Researching the ‘International’ in International Tax Law

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Overview

1. The General Idea
2. Theoretical Foundations
   a. Customary international law (CIL) in int’l tax law (ITL)
   b. General principles of law (GP) in ITL
3. Methodology
4. Preliminary Findings
Theoretical Foundations
International Tax Law

State A
(residence)

State B
(source)

- 3000 bilateral double tax treaties
- highly similar/identical
- OECD or UN Model Tax Conventions
Customary International Law

= ‘unwritten law deriving from practice accepted as law.’ (ILC definition)

- 2018 ILC Conclusions on the Identification of CIL
- two-element approach: State practice + *opinio juris*
Types of Evidence for State practice (Conclusion 6)

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts.
Types of Evidence for *Opinio Juris* (Conclusion 10)

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.
1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (opinio juris), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.
Treaties as Historic Evidence for CIL

- Baxter Paradox

- Int’l tax law lopsided: OECD/BRICS States dominate the field
  → Selection bias in data
General Principles of Law

‘General principles of law recognized by [civilized] nations’ (Art 38 ICJ Statute)

• require comparative legal analysis
• of domestic rules applied by most States in their international relations (eg. proceedings against foreigners)
Methodology
Empirical Part: Inductive, Mixed-Method Approach

Types of Evidence for CIL:

1. conduct in connection with treaties
2. domestic practice: domestic court decisions, administrative and legislative acts
3. statements by states (eg. model DTTs, Mutual Agreement Procedures [?], diplomatic acts and correspondence [?])
4. State conduct within international organizations (esp. League of Nations, OECD and UN Tax Committee)

Evidence for General Principles:

- domestic practice: domestic court decisions, administrative and legislative acts
1st Stage: Comparative analysis

- Legal families of tax law (Thuronyi):
  1. Commonwealth: UK
  2. US American: USA
  3. French: France
  4. Latin American: Mexico
  5. Northern Europe: Austria
  6. Southern Europe: Spain
  7. “Transition countries”: Russia; China
  8. Japan/Korea: South Korea
  9. Misc.: Iran, Indonesia
2nd Stage: ‘Traditional’ Analysis of Evidence for CIL

- conduct in connection with treaties
- statements by states (eg. model DTTs, Mutual Agreement Procedures [?], diplomatic acts and correspondence [?])
- State conduct within international organizations (esp. League of Nations, OECD and UN Tax Committee)

→ mostly secondary literature
Anticipated Obstacles

- Data collection (confidentiality issues, accessibility, etc)
- Language barrier
- Comparability for the coding of convergence
Testing the Normative Quality of:

Customary International Law:
- Empirics of jurisdiction to tax – truly only source/residence?
- Primacy of source-based taxation for
  - business profits
  - or all types of active income
  - or all types of income
- Definition of source/permanent establishment

General Principles of Law:
- Abuse of rights/process
Thank you - I am looking forward to your feedback!