Journal of International Economic Law, 2025, **27**, 591–595
DOI: https://doi.org/10.1093/jiel/jgae042
Advance Access Publication Date: 12 December 2024
Original Article

OXFORD

Special Feature Editorial

Global tax governance: taking stock of the past and looking forward

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International tax law operates within a decentralized regime, where sovereign states are formally independent in making their tax rules. Yet, in the context of the increasing mobility of people and resources across national borders, states' tax policies become interdependent: one state's tax rules will affect another state's constituents, resources and tax revenues. Hence, states need to determine the global reach of their taxes and decide how to handle cases of such interdependence. In setting their cross-border tax rules, states commonly claim rights to tax based on two main connecting factors: first, a personal connection based on one's 'residence', 'domicile' or 'citizenship'; and second, a territorial connection called 'source' by reference to the location where the income is produced. But such claims often interact with claims of other states, thus yielding overlaps and gaps between jurisdictions. *International tax law* is traditionally viewed as the tapestry of national tax laws adopted by individual states as applied to mobile individuals and cross-border activities, alongside multiple bilateral and multilateral mechanisms put in place to alleviate the many gaps and frictions resulting from the independent application of national tax provisions.[1] As the articles in this special feature on global tax governance reveal, the international tax regime is characterized by fundamental challenges.

Indeed, the decentralized nature of the international tax regime has led to two major challenges.[2] The first is tax competition between jurisdictions, where states design their tax rules and rates in a way that makes them attractive to foreign investors and people 'in-demand' (usually the rich, highly educated, young and skilled). The second is a coordination problem. The fact that states make their rules independently causes major inconsistencies between their respective tax systems, creating barriers to cross-border economic activities as well as opportunities for tax avoidance. The coordination problem was the first to attract the attention of policymakers. Following a 1923 report commissioned by the League of Nations[3], a wide network of bilateral tax

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[1] See Rainer Prokisch, 'Sources of Law and Legal Methods in International Tax Law' in Florian Haase and Georg Kofler (eds), *The Oxford Handbook of International Tax Law* (Oxford: OUP 2023) 45.

[2] For a more detailed overview of these problems, see Tsilly Dagan, 'Community Interests in International Taxation' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford: OUP 2018).

[3] Gijsbert W.J. Bruins, Luigi Einaudi, Edwin R.A. Seligman, Josiah C. Stamp, *Report on Double Taxation*, 5 April 1923. On the history of international tax law, see Sunita Jogarajan, *Double Taxation and the League of Nations* (Cambridge: CUP 2018); Nikki J. Teo, *The United Nations in Global Tax Coordination* (Cambridge: CUP 2023).

treaties emerged in an effort to mitigate the costs associated with uncoordinated tax systems. States adopted these treaties with the stated intention of alleviating double taxation and, more recently, preventing double non-taxation. A number of instruments provide for the standardization of such treaties, with their role increasing in volume and influence throughout the years: the UN and the OECD developed model tax conventions[4], with commentaries and guidelines to follow.[5]

Competition emerged as a major concern in the 1990s but was no less troubling.[6] Two trends fostered such competition: mobility and fragmentation. The former refers to the increasing mobility of resources and taxpayers across national borders. The latter refers to the ability of taxpayers to unbundle and reassemble 'packages' of public goods and services, forming combinations that would benefit them most at the lowest tax cost.[7] By relocating to a low tax jurisdiction, mobile taxpayers and businesses are able to reduce their tax liability. But taxpayers—especially multinational businesses and high net worth individuals—do not have to place their entire operations in a single jurisdiction. Instead, they can mix and match their interactions with multiple jurisdictions simultaneously. They can reside in one jurisdiction and work, invest, incorporate, conduct business and place their production, marketing or intellectual property in multiple other jurisdictions. This alters where they pay tax in connection to these activities. For instance, they can incorporate their business in a low tax jurisdiction, place their production in another jurisdiction where, for example, taxes on labour are low, and funnel their dividends through a jurisdiction which imposes a low withholding tax on such dividends. Faced with such fragmented competition (involving tax and other policies), states, trying to outbid one another, engage in a race to the bottom, in which they offer increasingly attractive tax (and other regulatory) regimes and lower their tax rates to a level that many tax scholars and policymakers have considered suboptimal.[8] This threatens these states' ability to collect enough tax revenues to pay for their public goods and services and to promote domestic distributive justice. These issues have been further exacerbated by tax avoidance (as a result of taxpayers' jurisdiction-shopping, often with the active assistance of tax havens), and tax evasion (facilitated by a lack of exchange of information between jurisdictions).

In the 1990s, the Organisation for Economic Co-operation and Development (OECD) initiated various multilateral efforts to try to prevent harmful tax competition.[9] Most of the early efforts failed, but later efforts proved more successful. One of the first successful initiatives was in 2014, when the OECD approved the common reporting standard (CRS) with the aim of standardizing the automatic information sharing of financial accounts.[10] 2015 and 2016 then saw the emergence of a multilateral effort to curtail base erosion and profit shifting by tackling the 'gaps and frictions' between tax systems in order to limit tax planning opportunities.[11] One of the outcomes of this effort was the adoption by more than 100 jurisdictions of a multilateral instrument aimed at amending tax treaties to make them less prone to these issues.[12] Most recently, the two-pillar solution, which has received the support of over 130 jurisdictions, has been the

[4] For the latest versions of the models, see OECD Model Tax Convention on Income and on Capital: Condensed Version 2017 (Organisation for Economic Cooperation and Development 2017); United Nations Model Double Taxation Convention between Developed and Developing Countries (United Nations 2021).

[5] See Elliott Ash and Omri Marian, 'The Making of International Tax Law: Empirical Evidence from Tax Treaties Text' (2023) 24 Florida Tax Rev 151.

[6] Michael Keen and Kai A. Konrad, 'The Theory of International Tax Competition and Coordination' in Alan J. Auerbach and others (eds), *Handbook of Public Economics* (Amsterdam: North Holland 2013, vol 5) 257–328.

[7] Tsilly Dagan, 'Tax and Globalisation: Towards a New Social Contract' (2024) 44 Oxford J Legal Stud 487.

[8] Michael Devereux and others, *Taxing Profit in a Global Economy* (Oxford: OUP 2021) 104.

[9] OECD, *Harmful Tax Competition. An Emerging Global Issue* (Paris: OECD 1998).

[10] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (Paris: OECD 2017, 2nd edn).

[11] OECD/G20 Base Erosion and Profit Shifting Project, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15–2015 Final Report* (Paris: OECD 2015) 15.

[12] See OECD, 'BEPS Multilateral Instrument' (OECD) <https://www.oecd.org/en/topics/beps-multilateral-instrument.html> accessed 31 October 2024.

most ambitious attempt yet to redesign the international tax regime so as to 'address the tax challenges arising from the digitalisation of the economy'.[13] The first pillar ('Pillar One') proposes to re-allocate part of the taxing rights among participating states so that destination jurisdictions (where consumers are located) can share the tax revenues of multinational enterprises. The second pillar ('Pillar Two') defines a common approach for implementing a minimum global corporate tax of 15 per cent to be imposed on the largest multinational enterprises.[14] Although the jury is still out on how successful these later initiatives will be,[15] they have clearly transformed the conversation and level of involvement of various actors in the design of the international tax regime.

These expansive cooperative efforts uncover a third challenge for the international tax regime—the North/South divide. Even though the recent reforms have often been justified by calls to strengthen the fairness and effectiveness of the tax systems, many have criticized their lopsided results, often benefiting developed countries at the expense of developing and least-developed countries.[16] Scholars have pointed to various factors as a reason for such biased results, including negotiating power imbalances, agenda setting led by developed countries, more limited administrative capacity and the network structure of multilateral cooperation that puts much of the power in the hands of those leading the process.[17] Increasing discontent with the existing efforts brought about the latest development in global tax governance. In December 2022, the General Assembly of the United Nations (UN) adopted a resolution, initially tabled by a group of developing countries, on the 'promotion of inclusive and effective international tax cooperation'.[18] A year later, an ad-hoc intergovernmental committee was established to draft the 'terms of reference for a United Nations framework convention on international tax cooperation'.[19] If a majority of states adopt such a framework convention in the coming years, this could contribute to the multilateralization of the international tax regime while strengthening the role of the UN compared to that of the OECD.

This special feature provides readers of the *Journal of International Economic Law* with seven short articles featuring some of the major questions that are currently on the international tax agenda. Its ambition is to go beyond the technical character of tax law provisions to shed light on some of the big debates regarding critical developments in global tax governance. Which actors and institutions (should) influence tax law making? How and to what extent does international tax law favour developed countries over developing and least-developed ones? How does it advantage powerful economic actors over others? These questions are obviously not unique to international tax. Many other fields of international economic law struggle with similar questions, and thus intra-disciplinary dialogue may enrich academic discussion in this area. The articles discuss three main dimensions of international tax law and global tax governance. They

[13] OECD/G20 Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Paris: OECD 2021).

[14] See OECD/G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising from Digitalisation of the Economy—Global Anti-Base Erosion Model Rules (Pillar Two)* (Paris: OECD 2021) <https://www.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two_782bac33-en;jsessionid=iWAOwPoGyzXxkCI1ayakP1hk0tAx8Pl9L49Nxtwk.ip-10-240-5-152> accessed 31 October 2024.

[15] At the time of writing, Pillar Two has made significant progress—being adopted in an EU directive as well as in a number of other jurisdictions. Pillar One's future is uncertain given the need for a multilateral convention for its implementation and given that the USA is unlikely to support such a convention (as outlined in the contributions of John Vella as well as Luís Schoueri and Pedro Schoueri in this issue).

[16] Yariv Brauner and Miranda Stewart, *Tax, Law and Development* (Cheltenham: Edward Elgar 2013); Allison Christians and Laurens Apeldoorn, *Tax Cooperation in an Unjust World* (Oxford: OUP 2021); Tsilly Dagan, 'The Tax Treaties Myth' (2003) 32 NYU J Int Law Politics 939; Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (Cambridge: CUP 2018); Martin Hearson, *Imposing Standards* (Ithaca: Cornell University Press 2021); Afton Titus, 'Global Minimum Corporate Tax: A Death Knell for African Country Tax Policies?' (2022) 50 Intertax 414.

[17] For more on this, see the references in Titus' contribution in this special feature.

[18] United Nations General Assembly Resolution 77/244 on the Promotion of Inclusive and Effective International Tax Cooperation at the United Nations (United Nations 2022).

[19] United Nations General Assembly Resolution 78/230 on the Promotion of Inclusive and Effective International Tax Cooperation at the United Nations (United Nations 2023).

reflect on the structural and normative challenges of international tax; its current and 'imagined' institutions, instruments and procedures; as well as its impact on the interaction and power balance between developed, developing and least developed countries.

The three first articles examine key structural problems that characterise the international tax system. In his contribution, Vella provides a critical evaluation of the existing international business tax system against five criteria: economic efficiency, robustness to profit shifting, fairness, ease of administration and incentive compatibility.[20] His analysis underlines the deep structural flaws of the existing system, with its economic distortions, its vulnerability to profit shifting, its complexity and its proneness to tax competition. As he points out, the OECD international tax reform—in particular Pillar Two—is not directly targeted at fixing the primary cause of these flaws as it leaves the main building blocks of the existing system untouched. This, according to Vella, is concerning as Pillar Two, through its self-enforcing mechanism, will make it harder for states to move away from the architecture of the existing tax system and thus more difficult to tackle its deep structural flaws.

Brauner's contribution analyses the international tax system from a different angle by focusing on the international tax dispute resolution regime, which he describes as 'ineffective'.[21] He explains how the settlement of international tax disputes differs from the settlement of other international disputes. Among other things, most such disputes are settled at the domestic level and existing dispute settlement procedures at the bilateral level do not involve taxpayers, or involve them only in a very limited way. Brauner considers this situation unsatisfactory and calls for a reform of the international tax dispute settlement system, which should include a multilateral dimension and not be limited to the domestic and bilateral levels. In his opinion, this would contribute to the stability of the international tax regime as well as to its legitimacy.

Baker's contribution adds to Brauner's views on the role of multilateralism in tax as it argues that the use of multilateral instruments can serve as a way to preserve the bilateral tax system.[22] Baker first provides some insight as to why the international tax system has been dominated by bilateralism so far. On that basis, he then discusses the role that multilateral instruments can play in combination with bilateral double tax treaties. Using the example of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Baker sheds light on how this has allowed states to modify a complex network of bilateral treaties in a relatively easy and efficient way, ensuring that bilateral treaties remain effective and appropriate in a changing economic and political context. As he notes, the innovative approach of the Multilateral Convention might serve as a source of inspiration to streamline the amendments of double tax treaties for other objectives than that of addressing base erosion and profit shifting.

The second set of articles addresses concerns related to the institutions in global tax governance. Stewart's contribution sets the scene by guiding us through the different international actors that engage with global tax governance, including the UN, the OECD, the World Bank and the International Monetary Fund.[23] In addition to these international organisations, Stewart discusses the role of regional and non-governmental organizations. For instance, the African Tax Administration Forum has played a key role in recent international tax debates. A second important observation by Stewart concerns the divide between the OECD and the UN. Though the OECD and the G20 have initiated the most recent international tax reforms, the UN is often seen as a more inclusive forum for international tax cooperation.

[20] John Vella, 'What is Wrong with the International Business Tax System?' (2024) 27 *JIEL*.
[21] Yariv Brauner, 'The Elusive Reform of International Tax Dispute Settlement' (2024) 27 *JIEL*.
[22] Philip Baker, 'Using Multilateral Instruments to Preserve a Bilateral System' 27 (2024) *JIEL*.
[23] Miranda Stewart, 'International Institutions in Global Tax Governance' (2024) 27 *JIEL*.

Titus' contribution zooms in on the role of the UN in international tax governance.[24] She starts from the observation that global tax governance suffers from an inclusivity deficit, which is explained by the dominance of organizations that represent the interests of developed countries. On that basis, she calls for the creation of a UN tax body which, in her opinion, would fare better than the OECD in promoting equitable tax policies for developing countries. Among other things, she argues that the UN would be better able to involve developing countries in agenda-setting and decision-making processes. This is not to say that the UN does not suffer from its own weaknesses, but rather to emphasize that the UN, with its much broader membership, is better placed than the OECD in representing the interests of all countries, including developing ones.

The third and final part of the special feature includes two articles that, like Titus' contribution, discuss the impact of global tax governance on developing countries but do so from a substantive rather than an institutional point of view, through the perspective of global justice. The contribution by Luís Schoueri and Pedro Schoueri discusses the sensitive question of the allocation of taxing rights in the context of the digitalized economy.[25] They underline the implications of new allocation methods for developing countries with a focus on Pillar One. In their opinion, Pillar One is problematic for two main reasons: its scope is too narrow as it will target a relatively small group of multinational enterprises that meet certain thresholds in terms of turnover and profitability, and its rules are too complex. On that basis, they envisage other options for reallocating taxing rights across jurisdictions, including in the context of the UN negotiations for a framework convention on international tax cooperation.

Ozai's contribution nicely complements Luís Schoueri and Pedro Schoueri's analysis by bringing a more theoretical angle to the debate on the allocation of taxing rights. It challenges the traditional approaches that guide the allocation of taxing rights between states by demonstrating that they are not based on clear normative grounds.[26] By drawing attention to the arbitrary character of the connecting factors that are used to grant taxing rights to certain countries and not to others, Ozai demonstrates that the debate on the allocation of taxing rights is first and foremost a debate about distributional considerations, which should not be left to technocrats. From this perspective, Ozai's article, similarly to the other contributions in this feature, can be seen as an invitation to the broader community of scholars in international economic law to engage with the topic of international tax law in light of its impact on individuals and businesses across the globe.

The three parts of this special feature shed light on some of the most pressing problems that the international tax regime currently faces. None of the contributions provide ready-made solutions to these problems. Instead, they stimulate critical thinking about the different paths that international tax law might take in the coming years. Before we close, we would like to thank the Editors-in-Chief of the *Journal of International Economic Law* for inviting us to serve as special editors for this feature on global tax governance. We hope that this special feature will open the door for further cooperation among scholars in international economic law. Finally, we are most grateful to the eight tax law scholars who accepted our invitation to critically reflect on the topic of global tax governance as well as to the numerous anonymous reviewers for their constructive comments.

[24] Afton Titus, 'The Role of the United Nations in Ensuring Equitable Tax Policies for Developing Nations' (2024) 27 *JIEL*.
[25] Luís Eduardo Schoueri and Pedro Guilherme Lindenberg Schoueri, 'Rethinking Taxing Rights' (2024) 27 *JIEL*.
[26] Ivan Ozai, 'Global Justice in the Reshaping of International Tax' (2024) 27 *JIEL*.