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International constraints on national tax policy: reflecting the international tax order

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Introduction

As the French novelist, Karr, aptly commented in the middle of the nineteenth century, “Plus ça change, plus c’est la même chose”. It is remarkable given the exponential increase in the pace of change how much the basic tenets of society remain the same. And so, too, do the basic tenets of our system of taxation. In Athens, in about 450 BC, Pericles could argue strongly for the importance of the rule of law as the foundation of democratic society – a society inclusive of a basic tax system. Diocletian, in about 300 AD overhauled the tax system of the late Roman Empire to cope with inflation and economic decline. In Norman England, the breadth of exemptions available to strong interest groups undermined the effective collection of Danegeld. The 1579 Union of Utrecht, which “functioned as a kind of constitution for the Republic of the Seven United Provinces of The Netherlands” struggled to introduce common taxation. Even more difficult under that Union was implementation of the non-discrimination clause: harmful tax competition was, it seems, alive and well.

What has changed, particularly over the latter part of the 20th Century, is the global framework within which sovereign nations must operate. Wellington’s defeat of Napoleon at Waterloo was not televised. There were no CNN reporters transmitting instantaneous satellite images of the 74 guns of Marshal Ney’s “Great Battery” pounding the British and Belgian troops or of Napoleon’s final retreat. There were no statements from the European Commission when Napoleon left Elba. NATO did not call an emergency meeting and there were no special sessions of the United Nations (UN) Security Council. When Napoleon surrendered he did not appear before the International Criminal Court. Nor did he pursue an action under the European Convention on Human Rights (ECHR) when exiled to St Helena for life.

The rapid advances in communication and technology have forced nations to act more permanently in concert. The irony is that modern international groupings designed to preserve sovereignty and further individual national aspirations have their greatest effect when they intrude on the sovereignty of their members. At the national level, many

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1 By Professor Duncan Bentley, Faculty of Law, Bond University, Australia. This paper was delivered in an earlier form at the Tax Research Network Conference, University of Cambridge, 5-6 September 2002. I am grateful to the sponsors and to the participants for their many helpful comments.
2 “The more things change, the more they are the same”. A Karr, Les Guêpes (1859) 304.
4 Bowra, ibid.
6 AL Poole, Domesday Book to Magna Carta 1087-1216 (2nd ed 1986) 418.
7 FHM Grapperhaus, Taxes, Liberty and Property (1989) 204.
8 Ibid.
9 The European Union (EU), ECHR and International Criminal Court are examples.
nations were created from the coming together of states whose individual self-interest was enhanced by subsuming it into the collective self-interest.\(^{10}\) Many of these nations have evolved a single, unitary form of government. Others retain a federal system. Within any of these states, the basis of democracy rests on political representation.\(^{11}\) This introduces additional levels of civil government within the nation state with varying degrees of autonomy.

What then is our operating framework? There are different levels of political power and authority. The lower the level the more limited the jurisdiction. Ultimate sovereignty supposedly rests in the nation state. Yet, this sovereignty is increasingly limited by binding agreements at the supranational level. At all levels, the framework is determined in part by the formal legal and administrative authority vested in each component, whether an international organisation, a national government, a state or provincial government, a city or town council or some other entity vested with civic authority.

However, there is a further vital dimension to the operating framework. It is the voluntary and involuntary cooperation that provides an informal counterpoint to the exercise of formal legal and administrative authority. Sometimes it is based in delegated authority. For example, where the revenue authorities in Australia, the United States of America (US), Japan and Canada recently developed a standard package of documentation for taxpayers applying for an advance pricing agreement on transfer pricing involving those jurisdictions, or where the Australian state of Queensland negotiates special state tax concessions to persuade a multinational company to establish its regional headquarters there. Sometimes it simply represents the blatant exercise of economic or other power. An obvious example is where the members of the Organisation for Economic Cooperation and Development (OECD) have forced a number of small nations to comply with OECD requirements designed to prevent those nations from allowing money laundering or practising tax competition.

The whole provides a complex matrix of vertical and horizontal relationships. Advances in trade, technology and communication have exacerbated the complexity as different players can now relate to other players at different levels in a way that was not possible until recently. Individual taxpayers in one jurisdiction now routinely interact with authorities at all levels in another jurisdiction that they are targeting for direct investment. Where supranational organisations were once the preserve of member governments, the OECD Committee on Fiscal Affairs’ (CFA) Technical Advisory Groups on aspects of the taxation of Electronic Commerce (TAGs) included both individual taxpayers and representatives from non-member jurisdictions.

The international stage is now crowded with individuals, organisations and different levels of government, each with their own agenda. Fluidity is a hallmark of the set and characters. It is underpinned by the growing international economic inter-relationship. The sheer volume and extent of world trade in all its forms ensure that the livelihoods of

\(^{10}\) Whether in the view of the peoples themselves or that of power brokers able to impose their will on the peoples concerned.

\(^{11}\) Even within the most autocratic regimes, there is generally devolution of civic governance.
most people are inextricably linked to it. The result is that they participate directly or indirectly in its regulation. One of the most difficult challenges is how the individual government units should manage their revenue collection in this environment.

Tax systems have become increasingly sophisticated. They are subject to constant change and development, as they have to come to terms with evolving economic imperatives. Managing that change and development includes managing the significant pressures on the system both internally, within revenue compliance and administration, and externally, for example, with the development of electronic commerce.

The very diversity of experience within each system requires the application of general principles to bring order out of impending chaos. That order is more effective if it encompasses both the internal and external elements. It is here, as different units of government seek to carve out for themselves niches that allow them to operate independently as taxing agents within the context of an increasingly integrated world order, that we see the level of that integration. Where economic or relational interdependence is strongest, there is most convergence between tax systems, and principles have their widest acceptance. Where they are weaker, the convergence of tax systems and the general application of accepted principles is weaker.

This explains in part the growing influence of supranational organisations and the success of central governments in controlling the taxing powers in federal systems. But it also explains in part the limitations of those organisations and governments. The deeper the level of interaction that must or does occur between different authorities, the greater the pressure to reduce transaction costs between their respective tax systems. Where there is little interaction, the pressure is correspondingly reduced.

Not that this represents the complete picture. Many other factors influence convergence and a common approach. One of the most frustrating aspects of negotiation and policy development is trying to deal with the existing rules. The CFA’s TAGs spent much of their time in looking at the principles that should underlie the taxation of electronic commerce debating how to operate within the constraints of existing defined terms such as permanent establishment. Participation in a common stamp duty regime in Australia, across the different states, was strongly influenced by existing rules. Where rules are formalised, it favours the status quo, for rules are concerned with the allocation of power. Change is therefore much more difficult. Schauer argues:

Because rules allocate power across time by entrenching the categories and generalizations of the past and thus dissipating the power of the present (or by entrenching the categories and generalizations of today against the pressures of tomorrow), the extent of their use also reflects the extent of decisional conservativism within the system.

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13 Which is why most countries only negotiate double taxation agreements with their trading partners.

There are various other barriers to common approaches to taxation, even within federal systems. Political independence, ideology and a jealous guarding of sovereignty can often prove more influential than economic imperatives. Social and cultural barriers, including language and differences in definition and understanding, may prove impenetrable. These have all played their part in limiting convergence of direct tax systems within the EU.15 At a federal level in Australia, the issue of sovereignty and political independence tends to play a stronger role in limiting state/state tax relations than does a desire to maintain social and cultural diversity.

Given the pressures for convergence, albeit constrained by other factors, this article explores some of the areas where these are evident in supranational relations. It provides a brief Australian case study demonstrating those pressures.

**The growing influence of the World Trade Organisation (WTO) and other international organisations**

The WTO formally emerged from the General Agreement of Tariffs and Trade (GATT) in 1995.16 The history of the GATT has been to exclude taxation from its ambit. This reflects the large number of bilateral double tax agreements also designed to reduce barriers to trade, but with the different aim of moderating the specific features of domestic tax policy. However, it is inevitable that the GATT and the WTO have exerted influence on tax policy and, as the coverage of the WTO expands, this influence on tax policy will expand with it. However, the debate will continue as to how much coordination there should be between trade and investment agreements on the one side, and double tax agreements and domestic policy provisions on the other.17

Warren identifies the four most important elements of the international trade framework as it affects income taxation as:18

1. the traditional GATT approach to liberalizing trade in goods, which recently has been extended in part to services and intellectual property;
2. prohibitions against certain subsidies;
3. preliminary attempts to liberalize capital flows; and
4. procedures for binding dispute settlement.

In its efforts to liberalise trade, GATT has focused on a combination of reducing import barriers and requiring non-discrimination in internal trade. The focus is on allowing

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18 AC Warren Jr, “Income Tax Discrimination Against International Commerce” (2001) 54 *Tax Law Review* 131, 141. This is the clearest approach to an analysis of the WTO’s effect on taxation that I have seen and I adopt it in the discussion below.
nations to grow through competitive advantage in a free international market.\textsuperscript{19} More than 140 nations in the WTO have agreed over time to significant reductions in tariffs and the abolition of quotas.\textsuperscript{20} The non-discrimination requirement extends to domestic taxation, which cannot be used as an instrument to protect domestic goods.\textsuperscript{21} The General Agreement on Services (GATS) also includes a non-discrimination clause but has exceptions for existing tax treaties and domestic tax laws.\textsuperscript{22}

The prohibition on subsidies has developed over the life of the GATT, so that there are now three levels: prohibited, actionable and non-actionable.\textsuperscript{23} A subsidy is defined to include foregone revenue such as a beneficial tax credit.\textsuperscript{24}

Efforts to liberalise capital flows have also been dealt with under bilateral investment treaties with capital exporting countries, intent on protecting their investments. The US has been the prime mover. Its bilateral investment treaties have sought to impose non-discrimination and most-favoured-nation clauses, prevent expropriation without compensation, implement guarantees for investment transactions and to put in place clear dispute resolution procedures.\textsuperscript{25} However, most such treaties, including those of the US, specifically exclude tax matters.\textsuperscript{26}

The attempt by the OECD to implement a Multinational Agreement on Investment (which would also exclude tax matters) has failed to date.\textsuperscript{27} However, if it were to be implemented, the Agreement supports non-discrimination in tax matters, to be dealt with by double tax agreements.\textsuperscript{28} This exclusion, and those in the WTO agreements, is artificial, as tax policies inevitably overlap with trade policies. But because the international trade and tax regimes have developed separately, particularly given the bilateral versus multilateral approach, the exclusions overcome any immediate requirement to harmonise where there is overlap.\textsuperscript{29} Nonetheless, as international agreement develops, it will reshape domestic tax and trade policy.

Unlike in international tax law, international trade law has managed in its agreements to introduce various forms of adjudication, including binding adjudication. This is assisted by the multilateral nature of the agreements.\textsuperscript{30} The influence of the WTO through these mechanisms should not be underestimated. Consider the case of US Foreign Sales

\textsuperscript{19} For an analysis of competitive advantage, see ME Porter, \textit{The Competitive Advantage of Nations} (1990), particularly ch 12 on Government Policy.
\textsuperscript{20} GATT, 30 October 1947, 55 UNTS 194, arts II and XI.
\textsuperscript{21} Ibid, art III and Warren, above n 18, 142.
\textsuperscript{22} Marrakesh Agreement, above n 16, 1168, arts XIV, XVII and XXII.
\textsuperscript{23} Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement, above n 16, Annex 1A. Discussed more fully in Warren, above n 18, 143 and Jackson, above n 16, 279.
\textsuperscript{24} Marrakesh Agreement, ibid.
\textsuperscript{25} Warren, above n 18, 145.
\textsuperscript{26} Ibid.
\textsuperscript{27} For a brief overview of the purpose, see Owens, above n 17, 33.
\textsuperscript{28} Warren, above n 18, 146.
\textsuperscript{29} The OECD is well aware of the problem, particularly in its analysis of foreign direct investment. See, for example, OECD, \textit{Taxing Profits in a Global Economy} (1991).
\textsuperscript{30} Warren, above n 18, 146.
Corporations (FSC). The Reagan administration introduced special rules so that a FSC, with an adequate foreign presence, could defer tax on a portion of its income. It was designed to give US exporters similar concessions to those given under consumption tax regimes. In 1997, the EU successfully challenged the rules under the WTO Agreement on Subsidies and Countervailing Measures and the Appellate Body upheld the ruling. In 2001, the EU successfully challenged the successor legislation to the FSC, the Extraterritorial Income Exclusion Act of 2000 and this was upheld on appeal.

Stephan suggests that this example shows that the WTO does constrain US tax policy. He argues that the US would be concerned about the economic consequences of failure to comply with WTO rulings, as continued growth in the global economy and confidence in it may be undermined by the instability in the world trading system caused by a failure to comply. This is borne out by the fact that both rich and poor countries comply with most WTO rulings. Confidence that the benefits of WTO membership outweigh the costs, including the threat of having to comply with adverse adjudication, is seen in the membership growth of the WTO. As countries comply with WTO rulings, that act of compliance also reinforces the weight of those rulings under public international law and comity and entrenches their position as an ongoing constraint on domestic tax policy as it is affected by those rulings.

Taxation can clearly be used as both a subsidy equivalent and a tariff equivalent. The difficulty is often in identifying the measure as one affecting trade and then determining whether it is harmful enough to warrant action. Tariff equivalents have traditionally been dressed up as indirect taxes, for example, as a specific tax on an imported good or a different classification and rate within an existing tax. As discussed above, both would fall within the scope of the GATT and the GATS.

More difficult to determine is where direct taxes are used as substitutes for tariffs and subsidies. Most would fall within the tax exceptions. However, they are more complex, covert, and often fall within a tax policy framework designed to develop the economic

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34 Ibid.


36 Ibid, 68.

37 Ibid.
efficiencies sought under trade and investment agreements.\(^{38}\) For example, research and development incentives in the form of increased tax deductions, but available only to domestic investors, are designed to favour domestic industries.\(^{39}\) So, too, are accelerated depreciation provisions for those operating within a jurisdiction. The policy rationale is, of course, that imports are similarly supported in their home state. As analysis of the effects of tax policy on international trade becomes more sophisticated, so will the debate on how tax and trade policy should integrate.\(^{40}\) It will act as a further constraint on domestic tax policy.\(^{41}\) Meanwhile, exclusions for tax treaties under agreements such as the GATS recognise that tax treaties represent a flexible direct bargain between two jurisdictions intent on overcoming inconsistencies in the interaction between their two tax systems.\(^{42}\)

Perhaps the most immediate example of the influence of the WTO on the development of tax policy can be seen in the debate over the characterisation of electronic commerce in international trade. At the OECD Forum on Electronic Commerce, held in Paris in 1999 ("the Paris Forum") to discuss progress made in developing the Ottawa Taxation Framework Conditions,\(^{43}\) one of the working sessions was entitled, "Establishing Ground Rules for the Digital Marketplace". The discussion confirmed international agreement that the Internet is a tax-neutral zone so that there is no discrimination between electronic and conventional commerce.\(^{44}\) However, the discussion placed emphasis on the distinction between taxes and tariffs.\(^{45}\) There was a general view expressed that the Internet should be a tariff free zone and that the current moratorium on customs duties, under the auspices of the WTO should be extended.\(^{46}\) The WTO was recognized as the appropriate forum to take forward that discussion.

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38 Owens, above n 17, 32, discusses the analysis the OECD undertakes that provides some measure of the use of direct taxes in this way. Warren above n 18, 149-169, provides a detailed analysis of prohibited and permitted income tax discrimination.

39 To have any long-term effect, however, the problems of global efficiency loss, compensatory reliance on other distortionary taxes and lower quality investment must be weighed against the generation of positive externalities through incentives. See OECD, above n 29, 190 for a wider discussion.

40 Warren, above n 18, 168-169, concludes that this is critical to give coherence to the legal order ensuring that international tax policy effectively reduces impediments to international trade:

> When the tax and trade regimes are considered together, however, no coherent principle explains the current dividing line between prohibited and permitted income tax discrimination against international commerce. The distribution of jurisdiction between the tax and trade disciplines seems best understood as an accidental byproduct of the separate historical development of those disciplines.


42 Owens, above n 17, 33.


44 Ibid at 15 and 28.


46 Ibid at 28 and 33, reflecting the discussion in the Working Group, “Expanding Global Markets: The Road Ahead".
The WTO influence is moving far beyond classifying the Internet as a tariff free zone. Leading up to the Doha Ministerial meeting in November 2001, countries were identifying positions on the characterization of electronic commerce. The Work Programme on Electronic Commerce has also considered harmonization of laws governing electronic commerce within the WTO framework. If the WTO is indeed afforded the role of co-ordinator of the international legal framework for electronic commerce, this will flow directly into the work of the OECD on taxation of electronic commerce. Decisions taken within the WTO will have far-reaching implications for both international and domestic tax policy on electronic commerce.

As WTO influence grows with the extension of the trade rounds to cover new areas, it is inevitable that there will be increasing overlap between tax and trade agreements. Pressure will grow to ensure that the different policy requirements converge, supported by the practical influence of the WTO adjudication mechanisms, as countries explore before them the limits of tax exclusion clauses. More sophisticated analysis by organisations such as the OECD of how tax policy affects trade and investment will also increase constraints on members. Obvious tax policy deterrents to efficient investment and free trade will become more difficult to implement. That in turn will flow through into dealings with non-OECD member countries.

Two other organisations that have constrained domestic tax policy are the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank), a UN agency. Both came out of the Bretton Woods Conference in 1944. The IMF was designed to act as a catalyst for economic co-operation, growth and stability within the international monetary system. One of its key roles has been to extend credit and provide economic relief to countries experiencing a wide range of financial difficulties. The World Bank makes available project and program loans to less developed countries on preferential terms and by acting as a lender of last resort. They often operate in tandem.

Both the World Bank and the IMF impose conditions on their lending and their involvement. Before agreeing to involvement in a country, the institutions carry out an assessment of the economic and other conditions in the country. From this assessment, they will make recommendations, usually economic and legal. Although, they are increasingly more extensive:

48 Document WT/L/274.
52 Described extensively in Cahn, above n 50.
Bank-approved consultants often rewrite a country's trade policy, fiscal policies, civil service requirements, labor laws, health care arrangements, environmental regulations, energy policy, resettlement requirements, procurement rules, and budgetary policy.

Cahn argues that neither institution is sufficiently accountable; as in their involvement with developing nations and nations in distress, they effectively take on the role of a sovereign government when they require implementation of their conditions and recommendations.\(^5^4\) Certainly, their influence on the tax systems of developing nations and, more recently, of economies in transition, reflects their sovereign role. To see this, one only has to read the technically excellent volumes put out by IMF and World Bank experts,\(^5^5\) which are reflective of their extensive fieldwork.

One of the clearest examples of the impact of conditionality has been the spread of a broad based consumption tax (Value Added Tax or VAT).\(^5^6\) But the fiscal influence of the IMF and World Bank goes far beyond this. Whereas the influence of other institutions is severely circumscribed, that of the IMF and World Bank, within certain spheres, is almost unlimited. That is why Cahn and others have called for greater accountability of those institutions.

Undoubtedly the IMF and World Bank projects have had a direct impact on the lives of far more people than the initiatives of any other international institution. However, they deal primarily with developing countries and countries in distress. They largely attempt to implement solutions tried and tested elsewhere, but designed and modified to fit the peculiar circumstances of the project country. Inevitably, the solutions are diluted over time by subsequent political and economic developments. Theirs is a different kind of influence from that exercised by the OECD and the WTO. Whereas the OECD and WTO are concerned with co-ordinating and shaping the future economic direction of the world’s major economies, the IMF and World Bank are concerned to ensure that other countries follow suit. It is more of a police officer role, and the countries affected have little say in the framework of corrective measures to be applied.

The international organisations themselves have seen the convergence of their roles and influence in tax matters. They have also recognised the need for wider representation of developing countries in the policy dialogue. On 13 March 2002, the staffs of the IMF, OECD and World Bank issued a joint proposal, *Developing the International Dialogue*

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\(^5^4\) Ibid.


\(^5^6\) A Tait, *Value Added Tax: International Practice and Problems* (1988). For the increasing trend towards the implementation of a VAT, see IBFD, *Annual Report*, which publishes each year a worldwide survey of developments and trends in international taxation. See also, for example, “IMF Commends VAT Introduction in Cameroon” (1999) 18 *Tax Notes International* 1770 and “IMF Welcomes Tanzania’s VAT” (1999) 18 *Tax Notes International* 1675.
on Taxation.\textsuperscript{57} It aims to involve in the dialogue all international organisations concerned with taxation, including the UN Ad Hoc Group of Experts on International Co-operation in Tax Matters, regional development banks and organisations facilitating co-operation on tax administration, such as the recently formed umbrella Committee of International Organizations on Tax Administration.\textsuperscript{58}

The initiating organisations see international tax policy as “rich in initiatives and programs”, but lacking:\textsuperscript{59}

- Clear and transparent mechanisms for the co-ordination of these programs; and
- A real input from developing countries in the way programs are constructed and international tax issues debated.

The aim is not to create a new international organisation. Rather, it is to encourage dialogue, identify and share good practices, provide a clearer focus for technical assistance and avoid duplication of effort.\textsuperscript{60} One must assume that the success of the international dialogue on the policy governing taxation of electronic commerce combined with concerns by developing countries at their lack of representation in determining the tax policies of the IMF and World Bank were drivers in this initiative. The proposal makes it clear that there is no intention that the International Tax Dialogue will “have any power to make, enforce or mediate binding tax rules”.\textsuperscript{61}

There are some obvious benefits to international dialogue of this kind. It avoids duplication. It provides a forum to develop international consensus at the governmental level. The discussion of international tax policy will be more informed given the range of participants and their particular perspectives. The dialogue may act as a catalyst to improve practical co-operation between tax administrations.

In its current form, the proposal also has significant drawbacks. It does not mention the WTO. The intention is clearly to keep the tax and trade dialogues separate. A primary focus of the dialogue is to obtain “real” input from developing countries. Yet, the proposal ignores the current distinctions along the development continuum from least developed countries to countries in transition. They are apparently lumped in together.

There is also little representation from developing countries. The proposal states that the World Bank and IMF, as “the main providers of bilateral technical assistance in tax policy and administration issues”\textsuperscript{62} are “the pre-eminent repositories of expertise in respect of these issues in developing countries”.\textsuperscript{63} Does this mean that the “real” input from developing countries will actually be made by the World Bank and the IMF?

\textsuperscript{57} Available at http://www.oecd.org (at 20 March 2003).
\textsuperscript{58} Ibid, part II.
\textsuperscript{59} Ibid, para 4.
\textsuperscript{60} Ibid, part IV.
\textsuperscript{61} Ibid, para 11.
\textsuperscript{62} Ibid, para 6.
\textsuperscript{63} Ibid.
Although there may be developing country representatives from other organisations, developed countries dominate almost all organisations involved in the dialogue. If the dialogue is to have credibility among developing nations, it will need to show greater integrity in representing the views of countries outside the OECD.

Ideally, any international dialogue should follow the model used by the CFA in its attempts to develop international consensus on the taxation of electronic commerce. The dialogue has been informal and flexible. It has involved non-governmental organisations, business and interest groups. Representatives of any interested non-member governments have been encouraged to participate. The CFA has retained a large measure of influence, but through the participatory dialogue has ensured a broad measure of acceptance for its proposals. It remains to be seen whether the International Dialogue on Taxation will do the same.

### Harmful tax competition initiatives

The OECD launched its project on harmful tax competition in 1996. The EU established its own approach to countering harmful tax competition, with the adoption of a package of measures by the Council in 1997.

The EU measures were wide-ranging and focused specifically on harmful tax competition within the EU. They included draft directives on the taxation of savings and the taxation of cross-border interest and royalty payments, together with a non-binding code of conduct. The code of conduct, although voluntary, is intended to work through political pressure and peer review. Significant debate has followed the introduction of these measures. However, the existence of that debate illustrates the influence of the measures on domestic tax policy within the EU. Ireland, for example, acted quickly to replace its preferential tax regimes to avoid criticism from other members.

In 1998, the OECD produced its Report, *Harmful Tax Competition: An Emerging Global Issue* (Report). Implementation of the recommendations in this Report have had far-reaching implications for the national financial and tax policies of those countries listed as having harmful tax practices. But the recommendations also have potentially significant consequences for the national tax policy of member countries.

The Recommendations cover three areas: domestic legislation and practices; tax treaties; and international co-operation. All aim to eliminate harmful tax competition. The Report

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65 Conclusions of the ECOFIN Council Meeting on 1 December 1997 Concerning Taxation Policy, 1998 OJ (C2) 1, 1.


68 Other institutions, such as the IMF, Financial Stability Forum and Financial Action Task Force, are also active in contiguous areas such as money laundering, supervision and transparency. Space precludes consideration of these activities in this paper.
“focuses on geographically mobile activities, such as financial and other service activities, including the provision of intangibles.”69 Harmful competition is defined to include distortion of investment flows, attacks on the fairness and integrity of the tax system, discouragement of taxpayer compliance, changing the public spending and tax mix, shifting the tax burden to less mobile tax bases, and increasing administrative and compliance costs.70 Key factors in identifying tax havens are: they have no or nominal taxes; they do not allow effective exchange of information; they lack transparency; and there is no requirement that an activity taking place in the jurisdiction should be substantial.71

The Report recommended the establishment of a Forum on Harmful Tax Practices and this was approved.72 Member States were required to report to the Forum on their own harmful tax practices by 2000 and to eliminate them by the end of 2005.73

In 2000, the Forum produced a Report, Towards Global Tax Co-Operation: Progress in Identifying and Eliminating Harmful Tax Practices (2000 Report). It identified potentially harmful preferential regimes in OECD member countries.74 The 2000 Report also identified jurisdictions viewed as tax havens.75 Significantly, it excluded from this list those tax havens that made “a public political commitment at the highest level to eliminate their harmful tax practices and to comply with the principles of the 1998 Report”.76

The 2000 Report proposed that any tax haven listed that did not commit to removing harmful tax practices would be included in a list of uncooperative tax havens.77 It also proposed a framework for implementing a common approach to restraining harmful tax practices.78 Another proposal, which demonstrates how broad the reach of the OECD is, covered the OECD’s commitment to the extension of the work of the Forum to include non-member economies with similar concerns and which were “prepared to accept the same obligations as OECD members”.79 Meetings with non-member countries began in June 2000 to explore the extent to which they could be involved.80

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69 Report, 8, available at http://www.oecd.org (at 20 March 2003). See also on the OECD website, the article by J Owens, Head of CFA, “Promoting Fair Tax Competition” in which he justifies the OECD approach.
70 Ibid, 16.
71 Ibid, 23.
72 Ibid, 53.
75 Ibid, 16.
76 Ibid.
77 Ibid, 18.
78 Ibid, 24.
79 Ibid, 22.
After an extension of the commitment deadline to 28 February 2002 only Andorra, Liechtenstein, Liberia, Monaco, the Marshall Islands, Nauru and Vanuatu are listed as unco-operative Tax Havens. Co-ordinated defensive measures against these jurisdictions are planned. All other tax havens have committed to introducing transparency into their tax systems and effective exchange of information, subject to the adequate protection of taxpayers’ rights and the confidentiality of their information. The OECD has undertaken to support committed jurisdictions so that they can implement those commitments.

Both the OECD and the committed tax havens have carried out substantial work as part of their dialogue on exchange of information on tax matters. The assistance and information provisions that have been widely used within the OECD for some time, particularly in Europe, have provided a base for the dialogue. Increasingly aggressive unilateral measures have encouraged the OECD, in recent years, to push for agreement among member countries on general guidelines. The OECD has recently proposed Article 27 of the OECD Model Tax Convention, building on the 1995 OECD Convention on Mutual Administrative Assistance in Tax Matters that is now in force. The proposed Article 27 places an obligation on the signatories to assist in the collection of each other’s tax debts. There are significant flaws in the Article that mean that it is unlikely to be adopted without modification and this has been reflected in the agreement reached with the committed tax havens.

An Agreement on Exchange of Information on Tax Matters (the Agreement) is presented as both a model for bilateral treaties and a multilateral instrument that provides the basis for an integrated bundle of bilateral treaties. If implemented as intended, the Agreement is far-reaching. It provides for the provision of financial and ownership information and the interviewing of individuals and examination of records as part of a

81 See [http://www.oecd.org](http://www.oecd.org) (at 20 March 2003) and the article by S Kondo, Deputy Secretary-General, OECD, “Ending Tax Haven Abuse”.
82 Following the change in US approach following the election of President Bush, these measures are likely to focus on transparency and information exchange, as set out in the Agreement on Exchange of Information in Tax Matters, below.
83 2001 Report, 11.
84 Ibid, 12.
85 Nordic countries automatically exchange information that includes details of passive income, wages, pensions and social security payments. Other European countries have followed suit. See, for example, R Offermanns, “Netherlands: Exchange of Information” (1999) 39 European Taxation 166. For a detailed discussion of the position in the EU, see Terra and Wattel, above n 15 and RR Knobbout and HE Reith, “Memorandum on the Legal Basis for the Exchange of Information on Indirect Taxation – 21 April 1998” (1998) 26 Intertax 244.
87 For a detailed analysis, see E van der Bruggen, “Critical Comments On The OECD's Proposed Article For Assistance In The Collection Of Taxes” (2002) 25 Tax Notes International 363.
88 For example, there is a general significant diminution of taxpayers’ rights and there are technical issues such as no time limit on a request, no requirement that a claim be incontestable and confusion as to legal recourse in the state providing the information.
90 Ibid, 2.
tax examination abroad. The commentary specifically requires a purposive interpretation to uphold the intention of the Agreement. It is likely that the Agreement will be adopted as a multilateral instrument between a significant number of OECD and tax haven countries.

The effect is to take a broader version of aspects of the OECD Convention on Mutual Administrative Assistance in Tax Matters to a wider group of participants. When considered in light of developments such as the International Dialogue on Taxation, the influence of the Agreement could be substantial.

It is intended that the traditional political, legal and technical barriers to information exchange will no longer be allowed to prevent effective operation of such agreements. A significant concern is that Article 1 allows the “rights and safeguards secured to persons by the laws or administrative practice of the requested Party” to remain applicable. However, only “to the extent that they do not unduly prevent or delay effective exchange of information”. The assumption is that it will be an OECD party requesting the information and therefore the rights or safeguards in the non-OECD country would only be used as a delaying tactic. There is no need for a standard higher than that in the requesting country. Yet, there is ample case law in both the European Courts of Justice and Human Rights to demonstrate that the protection of human rights in European countries is neither consistent nor equivalent.

The proposed model is designed to obtain information needed to prevent tax avoidance and evasion through tax havens and that is evident in the commentary. A country that did not face extreme political or economic reprisals would not otherwise consider signing an agreement based on this model. Consider some examples. Procedures and safeguards in a requested party should not frustrate an investigation by the requesting party. Information need not relate to a national or resident of the requesting party. The model effectively intends the definitions to be interpreted broadly enough to support the requesting party’s investigation. Exchange of information on criminal tax matters does not depend on the conduct being investigated being a crime under the laws of the requested party. If a requested party does not have the relevant information, it must obtain it.

The proposed model does allow the requested party to decline a request under Article 7. Where the requested Party could not obtain the information requested under its own laws, the information relates to trade secrets, the information is subject to legal professional privilege, disclosure would be contrary to public policy, or the request discriminates

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91 Ibid, articles 5 and 6.
92 Commentary, para 20.
94 Commentary on art 1.
95 Commentary on art 2.
96 Commentary on art 4.
97 Commentary on art 5.
98 Ibid.
against a national of the requested party, the requested party may decline a request. The scope for declining is limited and does not cover concerns about processes and procedures. For example, the fact that a tax claim on which the information is requested is in dispute is not a ground for declining a request.

The UN has responded to the debate on harmful tax competition with a 2001 report suggesting the creation of an International Tax Organization. Its areas of interest would include limiting international tax evasion and tax avoidance, eliminating harmful tax competition, and strengthening tax administration. If it were an organisation in the style of the IMF, its strength would be that it would have the imprimatur of the UN. Its weakness would be that the OECD countries would still be likely to have the major influence, in which case why not remain with the OECD dialogue, whose agenda is clear?

There has been significant and extensive debate about the Report and subsequent OECD actions. Responses range widely. Avi-Yonah states that, “The OECD Report is a major achievement; it represents the first attempt to limit harmful tax competition to be based on a broad consensus of many nations, including developing countries”. MJ Langer expresses the contrary view:

No one outside the OECD has empowered the OECD to use its massive economic power to crush tax competition offered by low-tax countries that are not OECD members. Even worse, most OECD member states are guilty of egregious unfair tax competition that is much more serious and harmful than that of which the OECD is complaining.

Nonetheless, the OECD has successfully influenced its members to identify at least 47 harmful practices, which they have agreed to eliminate. All but 7 of the numerous tax havens have agreed to commit to the OECD requirements. A significant number of non-member countries are negotiating ways to join with the OECD in eliminating harmful tax practices. Switzerland, Luxembourg and numerous other countries are not participating. However, the Report has had significant effect. It again underlines how influential the OECD has become over a range of matters that impact directly on the development of national tax policy.

**The taxation of electronic commerce**

The development of rules for the taxation of electronic commerce has proved one of the most interesting recent examples of international constraints on national tax policy. There are some basic reasons. Some of the initial discussion and research painted a spectre of impending doom for the continued application of the rules governing international

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100 Above n 64, 1662. There are views along the continuum expressed in the numerous learned articles on the topic. The purpose of this paper is not to analyse the merits or otherwise of the OECD approach, but to demonstrate its influence.
taxation, administration and collection. This provided the impetus for much closer international cooperation. Initially there was discussion of an appropriate framework within which each sovereign jurisdiction would implement its own rules governing the taxation of electronic commerce. However, as discussion developed, so did collaboration on the form that those rules might take.

This issue will become more prevalent as globalisation increases. Tax systems require consistency between their domestic and international taxing rules. Previously it has been the domestic rules that have driven the form and scope of the international rules. With electronic commerce, the international implications tend to be the primary focus in policy development. Why is this? Electronic commerce is by its very nature not confined to physical boundaries. As Lessig comments:

In the end, I want to argue that there is a sovereignty in cyberspace; that this sovereignty competes with real-space sovereignty; and that control of that sovereign is essential if we are to achieve democratic control over an extraordinarily important aspect of real-space life. Real-space life, not just cyberspace life, since in the end, and in the beginning, life there is always also life here.

There have always been elements of society that have operated outside the rules. Cyberspace makes it simpler for them to do so. But most people operate within the rules most of the time. A breakdown in tax sovereignty occurs if there are either no tax rules governing cyberspace or those rules are unclear in their application and operation. For business, electronic commerce has made it far easier to operate internationally. Many businesses do so unintentionally. As soon as a business operates in any way over the Internet, even by doing as little as setting up a web site, it has a potential global customer base. Problems arise where the existing tax (and other) rules are inadequate to cope with the normal operations of that business.

There are many gaps in rules by intention or omission. For example, New Zealand has by intention chosen not to tax capital gains. Most jurisdictions discover omissions in their tax rules through their audit and enforcement programs, where they uncover tax-planning arrangements designed to take advantage of those omissions. Intended gaps are in the design of the tax system. Gaps of omission represent revenue leakage. Electronic commerce is not new in highlighting gaps in the tax rules. The difference is the extent of those gaps and how they relate to the structure of the international tax system. In 1996, Horner and Owens of the OECD argued that, “the speed, multiplicity, and decentralization of the cross-border exchanges/transmissions involved put pressure on traditional concepts of taxation”. Subsequent events have shown that it is far more than that.

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102 The Australian Commissioner of Taxation, Michael Carmody, refers in a speech “Tax and the Internet: The Journey Unfolds” to the OECD conference, “Dismantling the Barriers to Global Electronic Commerce”.


What emerged was that there was a need for reassertion of tax sovereignty, in the same way as Lessig suggests the reassertion of sovereignty in its broader sense. But Lessig’s argument that “control of that sovereign is essential if we are to achieve democratic control over an extraordinarily important aspect of real-space life”\textsuperscript{105} is predicated on assertion of control of the Internet architecture under the auspices of the US, to preserve for its citizens their fundamental rights and values, even in Cyberspace.\textsuperscript{106} When it comes to taxing rights, such an assertion of sovereignty is not easily accepted.

What makes it even more difficult is that Lessig’s call to focus on “\textit{Real-space} life, not just cyberspace life, since in the end, and in the beginning, life there is always also life here”\textsuperscript{107} does not always hold true in commercial transactions. And this is one part of the problem in trying to reclaim tax sovereignty in Cyberspace. Commercial transactions are largely carried out by fictional entities such as companies, trusts and foundations. Fictional entities have limited physical presence or links with a particular jurisdiction. They may be incorporated, constituted or settled in one country, yet operate exclusively in another or several other countries. The special rules that have been devised over time to allocate taxing rights are subject to physical connections that do not exist in cyberspace. Where is the permanent establishment of a company that operates largely on the Internet? If a company is a fiction in real-space life, its fictional persona is open to extensive manipulation in cyberspace life.

The other part of the problem is allocation of income between tax sovereigns. The special rules devised to allocate income are also artificial constructs. Nations can assert tax sovereignty more easily over an individual who operates in Cyberspace than over a fictional entity. The individual may escape that regulation through criminal means: hiding transactions and evading tax. There exists, nonetheless, a physical link or presence that allows the sovereign to enforce its regulation. However, because the rules allocating tax sovereignty between different jurisdictions are artificial, to overcome a dual link or presence, those rules can be manipulated using electronic transactions.

The potential for revenue leakage and loss of tax sovereignty was quickly identified. At the 1997 OECD Turku dialogue, it was stated unequivocally:\textsuperscript{108}

\begin{quote}
The challenges posed to tax systems by Internet Electronic Commerce are real and governments will need to focus on how to address them in a spirit of collective co-operation. The allocation of taxing rights must be based upon mutually agreed principles and a common understanding of how these principles
\end{quote}

\textsuperscript{105} Lessig, above n 103, 190.

\textsuperscript{106} Ibid, ch 14.

\textsuperscript{107} Lessig, above n 103, 190. Although, we are told that physical location is becoming easier to track. See, “The revenge of geography” (15 March 2003) The Economist Technology Quarterly 13. We may be moving more rapidly towards the feasibility of automatic international revenue collection. See D Bentley, “A Model for Electronic Tax Collection” (1999) 1 Tax Planning International E-Commerce 15.

should be applied. Even if such a consensus is achieved, governments may find that their ability to enforce taxation may be diminished. Without such a consensus, the Internet and other new communication technologies may pose a serious challenge to governments in maintaining their revenue bases.

It is pertinent that the OECD CFA identified the potential challenges to the international tax system early on. In 1996, it began to address the taxation issues arising from electronic commerce through a multi-disciplinary approach involving all its Working Parties. By November 1997, it had generated sufficient interest among the member countries to hold a series of high-level discussions at Turku in Finland. Significantly, these included a range of participants outside the member country delegates, particularly business representatives.

Meanwhile, the OECD member countries at this time took little notice of the OECD efforts as they developed their own policy approaches. There was also little interest shown in other international proposals, for example, in a multilateral agreement to apportion tax. The Bit tax received wider consideration, even attracting suggestions for further research in a report to the European Commission by its High Level group of Experts.112 Most governments, organisations and tax experts ultimately rejected it, as it did not conform to the basic principles of international tax.113

National governments began to issue reports on the taxation of electronic commerce.114 They identified the seriousness of the international threat to traditional concepts of income allocation and tax administration. This led to increased co-operation to reach a solution. In October 1998, the OECD Ministerial Conference endorsed a framework for discussion of taxation of electronic commerce.115 The OECD Taxation Framework Conditions have been widely accepted. They are used to justify approaches taken by

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109 Horner and Owens, above n 104,523.
110 Above n 108.
113 R Doernberg and L Hinnekens, Electronic Commerce and International Taxation (1999) 5.3.1.
national governments, for example by the ATO in Australia and by the Inland Revenue in the UK. 116

Following Ottawa, five TAGs were set up under the auspices of the CFA to report on various aspects of the taxation of electronic commerce. Much of the authority of the TAGs in the international community relates to their composition. They included representatives from both OECD and non-OECD countries and from the private sector. 117 Even more unusually, they were co-chaired by public and private sector representatives. 118 Although the TAGs were set up to consider the international implications of the taxation of electronic commerce, it was inevitable that these would flow through to domestic tax systems. It was one of the first occasions when new policy initiatives were developed at an international level before at least the OECD jurisdictions had first developed domestic policy positions. It was also the first time that public consultation both within and outside the OECD had taken place to such an extent in developing new policies on international taxation.

The TAGs have proved extremely successful in several areas. There has been an agreed clarification to the OECD Model Tax Convention interpretation of the definition of permanent establishment. 119 There has been a widely accepted report on treaty characterisation issues. 120 A number of other reports provide steps towards consensus on contentious issues. 121

Most important for this discussion, they have helped to set the international policy framework. With changes to the Commentary on the Model Tax Convention and the production of the TAG final reports, the OECD member countries have bought into the principles put forward. They will now form the basis for domestic policy development where the international and domestic intermesh. Nor does it stop at OECD member countries. For example, both Singapore and Hong Kong have expressed their approaches to taxation of electronic commerce in the context of the OECD framework. 122

The broad international consensus was carefully constructed by the CFA. Through wide-ranging international consultation with countries, organisations, business and other interested parties over a number of draft reports, the debate was taken forward and most

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118 Ibid.


120 Ibid.


122 The Inland Revenue Authority of Singapore has published several guidelines in the area, but see for example, Income Tax Guide on E-Commerce (2nd ed 2000) Tax Treatment on Payments for Web-Hosting Services (2001). For Hong Kong, see Inland Revenue Department, Departmental Interpretation and Practice Note No 39 (2001).
concerns were addressed. Where there were points of disagreement that could not easily be resolved, such as aspects of the interpretation of permanent establishment, these were not specifically covered in the final reports. They were either left for subsequent discussion or the reports used language general enough to cover a range of interpretations. The critical issue is that the OECD has created a strong body of international opinion on a range of key policy issues. As outlined above, it has shaped the national policy response. Even more telling has been the reaction where a country has suggested that it might deviate from the consensus.

The Indian government constituted a High Powered Committee on “Electronic Commerce and Taxation” in December 1999. It issued its Report in July 2001. In the Report the Committee accepts the need for international consensus and specifically endorses the OECD Taxation Framework Conditions. However, it goes on to suggest the elimination of the concept of permanent establishment given that it “does not ensure certainty and reasonable allocation of revenues between residence and source countries”. It suggests its replacement by a low rate withholding tax on all tax deductible outflows, including business incomes of foreign enterprises. The Report also examined the TAG report on income characterisation. It took a different view on a number of characterisation issues, particularly the characterisation of digital products ordered and downloaded electronically. The Report disagreed with the TAG that these should be characterised as business profits under Article 12 of the OECD Model Convention and stated that they should be treated as royalties.

There has been significant concern among the business community in India. An eCom Taxpert Group was formed to provide a high level response from international and Indian experts. There has been extensive discussion at various national and international fora, and lobbying by interested parties.

123 For example, the report from the Consumption Tax TAG highlights that the principle of taxation in the place of consumption needs clearer definition. It does not attempt a definition before there is greater consensus.
124 Although it was agreed that a server may constitute a permanent establishment in certain circumstances, the functions performed where it is located must be significant, as well as an essential or core part of the enterprise’s business activity. What constitutes a significant function or what is an essential or core part of an enterprise’s was left open because of the differing views. For a clear expression of these, see OECD, Clarification On The Application Of The Permanent Establishment Definition In E-Commerce: Changes To The Commentary On The Model Tax Convention On Article 5, 22 December 2000, available at http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-101-3-no-no-1564-0,00.html (at 1 August 2002).
126 Ibid, ch 2.
127 Ibid, 4.2.1.
128 Ibid 4.2.2.
130 Above n 125, 5.5.
131 For details of the response see www.nishithdesai.com/ecomtaxpert.html (at 20 March 2003).
132 For example, the 7th International Tax Planning Conference, December 2001, Mumbai.
At the time of writing, there has been no response from the Indian Government. However, both the Report and the response from the domestic and international community reinforce the importance of the OECD in this area of domestic tax policy. India is not a member of the OECD. Yet, the Report was structured so that almost all of its discussion was in the context of OECD reports and working papers. The published responses from all parties have made extensive use of the OECD documents to support their case. It is clear that it will now be difficult for any sovereign state to opt for an approach to international taxation of electronic commerce that does not reflect the consensus obtained through the work of the OECD.

The development of an international framework for the taxation of electronic commerce illustrates how significant the supranational constraints can be on national tax policy. As the OECD becomes a forum for developing international consensus on any issue that affects international taxation, its influence will grow to encompass non-member countries as a matter of course. We can wonder with Lessig who it is that has sovereignty over tax in cyberspace.

**Taxpayers’ rights**

Consider now an area where the OECD has taken the opposite approach. In most countries, the tax law is one area where, historically, specific individual protection has been minimal. The general provisions that apply to all laws usually protect taxpayers too. However, even these are often interpreted narrowly so that they do not apply in the tax arena. The tax laws themselves often exclude the operation of general protection. For example, judicial review of administrative decisions by the tax authorities may be specifically excluded. The courts in some jurisdictions also tend to interpret the law narrowly to exclude individual protection in the tax area. Nonetheless, there are basic rights that apply to taxpayers and specific taxpayer protection is starting to increase.

As in human rights policy generally, the development of domestic taxpayer protection is strongly influenced by the international environment. However, the influence is less overt than is the case with the taxation of electronic commerce. Once again, it is driven in part by the OECD and the co-operation between revenue authorities from OECD member countries in matters affecting tax administration.

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135 In Australia, for example, in the Administrative Decisions (Judicial Review) Act 1977 (Cth).

136 For example, the rule against self-incrimination is narrowly interpreted in tax matters in some jurisdictions, such as Australia.
Within the revenue authorities of OECD member countries, opinion has changed as to the value of specific taxpayer protection, in the context of complex tax laws. Tax law complexity is a focus for criticism and simplification has become a major issue. The complexity of the transactions that has led to complex law has also placed strains on the administration and compliance functions. Revenue authorities are constantly striving to improve compliance and make revenue administration more efficient. This can be both a domestic vote-winner and an incentive for foreign direct investment. International research has consistently shown that to achieve these goals revenue authorities need increased cooperation from taxpayers.

Here is a specific example of convergence in the tax systems of OECD member countries, brought about through a mix of competition and co-operation, but not necessarily driven by the OECD itself. Results of taxpayer compliance research within OECD revenue authorities have encouraged them to support simplification of tax laws, the introduction of self-assessment systems, and to change their traditional cultures. Those countries that have experimented and succeeded have reinforced this. To improve compliance, revenue authorities are trying to alter the way that taxpayers perceive them. They have developed charters of taxpayers’ rights, they have espoused friendly and efficient collection of revenue, they call taxpayers “clients”, and they have tried to create a service mentality among their staff with established service standards. An emphasis on taxpayers’ rights is integral to this process.

Co-operation between authorities and tax reform commissions has led to strong similarities in approach, for example, in the charters of rights introduced in many of the OECD member countries. Even in traditionally closed tax administrations, such as Japan, there has been conformity to a taxpayer-focused approach, at least in form, even if not in substance.

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139 Ibid; and CIAT, Measures for improving the level of voluntary compliance with tax obligations: Technical papers and reports of the 18th General Assembly of the Inter-American Center of Tax Administrators (1985).
141 For example, the UK, Canada, Australia and New Zealand. As pointed out by Messere (above n 137, 29), tax reform commissions are quick to learn from each other.
142 For a critical analysis of the substantive implementation, see K Ishimura, “The State of Taxpayers’ Rights in Japan”, in Bentley, above n 133, ch 9.
The rights are often linked to taxpayers’ responsibilities under the law. Sometimes, as in the United States, there is specific legislation enacted for the protection of specific rights. More usually, the revenue authorities develop administrative documents that are simply a restatement of existing rights. The rights include the diverse rights already given legislative protection elsewhere, such as the right to confidentiality. They also include administrative practices observed by the revenue authorities, such as the right of a taxpayer to be given reasons for particular action taken. Details of the basic rights of taxpayers are publicised widely, and are often sent to taxpayers with important communications from the revenue authorities.

Although not the driver of change in this area, at least some of the impetus and uniformity in approach can be traced back to the first relatively comprehensive survey of taxpayers’ rights, published by the OECD in 1990: *Taxpayers’ Rights and Obligations: A Survey of the Legal Situation in OECD Countries*. By setting out a clear framework of taxpayer rights and responsibilities, together with a detailed outline of the existing practises of member countries, the OECD was effectively encouraging change in those countries whose practises deviated from the norm. The topic was placed firmly in the realm of public debate and that prevents OECD countries, in particular, from ignoring it when developing domestic tax policy. I understand that the CFA is working on a further statement of its position on taxpayers’ rights and obligations that will encourage member countries to implement taxpayers’ charters. Once again, however, this tends to follow rather than influence the policies of its members.

Developments in the OECD have been emulated in the Americas. The Inter-American Center of Tax Administrations/ Centro Interamericano de Administraciones Tributarias (CIAT) approved a charter-document, “Minimum necessary attributes for a sound and effective tax administration” in 1996. It emphasises taxpayers’ rights and obligations and is designed to produce minimum standards among its members. The CIAT *Handbook for Tax Administrations*, produced in 2000, underlined the commonality of approach.

Bilateral and multilateral trade and other agreements often provide both direct and indirect protection to taxpayers, while constraining their governments. Although there are only a few agreements specifically for the protection of human rights, many other agreements include clauses or sections that encourage the protection of rights. Revenue collection is traditionally the subject of exclusion clauses in international agreements.

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143 Although, for example, Canada had published a Declaration of Taxpayers’ Rights in 1985 and the UK a Taxpayers’ Charter in 1986.
144 See Bentley, above n 133 and D Albrechtse and H van Arendonk (eds), *Taxpayer Protection in the European Union* (1998).
146 Particularly Sections 1.2 and 1.3.
147 The most comprehensive are the European Union (EU) treaties, which require Member States to ensure that any measures they adopt conform with the treaties: as explained in Case 294/83, *Les Verts v Parliament* [1986] ECR 1365, para 23. For a comprehensive analysis of the interaction between supranational and national law in a particular country, see Daiber on Germany, above n 133.
However, some clauses aid taxpayers indirectly, such as those requiring the right to a fair trial, the right of appeal and protection against discrimination.

Supranational protection arises from bilateral or multilateral treaties. Each jurisdiction has its own requirements on the application of treaties in domestic law. Treaties may require translation into domestic law before the protection given applies. This can produce conflicts between domestic and international obligations. In Australia, the government enacted legislation to prevent individuals arguing before the courts that they had a legitimate expectation that Australia would abide by its international treaty commitments. Members of the European Union (EU) have no such loophole when it comes to implementing directives under Articles 99 (indirect taxes) and 100 (direct taxes) of the EC Treaty. The European Court of Justice has held that Member States must correctly translate directives into domestic law. Failure to do so will not prevent individuals claiming their rights under a directive or for claiming damages against the Member State for that failure. As regional economic groupings become more influential, many more countries will face constraints on their domestic tax policy similar to those affecting members of the EU.

The EU also provides examples of specific extensions of rights unavailable at a national level. Van Gend en Loos v Nederlandse Administratie der Belastingen allowed a challenge against the rate of import duty under Article 12 EC Treaty and gave individuals the right to invoke Treaty provisions. The Avoir Fiscal Case found the French Government was discriminating against foreign member state branches and agencies of insurance companies, which could not use shareholders’ tax credits on the same terms as could French companies. In Biehl v Luxembourg and R v Inland Revenue Commissioners, Ex parte Commerzbank AG Member States were found to have discriminated against non-residents by denying them the right to repayment of overpaid tax.

The European Convention on Human Rights (ECHR) provides another example of conflict between national and international interests. It is incorporated into the law of the EU by virtue of Article F(2) of the EC Treaty. It has allowed taxpayers to ensure that they receive procedural safeguards and proportional treatment where it is not provided under national law. In the Hentrich Case the European Court of Human Rights found in favour of the taxpayer as it felt that the state’s actions upset the balance of interests between the individual and the state. This principle was applied in Funke v France.

149 See below, the discussion of Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273.
150 Case C-208/90 (Emmott), [1991] ECR I-4269.
151 Joint Cases C-6/90 and C-9/90 (Frankovich v Italy and Bonifaci v Italy), [1991] ECR I-5403. See further, for a discussion of the consequences of the incorrect implementation of tax directives, Terra and Wattel, above n 15, 3.5.
156 22/9/94 Series A No 296-A.
157 25/2/93 Series A No 256-A.
Article 6 ECHR protects the right to a fair trial, but it does not mention the right to silence or the right not to incriminate oneself. In *Funke* the Court found that these rights are necessary for a fair trial, in this case in the context of customs investigations.

Double tax agreements usually include certain rights for taxpayers. For those countries negotiating a double tax agreement, the OECD Model Tax Convention has become the standard template. It may be modified by adherence to the UN or US Models, but the template remains broadly the same. This in itself constrains the parties. There may be further international constraints that determine the rights that are allocated under such agreements. The negotiation of double tax agreements involves different interest groups within government and would usually include representatives from Treasury/Finance, the revenue authorities and Foreign Affairs. The final treaty represents an amalgam of views from each of these groupings. The broader international perspective of Foreign Affairs and Treasury can mean that the treaty includes elements favourable to taxpayers that conflict with national revenue policy.

For example, many treaties made by OECD countries provide for tax sparing with developing countries. Yet the revenue authorities in the OECD countries have usually introduced complex domestic rules aimed at ensuring that income taxed abroad at concessionary rates is fully taxed at home. Another example would be where efforts to make taxpayers competitive in the international economy require domestic recognition of investment and trade concessions. This could occur through the recognition of concessionally taxed international headquarter companies (say in Hong Kong or Singapore) as active businesses for controlled foreign corporation rules. Double tax agreements also ensure the elimination of elements of tax discrimination between the treaty parties. For example, a treaty may require treatment of a permanent establishment on the same basis as a resident under the agreement, although this runs contrary to domestic revenue policy towards non-residents generally.

The interpretation of double tax agreements can also constrain national tax policy. Courts sometimes interpret double tax agreements differently from the revenue authorities, thereby extending the protection of taxpayers. For example, the courts may prefer a literal approach to treaty interpretation where domestic statutory interpretation takes a substance over form approach. The courts are themselves constrained by the Vienna Convention on the Law of Treaties, which requires them to take an approach that may be different from that taken in domestic cases.

Clearly, various factors have helped to establish taxpayer protection as a priority. The great complexity of revenue legislation and its real or perceived threat to the individual is one. The desire by revenue authorities to improve taxpayer compliance and revenue collection is another. A third is both the direct and indirect influence of international treaties and agreements. The international constraints may be most obvious in the third, but are increasingly present as domestic policy is shaped to deal with the first two factors.

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159 See below for a discussion of the Australian case of *Thiel v FCT* (1990) 171 CLR 338.
As with human rights generally, the content of taxpayers’ rights may be determined domestically. But even here, the international influences are becoming stronger. One of the drivers is the increasing implementation of mutual assistance provisions.

**Conclusion**

International co-operation, regional political and economic groupings, and trade and investment agreements: these are some of the symptoms of the rush towards a global economy. It is hardly new. Trading relationships have linked nations since the beginning of commerce. What is new is that advances in communication and technology have made it possible to have closer relationships at different levels with a wide range of partners all at once. Where nations states once progressed regularly through forced political aggregation and some are still in the process of disaggregating, a similar process is now occurring more frequently at the economic level. As trade matrices become more important internationally, so does the international tax framework, as a key component. It can act as a direct constraint on national tax policy.

The WTO has emerged as a forum for trade dialogue. It is relatively democratic, representative, and provides a framework of agreements that allow for formal binding arbitration between members. The more successful it becomes in all its facets, the more influential it is in the trade environment. Where the trade and tax policy debate has been carefully separated until now, the advent of electronic commerce has shown how artificial the separation is. It is inevitable that the WTO will participate increasingly in the tax debate. However, the level of its intervention will depend on the satisfactory development of an international tax policy that integrates successfully with the trade policy.

Currently, the IMF and World Bank, with the imprimatur of the UN, are responsible for shaping much of the tax policy of countries outside the OECD, particularly those that are developing or in transition. It is probably accurate to describe them as the repositories of the greatest knowledge of developing country tax systems. However, their active intervention in national tax policy has been criticised. Their activities are not fully transparent. They are not widely representative and they are heavily influenced by the major economic powers. Nonetheless, although they often intervene using unpopular measures, it is at the request of the countries that they help. The IMF and World Bank do constrain national tax policy. However, their approach is based on existing policy.

In contrast, the OECD is concerned with developing new tax policies designed to meet the challenges to effective and efficient international taxation. But the OECD is also unrepresentative of the broader international community. Until recently, this has not mattered. It has taken forward its views through influence and persuasion. The economic power of its members has ensured that the Model Tax Convention has been adopted as the international model. Within the OECD, it has influenced its members to take a pragmatic and co-operative approach to issues such as transfer pricing, mutual assistance and information exchange. Through these methods, it has effectively constrained national tax policy.
Given the growing importance of the WTO, the OECD has recognised the dangers of excluding the views of non-member countries. Otherwise, it is possible that it could be marginalised. In its new policy development, it has sought to include non-member countries in its dialogue. It has also broadened its consultation to include non-governmental parties with recognised interests in the policy debate. This approach has enabled it to obtain widespread consensus on policies dealing with the taxation of electronic commerce.

The OECD concentration is on maintaining the revenue bases of its members. Taxpayers’ rights have an apparently peripheral impact. There has been little leadership from the OECD, which has chosen to follow rather than influence its members. Compare this approach to that of the EU in rights matters generally, where EU adherence to the ECHR forces the agenda.

The tendency to place lesser importance on taxpayers’ rights is reflected in recent policy initiatives. The Harmful Tax Competition Report has been extremely controversial. However, OECD members have used their economic power to force tax havens to agree to stringent measures to encourage transparency and provision of information. They have been assisted by the support of non-member countries included in a wider dialogue. There has been little debate about taxpayers’ rights. This process illustrates the adroitness of the OECD in developing new policies even where they are controversial. To obtain widespread acceptance, it used a combination of political and economic power, a broader dialogue to include other politically and economically influential countries with an interest in the proposals, and a concerted propaganda drive.

Organisations such as the EU and WTO have formal power to constrain national tax policy. The IMF and World Bank use conditionality to impose their requirements domestically. The OECD uses its influence effectively to achieve a wide level of acceptance of new international tax policies. In the international tax order as in the wider international framework, the power and influence of these organisations is growing. It is no longer enough to analyse national tax policy in isolation. International constraints and influences have worked their way to the heart of most national tax systems. This is the new international tax order.