Robert J. Danon and Sebastian Wuschka***

International Investment Agreements and the International Tax System: The Potential of Complementarity and Harmonious Interpretation

In this contribution to the 75th anniversary issue of the *Bulletin for International Taxation*, Professor Robert Danon and Sebastian Wuschka discuss the interplay between international investment agreements and corporate taxation measures. The authors shed light on the potential of complementarity and harmonious interpretation between the investment treaty regime and the international tax system.

1. Introduction and Scope of the Discussion

Over the last 20 years, the number of disputes relating to taxation measures which have been brought to investment arbitration has steadily grown.[1] The role of investment arbitration in tax-related disputes recently grew further in prominence with the awards rendered in *Vodafone v. India (2020)*[2] and *Cairn Energy v. India* (2020) (the "*Cairn* award").[3] In these cases, the tribunals in essence held that retroactive capital gains taxation violated India's obligation under the "fair and equitable treatment" standard in the India-United Kingdom Bilateral Investment Treaty (BIT) (1994).[4] The FET standard is the most frequently invoked protection standard contained in international investment agreements (IIAs) in general, and is equally frequently invoked in cases involving taxation measures.

In the meantime, India has unilaterally terminated the India-United Kingdom BIT (1994),[5] and it also announced that it would repeal the retrospective taxation with a view to settling ongoing disputes earlier in 2021. Consequently, on 1 October 2021, the government of India notified the rules setting out the conditions according to which these disputes could be settled.[6] At the global level, however, the findings of the arbitral tribunals in the *Cairn* and *Vodafone* cases have triggered an important policy debate. In particular, it is felt that, in the future, investment tribunals might excessively interfere with a country's tax sovereignty.[7] In turn, these concerns may support further the already increasing trend to include tax carve-out provisions in IIAs.[8]

Against this background, this article discusses the interplay between IIAs and taxation measures from a normative perspective and in light of the *Cairn* award.[9] We

* **Robert J. Danon is Professor of International Tax Law at the University of Lausanne and a founding partner of Danon, an independent tax firm. He is also the chair of the Permanent Scientific Committee (PSC) of the International Fiscal Association (IFA). He can be contacted at robert.danon@danonlaw.ch.**

** **Sebastian Wuschka is Research Fellow, University of Lausanne, Tax Policy Center, and Of Counsel, *Luther Rechtsanwaltsgesellschaft mbH*, Hamburg. He can be contacted at sebastian.wuschka@unil.ch.**
We wish to thank Mr Benjamin Malek, research associate and PhD candidate at the Tax Policy Center of the University of Lausanne, for his scientific and editorial assistance in the preparation of this article.

1. Taxation has been subject to investment arbitration on multiple occasions. The specialized database on investment disputes maintained by the United Nations Conference on International Trade and Development (UNCTAD) currently lists approximately 100 investment cases that were – completely or partly – triggered by taxation measures. *See UNCTAD Investment Dispute Settlement Navigator.* The most prominent of these are of course the cases decided by Permanent Court of Arbitration (PCA) tribunals in RU: PCA, 18 July 2014, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227 and the two parallel arbitrations, which primarily related to expropriation claims. In relation to the FET standard, prominent cases – next to IN: PCA, 21 Dec. 2020, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07 – include EC: UNCITRAL, 1 July 2004, *Occidental Exploration and Production Company v. Ecuador*, where the tribunal found a breach of FET due to Ecuador's denial of VAT credits and refunds, as well as recently BY: PCA, 22 June 2021, *Manolium-Processing v. Belarus*, PCA Case No. 2018-06, where a PCA tribunal held that the Minsk Municipality committed an abuse of tax law and that related tax and enforcement measures violated the FET standard since they were arbitrary (at para. 516).
2. IN: PCA, 25 Sept. 2020, *Vodafone International Holdings BV v. India (I)*, PCA Case No. 2016-35, Final Award.
3. *Cairn Energy v. India* (2020), *supra* n. 1.
4. *India-United Kingdom Agreement for the Promotion and Protection of Investments*, 34 ILM 935 (14 Mar. 1994) [hereinafter the *India-U.K. BIT* (1994)].
5. The *India-U.K. BIT* (1994) was signed on 14 March 1994, entered into force on 6 January 1995, and was terminated by India on 22 March 2017. According to its sunset clause in art. 15, the *India-U.K. BIT* (1994) will continue to apply for another 15 years beyond its termination to investments made during its time in force.
6. IN: Income-Tax (31st Amendment) Rules of 1 October 2021, available at: www.incometaxindia.gov.in/communications/notification/notification_no_118_2021.pdf (accessed 11 Nov. 2021).
7. *See*, for example, UN Committee of Experts on International Cooperation in Tax Matters (the UN Committee) Twenty-third session, 4 Oct. 2021, E/C.18/2021/CRP.36, at para. 15.
8. Tax carve-out provisions have become a regular occurrence in modern investment treaty models – for example, the *Canada Foreign Investment Promotion and Protection Agreement (FIPA) Model* (2021) [hereinafter the *Canadian Model FIPA* (2021), available at www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng (accessed 11 Nov. 2021) and the *Netherlands Model BIT* (2019), available at https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden (accessed 16 Nov. 2021), contain such provisions. *See further* M. Davie, *Taxation-based Investment Treaty Claims*, 8 J. Intl. Disp. Settle. 1, p. 210 et seq. (2015).
9. Some of the ideas expressed in this article are also discussed in R.J. Danon, *Relation between Dispute Resolution under Double Taxa-*

advance the position that a holistic and harmonious vision of the international tax system, which integrates the role played by the investment treaty regime, is desirable. The two fields offer considerable potentials for complementarity. These would remain untapped if the fields were to be further disintegrated through a treaty making policy of separation. Compared to tax treaties, IIAs have a scope of their own with their substantive standards of protection strengthening the international rule of law in taxation matters. Also on a substantive level, as will be shown, there is significant potential for a harmonious interpretation of IIAs and international tax standards.

In presenting the foregoing proposition, our focus will be on IIAs that do not include carve-out provisions relating to the FET standard. The reason for this focus is twofold. First, it is of practical relevance, as a majority of IIAs currently in force do not include such a carve-out.[10] Second, from a more fundamental perspective, this approach permits a proper consideration of the interaction between taxation measures and the FET standard.

We begin with a discussion of the position of taxpayers and investors under tax treaties and IIAs (*see* section 2.). From a substantive perspective, given that tax treaties confer benefits to taxpayers, we illustrate that the position of a taxpayer under a tax treaty presents some structural similarities with that of an investor under an IIA. Where appropriate, IIAs and tax treaties may therefore contribute to the interpretation of one another when it comes to benefits and rights granted to taxpayers and investors, in line with the principle of systemic integration enshrined in the Vienna Convention on the Law of Treaties (the "Vienna Convention") (1969).[11] From a procedural perspective, on the other hand, the differences between tax treaties and IIAs are significant. In particular, the dispute resolution mechanism embodied in tax treaties – the mutual agreement procedure (MAP) – remains very much rooted in the concept of diplomatic protection, with taxpayers having no formal standing at the international level. This position is in contrast to the rights granted to investors under IIAs.

Next, based on the findings of the *Cairn* award, we illustrate the complementarity of tax treaties and IIAs in light of their different subject matters (*see* section 3.). In contrast to the main objective of tax treaties, the object of an investment arbitration is not to resolve a tax dispute proper or to eliminate double taxation, but to determine whether the host state's taxation measures (whether involving domestic tax law or treaty obligations) are in breach of IIA standards of protection.

Then, we consider the application of the FET standard to domestic and tax treaty measures (*see* section 4.). In this regard, we stress that the interpretation of the FET standard can be strongly influenced by a comparative public law analysis aiming at identifying benchmarks in relevant national or international standards. This approach is particularly relevant to international tax law, given that its evolution is strongly influenced by the development of internationally accepted standards and common approaches.

Finally, in light of the potential of the FET standard for the international tax regime, we also argue that a complete carve-out of tax measures from its scope is not desirable (*see* section 5.), before we deliver concluding remarks (*see* section 6.). In these concluding remarks, we raise one point from the perspective of tax treaty interpretation. In the *Cairn* award, the tribunal found, in accordance with article 31(3)(c) of the Vienna Convention (1969), that a tax treaty "indisputably contains rules of international law applicable between the Parties to the BIT".[12] The opposite is also undoubtedly true. An IIA may contain rules that are applicable to the parties to a tax treaty. Consequently, tax treaty interpretation, which traditionally focuses extensively on the relevance of the OECD Commentaries, should also give consideration to the principle of systemic integration in the future – both in relation to IIAs specifically and more broadly in relation to general principles of law.

2. Opening Contextual Considerations

2.1. Introductory remarks

In order to open our discussion, it is important to set out certain commonalities and differences between international tax and investment law, especially with a view to individual rights. Accordingly, we will begin by addressing the taxpayer's position under tax treaties (*see* section 2.2.), in particular in relation to dispute settlement, which we then will contrast to the investor's position under IIAs (*see* section 2.3.).

2.2. The taxpayers' position under tax treaties: The weaknesses and limits of dispute resolution mechanisms

The ambiguous position of taxpayers under tax treaties has been discussed on several occasions in scholarly writing.[13] On the one hand, under public international law, tax treaties regulate a state-to-state relationship. Their primary objective is the allocation of taxing jurisdiction with a view to eliminating international double taxation. However, tax treaties also provide for a protection against non-discrimination in selected instances.[14] The

tion Conventions and Investment Treaties in *Alternative Dispute Resolution for Tax Disputes*, Elgar Tax L. & Prac. Series (W. Haslehner et al. eds., Edward Elgar 2022, forthcoming).

10. Of the 1,911 IIAs mapped by UNCTAD's Investment Policy Hub that are in force, 1,692 do not generally exclude taxation from their substantive scope. That being said, many IIAs without a stand-alone carve-out clause still include provisions limiting the application of certain treatment standards in relation to taxation measure or regulate normative conflicts, which at times also encompasses the FET standard. *See* further Davie, *supra* n. 8, at pp. 210 et seq.
11. *UN Vienna Convention on the Law of Treaties* (23 May 1969), art. 31(3)(c), Treaties & Models IBFD [hereinafter the *Vienna Convention* (1969)).
12. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 808.
13. *See*, inter alia, K. Perrou, *Taxpayer Participation in Tax Treaty Dispute Resolution*, IBFD Doctoral Series vol. 28, secs. 3.1 to 3.5, pp. 65-84 (IBFD 2014), Books IBFD; G. Groen, *Arbitration in Bilateral Tax Treaties*, 30 Intertax 1, pp. 3 and 4 (2002); and L. Riza, *Taxpayers' Lack of Standing in International Tax Dispute Resolutions: An Analysis Based on the Hybrid Norms of International Taxation*, 34 Pace L. Rev. 3 (July 2014).
14. Art. 24 OECD MC.

 © IBFD

obligations arising out of this bilateral relation must be performed, of course, in good faith.[15] On the other hand, tax treaties apply "to persons who are residents of one or both of the Contracting States".[16]

From a substantive perspective, there is, therefore, little doubt that tax treaties confer benefits to taxpayers.[17] These benefits are direct and not merely of a derivative nature (i.e. are not exercised by the taxpayer on behalf of the relevant contracting state).[18] This is the case with respect to the elimination of double taxation but becomes even more apparent in relation to the prohibition of discrimination. The taxpayer's position in this regard may also be illustrated by the problem of improper use of tax treaties. Following the position defended by Vogel,[19] the Commentaries on the OECD Model (2003)[20] onwards recognize that benefits granted to taxpayers under tax treaties are subject to a prohibition of abuse derived from a proper interpretation of treaty law in good faith.[21] Such a prohibition of abuse, consequently, does not only apply between states but also in relation to taxpayers.[22] Likewise, the taxpayer (and not only the other contracting state) is entitled to expect that a state will apply or put into effect a tax treaty in good faith and in accordance with the standard laid down in the OECD Commentaries.[23] In that sense, tax treaties are different from other international economic regulatory regimes such as that, for example, of the World Trade Organization (WTO).[24] Rather, the position of a taxpayer under a tax treaty presents some structural similarities[25] with that of an investor under an IIA.[26]

From a procedural standpoint, however, a key difference between investment and tax treaty law is that benefits derived by taxpayers under tax treaties only become enforceable rights at the domestic law level. This is the result of the MAP governing the resolution of disputes under tax treaties,[27] which remains a state-to-state procedure.[28] The taxpayer, although having a clear right to request the opening of a MAP,[29] which may be subject to domestic judicial review,[30] is not a party to the procedure when it moves to the international plane. Indeed, such a procedure is conducted exclusively by the competent authorities. These, in addition, are only to negotiate in good faith to "endeavour" to resolve the dispute but are under no obligation to reach an agreement.[31] Moreover, because of the nature of the procedure, disclosure to the taxpayer of the exchanges between the competent authorities is not warranted,[32] as demonstrated by case law.[33]

15. Art. 26 *Vienna Convention* (1969).
16. *OECD Model Tax Convention on Income and on Capital* art. 1 (21 Nov. 2017), Treaties & Models IBFD and *UN Model Double Taxation Convention between Developed and Developing Countries* art. 1 (1 Jan. 2017), Treaties & Models IBFD.
17. Perrou, *supra* n. 13, at sec. 3.2.3, pp. 71 and 72 and Groen, *supra* n. 13, at p. 4.
18. Perrou, *supra* n. 13, at sec. 3.2.3, pp. 69-70.
19. K. Vogel, *Klaus Vogel on Double Taxation Conventions*, Annex to Art. 1, at para. 95 (3rd ed., Kluwer L. Intl. 1997).
20. *OECD Model Tax Convention on Income and on Capital: Commentaries* (28 Jan. 2003), Treaties & Models IBFD.
21. Para. 59 *OECD Model: Commentary on Article 1* (2017). Under the so-called "guiding principle", tax treaty benefits may only be denied where "a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions" (*see* para. 61 *OECD Model: Commentary on Article 1* (2017)). This principle also operates as a threshold with which contracting states are to comply when relying on domestic anti-avoidance rules in order to set aside a tax treaty (*see* para. 58 *OECD Model: Commentary on Article 1* (2017)). Being an interpretative tool based on art. 31 *Vienna Convention* (1969), the guiding principle does not however support a denial of tax treaty benefits beyond the treaty wording, *see* on this issue, R.J. Danon et al., *The Prohibition of Abuse of Rights after the ECJ Danish Cases*, 49 Intertax 6/7, p. 488 (2021).
22. Vogel, *supra* n. 19, Annex to Art. 1, at para. 95.
23. With the introduction of a principal purpose test (PPT) into tax treaties (*see* art. 29(9) *OECD Model* (2017)) to deny benefits to taxpayers, the standard of prohibition of abuse applied to taxpayers and states has become asymmetrical. For this reason, it has been suggested that a comparable test should be introduced in the *OECD Model* (2017) and the *UN Model* (2017) to counter the abuse of tax treaties by states, *see* R.J. Danon, *The PPT in Post-BEPS Tax Treaty Law: It Is a GAAR but Just a GAAR!*, 74 Bull. Intl. Taxn. 4/5 (2020), Journal Articles & Opinion Pieces IBFD.
24. J. Scott Wilkie, *Article 25: Mutual Agreement Procedure – Global Tax Treaty Commentaries* sec. 1.1.2.6.3., Global Topics IBFD and Perrou, *supra* n. 13, at sec. 3.2.3, pp. 70 and 71.
25. As will be shown in sec. 3.2.3., however, tax treaties and IIAs govern different subject matters.
26. *See*, in the same vein, Perrou, *supra* n. 13, at sec. 3.2.1 and 3.5, pp. 67 and 83.
27. Art. 25 *OECD Model* (2017).
28. Wilkie, *supra* n. 24, at sec. 1.1.2.2.
29. Para. 31 *OECD Model: Commentary on Article 25* (2017).
30. For Canada, *see*, for example, the decision of the Federal Court of Appeal (FCA) in CA: FCA, 27 Sept. 2016, *CGI Holding LLC v. Canada (National Revenue)*, 2016 FC 1086 and 19 International Tax Law Reports (ITLR) 692, Case Law IBFD. For Switzerland, *see*, for example, art. 9 of new CH: *Bundesgesetz vom 18. Juni 2021 über die Durchführung von internationalen Abkommen im Steuerbereich / Loi fédérale du 18 juin 2021 relative à l'exécution des conventions internationales dans le domaine fiscal* (Federal Act of 18 June 2021 on the Implementation of International Tax Agreements) (not yet in force) published in the Federal Gazette CH: BBl/FF 2021 1497. As confirmed by the dispatch of the Swiss *Bundesrat / Conseil fédéral* (Federal Council), the right of the taxpayer to request the opening of a MAP is regulated by CH: *Bundesgesetz vom 20. Dezember 1968 über das Verwaltungsverfahren / Loi fédérale du 20 décembre 1968 sur la procédure administrative* (SR/RS 172.021, Federal Act on Administrative Procedure, APA) with the taxpayer being a party to the procedure. As result, the decision to deny access to a MAP can be appealed to the Swiss *Bundesverwaltungsgericht / Tribunal administrative fédéral* (Federal Administrative Court) (*See* Federal Gazette, BBl 2020 9236-9237 / FF 2020 8930). On the issue of the judicial review of MAP, *see* Q. Cai & P. Zhang, *A Theoretical Reflection on the OECD's New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring*, 21 J. Intl. Econ. L. 4, pp. 880-882 (2018).
31. Paras. 36 and 37 *OECD Model: Commentary on Article 25* (2017) and OECD, *Action 14 Final Report 2015 – Making Dispute Resolution Mechanisms More Effective* paras. 14 and 16, at pp. 14-15 (OECD 2015), Primary Sources IBFD [hereinafter the *Action 14 Final Report* (2015)].
32. For Switzerland, *see*, for example, art. 12 of the new Federal Act of 18 June 2021 on the Implementation of International Tax Agreements, *supra* n. 30, and the explanatory comments of the Federal Council (BBl 2020 9238-9239 / FF 2020 8931-8932).
33. For Belgium, *see*, for example, (the decision of the competent authorities to refuse disclosure set aside), the ruling of the *Raad van State/Conseil d'État* (Council of State, RS/CE) in BE: RS/CE, 22 Oct. 2013, Case No. 225.438 (*Garlon SA v. Belgium*), 23 ITLR 187, Case Law IBFD and BE: RS/CE, 2 June 2013, Case No. A. 224.757/IX-9262 (*X v. Belgium*), 23 ITLR 221. For the United Kingdom, *see*, for example, (disclosure outweighed by the need to maintain confidentiality) the decision of the First-tier Tribunal (FTT) in UK: FTT, 10 May 2019, *Kevin McCabe v. The Commissioners for HM Revenue and Customs*, TC/2016/07008 and 21 ITLR 783, Case Law IBFD, affirmed by the Upper Tribunal (UT) in UK: UT, 21 Sept. 2020, *Kevin McCabe v. The Commissioners for HM Revenue and Customs*, UKUT 0266 (TCC) and 23 ITLR 267.

The MAP is inspired by the regime of diplomatic protection.[34] Under general international law, a state may invoke diplomatic protection to protect its own citizens.[35] Rights and obligations in the realm of diplomatic protection exist, however, exclusively between states.[36] Moreover, a state invoking diplomatic protection is exercising its own right[37] for the breach of an obligation owed to itself, and, therefore, is not acting as an agent of its national.[38] It further enjoys full discretion as to whether to take up the claim on behalf of its injured national at all.[39]

Writing in 2002, Kokott observed that there appears to be "a strong sentiment of distrust" towards diplomatic protection as regards its political uncertainties, its discretionary nature[40] and noted that in the investment realm, the traditional law of diplomatic protection "has been to a large extent replaced by a number of treaty-based dispute settlement procedures".[41]

While the MAP remains rooted in the idea of diplomatic protection, we appreciate that the framework provided by Action 14 of the OECD/G20 Base Erosion and Profit Shifting (BEPS)[42] Project has sought to make this procedure much more effective. States are now to comply with a minimum standard, requiring them to ensure that their obligations arising from the MAP be implemented in good faith,[43] in a timely manner. BEPS Action 14 has reinforced the principle that access to the MAP should be made "as widely available as possible"[44] as soon as the objection presented by the taxpayer appears to be "justified".[45] In particular, in the absence of specific treaty language, access to a MAP cannot be denied simply because a transaction is regarded as abusive.[46] At the same time, what BEPS Action 14 provides in this regard already flows from a proper interpretation of tax treaty law in accordance with the Vienna Convention (1969)and is therefore also applicable to tax treaties concluded before the BEPS initiative.

According to a proper interpretation of tax treaties, therefore, the discretion enjoyed by the competent authorities under a MAP should be far more limited than under traditional diplomatic protection. In practice, however, the effectiveness of the MAP must still be improved. As shown by the latest peer reviews released by the OECD's Forum on Tax Administration earlier in 2021, well-known problems posed by this procedure, such as the independence of the competent authorities continue to be cited as recurrent issues.[47] Equally illustrative in this regard is a recent judgment of the Spanish *Tribunal Supremo* (Supreme Court, TS) denying access to a MAP by reason of the application of a domestic anti-abuse provision by Spain.[48]

Another important weakness of the current treaty dispute resolution framework is the fact that several states (notably developing countries) continue to object to mandatory binding arbitration, in particular because of *sovereignty concerns*.[49] Interestingly, several developing countries that do not currently feel ready for tax treaty arbitration put forward, also in this context, what they perceive as an excessive exposure to investment arbitration in taxation matters.[50] Hence, the BEPS initiative did not manage to elevate mandatory binding arbitration to the rank of a global minimum standard.[51] However, as conceived under the OECD Model and the UN Model, mandatory binding arbitration was never intended to serve as an alternative and independent route available to the taxpayer compa-

34. *See*, inter alia, J. Avery Jones et al., *The Legal Nature of the Mutual Agreement under the OECD Model Convention, Part I*, Brit. Tax Rev., p. 337 (1979); M. Züger, *Arbitration under Tax Treaties: Improving Legal Protection in International Tax Law*, IBFD Doctoral Series vol. 5, at sec. 2.2.2, p. 30 (IBFD 2001), Books IBFD; Perrou, *supra* n. 13, at sec. 2.1, p. 43; Groen, *supra* n. 13, at p. 3; and Wilkie, *supra* n. 24, at sec. 1.1.2.2.
35. *See* the decision of the Permanent Court of International Justice (PCIJ) in GR:/UK: PCIJ, 30 Aug. 1924, *The Mavrommatis Palestine Concessions: Greece v. Britain*, 1924 PCIJ (Ser. A) No. 2 para. 12: "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels".
36. Z. Douglas, *The International Law of Investment Claims* p. 11 (Cambridge U. Press 2009).
37. *See Mavrommatis Palestine Concessions* (1942), *supra* n. 37, at para. 12; the decision of the International Court of Justice (ICJ) in BE/ES: ICJ, 5 Feb. 1970, *Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain)*, 1970 ICJ Rep 4, 99, paras. 78 and 79; and UN, *Draft Articles on Diplomatic Protection with Commentaries* p. 3 (UN 2006).
38. Douglas, *supra* n. 36, at p. 14.
39. *Barcelona Traction* (1970), *supra* n. 37, at para. 79.
40. J. Kokott, *Interim Report on the Role of Diplomatic Protection in the Field of the Protection of Foreign Investment*, in International Law Association (ILA), *Report of the Seventieth Conference, New Delhi* p. 31 (ILA 2002).
41. Id.
42. OECD, *Action 14 Final Report* (2015), *supra* n. 31.
43. Para. 5.1 *OECD Model: Commentary on Article 25* (2017).
44. Id., at para. 17. Accordingly, the objection raised by the taxpayer is considered to be justified where: "it is reasonable to believe that there will be, in either of the Contracting States, taxation not in accordance with the Convention" (*see* para. 3.1. *OECD Model: Commentary on Article 25* (2017)).
45. Art. 25(2) *OECD Model* (2021).
46. Para. 26 *OECD Model: Commentary on Article 25* (2017).
47. R. Finley, *OECD's Latest MAP Peer Reviews Report Uneven Progress*, 102 Tax Notes Intl. 16, p. 382 (19 Apr. 2021) and *OECD's New Round of Action 14 Peer Reviews Reports Mixed Progress*, 103 Tax Notes Intl. 31, p. 633 (2 Aug. 2021). *See also*, in general, Groen, *supra* n. 13, at pp. 3-7 and Wilkie, *supra* n. 24, at sec. 1.1.2.5.
48. ES: TS, 22 Sept. 2021, Case No. 6432/2019. For a critical commentary of this decision, *see* A. Navarro, *Spanish Supreme Court denies Access to MAP in domestic GAAR Cases*, MNE Tax, 2 Nov. 2021, available at: https://mnetax.com/spanish-supreme-court-denies-access-to-map-in-domestic-gaar-tax-case-46099 (accessed 22 November 2021).
49. *See* the reservations made by Denmark, Israel, Korea, Mexico and Turkey to art. 25(5) OECD MC, *OECD* Commentary *on Article 25* (2017), para 97 as well as the position of non-member countries not to include art. 25(5) OECD MC in their tax treaties (Brazil, India, Indonesia, the People's Republic of China, Serbia, South Africa and Hong Kong, China), positions in *OECD Commentary on Article 25* (2017), para 4.1. Singapore reserves the right to modify paragraph 5 in its agreements, positions in *OECD Commentary on Article 25* (2017), para 4.2. *See* also example Committee of Experts on International Cooperation in Tax Matters, Twentieth Session, June 2020, Chapter 5 on MAP Arbitration of the Handbook on Avoidance and Resolution of Tax Disputes, para 26.
50. Committee of Experts on International Cooperation in Tax Matters, Twentieth Session, June 2020, Chapter 5 on MAP Arbitration of the Handbook on Avoidance and Resolution of Tax Disputes, para 26.
51. OECD, *Action 14 Final Report* (2015), *supra* n. 31, at para. 62. Accordingly, arbitration was included in OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, Pt. VI (7 June 2017), Treaties & Models IBFD [the *Multilateral Instrument* or MLI) with numerous options and reservations available to countries. For a comparison between Pt VI MLI and art. 25(5) *OECD Model* (2017), *see* H.J. Ault, *Tax Treaty Arbitration: A Reassessment*, in *Thinker, Teacher, Traveler: Reimagining International Tax: Essays in Honor of H. David Rosenbloom* sec. 5 (G.W. Kofler, R. Mason & A. Rust eds., IBFD 2021), Books IBFD.

 © IBFD

rable to rights granted to investors under IIAs.[52] Rather, it was simply built into the MAP procedure.[53] This policy is even more apparent under the UN Model: a case may not be submitted to arbitration if the competent authorities of both of the contracting states consider that it is not suitable for arbitration. Further, the competent authorities may depart from the decision reached by the arbitral panel if they agree on a different solution within six months after the decision has been communicated to them.[54]

In sum, dispute resolution mechanisms under tax treaties still require practical improvement and even structural changes reflecting the fact that tax treaties confer direct benefits to taxpayers. For this reason, taxpayers ought to have formal standing in the dispute resolution procedure. For the time being, however, one must indeed recognize that the MAP is too often *"a black box"*, while mandatory binding arbitration is an *"unfulfilled promise"*.[55] Whether this will change in the future remains, however, to be seen.[56]

Finally, dispute resolution mechanisms provided by tax treaties are obviously confined to cases involving a taxation that is not in accordance with tax treaty law.[57] Accordingly, for example, they do not provide for a means to resolve a dispute involving an alleged misapplication of domestic tax law, unless there is a direct connecting link between tax treaty law and domestic tax law.[58]

It is (partly at least) for the foregoing reasons that investment arbitration has become increasingly relevant in recent years as an option to deal with cross-border disputes involving taxation matters.

2.3. The investors' position under IIAs: Increased importance of investment arbitration in taxation matters

As alluded to in section 2.2, the investors' position under IIAs is different in nature from the taxpayers' position under tax treaties in at least two respects. First, almost all of today's IIAs provide for a direct right of investors to initiate dispute settlement procedures, most notably to file for international arbitration, against the host state of the investment in case of a dispute.[59] Procedurally, the conclusion of IIAs has thereby significantly strengthened the investors' rights on the international plane.[60] They have been removed from the sphere of inter-state relations, also in light of the idea that this would lead to a "depoliticization" of the relevant disputes and enable dispute settlement between the real disputing parties.[61]

The role of diplomatic protection in investment matters, therefore, is very limited nowadays. In light of the investors' direct right of action, article 27 of the International Centre for Settlement of Investment Disputes (ICSID) Convention even excludes the exercise of diplomatic protection (apart from post-award matters) in ICSID arbitration.[62] Additionally, the investment treaty regime as it stands nowadays also provides for a strong enforcement mechanism for any arbitral award rendered in favour of the investors. Under article 54 of the ICSID Convention or the New York Convention of 1958,[63] outside of the ICSID context investment arbitral awards are enforceable without or subject only to limited review by domestic courts.[64] Public international law dispute settlement in this way has been coupled with a strong private (international) law enforcement system.[65]

Second, notwithstanding the academic debate about the nature of such rights,[66] IIAs provide substantive protec-

52. *See* T. Wälde & A. Kolo, *Investor-State Disputes: The Interface Between Treat-Based International Investment Protection and Fiscal Sovereignty*, 35 Intertax 8/9 (2007), at p. 42; S. van Weeghel, *Tax and Investment Treaties: A Few Observations* in *Thinker, Teacher, Traveler: Reimagining International Tax: Essays in Honor of H. David Rosenbloom* sec. 49.4 (G. Kofler, R. Mason, A. Rust eds, IBFD 2021), Books IBFD.
53. *See*, in particular, para. 64 *OECD Model: Commentary on Article 25* (2017).
54. *UN Model Double Taxation Convention between Developed and Developing Countries: Commentary on Article 25* (2017) para. 1 (1 Jan. 2017), Treaties & Models IBFD. Of course, the effectiveness of dispute prevention and resolution mechanisms will be a key area of concern in the context of a successful implementation of Pillar One at a global level. A discussion of this point is beyond the scope of this article, however. This situation relates in particular to the avoidance of double taxation relating to Amount A through a mandatory and binding mechanism. *See*, in this respect, OECD, *Statement of 8 October 2021 on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2021).
55. S. van Weeghel, *Have the OECD Model and the UN Model Served Their Purpose ? Are They Still Fit for Purpose*, 75 Bull. Int'l Tax'n 11/12 (2021), sec. 3.3.3., Journal Articles & Opinion Pieces IBFD.
56. In the same vein, *see* Ault, *supra* n. 51, at sec. 3.7, p. 37.
57. While these disputes often concern instances of double taxation (*see* para. 9 *OECD Model: Commentary on Article 25* (2017)), the MAP also applies where taxes imposed by a contracting state are in direct contravention of the tax treaty in question, even if no actual double taxation arises. As mentioned in para. 13 *OECD Model: Commentary on Article 25* (2017), such is the case when one state taxes a particular class of income in respect of which the relevant tax treaty gives an exclusive right to tax to the other state, even though the latter does not exercise it owing to its domestic laws .
58. Para. 8 *OECD Model: Commentary on Article 25* (2017).
59. In detail, *see* L. Markert, *Streitschlichtungsklauseln in Investitionsschutzabkommen* (Nomos 2010).
60. *See further* R. Happ & S. Wuschka, *From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma*, 6 Indian J. Arb. L. 1, p. 113 (2017).
61. I.F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID Rev. 1, p. 327 (1986); M. Bungenberg et al., *General Introduction to International Investment Law*, in *International Investment Law – A Handbook* 3, para. 6 (M. Bungenberg et al. eds., Nomos/Beck Hart 2015); and A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties. Standards of Treatment* pp. 27 and 28 (Kluwer L. Intl. 2009).
62. It should be noted, however, that some recent IIAs move away from investor-state dispute settlement or even back to a system of diplomatic protection. The recently concluded *European Union-United Kingdom Trade and Cooperation Agreement* (TCA) of 30 December 2020, OJ L 444/14 (2020), Primary Sources IBFD, even envisages, for the first time, the exercise of diplomatic protection by an international organization, i.e. the European Union.
63. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 330 UNTS 38.
64. *See* further A. Reinisch, *Enforcement of Investment Treaty Awards*, in *Arbitration under International Investment Agreements – A Guide to Key Issues* pp. 797-822 (2nd ed., K. Yannaca-Small ed., Oxford U. Press 2018).
65. Happ & Wuschka, *supra* n. 60, at p. 120.
66. On this only, *see* Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 Brit. Y.B. Intl. L. 1, pp. 151-289 (2004); A. Gourgourinis, *Investors' Rights qua Human Rights? Revisiting the 'Direct'/'Derivative' Rights Debate*, in *The Interpretation and Application of the European Convention of Human Rights* pp. 147-182 (M. Fitzmaurice & P. Merkouris eds., Brill Nijhoff 2012); M. Paparinskis, *Investment Treaty*

tions to foreign investors which – as will be further highlighted in section 4. – operate independently from the domestic legal framework. As a consequence, investors not only enjoy direct rights of action under IIAs, but they can also rely on treaty standards specifically put in place to safeguard individual rights.

Accordingly, the self-standing right of an investor to challenge a host state's actions before an independent international tribunal presents distinct advantages compared to the framework provided by a MAP, and even tax treaty arbitration. As the *Cairn* award has reaffirmed, and as will now be discussed in section 3., the object of an investment arbitration is not to resolve a tax treaty dispute, however.

3. Jurisdiction over Tax-Related Investment Disputes under IIAs and the *Cairn* Award

3.1. Introductory remarks

In light of the just illustrated rights granted to investors under IIAs, we now turn to the question when this avenue is open to a taxpayer that qualifies also as a foreign investor. This raises the question of jurisdiction over tax-related investment disputes under IIAs, which we will illustrate in light of the findings of the tribunal in *Cairn*. After general considerations (section 3.2.), we move to the fundamental distinction drawn by the tribunal between, on the one hand, a tax dispute proper and, on the other hand, a tax-related investment dispute (*see* section 3.3.). We then discuss the relationship between an IIA and a tax treaty (*see* sections 3.4. to 3.5.) and the complementarity between the investment and the tax treaty regimes that the tribunal's reasoning on jurisdiction reflects (*see* section 3.6.). This conclusion on the procedural level will pave the way for the analysis of the relation on the substantive level between the FET standard and international corporate tax standards (*see* section 4.).

3.2. General considerations

The question of whether a tax-related investment dispute was covered by the India-United Kingdom BIT was answered in the affirmative and in a very articulate fashion in *Cairn*. Relying on the rules of the Vienna Convention (1969), the tribunal first considered that nothing in the ordinary meaning of the broad dispute resolution clause of the BIT could suggest that it would not cover tax-related investment disputes.[67] Moreover, the tribunal found that an exclusion of tax-related investment disputes would not be supported by the object and purpose of the BIT[68] to "create conditions favourable for fostering greater investment by investors of one State in the territory of the other State".[69] Additionally, the tribunal held that:

> guarantees of fairness of the taxation regime are in line with the objective of encouraging more foreign investment. Interpreting the BIT so as to exclude tax-related measures from its scope of application, without having express language to that effect, would not be in line with the treaty's object and purpose.[70]

From a contextual perspective,[71] the tribunal referred to the national treatment and most-favoured nation treatment clause in the BIT and, more specifically, to that clause's carve-out rule applicable to tax matters,[72] traditionally found in many IIAs.[73] The effect of this limited carve-out is first of all to remove from the ambit of national treatment any preference or privilege rooted in domestic tax law. Secondly, the clause prevents investors from claiming the benefit of a more favourable tax treaty pursuant to the most-favoured nation treatment. According to the tribunal, the existence of this exception confirmed that in all other instances tax-related investment disputes may be submitted to arbitration under the BIT. Indeed, this exception would not have any relevance and meaning of its own if, as India had advanced, tax-related investment disputes were generally excluded from the scope of the agreement.[74]

3.3. The distinction between a tax dispute and a tax-related investment dispute

One of the important contributions of the *Cairn* award in relation to the interaction of the international tax and investment regimes is the tribunal's focus on the fundamental distinction to be drawn between a tax dispute proper and a tax-related investment dispute. In this context, the tribunal noted that:

> the present dispute is a tax-related investment dispute, not a tax dispute. More precisely, this dispute concerns alleged violations of an investment treaty resulting from certain sovereign measures taken by the Respondent in the field of taxation, also referred to as fiscal measures. This type of dispute must be distinguished from tax disputes proper, which are disputes concerning the taxability (including the tax-amount) of a specific transaction.... In a tax dispute, the question is whether and how a particular transaction is taxable under the applicable (municipal) law or, possibly laws of several countries if the transaction is international. In tax-related investment disputes, on the other hand, the tribunal is tasked with determining whether the respondent State has breached substantive standards of treatment under the investment treaty through the exercise of its authority in the field of taxation, and whether liability arises as a result. The issue at stake is thus not a matter of domestic tax law; it is rather whether the fiscal measures taken by the State, valid or not under its own tax laws, violate international law.[75]

Arbitration and the (New) Law of State Responsibility*, 24 Eur. J. Intl. L. 2, pp. 617-647 (2013); and T.R. Braun, *Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law*, 15 J. W. Inv. & Trade, 1/2, pp. 73-116 (Apr. 2014).

67. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 797. Like many IIAs, art. 9(1) of the *India-U.K. BIT* (1994) referred to "any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former".
68. Art. 31(1) *Vienna Convention* (1969).
69. Preamble, *India-U.K. BIT* (1994).
70. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 798.
71. Art. 31(1) *Vienna Convention* (1969).
72. Art. 4(3) *India-U.K. BIT* (1994) reads as follows: "The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from … any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation".
73. UNCTAD, *International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know*, at p. 23 (UNCTAD 2021).
74. *Cairn Energy v. India* (2020), *supra* n. 1, at paras. 799-800. Wälde & Kolo, *supra* n. 52, at p. 434.
75. Id., at para. 793.

 © IBFD

While obvious and already addressed by scholarly writing,[76] the foregoing distinction was indeed the basis on which the tribunal approached the proposition advanced by India that tax disputes could not be subject to arbitration under the India-United Kingdom BIT (1994) because this matter was allegedly regulated by another treaty, the India-United Kingdom Income Tax Treaty (1993),[77] which did not contain a mandatory binding arbitration clause.[78]

3.4. A tax treaty and an IIA govern "different subject matters"[79]

Placing India's objection in its appropriate context under the rules of treaty interpretation, the tribunal first understood it to mean that the India-United Kingdom Income Tax Treaty (1993) would derogate from the India-United Kingdom BIT (1994) under article 30 of the Vienna Convention (1969).[80] Article 30 of the Vienna Convention (1969) contains residual rules governing the relation between successive treaties in the absence of conflict, saving or compatibility clauses.[81] However, it only applies to successive treaties relating to the "same subject matter".[82] Additionally, its application requires the existence of an incompatibility between two successive treaties,[83] which cannot be resolved through a harmonizing interpretation.[84]

In accordance with the distinction drawn between a tax dispute proper and a tax-related investment dispute, the tribunal found that the India-United Kingdom Income Tax Treaty (1993) and the India-United Kingdom BIT (1994) governed not only different subject matters but also operated in two separate spheres:[85]

> the former provides rules for "the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains" applicable to residents of each contracting State, while in the latter, each Contracting Party agrees to treat the investments in its territory made by nationals of the other Contracting Party in accordance with certain standards of treatment.[86]

The tribunal further observed that there was no incompatibility between the India-United Kingdom Income Tax Treaty (1993) and the India-United Kingdom BIT (1994) as envisaged by article 30(2) of the Vienna Convention (1969). This situation gave the tribunal the opportunity to emphasize once again the difference between the scope of dispute resolution under a tax treaty and an IIA. In particular, the tribunal noted that:

> article 27(1) of the UK-India DTAA [India-United Kingdom Income Tax Treaty (1993)] provides for a dispute resolution mechanism for situations in which "a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Convention. It does not purport to provide a dispute resolution mechanism for situations in which an investor of one of the Contracting States considers that the host State has violated his rights as an investor, especially the BIT.[87]

3.5. A tax treaty contains rules of international law[88] applicable to the parties to an IIA

For the sake of completeness, however, the tribunal went on to consider an alternative understanding of India's position, namely whether the India-United Kingdom Income Tax Treaty (1993) should be regarded as relevant external context within the meaning of article 31(3) of the Vienna Convention (1969). It was obvious that the India-United Kingdom Income Tax Treaty (1993) was neither a subsequent agreement[89] nor practice[90] regarding the interpretation of the India-United Kingdom BIT (1994).[91]

The tribunal however also referred to article 31(3)(c) of the Vienna Convention (1969), which puts into effect the principle of systemic integration in treaty interpretation. This provision requires that "any relevant rules of international law applicable in the relations between the parties" be also taken into account when determining the external context of a treaty. In that respect, the tribunal found that:

> the UK-India DTAA [the India-United Kingdom Income Tax Treaty (1993)] indisputably contains rules of international law applicable between the Parties to the BIT.[92]

We shall revert to the principle of systemic integration when discussing the interpretation of the FET standard and its application to taxation measures (*see* section 4). On jurisdiction, however, the tribunal held that there was nothing in the India-United Kingdom Income Tax Treaty (1993) which could suggest that a tax-related investment dispute was not arbitrable.[93]

76. *See*, inter alia, Wälde & Kolo, *supra* n. 52, pp. 427 and 432; A.E. Gildemeister, *L'arbitrage des différends fiscaux*, at p. 170 (L.G.D.J. 2013); and P. Pistone, *General Report*, in *The Impact of Bilateral Investment Treaties on Taxation*, IFA, sec. 1.2.2. (M. Lang et al. eds., IBFD 2017), Books IBFD.
77. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains* (25 Jan. 1993), Treaties & Models IBFD [hereinafter the *India-U.K. Income Tax Treaty* (1993)].
78. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 801.
79. Art. 30 *Vienna Convention* (1969).
80. *Cairn Energy v. India* (2020), *supra* n. 1.
81. *See* K. von der Decken, *Article 30*, in *Vienna Convention on the Law of Treaties: A Commentary* para. 16 (2nd ed., O. Dörr & K. Schmalenbach eds., Springer 2018) and M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* art. 31, para. 5 (Brill Nijhoff 2008).
82. von der Decken, *supra* n. 81, at para. 12.
83. Id., at para. 13.
84. Villiger, *supra* n. 81, at para. 7.
85. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 803.
86. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 803. Assuming arguendo that the *India-U.K. Income Tax Treaty* (1993) and the *India-U.K. BIT* (1994) were intended to cover the same subject matter, the tribunal dwelt on article 30(2) of the *Vienna Convention* (1969), which provides that: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail". Accordingly, here the question was whether the limitation contained in the national treatment and most-favoured-nation treatment clause referred to *supra* could be construed as "subjecting" this agreement to the *India-U.K. Income Tax Treaty* (1993). The tribunal rightly held that this was clearly not the case, since the effect of such a clause is merely to limit the scope of national treatment and most-favoured-nation treatment clause by excluding "any treatment, preference or privilege resulting from" tax-related treaties. (*See Cairn Energy v. India* (2020), *supra* n. 1, at para. 806).
87. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 806.
88. Art. 31(3)(c) *Vienna Convention* (1969).
89. Id., at art. 31(3)(a).
90. Id., at art. 31(3)(b).
91. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 808.
92. Id., at para. 808.
93. Id.: "India fails to point to any relevant rule in the former that would suggest that the latter should be interpreted so as to exclude tax-related measures from its scope".

3.6. Observations

The *Cairn* award confirms the position already defended in scholarly writing that tax treaties and IIAs regulate different subject matters. It follows that, in the absence of an express carve-out, a tax-related investment dispute may be subject to investment arbitration. Moreover, and although the question was not at issue in the *Cairn* arbitration, it is clear that the host state's obligation to treat foreign investors fairly and equitably also extends to the application and, as the case may be, the implementation of that state's obligations in respect of a tax treaty.[94] Therefore, an investment arbitration may be initiated independently, concurrently or alternatively to a MAP under a tax treaty concluded by the host State.[95]

This outcome is not surprising. As shown by the *Cairn* award, these dispute settlement procedures have a fundamentally different subject matter.[96] The primary purpose of tax treaties is to allocate taxing jurisdiction between the contracting states with a view to eliminating international double taxation. Consequently, a MAP (and, as the case may be, a binding arbitration clause tied to it) is only designed to resolve disputes arising out of actions by one or both of the contracting states that result in taxation not in accordance with the provisions of the tax treaty in question.[97]

By contrast, under an IIA, the host state commits to offer to investors of the other contracting state substantive and specific standards of protection.[98] As a result, investment arbitration does not aim at eliminating taxation that is not in accordance with a tax treaty. Rather, its focus is on whether the host state's taxation measures (whether rooted in domestic and/or tax treaty law) are in breach of its substantive standards of protection. In that sense, as Gildemeister (2013) rightly points out, IIAs and tax treaties have very different material purposes and effects.[99]

However, one may prima facie advance that tax treaties overlap with IIAs in relation to the prohibition of discrimination. It is clear that article 24 OECD MC, which is not limited to taxes covered by tax treaties,[100] deals with situations which may also fall into the scope of a national treatment or an FET clause.[101] However, tax treaties only cover the elimination of tax discrimination in certain precise circumstances,[102] while, as will be discussed, the FET standard is broader than a prohibition of discrimination.[103] Moreover, the national treatment standard under IIAs generally covers also indirect (or covert) discrimination.[104] Therefore, as the *Cairn* tribunal held:

> [i]t is perfectly possible for a tax-related measure to be governed under a double taxation regime, such as the one provided in the UK-India DTAA [the India-United Kingdom Income Tax Treaty (1993)], and at the same time be arbitrary, discriminatory or otherwise contrary to the BIT.[105]

Overall, the *Cairn* tribunal's delineation of the tax treaty and IIA regimes as part of its reasoning on jurisdiction neatly showcases the complementarity that exists between these two regimes on the procedural level. Based on this conclusion, we now move on to highlight that such complementarity also exists on the substantive level, and in particular regarding the FET standard.

4. The Relation between the FET Standard and International Corporate Taxation Standards: A Case for a Harmonious Interpretation

4.1. Introductory remarks

We now move on to the substantive interplay between the FET standard and international corporate taxation standards that increasingly shape taxation measures applying in a cross-border context. As indicated in our introductory considerations, there is a growing perception among fiscal policy makers that the review of these taxation measures against the flexibility and openness of the FET standard may potentially and unforeseeably encroach on states' tax sovereignty.

As we will discuss in the following, this perception is not justified. We will indeed show that the interpretation of the FET standard in arbitral practice is, where relevant

94. *See*, among others, UNCTAD, *supra* n. 73, at p. 27; A.E. Gildemeister, *Germany*, in Lang et al. eds., *supra* n. 76, at sec. 12.2; and Pistone, *supra* n. 76, at sec. 1.2.2.2; in the same vein, M. Lennard, *Some Key Elements of International Investment Agreements with Potential Tax Impacts for Developing Countries*, in *Thinker, Teacher, Traveler: Reimagining International Tax: Essays in Honor of H. David Rosenbloom* (G. Kofler, R. Mason, A. Rust eds, IBFD 2021), p. 330, Books IBFD.
95. *See*, inter alia, Wälde & Kolo, *supra* n. 52, at pp. 427 and 432; Pistone, *supra* n. 76, at sec. 1.2.2.; Gildemeister, *supra* n. 76, at p. 170; UNCTAD 2021, *supra* n. 73, at p. 16: "*Potentially, a taxpayer could request the relevant competent authority for a mutual agreement procedure (MAP) and, concurrently or afterwards, pursue ISDS claims as an investor under an IIA concerning the same matter. A MAP between the competent authorities of the contracting parties or a State-State tax arbitration could be ongoing when an ISDS proceeding is initiated. The outcome of a MAP, tax arbitration or tax litigation could also give rise to ISDS cases*".
96. In the same vein, Davie, *supra* n. 8, at pp. 217-218; Wälde & Kolo, *supra* n. 52, at p. 427.
97. Art. 25(1) *OECD Model* (2017) and *UN Model* (2017).
98. *See*, in general on the purpose, structure and content of BITs, C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration – Substantive Principles*, at pp. 26-35 (2nd edn., Oxford U. Press 2017) and R. Dolzer & C. Schreuer, *Principles of International Investment Law* pp. 13-15 (2nd edn., Oxford U. Press 2015).
99. *See* Gildemeister, *supra* n. 76, at p. 171: "*les traités d'investissement et les conventions fiscales consacrent en effet des principes matériels très différents. La question de savoir s'il y a une expropriation a peu en commun avec la question de savoir si une double imposition peut ou doit être évincée, ou avec celle de savoir quel Etat est compétent pour taxer telle ou telle opération économique*" ["IIAs and tax treaties provide for different substantive effects. Whether there is an expropriation has little to do with whether double taxation may or must be eliminated, or with whether a State has the right to tax an economic transaction."].
100. Art. 24(6) OECD MC (21 Nov. 2017).
101. This in particular holds true as regards art. 24(3) (non-discrimination of domestic permanent establishments of non-resident enterprises), art.24(4) (deductibility of payments) and art. 24(5) (non-discrimination in relation to foreign ownership).
102. Art. 24 OECD and UN MCs; para. 1, *OECD Model: Commentary on Article 24* (2017).
103. *See*, *infra*, section 4.2.1.
104. *See further* only MX: ICSID(AF), 21 Nov. 2007, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, para. 193.
105. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 809. *See also* Pistone, *supra* n. 76, at sec. 1.2.2 notes that: "(…) except where the context otherwise specifically requires, the need to interpret the specific features of the non-discrimination principle in tax treaties should not prevent investment arbitration bodies from examining the compatibility of the tax treatment with the clause contained in a BIT, including the ones concerning entitlement to NT".

 © IBFD

and mandated, increasingly influenced by a comparative public law analysis aiming at identifying accepted benchmarks in national and international standards. Accordingly, an analysis referring to globally accepted tax standards for purposes of determining what constitutes fair and equitable taxation by the host State is possible. Following this approach, the FET standard in fact provides a possibility to enforce international tax standards that states have already consented to, thereby ensuring a harmonious interpretation between the investment treaty protection regime and international tax standards.

For purposes of this analysis and with a view to keeping the discussion within manageable proportions, we will focus on "unqualified" FET standards. By "unqualified", we mean the formulation that is still used in the broad majority of IIAs in force to date. It is exemplified by the FET standard in the now terminated India-United Kingdom BIT (1994), on which, for example, the *Cairn* award was based. In particular, article 3(2) of the India-United Kingdom BIT (1994) envisaged that "[the] [i]nvestments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment". It is important to note, however, that recent treaty practice in international investment law also brings about a greater sophistication of FET clauses.[106]

We first address the characteristics of the FET standard under IIAs (*see* section 4.2.), including its core content, nature and foundations (*see* section 4.2.1.), and the comparative law approach in its interpretation that is particularly relevant international corporate tax standards increasingly shaping taxation measures (*see* section 4.2.2.). Then, we consider the FET standard's impact on domestic taxation measures (*see* section 4.3.), before we conclude this section by addressing tax treaty measures in light of the FET standard and the relevance of the Commentaries on the OECD Model and UN Models to investment disputes (*see* section 4.4.).

4.2. The FET standard's characteristics and interpretation

4.2.1. Core content, nature and foundation of FET

Despite what the wording "fair and equitable treatment" might suggest, the FET obligation under IIAs is a legal standard proper,[107] and does not give a *carte blanche* to arbitrators to decide cases *ex aequo et bono*.[108] Moreover, beyond the self-standing right of an investor to be treated fairly and equitably, an arbitral tribunal does not function as a court of appeal, and, therefore, does not, in particular, second-guess the policy choices made by the host state. Rather, its task is to assess whether the outcome of the host state's action is in conformity with international law.[109] More generally, arbitral tribunals may show deference towards the adoption and application of taxation measures. However, such deference is not unlimited, and cannot amount to granting "States discretion whether or not to comply with their international treaty obligations".[110]

In relation to its normative content, FET shares elements with the customary minimum standard of treatment of aliens.[111] However, in the absence an explicit link in the IIA, FET cannot be equated to it,[112] and has an autonomous treaty character.[113] Further, FET is a non-contingent standard in relation to the treatment of other investors or investments.[114]

Over time, investment tribunals have elaborated and operationalized the content of the FET standard through the identification of core principles.[115] As summarized in the recent award in *Infinito Gold v. Costa Rica* (2021):

> ... a consensus emerges as to the core components of FET, which encompass the protection of legitimate expectations, the protection against conduct that is arbitrary, unreasonable, disproportionate and lacking in good faith, and the principles of due process and transparency. FET also includes a protection against denial of justice.[116]

In accordance with the rules governing state responsibility, these core principles regulate the activities of all state organs (in particular legislative, executive, administrative and judicial activities).[117] The *Cairn* award is no exception to this approach,[118] but was decided primarily on the basis of the principle of legal certainty as a reflection of the rule of law.[119] As will be discussed in section 4.2.2., the foregoing principles, beyond the problem of retroactive taxation addressed in the *Cairn* award, may also be relevant in other areas of tax law.

FET operates as an international obligation derived from investment treaty law. Accordingly, the legality or consti-

106. *See*, for example, *EU-Canada-European Union Comprehensive Economic and Trade Agreement*, art. 8.10, OJ L 11/23 (2017).
107. *See*, in this regard, *Cairn Energy v. India* (2020), *supra* n. 1, at para. 1707.
108. *See further* A. Reinisch & C. Schreuer, *International Protection of Investments: The Substantive Standards* pp. 302-303 (Cambridge U. Press 2020), with reference also to investment tribunal decisions. *See also Cairn Energy v. India* (2020), *supra* n. 1, at para. 1707.
109. *See further* Reinisch & Schreuer, *supra* n. 108, p. 383, at para. 646.
110. *Manolium-Processing v. Belarus* (2021), *supra* n. 1, at para. 426.
111. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 1704.
112. IIAs following the North American model, for example, those based on the *Canadian Model BIT* (2021) or *US Model BIT* (2012), link FET to the customary minimum standard. A prominent illustration of this is the CA/MX/US: *North American Free Trade Agreement (NAFTA)*, 17 Dec. 1992, 32 I.L.M. 670 (1993), art. 1105, which sparked a considerable debate in practice as to whether FET must be equated to the minimum standard or has an autonomous meaning, leading to further clarification in treaty practice. *See*, for example, article 8(1) of the *Canada Model* (2021). For an overview of the debate, *see* C. Schreuer, *Fair and Equitable Treatment (FET): Interactions with Other Standards*, in *Investment Protection and the Energy Charter Treaty* pp. 76-88 (G. Coop & C. Ribeiro eds., Juris 2008).
113. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 1704.
114. N. Angelet, *Fair and Equitable Treatment*, in *Max Planck Encyclopedia of Public International Law* para. 3 (Online edn., last updated Mar. 2011). *See further* Reinisch & Schreuer, *supra* n. 108, at pp. 346-347.
115. *See further* R. Dolzer, *Fair and Equitable Treatment: Today's Contours* 12 Santa Clara J. Intl. L. 1, p. 16 (2014).
116. CR: ICSID, 3 June 2021, *Infinito Gold v. Costa Rica*, ICSID Case No. ARB/14/5, 355.
117. Compare UN, International Law Commission (ILC), *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), art. 4, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, annexed to UN GA Res 56/83 (12 Dec. 2001) UN Doc A/56/83.
118. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 1722.
119. Id., at para. 1757.

© IBFD

tutionality of a domestic taxation measure or a misapplication of a tax treaty under the host state's domestic law is irrelevant to its assessment under international law and specifically under the FET standard.[120] Rather, in line with article 27 of the Vienna Convention (1969), the domestic legality or illegality of a measure might serve as an indication as to its international legality,[121] but – as reaffirmed in the *Cairn* award – is not in and out of itself conclusive.[122] As a consequence, IIAs do not simply replicate the existing level of protection under domestic law.[123] As the tribunal in the *Cairn* case noted:

> when making an investment, the foreign investor is entitled to rely on the available international standards of protection, including those offered under the BIT, independently of those found under domestic law[124]

and the investor has a "a self-standing right under the BIT to be treated fairly and equitably".[125]

A significant number of tribunals have considered that FET is rooted in the principle of good faith.[126] This does not mean, however, that an FET violation requires bad faith conduct on the part of the host state.[127] Instead, the standard "embodies a more "objective" requirement of host state treatment vis-à-vis foreign investors".[128] However, as the tribunal in *Siag v. Egypt* (2009) concluded:

> [t]he general, if not cardinal, principle of customary international law that States must act in good faith is thus a useful yardstick by which to measure the Fair and Equitable standard.[129]

The principle of good faith is particularly relevant to those aspects of FET that concern arbitrariness and which address the abuse of form for an improper purpose.[130] Good faith may also be relevant to the principle of due process embodied in the standard.[131] For this reason, in particular, we will argue that the OECD and UN Commentaries to the MCs are of relevance to give content to FET where they rely on the principle of good faith as a benchmark to the proper application of tax treaty law.

4.2.2. The comparative law approach and international corporate tax standards

The rules of treaty interpretation enshrined in article 31(1) of the Vienna Convention (1969) reach their limits against the vague formula of "fair and equitable treatment". For this reason, scholarly writing[132] and arbitral practice[133] have begun to employ a comparative public law approach to give content to the FET standard in appropriate cases. This approach conceptualizes and applies standard concepts of investment law, in particular, the FET standard, by drawing parallels with public law concepts used in domestic law and other international regimes.[134]

A public law comparative analysis ensures cross-regime consistency and mitigates the negative effects of fragmentation by stressing commonalities and openness of international investment law towards other international regimes.[135] A prominent illustration of this approach may be found in *Total v. Argentina* (2010) (the "*Total* award"), where the tribunal observed that:

> in determining the scope of a right or obligation, Tribunals have often looked as a benchmark to international or comparative standards. Indeed, as is often the case for general standards applicable in any legal system (such as "due process"), a comparative analysis of what is considered generally fair or unfair conduct by domestic public authorities in respect of private firms and investors in domestic law may also be relevant to identify the legal standards under BITs.[136]

As part of this analysis, arbitral tribunals have also relied on other international obligations binding the parties (for example human rights[137] and WTO obligations).[138] The tribunal in the *Total* case considered, for example, that:

> additional criteria for the evaluation of the fairness of national measures of general application as to services are those found in the WTO General Agreement on Trade of Services (GATS).... This reference concerning services... in a multilateral treaty to which both Argentina and France are parties offers useful guidance as to the requirements that a domestic regulation must contain in order to be considered fair and equitable.[139]

The foundation of this approach has, however, been debated in scholarly writing. For instance, is this comparative analysis merely relied on as a source of inspiration or are arbitral tribunals applying the principle of systemic integration which, under article 31(3)(c) of the Vienna Convention (1969), requires "relevant rules of interna-

120. *See further* Reinisch & Schreuer, *supra* n. 108, at pp. 530-532.
121. Compare the examples given by Reinisch & Schreuer, *supra* n. 108, at pp. 532-535.
122. *See also Cairn Energy v. India* (2020), *supra* n. 1, at para. 1688: "While a judicially declared determination of the 2012 Amendment's constitutionality or lack thereof might be an element among others to consider [...], it would not, on its own, be dispositive of that question".
123. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 1690.
124. Id., at para. 1691.
125. Id.
126. *See* Reinisch & Schreuer, *supra* n. 108, at p. 296; MX: ICSID, 23 May 2003, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, para. 153; EG: ICSID, 1 June 2009, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award, para. 450; CZ: PCA, 12 Nov. 2010, *Frontier Petroleum Services v. Czech Republic*, PCA Case No. 2008-09, Final Award, para. 297 (with further references); and LV: ICSID, 22 Dec. 2017, *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, para. 839.
127. *See Tecmed v. Mexico* (2003), *supra* n. 126, at para. 153.
128. Reinisch & Schreuer, *supra* n. 108, at p. 42 and AR: ICSID, 6 Feb. 2007, *Siemens A.G. v. The Argentine Republic*, Award, para. 300.
129. *Siag v. Egypt* (2009), *supra* n. 126, at para. 450.
130. M. Paparinskis, *Good Faith and Fair and Equitable Treatment in International Investment Law*, in *Good Faith and International Economic Law* p. 158 (A.D. Mitchell, M. Sornarajah & T. Voon eds., Oxford U. Press 2015). *See also Frontier Petroleum Services v. Czech Republic* (2010), *supra* n. 126, at para. 300 (footnotes omitted) holding that bad faith: "includes the use of legal instruments for purposes other than those for which they were created".
131. *See* Paparinskis, *supra* n. 130, at p. 158.
132. *See*, for example, S.W. Schill, *International Investment Law and Comparative Public Law – An Introduction*, in *International Investment Law and Comparative Public Law* (S.W. Schill ed., Oxford U. Press 2010) and D. Peat, *International Investment Law and the Public Law Analogy: The Fallacies of the General Principles Method*, 9 J. of Intl. Disp. Settle. 4, p. 660 (2018).
133. *See*, for example, AG: ICSID, 27 Dec. 2010, *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, para. 111 and VE: ICSID, 22 Sept. 2014, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, paras. 575-576.
134. Schill, *supra* n. 132, at p. 25.
135. Id., at pp. 25-26.
136. *Total v. Argentina* (2010), *supra* n. 133, at para. 111.
137. Reinisch & Schreuer, *supra* n. 108, at p. 285.
138. *Total v. Argentina* (2010), *supra* n. 133, at para. 123.
139. Id.

© IBFD

tional law" applying between the parties to be taken into consideration as primary means of interpretation?[140] As McLachlan (2005) puts it, "treaties are themselves creatures of international law".[141] The principle of systemic integration seeks to avoid a "fragmentation" of international law caused by diverging interpretations within its specialized sub-regimes.[142] The "relevant rules of international law" to which article 31(3)(c) of the Vienna Convention (1969) refers, are, in particular, the sources of international law as set out in article 38(1) of the Statute of the International Court of Justice (the "ICJ Statute"),[143] namely international conventions, international custom and general principles of law.The function of general principles of law is essentially to fill gaps in the interpretation of treaty law.[144] They may be derived from both national and international law,[145] and include good faith, prohibition of abuse of rights,[146] proportionality[147] reciprocity and, of course, the rule of law.[148]

In the *Cairn* award, the tribunal made it very clear that its comparative law analysis designed to ascertain the contours of the principle of legal certainty derived from the rule of law was meant to identify general principles of law. The tribunal, indeed, expressly referred to article 31(3)(c) of the Vienna Convention (1969)[149] and to article 38 of the ICJ Statute,[150] and noted that:

> resorting to general principles of law to establish the content of the FET standard is, in the Tribunal's view, an appropriate methodology to establish its normative content. Not only is it consistent with the mandate of Article 31 of the VCLT to consider sources of international law when interpreting Article 3(2) of the BIT; it also provides objective guidelines that restrain the Tribunal from applying its own subjective interpretation of the terms "fair" and "equitable".[151]

It is beyond the scope of this contribution to a take a stand on whether the foregoing comparative law approach should be confined to the identification of general principles of law within the meaning of article 38(1) of the ICJ Statute or whether it should be broader. However, it is clear that the interpretation of substantive standards of protection contained in IIAs – notably FET – involves a significant degree of openness towards other fields of law.[152]

This comparative law approach is particularly justified with regard to taxation measures applying in a cross-border context. As is well known, the recent evolution of international taxation is characterized by a strong shift towards multilateralism. This shift, which the BEPS initiative has amplified, materializes through the development of minimum standards, common approaches, best practices, model laws and peer review mechanisms. Further, this evolution does not only have an impact on treaty law but also on domestic tax systems where, for example, minimum standards or best practices are simply imported by the lawmaker.

As a result, in some areas at least it is fair to say that a certain standardization of domestic tax systems takes place by reference to commonly defined international tax benchmarks. These standards are being shaped by the OECD, the UN and, of course, by the members of the Inclusive Framework comprising 140 countries. Last but not least, the contribution of EU law in this area is also significant. In its recent case law, the Court of Justice of the European Union (ECJ) was notably given the opportunity to consider the application of general principles of law, such as the prohibition of abuse of rights or the principle of proportionality to norms bearing similarities to those applicable at the global level. In 2007 already, leading commentators noted that the tax-related jurisprudence of the ECJ was one of the closest one gets to a comparable method of international disciplines on fiscal conduct by national authorities.[153] This position is even more justified today as the ECJ's case law in corporate direct taxation matters influences the interpretation of global standards and vice versa.[154]

Consequently, a comparative law analysis making reference, where appropriate, to international tax standards for purposes of determining what constitutes fair and equitable taxation by the host state is desirable. In the words of Wälde and Kolo, "comparative tax law thus serves as a tool to identify when tax surprises 'go too far'".[155] However, this approach is subject to three important reservations. First, it must be ensured that the selected standards are sufficiently globally accepted.[156] This should at least be the case where these standards refer and/or give content to general principles of law that are also relevant to FET (such as good faith, the prohibition of abuse of rights, proportionality, and legal certainty) and have been endorsed globally at the level of the UN, the OECD, or the Inclusive Framework. Second, external sources cannot be used to override the

140. On this issue, *see* Peat, *supra* n. 132, at p. 660.
141. C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 Intl. & Comparative L. Q. 2, p. 280 (2005).
142. ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission Finalized by M. Koskenniemi (13 Apr. 2006), A/CN.4/L.682, para. 413; Dörr, *Article 31*, in Dörr & Schmalenbach eds., *supra* n. 81, at para. 94; and McLachlan, *supra* n. 141, at p. 285.
143. Statute of the International Court of Justice (San Francisco, 1945) 33 UNTS 993.
144. M. Vazquez-Bermúdez, Special Rapporteur of the International Law Commission, *First report on general principles of law*, UN Doc. A/CN.4/732 (5 Apr. 2019), para. 144.
145. Id., at paras. 231-235.
146. *See* Vazquez-Bermúdez, *supra* n. 144, at paras. 63 and 64 and J. Kokott, P. Pistone & R. Miller, *Public International Law and Tax Law: Taxpayers' Rights*, The International Law Association's Project on International Tax Law – Phase 1, 52 Georgetown J. of Intl. Tax L. 2 p. 393 (2021).
147. *See*, for example, EC: ICSID, 5 Oct. 2012, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, paras. 403-403.
148. S.W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in Schill ed., *supra* n. 132, at p. 154 and Reinisch & Schreuer, *supra* n. 108, at para. 444.
149. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 1712.
150. Id., at para. 1713.
151. Id., at para. 1717.
152. Schill, *supra* n. 132, at pp. 25-26.
153. Wälde & Kolo, *supra* n. 52, at p. 428.
154. On the interaction between BEPS and EU law, *see*, in particular, W. Schön, *Interpreting European Law in the Light of the OECD/G20 Base Erosion and Profit Shifting Action Plan*, 74 Bull. Intl. Taxn. 4/5 (2020), Journal Articles & Opinion Pieces IBFD and in relation to the prohibition of abuse specifically, Danon et al., *supra* n. 21.
155. Wälde & Kolo, *supra* n. 52, at pp. 448-449.
156. *See* Schill, *supra* n. 132, at p. 175.

wording of an IIA.[157] Third and finally, it must always be considered whether, and if so to what extent, the use of the relevant source is appropriate to give content to the FET standard.[158]

4.3. Selected considerations on domestic taxation measures

We now focus on the FET standard's potential impact on domestic taxation measures. These measures may apply independently of any tax treaty obligation and, therefore, may well not be subject to a MAP. Under IIAs, by contrast, taxpayers qualifying as investors would have – as exemplified by the *Cairn* case – an avenue for recourse.

We begin with the principal of legal certainty, on which the tribunal in the *Cairn* case relied. The tribunal held that:

> [s]ubject to exceptions where this is justified by a specific public purpose as discussed below, the retroactive application of legislation constitutes a fundamental affront to the principle of legal certainty and runs afoul of the guarantee of predictability of the legal environment.[159]

Accordingly, the question is whether the principle of legal certainty as reflected in the *Cairn* award could also apply to an unpredictable and/or discretionary tax legislation.[160] A particular example is that of a discretionary general anti-avoidance rule (GAAR).

In a recent doctoral thesis dedicated to GAARs, Cunha (forthcoming) rightly raises this question.[161] Similarly, already in 2007, Wälde and Kolo noted that the function of the principle of legal certainty was precisely to identify situations that go too far: "when governments rely on open-ended legislation (e.g. the function of an anti-avoidance legislation to question virtually every transaction with a tax planning motive) involving considerable discretion"[162]. In this regard, the increased uniformity of GAARs following the emergence of global minimum standards could have some relevance[163] to determine whether the principle of legal certainty is being complied with.

A different and separate issue is the discretionary or arbitrary application of a properly drafted GAAR by a state organ, in particular by an administrative authority. Such conduct could violate the FET standard's due process guarantee, where it is established that the administration engaged in non-transparent or arbitrary conduct,[164] exceeded its powers[165] or acted on improper motives.[166]

The second question that deserves attention is the role of the principle of proportionality in taxation matters.[167] The tribunal in the *Cairn* case held that:

> States have the power to take measures in pursuance of a public purpose[, which] entails not only a requirement that the State's policy be rational and non-arbitrary, but also that the measure in question bear a reasonable relationship with that policy.[168]

In particular, the arbitrators pointed out that such an analysis also involves a balancing of interests, including a proportionality analysis.[169]

This situation continues the "growing body of arbitral law, particularly in the context of ICSID arbitrations",[170] applying the principle of proportionality to potential IIA breaches. Notably, in *Occidental v. Ecuador* (2012) ("*Occidental* award"), the tribunal recalled that the "principle has been adopted and applied countless times"[171] by the ECJ and the European Court of Human Rights (ECtHR). The reference to the case law of the ECJ by the tribunal in the *Occidental* case is particularly interesting, given the numerous examples of situations in which the ECJ applied the principle of proportionality in direct taxation matters. These cases could equally serve as guidance for investment tribunals.

For instance, the ECJ has held on numerous occasions that a general presumption of fraud and abuse is incom-

157. *See* DE: ICSID, 31 Aug. 2018, *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, para. 154: "It is not the proper role of Article 31(3)(c) VCLT to rewrite the treaty being interpreted, or to substitute a plain reading of a treaty provision with other rules of international law, external to the treaty being interpreted, which would contradict the ordinary meaning of its terms". *See further Third Report on the Law of Treaties*, by Sir Humphrey Waldock, Special Rapporteur, UN Doc A/CN.4/167 and Add. 1-3, YILC (1964) Vol. II, at p. 56: "It is not the function of interpretation to revise treaties or to read into them what they do not expressly or by necessary implication contain.". *See also* McLachlan, Shore & Weiniger, *supra* n. 98 at p. 81.
158. As observed by R. Kläger, *Fair and Equitable Treatment in International Investment Law* p. 106 (Cambridge U. Press, 2011): "the process of judicial reasoning may be compared with a filter which applies to arguments that are systemically integrated from other norms of international law into the concept of fair and equitable treatment". Consequently, the process of systemic integration "does not trigger a direct effect or direct applicability of other norms of international law in a particular investment dispute. Rather, other international law norms only have an indirect effect by delivering arguments for particular constructions of fair and equitable treatment."
159. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 1757.
160. The same issue arises under EU law, *see*, for example, BE: ECJ, 5 July 2012, Case C-318/10, *Société d'investissement pour l'agriculture tropicale SA (SIAT) v. État Belge* para. 58, Case Law IBFD.
161. R. Cunha, *A New GAAR Model: Countering Tax Avoidance and Promoting Investment through Legal Certainty and the Rule of Law*, IBFD Doctoral Series, (IBFD forthcoming), Books IBFD.
162. Wälde & Kolo, *supra* n. 52, at pp. 448-449.
163. We refer in particular to the PPT included in the *OECD Model* (2017) and the *UN Model* (2017) (article 29(9)) as the global minimum standard to counter treaty abuse as well as the prohibition of abuse of rights under EU law, *see* Art. 6 of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market OJ L 193 (19 July 2016) and, of course, the well-known "*Danish cases*" (DK: ECJ, 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 and Others*, Case Law IBFD, and DK: ECJ, 26 Feb. 2019, Joined Cases C-116/16 and C-117/16, *T Danmark and Y Danmark*, Case Law IBFD). On this issue, *see* inter alia Danon et al., *supra* n. 21 and from an EU perspective specifically, among others R. de La Feria, *On Prohibition of Abuse of Law as a General Principle of EU Law*, 29 EC Tax Rev. 4 (2020), 142.
164. Compare KZ: ICSID, 29 July 2008, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, para. 617 and LK: ICSID, 31 Oct. 2012, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 Oct. 2012, paras. 485-489.
165. *Deutsche Bank v. Sri Lanka* (2012), *supra* n. 164, at para. 490.
166. Id., at paras. 481 and 482.
167. In general, on the role of the principle of proportionality in taxation, *see* J. Rolim, *Proportionality and Fair Taxation*, Series on International Taxation (Kluwer L. Intl. 2014).
168. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 1787.
169. Id., at para. 1788 (footnotes omitted).
170. *Occidental v. Ecuador* (2012), *supra* n. 147, at para. 404.
171. Id., at para. 403.

© IBFD

patible with the principle of proportionality.[172] For this reason, the ECJ considered a mechanical application of predetermined general criteria equally inadmissible.[173] In the words of the ECJ in *Eqiom and Enka* (Case C-6/16):

> The imposition of a general tax measure automatically excluding certain categories of taxpayers from the tax advantage, without the tax authorities being obliged to provide even prima facie evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse.[174]

The second illustrative example concerns the consequences triggered by the finding of an abusive practice. According to the ECJ, these consequences must equally comply with the principle of proportionality.[175] In *Halifax* (Case C-255/02), the ECJ held that it:

> follows that transactions involved in an abusive practice must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice.[176]

This principle was later confirmed on numerous occasions, for example, recently in *Weald Leasing* (Case C-103/09)[177] and in *Cussens* (Case C-251/16).[178] As observed by the ECJ, the rationale of this approach is clear:

> a finding of abusive practice must not lead to a penalty, for which a clear and unambiguous legal basis would be necessary, but rather to an obligation to repay, simply as a consequence of that finding.[179]

On this point, the finding of the ECJ bears similarities with that in the *Occidental* award: "any penalty the State chooses to impose must bear a proportionate relationship to the violation which is being addressed and its consequences".[180]

We appreciate that the application of the principle of proportionality – especially in cases involving direct taxation measures – raises a series of additional questions, including the standard of the arbitral review[181] and, relatedly but more generally, whether a proportionality assessment conducted by investment arbitrators would not over-empower them.[182] At the same time, however, the relevance of the principle of proportionality as a general principle of law cannot be ignored.

4.4. Tax treaty measures and the relevance of the Commentaries on the OECD Model and the UN Model

Finally, another and last element that can ensure complementarity and coherence between the investment arbitration realm and international tax law is the relevance of the Commentaries on the OECD Model and the UN Model in relation to treaty measures whose application may be at issue in a tax-related investment dispute. In this regard, the following distinction should be drawn.

First, the Commentaries on the OECD Model and the UN Model would be of assistance, indeed, in determining or elucidating the proper application of tax treaty law notions in such circumstances. While the status of the OECD and UN Commentaries under the Vienna Convention (1969) may be perceived differently from one jurisdiction to another (i.e. from primary[183] to supplementary means of interpretation),[184] there is an international consensus on the fact that the commentaries are of "high persuasive value",[185] have "worldwide recognition",[186] represent a "a widely-accepted guide to the interpretation and application of the provisions of existing bilateral conventions...",[187] and, therefore, should play an effective role in the interpretation of tax treaties based on the principles of "logic and good sense".[188]

172. FR : ECJ, 7 Sept. 2017, Case C-6/16, *Eqiom SAS, formerly Holcim France SAS, Enka SA v. Ministre des Finances et des Comptes publics* paras. 29-32, Case Law IBFD: "The question then arises whether national tax legislation, such as that at issue in the main proceedings, satisfies that requirement of necessity (…). Therefore, a general presumption of fraud and abuse cannot justify either a fiscal measure which compromises the objectives of a directive (…). In order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying predetermined general criteria but must carry out an individual examination of the whole operation at issue." *See also*, generally, Danon et al., *supra* n. 21, sec. 2.3.
173. Id., at para. 32.
174. Id.
175. *See*, generally, Danon et al., *supra* n. 21, sec. 2.5.1.
176. UK: ECJ, 21 Feb. 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise, BUPA Hospitals Ltd, Goldsborough Developments Ltd v. Commissioners of Customs and Excise and University of Huddersfield Higher Education Corporation v. Commissioners of Customs and Excise* para. 94, Case Law IBFD.
177. UK: ECJ, 22 Dec. 2010, Case C-103/09, *The Commissioners for Her Majesty's Revenue & Customs v. Leasing Limited para. 51*, Case Law IBFD.
178. IE: ECJ, 22 Nov. 2017, Case C-251/16, *Edward Cussens, John Jennings, Vincent Kingston v. T.G. Brosnan* para. 46, Case Law IBFD.
179. *Halifax* (C-255/02), *supra* n. 176, at para. 93
180. *Occidental v. Ecuador* (2012), *supra* n. 147, at para. 416
181. *See* Reinisch & Schreuer, *supra* n. 108, at p. 345.
182. Compare B. Kingsbury & S.W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, Intl. Instit. L. & J. Working Paper 2009/6 p. 22 (2009), Global Administrative Law Series.
183. Art. 31 *Vienna Convention* (1969).
184. Id., at art. 32.
185. *See* the decision of the Supreme Court of Canada (SCC) in CA: SCC, 22 June 1995, *Crown Forest Industries Ltd. v. Her Majesty the Queen*, Case No. 23940, para. 52, Case Law IBFD.
186. *See* CA: FCA, 26 Feb. 2009, *Prévost Car Inc. v. The Queen*, para. 10, A-252-08, 11 ITLR 767, Case Law IBFD.
187. Id.
188. D.A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* pp. 111-112 (IFA/IBFD 2005). *See also* para. 29 of the Introduction, *OECD Model* (2017), which reads: "Although the Commentaries are not designed to be annexed in any manner to the conventions signed by member countries, which unlike the Model are legally binding international instruments, they can nevertheless be of great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes". A distinction should however be drawn between the OECD commentaries in force at the time of the conclusion of a tax treaty and those adopted subsequently. The introduction to the OECD MC mentions that: "changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions (…)" (*OECD Model: Introduction* (2017), para. 35). However, according to an overwhelming majority of commentators, this position does not apply to changes made to the OECD commentaries that do not simply clarify the interpretation of a tax treaty notion but rather reverse the previous interpretation. *See* in this regard among others K. Vogel, *Influence of the OECD Commentaries*, p. 615; Vogel, ; Vogel, *supra* n. 19, at p. 46, para. 82a; M. J. Ellis, *The Influence of the OECD Commentaries on Treaty Interpretation – Response to Prof. Dr Klaus Vogel*, 54 Bull. Int'l Tax'n 12 (2000) p. 617, at p. 618; H.J. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, 22 Intertax 4 (1994) p. 144, at p. 148; P.J. Wattel & O. Marres, *The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties*,

Moreover, as mentioned in the Introduction to the OECD Model, "taxpayers make extensive use of the Commentaries in conducting their businesses and planning their business transactions and investments".[189] In a recent judgment, the Swiss *Bundesgericht/Tribunal fédéral* (Federal Supreme Court, BGer/TF) even held that the Commentaries on the OECD Model were analogous to "relevant rules of international law applicable in the relations between the parties" within the meaning of article 31(3)(c) of the Vienna Convention (1969).[190] In the words of the American Law Institute (ALI):

> it would be wholly unrealistic to disregard the OECD Model and its accompanying Commentary in judging what should properly be included in a treaty or in ascertaining what treaty provisions mean. A country should depart from the internationally accepted policies embodied in the OECD Model only for strong reasons.[191]

The second question is whether, and to what extent, the Commentaries on the OECD Model and the UN Model can be relied on as relevant extrinsic material for purposes of giving content to the FET standard. One objection that might be raised *prima facie*, in this respect, is that treaties generally regulate state-to-state affairs, and, therefore, offer limited guidance as to the particularities of the relationship between an investor and a state, with which the FET standard is concerned.[192] As was observed in section 2., however, this objection is not justified with regard to tax treaties, which apply and grant benefits to persons.[193] The position of a taxpayer under a tax treaty, therefore, presents some structural similarities with that of an investor under an IIA. Moreover, the parties to an IIA would generally have a treaty network based on the OECD Model and/or the UN Model.

Consequently, in the interpretation of the FET standard, it appears appropriate to take the Commentaries on the OECD Model and the UN Model into consideration to the extent they express or give content to a general principle of law, which – also on its own – is relevant to the interpretative exercise under article 31(3)(c) of the Vienna Convention (1969).[194] This is the case, for example, where the OECD and the UN Commentaries rely explicitly or implicitly on the principle of good faith as a benchmark to determine the proper application of tax treaty law.

A first example is the situation in which a taxpayer is denied the application of a tax treaty on the ground of a purported abuse but on the basis of an interpretation which is not supported by the principle of good faith and the so-called "guiding principle" provided by the Commentaries on the OECD Model and the UN Model.[195]

A second example is that of changes made by a state to its domestic tax legislation which have the effect of circumventing or switching off its treaty obligations in a way that is not compatible with the principle of good faith ("tax treaty dodging").[196] As observed in 2006 by the UN Committee of Experts on International Cooperation in Tax Matters (the "UN Committee"), a state acting in this fashion may "cause significant damages to the legiti-

43 Eur. Tax'n. 7 (2003) p. 222, at p. 235; J.F. Avery Jones, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, 56 Bull. Int'l Tax'n 3 (2002) p. 102, at p. 103; K. Vogel & A. Rust, *Introduction*, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer, A. Rust eds., *Kluwer Law International*) para. 106 as well as para. 36 *in fine*, *OECD Model: Introduction* (2017).

189. Para. 29.2, *OECD Model: Introduction* (2017).
190. CH: BGer/TF, 3 Nov. 2017, Judgment 2C_201/2016, Case Law IBFD, also reported in BGE/ATF 144 II 130, 140 para. 8.2.2. In a series of judgments, notably in TR: ECtHR, 12 Nov. 2008, *Demir and Baykara v. Turkey*, Application No. 34503/97, para. 74, the ECtHR has also supported the use of non-binding instruments.
191. ALI, *Report* (1992), International Aspects, at pp. 3 and 4.
192. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 1714.
193. Art. 1 *OECD Model* (2017) and the *UN Model* (2017).
194. In the same vein, *see* Kokott, Pistone & Miller, *supra* n. 146, at pp. 390 and 391.
195. *See* para. 61 *OECD Model: Commentary on Article 1* (2017), which reads: "It is important to note, however, that it should not be lightly assumed that a taxpayer is entering into the type of abusive transactions referred to above. A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions". This guiding principle has a dual role. On the one hand, the principle regulates the denial of benefits on the basis of "the object and purpose of tax conventions as well as the obligation to interpret them in good faith (*see* Article 31 of the Vienna Convention on the Law of Treaties)" (*see* para. 59 *OECD Model: Commentary on Article 1* (2017)). On the other hand, the principle also serves as a threshold with which contracting states are to comply when relying on domestic anti-avoidance rules in order to set aside a tax treaty (*see* para. 58 *OECD Model: Commentary on Article 1* (2017)). As an interpretative tool, the guiding principle does not, however, support the denial of treaty benefits beyond the treaty wording understood in its context, object and purpose (*see* art. 31 *Vienna Convention* (1969)). With regard to post-BEPS tax treaties, the question is whether a domestic anti-avoidance rule complies with the PPT (*see* art. 29(9) *OECD Model* (2017) and the *UN Model* (2017)) as a minimum standard (*see further* thereupon Danon et al., *supra* n. 21).
196. *See* para. 13 *OECD Model: Commentary on Article 3* (2017), which reads: "a State should not be allowed to make a convention partially inoperative by amending afterwards in its domestic law the scope of terms not defined in the Convention". In this context, *see* the decision of the *Cour d'Appel Bruxelles* (Court of Appeal of Brussels, Cd'A Bruxelles, in BE: Cd'A Bruxelles, 15 Feb. 2002, FJF, 2002/109, affirmed by the decision of the *Hof van Cassatie/Cour de Cassation* (Supreme Court, HvC/CdC) in BE: HvC/CdC, 5 Dec. 2003, FJF, 2004/64; the decision of the *Hoge Raad* (HR)] in NL: HR, 18 Nov. 2016, *X v. State Secretary for Finance* (Fictitious Wage 3), 20 ITLR 125; Vogel, *supra* n. 19, at p. 65, m.no. 125b; K. Vogel & A. Rust, *Introduction*, in *Klaus Vogel on Double Taxation Conventions*, m.no. 149 (4th ed., E. Reimer & A. Rust eds., Kluwer L. Intl. 2015); J.F. Avery Jones, *Treaty Interpretation – Global Tax Treaty Commentaries* sec. 4.6., Global Topics IBFD; F.A. Engelen, *Interpretation of Tax Treaties under International Law*, sec. 10.10.4.6., p. 502 (IBFD 2004), Books IBFD; L. De Broe, *International Tax Planning and Prevention of Abuse: A Study under Domestic Tax Law, Tax Treaties and EC Law in relation to Conduit and Base Companies* pp. 272-273 (IBFD 2008), Books IBFD; C. De Pietro, *Tax Treaty Override* pp. 216 and 217 (Kluwer L. Intl. 2014); J. Wouters & M. Vidal, *The International Law Perspective*, in *Tax Treaties and Domestic Law* sec. 1. (G. Maisto ed., IBFD 2006), Books IBFD; E. van der Bruggen, *State Responsibility under Customary International Law in Matters of Taxation and Tax Competition*, 29 Intertax 4, p. 127 (2001); and Danon, *supra* n. 23, at sec. 4.

 © IBFD

mate financial interests of taxpayers".[197] Recent scholarly writing also considers tax treaty dodging may give rise to a breach of the FET standard.[198]

A third example would be the denial of access to a MAP in bad faith. Here, the global minimum standard provided by BEPS Action 14 and forming part of the Commentaries on the OECD Model (2017) and the UN Model (2017) would be of particular assistance. Reaffirming what may already be derived from the principle of good faith and the proper interpretation of tax treaty law, the OECD and the UN Commentaries (2017) emphasize that:

> The undertaking to resolve by mutual agreement cases of taxation not in accordance with the Convention is an integral part of the obligations assumed by a Contracting State in entering into a tax treaty and must be performed in good faith. In particular, the requirement in paragraph 2 that the competent authority "shall endeavour" to resolve the case by mutual agreement with the competent authority of the other Contracting State means that the competent authorities are obliged to seek to resolve the case in a fair and objective manner, on its merits, in accordance with the terms of the Convention and applicable principles of international law on the interpretation of treaties.[199]

Approaching the role of the Commentaries on the OECD Model and the UN Model from this angle, as well as in investment treaty cases, would not only be in line with the principle of systemic integration. Such an approach would also contribute to a more unified understanding of treaty notions and taxation matters in both fields.

5. A Systemic and Policy Perspective: Should Tax-Related Investment Disputed Be Carved Out from the FET Standard?

The foregoing analysis has shown that globally accepted standards can well be referred to by investment tribunals when determining what constitutes fair and equitable taxation. Thereby, a harmonious interpretation between the investment treaty protection regime and international tax standards can be ensured. At the same time, the FET standard also provides a possibility to enforce international tax standards, reflecting general principles of law.

As indicated at the outset of this contribution, however, there is a growing trend to include tax carve-out provisions in IIAs. The trend also encompasses the FET standard, while tax measures often remain subject to the expropriation standard[200] (subject, as the case may be to a "tax filter/veto mechanism").[201]

Therefore, and in light of the possibility for harmonious interpretation set out in this article, the question arises whether excluding tax-related investment disputes from the scope of the FET standard is a sensible policy choice. In *Cairn*, the tribunal considered that "guarantees of fairness of the taxation regime are in line with the objective of encouraging more foreign investment. Interpreting the BIT so as to exclude tax-related measures from its scope of application (…) would not be in line with the treaty's object and purpose".[202] Equally, from a systemic perspective, a tax carve-out applying to the FET standard represents a fundamental exception to the system of investment protection. There does not appear to be a systemic reason, for example, why the arbitrary conduct of a State in taxation matters should be excluded from the scope of the FET standard, while arbitrary treatment is subject to the FET standard in other regulatory fields.

Such a carve-out is even more problematic because it is then not only confined to measures governed by tax treaties (which then at least remain subject to a MAP between the contracting States) but also to those purely rooted in domestic tax law, which may also apply in the absence of any tax treaty obligation. Carving-out such instances from the application of the FET standard means that potentially no international review of these domestic measures is available anymore – even though they may well be in violation of general principles of law embodied in international tax standards.

Given the potential of alignment of the FET standard with globally accepted international tax benchmarks, this outcome is not desirable from a policy perspective. It leads to an unnecessary separation between the investment and the international tax system which undermines global tax fairness. As a consequence, a carve-out clause that includes the FET standard is not sensible where it is possible to align FET with international tax standards. Of course, going forward, this approach requires a more important dialogue between both fields.

Moreover, this conclusion inevitably also means that an FET carve-out might still be a sensible policy choice in selected instances, in particular where a possibility of harmonious interpretation of tax and investment law appear impossible.[203] This could be the case in situations in which the carve-out seeks to ensure that the FET standard (or, for example, a national treatment standard) does not prevent the host state from enforcing principles that are intrinsically linked to most tax systems. We have in mind for example the distinction between residents and non-residents or the imposition of final withholding taxes in cross-border situations and/or on a gross basis.[204] In

197. UN Committee, Second session, Geneva, 30 Oct. – 3 Nov. 2006, *Treaty Abuse and Treaty Shopping*, E/C.18/2006/2, para. 10.
198. *See*, recently, V. Arruda Ferreira, *The Improper Use of Tax Treaties by Contracting States: Tax Treaty Dodging from the Perspective of International Law*, at sec. 4.2.7., p. 205 (IBFD 2021), Books IBFD.
199. Para. 5.1 *OECD Model: Commentary on Article 25* (2017).
200. *See*, generally, Davie, *supra* n. 8, at pp. 216-217.
201. Wälde & Kolo, *supra* n. 52, at pp. 446 and 447. *See*, for example, article 21 of the *US Model Bilateral Investment Treaty* (2012), available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (accessed 16 Nov. 2021) [hereinafter the *US Model BIT* (2012)] and thereon L.M. Caplan & J. Sharpe, *United States* in *Commentaries on Selected Model Investment Treaties*, p. 850 (C. Brown ed., Oxford U. Press 2013), at para. 798; article 11 (4)-(5) of the *Canadian Model FIPA* (2021); article 21 (5) of the Energy Charter Treaty (1994), 2080 UNTS 100.
202. *Cairn Energy v. India* (2020), *supra* n. 1, at para. 798.
203. The need for such coordination in fact already arises within the international tax system itself, where, for example, the development of new international tax standards may conflict with existing tax treaty obligations. On this topic *see* V. Chand, A. Turina & K. Romanovska, *Tax Treaty Obstacles in Implementing the Pillar Two Global Minimum Tax Rules and a Possible Solution for Eliminating the Various Challenges*, World Tax J. (forthcoming).
204. *See* Pistone, *supra* n. 76, at sec. 1.5.2; UN Committee of Experts on International Cooperation in Tax Matters Eighteenth session, 8 April 2019,

© IBFD

these instances, the policy could be sensible as the carve-out may be regarded as a way of ensuring the consistency between the investment treaty regime and taxation systems.

Outside of the realm of FET, similar considerations should be applied to other IIA standards. For instance, a carve-out excluding the benefits of more favourable tax treaties from the scope of the most-favoured treatment standard may also be desirable.[205] This latter exclusion ensures the consistency with tax treaty policy based on the OECD MC.[206] An analysis of the foregoing problems is, however, beyond the scope of this study and requires further research.

6. Concluding Remarks and Lessons for Tax Treaty Interpretation

This contribution has advanced the position that a more harmonious vision of the international investment and tax systems is not only desirable but also possible, starting from the premise that "guarantees of fairness of the taxation regime are in line with the objective of encouraging more foreign investment".[207] The international tax system, which seeks to promote foreign investment, should integrate rather than exclude the investment treaty regime[208]. Since tax treaties and IIAs govern different subjects matters, they are complementary in nature, while, at the same time, contributing to the same underlying policy objective of economic growth. In this regard, the comparative public law analysis increasingly relied upon by arbitral tribunals and scholars in the investment arbitration realm supports an interpretation of the FET standard that is line with international tax standards agreed upon at a multilateral level (notably between the members of the IF).

In other words, where appropriate, reference is to be made to globally accepted tax standards for purposes of determining what constitutes fair and equitable taxation by the host State. One such example is the use of the OECD Commentaries to the MCs in instances in which they refer or give content to a general principle of law (for instance the principle of good faith) as a benchmark to determine the proper application of tax treaty law. The advantage of this approach is that it addresses, in a coherent fashion, the current interplay between taxation measures and a vast majority of IIAs not excluding such measures from the FET standard's scope.

In our opinion, the merits of this approach should also be borne in mind by policy makers and treaty negotiators when deciding whether, and if so to what extent, taxation measures should be carved-out from the scope of IIAs. Still, we could certainly conceive that such carve-outs may be necessary in selected instances, in particular where they are designed to ensure cross-regime consistency between the IIA and tax treaty regimes as well as general principles intrinsically linked to tax systems.

This contribution has, however, also highlighted a second aspect of the debate triggered by IIAs and taxation measures, namely the ability for the international tax system itself to provide for effective dispute resolution mechanisms. This question is certainly not new but has been indirectly exacerbated by the increased relevance of investment arbitration to deal with tax-related disputes. While BEPS Action 14 has significantly improved the MAP, it continues to be a state-to-state relationship, with taxpayers having no formal standing at the international level. Moreover, a large number of countries continues to object to mandatory arbitration, which, in any event, does not place the taxpayer in a position comparable to that of an investor in an investment arbitration. Under these circumstances, it is easy to understand that the pressure to improve the international tax dispute resolution framework from the perspective of taxpayers' rights will continue. That pressure may in fact materialize through an increased number of tax-related investment arbitration cases. Given that tax treaties undoubtedly confer benefits to taxpayers, who find themselves in a position that is thus structurally similar to that of investors under IIAs, a possible future path to explore would be for the international tax dispute resolution framework to draw inspiration from the rights granted to investors under IIAs.[209]

Finally, we wish to end this contribution with an observation that there might be a lesson to be drawn from the perspective of tax treaty interpretation. As this contribution has shown, the principle of systemic integration enshrined in article 31(3)(c) Vienna Convention (1969) is duly taken into account by arbitral tribunals when interpreting an IIA. This approach has the advantage of considering treaty interpretation within the broader framework

E/C.18/2019/CRP.14, Relationship of tax treaties with trade and investment treaties, at para. 61; UN Committee of Experts on International Cooperation in Tax Matters Twenty-third session, 4 October 2021, Relationship of tax, trade and investment agreements, E/C.18/2021/CRP.36, N 12; *See* also in this regard UNCTAD, *supra* n. 73, at p. 23. A similar problem arises under EU law, *see* in this regard DE: ECJ, 3 Oct. 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel*, Case Law IBFD and, very recently, the infringement procedure initiated against Spain on the basis of free movement of capital (art. 56 TFEU) with respect to a withholding tax levied on the gross amount of royalty payments without the possibility to deduct directly related expenses (*see* https://ec.europa.eu/commission/presscorner/detail/en/inf_21_5342); *see also* DK: ECJ, 21 June 2018, C-480/16, *Fidelity Funds, Fidelity Investment Funds, Fidelity Institutional Funds v Skatteministeret*, Case Law IBFD, FI: ECJ, 18 Dec. 2008, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy*, Case Law IBFD, FR: ECJ, 10 May 2012, Cases C-338/11 and C347/11, *Santander Asset Management SGIIC SA v. Directeur des residents à l'étranger et des services généraux*, Case Law IBFD, and PL: ECJ, 10 Apr. 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company v Dyrektor Izby Skarbowej w Bydgoszczy*, Case Law IBFD; compare with art. 24 (1) OECD MC allowing by contrast a different treatment to be applied to taxpayers who are not "in the same circumstances, in particular with respect to residence"; *see* para. 7 *OECD Model: Commentary on Article 24* (2017) and, in relation to art. 24(5) OECD Model, para. 78 *OECD Model: Commentary on Article 24* (2017): "it follows that withholding tax obligations that are imposed on a resident company with respect to dividends paid to non-resident shareholders but not with respect to dividends paid to resident shareholders cannot be considered to violate paragraph 5".

205. Concurring Gildemeister, *supra* n. 76, at pp. 279-280; UN Committee of Experts, 8 Apr. 2019, *supra* n. 204, at para. 61; UN Committee of Experts, 4 October 2021, *supra* n. 204, para. 12.
206. *See* para. 2 *OECD Model: Commentary on Article 24* (2017).
207. *Cairn Energy v. India*, *supra* n. 1, para. 798.
208. In the same vein, *see* Kokott, Pistone & Miller, *supra* n. 146, at p. 389.
209. In the same vein, Pistone, *supra* n. 76, at sec. 1.1.1.

 © IBFD

of the international legal system and, notably, to arrive at an outcome that is also consistent with other treaty obligations. By contrast, when interpreting tax treaties, domestic courts do not traditionally pay much attention to the principle of systemic integration. Rather, it is fair to say that the focus is limited to the interpretation of the tax treaty itself and to the use of the OECD commentaries in the vast majority of cases. At the same time, however, no one disputes that the principle of systemic integration is of course equally applicable to the interpretation of tax treaties.[210] In *Cairn*, the tribunal found that a tax treaty "indisputably contains rules of international law applicable between the Parties to the BIT".[211] The opposite is undoubtedly true: an IIA may contain rules that are applicable to the parties to a tax treaty. Therefore, tax treaty interpretation should in the future also give consideration to the principle of systemic integration – both in relation to IIAs specifically but generally also in relation to general principles of law.[212]

A relevant example is the interpretation by a domestic court of the right of a taxpayer to access a MAP within the meaning of article 25(1) OECD Model. Following the principle of systemic integration, this right should be interpreted in a way that is compatible with the substantive IIA standards of protection, where applicable, notably the FET standard. The outcome of the interpretative exercise could confirm the principles derived from BEPS Action 14 (i.e. in particular that the taxpayer should not be denied access to a MAP in bad faith). The difference, however, is that this outcome would then flow from a primary means of interpretation of the tax treaty, the principle of systemic integration.

210. Engelen, *supra* n. 195, at sec. 10.7, p. 436; L. De Broe, *Should Courts in EU Member States Take Account of the ECJ's Judgment in the Danish Beneficial Ownership Cases When Interpreting the Beneficial Ownership Requirement in Tax Treaties?*, in *Current Tax Treaty Issues. 50th Anniversary of the International Tax Group* (G. Maisto ed., IBFD 2020), at sec. 16.2.1, p. 681; F. Avella, *Using EU Law To Interpret Undefined Tax Treaty Terms: Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 3(2) of the OECD Model Convention* 4 World Tax J. 2 (2012) 95; Avery Jones, *supra* n. 195, sec. 3.4.8.

211. *Cairn v. India*, *supra* n. 1, para 808.

212. In the same vein, *see* Kokott, Pistone & Miller, *supra* n. 146, at p. 394 noting generally that: "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".

IBFD, Your Portal to Cross-Border Tax Expertise **www.ibfd.org**

Online Collection – Global Tax Treaty Commentaries: Authored by world-class academics and tax professionals, this collection of commentaries provides a rich tapestry of information about the OECD Model and tax treaties.

Publications: IBFD's innovative books and publications, written by renowned academics, cover a wide range of taxation topics.

Advanced Master's in International Tax Law: With the cooperation of the University of Amsterdam, this unique, challenging, full-time programme offers a thorough grounding in international tax law.

Academic Activities: Conferences and meetings with speakers who are highly specialized in their fields provide a platform for critical discussion on current topics in international, European and comparative taxation.

Read more about IBFD Academic or sign up to the newsletter: www.ibfd.org/ibfd-academic

Contact us
IBFD Head Office Rietlandpark 301 1019 DW Amsterdam
P.O. Box 20237 1000 HE Amsterdam The Netherlands
Tel.: +31-20-554 0100 (GMT+1) **Email:** academic@ibfd.org **Sales:** sales@ibfd.org
Online: www.ibfd.org www.linkedin.com/company/ibfd @IBFD_on_Tax

2021_2

© IBFD