constitution of the Republic of South Africa, 108 of 1996.
[29] www.sars.gov.za/AllDocs/Documents/Service%20Charter/SARS%20Service%20Charter%201%20July%202018.pdf.
[30] See sec 6.4.1.2.1.2. of this book.

Do states have to adopt taxpayer charters if general fundamental human rights are enshrined in the law? The charter can be understood in the sense of a unilateral document that does not establish new enforceable rights. In South Africa, there is a general obligation under section 7(2) of the Constitution (1996) for the state to 'promote and fulfil' fundamental rights, which indicates the source of the duty on state apparatus to explain how such rights are promoted.

5.1.2.1.3. The Charters in Other African Countries

In a few countries, charters on taxpayers' rights are enshrined in the general tax code,[31] but mostly they are enshrined in a separate statute.[32]

They usually cover a variety of rights, both procedural and substantive. Substantive rights include: the guarantees to pay taxes only established in accordance with the Constitution and not be taxed twice; the right to challenge assessment in court and other acts of tax administration that prejudice rights or legitimate interests (right to appeal); the right to confidentiality;[33] the rights to fair treatment, to appeal or review of decisions, to minimise tax liability within the bounds of law; to privacy of privileged communications and trade secrets;[34] the right to impartial application of the law; to privacy and confidentiality regarding information submitted to the tax authorities and the right to consistency and equity to ensure everyone experiences the same treatment;[35] the right to object to and appeal against administrative decisions;[36] the rights to impartial treatment, to privacy and confidentiality and to access tax benefits under the law;[37] to impartiality, to re-examination, objection and appeal and to confidentiality;[38] the rights to challenge and question and appeal decisions made regarding one's tax affairs and to fair, just, respectful and courteous treatment;[39] the rights to confidentiality of information and to review and appeal;[40] the rights to fair treatment, to privacy and to respect for constitutional rights;[41] the rights to impartial treatment, to privacy and confidentiality and to obtain tax incentives and exemptions under the law;[42] the rights to equity, to objections and appeals, to accountability and to confidentiality;[43]

[31] Eg Angola, art 23 Tax Code *Artigo 23.º, Garantias gerais do contribuinte, CÓDIGO GERAL TRIBUTÁRIO*, 2014 (www.ucm.minfin.gov.ao/cs/groups/public/documents/document/zmlu/mje2/~edisp/minfin216613.pdf); *Charte du contribuable en matière de controle fiscal, Direction Générale des Impôts, Royaume de Maroc*, 2019 (portail.tax.gov.ma/wps/wcm/connect/3b2f3988-fca0-4a61-a747-69aec7b9f4bc/Charte+FR++2018.pdf?MOD=AJPERES&CACHEID=3b2f3988-fca0-4a61-a747-69aec7b9f4bc); the Charter is most concerned with rights with regard to tax audits and claims to summarise the rights and obligations in the General Tax Code.

[32] Eg Eswatini Taxpayer Charter, Esatwini Revenue Authority, undated (www.sra.org.sz/aboutus/pageview.php?id=62&name=Taxpayer%20Charter); Kenya; Lesotho; Malawi; Mauritius; Rwanda; Seychelles; South Africa; Tanzania; Uganda; Zambia; Zimbabwe.

[33] *cf* art 23 of the Tax Code of Angola.

[34] *cf* Taxpayer Charter Eswatini.

[35] *cf* Taxpayer Charter Kenya Taxpayer Charter, Kenya Revenue Authority, 2018 (www.yumpu.com/en/document/read/15759384/taxpayer-charter-kenya-revenue-authority).

[36] *cf* Taxpayer Charter Lesotho. Client Charter, Lesotho Revenue Authority, undated (http://lra.org.ls/client-charter).

[37] *cf* Taxpayer Charter, Malawi Revenue Authority, October 2017 (www.mra.mw/assets/upload/downloads/Taxpayer_Charter.pdf).

[38] *cf* Taxpayer Charter Mauritius.

[39] *cf* Taxpayers Charter Rwanda.

[40] *cf* The Taxpayer's Charter, Seychelles Revenue Commission, 2012 (www.src.gov.sc/resources/TaxpayerCharterRevise2012.pdf).

[41] *cf* Taxpayers Charter South Africa, *The Service We Want to Offer You*, South African Revenue Service, released 2018 (www.sars.gov.za/About/Pages/Service-Charter.aspx).

[42] *cf* Taxpayers Charter Tanzania.

[43] *cf* Taxpayer Charter Uganda.

the rights to appeal, to equitable treatment and to privacy and confidentiality[44] and the right to accountability of tax administration.[45]

Procedural rights include: the rights to administrative justice, to procedural fairness before a final decision on a tax process, to access to your information, to full disclosure about one's full tax situation;[46] the rights to presumption of honesty and compliance; to reasons for decisions regarding your tax affairs; to access to 'your' information and to representation;[47] the rights to complete and accurate information on your rights and obligations under tax legislation, to presumption of honesty, to question and challenge the revenue authority and to identification of revenue authority;[48] the right to request explanation of any tax decision, to request advice on procedures to be followed in lodging an objection and to insist on identification of the person assisting you;[49] a presumption of honesty; the rights to access to your information, to provision of accurate and complete information, explanation and advice, to make a complaint, to demand identification of official, to impartial review of assessment and to representation;[50] the rights to provision of reasons for decisions and to provision of relevant information and assistance;[51] the presumption of good faith, the rights to defence during all audit phases, to counsel of own choice, to be informed of the start and close of tax verification and of rights and obligations in the Charter at the verification phase; the presumption of honesty and truthfulness, the right to be properly informed of one's rights and obligations and the right to representation and advise;[52] the rights to presumption of honesty, to fair, reasonable and respectful treatment, to access to information about 'your' tax affairs, to accountability and to due process;[53] the right to due process and to object and appeal to the courts;[54] the rights to presumption of honesty and to object regarding the tax assessment;[55] the rights to facilitation of tax compliance and to prior notice of inspection or audit;[56] the rights to information on rights and obligations and to clear information on tax matters[57] and the right to explanation of rights before a physical search.[58]

5.1.2.2. Americas

5.1.2.2.1. Latin America

5.1.2.2.1.1. Argentina[59]

Argentina's tax system does not include an explicit declaration of taxpayer's rights. However, there are fundamental rights derived from the Argentine Constitution that are applicable to tax matters.[60]

[44] *cf* Taxpayer Charter Zambia.
[45] *cf* Taxpayer Charter Zimbabwe.
[46] *cf* art 23 of the Tax Code of Angola.
[47] *cf* Taxpayer Charter Eswatini.
[48] *cf* Taxpayer Charter Kenya.
[49] *cf* Taxpayer Charter Lesotho.
[50] *cf* Taxpayer Charter Malawi.
[51] *cf* Taxpayer's Charter, Mauritian Revenue Authority, undated (www.mra.mu/download/TaxpayerCharter060114.pdf); this charter does not specify the assurances are rights but rather declares what taxpayers can expect from the revenue authority.
[52] *cf* Service Charter, Rwanda Revenue Authority, undated (rwandatrade.rw/media/RRA_service_charter_english.pdf).
[53] *cf* Taxpayers Charter Seychelles.
[54] *cf* Taxpayers Charter South Africa.
[55] *cf* Taxpayer's Service Charter, Tanzania Revenue Authority, 2017 (www.tra.go.tz/IMAGES/uploads/Laws/EIGHTHTAXPAYERSCharterRevised.pdf).
[56] *cf* The Taxpayer's Charter, Uganda Revenue Authority, undated (ura.go.ug/openFile.do?path=//webupload//upload//download//staticContent//RGTMENU//274//561_TAXPAYER_CHARTER.pdf).
[57] *cf* Taxpayer Charter, Zambia Revenue Authority, undated (www.zra.org.zm/tax-payer-charter/).
[58] *cf* Client Charter of the Zimbabwe Revenue Authority, undated (www.zimra.co.zw/about-us/client-charter).
[59] We would like to thank Eduardo A Baistrocchi for his contribution.
[60] EA Baistrocchi, *Colección Máximos Precedentes: Derecho Constitucional Tributario*, (2013).

These rights, listed in a non-exhaustive manner, are the following: the principle of equality,[61] the principle of legality,[62] the principle of reasonability,[63] the principle of ability to pay,[64] the rule of non-retroactivity,[65] the principle of legislative delegation,[66] the prohibition on confiscatory taxes[67] and the right of defence in trial.[68]

The Argentinian Taxpayers Association together with national deputy Gaston Roma launched a project for a taxpayers' bill of rights in 2019.

5.1.2.2.1.2. Brazil[69]

The Brazilian tax system does not have a taxpayers' bill of rights.

However, taxpayers' rights are protected under the Brazilian Constitution. One could even argue that a taxpayers' bill of rights would be unnecessary, apart from the gains derived from systematisation, considering the constitutional status of the fundamental rights, which means that no other norm will have a higher standing.

5.1.2.2.1.3. Chile[70]

Article 8bis, introduced to Chile's Tax Code in 2010, contained a catalogue of minimum taxpayers' rights, including the right to a respectful hearing, access to information and timely action.

In 2020, the law on the modernisation of tax legislation, replacing Article 8bis of the Chilean Tax Code,[71] significantly deepened and improved taxpayers' rights by establishing more specific rules on the matter, eg the assumption of good faith, the barring of the tax administration initiating new auditing processes regarding subjects that have already been audited; the right to be informed about being the object of an information exchange request; and the right to respect private life and to protect personal data in auditing actions, inter alia.

5.1.2.2.1.4. Colombia[72]

There is no taxpayers' bill of rights in Colombia.

5.1.2.2.1.5. Mexico[73]

The Federal Bill of Taxpayer Rights was published in 2005, and is a legal document issued by the federal Congress which is mandatory and focuses mainly on protecting the procedural rights

[61] Argentine Supreme Court, *S.A. La Martona v Municipalidad de la Ciudad de Buenos Aires*, judgment: 202:130, [1945].
[62] Argentine Supreme Court, *Video Club Dreams c/ Instituto Nacional de Cinematografía y otro s/Amparo*: 103. XXV, [1995].
[63] Argentine Supreme Court, *Dr. García Pinto, José p/ Mickey S.A. s/ infracción art. 44, inciso 1, ley 11.683*, judgment: 314:1376, [1991].
[64] Argentine Supreme Court, *Navarro Viola de Herrera Vegas, Marta v Dirección General Impositiva s/ repetición*, cit.
[65] Argentine Supreme Court, *Navarro Viola de Herrera Vegas, Marta v Dirección General Impositiva s/ repetición*, cit.
[66] Argentine Supreme Court, *Selcro S.A. c/ Jefatura de Gabinete*, judgment: 326:4251, [2003].
[67] Argentine Supreme Court, *Candy S.A. c/ AFIP y otro s/ acción de amparo*: C866XLII, [2009].
[68] Argentine Supreme Court, *Lapiduz, Enrique c/ D.G.I. s/ acción de amparo*, judgment: 321:1043, [1999].
[69] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.
[70] We would like to thank Yuri Varela for his contribution.
[71] Law No 21.210, www.leychile.cl/Navegar?idNorma=1142667. Amendment No 6 establishes the right to be informed when being object of an information exchange request (translated from Spanish by Yuri Varela):

> '6th. To be informed about the officials of the Service under whose responsibility the processes in which they have the status of interested party are processed. The foregoing shall not be applicable with respect to the matters dealt with in article 161 number 10, or the procedures of article 4 quinquies. Likewise, the right to be informed, if been subject of a request for the exchange of information, as long as it does not imply a possible breach of tax obligations.'

[72] We would like to thank Lucy Cruz for her contribution.
[73] We would like to thank Diana Bernal for her contribution.

of taxpayers in their dealings with the tax authorities.[74] It contains rights to be informed, to confidentiality of data, to be treated with due respect and consideration, the right to be heard, a presumption of good faith and the principle of proportionality.

5.1.2.2.1.6. Peru[75]

To date, the Peruvian tax authorities have not issued a taxpayers' bill of rights and/or taxpayers' charter. However, Article 74 § 2 of the Peruvian Constitution expressly recognises that the Peruvian state, in the exercise of its tax power, must respect the fundamental rights of human beings. That provision explicitly prohibits taxes of a confiscatory nature.

Although the said provision mainly focuses on the human rights recognised in the Peruvian Constitution, Peru also recognises international treaties as part of the national law in force when they have been duly ratified by Congress. Therefore, ratified human rights treaties such as the International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights must be taken into consideration by the Peruvian legislator as well as the Peruvian courts with regard to tax matters.

Finally, the Peruvian Tax Code[76] contains a list of the following taxpayers' rights:

1. The principle of legality;[77]
2. The right to be treated with respect and consideration by the tax administration;
3. The right to demand the refund of what is unduly or excessively paid, in accordance with law;
4. The right to issue substitute or rectify their tax return according to the law;
5. The right to file an administrative or judicial appeal against decisions by the tax administration;
6. The right to be informed of the status and responsibilities of the administrative procedures to which it is a part;
7. The right to request the non-application of interest and penalties in cases of reasonable doubt or dual criteria;
8. The right to make institutional enquiries on tax matters to the tax administration;
9. The right to confidentiality of the information provided to the tax administration;
10. The right to request copies of the documentation presented to the tax administration;
11. The right not to provide documents or information to the tax administration when they already are in their possession;
12. The right to obtain proper advice from the tax administration;
13. The right to request the postponement and/or fractionation for the payment of tax debts;
14. The right to exercise the statute of limitations against the actions of the tax administration to audit;
15. The right to receive an efficient service from the tax administration and be provided with the necessary facilities for the fulfilment of its tax obligations; and
16. The right to appoint up to two representatives during the audit procedure in order to have access to the information of comparable independent third parties used by the tax administration in the application of the transfer pricing rules.[78]

5.1.2.2.2. The Caribbean

Taxpayers' charters or codes of practice are not a general feature of the tax landscape in the Caribbean.

[74] www.diputados.gob.mx/LeyesBiblio/pdf/LFDC.pdf.
[75] We would like to thank Cecilia Delgado Ratto for her contribution.
[76] *Código Tributario Peru*.
[77] Art III preliminary Title, *Código Tributario Peru*.
[78] Art 92 and ff *Código Código Tributario Peru*.

5.1.2.2.3. North America

In 2015, the US Congress enacted a Taxpayer Bill of Rights, according to which 'the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title'. It then provides a list of 10 rights. However, the TBoR protects taxpayers' rights as laid down in other provisions. It does not create new enforceable rights or remedies against the IRS. The TBoR only groups existing rights into categories that are easier for taxpayers and IRS employees to understand and remember. It provides organising principles for statutory rights – a so-called framework. When the TBoR was released, it 'encompass[ed] "multiple existing rights embedded in the tax code" and [as IRS Commissioner John A Koskinen explained,] "[w]hile these rights have always been there for taxpayers, we think the time is right to highlight and showcase these rights for people to plainly see."'[79]

5.1.2.2.3.1. Canada

The Canada Revenue Agency (CRA) has issued a Taxpayer Bill of Rights that 'describes the treatment [taxpayers] are entitled to when [they] deal with the CRA.'[80] This document has no official legal status, but some of the rights set out in the Bill of Rights are protected by Canada's Income Tax Act (ITA).

Canada's Taxpayer Bill of Rights lists the following 16 rights:[81]

1. The right to receive entitlements and to pay no more and no less than what is required by law.
2. The right to service in both official languages.
3. The right to privacy and confidentiality.
4. The right to a formal review and a subsequent appeal.
5. The right to be treated professionally, courteously, and fairly.
6. The right to complete, accurate, clear, and timely information.
7. The right, unless otherwise provided by law, not to pay income tax amounts in dispute before having an impartial review.
8. The right to have the law applied consistently.
9. The right to lodge a service complaint and to be provided with an explanation of the findings.
10. The right to have the costs of compliance taken into account when administering tax legislation.
11. The right to expect CRA to be accountable.
12. The right to relief from penalties and interest under tax legislation because of extraordinary circumstances.
13. The right to expect CRA to publish its service standards and report annually.
14. The right to expect CRA to provide warning about questionable tax schemes in a timely manner.
15. The right to be represented by a person of the taxpayer's choice.
16. The right to lodge a service complaint or request a formal review without fear of reprisal.

5.1.2.2.3.2. United States

The US Internal Revenue Service (IRS) has issued a Taxpayer Bill of Rights, which is available on their website: www.irs.gov/taxpayer-bill-of-rights. Academics have pointed out that the

[79] US Tax Court, 152 T.C. 182, 196 [2019] (quoting IR-2014-72, 2014 WL 2590817); US Court of Federal Claims, judgment of 17 November 2020, *Shnier v United states*, 18-1257, Fed. Cl., [2020].

[80] Canada Revenue Agency, Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer, available at www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-17e.pdf.

[81] Canada Revenue Agency, Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer, available at www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-17e.pdf.

document is non-binding.[82] However, many of the rights listed within it are provided within the Internal Revenue Code and therefore legally protected to varying degrees.[83] For example, Right #8 in the Taxpayer Bill of Rights is the Right to Confidentiality, which is in fact provided in sections 6103 and 7216 of the Internal Revenue Code, which together provide civil and criminal penalties if the IRS or a tax return preparer discloses taxpayer information.[84]

The 10 rights set out in the US Taxpayer Bill of Rights are the following:

1. The right to be informed.
2. The right to quality service.
3. The right to pay no more than the correct amount of tax.
4. The right to challenge the IRS's position and be heard.
5. The right to appeal an IRS decision in an independent forum.
6. The right to finality.
7. The right to privacy.
8. The right to confidentiality.
9. The right to retain representation.
10. The right to a fair and just tax system.

5.1.2.3. Asia

5.1.2.3.1. China[85]

There is no particular law or regulation named the 'taxpayer bill of rights' or the 'taxpayer charter' in China. But taxpayers, both individuals and non-individuals, have a number of rights, found in various Chinese laws. For example, the Constitution expressly provides that Chinese citizens have the right to criticise and make suggestions regarding any governmental institutions. According to the Tax Collection Administration Law of China, taxpayers and withholding agents have the right to question the tax authorities about the tax laws and administrative regulations of the state as well as the information related to tax payment procedures, and taxpayers shall, in accordance with the law, have the right to apply for the reduction, exemption and refund of tax, etc.

In 2009, the State Administration of Taxation of China summarised the above-mentioned taxpayers' rights into 14 categories and published them in a notice informing all Chinese taxpayers of those rights (the '2009 Notice').[86]

These 14 rights are:

1. The right to know.
2. The right to confidentiality.
3. The right to supervise tax administration and collection.
4. The right to choose tax declaration methods.
5. The right to apply for deferred declarations.
6. The right to apply for deferred tax payments.
7. The right to apply for refund of overpaid taxes.

[82] A Christians, *Taxpayer Rights in the United States* (14 October 2016). CA Ruiz Jiménez, *Derecho Tributario Y Derechos Humanos/Tax Law and Human Rights* (Faculty of Law, McGill University, 2016).

[83] See Taxpayer Advocate Service, 'Know Your Rights as a Taxpayer', www.taxpayeradvocate.irs.gov/ (stating that 'The Taxpayer Bill of Rights groups the dozens of existing rights in the Internal Revenue Code into ten fundamental rights').

[84] 26 U.S.C. 6103; 26 U.S.C. 7216.

[85] We would like to thank Na Li for her contribution.

[86] The State Administration of Taxation of China, Notice of the State Administration of Taxation on the Rights and Obligations of Taxpayers (Letter No 761 [2009]), issued on 29 December 2009.

8. The right to enjoy tax incentives according to law,
9. The right to appoint tax agents,
10. The right to make statements and the right to defence,
11. The right to refuse tax audit/investigation without presenting proper tax audit certificates and tax audit notice,
12. The right to legal remedies,
13. The right to request a hearing in accordance with the law, and
14. The right to obtain relevant tax documents.

Although the 2009 Notice has no legally binding effects, it was the first governmental document which was published by Chinese tax authorities clearly summarising taxpayers' rights from various Chinese laws. So far, to our knowledge, there has been no update to the list of taxpayers' rights published by the 2009 Notice.

5.1.2.3.2. India[87]

In India, the fundamental rights enshrined in the Constitution apply to all matters, including tax matters, and are legally enforceable.

The Indian Government announced the adoption of a taxpayers' charter in 2020. The newly adopted charter enumerates 14 taxpayers' rights, including the right to a fair and a just tax system, timely decisions, reasonable treatment, privacy and confidentiality. In return, taxpayers are expected to respond and pay in time, be honest, compliant and keep accurate records.[88] It is hoped that a clear enumeration of taxpayers' rights will improve trust between taxpayers and the administration.[89]

Prior to this, the Income Tax Department had issued an aspirational, non-binding 'Citizen's Charter'[90] declaring their commitment to taxpayers. The vision of the Charter was to partner in the nation-building process through progressive tax policy, efficient and effective administration and improved voluntary compliance.

The mission had been to formulate progressive tax policies, to make compliance easy, to be accountable and transparent and act with honesty, in a fair and judicious manner, to deliver quality service and to continuously upgrade skills and build a professional and motivated workforce. The Charter also talked of standards of service delivery that the Department aspired to follow (good practice, ideal timelines etc), but also of the obligations and expectations of the taxpayer.

The Citizen's Charter did not mention taxpayers' rights directly. However, given the recent announcement, there is hope for improvement and binding legal protection in this regard.

5.1.2.3.3. Israel[91]

There is no taxpayers' bill of rights in Israel. However, the Basic Laws are the real and substantive taxpayer bill of rights in Israel. The rights, guarantees and judicial review safeguards apply in all

[87] We would like to thank Ashrita Prasad Kotha and Sriram Govind for their contribution.

[88] S 119A, Indian Income-tax Act 1961 empowers the apex direct tax authority, Central Board of Direct Taxes to issue a Taxpayers' Charter. The Charter notified by the Central Board of Direct Taxes is available at www.incometaxindia.gov.in/Documents/taxpayer-charter.pdf.

[89] Budget 2020–21, Speech of Nirmala Sitharaman, Minister of Finance, 1 February 2020, para 128, available at www.indiabudget.gov.in/doc/Budget_Speech.pdf.

[90] Income Tax Department, Citizen's Charter: A Declaration of Our Commitment to the Taxpayers, incometaxindia.gov.in/Documents/citizen-charter-declaration.pdf.

[91] We would like to thank Rifat Azam for his contribution.

fields and are also meant to protect taxpayers' rights. The Israeli tax authorities publish taxpayers' rights, but these cannot really be seen as a Bill of Rights, but as mere service standards and commitments.

5.1.2.3.4. Japan[92]

The Hatoyama administration, supported by the Democratic Party of Japan (DPJ), between September 2009 and June 2019 considered integrating a taxpayers' bill of rights into the relevant Japanese tax statutes. Under that administration, the Government Tax Committee (*Seifu Zeisei Chosakai)* announced its 'Tax Revision Plan' and the enactment of a taxpayer bill of rights was discussed as one of its long-term aims.[93] Consideration was also given to amending Article 1 of the Act on General Rules for National Taxes (AGRNT).[94]

In a 2011 tax reform, parliament passed the aforesaid tax reform bills that contained a series of tax transparency rules (eg, CRS). However, the enactment of the taxpayer bill of rights was dropped during the deliberations. Despite the failure to enact the taxpayer bill of rights, taxpayers' rights are partially guaranteed in Japanese tax practice through the amendment of the tax investigation procedure in the newly introduced Article 74-2 of the AGRNT. According to this new rule, before they commence their administrative tax investigation, tax investigators of the Japanese tax authority shall inform taxpayers of their precise aims/targets (ie, which kinds of items, how, and to whom they would like to investigate). In addition, they have to ask taxpayers to coordinate their investigation.

5.1.2.3.5. South Korea[95]

The delivery of a Taxpayer's Charter was prescribed under the Korea Framework Act on National Taxes 1974 as amended (Act No 9968 Jan 25, 2010) Articles 81-2.[96] This Charter should include such matters as a presumption of taxpayer's sincerity; prohibition of abuse in the context of tax investigation; right to receive assistance in responding to a tax investigation; due process and fair treatment in taxation and the investigation process. Accordingly, there is a Taxpayers' Rights Charter. It is very short and available only in Korean.[97] It covers the issues it is supposed to cover under the Framework Act as indicated above. In sum it focuses essentially on procedural issues. In addition, there is also a Taxpayers Advocate under the Taxpayer Advocacy Bureau.[98]

[92] We would like to thank Yuri Matsubara and Sake Urushi for their contribution.
[93] See Matsubara, *Tax Transparency* 1.
[94] Act No 66 of 2 April 1962.
[95] We would like to thank Asif Qureshi for his contribution.
[96] The table of contents in the Act as it relates to taxpayers' rights is as follows:

art 81-2 (Establishment and Delivery of Taxpayers' Right Charter)
art 81-3 (Presumption of Taxpayer's Sincerity)
art 81-4 (Prohibition of Abuse of Right of Tax Investigation)
art 81-5 (Right to Receive Help in Tax Investigation)
art 81-6 (Selection of Persons Subject to Tax Investigation)
art 81-7 (Advance Notice of Tax Investigation and Request for Postponement)
art 81-8 (Period of Tax Investigation)
art 81-9 (Notice of Result in Tax Investigation)
art 81-10 (Confidentiality)
art 81-11 (Offer of Information)
art 81-12 (Judgment on Propriety before Tax Levying).

[97] www.nts.go.kr/info/info_06_01.asp.
[98] www.nts.go.kr/eng/about/about_04.asp?top_code=A001&sub_code=AS01&ssub_code=ASA4.

5.1.2.4. Europe

5.1.2.4.1. European Union and its Member States

5.1.2.4.1.1. European Union

There is no legally binding taxpayers' charter for the European Union. Taxpayers' rights in the European Union are, however, protected by the Charter of Fundamental Right of the European Union and by the European Convention of Human Rights, as indicated in this report.[99] Moreover, there is a General EU Ombudsperson, who promotes good administration at EU level.[100]

Additionally, the European Commission adopted Guidelines for a Model for a European Taxpayers' Code in 2016.[101] The European Taxpayers' Code is a model of behaviour for both European taxpayers and Member States' tax administrations to follow rather than a strict template code or charter. It is a non-binding instrument.

The guidelines laid down therein aim to ensure a balance between the rights and obligations of both taxpayers and tax administrations. It is based on the main general principles and best practices in Member States deemed useful for enhancing cooperation, trust and confidence between tax administrations and taxpayers, ensuring greater transparency on the rights and obligations of both, and encouraging a more service-oriented approach of tax administrations. It encourages tax administrations and European taxpayers to adopt and apply all these principles and practices.

It affirms among other things the principle of legality, a presumption of honesty, non-discrimination, the right to be informed, confidentiality of tax data and the right to judicial protection. It also aims at greater transparency by both taxpayers and tax administrations.

The European Taxpayers' Code is based on a spirit of cooperation and working together for tax administrations and taxpayers.

5.1.2.4.1.2. EU Member States

5.1.2.4.1.2.1. Austria[102] Neither a distinct taxpayers' bill of rights nor a taxpayer charter consolidates taxpayers' rights in the Austrian tax system. However, other domestic legal sources provide for the protection of taxpayers' rights. The Austrian Constitution dictates the principle of legality (Article 18 B-VG), the principle of equality (Article 7 B-VG and Article 2 StGG), and the protection of property (Article 5 StGG), all of which are of particular importance to taxpayers. The ECHR, and thus crucial human rights for the protection of taxpayers such as the right to a fair trial in Article 6 and the prohibition of discrimination in Article 14, enjoys constitutional status in the Austrian legal system. The Federal Tax Code (*Bundesabgabenordnung*, BAO) stipulates certain substantive and procedural rights that are specific to taxpayers. Notable examples for taxpayers' rights in the Federal Tax Code are: confidentiality (§ 48a BAO and Article 20(3) B-VG), data protection rights (§§ 48d–48i BAO together with the GDPR), and access to information held by the tax administration (§§ 90–90b BAO). The Federal Tax Code also contains the obligations of taxpayers and the prerogatives and obligations of the tax agency. All of these provisions in the various legal sources are legally binding and apply to all taxpayers, irrespective of their nationality or residence.

[99] See sec 8.4.2.4. of this book.

[100] The EU Ombudsperson was established on the basis of art 228 TFEU. The ombud has non-binding powers concerning good governance of EU institutions and reports to the EU Parliament. The right to good administration of EU institutions under art 41 of the EU Charter has some important implications for tax procedures, connected with art 47 of the EU Charter and the right to a fair trial, which will be addressed later in sec 6.1.2.4. of this book.

[101] European Commission, Directorate-General Taxation and Customs Union, Guidelines for a Model for A European Taxpayers' Code, Ref Ares(2016)6598744-24/11/2016.

[102] We would like to thank Céline Braumann for her contribution.

5.1.2.4.1.2.2. Belgium Belgium adopted a taxpayers' charter in 1986,[103] as a part of a larger reform of the national laws on taxation, which had as its main goal to reduce the budget deficit. The aim of the Charter was to strike a fairer balance between the rights of the taxpayer and the rights of the anti-fraud authorities. From such perspective, its rationale characterises it more as an attempt to promote clarity in the action that tax authorities can undertake, than as an additional source of legal protection for taxpayers, which otherwise operates in the Belgian tax system in conformity with the constitutional principles of the country.

5.1.2.4.1.2.3. France There is a taxpayers' charter in France,[104] even though it is an administrative document that merely summarises the rights of audited taxpayers and. It is frequently updated (see https://www.economie.gouv.fr/files/files/directions_services/dgfip/controle_fiscal/organisation_fonctionnement/charte_contribuable_2020.pdf, last updated in July 2020). As such, the Charter of the audited taxpayer has a narrative content, which explains the rights, but does not consist of specific articles. Accordingly, the French Taxpayers' Charter (*Charte du contribuable vérifié*) does not add really further protection to that which already operates in line with the provisions of French tax procedure law, which establishes its binding value and allows taxpayers to invoke the Charter against tax authorities, who are bound to comply with it.

5.1.2.4.1.2.4. Germany There is no taxpayers' bill of rights in Germany. However, in addition to constitutional guarantees, the German tax code (*Abgabenordnung*, AO) also contains provisions restricting the processing of personal data[105] as well as detailed rules on tax secrecy and right of access by the data subject[106] and to judicial protection.[107]

5.1.2.4.1.2.5. Italy Since 2000, Italy has had a Taxpayers' Bill of Rights and a tax ombudsperson.[108] The Bill does not have constitutional rank.[109] Its purpose is to implement fundamental principles in tax matters.[110]

The Bill's comprehensive regulation has made it possible to ensure its stable functioning over two decades with only minor amendment. It contains three sections that regulate the adoption and content of tax rules, the principles applicable to taxation, the relations of private persons with tax authorities and further topics.[111] The formulation of several rules contained in the Italian Taxpayers' Bill of Rights has made it possible for judicial interpretation to acknowledge the binding effect of the Taxpayers' Bill of Rights, including the provisions mentioned here.

The first section establishes requirements of clarity and transparency for tax laws, prohibits retroactivity, including in connection with interpretative statutes that may undermine legal certainty, and limits the power of the government to introduce tax measures by decree in exceptional cases.

[103] *Charte du contribuable*/het Charter van de belastingplichtige, introduced by Law 4 August 1986.

[104] *Charte du contribuable* verifié. Its content begets binding value based on Art. L. 10 of the *Livre des procédures fiscales*. According to such clause, the provisions included in the Charter have binding value in line with Art. L. 47, 3rd indent of the *Livre des procédures fiscales*.

[105] § 29b and ff AO.

[106] § 30 and ff AO.

[107] § 32i AO.

[108] Art 13 of the Italian Taxpayers' Bill of Rights establishes the *Garante del Contribuente*, but in fact each Italian region has a council of tax ombudspersons. The *Garante del Contribuente* does not have binding powers and is not independent from tax authorities. The influence of the *Garante del Contribuente* has been rather limited in practice.

[109] The *Statuto dei Diritti del Contribuente* was established by Law 27 of February 2000, no 212*; cf* G Tieghi, '*Taxpayer Rights: a constitutional perspective, The Italian Taxpayer Bill of Rights 15 years on "at the top of the world". But what about effectiveness?*', Remark at the Inaugural International Taxpayer Conference on Taxpayer Rights in Washington (18 November 2015).

[110] Art 1(1) Italian Taxpayers' Bill of Rights.

[111] Such other rules do not necessarily relate to the protection of rights, but have a similar function to the ones that other tax systems in continental Europe attribute to general tax laws. Accordingly, for instance, art 10-bis Italian Taxpayers' Bill of Rights contains the Italian GAAR, whereas art 11 Italian Taxpayers' Bill of Rights regulates tax rulings.

The second section further specifies constitutional principles in the context of tax, such as, for instance, the right to exclude the application of tax sanctions in the presence of legitimate expectations, good faith and conditions of objective uncertainty.[112]

The third section includes rights that relate to procedures and are in fact instrumental to an effective exercise of the right to defence in tax procedures. In particular, tax authorities are under an obligation to clearly state the legal and factual grounds underlying requests for audit, reassessment and tax collection.[113] The same applies for the protection of the right to a sufficient delay in exercising the rights[114] and the protection of rights in the framework of tax inspections.[115]

The fourth section contains the principles of non-retroactivity, of no taxation without representation and of clear motivation of the acts of the fiscal authorities, inter alia.

5.1.2.4.2. Russia[116]

There is no charter of taxpayers' rights in Russia.

The organisational and legal mechanism of taxation and its functioning are based on the main principles of taxation, which are directly derived from the Constitution of the Russian Federation. According to paragraph i part 1 of Article 72 of the Constitution, general principles of taxation and fees are jointly established by the Russian Federation and its constituent parts (regions). According to Article 75, paragraph 3 of the Constitution of the Russian Federation the system of taxes paid to the federal budget and the general principles of taxation and dues in Russia shall be fixed by federal law.[117] Thus, in accordance with part 3 of Article 75 of the Constitution, the principles of taxation are a constitutional concept. The Tax Code of the Russian Federation as a type of federal law establishes general principles of taxation and fees. It summarises and defines the constitutional principles of taxation at all levels.

Most general principles of taxation are listed in Article 3 of the Tax Code of the Russian Federation. They include:

1. Legality of taxation;
2. Universality and equality of taxation;
3. Ability to pay;
4. Collection of taxes for public purposes;
5. The establishment of taxes and fees in accordance with the due process of law;
6. Economic basis of taxes and fees;
7. Interpretation in favour of the taxpayer (payer of fees) of all irrevocable doubts, contradictions and ambiguities of tax legislation;
8. Certainty of tax liability;
9. Unity of the economic space of the Russian Federation and unity of tax policy; and
10. Unity of the system of taxes and fees.

At the same time, not all of the generally recognised principles of taxation are enshrined in law. Some of them, for example the principle of sufficiency (tax revenues should be sufficient to cover government expenditure) or flexibility of taxation (this principle implies the ability of the tax system to change rapidly in the event of unforeseen additional government expenditures) are supported only in theory.[118] Some principles (for example, the principles of proportionality,

[112] Art 10 Italian Taxpayers' Bill of Rights.
[113] Art 7 Italian Taxpayers' Bill of Rights.
[114] This is the function of the so-called *rimessione in termini* under art 9 Italian Taxpayers' Bill of Rights.
[115] Art 12 Italian Taxpayers' Bill of Rights.
[116] We would like to thank Karina Ponomareva for her contribution.
[117] Constitutional Court of the Russian Federation, judgment of 21 March 1997, no 5-P, [1997].
[118] See, for example II Kucherov, *Russian Tax Law: the lecturing course* [*Nalogovoe paravo Rossii: kurs lekcii]* (2006) 75.

fairness, the inadmissibility of excessive use of tax control measures) are recognised and developed by the Constitutional Court and commercial courts in their case law.[119]

5.1.2.4.3. Switzerland[120]

The Swiss legislator has not implemented a taxpayers' charter or a taxpayers' bill of rights. However, various national tax laws contain provisions on the protection of taxpayers' rights. Moreover, the Constitution contains additional rights such as the right to be heard[121] and the right to privacy.[122] Therefore, taxpayers' rights might vary depending on the applicable tax laws. Moreover, some rights are only applicable in criminal tax proceedings (eg *ne bis in idem* or *nemo tenetur*). In general, however, the tax procedure is influenced by a relatively trustful relationship between taxpayers and the tax authorities.

5.1.2.4.4. United Kingdom[123]

The United Kingdom was one of the first countries to adopt a taxpayers' charter.[124] A charter was adopted by the former Inland Revenue in 1986, but was not carried forward when the Revenue was amalgamated with Customs and Excise in 2005. Instead, after the amalgamation, a new charter entitled 'Your Charter' was adopted.[125] (The reason the document has this title is that HMRC deals not just with the collection of taxes, and not all of its 'customers' are taxpayers). There is now a statutory obligation to publish this charter,[126] and an oversight committee which publishes reports on its implementation.[127] Under the Finance Act 2009, Her Majesty's Charter became a legal requirement. That legislation states that the Charter 'must include standards of behaviour and values to which Her Majesty's Revenue and Customs will aspire when dealing with people in the exercise of their functions'.[128] The new 2020 Charter, which was published on 5 November 2020, integrates the outcome of an extensive consultation process.

[119] See, for example, Constitutional Court of the Russian Federation, judgments of 17 December 1996, no 20-P, [1996] and of 15 July 1999, no 11-P, [1999].

[120] We would like to thank Peter Hongler for his contribution.

[121] Art 29(2) of the Federal Constitution of Switzerland.

[122] Art 13 of the Federal Constitution of Switzerland.

[123] We would like to thank Philip Baker for his contribution.

[124] There is a full explanation of the history in I Young, 'Taxpayer Rights and the Role of a Taxpayers' Charter', *Tax Notes* (2018), www.info.taxnotes.com/conferencepapers_the_role_of_a_taxpayers_charter_0818.

[125] The current text of 'Your Charter' can be consulted at www.gov.uk/government/publications/your-charter/your-charter.

[126] Introduced by s 92 of the Finance Act 2009.

[127] For the latest report, see www.gov.uk/government/publications/your-charter-annual-report-2016-to-2017/your-charter-annual-report-april-2016-to-march-2017.

[128] S 92 of the Finance Act 2009 reads:

> 'HMRC Charter
>
> (1) In CRCA 2005, after s 16 insert—
>
> "16A Charter of standards and values
>
> (1) The Commissioners must prepare a Charter.
> (2) The Charter must include standards of behaviour and values to which Her Majesty's Revenue and Customs will aspire when dealing with people in the exercise of their functions.
> (3) The Commissioners must—
>
> (a) regularly review the Charter, and
> (b) publish revisions, or revised versions, of it when they consider it appropriate to do so.
>
> (4) The Commissioners must, at least once every year, make a report reviewing the extent to which Her Majesty's Revenue and Customs have demonstrated the standards of behaviour and values included in the Charter."
>
> (2) The duty imposed by s 16A(1) of CRCA 2005 must be complied with before the end of 2009.'

5.1.2.5. Oceania[129]

5.1.2.5.1. Australia

The Australian Taxation Office (ATO) publishes a Taxpayers' Charter document on its website that outlines both the rights and obligations of taxpayers. The Charter describes in some detail the source and context of the identified rights and how these principles relate to common interactions, such as in a review or audit. The Charter itself is not legally binding but rather serves as a guide for taxpayers. Several of the rights identified in the Charter are drawn from general administrative law or taxation laws and therefore are legally enforceable under those laws. A number of the other 'rights' that are listed could more accurately be described as reasonable expectations (with respect to interactions with the ATO) in that they would be difficult, if not impossible, to legally enforce. The identified taxpayer 'obligations' cover the main situations where the taxation law provides for administrative and/or civil penalties. The foreword from the Commissioner emphasises that the Charter describes the relationship the ATO seeks to maintain with taxpayers, that being one of mutual trust and respect.

The Taxpayers' Charter was developed by the ATO following a recommendation of a parliamentary committee that recognised that, with the move to a self-assessment system for income taxation from the early 1990s, a formal statement of taxpayers' legal rights as well as standards of service from the ATO was desirable. The Charter was launched in 1997 and has been the subject of a number of detailed reviews including, most recently, a review by the Inspector-General of Taxation that reported in 2016. The recommendations from that review related largely to embedding the Charter principles more explicitly in ATO practice and improving monitoring and reporting. The Charter is updated and reformatted from time to time and the most recent version was published in November 2018.

The 'rights' of taxpayers that are identified in the Charter are described by reference to the ATO's role in relation to interactions with taxpayers rather than as positive rights of taxpayers. They are the following:

- treating you fairly and reasonably (this category includes the administrative law guarantees of impartiality and the right to fair and equitable decisions),
- treating you as being honest unless you act otherwise,
- offering you professional service and assistance,
- accepting you can be represented by a person of your choice and get advice,
- respecting your privacy,
- keeping the information we [the ATO] hold about you confidential,
- giving you access to information we [the ATO] hold on you,
- helping you get things right,
- explaining the decisions we [the ATO] make about you,
- respecting your right to a review,
- respecting your right to make a complaint,
- making it easier for you to comply, and
- being accountable.

On the other hand, the taxpayer obligations identified by the ATO in the Charter are:

- being truthful,
- keeping the required records,
- taking reasonable care,
- lodging by the due date,
- paying by the due date, and
- being cooperative.

[129] We would like to thank Celeste Black for her contribution.

5.1.2.5.2. New Zealand

In New Zealand, there is no taxpayers' charter or declaration. Rather, taxpayers' rights can be found in various statutes.[130]

5.1.3. Conclusions on Taxpayers' Bills of Rights[131]

The preceding survey of domestic approaches to the codification of taxpayers' rights through Taxpayers' Bills of Rights or Taxpayer Charters leads to a number of general observations.

First, almost a dozen jurisdictions have consolidated taxpayers' rights in discrete documents; to some extent, these documents also contain taxpayer obligations.

Second, often these documents are not legally binding per se, but some of the taxpayers' rights contained therein nevertheless derive binding legal force from other sources (typically the constitution, human rights law or tax codes).

Third, all jurisdictions, including those without consolidated Taxpayers' Bills or Charters, are reported to protect at least certain taxpayers' rights in a fragmented manner (again, typically through the constitution, human rights law or tax codes).

Fourth, some core taxpayers' rights seem to exist in all jurisdiction in one form or another, either explicitly in Taxpayers' Bills or Charters or in the constitution or tax codes, or implicitly as part of human rights law that extends to taxpayers as well. These core taxpayers' rights are discussed in further detail in Part II of this book.

As none of the explicit Taxpayers' Bills or Charters are vested with binding legal force, their provisions may hardly serve as evidence for general principles of law per se. However, this survey of jurisdictions suggests that certain core rights, which are of particular importance to taxpayers, are universally provided for in a legally binding manner; in other words, all states under review have reacted to certain concerns of taxpayers through legislation. Some of these rights might be candidates for general principles of law, if their content and application is shown to overlap in an overwhelming majority of jurisdictions. The final verdict on this matter is only possible after a detailed analysis of a sufficient amount of representative jurisdictions. Part II of this book adds substance to this question of convergence in the protection of domestic taxpayers.

5.2. Intermediaries

5.2.1. General

The focus of our study on the protection of taxpayers' rights should not prevent us from ascertaining whether other persons should also be entitled to a similar level of protection of similar rights in connection with the levying and collection of taxes.

Over recent decades the formal and substantive obligations of third parties involved in tax collection, generally not even remunerated for the exercise of their functions to the advantage of the state, have grown exponentially. In most tax systems, withholding agents are obliged to file returns and pay taxes, sometimes instead of the taxpayer. Moreover, intermediaries and

[130] See also A J Sawyer, 'A Comparison of New Zealand Taxpayer' Rights with Selected Civil Law and Common Law Countries – Have New Zealand Taxpayers Been "Short-Changed"?' (2007), SSRN: https://ssrn.com/abstract=213008.

[131] We would like to thank Céline Braumann and Peter Hongler for their contribution.

professionals are often required to give tax authorities information upon request or permanently. In some cases, such as for the mandatory disclosure of tax avoidance schemes, this even seems to give rise to an open-ended obligation. Such numerous reporting obligations in fact often first and foremost concern intermediaries and advisers and their professional rights, with potential repercussions on the rights of taxpayers.

This shows that there are very good reasons to include the protection of the rights of intermediaries and professionals involved in tax collection within the discourse about the protection of taxpayers' rights. This does not necessarily imply a full extension of protection, but at least to the extent required in order to protect such categories of persons in respect of the state's functions and sovereign power in tax matters. This means securing their protection to an extent that complies with the requirements of the rule of law, precludes any arbitrariness and corresponds to the superior needs of international justice, whose minimum standards are the core goal of our research project.

From such a perspective, those minimum standards can also extend to third parties involved in the relationship between taxpayers and tax authorities, such as professionals and intermediaries. The latter are also holders of their own fundamental rights. Moreover, for some rights, such as for instance the one to data protection, the effective protection of taxpayers' rights would be meaningless if it did not extend to those third parties.

5.2.2. Different Regions

5.2.2.1. Africa[132]

Different African countries have different laws on intermediaries. In Nigeria, only qualified chartered accountants, tax practitioners or legal practitioners may become intermediaries, in accordance with the provisions of the Institute of Chartered Accountants of Nigeria Act (ICANA), the Association of National Accountants of Nigeria Act (ANANA) or by admission to the bar. Tax intermediaries are subject to different professional regulations.[133] In order to protect taxpayers, under section 10 of the Legal Practitioners Act (LPA),[134] the Legal Practitioners Disciplinary Committee (LPDC) determines cases where a legal practitioner is alleged to have misbehaved in his professional capacity. The Financial Reporting Council of Nigeria Act 2011 (FCRNA) also requires auditors or accountants to register with the FCRN before undertaking professional practice, including tax intermediary service.[135] For all of the above-mentioned professionals, the general rules of professional conduct also apply. For example, for legal practitioners, the Rules of Professional Conduct for Legal Practitioners apply, pursuant to section 12(4) of the LPA. For tax practitioners, the Statement of Taxation Standard (STS) applies pursuant to section 1 of the Chartered Institute of Taxation of Nigeria Act (CITNA).[136]

In Kenya, taxpayers are allowed to appoint authorised tax agents. The Income Tax Act defines an authorised tax agent as 'any person who prepares or advises for remuneration, or who employs one or more persons to prepare for remuneration, any return, statement or other document with respect to a tax under this Act.'[137] The Act protects taxpayers by providing for a penalty for the negligence

[132] We would like to thank Attiya Waris and Johann Hattingh for their contribution.
[133] I Azuka Aniyie, 'Tax Intermediaries Management: A Review of Three Jurisdictions' (2019) 27 *Afr J Int'l & Comp L* 522.
[134] Legal Practitioners Act 1962, Cap 207 (Nigeria).
[135] Financial Reporting Council of Nigeria Act 2011 (Nigeria), s 44(2).
[136] Azuka Aniyie, 'Tax Intermediaries Management' 522.
[137] Income Tax Act, Cap 470 (Kenya), s 2.

of the authorised tax agent. Section 72B states that where additional tax is charged due to negligence or disregard of the law by an authorised tax agent, the agent will be liable to a penalty equal to one half of the additional tax, but not less than 1,000 shillings and not exceeding 50,000 shillings.[138]

South Africa regulates tax intermediaries in several ways and for different purposes. To protect taxpayers, only registered tax practitioners are allowed by law to provide tax advisory and representation services.[139] It is a criminal offence for a tax practitioner not to register with both a recognised controlling body and the South African Revenue Service. Tax practitioners who facilitate or promote schemes that may result in tax benefits and which carry certain hallmarks of tax avoidance are required to report information on an upfront basis and are subject to monetary sanctions for failure to do so.[140]

Thus, the rules are focused more on regulating the intermediaries and on protecting taxpayers from inadequate advice than on intermediaries' rights.

5.2.2.2. Americas

5.2.2.2.1. Latin America

5.2.2.2.1.1. Argentina

Argentina introduced a comprehensive mandatory reporting regime for domestic and international tax planning arrangements on 20 October 2020.[141] The information submitted could be shared with foreign jurisdictions under applicable agreements for the exchange of information. The new regime creates heavy burdens for advisers and may force taxpayers to self-incrimination in certain cases. The resolution establishing the reporting scheme includes a non-exhaustive list of cases that are deemed to be reportable international tax arrangements per se, eg the use of legal entities for obtaining benefits provided by treaties to avoid double taxation; the involvement of non-cooperative, or nil and low tax jurisdictions; the use of asymmetries in regulations of two or more jurisdiction; when a taxpayer has rights as beneficiary, grantor, fideicommissary or trustee of a foreign trust, foreign private foundation or similar, inter alia.[142] Prima facie, this regime raises problems regarding the principle of legal certainty.

By contrast, the Argentinian Supreme Court, like other courts in the world including the CJEU, had earlier held that taxpayers are free to structure their transactions and businesses efficiently and are not obliged to do it in such a way to derive the highest tax burden possible.[143]

The regime applies to taxpayers involved in a tax arrangement and, interestingly, also to tax advisers, individuals or entities, who help, assist, advise or are involved in any activity related to the implementation of a tax planning arrangement. They may be directly or indirectly involved in such implementation. Moreover, tax advisers will have to comply with the reporting duty if a related, associated or connected tax adviser implements a tax arrangement. Each relevant person must separately comply with the reporting regime; none of them are absolved from their reporting obligation if another person has already reported the same arrangement.[144]

[138] Income Tax Act, Cap 470 (Kenya), s 72B.

[139] S 240A of the Tax Administration Act, 2011 (as amended) requires that all tax practitioners register with a recognised controlling body. All recognised controlling bodies require minimum academic qualifications and practical experience in taxation law and accounting. Entry examinations may be required and ongoing education needs to be undertaken annually.

[140] Ss 34–35 of the Tax Administration Act 2011.

[141] *Resolución General de la Administración Federal de Ingresos Públicos* (General Resolution AFIP), no 4838/2000, published in the Official Gazette on 20 October 2000.

[142] Art 4 of General Resolution AFIP.

[143] Argentine Supreme Court, *Industrial Comercial Argentina c/ Nacion*, judgment: 241:210 [1958].

[144] Art 6 of General Resolution AFIP.

Tax advisers may refrain from reporting the information on the grounds of professional secrecy. In that case, they must serve notice to their clients through the website of the Argentine Tax Authority (AFIP).[145] But serving that notice through AFIP's website might, per se, involve a breach of professional secrecy obligations – and such a breach could lead to criminal sanctions.[146]

5.2.2.2.1.2. Brazil

In Brazil, intermediaries are not obliged to report tax planning to tax authorities.

5.2.2.2.1.3. Chile[147]

In Chile, there is no special legislation controlling the nature, characteristics and effects of tax intermediaries and their impact on tax inspection procedures.

However, in December 2016, there was a dispute between the Chilean Tax Administration and several tax consultants. The tax administration requested information on tax planning from certain tax intermediaries, in particular 'copies of service rendering contracts, reports or advices corresponding to the 20 highest invoices'. It was mentioned that this procedure should merely be for informative purposes and did not imply a background request nor was it a part of a taxable procedure, in spite of the fact that the non-fulfilment of such notification would be sanctioned according to Article 97 N°15 of the Chilean Tax Code. This caused worries regarding the protection of professional secrecy. Therefore, the said requirement had no effect.[148]

In 2018, the Chilean tax administration published the 'Tax Compliance Administration Plan 2018'. Due to the Panama Papers, 25 high-risk intermediaries were identified. A regulation programme was created to identify and monitor high-risk intermediaries whose clients present a low taxation charge regarding comparable taxpayers. In addition, the 'No Safe Havens' strategy, implemented in Chile, would be applied. After the commotion caused by this news amongst different associations of professionals, scholars and lawyers in general, the said measure apparently was not implemented as originally conceived.[149]

5.2.2.2.1.4. Mexico

In January 2020, Mexico implemented Action 12 of the BEPS Project into its domestic legislation with an amendment to the Federal Tax Code[150] that introduced a dedicated section on reportable tax arrangements.[151]

The obligation to disclose reportable schemes is imposed not only on the tax advisers involved,[152] but in some cases on the taxpayers themselves.[153]

In particular, the definition of tax advisers includes any individual or entity, which, within the ordinary course of the activity: (i) is responsible or involved in the design, marketing, organisation, implementation or management of a complete reportable scheme; or, (ii) makes available a complete reportable scheme for implementation by a third party.[154]

[145] Art 8 of General Resolution AFIP.
[146] *cf* W Keiniger, 'Argentina: new reporting regime for domestic and international tax planning arrangements', *European Tax Blog*, posted 4 November 2020.
[147] We would like to thank Yuri Varela for his contribution.
[148] La Tercera, www.latercera.com/pulso/polemica-por-una-solicitud-del-sii/.
[149] www.sii.cl/sobre_el_sii/plan_cumplimiento_tributario2018.pdf, 39.
[150] Arts 197-202 were introduced by Decree 9 December 2019.
[151] Namely, s VI of the Mexican Federal Tax Code.
[152] Art 197 of the Mexican Federal Tax Code.
[153] Art 198 of the Mexican Federal Tax Code.
[154] Art 197, para 2 of the Mexican Federal Tax Code.

Unlike in Argentina,[155] there is no obligation of multiple reporting, it being sufficient that one adviser does so and informs the rest of the tax advisers that the reporting was done also on their behalf.[156] No obligation exists for individuals acting as tax advisers through an entity, provided that the latter, in fact regarded as tax adviser, reports the scheme.[157]

The Mexican tax legislation expressly overrules the professional secrecy of tax advisers,[158] thus bringing in a critical element that may be questionable from the perspective of fundamental rights.

The boundaries of reportable schemes are defined by reference to the concept of hallmarks, which share the common element of directly or indirectly generating a tax advantage in Mexico.[159]

The penalties imposed on tax advisers for failure to report tax schemes may be particularly high.[160]

5.2.2.2.1.5. Peru[161]

To date, Peru has not established any legal or administrative obligation or right for tax planning intermediaries or advisers.

There has been some discussion on whether a joint responsibility should be implemented for tax advisers implicated in schemes that the tax administration considered elusive in application of the Peruvian anti-fraud clause but, to date, the legislator has not implemented this initiative.

5.2.2.2.2. United States[162]

Taxpayers may engage a range of advisers (eg lawyers, accountants, enrolled agents, etc) in connection with tax structuring, filing, payment, and administrative actions.

Advisers who represent taxpayers before the Treasury Department and the IRS are subject to Circular 230.[163] It prescribes a range of ethical obligations relating to competence, conflicts of interest, best practices, and standards regarding tax return preparation. IRC section 7525 offers limited protection to 'federally authorized tax practitioners' (ie accountants) regarding tax advice by applying the common law protections of confidentiality and privilege that would be applicable between an attorney and client. Attorney-client privilege between a taxpayer and its lawyer(s) could apply to matters involving legal advice, and the work-product doctrine protects documents prepared in anticipation of litigation. However, the US federal courts have come to different conclusions about whether certain tax work papers are protected from disclosure to the IRS.[164]

[155] On which *cf* sec 5.2.2.2.1.1.

[156] Art 197, para 4, first sentence of the Mexican Federal Tax Code.

[157] Art 197, para 4, second sentence of the Mexican Federal Tax Code.

[158] Art 197, para 7 of the Mexican Federal Tax Code.

[159] Art 199 of the Mexican Federal Tax Code. In line with the hallmarks of BEPS Action 12, the Mexican legislation includes fourteen blocks of hallmarks, which may present any of the following features as eg avoiding the exchange of tax or financial information between tax authorities; avoiding the application of CFC rules or transparent foreign entities regimes; involving the transfer of tax losses to other entities; applying a tax treaty, resulting in income not being taxed or allowing it to be taxed under a reduced rate abroad compared to the foreign corporate tax rate applicable in that jurisdiction; avoiding the identification of the effective beneficiary of the income or assets; transactions seeking to use tax losses about to expire; applying mechanisms that avoid the application of the reportable schemes regime.

[160] See art 82-B, which applies sanctions from an equivalent of 2,000 euros to over 800,000 euros for the failure to report a scheme, or also for doing so inaccurately or with errors.

[161] We would like to thank Cecilia Delgado Ratto for her contribution.

[162] We would like to thank Jeremiah Coder for his contribution.

[163] Treasury Department Circular no 230 (Rev. 6-2014), www.irs.gov/pub/irs-pdf/pcir230.pdf.

[164] See, eg, US Court of Appeals, *Textron v United States*, 577 F.3d 21, (1st Cir.), [2009] (en banc) (holding that company's tax accrual workpapers created by attorneys to assess potential litigation with the IRS, and shared with the company's outside auditors, were discoverable by the IRS); US Court of Appeals, District of Columbia Circuit, *United States v Deloitte LLP*, no 09-5171, 2010 BL 147265, D.C. Cir., [2010] (holding that the IRS could not obtain tax analyses in the possession of an outside auditor).

5.2.2.3. Asia

5.2.2.3.1. China[165]

Article 14 of the Tax Collection Administration Law affirms taxpayers' right to appoint tax agents. There is no mandatory disclosure obligation being imposed on tax agents yet. However, the National People's Congress might impose such a disclosure obligation in the near future. The proposed amendments to the Tax Collection Administration Law already include a clause stating that the tax authorities may request taxpayers and their tax agents to provide information during tax investigations.[166]

5.2.2.3.2. India[167]

In India, disclosure obligations for intermediaries are laid down by the Prevention of Money Laundering Act, 2002. The legislation was enacted to confiscate property involved in money laundering and prevent the occurrence of such crimes.

The legislation imposes obligations on reporting entities, that is, banking companies, financial institutions, intermediaries[168] and persons belonging to designated professions and businesses.[169] Lawyers and accountants are presently not included in the categories of persons belonging to designated professions and businesses, though the government has the authority to include them at a later stage. A 2013 Mutual Report on India regarding the Financial Action Task Force (FATF) notes that, based on risk assessments conducted, lawyers and accountants pose low risk for money laundering activities.[170]

The obligations include inter alia to verify the identity of the client and the beneficial owner and maintain records of transactions for a period of five years. If asked by the concerned authorities, the entities have to furnish such confidential information. Prior to the commencement of a transaction, if the details are not verifiable, the reporting entity shall not allow the specified transaction to be carried out. In the event that the reporting entity considers a transaction to be suspicious or to involve proceeds of crime, they are required to undertake enhanced due diligence.[171]

Additionally, section 285BA of the Indian Income-tax Act 1961, and rules 114F to 114H of Income-tax Rules 1962, lay down obligations on 'reporting financial institutions' in compliance with India's obligations under FATCA and CRS.[172]

5.2.2.3.3. Israel[173]

The Money Laundering Law 2000 imposes several reporting obligations on intermediaries and sets the boundaries of their obligations and responsibilities. In addition, several provisions in several

[165] We would like to thank Na Li for her contribution.

[166] Art 34 of the proposal for amending the Tax Collection Administration Law, published in 2015 for public consultation.

[167] We would like to thank Ashrita Prasad Kotha for her contribution.

[168] An intermediary is defined to mean (a) persons such as a stock broker, share transfer agent, portfolio manager or any adviser registered under the Securities and Exchange Board of India Act, 1992, (b) an association recognised under the Forward Contracts (Regulations) Act, 1952, (c) an intermediary registered by the Pension Fund Regulatory and Development Authority or (d) a recognised stock exchange referred to in Securities Contracts (Regulation) Act 1956. See s 2(1)(n), Prevention of Money Laundering Act 2002.

[169] Designated persons include real estate agents, persons carrying on activities for playing games of chance for cash or kind such as a casino, dealers in high value goods or precious stones, etc.

[170] Mutual Evaluation of India, 8th Follow up Report, June 2013, www.fatf-gafi.org/media/fatf/documents/reports/mer/India_FUR8_2013.pdf.

[171] Ss 11A to 12AA, Prevention of Money Laundering Act, 2002.

[172] *cf* also Guidance Notes on Suplementation of Reporting Requirements under Rules 114F to 114H of the Income-Tax Rules issued by the Indian Government, Ministry of Finance on 31 August 2018.

[173] We would like to thank Rifat Azam for his contribution.

tax laws impose reporting and liability responsibilities on intermediaries and especially financial institutions. Of course, FATCA obligations also impose various duties on intermediaries.

5.2.2.3.4. Japan[174]

Since the Japanese Ministry of Finance issued an information circular requesting financial institutions to verify their customers' identities in 1990, specific businesses' duties to verify customers' personal information and to provide it to the authorities have continued to expand.[175] At present, these duties are outlined in three different acts: 1) the Act on Prevention of Transfer of Criminal Proceeds; 2) the Foreign Exchange and Foreign Trade Act; and 3) the Act on Submission of Statement of Overseas Wire Transfers for Purpose of Securing Proper Domestic Taxation.[176]

In the Act on Prevention of Transfer of Criminal Proceeds,[177] financial institutions or similar businesses[178] are obliged to verify the identities of customers and to notify the authorities if they notice any suspicious trades. Certified accountants, tax accountants and certified legal specialists of administrative procedures also have duties to verify customers' identification.[179] Under the Foreign Exchange and Foreign Trade Act,[180] financial institutions are obliged to verify personal identification. According to the Act on Submission of Statement of Overseas Wire Transfers for Purpose of Securing Proper Domestic Taxation,[181] it is mandatory for financial instruments business operators to disclose to the authorities a summary of the trade, including the parties to it, in cases of cross-border trade worth over one million yen.

It should be noted that Japan has no mandatory disclosure rule on promoters in relation to aggressive tax planning so far, but it was mentioned as an 'important question to consider' in the midterm policy report of the Government Tax Commission (*Seifu Zeisei Chosakai*) issued in 2019.[182]

5.2.2.4. Europe

5.2.2.4.1. European Union

Directive 2011/16/EU as amended by DAC 6[183] introduced extensive reporting obligations for financial intermediaries and other providers of tax advice regarding 'aggressive cross-border tax-planning arrangements'.[184] Neither the reportable event, nor the addressees of the obligations are defined very clearly. It might be wondered whether the open-ended implications of this obligation could potentially threaten legal certainty.

There has been no CJEU case law to date. However, the Belgian *Grondwettelijk Hof* submitted a preliminary reference on the compatibility of the aforementioned Directive with Articles 7

[174] We would like to thank Yuri Matsubara and Saki Urushi for their contribution. *cf* generally K Ishimura, *The State of Taxpayers' Rights in Japan, A Survey of the Legal Situation* (IITL, 1995).

[175] Y Matsubara *Tax Transparency* 7–8.

[176] M Hanaki, 'Development of the International Anti Money Laundering Regulation and the Future of Japanese AML Regulation' (2017) 64 (1) *Journal of Business and Economics* 201, 209.

[177] Act No 22 of 2007.

[178] It includes finance lease companies, credit card companies, house agents, bullion dealers, receiving agent using post office boxes, telephone answering services, etc.

[179] S 2(2) of the Act on Prevention of Transfer of Criminal Proceeds provides the scope of applicable businesses and ff 4, 7-11 provide the duties for each business.

[180] Act No 228 of 1949.

[181] Act No 110 of 1997.

[182] Government Tax Commission, Midterm Policy Report, 'The Tax System in the Reiwa Era Concerning the Social Economic Changes', issued on 26 September 2019, www.cao.go.jp/zei-cho/shimon/1zen28kai1_2.pdf.

[183] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, [2018] OJ L 139/1.

[184] Recital 1 to Directive (EU) 2018/822.

and 47 of the EU Charter. That court has doubts about the constitutionality and compatibility with the EU fundamental rights to privacy and judicial protection of the obligation incumbent on the intermediary who invokes legal professional privilege to notify other intermediaries or the taxpayer of their reporting obligations, which was laid down by the Belgian legislature pursuant to DAC 6.[185]

Also, the 2012 ECtHR judgment in *Michaud v France*[186] involved reporting obligations analogous to those presently contemplated in DAC 6[187] and the ECtHR was requested to determine whether French law obliging lawyers to report suspicious transactions contravened Article 8 of the ECHR. The ECtHR did not find a violation but its conclusions were based on the fact that the French rules under examination provided for adequate procedural safeguards in the form of filtering processes that provided that reports were to be sent to the President of the French Bar Association and not directly to the authorities.

5.2.2.4.2. Russia[188]

As the main financial intermediaries in the economy, banks are assigned additional responsibilities in connection with opening and maintaining customer bank accounts. Within three days, banks must inform the tax authority about the opening/closing of the bank account of an organisation or a private entrepreneur.[189] Banks are also required to fulfil the client's instructions to transfer tax (fee) amounts to the federal budget within one business day; no service fee is charged.[190] Moreover, banks are obliged to execute decisions of the tax authority on collection of taxes (fees) at the expense of taxpayers.[191] Furthermore, banks have to execute tax authority decisions, suspend operations on accounts of the clients[192] and are not entitled to open new accounts for that client while the decision on the suspension of operations is in force.[193] Finally, banks are required to issue to tax authorities certificates on transactions and accounts of organisations on a reasoned request.[194]

Since 2015, all foreign financial institutions must report to the Federal Tax Service of Russia the details of financial accounts of Russian taxpayers – legal entities (directly or indirectly controlled by Russian citizens) and physical persons – which were opened and/or maintained during the reporting period.

5.2.2.5. Oceania[195]

5.2.2.5.1. Australia

Intermediaries that provide specified services in the financial, bullion, gambling and digital currency exchange sectors have reporting obligations under the anti-money laundering and terrorism financing legislation.[196] This includes customer identification procedures

[185] On 21 December 2020, case C-694/20, *Orde van Vlaamse Balies*, was referred to the CJEU in the framework of a preliminary ruling procedure.
[186] ECtHR, *Michaud v France*, no 12323/11, (6 December 2012).
[187] For more details see sec 4.1.3.4.1 and 8.2.2.4.1.3 of this book.
[188] We would like to thank Karina Ponomareva for her contribution.
[189] Art 86 of the Russian Tax Code.
[190] Art 60 of the Russian Tax Code.
[191] Art 46 of the Russian Tax Code.
[192] Art 31 C 5) of the Russian Tax Code.
[193] Art 76 of the Russian Tax Code.
[194] Art 86 of the Russian Tax Code.
[195] We would like to thank Celeste Black for her contribution.
[196] Pt 3, Anti-Laundering and Counter-Terrorism Financing Act 2006 (Cth) (Australia).

(information collection and verification) known as 'know your customer' procedures and a requirement that entities identify the beneficial owners of their customers.[197]

The Australian Government released a discussion paper in 2016 to solicit submissions on a proposal to impose mandatory disclosure rules on tax advisers in relation to aggressive tax arrangements but the Government has not yet proceeded further with these proposals.

5.2.2.5.2. New Zealand

Anti-money laundering legislation imposes a variety of risk assessment, customer identification and reporting obligations on specified financial, gambling and advisory services sectors.[198] An Identity Verification Code of Practice (2013) provides detailed requirements in relation to customer identity. New Zealand has not adopted mandatory disclosure rules in relation to aggressive tax avoidance schemes.

5.3. Human Rights of Legal Persons

Human rights generally also apply to legal persons, but not necessarily to the same extent as to natural persons. How this affects taxpayers will be shown in the following chapter.

5.3.1. Africa

5.3.1.1. South Africa[199]

The entitlement of legal persons to the protection of fundamental rights of taxpayers is neither precluded nor automatic in South Africa. According to the South African Constitution, a specified right will bind 'a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.[200] As regards entitlement to protection, a 'juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person'.[201] As a consequence, in all cases legal persons are in principle bearers of constitutional rights in South Africa, but in each matter both the nature of the right and the nature of the legal person must be considered. These two enquiries are interlocking.

Therefore, the rights that a legal person cannot exercise are the ones to human dignity, life, freedom and security of the person, protection against slavery, servitude and forced labour, political rights and other socio-economic rights.

At the other end of the spectrum, there are rights that clearly concern legal persons. In the case of *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty)*, South Africa's Constitutional Court confirmed that legal persons have a right to privacy.[202] The case illustrates an important difference when the right to privacy is attached

[197] Pts 2 and 7, Anti-Laundering and Counter-Terrorism Financing Act 2006 (Cth) (Australia).
[198] Anti-Laundering and Countering Financing of Terrorism Act 2009 (NZ).
[199] We would like to thank Johann Hattingh for the contribution.
[200] S 8(2) of the Constitution, 1996.
[201] S 8(4) of the Constitution, 1996.
[202] 2000 (10) BCLR 1079 (CC), at [18].

to a legal person because such a right may not always be co-extensive with other rights of a natural person, such as the right to dignity.[203]

In addition to the right to privacy, there are good grounds to recognise that legal juristic persons are bearers of the following rights: the rights to equality; freedom of religion, belief and opinion; freedom of assembly; property; access to information; just administrative action; access to courts; and fair trial.[204]

It has been argued in South Africa that the fact that a legal person may not be the bearer of certain rights does not mean that they will have no standing before a court to challenge the constitutionality of laws that may conflict with those rights.[205] What matters is whether the law impairs a protected human right and not whether the complainant possesses the right.

5.3.2. Americas

5.3.2.1. The Inter-American System for the Protection of Human Rights[206]

For the purposes of the American Convention on Human Rights, 'person' means 'every human being' (Article 1(2) ACHR). In a 2016 advisory opinion, the Inter-American Court of Human Rights held (in response to a request from the Republic of Panama) that human rights belong principally to natural persons and should only extend to legal persons where necessary in order for the individuals who are members of the entity to effectuate such rights.[207]

5.3.2.2. Latin America

5.3.2.2.1. Argentina[208]

The Argentine Supreme Court has held that, in principle, legal persons fall within the scope of the American Convention of Human Rights. This judgment is encapsulated in the leading case *Microomnibus Barrancas de Belgrano*.[209] The tax dispute involved a provision dealing with the right to a fair trial. The issue was the extent to which a domestic law encapsulating the principle of *solve et repete* as applied in tax litigation was compatible with the right to a fair trial. The Court decided the case in favour of the tax authority because the taxpayer had not demonstrated that the application of *solve et repete* would have prevented the taxpayer from protecting its rights.

[203] '[P]rivacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core … Juristic persons are not the bearers of human dignity. Their privacy rights, therefor, can never be as intense as those of human beings. However, this does not mean that the right to privacy does not protect juristic persons. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The State might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic State. Juristic persons therefor do enjoy the right to privacy, although not to the same extent as natural persons. The level of justification for any particular limitation of the right will have to be judged in the light of the circumstances of each case.'

[204] HM Cheadle, DM Davis and NRL Haysom, *South African Constitutional Law: The Bill of Rights* (LexisNexis: Online, 2020), at sec 3.6.2.

[205] Ibid. Reliance is placed on the Supreme Court of Canada, *R v Big M Drug Mart Ltd*, 18 DLR (4th), [1985] 321.

[206] We would like to thank Jeremiah Coder for his contribution.

[207] See IACHR, advisory opinion of 26 February 2016, *Titularidad de Derechos de las Personas Juridicas en el Sistema Interamericano de Derechos Humanos*, advisory opinion OC-22/16, [2016] (in Spanish).

[208] We would like to thank Eduardo A Baistrocchi for his contribution.

[209] Argentine Supreme Court, *Microomnibus Barrancas de Belgrano*, judgment: 312:2490, [1998].

5.3.2.2.2. Brazil[210]

The Brazilian Federal Supreme Court has confirmed, on many occasions,[211] that fundamental rights apply to legal persons insofar as compatible with their non-physical presence and the nature of the rights. The idea is that fundamental rights are mainly a protection mechanism for individuals against the state. As legal persons generally include such individuals, a violation of legal persons' fundamental rights is also a violation of physical/natural persons' ones. It should be emphasised that, using legal persons, physical ones concretise their liberty. In other words, the former is an instrument of the latter, having no proper autonomous existence. Based on such premises, legal persons are in principle entitled to the same protection of the rights to legal certainty, equality, confidentiality and due process, as apply to natural persons.

5.3.2.2.3. Chile[212]

In line with Advisory Opinion OC 22-16 of the Inter-American Court of Human Rights mentioned above, legal persons are generally not recognised as subjects of human rights in Chile.[213] There has, however, been some discussion in the Chilean Supreme Court as well as in doctrine on legal persons as holders of specific rights, such as the right to honour.[214]

5.3.2.2.4. Peru[215]

The previous Peruvian Constitution of 1979 expressly stated that fundamental human rights recognised to individuals also applied to Peruvian legal persons, insofar as they were applicable to them.[216] However, the current Peruvian Constitution of 1993 does not replicate this literal recognition of fundamental rights for legal persons in its text.

The Peruvian Constitutional Court held that the lack of express recognition in the current Constitution could not be understood as a disregard of the fundamental rights for legal persons in the Peruvian legal system given that individuals who make up the said legal persons retain a full set of fundamental rights and it is not possible to understand that said rights are minimised or disregarded when those individuals take part in a legal person.[217] According to the Peruvian Constitutional Court, legal persons can, however, only invoke rights that are compatible with their nature as a collection of individuals.[218] In this context, the Constitutional Court listed 23 fundamental human rights established in the Peruvian Constitution that legal persons can invoke, among which are the right to equality before the law, the right to property, the right to due process and judicial protection, bank secrecy and tax reserve, inviolability of communications and the freedoms of information, opinion and expression.[219]

[210] We would like to thank Clara Gomes Moreira for her contribution.

[211] Supreme Federal Court of Brazil, intermediary appeal of 15 August 2002, in the motion for clarification in the *reclamação* no 1.905-5/SP [2002]; *mandado de injunção* of 10 May 2007, no 725-0/RO [2007]; *habeas corpus* of 19 August 2008, no 92.921-4/BA [2008]; direct action of unconstitutionality of 17 September 2015, no 4.650/DF [2015].

[212] We would like to thank Yuri Varela for his contribution.

[213] For discussion in the doctrine see I Leguina, 'Derecho a la honra, ¿pueden ser las personas jurídicas titulares de este derecho?', *Constitutional Newspaper*, www.diarioconstitucional.cl/articulos/derecho-a-la-honra-pueden-ser-las-personas-juridicas-titulares-de-este-derecho/.

[214] Supreme Court of Chile, judgment of 18 May 2015, *Comercial Hual vs Chilean IRS*, case 13387/14, [2015]; JL Cea, *Derecho Constitucional Chileno*, *Tomo* II, vol 2, (2012) 137, 565.

[215] We would like to thank Cecilia Delgado for her contribution.

[216] Art 3 of the Peruvian Political Constitution of 1979.

[217] Peruvian Constitutional Court, judgment no 04972-2006-AA/TC, [2006], paras 10 and 11.

[218] Ibid, para 13.

[219] Ibid, para 14.

5.3.2.2.5. United States[220]

The US Supreme Court has affirmed that certain constitutional rights, such as free speech and due process, are not limited to natural individuals but also extend to corporate persons.[221]

5.3.3. Asia

5.3.3.1. China[222]

In China, natural and legal persons have the same rights in terms of tax compliance.[223] The 2009 Notice of the State Administration of Taxation of China further confirmed that Chinese taxpayers, including legal persons, shall have the following 14 rights: (1) the right to be informed, (2) the right to confidentiality, (3) the right to supervise tax administration and tax collection, (4) the right to choose tax declaration methods, (5) the right to apply for deferred declarations, (6) the right to apply for deferral of tax payments, (7) the right to apply for refund of overpaid taxes, (8) the right to enjoy tax incentives according to the law, (9) the right to appoint tax agents, (10) the right to be heard and the right to defence, (11) the right to refuse tax audit/investigation lacking proper certificates and notice, (12) the right to legal remedies, (13) the right to request a hearing in accordance with the law, and (14) the right to obtain relevant tax documents.[224]

5.3.3.2. India[225]

The Indian Constitution recognises several fundamental rights, some of which are also available to non-natural legal persons. For example, the right to equality under Article 14 guarantees to every person[226] equality before the law or the equal protection of the laws within the Indian territory. Conversely, the right to freedom of speech and expression is only available to citizens. The Indian Supreme Court has recognised that the provisions of the Constitution deliberately distinguish between fundamental rights available to any person and those available to citizens. The usage of the former includes not just natural persons but also legal persons such as companies (domestic or foreign).[227] The recently recognised right to privacy has been read into Article 21 which guarantees the right to life and personal liberty.[228] The right was drawn from the idea of the autonomy and dignity of natural persons which may not be 'entirely applicable' to legal persons. However, it has been recommended to maintain the distinction between data of companies and data held by companies which can identify an individual and that the latter be protected by a data protection law.[229]

[220] We would like to thank Jeremiah Coder for his contribution.

[221] See eg, US Supreme Court, *Citizens United v FEC*, 558 US 310, [2010]; US Supreme Court, *First Natl. Bank of Boston v Bellotti*, 435 US 765, [1978].

[222] We would like to thank Na Li for the contribution.

[223] See Chinese Law on the Levying and Collection of Taxes.

[224] The State Administration of Taxation of China, Notice of the State Administration of Taxation on the Rights and Obligations of Taxpayers, letter no 761 of 29 December 2009.

[225] We would like to thank Ashrita Prasad Kotha for her contribution.

[226] S 3(42) General Clauses Act 1897 defines person to include any company or organisation or body of individuals, whether incorporated or not.

[227] Supreme Court of India, judgment of 26 July 1963, *The State Trading Corporation of India Ltd and Ors v The Commercial Tax Officer, Visakhapatnam and Ors*, AIR 1963 SC 1811, [1963]; High Court of Gujarat, judgment of 22 July 2014, *Oil India Limited and Ors v Drillmec SPA and Ors*, Writ Appeal no 268/13, [2014].

[228] Supreme Court of India, *K.S. Puttaswamy (Retd.) v Union of India*, cit.

[229] White Paper of the Committee of Experts on a Data Protection Framework for India, 30, available at www.meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_171127_final_v2.pdf.

5.3.3.3. Israel[230]

The Israeli Supreme Court applies the Israeli Basic Laws to corporations and legal persons to protect their constitutional rights. In most cases, the Court has protected the rights of corporations without analysing the issue of applicability.[231] In some cases, the Court has ruled explicitly that corporations are within the scope of the Basic Law. In the *Reem Engineers* case, the Court held that rights apply to corporations as long as they can benefit from the right, as legal persons, like natural persons. Chief Justice Aharon Barak noted that freedom of speech is also granted to corporations. According to him, corporations could benefit from rights, such as property, freedom of occupation, and so on, as long as humanity is not essential to benefit from the right (like family rights).[232]

In another case, involving the famous *United Mizrahi Bank*, Chief Justice Aharon Barak stated that the term 'person' in the sense of the Basic Law on Human Dignity and Liberty includes corporations.[233] He based this important ruling on three grounds: first, human beings stand behind any corporation, therefore, excluding corporations from human rights, infringes the rights of the humans holding the corporation. Second, the right of incorporation will be absolute if corporations are excluded from rights. Third, corporations are an essential part of modern society and excluding them from human rights damages modern society.

5.3.3.4. Japan[234]

Traditionally, it was assumed in Japan that fundamental human rights belonged only to natural persons.[235] However, the majority view today is that legal persons can generally fall under the scope of fundamental human rights. In that regard, the Supreme Court of Japan held back in 1971 that there was no reason to deny fundamental human rights to corporations.[236] In that case, the issue was whether the corporation had a right to contribute money to a political party. The Japanese Supreme Court held that private corporations enjoy human rights insofar as these rights are not inconsistent with their nature. This judgment has, however, been criticised by academia on the basis that the freedom of political action for mega corporations should not exceed that of natural persons.[237]

In relation to the right to privacy, both individual and corporate taxpayers have been allocated taxpayer identification numbers (TIN, in Japanese *'Kojin Bango' and 'Hôjin Bengo'*) since October 2015.[238] In contrast to the TIN of individuals, third parties have full access to TINs of corporations because the right to privacy is considered to only apply to human beings. Furthermore, the legislator requires disclosure of 'the basic information' relating to each corporate TIN, namely, i) the name of corporate TIN holder, ii) their trade names and iii) locations of headquarters. This is on the basis that the (personal) data of corporate TINs is required to be disclosed to

[230] We would like to thank Rifat Azam for the contribution.

[231] Israeli Supreme Court, judgment of 31 August 1993, *Yavin Plast v National Labour Court Jerusalem*, HCJ 1683/93 [1993]; Israeli Supreme Court, judgment of 7 November 1993, *Eglo Contracting and Development Corporation v Minister of Industry and Trade*, HCJ 1452/93 [1993].

[232] Israeli Supreme Court, judgment of 21 September 1993, *Reem Engineers v Municipality of Nazareth Illit*, HCJ 105/92 [1993].

[233] Israeli Supreme Court, judgment of 20 September 2006, *United Mizrahi Bank v Prime Minister*, HCJ 4593/05 [2006].

[234] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.

[235] Y Hasebe, 'Rights of Corporations, Rights of Individuals: Judicial Precedents', in Y Higuchi (ed), *Five Decades of Constitutionalism in Japanese Society* (Univ of Tokyo Press, 2001) 73–87; S Matsui, *The Constitution of Japan – a Contextual Analysis* (Hart, 2011) 55, 159.

[236] Supreme Court of Japan (Grand Chamber), judgment of 2 April 1970, *Yahata Steel Corp Case*, [1970], Minshu vol 24, no 6, 625; *cf* N Ashibe and K Takahashi, *Constitutional Law* (in Japanese), (2017) 89–92, and Y Hasebe 'Rights of Corporations, Rights of Individuals' 74.

[237] Y Hasebe 'Rights of Corporations, Rights of Individuals' 75.

[238] S 42(1) of the TIN Act.

the public for investment purposes and credit examination. Corporate TIN disclosure rules do not however, extend to sole entrepreneurs that are assigned an individual taxpayer's number.

5.3.4. Europe

5.3.4.1. European Union

It is not completely clear to what extent certain rights are applicable to legal persons in the same way as to individuals.[239] In the European Union, the general principles of law, as enshrined in the EU Charter on Fundamental Rights, do not differentiate according to the holder of the rights. However, secondary legislation, such as data protection, namely the GDPR, may limit the entitlement to such rights solely to individuals. Thus, European Union law on the protection of data focuses on natural persons: according to Articles 39 TEU, 16 TFEU, the Union shall lay down the rules relating to the protection of 'individuals with regard to the processing of personal data'. Article 2(a) Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive), which is based on internal market competence, defines personal data as

> any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

In the same vein, the GDPR expressly entitles natural persons only, as can be seen from its title already. Its Article 1 – Subject-matter and objectives – refers to 'natural persons' only, in each of its three sections.[240]

In this context, the CJEU has reached the conclusion that legal persons

> can claim the protection of Articles 7 and 8 of the Charter [on the respect for private and family life as well as the protection of personal data] in relation to such identification only in so far as the official title of the legal person identifies one or more natural persons.[241]

Where this is not the case, legal persons may nevertheless invoke their right to privacy under Article 7,[242] freedom to conduct a business (Article 16 of the EU Charter) and their right to property, including intellectual property (Article 17 of the Charter) in order to protect their tax data.

Under the ECHR, legal persons clearly do enjoy certain rights. The right to property under Article 1 of its First Protocol expressly refers to every 'natural or legal person'. The ECtHR has also recognised that legal persons may enjoy many of the rights enumerated, including those rights most relevant to taxation, such as the right to a fair trial (Article 6 of the ECHR)[243] and the right to privacy (Article 8 of the ECHR).[244]

[239] On this see, in general, D Kinley (ed), *Human Rights of Corporations* (Routledge, 2009), and M Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford, 2006).

[240] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 March 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ, L 119/1.

[241] CJEU, judgment (Grand Chamber) of 9 November 2010, *Volker and Markus Schecke and Eifert*, joined cases C-92/09 and C-93/09, ECLI:EU:C:2010:662, [2010], paras 52 and ff.

[242] CJEU, judgment of 17 December 2015, *WebMindLicences*, case C-419/14, ECLI:EU:C:2015:832, [2015], para 80.

[243] See sec 6.3.1.1.5. and 6.3.2.4.1.2.3. of this book.

[244] See sec 8.2.2.4.1. with special emphasis on the implications arising in connection with data protection.

5.3.4.2. United Kingdom[245]

In the United Kingdom, the Human Rights Act 1998 gives effect in domestic law to the ECHR. Legal persons will, consequently, enjoy human rights protection to the extent that they enjoy that protection under the ECHR. It is now well-established that legal persons can enjoy certain rights under the ECHR – for example, the right to privacy or the right to enjoyment of possessions – but not other rights, such as the right to life and freedom from torture. In fact, some of the leading cases under the ECHR have involved companies.[246]

5.3.5. Oceania[247]

5.3.5.1. Australia

Lacking a comprehensive Bill of Rights or Charter of Rights, human rights in Australia have been recognised on a piecemeal basis through certain enumerated as well as implicit rights under the Australian Constitution (such as free exercise of religion and the implied right to vote), by way of specific federal legislation (such as anti-discrimination laws), and certain rights and freedoms recognised under common law. By their very nature, many of these rights and freedoms would not naturally extend to legal persons other than humans (eg the right to vote), but the extension of others, such as the right to a fair trial, is unclear. An exception is the right granted under the Australian Constitution to 'just terms' on the compulsory acquisition of property,[248] which has been relied on by corporations to obtain monetary compensation.[249]

In those states that have enacted human rights statutes, their application has been specifically limited to human individuals.[250] Similarly, the Australian federal data protection and privacy laws relate to 'personal information'.[251]

5.3.5.2. New Zealand

New Zealand, in contrast, does have human rights legislation that enumerates civil and political rights.[252] In relation to legal persons, a specific provision of the legislation states that the provisions apply 'so far as practicable' for the benefit of all legal persons as well as natural persons.[253] As a result, it might be possible for a legal person to assert the right to freedom of expression guaranteed under the New Zealand Bill of Rights Act 1990.[254] The data protection laws only apply to 'personal information' of 'individuals' who are therefore limited to natural persons.[255]

[245] We would like to thank Philip Baker for his contribution.
[246] Eg ECtHR, *The Sunday Times v United Kingdom*, no 6538/74, (2 April 1981); *cf* also Emberland, *The Human Rights of Companies*, (2012).
[247] We would like to thank Celeste Black for her contribution.
[248] S 51(xxxi) of the Australian Constitution.
[249] See, eg, High Court of Australia, *Newcrest Mining (WA) Ltd v Commonwealth*, 190 CLR 513, [1997].
[250] S 6 Human Rights Act 2004 (Australian Capital Territory); s 11 Human Rights Act 2019 (Queensland); s 6 Charter of Human Rights and Responsibilities Act 2006 (Victoria). See J Gans, 'Denial of Non-Human Rights Protection in Australia' (2011) 2 *New Zealand Law Review* 229–60.
[251] S 6 (interpretation) Privacy Act 1988 (Cth) (Australia).
[252] New Zealand Bill of Rights Act 1990 (NZ).
[253] S 29 New Zealand Bill of Rights Act 1990 (NZ).
[254] S 14 New Zealand Bill of Rights Act 1990 (NZ).
[255] S 7 Privacy Act 2020 (NZ).

5.4. Classification of Human Rights in Tax Matters

5.4.1. The Reason Underlying the Tripartite Classification

The tripartite classification of fundamental rights, differentiating between procedural, sanctions-related and substantive rights, reflects the different implications that arise in tax matters in connection with the constraints that limit the exercise of powers by the legislator in each of these three domains.

In principle, the legislator has much more leeway in defining the contours of tax policy than in the framework of tax procedures and the levying of sanctions. Certain discretionary powers are in fact unavoidable when it comes to determining how the various indicators of the ability to pay should concretely operate and how the overall tax burden is shared within the community. However, the rule of law imposes stricter legal constraints on tax procedures and, even more, on the levying of sanctions.

The tripartite classification of fundamental rights has therefore gradually gained traction in tax law, prompting their separate analysis by the tax community.[256]

There is considerable doctrinal consensus at the level of procedural rights, although there are differences in existing practices. By contrast, substantive rights are more controversial as the power to tax is a prerogative of states, which regulate it by statutes exercising their tax sovereignty. Thus, there is always a question of whether and how far human rights and their interpretation by the courts could interfere with this decision-making. Against this background, the tax community usually singles out the less controversial areas, procedural rights. They are instrumental to achieve the goals established by the legislator in conformity with the law. Procedural taxpayers' rights relate to the 'assessment, audit and collection of taxes, including their administrative and judicial review'.[257] They are usually contrasted with substantive taxpayers' rights.

There are significant differences across the countries regarding the levying of sanctions in tax matters, which raises controversial issues. However, even stricter requirements apply in this context as compared to the ones on tax procedures. For instance, even if there usually are sanctions in respect of each violation of the rules, it is commonly accepted that more serious violations may lead to more severe sanctions and that the less serious ones entail less serious consequences. Another issue is how far tax penalties may be imposed on top of criminal sanctions where taxpayers violate their obligations. This gives an additional reason to adopt this classification criterion when analysing how human rights concerning the reaction of each legal system to the violation of its tax rules, that is taxpayers' rights related to sanctions.

The application of the remaining 'substantive' human rights to tax matters is the most controversial.

We have thus adopted a tripartite classification of human rights applicable to tax matters, which groups them according to whether they are procedural, relate to the levying of sanctions, or are substantive. This classification reflects the common practice in tax matters and takes into account the different contexts in which the exercise of sovereignty operates. The control exercised by human rights law over tax procedures is generally more stringent than the control applicable

[256] In line with this classification, the European Association of Tax Law Professors has studied sanctions and tax procedures in the framework of two dedicated annual congresses, on which see respectively R Seer and A Wilms, 'General Report' in R Seer, *Surcharges and Penalties in Tax Law*, (IBFD 2016), 3 and ff; and P Pistone, 'General Report', in P Pistone (ed), *Tax Procedures*, (IBFD, 2020) 3 and ff.

[257] See P Pistone, 'Preface', in P Pistone (ed), *Tax Procedures* (IBFD, 2020).

in respect of substantive rights, and the judiciary can systematically enforce such control without questioning the policy choices of the legislator concerning the levying of taxes.

5.4.2. Interplay between the Categories

The right to fair trial possibly only has a procedural dimension. Nevertheless, there is an interplay between the substantive and procedural dimensions of most rights. Whilst the distinction between substantive and procedural rights is a useful analytical tool to focus on different aspects of taxation, from the perspective of human rights, the two dimensions should not be set in fixed compartments since procedural rights can impinge on substantive rights and conversely substantive aspects of taxation may have a bearing on procedural aspects.

Rights related to the levying of sanctions, including penalties, present some separate common features, including their proportionality to the goals pursued by the legislator. In tax matters, the state is more inclined to enforce severe penalties with dissuasive effects that prevent future violations of tax rules, but may produce a disproportionate impact on the exercise of human rights. A fair balance must be found between the effectiveness of such measures and their impact upon individuals. These are additional issues to the ones related to the enforcement of penalties in conformity with the rule of law, which share common elements with the dimension of procedural rights. Thus, the implementation of sanctions can also raise procedural issues (*ne bis in idem* principle).

In the case of substantive rights, considering that it is for the legislator to determine how to exercise taxing sovereignty, a stringent judicial control over policy decisions is less likely. However, this should not prevent the courts from assessing that the state exercised such power in line with the rule of law and the external limits imposed by human rights protection on the exercise of tax sovereignty. In particular, the right to property may mean that human rights hinder the levying of taxes that deprive the taxpayer of their possessions contrary to the requirements established by law. Also, taxes levied in conformity with the law must not lead to expropriation.

In recent years, the ECtHR has paid growing attention to the quality of the national decision-making process when determining whether a substantive right has been violated. This phenomenon is often referred to as the proceduralisation of human rights law. Instead of substantive balancing of public and private interests, the ECtHR focuses on 'whether the decision-making process leading to the measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual'[258] by various provisions of the ECHR. Some might see procedural justice as an alternative to substantive European supervision, while others see it as its complement.[259] Indeed, the ECtHR's focus on procedural shortcomings risks being a token of proportionality review, which can lead to an easing of the ECtHR's supervision of states' compliance with their obligations under the ECHR. Moreover, it may cause tensions in the ECtHR's dialogue with national judges who might even feel offended or misunderstood.[260] On the other hand, there can be positive effects of procedural review: if the national courts took all relevant interests into

[258] ECtHR, *Chapman v the United Kingdom* [GC], no 27238/95, (2001), ECHR 2001-I, para 92, and ECtHR, *Buckley v the United Kingdom*, Reports of Judgments and Decisions 1996-IV, no 20348/92, (25 September 1996), para 76.

[259] See dissenting opinion of Judge Pinto de Albuquerque in ECtHR, *Correia de Matos v Portugal* [GC], no 56402/12, (4 April 2018), para 41.

[260] See A Nussberger, 'Procedural Review by the ECHR: View from the Court', in JH Gerards, E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press, 2017) 163.

account and balanced various competing interests, there would be no need for the Court to repeat the balancing exercise to arrive at a conclusion on the reasonableness of a particular limitation of the fundamental right.[261] That goes hand in hand with the subsidiary character of the ECHR mechanism.

The implications of procedural review for taxpayers are quite remarkable. While the procedural right to a fair trial under the ECHR is limited to cases involving criminal charges, taxpayers can still claim that they were not afforded a reasonable opportunity to challenge the impugned tax measure before the domestic authorities as an argument in favour of breach of any substantive right.[262] In its analysis the ECtHR might consider whether particular procedural guarantees have been afforded to the taxpayer,[263] for instance, whether he or she had enjoyed the benefit of adversarial proceedings.[264] The denial of such guarantees might lead to the conclusion that a substantive right has been breached without delving into the scope of the state's margin of appreciation in tax cases.

5.4.3. The Mainly Affected Human Rights in Tax Matters

Taking into account the tripartite classification of human rights in tax matters that differentiates among procedural rights, rights related to sanctions and substantive rights, our research has indicated that the following human rights are mainly affected in tax matters.

First, a very important procedural right is the one to an effective legal remedy in respect of any measure that may adversely affect the taxpayer's legal sphere. This right is often referred to in the context of the right to fair trial. In tax matters it may entail a dual dimension, which concerns administrative procedures (on tax audit, collection and refund), ie the ones involving tax authorities and the affected persons, and judicial procedures, regarding the conformity of the activity of tax authorities with the law. Due to often lacking notification, access to legal remedies has become difficult in the field of mutual assistance and cross-border data exchange.

Second, three rights related to sanctions are prominent in tax matters, namely the implications of the principle of proportionality for tax sanctions. The limb of the *ne bis in idem* principle that is connected with the prohibition of double punishment in respect of a single violation applies with regard to criminal tax sanctions which have to be distinguished from administrative tax penalties. The prohibition on double jeopardy equally applies to criminal sanctions, whereas in the non-criminal area of taxation, taxpayers have to cooperate and provide information.

Third, the mainly affected substantive rights in tax matters include the principle of equality, data protection, and the right to property. These will be the focus of the following sections, even though taxation also affects other human rights.

[261] See JH Gerards, 'Procedural Review by the ECtHR: A Typology', in JH Gerards, E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press, 2017) 128, 129.

[262] See eg ECtHR, *AGOSI v the United Kingdom*, Series A no 108, (1986) 19, para 55, and ECtHR, *Hentrich v France*, Series A no 296-A, (22 September 1994) 21, para 49 in respect of the right to property; see also ECtHR, *G.S.B. v Switzerland*, no 28601/11, (22 December 2015), para 96 with regard to transfer of data to tax authorities (right to respect for private life).

[263] See, eg, ECtHR, *Rousk v Sweden*, no 27183/04, (25 July 2013), para 117.

[264] ECtHR, *Jokela v Finland*, no 28856/95, (21 May 2002), para 60.

6

The Procedural Rights

The concept of 'procedural rights' covers all the rights that protect various aspects of the tax procedures that are in place in order to give effect to substantive tax rules and which do not involve or are not directly linked with the tax due, but rather with the procedure followed to determine and collect the tax due.

In particular, tax procedures deal with the registration and in general the identification of taxpayers, the submission of tax returns, the conduct of tax audits, the assessment of taxes, the collection of taxes due and, last but not least, administrative review procedures for the resolution of disputes between taxpayers and tax authorities, and appeals before the judiciary.[1]

The main umbrella principle applicable to tax procedures is the rule of law. The protection of taxpayers' rights is necessary under the rule of law. As has been argued elsewhere, 'as part of the rule of law, taxpayers need to trust that the tax administration will protect their rights to confidentiality, privacy and the right to participate in the exchange of information'.[2] In addition, as stated by Bentley in respect of the rise of soft law but also applicable to the development of the rules on exchange of information,

> revenue administrators have been placed in a position where they have to engage with and understand taxpayers as much as they can. To do this effectively they have to protect taxpayers and set up the frameworks that provide effective rule of law both under the law and through the daily operational administration of the law.[3]

The rule of law in itself has a material and a procedural component. This section will only address the boundaries and implications of the procedural component of the principle, which requires taxes to be levied in conformity with the requirements established by law.[4] The goal is to avoid any possible arbitrary conduct of tax authorities or violations of taxpayers' fundamental rights. This function of the rule of law does not prevent the assessment of possible additional violations of the latter rights by tax rules that do not comply with the overall international standards as contemplated in this book (according to which all persons should have the right to an effective ex ante judicial remedy against tax measures that may adversely affect their legal sphere).

[1] Because of the connections between administrative and judicial procedures there may be no right to fair trial without a corresponding right to fair administrative tax procedures.

[2] IJ Mosquera Valderrama, A Mazz, LE Schoueri, N Quiñones, J Roeleveld, P Pistone, and F Zimmer, 'The Rule of Law and the Effective Protection of Taxpayers' Rights in Developing Countries', *WU International Taxation Research Paper Series no 10*, (2017), ssrn.com/abstract=3034360.

[3] D Bentley, 'The Rise of "Soft Law"' (January/February 2008) *Tax Administration- Good News for Taxpayers?, Asia-Pacific Tax Bulletin* 38.

[4] For the material component of the rule of law, see below under sec 8 of this book.

After analysing the right of taxpayers to access documents concerning them (*habeas data*),[5] and the right to be heard,[6] this section will focus on the right to judicial protection,[7] before reaching some conclusions.[8]

6.1. Access to Documents (*Habeas Data*)

6.1.1. General Issues

Access to documents is a condition for the effective exercise of the right of defence throughout tax procedures. Therefore, this right operates at a moment logically prior to the other rights. Its separate analysis reflects the view that taxpayers should always be given access to information concerning them and in the possession of tax authorities, since otherwise taxpayers may not exercise their procedural rights effectively and in line with the principle of equality of arms. This is because individual taxpayers cannot access all sources of relevant information that are available to tax authorities.

A good example is the cross-border procedures involving mutual assistance on information exchange.[9] These procedures allow the tax authorities of one country to gather information concerning the taxpayer from the tax authorities of other countries. The critical issue is that, since the procedures are exclusively targeted at facilitating the supply of information to tax authorities, taxpayers and other private parties are in principle not entitled to access the exchanged data.[10] In such circumstances, tax authorities have an obligation to exercise their powers in line with the rule of law under the same conditions as those which apply in respect of any other tax procedure. However, since the affected persons do not have access to the data supplied, they are not in a position to verify whether this occurs.[11]

Considering that not all taxpayers can always obtain relevant information, especially in the state of source when they have no direct relation with the tax authorities of such state, these procedures may create an unfair situation, which violates equality of arms and may potentially prevent an effective exercise of the right to defence. Therefore, the right to access data should be regarded as a basic requirement for securing fairness throughout tax procedures and including in cross-border situations. The circumstance in which tax authorities may obtain information by means of mutual assistance should not prevent, in principle, affected persons from also having access to this information on the same conditions that operate in purely domestic circumstances.

[5] See below under sec 6.1.

[6] See below under sec 6.2.

[7] See below under sec 6.3.

[8] See below under sec 6.5.

[9] Procedures on cross-border mutual assistance in tax matters also exist in respect of the recovery of taxes. These pursue a substantially similar goal, ie to allow tax authorities to invoke the cooperation of tax authorities of another country in respect of procedures to be conducted on the territory of the latter country.

[10] In the European Union, the CJEU has clarified that the object and purpose of cross-border mutual assistance is not to create rights for the affected persons (CJEU, *Sabou*). See further on this under sec 6.1.2.4.1.2.

[11] The CJEU acknowledged that only the addressees of information orders have legal standing to have the judiciary ascertain that such procedures are effectively conducted in line with the rule of law (CJEU, *Berlioz Investment Fund*, and CJEU, *État Du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*). See further on this below, sec 6.1.2.4.1.2.

6.1.2. The Situation in the Different Regions of the World

6.1.2.1. Africa[12]

6.1.2.1.1. The African Charter on Human and Peoples' Rights

Article 9(1) of the ACHPR provides for the right of access to documents.[13]

The African Commission on Human and Peoples' Rights prepared a Model Law on Access to Information in 2013[14] as well as guidelines on Access to Information and Elections in Africa.[15] The Model Law provides that the law, policy or practice creating a right of access to information must be interpreted and applied on the basis of a presumption of disclosure. Non-disclosure is permitted only in exceptional, justifiable circumstances and any refusal to disclose information is subject to appeal.[16]

In principle, the regulation contained in the Model Law reflects very high standards of legal protection, which could help to develop a global best practice for the effective protection of this right. Accordingly, Article 12 of the Model Law characterises the right of access as an enforceable right and indicates that the object of this right is information from public and, in certain cases, private bodies.[17] On the one hand, it creates a general obligation for those bodies to secure the right of access to their information under the conditions specified in the Model Law. On the other hand, it does not prevent those bodies from extending access also to further situations, including the ones that are carved out from disclosure.

The latter type of information includes not only classified information,[18] but also information that secures the protection of the public interest[19] and the economic interests of the state.[20] In particular, the latter clause includes an express reference to taxes.[21] Such a reference prevents a general exclusion in this domain. Rather it gives the right to limit the prevalence of the right of access to information over the one to secure the collection of taxes. This restrictive interpretation fits in very well with the goal of securing an effective protection of the collective interest to counter phenomena such as tax evasion and fraud, without giving rise to a disproportionate restriction of the fundamental rights of taxpayers.

Access to information has been developed in Africa in the context of enhancing democracy. The resulting transparency is, however, also important with regard to taxation and judicial

[12] We would like to thank Attiya Waris for her contribution.

[13] 'Every individual shall have the right to receive information'.

[14] Model Law on Access to Information for Africa 2013, www.achpr.org/legalinstruments/detail?id=32.

[15] F Adeleke, 'The impact of the Model Law on Access to Information for Africa', in O Shyllon (ed), *The Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa* (Pretoria University Law Press, 2018) 14 and ff, 17.

[16] S 2 of the Model Law.

[17] Under art 12(1)(a) the clause on the right of access applies to the documents of relevant private bodies, as well as (b) of private bodies, where the information may assist in the exercise or protection of any right. The concept of relevant private bodies is not defined further. However, the context suggests that such bodies may hold information that is akin to the one related to public bodies. Moreover, the circumstance that subpara (b) includes an express reference to the instrumental function of private bodies in the exercise of rights shows a willingness to give priority to the right of access, possibly reflecting its fundamental role in securing an effective protection of the right to defence.

[18] Art 26 of the Model Law. Further exemptions apply to personal information of a third party (art 27), commercial and confidential information of an information holder or a third party (art 28), protection of life, health and safety of an individual (art 29), national security and defence (art 30), international relations (art 31), law enforcement (art 33), legally privileged documents (art 34), academic or professional examination and recruitment processes (art 35) and manifestly vexatious requests (art 37).

[19] Art 25 of the Model Law.

[20] Art 32 of the Model Law.

[21] See subpara (c).

protection. Moreover, in Africa many persons live below the level of *minimum vitale*. The number of persons paying taxes is therefore limited. This, however, cannot waive the protection of taxpayers' rights.

6.1.2.1.2. South Africa

South African legislation provides detailed grounds for refusal of access to records including, but not limited to, the protection of privacy and commercial secrets.[22] For some confidential information, there is a period during which the records cannot be disclosed, for example, a period of 20 years in case of defence, security and international relations.

Information held by the tax administration (SARS) is protected. Section 35 of the Promotion of Access to Information Act states that a SARS official must refuse a request for access to a record held by SARS if it contains information which was obtained or is held by SARS for the purposes of enforcing legislation concerning the collection of revenue. One exception to this is where the record consists of information about the requesting person or the person on whose behalf the request is made.

6.1.2.2. Americas

6.1.2.2.1. The Inter-American System for the Protection of Taxpayers' Rights

Article 13 of the ACHR guarantees freedom of thought and expression, which 'includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice'.

The Inter-American Court of Human Rights held

> that, by expressly stipulating the right to 'seek' and 'receive' 'information,' Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention.
>
> Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.[23]

The Inter-American Court underlined the importance of regional consensus among the states that are members of the Organization of American States (OAS) about the importance of access to public information and the need to protect it.[24] This right has also been the subject of specific resolutions issued by the OAS General Assembly, where it urged the states to respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application.[25] In 2009, the OAS General Assembly called for a model law on access to public

[22] *cf* c 4 of the Promotion of Access to Information Act under ss 33 to 46.

[23] IACHR, judgment of 19 September 2006, *Claude-Reyes et al v Chile*, [2006], nos 76 and ff, 77.

[24] IACHR, *Claude-Reyes et al v Chile*, nos 76 and ff, 78.

[25] *cf* eg OAS, Resolution AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, on 'Access to Public Information: Strengthening Democracy,' second operative para; OAS, Resolution AG/RES. 1932 (XXXIII-O/03) of June 10, 2003, on 'Access to Public Information: Strengthening Democracy'; OAS, Resolution AG/RES. 1977 (XXXIV-O/04) of June 8, 2004, on 'Access to

information and a guide for its implementation, 'in keeping with international standards in this field'.[26] Article 4 of the Inter-American Democratic Charter emphasises the importance of '[t]ransparency in government activities, probity, responsible public administration on the part of Governments'.[27]

The Inter-American Commission on Human Rights (IACHR) Office of the Special Rapporteur for Freedom of Expression presented the Inter-American human rights system's standards on access to information in 2011.[28] Accordingly, the right of access to information is the rule and secrecy the exception. The burden of proof is on the state when limits on the right of access to information are established.[29]

Access to information held by government has been developed in the Americas in the context of enhancing democracy as well as transparent and good governance. This is also important in the area of taxation.

6.1.2.2.2. Latin America

6.1.2.2.2.1. Argentina[30]

Article 43 of the Argentine Constitution contains a specific provision on access to documents in purely domestic tax proceedings. The action of *habeas data* is provided for in its paragraph 3. The purpose of the action of *habeas data* is that taxpayers be aware of their personal data, the purpose for which registries use such data and the possibility of correcting such data.

The Argentine Supreme Court established that the purpose of the action of *habeas data* is not to require that such institutions – whether private or public – actually register or do not register data, but to protect the taxpayers to whom such data may eventually refer so that any taxpayer may become aware of the data referring to them and of their purpose. The action of *habeas data* does not prevent the collecting agency from having the power to request information from third parties, public or private institutions, which have data on registered taxpayers, with the purpose of facilitating the collection of taxes.[31]

6.1.2.2.2.2. Brazil[32]

According to Article 5(LXXII) of the Brazilian Constitution, individuals may initiate *habeas data* to obtain information about them recorded in a public register, including information about tax payments.[33] Regarding the possibility to access information during and after a tax audit, access to information shall be denied if it compromises the success of an official investigation during

Public Information: Strengthening Democracy'; OAS, Resolution AG/RES. 2121 (XXXV-O/05) of June 7, 2005, on 'Access to Public Information: Strengthening Democracy'; and OAS, Resolution AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, on 'Access to Public Information: Strengthening Democracy.

[26] OAS, General Assembly, Resolution AG/RES. 2514 (XXXIX-O/09) Access to Public Information: Strengthening Democracy) of June 4, 2009, no 9.

[27] Art 4 Inter-American Democratic Charter, Lima, 11 September 2001.

[28] OAS, Inter-American Commission on Human Rights, The Right to Access Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks, 2012, www.cidh.org/relatoria.

[29] Guiding Principles B.1.a. and b. of the Inter-American Legal Framework regarding the Right to Access to Information, 2012.

[30] We would like to thank Eduardo A Baistrocchi for his contribution.

[31] Argentine Supreme Court, *Instituto de Informaciones Comerciales Paraná c Dirección Gral Impositiva*, judgment: 321:1660, [1998].

[32] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[33] Supreme Federal Court of Brazil, extraordinary appeal of 17 June 2015, no 673707/MG [2015].

the administrative or judicial procedure.[34] Therefore, taxpayers generally have the right to access information on them by formulating an administrative request[35] and/or *habeas data*.

General public information regarding tax collection may be obtained by an administrative request based on the Brazilian Act of Access to Information. This information, however, must not identify taxpayers.[36] Furthermore, the authorities, when unlawfully disclosing information, commit a crime whose penalty can reach up to two years' imprisonment,[37] besides administrative sanctions.

6.1.2.2.2.3. Chile[38]

Article 19 N°4 of the Chilean Constitution assures all people of 'the respect and protection of private life and the honour of the person and his family. The management and protection for such data shall be carried out under the form and conditions established by law.' The Chilean legislation takes into account, in general terms, the management and protection of citizens' personal data. The Chilean Law on the Protection of Private Life[39] contains a catalogue of rights: the right of access to information, the right of modification or rectification and the right of personal data blocking. However, the said legislation has not been fully applied in the area of taxation. Procedurally, it is difficult to lodge complaints. Moreover, the protection of taxpayers' rights is restricted when this impedes or prevents the proper fulfilment of the auditing functions of the required public entity, or affects regulatory or legal decision-making, amongst other grounds.

The international exchange of tax data has not been widely analysed in Chile, legally or doctrinally. However, there is legislation and a procedure in case the state requires bank information about a certain taxpayer, but not for other types of requests for data which are not related to banks.

Several changes to the Chilean Tax Code have been introduced[40] in order to obtain access to bank data of certain persons. The Chilean tax administration shall require bank data to fulfil requests from foreign tax administrations, when the data exchange had been agreed upon in an international treaty entered into by Chile and ratified by the Chilean Congress. The requirements of bank data have to originate in the data exchange with the competent authorities of the contracting states, according to what was stated in the double taxation treaties in force, entered into by Chile and ratified by the Chilean Congress.

The procedure considers the subject's notice within five days of the Chilean tax administration receiving the request. The taxpayer has the possibility to ask that the bank refuse to provide the required information. In that case, the Chilean tax administration shall request the information via a ruling by the competent tax judge. Recently,[41] a new taxpayers' right was added to the Chilean Taxpayers' Bill of Rights.[42] It now contains 'the right to be informed, if he/she has been subject of a request of information exchange, as long as it does not imply a possible unfulfillment of tax obligations'. This applies to all data requests, not just bank data.

[34] Art 23(VIII) of the Brazilian Act of Access to Information No 12527/2011.
[35] Art 10 of the Brazilian Act of Access to Information.
[36] Art 31, para 3 (II) of the Brazilian Act of Access to Information.
[37] Art 325 of the Brazilian Criminal Code.
[38] We would like to thank Yuri Varela for his contribution.
[39] Law No 19.628, 1999.
[40] Arts 62 and 62bis as amended by Law no 20.406, 2009, and then regulated by Circular no 46, 2010, of the Chilean tax administration, www.sii.cl/documentos/circulares/2010/circu46.htm.
[41] Law no 21.210, 2020.
[42] Art 8bis, no 5.

6.1.2.2.2.4. Colombia[43]

Colombian taxpayers have recently been incompletely protected in tax audits, based on information received under FATCA and the CRS. In July and August 2019, the Colombian tax authority notified thousands of taxpayers that there were indications that they held assets abroad because of information exchanged under FATCA and CRS. Under this type of audit effort, it is considered that there is no firm investigation against the taxpayers who receive the letter; accordingly, the tax administration only delivers the information collected from the exchange to the taxpayers, if the taxpayers request that specific investigations are opened against them. In these cases, it is impossible to correct mistakenly exchanged information without requesting the opening of an investigation, which usually entails the payment of legal or accountancy fees. In 2019, several cases occurred in Colombia of natural persons whose information as disseminated in those letters was different from their actual banking information. However, the taxpayers could not access the exchanged information unless the Colombian tax authority formally opened an investigation. To date, no legal actions seem to have been initiated in that regard. Therefore, this attack on the taxpayers' *habeas data* right could go on.

6.1.2.2.2.5. Peru[44]

Article 2, subsection 5 of the Peruvian Constitution recognises that every person has the right to request, without stating a reason, the information he requires, and to receive it from any public entity, including the tax administration. Article 200 of the Peruvian Constitution contains a constitutional action to proceed against an act or omission by any authority, official or person that violates or threatens the individual rights of access to information and the right to informational self-determination.

The Peruvian Constitutional Court has defined the right of informational self-determination as allowing a person to demand, in court, access to information records in which data exists regarding oneself in order to require its rectification or removal or prevent its dissemination.[45] *Habeas data* has protected personal taxpayer information. For example, the Peruvian Constitutional Court ordered a credit reference agency[46] to remove from its databases private taxpayer information – such as job occupation and telephone numbers – which had been obtained from the publicly accessible website of the Peruvian tax administration.[47] Despite not being party to the case, the tax administration has currently stopped providing such information on taxpayers on its website, presumably as a consequence of the aforementioned judgment.

The Peruvian Constitutional Court has recognised taxpayers' right to obtain access to internal circulars of the tax administration concerning instructions to their officials for the exercise of the discretionary power when imposing fines. The Court established that these circulars could not be considered as documents that contain legal strategies of the administration in administrative procedures, but rather documents that promote a guideline for the application of its sanctioning power. Therefore, such restriction on public access is not justified.[48] Regarding the taxpayers' access to information from cross-border mutual assistance between tax authorities, Article 102-B°, subsection f of the Peruvian Tax Code establishes that – in the context of information exchanges – the Peruvian tax administration (SUNAT) has no obligation to activate mutual assistance to obtain information upon request of a taxpayer.

[43] We would like to thank Lucy Cruz for her contribution.
[44] We would like to thank Cecilia Delgado Ratto for her contribution.
[45] Peruvian Constitutional Court, judgment no 06661-2008-PHD/TC, [2008].
[46] *Infocorp – Equifax Peru SA*.
[47] Peruvian Constitutional Court, judgment no 03700-2010-PHD/TC, [2010].
[48] Peruvian Constitutional Court, judgment no 00937-2013-PHD/TC, [2013].

Peruvian legislation remains silent on the right of taxpayers to access information gathered in the framework of mutual assistance. In contrast, Article 102-A° of the Peruvian Tax Code expressly states that information obtained by the Peruvian tax administration by virtue of a mutual assistance agreement can be used as evidence against a taxpayer in proceedings.

To date, there is no jurisprudence or pending administrative or judicial cases on taxpayers' rights in such situations.

6.1.2.2.3. The Caribbean[49]

Some Caribbean jurisdictions now have freedom of information legislation which allows taxpayers the right of access to documents or records held by public authorities and which imposes a prescribed time limit for compliance, failing which legal action can be taken for disclosure and penalties can be imposed for non-compliance. Public authorities are only permitted to decline such requests on limited bases such as issues of national security.

With respect to tax information requested from other states or in responding to such requests, the position is normally governed by bilateral double tax treaties which contain a bilateral tax information exchange provision. Further, in respect of such specific tax treaties entered into with the United States in most Caribbean jurisdictions, there are specific provisions dealing with for example the US requesting information on US residents, both individual and corporate, in the Caribbean. Theoretically, such agreements are bilateral but were primarily entered into at the behest of the US, which had indicated that certain sanctions might follow if Caribbean jurisdictions did not enter into FATCA agreements. Some commentators have seen this as an extraterritorial extension of the domestic jurisdiction of the US. In any case, given the somewhat unequal bargaining power which exists between small island developing states and the US, the overall perception is that there was little choice. The banking sector in particular was insistent that such FATCA agreements be entered into. There is also one major multilateral CARICOM tax treaty which provides for the exchange of tax information among member states of this regional organisation.

6.1.2.2.4. United States[50]

Pursuant to the general statutory provisions of the Freedom of Information Act (FOIA), 5 USC section 552, taxpayers have the right to obtain federal agency records or information, and Internal Revenue Code section 6110 also requires public inspection of certain agency determinations.[51] However, Internal Revenue Code section 6103 governs confidentiality of tax return information and thus puts significant limits on what the public can obtain in a FOIA request. Generally, members of the public cannot obtain tax return information not specific to themselves unless the associated taxpayer grants permission as a designee.[52] Although a taxpayer is generally entitled to access any of its own records or associated information held by the Internal Revenue Service,

[49] We would like to thank Anthony Gafoor for his contribution.

[50] We would like to thank Jeremiah Coder for his contribution.

[51] S 6110 allows for public inspection of the Internal Revenue Service written determinations, which generally consist of rulings, determination letters, technical advice memorandum, and Chief Counsel advice. The contours of these categories requiring IRS release to the public have been subject to serious litigation over recent decades, often by media organisations, challenging Internal Revenue Service claims that 'new' types of administrative guidance are not covered. See, eg, US Court of Appeals, District of Columbia Circuit, *Tax Analysts v IRS*, 117 F.3d 607, DC Cir, [1997].

[52] See Internal Revenue Code s 6103(c).

the general FOIA framework sets out a number of exceptions and categories of denial that may allow the Internal Revenue Service to withhold information.[53] Common reasons for the Internal Revenue Service to withhold taxpayer information under FOIA include claims that disclosure would interfere with law enforcement activities, consist of protected communications, would constitute an invasion of personal privacy, or for national security reasons.

The broad right taxpayers have to obtain their own information from the Internal Revenue Service was further expanded in some respects in the 2019 Taxpayer First Act (PL 116-25), which directs the Internal Revenue Service to allow access to the taxpayer's case files held by the agency when the taxpayer appeals an administrative action to the Internal Revenue Service Independent Office of Appeals.[54]

Each federal agency, including the Internal Revenue Service, establishes the parameters for making a FOIA request. The Internal Revenue Service requires a written request with specificity as to the requested records; the taxpayer may have to pay a processing fee depending on its status and the volume of applicable materials produced. If the Internal Revenue fails to respond to a FOIA request, or produces fewer records than a taxpayer expects, the requesting taxpayer can file an administrative appeal with the Internal Revenue Service, and in certain circumstances may file a judicial appeal to pursue their rights.[55]

6.1.2.3. Asia

6.1.2.3.1. China[56]

Taxpayers have the right to request the Chinese tax authorities to provide documents with regard to their own tax filing and payment information, according to the Chinese Regulation on the Disclosure of Government Information.

Taxpayers may, via websites, client software, and tax self-service terminals, etc, and upon valid identity authentication, consult the information on payment of taxes and dues, tax payment credit evaluation results, handling progress of tax-related matters and tax-related information themselves. If taxpayers are unable to access the tax-related information they need themselves, they may file a written application for access with the tax authority.[57]

6.1.2.3.2. India[58]

Taxpayers accused of offences under the Indian Income-tax Act 1961 have the right to access all documents or evidence that form the basis of the case against them.[59] In civil proceedings, parties are required to produce documents relied upon and the other party is entitled to request an opportunity to inspect and make copies thereof.[60]

India's Right to Information Act 2005 enables citizens to seek information from the government. However, citizens cannot ordinarily request the income tax returns of other assessees, as

[53] 5 USC 552 sets out nine specific exemptions that may apply.
[54] See Internal Revenue Code s 7803(e)(7).
[55] See 5 USC 552(a)(4).
[56] We would like to thank Na Li for her contribution.
[57] Announcement no 41 [2016] of the State Administration of Taxation – Announcement on Issuing the Measures for the Administration of Tax-related Information Inquiries, issued on 30 June 2016.
[58] We would like to thank Ashrita Prasad Kotha for her contribution.
[59] S 207, Code of Criminal Procedure, 1973.
[60] Order VII, Rule 14, Order VIII, Rule 8A and Order XI, Rule 15, Code of Civil Procedure 1908.

it constitutes 'personal information' which is exempted from disclosure. An exception is made if there is a larger public interest warranting the disclosure.[61]

Information received from a foreign government under a confidentiality obligation is also exempt from disclosure under the Right to Information Act, 2005. Hence, information received pursuant to exchange of information agreements or clauses in tax treaties cannot be disclosed under the general Right to Information Act.

However, information requests can be made under section 138 of the Income-tax Act 1961, which permits a person to apply for information relating to any assessee received by the tax authority in discharge of their duties. This can include information received pursuant to exchange of information requests in tax treaties. The tax authority shall permit disclosure only if it is in the public interest. Its decision is final and there is no judicial review. Under section 280, if the tax officer acts contrary to the law, he is punishable with a fine and imprisonment which may extend to six months.

Pursuant to the Exchange of Information Manual issued by the apex Indian tax authority, any disclosures and sharing of information should be in compliance with tax treaties. Further, information received may be shared with the taxpayer or his proxy when the information is likely to be used against him, while giving the taxpayer the right to be heard. The actual correspondence from the foreign competent authority should not be shared; only the relevant content may be shared.[62]

In proceedings such as a MAP, the taxpayer is only informed of the outcome once the proceedings are complete. Taxpayers do not have the right to participate in the proceedings. India has not opted for mandatory binding arbitration as an extension of MAP.

6.1.2.3.3. Israel[63]

In criminal procedures, the right of access to documents and all the investigation documents is among the constitutional rights of the accused. In civil procedures, the right to access the documents is granted through several sources. One source is the basic principles of natural justice; another source is the administrative law and the authorities' duty to act fairly, and an additional source are several procedural norms in the tax legislation that impose duties to deliver the data and documents to the taxpayer.

6.1.2.3.4. Japan[64]

In Japan, the Information Disclosure Act was enacted in 1999 and came into effect in 2001.[65] Pursuant to this law, citizens may request disclosure of information held by administrative organs. Article 5 of the Act stipulates that administrative documents pertaining to a request for disclosure must be disclosed, except in the cases stipulated in the article. The matters stipulated for non-disclosure include information on (1) individuals and (2) legal entities, (3) matters pertaining to the safety and trust of the state, (4) information on public safety and order, (5) information on deliberations and consultations of the state, and (6) information where there is the possibility that disclosure may interfere with the proper execution of the affairs or business of state

[61] Supreme Court of India, judgment of 3 October 2012, *Girish Ramchandra Deshpande v Central Information Commissioner*, Special Leave Petition Civil no 27734/12, [2012].

[62] Government of India, Ministry of Finance, Manual on Exchange of Information, May 2015, 32-33, available at www.taxindiainternational.com/pdfdocs/Manual_EoI_1.pdf.

[63] We would like to thank Rifat Azam for his contribution.

[64] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.

[65] Act on Access to Information Held by Administrative Organs, Act no 42 of 14 May 1999.

agencies. The purpose of this Act is to acknowledge that there is public interest in disclosing information in principle, but where there is dispute, the balance with the public interest as to the disclosure of the information should be examined on a case-by-case basis.[66]

The head of an administrative organ may refuse to disclose information listed in (1) to (6) of Article 5 of the Law without acknowledging the existence or non-existence of the relevant administrative documents. In addition, when there is an appeal against a non-disclosure decision, the Information Disclosure and Personal Information Protection Review Board is consulted in accordance with Article 18 of the Law. The Board presents a report as to whether the non-disclosure is authorised by Article 5 to the advisory agency (Commissioner of the National Tax Agency).[67]

When a request for disclosure of information relating to taxation is made, the first question is whether the information requested constitutes non-disclosable information as defined in Article 5(i) of the Act, or exceptionally disclosable information. Article 5(i) of the Act stipulates that information about an individual or information that can be used to identify a specific individual is non-disclosable information. As an exception to that rule, information can be disclosed, even if it was otherwise non-disclosable pursuant to Article 5(i), if any of the following conditions are met: (a) the information is required to be disclosed by law or practice; (b) it is necessary to disclose the information to the public to protect the life, health, livelihood or property of a person; (c) the information relates to the performance of the duties of a public official; or (d) the disclosure is limited to information about the content of the information.

Examples of requests for information that arise within category (a) include that information is publishable that relates to the following facts: (1) whether or not a specified individual has submitted certain documents, such as a tax return, to the NTA; (2) whether or not a specified individual has been subjected to a tax audit or some other disposition, such as a reassessment or decision by the NTA; and (3) whether or not a specified individual has made a donation or taken some other action.

For these three types of case, the Board has determined that they do not fall into category (a) as the information is related to the specific individual and could identify that individual. Such information does not fall under 'Information that is made public, or information that is scheduled to be made public pursuant to the provisions of laws and regulations or by custom' as provided in Article 5(i)(a) of the Act. As a result, it is considered to be non-disclosable information and a refusal to respond to the existence or non-existence of such information is appropriate.[68]

Category (b) barely is an issue in taxation. In relation to category (c), in the case of a request for disclosure of the name and title of the inspector stated in the inspection report of a particular bank, the Board determined that the title of the inspector fell under Article 5(i) of the Law, and it was information relating to the performance of duties of a public servant falling under subparagraph (c) of Article 5(i). Therefore, it was considered to require disclosure. On the other hand, it has been held that the names of the inspectors who inspected a particular bank were not disclosable because (1) there is no public disclosure practice, and (2) there was a probability that undue pressure would be exerted on the inspectors.[69]

[66] S Kishida, 'Disclosure of Tax Information and Duty of Confidentiality' (in Japanese), (2002) 57 (2) *Tax* 128, 129.

[67] N Noishiki, 'Several Issues on disclosure/non-disclosure of tax information in the Government report of the Committee of information disclosure and protection of personal information' (2005) 3 *Zeidai Journal (NTA College)* 102, 104, (in Japanese).

[68] N Noishiki 'Several Issues on disclosure/non-disclosure of Tax Information' 107.

[69] N Noishiki 'Several Issues on disclosure/non-disclosure of Tax Information' 117; H14-175 of Report of the Information Disclosure and Personal Information Protection Review Board.

Article (5)(ii) makes the following information about a corporation or other organisation, or about an individual engaged in a business with such a business, non-disclosure information: '(a) Information which when disclosed is likely to cause harm to the rights, competitive position, or other legitimate interests of the said Juridical Persons, etc. or of the said individual'.

Under this clause, information is determined to be 'non-disclosure' information if it relates to the following facts: (1) whether or not the specified corporation has submitted any documents to the NTA, (2) whether or not the specified corporation has filed a claim with the NTA, (3) whether or not the specified corporation has been subjected to a tax audit or has been subjected to a correction or determination by the NTA, (4) whether or not the specified corporation has received any money or donation, or (5) whether or not the specified corporation has been subjected to a tax audit or a correction or decision by the NTA.[70]

Unlike the case of Article 5(i) above, it is also necessary to determine whether the disclosure of the fact that the Specified Juridical Person has committed the acts mentioned in (1) to (5) above would cause damage or not. Article 5(ii)(a) of the Act provides that 'the rights, competitive position, and other legitimate interests of the said Juridical Person or the said individual (an individual who operates a business) are likely to be harmed if made public'. Thus, it is necessary for the NTA and Board to consider what kind of disadvantage would be caused to the specified corporation by the information disclosure and balance this against the public interest. In most cases the conclusion of the NTA and Board is against disclosure.

Further, Article 5(vi) of the Act provides a general rule that permits the head of an administrative organ to decide against disclosure, namely

> Information concerning the affairs or business conducted by a state organ, an Incorporated Administrative Agency, etc., a local public entity or a Local Incorporated Administrative Agency, where disclosure is likely to have the following risks or is likely to hinder the proper execution of the said affairs or business due to the nature of the said affairs or business: (a) Risk of making it difficult to understand accurately facts concerning affairs pertaining to audits, inspections, supervision, examinations, or imposition or collection of tax, or facilitating wrongful acts regarding such affairs, or making it difficult to discover such acts.

As an example of the application of Article 5(vi), one case concerned whether information was publishable that related to the following facts: (1) whether or not there was any disposition or other action taken by the national tax authority, and (2) whether or not the national tax authority has a particular vehicle. In this case it was necessary to consider whether there was a risk of hindering the proper execution of the affairs of the national tax authority by making disclosures about these matters. In the case of fact (2), it was considered to be non-disclosable information and a refusal to respond to the existence or non-existence of such information was appropriate.[71]

6.1.2.4. Europe

6.1.2.4.1. European Union

Access to documents is an integral part of the right to fair trial, as guaranteed by Article 6(1) of the ECHR, widely applicable within the European region.

After presenting the sources of law and the general issues discussed in the European region, we will provide a separate analysis of the ones arising in cross-border situations, treating separately

[70] N Noishiki 'Several Issues on disclosure/non-disclosure of Tax Information' 107.
[71] H15-363 of Report of the Information Disclosure and Personal Information Protection Review Board.

the context of mutual assistance (including exchange of information and assistance in collection of taxes) from that of mutual agreement procedures and dispute settlement.

6.1.2.4.1.1. General Issues and Sources of Law

Insofar as the application of EU law is concerned, the EU Charter becomes applicable with two blocks of relevant provisions affecting access to data by the taxpayer, namely Article 47 of the EU Charter on the right to fair trial and Article 41(2) of the EU Charter on the right to good administration, supplemented by Article 42 of the EU Charter concerning access to European Parliament, Council and Commission documents.

Article 47 of the EU Charter contains the right to a fair trial in a way that largely corresponds to Article 6(1) of the ECHR. Therefore, the minimum standard of protection applicable under the ECHR applies in a similar way to the EU. However, in EU law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations or criminal charges, as the European Union is a more integrated community based on the rule of law and excluding a whole range of cases from the scope of application of the right to a fair trial would go against this principle.[72]

The right of access to documents is closely linked with the right to a fair hearing, as persons can only be in a position to defend their case when they have access to the documents that are relevant to their specific case. Indeed, this is an obligation that is incumbent on the administrative authorities, including the tax authorities. Taxpayers must have access to relevant documents in the possession of the tax authorities, if necessary via a procedure for the disclosure of documents.[73] If such access to documents is not properly guaranteed, this amounts to a denial of a fair hearing, in violation of Article 6(1) of the ECHR.

In the case of *Chambaz v Switzerland*,[74] the ECtHR concluded that the denial of access to documents held by tax authorities and concerning the taxpayer had deprived him of the right to a fair trial under Article 6 of the ECHR, and in particular the aspect of equality of arms.

In the European Union, the EU Charter of Fundamental Rights provides for the right of access to documents in two instances that may be considered as special in relation to the general provision of the right to a fair trial that is guaranteed under Article 47 of the EU Charter. First of all, the right of access to documents is a constituent element of the right to good administration, guaranteed by Article 41 of the EU Charter. The right to good administration provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. The right to good administration includes, inter alia, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.

Article 42 of the EU Charter covers specifically the right of access to documents and provides that any person has the right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium. Article 42 of the EU Charter confirms the right of *habeas data*, which is a prerequisite for the effective exercise of the right to defence under Article 48 of the EU Charter.[75]

Article 42 of the EU Charter guarantees the right of access to documents of persons with respect to the institutions, bodies, offices and agencies of the Union.[76] Its scope, therefore, is

[72] See also the Explanations to the EU Charter at art 47.

[73] See for example ECtHR, *McGinley and Egan v the United Kingdom*, nos 21825/93 and 23414/94, (9 June 1998), paras 86 and 90; the ECtHR found no violation of the right, as access to documents was guaranteed for the appellants.

[74] ECtHR (dec), *Chambaz v Switzerland*, no 11663/04, (5 April 2012).

[75] See the analysis in P Pistone, 'The EU Charter of Fundamental Rights', at sec 4.3.7.

[76] See for example CJEU, *WebMindLicences*, cited para 83: 'with regard to observance of the rights of the defence and of the principle of good administration, it is to be observed that Articles 41 and 48 of the Charter … are not relevant in the

limited in relation to the scope of Articles 47 and 48 of the EU Charter, which are addressed not only to the European Union bodies but also to the EU Member States, when they are implementing Union law. However, Article 41(1) and (2) of the Charter codify general principles of EU law.[77] In this respect, they also apply to the Member States when implementing Union law.

The CJEU had the opportunity to address issues of access to documents by the taxpayer in the *Glencore* case,[78] concerning a VAT audit. The taxpayer had not been admitted to participate in final proceedings concerning its suppliers and was only given access to selected tax audits, which had been chosen by the tax authority according to its own criteria. In such a context, the CJEU acknowledged the right of access to all relevant audits under Article 47 of the EU Charter, as a crucial element of the right to a fair hearing. Effective defence presupposes knowledge of the information on which the taxpayer is being assessed or on which the right to deduct input VAT is denied. It further specified that the right to access the documents cannot be limited only to the documents on which the tax authority based its decision against the taxpayer. Rather it also encompasses the evidence collected by the tax authority that is potentially beneficial and even proving that the taxpayer acted legally.[79] The general EU law principle of observance of the rights of the defence, in the context of national administrative procedures for inspection and for determining the taxable amount for value added tax purposes, can lead to the annulment of tax impositions. That applies under two conditions: (1) where the taxable person has not been allowed access to the information in the administrative file that was taken into consideration when an administrative decision imposing additional tax liabilities on that taxable person was adopted, and (2) where the court hearing the case finds that, had the irregulatity not occurred, the outcome of the procedure might have been different.[80]

However, the right of access to documents is not an absolute right. It can be limited legitimately, especially in the course of a tax audit, by national legislation protecting tax secrecy and professional secrets.[81] Therefore, partial access to documents is also acceptable where information pertaining to third persons may be included.[82]

Conversely, the arbitrary selection by the tax authority of the documents to which access is granted, without the taxpayer being in a position to examine the validity of the criteria used for such selection, does not seem to be compatible with the right of access to documents.[83]

There are two areas of Union law in which the right of access to documents is now particularly involved: cross-border mutual assistance between tax authorities and cross-border tax dispute resolution procedures. These aspects will be examined in the following sections.

6.1.2.4.1.2. Right of Access to Data in the Framework of Mutual Assistance

The CJEU has addressed the issue of access to documents in a few cases involving the exchange of tax information within the EU, from the perspectives of the EU Mutual Assistance Tax Directive and of the EU Charter.

main proceedings. First, it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union ((judgments in *YS and Others*, C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67, and *Mukarubega*, C-166/13, EU:C:2014:2336, paragraph 44)'.

[77] CJEU, *Ispas*, para 26. See on this point the analysis by P Pistone, 'The EU Charter of Fundamental Rights', sec 4.3.7.

[78] See CJEU, *Glencore Agriculture Hungary*.

[79] See CJEU, *Glencore Agriculture Hungary*, para 54.

[80] CJEU, judgment of 4 June 2020, *SC C.F.*, case C-430/19, ECLI:EU:C:2020:429, [2020], para 50.

[81] See CJEU, *Glencore Agriculture Hungary*, para 55, with further reference to CJEU, *Ispas*, para 36.

[82] See CJEU, *Glencore Agriculture Hungary*, paras 56 and 57.

[83] CJEU, *Glencore Agriculture Hungary*, para 58.

6.1.2.4.1.2.1. Rights in the Requesting Member State In the *Sabou* case,[84] the issue arose whether the EU Mutual Assistance Tax Directive established not only rights for tax authorities to receive information, but also for the affected person to be involved in the framework of mutual assistance within which such information was transmitted.[85] The CJEU rejected the view that the Directive conferred such rights,[86] but added that the observance of the rights of defence is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect an individual. In accordance with that principle, the addressees of decisions that significantly affect their interests must therefore be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when they take decisions that come within the scope of EU law, even though the Union legislation applicable did not expressly provide for such a procedural requirement.[87]

The CJEU concluded that respect for the rights of the defence of the taxpayer does not require that the taxpayer should take part in the formulation of the request for information.[88] Nonetheless, the CJEU pointed out that there is nothing to prevent a Member State from extending the right to be heard to other parts of the investigation stage, by involving the taxpayer in various stages of the gathering of information, in particular the examination of witnesses.[89]

The CJEU thus acknowledges that there are limitations to the fundamental rights, in order to safeguard the effectiveness of the exchange of information. In such circumstances, the limitation might, however, only be of a temporal nature: the taxpayer cannot rely on fundamental rights during the early stages of the collection of information to challenge the lawfulness of the mutual assistance procedure. A request for assistance made by the tax authorities under the directive on mutual assistance is part of the process of collecting information. The same applies to the reply made by the requested tax authorities and the inquiries carried out to that end by those authorities, including the examination of witnesses. Consequently, respect for the rights of the defence of the taxpayer does not require that the taxpayer should take part in the request for information sent by the requesting Member State to the requested Member State. Nor does it require that the taxpayer should be heard at the point when inquiries, which may include the examination of witnesses, are carried out in the requested Member State or before that Member State sends the information to the requesting Member State.[90] In our opinion, such a restrictive approach can apply where the request relates only to checking the taxpayer's

[84] CJEU, *Sabou*; see also the comments in CFE CJEU Task Force, 'Opinion Statement ECJ-TF 2/2014 of the CFE on the Decision of the European Court of Justice in Sabou (Case C-276/12), Concerning Taxpayer Rights in Respect of Exchange of Information upon Request' (2014) 54 no 7 *European Taxation*, Journals IBFD; F Chaouche and W Haslehner, 'Cross-Border Exchange of Tax Information and Fundamental Rights', in W Haslehner, G Kofler and A Rust, *EU Tax Law and Policy in the 21st Century*, (2017) 179 and ff.

[85] In particular, the taxpayer had claimed the right (i) to be informed in advance about the request for mutual assistance in order to be admitted to formulate the questions to the requested authorities and (ii) to be admitted to the examination of witnesses in other Member States, a right he enjoys under Czech law in similar domestic proceedings. CJEU, *Sabou*, para 17.

[86] CJEU, *Sabou*, para 30.

[87] CJEU, *Sabou*, para 38 with further references to CJEU case law.

[88] CJEU, *Sabou*, para 44. Compare the decision in ECtHR, *Othymia Investments BV v the Netherlands*, no 75292/10, (16 June 2015), where, following the CJEU, the ECtHR held the exchange of information that was the subject in the *Othymia* case was in accordance with Directive 77/799/EEC; pursued a legitimate aim (payment of taxes); and it was necessary in a democratic society, as, according to *Sabou*, there is no obligation to inform the taxpayer who is the subject of the exchange of information.

[89] CJEU, *Sabou*, para 45.

[90] CJEU, *Sabou*, paras 41 and ff.

own statements.[91] Otherwise, taxpayers should in principle be notified when subject to a specific information request.

6.1.2.4.1.2.2. Rights in the Requested Member State In the *Berlioz* case[92] the CJEU had the opportunity to address access to data in the framework of the right to judicial review of a penalty for an intermediary's failure to comply with an order to provide information in the context of an exchange between tax authorities performed under the EU Directive on Mutual Assistance. The preliminary question this time directly referred to Article 47 of the EU Charter rather than merely to the Directive itself.

The CJEU held that the person from whom information is requested can exercise their right to challenge the legality of the request under Article 47 of the EU Charter. Therefore, he or she has to have some minimum access to the documents of the file. However, full access is not required in such a context.[93] The national courts should have full access to the request for information, as well as any additional information, and if the national court considers it necessary, it may share this information with the relevant person.[94]

The CJEU acknowledges the right of access to the documents only for the addressee of an information order, and possible penalty, as in the case of *Berlioz*.[95]

Moreover, there is no legal protection of the taxpayer or third persons whose data are subject to an information order in the requested Member State. Only the addressee of an information order gets legal protection in the requested Member State, according to recent case law of the CJEU.[96] The reasoning, apparently, is that the taxpayer may get indirect legal protection later, in the case of a tax assessment and that no protection is necessary in 'preliminary' and not yet contentious stages of the procedure.[97] Third parties' rights to data access and privacy could also be somehow indirectly protected, possibly in the framework of judicial proceedings initiated by the addressee of the information order.[98]

The CJEU also had the opportunity to address the issue of access to documents in the framework of mutual assistance in collection of taxes.[99] When reviewing the legality of the levying of penalties to be collected by mutual assistance, the CJEU observed that in order to ensure respect for the rights laid down in Article 47 of the EU Charter, it is important not only to ensure that the addressee of a document actually receives the relevant document, but also that he is able to know

[91] Opinion of Advocate General Kokott of 6 June 2013, *Sabou*, case C-276/12, ECLI:EU:C:2013:370, [2013], para 83.

[92] CJEU, *Berlioz Investment Fund*.

[93] In the context of VAT and in a purely domestic situation, the CJEU acknowledged a general right of access to documents, except when reasons of public interest require otherwise (CJEU, *Ispas*).

[94] CJEU, *Berlioz Investment Fund*, paras 92 and 100. For comments on the Berlioz judgment see, indicatively, K Pantazatou, 'Luxembourg: Fundamental rights in the era of information exchange – The Berlioz case (C-682/15)', in M Lang et al (eds) *CJEU – Recent Developments in Direct Taxation 2017*, (2018) 127 and ff; CFE CJEU Task Force, 'Opinion Statement ECJ-TF 3/2017 on the Decision of the Court of Justice of the European Union of 16 May 2017 in Berlioz Investment Fund SA (Case C-682/15), Concerning the Right to Judicial Review under Article 47 of the EU Charter of Fundamental Rights in Cases of Cross-Border Mutual Assistance in Tax Matters' (2018) 58 *European Taxation 2/3*, Journals IBFD; B Michel, 'Exchange of Information on Request: Whenever, Wherever? Shakira's (and Berlioz's) Right to Judicial Review of the Foreseeable Relevance Standard' (2019) 73 *Bull Intl Taxn 2*, Journals IBFD.

[95] In *Berlioz*, the limitation was of a quantitative nature: the relevant person cannot have access to the full text of the request of information; yet he must have access to the minimum information referred to in art 20(2) of Directive 2011/16. See further on this in CJEU, *Berlioz Investment Fund*, para 100.

[96] CJEU, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, para 175, for more judicial protection Opinion of Advocate General Kokott of 2 July 2020, ECLI:EU:C:2020:516 [2020].

[97] CJEU, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, paras 79 and ff.

[98] CJEU, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, paras 100 and ff.

[99] CJEU, judgment of 26 April 2018, *Donnellan*, case C-34/17, ECLI:EU:C:2018:282, [2018].

and understand effectively and completely the meaning and scope of the action brought against him abroad, so as to be able to effectively assert his rights in the Member State of transmission.[100] The CJEU concluded that since the decision imposing the fine was not properly notified to the person concerned before the request for recovery was made to that authority pursuant to that Directive, the receiving country authority could deny assistance.

6.1.2.4.1.3. Right of Access to Data in the Framework of MAP and Arbitration under the Dispute Resolution Directive (DRD)[101]

Mutual agreement procedures (MAP) and tax arbitration are traditionally viewed as cross-border procedures that take place exclusively between the concerned competent authorities; the taxpayers are not parties to the procedures. Moreover, they are in principle not given access to the file of the case, as this is considered to be covered by the confidentiality that governs intergovernmental procedures.

A question that arises after the entry into force of the Dispute Resolution Directive (DRD) is whether there is such an obligation to grant access to documents in the course of MAP and arbitration under the DRD. To answer this question one must decide whether the dispute resolution procedure under the DRD is covered by the EU Charter.

The EU Charter offers protection against human rights violations committed by the institutions and bodies of the Union, including the European Parliament, the Commission, the Council, the Court of Justice the Court of Auditors and the European Central Bank (Article 51(1)).[102] The Dispute Resolution Directive, however, provides, for the first time within the EU, a legal basis for the establishment of dispute resolution bodies that are entrusted with the resolution of disputes relating to the application and interpretation of intra-EU double tax treaties.[103] If the taxpayer chooses to submit his case under the DRD, then the DRD provisions are the only applicable and governing procedures of MAP and arbitration. Therefore, the competent authorities' consultations with each other, on a bilateral basis, are no longer a MAP under the applicable DTC, but a MAP under the DRD, and the competent authorities that convene and discuss in order to resolve the dispute do so on the basis of the DRD. Similar considerations apply for the Advisory Commission provided for in Article 6 DRD and the Alternative Dispute Resolution Commission of Article 10 DRD.[104]

The arbitration phase is an integral part of the MAP, which is conducted by and between the competent tax authorities of the Member States. Therefore, strictly speaking, there is not a 'body' involved in the MAP. The MAP is only an agreement between the competent authorities, which, in their turn, are organs of the respective state. The competent authorities may agree to form a 'joint commission', but there is no obligation to do so and, in fact, this is rarely the case. The setting up of an Advisory Commission or an Alternative Dispute Resolution Commission

[100] CJEU, *Donnellan*, para 58, with further references.

[101] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ L 265, 14 October 2017, 1–14.

[102] For a discussion on the concept of institutions and bodies of the Union, see D Curtin and R van Ooik, 'The Sting is Always in the Tail. The Personal Scope of Application of the EU Charter of Fundamental Rights' (2001) 8 *Maastricht J Eur & Comp L* 102, 105 and ff.

[103] Although the Directive deals with procedures only, it is very likely that it will also have an impact on substantive issues of taxation within the EU; compare the comments made by Fortsakis, who has pointed out that the application of human rights guarantees to procedural aspects of taxation may lead to a higher level of harmonisation of substantive tax matters in Europe; see TP Fortsakis, 'The Role of Individual Rights in the Europeanization of Tax Law, in Human Rights and Taxation in Europe and the World', chapter 5, sec 5.2. in G Kofler, M Poiares Maduro and P Pistone (eds), *Human Rights and Taxation in Europe and the World* (IBFD, 2011).

[104] See J Kokott, 'Taxpayers' Rights' 3.

enabled by the authority to give an opinion on the matter referred to it is, however, a different issue.

This Commission, in each case, is clearly a body; it is also separate from the competent authorities that requested its setting up; detailed rules are included in the Directive that govern the establishment and function of either Commission. The question is whether, under these circumstances, such an Advisory Commission or an Alternative Dispute Resolution Commission qualifies as a 'Union body' for the purposes of Articles 41 and 42 of the EU Charter. According to the Explanations that accompany the Charter, the expression 'bodies, offices and agencies' is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation.[105] The Advisory Commission provided for in Article 6 of the Directive and the Alternative Dispute Resolution Commission provided for in Article 10 of the Directive, are each bodies that are established by secondary EU legislation. Arguably, they could qualify as 'Union bodies'. The fact that the body is not a permanent one but an ad hoc one[106] is not decisive in this case; nor is it decisive that the Advisory Commission is set up each time by a special agreement of the competent authorities. What is decisive is the fact that the legal basis providing for the establishment of the Advisory Commission and for the establishment of the Alternative Dispute Resolution Commission is found in the Directive itself.

It appears, therefore, that it could be argued that the Advisory Commission provided for in Article 6 of the DRD and the Alternative Dispute Resolution Commission provided for in Article 10 of the Directive could be considered as 'Union bodies', as each of them is established by EU (secondary) legislation and is entrusted with (part of) the dispute resolution power that the DRD brings into the realm of Union law. In addition, it must be pointed out that it appears that the aim of the EC which proposed the DRD, and of the Member States that adopted it, has been to bring the dispute resolution mechanism for double taxation cases under the protection of the EU Charter, and particularly under the umbrella of the right to a fair trial. According to Recital number 9 of the DRD,

> This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to a fair trial and the freedom to conduct a business.

However, the absolute secrecy of MAPs is not only of questionable legitimacy vis-à-vis the taxpayers whose monetary interests are at stake in the particular case. MAPs are likely to give rise to statements and documents by states that would clarify many of the contentious points that scholars of international tax law and public international law require for reliable results in their research; for example, customary international law necessitates an appraisal of a 'subjective element', ie data that explains the subjective reasons of states to engage in certain behaviour. Currently, there is only little and one-dimensional data for researchers to assess in order to determine the 'international relations of international taxation'; a lot must be read between the lines or simply guessed.

Of course, MAPs also entail information that should not be shared with the broader public for research purposes. Trade secrets and sensitive personal information are just two examples of data that should be protected from public scrutiny. This, however, does not suggest that MAPs should remain as non-transparent as they currently are: investor-state dispute settlement used to be as secretive as MAPs, with little data in the public domain. Over recent decades, efforts to make at least the most essential information about investor–state arbitration cases public has led to a steep increase in research on investment law and ultimately to a much clearer picture of

[105] See in particular arts 15 and 16 TFEU.

[106] The argument becomes stronger when one considers the option of setting up a standing Alternative Dispute Resolution Commission, as provided for in art 10(1) of the Directive.

the subject matter; international investment law is now one of the most advanced and successful branches of public international law. Hence, a successful blueprint for the public disclosure of certain key documents of MAPs exists and might offer useful inspiration for the domain of international tax law. This would likely serve an important purpose, namely informed academic and public discourse and possibly more legal certainty and fruitful progress in the field of international taxation.

From this perspective it could be argued that one cannot entirely exclude the possibility that the taxpayer has to be granted access to documents that are relevant to a case of his that is the subject of a MAP under the DRD.

Incidentally, such is the approach of the Belgian State Council (*Raad van State*). It decided in June 2020[107] that the grounds and motives of the refusal to grant a taxpayer access to MAP documents were incompatible with the right of access laid down in the Belgian Constitution,[108] in the Law concerning the access to administrative documents[109] and in Article 26 of the Belgium–United Kingdom Income Tax Treaty (1987).

Article 32 of the Belgian constitution provides that everyone has the right to consult and receive a copy of each administrative document, except in the cases and under the conditions determined by the law, decree or rule. Under the Belgian Income Tax Code (ITC), information requests from foreign authorities and the answer provided do not have to be made public pending investigations, unless the foreign authority grants consent.[110] However, the constitutional right to access to files has to be interpreted broadly and the provision of the Belgian Income Tax Act according to which information requests from foreign authorities and answers do not have to be made public is an exception. A general denial of access to administrative documents because it is a general policy between tax authorities is not allowed, and only a denial based on well-grounded arguments and the concrete facts of a case is possible. The Belgian fiscal authority had not shown that it had carefully weighed the interest of the federal international relations of Belgium and the general interest that is served by disclosure and that access to the letters exchanged and the administrative MAP dossier would harm international relations with the United Kingdom. Consequently, the Belgian State Council decided in favour of the taxpayer and nullified the decision to deny access.

6.1.2.4.2. United Kingdom

In a recent case from the UK, *McCabe v HMRC*,[111] the first-tier Tribunal held that there is no obligation on the competent authority to grant access to the taxpayer to the documents that were part of the discussions that took place between HMRC and the Belgian competent authority in the course of the MAP that concerned that same taxpayer. This appears to be the first time in the UK that a taxpayer has sought an order from a tribunal requiring HMRC to disclose documents that were part of a failed attempt to resolve a matter with another country through MAP. The Tribunal concluded that it had power to order disclosure of the documents, but a discretion whether or not to do so. In the end it rejected the taxpayer's request, stating that in the present case the relevance of the documents requested by the taxpayer was low and therefore it was not necessary that the taxpayer had access to them. Moreover, the Court agreed with the competent authorities that the procedure is governed by confidentiality.

[107] Belgian Council of State (9th Court Chamber on Administrative Law), judgment of 2 June 2020, *X v Belgium*, case A.224.757/IX-9262, judgment no 247.694, (2020) 23 part 2 *International Tax Law Reports*.
[108] Art 32 Constitution of Belgium.
[109] Art 6(1)(3) of the Law of 11 April 1994 concerning the access to administrative documents.
[110] Art 337/1 of the Belgian Income Tax Code (ITC).
[111] UK Tax Chamber, *McCabe v Revenue and Customs Commissioners*, UKFTT 317 (TC), 21 ITLR 0783, [2019].

There is however some small leeway; it is observed that the judgment leaves open the possibility that, in appropriate circumstance, access may be granted to documents used in MAP.[112]

6.1.2.4.3. Russia[113]

The Russian authorities provide the following information free of charge: (1) information on the activities of the state authorities, local self-government bodies, posted by such bodies in information and telecommunications networks; (2) information affecting the interested person's rights and obligations established by Russian legislation; and (3) other information as provided by law.[114]

Taxpayers in Russia have the right to receive free information from the tax authorities on current taxes and levies, tax legislation and normative legal acts adopted in accordance with it, the procedure for the calculation and payment of taxes and levies, the rights and obligations of taxpayers and the powers of tax authorities and their officials. The taxpayer also has the right to receive tax declaration forms and to obtain explanations on how to complete them.[115]

Two mechanisms for the interaction of the state with taxpayers can be distinguished, namely public and individual information procedures. The public information procedure involves posting information in various ways that involve communicating a certain amount of information to interested parties. First, information published on the official websites of tax authorities or in mass media contains a list of regulatory legal acts, samples and forms of documentation required from taxpayers, the deadlines for fulfilment of tax obligations, etc. Second, information can be provided through information stands in the building of the Federal Tax Service of Russia or its regional and local tax offices, or on the premises of multifunctional centres. In this case, the information is aimed at clarifying procedural issues, such as the procedure of applying to the tax authority, the procedure for appealing, the grounds for refusal, etc. Third and last, seminars, round tables and other awareness-raising and training events are of great importance for the dissemination of information. Information concerning the organisation of these events, like name, date and venue, conditions of participation etc, is also public. The activities organised by the tax authorities are free of charge.

The most popular kind of information is individual information on taxpayers. It can be requested by lodging oral and/or written requests, and by submitting requests in electronic form with an enhanced qualified electronic signature through a telecommunications channel. This information can concern the status of settlements for taxes, fees, penalties, interest, the fulfilment of obligations to pay taxes, fees, penalties, fines, interest etc.

6.1.2.5. Oceania

6.1.2.5.1. Australia

Taxpayers can make requests under the Freedom of Information Act 1982 to obtain documents that relate to themselves.[116] However, due to the strict taxpayer information confidentiality rules

[112] See P Baker's comment to the McCabe judgment, P Baker, 'McCabe v Revenue and Customs Commissioners' (2019) 21 *International Tax Law Reports* 783 and ff.

[113] We would like to thank Karina Ponomareva and Natalia Vorobyeva for their contribution.

[114] Art 8 of the Russian Law on Information, Information Technologies and Protection of Information (No 149-FZ of 27 July 2006).

[115] Art 21 of the Russian Tax Code.

[116] This right is in fact similar to the one that in several other countries is indicated as *habeas data*.

contained in the tax administration legislation, a person cannot obtain tax information that identifies or could be used to identify another entity.

6.1.2.5.2. New Zealand

Interesting issues concerning access to documents were raised in the context of cross-border mutual assistance in the *Chatfield* case.[117] The case concerned a request for information under Article 25 of the New Zealand-Korea Double Tax Agreement. The Court of Appeal agreed with the taxpayer that the request must be reviewed by the court. Indeed, even though the availability of review may have a significant impact on the timeliness for responses to double tax agreement requests, that can afford no principled basis for treating the competent authority as immune from review.[118]

6.2. Right to Be Heard

6.2.1. General

The right to be heard is the most direct implication of the adversarial principle (*audi alteram partem*) and should extend through administrative and judicial tax procedures.

Tax authorities have the power to adversely affect the legal sphere of taxpayers. Consequently, it is important that such measures can only apply after the affected persons have had the opportunity to put forward the arguments in their defence.[119]

In administrative tax procedures, the right to be heard should not only imply taxpayers' right to present their views before any measure is taken that may adversely affect them,[120] but also the obligation of the tax authorities to take into account such views.

During judicial tax procedures, this right does not necessarily imply the obligation to actually conduct a hearing, but at least the possibility that parties may present their views before the case is decided. Thus, if a party has such a right, but does not exercise it, for instance by not submitting memorials, there will be no violation, unless the party proves that it was impossible to make such a submission.

6.2.2. Different Regions

6.2.2.1. Africa[121]

Article 7 of the ACHPR provides for the right to be heard.[122] It states that this right comprises the right to appeal, the right to be presumed innocent until proven guilty, the right to defence and the right to be tried within a reasonable time by an impartial court or tribunal.

[117] Court of Appeal of New Zealand, *CIR v Chatfield & Co Ltd*, NZCA 73, [2019].
[118] See para 44 of the *Chatfield* judgment.
[119] See further on this P Pistone, 'General Report', sec 1.2.1.1.
[120] *cf* CJEU, judgment of 3 July 2014, *Kamino International Logistics und Datema Hellmann Worldwide Logistics*, joined cases C-129/13 and 130/13, ECLI:EU:C:2014:2041, [2014], para 73.
[121] We would like to thank Attiya Waris and Johann Hattingh for their contribution.
[122] *cf* IA Badawi El-Sheikh, 'Preliminary Remarks on the Right to a Fair Trial Under the African Charter on Human and Peoples' Rights', in D Weissbrodt and R Wolfrum (eds), *The Right to a Fair Trial*, (Springer-Verlag, 1997) 327 and ff.

In addition, nearly all written constitutions of the 55 African countries provide for the right to a fair hearing before an impartial judicial body.[123] The presumption of innocence is also mostly constitutionally enshrined,[124] but the right to be represented is less frequently mentioned.[125] Not surprisingly, individual rights are much better protected in criminal cases. Many constitutions guarantee a hearing, at least explicitly, only in criminal cases. Interestingly, no such rights were found in the Senegalese constitution. 14 African countries have published so-called taxpayer charters, which except for Angola are unilateral positions of the revenue authorities.[126] Most of these charters confirm that revenue authorities will respect the fair trial rights of taxpayers in these countries.

[123] Art 56 of the Constitution of Algeria, 2016 (www.conseil-constitutionnel.dz/pdf/Constitutioneng.pdf); art 29 Constitution of the Republic of Angola, 2010 (extwprlegs1.fao.org/docs/pdf/ang72591ENG.pdf); arts 16 and 17 of the Constitution of Benin; s 10 of the Constitution of Botswana; art 4 of the Constitution of Burkina Faso; arts 38–42 of the Constitution of Burundi; art 33 of Constitution of Cape Verde; art 4 of the Constitution of the Central African Republic; arts 24 and 25 of the Constitution of Chad; art 19 of the Constitution of the Democratic Republic of Congo; art 9 of the Constitution of Congo; arts 54 and 55 of the Constitution of Egypt; art 13j, n, p and r of the Constitution of Equatorial Guinea; art 17 of the Constitution of Eritrea; art 21 of the Constitution of Eswatini; art 20 of the Constitution of Ethiopia; art 23 of the Constitution of Gabon; arts 19 and 24 of the Constitution of Gambia; art 19 of the Constitution of Ghana, only in case of criminal charges; art 9 of the Constitution of Guinea; art 42 of the Constitution of Guinea-Bissau; art 50 of the Constitution of Kenya; art 12 of the Constitution of Lesotho for criminal charges; art 21 of the Constitution of Liberia; art 31 of the Constitution of Libya; art 13 of the Constitution of Madagascar; arts 41–43 of the Constitution of Malawi; art 10 of the Constitution of Mauritius in criminal cases; art 12 of the Constitution of Namibia; art 20 of the Constitution of Niger for criminal matters; art 36 of the Constitution of Nigeria; art 19 of the Constitution of Rwanda in criminal cases; art 40 of the Constitution of Sao Tomé and Principe for criminal cases; art 19 of the Constitution of the Seychelles for persons charged with an offence; art 23 of the Constitution of Sierra Leone for criminal cases; arts 34 and 35 of the Constitution of South Africa; art 19 of the Constitution of South Sudan for accused persons; art 52 of the Constitution of Sudan for incriminated persons, but art 53: right to litigate for all; art 13(6)(a) of the Constitution of Tanzania; art 19 of the Constitution of Togo; art 27 of the Constitution of Tunisia in criminal cases; art 18 of the Constitution of Zambia in criminal cases; arts 69 and 70 of the Constitution of Zimbabwe for accused persons.

[124] Art 58 of the Constitution of Algeria, 2016 (www.conseil-constitutionnel.dz/pdf/Constitutioneng.pdf); art 67(2) Constitution Angola, 2010 (extwprlegs1.fao.org/docs/pdf/ang72591ENG.pdf); art 17 Constitution Benin; s 10(2)(a) Constitution Botswana; art 4(2) Constitution Burkina Faso; art 40 Constitution Burundi; art 33(1) Constitution Cape Verde; art 4(1) Constitution Central African Republic; art 25 Constitution Chad; art 17 Constitution Democratic Republic of Congo; art 9 Constitution Congo; art 22(2) Constitution Ivory Coast; art 10(5) Constitution Djibouti; art 13o Constitution Equatorial Guinea; art 17(7) Constitution Eritrea; art 21(2)(a) Constitution Eswatini; art 20(2) Constitution Ethiopia; art 23(2) Constitution Gabon; art 24(3)(a) Constitution Gambia; art 19(2)(c) Constitution Ghana; art 9 Constitution Guinea; art 42(2) Constitution Guinea-Bissau; art 50(2)(a) Constitution Kenya; art 12(2)(a) Constitution Lesotho; art 31 Constitution Libya; art 13 Constitution Madagascar; art 42(2)(f)(iii) Constitution Malawi; art 9 Constitution Mali; art 13 Constitution Mauritania; art 10 Constitution Mauritius; art 23 Constitution Morocco; art 59(2), 62 Constitution Mozambique; art 12(1)(d) Constitution Namibia; art 20 Constitution Niger; art 36(5) Constitution Nigeria; art 19 Constitution Rwanda; art 40(2) Constitution Sao Tomé and Principe; art 19(2)(a) Constitution Seychelles; art 23(4) Constitution Sierra Leone; art 35(3)(h) Constitution South Africa; art 19(1) Constitution South Sudan; art 52(1) Constitution Sudan; art 13(6)(b) Constitution Tanzania; art 18 Constitution Togo; art 27 Constitution Tunesia; art 18(2)(a) Constitution Zambia; art 70(1)(a) Constitution Zimbabwe.

[125] Art 29(2) Constitution Angola, 2010 (extwprlegs1.fao.org/docs/pdf/ang72591ENG.pdf); s 10(2)(d) Constitution Botswana – at his own expense; art 4(3) Constitution Burkina Faso; art 40 Constitution Burundi: 'free defense'; art 33(2) and (3) Constitution Cape Verde; art 19 Constitution Democratic Republic of Congo; art 10(6) Constitution Djibouti; art 54 Constitution Egypt; art 21(2)(c) Constitution Eswatini: 'entitled to legal representation at the expense of the government in the case of any offence which carries a sentence of death or imprisonment for life'; art 20(5) Constitution Ethopia; art 24(3)(d) Constitution Gambia: 'at his or her own expense'; art 19(2)(f) Constitution Ghana, only in case of criminal charges; art 9 Constitution Guinea; art 42(3) Constitution Guinea-Bissau; art 50(2)(g) Constitution Kenya; art 12(2)(d) Constitution Lesotho for criminal charges; art 21(g), (h) Constitution Liberia in criminal cases; art 42(2)(f)(v) Constitution Malawi; art 9 Constitution Mali in criminal cases; art 10(d) Constitution Mauritius in criminal cases; art 62(2) Constitution Mozambique for 'accused persons'; art 36(6)(c) Constitution Nigeria in criminal cases; art 40(3) Constitution Sao Tomé and Principe for criminal cases; art 19(2)(d) Constitution Seychelles for persons charged with an offence; art 23(5)(c) Constitution Sierra Leone for criminal cases; art 35(2)(b)(c) Constitution South Africa in criminal cases; art 19(7) Constitution South Sudan for accused persons; art 52(6) Constitution Sudan; art 18(2)(d) Constitution Zambia in criminal cases and at his own expense; art 70(d)(e) Constitution Zimbabwe for accused persons.

[126] See sec 5.1.2.1. above.

For example, under Article 34 of the Constitution of South Africa and Article 50(1) of the Constitution of Kenya, everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. But Article 50(2) to (9) of the Constitution of Kenya specifies in detail the different elements of the right to a fair hearing. Article 36 of the Constitution of Nigeria grants persons a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. That Article grants protection with regard to 'civil rights and obligations, including any question or determination by or against any government or authority' and to criminal offences. How far these guarantees are observed in practice[127] and applied to tax proceedings is open to question.

6.2.2.2. Americas

6.2.2.2.1. The Inter-American System for the Protection of Human Rights

Article 8 of the American Convention on Human Rights (ACHR) guarantees the right to a fair trial including the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law. That right explicitly covers the determination of his rights and obligations of a 'fiscal, or any other nature'. Article 8(2) of the ACHR contains additional guarantees for persons accused of criminal offences. These include the presumption of innocence, assistance without charge by a translator or interpreter, prior notification in detail, adequate time and means for the preparation of his defence; the right of the accused to defend himself personally or to be assisted by legal counsel; *nemo tenetur*, the right to appeal, *ne bis in idem*. Those rights also apply to tax cases as far as criminal law is involved, as for example with regard to tax fraud.

The Inter-American Court of Human Rights held, in a tax case, that any domestic law or measure that imposes costs or in any other way obstructs individuals' access to the courts and that is not warranted by what is reasonably needed for the administration of justice must be regarded as contrary to Article 8(1) of the Convention.[128]

6.2.2.2.2. Latin America

6.2.2.2.2.1. Argentina[129]

The right to defence in court is provided for in Article 18 of the Argentine Constitution. The Argentine Supreme Court held that the validity of the jurisdictional functions of the administrative bodies is conditional on the decisions of these bodies being subject to 'sufficient judicial control'. It found that the organisation of the *Cámaras Paritarias de Arrendamientos y Aparcerías Rurales* violates the Constitution insofar as it does not admit sufficient judicial control of the resolutions of these administrative tribunals. This requirement, according to the Argentine Supreme Court, is intended to avoid unfettered discretionary powers of the administration.[130]

Applying this doctrine to taxation, the Argentine Supreme Court established that administrative tax bodies are empowered to and may exercise jurisdictional functions whenever it is

[127] *cf* IE Iwara and OO Simeon, 'Rights of Fair Trial and the Human Person in Nigeria's Political System: a Legal-Political Perspective' (2016) 1 *International Journal of Arts Humanities and Social Sciences* 106 and ff.

[128] IACHR, *Cantos v Argentina*, no 50.

[129] We would like to thank Eduardo A. Baistrocchi for his contribution.

[130] Argentine Supreme Court, *Fernández Arias, Elena and others v Poggio, José (Suc)*, judgment: 247:646, [1960].

possible to access a subsequent judicial instance.[131] The constitutional validity of the decisions of administrative bodies is contingent on the possibility of a subsequent judicial review, especially in the case of criminal sanctions.[132] The Supreme Court added that the word 'trial' contained in Article 18 of the Argentine Constitution should be understood as a trial before the ordinary courts. If the appeal to the court did not have a suspensive effect, the decision of the administrative body would be given the force of a final decision of an ordinary court. Such irreversible decisions should be exclusively in the hands of judges. Therefore, administrative bodies could not validly grant appeals to ordinary courts without suspensive effect in the light of Article 18 of the Argentine Constitution. The requirement of suspensive effect includes appeals against criminal sanctions.

In a ruling which contained elements related to due process in light of the American Convention on Human Rights, the Argentine Supreme Court reiterated that the executive branch, and in this case the tax administration, may exercise jurisdictional functions. However, these jurisdictional functions must be subject to sufficient judicial control to preserve the division of powers and the right to defence at trial.[133]

The guarantee of the defence in trials in Argentina provides greater protection than other constitutional guarantees to the taxpayer. Unlike other lines of jurisprudence of the Argentine Supreme Court in tax matters, the court's jurisprudence on the right to defence at trial has been favourable to the taxpayer in tax litigation.

6.2.2.2.2.2. Brazil[134]

Article 5 (LV) of the Brazilian Constitution protects the right to defence for both plaintiffs and defendants. Both shall be able to understand the mutual accusations (in relation to the plaintiff, he/she shall comprehend the defendant's arguments of defence and counterclaim, if applicable) and bring all arguments and evidence (if legal) to demonstrate their rights.[135] This last prerogative does not mean that a procedural rule cannot limit this right, eg the assignment of a specific time for (new) arguments and documents to be presented. Besides that, the kind of action chosen by the plaintiff can also limit this right.[136]

The Supreme Federal Court[137] has decided that different defendants involved in the enforcement action, independently of the legal base of their tax liability, shall have an equal right to defence. This is especially important when there is a modification of the enforcement action to include individuals or entities as being responsible for the debt payment. The new debtor generally should have the same right to defence as the original one, irrespective of the ongoing judicial phase.

The right to be heard applies to both judicial and administrative procedures. In its more recent interpretation, the Brazilian Federal Supreme Court has acknowledged that this right also applies to procedures to regularise tax arrears with payments in instalments (also known as REFIS), indicating that the relevant taxpayers have to be given the opportunity to present their administrative defence before the tax authorities adopt their final decision.[138]

[131] Argentine Supreme Court, *Lapiduz, Enrique c/ DGI s/ acción de amparo*.

[132] Argentine Supreme Court, *Dumit, Carlos E v Instituto Nac. de Vitivinicultura*, judgment: 284:150, [1972].

[133] Argentine Supreme Court, *Administración Federal de Ingresos Públicos c/ Intercorp SRL s/ ejecución fiscal*, judgment:333:935, [2010].

[134] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[135] Supreme Federal Court of Brazil, binding summary of precedent no 14; *habeas corpus* of 25 August 2009, no 84580/SP [2009].

[136] Eg in the writ of mandamus, there is no evidence production, meaning that it should be elaborated before filling the motion.

[137] Supreme Federal Court of Brazil, interlocutory appeal in the extraordinary appeal of 4 October 2011, no 608426/PR [2011].

[138] Supreme Federal Court of Brazil, extraordinary appeal of 26 October 2020, no 669196/DF [2020].

6.2.2.2.2.3. Chile[139]

In Chile, the right to be heard is not explicitly regulated. However, it is conceived as an integral and fundamental part of the constitutional right to a fair trial according to Article 19 N°3 of the Chilean Constitution, which states that any 'sentence of an organ which exercises jurisdiction must be based on prior legally held process. The legislator must always establish the guarantees of a rational and just procedure and investigation'.

In addition, according to Article 5, sub-section 2 of its Constitution, Chile is bound to acknowledge and respect the ratified international treaties which are in force. This includes the American Convention on Human Rights which, in its Article 8, binds the signatory states to respect the right of every person 'to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, for the determination of his rights and obligations of a civil, labor, fiscal or any other nature'.[140] Accordingly, Chile has adopted several legal and administrative rules to establish hearings with the taxpayer or to present his/her requests.[141]

Regarding the tax administrative hearing processes, taxpayers have several opportunities to give background and their explanations to justify their operations or to ask for meetings or hearings in the different stages of the investigation. There are several administrative procedures where taxpayers may ask for the reconsideration of their case before the Chilean tax administration. Therefore, generally speaking, there are numerous opportunities where taxpayers have the right to justify their actions, to present a defence and to resort to superior instances to enforce their right to be heard.

6.2.2.2.2.4. Peru[142]

The right to be heard is not expressly established in Peruvian tax legislation. The Peruvian tax court has, however, repeatedly held[143] that this right is recognised in the tax field through the supplementary application of the right to due administrative procedure established by Article IV of the Preliminary Title of the Peruvian General Administrative Procedure Law.

The Peruvian Tax Court has defined the right to be heard as the taxpayers' right to expose the bases of their claims and defend themselves before the issuance of acts that affect their interests, having the possibility to file appeals and to be properly legally represented.[144] In the same way, the Peruvian Constitutional Court has ruled that the right to be heard is applicable to tax procedures based on the application of the right to due constitutional process.[145]

6.2.2.2.3. The Caribbean[146]

The right to be heard is not necessarily spelt out with that specific formula in the Caribbean but may be perceived and understood as being encapsulated within a constitutional right to be brought promptly before an appropriate judicial authority which is enshrined in many Caribbean constitutions. The extent to which this can be seen as pertaining to taxpayers' rights has not been tested as such but can be understood as extending to ensuring that, where assessments are being contested judicially, such hearings should take place promptly.

[139] We would like to thank Yuri Varela for his contribution.

[140] *cf* J Kokott, 'Fair Trial – The Inter-American System for the Protection of Human Rights', in D Weissbrodt and R Wolfrum (eds), *The Right to a Fair Trial*, (Springer, 1997) 133 and ff.

[141] Chilean Tax Code, art 8bis; Chilean IRS, Circular letters nos 26/2008, 13/2010 and 34/2018.

[142] We would like to thank Cecilia Delgado Ratto for her contribution.

[143] Peruvian Tax Court, resolutions nos 4970-2-2003, [2003] and 5372-2-2003, [2003].

[144] Peruvian Tax Court, resolutions nos 4970-2-2003, and 5372-2-2003.

[145] Peruvian Constitutional Court, judgment no 00090-2004-AA/TC, [2004].

[146] We would like to thank Antony Gafoor for his contribution.

6.2.2.2.4. United States[147]

In general, taxpayers have opportunities to be heard both in administrative actions undertaken by the IRS as well as in judicial proceedings challenging IRS action. The right to be heard forms part of the IRS Taxpayer Bill of Rights, meaning that taxpayers have the right to raise objections and provide documentation to the IRS as part of an administrative examination or other formal action; if a taxpayer disagrees with an IRS position (for example, deficiency notice or assessment), they can generally appeal the decision to the IRS Independent Office of Appeals. The US Code also gives taxpayers the right to challenge certain IRS actions by instituting refund suits in federal district court,[148] or to make pre-payment petitions to the US Tax Court for certain deficiency actions.[149]

6.2.2.3. Asia

6.2.2.3.1. China[150]

Both taxpayers and withholding agents have the right to make statements and the right to defence with regard to the decisions made by Chinese tax authorities. The right to statement means taxpayers can state their opinions on the decisions made by Chinese tax authorities. The right to defence means that the taxpayers can apply for administrative review and then litigation through providing facts and reasons supporting their opinions. In both administrative review and judicial ligation, equality of arms between the taxpayers and the disputed tax authorities shall be guaranteed. Chinese tax authorities should not increase the amount of the taxes payable because taxpayers have exercised the right to make a statement and/or the right to defence. The State Administration of Taxation has issued a number of tax circulars to ensure taxpayers can exercise these rights.[151]

6.2.2.3.2. India[152]

Audi alteram partem or the right to be heard is one of the principles of natural justice recognised under Indian law. The right to be heard is protected through the right to equality enshrined in Article 14 of the Indian Constitution.[153]

Taxpayers have the right to be heard. The Indian Income-tax Act 1961 guarantees the assessee the right to be heard at all stages of the appellate procedure. This right applies even before the administrative authority, the Commissioner (Appeals). The taxpayer has the right to appear in person or through an authorised representative.[154] The concerned authority (administrative or judicial) is required to hear both sides before deciding the questions in dispute. *Ex-parte* rulings (caused by the absence of one of the parties) are rare in practice.

In September 2020, the Indian government introduced the so-called Faceless Appeal Scheme 2020[155] enabling faceless filing and hearing of appeals in income tax matters. Under the scheme,

[147] We would like to thank Jeremiah Coder for his contribution.
[148] 28 USC s 1346(a)(1).
[149] 26 USC s 7442.
[150] We would like to thank Na Li for her contribution.
[151] W Jun, 'China's plans to improve and streamline the provision of taxpayer service – Wang Jun, the Minister of Taxation of the People's Republic of China, China Streamlines Taxpayer Service' (2015) 69 *Bulletin for International Taxation*.
[152] We would like to thank Ashrita Prasad Kotha for her contribution.
[153] Supreme Court of India, judgment of 11 July 1985, *Union of India v Tulsiram Patel*, 3 SCC 398, [1985].
[154] S 250, Indian Income-tax Act 1961.
[155] Ministry of Finance (Department of Revenue, Central Board of Direct Taxes), Notification no 76/2020-Income Tax Act, New Delhi, 25 September 2020.

an automated allocation system will facilitate random allocation of cases using artificial intelligence. An automated examination tool will facilitate examination of draft orders using technology. Hence, the use of artificial intelligence will eliminate discretion in the examination and selection of cases. The proceedings in tax appeals will be through an 'e-appeal' facility under the registered account of the appellant in a specifically designated web portal for e-appeals. The requirement to appear personally or through an authorised representative is no longer applicable. However, the parties can place a request for an oral hearing before the appeal unit subject to the approval of the Chief Commissioner.

It is not clear whether and to what extent there is a right to a hearing or whether tax authorities have discretion.[156] The New Delhi High Court has allowed a petition challenging the scheme.[157] That petition has been filed seeking a direction to the respondents to grant an opportunity of hearing to all taxpayers/assessees and to hold that the same is not at the discretion of the Chief Commissioner or the Director General as proposed in the Faceless Appeal Scheme, 2020 notified as of 25 September 2020. The petitioner submitted that the mechanism is discriminatory and is against the settled principles of law and in violation of Article 14 of the Constitution of India. He further submitted that the right to provide or not to provide a hearing in the matter was also against the principle of *audi alteram partem*, ie no person should be judged without a fair hearing in which each party is given an opportunity to respond to the evidence against them.[158]

6.2.2.3.3. Israel[159]

Israel has adopted the common law principle of natural justice which requires that a person affected by a decision should be given an opportunity to be heard and that a decision-maker must be impartial. Several provisions of the tax laws explicitly require taxpayers to be heard before deciding on their tax liability. Taxpayers have the right of administrative appeal against decisions of tax officers. Tax authorities must hear taxpayers before making any decision in their appeals.

6.2.2.3.4. Japan[160]

Article 31 of the Japanese Constitution contains the principle of due process: 'No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.' This principle explicitly applies to criminal procedures only. However, it is generally believed that it is also applicable to administrative procedures.[161] The principle of due process includes the right to a notice of a hearing and the right to be heard. These rights should be guaranteed in administrative procedure.

The Japanese Administrative Complaint Review Act regulates the right to be heard. However, some parts of the tax procedure are exempt from the application of the Administrative Procedure Act because of certain provisions in the Act on General Rules for National Taxes.[162] After filing a tax return, taxpayers have no opportunity to be heard when the tax authorities issue a tax

[156] S.O. 3296(E), no 5 (iv.) of Notification no 76/2020-Income Tax Act reads: 'the National Faceless Appeal Centre shall intimate the admission or rejection of appeal, as the case may be, to the appellant'.

[157] New Dehli High Court, order of 16 October 2020, *Lakshya Budhiraja v Union of India & Anr*, W.P.(C) 8044/20, [2020].

[158] New Dehli High Court, *Lakshya Budhiraja v Union of India & Anr*.

[159] We would like to thank Rifat Azam for his contribution.

[160] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.

[161] N Ashibe, *Constitutional Law* (2019) 254 (in Japanese).

[162] The Act on General Rules for National Taxes is *lex specialis* to the Administrative Complaint Review Act.

assessment. The taxpayer may request reinvestigation by the tax authority and to make an oral statement on the case.[163] The taxpayer may submit evidentiary documents or materials.[164]

The National Tax Tribunal reviews taxpayers' requests through examination of submissions from the taxpayers and tax authorities and conducts interviews with both parties.[165] The investigation is conducted ex officio.

6.2.2.4. Europe

6.2.2.4.1. European Union

Under Article 47(2) of the EU Charter everyone is entitled to a fair and public hearing. Under Article 52(3) of the EU Charter, '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention'.

6.2.2.4.1.1. The Domestic Scenario

The right to be heard under Article 8 of the ECHR only applies to 'civil rights and obligation' or 'criminal charges'. Therefore, taxation is only covered insofar as it falls within the scope of 'criminal sanctions'. But, in order to protect taxpayers effectively, the ECtHR interprets the criminal limb of Article 6 of the ECHR broadly.[166] Nevertheless, the requirements inherent in the concept of 'fair hearing' are not necessarily identical in cases concerning the determination of tax fines as they are in cases concerning the determination of a criminal charge in the narrower sense.[167]

However, it is clear that the principles of the ECtHR developed for the civil limb of Article 6 of the ECHR should apply as a minimum standard to taxation. This is so because taxpayers, as opposed to the parties in civil litigation, are in a subordinate position to the authorities. Certainly, the requirement of 'equality of arms', in the sense of a fair balance between the parties, applies in principle to such cases as well as to criminal cases. As regards litigation involving opposing interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.[168] Another element of a fair hearing within the meaning of Article 6(1) of the ECHR is the right to adversarial proceedings; each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.[169]

The CJEU confirms in settled case law that the right to fair trial includes the application of the *audi alteram partem* principle,[170] thus obliging tax authorities throughout the entire tax

[163] S 84(1) of the Act on General Rules for National Taxes.
[164] S 84(6) of the Act on General Rules for National Taxes.
[165] S 95.2 to 97(1) of the Act on General Rules for National Taxes.
[166] *cf* sec 7.3.4.1. of this book.
[167] This may be due to the circumstance that the presumption of innocence, the privilege against self-incrimination and the obligation for tax authorities to prove the subjective element are applicable to criminal sanctions, but not necessarily to tax penalties.
[168] ECtHR, *Khodorkodvskiy and Lebedev v Russia*, nos 5111/07 and 42757/07, (14 January 2020), para 477.
[169] *cf* ECtHR (dec), *Adorisio and Others v the Netherlands*, nos 47315/13, 48490/13 and 49016/13, (17 March 2015), paras 86 and ff.
[170] See CJEU, judgment of 18 December 2008, *Sopropé*, case C-349/07, ECLI:EU:C:2008:746, [2008], paras 36 and ff.

procedure to allow taxpayers to express their views before adopting any measure that may affect their personal sphere.[171] Therefore, in principle, in every case in which national tax authorities intend to take an administrative decision, such as an (additional) tax assessment which is not to the benefit of the taxpayer (and which is within the scope of application of EU law), the taxpayer must be given an opportunity to make known his view[172] and to access the documents underlying that intended decision before it is taken,[173] unless there is a justification for immediate imposition and enforcement, or if a prior hearing could not have produced a different outcome.[174] How much time taxpayers need to be granted to prepare their defence depends on the specific circumstances of each individual case.[175]

Also, according to settled case law of the CJEU, the general principle of EU law of respect for the rights of the defence is not an unfettered prerogative, but may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question and do not constitute, in light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed. In that regard, in a procedure of tax inspection and establishment of the basis for VAT assessment, such restrictions enshrined in national law may, in particular, be designed to protect requirements of confidentiality or professional secrecy, which are liable to be infringed by access to certain information and certain documents.[176]

It is not disputed that the effective application of tax legislation is a general aim that serves the public interest and has to be safeguarded. In addition, it is also common ground that a balance must be struck between the right to be heard and the administrative burden on the tax authority that is caused by the application of this principle and the possible delays that it may cause to the progress of the tax audits or tax assessment.

The ECtHR has specified that restrictions on an individual's procedural rights (including access to certain information) may be justified in very exceptional circumstances, such as the need to intervene as a matter of urgency in order to prevent serious harm to the national economy.[177]

However, the right to be heard cannot be limited to a point where it becomes non-existent. For example, in the *Glencore* case, the CJEU held that the fact that decisions establishing VAT fraud against certain suppliers of the taxpayer could indeed be used as evidence in assessing the taxpayer as liable to pay additional VAT. The same set of facts should have the same results when applied to different persons. On the other hand, the fact that such decisions finding tax fraud on the side of a taxpayer's suppliers have become final does not mean that the taxpayer is barred from having access to them in order to effectively challenge the findings of those decisions in proceedings that concern the taxpayer himself.[178]

[171] This general principle of EU law protects a free and effective exercise of the right to defence under art 47 of the EU Charter, but also has implications under art 48 of the EU Charter in respect of penalties, and art 41 of the EU Charter for acts issued by the EU institutions.

[172] ECtHR, *Jussila v Finland*, specifically on the right to a hearing.

[173] CJEU, *Glencore Agriculture Hungary*, paras 51 and ff; CJEU, *Ispas*, para 26; CJEU, *Sopropé*, case C-349/07, ECLI:EU:C:2008:746, [2008], paras 36 and ff; and, outside tax matters, ECtHR, *Foucher v France*, no 22209/93, (18 March 1997); ECtHR, *Rowe and Davis v United Kingdom*, no 28901/95, (16 February 2000).

[174] CJEU, *Glencore Agriculture Hungary*, paras 51 and ff; ECtHR, *Jussila v Finland,* no 73053/01, (23 November 2006), paras 41 and ff; see also the analysis by P Pistone, 'The EU Charter of Fundamental Rights', sec 4.3.5. Moreover, in a non-tax case, the ECtHR stated that the right to a hearing is not absolute, and infringement can be justified in exceptional cases (ECtHR, *Grande Stevens and Others v Italy*, no 28901/10, (4 March 2014), paras 121 and ff).

[175] CJEU, *Sopropé*, paras 51 and ff; *cf* ECtHR, *Adorisio and Others v the Netherlands*, paras 102 and ff.

[176] CJEU, *Ispas*, paras 35 and ff; CJEU, *Glencore Agriculture Hungary*, para 55.

[177] ECtHR, *Adorisio and Others v the Netherlands*, para 92 and ff.

[178] CJEU, *Glencore Agriculture Hungary*, para 50.

6.2.2.4.1.2. Cross-Border Situations

Combatting BEPS under the guidance of the OECD, many states have abolished the right to a hearing before exporting taxpayers' data to other jurisdictions. The CJEU has confirmed the right to judicial protection of the addressees of information orders,[179] but not of taxpayers or third parties whose data are exchanged with other jurisdictions.[180] Also, EU law does not require the taxpayer to be informed of a request for information addressed to another state.[181]

6.2.2.4.2. Russia[182]

According to Article 101, paragraph 2 of the Russian Tax Code the director (or deputy director) of a tax authority shall give notice of the time and place of the examination of the tax audit materials to the person in relation to whom the audit is performed. That person shall have the right to participate in the process of examining the materials relating to that audit in person and/or through their representative. Before a decision is issued, he or she shall have the right to inspect all materials in the file, including materials relating to additional tax control measures.

Article 21 of the Russian Tax Code lists the basic rights of taxpayers during tax audits, which promote equality of arms with tax authorities in the framework of tax procedures. It includes the right to be represented in person or by representatives in procedures regulated by the tax legislation, to provide explanations to tax authorities and their officials on the calculation and payment of taxes, as well as on the acts of conducted tax audits, to be present during an on-site tax audit, to receive copies of the tax audit report and decisions of tax authorities, as well as tax notifications and requirements for payment of taxes, to require officials of tax authorities and other authorised bodies to comply with the tax legislation when they perform actions against taxpayers, not to comply with acts and requirements of tax authorities, other authorised bodies and their officials that violate the Tax Code or other federal laws, to appeal against acts of tax authorities, other authorised bodies and actions (or inactions) of their officials in accordance with the established procedure, to comply with tax secrecy, to claim full compensation of losses caused by illegal acts of tax authorities or illegal actions (or inactions) of their officials and to participate in the process of examination of tax audit materials or other acts of tax authorities in cases stipulated by the Russian Tax Code.

Furthermore, during the tax audit procedures, taxpayers have the rights (1) to receive free information from tax authorities at the place of registration (including in writing) about current taxes and fees, legislation on taxes and fees and regulatory legal acts adopted in accordance with it, the procedure on calculation and payment of taxes and fees, the rights and obligations of taxpayers, the powers of tax authorities and their officials, as well as (2) to receive forms of tax returns (calculations) and explanations about the procedure for filling them in, (3) to obtain from the Ministry of Finance of the Russian Federation written explanations on issues of application of the tax legislation of the Russian Federation, (4) to use tax benefits if there are grounds for it, and in accordance with the procedure established by the tax legislation, (5) to receive a deferral, instalment plan or investment tax credit in accordance with the procedure and conditions established by the Tax Code, (6) to get refund of amounts of excessively paid or excessively collected taxes, penalties, fines, and (7) to perform a joint reconciliation of calculations of taxes, fees, penalties and fines with the tax

[179] CJEU, *Berlioz Investment Fund*, and CJEU, *État Du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*.

[180] CJEU, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, paras 80 and ff; for more judicial protection Opinion of Advocate General Kokott of 2 July 2020.

[181] CJEU, *Sabou*, paras 41 and ff.

[182] We would like to thank Karina Ponomareva for her contribution.

authorities, as well as to (8) obtain an act of joint reconciliation of calculations of taxes, fees, penalties and fines.

6.2.2.5. Oceania[183]

In Australian law, the common law principle of natural justice requires that a person affected by a decision should be given an opportunity to be heard and that a decision-maker must be impartial (the bias rule). The hearing rule requires that the person affected be given a reasonable opportunity to present his position or case in court or administrative tribunal proceedings. The right to a hearing necessarily implies that the submissions are considered at least to some extent. However, the requirements of procedural fairness only apply to some and not all administrative decisions. The High Court of Australia confirms[184] that, where a statute grants a power to an administrative decision-maker that may destroy, defeat or prejudice a person's rights or interests, the rules of procedural fairness apply to the exercise of that power unless they are excluded by the plain words or necessary implication of the statute. In the tax administration legislation, taxpayers are granted the right to object against the correctness of the tax assessment (and certain other) decisions and then appeal to an administrative tribunal or court. On the other hand, the Australian High Court has held that judicial review of the process of making a tax assessment is limited to claims of bad faith and conscious maladministration.[185] This suggests that other claims of shortfalls in procedural fairness are precluded, and the lower courts have taken this approach in practice.[186] However, this may not be viewed as particularly disadvantageous to taxpayers given that a successful appeal on the merits would usually provide a better remedy (a reduction in the amount assessed) than judicial review (where, even if the taxpayer is successful and the assessment is deemed invalid, the revenue will ordinarily be able to re-exercise the assessment power and make a new assessment).

6.3. Right to Judicial Protection

6.3.1. General Issues

The right to judicial protection includes various specific expressions of the right to a fair trial, including equality of arms, motivation of judgments, the right to be heard[187] and further implications of the general right to defence, plus, in criminal cases, the privilege against self-incrimination, the presumption of innocence, the prohibition on double jeopardy.

The various expressions of the right to judicial protection require separate analysis in the framework of this section. We will first address them in a purely domestic scenario and then in cross-border situations.

[183] We would like to thank Celeste Black for her contribution.

[184] High Court of Australia, *Annetts v McCann*, 170 CLR 596, [1990].

[185] High Court of Australia, *Federal Commissioner of Taxation v Futuris Corp Ltd*.

[186] By way of example, the Federal Court of Australia has concluded that a claim that an assessment was invalid on the basis that it was made beyond power could not be sustained where the information on which the assessment was based was illegally obtained or subject to legal professional privilege: Full Federal Court of Australia, *Advanced Holdings Pty Ltd v Federal Commissioner of Taxation*, FCAFC 157, [2020]; Federal Court of Australia, *Federal Commissioner of Taxation v Donoghue*, FCR 316, [2015]; Federal Court of Australia, *Denlay v Federal Commissioner of Taxation*.

[187] This right is separately addressed in sec 6.2, since, in our view, it should apply to both administrative and judicial tax procedures.

6.3.1.1. The Domestic Scenario

6.3.1.1.1. Access to Judicial Protection

Access to judicial protection in tax matters implies the right to present a case before an independent tribunal established by law. The legal system in its entirety shall not contain procedural obstacles that may prevent taxpayers from presenting their cases to a court. The latter body must have the power to check whether the action of tax authorities complies with the rule of law. Access to justice should be granted within a reasonable time frame and limits must not impair the essence of this right.

Various tax measures can dissuade access to justice, including the time required to appeal a case before the judiciary[188] and forms of tax collection while the taxpayer challenges the validity of tax audits before a court.[189] However, it seems common practice to exclude the automatic suspensive effect of legal remedies in the tax area.[190] Article 45(1) of the EU Customs Code also provides that '[t]he submission of an appeal shall not cause implementation of the disputed decision to be suspended.' However, there has to be possibility of suspension where there is good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.[191]

6.3.1.1.2. Privilege against Self-Incrimination

The privilege against self-incrimination applies to tax matters insofar as criminal offences are the object of a controversy. Whether and from what point this is the case is not always easy to determine in practice.

In general terms, taxpayers are obliged to render loyal cooperation to tax authorities. For most taxes, taxpayers are required to fill in their returns, which may contain elements that trigger the liability to criminal sanctions. Under no circumstances should they be allowed to invoke the privilege against self-incrimination in order to avoid submitting tax returns and the books that the law requires them to keep. However, it can be difficult in practice to determine during tax audits when the implications of a violation are criminally relevant. This applies particularly to cross-border situations.[192]

6.3.1.1.3. Presumption of Innocence

The presumption of innocence applies where a person is charged with a criminal offence. It protects the right of any person to be presumed innocent until proved guilty according to law. Beyond being a procedural safeguard in the context of the criminal trial itself, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have

[188] Specific issues arise in tax matters when the access to the judiciary is subordinated to the prior completion of administrative review, as occurs in a large number of tax systems. Some particularly critical cases are reported from the European region, on which see further in sec 6.3.2.4.

[189] This occurs for instance in the case of the so-called *solve et repete*, according to which taxpayers are first obliged to pay the tax requested by tax authorities and are then entitled to get it back to the extent that its validity has been rejected by a tribunal.

[190] *cf* eg para 362 of the German Tax Code; art 39 of the Italian Decree 29 September 1973, no 602; art 66(2) of the Portuguese General Tax Code (Law Decree 398/98 of 17 December 1998). In Spain, art 233 of the General Tax Code (Law 58/2003 of 17 December 2003) indicates that the suspension is automatic only when the person gives a guarantee.

[191] CJEU, *Kamino International Logistics und Datema Hellmann Worldwide Logistics*, para 83.

[192] *cf* below, sec 6.3.1.2. of this book.

been discontinued, from being treated by public officials and authorities as though they were in fact guilty of the offence charged. Without such protection to ensure respect for the acquittal or the discontinuance decision in any other proceedings, the fair-trial guarantees could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.[193]

Taxpayers can be substantially affected by the inquiry conducted by the investigative authorities into their alleged tax evasion, during which they were repeatedly questioned as de facto suspects. Such taxpayers can be regarded as having been charged with a criminal offence and are thus covered by the presumption of innocence.[194]

Also, civil courts cannot base their decision granting claims against taxpayers upon their opinion that a criminal tax evasion had been committed and that the applicant was guilty of that offence, even though they had never been convicted and had never had the opportunity to exercise their rights of defence in a criminal trial. Such statement of a civil court is inconsistent, if applicable, with the discontinuation of the criminal proceedings and amounts to an impermissible pronouncement that the applicant had committed a criminal offence.[195]

6.3.1.1.4. Independent Tribunal

The independence of the judiciary is the key point for singling out the function of this part of tax procedures and differentiating them from administrative tax procedures, which are mainly a review by tax authorities of their own activity, usually conducted under the adversarial principle with the taxpayers.

The non-independent nature of tribunals can therefore undermine the core value of justice[196] and impartiality of the judiciary. This may occur when courts are not established by law, the members are either appointed by the government[197] or for short periods of time.[198] Various criteria have been developed in the different regions to single out the features that the bodies administering justice must present.[199]

6.3.1.1.5. Fair Trial

Fair trial includes the rights to be heard, equality of arms, a reasoned judgment; in criminal cases also the privilege against self-incrimination and the prohibition on double jeopardy apply.

The application of the right to be heard to judicial tax procedures does not present significant differences from the ones that characterise it in other tax and non-tax procedures.[200] The right to a public hearing in itself encompasses two elements, namely (1) the principle of publicity, which implies the holding of public hearings and the public delivery of judgments, and (2) the right to an oral hearing and presence at trial.

[193] ECtHR, *Agapov v Russia*, no 52464/15, (6 October 2020), para 31.
[194] ECtHR, *Agapov v Russia*, para 32.
[195] ECtHR, *Agapov v Russia*, para 44.
[196] Similar problems may arise in the presence of part-time judges, who may have conflicts of interest. Several countries apply specific rules in order to minimise the negative implications that may otherwise arise.
[197] This occurs in various countries, including Brazil and Trinidad and Tobago.
[198] For instance, this occurs in some Caribbean countries, including Trinidad and Tobago, for judges, other than the Chair, appointed for only three years with no guarantee of being re-appointed.
[199] Judicial interpretation in the European region has singled out four criteria in this respect (independence, impartiality, existence of a tribunal, established by law) to emphasise the judicial nature of bodies in charge of this function. See further on this under secs 6.3.2.4.1.1. and 6.3.1.1.1.
[200] See further on this in this report under secs 6.3.2.4.1.1. and 6.3.1.1.1.

Equality of arms is the procedural expression of the more general principle of equality. It presents two specific dimensions of the right to a fair trial and the right to an effective legal remedy, which partly overlap and reflect the inherent nature of this principle to the right to a fair trial.

Proper administration of justice requires, inter alia, that judgments of courts and tribunals should adequately state the reasons on which they are based.[201] This prevents judgments from being arbitrary. The obligation to explain the reasons for judgments is reflected in tax procedures by the obligation to explain the motivation for all acts by tax authorities and also implies the rights of the parties to tax procedures in which they receive a specific and explicit reply to the arguments which are decisive for the outcome of the proceedings.[202]

The prohibition on double jeopardy (*ne bis in idem*) protects the affected persons from having to defend themselves twice. The procedural limb of this right, also known as *ne bis vexari*, may raise critical issues in tax matters, especially when a separate criminal procedure is added to the one concerning the correct payment of taxes and which is also criminal in nature.[203]

6.3.1.2. Cross-Border Situations

Cross-border exchange of information has intensified over the past few years in the context of global tax transparency. Therefore, the number of instruments providing for the exchange of information between tax authorities (automatic, spontaneous and upon request exchanges) has increased dramatically.[204] As a result, the world has witnessed an enormous increase in the volume and detail of tax information that is collected and subsequently shared among tax authorities on a global level. We agree that, in order to effectively implement tax legislation and to tackle tax avoidance and tax evasion, it is important that tax authorities have timely access to accurate and relevant information concerning taxpayers.[205] However, no proper system of checks and balances secures an effective global protection of taxpayers' rights at a time in which tax authorities have significantly sharpened their global cooperation to combat undesirable phenomena, such as international tax avoidance. Therefore, a corresponding global standard should be established for taxpayers' fundamental rights, including effective judicial protection.

[201] ECtHR, *Moreira Ferreira v Portugal*, no 19867/12, (11 July 2017), paras 84–85; ECtHR, *Khodorkodvskiy and Lebedev v Russia*, para 518.

[202] ECtHR, *Moreira Ferreira v Portugal*, para 84; *cf* also ECtHR, *Adorisio and Others v the Netherlands*, paras 86 and ff.

[203] *cf* eg CJEU, judgment of 26 February 2013, *Åkerberg Fransson,* case C-617/10, ECLI:EU:C:2013:105, [2013], paras 34 and ff, stating this principle in respect of *ne bis puniri*. In ECtHR, *Zolotukhin v Russia*, no 14939/03, (10 February 2009), the ECtHR had concluded that the right to fair trial prohibits both *bis puniri* and *bis vexari*. In the later judgment *A and B v Norway* (Grand Chamber), nos 24130/11 and 25798/11, it excluded that problems of *bis puniri* could occur in tax matters in respect of the levying of administrative penalties and criminal sanctions, considering them two different measures with a different rationale (see further on this below, sec 7.3.4. of this book). This line of case law was also followed by the CJEU (*see* CJEU, judgment (Grand Chamber) of 20 March 2018, *Menci*, case C-524/15, ECLI:EU:C:2018:197 [2018]). However, the *Zolotukhin* judgment still maintains its authority in tax matters in respect of the procedural limb of *ne bis in idem*, since a person may not reasonably be asked to plead twice for his innocence in respect of one behaviour that infringes the law. Even if such conduct gives rise to several violations.

[204] For a historical overview of the development of the bilateral and multilateral rules on exchange of information, see analysis in Wöhrer, *Data Protection and Taxpayers' Rights*, ch 3. Instruments developed in order to facilitate exchange of information between tax authorities include the OECD Common Reporting Standard Multilateral Competent Authority Agreement, the OECD Model Agreement on Exchange of Information on Tax Matters; the Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters (of 25 January 1988, as amended in 2010); the US Foreign Account Tax Compliance Act (FATCA); the EU Council Directive 2011/16/EU of 15 February 2011 in administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (DAC) (as amended in 2020).

[205] See eg S Hemels, 'Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims', in P Wattel, O Marres and H Vermeulen (2018) 1 *European Tax Law* 541; see also M Stewart, 'Transnational Tax Information Exchange Network: Steps towards a Globalized, Legitimate Tax Administration' (2012) 4 *World Tax Journal* 152, 154.

In this context, several issues require more attention, including the processing of taxpayers' data, the disclosure rules and the taxpayers' position in the resolution of cross-border tax disputes.

The concerns of the taxpayers about the use of their tax information have increased along with increased data exchange. A number of challenges have arisen concerning various aspects of the access to and use of tax information by the tax authorities.[206] Effective judicial protection in respect of possible violations arising in such a context is of paramount importance. Critical issues may also arise in connection with the application of the so-called mandatory disclosure rules.[207] Even though the final report of BEPS Action 12 indicates that the information disclosed in such a context is no different from that normally requested in a tax audit,[208] the obligation for the taxpayer to disclose it may conflict with the privilege against self-incrimination.[209] In addition, the proposed solutions[210] for cases that may indeed conflict with the principle against self-incrimination is the surrender of the mandatory obligation rules in favour of the protection of taxpayers' rights. This is the correct approach. However, it dramatically diminishes the desired effect of the mandatory disclosure rules.[211]

Another area in which we expect cross-border cooperation between tax authorities to grow significantly is dispute resolution. It is expected that cross-border disputes will grow exponentially as a result of the implementation of the results of the BEPS Project. One of the BEPS Actions focused on making cross-border dispute resolution mechanisms more effective. Mutual agreement procedures and arbitration are becoming the most effective dispute resolution mechanism for cross-border tax disputes. However, the BEPS Action itself does not deal with the taxpayers' position. Given the increasing role of such procedures and their effects on taxpayers, it appears that we can no longer be satisfied that mutual agreement procedures and arbitration are merely an intergovernmental procedure in which the taxpayers have no standing and no say.[212] Rather, it is important that they comply with the fair trial guarantees, which in our view operate throughout tax procedures and apply to both the administrative and judicial phases. In that respect,

[206] See eg P Baker, 'Privacy Rights in an Age of Transparency: A European Perspective' (2016) 82 *Tax Notes International* 584.

[207] Such rules require taxpayers and third parties to report some transactions that may potentially constitute tax avoidance. Similar issues arise in the European Union with the mandatory disclosure regime applicable under the so-called DAC 6, which also includes possible violation of data protection by the third parties obliged to mandatory disclosure, on which see further under sec 6.3.2.4.1.3.2. below.

[208] The Report claimed that for many countries the types of transactions targeted for disclosure under Action 12 were not generally the types of transactions that would give rise to criminal liabilities. Furthermore, it indicated that such issues would normally arise only when criminal proceedings had already been initiated, and not in cases where the information was obtained earlier. In case a scheme was reported which had not even been implemented yet, it appeared that no issue would ever arise. See, in particular, Annex B – Compatibility between self-incrimination and mandatory disclosure, in OECD, Mandatory Disclosure Rules, Action 12 – 2015 Final Report, 85, available at www.oecd-ilibrary.org/docserver/9789264241442-en.pdf?expires=1579266965&id=id&accname=guest&checksum=9DD0D3B453E13922DE65025A41E22AC3.

[209] As indicated by N Čičin-Šain, 'New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?' (2019) 11 *World Tax Journal* 98-99 and 101, the final report addresses only a few of the potential issues that may arise under the mandatory disclosure rules.

[210] In particular, the first drafting suggestions are that countries may choose to simply exclude those transactions from the scope of the disclosure regime without substantially curtailing the scope of the regime. The second indicates that countries could also specify that the privilege against self-incrimination was a reasonable excuse for not reporting a disclosable transaction and exclude taxpayers from the obligation to disclose such schemes.

[211] See also N Čičin-Šain, 'New Mandatory Disclosure Rules for Tax Intermediaries' 107, arguing that the 'solutions' proposed in the OECD Final report would strip these rules of their intended efficiency.

[212] *cf* also Belgian Council of State, *X v Belgium*, judgment no 247.694, concerning the access to information under the Belgium-United Kingdom Treaty, with comments by R Offermanns, 'Treaty between Belgium and the United Kingdom', www.ibfd.org.

mutual agreement procedures and arbitration under the EU Dispute Resolution Directive[213] are an important development strengthening taxpayers' rights.[214]

Last but not least, the area of mutual assistance in the collection of taxes may also grow in the near future as a consequence of increased international cooperation.

6.3.2. The Right to Judicial Protection in Different Regions

6.3.2.1. Africa

6.3.2.1.1. General[215]

The African Charter on Human and Peoples' Rights provides for the right to a fair trial, which includes the right to have one's cause heard. This comprises the right to appeal, to be presumed innocent until proven guilty, the right to defence and the right to be tried within a reasonable time by an impartial court or tribunal.[216] This is a broad provision which also applies to tax cases. On access to justice, the Preamble to the African Charter also provides that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'.

Apart from these basic provisions, African countries also have specific provisions on access to courts and justice under their laws. In Kenya, for example, Article 48 of the Constitution 2010 provides for access to justice for all persons. Article 50, which provides for the right to a fair trial, reiterates the provisions of Article 7 of the African Charter and adds more rights to it (for example, the right to be given adequate time and facilities to prepare a defence). These provisions apply to tax matters as well. Further, through the Fair Administrative Action Act, an aggrieved taxpayer can also seek judicial review in respect of the actions or decisions made by authorities in charge of tax administration.[217] The aggrieved taxpayer may apply for review to a court or a tribunal, and this application is to be determined within 90 days of filing the application.[218]

Another example is Botswana. The country's Income Tax Act provides that where a person is aggrieved by a tax assessment, he may object by lodging the objection with the Commissioner General.[219] Where the party is aggrieved by the decision of the Commissioner General, he may appeal to the High Court or to the Board of Adjudicators.[220] The Act also provides for recovery of tax by court action.[221]

We are not aware of court cases in Africa relating to mutual assistance in collection or in respect of exchange of taxpayer information. Apart from industrialised countries such as South Africa, African countries generally act as recipients of requests for taxpayer information from foreign counterparts, but often lack the institutional capacity and IT infrastructure to make significant requests themselves. Work has been done about this lopsided situation, but progress appears to be slow. According to a G20 report from 2019, India made 10 times as many exchange

[213] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ, L 265/1.
[214] *cf* sec 6.3.2.4.1.3.3.
[215] We would like to thank Johann Hattingh and Attiya Waris for their contribution.
[216] African Charter on Human and People's Rights, art 7.
[217] Fair Administrative Action Act No 4 of 2015 (Kenya), Part III.
[218] Fair Administrative Action Act No 4 of 2015 (Kenya) s 8.
[219] Income Tax Act 1995, Cap 52:01 (Botswana).
[220] Income Tax Act 1995, Cap 52:01 (Botswana) ss 88–92.
[221] Income Tax Act 1995, Cap 52:01 (Botswana) s 103.

of information requests as all African economies combined and the United Kingdom made 1,856 exchange of information requests in 2016 alone, whereas the whole of the Africa Tax Administrator Forum's EoI Initiative members[222] made 79 requests in the first three years of this initiative from 2015 to 2017.[223]

African countries experience difficulty obtaining inclusion of mutual assistance in collection clauses in their tax treaties with major FDI partners, particularly China. The background is that the Chinese government and Chinese state-owned enterprises can be significant foreign investors or project financiers, for example in large infrastructure projects. Regrettably, local tax compliance by foreign contractors working on such projects is not always exemplary. Some African countries are experiencing difficulty in enforcing tax claims against such non-residents.

6.3.2.1.2. South Africa

Under South Africa's Constitution, there is a general duty on the state to 'protect, promote and fulfil' fundamental rights. The state has a specific duty to enact secondary legislation to give effect to certain rights concerning procedure, for example with regard to the rights to privacy or just administrative action.[224] A trend has emerged that secondary legislation concretises the actual operation of such constitutionally enshrined rights, whereby exceptions or carve-outs are created for revenue administration. For example, whilst there is a general duty on government authorities to obtain consent when personal information is being collected and/or requested and accessed, or to afford an opportunity to correct information, blanket exceptions are created so that these do not apply with regard to tax administration (there is ongoing debate about the constitutional nature of such blanket carve-outs). Situating such carve-outs in legislation creates problems about the hierarchy of norms in areas such as cross-border exchange of taxpayer information under bilateral and multilateral inter-governmental agreements or treaties.

Judicial implementation of fundamental rights is very burdensome and lengthy in South Africa. This has led to the establishment of a tax ombudsperson.[225]

In South Africa, the most relevant case in the area of cross-border mutual assistance is the decision by the Supreme Court of Appeal in *Krok*.[226] The case shows that a non-resident taxpayer, whose assets in South Africa were subject to an asset preservation order to allow the South African Revenue Authority (SARS) to collect tax on behalf of the Australian Tax Office, had standing before a local court to challenge the action of SARS. The non-resident challenged the interpretation by SARS of the relevant mutual assistance treaty clauses, including their retrospective effect in collecting taxes for which the liability arose in years when the treaty clause was not yet part of the tax treaty. The taxpayer lost the treaty interpretation argument in this case. The Supreme Court referred to the revenue rule. In terms of this international law rule, which forms part of South African law, the courts of one state are precluded, in the absence of a permissive rule to the contrary, from entertaining legal proceedings involving the enforcement of the revenue laws of another state – an attribute of sovereignty. Thus, a foreign state may not have a claim for taxes payable to its fiscus enforced in another state, as this would be tantamount

[222] Cameroon, Burkina Faso, Ghana, Kenya, Liberia, Morocco, Nigeria and Uganda.

[223] www.g20-insights.org/policy_briefs/tax-transparency-and-exchange-of-information-eoi-priorities-for-africa/.

[224] S 33 of the Constitution of South Africa (1996) provides that '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair; Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons'.

[225] See below, sec 6.4.1.2.1.2.

[226] Supreme Court of Appeal of South Africa, *Krok and another v Commissioner for the South African Revenue Services*, cases 20230/2014 and 20232/2014, ZASCA 107, 18 ITLR 42, [2015].

to derogation of the other state's territorial supremacy.[227] In *Krok*, the taxpayer argued that the revenue rule entitles taxpayers 'to arrange their affairs on its assurance that their assets were protected against foreign tax authorities'. The Supreme Court therefore had to evaluate the basis of the revenue rule to understand whether the rationale of the rule had something to do with protection of taxpayers. The answer was that it did not, and that the revenue rule did not exist for the benefit or protection of taxpayers.[228] Moreover, the reason for the rule between South Africa and Australia evidently ceased to exist once the two countries agreed to assist each other in the collection of taxes.[229]

Judicial review of the decision to accept a request for mutual assistance is possible, but the chances of such a review succeeding will generally be low if the receiving authority follows due process in terms of the enabling tax treaty.

In the *Krok* case, the lower court revealed that SARS and the Australian Tax Office had concluded a memorandum of understanding, which is not in the public domain, in terms of which the mutual assistance would be conducted. The content of the MOU and procedure envisaged therein illustrates the type of detailed information that tax officials will need to supply, on the one hand, and consider as receiving agency, on the other:

> The memorandum of understanding between the two competent authorities of the Republic of South Africa and Australia, concerning assistance in the collection of taxes under art 25 A of the Protocol amending the agreement between South Africa and Australia … states that its purpose is to outline the shared understanding between the competent authorities of the procedural issues involved, in providing mutual assistance to each other in their collection of revenue claims. It refers to the appropriate form that must be used for a request for assistance in collection. The form, after making provision for the identity of the debtor and the amount owing, states that the request be accepted for collection by the government of South Africa and the 'conserving of assets for the purposes of such collection.' Under the heading 'Revenue Claim', details are given as to what documentation or evidence would be required for that purpose, and it is stated that a request for assistance in tax collection or conservancy, requires sufficient information to be provided to the requested authority to enable collection or conservancy action to be taken. Amongst others, this would include the providing of evidence reflecting on the likelihood that the debtor's assets without conservancy action will be dissipated.[230]

This approach can make it very difficult to challenge the decisions of the revenue officials under judicial review. The taxpayer would need to show that the officials acted irrationally and/or considered irrelevant factors or information. The MOU procedure and form appears to be designed to reduce the scope for irrational reasoning or consideration of irrelevant information.

South African taxpayers are not entitled to automatically receive ex ante notification if a request for mutual assistance in collecting a tax debt was received by SARS. The relevant legislation provides that a senior SARS official 'may, by notice, call upon [the taxpayer] to state, within a period specified in the notice, whether or not the person admits liability for the amount or a lesser amount'.[231] Notification to the taxpayer is therefore discretionary.

[227] Supreme Court of Appeal of South Africa, *Krok and another v Commissioner for the South African Revenue Services*, para 26.

[228] Supreme Court of Appeal of South Africa, *Krok and another v Commissioner for the South African Revenue Services*, para 29.

[229] Supreme Court of Appeal of South Africa, *Commissioner for the South African Revenue Service v Krok and another*, case 1319/13, 16 ITLR 838, [2014] 843, para 28.

[230] Supreme Court of Appeal of South Africa, *Commissioner for the South African Revenue Service v Krok and another*, 843.

[231] S 185(1)(b) of the Tax Administration Act 2011.

However, when a notice is furnished to a taxpayer, certain procedural safeguards apply. For example, when the taxpayer receives the above-mentioned notice and denies liability, the legislation provides that the senior SARS official may only go ahead with the collection request from the foreign counterpart, if (i) the taxpayer is not disputing liability for the amount in terms of the laws of the other country; or (ii) the taxpayer is disputing liability in terms of the laws of the other country, but such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; or (iii) there is a risk of dissipation or concealment of assets by the person.

The senior SARS official must base a decision about the above on the statements in the required formal certificate that the foreign counterpart must issue in respect of the collection request or obtain satisfactory further information in consultation with the competent authority of the other country.[232]

The legislation specifies that any request for assistance in collection to SARS by a foreign counterpart must be in a prescribed form and must include a formal certificate issued by the competent authority of the other country stating (i) the amount of the tax due; (ii) whether the liability for the amount is disputed in terms of the laws of the other country; (iii) if the liability for the amount is so disputed, whether such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; and (iv) whether there is a risk of dissipation or concealment of assets by the person.[233]

In any legal proceedings against the taxpayer, the formal certificate will be regarded as conclusive proof of the existence of the foreign tax liability alleged and prima facie proof of the other statements contained therein.[234]

South Africa is a signatory of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which entered into force in 2014 for South Africa. There is no information in the public domain about whether SARS engages in cross-border tax audit or examination activities. If the tax examination by foreign tax officials takes place pursuant to Article 9 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, South Africa as the receiving state must under Article 9(2) specify the procedures and conditions under which the examination must take place. The status of the Multilateral Convention is that it forms part of the law of South Africa and ranks equal with other domestic law. It is therefore subservient to the 1996 Constitution. As a consequence, the procedures and conditions that SARS would need to specify for the tax examination by foreign officials in South Africa will have to adhere to the constitutional Bill of Rights and the standards that these rights imply for the conduct of SARS in performing its mandate as revenue collection agency. These constitutional standards (eg adherence to the rule of law, just administrative action, privacy, protection of property, etc) have been translated into detailed rules under the Tax Administration Act, 2011, which in practice should mean that the foreign tax officials will need to perform their duties according to the same rules as specified for SARS officials.

The question whether information obtained by illegal means can be used by SARS has not been tested in South African courts. There is no express prohibition in South African tax law. However, the matter will need to be dealt with based on general principles of law and the 1996 Constitution.

[232] S 185(4) of the Tax Administration Act 2011.
[233] S 185(2) of the Tax Administration Act 2011.
[234] S 185(3) of the Tax Administration Act 2011.

In 2016, the large amount of private information illegally obtained from Panamanian law firm Mossack Fonseca provided the backdrop to an announcement by the Minister of Finance of a Special Voluntary Disclosure Programme (SVDP) by SARS, which operated from 1 October 2016 to 31 August 2017. The aim of the SVDP was to allow South African resident taxpayers to disclose offshore assets and income without penalties and with favourable tax consequences. It was reported at the time that SARS set up a special unit to investigate the 1,700 South Africans named in the Panama Papers. It would therefore appear that SARS as an institution is willing to systematically use information about the offshore assets and income of taxpayers regardless of whether the information was obtained by lawful means or not. This is of course not saying that SARS is prepared to commission any unlawful act that may result in the obtaining of such information. Rather it seems SARS is willing to utilise information illegally obtained if in the public domain.

6.3.2.2. Americas

6.3.2.2.1. The Inter-American System for the Protection of Human Rights

6.3.2.2.1.1. Legal Sources of the Access to Judicial Protection in the Inter-American System

Article 8 (right to a fair trial) and Article 25 (right to legal protection) of the American Convention on Human Rights (ACHR) expressly apply to tax issues.[235] Under Article 8(1) of the ACHR, '[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature'. Article 8(2) of the ACHR provides for certain minimum guarantees for '[e]very person accused of a criminal offense'. However, the Inter-American Court held that

> although this article does not establish minimum guarantees in matters relating to the determination of rights and obligations of a civil, labor, fiscal or any other nature, the full range of minimum guarantees stipulated in the second paragraph of this article are also applicable in those areas and, therefore, in this type of matter, the individual also has the overall right to the due process applicable in criminal matters.[236]
>
> In other words, when the Convention refers to the right of everyone to be heard by a competent judge or court to 'determine his rights', this expression refers to any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and obligations.[237]

Article 25 of the ACHR establishes that

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.

That article gives expression to an institution known as '*Amparo*' in Latin America.[238]

[235] See also the intervention of the Inter-American Commission on Human Rights in *Cantos v Argentina*, www.worldcourtp.com/iacthr/eng/decisions/202.11.2028_Cantos_v_Argentina.pdf.

[236] IACHR, judgment of 31 January 2001, *Constitutional Court v Peru*, [2001], no 70.

[237] IACHR, *Constitutional Court v Peru*, no 71.

[238] IACHR, advisory opinion of 6 October 1987, *Judicial Guarantees in State of Emergency*, no 32, advisory opinion OC-9/87, [1987].

6.3.2.2.1.2. Independent and Impartial Tribunal

Under the rule of law, the independence of all judges must be guaranteed. As the European Court of Human Rights has also indicated,[239] the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position and a guarantee against external pressures.[240] One of the basic principles about the independence of the judiciary is that every person has the right to a hearing by an ordinary court, under the procedures established by law. Those courts must be competent, independent and impartial, according to Article 8(1) of the ACHR.[241] In creating temporary public law chambers and courts and appointing judges to them at the time that the facts of the case subjudice occurred, a State violates the right to be heard by judges or courts 'previously established by law', as stipulated in Article 8(1) of the ACHR. Such judges do not meet the standards of competence, impartiality and independence required by Article 8(1) of the ACHR.[242]

6.3.2.2.1.3. Fair Trial

Articles 8 and 25 of the ACHR provide for the right to a fair trial. Although Article 8 of the ACHR is entitled 'Right to a Fair Trial', its application is not limited strictly to judicial remedies, 'but to a series of requirements that must be observed by the procedural bodies'[243] so that a person may defend himself adequately against any act of the state that could affect his rights.[244]

Under Article 25 of the ACHR, there must be an effective remedy. Recourse is illusory when it is shown that it is ineffective in practice, when the judiciary lacks the necessary independence to take an impartial decision, or in the absence of ways to execute the respective decisions that are delivered. The effectiveness of legal rights also implies the right to a response from the court within a reasonable period of time. Ten years is prima facie too long, but special circumstances may justify such a long period.[245] However, legal rights become illusory when justice is denied, when there is an unjustified delay in the decision and when the alleged victim is impeded from having access to judicial recourse.[246]

Moreover, the Inter-American Court of Human Rights, in *Cantos v Argentina*, held that a method laid down by law for calculating attorney fees can place a disproportionate burden on the plaintiff. Ultimately, such fees can become an obstruction to the effective administration of justice.[247] In the *Cantos* case, application of the filing fee and the professional fees strictly according to the letter of the law meant that exorbitant amounts were charged, with the effect of obstructing Cantos' access to the court. The judicial authorities should have taken appropriate steps to prevent this situation from materialising and to ensure effective access to the court and effective observance and exercise of the right to judicial guarantees and judicial protection, the Inter-American Court held.[248]

More recently, the Inter-American Commission on Human Rights noted that the procedural impossibility of bringing a complaint before a competent tribunal about tax claims, due

[239] *cf* ECtHR, *Langborger v Sweden*, no 11179/84, (22 June 1989), para 155, and ECtHR, *Campbell and Fell v United Kingdom*, nos 7819/77 and 7878/77, (28 June 1984), para 80.
[240] IACHR, *Constitutional Court v Peru*, no 75.
[241] IACHR, judgment of 6 February 2001, *Ivcher-Bronstein v Peru*, [2001], no 112.
[242] IACHR, *Ivcher-Bronstein v Peru*, nos 114 and ff.
[243] *cf* IACHR, advisory opinion, *Judicial Guarantees in State of Emergency*, no 27; (arts 27(2), 25 and 8 American Convention on Human Rights), Series A No 9.
[244] IACHR, *Constitutional Court v Peru*, no 69, Series C No 71. Generally, J Kokott, 'Fair Trial' 133 and ff.
[245] IACHR, *Cantos v Argentina*, nos 57 and ff.
[246] IACHR, *Ivcher-Bronstein v Peru*, no 137.
[247] IACHR, *Cantos v Argentina*, nos 56 and ff.
[248] IACHR, *Cantos v Argentina*, nos 60 and ff.

to the requirement to deposit certain bonds, could involve violations to the rights enshrined in Articles 8 (fair trial) and 25 (judicial protection) of the ACHR, in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects).[249]

6.3.2.2.2. Latin America

6.3.2.2.2.1. Argentina[250]

In Argentina, the right of access to justice in tax matters, both in terms of administrative and jurisdictional appeals, is closely linked to the guarantee of defence in court established in Article 18 of the Argentine Constitution.

At the administrative level, the Argentine Congress has created procedures and resources for taxpayers to defend their rights. Among them are the 'Appeal for Repetition' and the 'Appeal for Reconsideration'. Both are intended to request the tax administration to review tax rulings and sanctions levied on the taxpayer.

The Argentine Nation's Fiscal Court is independent of the tax authority. Therefore, the jurisdictional review offered by this court seeks to ensure sufficient judicial control of the decisions of the tax authority. The Argentine Supreme Court has established that administrative bodies may exercise jurisdictional functions whenever it is possible to gain access to a subsequent judicial instance.[251]

There are no legal remedies in Argentine law specifically designed to guarantee ex ante protection, preventing the administration from cooperating with another state, nor are there any precedents or practices to support it. Despite this absence of explicit rules on the matter, it is possible to initiate a procedure before the courts on the basis of the guarantee of *habeas data*, a remedy according to Article 43 of the Argentine Constitution that allows taxpayers to protect themselves against possible abuses by the state in the use of their private information. We are not aware of any case in which this issue has been addressed in the area of cross-border exchange of tax information. From a practical perspective, it is difficult to conceive of a dispute on this issue, since taxpayers are normally not informed that their data will be disclosed to another country.

Argentina has not signed any international treaty providing for joint tax audits. However, it would be possible to carry out joint tax audits, provided that an international treaty so provides, since international treaties are higher in the legal hierarchy than national laws. We are aware that Argentina and Brazil have carried out joint tax audits for the control of taxpayers in the automotive industry. However, there are no public records of such joint audits. If there were an international treaty allowing joint tax audits, the courts would grant protection, if the tax audit went beyond the provisions of the international treaty. In this case, national law (and the international treaty) would apply.

Taxpayers cannot question AFIP's information collection measures.[252] However, if the information were illegally acquired, taxpayers may challenge it by making use of the constitutional guarantees that exist in the area of personal data protection and the principle of exclusion of evidence in criminal proceedings. The doctrine of the fruit of the poisonous tree may be relevant

[249] IACHR, *Report on Admissibility Oswaldo Senen Paredes/Ecuador*, report no 207/20, petition 1113-11, [2020], para 18.
[250] We would like to thank Eduardo A Baistrocchi for his contribution.
[251] Argentine Supreme Court, *Lapiduz, Enrique c/ D.G.I. s/ acción de amparo*.
[252] Art 35 of Law 11,863 on Tax Procedures.

to support this kind of taxpayer request. In Argentina, the doctrine of the fruit of the poisonous tree is in force in criminal tax matters. The Argentine Supreme Court of Justice transplanted[253] this doctrine from the jurisprudence of the Supreme Court of the United States.[254] The doctrine of the fruit of the poisonous tree is related to the procedure for the evaluation of evidence within the criminal process. It consists of rejecting any evidence obtained by illicit means. In the light of the poisonous fruit doctrine in criminal tax matters, illicit evidence obtained fraudulently by tax officials should, in principle, be nullified. However, there is no precedent to validate this procedure to protect the constitutional rights of the taxpayer to exclude evidence obtained illegally.

In the *HBSC* case,[255] the French tax authority had obtained information from a former employee of HSBC Private Bank in Switzerland, which, in turn, was provided by France to Argentina under an information exchange clause contained in a tax treaty between the two countries. With the information obtained from the French source, the Argentinian tax authority made tax assessments and filed criminal complaints against taxpayers residing in Argentina before the Argentinian courts. Some taxpayers appealed against the tax assessments and criminal complaints on the basis of the illegal origin of the mechanisms that collected the information. However, the Argentine courts rejected the appeals, establishing that the information had been legally obtained by Argentina under the double taxation agreement with France. The Federal Chamber established that the evidence in question referred to deposits by Argentinian residents in Swiss bank accounts, and that such information was not protected by the right to privacy provided for in Article 19 of the National Constitution. Accordingly, banks have a legal duty to inform the local tax authority of holdings in the national and international banking system. Taxpayers, in turn, have a duty to provide similar information.

We believe that if there were an international treaty in force between Argentina and another country to provide mutual assistance in tax matters, such as the spontaneous exchange of information, it is unlikely that Argentine courts would allow challenges to decisions by Argentine tax authorities who have used such information against the taxpayer's interests. The *HSBC* precedent is an example of this proposition.

In summary, Argentinian courts would likely validate the use of information in Argentina obtained by the local tax authority from third countries as a product of international information exchange agreements, such as the one provided for in Article 26 of the OECD Model Tax Convention.

6.3.2.2.2.2. Brazil[256]

6.3.2.2.2.2.1. General The right of access to courts was first prescribed in the Brazilian Constitution in 1946. Nowadays, Article 5(XXXV) of the Brazilian Constitution establishes that the law may not exclude from review by the Judiciary any injury or threat to a right.

In tax matters, the Supreme Federal Court[257] has stated that it is unconstitutional to require the posting of a bond, a cash deposit, bank guarantee or assets for the admissibility of a judicial claim about tax liability. Regarding the motion to stay tax execution, the requirement to post

[253] Argentine Supreme Court, *Rayford, Reginald y otros*, judgment: 308:733, [1986].

[254] US Supreme Court, *Silverthorne Lumber Co v United States*, 251 US 385, [1920].

[255] Juzg Nac Penal Ec, HSBC Bank Argentina SA and others s / l. 24769, incident of nullity on the origin of the evidence, Buenos Aires, Judge. National Criminal Eco – no 11, [2017].

[256] We would like to thank Clara Gomes and Louis Schoeuri for their contribution.

[257] Supreme Federal Court of Brazil, binding summary of precedents no 28/2010. This summary of precedents binds not only the judicial branch, but also the executive and legislative (the latter only concerning its atypical, ie not legislative, functions).

bond or others does not limit access to courts, but only the expected result (the suspension of the enforceability of tax liability). Therefore, it does not constitute *solve et repete*, since the taxpayer has access to courts, regardless of the form of payment.[258]

The taxpayer has no right to defence in a tax audit in the initial administrative phase, ie when the tax authorities draft the tax audit notice, since it has an inquisitorial nature: it is a unilateral proceeding for the construction of an accusation. This does not mean, however, that during a tax audit, the right of access to (judicial) courts is violated, because whenever there is any damage or threat to their rights, individuals may bring a claim to court. In addition, during the administrative review, taxpayers have the right to defence bringing legal arguments and evidence to demonstrate their rights.[259]

6.3.2.2.2.2.2. Administrative Review and Judicial Protection The administrative review shall not occur at the same time as the judicial procedure when they have the same object. Hence, when taxpayers file claims before the judiciary, they renounce the administrative procedure and withdraw the appeals.[260] Conversely, the administrative review may run simultaneously to a judicial procedure if they have different objects, eg, if the taxpayer discusses a violation of a rule of administrative procedure before a court. The logic behind this is that the administrative review is a constitutional guarantee derived from the right to petition.[261] Not only does the taxpayer have the freedom to decide whether to renounce it or not, but he/she also does not have a duty to exhaust the administrative procedure as a condition for the judicial procedure to begin.[262]

An administrative decision in favour of a taxpayer is final, generally preventing tax authorities from starting a judicial procedure. Conversely, an administrative decision in favour of the tax administration may be challenged before courts mainly through (1) a declaratory judgment lawsuit (for the declaration of no tax liability), when there is no extrajudicial enforcement order; (2) an action for annulment of an extrajudicial enforcement order; (3) a motion for a writ of mandamus (this option does not depend on the existence of an extrajudicial enforcement order, but on the evidence already in the possession of the taxpayer); or (4) a motion to stay tax enforcement, when the tax authorities initiate an enforcement action. The same happens when the taxpayer decides to initiate a judicial procedure instead of an administrative review.

In the event of a decision in favour of the tax administration, the latter registers the tax debt in the overdue payment roster, which constitutes an extrajudicial enforcement order. After that, the tax authorities normally initiate an enforcement action. On the federal level, tax administration should register tax debts at the public offices in relation to taxpayers' assets.[263]

Regarding the federal judicial organisation, there are two instances (ie, the federal judiciary and the regional federal Courts) and two superior courts (the Superior Court of Justice and the Supreme Federal Court). In the federal judiciary, the Regional Federal Court and the Superior Court of Justice, there are courts and chambers specialised in public law. Despite having other

[258] After all, a bond is not necessarily paid in currency, but could also be paid with, eg, a bank guarantee or even real estate.

[259] See below, sec 6.3.2.2.2.2.2.

[260] Art 38 of the Brazilian Act of Enforcement Action in Tax Matters and art 1, para 2 of BR: Decree-law No 1737/1979; Supreme Federal Court of Brazil, special appeal of 28 August 2012, no 1294946/MG [2012], and Administrative Tax Appeals Council, summary of precedents no 1/2018.

[261] Art 5 (XXXIV)(a) of the Brazilian Constitution.

[262] Supreme Federal Court of Brazil, extraordinary appeal of 16 August 2007, no 233582/RJ [2007].

[263] See Supreme Federal Court of Brazil, direct actions of unconstitutionality of 9 December 2020, nos 5881/DF, 5886/DF, 5890/DF, 5925/DF, 5931/DF and 5932/DF, [2020].

powers, the Brazilian Superior Court of Justice controls legality, and the Supreme Federal Court controls constitutionality. The superior courts normally analyse legal issues, while lower courts examine legal and factual issues.

As a hierarchical structure (in respect of the relationship between the lower and superior courts) with specialised courts, generally, the decision of the *ad quem* court prevails over the decision of the *a quo* court. The decision of the specialised/superior court (eg, control of legality or constitutionality) also prevails over other decisions, replacing them and sometimes imposing a new trial by the *a quo* court.

The Federal Council for the Judiciary[264] inspects, controls and monitors judges of the first and second instance of the federal judicial branch, analyses complaints against them and formulates rules for guiding them, among other powers.[265] It has disciplinary power over those judges.

The due process of law according to article 5(LIV) of the Brazilian Constitution guides the judicial and administrative procedures, as a supra-principle, in the sense that it includes other principles and that these principles concretise the supra-principle. In consonance with the Supreme Federal Court,[266] the due process of law includes mainly the following: the right of access to courts, the right to service of process, the right to trial within a reasonable time,[267] the right to a public trial, the right to defence, the prohibition of ex post facto laws, the principle of equality of arms, the prohibition on illegal evidence, the right not to incriminate yourself and the right to free justice.[268] The right to a natural judge also applies, meaning that no one can be tried other than by an ordinary, pre-established, competent tribunal or judge. As a corollary of this principle, emergency, ad hoc, 'extraordinary', ex post facto and special courts are forbidden.[269]

Consequently, the due process of law determines that administrative and judicial procedures observe the procedural rules and the right to a fair trial, which impose the duty of loyalty and good faith not only on plaintiffs and defendants, but also on public authorities (judges and civil servants from the judicial branch).[270]

Ordinarily, governments create or extend instalment plans for tax payment, which essentially reduce penalties and interest in exchange for renunciation of judicial procedures and the withdrawal of judicial and administrative appeals by taxpayers. There are two opinions regarding the validity of this. On the one hand, it is argued that taxpayers may renounce their fundamental rights in some cases. Additionally, in the instalment plans, there is a balance between the obligations assumed by the tax authorities and the taxpayers, making them proportional. On the other hand, some claim that the aforementioned renunciation and withdrawal are not valid, since they violate fundamental rights, which are inviolable and inalienable. Nevertheless, there are some problems with instalment plans: (1) governments may violate the constitution creating

[264] *Corregedoria-Geral da Justiça Federal*.

[265] Act No 11798/2008, art 6.

[266] Supreme Federal Court of Brazil, *habeas corpus* of 16 September 2008, no 94016/SP [2008].

[267] Individuals have the constitutional right to a trial within a reasonable time in administrative and judicial procedures, as decided by the Superior Court of Justice of Brazil (special appeal of 9 August 2010, no 1138206/RS [2010]). This Court associates this right with administrative efficiency, morality and reasonableness. An administrative judgment shall occur within a maximum of 360 days from the date of filing of the petition (Act No 11457/2007, art 24). However, there are exceptions to this rule, resulting in a longer duration. Despite this constitutional right, the judicial procedure generally takes longer than the reasonable time, and there is no time limit for judges' and justices' decisions in the statutory rules. Therefore, in practice, it seems that this principle has lower efficacy than others. For that reason, the administrative review is important, as it is normally faster than the judicial appeal.

[268] When the individual complies with the statutory requirements and presents a motion for it, he/she is freed of court costs.

[269] *cf* eg International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (2007) 7 and ff, 'The Principle of the natural judge'.

[270] Supreme Federal Court of Brazil, interlocutory appeal of 10 October 2006, no 529733/RS [2006].

instalment plans; (2) administrative courts have a strong tendency to protect the tax administration's interests to the detriment of taxpayers' rights; and (3) some subjects, eg tax planning, have not yet been analysed by the courts, which creates uncertainty about their position in this regard.

Therefore, on the one hand, when taxpayers face the decision to apply or not apply for an instalment plan, a rational decision will usually conclude that the taxpayers should apply for it, rather than bringing a claim before the court. If the uncertainty and the amount involved are too high (eg in cases of tax planning, which generally involve large amounts) a way to reduce the risk is to utilise an instalment plan. On the other hand, the last word regarding important subjects (eg in respect of tax planning) then does not belong to the courts, despite their being the guardians of the law. This vicious cycle is even more complicated when time passes, since the complete silence of the courts increases uncertainty about the subject and gives governments more power to commit new unconstitutional acts, violating taxpayers' rights.

6.3.2.2.2.2.3. Right to Judicial Protection in Cross-Border Situations There is no case law on legal remedies regarding taxpayers' rights in mutual assistance. There are no legal remedies specifically designed for this protection. One could deem it possible to start proceedings before judicial courts based on the due process clause, Article 5(LIV) of the Brazilian Constitution. However, taxpayers have not yet brought any lawsuit, since they have not been informed that their data is to be disclosed.

Nevertheless, courts could grant protection. When the Supreme Federal Court of Brazil discussed whether or not financial institutions should disclose their clients' information to tax administrations, it stated that this obligation would exist only if tax administrations secured a reasonable level of data protection.[271] This is especially relevant in Brazil since, besides the Federal tax administration which has reliable protection tools, there are 27 states and more than 5,500 municipalities, each with its own tax administration. One can easily imagine that smaller municipalities would not offer sufficient data protection. For this reason, the Supreme Court of Brazil stated that the data protection should be secured. If this is true for domestic tax administrations, then, according to Gomes Moreira/Schoueri, it must also apply in cross-border situations involving foreign states.

Brazil so far has not entered into a treaty providing for joint tax audits. However, joint audits would theoretically be possible if foreseen in a treaty. Again, courts could theoretically grant protection, if auditing went beyond the treaties. In this case, the domestic law (and the treaty) would be applicable, especially the constitutional guarantees, and depending on the case, foreign law could be applicable.

If information is gathered illegally, then taxpayers may question it. The Superior Court of Justice of Brazil decided regarding criminal offences[272] that information obtained abroad should be accepted by Brazilian courts where it is (1) legally obtained in accordance with the foreign law and (2) compatible with the vague concepts of national sovereignty, public order and public morals.[273]

Thus, from a theoretical perspective, if the court decided that this understanding is also applicable in tax matters, one could imagine that the use of the information could be forbidden. This would occur if the information-gathering procedure was illegal under the foreign law – in our view, it is very unlikely that Brazilian courts would decide that another country acted illegally

[271] Supreme Federal Court of Brazil, extraordinary appeal no 601314/SP.

[272] In that case arts 13 and 17 of Act (Decreto-Lei) No 4 657/1942.

[273] Superior Court of Justice of Brazil, interlocutory appeal in the special appeal of 24 May 2018, no 1656153/PR and criminal suit of 18 October 2017, no 856/DF.

under its law – or violated national sovereignty, public order and public morals. As a result, there is only a quite limited prohibition on the use of illegally obtained evidence.

6.3.2.2.2.3. Chile[274]

6.3.2.2.2.3.1. Reform of Judicial Protection In Chile, the right of access to tax justice has seen radical changes over the past 10 years, both in terms of administrative and jurisdictional resources.

In the administrative area, new procedures and resources have been created so that taxpayers may present their evidence and defend their rights, such as the resource of 'Voluntary Administrative Review' or the 'Resource of Auditing Review' which attempt to demand that the tax administration re-evaluates tax assessments. The reason may either be that new and better background information is presented or that the said act is vitiated by a manifest vice or mistake. This has been linked to a constant effort of the authorities to explain and convince public officials of the righteousness and justice of such new mechanisms which, in fact, allow the questioning of the same actions of the administrations to find solutions at its core and thus take those cases to courts in which there is an actual disagreement with the taxpayer.

In jurisdictional matters, the changes have been even more radical. Ten years ago, there were no independent jurisdictional entities in tax law. The very same Chilean Tax Administration was the one in charge of knowing and solving judicial complaints presented by taxpayers. Nowadays there are independent tax and customs courts. Procedures, resources and judges are independent from the Chilean Tax Administration. However, the jurisdictional entities decide in favour of the tax authorities in about 70 per cent of cases. This has created a certain frustration amongst taxpayers. Tax complaints have decreased.

Several explanations have been given regarding this phenomenon, such as that the arguments presented by the taxpayer are not technically good or that there was an evidentiary standard restricting the evidence that could be presented by the taxpayer. It seems, however, that the Chilean tax justice system needs new upgrades to effectively protect taxpayers' rights.

6.3.2.2.2.3.2. Right to Judicial Protection in Cross-Border Situations Chile enacted the Convention on Mutual Administrative Assistance in Tax Matters in 2016.[275] In 2017, the regulations for the automatic exchange of financial data were established, providing for compliance with the Common Reporting Standards (CRS).[276] Furthermore, Chile is part of JITSIC.[277] However, Chile approved the Convention on Mutual Administrative Assistance in Tax Matters with a couple of reservations, including that, as a general rule, it will not accept tax auditing requests from abroad.[278] Therefore, tax auditing requests from abroad should not occur. Nevertheless, in the event that tax auditing from abroad occurs, there are no special protection regulations. Therefore, the actual Bill of Right would have to be applied, plus other relevant regulations.

To date, there are no records of court cases regarding the process of mutual administrative assistance in tax matters. However, despite the absence of a specific procedure for this type of case, there are other legal resources that could be useful when it comes to violations of taxpayers' rights in the processes of exchange of information, eg, the so-called Resort for Violation

[274] We would like to thank Yuri Varela for his contribution.
[275] Decree No 104 of the Foreign Relation Ministry.
[276] Decree No 418 of 2017.
[277] JITSIC (Joint International Taskforce on Shared Intelligence and Collaboration) brings together 42 of the world's national tax administrations that have committed to more effective and efficient ways to deal with tax avoidance.
[278] Art 9(1) of Decree No 104 of 2016.

of Taxpayer Rights[279] or the resort to protection established in Article 20 of the Chilean Constitution.

It is worth mentioning that, as a general rule, taxpayers do not have full knowledge that the tax authority has exchanged their information or that the Chilean state has been requested to give their information, unless it was a request for information the Chilean tax administration did not have and had to directly ask the taxpayers or their bank for. Thus, there is no proceeding; nor is there an opportunity for taxpayers to question ex post the validity of the information gathered in breach of their fundamental rights, or to suggest that it was illegally provided.

6.3.2.2.2.4. Colombia[280]

In Colombia, special constitutional injunction actions, or *tutelas*, have not fared well before the Courts in tax matters. However, some have succeeded, mainly for violation of due process and the guarantees recognised by Article 29 of the Colombian Constitution. The principle that official tax assessments cannot be enforced while their legality is being debated in administrative and court proceedings is perhaps the biggest contribution of the Colombian legal system. This is why no deficiency tax assessment is enforced before a decision is made about its lawfulness without the taxpayer being required to request the stay of execution in respect of the assessment.

The legislature is the competent authority to fix a single procedure that applies to both national and local taxes. If there are disparities between local and national procedures, the latter prevails; this has been adopted as the single unified procedure for tax matters. A municipality must not disregard the appropriate forms of every proceeding and, even more seriously, attempt to apply a shorter term for a motion for reconsideration and deny the two-month term which pertains to tax proceedings. As long as the administrative resolutions have not become final and non-appealable, the municipality cannot initiate forceful collection proceedings.[281]

There are many cases where enforced collection jurisdiction has been exercised abusively. The Colombian Constitutional Court held that

> enforced collection jurisdiction is indeed a privilege that some public law entities enjoy to collect their receivables; but it is not a system that allows these entities to violate the right to due process of law of the taxpayer subject to collection. If the administration violates due process of law within enforced collection proceedings, then the Courts may correct the abuse.[282]

In another action, the Colombian Constitutional Court also protected due process of law and the right of defence. The municipality of Montelíbano had issued a writ of payment and had liquidated the tax receivable pending resolution of the administrative appeals.[283] The complainant interposed motions for reconsideration. It established an insurance compliance bond to guarantee the tax obligation and requested that the attachment be lifted. It also raised as defence the lack of a valid document to initiate enforced collection and the fact that the obligation could not be collected because the obligation was not firm and non-appealable; the municipality treasurer decided against these defences and proceeded to liquidate the receivable to be able to appropriate the relevant amounts for the municipality budget. The Colombian Council of State had provided an injunction under *tutela* for the right, but only as a transitory measure for lack of notification

[279] Art 155 of the Chilean Tax Code.

[280] We would like to thank Lucy Cruz for her contribution.

[281] Constitutional Court of Colombia, judgment of 10 December 1999 *Bogotá Colombia electrical utility company (Empresa de Energía de Bogotá) v the municipality of El Colegi*o, case T-1013, [1999].

[282] Constitutional Court of Colombia, judgment of 12 October 1994, case T-445, [1994], ratified by judgment of 20 January 2005, case T-027, [2005].

[283] Constitutional Court of Colombia, judgment of 27 April 2000, *ISA*, case T-453, [2000].

of the order of liquidation; but it had suspended the 'auction' of the attached cash amounts until the claim on the defences had been decided upon, and thus allowed the municipality to use the attached cash amounts. The Colombian Constitutional Court revoked the judgment of the Council of State and provided an injunction under *tutela* for the complainant's right. It held that the liquidation of the credit and every other subsequent action had no effect whatever (including the collection of the attached cash amounts from a bank). It ordered the remission of copies to the Colombian attorney general and prosecutor for investigation.

With regard to gathering information through mutual administrative assistance, Colombia has already gained some experience. However, taxpayers are not allowed to know the context in which the information was exchanged until tax investigation is formally opened. Nevertheless, wrong information is sometimes reported. It has also become apparent that the tax administration has incurred errors when processing the identity of several taxpayers, their account numbers, associated jurisdiction, and the value of transactions or balances. This circumstance would not be concerning if taxpayers had a direct mechanism to introduce information that would prove the administration's or the financial institutions' mistakes prior to a tax investigation being initiated (in order to prevent such an investigation from taking place), but this has not been what has happened in relation to information requests. It is the tax administration which should detect mistakes and correct them before initiating a formal procedure.

Despite the fact that the Strasbourg Convention on Mutual Administrative Assistance in Tax Matters has been in force for several years, we do not know of any ordinary ruling, constitutional protection ruling (*tutela*), or compliance claim ruling (*acción de cumplimiento*) that has addressed *habeas data* or the protection of privacy claims in relation to the massive exchange of information.

6.3.2.2.2.5. Mexico[284]

In Mexico, access to justice in tax controversies is well regulated and widely exercised. Taxpayers can elect between challenging a tax assessment through an administrative appeal or go directly to tax litigation. The administrative appeal is filed with an independent section of the Mexican Tax Administration Service, while the tax litigation is processed before a specialised Administrative and Tax Court.

Notwithstanding that the taxpayer's right to justice is fairly well regulated in Mexico, the genuine crisis of judicial defence in Mexico has to do with the way the Courts solve tax controversies. Verdicts commonly focus on formal issues, which leads to a system that is unaware of the real needs of taxpayers.

In an effort to remedy this crisis, on 27 January 2017, the Substance Trial Bill was successfully introduced as an amendment to the law governing the legal procedure before the Administrative and Tax Court. In the substance trial the Magistrates are empowered to overlook formal issues to solve the substance of the case.

Moreover, Article 8 (right to a fair trial) and Article 25 (right to judicial protection) of the ACHR – Pact of San José, certainly apply to tax matters. Article 21 of the Convention also deals with the right to property, which is essential for taxpayers.

The intervention of the Inter-American Commission on Human Rights in the *Cantos v Argentina* case is a good practical example of the application of these minimum human rights standards.[285]

[284] We would like to thank Diana Bernal for her contribution.
[285] www.worldcourts.com/iacthr/eng/decisions/2002.11.28_Cantos_v_Argentina.pdf.

Taxpayers in Mexico have two main alternatives when facing abuse and arbitrary action from the tax authorities. The first one is judicial, the *Amparo* action[286] and the second one is non-judicial, the complaint procedure processed before the Mexican Tax Ombudsman Agency (PRODECON).[287]

The *Amparo* is a remedy for the protection of all constitutional and conventional fundamental rights, not only those related to tax.[288] The writ of *Amparo* must be filed by a person (understood as an individual or legal entity) before a Federal Court against the act of authority that is considered to breach that person's fundamental rights.

The *Amparo* serves a dual protective purpose. It safeguards the fundamental rights of the person filing the writ, and protects the Mexican Federal Constitution by ensuring that its principles are not breached by laws or actions of any governmental authority, such as tax authorities.

6.3.2.2.2.6. Peru[289]

According to Article 148 of the Peruvian Constitution, taxpayers can judicially challenge administrative action, including administrative resolutions with regard to tax matters.

In the Peruvian tax system, the decisions of the tax administration must be challenged by filing a claim against the tax administration itself. The decision by the tax administration can be the object of administrative review before the Peruvian tax courts. There is an obligation of prior exhaustion of administrative reviews (the so-called administrative route) before accessing the judiciary. The resolution of the Tax Court exhausts the administrative route, however both the Peruvian Constitution and Article 157 of the Peruvian Tax Code recognise the possibility for taxpayers – and in exceptional cases the tax administration itself – to challenge tax court decisions and take the controversy to judicial courts through filing a contentious administrative lawsuit.

The judicial appeal following the administrative review consists of two judicial instances and a cassation appeal that should only be filed in cases of regulatory infringement by the decisions of the previous instances. In practice, however, taxpayers use it as a third judicial instance.

Although the actions of the public administration can only be contested in the administrative contentious process, taxpayers can exceptionally resort to constitutional actions. Three of these are relevant in tax matters: (1) the so-called *Amparo* action established to challenge any act of an authority that violates or threatens the rights recognised by the Peruvian Constitution; (2) the so-called unconstitutionality action applicable against any legal norm that contravenes the constitutional text in form or substance; and (3) the so-called popular action, enforceable against regulations, administrative norms and resolutions that contravene the Constitution.

Peru signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in October 2017 and it entered into force for Peru on 1 September 2018. However,[290] Peru recently assumed its first commitment for the exchange of information regarding the Common Reporting Standards (CRS) and country-by-country reporting in December 2020 regarding information for the fiscal year 2019. Therefore, to date, there is still little practical experience and few cases

[286] The *Amparo* is governed by arts 103 and 107 of the Mexican Federal Constitution and by the *Amparo* Law issued on the basis of such Constitutional arts.

[287] Its acronym in the Spanish language is *Procuraduría de la Defensa del Contribuyente; cf* below, sec 6.4.1.2.2.1.5.

[288] *cf* also above, at sec 6.3.2.2.1.1.

[289] We would like to thank Cecilia Delgado Ratto for her contribution.

[290] https://busquedas.elperuano.pe/download/url/entrada-en-vigencia-de-la-convencion-sobre-asistencia-admin-convenio-convenio-sobre-asistencia-entrada-en-vigencia-convencion-so-1686091-1.

related to judicial protection of the rights of Peruvian taxpayers with regard to mutual assistance between the Peruvian tax administration and foreign tax administrations. Notwithstanding the lack of practical experience, the Peruvian taxpayer has the possibility to file constitutional appeals such as *Amparo* and *habeas data* against the tax administration, if their fundamental rights are violated by this authority in the information exchange procedure.

6.3.2.2.3. United States[291]

The right to a fair trial for criminal defendants is enshrined in the Constitution's Sixth Amendment, which requires the right to a timely public trial, right to a lawyer, right to an impartial jury, and right to know the accusers and the nature of charges and evidence against the defendant. There is no similar guarantee for civil trials.

At an administrative level, the IRS Taxpayer Bill of Rights offers taxpayers several critical guarantees regarding due process related to a tax examination or liability: the right to be informed, the right to pay no more than the correct amount of tax, the right to challenge the IRS's position and be heard, and the right to appeal an IRS decision in an independent forum. This last-mentioned right is the most frequent opportunity for taxpayers challenging an IRS action to be heard and have the issue looked at in a fresh review. The newly constituted IRS Independent Office of Appeals is mandated to offer most taxpayers an avenue to have their appeal heard by non-examination staff; appeals conferences are generally informal and conducted by correspondence, telephone/video conference, or in-person. The Appeals Office mission is to 'resolve tax controversies, without litigation, on a basis which is fair and impartial to both the government and the taxpayer in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service'.

Thus, taxpayers seeking judicial access to remedy perceived abuses or incorrect assessments are subject to either administrative IRS rules or statutory requirements that provide some measure of due process. In general, taxpayers may seek judicial redress from federal district courts when they are seeking a refund of tax amounts already paid to the IRS.[292] In certain situations involving a notice of deficiency issued by the IRS, a taxpayer may file suit in the US Tax Court before paying the alleged deficiency.[293] Decisions made by either the US Tax Court or a federal district court may generally be appealed to the applicable federal circuit court of appeal as of right, while appeals to the US Supreme Court are rarely granted hearing.

The privilege against self-incrimination exists under the Constitution's Fifth Amendment. However, this right does not extend to non-filing of tax returns, and certain required records must be provided to the IRS if requested, even if incriminating.

Where the US provides mutual assistance to treaty partners and is thus engaged in either the collection of taxpayer information or process of exchanging information, the subject taxpayer may seek judicial review. For example, when a taxpayer seeks to quash a summons the IRS has issued for information, the IRS must show that: (1) its investigation is being conducted pursuant to a legitimate purpose; (2) the information sought may be relevant to that purpose; (3) the government does not already possess the information sought; and (4) the IRS has followed the

[291] We would like to thank Jeremiah Coder for his contribution.

[292] See 28 USC s 1346.

[293] See IRC s 6213. The Tax Court's jurisdiction also includes the authority to redetermine transferee liability, make certain types of declaratory judgments, adjust partnership items, order abatement of interest, award administrative and litigation costs, redetermine worker classification, determine relief from joint and several liability on a joint return, review certain collection actions, and review awards to whistleblowers.

administrative steps in the Code.[294] However, in practice, courts are largely deferential toward IRS efforts to obtain and exchange information under a tax treaty or other agreement.[295]

6.3.2.2.4. Canada

In Canada, there is some interesting case law on the right to judicial protection in cases which are difficult to categorise either as criminal proceedings or as (tax) law enforcement. In its *Jarvis* judgment,[296] the Canadian Supreme Court identified criteria for determining whether an inquiry's purpose is to administer and enforce the law or to investigate penal or criminal liability. If the dominant purpose is to assess whether a penal or criminal offence has been committed, the protection afforded by the Canadian Charter applies, including the right of every person to be secure against unreasonable search or seizure. The Supreme Court acknowledged that while an audit may continue after the institution of a criminal or penal investigation, the results of this audit cannot be used in pursuance of this investigation or prosecution.

However, even if the fiscal authorities had no intention of ever seeking criminal charges, criminal charges may in fact ultimately be laid, depending on the circumstances. This may apply in case of an obvious breach, where a taxpayer provides incriminating documents and statements that serve as the basis of the criminal charges later brought against them. In a recent case, the Court of Québec went so far as not only excluding such evidence, but also staying the whole procedure. Even if the illegally obtained evidence was excluded, the Court of Québec stated that holding the trial would 'manifest, perpetuate and aggravate the disrepute to the administration of justice'.[297] The stay of proceedings was then granted on the basis of the findings that the accused's constitutional rights violations were serious, multiple and systemic.

6.3.2.3. Asia

6.3.2.3.1. China[298]

When a tax dispute arises, the taxpayer must first pay the taxes in accordance with the decision on tax payment made by the Chinese tax authority, or provide a corresponding security. The taxpayer may then apply for administrative review to the higher-level tax authority (*solve et repete*). The application for administrative review must be made in writing or in electronic form within 60 days from the date of knowledge of the tax decision. The review normally should be in a written form. However, the review committee may hear oral statements from the applicant, the respondent and third parties. It may even investigate the facts with the relevant organisations and personnel when the applicant (ie taxpayer) so requests and the review committee considers it necessary.

If a taxpayer disagrees with the decision made at the administrative review, they may then bring a lawsuit against the Chinese tax authority at the Administrative Chamber of the Chinese courts.

[294] US Supreme Court, *United States v Powell*, 379 US 48, [1964].

[295] See, eg, US District Court, C.D. California, *Puri v United States*, case 2:20-cv-07270, [2020] (denying taxpayer's claim that IRS attempts to obtain bank records to exchange with Indian tax authorities was improper purpose used for political harassment).

[296] Supreme Court of Canada, *R v Jarvis*, SCC 73, [2002]; *cf* also C Larouche, 'Stay of Proceedings, a Drastic Remedy Granted for Violation of Constitutional Rights, Posted Securities Litigation and Enforcement' (2020) *Civil Claims*.

[297] Court of Québec, *R v Goldberg*, QCCQ 4548, [2020], at para 470; *cf* also C Larouche, *Stay of Proceedings, a Drastic Remedy Granted for Violation of Constitutional Rights*.

[298] We would like to thank Na Li for her contribution.

Taxpayers and the tax authorities have equal legal status in litigation, while the Chinese courts are competent and neutral in tax adjudication. A collegial bench decides with an open trial at both the first trial and the appeal in accordance with the Chinese Administrative Litigation Law. However, there is a relatively low volume of litigation in tax cases in China. According to Wei Cui, this might be caused by the external environment of tax compliance and the substance of Chinese tax law.[299]

With regard to cross-border tax disputes, all Chinese bilateral tax treaties contain a mutual agreement procedure clause. Although taxpayers will not participate in the MAP, they are to be informed of the progress of the MAP by the Chinese tax authorities in charge. China has not yet adopted an arbitration regime for resolving tax disputes. China has made reservations to the sections on assistance in recovery and service of documents, when signing the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in 2013. To our knowledge, there is no case law in China with regard to legal remedies for taxpayers in connection with mutual assistance.

6.3.2.3.2. India[300]

In India, procedural rights are available at every stage of the tax process and can be invoked before the courts (writ petitions under Articles 32 or 226 of the Indian Constitution):

a. Assessment level – improper notification, information collection etc. may be challenged and any procedural failing can lead to a quashing of the procedure itself. There are many cases that have upheld such matters.
b. Administrative appeal – the first level is within the tax administration, but an independent wing; the second level is before an independent tribunal. Procedural remedies are available here as well. For example, even though Indian law does not grant a stay of demand on filing an appeal, a taxpayer may approach a court to obtain a stay of demand if he/she proves that there is a cash-flow concern or if the balance of the case clearly lies in the taxpayer's favour.
c. Judicial appeal – appeal to the State High Court and Supreme Court where the same procedural failings may once again be challenged separately.

The few Indian cross-border cases pertain to taxpayers' ex post protection claims.

However, there is an American decision where a taxpayer in the US sought to block a request made by the Indian competent authority. Pursuant to an examination by the Indian authorities, a request for information was made by the Indian authorities under the India–US treaty. The taxpayer approached the district court in Northern Illinois to quash the summons served by the US competent authority on two third-party banks. In the first round, the government's plea to dismiss the taxpayer's petition was disallowed for inadequate notice. This led the IRS to issue fresh summons to the banks. The taxpayer again approached the court claiming that the IRS was not pursuing a legitimate purpose. Additionally, the taxpayer argued that the financial information for the period between 2000 and 2010 was irrelevant for the Indian authority as during that period his income was exempt under Indian income tax laws. The district court rejected the taxpayer's claim. It held that attacks on the requesting state's good faith or legitimacy in requesting information are usually rejected.[301] The only thing that mattered is the good faith of the IRS

[299] W Cui, 'An Empirical Research of China's Tax Litigation' (2015) 9 (3) *Tsinghua University Law Journal*.
[300] We would like to thank Sriram Govind for his contribution.
[301] US District Court, Colorado, *Villareal v United States*, 524 F App'x 419, 423, (10th Cir), [2013].

in complying with the information request. As the taxpayer could not prove the bad faith of the IRS, the court denied the taxpayer's request to quash the summons issued to the banks.[302]

Theoretically speaking, if a taxpayer were to learn of exchange requests they wished to prevent, they might seek to argue that divulging the information would infringe their fundamental right to privacy. This has not been tested before the Indian courts. In light of the confidentiality obligations under tax treaties, Indian courts may not give ex ante protection. They typically side with the government in any steps, particularly those designed to tackle illicit funds.[303]

India has joined JITSIC, although it was not a founding member. A government manual on exchange of information provides a non-exhaustive list of issues suitable for joint audits. Some issues are transfer pricing, taxpayer residency or permanent establishment, hybrid financial instruments and cost allocation agreements.[304]

It seems unlikely that taxpayers may also seek protection against the tax officials of another Member State taking measures against them on domestic territory given that Indian authorities attach high value to sovereignty. Even in the government's manual on exchange of information, it is contemplated that any requests for joint audit will be made to the Indian competent authority. Appropriate proposals would be forwarded to the foreign competent authority.[305]

Typically taxpayers have questioned the validity of information exchanged ex post when they receive a reassessment order[306] from the concerned tax officer.

There was a case where the taxpayer sought to question the validity of the information on the grounds that it was 'stolen'. The Indian authorities received the information under the Indo-Germany tax treaty.[307] A bank employee in Liechtenstein had given the information to the German authority. The information revealed that the taxpayer was the beneficiary of an offshore trust which earned income that was undisclosed to the Indian tax authority. The tribunal did 'not find any relevance in Ld. Counsel of the assessee's submission that the data were stolen by the foreign bank employee and it was not the case of a whistle blower. How this affects the veracity of information has not been spelt out'.[308] The tribunal held that the burden of proof was on the assessee to prove that the trust and related bank account were fictitious, which he failed to discharge. Interestingly, the judgment dismissed the argument in a single line and there is no record of the taxpayer's attempt to substantiate the claim. If in a case the taxpayer was able to prove that the information was indeed obtained illegally, the finding would still have to be assessed in light of the fact that the Indian competent authority did not use any improper or illegal means to obtain the said information.[309] As the judgment is only of a tribunal, one needs to see whether the higher courts would endorse this view.

Another ground taken up by taxpayers to challenge reassessment is lack of reasonable opportunity to be heard in the reassessment proceedings. In both cases where this was argued, the plea

[302] US District Court, Northern District of Illinois, *Bikramjit Singh Kalra v United States of America*, case 12-cv-3154, [2013].

[303] Supreme Court of India, judgment of 9 June 2017, *Binoy Viswam v Union of India Writ Petition*, Civil no 247/17, [2017].

[304] Government of India, Ministry of Finance, Manual on Exchange of Information, May 2015, 52–53, www.taxindia international.com/pdfdocs/Manual_EoI_1.pdf.

[305] Government of India, Ministry of Finance, Manual on Exchange of Information, May 2015, 53, www.taxindia international.com/pdfdocs/Manual_EoI_1.pdf.

[306] According to ss 147 and 148 of the Indian Income-tax Act 1961.

[307] Art 26 Tax Treaty between Germany and India of 19 June 1995.

[308] Income Tax Appellate Tribunal, Mumbai Bench, decision of 15 November 2017, *Hasmukh I Gandhi v Deputy Commissioner of Income Tax*, [2017], para 17.

[309] Income Tax Appellate Tribunal, Mumbai Bench, *Hasmukh I Gandhi v Deputy Commissioner of Income Tax*.

was dismissed. Also under the Indo-German treaty, the Indian competent authority received the information which was originally sourced from a bank employee in Liechtenstein. No argument about information being stolen was raised in that case.[310]

In another case the Indian Supreme Court allowed disclosure of details of individuals who had been found guilty of tax evasion.[311] However, disclosure was disallowed if the investigation was incomplete, as it would violate their right to privacy. Further, the phrase 'They may disclose the information in public court proceedings' in Article 26(1) of the Indo-German treaty was interpreted as meaning court proceedings *other than those* in connection with tax assessment, enforcement, prosecution, etc with respect to tax matters. This interpretation included public interest proceedings such as the case at hand. Public interest proceedings are unique to India, as any person can bring a matter of public interest to the Constitutional Courts despite not being himself affected by the cause in question.

6.3.2.3.3. Israel[312]

Access to courts is a constitutional right in Israel. Actions of the Israeli tax authorities are subject to judicial review in several ways. The basic framework is very similar to India. At the first level, the assessment level, several procedural rights are granted. Then, taxpayers have the right to administrative appeal in order to review the assessment within the same tax authority but by a higher and different officer. The main idea is that another officer considers the case again open-mindedly. After that, taxpayers have the right of judicial appeal to the district courts. In some cases, there is an additional appeal to the Supreme Court of Israel. Moreover, in some circumstances, taxpayers may directly petition the Supreme Court of Israel as the high court of justice, in constitutional and administrative petitions against tax laws and tax administration and execution.

Israel's tax treaties include an article on the mutual agreement procedure that follows the OECD Model Convention.[313] A taxpayer in one contracting state can ask the competent authority to file a mutual agreement application to reach an agreement regarding the interpretation and application of the treaty on the specific case. In addition, the competent authorities could follow the procedure to reach an agreement regarding the interpretation of general issues in the treaty. The competent authority in Israel is the international tax division at the Israeli tax authority, which had published instructions and details on the application of the mutual agreement procedure.[314] In the *Gtech Technologies* case, the Israeli Supreme Court came up with an important rule that the Israeli competent authority's discretion whether to enter into the mutual agreement procedure must be reasonable according to administrative law criteria. In the specific case, the Court ruled that the authority should enter into the procedure to protect the interests of the taxpayer to prevent double taxation, and that the assessment process in Israel should be paused until the end of the mutual agreement procedure.[315]

[310] Income Tax Appellate Tribunal, Mumbai Bench, decision of 31 October 2014, *Mohan Manoj Dhupelia v Deputy Commissioner of Income Tax*, ITA nos 3544, 3545 and 3546/MUM/2011, [2014] and Income Tax Appellate Tribunal, Mumbai Bench, decision of 23 October 2017, *Ambrish Manoj Dhupelia v Deputy Commissioner of Income Tax*, ITA nos 5720 to 5729, 5751 and 5752/MUM/2016 [2017].

[311] Income Tax Appellate Tribunal, Mumbai Bench, decision of 15 November 2017, *Hasmukh I Gandhi v Deputy Commissioner of Income Tax* [2017].

[312] We would like to thank Rifat Azam for his contribution.

[313] See OECD, *Israel Dispute Resolution Profile*, www.oecd.org/tax/dispute/Israel-Dispute-Resolution-Profile.pdf.

[314] Israeli Tax Authority, Publication 23/2001, Mutual Agreement Procedure, 2001.

[315] Israeli Supreme Court, judgment of 7 April 2005, *Gtech Technologies v Income Tax Officer Kfar Saba*, ITA 1255/02 [2005].

6.3.2.3.4. Japan[316]

6.3.2.3.4.1. The System of Reinvestigation, Reconsideration and Lawsuits

The Japanese Constitution explicitly guarantees the right of access to courts.[317] The Act on General Rules for National Taxes[318] outlines the procedures to guarantee this right in the area of taxation. The Japanese tax authorities may apply assessments against a taxpayer if the taxpayer's tax return does not comply with the applicable tax code and the tax authorities believe that the taxpayer should pay a higher tax. If the taxpayer does not agree with the tax assessment, he or she may request reinvestigation by the tax authority within three months after becoming aware of the disposition or the day of the disposition.[319] If the request is rejected, the taxpayer may submit a request for reconsideration to the National Tax Tribunal.[320] Taxpayers may dispense with the reinvestigation proceedings above and may directly file a request for reconsideration to the National Tax Tribunal.[321]

The National Tax Tribunal is annexed to the National Tax Agency, but is supposed to act independently from the other national agencies, including the National Tax Authority.[322] However, many tax practitioners doubt this, as many examiners are seconded from regional tax bureaux and tax offices.[323] The director-general of the National Tax Tribunal appoints more than three examiners to each trial, and they form a panel to carry out the investigation and review of the request.[324] After the examination and the trial, the panel holds a meeting to draft a resolution through a majority vote. Once the resolution has been drafted, the director-general of the National Tax Tribunal makes a judgment based on the resolution.[325] No filing fees are necessary to request reconsideration with the National Tax Tribunal. The proceedings are not public. The National Tax Tribunal is the administrative authority and its decision is the final determination. If the tax authority receives an unfavourable decision from the National Tax Tribunal, it cannot appeal the decision to the courts.

When taxpayers are dissatisfied with a judgment on a request for review with the National Tax Tribunal, they may file a lawsuit against that judgment. As Japan has adopted the principle of utilising lawsuits only after requests for review, taxpayers may not generally file a lawsuit without first making a request for review.[326] Taxpayers may directly file a lawsuit for revocation when a judgment on a request for review has not been made within three months of the request.[327] The time limit for filing a lawsuit for revocation is six months after becoming aware of a disposition or judgment (subjective limitation) and within one year of the disposition or the judgment (objective limitation).[328] To commence a tax lawsuit, a court filing fee must first be paid, the amount of which is based on the amount of the claim.

The Japanese court system tries tax disputes in three tiers: district courts, high courts, and the Supreme Court. All tax disputes are tried by professional judges, but there is no special tax court. No arbitration exists for tax disputes, and a formal settlement is not available for tax disputes.

[316] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.
[317] Art 32 of the Japanese Constitution provides: 'No person shall be denied the right of access to the courts'.
[318] Act No 66 of 2 April 1962.
[319] S 81 of the Act on General Rules for National Taxes.
[320] S 77(1) of the Act on General Rules for National Taxes.
[321] S 75(1)(1) of the Act on General Rules for National Taxes.
[322] H Kaneko, *Tax Law* 1073.
[323] A Hironaka, M Kitamura, and M Noda, 'Chap 13 Japan' (2013) 1 *Tax Disputes & Litigation Review* 229, www.jurists.co.jp/en/articles/article_13741.html.
[324] H Kaneko, *Tax Law*, 1073.
[325] S 98(4), Act on General Rules for National Taxes.
[326] S 115(1), Act on General Rules for National Taxes.
[327] S 115(1)(1), Act on General Rules for National Taxes.
[328] S 14(1), Administrative Case Litigation Act.

However, when the tax authority considers it difficult to continue a lawsuit, it may voluntarily annul its previous tax assessment, and the taxpayer can withdraw the lawsuit following this annulment.

6.3.2.3.4.2. Right to Judicial Protection in Cross-Border Situations

Taxpayers in Japan do not have legal remedies that secure an ex-ante protection, thus preventing the administration from cooperating with the administration of another state. Taxpayers are not informed that the Japanese tax authority will make a request for information to the foreign tax authority. The Japanese courts have held that requests for exchange of information are not addressed to the taxpayers directly but are similar to requests to other (domestic) administrative bodies. Thus, citizens (and foreign corporations) do not have any legal rights to contest the exchange of information request.[329]

Japan has participated in JITSIC since 2007. In addition, the Convention on Mutual Administrative Assistance in Tax Matters entered into force for Japan in 2013. The Convention enables various kinds of administrative assistance in tax matters (exchange of information, assistance in recovery, and service of documents) among the tax authorities of many countries to properly deal with international tax evasion and tax avoidance. Therefore, the Japanese tax authority can engage in at least a simultaneous tax audit.

In Japan, taxpayers cannot question ex post the validity of information gathered in violation of their fundamental rights before the case goes to the court. Taxpayers discover that their information was obtained through information exchange only after the assessment. Therefore, if requested information does not lead to the assessment, taxpayers do not have any chance to know that the Japanese tax authority requested a foreign authority for information. When taxpayers appeal the assessment based on the required information to a court, they can question the validity of the information. However, as in many other countries, an assessment based on illegal audit is not always considered to be invalid. Only significant illegality negates the validity of the assessment.

There are no specific provisions on the implementation of tax treaties with regard to cases in which the National Tax Agency of Japan receives information from foreign tax authorities. In general, the use of information obtained by a foreign authority in the Japanese decision to impose taxation does not immediately give rise to a problem in the Japanese legal system. A problem arises only when the 'use' of the information by the Japanese authorities to which it was provided is contrary to the 'spirit of Japan's entire tax law'.

This can be guided by the parallel with international assistance in criminal proceedings. Under international assistance in criminal procedure, the use of evidence obtained from investigations carried out in other countries (especially where acts committed in other countries must be assessed as illegal under Japanese law or where Japanese law is silent on similar acts) is arranged as follows. First, in international assistance, evidence-gathering activities based on a request for assistance shall be carried out by the investigative agency of the requesting country by the laws and regulations of the requesting country. Therefore, it cannot be equated with the actions of the Japanese investigative agency. Second, under a sovereign state system, it is natural that each country's systems differ, and if the differences in systems result in uniform restrictions on use, international assistance itself cannot be established. If this is so, even if, as a phenomenon, non-observance of Japanese statutorily imposed regulations has occurred, it cannot be taken straightforwardly and assessed as illegal. Therefore, as a meta-theory that intervenes between the two, we can refer to the question whether or not the use of the evidence that is the product of

[329] Tokyo District Court, judgment of 17 February 2017, H25 Gyou-U, [2017]; Tokyo High Court, judgment of 26 October 2017, H29 Gyou-Ko, [2017]; Supreme Court of Japan, judgment of 6 July 2018, [2018].

the act harms the fundamental values embodied as the 'spirit of the entire criminal law' in Japan. However, if an act of evidence collection is contrary to the express provisions of Japan's Penal Procedure Law, there is no need to go back to the 'spirit of the entire Penal Procedure Law'. It is necessary and sufficient to focus on the specific method of evidence acquisition.

If the ideas of international assistance in criminal proceedings are applied to the international exchange of information under tax law, this seems to have an impact on the use of information in Japan, although it is considered to be quite limited. Whether or not the concept of criminal procedure can be applied directly to the procedures under tax law is another matter for consideration, but it may be a good starting point to refer to the experiences already accumulated in criminal procedures.

6.3.2.4. Europe

6.3.2.4.1. European Union

6.3.2.4.1.1. Legal Sources of the Access to Judicial Protection in the European Region

In Europe, the right to a fair trial is expressed in Article 6 of the ECHR and Article 47 of the EU Charter.

Under the ECHR, access to legal protection in tax matters is subject to the preliminary condition that the dispute relates to 'civil rights and obligations' or to 'any criminal charge'. Only the criminal limb allows for protection of this right in tax matters, since the ECtHR held that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.[330] Later case law narrowed down the broad implications of this statement, confirming that the ECHR requires the exercise of taxing powers in line with the rule of law and in a way that does not prevent the affected persons from the right to an effective legal remedy in case of violation.[331] Consequently, the protection of the right to a fair trial in tax matters under the ECHR is not precluded, but subject to the preliminary assessment of this requirement. However, due to this constraint, the interpretative path for such legal reconstruction in tax matters is rather laborious in the context of the ECHR.[332]

Article 47 of the EU Charter does not require these preliminary criteria and in that respect its scope is broader. However, the violation of such rights has to relate to the implementation of

[330] ECtHR, *Ferrazzini v Italy*, no 44759/98, (12 July 2001). For a critical view of this judgment see P Baker, 'The Decision in *Ferrazzini*: Time to Reconsider the Application of the European Convention on Human Rights to Tax Matters' (2001) 29 (11) *Intertax* 360–61. The ECtHR position in *Ferrazzini* strengthens and broadens its previous case law, starting with ECtHR, *X v Belgium*, no 793/60, (22 June 1960), which the ECtHR had already regarded as *jurisprudence constante* as of 1973. Furthermore, in 1999, the ECtHR expressly stated that fundamental rights do not apply to ordinary tax proceedings (ECtHR, *Vidacar SA and Opergrup SL v Spain*, nos 41601/98 and 41775/98, (20 April 1998)).

[331] See in particular ECtHR case law concerning criminal charges in tax matters under sec 6.3.2.4.1.2.3. below.

[332] The following matrix summarises the framework for the application of art 6 of the ECHR to tax matters:

Type of Case	Application of Article 6 of the ECHR	Rationale
Tax case not involving penalties	Not applicable	*Ferrazzini* dictum
Case with administrative tax penalties	Applicable when administrative penalty meet *Engel* Criteria	Penalties meeting *Engel* criteria are considered to be criminal charges within the meaning of the ECHR
Case partly involving criminal tax penalties	Applicable when administrative penalty meet *Engel* Criteria	If the penalties are 'indivisible', their criminal nature may re-characterise the whole case
Tax case exclusively involving criminal tax penalties	Applicable	Sanctions fall under the scope of criminal charges

EU law. Otherwise, the Charter does not apply.[333] Article 47 of the EU Charter includes two separate rights, namely to an effective legal remedy and to a fair trial. However, these rights are the procedural expressions of a common core principle that reflects the value of the rule of law in procedures and gives the affected persons legal instruments to protect their legal sphere against any measure that can adversely affect them: *ubi ius, ibi remedium*, in line with the standards of the right to a judicial review.[334]

Non-tax case law acknowledges as a starting point for the right to a fair trial the moment when the person is officially notified by the competent authority of an allegation that he has committed a criminal offence. In tax matters, case law has acknowledged the existence of this right at the time in which the taxpayer has been substantially affected by actions taken by the authorities as a result of a suspicion against him.[335]

This standard reflects the reference framework for securing effective judicial protection and the links between the various rights applicable under Article 6 of the ECHR contribute to the evaluation of the overall fairness of the proceedings. They apply in domestic situations. It is more complicated with regard to cross-border situations.

6.3.2.4.1.2. Domestic Situations

According to the established case law of the ECtHR, a remedy, in order to be considered as effective under the ECHR[336] has to possess certain qualities:[337]

- it must be available and sufficient;[338]
- it must be sufficiently certain not only in theory, but also in practice;[339]

[333] Art 51(1) of the Charter; CJEU judgment of 24 October 2019, joined cases C-469/18 and C-470/18, *IN and JM v Belgische Staat*, ECLI:EU:C:2019:895, [2019], with Opinion of Advocate General Kokott of 11 July 2019, ECLI:EU:C:2019:597 [2019].

[334] In the *Ravon* case (ECtHR, *Ravon and Others*, application no 189497/03, (21 February 2008)) the absence of a judicial review for an on-site inspection at the domicile of the taxpayer led the ECtHR to assess the violation of the right to fair trial. In the *Berlioz* case (CJEU, *Berlioz Investment Fund*) the Court of Justice clarified that this right also applies to administrative cooperation in the field of taxation. In particular, the affected persons have legal standing to require that the judiciary of the requested state checks that tax authorities have conducted mutual assistance in line with the rule of law. Such review must take place regardless of whether it already existed in the requesting state, thus limiting in fact the mutual recognition principle within the EU. However, only the addressee of an information order as affected person has such legal remedy, not the taxpayer or other third parties whose data are transferred, CJEU, joined cases C-245/19 and C-246/19, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, paras 80 and ff; for more judicial protection see the Opinion of Advocate General Kokott of 2 July 2020, on the *Etat du Grand-duché de* Luxembourg, ECLI:EU:C:2020:516 [2020] and, in this book, see under sec 6.1.2.4.1.2.2. above.

[335] ECtHR, *Ibrahim and Others v the United Kingdom* [GC], nos 50541/08 and 3 others, (13 September 2016), para 249. In tax matters, the ECtHR acknowledged this right in a case concerning the application of Article 6 of the ECHR to the notification of the indictment by the public prosecutor (see ECtHR, *Ragnar Thorisson v Iceland*, no 52623/14, (12 February 2019), para 10).

[336] Art 13 of the ECHR. The right to an effective remedy is guaranteed under art 47 of the EU Charter, which provides wider protection than art 13 of the ECHR.

[337] For the meaning of 'remedy' within art 13 of the ECHR, see the collection of case law provided in the Council of Europe 'Guide to good practice in respect of domestic remedies', adopted by the Committee of Ministers on 18 September 2013, 10 and ff; the Handbook on European Law relating to access to justice (2016), prepared by the EU Agency for Fundamental Rights and the Council of Europe, 91 and ff.

[338] The existence of a single final judicial decision by a court of first instance does not per se satisfy that this requirement is met (see ECtHR, *Sürmeli v Germany*, no 75529/01, (8 June 2006), para 113).

[339] The absence of case law may be regarded as an indicator of the uncertainty of the legal remedy (see ECtHR, *Horvat v Croatia*, no 51585/99, (26 July 2001), para 44). The conditions for obtaining judicial scrutiny must not be too high (see ECtHR, *Smith and Grady v United Kingdom*, nos 33985/96 and 33986/96, (25 July 2000), para 138). Moreover, administrative practice may not unjustifiably hinder the remedies established by law (see ECtHR, *Menteş v Turkey*, no 23186/94, (28 January 1997), para 89).

- it must be effective in practice as well as in law, having regard to the individual circumstances of the case;[340]
- a 'remedy' must be such as to allow the competent domestic authorities both to deal with the substance and to grant appropriate relief.[341]

Neither Article 13 of the ECHR, nor Article 47 of the EU Charter require any particular form of remedy; it is the nature of the right at stake that has implications for the type of remedy that a state is required to provide. In addition, even if a single remedy does not by itself entirely satisfy the requirements of Article 13 of the ECHR, the aggregate of remedies provided for under domestic law may do so.[342]

6.3.2.4.1.2.1. Independent and Impartial Tribunal The right to judicial protection entails the specific rights of access to justice and to file appeals[343] before an independent and impartial tribunal established by law, to a public hearing and to obtain justice in reasonable time, as well as additional specific rights that secure the fairness of the judicial procedure.

The effective access to justice presupposes that the rules governing access are clear[344] and that legal assistance is secured.[345]

Article 6 of the ECHR requires that protection applies to cases where either civil, or criminal (or both) aspects come into play. The judicial interpretation by the ECtHR of 'independent and impartial tribunal established by law' embraces four concepts developed by ECtHR case law that should characterise the bodies securing judicial protection, namely a) independence, b) impartiality, c) the existence of a tribunal and d) established by law. The lack of the first two requirements may undermine the effectiveness of the right to a fair trial,[346] but a similar framework may occur when courts are not established by law, the composition of the bench lacks legal basis[347] or the members are either appointed by the government or for short periods of time.[348]

Taxpayers have no direct access to the CJEU. There is a separation of competences between the courts of the Member States and the CJEU. The latter has exclusive power to interpret European

[340] See ECtHR, *N v Sweden*, no 11366/85, (1986); and *Stewart-Brady v United Kingdom*, nos 27436/95 and 28406/95, (1997).

[341] See ECtHR, *Hatton and Others v United Kingdom*, no 36022/97, (8 July 2003), para 142, where the ECtHR indicated that a review based solely on irrationality, unlawfulness and patent unreasonableness without the opportunity to address the substance of the case is not enough for detecting the existence of an effective legal remedy under art 13 of the ECHR.

[342] See, for example, the reiteration of the general principles concerning the concept of 'effective remedy' under art 13 ECHR in ECtHR (Grand Chamber), *M.S.S. v Belgium and Greece*, no 30696/09, (21 January 2011), paras 288–293.

[343] The ECtHR found that withdrawal of appeals upon agreement with the Advocate General that the sentence imposed by the first-instance court would be remitted violated the applicants' right of access to a court, in particular, their right of appeal (ECtHR, *Marpa Zeeland BV and Metal Welding BV v the Netherlands*, no 46300/99, (9 November 2004), paras 46–51). The ECtHR also assessed a violation of the right of access to justice in a VAT case in which there was no possibility of having the decision of an administrative authority reviewed by the higher Courts (ECtHR, *Silvester's Horeca Service v Belgium*, no 47650/99, (4 March 2004), paras 28–30).

[344] *cf* ECtHR, *de Geouffre de la Pradelle v France*, no 12964/87, (16 December 1992), para 35; ECtHR, *Maširević/Serbia*, no 30671/08, (11 February 2014), para 48; ECtHR, *Bellet/France*, no 23805/94, (4 December 1995), paras 37 and ff.

[345] Art 47(2) of the EU Charter specifies that 'everyone shall have the possibility of being advised, defended and represented'. This may imply the right to legal assistance for those who lack sufficient resources. For the same reasons, art 6(3)(a) and (e) of the ECHR includes the right to linguistic assistance in respect of criminal charges.

[346] See ECtHR, *Feldman v Ukraine*, nos 38779/04 and 76556/01, (8 April 2010), paras 96–100, concerning a case of courts lacking the impartiality and independence requirements.

[347] Lay judges must also fulfil the conditions of art 6 ECHR. Otherwise the court is not a 'tribunal established by law' (see ECtHR, *Posokhov v Russia*, no 63486/00, (4 March 2003), paras 39–44).

[348] Similar problems may arise where there are part-time judges who may have conflicts of interest. Several countries apply specific rules in order to minimise the negative implications that may otherwise arise.

Union law. In such a context, the preliminary reference mechanism under Article 267 TFEU establishes a framework for cooperation. The courts of the Member States are required to interpret the EU law applicable in a case pending before them. Under certain conditions, national courts may or shall request the CJEU to provide a definitive interpretation of Union law or the validity of Union acts. This preliminary reference mechanism is to guarantee the uniform application of EU law throughout the Union. It presupposes a request by a national court or tribunal as to the meaning of EU law.[349] The CJEU has excluded bodies conducting administrative review in tax matters from qualifying as tribunals.[350] Permanent arbitration bodies[351] can do so. However, taxpayers may sometimes have to exhaust administrative review procedures before having a tribunal decide and possibly submit their case to the CJEU.[352]

Judicial interpretation acknowledged that the right to a public hearing can be waived, including by the behaviour of the taxpayer,[353] and that written submissions may, in tax matters, be reasonably equivalent to fulfil the requirements of the oral hearing.[354]

6.3.2.4.1.2.2. Within a Reasonable Time The standard protection of the right to a fair trial under Article 6 of the ECHR, which constitutes the minimum standard also for EU law purposes, includes the taxpayer's right to obtain justice within a reasonable time. This right has particular importance for taxpayers, as tax proceedings can often be quite lengthy due to various structural reasons connected with tax procedure. These are related to the complex nature of the cases, involving, in particular, difficult factual and legal questions in the area of double taxation, tax avoidance techniques etc. Moreover, the obligation of prior exhaustion of administrative reviews, which in many systems constitutes a precondition for accessing justice, may also prolong the procedures.[355]

In line with the judicial interpretation on Article 6 of the ECHR, the period to be taken into consideration begins on the day on which a person is charged with a 'criminal offence', covers the whole proceedings and ends with the final judgment determining the charge. Furthermore, the

[349] See art 267 TFEU. When judging whether a national court is a tribunal within the meaning of art 267 TFEU, the CJEU takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. See CJEU, judgment (Grand Chamber) of 21 January 2020, *Banco de Santander*, case C-274/14, ECLI:EU:C:2020:21, [2020], para 51.

[350] See inter alia CJEU, judgment of 30 May 2002, *Walter Schmid*, case C-516/99, ECLI:EU:C:2002:313, [2002], para 35 (on the Austrian *unabhängige Finanzsenate*), and CJEU, *Banco de Santander*, para 77 (on the Spanish *Tribunales Económico-Administrativos*).

[351] See the case of the Portuguese optional arbitration mechanism run by the *Tribunais Arbitrais Tributários*, incorporated in the Portuguese judicial system by virtue of the amendment to art 209 of the Portuguese Constitution, which CJEU, judgment of 12 June 2014, *Ascendi*, case C-377/13, ECLI:EU:C:2014:1754, [2014], para 34 regarded as tribunals for the purposes of art 263 TFEU.

[352] This problem currently arises in Spain as a consequence of the obligation of prior exhaustion under the *Ley General Tributaria* and the position held in CJEU, *Banco de Santander*.

[353] ECtHR, *H.B. v Switzerland*, no 17951/91, (18 October 1995).

[354] ECtHR, *Jussila v Finland,* no 73053/01, (23 November 2006). In para 43, the reasoning stated that this may apply to cases of tax surcharges, which differ from the hard core of criminal law.

[355] See further on this P Pistone, 'General Report', in P Pistone (ed), *Tax Procedures*, (IBFD, 2020), 3 and ff. From the perspective of access to justice on the rights protected by EU law, this type of issue has become more critical in Spain after the CJEU decided (CJEU, *Banco de Santander*, cited) that the bodies in charge of the administrative review could not be regarded as tribunals within the meaning of art 267 TFEU. A referral to the CJEU may in fact not take place until the case reaches a tribunal, which may take several years. In a similar context, concerning the rules applicable to tax litigation in Italy until 1992, the CJEU assessed in tax matters a violation of the right to justice in a reasonable time (CJEU, judgment of 29 March 2012, *Belvedere Costruzioni*, case C-500/10, ECLI:EU:C:2012:186, [2012]) in a case in which the procedures had continued for a period of almost 30 years.

reasonableness of the length of proceedings must be determined in the light of the circumstances and with reference to the complexity of the case, the taxpayer's conduct and that of the authorities, and what was at stake for the taxpayer in the dispute.[356]

In the light of these criteria, the ECtHR found the following durations of tax proceedings unreasonable:

- five years and three months in *Danielli v Italy*,[357] where certain periods of inactivity were attributable to the state;
- six years and eight months in *Janosevic v Sweden*,[358] despite the relative complexity of the case;
- 11 years and two months in *Nielsen v Denmark*,[359] where the case concerned so-called tax asset stripping with complicated financial transactions and several persons involved, who were intricately interconnected (the case was, however, civil in nature).

There are quite a few examples of cases where the complexity of tax matters justified the long duration of proceedings, for example *Hozee v the Netherlands*[360] (four years and seven months) and *H.H. v the Netherlands*[361] (investigation and trial on charges of tax fraud which lasted nine years and six months). Indeed, compliance with the requirement of a reasonable time has to be examined in the particular circumstances of each case. However, no complexity can justify an unreasonable duration of tax procedure, such as the one coming close to a period of 30 years, which the CJEU regarded as in breach of the right to a fair trial.[362]

6.3.2.4.1.2.3. Fair Trial The core part of the right to a fair trial relates to the overall fairness of the proceedings, which is an umbrella term, encompassing in the ECtHR's case law various features of the proceedings, such as (1) equality of arms and adversarial proceedings, (2) reasoning of judicial decisions, (3) the right to remain silent and not to incriminate oneself, and the use of evidence obtained unlawfully or in breach of Convention rights.

First, in judicial interpretation, the application of equality of arms protects the rights of the litigant parties to present their views and evidence,[363] and to debate them in line with the adversarial principle (*audi alteram partem*)[364] under conditions that place neither of them at a disadvantage[365] and in a way that contributes to a fair assessment by the judiciary. This also shows that it is often difficult to differentiate between the specific implications of the right to an effective legal remedy and to a fair trial, both constituting procedural expressions of the same general principle of the rule of law and the general right to defence. Article 6(3) of the ECHR specifies the right to fair trial in criminal proceedings as including the right to defend oneself in person or through legal assistance and the right to examine witnesses. They are not an end in themselves, but their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole.[366]

[356] See, for example, ECtHR, *Frydlender v France* [GC], no 30979/96, (27 June 2000), para 43.
[357] ECtHR, *Danielli v Italy*, no 20363/92, (6 September 1995).
[358] ECtHR, *Janosevic v Sweden*, no 34619/97, (23 July 2002), paras 94–95.
[359] ECtHR, *Nielsen v Denmark*, no 44034/07, (2 July 2009).
[360] ECtHR, *Hozee v the Netherlands*, no 21961/93, (22 May 1998), paras 50–55.
[361] ECtHR, *H.H. v the Netherlands*, no 23229/94, (1 July 1997), paras 43–54.
[362] CJEU, *Belvedere Costruzioni*, para 26.
[363] See, for example, ECtHR, *Brandstetter v Austria*, nos 11170/84 and 2 others, (28 August 1991), para 67.
[364] The right to an adversarial trial is closely related to equality of arms. Therefore, a violation of art 6, para 1 of the ECHR can also arise from an analysis of the two concepts bundled together (ECtHR, *J.J. v the Netherlands*, no 21351/93, (27 March 1998), para 43).
[365] ECtHR, *Foucher v France*, para 34.
[366] ECtHR, *Mayzit v Russia*, no 63378/00, (20 January 2005), para 77.

Three specific expressions of the right to defence have raised critical issues in tax matters involving criminal charges:

(1) The taxpayer's right to have adequate time and facilities for the preparation of his defence implies that the substantive defence activity on his behalf may comprise everything which is 'necessary' to prepare for the trial.[367]
(2) The right of taxpayers to defend themselves in person, or through legal assistance of their own choosing, or to be given it free when the interests of justice so require.[368]
(3) Limitations are often recorded in practice[369] in respect of the taxpayer right to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.[370]

Secondly, under Article 48 of the EU Charter, the right to an effective defence along with the equality of arms principle requires that the parties to the dispute should have access to all information that may affect them during the procedure.[371] This right is also known as *habeas data*.[372] In cases involving interference with the rights secured under the ECHR (eg the right to property), the ECtHR normally seeks to motivate its judgments by establishing whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical[373] and, more rarely, admit a violation of the right to fair trial solely on the ground that the judicial decision lacked reasoning.[374]

Thirdly, the right to remain silent and the privilege against self-incrimination, also known as the *nemo tenetur* principle, have developed in the framework of case law concerning the right to a

[367] In the *Yukos* case, the ECtHR found a violation of this right, after ascertaining that the applicant company had not had sufficient time to study the case file at first instance (four days for at least 43,000 pages) or to make submissions and, more generally, to prepare the appeal hearings. (ECtHR, *OAO Neftyanaya Kompaniya Yukos v Russia*, no 14902/04, (20 September 2011), paras 536–42).

[368] The ECHR held that the interests of justice did not require in a VAT case that a counsel with extensive experience and specialisation in this field be instructed on the applicant's behalf in order to secure an effective protection of the right to defence (ECtHR, *Georgiu v United Kingdom*, no 40042/98, (16 May 2000)).

[369] ECtHR, *Chap Ltd v Armenia*, no 15485/09, (4 May 2017).

[370] For the general standard of protection of this right see ECtHR, *Al-Khawaja and Tahery v the United Kingdom* (Grand Chamber), nos 26766/05 and 22228/06, (15 December 2011); ECtHR, *Schatschaschwili v Germany*, no 9154/10, (15 December 2015).

[371] In CJEU, judgment of 21 November 2018, *Fontana*, case C-648/16, ECLI:EU:C:2018:932, [2018], paras 42–44, the CJEU implicitly addressed this issue in light of the effective protection of the right of defence in connection with the possibility to overturn the so-called *studi di settore*, ie statistical analysis used by Italian tax authorities to single out cases of tax non-compliance. It made a more comprehensive statement on the right of access to the file held by tax authorities and concerning the taxpayer in judgments of CJEU, *Ispas*, para 31; and of CJEU, *Glencore Agriculture Hungary*, paras 51 and ff. Notably, the CJEU indicated that such a right of access also covers relevant documents for the exercise of the right of defence by the taxpayer that have not been used by tax authorities.

[372] The Argentine Constitution includes a specific provision on *habeas data* (art 43).
The existence of *habeas data* in connection with the effective right to defence in tax procedures has been acknowledged by CJEU, *Ispas*, para 39. Interestingly, the facts of the case concerned the levying of VAT in a purely domestic situation. Furthermore, in CJEU, judgment of 1 October 2015, *Bara and Others*, case C-201/14, ECLI:EU:C:2015:638, [2015], paras 43 and ff, the CJEU held that EU law precludes the transfer of data between two public authorities of the same Member State without informing the affected persons. Consequently, this judgment confirms the existence of the right for the affected persons to access information concerning them. Previously (CJEU, judgment of 22 October 2013, *Sabou*, case C-276/12, ECLI:EU:C:2013:678, paras. 48 and ff), the CJEU had excluded a taxpayer right to be informed about a request for mutual assistance to another EU Member State. The later *Berlioz* case should not be read as implying a limitation on *habeas data*. The core of the CJEU, *Berlioz Investment Fund* was not to have direct access to the relevant information exchanged by tax authorities, but to make sure that they have exercised mutual assistance in line with the requirements of the rule of law.

[373] See ECtHR, *Moreira Ferreira v Portugal*, (Grand Chamber), no 19867/12, (11 July 2017), para 84.

[374] An exception would apply when the domestic courts ignored a specific, pertinent and important point raised by the applicant (see, for example, ECtHR, *Rostomashvili v Georgia*, no 13185/07, (8 November 2018), para 59).

fair trial under Article 6 of the ECHR. Even though not expressly mentioned by Article 47 of the EU Charter, such rights are generally recognised as international standards which lie at the heart of the notion of a fair procedure and are thus to be protected also under EU law.

The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and applies from the notification of the charge of a criminal offence, together with the right to legal assistance.[375]

It is difficult to determine from what moment on this right may apply in tax cases involving crimes. However, the judicial interpretation by the ECtHR allows us to reach two conclusions.

First, the taxpayer's right to remain silent arises, in particular, when the applicant becomes substantially affected by the investigation, including at the stage of tax audits. In analysing that moment we should take into account the special features of the 'investigation stage' of tax proceedings.[376] In particular, whether the authorities are contemplating a criminal prosecution or whether substantial tax penalties can be imposed on the taxpayer within that stage.[377]

Second, the nature of the right to remain silent does not exclude the taxpayer's obligation to send the necessary information for the effective functioning of taxes to the tax office. The right not to incriminate oneself does not act as a prohibition on the use of compulsory powers to require taxpayers to provide information about their financial affairs. Indeed, the obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is a common feature of the tax systems of member states and it would be difficult to envisage them functioning effectively without it.[378] However, where it comes to criminal cases, tax authorities have to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the 'person charged'.[379]

Consequently, according to the ECtHR, the privilege against self-incrimination that taxpayers may invoke against tax authorities, may be summarised as follows:[380]

- Tax authorities can request the taxpayer to disclose information which is relevant and crucial for the assessment of taxes and the taxpayer has the obligation to provide such information.[381]
- A distinction must be made between information that can be obtained only from the taxpayer (will-dependent information) and information that exists independently of the taxpayer's will (will-independent information).
- Will-dependent information obtained through coercion can form the basis for tax assessments, but it cannot form the basis for the initiation of criminal proceedings and sanctions against the taxpayer.

[375] ECtHR, *Ibrahim and Others v the United Kingdom* [GC], paras 272–73.

[376] ECtHR, *Abas v the Netherlands*, no 27943/95, (26 February 1997).

[377] See, for example, ECtHR, *JB v Switzerland*, no 31827/96, (3 May 2001), paras 47–50 and 66.

[378] ECtHR, *van Weerelt v the Netherlands*, no 784/14, (16 June 2015), para 56. The ECtHR noted that the Dutch Supreme Court acted pre-emptively to prevent the misuse of the information for the purposes of determining a 'criminal charge' against the taxpayer (para 62), providing sufficient protection against self-incrimination in line with the principles established by the ECtHR (para 66). See also ECtHR, *de Legé v the Netherlands*, no 58342/15, pending.

[379] ECtHR, *JB v Switzerland*, para 64, commented on by R Luja, 'Accounting Disclosure of Tax Liabilities, Fair Trial and Self-incrimination: Should the European Commission endorse IFRS in the light of the European Human Rights', in Kofler, Poiares Maduro and P Pistone (eds), *Human Rights and Taxation*, (IBFD, 2011) 263. In this case, tax authorities requested the taxpayer to explain the source of the investment income, which had given rise to the assessed interest income.

[380] For additional issues that arise, such as timing issues and the existence of a 'charge', see analyses in Luja, 'Accounting Disclosure of Tax Liabilities', and N Čičin-Šain, 'New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?' (2019) 11 *World Tax Journal* 77.

[381] Taxpayers cannot, however, be compelled to provide evidence of offences they allegedly committed, even in view of the duty to disclose information to the authorities, see ECtHR, *Funke v France*, no 10828/84, (25 February 1993), para 44.

However, in practice, drawing the line between will-dependent and will-independent information and between tax and criminal proceedings may prove to be very tricky, especially in a cross-border context.[382]

6.3.2.4.1.2.4. Use of Evidence Obtained The content of Article 48 of the EU Charter should be read in a way that allows the parties to present evidence in their favour, provided that they do so in line with the applicable time requirements that preserve legal certainty and with admissible evidence. Moreover, rules on evidence may not have the effect of making it virtually impossible or excessively difficult to exercise the right.[383] That is the case for statutory presumptions (or resulting from the practice of tax authorities),[384] especially when irrefutable,[385] for rules of evidence reversing the burden of proof upon the taxpayer in lack of serious grounds that justify it,[386] or for the exclusion of any kind of evidence other than documentary evidence.[387] However, this should not prevent documentary evidence from having de facto a stronger persuasive value for the tribunals, which have full discretionary powers as to the assessment of the relevance of the submitted evidence.

The last feature of the proceedings covered by the notion of 'fairness' concerns the use of evidence that has been obtained unlawfully. Neither Article 6 of the ECHR nor European Union law lay down specific rules on the admissibility of evidence, which is primarily a matter for regulation under national law and remains within the discretion of the domestic courts.[388] Various national courts have addressed the issue of whether illegally obtained evidence may be used in tax procedures. The prevailing opinion has answered this question positively, especially taking into account the particularly serious nature of tax evasion cases in which the national courts have reached these conclusions.[389] There is no conclusive case law at the European level on the concept of admissible evidence, and illegally obtained evidence is not per se excluded.[390] From the perspective of the right to a fair trial, the question at stake therefore turns into whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.

Three specific criteria can be mentioned in this respect, namely (1) the opportunity for the taxpayer to challenge the authenticity of the evidence and to oppose its use, (2) the circumstances in which the evidence was obtained (including whether these circumstances cast doubt on reliability or accuracy of the evidence); and (3) the decisive nature of the evidence in question for the outcome of the criminal proceedings.

[382] *cf* sec 6.3.2.4.1.3. below.

[383] CJEU, judgment of 9 November 1983, *Amministrazione delle finanze dello Stato v San Giorgio*, case 199/82, ECLI:EU:C:1983:318, [1983], para 14.

[384] CJEU, judgment of 2 October 2003, *Weber's Wine World and Others*, case C-147/01, ECLI:EU:C:2003:533, [2003], para 114.

[385] CJEU, judgment of 18 December 1997, Garage Molenheide and Others v Belgische Staat, joined cases C-286/94, C-340/95, C-401/95 and C-47/96, ECLI:EU:C:1997:623, para 52.

[386] CJEU, judgment of 8 March 2017, *Euro Park Service*, case C-14/16, ECLI:EU:C:2017:177 [2017], para 53; CJEU, judgment of 26 February 2019, joined cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 and Others*, paras 142 and ff and CJEU, joined cases C-116/16 and C-117/16, T Danmark and Y Denmark, paras 142 and ff. It should be noted that in the latter cases, taxpayers could have presented the evidence that the companies had a function other than being mere conduits.

[387] CJEU, *Amministrazione delle finanze dello Stato v San Giorgio*, para 14, CJEU, judgment of 21 September 2000, *Michailidis*, case C-441/98, ECLI:EU:C:2000:479, [2000], para 36, and CJEU, judgment of 30 June 2011, *Meilicke and Others*, case C-262/09, ECLI:EU:C:2011:438, [2011], paras 45 and ff.

[388] See ECtHR, *Khodorkovskiy and Lebedev v Russia*, nos 11082/06 and 13772/05, (25 July 2013), para 700; and CJEU, *Collée*, para 36, and CJEU, *Twoh International*, para 25.

[389] *cf* eg German Federal Constitutional Court, order of 13 May 2015, 2 BvR 616/13, [2015]; P Pistone, 'General Report', in P Pistone (ed), *Tax Procedures*, (IBFD, 2020), 3 and ff.

[390] ECtHR, *Pélissier and Sassi v France*, no 25444/94, (25 March 1999), para 45.

6.3.2.4.1.3. Right to Judicial Protection in Cross-Border Situations

Specific problems of access to justice may arise in connection with cross-border tax dispute settlement. Mutual agreement procedures and arbitration as applicable under tax treaties may be regarded as quasi-judicial procedures, but do not secure the effective participation of taxpayers.[391] Furthermore, judicial protection is not effectively secured at the cross-border level due to the absence of a single judicial instance that can address issues involving both countries.

6.3.2.4.1.3.1. General Issues The European region is at the forefront of increased cross-border cooperation between tax authorities that results from the projects of global tax transparency and the fight against base erosion and profit shifting. The European Courts, namely the ECtHR and the CJEU, have heard some important cases that deal with various aspects of the protection of taxpayers' rights in cross-border situations.

Judicial protection in cross-border situations is addressed in connection with cross-border exchange of information[392] and dispute settlement.[393]

6.3.2.4.1.3.2. Right to Rule of Law Protection in Connection with Mutual Assistance in the Exchange of Information Taxpayers enjoy certain rights and guarantees in relation to how their information is treated. Such guarantees are mainly derived from Article 6 of the ECHR and Article 47 of the EU Charter that provide for the right to a fair trial, on the one hand, and Article 8 of the ECHR as well as Articles 7 and 8 of the EU Charter, on the other, that provide for the right to respect private and family life, home and correspondence and to data protection.[394]

Four groups of issues concerning information exchanged across borders and the right to judicial protection deserve particular attention:

(1) the exchange of information without the taxpayers' or third parties' knowledge that information is exchanged;
(2) the existence of different standards of protection between countries and its impact on exchange of information;
(3) the right to judicial protection in respect of the use and exchange of illegally obtained information; and
(4) finally, the implementation of the privilege against self-incrimination and the prohibition on double jeopardy may be more difficult in cross-border situations.

(1) The exchange of information that takes place without the taxpayer knowing[395] may violate the fundamental rights to data protection[396] and to judicial protection. The European courts have shown tolerance for the practice of mutual assistance without actual rights for the affected persons[397] as long as this is conducted in line with the requirements established by law.

[391] Tax literature denies the judicial nature of such procedures (see P Pistone, 'General Report', in P Pistone (ed), *Tax Procedures*, (IBFD, 2020), 100 and ff). For further analysis of the access to mutual agreement procedures and arbitration in cross-border tax matters see below under sec 6.3.2.4.3.4.

[392] See further under sec 6.3.2.4.1.3.2.

[393] See further under sec 6.3.2.4.3.4.

[394] See P Pistone, 'The EU Charter of Fundamental Rights' in B Terra, P Wattel (eds), *European Tax Law*, VII ed. (Wolters Kluwer, 2018), 153.

[395] In relation to the right to be informed, see CE Weffe, 'The Right to Be Informed: The Parallel between Criminal Law and Tax Law, with Special Emphasis on Cross-Border Situations' (2017) 9 *World Tax Journal* 431.

[396] See sec 8.2.3. below.

[397] In the *Sabou* case, cited, the CJEU denied the taxpayer's right to be informed of a request for assistance from one Member State to another one, to take part in formulating the request addressed to the requested Member State, and to take part in an examination of witnesses organised by the requested Member State. See further on this case CFE

However, in the *Berlioz* case,[398] the CJEU re-established the right to judicial protection of addressees of information orders in respect of cross-border exchange of information in the requested Member State. Luxembourg had abolished that right in the context of the anti-BEPS movement. The CJEU recalled that the protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person constituted a general principle of EU law.[399] Therefore, a person from whom information was requested had the right under Article 47 of the EU Charter to be informed in a way that allowed him to challenge the validity of the request, without at the same time having the right to have full access to the request for information. According to our opinion, all – the addressee of an information order,[400] the taxpayer concerned[401] and third parties affected by the information order[402] – should have a legal remedy in the requested Member State. The CJEU, however, only guarantees a legal remedy to the addressees.[403]

In all its case law, the CJEU, by accepting legitimate limitations to fundamental rights, seeks to safeguard the effectiveness of information exchanges within the EU.[404] In *Sabou*, the limitation was of a temporal nature: the taxpayer could not rely on fundamental rights during the early stages of the collection of information to challenge the lawfulness of the procedure.[405] In *Berlioz*, the limitation was of a quantitative nature: the relevant person could not have access to the full text of the request for information. Yet, the person must have access to a minimum of information referred to in Article 20(2) of Directive 2011/16.[406]

The impact of the *Berlioz* case is significant. First, it shows that tax transparency is not absolute and that fundamental rights, such as the right to an effective remedy, can limit its application. Second, after *Berlioz* it is very difficult for the tax authorities to rely on 'fishing expeditions', as the information holder may effectively challenge the validity of an information order, at least in cases of obvious lack of foreseeable relevance of the request. Last but not least, it must be pointed out that in order to conduct its judicial review, the court in the requested Member State should have access to the request for information sent by the requesting Member State. That court may, if necessary, ask the requested authority for the additional information which it may have obtained from the requesting authority and which may be necessary in order to rule out, from its own perspective, the possibility that the requested information manifestly has no foreseeable relevance.[407]

CJEU Task Force, 'Opinion Statement ECJ-TF 2/2014', 318; Chaouche and Haslehner, 'Cross-Border Exchange of Tax Information', 179. Similarly, as long as information is conducted in line with the rule of law and reasonable margins of appreciation, the ECtHR case law excludes an obligation to inform the taxpayer, which is the subject of the exchange of information (ECtHR in *Othymia Investments BV v the NL*; ECtHR, *GSB v Switzerland*, no 28601/11, (22 December 2015)). For further analysis of tax transparency and mutual assistance see at sec 8.2.3.2. below.

[398] CJEU, *Berlioz Investment Fund*. For comments see, indicatively, Pantazatou, 'Luxembourg: Fundamental rights in the era of information exchange – The Berlioz case' 127; CFE CJEU Task Force, 'Opinion Statement ECJ-TF 3/2017' 93; B Michel, 'Exchange of Information on Request', 90.

[399] CJEU, *Berlioz Investment Fund*, para 51, with further references to CJEU case law.

[400] Opinion of Advocate General Kokott of 2 July 2020, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, joined cases C-245/19 and C-246/19, paras 52 and ff.

[401] Ibid, paras 59 and ff.

[402] Ibid, paras 98 and ff.

[403] CJEU, judgment of 25 November 2021, État du Grand-duche de Luxembourg (Droit de recours contre une demande d'information en matiere fiscale), joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795. This standard seems to differ from the one acknowledged in a purely domestic situation involving the transfer of data between tax and social security authorities (see CJEU, *Bara and Others*). Critically T Sendke, 'Rechtsschutz beim Informationsaustausch auf Ersuchen innerhalb der EU – zugleich Anmerkung zum Urteil des EuGH v (6 October 2020) – C-245/19 and C-246/19' (2020) *ISR* 431 and ff.

[404] On tax transparency see further under sec 8.2.3.

[405] CJEU, *Sabou*.

[406] CJEU, *Berlioz Investment Fund*, para 100.

[407] CJEU, *Berlioz Investment Fund*, para 92.

(2) This brings us to analyse the second issue, namely the exercise of the right to legal protection in connection with the exchange of information between countries that have different standards of data protection.[408]

Tax authorities have a duty to protect the information collected in the course of exercising their duties. A taxpayer sharing information with the tax administration of his state of residence is covered by the information protection legislation of that state and the taxpayer also has the (judicial) means to enforce such protection at the level guaranteed by domestic legislation. However, once exchanged, this information is protected in the other state according to the level of protection that applies in the recipient state. Under Article 26(2) of the OECD Model Convention, the recipient state is obliged to treat any information it receives in the same manner as it treats information obtained under its own domestic laws. This guarantee essentially reflects the principle of national treatment. Within the EU this may not be such a problem, as the level of protection guaranteed in all Member States may be considered comparable.[409] This is particularly so for individuals who enjoy the protection of the GDPR.[410] However, for exchanges between the EU and third countries, taxpayers cannot just rely solely on an assumption that the level of protection in the recipient country will not be lower than that accorded in the requested EU Member State. For example, the CJEU recorded lower standards of data protection than the US in non-tax case law.[411]

(3) In principle, all information that a tax authority possesses may be exchanged with other tax authorities, on the basis of specific international agreements.[412] If the information exchanged was obtained under questionable circumstances, such as, for instance, in the case of stolen information, the courts should be able to verify whether the use and exchange of illegally obtained evidence can be reconciled with the rule of law and the right to data protection and, if needed, prohibit its use after taking all relevant elements into account.[413] The question then arises, whether illegality refers to the legal order of the requesting or the requested Member State or to both.

The ECtHR accepts the justification of the interference with the rights protected under Article 8 of the ECHR only on an exceptional basis, and not if it is a widespread practice of the tax authorities.[414] In *K.S. and M.S. v Germany*, the ECtHR observed that the applicable safeguards provided by the German legislation and jurisprudence in such a context could be considered adequate, effective and compliant with Article 8 of the ECHR.[415] Indeed, there is no absolute rule stating that evidence which has been acquired in violation of the procedural rules cannot be used in criminal proceedings.[416] The ECtHR has explicitly stated that the ECHR does not lay

[408] On data protection issues see further under sec 8.2.

[409] See ibid.

[410] See however art 25 of Directive 2011/16, concerning data protection, where it is provided that the rights to data protection are superseded by the need for the effective functioning of the exchange of information. For a more thorough analysis of issues involving the application of GDPR in tax matters see sec 8.2.2.4.1.1. below.

[411] CJEU, judgment of 6 October 2015, *Schrems*, case C-362/14, ECLI:EU:C:2015:650, [2015]. Considering the direct relevance of these issues for data protection, our report discusses the potential implications of this judgment on tax matters in sec 8.2.3.3.4.1.3. below.

[412] The OECD Global Forum Working Group on Effective Exchange of Information has developed a Model Agreement on the Exchange of Information in Tax Matters (Model TIEA), www.oecd.org/ctp/exchange-of-tax-information/taxinformation exchangeagreementstieas.htm.

[413] The ECtHR has rejected claims concerning the admissibility of evidence stolen by bank employees and thus illegally purchased by the German authorities (ECtHR, *K.S. and M.S. v Germany*, no 33696/11, (6 October 2016)).

[414] In ECtHR, *K.S. and M.S. v Germany*, para 52, the ECtHR refers to the fact that no evidence was produced before it to indicate that the German authorities deliberately and systematically breached domestic and international law in order to obtain information relevant to the prosecution of tax crimes.

[415] ECtHR, *K.S. and M.S. v Germany*, para 47.

[416] ECtHR, *K.S. and M.S. v Germany*, paras 28 and 51, and ECtHR, *Gäfgen v Germany*, no 22978/05, (1 June 2010), paras 69 and ff; CJEU, judgment of 16 June 1998, *Lemmens*, case C-226/97, ECLI:EU:C:1998:296, [1998], paras 35 and ff, CJEU, judgment of 10 April 2003, *Steffensen*, case C-276/01, ECLI:EU:C:2003:228, [2003], para 80, CJEU, *IN and JM v*

down rules on evidence as such: 'It cannot therefore exclude as a matter of principle and in the abstract that evidence obtained in breach of domestic law may be admitted.'[417] Accordingly, the question of whether the use as evidence of information obtained in violation of Article 8 of the ECHR – right to respect for private and family life – has to be determined with regard to all the circumstances of the case, including respect for the applicant's defence rights and the quality and importance of the evidence in question.[418]

(4) Fourth, the mandatory disclosure rules on possible tax avoidance schemes, contained in DAC 6,[419] may raise critical issues from the perspective of the privilege against self-incrimination. The taxpayer himself who is using the tax scheme[420] can be obliged to report it to the tax authorities in order to avoid liability for sanctions. The recitals to DAC 6 indicate that the fundamental rights are respected, and the principles recognised especially by the EU Charter are observed.[421] Even though they are not explicitly laid down in either the ECHR or in the EU Charter, the right to silence and the right not to provide evidence against oneself (*nemo tenetur*) are generally recognised international standards which lie at the heart of the notion of a fair procedure.[422] Those guarantees apply, in principle, to criminal offences.[423] In the area of taxation, the right to silence and the privilege against self-incrimination[424] can, however, become relevant with regard to tax offences or if there is no clear separation between tax and criminal proceedings.[425] Obviously, these principles then contrast with taxpayers' duties to cooperate.[426] Thus, there is first a need to keep criminal and tax procedures apart.[427] Second, the links between the administrative and criminal phases of tax procedures may be such that an effective protection of the right

Belgische Staat, paras 11 and ff; *cf* also S Gless and T Richter (eds), *Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules*, (Springer, 2019); for German constitutional law, see German Federal Constitutional Court, order of 9 November 2010, 2 BvR 2101/09, [2010], paras 43 and ff.

[417] ECtHR, *Pélissier and Sassi v France*, para 45.

[418] ECtHR, *Harutyunyan v Armenia*, no 36549/03, (28 June 2007), paras 60 and ff.

[419] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, [2018] OJ, L 139/1 (commonly referred to as DAC 6, as it is the sixth amendment of Directive 2011/16/EU). See further under sec 8.2.2.4.1.1. For the issues concerning possible violations of data protection related to mandatory disclosure rules see secs 6.2 and 6.3.

[420] See art 8ab, para 6, of DAC 6.

[421] See recital 18 of Directive 2011/16.

[422] ECtHR, *Allen v United Kingdom*, no 76574/01, (10 September 2002), and ECtHR, *Saunders v United Kingdom*, no 19187/91, (17 December 1996), paras 71 and ff.

[423] Eg ECtHR, *JB v Switzerland*, paras 64 and ff.

[424] ECtHR, *Gäfgen v Germany*, paras 169 and ff.

[425] *cf* also R Seer and A Wilms (eds), 'Surcharges and Penalties in Tax Law' (IBFD 2016), 3–30. In *Abas v the Netherlands*, no 27943/95, 26 February 1997, the ECtHR considered that information voluntarily provided by the taxpayer in the course of a tax audit could not fall within the scope of the right to fair trial, as the taxpayer was not yet a person charged with a criminal offence at the point when he agreed to provide such information. The ECtHR endorsed this line of reasoning in its case law on art 8 of the ECHR (ECtHR, *Othymia Investments BV v the NL*, cited para 44), holding that prior notice of lawful tax investigations or exchanges of tax-related information does not necessarily have to be given to all persons potentially implicated.

[426] *cf* eg s 393 of the Fiscal Code of Germany. *cf* S Reinel, *Der 'nemo tenetur'-Grundsatz als Grenze steuerlicher Informationshilfe in der Europäischen Union*, (2015) 39 and ff; L Bachmaier Winter, 'European Investigation Order and Cross-border Investigation of Tax Offences: Mutual Recognition and Grounds for Refusal' (2017) 7 *European Criminal Law Review* 46 and ff. Regarding *nemo tenetur* in antitrust law *cf* CJEU, judgment of 18 October 1989, *Orkem v Commission*, case C-374/87, ECLI:EU:C:1989:387, [1989], paras 30 and ff, and CJEU, judgment of 10 November 1993, *Otto v Postbank*, case C-60/92, ECLI:EU:C:1993:876, [1993], para 20.

[427] *cf* generally Reinel, *Der 'nemo tenetur'* 79 and ff, 449 and ff; IFA, *The Practical Problems of Taxpayers' fundamental rights*, 2015 Basel Congress, vol 100B, (2015).

to a fair trial is only possible insofar as such right covers both those phases. In any case, mutual assistance procedures should not lead to inestimable risks for taxpayers.[428]

6.3.2.4.1.3.3. Taxpayers' Rights in Mutual Agreement Procedures and Arbitration Tax treaty dispute resolution is a procedure that is traditionally understood, designed and implemented as a state-to-state procedure in which the affected taxpayer, lacking international law standing, may not be a party and is only marginally involved.[429] Although an individual mutual agreement procedure involves a taxpayer, that taxpayer does not have rights.

Neither of these cross-border procedures allows for the actual involvement of the affected persons. Traditionally, this is based upon the assumption that a public international law dispute, such as one concerning the interpretation of tax treaties, is between two parties to that treaty. However, there are good reasons to involve the affected persons and no good reasons to exclude them. On the one hand, the involvement of the affected persons would allow tax authorities to gather more quality information. Moreover, the active cooperation of the affected persons can help to achieve a faster settlement of the dispute. On the other hand, the exclusion of the affected persons may produce poorly accepted results in the dispute settlement. It may have a disproportionate impact on the affected persons and lead to incoherent court judgments in the two countries concerned. Therefore, proposals to address this gap in the protection of taxpayers have been put forward, calling for an enhancement in the level of participation of the taxpayer in mutual agreement and arbitration procedures.[430]

The European Union, in the post-BEPS era, has moved towards the establishment of a more effective mechanism for the resolution of double tax treaty disputes, as compared to the existing mutual agreement and arbitration procedures contained in the double taxation agreements and the mutual agreement and arbitration procedures provided for in the Arbitration Convention. The adoption of Directive 2017/1852 on tax dispute resolution mechanisms in the European Union[431] marks an important development.[432] The Advisory Commission provided for in Article 6 of Directive 2017/1852[433] has enough guarantees of independence. The rules on the appointment of its members, on the duration of their terms, the guarantees provided against

[428] Reinel, *Der 'nemo tenetur'* 107 and ff.

[429] It is sufficient to refer here to the position in the OECD Model Commentary on Art 25, at para 36, where is mentioned that '[i]n its second stage – which opens with the approach to the competent authority of the other State by the competent authority to which the taxpayer has applied – the procedure is henceforward at the level of dealings between States, as if, so to speak, the State to which the complaint was presented had given it its backing … [T]his procedure is indisputably a procedure between States …'.

[430] See, for a summary of this discussion, K Perrou, 'Chapter 11: Participation of the Taxpayer in MAP and Arbitration: Handicaps and Prospects', in M Lang et al (eds), *International Arbitration in Tax Matters* (IBFD, 2016) 287 and ff. See the proposals in Perrou, *Taxpayer Participation in Tax Treaty Dispute Resolution*; P Baker and P Pistone, 'BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations' (2016) 25 *EC Tax Review* 335–45; G Almeida, 'Should Taxpayers Have Access to the International Tax Arbitration Procedure? Proceedings of the 10th International RAIS Conference on Social Sciences and Humanities' (2018) 211 *ASSEHR*.

[431] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ, L 265/1. For an analysis of the provisions of the Dispute Resolution Directive see P Pistone, 'The Settlement of Cross-Border Tax Disputes in the European Union', in B Terra and P Wattel, *European Tax Law*, VII ed. (Wolters Kluwer, 2018), 331 and ff; for a comparison of the DRD provisions with those of the EU Arbitration Convention see the analysis in HM Pit, 'Dispute Resolution in the EU: The EU Arbitration Convention and the Dispute Resolution Directive' (2018) 42 *IBFD Doctoral Series* 1537 and ff; RP Papotti (ed), *Tax Dispute Resolution: A Commentary on the EU Directive 2017/1852* (Kluwer, 2020).

[432] For an analysis of the protection of taxpayers' rights and the participation of the taxpayer in MAP and arbitration under Directive 2017/1852 see K Perrou, 'Taxpayer Rights and Taxpayer Participation in Procedures under the Dispute Resolution Directive' (2019) 47 *Intertax* 715 and ff.

[433] There seems to be a lower standard for the Alternative Dispute Resolution Commission provided for in art 10 of Directive 2017/1852; this choice, however, is not justified.

outside pressure and the overall appearance of independence, are all capable of ensuring that the Advisory Commission is independent from the competent authorities and from the affected taxpayer as well.

Most importantly, at least in our context, the protection of taxpayers' rights is one of the objectives of Directive 2017/1852. In its recital 9, particular reference is made to the right to a fair trial and the right to conduct a business. Nevertheless, affected persons are not formally involved in the proceedings as parties. In a number of instances, however, they enjoy certain rights and guarantees that significantly enhance their position as compared to mutual agreement procedures and arbitration under tax treaties or the Arbitration Convention in the sense that they have a higher level of control over the proceedings.[434]

Even though EU Directive 2017/1852 is a step forward with regard to the protection of taxpayers' rights,[435] dispute resolution under it remains an intergovernmental procedure with only limited participation of taxpayers. Taxpayers have the right to initiate the MAP procedure and to carry it forward before the Advisory Commission or the Alternative Dispute Resolution Commission. EU Directive 2017/1852 also provides that, in the absence of notification of a final decision to the taxpayers, they may appeal in their Member State of residence in accordance with the applicable national rules in order to obtain the final decision.[436]

Further taxpayer participation requires, however, the agreement of the competent authorities. Only where the competent authorities of the Member States concerned agree may the affected person(s) provide the Advisory Commission or Alternative Dispute Resolution Commission with any information, evidence or documents that may be relevant for the decision. Affected persons may, at their request and with the consent of the competent authorities of the Member States concerned, appear or be represented before an Advisory Commission or Alternative Dispute Resolution Commission. They shall appear or be represented before that Commission upon request.[437]

Taxpayers may rely on the EU Charter to request greater participation[438] under the right to a fair trial and a fair hearing, access to documents[439] and a reasoned opinion[440] insofar as Member States implement Union law (Article 51(1) of the EU Charter). This condition is fulfilled where Member States are processing taxpayers' complaints initiating the MAP procedure or carrying it forward to the next stage before the Advisory Commission or the Alternative Dispute Resolution Commission under the EU Directive 2017/1852.[441] Thus, the options and possibilities that Directive 2017/1852 offers for the involvement of the taxpayer are in many cases important and, also, enforceable.

[434] See, however, on the position of taxpayers under Directive 2017/1852, especially in comparison to the EU Arbitration Convention, the detailed analysis in Pit, 'Dispute Resolution in the EU', at sec 3.2.2, where he discusses the rights and involvement of affected persons during the five phases of Directive 2017/1852 in comparison with the current state of play under the EU Arbitration Convention. Pit submits that, similar to that Convention, under the Directive, affected persons do not have a real involvement during all of its five phases.

[435] *cf* Kokott, *Taxpayers' Rights, European Taxation* 3 and ff.

[436] Art 15(3) EU Directive 2017/1852.

[437] Art 13 EU Directive 2017/1852.

[438] Issues that could be agreed upon include, indicatively, the right of the taxpayer to participate on an equal footing, as compared to the competent tax authorities that are parties to the proceedings; the right of the taxpayer to participate in adversarial proceedings, by being present or represented before the Advisory Commission and whether the judgment delivered will be reasoned in every case, even when baseball arbitration is employed as the dispute resolution method.

[439] *cf* CJEU, *Ispas*, on access to Member States' documents.

[440] Arts 41, 42 and 47 of the EU Charter.

[441] *cf* Kokott, *Taxpayers' Rights, European Taxation* 3.

It is, however, unclear to what extent the CJEU may grant protection.[442] Interestingly, the Belgian Supreme Court in its judgment *SA Garlon v Belgian State* has already held that the taxpayer should have access to the MAP file and the tax authority erred in denying access without justification.[443] On the other hand, in the UK First-tier Tribunal (FTT) judgment in *McCabe v Revenue & Customs*,[444] the Court denied the taxpayer's request to be granted access to the MAP file.[445] However, this seemingly adverse outcome should not be overestimated; the starting proposition of the FTT seems to be in line with the approach adopted by the Belgian Supreme Court in *Garlon* and later confirmed in *X v Belgium*: the tax authority should disclose relevant documents to the taxpayer unless there is a good reason not to do so.[446]

*6.3.2.4.1.3.4. Mutual Agreement Procedures, Arbitration and the CJEU (*Achmea*)* Arguably, MAP and arbitration, even under Directive 2017/1582, create a parallel method of settlement under Article 344 TFEU which obliges Member States to observe the CJEU's role as final arbiter on the interpretation of Union law.[447] In its much-discussed *Achmea* judgment, the CJEU ruled that Articles 267 and 344 TFEU preclude a provision in an international agreement between Member States under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[448] The CJEU held that a Member State, by accepting the jurisdiction of the BIT arbitral tribunal for the disputes referred to it, has excluded a whole range of disputes that may potentially involve the application and interpretation of EU law from the EU judicial system, and hence from the jurisdiction of the CJEU.[449] The *Achmea* case concerned the compatibility with EU law of the arbitration clause in the bilateral investment treaty (BIT) between the Netherlands and Slovakia. The CJEU held that the arbitration clause contained in that BIT is incompatible with EU law. Where EU-related disputes are referred to bodies that are outside the EU jurisdiction, the effectiveness of EU law may be undermined and its autonomy adversely affected.[450] A provision

[442] See sec 6.3.2.4.1.3.4. below.

[443] Belgian Council of State, section du contentieux administrative, judgment of 12 November 2013, *Garlon v Belgian State*, case A.206.078/XV-2025, judgment no 225.438, [2013].

[444] [2019] UKFTT 317 (TC).

[445] The appeal submitted by the taxpayer was dismissed by the UK Upper Tribunal, decision of 21 September 2020, *Tax and Chancery Chamber*, UKUT 0266 (TCC), [2020]. The taxpayer also sought to annul the refusal in Belgium, where he appealed against the decision of the Belgian Tax Authority refusing to grant him access to the file of the MAP. In Belgian Council of State, *X v Belgium*, judgment no 247.694, the Belgian court annulled a decision of the Belgian Tax Authority to refuse disclosure of the correspondence with and the administrative file regarding the mutual consultation procedure with the United Kingdom to the taxpayer [X].

[446] J Schwarz, 'Mutual agreement procedure: Taxpayer access to information' (12 June 2019) *Kluwer International Tax Blog*, kluwertaxblog.com/2019/06/12/mutual-agreement-procedure-taxpayer-access-to-information/; see also Belgian Council of State, *X v Belgium*, judgment no 247.694.

[447] Indeed, since EU Directive 2017/1582 duplicates, with some important enhancements, the MAP and arbitration procedure for the resolution of double taxation disputes under DTCs, the same considerations apply for the MAP and arbitration, whether this is under a DTC or under EU Directive 2017/1582. This analysis will focus on EU Directive 2017/1582 which covers intra-EU relations but it is understood that the same concerns apply for the MAP and arbitration based on DTCs, ie mainly the MAP and arbitration between EU Member States and third countries.

[448] CJEU, *Achmea*; *cf* also CJEU, judgment of 26 October 2021, case C-109/20, *PL Holdings*, ECLI:EU:C:2021:875 [2021].

[449] CJEU, *Achmea*, paras 56 and 58. This, according to the CJEU, distinguishes the BIT investor-state arbitration from commercial arbitration, which the Court has accepted to be compatible with the EU legal system; ibid, paras 54–56. On the possible impact of the *Achmea* judgment on tax dispute resolution mechanisms see also the discussion in J Monsenego, 'Does the Achmea case prevent the Resolution of Tax Treaty Disputes through Arbitration?' (2019) 47 *Intertax* 725 and ff. *Monsenego* argues that, in principle, the *Achmea* judgment does not affect the existing dispute resolution mechanisms, unless the MAP decisions were really final, without the possibility of being challenged before a domestic court.

[450] CJEU, *Achmea*, para 59: the CJEU states that 'In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law'.

allowing for such action is not compatible with the principle of sincere cooperation provided for in the first subparagraph of Article 4(3) TEU, as it calls into question not only the principle of mutual trust between the Member States, but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU.[451]

The Court followed a three-pronged analysis in order to reach this conclusion:

(1) the arbitral tribunal in *Achmea* is dealing with disputes that are liable to relate to interpretation or application of EU law;
(2) the BIT arbitral tribunal is not a 'court or tribunal' under Article 267 TFEU;[452]
(3) the decisions of the BIT arbitral tribunal are not subject to review by national courts, in the course of which the fundamental provisions of EU law could be examined.

Regarding the essence of the *Achmea* judgment, it is helpful to refer to the remarks of Advocate General Bot, in his opinion delivered on 29 January 2019. The Advocate General suggested that the approach adopted by the CJEU in the *Achmea* judgment appears

> to have been primarily guided by the idea that the judicial system of the European Union, in so far as it is based on mutual trust and sincere cooperation between Member States, is inherently incompatible with the possibility of Member States establishing, in their bilateral relations, a parallel dispute settlement mechanism which may concern the interpretation and application of EU law. To that extent, Article 344 TFEU has been interpreted by the Court as precluding such a mechanism; the fact that the disputes in question are between investors and States is not a bar to such preclusion. Article 267 TFEU was supplementary, since the preliminary ruling procedure was necessarily affected by the operation of such a mechanism.[453]

Disputes relating to double taxation present an 'objectively identifiable link' with the subject matter of the Treaties, as the avoidance of double taxation (through tax treaties) has a manifestly beneficial effect on the functioning of the internal market, which the EU is bound to establish further to Article 3(3) TEU and Article 26 TFEU.[454] The CJEU regularly reviews cases where both economic and juridical double taxation are questioned as to their compatibility with the fundamental freedoms, even if only to state that 'in the absence of any unifying or harmonising Community measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation'.[455]

'Supervision' by the Court of Justice would presuppose that the Advisory Commission or the Alternative Dispute Resolution Commission established under Directive 2017/1582 (referred to here as 'the Commissions') qualify as a 'court or tribunal of a Member State' under Article 267 TFEU so that they may request preliminary opinions regarding the interpretation of Union law.[456] This is controversial. The CJEU has already admitted preliminary requests by a court

[451] CJEU, *Achmea*, para 58.
[452] CJEU, *Achmea*, paras 43 and ff.
[453] Opinion of Advocate General Bot of 30 April 2019, 1/17, *EU-Canada CET Agreement*, ECLI:EU:C:2019:72 [2019], para 105. The Court, in its Opinion delivered on 30 April 2019, ECLI:EU:C:2019:341, held that the dispute resolution mechanism under the EU-Canada CET Agreement is compatible with EU primary law.
[454] In CJEU, judgment (Grand Chamber) of 12 September 2018, *Austria v Germany*, case C-648/15, ECLI:EU:C:2017:664, [2018], para 26; the CJEU explicitly refers to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Double Taxation in the Single Market, COM (2011) 712 final of 11 November 2011.
[455] See for example CJEU, judgment of 8 November 2007, *Amurta*, case C-379/05, ECLI:EU:C:2007:655, [2007], para 17.
[456] *cf* D Rüll, 'Die Streitbeilegungsrichtlinie und ihre Umsetzung in Deutschland' (2019) 28 *IStR* 728 and ff, 737: possibly yes; F Boulogne, 'Implications of the CJEU's Achmea decision (C-284/16) on tax treaty arbitration', *Kluwer International*

common to a number of Member States.[457] In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, the CJEU takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[458] Are the Commissions sufficiently independent? In any case, it is difficult to consider them as 'permanent'.[459] Especially with regard to baseball arbitration the question arises whether this is the application of rules of law. Under 'baseball arbitration', as opposed to 'independent opinion' arbitration, the authority of the arbitrators is severely restricted. They are not allowed to reach an independent decision on the case. Instead, their decision only involves the choice between the two options for resolution offered by the contracting states.[460]

In any case, there is no risk that the Commissions under EU Directive 2017/1582 may develop a separate body of Union law beyond the reach of the CJEU. The outcome of the MAP or Commission's proceedings serves as a basis for the national tax assessment which taxpayers may contest before the national courts.[461] The latter may then ask the CJEU for preliminary rulings. The dispute settlement procedures as laid down in Directive 2017/1852 thus do not call into question the autonomy of Union law.

6.3.2.4.1.3.5. Baseball Arbitration and Fair Trial An additional issue that may arise concerns the compatibility of the baseball-type arbitration with fair trial guarantees. In baseball arbitration, the decision contains nothing more than the choice of one of the options presented to the arbitration panel in the form of proposals submitted by the competent authorities. The arbitration panel does not have the obligation, nor perhaps even the option, to include a rationale or any other explanation for its choice. As a result, MAP based on baseball arbitration most probably will not include a statement of the reasoning underlying the decision reached. However, the right to a fair trial, in particular the right to a fair hearing, includes, among other guarantees, the right to a reasoned judgment. Baseball-type arbitration, as designed and included in the Multilateral Instrument (MLI), does not provide for a reasoned judgment. The obligation to give reasoned judgments extends and applies not only to judicial decisions but also to the decisions of the administration that affect individuals.[462] Consequently, irrespective of whether MAP and arbitration are viewed as purely administrative or as quasi-judicial procedures, there could be an obligation to give reasons for the decision reached, as far as taxpayers' rights are concerned. First, however, the EU Charter

Tax Blog (26 March 2018), kluwertaxblog.com/2018/03/26/implications-cjeus-achmea-decision-c-28416-tax-treaty-arbitration/: doubtful whether the Advisory Commission or the Alternative Dispute Resolution Commission under Directive 2017/1582 could be regarded as courts or tribunals 'situated within the EU judicial system'.

[457] CJEU, judgment of 4 November 1997, *Parfums Christian Dior/Evora*, case C-337/95, ECLI:EU:C:1997:517, [1997], paras 21 and ff.

[458] Eg CJEU, judgment of 17 September 1997, *Dorsch Consult Ingenieursgesellschaft/Bundesbaugesellschaft Berlin*, case C-54/96, ECLI:EU:C:1997:413, [1997], para 23, and CJEU, judgment of 14 June 2011 (Grand Chamber), *Miles and Others*, case C-196/09, ECLI:EU:C:2011:388, [2011], paras 37 and ff.

[459] But see CJEU, judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, agissant pour Danfoss*, case C-109/88, ECLI:EU:C:1989:383, [1989], paras 7 and ff, admitting a preliminary request from an Industrial Arbitration Board.

[460] R Petruzzi, P Koch and L Turcan, 'Baseball Arbitration in Comparison to Other Types of Arbitration', in M Lang and J Owens (eds), *International Arbitration in Tax Matters*, (2015) 139 and ff.

[461] *cf* H Schaumburg, *Bilaterale Investitionsschutzabkommen mit Unionsrecht nicht vereinbar*, (ISR, 2018) 206 and ff; L Vandenberghe, 'The Limits to Arbitration Posed by the Natural Judge Theory (Due Process of Law) and Cross-Border Tax Disputes', in P Pistone (ed), *Tax Procedures* (IBFD, 2020) 197 and ff, 201 and ff and 214.

[462] Compare the wording in art 41 of the EU Charter on the right to good administration. The right includes the obligation of the tax administration to give reasons for its decisions.

only applies insofar as Member States implement Union law (Article 51(1) of the EU Charter).[463] Second, the result of baseball arbitration does not necessarily affect individual rights. As already mentioned, the outcome of the MAP or the Commissions' proceedings serves as a basis for the national tax assessment which taxpayers may contest before the national courts.[464] There is generally no right to legal protection in the preliminary stages of administrative decision making.[465]

Theoretically, one could moreover argue that the decision reached in baseball arbitration is not entirely devoid of reasoning. Indeed, under Article 23(1)(b) of the MLI, the competent authority of each contracting jurisdiction may also, in addition to the proposed resolution, submit a supporting position paper for consideration by the arbitration panel, as well as a reply submission. Assuming that a supporting position paper is submitted by both competent authorities (submission by only one competent authority would jeopardise the balance of the decision-making procedure), when the arbitration panel hands down its decision, it could be inferred that it was convinced by the supporting position paper that was submitted in support of the chosen resolution; that supporting position paper would then form the reasoning of the decision of the arbitration panel. That would not be enough, however. First, the submission of this supporting position paper is merely optional. Second, in order to have a reasoned decision of the tax administration, the reasoning would have to appear in the MAP that follows the arbitration panel decision and also be made public. Article 21 of the MLI, however, provides for the confidentiality of arbitration proceedings. Therefore, this point is really hypothetical.

Nevertheless, if baseball arbitration is to be used in MAP, either under Directive 2017/1582 or under the MLI or any other instrument, then a form of reasoned baseball arbitration would be preferred in relation to the current structure.[466] This, however, is a contradiction in terms, since baseball arbitration is not reasoned.

6.3.2.4.1.3.6. Conclusions and Way Forward[467] The application of procedural rights in cross-border situations becomes more and more relevant as the level of intensity and the number of instances of cross-border cooperation between tax authorities increases. There are two areas where it appears that the impact of procedural rights may result in changes in the way the current rules apply: the first one is the way exchange of information between tax authorities is taking place; and the second is the way dispute resolution procedures, especially tax treaty arbitration rules, are designed.

Issues Concerning the Exchange of Information

The volume, velocity and variety of information exchanged between tax authorities has increased exponentially in recent years. At the same time, little if any, judicial protection for taxpayers in cross-border situations is provided. This also applies with regard to fishing expeditions, which are, in principle, prohibited under the current rules. The 2017 CJEU *Berlioz* judgment made it

[463] *cf* sec 6.3.2.4.1.1. above.

[464] *cf* Schaumburg, *Bilaterale Investitionsschutzabkommen* 206 and ff; Vandenberghe, 'The Limits to Arbitration' 197 and ff, 201 and ff and 214.

[465] *cf* eg CJEU, *Sabou*, paras 39 and ff, and CJEU, *État Du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, paras 79 and ff.

[466] See also the discussion on the use of baseball arbitration by the Standing Committee provided for in art 10 of Directive 2017/1582 and the preference for a variation of reasoned baseball arbitration in S Piotrowski, R Ismer et al, 'Towards a Standing Committee Pursuant to Article 10 of the EU Tax Dispute Resolution Directive: a Proposal for Implementation' (2019) 47 *Intertax* 678 and ff, 691.

[467] We would like to thank Katerina Perrou for her contribution.

clear that information holders must have remedies available. To that end, it is necessary that they have access to, at least, some minimum information regarding the request for information sent by one competent authority to another. Advocate General Kokott, in her opinion on joined cases C-245/19 and C-246/19 (also known as *Berlioz II*) takes this further: she proposes that those rights should also cover the concerned taxpayer himself, as well as any third party on whom, in addition to the concerned taxpayer, information is also requested.

However, the opinion of AG Kokott was not followed by the CJEU. That means that, where the requested state is an EU Member State, as in many other states, taxpayers are not necessarily given notice that requests for information that concern them exist. From the academic perspective, there are two approaches that could be adopted in order to satisfy this 'right to know': to know that an exchange is taking place and to know the contents of that exchange.

One option would be to provide that all requests be notified to the taxpayers themselves as well as any other persons in respect of whom information is also sought except where certain conditions apply, eg taxpayers with a criminal record or taxpayers suspected of money laundering (the 'full access, unless …' approach). The other option would be the opposite: to impose an obligation on tax authorities to notify the taxpayer only when certain conditions are met (the 'full access, if …' approach). Taking into account the current state of play, it appears that the former approach is more appropriate and compatible with the taxpayer's rights. However, as mentioned, the CJEU does not recognise such rights. From our perspective, by contrast, the right balance would be struck where adequate opportunity for taxpayers to exercise their rights is provided without, at the same time, putting at risk the audit in progress, with which the request for information may be linked.

These considerations concern only the exchange of information upon request, where the standard of foreseeable relevance applies; however, they should not be limited to it. Given that the severity of the intrusion to a taxpayer's private affairs is no less important in the cases of automatic or spontaneous exchanges of information, it appears that even in these cases there should be at least a right to know that the exchange is taking place.

As a result of the OECD BEPS Project, there have been considerable improvements to the mutual agreement procedure. Within the EU, the adoption of Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (DRD) has a clear aim of creating a procedure that respects the right to a fair trial and provides adequate guarantees to the taxpayers involved.

One gap that has been identified and that needs to be remedied is the limited extent to which the right to be heard, and its corollary, the right of access to file, currently apply.

The right of access to the MAP file needs therefore to be properly regulated, not only where the DRD applies, but also in the context of DTCs, as the case law discussed above indicates. Until now, it remains unclear to what extent the CJEU or the ECtHR will grant protection. Case law only starts to develop at national level. Notably, the Belgian Council of State grants taxpayers a constitutional right of access to the files.[468]

6.3.2.4.2. Russia[469]

According to Article 45 of the Constitution of the Russian Federation, everyone has the right to protection of his rights and freedoms in any way not prohibited by law.

[468] *cf* Belgian Council of State, *X v Belgium*, judgment of 2 June 2020, no. A. 224/757/IX-9262, (2020)23 ITRL 221.
[469] We would like to thank Karina Ponomareva and Natalia Vorobyeva for their contribution.

As stipulated in the ECtHR's case law, taxpayers complaining of interference with their property rights must first prove that such rights exists.[470] This is owing to the ECHtR's well-established position that Article 1 of Protocol no 1 to the ECHR applies only to existing possessions and does not guarantee a right to acquire property.[471]

The Russian Tax Code includes specific rules for protecting the rights of private persons. Some of them have a general character, such as the rule that resolves all interpretative doubts in favour of taxpayers,[472] the right to refuse to comply with unlawful acts and orders by tax authorities,[473] and the right to an effective legal remedy.[474]

The specific implications of the right to an effective legal remedy can be grouped into two categories, according to whether the taxpayer appeals[475] or resists the public authorities.[476] Furthermore, taxpayers can actively protect their rights by influencing the process of adoption of a non-normative act by the tax authority.[477]

The right to an effective legal remedy is enshrined in Article 33 of the Constitution, which gives all Russian citizens the right to apply personally, as well as to send individual and collective appeals to state and local self-government bodies. Commercial courts have jurisdiction over tax disputes.[478]

Public authorities have the obligation to protect the rights of private persons, but this does not necessarily mean that such protection is effective.[479] In practice, the most effective legal way to protect taxpayers' rights in Russia is by lodging a request for administrative review to tax authorities.[480] Such review is not further regulated in the Tax Code, but conducted according to the procedures of the commercial procedural legislation and the law on the judicial system.

The effectiveness of a specific legal remedy can significantly change over time owing to changes in the legislation and its enforcement practice.[481] In some cases, the effective protection

[470] ECtHR, *Pištorová v the Czech Republic*, no 73578/01, (26 October 2004), para 38.

[471] See, eg, ECtHR, *Van der Mussele v Belgium*, no 8919/80, (23 November 1983), para 48.

[472] Art 3, para 7, of the Russian Tax Code.

[473] Art 21, para 1, subpara 11, of the Russian Tax Code, also known as the right to self-defence.

[474] Art 22, para 1, of the Russian Tax Code.

[475] In line with this right, taxpayers may, inter alia, appeal against legal acts/(in)actions of tax officials, submit a claim for tax refund or compensation for losses caused by illegal acts of tax authorities, block the enforcement of decisions of tax authorities, challenge the assessment of the value of property for tax purposes, write-off bad debts for tax purposes and claim compensation for the right to execute a judicial act within a reasonable time.

[476] In line with this right, taxpayers may lodge objections to the tax audit report, to the reviewing of auditing materials, or to the acts of coercive collection of taxes.

[477] For example, the person who was subject to the audit has the right to submit objections and participate in the review process of the audit materials and thereby influence the possible results of the audit (art 21, para 1, subpara 15, art 100, para 6, art 101, para 2 and art 101.4, para 7 of the Tax Code of the Russian Federation).

[478] The following actions are admissible before Commercial Courts: Such disputes may concern non-normative legal acts, decisions and actions (or inactions) of bodies and organisations with public powers; the collection of obligatory payments and sanctions; tax refunds, penalties and fines; tax assessment; recognition of non-collectible tax; compensation for losses caused by actions or decision of the tax authorities; protection of the rights and legitimate interests of a group of persons.

[479] In the ECtHR's case law, the 'effectiveness' of a 'remedy' within the meaning of art 13 of the ECHR does not depend on the certainty of a favourable outcome for the applicant. At the same time, the remedy required by art 13 of the ECHR must be 'effective' in practice as well as in law in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred. See ECtHR, *Liseytseva and Maslov v Russia*, nos 39843/05 and 40527/10 (9 October 2014), para 157.

[480] Arts 137 and 138 of the Tax Code of the Russian Federation. An example of effective protection of taxpayer's rights by way of combining active and passive methods is given in the judgment of the Supreme Court of the Russian Federation of 17 November 2009, no 10349/09, [2009]. The Court agreed with the taxpayer's arguments about the illegality of the request for submission of documents and invalidated the decisions based on the results of the audit, including the application of penalties for failure to submit documents.

[481] For example, the ECtHR in its admissibility decision in the case of *Kovaleva and Others v Russia*, on the one hand, considered that the application for review of judicial acts in the supervisory procedure on the basis of the previous Code

of taxpayers' rights in Russia has raised critical issues from the perspective of the European Convention on Human Rights,[482] triggering action before the European Court of Human Rights.[483] This also concerns cases in which taxpayers have obtained justice at international level and national authorities have failed to execute the decision at national level, including in the landmark *Yukos* case.[484] The Russian authorities have been asked by the Committee of Ministers of the Council of Europe, which is responsible for the supervision of the execution of the ECtHR's judgments (Article 46(2) of the ECHR), to provide the distribution plan required by the judgment[485] on several occasions. However, the Russian authorities failed to produce, in cooperation with the Committee of Ministers, a comprehensive plan, including a binding time-frame, for the distribution of the award of just satisfaction (the Distribution Plan). Moreover, on 17 January 2017, the Russian Constitutional Court ruled that execution of that judgment was not compatible with the Russian Constitution.[486] The Constitutional Court has been previously empowered[487] to declare decisions of international courts, notably of the ECtHR, as 'unenforceable' based on their incompatibility with the 'fundamentals of the Russian constitutional system' and the 'human rights regime established by the Constitution of the Russian Federation'. The consequence of such a finding by the Constitutional Court would be that 'no actions/acts whatsoever' aimed at enforcing the international decision may be taken/adopted in the Russian Federation.

Indeed, an interesting question arises whether the Russian authorities can invoke this judgment of the Constitutional Court about incompatibility of the *Yukos* judgment with the Constitution as the justification for their failure to execute it. The injured party considers that the Russian authorities 'remain obliged to abide by the Judgment unconditionally under the express terms of Article 46(1) of the ECHR', as stipulated in its most recent communication.[488] The Committee of Ministers during its last examination of the state of execution of the *Yukos* judgment at the meeting of 12–14 March 2019 expressed grave concern at the continued non-implementation of the just satisfaction judgment and recalled the State's unconditional obligation under Article 46 of the ECHR to abide by the judgments of the ECtHR. Indeed, the Constitutional Court's finding

of Commercial Procedure of the Russian Federation, which was in force until 1 January 2003, was not an effective remedy for the purposes of art 35, para 1 of the ECHR. On the other hand, the ECtHR came to the conclusion that, under the new Code of Commercial Procedure, application for review of judicial acts in the supervisory procedure should be considered as an effective domestic remedy, providing prevention and correction of possible violations of the Convention at national level. See ECtHR, *Kovaleva and Others v Russia (dec)*, no 60205/09, (25 June 2009).

[482] In line with the so-called local remedies rule, which constitutes a principle of international law (see JR Crawford and TD Grant, 'Exhaustion of local remedies' (2007) *Max Planck Encyclopedia of Public International Law*, opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e59), the ECHR system of legal protection relies on the concept of subsidiarity, implying in tax matters that taxpayers should first and foremost seek protection at the domestic level, and only if such protection turns out to be ineffective, to have recourse to international means of protection (art 35 of the ECHR).

[483] See ECtHR, *Lutsenko v Russia* (dec), no 40508/13, (25 September 2018), in which the taxpayer had failed to exhaust domestic remedies before filing a case before the European Court of Human Rights.

[484] ECtHR, *OAO Neftyanaya Kompaniya Yukos v Russia*, no 14902/04, 20 September 2011. In such case the ECtHR found, in particular, a violation of Yukos's right to property on account of the unlawful imposition and calculation of penalties in the 2000–2001 tax assessments owing to the retroactive application of a change of case law as regards the time limit for liability for tax offences. The ECtHR also found a violation of the applicant's right to a fair trial in that case. Yukos was awarded almost 2 billion euros of pecuniary damage; the amount was to be paid to the applicant company's shareholders and their legal successors and heirs, owing to its liquidation. The judgment became final in December 2014 but to date no compensation has been paid to the approximately 30,000 former Yukos shareholders.

[485] ECtHR, *OAO Neftyanaya Kompaniya Yukos v Russia*, operative part no 2(b).

[486] Constitutional Court of the Russian Federation, judgment of 17 January 2017, no 1-P, [2017].

[487] Federal law no 7-FKZ 'On the amendments to the Federal Constitutional Law "On Constitutional Court of the Russian Federation" of 14 December 2015'.

[488] See Communication from the applicant no DH-DD(2020)117 of 7 February 2020.

of contradiction between the Constitution and international decisions does not terminate the state's obligation to enforce the latter. As the Venice Commission recalled,

> whatever model of relations between the domestic and international system is chosen, a State is bound under Article 26 of the Vienna Convention of the Law on Treaties to respect ratified agreements and pursuant to Article 27 of the Vienna Convention it cannot invoke the provisions of its internal law as justification for its failure to perform a treaty, including the European Convention on Human Rights.[489]

There is a further consequence of the amendments to the Federal Constitutional Law on the Constitutional Court which concerns the practical protection of taxpayers' rights. The amendment to Article 47 of that Law provides that a decision to enforce, or not to enforce, a judgment of the ECtHR concerning a Russian taxpayer is taken without a hearing. It is obvious that a taxpayer is directly affected by the Constitutional Court's decision and that the principle of equality of arms should be respected by providing a taxpayer the possibility to submit his or her observations. However, at the moment a taxpayer is in no way involved in these proceedings.

Interesting issues also arise in connection with cross-border administrative procedures in tax matters, including MAP. The latter has always been available for settling double taxation cases with the 84 countries that have effective double tax treaties with Russia. Russian taxpayers have already demonstrated significant attention regarding an instrument that protects their interests.[490]

A recent amendment to the Russian Tax Code[491] has introduced the concept of mutual agreement procedures also in domestic tax legislation in connection with the implementation of the OECD Action Plan on BEPS. This confirms the trend towards approximating Russian standards to international tax law standards, within which Russia has also ratified the BEPS Multilateral Instrument (MLI)[492] and issued its guidance for entering into bilateral and multilateral advance pricing agreements (APAs).[493]

There are good expectations that MAP may contribute to enhancing the standards of effective legal protection in cross-border situations, especially if competent authorities are sufficiently independent and technically capable of carrying out their mandates without becoming overly reliant on the audit function of a tax administration. In the specific Russian context, this also requires proper involvement of the Federal Tax Service in performing the necessary technical analyses of cases and making conclusions on the appropriateness of MAP requests.

However, in view of the wording used in the new legislation and recent developments in law enforcement, taxpayers may refrain from using the MAP, simply out of fear that it may backfire. While the OECD advocates for not treating the mere assertion that a domestic anti-avoidance provision may apply to a particular case as sufficient justification for denying access to MAP, the detailed guidance on the Russian MAP process, which was initially present in the draft law and will likely soon be enacted in an order of the Russian Ministry of Finance, takes an opposing view

[489] Final Opinion of the European Commission for Democracy through law (Venice Commission) on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, adopted at the 107th Plenary Session on 10–11 June 2016, para 143, www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e.

[490] About 24 MAP cases are currently under consideration by Russian tax authorities.

[491] See Federal Law No 325-FZ of 29 September 2019, in force as of 2020. This law allows filing of MAPs by Russian or foreign residents entitled to do so under applicable double tax treaties, or by the competent authorities of foreign states that are parties to double tax conventions with Russia. The outcome of MAPs can be invoked by taxpayers for tax refunds or offsets of the overpaid tax.

[492] The ratification took place on 1 May 2019.

[493] This document was issued on 3 May 2018.

on the matter. The grounds for refusing to grant any relief or assistance include cases where a MAP request is perceived to have been filed for the sole purpose of reducing, avoiding, or deferring tax. As tax avoidance may entail a criminal prosecution, the wording conveys a very strong message to taxpayers. Both the deliberate and unintended abuse of this provision may be a gross impediment to the viability of MAP as a dispute resolution tool.

Since January 2020, the Russian Tax Code has a new chapter 20.3 on mutual assistance procedure, in accordance with international tax treaties. The details of the procedure (lodging an application, its examination etc) will be determined by the Tax Service of Russia. It is expected that Russian authorities will put in place some legal remedies for taxpayers in connection with mutual assistance. In general Russian taxpayers can challenge information gathered in breach of their fundamental rights and ask for it to be excluded from the body of evidence against them, for instance within the framework of criminal proceedings instituted as a result of a tax audit. In the absence of any positive answer from the domestic courts taxpayers can then claim a breach of Article 6 of the ECHR on account of the use of illegally obtained evidence which rendered the proceedings as a whole unfair.[494] However, the ECtHR has been very reluctant to acknowledge violations of the right to a fair trial in such cases, pointing out that the domestic courts are in the best position to assess the evidence before them, establish facts and interpret domestic law.[495]

6.3.2.4.3. Switzerland[496]

In Switzerland the concept of *audi alteram partem* is of crucial importance in every stage of any procedure. It is respected in Swiss tax procedures from the very beginning, starting person's with the person's right to hand in a tax return and declare his financial situation. From a Swiss perspective, based on the perception of the taxpayer as trustworthy citizen, on an equal footing with the authorities, the mandatory participation of the taxpayer is hence rather to be considered as a right than a mere duty.

Judicial review procedures are seen as being effective and reasonably quick. There is neither a specific tax ombudsperson nor a specific charter of taxpayers' rights. There is no public demand or discussion to introduce such elements. Current challenges are linked with the *ne bis in idem* and the *nemo tenetur* principles. For several years, there has been a campaign to alter and amend the law regarding fiscal offences. Due to its link with so-called 'banking secrecy', the Swiss Parliament has refrained from doing so hitherto. Hence, the Swiss procedural situations remain similar to those described in *A and B v Norway*.[497] With regard to the *nemo tenetur* principle, discussions among scholars and courts have initiated a debate about whether the refusal to refund the withholding tax on capital-income of 35 per cent for failing to comply with the declaration requirements, having as a goal to ensure the correct declaration for the purpose of the income tax, has to be considered as an administrative penalty. This has hitherto been denied by the Federal Supreme Court of Switzerland.[498] If this were the case, it would obviously have an impact on the procedure, Article 6 of the ECHR coming into play.

Taxpayers can appeal decisions of the Swiss Federal Tax Administration to exchange information. They can do so in fact as, at least, in cases of exchanges on request, the taxpayer is informed

[494] ECtHR, *Moreira Ferreira v Portugal*, (Grand Chamber), no 19867/12, (11 July 2017), para 83.
[495] ECHtR, *Navalnyy and Ofitserov v Russia*, nos 46632/13 and 28671/14, (23 February 2016), para 97.
[496] We would like to thank Peter Hongler and Michael Beusch for the contribution.
[497] See ECtHR, *A and B v Norway* (Grand Chamber), nos 24130/11 and 29758/11, (15 November 2016).
[498] Swiss Federal Supreme Court, decision of 5 October 2018, 2C_56/2018, [2018], para 2.3.2 (only available in German).

according to Article 14 of the *Steueramtshilfegesetz*[499] However, the limitation of an 'at least equivalent level of protection' does not exist. There is a limitation according to which information will not be exchanged if the other state does not uphold the *ordre public*.[500]

There have been several judgments in this respect. For instance, it was held that Switzerland should exchange information with India, even though data protection (ie not tax data protection) is inadequate in India.[501] Moreover, in the famous *UBS* case, the bank argued that the information would be used, inter alia, in a money laundering procedure against UBS which would be against the principle of specialty in the mutual assistance treaty with France. However, the Swiss Supreme Court argued that the written assurances of France not to use the information in such procedure against UBS were sufficient.[502]

Joint and/or simultaneous tax audits are not common in Switzerland.

At least two rules have been challenged under the ECHR. If the taxpayer in the ordinary assessment is forced to disclose information by using the threat of a fine/penalty, such information cannot be used in a criminal tax procedure, as this would infringe the ECHR.[503]

There is a limited 'fruit of the poisonous tree' doctrine in Swiss criminal law.[504]

6.3.2.4.4. United Kingdom[505]

In principle, taxpayers in the UK have legal remedies in relation to mutual assistance, but in practice it is extremely difficult for them to prevent exchange or obtain any compensation afterwards. Where information is sought for the purpose of exchange, or taxpayers learn of planned exchanges, in principle a judicial review application could be used to prevent exchange. However, it is extremely unlikely that such an application would be successful. For example, an application was made in the UK by the Australian taxpayer seeking judicial review to prevent the disclosure of information for the purpose of exchange on request with Australia. However, the application for judicial review was unsuccessful and the accountancy firm in the UK that held the information was required to disclose the documents.[506]

[499] Art 14 of the *Steueramtshilfegesetz* has the following wording:

'1 *Die ESTV informiert die betroffene Person über die wesentlichen Teile des Ersuchens.*
2 *Sie informiert die weiteren Personen, von deren Beschwerdeberechtigung nach Artikel 19 Absatz 2 sie aufgrund der Akten ausgehen muss, über das Amtshilfe-verfahren.*
3 *Ist eine Person nach Absatz 1 oder 2 (beschwerdeberechtigte Person) im Ausland ansässig, so ersucht die ESTV die Informationsinhaberin oder den Informationsinhaber, diese Person aufzufordern, in der Schweiz eine zur Zustellung bevollmächtigte Person zu bezeichnen. Sie setzt hierfür eine Frist.*
4 *Sie kann die im Ausland ansässige beschwerdeberechtigte Person direkt informieren, wenn:*

a. *es zulässig ist, Schriftstücke im betreffenden Staat durch die Post zuzustellen; oder*
b. *die ersuchende Behörde diesem Vorgehen im Einzelfall ausdrücklich zustimmt.*

5 *Kann eine beschwerdeberechtigte Person nicht erreicht werden, so informiert die ESTV sie auf dem Weg der ersuchenden Behörde oder durch Veröffentlichung im Bundesblatt über das Ersuchen. Sie fordert sie auf, eine zur Zustellung bevollmächtigte Person zu bezeichnen. Sie setzt hierfür eine Frist von zehn Tagen.*'

See SR 651.1 – Bundesgesetz vom 28. September 2012 über die internationale Amtshilfe in Steuersachen (Steueramtshilfegesetz, StAhiG) (admin.ch).

[500] In line with art 26(3)(c) of the OECD Model Convention and art 21 Convention on Mutual Administrative Assistance in Tax Matters.

[501] Swiss Federal Supreme Court, judgment of 21 December 2018, CH: FC, 2C_619/2018, [2018].

[502] See at: www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://26-07-2019-2C_653-2018&lang=de&zoom=&type=show_document.

[503] See eg ECtHR, *JB v Switzerland*, and ECtHR (dec), *Chambaz v Switzerland*.

[504] Art 141 *Schweizerische Strafprozessordnung.*

[505] We would like to thank Philip Baker for his contribution.

[506] UK Court of Appeal (Civil division), judgment of 15 January 2016, *Derrin Brother*s, EWCA Civ 15, [2016].

Again, in principle, if taxpayers suffer damage as a result of wrongful exchange, they might claim damages (as in the *Aloe Vera* case in the US), but it has never been heard of anyone even trying this in the UK. Unless taxpayers could prove something close to gross negligence or actual malice, they would not be expected to succeed. One of the difficulties is that a taxpayer may not even be aware that an exchange is taking place/has taken place.

If HMRC already holds the information requested, it has no obligation to notify the taxpayer in advance of the exchange. HMRC can simply send it. If it does not have the information, but needs to obtain it from a third party (eg a bank), it will usually need to obtain an order from the tax tribunal for disclosure, but again it has no obligation to notify the taxpayer (though in most cases one might expect the bank to do so). If it does not have the information, but needs to obtain it from the taxpayer, it will again usually need to obtain an order from the tax tribunal for disclosure. In both the latter two cases, where the Revenue seeks an order for disclosure from the tribunal, the application is made ex parte by the Revenue. The taxpayer/bank has no right to even attend the hearing and make representations. Of course, if an order is obtained to disclose information, and the bank/taxpayer refuse, a penalty will follow. Then the bank/taxpayer could appeal against the penalty.[507]

Incidentally, all of this relates to exchange of information on request; for automatic exchange, however, there are absolutely no safeguards in practice.

The UK has participated in joint audit arrangements for some time, as well as being a founder member of JITSIC (originally based in London). Several foreign embassies in London have revenue attaches who deal with tax matters – the IRS has a small team based at the London Embassy. The UK is quite protective of its sovereignty, and would not generally allow foreign revenue officials to operate on UK territory without permission.

There is nothing in UK domestic law to prevent information obtained illegally from being used by the Revenue authorities. An attempt might be made to challenge that under the ECHR (breach of Article 8 as not in accordance with the law), but is not expected to be successful, as case law from the ECtHR has not prevented information illegally obtained from being used.[508]

The UK Revenue was one of the tax authorities that obtained data purchased by the German secret service from a person who had obtained those data unlawfully. The UK may have used those data, and may even have passed them on to third states. No legal actions were brought.

6.3.2.5. Oceania[509]

6.3.2.5.1. Australia

6.3.2.5.1.1. Judicial Review

Australia is the only common law country with neither a constitutional nor federal legislative bill of rights to protect its citizens, although there is ongoing debate on the subject.[510] Nevertheless, access to justice in relation to taxation matters can take two avenues: judicial review of the

[507] CJEU, *Berlioz Investment Fund*, see sec 6.1.2.4.1.2.2.; the CJEU grants judicial remedies even against the information order, but only the addressee of the information order has such right, not the the taxpayer or other persons whose data is exchanged. See CJEU, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale*; for more legal protection, including for taxpayers and third persons, see Opinion of Advocate General Kokott of 2 July 2020 in these joined cases.

[508] See sec 6.3.2.4.1.2.4. above.

[509] We would like to thank Celeste Black for her contribution.

[510] See, for example, the Australian Human Rights Commission's major project 'Free and Equal: An Australian Conversation on Human Rights', humanrights.gov.au/free-and-equal.

administrative action of the Commissioner, which considers procedural aspects; and merits review of assessments and certain other decisions or actions of the Commissioner, which considers whether the decision, such as the amount assessed, is correct. The apex High Court of Australia has held[511] that an implicit requirement of the Constitution (which grants Federal Parliament the power to impose tax) is that a tax must not be incontestable: to distinguish a tax from an arbitrary exaction, taxpayers must have access to a judicial process whereby they may show that they are not taxable or not taxable in the sum assessed. This avenue for challenge is provided in legislation, whereby a taxpayer may object to an assessment or other specified decisions of the Commissioner. After an internal ATO review, further review is available by an administrative tribunal or by appeal to a court. A tax matter can potentially be appealed ultimately to the High Court, though appeals to the High Court in tax matters are usually subject to being granted leave to appeal. Administrative review by the tribunal is attractive as it involves relatively low costs, is informal and proceedings may be kept confidential. In 2019, a small business tax division of the tribunal was established to further reduce costs and simplify procedures for small business taxpayers.

An entrenched right to judicial review of administrative action is derived implicitly from section 75(v) of the Australian Constitution (this right cannot be removed by legislation).[512] Application for writs of mandamus, prohibition and certiorari may be made to the High Court but are generally first considered in the Federal Court. The grounds for judicial review are established by common law and are generally grouped into illegality (ultra vires), irrationality or a failure to provide natural justice/procedural fairness. A legislative regime provides a parallel system of judicial review of administrative action that also includes a right to obtain reasons for the decision.[513] A type of tax exceptionalism exists in relation to tax assessments. Decisions that relate to the calculation of assessment of tax are explicitly excluded from the legislative judicial review mechanism. The High Court[514] has held that, as a consequence of a tax law provision that protects the integrity of assessments, Constitutional judicial review of assessments is limited to the grounds of bad faith or conscious maladministration, a very difficult case that no taxpayer has yet been successful in making.

Given that judicial review applications are very costly and time-consuming, non-judicial mechanisms to address procedural failings are particularly important. The Inspector-General of Taxation also serves as the Tax Ombudsman,[515] empowered to investigate taxpayer complaints against the ATO. The Australian Government has also established an administrative arrangement called the Compensation for Detriment caused by Defective Administration scheme, whereby persons affected by procedural failures can apply for financial compensation. However, claims are investigated by the administrative entity and decisions regarding compensation are entirely discretionary.

6.3.2.5.1.2. Use of Evidence Obtained through Mutual Assistance

In principle, a taxpayer would have the same right to seek judicial review of the tax authority's exercise of powers in relation to mutual assistance as in the exercise of any other authorised

[511] High Court of Australia, *MacCormick v Federal Commissioner of Taxation* 640.

[512] The legitimacy of the Australian High Court's power of judicial review is well established and rarely questioned. However, its exact constitutional source is unclear. *Cf* K Foley, 'Australian Judicial Review' (2007) 6 *Washington University Global Studies Law Review* 281 and ff, 285 and ff.

[513] Administrative Decisions (Judicial Review) Act 1977.

[514] High Court of Australia, *Federal Commissioner of Taxation v Futuris Corp Ltd*.

[515] See below under sec 6.5.6.

power. However, to date, such litigation does not seem to have taken place. The Commissioner can use the extensive information gathering powers provided in the tax legislation for the purpose of gathering information to be exchanged under international tax agreements, whether or not the information relates to Australian tax.[516] There is no right to notice of an information exchange. Therefore, it is unlikely that taxpayers would in the ordinary course be aware that information relating to them is being exchanged.

There have been a few cases that might be of interest in relation to these issues. *Hua Wang Bank Berhad*[517] was one of a long line of cases that led ultimately to the judgment of the High Court on corporate residence (the central management and control test) in *Bywater Investments.*[518] This 2013 Federal Court judgment related to evidence ultimately used to show that the central management and control of the taxpayers was in Australia. The ATO had made requests for information to the Cayman Islands Tax Information Authority (CITIA) under the Australia-Cayman Islands TIEA and the information was provided in 2011. Later, after the affected parties made an application for judicial review to the Grand Court of the Cayman Islands, the consent to use the documents in proceedings that had been granted by CITIA in 2012 was revoked. The Grand Court sought an undertaking from the ATO not to divulge the documents and demanding their return or destruction. The ATO refused and then sought to use the documents in the subsequent Australian tax appeal proceedings. This was challenged by the taxpayers on a number of bases. The taxpayers' comity argument was based on the assertion that the use of the documents in the Australian proceedings would be an offence under the laws of the Cayman Islands and therefore judicial comity required that the court reject this evidence. With reference to the Evidence Act section 130 (discretion to exclude evidence of matters of state) the Court held that comity in this sense was a relevant consideration but allowed the evidence to be admitted nonetheless, given that any damage to international relations (between the ATO and CITIA) stemming from the use of the evidence was merely speculative. Alternatively, the taxpayer argued that using this information would be in breach of Article 12(b) (entry into force provision) of the TIEA since it related to assessment for years earlier than 1 July 2010 (the entry into force date). There was no breach of the treaty as information was correctly requested in relation to tax years after the entry into force date, though also relevant to earlier years.

The use of information obtained by the ATO from the Paradise Papers leak was challenged by application to the High Court in *Glencore International.*[519] The taxpayers (members of the global Glencore group) sought an injunction to prevent the ATO from making any use of the documents, on the basis that they were protected by legal professional privilege (LPP). The High Court confirmed that LPP provided immunity against production but it was not an actionable right. The Court confirmed that once the documents had been disclosed, the relevant action to prevent their use was the equitable doctrine of breach of confidence, though in this case such an action would be difficult given that the documents were in the public domain.

The *Glencore* judgment followed an earlier decision of the Full Federal Court related to privileged documents.[520] In that case a former law clerk employed by the taxpayer's solicitors provided to the ATO documents alleged to be the subject of an LPP claim by the taxpayer. In judicial review proceedings, the taxpayer argued that by using the documents the ATO officer engaged in conscious maladministration and therefore the assessments were invalid. The Court disagreed,

[516] S 23 of the Australian International Tax Agreements Act, 1953.
[517] Federal Court of Australia, *Hua Wang Bank Berhad v Federal Commissioner of Taxation (no 7)*, FCA 1020, [2013].
[518] High Court of Australia, *Bywater Investments Ltd v Commissioner of Taxation*, HCA 45 [2016].
[519] High Court of Australia, *Glencore International AG v Federal Commissioner of Taxation*, HCA 26, [2019].
[520] Full Federal Court of Australia, *Federal Commissioner of Taxation v Donoghue*.

concluding that, where the Commissioner is provided with a taxpayer's privileged documents and uses them in the assessment-making process, this will not involve conscious maladministration under the test from *FCT v Futuris Corporation*[521] and the notices of assessments will be valid. The Court stated:

> This requires the conclusion that [the assessment power in] s 166 not only permits but requires the Commissioner to act upon the information which he has in his possession regardless of how he came to have it. Section 166 exhibits a policy which *explicitly privileges the need to have accurate assessments made on the information available over other private law rights*.[522]

The use of stolen information was considered in *Denlay*.[523] This involved the use of information acquired overseas from third parties who had stolen the information from companies associated with the Liechtenstein Group Trust. The taxpayer's challenge was based on an argument that the disks containing the information were the proceeds of crime and therefore the use thereof was conscious maladministration and the assessments were invalid. The Court stated:

> It would be a remarkable state of affairs if the Commissioner were entitled, and indeed obliged, to refrain from doing what is expressed to be his duty by the terms of s 166 of the ITAA 1936 [the assessment power] by reason of a suspicion on his part, even a reasonable suspicion, that some illegality on the part of his officers may have occurred in the course of gathering the information.[524]

As a more general comment, the ATO is a founding member of JITSIC and remains strongly committed to information sharing and coordination between tax authorities, with Australia's Commissioner of Tax currently serving as Vice Chair of the FTA and the JITSIC Sponsoring Commissioner. In relation to tax crime, Australia is also a member of the J5 (the Joint Chiefs of Global Tax Enforcement, formed in 2018 along with the revenue authorities of the UK, the US, Canada and the Netherlands), which provides a base for the sharing of intelligence and joint investigations of cases of tax evasion.[525]

6.3.2.5.2. New Zealand

6.3.2.5.2.1. The Domestic Scenario

New Zealand has a complex administrative system for the resolution of tax disputes. It is intended to improve taxpayer compliance and the decision-making by the Inland Revenue Service of New Zealand and, in combination, reduce disputes in number and longevity. That system combines incentives for better taxpayer decision-making and a greatly improved capability for technical analysis and judgment within the Inland Revenue Service.

It includes a 'conference stage' which allows the parties to explain and advocate their respective positions outside the limitations of a written document. The conferences are conducted with trained Inland Revenue Service facilitators in the chair to reduce the risk of unproductive outcomes. Facilitators are senior and experienced Inland Revenue Service officers who have no connection with the case or the Inland Revenue Service case officers. While they are not able to impose a resolution on case officers, facilitators will suggest that they reconsider the position of

[521] High Court of Australia, *Federal Commissioner of Taxation v Futuris Corp Ltd*.
[522] At 74, emphasis added.
[523] Full Federal Court of Australia, *Denlay v Federal Commissioner of Taxation*.
[524] At 81.
[525] www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Joint-Chiefs-of-Global-Tax-Enforcement/.

the Inland Revenue Service on taxpayer arguments when that seems necessary and set a time within which further exchanges should take place. The conference stage may be adjourned more than once when the parties consider it prudent or productive to continue talking, rather than move to the next phase of the disputes procedure. Thus, during this stage, taxpayers are heard by the administration.

Comparatively few tax matters are litigated, and the great majority are resolved in favour of the Inland Revenue.[526]

6.3.2.5.2.2. Judicial Protection in Cross-Border Situations

In the *Chatfield* case, the Supreme Court of New Zealand confirmed that decisions of the competent authorities to exchange foreseeably relevant information are subject to judicial review.[527] The preceding High Court judgment[528] concerned judicial protection against an information order. Korea's National Tax Service had asked the New Zealand Commissioner of Inland Revenue to obtain and provide information relating to the companies concerned. As a result, the New Zealand Commissioner had issued Chatfield with notices to furnish information. The notices required Chatfield to provide information about the companies to the Commissioner in order that it might be passed on to Korea's National Tax Service. Chatfield had sought judicial review of the decision to issue the Notices. In the context of that application for review, Chatfield had sought copies of documents exchanged between South Korea and the New Zealand Commissioner, including the original request. Chatfield said that it was necessary to see those documents because they would evidence the reasons for the Commissioner's decision and the procedures that were followed, and that those matters were relevant to the application for review. The Commissioner had refused to provide copies of the documents on the grounds that they were not relevant and (in any event) related to 'matters of state'. The High Court had rejected the proposition that, simply because the request was made pursuant to a DTA, the request and any associated documents had to be confidential, insofar as the affected taxpayers (or their proxies) were concerned.[529] The Court of Appeal had dismissed the Commissioner's appeal. Thereupon, the Commissioner had sought leave to appeal to the New Zealand Supreme Court invoking the non-judiciality of the Commissioner's decision.

The High Court's judgment is also interesting regarding its use of OECD commentaries subsequent to the legislation. It states that any changes to the Commentaries (where there has been no relevant substantive change to the Model Convention) are to be viewed not as recording an agreement about a new meaning but as reflecting a common view as to what the meaning is and always has been.[530]

The exclusion of evidence obtained in breach of the law, notably the New Zealand Bill of Rights Act, is determined on the basis of a balancing test, which examines inter alia the nature of the breach, seriousness of charges, centrality of evidence to the case, etc.[531]

[526] *cf* G Clews, *The Tax Disputes and Litigation Review: New Zealand*, (24 March 2021).

[527] Supreme Court of New Zealand, judgment of 7 August 2019, *I Te Kōti Mana Nui Chatfield & Co Ltd v CIR*, SC 34/2019 [2019] NZSC 84; see also Court of Appeal of New Zealand, judgment of 16 December 2016, CA 315/2016, NZCA 614, [2016], dismissing the Commissioner's appeals.

[528] High Court of New Zealand, judgment of 1 September 2015, *Chatfield & Co Ltd v CIR*, CIV-2015-404-1013, NZHC 2099, [2015].

[529] High Court of New Zealand, *Chatfield & Co Ltd v CIR*, NZHC 3289, [2017], para 79.

[530] High Court of New Zealand, *Chatfield & Co Ltd v CIR*, paras 57 and ff and 62.

[531] *cf* R Gupta, *The Relevance of Taxpayers' Constitutional Rights in the Light of Inland Revenue's Power of Search*, paper submitted to the 25th Australasian Tax Teachers' Association Conference (2013) 12 and ff and s 30 of the Evidence Act 2006, regarding improperly obtained evidence in criminal proceedings.

6.4. Equivalent Measures for Protection of Taxpayers' Rights, Notably Ombudspersons

Different institutional frameworks are possible for the protection of taxpayers' rights. Several countries have established an ombudsperson specialised in tax matters for safeguarding the rights enshrined in taxpayer charters or other national legislation.

Both internal complaints within the revenue authority and complaints management by an independent agency may provide legal protection. Such assistance is ordinarily provided for free to the public. Tax ombudspersons generally do not have binding powers on tax authorities. However, the effect of their recommendations differs according to whether they are internal to the revenue authorities or separate from them. In the former case, the recommendations may be regarded as akin to any other non-binding administrative action.[532] In the latter case, the recommendations have value of moral suasion, unless the law otherwise indicates. In any case, investigations by the tax ombudsperson may significantly contribute to the settlement of disputes.

6.4.1. Tax Ombudspersons as Equivalent Protection Mechanism

6.4.1.1. General[533]

The relationship between the revenue authorities and taxpayers has always been a complicated one. While the authority is continuously designing mechanisms to increase revenue collection by making sure taxpayers comply with their legal obligations, taxpayers are continuously looking for alternatives to arrange their affairs in the least burdensome way.

In the course of this delicate relationship, abuses may happen on both sides. Taxpayers may cross the line between legal tax planning and tax evasion, while tax authorities may go beyond the law when exercising their powers and harm taxpayers' rights.

Taxpayers commonly have the possibility to challenge a decision of the tax authorities through an administrative appeal or a lawsuit before a court. These alternatives may vary from jurisdiction to jurisdiction. In some cases, an administrative appeal may not be available, while in others, taxpayers may choose between the appeal or tax litigation. In any case, these are commonly the mechanisms that taxpayers have to present their disagreement when they are facing a dispute with the tax authority.

However, what happens when the traditional mechanisms to safeguard taxpayers' rights fail? While the international coordination of tax administrations has been effective in deterring tax evasion, it has also caused a significant increase in tax controversies. Furthermore, the heavy workload of tax administrations and the courts subjects taxpayers to legal procedures that can take years to be concluded, and the quality of the judgments may not always be good.

As a consequence, some governments have created new institutions that provide alternative mechanisms to safeguard taxpayers' rights, such as the Tax Ombudsman (some countries may have different denominations for the same institution, such as Tax Inspector, Taxpayer Advocate etc.).

Many countries have institutions like a tax ombudsperson, which are independent agencies established by government commonly aimed at safeguarding the human rights of citizens against

[532] Among others, such non-binding acts could therefore also give rise to legitimate expectations.
[533] We would like to thank Celeste Black and Ali Noroozi for their contribution.

the conduct of governmental authorities or in relation to certain industry sectors, such as telecommunications or banking. An ombudsperson normally receives and investigates complaints, working to resolve disputes informally. A Tax Ombudsman does precisely that, but with a focus on safeguarding taxpayers' rights from the conduct of the tax authorities.

The ways in which Tax Ombudsmen safeguard taxpayers' rights vary from country to country, and while some Ombudsmen are a division within the tax administration, others are autonomous institutions independent from the tax authority. The existence of Tax Ombudsmen ensures that taxpayers have a governmental institution specially created to safeguard their rights. Moreover, they can play an important role in preventing disputes or settling them at an early stage, acting as pivots for mediation with tax authorities.[534]

Taxpayers may hold a series of 'expectations' as set out in the Australian Taxpayers' Charter,[535] similar to those in New Zealand[536] and the United Kingdom,[537] or the Taxpayer Bill of Rights in the United States[538] or Canada.[539] There are few jurisdictions in which these 'expectations' are enshrined in legislation and able to be enforced through courts of law. Chile is one of the few countries in which this occurs.[540] In the US, the Taxpayer Bill of Rights now has a legislative basis[541] although its legal enforceability appears to be limited.[542]

6.4.1.2. Tax Ombudspersons in the Different Regions

6.4.1.2.1. Africa

6.4.1.2.1.1. General[543]

A number of countries in Africa have established tax ombudspersons. In Tanzania, the 'Office of the Tax Ombudsperson' (OTO) was established recently through the Finance Act 2019.[544] This Act amended the Tax Administration Act,[545] establishing the office of tax Ombudsman within the Ministry of Finance as an independent body to receive and work on complaints of corruption, arbitrary assessments, unlawful closure of businesses, inter alia. The Ombudsman also handles mediation and facilitates taxpayer access to dispute resolution processes.[546] The Ombudsman is appointed for a renewable tenure of three years and has a duty to handle complaints with confidentiality.[547] The establishment of this office serves as a mechanism to hold the Tanzania

[534] Not all disputes must undergo judicial litigation. The latter should instead be used only for those that cannot be prevented or settled at an earlier stage. In P Pistone and J de Goede (eds), *Flexible Multi-Tier Dispute Resolution in International Tax Disputes* (IBFD, 2020), the merits of mediation in tax matters were explored, including at international level. A multi-stage approach to international tax disputes was suggested, stressing that international tax arbitration cannot per se represent the way to settle all disputes.

[535] Australian Taxation Office, *Taxpayers' Charter – what you need to know* (15 February 2017), www.ato.gov.au/About-ATO/Commitments-and-reporting/Taxpayers--Charter/Taxpayers--Charter---what-you-need-to-know/.

[536] Her Majesty's Revenue and Customs, *Your Charter* (12 January 2016), www.gov.uk.

[537] Inland Revenue Department (IRD), *Inland Revenue's Charter*, www.ird.govt.nz.

[538] Internal Revenue Code (US), para 7803(a)(3).

[539] Canada Revenue Authority, Taxpayer Bill of Rights (December 2013).

[540] Ministerio de Hacienda, Modifica El Código Tributario Para Explicitar Derechos De Los Contribuyentes (19 February 2010), www.leychile.cl.

[541] Internal Revenue Code (US), para 7803 (a)(3).

[542] US District Court, Northern California, *Facebook Inc and Subsidiaries v Internal Revenue Service, et al*, case 17-CV-06490-LB, [2018].

[543] We would like to thank Attiya Waris for her contribution.

[544] Finance Act 2019 (Tanzania) s 45.

[545] Tax Administration Act 2015 (Tanzania) s 28A.

[546] Tax Administration Act 2015 (Tanzania) s 28C.

[547] Tax Administration Act 2015 (Tanzania) s 28B.

Revenue Authority (TRA) to its commitments and obligations set out in the Taxpayer's Service Charter. In Kenya, the Commission on Administrative Justice (CAJ) is established as the Ombudsperson responsible for investigation of complaints on abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector (including the Kenya Revenue Authority). The CAJ is established under section 3 of the Commission on Administrative Justice Act.[548]

6.4.1.2.1.2. South Africa

In South Africa, as a country with a young formal fundamental rights framework, independent institutions such as a public protector or a Tax Ombud are proving to play a decisive role in the actual realisation of rights.

Under the Constitution of 1996, the so-called chapter 9 institutions (referring to the relevant section of the Constitution) are established as independent and impartial state institutions with the main aim to 'strengthen constitutional democracy'. Their independence is established by being subject only to the Constitution and the law: they are accountable to, and report to, Parliament and their members are appointed through a general democratic process in Parliament.

The constitutional duty on South African state organs to 'protect, promote and fulfil' fundamental rights, coupled with the precedent set by the creation of chapter 9 institutions, drove calls by several official commissions of enquiry into the design and operation of South Africa's tax regime for the creation of a specialised Tax Ombud.[549] Initially, the responsible parliamentary bodies planned to establish a specialised and skilled tax unit within the Public Protector's Office. This design choice was later abandoned in favour of establishing a Tax Ombud within the same legal framework that governs the South African tax administration (also an independent government organ). The office of the Tax Ombud was consequently established in 2011 with the enactment of a Tax Administration Act 28 of 2011. The following are key design features of South Africa's Tax Ombud:

(1) It operates independently in the following respects:
   a. It does not report to the South African tax administration.
   b. Its mandate is established by law, namely to review and address any complaint regarding a service, procedural or administrative matter arising from the application of legislation by the tax administration, and to review any systemic and emerging issue in the application of legislation by the tax administration.[550]

(2) However, the Tax Ombud is not wholly independent in the following respects:
   a. It is answerable to the executive by having to report annually to the Minister of Finance.
   b. The Minister of Finance's approval must be obtained should it wish to investigate any systemic or emerging issue.
   c. The Minister of Finance approves the budget for expenditure connected with the office of the Tax Ombud (it should be noted that up to 2016 the budget was approved by the tax administration, but the law was changed as it was argued that budgetary approval could be used to influence appointments and staffing in the office of the Ombud).[551]

[548] Commission on Administrative Justice Act No 23 of 2011 (Kenya).
[549] The first of these calls appeared in the Third Interim Report of the Katz Commission of inquiry into the tax system, 1995.
[550] South African Tax Administration Act (2011) s 16.
[551] South African Tax Administration Act (2011) ss 15 and 16.

The Tax Ombud is therefore not like a chapter 9 institution (such as the Public Protector) only subject to the Constitution and law. Consequently there is ongoing discussion in South Africa for further changes to the legal framework to ensure that the Tax Ombud attains more independence in future (this concerns doing away with requirements such as ministerial approval for investigation of systemic issues and a broadening of the mandate).

A most striking example of the role that the Tax Ombud can play as a surrogate for championing individual rights of taxpayers occurred in 2018. The current President of South Africa, shortly after inauguration, cited a report by the Tax Ombud as reason to suspend the head of the South African Revenue Service due to mismanagement of tax refunds. The Tax Ombud's report also led to the underlying issue being addressed in a new version of the taxpayer charter.[552]

Arguably, it may be very difficult if not impossible for a single taxpayer to procure the type of evidence required to prove systemic manipulation (and abuse) of a tax system by the state apparatus. The example from South Africa shows that an empowered Tax Ombud is able to dramatically increase the realisation of fundamental rights simultaneously for many taxpayers. As noted, one outcome of the Tax Ombud's investigation of this systemic failure was to amend the taxpayer charter by detailing remedial commitments by the tax administration.[553]

Promoting access to justice may be another (context-dependent) reason for making provision for independent institutions to operate as surrogates for taxpayers. This may be compounded by the institutional design for constitutional and human rights litigation. In South Africa, the design for constitutional (ie fundamental rights-based) litigation requires that matters filter through three levels of courts before they reach the apex Constitutional Court. The litigation processes and culture are like those of the UK, which have many merits but are also known to be time-consuming and expensive as a result. The state has endless resources and the prospect of litigating on a taxpayers' rights matter will involve a period of at least three to five years in the lower courts. In complex matters it can take up to 10 years or even longer in difficult cases. Whilst provision is made for dealing with tax disputes through an internal administrative mechanism (so-called objection against assessment), the revenue authority is by its nature not equipped to adjudicate human rights type arguments. The cost and time involved to take human rights-based tax disputes to court effectively discourages taxpayers with limited resources to take up their rights. In this regard, the South African Tax Ombud has played an important role because the mandate includes investigating complaints that involve procedural rights.[554] Recommendations by the South African Tax Ombud regarding breaches of procedural rights in particular cases are not binding on the tax administration or the taxpayer. However, if either party does not accept the recommendation, written reasons must be provided that may be used in administrative review proceedings.[555]

[552] The 2017 report by the Tax Ombud documented how manipulation of tax refunds due to a large number of taxpayers resulted in financial hardship. Complaints, particularly by small business or sole traders revealed that the deliberate and planned delay of tax refunds led to the near collapse of businesses or ensuing job losses. Evidence was assembled from many constituents, resulting in a large data set from which certain standard practices were identified that amounted to systemic manipulation to delay tax refunds due to a significant body of taxpayers (the report may be viewed in the annex at www.taxombud.gov.za/Documents/OTO-AnnualReport-2017.pdf).

[553] See the commentary under sec 1.3 on sources of law, customary international law.

[554] South African Tax Administration Act (2011) s 16.

[555] South African Tax Administration Act (2011) s 20.

6.4.1.2.1.3. Other African Countries

The African Commission on Human and Peoples' Rights exercises functions that strongly resemble those of ombudspersons.[556]

Moreover, several African countries have established ombudspersons responsible for faults in administration in general.[557] Such ombudspersons are generally appointed by the executive.[558]

The strong presence of general ombudspersons in Africa may be explained in different ways. Inter alia, unlike in other continents, traditional litigation is the preserve of an elite, due to the narrow tax base. Ombudspersons can therefore play a role in support of a fair administration of justice, supplementing the action of those persons who are either unable to access justice, or to raise technical issues related thereto.

A limited number of African countries also have ombudspersons specialised in the tax area. These are normally established within tax authorities and perform the function of fostering administrative settlement of disputes.[559]

6.4.1.2.2. Americas

6.4.1.2.2.1. Latin America

6.4.1.2.2.1.1. Argentina[560] The Argentine Ombudsman is provided for in Article 86 of the Constitution. It is elected by the Nation's Congress:

> The Ombudsman is an independent body established within the Nation's Congress, which shall act with full functional autonomy, without receiving instructions from any authority. Its mission is the defence and protection of human rights and other rights, guarantees and interests protected by this Constitution and the laws, in the face of actions or omissions of the Administration, and the control of the enforcement of public administrative functions.

The Argentine Supreme Court has established that the Ombudsman lacks active standing in tax cases.[561]

6.4.1.2.2.1.2. Brazil[562] According to Articles 12 and 65 of Decree no 9745/2019, the Inspection Office of the Secretariat of the Federal Revenue of Brazil[563] shall, inter alia, investigate and verify illegal acts committed by tax authorities, analyse reports about it and decide disciplinary procedures.

[556] See art 45 African Charter on Human and People's Rights.

[557] *cf* eg arts 243–45 Constitution of Burundi; arts 120–28 Constitution of Malawi, see also arts 129 and ff for the Human Rights Commission; arts 96–102 Constitution of Mauritius; arts 256–61 Constitution of Mozambique; arts 89–94 Constitution of Namibia; arts 110 and ff Constitution of Somalia: independent commissions, including the Office of the Ombudsman, art 111 J.

[558] See J Hatchard, 'The Institution of the Ombudsman in Africa with Special Reference to Zimbabwe' (1986) 35 (2) *The International and Comparative Law Quarterly* 257.

[559] In 2009 Uganda introduced a Taxpayers' Charter. Even if it does not include a specific person protecting the rights of taxpayers, it sets clear standards of what taxpayers may expect from tax authorities and establishes a customer care service (see Uganda Revenue Authority, *Taxation Handbook*, 2nd edn (2015) 151–53). Kenya followed this example in 2011, reaching out for an informal direct link with taxpayers also via social media, who can file complaints to the Commissioner General of the Revenue Authority (see kra.go.ke/en/complaints-info). After Tanzania introduced a Taxpayers' Charter in 2017, the Commissioner General of the Tanzanian Revenue Authority pledges to intervene for service recovery, directing a tax officer to expedite and resolve matters that do not comply with the standards of good tax governance, www.tra.go.tz/index.php/80-taxpayer-s-charter.

[560] We would like to thank Eduardo A Baistrocchi for his contribution.

[561] Argentine Supreme Court, *Defensor del Pueblo de la Nación c/ Estado Nacional -Ministerio de Economía y Obras y Servicios Públicos- [monotributo] dto. 885/98 s/ amparo-ley 16.986*, judgment: 326:2777, [2003].

[562] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[563] *Corregedoria da Secretaria Especial da Receita Federal do Brasil.*

6.4.1.2.2.1.3. Chile[564] In 2020, Law N° 21.210 on tax modernisation introduced the 'Taxpayers Defender's Office' (DEDECON, its acronym in Spanish). The Chilean tax ombudsperson depends on the Ministry of Finance.

Article 3 of Law N° 21.210 states that it 'shall have as a main purpose the protection and safeguard of taxpayers' rights in the matters of national taxation. While exercising its legal duties, the Defender's Office shall especially ensure the protection and safeguard of the most vulnerable and the micro-, small- and medium-sized businesses'.

Therefore, DEDECON shall ensure the protection of taxpayers' rights, the surveillance of the principle of legality and, in general, assure respect for the rule of law. It must grant guidance to taxpayers, acknowledge their complaints, issue public recommendations, represent small and medium-sized businesses or natural persons of low income before the Chilean tax administration, issue technical opinions, etc. It does not possess representation faculties in judicial matters.

6.4.1.2.2.1.4. Colombia The Colombian Taxpayer and Customs User's Ombudsman's Office (*Defensoría del Contribuyente y del Usuario Aduanero*) is a Special Body of the Directorate of National Taxes and Customs, created in exercise of the extraordinary powers conferred by Article 79 of Law 488 of December 24, 1998. Its purpose is to ensure that the administration complies with the provisions on tax, customs and exchange, that it does not impose burdens that are not established by law and that citizens are treated fairly, equitably, kindly and respectfully. The Taxpayer and Customs User's Ombudsman's Office may, for example, intervene in the event of rejection of the request for refund of the overpayment of the VAT sales obligation. That Office has also more general obligations to identify problems and present assessments and recommendations. It also has to analyse the information and arguments provided by the Directorate of National Taxes and Customs for taxpayer guidance. The Colombian Constitutional Court affirmed that the Taxpayer and Customs Users' Ombudsman's Office is not a control agency, but is designed to guarantee citizens' rights, specifically those of taxpayers and customs users.[565]

6.4.1.2.2.1.5. Mexico[566] The *Procuraduría de la Defensa del Contribuyente* (PRODECON) is empowered by its Organic Law (issued by the Mexican Federal Congress)[567] to receive and address complaints filed by taxpayers against any kind of act of the Federal Tax Authorities. Through the complaints procedure PRODECON exercises its tax ombudsperson function to safeguard the fundamental rights of taxpayers.

PRODECON's approach appears to extend the powers further. Amongst other functions, PRODECON acts as public defender, mediates disputes to reach a Conclusive Agreement between taxpayers and auditors and performs ombudsperson functions, including publicly naming officers where the revenue authority does not accept PRODECON's recommendations for improvement.[568] If PRODECON is not able to reach a solution with the tax authority, it may issue a non-binding public recommendation exposing the inappropriate behaviour of the tax authority.[569]

[564] We would like to thank Yuri Varela for his contribution.

[565] Constitutional Court of Colombia, judgment of 4 October 2000, *Defensor del Contribuyente y del Usuario Aduanero*, case C-1343, D-2926, [2000].

[566] We would like to thank Diana Bernal for her contribution.

[567] The current version of the *Estatuto Orgánico para la Defensa del Contribuyente* was published in the *Diario Oficial* of 24 July 2020.

[568] D Bernal, *The role of PRODECON in the protection of taxpayers' rights* 2.

[569] According to art 35 (XVI) Mexican PRODECON Organic Law.

6.4.1.2.2.1.6. Peru[570] The Peruvian *Defensoría del Contribuyente* is similar to an ombudsperson. The *Defensoría* is an entity of the Ministry of Economy and Finance at the taxpayers' service to guarantee their rights before all tax administrations in the country (national, municipal and others) and before the tax court.

The *Defensoría* was established in 2004[571] and has the following functions: to receive and address taxpayers' complaints and suggestions related to the actions of the tax administration and the tax court; to gather the necessary information from the tax administrations and courts for a better assessment of the complaints and suggestions; to propose regulatory and procedural modifications in tax matters to the Minister of Economy and Finance; to ensure that the actions of the various organs of the tax administration and the tax court comply with the current regulatory framework; to inform the Ministry of Economy and Finance about the validity of the requests made by the Peruvian tax administration to file contentious-administrative judicial claims against decisions of the tax court; and to inform the Ministry of Economy and Finance about the received complaints and suggestions.

The *Defensoría* does not have powers over the tax administration or the tax court, but only acts as an intermediary in favour of taxpayers' rights. It does not issue binding pronouncements. For this reason, it is uncommon that taxpayers refer to the *Defensoría*.

6.4.1.2.2.2. The Caribbean[572]

Caribbean jurisdictions have an office of an ombudsperson established under their respective constitutions. However, such an individual is not specifically focused on seeking to mediate between the taxpayer and the taxing authority but rather is designed to address complaints of maladministration by Government departments. That includes the Ministry of Finance, under which the Board of Inland Revenue and Customs and Excise departments fall. Thus, it is possible for a taxpayer to bring a complaint to seek redress to the Ombudsperson who will often act as a type of mediator by referring such complaints to the department in question and also providing feedback to the taxpayer or other complainant.

6.4.1.2.2.3. United States[573]

In the United States, the primary responsibility for assisting taxpayers rests with the National Taxpayer Advocate (NTA) and the Taxpayer Advocate Service (TAS). The TAS is an independent organisation within the IRS that is tasked with ensuring that taxpayers are treated fairly and helping taxpayers understand their rights. As part of its responsibilities, TAS can assist taxpayers who are experiencing financial hardship, help taxpayers in resolving tax problems they have not been able to resolve with the IRS, and identify systemic tax administration problems with recommendations to address such issues. As such, TAS has at least one local taxpayer advocate and office in each US state.

The previous Office of the Taxpayer Ombudsman was codified in 1988 as part of the Taxpayer Bill of Rights (1), which enacted IRC section 7811 to give the Ombudsman the statutory authority to issue Taxpayer Assistance Orders (TAOs) in specific individual cases when taxpayers were suffering or about to suffer significant hardships because of the way the IRS administers laws. The subsequent Office of Taxpayer Advocate was created in 1996 by the Taxpayer Bill of Rights, which gave the NTA more authority.

[570] We would like to thank Cecilia Delgado Ratto for her contribution.
[571] Peruvian Supreme Decree no 050-2004-EF.
[572] We would like to thank Anthony Gafoor for his contribution.
[573] We would like to thank Jeremiah Coder for the contribution.

IRC section 7803 requires the NTA to provide two annual reports to Congress – a midyear report contains the objectives of the NTA for the upcoming fiscal year, and the year-end report catalogues the NTA/TAS activities (including initiatives taken to improve taxpayer services and the IRS responses) as well as a summary of at least the 10 most serious problems facing taxpayers and 10 most litigated issues.

In order to deal with systemic issues, the NTA is empowered to issue Taxpayer Advocate Directives (TADs) to 'mandate administrative or procedural changes to improve the operation of a functional process or to grant relief to groups of taxpayers (or all taxpayers) when implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment or provide an essential service to taxpayers'.[574] In response to a TAD, the IRS Commissioner or Deputy Commissioner has 90 days to either implement the directive or else to modify or rescind the TAD, with an appropriate written response given the NTA.[575]

When dealing with specific taxpayer cases, the NTA or local taxpayer advocates can issue TAOs in any case in which a taxpayer is facing a significant hardship, which is defined by statute as: (1) an immediate threat of adverse action; (2) a delay of more than 30 days in resolving taxpayer account problems; (3) the taxpayer incurs (or will incur) significant costs (including fees for professional representation) if relief is not granted; and (4) irreparable injury or a long-term adverse impact on the taxpayer if relief is not granted.[576] While a TAO is not strictly binding on the IRS, it has generally complied with it unless it has been appealed, modified or rescinded. Only the Commissioner or Deputy Commissioner can modify or rescind a TAO, but where the IRS modifies or rescinds the TAO (rather than the NTA herself modifying or rescinding the TAO), a written explanation must be provided to the NTA.[577]

The NTA is appointed by the Secretary of the Treasury in consultation with the IRS Commissioner and Oversight Board. The NTA, who reports directly to the IRS Commissioner, must have experience representing individual taxpayers and a background in customer service as well as tax law.[578]

6.4.1.2.3. Asia

6.4.1.2.3.1. China[579]

There is no tax ombudsperson in China. However, scholars have suggested the introduction of such an institution in China.[580] There is a Taxpayers' Rights Protection Division under the Taxpayer Services Department of the State Administration of Taxation. This Division is responsible for handling complaints from taxpayers and for protecting taxpayers' rights. According to the Tax Collection Law, taxpayers and withholding agents have the right to bring charges against or expose any tax authority or tax official for violation of laws or disciplines. In addition, any entity or individual shall have the right to expose any acts committed in violation of the law or the administrative regulations. The authorities who receive such exposures or who are in charge of investigation and disposition shall keep the informers secret. The tax authorities shall grant

[574] Internal Revenue Manual, para 13.9.1.1.2 (10 August 2020).
[575] Internal Revenue Code (US), Title 26, para 7803(c)(5).
[576] Internal Revenue Code (US), Title 26, para 7811.
[577] Code of Federal Regulations (US), Title 26, Chapter I, Subchapter F, Part 31, para 301.7811-1 (b).
[578] Internal Revenue Code (US), Title 26, para 7803(c).
[579] We would like to thank Na Li for her contribution.
[580] D Xu, 'An Effective Path to Implement Tax Principle of Legality: Establishing Taxpayer Advocate Service System in China' (2014) 29 (4) *Legal Forum*, 54–61.

the informers rewards in accordance with the relevant provisions. Tax officials violating tax laws are sanctioned under several laws and regulations, including the Punishment Ordinance for Civil Servants, the Criminal Law and the State Compensation Law. Therefore, they will be ordered by the authority at the upper level or the administrative supervision authority to correct their acts, be subject to administrative sanctions, and even be subject to criminal liabilities.

6.4.1.2.3.2. India[581]

India had created the office of the so-called Income Tax Ombudsman in 2003 to deal with the settlement of complaints relating to Income Tax. Guidelines were issued in 2010.[582] However, in 2019, the government abolished the Ombudsman, as the complaints had fallen to single digits signalling that it had failed to achieve its objectives.[583]

The ombudsperson was 'external' in the sense that he/she had to be independent of the jurisdiction of the income tax department. They were to hear only procedural complaints (such as delay in refunds, lack of transparency, non credit of tax paid etc, clause 8 I (a) in connection with clause 9 of the Guidelines). The ombudsperson could help settle such issues directly (clause 9 I (b) to (d) of the Guidelines).

6.4.1.2.3.3. Israel[584]

There is no formal tax ombudsman in Israel, but the tax authorities handle complaints against their actions through specific units within the tax authority. In addition, the general state controller and the Ombudsman of Israel could hear and handle taxpayers' complaints against tax authorities.

6.4.1.2.3.4. Japan[585]

There is no tax ombudsperson at the national level in Japan. Only some local governments have introduced ombudspersons, but they do not deal with tax issues.

6.4.1.2.4. Europe

6.4.1.2.4.1. The European Union and its Member States

The European Union itself does not have a tax ombudsperson, but only a general ombudsperson. The activity of the EU ombudsperson in tax matters has not been particularly relevant until now.

However, at the national level of EU Member States there are various interesting experiences that are reported in the following.

6.4.1.2.4.1.1. Austria[586] There are two distinct ombuds systems with the mandate to assist in the protection of taxpayers rights in Austria: an 'internal' ombudsperson for taxation (*Steuerombudsstelle*) who is integrated in the tax administration, and the 'external' Austrian Ombudsperson Board (*Volksanwaltschaft*). The latter is an independent body that maintains broad

[581] We would like to thank Ashrita Prasad Kotha and Sriram Govind for their contribution.
[582] The Income Tax Ombudsman Guidelines 2010, www.incometaxindia.gov.in/Documents/ombudsman_guidelines_2010.PDF.
[583] Press Information Bureau, Government of India, Cabinet approves Abolition of Institution of Income-Tax Ombudsman and Indirect Tax Ombudsman, 6 February 2019, available at pib.gov.in/newsite/PrintRelease.aspx?relid=188156.
[584] We would like to thank Rifat Azam for his contribution.
[585] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.
[586] We would like to thank Céline Braumann for her contribution.

investigative powers and may espouse complaints by aggrieved subjects against administrative acts rendered by any government authority, including the tax administration.

6.4.1.2.4.1.2. France The Mediator of the Economic and Financial Ministries (*Médiateur des ministères économiques et financiers*) is competent to help taxpayers resolve their persistent disputes with all the services of these Ministries. The Mediator also reports to the Defender of Rights (an equivalent to an Ombudsperson).

The Mediator can only be seised by complaints from individuals or legal entities concerning the operation of the services of the Ministry of Finance and Public Accounts in their relations with users. The Mediator cannot rule on requests from professional or trade union organisations for the settlement of a collective issue.

Taxpayers can refer a matter to the Mediator if they have taken the first step with the tax department concerned and are not satisfied. However, the Mediator does not intervene during a tax audit procedure in progress. Thus, the contradictory dialogue between the user and the tax authorities, which is part of an external audit or a documentary audit, cannot in itself constitute the first step to seising the Mediator. A request for mediation can only be made after rejection of the user's first step (hierarchical appeal, contentious complaint, etc) following the control procedure.

6.4.1.2.4.1.3. Italy When Italy introduced the Taxpayers' Bills of Rights in 2000, it also established a Tax Ombudsperson (*Garante del contribuente*) as an independent body operating at each regional tax authority. The president of the tax court of second instance selects the *Garante del contribuente* among independent persons (often professionals with a strong tax background).

The *Garante del contribuente* ensures that tax procedures are respected in accordance with the rule of law. The ombudsperson does not have binding powers on tax authorities and may not intervene before courts.

However, considering that Italian tax authorities have to exercise their powers in conformity with the rule of law, any possible violation assessed by the *Garante del contribuente* should make them review the exercise of their powers. The absence of case law enforcing the violations assessed by the *Garante del contribuente* before courts may be due to the fact that the *Garante del contribuente* merely issues recommendations, which, unlike the acts issued by tax authorities, are not formally contained in an administrative act. These recommendations only have a value of moral suasion, backed up by the validity of their technical arguments.

6.4.1.2.4.1.4. Spain The Council for the Defence of the Taxpayer (*Consejo para la Defensa del Contribuyente*) is a collegiate body integrated in the Ministry of Economy and Finance and attached to the Secretary of State for Finance and Budgets. It is made up of 16 members. The members shall be appointed and dismissed by the Minister of Finance and Public Function by Ministerial Order, with the exception of its ex officio members. Eight so appointed members represent the professional and academic sectors related to the field of taxation. Four members represent the State Tax Administration Agency. A representative of the General Directorate of Taxes and a representative of the General Directorate of Cadastre shall also be members. A representative of the Economic-Administrative Courts is a further member, proposed by the Secretary of State for the Treasury, having heard the President of the Central Economic-Administrative Court. Finally, the Chief State Lawyer of the State Attorney's Office for the financing of the territorial entities is a member and also the Secretary of the Council for the Defence of the Taxpayer.[587]

[587] Arts 2 and 4 *Real Decreto* 1676 of 13 November 2009 *por el que se regula el Consejo para la Defensa del Contribuyente.*

The president of the Council for the Defence of the Taxpayer shall be a person of recognised prestige in the tax field, with at least ten years' professional experience. He or she is appointed from among its members by the Minister of Finance, at the proposal of the Council, for a renewable term of three years. The president of the Council for the Defence of the Taxpayer represents the Council and is in charge of relations with the Secretary of State for the Treasury, with the State Agency for Tax Administration and with other centres, bodies and agencies, both public and private.[588]

The Council shall exercise its functions independently. Its functions include: dealing with complaints; collecting and contrasting the necessary information about the complaints filed in order to verify their importance, and subsequently making proposals for the adoption of the pertinent measures; sending reports to the bodies of the tax administration affected by the complaint as well as making suggestions and recommendations.[589]

The complaints are resolved through a flexible procedure, without strict formalities and always looking for the best possible solution for the specific dispute between the tax authority and the taxpayer.

6.4.1.2.4.2. Russia[590]

There is no tax ombudsperson in Russia.

The Constitution of the Russian Federation enshrines the right of citizens to freely use their abilities and property for entrepreneurial and other economic activities not prohibited by law. Protection and free exercise of this right is guaranteed, in particular, by the so-called Ombudsman for the protection of entrepreneurs' rights. The President of the Russian Federation appoints this ombudsperson on the basis of the opinion of the business community for a period of five years. The Ombudsman for the protection of entrepreneurs' rights is a state body, which guarantees the protection of the rights and legitimate interests of subjects of business activity and observance of these rights by public authorities, local governments and officials.[591]

The Ombudsman for the protection of entrepreneurs' rights has the power to examine complaints of business entities, participate in the consideration of cases by commercial courts, participate in criminal proceedings, request and receive the necessary documents and information, visit places of detention of suspects and those accused of having committed a crime, as well as institutions executing penalties, without special permission (in cases provided for by federal laws), and to perform other actions aimed at protecting the rights and legitimate interests of business entities.

The reduction of the tax claims of tax authorities is one of the most significant achievements of the Ombudsman for the protection of entrepreneurs' rights.

6.4.1.2.4.3. United Kingdom

Complaints about the conduct of the Her Majesty's Revenue and Customs (HMRC) in the UK may be raised with the Adjudicator's Office or the Parliamentary and Health Services Ombudsman. Issues which may be examined by the Adjudicator include unreasonable delay, poor advice, inappropriate staff behaviour or the HMRC's use of discretion.[592] While the Parliamentary Ombudsman may exercise similar powers, it has noted that most matters are resolved by the Adjudicator before reaching the Parliamentary Ombudsman.[593]

[588] Art 5 of that law.
[589] Arts 2 and 3 of that law.
[590] We would like to thank Karina Ponomareva for her contribution.
[591] Federal Law of 7 May 2013 No 78-FZ 'On Business Ombudsmen in the Russian Federation'.
[592] The Adjudicator's Office, *How we work*, available at www.adjudicatorsoffice.gov.uk.
[593] Parliamentary and Health Service Ombudsman, *Complaints about UK government departments and agencies, and some UK public organisations 2014–15* (2015) 26.

6.4.1.2.5. Oceania

6.4.1.2.5.1. Australia[594]

In Australia, taxpayers have a range of statutory and common law rights which are legally enforceable through courts or tribunals. Such rights may include being able to challenge the decision of a revenue authority,[595] a right to have privacy respected and affairs treated confidentially,[596] access to information that the revenue authority may hold about them[597] or the right to claim legal professional privilege over certain communications with their lawyer.

The main avenues of redress for breaches of the 'expectations' mentioned above are through the complaints handling function, either within the revenue agency itself[598] or through independent scrutinising offices that are either within the revenue agency, such as the National Taxpayer Advocate (NTA) in the US, general ombudsman services or the dedicated tax specialist ombudsman like the Inspector-General of Taxation (IGT) in Australia.

In Australia, the IGT performs the role of the Taxation Ombudsman, in addition to other functions, and is responsible for assisting taxpayers with their complaints about the administrative actions of the Australian Taxation Office (ATO), Australia's federal revenue authority, and the Tax Practitioners Board (TPB), a regulatory body for tax practitioners in Australia.[599]

Consistent with the majority of other ombudspersons' services globally, the IGT may issue determinations which are persuasive but not binding on the revenue authority.

In Australia, taxpayers may also lodge a claim under the Compensation for Detriment caused by Defective Administration (CDDA) scheme that operates across the Australian Commonwealth public service. The scheme applies where there has been an unreasonable failure in administration by the agency that causes direct loss or detriment to the person.[600] The CDDA scheme was established under the executive power of the government that is granted by the Constitution and not by legislation. The granting of compensation is effectively at the discretion of the agency head and it has to be met out of the agency's existing budget. A review into the CDDA in relation to the ATO and small business was undertaken in 2019 and the government has accepted all the recommendations made in the review's published report.[601]

6.4.1.2.5.2. New Zealand[602]

In New Zealand, there is no dedicated taxation ombudsperson. Taxpayers may raise complaints with the revenue authority or with the general Ombudsperson who is also tasked with investigating complaints about other government departments.[603] New Zealand's Ombudsman is not authorised to review tax assessment or tax shortfall penalty decisions. However, issues such as delay or inadequate service may be investigated.[604]

[594] We would like to thank Celeste Black and Ali Noroozi for their contribution.
[595] Taxation Administration Act 1953, Pt IVC.
[596] Privacy Act 1988; Taxation Administration Act 1953, Sch 1, Div 355.
[597] Freedom of Information Act 1982.
[598] See for example: Australian Taxation Office, *Complaints* (11 November 2019), www.ato.gov.au.
[599] Inspector-General of Taxation Act 2003.
[600] Department of Finance (Aus), *Resource Management Guide 409: Scheme for Compensation for Detriment caused by Defective Administration* (2016), www.finance.gov.au.
[601] Australian Government, Department of Finance, *Review of the Compensation for Detriment Caused by Defective Administration Scheme in relation to the Australian Taxation Office and Small Business* (the Cornall Review) (2019).
[602] We would like to thank Celeste Black for her contribution.
[603] Ombudsman (NZ), *What we do*, www.ombudsman.parliament.nz.
[604] Ombudsman (NZ), *Internal Revenue Department*, www.ombudsman.parliament.nz.

6.4.1.3. Conclusions on Tax Ombudspersons[605]

The functions of a tax ombudsperson fill an important gap in protecting taxpayers' rights. This offers an avenue to seek assistance in the investigation of complaints against the revenue authorities without requiring the taxpayer to resort to more formal and expensive judicial processes. Where tax ombudspersons are established, they will most often be independent of the revenue authority, but still be appointed by and reporting to the government. These ombudsperson functions can take several forms: a specialised tax ombudsperson; a general ombudsperson with scope to consider tax-related complaints; or another government oversight function that includes ombudsperson-like powers and responsibilities. The tax ombudsperson's role is most often focused on investigating taxpayer complaints regarding the procedural administration of the tax system (rather than disputes over substantive tax liability) and assisting taxpayers in resolving such disputes with the revenue authority where the internal complaints mechanism has been insufficient.

6.4.2. Other Equivalent Protection Mechanisms

Particular situations in some countries are addressed through mechanisms other than ombudspersons. For example, as discussed above,[606] although the IGT in Australia can assist with resolving disputes regarding the administration of the tax system, the IGT cannot award damages for harm suffered by the taxpayer as a result of such defective administration. A separate government mechanism, the Scheme for Compensation for Detriment caused by Defective Administration, provides the means for seeking such a monetary award.

Some countries provide specific alternative mechanisms for more serious complaints against individual revenue officers. In the United States, the civil rights of taxpayers are protected by the IRS Office of Equity, Diversity and Inclusion, Civil Rights Division, and allegations of impropriety and mismanagement of IRS programmes can be reported to the Treasury Inspector General for Tax Administration. In the UK, complaints of serious misconduct by HMRC staff are investigated by HMRC but this process is overseen by the Independent Office for Police Conduct.

6.5. Conclusions on Procedural Rights

6.5.1. Introduction

The concept of 'procedural rights' covers all the rights applicable in various stages of the tax procedures, encompassing the administrative and judicial ones. They are in place in order to give effect to substantive tax rules and to substantive rights. Procedural rights do not involve or have a direct link with the tax due, but rather with the procedure followed to determine and collect it.

The main umbrella principle applicable to tax procedures is the rule of law. This principle in itself has a procedural and a material component. The main procedural expression of the rule of law is the right to effective legal protection, which entails several specific principles, such as access

[605] We would like to thank Celeste Black for her contribution.
[606] See sec 6.4.1.2.5.1.

to justice, equality of arms, the privilege against self-incrimination, the prohibition on double jeopardy or the right to be heard.

These are generally protected under the right to a fair trial and present significant interaction across the various specific applications of this right. Our report has addressed them in respect of three main aspects, namely the taxpayers' right to access relevant documents (also known as *habeas data*), the right to be heard (also known as *audi alteram partem*) and the right to judicial protection. All of these are indispensable components of the right to fair trial, in order to secure an effective legal remedy that the affected persons can activate in order to prevent their legal sphere from being adversely affected by acts issued by tax authorities.

Mutual assistance including cross-border and worldwide data exchange are rendering the effective protection of those rights more difficult. However, the protection of procedural rights must be secured in both purely domestic and in cross-border scenarios. Tax authorities are bound to exercise their powers in line with the rule of law in both cases.

6.5.2. Access to Documents (*Habeas Data*)

Access to data (*habeas data*) is a precondition for the effective exercise of the right of defence throughout tax procedures.[607] Therefore, it concretely operates at a moment logically prior to other rights. As such, access to any documents and information that may affect the parties to the dispute is an integral part of the right to a fair hearing.[608] The taxpayer must have access to the relevant documents in the possession of the tax authorities, if necessary via a procedure for the disclosure of these documents.[609] If access to documents is not – or not properly – guaranteed, this amounts to the denial of a fair hearing.[610] However, the right of access to documents is not an absolute right. It can be legitimately limited, especially in the course of a tax audit.

With regard to mutual assistance and cross-border data exchange, the CJEU has held that the person from whom information is requested must have access to the documents in the file in order to be able to challenge the legality of the request for information. To that end, addressees of an information order must at least have access to the minimum information referred to in Article 20(2) of Directive 2011/16/EU, which means the identity of the person under examination or investigation and the tax purpose for which the information is sought.[611] However, in conformity with international tax law, the person under examination can also be a group of persons. In addition, the national court should have full access to the request for information, as well as any additional information, and, if the national court considers it necessary, it may share this information with the addressee of an information order holding that information.[612]

[607] The Argentine Constitution includes a specific provision on habeas data (art 43). The existence of habeas data in connection with the effective right to defence in tax procedures has been acknowledged by CJEU, *Ispas*, para 39. Interestingly, this case concerned the levying of VAT in a purely domestic situation.

[608] In Europe this is guaranteed by art 6(1) of the ECHR and, in the EU, by art 47 of the EU Charter. In the European Union, specific expressions of this right also fall under art 42 of the EU Charter, for the acts issued by the European institutions, and receive legal protection under national Constitutions and statutes.

[609] See, for example, ECtHR, *McGinley and Egan v United Kingdom*, nos 21825/93 and 23414/94, (9 June 1998), paras 86 and 90; the ECtHR found no violation of the right, as access to documents was guaranteed for the appellants.

[610] In the case of ECtHR, *Chambaz v Switzerland*, no 11663/04, (5 April 2012). The ECtHR concluded that the denied access to documents held by tax authorities and concerning the taxpayer had deprived him of the right to a fair trial under art 6 of the ECHR, and in particular the aspect of equality of arms.

[611] CJEU, *Berlioz Investment Fund*, para 100.

[612] CJEU, *Berlioz Investment Fund*, paras 92 and 100. See also CJEU, judgment of 25 November 2021, *État du Grand-duche de Luxembourg (Droit de recours contre une demande d'information en matiere fiscale)*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795; as well as CJEU, judgment of 25 November 2021, État du Grand-duche de Luxembourg (Informations sur un groupe de contribuables), case C-437/19, ECLI:EU:C:2021:953. See also the Opinion of Advocate

Simply because requests are made within the framework of inter-State mutual assistance does not mean that the request and any associated documents must be confidential, including insofar as the affected taxpayers (or their proxies) are concerned. Taxpayers may need those documents to prepare their defence because they would evidence the reasons for the fiscal authorities' decision and the procedures that were followed.[613] However, the CJEU grants legal protection only to the addressees of information orders, not to the taxpayers concerned.[614]

6.5.3. Right to be Heard (*Audi Alteram Partem*)

The right to a fair trial includes the right to be heard, ie the application of the *audi alteram partem* principle. It obliges tax authorities throughout the entire procedure to allow taxpayers to express their views before adopting any measure that may burden them,[615] unless there is a justification for immediate imposition and enforcement, or if a prior hearing could not have produced a different outcome.[616]

In principle, taxpayers should be notified when their data are transferred to other states.[617] In the European Union, the GDPR establishes the right to be informed in case of transfer to non-EU countries or international organisations.[618] Such right may be subjected to limitations in the public interest, including in taxation matters. However, such limits cannot entirely exclude the right of the affected persons to be informed about the transfers. Taxpayers should know when, where and for what purpose their data are processed and where they end up or are stored. Tax data are also personal data worthy of at least some protection. However, under the auspices of BEPS, many states have abolished the right to notification and to a hearing when it comes to mutual assistance and cross-border data exchange.[619] This probably reflects the general climate of combatting tax fraud and evasion and can be based on Article 1, last sentence of the OECD Model Agreement on Exchange of Information on Tax Matters. Accordingly, '[t]he rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information'.

It is, however, questionable whether and to what extent this more recent practice of denying notification and a hearing in such situations will withstand judicial review. The CJEU has been generous. It grants judicial protection only to the addressees of information orders which are

General Kokott of 3 June 2021, ECLI:EU:C:2021:450 [2021]. A similar approach has been adopted in Court of Appeal of New Zealand, *CIR v Chatfield & Co Ltd*, concerning a request for information under art 25 of the New Zealand-Korea Double Tax Agreement.

[613] High Court of New Zealand, *Chatfield & Co Ltd v CIR*, para 79.

[614] CJEU, *État Du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, cited; as well as CJEU, case C-437/19, *État du Grand-Duché de Luxembourg*, cited. See also the Opinion of Advocate General Kokott of 3 June 2021, ECLI:EU:C:2021:450 [2021].

[615] CJEU, judgment of 3 July 2014, *Kamino International Logistics und Datema Hellmann Worldwide Logistics*, case C-129/13, ECLI:EU:C:2014:2041, para 73.

[616] See P Pistone, 'The EU Charter and Fundamental Rights' in B Terra, P Wattel (eds), *European Tax Law*, VII ed. (Wolters Kluwer, 2018), 153.

[617] *cf* also P Porporatto, 'Taxpayers' rights and guarantees in relation to the exchange of tax information and its new paradigms Part II, CIAT' (2020) *Inter-American Center of Tax Administrations*; P Baker and P Pistone, *Blueprints for enhancing the protection of taxpayers' rights in cross-border tax procedures*, paper submitted to the Committee of Experts on International Cooperation in Tax Matters, Twelfth Session, Geneva, (11–14 October 2016), Agenda item 3(b)(v), Mutual Agreement Procedure – dispute avoidance and resolution, E/C.18/2016/CRP.11, Distr.: General, (6 October 2016); V Burilov, *Can GDPR revive taxpayers' rights to privacy in relation to exchange of tax information?*, Research Proposal, Tilburg University, (2017).

[618] See art 15(2) GDPR.

[619] *cf* eg A Feenstra, 'It takes two to tango: international exchange of information on tax matters and the protection of taxpayers' rights' (2017) *International Bar Association*: the Netherlands abolished prior notification as of 1 January 2014 on the assumption of a comparable standard of confidentiality in all participating States.

based on mutual assistance to another Member State. The taxpayer or third parties whose data are transferred do not have a right to prior or *ex post* notification or a hearing under EU law.[620] There does not seem to be too much concern about taxpayers' data protection rights until now, perhaps under the assumptions of comparable protection standards, that tax data are supposed to be not so private and of the overwhelming importance of anti-BEPS measures. In our opinion, minimum standards for taxpayers need to be developed and the right to prior notification cannot be generally excluded.

6.5.4. Right to Judicial Protection

The right to judicial protection is the right to access justice and to have an effective legal remedy before an impartial body established by law against measures that may adversely affect the taxpayers' legal sphere: *ubi ius, ibi remedium*. This right secures the core procedural expression of the rule of law and a possible judicial review for all acts issued by tax authorities in the framework of tax procedures.[621]

Access to justice implies the right to present a case before an independent tribunal established by law. The non-independent nature of tribunals can undermine the core value of justice[622] and impartiality of the judiciary. This may occur when courts are not established by law,[623] or when the members are either appointed by the tax authorities or are on short-term secondment from those authorities. Effective access to justice also implies that the rules governing access are clear[624] and that legal assistance is secured. The procedural rights should also be protected in the framework of tax audits.[625]

In order to defend one's rights, one needs to know about infringements. Therefore, the general abolition of taxpayer's data transfer notifications to other countries[626] can violate his right to an effective remedy.

The core of the right to a fair trial requires that procedures secure equality of arms. Together with *habeas data*,[627] this protects the right to an effective defence, which allows the parties to present evidence in their favour (provided that they do so in line with the applicable time requirements that preserve legal certainty and with admissible evidence). This also has an impact on the rules of evidence.[628] The right to a fair trial does not per se exclude the use of illegally obtained evidence.[629]

[620] CJEU, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, cited; for more legal protection including for taxpayers and third persons see the Opinion of Advocate General Kokott of 2 July 2020 in these cases.

[621] In ECtHR, *Ravon and Others*, no 189497/03, (21 February 2008), the absence of judicial review for an on-site inspection at the domicile of the taxpayer led the ECtHR to assess a violation of the right to fair trial. In CJEU, *Berlioz Investment Fund*, the CJEU clarified that this right also applies to administrative cooperation in the field of taxation.

[622] Similar problems may arise in the presence of part-time judges, who may have conflicts of interest. Several countries apply specific rules in order to minimise the negative implications that may otherwise arise.

[623] See art 6(1) of the ECHR.

[624] *cf* ECtHR, *de Geouffre de la Pradelle v France*, no 12964/87, (16 December 1992); ECtHR, *Maširević/Serbia*, no 30671/08, (11 February 2014); ECtHR, *Bellet/France*, no 23805/94 (4 December 1995), cited.

[625] CJEU, *Sopropé*, case C-349/07, ECLI:EU:C:2008:746, [2008], paras 36 and ff, as well as ECtHR, *Ravon and Others*.

[626] *cf* sec 6.2.2.4.1.2. above.

[627] See sec 4.2. above.

[628] *cf* sec 6.1.1. above.

[629] *cf* in the European Region sec 6.3.2.4.1.2.4. above and the interpretation by the European Court of Human Rights in ECtHR, *Pélissier and Sassi v France*, no 25444/94, (25 March 1999) para 45, and ECtHR, *Gäfgen v Germany*, no 22978/05, (1 June 2010), paras 69 and ff; Opinion of Advocate General Kokott of 11 July 2019 in joined cases C-469/18 and C-470/18, *IN and JM v Belgische Staat*, ECLI:EU:C:2019:597 [2019], paras 69 and ff; and CJEU, *Steffensen*, para 75; CJEU, *Lemmens*,

Within the framework of mutual assistance, whether evidence was 'illegally' obtained raises more complex issues, as more than one jurisdiction is involved. The question is whether illegality refers to the legal order of the requesting or the requested Member State or to both. Neither that nor under what circumstances and to what extent illegally obtained evidence shall be excluded is clear. Much depends on the circumstances of the individual case.[630] Only the use, in criminal proceedings, of evidence obtained in breach of the prohibition of torture and of inhuman or degrading treatment or punishment always raises serious issues as to the fairness of the proceedings.[631]

The privilege against self-incrimination, also known as the *nemo tenetur* principle, is also applicable with regard to tax crimes. The right not to incriminate oneself presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the 'person charged'.[632] However, the right to remain silent does not generally prohibit the use of compulsory powers to require taxpayers to provide information about their financial affairs.[633] Taxpayers have to cooperate with the tax authorities, but not with the prosecutor's office. Therefore, tax and criminal proceedings need to be kept apart.

The *nemo tenetur* principle is especially relevant in relation to the mandatory disclosure rules provided for in BEPS Action 12,[634] including when the reporting obligation is shifted to the taxpayer himself. However, if the self-reporting cannot result in the levying of criminal sanctions, the *nemo tenetur* principle is respected. The same applies where the taxpayer can avoid criminal prosecution for tax evasions by self-disclosure.[635]

As a consequence of the BEPS project MAP have gained importance. However, until now, there is very limited participation of taxpayers in those procedures.[636] Only exceptionally, national courts have granted taxpayers access to documents in MAP procedures.[637] Based on fair trial considerations, proposals have been put forward, calling for an enhancement of the level of participation of the taxpayer in MAP and arbitration procedures.[638] Taxpayers may not have the

paras 35 and ff; US Supreme Court, *Nardone v US*, Justice Frankfurter delivering the opinion of the Court, 308 US, [1939] 338 and ff, 341 (fruit of the poisonous tree doctrine). For German constitutional law, see German Federal Constitutional Court, order of 9 November 2010 2 BvR 2101/09, paras 43 and ff. Various national courts have addressed the issue of whether illegally obtained evidence may be used in tax procedures. The prevailing opinion has answered this question positively, especially taking into account the particularly serious nature of tax evasion cases in which the national courts have reached these conclusions. Pistone, 'General Report' sec 4; Gless and Richter, *Do Exclusionary Rules Ensure a Fair Trial?*

[630] *cf* Schauerte, *Folgen und Probleme aus der Kauf von Steuer-CDs*, (2013); Schilcher, Spies and Zirngast, in M Lang and P Pistone et al, *European Tax Law on Direct Taxation* (Linde, 2015) 203 and ff, 230 and ff, para 692; *cf* also J Kokott, 'Bedeutung und Wirkungen deutscher und europäischer Grundrechte im Strafrecht', (2017) 6 *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 409 ff. and 415 and ff.

[631] *cf* ECtHR, *Gäfgen v Germany*, no 22978/05, (1 June 2010), paras 176 and ff, and ECtHR, *Harutyunyan v Armenia*, no 36549/03, (28 June 2007), para 63.

[632] ECtHR, *JB v Switzerland*, no 31827/96, (3 May 2001), para 64. See also Luja, 'Accounting Disclosure of Tax Liabilities' 263.

[633] ECtHR, *van Weerelt v the Netherlands*, no 784/14, (16 June 2015), para 56.

[634] For the EU, see Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ 2018, L 139, 1 (commonly referred to as DAC 6, as it is the sixth amendment of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EC, OJ 2011, L 64, 1).

[635] *cf* German Federal Supreme Court, judgment of 23 May 2019, 1 StR 127/19, [2019].

[636] Critical P Pistone, 'General Report' sec 5.

[637] Belgian Council of State, judgment of 12 November 2013, *Garlon v Belgian State*, case A.206.078/XV-2025, judgment no 225.438, [2013], and, more recently, Belgian Council of State, judgment of 2 June 2020, *X v Belgium*, judgment no 247.694 [2020].

[638] See the proposals in Perrou, *Taxpayer Participation in Tax Treaty Dispute Resolution*; P Baker and P Pistone, 'BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations' (2016) 25 *EC Tax Review*, 335–45.

right to participate in mutual agreement procedures. However, it would probably improve the efficiency of those procedures if taxpayers were given a more active part.

The *ne bis in idem* principle[639] also applies to tax crimes. Its procedural limb (*ne bis vexari*) may cover both the administrative and judicial phases of tax procedures.[640] The delimitation between administrative tax penalties and criminal sanctions is not always clear. Generally, *ne bis in idem* only applies within one and the same jurisdiction. The US Supreme Court recently affirmed its 'dual sovereignty doctrine' according to which even separate prosecutions of the same conduct in State and in federal courts are allowed.[641] Under EU law, however, the principle also covers the prohibition of exposure to two judicial disputes in two separate countries 'within the Union' (Article 50 of the EU Charter).

6.5.5. Alternative Measures

Our empirical findings in comparative law also show the existence of various forms of non-judicial complaint mechanisms. These provide an alternative means of protecting taxpayers' rights in addition to administrative review (which considers the correctness or merits of a decision) and judicial procedures (which assess the legality or validity of the administrative action). Such complaints mechanisms are particularly amenable to raising concerns regarding alleged arbitrary or abusive action by the revenue authorities. Barriers exist to raising some issues for consideration in a judicial forum, and non-judicial alternatives will normally be a less costly and more expedient avenue to raise and resolve issues related to processes.

Such mechanisms are normally limited to complaints relating to procedural aspects of the interaction between the taxpayer and the tax authority. They are often linked to the protection of rights enshrined in a taxpayer charter or legislation establishing taxpayers' rights.[642] Complaints may be made directly to the revenue authority where a review is undertaken internally, though potentially by an independent team. Many jurisdictions also provide a mechanism for complaints to be investigated by an independent government institution, such as a tax ombudsperson. Usually such services are free for taxpayers. The powers of tax ombudspersons are, however, often limited to making non-binding recommendations to the relevant taxpayer and revenue authority. These mechanisms would not generally preclude taxpayers from accessing more formal judicial processes should these informal avenues fail to produce a satisfactory outcome.

Taxpayer complaints may be considered by a general government ombudsperson[643] or an ombudsperson with responsibility for the relevant government segment.[644] However, a specialist tax ombudsperson may be preferred, taking into account the very encouraging results achieved in various countries of the world. The US National Taxpayers' Advocate steers the work of tax authorities towards the effective protection of taxpayers' rights in line with the requirements of the rule

[639] See art 4(1) of ECHR Protocol No 7 and art 50 of the EU Charter. However, that was already recognised as a general principle of EU law before the approval of the EU Charter.

[640] See CJEU, judgment of 20 March 2018 *Menci*, and P Pistone, 'General Report' ss 2 and 3.

[641] US Supreme Court, judgment of 17 June 2019 C-524/15 *Gamble v United States*, no 17-646, 587 US [2019].

[642] The most notable example of a national taxpayer charter is the US Taxpayers' Bill of Rights, introduced in 2014 as a result of the action undertaken by the National Taxpayers' Advocate. The Taxpayers' Bill of Rights has marked a major improvement in the effectiveness of taxpayers' rights protection. It is being followed by several countries around the world.

[643] Eg in New Zealand.

[644] Such as the UK's Parliamentary and Health Services Ombudsman.

of law.[645] Another interesting example is the Mexican Tax Ombudsman Agency (PRODECON), which enjoys independence and strong powers.[646] Other specialist tax ombudspersons[647] have specific mandates to investigate complaints involving procedural rights. The tax ombudsperson may be granted specific information gathering powers in legislation, thereby promoting the effectiveness of investigations, as is the case with Australia's Inspector General of Taxation. A tax ombudsperson may be prohibited from investigating a complaint until the taxpayer has first exhausted the avenue of internal complaints within the authority. Ombudspersons will generally act independently to resolve the complaint rather than as an advocate for the taxpayer.

The informal processes of tax ombudspersons have the potential to rectify a procedural issue in relation to a specific taxpayer as well as improve administrative processes more generally, but further measures may be provided to strengthen the protection of taxpayers' rights. Mechanisms can be put in place by governments to compensate taxpayers for financial loss resulting from poor administrative processes.[648] Allegations of serious misconduct by revenue officers may require a stronger response. In the United States, the civil rights of taxpayers are protected by the IRS Office of Equity, Diversity and Inclusion, Civil Rights Division, and allegations of impropriety and mismanagement of IRS programmes can be reported to the Treasury Inspector General for Tax Administration.

[645] In 1979, the IRS created the Tax Ombudsman. Since 1997, the US Taxpayer Advocate operates independently within the IRS for taxpayers' rights protection and the promotion of taxpayers' confidence in the integrity and the accountability of the IRS.

[646] PRODECON is empowered by federal legislation to receive and address complaints filed by taxpayers against any act of the Mexican Federal Tax Authorities, thereby exercising its tax ombudsperson function to safeguard the taxpayers' fundamental rights. The complaints are sought to be resolved through a flexible procedure, without strict formalisms. However, if PRODECON is unable to reach a solution with the tax authority, it may issue a non-binding public recommendation exposing the inappropriate behaviour of the tax authority.

[647] See South Africa's Tax Ombud, Chile's *DEDECON*, Canada's Taxpayers' Ombudsman, Spain's *Consejo para la Defensa del Contribuyente*, France's *Médiateur des ministères économiques et financiers*, Colombia's and Peru's *Defensorías del Contribuyente*, Pakistan's Federal Tax Ombudsman and Australia's Inspector General of Taxation.

[648] See Australia's Scheme for Compensation for Detriment caused by Defective Administration.

7

Taxpayers' Rights Related to Sanctions

7.1. General

The law establishes the obligation to pay taxes and the consequences that arise when the addressee of the obligation (usually the taxpayer, but also third parties required by law to make the actual payment of tax) fail to fulfil it in a timely manner and/or in full. Such consequences are twofold, namely the obligation to pay late interest on tax arrears and possibly sanctions for breaching the rules.

In principle, late interest payments pursue the goal of giving the creditor, ie the state itself or its regional or local subdivisions, the right to collect an additional amount that compensates its expectations of timely receipt of the taxes due. The obligation to pay interest arises as an automatic consequence of the failure to pay tax on time. The size of the interest payment is usually established by law, but can vary depending on whether it exclusively pursues such a compensatory function, or also regulatory purposes, such as for instance encouraging the timely payment of due taxes. In the latter circumstances, the interest in fact takes on the mixed nature of punishing non-compliance, which shows nuances similar to the ones that normally characterise sanctions and a blurred dividing line from them.

The principle of proportionality requires that more severe sanctions apply to more serious breaches of tax law. Therefore, it justifies, on the one hand, the levying of criminal sanctions in respect of violations that can undermine the legal order and, on the other hand, the quantitative amount of the sanction due by the offenders.

Therefore, tax systems usually apply criminal sanctions to more serious breaches, namely those that have a higher potential to undermine the legal order. This is normally the case for violations such as tax fraud or evasion, which, as criminal contraventions, both require a subjective element.

The less serious breaches of tax law, especially those not requiring a subjective element, are addressed instead by means of administrative penalties, which sometimes apply in the form of surcharges, automatically applicable in connection with the failure to pay taxes in a timely manner and in full or meet other tax obligations, such as lodging returns on time.

Besides complying with the principle of proportionality, this two-tier approach also enhances flexibility in the reaction of the system to the breach of tax rules and allows, by using criminal sanctions, a punitive consequence with a stronger dissuasive effect regarding future violations,[1] as well as an alternative reaction to all other cases, in a way that still secures a reasonable degree of protection of the integrity of tax collection.

However, this approach creates a more complex assessment of the impact on the protection of taxpayers' rights, since it creates the possibility of multiple reactions to one single violation.

[1] ECtHR, *Jussila v Finland*, no. 73053/01, (23 November 2006), para 38.

Taken together, these different administrative measures may burden the taxpayer in a way comparable to a criminal sanction. Thereby, the clearly distinctive and stricter legal requirements for levying and applying criminal sanctions might not duly be taken into account.

This assessment requires a separate analysis in the framework of our study. However, to perform such an analysis, some definitions are first needed in order to show the difference between criminal sanctions and administrative penalties.[2] Afterwards, we will show how the legal systems around the globe deal with this difference and whether and to what extent these types of sanctions may be combined.[3] Finally, we will draw some conclusions.[4]

7.2. Criminal and Administrative Contraventions

7.2.1. Criminal Contraventions

Tax fraud or evasion presuppose the deliberate misrepresentation or omission of data on a tax return or other lodgement.[5] Tax fraud is a particularly serious form of tax evasion,[6] which occurs when the taxpayer's particularly wilful behaviour gives rise to falsified documents in order to prevent tax authorities from discovering the intentional failure to pay taxes that were due. Thus, individuals or entities may furnish the revenue authorities or other authorities with incorrect or incomplete particulars concerning matters that are relevant for tax purposes; they may fail to inform the revenue authorities of facts that are relevant for tax purposes when obliged to do so; or they may fail to use revenue stamps or revenue stamping machines when obliged to do so. As a result, individuals or entities may then understate taxes due, or derive unwarranted tax advantages for themselves or for other persons.

Tax fraud and evasion are ordinarily punishable by a monetary fine or imprisonment. In particularly serious cases, generally including all cases of tax fraud, imprisonment often up to several years is possible in most countries.[7] Particularly serious cases could include deliberately understating taxes on a large scale, abuse of authority or a position as a public official, repeatedly understating taxes or deriving unwarranted tax advantages by using falsified or forged

[2] See sec 7.2 of this book.

[3] See sec 7.3 of this book.

[4] See sec 7.4 of this book.

[5] *cf* eg art 1741 of the French Tax Code, s 370(1) of the Tax Code of Germany, s 396 (4) of the General Tax Law of Luxembourg, art 175 of the Swiss Federal Direct Tax Law. See also on Italy sec 7.3.4.1.4. and on New Zealand sec 7.3.5.

[6] The boundaries between tax fraud and evasion are not always clearly defined. For the purposes of this book, we will consider that the failure to pay taxes that are due always gives rise to tax evasion, but not necessarily to tax fraud. This conceptual dividing line is common usage in the tax community and reflects the terminology used since the 1987 OECD Report, 'International Tax Avoidance and Evasion – Four Related Studies', and in several tax systems. However, non-tax European Union law adopts in the English language the expression 'fraud' with a much broader meaning, which corresponds to the ones applicable in French language (see the so-called Directive on the Protection of Financial Interests 2017/1371 on the fight against fraud to the detriment of the financial interests by means of criminal law, [2017] OJ L 198/29–41).

[7] Eg in Argentina arts 1 and 2 *Ley* 24.769 *Delitos tributarios*: up to nine years; Australia s 8V Taxation Administration Act; Germany s 370 of the Tax Code: up to five years; Italy, arts 2 and 3 of Legislative Decree 10 March 2000, No 74: up to eight years; Luxembourg art 506-1(1) of Code Pénal; South Africa s 235 Tax Administration Act; United Kingdom s 106A Taxes Management Act; in the United States 26 USC para 7201. A Storm, 'Toward Improving South Africa's Legislation On Tax Evasion: A Comparison Of Legislation On Tax Evasion of the USA, UK, Australia and South Africa' (2017) 34 (1) *Journal of Applied Business Research* 151–68.

documents, or performing such acts as a member of a group or using a third-country company.[8] Courts may also disqualify an individual from holding a public office and acquiring rights from public elections because they committed tax evasion.

In order to be effective, limitation periods for tax crimes cannot be too short. Time is needed for fact-finding and court proceedings. Therefore, the limitation period for the prosecution of a tax crime may be interrupted in some legal orders,[9] where the accused is notified of the initiation of administrative proceedings or this notification is ordered.

Many legal systems provide for impunity or reduced penalties in case of voluntary disclosure. The United States operate a 'Multistate Voluntary Disclosure Program' which provides a way for taxpayers with potential tax liability in multiple states to negotiate a settlement whereby penalties are waived, though interest may still be payable.[10] Voluntary disclosure encourages taxpayers to disclose by providing a way back to legality and at the same time allowing for the recovery of the lost tax revenue. To achieve these aims, the disclosure must be full and it must cover all tax offences. In case of prior notification or detection, the disclosure is then not considered voluntary and impunity does not apply. Also, impunity on the ground of voluntary disclosure may not cover the most serious tax crimes. Of course, the taxpayer has to pay the evaded tax, plus in some cases interest, in order to be eligible for impunity.[11]

Taxes are often considered to have been understated where they are not assessed at all, in full or in time.[12] However, this must be done deliberately or dishonestly to constitute a tax crime. Otherwise, it can only amount to a tax-related administrative offence.

7.2.2. Administrative Contraventions

Wherever a taxpayer or intermediary commits one of the acts described in the section on criminal contraventions recklessly or negligently, they can be deemed to have committed an administrative offence. Moreover, administrative contraventions may comprise also offences liable to criminal sanctions above a certain threshold,[13] or acts which merely put at risk a state's tax revenue without there being evidence of actual loss. Such acts may include the lodgement of factually incorrect documents or contraventions regarding the rules on accounting and keeping records.[14]

Administrative contraventions may be punished by a monetary fine and they should not, and usually are not, subject to imprisonment. However, these fines or penalties may be levied

[8] *cf* § 370(3) of the Tax Code of Germany; Italy, arts 2 and 3 Legislative Decree 10.3.2000, n 74. See also on Europe regarding VAT fraud sec 4.1.3.4.1. above.

[9] *cf* § 376(2) of the Tax Code of Germany. In Italy, under art 17 Legislative Decree the notification of a tax audit notice interrupts the statute-of-limitation rules, thus derogating the criminal law rules, which would otherwise impose a maximum period of six years (Court of Cassation of Italy, sez pen, judgment of 31 March 2016, no 45396/2016, [2016]).

[10] On that Commission see B Johnson, 'The Multistate Tax Commission – Its History and its Future' (2001) 6 *State & Local Tax Lawyer* 45 and ff.

[11] *cf* § 371 of the Tax Code of Germany. See also on China sec 7.3.3.1., Greece sec 7.3.4.1.3., Israel sec 7.3.3.3. and Russia sec 7.3.4.2. The 2010 OECD Voluntary Disclosure Report recorded as many as 39 countries already applying voluntary disclosure schemes (see OECD, *Offshore Voluntary Disclosure* (2010) 18). Since this report, the practice of voluntary disclosure has gained further traction, also considering the global trend to put an end to tax fraud and evasion involving tax havens. For instance, in Italy two voluntary schemes became applicable, in 2014 and 2016 (Law of 15 December 2014, No 186 and Law of 1 December 2016, No 225).

[12] *cf* eg § 370(4) of the Fiscal Code of Germany, § 33 of the Financial Criminal Law of Austria, art 1741 of the French Tax Code, art 175(1) of the Swiss Federal Direct Tax Law. See also on India sec 7.3.3.2. below.

[13] This is for instance the case in Italy, on which see Legislative Decree 74 of 2000.

[14] *cf* eg §§ 378 and ff of the Tax Code of Germany; orders 30 January 1987, n 41 and 9 July 2012, n 44 on VAT in Belgium. See also on Italy sec 7.3.4.1.4. and on Japan sec 7.3.3.4.

automatically on top of the tax and interest due in connection with the failure to pay taxes on time and/or in full, as well as increased interest and tax payments (so-called surcharges) in order to encourage compliance.

Administrative penalties are usually subject to a shorter period of limitation than criminal contraventions.[15] But, as with criminal contraventions, a monetary fine may not be set insofar as the perpetrator corrects the incorrect particulars submitted to the revenue authority, supplements the incomplete particulars submitted to the revenue authority, or furnishes the revenue authority with the previously omitted particulars before the taxpayer or the representative has been notified of the initiation of criminal or administrative fine proceedings resulting from the act.[16] Of course, this is also subject to the perpetrator paying the full amount of the tax correctly assessed and due.[17]

7.2.3. Sanctions, Penalties or Both?

Generally, the question arises whether and to what extent criminal and administrative procedures and sanctions can be combined.[18]

Prima facie, the answer could be yes, since administrative and criminal penalties are by their very nature alternative ways of reacting to a violation of tax rules.

Criminal sanctions show a more distinct punitive function, which reflects their more dangerous nature from the perspective of the legal order. In line with the principle of proportionality, legal systems should only apply such sanctions to the most serious violations of the tax rules and, in line with the standards in common usage within criminal law, after assessing the existence of a subjective element. Even though most criminal tax sanctions in fact consist of monetary payments, imprisonment of offenders is also possible.[19] Imprisonment should by contrast be in principle excluded for the administrative penalties, taking into account the more limited danger of the administrative tax offence.

Where a given legal system decides to apply both criminal and administrative measures, it should make sure that their levying does not create problems of *bis vexari*, but operates in the framework of a fully integrated process (ie one violation, one obligation for the taxpayers to defend their rights), which also prevents an overall more burdensome framework. First, according to the approach of the European Court of Human Rights, measures can affect taxpayers so heavily that they could be considered as criminal sanctions even though national law labels them as merely 'administrative'.[20] Second, the overall effect on taxpayers that has to be taken into account is the combined effect of both types of measures and reactions to a contravention, even if some reaction is only administrative, if considered separately. Criminal sanctions may also consist of a combination of sanctions or penalties.

[15] *cf* eg art L 188 of the French Law on Tax Procedures; §§ 377 and ff of the Tax Code of Germany; art 20 Legislative Decree 18 December 1997, n 472 in Italy.

[16] This is the so-called repentance. In line with the postulates of restorative justice and considering that the taxpayer's proactive behaviour facilitates a faster re-establishment of the levying of taxes, a reduction of the applicable penalties is justified. In Italy, this mechanism, known as *ravvedimento operoso*, allows a reduction in the applicable sanctions from after the moment that the taxpayer has failed to submit a full and correct tax return, throughout tax audits (see art 13, Legislative Decree 18 December 1997, n 472).

[17] *cf* eg § 378 of the Tax Code of Germany; art 13, Legislative Decree of 18 December 1997, No 472 in Italy. See also on India sec 7.3.3.2. and on Japan sec 7.3.3.4. below.

[18] *cf* eg MF Dell'Isola, '¿La aplicación simultanea de infracciones y delitos fiscales supone castigar dos veces un mismo hecho? ¿Estamos ante una violación del principio de legalidad?' (2016) 2 *Derecho Penal*.

[19] *cf* eg for China, see under sec 7.3.3.1.; Germany, § 370(1) Tax Code/*Abgabenordnung*; India, see under sec 7.3.3.2.; Israel, see under sec 7.3.3.3.; Japan, see under sec 7.3.3.4.; South Africa, see under sec 7.3.1.1.

[20] ECtHR, *Engel and others v the Netherlands* (Plenary), nos 5100/71, 5102/71, 5354/72 and 5370/72, (8 June 1976).

In line with such features, some concern can arise in tax systems which merely draw a dividing line between administrative penalties and criminal sanctions by reference to a threshold of unpaid taxes and otherwise apply the same set of rules for assessing existence of a violation.[21] Tax crimes require an assessment of the subjective element and, in principle, tax authorities have to present evidence beyond a reasonable doubt to prove its existence. In some circumstances, the extreme vulnerability of the levying of some taxes to severe forms of violations, such as the so-called carousel fraud in intra-EU cross-border situations, could lead the judiciary to show an inclination to tolerate a lower standard of evidence in cases that are well-known to generate serious violations.[22] However, also in these circumstances, it is important to prevent enforcement of such interpretative standards in a way that allows tax authorities to make third persons acting in good faith objectively responsible for a serious violation committed by others without giving them an effective opportunity to protect their right to defence.[23]

7.3. Different Regions

7.3.1. Africa

7.3.1.1. South Africa[24]

In South Africa, the issue as to whether failure to pay tax that is legally due amounts to common law theft and/or statutory offences, both of which amount to a crime, has led to several court disputes.

Under section 234 of the Tax Administration Act, any person who 'who wilfully and without just cause' fails or neglects to withhold and pay to the South African Revenue Service an amount of tax as and when required under legislation, is 'guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding two years'. In addition, the possibility exists that taxpayers who keep money that should have been paid over in taxes may be guilty of common law theft.

In 2015, in the case of *Director of Public Prosecutions, Western Cape v Parker*,[25] South Africa's Supreme Court of Appeal had to decide whether, as a question of law, a VAT vendor who had misappropriated an amount of VAT which was collected on behalf of the South African Revenue Service could be charged with the common law crime of theft. The Court held that such an action did not amount to the common law crime of theft. The reason was that in law, the money that could have been used to pay the VAT due remained the property of the taxpayer.[26] The state

[21] Some contributors held this for instance in Greece, on the basis of art 25 of Greek Law 1882/1990, which however must be seen in context, see further under sec 7.3.4.1.3, Italy (arts 2 and ff of the Legislative Decree 74 of 2000, on which see further under sec 7.3.4.1.4), Malta (arts 49–52 of the Income Tax Management Act and arts 76–81 of the VAT Act, on which see further under sec 7.3.4.1.5) and Russia, on which see further sec 7.3.4.2. The situation does not substantially differ in countries that admit the existence of other crimes, such as, for instance, embezzlement in the United Kingdom, without the obligation to give evidence of the subjective element. See the UK 1968 Theft Act. Tax embezzlement is regulated in the United States by ss 6721 and 6722 of the Internal Revenue Code.

[22] See the criterion established by the CJEU in its interpretation of VAT carousel fraud, by which persons not directly involved in committing the fraudulent scheme may be held responsible for it when 'the taxable person knew, or should have known' about its existence. *Cf* CJEU, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, cases C-131/13, C-163/13 and C-164/13, ECLI:EU:C:2014:2455 [2014], paras 62 and 71.

[23] See CJEU, *Glencore Agriculture Hungary*, paras 39 and ff.

[24] We would like to thank Johann Hattingh for his contribution.

[25] Supreme Court of Appeal of South Africa, judgment of 12 December 2014, *Director of Public Prosecutions, Western Cape v Parker*, 1 All SA 525 (SCA), [2015].

[26] Supreme Court of Appeal of South Africa, *Director of Public Prosecutions, Western Cape v Parker* [17].

argued that when tax becomes due to the state, a relationship of trust is established between a taxpayer and the state, with the result that any misappropriation of funds due as tax can amount to theft by analogy with cases dealing with theft by trustees of trust fund money. The Court rejected this argument because tax legislation establishes a relationship between the state and taxpayers that is *sui generis*. The applicable VAT legislation did not confer on a VAT vendor the status of a trustee or an agent of the South African Revenue Service. The Court held that a relationship of debtor and creditor was established between the state and a VAT vendor.[27]

In the *Parker* case, the Supreme Court of Appeal requested the state to explain why it wanted to prosecute taxpayers under common law criminal offences for non-payment of tax. The approach of the prosecuting authority was that the statutory offence punishable with imprisonment not exceeding two years was 'too lenient for certain cases', hence the effort to convict taxpayers based on common law crimes because that would enable 'sterner sanctions'.[28]

In 2016, the state again tried to prosecute taxpayers for common law theft because they failed to withhold and pay employees' tax. In *Grayston Technology Investment (Pty) Ltd and another v S*, South Africa's High Court held that common law theft did not occur.[29] Different from the 2015 *Parker* case, the High Court indicated that under the South African employees' tax regime, the state may have a special property interest that can be stolen. This special interest would be based on an employer's statutory duty to account for monies owed as employees' tax, which was withheld from a third party (the employee); theft could occur when there was no proper accounting in the debtor and creditor account between the debtor and the person entitled to the accounting.[30] On the evidence, the state failed to prove that the taxpayer had any available funds that were capable of being appropriated at the time the credit entry was made by the taxpayer for employees' tax owed; as a result, there was no property in respect of which the South African Revenue Service could have a special property interest. The state also failed to prove theft of the employees' tax monies by reason of a failure to properly account, as there was no evidence to demonstrate that the taxpayer had failed to properly record any part of the proceeds of such monies in its accounting to the South African Revenue Service.[31]

In the *Grayston Technology* case, the High Court held, obiter, that had the state proved on the facts that common law theft of employees' tax had occurred, the issue of double jeopardy would arise.[32] This would be based on the High Court's review of the extensive set of administrative penalties and statutory interest for which taxpayers are liable under the applicable legislation, in addition to statutory offences. The High Court relied on the South African Constitution, case law and the judgment of the UK Court of Appeal in *Han and another v Commissioner of Customs & Excise*,[33] which dealt with Article 6 of the ECHR.

The South African tax system was reformed to unify the basis for the imposition of administrative tax penalties, statutory interest, statutory offences and sanctions, and procedures, which are set out in the Tax Administration Act 2011. Administrative non-compliance infringements are categorised to establish whether fixed amount or percentage-based penalties apply.

[27] Supreme Court of Appeal of South Africa, *Director of Public Prosecutions, Western Cape v Parker* [16].
[28] Supreme Court of Appeal of South Africa, *Director of Public Prosecutions, Western Cape v Parker* [5].
[29] High Court of South Africa, *Grayston Technology Investment (Pty) Ltd and another v S*, case A225/2014, 4 All SA 908 (GJ), [2016].
[30] High Court of South Africa, *Grayston Technology Investment (Pty) Ltd and another v S* [73].
[31] High Court of South Africa, *Grayston Technology Investment (Pty) Ltd and another v S* [110].
[32] High Court of South Africa, *Grayston Technology Investment (Pty) Ltd and another v S* [124].
[33] UK Court of Appeal, *Han and another v Commissioner of Customs & Excise*, 4 All ER 687 (CA), [2001].

A fixed amount penalty or a percentage-based penalty is imposed by way of a penalty assessment. Taxpayers must be notified of such penalties, including the following information: the non-compliance in respect of which the penalty is assessed and its duration; the amount of the penalty; the date for paying the penalty; the automatic increase of the penalty; and a summary of procedures for requesting remittance of the penalty.[34] Taxpayers who are aggrieved by tax penalties and statutory interest have the right to submit their complaints to extensive administrative dispute resolution procedures (these procedures are internal to the South African Revenue Service such as lodging an objection, or opting for a form of mediation). Moreover, taxpayers have the right to appeal to the Tax Court to set aside any decisions concerning tax penalties or statutory interest. Percentage-based tax penalties are not determined based on open-ended discretionary power awarded to tax officials; rather they are determined based on specified categories of taxpayer behaviours. Case law helps to explain the various grounds on which these percentage-based tax penalties may be based, including when reasonable care was not taken by a taxpayer, when no reasonable grounds exist for a tax position, when gross negligence is committed in tax, when tax evasion is intentional etc. The South African Revenue Service issues guidance on its own powers to impose certain tax penalties.[35]

7.3.2. Americas

7.3.2.1. The Inter-American System for the Protection of Human Rights

The Inter-American Court of Human Rights sees similarities between administrative and criminal sanctions. Article 9 of the ACHR refers to 'criminal offences', but the Inter-American Court analysed whether it could also be applied to administrative sanctions. The terms used in such precept seem to refer exclusively to the penal realm:

> However, it is appropriate to take into account that administrative sanctions, as well as penal sanctions, constitute an expression of the State's punitive power and that, on occasions, the nature of the former is similar to that of the latter. Both, the former and the latter, imply reduction, deprivation or alteration of the rights of individuals, as a consequence of unlawful conduct. Therefore, in a democratic system it is necessary to intensify precautions in order for such measures to be adopted with absolute respect for the basic rights of individuals, and subject to a careful verification of whether or not there was unlawful conduct. Likewise, and for the sake of legal security, it is indispensable for the punitive rule, whether of a penal or an administrative nature, to exist and to be known or to offer the possibility to be known, before the action or omission that violate it and for which punishment is intended, occurs. The definition of an act as an unlawful act, and the determination of its legal effects must precede the conduct of the subject being regarded as a violator. Otherwise, individuals would not be able to orient their behaviour according to a valid and true legal order within which social reproach and its consequences were expressed. These are the foundations of the principles of legality and unfavourable non-retroactivity of a punitive rule.[36]

However, there is no specific case law in the area of taxation. Also, the Inter-American Court applies the principle of legality to administrative penalties, which is not surprising. The case law does not deal, however, with more controversial issues such as objective liability in taxation or *ne bis in idem* as applied to administrative and criminal sanctions.

[34] S 214(1) of the Tax Administration Act 2011.
[35] See for example, South African Revenue Service *Guide to Understatement Penalties* (Issue 2), 18 April 2018.
[36] IACHR, judgment of 2 February 2001, *Baena-Ricardo et al v Panama* [2001], para 106.

7.3.2.2. Latin America

7.3.2.2.1. Argentina[37]

The Bill of Rights of the US Constitution was transplanted to the Argentine Constitution in 1863. Hence, strict liability in the area of criminal tax law is considered invalid on due process of laws grounds crystallised in Article 18 of the Argentine Constitution. For example, the taxpayer's mere failure to make full and timely payment of tax cannot give rise to a criminal offence of tax evasion. Under the Argentine Constitution, evidence is required of the subjective element to commit a crime in order for tax evasion to constitute a criminal offence. The subjective element denotes two alternative concepts: i) wilfulness, connoting the voluntary, intentional violation of a known legal duty (*dolo*) and ii) negligence (*culpa*). The taxpayer has the burden of the proof of excusable error, that is, a genuine, good faith belief that she is not violating the tax law, based, for example, on a misunderstanding caused by the complexity of the relevant tax regulation. Excusable error is a defence to a charge of 'negligence'. A belief that the income tax is invalid is not a misunderstanding caused by the complexity of the tax law and is not a defence to a charge of 'negligence', even if that belief is genuine and is held in good faith. The leading Argentine Supreme Court cases establishing this set of constitutional principles governing tax criminal law include *Mazza*[38] and *Casa Elen-Valmi de Claret y Garello.*[39]

The Argentine Constitution establishes, in terms of sanctions, that taxpayers have the right to defence under Article 18 of the Argentine Constitution. This right implies being able to know the accusations and provide the arguments and evidence to prove innocence. Due process of law determines that administrative and judicial procedures in tax matters must respect the procedural rules and the right to a fair trial established by Article 18.

The constitutional guarantee of defence in a tax trial is clearly established in the case of *Lapiduz, Enrique v DGI*.[40] In this ruling, the Supreme Court established that administrative bodies may exercise jurisdictional functions whenever it is possible to access a subsequent judicial instance. The Supreme Court added that the word 'trial', contained in Article 18 of the Constitution, was to be understood as a trial before the ordinary judicial courts. The Court held that this was particularly relevant when it came to a criminal sanction.

Likewise, the principle of innocence governs sanctions in Argentina. This guarantee can be seen in the light of the Argentine Constitution with regard to the basic principles of the legal criminal system, as established in Article 18 of the Argentine Constitution.[41] The principle of innocence has the following elements: (1) criminal law must precede any sanction (*nulla poena sine lege*); (2) no one may be punished without a prior trial (*nulla poena sino iudicio*); (3) no one may be considered guilty until a final judgment declares them to be so; (4) the judgment of the natural judge is the only legitimate source for validly limiting freedom.

The principle of innocence is established by Article 18 of the Argentine Constitution stating that no inhabitant of the Argentine nation can be punished without prior trial based on a law in force prior to the offence. The procedural instance of prior trial is the one that can give way to a constitutionally valid criminal sanction.

[37] We would like to thank Eduardo Baistrocchi for his contribution.

[38] Argentine Supreme Court, judgment of 6 April 1989 *Mazza case*, judgment: 312:447, [1989], archivo.consejo.org.ar/Bib_elect/abril04_CT/documentos/mazza.htm (in Spanish).

[39] Argentine Supreme Court, judgment of 31 March 1989 *the Casa Elen-Valmi de Claret decision*, judgment 322:519, [1999], sjconsulta.csjn.gov.ar/sjconsulta/documentos/verUnicoDocumentoLink.html?idAnalisis=466741&cache=1586118683141 (in Spanish).

[40] Argentine Supreme Court, judgment of 28 April 1998 *Lapiduz, Enrique c/ D.G.I. s/ acción de amparo*.

[41] 'No inhabitant of the Nation may be punished without a prior trial based on a law prior to the fact of the trial, or judged by special commissions, or removed from the judges appointed by law prior to the fact of the case'.

Another guarantee established by Argentine criminal law is the principle of guilt as an individual guarantee.[42] This presumption of innocence is part of the fundamental principles of the rule of law, which acts as a limit to the punitive power (*ius puniendi*) exercised by the state. The principle of guilt is a necessary condition not only for the attribution of the penalty, but also for the imposition of the sentence. Consequently all persons living in Argentine territory enjoy the 'status of innocence', as long as a person is not convicted by a final judgment.

Finally, Argentine legislation on criminal tax matters is governed by the constitutional principle of the proportionality of the penalty. This principle implies the reasonable exercise of the punitive power of the state insofar as it is effective in achieving the requirements of the common good, integrating and respecting the rights and constitutional guarantees of the taxpayers. In Argentine criminal tax law, the principle of the proportionality of the penalty in terms of sanctions for non-compliance with tax obligations applies in two different areas: 1) tax violations that carry a merely administrative sanction that results in the payment of money (fine); 2) tax violations that, due to their magnitude, account for a criminal offence expressly defined by law.

In summary, the guarantees mentioned in the previous sections serve as guidelines that seek to guarantee the rights of taxpayers. The Argentine Supreme Court has held that the guarantees in administrative sanctioning proceedings summarised in this section are a human right for the taxpayer.[43]

7.3.2.2.2. Brazil[44]

Regarding the procedural aspects of sanctions, taxpayers have the right to defence under Article 5(LV) of the Brazilian Constitution in the sense that they have to understand the accusations and may bring all arguments and evidence to demonstrate their rights.[45] The due process of law (Article 5(LIV) of the Brazilian Constitution) determines that administrative and judicial[46] procedures observe the procedural rules and the right to a fair trial, which imposes the duty of loyalty and good faith not only on plaintiffs and defendants, but also on public authorities (judges and civil servants from the judicial branch).[47]

Regarding the substantive perspective of tax sanctions, the Supreme Federal Court[48] has decided that non-monetary sanctions[49] for enforcing tax payment are unconstitutional. The justices' arguments focus on the due process of law since the tax administration must initiate a judicial claim. Additionally, non-monetary sanctions violate the right of access to courts and prevent legal activities. This position, however, does not include situations of systematic default in the payment of taxes, in which case non-monetary sanctions may be proportional.[50]

Furthermore, in the case of default on tax payment, there may exist administrative sanctions and/or criminal sanctions. Concerning the former, when individuals or entities responsible for paying tax hamper or block the safety of the investigation by not answering the tax authorities'

[42] Argentine Supreme Court, judgment of 2 September 1968, 271:297, [1968] and progeny.

[43] Argentine Supreme Court, judgment of 28 April 1998, no 321:1043 [1998].

[44] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[45] Supreme Federal Court of Brazil, binding summary of precedent no 14; habeas corpus no 84580/SP.

[46] Supreme Federal Court of Brazil, interlocutory appeal in the extraordinary appeal of 28 March 2006, no 426147/TO [2006].

[47] Supreme Federal Court of Brazil, interlocutory appeal of 17 October 2006, no 529733/RS [2006].

[48] See Supreme Federal Court of Brazil, summaries of precedent of 13 December 1963, no 70/1963 [1963]; precedent of 13 December 1963, 323/1963 [1963] and precedent of 3 December 1969, 547/1969 [1969] (which bind only the judicial branch); and extraordinary appeal of 29 May 2014, no 565048/RS [2014].

[49] Eg to prevent the exercise of one's profession, seize goods or close establishments.

[50] Supreme Federal Court of Brazil, direct actions of unconstitutionality of 25 September 2008, nos 173/DF and 394/DF [2008].

questions or not presenting the requested documents etc, Article 44(2) of Act no 9430/1996 prescribes a fine of 37.5 per cent or 75 per cent of the tax due. These penalties may be increased to up to 225 per cent of the due tax in the case of fraud. All these penalties are for federal taxes, but states' and municipalities' penalties tend to be the same as the federal ones. The failure to pay taxes in full and on time may give rise to a criminal offence if there is evidence of the subjective element (the intention) to commit a crime,[51] as well as in the case of crimes against the tax system committed by taxpayers or tax authorities.[52]

Criminal sanctions for systematic default may be imprisonment for between two and five years or a fine in conformity with federal legislation.[53] While criminal sanctions are balanced by judges in attention to the facts, eg according to the unpaid tax,[54] tax sanctions do not admit such graduation, being generally a fixed fine.

In Brazil, the *ne bis in idem* principle does not apply to avoid the accumulation of administrative penalties and criminal sanctions because they have different justifications and requirements. However, for most tax crimes, late payment – even after criminal conviction[55] – hinders the punishable character of the conduct.[56]

Besides, the *ne bis vexari* principle is not applicable, because administrative and criminal procedures have diverse guiding standards, especially regarding the intention demonstrated by uncontroversial evidence required for the characterisation of the criminal offence. This is not relevant for most administrative penalties. Moreover, the criminal procedures are conducted by public prosecutors, and not by tax authorities, and they are never brought to administrative courts, but only to judicial ones. This is important since most tax crimes are connected to other crimes (mainly falsifying documents[57] and financial ones). Hence, they follow autonomous investigations in comparison to the ones regarding administrative penalties. Nevertheless, the criminal procedure is suspended as long as the administrative procedure is ongoing because the identification of a criminal offence in tax matters normally depends on whether the tax credit exists.[58] This is not necessary when an ancillary obligation is not fulfilled. In this case, both procedures run separately.[59] After the establishment of the tax credit, if the time limit for enforcing it is exceeded – and the tax procedure is finished – the criminal procedure may still continue as long as its own time limit is respected.[60]

7.3.2.2.3. Chile[61]

In recent decades, the Chilean tax system has significantly evolved from a rather authoritarian system in which sanctions were imposed automatically and with little transparency, towards a more democratic vision, respecting the rule of law.

[51] See Supreme Federal Court of Brazil, appeal in the *habeas corpus* of 18 December 2019, no 163334/SC [2019].

[52] See arts 1 to 3 of Act No 8137/1990.

[53] See arts 1 and 2 of Act No 8137/1990.

[54] See Superior Court of Justice of Brazil, interlocutory appeal in special appeal of 17 May 2018, no 1268981/SP [2018] and interlocutory appeal in special appeal of 22 May 2018, no 1640455/SP [2018].

[55] Supreme Federal Court of Brazil, appeal in the *habeas corpus* of 21 October 2016, no 128245/SP [2016].

[56] See arts 34, Act No 9249/1995, 9(2) of Act No 10684/2003, 29 of Act No 11941/2009, 83(4) of Act No 9430/1996, 1 and 2 of Act No 8137/1990, and 168-A and 337-A of Penal Code.

[57] See Superior Court of Justice of Brazil, appeal in the *habeas corpus* of 11 December 2018, no 82025/SC [2018].

[58] Supreme Federal Court of Brazil, binding summary of precedent no 24.

[59] See Superior Court of Justice of Brazil, interlocutory appeal in the special appeal of 21 November 2017, no 1126039/SP [2017].

[60] See Superior Court of Justice of Brazil, appeal in the *habeas corpus* of 13 June 2017, no 81446/RJ [2017].

[61] We would like to thank Yuri Varela for his contribution.

However, the catalogue of material tax infringements has been neither reviewed nor updated. Rather, more and more infringements have been added. This might in itself violate the proper safeguarding of taxpayers' rights. The taxpayer remains insecure and defenceless.

One must distinguish such tax infringements that, due to their severity, represent a crime.[62] In Chile, there is no specific limit or threshold from which a certain degree of failure to pay tax can be classified as administrative offence or tax crime. Generally, the difference is determined by law according to the severity of the action committed by the offender or, in other words, by the judgment the legislator makes on the committed misdeed, thus higher penalties being given to taxation offences.

Usually, administrative offences are those which include breaches of a tax obligation established by law; and these are sanctioned with an administrative fine of pecuniary nature, regulated in a minimum and a maximum, depending on the seriousness of the violation and quality of the offender.[63] In turn, tax crimes are those committed by the taxpayer with intent (malice) to affect the fiscal treasury and/or to affect the economic public order; and they are sanctioned with custodial sentences.[64]

Accordingly, in Chile, the subjective element is always required from the taxpayer (ie will and knowledge) in order for the tax offence to exist, such as tax evasion or fraud.

Moreover, there are certain special infringements that may be categorised at the discretion of the tax authority either as an infringement or as a crime. Again, these issues cause insecurity for the taxpayer, since there is no certainty regarding the protected legal asset (economic public order, fiscal wealth), nor the technical criteria to categorise the conduct in one sense or another.

Tax infringements are regularly punished with a monetary fine and exceptionally with a custodial sentence. The more severe the infringement, the heavier the penalty in order to prevent such conduct. This corresponds to the principle of proportionality.

The creation of the independent Chilean Tax and Customs Courts in 2000 generated expectations regarding the imposition of more proportional sanctions, but these have not been totally fulfilled in practice.

7.3.2.2.4. Colombia[65]

7.3.2.2.4.1. Criminal Sanctions

Article 9 of the Colombian Penal Code[66] provides that any punishable action must not only be classified and unlawful, but also culpable. Under Article 12 of the Colombian Penal Code, criminal sanctions can only be imposed for actions that are carried out with culpability; 'any form of objective responsibility is hereby eradicated'.

The Constitutional Court of Colombia has held on multiple occasions that the principles that pertain to the *ius puniendi* apply to criminal sanctions. The principles of criminal law – as a paradigmatic form of control of punitive power – apply, with certain nuances, to all forms of punitive activity of the state.[67]

The Court reiterated that, having regard to Article 29 of the Colombian Constitution which enshrines the right to due process of law, the law on penalties in Colombia requires the authority

[62] *cf* also A Schoeppern, *Sistema Sancionatorio Tributario, Infraciones y Delitos* (Editorial Jurídica de Chile, 1994).
[63] Art 97 paras 1 to 3, 6 and 7 of the Chilean Tax Code.
[64] Art 97 paras 4, 5, 8 and 9 of the Chilean Tax Code.
[65] We would like to thank Lucy Cruz for her contribution.
[66] Law 599 of 2000.
[67] Constitutional Court of Colombia, judgment of 5 December 1996, case C-690, [1996], no 7.

to establish the culpability of the person; and it reiterated also that objective responsibility is inadmissible under the principle of *nulla poena sine culpa*.[68]

All principles of criminal law, including the principle of 'culpability' as stated in the Criminal Code,[69] should apply in relation to the imposition of criminal tax penalties.

7.3.2.2.4.2. Administrative Penalties

Administrative sanctioning actions must be governed within the parameters of due process; therefore, the minimum individual guarantees that derive from this right must be applied in the area of taxation. For this reason, the administrative tax offence requires the pre-existing legal classification of the act charged, the clear manifestation of the unlawfulness of the act and the imputability of the conduct.[70]

The principle of tax certainty is relevant and important when establishing the rules that make up the system of sanctions for failure to comply with tax obligations. This goes in conjunction with the principle of typicity or specificity (*tipicidad o taxatividad*) according to which the act considered a crime must fit the figure or type described by law. The description must be sufficiently precise so that it guides the punitive action of the state. However, according to the Colombian Constitutional Court, this principle applies with a certain flexibility because of the difference in the legal goods that are being protected by the two systems of penalties – the administrative and the criminal one.[71]

The Colombian Constitutional Court has held that administrative penalties must be governed by the due process of law also in tax matters. Therefore, any administrative tax infringement must be established by a law that predates the concrete violations to which it applies and must require a clear manifestation of the unlawfulness of the act and the imputability of the conduct. In criminal matters, due process implies strict liability, due to its impact on the principle of human dignity and the principle of culpability enshrined in Article 29 of the Colombian Constitution.[72]

Moreover, in another tax case, the Constitutional Court stated that the principles of criminal law are applicable, with certain nuances, to all forms of sanctions imposed by the state, concluding that due process is applicable to all kinds of judicial and administrative proceedings.[73]

Nevertheless, some Colombian courts (especially administrative tribunals and the Council of State), have in fact applied administrative tax penalties without taking such levels of legal protection.[74] Lucy Cruz sees this as unfortunate and as the expression of an obstinate

[68] Constitutional Court of Colombia, judgment of 6 November 1996, C-597, 1996 and judgment of 5 December 1996, C-690/96.

[69] Law 599 of 2000.

[70] Constitutional Court of Colombia, judgment of 5 December 1996, C-690/96.

[71] Constitutional Court of Colombia, judgment of 5 December 1996, C-690/96, no 14.

[72] Constitutional Court of Colombia, judgment of 5 December 1996, C-690/96, no 7.

[73] Constitutional Court of Colombia, judgment of 6 November 1996, C-597/96.

[74] *cf* Council of State of Colombia, judgments of 23 July 2020, no 23580, [2020] and of 6 August 2020, no 22979, [2020]. In the same vein, Council of State of Colombia, judgment of 5 May 2011, no 17708, [2011] ruled that there is no need to prove the culpability; Council of State of Colombia, judgment of 13 March 1998, no 8570, [1998] stated that administrative penalties are different in this respect from criminal law, developing an interpretation already endorsed in Council of State of Colombia, judgment of 27 August 1993, no 4683, (PJ Jaime Abella), [1993] that for administrative law purposes there is no goal to punish a fault, but merely the willingness to sanction the failure to fulfil an obligation. Consequently, according to Council of State of Colombia, judgment of 30 August 2016, no 19851, [2016], unlike in criminal law, administrative penalties can apply regardless of an assessment of culpability. The Council of State of Colombia, judgment of 11 June 2020, no 21640, [2020] then specified that the offender has the burden of clearing any doubt associated with the occurrence of the factual circumstances that determine the interpretation and subsequent application of the legal rule giving rise to the error. This also occurs in cases – such as the determination of the applicable law on VAT self-assessment – where the law might be unclear, on which also see Council of State of Colombia, judgment of 30 August 2016, no 19851, [2016].

trend to approve the imposition of penalties in cases where the tax administration never proved the existence of subjective responsibility of the alleged perpetrator, whether because the administration never proved the existence of culpability, or because wilfulness was never proven.

Unlike in criminal law, the subjective element can be presumed in the Colombian administrative tax penalties mechanism, where taxpayers have not filed their tax return. Such a presumption, which must be rebuttable, is compatible with the presumption of innocence in the case of administrative sanctions.

In practice, the Council of State generally endorses the levying of all kinds of tax penalties, including that for inaccurate reporting established in Article 647 of the Colombian Tax Code, even where there is no evidence in the case file as to the *mens rea* of the alleged violator, and even where, to the contrary, there was evidence in the case file indicating that there was neither negligence nor a malicious intent.[75]

This shows the attitude of Colombian administrative courts, giving taxpayers weak protection in connection with the levying of administrative tax penalties. Lucy Cruz indicates that this goes as far as endorsing the legitimacy of *bis in idem* when the second penalty applies at a time in which it is uncertain as to whether the first one may apply. According to her, this occurs in the case of the penalty for inappropriate reimbursement of tax overpayment under Article 670 of the Colombian Tax Code and the penalty for inaccurate reporting under Article 647 of the Colombian Tax Code.

The authors concur with Lucy Cruz in questioning whether there might be a possible gap between protection of the rights of taxpayers in theory, ie as contemplated by Colombian law, and the conditions upon which the Colombian tax authorities may impose administrative tax penalties.

7.3.2.2.5. Mexico[76]

Article 22 of the Mexican Federal Constitution establishes that penalties of death, mutilation, infamy, marks, physical punishments, torture, excessive sanctions, confiscation of assets, and other cruel punishments are prohibited. Every penalty must be in proportion to the crime committed and to the legally protected interest.

The Mexican Supreme Court of Justice has established that even when Article 22 of the Constitution does not set a limit for the imposition of sanctions, for these not to be excessive, it is indispensable that secondary laws grant the ability to the tax authority imposing the fine, to evaluate and determine the circumstances presented in each case to impose a fair amount.[77]

7.3.2.2.6. Peru[78]

In Peruvian legislation, the sanctions for tax violations are mostly of an administrative nature and established in the Tax Code,[79] but exceptionally some violations are qualified as criminal sanctions and are established in the Peruvian criminal tax law.[80] In addition, it is relevant to

[75] Council of State of Colombia, judgment of 11 May 2017, no 21883, PJ Stella Jeannette Carvajal Basto, [2017].

[76] We would like to thank Diana Bernal for her contribution.

[77] See Mexican Supreme Court of Justice, Tribunales Colegiados de Circuito, *Multas Fiscales Excesivas, Son Inconstitucionales*, Novena Época, Registro: 203340, Semanario Judicial de la Federación y su Gaceta, Tomo III, Tesis: VI.3o. J/4, [1996] 322.

[78] We would like to thank Cecilia Delgado Ratto for her contribution.

[79] Arts 173 to 178 of the Peruvian Tax Code.

[80] Peruvian Criminal Tax Law – Legislative Decree No 1114.

mention that omitted tax debt and tax fines are subject to a monthly moratory interest at a rate of 1.00 per cent.

With regard to administrative sanctions, the Tax Code classifies them in six groups: (1) infractions related to the obligation to register in the administration's records, (2) infractions related to invoices and other payment vouchers, (3) infractions related to the obligation to keep books and/or records, (4) infractions related to the obligation to file tax returns and other declarations or communications, (5) infractions related to the obligation to allow the audits and controls of the administration, and (6) infractions related to the determination and payment of tax obligations.[81]

With regard to criminal sanctions, the Peruvian criminal tax law establishes five cases of conduct classified as tax crimes: (1) tax fraud,[82] (2) accounting crime,[83] (3) providing false information to the records of the tax administration, (4) storing undeclared assets and (5) obtaining, selling or facilitating in any way invoices or other payment vouchers in order to commit or enable the commission of crimes established in the Tax Penal Law.

The Peruvian Tax Code establishes five principles which serve as guarantees for the protection of taxpayers' rights against the imposition of administrative sanctions related to tax matters:

(1) The attribution of sanctioning power to a public administration, the determination of sanctionable behaviours and consequences of the said behaviours can only be determined by law (principle of legality).
(2) In order for a conduct to be punishable, it must be expressly established as such in a legal norm (principle of typicity).
(3) Two or more penalties for the same conduct cannot be applied to the same taxpayer (*ne bis in idem* principle).
(4) The established sanction must have a reasonable proportion between the seriousness of the conduct incurred and the affectation of the rights of the taxpayers (principle of proportionality).
(5) In the event that the same conduct qualifies as more than one infraction, only the sanction corresponding to the most serious infraction will be applied to the taxpayer (principle of non-concurrence of infractions).[84]

The Peruvian Constitutional Court explicitly held that the principles of culpability, legality and typicity, inter alia, constitute basic principles of the sanctioning power which are not only applicable in the area of criminal law but also with regard to administrative sanctions.[85] The question is whether and to what extent exceptions to this principle can be established by law. In any case, Article 165 of the Peruvian Tax Code clearly establishes that infractions shall be determined objectively and subject to administrative sanctions which do not include imprisonment. The Peruvian Tax Court does not see constitutional problems with regard to that objective liability.[86]

[81] *cf*, art 172 and ff Tax Code Peru.

[82] Tax Fraud is defined by art 1 of the Criminal Tax Law as the action by which one for his own benefit or that of a third party, using any artifice, deception, cunning, trickery or other fraudulent form, does not pay all or part of the taxes established by law.

[83] Accounting crime is defined by art 5 of the Peruvian Criminal Tax Law as when, being required to keep accounting books and registries, one completely neglects said obligation, knowingly omits or falsely registers acts, operations or income or destroys totally or partially the accounting books and registries.

[84] Art 171 of the Tax Code of Peru.

[85] Peruvian Constitutional Court, judgment of 8 August 2012 no 00156-2012-PHC/TC, [2012], no 7.

[86] Peruvian Tax Court, judgment of 8 January 2014, [2014] no 00319-5-2014: 'cabe precisar que esta instancia no considera que corresponda aplicarse el control difuso de la Constitución frente a la responsabilidad objetiva establecida

In addition thereto, the Peruvian General Administrative Procedure Law[87] established six further principles:

(1) The imposition of sanctions must be carried out following the legally established procedure (principle of due procedure).
(2) Incurring in a punishable conduct cannot be more beneficial to the offender than paying or assuming the sanction imposed or complying with the established rules (reasonability principle).
(3) The sanctioning rules are only applicable to events or conducts that occurred after its entry into force. In the same way, the rules that eliminate or reduce sanctions will not apply with respect to those that happened prior to their entry into force (principle of non-retroactivity).[88] As applied to criminal sanctions, however, this would violate Article 9 section 3 of the American Convention on Human Rights.[89]
(4) In order to impose multiple sanctions to the same continued conduct of a taxpayer, it is required that at least 30 business days have elapsed since the imposition of the last sanction (principle of continuation of infractions).
(5) The sanctions must fall on those who incur the punishable conduct (causation principle).
(6) It must be presumed that taxpayers have acted correctly and duly fulfilled their obligations as long as there is no evidence proving the contrary (presumption of lawfulness).

The principles listed above serve as guidelines to ensure respect for taxpayers' rights. The Peruvian Constitutional Court,[90] citing the Inter-American Court of Human Rights,[91] has held that it is a human right to have the necessary guarantees in an administrative sanction procedure in order to reach fair decisions based on the rule of law.

7.3.2.3. The Caribbean[92]

Penalties and interest may be imposed for non-payment of a tax assessment unless an objection is lodged against it and thereafter there is a further appeal to the judicial system to challenge the assessment. Such penalties and interest are often the subject of intense negotiation between taxpayers and the taxing authority, especially if the substantive matter is settled. The Court system in the Caribbean is not generally involved in that process but applications for consent orders are often held back pending such discussions. Penalties and interest are also waived during the period of a tax amnesty which is offered from time to time by the Ministry of Finance. Debts to the state are given priority in the event of bankruptcy or liquidation. There are also criminal sanctions for offences under various pieces of taxing legislation such as giving false or misleading information.

en el articulo 165 del Código Tributario, habida cuenta que no aprecia la existencia de alguna vulneración de los derechos fundamentals de la persona ni la contravención de la Constitución por parte de dicha norma.'

[87] Peruvian Supreme Decree No 004-2019-JUS – TUO of the General Administrative Procedure Law.

[88] Art 168 Código tributario Peru.

[89] Art 9 American Convention on Human Rights states with respect to 'criminal offences': '… If subsequent to the commission of the offence the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.' Quoted by Peruvian Constitutional Court, judgment of 8 August 2012 no 00156-2012 PHC/TC, nos 5 and ff.

[90] Peruvian Constitutional Court, judgment of 8 August 2012 no 00156-2012-PHC/TC.

[91] IACHR, *Baena-Ricardo et al. v Panama*.

[92] We would like to thank Anthony Gafoor for his contribution.

7.3.2.4. United States[93]

In order for the failure to pay tax to be considered a criminal offence under IRC sections 7201(b), 7202 and 7203, the failure must be wilful, and thus the government bears the traditional burden of proving the necessary elements beyond a reasonable doubt. There is no scope for a case to be labelled criminal simply because of the dollar amount involved; it must involve a subjective element of wilful conduct.

US taxpayers have a right to contest most non-criminal penalties within an IRS administrative appeal, or as part of a judicial proceeding. Many penalties can be abated administratively, if the taxpayer demonstrates reasonable cause for a reporting or filing error, and some penalties may be abated under 'First Time Abate' procedures,[94] if the taxpayer has otherwise recently been compliant. Challenges to assessed penalties can be brought in court, subject to the rules governing judicial jurisdiction (ie, certain assessed penalties must first be paid and then refund suits brought in federal district court, while penalties proposed in a notice of deficiency can be brought to a US Tax Court).

There are a number of circumstances and behaviours that can lead to a criminal prosecution related to federal tax laws. A defendant in such cases is entitled to the extensive protections explicitly provided by the US Constitution in all criminal proceedings. If the tax charge involves proceedings of a criminal nature, the charged taxpayer maintains general constitutional rights under the Sixth Amendment. Such protection includes the right to a timely public trial, the right to a lawyer, the right to an impartial jury, and the right to know accusers and the nature of charges and evidence against the defendant. Any sentence imposed upon a guilty determination would also need to respect the Eighth Amendment's prohibition on excessive punishments.

Furthermore, Article 1, section 9 clause 3 of the US Constitution protects against 'ex post facto laws'. From its earliest days, the Court has interpreted the clause to apply only to criminal punishment.[95]

According to such provision, no prosecution is permissible under laws not in effect at the time of the alleged criminal act. The same provision prohibits the passage of any 'bill of attainder.' As such, legislation authorising the criminal punishment of an individual by declaring that the target is guilty of a criminal offence cannot be sustained. The Supreme Court has identified three types of legislation that would fulfil the 'punishment' prong of the test:

(1) where the burden is such as has 'traditionally' been found to be punitive;
(2) where the type and severity of burdens imposed cannot reasonably be said to further 'non-punitive legislative purposes'; and
(3) where the legislative record evinces a 'congressional intent to punish'.[96]

However, tax penalties will typically not be seen as criminal sanctions; the Supreme Court has struck down tax penalties only under exceptional circumstances.[97] For example, the Supreme Court held that the delinquency of a decedent in not paying taxes may be penalised under the state taxing power by inflicting upon his estate a penalty measured by the discretion of the legislator. 'The constitutional prohibition of ex post facto laws is inapplicable to a retroactive tax penalty.'[98]

[93] We would like to thank Jeremiah Coder and Charles H Gustafson for their contribution.
[94] See IRM 20.1.1.3.3.2.1 (21 November 2017).
[95] US Supreme Court, *Calder v Bull*, 3 US 3 Dall, [1798] 386 and ff, 390 and ff.
[96] *cf* EK Lunder, R Meltz and KR Thomas, 'Constitutionality of Retroactive Tax Legislation' (25 October 2012) *Congressional Research Service* 6.
[97] *cf* US Supreme Court, *Burgess v Salmon*, 97 US 381, [1878].
[98] US Supreme Court, *Bankers Trust Co. v Blodgett*, 260 US 647, [1923].

In addition to the rights prescribed constitutionally, there is a range of statutory rights to which an accused is entitled. An evidentiary privilege derived from the common law protects communications between the accused and his/her legal counsel and in some instances others working on the defence team.

Tax penalties may also violate the Fifth Amendment's prohibition on double jeopardy, provided they are of a criminal nature. In a 5:4 judgment, the Supreme Court once found a state tax violating the constitutional prohibition against successive punishments for the same offence. But this was under exceptional circumstances:

> While taxes are usually motivated by revenue-raising rather than punitive purposes, Montana's tax departs far from normal revenue laws. Its high rate and deterrent purpose, in and of themselves, do not necessarily render it punitive, but other unusual features set it apart from most taxes. That it is conditioned on the commission of a crime is significant of penal and prohibitory intent rather than the gathering of revenue. It is also exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place. Since the taxed activity is completely forbidden, the legitimate revenue-raising purpose that might support the tax could be equally well served by increasing the fine imposed upon conviction. In addition, it purports to be a property tax, yet it is levied on goods-here, the destroyed marijuana plants-that the taxpayer neither owns nor possesses.[99]

The modern federal income tax law in the United States was adopted in 1913 under the explicit authority of the 16th Amendment to the US Constitution. The constant tension between the need for revenues to finance governmental expenditures and the posture of taxpayers confronted with the overwhelming power of a national government has led to the development of a wide range of practices designed to protect taxpayers from the abuse of the power by the tax collector. Some have been established by statute, others by regulation or tradition. They have been summarised in a publication issued by the Internal Revenue Service, the agency of the US Treasury Department responsible for federal tax administration and enforcement, called the Taxpayer Bill of Rights.[100] These practices are conceded by the Internal Revenue Service and are generally respected, although disputes about their application sometimes arise.

7.3.3. Asia

7.3.3.1. China[101]

Taxpayers face various administrative and/or criminal sanctions when they fail to comply with Chinese tax laws. Surcharges of 0.05 per cent per day of the amount of taxes underpaid are imposed. The administrative fines shall be calculated from 50 per cent to five times the taxes unpaid or underpaid. If the non-compliant act constitutes an offence, criminal liability shall be investigated in accordance with the law.

The failure to make a full and timely payment of tax in China will give rise to a criminal offence of tax evasion, when both the subjective elements and the threshold as follows are satisfied: (1) the taxpayer intentionally fails to pay a full amount or a part of taxes on time by cheating or concealment activities; and (2) (i) when the amount of taxes evaded exceeds CNY 50,000 or more and accounts for up to 10 per cent of the total tax amount due, the taxpayer shall be sentenced to fixed-term imprisonment of not more than three years together with a fine; (ii) when the

[99] See US Supreme Court, judgment of 6 June 1994 *Montana Dept of Revenue v Kurth Ranch*, No 93-144, 511 US 767, [1994], syllabus b).

[100] *cf* sec 6.4.1.2.2.3. of this book.

[101] We would like to thank Na Li for her contribution.

amount of taxes evaded is huge and accounts for up to 30 per cent of the total tax amount due, the taxpayer shall be sentenced to a fixed-term of imprisonment of not less than three years but not more than seven years, together with a fine.

However, the above criminal liability can be discharged if the taxpayer pays the full amount of the taxes due, the surcharge, the fines and other administrative penalties when receiving the tax payment notification from Chinese tax authorities. The exception is where the taxpayer is subject to the above criminal offence of tax evasion twice or more within five years. In that case, the criminal liability of the taxpayer cannot be discharged.

With regard to the statute of limitation, where a taxpayer or withholding agent fails to pay taxes or underpays taxes due to his own fault, such as making an erroneous calculation, the tax authority may pursue the collection of the unpaid taxes and surcharges within three years. In case of any particular circumstance, the period for pursuing the collection of the taxes may be extended to five years. And for evasion of taxes, refusal to pay taxes and tax fraud, the tax authorities shall not be restricted by the period prescribed in the preceding paragraph from pursuing the collection of the taxes unpaid or underpaid, the surcharges or the fraudulently obtained taxes.

7.3.3.2. India[102]

Under Indian law, failure to pay tax fully and on time may give rise to either administrative or criminal sanctions. The Indian Income-tax Act 1961 sets out a range of sanctions for tax violations. The sanctions may be civil or criminal, depending on the nature of the infringement. Civil and criminal sanctions are also contained in certain special legislations. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 brings to charge any undisclosed foreign income and assets of a taxpayer at a special tax rate of 30 per cent. The tax officer may impose a penalty up to three times the tax assessed under the legislation. If a resident wilfully evades any tax, penalty or interest, the criminal sanction is a rigorous imprisonment for a minimum of three years extendable to 10 years plus a fine.[103]

The Indian Supreme Court has distinguished between administrative and criminal sanctions under the Indian Income-tax Act 1961. The former are remedial in nature and the aim of the civil penalty is to compensate the government for loss of revenue. However, criminal penalties aim to act as deterrence and to punish the offender. The latter necessarily require proof of *mens rea* or a culpable mental state.[104] Hence, also under the Indian tax law, evidence of the subjective element to commit a crime is a prerequisite to constitute a criminal offence.

On the one hand, the conduct may amount to the criminal sanction of tax evasion if the taxpayer makes 'wilful attempts in any manner whatsoever to evade any tax, penalty or interest'. Tax evasion is a crime. Any person wilfully attempting to evade any tax, penalty or interest, or under-reporting his or her income, is liable to rigorous imprisonment for a minimum term of three months extendable to two years. If the amount evaded or under-reported is more than 3,000 euros, the rigorous imprisonment is for a minimum of six months which may extend to seven years. Imprisonment is over and above any fine that may be otherwise imposed. The criminal intent is inferred if a person has books of accounts containing a false entry, or makes or causes to be made any false entry or statement in such books of account or other documents.[105] For the

[102] We would like to thank Ashrita Prasad Kotha for her contribution.

[103] Ss 41 and 51, Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015.

[104] Supreme Court of India, judgment of 2 May 1989, *Cochin v Commissioner of Income tax*, [1989], reported in (1989) 44 *Taxmann* 278.

[105] S 276C, Income-tax Act 1995.

prosecution of any offence requiring a culpable mental state, the court presumes the existence of such mental state. The burden of proof is on the taxpayer to show the absence of such mental state and the standard of proof is beyond reasonable doubt.[106]

On the other hand, failure to furnish a tax return before the end of the relevant assessment year, or under-reporting of income, when not accompanied by the mental element, is met with monetary penalties stipulated under the law.[107]

The penalty for failure to furnish a tax return before the end of the relevant assessment year is approximately 60 euros. For under-reporting of income, the penalty payable could be between 50 per cent and 200 per cent of the amount of tax payable. Failure to deduct tax at source or pay the deducted tax is punishable with a penalty equivalent to the amount of tax which the person failed to deduct or pay.[108]

The taxpayer may request the assessing officer to condone the penalty for under-reporting of income or failure to deduct or pay tax at source. The taxpayer should, without protest, have paid the demanded tax and interest within the period stated in the notice of demand. The officer shall give a hearing to the taxpayer before rejecting any such request.[109]

In addition, successive Indian governments have rolled out voluntary income disclosure schemes that condone all or some of the sanctions. The recently announced '*Vivad se Vishwas Scheme*' ('From dispute to trust') grants taxpayers immunity from prosecution and waiver of interest and penalty. The taxpayer has to make an unconditional one-time payment of the stipulated amount (which ranges from 50 per cent to 135 per cent of the disputed amount, depending on who filed the pending appeal and the timeline chosen for payment).[110]

7.3.3.3. Israel[111]

The Israeli Income Tax Ordinance and most tax legislation include a long list of criminal tax offences. It is fair to say that Israel uses the criminal law widely to enforce tax compliance. For example, the opening of a business without reporting to tax authorities is a criminal offence.[112] The non-declaration of tax planning that necessitates advance reporting also is a criminal offence.[113] The non-fulfilment of several administrative duties in the taxation process on time are considered criminal offences.[114] Tax evasion is a hard offence with seven years in prison as the maximum sanction.[115] Anyone who assists taxpayers in making false reports to the tax authorities is subject to criminal responsibility as well.[116] The tax authority itself has an investigation unit that runs the investigations, but the general criminal authorities administer the decision to accuse and the following trial.

Sanctions in Israel can vary and include fines and imprisonment. According to the Israeli Administrative Offences Law (1985), the state could enforce some technical offences through administrative fines instead of criminal trials. In some circumstances, in offences with sanctions of up to seven years in prison, the tax authority could replace criminal trial with payment

[106] S 278E, Income-tax Act 1961.
[107] Ss 271F and 270A, Income-tax Act 1961.
[108] Ss 271F, 270A and 271C, Income-tax Act 1961.
[109] S 270AA, Income-tax Act 1961.
[110] Direct Tax Vivad se Vishwas Act 2020.
[111] We would like to thank Rifat Azam for his contribution.
[112] Art 215-A of the Israeli Income Tax Ordinance.
[113] Art 215-B of the Israeli Income Tax Ordinance.
[114] Art 216 of the Israeli Income Tax Ordinance.
[115] Art 220 of the Israeli Income Tax Ordinance.
[116] Art 224 of the Israeli Income Tax Ordinance.

of ransom tax.[117] As per the published guidelines on the use of this discretion, the Israeli tax authority considers the circumstances of the offence and the taxpayers' personal involvement, the taxpayers' personal circumstances and their families, the public interest in criminal trial and the payment of the tax. In recent years, the Israeli tax authority has enabled taxpayers to disclose their tax evasion activities and pay the full tax without criminal trial in some circumstances.

7.3.3.4. Japan[118]

Section 38(1) of the Japanese Penal Code provides: 'An act performed without the intent to commit a crime is not punishable; provided, however, that the same shall not apply in cases where otherwise specially provided for by law.'[119] Intention is also a necessary element to render tax evasion punishable. Taxpayers are only required to have a general intention or recognition of tax evasion, not a detailed knowledge of the scheme.[120]

In addition, there are some technical offences (*Formaldelikte*) in the field of taxation. As technical offences, each tax act provides 'false return', 'simple failure to file a tax return', 'failure to withhold tax' and 'failure to cooperate with tax audit'. These offences are not regarded as tax evasion and are punished relatively mildly.

As elements of criminal tax evasion, criminal law provisions usually require that 'a taxpayer is exempted from a tax or receives a tax refund through deception or other wrongful conduct'. If a taxpayer does not pay or reduces the payment of tax by concealing or falsifying all or a part of the facts that should be the basis for the calculation of the tax amount owed, then 35 per cent of the tax amount should to be paid as a 'heavy additional tax' instead of an additional tax for understatement, and 40 per cent of the tax amount to be paid is imposed instead of the normal surcharge for failure to file.[121]

In 1963, the Supreme Court of Japan held that 'through deception or other wrongful conduct' is limited to the positive use of fraud or other wrongful conduct. According to the Supreme Court, the simple failure to file the tax return does not constitute a criminal tax evasion, even if the taxpayer intentionally did not file a tax return.[122] In that case, it was deemed as a light delict or non-malicious/intentional mistake. Therefore, it fell within the scope of administrative tax investigation. However, whether taxpayers are investigated by public prosecutors as part of a criminal investigation or by tax inspectors within an administrative investigation depends on the total amount in question. Usually, c 1,500,000 euros is the cut-off point.

If taxpayers do not file their tax return by the due date designated by law, they have to pay defaulting taxes on any amount in arrears. Such delinquent tax accrues on unpaid taxes beginning on the day after the due date for a tax payment and continues until the day on which the tax owed is paid in full.[123] The mechanics of determining the rate of such delinquent taxes applicable is complicated. The rate will be decided annually with due consideration of a special standard rate to be announced by the finance minister by the middle of December of the year preceding the tax year concerned.[124] This special standard rate shall be based on the average interest rate for

[117] Art 221 of the Israeli income Tax Ordinance.
[118] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.
[119] Japanese Penal Code, Act No 45 of 24 April 1907.
[120] H Kaneko, *Tax Law* (in Japanese), (2019) 1125–26.
[121] S 68(2) of the Act on General Rules for National Taxes.
[122] Supreme Court of Japan, judgment of 12 February 1963, S33, A, [1963], no1569.
[123] S 61 of the Act on General Rules for National Taxes.
[124] S 60 of the Act on General Rules for National Taxes, art 94(1) of Act on Special Tax Measures.

short-term loans by banks.[125] The applicable rate shall be increased for the period of two months after the due date until the remaining taxes due are paid in full.

If a taxpayer does not comply with the required tax obligations, an 'additional tax' will be imposed. This additional tax should be imposed if a taxpayer files a tax return by the due date but the amount paid in the tax return is found to be less than the amount due to be paid (the 'additional tax for understatement' is 10 per cent of the tax amount of the difference)[126] or a taxpayer does not file a tax return by the due date (the 'additional tax for failure to file' is 15 per cent of the tax amount to be paid).[127] These additional taxes are waived when taxpayers voluntarily amend their own tax return before the authority points out the error.[128] When a taxpayer who deducts withheld taxes and is obliged to pay the tax does not pay it by the due date, 10 per cent of the tax amount is imposed as an 'additional tax on non-payment'.

However, the tax revision of 2011 introduced the tax crime of 'intentional failure to file a tax return'. As there are some serious cases of intentional failure to file tax returns and such cases should be met with more severe punishment, distinguished from 'simple failure to file tax returns', the lawmakers introduced the special provision for intentional failure to file tax returns in 2011.[129]

In addition to the aforementioned non-criminal sanctions, a taxpayer may be punished by criminal sanctions. If a taxpayer is exempted from a tax or receives a tax refund by means of deception or other wrongful conduct, then the taxpayer may be punished by imprisonment with labour for not more than 10 years or a fine of not more than 10 million yen.[130] Other criminal penalties may be imposed on a taxpayer who simply fails to file a tax return or who fails to cooperate in the framework of a tax audit.[131]

Imposing criminal sanctions in addition to civil sanctions may cause the problem of cumulative punishment (*ne bis in idem*).[132] However, the Supreme Court of Japan has held that additional tax is different from criminal sanctions. Its purpose is to secure that taxpayers cooperate appropriately, which is considered less punitive.[133]

7.3.4. Europe

7.3.4.1. European Union

This section addresses the legal framework applicable to the levying of tax sanctions in the European Union with special emphasis on the principles established in the ECHR and in European Union law. The ECHR mainly operates in tax matters through the gateway of the right

[125] For the first two months, the rate of the delinquent tax was expected to be 2.6 per cent per cent for 2020; for the period from two months after the due date until the remaining taxes due are paid in full, the delinquent tax rate is expected to be 8.9 per cent for 2020. If these specific rates exceed 14.6 per cent per annum, 14.6 per cent should be applied.

[126] S 65(1) of the Act on General Rules for National Taxes. If the unpaid tax amount is larger than a certain amount, further 5 per cent should be added as an additional tax for understatement (art 65-3 of the Act on General Rules for National Taxes).

[127] S 66(1) of the Act on General Rules for National Taxes.

[128] S 65(5) of the Act on General Rules for National Taxes.

[129] Tax reform act, no 82 of 30 June 2011.

[130] Criminal sanctions for tax evasion are provided in each tax act: s 238(1) of the Individual Income Tax Act, s 159-1 of the Corporate Income Tax Act, s 68(1) of the Inheritance Tax Act, etc.

[131] S 238(3) of the Individual Income Tax Act, s 159(3) of the Corporate Income Tax Act, etc.

[132] Art 39 of the Japanese Constitution prohibits cumulative punishment: 'No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy'.

[133] Supreme Court of Japan, judgments of 30 April 1958, S29, O, [1958], no 236, of 2 May 1961, S32, A, [1961], no 1659 and of 11 September 1970, S43, A, [1970], no 712.

to a fair trial for criminal charges under Article 6 of the ECHR. This is due to the fact that the ECtHR, in its famous *Ferrazzini* judgment,[134] stated that disputes concerning taxation could not fall within 'the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer'. However, the European Union also issued secondary criminal law to protect its financial interest which is applicable to the EU own resources, including in particular value added tax (VAT).[135]

Under EU law, the prohibition on double jeopardy[136] (*ne bis vexari*) prevents exposure to two judicial disputes in two separate Member States. Article 50 of the EU Charter specifically mentions 'within the Union'. By contrast, the wording of Article 4(1) of the 7th Protocol to the ECHR expressly refers to 'the same State'. This wording of the ECHR clearly reflects public international law, whereas the wording in the EU Charter introduces the principle of mutual recognition in this specific context within the Internal Market.[137]

Because of the intricate connections between the administrative and judicial phases of tax procedures, the protection of this right should cover both, at least to the extent that the matter is relevant for criminal charges.[138] CJEU case law endorses the protection of procedural rights also in the framework of tax audits.[139] A similar view has been taken in some ECtHR judgments.[140]

From the perspective of EU law, various specific rights operate under the EU Charter as expressions of the general principles of EU law applicable to criminal penalties, including in particular the privilege against self-incrimination,[141] the presumption of innocence[142] and the principle of proportionality.[143] Article 52(3) of the EU Charter requires legal protection to have the same meaning and scope under the EU Charter as under the ECHR for all corresponding fundamental rights.[144] The legal framework of ECHR and EU law is thus suitable for a joint analysis, supplemented by elements reflecting the common constitutional traditions of European

[134] ECtHR, *Ferrazzini v Italy*, no 44759/98, (12 July 2001), para 29.

[135] Directive EU 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interest by means of criminal law includes a specific regulation for serious criminal offences that may also apply to VAT. As already indicated in sec 7.2.1, fraud falling within the scope of this directive was not meant to exclude cases of tax evasion. This directive applies criminal sanctions to fraud, safeguarding in its recital 17 the application of penalties other than of a criminal nature and recalling the application of *ne bis in idem* for other sanctions. According to art 2 of the Directive, serious offences against the common VAT system require intentional acts or omissions connected with the territory of two or more Member States and involve a total damage of at least 10 million euros. Moreover, art 3(2)(d) states that fraud affecting the Union's financial interests arises in connection with VAT in the presence of three elements, namely (i) use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union, (ii) non-disclosure of VAT-related information in violation of a specific obligation with the same effect, (iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds. The latter elements confirm the relevance of the subjective element for the existence of VAT fraud.

[136] See art 4(1) of ECHR Protocol no 7 and art 50 of the EU Charter. However, this was already laid down in art 54 of the 2000 Convention Implementing the Schengen Agreement of 14 June 1985 between the Governements of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which reads: 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

[137] This may lead to difficulties across borders when there are disparities in substantive law.

[138] See CJEU, judgment (Grand Chamber) of 20 March 2018, *Menci*, case C-524/15, ECLI:EU:C:2018:197 [2018]; *cf* also P Pistone, 'General Report', secs 2 and 3.

[139] CJEU, *Sopropé*, case C-349/07, ECLI:EU:C:2008:746, [2008], paras 36 and ff.

[140] ECtHR, *Funke v France*, no 10828/84, (25 February 1993), para 44, ECtHR, *J.B. v Switzerland*, no 31827/96, (3 May 2001), paras 66–71, and ECtHR, *Ravon and Others*, no 189497/03, (21 February 2008).

[141] Art 47 of the EU Charter.

[142] Art 48(1) of the EU Charter.

[143] Art 49(3) of the EU Charter.

[144] As indicated by art 52(3), 2nd sentence of the EU Charter, this does not prevent European law from having a stronger legal protection of such rights as compared to the one applicable under the ECHR.

countries. The starting point for such analysis is the concept of criminal charge in the sense of Article 6 of the ECHR. Criminal charges are subject to the principle of legality, specifically enshrined in Article 49(1) of the EU Charter. It presupposes the existence of a law prior to the criminal offence, that means at the time of committing the violation. This is, however, subject to an exception: the application of heavier penalties as compared to the ones that were applicable at the time of the act is excluded. Article 49(1) 3rd sentence of the EU Charter requires the application of a subsequent law if that law provides for a lighter penalty.[145] This includes waiving the application of penalties when later changes in the law have excluded the criminal relevance of a violation.

Article 49 of the EU Charter applies to tax matters as far as they involve criminal charges under the *Engel* approach.

Judicial interpretation has developed its boundaries along three criteria, better known as the *Engel* criteria.[146] These criteria are: (1) the classification as criminal charge under domestic law, (2) the nature of the offence and (3) the severity of the applicable penalty.[147] The ECtHR case law usually goes beyond the mere classification under domestic law.[148] Even though all criteria contained in the *Engel* judgment are decisive for determining a criminal charge, the ECtHR case law has gradually put more emphasis on the second and third criteria,[149] stressing that they do not always have to be cumulatively met.[150] This will become clear in the light of the following considerations. Critical issues arise in practice in drawing a precise dividing line between criminal tax sanctions and the so-called tax surcharges,[151] ie an increased amount of tax due, solely for the failure to pay the tax due on time, which in fact constitutes an administrative tax penalty. When applying the *Engel* criteria to such a context, judicial interpretation has often taken into account four elements, bundled together, for singling out criminal charges, namely (1) the general application of the law to all taxpayers, (2) the prevailing punishment function over that of pecuniary compensation for damage, (3) the existence of a general rule with deterrent and punitive purposes, and (4) the substantial nature of the penalties, such as leading to imprisonment in case of failure to pay the taxes.[152] The first three elements were then held to be relevant for detecting the existence of the second *Engel* criterion,[153] which has gradually gained importance,[154] in order to reach the conclusion that the minor nature of the penalty did not exclude the criminal nature of

[145] *cf* CJEU, judgment (Grand Chamber) of 3 May 2005, *Berlusconi and Others*, joined cases C-387/02, C-391/02 and C-403/02, ECLI:EU:C:2005:270, [2005], paras 66 and ff, and Opinion of Advocate General Kokott, *Berlusconi and Others*, cases C-387/02, C-391/02 and C-403/02, ECLI:EU:C:2004:624, paras 154 and ff.

[146] ECtHR, *Engel and others v the Netherlands* (Plenary), nos 5100/71, 5102/71, 5354/72 and 5370/72, (8 June 1976).

[147] See ECtHR, *Janosevic v Sweden*, no 34619/97, (23 July 2002), para 67.

[148] See ECtHR, *Jussila v Finland*, no 73053/01, (23 November 2006), para 37.

[149] See ECtHR, *Jussila v Finland*, para 38.

[150] See ECtHR, *Lutz v Germany* (Plenary), no 9912/82, (25 August 1987), para 55, and ECtHR, *Nicoleta Gheorghe v Romania*, no 23470/95, (3 July 2012), para 26. However, an exception occurs when the separate analysis of such criteria does not allow a proper assessment of the conditions for applying art 6 (see ECtHR, *Bendenoun v France*, no 12547/86, (24 February 1994), para 47).

[151] Their combined application has been endorsed in ECtHR, *A and B v Norway* (Grand Chamber), nos 24130/11 and 25798/11, (15 November 2016), paras 130 and ff, and CJEU, *Menci*, C-524/15, para 61. By contrast, the CJEU has excluded their compatibility with the prohibition on double jeopardy, also in the meaning of *ne bis puniri*, in its landmark CJEU, judgment of 26 February 2013, *Åkerberg Fransson*, case C-617/10, ECLI:EU:C:2013:105, [2013], para 34.

[152] ECtHR, *Bendenoun v France*, para 47.

[153] ECtHR, *Jussila v Finland*, para 38.

[154] See, for example, ECtHR, *Hannu Lehtinen v Finland*, no 32993/02, (22 July 2008), para 40. Furthermore, in *Paykar Yev Haghtanak Ltd v Armenia*, no 21638/03, (20 December 2007), paras 35–37, the ECtHR noted that (i) the relevant provisions of tax law were applicable to all persons liable to pay tax and were not directed at a specific group; (ii) the surcharges and the fines were not intended as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer's conduct; and (iii) the purpose pursued by these measures was to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations.

a charge. This has reduced the weight of the third *Engel* criterion.[155] The logical priority of establishing what constitutes a criminal charge in tax matters applies both to the ECHR and the EU Charter, delimiting the framework within which the applicable fundamental rights operate. This precludes the application of the legal standard of Article 6 of the ECHR to administrative tax penalties, as well as of the other specific rights that are linked to criminal charges, such as the presumption of innocence and the privilege against self-incrimination.[156] However, imposing two different types of tax sanctions creates problems. In addition to the problems affecting *ne bis vexari* in respect of one and the same violation, which are addressed in a different section of this book,[157] the issue remains that such a violation produces two negative consequences. This result may be the outcome of the function of tax surcharges that characterise administrative tax penalties, which increases the amount of tax due for the mere failure to completely and timeously fulfil the obligation to pay such tax, as compared to the punitive and deterrent function of tax sanctions.

In a number of tax cases, mostly dealing with VAT, the CJEU has considered the levying of tax surcharges in addition to tax sanctions as compatible with Article 50 of the EU Charter as far as at least one of the penalties is not criminal in nature, a matter which is for the national court to determine.[158] The ECtHR has regarded this type of situation as compatible with the same principle as enshrined in Article 6 of the ECHR, insofar as the levying of the sanctions is complementary.[159] Thus, when addressing the tax implications of the *ne bis in idem* principle, the CJEU and the ECtHR may in fact have followed different argumentative paths that may in the end, however, lead to similar results.

Drawing a precise threshold between administrative and criminal tax sanctions is not easy, considering that the ECtHR held a penalty equal to 25 per cent of the applicable tax as sufficiently severe to be regarded as a criminal charge where the government did not dispute its criminal nature.[160] The CJEU by contrast did not consider the denial of 30 per cent of the right to input VAT tax deduction a criminal charge. The CJEU motivated its position also through arguments based on the principle of proportionality, supporting the need to secure deterrence by the penalty and effectiveness of the tax.[161] The application of this principle to administrative tax penalties comes as no surprise in the context of EU law. Even though Article 49(3) of the EU Charter specifically applies the principle of proportionality to criminal offences, this general principle has a much broader scope under EU law. The principle of proportionality can question the validity of all measures, including administrative tax penalties, verifying whether they are suitable to achieve their goals and/or whether they go beyond what is strictly required for such a purpose.

[155] ECtHR, *Cecchetti v San Marino* (dec), no 40174/08, (9 April 2013), para 22. However, the ECtHR declared this case inadmissible on different grounds: it applied the new admissibility criteria introduced by Protocol no 14 to the ECHR, namely whether the applicant has suffered a significant disadvantage. In the *Cecchetti* case, the ECtHR considered it beyond doubt that the amount at stake was of minimal significance to the applicant.

[156] On the privilege against self-incrimination see further under sec 6.3.1.1.2. of this book.

[157] See sec 6.3.1.1.5. of this book.

[158] CJEU, *Åkerberg Fransson*, C-617/10, concerning the *ne bis in idem* principle. In later judgments, the CJEU has accepted the application of limitations to the *ne bis in idem* principle, such as CJEU judgments of 27 May 2014 (Grand Chamber), *Spasic*, case C-129/14 PPU, ECLI:EU:C:2014:5865, [2014], paras 55 and ff, and CJEU, *Menci*, C-524/15 paras 40 and ff, and of 20 March 2018, *Di Puma*, joined cases C-596/16 and 597/16, ECLI:EU:C:2018:192, [2018], paras 40 and ff, and of 20 March 2018, *Garlsson Real Estate and Others*, case C-537/16, ECLI:EU:C:2018:193, [2018], paras 42 and ff.

[159] ECtHR, *A and B v Norway* nos. 24130/11 and 29758/11, (16 November 2016) (Grand Chamber), para 132; ECtHR, *Jóhannessen and Others v Iceland*, no 22007/11, (18 March 2017), para 49.

[160] ECtHR, *Jóhannessen and Others v Iceland*, paras 36 and ff.

[161] CJEU, judgments of 29 July 2010, *Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski*, case C-188/09, ECLI:EU:C:2010:454, [2010], paras 28 and ff, 35; and of 7 December 2010, *R*, case C-285/09, ECLI:EU:C:2010:742, [2010], para 50.

Whether or not the field of VAT should constitute a separate micro-context is also hard to determine at present. However, it is a fact that the CJEU is very concerned about the need to effectively counter abusive and fraudulent tax practices in the field of VAT. For this reason, it has gone as far as justifying the denial of full input tax deduction (also combined with the levying of sanctions and the withdrawal of exemptions), including in cases where a taxpayer did not necessarily know, but should have reasonably known, about the existence of the evasive scheme.[162] Such issues show the urgent need for an intervention through measures of positive integration to enhance the functioning of VAT across the European Union.

As already mentioned, the criminal nature of the charge is also of particular importance for determining the application of further specific human rights connected with tax sanctions, such as the presumption of innocence and the privilege against self-incrimination.[163] The core value of the presumption of innocence is connected with guilt and therefore with the existence of a crime.

Critical issues frequently arise in respect of the protection of individual rights for violations committed by companies they control.[164] This is possibly due to the indirect implications of *societas delinquere non potest* which can nevertheless not deprive such individuals of their right to invoke the presumption of innocence. In a case decided by the ECtHR, both the tax authorities and the administrative courts before the decision of the ECtHR rejected the acquittal of the applicant by a criminal court on the charge of tax fraud for acts committed by a company, on the grounds that the applicant was not its de facto manager. This way, they considered as established an element that had been considered unproven by the criminal courts. The ECtHR considered that this behaviour casts doubt on the validity of the applicant's acquittal. That appears incompatible with respect for the presumption of innocence. In these circumstances, the ECtHR concluded that there was a violation of Article 6(2) of the ECHR.[165]

In another case, the investigator refused to institute criminal proceedings against the managing director of a company on the charge of tax evasion, as prosecution of the offence was time-barred. In other words, the applicant was never tried or convicted of that offence by a court competent to determine questions of guilt under criminal law. Nevertheless, when suing the applicant for damages, the tax authorities claimed that the damage had resulted from a criminal offence committed by him. The civil courts did not invite the plaintiff to recharacterise the claims, nor did they do so of their own motion. The civil courts based their decision to grant the claims against the applicant exclusively on the findings as to his criminal liability as set out in the investigator's decision. They did not evaluate any evidence or assess the facts or conclusions made by the investigator or the tax inspectorate. Instead, they simply referred to a mere existence of the investigator's decision and the audit report confirming the company's obligations to pay taxes. They construed the absence of an acquittal in the applicant's criminal case as an automatic and sufficient ground to hold him liable for the damage resulting from the non-payment of taxes

[162] CJEU, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, cases C-131/13, C-163/13 and C-164/13, ECLI:EU:C:2014:2455 [2014], paras 57 and ff, and 61. This line of reasoning can also be found in several other cases, including CJEU, judgment of 6 July 2006, *Axel Kittel*, joined cases C-439/04 and C-440/04, ECLI:EU:C:2006:446 [2006], para 56, and CJEU, judgment of 6 December 2012, *Bonik*, case C-285/11, ECLI:EU:C:2012:774 [2012], para 39.

[163] The latter right has implications in tax matters that affect both procedural rights (on which see above under sec 4.2.) and the ones related to criminal sanctions.

[164] In ECtHR, *Melo Tadeu v Portugal*, no 27785/10, (23 October 2014), the ECtHR assessed the violation of the presumption of innocence in a case in which the *de facto* manager had been acquitted in criminal proceedings concerning a case of tax fraud, but the tax enforcement procedure had continued in spite of such acquittal. A more complex issue arose in *Agapov v Russia*, no 52464/15, (6 October 2020), in connection with the liability of the manager of a company for civil damages in a case in which the criminal proceedings for tax fraud became time-barred.

[165] ECtHR, *Melo Tadeu v Portugal*, para 66.

by the company. Against this background, the ECtHR considered that the wording used by the civil courts reflected those courts' unequivocal opinion that a criminal offence had been committed and that the applicant was guilty of that offence. However, he had never been convicted of that offence and had never had the opportunity to exercise his rights of defence in a criminal trial. In the ECtHR's view, the civil courts' statement was inconsistent with the discontinuation of the criminal proceedings against the applicant and amounted to a pronouncement that the applicant had committed a criminal offence. The ECtHR found no justification for such a statement imputing criminal liability to the applicant. Therefore, it concluded that the applicant was treated in a manner inconsistent with his right to be presumed innocent and held that there has been a violation of Article 6(2) of the ECHR.[166]

More generally, the ECtHR holds that (i) when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged, (ii) the burden of proof is on the prosecution, and (iii) any doubt should benefit the accused.[167]

An additional specific problem arising in tax matters is when two separate courts have jurisdiction to assess respectively crimes and tax violations. This can occur when there is the parallel jurisdiction of a tax court on tax and of a general court on the levying of criminal sanctions.[168] In such circumstances, two conflicting verdicts show legal uncertainty, specifically connected with criminal charges. Such problems should be prevented by clear legal definitions. The adoption of the latter can reduce the potential for inconsistent judgments better than solving the problems at the judicial level.

7.3.4.1.1. Austria[169]

Under § 33 *Finanzstrafgesetz*, *dolus eventualis*/intent is part of the elements of crime. Under § 34 *Finanzstrafgesetz*, gross criminal negligence (*grobe Fahrlässigkeit*, which requires more severe negligence than simple *Fahrlässigkeit*) is sufficient to fulfil the elements of crime (with the same *actus reus* as § 33). There is no minimum threshold below which the failure to make a full and timely payment, provided there is proof of the requisite *mens rea*, only constitutes an administrative offence. In other words, the amount of evaded taxes is irrelevant for the application of both § 33 and § 34. Both § 33 and § 34 only constitute misdemeanours (*Vergehen*), not felonies (*Verbrechen*) under Austrian criminal law.

[166] CJEU, *Agapov v Russia*, paras 43–45.

[167] See ECtHR, *Barberà, Messegué and Jabardo v Spain*, no 10590/83, (6 December 1988), para 77.

[168] For instance, this occurs in Italy under the so-called *doppio binario*, creating a problem of *bis vexari*, due to the concurrent jurisdiction of tax and criminal courts (on which see further in S Gianoncelli, 'Procedimento tributario e procedimento penale: oltre il doppio binario: le convergenze parallele' (2019) *Riv Dir Fin Sc Fin* 177 and ff; O Mazza, 'I controversi rapport fra processo penale e processo tributario' (2020) *Rass Trib* 233 and ff). On the one hand, art 2 of the Criminal Procedural Code allows the Criminal Court to state incidentally on all relevant matters, including tax violations. On the other hand, the wording of art 3 of the Criminal Procedural Code does not allow for a suspension of the criminal procedure in cases other than the ones specifically listed therein (not expressly making a reference to the procedures for levying taxes and their judicial phase). See further on this F Tesauro, *Istituzioni di diritto tributario, Parte generale*, XIV edn (UTET, 2020) 355. In such circumstances, the Criminal Court may therefore conclude on the application of a criminal sanction also when the tax court would otherwise conclude. Furthermore, art 2 of the Law on Judicial Tax Procedures (Law 546 of 1992) allows the tax court to state incidentally on all tax relevant matters, thus including on sanctions. Judicial tax procedures are not to be suspended in cases other than the ones expressly indicated in art 39 of the Law on Judicial Tax Procedures, which do not include reference to criminal tax procedures. Moreover, the tax court is not bound by the judicial assessments contained in criminal judgments, also considering that they are based on evidence (such as witness evidence and some form of presumptions) that is not admissible in tax litigation (see Court of Cassation of Italy, sez pen, judgment of 26 November 2008, no 5490/2008, [2008]; Court of Cassation of Italy, sez pen, judgment of 23 January 2013, no 7078/2013, [2013]; Court of Cassation of Italy, judgment of 12 April 2017, no 9442/2017, [2017]).

[169] We would like to thank Céline Braumann for her contribution.

7.3.4.1.2. Germany

As required by internationally recognised standards, tax crimes subject to criminal sanctions including imprisonment require intent; lacking that subjective element, the acts are only subject to administrative penalties.[170] The Federal Fiscal Court (BFH) has emphasised that *ne bis in idem* as laid down in the German Constitution (*Grundgesetz*, Basic Law or GG)[171] only applies to general criminal law and real criminal penalties. Late filing fees of up to 50,000 euros[172] are obviously not criminal penalties according to the Federal Fiscal Court.[173] Those provisions establish liability for late returns, but not a strictly objective one as the levy shall not be imposed if the delay is due to reasons beyond the control of the body required to notify (Section 22a(5) EStG) or requires that the offence is committed 'deliberately or recklessly' (Section 50f EStG). However, the subjective element has to be assessed objectively on the basis of a hypothetical typical person rather than individually with regard to the person in question in a particular case.[174] Not being 'criminal' penalties nor even administrative penalties,[175] neither *ne bis in idem* nor the presumption of innocence applies to late filing fees.[176] Moreover, rebuttable presumptions are also not excluded in the area of administrative law including surcharges.[177] Therefore, it does not breach the German Basic Law, or the standards of the ECHR or the EU Charter that taxpayers have to show an absence of the subjective element.[178] Late filing fees aim to prevent and compensate violations, whereas administrative penalties are to punish them.[179] This corresponds to the consistent case law on penalties for the late filing of tax returns.[180] Even though such fees are linked to a culpable behaviour of the taxpayer in the past, these are not a punishment or a fine, but a special means of pressure of the tax administration to ensure a proper assessment procedure, which has a preventive character.[181] The surcharges for late filing of tax returns merely sanction that timely tax assessments are made more difficult; however, the late transmission of data is neither associated with a negative value judgment nor with stigmatisation.[182] Considering all the circumstances, the German system of late filing fees is also compatible with the requirements of the ECHR as interpreted by the ECtHR in its case law.[183]

[170] §§ 370, 378 Tax Code Germany.

[171] Art 103(3) Germany Basic Law.

[172] The Federal Fiscal Court/BFH referred to § 22a(5) Income Tax Act (EStG) which reads: 'If a pension payment notification is not submitted within the period specified in § 93c(1)(1) of the German Tax Code, an amount of EUR 10 for each month or part thereof in which the pension payment notification is still outstanding shall be paid to the central office for each outstanding pension payment notification (late payment). The levy is collected by the central office as part of its audit under § 93c para 4 of the Tax Code. The levy shall not be imposed if the delay is due to reasons beyond the control of the body required to notify. The actions of a legal representative or vicarious agent are equivalent to their own actions. The late payment to be paid by an authority subject to notification may not exceed EUR 50,000 for all pension benefit notifications to be submitted for an assessment period.' and to para 50f which reads: '(1) It is an administrative offence to deliberately or recklessly fail to transmit the data referred to in the first sentence of s 22a(1) in full or in good time or to make a notification referred to in the first sentence of s 22a(1) in full or in good time. (2) The administrative offence may be punishable by a fine of up to fifty thousand euros […].'

[173] German Federal Fiscal Court, judgment of 20 February 2019, X R 28/17, ECLI:DE:BFH:2019:U.200219.XR28.17.0, [2019], no 26; of 11 June 2019, X R 29/17, ECLI:DE:BFH:2019:U.110619.XR29.17.0, [2019], no 14.

[174] German Federal Fiscal Court, judgment on X R 28/17, no 26, nos 81 and ff.

[175] German Federal Fiscal Court, judgment on X R 32/17, nos 23 and ff.

[176] German Federal Fiscal Court, judgment on X R 32/17, nos 32 and ff.

[177] German Federal Fiscal Court, judgment on X R 32/17, nos 34 and ff.

[178] This refers to § 22a(5) Income Tax Act as opposed to § 50f Income Tax Act. German Federal Fiscal Court, judgment on X R 29/17, no 15.

[179] § 50f(2) Income Tax Act/EStG uses the term 'punishable'.

[180] § 152 Tax Code/*Abgabenordnung*/AO.

[181] German Federal Fiscal Court, judgment on X R 32/17, nos 26 and ff.

[182] German Federal Fiscal Court, judgment on X R 32/17, no 48.

[183] German Federal Fiscal Court, judgment on X R 32/17, nos 38 and ff.

7.3.4.1.3. Greece[184]

The failure to pay taxes can easily constitute a criminal offence in Greece above the threshold established by law. In particular, criminal liability applies in case of failure to pay taxes for an amount exceeding 100,000 euros[185] and insofar as the amount is not paid back in full before the case is heard by court. In all other cases, failure to pay taxes is sanctioned by an administrative penalty.

Even though the wording of Article 25 of the Greek Law 1882/1990 does not require a subjective element, that requirement follows from Article 27 of the Greek Criminal Law. The Greek Supreme Criminal Court explicitly confirmed that a subjective condition, apparently intent, is necessary in connection with the application of sanctions under Article 25 of Greek Law 1882/1990.[186] Nevertheless, taking into account an earlier judgment of that same Supreme Court, the standard of evidence regarding the subjective element seems to be low.[187]

7.3.4.1.4. Italy

In case of failure to make a timely full payment of taxes due, besides charging interest at the legally applicable rate, the Italian tax system applies either an administrative penalty or, in some cases, even a criminal sanction,[188] depending on the severity of the violation. However, based on the application of the *ne bis puniri* principle, there must be only one criminal sanction for one tax violation.

In the Italian tax system, administrative penalties and criminal sanctions currently follow similar principles. In particular, administrative penalties range from a minimum to a maximum amount according to the type of violation and taking into account a number of additional factors, including repeat offences and the person who commits the violation. Neither criminal sanctions, nor administrative penalties may be levied on persons other than the ones who committed the violation, since this would otherwise conflict with personal liability. This means that heirs are liable for unpaid tax, but not for the administrative penalties or criminal sanctions. It also shows that, in the Italian tax system, administrative penalties are not mere tax surcharges due in connection with the violation of the tax rules.

Administrative penalties are calculated either by reference to the unpaid tax (so-called substantive tax violations), or applicable on a flat-rate basis when violations concern reporting obligations (so-called formal tax violations).

Criminal sanctions apply to the most serious infringements of tax rules, which the law identifies either by reference to the type of violation, or to the amount of unpaid tax exceeding a specific threshold (which varies according to the type of violation). The most typical examples of tax crimes are related to tax evasion and fraud.

[184] We would like to thank Katerina Perrou for her contribution.

[185] In such cases, art 25(1)(a) of Law 1882/1990 foresees the punishment of imprisonment of at least one year, increased under (b) to four years in case the amount evaded exceeds 200,000 euros.

[186] Greek Supreme Criminal Court (Areopag), decision of 11 October 2019, no 26/2020, [2019], www.areiospagos.gr/nomologia/apofaseis_DISPLAY.asp?cd=NONVL691CKKT0NBVAQNIS98HSQN15V&apof=26_2020&info=%D0%CF%C9%CD%C9%CA%C5%D3%20-%20%20%C5.

[187] Greek Supreme Criminal Court (Areopag), decision of 19 January 2018, no 434/2018, [2018], www.areiospagos.gr/nomologia/apofaseis_DISPLAY.asp?cd=UFJI0L77UIHOVE6PSYTZK2DZST468Q&apof=434_2018&info=%D0%CF%C9%CD%C9%CA%C5%D3%20-%20%20%C5.

[188] See arts 10-bis and 10-ter of the Legislative Decree of 10 March 2000, No 74.

Since the 1980s, Italy has significantly strengthened its reaction to tax violations, introducing criminal sanctions to a much greater extent.[189] Since then the liability for tax crimes does not presuppose the assessment of the damage (*reati di danno*), but operates in respect of violations that are precursors to the ones that may cause such damage (*reati di pericolo*).

This has significant repercussions on the assessment of the subjective element and puts more emphasis on the objective element. Even though in principle both elements are required, critical issues might arise in practice and lead to potential conflicts with the right to a fair trial, as protected under the ECHR and the EU Charter.

In particular, under the current rules[190] criminal tax sanctions not only apply to cases of fraud and wilful behaviour, such as altering books or returns, but also, in several cases related to tax evasion, as a consequence of the mere failure to pay tax due (so-called omissive tax crimes).[191] From a theoretical perspective, also the punishment of the latter tax crimes requires the subjective element, consisting in the wilfulness (*dolo*), ie the objective of evading taxes. However, since only the failure to submit a tax return expressly mentions this specific element (*dolo specifico*), the latter two tax crimes are generally interpreted as simply presupposing the awareness of the failure to pay withholding taxes and VAT at the due date (*dolo generico*). This means in practice that only in very exceptional cases can an in-depth factual analysis lead to excluding the presence of the subjective element when the withholding agent and taxpayer fail to make the payment of tax on time. Italian courts generally endorse the legitimacy of this approach, confirming the application of the criminal tax sanctions also in cases where the failure to pay taxes arises in connection with serious economic difficulties.[192]

Further issues of compatibility with the right to fair trial could arise in connection with how judicial procedures operate with respect to tax crimes. In particular, even though tax authorities have the exclusive power to levy criminal sanctions, this does not prevent the same tax crimes being assessed in two separate judicial procedures. This may give rise to an exposure to double jeopardy, both in forms of *bis puniri* and *bis vexari*. In particular, a negative judicial assessment of a criminal sanction by a criminal court does not prevent a tax court from endorsing the levying of an administrative penalty. A problem of *bis vexari* may instead arise more often since the procedure before the criminal court for the assessment of the crime does not deprive tax courts of the right to conduct judicial procedures for the assessment of the tax violation, including the related criminal sanctions. This duplication might violate the right to fair trial, together with a different assessment of the tax crime by the criminal court as compared to the one concerning the determination of taxes and the possible application of penalties, assessed by the tax court.

7.3.4.1.5. Malta[193]

The main penal provisions contemplated in Maltese tax law are to be found in the Income Tax Management Act (ITMA) and the VAT Act (VATA). Articles 49 ITMA and 81 VATA must be singled out because both provisions contemplate what is known as a 'general offence'; the aforesaid

[189] Law of 7 August 1982, No 516, also known as Act 'Handcuffs on Tax Evaders'.

[190] Legislative Decree of 10 March 2000, No 74.

[191] These forms of omissive tax crimes (*reati tributari omissivi*) include the failure to submit a tax return (art 5), as well as to pay withholding taxes (art 10-bis) and VAT (art 10-ter) for more than 50,000 euros per year.

[192] This is a settled judicial trend, on which see Court of Cassation of Italy, sez pen, judgment of 5 March 2021, no 9083/2021, [2021].

[193] We would like to thank Robert Attard for his contribution.

articles classify any infringement of the Maltese Income Tax Act and the VATA as a prosecutable criminal offence bringing any breach of the two tax laws within the realm of criminal law. With respect to the approach taken vis-à-vis the subjective element, the wording of the main penal provisions is not consistent, to the extent that not all provisions criminalise acts or omissions done wilfully and knowingly. Thus, Article 49 ITMA states that any person who contravenes or fails to comply with any of the provisions of the Income Tax Acts or of any rules made thereunder shall be guilty of an offence without referring to an intentional element. The same may be said of Article 76 VATA dealing with a range of VAT offences. Conversely, the crimes contemplated in Article 52 ITMA on tax evasion and Articles 77 and 81 VATA tend to refer to an intentional element. Articles 50 ITMA – failure to comply with notice – and 51 – incorrect returns inter alia – link the crime to the absence of a reasonable excuse.

7.3.4.2. Russia[194]

The failure to make a full and timely payment of tax can give rise to a tax offence under the Russian Tax Code[195] as well as a criminal offence of tax evasion under Articles 198 and 199 of the Russian Criminal Code. The criminal offence of tax evasion does not exist without the tax offence. The latter is transformed into the crime in the event of its harmful effects on society, which should pass a certain threshold (amount of unpaid taxes).

The difference between the tax offence and the criminal offence can be drawn according to the following criteria:

(1) The amount of damages to the budget. The Russian legislator in defining tax evasion uses the criteria of 'large amount' or 'especially large amount' of unpaid taxes and/or fees (fees, like social security contributions, are included in these amounts). Large amount means the amount of taxes and (or) fees totalling within the period of three financial years running over RUB 5,000,000 (about 60,549 euros), provided that the share of unpaid taxes and (or) fees exceeds 25 per cent of the payable amount of taxes and (or) fees, or exceeding RUB 15,000,000 (about 181,646 euros). Especially large amount means an amount totalling within a period of three consecutive financial years over RUB 15,000,000 (181,646 euros), provided that the share of unpaid taxes and (or) fees exceeds 50 per cent of the payable amount of taxes and (or) fees, or exceeding RUB 45,000,000 (about 544,939 euros). Accordingly, all amounts falling below these thresholds are attributed to tax offences.
(2) The subjective element, namely the form of guilt. Tax evasion can only be committed with direct criminal intent. Tax offences can be committed by negligence or intentionally (Article 110 of the Russian Tax Code).

According to Article 25 of the Russian Criminal Code, a crime shall be deemed to be committed with direct (clear) intent, if the person was conscious of the social danger of his actions (inaction), foresaw the possibility or the inevitability of the onset of harmful effects on society, and willed such consequences to ensue.

Articles 198 and 199 of the Russian Criminal Code provide that the person who has committed tax evasion for the first time shall be discharged from criminal liability, if this person or organisation has paid in full the amount of arrears and interest as well as the amount of fine determined in accordance with the Russian Tax Code.

[194] We would like to thank Natalia Vorobyeva for her contribution.
[195] Arts 122, 129.3 and 129.5 of the Russian Tax Code.

7.3.4.3. United Kingdom

There is an administrative penalty in the UK for late payment of tax (in addition to interest), but it is not criminal unless it is embezzlement. Persons charged with collecting VAT and then handing it over to the authorities commit a crime of the nature of embezzlement when they retain the money and appropriate it to their ends.

7.3.5. Oceania[196]

7.3.5.1. Australia

Under Australian law, the mere failure to make a tax payment in full and on time is not a criminal offence but triggers a (relatively high) interest charge. There are, of course, many debt collection powers available to the Commissioner to recover a tax related liability once it is due and payable.

Section 80 of the Australian Constitution provides the right to a trial by jury for indictable federal offences. Indictable offences are those under Commonwealth law that are punishable by imprisonment exceeding 12 months.[197] Offences which are not punishable by imprisonment or for a period of imprisonment of less than 12 months are referred to as 'summary offences'.[198] With consent, an indictable offence may in some cases be dealt with summarily (that is, by a court alone).[199] Rights in relation to a fair trial (the right to legal representation, the presumption of innocence, the standard of proof being beyond a reasonable doubt and the privilege against self-incrimination) are established by common law.

The tax administration legislation establishes a variety of criminal tax offences, civil penalties and administrative penalties in addition to interest charges (the general interest charge and the shortfall interest charge). In many cases, the severity of the penalty is graduated with the degree of culpability (for example, the penalty for a false or misleading statement made as a result of recklessness is double the penalty that applies if the statement is made as a result of failure to take reasonable care).[200] In some cases, the level of penalty depends upon the type of taxpayer (the penalty applicable to significant global entities for failing to lodge a document on time is 500 times that of the base penalty).[201] A civil penalty is not payable if a criminal prosecution is instituted in relation to the same act or omission.[202]

The most serious crimes related to tax matters (such as tax evasion) are prosecuted under the general Criminal Code rather than specific tax legislation.[203] In addition, tax evasion can serve as a predicate offence under the proceeds of crime (asset forfeiture) regime.[204]

There is no crime of tax evasion per se. Rather, there are a number of more general criminal offences under Commonwealth law (such as dishonestly causing a loss to the Commonwealth or obtaining financial advantage from the Commonwealth by deception) which are applied in the tax context. These all have fault elements. There is also a specific Crimes (Tax Offences) Act that creates specific offences for involvement in arrangements by virtue of which a company or

[196] We would like to thank Celeste Black for her contribution.
[197] S 4G of the Crimes Act 1914 and s 8ZA of the Taxation Administration Act 1953.
[198] S 4I of the Crimes Act 1914.
[199] S 4J of the Crimes Act 1914.
[200] Sch 1, ss 284–85 of the Taxation Administration Act 1953.
[201] Sch 1, ss 286–80 of the Taxation Administration Act 1953.
[202] S 8ZE of the Taxation Administration Act (1953).
[203] Pt 7.1 (Fraudulent Conduct) of the Criminal Code Act 1995.
[204] Proceeds of Crime Act 2002.

trustee will be unable to pay federal taxes due (including income tax) and these offences also have a required mental element. There are no quantum requirements or thresholds with respect to the amount of tax involved in relation to either of these categories of offences.

7.3.5.2. New Zealand

New Zealand provides for both administrative penalties and criminal sanctions.

An initial late payment penalty of 1 per cent applies if the taxpayer does not pay tax by the due date. A further 4 per cent late payment penalty applies if the tax is still not paid within seven days of the due date.

Inland Revenue is required to notify a taxpayer the first time their payment is late rather than imposing an immediate late payment penalty. If the taxpayer does not pay by a certain date, Inland Revenue will impose a late payment penalty. Taxpayers are entitled to one notification every two years. After receiving a first warning, Inland Revenue will not send further notifications for two years and will impose an initial late payment penalty in the normal manner.

Criminal offences for evasion include: not keeping legally required books and documents; not providing information, including tax returns and forms, when required; providing altered, false, incomplete or misleading information; and not making a legally required deduction or withholding of tax.

New Zealand law provides for different standards of evidence and proof regarding administrative or 'civil' tax penalties and tax crimes. Section 149A of the Tax Administration Act states:

> (1) The standard of proof in civil proceedings relating to the imposition of penalties is the balance of probabilities.
> (2) The onus of proof in civil proceedings—
> (a) relating to evasion or similar act to which section 141E applies or to obstruction rests with the Commissioner;
> (b) relating to any other matter or thing rests with the taxpayer.
> (3) The standard of proof in criminal proceedings relating to the imposition of penalties is beyond reasonable doubt.
> (4) The onus of proof in criminal proceedings relating to any matter or thing rests with the Commissioner.[205]

7.4. Conclusions on Sanctions

In line with the methodology used throughout this report, the starting point of our analysis is to compare the tax framework with the general one in order to see whether and to what extent differences can be observed with regard to the levying of penalties in tax matters.

Sanctions are the concrete reaction of the legal system to a breach of its rules. Their application determines negative consequences for the infringer and may produce dissuasive effects. Criminal sanctions moreover stigmatise the conduct. This situation also occurs in tax matters. Human rights law applies to such a context.

[205] On the interpretation of that provision Supreme Court of New Zealand, judgment of 10 August 2016, *Barrie James Skimmer*, SC 79/2015, NZSC 101, and *David Ingram Rowley*, SC 126/2015, [2016].

Even though sanctions may present several specific nuances, their application usually follows two main models. They apply as an additional payment of tax – often in the form of a tax surcharge – due to the mere failure to make a timely and full payment of such tax, or they presuppose an assessment of a violation. This overlaps with the difference between administrative and criminal sanctions (or penalties). Even though the former sanctions generally apply to minor tax violations, the dividing line between these and the latter penalties is often very thin. The quantum of administrative sanctions can be significantly high. In Europe, the dividing lines between administrative and criminal sanctions have been blurred as, under the so-called *Engel* approach of the ECtHR,[206] the gravity of the sanctions is a decisive factor.[207] Our analysis has shown that, in tax law, there is conceptual proximity and both types of tax sanctions pursue common goals.

The principles of legality and proportionality are of particular importance for penalties and both are fully applicable to tax matters. The principle of legality postulates that the conduct constitutes a violation at the time in which it takes place. This principle requires the awareness of the infringer of the law, which justifies the obligation to bear the negative consequences connected with such violation. That is the reason why legal systems prohibit the retroactive introduction of penalties.

The principle of proportionality sets constraints on the determination of the applicable penalties. It requires that the negative consequences be suitable to achieve the goal of effectively sanctioning the violation and not exceed what is strictly required for such purpose. The principle of proportionality thus prevents all sorts of overkill effects that may operate with sanctions that pursue primarily dissuasive goals, even though prevention can also be a legitimate goal of the legislator. Furthermore, this principle requires that the severity of sanctions vary according to a number of objective and subjective elements, including how serious the violation is, whether there are repeated infringements of the law by a person and, according to some countries,[208] also the person's economic situation.

The application of criminal penalties in relation to tax matters generally requires an assessment of guilt. The tax crime of tax evasion commonly requires intentional or wilful failure to pay taxes, whereas administrative penalties are the norm for a mere omission to make a full and timely payment of the tax due or a negligent omission. In some instances, the tax evasion offence requires a threshold level of tax avoided, set as a minimum quantum or percentage of the tax payable. To reflect the relative degree of harm to society, the severity of punishment for tax evasion may also depend upon the amount of tax avoided, though this is not the most common approach. Where such a graduated penalty operates in relation to tax evasion, it may also be possible to have the sentence discharged if the tax amount due, along with any associated fines and interest, is paid in full.

Even though the right to a fair trial has been addressed elsewhere in this study, the right of access to justice is of fundamental importance in connection with the application of penalties, and strengthens the rule of law.

Specific expressions of the right to fair trial in connection with the application of criminal sanctions also include the presumption of innocence and the privilege against self-incrimination. The application of the presumption of innocence to tax crimes requires that the imposition of penalties be subordinated to standards of evidence going beyond a reasonable doubt. In tax matters, this implies that tax authorities may only apply for a criminal penalty when they have successfully given such evidence as to the violation and its author. Presuming either of these can

[206] Ibid.
[207] ECtHR, *Engel and others v the Netherlands* (Plenary).
[208] Eg Finland and Switzerland.

lead to situations that generate conflict with the presumption of innocence and infringe taxpayers' rights. Critical issues may arise in connection with cases in which persons have reasonably learnt about violations perpetrated by others and are held liable for them, such as possibly under DAC.

The privilege against self-incrimination only applies to tax crimes. Otherwise, taxpayers and intermediaries are required to cooperate with the tax authorities. However, issues concerning the delimitation of the tax administration and the criminal sphere can arise, for example, as to the use of evidence collected from the taxpayer in administrative matters in subsequent criminal proceedings.

When applying the prohibition on double jeopardy (*ne bis puniri*), courts take into account the different features and functions of tax surcharges and criminal tax penalties. Courts may accept their combined levying[209] or make a broader statement of the prohibition on double jeopardy to reject the duplication. Duplication can be rejected where the tax surcharge is quasi criminal in its effects. It is admissible where both penalties complement each other and, taken together, are not disproportionate.[210] Where severe measures are not classified as criminal sanctions, this may raise some concern as to the importance of the subjective element.

When different bodies have jurisdiction to assess tax surcharges and criminal sanctions, taxpayers may have to defend themselves twice, namely once in respect of the tax surcharge and once in respect of the criminal sanction. This situation may, depending on the circumstances, conflict with the procedural limb of the prohibition of double jeopardy (ie not to be sued twice – *ne bis vexari*). Where appropriate, the application of a single tax penalty may automatically solve all problems of *bis vexari*.[211]

Finally, there are some further conditions which may play a particularly important role in tax matters and should be taken into account in combination with the principles earlier described in this section. This is, for instance, the case of the loss of the right to deduct input VAT, which, if combined with the loss of tax exemptions or another administrative or criminal tax sanction, could have an effect of multiplication of sanctions that should be addressed under the *ne bis puniri* principle under the *Engel* approach.

[209] See ECtHR, *A and B v Norway* (Grand Chamber), nos 24130/11 and 25798/11, paras 130 and ff; CJEU, judgment (Grand Chamber) of 20 March 2018, *Menci*, case C-524/15, ECLI:EU:C:2018:197 [2018], para 61.

[210] CJEU, judgment of 26 February 2013, *Åkerberg Fransson*, case C-617/10, ECLI:EU:C:2013:105, [2013], para 34.

[211] See further on this sec 6.3.1.1.5. of this book.

8

Substantive Rights

The specific human rights that have most effect on taxation are equality,[1] data protection,[2] and the so-called professional rights, that is, the ones concerning the involvement of intermediaries and advisers[3] and the right to property.[4]

8.1. Equality

8.1.1. Introductory Remarks

The principle of equality can be found in different legal instruments, such as national Constitutions, domestic provisions, bilateral tax conventions,[5] and other international legal instruments and conventions.[6] Taxpayers may use all of these instruments to claim the application of the principle of equality. Therefore, different judicial institutions secure the effective protection of the principle of equality, ranging from ordinary courts to constitutional courts. Furthermore, in the presence of supranational law or international conventions, additional courts protect the functioning of this principle. Therefore, taxpayers may generally activate different legal instruments for the protection of their rights, which are subject to the jurisdiction of different courts and sometimes may operate in parallel. In such circumstances, it is possible that the positive legal framework, in which the principle of equality operates, allows for different results for reasons connected with the scope or different boundaries of the respective legal protection.[7]

[1] See sec 8.1.

[2] See sec 8.2.

[3] See sec 8.3.

[4] See sec 8.4.

[5] See eg the non-discrimination clause in art 24 of bilateral tax conventions drafted along with the OECD Model Convention, which in essence contains an obligation for the source state to exercise its taxing rights on non-resident taxpayers in line with the principle of equality.

[6] In the European region, there are various examples of clauses reflecting the principle of equality, such as art 20 of the EU Charter, and those that apply the non-discrimination principle, such as the ancillary (ie with the function of complementing other ECHR provisions) clause contained in art 14 of the ECHR, the self-standing clause of art 1 XII ECHR Protocol and art 21 of the EU Charter. The latter last of these operates with the corresponding general and specific provisions in the Treaty on the Functioning of the EU.

[7] Accordingly, in the European region, the non-discrimination principle operates under EU law for cross-border situations only (admitting the so-called reverse discrimination, ie discrimination against nationals in purely domestic situations lacking a connection with the rights enshrined in the EU legal system). This protection may operate in parallel with the traditionally limited scope of this principle under bilateral tax conventions (which does not create obligations for the exercise of taxing powers by the state of residence of the taxpayer) and the one of the ECHR, which (at least insofar as countries have not ratified XII ECHR Protocol) keeps the non-discrimination prohibition with a mere ancillary function to other rights enshrined in the ECHR.

Generally, national Constitutions contain the broadest expression of this principle, which is the bedrock substantive legal principle applicable to taxation. This principle requires formal equality between taxpayers before the law and establishes the main reference framework for the legislator as to how it may concretely exercise tax sovereignty. It obliges the legislator to treat similar situations alike for tax purposes.

Equality also requires tax authorities to apply tax law in an equal way in respect of all taxpayers. Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR) specifically provides for the protection of property and prohibits an individual and excessive burden being placed upon any person or a particular class of taxpayers.[8]

Equality moreover implies consistent treatment of all taxpayers and establishes a connection between taxpayers' ability to pay and their obligation to contribute to the state budget. It provides a framework for an underlying theory of justice, where taxpayers can be treated as equals (horizontal equity) or with an appropriate pattern of differentiation among unequals (vertical equity), but this is controversial.[9] In such a context, it may also give a legal dimension to economic theories of sacrifice,[10] which requires non-taxation of the *minimum vitale*. The ability to pay could also be linked to progressive taxation, but this is not commonly accepted.[11]

Furthermore, the principle of equality prevents distortion of competition and preserves neutrality across taxpayers. Finally, equality raises issues in connection with the fairness of tax treatment within one state and relations between states, also known as inter-nation equity. Even if the latter is an important tax policy objective,[12] it falls outside the scope of the present legal analysis, which focuses on individual taxpayers' rights.

The principle of equality provides for the same treatment between taxpayers, including among residents of different nationalities.[13] It applies to individual and corporate taxpayers, both in

[8] ECtHR, *Plaisier BV and Others v the Netherlands* (decision), nos 46184/16, 47789/16 and 19958/17 (14 November 2017), para 82.

[9] See PR McDaniel and J Repetti, 'Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange' (1993) 1(10) *Florida Tax Review* 621, and J Repetti and D Ring, 'Horizontal Equity Revisited' (2012) 13(3) *Florida Tax Review* 155 and below sec 8.1.5.

[10] See A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, book V, ch 2, (1776); JS Mill, *Principles of Political Economy with some of their Applications to Social Philosophy*, London, book V, ch 2, (John W Parker, 1848).

[11] Some constitutional systems bundle the two principles in the same provision, *cf* eg art 19 of the Chilean Constitution and art 53 of the Italian Constitution.

In literature, the connection between the ability to pay and progressive taxation is questioned by some scholars: see J Hey, 'Steuersystem und Steuerverfassungsrecht,' in K Tipke et al (eds), *Steuerrecht* 24th edn (Otto Schmidt, 2020), 62 and ff, 127, para 3, no 212; MN Rothbard, *Power and Market: Government and the Economy* 2 edn (New York University Press, 1981), 7. Canons of 'Justice' in Taxation, C Distribution of the Tax Burden, 1218.

Furthermore, the EC questions turnover based progressive taxation, see CJEU, judgment (Grand Chamber) of 3 March 2020, *Vodafone Magyarország*, case C-75/18, ECLI:EU:C:2020:139 [2020], including the Opinion of Advocate General Kokott of 13 June 2019, ECLI:EU:C:2019:492 [2019]; CJEU, judgment (Grand Chamber) of 3 March 2020, *Tesco-Global Áruházak*, case C-323/18, ECLI:EU:C:2020:140 [2020], including the Opinion of Advocate General Kokott of 4 July 2019; CJEU, judgment of 3 March 2020, *Google Ireland*, case C-482/18, ECLI:EU:C:2020:141 [2020] and CJEU, judgment of 4 June 2020, *Hungary/Commission*, case C-456/18 P ECLI:EU:C:2020:421 [2020] and GC, judgment of 16 May 2019, *Poland/Commission*, joined cases T-836/16 and T-624/17, ECLI:EU:T:2019:338 [2019]; CJEU, judgments of 16 March 2021, Commission/Poland, case C-562/19 P, ECLI:EU:C:2021:201 [2021] and Commission/Hungary, case C-596/P, ECLI:EU:C:2021:202 [2021] and in literature J Kokott, 'Fact and Law-Finding Issues in the Preliminary Ruling and Infringement Procedures before the CJEU in Tax Matters' (IBFD, 2019) (2)5 *ITAXS*.

Progressive taxation has been held to have discriminatory effects (see CJEU, judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, case C-385/12, ECLI:EU:C:2014:47 [2014], para 39). The CJEU has also discussed the issues of progressive taxation in CJEU, judgment of 26 April 2018, *ANGED*, case C-233/16, ECLI:EU:C:2018:280 [2018], paras 36 and ff and in Opinion of Advocate General Kokott of 13 June 2019, *Vodafone Magyarország*, case C-75/18, paras 63 and ff.

[12] See Brooks, 'Inter-Nation Equity' in Head and Krever (eds), *Tax Reform in the 21st Century: A Volume in Memory of Richard Musgrave*, (Kluwer Law International, 2009) 487 and ff.

[13] See, for instance, the introduction of a 15 per cent tax rate to non-Australian nationals with specific immigration status, ie working holidaymakers, whereas for Australian nationals, the income is tax-free. In this case, the Australian

direct and indirect taxation.[14] However, first of all, taxpayers need to be in comparable situations; second, even then, in some cases, the discrimination might be justified if there are important regulatory reasons for differentiation.[15]

A very relevant issue for tax equality arises in the cross-border context because each state exercises its tax jurisdiction according to its own criteria and takes into account the applicable nexus. For this reason, notable disparities arise across the states, which are free to determine the extent to which they should consider the concurrent taxation of other countries on the same taxpayer.

This generates a highly fragmented tax treatment at the global level, which states often address by means of their unilateral, bilateral and multilateral measures. However, in principle, there is no obligation for any state to take into account any external factors. Therefore, the principle of equality is not as far-reaching in international tax law as it may prima facie appear. This is due to the fact that equality among taxpayers is usually interpreted within one and the same jurisdiction by reference to their relationship with the state powers to tax them.[16] Thus, a different tax nexus of residents and non-residents usually prevents them from being in comparable situations for taxing purposes and thus from invoking the entitlement to equal treatment.

At the level of international tax, there has also been discussion as to whether single taxation constitutes a generally accepted substantive tax principle. This development is connected with the call for international tax coordination, which has significantly expanded in the framework of the global projects on tax transparency, base erosion and profit shifting (BEPS). In particular, since the latter project aims to prevent cases of unintended double non-taxation among countries, the elimination of such tax disparities could be the starting point to deem the existence of a principle requiring a consistent exercise of taxing powers across the countries, in other words, single taxation.[17] Therefore, single taxation is gaining ground, including the projects supporting minimum global taxation (also known as GLOBE).[18] Even though the underlying idea of a duty to tax is difficult to reconcile with the core concept of national tax sovereignty, the international single taxation movement could thus lead to decreased double taxation and, at the same time, to taxation more in line with the ability-to-pay principle.

Federal Court held that this violated art 25 of the tax treaty between Australia and the UK (*Addy v Commissioner of Taxation*, FCAFC 135 [2020]).

[14] J Englisch, in Lang, Melz and Kristoffersson, *Value Added Tax and Direct Taxation – Similarities and Differences* (2009) 1 and ff and 20 ff.

[15] The exception based on imperative grounds can be found in different geographical regions of the world. For instance, see Brazil Supreme Federal Court, extraordinary appeal no 405579/PR (01 December 2010); in the EU, the CJEU has developed the justification based on the so-called rule of reason, which applies in addition to the ones expressly provided by EU primary law (judgment of 3 December 1974, *van Binsbergen*, C-33/74). It particularly developed this exception to overcome the frequent failure of several express limitations to achieve a reasonable balance. Even though various specific justifications in tax matters are based on the rule of reason, the most important one relates to the goal of countering tax avoidance (CJEU, *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited, para 38), which has meanwhile merged into a general principle of EU law (CJEU, *N Luxembourg 1* et al, cited, para 155; CJEU, *T Danmark and Y Denmark*, cited, para 122).

[16] In the EU, by contrast, the CJEU has gone beyond these dogmatic differences, acknowledging the equal situations between residents and some non-residents (the first judgments were of 14 February 1995, *Finanzamt Köln-Altstadt/ Schumacker*, case C-279/93, ECLI:EU:C:1995:31 [1995], and *Saint-Gobain ZN*, cited, paras 48 and 49). However, this situation remains rather problematic because several countries have stretched their tax nexus for different reasons, including the need to prevent international tax avoidance and related phenomena. The research project of the ILA will address such issues in the framework of its second phase, with a view to establishing a more modern tax nexus, which better reflects the goals of equity and justice among taxpayers, as well as that of inter-country equity between the nations.

[17] This theory was first proposed by R Avi-Yonah, *International Tax as International Law: An Analysis of the International Tax Regime* (Cambridge University Press, 2007) 10 ff.

[18] OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalization of the Economy, OECD-G20 Inclusive Framework on BEPS* (OECD, Paris, 2019) 27 and ff (nos 61 and ff); *cf* Englisch and Becker, 'International Effective Minimum Taxation' 483 ff.

The following section will first deal with the general principle of equality as applied in the different regions of the world,[19] then with its specific expressions as in the principle of neutrality,[20] ability to pay[21] and equity[22] before concluding on equality.[23]

8.1.2. Equality in Different Regions

8.1.2.1. Africa[24]

The Preamble of the African Charter on Human and Peoples' Rights provides that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'. Many countries incorporate equality as a fundamental principle in their constitutions[25] but often reserve it for their citizens only.[26] Similarly, equality before the law may be granted to all persons, whereas freedom from discrimination is reserved for citizens. Thus the prohibition on discrimination does not apply 'with respect to persons who are not citizens' in some countries[27] or concerning 'devolution of property on death or other matters of personal law'.[28] In a few instances, the right to equality is constrained to narrow situations, such as gender. As a result, it is not always clear that a constitutional guarantee of equal treatment may be applied to tax laws, although in the majority of countries, it should, in principle. For example, in Rwanda, the Constitution provides equality as a fundamental principle under the Preamble and Article 10.[29] However, the tax laws do not contain express provisions on equality in taxation. Similarly, the Constitution of Uganda provides equality as a principle under the Preamble and Article 21,[30] but the country's tax laws do not contain express provisions on equality. Articles 102 and 103

[19] See sec 8.1.2.
[20] See sec 8.1.3.
[21] See sec 8.1.4.
[22] See sec 8.1.5.
[23] See sec 8.1.6.
[24] We would like to thank Attiya Waris and Johann Hattingh for their contribution.
[25] Art 32 Constitution of Algeria; art 32 Constitution of Angola; art 26 Constitution of Benin; ss 3 and 15 Constitution of Botswana; art 1 Constitution of Burkina Faso; art 13 Constitution of Burundi; art 1(2) and art 22 Constitution of Cape Verde; Preamble no 1 Constitution of Cameroon; art 6 Constitution of the Central African Republic; art 14 Constitution of Chad; art 2 Constitution of the Comoros; art 14 Constitution of Eritrea; sec 20 Constitution of Eswatini/Swaziland; art 25 Constitution of Ethiopia; art 17 Constitution of Ghana; art 8 Constitution of Guinea; art 27 Constitution of Kenya; art 19 Constitution of Lesotho (equality before the law and equal protection of the law); art 11 Constitution of Liberia; art 28 Constitution of Madagascar; art 20 Constitution of Malawi; art 19 Constitution of Morocco with an emphasis on equality between women and men; art 10 Constitution of Namibia; art 8 Constitution of Niger; art 15 Constitution of Rwanda (equality before the law); art 15 Constitution of Sao Tomé and Principe; art 1 Constitution Senegal; art 27 Constitution of the Seychelles; sec 9 Constitution of South Africa; art 14 Constitution of South Sudan; section 48 Constitution of Sudan; ss 12 and 13 Constitution of Tanzania; art 11 Constitution of Togo; art 21 Constitution of Uganda; art 56 Constitution of Zimbabwe.
[26] Art 12 Constitution of the Democratic Republic to Congo (only applicable to Congolese people); art 15 Constitution of the Republic of Congo (only applicable to Congolese citizens); art 4 Constitution of the Ivory Coast (reserved to Ivorians); art 10 Constitution of Djibouti; art 53 Constitution of Egypt (for citizens); art 13(1)(c) Constitution of Equatorial Guinea (citizens); art 2 Constitution of Gabon; art 33(2) and (5) Constitution of the Gambia; art 24 Constitution of Guinea-Bissau; art 18(1)(4) Constitution of Lesotho (freedom from discrimination); art 6 Constitution of Libya; art 2 Constitution of Mali; art 1 Constitution of Mauritania; art 16(1)(4) (b) Constitution of Mauritius; art 35 Constitution of Mozambique; art 17 Constitution of Nigeria; art 16 Constitution of Rwanda (freedom from discrimination); art 8 and 27(4)(b) and (c) Constitution of Sierra Leone (non-applicability of the prohibition of discrimination to non-citizens or citizens who did not acquire nationality by birth); art 11 Constitution of Somalia; art 2 Constitution of Togo; art 21 Constitution of Tunisia; art 23(1)(4)(b) Constitution of Zambia.
[27] eg in art 15 and 16 Constitution of Rwanda.
[28] S 15(3)(b) and (c) Constitution of Botswana.
[29] Constitution of Rwanda, 2003.
[30] Constitution of Uganda, 1995.

of the Angolan Constitution emphasise the rule of law in taxation but without special reference to the principle of equality. Interestingly, some African Constitutions explicitly provide that the prohibition on discriminatory provisions in laws 'shall not apply to any law so far as that law makes provision for the appropriation of revenues or other funds … or for the imposition of taxation'.[31]

Even though it is difficult to find equality in taxation expressly stated in African national legislation, the canon of equality is a guiding principle of fiscal systems in Africa. It requires subjects of a state to contribute towards the revenue in proportion to their abilities and is fundamental to economic justice.[32]

In South Africa, the special constitutional procedure for the enactment of proposed tax legislation requires that legislators consider, inter alia, the principles of equity and international tax trends as well as the fundamental rights of persons, which includes equality. Angola 'shall promote social development by (a) Adopting criteria for the redistribution of wealth which prioritises citizens and, in particular, the more vulnerable and needy sectors of society'.[33] Other African Constitutions also contain redistribution as an objective of fiscal policy,[34] while some explicitly and notably prohibit discrimination founded on wealth,[35] property,[36] economic status[37] or fortune;[38] this prohibition on discrimination is often applicable to citizens only.

8.1.2.2. Americas

8.1.2.2.1. The Inter-American System for the Protection of Human Rights[39]

Taxpayers are entitled to receive impartial treatment under the prohibition on discrimination in Articles 1 and 2 of the Pact of San José (ACHR). This prohibition derives from the universal principle of equality. In tax matters, this treatment requires essentially that equal taxes be levied upon those in similar circumstances; this does not preclude progressive taxation in respect of increased tax paying capacity.

Pursuant to Article 24 of the ACHR, all persons are equal before the law. Consequently, they are entitled, without discrimination, to the equal protection of the law. However, there is not much case law in the Inter-American Court of Human Rights, specifically on taxation.

8.1.2.2.2. Latin America

8.1.2.2.2.1. Argentina[40]

The principle of equality before the law is provided for in Article 16 of the Argentine Constitution. That article explicitly provides that equality is the basis of taxation and

[31] Art 27(4)(a) Constitution of Sierra Leone; sec 15(4)(a) Constitution of Benin; art 18(4)(d) Constitution of Lesotho; art 16(1)(4)(a) Constitution of Mauritius; art 27(4)(a) Constitution of Sierra Leone; art 21 Constitution of Tunisia; art 23(1)(4)(a) Constitution of Zambia.

[32] Waris, *Financing Africa* 108.

[33] Art 90 Constitution of Angola.

[34] *cf* eg art 95 Constitution of Cape Verde.

[35] Art 1 Constitution of Burkina Faso; art 6 Constitution of Libya; art 11(3) Constitution of Somalia.

[36] Art 25 Constitution of Ethiopia; art 33(4) Constitution of Gambia; art 18(3) Constitution of Kenya; art 20 Constitution of Malawi.

[37] Art 22 Constitution of Cape Verde; sec 20(2) Constitution of Eswatini/Swaziland; art 17(2) Constitution of Ghana; art 10(2) Constitution of Namibia; art 16 Constitution of Rwanda; art 11 Constitution of Togo; art 21(2) Constitution of Uganda; art 56(3) Constitution of Zimbabwe.

[38] Art 5 Constitution of the Ivory Coast.

[39] We would like to thank Lucy Cruz for her contribution.

[40] We would like to thank Eduardo A Baistrocchi for his contribution.

public charges. The Argentine Supreme Court has held that the principle of equality consists of the fact that the law does not establish exceptions or privileges that exclude some inhabitants and not others under equal conditions. In other words, equality before the law establishes that the same regulations must be applied equally in the same situation, without authorising prerogatives or privileges that place some inhabitants in a different condition from others. There are two distinguishable stages in the case law of the Argentine Supreme Court. In the first stage, until 1945, judges chose to respect this guarantee in its two senses: the principle of equality could be violated both by the text of the law itself and the unequal application of the administrative power.[41] In 1945, the Argentine Supreme Court made an implicit change in its interpretation of that constitutional guarantee and limited its scope to cases in which inequality arose expressly from the text of the law.[42]

The Argentine Supreme Court held that higher tax rates for out of province taxpayers were not permissible. The Court decided that the discrimination generated by the tax legislation of provincial states according to the place of residence of the taxpayer damages the principle of equality of public charges and alters the natural flow of trade, thus establishing a sort of 'internal customs' prohibited by the Constitution, to the detriment of products coming from other provinces to the benefit of those manufactured in their territories.[43]

The Argentine Supreme Court also held unconstitutional the taxation of pensioners. It emphasised its constitutional mandate to protect vulnerable groups and explained that the mere use of the ability to pay as a parameter to establish taxes for retirees and pensioners is insufficient because it does not consider the vulnerability of retirees, protected by the National Constitution. The levying of withholding taxes on the plaintiff's pension was, therefore, not compatible with the ability to pay despite the fact that the National Congress had not issued a law exempting pensions from this tax. Consequently, the amounts withheld since the filing of the claim had to be reimbursed to the plaintiff.[44]

8.1.2.2.2.2. Brazil[45]

The principle of equality[46] is a metanorm – a norm about other norms.[47] It asks, firstly, why a rule treats two different situations in the same way or two similar situations in a different way. Considering the rule(s)/principle(s) concretised by the tax rule; secondly, we examine the proportionality of the differentiation. We ask about the rule's suitability, that is, whether the rule concretely promotes its legitimate purpose, considering the comparative criterium adopted. Thirdly, we ask about its necessity. This is a comparative analysis in which the rule is compared with other possible means that equally (or even more) promotes this purpose but are less

[41] Argentine Supreme Court, *Salzmann y Cía v la Nación*, judgment: 187:655 [1938].

[42] Argentine Supreme Court, *SA La Martona v Municipalidad de la Ciudad de Buenos Aires*, cited.

[43] Argentine Supreme Court, *Bayer, Harriet y Donnelly*, judgment CSJ 505/2012 (48-B)/CS1 [2017].

[44] Argentine Supreme Court, *García, María Isabel*, judgment FPA 7789/2015/CS1-CA1, FPA 7789/2015/1/RH1 [2019]. According to the dissenting judge Rosenkrantz, by contrast, 'the mere fact that we consider that the State has not done for retirees what each one of us would wish cannot become an argument to fulminate with unconstitutionality a regime that necessarily depends on assessments, facts, strategies and opportunity criteria whose articulation corresponds primarily to the Congress of the Nation'. To this, he added that the Judiciary 'does not have the power to invalidate taxes on the grounds of their unfairness or inappropriateness, the excess of their amount or the forms of collection, as long as they do not result in a violation of constitutional provisions' and neither is it empowered to establish tax categories or distinctions not provided for in the laws submitted for its consideration.

[45] We would like to thank Luís Eduardo Schoueri and Clara Gomes Moreira for their contribution.

[46] Art 150(II) of the Brazilian Constitution.

[47] H Avila, *Theory of Legal Principles* 104.

restrictive to fundamental rights. Fourthly, we ask about balancing reasoning. We balance the conflicting norms according to their legal relevance and factual effects.[48]

8.1.2.2.2.2.1. Equal Treatment of Taxpayers Article 5 of The Constitution of Brazil guarantees equality to Brazilians and foreigners.

The Union, States, Federal District and Counties are explicitly prohibited from: 'instituting unequal treatment among taxpayers that are similarly situated, it being prohibited to make any distinction because of professional occupation or job performed by them, regardless of the legal denomination of income, securities or rights'.[49] The Brazilian Constitution provides that Union tax on income and earnings of any nature shall be based on criteria of generality, universality and progressiveness and that the Union tax on rural property shall also be progressive, and its rates shall be fixed in a manner that is a disincentive to the maintenance of unproductive properties.[50] The latter shall not be levied on small rural properties when worked by the owner if he owns no other real property.[51]

In practice, the Brazilian Federal Supreme Court does not apply the principle of equality transparently. Rather, it is an argument that gives force to other norms.[52]

Regarding the equality criterion for comparing taxpayers, tax rules with revenue collection purposes normally do not have an explicit steering purpose. Therefore, the ability to pay usually measures the tax burden distribution among taxpayers.[53] Conversely, tax rules with steering purpose, depending on that purpose, may adopt different criteria for imposing tax liability among taxpayers, for example, activities that are more protective of the environment have a tax benefit.[54]

When applying the principle of equality in tax matters, the Brazilian Federal Supreme Court decided that the principle of legality – and the principle of separation of powers – are limited for this. As a consequence, the Court should not extend a more burdensome or less burdensome tax treatment, even when the tax rule violates the equality principle.[55] The Supreme Court can only declare a tax rule unconstitutional as a negative legislator, not as a positive one.[56] In a recent case,[57] the Brazilian Federal Supreme Court concluded that based on gender equality, the social security contribution levied on full wages during the maternity benefit period is unconstitutional. This is because these wages do not remunerate work, and this taxation generates a disadvantage for women compared to men when, in fact, equality from its positive and negative perspectives demands the oppositive result: a protective measure.

8.1.2.2.2.2.2. Competition Neutrality The Constitution of Brazil dedicates many articles to taxation, which is complicated due to the multilevel structure of the Brazilian state. The Union, Federal Districts and Counties may levy taxes. This may lead to problems including multiple burdens on taxpayers and distorted competition. The Constitution aims to ensure competition neutrality. Therefore, it provides for a complementary law to deal with conflicts of taxing power

[48] See Supreme Federal Court of Brazil, direct action of unconstitutionality of 29 August 2002, no 1276-2/SP [2002].
[49] Art 150(2) Constitution of Brazil.
[50] Art 153 para 2(1) and para 4(1) Constitution of Brazil.
[51] Art 153 para 4(2) Constitution of Brazil.
[52] See Supreme Federal Court of Brazil, direct action of unconstitutionality no 2588/DF, cited.
[53] See under sec 4.4.2.2.2.2.
[54] See H Ávila, *Teoria da Igualdade Tributária* (2015) 98–118.
[55] See Supreme Federal Court of Brazil, extraordinary appeal no 405579/PR, cited.
[56] See Supreme Federal Court of Brazil, direct action of unconstitutionality of 29 March 2007, no 3260-7/RS [2007]; direct action of unconstitutionality of 20 August 2014, no 4276/MG [2014].
[57] Supreme Federal Court of Brazil, extraordinary appeal of 5 August 2020, no 576967/PR [2020].

among the Union, States, Federal District and Counties; regulate the constitutional limitations on the taxing power; establish general rules for tax legislation, particularly as to the definition of tributes and their types, the definition of the respective taxable events, basis for calculation and taxpayers; ensure tax liability; establish adequate tax treatment for the cooperative acts performed by cooperative entities; define differentiated and preferential treatment for micro-firms and small firms. The complementary law shall also institute a unified regime for the collection of taxes and contributions of the Union, States, Federal District and Counties, observing that: it shall be optional for the taxpayer; a state may establish conditions for differentiated enrolment; collection shall be unified and centralised, and the distribution of the portion of the funds belonging to the respective federative entities shall be immediate, prohibiting any retention or conditioning; collection, supervision and levying may be divided by the federative entities, adapting a unified national roll of taxpayers.[58] The Brazilian Constitution also prohibits the Union, States, Federal District and Counties from 'establishing limitations on movement of persons or goods by means of interstate or inter-county taxes, except for collection of tolls for use of highways maintained by the Government'.[59] Article 151 of the Brazilian Constitution prohibits tax discrimination by the Union. It forbids the Union to levy taxes that are not uniform throughout the entire national territory or that imply a distinction or preference in relation to a State, Federal District or County, to the detriment of another; however, tax incentives may be granted to promote balance in socioeconomic development among different regions of the country. Further discriminations, for example, exemptions are also excluded. Pursuant to Article 152 of the Constitution of Brazil, the States, the Federal District and the Counties are prohibited from establishing a tax differential between goods and services of any nature because of their origin or destination.

8.1.2.2.2.3. Chile[60]

In Chile, as in most countries, equality is a fundamental principle of the tax system. It is stated in the Chilean Constitution three times. First, Article 19 N°2 states that all people are equal before the law, thus excluding the existence of any privileged person or group. Second, Article 19 N°20 establishes its specific implications for taxes. Such provision also covers the ability-to-pay principle, progression of the tax system, proportionality and fairness, earmarks taxes to the nation's budget, with possible exceptions established by law. Third, Article 19 N°22 prohibits the state and its organs from discriminating in economic matters. In this sense, the Chilean Supreme Court has found that there shall be no inequality between equals.[61]

The Chilean Constitutional Court has decided that, even though tax justice is of eminent value, the proportion or disproportion of a tax shall be weighed according to the taxpayer's ability to pay and not on the basis of his tax burden under the previous legislation. Therefore, quadrupling the tax burden by legislative amendment can be admissible. This does not constitute 'arbitrary discrimination' under Article 22 N°22 of the Chilean Constitution.[62]

The legal guarantee of equality permits reasonable differentiation, based on objective criteria, between those not in the same situation (differences that may be based on taxable capacity; and on the origin of incomes depending on whether it is capital or labour). This is because it is not

[58] Arts 145 and 146 Constitution of Brazil.
[59] Art 150(5) Constitution of Brazil.
[60] We would like to thank Yuri Varela for his contribution.
[61] Supreme Court of Chile, judgment of 15 June 1988, case 101/88 [1988], 72.
[62] Chilean Constitutional Court, decision of 6 December 1994, on case 203/94, cited; *cf* also JA Fernández Amor, 'El Principio de Capacidad Económica en la Jurisprudencia Tributaria Comparada de Chile e España', *Revista de Derecho, VaIparaiso*, XXXVII (2011) 567 and ff.

prohibited for different situations to be regulated differently, as long as the discrimination cannot be qualified as arbitrary nor hide persecution or hostility against certain groups of people; or grant undue privileged treatment. As stated by the Constitutional Court, 'the justified disproportion does not violate the principle of tax equality', but it is forbidden for them to be 'crude, exaggerated and unjustified'.[63]

8.1.2.2.2.4. Colombia

In Colombia, the principle of equality is closely intertwined with the broader principle of tax equity, which comprises tax progression and the ability to pay.[64]

When dealing with the concept of tax equity and its analysis, the Colombian Constitutional Court (1) starts from the principle that the legislator has the freedom to configure, create, modify and eliminate taxes, (2) however, this power must be exercised in accordance with the principles of equity, efficiency and progressiveness inherent to the tax system, (3) the principle of tax equity operates as a concrete expression of the principle of tax justice, and as a synthesis of the principles of equality, progressiveness and effectiveness. Under the first type of equity, the tax system must treat persons who, before taxation, enjoy the same economic capacity in such a way that they are placed on an equal footing after paying their contributions. The second type of equity is identified with the requirement of progressivity, which orders the distribution of the tax burden so that those with greater economic capacity bear a higher tax liability. These postulates complement each other in an articulated manner to consolidate a tax system that complies with higher constitutional standards and safeguards a fair order, (4) the principle of tax equity is defined as the prohibition of the legal order imposing excessive obligations or excessive benefits on the taxpayer, which, in turn, is divided into horizontal and vertical equity.

Finally, (5) to resolve a charge of tax inequality, the Colombian Constitutional Court applies a reasonableness or proportionality test.[65] The Court has used an unusually strict proportionality test to analyse amnesties, which may easily violate the right to equality of taxpayers or the principles governing the Colombian tax system.[66]

Otherwise, the Colombian Constitutional Court has held that a charge or benefit is excessive where it ostensibly fails to reflect the economic capacity of the taxpayers taking into account the nature and objectives of the relevant tax.[67] It has accepted the differences of tax equity by requiring that horizontal equity, or equal treatment, is applied to those who enjoy the same paying capacity, and by requiring that vertical equity is applied as it relates to the progressiveness of those who have a greater capacity and bear increased taxation.[68]

As to the economic double taxation of dividends distributed to natural persons only and not to legal persons, the Colombian Supreme Court applied intermediate scrutiny. Strict scrutiny is excluded since the rules do not provide for an amnesty. However, even if the case is economic so that a light test would be appropriate, there are elements that justify more rigorous scrutiny. As was seen previously, case law has accepted the application of an intermediate assessment in tax

[63] Chilean Constitutional Court, judgment of 31 July 1995, case 219/95 [1995].
[64] Chilean Constitutional Court, judgment of 1 October 2020, case 431/20, Expediente: D-13535 [2020], nos 71 and ff.
[65] See above at sec 4.2.2.2.2.4. and Colombian Constitutional Court, case C-431/20, cited, nos 71 and ff.
[66] Constitutional Court of Colombia, case C-129/18, cited, no 40 – dividend taxation.
[67] Constitutional Court of Colombia, judgment of 21 January 1993, case C-015 [1993] (on loans made by an institution subject to surveillance by the state applied to the purchase price of real property).
[68] Constitutional Court of Colombia, case C-743/15, cited (tax amnesty).

matters where there is evidence of inequity or arbitrariness in the taxation or some of its elements, for example, (1) where the provision affects a right beyond what may historically be regarded as the normal effect of the tax measure, (2) where there are certain tax benefits which do not cover all taxpayers but only some, (3) where free competition is affected because it taxes only certain taxpayers and not others although, prima facie, they are competitors under similar conditions and, therefore, the state intervention can be qualified as arbitrary, unacceptable or unbearable. The latter hypothesis is based on the fundamental principles of a constitutional system since the taxing power at the head of the state cannot be manifested through unreasonable or capricious tax policies. It is, therefore, forbidden to generate contingent advantages for certain beneficiaries that can be imposed on other competitors only because this is provided for by the prevailing political majorities. In the case of dividend taxation in the hands of natural but not legal persons, the Colombian Supreme Court found the following indications of inequity justifying intermediate scrutiny: (1) It is a novel tax. Indeed, this type of tax has not existed in the country for more than 50 years. (2) It taxes a concept – dividends or shares – only on certain groups that receive it – resident and non-resident individuals – and not on other potential taxpayers. (3) There may be an effect on free competition resulting from this distinction between taxpayers and similar groups, that is, competitors who are not obliged to pay the tax, and the rules could therefore create unjustified advantages for certain players. (4) The distinction between groups affected by the levy and non-taxable persons creates a burden that may not be bearable or enforceable [inequality in application], as claimed by the complainant and some interveners.[69]

The Colombian Supreme Court held that resident and non-resident individuals and national companies could be comparable: The two groups are made up of subjects who receive dividends or shares; therefore, as stated by the attorney, they are capital investors in legal entities and receive income as a result of that investment and, at the same time, they are taxpayers. They are clearly different in many other respects, but their status as investors is of interest because they derive income from it, and this was the activity that for 50 years was exempt from taxation and is now, under the rules under examination, only taxed for individuals. However, the legislation pursued the legitimate objective to stimulate the economy by promoting corporate activity in a proportionate manner and is, therefore, constitutional. The legislator can also tax non-resident individuals less than resident individuals and maintain tax progression with regard to resident individuals, which is not possible with regard to non-residents. Also, this is to stimulate foreign investment in the country. A five per cent flat rate for non-resident individuals may be justified by the impossibility of knowing what their taxable capacity is exactly, since the state only knows that these subjects receive dividends in Colombia.[70]

8.1.2.2.2.5. Peru[71]

Article 74 of the Peruvian Constitution expressly provides for the principle of equality in tax matters. The Peruvian Constitutional Court has defined this principle[72] as the guarantee against discriminatory treatment in the tax field, understanding discrimination as making a distinction between taxpayers that is not supported on the basis of reasonable, objective and verifiable

[69] Constitutional Court of Colombia, judgment of 28 November 2018 case C-129/18, cited, no 46 – dividend taxation.

[70] Constitutional Court of Colombia, judgment of 28 November 2018 case C-129/18, cited, nos 47 and ff – dividend taxation.

[71] We would like to thank Cecilia Delgado Ratto for her contribution.

[72] Peruvian Constitutional Court judgment of 2 August 2004, case 00029-2004-AI/TC [2004], no 45.

elements. The principle of equality in tax matters is closely related to the human right to equality before the law, which constitutes a fundamental right recognised in the Peruvian Constitution that dictates the actions of public powers.[73]

According to the Peruvian Constitutional Court,[74] the principle of tax equality has a double dimension. On the one hand, horizontal equality implies that the obligation to pay taxes must be applied without discrimination. On the other hand, vertical equality means that tax obligations must be proportional to the taxpayers' economic capacity. The Peruvian Constitutional Court has repeatedly emphasised the close link between the principle of equality and the principle of ability to pay.[75]

8.1.2.2.3. United States

'No State shall … deny to any person within its jurisdiction the equal protection of the laws.'[76] For over 20 years after the adoption of the 14th Amendment, the Supreme Court maintained the position that the Equal Protection Clause had no application to revenue legislation. In *Davidson v New Orleans*, Justice Miller declared: 'We know of no provision in the Federal Constitution … which forbids unequal taxation by the States'.[77] On the one hand, this can also be explained by deference to the powers of the states and their courts in a federal system, and on the other hand, this was long ago. Meanwhile, it is formally established that the Equal Protection Clause is a limitation on the taxing power, including of the states, but that it should be handled with great caution.[78] Accordingly, as long as a distinction has a rational basis, it does not violate the Equal Protection Clause. The Supreme Court has long held that 'a classification neither involving fundamental rights nor proceeding along suspect lines … cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose'.[79] Where 'ordinary commercial transactions are at issue, rational basis review requires deference to reasonable underlying legislative judgments'.[80] This is even more true in the area of taxation. 'Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.'[81]

Thus, tax law is subject to equal protection as guaranteed in the 14th Amendment. However, the lowest standard of scrutiny applies, where legislative discretion is particularly broad. Stricter judicial scrutiny only comes into question where tax statutes infringe on fundamental rights, for example, freedom of speech, where they contain 'suspect classifications' such as those based on race and, to a lesser degree (intermediate scrutiny), discrimination based on sex. Finally, more

[73] Peruvian Constitutional Court, judgment of 13 December 2011 no 02835-2010-AA/TC, cited, paras 37–40.

[74] Peruvian Constitutional Court, judgment of 20 July 2005 no 04014-2005-PA/TC, cited, para 7: '(…) For its part, the principle of tax equality, applies horizontally or vertically, (…) determining on the one hand, that the obligation of payment is generalized to the same manifestation of wealth; and, on the other, that said obligation is proportional to the taxable capacity of the taxpayer'.

[75] Peruvian Constitutional Court, judgments of 15 December 2007 no 08349-2006-AI/TC [2006], para 7, of 8 July 2015 no 01414-2013-AA/TC [2013], para 3.3.3.

[76] Amendment XIV US Constitution.

[77] US Supreme Court, *Davidson v New Orleans*, 96 SCt 97, 106 [1878]. See also J Sholley, 'Equal Protection in Tax Legislation' (1938) 24 *Virginia Law Review* 229 and ff.

[78] See US Supreme Court, *Bell's Gap Case* judgment of 3 March 1890, SCt 134 US 232, 237 [1890].

[79] US Supreme Court, *Armour v Indianapolis*, judgment of 4 June 2012 132 SCt 2073 [2012] 2080.

[80] US Supreme Court, *US v Carolene Products*, judgment of 25 April 1938 304 US 144, 152 [1938].

[81] US Supreme Court, *Armour v Indianapolis*, judgment of 4 June 2012 cited.

than mere rational basis review also applies to tax statutes discriminating against out-of-state commerce or new residents.[82]

8.1.2.3. Asia

8.1.2.3.1. China[83]

According to the Constitution, it is the duty of all Chinese citizens to pay taxes in accordance with the law, and all Chinese citizens are equal before the law. Therefore, any decision on tax reduction or exemption made by local governments shall be null and void if such a decision is in violation of Chinese laws and regulations. Chinese tax authorities are ordered not to execute such decisions and shall report them to the tax authorities at higher levels.

8.1.2.3.2. India[84]

Taxpayers can claim the right to equality under Article 14 of the Indian Constitution. Article 14 guarantees every person equality before the law and equal protection of the laws within the territory of India. The equal protection promise entails that equals must be treated equally, but reasonable classification is permitted under law. In order to pass the test of reasonable classification, the law must demonstrate two things: (a) that the classification is based on intelligible differences and (b) that the factor used for drawing a distinction has a rational relation to the objects sought to be achieved by the legislation.

The equality protection extends to tax treatment as well. The legislature has the discretion to identify the person(s) to be taxed, the method and rate of assessing the tax, if done so reasonably and in a non-arbitrary manner. The protection is available irrespective of whether the person claiming the right is a resident or non-resident taxpayer.

Thus, non-resident taxpayers are equally eligible to approach the Indian courts for violation of the right to equality resulting from any arbitrary state action, including the passing of retrospective tax legislation.

8.1.2.3.3. Israel[85]

Equality is a very complex concept in general and in tax law in particular. It is recognised as a human right in Israeli statutes[86] and the jurisprudence of the Supreme Court of Israel.[87] That Court has emphasised that equality is one of the leading principles of the Israeli legal system.[88] However, equality is not included explicitly in the Basic Laws as a constitutional right. Nevertheless, the Supreme Court of Israel ruled that some infringements of equality, such as discrimination based on race or gender, are actually infringements of dignity, explicitly included in the Basic Laws.[89]

[82] US Supreme Court, *Armour v Indianapolis*, cited.
[83] We would like to thank Na Li for her contribution.
[84] We would like to thank Ashrita Prasad Kotha for her contribution.
[85] We would like to thank Rifat Azam for his contribution.
[86] eg gender equality is explicitly recognised in the Israeli Women Equality Rights Law.
[87] Israeli Supreme Court, judgment of 3 July 1969, *Bergman v The Minister of Finance*, (1969) HCJ 98/69 [1969].
[88] Israeli Supreme Court, judgment of 11 August 1998, *Israeli Women Lobby v the Minister of Employment and Welfare*, (1998) HCJ 2671/98.
[89] Israeli Supreme Court, judgment of 11 May 2006 *Movement for Quality Government v Knesset*, (2006) HCJ 6427/02; Israeli Supreme Court, judgment of 14 June 2010, *Yekutieli v Minister of Religious Affairs*, HCJ 4124/00 [2010].

But the picture is even more complicated because Israel is defined as a Jewish and democratic state. The contradictions between these two terms and the balancing between them make equality so complex. Furthermore, an additional layer was added to the Constitution in the recent legislation of Basic Law: Israel as the Nation State of the Jewish People. This controversial law grants priority to the Jewish values of the state over its democratic values and intentionally does not guarantee equality rights.

Nevertheless, equality is a cornerstone of the Israeli legal system and applies in the field of tax law. Tax equality arguments are common. In the *Kaniel* case,[90] Chief Justice Aharon Barak analysed the constitutionality of the different tax rates on ordinary income and capital gains taxes under the principle of ability to pay.[91] The Supreme Court of Israel also ruled that a local municipality was allowed to change a signed tax agreement in order to achieve equality between taxpayers.[92] In another case, the Supreme Court of Israel relied on the presumptions of protecting gender equality, property and freedom of occupation in order to expand separate filing for couples who work together in their own business.[93] In an important case on tax equality, the Supreme Court of Justice examined whether a tax benefit applied to common law marriage and formal marriage and reached a positive conclusion based on principles of tax equality.[94] The Supreme Court of Justice asserted that the purpose of the examined tax benefit is social and the legal method of marriage is not relevant for such purpose. Therefore, the distinction in the applicability of the benefit based on the legal method of marriage is discrimination that infringes the human right of equality. According to the Supreme Court of Israel, 'the principle of equality applies on tax liabilities as well as benefits'.

In the case of *Gadban Naser*, after giving the government endless possibilities to fix the clearly extreme human rights infringements, the Supreme Court of Israel intervened and ruled that it was unconstitutional to grant tax benefits to the residents of certain municipalities.[95] However, the list of municipalities was set in the law and benefits were given to the listed municipalities differently without any criteria to distinguish between the beneficiaries already included. The list discriminated between similar Jewish Israeli municipalities and Israeli Palestinian municipalities. The Supreme Court of Israel ruled that the principle of equality requires granting tax benefits according to criteria that are applied equally to all. Granting tax benefits without any criteria infringes upon equality. According to the Supreme Court of Israel, the granting of the tax benefits, in this case, was so arbitrary that it infringed upon human dignity. The Supreme Court of Israel decided that this infringement did not meet the limitation clause because it did not have any purpose, and there was no correlation between the measure used and the non-existing purpose.

With regard to more recent Foreign Account Tax Compliant Act (FATCA) implementation legislation, the Constitutional Court of Israel rejected the claim that US account holders were discriminated against in comparison with those not subject to the reporting requirements. According to this Court, information sharing with US tax authorities increases the equal application of tax obligations, thereby eliminating the distinction between taxpayers who paid tax and those who evaded their tax obligations.[96]

[90] Israeli Supreme Court, judgment of 15 November 1999, *Kaniel v. The Government of Israel (Minister of Finance)*, HCJ 3975/95 [1999].

[91] *cf* sec 8.1.4.2.3.3. below.

[92] Israeli Supreme Court, judgment of 22 August 2010, *The Israeli Electric Company v Golan Regional Council*, AA 8183/03 [2010].

[93] Israeli Supreme Court, judgment of 12 May 2003, *Keles v Assessing Officer Tel-Aviv 4*, CA 900/01 [2003].

[94] Israeli Supreme Court, judgment of 29 July 2002, *Real Estate Tax Director v Lavnon*, CA 2622/01 [2003].

[95] Israeli Supreme Court, judgment of 22 May 2012, *Gadban Naser v The Government of Israel*, HCJ 8300/02 [2012] regarding s 11(b) of the Israeli Income Tax Ordinance.

[96] Israeli Supreme Court, judgment of 2 January 2018, *Foreign Republicans in Israel v the Government of Israel*, HCJ 8886/15 [2018].

8.1.2.3.4. Japan[97]

Article 14 of the Japanese Constitution contains the principle of equality. It requires treating comparable situations equally and different situations differently. With regard to the equality principle, the Supreme Court of Japan decided as follows:

> Tax today has, in addition to its original function to fulfil the financial needs of the State, various functions such as income redistribution, optimum allocation of resources, economic adjustment and so on, and to this end, it is obviously necessary not only to make a comprehensive decision in light of policy requirements for the whole field of national administration including fiscal, economic, social and other policies so as to determine the tax burden on the people, but also take a highly specialized and technical decision so as to provide for taxation and other requirements. Hence, it is held that when it comes to enactment of the Tax Code, there is no other way than to leave to the technical decision of the legislature in line with policy based on accurate material and data for the real state of national finance, socio-economy, national income, the people's living and the like, and that the court basically has no choice but to respect such legislative discretional decision. If that is the case, it is appropriate to construe that differentiated treatment on the ground of the difference in the nature of income as categorized in the field of the Tax Code and so forth cannot, as far as the object of a statute thereof is rightful and unless the form and manner of differentiation specifically introduced in the said legislature is deemed significantly irrational in relation to the said object, be negated as irrational or judged to conflict with the provisions set forth in Article 14, Paragraph 1 of the Constitution.[98]

8.1.2.4. Europe

8.1.2.4.1. European Union[99]

In the EU, there are many expressions of the principle of equality at the national and supranational level and, in line with Article 6(3) TFEU, this principle forms part of the common constitutional traditions of the EU Member States. It is, therefore, of particular importance for the legal protection of taxpayers' rights under EU law. Moreover, the Court of Justice of the European Union (CJEU) has elaborated greatly on this principle in its case law.

First, the **general principle of equality** is laid down in Article 20 of the Charter of Fundamental Rights of the European Union (EU Charter). Since the EU Charter only applies to the Member States as far as they are implementing Union law (Article 51 of the EU Charter), this principle lacks the general scope that it presents under national Constitutions. Therefore, the equality principle in Article 20 of the EU Charter is apt to play a bigger role in the harmonised area of indirect taxation than in direct taxation.[100]

The same is true with regard to the prohibition of discrimination under Article 21 of the EU Charter, which, inter alia, prohibits any discrimination based on property. Indirect taxation, particularly value added tax (VAT), is an implementation of Union law. However, the CJEU grants the EU legislator a large margin of appreciation with regard to the exemptions and reduced rates laid down in VAT Directive 2006/112/EC.[101] This also concerns the principle of neutrality

[97] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.

[98] Supreme Court of Japan (Grand Chamber), judgment of 27 March 1985, *Prof Oshima v NTA*, cited, available in English at www.courts.go.jp/app/hanrei_en/detail?id=81.

[99] We would like to thank Natalia Vorobyeva for her contribution.

[100] Direct taxation largely falls into the competences of the Member States. Therefore, insofar as it does and there are no measures of EU law directly involved, it is not to be regarded as an implementation of Union law in the sense of art 51 of the EU Charter.

[101] *cf* eg CJEU, judgment of 7 March 2017, *RPO*, case C-390/15, ECLI:EU:C:2017:174 [2017], para 54 (reduced rate of VAT precluded from being applied to the electronic supply of digital books).

as a more specific expression of the general principle of equality. This requires that economic operators be treated equally in similar situations. More specifically, in VAT law, the principle of neutrality also means that economic operators should bear the same tax burden whatever the length of the production and distribution chain.[102] However, the latter is not a matter of fundamental rights but of the specific features of the common system of VAT.[103]

EU law contains many more specific principles of equality. Article 110 TFEU prohibits discriminatory and protectionist taxation on the products of other Member States.

The fundamental freedoms are *leges speciales* in relation to the general prohibition on all discrimination based on nationality.[104] They lay down specific rules of non-discrimination. More specifically, they prohibit discrimination based on nationality in the areas of the free movement of workers, freedom to provide services, free establishment of natural persons or companies and free movement of goods and capital.[105] Moreover, independently of the differences in the wording of the treaty provisions, the CJEU understands all fundamental freedoms as comprehensive prohibitions on restrictions.[106] But for the special area of tax law, the concept of non-discriminatory restrictions remains questionable. Rather, most of the cases decided by the Court can be traced back to the question of whether a situation involving the exercise of a fundamental freedom is treated – de iure or de facto – less favourably than a purely internal situation.

The general prohibition of discrimination (Article 18 TFEU) and the general right to freedom of movement (Article 21 TFEU) are applicable to persons 'moving from one Member State to another Member State … for reasons not connected with the pursuit of an economic activity'.[107] It applies independently only to situations governed by Union law for which the treaty lays down no specific rules of non-discrimination.[108]

Article 21 of the EU Charter prohibits discrimination on specific grounds, inter alia, based on the grounds of property and age. It is now generally recognised that taxpayers may invoke their right to property to defend themselves against tax measures.[109] The prohibition of age discrimination in Article 21 of the EU Charter could, in theory, be violated, for example, where pensions are taxed more highly than other income. However, the Charter applies to the Member States only when they are 'implementing Union law' (Article 51(1) of the EU Charter) which is generally not the case in income taxation. Article 21 of the EU Charter, therefore, offers no remedy against income or pension taxation that differs depending on age.[110]

[102] eg CJEU, judgment of 24 October 1996, *Elida Gibbs/Commissioners of Customs and Excise*, case C-317/94, ECLI:EU:C:1996:400 [1996], para 20.

[103] J Kokott, *Tax Law of the European Union,* 7 nos 12 and ff. (2022).

[104] eg CJEU, judgment of 21 January 2010, *SGI*, case C-311/08, ECLI:EU:C:2010:26 [2010], para 31, and CJEU, judgment of 22 June 2017, *Bechtel*, case C-20/16, ECLI:EU:C:2017:488 [2017], paras 30 and ff.

[105] *cf* arts 34 and ff, 45(2), 49(2), 57(2), 49(1), 56(1) and 63(1) TFEU.

[106] CJEU, judgments of 25 July 1991, *Saeger/Dennemeyer*, case C-76/90, ECLI:EU:C:1991:331 [1991], para 12; of 30 November 1995, *Gebhard/Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, case C-55/94, ECLI:EU:C:1995:411 [1995], para 37; of 15 December 1995, *Union Royale Belge des Sociétés de Football Association and Others/Bosman and Others*, case C-415/93, ECLI:EU:C:1995:463 [1995], paras 98 and ff; of 28 April 2009, *Commission/Italy*, case C-518/06, ECLI:EU:C:2009:270 [2009], para 62; of 20 May 2008, *Orange European Smallcap Fund*, case C-194/06, ECLI:EU:C:2008:289 [2008], para 74; CJEU, *SGI*, cited, paras 98 and ff; and of 16 March 2010, *Olympique Lyonnais*, case C-325/08, ECLI:EU:C:2010:143 [2010], para 33.

[107] *cf* CJEU, judgment of 1 December 2011, *Commission/Hungary*, case C-253/09, ECLI:EU:C:2011:795 [2011]; CJEU, *N*, case C-470/04, cited, paras 22 and ff, with Opinion of Advocate General Kokott of 30 March 2006, paras 22 and ff.

[108] CJEU, judgments of 11 October 2007, *Hollmann*, case C-443/06, ECLI:EU:C:2007:600 [2007], paras 26 and ff; of 31 March 2011, *Schröder*, case C-450/09, ECLI:EU:C:2011:198 [2011], paras 28 and ff; CJEU, *SGI*, cited, paras 31 and ff.

[109] ECtHR, judgment of 16 April 2002 *SA Dangeville v France*, no 36677/97 (2005), and ECtHR, judgment of 23 February 1995 *Gasus Dosier- und Fördertechnik GmbH v The Netherlands*, no 15375/89(1995).

[110] CJEU, judgment of 2 June 2016, *C*, case C-122/15, ECLI:EU:C:2016:391 [2016], paras 28 and ff.

8.1.2.4.2. Council of Europe

The European Convention on Human Rights (ECHR) only prohibits discrimination with regard to the enjoyment of the rights and freedoms laid down in it (Article 14 of the ECHR). This provision is most commonly invoked in conjunction with Article 1 of Protocol No. 1 to the ECHR, which guarantees the right to property to taxpayers. The complaints about the allegedly discriminatory treatment of taxpayers raised under these provisions have concerned, in particular, (1) the inability of cohabiting sisters to obtain an exemption from inheritance tax enjoyed by surviving spouses or civil partners,[111] (2) the refusal of tax relief on the purchase of property suitably adapted to the needs of a child with disabilities,[112] (3) the inability to enjoy the exemption from inheritance tax and gift tax granted by law in cases of enterprise succession,[113] (4) the authorities' refusal to pay a taxpayer tax credits in respect of maintenance payments[114] and (5) taxpayers' obligation to allocate a portion of their income tax to specific beneficiaries without the right to reduce the amounts payable except for the portion allocated to the state.[115]

Article 14 is widely invoked in connection with other substantive rights under the ECHR. For example, there is a line of case law against Switzerland concerning the obligations of persons found unfit for military service to pay exemption tax, where the complaint about discrimination was examined in connection with the right to respect for private life (Article 8 of the ECHR).[116] In a number of cases, the human right to religion (Article 9 of the ECHR) was scrutinised with regard to the allegedly differentiated treatment of certain taxpayers. These cases commonly concern the refusals of tax exemption in respect of religious organisations[117] or natural persons' duty to pay church fees or church taxes.[118]

The European Court of Human Rights (ECtHR) analysis of the allegedly discriminatory nature of tax measures often results in confirming particularly wide taxing powers of the states under the ECHR.[119] Only in rare cases, where for instance the restriction of fundamental rights applied to a particularly vulnerable group in society such as persons with disabilities, must the states advance very weighty reasons justifying such restrictions.[120] Furthermore, the ECtHR is quite reluctant to separately examine the complaints about discrimination against taxpayers in cases where it has already found a breach of another substantive right, for instance, the taxpayer's right

[111] ECtHR, *Burden v the United Kingdom*, no 13378/05 (29 April 2008), paras 48–56.
[112] ECtHR, *Guberina v Croatia*, no 23682/13 (22 March 2016), paras 75–100.
[113] ECtHR, *Berkvens v the Netherlands* (decision), no 18485/14, (27 May 2014), paras 23–27.
[114] ECtHR, *Efe v Austria*, no 9134/06 (8 January 2013), paras 5053.
[115] ECtHR, *Spampinato v Italy* (decision), no 23123/04 (29 March 2007).
[116] See, eg ECtHR, *Glor v Switzerland*, no 13444/04 (2009), paras 77–98, and most recently ECtHR, *Ryser v Switzerland*, no 23040/13 (12 January 2021), paras 51–63. As Switzerland has not ratified Protocol No 1 to the ECHR, which grants, inter alia, the right to property, the applicants in those cases could not invoke a violation of that right although the obligation to pay taxes obviously falls under its scope.
[117] See, eg ECtHR, *The Church of Jesus Christ of Latter-Day Saints v the United Kingdom*, no 7552/09, (4 March 2014), paras 30–36, where the Church complained that it could not benefit from a full tax exemption in respect of a Mormon temple that was not open to the general public, while buildings designated for 'public religious worship' could benefit from such an exemption; see also ECtHR, *Christian Religious Organization of Jehovah's Witnesses v Armenia* (decision), no 73601/14 (29 September 2020), about the refusal to exempt a religious organisation from taxation on regular imports of donated religious literature, and ECtHR, *Association Les Témoins de Jéhovah v France*, cited, on the refusal to grant association of Jehovah's Witnesses tax exemptions available to liturgical associations.
[118] See, eg ECtHR, *Klein and Others v Germany*, nos 10138/11 and three others (6 April 2017) about a married couple's joint liability to church tax on account of wife's membership of the Protestant Church, and ECtHR, *Bruno v Sweden* (decision), no 32196/96 (28 August 2001) about the obligation to pay church tax by a non-member of the Church.
[119] See, eg ECtHR, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, no 15375/89 (23 February 1995), para 60, and *Bulves AD v. Bulgaria,* no. 3991/03 (22 January 2009), para 63. This position has also been held by the European Commission of Human Rights, see *Gianquitto v Italy* (decision), no 26779/95 (4 September 1996).
[120] See ECtHR, *Guberina v Croatia*, cited, para 53.

to property.[121] Such practice, often referred to as the '*Câmpeanu* formula',[122] allows the ECtHR not to examine *in extenso* certain secondary complaints or complaints which are in one way or another absorbed by the main complaint. While such an approach indeed allows the Court to focus on the main legal issue of the case, for example, on the tax measures taken in breach of the right to property, there is a potential danger of 'denial of justice'. This can happen if there are sufficient grounds to scrutinise the taxpayer's complaint about the allegedly discriminatory treatment to which he was subjected, but the Court makes a choice in favour of judicial economy. One should not forget that the use of the above formula affects the amount of just satisfaction,[123] which is awarded only for the violation of the main right at issue.

8.1.2.4.3. Russia[124]

According to Articles 19 and 57 of the Constitution of the Russian Federation, taxation is based on the constitutional principle of equality, which prohibits any discriminatory character of taxes and fees and the possibility of their different application. Further to the provisions of the Constitution of the Russian Federation, the federal legislator indicated in Article 3 of the Tax Code of the Russian Federation that the tax legislation of the Russian Federation is based on recognition of universality and equality of taxation. In taxation, equality is understood primarily as uniformity, neutrality and fairness of taxation. This means that the same economic results of taxpayers' activities should entail the same tax burden and that the principle of equality of the tax burden is violated in cases where certain categories of taxpayers are provided with different conditions compared to other taxpayers, although there are no significant differences between them that would justify unequal legal regulation.[125] Taxpayers, especially payers of personal income tax, should bear the same tax burden if they have the same solvency.[126]

The Constitutional Court of the Russian Federation has explained that the principle of equality of all before the law (Article 19 of the Constitution of the Russian Federation) guarantees equal rights and obligations for subjects belonging to the same category and does not exclude the possibility of establishing different rules for persons belonging to other categories of taxpayers by their conditions and type of activity.[127]

Moreover, the Constitutional Court of the Russian Federation stated that the principle of equal tax burdens follows from Articles 8 (part 2), 19 and 57 of the Constitution of the Russian Federation. In the area of tax relations, this means that it is not allowed to establish additional or

[121] eg in ECtHR, *RSz v Hungary*, no 41838/11, (2 July 2013), para 70, 2 July 2013, the Court considered that the inequality of treatment to which the applicant had been subjected, namely imposition of 98 per cent tax rate on the part of his severance pay, was sufficiently taken into account in its analysis under art 1 of Protocol no 1; in ECtHR, *Trafik Oil,* no. 67437/17, (18 May 2021), paras 44-45, the Court addressed the arbitrary nature of confiscatory taxation only in the light of art 1 of Protocol and concluded that the national court had failed to make an assessment of the proportionality of the measure and the safeguard against arbitrariness; see also ECtHR, *SA Dangeville v France*, cited, para 66.

[122] This formula had already been used in the ECtHR's case law before 2014, but since the delivery of the judgment in ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC], no 47848/08 (2014), it became more common.

[123] Art 41 provides: 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'. The number of violations found usually affects the amount of non-pecuniary damage to be awarded to the applicants.

[124] We would like to thank Karina Ponomareva for her contribution.

[125] Constitutional Court of the Russian Federation, judgment of 22 June 2009, no 10-P [2009].

[126] Constitutional Court of the Russian Federation, judgment 13 March 2008, no 5-P, cited.

[127] Constitutional Court of the Russian Federation, judgments of 25 March 2004, no 96-O [2004], of 3 July 2008 no 630-O-P [2008] of 13 March 2008, no 5-P, cited, and of 27 April 2001, no 7-P [2001].

increased tax rates depending on the form of ownership, the legal form of business activity, the location of the taxpayer and other discriminatory grounds. Different legal conditions for different categories of taxpayers cannot be arbitrary; they must be based on objective characteristics of the relevant subjects of law.[128]

Revealing the essence of equality in taxation, the Constitutional Court of the Russian Federation pointed out that the principle of equality requires taking into account the actual ability to pay tax based on the legal principles of fairness and proportionality. The principle of equality in the social state with respect to the obligation to pay legally established taxes and fees implies that equality must be achieved through the fair redistribution of income and differentiation of taxes and fees. Taxation that paralyses citizens' exercise of their constitutional rights must be recognised as disproportionate.[129]

8.1.2.5. Oceania

8.1.2.5.1. Australia

The power to make laws with respect to taxation is granted by section 51(ii) of the Australian Constitution to Parliament. It is through democratic processes that any taxes would be imposed and tax rates determined. However, by this provision, taxes must not discriminate between states[130] and, with respect to the laws of Australia more generally, individuals may not be discriminated against on the basis of their state of residence due to section 117 of the Constitution. Section 55 further provides that the laws imposing tax shall deal only with the imposition of taxation, and provisions dealing with any other matters shall have no effect.

A broad right to equality in taxation has not seemingly been recognised in Australia, as the Parliament has a broad power to define the criteria under which a tax liability will be assessed. By way of example, the Income Tax Rates Act 1986 currently provides one income tax rate scale for resident individual taxpayers generally and a more onerous rate scale for residents who are 'working holiday makers', individuals holding certain specified categories of immigration visas (the key difference is that income that would have been tax-free for ordinary residents is subject to a 15 per cent tax rate). The Full Federal Court of Australia recently considered a challenge to this alternative rate scale and concluded that it did not represent discrimination on the basis of nationality since this rate scale applies on the basis of visa class.[131] The Court held that this did not trigger Article 25 of the tax treaty between Australia and the UK. The taxpayer has applied to have this case heard by the High Court.

8.1.2.5.2. New Zealand

New Zealand does not have a single constitutional document. Instead, its Constitution is drawn from a number of important statutes, judicial decisions and customary rules known as constitutional conventions. Article 19 of the New Zealand Bill of Rights Act 1990 grants everyone the right to 'freedom from discrimination on the ground of discrimination in the Human Rights Act 1993'. This is one of the key written constitutional sources in New Zealand. It is predicated on statutory construction as a means of protecting underlying rights and ensuring legislative

[128] Constitutional Court of the Russian Federation, judgment of 14 July 2011, no 949-O-O [2011].
[129] Constitutional Court of the Russian Federation, judgment of 4 April 1996, no 9-P [1996].
[130] Considered by the High Court of Australia, order of 5 February 2003 *Austin v Commonwealth*, 215 CLR 185 [2003].
[131] Full Federal Court of Australia, judgment of 6 August 2020 *Addy v Commissioner of Taxation*, FCAFC 135 [2020].

consistency with human rights norms. However, the Bill of Rights Act is neither entrenched nor supreme law and can be repealed by a simple majority of Parliament.

Courts in New Zealand do not have the power to strike down legislation. Section 6 of the Bill of Rights Act, however, is a directive to the judiciary to, whenever possible, interpret a provision in a manner consistent with the rights and freedoms contained in this Bill of Rights.[132]

Sections 20I to 74 of the Human Rights Act contain detailed provisions regarding prohibited discrimination as well as exceptions. There is a further section on the implementation of these provisions. It is, however, hard to find tax measures tested against the principle of equality in New Zealand.

8.1.3. Neutrality as a Principle of International Taxation

Economic scholars have supported the need for tax neutrality for the tax levies to be allocated fairly among taxpayers from the perspectives of horizontal and vertical equity.[133] An exception to tax neutrality must rely on the need to pursue relevant regulatory purposes, in line with the postulates of the tax expenditure doctrine.[134]

From an international perspective, the concept of neutrality 'pleads for equal treatment of taxable events, irrespective of where they are located'.[135] Therefore, to achieve neutrality, taxes should not be a factor influencing taxpayers' private and business decisions.[136]

At international level,[137] Elkins has addressed two different ways to achieve neutrality.[138] One way is to tax the worldwide income of their individual residents and domestic corporations at the same rates.[139] Another way is to harmonise the tax regimes of the various countries, at least as far as the taxation of international investments is concerned. Again, if investors face similar tax burdens wherever they choose to invest, then investment decisions will not be driven by tax forces and capital will flow to where it can produce the highest pretax return.[140]

[132] 'Interpretation consistent with Bill of Rights to be preferred wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning'.

[133] HC Simons, *Personal Income Taxation* (Chicago, University of Chicago Press, 1938) 30. Horizontal equity requires a similar tax burden for two persons with similar income positions. Vertical equity requires a comparable different tax liability for persons with a different income position. See further on this in sec 8.1.5. of this book.

[134] See S Surrey, 'Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures' (1970) 83 *Harv L Rev*, 705. A more thorough analysis of such issues falls out of the scope of our research.

[135] W Schön, 'Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?' (8 June 2015) 69(4/5) *Bulletin for International Taxation*.

[136] Schön, 'Neutrality and Territoriality' 272, has indicated that distortions of private decisions could result in welfare, or 'deadweight' losses, adding that income tax can create an inefficient bonus for leisure over labour and that wealth tax can favour consumption over saving. However, *Schön* is also sceptical as to whether real full tax neutrality conditions can be effectively achieved.

[137] There are also two ways to address neutrality, which are Capital Export Neutrality and Capital Import Neutrality. These two ways refer to methods to prevent double taxation and are, therefore, outside the scope of this book. See F Shaheen, 'International Tax Neutrality: Reconsiderations' (2007) 27 *Virginia Tax Review* 203, available at ssrn.com/abstract=2245382.

[138] See D Elkins, 'A Critical Reassessment of the Role of Neutrality in International Taxation' (2019) 40(1) *Northwestern Journal of International Law & Business*. See also Shaheen, 'International Tax Neutrality' 203.

[139] See D Elkins, 'A Critical Reassessment of the Role of Neutrality' 6, also referring to MP Devereux, 'Taxation of Outbound Direct Investment: Economic Principles and Tax Policy Considerations' (2008) 24 *Oxford Rev Econ POL'Y* 698, 707 and E Troup and P Hale, 'EU Initiatives on Tax Harmonization: Do as I Say, Not as I Do?' (1998) 17 *Tax Notes Int'l* 1081, 1082.

[140] D Elkins, 'A Critical Reassessment of the Role of Neutrality' 6.

These two objectives have been addressed in the current OECD-G20 Base Erosion and Profit Shifting (BEPS) Project, the most important work on the global coordination of international taxation. For instance, the first can be achieved by introducing Controlled Foreign Company (CFC) rules included in BEPS Action 3.[141] The second can be achieved by fighting tax competition included in BEPS Action 5.[142] Furthermore, the current discussion about introducing GLOBE that provides a minimum tax rate in the income inclusion rule also can influence neutrality.[143] This proposal aims to prevent countries from engaging in tax competition to attract investors and prevent a race to the bottom regarding tax rates.

At the international level, the problem is that increased tax revenue obtained by improving tax neutrality through minimum taxation cannot be shared fairly among the states as they can in a domestic context. Therefore, the claim that the international tax regime should be as neutral and as efficient as possible encounters a certain scepticism. Several authors have already highlighted the weaknesses of neutrality as a normative goal for international tax policy.[144]

8.1.4. Ability to Pay

8.1.4.1. General

The ability-to-pay principle is recognised, either directly[145] or indirectly,[146] by the large majority of national Constitutions as a cornerstone of taxation. Its essence can be derived from economic theories developed by Adam Smith and pursues the goal of a fair sharing of the tax burden among taxpayers in line with the corollaries of distributive justice.[147] Accordingly, an ability to pay is presupposed for the obligation of a taxpayer to contribute to funding public expenses and, at the same time, the actual ability to pay of each taxpayer determines the extent to which the legislator can request such person to pay taxes.

The goals of distributive justice influence the relation of this principle to that of progressive taxation and its interpretation. However, such relation and its impact on the rights of the taxpayers is unclear. Some authors maintain that the ability to pay requires progression.[148] Others indicate that progression is mainly related to the social state principle.[149] Probably, both can be to some extent relevant, especially when the wording of the principles is reflected in the Constitution.[150]

[141] D Elkins, 'A Critical Reassessment of the Role of Neutrality' 6.

[142] See sec 3.2.2.2. above on fairness and the criterion of fair tax competition.

[143] The income inclusion 'would tax the income of a foreign branch or a controlled entity if that income was subject to tax at an effective rate that is below a minimum rate' OECD, *Public Consultation Document, Global Anti-Base Erosion Proposal (GloBE) – Pillar Two*, (8 November–2 December 2019), available at www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf.

[144] M Graetz, 'The David Tillinghast Lecture, Taxing International Income – Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies' (2001) 54 *Tax Law Review* 282 and ff; P Hongler, *Justice in International Tax Law*, (IBFD, 2019), 421 and ff; C Peters, *On the Legitimacy of International Tax Law* (IBFD, 2014) 106 and ff, 364 and ff.

[145] Art 108(7) Bolivian Constitution, art 145, para 1 Brazilian Constitution; art 24(1) Cypriot Constitution; art 4(5) Greek Constitution; arts O and XXX Hungarian Constitution; art 53(1) Italian Constitution; art 181 Paraguayan Constitution (1992), art 31(1) Spanish Constitution, art 127(2) Swiss Constitution, art 316 Venezuelan Constitution.

[146] The principle has been developed by judicial interpretation as a corollary of the principle of equality in Germany (see German Federal Constitutional Court, decision 1 BvR 1656/09, cited).

[147] Smith, *An Inquiry into the Nature*, ch 2, of the Sources of the General or Public Revenue of the Society, sec 2.25.

[148] Anglo-American authors generally hold this view, even though then they reject this as a principle altogether. This trend was initiated long ago, *cf* eg Kendrick, 'The Ability-to-Pay Theory of Taxation' (1939) 29(1) *American Economic Review* 92–101.

[149] J Hey, 'Steuersystem und Steuerverfassungsrecht', 24th edn (Otto Schmidt, 2020), para 3.62 and ff, para 3.131.

[150] For instance, in the case of Italy, art 53 of the Italian Constitution requires the ability-to-pay principle and the overall progression of the tax system. In such a context, it would be hard to deny that the two principles are related.

The ability to pay applies to its ultimate bearers, that is, natural persons. There, it refers to any personal situation that may affect the taxpayer's capacity. This justifies a different treatment of a single taxpayer and a taxpayer with dependent family members. Likewise, any personal unavoidable expense could require consideration for tax purposes, such as, for instance, medical expenses and anything related to the minimum subsistence income. It is more difficult to define the content of ability to pay with regard to legal persons. However, the application of this principle to them may not be excluded either.[151] In this regard, the ability to pay could be used to require deduction of business expenses (net principle). However, taxation of profits or earnings implies deduction of business expenses in any case.

The principle of ability to pay clearly covers direct taxes, such as those levied on income and capital. Some authors hold the view that it also reaches out for indirect taxes, like VAT.[152] As indirect taxes are to be borne by the consumers, the supposed ability of the consumer is decisive. The ability to pay may, therefore, be used as an argument for lower VAT rates for basic need goods and higher VAT rates for 'luxury' goods.[153] It is more controversial whether the principle of ability to pay should also apply to preferential tax treatment connected with regulatory goals, such as tax incentives. The principle of ability to pay should not govern other types of compulsory payments, such as levies (for instance, connected with the exploitation of the environment) and similar charges.

Another issue arises as to whether this principle necessarily requires an exact identification of the taxable base with respect to the real manifestation of the ability to pay. In the affirmative, it would require for income taxes, taxation of net income. In some cases, this is reasonable, but in others, it may not be so. We could, for instance, compare the cases of taxing profits of a large company and a small and medium enterprise (SME). While any ancillary compliance burden, including the obligation to keep accounting books, can be acceptable for a company with large profits, the same may not hold true for an SME, which would in such circumstances be obliged to bear a cost that is not reasonable for the volume of income produced. This shows that the ability to pay may not be regarded as obliging the legislator always to levy taxes on the real situation and that proxies can be acceptable. However, such proxies should not be unreasonable and should, therefore, keep a sufficient connection with the real ability to pay. In the case of the digital services tax, the issue may arise as to whether turnover represents such a proxy, indicating the ability to pay for the purposes of progressive tax rates. This issue may be controversial and may have to be analysed in line with the actual shaping of the digital services tax.[154]

However, also in such a context, it would be hard to deny the relevance of the principles of the social state in respect of tax progression.

[151] In Constitutions that expressly include the ability-to-pay principle, this conclusion becomes much easier. Accordingly, for instance, insofar as art 53 (1) of the Italian Constitution indicates that 'everyone is obliged to contribute to funding the State budget', it is rather hard to question the general nature of this obligation for all persons, including the legal ones.

[152] J Englisch, in Lang, Melz and Kristofferson, *Value Added Tax and Direct Taxation* (2009) 1 and ff, 20 and ff. This conclusion is very easy to endorse in countries that expressly include the ability-to-pay principle. Accordingly, for instance, in countries like Italy, Spain and several South American countries, the general obligation to pay taxes in accordance with the ability to pay implies that this principle is presupposed for the levying of any tax and reflects the reasonableness of the legislation as well as its link with facts that may denote such ability. In the case of VAT, this means that the ability to afford consumption of certain goods and services may also, indirectly, denote the one to pay the corresponding tax.

[153] *cf* eg Constitutional Court of Colombia, judgment of 14 November 2018, case C-117 [2018] (VAT applicable to sanitary towels and tampons).

[154] See further on this Opinion of Advocate General Kokott of 13 June 2019, *Vodafone Magyarország*, cited, and of 4 July 2019, *Tesco-Global Áruházak*, C-323/18, ECLI:EU:C:2019:567.

Similarly, the legislator can adopt proxies with regard to expenses that are presupposed for the exercise of a business, as well as those directly linked to generating income.

A more complex issue arises with regard to the cross-border application of the ability-to-pay principle,[155] especially considering that each state has sovereignty as to the determination of the tax base, the connecting factors and the methods for relieving international double taxation.

Double taxation and the various methods to limit its effects may lead to results that do not precisely reflect taxpayers' ability to pay. Even though countries have no obligation to relieve double taxation, they generally do so, also on a unilateral basis, in order to facilitate cross-border relations. Countries pursue this goal via different routes. Some countries relieve double taxation by the credit method and others by means of the exemption method, in each case pursuing different international neutrality goals.

When the foreign tax credit applies, the tax burden will reflect the levels of taxation applicable in the state of residence even when the state of source levies taxes at a lower rate. This is because foreign taxes can be offset against the ones due in the state of residence on the worldwide liability to tax. Therefore, the lower the foreign taxes, the lower the credit against domestic taxes of the state of residence. This method produces compensatory effects of lower foreign taxes, which on the one hand may prevent the competitiveness in lower foreign tax jurisdictions with local players, but on the other hand allow for consideration of foreign losses when determining the final taxes due in the state of residence.

When the exemption method applies, the level of taxes in the state of source is final because the state of residence refrains from exercising its jurisdiction on such income. This means that it is possible to compete with equality of arms with local players in the state of source and that any loss in the source state will not be taken into account by the state of residence.

This framework creates significant potential for cross-border tax disparities, making it hard to justify a common application of the ability-to-pay principle across jurisdictions. Accordingly, even if from a policy perspective there is a tendency to mitigate international double taxation, the ability to pay is not really reflected in state practice as a foundational principle to eliminate double taxation. Being an expression of the principle of equality, the application of the ability to pay is in reality always confined within one jurisdiction,[156] even though such jurisdiction is not prevented from taking into account indicators of the ability to pay that arise in other jurisdictions.

Our conclusions should nevertheless not exclude the possibility that problems of international double taxation could be addressed through other rights and principles. This is, for instance, the case of the right to property and the principle that prohibits confiscatory taxation, which should also be addressed in connection with the parallel exercise of taxing jurisdictions to the extent that taxpayers are, in fact, deprived of their property.[157]

8.1.4.2. Different Regions

8.1.4.2.1. Africa[158]

The ability-to-pay principle is seen in the progressive tax systems adopted by many African countries,[159] such as Kenya, Lesotho, Tanzania, Mauritania, among many others, where those

[155] For a critical analysis, see P Hongler, *Justice in International Tax Law* (IBFD, 2019), 387 and ff.

[156] But see CJEU, *Bevola and Jens W Trock*, judgment of 12 June 2018, C-650/16, para 59 with Opinion of Advocate General Campos Sánchez Bordona of 17 January 2018, ECLI:EU:C:2018:15 [2018], paras 37 and ff.

[157] See further sec 6.4. above. In tax literature, those issues have been addressed by F Debelva, *International Double Taxation and the Right to Property: A Comparative, International and European Law Analysis* (IBFD, 2019).

[158] We would like to thank Johann Hattingh and Attiya Waris for their contribution.

[159] Committee on Fiscal Studies, *Africa Revenue and Expenditure Map* (2020), cfs.uonbi.ac.ke/Africa%20Revenue%20%26%20Expenditure%20Map.

with higher incomes are subjected to a higher rate of tax. In Lesotho, the tax rate ranges from 20–30 per cent, depending on income.[160] Specifically, it increases to 22–35 per cent for chargeable income over a certain threshold.[161] In Kenya, similarly, the tax rate ranges from 10–30 per cent depending on income.[162]

Under the South African Constitution, special procedures for the making of tax laws require that equity in taxation, which encompasses the ability to pay, must be considered. Under these procedures, the impact of redistributive taxes must be considered on 'development, investment, employment and economic growth';[163] the government additionally has to hold public hearings on these laws, to consult and report on how the tax system generally responds to equity in taxation. South Africa's progressive income tax rates range from 18–45 per cent, which is appropriate given that it has the most skewed wealth and income distribution globally. As already mentioned, only 11 per cent of South Africa's population contributed to the income tax base in 2018. The rest of the population does not have the ability to pay taxes. The vast majority of such population would not qualify as taxpayers. Hence, they may not be the bearers of taxpayers' rights in a narrow technical sense. However, this does not prevent these non-taxpaying persons from enjoying the protection of basic rights, including the entitlement to the benefits that should be provided with the funds collected through the levying of taxes.

8.1.4.2.2. Americas

8.1.4.2.2.1. Latin America

8.1.4.2.2.1.1. Argentina[164] The principle of ability to pay is not expressly incorporated in the Argentine Constitution. However, doctrine and case law consider that the concept arises from Article 4 of the Argentine Constitution insofar as it establishes that 'the federal government provides for the expenses of the Nation with contributions that are equitably and proportionally levied by Congress'. It seems plausible that doctrine should find the ability to pay laid out in this article because it determines the methods by which the state is financed, including taxes.

The Argentine Supreme Court has set criteria for interpreting the principle of contributory capacity. It has established that all taxes must correspond to taxpayers' ability to pay such taxes. For example, the state may categorise taxpayers for reasons other than economic capacity. These determinations may involve factors that are not – or only indirectly – of an economic nature. However, taxes must always be adapted to the taxpayer's ability to pay.[165] The Argentine Supreme Court has equated the taxpayer's ability to pay with the guarantees of equality before the law in the Argentine Constitution under Article 16, the protection of the right to property crystallised in Article 17 and the principle of reasonability in Article 28. That Court has also incorporated a new interpretation of the principle of reasonableness, read in light of Article 28 of the Argentine Constitution. It uses this interpretation in all cases not involving categories of taxpayers (ie cases unrelated to the guarantee of equality before the law). Therefore, it has been established that a fiscal rule is unreasonable if the costs produced by applying the relevant regulation are greater than the benefits of its application.[166]

[160] Ibid.
[161] Income Tax Act No 9 of 1993 (Lesotho), sch 2.
[162] Income Tax Act 1973, Cap 470 (Kenya), sch 3.
[163] Money Bills and Related Matters Act, 9 of 2009, s 11(3)–(4).
[164] We would like to thank Eduardo A Baistrocchi for his contribution.
[165] Argentine Supreme Court, judgment of 5 May 1948, Bonorino Ezeyza de Claypole Delia y otros c Provincia de Buenos Aires s Inconstitucionalidad de Las Leyes 4834 y 4204, judgment 210:284 [1948].
[166] Argentine Supreme Court, judgment of 5 November 1991, Dr. García Pinto, José p/Mickey SA s/ infracción ar 44, inciso 1, ley 11.683, judgment 314:1376 [1991].

On the other hand, the Argentine Supreme Court has established that taxes cannot be applied retroactively, taking as a taxable base a financial asset that does not exist in the taxpayer's net worth after the sanction of the tax law.[167] The Court established that if the taxpayer is able to prove a decrease in taxable capacity or wealth before the law was enacted, the retroactive application of that tax law for the collection of the tax is invalid. Therefore, the ability-to-pay principle also works as a guarantee that prohibits the retroactive application of tax laws.[168]

8.1.4.2.2.1.2. Brazil[169] The ability-to-pay principle constitutes a corollary of the principle of equality,[170] necessarily presupposed for a legitimate levying of taxes.[171] It is expressly recognised in Article 145(1) of the Brazilian Constitution: 'Whenever possible, taxes shall be personal and shall vary with the economic capacity of the taxpayer. To make these objectives effective, the tax administration may identify the patrimony, income and economic activities of the taxpayer'.[172] From one perspective, the ability to pay determines that the tax event must represent an increase in taxpayers' wealth (an economic power).[173] Furthermore, when interpreted according to the principle of human dignity, the ability to pay guarantees a tax-free minimum income.[174] From another perspective, the ability to pay defines the criterion for distributing the tax burden among taxpayers.[175] The ability to pay can thus be used in favour of taxpayers limiting their tax burden. The Brazilian Federal Supreme Court, however, has decided cases in which the ability to pay within the principle of solidarity was applied to expand the power to tax.[176]

Regarding indirect taxes, the ability to pay prescribes that the essential goods and services shall receive a lower tax burden in comparison to superfluous ones for human life.[177] This conclusion can be shared insofar as one considers that the former goods and services are indispensable also to persons with a limited ability to pay. Furthermore, some scholars do not want to apply the ability to pay to regulatory taxes because other criteria compatible with the regulatory purpose prevailed.[178] Others argue that it is necessary to combine the ability-to-pay criterion with other criteria related to the regulatory purpose.[179] Despite this academic divergence, the legislator has to comply with the ability-to-pay principle when creating taxes.[180]

[167] Argentine Supreme Court, judgment of 19 December 1989, *Marta Navarro Viola de Herrera Vegas v. Nacion Argentina (Direccion General Impositiva) s/ repeticion*, judgment 312:2467 [1989].

[168] See also A Tarsitano, 'El Principio de Capacidad Contributiva: La Visión de la Jurisprudencia Argentina y Peruana' (24 June 2014) *El Derecho*, ISSN 1666-8987, no 13.510, ED 258, 1–4.

[169] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[170] Schoueri, *Direito tributario* 332.

[171] See H Ávila, *Teoria dos Principios: Da Definição à Aplicação dos Princípios Jurídicos* (2011) 127; R Lobo Torres, *Legitimação da Capacidade Contributiva e dos Direitos Fundamentais dos Contribuintes* (2003) 441.

[172] Art 145, para 1 Constitution of Brazil.

[173] See Supreme Federal Court of Brazil, direct action of unconstitutionality of 10 April 2013, no 2588/DF, cited; extraordinary appeal no 651703/PR, cited; extraordinary appeal of 13 February 2014, no 636941/RS [2014]; and extraordinary appeal no 574706/PR, cited.

[174] See Supreme Federal Court of Brazil, pending direct action of unconstitutionality no 6025/DF.

[175] See Supreme Federal Court of Brazil, extraordinary appeal of 2 February 2013, no 562045/RS [2013]; provisory appeal of 9 April 2013, no 703982/RJ [2013]; extraordinary appeal of 6 June 2018, no 578846/SP [2018]; see also sec 4.4.2.2.2.2.

[176] See Supreme Federal Court of Brazil, extraordinary appeal of 29 September 2016, no 651703/PR, cited; *cf* also LC Pessôa, 'O Princípio da Capacidade Contributiva na Jurisprudência do Supremo Tribunal Federal (The ability to pay principle in the decisions of the Brazilian Supreme Court)' (January/June 2009) 5(1) *Revista Direito GV*, ISSN 2317-6172, dx.doi.org/10.1590/S1808-24322009000100005.

[177] See Supreme Federal Court of Brazil, provisory appeal in the extraordinary appeal of 5 August 2014, no 634457/RJ [2014].

[178] See Ávila, *Teoria da Igualdade Tributaria* 166.

[179] See Schoueri, *Direito Tributário* 360.

[180] See Supreme Federal Court of Brazil, extraordinary appeal of 2 February 2013, no 562045/RS, cited.

8.1.4.2.2.1.3. Chile[181] In Chile, there is no specific constitutional rule that explicitly establishes the principle of ability to pay or taxable capacity. This principle remains implicit in Article 19 N°20 of the Chilean Constitution, whose sub-sections 1° and 2° require equal distribution of taxes 'in proportion to income or in the progression or form that the law establishes' avoiding 'manifestly disproportionate or unjust taxes'.

Essentially, the taxable capacity or ability to pay has been understood in Chile, as in some other countries, by both the Supreme Court[182] and Constitutional Court,[183] as another element of the principle of tax equality, which has led the latter Court to conclude that 'the proportion or disproportion of taxes shall be weighed according to the taxpayer's ability to pay'.[184]

An example of the above is that tax income for natural persons residing in Chile (Complementary Global Tax) has a gradual rate according to income bracket, and the first income bracket is of said tax, precisely because of the principle of economic capacity.

8.1.4.2.2.1.4. Colombia[185] Article 363 of the Colombian Constitution enshrines the principle of progressiveness which is often linked with the ability to pay.[186] There is rich jurisprudence of the Colombian Constitutional Court on the ability to pay in direct and indirect taxation. The Constitutional Court concluded that the capacity to pay of individuals constitutes the cornerstone on which most of the principles that make up the constitutional axiology in tax matters are based. In that regard, a provision imposing a tax burden without considering the capacity of individuals is contrary to such a system. According to the Colombian Constitutional Court, the concept of capacity to pay limits the legislative power in indirect taxes. In indirect taxes, the legislator does not set the tax based on the income of the taxpayer, nor does it directly assess their capacity to pay taxes. On the contrary, as the name of this type of tax indicates, the analysis of such capacity is indirect and carried out through the use of inference, to the extent that it presumes a fact – the taxpayer's capacity to pay – based on another fact, which depending on how one looks at it, may be the acquisition of a certain good or service by the economic taxpayer, or the sale or importation of the same by the person who is usually the legal taxpayer, inter alia.[187]

Although in indirect taxes there is no direct knowledge of the taxpayers' capacity to pay taxes, the power of legislature depends in any case on the plausibility of the inference. That is to say, it depends on the known fact allowing, effectively, to know the unknown or inferred fact. This means that the consumption of the good or service that constitutes the generating fact of the tax effectively reveals the taxpaying capacity of the subject, who must assume its cost. Otherwise, if the acquisition of the taxed good does not allow the taxpayers' capacity to pay taxes to be validly inferred, the legislator may be in breach of its constitutional obligation to take into consideration the ability to pay. Even though a direct mathematical correlation between consumption

[181] We would like to thank Yuri Varela for his contribution.

[182] *cf* eg Supreme Court of Chile, case 16293/92, cited.

[183] See Chilean Constitutional Court, judgment of 4 November 2010, case 1399/10 [2010], para 14. According to the Constitutional Court of Chile: 'When assessing the equality of a given tax regulation, it should be borne in mind that it is the essence of such regulations to establish differentiated regimes according to contributive capacity. In this sense, it has been pointed out that "tax equality" is a species within the genus equality before the law. In the latter, all persons are equal; in the former, not all are equal before the law of taxation. In fact, it is the law of taxation that must be equal in the face of equal contributive capacities.

Therefore, in order to verify whether or not a regulation is arbitrary or lacking in proportionality, it is necessary to bear in mind that it is not up to this Court to judge the merits of legislative decisions.'

[184] Chilean Constitutional Court, judgment of 20 October 1998 case 280/98, cited.

[185] We would like to thank Lucy Cruz for her contribution.

[186] Constitutional Court of Colombia, judgment of 5 December 2019, case C-593 [2019], paras 37, 41.

[187] Constitutional Court of Colombia, case C-593/19, cited.

and ability to pay cannot be claimed, there must at least be a minimum correlation between the specific consumption that constitutes the taxable event and the taxable capacity. It follows that the imposition of differential rates in indirect taxes levied on transactions on goods considered luxury goods is a reasonable mechanism by which to infer the taxpaying capacity of individuals. In such cases, the differential treatment contributes to the realisation of the principle of tax equity in its vertical dimension. In the same vein, taxes levied at the same rate on transactions involving luxury goods and irreplaceable essential goods may violate the vertical dimension of the principle of equity since the same taxpaying capacity cannot be inferred from the consumption of some products and not others. Finally, taxes that reinforce existing inequalities within society without compensating disadvantaged persons are also contrary to the principle of tax equity, especially when the imposition of a tax implies discrimination based on a suspicious criterion. In this case, the ability to pay cannot be validly inferred from the forced consumption of products by a historically discriminated sector of the population.[188]

The legislator has a margin of discretion granted by the Constitution when it comes to interfering with the taxpayers' ability to pay. However, the Colombian Constitutional Court has declared the unconstitutionality of rules that levy VAT on articles of basic necessity and others of a sumptuary nature and that apply the same rate to all of them, to the extent that this disproportionately affects the most vulnerable sectors of society.[189] For example, the Colombian Constitutional Court declared a provision unenforceable that taxed tampons and sanitary napkins at 5 per cent and declared them exempt from VAT because this provision disproportionately and unjustifiably affected women, especially the poorest, and since these are basic necessities for which there are no substitutes.[190] The Colombian Constitutional Court also held unconstitutional a cascading tax on the 'consumption' of property. That type of multiphase tax was not levied only once but on multiple occasions, each time the property was disposed of. This is different from VAT, which is also a multiphase tax, but with deductions. According to the Colombian Court, the multiphase cascading tax on consumption violated the principles of tax equity in its horizontal and vertical dimensions and ignored the contributive capacity of individuals. It violates horizontal equity since it is a cascading tax that adheres to the cost; the effective rate varies only according to the length of the chain of tradition. The effective rate will be higher in properties with longer chains of tradition and lower in those with shorter chains of tradition. This produces a different treatment of equal situations without there being a constitutionally valid criterion for it. In turn, legislation violates vertical equity and the obligation to consider the taxpaying capacity of individuals insofar as it taxes equally transactions made under different titles, regardless of the type of property and its destination, and without considering that the economic capacity of the taxpayers cannot be inferred in all cases.[191]

8.1.4.2.2.1.5. Mexico[192] According to Article 31(IV) of the Mexican Constitution, Mexicans have to contribute to public expenditure in proportional and equitable manners that the law has established. Proportional contribution is understood as an expression of the ability-to-pay principle.[193] The Mexican Supreme Court of Justice has determined that the proportionality of

[188] Constitutional Court of Colombia, case C-593/19, cited.

[189] *cf* Constitutional Court of Colombia, case C-593/19, cited, no 42, and judgment of 9 September 2003, case C-776 [2003], declared art 116 of Law 788 of 2002 unconstitutional.

[190] Constitutional Court of Colombia, judgment of 14 November 2018 case C-117/18, cited.

[191] Constitutional Court of Colombia, case C-593/19, cited.

[192] We would like to thank Diana Bernal for her contribution.

[193] *cf* eg DR López, 'Los Principios Materiales de Justicia Tributaria como Derechos Fundamentales de los Contribuyentes en México' (2020) *Ius Revista Jurídica*; R Rodríguez Vidal, G Díaz Torres, ÓE Castillo Flores, Dialnet, 'El Mínimo vital como Principal Elemento de la Capacidad Contributiva en México' in C Espinosa Berecochea (ed), *Derechos de los*

taxes lies in the fact that citizens should pay them according to their economic capacity, having to contribute a fair share of their income, profits or wealth. This ensures that those citizens with higher economic resources contribute more than those with fewer resources.[194]

8.1.4.2.2.1.6. Peru[195] The Peruvian Constitutional Court[196] has recognised the ability-to-pay principle as an expression of the principle of equality, expressly provided for in Article 74 of the Peruvian Constitution. That Court has also indicated that the ability to pay constitutes an essential element for the legitimacy of the tax imposition.[197] In practice, this principle serves as a limitation to the tax power of the Peruvian state. Consequently, the creation of taxes must keep in mind the taxpayers' capacity, which delimits the tax burden imposed.[198]

Peruvian tax law does not contain any definition of ability to pay. According to the Peruvian Constitutional Court, tax imposition must be carried out equitably, based on the suitability of each taxpayer to support the tax burden. This suitability must be measured by virtue of the intensity of the objective manifestations of wealth that are attributable to the taxpayers. These manifestations of wealth can be measured by levels of income, consumption or property.[199]

8.1.4.2.2.2. United States[200]

Although not expressly prescribed in either the Constitution or other statutory requirements, the notion of taxing based on the ability to pay has been an implicit consideration in the area of federal individual income taxation, as the US has generally employed a progressive rate structure so that higher-earning taxpayers often are subject to higher marginal rates.[201]

Contribuyentes, (Academia Mexicana de Derecho fiscal, 2019), 175–206; F Tejeda Uscanga, *'El Principio de Capacidad Económico- Contributiva', Eje de los Principios Materiales de Justicia Tributaria en el Sistema Fiscal-tributario Mexicano*, (Academia Mexicana de Derecho fiscal, 2019), 271–297.

[194] See case law: Mexican Supreme Court of Justice, Pleno, *Proporcionalidad Tributaria. Debe Existir Congruencia Entre El Tributo Y La Capacidad Contributiva De Los Causantes*, Semanario Judicial de la Federación y su Gaceta, Tomo XVII, P/J 10/2003 [2003] 144.

[195] We would like to thank Cecilia Delgado Ratto for her contribution.

[196] Peruvian Constitutional Court, judgment no 02727-2002-AA/TC [2002], para 4: 'the taxation that is carried out must always be based on a manifestation of the taxpayer's contributive capacity … the right to equality in tax matters or, rather the principle of contributive capacity, according to which the distribution of taxes must be carried out in such a way that it treats equally the same and unequally the unequal, so that the tax burdens must fall, in principle, where there is wealth that can be taxed, which obviously implies that the personal capacity or taxpayers' assets' are taken into account.

[197] According to the Peruvian Constitutional Court, judgment no 0033-2004-AI/TC, cited: 'Whenever a tax is established, it must be closely related to the economic capacity of the obligated subjects, since only in this way will the taxpayer's ability to pay tax be respected or, which is the same, only in this way will the tax not exceed the limits of the taxable capacity of the taxpayer, configuring the legitimating budget in tax matters and respecting the criteria of tax justice in which the legislator must be inspired … when the Constitutional Court recognizes that any tax established by the legislator must be based on a manifestation of taxable capacity, what it does is confirm that the relationship between economic capacity and tax constitutes the framework that, in general terms, legitimizes the existence of taxable capacity as implicit tax principle within the constitutional text.'

[198] Peruvian Constitutional Court, judgment of 28 September 2004 no 0033-2004-AI/TC [2004], para 5: 'The tax power constitutes the faculty that the State has to impose on individuals the payment of taxes, power that cannot be exercised on a discretionary basis or arbitrarily, but is subject to a series of limits that are imposed by the legal system, whether they are constitutional or legal. … This Court considers necessary to understand the meaning and scope that, within the constitutional interpretation and given its undeniable connection with the limits to the tax power, the concept of the taxpayer contributive ability to pay has as we consider that only once its content or conceptual framework is determined it will be possible to elucidate the limit of the tax power enjoyed by the legislator for the creation of a tax …'.

[199] Peruvian Constitutional Court, judgment of 28 September 2004 no 0033-2004-AI/TC [2004], para 16: '… the legislator may only take as a specific index of the taxable capacity the income generated by the taxable person … and, in that same line, the property or the level of consumption or spending may also be indicators of taxable capacity in regard to other taxes'.

[200] We would like to thank Jeremiah Coder for his contribution.

[201] See IRC para 1. The corporate income tax rate has generally been a flat rate; see IRC para 11.

The Internal Revenue Service (IRS) considers a taxpayer's ability to pay[202] in certain circumstances, offering instalment agreements to eligible taxpayers who cannot pay the tax liability in full when due. In collection matters, the IRS might consider an offer in compromise if a taxpayer can show financial distress or exceptional circumstances. The IRS may also temporarily delay the collection of tax debt if the taxpayer can show that payment would prevent the individual from being able to meet basic living expenses.[203]

The US Taxpayer Bill of Rights includes as #10 the right to a fair and just tax system, but this right focuses primarily on ensuring that taxpayers have the ability to cover their basic living expenses after paying taxes. This does not provide a right to progressive taxation, and it only focuses on the principle of ability to pay in that it ensures that taxpayers do not pay more than would leave them with sufficient funds to pay their basic living expenses, but it does not ensure that each taxpayer is taxed proportionate to their ability to pay.

8.1.4.2.3. Asia

8.1.4.2.3.1. China[204]

Chinese tax laws do not expressly mention the ability-to-pay principle. This principle has, however, been implicitly adopted in tax lawmaking and applications. The individual income tax law contains a tax exemption for disabled persons, unsupported aged persons or dependents of a martyr[205] and individuals suffering significant losses due to a severe natural disaster. The enterprise income tax law allows taxpayers to apply to postpone tax payments for reasons of (i) suffering from considerable losses due to force majeure events which significantly impact the normal business operation of the taxpayer, or (ii) having no sufficient fund to pay taxes after paying the employees' salaries, wages and social contributions.

8.1.4.2.3.2. India[206]

There is no constitutional or statutory principle of ability to pay in India. However, Indian courts often refer to the principle of the ability to pay to distinguish between a tax and a fee. According to them, the former is based on the concept of burden and ability to pay, while the latter is based on the principle of equivalence (of benefits to the amount paid).[207]

Moreover, the Indian Supreme Court had justified the constitutional validity of a turnover based tax that differentiated between large and small dealers holding that 'a large dealer occupies a position of economic superiority by reason of his volume of business and to make the tax heavier on him both absolutely and relatively is not arbitrary discrimination but an attempt

[202] IRS Publication 594.

[203] See www.irs.gov/payments/offer-in-compromise.

[204] We would like to thank Na Li for her contribution.

[205] According to the Regulations on Honouring Martyrs (Order No 601 of the State Council of the People's Republic of China), a martyr refers to any Chinese citizen who has sacrificed himself/herself under any of the following circumstances: (i) who died when investigating and punishing illegal criminal activities in accordance with law, carrying out tasks in relation to national security or counter-terrorism or disposing of emergency incidents; (ii) who died in emergency rescue and disaster relief or in any other rescue and protection of national assets, collective assets, and life and properties of citizens; (iii) who died when carrying out tasks regarding foreign affairs or tasks in relation to foreign aid and international peacekeeping assigned by the state; (iv) who died in carrying out scientific research testing tasks on weapons; or (v) who makes outstanding sacrifices in any other aspect that he/she can be a role model.

[206] We would like to thank Ashrita Prasad Kotha for her contribution.

[207] Supreme Court of India, judgment of 11 November 2016, *Jindal Stainless Ltd and Another v State of Haryana and Others*, Civil Appeal no 3453/02 [2016]. Similarly, the Brazilian Constitution lays down the principle of ability to pay for taxes (art 145, para 1) while at the same time affirming that 'fees may not be calculated on the same basis as taxes'. In Germany, conversely, progressive fees, eg for kindergarten, are common practice.

to proportion the payment to capacity to pay and thus arrive in the end at a more genuine equality'.[208]

8.1.4.2.3.3. Israel[209]

As to equality in taxation, Chief Justice Barak in the *Kaniel* case[210] analysed the constitutionality of the different tax rates on ordinary income and capital gains taxes to conclude that the infringement of equality is proportionate in the circumstances and, therefore, constitutional. He assumed that the gap in tax rates infringes on tax equality. Tax equality means equal taxation of taxpayers with similar ability to pay (horizontal equity) and different taxation of taxpayers with different abilities to pay in accordance with their differences (vertical equity). He also assumed that this infringement of equality constitutes an infringement of the constitutional right of dignity and therefore is subject to constitutional scrutiny. However, he concluded that the gap is justified and proportionate to protect the competitiveness of the Israeli tax regime at the international level.

8.1.4.2.3.4. Japan[211]

Article 14(1) of the Japanese Constitution contains the principle of equality under the law. It is generally believed in Japan that taxation according to the taxpayers' ability to pay derives from the principle of equality.

The basis of the Japanese tax system can be traced back to the Shoup Mission.[212] The Shoup report recommended a tax system in which direct taxes occupied a central and dominant role because direct taxes better satisfy the principle of taxation according to the ability to pay.[213] In addition, the report recommended promoting the idea of global, progressive taxation with a comprehensive tax base.[214] It advised that the tax base should be as broad as possible.

8.1.4.2.4. Europe

8.1.4.2.4.1. European Union

The CJEU has mostly addressed the ability to pay in combination with the prohibition on discrimination related to the fundamental freedoms. Therefore, it is only in the case of discriminatory measures that the CJEU will address possible conflicts with the ability-to-pay principle, which becomes a benchmark for assessing the existence of the discrimination.[215]

[208] Supreme Court of India, judgment of 17 April 1974, *S Kodar v State of Kerala*, 1974 SCC (4) 422 [1974].

[209] We would like to thank Rifat Azam for his contribution.

[210] Israeli Supreme Court, judgment of 15 November 1999, Kaniel v. The Government of Israel (Minister of Finance), HCJ 3975/95 [1999].

[211] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.

[212] WE Brownlee and E Ide et al, *The Political Economy of Transnational Tax Reform: The Shoup Mission to Japan in Historical Context* (2010) 1–2: 'General Douglas MacArthur, as Supreme Commander for the Allied Powers (SCAP) – in effect proconsul of Japan – delegated public finance economist Carl S Shoup, a professor at Columbia University, to head a mission to undertake a huge task – nothing less than a thorough reform of taxation in Japan. Shoup's specific charge was to frame a tax system that both strengthened the democratic state and accelerated the pace of capital investment and economic development in the nation. After each of their two visits, Shoup and his colleagues filed extensive reports, the first of which, accompanied by a Japanese translation, became foundational in the knowledge base of the post-war tax community in Japan.'

[213] H Kaneko, 'The Reform of Japanese Tax System in the Latter Half of the Twenty-First Century' in Foote (ed), *Law in Japan: A Turning Point* (2007) 564, 566.

[214] Ibid.

[215] Therefore, in CJEU, judgment of 12 May 1998, *Gilly*, case C-336/96, ECLI:EU:C:1998:221 [1998], paras 49–51, the existence of tax disparities prevented the CJEU from invoking the application of the ability-to-pay principle to personal deductions.

The boundaries of the ability-to-pay principle have been traditionally kept within the area of income taxation, with specific reference to the personal situation of individuals. Normally, in tax law, residents and non-residents are not in comparable situations when it comes to the benefit of taking into account these personal and family circumstances. However, in the case of non-residents who receive the major part of their income and almost all family income in a Member State other than that of residence, discrimination arises from the fact that their personal and family circumstances are taken into account neither in the state of residence nor in the state of employment.[216] The underlying concept is that such costs arising to the taxpayer must at least be taken into account once.[217] Taking into account personal and family allowances in the Member State where taxpayers receive the major part of their income and almost all family income is in accordance with the principle of symmetry. Such non-resident taxpayers must be considered equal with resident taxpayers.

In later judgments, this line of interpretation was expanded to mortgage[218] and situations involving third countries,[219] stating an obligation to grant such deductions also in the source state at least to the extent that a comparison could be drawn with residents of such country.

Judicial developments have gradually accepted that the ability-to-pay principle operates in connection with deductions not strictly related to the personal sphere of the taxpayer. In *Conijn*, the Court recognised the right to deduction of costs related to tax advisers. Thus, a similar approach applies to business expenses (objective net principle).[220]

The freedom of the Member States to allocate, between themselves, their powers to impose taxes must be reconciled with the necessity of assuring taxpayers that, ultimately, all their personal and family circumstances will be duly taken into account. Where self-employed persons receive taxable income within a number of Member States, other than that of residence, that reconciliation can be achieved only by permitting them to submit a claim for the right to deduct 'negative income' to each Member State of activity where that type of tax advantage is granted. Union law grants a right to deduction in proportion to the share of that income received within each such Member State.[221]

More recently, the CJEU has applied the ability-to-pay principle to legal persons in cross-border situations. In *Bevola*, the acknowledgement of this dimension culminated in a broader statement concerning the application of this principle to a situation involving 'final' losses, that is, of losses that could no longer be taken into account in the country where they arose.[222] In that regard, the CJEU has even used the ability-to-pay principle, taken together with the fundamental freedoms, to require a Member State, which does not have the corresponding taxing power to

[216] CJEU, judgments of 14 February 1995, *Finanzamt Köln-Altstadt/Schumacker*, case C-279/93, ECLI:EU:C:1995:31 [1995] paras 32, 38 and 41; of 12 December 2002, *de Groot*, case C-385/00, ECLI:EU:C:2002:750 [2002], paras 99–101 and the Opinion of Advocate General Léger of 20 June 2002, *de Groot*, ECLI:EU:C:2002:389 [2002], para 56; CJEU, judgment of 12 December 2013, *Imfeld and Garcet*, case C-303/12, ECLI:EU:C:2013:822 [2013], para 70; CJEU, judgment of 11 August 1995, *Wielockx*, case C-80/94, ECLI:EU:C:1995:271 [1995] para 18; and judgment of 14 March 2019, *Jacob and Lennertz*, case C-174/18, ECLI:EU:C:2019:205 [2019], para 26.

[217] On final losses, see CJEU, judgment of 12 June 2018, *Bevola and Jens W Trock*, case C-650/16, ECLI:EU:C:2018:424 [2018] paras 59 and 60.

[218] CJEU, judgments of 18 July 2007, *Lakebrink and Peters-Lakebrink*, case C-182/06, ECLI:EU:C:2007:452 [2007], para 34; and of 16 October 2008, *Renneberg*, case C-527/06, ECLI:EU:C:2008:566 [2008], para 59.

[219] CJEU, judgment of 18 June 2015, *Kieback*, case C-9/14, ECLI:EU:C:2015:406 [2015], para 23.

[220] CJEU, judgment of 13 March 2014 *Bouanich*, case C-375/12, ECLI:EU:C:2014:138 [2014] paras 35 and ff, CJEU, judgments of 6 July 2006, *Conijn*, case C-346/04, ECLI:EU:C:2006:445 [2006], paras 20 and ff; of 6 December 2018, *Montag*, case C-480/17, ECLI:EU:C:2018:987 [2018], paras 30 and ff, as well as the Opinion of Advocate General Kokott, *Brisal and KBC Finance Ireland*, case C-18/15, ECLI:EU:C:2016:549 [2016], nos 26 and ff.

[221] CJEU, judgment of 9 February 2017, *X*, case C-283/15, ECLI:EU:C:2017:102 [2017], paras 47 and ff; *cf* also Cordewener in Ismer/Reimer et al (eds), *Territorialität und Personalität, Festschrift für Moris Lehner*, (2019) 329 and ff, 348.

[222] CJEU, *Bevola and Jens W Trock*, cited, paras 39 and 59.

take into account the losses of an extraterritorial member of a group of companies.[223] However, the principle of equality, including the ability to pay, can, in principle, not be applied to situations involving more than one jurisdiction.[224]

In two cases, the CJEU has stated[225] that the existence of a progressive tax rate based on turnover for the application of a special tax falls within the discretion of each Member State. Therefore, even if the higher rate mostly affects (foreign) undertakings owned by natural or legal persons from other Member States, the progressive tax rate does not constitute discrimination. Such different treatment may serve taxation in accordance with the ability-to-pay principle. When introducing the special tax, the legislator did not objectively intend that foreign companies should mainly fall under the higher tax rate. This was rather incidental, and therefore, this tax did not inherently create any discrimination.[226]

Thus, the ability to pay is important under Union law. However, it is not a self-standing principle but rather a corollary of fundamental freedoms in certain constellations.

8.1.4.2.4.2. Russia[227]

From the point of view of the Constitutional Court of the Russian Federation, the principle of equality means taking into account a person's actual ability to pay taxes based on the legal principles of fairness and proportionality.[228] Equality should be achieved by fair redistribution of income and differentiation of taxes and fees. Since taxation always means certain restrictions on property rights, the laws on taxes and fees are subject to the provisions of Article 55, paragraph 3, of the Constitution of the Russian Federation. The rights and freedoms of a person and a citizen can be restricted by federal law only to the extent that it corresponds to certain constitutionally significant goals, that is, proportionate to them. Taxation that paralyses the exercise of constitutional rights by its citizens is considered disproportionate.[229]

The Constitutional Court of the Russian Federation has repeatedly developed and commented on this principle, expanding the scope of its application: ensuring informal employment of citizens requires keeping and accounting for the actual ability of a citizen (depending on their income) to pay an insurance premium, which, in fact, does not differ in nature from tax payments (on the basis of irrevocability and individual gratuitousness), in an appropriate amount (inadmissibility of excessive tax burden). When setting mandatory payment rates for certain categories of payers, the legislator must take into account the actual similarities and real differences between them and other categories of taxpayers.[230]

[223] CJEU, *Bevola and Jens W Trock*, cited, paras 39 and 59, with Opinion of Advocate General Campos Sánchez-Bordona of 17 January 2018, paras 38, 59, 60, 78; see also critical case note D Eisendle, *Internationale Steuer-Rundschau* ISR (2018) 126 and ff (in German).

[224] See above sec 8.1.1.

[225] In CJEU, judgment of 3 March 2020. *Tesco-Global Áruházak*, case C-323/18, ECLI:EU:C:2020:140 [2020], and CJEU, judgment of 3 March 2020, *Vodafone Magyarország*, case C-75/18, ECLI:EU:C:2020:139 [2020], Hungary introduced a special (progressive) tax for all companies in the telecommunication sector. In both cases, the aim of the law was 'to impose a tax on taxable persons who have an ability to pay that exceeds the general obligation to pay', CJEU, *Tesco-Global Áruházak*, cited, para 71; and CJEU, *Vodafone Magyarország*, cited, para 51.

[226] See CJEU, *Tesco-Global Áruházak*, cited, paras 70 and 74, and CJEU, *Vodafone Magyarország*, cited, paras 49, 51 and 56. In both cases, the tax was applicable to all companies irrespective of their registered office (in Hungary or another Member State).

[227] We would like to thank Karina Ponomareva for her contribution.

[228] Constitutional Court of the Russian Federation, judgment of 4 April 1996, no 9-P [1996] and judgment of 9 April 2001, no 82-O [2001].

[229] Arts 35, 55 and 57 of the Russian Constitution.

[230] Constitutional Court of the Russian Federation, judgment of 24 February 1998, no 7-P. This judgment is motivated in conformity with art 7, para 1, art 19, paras 1 and 2, art 39, para 1, art 55, paras 2 and 3, art 57 of the Constitution of the Russian Federation.

8.1.4.2.5. Oceania

The principle of fairness, or ability to pay, has been fundamental to the federal income tax system since its introduction in Australia in 1915, evidenced by the graduated rate scales applicable to individuals' personal exertion and property income under the first income tax act. The High Court of Australia[231] considered progressivity in the context of the federal land tax that operated from 1910, where a graduated rate of tax applied to the total value of interests in land held by the taxpayer. The taxpayer's challenge to the validity of the land tax under the Australian Constitution on this and other bases failed: the degree of progressivity or 'heaviness' of the tax was determined not to be a matter for the courts. The Australian government continues to examine the degree of progressivity in the system, and trade-offs are acknowledged.[232]

New Zealand introduced progressive income tax rates as early as 1891.[233]

8.1.5. Equity

The concept of equity has roots in Roman law and early common law. In both cases, it provided more flexible approaches to granting justice.[234] In general, equity is defined as 'fairness and impartiality towards all concerned'.[235] In taxation, the concept of equity has been used differently in international and domestic discussions of fairness. In addition, there are some discussions in the literature on the usefulness of these concepts to address fairness due to the lack of common understanding (inter-nation equity) or to lack of usefulness of these principles to steer international tax policy (horizontal and vertical equity).

At international level, *inter-nation equity* has been used as a principle to achieve a fair allocation of tax income and mainly to justify a certain tax income allocation between the country of source and country of residence.[236] However, some scholars argue that 'this principle has often been misused and misunderstood in the debate about redesigning the international tax regime'.[237] In order to use it as a normative principle to design the international tax regime, a common understanding of this principle is required, and its content should be explained in detail.[238]

In many jurisdictions, a distinction has been made between *horizontal and vertical equity*. Both concepts have been dealt with in the literature and sometimes as criteria of 'good tax'.[239] Public finance scholars such as Musgrave and Kaplow have defined horizontal equity as the requirement that equals be treated alike and vertical equity as requiring an 'appropriate' pattern of differentiation among non-equals.[240]

[231] High Court of Australia judgment of 31 May 1911, *Osborne v Commonwealth*, 12 CLR 321 [1911].

[232] See, eg Australian Government, Treasury Working Paper 2019-05, 'Recent Personal Income Tax Progressivity Trends in Australia' (September 2019).

[233] *cf* R Vosslamber, 'Taxation for New Zealand's future: The introduction of New Zealand's progressive income tax in 1891' (2012) 17(1) *Accounting History* 105–22.

[234] *cf* eg M Illmer, 'Equity', *Max-Planck-Institut für Ausländisches Internationales Privatrecht* in J Basedow, KJ Hopt and R Zimmermann (eds), *Handwörterbuch des Europäischen Privatrecht* (Mohr Siebeck, 2009), http://hwb-eup2009.mpipriv.de/index.php/Equity.

[235] www.businessdictionary.com/definition/equity.html.

[236] P Hongler, *Justice in International Tax Law* (IBFD, 2019), 407.

[237] P Hongler, *Justice in International Tax Law* (IBFD, 2019), 407.

[238] P Hongler, *Justice in International Tax Law* (IBFD, 2019), 410.

[239] For instance, regarding horizontal equity, see D Elkins, 'Horizontal Equity as a Principle of Tax Theory' (2006) 24 *Yale Law & Policy Review* 43.

[240] IJJ Burgers and IJ Mosquera, 'Fairness: A Dire International Tax Standard' 769. See also RA Musgrave, *The Theory of Public Finance*,(1959) 160; L Kaplow, 'Horizontal Equity: Measures in Search of a Principle', Discussion Paper no 8 5/85, *Harvard*

Horizontal equity requires that individuals with the same income should pay the same tax.[241] Vertical equity has generally been thought to require a progressive rate structure that imposes progressively higher rates on individuals with higher incomes.[242] In the literature, there are different views regarding the use of vertical and horizontal equity as tools for tax policy.

According to McDaniel and Repetti, neither horizontal nor vertical equity have any independent normative content since the 'content must be supplied by reference to economic assumptions and a theory of justice'.[243] Repetti and Ring, when analysing this argument, concluded that 'vertical equity and horizontal equity are together a single concept which lacks normative content and is itself only a proxy for theories of distributive justice and morality. It is a detour in history that led us to frame the issues of equality and fairness in the tax system in the language of vertical equity and horizontal equity'.[244]

Regarding horizontal equity, Elkins argues that its normative grounds are problematic, and therefore, the normative justification of horizontal equity should depend 'upon the moral entitlement of each individual to his free-market holdings'. Therefore, 'horizontal equity, if justifiable must derive from the conception that a person is morally entitled to his or her pre-tax level of well-being, and that the state, through its tax structure, must respect that position'.[245] Thus, as argued by Burgers and Mosquera, one of the challenges in defining horizontal equity requirements is that these requirements 'can only be satisfied in respect of income taxes if individuals have identical tastes and a single type of ability or income and if it can be determined which differences are important and why these differences justify different tax treatment'.[246]

Regarding vertical equity, it is not clear what constitutes 'appropriate' differences in treatment.[247] For instance, Repetti and Ring have argued for the importance of addressing a theory of distributive justice. Referring to McDaniel and Repetti, these authors stated that 'vertical equity, by itself does not lead to the conclusion that we need a progressive income tax. It is necessary to refer to an underlying theory of justice and to make some key economic assumptions in order to conclude that a progressive rate structure is desirable'.[248]

At an international level, it becomes even more difficult to use these principles for tax policy decisions. The main reason lies in the fact that international tax policy has to deal with persons in different societies and different basic structures. This makes it difficult to draw the right comparison both in a horizontal and vertical perspective as we are comparing persons in different societies and different basic tax structures. Therefore, both horizontal and vertical equity might lack a normative base for the purpose of designing the international tax regime.[249]

Law School (1989) 2 *Nal'l Tax J* 139, www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_8.pdf; quoted by PR McDaniel and J Repetti, 'Horizontal and Vertical Equity', www.lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1706&context=lsfp.

[241] J Repetti and D Ring, 'Horizontal Equity' 136.

[242] J Repetti and D Ring, 'Horizontal Equity' 136.

[243] McDaniel and Repetti, 'Horizontal and Vertical Equity' 621, www.lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1706&context=lsfp.

[244] J Repetti and D Ring, 'Horizontal Equity' 155.

[245] D Elkins, 'Horizontal Equity as a Principle of Tax Theory' 87.

[246] IJJ Burgers and IJ Mosquera, 'Fairness: A Dire International Tax Standard' 769.

[247] R Bird and E Zolt, 'Introduction to Tax Policy Design and Development, prepared for a course on Practical Issues of Tax Policy in Developing Countries' (28 April–1 May 2003) *World Bank*, sec 3, available at www.gsdrc.org/document-library/introduction-to-tax-policy-design-and-development/.

[248] J Repetti and D Ring, 'Horizontal Equity' 139, also referring to PR McDaniel and J Repetti, 'Horizontal and Vertical Equity' 610.

[249] See for details Hongler, *Justice in International Tax Law* (IBFD, 2019), 393 and ff.

Notwithstanding the above, in the discussion of fairness and individual taxpayers' rights, one element addressed by governments, international and supranational organisations and NGOs refers to the need for fair and equitable taxation to prevent aggressive tax planning, tax avoidance, tax evasion and tax fraud.[250] To achieve these goals, an exchange of information (EoI) should take place in a timely and effective manner.[251] Therefore, many countries have changed or repealed the notification to taxpayers.[252] Such an approach to fair and equitable taxation affects taxpayers' rights.

The question, therefore, is how to reconcile fair and equitable taxation with the protection of taxpayers' rights. Simonek has rightly argued that there should be a balance between EoI and taxpayers' procedural rights. For Simonek,

> a denial of any procedural rights to the person concerned in the information-supplying state may seriously affect his legitimate rights and interests. Further, such a denial is not necessary in order to guarantee an effective exchange of information process. A judicial review of the exchange of information in the requested state could be combined with measures to avoid undue delays.[253]

8.1.6. The Different Expressions of the Principle of Equality in Tax Law

8.1.6.1. Introductory Remarks

There are many expressions of the principle of equality in tax law.

First, the general principle of equality as such is of paramount importance in tax law since it preserves equal treatment, including equal enforcement of taxes due by all taxpayers. Second, the ability-to-pay principle, expressly recognised in some national Constitutions,[254] is a more specific expression of the principle of equality. Third, the principle of equality implies competition neutrality. And fourth, it secures fairness and justice across all taxpayers. The following paragraphs will summarise the different expressions of the principle of equality in tax law around the globe.

8.1.6.2. The General Principle of Equality

The general principle of equality requires formal equality between taxpayers before the law and establishes the main reference framework for the legislator. It applies to individual and corporate taxpayers. The principle of equality binds the legislator to treat similar situations alike for tax purposes and different situations differently. It also requires tax authorities to apply tax law in an equal way in respect of all taxpayers and implies, at the same time, consistent treatment

[250] IJJ Burgers and IJ Mosquera, 'Fairness: A Dire International Tax Standard' 773.

[251] For EoI on request, a 90 day time limit has been used, OECD, *Terms of Reference in Exchange of Information on Request: Handbook for Peer Reviews 2016–2020* (OECD Publications, 2016), paras 10 and 15, www.oecd.org/tax/transparency/global-forum-handbook-2016.pdf, 17, 23.

[252] For instance, the IFA 2015 general reporters referred to the branch reports for Austria, Liechtenstein, the Netherlands, Portugal, Switzerland and Uruguay stating that the procedure to notify the taxpayer including the possibility to challenge the EoI have been removed entirely or cut down. In all cases, the removal of the right to notification and to challenge came about as a result of pressure from the OECD Forum on Transparency and EoI, and as a result of a threat to give a lower peer review rating to the countries concerned, see P Baker and P Pistone, *General Report – The Practical Protection of Taxpayers' Rights*, vol 100B (2015) 60 and 62. See also sec 5.3.2. of this book on the right to judicial protection.

[253] M Simonek, 'Taxpayers' rights in the international exchange of information procedure: where is the right balance? Special issue IFA 2015' (May–June 2015) 83 *Archives de Droit Fiscal Suisse* 877.

[254] See, for instance, Brazil, Greece, Italy and Spain.

of all taxpayers, including, in some cases and generally in the EU, among residents with different nationalities[255] insofar as they are in a similar situation. The general principle of equality also includes the requirement of equal implementation of tax law. That means effective implementation in order to protect cooperative taxpayers from being burdened with the share of aggressive tax planners. National constitutions guarantee equality either to all persons or only to nationals. Some constitutions, however, guarantee equal protection of the law and equality before the law to all persons, whereas the general principle of equality, which also binds the legislator, is reserved to nationals. Other, notably African, constitutions are ambiguous regarding the application of the constitutional principle of equality to the area of tax. The underlying idea may be to avoid restricting the legislature's discretion in that area.

8.1.6.3. Ability to Pay

The ability-to-pay principle is recognised as a general principle of law applicable to taxation in the constitutional orders of the world. It establishes a connection between the taxpayers' economic and personal situation (ie the ability to pay) and their obligation to contribute to the state budget. It can be used to guarantee equal fair sharing of the tax burden among taxpayers.[256] The ability to pay is also linked to progressive taxation.[257] It applies to individuals and, in some countries, also to legal persons.[258] It applies to direct taxes (income tax) and indirect taxes (eg VAT).[259] The CJEU has accepted a progressive tax rate based on turnover on legal persons that falls within the discretion of each Member State.[260]

Moreover, the ability to pay can be useful to guarantee sufficient time between the taxable event and the payment of tax. The ability-to-pay principle can also be invoked to provide a different treatment between single taxpayers and taxpayers with dependent family members. Conversely, the ability to pay may also serve to justify higher tax burdens.[261]

It is not clear whether there should be an international, cross-border application of the ability-to-pay principle in tax matters. The CJEU applies the ability-to-pay principle to situations where more than one jurisdiction is involved, though only in the framework of the basic freedoms.[262]

In the international scenario, the ability to pay could be invoked against double taxation. To tax the same event more than once has nothing to do with taxation according to the principle of ability to pay. Moreover, it burdens taxpayers who operate across borders. This conflicts with the principles underlying the EU single market and the World Trade Organization (WTO) system.

[255] See, for instance, the introduction of a 15% tax rate to non-Australian nationals with specific immigration status, ie working holidaymakers, whereas income is tax-free for Australian nationals. The Australian court held that this violated art 25 of the tax convention between Australia and the UK, in Federal Court of Australia, *Addy v Commissioner of Taxation*, FCA 1768 [30 October 2019]. In the EU, the non-discrimination principle prohibits discrimination of nationals of the other Member States and between nationals of the different Member States. Non-discrimination under the freedom of capital movement even applies with regard to third-country nationals.

[256] For instance, Australia and Brazil linked the principle of equality to the ability to pay.

[257] For a different view see J Hey, 'Steuersystem und Steuerverfassungsrecht' para 3.62 and ff and para 3.131.

[258] eg Hungary and Poland. The EC considers progressive turnover-based taxation 'State aid' to companies with a lower turnover. This view has been rejected in CJEU, judgment of 16 March 2021, cases C-562/19 P, *Commission/Poland*, ECLI:EU:C:2021:201 [2021] and C-596/19 P, *Commission/Hungary* ECLI:EU:C:2021:202 [2021].

[259] Constitutional Court of Colombia, case C-593/19, cited, J Englisch in Lang, Melz and Kristofferson, *Value Added Tax and Direct Taxation* 1 and ff and 20 and ff. However, some scholars reject this view.

[260] *cf* above sec 8.1.4.2.4.1.; CJEU, *Tesco-Global Áruházak*, cited, para 70 and ff, 71, 74 and CJEU, *Vodafone Magyarország*, cited, paras 49 and ff, 51 and 56.

[261] With regard to tax progression *cf* Supreme Federal Court of Brazil, extraordinary appeal no 562045/RS, cited.

[262] *cf* above at sec 8.1.4.2.4.1. In CJEU, *Gilly*, judgment of 12 May 1998, C-336/96, paras 49–51, the existence of tax disparities prevented the CJEU from invoking the application of the ability-to-pay principle to personal deductions.

However, it is difficult to apply the principle of equality, including its specific expression of the ability to pay, where more than one tax jurisdiction is involved. The reason for such difficulty is that remedying double taxation requires either the determination of *one* responsible state or close cooperation between the two states concerned. Both approaches are difficult for the judiciary to implement.

Nevertheless, there is more and more discussion about the principle of single taxation at international level. Such a principle could lead to more taxation in line with the ability to pay, this time with a concept that stretches across borders.

8.1.6.4. Competition Neutrality

The principle of equality in competition in tax law serves to prevent distortions of competition. Tax should not be the determining factor influencing business decisions. Taxpayers in comparable situations, with comparable transactions and comparable products should be treated equally. The legislator has a wide discretion, but there must be no arbitrary distinctions. Generally, there is judicial restraint when applying the principle of equality, including competition neutrality, to tax legislation. Nevertheless, the Colombian Constitutional Court, for example, has held that higher taxation through a cascading consumption tax constitutes inadmissible discrimination based on the length of the production chain.[263]

At international level, neutrality can be a challenge since it is difficult to have the same tax rates worldwide. However, some attempts have been made in the BEPS project to harmonise taxation so that it is not driven by harmful tax competition.[264] The recent GLOBE proposal aims to prevent a race to the bottom regarding tax rates and to establish a level playing field by minimum taxation. This new proposal is a challenge since it may conflict with the principle of tax sovereignty. It may factually restrict the freedom of each country to determine the contours of its tax policy and the extent to which it may use its tax system to pursue legitimate regulatory goals.

8.1.6.5. Tax Justice, Fairness, Equity

Finally, the principle of equality provides a framework for an underlying theory of justice, whereby taxpayers can be treated as equals (horizontal equity) or with an appropriate pattern of differentiation among non-equals (vertical equity). However, this is controversial.[265]

If there were international minimum taxation (as currently discussed), one question that would need to be addressed is how to share efficiency gains from this tax among countries. In concrete terms, this means that additional revenue resulting from the compensation of lower taxes in the residence state of an investor should not necessarily stay in such country but possibly also be shared with others, including, in particular, the country where such income is sourced. This relates to fairness in the relations between states, also known as inter-nation equity. Even if the latter is an important tax policy objective,[266] it falls outside the scope of Part I of our study.

[263] Constitutional Court of Colombia, case C-593/19, judgment of 5 December 2019.
[264] See Action 3 introducing CFC rules and Action 5 preventing harmful tax competition.
[265] See PR McDaniel and J Repetti, 'Horizontal and Vertical Equity' 621, and J Repetti and D Ring, 'Horizontal Equity' 155 and above 8.1.5.
[266] See K Brooks, 'Inter-Nation Equity' 487 and ff.

8.2. Data Protection Rights

8.2.1. General Issues Regarding Data Protection in Tax Matters

The right to data protection has gradually emerged as a separate individual right from privacy and confidentiality. The human right to privacy has been the object of protection at the constitutional level for much longer than that of its specific expression related to data. Almost all Constitutions in the world guarantee the right to privacy; some explicitly guarantee a right to data protection.[267] Even today, not all legal systems have specific rules on data protection. In those missing such rules, protection is indirectly achieved at an interpretative level through the right to privacy. The Indian Supreme Court even derives the right to privacy, including data protection, from the fundamental rights to life and liberty.[268] However, more and more states explicitly grant data protection. For instance, the 1974 US Privacy Act protects the right to non-publication of data concerning taxpayers within the framework of the right to privacy. The EU issued the General Data Protection Regulation (GDPR), which ensures extensive protection.[269] The judiciary has considerably contributed to the development of effective data protection. In 1983, the German Federal Constitutional Court[270] 'invented'[271] the fundamental right to data protection, which has since become guaranteed in most Constitutions of the world. Even if this is not explicitly stated in the Constitution, almost all legal systems respect the taxpayers' right to confidentiality of information they share with the tax authorities.[272] More recently, the increased risks connected with digitalisation have induced a global trend towards the recognition of the need for special legal instruments on data protection, which usually take place in the form of data privacy acts and, in some cases, also of constitutional provisions. Such a trend is creating the grounds for the development of customary international law in this respect. The protection of tax-related information may become an international minimum standard.

The individual right to data protection raises specific issues in connection with the collective right of tax authorities to gather all relevant information for conducting tax audits and collecting taxes (also known as tax transparency) and exchange them with the authorities of other states worldwide. Tax authorities have the right to be provided with all information necessary and proportionate for the correct assessment of the amount of tax in order to assure fair taxation. The individual right to data protection and the legitimate public interest in tax transparency operate concurrently in tax matters, thus requiring a balanced approach that secures their core values. Moreover, taxpayers should not be unduly exposed to the risks of data leaking. The latter circumstance may play a role in creating the legal basis for the establishment of a reliable data protection system[273] and in limiting the transfer of data to tax authorities of states that do not provide an equivalent standard, or at least one that complies with a minimum level of effective

[267] eg arts 45 and 46 of the Constitution of Cape Verde; art 1.6. of the Constitution of Gabon; art 27 of the Constitution of the Comoros; art 71 of the Constitution of Mozambique; arts 31(c) and 35(2) of the Constitution of Kenya.

[268] Supreme Court of India, judgment of 24 August 2017, *KS Puttaswamy v Union of India*, 10 SCC 1 [2017].

[269] See further on this under sec 8.2.2.4.1.1.

[270] German Federal Constitutional Court, judgment of 15 December 1983 *(Volkszählung, census)*, 1 BvR 209/83, 1 BvR 269/83, 1 BvR 362/83, 1 BvR 420/83, 1 BvR 440/83 and 1 BvR 484/83, ECLI:DE:BVerfG:1983:rs19831215.1bvr020983 [1983], (in German).

[271] Frankfurter Allgemeine Zeitung, *Ein Neues Grundrecht ist Erfunden* (17 December 1983), (in German).

[272] See in general IFA, *The Practical Protection of Taxpayers*.

[273] A good practice to secure the effectiveness of data protection in respect of the action by tax officials is to apply sanctions in case of violations of such rules. See P Baker and P Pistone, *General Report – The Practical Protection* 29, who indicate that this type of mechanism already applies in some countries.

protection of data. Under BEPS, the balance is in favour of tax transparency. Many states have abolished notification and hearings for taxpayers whose data are transferred. Often, data are transferred automatically in any case. However, some court decisions require judicial protection even in the framework of cross-border cooperation of fiscal authorities.

The following section addresses the individual right to data protection, taking into account the different geographical regions and the special problems arising with regard to mutual assistance, followed by some conclusions.

8.2.2. Taxpayers' Data Protection Rights in Different Regions

8.2.2.1. Africa[274]

The African Union Convention on Cyber Security and Personal Data Protection is an international legal instrument entered into by the members of the African Union (AU), including Nigeria.[275] This Convention aimed to address the need for synchronised legislation in the area of cyber security in the Member States of the AU and established in each party a mechanism capable of combating violations of privacy that may be generated by personal data collection, processing, transmission, storage and use.[276]

Nearly all African Constitutions guarantee the fundamental right to privacy[277] but only very few deal with data protection specifically.[278] Privacy is most often understood as the inviolability of the home, freedom of searches and privacy of correspondence. A small number of Constitutions limit the right to privacy to only natural persons and/or their homes, suggesting that such a limited right would have minimal value in regard to taxation. However, where data protection is provided, it may specifically refer to computerised data. For example, the Constitutions of Cape Verde and Mozambique contain comprehensive provisions on the use of computer resources and protection of personal data as well as on *habeas data*. Access to data and the right to correct and update are provided. Access to databases or computerised archives, files and records archives, filing systems or for obtaining databases as a domain for personal data related to third parties, as well as the transfer of personal data from one computerised file filing system to another pertaining to different services or institutions shall be prohibited except in cases established by law or by judicial decision. Under no circumstance shall a unique number be assigned to citizens.[279] This should, however, not exclude the attribution of VAT numbers to economic operators.

[274] We would like to thank Johann Hattingh and Attiya Waris for their contribution.

[275] www.webfoundation.org/docs/2018/03/WF_Nigeria_Full-Report_Screen_AW.pdf.

[276] Ibid.

[277] *cf* eg Constitutions of Algeria, arts 46 and 47; Angola, arts 32–34; Benin, arts 20 and 21; Botswana, s 9; Burkina Faso, art 6; Burundi, arts 28 and 43; Cape Verde; Central African Republic, arts 16 and 19; Chad, arts 46 and 49; Comoros, arts 26 and 27; Democratic Republic of Congo, arts 29 and 31; Republic of Congo, arts 20 and 26; Ivory Coast, art 8 (only inviolability of the home); Djibouti, arts 12 and 13; Egypt, arts 57 and 58; Equatorial Guinea, art 13(1)(g); Eritrea, art 18; Eswatini, art 14(1)(c) (only in respect of an individual's home); Ethiopia, art 26; Gabon, arts 1.5. and 1.12; Gambia, s 23; Ghana, s 18; Guinea, art 12; Guinea-Bissau, art 48; Kenya, art 31; Lesotho, arts 10 and 11; Liberia, art 16; Libya, arts 11–13; Madagascar, art 13; Malawi, s 21; Mali, art 6; Mauritania, art 13(4); Mauritius, s 9; Morocco, art 24; Mozambique, art 41; Namibia, art 13; Niger, arts 27 and 29; Nigeria, art 37; Rwanda, art 23; Sao Tomé and Principe, arts 24 and 25; Senegal, art 13 and 16; Seychelles, s 20; Sierra Leone, art 22; Somalia, art 19; South Africa, s 14; South Sudan, art 22; Sudan, art 55; Tanzania, art 16; Togo, arts 28 and 29; Tunisia, art 24; Uganda, art 27; Zambia, art 17; Zimbabwe, art 57.

[278] Constitutions of Cape Verde, arts 42 and 43, and Comoros, art 27(2).

[279] Arts 45 and 46 of the Constitution of Cape Verde; see also art 71 of the Constitution of Mozambique: '1. The use of computerised means for recording and processing individually identifiable data in respect of political, philosophical or ideological beliefs, of religious faith, party or trade union affiliation or private lives, shall be prohibited. 2. The law shall regulate the protection of personal data kept on computerized records, the conditions of access to data banks, and the

So far, around half of the African countries have adopted laws and regulations to protect personal data until now.[280] The EU GDPR has inspired some of them.[281] For example, Nigeria, the continent's biggest economy and most populated country, adopted its first Data Protection Regulation (NDPR) in early 2019. Based on the NDPR, a data controller is required to only transfer data to a foreign country or international organisation subject to the supervision of the Nigerian Information Technology Development Agency (NITDA) and the Attorney General of the Federation. In some countries, the transfer of personal data is, in principle, prohibited unless the receiving country provides sufficient protection to data subjects' private life, liberties, and fundamental rights.[282] Such a transfer may require prior notification of a data protection authority, which may be required to establish a list of countries that offer sufficient protection. Data transfer to other countries which lack sufficient protection can possibly be subject to authorisation by a data protection agency in the transferring country.[283]

South African courts recognise the fundamental issue of taxpayer confidentiality which the Tax Commissioner is by law compelled to uphold for the benefit of all the taxpayers.[284] The underlying reason for not lightly directing an official of the Revenue Service to divulge information imparted to him by a taxpayer is a public policy common to many tax systems. South African jurisprudence expresses it as follows: 'The legislature has thought it desirable to encourage full disclosure of their affairs by taxpayers, even by those who carry on illegal trades or have illegally come by amounts qualifying as gross income. This object might easily be defeated [if] orders were freely made for disclosure of those communications'.[285]

The limits of disregarding confidentiality in the name of public interest have been tested in a ruling by the Gauteng Division of the High Court of South Africa, delivered on 23 March 2020.[286] The Court denied the Public Prosecutor access to taxpayer information held by the South African Revenue Service about the country's former president. The parties disputed the Public Prosecutor's possibility to subpoena tax authority officials to disclose taxpayer information that is legally deemed confidential without being previously authorised by a court of law. The Court ruled that 'the powers given the Public Protector to subpoena a witness to give evidence or to produce a document may not be invoked to coerce that witness to violate the law under which such a witness operates', granting the tax authorities relief against the Public Prosecutor's request on the ground of taxpayer information confidentiality.

creation and use of such data banks and information stored on computerised media by public authorities and private entities. 3. Access to data bases or to computerised archives, files and records for obtaining information on the personal data of third parties, as well as the transfer of personal data from one computerised file to another that belongs to a distinct service or institution, shall be prohibited except in cases provided for by law or by judicial decision. 4. All persons shall be entitled to have access to collected data that relates to them and to have such data rectified.'; art 27 of the Constitution of Comoros: 'The law guarantees the protection of individual computer data.'; art 1.6. of the Constitution of Gabon: 'Limits to the use of computing technology may be fixed by the law in the interest of preserving personhood, one's personal and familial intimacy, and the full exercise of one's rights'; arts 31(c) and 35(2) of the Constitution of Kenya: 'Every person has the right to the correction or deletion of untrue or misleading information that affects the person.'

[280] Out of 53 African countries, the following have adopted special data protection rules: Kenya, Data Protection Act 2019; Nigeria, Data Protection Regulation 2019; Senegal, Law No 2008-12 of 25 January 2008 Concerning Personal Data Protection; South Africa, The Protection of Personal Information Act 4 of 2013; Tunisia, Loi portant sur la protection des donnees a caractere personnel, 2004.

[281] *cf* sec 8.2.2.4.1.1.

[282] *cf* eg Senegal, Data Protection Law, art 49.

[283] This occurs in Senegal under art 49 of its Data Protection Law.

[284] High Court of South Africa, Gauteng Division, Pretoria, *SARS v Public Protector and others*, case 84074/2019, ZAGPPHC 33, 2 All SA 427 [2020], para 39, available at www.saflii.org/za/cases/ZAGPPHC/2020/33.html.

[285] High Court of South Africa, Gauteng Division, Pretoria, *SARS v Public Protector and others*, cited, para 44 with refs.

[286] High Court of South Africa, Gauteng Division, Pretoria, *SARS v Public Protector and others*, cited.

8.2.2.2. Americas

8.2.2.2.1. The Inter-American System for the Protection of Human Rights

The American Convention on Human Rights (ACHR) does not contain a specific right to data protection. The right to privacy laid down in Article 11 prohibits interference with a person's 'private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation'. The ACHR has not derived a specific right to data protection or *habeas data* from that provision.[287]

8.2.2.2.2. Latin America

8.2.2.2.2.1. The Andean Community

In 2004 the Andean Community adopted a decision on the prevention of double taxation and tax evasion.[288] It includes clauses on mutual assistance in the EoI[289] and recovery of taxes.[290] According to Article 19, the information exchanged shall be secret and may not be transmitted to any person other than the authorities responsible for administering the taxes. Even though taxpayers do not participate in mutual assistance, their right to data protection is taken into account.

8.2.2.2.2.2. Argentina[291]

In Argentina, the right of access to personal data is protected by Article 43(3) of the Argentine Constitution. This right allows taxpayers to protect themselves against possible abuses by the state of the use of taxpayers' private information.

Likewise, the right to the protection of personal data is regulated.[292] Current legislation establishes that, in tax matters, this right is limited by the content of the information and the purpose of the use of the data for fulfilling any tax obligations.

Therefore, in tax matters, information on taxpayers' personal data has both constitutional and legal protection. However, disclosing such information may be denied by public or private institutions, such as banks or financial institutions, when the mere act of providing the taxpayers' personal information might hinder judicial or administrative proceedings related to the fulfilment of tax obligations.[293] Correspondingly, the Argentine Supreme Court held that the Argentine tax authority lacks legal standing to provide information on taxpayers' personal data, under Article 43(3) of the Argentine Constitution, if, for example, the mere act of requesting disclosure might hinder such proceedings.[294]

Thus, the personal data protection law provides for the protection of taxpayers' personal data and free access to their information for the purpose of protecting taxpayers' constitutional rights.

[287] *cf* also J Wolfson, 'The Expanding Scope of Human Rights in a Technological World – Using the Inter-American Court of Human Rights to Establish a Minimum Data Protection Standard Across Latin America' (2017) 48(3) *University of Miami Inter-American Law Review* 188 and ff.

[288] Andean community, decision 578 of 4 May 2004. The Member States of the Andean Community are Bolivia, Colombia, Ecuador and Peru. At the time of the decision, it also included Venezuela.

[289] See art 19 of Decision 578.

[290] See art 21 of Decision 578.

[291] We would like to thank Eduardo A Baistrocchi for his contribution.

[292] Law 25, 326.

[293] S 17 of law 25, 326 – Ley de Protección de los Datos Personales en Argentina.

[294] Argentine Supreme Court, *Empresa de Combustible Zona Común SA c Administración Federal de Ingresos Públicos*, judgment: 332:770 [2009].

However, in tax matters, the exercise of such a right is restricted when its application hinders compliance with the payment of a tax.

When analysing whether financial institutions should disclose their clients' information to the tax authorities, the Supreme Court of Justice of Argentina stated that this obligation is limited by the content of the information and the purpose of using the data for compliance with tax obligations. It stated that data protection must be ensured in light of the taxpayers' constitutional guarantees.[295]

8.2.2.2.2.3. Brazil[296]

Data protection, including in tax matters, applies in Brazil within the more general framework of the right to privacy[297] and is subject to limitations in connection with the powers of tax authorities to gather information required for the exercise of taxing powers.

The tax authorities have the power to request information from individuals and entities responsible for paying tax, as well as third parties (eg financial institutions, public notaries, brokers, auctioneers, administrators of an estate).

The Brazilian Federal Supreme Court has held that, even in the absence of prior judicial authorisation, there is no disproportionate breach of the right to privacy insofar as tax authorities do not disclose the information to the general public. In this case, there would be a mere transfer of the duty of confidentiality of intermediaries to the tax authorities. Furthermore, the protection of the general interest, backed up by the international movement towards tax transparency, is sufficient to justify restrictions on the protection of the right to privacy, in particular bank secrecy. Nevertheless, the Brazilian Federal Supreme Court derived the following requirements from the taxpayers' right to privacy: (1) the right to a prior administrative procedure; (2) the necessity of the information for the current investigation; (3) the ratification of the request for information by a higher tax official; (4) the safety of the government's system; (5) the system of record that controls who has accessed the information; (6) a punishment in case of disclosure of tax secrets.[298]

Moreover, the Brazilian Superior Court of Justice[299] and the Brazilian Federal Supreme Court[300] have decided that the information exchange between the Secretariat of the Federal Revenue of Brazil and federal prosecutors – for criminal investigation – after the conclusion of the tax administrative procedure is legal.[301]

8.2.2.2.2.4. Chile[302]

Tax information is protected by Article 35 of the Chilean Tax Code.[303] It points out the special treatment that the tax legislator granted to tax privacy. Along with other rules, it establishes a system of protection and safeguarding for the information obtained by the administration facing its disclosure to third parties. The use and transfer of tax information are restricted by a statute

[295] Argentine Supreme Court, *Instituto de Informaciones Comerciales Paraná c Dirección Gra. Impositiva*, cited.

[296] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[297] Art 5(X) of the Brazilian Constitution.

[298] Supreme Federal Court of Brazil, extraordinary appeal of 24 February 2016 no 601314/SP.

[299] Superior Court of Justice of Brazil, interlocutory appeal in the special appeal of 20 September 2018, no 1601127/SP [2018].

[300] Supreme Federal Court of Brazil, extraordinary appeal of 28 November 2019, no 1055941/SP [2019].

[301] Art 83 of Act No 9430/1996.

[302] We would link to thank Yuri Varela for his contribution.

[303] Art 35 of the Chilean Tax Code reads: 'The Director and other Chilean Tax Administration employees shall not be able to circulate, the amount or source of the revenues nor the losses, expenses or any data related to it, determined in the obligatory representations, under any form; nor shall allow these or their copies or books or papers containing extracts or data taken from them to be known by any person foreign to the Tax Administration, except when necessary for the fulfillment of the statements in the Code herein or other legal rules'.

of limitations. Under this confidentiality regime, records in the possession of the tax administration are kept from being used for purposes other than those strictly determined by the administration. In this manner, the general prohibition on disclosure and use for purposes other than those strictly determined by the administration protect the essential content of the privacy right, personal intimacy and personal data without interfering with the protection of other legally protected assets with constitutional value.

8.2.2.2.2.5. Peru[304]

Taxpayers' right to data protection is recognised in the Peruvian Constitution, including the so-called tax reserve.[305] The tax reserve is defined as the duty to preserve the confidentiality of data and documents revealed to the tax administration by taxpayers.[306] It is supported by the fundamental right to privacy,[307] the same that is projected as a limit to the illegitimate disclosure of facts or private documents.

The Peruvian Constitutional Court[308] has established that the tax reserve constitutes

> a limit to the use of data and information by the Tax Administration, and guarantees that the data and information of the taxpayers, relative to the economic and fiscal situation, are kept in reserve and confidentiality, not being given any other use than that which is not for the strict fulfillment of their purposes.

Notwithstanding, this protection has limitations. The tax reserve is further defined in the Peruvian Tax Code. It recognises that tax debtors have the right to confidentiality of the information provided to the Tax Code, but with exceptions, for example, the academic use of files of completed tax procedures, the use of financial information for the publication of global statistical data, the information requested by the Central Government regarding its claims for taxes and the EoI with tax administrations of other countries.

The Peruvian Constitution states that the tax reserve may be lifted at the request of a judge, the national prosecutor or a congressional investigating commission as long as it is relevant to a case under investigation.[309]

That Court[310] has also noted that neither bank secrecy nor the tax reserve is part of the essential content of the fundamental right to privacy. In this sense, the transmission of personal information related to tax matters does not violate the right to tax reserve as long as it is reasonable and proportional, maintains its confidential nature and is intended to fulfil legitimate purposes. The main implication of that decision is that taxpayer information related to tax reserve is not protected or private in view of information exchanges with foreign tax administrations related to the legitimate purpose of fighting tax avoidance and evasion. Therefore, taxpayers will not have the right to confidentiality and reservation of the tax information required or automatically exchanged with foreign administrations within the context of international tax conventions.

8.2.2.2.2.6. Mexico[311]

Mexico has no specific fundamental right to data protection but uses the fundamental right to privacy of Article 6 of the Mexican Federal Constitution to protect taxpayers' confidential information, supplemented by the additional legal framework established in Article 69 of the Mexican Federal Tax Code (MFTC).

[304] We would like to thank Cecilia Delgado Ratto for her contribution.
[305] Art 2(5) of the Peruvian Constitution.
[306] Peruvian Constitutional Court, judgment of 4 March 2016 no 009-2014-AI/TC [2014], para 14.
[307] Peruvian Constitutional Court, judgment no 009-2014-AI/TC, cited, para 15.
[308] Peruvian Constitutional Court, judgment of 29 January 2002 no 009-2001-AI/TC [2001].
[309] Art 2, sub-s 5 of the Peruvian Constitution.
[310] Peruvian Constitutional Court, judgment of 31 January 2011 no 02838-2009-PHD/TC [2011], para 14.
[311] We would like to thank Diana Bernal for her contribution.

Article 69 MFTC establishes the obligation of the authorities to preserve the confidentiality of tax returns and data. Official staff intervening in the various procedures related to the application of tax provisions are required to maintain in absolute secrecy the returns and information furnished by taxpayers or third parties related to them, as well as the information obtained when they exercise review powers.

This obligation of secrecy does not apply to certain cases set forth in tax laws and those in which information must be furnished to officials in charge of the management and defence of federal tax interests, judicial authorities in criminal cases, among other exceptions.

8.2.2.2.3. The Caribbean[312]

Caribbean Constitutions and case law recognise the right to privacy, which focuses on the uninterrupted enjoyment of property and the right to private and family life. Such provisions also mirror the International Convention on Civil and Political Rights, which is enacted into the domestic law of the Member States. Violation of such rights can result in a constitutional motion against the state as well as a claim for damages. It may also be possible to seek other equitable legal remedies such as injunctive relief.

8.2.2.2.4. United States[313]

The protection of confidentiality in the US applies in respect of the power of tax authorities to collect information and the overall right to privacy, which prevents the disclosure of taxpayers' confidential information.[314]

The Fourth Amendment protects taxpayers' rights in the context of the power of tax authorities to collect information by prohibiting unreasonable searches and seizures and providing that 'no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized'. The failure to obtain such a warrant will usually result in the suppression of improperly obtained evidence.

Similar to the interaction between information exchange and data protection, the interaction between public dissemination and data protection gives rise to conflict. On the one hand, public disclosures are meant to enhance the effectiveness of tax collection because the public can see the extent of non-compliance. On the other hand, the confidentiality of taxpayer information encourages them to 'voluntarily' provide essential information for effective tax administration. This conflict poses a challenge for every tax administration. The issue has been addressed extensively in the US for many years. The result was a basic shift of philosophical premises and a detailed regime for dealing with the issue.

Faced with such a conflict, some jurisdictions make certain information from all tax returns publicly available, others make certain information from certain tax returns publicly available, and still, others make no information at all publicly available. The US is an example of the latter type of jurisdiction, but many academics have suggested that shifting to public disclosure could have positive consequences for compliance.[315]

[312] We would like to thank Anthony Gafoor for his contribution.

[313] We would like to thank Lilian Faulhaber for her contribution.

[314] For a comparative perspective *cf* N Büngers, *Taxpayers Rights in Comparative Perspective. The Protection of Tax Related Information of Individual Taxpayers and the Rationale Behind It. A comparison between the legal systems of Germany and the United States* (GRIN, 2017); J Blank, 'The United States', in E Kristoffersson et al (eds), *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law*, (Switzerland, Peter D Lang, 2013) 1163.

[315] www.nytimes.com/2010/02/14/business/yourtaxes/14disclose.html. However, the Freedom of Information Act (FOIA) could allow the publication of certain limited return-related data in certain situations. See further at www.irs.gov/privacy-disclosure/irs-freedom-of-information.

Many jurisdictions protect the right to privacy or the right to non-publication of taxpayer information. This, in turn, means that tax administrations must have procedures for protecting confidential taxpayer data and making sure that it is not shared. This section will outline the following fundamental issues arising in the context of data protection: (1) how jurisdictions protect data from impermissible sharing, (2) how the trend toward stronger cross-border transparency in tax matters and EoI creates new challenges for data protection and (3) how data protection interacts with public dissemination of certain taxpayer data. There is a constitutional undercurrent concerning this question in the US. The Fifth Amendment to the US Constitution establishes a person's right to avoid the provision of information against oneself in criminal cases. This protection raises issues for a taxing regime that essentially depends upon the requirement that taxpayers provide information that can then be the basis for possible action against them. Nevertheless, the US Supreme Court held long ago that the filing requirement was not unconstitutional because a taxpayer could openly and explicitly assert the constitutional right to refuse to provide information on a tax return.[316]

Prior to the 1970s, information on taxpayers accumulated by the tax administration was considered to be generally for use, of course, in that administration, but also for other governmental objectives. A part of the famous Watergate scandal of that time involved the alleged use of taxpayer information for political advantage by favouring supporters and harassing adversaries. As a result, legislation was adopted in 1976 that reversed the basic proposition and established a detailed mechanism for its implementation.

In the US, tax returns are confidential. There are a variety of ways in which the US protects confidential taxpayer data. Broadly, the Privacy Act of 1974[317] prohibits any federal agency from 'disclos[ing] any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains'.[318] Although there are several exceptions when this prohibition does not apply,[319] impermissible disclosure will be punished with criminal penalties.[320]

[316] US Supreme Court, *United States v Sullivan*, judgment of 16 May 1927 274 US 259 [1927].

[317] 5 USC 522a, available at www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partI-chap5-subchapII-sec552a.htm.

[318] 5 USC 522a(b).

[319] Those exceptions arise when 'disclosure of the record would be (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties; (2) required under s 552 of this title; (3) for a routine use as defined in sub-s (a)(7) of this s and described under sub-s (e)(4)(D) of this s; (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13; (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable; (6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value; (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought; (8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual; (9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee; (10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office; (11) pursuant to the order of a court of competent jurisdiction; or (12) to a consumer reporting agency in accordance with s 3711(e) of title 31.' 5 USC 522a(b).

[320] www.justice.gov/opcl/criminal-penalties.

While the Privacy Act of 1974 applies to all federal agencies, many other data protection provisions apply just to the IRS. In the Internal Revenue Code, section 6103 requires government employees to maintain the confidentiality of taxpayer returns,[321] while section 6105 requires the same for information shared under double tax treaties.[322] Impermissible disclosure will again be subject to criminal penalties.[323] Similar penalties apply to other parties, such as tax return preparers, who disclose confidential tax return information.[324] The Taxpayer Bill of Rights also explicitly provides for the confidentiality of taxpayer information.[325]

In particular, in the US, tax return information is strictly protected from disclosure under section 6103 of the Income Revenue Code unless a statutory exception is provided. The rationale for strict regulation is that confidentiality enhances voluntary compliance by the taxpayer; if too much private taxpayer information were made public outside of tax administration, it might cause taxpayers to report their tax situations less completely. Of course, such data can be used for tax administration. However, over time, the US Congress has specifically authorised the use of taxpayer data for many other governmental purposes. While the basic premise of the new philosophy was respected by requiring statutory approval, taxpayer information can be used for many reasons other than tax administration.

The IRS is given statutory permission to disclose taxpayer information in a number of prescribed situations. The list of permissible usage is long. For example, it includes disclosures to the US Congress for policy reasons, disclosures in certain non-tax criminal cases, to implement certain federal benefit and loan programmes, for child support enforcement proceedings, to assist state tax authorities and for statistical use. In each instance, particular criteria for permissible disclosure are established. Safeguards against unauthorised disclosures apply in each instance. Moreover, periodic reports of disclosures made must be provided to the US Congress, and civil damages can be imposed for unauthorised disclosures.

8.2.2.3. Asia

8.2.2.3.1. China[326]

Taxpayers and withholding agents both have the right to require Chinese tax authorities to maintain confidentiality. The information to be kept confidential includes the commercial secrets and individual privacy of taxpayers and tax withholding agents. Commercial secrets refers to technical and business information that is not known to the public, can bring economic benefits to the holder, is relevant in practice and where the right holder has taken confidentiality measures. Individual privacy means the personal information collected in tax management, including savings account numbers, deposits, personal property, income status, marital status, etc. However, any information on taxpayers' violations of tax law does not fall within the scope of confidentiality.

Chinese tax authorities shall keep taxpayers' abovementioned information confidential and not disclose it unless requested by a court, a prosecutor, a public security authority or a national

[321] 26 USC 6103.
[322] 26 USC 6105.
[323] 26 USC 7213.
[324] 26 USC 7216.
[325] www.irs.gov/newsroom/taxpayer-bill-of-rights-8-the-right-to-confidentiality-0.
[326] We would like to thank Na Li for her contribution.

audit department.[327] Although hearings before Chinese courts are open to the public, cases involving state secrets and personal privacy can be heard non-publicly. Cases involving trade secrets can be made non-public if the party applies for it.[328]

Both taxpayers and withholding agents also have the right to ask tax authorities about Chinese tax laws and administrative regulations as well as tax payment procedures. Moreover, taxpayers have the right to request Chinese tax authorities to provide documents with regard to their own tax filing and payment information.

Chinese tax authorities at the county level or above shall regularly make proclamations concerning the overdue tax unpaid by taxpayers at the site of tax collection or through media such as radio, television, cinema, newspapers, periodicals or computer networks, etc ('naming and shaming'). Court judgments on tax cases should be published too.

8.2.2.3.2. India[329]

In India, data protection may be considered part of the 'right to privacy' enshrined in the Constitution of India. In 2017, the Indian Supreme Court held in its famous *Puttaswamy* judgment[330] that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

Pursuant to the *Puttaswamy* judgment, the state may only curtail the right to privacy if this would be 'just, fair and reasonable', that is, where the state pursues a legitimate objective using reasonable means to achieve such objective. In addition, there must be no less intrusive means which could equally well achieve that same objective. Finally, the state measures need to be proportional in the sense that there must be a reasonable relation between the infringement by the measures taken and the objective to be achieved. Those measures must not produce greater harm than is justified by the importance of the objective.

Therefore, even in tax cases, this standard of review should apply when taxpayer data is being handled, whether for exchange or otherwise. However, the requirement to have a 'Permanent Identification Number' and '*Adhaar*' (the biometric identification number linked for filing an income tax return) was held to be constitutional in this judgment, based on the fact that there was a legitimate state interest such as curbing tax evasion.

There is a proposal to enact a law to protect the privacy of the personal data of individuals. The bill seeks to regulate the processing, storage and cross-border transfer of data by the government and private entities. Financial data is classified as sensitive personal data that may be processed for the exercise of any function of the state authorised by law.[331]

8.2.2.3.3. Israel[332]

Data protection is part of the right to privacy, which is protected as a constitutional right in Israel. According to Article 7 of the Basic Law Human Dignity and Liberty:

> (a) All persons have the right to privacy and to intimacy; (b) There shall be no entry into the private premises of a person who has not consented thereto; (c) No search shall be conducted on the private

[327] State Administration of Taxation, Interim Administrative Measures of Tax Confidential Information of Taxpayers (Guo Shui Fa, no 93 [2008]).

[328] Art 54 of the Law of Administrative Litigation of China.

[329] We would like to thank Ashrita Prasad Kotha and Sriram Govind for their contribution.

[330] Supreme Court of India, judgment of 24 August 2017, *KS Puttaswamy v Union of India*, cited.

[331] The Personal Data Protection Bill, 2018, www.prsindia.org/sites/default/files/bill_files/Draft%20Personal%20Data%20Protection%20Bill%2C%202018%20Draft%20Text.pdf.

[332] We would like to thank Rifat Azam for his contribution.

premises of a person, nor in the body or personal effects; (d) There shall be no violation of the confidentiality of conversation, or of the writings or records of a person.

Therefore, any legislation that infringes this constitutional right is subject to judicial review according to the limitation clause. Obviously, tax authorities and all authorities must respect and fulfil this constitutional right. Furthermore, The Israeli Privacy Protection Law, 1981, protects the right to privacy and includes detailed rules and measures to ensure the protection of that right. It defines data and data protection measures which must be followed; infringements of privacy and data protection would lead to civil and even criminal liability. Tax data is considered confidential data, and tax laws protect the data. Any data relating to taxpayers' income are confidential and must be kept secret.[333] Tax officers who disclose data are subject to criminal and civil liabilities.

8.2.2.3.4. Japan[334]

Article 13, 21, and 35 of the Japanese Constitution[335] are relevant for the right to data protection. While Article 13 guarantees the right of all people to be respected as individuals and the pursuit of happiness, Article 21 guarantees freedom of expression, including explicitly the secrecy of any means of communication. Furthermore, Article 35 secures the right of all persons to be secure in their homes, papers and effects against entries, searches and seizures by public powers. The Japanese Supreme Court decided that collecting global positioning data from a car may invade the privacy of a crime suspect. In addition, the Court stated that secretly attaching a GPS terminal to a private person's belonging is an invasion of private space by the government.[336]

In general, data are protected by the Act on Protection of Personal Information.[337] In relation to the protection of Japanese residents' personal information, the Supreme Court of Japan decided that a nationwide personal information network system for residents itself does not infringe the residents' privacy. If it is misused by someone, they shall be punished by law.[338]

However, the Act on Protection of Personal Information does not cover the newly introduced social security and tax number system in Japan at the moment.[339] Therefore, in 2013, a new act was prescribed as a *lex specialis* for the tax/social security number system.[340]

In Japan, the criminal tax investigation procedure is strictly separated from the administrative tax investigation procedure.[341] For instance, pursuant to Article 35 of the Japanese Constitution,[342] tax inspectors must obtain a search warrant issued by a court before carrying out a criminal tax investigation. In relation to the administrative tax investigation procedure, a new tax inquiry and inspection system was introduced in 2012.[343] The aim of the tax inquiry and inspection system in the administrative tax investigation procedure in Japan is to obtain the documents necessary to collect taxes, not to investigate criminal offences.[344]

[333] Art 231 of the Israeli Income Tax Ordinance.
[334] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.
[335] www.japaneselawtranslation.go.jp/law/detail/?id=174.
[336] Supreme Court of Japan, judgment of 15 March 2017, H28, A [2017], no 442.
[337] Act No 57 of 2003.
[338] Supreme Court of Japan, judgment of 6 March 2008, H19, O [2008], no 454.
[339] Matsubara, *Tax Transparency, National Report in Japan* 4–5 and 7.
[340] Act on the Use of Numbers to Identify a Specific Individual in Administrative Procedures, Act No 27 of 2013.
[341] S 74-8 of Act on Special Provisions of the Income Tax Act, the Corporative Tax Act and the Local Tax Act, Incidental to Enforcement of Tax Matters, Act No 46 of 1969.
[342] 'The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be sized …'.
[343] Tax Reform Act of December 2012.
[344] H Kaneko, *Tax Law* 905 and 906.

During the criminal tax procedure (including the trial), taxpayers who were shown a warrant are generally protected not only by Article 35 of the Japanese Constitution but also by the *ne bis in idem* principle enshrined in Article 38 of the Constitution. This means that in Japan, a criminal tax investigation is not considered part of the civil administrative procedure but as part of the general criminal procedures.

If tax inspectors find evidence of a tax crime, they must not pass on that information to third parties (including in the public sector).[345] Thus, the tax secret is subject to the tax inspectors' duty of confidentiality.[346] This should trump a duty upon public servants to disclose wrongdoing. Nevertheless, a 2004 Supreme Court judgment seemed to allow evidence uncovered by an administrative tax investigation to be used in a criminal investigation.[347] In any case, evidence obtained in the criminal tax procedure can be used in the administrative tax procedure.[348]

In 2017, the Japanese government abolished the National Criminal Tax Act[349] and incorporated criminal tax investigation procedures into the Act on General Rules for National Taxes.

8.2.2.4. Europe

8.2.2.4.1. European Union and Council of Europe

Issues of taxation have recently been the subject of a number of EU publications on data protection,[350] which, together with the interpretation contained in the judgments of the ECtHR and CJEU, provide for orientation in addressing data protection in tax matters. Generally and outside the tax area, the CJEU provided for a particularly high level of protection for personal data. In the *Digital Rights Ireland* and *Tele2 Sverige* cases, the CJEU has in principle prohibited data retention, limiting it to situations which reveal a link with of serious crimes, 'where the competent national authorities consider, on the basis of objective evidence, that there exists, in one or more geographical areas, a high risk of preparation for or commission of such offences'.

[345] H Kaneko, *Tax Law* 907.

[346] S 100 of the National Public Service Act No 120 of 1947 (full text: www.japaneselawtranslation.go.jp/law/detail/?id=1917&vm=04&re=01); s 34 of the Local Civil Public Service Act No 261 of 1950 (www.japaneselawtranslation.go.jp/law/detail/?id=497&vm=&re=01); s 126 of the Act on Special Provisions of the Income Tax Act, the Corporative Tax Act and the Local Tax Act, Incidental to Enforcement of Tax Matters and s 22 of the Local Tax Act No 226 of 1950 (only in Japanese).

[347] Supreme Court of Japan, judgment of 20 January 2004, H15, A [2004], no 884. This decision has been criticised as 'unconstitutional' by Japanese academia, *cf* H Sasakura, 'Administrative Procedures, Criminal Procedures for Implementation of Law' in H Saeki (ed), *Gendai Ho no Doutai (2), Houno Jitsugen Shuho*, (2014) 325 (in Japanese).

[348] Supreme Court of Japan, judgment of 31 March 1988, S62, Gyou-Tsu no 77 [1988], www.courts.go.jp/app/files/hanrei_jp/381/062381_hanrei.pdf (in Japanese).

[349] Law No 67 of 1900.

[350] *cf* The ECtHR, *Factsheet on Personal Data*, (May 2021), available at www.echr.coe.int/Documents/FS_Data_ENG.pdf; and the ECtHR, *Guide to the Case-law of the European Court of Human Rights – Data Protection* 1st edn (ECtHR, 31 December 2020), available at rm.coe.int/guide-data-protection-eng-1-2789-7576-0899-v-1/1680a20af0. The reference to the 2018 FRA handbook is still valid (available at fra.europa.eu/sites/default/files/fra_uploads/fra-coe-edps-2018-handbook-data-protection_en.pdf) – there is no more recent edition; it has not been revised. Lastly, a newer edition of the ECtHR, *Factsheet on Legal Professional Privilege*, was published in November 2019 (available at www.echr.coe.int/Documents/FS_Legal_professional_privilege_ENG.pdf). The subject of taxation is also prevalent in the Council of Europe's 2018 compilation, entitled Case Law of the European Court of Human Rights concerning the protection of Personal Data (rm.coe.int/t-pd-2018-15-case-law-on-data-protection-may2018-en/16808b2d36 as of 25 October 2019), the 2018 Edn of Handbook on European Data Protection Law of European Union Agency for Fundamental Rights and Council of Europe and the ECtHR's very own fact sheet relating to Legal professional privilege, published in October 2018.

It should be subject to a prior review either by a court or by an independent administrative body.[351] Recently, the CJEU slightly loosened these strict requirements.[352] In any case, such an approach cannot function in the area of taxation. Nevertheless, data protection law must be applied consistently, and reasons should be given for applying the various standards of protection.

The following analysis starts with the legal sources and their application to tax matters and then continues with the impact of such rules on taxpayers and third parties, such as professionals and intermediaries.

8.2.2.4.1.1. Legal Sources

The analysis of the legal sources will mostly focus on the rules applicable under the ECHR and related sources and EU law. Both sets of rules constitute the two main pillars for a large number of European countries and share the core legal values common to the constitutional traditions of the vast majority of European countries.[353]

The ECHR includes a provision, namely Article 8, on the right to privacy and family life. Article 8 constitutes the legal basis for developing judicial interpretation through which data is protected.

As early as 1981, the Council of Europe Member States concluded an international agreement for the Protection of Individuals with regard to Automatic Processing of Personal Data.[354] It was amended in 2018.[355]

From the perspective of the ECHR, the absence of a specific provision on data protection can be justified in various ways, including that at the time that the Convention was signed, there was not sufficient awareness of the specific critical issues raised by data protection as compared to the ones affecting the private and family life of individuals.

Article 8(2) of the ECHR regulates intrusions into data privacy by public authorities, adding that

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety *or the economic well-being of the country*, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (emphasis added).

Unlike the CJEU, the ECtHR recognised that national authorities enjoy a wide margin of appreciation in choosing how best to achieve the legitimate aim of protecting national security and that bulk interception is of vital importance to the Contracting States in identifying threats to their national security.[356]

[351] See CJEU, judgments (Grand Chamber) of 6 April 2014, *Digital Rights Ireland and Seitlinger and Others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238 [2014], and of 21 December 2016, *Tele2 Sverige*, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970 [2016], paras 111, 119 and ff.

[352] CJEU, judgment of 6 October 2020, *La Quadrature du Net and Others*, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791 [2020], and of 6 October 2020, *Privacy International*, case C-623/17, ECLI:EU:C:2020:790 [2020]; but see judgment of 2 March 2021, *Prokuratuur (Conditions d'accès aux données relatives aux communications électroniques)*, case C-746/18, ECLI:EU:C:2021:152 [2021].

[353] This technique will not prevent singling out, where appropriate, the situation of some specific countries.

[354] Convention 108, signed on 28 January 1981; as of 30 May 2021, there are 55 states parties to the Convention.

[355] According to the website of the Council of Europe, 34 States are Parties to the Protocol. None of them has yet ratified the modernised Convention (www.coe.int/en/web/conventions/full-list/-/conventions/treaty/223/signatures).

[356] ECtHR, *Big Brother Watch and Others v The United Kingdom*, nos 58170/13, 62322/14 and 24960/15 (25 May 2021), paras 338 and 424.

The EU legal system secures protection at levels that are at least equivalent to those of the ECHR,[357] insofar as the situations are covered by EU law.[358] However, the EU legal framework includes more specific rules on data protection, both in primary and secondary legislation.

The bulk of EU rules consist of applying legal principles, also enshrined in the EU Charter, which entered into force in 2009. It includes Article 8 on data protection as a separate provision from Article 7 protecting the right to privacy. The recognition of this separate right may have been influenced by the preceding secondary legislation on data protection at the European level.[359]

This secondary EU legislation on data protection has been developed further and now implements the principles and rules of primary EU law. Rules were initially issued in accordance with Article 16(2) TFEU and in the form of directives, namely on the processing of personal data (1995)[360] and their retention (2002).[361] Then such rules were gradually converted into regulations. The first regulation on data protection was issued in 2000[362] and then replaced by the GDPR.[363] Its applicability in the tax sphere is restricted. Article 1 of the GDPR provides for 'the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data', but Article 2(2)(d) of the GDPR clarifies that the protection of GDPR does not extend, inter alia, 'to the processing of personal data … by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security'.[364] Nevertheless, the CJEU applies its data protection standards to the area of crime prevention and national security.[365]

[357] The application of art 52(3) of the EU Charter to this context requires such rights to be protected under EU law in line with the interpretation applicable under the ECHR, even if not preventing higher levels of protection.

[358] Art 51(1) of the EU Charter indicates that 'the provisions of this Charter are addressed to the institutions and bodies of the Union … and to the Member States only when they are implementing Union law'.

[359] Moreover, the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Data, which has been ratified by all EU Member States may have influenced the introduction of a specific provision in the EU Charter on data protection, since this Convention is explicitly mentioned in the Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), (2007) OJ C 303, 17, 20.

[360] Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

[361] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, then amended by Directive 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communication services or of public communication networks and amending Directive 2002/58/EC. This directive was the subject of interpretation by the Court of Justice in CJEU, *Digital Rights Ireland and Seitlinger and Others*, cited, in which the CJEU has declared the Directive invalid for being a disproportionate interference with the right to privacy and data protection.

[362] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and the free movement of such data; see also Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

[363] Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[364] Additional relevant provisions of the GDPR include arts 13 and 14 on the right of data subject to knowledge of the collection of such data from third parties, art 15 on the right of access (*habeas data*), art 16 on the right to rectify data and art 22 on the restrictions on automatic decision making and profiling.

[365] *cf* CJEU, *Tele2 Sverige*, cited; CJEU, *La Quadrature du Net and Others*, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791 [2020], and CJEU, judgment of 6 October 2020, *Privacy International*, case C-623/17, ECLI:EU:C:2020:790 [2020]. For the reaction from the Council of State of France, see decision of 21 April 2021, no 393099 [2021], discussing national identity and security.

However, Article 23 of the GDPR covering 'Restrictions' includes a specific reference to taxation,[366] adding that

> Union or Member State law … may restrict by way of a legislative measure the scope of the obligations and rights provided for when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard … other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters …

Recital 71 of the GDPR refers to profiling and admits it for countering fraud and tax evasion, as well as for monitoring and prevention purposes. While profiling is permitted, it is still subject to limitations. Recital 71 of the GDPR promotes the rights of the data subject to obtain specific information, express their point of view and obtain an explanation of the decision reached after such assessment and challenge the decision. This Recital can, therefore, help explain the underlying goals of GDPR when interpreting the restrictions tolerated under Article 23 of the GDPR. Interestingly, however, Recital 71 does not specifically refer to tax avoidance but only to tax evasion and fraud.[367]

In the current framework, it is doubtful whether the GDPR could serve as an effective tool to limit the dissemination of data to tax authorities because such dissemination would fall within the purview of the saving clause in Article 23 of the GDPR.[368]

However, data protection in tax matters has become highly relevant. First, tax authorities are increasingly relying on big data collected around the globe and on the supply of information in the framework of cross-border mutual assistance. Automatic data exchange may not be limited to 'foreseeably relevant'[369] tax information. The use of big data helps to single out situations of taxpayers presenting a higher risk of tax evasion, thus improving the quality of the selection of cases to

[366] Art 23(1)(e) of the GDPR contains one of four references; for further references to taxation, see recitals 31, 71 and 112 of the GDPR, premising that,

> '(31) Public authorities to which personal data are disclosed in accordance with a legal obligation for the exercise of their official mission, such as *tax* and customs authorities, financial investigation units, independent administrative authorities, or financial market authorities responsible for the regulation and supervision of securities markets should not be regarded as recipients if they receive personal data which are necessary to carry out a particular inquiry in the general interest, in accordance with Union or Member State law …'

> '(71) … However, decision-making based on such processing, including profiling, should be allowed where expressly authorised by Union or Member State law to which the controller is subject, including for fraud and tax-evasion monitoring and prevention purposes conducted in accordance with the regulations, standards and recommendations of Union institutions or national oversight bodies and to ensure the security and reliability of a service provided by the controller, or necessary for the entering or performance of a contract between the data subject and a controller, or when the data subject has given his or her explicit consent. In any case, such processing should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision. Such measure should not concern a child.'

> '(112) Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example, in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport …'

[367] We submit, however, that this may have been an unintended linguistic mismatch, since the French version refers to '*évasion et fraude fiscales*', which would correspond to the English expressions 'avoidance and evasion'. However, the German language version refers to '*Steuerbetrug und Steuerhinterziehung*' and, therefore, matches the English one.

[368] These issues will be more thoroughly discussed in this Report when addressing the impact of the protection of the collective right to tax transparency on the individual rights to data protection of taxpayers and third parties.

[369] On the 'foreseeably relevance' standard, *cf* OECD, *Commentary of the OECD Model on Article 26*, para 5.

be audited for tax purposes. Furthermore, Article 25 of the DAC 1[370] safeguards the application of data protection by including an express reference to EU Directive 95/46 and the GDPR. However, there is no transparency as to the collection and use of big data. Second, it is unclear whether the affected persons have *habeas data* and, in the affirmative, how and where (eg applicable law, which jurisdiction, etc) to seek legal protection. Often taxpayers are neither notified nor heard in case of data exchange. The CJEU has held that only addressees of an information order have a right to judicial protection under the EU Charter. Neither the taxpayer nor third parties whose data are transferred to another Member State are granted legal protection before such data exchange in the framework of mutual assistance and cooperation of fiscal authorities.[371] In case of leakage or hacking of data held by tax authorities, the problems for the affected persons are enormous.[372] In such circumstances, caution is particularly important, and, therefore, it is reasonable to go even as far as suspending the EoI until adequate levels of data protection are secured.[373]

The European Data Protection Working Party[374] took up those concerns and formulated several warnings. Such warnings relate to the risk of unlawful data processing arising from the dual compliance with the European and US FATCA standards,[375] also considering that some EU secondary legislation could, in fact, be a mere implementation of such US standards.[376]

The European Data Protection Working Party has put forward further warnings in respect of the increased storage of data for AEoI purposes, which can correspondingly increase the risk and liability under EU data protection laws.[377] For these reasons, the European Data Protection Working Party has issued guidelines in order to secure effective data protection in connection with the cross-border exchange of tax information.[378]

We shall bundle together the actual impact of data protection under ECHR and EU law and address the relevant issues by reference to the rights of the affected persons, ie taxpayers[379] and the third parties involved.[380] Both categories of persons will then be the object of specific analysis in areas where the conflict between the collective and individual rights are more likely to arise, such as cross-border mutual assistance[381] and mandatory disclosure by taxpayers and intermediaries.[382]

8.2.2.4.1.2. Taxpayers[383]

The ECtHR has delivered a number of judgments relating to taxpayers' rights in the context of the power of tax authorities to collect information. Over the years, the ECtHR has applied to

[370] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, (2011) OJ L 64, 1.

[371] CJEU judgment (Grand Chamber) of 6 October 2020, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale),* joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [2020], for more legal protection, including for taxpayers and third persons, see Opinion of Advocate General Kokott of 2 July 2020 in these joined cases.

[372] See the case of hacking Bulgarian National Revenue Agency (www.oecd.org/tax/transparency/statement-on-the-data-breach-in-the-national-revenue-agency-of-bulgaria.htm as of 25 October 2019).

[373] This was suggested by the OECD (www.oecd.org/tax/transparency/statement-on-the-data-breach-in-the-national-revenue-agency-of-bulgaria.htm as of 25 October 2019).

[374] As of May 2018, the European Data Protection Working Party has been replaced by the European Data Protection Board, an independent legal body with a legal personality.

[375] See European Data Protection Working Party, Letter of 21 June 2012.

[376] See European Data Protection Working Party, Letter of 18 September 2014.

[377] See European Data Protection Working Party, Letter of 4 February 2015.

[378] See European Data Protection Working Party, 175/16/EN WP 234.

[379] See sec 8.2.2.4.1.2.

[380] See sec 8.2.2.4.1.3.

[381] See sec 8.2.3.2.2.

[382] See sec 8.2.2.4.1.3.

[383] We would like to thank Andreas Kallergis and Michael Beusch for their contributions.

this domain its general standards developed for interferences with human rights, namely that the activity of tax authorities must be (1) in accordance with law; (2) necessary in a democratic society; and (3) conducted in the interests of the economic well-being of the country, or for the prevention of disorder or crime.[384] Thus, the ECtHR has developed a human right to data protection, despite the absence of a dedicated data protection provision in the ECHR, separate from Article 8 of the ECHR on the protection of respect for private and family life. In particular, the ECtHR has acknowledged the entitlement of legal persons to Article 8 of the ECHR,[385] which opens the door to broad recognition of the right to data protection for individuals and companies.

This statement may differ from the boundaries within which the CJEU recognises the entitlement to data protection under the EU Charter's specific right to data protection (Article 8), which admits it for legal persons only to the extent that the data identifies one or more natural persons.[386] However, similar to the ECtHR, the CJEU grants legal persons data protection under the EU Charter's general privacy right (Article 7 of the EU Charter).[387] Both Courts recognise certain limitations to freedom of the press with regard to the publication of tax data, thus protecting them.[388] The ECtHR has secured effective data protection in line with the requirements of the right to privacy in tax matters in a context in which the parallel protection of the freedom of expression under Article 10 of the ECHR could have otherwise undermined it.[389]

An important number of jurisdictions seem to enshrine in their domestic law the right of taxpayers to confidentiality with respect to information they share with the tax authorities.[390] The ensuing duty to avoid public disclosure of taxpayers' confidential information should also prevent the application of unilateral measures, better known as naming and shaming. This modern form of the medieval pillory, practised in roughly a third of states around the world,[391] essentially consists in making public the names of tax evaders,[392] thus exposing them to public disgrace with evident prospective deterrent effects. For instance, recent French legislation aiming to strengthen

[384] See inter alia ECtHR, *MN and Others v San Marino*, no 28005/12 (7 July 2015), no 75; *André and others v France*, no 18603/03 (24 October 2008); ECtHR, *Othymia Investments BV v the NL*, no 75292/10, (16 June 2015).

[385] ECtHR, *Société Colas*, no 37971/97 (16 April 2002), para 41; *Centrum för Rättvisa/Sweden*, no 35252/08 (19 June 2018), para 85; *Ekimdzhiev/Bulgaria*, no 62540/00 (28 June 2007), para 60.

[386] CJEU, judgment (Grand Chamber) of 9 November 2010, *Volker and Markus Schecke and Eifert*, joined cases C-92/09 and C-93/09, ECLI:EU:C:2010:662, [2010] paras 52 and ff; CJEU, judgment of 17 December 2015, *WebMindLicences*, case C-419/14, ECLI:EU:C:2015:832, [2015], cited, paras 79 and ff.

[387] CJEU, judgment of 14 February 2008, *Varec*, case C-450/06, ECLI:EU:C:2008:91 [2008].

[388] This exception applies under secondary law. On its interpretation, see CJEU, judgment of 16 December 2008, *Satakunnan Markkinapössi and Satamedia*, case C-73/07, ECLI:EU:C:2008:727 [2008], paras 38 and ff, which has excluded that the journalist exception can apply in the case of publication in a journal of data concerning individual taxpayers. The ECtHR has reached similar conclusions in ECtHR (Grand Chamber), *Satakunnan Markkinapörssi and Satamedia v Finland* case, no 931/13 (27 June 2017), paras 174 and 190, but with different arguments. In particular, the ECtHR has held that publication of tax data does not necessarily contribute to a debate of public interest and that data are accessible to the public under the domestic law in a transparent taxation system, does not necessarily mean that they can be published to an unlimited extent.

[389] In the *Satakunnan Markkinapörssi and Satamedia v Finland* case, the ECtHR (Grand Chamber) stated that '[i]t is unquestionable that permitting public access to official documents, including taxation data, is designed to secure the availability of information for the purpose of enabling a debate on matters of public interest'. However, it held that the publication of taxpayer data in a raw and unaltered form, such as the one provided by a magazine, is likely not necessary to protect the public interest as intended by the freedom of expression, see ECtHR (Grand Chamber), *Satakunnan Markkinapörssi and Satamedia v Finland*, cited, para 172.

[390] See in general IFA, *Practical Protection of Taxpayers' Rights*.

[391] According to the IBFD, *Observatory of Taxpayers' Rights*, (2020) 61 – yes: Bosnia and Herzegovina, Brazil, Bulgaria, Canada, China, Croatia, Greece, Kenya, Mauritius, Mexico, Peru, Poland. Portugal, Serbia, Slovenia, Spain, UK; no: Argentina, Australia, Austria, Belgium, Chile, Colombia, Cyprus, Czech Republic, Denmark, Finland, Guatemala, India, Italy, Japan, Luxembourg, The Netherlands, New Zealand, Panama, Peru, Russia, South Africa, Sweden, Switzerland, US, Uruguay, Venezuela.

[392] For instance, in France, art 1729 A bis of the French General Tax Code, codifying art 18 of Law 2018-898 of 23 October 2018 on the fight against fraud. In the EU, the same practice can be recorded in Greece, Ireland and Portugal.

legal instruments against fraud henceforth allows, under certain conditions, the tax authorities to publish the names of taxpayers involved in tax evasion schemes. However, this legislation is only applicable against legal persons and only covers situations where the evaded amounts are higher than 50,000 euros.[393] A chamber of the ECtHR recently considered within the national margin of appreciation the publication of tax defaulter's and evader personal data, including home addresses, on the tax authority website. The ECtHR found it relevant that 'the Tax Authority's website did not provide the public with a means of shaming the applicant, for example, a way of posting comments underneath the lists in question'.[394] The Court noted that

> although the applicant referred to the general public-shaming effect of appearing on the list, his submissions contained no evidence or reference to personal circumstances indicating that the publication of his personal data on the tax defaulters' and tax evaders' list had led to any concrete repercussions on his private life.[395]

Therefore, the ECtHR denied a serious intrusion into the applicant's personal sphere. It did not appear to the Court that making personal data public placed a substantially greater burden on private life than was necessary for the state's legitimate interest. Such publication was designed to secure the availability and accessibility of information in the public interest and had a limited effect on the applicant's daily life. Therefore, the Court held that the publication fell within the respondent state's margin of appreciation and that there was no violation of Article 8 of the ECHR.[396] The dissent[397] particularly considered the publication of the tax defaulter's home address disproportionate. The request for referral to the Grand Chamber of the ECtHR was accepted on 30 May 2021.[398]

In principle, one can argue that such prevention of tax evasion is more proportionate than the sole levying of criminal sanctions. However, the side effects of naming and shaming on the data protection of taxpayers are often very far-reaching and uncontrollable.[399] Therefore, especially considering the technical complexity of some borderline cases, one may wonder whether legal systems should really tolerate this type of measure. Considering how the European courts have so far applied the principle of proportionality to data protection, this question of balancing such right with the public interest in effective tax collection is an issue open for discussion.[400] The CJEU now has to decide a case regarding the publication of data of an agent of a commercial company in the Luxembourg Register of Beneficial Owners. On the one hand, such publication is to prevent the use of the financial system for the purposes of money laundering or terrorist financing. On the other hand, the natural person behind the beneficial owner company states that such publication would put him at risk with regard to attempts to extract money from him. Such attempts may include kidnapping, abduction, violence and even death.[401]

[393] New art 1729 A *bis* of the French General tax Code, codifying art 18 of law 2018-898 of 23 October 2018 on fight against fraud, Official Gazette, 24 October 2018.

[394] ECtHR, *LB v Hungary*, no 36345/16 (12 January 2021), para 69.

[395] ECtHR, *LB v Hungary*, cited, para 70.

[396] ECtHR, *LB v Hungary*, cited, paras 69 and ff.

[397] ECtHR, *LB v Hungary*, cited, joint dissenting Opinion of Judges Ravarani and Schukking.

[398] See https://www.echr.coe.int/Documents/CLIN_251_BIL.pdf.

[399] The reputational damages are often hard to remove from the public opinion ex post, even when the judiciary decides in favour of the taxpayer. Furthermore, when the allegations of tax evasion concern business taxpayers, the reputational damages can activate boycotts of business products, which can be uncontrollable and even force shutdown.

[400] In particular, insofar as CJEU judgment (Grand Chamber) of 21 December 2016, *Tele2 Sverige*, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970 [2016], has set some clear standards applicable to criminal violations, the issue arises as to whether tax evasion, which in a large number of cases has criminal relevance, should be treated differently from the general standard relevant for criminal law; but see now CJEU, judgment of 6 October 2020, *La Quadrature du Net and Others*, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791 [2020] and CJEU, judgment of 6 October 2020, *Privacy International*, case C-623/17, ECLI:EU:C:2020:790 [2020].

[401] CJEU, pending case C-37/20 – *Luxembourg Business Registers*. See so far the Opinion of Advocate General Pitruzzella of 20 January 2022, joined cases C-37/30 and C-601/20, ECLI:EU:C:2022:43.

Criminal procedures are usually vested with particular safeguards for the prosecuted or suspected person.[402] Accordingly, tax authorities and the police cannot intercept the correspondence of persons against whom criminal proceedings for tax evasion have been instituted unless there exist adequate and effective safeguards against abuse,[403] use evidence in the context of a different procedure other than the criminal proceedings for which they have been obtained only if that satisfies the requirements set out in Article 52(1) of the EU Charter,[404] or search taxpayer's premises and seize documents in the absence of sufficient safeguards.[405] This prohibition also applies to search and seizure operations conducted in the premises of professionals when this could be easier for obtaining documents and evidence for the suspected fraudulent activities of their client company.[406] The copying of a server is, however, not equivalent to seizure. Therefore, the 'seizure' of the backup tape of the entire server was not considered a violation of taxpayers' privacy.[407]

Secret surveillance is allowed only when such surveillance is strictly necessary, in accordance with the law, and in pursuit of a legitimate aim. The rules relating to surveillance must be clear and incorporate adequate safeguards against abuse.[408] Moreover, searches and seizures, which are

[402] CJEU, judgment of 21 December 2016, *Tele2 Sverige*, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970 [2016].

[403] ECtHR, *Volokhy v Ukraine*, no 23543/02 (2 November 2006), paras 46 and ff, 52 and ff; see also ECtHR, *Big Brother Watch and Others v The United Kingdom*, nos 58170/13, 62322/14 and 24969/15, (25 May 2021) paras 335 and ff. See, in the same line, CJEU, judgment of 17 December 2015, *WebMindLicences*, case C-419/14, ECLI:EU:C:2015:832, [2015], paras 71 and ff and holding nos 3 and 4 (only in accordance with the law).

[404] Art 52(1) on the scope of guaranteed rights reads: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

In the *WebMindLicences* case (cited), paras 71 and ff, 90, the CJEU held that the national court which reviews the legality of the decision founded on such evidence has the duty to verify, first, whether the interception of telecommunications and seizure of emails were means of investigation provided for by law and were necessary in the context of the criminal procedure and, second, whether the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary. If the national court finds that that evidence was obtained in the context of the criminal procedure or used in the administrative procedure contrary to art 7 of the EU Charter, it must disregard that evidence and annul that decision. That evidence must also be disregarded if the national court is not empowered to verify that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself on the basis of a review already carried out by a criminal court in an *inter partes* procedure that it was obtained in accordance with EU law. However, tax authorities can use evidence obtained in the context of a parallel criminal procedure, by means, eg, of the interception of telecommunications and seizure of emails, provided that the obtaining of that evidence in the context of the criminal procedure and its use in the context of the administrative procedure do not infringe the rights guaranteed by EU law (para 90).

[405] ECtHR, *Funke v France*, no 10828/84, (25 February 1993), the ECtHR (para 56) recognised that, since in the field of the prevention of capital outflows and tax evasion states encounter serious difficulties, they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. However, for all such measures, the relevant legislation and practice must be proportionate (para 57) and afford adequate and effective safeguards against abuse, including the need for judicial supervision (in the form of a warrant). In ECtHR, *GSB v Switzerland*, no 28601/11, (22 December 2015), the existence of procedural rights in Switzerland before the transmission of confidential taxpayer data in the framework of cross-border mutual assistance to the US Internal Revenue Service led the ECtHR to conclude that Switzerland had not overstepped its margin of appreciation, securing effective protection of art 8 ECHR. See further under sec 4.3.2.4.

[406] See ECtHR, *André and others v France*, cited, paras 46 and 47. Interestingly, in this case, the ECtHR reached this conclusion despite tax authorities having complied with the procedural rules established by law, considering that this was in fact a disproportionate way for tax authorities to achieve their goal.

[407] See ECtHR, *Bernh Larsen Holding (BLH) and Others v Norway*, no 24117/08 (14 March 2013), para 173. The companies used a common server, which contained the applicants' own data and private information pertaining to third parties (some of whom were individuals). In the course of a tax investigation, tax authorities demanded that *BLH* allow its inspectors to make a copy of all the data on the server. Although *BLH* complied with the request to grant access to the server, it refused to provide the tax authorities with a mirror copy of the entire server.

[408] ECtHR, *Volokhy s Ukraine*, cited.

'in accordance with the law' and 'which have a legitimate aim', are only compatible with the ECHR if they are proportionate to the aim pursued.[409]

In any case, the effective protection of taxpayers' rights entails specific duties for the agents of tax authorities. For instance, specific sanctions are established for public agents that disclose taxpayer information in many jurisdictions.[410] As demonstrated in surveys already conducted,[411] data protection may take the form of information encryption or limited access to the information reserved to agents that deal with the taxpayer's personal file. It is open to question whether these practices are general enough to qualify as international custom.

8.2.2.4.1.3. Tax Professionals and Intermediaries

Tax data processing also affects the rights of professionals and intermediaries, particularly advocates, tax advisers, banks and funds. This section will address the issues directly related to the application of Article 8 of the ECHR with a view to showing that only minor differences arise as compared to the legal framework applicable to taxpayers in 'the right to respect for private and family life' (Article 8 of the ECHR).[412]

As to funds and banks, the CJEU also grants them the right to 'respect for private and family life' (Article 7 of the EU Charter) with regard to their data.[413] The background is that 'personal data' protected under Article 8 of the EU Charter have been defined in legislation and by the courts as referring to natural persons only.[414]

'Home' is to be construed as also including the registered office of a company run by a private individual, as well as a legal person's registered office, branches and other business premises.[415] The search of a lawyer's office constitutes an interference with 'private life', 'home' and 'correspondence'. Where a lawyer is involved, an encroachment on professional secrecy may also have repercussions on the proper administration of justice and hence on rights guaranteed by Article 6 of the ECHR.[416] Furthermore, lawyers' professional secrecy regarding, for example, money paid to their bank accounts by their clients is covered by the right to respect for privacy under Article 8 of the ECHR. Therefore, the access of tax authorities to the personal bank account of a lawyer in the framework of investigations on tax fraud must fulfil the conditions of Article 8 of the ECHR, including the appropriate procedural guarantees and judicial remedies. These include that the inspection must be ordered by a judicial authority and that there be specific procedural guarantees to protect legal professional privilege. A subsequent judicial review can only offer sufficient protection if a review procedure at an earlier stage would jeopardise the purpose of the investigation or surveillance. Therefore, the effectiveness of subsequent judicial review is inextricably linked to a subsequent notification of the surveillance measures, since otherwise there would be little scope for recourse to the courts.[417]

[409] See ECtHR, *Bernh Larsen Holding (BLH) and Others v Norway*, no 24117/08 (14 March 2013), and ECtHR, *Volokhy v Ukraine*, no 23543/02 (2 November 2006).

[410] P Baker and P Pistone, *General Report – The Practical Protection* 29 considered this type of measure good practice. The 2015 IFA Cahiers recorded its existence in several European countries, eg Denmark (see H Peytz and H Klitz, 'Denmark' in P Pistone and P Baker (eds), *The Practical Protection*, vol 100B, (2015) 321, K Loor, 'Estonia', ibid. 351, D Dürrschmidt and K Kopp, 'Germany', ibid. 409–10, M Adams and A Goebel, 'Luxembourg', ibid. 546, R Camacho Palma, 'Portugal', ibid. 689).

[411] Ibid.

[412] For all other substantive rights of professionals and intermediaries, see sec 8.3 of this book.

[413] CJEU, judgment of 17 December 2015, *WebMindLicences*, case C-419/14, ECLI:EU:C:2015:832, [2015], para 80, and CJEU, judgment of 14 February 2008, *Varec*, case C-450/06, ECLI:EU:C:2008:91 [2008], para 48; in this sense, see also CJEU, *Volker and Markus Schecke and Eifert*, joined cases C-92/09 and C-93/09, ECLI:EU:C:2010:662, [2010] para 87.

[414] CJEU, *Varec*, cited, para 48.

[415] ECtHR, *Lindstrand Partners Advokatbyrå AB v Sweden*, no 18700/09 (20 December 2016), para 83.

[416] ECtHR, *Lindstrand Partners Advokatbyrå AB v Sweden*, cited, para 95.

[417] ECtHR, *Sommer v Germany*, no 73607/13, (27 April 2017), para 62.

In the absence of such protection, there is no fair balance between public interests and the protection of individual rights.[418]

As to the seizure of banking documents in the framework of a criminal investigation relating to money laundering, tax evasion, fraud and other financial crimes, the affected person must have available to him the 'effective control', restricting the interference to what was 'necessary in a democratic society'.[419] Otherwise, there is an interference with Article 8 of the ECHR. Nevertheless, it is possible for a revenue authority to obtain information from a third party without notifying the taxpayer if this is justifiable regarding the margin of appreciation and the balance between the interests of the individual and the community in general. This can be the case where, on the one hand, there is a risk that the relevant documents would disappear and on the other hand, there has been sufficient safeguard against abuse due to prior scrutiny by the national judge.[420]

Generally, the ECHR admits that the need to combat tax fraud and evasion can prevail over taxpayers' and intermediaries' rights to protect their financial data. The Court underlines that states parties to the ECHR have a margin of discretion in balancing human rights and the public interest. This also applies to data exchange with third countries.[421]

The mandatory disclosure rules of DAC 6 are a burden on taxpayers and intermediaries. They are the subject of a referral for a preliminary ruling before the CJEU.[422] The case deals with the Belgian implementation of DAC6 and its compatibility with the EU Charter regarding fair trial and respect for private life. In particular, the case concerns the reporting obligations of intermediaries and the shift of this obligation to the taxpayer if there are no intermediaries or if they invoke professional secrecy. If such secrecy is invoked, the intermediary must inform the other intermediaries involved in writing and explain why the reporting obligation cannot be fulfilled.

8.2.2.4.2. Russia[423]

Information collected by tax authorities in conformity with the collective interest in tax transparency may only be used in Russia for tax purposes within the framework of the so-called tax secrecy, established in Article 102 of the Tax Code of the Russian Federation.[424] The scope of this clause is not limited to economic information but also covers personal data, including that of third parties involved in tax collection.[425] Its more precise identification is not established by law but can be reconstructed in practice by reference to the entities that have issued such information.[426]

[418] ECtHR, *Brito Ferrinho Bexiga Villa-Nova v Portugal*, no 69346/10 (1 December 2015).

[419] ECtHR, *MN and Others v San Marino*, no 28005/12 (7 July 2015), para 83.

[420] ECtHR, *Othymia Investments BV v the NL*, no 75292/10, (16 June 2015); ECtHR, *GSB v Switzerland*, no 10828/84, (25 February 1993), ECtHR, *Lindstrand Partners Advokatbyrå AB v Sweden*, no 18700/09 (20 December 2016), paras 8 and 97; apparently more generous CJEU, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 [2020], for more legal protection, including for taxpayers and third persons, Opinion of Advocate General Kokott of 2 July 2020 in the latter cases.

[421] ECtHR, *Keslassy* (decision), no 51578/99 (8 January 2002); ECtHR, *KS and MS v Germany*, no 33696/11, (6 October 2016), para 48.

[422] CJEU, *Orde van Vlaamse Balies*, pending case C-694/20, referred on 21 December 2020.

[423] We would like to thank Karina Ponomareva for her contribution.

[424] According to this provision, 'any information about a taxpayer received by a tax authority, internal affairs bodies, investigative bodies, a state off-budget fund body and a customs body constitutes tax secrecy'.

[425] Tax secrecy does not cover publicly available information, information about the taxpayer's identification number, etc.

[426] See eg the letter of the Russian Ministry of Finance of 12 April 2011, No 03-02-08/41, which states that the information reflected in the primary documents of the taxpayer, which the tax authority received during the implementation of tax control, is a tax secret.

The applicable Russian legislation shows particularly intense protection against public dissemination by tax authorities. In the latter circumstances, Article 102 of the Russian Federal Tax Code and related legislation apply specific criminal,[427] administrative and disciplinary[428] liability to offenders in case of violation, which occurs in disclosure and loss of confidential documents. Furthermore, in cases of violation, it is not uncommon for taxpayers to claim compensation for damages.[429]

8.2.2.5. Oceania[430]

8.2.2.5.1. Australia

Data protection, including in tax matters, applies in Australia within the more general framework of the right to privacy and only receives partial protection under common law.[431]

The Privacy Act 1988 requires that most Australian government agencies (other than intelligence and national security agencies) comply with the Australian Privacy Principles established under the Act. These principles apply to protect the personal information of individuals. In mid-2019, a national consumer data right (CDR) was established by legislation; this right is recognised in relation to individuals and businesses.[432] The CDR has been established initially only in relation to the banking sector, but the government has committed to extending the CDR to the energy and telecommunications sectors and, eventually, the economy as a whole. The government has concurrently commenced a consultative process directed towards developing new laws to facilitate the safe sharing and release of public sector data and released draft legislation for comment in September 2020.

A tax-specific regime protects the confidentiality of taxpayer information. The Australian Taxpayers' Charter provides that '[w]e will respect your privacy and keep your personal information confidential'.

Under Division 355 of Schedule 1 to the Taxation Administration Act 1953 (Cth), it is an offence for a taxation officer to make a record of or disclose 'protected information', defined[433] as information disclosed or obtained under or for the purposes of a taxation law, that relates to the affairs of an entity, and identifies or could be used to identify the entity, unless an exception applies. These exceptions are rather extensive and include a record or disclosure made by the taxation officer in performing their duties as such, including specifically disclosures to a competent authority for the purposes of information exchange under an international tax agreement

[427] Art 183 of the Criminal Code of the Russian Federation.

[428] See art 12 of the Federal Law 'On tax authorities', which applies even in the absence of major damage to the taxpayer.

[429] Such claims will be based on the general provisions of property liability of tax authorities, contained in arts 35 and 103 of the Tax Code of the Russian Federation and art 13 of the Federal Law 'On tax authorities'. In accordance with these articles, losses caused to the taxpayer or his property by illegal actions (inaction) of tax authorities or their officials (including those provided for in art 102, paras 2 and 4 of the Tax Code of the Russian Federation) shall be reimbursed in full, including lost profits, at the expense of the treasury of the Russian Federation (art 1069 of the Civil Code of the Russian Federation). Moreover, art 12 of this Federal Law also applies administrative and disciplinary liability in the absence of major damage to the taxpayer.

[430] We would like to thank Celeste Black for her contribution.

[431] From a comparative perspective G Bellett, 'A New Approach to Tax Secrecy, Does a Move Toward Taxpayer Confidentiality Pose a Threat to the Integrity of the Tax System?' (dissertation in partial fulfilment of LLB (Hons), University of Otago, 2017) 49 and ff.

[432] Treasury Laws Amendment (Consumer Data Right) Act 2019 (Cth), amending the Competition and Consumer Act 2010 (Cth).

[433] Taxation Administration Act 1953 (Cth), Sch 1, s 355-30.

and disclosures to assist law enforcement agencies. The penalty for the disclosure offence is a maximum term of imprisonment of two years.[434]

This situation shows that the protection of the individual rights to data protection and confidentiality has no general scope in tax matters but only applies to the specific aspects expressly regulated by the law.

8.2.2.5.2. New Zealand

8.2.2.5.2.1. Protection against Unreasonable Searches and Seizures

Section 21 of the Bill of Rights Act of New Zealand protects against illegal and unreasonable searches.[435] The values protected by section 21 are property, personal freedom, dignity and privacy in particular. These have to be balanced against reasonable state interests. However, unreasonable search and seizure are not identical to violating reasonable expectations of privacy.[436] The deepest personal values are at stake when police intercept and record conversations. The individual's right to privacy in his home has indeed long been recognised by the judiciary.[437] The phrase 'search and seizure' covers the intrusion into a person's private sphere using listening devices. The surreptitious recording of statements made by a suspect to a police informer wired for sound puts at stake the 'deepest personal values'.[438]

An individual's expectation of privacy in a commercial setting is less stringent. This distinction is reflected in section 16 of the New Zealand Tax Administration Act (TAA), which permits free and full access without a warrant in respect of searches of commercial premises but the search must be either consensual or under a search warrant to enter private premises.

Section 16 of the TAA gives the Tax Commissioner 'full and free access' at all times to inter alia 'books and documents' that they consider 'necessary or relevant' for collecting tax. Computer hard drives fit the extended definition of documents.[439] Cloning the hard drive can be accepted without a preliminary screening search to determine whether the information on the hard drive was 'necessary' or 'relevant'. There is nothing such as a reasonable cause required as a prerequisite for the use of section 16. In respect of encrypted hard drives, it was held that cloning the hard drives prior to a relevance search being conducted did not render the access unlawful and that such a process was reasonable.[440] Thus, when Inland Revenue has evidence that computer data would be relevant or necessary, the use of keyword searches of hard drives as a preliminary screening tool was not required.[441]

Whether forcible entry into premises is permitted without clear authority or implied in the phrase 'full and free access' under section 16(1) of the TAA is unclear. The factual circumstances surrounding each search would probably be determinative of this issue.[442]

[434] Taxation Administration Act 1953 (Cth) Sch 1, s 355-25.

[435] 'Unreasonable search and seizure: Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.'

[436] Court of Appeal of New Zealand, *R v Jefferies*, 1 NZLR 290 [1994] 304–05; Court of Appeal of New Zealand, *R v A*, 1 *NZLR* 429 [1994] 433.

[437] Court of King's Bench, *Semayne's Case* [1604] 77 ER 194 (QB) 195 per Lord Coke.

[438] Court of Appeal of New Zealand, *R v A*, cited 433.

[439] High Court of New Zealand, *Avowal Administrative Attorneys Limited v District Court at North Shore* (2007) 23 NZTC 21,616.

[440] High Court of New Zealand, *Avowal Administrative Attorneys v District Court at North Shore* (2009) 24 NZTC 23,252 at [136].

[441] Confirmed: Court of Appeal of New Zealand, judgment of 11 May 2010, *Avowal Administrative Attorneys Limited v District Court at North Shore* (2010) 24 NZTC 24, 252; *Avowal Administrative Attorneys v District Court at North Shore* [2010] NZCA 183 per O' Regan J; *Avowal Administrative Attorneys Limited v District Court of the North Shore* [2010] NZSC 104 at [2].

[442] *cf* Gupta, *The Relevance of Taxpayers' Constitutional Rights* 133 and ff.

8.2.2.5.2.2. Privacy and Data Protection

In New Zealand, data protection is typically referred to as 'privacy'. The key legislation in New Zealand in relation to data protection is the Privacy Act 2020. The main regulator for data protection is the Office of the Privacy Commissioner. Apart from this Act, privacy principles can be found within New Zealand's common law. The New Zealand courts have developed a tort of privacy (ie the right to sue another person for breach of privacy).[443]

The Privacy Act 2020 regulates the collection, use, disclosure, storage, retention, transfer and other means of processing personal data about an individual by agencies. Their definition is split into New Zealand and overseas agencies. It covers New Zealand agencies, whether or not present in New Zealand, and overseas agencies in relation to any action taken in the course of carrying on business in New Zealand in respect of personal information collected or held. Carrying on business in New Zealand is understood widely, receiving monetary payments from or intending to make a profit in New Zealand is sufficient to meet that criterion. The Act also covers any action taken by an individual who is not ordinarily resident in New Zealand in respect of personal information collected or held while present in New Zealand, regardless of where the information is subsequently held or where the individual to whom the information relates is located. The Ombudsman is not covered.

Under the Privacy Act 2020, data subjects have the right to access information, meaning confirmation whether an agency holds information about that person and access to such personal information, where such personal information may be readily retrieved. Data subjects also have the right to correction of information. However, there is no 'right to be forgotten' nor a 'right to erasure' in New Zealand. Agencies must not retain personal information longer than necessary for the purposes for which it may lawfully be used. Once such legal purpose cedes, personal data must be erased (or de-identified).

8.2.2.5.2.3. Tax Secrecy

The secrecy of taxpayer information has traditionally been a central pillar of tax administration in New Zealand. As in other countries, the policy reason to maintain tax secrecy as the underlying concept is the willingness of taxpayers to provide proper and timely tax information to the Revenue. This rests on the assurance provided by stringent official secrecy provisions that the tax affairs of taxpayers are solely the concern of the Revenue and the taxpayers and will not be used to embarrass or prejudice them.[444]

However, reasonable exceptions to tax secrecy have been recognised for a long time. The New Zealand Supreme Court has, for example, upheld the Inland Revenue's right, in litigation involving banks, to use documents concerning financing transactions entered into by other banks. Exceptions in tax secrecy legislation permit the use for evidential purposes of such documents by the Commissioner in litigation if they are relevant and that use is reasonably necessary for the Commissioner's case. That is so even though information held by the department concerning taxpayers other than the particular litigant banks is involved.[445] Moreover, as in other countries, the protection offered by the secrecy rule is being gradually watered down in New Zealand.[446] The 2009 New Zealand Taxpayer Charter provides: 'We will treat all information about you as private and confidential and keep it secure. We will only use or disclose it in accordance with the law.'[447] Cross-agency sharing has been controversial but may override privacy concerns when

[443] High Court of New Zealand, *Bradley v Wingnut Films Ltd* [1993] 1 *NZLR* 415.
[444] Court of Appeal of New Zealand, *Knight v Commissioner of Inland Revenue* [1991] 2 *NZLR* 30 (CA) 39.
[445] Supreme Court of New Zealand, judgment of 14 April 2008, *Westpac Banking Corporation*, NZSC 24 [2008].
[446] G Bellett, A *New Approach to Tax Secrecy*.
[447] Inland Revenue, *Our Charter*, IR 614 (2009).

serious crime is suspected.[448] Now, the 'Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Act 2019' repealed the whole Part 4 consisting of detailed and comprehensive provisions on tax secrecy of the TAA 1994,[449] replacing it with just two provisions on confidentiality of sensitive revenue information and requirements for revenue officers and other persons[450] and eight comprehensive provisions on permitted disclosures.[451] Disclosure is now explicitly permitted when carrying into effect revenue laws, under information-sharing arrangements, for information sharing for public service purposes, to other agencies for certain specified purposes. This national legislation precisely reflects the worldwide shift of perspective from tax secrecy to effective tax collection through the EoI. Apparently, the reasons underlying the tax secrecy rule are no longer considered to be as important.

8.2.3. The Impact of Tax Transparency on Data Protection – Cross-Border Situations

8.2.3.1. General

The general protection of tax confidentiality operates with a fundamental divide as to the object and limits of such protection. Some countries go in some cases as far as allowing for full disclosure of information,[452] others allow for limited disclosure of the tax defaulters[453] and others still secure more intensive protection of tax confidentiality.[454]

[448] *cf* P Bickers et al, 'Information Sharing by Government Agencies: The Effect on the Integrity of the Tax System' (2015) 13 *eJournal of Tax Research* 183 and ff; critical J Coleman, 'Tax Secrecy and the Taxation of the Proceeds of Crime' (2013) 62 *Taxation Today* 4 and ff, 5: 'The Government cannot have it both ways. It cannot both maintain that criminals ought to return and pay tax on their illegal earnings and hence prosecute for failure to do so and at the same time water down the secrecy provisions such that those same returns can be passed on to the police.'

[449] Art 81 and ff Tax Administration Act 1998 of New Zealand.

[450] S 18 and 18B Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Act 2019.

[451] S 18C and ff of the same Act.

[452] For instance, in Finland, after the completion of tax audits, the following information concerning the taxpayer becomes publicly available: a) name; b) year of birth; c) municipality of domicile; d) earned income taxable at the state level; e) capital income and property taxable at the state level; f) income taxable at the municipal level; g) income and net wealth tax and municipal tax paid; h) total amount of taxes and charges imposed; i) total amount of withholding tax; and j) amount to be debited/refunded in the final assessment for the tax year. See further on this in K Äimä, 'Finland' in F Başaran Yavaşlar and J Hey (eds), *Tax Transparency*, (IBFD, 2019) 491 and ff.

In Sweden, the Tax Agency publicises tax-related information of individuals and legal persons, identified by name, in the publicly accessible *taxeringskalender* (tax calendar). However, the tax agency only discloses the amount of taxable income and the tax liability of taxpayers and not entire tax returns to protect certain sensitive personal data. In other words, the sources of income and the deductible expenses that affect the tax liability are not visible in the *taxeringskalender*; yet, any ex post audits or amendments to the tax liability and every decision by the tax agency have to be published. However, none of this information is accessible online but is only made available by the tax agency upon request.

Until 2004 and 2005, respectively, the Japanese tax agency used to publish the amount of taxable individual or corporate income if the taxable income surpasses a certain threshold (about USD 400,000). No other information than the taxable income was released. This public disclosure was discontinued because the Japanese Tax Advisory Commission reported that the notification system was 'being utilized in various ways inconsistent with its initial aim, and there are various reports of the disclosure being a factor in causing crimes and harassment'. Tax Advisory Commission (2005) – translation provided by Lingua Science Corporation of Ann Arbor, MI and citation taken from M Hasegawa et al, 'The Effect of Public Disclosure on Reported Taxable Income: Evidence from Individuals and Corporations in Japan' (2013) 6(33) *National Tax Journal* 571–608.

[453] See Canada, China, Greece, Ireland, Portugal and Russia. Furthermore, New Zealand also used to engage in this practice, also known as 'naming and shaming' (on which see further under sec 8.2.2.5.2. of this book), by publishing the name of tax evaders in the so-called 'Tax Evaders Gazette', but then discontinued it.

[454] With further references P Hongler, 'Tax Secrecy: Between Legal and Normative Arguments' in F Başaran Yavaşlar and J Hey (eds), *Tax Transparency* (IBFD, 2019) 323 and ff. An interesting example of data protection arises in connection

Most notably, data protection in a cross-border context poses new problems. These relate to different standards of protection, both de jure and de facto. Extensive leaks of taxpayer data, including personal data such as date of birth, without taxpayers knowing, are not uncommon.[455]

Even though the extent of public disclosure of taxpayer confidential information is limited by the right to privacy and data protection, this does not entirely exclude the obligation, also for third parties, to disclose confidential taxpayer data. This obligation has taken the form of specific rules, better known as mandatory disclosure, which has become very common in several regions of the world.[456]

Since the turn of the millennium, there has been a shift away from tax secrecy towards a global framework for cash flow transparency,[457] sometimes perceived as a 'collective right'[458] to secure that all taxpayers pay taxes effectively and at the same time prevent highly dangerous phenomena, such as terrorism and drug trafficking, facilitated by money laundering. This section focuses on the impact that this legitimate public interest in tax transparency may have on the protection of individual rights concerning confidential data of taxpayers.

8.2.3.2. Mutual Assistance in Tax Matters

8.2.3.2.1. General Introduction and Legal Sources

In a cross-border context, the collective right to tax transparency prompts countries to adopt measures of mutual assistance between tax authorities. Such measures facilitate the gathering of information and collection of taxes also beyond national borders.

Mutual assistance can operate through coordinated bilateralism (as in the case of tax treaties), multilateralism (by multilateral agreements or in the presence of supranational legislation, such as the EU Directives on Administrative Cooperation, better known as DACs), or, less frequently, unilateralism (ie based on domestic law).

Coordinated bilateralism characterises the approach taken by states in tax treaties. This is typically the case of clauses reflecting the wording of Article 26 of the OECD Model Convention, which was repeatedly upgraded in order to broaden the scope of cross-border mutual assistance,[459] but also of the so-called tax information exchange agreements (TIEAs), which have been concluded from around the turn of the millennium. In some cases, international

with the anonymisation of rulings in Sweden (27 ch 1 para Offentlighets (Svensk författningssamling [SFS] 2009:400)) and the limited disclosure of information provided in such a context.

[455] *cf* eg Frankfurter Allgemeine Zeitung of 2 November 2020, 15: data of thousands of German taxpayers spied out in Bulgaria, activities of Russian and Chinese hacker crews; P Baker, 'Bulgarian Data Hack Provides a Timely Warning of Data Breaches to Come' (2011) 47 *Intertax* 908 and ff.

[456] Such issues are addressed in sec 6.3.

[457] *cf* also F Başaran Yavaşlar and J Hey (eds), *Tax Transparency* (2019).

[458] For the terminology 'collective rights', see above sec 3.3.

[459] The scope for mutual assistance has developed in this context, especially in respect of EoI upon request, evolving from the one necessary to apply the convention to that necessary and then foreseeably relevant also for the domestic law of the Contracting States. The broadening of the conditions for mutual assistance to the standard of foreseeable relevance raised the issue of preventing outsourcing of fact finding to the requested tax authorities without proper prior instruction by the requesting ones. In this context, the OECD developed the concept of a fishing expedition in the Commentary on art 26 in order to admit mutual assistance only in cases in which the requesting tax authorities had properly identified the object of such assistance and described it with sufficient precision. The application of the standard of foreseeable relevance has raised critical levels at the judiciaries as to when such conditions would be met concretely. It is particularly interesting to follow how Swiss courts have addressed such issues, eventually concluding that group requests are in some cases admissible even when not specifically indicating the names of the persons who were the object of mutual assistance. See Swiss Federal Supreme Court, judgments of 12 September 2016, BGE 143 II 136 [2016]; of 1 September 2017, BGE 143 II 628 [2017]; of 9 April 2018, 2C 646/2017 [2018].

tax coordination also takes the form of multilateral double taxation agreements, such as the Nordic Tax Convention[460] or the multilateral double taxation agreement Caribbean Community (CARICOM).[461]

Moreover, the tax transparency and BEPS projects initiated under the auspices of the OECD and the political mandate of the G20 are current examples of the growing willingness of states to join forces when it comes to tax phenomena of global importance. The implementation of the tax transparency project has increased the importance of multilateral agreements and international administrative assistance between tax authorities worldwide. In the case of the implementation of the BEPS project, countries have largely agreed to supplement their existing network of double taxation conventions (DTCs) with a multilateral agreement (the Multilateral BEPS Instrument), to be applied alongside their DTCs in order to steer them towards convergence and compliance with the standards and rules of the BEPS project.[462]

The multilateral measures establish a framework for mutual assistance that allows for cross-border sharing of tax information among tax authorities which currently allows for three types of tax data exchange, namely upon request of a tax authority, spontaneous and automatic. Each of these three types raises different issues, but it is certainly the final one that presents the highest risk for violations of data protection standards. This is because AEoI is structurally pursuing data sharing, possibly independently of any 'foreseeable relevance', and can therefore put data out of control in the absence of sufficient levels of data protection among the tax authorities participating in that system.

The multilateral features also characterise the EU Directives on Mutual Assistance, which give the EU Member States' tax authorities rights and obligations of assistance as to the supply of information and collection of taxes in situations involving the tax sovereignty of more than one country. These instruments of secondary legislation of the EU implement closer cooperation that enhances the functioning of the EU Internal Market. They facilitate tax collection in cross-border cases and create more tax transparency.

Unilateral measures have been a very specific feature of the national policy of several countries in order to implement effective protection of the collective interest in tax transparency also in cross-border tax scenarios. The most notable example is the US tax transparency policy, especially since the introduction of the FATCA,[463] the Foreign Account Tax Compliance Act. According to FATCA, all financial intermediaries, even when established outside of the US, would be obliged to inform the IRS about tax data concerning financial accounts of US citizens held outside the US.[464] The FATCA type of legislation has been bundled in the US with Inter-Governmental Agreements (IGAs)[465] to overcome its extraterritorial effects that would otherwise arise, insofar as the US government would create legal obligations or otherwise adversely affect the legal sphere of the

[460] Nordic Double Taxation Convention on Income and Capital, 1983.

[461] Agreement among the governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment, 1994.

[462] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), signed in Paris on 7 June 2017, entered into force on 1 July 2018, signed by over 90 states as of July 2020; see Council of Europe and OECD, Multilateral Convention on Mutual Administrative Assistance in Tax Matters, signed in 1988, as amended by the 2010 Protocol.

[463] FATCA was signed by US President Obama on 18 March 2010 and has been in effect since 1 July 2014 for all non-US foreign financial institutions.

[464] The failure to comply with these reporting obligations, in fact, puts non-US foreign financial institutions out of the US market for the obligation to apply an additional levy on all their US-based business.

[465] The number of IGAs concluded by the US is significantly high. A list of the IGAs can be found at www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca.aspx.

intermediaries in case of breach of FATCA. This has gradually brought the US to build up a global network of IGAs with numerous countries worldwide and establish FATCA-type legislation as a model for other jurisdictions to move towards automatic access to information concerning financial accounts. Evident repercussions of this trend can be perceived in the EU, namely in the so-called DAC 2,[466] which applies AEoI on financial accounts as a general standard, broadly along the lines of FATCA. This shows the snowball effect produced by FATCA.[467] However, the application of this type of rule in Europe and information exchanged by the EU Member States with the US should take place in conformity with the requirements established by EU law for data protection.[468]

8.2.3.2.2. The Impact of Mutual Assistance on Taxpayers' Rights

The right of tax authorities to obtain mutual assistance may generate critical issues on the protection of individual rights of taxpayers in various scenarios.

The first scenario concerns sharing confidential tax data in the framework of mutual assistance between tax authorities. Various legal instruments of mutual assistance between tax authorities have been developed in order to implement tax transparency in cross-border situations. Such instruments are included in bilateral[469] and multilateral[470] tax treaties, in a mixed system of treaties implementing domestic US tax legislation,[471] as well as in supranational instruments.[472]

An emerging international standard is likely to be that only prospectively significant information should be transmitted.[473] Insufficiently specified reference research or fishing expeditions

[466] See Council Directive 2014/107/EU of 9 December 2014, amending Directive 2011/16/EU as regards the mandatory AEOI in the field of taxation.

[467] Also, other countries in the world have introduced this type of legislation, such as Russia.

[468] The concern may be due to the fact that the US applies lower standards of data protection (see CJEU judgment of 6 October 2015, *Schrems*, case C-362/14, ECLI:EU:C:2015:650, [2015] and CJEU, judgment of 16 July 2020, *Facebook Ireland and Schrems (Schrems II)*, case C-311/18, ECLI:EU:C:2015:650 [2020]), because it considers that it is sufficient to compensate the damages resulting from such violations, and that this may be especially the case in the presence of the superior interest to tax collection. See EU Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, FATCA legislation and its application at international and EU level, Directorate General for Internal Policies of the Union, PE 604.967, May 2018, 38 and ff.

[469] See OECD, *Commentary of the OECD Model Convention*, arts 26 and 27 and the clauses included in bilateral tax treaties that reflect the pattern of such clauses. More recently, states have also concluded bilateral treaties with an exclusive focus on mutual assistance between tax authorities, the so-called TIEAs.

[470] See the OECD-Council of Europe Multilateral Convention on Mutual Assistance.

[471] This is the case of financial information exchanged through IGAs concluded in execution of the FATCA type of legislation, first introduced by the US in order to inform tax authorities about cross-border financial information concerning individuals.

[472] See the EU Mutual Assistance Directives in Tax Matters.

[473] *cf* CJEU, *Berlioz Investment Fund*, judgment of 16 May 2017, C-682/15, paras 60 and ff and operative parts 3 and 4. In 2005, the standard in the OECD Model Convention on Mutual Assistance was changed from 'necessary' to 'foreseeably relevant' information. The adaptation to this was first made by case law and later by amendments to the national laws on mutual assistance in tax matters. The Swiss Federal Supreme Court developed an interesting way of adapting to the new standard, which also affected the clauses of bilateral agreements that still contain a reference to necessity, see Swiss Federal Supreme Court, judgments of 27 January 2004, 2A.185/2003 [2004], para 7.1, of 12 April 2006, 2A.430/2005 [2006], para 6.1, of 29 March 2018, 2C_598/2017 [2018], para 4.1, of 5 March 2019, A-2591/2017 and ATF 139 II 451 [2019], sec 2.3.3, para 459: linking the concept of necessity to that of proportionality. For the different approaches in Belgium, judgment of 7 November 2012, *Rechtbank van Eerste Aanleg Hasselt*, 11/2968/A [2012]; Court of Cassation of Italy, order of 28 April 2015, no 8605/2015 [2015]; Administrative Court of Luxembourg, judgments of 20 March 2012, no 29592a [2012], of 24 July 2013, nos 33111C and 33118C [2013], as well as of 11 April 2014, no 34356C [2014] 11: 'La Cour partage de même l'analyse des premiers juges que l'article 22 de la Convention limite l'échange de renseignements à ceux qui sont nécessaires pour l'application des lois internes des Etats contractants relatives aux impôts visés par la Convention et que l'échange est partant confiné aux renseignements nécessaires dans le cadre du cas d'imposition tel que circonscrit dans la demande de renseignements de l'Etat requérant'; Supreme Court of Bermuda, judgment of 23 March 2016, 2014: no of ap 2015 [2016]; Singapore High Court, judgment of 4 November 2015, *AXY and Others*, SGHC 291 [2015] and of 23 May 2012, *Comptroller of Income Tax v AZP*, 14 ITLR 1155 SGHC 112 [2012].

are not permitted.[474] This applies to information exchange upon request, but possibly not to spontaneous and particularly automatic exchange. The level of precision of the requests by tax authorities in a cross-border context has to be read in the light of bilateral tax conventions and other instruments binding on the two parties. Group requests cannot not be easily distinguished from these.[475] Under DTCs and national law,[476] administrative assistance is normally only permitted if the requesting state provides the information necessary to identify the person(s) involved in the investigation, particularly their names. This is not the case with a group request. Instead, it applies to a group of persons for whom there is an increased probability that they have not fulfilled their tax obligations in the requesting state. The Commentary on the OECD Model Tax Convention[477] and paragraph 3 of Article 5a of DAC 1, inserted by the newly adopted DAC 7,[478] stress that group requests are not inadmissible per se.[479] However, this standard should be interpreted so that even in the case of group requests, it is possible to clearly identify the persons concerned. Otherwise, no effective legal protection can be granted to these persons.

The second scenario concerns the shared gathering of confidential tax data in the framework of joint and simultaneous tax audits, which are becoming increasingly common,[480] as well as in equivalent practices conducted ex ante also upon request of the affected persons or with their consent.

'Joint audits' are a successful type of direct administrative cooperation. They are evidently more effective than traditional administrative assistance and probably needed in a more mobile and digitalised economy where even smaller enterprises can easily pursue transborder businesses.

The OECD originally defined joint audits as

> two or more countries joining together to form a single audit team to examine issues or transactions of one or more related taxable persons (both legal entities and individuals) with cross-border business activities, perhaps including cross-border transactions involving related affiliated companies organized in participating countries, and in which the countries have a common or a complementary interest; where the taxpayer jointly makes presentations and shares information with the countries, and the team includes Competent Authority representatives from each country.[481]

[474] *cf* eg CJEU judgment of 16 May 2017, *Berlioz Investment Fund*, case C-682/15, ECLI:EU:C:2017:373, [2017], paras 72 and 73; Swiss Federal Supreme Court, judgment of 12 September 2016, *UBS: Group Request*, 2C_276/2016 [2016], para 6.3.

[475] *cf* OECD, *Commentary on Article 26*, para 5.2; Swiss Federal Supreme Court, *UBS: Group Request*, cited, para 6.3, judgment of 26 July 2019, *DTC UBS Switzerland-France*, 2C_653/2018 [2019], paras 5.2.3. and ff and 6.1.; Canadian Federal Court, *Minister of National Revenue and Hydro-Québec*, FC 622 [2018]: 'Some form of fishing expedition may be allowed, but judicial authorization, with its inherent discretion, exists to limit and govern it.' See on this CJEU, judgment of 25 November 2021, case C-437/19, *État du Grand-Duché de Luxembourg*, ECLI:EU:C:2021:953; see also the Opinion of Advocate General Kokott of 3 June 2021, ECLI:EU:C:2021:450 [2021].

[476] eg Canadian Income Tax Act, RPC, 1985, c.1 (5th Supp) s 231.2 (2): 'Unnamed persons. The Minister shall not impose on any person a requirement … to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge …'. art 20(2) of Directive 2011/16 requires 'at least … the name of the person to whom the investigation or inquiry applies'.

[477] OECD, *Commentary on Article 26*, para 5.2.

[478] Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation

[479] Subject to the condition of likely relevance, courts also allow group requests in a similar way. See Gerechtshof den Haag, judgment of 17 July 2018, 17/00901 [2018], on *DTC Netherlands-Switzerland*; Swiss Federal Supreme Court, judgments of 16 September 2016, 2C_276/2016 [2016] on *DTC Switzerland-Netherlands*; of 1 February 2019, *DTC Switzerland-France*, 2C_625/2018 [2019]; of 7 June 2019, 2C_764/201 [2019] on *DTC Switzerland-Spain*, and of 22 July 2019, 2C_1053/2018 [2019] on *DTC Switzerland-Sweden*; Swiss Federal Administrative Court, judgment of 21 August 2018, A-4154/2017 [2018] *on DTC Switzerland-India*, and Swiss Federal Supreme Court, cited on *DTC Switzerland-Netherlands*. They see the relevance of the suspicions in connection with the Panama Papers. See also Administrative Court of Luxembourg, judgment of 14 November 2019, on *DTC Luxembourg/Denmark*, nos 43406C, 43407C, 43408C, 43409C, 43410C, 43411C, 43412C, 43413C, 43414C and 43415C [2019], all on the *DTC Luxembourg/Denmark*.

[480] Detailed regulations on this, similar to the practice in Europe, can be found in art 5 of the Southern African Development Community's Agreement on Assistance in Tax Matters (AATM), signed in 2012.

[481] OECD, *Joint Audit Report*, (2010) 7 no 7; similar, but more comprehensive definition in OECD, *Forum a Tax Administration, Joint Audit* (2019) – Enhancing Tax Co-operation and Improving Tax Certainty, Implementation Package, 13, para 1.2.; see also N Čičin-Šain, T Ehrke-Rabel and J Englisch (2018) 10(4) *World Tax Journal* 585 and ff, 589.

In the EU, Directive 2011/16 explicitly provides for 'other forms of administrative cooperation', presence in administrative offices and participation in administrative enquiries and regulates them.[482] The recently adopted DAC 7 inserted Article 12a on joint audits to DAC 1; point 26 was added to Article 3 of DAC 1 defining joint audits as an: 'an administrative enquiry jointly conducted by the competent authorities of two or more Member States, and linked to one or more persons of common or complementary interest to the competent authorities of those Member States'.[483]

Audits can take place in the presence and with the participation of officials from the other Member State, which needs the information. Both the applicable law, including the precise legal basis, and taxpayers' legal protection with regard to this new instrument of administrative cooperation are still unclear and need to be developed. Taxpayers may seek ex ante protection hindering the administration from cooperating with the administration of another Member State[484] and seek protection against the tax officials of another Member State taking measures against them on domestic territory. The question of where to seek legal protection then arises, whether this is only in the state where the joint audit occurs or possibly also in the state where a foreign tax official comes from.[485] Finally, taxpayers may seek ex post legal protection against the use of the information gathered by a joint audit. Where tax secrets leak in the other Member State participating in a joint audit or simultaneous control, taxpayers may seek legal protection in their own state or before the courts of the state where the violation occurs. This happened in the famous US-Japan *Aloe Vera* case.[486] The question then needs to be addressed, as in other cases of data exchange, whether and to what extent illegally gathered information might be used[487] to show cases of tax avoidance and evasion that should not be tolerated.

Equivalent forms of fact finding outside tax audits may concern bilateral and multilateral advance pricing agreements and the international compliance assurance programs (ICAP). In such circumstances, the consent of the taxpayer cannot mean surrendering the right to legal certainty or an ex ante indefinite acceptance of all behaviours by tax authorities.

8.2.3.3. Tax Transparency and Mutual Assistance in the Different Regions

8.2.3.3.1. Africa[488]

On the regional level and in the framework of the African Tax Administration Forum (ATAF), 22 African states[489] have adopted the ATAF Model Tax Agreement. This Agreement aims to eliminate double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the Agreement for the indirect benefit of residents of third states). Therefore, the ATAF Model Tax Agreement contains extensive

[482] Arts 11 and ff Directive 2011/16.

[483] Art 3, para 26 of DAC 1.

[484] *cf* Financial Court/FG Cologne, judgments of 23 February 2018, 2 V 814/17 [2018]; of 20 October 2017, 2 V 1055/17 [2017]; of 13 April 2018, 2 V 174/18 [2018]; and of 12 September 2018, 2 K 814/18 [2018].

[485] See also LH Haverkamp, 'Joint Audit: Überlegungen zur Rechtslage und Ausblick in die Zukunft' (2020) 13 *ISR* 64, 65 and ff, 71.

[486] *cf* US District Court, judgment of 22 June 2017 Arizona, *Aloe Vera of America, Inc v United States*, 128 F Supp. 2d 1235 [2000], regarding a US Japanese simultaneous control.

[487] This issue is briefly addressed in sec 6.3.2.4.1.3.2.

[488] We would like to thank Attiya Waris for her contribution.

[489] Angola, Benin, Botswana, Burundi, Cameroon, Chad, Gabon, the Gambia, Ghana, Kenya, Lesotho, Mauritius, Namibia, Niger, Rwanda, Senegal, South Africa, Swaziland, Tanzania, Togo, Uganda and Zimbabwe.

rules on EoI (Article 26) and assistance in the collection of taxes (Article 27). The ATAF Model Tax Convention reflects the trend towards tax transparency while at the same time taking into account taxpayers' rights to data secrecy.[490]

At the subregional level, there is already the Southern African Development Community's AATM, signed in 2012. Its Article 5 focuses on tax examinations abroad intended to enhance effective EoI and which should occur in the territory of the requested state. Similarly, as in Europe, these tax examinations abroad may take the following forms: (1) interview by officials of the requesting state, subject to the written consent of the taxpayer; (2) presence of officials of the requesting state during an examination by officials of the requested state. The foreign officials may be present at any stage of the examination. There is no need for consent – only notification to the taxpayer. However, the officials of the requested state decide on the conduct of the examination; (3) simultaneous examinations – the states may discuss and decide collectively for the purposes of determining cases as well as guidelines for simultaneous tax examinations.[491] The AATM agreement is also intended to deal with challenges brought about by VAT carousel fraud and evasion schemes that are on the rise as a result of electronic commerce.

African countries have also concluded bilateral agreements on the exchange of tax information (TIEAs) among themselves. For example, South Africa and Lesotho, as well as South Africa and Swaziland, have concluded agreements on mutual assistance and cooperation and the prevention of fiscal evasion concerning VAT.[492]

Transparency and mutual assistance have led to tax gains generated through the implementation of the EoI on request standards. Uganda recovered over USD 9 million in taxes; South Africa collected USD 62.24 million through a settlement from one taxpayer in 2013. Additionally, the implementation of the internationally agreed standards of tax transparency and EoI, that is, EoI on request and the automatic exchange of financial account information, has helped in bridging informational asymmetry between taxpayers and tax authorities and acted as a deterrent by making the costs of evasion higher.[493]

8.2.3.3.2. Americas

8.2.3.3.2.1. Latin America

8.2.3.3.2.1.1. Argentina[494] In the area of tax transparency and mutual assistance, Argentina ratified the OECD Multilateral Agreement on Mutual Assistance in Tax Matters in 2012.[495]

[490] Art 27(2) ATAF Model Agreement reads: 'Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use.'

[491] *cf* P Letete, 'Developments In Exchange Of Information In Tax Matters Within SADC: A Move Towards Tackling Tax Fraud In Southern Africa' (2018) 14 *Intl Business & Economic Research Journal* 9 and ff, www.cmi.no/publications/file/4045-taxation-mozambique-tanzania.zambia.pdf.

[492] P Letete, 'Developments in Exchange of Information in Tax Matters Within SADC' 9 and ff, www.cmi.no/publications/file/4045-taxation-mozambique-tanzania-zambia.pdf.

[493] Tax Transparency and EoI: Priorities for Africa (G20 Insights), www.g20-insights.org/policy_briefs/tax-transparency-and-exchange-of-information-eoi-priorities-for-africa/.

[494] We would like to thank Eduardo A Baistrocchi for his contribution.

[495] www.oecd.org/countries/argentina/taxargentinabecomesthefirstsouthamericancountrytobecomeapartytothemultilateralconvention.htm.

The Convention applies in Argentina to income tax, social security contributions and withholdings, personal property taxes, VAT, tax on liquid fuels and internal taxes.[496] The Argentine tax authority is competent to execute the agreement.

The Argentine Supreme Court has established the minimum constitutional guarantees for the protection of taxpayers' rights regarding *habeas data*.[497] There is no precedent yet in case law in which the compatibility of mutual assistance and the AEoI with data protection has been discussed. However, the guarantees mentioned above could apply in this context, such as the right to protection of the personal data of the taxpayer.

8.2.3.3.2.1.2. Brazil[498] For domestic requests of information from third parties and EoI between government bodies, the Brazilian Federal Supreme Court has defended minimum guarantees for taxpayers.[499] Law 25.326 governs the exchange of international information and the protection of personal data.

Brazil formally requested OECD membership in 2017 and aligned itself to international tax transparency and BEPS standards.[500] There is no concrete case yet in which the compatibility of mutual assistance and AEoI with data protection has been discussed. However, the aforementioned guarantees could apply in this context, especially considering the fundamental right to privacy.[501]

8.2.3.3.2.1.3. Chile[502] Even though in the Chilean tax system, taxpayers' tax information is protected by the 'principle of tax privacy or safeguard', from the international perspective, Chile has followed the OECD guidelines, both in the matter of the Conventions for the avoidance of double taxation and in the matter of data exchange.

Indeed, each of the current 33 Conventions for the avoidance of double taxation contains an arrangement on the rules about data exchange – generally in their Article 26.

In addition, Chile has signed the Convention on Mutual Administrative Assistance in Tax Matters (CMAATM).[503] Its Article 6 establishes AEoI. Chile committed to implementing a new unique and global standard on financial accounts for non-residents, that is, the Common Reporting Standard (CRS). As a consequence, a new Article 62[504] was added to the Chilean Tax Code in November 2017 in order to adjust it to the rules in the CMAATM and the CRS so that the Chilean Tax Administration fulfils international standards when exchanging tax data.

[496] Law no 24,674.

[497] Argentine Supreme Court, *Empresa de Combustible Zona Común SA c Administración Federal de Ingresos Públicos*, judgment of 7 April 2009.

[498] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[499] See above sec 6.2.2.2.2.

[500] *cf* F Silva Bastos, 'Tax Exchange of Information and International Cooperation in Brazil/*O Intercâmbio de Informações Tributárias e a Cooperação Internacional no Brasil*' (January/June 2015) 11(1) *Rev direito GV*, doi.org/10.1590/1808-2432201502; RA Bittencourt and AJ Ferreira Levenhagen, 'Brazil's Road to OECD Accession: Tax Transparency and BEPS Standards' (2019) 96 *Taxnotes International* 581 and ff.

[501] Art 5(X) of the Brazilian Constitution.

[502] We would like to thank Yuri Varela for his contribution.

[503] On 24 October 2013, Chile's Finance Minister Felipe Larraín signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, at a ceremony in Santiago. This decision made Chile become the 59th signatory to the Convention; www.oecd.org/chile/chile-strengthening-international-tax-co-operation.htm.

[504] Art 62 reads: 'In order to fulfill the international agreements on data exchange from financial institutions qualified as such, according to said agreements that remain unexpired in our country, the Chilean Tax Administration shall yearly require the safeguarded data that fulfills the requirements established in this article. The audited financial institutions above mentioned, on their behalf, shall apply reviewing and identification procedures established in due regulation.'

In Chile, there is no public dissemination of taxpayer information because Article 35 of the Chilean Tax Code provides for the principle of tax privacy and safeguard. Furthermore, law N°20.285 of 2008 on public access to information regulates the principle of transparency of the public service, the right of access to the information of the organs of state administration, procedures for the exercise of the right and its protection and exceptions for information dissemination.

Moreover, in 2014, an additional sub-section was added to Article 25 of the Chilean Tax Code. Besides the special rules in favour of public information dissemination and transparency, this provision indicates that there is no violation of the principle of tax privacy when published information is not linked to a particular taxpayer. In a resolution of 31 December 2018, the Chilean Supreme Court ordered that tax information regarding income tax stated annually and requested by an individual applying the law of transparency be kept secret. The Court stated that even though the requested information was not personal, from the analysis of the same data, such as economic activity, the taxpayers' identity could be determined, resulting in a violation of the privacy or safeguard established in the law.[505]

8.2.3.3.2.1.4. Peru[506] Peru signed the Multilateral CMAATM in October 2017, and it entered into force for Peru on 1 September 2018. Since then, Peruvian legislation has been modified in order to comply with the needs for the information exchange assumed in the Convention. The Peruvian General Law for the Financial System and Insurance now establishes that financial companies provide the tax administration with information on the passive operations of the companies of the financial system with their clients, referring to balances and/or accumulated amounts, averages or higher amounts of a certain period and the returns generated, including the information that identifies clients, in compliance with what is agreed in international treaties.[507]

Additionally, in 2018, the regulation was approved that establishes the procedure through which national financial entities must provide the tax administration with financial information for the automatic EoI that complies with the CRS. The tax administration received powers to inspect in order to access information that will be requested from taxpayers to meet the requirements of a third country.[508] In this sense, the Peruvian tax administration was empowered to request financial information from banking entities in order to satisfy the information requirements of third states with respect to non-resident subjects in Peru. Peru is therefore able to comply with the requirement to have legislation in place to guarantee the delivery of information possessed by third parties.

Automatic, spontaneous and on request exchange of tax data are exempt from the protection of the taxpayer's tax reserve.[509] Therefore, the taxpayer does not have the right to confidentiality and reservation with respect to foreign administrations that require this information.

[505] Supreme Court of Chile, judgment of 31 December 2018, case 6333/18 [2018] 8.

[506] We would like to thank Cecilia Delgado Ratto for her contribution.

[506a] Law no 26702.

[507] Through Legislative Decree 1313 of 31 December 2016, arts 143 and 143-A General Law of the Financial System and of the Superintendency of Banking and Insurance were amended as of 2017 in order to comply with the requirements of the CRS.

[508] In December 2016, by Law no 30506, the Executive Power was granted the power to legislate and adapt national legislation to the OECD standards and recommendations on the EoI for tax purposes, international taxation, erosion of tax bases, transfer prices and combat against tax avoidance. Under these powers, Legislative Decree No 1315 modified arts 62, 77, 87, 92, 96, 101, 133, 175, 177 and 180 of the Peruvian Tax Code, establishing various competences, powers of inspection, collection and sanction for the Peruvian tax administration to carry out exchanges of mutual information between tax administrations.

[509] Art 85(h) of the Peruvian Tax Code.

Peru recently assumed its first commitment to AEoI regarding the CRS (related to the 2019 financial year) in December 2020. Therefore, to date, there is still little practical experience or cases related to possible violations of the rights of Peruvian taxpayers. However, regardless of the lack of practical experience or jurisprudence about this topic, in our professional opinion, the future exchange procedures between the Peruvian and foreign tax administrations must respect the following constitutional rights: i) the taxpayer's right to be notified of the exchange procedure; ii) their right to participate in the procedure in order to exercise their right of defence; iii) their constitutional right to access the information in the file and iv) the confidentiality of the information in the sense that neither tax administration can make the information public.

8.2.3.3.2.1.5. Mexico Pursuant to international treaties entered into by Mexico which include provisions governing reciprocal EoI, information may be supplied to foreign tax authorities. In line with the common interpretation of the tax treaty obligations under the OECD Model,[510] such information may only be used for purposes other than tax purposes when so established in the relevant treaty and the tax authorities so authorise it.

8.2.3.3.2.2. The Caribbean[511]

Clauses pertaining to mutual legal assistance and the exchange of tax information among the CARICOM Member States arise under the CARICOM Double Tax Agreement[512] and various bilateral double tax treaties outside the Caribbean region and under the FATCA agreements with the US. In the former case, they tend to focus on residents of the Member States who live in other tax jurisdictions within or outside the region and who may be liable for tax. In relation to FATCA, the focus is on US residents in the Caribbean who may be liable for tax in the US.

8.2.3.3.2.3. United States[513]

It would be impermissible for the IRS to provide information to the tax authorities of another government without express statutory authority to do so. Sections 6103(k) (4) and (5) of the Internal Revenue Code provides that the US competent authority is generally authorised to exchange tax information where such disclosure is authorised under bilateral tax conventions and other international agreements.

Thus, pursuant to the provisions of various tax conventions or TIEAs entered into by the US,[514] it may exchange taxpayer information with a foreign competent authority without any notice required to be given to the subject taxpayer. In situations when the foreign party to the treaty or agreement fails to protect the information according to the requirements of section 6103 or uses the information in ways not authorised in the specific agreement, the IRS has made it clear that it would not be obliged to provide data. Furthermore, if a foreign competent authority seeks taxpayer information from the IRS that is not within its control, the IRS can seek to obtain the requested information from a resident third party via a 'third party summons' but must give

[510] See OECD, *Commentary on Article 26*, para 12.2.

[511] We would like to thank Anthony Gafoor for his contribution.

[512] Art 24 Agreement Among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment.

[513] We would like to thank Jeremiah Coder and Charles H Gustafson for their contribution.

[514] The US is currently a party to more than 60 such bilateral conventions. Such conventions typically also provide for mutual cooperation in several respects. As a result, the IRS can transmit taxpayer information in response to requests by the convention partner as well as the implementation of mutual agreement procedures in circumstances when those procedures have become invoked. All such conventions have been approved by a vote of two-thirds of the Senate, as explicitly required by the US Constitution.

notice to the taxpayer of its effort. Under section 7602(a) of the Internal Revenue Code, the IRS can issue an administrative summons to a third party to provide documents, electronic data, or testimony. The taxpayer who is the subject of this request is entitled to receive notice that the information request has been made to the third party. If the government attempts to enforce the summons on the third party by seeking a court order, the taxpayer can intervene to challenge the legality of the summons.[515] However, a taxpayer has a heavy burden to demonstrate that such a summons is illegal.[516] This provides the IRS with broad authority to obtain domestic information and exchange it upon request from a foreign tax authority under an authorised agreement.

Concern with respect to transparency and data protection is unlikely to diminish with the rapid evolution of the digital economy. Attention on these issues in the US will continue, particularly if there are reports of unauthorised disclosures and/or other forms of abuse. A peculiarity of US jurisprudence may also invite legislative action to protect against disclosures. The US practices the so-called later-in-time doctrine with respect to the relationship between legislation and treaties. As a result, if legislation is adopted that contravenes an existing treaty and it is clear that Congress so intends, then judges in US courts will apply the legislation even though it constitutes a violation of the treaty under international law, a practice referred to commonly as a 'treaty override'. There is another issue arising in the context of mutual cooperation that goes beyond information exchanges. Under a practice inherited as part of the legacy of the English Common Law, foreign countries may not sue to collect foreign taxes. Ironically, this principle is usually called the 'Revenue Rule'. As a result, a foreign country cannot bring a civil action in a US court to collect taxes owed by a US citizen, resident or corporation. However, in a limited number of cases, criminal prosecutions have been sustained against US persons for intentionally violating foreign tax laws.[517] The Supreme Court held that the prosecution did not violate the Revenue Rule because a US criminal statute was enforced. Attempts by several foreign governments to use the decision as a precedent for initiating collection actions in US courts have been rejected.

8.2.3.3.3. Asia

8.2.3.3.3.1. China[518]

China has made reservations to the mutual assistance provisions when signing the Multilateral CMAATM in 2013. Only a few Chinese tax treaties contained a mutual assistance clause. But China has been quite active in exchanging tax information. All Chinese tax treaties now contain a provision on EoI. China has also signed TIEAs with ten jurisdictions. In addition to signing the

The same occurs under the TIEAs, which, as the title implies, deal with cooperation between the parties in tax administration but do not affect the calculation of tax liabilities in the two countries. TIEAs are not approved as such by the Senate but treated as 'executive agreements' authorised by appropriate legislation. Under US practice, executive agreements are treated as international agreements with virtually the same status as a treaty.

Furthermore, the US is a party to the OECD Convention on Assistance in Tax Matters and has concluded a number of Mutual Legal Assistance Agreements. These are treaties providing for cooperation between the parties in the enforcement of criminal law. While not particularly directed at tax crimes, they can and have been used as a vehicle for information transfer in connection with the criminal enforcement of tax laws.

[515] See, eg www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Summons-Enforcement-Under-IRC-7602-a-7604-a-and-7609-a.pdf.

[516] See US Supreme Court, judgment of 23 November 1964, 379 U.S. 48, 58 (1964) *United States v Powell*, cited, 58.

[517] See, eg US Supreme Court, *Pasquantino v United States*, judgment of 26 April 2005, 544 US 349 [2005], in which US citizens were prosecuted for smuggling alcohol and cigarettes into Canada while evading Canadian taxes.

[518] We would like to thank Na Li for her contribution.

Multilateral CMAATM, China also has signed the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and the Multilateral Competent Authority Agreement on the Exchange of CbCR. Moreover, it has joined the Global Forum on Transparency and EoI for Tax Purposes and passed the peer reviews.

When exchanging tax information, Chinese tax authorities shall inform the relevant taxpayers of the purpose of collecting the information, and its source and content, except for any information that should not be disclosed to the taxpayers for confidentiality reasons. Then they set out the confidentiality obligations and exceptions (where information is not provided).

8.2.3.3.3.2. India[519]

The Indian government has entered into exclusive TIEAs with 20 low tax jurisdictions such as the Cayman Islands, British Virgin Islands, Bermuda and Gibraltar. India's comprehensive tax treaties ordinarily contain an EoI provision along the lines of the OECD Model Convention.

Taxpayer information is required to be kept confidential. Disclosures may be made only upon request and if considered to be in the public interest as per section 138 of the Indian Income Tax Act, 1961. Improper disclosures made by tax authorities are punishable with a fine and imprisonment extendable to six months under section 280 of the Indian Income-tax Act, 1961.

India entered into an IGA with the US to implement the FATCA in July 2015.[520] Indian financial institutions are required to provide necessary information to the tax authorities that will be periodically transmitted to the USA. India has also supported the CRS on AEoI, under which the source jurisdiction collects and reports information to the tax authorities about account holders resident in other countries. Suitable amendments to the Indian Income-tax Act, 1961, and Income-tax Rules, 1962, facilitate such EoI.[521]

India is a signatory to the CMAATM. The instrument of ratification was deposited in February 2012. As per the declaration deposited for India, the Convention applies to taxes of every kind and description, whether imposed by the Central Government, political sub-divisions or local authorities.[522] A number of India's treaties contain a special clause addressing assistance in the collection of taxes. Section 228A, Indian Income-tax Act, 1961, provides for the procedure for collecting taxes of a resident or a person having property in India pursuant to treaties with foreign countries. The foreign country is required to send a certificate for the tax recovery, and the concerned Indian authorities are required to recover and remit the sum so recovered (after allowing for collection expenses).

8.2.3.3.3.3. Israel

In the leading case *Foreign Republicans in Israel v The Government of Israel*,[523] the Israeli Supreme Court examined the constitutionality of amendment 227 to the Income Tax Ordinance, which implemented in domestic law the international commitments of Israel under FATCA agreements between Israel and the US. According to this Amendment, Israeli financial institutions were

[519] We would like to thank Ashrita Prasat Kotha for her contribution.

[520] IGA and Memorandum of Understanding (MoU) between Government of India and Government of USA to improve International Tax Compliance and to Implement Foreign Account Tax Compliance Act of USA, www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-India-7-9-2015.pdf.

[521] See s 285BA, Indian Income-tax Act, 1961, and rr 114F to 114H, Income-tax Rules, 1962.

[522] India's Declaration in Reservations and Declarations for Treaty No 127 – Convention on Mutual Administrative Assistance in Tax Matters, available at www.coe.int/en/web/conventions/full-list/-/conventions/treaty/127/declarations.

[523] Israeli Supreme Court, judgment of 2 January 2018, *Foreign Republicans in Israel v the Government of Israel,* HCJ 8886/15 [2018].

obliged to share information with regard to accounts held by US citizens or residents with the Israeli Tax Authority, which in turn automatically exchanges the information with the IRS in the US. The petitioners challenged the constitutionality of the law based on arguments of unlawfully infringing the constitutional rights of privacy, property and equality. But the Israeli Supreme Court rejected the petition and found the amendment constitutional because it complied with the requirements of the limitation clause under section 8 of the Israeli Basic Law: Human Dignity and Liberty, being a law for an appropriate purpose that fits the values of Israel as a Jewish and a Democratic State, and achieves the goals in a proportionate manner without exceeding infringements of the rights.

The Court opened the ruling by emphasising that courts should restrain their judicial review to laws because these reflect the will of the Parliament and the people. According to the ruling, the courts should be very careful in reviewing laws that implement general economic or social policy, such as amendment 227 to the Israeli Income Tax Ordinance. The court followed the typical three-stage analysis of constitutionality: First examining an infringement of a constitutional right; second, analysing whether the infringement met all the requirements of the limitations clause; and third, if the court found that a law infringed a constitutional right and did not meet all the requirements of the limitation clause, then the court would find the law unconstitutional and grant the appropriate remedies.

As to the first stage, the court found that amendment 227 infringes the constitutional right to privacy because personal data is shared and exchanged automatically with the tax authorities of Israel and the US.[524] As to the second stage, the first requirement is fulfilled since the infringement is made by law. The second requirement is also fulfilled since the purpose of the amendment is appropriate to comply with the international obligations of Israel according to the agreements with the US and fight tax evasion. The court reiterated that legislation serves an appropriate purpose under the limitation clause if it intends to achieve important public interests. Similarly appropriate would be legislation designed to promote human rights. Consequently, the court focused on the discussion of proportionality.

The court emphasised that proportionality examines the relations between the purposes of the law and the infringing means used to achieve those purposes. It found that the first subtest of proportionality is met because the means used achieve the purposes of the law since AEoI is the commitment of Israel and could reduce tax evasion. The court also found that AEoI causes the least harm to the right to privacy in order to achieve the goals because the previous data exchange according to a specific request, does not achieve the same goals and results, and no other less infringing means were introduced to achieve the same goals and results. In the court's opinion, there was no alternative to the amendment, as non-compliance with FATCA would cause greater harm to the Israeli financial system and public than compliance. It explained that refraining from implementing FATCA provisions by Israeli financial institutions would prevent such institutions from maintaining financial relationships with foreign financial institutions. Under such circumstances, the Israeli financial institutions would be categorised as 'non-compliant' and subject to a general deduction of 30 per cent at source. It is reasonable to believe, the court concluded, that if Israel had not signed the bilateral agreement for FATCA's implementation and adjusted its laws accordingly, significant harm would be inflicted on all account holders in Israel and likely cause serious damage to the Israeli economy and the image of the State of Israel, which would be

[524] The court ruled that amendment 227 does not infringe the right of equality because its distinction between US citizens and others is based on substantive considerations and relevant factors.

identified as a country that encourages tax evaders. Accordingly, the court ruled that the second subtest of proportionality is met. Finally, the court examined the third subtest of proportionality, which balances the additional infringement of the right and the additional fulfilment of the purposes of the law, and found the balance appropriate because the additional benefits of amendment 227 outweigh the additional infringement of privacy. As a result, the Supreme Court ruled that amendment 227 is constitutional despite the infringement of privacy and data protection rights.

8.2.3.3.3.4. Japan[525]

For mutual assistance, Japan has gradually participated in the global tax transparency campaign. First, Japan signed the OECD CMAATM in 2013. Second, because of the connection with FATCA in the US, AEoI came into force in Japan in 2015.[526] Third, Japan introduced country-by-country reporting in 2016 to implement BEPS Action Plan 13.[527] In order to ensure the proper application of the reporting rules, the Japanese government had firstly allowed taxpayers to report only at the level of a master file, whereas since 2017 taxpayers must submit local files as well.

In 2018, the Supreme Court of Justice of Japan decided the first case on international EoI. A taxpayer sought to withdraw a request for EoI issued by the National Tax Authority to the competent authority of foreign countries. The judges, at first instance,[528] held that a request for EoI was not directly addressed to the taxpayers. It was rather similar to a request to other (domestic) administrative bodies. Thus, taxpayers did not have any legal rights to contest a request for the EoI. Second, it was entirely up to the authorities of the other state whether they accept the request for EoI or not. The second instance court[529] and the Supreme Court of Justice of Japan[530] rejected the appeals.

8.2.3.3.4. Europe

8.2.3.3.4.1. European Union

Cross-border mutual assistance between tax authorities is regulated in the EU by means of secondary law.[531]

8.2.3.3.4.1.1. Standards of Transparency The EU Directives on Mutual Assistance include various limitations of the right to data protection with a view to preserving the effectiveness of tax transparency. In principle, EoI does not imply public disclosure, at least as long as such information is kept confidential among tax authorities. In practice, the issue is that some European countries have higher standards of tax transparency, which present features of public dissemination. Whether such practices are in all cases compatible with the right to privacy

[525] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.

[526] S Hemels and Y Shiba, 'Automatic Exchange of Information and Cross Border Flows of Personal Data' (2017) 3(1) *Law Journal of Tokoha Univ* 45–87.

[527] Y Matsubara, 'National Report on Japan, The Future of Transfer Pricing' (2016) 102b *Cahier de Droit Fiscal International* 471–89.

[528] Tokyo District Court, judgment of 17 February 2017, H25 Gyou-U, no 618, cited.

[529] Tokyo High Court, judgment of 26 October 2017, H29 Gyou-Ko, no 94, cited, not published.

[530] The Supreme Court has not published its reasoning.

[531] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of [direct] taxation and repealing Directive 77/799/EEC (2011) OJ L 64, 1. In the field of value-added tax, mutual assistance currently operates in line with the requirements established by Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of VAT in force as of 5 November 2018.

has not yet been decided.[532] In Finland[533] and, outside of the EU, in Iceland (which, being a European Economic Area (EEA) country, complies with the EU DAC system by means of its domestic legislation),[534] tax authorities publish not only the amount of taxable income and the tax liability of individual and corporate taxpayers in a database, but also details on capital income and ordinary taxable income and other information. Similar rules apply in Sweden through the publication in the so-called '*taxeringskalender*', though with some limitations that better protect confidential information.[535] Tax authorities of all these countries provide access to the database upon request and publish the country's top tax earners, using data from this official database. The latter is also followed by other countries, such as, for instance, Italy, which extends the practice to politicians.[536] In Norway, an EEA country, public access to taxpayer confidential information is secured by search tools based on taxpayers' names and zip codes. The type of confidential information is roughly equivalent to the one described in the case of Finland, except for the fact that information on losses is redacted. However, taxpayers are informed about who is looking at their tax profile.[537]

8.2.3.3.4.1.2. Strict Regime for the Exchange of Data Other than Tax Data The CJEU *Schrems* judgment illustrates the difficulties resulting from EoI between tax authorities with different standards of data protection.[538] Although this is not a tax case, it offers useful insights on how the protection of tax information at the level of the recipient state should be treated. The CJEU held in *Schrems* that Commission Decision 2000/520[539] did not contain any finding regarding the existence of US rules providing for the protection of persons whose data were transferred from the EU to the US. The CJEU pointed out that there was no evidence that measures were adopted by the US intended to limit any interference with the fundamental rights of those persons. Such measures were required even for cases in which the interference of the state entities of that country would be justified by the need to pursue legitimate objectives, such as national security. The examination of the adequacy of the protection afforded in the recipient country, as dictated by the CJEU, ought not to be merely formalistic. Rather, there must be a substantial test

[532] The matter has been examined both by the CJEU (CJEU, *Satakunnan Markkinapössi and Satamedia*, judgment of 16 December 2008, C-73/07) and the ECtHR (ECtHR (Grand Chamber), *Satakunnan Markkinapörssi and Satamedia v Finland*, no 931/13 (27 June 2017), para 123; and, ECtHR, *Benediktsdóttir v Iceland* (decision), no 38079/06 (16 June 2009)) in respect of the balance with the concurrent freedom of expression.

[533] In Finland s 3 and ff of the *Lag om Offentlighet iMmyndigheternas Verksamhet* 621/1999 allows a very wide public disclosure of information concerning income and property. As K Äimä in P Pistone and P Baker (eds), *General Report: The Practical Protection of Taxpayers' Rights* 361, sets out, access to information allows taxpayers to monitor the exercise of public authority and the use of public resources.

[534] Art 71(1) of the Icelandic Constitution (*Stjórnarskrá lýðveldisins Íslands*) protects the freedom from interferences with privacy, home and family life. However, such protection is subject to limitations by law if this is urgently required to protect the rights of others.

[535] See further on this above sec 8.2.3.1.

[536] In Italy, this is required by Law 5 July 1982, No 441. The Italian Constitutional Court has suspended the application of this law, requiring a legislative amendment to remove the conflicts with various general principles and specific provisions contained in the Italian Constitution. A similar measure existed in France, but the *Conseil Constitutionnel* declared it incompatible with the Constitution (see Constitutional Court of France, judgment of 9 October 2013, no 2013-676 DC [2013], paras 18–22). By contrast, this type of measure still validly operates in Hungary (Act CLII of 2007), on which see further I Simon, in F Basaran and J Hey (eds), *Tax Transparency* (IBFD, 2019), 605.

[537] K Devos and M Zackrisson, 'Tax Compliance and the Public Disclosure of Tax Information: An Australia/Norway Comparison' (2015) 13 *eJournal of Tax Research* 108–29.

[538] CJEU, *Schrems*, judgment of 16 July 2020, C-311/18.

[539] 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document no C(2000) 2441), (2000) OJ L 215, 7.

of whether effective legal protection against interference of that kind was indeed available in the recipient country.

The CJEU conducted an examination of the remedies available in the USA in this respect and concluded[540] that legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, did not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the EU Charter. The CJEU pointed out that the Commission did not state, in Decision 2000/520, that the US, in fact, 'ensures' an adequate level of protection by reason of its domestic law or international commitments.[541] As a consequence, the CJEU declared Decision 2000/520, which contained the safe harbour rules, invalid. In *Facebook Ireland and Schrems* (*Schrems II*),[542] the CJEU held that the appropriate safeguards, enforceable rights and effective legal remedies required by EU legislation[543] read in light of the EU Charter of Fundamental Rights must ensure that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the EU. Unless there is a valid EC adequacy decision, the competent supervisory authority is required to suspend or prohibit a transfer of data to a third country pursuant to standard data protection clauses adopted by the Commission if, in the view of that supervisory authority and in the light of all the circumstances of that transfer, those clauses are not or cannot be complied with in that third country and protection of the data transferred required by EU law cannot be ensured by other means.[544] The CJEU then found Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and the Council on the adequacy of the protection provided by the EU-US Privacy Shield invalid.

8.2.3.3.4.1.3. Exchange of Tax Data Arguably, the judgment in *Schrems* points in the directioin that the EU Member States should go regarding the exchange of tax information with third countries. In *Schrems*, the CJEU emphasised that it is the duty of national data protection authorities to keep data transfers to third states under review in order to ensure that EU citizens will enjoy adequate guarantees in the recipient country. However, *Schrems* concerned a natural person. Personal data by natural persons are covered by EU secondary legislation on data protection, applicable in *Schrems*. Even though corporate taxpayers may also need some protection in cross-border data exchange, their data are in principle not covered by the term 'personal data'.[545] Moreover, first,[546] the CJEU might have somewhat lowered its standards of data protection.[547] Second, those standards have not been applied to data exchange in tax matters.

Intergovernmental bilateral agreements, adopted by different states in order to ensure the international effectiveness of the US FATCA, may establish obligations on the EU Member States that have to be interpreted in the light of EU law and the ECHR to avoid potential violations of taxpayers' human rights.[548] Transfer of information to another Member State in the course of a

[540] CJEU, *Schrems*, para 95.
[541] CJEU, *Schrems*, cited, para 97.
[542] CJEU, judgment of 16 July 2020, *Facebook Ireland and Schrems (Schrems II)*, case C-311/18, ECLI:EU:C:2015:650, [2020].
[543] Arts 46(1) and (2)(c) GDPR.
[544] CJEU, *Facebook Ireland and Schrems (Schrems II)* cited, para 203; *cf* arts 44, 45, 58(2)(f) and (j) GDPR.
[545] *cf* CJEU, *Schrems*, cited, ruling 4.
[546] See above sec 8.2.2.4.1.
[547] CJEU, judgment of 6 October 2020, *La Quadrature du Net and Others*, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791 [2020] and CJEU, judgment of 6 October 2020, *Privacy International*, case C-623/17, ECLI:EU:C:2020:790 [2020].
[548] EU Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, FATCA legislation and its application at international and EU level, Directorate General for Internal Policies of the Union, PE 604.967, May 2018, specifically 38 and ff.

cross-border tax investigation under the EU Mutual Assistance Directive can be an interference with Article 8 of the ECHR or Articles 7 (respect for private and family life) or 8 (protection of personal data) of the EU Charter. Interestingly, the CJEU, in principle, denies legal persons like companies and banks the right to data protection (Article 8 of the EU Charter).[549] However, they enjoy the right to private and family life (Article 7 of the EU Charter).[550]

Recent case law of international courts shows that 'fishing expeditions', that is, unrestrained access to tax-related information by the tax authorities or access to tax data that are not foreseeably relevant for tax procedures, are not permissible.[551] In the European region, they have to pass the compatibility test both of Article 8 of the ECHR,[552] and of Articles 7 and 8 of the EU Charter including secondary EU law.[553] Group requests are problematic but not necessarily excluded,[554] even though legislation and standards forms for requests usually require the identity of the person under examination or investigation.[555] According to the most recent amendment of the DAC Directive 2011/96

> [w]here a request referred to in Article 5 relates to a group of taxpayers who cannot be identified individually the requesting authority shall provide at least the following information to the requested authority: (a) a detailed description of the group; (b) an explanation of the applicable law and of the facts based on which there is reason to believe that the taxpayers in the group have not complied with the applicable law; (c) an explanation how the requested information would assist in determining compliance by the taxpayers in the group; and (d) where relevant facts and circumstances related to the involvement of a third party that actively contributed to the potential non-compliance of the taxpayers in the group with the applicable law.[556]

Outside of tax law, the CJEU has shown increased general concern for securing the effectiveness of data protection.[557] When it comes to the collection of tax data by tax authorities, however, the European courts have given states a wide margin of appreciation, expressing reservations only in cases when basic procedural safeguards were not observed.[558] Taking into account that Directive 2011/16 on administrative cooperation in the field of taxation as it stands now, FATCA and similar legal instruments have pushed the elasticity of laws granting tax authorities powers over taxpayer data to its limits,[559] some protection is needed. The standards of protection by the

[549] Legal persons only enjoy the right to data protection under art 8 of the EU Charter where their name indicates the name of natural persons, *cf* CJEU, *WebMindLicences*, cited, para 79, and CJEU, *Volker und Markus Schecke und Eifert*, cited, paras 52 and 53.

[550] CJEU, *Varec*, cited, para 48; *cf* also ECtHR, *Othymia Investments BV v the NL*, cited, para 37, ECtHR, *Bernh Larsen Holding (BLH) and Others v Norway*, cited, para 104, and ECtHR, *Société Colas*, cited, para 41.

[551] See above sec 8.2.3.2.2.

[552] ECtHR, *Sommer v Germany*, cited.

[553] CJEU, judgment of 16 May 2017, *Berlioz Investment Fund*, case C-682/15, ECLI:EU:C:2017:373, [2017].

[554] *cf* OECD, *Commentary on Article 26*, para 5.2; Swiss Federal Supreme Court, *UBS: group request*, cited, para 6.3, *DTC UBS Switzerland-France*, cited, paras 5.2.3. and ff and 6.1; Canadian Federal Court, *Minister of National Revenue and Hydro-Québec*, cited, para 96: 'Some form of fishing expedition may be allowed, but judicial authorisation, with its inherent discretion, exists to limit and govern it.' See on this CJEU, judgment of 25 November 2021, *État du Grand-duche de Luxembourg (Informations sur un groupe de contribuables)*, case C-437/19, ECLI:EU:C:2021:953 [2021].

[555] eg Canadian Income Tax Act, RPC, 1985, c.1 (5th Supp) 231.2 (2): 'Unnamed persons. The Minister shall not impose on any person a requirement … to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge …'. art 20(2) of Directive 2011/16 requires 'at least … the name of the person to whom the investigation or inquiry applies'.

[556] Art 5a para 3 of Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation.

[557] CJEU, *Schrems*, cited, and CJEU, *Facebook Ireland and Schrems (Schrems II)*, cited; but see also CJEU, judgment of 6 October 2020, *La Quadrature du Net and Others*, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791 [2020] and C-520/18, and CJEU, judgment of 6 October 2020, *Privacy International*, case C-623/17, ECLI:EU:C:2020:790 [2020]; see also above at sec 8.2.3.3.4.1.2.

[558] See CJEU, *Berlioz Investment Fund*, cited; and ECtHR, *Othymia Investments BV v the NL*, cited.

[559] See further on this under sec 8.2.3.2.

judiciary are still developing, as cases in this relatively new area are only beginning to reach the courts. Such standards of protection are necessary. Otherwise, national authorities may refuse to exchange the data when they consider that the level of protection of the taxpayer privacy rights are not sufficient in the jurisdiction to which tax data are to be transferred.[560] The CJEU requires judicial protection against information orders.[561] For that purpose, the court in the requested Member State must have access to the request for information addressed to the requested Member State by the requesting Member State. The relevant person does not, however, have a right of access to that request for information. It remains a secret document.[562] In order for that person to be given a full hearing of their case in relation to the lack of any foreseeable relevance of the requested information, it is sufficient, in principle, that they be in possession of the identity of the person under examination or investigation and the tax purpose for which the information is sought.[563] Neither the taxpayer nor third parties whose data are transferred have a right to judicial protection in the requested Member State, according to the CJEU.[564] Protection of tax data, including against exchange of foreseeably irrelevant data, is difficult under such circumstances. Taxpayers may not even know whether and to where their data are transferred and, if they know, they have no remedy. This also applies to intermediaries and third parties, eg banks or companies where the taxpayer holds participation.

Similarly, Article 8 of the ECHR does not require a prior notice of lawful tax investigations to be given to all persons potentially implicated.[565]

8.2.3.3.4.2. Russia[566]

The gathering of confidential tax information by Russian tax authorities in the framework of tax audits, also when held by third parties and including by means of mutual assistance in the cross-border scenario, implements the collective right to tax transparency and is not limited by the provisions of tax secrecy, as long as this information is not publicly disclosed.

However, in the framework of the electronic service 'transparent business'[567] taxpayers can accept the disclosure of some information concerning them that would otherwise have to remain confidential.[568] This service pursues tax transparency but, in fact, produces public disclosure effects, which can also impact business relations.

[560] See eg CJEU, *Schrems*, cited and CJEU, *Facebook Ireland and Schrems (Schrems II)*, cited; *cf* also 29 Working Party, Guidelines for the Member States on the criteria to ensure compliance with data protection requirements in the context of the automatic exchange of personal data for tax purposes, 16 December 2015, 175/16/EN WP234, ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=56084; not least Wöhrer, *Data Protection and Taxpayers' Rights*, para 6.4.7.

[561] CJEU, *Berlioz Investment Fund*, cited.

[562] *cf* art 16 Directive 2011/16.

[563] *cf* art 20(2) Directive 2011/16 and CJEU, *Berlioz Investment Fund*, cited, para 102.

[564] CJEU, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*, cited; for more legal protection, including for taxpayers and third persons, see Opinion of Advocate General Kokott of 2 July 2020 on these cases.

[565] ECtHR, *Othymia Investments BV v the NL*, cited.

[566] We would like to thank Karina Ponomareva and Natalia Vorobyeva for their contribution.

[567] Прозрачный бизнес: Проверь себя и своего контрагента/Transparent Business: Check Yourself and Your Contracting Party, pb.nalog.ru/about.html.

[568] Such information includes the tax identification number, the main activity, authorised share capital, address, nature as SME, the possible existence of inaccurate data on the managing bodies, participation of management bodies in other companies, etc. Furthermore, since 1 October 2018, it includes information on income, expenditure and the amounts of taxes, fees and social security contributions and, since 1 December 2018, also on violations, underpayments, penalties and fines.

Furthermore, Russia has a general policy of disclosing specific information concerning taxpayers on the website of the Federal Tax Service.[569]

In an international context, Russia has implemented the so-called CRS in Tax Matters and provides mutual assistance in tax matters along the lines established in its bilateral tax treaties, as well as of the Multilateral CMAATM of 25 January 1988, which it ratified in March 2015.

In the framework of such legal instruments, therefore, Russia exchanges information (automatically,[570] spontaneously, or upon request) with the other Contracting States, participates in cross-border assistance in the collection of taxes,[571] may become involved in joint and simultaneous tax audits and in the servicing (sending) of documents.

The competent authority for information exchange is the Federal Tax Service of Russia.

8.2.3.3.4.3. Switzerland[572]

Switzerland applies very interesting domestic rules to secure data protection and its intersection with mutual assistance (including AEoI). Such rules are additional to those contained in its international agreements, which in the past few years have become more similar to the ones that pursue global tax transparency in most other countries.

Mutual assistance and data protection are complex areas with various overlapping rules and regulations. As in other jurisdictions, the Swiss Federal Constitution (FC) contains a right to privacy in Article 13 FC, which provides a person in simplified terms with the right to protect their own data. Moreover, Switzerland has had a domestic Data Protection Act (DPA) since the early 1990s, which will in the near future likely be more aligned to protection according to the GDPR. The DPA protects both individuals and legal entities.[573]

The DPA is applicable to a mutual assistance procedure as long as it is still an administrative and non-criminal procedure.[574] It contains several provisions relevant to the purpose of this chapter, including personal rights such as:

- The right to information (Article 8 and ff. of the DPA): ie, a person has the right to receive information about him- or herself collected by the data processor. Such right applies not only towards the Swiss Federal Tax Administration responsible for the cross-border exchange of information but also towards financial institutions collecting data in the preparation for an exchange of information. Closely related is the general principle of transparency

[569] Besides publicly available information and the one to whose disclosure the taxpayer has given consent, the website includes information concerning the name and tax identification number of taxpayers, the situations in which they have infringed tax law, tax arrears, fines and penalties, the application of special regimes, participation in multinational enterprises, income and expenses for the previous year, the average number of employees per each employer, taxes and social security contributions paid in connection with the import of goods.

[570] On 12 May 2016, Russia signed the multilateral competent authority Agreement on the Automatic Exchange of Financial Account Information (CRS MCAA). Federal Law of 27 November 2017 N 340-FZ has amended the Tax Code of the Russian Federation to allow the automatic exchange of financial information with the competent authorities of foreign countries. Such law makes financial intermediaries responsible for collecting and accumulating information about the taxpayer and conducting an appropriate verification of such information. Further regulations implemented are the automatic exchange of financial information in Russia, including No 693 of 16 June 2018, which contains a list of information provided by the financial intermediary.

[571] Among the various rights reserved by Russia in connection with the ratification of the Convention on Mutual Assistance in Tax Matters are the ones not to render assistance in collecting any tax claims or administrative penalties.

[572] We would like to thank Michael Beusch and Peter Hongler for their contribution.

[573] Art 2(1) DPA.

[574] See art 2(2) DPA.

(see also Article 4(4) of the DPA) according to which the collection of data and the purpose of the data processing should be visible.[575]

- the correction of data (Article 5(2) of the DPA)**:** A person may request that incorrect data is corrected (a reservation applies in case of an automatic exchange of information, see below).

Importantly, the Tax Administrative Assistance Act (TAAA), a domestic act implementing the various forms of mutual assistance obligations of Switzerland, contains several provisions which partly reflect the rights provided for in the DPA:

- Article 14 of the TAAA provides a right to be informed about an exchange of information (including a right to review and inspect files; see Article 15 of the TAAA). See also Article 22b of the TAAA, according to which a person concerned shall also be informed if there is a spontaneous exchange of information.
- Article 22h of the TAAA contains a secrecy clause in the sense that persons who are responsible for the application of the TAAA shall act in a confidential manner towards private individuals and other governmental bodies. There are certain exceptions, such as if the TAAA or an international treaty explicitly enables the transfer of information (see Article 22h(2) of the TAAA). The latter is necessary to enable a cross-border exchange of information.
- A particular feature of the TAAA is that according to Article 7(c) of the TAAA an exchange of information is prohibited if the request infringes the principle of good faith, in particular if the request is based on information which was collected in a criminal act according to Swiss law. This provision was introduced to disable requests from states which acquired stolen taxpayer data before Switzerland abolished banking secrecy in cross-border circumstances.

In order to be in line with the legality principle, Articles 22f and 22g of the TAAA explicitly allow the Swiss Federal Tax Administration to collect data for the fulfilment of international obligations and the application of the TAAA, and it may operate an IT system for such purpose.

Moreover, the domestic implementation act concerning the automatic exchange of information (AEOIA) contains further provisions regulating the collection of data in the process of AEOIA:

- Article 14 of the AEOIA provides for an obligation on the reporting financial institution to inform the reportable person concerning various elements of the automatic exchange such as their capacity as reporting financial institution but also the rights of the reportable persons.
- Article 19 of the AEOIA states that in relation to the information collected by domestic financial institutions, the persons concerned have the rights provided for by the DPA. However, an important reservation is made towards the Swiss Federal Tax Administration according to which persons concerned only have the right to amend information in case of mistakes triggered by transfer of information (Article 19(2) of the AEOIA), ie a limited right to a correction of data. However, this reservation does not apply to financial institutions. This means that incorrect data shall be corrected in any case if requested by the person and if such data is held by a financial institution (see Article 5(2) of the DPA).
- Other provisions of the DPA might not be applicable, for instance, the prohibition on a cross-border disclosure in case the privacy of the data is endangered abroad (see Article 6 of the DPA). It seems that in practice the obligations according to international law (eg double tax

[575] For a detailed review see D Vasella and J Schneider, in M Zweifel, M Beusch and S Oesterhelt (eds), *Kommentar Amtshilfe* (Helbing Lichtenhahn Verlag, 2020), para 28 nos 62 and ff.

treaties or tax information exchange agreements) prevail over the general prohibition of cross-border disclosure of data in the DPA.

Another interesting point concerning all forms of mutual assistance is the examination of whether the receiving state provides for sufficient data protection. It is the position of the Swiss Federal Tax Administration that even though data protection might, in general terms, with no relation to taxpayer data, be considered insufficient in certain states, EoI is still necessary and in line with international obligations. This was also confirmed by the Swiss Federal Supreme Court applying the double tax treaty with India. According to the Swiss Federal Supreme Court, signing a double tax treaty is a political commitment to exchange information which should in general not be restricted by too narrow an understanding of sufficient data protection even though the general level of data protection might be low in India.[576]

There is rich case law of the Swiss Federal Supreme Court on EoI.[577] That Court has ruled still compatible with treaty-based international law a group inquiry with no mention of specific names of taxpayers, but with sufficient elements that allowed the identification of the persons whose information is to be exchanged.[578]

8.2.3.3.5. Oceania

8.2.3.3.5.1. Australia

Although the confidentiality of taxpayer information is protected from disclosure by legislative sanction, a broad exception allows an Australian Tax Office (ATO) officer to disclose taxpayer information to a competent authority for the purposes of information exchange under an international tax agreement.[579] A taxpayer challenged the use of information obtained by the ATO under the TIEA with the Cayman Islands on the basis that the request violated the terms of the agreement.[580] The information in question was critical to determining the tax residency of a corporation under Australia's central management and control test. It was obtained in response to a request by the ATO to the Cayman Islands revenue authority under the TIEA, but later consent to use the documents in legal proceedings was revoked by the Cayman Islands Grand Court. The taxpayer argued that the request was in violation of Article 12 of the TIEA between Australia and the Cayman Islands (the entry into force provision), given that the information was sought to be used in relation to a year of income earlier than the entry into force date of the TIEA. The Australian court concluded that the information could be used: the request complied with the TIEA as it related to a covered tax period but happened to be useful in relation to earlier periods as well. This information was crucial to related tax avoidance proceedings.

8.2.3.3.5.2. New Zealand

New Zealand has entered into international agreements and has passed amended legislation to support the automatic exchange of account information between the New Zealand Inland Revenue Department (IRD) and the tax authorities of other participating countries in order to reduce global

[576] Swiss Federal Supreme Court, judgment of 21 December 2018 CH: FC, 2C_619/2018, cons 4.2.

[577] eg Swiss Federal Supreme Court, judgment of 26 July 2019, 2C-653/2018 *DTC UBS Switzerland-France*, cited, nos 5.2.3. and ff, 6.1 and no 6.3.

[578] Swiss Federal Supreme Court, judgment of 12 September 2016, BGE 143 II 136; of 1 September 2017, BGE 143 II 628; of 9 April 2018, 2C 646/2017; of 26 July 2019, 2C_653/2018 (regarding a list of roughly 40,000 account numbers without any names of presumably French taxpayers).

[579] Taxation Administration Act 1953, s 355-50(2), item 9.

[580] Federal Court of Australia, judgment of 11 December 2015, S135/2016, *Hua Wang Bank Berhad v Federal Commissioner of Taxation*.

tax evasion. The 'Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Act 2019' now explicitly permits disclosure among many other situations under information-sharing arrangements and generally for international purposes.[581] As stated above,[582] this legislation precisely reflects the worldwide shift from tax secrecy to effective tax collection through the EoI. However, taxpayers can still challenge the new practices before the courts.

New Zealand's Privacy Act 2020 applies to certain personal information even when it is transferred or held outside New Zealand. Therefore, agencies must inform individuals if they transfer their information outside New Zealand. Data transfer, outsourcing or disclosure of personal information outside New Zealand is only allowed with the consent of the duly informed data subject or where comparable standards of protection apply. The Office of the Privacy Commissioner has the right to prohibit a transfer of personal information from New Zealand to another country if there are reasonable grounds to think that there will not be comparable safeguards in place.

In recent proceedings in New Zealand, as a result of a challenge by a taxpayer's local tax agent, information notices triggered by a request for information from the Korean National Tax Service were quashed. The Supreme Court of New Zealand refused[583] the New Zealand Commissioner of Inland Revenue's application to appeal from the decision of the Court of Appeal, which had held that the New Zealand revenue authority applied the incorrect standard of 'necessary or relevant' in evaluating the Korean request for information, rather than the 'necessary' test as required under Article 25 of the New Zealand-Korea Tax Treaty.

8.2.4. Conclusion on Data Protection[584]

The individual right to data protection and the legitimate collective interest in tax transparency operate concurrently in tax matters, thus requiring a balanced approach that secures both core values.

The right to data protection has gradually emerged as a separate individual right from the right to privacy and confidentiality of information for the persons to whom it relates in many countries. This development was partly framed through dedicated legislation and partly also by the judiciary.[585]

Nearly all jurisdictions enshrine in their domestic law the right of confidentiality of taxpayers with respect to information they share with the tax authorities.[586] Data protection is often not guaranteed explicitly on the constitutional level, but those Constitutions guarantee privacy.[587] Such is the situation, for example, in Africa. However, most African countries have been adopting data protection legislation. Regional and subregional (model) conventions provide for data exchange while at the same time taking taxpayers' privacy rights into account.

Generally, the signing of international tax agreements can imply the acceptance of different standards.[588] That should, however, never be the case insofar as a country applies the death penalty in connection with tax crimes. In such circumstances, where countries do not

[581] S 18C and ff of that Act.
[582] See above at sec 8.2.2.5.2.1.
[583] Supreme Court of New Zealand, judgment of 7 August 2019, SC 34/2019 *Chatfield & Co Ltd v CIR*.
[584] We would like to thank Philip Baker and Katerina Perrou for their contribution.
[585] The German Federal Constitutional Court (*Bundesverfassungsgericht*) was perhaps the first to develop the concept of effective data protection as an instrument for the protection of the right to information self-determination. See German Federal Constitutional Court, judgment of 15 December 1983, 1 BvR 209/83 et al, cited *Volkszählung, census*.
[586] See in general IFA, *The Practical Protection of Taxpayers' Rights*.
[587] *cf* eg the analysis of African constitutions in that regard above at sec 8.2.2.1.
[588] *cf* above at sec 8.2.3.3.4.3. with regard to Switzerland and at sec 8.2.3.5.1. with regard to Australia.

abstain from concluding these types of agreements,[589] taxpayers and professionals should be allowed to invoke the protection of individual human rights for denying the transmission of the information.[590]

Various observers have criticised the trend towards information exchange for not focusing enough on protecting data.[591] Some have suggested that any sharing of taxpayer information violates a jurisdiction's data protection rules, while others have focused more on the concerns raised by sharing taxpayer information with jurisdictions that do not have equally strong data protection rules. In response, several African countries have adopted laws and regulations to protect personal data, some of them inspired by the EU GDPR. In particular, Nigeria adopted a Data Protection Regulation in 2019, based on which a data controller is required to only transfer data to a foreign country or international organisation subject to the supervision of the NITDA and the Attorney General of the Federation.[592] In Senegal, the transfer of personal data is in principle prohibited unless the receiving country provides sufficient protection to data subject's private life, liberties, and fundamental rights.[593]

In some states, the protection of taxpayer data is guaranteed by law, either specifically as in the case of Chile[594] and Peru[595] or under the more general framework of the right to privacy, as in the case of Argentina,[596] Brazil[597] and Mexico.[598] In the US,[599] the Fourth Amendment protects taxpayers' rights in the context of the power of tax authorities to collect information by prohibiting unreasonable searches and seizures. Both the Privacy Act of 1974, which applies to all federal agencies, and other specific data protection provisions in the Internal Revenue Code and the Taxpayer Bill of Rights, create a protection net covering taxpayer information.

Under the Indian Constitution,[600] data protection is considered part of the right to privacy, which is considered an inherent part of the right to life and liberty. In Israel,[601] data protection is also part of the right to privacy protected as a constitutional right. Furthermore, tax data are protected under the 1981 Israeli Privacy Protection Law. In Japan,[602] several constitutional provisions are relevant for the right to data protection. In addition, data are covered by the Act on Protection of Personal Information and specifically by the Act on the Use of Numbers to Identify a Specific Individual in Administrative Procedures.

In Europe,[603] data are protected under multiple legal sources. Article 8 of the ECHR, the 1981 Convention on the Protection of Individuals with regard to Automatic Processing of Personal

[589] Interestingly, Germany has included a carve-out from the obligation of mutual assistance in some of its double tax treaties that operates when the information subject to mutual assistance may be used for the purpose of applying death penalties. See, for instance, art 26(3)(c) of the double taxation convention with Tunisia, concluded on 8 February 2018 and in force since 16 December 2019.

[590] For remedies against data transmission to other countries, *cf* above at sec 8.2.3.3.4.1.3.

[591] See, eg www.ebf.eu/wp-content/uploads/2017/01/EBF_009374-Letter-to-G20-on-data-protection-aspects-of-Automatic-Exchange-of-Information.pdf; https://ec.europa.eu/newsroom/article29/items/622219; international-adviser.com/common-reporting-standards-conflict-data-human-rights/.

[592] *cf* above sec 8.2.2.1.

[593] *cf* above sec 8.2.2.1 and Senegal, Data Protection Law, art 49.

[594] *cf* above sec 8.2.2.2.2.4.

[595] *cf* above sec 8.2.2.2.2.5.

[596] *cf* above sec 8.2.2.2.2.2.

[597] *cf* above sec 8.2.2.2.2.3.

[598] *cf* above sec 8.2.2.2.3.

[599] *cf* above sec 8.2.2.2.5.

[600] *cf* above sec 8.2.2.3.2.

[601] *cf* above sec 8.2.2.3.3.

[602] *cf* above sec 8.2.2.3.4.

[603] *cf* above sec 8.2.2.4.

Data, and specific to the EU,[604] the EU Charter and the GDPR provide a comprehensive framework for the protection of taxpayer data. In Russia,[605] the Russian Federal Tax Code provides for criminal, administrative and disciplinary liability of any violation of the protection of data against public dissemination.

In Australia,[606] data protection, including tax matters, applies within the more general framework of the right to privacy and only receives partial protection under common law, as it applies only to the specific aspects expressly regulated by the law. Indeed, a tax-specific regime protects the confidentiality of taxpayer information. The Australian Taxpayers' Charter provides that taxpayer privacy shall be respected, and personal information shall be kept confidential. Disclosure of protected information constitutes an offence for a taxation officer. In New Zealand,[607] the Taxpayer Charter provides that information shall be treated as private and confidential and kept secure; it can be used or disclosed only in accordance with the law. The Taxation Act 2019 marked a shift of perspective from tax secrecy towards effective tax collection through the EoI by replacing the provisions on tax secrecy with provisions on confidentiality, on the corresponding duties of tax officers and on identifying permitted disclosures.

In many countries, the shared gathering of confidential tax data in the framework of so-called joint and simultaneous tax audits (as well as in equivalent practices conducted ex ante either on request by the affected persons or with their consent) presents new questions regarding effective judicial protection. These concern the competence of the courts of one or the other or both of the participating states and the applicable law.

In conclusion, also taking into account the issues of transparency and cross-border mutual assistance, balancing the legitimate public interests and individual rights presents a serious challenge for tax administrations and taxpayers. It is important to avoid an indefinite expansion of the legitimate public interest to the detriment of individual rights, thus securing a proportionate reaction to tax evasion and profit shifting without an overkill effect.

8.3. Rights and Obligations of Professionals and Intermediaries

8.3.1. General Introduction

Human rights, as applied in the field of taxation, are not only important for taxpayers but also for third parties involved in tax collection, such as tax advisers and lawyers, withholding agents (including banks and financial intermediaries) and others.[608]

In the case of financial intermediaries, two important developments may be recorded in the tax scenario. First, for a number of years, banks and financial institutions have incurred additional costs in the framework of outsourced external support to tax auditing. This has been generally justified in the light of the collective interest, taking into account that the relevant information is often available to them as withholding agents.

Second, the protection of the collective interest in tax collection has gradually faded out the confidentiality of banking and financial secrecy towards tax authorities. This is very clear if one considers the type of financial disclosure determined through the US FATCA[609] and equivalent

[604] *cf* above sec 8.2.2.4.1.
[605] *cf* above sec 8.2.2.4.2.
[606] *cf* above sec 8.2.2.5.1.
[607] *cf* above sec 8.2.2.5.2.
[608] Also, see sec 8.2.2.4.1.3. above.
[609] US Foreign Tax Account Compliance Act.

legislation enforced in Europe[610] and other parts of the world.[611] This legislation essentially obliges the financial intermediary to automatically report all relevant tax data to tax authorities in order to facilitate their effective auditing of taxpayers. Inter alia, it should be noted that such type of legislation has further increased the extra cost incurred by banks and financial intermediaries.[612]

However, and in line with the functional protection theory, confidential information concerning taxpayers should receive the same level of protection regardless of the nature of the third party that holds it, thus including the case of the information held by professional intermediaries. Insofar as the object of protection of the human right takes into account the situation of the person whose confidential information may be disclosed, it is indeed important to secure comprehensive protection of this right also against possible disclosure of this information by third parties, such as tax advisers who are often not covered by client-attorney or a similar privilege.

This section will analyse the protection of the substantive rights connected with the functions exercised by such third parties. Their professional and business-related individual rights also need protection in view of the collective interest in an effective tax collection, which has justified the adoption of several specific tax measures to facilitate the work of tax authorities and also creates some obligations for those third parties. Thus, in the framework of BEPS and tax transparency projects[613] and related implementation, also in the EU,[614] the need for effective protection of the collective interest in transparency has produced the so-called country-by-country reporting system. In such a system, large multinational enterprises[615] have to report their global activities,[616] breaking them down per country.

The latter type of measure generally enhances the transparency standard towards tax authorities in respect of confidential information of taxpayers by creating actual disclosure obligations for third parties. There is currently a tendency to put the protection of collective rights above intermediaries' professional obligation to preserve the confidentiality of data. This scenario of global transparency of cash flows is generally acceptable for the sake of an effective global fight against money laundering and terrorism financing[617] and against the failure of global players to pay taxes. However, the protection of individual human rights should be taken into account in the context of a balanced approach that does not undermine the effectiveness of professional rights in tax matters. Professional rights have wide recognition outside the field of taxation. In particular, the client-attorney privilege of lawyers is the cornerstone of the right to an effective defence of all persons, recognised by the United Nations for dealing with offenders.[618] Lawyers would be unable to satisfactorily carry out their task of advising, defending and representing their clients, who would, in consequence, be deprived of their right to a fair trial if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing on information obtained in the course of related

[610] See at sec 6.1.2.4.1.3.

[611] See, for instance, in India, at sec 6.1.2.3.2. and sec 7.3.3.2.

[612] For this reason, banks and financial institutions have, in some cases, simply terminated business relations with some of their clients due to the cost connected with the FATCA-type tax reporting obligations.

[613] See BEPS Action 13.

[614] COM/2016/0198 final.

[615] A multinational enterprise should have a combined revenue of at least 750 million euros.

[616] The reporting should indicate – on a global basis with per-country breakdown – revenue, income, tax paid and accrued, employment, capital, retained earnings, tangible assets and activities.

[617] *cf* eg OECD, *Money Laundering and Terrorist Financing Awareness Handbook for Tax Examiners and Tax Auditors*, Paris (2019), www.oecd.org/tax/crime/money-laundering-and-terrorist-financing-awareness-handbook-for-tax-examiners-and-taxauditors.pdf.

[618] See UN, *Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba (7 September 1990), which protect the access to lawyers and (see para 22) the respect of confidentiality for all communications and consultations between lawyers and their clients.

legal consultations.[619] Nevertheless, certain obligations of sharing information and cooperation with the authorities responsible for combating money laundering do not infringe the right to a fair trial.[620]

The situation of intermediaries will now be further addressed with reference to specific geographical frameworks before drawing some general conclusions.

8.3.2. Different Regions

8.3.2.1. Africa[621]

Different African countries have different laws on intermediaries. In Kenya, tax intermediaries have an obligation to have regard for the law and not to be negligent in performing their duties. Section 72B of the Income Tax Act states that where additional tax is charged due to negligence or disregard of the law by an authorised tax agent, the agent will be liable to a penalty equal to one half of the additional tax, but not less than 1,000 shillings and not exceeding 50,000 shillings.[622] In Nigeria, tax intermediaries are qualified chartered accountants, tax practitioners or legal practitioners.[623] The intermediaries are obliged to adhere to the rules of professional conduct for their respective professions. For the legal practitioner, the Rules of Professional Conduct for Legal Practitioners apply pursuant to section 12(4) of the Legal Practitioners' Act.[624] For tax practitioners, the Statement of Taxation Standard (STS) applies pursuant to section 1 of the Chartered Institute of Taxation of Nigeria Act (CITNA).[625]

South Africa regulates tax intermediaries in several ways and for different purposes. To protect taxpayers, only registered tax practitioners are allowed by law to provide tax advisory and representation services.[626] It is a criminal offence for a tax practitioner not to register with both a recognised controlling body and the South African Revenue Service. Tax practitioners who facilitate or promote schemes that may result in tax benefits and carry certain hallmarks of tax avoidance are required to report information on an upfront basis and are subject to monetary sanctions for failure to do so.[627]

8.3.2.2. Americas

8.3.2.2.1. Latin America

8.3.2.2.1.1. Argentina[628]

In Argentina, tax authorities may request information from third parties other than taxpayers such as financial institutions, notaries and banks. However, the obligations of third parties to

[619] CJEU, judgment (Grand Chamber) of 26 June 2007, *Ordre des barreaux francophones et germanophone and Others*, case C-305/05, ECLI:EU:C:2007:383 [2007], para 32.
[620] *cf* CJEU, *Ordre des barreaux francophones et germanophone and Others*, cited, para 37.
[621] We would like to thank Attiya Waris and Johann Hattingh for their contribution.
[622] Income Tax Act 1973, Cap 470 (Kenya), s 72B.
[623] Azuka Aniyie, 'Tax Intermediaries Management' 522.
[624] Legal Practitioners' Act 1962, Cap207 (Nigeria).
[625] Azuka Aniyie, 'Tax Intermediaries Management' 522.
[626] S 240A of the Tax Administration Act, 2011 (as amended) requires that all tax practitioners register with a recognised controlling body. All recognised controlling bodies require minimum academic qualifications and practical experience in taxation law and accounting. Entry examinations may be required, and ongoing education needs to be undertaken annually.
[627] Ss 34 and 35 of the Tax Administration Act, 28 of 2011.
[628] We would like to thank Eduardo A Baistrocchi for his contribution.

provide such information must not violate the duty of professional confidentiality and the right to protection of personal data. This includes the obligation of lawyers not to breach their duty of confidentiality.[629] Therefore, they may not disclose information to the tax authority obtained in the exercise of their profession, such as taxpayer tax planning.

Tax returns in Argentina are covered by tax secrecy. Judges, government officials, judicial employees and employees of the Argentine tax authority are obliged to keep secret all tax information that comes to their knowledge in the performance of their duties.[630]

Professionals and intermediaries in tax matters in Argentina are protected under Article 43 of the Argentine Constitution against the requirements of the tax authority to disclose confidential information. This protection extends to any taxpayers' data or personal information with respect to tax planning, or tax defence carried out by such professionals and intermediaries.[631]

8.3.2.2.1.2. Brazil[632]

Brazilian tax authorities may request information from parties other than the taxpayers themselves (eg financial institutions, notaries, brokers, auctioneers, administrators of an estate). Nevertheless, the third parties' obligations must not violate the duty of professional confidentiality (including clergy privilege).[633] Lawyers must not violate their duty of confidentiality.[634] The government tried to introduce a mandatory disclosure regime (BEPS Action 12) in 2015, but that was rejected by Congress. Consequently, lawyers cannot disclose information obtained in the exercise of their profession (eg the taxpayer's tax planning) to the tax authorities. This does not affect lawyers' criminal liability when they commit a crime. The same applies to tax accountants.

According to a legal opinion of the Brazilian Federal Tax Administration, tax consultants, lawyers and accountants are responsible for tax payment[635] when they are deemed to participate in unlawful tax planning if they are conscious that the tax planning is illegal.[636] This approach has been criticised because tax consultants, lawyers and accountants have no legal connection with the tax event. The Administrative Tax Appeals Council has endorsed this criticism.[637] This line of reasoning also complies with the position of the Brazilian Superior Court of Justice concerning the impossibility of expanding the tax liability; the person responsible for tax payment must contribute directly to the tax event, benefiting from it.[638] Usually, this is not the case for tax consultants, lawyers and accountants. According to the Brazilian Federal Supreme Court, tax penalties on lawyers are unconstitutional, as they violate free exercise of the profession of lawyer,[639] immunity of lawyers' in their professional activities[640] and the personal nature of penalties.[641]

[629] Art 10(h) of the Argentine Code of Professional Ethics, 1987, www.cpacf.org.ar/formularios/codigoetica.pdf.

[630] Art 101 of the Argentine Law on Tax Procedures (Law No 11, 683), servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/18771/texact.htm.

[631] Argentine Supreme Court, judgment of 11 June 1998, FA 98000299, *Instituto de Informaciones Comerciales Paraná c Dirección Gral Impositiva*.

[632] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[633] Art 5(XIV) of the Brazilian Constitution and art 197 of the Brazilian Tax Code.

[634] Art 34(VII) of the Act of the Brazilian Bar Association (No 8906/1994).

[635] Art 124(I) of the Brazilian Tax Code.

[636] Brazilian Federal Tax Administration, Legal opinion no 04 (10 December 2018). This opinion only binds the administration.

[637] Administrative Tax Appeals Council, decision of 14 March 2017, no 2402-005.697 [2017].

[638] See Superior Court of Justice of Brazil, special appeal of 5 December 2019, no 1273396/DF [2019].

[639] Art 5(XIII) of the Brazilian Constitution.

[640] Art 133 of the Brazilian Constitution.

[641] Art 5 (XLVI) of the Brazilian Constitution; Supreme Federal Court of Brazil, direct action of unconstitutionality of 13 February 2020, no 4845/MT [2020].

8.3.2.2.1.3. Chile[642]

Article 19 of the Chilean Constitution provides for privacy in its number 4 (the respect and protection of private life) and number 5 (the inviolability of homes and all forms of private communication). Professional privacy in taxation is also protected through Article 60, subsection 9 of the Chilean Tax Code, according to which

> for the implementation, auditing or investigation of the fulfillment of tax laws, the Tax Administration shall ask for a written affidavit or to summon all persons resident within the same jurisdiction of the summoning department to make a statement, under oath, about the facts, data or background of any nature related to third parties … In addition, people obliged to maintain professional privacy are an exception to these obligations.

Furthermore, Article 61 of the Chilean Tax Code explicitly states that: 'With the exception of a contrary decision, the rules of law contained in this Code do not modify the current rules on professional privacy, bank checking account safeguard, and other operations to which the law grants confidentiality'.

In that regard, the Chilean Supreme Court settled a dispute between two organs of the state as the Council of Transparency requested the publishing of minutes of the State Defence Council, formed by lawyers who pleaded as a fundamental principle the professional privacy, finally prevailing over the right of public data access.[643]

However, it is important to note that the General Anti-Abuse Rule was included in the Chilean Tax Code in 2014, whose penalty also reaches those who have designed or planned acts, agreements or businesses qualified as abuse or simulation based on a final and binding judgment (Article 100 bis of the Chilean Tax Code). That provision, like some other more recent tax legislation around the globe, seems to blur the distinction between abuse and criminal tax evasion. On the other hand, the 'penalty' amounts up to what amount of taxes is due if one ignores the abusive construction.[644] Such legal consequence generally applies to abuse.[645]

This penalty has not been applied yet.

In 2016, there was a controversy between the Chilean Tax Administration and several tax consultants. The former pointed out that data on tax planning had to be submitted under an OECD request to update a study on the role of tax intermediaries in 2008, like the ones carried out in Canada, Australia, Switzerland or Italy. Specifically, a 'copy of the 20 highest sells invoices and services issued in 2015' was requested, considering different clients and the copies of service rendering contracts, reports or advice corresponding to those highest invoices. It was mentioned that the said procedure should be for merely informative purposes and did not imply a background request nor was the information part of a taxable procedure, but it was noted that the

[642] We would like to thank Yuri Varela for his contribution.

[643] Supreme Court of Chile, judgment of 28 November 2012, case 2582/12 [2012].

[644] Art 100 bis Chilean Tax Code – Decreto Ley 839, Codigo Tributario – reads (translated from the original version in Spanish): 'The natural or legal person who is proven to have designed or planned the acts, contracts or businesses constituting abuse or simulation, …, shall be punished with a fine of up to 100% of all taxes that should have been paid into the tax coffers, in the absence of such misconduct, and which are determined against the taxpayer. However, such fine shall not exceed 100 tax units per year.

For these purposes, in the event that the infringement has been committed by a legal person, the aforementioned sanction shall be applied to its directors or legal representatives if they have infringed their duties of management and supervision.'

[645] *cf* eg the EU's GAAR laid down in art 6 of the ATAD Directive 2016/1164 of 12 July 2017: '1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. …'.

non-fulfilment of such notification would be sanctioned according to Article 97 N°15 of the Chilean Tax Code. The above raised worries concerning professional privacy. Therefore, the said requirement has had no effect.

8.3.2.2.1.4. Mexico[646]

In Mexico, there are no mandatory disclosure rules for advisers or intermediaries with respect to questionable tax structures.

However, Mexico has a legal disposition according to which, when taxpayers' counsellors propose an interpretation that is not in accordance with the non-binding criteria of the Mexican tax authorities, they must expressly state such situation in the advice provided to their clients.

The country-by-country reporting in Mexico is governed by Article 76-A of the Mexican Federal Income Tax Law. The tax returns filed are not public and subject to secrecy pursuant to Article 69 of the MFITL.

In Mexico, costs incurred by financial institutions for the exchange of financial information for tax purposes are borne by such institutions.

8.3.2.2.1.5. Peru[647]

The right to professional secrecy is recognised in the Peruvian Constitution.[648] It applies in tax matters, including tax planning. Professional secrecy is expressly recognised as a valid reason for rejecting compliance with information requirements from the tax administration through the supplementary application of the General Administrative Procedure Law[649] to tax law.

In this regard, the Peruvian Constitutional Court has established[650] that professional secrecy has constitutional protection. It represents a guarantee for the effective exercise of a certain profession so that no authority or public power can compel the release of information reserved for the proper use of the profession.

Consequently, tax advisers and consultants in Peru have constitutional protection against the mandatory disclosure requirements from the tax administration. This protection covers any tax data or information from their clients that is made available to them in the exercise of their profession, which includes any tax planning or defence carried out in their favour.

Recent regulation[651] issued for the identification of taxpayers' final beneficiaries established that communication and information shared between legal professionals or professionals in accounting and financial sciences and their clients is only protected by professional secrecy when these professionals exercise their profession. It does not apply when said professionals are partners, shareholders, legal representatives, proxies, administrators, directors, members of the board or final beneficiaries of the taxpayers themselves.

[646] We would like to thank Diana Bernal for her contribution.

[647] We would like to thank Cecilia Delgado Ratto for her contribution.

[648] Art 2, sub-s 18, of the Peruvian Constitution.

[649] Supreme Decree No 004-2019-JUS – TUO of the General Administrative Procedure Law. Art 180 (translated from the original version in Spanish):

> '180.1. The authority may require the parties to provide information, present documents or assets, submit their assets to inspections, as well as collaborate in the practice of other means of evidence. For this purpose, the request is made mentioning the date, term, form and conditions for its fulfillment.'
>
> '180.2. The denial of the requirement mentioned in the previous paragraph will be legitimate, when the compliance implies: the violation of professional secrecy, a disclosure prohibited by law, directly implies the disclosure of prosecutable facts practiced by the administered, or affects constitutional rights. In no case does this exception cover the falsification of facts or reality.'

[650] Peruvian Constitutional Court, judgment no 07811-2005-AA/TC [2005].

[651] Legislative Decree No 1372.

8.3.2.2.2. United States[652]

Communications between lawyers and clients with respect to legal issues are generally protected under US law. This principle derives from the common law and applies unless an exception is created under the US Constitution or by statute. The purpose of the attorney-client privilege is to facilitate confidential communications that will enhance the efficacy of legal representation. While statements by legal counsel are treated under the privilege, the privilege exists for the benefit of clients – in this instance, the taxpayer. It should be noted that the privilege may be waived by the client. Moreover, such a waiver may derive from the behaviour of the client. For example, disclosure of information to a third party in addition to the attorney may be regarded as a constructive waiver of the privilege.

The protection of communications by taxpayers with their representatives has been extended beyond the traditional attorney-client privilege. Some years ago, Congress adopted legislation extending the protection by adopting section 7525 of the Internal Revenue Code, which provides:

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

The privilege may only be asserted in (1) any noncriminal tax matter before the IRS and (2) any noncriminal tax proceeding in Federal court brought by or against the US.

A 'federally authorized tax practitioner' is defined as 'any individual who is authorized under Federal law to practice before the IRS if such practice is subject to federal regulation' under certain statutory provisions. Federally authorised tax practitioners can include CPAs, attorneys, enrolled agents, enrolled actuaries and other tax professionals.

The term 'tax advice' means 'advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice'.

The extent of the privilege is restricted. It

> shall not apply to any written communication which is (1) between a federally authorized tax practitioner and (A) any person, (B) any director, officer, employee, agent, or representative of the person, or (C) any other person holding a capital or profits interest in the person, and (2) in connection with the promotion of the direct or indirect participation of the person in any tax shelter.[653]

The privilege can be waived in the same manner that the attorney-client privilege can be waived. Whether under common law or the Internal Revenue Code, there are certain other considerations relevant to the privilege. It can extend in certain instances to the work product of the attorney or other eligible tax professional. Non-legal advice is not subject to the privilege, and it will not protect communications that are in furtherance of fraud or other crimes.

The conduct of tax professionals is brought into play in other circumstances as well. For some time, certain relatively large corporate taxpayers have been required to identify 'uncertain tax positions'[654] taken in the filing of a tax return. The purpose is to assist the IRS in examining the treatment of transactions and relationships that may stretch the limits of permissible conduct so as to invite challenge. The opinion of legal counsel would generally be highly relevant in determining the existence of such positions and proffering legal advice with respect to the clarity of the positions being asserted.

[652] We would like to thank Charles H Gustafson for his contribution.
[653] 26 US Code s 7525(b)(1) and (2).
[654] Treasury Reg para § 1.6012-2. IRS Announcement 2010-75; IRS Schedule UTP.

A somewhat similar requirement arises when a taxpayer asserts a position on a tax return based upon the provisions of a tax treaty. The regulations require that the position be explicitly disclosed to give the IRS an opportunity to consider challenging the position.

Parties other than taxpayers and their representatives are strongly affected by US tax law and administration. For example, there are no bank secrecy laws in place in the US that would defend against actions to collect relevant information about taxpayers from financial institutions. The IRS has broad authority to require the production of such information in connection with criminal or civil tax litigation or the process of an audit.

As is the case in many countries, employers are required to withhold taxes from wages paid to employees and pay over to the IRS. Such amounts are treated as payments in respect of the income tax liability of the employees. The actual liability will depend upon information and calculations reflected in the annual tax return of the employee, and the result may be either a refund of excess taxes withheld or the payment of an additional tax amount. The IRS has substantial authority to bring collection actions against employers who fail to withhold and/or pay over the amounts withheld.

Employers are also required to withhold social security and medical care taxes from their employees and make payments on their behalf. Again, the IRS is empowered to initiate actions to collect amounts that are due.

In addition to withholding and paying taxes in respect of employment, organisations are required to file information returns concerning payments of interest, dividends and royalties. While no withholding obligations arise regarding such payments, the IRS may invoke sanctions against entities that fail to satisfy the reporting requirements.

Special obligations may arise when US domestic taxpayers pay dividends, interest and royalties to foreign taxpayers. Under the Internal Revenue Code, such payments are normally subject to a withholding tax of 30 per cent. If the US person or entity does not pay an applicable withholding tax, the IRS is empowered to initiate procedures to collect the tax. It should be noted that most bilateral income tax treaties to which the US is a party provide either for the reduction or the elimination of such withholding taxes.

Legislation adopted in 2010 added a new dimension to how foreign financial institutions may be subject to US tax requirements. Under the provisions of FATCA, foreign financial institutions that do not agree to provide information about US depositors can be subject to an additional withholding tax of 30 per cent on dividends, interest and certain other payments. Approval of FATCA derived from reports of the widespread use of secret bank accounts in certain countries to evade applicable US tax obligations. Although strongly criticised by some foreign governments as an example of the inappropriate exercise of extraterritorial jurisdiction by the US, a number of other countries have adopted similar regimes. Moreover, many IGAs have been concluded to establish arrangements for providing relevant data without violating the bank secrecy laws of the countries involved.

8.3.2.3. Asia

8.3.2.3.1. China[655]

Both taxpayers and withholding agents have the right to appoint tax agents. When a tax agent violates tax laws or administrative rules or regulations, which results in a non-payment or underpayment of tax by the taxpayer, the taxpayer shall undertake the liabilities, while an administrative

[655] We would like to thank Na Li for her contribution.

penalty of not less than 50 per cent but not more than three times the amount unpaid or underpaid shall be imposed upon the tax agent. There is no mandatory disclosure obligation on tax agents yet. In China, tax advisers are not covered by legal professional privilege.

8.3.2.3.2. India[656]

In India, a taxpayer may be advised by a lawyer practising in a firm, an advocate[657] enrolled at the bar or a practising chartered accountant. In some instances, the services of bankers may also be used.

Indian law recognises attorney-client privilege under the Indian Evidence Act, 1872. It applies only once the attorney-client relationship has been formed. Hence, a lawyer/advocate must not disclose, except with the express consent of the client, the following: (a) any communication made to him by the client (or any person acting on behalf of the client), (b) contents of any document he has become acquainted with, and (c) any advice given, in the course of, or for the purpose of being employed.

The privilege extends even after the employment ceases. However, the privilege will not apply if any such communication were made in furtherance of any illegal purpose or the lawyer or advocate observes that any crime or fraud has been committed after the commencement of his employment.[658]

The Bar Council of India lays down the standards of professional conduct and ethics to be followed by advocates. Advocates, being officers of the court, owe some duties to the court. For example, an advocate must not influence the decision of a court through illegal or improper means and must prevent a client from resorting to unfair practices and should not take up any matter in which he is himself interested. An advocate is under a duty to defend a person accused of a crime irrespective of his own opinion about their guilt. He should not commit a direct or indirect breach of the attorney-client privilege under Indian law.[659]

Any complaint regarding the professional or other misconduct of advocates is investigated by the disciplinary committee of the respective State Bar Council. A finding of misconduct can result in measures as drastic as suspension from practice or removal of name from the name roll maintained by the State Bar Council.[660]

Any professional or other misconduct by a chartered accountant is governed by The Chartered Accountants Act, 1949. Complaints are heard by a disciplinary committee. The Committee may remove the name of the accountant from the register, impose a monetary fine, etc.[661]

The Prevention of Money Laundering Act, 2002, mandates reporting entities (banking companies, financial institutions, intermediaries[662] and persons belonging to designated professions and businesses[663]) to verify, report and disclose details of clients and transactions.[664] Lawyers and

[656] We would like to thank Ashrita Prasad Kotha for her contribution.
[657] S 2(1)(a), Advocates Act, 1961.
[658] S 126, Indian Evidence Act, 1872.
[659] Part VI, Bar Council of India Rules issued under the Advocates Act, 1961.
[660] S 35, Advocates Act 1961.
[661] Ss 21 to 22, Chartered Accountants Act 1949.
[662] An intermediary is defined to mean (a) persons such as a stockbroker, share transfer agent, portfolio manager or any adviser registered under the Securities and Exchange Board of India Act 1992, (b) an association recognised under the Forward Contracts (Regulations) Act 1952, (c) an intermediary registered by the Pension Fund Regulatory and Development Authority or (d) a recognised stock exchange referred to in Securities Contracts (Regulation) Act, 1956. See s 2(1)(n), Prevention of Money Laundering Act 2002.
[663] Designated persons include real estate agents, persons active in the gambling sector including casinos, dealers of high-value goods or precious stones, etc.
[664] Ss 11A to 12AA, Prevention of Money Laundering Act 2002.

accountants are presently not included in the reporting entities list. Additionally, section 285BA of the Indian Income-tax Act, 1961, and Rules 114F to 114H of Income-tax Rules, 1962 lay down information reporting obligations on 'reporting financial institutions' in compliance with India's obligations under FATCA and CRS.

8.3.2.3.3. Israel[665]

Israeli law contains the client-attorney privilege:

> (A) An advocate is not bound to submit as evidence any matters or documents which have passed between him and his client or a person acting on behalf of his client and which are substantively connected with the professional service rendered by him to his client, unless the client has waived this privilege. The same applies to an advocate's employee whom any matters or documents communicated to the advocate reached during his work in the service of the advocate. (B) The provisions of Subsection (A) shall apply also after the witness has ceased to be an advocate or the employee of an advocate.[666]

In interpreting the scope and implication of the privilege in tax matters, the Israeli courts have distinguished between two scenarios. In the first one, which involves an investigation against the lawyer himself for evasion of his own incomes and taxes, the Supreme Court of Israel ruled that the lawyer can disclose clients' names and invoices.[667] Accordingly, the ethics committee announced that lawyers could disclose their bank account, including trust accounts if the tax authorities investigate them for their own tax offences. In the second scenario, where the tax investigation is against the client, the lawyer has to deliver the documents despite the client-attorney privilege, but tax officers are not allowed to view the document. They have to close it in sealed envelopes and deposit it at the district court.[668] Then, the lawyer and the client could apply and argue for privilege. The court would examine the arguments of all parties and decide whether the privilege applies or not in relation to the specific document.[669]

In one case involving the procedures mentioned above, the tax authorities seized several documents of incorporation regarding offshore companies in the lawyer's office. The Supreme Court of Israel ruled that these documents are not confidential under the privilege because they are the products of the legal service rather than the legal service itself.[670] The investigation started after the Panama documents scandal, and the Israeli tax authorities seized documents in lawyers' offices and companies that provided services for establishing offshore companies. The Supreme Court of Justice emphasised that lawyer offices could not become tax shelters.

8.3.2.3.4. Japan[671]

Tax intermediaries in Japan comprise licensed tax advisers (*Zeiri-shi*), chartered accountants, especially CPAs (*Kaikei-shi)* who also include licensed tax advisers [672] and tax attorneys (*Zeimu-Bengoshi*).[673] The most important tasks of licensed tax advisers and CPAs are to file tax

[665] We would like to thank Rifat Azam for his contribution.
[666] Art 48 of the Israeli Evidence Ordinance.
[667] Israeli Supreme Court, judgment of 3 June 1973, *Dr Yismachovits v Baruch*, HCJ 447/72 [1973].
[668] Ss 235-A to 235-D of the Israeli Income Tax Ordinance.
[669] Israeli Supreme Court, judgment of 14 May 1984, *Israeli v District Attorney*, HCJ 665/83 [1984].
[670] Israeli Supreme Court, judgment of 29 May 2016, *Lawyer v Tax Authority*, TA 32164-05-16 [2016].
[671] We would like to thank Yuri Matsubara for her contribution.
[672] According to s 16(1) of the CPA Act (Act No 103 of 1948, last amended in 2019), CPAs who would like to register as licensed tax advisers should take the special tax course offered by JICPA in advance.
[673] According to s 51 of the Licensed Tax Advisors Act (Act No 237 of 1951, last amended in 2019), lawyers may also be able to act as licensed tax advisers within their region if they notify the regional national tax bureau. However, in comparison with the CPAs, it is not common for Japanese lawyers to exercise that privilege.

returns on behalf of their clients and assist their clients during administrative tax investigations (tax audits). The most important tasks of tax attorneys are to file petitions on behalf of clients in relation to disputed tax amounts and conduct by the tax administrator at civil/administrative trials and defend accusations of tax fraud by their clients in criminal trials. Article 32 of the Japanese Constitution guarantees the right of access to courts, and Article 37(1) prescribes the right of an accused to a speedy and public trial.

In addition, some tax intermediaries are engaged in tax consultancy and advisory services. They are accustomed to maintaining secrecy regarding their clients' affairs even though the principle of the client-attorney privilege is not expressed in the provisions of the relevant Japanese statutes. Furthermore, the Japanese legislature (especially the conservative LDP) does not endorse a charter of taxpayers' rights even though the rights and obligations of tax professionals are often discussed both in the public arena and academia.[674] In 2010, under the administration of the Opposition Party, the DPJ, there was a proposal to amend the Act of General Rules for National Taxes (AGRNA) to prescribe some features of a charter of taxpayers' rights.[675] However, the proposal to extend taxpayers' rights was removed from the new section 74-2 of AGRNA during the debate in Parliament.

As for the public sector, Japanese tax inspectors have an obligation not to disclose taxpayer information obtained in the process of a tax audit.[676] That obligation is much stricter than for other civil servants. This is justified on the basis of both the need to protect taxpayers' rights (especially as to privacy) as well as to encourage taxpayers to cooperate in tax investigations and audits.[677]

8.3.2.4. Europe

8.3.2.4.1. European Union

The legal sources of protection of professional rights pursue two main goals: to establish a positive legal framework for the client-attorney privilege and make sure that cross-border services can operate smoothly despite the different national qualifications without discrimination and restrictions. In the EU, such measures include a mix of soft and hard law,[678] supplemented by soft law addressed to the countries of the Council of Europe.[679]

[674] *cf* eg S Suto, 'Recent Legislation in Japan, Failure of Establishment of Charter for the Rights of Taxpayers' (2012) 32 *Waseda Bulletin of Comparative Law* 113 and ff; K Ishimura, 'The State of Taxpayers' Rights in Japan' (1997) 7 *Revenue Law Journal*, 164 and ff.

[675] S 74-2 of AGRNA. See Y Matsubara, 'Tax Transparency in Japan' in Basaran and Hey (eds), *Tax Transparency* (IBFD, 2019) 684.

[676] S 243 ITA, s 163 CITA.

[677] M Uematsu et al, *Commentary of Income Tax Act*, (2005) 1161 (in Japanese); *cf* Noishiki, 'Several Issues on disclosure/non-disclosure of Tax Information'.

[678] For hard law in the EU, see the Establishment of Lawyers Directive (Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained ((1998) OJ L 77, 36, as amended by Council Directive 2013/25/EU of 13 May 2013, (2013) OJ L 158, 368) and the Directive on the recognition of professional qualifications (Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 ((2005) OJ L 255, 22, as amended by Commission Delegated Decision (EU) 2019/608 of 16 January 2019 (2019) OJ L 104, 1).

For soft law in the EU, see the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, entitled 'Professional Services – Scope for more Reform – Follow-up to the Report on Competition in Professional Services', COM(2005), 405 final of 5 September 2005.

[679] See the Council of Europe Recommendation Rec (2000) 21 of 25 October 2000 on the freedom of exercise of the profession of lawyer, and the Recommendation 2121(2018), proposed by the Parliamentary Assembly of the Council

Furthermore, the interpretation by the ECtHR combines – also in tax matters – professional rights with obligations as two sides of the same coin and links up the legal protection of human rights of professionals to that of their clients, largely applying case law on the right to privacy[680] and defence[681] also to professional rights.

In particular, such combination characterises professional rights as a corollary to the rights of the clients with four specific implications for the rights to a) professional secrecy as an enhanced privacy right, b) defence of the clients as freedom of expression of professionals,[682] c) access of the clients to services also as the freedom to provide such services,[683] and d) choice of professionals as the right to be chosen freely and without discrimination.

Critical issues may arise for such corollaries in connection with the mandatory disclosure system introduced in the EU by the so-called DAC 6,[684] which largely reflects the one applicable in the UK (also known as DoTAS),[685] including the 'hallmarks', that is, indicators that determine what types of situation should be the object of mandatory disclosure. The various hallmarks are laid down in length in Annex IV to Directive 2011/16 as amended by DAC 6. This Directive applies as of 31 August 2020 with reportable obligations for the periods starting on the day of its entry into force.

The Directive establishes a general obligation for any intermediary to report cross-border transactions with a potential risk of tax avoidance, leaving the identification of such situations rather vague and providing a very long list of general and specific indicators (hallmarks) that the intermediaries should use for detecting cases to be reported to tax authorities. The definition of an intermediary in Article 3(21) of the Directive 2011/16 as amended by DAC 6 includes a very large number of persons who may have had some knowledge of the reportable cross-border tax arrangements.

For at least three reasons, this definition creates a significant degree of legal uncertainty. First, the subjective scope of the reporting obligation is so broad that virtually anyone involved in a reportable transaction can be an intermediary. Second, even the mere indirect participation in a part of the reportable transaction is sufficient. This may mean that even persons without an immediate and thorough knowledge of the entire scheme could be liable to this obligation and may reach inappropriate conclusions due to the absence of in-depth knowledge of all relevant aspects. This is not infrequent in practice, since various professionals may be involved only in specific aspects of such schemes. Third, the obligation to report may clash with the privilege against self-incrimination.

The obligation for intermediaries arises when, based on the relevant facts and circumstances, the available information and their expertise, they know, or it is reasonable to assume that they know or could have known, about the reporting obligation, including where they have not provided advice with regard to this situation.

of Europe for the development of a Council of Europe Convention on the Profession of Lawyer. This proposal was welcomed by the International Commission of Jurists, see www.icj.org/wp-content/uploads/2018/06/Europe-Drafting-a-EU-Convention-on-the-Profession-of-Lawyer-2018-ENG.pdf.

[680] See sec 8.2.1.

[681] See sec 6.1.2.4.1.

[682] Freedom of expression may not justify defaming of judges (ECtHR, judgment of 20 May 1998, no 56/1997/840/1046, *Schöpfer v Switzerland*, Reports of Judgments and Decisions 1998-III (1998) 1052–53, paras 29–30), but should allow for a possibility of lawyers to challenge the impartiality of a judge in a case: see ECtHR (Grand Chamber), *Morice v France*, no 29369/10 (23 April 2015); ECtHR, *Nikula v Finland*, no 31611/96 (21 March 2002); ECtHR, *Kyprianou v Cyprus*, no 73797/01 (15 December 2005).

[683] See ECtHR, *Lagerblom v Sweden*, no 26891/95 (14 January 2003), and ECtHR, *Croissant v Germany*, no 13611/88 (25 September 1992), on the right to choose the lawyer.

[684] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory AEOI in the field of taxation in relation to reportable cross-border arrangements (2018) OJ L 139, 1.

[685] Disclosure of Tax Avoidance Schemes, www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance.

Even if this clause allows intermediaries to provide evidence in their favour, the vagueness of the reasonableness test about the knowledge or supposed knowledge of the schemes creates a large grey area both with regard to the persons and the schemes covered.

This will, on the one hand, significantly increase the amount of information accessible to tax authorities (perhaps based on the questionable assumption that it may facilitate their audits) and, on the other hand, correspondingly impair legal certainty for taxpayers and tax intermediaries. The five categories of hallmarks, with several subcategories and sub-subcategories set a very low threshold for reportable schemes. In such circumstances, taxpayers and intermediaries may be induced to report more schemes than is, in fact, reasonable and do so only in order to prevent possible exposure to liability for non-reporting of such schemes. All kinds of not foreseeably relevant information may be produced and exchanged. This is because Article 25a of DAC 1 requires the Member States to apply penalties which 'shall be effective, proportionate and dissuasive'. There is an intrinsic clash between the latter two criteria, both of which could otherwise work well with the former one. Besides, the dissuasive effect of penalties should be limited to clear violations. While there would be no problem with having dissuasive penalties in respect of money laundering, it is doubtful whether the same should occur in the case of reportable transactions that are too difficult to identify with a reasonable degree of legal certainty. Consequently, the standards established by DAC 6 for reporting obligations may violate the fundamental rights of taxpayers and tax intermediaries in a disproportionate manner and increase the risk of data leakage in the absence of secure storing of such large amounts of data.

In such a context, the Directive allows the Member States the right to waive professionals from the reporting obligation when this 'would breach the legal professional privilege of that Member State'.[686]

Furthermore, the specific reference to the 'legal professional privilege' is possibly too narrow. In real terms, this means that tax advisers who are not lawyers are always outside the scope of this carve-out, which could be held to be a disproportionate restriction on the right to exercise their profession, enshrined in Articles 15 and 16 of the EU Charter.

Moreover, it can also mean that if a tax adviser is aware of a reportable scheme concerning a taxpayer, the communications between the lawyer and the taxpayer could be exposed to disclosure. Meeting one of the many hallmarks could perhaps be too low a threshold to create such exposure in the absence of a strong taint of the existence of aggressive tax planning, tax avoidance, tax evasion or fraud. One must keep in mind that 'aggressive tax planning' can also be understood as the mere 'due consequence of the proper application of the law in cross-border situations'.[687] Therefore, under certain conditions, a Member State may be obliged to waive professionals from the reporting obligation. The scope of such an obligation would not necessarily be limited to attorneys but could cover other professionals and intermediaries who have knowledge of data covered by the client-attorney privilege.

On the other hand, it would not be hard to override the protection of individual human rights in cases where a professional comes to know about the involvement of another professional in the implementation of an arrangement with the potential for tax avoidance. Accordingly, in the presence of clear indicators that it is in the interest of justice and the 'collective right' to protect tax collection from attempts to conduct abusive and fraudulent schemes, the application of proportionate measures to combat such undesirable phenomena limits individual rights,

[686] See art 8ab (5) of Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory AEIOA in the field of taxation in relation to reportable cross-border arrangements, (2018) OJ L 139, 1. See pending case CJEU, C-694/20, *Orde van Vlaamse Balies et al.*

[687] FD Martínez Laguna, 'Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives – The Dividing Line between Intended and Unintended Double Non-Taxation' (2017) 9 *World Tax Journal*, under 1; *cf* also R Mason, 'The Transformation of International Tax', vol. 114, (2020), 353 and ff, under 3 (legality of tax gaps).

including those concerning the professionals involved. However, there must be legal protection by effective remedies.

This conclusion also applies to intermediaries and business taxpayers. However, there is a particular concern about the potential impact of DAC 6 on the exercise of individual rights of this group or persons. Neither the 'reportable cross-border arrangement' nor the intermediaries who are obliged to report are clearly defined. However, legal certainty is required, as non-compliance with the reporting obligations can entail significant sanctions under the law of the Member States as well as reputational risks for businesses, individuals and intermediaries. Under Article 25(a) of the Directive 2011/16 as amended by DAC 6,

> Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8ab, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.[688]

This may include criminal sanctions. The CJEU's case law, under specific circumstances, has encouraged the application of criminal sanctions in order to render the implementation of Union law effective.[689] Intermediaries, including lawyers, can be required to report suspicious arrangements, but only in compliance with the rule of law and with sufficient procedural safeguards.[690] These are not evident in Directive 2011/16 as amended by DAC 6.

Possibly, a clearer approach to such issues is only possible insofar as the practice of DAC 6 clarifies the implications of generic or specific hallmarks. Until now, the extreme complexity of the picture arising from the combination of generic and specific hallmarks can create a framework of legal uncertainty, which can be detrimental to the exercising of individual rights. Furthermore, we also think that the obligation to report and the object of such reporting should not create an excessive burden for third parties and the taxpayer, taking into account that, especially within the EU, there is a very effective framework for mutual assistance, including AEoI. From this perspective, we think that cases of multiple reporting should be limited as far as possible, if necessary by an amendment to the existing secondary legislation.

8.3.2.4.2. Russia[691]

In the framework of tax audits, Russian tax authorities can request financial intermediaries to provide very specific information concerning specific taxpayers.[692] The supply of such information may take place without the taxpayers' consent[693] and shall not constitute a violation of banking secrecy.

The Russian legislator protects client-attorney privilege,[694] but not in respect of tax advisers. Counsel and auditors cannot be questioned within the framework of tax audits.

[688] Art 1(6) Directive 2018/822 (DAC 6).

[689] CJEU, judgment of 8 September 2015, C-105/14 *Taricco and Others*, *cf* also CJEU, judgment (Grand Chamber) of 13 September 2005, *Commission v Council*, case C-176/03, ECLI:EU:C:2005:542 [2005], paras 46 and ff regarding the EU's competence to implement EU law by prescribing criminal sanctions.

[690] See ECtHR, judgment of 6 December 2012, no 12323/11, *Michaud v France*. The case concerned a mandatory framework that bound lawyers to report suspicious transactions. The Court did not find a violation of art 8 of the ECHR due to the existence of adequate procedural safeguards.

[691] We would like to thank Karina Ponomareva for her contribution.

[692] Art 142.2 of the Russian Tax Code. Such information generally concerns the movement of funds and deposits, as well as financial services concerning taxpayers, beneficiaries and persons directly or indirectly controlling them, also (art 142.4.1) when resident abroad. The financial intermediaries must transmit such information in the electronic format and along the standard requested by the Government of the Russian Federation in cooperation with the Russian Central Bank, which may also establish exceptions for low-risk taxpayers.

[693] Exceptions may apply. See Russian Federal Law No 125 FZ, which has amended art 105.16 of the Russian Tax Code.

[694] Art 90 of the Russian Tax Code.

Cross-border mutual assistance concerning strategic enterprises is subject to the prior consent of the Russian Federal Tax Authority and the taxpayers.[695]

8.3.2.5. Oceania[696]

8.3.2.5.1. Australia

The apex High Court of Australia recently considered the nature of the protection afforded by legal professional privilege in *Glencore International AG v Commissioner of Taxation*.[697] At various times, members of the Glencore group had engaged Appleby (Bermuda) Limited to provide legal advice, either directly or through their Australian legal advisers. By virtue of the publication of the 'Paradise Papers', the Commissioner of Taxation had obtained a number of documents in respect of the Glencore Group. Glencore applied to the High Court for an injunction to restrain the ATO from making any use of the documents and also sought to have the documents returned to them. There was no issue in this proceeding that the documents were the subject of legal professional privilege. In a unanimous decision, the High Court dismissed the taxpayer's application and held that, consistent with earlier authority, the privilege is only immunity from compulsory disclosure: legal professional privilege is not a legal right that is capable of being enforced and cannot found a cause of action; at most, it is a right to resist disclosure. The Court suggested that the appropriate avenue for relief would be on the basis of confidential information protected in equity.

The Australian government released a discussion paper in 2016 in relation to proposed mandatory disclosure rules, but these proposals have not been pursued to date. Only very limited data from the tax returns of the very largest business taxpayers are released publicly,[698] and CbC reports are not made public. Financial institutions must bear the costs of mandatory reporting regimes to comply with FATCA and the CRS.

Under section 3C of the Taxation Administration Act 1953 (Cth), the Commissioner must make publicly available certain information in relation to the Australian public and foreign-owned entities with a total income of AUD 100 million or more and Australian-owned resident private entities with a total income of AUD 200 million or more. The reportable information is drawn from the income tax return and, for each entity, is the entity's name and identifying Australian Business Number; the entity's total income; the entity's taxable income; and the entity's income tax payable. In addition to reporting the entity tax information data set, the ATO prepares an annual corporate tax transparency report that describes and interprets the results.

8.3.2.5.2. New Zealand

8.3.2.5.2.1. Legal Professional Privilege

The common law doctrine of legal professional privilege also applies in New Zealand.[699] It comprises two kinds commonly known as lawyer/client privilege and litigation privilege.[700] In the first place, a party to a dispute or a mediator of a dispute has a privilege in respect of any communications or documents intended to be confidential and made in connection with an attempt to settle or mediate the dispute. This legal privilege does not extend to the terms of a settlement

[695] Art 105.16-3 of the Russian Tax Code.
[696] We would like to thank Celeste Black for her contribution.
[697] [2019] HCA 26 (14 August 2019).
[698] See sec 8.2.2.5.1. of this book.
[699] *cf* J Manyam, 'Legal Professional Privilege and New Zealand's Taxation Law' (2015) 23 *Waikato Law Review* 56 and ff.
[700] See also R Mitchell and M Stockdate, 'Legal Professional Privilege in Corporate Criminal Investigations: Challenges and Solutions in the Modern Age' (2018) 82 *The Journal of Criminal Law*, 321 and ff.

once it is actually reached. However, both lawyer/client privilege and litigation privilege are also recognised in areas that are not 'proceedings'.[701] The latter may include investigations by the fiscal authorities. Where the fiscal authorities compel the production of documents, those protected by lawyer/client privilege (and litigation privilege, if any) should not have to be provided.

The person holding the privilege can also prevent others who have the information or communication from disclosing it. However, the latter must not have received the information or communication in a way that amounted to a privilege waiver. Moreover, a judge may order that evidence of communication, information, opinion or a document in respect of which a person has privilege must not be given. The person who has the privilege, or any other interested party, can seek such an order from a judge. Essentially, a tax advice document is a confidential document created to give or obtain advice on the operation and effect of tax laws.[702]

A party's discovery obligations include identifying the documents in which privilege is claimed. However, those documents do not have to be produced for inspection by other parties.

Confidential communication 'for the purpose of committing or furthering the commission of some illegal or wrongful act' is not covered.[703] The terminology 'illegal or wrongful acts' creates doubts about whether communication relating to 'aggressive tax planning' falls outside legal privilege.[704]

8.3.2.5.2.2. Non-disclosure Right Regarding Tax Advice Documents

Tax advisers are not on the same footing as lawyers.[705] However, tax advisers need not disclose tax advice documents. The document can be created by either the client in order to instruct a tax adviser or by the tax adviser in the context of recording analysis and research to give advice to the client. In all cases, the main purpose of creating the relevant documents must be the purpose of giving or obtaining advice on the operation and effect of taxation legislation.[706] So-called tax-contextual information has to be disclosed even where attached to a tax advice document.[707]

Similar to legal privilege,[708] documents created in connection with assisting or promoting illegal or wrongful acts are excluded from the definition of tax advice documents.[709]

A tax adviser is a natural person subject to the code of conduct and the disciplinary process of an approved adviser group.[710] The privilege belongs to the client. In reality, most clients will rely on their tax adviser to indicate whether privilege can be claimed.

8.3.3. Conclusion on Professional Rights and Obligations

8.3.3.1. Taxpayers and Intermediaries

The scope of individual human rights in taxation covers all private persons affected by the exercise of taxing rights and/or involved in the procedures for implementing tax collection. The

[701] S 20 Tax Administration Act New Zealand.
[702] *cf* s 20B – No requirement to disclose tax advice documents – (2) Tax Administration Act New Zealand; R Mitchell, 'Comparative Standards of Legal Advice Privilege for Tax Advisors and Optimal Reform Proposals for English Law' (2015) 19 *International Journal of Evidence & Proof* 246 and ff, 252 and ff, 253.
[703] S 20B(1)(c) Tax Administration Act New Zealand.
[704] R Mitchell, 'Comparative Standards of Legal Advice Privilege' 246 and ff, 254 and ff.
[705] cf R Mitchell, 'Comparative Standards of Legal Advice Privilege' 246 and ff, 252 and ff.
[706] S 20B Tax Administration Act New Zealand.
[707] S 20E Tax Administration Act New Zealand.
[708] See above sec 8.3.2.5.2.1.
[709] S 20B(2)(b) Tax Administration Act New Zealand.
[710] S 20B(4)(b) Tax Administration Act New Zealand.

two main categories concerned are thus taxpayers and third parties, such as intermediaries and advisers. Taxpayers enjoy the protection of their own human rights, whereas the object of the legal protection of human rights in the case of third parties may be twofold, that is, their own legal sphere and that of the involved taxpayer. Therefore differences may arise as to how human rights protect such persons.

The two categories of persons may have a different entitlement to legal protection in respect of the particular rights. In some cases, this is related to the actual content of the human right, which may only be conceived in respect of individuals, whereas the intermediary can be a legal person or vice versa; in other cases, it can be the outcome of a decision by the national legal system. In the latter circumstances, the international human right can be invoked to assess the validity of any restriction applicable within a given legal system.

The rationale for protecting professional rights in tax matters is closely linked to the protection of taxpayers and intermediaries. The protection of professional rights in tax matters is a functional extension to that of individual taxpayers' rights but also the object of separate protection. Nevertheless, it is possible for a revenue authority to obtain information from a third party without notifying the taxpayer if this is justifiable having regard to the margin of appreciation and the balance between the interests of the individual and the community in general.[711]

Both aspects of professional rights should contribute to the levelling out of the protection of the legitimate public interest in tax transparency with a view to achieving a balanced outcome that complies with legal certainty and the rule of law. Legal interpretation should also ensure that professionals are not subject to an unnecessary and disproportionate burden to protect the 'collective right' to tax collection.

The protection of professional rights concerns, for example, the search at a lawyer's office,[712] at a legal person's registered office,[713] at branches and other business premises,[714] lawyers' professional secrecy[715] and the seizure of banking documents.[716] Lawyers are particularly protected by legal professional privilege, which is recognised all over the globe. Few countries, notably the US, extend similar protection to tax advisers; New Zealand, for example, has a differentiated system according significantly less protection to tax advisers, more precisely to 'tax advice documents'.

The object of the legal protection of human rights may also differ according to the actual content and features that each right may have in tax matters. However, a common specific framework for the dimension of human rights in tax matters is that they all relate to an area in which the state exercises its sovereignty to request the coercive payments required to fund the national budget. But, in this context, states must comply with the postulates of legal certainty and the rule of law. Furthermore, they have to exercise their sovereignty in a way that corresponds with the protection of taxpayers' rights in line with international conventions, international custom and 'the general principles of law recognised by civilized nations' (Article 38(1) (a)–(c) ICJ Statute).

[711] This can be the case where there is a risk that the relevant documents would disappear but there are sufficient safeguards against abuse due to prior scrutiny by the national judge. See further on this ECtHR, *Othymia* no 75292/10, (16 June 2015), para 44; ECtHR, *GSB v Switzerland*, no 28601/11, (22 December 2015), paras 90-91; ECtHR, *Lindstrand Partners Advokatbyrå AB v Sweden*, no 18700/09, (20 December 2016), para 101, paras 8 and 97.

[712] The search of a lawyer's office constitutes an interference with private life, home and correspondence.

[713] Home is to be construed as including the registered office of a company run by a private individual.

[714] ECtHR, *Lindstrand Partners Advokatbyrå AB v Sweden*, cited, para 83.

[715] Therefore, tax authorities' access to the personal bank account of a lawyer in the framework of an investigation of tax fraud must fulfil the conditions of art 8 of the ECHR, including the appropriate procedural guarantees and judicial remedies. See ECtHR, *Sommer v Germany*, no 73607/13, (27 April 2017), para 62.

[716] This applies, even more, where these documents are not related to the investigation. The affected person must have available to him the 'effective control' restricting the interference in question to what was 'necessary in a democratic society'. See ECtHR, *MN and Others v San Marino*, no 28005/12, (7 July 2015), para 83.

In the absence of such protection, there is no fair balance between the public interest and the protection of individual rights.[717]

8.3.3.2. Professional Rights in the Era of Tax Transparency

A topical and geographical overview of human rights shows that the predominant protection of the collective interest to counter tax avoidance and evasion as well as secure an effective tax collection is generally accepted. It was desirable and reasonable to bring the era of banking and financial secrecy towards tax authorities to an end. However, the implications for the individual rights of persons, including professionals and intermediaries, have to be taken into account.

The specific problems of professionals in tax matters may vary when it comes to obligations imposed on each category of professionals in various parts of the world. Accordingly, the role of financial intermediaries has turned from tax collection agents to outsourced aids to tax auditing, especially in the presence of very burdensome (not least from a financial perspective) reporting obligations mechanisms, including FATCA. States should take into account the (also financial) burden connected to such mechanisms. Rather than leaving the market to regulate itself by shifting costs down to the consumers of such services, states could consider a dedicated funding system, which could also prove very effective in overcoming the inequity arising from asymmetrical flows of information between countries. Moreover, the reporting obligations need to have a clear objective as, for example, (criminal) tax evasion as opposed to abuse or 'tax planning'. Otherwise, violations of the principle of legal certainty and the professional rights of tax lawyers and tax advisers may result. In the European Union, unlike some other jurisdictions, intermediaries are subject to heavy and often unclear reporting obligations.

In the case of legal professionals, the core values of the right to a fair trial presuppose effective and comprehensive protection of the information that should be covered by the client-attorney privilege.[718] Communications between attorney and client and the information in the hands of other persons who happen to be involved in a given case can be covered by professional secrecy. Considering that a number of additional professionals are involved in tax matters, including areas covered by the right to a fair trial, it can be important to expand the subjective scope of the protection to such additional professionals in a given case.

8.4. Taxpayers' Property Rights

8.4.1. Introduction

The human right to property plays a rather subordinate role in taxation. This is due to several circumstances, which reflect functional protection of the right of individuals to property and admit limitations to such right with a view to reconciling it with those of other individuals and the community.[719] Thus, in tax matters, there is due consideration for the importance of levying

[717] ECtHR, judgment of 1 December 2015, no 69436/10 *Brito Ferrinho Bexiga Villa-Nova v Portugal*, no. 69346/10, (1 December 2015).

[718] Not all legal systems secure broad protection of human rights in respect of professionals. A good example is the client-attorney privilege. It usually secures protection for lawyers but not necessarily also for tax advisers. Possible loopholes undermine the confidentiality of the communications of tax advisers, and the effective protection of communications between the lawyer and the taxpayer, which may be legally intercepted by the tax advisers.

[719] This is particularly visible in some African Constitutions, *cf* eg Ch II, art 8(5) of the Constitution of Botswana; art 22(2)(a) of the Constitution of the Gambia; art 44(2)(a) of the Constitution of Nigeria; see also art 26(2)(c) of the

taxes in order to fund the public budget and the right of the state to exercise its jurisdiction to request the payment of taxes. The levying of taxes does not per se constitute a violation of the right to property. This explains the various clauses that give taxation a special status within measures that affect the right to property.[720] However, such clauses produce no carve-out effects for taxation and thus still assess whether the exercise of taxing powers infringes the right to property. There are limits to the discretionary powers of the state to request payment of taxes, such as the prohibitions on arbitrary or confiscatory taxation.[721] Arbitrary taxation violates the principle of equality.[722]

Defining the boundaries of confiscatory taxation is difficult in practice. The quantitative element is the primary factor that can be used for such purpose. However, except for extreme cases,[723] it is difficult to determine an actual threshold.[724] States are entitled to have elevated and progressive systems of taxation; these may reflect the ability to pay[725] or equity.[726] Whether such a tax system could be considered ineffective or stifling of personal initiative or entrepreneurial spirit is irrelevant. But once the tax rate begins to go above, say, 80 per cent, especially when this occurs in one state,[727] questions must surely be asked. On the other hand, in several countries, confiscatory taxation is understood as grossly disproportionate taxation.[728]

8.4.2. Different Regions

8.4.2.1. Africa[729]

The presence of supranational legal instruments, their recognition of fundamental rights and provision for enforcement mechanisms and institutions often takes a long time to become a

Constitution of the Seychelles; art 21(2)(a) of the Constitution of Sierra Leone; art 16(2)(a) of the Constitution of Zambia. See further below sec 8.4.2.1.

[720] Art 1(2) of the First Additional Protocol to the ECHR reads: 'The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

[721] Some national Constitutions expressly include a prohibition on confiscatory taxation, for instance art 31 (1) of the Spanish Constitution.

[722] On the principle of equality and its implications, see sec 8.1 of this book.

[723] These are cases of taxation above 90 per cent, such as those addressed by the ECHR in respect of taxation of income from severance pay in Hungary and by the Belgian Constitutional Court on inheritance tax (Belgian Constitutional Court, judgment of 22 June 2005, no 107/2005, B.15.6 [2005]).

[724] Interestingly, the Belgian Constitutional Court (*Grondwettelijk Hof/Cour Constitutionnelle*) had rejected the confiscatory nature for an inheritance tax rate above 80% (Belgian Constitutional Court, judgment of 28 April 2004, no 66/2004 [2004]), – thus taking a different view from the one held in respect of a rate of the same tax exceeding 90% – and the French Constitutional Court (*Cour Constitutionnelle*) had assessed that the bundled rate of income tax and social security contribution exceeding 75% was confiscatory (Constitutional Court of France, judgment of 29 December 2012, no 2012-662 DC, para 74) unless in exceptional circumstances (Constitutional Court of France, judgment of 29 December 2013, no 2013-685 DC [2013], para 24). It is worth noticing that the German Constitutional Court (*Bundesverfassungsgericht*) had derived the *Halbteilungsgrundsatz*, according to which income taxation should not exceed 50%, from art 14 of the Basic Law (*Grundgesetz*) on the right to property (German Federal Constitutional Court, judgment of 22 June 1995, 2 BvL 37/91 [1995]).

[725] See above sec 8.1.4.

[726] See above sec 8.1.5.

[727] International double taxation, resulting from cross-border tax disparities, can produce effects of expropriation that are even harder to address in the absence of proper international coordination of the tax nexus. See F Debelva, *International Double Taxation*. The Tax Committee of the International Law Association will address them during the second phase of of its research.

[728] See further on this under sec 8.4.2.

[729] We would like to thank Johann Hattingh for his contribution.

reality in individual states – if they ever do – even when states formally ratify the necessary instruments.[730] Ratification can take place under external influence (eg of donor countries) and in the knowledge that there may not be an appreciable prospect of implementation (the reasons are varied: lack of resources for implementation, political insincerity, etc).

At present, only 30 African countries (out of potentially 55) have ratified the protocol that established the African Court on Human and Peoples' Rights. The Court was established in the 1990s and delivered its first substantive judgment in 2009. Out of 30 countries that formally ratified the establishment protocol, only eight have ratified a protocol that provides competence to the Court to receive cases from individuals and NGOs.[731] By its nature, tax cases will only come from this group of countries. The eight countries are Benin, Burkina Faso, the Ivory Coast, Ghana, Mali, Malawi, Tanzania and Tunisia. In this group, five countries appear on the World Bank's Low-Income Country Index, making it most unlikely that tax cases will be brought from them. The court has to date not decided a tax case. It is not realistic to expect that the Court is likely to be asked to do so soon. This is because of the typical narrow composition of tax bases in Africa, especially in low-income countries.

However, a review of 55 African countries reveals that most of their written Constitutions protect the right to property,[732] possibly also to private economic initiative.[733] Some African Constitutions contain provisions to stimulate and protect foreign investment. Under those provisions, the state supports the national economic actors in their relations with the rest of the world, supports integration into the global economic system and guarantees free enterprise as well as the security of capital and investments.[734] Sometimes, the article on property protection also addresses taxation. For example, the protection from deprivation of property under some Constitutions explicitly provides that nothing contained in or done under the authority of any law shall be held inconsistent with or in contravention of the constitutional guarantee of property 'to the extent that the law in question makes provision for the taking of possession or acquisition of any property [...] in satisfaction of any tax, rate or due'.[735]

More often, taxes are addressed in a separate provision requiring that citizens are equal before the taxes and that everyone should participate in financing the public expenses, according to the law and with his contributory capacity.[736] Constitutions may even contain, along with the

[730] *Vide* African Charter on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and the African Commission on Human and Peoples' Rights.

[731] According to the Court's website en.african-court.org/.

[732] Constitutions of Algeria, art 52, www.conseil-constitutionnel.dz/pdf/Constitutioneng.pdf; Angola, arts 14 and 37, extwprlegs1.fao.org/docs/pdf/ang72591ENG.pdf; Benin, art 22; Burkina Faso, art 15; Burundi, art 36; Cape Verde, art 66; Cameroon, Preamble, principle 19; Central African Republic, art 18; Chad, art 45; Congo, art 23; Democratic Republic of Congo, art 34; the Ivory Coast, art 11; Djibouti, art 12; Egypt, arts 35 and 40 (prohibition of confiscation of property); Equatorial Guinea, art 30; Eritrea, art 23; Swaziland, art 19; Ethiopia, art 40; Gabon, art 1.10; the Gambia, art 22; Ghana, art 20; Guinea, art 13; Kenya, art 40; Lesotho, art 17; Liberia, arts 22 and 24; Libya, art 16; Madagascar, art 34; Malawi, art 28; Mali, art 6; Mauritania, art 15; Mauritius, art 8; Morocco, art 35; Namibia, art 16; Niger, art 28; Nigeria, arts 43 and 44; Rwanda, arts 34 and 35; Sao Tomé and Principe, art 47; Senegal, art 15; Seychelles, art 26; Sierra Leone, art 21; Somalia, art 26; South Africa, art 25; South Sudan, art 28; Sudan, art 61; Tanzania, art 24; Togo, art 27; Tunisia, art 41; Uganda, art 26; Zambia, art 16; Zimbabwe, art 71.

[733] Art 65 Constitution of Cape Verde; arts 50, 51 Constitution of the Comoros.

[734] eg arts 50 and 51 Constitution of Comoros; art 10(3) Constitution of Zambia.

[735] Constitutions of Botswana, 1966 (www.parliament.gov.bw/images/constitution.pdf) Chapter II art 8(5); Gambia, art 22(2)(a); Nigeria, art 44(2)(a); Seychelles, art 26(2)(c); Sierra Leone, art 21(2)(a); Zambia, art 16(2)(a).

[736] Those articles often also contain a prohibition on retrospective taxation. Constitutions of Algeria, art 64; Angola, arts 102 and ff; Cape Verde, art 85(g); Cameroon, Preamble, principle; Central African Republic, art 20; Chad, art 58; Democratic Republic of Congo, art 65; Equatorial Guinea, arts 19 and 20; Guinea, art 22(4); Mauritania, art 20; Mozambique, art 45(c); Niger, art 40; Tunisia, art 10.

citizens' duty to pay taxes,[737] the state's obligation to take the necessary measures to ensure the collection of taxes, the fight against tax evasion and fraud.[738]

8.4.2.2. Americas

8.4.2.2.1. The Inter-American System for the Protection of Human Rights

Article 21 of the ACHR guarantees the right to property without express reference to taxation. However, the most relevant judgments of the Inter-American Court of Human Rights in tax matters have secured indirect protection of this right, based on the right to a fair trial and the right to judicial protection and acknowledging the entitlement to compensation for damages.[739] Moreover, the Inter-American Commission on Human Rights has held a hearing and published a report on 'Fiscal Policy and Human Rights in the Americas' in 2015.[740] However, this report is based on the collective rights approach[741] (taxation for enabling governments to foster social progress) rather than on the individual human rights approach followed in the first part of our study on public international law and taxation.

8.4.2.2.2. Latin America

8.4.2.2.2.1. Argentina[742]

The fundamental right to property is established in Article 17 of the Argentine Constitution. Article 4 of the Argentine Constitution prohibits confiscatory taxes without setting a specific tax rate or level.

The Argentine Supreme Court has held that confiscation implies a takeover by the state of a substantial portion of the taxpayer's income. It emphasises that the mere difference between what would be paid for the application of a tax and the portion of income that the tax law intends to tax does not imply that the tax becomes confiscatory. However, confiscation may occur if there is a disproportion of magnitude such that a reasonable conclusion may be drawn that the application of the tax according to the rules in force is not adequately representative of the income that the tax law intends to tax. Therefore, an objective test established by the Argentine Supreme Court of when the application of tax results in the confiscation of property is when the effective income tax rate is equal to or higher than 65 per cent. In the case under examination by the Court, the company Candy SA filed an amparo on the grounds that if it had to pay income tax without adjusting its balance sheet for inflation, it would be doing so on a fictitious profit, only in numbers but not on a de facto income. According to the majority of the judges,

> if the corrective mechanism discussed in the case were not applied in the tax period ending on 31 December 2002, i.e. if the income tax were determined without applying the inflation adjustment, the effective tax rate to be paid would not be 35 per cent, but would represent 62 per cent of the adjusted tax result for 2002, or 55 per cent of the profits – also adjusted – obtained [by the company].

Those percentages, the High Court argued, 'would exceed the reasonable limits of taxation'.[743]

[737] eg Constitution of the Democratic Republic of Congo, art 174; Constitution of Uganda, art 21(1)(g).

[738] Constitution of the Ivory Coast, art 43; *cf* also Constitution of Egypt, art 38(5): 'Paying taxes is a duty, and tax evasion is a crime' and Constitution of Cape Verde, art 82(c).

[739] See IACHR, judgment of 28 November 2002 *Cantos v Argentina*.

[740] Política Fiscal y Derechos Humanos en las Américas, Movilizar los recursos para garantizar los derechos, Informe preparado con ocasión de la Audiencia Temática sobre Política Fiscal y Derechos Humanos, 156° Periodo de Sesiones de la Comisión Interamericana de Derechos Humanos (CIDH), Washington DC, October 2015.

[741] *cf* above sec 3.3.

[742] We would like to thank Eduardo A Baistrocchi for his contribution.

[743] Argentine Supreme Court, judgment of 3 July 2009, FA09000058 *Candy SA c/ AFIP y otro s/acción de amparo*, cited.

8.4.2.2.2.2. Brazil[744]

The fundamental right to property is established in Article 5 (XXII) of the Brazilian Constitution. Article 150 (IV) of the Brazilian Constitution prohibits confiscatory taxes without setting a specific tax rate or level. Moreover, the Supreme Federal Court of Brazil[745] has decided that non-monetary sanctions for enforcing tax payment[746] are unconstitutional. The justices' arguments focused on the due process of law and the right to property. Tax administration must initiate a judicial claim. Additionally, non-monetary sanctions violate the right of access to courts and prevent legal economic activities. This position, however, does not include situations of systematic default in tax payment, in which non-monetary sanctions can be proportional.[747] In understanding the difference between these cases, it should be emphasised that the property right as a principle may be balanced with other norms; nevertheless, it derives the protection of its core from its fundamental nature.[748] Hence, any restriction to the property right should be justified, taking into account the principle of proportionality. In cases of systematic default in tax payment, three factors may justify the imposition of non-monetary sanctions: (1) its exceptionality – which should be clearly demonstrated, (2) the impossibility of guaranteeing the tax payment by other means and (3) the market distortion.[749]

Regarding confiscatory taxes, the Supreme Federal Court has defined them on a case-by-case analysis[750]: (1) when the governments tax beyond their tax power, imposing taxes on tax events already subject to taxes from other governments;[751] (2) when the fiscal (punitive) fine is above 100 per cent,[752] though a sanction of 20 per cent for payment default was not considered confiscatory;[753] and (3) progressive taxation may not be confiscatory.[754]

8.4.2.2.2.3. Chile[755]

The right to property is widely regulated and protected in the Chilean Constitution, such as in Article 19 N°23 ('freedom to acquire ownership over all classes of assets, except those which nature has made common to all men') and Article 19 N°24 ('right of ownership in its diverse species of all kinds of tangible and intangible assets'). According to Article 19 N° 24 of the Chilean Constitution, the only means to deprive someone of the property of an asset is a general or special law, which pursues reasons of public benefit or national interest. Article 19 N°20 of the Constitution, though, prohibits manifestly disproportionate or unjust taxes.

[744] We would like to thank Clara Gomes Moreira and Luís Eduardo Schoueri for their contribution.

[745] See Supreme Federal Court of Brazil, summaries of precedents nos 70/1963, 323/1963 and 547/1969 (which bind only the judicial branch); and extraordinary appeal of 29 May 2014 no 565048/RS, cited.

[746] eg to prevent the exercise of one's profession, seize goods or close establishments.

[747] Supreme Federal Court of Brazil, direct action of unconstitutionality judgments of 25 September 2008 nos 173/DF and 394/DF, cited.

[748] See Supreme Federal Court of Brazil, direct action of unconstitutionality of 10 August 2012, no 4628/DF.

[749] Supreme Federal Court of Brazil, direct action of unconstitutionality nos 173/DF and 394/DF, cited.

[750] Supreme Federal Court of Brazil, provisory appeal in the extraordinary appeal of 23 April 2013, no 712285/SC [2013].

[751] Supreme Federal Court of Brazil, direct action of unconstitutionality no 4628/DF, cited.

[752] Supreme Federal Court of Brazil, provisory appeal of 10 February 2015, no 851038/SC [2015]; provisory decision in the direct action of unconstitutionality of 17 June 1998, no 1075/DF [1998] on a fiscal (punitive) fine of 300 per cent which was considered confiscatory.

[753] Supreme Federal Court of Brazil, extraordinary appeal of 18 May 2011, no 582461/SP [2011].

[754] Supreme Federal Court of Brazil, direct action of unconstitutionality of 17 March 2011, no 2078/PB [2011].

[755] We would like to thank Yuri Varela for his contribution.

The Chilean case law and doctrine understand that the prohibition on manifestly disproportionate or unjust taxes refers to the prohibition on confiscatory taxes. They, therefore, identify a constitutional principle of tax justice. Thus, the limit of taxes shall be given by the protection of private property according to Article 19 N°24 of the Chilean Constitution: if the tax is unjust or disproportionate in a manner that it affects property on such an intensity that it amounts to confiscation.

The Chilean Constitutional Court decided on this limit based on the balance of a series of elements, such as the taxpayer's payment capability, the asset's qualification in terms of use or regular consumption, or if its taxation interferes with the development of an economic activity.[756]

This being the case, although in Chile the taxpayers' property right is constitutionally established and protected from 'evidently disproportionate and unjust' taxes (Article 19 No 20(2) of the Chilean Constitution) under the principle of tax justice, there are no objective or clear indicators as to when taxation is confiscatory. Consequently, and following the Chilean case law and doctrine, its consistent protection will depend on the interpretation of the judges regarding the said tax in the framework of the specific de facto circumstances of the case (payment capability, economic activity, asset qualification, inter alia).

8.4.2.2.2.4. Colombia[757]

8.4.2.2.2.4.1. Three Paradigmatic Cases There are three paradigmatic cases of the Constitutional Court of Colombia on the right to property.

The first case corresponds to an action of *tutela* brought by a local brewery when questioned about the standard inputs or raw materials for each type of beer it manufactures for the purposes of controlling excise taxes. The brewery believed that its right of ownership in an intangible asset had been threatened – the industrial property that it owns because, from such percentage standards, somebody could extract the formula that distinguishes each type of beer that the company produces. It considered that the request for that information was disproportionate. It included the degree of humidity, dilution, necessary sediment time, qualities and the process for the rye to be made into root beer; this was requested for purposes of determining the taxable base of this tax, that is, the ex-factory sales price, which could be verified by merely examining accounting costs and expenses as well as the sales invoices issued to distributors. The Constitutional Court[758] recognised that the right of ownership is fundamental in every particular case, provided that the same relates to the 'material conditions of existence';[759] or 'that the disregarding of it affects the right to equal treatment and the right to live a dignified life'. It also recognised that this right might be protected by this special injunction action (the *tutela*), provided that 'the essential core of the right' is affected. But it concluded that the brewery had not been requested to provide specific formulae protected by industrial property law but the disclosure of certain proportions between production and raw materials. The Colombian Constitutional Court believed that this querying was justified by the social function of ownership, the collective ends of taxes and the rules of probative nature included in the Colombian Tax Code.

In the second case, the claimant pledged that his economic patrimony had been violated. His vehicle had been stolen and despite his immediate report to the prosecutor, forceful collection proceedings were initiated against him to collect the vehicle tax on the stolen vehicle. This judgment causes true perplexity: it demands more exchange of information and coordination

[756] Chilean Constitutional Court, judgment of 31 July 1995, case 219/95 [1995].
[757] We would like to thank Lucy Cruz for her contribution.
[758] Constitutional Court of Colombia, judgment of 14 September 1993, case T-381 [1993].
[759] Constitutional Court of Colombia, judgment of 18 May 1992, case T-506 [1992].

between public authorities – in general terms. The Colombian Constitutional Court held that the right to property is not absolute: 'its exercise is limited by other rights and also by the duties that derive from the fact that one lives within a political community' – among others, the duty to pay taxes. The Court did not protect the complainant's right to property violated already by the stealing, on the understanding that the tax on vehicle ownership accrues on 1 January every year from the moment of registration of the vehicle. Given that in the case at hand, the report was made that the taxpayer did not cancel the registration of the vehicle, he still has to pay for a vehicle that he no longer owns because he is still formally registered as the owner.[760]

To sum up, the right to property is fundamental when examined under certain circumstances that may lead to its being extinguished. However, in taxation in general, and in tax investigations in particular, that right is not being jeopardised, given that the duty to pay taxes is constitutional in nature. Even where ownership of taxable property has been extinguished, formal registration prevails over the fundamental right.

In the third case, the Colombian Constitutional Court pronounced on the rights of the displaced population and the impossibility of carrying out forceful collection for overdue tax property obligations charged on pieces of real property that the displaced had had to abandon. Against this background, the Constitutional Court examined whether a municipality had violated the rights to 'due process of law, the rights to health, to human dignity, to a final minimum income, the right to access justice, the right to comprehensive redress, and the rights of the displaced' by refusing to condone the amounts owed by the unified property tax of three pieces of rural property owned by the claimant and which they ceased to occupy and to exploit economically as victims of forced displacement.

The Constitutional Court exhorted the municipality to

> initiate the procedure for the preparation, discussion and approval of a draft Municipal Agreement, by means of which it provides in a general manner the pertinent to adopt and regulate tax relief measures, such as the exemption and/or remission of the property tax levied on the properties located in that locality and whose property is owned by those persons who are victims of dispossession and/or forced displacement due to the internal armed conflict.[761]

The defendant alleged that exclusions must be established by law and referred to pieces of real property destined to religious service, diocese curias, episcopal houses, parish houses, priest seminars, natural parks and public parks owned by state entities. But the conditions of extreme vulnerability of a forced displacement victim who had to abandon the three pieces of real property deserved

> a preferential treatment under Articles 13 and 95 of the Constitution, where the latter pins down to the obligation of giving assistance to people who are under circumstances of manifest weakness, to guarantee that they may enjoy their fundamental rights effectively; which, in the case at hand, translate into an exoneration of the tax upon a property that [the taxpayer] could not enjoy because of reasons beyond its will; accordingly, the revenue collection (or taxing) interest gives way to the fundamental right to receive assistance where the taxable property could not be enjoyed.[762]

8.4.2.2.2.4.2. Confiscatory Taxation Taxpayers must not be charged with confiscatory or disproportionate taxes. The 'sin' of tax confiscation occurs where the tax absorbs a substantial

[760] Constitutional Court of Colombia, judgment of 20 May 2004, case T-489 [2004].
[761] Constitutional Court of Colombia, judgment of 1 December 2014, case T-911 [2014], para 7.2.6. Decision, Tercero.
[762] Constitutional Court of Colombia, T-911/2014.

portion of the taxable operation or transaction and the amount of the tax is utterly disproportionate to the amount of the operation or transaction. The following are the most relevant cases decided by the Constitutional Court of Colombia.

Case C-364/23 dealt with an exceptional tax, highly debated because it taxed the entire exchange gain of certain securities held by creditors of the nation abroad; this tax was challenged, inter alia, as a confiscatory charge. The Court held that certain types of exceptional limits to the taxing powers of the state must be considered today in accordance with the principles of taxing justice and equity. These limits are particularly quantitative in nature, and justified by court precedents issued under the former Constitution under the notion of 'confiscatory tax' or 'expropriation tax'. The mentioned principles of justice and equity, on the one hand, constitute the foundation of the duty of every person to contribute to the financing of the expenses and investments of the state (Article 95-9). On the other hand, they constitute a limit to the taxing power of the state (Articles 95-9 and 363 of the Colombian Constitution).

> This means that establishing an unjust and inequitable tax does not fall within the constitutional sphere of taxing power. Taxation affects ownership and wealth necessarily; and it is a powerful and legitimate instrument for the redistribution of income and the curtailment of social and economic inequalities. However, it has not been designed to destroy the sources of wealth and of work of a society. Therefore, and rightly so, traditional Colombian court precedents have placed the limit of the taxing power of the State in the extinguishment of ownership or of income.

Case C-409/1996 focused on the limitation of deductible costs and expenses paid abroad to obtain Colombian source income, equal to 15 per cent of the taxpayers' net income as computed before deducting the said costs and expenses – without detriment to a list of exceptions set by the same rule to mitigate the reach of this 15 per cent cap. This means that any person who obtains Colombian source income based upon, for example, technical services provided abroad cannot deduct from its revenue more than 15 per cent for costs or expenses. The complainant held that this limitation was unconstitutional because it was 'discriminatory, unjust and confiscatory' as it considerably affected the possibility of economic agents whose operating costs derive to a great extent from services obtained abroad. But the Constitutional Court of Colombia, despite saying that the Constitution does not admit the creation of any confiscatory taxes (Article 58 of the Constitution of Colombia, which recognises private ownership and Article 333 of the Colombian Constitution that protects economic freedom and the freedom to create enterprises, and the principles of tax justice and equity – under Articles 95-9 and 363 of the Colombian Constitution), concluded that, in the case at hand,

> the said prohibition of confiscatory taxes is compatible with an ample freedom of the legislature in this field, because under the Constitution the representative bodies are charged with the function of defining the various elements of the various taxes – under convenience criteria and respecting the rules of the Constitution. Therefore, only extreme cases may fall within the hypotheses of constitutionally forbidden confiscatory taxes.[763]

This is so because the threshold of the maximum tax burden has not been defined. Hence, in the Colombian practice, a tax is only confiscatory where the tax consumes the majority of the income or the patrimony.

Case C-528/13 concerned the 2 per cent tax charged on the value of certain insurance policies that apply to firemen's activities. In this case, the complainant alleged that the challenged legal provision entailed an attack on the principles of progressiveness, justice, moderation and

[763] Constitutional Court of Colombia, judgment of 4 September 1996, case C-409 [1996], no 5.

the non-confiscatory nature of taxation matters (Articles 58, 95-9 and 363 of the Colombian Constitution). They imposed a disproportionate burden compared to prior rules. Indeed, 'the amount of the collection is doubled' and 'it is substantially extended, by including insurance policies of other lines and covering other risks in the taxable base'. There were no reasonableness criteria that would explain or justify the inclusion of certain lines and exclusion of others. Finally, the Colombian Constitutional Court added that the challenged tax was also unconstitutional because 'we would arrive at a tax rate … that would exceed 50 % of profits' of the amount paid if this tax with the corporate income tax paid by insurance companies was added. However, the Colombian Constitutional Court assumed that there was confiscation only

> where the economic activity of the private person is carried out exclusively in order to pay [the tax], in such a way that there is no profit, and not where [the taxpayer] must apply only a part of the profits as indicated in this case. Besides, the accusation that [the tax] exceeds 50% of the profits when added to other taxes was not proven.[764]

8.4.2.2.2.5. Mexico[765]

For many decades, confiscatory taxes were prohibited by Article 22 of the Federal Mexican Constitution. According to case law issued by the Mexican Supreme Court, a tax will not be considered confiscatory or ruinous so long as taxpayers pay taxes pursuant to their economic capacity, based on the proportionality principle.[766]

8.4.2.2.2.6. Peru[767]

Article 70 of the Peruvian Constitution expressly recognises and protects the right to property. According to the Peruvian Constitutional Court, the right to property guarantees the existence, protection and integrity of the property of the individuals or corporations where the object of said property is tangible or intangible.[768]

In the tax field, the protection of the right to property mainly applies through two principles, the principle of non-confiscatory nature as laid down in Article 74(2) of the Peruvian Constitution and the ability-to-pay principle.[769] The Constitutional Court of Peru held that the constitutional principle of the non-confiscatory nature of taxes informs and limits the exercise of the state's taxation powers. As such, that principle constitutes a mechanism for the defence of certain constitutional rights, starting, of course, with the right to property. It prevents tax law from unreasonably and disproportionately affecting the patrimonial sphere of individuals.[770]

[764] Constitutional Court of Colombia, judgment of 14 October 2004, case C-1003, [2004] (Justice Jaime Córdoba-Triviño. Clarifying statement on vote, Jaime Araujo-Rentería). This decision declared that a certain provision was constitutional – a provision that reduced income tax deductions. Among other reasons, the Colombian Constitutional Court held that this was not true – as the complainant was alleging – that the rule was violating the principle of tax equity to the extent that it ended up being confiscatory: 'a tax is confiscatory where the economic activity of the private person is exclusively applied to payment of the same, in such a manner that there is no profit. In the case of the challenged rule of the law, this does not happen because the taxpayer is not being taxed excessively'.

[765] We would like to thank Diana Bernal for her contribution.

[766] See Mexican Supreme Court of Justice, *Impuesto Sobre La Renta. El Aumento De Su Tasa No Viola La Garantía De Proporcionalidad Tributaria*, Novena Época, Registro: 161613, Semanario Judicial de la Federación y su Gaceta, Tomo XXXIV, 2a./J 116/2011 [2011] 564.

[767] We would like to thank Cecilia Delgado Ratto for her contribution.

[768] Peruvian Constitutional Court, judgment of 20 April 2011 no 3258-2010-AA/TC [2010].

[769] Above under sec 8.1.4.2.2.1.6. See Peruvian Constitutional Court judgments of 2 August 2004 no 00029-2004-AI/TC, cited and of 11 November 2004 no 0041-2004-AI/TC.

[770] Peruvian Constitutional Court, judgment no 02727-2002-AA/TC [2002], no 4.

The joint application of these constitutional principles serves as a limit to the tax powers of the state, with the aim of guaranteeing Peruvian taxpayers that the imposition of taxes will be kept to a reasonable proportion of the taxpayer's assets, preventing the patrimonial sphere of the taxpayer from being affected in too burdensome a way, which would imply an illegitimate exercise of the state's tax power.[771]

8.4.2.2.3. The Caribbean[772]

Caribbean Constitutions and civil codes, in general, enshrine the right to the enjoyment of private property. This would encompass the protection from arbitrary seizure and/or recourse to the judicial system to protect that right from interference by the state save for legitimate reasons such as to satisfy an outstanding debt. New property tax legislation due to be implemented in 2021 permits the forfeiture of property for failure to pay property tax.[773]

8.4.2.2.4. United States

The question of taxation and human rights has been raised in some cases under general provisions of the US Constitution providing for 'equal protection of the law' and 'due process'. Such arguments have been asserted, for example, in situations where special advantages have been provided for some segments of the society but not for others, resulting in material differences in the tax burdens of similarly positioned taxpayers. Such arguments have, however, not been successful. In other words, horizontal equity (the idea that similarly placed taxpayers should bear similar tax burdens) is not a constitutional requirement. Congress is empowered to impose different tax burdens on different classes of taxpayers.

The US does not have constitutional prohibitions against confiscatory taxation per se. In theory, a targeted tax could be seen as a violation of the Eighth Amendment prohibition on excessive fines; the prohibition on bills of attainder in Article I, section 9; or the Fifth Amendment prohibition on takings of private property without just compensation.[774] The Eighth Amendment only applies to fines imposed as punishment, so confiscatory taxation would only lead to an Eighth Amendment claim if the tax were imposed as a penalty, and the Supreme Court has not found a tax on its own to constitute an excessive fine. The prohibition on bills of attainder prohibits Congress from inflicting punishments on specific individuals. Although the Congressional Research Service did suggest in 2009 that certain proposed 90 per cent taxes on a select group of individuals could be considered an impermissible bill of attainder,[775] the Supreme Court has not reached such a conclusion. However, the Supreme Court in 1916 determined that the Fifth Amendment prohibition on takings without just compensation 'is not a limitation upon the taxing power conferred upon Congress by the Constitution'.[776] Therefore, thus far, none of these constitutional provisions has been held to prohibit high levels of taxation.

[771] Peruvian Constitutional Court, judgment of 28 September 2004 no 033-2004-AI/TC.
[772] We would like to thank Anthony Gafoor for his contribution.
[773] Property Tax Act 2009 of Trinidad and Tobago, s 34(1)(b).
[774] USC, Eighth Amendment; art I, s 9, cl 3; Fifth Amendment.
[775] EK Lunder, R Meltz and KR Thomas, 'Retroactive Taxation of Executive Bonuses: Constitutionality of HR 1586 and S 651', *Congressional Research Service* (25 March 2009).
[776] US Supreme Court, *Brushaber v Union Pacific R Co* (1916) 240 US 1.

8.4.2.3. Asia

8.4.2.3.1. China[777]

According to its Constitution, China protects the lawful rights and interests of foreigners within Chinese territory. The lawful private property of Chinese citizens may not be encroached upon. Therefore, the collection of tax, the reduction, exemption and refund of tax, as well as the payment of tax dodged or overdue, must be implemented in accordance with Chinese laws.

Where a Chinese tax authority has grounds for deeming that a taxpayer engaged in production or business operations commits any act to evade tax payment obligations, the tax authority may, prior to the prescribed date of the tax payment, order the taxpayer to pay the taxes payable within a prescribed time limit. If the tax authority discovers obvious evidence that the taxpayer has transferred or concealed its taxable commodities, goods and other properties, or taxable income within the prescribed time limit, the tax authority may order the taxpayer to provide a guarantee for tax payment. If the taxpayer is unable to provide a guarantee for tax payment, the tax authority may, upon approval of the commissioner of a tax bureau (or a sub-bureau thereof) at the county level or above, adopt the following preservative measures of taxation: (1) notify in writing the banks or other financial institutions with which the taxpayer has opened an account to freeze the taxpayer's deposits of an amount equivalent to the amount of taxes payable; (2) seal up the taxpayer's taxable commodities, goods or other properties, the value of which is equivalent to the amount of taxes payable. If the taxpayer makes the tax payment within the time limit as prescribed in the preceding paragraph, the tax authority must immediately release the interim measures of taxation. If the taxpayer fails to make the tax payment at the expiration of the time limit, the tax authority may, upon approval of the commissioner of a tax bureau (or a sub-bureau thereof) at the county level or above, notify in writing the bank or other financial institution with which the taxpayer has opened an account to withhold and remit the amount of tax from the taxpayer's deposits which have been frozen, or sell by auction or sell off in accordance with law the commodities, goods or properties which have been sealed up and use the proceeds sold by auction or sold off to make good the amount of taxes payable.

The power to adopt interim measures or mandatory enforcement measures shall not be exercised by any entity or individual other than the statutory tax authorities. Any of the tax authorities must adopt interim taxation or mandatory enforcement measures according to the legal authority and the legal proceedings and shall not seal up the lodgings or articles of a taxpayer himself and his dependent family members necessary to make a living. These necessary items shall not be within the scope of the mandatory enforcement measures. As stipulated in the Detailed Implementation Rules of the Law on Tax Administration and Collection, taxpayers and their dependent family's housing and any daily necessity of price below RMB 5,000 shall not be subject to such tax measures.

8.4.2.3.2. India[778]

The Indian Constitution had initially guaranteed Indian citizens the fundamental right to 'acquire, hold and dispose of property' under Article 19(1)(f). The right could be subject to reasonable restrictions in the public interest. However, the Constitution (Forty-Fourth Amendment) Act of

[777] We would like to thank Na Li for her contribution.
[778] We would like to thank Ashrita Prasad Kotha and Sriram Govind for their contribution.

1978 relegated the status of the right to a legal right (as opposed to a fundamental right) under Article 300A. Article 300A now guarantees persons the right not to be deprived of property, except under the authority of law.

In general, the Indian courts have granted the legislature a larger latitude in tax matters given the Parliament's prerogative to adopt economic or social policies. It would be rare for the Supreme Court of India to state that taxes imposed by the federal or state governments are unconstitutional and affect the taxpayers' fundamental rights. Only in situations where the taxes clearly fall outside the competence of the Union or state legislatures under the Constitution can such matters be questioned under usual circumstances.[779]

A tax law may be struck down if it is confiscatory. An example of a confiscatory provision was a penalty provision under section 140A of the Income-tax Act, 1961, which enabled the income-tax officer to levy a penalty extending up to 50 per cent of the payable tax. The taxpayer argued that it was confiscatory and violated the (then guaranteed) fundamental right to property. The court observed that a penalty could only be sustained in cases involving tax evasion or concealment of income where deterrence is sought to be achieved, which was not the case here. Thus, the penalty provision was struck down for being confiscatory in nature.[780] This 1972 judgment is remarkable as there is presently a crucial shift in international tax law, especially in the European area, to take revenue loss as a proxy for tax fraud. In such a scenario, anti-fraud measures are designed primarily not to deter or punish fraud but rather to facilitate the recovery of or compensation for the revenue lost.[781]

8.4.2.3.3. Israel[782]

The right to property is protected constitutionally under Article 3 of Basic Law Human Dignity and Liberty: 'There shall be no violation of the property of a person.'

Accordingly, the first and common question is whether tax infringes upon property rights. The common position in the Israeli constitutional tax law literature is affirmative: any tax infringes upon the constitutional property right since this right includes any property with economic value, and taxation cuts this value.[783] Aeyal M Gross added that property rights also include a distributional aspect meant to guarantee a minimum standard of living for all residents and personal aspects meant to enhance self-realisation. In his analysis, constitutional tax shall respect these aspects of property rights.[784] It was also less convincingly argued that a 'good tax', which fulfils four criteria – efficiency, certainty, consideration and fairness – does not infringe upon a property right at the first stage of the constitutional review.[785] In the *Bank Mizrahi* case, several opinions were expressed by the different judges, but no clear majority rule was made in this regard.[786] The judiciary overcame this question in several cases by assuming infringement of property but ruled that the infringement was constitutional because it met the limitation clause.

[779] Supreme Court of India, judgment of 9 December 1960, *Kunnathat Thathunni Moopil Nair v State of Kerala and Anr* [1960] 3 SCR 77.

[780] Indian Madras High Court, judgment of 6 December 1972, *AM Sali Maricar And Another v Income-Tax Officer*, (1973) 90 ITR 116 Mad [1972].

[781] *cf* R de la Feria, 'Tax Fraud and Selective Law Enforcement' (2020) 47 *J of Law and Society*, 1–31, 30.

[782] We would like to thank Rifat Azam for his contribution.

[783] See R Yoran, 'The Constitutional Revolution in Israeli Taxation' (1994) 23 *Mishpatim* 55–68; R Cohen, *The Values of Israel as Jewish and Democratic State* (Hapraklit, 1993) 9–52, and (2011) 21 *Jewish Law Association Studies* 19–76; MF Barnes, 'Judicial Review of Economic Legislation' (1998) *Taxes*, A-80.

[784] See AM Gross, 'Property as a Constitutional Right and Basic Law: Human Dignity and Liberty' (1998) 21 *Tel Aviv University Legal Review* 405–47.

[785] See YM Edrey, 'Constitutional and Normative Obstacles for the New Tax legislation' (1994) 6 *Taxes*, a20-a52 (in Hebrew).

[786] Israeli Supreme Court, judgment of 9 November 1995, *United Mizrahi Bank v Migdal Cooperative Village*, CA 6821/93 [1995], www.versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-bank.

In reviewing tax laws, the Israeli Supreme Court has shown restraint. For example, in the *Davidyan* case, the court examined the constitutionality of the new tax law from 2011, which changed the tax regime on income from the gas fields found in Israel's territorial sea. The law imposed a new progressive tax on these profits and designated transitional provisions. The court ruled that the new tax regime was not retroactive since it taxed future incomes from the fields. The fact that the investments in the fields were made while a lower tax regime was imposed on the expected income did not make the new regime retroactive as long as the tax was imposed on future income. The court ruled that the law was constitutional. This is because it met the limitation clause assuming it infringes upon the property rights of the investors since it was made for a good purpose of collecting revenues in a fair and redistributive manner and the means used were proportionate, given the transitional provisions.[787]

In another case, the court ruled that the repealing of tax residency benefits for the residents of a few municipalities were constitutional because, despite its assumed infringement of their property rights, it was proportionate and fulfilled the limitation clause.[788]

With regard to more recent FATCA implementation legislation, the Supreme Court of Israel rejected the claim that that legislation violated the property rights of account holders who refuse to fill out forms. The choice was given to the customer, who decided to comply and avoid closure of the account.[789]

While tax legislation usually passed property rights scrutiny, these rights substantially influenced the interpretation of tax laws. In the purposive interpretation method, it is presumed that the objective purpose of any legislation is to protect property rights. Therefore, tax laws are interpreted to keep property rights as far as possible while collecting the required taxes. Accordingly, the Supreme Court of Israel allowed, for example, the deduction of actual interest payments on a construction project instead of sticking to the literal meaning of the formula in the law that did not really reflect the actual costs in the specific circumstances.[790] In the *Elka* case, the Supreme Court of Israel emphasised the right of property in order to allow VAT refund in cases of bad debts through interpretation.[791] To sum up, the constitutional right of property limited the meaning of tax legislation through interpretation to enhance the protection of that right.

8.4.2.3.4. Japan[792]

Article 29 of the Japanese Constitution addresses the right to property. Article 29(1) states that the right to own or hold property is inviolable. However, Article 29(2) allows for the restriction of that right if it violates the public welfare: 'Property rights shall be defined by law, in conformity with the public welfare.' Furthermore, Article 29(3) states: 'Private property may be taken for public use upon just compensation thereof'.

Article 25 of the Japanese Constitution provides for the right to life under the welfare state. To guarantee the right to life, social security measures and redistribution of wealth are absolutely necessary. Therefore, the Japanese Constitution assumes redistribution of wealth to be a legitimate role of the state.[793]

[787] Israeli Supreme Court, judgment of 15 August 2012, *Hayem Davidyan v The Knesset*, HCJ 3734/11 [2012].

[788] Israeli Supreme Court, judgment of 10 May 2006, *Beer Sheva Municipality v The Government of Israel*, HCJ 4947/03 [2006].

[789] Israeli Supreme Court, judgment of 2 January 2018, *Foreign Republicans in Israel v the Government of Israel*, HCJ 8886/15 [2018].

[790] Israeli Supreme Court, judgment of 16 March 1999, *Interbuilding Construction Ltd v Assessment Officer Tel Aviv*, CA 1527/97 [1999].

[791] Israeli Supreme Court, judgment of 1 December 1999, *Department of Customs and VAT v Elka Holdings Ltd*, CA 2112/95 [1999].

[792] We would like to thank Yuri Matsubara and Saki Urushi for their contribution.

[793] H Kaneko, *Tax Law* 4.

8.4.2.4. Europe[794]

The concept of confiscatory taxation may change over time. Until the end of the 1970s, it was very common to have very high tax rates in Western Europe applicable to taxation of income earned by individuals and inheritance tax. While this would be a difficult question for any court, one imagines that there must come a point where the level of taxation is simply so high – at levels of, say, 80 per cent or higher – that it assumes the character of confiscation of property without compensation such as to trigger the application of Article 1 of Protocol No 1 of the ECHR and Article 17 of the EU Charter.

8.4.2.4.1. Council of Europe

As a result of the ECHR negotiations, the right to property was not stipulated in the main text of the ECHR but was included in its First Protocol. This is possibly due to historical reasons, taking into account the fact that it was difficult to reach agreement on this clause and its wording.[795] Inter alia, it should not be forgotten that, when the ECHR was drafted, socialist countries denied the very concept of private property. As a result of this situation, the Member States of the Council of Europe can still be part of the ECHR mechanism by adhering to its main text but are not obliged to guarantee, inter alia, the protection of property rights. This compromise leaves taxpayers without the possibility of claiming a violation of their property rights in the countries that have opted not to ratify the First Protocol to the ECHR,[796] leading to important practical repercussions.[797]

Article 1 of Protocol No 1 to the ECHR provides for the protection of property. According to the case law, it prohibits any individual and excessive burden being placed upon any person or a particular class of taxpayers.[798]

Pursuant to Article 1(2) of Protocol No 1 to the ECHR, the protection of the right to property 'shall not … impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'. This is the first significant difference arising in comparison with the protection of the right of property in the EU, where Article 17 of the EU Charter does not contain a corresponding clause regarding taxation.

Ad incipit, the ECHR perceives taxation as a necessary interference with the right to property. Therefore, the bottom line is that Article 1 of Protocol No 1 to the ECHR allows the state to interfere with the right to property to secure the payment of taxes. Prima facie, Article 1 of Protocol No 1 to the ECHR leaves little room for intendment; taxation is an allowed interference with the

[794] We would like to thank Natalia Vorobyeva for her contribution.

[795] D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (2014) 655.

[796] eg Monaco and Switzerland are contracting parties to the ECHR, but they have never ratified the First Protocol. See Chart of Signatures and Ratifications of Treaty 009, Council of Europe: www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p_auth=C9 U9u9wD.

[797] eg in the case of *Al-Dulimi and Montana Management Inc. v Switzerland* (ECtHR (Grand Chamber), *Al-Dulimi and Montana Management Inc v Switzerland*, no 5809/08 (21 June 2016)), the Iraqi national and the Panama-based company could not claim violation of their property rights on account of freezing with the subsequent confiscation of their assets by Swiss authorities which were implementing their obligations under the UN Security Council Resolution. The applicants' complaint was confined to arguing that they had no right of access to a court under art 6(1) of the ECHR. In particular, they could not request a review by the national courts of this measure adopted pursuant to the sanctions regime. While the Grand Chamber found a violation of art 6 of the ECHR in that case, the applicants were refused any pecuniary damage award because there was no link between the violation found and the damage which could have been caused by the confiscation of their assets (see paras 159 and 160 of the judgment). This is a clear consequence of the impossibility for the applicants to challenge the measure infringing upon their right to property under the relevant legal provision (notwithstanding the fact that no confiscation had yet occurred at the time when the case was lodged).

[798] ECtHR, judgment of 14 November 2017, *Plaisier BV and Others v the Netherlands*, nos 46184/16, cited, para 82.

right to property. One could doubt whether the drafters of the ECHR would have expected that taxation would eventually form part of the basis of judgments of the ECtHR interpreting the ECHR. Indeed, when the ECHR was drawn up, taxation was understandably not a priority. Few could have anticipated that a Court seized with jurisdiction to hear cases involving the right to life and the prohibition of torture would determine issues involving taxation. Nonetheless, judicial experiences gained in 60 years of the jurisprudence of the ECtHR (and the former European Commission on Human Rights) demonstrates that there is more here than meets the eye. Over the years, the Strasbourg institutions have concluded that certain forms of taxes and tax policies could violate the right to property, but the road to Damascus was a long one.

The Council of Europe Report offers major insights relating to the meanings of the terms 'control the use of property … to secure payment of taxes or other contributions or penalties'[799] because it seeks to establish the meaning of 'tax' for the purposes of the ECHR[800] and begins to delve into the core topic of national tax sovereignty versus taxpayers' rights.

The Report confirms that the power to levy taxes is one of the attributes of national authorities.[801] Therefore, the Convention bodies should not review the actual decision to raise taxes but the proportionality between the level of taxes and the means of those required to pay them. The ECtHR, however, has the right to denounce any law that transgresses the ample margin of appreciation which applies to the adoption of the fiscal legislation needed to ensure the payment of taxes. The Report also explained that the expression 'legislation needed to ensure the payment of taxes', referred to in the third sentence of Article 1 of the First Protocol, applies both to tax legislation (definition of the scope and amount of tax) and the individual's obligation to pay taxes.

Article 1 of Protocol No 1 to the ECHR on the legal protection of the right to property in tax matters had limited application for quite a long period.[802] However, after several economies in transition joined the Council of Europe,[803] it started to become clear that Article 1 of Protocol No 1 to the ECHR could help design tax policies in conformity with such provision and in line with the best practice standard.[804] In the early 2000s, the ECtHR tried to map out the 'best practice standard' for former Soviet countries (or those that used to have socialist regimes) in designing their tax policies, in particular the requirement to respect for the rule of law.[805] Ultimately, the ECtHR has produced rich case law on the fundamental right to property under Article 1 of Protocol No 1 to the ECHR in taxation. Meanwhile, the number of these cases is quite high.

Predictably, the vast majority of judgments dismissed most claims either as unfounded or as manifestly ill-founded.[806] The ECtHR also dismissed complaints on the basis of other criteria

[799] L Sermet, 'The European Convention on Human Rights and Property Rights' (1992) 11 *Council of Europe Publishing Human Rights Files* 25–27.

[800] According to the said Report, 25, taxes apply over a period of time. Furthermore, the purpose for which a tax is raised should not 'alter the nature of the tax as such'; taxation inevitably differentiates between different groups of taxpayers and varies with the states' social and economic objectives.

[801] See Report, cited 25.

[802] Sermet, 'The European Convention on Human Rights and Property Rights' 25–27. This report acknowledged the tense relationship that may exist between taxation and the right to property.

[803] For instance, Latvia, Moldova, Ukraine, Georgia, Bulgaria, Russia, Azerbaijan, Poland and others.

[804] This finding can be supported by reference to measures taken, eg by Ukraine in enforcing the judgment in the *Intersplav* case (ECtHR, *Intersplav v Ukraine*, no 803/02 (9 January 2007)). In particular, Ukraine introduced a clear VAT refund notification and reimbursement procedure and an electronic system of VAT administration. Furthermore, the Supreme Court of Ukraine established a coherent approach for the examination of compensation requests for delays in VAT refunding. See Status of execution in *Intersplav v Ukraine*, www.hudoc.exec.coe.int/eng?i=004-31332.

[805] Following the famous *Intersplav* judgment (ECtHR, *Intersplav v Ukraine*, cited), Ukraine introduced a new VAT refunding procedure, ensuring transparency and time sensitivity.

[806] Drawing up statistics speculating on success rates has become almost impossible because, after the introduction of the single-judge system, cases that are dismissed are not even published. Interestingly, P Baker, 'Taxation and the

for inadmissability, such as non-exhaustion of domestic remedies,[807] incompatibility *ratione materiae.*[808]

The following principles can be drawn from the ECtHR's case law and the Council of Europe's report. Taxation is *ex natura rerum* an interference with the right to property, but certain forms of such interference are allowed. Nonetheless, the ECtHR – and the Commission before it – have a right of review. Tax measures can legitimately interfere with the right to property provided they fulfil the following criteria: (1) they must be in accordance with law meeting qualitative requirements, notably those of accessibility, precision and foreseeability;[809] (2) they must pursue a legitimate aim in the public interest, notably to secure the payment of taxes[810] or to preserve the financial stability of the VAT system;[811] (3) there must be a reasonable relationship of proportionality between the means employed and the aims sought to be realised. In other words, they must strike a 'fair balance' between 'the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[812] It is in the first instance for the national authorities to decide on the type of tax or contributions they wish to levy. Decisions in this area normally involve, in addition, an assessment of political, economic and social problems, which the ECHR leaves to the competence of the Member States, for the domestic authorities are clearly better placed than the ECtHR to assess such problems. The Member States, therefore, have a wide margin of appreciation.[813] The ECtHR will respect the national authorities' assessment in such matters unless it is devoid of a reasonable foundation.[814]

Therefore, the ECtHR has shown a reluctance to disturb the tax policies of the Member States. In this area, the ECtHR has so far only intervened in cases of taxes levied at such exorbitantly high levels that evidently show their confiscatory nature. Conversely, the ECtHR has proven to be less hesitant in cases involving tax refunds and sanctions, thus generally making the protection of the rule of law stronger.[815] However, in some of these cases, the

European Convention on Human Rights' (2000) 40(8) *European Taxation* 298 and ff, noted that out of over 60 tax cases in which art 1 of the First ECHR Protocol was considered, most were dismissed for the following reasons: a) the tax measure was in accordance with the law (ECtHR, *Špaček Sro v the Czech Republic*, no 26449/95 (9 November 1999)); b) the tax measure under scrutiny fell within the state's wide margin of appreciation (ECtHR, judgment of 23 February 1995, no 15375/89 *Gasus Dosier- und Fördertechnik GmbH v The Netherlands*, cited, para 60); c) the tax measure under scrutiny was justified serving a legitimate purpose (ECtHR, *X v Germany*, no 8724/79 (6 March 1980); ECtHR, *Svenska Management gruppen AB v Sweden*, no 11036/84 (1 December 1985); ECtHR, *Hanzmann v Austria*, no 12560/86 (16 March 1989); ECtHR, *Amitrano and 159 others v Italy*, no 17154/90 (1 December 1993); ECtHR, *Voggenberger Transport GmbH v Austria*, no 21294/93 (12 October 1994); European Commission of Human Rights, *Gianquitto v Italy* (decision), no 26779/95 (04 September 1996); ECtHR, *Galeotti Ottieri Della Ciaja and others v Italy*, no 46757/99 (22 June 1999); ECtHR, *Tre Traktörer AB v Sweden*, no 10873/84 (7 July 1989); ECtHR, *Wasa Ömsesidigt, Försäkringsbolaget Valands Pensionsstiftelse, a group of approximately 15000 individuals v Sweden*, no 13013/87 (14 December 1988); and ECtHR, *Försti v Finland*, no 22588/93 (18 October 1995)); d) the tax measure under scrutiny was reasonable and proportionate (ECtHR, *Travers and Others v Italy*, no 15117/89 (16 January 1995); ECtHR, *Gasus Dosier- und Fördertechnik GmbH v The Netherlands*, cited; ECtHR, *Schneider Austria GmbH v Austria*, no 21354/93 (30 November 1994); ECtHR, *X v Austria*, no 7287/75 (3 March 1978)).

[807] See ECtHR, judgment of 25 September 2018, no 40508/13 *Lutsenko v Russia* (decision).

[808] See ECtHR, *Khabarovskaya Toplivnaya Kompaniya v Russia*, no 10114/06 (19 September 2017).

[809] ECtHR, judgment of 9 November 1999, no 26449/95 *Špaček Sro v Czech Republic* (9 November 1999).

[810] *cf* ECtHR, judgment of 20 September 2011, no 14902/04 *OAO Neftyanaya Kompaniya Yukos v Russia*, para 606.

[811] See ECtHR, *Bulves AD v Bulgaria*, no 3991/03 (22 January 2009), para 56.

[812] See ECtHR, *MA and others v Finland* (decision), no 27793/95 (10 June 2003).

[813] ECtHR, *Musa v Austria*, no 40477/98 (10 September 1998); and ECtHR, *Lindsay v United Kingdom*, no 11089/84 (11 November 1986).

[814] ECtHR, *Gasus Dosier- und Fördertechnik GmbH v The Netherlands*, cited, para 60.

[815] In several cases, starting from ECtHR, *Intersplav v Ukraine*, no 803/02 (9 January 2007), the ECtHR reiterated that a state's margin of appreciation in tax policy is not unlimited and that a signatory's tax policy is always subject to the ECtHR's right of judicial review.

implementation of its judgments has proved to be particularly difficult, as, for example, in the famous *Yukos* case.[816]

The following issues leading to the breach of Article 1 of Protocol No 1 to the ECHR can be identified in the ECtHR's case law: (1) the failure of the authorities to settle VAT refunds or to grant the reduction of input VAT;[817] (2) insufficiently precise or unforeseeable legal provisions leading to uncertainty for taxpayers;[818] (3) an excessive and individual financial burden imposed on a taxpayer as a result of a tax measure[819] or sanction;[820] (4) the lack of procedural guarantees

[816] The *Yukos* case concerns various violations of tax and enforcement proceedings against the company, for which the ECtHR (ECtHR, *OAO Neftyanaya Kompaniya Yukos v Russia*, no. 14902/04, (20 September 2011)) sentenced Russia to pay almost two billion euros of pecuniary damage to the Yukos' shareholders and their legal successors and heirs. Russian authorities turned to their Constitutional Court, asking whether the judgment was compatible with the Russian Constitution, and the Constitutional Court ruled that it was not. The judgment was therefore not enforceable in Russia, leaving the shareholders without any compensation for pecuniary damage. This makes protecting taxpayer's property rights totally ineffective at the national level, even when the international court has found a violation of such rights.

[817] This cluster records the vast majority of cases where the ECtHR has admitted violations to the right to property in tax matters. Most such cases concern the right of VAT refunds, protected as a right to a 'possession', considering the failure by tax authorities to settle it as sufficient to determine an excessive burden on the taxpayer. In particular, see ECtHR, *Intersplav v Ukraine*, cited; ECtHR, *Bulves AD v Bulgaria*, no. 3991/03, (22 January 2009); ECtHR, *Euromak Metal DOO v the Former Yugoslav Republic of Macedonia*, no 68039/14 (14 June 2018); ECtHR, *Edata-Trans v The Republic of Moldova*, no 55887/07 (17 March 2020); ECtHR, *Avto Atom Doo Kochani v North Macedonia*, no 21954/16 (28 May 2020).

Furthermore, in *Euromak Metal DOO v the Former Yugoslav Republic of Macedonia*, cited, the ECtHR held the view that there was at least a legitimate expectation of the right to VAT deduction based on the acceptance of previous returns on a similar factual pattern and in such a context the tax audit constituted an interference with the taxpayer's possessions (para 43), also considering that the applicant had not participated in the criminal activities perpetrated by its suppliers, and did not have, and could not have had, knowledge of such activities.

[818] Unlike in ECtHR, *Špaček Sro v Czech Republic*, cited, para 54, in ECtHR, *Shchokhin v Ukraine*, nos 23759/03 and 37943/06 (14 October 2010), the ECtHR reiterated that tax measures should be based on principles of legality enshrined in domestic law and tax measures must be accessible to the persons concerned, precise and foreseeable in their application. Although the ECtHR acknowledged the states' margin of appreciation in tax policy, the ECtHR referred to its inherent residual power to stress-test such policies against the core values of the ECHR. It was clear (para 57) that the Ukrainian tax authorities had arbitrarily decided to disregard a withholding tax prescribed by law in favour of a more onerous rate of withholding tax that did not have a sound legal basis.

In ECtHR, *OAO Neftyanaya Kompaniya Yukos v Russia*, cited, the ECtHR found a violation of the company's right to property on account of the change in interpretation of the rules on the statutory limitation period resulting from the Russian Constitutional Court's judgment. That judgment represented a reversal and departure from the well-established practice of the commercial courts. There was no clear guidance to Yukos in 2000 that taxpayers acting in bad faith could face unfavourable legal consequences, as established by the Russian Constitutional Court in 2005 (paras 67–75). Furthermore, Russia also incurred violations when enforcing the collection of the tax debt by systematically refusing to concede to the applicant company's demands for additional time, failing to strike a fair balance between the legitimate aims sought and the measures employed (paras 656–57).

See also most recently, ECtHR, *Lopac and Others v Croatia*, nos 7834/12, 43801/13, 19327/14 and 63535/16 (10 October 2019), paras 57 and 58.

[819] See ECtHR, *Travers and Others v Italy*, no 15117/89 (16 January 1995), where the ECtHR indicated that this occurs if the law places an excessive burden on the person or entity concerned or fundamentally interferes with the taxpayers' financial position.

The most evident violations of the right to property related to an excessive tax burden are the Hungarian cases on severance payment taxation (see ECtHR, *NKM v Hungary*, no. 66529/11, (14 May 2013); ECtHR, *Gáll v Hungary*, no 49570/11 (25 June 2013)), which neared deprivation of property with income tax rates up to 98 per cent and was considerably higher than the one in force when the revenue in question was generated (on this criterion also see ECtHR, *di Belmonte v Italy*, no 72638/01 (16 March 2010)). In such cases, the ECtHR awarded financial compensation.

However, in emergency scenarios, the ECtHR has left the states with more leeway as to the decision of which tax measures should apply. In this context, the ECtHR (ECtHR, *Plaisier BV and Others v the Netherlands* (decision), nos 46184/16, 47789/16 and 19958/17 (14 November 2017), admitted the levying of a solidarity tax surcharge also in respect of loss-making taxpayers (on which see further R Attard, 'Not a Pleasure to the Eye; the ECtHR's judgment in P Plaisier BV Against the Netherlands' (2018) 27(3) *EC Tax Review* 177–79) and ECtHR, *Da Conceição Mateus and Santos Januário v Portugal*, nos 62235/12 and 57725/12 (8 October 2013); ECtHR, *Da Silva Carvalho Rico*, no 13341/14 (1 September 2015); ECtHR, *Koufaki and Adedy v Greece*, nos 57665/12 and 57657/12 (7 May 2013); and ECtHR, and *Mamatas and other v Greece*, nos 63066/14, 64297/14 and 66106/14 (21 July 2016).

[820] *cf* eg ECtHR, *Intersplav v Ukraine*, cited, paras 39 and 40, and of ECtHR, *Mamidakis v Greece*, no 35533/04 (11 January 2007). In this particular case, the sanction was exorbitant (equal to 3 008 216 euros and 4 946 145 euros) to such an extent that it created an excessive burden incompatible with the right to property (see paras 47 and 48).

allowing the taxpayer to effectively argue his case in the domestic procedures;[821] and (5), less frequently, the application of retroactive tax legislation by the state.[822]

Most of these issues are analysed under the umbrella of the proportionality requirement, where the ECtHR has to weigh the general public interest against the need to protect taxpayers' rights, taking into account the wide margin of appreciation of the states. The majority of cases pass this proportionality test under Article 1 of Protocol No 1 to the ECHR.

The ECtHR has not developed, in particular, a quantitative threshold for the issue of confiscatory taxation. In its line of cases on the Hungarian legislative measures introducing a 98 per cent personal income tax rate on a certain part of the severance pay, it found a violation of Article 1 of Protocol No 1 to the ECHR.[823] However, the (ultra) high tax rate as such was, in fact, not decisive. The ECtHR also took into account additional factors such as the retroactivity of the tax measure and the fact that the applicant was confronted with a substantial deprivation of income in a period of considerable personal difficulty (ie unemployment after retirement). The CJEU, in one of its judgments, also stated, in relation to the wealth tax, that in order to limit its confiscatory effect, it should reflect the taxpayer's real ability to pay.[824] However, this was in the very specific context of levies due by EU civil servants to the EU institutions, and it is not easy to determine what weight this interpretation may have in future case law.

In international tax law, there remains the unrelieved international double taxation arising in cases of uncoordinated exercise of taxing jurisdictions by two or more states. Such situations are generally left without effective protection, despite the negative effect on the right to property.

8.4.2.4.2. European Union

From the perspective of EU law, it is important to focus on the wording of Article 17 of the EU Charter, which has similar wording to Article 1(1) of Protocol No 1 to the ECHR. Accordingly, in line with Article 52(3) for the EU Charter, the interpretation provided by the ECtHR may also determine the minimum standard for the legal protection of the right to property in the EU.

However, Article 17 of the EU Charter does not include a similar clause to the one contained in Article 1(2) of Protocol No 1 to the ECHR. According to the latter clause, the right to property 'shall not … in any way impair the right of a State to enforce such laws as it deems necessary … to secure the payment of taxes or other contributions or penalties'. Therefore, the effective protection

[821] See ECtHR, *Rousk v Sweden*, no 27183/04, (25 July 2013), where the Court held that enforcement measures must be accompanied by procedural safeguards, which ensure that the persons are able to protect their interests effectively (para 117). The Court also reached the same conclusion in further cases in which the absence of appropriate procedural safeguards prevented taxpayers from effectively protecting their possessions. See ECtHR, *Microintelect OOD v Bulgaria*, no 34129/03 (4 March 2014), paras 44 and 49; ECtHR, *Trafik Oil - OOD 1 v Bulgaria*, no 67437/17 (18 May 2021), para. 44. This line of reasoning comes in fact very close to the protection of the right to a fair trial under art 6 of the ECHR; see further in sec 6.3.2.4.1.2.3. of this book.

[822] See ECtHR, *di Belmonte v Italy*, judgment of 16 March 2010, no 72638/10, para 42, in a case concerning delays by authorities in complying with the court order to pay compensation for expropriation and the fact that, prior to the entry into force of the law, such compensation had not been taxable. Even in such circumstances, it is clear that the retrospectivity of this tax was not by itself disproportionate but could become such in connection with the excessive burden for the individual taxpayer.

More frequently, the ECtHR has justified this prohibition, such as in the presence of technical shortcomings in the existing legislation requiring reparation of loopholes (see ECtHR, judgment of 23 October 1997, nos 21319/93 et al, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v the United Kingdom*), or with a view to countering tax evasion (ECtHR, *Arnaud and Others v France*, nos 36918/11 et al (15 January 2015)), or avoidance (ECtHR, *Huitson v the United Kingdom*, no 50131/12 (13 January 2015)).

[823] eg ECtHR, judgment of 14 May 2013, no 66529/11, *NKM v Hungary*; ECtHR, judgment of 25 June 2013, no 49570/11, *Gáll v Hungary*.

[824] CJEU, judgment of 5 July 2012, *Bourgès-Maunoury and Heintz*, case C-558/10, ECLI:EU:C:2012:418 [2012], para 29.

of fundamental rights of taxpayers may take place within a legal framework that allows for a stronger interference with the prerogatives of the legislator. This applies especially with regard to the protection of the rule of law,[825] including the four criteria indicated earlier in this book.[826] After all, this interpretation is also perfectly compatible with Article 52(3) of the EU Charter, which allows the EU to provide more intensive protection of rights compared to the one that applies under ECHR.

Until now, however, tax case law from the CJEU on Article 17 of the EU Charter has been hard to find.

The ECtHR and the CJEU may develop common standards of protection of the right to property in tax matters, which take into account the possible existence of a common constitutional tradition in the meaning of Article 6(3) TEU.[827] They may also have to deal with more complex issues arising from cases of international double taxation, in which the parallel exercise of taxing rights by two or more states gives rise to equivalent levels of taxation to those which, within a single country, would be regarded as confiscatory.[828]

8.4.2.4.3. Russia[829]

8.4.2.4.3.1. Claims as Property

The Constitutional Court of the Russian Federation points out that the concept of 'property' used in Article 35 of the Constitution of the Russian Federation in its constitutional and legal sense covers, in particular, real rights and claims. Accordingly, the legal essence of the 'property' notion is that it includes 'property rights' and 'the rights of claim'. The Court stated that 'the tax liability consists of the taxpayer's obligation to pay a certain tax established by law'.[830] The Constitutional Court considers that the taxpayer's duty to pay is of a relative character. Funds not transferred to fulfil the tax obligation are the property of the taxpayer that is not legally differentiated from other property of the taxpayer.

In the course of tax enforcement, the goal of resolving a specific tax case is achieved by using remedies of tax law. For example, compulsory collection of tax arrears from an organisation is performed by sending a tax claim to the taxpayer, making a decision on collection by the tax authority, and sending a collection order to the bank (Articles 46 and 69 of the Tax Code of the Russian Federation).

8.4.2.4.3.2. Taxpayers' Liability for 'Property Damages' to the State Budget

Practice in recent years shows that the tax authorities are increasingly using civil legal means to resolve tax cases, for example, unjust enrichment and damage compensation for losses.

[825] See further on this P Pistone, 'General Report', sec 1.

[826] See above sec 8.4.1.

[827] Constitutional Courts from various countries have developed their own line of interpretation as to the maximum levels of taxation. In France, see the 75% threshold, developed in Constitutional Court of France, judgment of 16 August 2007, no 2007-555 DC [2007]; of 29 December 2005, no 2005-530 DC [2005]; of 28 July 2011, no 2011-638 DC [2011]; of 29 December 2012, no 2012-662 DC [2012]. After developing the so-called *Halbteilungsgrundsatz* (by which confiscatory taxation may exist insofar as the tax exceeds 50 per cent (German Federal Constitutional Court, judgment 2 BvL 37/91, cited, nos 62 and ff), the German Federal Constitutional Court tempered this criterion with additional elements, which also take into account the ability to pay. See further on this above in sec 8.1.4.2.4.

[828] Such disparities may more frequently arise in the field of inheritance and estate taxes, which include a limited number of double taxation conventions (see CJEU, judgment of 19 February 2009, *Block*, case C-67/08, ECLI:EU:C:2009:92 [2009]). Those issues have been addressed in depth by tax literature, see F Debelva, *International Double Taxation*.

[829] We would like to thank Karina Ponomareva for her contribution.

[830] Constitutional Court of the Russian Federation, judgments of 12 October 1998, no 24-P [1998] and no 20-P, cited.

According to the judgment of the Constitutional Court of the Russian Federation of 24 March 2017 no 9-P, the institute of unjust enrichment is a universal legal instrument, and its use, based on the constitutional requirements for ensuring a balance of public and private interests, is not excluded in tax relations. The constitutionality of collecting damage caused by a tax crime from the head or chief accountant of a taxpayer organisation was confirmed by the judgment of the Constitutional Court of the Russian Federation of 8 December 2017 no 39-P. Thus, civil law institutions of unjust enrichment and compensation of damages in tax relations are applied in a special regime.

According to Article 53, paragraph 3, of the Civil Code of the Russian Federation, an authorised person must act in the interests of the represented legal entity, reasonably and in good faith. In case of a violation of this principle, the specified person may be charged for damages caused to the legal entity.

The Russian Constitutional Court has repeatedly emphasised that the obligation to compensate for the harm caused as a measure of civil liability is applied to the responsible person in the presence of an offence that includes, as a rule, the occurrence of harm, the wrongfulness of the offender's behaviour, the causal relationship between the unlawful behaviour of the offender and his guilt (judgments of 15 July 2009 no 13-P and of 8 December 2017 no 39-P). The applicant was charged damages caused during the commission of crimes (tax evasion and concealment of funds or property of the organisation). He challenged the constitutionality of a number of provisions of the Civil Code, Criminal Code, Criminal Procedure Code and Tax Code that allow courts to recover from individuals brought to criminal responsibility for committing tax crimes the damage caused to the state by non-payment of taxes, not by them, but by the officials of these organisations. Also, he considered unconstitutional the provisions of laws that, due to the uncertainty of the fixed concept of 'harm', allowed the amount of taxes unpaid by an organisation to be equated the harm caused by an individual.[831]

The Constitutional Court of the Russian Federation pointed out that an organisation as a legal entity acts in an illegal tax act indirectly – through individuals, usually a manager and an accountant. Acting in their own interests, as well as in the interests of their organisation, they commit a crime and bear criminal liability. At the same time, subjects of tax crimes whose illegal actions led to non-receipt of taxes to the budget are not exempt from the obligation to compensate for the property damage caused by them.[832]

The current legislation provides the possibility to collect damages caused by tax crimes, but they cannot be collected from fines imposed on the organisation-taxpayer.

In addition, recovery of damage caused by arrears from individuals accused of committing a tax crime is possible only after the company is liquidated or recognised by the court as actually invalid.[833]

In determining the liability of a natural person, the court may take into account his financial situation, the fact of enrichment in the commission of tax crimes, the degree of culpability, his criminal sentence and other circumstances of the case.[834]

It is very peculiar to consider the non-payment of taxes as causing property damages to the state. First, the right to property entitles natural and legal private persons, not the state.

[831] Constitutional Court of the Russian Federation, judgment of 8 December 2017, no 39-P [2017].
[832] Ibid.
[833] Ibid.
[834] Ibid.

Second, a systematic interpretation of the norms of Articles 15, 1064 and 1082 of the Civil Code of the Russian Federation shows that by causing harm, the legislator understands the loss or damage to property belonging to the victim on an absolute right. In absolute terms, a loss is a monetary assessment of property damage caused by damage, loss of a thing, loss of properties and qualities by a thing that already belongs as property. By contrast, the loss in legal relations of a relative nature appears in connection with the non-performance/improper performance of a duty or unjustified refusal to perform it.

8.4.2.5. Oceania

8.4.2.5.1. Australia[835]

The nature of a 'tax' and, therefore, the limits of the taxation power have been considered by the High Court. They are compulsory. They are to raise money for governmental purposes. They do not constitute payment for services rendered. They are not penalties, since the liability to pay the exactions does not arise from any failure to discharge antecedent obligations on the part of the persons upon whom the exactions fall. They are not arbitrary. Liability is imposed by reference to criteria that are sufficiently general in their application and mark out the objects and subject matter of the tax.[836] Moreover, for a charge or levy to be a valid 'tax' it must be contestable (ie the substantive liability must be open to challenge in court); it must not be an arbitrary exaction (ie it must be based on ascertainable criteria that mark out the objects and subject matter of the tax).[837] Any compulsory acquisition of property from any state or person must be on just terms as provided by section 51(xxxi).

8.4.2.5.2. New Zealand

Remarkably, New Zealand's Bill of Rights Act 1990 does not include the right to property. Interestingly, however, there are neither land nor state taxes, capital gain taxes or inheritance tax in New Zealand.

8.4.3. Conclusion on Taxpayers' Property Rights[838]

Practically all Constitutions of the world guarantee the right to property.[839] However, the taxpayers' right to property is often seen as marginal because the state remains free to determine its exercise of tax sovereignty. The state takes various fiscal measures to implement its tax policy, taking into account political, economic and social circumstances. This refers not only to the design of tax policy and the collection of taxes, but also to the expenditure side of providing public goods. Nonetheless, such power does not impede national, supranational and international courts from assessing whether it has been exercised in line with the rule of law and in accordance with the minimum guarantees set out by human rights instruments.

[835] We would like to thank Celeste Black for her contribution.
[836] High Court of Australia, judgment of 10 April 1984 *MacCormick v Federal Commissioner of Taxation*, (1984) 158 CLR 622, no 28.
[837] High Court of Australia, *MacCormick v Federal Commissioner of Taxation*, cited, nos 29 and ff.
[838] We would like to thank Lilian Faulhaber for her contribution.
[839] Except for New Zealand, on which see above in sec 8.4.2.5.2.

8.4.3.1. Prohibition on Confiscatory Taxation

Jurisdictions differ on whether taxation on their citizens can ever rise to a level that raises property rights concerns. Although the concept of 'confiscatory taxation' often arises in political debates about the level of acceptable taxation, with advocates of smaller governments and lower taxation using this term to challenge high progressive tax rates, the fundamental question of what degree of taxation, if any, rises to the level of confiscation or expropriation has long challenged legal scholars.

In theory, a 100 per cent tax targeted at just one individual or corporation seems likely to qualify in many legal systems as a confiscatory tax or expropriation,[840] but there is little agreement over what degree of taxation below that extreme would qualify as confiscatory and what the remedy for confiscatory taxation should be.

Moreover, it must be recalled that very high income tax rates were the norm right up to the end of the 1970s.[841] Nevertheless, there are limits to the levying of taxes, which Constitutional Courts generally recognise with a view to excluding confiscatory taxes.[842] Some Constitutions even prohibit confiscatory taxes explicitly without determining, though, specific tax rates or levels.[843] In some cases, Constitutions[844] or Supreme Court judgments[845] also prohibit confiscatory penalties. The determination of the confiscatory character is left to the courts. They determine confiscatory taxes on the basis of case-by-case analysis. In doing so, they take into account, in particular, the taxpayer's ability to pay, the principle of proportionality and whether the tax essentially eats up the income from the burdened economic activity. Within the framework of the latter criterion, the tax rate again comes into play.[846]

Jurisdictions that protect taxpayers from confiscatory taxation do so in a variety of ways. First of all, taxation must be imposed by statute.[847] Generally, taxes have to be imposed according to the principle of proportionality based on taxpayers' ability to pay.[848] The Spanish Constitution requires that taxes be based 'on the principles of equality and progressive taxation, which in no case shall be of a confiscatory scope'.[849] Some other countries prohibit confiscatory

[840] See, eg E Kades, 'Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application' (2002) 97 *Nw U L Re.* 189, 189.

[841] eg the UK had rates as high as 99 per cent in the late 1940s, and the top rate was 83 per cent in 1979 when Mrs Thatcher came to power.

[842] See above at sec 8.4.2.2.

[843] eg art 150(4) of the Constitution of Brazil; art 22 of the Constitution of Mexico; art 74(2) of the Constitution of Peru; art 31(1) of the Constitution of Spain: 'All contribute to public expenditure in accordance with their economic possibilities and by means of a fair tax system based on the principle of equality and progression, which in no case should be confiscatory'.

[844] eg art 40 of the Constitution of Costa Rica and art 22 of the Constitution of Mexico.

[845] eg Indian Madras High Court, judgment of 6 December 1972 *AM Sali Maricar and Another v Income-Tax Officer*, cited.

[846] *cf* eg Supreme Court of Justice of Costa Rica, judgment of 9 November 1993, *Considerando IV – Ana Virginia Calzada Miranda*, no 5749/93 [1993]; Supreme Federal Court of Brazil, judgment of 2 September 2014 provisory appeal in the extraordinary appeal no 712285/SC, cited): The Brazilian Federal Supreme Court examines whether taxes outside the jurisdiction of any level of government are levied in addition to those already in force (see Supreme Federal Court of Brazil, direct action of unconstitutionality of 17 September 2014 no 4628/DF, cited) and whether a sanction exceeds 100% of the amount of the tax (Supreme Federal Court of Brazil, provisory decision judgment of 17 June 1998 in the direct action of unconstitutionality no 1075/DF, cited and provisory appeal decision of 10 February 2015 no 851038/SC, cited). Argentine Supreme Court, judgment of 15 October 1991, *López et al v Santiago*, SAIJ: SUA0015639 [1991]; see also CE Peralta, 'Tributación y derechos fundamentales, los principios constitucionales como límite al poder tributario. Refelxiones a partir de los ordenamientos jurídicos de Brasil y Costa Rica' 138 (2015) *Revista de Ciencias Jurídicas* 89 and ff and 120 and ff; B Buitrago Duarte, 'La no confiscatoriedad como expressión de la capacidad contributiva y garantía en los tributos sobre la propriedad immueble' (2008) *Revista de Derecho Fiscal* 229 and ff.

[847] *cf* eg the Constitutions of France and Belgium.

[848] Art 53, para 2 of the Italian Constitution and art 127, para 2 of the Swiss Federal Constitution. Also, see German Federal Constitutional Court, decision of 22 March 1983, 2 BvR 475/78 [1983], BVerfGE 63, 343, 380.

[849] Art 31 of the Spanish Constitution of 1978.

taxation in their constitutional prohibitions on excessive fines or penalties.[850] Note that none of these prohibitions on confiscatory taxation state a particular rate or level of taxation that would qualify as confiscatory. They instead suggest that taxes arbitrarily imposed by the legislature or the tax administration, as well as taxes that violate the general principles of proportionality, sometimes of progressivity, ability to pay or which constitute excessive punishment, will not be permissible.

To sum up, the assessment is left to the judiciary. Strictly speaking, and as recognised, for example, in Brazilian case law and doctrine,[851] the ability to pay and confiscatory taxation are separate concepts. Ability to pay defines when (considering the presence of wealth) and how (considering the comparability analysis) to levy taxes, but it does not specify when to tax. That is defined by the prohibition on confiscatory taxation. That is why the former concept is related to equality, and the latter one is related to a property right. Nevertheless, confiscatory taxes are defined on a case-by-case analysis, taking into account the taxpayers' ability to pay, economic activity, asset qualification, personal situation and other factors.[852] Taxation in violation of the principle of ability to pay and which infringes upon the *minimum vitale* could be considered confiscatory or, in any case, unconstitutional.[853] But then, confiscatory taxation is not a self-standing concept but possibly works together with the ability to pay.

8.4.3.2. Protection of Foreign Property

While the protections listed above generally apply to the citizens or residents of the jurisdictions in question, there are added protections for foreign investors whose property is confiscated by taxation.

In some instances, tax laws have been challenged under Bilateral Investment Guarantee Agreements as a form of expropriation or 'creeping expropriation'. The US has long argued that expropriations of foreign investments constitute violations of customary international law. In such cases, the US is almost always the claimant. Such arguments have sometimes prevailed, but these are not necessarily examples of a human rights basis for challenging the tax laws.[854]

Confiscatory taxation is generally considered a form of expropriation, and the remedy is, therefore, just compensation.[855] The OECD has stated that 'it is a well recognized rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation'.[856] The historical debates over expropriation, therefore, focused primarily on what constituted just compensation. In recent decades, the increase in foreign investment has led to an associated increase in bilateral investment treaties (BITs) that require

[850] Art 22 of the Federal Mexican Constitution.

[851] *cf* R Lobo Torres, 'Tratado de Direito Constitucional Financeiro e Tributário. v. II. Valores e Princípios Constitucionais Tributários' (2005) *Renovar* 304; A Baleeiro, 'Limitações Constitucionais ao Poder de Tributar' (2010) *Forense* 911.

[852] eg the Supreme Federal Court of Brazil judgment of 17 June 1998 (provisory decision in the direct action of unconstitutionality no 1075/DF, cited; direct action of unconstitutionality judgment of 17 March 2011 no 2078/PB, cited) considers that fiscal (punitive) fines above 100% are confiscatory as well as the imposition of taxes on tax events already subject to taxes by other governments.

[853] Ibid; *cf* also German Federal Constitutional Court, order of 25 September 1992, 2 BvL 5/91 [1992] – taxation of the *minimum vitale* violates the Basic Law, without, however, no reference to property rights, but rather to the principle of equality, human dignity and the protection of the family.

[854] See AF Rodriguez, *International Arbitration Claims against Domestic Tax Measures Deemed Expropriatory or Unfair and Inequitable*, Occasional Paper SITI-11 (Inter-American Development Bank, 2006).

[855] eg in the US, the Restatement Third of Foreign Relations Law, para 712 defines an expropriation as 'a taking by the State of the property of a national of another State that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation'.

[856] OECD, *Working Papers on International Investment*, 2004/04 (OECD Publishing, Paris).

prompt, adequate and effective compensation in the wake of expropriation, but BITs vary in the degree to which they protect investors from tax measures.[857]

The avoidance of disproportionate and possibly confiscatory taxation also poses a particular challenge if based on international double taxation, that is, the interaction of several tax jurisdictions. Uncoordinated exercises of taxing jurisdiction by two or more states have led to many cases of unrelieved international double taxation not easily attributed to a specific country. Such situations are normally left without effective protection, despite the negative impact on the right to property. It is not easy to find a solution for this type of problem. Are there obligations for the states involved to give taxpayers effective joint protection of their right to property? The concept of single taxation in the sense of preventing double non-taxation gains ground in the framework of BEPS; the same should apply to avoiding double taxation. Both result from the interplay of different tax regimes of the states in the absence of coordination and harmonisation. In this respect, non-taxation and double taxation are two sides of the same coin.[858]

[857] OECD, *Working Papers on International Investment*; M Gregoire, 'Taxation and Expropriation under Bilateral Investment Treaties: Setting the Standard' (November 2015) *Butterworths Journal of International Banking and Financial Law* 629.

[858] *cf* also FD Martínez Laguna, 'Abuse and Aggressive Tax Planning', under 1: 'due consequence of the proper application of the law in cross-border situations'; E Gil García, 'OECD/International – The Single Tax Principle: Fiction or Reality in a Non-Comprehensive International Tax Regime?' (2019) 11(3) *World Tax Journal*, under 3.

PART III

An International Tax Regime Containing Minimum Standards for the Protection of Taxpayers' Rights

9

The Emergence of an International Tax Regime

In 2004, the renowned scholar of international tax law, Avi-Yonah, raised the question: is there a customary international tax law?[1] In his view, in light of the international tax practices that are widely followed by countries including the methods to prevent double taxation (and the use in the more than 3,000 bilateral tax treaties of either the United Nations (UN) or the Organisation for Economic Co-operation and Development (OECD) model treaties), the question is whether these practices are enough to create a customary international law of taxation. Taking a contrary view, David Rosenbloom denies the existence of an international tax regime since the network of bilateral tax treaties is optional (elective), admitting, though, that it represents 'a triumph of international law in the field of taxation'.[2]

9.1. Nexus Requirement as Customary International Law[3]

The nexus principle 'forms part of general international law of income tax jurisdiction, since it has attained the status of international custom'.[4] It aims to ascertain tax jurisdiction by finding a qualifying connection between the taxpayer/tax activity and the taxing state.[5] The state practice exists in the tax treaties concluded by countries and in domestic laws that include the criteria of income tax allocation, whereas the *opinio iuris* has been confirmed 'either explicitly or implicitly in a number of domestic judicial decisions'.[6]

Accordingly, every state in the world, as a subject of international law, has to respect and does respect this a priori limitation of its taxing powers, particularly as regards the regulation of cross-border income taxation.[7] The consequence of the nexus principle, being regarded as a rule

[1] R Avi-Yonah, 'International Tax as International Law' (2004) 57 *Tax L Rev* 483.

[2] DH Rosenbloom, 'International Tax Arbitrage and the "International Tax System"' (1999–2000) 53 *Tax L Rev* 137 and ff.

[3] We would like to thank Irma Mosquera for her contribution. See IJ Mosquera Valderrama, 'BEPS Principal Purpose Test and Customary International Law' (2020) 33 (3) *Leiden Journal of International Law*, 745 and ff. Please note that the ILA Study Group on International Tax Law will address nexus in a second working phase.

[4] On the customary law criteria see PCIJ, *S.S. 'Lotus' (France v Turkey)*, PCIJ Rep Series A n 10, [1927], paras 66 and ff, and ICJ, *Nottebohm (Liechtenstein v Guatemala)*, Rep 1955, [1955]; *cf* also S Gadžo, 'The Principle of "Nexus" or "Genuine Link" as a Keystone of International Income Tax Law: A Reappraisal' (2018) 46 (3) *Intertax* 194 and ff.

[5] The nexus principle has been defined as 'the requirement that a qualifying connection exists between the State exercising its taxing power on the one hand and the taxable subject and/or taxable object on the other'. S Gadžo, 'The Principle of "Nexus" or "Genuine Link"' 208.

[6] S Gadžo, 'The Principle of "Nexus" or "Genuine Link"' 206; see generally, C Ryngaert and D Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 *Netherlands International Law Review* 1–25.

[7] S Gadžo, 'The Principle of "Nexus" or "Genuine Link"' 208.

of international customary tax law, is the prohibition of income taxation in the absence of any personal or territorial nexus.[8]

The examples show that in international tax law, the discussion of customary international law has taken place mainly regarding the OECD/UN Tax Treaty Models, the OECD Harmful Tax Practices Project and the OECD Transfer Pricing Guidelines containing the arm's-length principle, the standard of global transparency and the nexus requirement for business taxation.

At the time of writing, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) has more than 90 signatories,[9] affecting around 1,500 tax treaties. Each one of those treaties has accepted the new preamble language. Some may be of the view now that these provisions will become closer to customary international law due to state practice, at least a few years after they become applicable to each such treaty. Maybe the success of multilateral initiatives in international taxation from 2013 to 2017, even ill-designed, will reduce for some time the importance of the discussion of the existence of customary international tax law.[10]

9.2. A Convention-based Regime

The international tax law regime has developed over the past century mainly as a convention-based system. Double tax conventions (DTCs) have been its main source of law. DTCs are primarily of a coordinating nature, allocating the right to tax cross-border income to one of the two contracting states that could otherwise, in the absence of a convention, both exercise tax jurisdiction, thereby subjecting taxpayers to double taxation. However, most DTCs also contain provisions on inter-state cooperation (eg exchange of information) or create – albeit limited – substantive or procedural rights for taxpayers (eg non-discrimination or mutual agreement procedures). Currently, there are more than 3,000 DTCs in force and these conventions have mainly been based on two model conventions, namely the OECD Model Convention and the UN Model Convention. Therefore, even though the international tax regime is formally a bilateral regime, it contains elements of what we can describe as coordinated bilateralism: existing DTCs contain many identical or highly similar provisions.[11]

In some cases, international tax coordination takes the form of multilateral DTCs, as, for instance, the Nordic Tax Convention[12] and the CARICOM Multilateral Double Taxation Agreement.[13] Moreover, the Tax Transparency and Base Erosion and Profit Shifting (BEPS) Projects, initiated under the auspices of the OECD and the political mandate of the G20, are concrete examples of the willingness of states to join forces when approaching tax phenomena of global relevance. The implementation of the Tax Transparency Project has increased the importance of multilateral conventions[14] and given birth to a coordinated review of mutual assistance between tax authorities. In the case of the implementation of the BEPS Project,

[8] J Kokott, 'The "Genuine Link" Requirement for Source Taxation in Public International Law and the Digital Economy', in W Haslehnee et al (eds), *Tax and the Digital Economy*, (IBFD, 2019) 9–23.

[9] www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

[10] D Broekhuijsen and IJ Mosquera Valderrama, 'Revisiting the Case of Customary International Tax Law' 79–105.

[11] *cf* E Baistrocchi (ed), *A Global Analysis of Tax Treaty Dispute* (Cambridge University Press, 2017).

[12] Nordic Double Taxation Convention on Income and Capital (1983).

[13] Agreement among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment (1994).

[14] The Council of Europe-OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, signed in 1988, as amended by the 2010 Protocol, on which see OECD/Council of Europe (2011), *The Multilateral*

countries have widely agreed to supplement their existing DTC network with a multilateral convention (better known as the BEPS Multilateral Instrument), which applies side-by-side with such conventions in order to steer them towards convergence and consistency with the standards and rules of the BEPS Project.[15] The BEPS Multilateral Instrument is thus an efficient means of modifying existing bilateral conventions and gradually implementing a multilateral system without bilateral re-negotiations. Despite reservations by several states, its effects are becoming increasingly visible.

This framework has also prompted several countries to conclude ancillary conventions. These implement the overall international tax coordination. In that regard, they support the establishment of a global framework for tax transparency. Noteworthy are the international conventions concluded with (former) offshore jurisdictions (or tax havens) to enhance tax transparency, known as Tax Information Exchange Agreements (TIEAs), or those providing for automatic exchange of information between states, such as the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports.[16] Further international agreements are the outcome of unilateral action undertaken by some countries on international tax matters. To date, the most relevant example is the US Foreign Account Tax Compliance Act (FATCA), which requires banks and financial institutions to provide the US Internal Revenue Service (IRS) with information about accounts held by US citizens. In that context, new international tax agreements – better known as Inter-Governmental Agreements (IGAs)[17] – have established an obligation for those institutions to report such information to tax authorities of their own countries, which then share it with the US. All these conventions have an impact on taxpayers' rights.

However, there are further, non tax-specific international conventions which affect both domestic and international taxation, eg (regional) human rights conventions.[18] They have influenced taxpayers' legal position in the international tax regime and, even more, in the domestic tax systems. Moreover, the Vienna Convention on Diplomatic Relations[19] and the Vienna Convention on Consular Relations contain rules regarding the taxation of consular and diplomatic personnel, which can be regarded as expressions of customary international law in tax matters.[20] Finally, the Vienna Convention on the Law of Treaties (VCLT)[21] is highly relevant for the interpretation of

Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol, (OECD Publishing, Paris), doi.org/10.1787/9789264115606-en.

[15] The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) was signed in Paris on 7 June 2017 and entered into force on 1 July 2018.

[16] Signatory states of this agreement exchange so-called country-by-country reports with specific information on multinational enterprises (including taxes paid and revenue).

[17] IGAs may be unilateral (establishing an obligation to report to the US) or bilateral (establishing an obligation for both contracting states to share the relevant information).

[18] *cf* the European Convention on Human Rights (ECHR, signed in Rome on 4 November 1950 and entered into force on 3 September 1953), the American Convention on Human Rights (signed in San José de Costa Rica on 22 November 1969 and entered into force on 18 July 1978), the African Charter on Human and Peoples' Rights (signed in Nairobi on 28 June 1981 and entered into force on 21 October 1986) and the Charter of Fundamenal Rights of the European Union (EU Charter, proclaimed on 7 December 2000 and entered into force on 1 December 2009).

[19] See eg art 34 Vienna Convention on Diplomatic Relations (1961).

[20] *cf* eg ILC, 'Fiscal Immunities and Exemptions from Customs Duties', *Yearbook of the International Law Commission*, vol 2, Part 1, II (1991) 116; B Boczek, *International Law: A Dictionary* (Scarecrow Press, 2005) 50; ICJ, order of 15 December 1979, *Tehran Hostages: Interim Measures*, ICJ Rep. 1979, [1959] 3, 19–20.

[21] For an overview of references to the VCLT by courts in the context of international tax law, see M Lang et al, *The Impact of the OECD and UN Model*, 352, 426, 470, 502, 600, 797, 822, 918, 1027, 1059, 1108, 1150.

DTCs by domestic courts.[22] The latter also apply the VCLT in order to determine the meaning and relevance of DTC clauses.

It is important to remember that the international tax regime is in constant interaction with other areas of international law. In particular, trade law obligations and bilateral investment treaties are key to a comprehensive understanding of the international tax regime as part of public international law.

9.3. The Interaction of International Conventions and Domestic Law

Taxes are levied based on domestic laws and by national or local authorities: 'Taxation is an essential prerogative of State sovereignty'.[23] Therefore, the interaction between the outlined bouquet of conventions, agreements or treaties and domestic law is key in determining the actual legal position of taxpayers.

In particular, the various approaches of states with respect to the domestic application of international law (ie variations of monist vs dualist systems) is a delicate issue in the area of tax law. Both treaties and customary international law may provide for individual rights and obligations for private persons without any further implementation in domestic law.[24] However, whether taxpayers can base their claims before administrative authorities or domestic courts directly on such rights, resulting eg from a convention provision, depends on its direct applicability under domestic constitutional law.[25]

The relationship between domestic law and international law receives a further complexity in the European Union. The reason is that direct taxes are not harmonised at the EU level, although both primary and secondary law have a significant impact on the EU Member States' tax systems. In such a context, EU Member States have the right to exercise their national sovereignty by means of domestic law and international tax conventions, but, when doing so, they must comply with European Union law. Furthermore, several principles of EU law affecting the protection of taxpayers' rights are enshrined in the Charter of Fundamental Rights of the European Union (EU Charter).[26]

[22] For case law with regard to the application of VCLT to taxation see eg: Supreme Federal Court of Brazil, judgment of 5 August 2020, extraordinary appeal no 460320/PR, [2020] *DTA Brazil-Sweden, Volvo;* UK Supreme Court, judgment of 20 May 2020 *Fowler v Commissioners for HM Revenue and Customs*, UKSC 22, [2020] nos 16 and ff; German Federal Fiscal Court, judgment of 1 February 1989, I R 74/86, [1989], paras 14 and ff; and judgment of 16 January 2014, I R 30/12, [2014], para 19; Fiscal Court of Hamburg, order of 9 November 2017, 6 K 14/17, [2017] nos 74 and 84 and ff; Swiss Federal Supreme Court, judgment of 17 March 2017, 2C_1000/2015, [2017], paras 6.2. and ff; judgment of 26 July 2019, 2C_653/2018, [2019] paras 5.3.1. and ff and 7.1.; judgment of 12 September 2016, 2C_276/2016, [2016] paras 5.2.1. and ff; judgment of 9 July 2019, 2C_616/2018, [2019]; judgment of 2 August 2018, 2C_819/2017, [2018], paras 3.2.1. and ff; and judgment of 24 September 2015, 2C_963/2014, [2015], para 4.1. See also M Lang et al, *The Impact of the OECD and UN Model*, 352, 426, 470, 502, 600, 797, 822, 918, 1027, 1059, 1108, 1150; see also CJEU, judgment of 18 June 2019, *Austria v Germany* case C-519/17, ECLI:EU:C:2019:504 [2019], paras 39 and ff.

[23] ICSID, Decision on Liability of 14 December 2012, *Burlington Resources v Ecuador*, case ARB/08/5, [2012], para 391; see also ICSID, Excerpts of Award of 12 May 2012, *Meerapfel Söhne v Central African Republic*, case ARB/07/10, [2012], para 319.

[24] *cf* eg ICJ, *LaGrand case (Germany v United States of America)*, ICJ Rep. 2001, [2001] no 42; IACHR, advisory opinion of 1 October 1999, OC-16/99, [1999], nos 82 and ff; CJEU, 5 February 1963, *Van Gend en Loos*, case 26/62, ECLI:EU:C:1963:1, [1963].

[25] *cf* eg K Kaiser, 'Treaties, Direct Applicability', paras 14–18, 20; L Henry, 'When is a Treaty Self-Executing' (1929) 27 *Michigan Law Review* 776 and ff; US Supreme Court, Appeal Judgment, *Medellín v Texas*, Docket no 06-984, 552 US 491 [2008], 128 S.Ct. 1346 [2008], 170 L.Ed 2d 190, [2008], sub c *in fine* dissent by Breyer et al.

[26] See CJEU, judgment of 16 May 2017, *Berlioz Investment Fund* case C-682/15, ECLI:EU:C:2017:373, [2017].

9.4. The Importance of Soft Law in International Taxation – Impact of the OECD

9.4.1. The Role of Soft Law

As has been outlined, the international tax regime is mainly treaty-based, mostly relying on double taxation conventions. However, the importance of soft law in such a treaty-based system should not be underestimated. Soft law has generally proven to be highly effective in steering the behaviour of states and may affect 'hard' law in several ways: by informing the interpretation of binding international and domestic law by the courts, by facilitating the consensus-finding process for future conventions and as a potential starting point for customary international law by consolidating state practice.

The general rule of thumb is that the more technical an area, the more details are contained in soft law regulations.[27] Taxation is a highly technical area, which explains why many international legal instruments concerning international taxation are soft law. This soft law has had considerable impact on international tax law. For example, both the OECD and UN Model Conventions are accompanied by a commentary. These commentaries are important sources of technical interpretation for domestic courts, which have to apply DTCs that are based on either of the two Model Conventions.[28] Their value mainly derives from the assumption that DTC negotiators may have relied on such commentaries when replicating the wording of Model Conventions clauses in DTCs. Furthermore, even dynamic or continuing references to the OECD work as it develops after the adoption of implementing legislation are discussed and accepted. Thus, and rather far going, the Court of Justice of the European Union (CJEU), for example, has already held that even 'successive amendments of that model and of the commentaries relating thereto are … relevant when interpreting Directive 2003/49'.[29]

Model Law/Model Convention commentaries or preparatory work in expert bodies or associations (eg in the context of international organisations) can also be considered 'soft law'.[30] It is either preparatory work for what are intended to become legally binding agreements, or expert analysis of what the state of the law is and how it should develop *de lege ferenda*. It is also relevant in allowing the treaty negotiators to understand the possible meaning that a specific clause may have in a given context.[31] As such, those texts may have significant impact on legislators and courts. For example, the commentaries to the OECD Model Conventions play a role in interpreting these conventions or other legal texts based on the work and expertise developed in this context.[32] This helps courts who are grappling with the interpretation of (new and untested)

[27] See, for instance, OECD/G20, *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, (2014); *cf* also J Kokott, 'Soft law standards'.

[28] *cf* eg CJEU, judgment of 26 February 2019, joined cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 et al*, paras 90 and ff and CJEU, joined case, C-116/16 and C-117/16, *T Danmark and Y Denmark*, paras 48 and ff with Opinions of Advocate General Kokott (ECLI:EU:C:2018:143 to 148), paras 48 and ff.

[29] CJEU, *N Luxembourg 1 et al*, paras 90 and ff; see, however, Opinion of Advocate General Kokott of 1 March 2018 in these cases, para 48 and ff and 55. Critically G Bizioli, 'Le nuove "lenti" della Corte di Giustizia sul Mercato Interno' 149 and ff, 160 and ff.

[30] This is even more so where these expert documents receive the blessing of state actors (for example an approving declaration by the UN General Assembly) so that the quality may change.

[31] P Arginelli, *Multilingual Tax Treaties: Interpretation, Semantic Analysis and Legal Theory* (IBFD, 2015) 478 and ff; JF Avery Jones, 'Treaty Interpretation – Global Tax Treaty Commentaries', in M Lang, *Qualification Conflicts – Global Tax Treaty Commentaries*.

[32] See eg Opinion of Advocate General Kokott of 1 March 2018, *Z Denmark*, case C-299/16, ECLI:EU:C:2018:144, [2018], with references to the CJEU jurisprudence.

legal texts. However, the commentaries as such are neither binding law, nor do they constitute (classic) *travaux préparatoires* under Article 32 VCLT for the parties to the DTCs.[33] In principle, they constitute 'mere' soft law, despite their considerable authority in practice.

Nevertheless, many of the abovementioned conventions concerning administrative assistance between states find further guidelines in soft law instruments. It is thus uncontroversial that many initiatives at G-20 and OECD level, while lacking legally binding quality, have massively shaped what states perceive to be appropriate tax practices.[34] Indeed, the European Commission's view on certain of Member States' tax measures may have been shaped by some of these soft law instruments.

A number of 'other' (non-state) actors, in particular international organisations, have had significant impact on taxation.[35] On the one hand, non-state actors cannot create binding law for states; their resolutions do not constitute treaties and their conduct is neither creative nor expressive of customary international law (although it is noteworthy that international organisations may create their own customary international law that governs only the international organisations' behaviour).[36] On the other hand, non-state actors occupy a crucial position in the creation of soft law.

9.4.2. The International Institutional Framework of International Taxation

The two most notable international organisations are the OECD and the UN as the authors of the two Model Conventions and the most active fora for the international dialogue and consensus-finding process. Furthermore, the International Monetary Fund (IMF), the OECD, the United Nations and the World Bank Group have established the Platform for Collaboration on Tax. The EU also plays an important role as an architect of international taxation. The G20 constitutes the most active intergovernmental forum in the realm of international taxation, and the G7 reached a historic agreement on a global minimum corporation tax rate of 15 per cent in June 2021. The free-market Adam Smith Institute argues that the Americans fought a revolution to ensure their tax rates weren't set in Westminster without representation. They awaken now in horror to find the British have agreed, on their own turf, to have their tax rates set by Washington.[37] However, the underlying message of the G7 deal is also about reasserting the power of government over big business.[38]

Finally, on the non-governmental side, the IFA and the ILA may not only contribute to the determination of *lex lata*, but also to the progressive development of taxpayers' rights.

OECD and UN resolutions, the OECD model tax conventions and commentaries, national taxpayer charters, deliberations of states in the OECD and the UN tax fora are becoming more and more important. Such activity within international organisations per se neither

[33] There are different approaches of courts around the world regarding the legal quality of these commentaries under the VCLT (ie whether the commentaries fall under any of the paras of art 31 or under art 32 VCLT). See F Engelen, *Interpretation of Tax Treaties under International Law* (IBFD, 2004), ch 10.

[34] See, eg, K Vogel, 'Double Tax Treaties and their Interpretation' (1986) 4 *International Tax & Business Lawyer* 41, who hints at this soft law quality; *cf* also E Baistrocchi and M Hearson, 'Tax Treaty Disputes: A Global Quantitative Analysis', in E Baistrocchi (ed), *A Global Analysis of Tax Treaty Dispute* (Cambridge University Press, 2017) 1538–39.

[35] *cf* J Odermatt, 'The Development of Customary International Law by International Organizations' (2017) 66 *International and Comparative Law Quarterly* 491 and ff.

[36] ILC, *Conclusions on identification of customary international law, with commentaries*, A/CN.4/L.908, UN Doc II Yearbook of the ILC (2018) 132, para 8.

[37] *cf* Adam Smith Institute on Twitter on 5 June: '… Nobody voted to hand power over our taxes to Washington's demands'.

[38] R Partington, 'G7 deal is as much about balance of power as global tax reform' (6 June 2021) *The Guardian*.

constitutes state practice, nor *opinio iuris*.[39] However, if 'sufficiently widespread and representative, as well as consistent', these acts and instruments can be very helpful for identifying customary international law. No particular duration is required.[40] However, if there is a noticeable disparity as between developed and developing states coalescing around the OECD and the UN in the sphere of taxation (or indeed within a particular group) respectively, the practice would not be widespread unless the practice of the other group is analysed in terms of an irrelevant 'inaction'.

9.4.3. OECD Model Conventions and Commentaries

The Model Conventions of the OECD, their commentaries and guidelines, are of particular importance for the development of international tax law. They are not binding international treaties, but only unilateral acts. Even in the OECD's view, these recommendations are not binding; rather, according to the OECD's Rules of Procedure, they 'shall be submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation'.[41] Nevertheless, the OECD Model Tax Conventions are regularly considered soft law in the domain of taxation.[42]

The model conventions are developed continuously by experts and have proven their worth in practice. They have had a lasting effect on the making of double tax treaties, as intended by the conventions' drafters. More than 1,000 bilateral double taxation treaties are based on the OECD model conventions on income taxation. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, which aims at coordinated interpretation and changes of bilateral tax treaties, was also developed within the OECD. The Court of Justice of the European Union takes into account the OECD Model Conventions, despite their lack of legally binding force,[43] so that they have an indirect effect in the Union's tax law.

Using OECD Model Conventions and other soft law instruments in finding the law is legitimate to a certain extent. Prima facie, they reflect and coordinate state practice and may thus contribute to the formation of customary international law if states develop the requisite *opinio iuris*. The OECD Model Convention and commentaries precisely influences the interpretation. These documents are 'in the nature of *contemporanea expositio* inasmuch as the meaning indicated in these documents to the clauses and expressions in the tax treaties can be inferred as the meaning normally understood in, to use the words of Lord Redcliffe, "international tax language" developed by the organizations like OECD'.[44] Thus, it is normal to use OECD material when interpreting tax treaties. This also applies (though to a lesser degree) to legislation. For example, many countries have implemented, as part of their anti-abuse framework,

[39] *cf* above sec 9.1.

[40] Conclusion 8.

[41] OECD, *Rules of Procedure of the co-ordinating body of the convention on mutual administrative assistance in tax matter* (2015), Rule 18. See also R Mellinghoff, 'Heranziehung von OECD-Musterabkommen und –Musterkommentar', in F Wassermeyer, *Doppelbesteuerung: Festgabe zum 75. Geburtstag von Franz Wassermeyer: 75 Beiträge zum Recht der DBA* (Beck, 2015) 35 and ff; A Christians, 'Hard Law, Soft Law, and International Taxation' (2007) 25 *Wisconsin International Law Journal* 325 and ff.

[42] Model double tax treaties. Whether instruments drafted by expert bodies that are not full subjects of international law, such as the ILA or other NGOs, may have soft law quality is controversial; this report negates soft law quality of such instruments in order to reflect the lowest common denominator in international law scholarship.

[43] Eg CJEU, judgment of 26 February 2019, joined cases, C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 et al*, paras 90 and ff; critically G Bizioli, 'Le nuove "lenti" della Corte di Giustizia sul Mercato Interno', 149 and ff, 160 and ff.

[44] Kolkata Income Tax Appellate Tribunal Order of 12 April 2013, *Right Florist Pvt Ltd, Kolkata vs Department Of Income Tax*, no 17.

de facto minimum taxation requirements. If the overall taxation is below a certain threshold (often formulated in soft terms, like 'unfair level' or similar wording), additional domestic tax can be imposed on top. It makes sense to construe these and similar rules of domestic tax laws in light of 'international tax language'.

However, it is noteworthy that the OECD cannot be considered 'subsidiary means for the determination of rules of law' as defined by Article 38(1)(d) of the ICJ Statute, as the OECD is mainly made up of interest representatives and not of 'the most highly qualified publicists of the various nations'. Thus, there is a qualitative difference between OECD instruments and the works of the ILC or eminent public international lawyers for the determination of rules of international law. Yet, although OECD Model Conventions cannot be placed anywhere in Article 38 of the ICJ Statute, they may constitute an important tool for the interpretation of treaties under the VCLT.

In addition, soft law often suffers from a democratic deficit.[45] Tax officials and experts work within the framework of the OECD without parliamentary back up. This is so because Model Conventions are not international treaties made with the participation of national parliaments. Accordingly, the quasi-legal effects of the OECD conventions and its commentaries must be taken with a grain of salt. They do not carry equal weight in the interpretation of tax treaties as compared to the treaty text itself or any other, directly related evidence such as *travaux préparatoires*.

9.4.4. The 2017 Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations[46]

Another interesting example of soft law documents and their influence in the formation and progressive development of customary international law is the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. They aim to provide guidance regarding the application of the arm's-length principle. The 2017 Guidelines incorporate clarifications and revisions agreed in the 2015 BEPS Reports (on Actions 8–10 and 13) and were designed and expected to relieve taxpayers from certain compliance burdens and provide more legal certainty. Although the Guidelines are by no means legally binding, they constitute a highly influential soft law document that can gradually lead to the convergence of state practices towards a common standard. A recent example of the soft normative pull of the OECD Guidelines is, for instance, the outcome of Brazil and the OECD's common project to 'align Brazil's transfer pricing rules to the OECD standard' in December 2019.[47]

9.4.5. The 4th International Guidelines of the OECD on Value Added Tax and Goods and Services Tax ('VAT/GST-Guidelines')

In the long run, the OECD has not limited its work to direct taxes but has become more active in the area of value added tax (VAT) as well. The VAT/GST Guidelines purport to

[45] J Klabbers, 'Informal Agreements in International Law: Towards a Theoretical Framework' (1994) 5 *Finnish Yearbook of International Law* 267, 361–62.

[46] We would like to thank Panos Merkouris for his contribution.

[47] OECD, *Brazil Identifies a Clear Pathway for Aligning its Transfer Pricing Framework with the OECD Standard* (OECD, 2019), www.oecd.org/tax/transfer-pricing/brazil-identifies-a-clear-pathway-for-aligning-its-transfer-pricing-framework-with-the-oecd-standard.htm.

set out internationally agreed principles and standards for the VAT treatment of the most common types of international transactions, with a particular focus on trade in services and intangibles. Here too, the aim is to reduce the uncertainty and risks of double taxation and unintended non-taxation that result from inconsistencies in the application of VAT in a cross-border context. This is very important because VAT has become a major source of revenue for governments around the world. As a result of its global spread, most international trade is now subject to VAT. The interaction of national VAT regimes can potentially have a major impact in either facilitating or distorting trade.[48] Against this background, the Guidelines do not aim at detailed prescriptions for national legislation. Rather, they seek to identify objectives and suggest means for achieving them. Their purpose is to serve as a reference point. They are intended to assist policy makers in their efforts to evaluate and develop the legal and administrative framework in their jurisdictions while respecting the sovereignty of states.[49] Nevertheless, like other soft law, they can make an important contribution to the rapidly developing field of international VAT law by virtue of their persuasiveness.[50] If international VAT law is to develop consistently, such accompanying support and preparatory work with regard to possible codifications seems indispensable.

9.5. The International Financial Reporting Standards

The International Financial Reporting Standards (IFRS) are issued by the independent experts of the International Accounting Standards Board.[51] The IFRS Foundation is a not-for profit international organisation responsible for developing a single set of high-quality accounting standards. Those standards are to bring transparency, accountability and efficiency to financial markets around the world. IFRS standards are now required by more than 140 jurisdictions, with many others permitting their use. This allows for internationally comparable consolidated financial statements. As such, the IFRS standards are not binding, but due to their considerable indirect influence they can be classified as 'soft law'.[52] In any event, Union law incorporates certain standards, so that theses function as 'hard' Union law. Regulation (EC) No 1126/2008 requires publicly traded companies governed by the law of a Member State, under certain conditions, to prepare their consolidated accounts in conformity with international accounting standards.[53] Nevertheless, the effect of the accounting standards is controversial. For rules not formulated in a parliamentary process but by experts, their impact is very strong. In any event, important harmonisations such as the Common Consolidated Corporate Tax Base should be adopted in the regular legislative process of the Union pursuant to Article 115 TFEU. Essential standards should not become binding merely by reference or recognition by the Commission.[54]

[48] International VAT/GST Guidelines of 2017, Foreword.

[49] International VAT/GST Guidelines of 2017, Preface, no 6.

[50] See, M Lamensch, 'The OECD International VAT/GST Guidelines: Completion of a (First) Major Step towards Global Coordination of Value-Added-Tax Systems' (2016) 44 *Intertax* 360, 371 and ff.

[51] The International Accounting Standards Board consists of 14 members who are appointed by the trustees of the International Accounting Standards Committee Foundation according to criteria of origin and qualification.

[52] See generally J Kokott, 'Soft Law Standards' 15.

[53] *cf* Regulations No 1126/2008 of 3.11.2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (of 19 July 2002).

[54] Kirchhof F, 'Das Steuerrecht zwischen europäischer Integration und nationaler Souveranität', in J Brandt, *8. und 9. Deutscher Finanzgerichtstag 2011/2012, Europäische Perspektiven im Steuerrecht, Steuergerechtigkeit und Steuervereinfachung*, (2013) 23, 30 and ff.

9.6. 'Soft Law' in Customs and Value Added Tax Law of the EU

There are a number of opinions, guidelines and explanations, which the CJEU uses when interpreting VAT law.[55] According to its settled case law, the explanatory notes formulated by the Commission and drawn up by the Nomenclature Committee – now assisted by the Customs Code Committee[56] – are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force.[57]

The guidelines of the VAT Committee are to be assessed in a similar way. Pursuant to Article 398(4) of the VAT Directive, the VAT Committee shall examine questions which concern the application of Community provisions on VAT and draw up guidelines, which are not legally binding.[58] These are, in essence, an expression of the opinion of the Commission and the competent authorities of the Member States.[59] They too are a subsidiary means for the determination of rules of law. Concerns in respect of legal subjects not being able to find out about them[60] are no longer relevant since those guidelines have been published.[61] After all, the guidelines of the VAT Committee are now also part of the Union's 'soft law'. They do offer tax administrations and companies some guidance, but no certainty.

Other candidates for 'soft law' could perhaps be the explanatory notes on VAT invoicing rules,[62] the 'Explanatory notes on EU VAT rules concerning the place of supply of telecommunications, broadcasting and electronic services',[63] the 'Explanatory notes EU VAT place of supply rules on services connected with immovable property',[64] the 'Guide to the VAT mini One Stop Shop (MOSS)' and further explanatory notes on VAT.[65] These are drafted on the initiative and under the auspices of the Commission, when it sees a need for clarification and amendment in view of new VAT legislation (see eg Articles 217–40 of the VAT Directive). The explanatory notes themselves correctly state that they are not legally binding and do not replace an implementing regulation nor the guidelines of the VAT Committee. The Commission describes them as providing 'both a mixture of practical help as well as help in understanding the meaning of certain issues contained in the articles.'[66]

[55] On 'soft law' in VAT law see M Lamensch 'The use of soft law by the European VAT legislator, and what the CJEU makes of it', in M Land and P Pistone et al (eds), *CJEU – Recent Developments in Value Added Tax* (Beck, 2015) 21 and ff.

[56] See the second indent of art 9(1)(a) and art 10 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff ([1987] OJ L 256/1), as amended by Council Regulation (EC) No 254/2000 of 31 January 2000 ([2000] OJ L 28/16).

[57] *cf* CJEU, judgments of 6 November 1997, *LTM/FIRS*, case C-201/96, ECLI:EU:C:1997:523, [1997], para 17; CJEU, of 17 March 2005, *Ikegami*, case C-467/03, ECLI:EU:C:2005:182, [2005], para 17, and CJEU, of 18 May 2011, *Delphi Germany*, case C-423/10, ECLI:EU:C:2011:31, [2011], para 24.

[58] *cf* Opinion of Advocate General Bot of 13 September 2007 on judgment of 6 December 2007, *Commission/Germany*, case C-401/06, no 50, and Opinion of Advocate General Geelhoed of 14 November 2002, *Hoffmann*, case C-144/00, no 72. Likewise, see the German Federal Ministry of Finance (BMF) letter of 3 January 2014 – IV D 1 – S 7072/13/10005: non-binding guidance.

[59] *cf* Opinion of Advocate General Warner of 19 January 1977, *Dittmeyer*, joined cases 69/76 and 70/76; Opinion of Advocate General Kokott of 31 January 2013, *Turnkey*, case C-155/12, paras 46 and ff.

[60] On the different legal situation before the guidelines were published, see Opinion of Advocate General Kokott of 12 May 2005, *Levob Verzekeringen and OV Bank*, case C-41/04, para 25.

[61] For the publication, see the Commission's website at https://ec.europa.eu/taxation_customs/vat-committee_en – Guidelines resulting from meetings of the VAT Committee.

[62] Explanatory notes VAT invoicing rules (Council Directive No 2010/45/EU).

[63] Explanatory notes on the EU VAT rules on the judgment of supply of telecommunications, broadcasting and electronic services, which will enter into force in 2015, 3 April 2014.

[64] Explanatory notes on EU VAT place of supply rules on services connected with immovable property that enter into force in 2017 (Council Implementing Regulation (EU) No 1042/2013).

[65] On the complex and not very transparent regulatory structure see M Kemper, 'Die stetig wachsende Bedeutung des Unionsrechts im nationalen Umsatzsteuerrecht' (2017) *UR* 1 and ff.

[66] Explanatory notes VAT invoicing rules (Council Directive No 2010/45/EU). Critical van Doesum, van Kesteren, van Norden, *Fundamentals of EU VAT Law*, (2016) 18: 'risk that they will rather confuse than enlighten businesses'.

Equally questionable is the soft law character of the opinions of the EU VAT expert group (VEG). The Commission established the VEG in 2012 by decision. The group is composed of persons with the requisite expertise in the area of VAT and of organisations representing in particular businesses, consumer or tax practitioners which can help develop and implement VAT policies. It publishes opinions that are not legally binding.[67] It advises the Commission on the preparation of legislative acts.[68]

9.7. Measures against Harmful Tax Practices

In respect of the OECD Harmful Tax Practices the question arises whether and to what extent international tax norms should be considered legally binding on other states and whether the categorisation as hard law has practical effects. Does it matter whether an international tax practice or norm is described as 'hard' law, 'customary' law, 'soft' law, or no law at all, if most countries feel compelled to abide by it in any case?[69]

State practice based on OECD actions against harmful tax practices may not be sufficiently widespread to be described as customary law. Fewer than half of the nations in the world have been involved in the initiative, and a growing number of states have abstained from it. Still, customary law develops sometimes dynamically, especially in the tax area: these tax norms could evolve into customary law if enough states sufficiently internalise them going forward. Courts around the globe apply them. The OECD's current focus encourages internalisation through 'monitoring any continuing and newly introduced preferential tax regimes [within or without the OECD membership] identified by member countries'.[70] Regarding the subjective element, the general legal obligation (*opinio iuris*) required by customary law, first, the OECD is not a state and second, its guidance is by its terms recommendatory rather than obligatory.[71] States follow its guidance, but not necessarily from a sense of legal obligation. Therefore, the OECD Harmful Tax Practices until now has not become customary international law.[72] However, since BEPS Action 5 dealing with harmful tax practices is also a BEPS Minimum Standard, this conclusion can change in light of the implementation of the BEPS Minimum Standards by the jurisdictions participating in the BEPS Inclusive Framework.

[67] Eg VAT Expert Group, VEG No 071 Rev 1, Paper on topic for discussion, Possible VAT implications of Transfer Pricing, 18 April 2018.

[68] *cf* M Lamensch, 'CJEU, Recent Developments in Value Added Tax 2015' 21, 44 and ff.

[69] A Christians, 'Hard Law, Soft Law, and International Taxation' (2007) 25 (2) *Wisconsin International Law Journal*, Univ of Wisconsin Legal Studies Research Paper no 1049, available at SSRN: ssrn.com/abstract=988782, 3. For an EU perspective, see D Weber (ed), *Traditional and alternative routes to European tax integration: primary law, secondary law, soft law, coordination, comitology and their relationship* (IBFD, 2010).

[70] A Christians, 'Hard Law, Soft Law, and International Taxation' 6. In international law, the acceptance of state practice can be also tacit (for instance due to silence or lack of action by the state). According to both the ILA and the ILC, silence can (under certain conditions) be taken into account as a way to adopt state practice. The silence does not mean that the state is against the rule, unless they adopt practices that are clearly in opposition of the emergent rule. See M Wood, 'Second report on identification of customary international law', *UN International Law Commission*, A/CN.4/672, paras 57, 50.

[71] A Christians, 'Hard Law, Soft Law, and International Taxation' 6.

[72] The OECD harmful tax practices guidance thus seems to fall short of international law in the formal, or 'hard' sense of treaty or custom. Yet states feel compelled to adhere to the recommendations and guidelines, perhaps not least because there are – at least potentially – real consequences for failure to comply. If the OECD initiative is not law, it nevertheless creates a strong degree of obligation among member and non-member states alike. This sense of obligation makes it difficult to simply dismiss the guidance as 'not law'. Therefore, this author argues that in this case, the OECD harmful tax practices can be regarded as soft law, see A Christians, 'Hard Law, Soft Law, and International Taxation' 7, 8.

9.7.1. Standard of Global Fiscal Transparency

The standard of global fiscal transparency developed by the OECD and also followed by the EU is another candidate for customary international law *in statu nascendi*. Therefore, 'it may be questioned as to whether or not a Member State may conclude an international agreement with a third country that runs counter to fiscal transparency'.[73]

Fiscal transparency seems to reflect the treaty practice of most states.[74] But if there is no treaty, 'even the most progressive states do not exchange information with other states'.[75] Regarding the subjective element, Hongler argues that

> the current system of a rather transparency tax world has been achieved through coercive measures, which should not lead to the conclusion that there is a law requiring a transparent global world. Coercive measures in this context mean that States (in particular offshore States) were forced, eg through the threat of economic disadvantages in case of blacklisting, to sign treaties to enable cross-border fiscal transparency. This means that these States were not of the opinion that there was a need for fiscal transparency in the sense of an *opinio iuris*. Otherwise, it would not have been necessary to use coercive instruments, such as blacklisting or threatening the termination of double tax treaties.[76]

On the other hand, the states forcing the offshore jurisdictions to sign transparency treaties felt entitled to enforce this principle of transparency, and there was no significant critique of such a coercive measure. This could indicate a certain degree of tax transparency as customary international law *in statu nascendi*.

9.7.2. The Arm's-Length Standard

The arm's-length principle of transfer pricing states that the amount charged by one related party to another for a given product must be the same as if the parties were not related. An arm's-length price for a transaction is therefore what the price of that transaction would be on the open market.

The arm's-length standard or principle (*Fremdvergleichsgrundsatz* in German; *principe de la pleine concurrence* in French) could have become customary when it comes to evaluating whether there is an abuse. This standard secures a valid benchmark for the balanced allocation of taxing powers between states through a comparison with the conditions that would apply between independent parties.[77] Accordingly, the arm's-length principle helps states in neutralising the possible group dynamics that may impose different conditions for transactions between

[73] See P Pistone, 'Exchange of information and Rubik Agreements: The Perspective of an EU Academic' (2013) 67 *Bull Intl Taxn* 219 and ff, 223.

[74] See above sec 8.2.3.3.

[75] P Hongler *Justice in International Tax Law*, (IBFD, 2019), 188.

[76] P Hongler. Ibid.

[77] The arm's-length standard is used by the EU Commission when assessing whether special tax regimes applicable to some multinational enterprises comply with EU competition policy. In particular, the European Commission considers the arm's-length standard embedded in art 107 TFEU and is using it as a benchmark to detect whether EU Member States have granted selective advantages to some enterprises and not to others which are comparable under the reference framework of the ordinary tax regime that would have otherwise applied. When verifying whether the EU Commission had exercised its powers in conformity with the applicable rules of EU law, the General Court has reached different conclusions, endorsing it in GC, judgment of 24 September 2019, *Luxembourg/Commission (FIAT)*, joined cases T-755/15 and T-759/15, and striking it down in GC, judgment of 14 February 2019, *Belgium/Commission*, cases T-131/16 and T-263/16. *Cf* also Opinion of Advocate General Kokott of 3 December 2020 on the appeal to the CJEU, and GC, *Netherlands/Commission (Starbucks)*, cases T-760/15 and T-636/16. Appeals against Fiat Chrysler Finance are pending before the CJEU, see cases C-885/19 P and C-898/19 P, cf also judgment of 16 September 2021, *Commission v Belgium and Magnetrol International*, case C-337/19 P, ECLI:EU:C:2021:741.

associated enterprises, resident in two different countries, in order to shift profits towards low-tax jurisdictions and costs towards the high-tax ones. The general recognition of the arm's length principle around the world does not mean that enterprises are obliged to comply with that standard, but rather that it denotes conditions that are prima facie unlikely to give rise to abusive tax practices. Failing to meet such conditions, however, does not per se denote the existence of tax avoidance. However, it serves as a relevant indicator which can be used to justify obliging the taxpayers to prove the genuine nature and economic framework within which the specific transaction takes place.[78] This also applies to methods that only approximate the arm's-length standard – an example is the Transactional Net Margin Method (very frequently used in international business practice) – at least to the extent that they present a sound business framework, which reflects reasonable conditions not essentially driven by tax saving dynamics.

However, the arm's-length method is controversial as to its content. For instance, even though the US initiated the use of the arm's-length standard (which relies on the use of comparables for its application and which has been adopted by the OECD Transfer Pricing Guidelines and by countries in their tax treaties (Article 9)), later on, the US decided to follow a different path. Since in the US, domestic legislation can override treaties[79] or customary international law, the application of the arm's-length standard will not be the same as the one that is applicable under the tax treaties or customary international law. Thus, it is difficult to say whether there is a worldwide or a European or different national arm's-length principles.

Also, there is an alternative – unitary taxation with formular apportionment. The US Supreme Court confirmed the constitutionality of worldwide formular apportionment in 1983 when it upheld California's use of the method to apportion the worldwide income of multinationals doing business in the state.[80] The multinationals and their supporters argued that UT&FA was inconsistent with the internationally accepted ALS and therefore California's reliance on it was unconstitutional, but the Court rejected this argument, once for a US-based[81] and again for a foreign-based multinational.[82] As a result, the literature from the early 1990s is full of debates between advocates of ALS and UT&FA.[83] Thus, there is lack of uniformity and consistency both with regard to state practice and *opinio iuris*. Consequently, it is not evident whether the arm's-length principle may qualify as customary international law or as a general principle of international law.[84]

[78] These issues have been the subject of an interesting transfer pricing case concerning fundamental freedoms and the justification raised by the Belgian government, where the CJEU has addressed the arm's-length standard under the label 'fully competitive conditions' (this was the wording used by the Belgian government when raising the justification – 'principe de la pleine concurrence' is the French term for the ALP). See CJEU, *SGI*, judgment of 21 January 2010, case C-311/08, in particular paras 68 to 72.

[79] From the perspective of public international law, tax treaty override raises a general issue of compatibility with art 26 VCLT and the *pacta sunt servanda* principle. See further on this C De Pietro, 'Tax Treaty Override and the Need for Coordination between Legal Systems' 78, also on the relation with art 3(2) OECD, *Model Convention*; OECD, *Tax Treaty Override*; and various articles published in *European Taxation*, special issue 9/2013.

In the US, this doctrine was developed judicially, based on the Supremacy Clause of art VI para 2 of the US Constitution. In Germany, this has raised repeated concerns over the compatibility with the international obligations and the Constitution, on which see for instance German Federal Fiscal Court, judgment of 11 December 2013, I R 4/13, [2013]. The German Federal Constitutional Court/BVerfG accepts treaty override, German Federal Constitutional Court, decision of 15 December 2015 (*Treaty Override*), 2 BvL 1/12.

[80] US Supreme Court, judgment of 27 June 1983, *Container Corp v Franchise Tax Bd*, 463 US 159, [1983].

[81] US Supreme Court, *Container Corp v Franchise Tax Bd*.

[82] US Supreme Court, judgment of 20 June 1994, *Barclays Bank*, 512 US 298, [1994].

[83] See also R Avi-Yonah, *Chapter 13: The future of transfer pricing, Advanced introduction to International Tax Law* 71; RD Pomp and MJ McIntyre, 'Double Trouble: Double Taxation aspects of formulary appointment in the international context' (1994) 87 *National Taxation* 236 and ff.

[84] *cf* eg A Vega, *International governance through soft law: The case of the OECD transfer pricing guidelines*, Transtate Working Paper no 163 (2012); denying the customary international law character J Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law* (Kluwer, 2010) 288 and ff, 290.

9.7.3. CFC Legislation

A further candidate for the development of customary international law might be the spread of CFC legislation that allows countries to tax non-residents on their foreign source income.

Even though the OECD conducted thorough international tax studies in the last century,[85] until 2013, the CFC rules did not meet the element of state practice since the number of countries introducing CFC rules was neither extensive, nor representative. From the time of the adoption of CFC rules (1963) until the time that the BEPS Action 3 was published (2015), only 30 countries of the 193 UN countries around the world had adopted CFC legislation.[86] This may be understandable insofar as CFC rules operate as a tax policy tool of capital exporting countries and especially of those that pursue capital export neutrality.[87]

After the introduction of BEPS Action 3, more countries are expected to in fact adopt CFC legislation. However, since BEPS Action 3 is not regarded as a minimum standard for countries of the BEPS Inclusive Framework and also considering the international tax policy goals pursued by this measure, the number of countries may be far less than the jurisdictions participating in the Framework.[88]

The more recent project of international minimum taxation aims at comprehensive coordination of international business taxation, going in a direction that comes very close to that CFC legislation.[89]

Nevertheless, even though more and more countries are adopting CFC legislation, that does not necessarily mean that they do so out of a sense of obligation. Thus, the subjective element, *opinio iuris* is lacking.

9.8. Investment Law and Customary Taxpayers' Rights: The Prohibition of Indirect Expropriation, the National Treatment and Fair and Equitable Treatment Standards[90]

Numerous awards rendered by ad hoc arbitral tribunals have had to determine whether various tax measures constituted violations of investment protection standards contained in bilateral

[85] OECD, *Controlled Foreign Company Legislation* (OECD, 1996).

[86] Germany and the US are the countries with the longest tradition of CFC legislation within their respective international tax systems. It is worth mentioning those countries especially if one considers that the German type of CFC legislation (*Hinzurechnungsbesteuerung*) in fact pursues to a much greater extent equalisation between domestic and cross-border business based in Germany than the US and other countries respectively do. The latter model of CFC legislation is rather based on the assumption that only the control of a foreign subsidiary can create the conditions to justify stretching the international personal tax nexus of the country of residence of the parent company in a way that also reaches out to a company established in another jurisdiction. *Cf* also OECD, *Designing Effective Controlled Foreign Company Rules*, Action 3 – Final Report (OECD, 2015), OECD/G20, *Base Erosion and Profit Shifting Project*, (OECD Publishing, Paris), doi.org/10.1787/9789264241152-en, 9.

[87] For such reasons, on the one hand, OECD countries pursuing capital import neutrality, such as, for instance, the Netherlands, have not adopted CFC legislation, since it would be inconsistent with their overall international tax policy goals; on the other hand, non-OECD countries, including especially the capital importers ones, have no need to include CFC legislation in their tax policy.

[88] As of November 2021, 141 jurisdictions. See www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf.

[89] *cf* also R Mason, 'The Transformation of International Tax' 353 and ff, under 3. Fiscal Fail-Safes.

[90] We would like to thank Céline Braumann for her contribution.

investment treaties (BITs).[91] Overall, however, tribunals have been very deferential to states' tax measures and only a few decisions have actually found tax-related violations of BITs; in most cases, the tribunals have held that taxation generally falls within the police power and thus the ordinary and non-compensable exercise of states' regulatory powers.[92]

9.8.1. Expropriation through Taxation

With regard to indirect expropriation through taxation, the Commentary to the 1967 OECD Draft Convention explicitly stated that 'excessive or arbitrary taxation'[93] may constitute creeping expropriation; tribunals have also confirmed that, theoretically, taxation may result in expropriation.[94] Nevertheless, tribunals generally agree that '[t]axation is an essential prerogative of State sovereignty.'[95] Hence, even very high taxation that renders the investment less profitable or even unprofitable[96] will only rise to the level of indirect expropriation if it is an extreme case that goes hand in hand with some other, additional grievance,[97] such as discrimination or a breached stabilisation clause.[98] Thus, while cases do exist where tribunals equated

[91] Eg ICSID, Award of 8 August 1980, *Benvenuti & Bonfant v Congo*, [1980]; ICSID, Final Award of 11 October 2017, *Wirtgen v Czech Republic*, [2017]; ICSID, Award of 3 February 2006, *EnCana v Ecuador*, [2006].

[92] See eg JR Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2007) 621: 'state measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licences and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.'; American Law Institute (ed), Restatement (Third) of the Foreign Relations Law of the United States, para 712 (1987) 201: 'bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states'; for cases that reviewed but did not find violations of BITs, see ICSID, *EnCana v Ecuador*, paras 183 and 197; ICSID, Award of 16 December 2002, *Feldman v Mexico*, [2002], para 103; ICSID, Final Award of 18 April 2002, *Link-Trading v Moldova*, [2002]; ICSID, Award of 24 October 2014, *Belokon v Kyrgyzstan*, [2014], para 198; ICSID, *Burlington Resources v Ecuador*; ICSID, Decision on Remaining Issues of Jurisdiction and Liability of 12 September 2014, *Perenco v Ecuador*, [2014]; ICSID, Award of 24 November 2015, *Ryan, Schooner Capital and Atlantic Investment v Poland*, [2015].

[93] Notes and Comments to art 3 OECD Draft Convention on the Protection of Foreign Property, 126.

[94] ICSID, Final Award of 1 July 2004, *Occidental Exploration v Ecuador*, [2004], para 85; ICSID, Award of 21 November 2007, *Archer Daniels Midland v Mexico*, [2007], para 238.

[95] ICSID, Decision on liability of 14 December 2012 *Burlington Resources v Ecuador*, Case ARB/08/5, [2012] para 391; see also ICSID, Decision of 12 May 2011 *Meerapfel Söhne v Central African Republic*, Case ARB/07/10, para 319.

[96] See eg Iran-US Claims Tribunal, award no 460-880-2 of 29 December 1989, *Too v Greater Modesto Insurance Associates*, [1989] 23 Iran-USCTR 378, 387: 'a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.'; Upper Silesian Claims Tribunal, Decision of 5 February 1932, *Kügele v Polish State*, 6 ILR 69, [1932].

[97] ICSID, award of 3 February 2006, *EnCana v Ecuador*, para 177; ICSID, Award on Jurisdiction and Liability of 28 April 2011, *Paushok v Mongolia*, [2011], paras 330–36.

[98] A Reinisch and C Schreuer, *International Protection of Investments: The Substantive Standards*, (2020) 92; Sornarajah, *The International Law on Foreign Investment*, (2017) 401; see ICSID, award of 18 April 2002, *Link-Trading v Moldova*, para 64: '[f]iscal measures only become expropriatory when they are found to be an abusive taking. Abuse arises where it is demonstrated that the State has acted unfairly or inequitably towards the investment, where it has adopted measures that are arbitrary or discriminatory in character or in their manner of implementation, or where the measures taken violate an obligation undertaken by the State in regard to the investment.'; ICSID, *Burlington Resources v Ecuador*, paras 392–93: 'There are, however, limits to the State's power to tax. There are limits that arise from customary international law on taxation and limits that arise from the protections granted under international law to foreign investments, the only relevant one for present purposes being the protection against expropriation under the Treaty … Taxes may not be discriminatory and they may not be confiscatory.'

tax measures with indirect expropriation, such as *Revere Copper v OPIC*,[99] the *Yukos* cases[100] or *Ampal-American Israel v Egypt*,[101] they remain rare exceptions.

Numerous tribunals and the majority of the literature have stated that customary international law has long played a role in the law of expropriation. When the UN General Assembly was still dominated by Western states, it passed a number of resolutions that proclaimed a right to expropriation by states that emanated from the states' permanent sovereignty over their natural resources; this right to expropriation went hand in hand with an obligation to compensate expropriated foreigners.[102] However, this ostensible consensus faltered with the 1960s and developing countries' call for a New International Economic Order.[103] The content of any customary rule on expropriation remains unclear, both due to the inhomogeneous views among states on that matter and due to the increase of BITs; BITs constitute *lex specialis* in relation to custom[104] and thus make an identification of any customary principles that are also enshrined in the treaties – such as rules on expropriation – a complex endeavour.[105] The least common denominator is that expropriation is only illegal if the state does not adhere to a certain 'minimum standard',[106] which is said to encompass some kind of compensation (the amount of which remains highly controversial), the prohibition of discrimination and some procedural safeguards (in some form of due process, although this remains contentious).[107]

It would require a much more thorough analysis to determine the extent to which foreign taxpayers may claim that tax measures gave rise to indirect expropriation and are thus compensable as a matter of customary international law. Considering the case law cited above, the core question will probably be at what point taxation becomes not a legitimate, non-compensable exercise of regulatory power but an instance of expropriation under custom. As soon as it can be established that the level of expropriation is reached, there would likely be consensus that the state owes some compensation to the taxpayer (although any other details about this customary

[99] ICSID, Award of 24 August 1978, *Revere Copper and Brass v Overseas Private Investment Corporation*, 56 ILR 258, 271, [1978].

[100] ICSID, Final Award of 12 September 2010, *RosInvest v Russian Federation*, [2010]; ICSID, Award of 20 July 2012, *Quasar de Valores v Russian Federation*, [2012]; PCA, *Hulley Enterprises v Russian Federation*, PCA case 2005-03/AA226, [2005]; PCA, *Veteran Petroleum v Russian Federation*, PCA case 2005-05/AA228, [2005]; ICSID, Final Award of 18 July 2014, *Yukos v Russian Federation*, [2014].

[101] ICSID, Decision on Liability and Heads of Loss of 21 February 2017, *Ampal-American Israel v Egypt*, [2017], paras 171–83: 'The Tribunal finds that the inclusion of EMG within the tax-free zone system in Egypt was a fundamental part of the economic structure of the investment, which the Respondent knew and accepted from the outset at the highest level of Government, and which it confirmed by the issue of the specific licence to EMG, conferring tax-free status under the free zones system until 2025. These facts take the consideration of a change in the tax regime applicable to Claimants' investment in EMG well outside the realm of the ordinary exercise of the State's regulatory power. In the case of this investment, the Respondent's decision to remove EMG's tax-free status took away a defined and valuable interest that had been validly conferred according to Egyptian law at the time that the investment was made and that had been guaranteed by the State for a defined period. It was not to be subject to the vicissitudes of changes in State tax policy over that time period. For this reason, the taking is tantamount to expropriation.'

[102] See GA Res 1803 (XVII), UN GAOR, 17th Sess, Agenda Item 39, para 4, UN Doc A/RES/1803 (XVII) (1962); A Reinisch and C Schreuer, *International Protection of Investments* 7 and ff.

[103] R Rothstein, *Global Bargaining: UNCTAD and the Quest for a New International Economic Order*, (1979); GS Varges, *The New International Economic Order Legal Debate*, (1983); J Bhagwati (ed), *The New International Economic Order: The North-South Debate*, (1977).

[104] ICSID, Award of 21 November 2007, *ADM v Mexico*, [2007], para 117; ICSID, Award of 2 October 2006, *ADC v Hungary*, [2006], para 481.

[105] R Baxter, 'Treaties and Custom' (1970) 129 *Recueil des cours* 57 and ff; P Dumberry, 'The Formation and Identification of Rules of Customary International Law', *International Investment Law* (CUP, 2016).

[106] See eg ICSID, Award of 27 September 2017, *Caratube and Hourani v Kazakhstan*, [2017] 1065; PCA, *Norwegian Shipowners' Claims (Norway v US)*, 1 RIAA 307, 334, [1922].

[107] A Reinisch and C Schreuer, *International Protection of Investments* 10.

obligation to compensate are hotly debated). Furthermore, the case law allows for some additional, preliminary conclusions. First, foreign taxpayers/investors are likely not protected from even extremely high taxes under customary international law, as the case law regarding BITs (which probably offer more protection than under mere custom) does not warrant such a conclusion. Second, the case law on treaties indicates that foreign taxpayers may have a claim if they have also been targeted by the state in a discriminatory or arbitrary manner, or if they relied on special assurances under a stabilisation clause. If any customary rules protecting foreign taxpayers/investors on this matter exist, they would likely only cover the most extreme and abusive cases as instances of expropriation through taxation.

However, this addresses the complex issue of compensation and damages. Decreasing the tax rate (ie forcing the state to change its tax laws) would not be part of the awarded damages. That would be very unusual. Under the subjective/differential method, the investor should receive a set amount of money that puts investors in the financial situation they would be in had the violation not occurred. Essentially, the tribunal would come up with an amount that represents the excessive part of the tax (probably not an easy determination to make for any tribunal) and maybe even other losses triggered by the excessive tax rate.

9.8.2. National Treatment

Investors have mostly claimed violations of national treatment clauses or indirect expropriation in attempts to gain relief for taxation that they felt illegally harmed their investments. Investors have also claimed that tax measures violated the fair and equitable treatment (FET) standard, but have been unsuccessful with this argument.[108]

The most famous and most potent national treatment standards are contained in Article III of the GATT and in other WTO Agreements. They explicitly refer to taxation and state, in short, that internal taxes may not be levied on foreign products in a discriminatory manner. However, many BITs also contain national treatment clauses and the national treatment standard may potentially offer protection against discrimination of foreign taxpayers/investors.

Tribunals have produced varying definitions of the national treatment standard, both in general and with regard to problematic tax measures. For example, there has been a split regarding the question whether discriminatory intent is required for a violation of the national treatment standard. Some tribunals came to the conclusion that differential tax treatment between foreigners and nationals based on arbitrary or subjective criteria were sufficient to find a violation of the national treatment standard, even if the discrimination was unintended.[109] Other tribunals insisted that the differential tax measures had to emanate from discriminatory intent to constitute a violation of national treatment.[110]

[108] See eg ICSID, Case no 2014-03 of 11 October 2017, *Wirtgen v Czech Republic*, para 437, where the tribunal explained why the investor was unsuccessful with his claim of an FET violation through altered tax incentives: 'In the absence of a commitment by the Respondent that the Tax Incentives would not be altered, the Claimants should expect that the laws in force at the time of its investment would change. The expectations which the Claimants might have had cannot be deemed legitimate and, therefore, cannot benefit from the protection of the Treaty. As the Claimants recognize: "an investor can[not] legitimately expect that the laws at the time of investment will not be changed."'

[109] ICSID, Case no ARB(AF)/99/1 of 16 December 2002, *Feldman v Mexico*, para 183.

[110] ICSID, Case no ARB(AF)/04/05 of 21 November 2007, *ADM v Mexico*, para 209; ICSID, Decision on Responsibility of 15 January 2008, *Corn Products v Mexico*, [2008], paras 137–138.

Despite the limited and somewhat heterogeneous case law on national treatment, tribunals have been relatively consistent in the application of a 'three-step test' to determine a violation of the national treatment standard. First, there must be a domestic comparator that is 'in like circumstances' to compare the treatment afforded to the investor. The second step assesses whether the treatment of the foreigner was less favourable than the treatment of the comparator. The third and last step considers whether there was any justification for the differential treatment.[111] This three-step test has also been applied in cases where differential taxation was the treatment under scrutiny.[112] In a number of these cases, the tribunals ultimately found a violation of the national treatment standard due to discriminatory tax treatment.[113] In *Feldman v Mexico*, on the other hand, the tribunal held that the differential tax treatment was due to a reasonable distinction between foreigners and nationals in like circumstances; differential treatment was justified as it allowed, inter alia, 'better control over tax revenues'.[114] The Court of Justice of the European Union adopts a similar approach with regard to taxation of third country nationals.[115]

In sum, some foreign taxpayers/investors covered by relevant BITs enjoy protection from discriminatory tax treatment before investment tribunals. For state conduct that is downright abusive (or even outrageous), claims invoking the national treatment standard appear more promising than claims of expropriation through taxation. Thus, if no BIT (or other treaty) is in force that creates the national treatment standard to protect the foreign taxpayer/investor, the state may legally discriminate against the foreigner without violating any customary national treatment standard. As to expropriation, several authors have indicated that there exists no national treatment standard in customary international law.[116]

Finally, especially in the context of the fair and equitable treatment standard, tribunals and scholars have tended to invoke a certain 'minimum standard' that is part of customary international law and must be afforded to all aliens.[117] At its heart, the controversy revolves around the question whether a fair equitable treatment standard in a BIT only affords protection up to the level of the customary minimum standard, or whether the fair and equitable treatment standard creates protection that surpasses those of the customary minimum.[118] However, this discussion does not promise to add further clarity to the question of taxpayers' rights: while some broad, generic principles have been held to be part of the minimum standard (such as good faith in general,[119] procedural fairness and justice,[120] non-arbitrariness and non-discrimination

[111] A Reinisch and C Schreuer, *International Protection of Investments* 623; ICSID, Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005, *Methanex v USA*, Part IV, Chapter B, [2005], para 13.

[112] ICSID, *ADM v Mexico*, para 196; ICSID, *Corn Products v Mexico*; ICSID, *Feldman v Mexico*; ICSID, Award of 1 July 2004, *Occidental Exploration and Production Company v. Republic of Ecuador*, paras 173-177; ICSID, Award of 18 September 2009, *Cargill v Mexico*, [2009].

[113] Eg ICSID, *ADM v Mexico*, para 196; ICSID, *Corn Products v Mexico*; ICSID, *Cargill v Mexico*; ICSID, Award of 1 July 2004, *Occidental Exploration and Production Company v. Republic of Ecuador*, para 179.

[114] ICSID, *Feldman v Mexico*, para 170.

[115] Eg CJEU, judgment (Grand Chamber) of 26 February 2019, *X (Sociétés intermédiaires établies dans des pays tiers)*, [also known as: X GmbH], case C-135/17, ECLI:EU:C:2019:136, [2019], paras 89 and ff.

[116] A Reinisch and C Schreuer, *International Protection of Investments* (Cambridge University Press, 2020) 605; AK Bjorklund, 'National Treatment', in A Reinisch (ed), *Standards of Investment Protection* (Cambridge University Press, 2009) 29, 31; C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2017) 283.

[117] PCA, *Neer (USA) v Mexico*, 4 RIAA 60, [1926]; PCA, *Roberts (USA) v Mexico*, 4 RIAA 77, [1926]; AH Roth, *The Minimum Standard of International Law Applied to Aliens* (Sijthoff, 1949) 127; A Reinisch and C Schreuer, *International Protection of Investments* 305.

[118] A Reinisch and C Schreuer, *International Protection of Investments* 274.

[119] ICSID, Award of 25 June 2001, *Genin v Estonia*, [2001], para 367.

[120] PCA, *Neer (USA) v Mexico*; ECtHR, *Golder v UK*, no 4451/70, (21 February 1975), para 36: 'the right of access constitutes an element which is inherent in the right stated by Article 6 para 1'.

on the basis of race or other illegitimate grounds[121] – the exact content of minimum standard is still unclear), there is no meaningful, consistent case law by investment tribunals to give guidance on tax measures as violations of fair and equitable treatment.[122] Consequently, the case law does not allow for general conclusions on the minimum standard that governs taxation of aliens either. In any event, the relevant minimum standard regarding taxation is likely to encompass only extreme cases, such as racial discrimination or clearly abusive measures. In this regard, the minimum standard may coincide with the standard that must be afforded to render taxation a legitimate exercise of regulatory power as opposed to illegal expropriation.

9.8.3. Conclusions on Investment Law and Taxpayers' Rights

The preceding summary of protection standards with regard to tax measures directed at foreign investors only allows for a few cautious conclusions with regard to taxpayers' rights. Notably, as the substantive law that had been violated derived from BITs in all of these cases, one must be cautious when using these decisions to deduce any meaning for taxpayers that are not protected by BITs. Neither the national treatment standard, nor the fair and equitable treatment standard per se (if it affords protection beyond the minimum standard) have acquired customary international law status according to the literature.[123] It also remains unclear where the line between the exercise of legitimate, non-compensable regulatory power and illegal or legal but compensable expropriation runs under customary international law. Furthermore, any parallels can only be drawn for 'foreign' taxpayers, as only investors (ie taxpayers) who do not have the nationality of the state implementing the tax measure could raise claims under the relevant BITs; nationals could thus not rely on any of the case law as evidence for customary taxpayers' rights.

This leads to the final observation that only downright abusive taxation of aliens (in the sense of outrageous discrimination, eg on the basis of race, or extreme violations of due process such as in the *Yukos* cases) can be considered violations of general public international law (ie law that exists also in the absence of a relevant treaty rule, either as CIL or general principles of law) with a significant degree of certainty.

[121] ICSID, Award of 28 July 2015, *Pezold v Zimbabwe*, [2015], para 501; ICSID, Award of 30 April 2004, *Waste Management v Mexico [II]*, [2004], para 98; ICSID, Final Award of 15 November 2004, *GAMI Investments v Mexico*, [2004], para 89; ICSID, Award 3 November 2015, *Al Tamimi v Oman*, [2015], para 399.

[122] An example is ICSID, Final Award of 11 October 2017, *Wirtgen v Czech Republic*, [2017] para 437, where the tribunal explained why the investor was unsuccessful with his claim of an FET violation through altered tax incentives: 'In the absence of a commitment by the Respondent that the Tax Incentives would not be altered, the Claimants should expect that the laws in force at the time of its investment would change. The expectations which the Claimants might have had cannot be deemed legitimate and, therefore, cannot benefit from the protection of the Treaty. As the Claimants recognize: "an investor can[not] legitimately expect that the laws at the time of investment will not be changed"'.

[123] See eg P Dumberry, 'Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?' (2017) 8 *Journal of International Dispute Settlement* 155–78; A Reinisch and C Schreuer, *International Protection of Investments* 605; AK Bjorklund, 'National Treatment', in A Reinisch (ed), *Standards of Investment Protection* (Cambridge University Press, 2009) 29, 31; C McLachlan, L Shore and M Weiniger, I*nternational Investment Arbitration* 283.

10

International Minimum Standards for the Protection of Taxpayers' Rights

10.1. The Need for Global Minimum Standards

This interdisciplinary research project brings together the worlds of public international law and international tax law on a largely unexplored area of common interest, which looks at taxpayers from the broader perspective of non-state actors, largely explored by public international law.

For various reasons, public international lawyers often regard tax law as a world apart. Tax law presents, inter alia, numerous technicalities and forms part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant and confined within each single state. In line with this traditional view, international tax law constitutes an exclusive matter for the states, which regulate the exercise of their respective sovereignty by means of international agreements, producing effects on the taxpayers as if they were mere objects of the exercise of sovereignty. In times of Base Erosion and Profit Shifting (BEPS) and international minimum taxation, such an approach has become obsolete. As in other fields of the law, for example, environmental law, sovereignty can no longer be exercised effectively in isolation. Instead, states need to cooperate in order to cope with big business. At the same time, those businesses need legal certainty and have long called for the reform of the global tax rules.

10.1.1. Tax Law as Public International Law: Coordinated Bilateralism

As indicated earlier in this book,[1] even though states are in principle free to exercise their sovereignty, they only do so in conformity with the nexus requirement. If such requirement is the expression of customary law and applies to tax matters, the actual content of its tax implications is far from giving rise to a clear *opinio iuris*. States limit the exercise of their taxing rights not only by their domestic law but also and especially by means of international conventions, which follow model conventions. Even though, in principle, they have no obligation to do so, the relevant degree of similarity in such clauses across tax treaties objectively shows that the allocation of taxing rights is the object of coordinated bilateralism. In some areas, such as mutual assistance between tax authorities and the fight against BEPS, including aggressive tax planning,

[1] See above sec 9.1.

tax avoidance, evasion and fraud, international tax law seems even closer to a common global standard, which nears multilateralism in substance.

This form of coordinated bilateralism started about a century ago to foster cross-border relations by reducing international double taxation. More recently, the pendulum of international taxation kept swinging and achieved stronger international tax coordination. This was mainly due to the common perception that international tax coordination is the best possible way to secure an efficient exercise of national sovereignty in the context of the globalised economy, making sure that all businesses effectively pay taxes due in each country.

10.1.2. Individuals as Subjects of International Law

By contrast, states have so far shown no interest in supplementing this global coordination with the corresponding forms of legal protection for the individual rights of taxpayers. Currently, it is hard to perceive the existence of any *opinio iuris* concerning the protection of taxpayers' rights at international level.

The protection of taxpayers' rights has mainly remained a matter for domestic law to regulate, based upon the assumption that international tax law is a matter for disputes between persons of public international law and there are no international legal remedies applicable to the private persons affected by the exercise of taxing powers.

In our view, the swinging pendulum of international tax law cannot stop here but should develop a global solution to the global problems that taxpayers face when acting across borders. Insofar as there is a global standard for exercising tax sovereignty, there should also be a global standard for securing a minimum protection of taxpayers' rights, which applies to purely domestic situations. Therefore, our International Law Association (ILA) Committee has elaborated a more modern vision of international tax law, which looks at taxpayers as holders of individual rights rather than as mere objects of the exercise of national sovereignty. This vision imports into tax law the standards of legal protection applicable to non-state actors under public international law and pursues the establishment of a global standard for protecting the rule of law and the fundamental rights of taxpayers, which can question the validity of the rules of international tax law agreed by the states. *Ubi ius, ibi remedium*: therefore, each right should be bundled with an effective legal remedy that secures effective protection of such right. In line with the requirements of the rule of law, such remedies should prevent measures from adversely affecting the legal sphere of the holders of the rights and operate on an ex ante basis.

This book has gathered common principles from the analysis of national Constitutions, international regional agreements (eg human rights conventions) and taxpayers' charters. Such common principles constitute a valid starting point for building up a global standard of protection for taxpayers' rights.

The rights of non-state actors under public international law, clearly recognised in various areas of international economic law, constitute the starting point for overcoming the absence of international customary law concerning the protection of taxpayers' rights by the research project underlying the content of this book.

The concrete identification of fundamental rights of taxpayers has followed the traditional categories used by international tax lawyers, differentiating among rights related to procedures, sanctions and substantive rules. The core value of the comparative legal analysis consists of several principles affecting the treatment of taxpayers. The ILA Study Group has processed such principles in order to establish the content of the Global Legal Framework for the Protection of Taxpayers' Rights, which constitutes the main research output of this project.

The ILA Committee suggests that the Global Legal Framework for the Protection of Taxpayers' Rights should become a worldwide standard for protecting the rule of law. In such a context, the protection of taxpayers' rights can counterbalance the powers of tax authorities, which are, in part, already coordinated at global level, and question the validity of how states exercise their national tax sovereignty.

The ILA Committee proposes two legal vehicles for conveying its research output, the 'soft law approach' and the 'hard law approach'. The former relies on an International Taxpayers' Charter as a global, non-binding container of rules securing the protection of fundamental rights of taxpayers, by which states should choose to abide. The latter approach pursues the same goal through legally binding instruments.

Taxpayers' judicial protection could be guaranteed by the existing (international) courts or even by the creation of a specialised international tax jurisdiction. The concrete shaping of such jurisdiction could then take into account the experience of investment law, adapting it to the specific needs of international taxation.

This section will further develop the content that our research project has gathered worldwide to establish a global standard of protection of taxpayers' rights.

10.2. The General Principles of Taxpayers' Rights Protection

Before addressing the content of the three categories of tax measures to be included in the Global Legal Framework for the Protection of Taxpayers' Rights, it is important to single out the foundational principles that govern taxation across the world and which should be taken into account as driving forces of such Global Legal Framework.

These foundational principles have been extracted from an in-depth comparative analysis of the applicable foundational rules of taxation across the world. They constitute the cornerstones of an effective protection of taxpayers' rights in each legal system and should operate a kind of external limit to the exercise of tax sovereignty by each country, that is, an internationally accepted standard.

Compliance with such principles and the specific rules contained in the Global Legal Framework for the Protection of Taxpayers' Rights should be a policy priority for all tax systems, to show that the globally coordinated exercise of their taxing sovereignty fully respects the fundamental rights of non-state actors. International tax law should not just make sure that each state protects its collection of tax but also fully complies with the protection of fundamental rights of the affected persons when exercising its taxing jurisdiction.

The four foundational principles of the Global Legal Framework for the Protection of Taxpayers' Rights, as elaborated earlier in this book,[2] are 1) the rule of law, 2) proportionality, 3) the fight against abusive and fraudulent practices,[3] and 4) tax fairness.

We will now describe these more in detail, taking into account the fact that their legal sources usually already exist within most tax systems around the world. Therefore, turning them into a globally coordinated standard is, in most cases, only a matter of acknowledging their common core values rather than introducing a major shift from the currently applicable rules.

[2] See above sec 4.

[3] In tax matters, this means concretely the fight against aggressive tax planning, tax avoidance, tax evasion and tax fraud.

10.2.1. The Rule of Law

The rule of law is one of the most important expressions of the general principles recognised by the civilised nations, thus not only a source of international law but also an intrinsic expression of the core values of law that regulate taxation as well as any other domain.

In tax matters, the rule of law has multiple functions of protection for each private party affected by tax obligations, be they taxpayers or intermediaries and professionals involved in collecting taxes. The rule of law secures legal certainty, prevents any arbitrary exercise of taxing powers, including in connection with retroactive taxation, and pursues consistency with established criteria that can be monitored and corresponds to the value of justice. A global dimension of the rule of law should not be prevented by the mere circumstance that each state has the power to determine its own tax policy goals. Such goals may not justify adopting all measures, including those that go against the internationally accepted standards that apply to tax matters as much as to other areas. The rule of law applies to substantive tax law and sanctions just as much as to procedural law of taxation and may, therefore, not give rise to favouring the collective interest to the detriment of the rights of the individual persons requested to pay taxes. The establishment of an international dimension of the rule of law, also applicable to taxation, can, therefore, act as an overarching principle that justifies the implementation of a system for monitoring its consistent application of its foundational rights throughout the world. In essence, this mechanism would be nothing different from that which states have already accepted to apply in tax matters within the framework of the various types of peer review, such as those concerning mutual assistance and administrative cooperation to settle cross-border tax disputes.

Moreover, the international dimension of the rule of law could become the way to activate instruments for international dispute settlement in cases of blatant violations. Such instruments, however, should operate in line with the modern vision of public international law, that is, not be merely a matter between states who have a dispute over the exercise of their powers, but also involve the non-state actors affected by this dispute.

10.2.2. Proportionality

The principle of proportionality establishes a relationship between each measure and the goal it pursues, monitoring the adequacy to achieve such a goal and taking into account the potential side repercussions. The application of this principle to taxation has far-reaching implications, which cover all categories of taxpayers' rights, ranging from questioning the content of the law and underlying policy choices, to its implementation and reactions to breaches of it. Therefore, proportionality supplements the rule of law. Together they become instruments to the overall goals of fairness that each tax system should pursue. From a taxpayer's perspective, proportionality does not constitute an absolute legal value but rather a principle that establishes a system of checks and balances in the exercise of taxing sovereignty.

10.2.3. The Fight against Abusive and Fraudulent Practices

The fight against aggressive tax planning, tax avoidance, tax evasion and tax fraud constitutes a crucial component of the Global Legal Framework for the Protection of Taxpayers' Rights insofar as it establishes a connection between the already existing international tax coordination

(eg in relation to BEPS and global tax transparency) and internationally accepted principles that recognise the entitlement to legal protection for all persons acting in good faith.

This foundational principle has several specific corollaries. First, it is not enough to say that taxpayers acting in good faith have nothing to fear from international tax coordination. If there is such coordination at international level, then there should also be coordination among states to make sure that those non-state actors who act in good faith have legal remedies available to protect their legal sphere against any measure that can adversely affect them.

Second, this foundational principle implies that the need to counter abusive and fraudulent practices allows states to adopt measures that effectively achieve such goals, thus also producing repercussions in the legal sphere of the affected persons. The interaction between this corollary and other principles, particularly the rule of law and proportionality, ensures that this reaction operates within the boundaries of a balanced reaction to such phenomena.

The third corollary implies that those persons who do not act in good faith should not be left to purely arbitrary measures.

Taking into account the perspective of protecting the rights of non-state actors, the international dimension of the fight against abusive and fraudulent practices begets a more balanced dimension, which reflects what would be normal within legal systems of civilised nations, in line with the recognised value of the effective legal protection against any measure of the authorities that can affect the person's legal sphere.

10.2.4. Fairness

The essence of fairness has been thoroughly explored in this research project from an economic and legal perspective, in the domestic and international scenario, and in connection with several substantive principles of taxation that are consonant with fairness, such as equity, equality, neutrality and ability to pay.

These principles are essential components of tax fairness as a foundational principle of our Global Legal Framework and should be considered when exploring the actual meaning of a fair tax system. Our study has brought the analysis of principles of taxation to an international dimension, overcoming their traditional confinement within national boundaries (which has often characterised their analysis from an economic perspective), acknowledging the importance of a global vision of tax fairness.

Such principles also explain the implications of fairness in taxation and reflect the core values of fairness, which are no different from the overall idea of justice. Accordingly, tax fairness is, in fact, akin to tax justice. Bringing all such components to an international dimension and establishing a minimum international standard that applies between states and recognises the rights of non-state actors may seem a titanic challenge, but is actually possible insofar as all the components of fairness are duly taken into consideration when establishing the applicable rules. There is no fairness of international taxation without a fair consideration for the rights of non-state actors and all the different states. Tax fairness does not require depriving single states of their right to pursue their own policy goals. However, it sets limits to what states can do for their own benefit when such a practice produces negative repercussions on other countries or fails to take into due consideration the rights of non-state actors.

Also, tax fairness interacts with the other three foundational principles indicated earlier in this section. In particular, fairness may enrich the validity of the rule of law, going beyond the fact that specific tax measures may be due by law and giving an actual justification to the content

of the regulation contained in the law. Fairness goes hand-in-hand with proportionality, insofar as both set benchmarks for the legal framework within which the levying of taxes can operate.

Finally, fairness also justifies and even requires the fight against tax avoidance and evasion, bringing together the collective interest and protecting the rights of persons acting in good faith. This will be further elaborated in Part II of our study on nexus and a fair international taxation system.

10.3. Procedural Rights

As indicated earlier in this book,[4] there is considerable doctrinal consensus on procedural rights across the countries. The establishment of minimum procedural standards to protect taxpayers' rights is, therefore, less problematic than it would be for substantive rights.

The overall framework for developing minimum procedural standards should be to secure consistency between domestic and cross-border procedures, as well as between the protection of rights in purely domestic and cross-border situations, applying a minimum standard that may not be derogated by the various countries except when introducing rules more favourable for the protection of taxpayers' rights.

The international minimum standard should also apply in a way that secures an effective legal remedy that can be easily activated in respect of any measure that adversely affects the legal sphere of a taxpayer or other categories of private persons involved in the levying of tax.

Moreover, the domestic cross-border consistency should also characterise the exercise of powers by tax authorities. Accordingly, insofar as, for instance, tax authorities in a country have an obligation to secure the protection of rights in a domestic tax audit, they cannot deny it in a mutual agreement procedure.

Four specific rights should be included within the international minimum procedural standard, namely, 1) the right of access to documents, 2) the right to be heard, 3) the right to judicial protection, and 4) the right to obtain protection through equivalent measures, including with the involvement of ombudspersons.

10.3.1. Access to Documents (*Habeas Data*)

The right of access to relevant documents held by tax authorities and concerning the taxpayer is a necessary condition for the latter to exercise an effective right of defence. Moreover, it also secures consistency with the equality of arms, in line with the requirement for a fair trial.

In principle, there may be no general limits to the right of access to documents, except when specific reasons may require it. Such reasons should not reflect the strategic goals of tax authorities but rather relate to specific problems that would likely arise if the taxpayer were granted access to documents held by the tax authorities. A good example of a situation that would justify a limitation arises in connection with fraudulent schemes, when the access to such information would, in fact, hinder the effective fight against such practices.

We stress that all practical difficulties in securing effective access to information recorded in cross-border tax procedures, such as mutual assistance and settlement of disputes, can be overcome with appropriate consideration for the legal situation of the affected persons as non-state

[4] See above sec 5.4.

actors in the framework of the cross-border procedures. Interpretative principles developed by courts have shown that access to such information is a powerful instrument to secure effective protection of the rule of law, thus confirming that non-state actors should be given legal standing also in respect of instruments that pursue cooperation between tax authorities.

10.3.2. Right to Be Heard

The right to be heard is another essential component of procedural rights. In the framework of tax procedures, this right applies before tax authorities issue any measure that can adversely affect the taxpayers' legal sphere. Therefore, the right to a fair trial implies in tax procedures that the right to be heard not only applies during judicial procedures but also throughout administrative ones, from even before the moment they have their formal start.

Being heard does not just mean that affected persons have the right to express their point of view. It also has two important corollaries for administrative and judicial tax procedures. First, tax authorities are obliged to take the affected person's position into account when issuing their acts and, when holding a different view, explaining the reasons for departing from the affected person's perspective. Second, the affected person or taxpayer has the right to express his view before the judiciary and have the latter provide the reasoning behind his judgment to show consideration for such view.

The right to be heard applies along the same general lines as all procedural rights, as described earlier in this section.[5] This means that changes are required for cross-border procedures in which the taxpayer is currently not involved. In particular, even though the overall goal of mutual assistance procedures is to request the involvement of tax authorities of another country for matters related to the gathering of information or recovery of taxes, it is important that both the requesting and requested authorities keep the taxpayer informed, except in cases when special reasons exist to not do so (eg suspicion of fraud or wilful behaviour). In such circumstances, the taxpayer may, for instance, have a right to be heard before the information is requested or the requested tax authority supplies it, as well as after mutual assistance has occurred and before an administrative act is formally issued. Likewise, the taxpayer should be heard during mutual agreement procedures whenever he requests it. Also, in this case, the right of access to documents processed in the framework of the mutual agreement procedure should facilitate effective participation. It does not matter whether the taxpayer is a party to the mutual agreement in strict terms. What matters instead is that the taxpayer has the right to be heard in no different conditions from those that would apply in a purely domestic situation of either state involved and that this right is exercised in line with international minimum standards.

10.3.3. Right to Judicial Protection

The right to judicial protection is the most concrete expression of the right to justice. Our book has set out the reasons for full support of the right to a fair trial throughout tax procedures without limitations, based upon the assumption that only this will effectively secure the right to an exercise of taxing powers in conformity with the rule of law and give the affected person an effective legal remedy.

[5] See above sec 10.3.

The right to justice does not mean, however, that the taxpayer is obliged to access justice in order to secure that the exercise of taxing powers is in conformity with the rule of law, but only that she may do so if this seems the most appropriate way to protect the legal sphere against measures that may adversely affect it.

The right to justice implies obtaining it within a reasonable time frame and without too cumbersome a procedure. In tax matters, this has often proved to be a challenge, especially considering that the assessment of the rights of non-state actors is often subordinated to the one of levying taxes.

Another critical issue arises in the cross-border scenario. In such a context, the right to justice in tax matters inevitably faces the issue of the absence of an international tax court and the fact that the current settlement of cross-border tax disputes is only possible through administrative procedures such as mutual agreement procedures and the so-called tax arbitration. The latter is a continuation of the administrative procedure before an impartial body, but without any obligation for the affected person to accept the verdict.

From a *de lege ferenda* perspective, it would be important to establish an international tax court with the power to adjudicate cross-border tax disputes, considering that such disputes concern not only states but are an expression of international economic law, which requires effective protection of the rights of the affected persons, that is, the non-state actors indirectly involved in the dispute. We stress that in many cases, a parallel exercise of legal remedies in two or more states is not equivalent to a single remedy. This is possibly also the reason why some cross-border tax disputes are settled by international economic (final) arbitration in the framework of bilateral investment treaties when such treaties do not include tax-carve out clauses. We will elaborate further on the implementation of international tax law, notably by mutual agreement procedures, arbitration and (international) courts, in Part III of our study.

10.3.4. Equivalent Measures for the Protection of Taxpayers' Rights, Notably Ombudspersons

The presence of equivalent measures for settling disputes is often regarded within tax systems from the sole perspective of tax authorities but is, in fact, a particularly valuable component of an effective system for protecting taxpayers' rights. Insofar as administrative and judicial tax procedures operate in line with the rule of law and secure effective legal remedies for the protection of rights, it may be convenient for taxpayers to settle disputes not by accessing justice but by using alternative legal instruments that achieve a similar result in a more expedited and less costly manner.

Ombudspersons may have a crucial role, especially when taxpayers consider that a given measure adopted by tax authorities is unfair but have no sufficient possibilities or means to react to it. Mediation and other instruments for preventing or settling disputes at an early stage are also essential components of this set of equivalent measures.

10.4. Taxpayers' Rights Related to Sanctions

Tax systems must react to the infringement of tax rules. However, such reaction should balance out the need to secure effective compliance with the requirements of the rule of law and other foundational principles enshrined in this book for securing the protection of taxpayers' rights.

The international minimum standard for the protection of taxpayers' rights also requires a clear approach to the two types of sanctions that apply in tax matters, namely administrative fines, generally used for less serious violations, and criminal sanctions, which usually apply to (most cases of) tax evasion and to all cases of tax fraud. In particular, the two facets of the *ne bis in idem* principle require that only one criminal sanction applies to each violation (*ne bis puniri*) and that the application of the criminal sanction takes place only within the framework of one single procedure (*ne bis vexari*). However, tax systems may apply surcharges or top-up taxes for the mere failure to comply with the timely payment of taxes due. Nevertheless, the size of such surcharges taken separately or in combination with other penalties for the same tax violation should remain within reasonable boundaries, to avoid becoming in substance akin to a criminal sanction and, therefore, fit within the scope of the safeguards and guarantees applicable to criminal procedures.

Such guarantees as *in dubio pro reo* and the privilege against self-incrimination also have significant implications in the cross-border context, and have received little attention so far. The *ne bis in idem* principle, by contrast, traditionally only applies within one and the same jurisdiction. Perhaps this traditional approach could be reconsidered in the process of working towards single taxation.

10.5. Substantive Rights

10.5.1. General Issues

The international recognition of the substantive rights of taxpayers is surrounded by a significant degree of controversy, especially when related to the right to property. This may be particularly due to the conflict between the protection of the individual right to property and the legislative leeway that should be recognised in determining the tax policy that better pursues the protection of the collective interest to secure the funding of the state budget.

In line with the view held throughout this book, we support a line of interpretation that looks across borders in a way that is consistent with the rights of taxpayers as it is for the protection of the collective interest to levy taxes and fight against tax avoidance and evasion.

The most important fundamental principle in taxation is the principle of equality, including the ability to pay. Data protection becomes increasingly vital, particularly in the age of worldwide data exchange, including the automatic exchange of bulk data. The right to property is generally controversial, particularly in the context of taxation. Nevertheless, taxpayers' right to property is generally recognised, and there is international case law protecting it.

10.5.2. Equality and Related Principles

The principle of equality is the most important principle of justice and of particular relevance in the area of tax. It includes the principles of fair and neutral taxation as well as the ability to pay. The principle of the ability to pay is recognised in many constitutions, either explicitly within the text of the constitutions or derived from it by constitutional jurisprudence. However, it is difficult to apply that principle and, generally, the principle of equality in a cross-border context. The Court of Justice of the European Union (CJEU) applies the principle of equality, including the ability to pay, where

several tax jurisdictions are involved.[6] However, this is an innovative and special approach, not shared by other jurisdictions. Therefore, the right to equality (nor the right to property) does not grant protection against, notably, double taxation. For want of single taxation, doing cross-border business may lead to double taxation and non-taxation, which are two sides of the same coin.

In the tax context, the principle of equality should operate in line with the goals of tax fairness, which constitutes one of the four foundational principles of our international minimum standard for the protection of taxpayers' rights and has already been the object of specific attention.

It is immaterial whether the specific implications of the principle of equality are expressly recognised as separate rights or principles in each tax system. In any case, the international minimum standard has to take them into account in a way that limits the discretionary powers of the legislator to exercise taxing powers. Such principles shall guide judicial interpretation and application in administrative practice.

10.5.3. Data Protection[7]

10.5.3.1. Recent Developments

The protection of taxpayers' data raises a number of novel issues. Most of these issues have only come to prominence in the last 20 years, and there has been limited opportunity to identify common solutions to these problems. For that reason, much of this section identifies issues that require consideration rather than established solutions.

Revenue authorities have held personal (and sometimes sensitive) data about taxpayers for many decades. However, most of those data were in physical form, and there was no danger of unauthorised access through hacking or widespread duplication or dissemination of those data. Obligations of confidentiality and secrecy imposed on revenue officials are well developed but less suited where the data are held in electronic form. Aside from the much greater amount of data that taxpayers may be supplying to revenue authorities – particularly in those countries where there is real-time reporting of all commercial transactions, possibly through a VAT invoicing system – there is also the possibility to gather data by mining it from various sources, including social media. Several revenue authorities now employ sophisticated search applications to build up taxpayers' profiles. Much greater computing power, and the use of artificial intelligence, allows those data to be processed, with the possibility of automated decisions being taken, for example, about which taxpayers to audit or which taxpayers represent a particular risk. There is an impression that the collection and processing of big data for tax purposes have developed very fast, and issues of data protection lag well behind.

General data protection legislation exists in many countries, but the scope and level of protection are by no means uniform between countries. A degree of conformity has been achieved through the European Union's General Data Protection Regulation (GDPR), and the standards that it guarantees have, to a certain extent, been exported outside the EU by the need for other countries to show an adequate level of data protection to receive data transfers from the EU. However, not all countries by any means observe the same level of data protection as reflected in the GDPR. Many of the data protection rights contained in the GDPR are themselves subject to potential exceptions in accordance with its Article 23(1)(e), which permits restrictions by way of legislative measures where such restrictions are necessary and proportionate in a democratic

[6] CJEU judgment of the Court (Grand Chamber) of 12 June 2018, *Bevola*, case C-650/16, ECLI:EU:C:2018:424, para 59.

[7] We would like to thank Philip Baker for his contribution.

society to safeguard important objects of public interest, including taxation. The legislation enacting such restrictions needs to satisfy the very specific conditions laid down in Article 23(2) of the GDPR. At present, the scope of the limitations permitted for taxation purposes remains to be clarified.

10.5.3.2. The Clash between Individual Rights and Collective Rights in the Realm of Data Protection

The realm of data protection – and taxpayer confidentiality more generally – gives rise to perhaps the clearest potential conflict between, on the one hand, the protection of the interests of individual taxpayers to confidentiality and protection of their data, and, on the other, the collective interest in the use of transparency as a cure for aggressive tax planning and a way of ensuring that adequate resources are gathered through the tax system to finance socially desirable objectives, including health, education, defence, etc. It may be contended that public information about tax planning strategies offers the best antiseptic against aggressive tax planning. However, there is a balance to be achieved between the interest of the community in generating resources through the tax system and the rights of individual taxpayers to privacy, confidentiality and data protection. This is manifest in a number of specific issues.

First, information from the various reports suggests that 'naming and shaming' is practised in a number of jurisdictions,[8] particularly where taxpayers either participate on a serial basis in aggressive tax planning or regularly and deliberately evade their obligations. Clearly, in those situations, there must be safeguards in place not only to ensure that naming and shaming is only applied to those genuinely identified as evaders or serial and aggressive avoiders but, more generally, the activity of naming and shaming must not be used as a disproportionate measure and must always be in accordance with the law.

Secondly, in the case of large, multinational enterprises, one of the outcomes of the BEPS project of the OECD has been the requirement to prepare 'country-by-country reports' (CbCRs) showing the economic activities and the taxes paid by multinationals in each of the countries in which they operate. Since these reports were conceived, a debate has been raging over whether these CbCRs should be available only to revenue authorities or be made publicly available. Arguments on this topic revolve around whether the reports may contain commercially sensitive information and whether there is any, or any sufficient, public interest in requiring or even permitting their publication.

Thirdly, the last few years have seen a growth in beneficial ownership registers, which require both details of ownership and any persons holding significant influence. The expansion of these registers does not only concern taxation: they include issues of commercial transparency (so that it is possible to identify persons having significant interest over particular companies and other entities) and issues relating to anti-money laundering and terrorist financing. However, the dividing line between, for example, anti-money laundering and combating aggressive tax planning is not a precise one, and some of the developments in this area have clearly been motivated by tax collection concerns. As in the CbCRs, the debate rages around whether these registers should be open to the public. It is undeniable that they should be open to public authorities, both those concerned with anti-money laundering and terrorist finance, and to tax authorities. However, there is a very real issue of conflicting interests to be balanced on the question of public access to the information contained in these registers. The issue may be seen as drawing the line between,

[8] *cf* above sec 8.2.2.4.1.2.

on the one hand, the clear interest of revenue authorities – subject to legal obligations of confidentiality and data protection – to access these data and the interests of the general public (and journalists and civil society groups, in particular) to access data that would otherwise be private, confidential, and protected with respect to the data subject.

All of these practical issues involve a balance between the individual rights of the taxpayer to confidentiality and data protection, on the one hand, and the collective rights of society to utilise transparency as a means of ensuring the collection of adequate tax resources on the other. The balance may be resolved in different ways in different countries. Historically – and the country reports display this – there has been a traditional difference with respect to individual tax data in certain countries. The practice of certain Scandinavian countries has been to allow public access to information about the tax contributions paid by specific individuals each year. That contrasts very sharply, however, with the approach to the confidentiality of tax information adopted in many other countries. The potential conflict of law issues that arise where different jurisdictions adopt different approaches to taxpayer data protection is discussed further below.

10.5.3.3. Data Protection in a Domestic Tax Context

A distinction may be made between the application of data protection in a purely domestic tax context and data protection in cross-border scenarios. The first situation is primarily governed by domestic law, subject of course to international human rights obligations, as well as soft law obligations to observe best practice and minimum standards. The latter is usually based on bilateral or multilateral treaties.

The issues identified above (relating to the clash between individual rights to data protection and collective interests in combating aggressive tax planning) are, of course, relevant in this context. Additionally, there are particular issues that concern domestic approaches to data protection, some of which need to be resolved in many countries.

One specific issue concerns the application of data protection rights to legal persons. In many countries, data protection extends to the personal data of individuals, but the position for legal persons is less clear. Mostly, data respecting legal persons are not subject to the same protection as data of human individuals.

A distinction may be drawn here between small companies on the one hand and public companies and multinational enterprises on the other. In the case of small companies, they may represent the commercial alter ego of the owner/founder of the business. In that respect, the data relating to the business is often identical to the data relating to the individual owner/founder or their family. It would be somewhat surprising if one extended obligations of confidentiality and data protection to the individual, but not to the equivalent data when it relates to a closely-held company that is the alter ego of that person.

Similar considerations do not necessarily arise, however, with regard to public companies or multinational enterprises. A dividing line might be based upon statutory definitions of small and medium-sized enterprises, or it might focus specifically on the nature of the data and ensure that personal data that would be protected in respect of an individual should equally be protected in respect of that individual's company.

10.5.3.4. Data Protection in Cross-Border Tax Scenarios

The major issue in this context concerns the automatic exchange of information for tax purposes (AEoI). However, a word might be said at the outset about the exchange of information on request (EoIR).

Exchange on request takes place within the constraints of a bilateral or a multilateral agreement, such as a bilateral tax treaty, tax information exchange agreement, or the OECD/Council of Europe Multilateral Convention on Administrative Assistance in Tax Matters. In all cases, the agreement concerned will contain safeguards for data confidentiality. Typically, any information supplied is subject to the same obligations of confidentiality as applied to information gathered by the recipient tax authority. International agreements based upon the OECD Model provisions now include a 'foreseeable relevance' test for determining whether information should be exchanged. The meaning of that test is gradually being clarified through litigation; it is usually contrasted with a prohibition on 'fishing expeditions' for tax purposes.

One specific area of difficulty in relation to EoIR is the issue of notification to the taxpayer concerned and the possibility for that taxpayer to bring a judicial action to prevent the exchange of information. This is a developing area where there is case law currently developing the principles. On the one hand, exchange of information could, in certain circumstances, have potentially damaging consequences for a taxpayer, particularly if that information is inaccurate or relates to the wrong person, and general principles of law should allow a taxpayer to bring an action to prevent exchange on request in appropriate circumstances. On the other hand, litigation should not be used inappropriately to frustrate the legitimate exchange of information or unduly delay it. Luckily, there is a solution in developing procedures that are adequate to test the legality of the exchange of information without being excessively slow and imposing impossible burdens on either party.

Clearly, if the taxpayer will be given access to appropriate (even if simplified) remedies to prevent the exchange of information, then the taxpayer needs to be notified of the proposed exchange. Any right to be notified should obviously be subject to an override in circumstances where there is a fear that prior notification will lead the individual to destroy or alter the information. It would usually be the requesting state that has reason to fear the loss or destruction of data, and it is appropriate to expect that state to provide adequate reasons for not notifying the individual.

However, the taxpayers' right to be notified needs to be recognised and implemented. Until now, such a right is not reflected in state practice. Rather, most states have abolished taxpayers' notification, hearing and judicial remedies when establishing mutual assistance and data exchange in the framework of the OECD's fight against BEPS.

10.5.3.5. Automatic Exchange of Information for Tax Purposes

This represents perhaps the most recent and the most significant issue for the protection of taxpayers' data. There has, in recent years, been a quantitative and qualitative shift in the amount and nature of data exchange for tax purposes. The issue is enormous: statistics released in June 2020 indicate that, in 2019, 97 jurisdictions exchanged information relating to 84 million individual accounts, amounting to total assets of approximately EUR 10 trillion. By comparison, in 2017, only 48 countries had taken part, the number of accounts was EUR 11 million, and the assets involved were EUR 1.1 trillion. It is becoming increasingly the case that, wherever a taxpayer holds a bank account, an investment account, a pension scheme or any interest in any form of financial institution in another country (different from the country of usual residence), data relating to that taxpayer will be subject to automatic exchange. In those circumstances, the potential for data loss or data misuse is enormous. The data exchange represents perhaps the most attractive target for data hackers or non-benign organisations of any form ever generated by international action. It should be recalled that in the case of each individual account, the data exchanged will include the name, date of birth, address, tax identification number of the individual concerned, together with details identifying the account and the account balance, income and gains.

It is also important to stress that in respect of this automatic exchange, there is no 'foreseeable relevance' test: all data within scope is exchanged. It is reasonable to assume, given the high levels of voluntary compliance of taxpayers in most of the countries concerned, that the vast majority of this data relates to entirely compliant taxpayers. In practice, it is virtually impossible for a taxpayer to take any steps to protect their position with regard to automatic exchange. Steps taken by an individual to protect any of their financial data from exchange would be treated as deliberate attempts to avoid disclosure and treated in the same way as aggressive tax planning in many countries.

It is not easy to see how the safeguards provided for in the GDPR, for example, are applied in the context of this automatic exchange of information for tax purposes. The taxpayer should have a right to be notified before any processing of personal data, which includes the transmission of data to a third country. Aside from general notifications when opening bank accounts, for example, that data may be exchanged, the taxpayer may be given no other warning. In the case of the transmission of data outside the EU, the GDPR requires that there should be either an adequacy decision in place with respect to the country concerned or specific legal safeguards should exist that guarantee an adequate level of protection. Despite repeated warnings of the dangers of AEoI, it is extremely difficult to see these safeguards operating in practice. Challenging the lack of data protection is difficult for individual taxpayers.

It is understood that there is a system of peer review in place under the aegis of the OECD for countries involved in the OECD's Common Reporting Standard for AEoI. That process is non-transparent. The Common Reporting Standard (CRS) includes countries that do not have a tradition or commitment to a liberal, democratic approach to privacy and data protection. It also includes countries in which data has been hacked or simply sold by corrupt officials.

Cross-border AEoI raises to an even greater extent than EoIR the issue of different standards of data protection laws in the countries concerned. On the one hand, there may be relatively minor differences between the data protection afforded in the two countries: for example, the country supplying data for exchange may recognise rather narrower exceptions for the activities of revenue authorities while the recipient country allows broader exceptions to its revenue authorities. However, access to the data by other government agencies, including security agencies, may also differ from country to country. Not all of the countries participating in the systems of AEoI share the same liberal, democratic traditions. There is a real concern that data may be supplied to countries where it might (now or in the future: regimes change) be used for impermissible purposes. Examples that illustrate this concern include the cases of civil society organisations or human rights advocates in countries where those activities are viewed negatively by the local administration and where the disclosure of funds held outside the country, or donations received from outside the country, could have a significantly adverse impact.

As a general principle, it is appropriate to state that a data subject should enjoy no lesser protection in a bilateral situation than in a purely domestic situation. Where there is notification and judicial protection in case of domestic data transfer between two authorities within the same state, the same should apply to international data transfer from a domestic to a foreign authority, even though both of them are fiscal authorities.

Many of these issues are novel; they are also urgent. It is self-evident that the bodies developing AEoI need to have adequate knowledge of data protection and adequate concern for the protection of taxpayers' data. It would seem equally self-evident that there is a need for clarity as to the legal responsibility of the bodies involved in AEoI, particularly their responsibility for protecting the confidentiality and observance of taxpayers' data protection rights.

10.5.4. Taxpayers' Property Rights

The prohibition on confiscatory taxation is generally accepted. Confiscation is defined taking into account a bundle of factors, notably suffocating taxation contrary to the ability to pay. As opposed to data protection, property in cross-border situations, that is, foreign property, is often better protected than property in a purely internal context that is usually the property of residents. This derives from the law of aliens, a classic area of the old public international law. Only under the more recent law of international human rights, aliens or foreigners are to be treated equally without regard to their nationality. International property law, however, is still under the influence of classical international law concepts, which rather protects the rights of foreigners.[9]

However, the protection of the human right to property in tax matters, including in domestic situations, should not be neglected by our international minimum standard for the mere fact that it is controversial. As such, this would be one reason to show that action is required at the level of interpretation and protection in order to secure effective protection of this fundamental right of taxpayers. Our book suggests, in fact, protection of this right that bundles the compliance with the rule of law and the activation of legal remedies on the side of procedural rights with narrowing down the powers of the legislator and tax authorities. On the one hand, the legislator has to exercise its powers in line with all substantive principles of taxation; on the other hand, tax authorities must enforce their powers in a way that respects private property and does not undermine its effective enjoyment for protecting the collective interest, unless when this is done in a way that respects the rule of law.

10.6. Conclusion

In conclusion, there is already some evidence for state practice and *opinio iuris*, both domestically and internationally, regarding basic taxpayers' rights. However, evidence for *opinio iuris* is more elusive and harder to pin down than evidence for practice; this is a common feature of the identification of customary international law and is not only true in the context of taxpayers' rights. In any case, the area of taxpayers' rights under international tax law is particularly dynamic. Moreover, international investment law can serve as a source of inspiration for international tax law. This concerns both the procedures to protect these rights and their substance. It seems that there is customary international law *in statu nascendi*. The international instruments proposed in the following section could contribute to promote and clarify such customary international law.

[9] *cf* Sohn, 'The New International Law', 1–64.

11

Proposed International Instruments

11.1. Hard and Soft Law Approach[1]

This chapter discusses the merits and shortcomings of the two possible designs of a legal instrument for the protection of taxpayers' rights: the founders of the instrument could resort either to a non-binding 'soft law approach' or to a legally binding 'hard law approach'. It could become either a soft or a hard law instrument. Yet, policymakers should contemplate the following caveats before deciding to implement the draft instrument under either a soft or a hard law approach.

11.1.1. Soft Law

Soft law raises various controversial issues, but its existence and influence on the development of international taxation are very strong.[2] The defining feature and potential disadvantage of soft law is that it is not legally binding and thus not enforceable if disregarded. However, numerous advantages are said to make up for this 'lack of teeth'. For instance, it might be easier for states to agree on stronger, more specific language if the commitment is of a hortatory instead of a legally binding nature. Indeed, soft law agreements might be the only feasible option, for example, for politically sensitive issues or matters at the core of sovereignty – states must expect repercussions such as countermeasures if they violate treaties, whereas the worst that can happen if they disregard soft law commitments might be a blow to their reputation (which is sometimes a high price). Deviating from a soft law instrument is thus less costly than deviating from a binding treaty; with regard to certain vital matters, states prefer to keep the back door open in case a course of action seems necessary and thus not agree to binding treaties that render any deviations illegal. Soft law might also be less costly and more flexible than treaties because the former typically does not require domestic ratification, that is, parliamentary approval. Politically sensitive issues or matters at the core of sovereignty might never pass this ratification process in more pluralistic or divided democracies.[3] However, one has to acknowledge that, this way, soft law bypasses the democratic process. The international tax system is being created without the discussions that normally accompany the lawmaking process.

[1] We would like to thank Céline Braumann for her contribution.

[2] On soft law, see further under sec 1.6 of this book.

[3] S Voigt, 'The Economics of Informal International Law: An Empirical Assessment' in J Pauwelyn, R Wessel and J Wouters (eds), *Informal International Lawmaking* (2012) 102–03.

In addition to these advantages that often make soft law a more pragmatic choice, non-binding agreements are frequently also very effective.[4] Soft law instruments have noticeably shaped the trajectory of international relations and state conduct in various sub-fields of international law.[5] At the very least, they spell out a common understanding among the parties, which is crucial for the successful coordination of efforts. Furthermore, soft law may influence the interpretation of any legally binding international or domestic law; it might also be the predecessor of binding international law, either through a treaty that adopts former soft law or through customary international law if the soft law leads to corresponding state practice and ultimately gives rise to *opinio iuris*.[6] Even if soft law is not specifically referred to for interpretation and does not trigger the creation of binding international law studies suggest that states tend to adhere to soft law.[7] In other words, soft law has the potential to effectively and also – due to its lower costs – efficiently shape state conduct.

In the context of taxpayers' rights, a soft law instrument might be a worthwhile first step towards codified international taxpayer protection, especially if a binding treaty is not yet feasible. As Chapter 3 has shown,[8] even domestic taxpayer bills of rights or charters are non-binding – if domestic legislators have not come around to adopting binding instruments for the protection of taxpayers' rights within states, it might be even harder to mobilise the requisite political will to agree on a binding treaty between states.

If policymakers choose the soft law approach, they must bear in mind that the instrument must be in line with binding international law; soft law does not enjoy the benefit of treaties, which constitute *lex specialis* vis-à-vis unwritten international law. Accordingly, if customary international law or general principles of law have evolved with regard to the treatment of taxpayers, the soft law instrument must not run counter to it – otherwise, the states adhering to the instrument would engage in a violation of international law. However, such an outcome is unlikely to happen in the context of the draft instrument proposed in this book:[9] the comparative analysis of this study paints a clear picture of domestic solutions for the protection and treatment of taxpayers, and the draft instrument does not diverge from the most common solutions. This study could not give a definitive answer on the existence and content of custom or general principles with regard to taxpayer rights; yet, even if such unwritten rules have arisen, tailoring the instrument closely to existing legal designs – that have not faced any noteworthy opposition – ensures that the instrument would likely be in line with international law.

11.1.2. Hard Law – Treaty

On the other hand, treaties are desirable if states want to increase the cost of deviations from the commitments. Thus, a treaty would make successful cooperation between states (ie adherence to taxpayers' rights as stipulated in the instrument) more likely. However, this potential for enhanced cooperation depends on the design of the treaty. Many treaties do not

[4] R Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995) 25.

[5] eg C Brummer, *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering Are Redefining Economic Statecraft* (Cambridge University Press, 2014).

[6] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ Reports 14 [1986], paras 188, 191; see C Chinkin, 'The Challenge of Soft Law' (1989) 38 ICLQ 850.

[7] See eg CA Bradley, 'Unratified Treaties, Domestic Politics, and the US Constitution' (2007) 48 *Harvard International Law Journal* 307, 311.

[8] See sec 3.4.7.2.

[9] See below under sec 11.2.2.

contain any, or only weak, sanctions, and even if they are provided for,[10] the enforcement of such sanctions poses hurdles rarely overcome through legal avenues at the international level. Thus, if the treaty on taxpayers' rights does not entail credible sanctions, preferably such that can be enforced through reciprocal treatment, choosing the hard law approach may not automatically provide for more reliable commitments. However, similar to human rights treaties, enforcement through reciprocal treatment would not be feasible in the context of taxpayers' rights. Such treatment would only make matters for taxpayers worse and thus undermine the object and purpose of the treaty. If a state violated the treaty by denying taxpayers' rights, another Member State's reciprocal act of also denying taxpayers' rights would hardly be a sensible countermeasure. It is unlikely that this reaction would be suitable to 'induce that [responsible] State to comply with its obligations' under Article 49(1) of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[11] and would thus not constitute a lawful countermeasure, but an unjustified treaty violation in itself. Also, the breach of a treaty by one party does not entitle the other party to terminate or suspend the operation of provisions relating to the protection of the human person (Article 60(5) of the VCLT).

Furthermore, negotiation and implementation costs of treaties are usually higher than the costs of soft law approaches; thus, states' interest in more or less secured compliance would have to outweigh the costs of negotiating a compromise and implementing the treaty. The negotiation costs depend on a number of factors, such as the homogeneity of member states and the alignment of their interests; this determines how much time and effort must be spent on negotiating a compromise that is acceptable to all. If the comparative analysis of this study allows for the conclusion that states' approaches to taxpayers' rights are sufficiently alike, the negotiation process of the treaty might entail fewer controversial points. Of course, agreeing on credible sanctions for treaty violations might still prove to be difficult, even if all states strive for similar substantive provisions. The implementation costs (eg those of the ratification process) differ from state to state, depending on the respective constitutional and legal system.

A treaty for the protection of taxpayers' rights is similar to traditional human rights treaties, as both types of treaties primarily serve the interests of private persons as opposed to classic state interests. Accordingly, it is not clear whether states' interest in having a binding treaty would outweigh the costs of the treaty-making process. The 'treatification' of human rights is said to be a consequence of the Second World War and started with a soft law instrument, namely the Universal Declaration of Human Rights. It is possible that globalisation and the specific issues it poses for taxpayers' rights create an environment in which states consider a binding treaty desirable. Even if this is not yet the case, the evolution of human rights suggests that a soft law instrument on taxpayers' rights might trigger and forge future efforts to conclude a binding treaty. By contrast, a treaty would signal a much stronger commitment to taxpayers' rights and might increase taxpayers' trust in the international system when doing business abroad. In domestic systems that consider international law part of the law of the land that must be applied (or at least used for interpretation) by courts, a treaty would have real-life implications for taxpayers even if treaty violations could not be punished at international level.

Taxpayers' rights laid down in a treaty could also be implemented by an international court, if states so agree, ad hoc for a specific dispute or generally. To implement international tax law, courts could be arbitral or permanent courts, existing courts or courts still to be created.[12]

[10] A Guzman and T Meyer, 'International Soft Law' (2010) 2 *Journal of Legal Analysis* 171, 182.
[11] Arts on State Responsibility for Internationally Wrongful Act of the International Law Commission.
[12] Such questions are dealt with in Part III of our research.

In sum, whether policymakers should follow the soft law or hard law approach comes down to questions of political will and states' valuation of the international protection of taxpayers' rights.

11.2. The International Charter of Taxpayers' Fundamental Rights

11.2.1. The Methodology[13]

One of the suggestions from the International Law Association (ILA) study group is that the ILA develops a draft International Charter of Taxpayers' Rights. Assisting in drafting such an International Charter would be consistent with the Constitution of the ILA and its objectives of 'the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law'.

The ILA, through this study group, clearly has the expertise to assist in drafting an International Charter of Taxpayers' Rights. In carrying out its work, it is able to call upon the assistance both of ILA members, some of whom have contributed to the report of this study group, and the Observatory on the Protection of Taxpayers' Rights of the International Bureau for Fiscal Documentation. In 2015, at its Basel Congress, the International Fiscal Association also published its report on 'The Practical Protection of Taxpayers' Fundamental Rights', identifying over 80 minimum standards and best practices to protect taxpayers' rights.

In assisting in the drafting of an International Charter of Taxpayers' Rights, the ILA should avoid the danger of repeating the contents of taxpayers' charters frequently found in the domestic tax system of individual countries. These taxpayers' charters are often issued by the revenue authorities and range from promises of service standards to be achieved by the revenue authority to codes of taxpayers' rights and obligations. There has been a growth in these taxpayers' charters – or sometimes taxpayers' bills of rights – in the last few decades. Usually, they are not legally binding and offer relatively broad promises of the rights (and sometimes obligations) that may be accorded to (or expected from) taxpayers. It is not unusual to find that these charters contain broad statements such as: the taxpayer is to be treated with respect; the taxpayer is entitled to confidentiality; the taxpayer has the right to pay the correct amount of tax, etc.

Based upon the detailed work carried out by this Committee, together with the material available from the Observatory and the IFA 2015 Congress, the ILA is in a position to assist in drafting a more detailed and concrete instrument that provides practical and pragmatic guidance on the concrete implementation of international human rights' obligations in the field of relations between taxpayers and tax administrations.

There are a number of patterns that the ILA could follow in preparing a draft of an International Charter of Taxpayers' Rights. One pattern would be to take some of the existing UN-endorsed sets of guidelines or principles – for example, those related to law enforcement officials – and adjust those as appropriate to the circumstances of revenue officials. This could, in fact, produce a series of codes of conduct and guidelines, taking, for example, the Code of Conduct for Law Enforcement Officials as one document and the World Customs Organization Model Code of Ethics and Conduct as another document.

An alternative would be to draw more heavily on the expertise of the members of the ILA study group to provide a *sui generis* document based upon the results of this book, the work of the

[13] We would like to thank Philip Baker for his contribution.

Observatory and the 2015 IFA Report. In particular, the 2015 IFA Report adopted the approach of identifying both *minimum standards* and *best practices*. The study group sees merit in this approach and considers that it could be utilised in preparing the draft International Charter.

It is important to bear in mind the wide variation in the size, experience and role of different revenue authorities in this context. Some authorities are large, have experience built upon over centuries and responsibility for collecting the entire range of taxes. Other authorities operate only at the regional or provincial level and may have responsibility for only a limited range of taxes. In some cases, tax authorities struggle with basic processes, such as simply identifying all taxpayers and collecting the taxes; others are at a highly advanced stage of automation. It is essential that any International Charter is relevant to all revenue authorities, whether federal or regional, irrespective of their level of sophistication.

Equally, an International Charter must be capable of taking account of developing and changing knowledge and expertise, as well as the appearance of entirely novel challenges to tax administrations. The approach of identifying minimum standards and best practice builds in an element of this flexibility: what starts as a best practice may develop into a minimum standard for the conduct of revenue authorities. However, even beyond that, it is imperative that the International Charter is capable of flexibility and updating based on ongoing information supplied by the Observatory and by members of the ILA.

In that context, it may make sense for the Charter to be structured along the lines of an introductory chapter, setting out general principles, followed by a series of appendices containing currently identified minimum standards and best practices. Those appendices could each relate to the 12 areas of interaction between taxpayers and the tax authorities identified in the 2015 IFA Report. Thus, for example, Appendix 1 might deal with 'identification of taxpayers, issuing tax returns and communicating with taxpayers'; Appendix 2 could deal with 'the issue of tax assessments'; Appendix 3 with 'confidentiality' etc. This structure should allow for a degree of flexibility both by amendments to individual appendices and the addition of further appendices, if necessary, to deal with issues not currently within the scope of the draft International Charter.

11.2.2. The Content

11.2.2.1. General Issues

This section further elaborates on the proposed soft law approach outlined earlier in this research project,[14] drafting an International Charter of Taxpayers' Rights (ICTR, or the Charter), whose content reflects the principles that should secure effective protection of such rights. Independent of the binding or non-binding value of norms in the proposed ICTR, their relationship to legal principles could prompt states to give such norms binding value within their legal systems. From such a perspective, it is entirely possible that states may feel obliged to do so, thus indirectly acknowledging the formation of *opinio iuris ac necessitatis* in this field.

The proposed Charter consists of general clauses that define its subjective scope, objective scope, regulate fundamental rights in cross-border situations, their interpretation and minimum legal standard and specific rights, including clauses on substantive and procedural rights and the rights related to tax sanctions.

The following text will describe the content of such clauses more precisely, including their wording and some short commentaries that can help outline their object and purpose.

[14] See above sec 10.

11.2.2.2. Subjective Scope

Article 1 regulates the subjective scope of the Charter. It defines the persons entitled to legal protection under the Charter.

The proposed clause could have the following wording:

> **Article 1 – Subjective scope**
>
> This Charter applies to all persons with tax obligations.

Three relevant points arise from such wording.

First, only specific persons are entitled to the application of protection under the ICTR. The collective rights that persons may have within a given community do not fall within the scope of the ICTR but should be addressed through other legal and policy instruments that secure their protection.

Second, the definition of persons with tax obligations should be understood in the broadest possible sense, thus including individuals and other persons, as well as any other entity (also when lacking its own personality) that, according to the applicable legal rules, may have obligations concerning the liability to pay taxes, file tax returns or documents, supply tax-relevant information, collect taxes, including the penalties and sanctions that may be due in case of non-compliance with such obligations.

Third, the subjective scope is not limited to taxpayers but also covers other private persons who may have tax obligations. The latter category of persons includes the so-called tax intermediaries, that is, persons that are often involved in the collection of taxes for facilitating compliance and often also have obligations to file tax returns and documents, as well as to supply information to tax authorities.

The subjective scope does not need to define further who is a person with tax obligations, also considering that the object and purpose of the ICTR are to secure effective protection of fundamental rights of persons in connection with the levying of taxes. Therefore, if a person does not have a tax obligation, there is no need for the ICTR to secure any protection.

11.2.2.3. Objective Scope

Article 2 regulates the objective scope of the Charter. It defines the boundaries of fundamental rights.

The proposed clause could have the following wording:

> **Article 2 – Objective scope**
>
> This Charter applies to the rights expressly provided therein and to all other fundamental rights of persons with tax obligations in line with the internationally accepted standards.

In line with this clause, not all rights of persons in connection with tax obligations fall within the scope of the ICTR – only those that can be characterised as fundamental.

This clause does not contain an actual definition of fundamental rights but determines them by means of a designated-right approach and an open-ended reference to internationally accepted standards. The combined effect of the two criteria that define the objective scope of the ICTR preserves flexibility while securing a reasonable degree of legal certainty.

The former criterion makes all rights expressly enshrined in the Charter automatically eligible to its scope and legal protection. Its combination with the latter criterion characterises the list of rights as non-exhaustive and allows for the identification of additional rights by means of legal interpretation.

Such an interpretation should primarily be conducted in line with the object and purpose of the ICTR. However, it should also take into due consideration all relevant elements, including the ones based on applicable national rules. The latter analysis can prove particularly important in determining whether a given right can be regarded as fundamental in a specific region of the world. This is, for instance, the case of the principles that reflect the common constitutional tradition. Such principles have a specific legal value under the supranational law of the EU.

The theoretical reconstruction of fundamental rights of persons with tax obligations, contained in the research project underpinning the ICTR and conducted under the auspices of the ILA, plays a preeminent role in assessing the legitimacy of a right to fall within the objective scope of the ICTR. This legitimacy may grow further, considering the adoption of the recommendations by the ILA.

11.2.2.4. Cross-Border Situations

Since violations of fundamental rights connected with tax obligations frequently arise in cross-border tax situations and are generally more difficult to address, Article 3 of the Charter establishes an obligation for each state to secure effective protection of such rights in such scenario at the same conditions that would operate in a purely domestic situation.

The proposed clause could have the following wording:

Article 3 – Cross-Border Situations

The protection of fundamental rights of persons with tax obligations shall also be secured in cross-border situations.

When states conclude international conventions to regulate the exercise of their tax sovereignty, such conventions also create rights and obligations for the persons falling within the scope of this Charter.

Currently, there is no effective protection of the rights of persons with tax obligations in a cross-border context. The most critical situations arise in the presence of issues related to disparities or disputes concerning the exercise of tax sovereignty by two or more states, which still ignore the rights of the affected persons as non-state actors under public international law.

This situation is unacceptable in the globalised economy and can severely undermine the effective protection of the rights of persons with tax obligations, leaving them as mere objects of discretionary decisions of states rather than as actual holders of rights.

Insofar as one acknowledges that the latter rights are expressions of the general principles of civilised nations, this clause establishes the obligation for each state to secure effective protection of the fundamental rights of the persons with tax obligations also in cross-border situations.

This obligation affects all powers of the state with the following three corollaries.

First, each state must establish proportionate legislative measures to achieve this goal.

Second, tax authorities have an obligation to exercise their powers in a way that promotes the prompt and effective settlement of cross-border tax disputes, also when this may affect the collective interest of the national community in a speedy and effective tax collection.

Third, the judiciary must conduct its legal interpretation in conformity with the goal of securing effective protection of such rights.

The failure to secure this protection should be regarded as a violation of the obligation enshrined in Article 3 ICTR, except when the state reasonably indicates that it is imputable to a different state and has taken all reasonable steps to settle the dispute.

Each person with a tax obligation has the right to a legal remedy, including under domestic law, to enforce the right in conformity with the rule of law and secure the removal of any violation arising in a cross-border context. The entitlement to the legal remedy implies access to justice in each country with equal conditions to those that would apply in a purely domestic situation and covers all administrative review instruments that are available. In such circumstances, the effective enforcement of such remedies should operate so that each person with tax obligations has an actual right to obtain that the state and its bodies operate in line with the rule of law and the general principles recognised by the civilised nations.

In the presence of international agreements between states, the right to a legal remedy may also be exercised using cross-border tax dispute settlement administrative and (quasi-) judicial instruments. In such circumstances, the persons with tax obligations have the right to an effective legal remedy to secure that any act issued in the framework of these procedures complies with the requirements of this Charter.

11.2.2.5. Interpretation

Article 4 regulates the interpretation of clauses contained in the Charter.

The effective protection of fundamental rights of persons with tax obligations under this Charter should be limited to the cases in which it is required. A completely autonomous interpretation of its terms is, therefore, neither necessary nor desirable, since it would fail to operate as a supplement to the protection already functioning within each national legal system and also disregard the actual violations that arise in connection with the application of the tax rules in a given context.

The proposed clause could have the following wording:

Article 4 – Interpretation

Each term used in this Charter should be interpreted in good faith and in accordance with its ordinary meaning to be given to the terms in the context of the Charter and in the light of its object and purpose.

Where appropriate and to the extent that is compatible with this Charter, interpretation will also take into account the meaning that the relevant terms may have under national law from domestic and treaty sources of each state.

The criteria applicable to the ICTR, in essence, combine the autonomous interpretation of its terms with the possibility of using national law as a supplementary means of interpretation.

11.2.2.6. International Minimum Standard of Legal Protection

Article 5 establishes an international minimum standard of the effective legal protection of the fundamental rights of persons with tax obligations that limits the tax sovereignty of states and an obligation to protect such rights in line with the requirements of the rule of law and the general principles of law recognised by the civilised nations.

The proposed clause could have the following wording:

Article 5 – International Minimum Standard of Legal Protection

States shall secure effective protection of fundamental rights of persons with tax obligations with the conditions enshrined in this Charter, in line with the requirements of the rule of law and the general principles of law recognised by civilised nations.

States shall exercise their taxing powers, including in international relations, in a way that complies with the protection of fundamental rights of persons with tax obligations, as enshrined in this Charter.

The right to levy and collect taxes may not justify the violation of the fundamental rights of persons with tax obligations or to apply a more burdensome treatment than that which is proportionate to secure the payment of taxes.

The specific clauses contained in the ICTR establish an international minimum standard for the effective legal protection of persons with tax obligations. States are obliged to abide by it and to protect such rights in line with the two specific criteria set out below, which contribute to the development of an internationally homogeneous concept by way of interpretation.

The rule of law is by its own nature the first bastion that prevents arbitrariness in the levying and collection of taxes. Normally, such criterion will per se secure compliance with fundamental principles, such as legal certainty, equality, prohibition of retroactivity, proportionality, effective judicial protection and numerous other specific fundamental rights connected with tax obligations normally effectively secured by most legal systems in tax matters. However, it does not entirely prevent critical situations in which the law sets standards of protection of fundamental rights that are not in line with the ones established by this Charter.

Therefore, the reference of the rule of law should be framed in the context of the supranational standard established by this Charter and bundled together with the second criterion enshrined in this clause.

The general principles of law recognised by civilised nations supplement the former criterion by establishing an unsurmountable limit for those states that exercise taxing powers not in conformity with the international perception of fairness and justice throughout the world. The latter criterion, in fact, creates an external limit on the exercise of taxing sovereignty, which allows the ICTR to operate in line with the sources of international law, as indicated in Article 38 of the Statute of the International Court of Justice.

The third paragraph strengthens the functioning of the second one by expressly rejecting that the collective interest to secure the payment of taxes can prevail over the fundamental rights of the persons with tax obligations. This clause reflects the overall view of the ICTR that states are no longer holders of unlimited supremacy over their subjects. Instead, when exercising their taxing powers, states must comply with the rule of law and external legal constraints that operate in line with internationally accepted standards.

Further specific repercussions arise in connection with the minimum standard of legal protection for each of the three categories of rights enshrined in the ICTR.

As far as procedural rights are concerned, it creates a structural mechanism for questioning the validity of acts issued by tax authorities. Moreover, the prohibition against imposing a more burdensome treatment can stop any measure that creates disproportionate formal obligations or their disproportionate enforcement, thus also applying a proportionality test to what each tax system may request for the purpose of securing the payment of taxes.

From the perspective of substantive rights, it prevents undue tax enforcement and undue processing of confidential data of persons with tax obligations.

Finally, it confines the levying and enforcement of sanctions within the boundaries of the rule of law, avoiding any possible deterrent function that could produce an unjustified threatening effect on the persons with tax obligations and securing levels of protection for those who have violated such obligations.

11.2.2.7. Substantive Rights

Article 6 covers the so-called substantive rights. The ICTR does not aim to interfere with how states determine what persons and in what circumstances are liable to pay tax, regulate the access to confidential information for tax purposes or introduce any general limitation on similar rights of a substantive nature in connection with the levying of taxes.

However, it introduces limits on the exercise of such power in order to secure effective protection of these rights.

The proposed clause could have the following wording:

Article 6 – Substantive Rights

Any person with tax obligations has the right to the peaceful enjoyment of property, the protection of personal data and any other fundamental right of a substantive nature against measures that may adversely affect them.

The protection shall prevent the application of arbitrary measures, even when established by law and their enforcement by tax authorities.

This Article does not affect the right of each state to exercise its taxing powers and secure the collection of taxes, or to allow tax authorities to access confidential information, insofar as it does not give rise to its public disclosure.

The protection of substantive rights under the ICTR preserves a reasonable leeway for the legislator to enact its policy and establishes as legal constraints the boundaries within which the tax system may legitimately affect the right of persons to the protection of their possessions.

Tax sovereignty and the corresponding power to levy taxes do not imply the right for the state to dispose of private possessions of the persons with tax obligations but only allow for a limited functional entitlement to such possessions to the strict extent required for the payment of taxes and within the limits that do not deprive those persons of their peaceful enjoyment.

As far as the right to property is concerned, this clause prevents any form of confiscatory taxation. Taking into account the interaction of this clause with the one contained in Article 3, the context of the ICTR requires that the prohibition on confiscatory taxation applies to both purely domestic and cross-border situations. Therefore, it establishes insurmountable limits of taxation

with a view to protecting the right of the persons with tax obligations both when the confiscatory effects are due to the exercise of one tax jurisdiction and to cases of exercise in parallel of two taxing jurisdictions. In the latter case, it creates a legal obligation for the state(s) to settle the cross-border dispute.

The impact of this clause on the right to data protection implies, on the one hand, a general prohibition of public disclosure of confidential information and, on the other hand, that also when tax authorities have legitimate access to such information for the purpose of securing correct tax enforcement, they must exercise such powers in a way that complies with the overall protection of such right.

11.2.2.8. Procedural Rights

Article 7 introduces a separate right from those enshrined in Articles 6 and 8, but in essence it protects the right to fair trial for all rights contained in the Charter and with an innovative philosophy.

Basically, it gives a legal remedy for persons with tax obligations, allowing them to activate preventive judicial scrutiny in respect of any measure related to the levying and enforcement of tax obligations, including the ones related to the levying of sanctions, in order to verify their consistency with the Charter.

The proposed clause could have the following wording:

Article 7 – Procedural Rights

Any person with tax obligations has the right to a fair trial before an impartial body established by law and with mandatory jurisdiction in respect of all rights covered in this Charter.

The right to fair trial consists of the right to an immediate and effective legal remedy, which prevents any measure from adversely affecting the legal sphere of such persons in violation of this Charter.

This right to fair trial covers all phases of tax procedures, including administrative reviews with tax authorities and several related ancillary procedural rights.

Such rights include the full access to relevant information, the right of being heard before any tax measure produces its effects and all related rights necessary to secure an effective exercise of the right to defence, in line with the principle of equality of arms, the right to obtain justice within a reasonable delay and, with regard to criminal sanctions, the prohibition on double jeopardy and the privilege against self-incrimination.

No further exceptions to procedural rights shall be admitted other than the ones specifically indicated in this Charter.

The Charter reflects a dramatically new philosophy in the exercise of taxing powers, which balances tax sovereignty with international human rights and their judicial review. This international standard, in fact, levels out the right of the states to levy and collect taxes, with their obligation to comply with the limits established by the Charter for securing effective protection of the right of the persons with tax obligations.

The legitimacy of this legal standard arises from the comprehensive review of the protection of fundamental rights of persons with tax obligations under national Constitutions, supranational

law, international conventions in tax matters, including case law from throughout the world. The outcome of this analysis has then been framed in the context of the theoretical studies concerning the rights of non-state actors under public international law.

The core values of this article are common with those contained in most clauses that secure the protection of the right to a fair trial. This will facilitate its interaction with national Constitutions, international conventions and supranational law. However, the more specific wording of the provision reflects the specific critical issues that arise in tax procedures and have been studied in the framework of the research projects underpinning this Charter.

Accordingly, in the context of this Charter, the right to a fair trial operates within wider boundaries than those that are often clearly recognised. The detailed clauses in this article expressly acknowledge some specific implications, without hindering the application of further specific ancillary procedural rights.

In particular, since there can be no effective right to a fair trial in tax matters unless fairness is secured throughout the entire tax procedures with tax authorities, the Charter clearly states that the right to a fair trial also requires the right to a fair tax procedure.

Moreover, the Charter postulates the need for an immediate and effective legal remedy. Therefore, even though the ultimate goal of legal remedies is to secure an effective judicial pronouncement, the Charter clearly states the right to have measures that operate with an ex ante approach, that is, prevent the possible violations from producing their effects as an automatic consequence of the exercise of taxing powers. Executing the payment of taxes in violation of the Charter and then repaying them, including making damages good, is not as good as preventing the damages from being done. This becomes evident in respect of some rights enshrined in the Charter, such as data protection, where the prevention of public unauthorised disclosure or exchange of data is the only way to avoid major damages to the rights of persons with tax obligations.

The right to judicial scrutiny may operate in different ways in respect of the different clauses contained in the Charter, but never question the core values of this provision and the entire Charter, as indicated by the last paragraph of Article 7.

In the context of cross-border tax procedures, the absence of real judicial tax dispute settlement procedures creates serious threats to the right to a fair trial, also due to the circumstance that there is no international tax court with jurisdiction to adjudicate the disputes between states. Regardless of that, the interaction of this provision with the ones contained in other clauses of the Charter (including, in particular, Articles 3 and 5) clearly states an obligation to secure effective protection of the procedural rights of affected persons. This means, for instance, the legal standing of persons with tax obligations to question the compliance with the rule of law in the administrative cooperation concerning mutual assistance (on the exchange of information and recovery of taxes) and mutual agreement procedures (including when leading to tax arbitration). These rights will certainly create corresponding obligations (no longer just of endeavour, but also of result) on the states involved and the right to enforcement with the involvement of the judiciary in each Contracting State, where no other remedy is available.

11.2.2.9. Rights Related to Sanctions

Article 8 covers the sanctions applicable to cases of tax offences and broadly reflects the common principles applicable to criminal offences, also taking into account the common practice of levying penalties in connection with some tax violations.

The protection of such rights operates in line with the right to an effective legal remedy under Article 7.

The proposed clause could have the following wording:

Article 8 – Rights Related to Sanctions

No one shall be held guilty of any offence, which did not constitute an offence under the applicable law at the time when it was committed. Where more favourable laws are introduced before a final judgment is rendered, such laws also apply to prior committed offences.

Everyone has the right to remain silent in respect of allegations that may lead to the levying of a criminal sanction.

Sanctions must be proportionate to the severity of the offence. Criminal sanctions may only apply to more severe violations and always presuppose the culpability of the offender.

Everyone has the right to be held criminally liable or tried only once in respect of a tax offence. When sanctions of a criminal nature are due in connection with an offence, no further sanction may apply. However, this may not prevent the application of tax surcharges, interest and similar related fees connected with the mere failure to timely pay a tax due.

In principle, the Charter protects the specific rights connected with criminal tax offences in line with the standards of national constitutions, supranational law and international conventions. Accordingly, it requires prior legality, retroactivity of the law more favourable to the offender, the right to remain silent, the proportionality of a sanction to the severity of the offence and the prohibition on double jeopardy (*ne bis puniri* and *ne bis vexari*).

However, the distinction between criminal tax evasion, on the one hand, and 'aggressive tax planning' and tax avoidance, on the other hand, and the sanctions for both types of offences tend to be unclear in the framework of fighting Base Erosion and Profit Shifting (BEPS). Or, a combination of possibly several tax penalties or criminal sanctions can lead to disproportionate reactions, even though each penalty or sanction taken separately may be proportionate. This phenomenon needs particular attention.

Therefore, the Charter requires stronger protection in such situations.

This occurs for the protection in respect of certain tax penalties, which the Charter equates with those normally applicable to criminal sanctions, except for the strict requirement of culpability, which the Charter requires for criminal sanctions, but not for tax penalties (even though the Charter does not prevent applying it to them too).

Another important difference can be recorded as to the prohibition on double jeopardy concerning the levying of more than one sanction of a different nature, which the Charter allows for cases in respect of tax surcharges and interest, that is, of the obligation to pay additional amounts for the mere failure to make timely payment of tax, but not in others.

11.3. Guidelines for Tax Authorities[15]

The drafting of such an International Charter would also be consistent with the process of standard setting for government officials, developed in particular through the institutions of the United Nations (UN) and the Office of the High Commissioner for Human Rights, but drawing

[15] We would like to thank Philip Baker for his contribution.

upon the particular expertise of members of the ILA and, in particular, the study group that has prepared this report.

The process of standard setting for government officials is well known to members of the ILA. In particular, ILA members will be cognisant of the role of international bodies in developing, for example, the Code of Conduct for Law Enforcement Officials;[16] the Basic Principles on the Independence of the Judiciary;[17] the Basic Principles on the Role of Lawyers;[18] and the Guidelines on the Role of Prosecutors.[19] These and other human rights instruments put into concrete form principles, rules or guidance for the application of general human rights instruments in specific situations.

Somewhat unusually, this process of standard setting has barely begun in the realm of the activities of revenue authorities. This is particularly surprising given that international human rights instruments are clearly applicable to the activities of revenue authorities, and in many cases, revenue authorities enjoy similar powers – if not more extensive power – to those enjoyed by officials engaged in the administration of justice more generally. The only credible explanation for the failure to develop standard setting in respect of the activities of revenue authorities is that this topic has in some way fallen into the gap between two international organisations. On the one hand, the OECD is seen as the leading body in respect of tax matters but has no specific human rights mandate. On the other hand, the UN leads on human rights, especially through the Office of the High Commissioner for Human Rights, but the UN's work in the field of taxation has been relatively limited and largely confined to discussion of tax cooperation in relation to developing countries. The work of the ILA and this study group can provide extremely useful input to remedy this lacuna.

The absence of standard setting in respect of revenue authorities is particularly surprising given that there are codes of conduct that relate to government officials operating in realms not very far removed from those of revenue officials. Thus, for example, the Office of the UN High Commissioner for Human Rights has published 'Recommended Principles and Guidelines on Human Rights at International Borders'.[20] Additionally, the World Customs Organisation (WCO) has adopted a 'Model Code of Ethics and Conduct' for customs employees.[21] The WCO Model Code of Ethics and Conduct is particularly significant given that, in many countries, the administration of inland revenue and customs are combined within the same agency.

[16] Adopted by the UN General Assembly by Resolution 34/169 of 19 December 1979.

[17] Endorsed by UN General Assembly by Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[18] Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, August to September 1990.

[19] Also adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders.

[20] www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

[21] http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/integrity/instruments-and-tools/model-code-of-ethics-and-conduct.pdf?la=en#:~:text=The%20Code%20of%20Ethics%20and.

LIST OF COUNTRIES' OFFICIAL COURT NAMES

Argentina
Corte Suprema de Justicia de la Nación – Argentine Supreme Court
Juzgado Nacional Penal Económico – Argentine Federal Criminal Economic Court

Australia
High Court of Australia – High Court of Australia
(Full) Federal Court of Australia – (Full) Federal Court of Australia

Austria
Verfassungsgerichtshof – Austrian Constitutional Court
Der Oberste Gerichtshof – Austrian Supreme Court of Justice
Verwaltungsgerichtshof – Austrian Supreme Administrative Court

Belgium
Grondwettelijk Hof / *Cour Constitutionnelle* – Belgian Constitutional Court
Raad van State / *Conseil d'État* – Belgian High Administrative Court
Hof van Cassatie / *Cour de Cassation* – Belgian Court of Cassation
Rechtbank van Eerste Aanleg / *Cour de prémière instance* – Belgian Court of First Instance

Bermuda
Supreme Court of Bermuda – Supreme Court of Bermuda

Brazil
Supremo Tribunal Federal – Supreme Federal Court of Brazil
Superior Tribunal de Justiça – Superior Court of Justice of Brazil
Conselho Administrativo de Recursos Fiscais – Brazilian Administrative Tax Appeals Council

Bulgaria
Върховен административен съд – Supreme Administrative Court of Bulgaria

Canada
Supreme Court of Canada / *Cour suprême du Canada* – Supreme Court of Canada
Federal Court / *Cour fédérale* – Federal Court of Canada
Cour du Québec – Court of Quebec

Cayman Islands
Cayman Islands Grand Court – Cayman Islands Grand Court

Chile
Tribunal Constitucional – Supreme Court of Chile
Corte Suprema – Supreme Court of Chile

Colombia
Corte Constitucional – Constitutional Court of Colombia
Consejo de Estado – Council of State of Colombia

Costa Rica
Corte Suprema de Justicia – Supreme Court of Justice of Costa Rica

France
Conseil Constitutionnel – Constitutional Court of France
Conseil d'État – Council of State of France

Germany
Bundesverfassungsgericht – German Federal Constitutional Court
Bundesfinanzhof – German Federal Fiscal Court
Bundessozialgericht – German Federal Social Court
Finanzgericht – German Regional Fiscal Court

Greece
Συμβούλιο της Επικρατείας – Greek Supreme Administrative Court
Άρειος Πάγος – Supreme Civil and Criminal Court of Greece

India
भारत का उच्चतम न्यायालय – Supreme Court of India
उच्च न्यायालय – High Court of India
आयकर अपीलीय अधिकरण – Indian Income Tax Appellate Tribunal

Italy
Corte Costituzionale – Italian Constitutional Court
Corte di Cassazione – Court of Cassation of Italy

Israel
וּוִינְלְעָה עָפְשִׁמַה תיִב / المحكمة العليا – Supreme Court of Israel

Japan
最高裁判所 – Supreme Court of Japan
国税不服審判所 – National Tax Tribunal of Japan
高等裁判所 – High Court of Japan
地方裁判所 – District Court of Japan

Kenya
High Court of Kenya – High Court of Kenya
Court of Appeal of Kenya – Court of Appeal of Kenya

Latvia
Latvijas Republikas Satversmes tiesa – Constitutional Court of the Republic of Latvia

Luxembourg
Cour Constitutionelle / *Verfassungsgerichtshof* / *Verfassungsgeriicht* – Constitutional Court of Luxembourg
Cour Administrative / *Verwaltungsgerichthof* / *Verwaltungsgeriichthaff* – The Administrative Court of Luxembourg

Mexico
Suprema Corte de Justicia de la Nación – Supreme Court of Justice of Mexico

The Netherlands
Hoge Raad der Nederlanden – Supreme Court of the Nederlands
Gerechtshof – Court of Appeal of the Netherlands

New Zealand
Supreme Court of New Zealand – Supreme Court of New Zealand
Court of Appeal of New Zealand – Court of Appeal of New Zealand

Peru
Tribunal Constitucional – Peruvian Constitutional Court
Tribunal Fiscal – Peruvian Tax Court

Poland
Sąd Najwyższy – Supreme Court of Poland
Naczelny Sąd Administracyjny – Supreme Administrative Court of Poland
Sąd Rejonowy – Regional Court of Claims

Russia
Конституционный Суд Российской Федерации – Constitutional Court of the Russian Federation
Верховный Суд Российской Федерации – Supreme Court of the Russian Federation
Высший Арбитражный Суд Российской Федерации – Supreme Arbitration Court of the Russian Federation

Singapore
Singapore High Court – Singapore High Court

South Africa
High Court of South Africa – High Court of South Africa
Supreme Court of Appeal of South Africa – Supreme Court of Appeal of South Africa

South Korea
대법원 – Supreme Court Republic of Korea

Sweden
Högsta förvaltningsdomstolen – Swedish Supreme Administrative Court

Switzerland
Bundesgericht / *Tribunal Fédéral* / *Tribunale Federale* / *Tribunal Federal* – Swiss Federal Supreme Court

Tanzania
Court of Appeal of Tanzania – Court of Appeal of Tanzania
Tax Revenue Appeals Tribunal – Tanzania Tax Revenue Appeals Tribunal

Ukraine
Верховний Суд України – Supreme Court of Ukraine

United Kingdom
House of Lords – UK House of Lords
Supreme Court – UK Supreme Court
Court of Appeal – UK Court of Appeal
Upper Tribunal – UK Upper Tribunal
High Court of Justice – Her Majesty's High Court of Justice in England
First-Tier Tribunal (*Tax)* – First-tier Tax Tribunal

United States
Supreme Court of the United States – US Supreme Court
Court of Appeals – US Court of Appeals
United States Tax Court – US Tax Court
United States Court of Federal Claims – US Court of Federal Claims
United States District Court – US District Court

Zambia
Supreme Court of Zambia – Supreme Court of Zambia

Supranational courts
African Court on Human and Peoples' Rights – ACHPR
Court of Justice of the European Union – CJEU
European Court of Human Rights – ECtHR
Inter-American Court of Human Rights – IACHR
International Centre for Settlement of Investment Disputes – ICSID
International Court of Justice – ICJ
International Criminal Tribunal for Rwanda – ICTR
International Criminal Tribunal for the former Yugoslavia – ICTY
Permanent Court of International Justice – PCIJ

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Introductory Note

References such as '178–79' indicate (not necessarily continuous) discussion of a topic across a range of pages. Wherever possible in the case of topics with many references, these have either been divided into sub-topics or only the most significant discussions of the topic are listed. Because the entire work is about 'taxation', the use of this term (and certain others which occur constantly throughout the book) as entry points has been restricted. Information will be found under the corresponding detailed topics.

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