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Ana Paula Dourado (General Editor of Intertax) · Thursday, April 17th, 2025

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Xiaorong Li, *An Analysis on Expropriation Risks of Top-Up Tax under Pillar Two*

As Pillar Two moves closer to implementation, its potential clashes with international investment agreements (IIAs) are gaining attention. Among other possible claims, the possibility of top-up taxes under Pillar Two amounting to expropriation under them is often mentioned. This article examines whether a potential investor-state dispute settlement (ISDS) claim on expropriation against top-up taxes is likely to succeed. The analysis begins with jurisdictional issues and concludes that all implementing states, including ultimate parent entity (UPE) jurisdictions, might face challenges for expropriation. Most IIAs provide a definition only on lawful seizure but not expropriation per se. Therefore, the criteria used to ascertain it vary across ISDS tribunals. The key criterion is the substantial deprivation test that is likely going to be the main difficulty in demonstrating the expropriatory nature of top-up taxes in a majority of cases. Even if expropriation risks are not imminent, Pillar Two is leading international tax law down a dangerous and irreversible course with more clashes with other parts of international law. In designing new international tax rules, careful consideration of compliance with the larger international legal framework would be crucial for preventing disputes.

Vanessa Arruda Ferreira & Luzius Cavelti, *Good Faith and Investment Treaties With a Particular View on Pillar Two*

Good faith has distinct functions in investment law that balance competing interests. It protects investors' legitimate expectations under investment agreements and stabilization clauses while safeguarding host states' right to regulate in good faith for a legitimate public interest or purpose. This article first examines whether amendments of the legal and tax regulatory framework by host states, as part of the Pillar Two global policy reform, frustrates investors' legitimate expectations. It then assesses if such changes could still qualify as good faith conduct by a state that is pursuing legitimate policy objectives thereby excluding liability. Additionally, the article explores how home states' activation of the Pillar Two mechanisms may conflict with treaties' performance in good faith and estoppel. Finally, the article investigates how tribunals weigh the good faith aspect in involved parties' behaviour when calculating liability for damages. It assesses whether the coercive effect on host states caused by Pillar Two mechanisms activated by home states could make them fully or partially liable for damages. The article accentuates the increasing relevance of

good faith in current international tax policymaking in which political and economic pressure has become a powerful tool for shaping global rules.

Gergely Czoboly & Gabriella Erd?s, *QDMTT's Alignment With International Obligations With Potential Deviations*

The introduction of a domestic top-up tax system ensures that the investment country has the primary taxing right to collect the tax necessary to reach the global minimum tax level. However, this makes certain types of income tax incentives redundant and makes some of the promises made to the investors in host countries unfulfillable, creating potential tension between qualified domestic top-up tax systems and international investment agreements (IIAs). The current article focuses on the tax strategies available to countries that minimize the conflict between Qualified Domestic Minimum Top-up Tax (QDMTT) and IIAs while meeting GloBE requirements. We examine in detail the global minimum tax consequences of the different types of incentives, the different scope and terminology of IIAs and GloBE, and the interaction of investment treaties and any GloBE induced changes in tax policy. We conclude that different tax incentives are favoured over others by GloBE, limiting countries' possibilities to form their tax policies. Since the incentives that are more in line with GloBE require more free cash from jurisdictions, modifying them could be challenging for developing countries without the necessary financial resources. mechanisms activated by home states could make them fully or partially liable for damages. The article accentuates the increasing relevance of good faith in current international tax policymaking in which political and economic pressure has become a powerful tool for shaping global rules.

João Vitor Gomes Martins & Thatiane Cristina Fontão Pires, *Assessing Damages in Investment Treaty Arbitration in the Context of Pillar Two: The Interplay Between the Charging Provisions and the Principle of Compensatio Lucri Cum Damno*

Assuming that the implementation of Pillar Two Rules into the domestic legislation of several jurisdictions potentially violates international investment agreements (IIAs), the question remains as to how damages should be calculated. While it seems logical to equate them with the tax burden that is imposed, the principle of compensatio lucri cum damno provides that, if the wrongdoer's actions result in both losses and gains for the victim, these benefits must be offset against his obligation to indemnify.Doing so warrants that reparation will not put the aggrieved party in a more advantageous position because it suffered the damage. This article explores the interplay between the Pillar Two charging provisions and the principle of equalization of benefits, emphasizing the necessity of considering such interactions when assessing damages in investor-state arbitration. It concludes that the OECD guidance on the QDMTTpayable generates two possible undesirable outcomes over the quantum of damages. If the guidance is followed, the damages that are awarded may, at a maximum, reimburse the qualified domestic minimum top-up tax (QDMTT) collected which would likely not nullify the overall Pillar Two impact on an multinational enterprise (MNE) group; if not followed, benefits arising to the investor would need to be considered in the assessment of damages and reduce the compensation to an insignificant amount.

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