

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, substantive law, 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 taxation¹), tax 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

¹ Cf. e.g. K. Vogel (ed.), *Grundfragen des Internationalen Steuerrechts*, 1985.

² www.eatlp.org, last congress 2019 on “Tax Procedures”; see also P. Pistone (ed.), *Tax Procedures*, IBFD Publications, 2020.

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 International Law Association Study Group on International Tax Law (“the Study Group”), 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 Study Group has therefore started to address taxpayers’ rights (phase 1). Based on a comparative legal study, the Study Group analyzes their

³ Organized by the Center for Taxpayer Rights, <https://taxpayer-rights.org/international-conference/>; see also J. Schamell, *Aktuelles zum Thema Grundrechtsschutz von Steuerpflichtigen – zugleich Konferenzbericht zur "Third International Conference on the Protection of Taxpayer Rights"*, *Internationale Steuer-Rundschau* 2018, pp. 262 et seq.

⁴ <https://www.ibfd.org/Academic/Observatory-Protection-Taxpayers-Rights>.

⁵ P. Baker and P. Pistone, *The Practical Protection of Taxpayers’ Rights*, in IFA, *Cahiers de droit fiscal international*, vol. 100B, 2015.

⁶ Cf. e.g. L. B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, *Am. U. L. Rev.* vol. 32, 1982-1983, pp. 1 et seq.

⁷ See e.g. R. Miller, *Report on the ILA Study Group on International Tax Law Seminar “Public International Law and Taxation” held on 11 October 2019 in Luxembourg*, *European Taxation* 2020, pp. 112 et seq.

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 Study Group is focusing on the protection of individual rights through human rights. This contrasts to 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 basis for recommendations by the International Law Association. 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

⁸ Cf. e.g. Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, 2014, <https://undocs.org/A/HRC/26/28>; International Bar Association, Taxation as a Human Rights Issue, 2016, <https://www.ibanet.org/Article/Detail.aspx?ArticleUid=4d8668cb-473a-44ea-b8be-1327d6d9d977>; Association of World Citizens, Global Endorsement of the Declaration of Taxpayers’ Human Rights (since December 2012), <http://www.taxpayerhumanright.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° Período de Sesiones de la Comisión Interamericana de Derechos Humanos (CIDH)*, October 2015, https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_772.pdf.

⁹ Cf. Article 64 of the Constitution of Algeria; Article 102 et seq. of the Constitution of Angola; Article 85(g) of the Constitution of Cabo Verde; Principle 23 of the Preamble to the Constitution of Cameroon; Article 20 of the Constitution of the Central African Republic; Article 58 of the Constitution of the Republic of Chad; Article 65 of the Constitution of the Democratic Republic of Congo; Articles 19 and 20 of the Constitution of Equatorial Guinea; Article 22(4) of the Constitution of Guinea; Article 20 of the Constitution of Mauritania; Article 45(c) of the Constitution of Mozambique; Article 40 of the Constitution of Niger; Article 10 of the Constitution of Tunisia.

¹⁰ Article 43 of the Constitution of the Ivory Coast; see also Article 38(5) of the Constitution of Egypt.

¹¹ N. Machiavelli, *Il principe*, 1513, Ch. XVIII: „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“.

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 Organisation for Economic Co-operation and Development ("OECD")'s base erosion and profit shifting ("BEPS") project. The Study Group'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 summer 2020. The Study Group is working towards including as many legal systems as possible, in particular from outside the European region.

¹² Such „restatements“ play an important role in American common law. They are regularly issued by the highly regarded American Law Institute, which was founded in 1923. On restatements see *U. Kriebaum*, *Restatements*, *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 47, 2015, pp. 295 et seq.

¹³ See ILA Committees: Rules and Guidelines, Section 3.2, 25 April 2015, https://www.ila-hq.org/images/ILA/docs/committee_rules_and_guidelines_2015_as_adopted_by_ec_25_april_2015_-_web_version.pdf; 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".

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 is 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

¹⁴ See <https://www.icj-cij.org/en/statute>

¹⁵ See J. Kokott, *Das Steuerrecht der Europäischen Union*, 2018, pp. 72 et seq., § 2, paragraphs 175 et seq.

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 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 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

¹⁶ <https://www.oecd.org/berlin/publikationen/oecd-musterabkommenzurvermeidungvondoppelbesteuerung.htm>.

¹⁷ https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf.

¹⁸ Cf. E. Baistrocchi (ed.), A Global Analysis of Tax Treaty Dispute, 2017.

¹⁹ 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, 1994.

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

²² Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), signed in Paris on 7 June 2017, entered into force on 1 July 2018, signed by over 90 States as of July 2020.

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 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

²³ See for general aspects: <https://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieap.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 *D.M. Ring, Art. 26: Exchange of information – Global Tax Treaty Commentary, Global Topics* IBFD, paragraphs 1.2.5.2. and 3.2.

²⁵ The reports contain specific information on multinational groups and investment funds (turnover, income taxes paid and payable, etc.). Cf. Guidance on the Implementation of Country-by-Country Reporting BEPS ACTION 13, Updated December 2019, <https://www.oecd.org/ctp/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.pdf>.

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

²⁷ Cf. *L. Parada, Intergovernmental Agreements and the Implementation of FATCA in Europe*, *World Tax Journal*, vol. 7, 2015, no. 2.

countries. The latter then forward it to the United States. The obligations of intermediaries are implemented through elaborate domestic legislation.²⁸

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

²⁸ Cf. e.g. for Germany: Act on the Agreement of 31 May 2013 between the Federal Republic of Germany and the 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, https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales/Steuerrecht/Staatenbezogene%20Informationen/Laender/A%20Z/Verein%20Staaten/2013-10-15-USA-Abkommen-FATCA-Gesetz.pdf?__blob=publicationFile&v=3; Article 117(5) of the Fiscal Code of Germany, https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p0989, and, on that basis, Regulation implementing the obligations under the Agreement between the Federal Republic of Germany and the 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, *Bundesgesetzblatt* Part I, No. 35 of 28 July 2014.

²⁹ Cf. European Convention on Human Rights (ECHR), signed in Rome on 4 November 1950 and entered into force on 3 September 1953; American Convention on Human Rights, signed in San José (Costa Rica) on 22 November 1969 and entered into force on 18 July 1978; African Charter on Human and Peoples' Rights, signed in Nairobi on 28 June 1981 and entered into force on 21 October 1986; Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 and entered into force on 1 December 2009.

³⁰ See e.g. Article 34 of the Vienna Convention on Diplomatic Relations, 1961.

³¹ Cf. e.g. Yearbook of the International Law Commission 1991, vol. II, part 1, II, Fiscal Immunities and Exemptions from Customs Duties, p. 116; *B. Boczek*, International Law: A Dictionary, 2005, p. 50; ICJ, order of 15 December 1979, Tehran Hostages: Interim Measures, ICJ Reports 1979, pp. 3, 19, 20.

³² For case law of fiscal courts with regard to the VCLT see e.g.: German Federal Finance Court, judgment of 1 February 1989 – I R 74/86, paragraphs 14 et seq. – *DTC Germany-Italy 1925*, and judgment of 16 January 2014 – I R 30/12, paragraph 19 – *DTC Germany-United States 1989*; Federal Supreme Court of Switzerland, judgment of 17 March 2017 – 2C 1000/2015, paragraphs 6.2. et seq. – *HSBC Hervé Falciani*, of 26 July 2019 – 2C_653/2018, paragraphs 5.3.1. et seq. and 7.1. – *DTC UBS Switzerland-France*; of 12 September 2016 – 2C_276/2016, paragraphs 5.2.1. et seq. – UBS: group requests, of 9 July 2019 – 2C_616/2018 – *DTC Switzerland-Netherlands*, of 2 August 2018 – 2C_819/2017, paragraphs 3.2.1. et seq. – *DTC Switzerland-India* and of 24 September 2015 – 2C_963/2014, paragraph 4.1. – *DTC Switzerland-Netherlands*. See also *M. Lang et al.* (eds.), The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties, 2012, pp. 352, 426, 470, 502, 600, 797, 822, 918, 1027, 1059, 1108, 1150, and CJEU, judgment of 12 September 2017, *Austria v Germany*, C-648/15, ECLI:EU:C:2017:664, paragraphs 39 et seq.

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 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

³³ See e.g. R. Avi-Yonah, *International Tax as International Law: An Analysis of the International Tax Regime*, 2007; P. Hongler, *Justice in International Tax Law*, 2019, pp. 139 et seq.

³⁴ Cf. e.g. J. Azzi, *Tackling Tax Treaty Tensions: Time to Think About an International Tax Court*, *Bulletin for International Fiscal Documentation*, vol. 52, 1998, pp. 344 et seq.; M. Albert, *DBA-Verständigungsverfahren – Probleme und Verbesserungsvorschläge* –, *IFSt-Schrift* No. 457, 2009; Lang/Owens (eds.), *International Arbitration in Tax Matters*, 2016; L. Maklouf, *Resolving International Tax Disputes through Arbitration*, *Arbitration International*, vol. 4, 2014, pp. 32 et seq.; R. Ismer/P. Piotrowski, *Internationale Streitbeilegung in Steuersachen und innerstaatliches Verfassungsrecht: Auf zu gerichtsförmigen Verfahren!*, *Internationales Steuerrecht* 2019, pp. 845 et seq.

³⁵ K. Wolfke, *Some Persistent Controversies regarding Customary International Law*, *NYIL*, 1993, pp. 2, 24: "in customary international law nearly everything remains controversial".

³⁶ ILC, *Conclusions on identification of customary international law*, with commentaries, A/CN.4/L.908, UN Doc II, Yearbook of the ILC, 2018, Conclusion 3.2 and General Commentary 3.

³⁷ ILA, *Committee on Formation of Customary (General) International Law*, Final Report, Statement of Principle Applicable to the Formation of General Customary International Law, 2000.

³⁸ ILC, *Conclusions on identification of customary international law*, cit., Conclusion 3.2 and General Commentary 3.

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 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.

³⁹ ILC, Conclusions on identification of customary international law, cit., Conclusion 11.1.

⁴⁰ ILC, Conclusions on identification of customary international law, cit., Commentary on ILC Conclusion 4.2., paragraph 4.

⁴¹ ILC, Conclusions on identification of customary international law, cit., Conclusion 12.2; see also *J. Odermatt*, The Development of Customary International Law by International Organizations, ICL Q, vol. 66, 2017, pp. 491 et seq.

⁴² ILC, Conclusions on identification of customary international law, cit., Conclusion 4 and the corresponding commentary.

⁴³ ILC, Conclusions on identification of customary international law, cit., Conclusion 11.2.

⁴⁴ After *R. Baxter*, Treaties and Custom, *Recueil des Cours* 1970, pp. 81, 129.

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 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 taxation has received little attention in the

⁴⁵ ICJ, judgment of 20 February 1969 – *North Sea Continental Shelf Cases (Germany/Denmark, Germany/The Netherlands)* – ICJ Report 1969, pp. 3 et seq.; of 27 June 1986 – *Military and Paramilitary Activities in and against Nicaragua* – ICJ Reports 1986, pp. 14 et seq.; *Bilder/Schachter/Charney/Mendelsohn*, Disentangling Treaty and Customary International Law, Proceedings of the American Society of International Law, 1987, pp. 157 et seq., 161 et seq.

⁴⁶ C. Braumann, Imposing Customs on Taxes: On the Value of Double Tax Treaties as Evidence for Customary International Law, *Journal of International Economic Law*, 2020.

⁴⁷ E.g. *Charte des droits et obligations du contribuable vérifié*, France; Taxpayer’s Charter, Hong Kong; Taxpayer Bill of Rights, Canada; Taxpayers’ Charter, Malta; *Carta de Derechos del Contribuyente*, Mexico; *Taxpayers’ Charter*, Pakistan; *Carta de Derechos del Contribuyente*, Peru; *Your Charter*, United Kingdom; *Taxpayers’ Bill of Rights*, United States; *Carta de Derechos de los Contribuyentes*, Spanish Region Catalonia; planned Taxpayers’ Charter, India; see also *Carta de derechos del contribuyente para los países miembros del Instituto Latinoamericano de Derecho Tributario (ILADT)*; *Confédération fiscale européenne*, Towards greater fairness in taxation, A Model Tax Payer Charter, Presentation to the Members of the Platform for Tax Good Governance, 2014; Australian Government, Inspector-General of Taxation, Review into the Taxpayers’ Charter and Taxpayer Protections, 2016; M. Cadesky, I. Hayes & D. Russell, Towards greater fairness in taxation: A Model Taxpayer Charter, 2016; and <http://www.taxpayercharter.com/>.

⁴⁸ ILC, Conclusions on identification of customary international law, cit., Conclusion 5 with commentaries 3 and 4: “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.

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 (“EU Charter”).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.

⁴⁹ An exception might be an unwritten anti-abuse principle; see *P. Hongler*, cit., pp. 189 et seq.

⁵⁰ See also *G. Gaja*, General Principles in the Jurisprudence of the ICJ, in *Andenans/Fitzmaurice et al.* (eds.), General Principles and the Coherence of International Law, 2019, pp. 35-43.

⁵¹ See also Article 6 of the Treaty on the European Union.

⁵² See e.g. *Total v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27.12.2010, No. 111; *Toto Costruzioni v. Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, No. 166; see, however, *P. Hongler*, cit., pp. 191 et seq.

⁵³ See e.g. CJEU, judgment of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, ECLI:EU:C:1980, paragraph 4.

⁵⁴ See CJEU, judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, ECLI:EU:C:2017:373, paragraph 54.

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

⁵⁵ ILC, *M. Vázquez Bermúdez*, Special Rapporteur, First Report on general principles of law, UN Doc. A/CN.4/732, 5 April 2019, paragraphs 231 et seq.; *M. C. Bassiouni*, A Functional Approach to "General Principles of International Law", *Michigan Journal of International Law*, vol. 11, 1990, pp. 768 et seq.

⁵⁶ For an excellent summary see ILC, *M. Vázquez-Bermúdez*, First Report on general principles of law, cit.

⁵⁷ Cf. e.g. *F. Ranieri*, *Die „bona fides“ und die richterliche Kontrolle der Rechtsausübung*, in *R. Ranieri*, *Europäisches Obligationenrecht*, 2009, pp. 1801-1898; *H. Kreller*, *Die Theorie des Missbrauchs der Rechte in der römischen Rechtslehre/La théorie de l'abus des droits dans la doctrine romaine*, in *E. Heymann* (ed.), *Deutsche Landesreferate zum II. Internationalen Kongress für Rechtsvergleichung im Haag 1937, Sonderheft des elften Jahrgangs der Zeitschrift für ausländisches und internationales Privatrecht*, 1937; *D. Barak-Erez*, *The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests*, *European Public Law* 2005, pp. 583 et seq.

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 *C. Chinkin*, *The Challenge of Soft Law: Development and Change in International Law*, *International and Comparative Law Quarterly*, vol. 38, 1989, pp. 850 et seq.

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 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

⁵⁹ See e.g. OECD/G 20, Standard for Automatic Exchange of Financial Account Information in Tax Matters, 2014; see also *J. Kokott*, Soft Law Standards under Public International Law, in *P. Nobel/C. Anderfuhren* (eds.), *International Standards and the Law*, 2005.

⁶⁰ See above at III.1.a).

⁶¹ See e.g. CJEU, judgments of 16 May 2017, *Berlioz Investment Fund*, cit., paragraph 67, of 26 February 2019, *N Luxembourg 1*, C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134, paragraphs 90 et seq., and *T Danmark*, C-116/16 and C-117/16, ECLI:EU:C:2019:135, paragraphs 48 et seq., with opinions of Advocate General Kokott of 1 March 2018 (ECLI:EU:C:2018:143 to 148), points 48 et seq.; Federal Supreme Court of Switzerland, judgment of 13 February 2017 – 2C_411 bis 418/2016, paragraphs 3.3.1. et seq. – foreseeable relevance for administrative assistance; German Federal Fiscal Court, judgments of 27 February 2019 – I R 73/16, paragraph 27, and I R 51/17, paragraph 15 – both concerning income corrections according to Section 1(1) of the German External Tax Relations Law (*Außensteuergesetz*); Spain, *Tribunal Supremo*, order of 28 November 2018, 5448/2018, paragraphs 5.2. et seq. – dynamic reference to „permanent establishment“.

⁶² Vgl. *J. Odermatt*, The Development of Customary International Law by International Organizations, cit., pp. 491 et seq.

international law (international organizations can, however, create their own customary international law that only regulates their conduct).⁶³

The OECD and the United Nations 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 United Nations, and the World Bank Group have established platforms for tax 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 different 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

⁶³ ILC, Conclusions on identification of customary international law, cit., p. 132, no. 8.

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

⁶⁵ *Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraph 391; see also *Meerapfel Söhne v. Central African Republic*, ICSID Case No. ARB/07/10, Excerpts of Award, 12 May 2012, paragraph 319.

⁶⁶ Cf e.g. ICJ, judgment of 27 June 2001 – *La Grand (Germany/United States)* – ICJ Reports 2001, p. 466, No. 42; Inter American Court of Human Rights, advisory opinion of 1 October 1999 – Oc-16/99, nos. 82 et seq.; CJEU, judgment of 5 February 1963, *Van Gend en Loos*, 26/62, ECLI:EU:C:1963:1, p. 27 and operative part 1.

can be derogated from by subsequent domestic law (“treaty override”),⁶⁷ depends in addition on their direct applicability 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

⁶⁷ This is the case in Germany, German Federal Constitutional Court, judgment of 15 December 2015 – 2 BvL 1/12, at II. 2 (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, orders of 11 December 2013 – I R 4/13 and of 10 January 2012 – I R 66/09; see *K. Vogel*, in *K. Vogel/M. Lehner* (eds.), *Doppelbesteuerungsabkommen*, 5th ed. 2008, p. 174, *Einleitung des OECD-MA*, paragraph. 205; on the debate in the literature *M. Lehner*, in *K. Vogel/M. Lehner* (eds.), *Doppelbesteuerungsabkommen*, 6th ed. 2015, *Einleitung des OECD-MA*, paragraphs 197 et seq.; *pro* unconstitutionality also *P. Vöniky*, *Verfassungsrecht und internationale Verträge*, in *Isensee/Kirchhof* (eds.), *Handbuch des Staatsrechts*, 3th ed., vol. XI, Internationale Bezüge, 2013, § 236, paragraph 33, and *A. Rust/E. Reimer*, *Treaty Override im deutschen Internationalen Steuerrecht*, *Internationales Steuerrecht* 2005, pp. 843 et seq.

⁶⁸ Cf. e.g. *K. Kaiser*, *Treaties, Direct Applicability*, in *Max Planck Encyclopedia of Public International Law*, 2013, paragraphs 14 to 18, 20; *L. Henry*, *When is a Treaty Self-Executing*, *Michigan Law Review*, vol. 27, 1929, pp. 776 et seq.; US Supreme Court, judgment of 25 March 2008 – 128 S.Ct. 1436 (2008), *sub c in fine*, dissent by *Breyer et al.* – *Medellín of Texas*.

⁶⁹ For Germany see Articles 24, 25 and 59(2) of the German Basic Law; see also *M. Will*, *Völkerrecht und nationales Recht*, *Juristische Ausbildung* 2015, pp. 1164 et seq.

⁷⁰ CJEU, settled case law; leading precedent judgment of 14 February 1995, *Schumacker*, C-279/93, ECLI:EU:C:1995:31, paragraph 21; most recently e.g. judgment of 3 March 2020, *Google Ireland*, C-482/18, ECLI:EU:C:2020:141, paragraph 37.

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

⁷¹ P. Pistone, in P. Pistone (eds.), Tax Procedures – General Report, EATLP Madrid Congress 2019, 2020, pp. 3 et seq.

⁷² Article 43 of the Argentinean Constitution contains a specific provision on access to documents in purely domestic tax proceedings; see also CJEU, judgment of 9 November 2017, *Ispas*, C-298/16, ECLI:EU:C:2017:843, paragraph 39.

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,

⁷³ See e.g. ECtHR, *McGinley and Egan v. the United Kingdom*, nos. 21825/93 and 23414/94, 9 June 1998, §§ 86 and 90.

⁷⁴ CJEU, judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, ECLI:EU:C:2019:861, paragraph 54.

⁷⁵ ECtHR, *Chambaz v. Switzerland*, no. 11663/04, 5 April 2012, § 63.

⁷⁶ CJEU, *Glencore Agriculture Hungary*, cit., paragraph 55 with reference to *Ispas*, paragraph 36.

⁷⁷ CJEU, *Glencore Agriculture Hungary*, cit., paragraphs 56 and 57.

⁷⁸ P. Pistone, *The EU Charter and Fundamental Rights, General Principles of EU law and taxation*, in B. Terra/P. Wattel, *European Tax Law*, 7th ed. 2018, pp. 169 et seq.

⁷⁹ CJEU, judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, ECLI:EU:C:2014:2041, paragraph 73.

but at 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 procedural rights in many cases, and the CJEU even in

⁸⁰ See Article 6(1) ECHR and Article 47(2) EU Charter.

⁸¹ The CJEU considers the Portuguese tax arbitration tribunals as independent courts, judgment of 12 June 2014, *Ascendi*, C-377/13, ECLI:EU:C:2014:1754, paragraphs 22 to 34; see also pending cases C-388/19, *Autoridade Tributária e Aduaneira*, and C-545/19, *Allianzgi-Fonds Aevn*; see, however, judgment of 21 January 2020, *Banco de Santander*, C-274/14, ECLI:EU:C:2020:17, paragraphs 53 et seq., on the *Tribunal Económico-Administrativo Central* (Central Administrative Control Body, Spain), which is not an independent court.

⁸² CJEU, *Berlioz Investment Fund*, cit., operative part 2 and paragraph 59; judgment of 6.10.2020, joined cases *État du Grand-duché de Luxembourg*, C-245/19 and 246/19, ECLI:EU:C:2020:516, regarding the absence of a judicial remedy for the interested persons prior to information being exchanged with opinion of Advocate General Kokott of 2 July 2020.

⁸³ Cf. e.g. ECtHR, *Ravon and Others v. France*, no. 18497/03, 21 February 2008, § 24.

⁸⁴ ECtHR, *Ferrazzini v. Italy*, no. 44759/98, 12 July 2001, §§ 20–31.

⁸⁵ Article 51(1) EU Charter; CJEU, Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, paragraphs 16 et seq., and opinion of Advocate General Kokott of 11 July 2019 in joined cases C-469/18 and C-470/18, *Belgische Staat*, ECLI:EU:C:2019:597, points 30 et seq.

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 applies to tax issues.⁸⁷

Various tax measures may discourage access to justice. These include the legal institution *solve et repete*.⁸⁸ According to *solve et repete*, the taxpayer is first obliged to pay the tax debt claimed by the tax authorities and is 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

⁸⁶ Cf. e.g. CJEU, *Ipsas*, cit., and ECtHR, *Ravon and Others v. France*, cit.

⁸⁷ See also the intervention of the Inter-American Commission on Human Rights in the *Cantos v Argentina* case, http://www.worldcourtp.com/iacthr/eng/decisions/202.11.2028_Cantos_v_Argentina.pdf.

⁸⁸ For the incompatibility of *solve et repete* with the right of access to justice and the principle of equality see Italian Constitutional Court, judgment no. 21 of 15 March 1961.

⁸⁹ Cf. G. Walde, *Solve et Repete*, *Finanzarchiv* 1941, pp. 44 et seq.

⁹⁰ Cf. ECtHR, *de Geouffre de la Pradelle v. France*, no. 12964/87, 16 December 1992; *Bellet v. France*, no. 23805/94, 4 December 1995; *Maširević v. Serbia*, no. 30671/08, 11 February 2014.

⁹¹ See above at VI.2.

⁹² Article 48 of the EU Charter.

⁹³ CJEU, judgment of 9 November 1983, *San Giorgio*, C-199/82, ECLI:EU:C:1983:318, paragraph 14.

⁹⁴ CJEU, judgment of 2 October 2003, *Weber's Wine World and Others*, C-147/01, ECLI:EU:C:2003:533, paragraph 114.

⁹⁵ CJEU, judgment of 18 December 1997, *Garage Molenheide and Others v Belgische Staat*, joined cases C-286/94, C-340/95, C-401/95 and C-47/96, ECLI:EU:C:1997:623, paragraph 52.

taxpayer without serious reasons justifying it,⁹⁶ or for the exclusion of any 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. At least in Europe, no rigid rules apply in this respect. In any case, the tendency is to use

⁹⁶ CJEU, judgments of 8 March 2017, *Euro Park Service*, C-14/16, ECLI:EU:C:2017:177, paragraph 53; and *N Luxembourg 1*, cit., paragraphs 142 et seq., as well as *T Danmark*, cit., paragraphs 142 et seq., on the burden of proof and presumptions.

⁹⁷ CJEU, *San Giorgio*, cit., paragraph 14, and judgment of 21 September 2000, *Michailidis*, joined cases C-441/98 and C-442/98, ECLI:EU:C:2000:479, paragraph 36.

⁹⁸ ECtHR, *J.B. v. Switzerland*, no. 31827/96, 3 May 2001, § 64; see also *R. 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 *G. Kofler, M. P. Maduro and P. Pistone* (eds.), *Human Rights and Taxation in Europe and the World*, 2011, p. 263.

⁹⁹ Cf. Article 8(a), 8(a)(a) and annexes of the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ 2011, L 64, p. 1, as amended by Council Directive 2018/822/EU of 25 February 2018, OJ 2018, L 139, p. 1 (“DAC 6”).

¹⁰⁰ ECtHR, *van Weerelt v. the Netherlands* (dec.), no. 784/14, 16 June 2015, § 56; German Constitutional Court, order of 27 April 2010 – 2 BvL 13/07, no. 3 – 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*).

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 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 These 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

¹⁰¹ Cf. ECtHR, *Pélissier and Sassi v. France*, no. 25444/94, 25 March 1999, § 45; CJEU, judgment of 10 April 2003, *Steffensen*, C-276/01, ECLI:EU:C:2003:228, paragraph 75, and opinion Kokott, *Belgische Staat*, cit., points 69 et seq. See also J. Kokott, *Bedeutung und Wirkungen deutscher und europäischer Grundrechte im Steuerstrafrecht und Steuerstrafverfahren*, *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* 2017, pp. 409 et seq. and 415 et seq.; J. Kokott, *Das Steuerrecht der Europäischen Union*, cit., pp. 203 et seq., § 4, paragraphs 64 et seq.; P. Pistone, *Tax Procedures*, cit., pp. 82 et seq.

¹⁰² Section 393(2) of the Fiscal Code of Germany: ”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 German Constitutional Court, order of 27 April 2010 – 2 BvL 13/07.

¹⁰⁴ See in the following at VII.

¹⁰⁵ See also CJEU, judgment of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, and P. Pistone, *Tax Procedures*, cit., pp. 27, 29 et seq., 59 and 110.

¹⁰⁶ Article 50 EU Charter.

¹⁰⁷ Article 4 of the 7th Additional Protocol to the ECHR contains the common approach: “criminal proceedings of the same State”.

¹⁰⁸ See German Constitutional Court, orders of 31 March 1987 – 2 BvM 2/86, and of 4 December 2007 – 2 BvR 38/06, both with numerous references.

¹⁰⁹ U.S. Supreme Court, judgment of 17 June 2019, 587 U.D.(2019) – *Gamble v. United States*.

E. Rights in Cross-Border Situations

The basic procedural rights also bind the authorities when they act in the context of European or international mutual assistance.¹¹⁰ This is important, as the Member States are currently very keen to remove obstacles to effective cooperation, such as prior consultation of the parties concerned. However, the CJEU has made clear that administrative cooperation in the field of taxation must not undermine taxpayers' protection of their fundamental rights. 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.¹¹⁴

¹¹⁰ P. Pistone, The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation, in *Terra/P. Wattel*, European Tax Law, cit., p. 153.

¹¹¹ CJEU, judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, ECLI:EU:C:2017:373.

¹¹² See *ibid.*, paragraph 100 with reference to Article 20(2) of Directive 2011/16/EU.

¹¹³ *Ibid.*, paragraphs 92 and 100; see also CJEU judgment of 6.10.2020, *État du Grand-duché de Luxembourg* (Droit de recours contre une demande d'information en matière fiscale), joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:795 and pending case C-437/19, *État du Grand-duché de Luxembourg*. A similar approach has been adopted in New Zealand in *CIR v Chatfield & Co Ltd* [2019] NZCA 73, concerning a request for information according to Article 25 of the New Zealand-South Korea Double Tax Convention.

¹¹⁴ In her opinion of 2 July 2020 in joined cases C-245/19 and 246/19, *État du Grand-duché du Luxembourg*, cit, no. 147, 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; the CJEU by

Moreover, data are protected particularly intensively in Europe, although 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 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, which must, however, concern individuals.¹¹⁹

The European Union has tried to address those issues by introducing Directive 2017/1852 on tax dispute resolution mechanisms in the EU,¹²⁰ whose 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

contrast only grants legal protection to the addressee of the information order, judgment of 6.10.2020, ECLI:EU:C:2020:795.

¹¹⁵ On data protection see VIII.2.

¹¹⁶ CJEU, judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, ECLI:EU:C:2020:559, operative part 2.

¹¹⁷ Denied e.g. by *P. Pistone*, *Tax Procedures*, cit., pp. 94 et seq.

¹¹⁸ See the proposals in *K. Perrou*, *Taxpayer Participation in Tax Treaty Dispute Resolution*, IBFD Doctoral Series vol. 28, 2014; *P. Baker & P. Pistone*, BEPS Action 16: The Taxpayers’ Right to an Effective Legal Remedy Under European Law in Cross-Border Situations, 25 *EC Tax Review* 5/6, 2016, pp. 335–345.

¹¹⁹ See e.g. Article 41(2)(c) EU Charter.

¹²⁰ Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ 2017, L 265, p. 1.

¹²¹ Article 10(2) Directive 2017/1852; see also Article 23 Multilateral Instrument and at III.1.b).

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 taxpayer and the authority. They often 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

¹²² See footnote 46.

¹²³ E.g. in New Zealand; cf. also Article 43 EU Charter 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

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 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 resulting 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. For example, the amount to be paid as a result of an administrative sanction can be very high and

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*, Pakistan's Federal Tax Ombudsman and Australia's Inspector General of Taxation.

¹²⁸ E.g. Australia's Scheme for Compensation for Detriment caused by Defective Administration.

¹²⁹ ECtHR, *Engel and Others v the Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, § 10.

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 in 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 taxpayer's side for such harsh reaction by the legal system.¹³³ Moreover, the presumption of innocence (*in dubio pro reo*) implies that the guilt of the person accused of a tax offense has

¹³⁰ Ibid; see in more detail at VI.4.

¹³¹ ECtHR, *A and B v. Norway*, nos 24130/11 and 29758/11, 15 November 2016, §§ 130 et seq.; cf. also CJEU, , *Menci*, cit., paragraph 61.

¹³² Cf. CJEU, *Åkerberg Fransson*, cit., paragraphs 34 et seq.

¹³³ See at VI.2.

to be proven (burden of proof) beyond reasonable doubt (standard of proof).¹³⁴ Presumptions in tax law can collide with this.

Finally, the principle of proportionality¹³⁵ 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.

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,¹³⁶ and other international agreements.¹³⁷ 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.¹³⁸

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

¹³⁴ On the burden and standards of proof from a comparative perspective see *J. Kokott, Beweislastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten*, 1993, pp. 12 et seq., and *The Burden of Proof in Comparative and International Human Rights Law*, 1998.

¹³⁵ On the importance of the principle of proportionality as an internationally recognized general principle of law see the German Constitutional Court, judgment of 5 May 2020 – 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16 – paragraphs 124 et seq.

¹³⁶ See the principle of non-discrimination in Article 24 of the bilateral tax treaties based on the OECD Model Convention.

¹³⁷ E.g. Articles 20 and 21 EU Charter on equality before the law and non-discrimination, Article 14 ECHR and Protocol 12 to the ECHR.

¹³⁸ E.g. CJEU, ECtHR and the Inter-American Court of Human Rights.

guarantees equal treatment—including equal enforcement¹³⁹—of the taxes owed by all taxpayers. Second, the ability-to-pay principle, which is explicitly recognized in some national constitutions,¹⁴⁰ is a specific expression of the principle 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.¹⁴¹ 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 1st Protocol to the ECHR, as

¹³⁹ German Constitutional Court, judgments of 27 June 1991 – 2 BvR 1493/89 –, BVerfGE 84, 239, *Zinsbesteuerung*, paragraph 109, and of 9 March 2004 – 2 BvL 17/02 –, BVerfGE 110, 94, *Spekulationssteuer*, at II.1. et seq.; R. Eckhoff, *Rechtsanwendungsgleichheit im Steuerrecht, Die Verantwortung des Gesetzgebers für einen gleichmäßigen Vollzug des Einkommensteuerrechts*, 1999.

¹⁴⁰ E.g. Article 4(5) of the Constitution of Greece: „Greek citizens shall bear public burdens without distinction according to their ability.“; Article 53(1) of the Constitution of Italy: „Everyone is obliged to contribute to public expenses in proportion to his or her fiscal power.“; Article O of the Constitution of Hungary: „Everyone is responsible for himself and is obliged to contribute to the fulfilment of state and community tasks according to his abilities and possibilities.“ and Article XXX of the same constitution: “(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.”; Article 31(1) of the Constitution of 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.“; Article 24(1) of the Constitution of Cyprus: „Every person is bound to contribute according to his means towards the public burden.“; See also K. Tipke, *Europäisches Steuerverfassungsrecht, Eine rechtsvergleichende Übersicht*, in P. Kirchhof/M. Lehner et al. (eds.), *Staaten und Steuern, Festschrift Vogel*, 2000, pp. 561 et seq. and 567 et seq.; K. Tipke, *Die Steuerrechtsordnung*, vol. I, 2000, p. 486 with further references; L. Ohlendorf, *Grundrechte als Maßstab des Steuerrechts in der Europäischen Union*, 2015, pp. 114 et seq.

¹⁴¹ Cf. e.g. German Constitutional Court, order of 11 September 2008 – VI R 63/04, *Abgeordnetenbesteuerung*.

interpreted by the ECtHR, prohibits any individual and excessive burden on a person or a specific group of taxpayers.¹⁴²

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).¹⁴³ It often prohibits unequal treatment on the basis of nationality, for example, within the EU and under double taxation and investment agreements.¹⁴⁴

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.¹⁴⁵ The ability-to-pay principle applies above all to natural persons and, in some countries, also to legal entities.¹⁴⁶

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

¹⁴² ECtHR, *P. Plaisier BV v. The Netherlands*, nos. 46184/16, 47789/16 and 19958/17, 14 November 2017, § 82.

¹⁴³ J. Englisch, in M. Lang/P. Melz/E. Kristofferson, *Value Added Tax and Direct Taxation – Similarities and Differences*, 2009, pp. 1 et seq. and 20 et seq.

¹⁴⁴ Cf. e.g. Federal Court of Australia, judgment of 30 October 2019, *Addy v Commissioner of Taxation* [2019], FCA 1768, paragraphs 70 et seq.: tax disadvantage in respect of working holiday makers infringes Article 25 of the tax convention between Australia and the United Kingdom.

¹⁴⁵ E.g. Article 108(7) of the Constitution of Bolivia; Article 145(1) of the Constitution of Brazil; Article 4(5) of the Constitution of Greece; Article 53(1) of the Constitution of Italy; Article 181 of the Constitution of Paraguay; Articles O and XXX of the Constitution of Hungary; Article 31(1) of the Constitution of Spain; Article 316 of the Constitution of Venezuela; Article 24(1) of the Constitution of Cyprus; for detailed information on the ability to pay principle see J. Kokott, *Das Steuerrecht der Europäischen Union*, cit., pp. 103 et seq., § 3, paragraphs 48 et seq.

¹⁴⁶ E.g. in Hungary and Poland. The European Commission considers progressive turnover-based taxation “State aid” to companies with a lower turnover, cf. the pending cases C-562/19 P and C-596/19 P, *Commission/Poland and Hungary*. See also CJEU, judgment of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, ECLI:EU:C:2018:424; see also M. Valta, *Grenzüberschreitende Leistungsfähigkeit multinationaler Unternehmen im EU-Recht*, *Internationales Steuerrecht* 2020, pp. 189 et seq.

welfare state principle.¹⁴⁷ The ability-to-pay principle can thus also justify a higher tax burden.¹⁴⁸ Furthermore, the ability-to-pay principle can ensure that there is sufficient time between the taxable event and the tax payment.

Many EU Member States recognize the link between the principle of equality and the ability-to-pay principle. At the Union level, 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.¹⁴⁹ Thus, the ability-to-pay principle does not apply per se, but helps to identify violations of the fundamental freedoms.¹⁵⁰

Progressive tax rates based on turnover in the case of special taxes are in principle in the discretion of the Member States of the Union.¹⁵¹ 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.¹⁵²

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, as is also supposed to justify the obligation to take into

¹⁴⁷ Cf. J. Hey, *Steuersystem und Steuerverfassungsrecht*, in Tipke/M. Lang, *Steuerrecht*, 23rd ed 2018, pp. 65 et seq. and 127, § 3, paragraph. 212.

¹⁴⁸ Cf. e.g. Supreme Court of Brazil, judgment of 24 February 2016, extraordinary appeal no. 601314/SP; see also L. C. Pessôa, *O princípio da capacidade contributiva na jurisprudência do Supremo Tribunal Federal* (The ability to pay principle in the decisions of the Brazilian Supreme Court), *Revista Direito GV* 2009, pp. 2317 et seq.

¹⁴⁹ CJEU, *Schumacker*, cit., paragraph 32; extensive interpretation: *Bevola and Jens W. Trock*, cit., paragraphs 39 and 59.

¹⁵⁰ Cf. judgment of 12 May 1998, *Gilly*, C-336/96, ECLI:EU:C:1998:221, paragraphs 49-51.

¹⁵¹ CJEU, judgments of 3 March 2020, *Tesco-Global Áruházak*, C-323/18, ECLI:EU:C:2020:140, paragraph 70, and *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 51.

¹⁵² CJEU, *Tesco-Global Áruházak*, cit. paragraphs 70 and 74, and *Vodafone Magyarország*, cit., paragraphs 49, 51 and 56. See also J. Mössner, *Umsatzbasierte direkte Steuern*, *Internationales Steuerrecht* 2020, pp. 162 et seq., and P. Hongler, *Justice in International Tax Law*, cit., pp. 387 et seq.

account personal expenses¹⁵³ and even final losses of companies.¹⁵⁴ After all, 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.¹⁵⁵

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 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.¹⁵⁶ Therefore, the principle of single taxation is gaining ground in the context of efforts towards a global minimum taxation (“GLOBE”).¹⁵⁷ 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

¹⁵³ E.G. CJEU, judgment of 9 February 2017, X, C-283/15, ECLI:EU:C:2017:102, paragraphs 30 et seq.

¹⁵⁴ CJEU, *Bevola and Jens W. Trock*, cit., paragraph 59.

¹⁵⁵ Cf. e.g. CJEU, judgment of 12 February 2009, *Block*, C-67/08, ECLI:EU:C:2009:92, paragraphs 28 et seq.

¹⁵⁶ For the concept of single taxation see *R. Avi-Yonah*, *International Tax as International Law: An Analysis of the International Tax Regime*, cit., pp. 10 et seq.; see also *J. Wheeler* (ed.), *Single Taxation*, 2018.

¹⁵⁷ 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, 2019, pp. 27 et seq., paragraphs 61 et seq.; cf. *J. Englisch & J. Becker*, *International Effective Minimum Taxation – The GLOBE Proposal*, 11 *World Tax Journal*, 2019, pp. 483 et seq.

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.¹⁵⁸ 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 justice between recipients of different incomes. Whether and what legal consequences are to be drawn from this is controversial.¹⁵⁹

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 states¹⁶⁰ (Phase 2 of the ILA project) and therefore only indirectly affects taxpayers' rights which are the subject of this Article.

¹⁵⁸ See BEPS Action 3 introducing Controlled Foreign Corporation (CFC) rules and Action 5 preventing harmful tax competition.

¹⁵⁹ 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 *P. R. McDaniel and J. Repetti*, Horizontal and Vertical Equity: The Musgrave/Kaplow exchange, *Florida Tax Review*, vol. 1, 1993, no. 10, pp. 621 et seq., and *J. Repetti and D. Ring*, Horizontal Equity revisited, *Florida Tax Review*, vol. 13, 2012, no. 3, pp. 155 et seq.

¹⁶⁰ See German Federal Minister of Finance Scholz, speech of 8 May 2019, *Mindestbesteuerung bringt Fairness ins internationale Steuerrecht, 150 Jahre DBA – Fit for Purpose? – Symposium zur Internationalen Steuerpolitik*, <https://www.bundesfinanzministerium.de/Content/DE/Reden/2019/2019-05-08-150-Jahre-DPA.html>; *K. Brooks*, Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Policy Objective, in *J. G. Head and R. E. Kreyer* (eds.), *Tax Reform in the 21st Century: A Volume in Memory of Richard Musgrave*, 2009, pp. 487 et seq.

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.¹⁶¹ Almost all constitutions in the world guarantee the right to privacy, and some explicitly guarantee a right to data protection.¹⁶² For example, the Indian Supreme Court derives the right to privacy, including data protection, from the fundamental rights to life and liberty.¹⁶³ According to this court, biometric tax identification number (“adhaar”) is permissible in view of the legitimate state interest in combating tax evasion.¹⁶⁴ 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.¹⁶⁵ 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

¹⁶¹ 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 information self-determination, see judgment of 15 December 1983 – 1 BvR 209/83 et al, BVerfGE 61, 1, *Volkszählung*.

¹⁶² E.g. Articles 45 and 46 of the Constitution of Cabo Verde; Article 1.6. of the Constitution of Gabon; Article 27 of the Constitution of the Comoros; Article 71 of the Constitution of Mozambique; Articles 31(c) and 35(2) of the Constitution of Kenya.

¹⁶³ Indian Supreme Court, order of 24 August 2017, *K.P. Puttaswamy of Union of India*, (2017) 10 SCC 1.

¹⁶⁴ Indian Supreme Court, order of 24 August 2017, *K.P. Puttaswamy of Union of India*, (2017) 10 SCC 1.

¹⁶⁵ See in general IFA, *The Practical Protection of Taxpayers’ Rights*, CDFI, vol. 108B, 2015.

in line with the requirements of the right to privacy, especially in tax matters, also in relation to the requirements of freedom of expression under Article 10 of the ECHR.¹⁶⁶

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”).¹⁶⁷ 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: Article 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.

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.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰

¹⁶⁶ ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, no. 931/13, 27 June 2017, § 172.

¹⁶⁷ 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, OJ 2016, L 119, p. 1.

¹⁶⁸ ECtHR, *Funke v. France*, no. 10828/84, 25 February 1993, § 56.

¹⁶⁹ ECtHR, *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14 March 2013, § 173.

¹⁷⁰ ECtHR, *Volokhy v. Ukraine*, no. 23543/02, 2 November 2006, §§ 49 et seq.

In general, the CJEU already allows data storage only under extremely strict conditions.¹⁷¹ However, 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.¹⁷²

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,¹⁷³ including the concerned persons' procedural rights.¹⁷⁴ 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 standard of the recipient state. They can, in principle, only be used within the framework of tax administration.¹⁷⁵ Exchange of information on the basis of administrative assistance agreements is therefore justified in principle and does not violate the right to privacy.¹⁷⁶ 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.¹⁷⁷

An emerging international standard is likely to be that only foreseeably relevant information can be transmitted.¹⁷⁸ Insufficiently specified requests or fishing expeditions are

¹⁷¹ CJEU, judgment of 8 April 2014, *Digital Rights Ireland and Seitlinger and Others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238, of 6 October 2015, *Schrems*, C-362/14, ECLI:EU:C:2015:650, and of 21 December 2016, *Tele2 Sverige*, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970.

¹⁷² CJEU, judgment of 1 October 2015, *Bara and Others*, C-201/14, ECLI:EU:C:2015:638, paragraphs 28 et seq.

¹⁷³ See Federal Supreme Court of Switzerland, judgment of 17 March 2017 – 2C 1000/2015, paragraphs 6.2. et seq. – *HSBC Hervé Falciani*.

¹⁷⁴ Cf. CJEU, *Berlioz Investment Fund*, cit., paragraphs 43 et seq. and 75 et seq. as well as operative parts 2 and 5, and judgment of 22 October 2013, *Sabou*, C-276/12, ECLI:EU:C:2013:678, paragraphs 37 et seq.

¹⁷⁵ Article 27(2) of the ATAF Model Convention.

¹⁷⁶ ECtHR, *G.S.B. v. Switzerland*, no. 28601/11, 22 December 2015, §§ 50 et seq.

¹⁷⁷ ECtHR, *Othymia Investments v. The Netherlands* (dec.), no. 75292/10, 16 June 2015, § 44. However, see on this CJEU, judgment of 6.10.2020, joined cases *État du Grand-duché de Luxembourg*, C-245/19 and 246/19, ECLI:EU:C:2020 with opinion by Advocate General Kokott of 2.7.2020., paragraph 97.

¹⁷⁸ Cf. CJEU, *Berlioz Investment Fund*, cit., paragraphs 60 et seq. and operative parts 3 and 4. In 2005, the standard in the OECD Model Convention on Mutual Assistance was changed from "necessary" to "foreseeably

not permitted.¹⁷⁹ Group requests cannot not be easily distinguished from these.¹⁸⁰ Under DTCs and national law,¹⁸¹ 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 EU¹⁸² stress that group requests are not inadmissible per se.¹⁸³ However, this standard should be interpreted in such a way that, even in the case of group

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 judgments of 27 January 2004, 2A.185/2003, paragraph 7.1, of 12 April 2006, 2A.430/2005, paragraph 6.1, of 29 March 2018, 2C_598/2017, paragraph 4.1, of 5 March 2019, A-2591/2017 and ATF 139 II 451, at 2.3.3, paragraph 459: linking the concept of necessity to that of proportionality. For the different approaches in Belgium, *Rechtbank van Eerste Aanleg Hasselt*, judgment of 7 November 2012, 11/2968/A; Italy, *Corte di Cassazione*, order of 28 April 2015, no. 8605/2015; Luxembourg, *Cour Administrative*, judgment of 20 March 2012, 29592a, of 24 July 2013, 33111C and 33118C as well as of 11 April 2014, 34356C, p. 11: “*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.*”; Bermudas, Supreme Court, judgment of 23 March 2016, 2014: no. of ap. 2015; Singapur, High Court, judgment of 4 November 2015, *AXY and Others*, (2015) SGHC 291, and of 23 May 2012, *Comptroller of Income Tax v AZP* 14 ITLR 1155 (2012) SGHC 112.

¹⁷⁹ Cf. e.g. CJEU, *Berlioz Investment Fund*, cit., paragraphs 72 and 73; Federal Supreme Court of Switzerland, judgment of 12 September 2016, paragraph 6.3 – *UBS*: group request.

¹⁸⁰ Cf. paragraph 5.2 of the Commentary on Article 26 of the OECD Model Tax Convention; Federal Supreme Court of Switzerland, judgment of 12 September 2016 – 2C_276/2016, paragraph 6.3 – *UBS*: group request, of 26 July 2019 – 2C_653/2018, paragraphs 5.2.3. et seq. and 6.1. – *DTC Switzerland-France*; Canadian Federal Court, 2018 FC 622, paragraph 96 – *Minister of National Revenue and Hydro-Québec*: „Some form of fishing expedition may be allowed, but judicial authorization, with its inherent discretion, exists to limit and govern it.“ See on this the pending CJEU case C-437/19, *État du Grand-Duché de Luxembourg*.

¹⁸¹ E.g. Canadian Income Tax Act, R.P.C., 1985, c.1 (5th Supp.) 231.2 (2): “Unnamed persons. 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“ Article 20(2) of Directive 2011/16 requires “at least ... the name of the person to whom the investigation or inquiry applies”.

¹⁸² 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, Article 5b.

¹⁸³ Subject to the condition of foreseeable relevance, courts also allow group requests in a similar way. See Netherlands, *Gerechtshof den Haag*, judgment of 17 July 2018, 17/00901 – *DTC Netherlands-Switzerland*; Federal Supreme Court of Switzerland, judgment of 16 September 2016, 2C_276/2016 – *DTC Switzerland-The Netherlands*, of 1 February 2019, 2C_625/2018 – *DTC Switzerland-France*; of 7 June 2019, 2C_764/2018 – *DTC Switzerland-Spain*, and of 22 July 2019, 2C_1053/2018 – *DTC Switzerland-Sweden*; Swiss Federal Administrative Court, judgment of 21 August 2018, A-4154/2017 – *Switzerland v India*, and Swiss Federal Court, judgment of 16 September 2016 – 2C_276/2016 – *DBA Switzerland-Netherlands*. They see the relevance of the suspicions in connection with the Panama Papers. See also Luxembourg, *Cour Administrative*, judgment of 14 November 2019, 43406C, 43407C, 43408C, 43409C, 43410C, 43411C, 43412C, 43413C, 43414C and 43415C, all on to the DTC Luxembourg-Denmark.

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.¹⁸⁴ 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,¹⁸⁵ during the joint audit,¹⁸⁶ and finally in relation to the use of confidential tax data collected during joint or simultaneous audits.¹⁸⁷

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.¹⁸⁸ However, it remains to be seen the extent to which this assessment also applies to the area of taxation. 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 context of tax assessment or collection,

¹⁸⁴ Detailed regulations, similar to the practice in Europe, can be found in Article 5 of the Southern African Development Community's Agreement on Assistance in Tax Matters (AATM), signed in 2012; see also most recently in Article 12a of the 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.

¹⁸⁵ Cf. for Germany Cologne Finance Court, judgments of 20 October 2017 – 2 V 1055/17, of 23 February 2018 – 2 V 814/17, of 13 April 2018 – 2 V 174/18, and of 12 September 2018 – 2 K 814/18.

¹⁸⁶ Cf. L. H. Haverkamp, *Joint Audit: Überlegungen zur Rechtslage und Ausblick in die Zukunft*, *Internationales Steuerrecht* 2020, pp. 65 et seq.

¹⁸⁷ Cf. the famous *Aloe Vera* case, US Court of Appeals, 128 F. Supp. 2d 1235 (D. Ariz. 2000), which involved simultaneous audits by American and Japanese tax authorities.

¹⁸⁸ CJEU, *Schrems*, cit., and judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, ECLI:EU:C:2020:559.

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 taxpayer’s 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,¹⁸⁹ the registered office of a legal person,¹⁹⁰ branches and other premises,¹⁹¹ the professional secrecy of lawyers,¹⁹² and seizure of bank documents.¹⁹³

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.¹⁹⁴ 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 subject to very burdensome reporting obligations. This is partly

¹⁸⁹ ECtHR, *Volokhy v. Ukraine*, no. 23543/02, 2 November 2006, § 53, *André and Others v. France*, no. 18603/03, 24 October 2008, §§ 46 and 47, *Bernh Larsen Holding and Others v. Norway*, no. 24117/08, 14 March 2013, § 173.

¹⁹⁰ ECtHR, *Lindstrand Partners Advokatbyrå v. Sweden*, no. 18700/09, 20 December 2016, § 83.

¹⁹¹ ECtHR, *Lindstrand Partners Advokatbyrå v. Sweden*, cit., § 83.

¹⁹² ECtHR, *Sommer v. Germany*, no. 73607/13, 27 April 2017, § 62.

¹⁹³ ECtHR, *M.N. and Others v. San Marino*, no. 28005/12, 7 July 2015, § 83; *Sommer v. Germany*, cit., § 62.

¹⁹⁴ Vgl. ECtHR, *Othymia Investments BV v. The Netherlands* (dec.); *GSB v. Switzerland*, cit.; *Lindstrand Partners Advokatbyrå v. Sweden*, cit., §§ 8 and 97.

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.¹⁹⁵

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.¹⁹⁶ 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.¹⁹⁷

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 Rights¹⁹⁸) 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 1st Protocol to the ECHR. It follows from this that taxes fall within the scope of the human right to property. Otherwise,

¹⁹⁵ ECtHR, *Brito Ferrinho Bexiga Villa-Nova v. Portugal*, no. 69346/10, 1 December 2015, §§ 54-55.

¹⁹⁶ Cf. e.g. Chapter II, Article 8(5) of the Constitution of Botswana; Article 22(2)(a) of the Constitution of Gambia; Article 44(2)(a) of the Constitution of Nigeria; see also Article 26(2)(c) of the Constitution of the Seychelles; Article 21(2)(a) of the Constitution of Sierra Leone; Article 16(2)(a) of the Constitution of Zambia.

¹⁹⁷ See above at VIII.1.c).

¹⁹⁸ 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.

there would be no need for the clarification in Article 1(2) of the 1st Protocol to the ECHR. According to its paragraph 1, this “shall not prejudice the right 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.¹⁹⁹ 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.²⁰⁰

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.²⁰¹ 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;²⁰² (2) imprecise or unforeseeable legal provisions which create uncertainty among taxpayers;²⁰³ (3) tax measures that impose an excessive and individual financial burden on a taxpayer;²⁰⁴ (4) the absence of

¹⁹⁹ Cf. F. Debelva, *International Double Taxation and the Right to Property*, 2019, at 5.3.3.

²⁰⁰ E.G. Switzerland and Monaco. See Council of Europe, chart of signatures and ratifications, https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/009/signatures?p_auth=mptwtzk9.

²⁰¹ In the aftermath of the famous *Intersplav v. Ukraine* judgment (ECtHR, *Intersplav v. Ukraine*, no. 803/02, 9 January 2007), Ukraine introduced a new more transparent and more speedy VAT refunding procedure.

²⁰² Cf. e.g. ECtHR, *Euromak Metal Doo v. the former Yugoslav Republic of Macedonia*, no. 68039/14, 14 June 2018, §§ 43 et seq.

²⁰³ Cf. ECtHR, *Shchokin v Ukraine*, nos. 23759/03 and 37943/06, 14 October 2010, §§ 51 et seq., *Lopac and Others v. Croatia*, nos. 7834/12, 43801/13, 19327/14 and 63535/16, 10 October 2019, §§ 57 and 58.

²⁰⁴ Cf. e.g. ECtHR, *Intersplav v. Ukraine*, no. 803/02, 9 January 2007, §§ 39-40.

procedural guarantees enabling taxpayers to be effectively represented in domestic proceedings;²⁰⁵ or (5) retroactive tax legislation.²⁰⁶

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 1st 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.²⁰⁷

3. Confiscatory Taxation

Subjecting a specific person or company to a tax rate of 100% is probably 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.²⁰⁸ In some

²⁰⁵ Cf. e.g. ECtHR, *Rousk v. Sweden*, no. 27183/04, 25 July 2013, §§ 117 and 118.

²⁰⁶ ECtHR, *di Belmonte v. Italy*, no. 72638/01, 16 March 2010, § 42.

²⁰⁷ See *F. Debelva*, cit., at 5.4.2. This is because the Charter applies "to the Member States only when they are implementing Union law" (Article 51(1) of the EU Charter). The EU has no competence for tax policy. The harmonization of taxes, especially direct taxes, is therefore very limited.

²⁰⁸ E.g. Article 150(4) of the Constitution of Brazil; Article 22 of the Constitution of Mexico; Article 74(2) of the Constitution of Peru; Article 31(1) of the Constitution of 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".

cases, constitutions²⁰⁹ or supreme court decisions²¹⁰ 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, 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.²¹¹

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.²¹² However, the extreme tax rate as such is not sufficient. The ECtHR, like other courts,²¹³ 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,

²⁰⁹ E.g. Article 40 of the Constitution of Costa Rica and Article 22 of the Constitution of Mexico.

²¹⁰ E.g. India, Madras High Court, 6 December 1972, A.M. Sali Maricar And Another/Income-Tax Officer, 1973 90 ITR 116 Mad.

²¹¹ Cf. e.g. Costa Rica, *Corte Suprema*, judgment of 9 November 1993 – no. 5749-93, *considerando IV* – Ana Virginia Calzada Miranda; Brazilian Supreme Court, judgment of 23 April 2013, extraordinary action no. 712285/SC): 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 judgment of 17 September 2014, no. 4628/DF) and whether a sanction exceeds 100 % of the amount of the tax (judgment of 17 June 1998, 1075/DF and of 10.2.2015, no. 851038/SC). Argentina, *Corte Suprema*, judgment of 15 October 1991, SAIJ: SUA0015639; see also C.E. Peralta, *Tributación y derechos fundamentales, los principios constitucionales como límite al poder de los ordenamientos jurídicos de Brasil y Costa Rica*, *Revista de Ciencias Jurídicas* 2015, pp. 89 et seq. and 120 et seq.; B. Buitrago Duarte, *La no confiscatoriedad como expresión de la capacidad contributiva y garantía en los tributos sobre la propiedad inmueble*, *Revista de derecho fiscal* 2008, pp. 229 et seq.

²¹² E.g. ECtHR, *N.K.M. v. Hungary*, no. 66529/11, 14 May 2013, §§ 32 et seq. and *Gáll v. Hungary*, no. 49570/11, 25 June 2013, §§ 31 et seq.

²¹³ Costa Rica, *Corte Suprema*, judgment of 9 November 1993 – no. 5749-93, *considerando IV* – Ana Virginia Calzada Miranda.

taking into account the *minimum vitale*.²¹⁴ If a taxpayer remains without a certain amount of income or capital after the tax payment, this is often regarded as confiscatory taxation.

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

²¹⁴ *Ibid.*; cf. also German Constitutional Court, order of 25 September 1992 – 2 BvL 5/91 – 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.

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 Study Group on international tax law has set the goal of bringing tax law and international law closer together again.