EDITORIAL

Scholactivism in Tax Law

Tax law journals, including Intertax, regularly publish articles that can influence the policy debate. This raises questions about the role of tax law scholars as potential tax activists.[1] To what extent do they actually use their scholarly work as a way to encourage (or discourage) political, social, or legal change? What are the risks associated with such activism? These questions concerning the interaction between tax law scholarship and activism are not discussed much, at least not in writing. This editorial aims to contribute to the nascent debate initiated by scholars such as Raitasuo and Schön by offering some insights into the use of scholarly work as a tool for advocacy in tax law - an attitude that I refer to as 'tax scholactivism'.[2] Though the term activism is often associated with efforts driven by a concern for justice or the common good, I use it here to refer to any engagement aimed at facilitating or preventing social, legal, or political change even when guided by self-interest rather than a commitment to justice.[3]

I distinguish between 'tax scholactivism', for which the underlying motivation of tax law scholars' academic work is to 'directly pursue specific material outcomes' and practices of 'discursive tax scholarship', where their work is not motivated by this goal but rather by the aim of contributing to scholarly discourse.[4] I then contrast 'independent tax scholactivism' when tax law scholars act in their own name with 'professional tax scholactivism' which is when they act in the interest of other economic or political actors. These different categories are helpful because they encourage us, tax law scholars, to be self-reflective about our own work and the role of tax law scholarship more generally. To what extent are we aware of engaging in independent or professional 'tax scholactivism' rather than in 'discursive tax law scholarship'? In the final part of this editorial, I argue that tax law scholars should systematically disclose potential conflicts of interest when contributing to tax law journals, including Intertax, with this obligation being particularly evident in the case of professional tax scholactivism.

There are two points to be made before starting. First, I do not distinguish between professional tax scholactivism, independent tax scholactivism, and discursive tax law scholarship to suggest that tax scholactivism is equivalent to poor tax law scholarship or that one type of scholactivism is better than another. Instead, I use the distinction as a lens to reflect on activism in tax law and the risks that it entails. These risks might affect the quality of research projects resulting from scholactivism, but this in no way implies that it cannot produce high-quality research. Second, I should acknowledge that a large part of this editorial has been inspired by the work of two constitutional scholars, Khaitan and Lazarus, on 'scholactivism' and 'constitutional scholars as constitutional actors', respectively.[5] Khaitan considers that constitutional scholars play a 'performative' role 'in relation to constitutional law and politics'.[6] In the light of this performative role, he warns constitutional scholars, especially those with 'activist impulses', to avoid the 'temptation of directly pursuing specific material outcomes' with their scholarly work.[7] Lazarus' work complements that of Khaitan. She argues that constitutional scholars have a 'facilitative role' in healthy democracies (by 'facilitating robust democratic and constitutional debate') but also a 'constitutive role' in that they help shape 'constitutions and constitutional

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1 I define scholars in a similar manner as Lazarus: 'scholars operating in their academic capacity within a university or independent academic institution' (Liora Lazarus, *Constitutional Scholars as Constitutional Actors*, 48(4) Federal L. Rev. 483–496 (2020), doi: 10.2139/ssrn.3612305, at footnote 4).

2 Santtu Raitasuo, *The Conflict of Interest in Tax Scholarship,* 99 Critical Persps. Acct. 102394 (2024), doi: 10.1016/j.cpa.2021.102394; Wolfgang Schön, *International Tax Scholarship and International Tax Activism*, Max Planck Institute for Tax Law and Public Finance Working Paper 06 (2024).

3 The Oxford English Dictionary includes the following meaning (among others) for the word activism: 'The policy of active participation or engagement in a particular sphere of activity; spec. the use of vigorous campaigning to bring about political or social change', available at https://www.oed.com/dictionary/activism_n (accessed 10 Jan. 2024).

4 *See* Tarunabh Khaitan, *On Scholactivism in Constitutional Studies: Skeptical Thoughts*, 20(2) Int'l J. Const. L. 547–556, at 548 (2022), doi: 10.1093/icon/moac039.

5 *Ibid.*; Lazarus, *supra* n. 1.

6 Khaitan, *supra* n. 4, at 556.

7 *Ibid.,* at 555. *See also* his rejoinder for the reference to 'activist impulses'. *See* Tharunabh Khaitan, *Facing Up: Impact-Motivated Research Endangers not Only Truth, but also Justice* (6 Sep. 2022), Verfassungsblog, available at https://verfassungsblog.de/facing-up-impact-motivated-research-endangers-not-only-truth-but-also-justice/ (accessed 13 Jan. 2025).

doctrine'.[8] She posits that this implies specific 'ethical obligations' on constitutional scholars: a duty of 'academic self-awareness' and a 'duty of independence'.[9] This is not the place to provide a detailed analysis of the role of tax law scholars in today's democracies, but it does not seem too far-fetched to assume that it is similar to that of constitutional scholars (i.e., facilitative and constitutive in nature) in relation to tax law. Indeed, tax law scholars contribute to the tax policy debate, and their work can influence the interpretation and formation of tax laws. Thus, Khaitan and Lazarus' arguments can also apply to tax law scholars. In this context, the remainder of this editorial reflects on the lessons that we, tax law scholars, can derive from their work.

1 Tax scholactivism *v.* discursive tax scholarship

Scholactivism can characterize the work of all scholars. Therefore, it should not be associated with any specific type of scholarship, such as critical legal scholarship.[10] This implies that a broad range of tax law scholars, including those with a positivist approach to legal analyses, potentially engage in scholactivism. It includes those who openly argue for policy change in the field of tax but also those whose work touches upon technical tax provisions and, that way, hope to convince judges that they should be interpreted in a certain way or to encourage policymakers to amend such provisions. Similarly, tax law scholars whose work is aimed at maintaining the status quo participate in scholactivism.[11] The focus is on the scholar's motivation when conducting research rather than on its topic, research output, actual outcome, or research method. This focus thus rejects the dichotomy between 'a highly technical understanding of tax scholarship' and 'a highly political one' as the former can also be driven by political or commercial intent.[12] Consequently, it also challenges the view that scholactivism in tax is a recent phenomenon. The technical character of 'old' tax law scholarship along with its embedding in a more 'stable fiscal framework' does not support the idea that tax law scholars at the time were necessarily politically disengaged.[13] Conversely, 'new' tax law scholarship on policy relevant questions qualifies as tax scholactivism only if the scholarly contribution is driven by the motivation to effectuate policy change.

This definition of tax scholactivism is inspired by Khaitan's definition of what he refers to as 'scholactivism-driven research'.[14] He states as follows: 'Whereas truth-seeking and knowledge dissemination are constitutive of the role of a scholar, scholactivism-driven research is distinguished by the existence of a *motivation to directly pursue specific material outcomes* (i.e., *outcomes that are more than merely discursive)* through one's scholarship'.[15] Khaitan admits that 'the difference between material and discursive [outcome]' is 'fuzzy'.[16] However, 'fuzziness' is not a problem to the extent that the distinction between material and discursive outcomes is used as an internal test by legal scholars themselves to reflect on their own research process rather than as an external test to assess the quality of the research output (for instance, by funding agency or promotion committees to evaluate the profile of scholars competing for a grant or tenure).[17] When used as an external test, the concept of scholactivism is likely to fail because a tax law scholars' motivation cannot be inferred from their research findings and academic publications.[18] The fact that they conduct research on topics relevant to the policy debate does not necessarily mean that they are engaging in tax scholactivism. Likewise, if a tax law scholar's research eventually influences the policy debate, it does not automatically mean that they were engaging in tax scholactivism. If their motivation was discursive rather than policy-driven, they were engaging in discursive tax scholarship. Thus, the

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[8] Lazarus, *supra* n. 1, at 484 and 490.

[9] *Ibid.,* at 483.

[10] Note that Bookman criticizes the term scholactivism for being a 'bad label'. *See* Sam Bookman, *What's wrong with good 'scholactivism'?* (26 Aug. 2022), Verfassungsblog on Matters Constitutional, available at https://verfassungsblog.de/whats-wrong-with-good-scholactivism/ (accessed 13 Jan. 2025). Khaitan seems to agree with him (Khaitan, *supra* n. 7).

[11] On this point, *see* Gleider Hernández, *The Responsibility of the International Legal Academic. Situating the Grammarian Within the 'Invisible College'*, in *International Law as a Profession* 160–188, at 173 (Jean d'Aspremont et al. eds, CUP 2017). *See also* Raitasuo on what could be referred to as 'self-censorship' (Raitasuo, *supra* n. 2, s. 5).

[12] *See* Schön, *supra* n. 2, at 1.

[13] *Ibid.*

[14] Khaitan, *supra* n. 4, at 548 (italics maintained as in the original quote by Khaitan).

[15] *Ibid.*

[16] Khaitan, *supra* n. 7.

[17] *Ibid.* Khaitan writes: 'This fuzziness is especially less problematic because the line-drawing I am calling for is internal and motivational, rather than external and judgmental. It is best navigated by asking oneself a question in terms of agency: "*who*/*what* (do I hope) will bring about the material change?" If the answer gives primary agency to *the ideas* I am expounding, then my motivation is only to seek discursive change (and therefore do not attract my criticism). On the other hand, if there is an "I" in my question to the self, the agency I have in mind is that of myself as a scholar – *this* self-invested motivation is, to my mind, what carries the risks I identify'. (Khaitan's own emphasis is maintained in the quote).

[18] *Ibid.*

true value of the concept of tax scholactivism lies in its role as a tool for self-reflection.

2 The risks associated with scholactivism

According to Khaitan, scholars should avoid scholactivism because of the risks it entails: '*the risk* of undermining truth-seeking and/or being counter-productive'.[19] He uses two hypothetical scenarios to illustrate his point. In the first, he describes the work of someone who he refers to as a 'radical scholactivist': someone who 'cherry-picks examples' to support their argument and downplays the importance of a relevant theory because they know that the judges who they seek to influence in a future court case are opposed to it.[20] To Khaitan, this example demonstrates that scholactivism can lead to intellectual dishonesty or even fraudulent behaviour. His second example is that of a 'moderate scholactivist' who conducts their work in all honesty but who, due to their willingness to have an impact, ends up publishing their work too quickly thereby avoiding a serious peer-review process and discussions with colleagues. This ultimately prevents them from anticipating the long-term negative effects of their work. Due to their material objective, the moderate scholactivist has not devoted sufficient 'time for reading, thinking, discussing, workshopping, getting peer reviewed, revising, and so on'.[21] Given these risks, Khaitan recommends conducting research with 'a deep commitment to intellectual virtues *shaped solely by the goal of knowledge creation*' (emphasis added).[22] This does not imply, however, that research should be detached from values and engagement: values can influence the choice of topic *before* the research process begins (though Khaitan consciously chooses to avoid topics that relate to 'still-unfolding current or relatively recent events') while engagement can come *after* publication, for instance, through dissemination activities.[23]

I tend to agree with Khaitan's position, probably because of my own research experience; I find it easier to avoid the risks he describes when undertaking a research project with the aim of pursuing a discursive outcome rather than a material one. That Khaitan's work led to a considerable debate among constitutional law scholars suggests, however, that his position might require further nuance.[24] For instance, Stone argues that Khaitan's argument 'overlooks the potential epistemic *benefits* of the scholactivist mindset', i.e., the hope of bringing about social, legal, or political change can serve as a motivating factor for producing robust and reliable research outputs.[25] Another argument against Khaitan's thesis is that scholactivism is not the problem.[26] Though it might involve risks (such as 'undermining truth-seeking' due to the pressure to publish work hastily), they are not unique to it; they can also arise from institutional practices, such as universities' promotion guidelines. Instead of drawing the attention to scholactivism, it might thus be better to focus on the risks themselves. These are fair criticisms. Yet, I still believe that Khaitan's work serves as a useful starting point for reflecting on scholactivism in tax law.

Applied to the tax context, Khaitan's argument draws the attention to two main concerns. First, unlike Khaitan, many tax law scholars – including myself – choose to work on current or recent topics. It could be argued that this is due a difference between constitutional law and tax law as the former might seem more immune to the passing of time than the latter. Indeed, the regular amendments of tax laws might encourage tax law scholars to be reactive, if not proactive, towards research. This increases the likelihood and feasibility of pursing material outcomes, but it also makes tax law research more susceptible to the risks Khaitan associates with scholactivism.

Second, Khaitan's remarks on the differences of 'time and space horizons' between moderate scholactivism and discursive research draw attention to the fact that tax law scholarship is often published in relatively rapid processes.[27] This might suggest that it follows the pace of scholactivism rather than that of discursive research. I have not conducted empirical research on the timeframe of

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[19] *Ibid.* (Khaitan's own emphasis is maintained in the quote). *See also* Khaitan, *supra* n. 4, at 548.

[20] Khaitan, *supra* n. 4, at 550–551.

[21] *Ibid.,* at 552.

[22] *Ibid.*

[23] *Ibid.,* at 555–556.

[24] Part of that debate was published as letters to the editors in the International Journal of Constitutional Law and as blog on the *Verfassungsblog on Matters Constitutional*. Among others, *see* Thomas Bustamante, *Reflecting on the Ethical Commitments of Our Role*, 20(2) IJCL 557–558 (2022), doi: 10.1093/icon/moac042; Jan Komárek, *Scholarship Is about Knowledge, not Justice,* 20(2) IJCL 558–559 (2022), doi: 10.1093/icon/moac043; Liora Lazarus, *Constutional Scholars and Scholactivism*, 20(2) IJCL 559–560 (2022), doi: 10.1093/icon/moac048; Alberto Alemanno, *'Knowledge Comes With Responsibility': Why Academic Ivory Towerism Can't Be the Answer to Legal Scholactivism*, 20(2) IJCL 560–561 (2022), doi: 10.1093/icon/moac062. *See also* Rachel López, *Participatory Law Scholarship*, 123 Colum. L. Rev. 1795–1854 (2023), doi: 10.2139/ssrn.4335644, in particular 1846–1849.

[25] Adrienne Stone, *A Defense of Scholactivism* (22 Aug. 2022), Verfassungsblog on Matters Constitutional, available at https://verfassungsblog.de/a-defence-of-scholactivism/ (accessed 13 Jan. 2025). For a similar argument, *see* Richard O. Lempert, *Activist Scholarship*, 35(1) L. & Soc. 25–32 (2001), doi: 10.2307/3185384: 'caring deeply about a problem is a great stimulus to doing one's best work'; Frank Munger, *Inquiry and Activism in Law and Society*, 35(1) L. & Soc. Rev. 7–20 (2001), doi: 10.2307/3185382.

[26] *See* Leonid Sirota, *More and Better. Intellectual Diversity as a Response to Scholactivism* (23 Aug. 2023), Verfassungsblog on Matters Constitutional, available at https://verfassungsblog.de/more-and-better/ (accessed 22 Jan. 2025).

[27] Khaitan, *supra* n. 4, at 551.

publication between different law journals, but – from personal experience that serves as anecdotal evidence – I have observed that the publication process in tax law journals almost always occurs more rapidly than in environmental law and international law journals. This is not necessarily a negative feature: being published quickly can have positive outcomes, especially for early-career scholars who need to demonstrate their ability to publish for advancing their career. However, in some cases, a slower pace contributes to improving the quality of a publication if it allows the author to benefit from several rounds of comments from the peer-reviewers. Though it is obviously satisfying to have work published relatively rapidly, Khaitan's work is a reminder of the crucial role of time in the craft of scholarship, including tax law scholarship.[28]

3 Independent tax scholactivism *v.* professional tax scholactivism

There is one pervasive feature of tax law scholarship, however, that Khaitan's work does not allude to but still deserves attention: the fact that many tax law scholars engage in multiple professional activities.[29] Here, the work of Lazarus on 'constitutional law scholars as constitutional actors' is of relevance.[30] In her opinion, 'academic authority should not be bought and sold for the delivery of convenient ideas or shaped merely in the pursuit of government, corporate or institutional policy'.[31] Academic authority implies a duty of independence to be legitimate, and an inevitable corollary to this is a duty of disclosure of professional affiliations.[32] From this perspective, I find it helpful to distinguish between 'independent scholactivism' and 'professional scholactivism'. Whereas scholars who engage in the former act *independently*, those involved in the latter support a particular material outcome because it is in accordance with the interest of economic or political actors to whom they are related professionally, economically, or politically. Importantly, this does not imply that the research resulting from professional tax scholactivism is necessarily of lesser quality than that qualifying as independent tax scholactivism or discursive tax scholarship. In fact, in some cases, the opposite may be true as professional tax scholactivists might benefit from insights that are not available to outsiders.

Applied to the context of tax, an obvious – and extreme – case of professional tax scholactivism is when a tax law scholar is paid, for instance, by a corporation or a lobby group, to publish articles that support a specific material outcome. Another form of professional tax scholactivism is when one is working part-time in academia and part-time in practice and decides to publish on certain topics because they are of interest to their work outside of academia, whether it is a law firm, consultancy firm, or corporation. I should stress, however, that part-time scholars should not automatically be labelled as professional tax activists. A part-time scholar who also works in practice will not engage in professional tax scholactivism to the extent that they are not motivated by material outcomes when undertaking their schorlarly activities. Admittedly, this might be most easily achieved when working on topics that are irrelevant – and unlikely to ever become relevant – to their tax practice. Conversely, one should not automatically consider that full-time scholars never engage in 'professional tax scholactivism'. A tax law scholar whose university chair is funded by an NGO working in the field of tax justice would engage in professional tax scholactivism when they write on global tax justice with the motivation of pleasing their funder. The same would be true of a tax law scholar writing on the taxation of high-net-worth individuals with the motivation of pleasing a rich donor who is opposed to wealth taxation.

There are obviously cases when it will be difficult to distinguish between independent tax scholactivism, professional tax scholactivism, and discursive tax law scholarship. For instance, do tax law scholars who have invested their entire wealth in digital giants, such as Amazon, Apple, Microsoft and Meta, engage in professional tax scholactivism when they write on the taxation of the digitalized economy with the motivation of discouraging policymakers in their country from adopting a digital services tax? The absence of a clear answer to such hard-line cases is problematic in the context of disclosure of conflict of interest: unlike independent tax scholactivists, professional tax scholactivists face a conflict of interest that they should disclose.

4 Disclosure of conflict of interests

Disclosure of conflict of interest, which Lazarus describes as 'a common practice in academic writing', does not yet

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[28] On scholarship as a craft, *see* Elizabeth Fisher, *Back to Basics: Thinking About the Craft of Environmental Law Scholarship*, in *Perspectives on Environmental Law Scholarship* (Ole Pedersen ed., CUP 2019).

[29] Schön, *supra* n. 2, at 9–10. Schön observes: 'One of the most problematic features of tax scholarship lies in the fact that many actors in this game have professional or political affiliations that go beyond the academic institution where they are employed'.

[30] Lazarus, *supra* n. 1.

[31] *Ibid.,* at 495. On this, *see also* Peters: 'Scholars are not and should not be accountable to real clients, but only to ideal entities such as the scientific community, the truth, the public' (Anne Peters, *Realising Utopia as a Scholarly Endeavour*, 24(2) EJIL 533–552, at 540 (2013)).

[32] Lazarus, *supra* n. 1, at 496.

seem to be the norm in tax law scholarship.[33] Though I have not researched the matter empirically, my personal experience suggests that tax law journals still rarely include an explicit 'declaration of conflicting interests' that is visible below the text, in print, and on the publisher's website. To be clear, such declarations go beyond the mere mention of the potential multiple affiliations of the author next to their signature. Interestingly, they appear in some journals even when the author has declared no conflict.[34]

Clauses that explicitly indicate an absence of conflict of interest should not be viewed as redundant. They contribute to a process of self-awareness as scholars are encouraged to ask themselves whether there is 'any arrangement that would compromise the perception of [their] impartiality or that of [their] co-authors if it were to emerge after publication and [they] had not declared [such conflict]'.[35] This emphasizes that tax law scholars themselves must make a decision based on what they believe would compromise the perception of their impartiality should the information be made available to the pulic. Thus, in the example of tax law scholars who have invested all of their wealth in the digitalized economy, they would have to decide on whether this information is worth disclosing under the article that they plan to publish on digital service taxes. They could choose to proceed very carefully and disclose a potential conflict of interest to the editors who could then decide on whether they have been overly cautious. Alternatively, they could choose *not* to conduct research on the taxation of the digitalized economy to avoid the risks associated with tax scholactivism.

Before concluding, I should add some thoughts about Intertax's own policies. Readers of the journal and potential authors should be aware of Kluwer Law International's guidelines on 'publication ethics and malpractice', including its section on conflicts of interest.[36] It states as follows: 'All authors should disclose in their manuscript any financial and personal relationships with other people or organizations that could be viewed as inappropriately influencing (bias[ing]) their work'.[37] This requirement is broad. Though it is primarily directed at professional tax scholactivists, it also applies to discursive tax law scholars to the extent that their financial and personal relationships might be viewed as leading to biases even if they have had no motivation of bringing about or preventing social, legal, or political change in relation to these financial and personal relationships.

It is now perhaps appropriate to conclude this editorial with a self-reflection and disclosure of a potential conflict of interest in relation to the writing and publication of this editorial. I should first acknowledge that I set about writing it slightly differently than how I approach research generally. To be very concrete, I spent less time working on this editorial than I usually do for peer-reviewed articles. I did not present the content of this editorial at conferences and workshops before publishing it but simply asked a few trusted friends and colleagues to provide me with comments. Though I did research the topics I had planned to discuss (such as conflict of interest and activism in legal scholarship), my literature review was not as thorough as for peer-reviewed articles I have written over the past years. This is not to say that this editorial was not written with care. Yet, the *genre* and *authority* of editorials are different from that of peer-reviewed articles, and this necessarily had an impact on my writing process. Second, I should reflect on my role as a scholar with respect to this editorial: did I act as a scholactivist or as a discursive scholar? A friend who read a draft version of this editorial thought that it was 'funny' that my editorial was precisely doing 'scholactivism'. In his opinion, my motivation was to change tax law scholarship and the way we approach conflicts of interest. My friend was right, at least in part. He was correct in guessing that part of my motivation in writing this editorial was directly linked to the pursuit of a material objective. I wanted to suggest some changes to the community of tax law scholars, including that we become more compliant with rules requiring disclosure of conflict of interest. However, my motivation was also discursive. I wanted to contribute to the way we think about the *idea* of activism in tax law scholarship.

5 Declaration of conflict of interest

I do not have dual affiliation, and I have only served as a consultant on rare occasions. Therefore, I would be minimally affected by increased adherence to requirements for disclosing conflicts of interest. Aside from this – likely overly careful – disclosure, I declare no conflicts of interest with respect to the writing and publication of this editorial.

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[33] Note, however, that tax law is not the only legal area that lacks clear disclosure rules. *See* Robin Feldman et al., *Open Letter on Ethical Norms in Intellectual Property Scholarship*, 29(2) Harv. J.L. & Tech. 1–14 (2016), doi: 10.2139/ssrn.2714416.

[34] *See* for instance, Eduardo Baistrocchi, *Global Tax Hubs*, 27(2) Fla. Tax Rev. 407–477 (2024), doi: 10.2139/ssrn.4658854.

[35] This question is directly inspired by the question mentioned on the website of Oxford University Press to help authors know whether they 'should declare something'; (Oxford Academic, Conflict of Interest), available at https://academic.oup.com/pages/for-authors/journals/preparing-and-submitting-your-manuscript/conflicts-of-interest (accessed 13 Jan. 2025).

[36] Kluwer Law International B.V., Publication Ethics and Malpractice Statement, available at https://kluwerlawonline.com/media/KLI_Publication_Ethics_Malpractice_Statement.pdf (accessed 13 Jan. 2025). Note that similar guidelines apply to publications in IBFD journals. *See* IBFD Publication Ethics and Malpractice Statement (2021), at 4, available at https://www.ibfd.org/sites/default/files/2022-12/ibfd-publication-ethics-and-malpractice-statement.pdf?utm_source=chatgpt.com (accessed 13 Jan. 2025).

[37] *Ibid.*

6 Acknowledgement

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7 Editorial support

I benefited from the editorial support of Jenny Hill. Moreover, I used ChatGPT in the drafting of this editorial to rephrase some sentences.

8 Post scriptum: introduction to the special issue

The articles included in this issue address the topic of the global minimum tax under international investment agreements. They should be read together with the articles published in issue 4 on the same topic. For a short introduction to all contributions, readers are invited to consult Haslehner, Kuźniacki and van Weeghel's guest editorial published in issue 4.[38]

Alice Pirlot,
Assistant professor at the Geneva Graduate Institute,
Email: Alice.Pirlot@graduateinstitute.ch.

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[38] Werner Haslehner, Błażej Kuźniacki, Stef van Weeghel, *Global Minimum Taxation and International Investment Agreements*, 53(4) *Intertax* (2025).