Memorandum for the Establishment of an ILA Committee on International Tax Law

In 2017, ILA resolved to establish a Study Group on International Tax Law. The Study Group has operated since 2018 with Juliane Kokott as Chair and Pasquale Pistone as Co-Chair, the involvement of a dozen authors and with a further dozen contributors from all continents. In accordance with its mandate submitted to ILA in June 2017, the Study Group has extensively examined the human rights implications of the current development in international taxation, as e.g. the worldwide data exchange, worldwide fight against tax avoidance or international tax dispute resolution mechanisms. On 8 April 2020, the Study Group has submitted to ILA a short (36 pp.) version of its over 350 pp. work on taxpayers’ rights. This report drafted by the ILA Study Group in preparation of the 2020 ILA Kyoto Conference completes Phase 1 of research on international tax law.

Phase 2 of our research will continue showing how much taxation matters to international law and vice versa, and further explore avenues that had been opened by seminal research in this field (R.S. Avi-Yonah, *International Tax as International Law, An Analysis of the International Tax Regime*, Cambridge University Press, 2007).

On the one hand, international tax law cannot be confined to its own technicalities and ignore the overall international law framework. On the other hand, international law cannot leave out taxation and ignore that the dramatically increasing cross-border cooperation of States raises some relevant issues for international law too.

International taxation is therefore a sui generis domain of international law, which the latter has long unduly neglected.

For such reasons, we hereby submit our request to continue the activities of the ILA Study Group on International Tax Law with a mandate for the establishment of an ILA Committee on International Tax Law.

We are confident that the establishment of an ILA Committee on International Tax Law will further assist ILA in pursuing its statutory objectives and enhance the impact of studies conducted in the framework of ILA on the analysis of structural issues of international taxation, which require urgent comprehensive analysis, as well as enrich the overall scientific analysis of international economic law, with further repercussions on various areas of the law.

**Mandate (second stage, 2020 – 2024)**

Whereas in Phase 1 of our study, we considered international tax law from the human rights perspective of the individual, Phase 2 rather takes into account the perspective of States, starting with the genuine international law concept of nexus or effective link for jurisdiction.

International tax nexus is a fundamental topic of international tax law, since it addresses the connecting factors with each country’s jurisdiction to exercise taxing powers. This topic has been of paramount importance throughout the entire history of international taxation. About one hundred years ago - based on the output of some prior studies (G. Schanz, *Zur Frage der Steuerpflicht*, in *Finanzarchiv* 1892, Vol. 2, pp. 1-74), supplemented by an additional comprehensive study of a group of economists under the auspices of the League of Nations (G.W.J. Bruins et al., *Report on Double Taxation: Submitted to the Financial Committee*, Geneva: League of Nations, 1923) - international tax law has developed as a legal domain of classification and assignment of taxing rights between the States, which could accordingly exercise their respective taxing powers.

Proposal for the Establishment of an ILA Committee on International Tax Law (Second stage – International Tax Nexus)
Throughout the past century, a large network of bilateral treaties has gradually steered countries to exercise taxing powers with a view to countering international double taxation. Under the auspices of the Organization for Economic Co-operation and Development (OECD) this network has evolved into a largely consistent form of global coordinated bilateralism, which currently includes over 3000 double tax treaties on income and capital. Despite the high consistency across the bilateral tax treaties, the existing cross-border tax disparities has opened up loopholes which have been exploited for the purpose of obtaining unintended tax advantages in the form of international tax avoidance and evasion.

Therefore, some years after the turn of the millennium, under the political mandate of G20, the OECD has undertaken an unprecedented process of international coordination in the field of taxation, enhancing cross-border mutual assistance between tax authorities against tax havens (so-called Global Tax Transparency Project, whose implementation is monitored by the Global Forum on Tax Transparency) and prompting the introduction of common rules against base erosion and profit shifting (so-called BEPS Project, whose implementation is monitored by the OECD itself).

International tax coordination conducted in the framework of the BEPS project is continuing with the aim of 1) adjusting the international tax nexus and allocation of taxing powers to the new business models in a way that duly reflects their ability to operate remotely and 2) achieving a consistent exercise of taxing powers that prevents a global race to the bottom. Both goals are expressions of the same core aspect, namely the need for a comprehensive global reform of the international tax nexus, which reflects the ambition to establish a globally consistent exercise of taxing powers, capable of securing worldwide fairness in inter-State and international economic relations.

Scholar of public international law should not leave this development, which is vital to the international community, to the government officials and experts of the OECD only.

**Working Plan**

The working plan will be divided into two parts and follow the same methodology already adopted in the first stage of the ILA research project on international tax law, including requests for contributions from different countries around the world. The expected research output is a report with final resolutions, submitted to ILA approval, backed up by a longer open-access study.

The **first part** will draw on the legal sources of international tax nexus and make a preliminary assessment of how States stretch their taxing jurisdiction and may exercise it. The analysis will be based on domestic, international and supranational law, taking into account relevant judicial interpretation. During such phase, we intend to identify the areas requiring urgent attention and ponder various alternatives to address the current shortcomings. Among others, this phase will assess the process of international tax coordination and its legitimacy and the international organizations involved. Furthermore, it will cover inter-nation equity, including in relations with developing countries in line with the UN sustainable development goals. Also, at this stage of the ILA research project on international tax law, we will seek for synergies with other projects on similar topics, continuing the close cooperation with the International Bureau of Fiscal Documentation (IBFD). The first part of the second phase will be completed with a comprehensive overview and a preliminary critical analysis of the current connecting factors to the taxing jurisdiction, which may be presented as an interim report at the 2022 ILA Conference in Lisbon.

The **second part** will build on the results of our research until 2024. It will start with the assessment of the connecting factors and steer their reconsideration along lines that can lead to a balanced global allocation of taxing powers. In this context, many more specific issues arise. These include whether international tax law can make a global shift from double to single taxation (see R.S. Avi-Yonah, *International Tax Law as International Law*, 57 Tax Law Review 4 (2004), pp. 483 ff.) as well as the Proposal for the Establishment of an ILA Committee on International Tax Law (Second stage – International Tax Nexus)
currently discussed project of international minimum taxation. Both, single taxation and minimum
taxation, including a potential duty to tax, may conflict with the tax sovereignty of States.

Allocation of taxing powers according to a modernized nexus, which will reflect the modern
(digitalized) economy, needs to be implemented effectively. Therefore, anti-tax avoidance measures
as well as international tax transparency also need to be addressed from an international law
perspective. Whereas in Phase 1 of our study, we tackled these issues from the human rights
perspective of the individual, Phase 2 rather takes into account the collective interests represented by
the States, however, within the boundaries of international law.

In line with the methodology used by the ILA Study Group during the first stage of the research on
international tax law, the proposed ILA Tax Committee will elaborate concrete content, this time
focusing on the jurisdiction to tax. Taken together with the research outcome of the ILA Study Group
on taxpayers’ human rights, the result of both, the Study Group’s work and the Committee’s work
should serve as the basis for an international tax order serving both, the interests of the individuals in
legal certainty and protection of their legitimate expectations as well as their data, and of the society
at large in globally fair and effective taxation. States are currently struggling to create such a fair
international tax order. Strengthening ILA’s role, importance and visibility in the formation of the
international tax order requires transformation of the Study Group into a Committee. We could then
also integrate the Study Groups’ results on taxpayers’ rights into the Committee’s work and present
the end results for adoption by the Conference Plenary at the ILA Biennial Conference to be held in
2024. Necessarily, an international tax order must be based on both components: individual
(taxpayers’) rights and fair and effective allocation of taxing powers between the States.

As the ILA Study Group, the ILA Tax Law Committee would study national practices all over the
world and compare them in order to identify general principles and customary international law in the
area of taxation. We will present our results on the basis of a solid report of probably several hundred
pages. These results or research outcome would take the form of a declaration containing principles
and guidelines including commentaries thereto to be adopted by ILA.

Furthermore, the output of this second stage of the ILA research project on international tax law could
be the basis for continuing research on international tax law beyond 2024. Such Phase 3 could focus
on the implementation of international tax law. This refers to domestic, supranational and
international courts, mutual agreement procedures and arbitration and, possibly, the future
establishment of a global judicial institution.

Chair

Juliane Kokott

Prof. Dr. Juliane Kokott LL.M., S.J.D., holds the position of Advocate General at the Court of Justice
of the European Union. Since October 2003, she has been responsible for about 1 300 cases and has
delivered more than 540 opinions including about 150 on taxation.

Before joining the Court of Justice, she was a professor for public (international) law at the
universities of Augsburg, Heidelberg, Düsseldorf and St. Gallen. She also was a visiting professor at
Berkeley Law. Juliane Kokott is a graduate of the universities of Bonn, American
University/Washington D.C., Heidelberg and the Harvard Law School. She has authored and co-
authored a broad variety of publications on European Law, public international law and constitutional
law as well as on international and European tax law. Moreover, she has actively initiated and
organized several high-level expert conferences and symposia.
Juliane Kokott presented her interim report on the Diplomatic Protection of Persons and Property to ILA at the 70th Biennial Conference in New Delhi where she also contributed to the Role of Diplomatic Protection in the Field of the Protection of Foreign Investment. Her report was later adopted by the ILA (F. Bederman and J. Kokott, Report of the 72nd Session, Toronto (2008) 388 and quoted by the International Law Commission (cf. Yearbook 2002 II, Part 1, p. 72)).

Since 2018, she is the Chair of the ILA Study Group on International Tax Law.

In consideration of the complexity of the interaction between international law and the technical issues raised by international tax law, in continuity with the first stage of the ILA Study Group on International Tax Law, we also submit the request for the hereby proposed ILA Committee on International Tax Law to include a Co-Chair, in the person of

Pasquale Pistone

Pasquale Pistone is the Academic Chairman of IBFD. He holds a Jean Monnet ad personam Chair in European Tax Law and Policy at WU Vienna University of Economics and Business (Austria) and is Associate Professor of Tax Law at the University of Salerno (Italy). Furthermore, he holds honorary professorships at the Ural State Law University (Russia) and at the University of Cape Town (South Africa) and an honorary doctorate at the University of Örebro (Sweden).

He is a member of the Executive Board of the European Association of Tax Law Professors (EATLP) and of the Permanent Scientific Committee of the IFA (International Fiscal Association).

He is the editor of various publications on international and European tax law and a member of the board of several specialized tax journals. He has directed several research projects, and organized high-level conferences and seminars on international and European tax law. He has (co-)authored and/or (co-)edited numerous publications, written and/or translated in eleven languages.

Since 2018, he is the Co-chair of the ILA Study Group on International Tax Law.

Members

In order to ensure continuity in the research, it is proposed to maintain the same Chair and Co-Chair (see above) and to include in the proposed ILA Tax Committee on International Tax Law, besides the Members indicated by the national ILA branches, also some of the members that have already contributed to the first stage and have specific technical competence on international tax nexus. Such members are Philip Baker, Celine Braumann, Lilian Faulhaber and Peter Hongler.