EDITORIAL

Global Minimum Taxation and International Investment Agreements

This special issue is devoted to what could be somewhat considered as a 'niche' as it seeks to analyse the combined effect of legal regimes that are themselves fields of a high level of complexity and thus specialization. However, as the articles collected here demonstrate in impressive fashion, the topic is far from being purely of an academic interest. It is believed that it will prove to be an area of great practical importance as ever more countries proceed to implement Pillar Two in their domestic legislation.

Similar to the international tax regime that is made up of thousands of bilateral tax treaties, the international investment arena consists of approximately 2,500 bilateral agreements and a few multilateral agreements known as international investment agreements (IIAs). The large majority of these were concluded in the period between 1980–2000. They do not generally regulate tax matters, however, they provide standards of protection from harm to investments through state action, in particular through fair and equitable treatment (FET), prohibition of expropriation, and protection from discrimination.[1] Importantly, they provide investors access to a direct investor-state dispute settlement (ISDS) process in the form of binding international arbitration. The ISDS is definitely the IIA's most important and powerful enforcement tool. It is usually included in the provision under the heading 'Submission of a Claim to Arbitration'.[2] This tool ensures that host states will respect the standards of investment protection under IIAs.[3] Otherwise, they may bear significant costs of defending and losing ISDSs which will consequently negatively affect their investment climate.[4]

The Pillar Two 'regime' – if there was an inclination to refer to it as such – consists of the rules published by the OECD under the title 'OECD/G20 GloBE Model Rules' which represent a non-binding agreement by the participating states to accept the imposition of global minimum taxation at a 15% rate on large multinational corporations in the form of a set of highly technical rules.[5] As such, implementing the Pillar Two rules is liable to create significant burdens for multinational taxpayers that naturally seek to explore legal remedies to reduce the negative impact on their bottom line.

Certainly at the initial stages of the Pillar Two initiative, little attention was paid to the question of how the various elements of Pillar Two – the Income Inclusion Rule (IIR), the Undertaxed Profits Rule (UTPR), and the qualified domestic minimum top-up tax (QDMTT) – that were once implemented in the various countries either directly or, as was the case in the EU, through a directive, would adhere to existing international law. Then, virtually all discourse about the project was completely dominated by politics, policy considerations, and technical detail. Academics began to only gradually devote attention to the relationship between Pillar Two and existing income tax

Notes

1 On the application of IIAs to tax matters in general, *see* e.g., P. Pistone, *General Report*, in *The Impact of Bilateral Investment Treaties on Taxation* 1 (Lang et al. eds 2017); the United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know* (2021) (https://unctad.org/system/files/official-document/diaepcbinf2021d3_en.pdf); S. Van Weeghel, *Tax and Investment Treaties: A Few Observations*, in *Thinker, Teacher, Traveller: Reimagining International Tax – Essays in Honor of H. David Rosenbloom* 637 (Kofler, Mason & Rust eds 2021); Błażej Kuźniacki & Stef van Weeghel, *VCLT and the Peaceful Coexistence of Tax and Investment Treaties: A Case Study of Limited MFN Clauses and the FET Standard*, 17(1) World Tax J. (2024), doi: 10.59403/32xh33c; B. Kuźniacki, *European Union Law and Global Investment Regime: Unshell Proposal as a Next (Mis)step of the EU Against Investment Treaty Arbitration?*, 50 Intertax 11, 800 782–802 (2023), doi: 10.54648/TAXI2022084.

2 From the tax and investment policy-oriented analysis of the UNCTAD follows that '[a]bout 95 per cent of IIAs provide for States' advance consent to international arbitration proceedings between an investor claimant and the respondent state. Investors can directly challenge state measures before an ISDS tribunal. Recourse to domestic courts or the exhaustion of local remedies is not required under most IIAs. Tax matters are generally not excluded from ISDS'. *See* UNCTAD, *supra* n. 1, at 5.

3 J. W. Salacuse, *The Law of Investment Treaties (3rd Edition)*, 111 (Oxford University Press 2021).

4 *Ibid.*, at 161.

5 For early in-depth studies of the rules in their entirety *see* e.g., V. Bendlinger, *The OECD's Global Minimum Tax and Its Implementation in the EU: A Legal Analysis of Pillar Two in the Light of Tax Treaty and EU Law* (Kluwer 2023); Galendi Júnior, *The Justification and Structure of the GloBE Model Rules* (PhD Dissertation 2023, awarded with the EATLP Award 2024); *The 'Pillar Two' Global Minimum Tax* (Haslehner et al. eds, Edward Elgar 2024); *The Global Minimum Tax – Selected Issues on Pillar Two* (Bendlinger & Schoueri eds, Linde 2024); for a discussion of the rules at their stage prior to adoption, *see Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative* (Perdelwitz/Turina eds, IBFD 2021).

treaties, and the question was occasionally raised how its measures would stand up in the face of IIAs, in particular the standards of FET and expropriation.[6] Relatively late on a timeline of Pillar Two's developments, i.e., in late 2022 and 2023, the OECD and the UN recognized that Pillar Two measures might result in tension with the IIA standards.[7] While the UN has at least presented a brief analysis of the risks and recommended certain steps to governments to avoid conflicts between international tax and investment regimes, the OECD has not done so. Absent such an analysis, however, in summer 2023, the OECD decided to discourage investors from any claim against the host states under relevant IIAs (in such cases, the QDMTT loses its status allowing other states to levy a top-up-tax through the IIR or UTPR) without explicitly identifying the issue.[8]

Coincidently, also in the summer of 2023, the three co-authors of this editorial began discussing the feasibility of a special issue of Intertax devoted to Pillar Two and IIAs. Following a call for articles and the submission of a number of high quality drafts, a full-day seminar was held on 28 June 2024 in Luxembourg that was hosted by the ATOZ Chair for European and International Tax Law. The goal of this seminar was not only to discuss the draft articles but also to bring together experts from the tax law realm and the investment law world. The format of the day was a presentation of each article by the author followed by a discussion with experts from both worlds. Not only did these discussions offer valuable feedback to be used by the authors for completing their articles, they also showed the importance of the intercourse of disciplines to further mutual understanding of the interaction of one branch of law with another. Additionally, in the context of the Pillar Two project, the evaluative responses elucidated how that project indeed accords with the international investment protection construct provided for by IIAs. This special issue of Intertax brings together most of the articles discussed during the above seminar.

It begins with a contribution by Xiaorong Li who explores expropriation risks of the Pillar Two top-up taxes – in particular the IIR and the UTPR. It concludes that it will be difficult to prove that top-up taxes are expropriatory except in extraordinary cases because of the significant standards of the substantial deprivation test applied by ISDS tribunals.

Vanessa Arruda Ferreira and Luzius Cavelti then address good faith and investment treaties with a focus on the QDMTT. They conclude that it may possibly violate investors' legitimate expectations protected by good faith, but they remarkably include in their assessment the pressure exercised by home states that implement the IIR. If that resulted in a host state violating its obligations under an IIA, they envisage liability for the home state.

How countries may be able to minimize the conflict between the QDMTT and how to align it and IIAs is subsequently explored by Gergely Czoboly and Gabriella Erdős.

Of course, the pursuit of an IIA claim in arbitration is fruitless if no damages can be awarded. João Vitor Gomes Martins and Thatiane Cristina Fontão Pires comprehensively explore the interplay between the various charging provisions of Pillar Two and whether the different scenarios could result in damages for which the investor should be compensated.

In particular, the scenario in which a successfully challenged minimum tax leads to a top up tax in another jurisdiction raises the question of whether that other jurisdiction would commit a denial of justice under customary international law. This is explored by Jarrod Hepburn and Sunita Jogarajan who conclude that such an outcome is unlikely but not impossible.

Finally, Fabian Kratzlmeier and Aitor Navarro explore the difficult question of adjudication and enforcement of IIA-based claims against Member States of the European Union. As could be expected subsequent to the *Achmea*[9] case, there is very little possibility that intra-EU disputes can be resolved through IIAs, but

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[6] *See* e.g., B. Kuźniacki, *Pillar 2 and International Investment Agreements: 'QDMTT Payable' Seals an Internationally Wrongful Act*, 112 Tax Notes Int'l 159 (2023), https://ssrn.com/abstract=4598045; B. Kuźniacki, *Duel of the Giants: Global Minimum Tax v. Global Investment Regime* (Kluwer Arbitration Blog 4 Jan. 2024), https://arbitrationblog.kluwerarbitration.com/2024/01/04/duel-of-the-giants-global-minimum-tax-v-global-investment-regime; C. Brown & E. Whitsitt, *Implementing Pillar Two: Potential Conflicts With Investment Treaties*, 71(1) Can. Tax J. / Revue Fiscale Canadienne 189 (2023), doi: 10.32721/ctj.2023.71.1.sym.brown; R. Wamuyu, B. Ferreira Liotti & J. Owens, *Challenges at the Intersection Between Investment Provisions in Regional Trade Agreements and Implementation of the GloBE Rules under Pillar Two*, 30 (1) Transnat'l Corps 49 (2023), doi: 10.18356/2076099x-30-1-2; V. Beyer, *International Investment Agreements and the Global Minimum Tax: of Treaty Troubles and Investment Incentives*, 27(2) J. Int'l Econ. L. Jun. 241–258 2024, doi: 10.1093/jiel/jgae010; R. S. Avi-Yonah, *Pillar 2 and the BITs* (28 May 2023), https://ssrn.com/abstract=4461285.

[7] OECD, *Tax Incentives and the Global Minimum Corporate Tax: Reconsidering Tax Incentives After the GloBE Rules* (6 Oct. 2022), paras 21–22, https://www.oecd.org/publications/tax-incentives-and-the-global-minimum-corporate-tax-25d30b96-en.htm. UNCTAD, *The Global Minimum Tax and Investment Treaties: Exploring Policy Options,* IIA Issues Note 4 6–13 (2023).

[8] OECD, 'QDMTT payable' in Tax Challenges Arising from the Digitalization of the Economy – Administrative Guidance on the Global Anti-base Erosion Model Rules (Pillar Two), 17 Jul. 2023, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, paras 73–81 at 74–76, www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosion-rules-pillar-two-july-2023.pdf.

[9] Judgment by the Court of Justice of 6 Mar. 2018, C-284/16, EU:C:2918:158.

resolution of extra-EU disputes may still be pursued through IIA arbitration.

As a number of the authors themselves note, there are many uncertainties surrounding the relationship between Pillar Two's taxes and commitments under IIAs, and further research is necessary. However, they all seem to underscore the challenges that Pillar Two legislation, depending on the specific circumstances of the case, may face in the presence of an IIA.

Ultimately, even if this special issue fails to resolve all of the controversies stemming from the interplay between global minimum taxation and IIAs, the authors hope it contributes to establish a harmonious and effective working relationship between otherwise largely isolated worlds: the tax world and the investment treaty world.

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