

# The settlement of tax disputes by the International Court of Justice

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## INTERNATIONAL LEGAL THEORY

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**Abstract:** *This article analyses the ICJ, one of the most eminent actors of the international legal regime, as an actor of the international tax regime. So far, the ICJ's role in tax dispute resolution has been a blind spot in the literature.*

*The descriptive part of this article first discusses the case law of the PCIJ and ICJ that considers – albeit incidentally – questions of taxation. These tax-related cases are categorized as (i) 'wrongful taxation' constituting the subject matter of the dispute; (ii) taxation as evidence for a 'genuine link' between the state and a national; or (iii) taxation as an 'effectivité' to prove the de facto exercise of state authority over a given territory.*

*The second half of the descriptive analysis assesses the Court's jurisdiction over tax disputes. Tax treaties usually lack compromissory clauses. Yet, there are a number of jurisdictional bases that vest the Court with the competence to sit over hypothetical tax treaty disputes, although certain reservations may render the Court's jurisdiction residual to other means of tax dispute settlement. Further, Article 344 TFEU possibly precludes EU member states from initiating ICJ proceedings concerning tax treaty disputes with other EU states.*

*The second, normative part of this article contemplates the Court as a future 'World Tax Court'. It briefly addresses (i) possible effects of the ICJ's hypothetical involvement in tax disputes; (ii) whether the ICJ might have a future role in tax dispute settlement in light of recent developments; and (iii) whether it is even desirable to involve the Court in tax disputes.*

**Keywords:** *double tax treaties; international dispute resolution; international tax disputes; international tax law; jurisdiction of the International Court of Justice*  
Ecclesiastical Law

## 1. Introduction

## The settlement of tax disputes by the International Court of Justice

The idea of engaging the 'World Court' with tax disputes is not new. For instance, the League of Nations' 1928 Draft Conventions for the Prevention of Double Taxation explicitly referred to the possibility of dispute settlement by the Permanent Court of International Justice (PCIJ or the

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Court).<sup>1</sup> In 1949, the Netherlands proposed to set up a 'fiscal chamber' within the newly established International Court of Justice (ICJ or the Court).<sup>2</sup> None of these propositions ever materialized, and international tax law, along with the settlement of tax treaty disputes, branched off from the discipline of public international law.

This separate evolution of international tax law and public international law is reflected in tax treaties and international case law: tax treaties do not grant the ICJ jurisdiction, and in turn, the ICJ has never ruled on any tax treaty disputes. In brief, there appears to be no appetite to settle tax disputes before the Court. Yet, there is no intrinsic reason why international taxation should not concern the Court. Indeed, the Court has repeatedly acknowledged – albeit only in passing – a core feature of taxation, namely its vital role for state sovereignty.<sup>3</sup>

This article aims to reunite the discourse on ICJ dispute settlement and international tax law by analysing the ICJ's role in tax dispute resolution. Much has been written about the potential of international tax arbitration to reform tax dispute settlement.<sup>4</sup> Yet, in stark contrast to the wealth of literature on international tax arbitration, there is little scholarship on the ICJ's role in tax dispute settlement.<sup>5</sup>

This lack of scholarly attention is hardly surprising, considering the general alienation between public international lawyers and international tax law. However, in the wake of recent efforts to make international tax law fit (and fair) for our fast-paced, digital world in the twenty-first century,<sup>6</sup> it is worthwhile to take a step back and reconsider international tax law within the broader system of international dispute settlement. Accordingly, this article contemplates the ICJ, the bigwig of international dispute resolution, as an actor of the international tax regime.

Another central and recurring question of this article is the relationship between the ICJ and other actors with a role in tax dispute resolution: overlaps and potential conflicts arise in relation to the tax treaty-specific 'mutual agreement procedures' (MAPs), tribunals engaged in international tax arbitration, and, in the intra-EU context, the Court of Justice of the European Union (CJEU).<sup>7</sup> However, any analysis of these alternative avenues of dispute settlement can only

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be incidental in an article that focuses on tax dispute *litigation* before the PCIJ and ICJ from the perspective of a public international lawyer. Although other means of tax dispute settlement warrant occasional reference and comparison, an in-depth analysis of the case law and potential of other international courts and tribunals is beyond the scope of this study.

This article proceeds as follows. The next, descriptive Section 2 discusses the role of taxation in the Court's case law. As the Court has never heard a tax *treaty* dispute, this section takes a broad view and investigates whether and in what context the Court has engaged with tax matters more generally. Subsequently, Section 2 analyses existing bases for the Court's jurisdiction over tax treaty disputes, in particular compromissory clauses and optional clause declarations under Articles 38(1) and (2) of the ICJ Statute. Section 3, the normative part of this article, assesses (i) anticipated effects of the Court's involvement in tax treaty disputes; (ii) the likelihood of tax dispute settlement by the ICJ in the future; and (iii) whether it is even desirable to involve the Court in tax treaty disputes.

## 2. The *lex lata* of tax disputes before the ICJ

This section asks descriptive questions to establish the *status quo* of the Court's (i) jurisprudence; and (ii)

jurisdiction relating to tax disputes. We will first screen the PCIJ's and ICJ's case law to see whether and, if so, how the subject matter of taxation has featured in the Court's past decisions. Second, we will discuss whether any jurisdictional bases vest the Court with the competence to sit over a hypothetical tax treaty dispute.

## 2.1 Taking stock: Taxation in the case law of the Court

Neither the PCIJ nor the ICJ has ever dealt with a dispute concerning a double tax treaty. However, both Courts occasionally had to consider – mostly incidental – questions of taxation that did not relate to tax treaties but to other legal instruments. The cases that entailed tax-related considerations can be categorized as follows: (i) 'wrongful taxation' as the actual subject matter of the dispute; (ii) taxation as evidence for a 'genuine link' between the state and a national; and (iii) taxation as an '*effectivité*' to prove the exercise of state authority over a given territory. The following review addresses the cases that belong to these categories in turn.

### 2.1.1 Cases on 'wrongful taxation' before the World Court

A handful of cases before the PCIJ and ICJ revolved around claims that certain tax measures constituted internationally wrongful acts.

The earliest example is the PCIJ's 1932 judgment in *Free Zones of Upper Savoy and the District of Gex*, which concerned French taxes levied at the frontier to free zones established by treaties between France and Switzerland. Switzerland argued that these levies on imported goods ('importation taxes' in the Swiss diction) were incompatible with France's treaty obligations to refrain from imposing customs duties at these frontiers. The Court first reiterated a notion now known as the Lotus principle: 'the sovereignty of France is to be respected in so far as it is not limited by her international obligations'<sup>8</sup> and further that 'in case of doubt a limitation of sovereignty must be construed restrictively'.<sup>9</sup> Following these observations and a review of the parties' past practice, the Court determined that France had only agreed to abstain from erecting *customs* barriers but retained its full sovereign rights to collect 'fiscal taxes' in the free zones. With respect to the specific

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French duties at stake, the Court 'neither desire[d] nor [was] able to'<sup>10</sup> decide whether they actually constituted fiscal taxes or customs duties in disguise.<sup>11</sup> Thus, the Court concluded in its *dis-positif* that, in *abstracto*, France retained 'the right of the French Government to collect at the political frontier fiscal duties not possessing the character of customs duties'<sup>12</sup> but refrained from deciding on the lawfulness of the French duties.

In the abstract, the PCIJ further acknowledged that the levying of impermissible customs duties under the guise of permissible fiscal taxes would be an 'abuse of a right' and thus contrary to France's treaty obligations; on the other hand, 'an abuse cannot be presumed by the Court'.<sup>13</sup> The PCIJ also came up with a general distinction between taxes and customs duties in an *obiter dictum*: 'in principle, a tax levied solely because of importation or exportation across the frontier must be regarded as a tax in the nature of a customs duty and consequently as subject to the regulations relating thereto'.<sup>14</sup> Thirty years later, the Court of Justice of the European Communities adopted the same definition in *EEC Commission v. Luxembourg and Belgium*.<sup>15</sup> In contemporary tax law, the PCIJ's *dictum* still reflects the classic distinction between customs duties and taxes.

Three further PCIJ or ICJ cases concerned allegations of 'wrongful taxation': they deal with taxation as 'treatment' of private persons in contravention of non-discrimination standards (now often divided into the 'national treatment' and the 'most-favoured-nation' (MFN) standard).

The first of these cases is the PCIJ's *Prince von Pless* case, which the German Reich instituted against Poland in 1932 to claim violations of the non-discrimination clause in the 1922 Geneva Convention concerning Upper

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Silesia.<sup>16</sup> Germany claimed that the Polish Tax Office had imposed discriminatory income taxes on the Prince von Pless, a Polish national belonging to the German minority ('of German race and language'<sup>17</sup>) in Polish Upper Silesia.<sup>18</sup> The PCIJ never decided on this tax dispute because the German Reich ultimately asked for the case to be discontinued.<sup>19</sup>

In *Electricity Company of Sofia and Bulgaria*, Belgium argued that Bulgaria had passed an income tax law that discriminated against a Belgian company operating in Bulgaria.<sup>20</sup> In its 1939 judgment on Bulgaria's preliminary objections, the PCIJ held this tax-related claim inadmissible, as Belgium had not established that 'before the filing of the Application, a dispute had arisen' between the two states.<sup>21</sup> The case was interrupted by the German invasion of Belgium in 1940 and was never resumed before the newly established ICJ.

In the case *US Nationals in Morocco* before the ICJ, the USA contended in a counter-claim that France had disregarded the 'fiscal immunity' (i.e., tax exemption) of US nationals in France's

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protectorate in Morocco.<sup>22</sup> According to the USA, collecting taxes from US nationals was contrary to the MFN clause contained in the 1836 Treaty between Morocco and the USA, a treaty which was also binding on France in its administration of Morocco. The USA argued that this MFN clause imported fiscal immunities granted in treaties between Morocco and third states (namely the UK and Spain) into the 1837 Morocco-USA Treaty and thereby applied to US nationals living in the French protectorate.<sup>23</sup> The Court rejected this argument since the relevant provisions in Morocco's treaties with the UK and with Spain had been either abrogated or renounced and could thus not be invoked under an MFN clause.<sup>24</sup> Further, the Court disagreed with the USA's reading of other treaties that allegedly stipulated fiscal immunity for US nationals.<sup>25</sup>

Finally, the ICJ's *Dispute regarding Navigational and Related Rights*<sup>26</sup> between Costa Rica and Nicaragua has been discussed as a tax-related ICJ case in the literature,<sup>27</sup> although the charges at stake may be better understood as fees for services. In substance, the Court agreed with Costa Rica's claim that Nicaragua had violated the freedom of navigation under the 1858 Treaty of Limits, which entailed an 'obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the [San Juan River]'.<sup>28</sup>

### 2.1.2 Diplomatic protection and tax obligations

The second category of tax-related considerations before the ICJ arose in the context of the law of diplomatic protection.

In *Nottebohm*, Guatemala maintained that it was under no obligation to recognize Liechtenstein's exercise of diplomatic protection in favour of Mr Nottebohm, who had previously acquired Liechtenstein nationality through naturalization.<sup>29</sup> The Court agreed with Guatemala and held that Nottebohm's fiscal obligations owed to Liechtenstein in the form of a naturalization tax did not suffice to establish the requisite 'genuine connection' between Nottebohm and Liechtenstein.<sup>30</sup>

*Barcelona Traction* prompted the Court to address how corporate tax planning affected diplomatic protection. The Court decided that Belgium lacked standing, as it could not exercise diplomatic protection for a company incorporated in Canada, even if the company was largely held by Belgian shareholders.<sup>31</sup> According to the Court, this outcome withstood arguments of

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equity since the incorporation of companies abroad was often motivated by tax advantages – advantages the

shareholders had to balance against the risk of closing the door to diplomatic protection by their state of nationality.<sup>32</sup>

### 2.1.3 Taxation as proof of state authority over territory

The third line of ICJ case law entails considerations of taxation in boundary disputes. The 1959 *Case concerning Sovereignty over Certain Frontier Land* between Belgium and the Netherlands was the Court's first case that featured taxation as an *effectivité*.<sup>33</sup> In this case, the Netherlands argued that Belgium had lost its legal title over the disputed plots by prolonged non-assertion of authority and by Belgium's acquiescence to the Netherlands' exercise of territorial sovereignty.<sup>34</sup> To support this claim, the Netherlands invoked its practice of tax collection – allegedly undisturbed by any resistance or protest by Belgium – as evidence for its exercise of sovereignty over the disputed plots. Belgium on the other hand responded that it had been unaware of the Dutch practice of tax collection.<sup>35</sup> The Court observed that 'the acts relied upon by the Netherlands [were] largely of a routine and administrative character performed by local officials' and ruled that they were 'insufficient to displace Belgian sovereignty'.<sup>36</sup>

Since then, parties in various territorial disputes have sought to substantiate their claims, often concerning boundaries of post-colonial territories in light of the *uti possidetis* doctrine,<sup>37</sup> by referring to their practice of tax collection as an '*effectivité*'.<sup>38</sup> In the *Frontier Dispute* between Burkina Faso and Mali, the Chamber of the ICJ defined colonial *effectivités* as 'the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period',<sup>39</sup> which in turn 'may be of value as evidence of the position of the provincial boundary'.<sup>40</sup>

Crucially, the Court has consistently held that proof of legal title trumps colonial and post-independence *effectivités*, including tax collection – unless the state holding the title acquiesced in the passing of title to the other state.<sup>41</sup> If legal title cannot be ascertained for either state, however, *effectivités* may suffice to establish sovereignty if they entail an 'intention and will to act as sovereign' and constitute an 'actual exercise and display' of authority over the territory.<sup>42</sup>

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Further, the Court has accepted the payment of taxes as evidence that the taxed activity was undertaken with governmental authorization.<sup>43</sup> This is relevant because activities by private persons can only 'be seen as *effectivités* if they ... take place on the basis of official regulations or under governmental authority'.<sup>44</sup> In other words, taxation may not only constitute an *effectivité* in itself but may also qualify acts undertaken by private actors as (state-sanctioned) *effectivités*.

### 2.2 ICJ jurisdiction over tax treaty disputes

Double tax treaties are bilateral treaties between states and thus fall within the scope of the Court's personal jurisdiction, which is limited to inter-state (i.e., 'horizontal') disputes. However, tax treaties also benefit private persons, which may give rise to 'vertical' disputes, i.e., between taxpayers and states.

Private persons lack standing before the Court. Therefore, taxpayers can only have indirect recourse to the Court if their state of nationality espouses their claim through diplomatic protection.<sup>45</sup> Yet, this avenue of diplomatic protection may not be open under tax treaties due to an idiosyncrasy: their application *ratione personae* is usually tied to taxpayers' *residence*, not to their nationality.<sup>46</sup> In contrast, public international law insists on *nationality* as the fundamental link between private persons and the state vested with the right to exercise diplomatic protection.

Since states may only exercise diplomatic protection in favour of their nationals, there are certain constellations in which a taxpayer's individual rights under a tax treaty cannot be asserted by any state. For instance, if a taxpayer is

not a national (but only a tax resident) of either contracting state of a given tax treaty, a case brought on the basis of diplomatic protection would be inadmissible. Under these circumstances, the taxpayer's state of nationality is not a party to the applicable tax treaty and would therefore lack standing to bring a claim on behalf of their national. Conversely, the taxpayer's state of residence cannot espouse any claims of non-nationals. As a result, *vertical* tax treaty disputes of this constellation face an insurmountable obstacle with respect to the Court's jurisdiction.<sup>47</sup> Of course, aside from vertical disputes, the contracting parties may still claim the violation of *their own* (i.e., horizontal) rights under the relevant tax treaty that exist in parallel to any taxpayer rights.<sup>48</sup>

In principle, tax treaty disputes do not give rise to any tax-specific issues concerning the Court's consensual jurisdiction. This is to say that the Court could theoretically hear tax treaty disputes through any of its four jurisdictional bases: through special agreements or compromissory clauses (Article 36(1) of the ICJ Statute), based on optional clause declarations (Article 36(2) of the ICJ Statute), or pursuant to *forum prorogatum*. As neither special agreements nor *forum prorogatum* give rise to any notable issues in the present context, the following subsection concentrates on compromissory clauses and optional clause declarations.

### 2.2.1 The ICJ's 'residual' jurisdiction and alternative dispute settlement for tax treaty disputes

Before entering into this analysis, it is worthwhile to discuss a defining feature of modern tax treaties that may affect the Court's consensual jurisdiction under Articles 36(1) and 36(2) of the ICJ Statute. The current architecture of international tax law typically provides for dispute

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settlement via MAPs. Article 25 of the OECD Model Tax Convention on Income and on Capital (OECD MTC), the blueprint for most tax treaties,<sup>49</sup> 'institutes a [MAP] for resolving difficulties arising out of the application of the Convention in the broadest sense of the term'.<sup>50</sup>

Article 25(1) provides for the resolution of specific, vertical tax treaty disputes: any private person who believes their rights under the applicable tax treaty have been violated may present their case to the 'competent authority' of the respective contracting state, irrespective of any available domestic remedies.<sup>51</sup> Competent authorities are representatives of the state organ responsible for tax treaties (most commonly the Ministry of Finance), who have the authority to negotiate on behalf of the state.<sup>52</sup> Article 25(2) of the OECD MTC further stipulates that:

2. The competent authority shall endeavour, if the objection [by the taxpayer] appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

Article 25(2) of the OECD MTCs embodies the traditional, state-centric system of international law: the settlement of vertical disputes remains fully mediated through the states, i.e., taxpayers do not attain the status of a formal party to the MAP. Notably, inter-state tax arbitration has become more common in recent years, and Article 25(5) of the OECD MTC now envisages arbitration as a second step of dispute settlement if the MAP does not lead to an agreement.<sup>53</sup>

Beyond vertical tax treaty disputes, Article 25(3) of the OECD MTC addresses 'interpretive mutual agreements',<sup>54</sup> which concern horizontal disputes of a general nature:

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention ...<sup>55</sup>

In brief, tax treaties that adopt Article 25 of the OECD MTC contain a *pactum de negotiando*, a duty to negotiate: 'the competent authorities are obliged to seek to resolve the case in a fair and objective manner, on its merits, in accordance with the terms of the Convention and applicable principles of international law on the interpretation of treaties'.<sup>56</sup> Yet, the competent authorities

are under no obligation to achieve a result: 'an obligation to negotiate does not imply an obligation to reach an agreement'.<sup>57</sup>

If states succeed in concluding a mutual agreement, the agreement is binding between the contracting states as a matter of international law. Its legal effect in the *domestic* context, e.g., whether it is directly binding upon tax authorities applying the treaty, depends on the respective domestic system.<sup>58</sup>

The classification of MAPs as negotiations is central to the assessment of the Court's consensual jurisdiction over tax treaty disputes. Many of the jurisdictional clauses discussed below only give the Court *residual* jurisdiction: they only apply if the disputing parties have not agreed on alternative means for the peaceful settlement of the respective dispute. Negotiations, defined by the PCIJ as a 'genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute',<sup>59</sup> feature as a means of peaceful dispute settlement listed in Article 33(1) of the UN Charter. Consequently, the MAPs envisioned in most tax treaties likely count as an alternative means of dispute settlement that precludes the Court's residual jurisdiction.<sup>60</sup>

This means that the mere obligation to engage (even unsuccessfully) in MAPs may permanently exclude tax treaty disputes from the respective states' consent to residual ICJ jurisdiction. However, this assessment must be taken with a grain of salt: as of yet, there is no ICJ case law to confirm that negotiations preclude the Court's competence under residual jurisdiction clauses.<sup>61</sup>

## 2.2.2 Compromissory clauses (Article 36(1) of the ICJ Statute)

Article 36(1) of the ICJ Statute provides that '[t]he jurisdiction of the Court comprises ... all matters specially provided for in the Charter of the United Nations or treaties and conventions in force'. Two types of compromissory clauses are discussed in turn: (i) general treaties for the peaceful resolution of disputes, which contain compromissory clauses vesting the Court with jurisdiction over any kind of international dispute between the treaty parties; and (ii) specialized treaties with compromissory clauses, commonly concerning the 'interpretation and application' of the respective treaty.

**2.2.2.1 General treaties for peaceful dispute resolution.** This part only discusses the three multilateral dispute settlement conventions that are currently in force.<sup>62</sup>

The most prominent example of a general treaty on dispute resolution is the 1948 American Treaty on Pacific Settlement (Pact of Bogotá),<sup>63</sup> ratified by 14 states<sup>64</sup> and the jurisdictional basis of numerous ICJ cases.<sup>65</sup> The compromissory clause in Article XXXI of the Pact of Bogotá<sup>66</sup> provides for residual ICJ jurisdiction: parties may seize the Court unilaterally if the dispute has not been resolved through conciliation and if the disputing treaty parties have not agreed upon dispute settlement through arbitral proceedings (Article XXXII).<sup>67</sup>

The 1957 European Convention for the Peaceful Settlement of Disputes, another general treaty on dispute resolution, is currently in force for 14 European states.<sup>68</sup> Article 28 renders the ICJ's jurisdiction residual: the compromissory clause in Article 1 only applies absent alternative dispute settlement 'which ... provide[s] for a procedure entailing binding decisions'.<sup>69</sup> So far, this convention was invoked as the jurisdictional basis of two ICJ cases, namely the 2005 *Certain Property* and the 2012 *Jurisdictional Immunities cases*.<sup>70</sup>

Finally, the oldest general treaty for dispute resolution is the 1928 General Act for the Pacific Settlement of International Disputes (General Act), which was amended in 1949 to expressly account for the succession of the

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ICJ to the PCIJ.<sup>71</sup> The General Act provides for ICJ jurisdiction that is residual only to arbitration but not to other types of dispute settlement.<sup>72</sup> To date, the Court has always found jurisdictional defects whenever states invoked the General Act's compromissory clause.<sup>73</sup> The 1928/1949 General Act has 21 state parties, although some of these states have disputed that the 1928 version (and thus, their ratification) is still in force, arguing that the original, pre-ICJ General Act had succumbed to *desuetudo*.<sup>74</sup>

All three of these conventions only equip the Court with some degree of residual jurisdiction. Under the Pact of Bogotá and the General Act, the ICJ's jurisdiction is excluded if the disputing parties have agreed to resolve the respective dispute through arbitral proceedings. Accordingly, an existing agreement to arbitrate tax disputes would preclude the compromissory clauses in these two conventions. Absent an arbitration clause, the Court has jurisdiction in parallel to the *pactum de negotiando* enshrined in the tax treaty's MAP clause.

-----*Leiden Journal of International Law*, 36 (2023), pp. 907–923 at 917

The Court's jurisdiction over tax treaty disputes might be even more limited under the 1957 European Convention. Given that a *pactum de negotiando* obliges states to engage in 'alternative dispute settlement' with a view to binding results, MAPs alone – even absent an arbitration clause – might override the compromissory clause in the 1957 European Convention.

**2.2.2.2 Specialized treaties with compromissory clauses.** The Court's consensual jurisdiction under the second type of compromissory clauses is usually limited to the 'interpretation and application' of the specific treaty containing the clause. The ICJ's website lists around 320 treaties with such compromissory clauses.

Double tax treaties typically do not contain compromissory clauses. However, exceptions exist. For instance, Article 41(5) of the 1992 Tax Treaty between Germany and Sweden refers the resolution of 'international legal questions' to either the 1957 European Convention (which, in turn, vests the Court with jurisdiction) or inter-state arbitration.<sup>75</sup> In parallel to these avenues of dispute resolution, Article 40 of the Germany-Sweden Tax Treaty provides for a MAP, which also enshrines the aggrieved taxpayers' right to be heard (Article 41(4)).

Double tax treaties are not the only treaties that deal with matters of taxation. Some treaties with compromissory clauses govern specific questions of international taxation in addition to other, non-tax related issues. A noteworthy example is the 1955 European Convention on Establishment, in force for 12 European states (nine of which are EU member states).<sup>76</sup> Article 31 of this Convention contains a compromissory clause, and Article 21 stipulates the obligation to afford national treatment, i.e., non-discrimination, concerning the taxation of nationals of other treaty parties.<sup>77</sup> A dispute concerning the interpretation or application of Article 21 would constitute a tax-related dispute under the Court's jurisdiction.

Yet, a hypothetical ICJ case between two EU member states based on the 1955 European Convention on Establishment might create issues reminiscent of the 2006 European Court of Justice (ECJ) decision in *MOX Plant* or, more recently, the 2018 CJEU decision in *Achmea*.<sup>78</sup> In *Achmea*, the CJEU held that arbitration clauses in intra-EU investment treaties were invalid, as they violated Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) – that is, the autonomy of EU law.<sup>79</sup> The CJEU came to the same general conclusion in its earlier *Opinion 2/13* when it stated that:

[A]n international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the court. That principle is notably enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.<sup>80</sup>

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Hypothetically, an ICJ judgment on an intra-EU tax dispute might call the autonomy of EU law into question. Of



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course, this depends on whether the dispute before the ICJ 'may relate to the interpretation both of [the European Convention on Establishment] and of EU law'.<sup>81</sup>

The CJEU held in *Achmea* that the mere possibility of the interpretation or application of EU law by 'a body which is not part of the judicial system of the EU [and] is provided for by an agreement which was concluded not by the EU but by Member States'<sup>82</sup> suffices to violate the autonomy of EU law. Although the EU member states have retained their exclusive competence with respect to direct taxation, the wealth of CJEU case law on matters of taxation – including the application of tax treaties<sup>83</sup> – reveals considerable overlap between EU law and the tax law of EU member states. This is due to the interaction between taxation and the fundamental freedoms of the EU internal market: just like investment law, tax law affects the free movement of goods, persons, services, and capital within the EU.<sup>84</sup> Tax measures that affect the free movement of EU citizens possibly violate EU law – which may coincide with EU states' obligations under Article 21 of the 1955 European Convention on Establishment. Consequently, it is conceivable that the CJEU would claim that Article 344 of the TFEU precludes EU member states from initiating tax disputes against other EU states before the ICJ. Of course, this assessment does not pertain to hypothetical ICJ cases under the 1955 European Convention between an EU member state and a *non*-EU state.<sup>85</sup>

The 1955 European Convention on Establishment is by far not the only treaty that combines a compromissory clause with substantive provisions on taxation. For instance, numerous bilateral treaties on friendship, commerce, and navigation with compromissory clauses prescribe national treatment for the taxation of nationals of the other treaty party.<sup>86</sup>

### 2.2.3 Optional clause jurisdiction (Article 36(2) of the ICJ Statute)

Article 36(2) of the ICJ Statute stipulates that:

[t]he states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law; ...

Such optional clause declarations open the door to dispute settlement of any future disputes concerning 'any question of international law', which gives the Court particularly broad subject matter jurisdiction. A central element of Article 36(2) is that it only creates reciprocal jurisdiction, i.e., if both disputing states have deposited an optional clause declaration.

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Approximately one-third of all UN member states have deposited an Article 36(2) declaration, although most of them limit the scope of the Court's jurisdiction through reservations.<sup>87</sup> For instance, more than 50 percent of all optional clause declarations encompass a *lex fori* reservation,<sup>88</sup> which renders the Court's jurisdiction residual. More specifically, *lex fori* reservations carve out 'any dispute which the Parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement or which is subject to another method of peaceful settlement chosen by the Parties'.<sup>89</sup> Some *lex fori* reservations are limited to alternative means of dispute resolution that lead to *binding* results.<sup>90</sup>

As MAPs likely constitute an alternative method of dispute settlement, *lex fori* reservations might exclude tax treaty disputes from the Court's Article 36(2) jurisdiction.<sup>91</sup>

## 3. The Court as a future 'World Tax Court'?

Section 2 has established that the Court could hypothetically hear certain tax disputes under existing

compromissory clauses or optional clause declarations. We proceed with an assessment of two positive questions: what are the possible effects of the Court's involvement in the settlement of tax disputes, and is it likely that the ICJ will hear tax treaty disputes in the future? The third sub-section discusses normative implications: is the Court's involvement in tax disputes even desirable?

At the outset, it should be stressed that this section mainly addresses the ICJ's involvement in *horizontal* disputes, i.e., between two states. The question of vertical disputes and whether the ICJ's involvement would be beneficial or detrimental to the interests of taxpayers goes beyond the scope of this article.

### 3.1 Possible effects of the ICJ's involvement in tax disputes

Measuring the Court's effectiveness, or the effects of its judgments more generally, poses difficult methodological questions that the scholarship has yet to resolve.<sup>92</sup> The least common denominator in the literature is that ICJ judgments are generally accorded a high degree of deference by domestic and international actors<sup>93</sup> – even though there are no feasible enforcement mechanisms in place.<sup>94</sup>

The scholarship has referred to the 'shadow' effects of ICJ jurisprudence: norm-rich rulings, which address legal questions of universal significance rather than case-specific details, affect both the disputing parties and states not involved in the case.<sup>95</sup> Hence, such ICJ judgments constitute

-----*Leiden Journal of International Law*, 36 (2023), pp. 907–923 at 920

general, normative guidance for states, which may change the future behaviour of international and domestic actors.<sup>96</sup> For instance, ICJ judgments may foster awareness among domestic institutions with respect to states' international obligations stemming from multilateral treaties. A prominent example are the educational campaigns undertaken in the USA to teach local law enforcement about treaty obligations under the 1969 Vienna Convention on Consular Relations in the aftermath of the Court's 2001 *LaGrand* and 2004 *Avena* cases.<sup>97</sup>

In the tax treaty context, the shadow effects of ICJ case law could lead to more uniformity in the interpretation and application of tax treaties, even among states that are not party to the specific ICJ case or the bilateral tax treaty at stake. This is because most tax treaties display a striking degree of similarity with the OECD or UN MTC (sometimes referred to a 'coordinated bilateralism').<sup>98</sup> If the ICJ was to resolve a dispute over the interpretation and application of a treaty clause that reappears in other tax treaties, the ICJ's decision might inform how these other tax treaties are interpreted and applied in the future.

Such harmonizing shadow effects on the interpretation and application of similar tax treaties would be a welcome development. After all, divergent readings of the exact same treaty text among decentralized interpreters may result in discrepancies and legal uncertainty for private actors that operate in multiple countries. Although the commentary to the OECD MTC constitutes a focal point for the interpretation of tax treaties, it only reflects a summary and compromise among various possible interpretations of the MTC. As the commentary does not offer a single, authoritative reading of the actual tax treaties, domestic interpreters are free to pick and choose – or deviate – from the various interpretations. Compared to adjudication through a permanent international body like the ICJ, the harmonizing effects achieved through the OECD framework are modest.

Further, ICJ proceedings and the resulting judgments are among the most transparent means of international dispute settlement. In turn, this transparency sparks academic and judicial discourse and influences decision-making processes on the international plane.<sup>99</sup> MAPs, on the other hand, are fully confidential and agreements reached to resolve specific cases are not publicly available.<sup>100</sup> As a result, it is hard to assess the effectiveness and fairness of MAPs; by extension, it is hard to compare and predict how ICJ involvement would change – and improve or worsen – the *status quo* of tax dispute settlement. In any event, the literature has long criticized MAPs for their opaqueness and their open-ended and state-centric design,<sup>101</sup> and calls for reform of tax treaty dispute settlement

have become commonplace.<sup>102</sup> At the very least, the ICJ's involvement and its high-profile proceedings would likely rekindle interest in international tax law among scholars of public international law.

### 3.2 A role for the ICJ in the wake of international tax reform?

Another question is whether there is any prospect of the ICJ's involvement in tax disputes. Notably, none of the current efforts to reform international tax law envisions a role for the

-----*Leiden Journal of International Law, 36 (2023), pp. 907–923 at 921*

Court. Hence, it is doubtful whether there is any place for the Court in the future of international tax law. The stagnation of compromissory clauses since the year 2000 reinforces these doubts:<sup>103</sup> why should there be a trend in the opposite direction with respect to the settlement of tax treaty disputes?

On the other hand, Eduardo Baistrocchi's recent global analysis of tax treaty disputes documents an enormous overall increase in such disputes.<sup>104</sup> Although most of these treaty disputes are still litigated before domestic courts, Baistrocchi also points out a trend towards MAPs in lieu of domestic remedies.<sup>105</sup> This suggests that there is a practical need for the review of contentious tax treaty provisions – and that the resolution of more and more disputes escalates to the interstate level. Eventually, these developments might build up an appetite for the streamlining effects associated with the uniform interpretation of treaties by a centralized, authoritative adjudicator such as the ICJ.

On a substantive level, recent developments in international tax law give rise to broader questions of norm-compliance that might lend themselves to a more principled adjudication by a permanent body. An interesting example is the push to re-calibrate the taxation of business profits generated by transnational corporations in the digital economy.<sup>106</sup> Tax treaties typically grant states the right to tax business profits if the profits are attributable to a physical 'permanent establishment' (PE) within their territory (Article 7 of the OECD MTC). However, states increasingly question the fairness of the requirement of a *physical* presence in a digital world. Accordingly, domestic and international policy-makers have introduced the notion of a 'digital' PE or a digital service tax,<sup>107</sup> which unilaterally extends states' tax base to revenues made in their territory through a digital as opposed to physical presence.<sup>108</sup> As tax treaties commonly enshrine the traditional notion of physical PEs (Article 5 of the OECD MTC), the taxation of profits due to digital presence may arguably breach existing tax treaties.<sup>109</sup> Some countries, especially those opposing the concept of digital presence, might be interested in centralized compulsory adjudication to determine this question.<sup>110</sup>

If states wanted to endow the Court with jurisdiction, the easiest way would be to append protocols with compromissory clauses to existing tax treaties. This strategy would obviate the need to re-negotiate existing tax treaties, especially if the protocol was multilateral and allowed for a simple opt-in, thereby covering all relevant tax treaties at once.

Yet again, this scenario is highly unlikely. As it stands, the settlement of tax treaty disputes by the ICJ will remain a mere hypothetical – states seem to prefer other avenues of international dispute settlement for the time being.

-----*Leiden Journal of International Law, 36 (2023), pp. 907–923 at 922*

### 3.3 Perks and pitfalls of engaging the ICJ in tax treaty disputes

Finally, a normative question warrants attention: is it even desirable to involve the Court in tax treaty disputes?

The confidentiality of MAPs makes it difficult to determine whether a shift to the ICJ would be an improvement or a

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step back. Yet, a number of observations and predictions can be made regardless. There are cogent arguments why negotiations through MAPs may in fact be the preferable means of dispute resolution for tax treaty disputes. First, the Court currently lacks expertise with respect to international tax law, a complex and technical field of law. This, however, overlooks that the Court has become a successful adjudicator of other highly specialized areas of law, such as the law of the sea; there is no reason to doubt the Court's capability to acquire expertise in international tax law as well.

Second, negotiations have the reputation of being the most flexible means of dispute resolution.<sup>111</sup> The competent authorities involved in MAPs are experts in their legal system and can deal with disputes discretely and, if desired, through relatively informal and cost-effective channels. In light of the lengthy written proceedings and high costs of legal representation associated with ICJ litigation, MAPs may be the more appropriate avenue – depending on the power dynamics among the parties and the interests at stake. The issue of power dynamics and state interests relates to another relevant feature of MAPs: states retain maximum control if they settle their disputes through negotiations, while adjudication hands over control to the adjudicator.<sup>112</sup> As taxation lies at the heart of state sovereignty, it makes sense that states favour dispute settlement that cannot culminate in solutions they consider unacceptable.<sup>113</sup>

Unsurprisingly, this supposed advantage comes with certain pitfalls. Most importantly, MAPs might lead to a dead end: 'an obligation to negotiate does not imply an obligation to reach an agreement'.<sup>114</sup> The uncertainty of any resolution at all is a heavy price to pay for the states involved – and an even heavier price for aggrieved taxpayers. Power imbalances between the negotiating states may further weaken the case for MAPs, as political and economic levers benefit larger and more powerful states in negotiations. Adjudication, on the other hand, lays greater emphasis on the principle of sovereign equality and the rule of law.<sup>115</sup>

Lastly, the transparency of ICJ procedures could be considered an inherent advantage vis-à-vis MAPs. This is especially true with respect to disputes concerning universal questions of norm compliance that would benefit from the shadow effects of ICJ decisions. Of course, taxpayers whose financial data is at issue (and in the worst case even exposed) in an ICJ case might oppose transparency. Then again, commercial secrets and other sensitive data can be protected by only including them in annexes that do not become public; indeed, this measure has been tried and tested successfully in past ICJ proceedings.<sup>116</sup>

### 4. Conclusion

It is unlikely that the ICJ will become a new actor in international tax law, irrespective of any advantages: neither the Court nor the architects of the international tax regime seem to be interested in one another.

-----*Leiden Journal of International Law*, 36 (2023), pp. 907–923 at 923

Nevertheless, we have seen that it is theoretically possible to initiate tax-related cases before the Court, albeit with some limitations due to jurisdiction clauses that render the Court's competence residual to other means of dispute settlement.

In any event, this article did not discern any decisive arguments in favour of the Court's involvement in tax treaty disputes. All things considered, the Court is not predestined to take up a new job as a tax adjudicator. Besides, as long as the other sub-fields of international economic law are adjudicated in distinct forums, the ICJ's involvement in international tax law would not help to consolidate this fragmented field.

Conversely, this article also highlighted severe shortcomings of the current means of tax dispute settlement, namely MAPs. Centralized dispute settlement could mitigate many of the discrepancies and mismatches in tax treaty interpretation – such harmonization is plainly unattainable through MAPs. Ultimately, the international tax regime will only age well if it also provides for reliable dispute settlement – with or without a role for the ICJ.

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