
Book review

HOW INTERNATIONAL IS TAX LAW?

A Global Analysis of Tax Treaty Disputes, by Eduardo Baistrocchi (ed), CUP, 2017, two volumes of 1,588 pages: ISBN 9781107142466 and 9781107142473. UK £300.

Both Eduardo Baistrocchi and his publisher Cambridge University Press are to be congratulated for having the courage, energy and discipline to produce this excellent publication. A book, even in two volumes, with the title “A Global Analysis of Tax Treaty Disputes” might ordinarily seem to be an over-ambitious project but this publication is a triumph. There are both scope and scale in this book which makes it unique in tax academic literature. The publication will also be immensely valuable in taxation practice, administration and jurisprudence for reasons discussed below. In short, the book is a remarkable reflection of legal analysis and likely to be of huge assistance in international tax disputes, but more generally in tax legal scholarship.

The book critically examines nearly a century of international tax cases and disputes, some 1,610 leading decisions, from a multitude of angles. The information is analysed from the perspective of time (from 1923 to 2015). The data is also analysed from the jurisdictional perspective of individual and collective groups of countries. These are separated into two major categories. The first is all of the G 20 countries, and the second, seven non-G 20 jurisdictions such as Hong Kong, Ireland, the Netherlands, Singapore and Switzerland (many of which are important jurisdictions for cross-border investment but one is hesitant to call them investment conduits in the post-Base Erosion and Profit Shifting (BEPS) era). This enables the analysis to consider the “general practice” of certain states and the categories of states over periods of time.

One of the principal purposes of this analysis is to examine whether there is convergence in legal analysis undertaken by courts in respect of tax disputes from around the world. Essentially, Baistrocchi’s book is examining whether there is such a thing as an international tax regime in the sense of where there is enough consistent jurisdictional recognition to say that an international tax regime exists and is binding upon different jurisdictional states as a matter of customary international law. Given the increasing reliance on the OECD Model by different countries for the formulation of tax treaties, it is perhaps unsurprising that the analysis supports common interpretation and closer alignment between jurisdictions.

Of course, post-BEPS and with the multilateral instrument (MLI) becoming so significant in amending treaties, one would expect this convergence to continue at an extremely rapid rate. For example, given that the principal purpose test for preventing tax treaty abuse will now be found in approximately one-third of the world’s tax treaties one would expect a greater reference to respected jurisdictions foreign court decisions and a growing body of international jurisprudence. Introducing the MLI into the world’s tax treaty network does not lessen the extremely valuable material produced in these volumes, but it does suggest that Baistrocchi’s work is not finished and that the comparison between the pre-BEPS and post-BEPS eras will be equally fascinating.

As well as identifying the big question of whether an international tax regime exists the book does much more. On an individual country basis, it looks at the structure of the law used for solving tax treaty interpretation disputes. It also examines tax treaty interpretation on a jurisdictional basis including the use of soft law and the OECD Commentary. It looks at the use of foreign judgments in deciding tax treaty disputes decisions. Of course, it is an invaluable source of international tax case law but readers will find the analysis of the cases insightful.

In formulating the analysis 116 patterns of tax treaty disputes are identified which are separated into three core categories relating to the OECD Model Tax Convention: (1) disputes on definitional articles (Articles 1-5); (2) disputes on substantive articles (Articles 6-23); and (3) disputes on procedural articles (Articles 24-31).

The country chapters are written by leading academics, practitioners and tax administrators but it also should be acknowledged that the writers had access during conferences to a team of the best international tax experts from around the world.

The book is likely to be of immense value, not only to academics and students but to tax practitioners, tax administrators and the tax judiciary because of the analytical features described above. The two-volume set is a comprehensive and significant contribution to tax literature.

Craig Elliffe

Professor of Taxation Law and Policy, University of Auckland, Faculty of Law