# LITERATURE REVIEW

## *Current Tax Treaty Issues, 50th Anniversary of the International Tax Group*, G. Maisto (Editor), EC and International Tax Law Series Vol. 18, IBFD. 2020

What defines a resident, and how does residence shape taxation in a globalized world? What is a permanent establishment, and when is it necessary to find one for a source state taxing right to exist? What is the meaning of Article 3(2) OECD MC? What is considered as 'discrimination' under Article 24 OECD MC? Do the answers to these questions differ based on the legal tradition of the countries applying them? Such problems, which have perennially plagued tax academics, courts, and lawyers alike, have been addressed repeatedly in scholarship over the last century. The subject matter of such study is exposed to continuous changes. As legal texts, legal practice, and real-world situations experience transformation, it should not be surprising that understanding is also incessantly developing, and seemingly definite answers can only ever remain applicable for a finite period of time. This book provides many such answers and, in the process of revisiting old problems, also unveils new issues.

In the history of tax law as an academic subject, no grouping of tax cognoscenti has more consistently left its mark on such debates than the exclusive circle of scholars that has become known as the 'International Tax Group' or ITG.[1] That humble acronym describes a collaboration of tax experts from all around the globe that – with some modification in the composition of the group – has frequently made seminal contributions to the understanding of international tax issues over the last fifty years. Since its origins at the 1970 IFA Congress in Brussels where it was first established by Sidney Roberts (United States), Raoul Lenz (Switzerland), Pierre Fontaneau (France), and Charles Berg (Australia), the group has counted thirty-eight scholars from fourteen countries that has published over thirty treatises on tax treaty law. Through not only its persistence but also the size, longevity, and a unique commitment to the depth of analysis rather than speed of publication, the ITG is prominent over any other established collaboration of tax specialists. This makes the publication of a book in recognition of such an auspicious anniversary a key moment not only for the persons involved but also for the international tax law community.

The reviewed book celebrates the group's existence, persistence, and impact on global tax scholarship by revisiting many of the questions that it has addressed – and, in so doing, the understanding that it has shaped. It is another invaluable contribution to the understanding of international tax law, bringing together not only the profound intellect and depth of knowledge on tax treaties accumulated in the members of the group but also a wealth of experience from the respective countries' national laws' perspective. If there was one change that may be wished for the future development of the ITG, it would be the inclusion of a greater number of outstanding women to contribute to the important work being accomplished by the group – in addition, possibly – to a further expansion of the geographic scope covered by it.[2] The book, in which there is one female author and sixteen male contributors, is a reminder of the need for more inclusiveness which could only serve the purposes of the group as it brings in more diverse perspectives.

In keeping with the tradition of the group, this anniversary book is more than a mere celebratory volume that reminisces on the past – although it contains a delightful introductory chapter that also covers the origins and functioning of the group itself. These had not been fully understood by this reviewer despite his longstanding admiration for the publications composed by the group's pens. Instead, this book represents a very serious effort to attempt to effectively address many of the old but still existing key problems of international taxation – as well as several rather newer ones. Divided into sixteen chapters – one from each of the country's current or latest members[3] – it addresses treaty policy, treaty definitions, taxing rules, and the concepts of non-discrimination and beneficial ownership, each in a separate part. For obvious

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1 Information about the International Tax Group can now also be found online at https://internationaltaxgroup.org.

2 The latter would admittedly inevitably create disadvantages on the feasibility of effective collaboration.

3 With the exception of Germany due to Jürgen Lüdicke's sad and untimely passing.


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reasons, this brief review cannot attempt adequately to describe the wealth of original scholarship contained in this 700-page strong volume; inevitably, the reviewer must confine himself to pointing to certain eclectic 'highlights'. It should be understood that these are not selected because of their greater importance or objective merit but are entirely a reflection of the reviewer's highly subjective interest in (and knowledge of) the discussed subjects.

The book's first section focuses on treaty policy and general topics such as tax history, the development of international tax law institutions, and the practical impact of tax litigation. It would have seemed natural to the reviewer to includePhilip Baker's chapter on 'Jurisdiction and Nexus' in this first section instead of the section on 'Taxing Rules' (Part Three) which otherwise focuses on more finely grained questions of tax treaty law. That chapter addresses the most fundamental of international taxation questions, seeking to establish a theory – or rather, in this author's view – a framework for understanding the idea of 'nexus' and the limits it imposes on taxation. As prescriptive jurisdiction has proceeded beyond mere enforcement jurisdiction over the last decades, it is also becoming increasingly important to develop its normative substance. Systematizing the elements of a possible theory, Baker makes some progress towards finding such concrete content for this often cited but poorly theorized concept that goes significantly beyond earlier scholarship. The chapter points to several criteria that may effectuate taxing claims – importantly differently for various taxes and taxpayers – recognizes the need to order such claims, and makes the point that the lack of exercised claims by other jurisdictions does not itself create such a claim. Stated differently, double-non taxation does not create universal tax jurisdiction. If one thing is somewhat surprising, although certainly deliberate, it is that a chapter on taxation nexus mentions neither the idea of 'value creation' nor the 'benefit principle' at all.

One notable highlight in the first part of the book lies in the two chapters contributed by Richard Vann on the use(s) of tax history and the influence of international institutions on the development of international tax law which concludes with the insight that a 'new international tax order' may be arising rather often. The next version of this order, in Vann's convincingly argued analysis, should be based on a relatively small number of global international tax standards. It should receive political support by the G20 operating under a unanimity approach and the wider 'Inclusive Framework' formed as part of the BEPS process to ensure broad representation of nations. Additionally, a type of international tax secretariat – a role currently filled, in effect, by the OECD – should be created. Whether the OECD is the appropriate institution to be taking that role is, of course, questionable. Might it be preferable to consider a divestiture from the current structure by perhaps creating a joint bureau for international tax law and policy of the UN and the OECD?

In another fundamental and thematically closely connected chapter, Bertil Wiman reminds the reader of the risks that arise with the flurry of tax policy making activity at the international level from a constitutional perspective. In this chapter, he shows how the status of international tax norms as 'law' ultimately depends on their creation's compliance with constitutional process rules in each and every country that may outwardly 'sign on' to an ostensible global agreement. As the ongoing difficult negotiations towards a global 'deal' on international tax reform ~~by the end of the year~~ at the G20, OECD, Inclusive Framework, and UN show, this warning could not be timelier. Certainly, any celebrations of a new tax order would be premature.

In part two, four chapters concern treaty definitions. Guglielmo Maisto's masterful and highly scholarly analysis focusses on the multi-faceted concept of a 'state' —and the role it and its many subcategories such as local authorities, agencies, and statutory entities exercising state functions —play for the allocation of taxing rights under treaty law. Clearly a hitherto underexplored topic in international tax scholarship, the chapter is a great example of the work that the ITG has been dedicated to over the decades. This includes the 'signature' element of a review of the terminology's use in dozens (if not hundreds) of tax treaties concluded by the countries represented in the group. Rightly, Maisto concludes that the doubts and diverse practice call for an inclusion of guidance in the OECD Commentary that is so far lacking.

An equally remarkable empirical element of studying the law in action is showcased in Johann Hattingh's chapter on the memoranda of understanding (MOUs) which highlights the many diverse uses of this instrument. Distinct from treaty protocols, exchange of notes, and 'mere' competent authority agreements (the latter are, ~~in fact~~, MOUs, although not all MOUs are competent authority agreements),[4] their practical application ranges from the mere recording of a historical understanding of treaty provisions to de-facto attempts by the tax administration to retroactively legislate. Using illustrative examples from key jurisdictions, Hattingh explains the status of MOUs in UK jurisprudence (where they are used for interpretative purposes) and analyses their controversially debated legal value in Dutch and German case law. As the chapter also notes, it is precisely due to this controversy that the OECD appears to have aimed at enlarging the powers of competent authorities to interpret tax treaties in a manner that they consider sensible. This is

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[4] J. Hattingh, *Ch. 10: Legal Considerations Arising from the Use of Memoranda of Understanding in Bilateral Tax Treaty Relations*, in *Current Tax Treaty Issues, 50th Anniversary of the International Tax Group* 359, 380 (G. Maisto, IBFD 2020).

accomplished by both amending Article 3(2) OECD MC in the 2017 update and adding references on the status of mutual agreements under the Vienna Convention in the Commentary on Article 25. The author correctly takes a critical view of the success of this proposed interpretation, noting that it would depend on the concrete type of MOU. This rather long chapter (eighty pages including a seventeen-page index of analysed MOUs) concludes on a cautionary note indicating the need precisely to distinguish and classify different types of MOUs and calls for countries to develop clearer and more transparent policies regarding their use.

In the same part, in an even slightly longer chapter (eighty-two pages – without annexes!), Peter Blessing covers the ever-topical issue of 'treaty access limitations' – stated otherwise, anti-abuse rules and doctrines applied to tax treaties. He comprehensively reviews the law as it stands in respect of the anti-conduit (i.e., beneficial ownership) test (referred to in the chapter as the 'ACT'), the principal purpose test (PPT), and the limitation of benefits test (LOBT). Following a comparative assessment in relation to key cases for application, he concludes, crucially, that 'it is important to dispel the notion that [the PPT and LOBT] are different means to a similar end and hence are generally exchangeable'.[5] Instead, each of the three tests should actually be understood to serve a different function to address 'inappropriate' behaviour that is designed to gain access to treaty benefits. As a critical note, it may be added here that the book might have put this chapter in closer coordination (or at least spatial proximity) to Robert Danon's comprehensive exploration of the beneficial ownership concept (BO) in Chapter 15. This would have been particularly advantageous because the views of the authors appear to differ with respect to the continued relevance of the ACT/BO test following the PPT's introduction to the OECD Model. Only Blessing argues in favour of keeping (an improved) the ACT in place due to its complementarity to the other norms. Although both authors probably do not fundamentally disagree, as both emphasize the need for a clear(er) delineation of the norms' purpose, it would have been very interesting for the reader to see a more direct engagement of the two chapters.

The third part proposes dealing with 'taxing rules'; there may be a temptation to think that it is about 'source' taxation rules. In addition to the chapter mentioned above by Philip Baker and Shefali Goradia's original and comprehensive analysis of special provisions regarding the taxation of services, two chapters by seasoned members of the ITG readdress topics that have been subject of profound studies in earlier years: (dependent agent) permanent establishments and the use of the 'other income' article (Article 21 OECD MC). The revisitation to dependent agent PEs is particularly relevant due to the effort made by the OECD via the MLI and 2017 model update. It addressed French and Norwegian jurisprudence that allowed commissionaire structures to work to avoid tax jurisdiction in the agent's country of activity. Stéphane Austry points out how these attempts have been largely without impact due to countries' hesitancy to adopt the new provisions and uncertainty surrounding the courts willingness to change jurisprudence in the absence of such explicit endorsement. Additionally concerned with deviations from the (latest) OECD Model, Kees Van Raad investigates the pros and cons of diverging treaty provisions on other income in another example of extensive study of concrete tax treaty practice. He concludes that a rather significant number of these deviations are drafted 'in language that is not clear or are structured in a way that reflects a misunderstanding of the way tax treaty rules operate'.[6] For example, when the word 'only' is omitted in the other income article (whose ostensible purpose is to allocate exclusive taxing rights to the residence state), the provision becomes entirely meaningless. Nevertheless, provisions with this seemingly obvious inadequacy are ascertained in treaties concluded by countries with a sophisticated tax bureaucracy.[7]

The fourth and final part consists of only two chapters of quite unequal length – seventy-seven pages compared to thirty-one – both of which address questions on the beneficial ownership concept.[8] Robert Danon presents a radical treatise in the original context of the word. He returns to the very 'roots' of the concept, delineating it – similarly to Blessing in chapter 8 – from other, more holistic anti-abuse norms and explores the well-known (and conflicting) leading international jurisprudence prior to the BEPS reforms. Yet, the main novelty of the chapter lies in the analysis of the post-BEPS jurisprudence[9] and arguing for a likely shift in approach due to the new preamble making it clear that double non-taxation because of the application of treaty rules should be avoided. Ultimately, Danon crafts an argument that 'an objective overly broad interpretation of beneficial ownership' that may capture conduit financing structures that

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[5] P. Blessing, *Ch. 8: Limitations on Treaty Access by or through Commercial Entities*, in *Current Tax Treaty Issues, 50th Anniversary of the International Tax Group* 237, 317 (G. Maisto, IBFD 2020).

[6] K. van Raad, *Ch. 14: Tax Treaty Practice Regarding Art. 21 and Related OECD and UN Model Issues*, in *Current Tax Treaty Issues, 50th Anniversary of the International Tax Group* 541, 542 (G. Maisto, IBFD 2020).

[7] Van Raad points, for instance, to the Argentina-Canada DTC of 1993 as an example of this lapsus.

[8] It is not entirely clear why the section is entitled 'Non-Discrimination and Beneficial Ownership'; although the ITG has done important work on non-discrimination in the past from which the reviewer has benefited enormously, the chapters in this book do not seek to readdress that aspect.

[9] Such as the Canadian Tax Court deciding in CA: Tax Court 22 Aug. 2018, Alta Energy Luxembourg Sàrl *v.* R, 2018 TCC 152. .

would fall beyond the ambit of the PPT rule would not be in accordance with the 'consensus' expressed in BEPS Action 6. This regards the type of conduit structures that should be addressed by anti-abuse rules.[10] As a result, Danon suggests, the beneficial ownership concept really has run its course.

This would be news to the European Court of Justice (ECJ), which appears only recently – and certainly influenced by precisely those BEPS discussions – to have expanded both the content and the scope of the concept within European Union law in the so-called Danish Beneficial Ownership cases.[11] In the book's final chapter, Luc de Broe addresses the importance for tax treaty interpretation by EU Member State courts in light of those judgments.[12] Despite frequently critical comments on those decisions' persuasiveness – which the author and this reviewer share – De Broe concludes that intra-EU tax treaties will need to be interpreted by national courts in a way that ensures consistency with those judgments. He reaches this conclusion following a careful deconstruction of the situation. Following a meticulous analysis of Article 31(3)(c) of the Vienna Convention, he concludes that EU law qualifies as 'rules of international law applicable in the relation between the parties' As such, the law must be considered when construing beneficial ownership for purposes of a DTC between Member States. As an additional argument, he submits that EU law forms part of the 'context' within the meaning of Article 3(2) OECD MC. However, this importing of EU law into tax treaty interpretation should be limited to cases in which a potential conflict of EU law and tax treaty law would otherwise arise. Indeed, De Broe also makes it clear that he thinks the ECJ case law should only be determinative of beneficial ownership when the facts come within the scope of the Interest-Royalties Directive on which that court rendered its judgment.

If this review appears rather uncritical to the reader, it is because there is hardly a fault to be found. This should not come as a surprise considering the 'pedigree' of its creators. The book is a truly remarkable addition to the International Tax Group's oeuvre and a very appropriate celebration of its fiftieth anniversary. (Re)investigating perennial problems again with fresh perspectives from the angle of the latest developments and repeatedly delving deeply into tax treaty practice, it is poised to both inspire much further scholarship worldwide and be a key reference for anyone seeking to understand tax treaty law at an elevated level.

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[10] R. Danon, *Ch. 15: The Beneficial Ownership Limitation in Arts 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?*, in *Current Tax Treaty Issues, 50th Anniversary of the International Tax Group* 585, 660 (G. Maisto, IBFD 2020).

[11] ECJ 26 Feb. 2019, Joined cases C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1, ECLI:EU:C:2019:134; ECJ 26 Feb. 2019, Joined cases C-116/16, C0117/16, T Danmark, ECLI:EU:C:2019:135.

[12] L. Du Broe, *Ch. 16: Should Courts in EU Member States Take Account of the ECJ's Judgment in the Danish Beneficial Ownership Cases When Interpreting the Beneficial Ownership Requirement in Tax Treaties?,* in *Current Tax Treaty Issues, 50th Anniversary of the International Tax Group*, (G. Maisto, IBFD 2020).