

PUBLIC INTERNATIONAL LAW AND TAX LAW: TAXPAYERS' RIGHTS

THE INTERNATIONAL LAW ASSOCIATION'S PROJECT ON INTERNATIONAL TAX LAW—PHASE 1

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ABSTRACT

Public international law recognizes rights to non-state actors. In tax matters, these include taxpayers and other private persons involved in the levying of tax. Their fundamental rights are human rights, which must be effectively protected even when there is a general interest of the community to the collection of tax. This Article contains a comprehensive worldwide analysis of such rights and addresses the different issues that arise—in national and cross-border situations—in connection with tax procedures and sanctions. The Article puts forward various innovative proposals that secure an effective ex ante protection on the basis of the general principles of law common to the various legal systems and the specific principles relevant to tax matters.

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I. INTRODUCTION: THE INTERNATIONALIZATION OF TAX LAW

In recent years an unprecedented internationalization of tax law has taken place. Whereas half a century ago, Klaus Vogel was the only one to deal with international tax law (in particular double taxation),¹ tax

1. Cf., e.g., KLAUS VOGEL (ED.), GRUNDFRAGEN DES INTERNATIONALEN STEUERRECHTS (1985).

lawyers today are connected worldwide: the International Fiscal Association (“IFA”) has existed since 1938; since 2010, financial judges from all over the world have been meeting annually within the framework of the International Association of Tax Judges (“IATJ”); since 2002, the Vienna University of Economics and Business Administration has been holding annual conferences on the case law of the Court of Justice of the European Union in direct and indirect tax law, at which tax law experts from all over the world exchange views; since 1999, European tax law professors have been meeting annually within the framework of the European Association of Tax Law Professors (“EATLP”).² Especially with regard to taxpayers’ rights, 2015 was an important year: the International Conference on Taxpayer Rights started being held annually at various locations around the world³ and the International Bureau of Fiscal Documentation (“IBFD”) Observatory on the Protection of Taxpayers’ Rights started documenting the worldwide development of taxpayers’ rights,⁴ based on the standard of legal protection developed in the framework of the IFA.⁵ This list could be continued.

II. SIGNIFICANCE OF TAXPAYERS’ RIGHTS

There is therefore no doubt that international tax law is increasingly important. However, from the point of view of international tax law, taxpayers are often still treated as mere objects of the exercise of state sovereignty. This needs to change. In international law, the states are still the primary subjects. Since the end of World War II, however, individuals have joined the states as bearers of rights under international law, especially of human rights.⁶ The problem is that international tax law has developed disconnectedly from international law since the IFA split off from the International Law Association (“ILA”) in 1938. Since 2018, the ILA Study Group, now transformed into a Committee, on

2. See PASQUALE PISTONE, *TAX PROCEDURES* (IBFD Publications ed., 2020).

3. *International Conference on Taxpayer Rights*, CTR. TAXPAYER RTS., <https://taxpayer-rights.org/international-conference/>. See generally Judith Schamell, *Aktuelles zum Thema Grundrechtsschutz von Steuerpflichtigen – zugleich Konferenzbericht zur “Third International Conference on the Protection of Taxpayer Rights”*, 7 *INTERNATIONALE STEUER-RUNDSCHAU* 262 (2018).

4. *Observatory on the Protection of Taxpayers’ Rights*, IBFD, <https://www.ibfd.org/Academic/Observatory-Protection-Taxpayers-Rights>.

5. Philip Baker & Pasquale Pistone, *The Practical Protection of Taxpayers’ Rights*, in IFA *CAHIERS DE DROIT FISCAL INTERNATIONAL* VOL. 100B (2015).

6. Cf., e.g., Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *AM. U. L. REV.* 1, (1982–1983).

International Tax Law (“the Committee”), of which the authors are apart, has been seeking to reunite the perspectives of tax law and international law.⁷

At present, the fight against tax avoidance and abuse dominates the development of international tax law. The reunion thus requires a comprehensive counterbalancing approach from a taxpayer’s perspective. The Committee has therefore started to address taxpayers’ rights (phase 1). Based on a comparative legal study, the Committee analyzes their fundamental rights, which generally limit the exercise of tax sovereignty. Phase 2 will deal with the delimitation of tax sovereignty within the framework of a fair international tax order, and phase 3 with the enforcement of international tax law.

In phase 1, the research of the Committee is focusing on the protection of individual rights through human rights. This contrasts with a view that invokes human rights in the fight against tax injustice.⁸ “Unjust” tax revenue shortfalls can lead to human rights not being adequately protected in certain states. Therefore, some constitutions, especially the African ones, include an obligation to pay taxes,⁹ and some even include a state obligation to levy taxes and to combat tax avoidance and evasion.¹⁰ The “collective right” to tax justice is therefore indeed fundamental. This is all the more true when it comes to developing a comprehensive perspective as a

7. See generally Robin Miller, *Report on the ILA Study Group on International Tax Law Seminar “Public International Law and Taxation”*, in 60 EUROPEAN TAXATION 112 (2020).

8. Cf., e.g., Magdalena Sepúlveda Carmona, *Report of the UN Special Rapporteur on Extreme Poverty and Human Rights*, U.N. Doc. A/HRC/26/28 (May 22, 2014); Sebastián López Nieto & Beretta Godoy, *Taxation as a Human Rights Issue*, INT’L BAR ASS’N (Sept. 1, 2016), <https://www.ibanet.org/Article/Detail.aspx?ArticleUid=4d8668cb-473a-44ea-b8be-1327d6d9d977>; *Global Endorsement of the Declaration of Taxpayers’ Human Rights*, ASS’N WORLD CITIZENS, <http://www.taxpayerhumanrights.org/endorse/index.php>; INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, POLÍTICA FISCAL Y DERECHOS HUMANOS EN LAS AMÉRICAS, MOVILIZAR LOS RECURSOS PARA GARANTIZAR LOS DERECHOS, INFORME PREPARADO CON OCASIÓN DE LA AUDIENCIA TEMÁTICA SOBRE POLÍTICA FISCAL Y DERECHOS HUMANOS, 156° PERIODO DE SESIONES DE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS (CIDH) (Oct. 2015), https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_772.pdf.

9. Cf. CONSTITUTION OF THE DEMOCRATIC AND PEOPLE’S ALGERIAN REPUBLIC Nov. 26, 1996, art. 64; CONSTITUTION OF THE REPUBLIC OF CAPE VERDE May 3, 2010, art. 85(g); CONSTITUTION OF THE REPUBLIC OF CAMEROON APR. 14, 2008, principle 23; CONSTITUTION OF THE CENTRAL AFRICAN REPUBLIC Mar. 27, 2016, art. 20; CONSTITUTION OF THE REPUBLIC OF CHAD May 4, 2018, art. 58; CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF CONGO Nov. 6, 2015, art. 65; THE FUNDAMENTAL LAW OF THE REPUBLIC OF EQUATORIAL GUINEA Feb. 16, 2012, art. 19–20; CONSTITUTION OF GUINEA May 7, 2010 art. 22(4); CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA Mar. 20, 2012, art. 20; CONSTITUTION OF THE REPUBLIC OF MOZAMBIQUE Dec. 21, 2004, art. 45(c); CONSTITUTION OF THE VIIITH REPUBLIC Nov. 25, 2010, art. 40 (Niger); CONSTITUTION OF THE TUNISIAN REPUBLIC Jan. 27, 2014, art. 10.

10. CONSTITUTION OF THE REPUBLIC OF IVORY COAST Oct. 30, 2016, art. 43; see also CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 38(5).

basis for recommendations by the ILA. Nevertheless, the protection of fundamental collective interests must not go so far as to infringe individual fundamental rights. Contrary to Machiavellianism,¹¹ the goal (namely the protection of “collective rights”) does not always justify the means (here the violation of individual taxpayers’ rights). Moreover, the fight against tax avoidance and for a fair distribution of international tax resources is already on the international agenda and, as previously mentioned, will be the subject of phase 2 of the project.

However, especially now, there have to be global minimum standards for effective protection of taxpayers’ rights (phase 1). This is because tax authorities around the world work together more and more closely in a common fight against tax avoidance. Even if tax avoidance does not always openly violate applicable tax regulations (as in the case of tax evasion or fraud), it nevertheless threatens to undermine tax sovereignty. States reasonably defend themselves against this through global coordination. However, there is an increased risk of undermining the effective protection of taxpayers. Taxpayers’ rights belong therefore on the global agenda, as is the international fight against tax avoidance, evasion, and fraud in the context of the Organization for Economic Cooperation and Development’s (“OECD”) base erosion and profit shifting (“BEPS”) project. The Committee’s research project within the framework of the ILA shall contribute to this. The committees of the ILA have the mandate to produce concrete and practically relevant results, such as so-called restatements of the law,¹² which serve as a guideline for legal practitioners, especially judges and lawyers. Committees of the ILA shall also draft international treaties or individual articles thereof, declarations, codes of conduct, recommendations, guidelines or opinions, which they may submit to the ILA General Assembly for adoption at one of its biennial conferences.¹³ The following sections outline the results of the research in phase 1 on taxpayers’ rights as of spring

11. NICCOLÒ MACHIAVELLI, *IL PRINCIPE*, Ch. XVIII (1513) (“nelle azioni di tutti gli uomini, e massime de’ Principi, dove non è giudizio a chi reclamare, si guarda al fine. Facci adunque un Principe conto di vivere e mantenere lo Stato; i mezzi saranno sempre giudicati onorevoli, e da ciascuno lodati.”).

12. In the U.S., the American Law Institute, which was founded in 1923, issues restatements of the law in different areas. On restatements, see Ursula Kriebaum, *Restatements*, 47 *BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT* 320, 320–21 (2015).

13. Committees “shall be designed to produce a concrete outcome in a practical form, such as a restatement of the law, a draft treaty or convention, draft articles, a declaration, a draft code of conduct, recommendations, guidelines, or statements, that can be presented for adoption by the Conference Plenary at a biennial conference.” See *ILA COMMITTEES, RULES AND GUIDELINES*, § 3.2 (Apr. 25, 2015), https://www.ila-hq.org/images/ILA/docs/committee_rules_and_guidelines_2015_as_adopted_by_ec_25_april_2015_-_web_version.pdf.

2021. The Committee is working towards including as many legal systems as possible, in particular from outside the European region.

This Article begins with the sources of international tax law (Part III). Then, the interaction of international and national law is addressed (Part IV). Next, the general questions of human rights in tax law are discussed (Part V), before addressing individual taxpayers' rights on the basis of the usual categorization in tax law in procedural rights (Part VI), sanctions-related rights (Part VII), and substantive rights (VIII). Finally, the Article will summarize the findings (Part IX).

III. SOURCES OF INTERNATIONAL TAX LAW

Article 38(1) of the Statute of the International Court of Justice (“ICJ Statute”) lists as legal sources of international law international agreements, customary international law, general principles of law and, as subsidiary means for the determination of rules of law, judicial decisions and the teachings of the most highly qualified publicists of the various nations.¹⁴ In addition, there is so-called soft law, which is becoming increasingly important, especially in the field of international taxation.

A. *International Conventions and Taxpayers' Rights*

1. Coordinated Bilateralism

International tax law has developed over the past century mainly on the basis of treaties. Double Taxation Conventions (“DTCs”) were its most important source of law and the focus of Vogel’s research, the doyen of international tax law. DTCs are primarily of a coordinating nature. They assign the right to tax cross-border income to one of the two contracting states, which, in the absence of an agreement, could exercise both tax jurisdictions. This would expose taxpayers to double taxation, which is permissible but undesirable.¹⁵ However, most DTCs also contain provisions on intergovernmental cooperation (e.g., exchange of information) or create—albeit limited—substantive or procedural rights for taxpayers. More than 3,000 DTCs are currently in force. They are mainly based on two model agreements, the OECD Model Convention on the avoidance of double taxation¹⁶ and the UN Model

14. Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1031, T.S. 993, <https://www.icj-cij.org/en/statute>.

15. See generally JULIANE KOKOTT, DAS STEUERRECHT DER EUROPÄISCHEN UNION 72, ¶ 175 (2018).

16. Model Convention with Respect to Taxes on Income and on Capital art. 24, OECD (Nov. 21, 2017), <https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf>.

Convention on the avoidance of double taxation between industrialized and developing countries.¹⁷ Individual tax treaties are therefore bilateral regulations. However, this bilateralism is coordinated. This is confirmed by the many identical or very similar provisions in existing DTCs.¹⁸ In some cases, international tax coordination also takes the form of multilateral double taxation agreements, such as the Nordic Tax Convention¹⁹ or the multilateral double taxation agreement of the Caribbean Community (“CARICOM”).²⁰

2. Tendency Towards Multinational Tax Treaties

Moreover, the tax transparency and BEPS projects initiated under the auspices of the OECD and the political mandate of the G20 are current examples of the growing willingness of states to join forces when it comes to tax phenomena of global importance. The implementation of the tax transparency project has increased the importance of multilateral agreements and international administrative assistance between tax authorities worldwide.²¹ In the case of the implementation of the BEPS project, countries have largely agreed to supplement their existing network of DTCs with a multilateral agreement (the “Multilateral BEPS Instrument”), to be applied alongside their DTCs in order to steer them towards convergence and compliance with the standards and rules of the BEPS project.²²

The Multilateral BEPS Instrument is thus an effective means of gradually bringing existing bilateral conventions into a multilateral system without the need for bilateral renegotiation. It has prompted several countries to conclude additional agreements that further implement international tax coordination and promote the creation of a global framework for tax transparency. Examples are the international Tax

17. U.N. Dep’t of Econ. & Soc. Affairs, United Nations Model Double Taxation Convention Between Developed and Developing Countries 2017 Update, U.N. Doc. ST/ESA/PAD/SERE/213 (2017).

18. Cf. EDUARDO BAISTROCCHI (ED.), *A GLOBAL ANALYSIS OF TAX TREATY DISPUTES* (2017).

19. The Nordic Double Taxation Convention on Income and Capital, 1983.

20. Agreement among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment, Dec. 8, 1994.

21. Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Council of Europe and OECD, 1988, as amended by the 2010 Protocol.

22. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, June 7, 2017.

Information Exchange Agreements (“TIEAs”),²³ concluded with (former) tax havens (so-called offshore jurisdictions) to improve tax transparency,²⁴ as well as the agreements on the automatic exchange of information between countries, in particular the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports.²⁵

Other international agreements are the result of unilateral measures taken by some countries in international tax matters. The most important example is the U.S. Foreign Account Tax Compliance Act (“FATCA”).²⁶ It requires banks and financial institutions to provide the U.S. Internal Revenue Service (“IRS”) with information on accounts held by U.S. citizens. Subsequently, further intergovernmental agreements (“IGAs”)²⁷ have created the basis for the obligation of these institutions to report such information to the tax authorities of their own countries. The latter then forward it to the United States. The obligations of intermediaries are implemented through elaborate domestic legislation.²⁸

23. See generally *Tax Information Exchange Agreements (TIEAs)*, OECD, <https://www.oecd.org/tax/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm>.

24. Although the United States concluded their first TIEAs in the 1980s (with Barbados in 1984, Jamaica and Granada in 1986, Dominica, American Samoa and St. Lucia in 1987, Bermuda in 1988, Costa Rica, the Dominican Republic, Guam, Puerto Rico and Trinidad and Tobago in 1989, Honduras and Peru in 1990, Marshall Islands in 1991, Guyana in 1992, Antigua, Barbuda, Cayman Islands and Colombia in 2001), several countries have only begun to conclude TIEAs after the OECD published its model TIEA in 2002. See also OECD, MODEL ON EXCHANGE OF INFORMATION ON TAX MATTERS (2002). The practice of concluding TIEAs has helped to increase transparency even between countries that do not justify a full double taxation agreement or where one of the countries concerned is not prepared to sign such an agreement. Such cases often occur in connection with tax havens. See Diane Ring, *Art. 26: Exchange of information*, in GLOBAL TAX TREATY COMMENTARY ¶¶ 1.2, 3.2, 5.2 (2014).

25. The reports contain specific information on multinational groups and investment funds (turnover, income taxes paid and payable, etc.). Cf. OECD, GUIDANCE ON THE IMPLEMENTATION OF COUNTRY-BY-COUNTRY REPORTING BEPS ACTION 13, <https://www.oecd.org/ctp/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.pdf>.

26. FATCA was approved on March 18, 2010 and came into force as Part V of the Hiring Incentives to Restore Employment (HIRE) Act.

27. Cf. Leopoldo Parada, *Intergovernmental Agreements and the Implementation of FATCA in Europe*, 7 WORLD TAX J. (2015).

28. Cf., e.g., Foreign Account Tax Compliance Act, Ger.-U.S., May 31, 2013; Neufassung der Abgabenordnung [Fiscal Code] Oct. 1, 2002, BGBl I at 3866, as amended by Gesetz [G], July 17, 2017, BGBl. I at 2541, art. 17, § 117(5) (Ger.), https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p0989; and, on that basis, Verordnung zur Umsetzung der Verpflichtungen aus dem Abkommen Zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika zur Förderung der Steuerehrlichkeit bei internationalen Sachverhalten und hinsichtlich der als Gesetz über die Steuerehrlichkeit bezüglich Auslandskonten bekannten US-amerikanischen Informations- und Meldebestimmungen (FATCA-USA-Umsetzungsverordnung - FATCA-USA-UmsV [Regulation implementing the obligations under the Agreement between the Federal Republic of Germany and the

3. Significance of Other International Agreements

Non-tax specific international agreements, such as regional human rights conventions,²⁹ also influence the taxpayers' legal status in international and, even more so, national tax systems. In addition, the Vienna Conventions on Diplomatic and Consular Relations contain rules for the taxation of members of consular and diplomatic missions,³⁰ which can be regarded as an expression of customary international law.³¹ Further, the Vienna Convention on the Law of Treaties ("VCLT") is of great importance for the interpretation of DTCs, particularly by domestic courts.³² Finally, commercial law obligations and bilateral investment treaties are important for a comprehensive understanding of the international tax regime within the framework of international law. The existence of these other agreements confirms the constant interaction between the international tax system and other areas of international law.

B. Customary International Law and Taxpayers' Rights

In recent years, customary international law has become increasingly important in international tax law.³³ However, literature focuses mainly

United States of America to Improve International Tax Compliance and with respect to the United States Information and Reporting Provisions Commonly Known as the Foreign Account Tax Compliance Act], July 28, 2014, ELEKTRONISCHES BUNDESGESETZBLATT [EBGBL.] at 1222, 2014 I no. 35 (Ger.).

29. Cf. European Convention on Human Rights, Nov. 4, 1950 [hereinafter ECHR]; American Convention on Human Rights, Nov. 22, 1969; African Charter on Human and Peoples' Rights, June 28, 1981; Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364/01) [hereinafter EU Charter].

30. See, e.g., Vienna Convention on Diplomatic Relations, art. 34, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

31. Cf. *Report of the Commission to the General Assembly on the work of its forty-third session*, [1991] II Y.B. Int'l L. Comm'n, 116, A/CN.4/SER.A/1991/Add.1. Boleslaw A. Boczek, INTERNATIONAL LAW: A DICTIONARY 50 (2005); Case Concerning United States Diplomatic and Consular Staff in Tehran, Order, 1979 I.C.J. 3, 19–20 (Dec. 15, 1979).

32. For case law of fiscal courts with regard to the VCLT, see, e.g., Bundesfinanzhof (BFH) [Federal Finance Court] Feb. 1, 1989, I R 74/86 BStBl II 1990, ¶ 14 and Bundesfinanzhof (BFH) [Federal Finance Court] Jan. 16, 2014, I R 30/12 BStBl II 721, ¶ 19 (Ger.); Tribunal Fédéral [Federal Supreme Court] [TF] Mar. 17, 2017, 2C_1000/2015 ¶ 6.2 (Switz.); Bundesgericht [BGR] [Federal Supreme Court] July 26, 2019, 653/2018 ¶¶ 5.3.1, 7.1 (Switz.); Bundesgericht [BGR] [Federal Supreme Court] Sept. 12, 2016, 2C_276/2016 ¶ 5.2.1, ¶ 7.1 (Switz.); Bundesgericht [BGR] [Federal Supreme Court] July 9, 2019, 2C_616/2018 (Switz.); Bundesgericht [BGR] [Federal Supreme Court] Aug. 2, 2018, 2C_819/2017, ¶ 3.2.1 (Switz.); Bundesgericht [BGR] [Federal Supreme Court] Sept. 24, 2015, 2C_963/2014, ¶ 4.1 (Switz.). D. Nerudová & L. Moravec, The Czech Republic, in THE IMPACT OF THE OECD AND U.N. MODEL CONVENTIONS ON BILATERAL TAX TREATIES, 352, 426, 470, 502, 600, 797, 822, 918, 1027, 1059, 1108, 1150 (Michael Lang et al. eds., 2012); Case C-648/15, Austria v. Germany, 2017 ECLI:EU:C:2017:664.

on the enforcement of tax law in international proceedings³⁴ and hardly ever on taxpayers' rights. However, human rights conventions, DTCs and other agreements do contain taxpayers' rights. These, as well as the model tax treaties and the dense network of international trade treaties, may have contributed to the formation of international customary law.

Customary international law requires state practice (*consuetudo*) accepted as law (*opinio iuris*). The mutual weighting of these two necessary components of customary international law is not entirely clear.³⁵ The United Nations International Law Commission ("ILC") considers the two constituent elements of customary international law to be of equal importance.³⁶ The ILA, however, in a 2000 report, had suggested that state practice could be more important for the determination of customary international law.³⁷ In any case, both elements must be determined separately and in each individual case.³⁸

The ILC's conclusions confirm that "conduct relating to treaties" constitutes state practice and that treaties can codify, crystallize, or lead to rules of customary international law.³⁹ However, model tax treaties are not treaties in the strict sense, but rather resolutions of international organizations. While the ILC noted that international organizations can serve "as arenas or catalysts" for state practice,⁴⁰ resolutions of

33. See, e.g., REUVEN S. AVI-YONAH, *INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME* (2007); PETER HONGLER, *JUSTICE IN INTERNATIONAL TAX LAW: A NOMINAL REVIEW OF THE INTERNATIONAL TAX REGIME* 139 (2019).

34. Cf., e.g., John Azzi, *Tackling Tax Treaty Tensions: Time to Think About an International Tax Court*, 52 BULLETIN INT'L FISCAL DOCUMENTATION 344 (1998); Markus Albert, *DBA-Verständigungsverfahren – Probleme und Verbesserungsvorschläge*, IFST-SCHRIFT NO. 457 (2009); BRIAN J. ARNOLD ET AL., *INTERNATIONAL ARBITRATION IN TAX MATTERS*, (Michael Lang & Jeffrey Owens eds., 2016); Lotfi Maktouf, *Resolving International Tax Disputes through Arbitration*, 4 ARB. INT'L 32 (2014); Roland Ismer & Sophia Piotrowski, *Internationale Streitbeilegung in Steuersachen und innerstaatliches Verfassungsrecht: Auf zu gerichtsförmigen Verfahren!*, 28 INTERNATIONALES STEUERRECHT - ZEITSCHRIFT FÜR EUROPÄISCHE UND INTERNATIONALE STEUER- UND WIRTSCHAFTSBERATUNG 845 (2019).

35. Karol Wolfke, *Some Persistent Controversies regarding Customary International Law*, 24 NETH. Y. B. INT'L L. 1, 2, 24 (1993) (explaining "in customary international law nearly everything remains controversial").

36. *Conclusions on Identification of Customary International Law*, 2018 Y.B. INT'L L. COMM'N 1–2, U. N. DOC. A/CN.4/L.908 [hereinafter 2018 ILC YB].

37. INT'L L. ASS'N COMM. ON FORMATION OF CUSTOMARY (GENERAL) INT'L L., FINAL REPORT, STATEMENT OF PRINCIPLE APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW (2000).

38. 2018 ILC YB, *supra* note 36, at 1–2.

39. *Id.* at 3.

40. *Id.* at 2.

international organizations (and intergovernmental conferences) can provide evidence of the existence or content of customary international law. They cannot *per se* create customary international law that is binding on states.⁴¹ Nevertheless, the conduct of states within international organizations (such as the OECD) or intergovernmental conferences can provide important evidence for state practice and *opinio iuris*.⁴²

The mere repetition of a provision within the framework of the network of very similar DTCs does not, however, necessarily indicate that a rule of customary international law is expressed in such provisions.⁴³ In fact, the so-called *Baxter* paradox⁴⁴ could make it more difficult to determine customary international law in the area of international taxation: the more states are bound by DTCs with similar or identical wording, the more difficult it becomes to observe state practice which is not merely the result of the principle *pacta sunt servanda* (according to which one is bound to its treaties). For the same reason, it is particularly difficult to find evidence of *opinio iuris* in relation to state practice, which conforms with international trade clauses. Evidence from areas not regulated by DTCs is particularly important for assessing whether taxpayers' rights under DTCs also exist as customary international law. Moreover, only contractual provisions with a "fundamentally normative character"⁴⁵ can reflect customary international law.⁴⁶

Apart from international agreements, national law and non-binding charters of taxpayers' rights⁴⁷ can contribute to the formation of

41. 2018 ILC YB, *supra* note 36, at 3; see also Jed Odermatt, *The Development of Customary International Law by International Organizations*, 66 INT'L & COMP. L.Q. 491 (2017).

42. 2018 ILC YB, *supra* note 36, at 2.

43. *Id.* at 3.

44. RICHARD BAXTER, RECUEIL DES COURS: TREATIES AND CUSTOM, 81, 129 (1970).

45. North Sea Continental Shelf, Judgment, 1969 I.C.J. Rep. 3, ¶ 14 (Feb. 20); Military and Paramilitary Activities in and Against Nicaragua, Judgment, 1986 I.C.J. Rep. 392 (June 27); Richard B. Bilder, Oscar Schachter Jonathan I. Charney & Maurice Mendelson, *Disentangling Treaty and Customary International Law*, 81 AM. SOC'Y INT'L L. 157, 157, 161 (1987).

46. Celine Braumann, *Imposing Customs on Taxes: On the Value of Double Tax Treaties as Evidence for Customary International Law*, 23 J. INT'L ECON. L. 747 (2020).

47. E.g. CHARTE DES DROITS ET OBLIGATIONS DU CONTRIBUABLE VÉRIFIÉ [CHARTER OF RIGHTS AND OBLIGATIONS OF THE AUDITED TAXPAYER] (July 2020), https://www.economie.gouv.fr/files/files/directions_services/dgfp/controle_fiscal/organisation_fonctionnement/charte_contribuable_2020.pdf (Fr.); *Taxpayer's Charter*, H. K. INLAND REVENUE DEP'T, <https://www.ird.gov.hk/eng/abo/tax.htm>; *Taxpayer Bill of Rights*, CANADA REVENUE AGENCY (Feb. 10, 2020), <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc17/taxpayer-bill-rights-guide-understanding-your-rights-a-taxpayer.html>; MALTA MINISTRY OF FINANCE, TAXPAYERS' CHARTER, https://cfr.gov.mt/en/inlandrevenue/Documents/taxpayers_charter.pdf; PROCURADURÍA DE LA DEFENSA DEL

customary international law.⁴⁸ Both are even more useful than DTCs in determining taxpayers' rights under customary international law. This is because state practice which follows from observance of identical domestic law or non-binding charters, in contrast to the DTCs described above, cannot be explained as mere treaty compliance (*pacta sunt servanda*).

Overall, however, it remains difficult to find sufficiently clear evidence that states respect taxpayers' rights to prove *opinio iuris*. After all, there remain numerous other reasons why states may grant rights to taxpayers, such as to maintain their international reputation or to attract foreign investment.

C. General Principles of Law and Taxpayers' Rights

Compared to the other two traditional sources of international law, the role of general principles of law in the context of international

CONTRIBUYENTE, CARTA DE DERECHOS DEL CONTRIBUYENTE, https://www.gob.mx/cms/uploads/attachment/file/66017/carta_derechos_de_los_Contribuyentes.pdf (Mex.); FEDERAL BOARD OF REVENUE, TAXPAYERS' CHARTER (2008), <https://download1.fbr.gov.pk/Docs/2018629146495149TaxpayersCharter-1.pdf> (Pak.); SUPERINTENDENCIA NACIONAL DE ADUANAS Y DE ADMINISTRACIÓN TRIBUTARIA, CARTA DE DERECHOS DEL CONTRIBUYENTE, <http://www.sunat.gob.pe/institucional/publicaciones/carta-derechos.pdf> (Peru); *The HMRC Charter*, HM REVENUE & CUSTOMS (Nov. 5, 2020), <https://www.gov.uk/government/publications/hmrc-charter/the-hmrc-charter> (U.K.); *Taxpayers' Bill of Rights*, INTERNAL REVENUE SERV., [https://www.irs.gov/taxpayer-bill-of-rights#:~:text=Taxpayers%20have%20the%20right%20to%20pay%20only%20the%20amount%20of,the%20correct%20amount%20of%20tax.](https://www.irs.gov/taxpayer-bill-of-rights#:~:text=Taxpayers%20have%20the%20right%20to%20pay%20only%20the%20amount%20of,the%20correct%20amount%20of%20tax.;); *Carta de Derechos de los Contribuyentes*, AGENCIA TRIBUTARIA DE CATALUNYA, <https://atc.gencat.cat/es/atencio/carta-drets/> (Spain); INCOME TAX DEPARTMENT, TAXPAYERS' CHARTER, <https://incometaxindia.gov.in/Documents/taxpayer-charter.pdf> (India); *see also* INSTITUTO LATINOAMERICANO DE DERECHO TRIBUTARIO, CARTA DE DERECHOS DEL CONTRIBUYENTE PARA LOS PAÍSES MIEMBROS DEL INSTITUTO LATINOAMERICANO DE DERECHO TRIBUTARIO (ILADT) (Nov. 9, 2018), http://www.iladt.org/frontend/docs/Carta_Derechos_Contribuyente_ILADT_aprobada_y_Presentacion.pdf; CONFÉDÉRATION FISCALE EUROPÉENNE, TOWARDS GREATER FAIRNESS IN TAXATION: A MODEL TAXPAYER CHARTER, PRESENTATION TO THE MEMBERS OF THE PLATFORM FOR TAX GOOD GOVERNANCE (Feb. 2014), https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/good_governance_matters/platform/meeting_20140610/cfe.pdf; AUSTRALIAN GOVERNMENT & INSPECTOR-GENERAL OF TAXATION, REVIEW INTO THE TAXPAYERS' CHARTER AND TAXPAYER PROTECTIONS (Dec. 2016), <https://cdn.tspace.gov.au/uploads/sites/16/2016/12/Review-into-the-Taxpayers-Charter-and-Taxpayer-Protections.pdf>; MICHAEL CADESKY, IAN EDWARD HAYES & DAVID GRAHAM RUSSELL, TOWARDS GREATER FAIRNESS IN TAXATION: A MODEL TAXPAYER CHARTER (2016); Asia Oceania Tax Consultants' Association, Confédération Fiscale Européenne & Society of Trust and Estate Practitioners, *Towards Greater Fairness in Taxation: A Model Taxpayer Charter* (2015), <http://www.taxpayercharter.com/>.

48. 2018 ILC YB, *supra* note 36, at 2 ("the relevant practice of States is not limited to conduct vis-à-vis other States or other subjects of international law. Conduct within the State, such as a State's treatment of its own nationals, may also relate to matters of international law"). Other states have to be aware of this practice.

taxation has received little attention in the literature.⁴⁹ This is not surprising. Even the ICJ rarely relies on general principles of law.⁵⁰ They play a rather subordinate role in international law. In the law of the European Union, however, general principles of law play an important role: the Court of Justice of the European Union (“CJEU”) has developed human rights from the constitutional traditions of the Member States and they are laid down in the European Convention on Human Rights (“ECHR”) as general principles of Union law.⁵¹ General principles of law can thus be derived from national legal systems. It is not clear how many national systems must have a principle in order for it to become a binding general legal principle of international law. In any case, the national systems must reflect a majority of states and comprise the most important legal systems. Therefore, the classical method of identifying general principles is a thorough comparative law study involving as many national legal systems as possible.⁵² Such an approach also underlies the case law of the CJEU on general principles of Union law.⁵³ To identify practice in the Member States, the CJEU is assisted by its scientific service (*Direction de la Recherche et Documentation*). However, several general principles of Union law relating to the protection of taxpayers’ rights are now codified in the Charter of Fundamental Rights of the European Union.⁵⁴ Similar to the process of identifying general legal principles in Union law, legal science should be used to identify taxpayers’ rights as general legal principles of international law. Traditionally, the ILC, the ILA, and the *Institut de droit international* play an essential role in this process.

However, general principles of law can also be established within the international legal system.⁵⁵ Concepts such as good faith, abuse of law,

49. An exception might be an unwritten anti-abuse principle; see HONGLER, *supra* note 33, at 189.

50. See also Giorgio Gaja, *General Principles in the Jurisprudence of the ICJ*, in GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 35–43 (Mads Andenæs et al. eds. 2019).

51. See also Consolidated Version of the Treaty on the European Union art. 6(3), Oct. 26, 2012, 2012 O.J. (C 326) 7.

52. See, e.g., *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 111 (Dec. 27, 2010); *Toto Costruzioni Generali S.P.A. v. Republic of Leb.*, ICSID Case No. ARB/07/12, Award, ¶ 166 (June 7, 2012). But see HONGLER, *supra* note 33, at 191.

53. See, e.g., Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, ¶ 4 (Dec. 17, 1970).

54. See Case C-682/15, *Berlioz Inv. Fund S.A. v Directeur de l’administration des contributions directes*, ECLI:EU:C:2017:373, ¶ 54 (May 16, 2017).

55. Marcelo Vázquez-Bermúdez (Special Rapporteur of the International Law Commission), *First rep. on general principles of law*, ¶ 231, U.N. Doc. A/CN.4/732 (Apr. 5, 2019); see Mahmoud Cherif Bassiouni, *A Functional Approach to “General Principles of International Law”*, 11 MICH. J. INT’L L. 768, 768 (1990).

or legitimate expectations have repeatedly been invoked and applied by international courts as general principles of law.⁵⁶ Such general principles, which are also widely recognized in the literature,⁵⁷ are relevant for taxpayers' rights. It seems reasonable to suppose that general principles should also be applied in the tax context where they have already found sufficient acceptance in the context of investment protection law. However, it is necessary to examine in more detail to what extent such transfers are actually persuasive.

D. *Soft Law and Taxpayers' Rights*

1. The Functioning of Soft Law

As explained above, the international tax system is mainly based on (double taxation) treaties. However, the importance of soft law within this system should not be underestimated. Soft law is non-legally binding agreements, declarations of intent, or guidelines. Nevertheless, there is a certain self-binding character. But this is not the only reason for the considerable impact of soft law, especially in international tax law.⁵⁸ Soft law can complement and influence "hard" law in several ways: as an inspiration for courts in interpreting binding international law and domestic law, to facilitate the negotiation of future conventions, and as a possible starting point for customary international law by consolidating state practice.

As a general rule of thumb, the more technical an area, the more details are included in soft law.⁵⁹ Taxation is a very technical area. Therefore, many legal instruments in international taxation are soft law. Soft law thus has a particularly considerable impact on international tax law. The influence of model agreements in the context of

56. For an excellent summary, see Vázquez-Bermúdez, *supra* note 55.

57. Cf., e.g., Filippo Ranieri, *Die, bona fides "und die richterliche Kontrolle der Rechtsausübung*, in EUROPÄISCHES OBLIGATIONENRECHT 1801 (2009); Hans Kreller, *Die Theorie des Missbrauchs der Rechte in der römischen Rechtslehre / La théorie de l'abus des droits dans la doctrine romaine*, in DEUTSCHE LANDESREFERATE ZUM II. INTERNATIONALEN KONGRESS FÜR RECHTSVERGLEICHUNG IM HAAG 1937 (Ernst Heymann & Kaiser-Wilhelm-Institut Für Ausländisches Und Internationales Privatrecht eds. 1937); Daphne Barak-Erez, *The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests*, 11 EUR. PUB. L. 583 (2005).

58. In general, the resolutions of the General Assembly of the United Nations, although not legally binding, also have a considerable effect as "soft law." For the definition and effect of international soft law, see Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).

59. See, e.g., OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS (2014); see also Juliane Kokott, *Soft Law Standards under Public International Law*, in INTERNATIONAL STANDARDS AND THE LAW 15 (Peter Nobel & Cynthia Anderfuhren eds., 2005).

coordinated bilateralism has already been described.⁶⁰ In addition, both the OECD and the UN Model Tax Convention are supplemented by commentaries. These help domestic, supranational, and international courts to apply DTCs which are based on a model convention.⁶¹ Their importance is based mainly on the assumption that the negotiators of the DTCs may have relied on such comments when reproducing the wording of the clauses of the Model Conventions in the DTCs. However, just as the model agreements themselves, the comments are not binding law as such. Nor do they represent (classic) *travaux préparatoires* under Article 32 of the VCLT for the parties to the DTCs. Despite their considerable authority in practice, they remain soft law. Moreover, there are the international value-added tax (“VAT”) and goods and services tax (“GST”) guidelines adopted by the OECD Council in 2016.

2. International Organizations and Soft Law in Taxation

Non-state actors, especially international organizations, have a considerable influence on the emergence of soft law.⁶² However, they cannot create binding law for states. Their decisions do not constitute treaties and their conduct neither creates nor expresses customary international law (international organizations can, however, create their own customary international law that only regulates their conduct).⁶³

The OECD and the U.N. are particularly influential international organizations in this respect. They are the authors of the two model conventions and are the most active forums for the international exchange of views and the process of consensus building in tax law. In addition, the International Monetary Fund, the OECD, the U.N., and the World Bank Group have established platforms for tax

60. See *supra* Part III.A.1.

61. See, e.g., Case C-682/15, *Berlioz Inv. Fund S.A. v Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373, ¶ 67 (May 16, 2017); Joined Cases C-115/16, C-118/16, C-119/16 & C-299/16, *N Lux. 1 v. Skatteministeriet*, ECLI:EU:C:2019:134, ¶ 90 (Feb. 26, 2019); Joined Cases C-116/16 & C-117/16, *Skatteministeriet v. T Danmark*, ECLI:EU:C:2019:135, ¶ 48 (Feb. 26, 2019); Opinions of Advocate General Kokott, March 1, 2018, ECLI:EU:C:2018:143–48 (Mar. 1, 2018), ¶ 48; Bundesgericht [BGer] [Federal Supreme Court] Feb. 13, 2017, 2C_411/2016 – 2C_418/2016, ¶ 3.3.1 (Switz.) (foreseeable relevance for administrative assistance); Bundesfinanzhof [BFH] [Federal Fiscal Court] Feb. 27 2019, I R 73/16, ¶ 27 (Ger.); BFH Feb. 27, 2019, I R 51/17, ¶ 15 (Ger.) (both concerning income corrections according to Section 1(1) of the German External Tax Relations Law (*Außensteuergesetz*)); T.S., Nov. 28 2018 (R.G.D., No. 5448/2018, 5.2) (Spain) (dynamic reference to “permanent establishment”).

62. Odermatt, *supra* note 41.

63. 2018 ILC YB, *supra* note 36, at 3.

cooperation.⁶⁴ The G20 is the most active intergovernmental forum in the field of international taxation. Finally, on the non-governmental side, IFA and ILA can contribute not only to determining the *lex lata*, but also to the future development of international tax law, including taxpayers' rights.

IV. INTERNATIONAL AND DOMESTIC LAW

Taxation is an essential attribute of state sovereignty.⁶⁵ Taxes are levied by national or local authorities on the basis of national laws. Therefore, the interaction between international law and national law is crucial for determining the taxpayers' legal status. The variety of approaches of states to the domestic application of international law (monistic as opposed to dualistic systems) is a sensitive issue in the field of tax law. Both international treaties and customary international law may, without further transposition into domestic law, establish individual rights and obligations for natural and legal persons, provided that they are sufficiently precise.⁶⁶ However, whether taxpayers can base their claims before administrative authorities or domestic courts directly on a provision of a treaty, and whether such provisions can be derogated from by subsequent domestic law ("treaty override"),⁶⁷ depends in addition on their direct applicability

64. *Platform for Collaboration on Tax*, OECD, <http://www.oecd.org/ctp/platform-for-collaboration-on-tax.htm>.

65. See *Burlington Res. Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 391 (Dec. 14, 2012); see also *M. Meerapfel Söhne AG v. Cent. Afr. Rep.*, ICSID Case No. ARB/07/10, Excerpts of Award, ¶ 319 (May 12, 2012).

66. Cf. *LaGrand Case (Ger. v. U.S.)*, Judgment, 2001 I.C.J. 466, 483 (June 27); *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A), No. 82 (Oct. 1, 1999); *Case 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Admin.*, ECLI:EU:C:1963:1, 16 & operative 1 (Feb. 5, 1963).

67. This is the case in Germany. See *Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2 BvL 1/12 2 BvL 1/12*, Dec. 15, 2015, Part II. 2. (Ger.) (regarding combat against abuse). *Klaus Vogel* had fought all his life against treaty override. The German Federal Fiscal Court shared his view and considered the treaty override to be unconstitutional, see *Bundesfinanzhof [BFH] [Federal Fiscal Court] Dec. 11, 2013, I R 4/13 (Ger.)*; *BFH*, Jan. 10, 2012, I R 66/09 (Ger.); see *Klaus Vogel*, *Einleitung des OECD-MA*, in *DOPPELBESTEUERUNGSABKOMMEN* 174 (5th ed. 2008); on the debate in the literature, see generally *Morris Lehner*, in *DOPPELBESTEUERUNGSABKOMMEN* (Klaus Vogel & Morris Lehner eds., 6th ed. 2015); pro unconstitutionality see also *Silja Vöniky*, *Verfassungsrecht und internationale Verträge*, in *HANDBUCH DES STAATSRICHTS* § 236, ¶ 33, (Josef Isensee & Ferdinand Kirchhof eds., 3rd ed. vol. XI, *Internationale Bezüge*, 2013); *Alexander Rust & Ekkehart Reimer*, *Treaty Override in deutschen Internationalen Steuerrecht*, in *Klaus Vogel*, *On Double Taxation Conventions* 843 (Alexander Rust & Ekkehart Reimer eds., 2005).

and their status under domestic law.⁶⁸ These are questions of domestic constitutional law.⁶⁹

In the European Union, the conflict between national law and international law is particularly complex. Although direct taxes are not harmonized, both primary and secondary Union law have a considerable influence on the tax systems of the EU Member States. Although the latter have the right to exercise their sovereignty through national law and international tax treaties, they must comply with European Union law.⁷⁰

V. CLASSIFICATION OF HUMAN RIGHTS IN TAX LAW

In tax law, human rights are generally categorized according to procedural rights, sanctions-related rights, and substantive rights. This classification takes into account the different degrees to which the exercise of these rights and their judicial control affect tax sovereignty.

As far as procedural rights are concerned, the courts can systematically enforce such control without calling into question political considerations and legislative priorities underlying the specific national tax system. Therefore, the human rights control of tax procedures can generally be stricter than the control relating to substantive rights, such as the fundamental rights of equality or property.

Rights related to the imposition of sanctions, including penalties, have some similarities with procedural rights. Still, these justify a separate category. Of particular importance is the proportionality of sanctions in relation to the legislative objectives. In tax matters, the state is more inclined to impose severe penalties with a deterrent effect in order to prevent future violations of tax rules. However, these can have a disproportionate impact on the exercise of human rights. A fair balance must therefore be struck between the effectiveness of such measures and their impact on individuals.

In the case of substantive rights, strict judicial control of political decisions that may underlie tax laws is generally not possible. It is primarily for the legislator to determine how to exercise tax sovereignty. However, this should not prevent the courts from assessing whether the

68. Cf., e.g., Karen Kaiser, *Treaties, Direct Applicability*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1, 4–5 (2013); Leslie Henry, *When is a Treaty Self-Executing*, 27 MICH. L. REV. 776 (1929); *Medellin v. Texas*, 552 U.S. 491, 538 (2008).

69. For Germany see Grundgesetz [GG] [Basic Law], art. 24, 25, 59 (2); see also MARTIN WILL, VÖLKERRECHT UND NATIONALES RECHT 1164 (Juristische Ausbildung 2015).

70. E.g., Cases C-279/93, *Kln-Altstadt v. Schumacker*, 1995 ECLI:EU:C:1995:31, ¶ 21 (Feb. 14, 1995); and C-482/18, *Google Ireland Ltd. v. Nemzeti*, 2020 ECLI:EU:C:2020:141, ¶ 37 (Mar. 3, 2020).

state has exercised that discretion in accordance with the principle of the rule of law and the external limits imposed on the exercise of fiscal sovereignty by the protection of human rights.

VI. PROCEDURAL RIGHTS

A. Introduction

Procedural rights give effect to substantive rights. They do not relate to the tax owed, nor are they directly related to it, but rather relate to the procedure for its assessment and collection. Procedural rights apply at all stages of the tax procedure. They include rules dealing with the registration and identification of taxpayers, the submission of tax returns, the conduct of tax audits, and the assessment and collection of taxes and sanctions, including penalties. However, this Article treats the latter as a separate category. Also included are administrative procedures for resolving disputes between taxpayers and tax authorities, as well as judicial remedies that ensure the effective exercise of taxing powers in accordance with the rule of law.⁷¹

The overarching principle of the rule of law applies to both the tax procedure and to material aspects of taxation (especially the prohibition of arbitrariness). The most important procedural expression of the rule of law is the right to effective judicial protection, which includes several specific subprinciples, such as access to justice (*ubi ius, ubi remedium*), equality of arms, freedom from self-incrimination (*nemo tenetur*), prohibition of double jeopardy (*ne bis in idem*), and the right to be heard (*audi alteram partem*). These are comprised in the right to a fair trial. Three main aspects are particularly important in tax proceedings, namely the taxpayers' right of access to documents (*habeas data*), the right to be heard, and the right to judicial protection.

The easily accessible case law of the CJEU and the European Court of Human Rights ("ECtHR") are the cornerstones of effective protection of taxpayers' procedural rights and could also provide inspiration for the development of a global standard. It will therefore be presented in more detail below.

B. Access to Documents (*Habeas Data*)

Access to all documents and information which may concern the parties to a dispute is an integral part of the right to a fair trial. It is an essential

71. See PISTONE, *supra* note 2, at 3–7.

condition for the effective exercise of the rights of defense in tax proceedings.⁷² Therefore, this right applies earlier than other procedural rights.

Taxpayers must have access to the relevant documents held by the tax authorities, if necessary, through a disclosure procedure.⁷³ Such access is not to be limited to the documents on which the tax authority has based its decision against the taxpayer. Rather, it shall also include the evidence collected by the tax authority, which may be advantageous and prove that the taxpayer has acted lawfully.⁷⁴ If access is not properly ensured, the right to a fair trial is violated.⁷⁵

However, the right of access to documents is not absolute. It can be legitimately restricted, in particular in the context of tax audits. Furthermore, national laws protecting fiscal and professional secrecy⁷⁶ may, in certain circumstances, justify only partial access.⁷⁷

C. *Right to be Heard (Audi Alteram Partem)*

The right to a fair trial includes the right to be heard (*audi alteram partem*) in administrative proceedings and before a court. It obliges the tax authorities to give taxpayers the opportunity to express their views throughout the procedure. In principle, the hearing must take place before the authorities take measures that may affect taxpayers. It is only different if there is a justification for the immediate decision and its enforcement or if a prior hearing could not have led to a different result.⁷⁸

Audi alteram partem includes not only the taxpayers' right to express their views⁷⁹ but also the obligation of the tax authorities to take these views into account in their motivation. During tax litigation, this right does not necessarily imply the obligation to hold an oral hearing, but at

72. Art. 43, Constitución Nacional [Const. Nac.] (Arg.) (specific provision on access to documents in purely domestic tax proceedings); *see also* Case C-298/16, *Ispas v. Direcția Generală*, 2017 ECLI:EU:C:2017:843, ¶ 39 (Nov. 9, 2017).

73. *See, e.g.*, *McGinley v. United Kingdom*, App. No. 21825/93 & No. 23414/94, §§ 86, 90 (1998), <http://hudoc.echr.coe.int/fre?i=003-741378-753326>.

74. Case C-189/18, *Glencore v. Nemzeti*, 2019 ECLI:EU:C:2019:861, ¶ 54 (Oct. 16, 2019).

75. *Chambaz v. Switzerland*, App. No. 11663/04, § 63 (2012), <http://hudoc.echr.coe.int/eng?i=001-110241>.

76. *Glencore v. Nemzeti*, 2019 ECLI:EU:C:2019:861, ¶ 55 (Oct. 16, 2019) (referencing Case C-298/16, *Ispas v. Direcția Generală*, 2017 ECLI:EU:C:2017:843, ¶ 36 (Nov. 9, 2017)).

77. *Glencore v. Nemzeti*, 2019 ECLI:EU:C:2019:861, ¶ 56–57 (Oct. 16, 2019).

78. *See* Pasquale Pistone, *The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation*, in *EUROPEAN TAX LAW* 169 (Peter J. Wattel et al. eds., 7th ed. 2018).

79. Cases C-129/13 and C-130/13, *Kamino Int'l v. Staatssecretaris van Financiën*, 2014 ECLI:EU:C:2014:2041 ¶ 73.

least the right and opportunity of the parties to present their point of view before the court decides on the case. However, the parties do not have to make use of this possibility.

D. *Right to Judicial Protection*

The right to an effective remedy and an impartial tribunal includes the right of any taxpayer whose rights have been adversely affected to have access to a court (*ubi ius, ibi remedium*). The court must be independent, impartial, and previously established by law. Especially in the case of part-time judges, conflicts of interest may arise from other activities that may call into question their independence and impartiality. The same applies where courts are not established by law⁸⁰ or their members are either appointed by the tax authorities or seconded at short notice by those authorities.⁸¹

As an essential expression of the rule of law, the right to judicial protection also applies in the course of tax proceedings connected with cross-border mutual assistance.⁸² However, Article 6 of the ECHR guarantees the right to a fair trial only for “disputes relating to . . . civil rights and obligations or . . . criminal charges.”⁸³ This does not include tax disputes.⁸⁴ However, the ECHR interprets the concept of “criminal charge” broadly, so that tax matters are covered in the context of sanctions. The right to a fair trial under the EU Charter does not contain such limitation, but the Charter applies only within the scope of Union law.⁸⁵ In the final analysis, both the CJEU and the ECtHR protect

80. See ECHR, *supra* note 29, art. 6(1); EU Charter, art. 47(2).

81. The CJEU considers the Portuguese tax arbitration tribunals as independent courts. See Case C-377/13, C-388/18, *Autoridade Tributária e Aduaneira (Impôt sur les plus-values immobilières)*, 2021 ECLI:EU:C:2021:212 (Mar. 18, 2021) *Ascendi v. Autoridade Tributaria*, 2014 ECLI:EU:C:2014:1754 ¶ 22–34 (June 12, 2014); see also pending Case C-545/19, *Allianzgi-Fonds Aevn. Sec.*, however, Case C-274/14, *Banco de Santander*, 2020 ECLI:EU:C:2020:17 ¶ 53 (Jan. 21, 2020) on the *Tribunal Económico-Administrativo Central* (Central Administrative Control Body, Spain), which is not an independent court.

82. Case C-682/15, *Berlioz Inv. Fund S.A. v. Directeur de l’administration des contributions directes*, ECLI:EU:C:2017:373, ¶ 59 and operative 2 (May 16, 2017); Cases C-245/19 and 246/19, *État luxembourgeois v. B.*, 2020 ECLI:EU:C:2020:795 (regarding the absence of a judicial remedy for the interested persons prior to information being exchanged with opinion of Advocate General Kokott of July 2, 2020, ECLI:EU:C:2020:516).

83. *Cf., e.g.*, *Ravon v. France*, App. No. 18497/03, ¶ 24 (Feb. 21, 2008), <http://hudoc.echr.coe.int/fre?i=001-85184>.

84. *Ferrazzini v. Italy*, App. No. 44759/98, ¶¶ 20–31 (July 12, 2001), <http://hudoc.echr.coe.int/eng?i=001-59589>.

85. EU Charter, art. 51(1); Case C-617/10, *Åklagaren v. Fransson*, 2013 ECLI:EU:C:2013:105 ¶ 16 (Feb. 26, 2013); Opinion Kokott in Cases C-469/18 & C-470/18, *IN v. Belgische Staat*, 2019 ECLI:EU:C:2019:597 ¶¶ 30 et seq (July 11, 2019).

procedural rights in many cases, and the CJEU even in the context of purely domestic tax audits notwithstanding the “within the scope of Union law” language.⁸⁶ Article 8 (right to a fair trial) and Article 25 (right to legal protection) of the American Convention on Human Rights also expressly apply to tax issues.⁸⁷

Various tax measures may discourage access to justice. These include the legal institution *solvo et repeto*.⁸⁸ According to *solvo et repeto*, the taxpayer is first obliged to pay the tax debt claimed by the tax authorities before going to court; they are only entitled to reclaim it once its illegality has been established by a court. This goes beyond the rule found in many states, according to which appeals in tax law do not have a suspensive effect and thus do not hinder recovery of tax claims.⁸⁹ Effective access to justice also requires that the rules for access are clear⁹⁰ and that legal aid is granted where necessary.

Equality of arms is at the heart of the right to a fair trial. Together with *habeas data*,⁹¹ it is the basis of the right to an effective defense.⁹² It entitles the parties to produce evidence in their favor. Time limits are permissible, though, and serve the purpose of legal certainty.

Rules of evidence must not result in making the exercise of the right practically impossible or excessively difficult.⁹³ This may be the case for legal presumptions (or presumptions resulting from the practice of the tax authorities⁹⁴), in particular if they are irrebuttable,⁹⁵ for rules of evidence which reverse the burden of proof to the detriment of the taxpayer without serious reasons justifying it,⁹⁶ or for the exclusion of any

86. Cf., e.g., Case C-298/16, *Ispas v. Direcția Generală; Ravon v. France*, App. No. 18497/03, ¶ 24 (Feb. 21, 2008), <http://hudoc.echr.coe.int/fre?i=001-85184>.

87. See also *Cantos v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 85 ¶ 3 (Sept. 7, 2001).

88. For the incompatibility of *solvo et repeto* with the right of access to justice and the principle of equality, see Corte cost. sez. un., 24 marzo 1961, n. 21, *Giur. it.*, II (It.).

89. Cf. Gernot Walde, *Solve et Repete*, FINANZARCHIV 444 (1941).

90. Cf. *Geouffre de la Pradelle v. France*, App. No. 12964/87 (Dec. 16, 1992), <http://hudoc.echr.coe.int/eng?i=001-57778>; *Bellet v. France*, App. No. 23805/94, (Dec. 4, 1995), <http://hudoc.echr.coe.int/eng?i=001-57952>; *Maširević v. Serbia*, No. 30671/08, (Feb. 11, 2014), <http://hudoc.echr.coe.int/eng?i=001-140775>.

91. See *supra* Part VI.B.

92. EU Charter, art. 48.

93. Case C-199/82, *San Giorgio*, 1983 ECLI:EU:C:1983:318 ¶ 14 (Nov. 9, 1983).

94. Case C-147/01, *Weber's Wine World*, 2003 ECLI:EU:C:2003:533 ¶ 114 (Oct. 2, 2003).

95. Cases C-286/94, C-340/95, C-401/95 and C-47/96, *Garage Molenheide v. Belgium*, 1997 ECLI:EU:C:1997:623 ¶ 52.

96. Case C-14/16, *Euro Park Services v. Ministre des Finances*, 2017 ECLI:EU:C:2017:177 ¶ 53; *Joined Cases C-115/16, C-118/16, C-119/16 & C-299/16, N Lux. 1 v. Skatteministeriet*, ECLI:EU:C:2019:134, ¶ 142 (Feb. 26, 2019); *Joined Cases C-116/16 & C-117/16, Skatteministeriet v. T Danmark*, ECLI:EU:C:2019:135, ¶ 142 (Feb. 26, 2019) (on the burden of proof and presumptions).

type of evidence other than documentary evidence.⁹⁷ However, it remains unchallenged that, in the context of the free judicial assessment of evidence, documentary evidence may *de facto* have a strong persuasive power for the courts.

The right to not incriminate oneself (*nemo tenetur*) also applies to tax offenses. It requires the authorities to prove incriminating facts without recourse to evidence obtained by coercion or generally in disregard of the will of the accused.⁹⁸ The *nemo tenetur* principle is of particular importance in view of the notification obligations provided for in Action 12 of the BEPS and, as far as the EU is concerned, accordingly in the so-called DAC 6 Directive,⁹⁹ if the notification obligation is shifted to the taxpayers themselves. Such notification obligations essentially concern tainted schemes of aggressive tax planning and tax avoidance. However, the situation of the taxpayer in tax proceedings differs significantly from that of a defendant in criminal proceedings.¹⁰⁰ Taxpayers and their intermediaries are, in principle, obliged to cooperate with the tax authorities. However, issues may arise regarding the distinction between tax and criminal law—e.g., with regard to the use of evidence contributed by the taxpayer in subsequent criminal proceedings. A violation of a prohibition on the collection of evidence, such as *nemo tenetur*, does not necessarily mean that the use of such evidence is also prohibited. No rigid rules apply in this respect. In any case, the tendency is to use illegally obtained evidence to prove serious crimes. However, the seriousness of the violation when obtaining the evidence also matters.¹⁰¹ In Germany, there is a limited ban on the use of

97. Case C-199/82, *San Giorgio*, 1983 ECLI:EU:C:1983:318 ¶ 14 (Nov. 9, 1983); Case C-441/98 and C-442/98, *Mikhailidis*, 2000 ECLI:EU:C:2000:479, ¶ 36 (Sept. 21, 2000).

98. *J.B. v. Switzerland*, App. No. 31827/96 § 64 (May 3, 2001), <http://hudoc.echr.coe.int/eng?i=001-59449>; see also Raymond H.C. Luja, *Accounting Disclosure of Tax Liabilities, Fair Trial and Self-incrimination: Should the European Commission Endorse IFRS in the Light of the European Human Rights?*, in *HUMAN RIGHTS AND TAXATION IN EUROPE AND THE WORLD* 253, 263 (Georg Kofler, Miguel Poiars Maduro & Pasquale Pistone eds., 2011).

99. Cf. Council Directive 2011/16, art. 8(a), 8(a)(a), annexes, 2011, on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799, O.J. (L 64) 1, as amended by Council Directive 2018/822, 2018 O.J. (L 139) 1.

100. *Van Weerelt v. Netherlands*, App. No. 784/14, ¶ 56 (June 16, 2015), <http://hudoc.echr.coe.int/eng?i=001-156022>; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2 BvL 13/07, Apr. 27, 2010, ¶ 3 (Ger.) (regarding the compatibility of § 393(2) of the Fiscal Code of Germany with Articles 2(1) in connection with 1(1) of the German Basic Law - *nemo tenetur*).

101. Cf. *Pélissier v. France*, App. No. 25444/94, ¶ 45 (Mar. 25, 1999), <http://hudoc.echr.coe.int/eng?i=001-58226>; Case C-276/01, *Joachim Steffensen*, ECLI:EU:C:2003:228, ¶ 45 (Apr. 10, 2003); Opinion Kokott in Cases C-469/18 & C-470/18, *IN v. Belgische Staat*, 2019 ECLI:EU:C:2019:597 (July 11, 2019); see also Juliane Kokott, *Bedeutung und Wirkungen deutscher und europäischer*

evidence obtained illegally.¹⁰² The German Constitutional Court has confirmed that evidence obtained illegally can be used in respect to offenses in the prosecution of which there is an overriding public interest.¹⁰³ This only applies to serious tax offenses.

The *ne bis in idem* principle also applies in tax matters of a criminal nature, although the distinction between criminal and administrative law is not always easy.¹⁰⁴ Its procedural part (*ne bis vexari*) can concern both the administrative and the judicial phase of tax proceedings.¹⁰⁵ Under Union law, *ne bis in idem* even includes the prohibition of being subject to two judicial proceedings in two different countries “within the Union.”¹⁰⁶ This is based on the principle of mutual recognition within the Union. By contrast, the ECtHR can only apply the principle in relation to one and the same state.¹⁰⁷ There is no cross-border *ne bis in idem* prohibition under general international law.¹⁰⁸ In the United States, due to the dual-sovereignty doctrine, *ne bis in idem* does not even apply in the relationship between the federal government and the states.¹⁰⁹

E. Rights in Cross-Border Situations

The basic procedural rights also bind the authorities when they act

Grundrechte im Steuerstrafrecht und Strafverfahren, in NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-
STEUER- UND UNTERNEHMENSSTRAFRECHT 409, 409, 415 (2017); KOKOTT, *supra* note 15, at 203; *see*
PISTONE, *supra* note 2, at 82.

102. Neufassung der Abgabenordnung [Fiscal Code] Oct. 1, 2002, BGBl I at 3866, last amended by Gesetz, July 17, 2017, BGBl. I at 2541, art. 17, § 393(2) (Ger) (“Where during criminal proceedings the public prosecutor’s office or the court learns from the tax records of facts or evidence which the taxpayer, in compliance with his obligations under tax law, revealed to the revenue authority before the initiation of criminal proceedings or in ignorance of the initiation of criminal proceedings, this knowledge may not be used against him for the prosecution of an act that is not a tax crime. This shall not apply to crimes for the prosecution of which there is a compelling public interest (section 30(4) number 5).”).

103. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2 BvL 13/07, Apr. 27, 2010 (Ger.).

104. *See infra* Part VII.

105. *See also* C-524/15, Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018); PISTONE, *supra* note 2, at 27, 29, 59, 110.

106. EU Charter, art. 50.

107. Additional Protocol to the ECHR, art. 4, Nov. 22, 1984 (containing the common approach: “criminal proceedings of the same State”).

108. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2 BvR 2/86, Mar. 31, 1987 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2 BvR 38/06, Dec. 4, 2007 (Ger.).

109. *See* *Gamble v. United States*, 139 S. Ct. 1960, 1980 (2019).

in the context of international mutual assistance.¹¹⁰ This is important, as the EU Member States are currently very keen to remove obstacles to effective cooperation, such as prior consultation of the parties concerned. In its much-noticed *Berlioz* judgment,¹¹¹ the CJEU decided that the person who is asked for information in the context of international administrative assistance must have access to certain documents in the file in order to be able to challenge the legality of the request for information.¹¹² In order to do so, the requested person must at least have knowledge of the person to whom the investigation or inquiry applies and of the tax purpose for which the information is requested. Furthermore, the national court should have full access to the request for information and to any additional information. If the national court considers it necessary, it may pass on this information to the person responsible for providing the information.¹¹³ The case is interesting because, in order to facilitate international administrative assistance, Luxembourg had just abolished legal remedies, which the CJEU then ordered to reintroduce. Against this background, the question remains open whether the abolition of consultation rights before international data exchange and cross-border administrative cooperation, as has taken place worldwide in the course of BEPS, will pass judicial muster in the long run. The CJEU only grants legal protection to the addressees of information orders, not to the taxpayer or other third parties.¹¹⁴

Moreover, data are protected less in the area of tax law.¹¹⁵ Nevertheless, the fundamental right to data protection may become important for the tax authorities in their cooperation with third countries with significantly lower levels of protection. The CJEU generally requires “a level

110. Pistone, *supra* note 78, at 153.

111. Case C-682/15, *Berlioz Inv. Fund S.A. v. Directeur de l'administration des contributions directes* (May 16, 2017).

112. *See id.* ¶ 100 (referencing Council Directive 2011/16/EU, art. 20(2), 2011 O.J. (L 64) 1).

113. *Id.* ¶¶ 92, 100. *See also* Joined Cases C-245/19 & C-246/19, *État de Luxembourg v. B* (Oct. 6, 2020); Pending Case C-437/19, *État du Grand-duché de Luxembourg* (May 31, 2019), <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=219996&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6865676>. A similar approach has been adopted in New Zealand in *CIR v. Chatfield & Co.* [2019] NZCA 73 per Asher, Brown & Gilbert JJ (concerning a request for information according to Article 25 of the New Zealand-South Korea Double Tax Convention).

114. Case C-245/19 and 246/19, *État luxembourgeois v. B*, 2020 (regarding the absence of a judicial remedy for the interested persons prior to information being exchanged. By contrast, in her opinion of 2 July 2020 in those Joined Cases, Advocate General Kokott concluded that the person required to give information, the taxpayer and affected third parties should be given access to a legal remedy before information is exchanged.

115. On data protection, *see* discussion *infra* Part VIII.B. *See also* pending Case C-175/20, *Valstienēmumu dienests* (Apr. 14, 2020) regarding the protection of tax data.

of protection essentially equivalent to that guaranteed within the European Union.”¹¹⁶

Problems of access to justice could also arise in connection with the cross-border settlement of tax disputes where mutual agreement and arbitration procedures under tax treaties or the Multilateral Instrument would be considered as judicial or quasi-judicial procedures. This is controversial, however.¹¹⁷ In any case, considering the principle of fair trial, there seems to be a trend towards greater participation of taxpayers in these procedures.¹¹⁸ Anyway, the duty to state reasons applies not only to judicial decisions but also to administrative decisions.¹¹⁹

The European Union has tried to address those issues by introducing Directive 2017/1852 on tax dispute resolution mechanisms in the EU.¹²⁰ Its aim is to make mutual agreement and arbitration procedures better and more efficient. However, from the taxpayers’ perspective, concerns remain, particularly with regard to arbitration procedures under the so-called baseball procedure.¹²¹ In that procedure, the arbitrators merely choose, without giving reasons, between two solutions presented by the parties.

F. *Alternative Protection Mechanisms, Ombudspersons in Particular*

In addition to internal administrative and judicial review, many countries have established alternative complaint mechanisms to protect taxpayers’ rights. Within the framework of these, taxpayers can defend themselves against arbitrariness or abuse by the tax authorities. Sometimes there are inhibitions about bringing such accusations to court. In addition, out-of-court alternatives are usually less expensive. Such mechanisms are usually limited to complaints relating to procedural aspects of the interaction between the taxpayer and the authority. They often

116. Case C-311/18, *Data Protection Comm’r v. Facebook Ireland Ltd.*, ECLI:EU:C:2020:559 (July 16, 2020).

117. Denied e.g., by PISTONE, *supra* note 2, at 94.

118. See the proposals in Katerina PETROU, *Taxpayer Participation in Tax Treaty Dispute Resolution*, in IBFD DOCTORAL SERIES (Vol. 28, 2014); Philip Baker & Pasquale Pistone, *BEPS Action 16: The Taxpayers’ Right to an Effective Legal Remedy Under European Law in Cross-Border Situations*, 25 EC TAX REV. 335 (2016).

119. EU Charter, art. 41(2)(c).

120. Council Directive 2017/1852, Oct. 10, 2017, 2017 O.J. (L 265) 1 (EU).

121. *Id.*; see also Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting art. 23, OECD (June 7, 2017), <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>; *supra* Part III.A.2.

serve to protect rights enshrined in law or in a (non-legally binding) charter of taxpayers' rights.¹²²

Taxpayers can lodge their complaints directly with the tax authority, which conducts an internal review, ideally by an independent team. Alternatively, an independent government institution, such as an ombudsperson, will investigate the complaints. As a rule, such services are free of cost for the taxpayer. However, the tax ombudspersons' powers are often limited to providing non-binding recommendations to the taxpayer and the relevant tax authority. In view of this, these mechanisms generally do not exclude taxpayers' access to formal judicial proceedings if the informal channels do not lead to a satisfactory outcome.

There are ombudspersons whose activities generally concern government action,¹²³ and ombudspersons who are responsible for specific areas.¹²⁴ Specialized tax ombudspersons in particular have achieved very satisfactory results in various countries around the world. One example is the U.S. National Taxpayers' Advocate.¹²⁵ The Mexican authority for the defense of taxpayers' rights, *Procuraduría de la Defensa del Contribuyente* ("Authority for the Defense of the Taxpayer's Rights") ("PRODECON"), is also independent and has extensive powers.¹²⁶ Other specialized tax ombudspersons¹²⁷ have specific mandates to investigate complaints concerning procedural rights. Like the Australian Inspector General of Taxes, a tax ombudsperson can be given special powers by law to obtain information. This promotes the efficiency of its investigations. Depending on the structure of the procedure, taxpayers

122. See generally Braumann, *supra* note 46.

123. For example in New Zealand; cf. EU Charter, art. 43 (regarding the European Ombudsman).

124. Such as the UK's Parliamentary and Health Services Ombudsman.

125. In 1979, the IRS created the Taxpayer Advocate Service. Since 1997, the Taxpayer Advocate Service has been operating as an independent body within the IRS. The institution fights for taxpayers' rights and promotes their confidence in the integrity and accountability of the IRS.

126. PRODECON is empowered by federal legislation to receive and address complaints, filed by taxpayers against any act of the Mexican Federal Tax Authorities, thereby exercising its tax ombudsperson function to safeguard the taxpayers' fundamental rights. The complaints are sought to be resolved through a flexible procedure, without strict formalisms. If PRODECON is, however, unable to reach a solution with the tax authority, it may issue a non-binding public recommendation exposing the inappropriate behaviour of the tax authority.

127. See South Africa's Tax Ombud, Chile's *DEDECON*, Canada's Taxpayers' Ombudsman, Spain's *Consejo para la Defensa del Contribuyente*, France's *Médiateur des ministères économiques et financiers*, Colombia's and Peru's *Defensorías del Contribuyente*, Pakistans' Federal Tax Ombudsman as well as Australia's Inspector General of Taxation.

must first exhaust internal remedies within the authority before calling on the tax ombudsperson.

Ombudspersons act independently. They do not necessarily act as the taxpayer's lawyer. However, as is often indicated by PRODECON's designation as "Taxpayers' Advocate," their *raison d'être* nevertheless is to defend taxpayer's rights. Informal procedures of the tax ombudsperson can clarify procedural issues for certain taxpayers and generally improve administrative procedures. In certain circumstances, the tax ombudsperson may take further protective measures, such as compensating taxpayers for financial losses caused by defective administration.¹²⁸

VII. SANCTION-RELATED RIGHTS

Traditionally, a distinction is made between administrative and criminal sanctions. The latter are usually more severe and have a stigmatizing effect. Additional tax payments—often in the form of tax surcharges—due to the mere failure to pay the tax on time and in full belong to the first category. In contrast, criminal sanctions require intent. In Europe, however, the dividing line between administrative and criminal sanctions is blurred. According to the so-called Engel approach of the ECtHR,¹²⁹ the severity of the sanctions is a decisive factor supporting their criminal nature. For example, the amount to be paid as a result of an administrative sanction can be very high and thus fulfil the criteria for the application of Article 6 of the ECHR, which only applies to civil rights and obligations or criminal charges.¹³⁰

The principle of legality (*nulla poena sine lege*) also applies to criminal tax law. According to this principle, the conduct must constitute an infringement at the time when it takes place. The author of the offense must have been aware of the infringement. This justifies the obligation to bear the drastic consequences associated with the infringement.

In applying the *ne bis in idem* principle, the ECtHR has more recently taken into account the different characteristics and functions of tax surcharges and tax penalties and allows them to be levied in combination

128. *E.g.*, Commonwealth Ombudsman, *Fact Sheet: Compensation for Defective Administration*, https://www.ombudsman.gov.au/__data/assets/pdf_file/0026/35594/Compensation-for-defective-administration.pdf.

129. *Engel v. Netherlands*, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, ¶ 82 (June 8, 1976), <http://hudoc.echr.coe.int/eng?i=001-57479>.

130. *Id.*; see discussion in more detail at *supra* Part VI.D.

with certain circumstances.¹³¹ However, a combination of administrative and criminal sanctions may also be covered by the prohibition.¹³²

If different bodies are responsible for the assessment of such sanctions, taxpayers may have to defend themselves twice, first in regard to the tax surcharge and second in regard to the criminal sanction. This may collide with the procedural part of the prohibition of double jeopardy (i.e. not to be sued twice in respect of the same facts—*ne bis vexari*), especially since both types of tax sanctions often pursue a common objective.

It is precisely in the area of combating VAT fraud that a taxpayer who knew or should have known about an evasion committed upstream or downstream of his transaction in the supply chain may even face a triple burden (refusal of both deduction and exemptions plus penalty). All in all, this could amount to a sanction without sufficient subjective conditions on the taxpayers' side for such harsh reaction by the legal system. Moreover, the presumption of innocence (*in dubio pro reo*) implies that the guilt of the person accused of a tax offense has to be proven (burden of proof) beyond reasonable doubt (standard of proof).¹³³ Presumptions in tax law can collide with this.

Finally, the principle of proportionality¹³⁴ sets limits for penalties. They must be appropriate, necessary, and proportionate. Excessive penalties are prohibited. Notwithstanding prevention being a legitimate objective, sanctions that primarily and unilaterally pursue deterrent objectives may violate the prohibition of excessiveness. Moreover, the principle of proportionality requires that the level of penalties be based on a number of objective and subjective factors, including the seriousness of the infringement, whether the offenders are repeat offenders, and their economic situation.

131. *A & B v. Norway*, App. Nos. 24130/11 and 29758/11, ¶ 130 (Nov. 15, 2016), <http://hudoc.echr.coe.int/eng?i=001-168972>; cf. also C-524/15, *Luca Menci*, ECLI:EU:C:2018:197, ¶ 61 (Mar. 20, 2018).

132. See Case C-617/10, *Case C-617/10, Åklagaren v. Fransson*, 2013 ECLI:EU:C:2013:105 ¶ 34 (Feb. 26, 2013).

133. On the burden and standards of proof from a comparative perspective, see JULIANE KOKOTT, *BEWEISLASTVERTEILUNG UND PROGNOSEENTSCHEIDUNGEN BEI DER INANSPRUCHNAHME VON GRUND- UND MENSCHENRECHTEN* 12 (1993); JULIANE KOKOTT, *THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW* (1998).

134. On the importance of the principle of proportionality as an internationally recognized general principle of law, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, and 2 BvR 980/16, May 5, 2020, ¶¶ 124–26 (Ger.)

VIII. SUBSTANTIVE RIGHTS

A. *The Principle of Equality*

1. Introduction

The principle of equality is enshrined in various legal instruments: national constitutions and statutory law, bilateral tax treaties,¹³⁵ and other international agreements.¹³⁶ Taxpayers can rely on all these instruments. The effective protection of the principle of equality is normally guaranteed by all courts, from lower courts to supreme courts and constitutional courts. Where supranational law or international agreements exist, supra- and/or international courts may be added.¹³⁷

The principle of equality is the foundation of tax law and has many manifestations there. First, the general principle of equality as such is of utmost importance in tax law, as it guarantees equal treatment—including equal enforcement¹³⁸—of the taxes owed by all taxpayers. Second, the ability-to-pay principle, which is explicitly recognized in some national constitutions,¹³⁹ is a specific expression of the principle

135. Cf. Model Convention with Respect to Taxes on Income and on Capital art. 24, OECD (Nov. 21, 2017), <https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf>.

136. E.g., EU Charter, art. 20–21; EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 14 OF THE EUROPEAN COURT OF HUMAN RIGHTS AND ON ARTICLE 1 OF PROTOCOL 12 TO THE CONVENTION (2020), https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.

137. E.g., CJEU, ECtHR and the Inter-American Court of Human Rights.

138. Bundesverfassungsgericht [BVerfG] [Federal Constitution Court], 2 BvR 1493/89, June 27, 1991, ¶ 109 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitution Court], 2 BvL 17/02, March 9, 2004, ¶¶ 31–42 (Ger.); ROLF ECKHOFF, RECHTSANWENDUNGSGLEICHHEIT IM STEUERRECHT, DIE VERANTWORTUNG DES GESETZGEBERS FÜR EINEN GLEICHMÄßIGEN VOLLZUG DES EINKOMMENSTEUERRECHTS (1999).

139. E.g., 1975 Syntagma [Syn.] [Constitution] 4(5) (Greece) (“Greek citizens shall bear public burdens without distinction according to their ability.”); Art. 53(1) Costituzione [Cost.] (It.) (“Everyone is obliged to contribute to public expenses in proportion to his or her fiscal power.”); Magyarország Alaptörvénye [The Fundamental Law of Hungary], Alaptörvény, art. O (“Everyone is responsible for himself and is obliged to contribute to the fulfilment of state and community tasks according to his abilities and possibilities.”), art. XXX (“(1) Each person shall contribute to the satisfaction of common needs in accordance with his or her ability to work or to participate in economic life. (2) The level of contribution to meet common needs shall be determined, in the case of persons having children, taking into account the expenses incurred in bringing up children.”); C.E., B.O.E. n. 311, art. 31(1) Dec. 29, 1978 (Spain) (“All contribute to public expenditure in accordance with their economic possibilities and by means of a fair tax system based on the principle of equality and progression, which in no case should be confiscatory.”); CONSTITUTION OF CYPRUS Aug. 16, 1960, art. 24(1) (“Every person is bound to contribute according to his means towards the public burdens.”); see also Klaus Tipke, *Europäisches Steuerfassungsrecht, Eine rechtsvergleichende Übersicht*, in STAATEN UND STEUERN, FESTSCHRIFT FÜR KLAUS VOGEL ZUM 70. GEBURTSTAG 561, 561–67 (Paul Kirchhof & Morris Lehner et al. eds., 2000);

of equality. Third, the principle of equality implies neutrality of competition. Fourth and finally, it aims for fairness and justice between taxpayers.

In the following subsections, these different, internationally recognized expressions of the principle of equality will be further elaborated.

2. The General Principle of Equality

The general principle of equality requires that taxpayers be equal before the law. Furthermore, it is the main frame of reference for the legislator. It obliges the legislator to treat substantially equal situations equally in terms of taxation and substantially unequal situations unequally.¹⁴⁰ Furthermore, tax authorities must apply tax law in the same way to all taxpayers. At the same time, the principle of equality implies coherent treatment. Accordingly, the fundamental right to property pursuant to Article 1 of the First Protocol to the ECHR, as interpreted by the ECtHR, prohibits any individual and excessive burden on a person or a specific group of taxpayers.¹⁴¹

The principle of equality applies to natural and legal persons. It applies to direct (e.g., income tax or corporation tax) and indirect taxes (in particular VAT).¹⁴² It often prohibits unequal treatment on the basis of nationality, for example, within the EU and under double taxation and investment agreements.¹⁴³

3. The Ability-to-Pay Principle

According to the ability-to-pay principle, taxpayers with different capabilities are to be charged differently. Many constitutions expressly provide for this.¹⁴⁴ The ability-to-pay principle applies above all to

1 KLAUS TIPKE, DIE STEUERRECHTSORDNUNG 486 (2000); LUTZ OHLENDORF, GRUNDRECHTE ALS MAßSTAB DES STEUERRECHTS IN DER EUROPÄISCHEN UNION 114 (2015).

140. Cf., e.g., Bundesfinanzhof [BFH] [Federal Finance Court] Sept. 11, 2008, VI R 63/04 BStBl.II 2008.

141. P. Plaisier B.V. v. The Netherlands, App. Nos. 46184/16, 47789/16 and 19958/17, ¶ 82 (Nov. 14, 2017), <http://hudoc.echr.coe.int/eng?i=001-179536>.

142. Joachim Englisch, *VAT/GST and Direct Taxes: Different Purposes, in VALUE ADDED TAX AND DIRECT TAXATION – SIMILARITIES AND DIFFERENCES* 1, 1, 20 (Michael Lang et al. eds., 2009).

143. Cf., e.g., *Addy v Comm'r of Taxation* (2019) FCA 1768, ¶¶ 70–74 (Austl.) (stating that tax disadvantage in respect of working holidays makers infringes Article 25 of the tax convention between Australia and the United Kingdom).

144. E.g., POLITICAL CONSTITUTION OF THE STATE Feb. 7, 2009, art 108(7) (Bol.); Constituição Federal [C.F.] [Constitution] art. 145(1) (Braz.); 1975 Syntagma [Syn.] [Constitution] 4(5) (Greece); Art. 53(1) Costituzione [Cost.] (It.); CONSTITUTION OF THE REPUBLIC OF PARAGUAY June 20, 1992, art. 181; Magyarország Alaptörvénye [The Fundamental Law of Hungary], Alaptörvény,

natural persons and, in some countries, also to legal entities.¹⁴⁵

The ability-to-pay principle can work in favor of the taxpayer by guaranteeing the tax exemption of the *minimum vitale* expenses and the deduction of necessary expenses from the assessment basis. Necessary expenses of a natural person include personal expenses such as food, clothing, housing, and business expenses, incurred in the ordinary course of business as a prerequisite to make profits. Sometimes a requirement for progressive taxation is derived from the ability-to-pay principle. However, progressive taxation can be better founded on the welfare state principle.¹⁴⁶ The ability-to-pay principle can thus also justify a higher tax burden.¹⁴⁷ Furthermore, the ability-to-pay principle can ensure that there is sufficient time between the taxable event and the tax payment.

Many States recognize the link between the principle of equality and the ability-to-pay principle. At the level of the European Union, however, it only plays a minor role. This is due to the limited competences of the European Union for tax law, especially income tax. Nevertheless, the CJEU has applied the ability-to-pay principle within the framework of the non-discrimination principle of the fundamental freedoms.¹⁴⁸ Thus, the ability-to-pay principle does not apply per se but helps to identify violations of the fundamental freedoms.¹⁴⁹

arts. O, XXX; C.E., B.O.E. n. 311, Dec. 29, 1978, art. 31(1) (Spain); CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA Dec. 1999, art. 316; CONSTITUTION OF CYPRUS Aug. 16, 1960, art. 24(1). For detailed information on the ability to pay principle, see KOKOTT, *supra* note 15, at 103.

145. E.g., in Hungary and Poland. Progressive turnover-based taxation do not constitute “State aid” to companies with a lower turnover, compare Case C-562/19 P, European Commission v. Republic of Poland, ECLI:EU:C:2021:201 (March 16, 2021) and Case C-596/19 P, European Commission v. Hungary, ECLI:EU:C:2021:202 (March 16, 2021). See also Case C-650/16, Bevola and Jens W. Trock v. Skatteministeriet, ECLI:EU:C:2018:424 (June 12, 2018); Matthias Valta, *Grenzüberschreitende Leistungsfähigkeit multinationaler Unternehmen im EU-Recht*, 9 INTERNATIONALES STEUERRECHT 189 (2020).

146. Cf. Johanna Hey, *Steuersystem und Steuerverfassungsrecht*, in STEUERRECHT 65, 127 (Klaus Tipke & Joachim Lang et al. eds., 23rd ed. 2018).

147. Cf. e.g., S.T.F., recurso extraordinário No. 601314/SP, Relator: Min. Edson Fachin, 24.2.2016 (Braz.), <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=11668355>; see also Leonel C. Pessoa, *O princípio da capacidade contributiva na jurisprudência do Supremo Tribunal Federal* [The Ability to Pay Principle in the Decisions of the Brazilian Supreme Court], 5 REVISTA DIREITO GV 95 (2009).

148. Case C-279/93, Koln-Altstadt v. Schumacker, ECLI:EU:C:1994:391, ¶ 32 (Nov. 22, 1994); for extensive interpretation, see Case C-650/16, Bevola and Jens W. Trock v. Skatteministeriet, ECLI:EU:C:2018:424, ¶¶ 39, 59 (June 12, 2018).

149. Cf. Case C-336/96, Gilly v. Directeur des Services Fiscaux du Bas-Rhin, ECLI:EU:C:1998:221, ¶¶ 49–51 (May 12, 1998).

Progressive tax rates based on turnover in the case of special taxes are in principle in the discretion of the Member States of the European Union.¹⁵⁰ Therefore, progressive tax rates, even if the higher rate mainly affects companies from other Member States, are normally not discriminatory. Rather, “progressive taxation may be based on turnover, because, on the one hand, the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person’s ability to pay.”¹⁵¹

Whether and to what extent there should be an international, cross-border application of the ability-to-pay principle in tax matters is still unclear. The ability to pay principle can be invoked against double taxation. In the EU, it is also supposed to justify the obligation to take into account the personal expenses of non-residents¹⁵² and even so-called final losses of a company’s permanent establishment in another Member State under certain conditions.¹⁵³ In any case, taxing the same event more than once has nothing to do with taxation according to the ability to pay. It also burdens taxpayers who operate across borders. This is contrary to the free market.

Nevertheless, it remains difficult to apply the principle of equality, including the ability-to-pay principle, when more than one (tax) jurisdiction is involved. This is because the elimination of double taxation requires either the designation of a single responsible state or forcing two or more states working together to eliminate double or multiple taxation. Both are difficult for the courts to implement.¹⁵⁴

There is a growing debate at the international level, though, as to whether uniform taxation is a generally accepted substantive principle of taxation. This relates to the demand for international tax coordination, which has gained considerable momentum in the context of the

150. Case C-323/18, *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:140, ¶ 70 (Mar. 3, 2020); Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:139, ¶ 51 (Mar. 3, 2020).

151. Case C-323/18, *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:140, ¶¶ 70, 74 (Mar. 3, 2020); Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:139, ¶¶ 49, 51, 56 (Mar. 3, 2020); see also Jörg Manfred Mössner, *Umsatzbasierte direkte Steuern*, 9 INTERNATIONALES STEUERRECHT 162 (2020); HONGLER, *supra* note 33, at 387–89.

152. *E.g.*, Case C-283/15, *X v. Staatssecretaris van Financiën*, ECLI:EU:C:2017:102, ¶ 30 (Feb. 9, 2017).

153. Case C-650/16, *Bevola and Jens W. Trock v. Skatteministeriet*, ECLI:EU:C:2018:424, ¶ 59 (June 12, 2018).

154. *Cf., e.g.*, Case C-67/08, *Margarete Block v. Finanzamt Kaufbeuren*, ECLI:EU:C:2009:92, ¶¶ 28–36 (Feb. 12, 2009).

BEPS project. BEPS aims to prevent unintentional double non-taxation between countries by eliminating tax disparities on the basis of consistent exercise of taxation powers between countries, such as single taxation.¹⁵⁵ Therefore, the principle of single taxation is gaining ground in the context of efforts towards a global minimum taxation (“GLOBE”).¹⁵⁶ It is true that the underlying idea of a commitment by states to tax is difficult to reconcile with tax sovereignty. However, this international trend towards single taxation may lead to a reduction in double taxation, and thus to taxation that better reflects the ability-to-pay principle.

4. Competition Neutrality

The principle of equality serves to prevent distortions of competition in tax law, as well as in competition law, and to maintain tax neutrality. Taxes should not be a factor that significantly influences business decisions. Taxpayers should therefore be treated equally. However, this is not feasible at the international level, as the tax rates of states differ. Nevertheless, attempts are being made in the BEPS project to harmonize taxation in order to curb harmful tax competition.¹⁵⁷ In this sense, the recent GLOBE proposal aims to prevent a downward spiral of tax rates, and to harmonize competitive conditions by means of minimum taxation.

5. Justice and Fairness in International Tax Law

The principle of equality finally provides the basis for general postulates of justice. This includes, as already mentioned, not only horizontal tax justice between recipients of the same income, but also vertical tax

155. For the concept of single taxation, see generally AVI-YONAH, *supra* note 33; see also IBFD, SINGLE TAXATION? (Joanna Wheeler ed. 2018).

156. OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalization of the Economy*, OECD-G 20 Inclusive Framework on BEPS, 27 (2019); cf. Joachim Englisch & Johannes Becker, *International Effective Minimum Taxation – The GLOBE Proposal*, 11 WORLD TAX J. 483, 484–87 (2019).

157. See OECD/G20 Base Erosion and Profit Shifting Project, *Designing Effective Controlled Foreign Company Rules*, OECD (2015), https://www.oecd-ilibrary.org/taxation/designing-effective-controlled-foreign-company-rules-action-3-2015-final-report_9789264241152-en; OECD/G20 Base Erosion and Profit Shifting Project, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance* OECD (2015), https://www.oecd-ilibrary.org/taxation/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report_9789264241190-en.

justice between recipients of different incomes. Whether and what legal consequences are to be drawn from this is controversial.¹⁵⁸

Nor does the current demand for international minimum taxation prescribe to any state how high it should tax its companies. However, states with a higher tax rate can react to very low tax rates in other states by imposing additional taxation or by failing to deduct operating costs. Additional income resulting from such compensatory taxation in an investor's home state does not necessarily have to remain there. It should possibly be shared with other countries, in particular with the countries from which these revenues originate. Nevertheless, this concerns the fair distribution of global tax resources between states¹⁵⁹ (Phase 2 of the ILA project), and therefore only indirectly affects taxpayers' rights which are the subject of this Article.

B. *Right to Data Protection*

The individual right to data protection and the legitimate collective interest in tax transparency require a balanced approach in international tax law that takes sufficient account of both fundamental values.

1. Legal Bases for the Protection of Privacy and Data

The right to data protection has gradually developed as a separate individual right from the right to privacy and confidentiality of personal information. This development is clearly visible in the European region and has been brought about partly by legislation and partly by case law.¹⁶⁰ Almost all constitutions in the world guarantee the right to privacy, and some explicitly guarantee a right to

158. According to McDaniel and Repetti, horizontal and vertical equity together are a single concept, which lacks normative content, and is itself only a proxy for theories of distributive justice and morality. See Paul R. McDaniel & James Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 FLA. TAX REV. 607, 621 (1993); James Repetti & Diane Ring, *Horizontal Equity Revisited*, 13 FLA. TAX REV. 135, 155 (2012).

159. See Olaf Scholz, German Fed. Minister of Fin., Speech at Symposium zur Internationalen Steuerpolitik: Mindestbesteuerung bringt Fairness ins internationale Steuerrecht, 150 Jahre DBA – Fit for Purpose? (May 8, 2019) (transcript available at <https://www.bundesfinanzministerium.de/Content/DE/Reden/2019/2019-05-08-150-Jahre-DPA.html>); Kim Brooks, *Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Policy Objective*, in TAX REFORM IN THE 21ST CENTURY: A VOLUME IN MEMORY OF RICHARD MUSGRAVE 471, 487–91 (John G. Head & Richard Krever eds., 2009).

160. The German Constitutional Court was perhaps the first to develop the concept of effective data protection as an instrument for the protection of the right to informational self-determination. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1 BvR 209/83, Dec. 15, 1983 (Ger.).

data protection.¹⁶¹ Interestingly, the Indian Supreme Court derives the right to privacy, including data protection, from the fundamental rights to life and liberty.¹⁶² According to this court, biometric tax identification number (“*adhair*”) is permissible in view of the legitimate state interest in combating tax evasion.¹⁶³ Even if this is not explicitly stated in the constitution, almost all legal systems respect the taxpayers’ right to confidentiality of information they share with the tax authorities.¹⁶⁴ The protection of tax-related information can therefore be regarded as a minimum international standard.

A particularly strict data protection regime, albeit not particularly for tax matters, has developed in Europe. Legal bases are Article 8 of the ECHR on the right to privacy and family life, and Articles 7 and 8 of the EU Charter. The ECtHR has ensured effective data protection in line with the requirements of the right to privacy, especially in tax matters, and also in relation to the requirements of freedom of expression under Article 10 of the ECHR.¹⁶⁵

In the European Union, Article 7 of the EU Charter guarantees the protection of the right to privacy, and Article 8 of the EU Charter guarantees data protection. In addition, data protection is subject to specific provisions in secondary Union law, in particular the General Data Protection Regulation (“GDPR”).¹⁶⁶ Unlike in many states, however, there are no regulations specifically for the protection of tax data, especially since the EU has no tax competence. On the contrary, the applicability of the GDPR in the field of taxation is limited for several reasons. Recital 23 of the GDPR expressly permits restrictions in the area of taxation. Furthermore, it is primarily applicable to personal data of individuals. The GDPR therefore offers only limited protection, particularly for the tax data of companies.

161. *E.g.*, FEDERAL CONSTITUTION July 26, 2010, arts. 45, 46 (Cape Verde); CONSTITUTION OF THE GABONESE REPUBLIC Mar. 26, 1991, art. 1.6 (Gabon); CONSTITUTION OF THE UNION OF THE COMOROS July 30, 2018, art. 27 (2018) (Comoros); CONSTITUTION OF THE REPUBLIC OF MOZAMBIQUE Nov. 16, 2004, art. 71 (Mozam.); CONSTITUTION arts. 31(c), 35(2) (2010) (Kenya).

162. Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

163. *Id.*

164. *See* PASQUALE PISTONE & PHILIP BAKER, THE PRACTICAL PROTECTION OF TAXPAYERS’ RIGHTS (2015).

165. Satakunnan Markkinapörssi Oy & Satamedia Oy v. Finland, App. No. 931/13, ¶ 172 (June 27, 2017), <http://hudoc.echr.coe.int/eng?i=001-175121>.

166. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1.

In a series of judgments, the ECtHR has specified taxpayers' rights in connection with the power of the tax authorities to obtain information. When the authorities search the taxpayers' premises and seize documents, the procedures must be designed in such a way that they leave no room for abuse.¹⁶⁷ However, copying the contents of servers is not the same as seizure. Therefore, the seizure of a backup copy of the entire server was not considered an infringement of the taxpayer's privacy.¹⁶⁸ Even in the context of criminal investigations, secret surveillance is only permissible if it is absolutely necessary, complies with the law, and pursues a legitimate objective. In particular, the rules on surveillance must be clear and contain adequate safeguards against abuse.¹⁶⁹

In general, the CJEU allows storage of data only under extremely strict conditions,¹⁷⁰ but this does not equally apply in the area of taxation. Within a Member State, however, the transfer of tax data from one authority (health insurance) to another authority (tax) is not permitted without informing the person concerned.¹⁷¹

2. Rights in Cross-Border Situations

The fundamental right to data protection and the resulting procedural rights and guarantees also apply to data exchange in the context of cross-border cooperation between tax authorities. Administrative assistance must be provided in accordance with the legal provisions,¹⁷² including the concerned persons' procedural rights.¹⁷³ Nevertheless, in many states, the international exchange of tax data does not necessarily require informing the persons concerned in the current BEPS era. The model tax treaty signed by twenty-two African states within the framework of the African Tax Administrative Forum ("ATAF") expressly guarantees the confidentiality of exchanged tax data, according to the

167. *Funke v. France*, App. No. 10828/84, ¶ 56 (Feb. 25, 1993), <http://hudoc.echr.coe.int/tur?i=001-57809>.

168. *Bernh Larsen Holding AS and Others v. Norway*, App. No. 24117/08, ¶ 173 (Mar. 14, 2013), <http://hudoc.echr.coe.int/fre?i=001-117133>.

169. *Volokhy v. Ukraine*, App. No. 23543/02, ¶¶ 49, 52 (Nov. 2, 2006), <http://hudoc.echr.coe.int/eng?i=001-77837>.

170. See most recently *Joined Cases C-511/18, C-512/18 and C-520/18, Quadrature du Net et al*, ECLI:EU:C:2020:791 (Oct. 6, 2020).

171. *Case C-201/14, Bara & Others v. Președintele Casei Nationale de Asigurări de Sănătate*, ECLI:EU:C:2015:638, ¶¶ 28–34 (Oct. 1, 2015).

172. See *Bundesgericht [BGer] [Federal Supreme Court] Mar. 17, 2017, 2C_1000/2015*, ¶¶ 6.2, 6.3 (Switz.).

173. Cf. *Case C-682/15, Berlioz Inv. Fund S.A. v Directeur de l'administration des contributions directes*, 43, 75 and *operatives 2 and 5* (May 16, 2017); *Case C-276/12, Sabou v. Finanční ředitelství pro hlavní město Prahu*, ECLI:EU:C:2013:678, 37–46 (Oct. 22, 2013).

standard of the recipient state. They can, in principle, only be used within the framework of tax administration.¹⁷⁴ Exchange of information on the basis of administrative assistance agreements is therefore justified in principle and does not violate the right to privacy.¹⁷⁵ Furthermore, in the European region, Article 8 of the ECHR does not require that all potentially affected persons be informed in advance of the transfer of their tax data to another state.¹⁷⁶

An emerging international standard is likely to be that only foreseeable relevant information can be transmitted.¹⁷⁷ Insufficiently specified

174. African Tax Administration Forum [ATAF], *ATAF Model Tax Agreement*, arts. 27(2), (4), https://irp-cdn.multiscreensite.com/a521d626/files/uploaded/ATAF%20Model%20Tax%20Agreement_Highres.pdf.

175. *G.S.B. v. Switzerland*, App. No. 28601/11, ¶¶ 77–80 (Dec. 22, 2015), <http://hudoc.echr.coe.int/eng?i=001-159732>.

176. *Othymia Investments v. The Netherlands*, App. No. 75292/10, ¶ 44 (June 16, 2015), <http://hudoc.echr.coe.int/ENG?i=001-115076>. See generally *Joined Cases C-245/19 & 246/19, État luxembourgeois v. B*, ECLI:EU:C:2020:795, ¶ 97 (Oct. 6, 2020) (with opinion by Advocate General Kokott, ECLI:EU:C:2020:516).

177. Cf. *Case C-682/15, Berlioz Inv. Fund S.A. v Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373, ¶ 60 and operative 3–4 (May 16, 2017). In 2005, the standard in the OECD Model Convention on Mutual Assistance was changed from “necessary” to “foreseeably relevant” information. The adaptation to this was first made by case law, and later by amendments to the national laws on mutual assistance in tax matters. The Swiss Federal Supreme Court developed an interesting way of adapting to the new standard, which also affected the clauses of bilateral agreements that still contain a reference to necessity. See *Bundesgericht [BGer] [Federal Supreme Court] Jan. 27, 2004, 2A.185/2003, ¶ 7.1 (Switz.)*; *Bundesgericht [BGer] [Federal Supreme Court] Apr. 12, 2006, 2A.430/2005, ¶ 6.1 (Switz.)*; *Bundesgericht [BGer] [Federal Supreme Court] Mar. 29, 2018, 2C_598/2017, ¶ 4.1 (Switz.)*; *Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Mar. 5, 2019, A-2591/2017 (Switz.)*; *Bundesgericht [BGer] [Federal Supreme Court] Aug. 27, 2013, 139 Arrêts du Tribunal Fédéral Suisse [ATF] II 451, 2.3.3, ¶ 459 (Switz.)* (linking the concept of necessity to that of proportionality). For the different approaches, see generally *Rechtbank van Eerste Aanleg Hasselt [Court of First Instance Hasselt]*, judgment of 7 November 2012, 11/2968/A.; *Cass., sez. VI civ.-T, 28 aprile 2015, n. 8605 (It.)*; *Tribunal administratif du Grand-Duché de Luxembourg [Luxembourg Administrative Court]*, 4 septembre 2013, No. 33111C, (July 5, 2013), <https://ja.public.lu/30001-35000/33111C.pdf>; *Tribunal administratif du Grand-Duché de Luxembourg [Luxembourg Administrative Court]*, No. 33118C (Sept. 24, 2013), <https://ja.public.lu/30001-35000/33118C.pdf>; *Tribunal administratif du Grand-Duché de Luxembourg [Luxembourg Administrative Court]*, No. 34356C, at 11 (July 10, 2014), <https://ja.public.lu/30001-35000/34356C.pdf> (“La Cour partage de même l’analyse des premiers juges que l’article 22 de la Convention limite l’échange de renseignements à ceux qui sont nécessaires pour l’application des lois internes des Etats contractants relatives aux impôts visés par la Convention et que l’échange est partant confiné aux renseignements nécessaires dans le cadre du cas d’imposition tel que circonscrit dans la demande de renseignements de l’Etat requérant.”); *Minister of Fin. v. Ap*, [2014] No. Ap. of 2015, Supreme Court of Bermuda, (Mar. 23, 2016), <https://www.gov.bm/sites/default/files/Minister-of-Finance-v-Ap-2016-SC-Bda-30-Civ-23-March-2016.pdf>; *AXY & others v. Comptroller of Income Tax*, 2015 SGHC 291, Singapore High Court, (Nov. 4, 2015), <https://www.supremecourt.gov.sg/docs/default-source/>

requests or fishing expeditions are not permitted.¹⁷⁸ Group requests cannot not be easily distinguished from these.¹⁷⁹ Under DTCs and national law,¹⁸⁰ administrative assistance is normally only permitted if the requesting state provides the information necessary to identify the person(s) involved in the investigation, particularly their names. This is not the case with a group request. Instead, it applies to a group of persons for whom there is an increased probability that they have not fulfilled their tax obligations in the requesting state. The commentary on the OECD Model Tax Convention and the proposed DAC 7 of the EU¹⁸¹ stress that group requests are not inadmissible *per se*.¹⁸² However,

module-document/judgement/2015-sghc-291.pdf; *Comptroller of Income Tax v. AZP*, [2012] SGHC 112 (May 23, 2012), <https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2012-sghc-112.pdf>.

178. *Cf.*, e.g., Case C-682/15, *Berlioz Inv. Fund S.A. v Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373, ¶¶ 71–72 (May 16, 2017); Cases C-245/19 and C-246/19, *État luxembourgeois v. B*, 2020 ECLI:EU:C:2020:795, ¶¶ 106 et seq. (Oct. 6, 2020); Bundesgericht [BGer] [Federal Supreme Court] Sept. 12, 2016, 2C_276/2016, ¶ 6.3 (Switz.).

179. *Cf. Update to Article 26 of the OECD Model Tax Convention and Its Commentary*, OECD ¶ 5.2 (2012); Bundesgericht [BGer] [Federal Supreme Court] Sept. 12, 2016, 2C_276/2016, ¶ 6.3 (Switz.); Bundesgericht [BGer] [Federal Supreme Court] July 26, 2019, 2C_653/2018, ¶¶ 5.2.3–5.2.5, 6.1 (Switz.); *Minister of Nat'l Revenue v. Hydro-Québec*, [2018] F.C. 622, ¶ 96 (Can.) (“Some form of fishing expedition may be allowed, but judicial authorization, with its inherent discretion, exists to limit and govern it.”). *See* Pending case C-437/19, *État du Grand-duché de Luxembourg* (May 31, 2019), <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=219996&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6865676>.

180. *E.g.*, *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.), 231.2 (2) (Can.) (“The Minister shall not impose on any person a requirement . . . to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge . . .”); Council Directive 2011/16/EU, Feb. 15, 2011, art. 20(2), 2011 O.J. (L 64) 1 (“The standard form . . . shall include at least . . . the name of the person to whom the investigation or inquiry applies.”).

181. *Proposal for a Council Directive Amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation of 15 July 2020*, COM (2020) 314 final (July 7, 2020).

182. Subject to the condition of foreseeable relevance, courts also allow group requests in a similar way. *See Hof Den Haag* 7 juli 2018, X, Z/ inspecteur van de Belastingdienst (Neth.), <https://linkeddata.overheid.nl/front/portal/document-viewer?ext-id=ECLI:NL:GHDHA:2018:1800>; Bundesgericht [BGer] [Federal Supreme Court] Sept. 12, 2016, *Eidgenössische Steuerverwaltung/A*, 2C_276/2016 (Switz.); Bundesgericht [BGer] [Federal Supreme Court] Feb. 1, 2019, 2C_625/2018 (Switz.); Bundesgericht [BGer] [Federal Supreme Court] June 7, 2019, 2C_764/2018 (Switz.); Bundesgericht [BGer] [Federal Supreme Court] July 22, 2019, 2C_1053/2018 (Switz.); Bundesverwaltungsgericht [BVGE] Aug. 21, 2018, A-4154/2017 (Switz.); Bundesgericht [BGer] [Federal Supreme Court] Sept. 12, 2016, 2C_276/2016, ¶ 6.3 (Switz.). They see the relevance of the suspicions in connection with the Panama Papers. *See also* Tribunal administratif du Grand-Duché de Luxembourg Luxembourg Administrative Court, No. 43406C, No. 43407C, No. 43408C, No. 43409C, No. 43410C, No. 43411C, No. 43412C, No. 43413C, No. 43414C & No. 43415C, (Nov. 14, 2019), <https://ja.public.lu/40001-45000/43406C.pdf> (all on to the DTC Luxembourg-Denmark).

this standard should be interpreted in such a way that, even in the case of group requests, it is possible to clearly identify the persons concerned. Otherwise, no effective legal protection can be granted to these persons.

Complex legal questions arise in the case of joint and simultaneous tax audits, which are becoming increasingly common.¹⁸³ For example, the question of which law is applicable arises—the law of the place where the business is located (*ius loci*) or the law of the country that sends its officials to another country? And under which law and before which courts can taxpayers obtain legal protection? Legal redress should be available at the time of the initiation of such procedures,¹⁸⁴ during the joint audit,¹⁸⁵ and finally in relation to the use of confidential tax data collected during joint or simultaneous audits.¹⁸⁶

An adequate level of protection can be required as a condition for data transferral to third countries. The CJEU confirmed this in its *Schrems* judgments.¹⁸⁷ However, the extent to which this assessment also applies to the area of taxation remains to be seen. In any case, taxpayers cannot be left without protection even in times of BEPS.

As a result, there are many new constellations, particularly in cross-border cooperation, in which it is important to balance the general interest of tax transparency on the one hand and the protection of taxpayers on the other.

C. Rights of Intermediaries

The material scope of fundamental rights in the field of taxation covers all taxpayers, all natural persons, and all legal persons acting in the

183. Detailed regulations, similar to the practice in Europe, can be found in the Southern African Development Community Agreement on Assistance in Tax Matters (AATM) art. 5 (2012), <https://www.sadc.int/documents-publications/show/6948>. See also *Proposal for a Council Directive Amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation of 15 July 2020*, COM (2020) 314 final, art. 12(a), (July 7, 2020).

184. Cf. Finanzgericht Köln [FG] [Cologne Finance Court] Oct. 7, 2017, No. 2 V 1055/17 (Ger.); Finanzgericht München [FG] [Munich Finance Court] Feb. 23, 2018, No. 2 V 814/17 (Ger.); Finanzgericht Köln [FG] [Cologne Finance Court] Apr. 13, 2018, No. 2 V 174/18 (Ger.); Finanzgericht Köln [FG] [Cologne Finance Court] Sept. 12, 2018, 2 K 814/18 (Ger.).

185. Cf. Lars H. Haverkamp, *Joint Audit: Überlegungen zur Rechtslage und Ausblick in die Zukunft*, INTERNATIONALES STEUERRECHT pp. 65 et seq (2020).

186. Cf. *Aloe Vera of Am., Inc. v. United States*, 128 F. Supp. 2d 1235 (D. Ariz. 2000) (involving simultaneous audits by American and Japanese tax authorities).

187. See most recently Case C-311/18, *Data Protection Comm'r v Facebook Ireland Ltd.*, ECLI:EU:C:2020:559 (July 16, 2020).

context of tax assessment or collection, such as banks and consultants (“intermediaries”). In the case of taxpayers, it is only a matter of protecting their own human rights, whereas in the case of the intermediaries there are two dimensions: their own legal sphere and that of the taxpayer involved. The protection of professional rights is a functional extension of rights of the individual taxpayer, but also the subject of separate protection, in particular the attorney-client privilege. However, effective protection of the taxpayers’ rights and the attorney-client privilege requires confidentiality protection also in relation to other professions. Otherwise, no trustful cooperation between the taxpayers, their advisors and lawyers is possible. Nor should the professions be unnecessarily and disproportionately burdened in order to protect the “collective right” to levy taxes. This is also shown by the case law of the European courts on searches of a law firm,¹⁸⁸ the registered office of a legal person,¹⁸⁹ branches and other premises,¹⁹⁰ the professional secrecy of lawyers,¹⁹¹ and seizure of bank documents.¹⁹²

Nevertheless, it remains possible for a tax authority to obtain information from a third party without informing the taxpayer, if this is justified within the limits of its discretion, while balancing the interests of the individual against the public interest.¹⁹³ However, DAC 6 in particular now requires intermediaries (such as financial institutions, banks, or consultants) to report tax arrangements that might be illegal. This not only raises problems of legal certainty, but also affects the rights to data protection of both taxpayers and intermediaries, and strains their freedom of profession. Also within the framework of the International Compliance Assurance Program (“ICAP”), intermediaries are increasingly becoming “assistants” of the tax authorities and are sometimes

188. *See* Volokhy v. Ukraine, App. No. 23543/02, ¶¶ 53–54 (Nov. 2, 2006), <http://hudoc.echr.coe.int/eng?i=001-77837>; André v. France, App. No. 18603/03, ¶¶ 46–47 (July 24, 2008), <http://hudoc.echr.coe.int/eng?i=001-87938>; Bernh Larsen Holding v. Norway, App. No. 24117/08, ¶ 173 (Mar. 14, 2013), <http://hudoc.echr.coe.int/eng?i=001-117133>.

189. Lindstrand Partners Advokatbyrå AB v. Sweden, App. No. 18700/09, ¶ 83 (Dec. 20, 2016), <http://hudoc.echr.coe.int/eng?i=001-169654>.

190. *Id.*

191. Sommer v. Germany, App. No. 73607/13, ¶ 62 (Apr. 27, 2017), <http://hudoc.echr.coe.int/eng?i=001-173091>.

192. *Id.*; M.N. v. San Marino, App. No. 28005/12, ¶ 83 (July 7, 2015), <http://hudoc.echr.coe.int/eng?i=001-155819>.

193. *Cf.* Othymia Investments v. The Netherlands, App. No. 75292/10 (June 16, 2015), <http://hudoc.echr.coe.int/ENG?i=001-115076>; G.S.B. v. Switzerland, App. No. 28601/11 (Dec. 22, 2015), <http://hudoc.echr.coe.int/eng?i=001-159732>; *see also* Lindstrand Partners Advokatbyrå AB v. Sweden, App. No. 18700/09, ¶¶ 8, 97 (Dec. 20, 2016), <http://hudoc.echr.coe.int/eng?i=001-169654>.

subject to very burdensome reporting obligations. This is partly due to the FATCA. The (also financial) burdens associated with such mechanisms must not be disregarded. Instead of leaving it to the market to shift the costs of such services to consumers, governments could consider a special financing system. This could also help to reduce inequalities resulting from asymmetric information flows between countries.

It should be kept in mind that the protection of professional rights in tax matters is closely linked to the protection of the taxpayers' rights. Without such protection, there can be no fair balance between the public interest and the protection of individual rights.¹⁹⁴

D. Property Rights

The human right to property plays a rather subordinate role in taxation. Some, especially African constitutions, even explicitly state that tax laws are compatible with the guarantee of property.¹⁹⁵ In this respect, states have a wide margin of discretion. It is probably only limited by the prohibition of confiscatory taxes. The avoidance of disproportionate and possibly confiscatory taxation also poses a particular challenge if it is based on international double taxation, such as the interaction of several tax jurisdictions.¹⁹⁶

1. Taxation and the Protection of Property Under the European Convention on Human Rights

It is noteworthy, however, that the ECtHR (in contrast to the Inter-American Court of Human Rights¹⁹⁷) has handed down numerous judgments on the fundamental right to property and taxation.

The basis for the case-law of the ECtHR is Article 1 of the First Protocol to the ECHR. It follows from this that taxes fall within the scope of the human right to property. Otherwise, there would be no need for the clarification in Article 1(2) of the First Protocol to the ECHR. According to its paragraph 1, this "shall not prejudice the right

194. Brito Ferrinho Bexiga Villa-Nova v. Portugal, App. No. 69346/10, ¶¶ 54–55 (Dec. 1, 2015), <http://hudoc.echr.coe.int/eng?i=001-159186>.

195. See CONSTITUTION OF BOTSWANA Sept. 30, 1966, art. 8(5); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA Aug. 8, 1996, art. 22(2)(a); CONSTITUTION OF NIGERIA May 5, 1999, § 44(2)(a); CONSTITUTION OF THE REPUBLIC OF SEYCHELLES June 21, 1993, art. 26(2)(c); CONSTITUTION OF SIERRA LEONE Oct. 1, 1991, art. 21(2)(a); CONST. OF ZAMBIA 1996 § 16(2)(a).

196. See discussion *supra* Part VIII.A.3.

197. As far as can be seen, only judgment Cantos/Argentina of 28 November 2002 concerns the application of tax laws without, however, expressly referring to the human right to property. See Cantos v. Argentina, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 97 (Nov. 28, 2002).

of a State to apply such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.” However, the fundamental right to property is not protected in the ECHR itself, but only in an additional protocol.¹⁹⁸ In several countries, taxpayers therefore remain without even minimal protection of their property rights under the ECHR because these countries have not ratified the additional protocol to the ECHR.¹⁹⁹

An analysis of the case law from over sixty years of activity shows that the ECHR (and previously the Commission on Human Rights) has rejected the majority of complaints concerning the taxpayers’ right to property as inadmissible. A change in this general trend occurred at the beginning of the millennium. At that time, most tax-related complaints were lodged against countries of the former Soviet Union (or those that had previously had socialist regimes). These economies were developing at that time. The ECtHR was thus called upon to set standards for the design of taxation practices based on the rule of law.²⁰⁰ In accordance with these standards, violations of the law of property in tax matters include, in particular: (1) the failure of the authorities to reimburse or allow the deduction of VAT;²⁰¹ (2) imprecise or unforeseeable legal provisions which create uncertainty among taxpayers;²⁰² (3) tax measures that impose an excessive and individual financial burden on a taxpayer;²⁰³ (4) the absence of procedural guarantees enabling taxpayers to be effectively represented in domestic proceedings;²⁰⁴ or (5) retroactive tax legislation.²⁰⁵

198. Cf. FILIP DEBELVA, INTERNATIONAL DOUBLE TAXATION AND THE RIGHT TO PROPERTY 161–64 (2019).

199. For example, Switzerland and Monaco. See *Chart of Signatures and Ratifications of Treaty 009*, COUNCIL EUR., https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/009/signatures?p_auth=mptwtxk9.

200. In the aftermath of the famous *Intersplav* judgment, Ukraine introduced a new more transparent and more speedy VAT refunding procedure. See *Intersplav v. Ukraine*, App. No. 803/02, (Jan. 9, 2007), <http://hudoc.echr.coe.int/eng?i=001-78872>.

201. Cf. *Euromak Metal Doo v. the former Yugoslav Republic of Macedonia*, App. No. 68039/14, ¶¶ 43–59 (June 14, 2018), <http://hudoc.echr.coe.int/eng?i=001-183555>.

202. Cf. *Lopac and Others v. Croatia*, App. Nos. 7834/12, 43801/13, 19327/14 & 63535/16, ¶¶ 57–58 (Oct. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-173633>; *Shchokin v. Ukraine*, App. Nos. 23759/03 & 37943/06, ¶¶ 51–69 (Oct. 14, 2010), <http://hudoc.echr.coe.int/eng?i=001-100944>.

203. Cf. *Intersplav v. Ukraine*, App. No. 803/02, ¶¶ 39–40 (Jan. 9, 2007), <http://hudoc.echr.coe.int/eng?i=001-78872>.

204. Cf. *Rousk v. Sweden*, App. No. 27183/04, ¶¶ 117–18 (July 25, 2013), <http://hudoc.echr.coe.int/eng?i=001-123422>.

Most tax measures are also tested against the principle of proportionality. The ECtHR takes into account the wide discretion of the states, particularly in tax law. In the majority of cases, the measures stand up to this proportionality test under Article 1 of the First Protocol to the ECHR.

2. Taxation and the Protection of Property in the European Union

The wording of Article 17 of the EU Charter is quite similar to the wording of Article 1 of the First Protocol to the ECHR, but does not contain any specific reference to taxation. Article 17 of the EU Charter only clarifies in general terms that the use of property may be regulated by law and its deprivation may be permissible for reasons of public interest if provided for by law and subject to fair compensation. According to Article 52(3) of the EU Charter, the protection granted by the ECtHR in relation to the right to property is the minimum standard for the interpretation of Article 17 of the EU Charter. Thus, the CJEU can ensure a more extensive protection of the taxpayers' right of property. However, there is hardly any case law on this.²⁰⁶

3. Confiscatory Taxation

Subjecting a specific person or company to a tax rate of 100% seems to be generally recognized as confiscatory. However, there is no consensus beyond this. A number of national constitutions prohibit confiscatory taxes without setting a specific tax rate or level.²⁰⁷ In some cases, constitutions²⁰⁸ or supreme court decisions²⁰⁹ also prohibit confiscatory penalties. The determination of the confiscatory character is left to the courts. They determine confiscatory taxes on the basis of a case-by-case analysis. In doing so,

205. *Di Belmonte v. Italy*, App. No. 72638/01, ¶ 42 (Mar. 16, 2010), <http://hudoc.echr.coe.int/eng?i=001-97748>.

206. *See* DEBELVA, *supra* note 198, at 169–75. This is because the Charter applies “to the Member States only when they are implementing Union law.” EU Charter, art. 51(1).

207. *E.g.*, FEDERAL CONSTITUTION [C.F.] [Constitution] art. 150(4) (Braz.); Constitución Política de los Estados Unidos Mexicanos, CP, art. 22, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.); POLITICAL CONSTITUTION OF PERU 1993, art. 74 (2); C.E., B.O.E. n. 311, Dec. 29, 1978, art. 31(1) (Spain) (“All shall contribute to the public expenditure in proportion to their resources, by means of a just system of taxation based on principles of equality and progressiveness, which in no case may become confiscatory.”).

208. *E.g.*, POLITICAL CONSTITUTION OF THE REPUBLIC OF COSTA RICA 1949, art. 40; Constitución Política de los Estados Unidos Mexicanos, CP, art. 22, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.).

209. *E.g.*, *A.M. Sali Maricar And Anr. v. Income-Tax Officer and Anr.*, (1973) 90 ITR 116 (India).

they take into account, in particular, the taxpayer's ability to pay, the principle of proportionality, and whether the tax essentially eats up the income from the burdened economic activity. Within the framework of the latter criterion, the tax rate again comes into play.²¹⁰

The ECtHR has also not developed a quantitative threshold for confiscatory taxes. In a number of cases concerning Hungarian legislation introducing a 98% income tax rate on a certain part of the severance pay for dismissals of civil servants, it found a violation of Article 1 of the First Protocol to the ECHR.²¹¹ However, the extreme tax rate as such is not sufficient. The ECtHR, like other courts,²¹² also took into account additional factors, such as the retroactivity of the tax measure and the fact that the applicant was confronted with a significant reduction in his income during a period of considerable personal difficulties (i.e. unemployment after retirement).

In the absence of a generally accepted quantitative threshold for the definition of confiscatory taxation, the latter concept seems to be based on the ability-to-pay principle, taking into account the *minimum vitale*.²¹³ If a taxpayer remains without a certain amount of income or capital after the tax payment, this is often regarded as confiscatory taxation.

210. Cf. Corte Suprema de Justicia [Supreme Court], Sala Constitucional, noviembre 9, 1993, Ana Virginia Calzada Miranda, Sentencia 5749-93 (Costa Rica); S.T.F., Relator: Min. Celso de Mello, 23.04.2013, RE 68 AM, Diário da Justiça Eletrônico [D.J.e.], 28.06.2013 (Braz.). The Brazilian Supreme Court examines whether taxes outside the jurisdiction of any level of government are levied in addition to those already in force (see S.T.F., Relator: Min. Luiz Fux, 17.09.2014, ADI 4628/DF, 230, Diário da Justiça Eletrônico [D.J.e.], 24.11.2014) and whether a sanction exceeds 100% of the amount of the tax (S.T.F., Relator: Min. Celso de Mello, 17.06.1998, ADI-MC 1075 DF, Diário da Justiça [D.J.], 24.11.2006; FS.T.F., Relator: Min. Roberto Barroso, 10.02.2015, AI 851038 AgR/SC). Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/10/1991, "López López, Luis y otro c/ Santiago del Estero, Provincia de s/ eximición de inversión," (Arg.), <http://www.saij.gov.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-lopez-lopez-luis-otro-santiago-estero-provincia-eximicion-inversiones-fa91000454-1991-10-15/123456789-454-0001-9ots-eupmocollaf?#>; see also Carlos E. Peralta, *Tributación y Derechos Fundamentales Los Principios Constitucionales como límite al Poder Tributario*, 138 REVISTA DE CIENCIAS JURÍDICAS 89 (2015); Bibiana Buitrago Duarte, *La no confiscatoriedad como expresión de la capacidad contributiva y garantía en los tributos sobre la propiedad inmueble*, 4 REVISTA DE DERECHO FISCAL 229 (2008).

211. E.g., Gáll v. Hungary, App. No. 49570/11, ¶¶ 31-40 (June 25, 2013), <http://hudoc.echr.coe.int/eng?i=001-121777>; N.K.M. v. Hungary, App. No. 66529/11, ¶¶ 32-41 (May 14, 2013), <http://hudoc.echr.coe.int/eng?i=001-119704>.

212. Corte Suprema de Justicia [Supreme Court], Sala Constitucional, noviembre 9, 1993, Ana Virginia Calzada Miranda, Sentencia 5749-93 (Costa Rica).

213. *Id.*; cf. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvL 5/91, Sept. 25, 1992 (Ger.) (taxation of the *minimum vitale* violates the Basic Law, without, however, any reference to property rights, but rather to the principle of equality, human dignity, and the protection of the family).

IX. CONCLUDING REMARKS

The fight against tax avoidance and a fair and effective distribution of taxing rights are not the only concerns of international importance. A fair international tax regime also and primarily includes the rights of individuals, including taxpayers and intermediaries, such as lawyers and consultants. Under certain circumstances, legal persons can also be the bearers of specific human rights. The protection of these persons must, however, not undermine the legitimate concerns of tax transparency and fair and effective global taxation. A balance must therefore be struck between collective interests and individual rights. To do this, however, the legal position of individuals in international law must first be determined.

Since World War II, a development can be observed in international law. Its focus has been shifting from the rights of states to including individual rights. Not only states, but increasingly individuals are recognized as bearers of rights in international law. For this reason, states cannot freely dispose of taxpayers. These are not only objects of intergovernmental agreements, but subjects of international law with their own rights. It seems that this development has not yet fully arrived in the tax world. Since the IFA split from the ILA in 1938, the two scientific communities have been going their separate ways. This is not appropriate.

Article 38(1) of the ICJ Statute enumerates the sources of international law. Accordingly, rights of individuals may arise from international conventions, international custom, as evidence of a general practice accepted as law, and general principles of law. International conventions in tax law refer in particular to double taxation agreements. Human rights treaties, but also investment treaties, can also be important. Customary international law can arise from these agreements, supplemented by so-called soft law and taking into account national practice, as recently increasingly expressed in charters of taxpayers' rights. Soft law in the form of model agreements with comments of the OECD and the United Nations play an extremely important role, especially in the development of international tax law. However, general principles of law are more difficult to determine. Nevertheless, the CJEU has very effectively established human rights as general legal principles of Union law.

According to their different significance for tax sovereignty, taxpayers' rights are generally classified as follows: procedural rights, sanctions-related rights, and substantive rights. Procedural rights are the most concrete rights that can be invoked and are subject to judicial review because they have the least impact on fiscal sovereignty. They do

not call into question legislative priorities regarding taxation. In the case of sanctions-related rights, the main issue is the proportionality of state measures to ensure effective tax collection, and increasingly, especially the fight against tax avoidance and fraud. Finally, states have most leeway in the area of substantive fundamental rights, which concern the structure of the tax system. The principle of equality is of fundamental importance and the foundation of every tax law system. It includes subprinciples, in particular ability to pay and competition neutrality. Data protection is becoming increasingly important, especially in international administrative cooperation. The fundamental right to property, traditionally of marginal importance in tax law, is the subject of numerous judgments of the ECtHR on tax law, which have often affected the structure of VAT law in Eastern European member states of the Council of Europe.

The closer examination of these three categories of taxpayers' rights is the subject of the soon-to-be completed phase 1 of the ILA research project on international tax law presented here; phase 2 concerns the division of taxation rights (nexus) and phase 3 focuses on the enforcement of international tax law through courts and other procedures. All three areas concern genuine issues of public international law. Therefore, the Committee on international tax law has set the goal of bringing tax law and international law closer together again.