

Jeroen Lammers

The Spirit of International Tax Law and International Corporate Tax Reform

IBFD DOCTORAL SERIES

76

The Spirit of International Tax Law and International Corporate Tax Reform

Why this book?

The premise of this book is the Babylonian confusion around the spirit of international tax law and the lack of comprehensive research on the topic. While most appear to believe that the spirit should be equated with the intent or purpose of the law, there are many examples of corporate taxpayers who act within the object and purpose of positive law but not in line with the broadly shared expectation of what is fair in society.

This study defines the spirit of international tax law and proposes how it can contribute to making the international corporate tax system more robust through a multidisciplinary approach. The book examines the role of morality in legal philosophy, as well as how morality may affect the interpretation of legal rules. Furthermore, it considers how the OECD/G20 Inclusive Framework's work relates to the development of political morality vis-à-vis international tax. Moreover, a comprehensive longitudinal discourse analysis substantiates the analysis.

It is identified that, in the public debate, the spirit of international tax law takes on three distinct meanings: (i) the purpose of the law or intention of the legislator; (ii) the evolving political morality that may not yet have crystalized in positive law; and (iii) personal moral preferences. The second meaning is deemed the best way to define the spirit of international tax law.

These findings raise awareness regarding the type of arguments used in the public debate and help to assign a certain objective weight to them. Moreover, the study demonstrates that efficiency and tax revenue effects are currently the dominant policy concerns regarding changes in international tax standards, while concerns about fairness are routinely placed in the background. It is contended that this fundamental hierarchy in policy concerns effectively blocks fundamental tax reform. A repurposing of the spirit of international tax law that transforms it from an implicit and abstract notion of fairness and fiscal virtuous behaviour into explicit, concrete and ambitious policy goals of the international tax system could lift such a blockade.

Title:	The Spirit of International Tax Law and International Corporate Tax Reform
Date of publication:	December 2024
ISBN:	978-90-8722-926-9 (print), 978-90-8722-928-3 (PDF), 978-90-8722-927-6 (e-pub)
Type of publication:	Book
Number of pages:	486
Terms:	Shipping fees apply. Shipping information is available on our website.
Price (print/online):	EUR 120 USD 145 (VAT excl.)
Price (eBook: e-Pub or PDF):	EUR 96 USD 116 (VAT excl.)

Order information

To order the book, please visit www.ibfd.org/shop/book. You can purchase a copy of the book by means of your credit card, or on the basis of an invoice. Our books encompass a wide variety of topics, and are available in one or more of the following formats:

- IBFD Print books
- IBFD eBooks – downloadable on a variety of electronic devices
- IBFD Online books – accessible online through the IBFD Tax Research Platform

The Spirit of International Tax Law and International Corporate Tax Reform

The Spirit of International Tax Law and International Corporate Tax Reform

Jeroen Lammers

This book is based on the thesis submitted for a doctoral
degree at the University of Amsterdam



Volume 76
IBFD Doctoral Series

IBFD

Visitors' address:
Rietlandpark 301
1019 DW Amsterdam
The Netherlands

Postal address:
P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Telephone: 31-20-554 0100
Email: info@ibfd.org
www.ibfd.org

© 2024 IBFD

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the written prior permission of the publisher. Applications for permission to reproduce all or part of this publication should be directed to: permissions@ibfd.org.

Disclaimer

This publication has been carefully compiled by IBFD and/or its author, but no representation is made or warranty given (either express or implied) as to the completeness or accuracy of the information it contains. IBFD and/or the author are not liable for the information in this publication or any decision or consequence based on the use of it. IBFD and/or the author will not be liable for any direct or consequential damages arising from the use of the information contained in this publication. However, IBFD will be liable for damages that are the result of an intentional act (*opzet*) or gross negligence (*grove schuld*) on IBFD's part. In no event shall IBFD's total liability exceed the price of the ordered product. The information contained in this publication is not intended to be an advice on any particular matter. No subscriber or other reader should act on the basis of any matter contained in this publication without considering appropriate professional advice.

IBFD and/or the author cannot be held responsible for external content, broken links or risks within the external websites that are referenced as hyperlinks within this publication.

Where photocopying of parts of this publication is permitted under article 16B of the 1912 Copyright Act jo. the Decree of 20 June 1974, Stb. 351, as amended by the Decree of 23 August 1985, Stb. 471, and article 17 of the 1912 Copyright Act, legally due fees must be paid to Stichting Reprorecht (P.O. Box 882, 1180 AW Amstelveen). Where the use of parts of this publication for the purpose of anthologies, readers and other compilations (article 16 of the 1912 Copyright Act) is concerned, one should address the publisher.

ISBN 978-90-8722-926-9 (print)
ISBN 978-90-8722-927-6 (eBook, ePub); 978-90-8722-928-3 (eBook, PDF)
ISSN 1570-7164 (print); 2589-9619 (electronic)
NUR 826

Table of Contents

Acknowledgments		xi
Chapter 1: Introduction		1
1.1.	Research questions	4
1.2.	Methodology	5
1.3.	Overview of the book	6
Part 1		
Defining the Spirit of International Tax Law		
Chapter 2: Morality in the Concept of Law		17
2.1.	Vague concepts and philosophy	18
2.2.	The concept of law	22
2.2.1.	Legal theories in legal philosophy	23
2.2.1.1.	Natural law theories	25
2.2.1.2.	Legal positivism	29
2.2.1.3.	Dworkin's theory of law	38
2.3.	Intermediate conclusions	44
Chapter 3: Perspectives on Morality in Political Philosophy		51
3.1.	Utilitarianism	52
3.2.	Rawls' theory of justice	56
3.3.	Nozick's Anarchy, State, and Utopia	61
3.4.	Closing remarks	64

Chapter 4:	Morality in Legal Interpretation	65
4.1.	The interpreter's moral values	67
4.1.1.	Understanding moral language through metaethics	71
4.1.1.1.	Moral facts do not exist	72
4.1.1.2.	Moral facts exist	73
4.1.1.2.1.	Moral absolutism	73
4.1.1.2.2.	Moral relativism	75
4.1.2.	Moral convictions and the concept of law	76
4.1.3.	Morality in general principles of law	77
4.1.3.1.	Principles of tax law	81
4.1.3.2.	Reconciling competing legal principles	83
4.2.	Converging legal cultures	87
4.2.1.	Civil law and common law cultures	89
4.2.1.1.	Different but similar	90
4.2.1.2.	Tax law is statutory law	95
4.2.1.3.	Globalization and digitalization	97
4.3.	Legislative intent and purpose	101
4.3.1	Intentionalists versus purposivists	108
4.3.2.	The assumption of reasonable intent	111
4.3.3.	The fiction of remedial effect	112
4.3.4.	A practical experiment: Fairness in parking regulations	119
4.4.	Intermediate conclusions	125
Chapter 5:	Morality in International Tax Law	131
5.1.	International law	131
5.2.	International tax law	133
5.3.	Sources of international tax law	136
5.3.1.	International conventions	137
5.3.2.	International custom	143
5.3.3.	General principles of law recognized by civilized nations	150
5.3.4.	Subsidiary means for the determination of rules of law	153

5.4.	The holistic approach	154
5.4.1.	International tax policy versus national tax revenue	164
5.4.2.	Should states consider justice and fairness?	171
5.4.2.1.	Statist versus cosmopolitan viewpoints	172
5.4.2.2.	Between statism and cosmopolitanism	175
5.4.2.3.	Views on how to distribute between states	177
5.4.3.	Justice for all	181
5.4.4.	Mechanisms blocking socially optimal outcomes	186
5.4.4.1.	International tax neutrality	188
5.5.	Intermediate conclusions	191
Chapter 6:	Defining the Spirit of International Tax Law	197
6.1.	Morality is part of the concept of law	197
6.2.	Only widely held moral convictions are part of the concept of law	199
6.3.	Widely held moral convictions in international tax law	201
6.4.	Ways to view the spirit of international tax law	204
6.5.	Defining the spirit of international tax law	210
Part 2		
Discourse Analysis		
Chapter 7:	Introduction	217
Chapter 8:	Analysis of Official OECD and EU Publications	221
8.1.	International exchange of information	221
8.1.1.	OECD Standard Magnetic Format	222
8.1.2.	Model agreement on exchange of information on tax matters	223
8.1.3.	The US foreign account tax compliance act	224
8.1.4.	Automatic exchange of information at the OECD	225
8.1.5.	Automatic exchange of information in the European Union	228

8.1.5.1.	Mutual assistance directive	229
8.1.5.2.	The EU Savings Directive	229
8.1.5.3.	Directives on administrative cooperation (DAC1-DAC7)	230
8.2.	Harmful tax competition	236
8.2.1.	The EU Code of Conduct for Business Taxation	243
8.2.1.1.	Extending the code's application beyond the European Union	246
8.2.1.2.	Reforming the Code of Conduct	248
8.3.	OECD/G20 Base Erosion and Profit Shifting Project	250
8.3.1.	The OECD/G20 BEPS Action Points	253
8.3.2.	The EU anti-tax avoidance actions	263
8.4.	Addressing the challenges of the digitalized economy	273
8.4.1.	Addressing tax challenges of the digitalization of the economy in the European Union	286
8.5.	Intermediate conclusions	294
Chapter 9:	Media Analysis	301
9.1.	Theories on newsworthiness	301
9.2.	Theories on media strategies	303
9.3.	Overview of media coverage of tax avoidance	306
9.4.	Analysis of media coverage of corporate tax avoidance	310
9.4.1.	Pre-BEPS (2004-2012)	310
9.4.1.1.	Reporting on government	312
9.4.1.2.	Reporting on non-governmental organizations	314
9.4.1.3.	Reporting on business	317
9.4.1.4.	Concluding observations on the pre-BEPS period	319
9.4.2.	Designing BEPS (2013-2015)	321
9.4.2.1.	Reporting on government	324
9.4.2.2.	Reporting on non-governmental organizations	331
9.4.2.3.	Reporting on business	333
9.4.2.4.	Concluding observations on the designing BEPS period	335

9.4.3.	Post-BEPS and BEPS 2.0 (2016-2021)	337
9.4.3.1.	Reporting on government	340
9.4.3.2.	Reporting on non-governmental organizations	347
9.4.3.3.	Reporting on business	350
9.4.3.4.	Concluding observations on the post-BEPS and BEPS 2.0 period	352
9.5.	Google Trends data	354
9.5.1.	Concluding observations on the Google Trends data	360
Chapter 10:	Conclusions from the Discourse Analysis	363
Part 3		
Conclusions and Recommendations		
Chapter 11:	Conclusions and Recommendations	375
11.1.	The spirit of international tax law defined	377
11.2.	The discourse on the spirit of international tax law	379
11.3.	The spirit of international tax law and future tax reform	382
11.3.1.	Recalibrating the political narrative	387
11.3.2.	From inter-nation equity to a mission-oriented moon-shot	387
11.3.3.	From effective tax rates to achieving an actual level-playing field	392
11.3.4.	From tax mix to tax incidence	393
11.4.	In closing	398
References		401

Acknowledgments

This book represents the culmination of a journey that would not have been possible without the support and guidance of many remarkable individuals and institutions.

First and foremost, I extend my deepest gratitude to my supervisors, Professor Stef van Weeghel and Professor Allison Christians, for their unwavering support, insightful guidance and invaluable feedback throughout my doctoral research. Their expertise and encouragement have been indispensable.

I am also indebted to the members of my assessment committee, Professor Otto Mares, Professor Dennis Weber, Professor Sjoerd Douma, Professor Stephen Shay, Dr Cees Peters and Professor Tsilly Dagan, for their thoughtful critiques and constructive suggestions, which greatly supported and improved this book.

My sincere thanks go to the University of Amsterdam, where I had the privilege of receiving my doctorate. The resources and opportunities provided by the university were crucial to the development of this work. I also wish to express my deep appreciation to the Copenhagen Business School for hosting me as a visiting scholar; the time spent there enriched my perspective and research. Without their generous hospitality, completing this project would not have been possible.

I am very grateful to IBFD for their belief in this project and for bringing this book to publication. I am honoured that this book is included in the IBFD Doctoral Series. The professionalism and dedication of their team have made this process a rewarding experience.

To my fellow scholars who have helped me along the way, thank you for your insights, stimulating discussions and collaboration, which have all contributed to the depth and breadth of this work. Your camaraderie and intellectual exchanges have been both inspiring and motivating.

Finally, I owe a special thank you to my friends and family for their unwavering support and understanding during this journey. Their encouragement and patience have given me the strength to persevere.

Chapter 1

Introduction

Over the course of the last 20 years, discussions about how profits of multinational corporations should be taxed in the international tax system have more and more become part of the public debate. In this public debate, it is often mentioned that multinational corporations are not paying their fair share in tax. This is not because they are breaking the rules but because they are using the rules to game the system.¹ This is possible because the international tax system is made up of separate national tax regimes. Multinational corporations can use the disparities between these national tax regimes as well as the differences in the national implementation of international tax standards to eliminate or reduce their tax burden.²

Multinational corporations typically maintain that they comply with both the letter and the spirit of all applicable rules and regulations of the countries where they are active.³ This is likely true, as exploiting such opportunities might not, per se, violate any domestic tax rules. Even so, from a more holistic point of view, one could argue that such behaviour is still inconsistent with the objectives of those domestic rules and the underlying international tax standards.⁴

Moreover, the international tax debate on whether a fair share has been paid is usually about two aspects that are closely connected but have different focuses. The first aspect concerns the question of how much tax is paid. This refers mostly to the comments suggesting that using the gaps between national systems would be contrary to the spirit of international tax law. This raises questions of whether there is a spirit of international tax law and whether such a spirit actually imposes any legal obligation on taxpayers or states. The second aspect concerns the question of where taxes are paid. In fact, it appears that commentators that claim that multinational corporations

1. See, for instance, M. Gelepathis & M. Hearson. The politics of taxing multinational firms in a digital age. *Journal of European Public Policy*, 29(5), 708-727, 717 (2022); M. Devereux et al., *Taxing Profit in a Global Economy*, 14 (Oxford University Press 2020); and European Commission, *A Fair Share – Taxation in the EU for the 21st century*. 4 (Publications Office of the European Union 2018).

2. OECD, *Addressing Base Erosion and Profit Shifting*, 5 (OECD Publishing 2013).

3. See sections 9.4.1.4., 9.4.2.3. and 9.4.3.3. for examples.

4. OECD, *supra* n. 2, at 5.

do not pay their fair share typically imply that a fair share has not been paid *in a specific jurisdiction*.⁵ This suggests that, based on fairness, there is a certain amount of tax revenue that any given jurisdiction is entitled to.⁶ This raises the question of whether the objectives of domestic rules and the underlying international tax standards aimed at allocating taxing rights align with the notion of what a fair share of each eligible jurisdiction should be.⁷

These two aspects are closely connected. If the tax base is shifted away from country A to country B through tax avoidance structures, country A will likely claim that the tax base rightfully belonged to country A. However, when a multinational corporation does not engage in any form of tax planning or tax avoidance, the global tax base of that company still needs to be allocated across jurisdictions. In that case, country A might still claim that, based on fairness, country A's share should have been greater than what the current international tax standards allocate in taxing rights to country A.

Because these two aspects are so closely connected, in practice, they tend to bleed into each other. In the public debate, this tends to happen to a point that they are almost indistinguishable from each other. This book will attempt to examine both aspects separately and shed light on if and, if so, to what extent an international holistic view on tax avoidance behaviour and the allocation of taxing rights exists as well as how this relates to the concept of the spirit of international tax law.

The overall aim of the study is to contribute to the debate on designing the international tax system in a way that is fair and just so that it is robust enough to keep up better with the rapidly changing world economy and so that it can deal with jurisdictions' competing claims for *their* fair share of the tax base. For this purpose, this book aims to define what the spirit of international tax law is, examine its development over the past 20 years, as well as suggest how the spirit of international law can be used more

5. See section 9.4. References in public discourse to the spirit of the law concerning a fair share often pertain to a national context rather than an international perspective. Generally, such references are intended as a corrective measure, expressing disapproval of taxpayer behaviour that, while possibly within legal bounds, should be deemed morally wrong due to its impact. See also P. Hongler, *Justice in International Tax Law, A Normative Review of the International Tax Regime*, 16-18 (IBFD 2019).

6. For an opposing view, see F. van Brunschot, De Wet van de Fiscale Jungle. *Weekblad voor Fiscaal Recht*, 141, 141 (1995).

7. O. Marres, *Eerlijk delen in de fiscale jungle*. Oratiereeks 439, 45-46 (Universiteit van Amsterdam 2012); R.F. Van Brederode, Introduction: Why Ethics Matter in Taxation, in *Ethics and Taxation*, 12 (Springer 2020); P. Valente, International-Spirit of Tax Law and Tax (Non-) Compliance: Reflections on Form and Substance. *European taxation*, 58(1), 14-21 (2018).

effectively to give the international tax system more purpose and how this can be helpful in making the entire system of international tax law better.

Currently, one could argue that the international tax system does not thrive in all of these aspects just yet. As is evident from the commentaries of both experts and non-experts in international tax, the current international tax system has issues dealing with greater societal and economic developments such as digitalization, globalization, and the high degree of vertical integration of value chains in recent times.

Moreover, fixing the international tax system to fit the rapidly changing economic reality has typically involved stacking ingenious technical solutions on top of the already complex architecture of the international tax system. However, this invariably means that the system is becoming more and more complex and that the international tax rules are more difficult to apply for both taxpayers and governments. There are already signs that less advanced economies lack the domestic capacity to keep up with all the changes.⁸ Subsequently, this added complexity often causes new problems, could have unforeseen consequences, or could even create new opportunities to game the system.

The danger of such a recursive cycle of ad hoc pinpoint repairs to the existing system is that it slowly but inevitably erodes the principles on which the international corporate income tax system is built. Given that the tax system fundamentally derives its authority from these principles,⁹ the measures that are supposed to fix the international tax system could – on a more fundamental level – also be putting an enormous strain on the entire international tax system. Moreover, these repairs might not always satisfy concerns for how tax revenue is allocated between countries, which could increase the strain on the system even further. This raises the questions of whether and, if so, to what extent the international tax system can rely on ever more intricate technical solutions or if continuing on this path will eventually lead to a system that is still technically sound but does not make much sense any longer.

8. See, for example, J. Cooper et al., *Transfer pricing and developing economies: A Handbook for policy makers and practitioners*, 9 (World Bank Publications 2017) on the fact that many developing economies lack effective transfer pricing regimes, typically due to inappropriate transfer pricing legislation and insufficient administrative capacity to effectively implement international tax provisions. As a result, these countries might be losing significant tax revenue due to intentional and unintentional transfer mispricing.

9. Compare section 2.3.

Therefore, a better understanding of the spirit of international tax law is important for the long-term sustainability of the international tax system. Between the bricks of the international tax system, there needs to be something that is strong enough to hold up the entire structure while also being flexible enough to withstand the inevitable storms that will hit it. The spirit of international tax law should bind the whole system together so that national tax systems can connect seamlessly, and it should give the whole system a purpose that both ensures and justifies a distribution of the tax base that each jurisdiction would consider fair and equitable. In doing so, the spirit of international tax law can give the whole edifice its structural integrity as well as inspire both taxpayers and governments to adhere to it.

1.1. Research questions

This book is concerned with exploring the concept of the spirit of international tax law to better understand its nature. It also means to shed light on how different actors (colloquially) use the concept of the spirit of international tax law in the public debate on corporate income tax and corporate tax avoidance as well as how it affects the positions that they take in the debate. Finally, this study aspires to provide recommendations as to how the concept of the spirit of international tax law could help to promote improvements and enhance the robustness of the international corporate income tax system.

The book will therefore address the following research questions:

- (1) How should the spirit of international tax law be defined?
- (2) Can the development of the discourse on the spirit of international tax law over the last 20 years shed light on which specific issues could hinder future reform of the international tax system?
- (3) Under which conditions can the spirit of international tax law improve and promote the robustness of the international tax system?

It is recognized that the concept of the spirit of international tax law is not limited to corporate income tax or the taxation of cross-border income. However, in terms of international tax policy discussions, legislative activity and media attention, the primary focus has been very much on international profit taxation. Additionally, the extent of international cooperation and the rules regulating the interaction between states and their national corporate income tax regimes seems much more extensive than what is the case with

other types of taxes, such as VAT or inheritance tax. The scope of this book is thus limited to international corporate income tax. The findings might, however, also be relevant for other international tax regimes.

Furthermore, it is acknowledged that the United Nations – and, specifically, the United Nations Committee of Experts on International Cooperation in Tax Matters – is an important body in the development of international tax policy and international tax standards as well as for international tax cooperation.¹⁰ However, for the practical reason that the OECD/G20 Inclusive Framework has much rather been the focal point for both European legislative activity and media attention as well as the generally somewhat different focus of the UN Tax Committee on financing for development, this study will not include the work of the UN Tax Committee in a comprehensive manner.

1.2. Methodology

Given the aim and research questions of this book, the methodology must go beyond the formal logical analysis of law.¹¹ As evidenced by the public debate, the issues surrounding the international tax system go beyond tax technical issues, as they also concern questions on matters such as fairness, morality, economics and politics. Moreover, these questions regarding the complex societal problems of the international tax system are – at least in part – the result of new technologies. This combination of factors makes international tax law very suitable for an interdisciplinary approach.¹²

Certainly, elements of legal dogmatic research, such as the concept of law, its legal principles and its interpretive techniques, are of great importance for understanding the spirit of international tax law. Particularly, part 1 of this book will focus on several of these elements, and, therefore, the legal dogmatic research methods will primarily feature in this part of the book.

However, a dogmatic analysis of how the law must be applied in certain cases will not suffice. The reason for this is succinctly encapsulated in the

10. See, for further information on the work of the United Nations Committee of Experts on International Cooperation in Tax Matters, United Nations, *UN Tax Committee*, available at <https://financing.desa.un.org/what-we-do/ECOSOC/tax-committee/tax-committee-home> (accessed 19 May 2022).

11. Compare Hongler, *supra* n. 5, at 23; and C.A.T. Peters, *The faltering legitimacy of international law*, 20 (Tilburg: CentER. Center for Economic Research 2013).

12. National Academy of Sciences et al., *Facilitating Interdisciplinary Research*, 40 (The National Academies Press 2005).

following quote: “We are not accusing you of being illegal; we are accusing you of being immoral.”¹³ Accordingly, a purely dogmatic approach would not give the needed insight into why different opinions exist on how international tax law *ought to* be applied or how such different opinions can support an interpretation that could be contrary to what the law says (or appears to say), nor would it sufficiently highlight the role that arguments on principles of morality, fairness, justice and legitimacy play in the development of these legal rules.

This book shows that these arguments have had a significant impact on the development of international tax standards in, particularly, the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project. An assessment on how morality and justice are to be viewed in relation to legal rules, therefore, forms an inherent and integral part of this study.

Moreover, given how international tax standards and rules are *made*, this book also covers considerations relating to politics, economics, public finance and public opinion, and considers how these play a major role in the debate on the international tax system for profit taxation. As a result, reference to political philosophy is made to understand moral theory and, thus, appreciate the different manners in which the debate on international tax law can be framed. Moreover, part 2 of the book consists of a discourse analysis to understand how the discussion on corporate tax avoidance has developed following the perspectives of various actors in this regard. Subsequently, how this development might have impacted the concept of the spirit of international tax law is examined.

Section 1.3. gives a brief overview of the main structure of the book and discusses the aim of the different approaches as they are applied in each of the chapters.

1.3. Overview of the book

Following the structure of the research questions, this book consists of three parts. Part 1 examines whether the spirit of international tax law exists and how it should be defined. Part 2 consists of a discourse analysis of official OECD and EU publications and a media analysis of the public debate on

13. Committee of Public Accounts, Nineteenth Report, HM Revenue and Customs: Annual Report and Accounts, Minutes of Evidence (12 Nov. 2012), available at <https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/121112.htm> (accessed 19 May 2022), quoting Margaret Hodge, Chair of the Committee on Public Accounts.

the international tax system and corporate tax avoidance. Finally, part 3 aims to give conclusions and recommendations based on the findings in parts 1 and 2.

Against this background, chapter 2 discusses the concept of law and, particularly, where the boundary between law and *not-law* may lie. Firstly, the chapter focuses on how philosophy in general considers vague concepts and then goes on to examine several views in legal philosophy on natural law theories, legal positivism and Dworkin's theory of law as well as these theories' relation to morality. The goal of this chapter is to discover whether morality is generally considered to be a part of the concept of law or not. This is relevant because if morality is not part of law, the assumption is that it should not be able to trigger legal rights and obligations. It is argued that, in each branch of legal philosophy, there is evidence of a strong connection between law and morality, but that does not mean that every moral consideration is automatically a legal one.

Chapter 3 gives a brief overview of several perspectives on morality in political philosophy in order to discuss where normative ideas on justice and fairness come from and why they are widely held to be valid. The chapter does not aim to be exhaustive but rather to give several normative reference points to differentiate the basics of moral thinking, which appear in a number of seminal works. In particular, the difference between the approaches of protecting the rights of individuals versus safeguarding collective interests is highlighted. In chapters 4 and 5 of this book, these reference points are applied to illustrate how moral considerations can be applied differently depending on whether they concern a national situation or issues on an international level. Additionally, the reference points are used to help better understand some of the fundamental design choices of the OECD/G20 BEPS Project.

In chapter 4, the author discusses how morality is part of the interpretation of law. The chapter particularly focuses on identifying and examining factors that might influence the outcome of an interpretation from one interpreter to the next. This chapter aims to identify factors that could be helpful in distinguishing moral convictions that are generally considered part of law from moral convictions that should be deemed personal preferences. The chapter starts out by examining if moral arguments can be objectively true. It discusses views on where moral language originates from based on insights from the field of metaethics. Moreover, it considers how moral considerations are part of legal principles, how competing legal principles can be reconciled, and whether a distinction between structural legal principles

and ideological legal principles could aid in separating legal moral considerations from personally held preferences.

Furthermore, even though legal culture is important with regard to different manners of interpretation of law in general, several arguments are considered as to why such differences appear to have less of an impact with regard to the interpretation of international tax law. Finally, the importance of the intention of the legislator and the purpose of the law are considered. Following a comparison of the Canadian Interpretation Act to other Interpretation Acts across different commonwealth countries, the author considers the risk that intentionalist or purposivist interpretations are influenced by personal moral preferences. Moreover, it is argued that these approaches to interpretation do not fully take into account the development of political morality in law, in particular, with regard to situations where the legislator might not have expressed an intention or where the purpose of the law did not include a certain situation. The latter, for example, could be due to the legislator not expressly considering such a specific situation, or it could be due to certain technologies that did not exist at the time of the law's enactment. Subsequently, it is proposed that introducing a "fiction of remedial effect" could be helpful in separating out personally held moral convictions in the interpretation of international tax law as well as be a way to ensure a more just and fair interpretation that would likely reflect a greater measure of institutional support.

In chapter 5, the focus of the book shifts from more general considerations on the spirit of the law to considerations on the spirit of international tax law in particular. The aim of this chapter is to investigate the role that morality plays in international tax law. The chapter demonstrates that international law is a legal system in its own right, and that international tax law is a part of this legal system. The different recognized sources of international tax law are considered in relation to the development of international tax law. In particular, the author examines how the ongoing work of the OECD/G20 Inclusive Framework might directly or indirectly impact these sources, and what this could mean for how international tax standards are to be understood. Generally, scholars agree that the agreements of international organizations are not part of the recognized sources of international law. This book confirms this viewpoint in principle. However, the study also finds that the impact that the ongoing work has on the development of political and doctrinal morality, as well as new domestic legislation, has grown enormously. This means that the question of whether the OECD work is, in and of itself, a source of international tax law almost becomes a moot point. This is even more so, considering the fact that over the last several years the

European Union has shown that it not only transposes OECD/G20 Inclusive Framework agreements into EU directives relatively quickly, but it also already uses much of the OECD/G20 argumentation in official EU communications leading up to the formal adoption of such directive proposals.

The chapter also discusses how several scholars argue that international tax law takes a much more holistic view as a result of the OECD/G20 BEPS Project. This holistic view, which is in part based on considerations of fairness, materializes through the concept of full taxation. This book argues that considerations of fairness and morality that lead to a holistic view in international tax law focus primarily on correcting taxpayer behaviour. A similar holistic view in international tax law does not encompass questions of sharing national tax revenues or the allocation of taxing rights. Several reasons for this difference between international tax policy and national tax revenue considerations are explored, and it is argued that the generally held importance of tax neutrality and its connected self-evidently held truths about the effects of the international tax system on cross-border trade could be a very important reason as to why a more holistic approach with regard to the allocation of taxing rights and the sharing of tax revenue has been so difficult to achieve in designing international tax policy.

Chapter 6 concludes part 1 and considers, based on the findings in the previous chapters, that the concept of the spirit of international tax law revolves around the question of where the boundary between legal norms and non-legal norms lies. The definition of the spirit of international tax law can thus be viewed in two ways. The first way of viewing it is by defining the spirit of international tax law based on the concept of law as it exists as a fixed quantity, while the other way of viewing it is by defining the spirit of international tax law based on the concept of law as continuously evolving discourse.

The main difference between the two approaches is that the first approach – contrary to the second approach – does not fully consider that the concept of law is subject to continuous change. This also means that the first approach does not fully consider that the boundary between legal and non-legal norms can move over time. This dynamic attribute of law in general and the spirit of international tax law in particular is usually left rather implicit in the debate on the international tax system. In this book, however, it is argued that this dynamic attribute is central to how the spirit of international tax law is used colloquially in the debate on international tax law. It refers to the fuzzy boundary between law and *not-law*, which is where new ideological legal principles are being formed concurrent to how political and doctrinal morality is changing, while, at that precise moment in time, these budding

legal principles do not quite have enough institutional support to be considered legally enforceable yet.

Part 2 builds on the conclusions in chapter 6 by analysing the public discourse on corporate tax avoidance. Its aim is to assess how the different actors position themselves in the debate on the international tax system and how they utilize the concept of the spirit of international tax law and/or its constituent parts in the debate to argue for necessary changes to the international tax system. In doing so, it identifies areas of the debate that could form important bottlenecks with regard to a future reform of the international tax system.

Discourse analysis is a methodological framework that allows for a multitude of ways to conduct a study. The chosen method in this study is aimed at analysing the form, structure, content and reception of the discourse. It does not challenge legal dogmatics in the search for correct interpretations of law but looks to explain how cultural and social values are reflected in the perception of law and its interpretation with regard to the issue of corporate tax avoidance.¹⁴ In short, it assesses the underlying ideologies present in discourse. The aim of applying discourse analysis in this book, therefore, is to ascertain the changes over time in political and doctrinal morality with regard to corporate tax avoidance as well as to better understand the dynamic that drives changes in political and doctrinal morality. Consequently, a good understanding of this dynamic should serve to better understand the meaning of the international tax standards that are central to the international corporate income tax system as well as to provide for an understanding of how important these tax standards are perceived in relation to each other.

To achieve this, a longitudinal analysis over a period of almost 20 years has been conducted. The analysis is conducted in three parts: (i) a comprehensive analysis of official OECD and EU publications; (ii) an analysis of several European newspapers with regard to how the subject of corporate tax avoidance has been reported on; and (iii) an analysis of Google Trends data to gauge how political discourse and media discourse has been received by the general public.

Chapter 7 is a short introductory chapter bridging parts 1 and 2, and chapter 8 covers the analysis of official OECD and EU publications. For

14. J. Niemi-Kiesiläinen, P. Honkatukia & M. Ruuskanen, *Legal Texts as Discourses*, in *Exploiting the Limits of Law. Swedish Feminism and the Challenge to Pessimism*, 84 (M. Davies, Å. Gunnarsson & E.M. Svensson eds., Routledge 2007).

practical reasons, the analysis has been linked to four major developments in international tax policymaking that are also briefly described in chapter 6. These developments show that states are progressively putting more weight on the collective interests of the global community when designing national and international tax policies as well as international tax standards. These developments concern (i) international exchanges of information, (ii) harmful tax competition, (iii) the Base Erosion and Profit Shifting Project and (iv) addressing tax challenges concerning the digitalization of the economy. Across all four developments, the analysis covers documents that were published between 1977 and early 2022. The analysis suggests an overall hierarchy in policy concerns that were instrumental in the argumentation throughout these official publications. The analysis indicates that the different policy concerns regarding inter-taxpayer equity and inter-nation equity have received an increasing amount of attention over time. However, policy concerns regarding national tax revenue receipts and economic efficiency concerns consistently appear to be the most prominent. This means that, overall, the hierarchy of policy concerns can be observed to be fairly stable throughout the entire examined period. Additionally, the analysis suggests that there has been a general development and increased use of a shared taxonomy and terminology over the examined period. The tone of voice in EU publications, however, is typically more outspoken than in OECD publications.

The media analysis in chapter 9 covers more than 9,400 newspaper articles that were published between 2004 and 2021 in six different newspapers in three different countries: the Netherlands, the United Kingdom and Germany.¹⁵ These countries were selected as they have been prominent actors in and subjects of the international tax debate. For instance, the Netherlands is often referred to as a major hub for foreign investors and, as a consequence, as an enabler of corporate tax avoidance. The United Kingdom is often shown in the media as a country that, on the one hand, is leading the fight against tax avoidance but, on the other hand, is aggressively competing for foreign investments with other countries. Finally, Germany has been a strong driving force behind the adoption of EU legislation aimed at preventing corporate tax avoidance as well as the OECD BEPS Project.¹⁶

15. The Guardian, available at <https://www.theguardian.com/>; Financial Times, available at <https://www.ft.com/>; Telegraaf, available at <https://www.telegraaf.nl/>; de Volkskrant, available at <https://www.volkskrant.nl/>; Financieele Dagblad, available at <https://fd.nl/>; and Frankfurter Allgemeine Zeitung, available at <https://www.faz.net/aktuell/>.

16. See examples throughout section 9.4., and, in particular, in sections 9.4.1.3., 9.4.2.3. and 9.4.3.3.

The media analysis includes a quantitative analysis of the prominence of the subject of tax avoidance in general as well as an overview of the number of articles dealing specifically with international corporate tax avoidance per year in each separate media outlet. Moreover, a qualitative analysis of the content of the newspaper articles on international corporate tax avoidance has been conducted, which highlights how the perspectives of different stakeholders (such as the government, business community and NGOs) are portrayed, how each of the stakeholders discusses the subject of the spirit of international tax law and how these relate to each other as well as how both the argumentation and the tone of voice have developed over the examined period.

Finally, the findings from the media analysis are cross-referenced with Google Trends data on search interests with regard to topics relating to corporate tax avoidance in the examined countries. The aim of this exercise is to find empirical evidence as to which extent the international political discourse on corporate tax avoidance has lined up with the development of the political morality in the examined countries. The Google Trends data is not conclusive, but there are some interesting trends that would suggest that there are differences in the national political discourses, which could point to the fact that generally specific national political discussions could generate more search interest than overarching international political developments.

For practical reasons, it was elected not to include a comprehensive discourse analysis, media analysis or a Google Trends data analysis of non-EU countries such as the United States. Instead, it is suggested that this could be interesting for further research. Where relevant, the chapter does include references to several newspaper articles from other countries – in particular, the United States – as well as references to other studies that have a primary focus on the United States. These references are indicative of similar patterns in the United States as compared to the results of the media analysis and Google Trends data analysis in this study.

Chapter 10 brings the insights from the discourse analysis together and reflects on whether there are signs of a discourse within the discourse. To this aim, the chapter considers that the discourse analysis demonstrates that the position of the OECD as the international body that sets the international tax standards has been growing over the years. The public opinion and changing political morality with regard to corporate tax avoidance has, in this respect, helped to further cement this position. More importantly, this stronger position has led to an almost global dissemination of the international tax standards and their underlying argumentation, as they have been

developed by the OECD. The positive side of this development is that this promotes a more consistent application of international tax rules across borders. However, this development also implies that the international tax standards' underlying hierarchy of policy concerns is, equally, widely exported. This means, on the one hand, that the traditional discourse in international taxation that endorses a more statist position is more or less imposed on (and endorsed by) countries that might benefit from a more cosmopolitan view on global revenue sharing. On the other hand, this means that the likelihood of fundamental international tax reform will reduce further as opposed to further incremental changes to the existing architecture of the international tax system. The margins for developing countries to secure a significantly larger share of the global corporate tax revenue are thereby also diminished further.

Finally, part 3 brings the insights from parts 1 and 2 together to formulate conclusions and recommendations on how the concept of the spirit of international tax law can improve the internal cohesion of the international tax system for profit taxation. It is hereby considered how the spirit of international tax law can promote future development of tax policy and the application of international tax standards in a way that can reduce the lock-in effect that is described in chapter 10. The chapter argues that this could be possible by reconsidering the political narrative surrounding the policy concerns driving changes to the international tax system with regard to corporate tax avoidance.

The assertion is that a recalibration of the political narrative could achieve a mission-oriented long-term view on international tax policymaking that explicitly connects the allocation of taxing rights to the aim of building a stronger sustainable tax base in less advanced economies. Such a mission-oriented strategy could harness the self-interests of countries to incentivize levels of cooperation aimed at helping the economies of developing countries to catch up with more advanced economies. By carefully tilting the playing field towards a common purpose and concrete policy goals, both advanced economies and developing countries could share in the risk and reward of a fairer tax system in the long run. Moreover, by explicitly imbuing the international tax system with an international spirit aimed at a purpose that promotes and furthers the collective interests of all countries involved, it is possible to pull the discussion on the spirit of international tax law out of the relatively vague realm of what is the most widely accepted political morality, and makes it clear that behaviour (by both states and taxpayers) that defeats this purpose is in conflict with the spirit of the international tax system.



The Home of International Taxation

Contact

IBFD Head Office

Tel.: +31-20-554 0100 (GMT+2)

Email: info@ibfd.org

Visitors' Address:

Rietlandpark 301
1019 DW, Amsterdam
The Netherlands

Postal Address:

P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Order online at ibfd.org/Shop/Book