

Are Taxes Converging?

Eduardo Baistrocchi's outstanding new book on tax treaty disputes is the result of an intense five-year global collaborative project among international tax scholars, practitioners, and administrators. The book provides an unprecedented set of information and offers the first global qualitative and quantitative analysis of one of the most important international tax scholarship debates over the last decades: whether a binding international tax regime exists as a matter of customary international law.

Baistrocchi's book covers over 1,610 leading tax treaty cases and is grounded on both country-by-country and topic-by-topic analyses. In particular, it covers the so-called "pre-BEPS Reports Era" from 1923 — when four eminent economists reached the compromise underlying the tax treaty network — to October 2015, when the OECD and G-20 released the final BEPS package, "the most fundamental changes to international tax rules in almost a century,"¹ said OECD Secretary General Angel Gurría in an October 5, 2015, official press release.

Baistrocchi's book allows readers to make an informed decision about whether a binding international tax regime exists. The book demonstrates an increasing convergence between tax treaties and the OECD model. This finding is consistent with recent research by Elliott Ash and Omri Marian on comparing treaty language using natural language analysis.² Ash and Marian found that between 1970 and 2015 the similarity of the texts of over 3,000 tax treaties rose from 60 percent to 80 percent, primarily due to increasing influence of the OECD model treaty.³

These conclusions bolster the view that countries are not free to adopt any international tax rules they please, but rather operate within the current international tax regime context. For example, Brazil will likely have to abandon its long tradition of establishing fixed margins for gross profits and markups regarding the cost-plus method and the resale price method, and adopt rules modeled after the OECD guidelines (making use of comparable transactions) in order to join the OECD. Mexico and South Korea made similar changes upon joining the OECD.

Baistrocchi's book also has interesting implications for the ongoing debate on whether the "single-tax principle" is part of the international tax regime. Since 1997, the first

should be taxed primarily at source, while passive investment income primarily at residence) and the single-tax principle (income should be taxed once — that is, not more and not less than once).

This thesis has been controversial. While most commentators agree that the benefits principle has been the core of the international tax regime since 1923, several prominent international tax academics and practitioners in the United States and elsewhere deny the validity of the single-tax principle. Some doubt its coherence.⁴

In the book's introduction, Baistrocchi briefly describes a tax treaty dispute that seems inconsistent with the single tax principle. Instead of investing in India directly, foreign direct investors decided to route investments from the Netherlands to India through Mauritius to take advantage of the favorable India-Mauritius tax treaty. The use of a "shell company" incorporated in Mauritius, whose main purpose was investing funds in India, had two important implications. First, the transfer of shares of an Indian company controlled by a Mauritius resident company was not subject to capital gains tax in either country under both the India-Mauritius tax treaty and Mauritian domestic tax law. Second, it substantially increased Indian inbound foreign

Similar positions have been adopted by the EU in the anti-tax-avoidance package⁵ and by the OECD in the context of BEPS. For example, the new preamble to the OECD model tax treaty states that:

(State A) and (State B) . . . Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance [Emphasis added.]

OECD Secretary General Gurría stated upon introducing the final BEPS package that:

Base erosion and profit shifting affects all countries, not only economically, but also as a matter of trust. BEPS is depriving countries of precious resources to jump-start growth, tackle the effects of the global economic crisis and create more and better opportunities for all. But beyond this, BEPS has been also eroding the trust of citizens in the fairness of tax

systems worldwide. The measures we are presenting today represent the most fundamental changes to international tax rules in almost a century: they will put an end to double non-taxation and facilitate a better alignment of taxation with economic activity and value creation, and when fully implemented, these measures will render BEPS-inspired tax planning structures ineffective.⁷ [Emphasis added.]

Baistrocchi's book shows how the international tax regime has evolved slowly toward coherence from its origins to 2015. The G-20/OECD BEPS efforts have now enshrined both principles of the regime in the tax treaty network. In particular, the new multilateral instrument, signed by over 70 jurisdictions (but not the United States), will incorporate the single-tax principle into over 1,000 tax treaties.⁸ This, as Baistrocchi recognizes, represents a new era in international taxation. But to understand this new era, it is essential to appreciate what came before it, and for that Baistrocchi's book will be an indispensable guide. ■

⁵This includes the anti-tax-avoidance directive effective in all EU member states from January 2019. The directive directly implements the single-tax principle.

⁶Note that the language ("without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance") is identical to the U.S. language, indicating that despite not signing the new multilateral instrument the United States is aligned with the OECD on this issue.

⁷OECD, *supra*note 1.

⁸On the MLI, see Avi-Yonah and Xu, "A Global Treaty Override? The New OECD Multilateral Tax Instrument and Its Limits," *Mich. J. Int'l L.* (forthcoming, 2017).