

The Distributive Surveillant Contract:
Reforming “surveillance capitalism through taxation”
into a legal teleology of global economic justice

by

Riccardo VECELLIO SEGATE

Doctor of Philosophy in International Law



澳門大學 2022

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VECELLIO SEGATE, Riccardo



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ACKNOWLEDGMENTS

Every PhD journey is a path on its own, where hurdles relate not only to one's tension towards excellence, but also to the challenges life brings on a more personal level. When I decided to join the University of Macau (UM) back in 2018, my intention was to pave my way towards a career in East Asia as a legal scholar and, in due course, practitioner. This is why I have spent the first 16 months of my doctoral experience travelling unreservedly around Asia, becoming part of all scholarly networks I could join, exploring East Asian law schools, and publishing extensively on East Asian jurisdictions as well as on East Asian approaches to international law, legal theory, and global governance. I entered Macao for the last time in early August 2019, subsequently I moved to Beijing for my visiting post at Tsinghua Law School, and then... the pandemic happened. Never have I seen Macao (or Asia) ever since.

Partly or wholly due to States' responses to such an unprecedented event, I have lost touch with most scholarly networks (particularly in Asia), could not perform field research there any longer (and decided to change PhD topic), had it fairly hard with PhD-related bureaucracy (including a great deal of drama to defend this Thesis), could not see my dearest friends anymore, lost what I thought was the love of my life, had the access to my banking operations impaired, and experienced loneliness to such an absolute extent that for the first time I could appreciate the importance of looking after one's mental wellbeing. I also had to reinvent my career and rethink myself entirely as both a professional and a human being. Such a well-rounded disaster, lasted *three years* (...and not yet overcome!), has changed me profoundly, not least by illuminating a renewed interest in medicine (particularly psychiatry) and health policies, as well as in the neurosciences, with their limitations and potential.

It is now the end of June 2022; time is ripe to move forward. The conclusion of a doctoral journey shall be, by any sake, a reason to celebrate ourselves and all those people who have made it possible. I will not attempt at betraying this expectation. Hundreds of them can be recounted, and I feel indebted with them all; I will only mention a few of them though, with my highest sense of gratitude. They are those who have most consistently provided intellectual and human inspiration along the way, or who have "simply" been there when things got really tough (as they *frequently* did, indeed). It is no surprise that Cicero, one of the sharpest lawyers of all times, already two millennia ago observed how *adversas vero ferre difficile esset sine eo qui illas gravium etiam quam tu ferret ... amicitia res plurimas continet; quoquo te verteris, praesto est, nullo loco excluditor, numquam intempestiva, numquam molesta est*.

I will start with my PhD supervisor, Professor Rostam J. NEUWIRTH. Thank you for your patience, guidance, and kindness; despite being forced to interact virtually, we both made our best to navigate these insidious waters. I am also most grateful to the former Vice Rector (Student Affairs) at UM, Professor Billy Kee-long SO, for his dedication to my welfare both in Macao and beyond. You have supported my aspirations and efforts both in your official capacity and besides it, trusting my talent and accompanying it all along; university leaders like you make higher-education institutions more liveable an environment. I shall also honour the service of my internal committee members and chairs, for both my Thesis defence and the previous Thesis Proposal assessment: in alphabetical order by surname, these are Dr Sara

MIGLIORINI, Dr João Loreto Ilhão MOREIRA, Dr Muruga Perumal RAMASWAMY, Dr Alexandr SVETLICINII, and Dr Io Cheng TONG. My gratefulness obviously extends to my external examiners as well: Professor Tina EHRKE-RABEL (University of Graz) for my Thesis Proposal assessment, and Professor Sofia H. RANCHORDÁS (University of Groningen) for my Thesis defence. The monograph ensuing from my Thesis will exhibit the mark of insights I received from all of you. Other people at UM have made my journey smoother and richer, supplying a fair amount of academic and spiritual fulfilment over the years. I desire to mention at least Dr Sten Idris VERHOEVEN for his early support at the beginning of my “Macao experience”, Dr Stephen Li DU for sharing some contacts across universities in Mainland China, and Dr Vera Lúcia RAPOSO for reassuring me that no matter how hard one works, someone else will always be working harder... On a more personal level, thank you to Jessie for being always so kind to me, to Sandro for making sure I knew that UM’s form-after-form stamping mood was a shared frustration, to Stella for assisting me in printing this Thesis (twice!), and especially to Ariel for representing a genuine incarnation of what friendship should be all about.

Over these years, and particularly before the pandemic, I was lucky enough to travel the globe and visit literally hundreds of universities, think-tanks, firms, NGOs, and international organisations, spread around dozens of countries across three continents. The contribution their representatives have made to my ideas is invaluable. I will not cite them all here, both owing to space constraints and because, in open honesty, I would run the risk of omitting someone important. I will thus confine myself to thanking the very main shapers of my journey. At Tsinghua Law School, thanks to Dr Kai TU for offering me his office space when the whole campus was on holiday. Also, I could never preserve some minimal degree of sanity in Beijing, were it not for Danlei’s patient commitment to my mental stability... again, thank you! In the same city, I have also benefitted from shared experiences of excitement (and disappointment) about the corporate IP world with Jiabin. At the European Commission, I cannot thank Rehana SCHWINNINGER-LADAK enough for caring about me as a person despite some divergence of views on the professional side. At Berkeley Law, I am extremely thankful to Mark Allen COHEN for sharing his priceless expertise with me as well as for making my Berkeley stay as worthwhile and memorable as it could be in the given circumstances. Thanks to Atefeh, too, for your generosity and for the wonderful time we spent together in California.

Other precious colleagues and friends have enlightened my path and provided support at several steps of this long ascent, from different regions of the world. To name but a few, thanks to Huahua, Margherita, and Piergiuseppe for our protracted meta-existential discussions about jobs, relationships, exams, illness, time, and the fate of us humans. Moreover, thanks *inter alia* to Dr Carola LINGAAS, James POOLEY, and Dr Danny FRIEDMANN, for enhancing my chances of finding an academic position in meaningful, timely, and helpful ways.

This Thesis is dedicated to my son Edoardo. You are the absolute definition of love, and the ultimate sense of everything I (try to) accomplish. As a multi-sprint marathon, life can prove overdemanding at times, but may it be generous with you always!

Please remember this ancient wisdom: *ames parentem si aequus est, aliter feras.*

* * * * *

Roster of Publications

*from the date of enrolment in this PhD Program (September 26, 2018)
to the date of final submission of the present Thesis (June 29, 2022)*

I Single-authored Research Articles

1. VECELLIO SEGATE, Riccardo (2022) «Shifting Privacy Rights from the Individual to the Group: A Re-adaptation of Algorithms Regulation to Address the Gestaltian Configuration of Groups», *Loyola University Chicago Journal of Regulatory Compliance*, 8(1), pp. 55-114, https://www.compliancelawjournal.com/compliancelawjournal/issue_viii/MobilePagedArticle.action?articleId=1793260#articleId1793260.
2. VECELLIO SEGATE, Riccardo (2022) «Horizontalizing insecurity, or securitizing privacy? Two narratives of a rule-of-law misalignment between a Special Administrative Region and its State», *The Chinese Journal of Comparative Law*, 10(1), pp. 56-89, <https://doi.org/10.1093/cjcl/cxac002>.
3. VECELLIO SEGATE, Riccardo (2022) «Persecution and Labor Migrations Due to Corporate “Environmental” Exploitation: Waiting for the UNHRC’s Binding Treaty on Transnational Business Activities?», *Loyola University Chicago International Law Review*, 18(1), pp. 31-74, https://www.luc.edu/media/lucedu/law/pdfs/ilr_18-1.pdf.
4. VECELLIO SEGATE, Riccardo (2022) «The first binding treaty on business and human rights: A deconstruction of the EU’s negotiating experience along the lines of institutional incoherence and legal theories», *The International Journal of Human Rights*, 26(1), pp. 122-159, <https://doi.org/10.1080/13642987.2021.1895767>.
5. VECELLIO SEGATE, Riccardo (2021) «Cognitive Bias, Privacy Rights, and Digital Evidence in International Criminal Proceedings: Demystifying the Double-Edged AI Revolution», *International Criminal Law Review*, 21(2), pp. 242-279, <https://doi.org/10.1163/15718123-bja10048>.
6. VECELLIO SEGATE, Riccardo (2021) «Hidden Hunger in Peacetime and Wartime: Retailoring the “Responsibility to Protect” to Food-Power Discourses in Burundi and North Korea, Between International Politics and International Law», *North Carolina Journal of International Law and Commercial Regulation*, 46(1), pp. 181-234, <https://scholarship.law.unc.edu/ncilj/vol46/iss1/5/>.
7. VECELLIO SEGATE, Riccardo (2021) «Protecting cultural heritage by recourse to international environmental law: Chinese stances on faultless state liability», *Hastings Environmental Law Journal*, 27(1), pp. 153-227, https://repository.uchastings.edu/hastings_environmental_law_journal/vol27/iss1/5/.
8. VECELLIO SEGATE, Riccardo (2020) «Litigating trade secrets in China: An imminent pivot to cybersecurity?», *Journal of Intellectual Property Law & Practice*, 15(8), pp. 649-659, <https://doi.org/10.1093/jiplp/jpaa092>.
9. VECELLIO SEGATE, Riccardo (2020) «Securitizing Innovation to Protect Trade Secrets between “the East” and “the West”: A Neo-Schumpeterian Public Legal Reading», *UCLA Pacific Basin Law Journal*, 37(1), pp. 59-126, <https://doi.org/10.5070/P8371048804>.
10. VECELLIO SEGATE, Riccardo (2020) «The Unified Patent Court and the frustrated promise of IP protection: Investors’ claims in (post-)Brexit Britain», *Maastricht Journal of European and Comparative Law*, 27(1), pp. 75-104, <https://doi.org/10.1177%2F1023263X19896917>.
11. VECELLIO SEGATE, Riccardo (2019) «Reconceptualising Musical Treasures in Italy, the EU and the World: The Functional Legacy of Performativity», *Art Antiquity and Law*, 24(3), pp. 199-222, <https://ial.uk.com/product/art-antiquity-and-law-2019-annual-subscription-hard->

copy/, available at the British Library in London (shelfmark no. 1733.365433).

12. VECCELIO SEGATE, Riccardo (2019) «Fragmenting Cybersecurity Norms Through the Language(s) of Subalternity: India in “the East” and the Global Community», *Columbia Journal of Asian Law*, 32(2), pp. 78-138, <https://doi.org/10.7916/cjal.v32i2.3371>.

II Co-authored Research Articles

13. ILHÃO MOREIRA, João Loreto, and VECCELIO SEGATE, Riccardo (2021) «The “It” Arbitrator: Why Do Corporations Not Act as Arbitrators?», *Journal of International Dispute Settlement*, 12(4), pp. 525-557, <https://doi.org/10.1093/jnlids/idab022>.

III Chapters in Edited Collections

14. VECCELIO SEGATE, Riccardo (forthcoming: 2023) «Internet design, digital policies, and regulatory capture as Israeli-American hegemonic reinforcers in Palestine», in HARTSHORNE, Richard, MCALANEY, John, and BENSON, Vladlena (eds) *Handbook of Social Media in Education, Consumer Behavior and Politics*, Amsterdam: Elsevier.
15. VECCELIO SEGATE, Riccardo (forthcoming: 2022) «Resisting domestic courts’ universal jurisdiction over international crimes: Comparative notes on China and Italy», in GRZEBYK, Patrycja Karolina (ed) *Penalization of international crimes in national law*, Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości.
16. VECCELIO SEGATE, Riccardo (2021) «India’s *Tiraṅgā* at the confluence of postcolonial nationalism, cosmopolitan aspirations, and chromatic social cognition: “Saffronising” democracy?», in WAGNER, Anne, and MARUSEK, Sarah (eds) *Flags, Color, and the Legal Narrative: Public Memory, Identity, and Critique*, Berlin: Springer International, ISBN: 9783030328658, pp. 385-436, https://link.springer.com/chapter/10.1007/978-3-030-32865-8_19. {This collective volume as a whole has been assigned the Gherardi Davis Prize 2021, presented by The Flag Research Center (Houston, Texas) for an outstanding contribution to vexillological research.}

IV Commentaries to leading case-law of Hong Kong SAR courts, included in the *Oxford Reports on International Law in Domestic Courts* Series published by OUP

(Senior Editors: Professor André NOLLKAEMPER and Professor August REINISCH)

17. VECCELIO SEGATE, Riccardo (forthcoming: 2022) Case-note on *HKSAR v. Lai Chee Ying*.
18. VECCELIO SEGATE, Riccardo (forthcoming: 2022) Case-note on *HKSAR v. Fu Man Kit*.
19. VECCELIO SEGATE, Riccardo (2022) Case-note on *Kwok and Lui v Director of Lands and others*, Appeal decision, [2021] HKCA 54, ILDC 3271 (HK 2021), 13th January 2021, Hong Kong; High Court; High Court as Court of Appeal [HKCA], <https://opil.ouplaw.com/view/10.1093/law-ildc/3271hk21.case.1/law-ildc-3271hk21>.
20. VECCELIO SEGATE, Riccardo (2021) Case-note on *Kwok and others v Chief Executive in Council and Secretary for Justice*, Last instance decision, FACV 9/2020, [2020] HKCFA 42, ILDC 3225 (HK 2020), 21st December 2020, Hong Kong; Court of Final Appeal [HKCFA], <https://opil.ouplaw.com/view/10.1093/law-ildc/3225hk20.case.1/law-ildc-3225hk20>.
21. VECCELIO SEGATE, Riccardo (2020) Case-note on *Comilang and Ahmed v Director of Immigration*, Last instance decision, FACV 9/2018, [2019] HKCFA 10, ILDC 3084 (HK 2019), 2 HKC 492, (2019) 22 HKCFAR 59, 4th April 2019, Hong Kong; Court of Final Appeal [HKCFA], <https://opil.ouplaw.com/view/10.1093/law-ildc/3084hk19.case.1/law-ildc-3084hk19>.

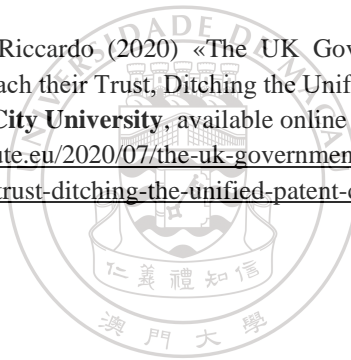
22. VECCELLIO SEGATE, Riccardo (2020) Case-note on *ZN v Secretary for Justice and others*, Last instance decision, [2019] HKCFA 53, (2020) 23 HKCFAR 15, 2 HKC 75, ILDC 3189 (HK 2020), 10th January 2020, Hong Kong; Court of Final Appeal [HKCFA], <https://opil.ouplaw.com/view/10.1093/law-ildc/3189hk20.case.1/law-ildc-3189hk20>.

V Book Reviews

23. VECCELLIO SEGATE, Riccardo (2022) «Navigating Lawyering in the Age of Neuroscience: Why Lawyers Can No Longer Do Without Emotions (Nor Could They Ever)», *Nordic Journal of Human Rights*, 40(1), <https://doi.org/10.1080/18918131.2022.2042989>.
24. VECCELLIO SEGATE, Riccardo (2022) «Book Review: V. Cuzzocrea, B. G. Bello, & Y. Kazepov (eds.) (2020). Italian Youth in International Context: Belonging, Constraints and Opportunities», *YOUNG – Nordic Journal of Youth Research*, 30(3), pp. 297-299, <https://doi.org/10.1177%2F11033088211025343>.

VI Blogposts

25. VECCELLIO SEGATE, Riccardo (2020) «The UK Government Created Expectations by IP Investors to then Breach their Trust, Ditching the Unified Patent Court's Momentum», **Brexit Institute at Dublin City University**, available online at <http://dcubrexitinstitute.eu/2020/07/the-uk-government-created-expectations-by-ip-investors-to-then-breach-their-trust-ditching-the-unified-patent-courts-momentum/>.



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Roster of Conferences

*from the date of enrolment in this PhD Program (September 26, 2018)
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I Virtually

1. Webinar on “Corporate social responsibility and human rights protection” for the Center for Constitutionalism and Human Rights of the Vilnius-based **European Humanities University**, May 2022.
2. Webinar on “Legal research in challenging scenarios” for the Center for Constitutionalism and Human Rights of the Vilnius-based **European Humanities University**, May 2022.
3. “China Law, Trade, and IP” Certificate Series – Session 3: “Trade-Related Impacts – Improvements and New Challenges” – Panel 1: “Trade-Related IP Developments, Including Impact of the Phase 1 Trade Agreement”, **Asia IP & Technology Law Project at the Center for Law & Technology of the University of California at Berkeley**, November 2021.
4. Transatlantic Cultural Property Crime Symposium – “Combating Cultural Property Crime: Innovations on the Intersection of Law and Cultural Property Crime”, **University of Kent** and **Queen Mary University of London**, November 2021.
5. Annual Conference of the American Society of Comparative Law – Younger Comparativists Committee Conference, **University of Wisconsin-Madison**, October 2021.
6. “Trade Secrets and the Digital Economy” Session of the “Intellectual Property and the Digital Economy” Online Course organized by the **Intellectual Property Office of Singapore** (IPOS International) and the **United States Patent and Trademark Office** (USPTO) and jointly sponsored by the Singapore Cooperation Programme and the United States Department of State under the Singapore-United States Third Country Training Programme (TCTP) – co-panellists: James Pooley and Gintarė Surblytė-Namavičienė, September 2021.
7. 18th Annual Colloquium of the IUCN Academy of Environmental Law: “The Future of Environmental Law: Ambition and Reality”, **University of Groningen**, June 2021.
8. “Penalization of International Crimes in National Law” Conference, **Polish Ministry of Justice’s Institute of Justice** (*Instytutu Wymiaru Sprawiedliwości*) and Polish Academy of Sciences in Warsaw, June 2021.
9. “Transforming Evidence and Proof in International Criminal Trials” Conference, iCourts – the Danish National Research Foundation’s Centre of Excellence for International Courts at the **University of Copenhagen**, April 2021.
10. 1st Geneva Digital Law Research Colloquium Online, **University of Geneva**, June 2020.
11. 1st Doctoral Workshop on Contemporary Digital Technologies and International Courts and Tribunals, **Max Planck Institute Luxembourg for Procedural Law**, February 2020.

II In the real world

12. 2nd Intellectual Property and Innovation Researchers of Asia (IPIRA) Conference, **Universitas Indonesia** (in Jakarta), February 2020.
13. 4th Annual International Conference of the *Asian Yearbook on Human Rights and Humanitarian Law*: “Law, Culture and Human Rights in Asia and the Middle East”, **British Institute for International and Comparative Law** (in London), February 2020.
14. Ad-hoc Seminar on “The concepts of group privacy and collective privacy under the GDPR as applicable to algorithmic decision-making”, Institute of International Law at **Wuhan University**, December 2019.
15. 8th Asian Privacy Scholars Network (APSN) Conference, **National University of Singapore**, December 2019.
16. Glendon Research Symposium on the European Union, **York University** (in Toronto), November 2019.
17. 1st “Multidisciplinary Perspectives on Algorithms: Regulation, Governance, Markets” Conference, **Kyushu University’s Faculty of Law** (in Fukuoka), November 2019.

18. 10th Asia-Pacific Innovation Conference, School of Economics at **Peking University**, October 2019.
19. 5th Jean Monnet Doctoral Workshop “Bilateralism versus Multilateralism”, **University of Geneva**, September 2019.
20. AsianSIL Biennial Conference “Rethinking International Law: Finding Common Solutions to Contemporary Civilizational Issues from an Asian Perspective”, **University of the Philippines College of Law**, August 2019.
21. Asia Regional Convening of the Young Scholars Initiative of the Institute for New Economic Thinking, **VNU University of Economics and Business** (in Hanoi), August 2019.
22. Workshop on “The Rule of Law in Cyberspace” convened by the “Interest Group on Peace and Security” of the European Society of International Law during the ESIL Research Forum, **Göttingen University**, April 2019.
23. 1st Intellectual Property and Innovation Researchers of Asia (IPIRA) Conference, International Islamic University Malaysia (in Kuala Lumpur), February 2019.
24. 3rd All Art and Cultural Heritage Law Conference “National Treasures: Limits to Private Property and Cross-Border Movements”, **University of Geneva**, November 2018.
25. SIDI-DIEMI Conference on “Environmentally-induced Migration and Human Rights’ Protection: The point of view of International and European law”, **Sapienza University of Rome**, November 2018.
26. Asian Society of International Law (AsianSIL) Regional Conference “International Law in Asia: Challenges and Opportunities”, **Renmin University** (in Beijing), October 2018.



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Roster of Scholarly Prizes, Journal Service, and Visiting Appointments

*from the date of enrolment in this PhD Program (September 26, 2018)
to the date of final submission of the present Thesis (June 29, 2022)*

I Scholarly Prizes

1. **Young Scholar Prize** at the “Multidisciplinary Perspectives on Algorithms: Regulation, Governance, Markets” Conference, organized by Kyushu University’s Faculty of Law in Fukuoka (Japan), November 2019.

II Journal Service

1. Member of the International Advisory Board, *International Journal for the Semiotics of Law* (Springer International, 2021-...)
2. Ad-hoc Peer Reviewer, *Energy Research and Social Science* (Elsevier, 2021)
3. Ad-hoc Peer Reviewer, *Queen Mary Journal of Intellectual Property* (Elgar, 2021)
4. Ad-hoc Peer Reviewer, *AI & Ethics* (Springer, 2020)
5. Executive Editor and Secretary-Treasurer, *Utrecht Journal of International and European Law* (Ubiquity Press, ...-2019)

III Visiting Appointments

1. Information Society Law Center, Faculty of Law, **University of Milan** (2022-...)
2. Center for Law & Technology, School of Law, **University of California at Berkeley** (2022)
3. Law & Technology Centre, Faculty of Law, **The University of Hong Kong** (2020, deferred)
4. School of Law, **Tsinghua University** in Beijing (2019)

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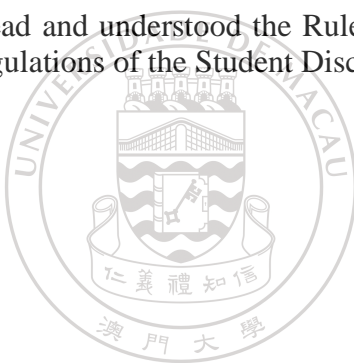
Abstract

One of the reasons why social contracts fell disregarded is that serious efforts against tax cheaters are long overdue, with the wealthiest individuals—mostly of whom are MNCs’ shareholders and/or top managers—concealing their assets through sophisticated portfolios of onshoring/offshoring formulas and jurisdictional carveouts worldwide. Through a combination of capture, revolving doors, lobbyism, and malversation, these same businesspeople influence legislative, executive, and regulatory agencies to such an extent that tax codes are mostly drafted and enforced to favour their moves and perpetuate (or even enhance) their socio-economic privilege, alongside more general trends of elitist neoliberal deregulation, exploitation, risk outsourcing, and dispossession. Within this context, governmental surveillance on the poorer has gradually shifted tone and substance from meta-exceptionalism narratives to security-phrased regimes of permanent indispensability. Taxation, too, has come to represent a fertile ground for the reproduction of regulatory asymmetries that disfavour the indigent while chilling and trapping their lives into all-encompassing scoring-scrutiny. At the onset of the XXI century, three “Grotian Moments” catalysed the customarisation of surveillant anti-tax-evasion campaigns: the 2008 financial crisis; whistleblowing journalism resulted in leaks such as the Panama/Paradise/Pandora Papers; and the anti-money-laundering counterterrorist policies enacted in the 9/11 aftermath. In particular, building on earlier US, Scandinavian, and EU initiatives, and departing from previous on-demand exchanges, most States gathered at the OECD and resolved to be sharing “their” citizens’ tax information automatically by compelling financial institutions under their jurisdiction to disclose them. Serving its new interests as a capital-exporting economy and AI powerhouse, China played an unprecedentedly instrumental, assertive role towards the stipulation of surveillance-through-taxation policies, which are powered by the Internet and self-learning algorithms. Meanwhile, corporate tax avoidance—far graver—continues unabated to sharpen disparities between the 1% and the 99%, with only watered-down soft-law attempts at constraining it being pursued at the G20 and other informal networks of transnational governance. Drawing on theories of surveillance capitalism, legal personality, geoeconomics, structural violence, global constitutionalism, and redistributive justice, I argue that surveillance-through-taxation practices are unlawful under IHRL as they unnecessarily and disproportionately violate natural-persons’ privacy entitlements. To address PIL teleologically, a corporate-restraining Distributive Surveillant Contract is warranted.

Declaration

I declare that the Thesis here submitted is original except for the source materials explicitly acknowledged and that this Thesis as a whole, or any part of this Thesis has not been previously submitted for the same degree or for a different degree.

I also acknowledge that I have read and understood the Rules on Handling Student Academic Dishonesty and the Regulations of the Student Discipline of the University of Macau.



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ABBREVIATIONS

5G	Fifth Generation (technology standard for broadband cellular networks)
ABCP	Asset-Backed Commercial Paper
ABS	Advanced Business Service
ACHPR	African Charter of Human and Peoples' Rights
ACHR	American Convention on Human Rights (aka Pact of San José)
ACP	African, Caribbean and Pacific (Group of States)
AEoI	Automatic Exchange of Information (in Tax Matters)
aka	also known as
AI	Artificial Intelligence
AIE	Automatic Information Exchange
AIF	Alternative Investment Fund
AMLD	Anti-Money Laundering Directive (of the EU)
APA	Advance Pricing Agreement
Art.	Article
ASEAN	Association of Southeast Asian Nations
ATAD	Anti-Tax Avoidance Directive (of the EU)
ATTAC	<i>Association pour la Taxation des Transactions financières et pour l'Action Citoyenne</i>
B2B	Business-to-Business
B2C	Business-to-Consumer
B&HR	Business and Human Rights
BA	Bachelor of Arts
BATX	Baidu, Alibaba, Tencent, and Xiaomi
BBC	British Broadcasting Corporation
BCC	Boston Consulting Group
BEAT	Base Erosion Anti-Abuse Tax
Benelux	Belgium, The Netherlands, and Luxemburg
BEPS	Base Erosion and Profit Shifting
BIT	Bilateral Investment Treaty
bn	Billion
BOO	Build-Operate-Own
BRI	Belt and Road Initiative
BRICS	Brazil, Russia, India, China, and South Africa
BRIICS	Brazil, Russia, India, Indonesia, China, and South Africa
BV	Dutch operating company
BVI	British Virgin Islands
Cal.	California
CbCR	Country-by-Country Reporting
CCCTB	Common Consolidated Corporate Tax Base
CCP	Chinese Communist Party (<i>see also</i> CPC)
CCPA	California Consumer Privacy Act
CCPR	Committee on Civil and Political Rights (of the UN)
CDA	<i>Consiglio di Amministrazione</i>
CDC	CDC Group plc (the UK's development finance institution)
CDD	Customer Due Diligence

CDO	Collateralised Debt Obligation
CDTA	Comprehensive Avoidance of Double Taxation Agreement
CEO	Chief Executive Officer
CEPA	Closer Economic Partnership Agreement (between Mainland China and HK)
CEPR	Centre for Economic Policy Research
CESCR	Committee on Economic, Social and Cultural Rights (of the UN)
CETS	Council of Europe Treaty Series
CFC	Controlled Foreign Company
CFR	Charter of Fundamental Rights (of the EU)
CFSP	Common Foreign and Security Policy (of the EU)
ch	Chapter
CIAT	Inter-American Center of Tax Administrations
CIGI	Centre for International Governance Innovation
CIL (<i>see also</i> ICL)	Customary International Law (<i>see also</i> International Customary Law)
CIR	Commissioner of Inland Revenue (of Hong Kong SAR)
CIT	Corporate Income Tax
CJEU	Court of Justice of the European Union
CMAA	Mutual Administrative Assistance in Customs Matters
CMLTI	Citigroup Mortgage Loan Trust Inc.
CoE	Council of Europe
Con	Conservatives (in the UK)
COP26	2021 26 th UN Climate Change Conference
Covid-19	Coronavirus Disease 2019
CPC	Communist Party of China (<i>see also</i> CCP)
CpIL	Comparative International Law
CPRA	California Privacy Rights and Enforcement Act
CRD	Capital Requirements Directive (of the European Union)
CRIS	Citizenship and Residency by Investment Scheme
CRS	Common Reporting Standard
CSR	Corporate Social Responsibility
CSTO	Collective Security Treaty Organization
CUFE	Central University of Finance and Economics (of China)
CUNY	City University of New York
CUP	Cambridge University Press
CV	Dutch limited partnership
D-SIB	Domestic Systemically Important Bank
DAVT	Dynamic Added Value Taxation
DBCFT	Destination-Based Cash Flow Tax
DC	District of Columbia
DDoS	Distributed Denial of Service
doi	Digital Object Identifier
DP	Discussion Paper
DSC	Distributive Surveillant Contract
DST	Digital Services Tax
EC	European Commission
ECB	European Central Bank
ECGI	European Corporate Governance Institute
ECHR	European Convention on Human Rights
ECINEQ	Society for the Study of Economic Inequality

ECJ	European Court of Justice (formerly)
ECLI	European Case Law Identifier
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EHRR	European Human Rights Reports
EIT	Enterprise Income Tax
eMBeD	Mind, Behaviour, and Development Unit (at the WB)
ent.	Endnote
EoI	Exchange of Information (in Tax Matters)
EoIR	Exchange of Information upon Request (in Tax Matters)
EP	European Parliament
etc.	etcetera
<i>et seq.</i>	and the following elements/points
EU	European Union
EU27	The remaining twenty-seven MSs of the EU following Brexit
EUI	European University Institute
EUR	Euro
EY	Ernst and Young Global Limited
FAANG	Facebook, Apple, Amazon, Netflix, and Google
FATCA	Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
FBAR	Report of Foreign Bank and Financial Accounts (<i>also</i> Foreign Bank and Accounts Report)
FBI	Federal Bureau of Investigation
FCA	Fiat Chrysler Automobiles N.V.
FDI	Foreign Direct Investment
FHTP	OECD/G20 Forum on Harmful Tax Practices
FI	Financial Institution
FIE	Foreign-Invested Enterprise
FPHC	Foreign Personal Holding Corporation
ftn.	Footnote
FTC	Federal Trade Commission (of the USA)
FTT	Financial Transaction Tax
FTZ	Free-Trade Zone
G20	Group of Twenty
G7	Group of Seven
G-SIFI	Global Systemically Important Financial Institution
GAAR	General Anti-Avoidance Rule
GAFAM	Google, Apple, Facebook, Amazon, and Microsoft
GC	Global Constitutionalism
GDP	Gross Domestic Product
GDPR	General Data Protection Regulation
GILTI	Global Intangible Low-Taxed Income
GloBE	Global Anti-Base Erosion
GMS	Greater Mekong Sub-Region
GN	Global North
GPS	Global Positioning System
GS	Global South

GTF	Global Tax Forum [Global Forum on Transparency and Exchange of Information for Tax Purposes]
GUO	Global Ultimate Owner
GVC	Global Value Chain
GWOT	Global War on Terror
HC	Hewlett-Packard Development Company, L.P.
HK	Hong Kong
HKCFA	Hong Kong Court of Final Appeal
HKD	Hong Kong Dollar
HMRC	Her Majesty's Revenue and Customs
HNWI	High-Net-Worth Individual
HR	Human Rights
HRC (or UNHRC)	Human Rights Council (of the United Nations)
HRCt (or UNHRCt)	Human Rights Committee (of the United Nations)
HRIA	Human Rights Impact Assessment
HSBC	HSBC Holdings plc
HUP	Harvard University Press
IAEA	International Atomic Energy Agency
IAPP	International Association of Privacy Professionals
IASB	International Accounting Standards Board
IBM	International Business Machines Corporation
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICIJ	International Consortium of Investigative Journalists
ICJ	International Court of Justice
ICL (see also CIL)	International Customary Law (<i>see also</i> Customary International Law)
ICRC	International Committee of the Red Cross
ICRICT	Independent Commission for the Reform of International Corporate Taxation
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communication Technology
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDI	<i>Institut de Droit International</i>
IFAC	International Federation of Accountants
IFI	International Financial Institution
IGA	Intergovernmental Agreement
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIL	International Investment Law
IL	International Law
ILA	International Law Association
ILC	(United Nations) International Law Commission
IMF	International Monetary Fund
Inc.	Incorporated
IO	International Organisation
IOSCO	International Organization of Securities Commissions
IOTA	Intra-European Organisation of Tax Administrations
IP	Intellectual Property
IPO	Initial Public Offering

IPR	Intellectual Property Right
IR	International Relations
IRS	Internal Revenue Service
ISP	Internet Service Provider
ISPI	<i>Istituto per gli Studi di Politica Internazionale</i> (Italian Institute for International Political Studies)
IT	Information Technology
ITL	International Tax Law
JITSIC	Joint International Tax Shelter Information Centre
jr.	Junior
JRE	Judgement Recognition and Enforcement
KPMG	KPMG International Limited
Lab	Labour Party (in the UK)
Legis.	Legislative
LLB	Bachelor of Laws
LLM	Master of Laws
LSE	London School of Economics and Political Science
Ltd.	Limited (company)
M&A	Merger and Acquisition
MA	Massachusetts Master of Arts
MCAA	Multilateral Competent Authority Agreement (on Automatic Exchange of Financial Account Information)
MD	Managing Director
MEP	Member of the European Parliament (European Parliamentarian)
MIT	Massachusetts Institute of Technology
ML	Machine Learning
MLI	Multilateral Instrument
MNC	Multinational Corporation
MNE	Multinational Enterprise
MoU	Memorandum of Understanding
MS	Member State (of the EU)
MSc	Master of Science
N-SIFI	National Systemically Important Financial Institution
NATO	North Atlantic Treaty Organisation
NBER	National Bureau of Economic Research (in the USA)
NGO	Non-Governmental Organisation
No	Number
NPO	Non-profit Organisation
NSA	National Security Agency (of the USA) Non-State Actor
NYC	New York City
NYU	New York University
OAS	Organisation of American States
OAU	Organisation of African Unity
ODI	Outward Direct Investment
OECD	Organisation for Economic Cooperation and Development
OFC	Offshore Financial Centre
OHCHR	Office of the United Nations High Commissioner for Human Rights
OUP	Oxford University Press
OWS	Occupy Wall Street
P5	Permanent Members of the United Nations Security Council

PA	Public Administration
para.	Paragraph
PBoC	People's Bank of China
PCIJ	Permanent Court of International Justice
PCPD	Privacy Commissioner for Personal Data (of Hong Kong SAR)
PCSD	Policy Coherence for Sustainable Development
PCV	Piercing the Corporate Veil
PDR	People's Democratic Republic
PE	Permanent Establishment
PhD	Philosophy Doctor
PIL	Public International Law
PIPEDA	Personal Information Protection and Electronic Documents Act
PIPL	Personal Information Protection Law (of the PRC)
plc	Public Limited Company
posth.	Posthumous
PPP	Purchasing Power Parity
PPT	Principal Purpose Test
PR	Public Relations
PRC	People's Republic of China
Prop.	Proposition
PTSD	Post-Traumatic Stress Disorder
PULP	Pretoria University Law Press
PUP	Princeton University Press
R&D	Research and Development
REIT	Real Estate Investment Trust
Rep	Reports
RGC	Redistributive Global Constitutionalism
ROI	Return on Investment
RoL	Rule of Law
RSV	Revised Standard Version (of the Bible)
s.	Section
SAFE	State Administration of Foreign Exchange (of the PRC)
SAR	Special Administrative Region (of the PRC)
SAT	State Administration of Taxation (of the PRC)
SC	Social Contract
SCO	Shanghai Cooperation Organisation
SCR	Supreme Court Reports (in India and Canada)
SCS	Social Credit System (in the PRC)
SDG	Sustainable Development Goal
SEC	Securities and Exchange Commission (of the USA)
Serv.	Service
SEZ	Special Economic Zone
sic	<i>sic erat scriptum</i>
SIFI	Systemically Important Financial Institution
SIPRI	Stockholm International Peace Research Institute
SIV	Structured Investment Vehicle
SMEs	Small and Medium Enterprises
SOE	State-Owned Enterprise
SpA	<i>Società per Azioni</i>

SPC	Supreme People's Court
SPE	Special Purpose Entity
SPV	Special Purpose Vehicle
SSN	Surveillance Studies Network
S&T	Surveillance through Taxation
SUP	Stanford University Press
SWWS	“Strong with the weak, weak with the strong”
SyRI	(Dutch Government's) System Risk Indication
TBTF	Too big to fail
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TIEA	Tax Information Exchange Agreement
TIGTA	Treasury Inspector General for Tax Administration
TOR	The Onion Router
TJN	Tax Justice Network
TNC	Transnational Corporation
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSOE	Transnational State-Owned Enterprise
UAE	United Arab Emirates
UCL	University College London
UCLA	University of California at Los Angeles
UDHR	Universal Declaration of Human Rights
UHNWI	Ultra-High-Net-Worth Individual
UK	United Kingdom (of Great Britain and Northern Ireland)
UMKC	University of Missouri-Kansas City
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDESA	United Nations Department of Economic and Social Affairs
UNECLAC	United Nations Economic Commission for Latin America and the Caribbean
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTS	United Nations Treaty Series
UNU	United Nations University
UP	University Press
US(A)	United States (of America)
USC	University of Southern California
USD (or US\$)	United States Dollar (or American Dollar)
USSC	United States Supreme Court
USTS	United States Treaty Series
VCLT	Vienna Convention on the Law of Treaties
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations
VIE	Variable Interest Entity
viz	<i>videlicet</i>

Vol	Volume
vs	versus
WB(G)	World Bank (Group)
WMD	Weapon of Mass Destruction
WP	Working Paper
WTO	World Trade Organisation
WW2	Second World War



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Part I

Introduction



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Chapter 1

Setting the stage:

Taxation as Surveillance Capitalism



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In the last 20 years we have gradually immersed ourselves in a worldwide web that [...] like any major change and opportunity, [...] has also created new risks and concerns. [T]his is why we need the work of people like Shoshana [...]. Indeed, [her latest book's] conclusion is a strong one: "Surveillance capitalism knows, decides, *and decides who decides*". For others, it paints a stark picture of capitalism in the digital age. [...] She has a message [...] for how we—Europeans—can shape our own approach to the digital world. We believe in a *human-centric approach*. [...] Of course, progress is not a given. We have to keep pushing.¹

Multijurisdictional corporate conglomerates operating (online) digital services, such as the West-headquartered GAFAM/FAANG and the China-based BATX, have taken over core aspects of the management of our daily lives from public authorities, at times directly, most times surreptitiously, amassing unthinkable amounts of nominal wealth.² Their services cost them marginally zero, because these companies provide no compensation for the raw data they “absorb” to thrive, turning its processing and exploitation into data quasi-ownership — which still lies beyond the reach of regulation.³ What is more, they routinely negotiate terms of business with tax authorities and have implemented an extensive diplomatic apparatus, factually coercing States into appointing public officials specifically devoted to conduct negotiations with tech giants.⁴ These and other results are being achieved through corporate rentierism,⁵ with massive amounts of digital trails being turned into assets, algorithmically perused, and sold to third parties in the form of class predictions.⁶ Such

¹ From the ‘*Laudatio* speech for Axel Springer Award winner Professor Shoshana Zuboff by the President-elect of the European Commission Dr Ursula von der Leyen’ (Berlin, 10 November 2019), SPEECH/19/6251, two emphases added.

² Refer also to DAVID and SAUVIAT 2019, pp. 128-129; ATTALI 2021^a, pp. 337-339; and HILL-LANDOLT et al. 2020, p. 26.

³ See extensively ASLAM and SHAH 2021, pp. 199-204.

⁴ Refer for instance to COHEN 2017, pp. 199-203.

⁵ Read generally BIRCH and COCHRANE 2021.

⁶ See e.g. FERNANDEZ et al. 2020, p. 17.

a business model is perfected in close (formalised) agreement with or through informal connivance by regulators and administrations, most compellingly via the elaboration of corporate-law rules which mimic corporate-power preferences so closely that they can be deemed to constitute a true, pre-emptively captured “code of capital”:

The masters of the code of capital, that is, the private attorneys who fashion different assets as capital mostly in private law also tend to have *privileged access to regulators and tax authorities* and often vet their coding strategies with them before applying them. Their ability to do so depends in no small measure on the economic power of the clients they represent, which in turn results from the success of earlier coding strategies.⁷

Notwithstanding this, regulatory capture per se is *not* a defining sign of our times. For example,

*[r]evenu de Francfort où il avait passé huit années à la présidence de la Banque centrale européenne, Jean-Claude Trichet observait qu’aucune décision politique n’était prise, en Allemagne fédérale, sans recueillir l’avis des exportateurs, à commencer par les grands noms de la construction automobile qui ont imposé le “Made in Germany” sur tous les axes routiers de la planète.*⁸

These days, however, the qualitative step forward—or backward, from the perspective of most citizens—rests with the fact that *those same entities* which influence regulators and amass wealth are the main *spying agents by proxy* on all of us. They host our social-media accounts, whose information is routinely—and lawfully⁹—perused by tax agencies to fathom individuals’ habits and personal

⁷ PISTOR 2021, p. 68, emphasis added.

⁸ GHOSN and RIÈS 2020, p. 15.

⁹ On tax agencies’ scrutiny of individual social-media accounts, see ALM 2021, p. 329. For instance, about Italy, refer to the 2016 *Circolare*, the 2018 *Circolare*, the 2017 Ancona Judgement, and the 2020 *Ordinanza*. In France, these checks may even be performed completely randomly by *individual* tax agents on password-protected accounts, according to their own personal “intuition”, as to start a potential investigation on any citizens, without reasonable suspicion, court permission, or any other limitation or supervision. This was legitimised by the *Conseil Constitutionnel A Été, dans les conditions prévues au deuxième alinéa de l’article 61 de la Constitution, de l’article 154 de la loi de finances pour 2020, sous le n° 2019-796 DC, le 20 décembre*

networks. They can track *and connect* our purchasing and consumption habits, while selling us techno-utopian storytelling;¹⁰ they are equipped to record *and analyse* our daily conversations, browsing and search histories; extrapolate behavioural data from our actions, gestures, emotions, facial expressions, and movements; estimate our voting patterns and support for this or that party (or for the only Party, where applicable); predict how likely we will be to dispute working conditions and to challenge the *status quo* in politics and at work;¹¹ and so forth.¹² That we are living in the age of hyperconnected governmental surveillance was already patent,¹³ but corporations have now joined forces (and shared data) with public authorities for surveillance to tighten,¹⁴ while receiving political favours in return and selling us consumers “fancy” publicly subsidised devices accompanied by empty respect-for-privacy rhetoric.¹⁵ This means that the extent to which we can tolerate corporate abuse, to which we endorse governments, we pay taxes, we interact digitally, and we will buy certain products, is well known to them *and the public entities they capture (and which capture them back)*, while we know little or nothing about neither of them – including whether *they* pay taxes, *why it is assumed by law as fine when they do not*, and where their assets are transferred and kept hidden as well as tax-wise shielded.

Meanwhile, private banks, insurance companies, and other credit institutes disclose natural persons’ transaction, deposit, and investment details to public (tax)

2019: <https://www.conseil-constitutionnel.fr/decision/2019/2019796DC.htm>. Ironically enough, the same multinational corporations like Facebook that—certainly—legally “avoid” taxes thanks to regulatory capture and aggressive tax planning, later help governments find out which private citizens *might* (!) be illegally “evading” even as little as a few hundred euros, under a privacy/welfare trade-off that only benefits corporate entities.

¹⁰ See WEST 2019, p. 36.

¹¹ Check also PASQUALE 2021^a, pp. 121-122.

¹² Read generally SCHNEIER 2015.

¹³ See also PACKARD 2018, p. 71.

¹⁴ Check extensively SHARMA 2021, pp. 8-15.

¹⁵ The exemplification provided in SADOWSKI 2020 (p. 153) is illustrative of these State-corporate surveillant partnerships.

authorities,¹⁶ while the public is not reciprocated by these entities as the latter's information (including on tax strategies) is protected as trade secrets – and wisely so, otherwise popular revolutions would probably ensue at all latitudes. Private resellers and marketplaces such as eBay or PayPal, while avoiding taxes “lawfully” in the billions, are often ordered to turn sales records over to tax agencies for the latter to investigate consumers' potential tax evasion of even just a few hundred dollars; US courts have endorsed the lawfulness of this cooperating practice in 2010,¹⁷ which has since normalised, with the mutual capture between States' agencies and corporate compliance/PR departments. Indeed, while adroitly escaping their own taxes, «firms and corporations have significantly improved the ability of [S]tates to tax labour and income». ¹⁸ No one should appear surprised:

[m]ultinational companies in the digital economy are indeed exposed to a number of regulatory stakes that can push them towards cooperation with state surveillance actors[, ...] to gain backing and support from public authorities on regulatory issues that are seen as key for the company[, ...] such as taxation [...].¹⁹

In other cases, corporations holding tax data do not even wait for court orders before disclosing such data to governmental agencies: they do so by default, usually in exchange for favourable tenders, state-backed market opportunities, regulatory relaxation, or other legal-economic benefits. Some of these corporations operate transnationally this way, also between China and the US. For this “enhanced cooperation” to prove fruitful,

¹⁶ Refer extensively to FERRARI 2020, pp. 529-531. Relevantly for present purposes, VAIVADE (2020, p. 22) notes that «[f]rom financial services intermediaries[,] banks have become tax intermediaries».

¹⁷ See WALKER-MUNRO 2020, p. 94.

¹⁸ BONADIMAN and SOIRILA 2019, p. 316.

¹⁹ TRÉGUER 2018, p. 17.

[s]urveillance ought to be all-encompassing, in the financial sector, in the hotel industry, *and on the digital platforms that citizens use to pay taxes*. [... For instance, t]he Golden Tax Project is intended to modernise the tax system in China. As part of the project[, Beijing-headquartered] Aisino's Golden Tax Division developed Intelligent Tax, a software that banking customers in China must install to pay taxes[, which comes] with a built-in backdoor that could allow Chinese authorities access to customers' systems at any time. [...] Aisino's involvement in [the Project] makes it an ideal candidate to provide both the tools to pay taxes digitally as well as to provide the surveillance tools for it. Oracle is involved by providing Oracle Receivables (an accounting tool) that is then integrated with the Golden Tax Software built by Aisino Corporation. [While this integrated device is certainly used to spy on Chinese citizens through tax data, t]he question of whether [it] comes exported with in-built Communist Party backdoors, or whether these are removed for export purposes, remains open for investigation.²⁰

This is not the same as to say that *all* digital corporations are captured tax-wise, nor does it equate to arguing that the mutual-capturing process is immediate, unavoidable, or straightforward. In many instances, corporations or States *do oppose initial resistance to the capturing process*,²¹ but then gradually fall into the other party's trap, mostly owing to economic convenience, corruption, inertia, or a multifaceted combination thereof. Tax collusion, though, increasingly seems "the ordinary way", the "new" normalcy, rather than the exception thereto – especially when it comes to multinationals.

Against such a perilous and, in several ways, unprecedented landscape, "surveillance capitalism" has become a defining buzzword for our societies, and just like any catchphrase, its inflation runs the risk of diluting its rather promising

²⁰ WEBER and VERVERIS 2021, pp. 5;14-15, emphasis added.

²¹ For instance, RAFFENNE (2002) magisterially recounts the vicissitudes of a Bill, named *De la Fiducie*, which sought to introduce into the French Civil Code a "trust-like" device known as *Fiducie*. The Bill was tabled before France's Parliament in February 1992 but later withdrawn out of fiscal-surveillance concerns over neoliberal tax-avoidance schemes. Although the Author mostly focuses on the negative sides of said withdrawal, arguably shaped by Foucauldian postmodern governmentality anxieties, mentioned process also expressed the tension between conceding and resisting to global competitive pressures unleashed by the deregulated *de facto* global scope of the Anglo-Saxon "code of capital". A few years later, the State surrendered, capital triumphed, and the *Fiducie* was transposed into law in order for French investors as well as foreign investors in French assets to benefit from such common-law-in-origin legal device, no matter its tax "counterindications"; refer further to BARRIÈRE 2012.

analytical momentum. At its most general, it refers to a legal-economic model whereby corporations *need to surveil users in order to nourish, consolidate, and perpetuate their capitalist class privilege*. The expression itself was coined by ZUBOFF years earlier, and yet it was endowed with its most compelling intellectual articulation in her homonymous monograph.²² Hers is closer to an eccentric criticism to automated behavioural commodification and corporate data extraction²³ than to surveillance, capitalism, or their conjunction *tout court*; indeed, the only scholarly article to date that builds on surveillance capitalism in the field of taxation²⁴ is centred on taxing the corporate operators of such capitalist model of data extraction, rather than focusing on the way surveillance capitalism shapes the taxation of natural persons by interacting with the State and capturing its democratic institutions.²⁵ Other authors went so far as to hypothesise that

in the context of non-democratic politics, [...] new capacities of revenue agencies could be part of “surveillance capitalism”[, whereby] digitalisation would help to perpetuate exclusionary fiscal contracts

²² ZUBOFF 2019^d.

²³ On her employment of this term, see ZUBOFF 2015, pp. 79-80.

²⁴ (In English language, to the best of my knowledge). That is: ROSEMBUJ 2019.

²⁵ Throughout the present study, unless otherwise specified, the regulatory capture of the State will be referred primarily to its Executive and Legislature; conversely, the Judiciary seems to have embraced the full spectrum of its responsibilities towards the magnitude of the challenge mounted by tax-avoidance practices against the balanced functioning of the state-citizens relationship. At worst, judges exercise self-restraint vis-à-vis deliberately pro-avoidance laws enacted by the relevant State, yet they rarely take initiative in favour of avoidance schemes through market-friendly readings of exceedingly vague tax-codes. A previous study conducted by the former General Counsel at Revenue Canada’s Tax Litigation Section confirmed this assumption, finding that while governments approach the matter at best half-heartedly (when not fully passively), last-instance courts—with the only possible exception of Canada’s Supreme Court—devote due attention to privileging assessments of economic substance over formalistic appraisals. In other words, courts try to establish whether a certain corporate operation was motivated by tax avoidance or shaped by a genuine business purpose (however successful per se), beyond the letter of tax codes – MCMECHAN 2012, pp. 389-390. The Canadian exception has a long history, tracing back to a two-decade-old judgement, where the Supreme Court held that

courts should not be quick to embellish the provisions of the [*Income Tax Act*] in response to concerns about tax avoidance when it is open to Parliament to be precise and specific with respect to any mischief to be prevented

(*Ludco*, para. 39). If only “prevention” were possible, this would even make sense! For an in-depth examination of courts’ handling of two of the foremost tax-avoidance schemes—*direct conduit* strategy and *stepping-stone conduit* strategy—exploiting double-tax treaties, see JAIN 2012, covering case-law from *inter alia* The Netherlands, Denmark, Belgium, Luxemburg, France, India, Austria, the UK, the US, Australia, Switzerland, and Germany; he succinctly introduced the functioning of the two avoidance schemes at pp. 26-29.

based on rent-seeking and restricted access to political decision-making.²⁶

This viewpoint was never elaborated upon, and it reads limited, too: it concerns itself with non-democracies, while it will be argued here that surveillance through taxation (StT) is instrumental to *all systems of power*, although the latter may avail themselves of it for different surveillant purposes. It is about working against the assumption, commonplace among most economists, that «modern societies may be [necessarily] viewed as both democratic and conducive to the advancement of social justice».²⁷

Despite these reservations, there are unmissable insights in Zuboff's approach, which might be made reference to for disassembling and revealing the inner economic working of international law (IL)—with its bilateral and multilateral, soft and hard, conservative and progressive arrangements—in the age of techno-neoliberalism. In her writing on related topics, she propounds the idea that

[t]he experiencing subject is [being] transformed into a data object. This transformation reflects what might be thought of as a journey through the ontologies, economics, and politics of possession, alerting us to the qualities of existence and power that attend self-possession in contrast to dispossession. The journey from one to the other is not restricted to body information but rather illustrates a pattern that now engulfs every aspect of human experience. We must therefore ask, what is it that determines these states of possession?²⁸

It is in replying to this question that her account remains suspended on the macroscopic surface of corporate profit-making strategies, without digging deeper into the ravines and the interstices of regulatory-power structures, where the regulator and the regulated tend to coexist so harmoniously that the former exercises its functions as a servant to the economic élite more than as an investigator under public delegation.

²⁶ VON HALDENWANG 2020, p. 11.

²⁷ DAHMS 2015, p. 119.

²⁸ ZUBOFF 2019^e, p. 5, emphasis omitted.

She draws on Theodor Adorno's *totally administered society*,²⁹ and I would say on Herbert Marcuse's critique of information technology as well,³⁰ but fails to extend the reach of her analysis onto a significant portion of such administration: the one that runs States from the top on the public side, forging their policymaking orientations.

To be true, Zuboff's work does not exhaustingly gloss over the interpenetration of governmental and corporate apparatuses of power, but the depiction of such dependence is understood quite traditionally, restating the well-known conjecture that «whether and how the [S]tate decides to acquire, discourage, or promote different technologies critically shapes the array of affordances in which those technologies might flourish».³¹ Zuboff wittily reads through the surveilling plans of corporate actors, but thinks of governmental agencies as neutral bureaucrats whose only potential fault or incompetence rests upon their feeling unfit for the challenge before them and their unwillingness to act before *those corporations by themselves* fully unmake democracy:

The surveillance capitalists do not content themselves with owning and operating the [I]nternet. [...] Facebook wants to internalize the financial system and the courts. Google wants bodies, homes, cars, cities[,] and regions. Amazon wants to own everyday life, where it lives everywhere and knows everything. Microsoft wants the indexibility of all people, places, objects. [...] All these derive revenues from buying and selling future human behavior. Lawmakers have been silent for too long or they have allowed the details of rule making to obscure the emergency that cries out for democratic control over surveillance capitalism. Lawmakers have been easily intimidated by carefully honed propaganda [...].³²

²⁹ MOROZOV 2019. Notably, this Frankfurt-School concept was first developed by Max Horkheimer and later employed also by Herbert Marcuse as well as, indirectly, by Leo Löwenthal and Friedrich Pollock.

³⁰ *Read further* FUCHS, pp. 113-116.

³¹ CUÉLLAR and HUQ 2020, p. 1304.

³² ZUBOFF 2019^a, p. 42.

Yet, if Google or Facebook's business models alone, for Zuboff, produce «vast asymmetries of knowledge and power» between these services and their users,³³ one can only imagine what level of asymmetry is created vis-à-vis the citizens when even the public sphere is captured by these corporate giants. In fact,

all these theories—of “managerial capitalism”, “advocacy capitalism”, “surveillance capitalism”—have a lot to say about each of the adjectives that qualify them but are silent on matters of capitalism itself, usually reducing it to something relatively banal, like the fact that there are markets, commodities, and *occasional* social pacts between capitalists and the rest of society [... which turn] capitalist firms into mere pawns in the game of disciplining human behavior.³⁴

But there is much more to that: States have come to be influenced by corporate giants as much as the latter depend on the former. There is of course a long history of ICT corporations cooperating with governments in the collection of information related to private citizens, but this was originally aimed at statistics³⁵ rather than at policy capture and data extraction for corporate benefit. Indeed, *dependence* is a step further compared to *cooperation*: it leans towards structural necessity, parasitism, or life-supporting mutualism at best.³⁶ To phrase it differently: *because* corporate giants depend on state support to thrive, they strive for the best-possible allocation of their

³³ ZUBOFF 2019^b.

³⁴ MOROZOV 2019, emphasis added.

³⁵ According to BALKIN (2008, p. 6, fn. 24),

[t]he creation of the modern welfare [S]tate, with its vast array of new government employees and beneficiaries of government programs, created a demand for the services of IBM and similar companies, and the Social Security number eventually became a central identifier for the federal and state governments. Initially created to provide unique identifiers for all individuals collecting benefits, social security numbers were then adopted by many [S]tates for administration of income taxes, drivers licenses, student IDs, and library cards. Eventually the private sector began to use the numbers for consumer credit reporting.

³⁶ Other Authors have characterised this relationship as a “synergy”; for instance, CALO (2016, pp. 39-40) believes that

the best way to characterize the [...] relationship between governments and corporations around surveillance is *synergistic*. Firms use government-mandated data and governments leverage private databases and tools. Both firm and government activities erode societal expectations of privacy. There is also evidence that corporate resistance is relatively rare in practice. [...] The government can make life more or less pleasant for a company [such as an ISP], including by conferring immunity from suit should consumers get upset

(emphasis in the original).

lobbyists and lawyers in public roles and back, both overtly and (mostly) covertly, ultimately influencing policymaking with unprecedented efficiency and performing surveillance capitalism through the public administration (PA), as if the government were trapped into an all-comprehensive echo chamber. This way, big data (or, more accurately, “data-exhaust”³⁷ analytics) becomes a negotiating leverage for corporations for more promisingly positioning themselves in the lobbying market. Astoundingly, even the most sophisticated and brilliant reviews of Zuboff’s standpoint failed to allocate a place to this perspective. For instance, CUÉLLAR and HUQ observed as follows:

Oddly, one point on which Zuboff does not evince concern is the risk associated with the [S]tate’s use of predictive technologies. She draws a contrast between Orwell’s famous Big Brother and what she sees today as “Big Other” [...]. The threat of “tyranny” today, she suggests, emerges from “Big Other” — and by implication not from the [S]tate [...]. Perhaps the only extended consideration of the surveillance [S]tate as a threat comes in a brief treatment of the Chinese [S]tate’s “social credit” system [...]. We disagree. *The [S]tate is an object of concern here not merely because it may be captured and thus fail to regulate. When the [S]tate acts, it does so often with the force of law [...]. Unlike most private firms (including Google and Facebook), [...] the [S]tate has at its disposal tremendous coercive capacity.* The [S]tate also is positioned to determine the shape of an individual’s life in a range of critical ways. [...] These range from the decision to recognize one as a legitimate citizen; to the imposition upon individuals of public obligations such as taxation and conscription [...]. The [S]tate is also a privileged locus of public conflicts about policy. Where the [S]tate ceases to be responsive to public demands articulated through democratic, nonviolent means, it ceases to have the distinctive and unique claim to democratic legitimacy upon which its monopoly on violence depends. Surveillance economies’ rise changes not a single whit of this. Rather, we think that the [S]tate still presents a distinctive kind of risk to human agency and well-being in a surveillance economy, regardless of the latter’s size and influences.³⁸

³⁷ “Data exhaustion”, referred to an individual, roughly stands for the hyper-production of digital trails and footprints deriving from the intensive and regular use of multiple technologies by the same individual, whereby such a trail remains available in the infosphere in perpetuity, in whole or in part, to be subsequently accessed (and usually profited from) by corporate entities and/or other third parties even if not immediately serviceable to mentioned individual’s initially performed activities. For a few examples, *see further* GARRETT 2021, p. 5; LYON 2021, p. 68; CUNNINGHAM 2014; QADIR et al. 2016, p. 3; THATCHER 2014, p. 1771; VENKATESH 2021, p. 377.

³⁸ CUÉLLAR and HUQ 2020, pp. 1329-1330, emphasis added.

These remarks are at least as naïve and partial as Zuboff's rhetoric, and I will identify three key reasons why they are so.

First, that between the Big Brother and the Big Other is not an alternative, but an increasingly surgical form of unaccountable and captured “deep State”;³⁹ it is not a dichotomy between two opposite poles over a line,⁴⁰ but a circular sliding scale that keeps revolving around itself, metamorphosing its facets according to the most profitable and convenient political environment. The issue is not about attributing to one the standard characters of the other, but about disentangling their novel modes of interaction and co-option, the osmosis of professionals and prerogatives between the two; it is not a shift in sovereignty, but a corrupted and fuzzy scheme of lawless, paternalistic, opaque governmentality. Old-fashioned state totalitarianism and contemporary data instrumentalisation by commercial entities⁴¹ are complementary rather than opposed, despite violence not necessarily manifesting itself as bodily harm: even if «behaviour replaces the human spirit as the target of government»,⁴² both totalitarianism and instrumentalisation are essentially oriented at legalising and normalising mechanisms of elitist co-optation and power preservation.⁴³

³⁹ With reference, for instance, to the US, *check further* BURKE 2020.

⁴⁰ Like they would seem to be portrayed in, e.g., ANDREW and BAKER 2021, pp. 567;569-570.

⁴¹ On the two concepts compared, *see* WHITEHEAD 2019, p. 13.

⁴² *Ibid.*, p. 14.

⁴³ Indeed, as PISTOR (2019, pp. 4-7, two emphases added) remarks,

[t]he wealthy often claim special skills, hard work, and the personal sacrifice they themselves or their parents or forefathers have made as justifications for the wealth they hold today. [...] Yet, without legal coding, most of these fortunes would have been short-lived. Accumulating wealth over long stretches of time requires additional fortification that only a code backed by the coercive powers of a [S]tate can offer. [...] Decoding capital and uncovering the legal code that underpins it regardless of its outward appearance reveals that not all assets are equal; the ones with the superior legal coding tend to be “more equal” than others. [...] “F]eudal calculus” is indeed alive and kicking, *including in democratically governed societies that pride themselves on guaranteeing everyone equality before the law — only that some can make better use of it than others*. It operates through the modules of the legal code of capital, which, in the hands of sophisticated lawyers, can turn an ordinary asset into capital. Not the asset itself, but its legal coding, protects the asset holder from the headwinds of ordinary business cycles and gives his wealth longevity, *thereby setting the stage for sustained inequality*. Fortunes can be made or lost by altering an asset's legal coding, by stripping some modules from an asset, or by grafting them onto a different asset. [...] For each of these assets, the legal coding ultimately determines their capacity to bestow

In fact—second reason—the problem is not that the State *halts* its functioning once captured, but that it merges its interests and thus, to an extent, its “policy identity”, with the entities by which its institutions are captured and that those same institutions should regulate with relative independence in the first place.

[Zuboff] notes only in passing that Apple has been criticized for “missteps” such as [...] institutionalized tax evasion, [...] but apparently sees these as having no deep relation to the advocacy-capitalist order she celebrates.⁴⁴

Third, the mentioning of China as the only example of State that practices surveillance-capitalism techniques is extremely simplistic; indeed, it is not a matter of «a vile, authoritarian state capitalism, largely a product of the East, threatening a more virtuous liberal-democratic form of free-market capitalism allegedly prevailing in the West»:⁴⁵ when it comes to surveillance, the two deceptively dichotomous—and extremely simplified here—forms of capitalism almost coincide. Further, surveillance-capitalism techniques extend to virtually any type of jurisdiction in terms of, for instance, form of government and value system; in fact,

the close collaboration between a government that grants economic and legal advantages to tech companies and companies that help the government conduct its surveillance is a global feature of data colonialism, not one restricted to China, Russia, or the [US].⁴⁶

The original insight about China, if any, is that the Big Brother and the Big Other overlap to such an extent (also due to state ownership of major tech and non-

wealth on their holders. It also provides them with a powerful defense against challengers: “But it’s legal”. [...] Whereas conventional wisdom attributes the operation of the invisible hand to the market, it might just as well be read as a reference to the quality of the rules of the game where business is conducted. The invisible hand does its job under weak institutions [...].

⁴⁴ KAPCZYNSKI 2020, p. 1475.

⁴⁵ ALAMI et al. 2021, p. 3.

⁴⁶ COULDRY and MEJIAS 2019, p. 57.

tech companies) that there is not even the need to distinguish between the two. Yet, in practice, societal repercussions are similar in the West, where the two can still be distinguished although the Other captured the Brother and the Brother pleased the Other as to smoothen and encourage its own capture. Further, supposedly democratic States such as India have entered global public-private surveillance networks jointly with autocratic regimes, placing (Indian and foreign) businessmen, journalists (not necessarily whistleblowers yet), and politicians under surveillance by monitoring their smartphones' activities and misappropriating the data contained therein or transiting through them.⁴⁷

In fairness, other authors had already pointed to this Brother-Other coalition, for instance by describing a worrisome trend according to which

the “public-private partnership” notion may be morphing into a vision of a high-tech, corporatised-government State [...] and hence becoming a major threat to democracy. It is reasonable to expect that developments towards a surveillance [S]tate would contribute to rapidly declining trust by individuals not only in governments but also in corporations.⁴⁸

Nonetheless, also this remit appears unhelpful to grasp the profound meaning of what is happening with international taxation. Its main limitations are twofold: the focus on tech corporations only, and especially the disingenuous distinction between a surveillant State that surveils to control and police, and surveillant corporations that surveil to profit.⁴⁹

⁴⁷ *Refer, extensively, to* LEWIS 2021; KIRCHGAESSNER et al. 2021; PEGG and CUTLER 2021; SUR 2021.

⁴⁸ CLARKE 2019, p. 62.

⁴⁹ For a contribution which is similarly insisting on this second distinction, i.e., that applies the conceptual paradigm of surveillance capitalism to States but only in the latter's coercive and security dimension, *refer to* DENCİK et al. 2016. Nevertheless, the authors do acknowledge, in passing, that a State-revisited surveillance capitalism

encompasses both the targeting of surveillance against activists leading to repression, self-censorship and chilling-effects in the organization, mobilization, and pursuit of social justice as well as *the role of surveillance in (new) forms of governance that shape society in line with particular political and economic agendas*

This Thesis will explain, *inter alia*, that this watershed no longer sheds light on the hidden engineering of the State-corporation symbiosis: States surveil *practically through* and *rhetorically to the benefit of* corporations, and corporations profit thanks to this practice, thus accomplishing the true vicious circle of surveillance capitalism – which proceeds much farther than the simple surveillance tech companies pursue in order to maximise revenue from their (actual and potential) customer base. State regulators pass through the same revolving doors as the regulated,⁵⁰ and join profits with them because they are essentially *the same people* (otherwise known as “the 1%”). Datafication and dataveillance⁵¹ help States craft not only their pretended counterterrorism strategies and other “security” measures, but also their taxation ones: it helps them collate behavioural projections as to identify the extreme possible extent to which they can tax the poor and untax the rich *not in terms of tax rates per se, but as far as the enforcement of and loopholes in the legislation are concerned*.

Surely, state-sanctioned surveillance-capitalist practices inferred their justification from counterterrorist operations, but they later spelled over into other areas of policymaking, including taxation. In this sense, surveillance capitalism is actually a large-scale plot of capital accumulation, “casteism”, and complacency with the superrich. Needless to clarify, by “plot” I do not imply the evocation of any conspiracy theory, nor that of a sudden phenomenon devised by a particular group of criminal individuals whose replacement would significantly alter the system. Conversely, it is all about human nature *as it is*, but no longer constrained by those formal checks and balances which would have ensured a few institutionalised barriers against our inherent greed. In other words, the problem lies with *the law—the “code*

(p. 9, emphasis added). See also FOSTER and MCCHESENEY 2014.

⁵⁰ See also ADLER 2019, p. 141.

⁵¹ Check further SADIN 2021, pp. 59-61;165-174.

of capital”—no longer serving its protective function against ourselves, i.e. our own egoistic nature. It is about a gradual (yet accelerating) historical and economic process which was triggered by the decline of representativeness in Western liberal democracies and facilitated by a State-centric design of international legal instruments that proves unable to stand up to *a-jurisdictional corporate misconducts*, and that is now aided and catalysed by re-centralising algorithmic and Internet-based technological developments.

As part of the scoring society induced by surveillance capitalism,⁵² welfare States are increasingly reliant on algorithms for performing their administrative duties. This is generally to be welcomed, in that it saves resources and potentially reduces errors; three aspects, however, may become problematic. First, «the collection of provided, derived, and inferred data» walks well beyond the gathering of raw information, trespassing into the realm of personality-tracing designed artificially by machines; in fact, many claim that “raw data” is an oxymoron:⁵³ either information is granular, or it is unserviceable as data. Second, if bias permeates primary data, algorithmic decision-making is not suitable to redress it, but will rather increase the scale of the bias and its consequences.⁵⁴ Third, the outcomes of algorithmic decision-making are unverifiable and virtually impossible to challenge and rectify, considering that in most cases, no human officer is responsible or can technically account for the steps taken by the algorithms in reaching its conclusions.⁵⁵ Is it often the case that institutions rely on algorithms without performing due-diligence checks on them over time. If “power” grasps the subjects of algorithmic governmentality [...] through

⁵² Refer also to COSTELLO 2020, pp. 52-53.

⁵³ Refer e.g. to GITELMAN 2013; MOSES and CHAN 2018, p. 810.

⁵⁴ See also WALKER-MUNRO 2020, pp. 99-100.

⁵⁵ CHOROSZEWICZ and MÄIHÄNIEMI 2020, pp. 2;9. See also FLYVERBOM and WHELAN 2019, pp. 63-64; WALKER-MUNRO 2020, pp. 101-102.

multiple “profiles” assigned to them, often automatically»,⁵⁶ is it not much easier, for those who govern, to preselect those whom policies should establish privileges for, and to enforce such policies once they have been codified? Who takes pride of being the algorithmic centre, who sits before the elitism as it is identified and favoured by the algorithm?

Other reviewers of Zuboff’s work, already, have noted that although

[t]here is a reason to believe that, just as industrial capitalism has a logic of development and functioning that had a specific pattern of exploitation of determined territories and populations—one for the centers of power and consumption, another for the periphery and production—the same happens with surveillance capitalism[.]

Zuboff identifies neither a centre, nor a periphery.⁵⁷ This Thesis intends to fill, *inter alia*, exactly this gap: assuming that the centre is where *the capital* of the 1% is parked, and the periphery is where *the capital* of the 99% is distributed, the idea that the centre coincides with a-jurisdictional legal solutions for tax avoidance seems suggestive and worth exploring. Phrased otherwise, the centre of power of surveillance capitalism is not a single physical space (not even in aggregated form, like the “West”, “developed countries”, the “industrialised world”, the “Global North”, etc.), but many places depending on “liquid” circumstances, because rather than a territory with a population, it overlaps with all those highly mobile “jurisdictional carveouts” represented by legal artifices⁵⁸ that *exploit the rigidity of Westphalia* to the benefit of ubiquitous corporate structures—especially chains of subsidiaries⁵⁹—whose “nationality” is rendered *substantially* fictitious by their actual *function* in the relevant tax-avoidance schemes.⁶⁰

⁵⁶ ROUVROY and BERNIS 2013, pp. 173-174.

⁵⁷ EVANGELISTA 2018, p. 247.

⁵⁸ Refer e.g. to Google’s Irish scheme as reported in DAGAN 2018, p. 29, fn. 59.

⁵⁹ See PHILLIPS et al. 2021, p. 101.

⁶⁰ On these legal artifices, see further PISTOR 2019, pp. 7-9. She claims that the centre coincides with «the leading global financial centers, London and New York City, and all of the top one hundred global law firms[,

These “tax renditions” are the equivalent of factually a-jurisdictional “extraordinary renditions” in the Global War on Terror (GWOT), but way more pernicious, widespread, and legalised. I also believe, more generally, that while the gap between the “First World” and the others is reducing dramatically, the new invisible wall is that between a transnational corporate oligarchy (and the plutocracy that follows as an informal system of governance) and the rest, made of those who are gradually deprived of authority over their modalities of self-determination as free citizens and individuals.

Since international law is a horizontal fiction in international relations (IR) but it is also increasingly concerned with the status of individuals across systems of (legal) authority, these dynamics cannot leave international lawyers indifferent. *A fortiori* so when especially the most customary forms of legal coding—common law domestically, and ICL internationally—need to react promptly to the solicitations of a seemingly permanent state of crisis. If a crisis causes the standard times once needed for change in history to contract—as e.g. Carl Jacob Christoph Burckhardt had once opined⁶¹—and crises become a normalised statute of history and law in this epoch of confusingly fast-paced transformation, it can be derived that the acceleration of history becomes normalised as well, and this is a phenomenon law is by definition ill-placed to cope with (especially at the international level). This forced acceleration in the legalisation of relevant phenomena is a delicate process that can be distorted by technology and misappropriated by power-politics, just like it had always occurred in

...] where most capital is coded today, especially financial capital, the intangible capital that exists only in law», but I do not fully subscribe to this postulation. Rather, I believe that the centre rests within the fractures of the Westphalian system in its overall configuration, and especially in the misalignment between citizenship-bound natural persons and jurisdiction-unbound “multinational” legal persons. This is why I am persuaded that by illustrating the taxation paradoxes between the two, I will succeed in exposing their unevenness before the legal code of capital, and consequently, the privileges-by-law of the public-private 1% conglomerate that rules over the whole game. Not by chance,

[a] major claim [...] against taxing the rich is that this policy is self-defeating. Levying high taxes on the rich, it is suggested, will prompt them to work less, invest less, and, *in a world of mobile capital, to shift their wealth abroad*

— SCHEVE and STASAVAGE 2016, p. 18, emphasis added.

⁶¹ See STARN 1971, p. 8.

the past, yet to an extent which is now legally sanctionable and that was unthinkable up to even a few years ago. Sustained by technology, surveillance accelerates and normalises at every step of the way (that is, at every “crisis”) and never turns back once the crisis has ended because another “crisis” that sort of “absorbs” and prolongs the previous one is already round the corner.

No entity has benefitted from the 9/11-Financial Crisis-coronavirus series of accidents more than Google or Amazon, but States have followed suit, tying themselves to the same logics of behavioral extraction, political rentierism,⁶² and capitalist elitist exploitation of the 99%.⁶³ After all, surveillance capitalism embodies the data-empowered commodification of mistrust, yet obviously valid for the 99% exclusively, about whom it is rhetorically posited that for the “common” good, surveilling them all is preferable compared to applying more reasonable grounds for mistrusting the 1% first. It is the Hobbesian «complete annihilation of trust»,⁶⁴ that draws on the capitalist commodity market—characterised by «constant lying, concealment, and manipulation»⁶⁵—to invade the public arena as well, with the same principles, techniques, aims, and—most disturbingly—the same absence of precaution and remedies, retorting against its own victims.

Fixing “inequality by taxation” (both intergenerationally and from the *élite vs the rest* perspective), globalising taxation-related procedural and substantial human

⁶² According to DAGAN (2018, pp. 41;127, emphasis added),

[t]he ability to opt out of a [S]tate’s taxation system without actually exiting its territorial jurisdiction further erodes political participation. Integral to the [S]tate’s power, indeed its very legitimacy, is its ability to impartially apply its coercive powers to its equally participating constituents. It is this quality that legitimizes the [S]tate’s imposition of its power on its residents and its acting in the name of its constituents. *Subordinating the requirements of equality to the market power of individual participants in the political community undermines the legitimacy of the [S]tate as a political unit* that treats its subjects with equal concern and respect. [...] A reason why tax competition may yield inefficiencies is the externality created by tax avoidance through tax planning and the consequent ability of certain individuals and corporations to free ride on the public goods of a jurisdiction without paying its taxes.

⁶³ Refer e.g. to these two short pieces on huge corporate bailouts vs negligible contributions to the unemployed in times of Covid-19: REDMAN 2020; HOLDEN and STRAUSS 2020.

⁶⁴ BEHAN 2015.

⁶⁵ MOROZOV 2019.

rights, and homogenising corporate taxation rules beyond Westphalia should be the preconditions for globalising surveillance by taxation, even assuming the latter is truly necessary to turn suspicion into enforceable legal code within transnational tax arrangements. This chance for rethinking global governance should not go wasted; if it does, «[g]lobalization skeptics argu[ing] that excessive globalization has deprived [S]tates of the power to redistribute some of the gains capitalists make through social programs or progressive taxation»⁶⁶ will prove to be the most accurate ones in diagnosing what is wrong with international law today, which lies primarily elsewhere than in the presumed tax evasion by the 99% who would supposedly deserve to be surveilled.

As a matter of fact, these policy preferences in the field of international taxation are of assistance in proceeding beyond the stereotype of *varieties of capitalism* which would express a dichotomy between the embracement and dismissal of surveillance capitalism by state power. According to some, the General Data Protection Regulation (GDPR) and the Social Credit System (SCS)⁶⁷ would be evidentiary of state rejection and formalisation of surveillance capitalism in the EU and China, respectively;⁶⁸ yet, although this might hold true for specific regulatory areas and aspects of social life, it should not be generalised impulsively. International taxation comes as a meaningful framework against which to frame the unhelpfulness of said generalisation, whilst helping us uncover and define the normalisation of state-driven surveillance capitalism

⁶⁶ PISTOR 2019, p. 2.

⁶⁷ On China's SCS from the perspectives of algorithmic regulation, captured public-private surveillance, social crediting and management, data-driven subjectification, behavioural "nudging", and market-powered social experimentalism, *refer further to* DEVEREAUX and PENG 2020; SÍTHIGH and SIEMS 2019; LIANG et al. 2018; BACH 2020; DING and ZHONG 2021; VON BLOMBERG 2018; ZHANG 2020. What positively distinguishes China from somewhat similar Western experiences—usually confined to natural persons—is the application of the scoring system to corporations as well, namely in the field of taxation; *see* LIN and MILHAUPT 2021, pp. 3;9-15.

⁶⁸ *See for instance* AHO and DUFFIELD 2020, pp. 188-189;205-208; XAN WONG and DOBSON 2019, pp. 224-228.

in Europe and the West, too. Indeed, while the GDPR is considered the latest demonstration of the EU's resistance to the unfettered powers of major corporations especially from overseas,⁶⁹ the interpretation of the truth I propose here suggests something radically different: even in Europe, MNCs create the economic need for state surveillance of private citizens (by “avoiding” taxes), to then actively cooperate with state agencies as to accomplish those agencies’ (read: those MNCs’) goal: recovering the lost taxes by chasing *all and any* individuals. Unsurprisingly, the GDPR represented a proficient transnational lobbying exercise for, e.g., the GAFAM⁷⁰ – none of which is European.⁷¹

This whole ordeal would even be acceptable if the goal were actually accomplished and private-public cooperation were the last-resort strategy for the PA to dispatch their objectives, said cooperation being pursued in a balanced, progressive, and motivated manner (which corresponds to general principles of good administration pursuant to the administrative law in several domestic jurisdictions). Regrettably, all the contrary seems to prevail: beyond the indiscriminate and extremely pervasive design of the mechanism, the mechanism itself is anything but necessary, at least at this stage. The almost totality of taxes States would need in order to satisfy their welfare standards are to be retrieved from corporate tax avoidance rather than individual evasion, even though the second only is persecuted by state agencies through massive international privacy violations. Resultantly, where surveillance capitalism lies stands clear: it resides in regulatory capture,⁷² understood here as the

⁶⁹ See e.g. LILLINGTON 2020.

⁷⁰ Check for instance CYPEL 2020, p. 274.

⁷¹ Read further VILLEROY DE GALHAU 2021, pp. 105-107.

⁷² Indeed, in the US and elsewhere today, «democracy only results in greater taxation of the rich when the rich are unable to use their wealth to capture the political process» – SCHEVE and STASAVAGE 2016, p. 16. The authors move on to recall that the *causal effect* of wealth on capture has not been definitely proven; and yet, I contend that definitive evidence (even admitting such a thing is not a foundational myth in the social sciences...) is unnecessary: not only untaxing the rich is unfair by and in itself, but these governmental

corporate ability to influence lawmakers⁷³ with reference to the contents of the law, public priorities, and obviously the ways such priorities are executed and implemented.

In this sense, surveillance capitalism exceeds the mere profit-making by Tech Giants operated through the collection and exploitation of users' data and metadata and consequent predictive behavioralism; it rather stands as a more cemented, subtle and crony form of degenerated capitalism where policy goals are set by MNCs, measured against their expectations, and eventually imposed on the citizenry at large by constructing rhetorical justifications grounded in imminence (of the need/threat), urgency (of the response), necessity, and often exception.

This creates a paradox of transparency, where the question becomes not one of legibility, but of power[:] *transparency, but for whom?* If big data analytics can be seen as the compulsion for market knowability, then it is only for the eyes of corporate elite interests.⁷⁴

The process distorts democracy by forging the sedimentation of exceptionalism, and by pledging policy outcomes which are sold as absolutely necessary to voters whilst being in fact charged with regulatory bias to the benefit of crony institutions that are ready to compress privacy rights for the sake of pleasing tax “avoiders”. «Pervasive and egregious inequalities are likely to solidify the one-sided distribution of political power, locking ordinary people into a nominally meritocratic oligarchy in which they cannot ascend»,⁷⁵ especially at a time when the social elevator seems rusty and the intergenerational divide proves rampant all throughout the “Global North”.⁷⁶

Because of this,

choices bear psychological effects as well on the entire population, going much beyond the mere economic effect of providing a few companies and/or individuals with tax-related escape routes.

⁷³ Watch also VAROUFAKIS 2019, 28:36-28:50.

⁷⁴ AHO and DUFFIELD 2020, pp. 16-17, emphasis added. See also GALIČ et al. 2017, pp. 22;24-26.

⁷⁵ TORPEY 2020, p. 767.

⁷⁶ See e.g. KOMLOS 2019, pp. 90-91.

we need to re-politicise the question of technology[, and] the discussion should be about the redistribution of assets and power, in particular relating to the management of future welfare services.⁷⁷

Taxation is not just one of the many variables of stake when it comes to wealth concentration, but possibly the foremost one; for example, following absolute-percentage detaxation

only the rich save [and reinvest] and thereby benefit continuously from the tax cut[,] while for the poor the tax cut brings about a once-and-for-all tiny increase in disposable income [which is immediately spent]. The result is an obvious kink in the rise in inequality.⁷⁸

Even more severely, the formally legal yet teleologically questionable (as an euphemism) convergence of interests *and decision-making powers* between corporations and governments to allow Ultra-High-Net-Worth Individuals (UHNWIs) to shift the burden on “the 99%”⁷⁹ is the actual mass-enslavement phenomenon of our time. Intellectual resistance to these phenomena is scant, and its impact on policymakers even fainter, which should not come as a surprise; in Europe, for instance, virtually all “think-tanks” and governmentally affiliated research centres are funded by American and Chinese MNCs, mostly in the tech and/or military industry, but also in the fossil fuels one as well as in investment banking, corporate finance, pharmaceuticals, and insurance.⁸⁰ ISPI, the oldest and most prominent Italian think-tank affiliated to the Italian Ministry of Foreign Affairs, which also delivers executive education on development cooperation and humanitarian intervention (!), is sponsored

⁷⁷ BRIA 2019, p. 85.

⁷⁸ KOMLOS 2019, p. 94.

⁷⁹ TORPEY 2020, p. 17.

⁸⁰ Refer to BANK et al. 2021.

inter alia by KPMG, Leonardo SpA (selling bombs and missiles to Saudi Arabia⁸¹ to be deployed to massacre Yemeni civilians, including hundreds of infants and disabled), Eni, BCC, HP, IBM, and Google,⁸² whose representatives have a seat in its CDA (Board of Directors) and all other bodies.

Sociological processes of this sort would not be immediate pertinence of international law if mentioned exception-underpinned justifications were not elaborated, engineered, doctrinally sanctioned, and enforced through the legal code of IO-mediated cooperation between state institutions at the global level. Furthermore, international tax surveillance on private citizens' accounts is *enabled* by technological progress, as well as by transnational coercion on credit institutions, i.e., those same global banks where MNCs' tax-avoided money is "parked" and channelled through; such banks have adapted to the new requirements with surprising enthusiasm. This mode of pretentiously neutral, technology-intensive rationality—recalling Max Weber—has «to do with the efficiency of means rather than the choice of ends[, standing] favorable to the ambitions of capitalists and bureaucrats, who rise to the top in any rationalized society».⁸³ For this reason, an analysis of «the role [S]tates play in economic development—shaping and creating markets, not just regulating or fixing them»⁸⁴ cannot be procrastinated any longer; even more essential is a disenchanted scrutiny of the legal implications of the transnationalisation of these elitist manoeuvres for the substance of international law as a fairer system of global governance.

The whole debate on "taxing the Big Tech" is just one of the several elements in the taxation puzzle,⁸⁵ and probably the least important; in truth, the issue at stake is

⁸¹ Check e.g. ZANDER et al. 2019, p. 28; BARANY 2021, p. 45, fn. 16.

⁸² Check <https://www.ispionline.it/it/istituto/soci>.

⁸³ FEENBERG 2002, p. 65.

⁸⁴ TORPEY 2020, p. 6.

⁸⁵ See further UNCTAD 2019, pp. 95-96;142-144.

not the extent to which these corporations are taxed,⁸⁶ but their ability to “legally” escape taxation *no matter its rate*, by exploiting jurisdictional asymmetries between a world of States (and State-allocated citizens) and a globalised legal code for capital that is factually accessible to an exceedingly little and self-entitled regulatory minority. «So long as the regulatory savings outweigh the increase in transaction costs [such as accounting, relocation, or higher-waged labour ones], such planning is perfectly rational».⁸⁷ Furthermore, when it ties itself to the State, any conglomerate of corporations can behave like a regulator not only for itself and its users/customers within the relevant market, but for broader societal discourses and priorities through informal access to and monopoly of policymaking and capital legalisation. Someone pushed the debate so far as to argue that the advent of big data will convince policymakers to tax information rather than money:⁸⁸ this is a fairly interesting take, although one shall consider that *money is already to a large extent information only*; and that, relatedly, States are *already taxing us on the information they have about us*: no information, no taxes, as simple as that. In this regard, no surprise if tax battles can be usually analysed as information-sharing struggles. Today’s state-backed technogiants are not monopolies, because they are far worse: they are not *in* a market, they are *the* market(place), and most perilously, the market *of cognition*. Everything that exists, is or can be phrased in terms of them. Their algorithms decide what should be seen and whom by;⁸⁹ they sort what is visible from what is secret, and *only once this preliminary decision has been taken*, they pretend to make us “decide” what data—

⁸⁶ Which regarding e.g. digital services, it is still a controversial topic; for a business-friendly viewpoint, *refer to* ATKINSON et al. 2019, pp. 31-32.

⁸⁷ FLEISCHER 2010, p. 231.

⁸⁸ *Watch e.g.* HARARI 2018, 45:18-46:04.

⁸⁹ *Watch* VAROUFAKIS 2021, 01:10:09-01:11:59.

but only among the visible one of course—should describe reality and relationships of power around us.

What results from all of the above considerations is that whilst surveillance capitalism, as it stands, is not a valid theory (a legal one even less so) to understand international taxation, it may well represent a worthwhile starting point to set the background stage for a number of trends that will recursively surface in our discussion over the next chapters. With no depreciation of those limitations – first, the overlooking of state-tied executors of this totalising surveillance, I find that Zuboff’s monograph is worth engaging with, not secondarily because it springs out of an intellectual *milieu*—that of Harvard Business School—which is usually anything but critical towards Silicon Valley’s power-system which captured the American political establishment, and that not rarely sustained the latter’s misdeeds with its theoretical pseudo-validations (for instance, at the outburst of the 2007 subprime-mortgage bubble), often retracting them *subsequently* – but unapologetically.

In particular, Zuboff’s contribution is an effective vehicle towards the unearthing of tacitly contractual structures which lie buried beneath our daily experience of surveilled users and citizens. In commercial terms,

“[u]ser” dependency is thus a classic Faustian pact in which the felt needs for effective life vie against the inclination to resist instrumentarian power’s bold incursions. This conflict produces a psychic numbing that inures users to the realities of being tracked, parsed, mined, and modified. It disposes users to rationalize the situation in resigned cynicism, shelter behind defense mechanisms (“I have nothing to hide”), or find other ways to stick their heads in the sand, choosing ignorance out of frustration and helplessness. In this way, surveillance capitalism imposes a fundamentally illegitimate choice that twenty-first-century individuals should not have to make, and its normalization leaves users dancing in their chains.⁹⁰

⁹⁰ ZUBOFF 2019^c, p. 25.

This is a significantly insightful passage, in that the same can be said of citizens on the (captured-)public side of the game, where the Faustian pact is nothing else than a new model of social contract (SC) where citizens no longer need the protection by a Leviathan, and yet find themselves still enchained to a legal device—citizenship—that corporate entities keep escaping from instead. In this novel scenario, the former security-provider Leviathan is captured by entities whose profits are routed through all kingdoms whilst their duties are rooted nowhere⁹¹ or negotiated on a *pro rata, sui generis* basis.

Facing this struggle, citizens should invoke new rules: the refoundation of their Westphalian Contract – in fact, a *Surveillant* one. In this new Contract, the Leviathan—perhaps in the form of an embryonic global Constitution—should leave old security problems aside and rather face the most pressing sources of contemporary social instability and resentment, heading the much-needed transition from *international* to *global* law. It should afford citizens a legal shield against the tax abuses of a-jurisdictional exploitative threats that have come to be known as “Multinational Corporations”. If this is not prioritised in the international agenda, it is far too easy to predict that the age of surveillance will come to a point where either *acracy* or *anomie*, or both, will be preferred instead,⁹² because the anarchy the old gold

⁹¹ Indeed,

[t]o be “nowhere” is the ultimate goal of those who use secrecy jurisdictions. [...] “Nowhere” in this case means that the jurisdiction which supplies the regulatory structure for the transaction cannot be identified because there is none responsible for doing so. [...] Being nowhere [...] happens through the interaction of “secrecy [s]paces” provided by “secrecy jurisdictions”. An example might be where a person resident but not domiciled in the UK creates a trust in a secrecy jurisdiction such as the [BVI] that in turn owns a company incorporated in Jersey that has a bank account in the Isle of Man and nominee directors in Cayman. The income of that company and trust are retained *within the company*[, as if the jurisdictional regulator and the authority apportioning spaces were the company rather than the State. [...] This structure might achieve the aim of being unregulated almost everywhere. This is possible because the individual creating this trust is allowed to do so without breaching UK law subject to meeting the non-domicile requirements of that country. [...] This structure is nowhere. *Achievement of this [sort] might not be possible in the physical world*, but it is in this strange regulatory and secret space.

– MURPHY 2008, pp. 13-15, two emphases added.

⁹² MALABOU 2020, pp. 150-151.

Contract was supposed to prevent will be adopted by the masses and turned into chaos as a form of atomised resistance to hyper-domination. Anarchy would eventually redesign the world village as we know it today, and yet I keep being persuaded there is room, still, to rewrite the Contract by taking into account the needs for—but also the perils and inequalities arising from—(tax) surveillance. Such stipulation might include relevant elements from the cryptocurrencies and blockchain debates,⁹³ as privacy-compliant transaction and trust-managing tools, respectively, but it should do so without extremization or acritical surrender.

Does the regime of digital truth (or digital behaviourism) not threaten, today, to undermine the very underpinnings of [human] emancipation by eliminating notions of critique and of project [...] and even of common?⁹⁴

Of course it does! This is why we need, *inter alia*, to consider firms' tax-avoidance practices as a problem of global risk management,⁹⁵ rather than shifting the blame onto natural persons by legitimising their surveillance. For this to occur, the rules underpinning the relationship between natural and legal persons in the code of capital warrant rewriting, within the context of a renewed Contract; if regulators cannot be uncaptured, the people *as world citizens* are called upon to step in. In this sense, «[w]e need to understand how surveillance capitalism works and fight it. But the fight needs to be about capitalism, not privacy».⁹⁶ This work will “fight” (the current savage form of) capitalism, via “fighting” for global privacy entitlements for natural persons in a world which seems to rest upon prerogatives which are global in scope only for legal persons and the individuals who are lucky or exploitative enough to be tied thereto as

⁹³ Refer e.g. to GOODELL and ASTE 2019; DE FILIPPI 2020, p. 12; GRECH 2021, pp. 2;4;8; FERRARI 2020, pp. 534-535; and VAIVADE 2020, pp. 3;20;23-24;32-40;62.

⁹⁴ ROUVROY and BERNS 2013, p. 190.

⁹⁵ See also TUVESON et al. 2020, p. 275.

⁹⁶ LINDROOS-HOVINHEIMO 2021, p. 129.

“high management” or “shareholding”. Taxation will serve as the most suitable background to illustrate what is wrong with the current state of affairs.

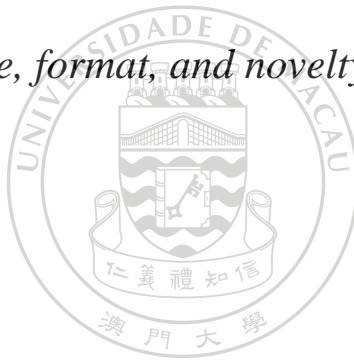


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Chapter 2

Structure, format, and novelty of the Thesis



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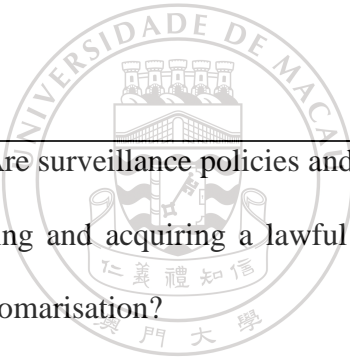
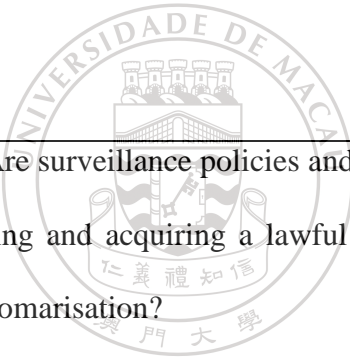
ORGANISATIONAL REMARKS

As a reader of (terrific amounts of) scholarship, I often find Introductions exceedingly irritating, which is why I wanted to table the introduction to my PhD Thesis with an alternative taste. Through the previous Chapter, in defiance of the academic *tópos* of inaugurating every scholarly work with an Introduction, I have consciously opted for a starting *in medias res* for the purpose of immersing the reader directly into the gist of the discussion, disintermediating it from the lengthy and self-indulging apparatuses of disclaimers, literature reviews, and organisational notes which ordinarily delay the reader's emotional and intellectual engagement with this type of works. And yet, it is now time to equip the reader with a few introductory remarks which, I hope, will smoothen their undertaking to interact with the present work rewardingly. Hence, via this introductory Chapter, I will offer an overview of the main themes explored in the subsequent **Parts (II, III, IV)** of this work; such an overview is intended *not* to be too lengthy an endeavour, because the reader will find that each Part is, in turn, opened by an introductory Chapter: by perusing those three **Chapters (3, 8, 14)** in-a-row, readers will be able to capture this work's skeleton, with the order and rationale by which all arguments are expounded. While I will now paint the general landscape of the Thesis, i.e. the overarching topics of its four Parts, readers should indeed refer to **Chapters 3, 8, and 14** for a zoomed-in deciphering of the specific structure (**sections and sub-sections**) subsuming **Parts II, III, and IV**. Furthermore, an essential summary of the Thesis in the form of a brief **Synopsis** is procured right before the References. Before entering the merits of this works with its outline and the specification of its research questions, I would like to emphasise that although taxation per se represents a highly volatile field legislatively (just like most

fields nowadays, especially where new technologies are released), the Thesis has been drafted with the aim to convey a reasoning and “projecting” whose rationale should prove to last well beyond the most recent developments involving MNCs’ minimum tax rates and the like.

RESEARCH QUESTIONS AND THESES

This Thesis consists of three core theses, underpinned by an equal number of research questions:

 <p>Research Question I: Are surveillance policies and practices by means of taxation of individuals normalising and acquiring a lawful status under international law through accelerated customarisation?</p> <p>Thesis I: Yes, they are.</p>	 <p>UNIVERSIDADE DE MACAU UNIVERSITY OF MACAU</p>
<p>Research Question II: Are the aforementioned policies and practices enacted in compliance with individuals’ right to privacy under international human rights law (IHRL)?</p> <p>Thesis II: No, they are in fact noncompliant and thus unlawful under IHRL.</p>	

Research Question III: May lawfulness and unlawfulness be reconciled by embracing a global constitutionalist belief on what the diffuse project of international law should prioritise and strive for?

Thesis III: GC cannot untangle the lawfulness dilemma, yet it may clarify the finalistic reasons why there exist potentially persuasive arguments to deem said policies and practices illegitimate (i.e. teleologically inappropriate as well as concretely undesirable).

THESIS OUTLINE

«Se vogliamo che tutto rimanga come è, bisogna che tutto cambi»
Giuseppe Tomasi di Lampedusa, *Il Gattopardo* (1958, posth.)

Part One

Part One has introduced the reader to the wider theme—or necessary premise—of this Thesis: States’ recourse to taxation as an expression of captured complicity with the corporate exercise of surveillance capitalism.

Surveillance capitalism, as most notoriously and elaborately termed by Harvard’s scholar Shoshana ZUBOFF, refers to corporate exploitation of individuals’ data in order to profit from it or to accrue more pervasive bargaining powers within society compared to public institutions, in order to turn state policies to privatised interests. Throughout this process, States often find themselves “captured”, in the sense that whilst they do endeavour to resist corporate pressure, their own élite comes to coincide with or being strictly tied to that running major corporations, to the effect

that the interests of the two can no longer be easily discerned. This is no news: sociologists such as Christian Fuchs have already applied surveillance capitalism to state apparatuses and argued that one single élite has merged corporate-public interests in exploiting personal data for the sake of economic profit, electoral control, and chilling surveillance, which entails predictability of people's future choices as consumers as well as citizens. However, this convergence of private and public elitist interests has never been analysed with reference to taxation, and in particular, to the taxation of individuals on the international plane via extensive networks of dataveillance.

Perhaps worth recalling is that wide societal benefits are brought about by a fair, distributed, well-conceived taxation system, in terms of public infrastructure, welfare, social services, techno-scientific progress, and even collective happiness (as allegedly “measured” by some scholars); nowhere in this Thesis is it advised that individuals, even the poorest ones, should be dispensed from the duty to pay taxes in the absolute: all reasonings will be developed by comparison with the intricate host of corporate deceptive solutions to lower or even fully disapply their tax burden. Thus, Part One has proceeded by focusing on the potential misuse of taxation by corporate-captured States as an instrument that mirrors the inequalities, contradictions, disruptions, and especially privileges informing the underpinned societies, also in relation to corporate nudging and power struggles across strata of society. This first Part has concluded indeed by wondering whether taxation, as currently designed and enforced, has become yet another instrument in élites' toolbox in order to exercise ever-renewed and subtle forms of surveillance capitalism. The thesis has been that it does so indeed, and such a perspective is going to be defended in the subsequent Parts of the Thesis.

Part Two

Part Two of my Thesis aims at validating the hypothesis that surveillance capitalism by means of taxation is undergoing a process of customisation on a global scale. This is extremely meaningful from an international legal perspective: according to traditional IL doctrines, international customs form the *corpus* of international customary laws and are thus by definition lawful (unless they stand in violation of so-called “peremptory norms”, also known as *ius cogens*, which save for what will be specified *infra*, it is not the case here).

Part Two opens with an in-depth analysis of the functions, merits, and shortcomings of ICL today as a source of international obligations, particularly when it comes to ICL norms triggered by IOs and pertaining to information exchanges in the cyberspace. This is immediately linked to a scrutiny of broader surveillance practices operated nowadays at the international level, as revealed for example by Wikileaks cables; in general terms, as scholarship itself has long confirmed, no doubt exists that surveillance has undergone a gradual yet extremely rapid process of normalisation across space (involving all regions) and time (being reiterated on a continuous basis), with intelligence agencies indiscriminately collecting vast amounts of (digital) information on citizens worldwide, backed more or less formally by their States of affiliation.

Once this has been established, this Part turns to the assessment of surveillance techniques, methods, and legal arguments especially related to the taxation of individuals, as to demonstrate the customisation of surveillance through taxation. For accomplishing this result, it succinctly traces the civilisational history of

individuals' taxation as to show how concepts of sovereignty, jurisdiction, and citizenship, as well as foreign interference in tax matters evolved over centuries as to accommodate the new "needs" and problematics inherent to an increasingly globalised, mobile, digitised, populated, atomistic, and perhaps even "liquid" society. It argues that whilst in pre-Westphalian configurations of state power, tax enforcement was exceptionally lenient and disorganised, it theoretically surged to become a cornerstone of contemporary conceptions of the separation of powers, territorial sovereignty, and the rule of law in the post-Westphalian social texture – only later in the Thesis I will illustrate that, in fact, Westphalia has *always* been porous for the rich to infiltrate their exceptionalism-grounded capitalist claims. Since the time of Westphalia, one may generally posit that the customary rule encompassed *informal* exchanges of intelligence on tax matter which, however, could only be operated between sovereigns *as an exception*: the enforcement of tax laws was, as a norm, assigned to each State with other States never being legally expected, let alone mandated to collaborate in investigating or enforcing foreign tax claims.

This scheme, modelled on a predominantly sedentary and pre-industrial society, became outdated in the wake of the post-WWII phenomena of capital-intensive, mass-labour globalisation of transactions and people's lives, accompanied by the ascendancy of more and more influential IOs across all policy areas. Among the loopholes that emerged (or, more accurately, intensified quantitatively and qualitatively) in the customary approach to taxation as encoded in the Westphalian international order, two deserve special mention: onshore and offshore financial centres (including the improperly called "tax havens"), mostly exploited by wealthy individuals as to circumvent taxation (i.e. for tax evasion), but increasingly sought after by corporations, too, as a means of arbitraging the allocation of their tax burdens

(i.e. for tax avoidance). The common mantra is that tax evasion is strictly illegal, whilst tax avoidance is quasi-legal in that it complies with the blank-letter of the law on a country-by-country reading, yet it does obviously escape its overall intent when scrutinised through systemic, global, suprajurisdictional lenses.

In an attempt to readapt customary schemes to the new course of history, the US began to exercise unilateral assertions of jurisdiction, that is, extremely assertive forms of legally vested politico-economic coercion against foreign States and their financial institutions as for them to disclose personal information belonging to US citizens, contrary to those foreign States' own laws. Most notably, *at the same time*, a wave of financial deregulation traversed the US (and, to a lesser extent, the entire “West”), laying the foundations for the aggressive tax planning that will have characterised the operation of investments banks, hedge funds, insurance companies, supply-chain MNCs, and most radically the Big Tech for decades to come – and that still runs unabated this day. Therefore, the process which led to exchanges of tax information internationally started as a unilateral initiative by the world's then-only superpower. Drawing inspiration from—and trying to resist the unilaterality of—mentioned initiative, other regional actors, including within today's EU, pursued similar initiatives; and yet, exchanges of information were performed on demand, rather than automatically. Eventually, the international community decided to engage more resolutely with the issue of international taxation, with the purpose of aligning States' policies with the exigencies of a hectic society where people move, spend, are paid, and invest globally through millions of transactions per minute. States decided to negotiate multilaterally through several fora, the most prominent thereof being the OECD, and yet the first initiatives failed due to both a lack of protracted interest and

scarce participation from jurisdictions outside the circle of this exclusive “rich countries’ club”.

A more resolute and somewhat inclusive phase of negotiations was made undelayable by the combined effect of three events and conditions, which arguably led to an abrupt and accelerated amendment of the customary rules followed till then in the field of international taxation. In ICL terms, these events and conditions can be deemed “Grotian Moments”; the latter are accelerated shifts (by alteration, emergence, or submersion) of customary rules in times of fundamental change, as defined by Michael Scharf, who in turn coined the label on the suggestion formulated by Bin Cheng to identify as “instant custom” any customary rule that crystallises exceedingly rapidly, particularly vis-à-vis technology-intensive affairs. As far as the subject-matter of the present Thesis is concerned, the relevant Grotian Moments are: 1) the 9/11, which urged States (both factually and rhetorically) to improve their intelligence acquaintance with and enforcement reach over offshore financial centres (OFCs) in order to increase their chances to tackle international money laundering as a source of arms trade and terrorism financing; 2) the 2008 financial crisis, which left States overindebted and thus short of financial resources to fund welfare interventions as needed to address the surge in poverty, homelessness, and unemployment, thus compelling those same States to regain more revenues from combating tax evasion; and 3) the Panama Papers (in addition to dozen more information leaks to investigatory journalists), exposing the scale of and interconnections among professional legal/consulting services assisting wealthy clients worldwide in avoiding taxes, thus facilitating typical corporate-tied “white-collar” crimes. These three Moments were channelled through and sustained by the more general but equally disruptive emergence of computers and AI technologies as enablers or catalysers of—as much as

awareness-shapers about—both tax evasion and tax recovery “real-time” through the cyberspace.

This new “momentum” in international taxation witnessed the somehow unexpected protagonist role played by China as a norm exporter (or “norm entrepreneur”), bilaterally first and within the OECD later, also owing to the US’ defiance of any multilateral initiative which could somehow replicate the American unilateral scheme. Several other so-called “developing” countries, too, joined the OECD process and collaborated actively in bringing the new outcomes to life – although some suspect that this might have occurred under threat of economic retaliation or other coercive manoeuvres threatened by Global North’s “great powers”. In any case, under the input of the G20, the OECD reached consensus over a package of new instruments, notably the Base Erosion and Profit Shifting (BEPS) project (soft law) and the Automatic Exchange of Information in Tax Matters (hardened into binding law by each party on multi-bilateral bases). Indeed, the second is a web of multi-bilateral agreements according to which all banks *et similia* in the jurisdictions concerned are mandated to disclose financial information related to citizens or fiscal residents of the other state parties, to be disclosed automatically and indiscriminately with those other parties, on a reciprocal commitment (meaning that this two-way process is operated continuously and simultaneously).

In other words, the exchange of tax information *on natural persons* between sovereigns is no longer contingent upon specific administrative requests, a judicial mandate, or even reasonable and motivated grounds of suspicion by tax agents or other state authorities; rather, it has simply become a preventive, comprehensive, and automatic disclosure of private information regarding *all* natural persons, which is shared across countries with no need to respect procedural safeguards to be established

at the international level. Instead, such information will be treated in accordance with the laws in force in the receiving countries, in the absence of any supervision, remedy, or actionable right on the part of—or even notification to—those whose data is this way shared.

In sum, amended customary rules are being moulded internationally, with the US as a “persistent objector” not so much to the norms’ content, but to their multilateral design, and with China as a novel norm crafter; moreover, these rules are customising rapidly due to their technological application and the widespread consensus they seemingly gathered across sovereigns. Resultantly, with the only exception of data shared with countries where it could be utilised to politically charge individuals with financial crimes leading e.g. to torture, no peremptory norm stands in opposition to the lawfulness of such customs, so that from the exclusive perspective of ICL, the OECD initiative and States’ surveillance through taxation—which has gradually expanded domestically as well—shall be deemed to represent a lawful exercise of sovereign prerogatives grounded in a source of public international law (PIL) as reported in the International Court of Justice (ICJ) Statute. Individuals might be convicted by capital punishment, too, but differently from the abstention from torture, the right to life is not yet absolute (*ius cogens*) in international law; as such, only instances of torture would displace the lawfulness of this form of surveillance’s customisation.

Part Three

Part Three analyses surveillance-through-taxation mechanisms in light of human-rights concerns, aiming at demonstrating the thesis that Automatic Exchanges

of Information (AEoIs) are unlawful under IHRL. The analysis is not a straightforward one: not only privacy is an essentially contested concept internationally, but there is no general test applicable at the international level to assess whether a certain intrusion perpetrated by the State violates the privacy of individuals. However, given the non-absolute (i.e. derogable) configuration of this right (e.g. in the International Covenant on Civil and Political Rights (ICCPR)), a test is needed, even from a purely abstract perspective which does not ground the assessment in the specific wording of any treaty.

The most detailed and somehow consistent body of case-law on derogations to the right to privacy is the one developed regionally by the ECtHR: owing to its extension and sophistication, it has shaped the legal understanding of privacy under international law more generally, well beyond Europe, and influenced extra-European regional human-rights systems remarkably. As such, for the purpose of the present work, AEoIs' potential violations of individuals' right to privacy will be scrutinised by drawing "liberally" (but with due attention being paid to preventing selection bias) from ECtHR's jurisprudence related to tax enforcement, mass-surveillance programs, data sharing, criminal procedural safeguards, and cognate situations as relevant.

It shall be clarified from the outset that this Thesis is premised upon the standpoint of democratic societies, *viz.* those where citizens should at least theoretically shape state policies by exercising their electoral and constitutional rights, and where the State acts primarily on behalf and to the benefit of its citizens – on paper. As such, the first assessment criterion to be drawn from ECtHR's case-law is that of necessity (*in a democratic society*, indeed), which endeavours to appraise whether the same societally endorsed policy goal could be attained by alternative (less intrusive) means. In order to be necessary, privacy violations need to be effective, that is, to truly

reach the intended target and contribute a fair share towards the resolution of the policy problem which declaratively triggered them in the first place. In the case at hand, OECD-modelled AEOIs are contributing towards a concrete overhaul of banking secrecy laws, compelling several jurisdictions (such as Switzerland or Hong Kong SAR) to discontinue or significantly resize their long-standing banking-secrecy tradition, whilst scrutinising their citizens' movements and spending capacity by all means – even through social media and massaging applications. Nevertheless, withdrawals of banking-secrecy traditions are not necessarily accompanied by a reformulation of tax policies in tax havens or OFCs, to the effect that jurisdictional exceptions to and holes in the Westphalian order never ceased to attract highly volatile capital through countless combinations and shortcuts (...not quite short, though) that allow corporations to go basically tax-free. The only difference from before is that the very existence of such a capital is now mostly ascertainable by the tax authorities of third countries – which, again, is else from saying that it will be effectively taxed.

“Necessity” equally means that no reasonably available alternatives could be deemed pursuable to deliver on the same policy objective with comparable degrees of effectiveness, in an equally timely as well as cost-effective manner. Against this criterion, the OECD's AEOI model shall be regarded as a total failure, and as a rhetorical fallacy in international efforts to bring tax privileges to an end. Indeed, whilst AEOIs hit all individuals, the overwhelming majority of whom belong to the working class, the almost totality of tax revenues that escape States' remit derives from corporate tax avoidance. Regrettably, any attempt to date to regulate corporate taxation as to close these gaps has failed miserably. International corporate taxation is chiefly based on the application of the arm's length principle to transfer pricing, through which MNCs (rightly) avoid to be taxed twice (double taxation) for their services;

nevertheless, the principle was not conceived for the digital economy, and its application is so arbitrary and often even corrupt that States possess no resources and/or willingness to oppose MNCs' interpretation of the latter. Consequently, MNCs factually employ an exceedingly discretionary approach to the principle, this way operating tax-avoidance schemes worth trillion dollars every fiscal year. The US government unsuccessfully endeavoured to counter this phenomenon multiple times, and yet, with revolving doors for Big-Tech executives and Congresspeople, the Big Four and supervisory authorities, and so forth, it has always proven too captured to do so effectively. The EU, too, failed to upgrade or invalidate the principle, with its draft Common Consolidated Corporate Tax Base (CCCTB) proposal being objected to by Member States (MSs) exercising tax dumping systemically, including Luxemburg, Malta, Cyprus, Ireland, Belgium, and The Netherlands. The same uninterest-incapacity cycle holds true for the OECD: in contrast to the apparent easiness by which it persecutes individuals, it seems unable to seal any serious agreement on a "re-edition" of the arm's length principle that could finally capture, for instance, digital sales and other online services. In fact, the OECD's BEPS project was just condensed into a soft-law document reporting several laudable—and pretty technical—aspirations which are not complemented by concrete commitments on a time-frame to operationalise them *in the current tax-competitive political climate*.

Along similar lines, going after individuals in an indiscriminate and unprioritised fashion cannot be deemed necessary from an IHRL perspective, in that billions of citizens' privacy is violated, with the large majority of those citizens being indigent or in any event standing significantly detached from the wealthy layers of the world's population – which happen to be those that evade most taxes by far. To be sure, empirical studies authored by authoritative economists from all regions have long

demonstrated that the overwhelming majority of financial assets “parked” in tax havens or laundered through OFCs belong to the so-called “ultra-high-net-worth individuals” (whose identity, in most cases, is well-known to tax authorities, and easily discoverable by the general public as well). This observation leads directly to the criterion of “proportionality”: is the privacy violation applied (or foreseen in the law) in a reasonable manner, only to the extent that is strictly unavoidable in order to accomplish the policy aim? In other words: assuming the method is appropriate, is the extent to which it is exploited equally proper? Here, too, the answer must lie in the negative. First and foremost, there is no multilaterally stipulated “wealth threshold” over which banks are required to disclose individuals’ assets: that threshold might be provided for in the law of or operative guidelines issued by any participating country, and adjusted by policymakers as they please, yet no commonly agreed limitation features in the framework conventions as to what data can be collected, and what threshold should be respected. Any citizen can be scrutinised, regardless of reasonable suspicion on the part of tax authorities, with their personal data shared all over the planet across jurisdictions in a manner that exponentially increases the probability of such data being leaked and even re-sold on the dark web (for example, following targeted or—even worse—“trawling” cyberattacks).

All of the above occurs against a context of blatant comparative unfairness among social classes, generations, but also between natural and legal persons, where those same corporations which avoid taxes are bailed-out at any single crisis, often under the mantra of being considered “too big to fail” (TBTF), and where previous generations could avoid taxes—thus amassing proto-dynastic wealth—with relative ease by placing their assets in foreign banks under banking-secrecy guarantees. Tangentially for the mere sake of this Thesis, and yet tellingly from a broader

sociological perspective, the AEoI initiative might also acquire an enlightening intergenerational reading, surfaced even more evidently during the Covid-19 pandemic. Even the most advanced countries fell unprepared in the face of said conjunctural emergency, with their health personnel and facilities exhausted by draconian spending cuts and their welfare systems unready to respond to the crisis' economic fallout, after at least four decades of tax evasion by entire social groups belonging to previous generations (not only in “developed countries”) who selfishly, lavishly, and shamelessly, have left nothing but societies dried up of resources, paid jobs, and public services for the current youth and those yet to come.

From a procedural standpoint, the privacy violations scrutinised here are unacceptable and non-compliant with IHRL, either. Any AEoI, as the definition itself spells out, is an automatic process which does not depend upon judicial mandates or any other criterion; in the face of this, standard domestic procedural rights not only are not enhanced, but are frustrated by the supranational nature of these violations, with no corresponding remedy, procedure, or redress mechanism available to citizens for the violation itself or its material/emotional consequences (also because the violation itself cannot be proven on a case-by-case basis: it can only be “presupposed” by law). What is more, the data is processed according to the laws in force in destination jurisdictions, which only contributes to risks of abuse, manipulation, oversharing, and lack of transparency, *a fortiori* considering that the general principle of non-retroactivity is not always maintained (for instance under the DAC6 Directive) and no RoL-dependent screening is operated on a global consensual basis to “qualify” jurisdictions for these exchanges. For example, the financial data of a German citizen operating commercially in Mainland China could be shared with the latter and processed according to PRC law, although Chinese law does not necessarily uphold

comparable standards of impartiality and independence, for instance, in its judicial review. Even comparing PRC privacy laws to those in force in China's HKSAR, it emerges clearly how the former are designed horizontally (protecting from "peer interference") whilst allowing or even encouraging vertical interference from PRC governmental agencies. Put differently, whilst China does have a privacy regime in place, as outlined e.g. in the section on personality rights embodied in its 2021-effective Civil Code, as well as its most recently released data protection and data security laws, such a regime does not shield citizens from warrantless governmental intrusions (from the local to the central levels), but only from those of other common citizens (and companies); coherently, Mainland China has not even ratified the ICCPR.

Any comprehensive analysis of privacy violations, however, needs to proceed beyond the single violation in and by itself, in order to situate it contextually and evaluate it in light of potential "cumulative effects" that multiple stand-alone violations might entail. Haggerty and Ericson, for example, advised that citizens' identity and habits today are ceaselessly kept monitored by means of a combination of private-public techniques across multiple policy areas. Mentioned techniques tend to "dissect" an individual's digital footprints to then merge all these "data doubles" and obtain a complete personality-behavioural profiling; when this process occurs internationally and is sponsored by electorally unaccountable IOs (not to mention informal governance fora), risks of abuse are even higher. Overall, no doubts exist that the OECD's AEOI standard as it is designed and implemented at the time of writing is unnecessary, disproportionate, substantially unfair, and procedurally unsound, therefore harmful to individuals and their privacy. Furthermore, the standard sits incoherently with policymakers' relaxed campaigns in fighting tax avoidance, as well as with "ecosystemic" economic injustice originated and perpetuated by corporate

entities – particularly multinational ones. Even if one wanted to concede that the underlying intentions subsumed under the adoption of the OECD’s AEOI model were abstractly positive, or even that they were positive *and genuine*, their policy outcome does not live up to acceptable human-rights standards (nor to the “revolutionary” expectations placed upon this mechanism by the general public, on the wake of global leaders’ inflammatory rhetoric). As a result, on the whole, and as currently phrased and operated, it shall be considered unlawful under IHRL – just like any StT option that replicates domestically at least the contextual tax-cheating misalignments between natural and legal persons which I outlined *supra*.

As recalled in the Strega-Prize-winner historical novel *Il Gattopardo*, not rarely lawmakers rewrite the laws superficially *in order to* look busy, popular-solicitation-responsive, as well as benevolent, while actually changing nothing substantive beneath the surface. In the case at hand, the financial *status quo* for the élites remains unaltered, whilst the only practical consequence is an increase in surveillance – chiefly on the wrong (or anyway secondary) targets. Being it as it may, mentioned OECD process would have been better off at imploding upon its very genesis.

Part Four

Up to this point, my work will have read for the largest part analytical and descriptive; contrariwise, its more normative message materialises with the fourth Part. Following the first Part, Part Two will have demonstrated that mass surveillance through individuals’ taxation is customarising, thus acquiring its doctrinal lawfulness-by-default status under IL. Conversely, Part Three will have argued that the same

process is unlawful, when scrutinised through its human-rights implications. Can and should lawfulness and unlawfulness be reconciled?

Fragmentation is anything but unusual in PIL, to the extent that decade-long studies have been conducted by the International Law Commission with the intent of consolidating consensus around a set of tools which might assist international lawyers and judges navigate the complexity of inter-regime obligations. Nevertheless, these tools—like the most applied “systemic integration”—are of exclusive pertinence and serviceability during particular disputes before an international body, whilst proving unhelpful in untangling theoretical assessments on the lawfulness of a certain conduct or legislative outcome as such. In this case, then, tax surveillance will remain lawful and unlawful at once, unearthing tensions and contradictions which have been inherently struggling along the faultlines of the decentralised IL project since the time of its conception, dilating up to threatening the true foundation of the project. If one cannot establish via commonly accepted legal defragmenting tools whether an action or a policy is lawful or unlawful, because said action or policy is simultaneously both, perhaps the only stratagem out of the impasse is to decide meta-politically what perspective on the project of IL we would like to prioritise, and attribute (un)lawfulness accordingly. Such decision, however, will pertain assessments of lawfulness or unlawfulness not per se via hetero-extrapolated doctrines (i.e. on policy *X* being lawful under specialised legal regime *Y*), but rather in accordance with a certain number of teleological premises derived from homo-validated narratives on legitimacy or illegitimacy that those who perform the assessment shall agree upon from the outset. In performing these normative conflict-resolution exercises, evaluative criteria cannot but become autopoietic: they stand in the subjective priorities and values of the normative evaluator – myself, in this case. Hence, the

normative function of Part Four of the present Thesis is to advance a critical, definitely contestable, but hopefully edifying and revealing set of possible teleological ends for tax surveillance to transform itself into a component of a wider plan towards global economic justice through the revised IL project. The daunting but rewarding task for me will be to justify the saliency of my teleological aspirations, and to persuade the reader that they are if not yet of immediate serviceability, at least worth exploring and reflecting upon towards a more prosperous and sustainable future for all.

When it comes to the globalisation of capital transfers and “tax surveillance” alike, global constitutionalism is arguably a meaningful framework to appreciate the detachment between investigations going global and safeguards which remain anchored to the territorial fictions we call “States”. This way, if surveillance capitalism represented the most suitable conceptual toolbox to frame contemporary surveillance, GC seems to me the most convenient legal teleology to reconcile the different stances of ICL and IHRL on the policies under scrutiny. Whilst MNCs are allowed to exploit all loopholes—and invent new ones—in the texture of Westphalian sovereignty due to their mobile, transferable legal personality, physical persons are bound to the rights “granted” to them by domestic (fictitious) sovereigns, which can repress their behaviours and cooperate with other sovereigns in bringing them to “justice”. Nonetheless, in a global-governance scenario where politico-economic power is gradually but consistently shifting towards multinational aggregations of corporate entities, the risk that mentioned sovereigns become subservient to corporate interests by pretentious legal means is more than a prophecy; in fact, cited failed-at-the-start initiatives of the international community in the field of taxation exemplify the danger at its best. In this scenario, the global constitutionalisation of rights which are actionable internationally, and whose scope matches rigorously that of the violations

(to privacy, in this case) which occur on the international plane as a result of rhetorical arrangements concluded by transnational élites (all too often without parliamentary oversight and overcomplacently with all those conservative policies that can favour the “1%” more or less straightforwardly), would constitute a step towards improvement.

Eventually, a new social contract (which I will denominate as the “Distributive Surveillant Contract”) is called for, with the specific aim of accounting for state-driven surveillance practices and—should the latter be considered indispensable in the era of social liquidity, relativism, AI, and the Internet—not so much their limitations, as their effective redistributive purpose. This is all the more essential at a time when the originally intended essence of certain customs can be manipulated through arguments built on selectively collected, forcibly cross-checked, and/or top-down nudged big data (i.e. algorithmically mined “bulk data”), made readily disposable to tax authorities by supranational arrangements which serve the late-capitalist interests of a fully captured public-private surveillant establishment whilst disregarding the liberties, dignity, merits, and aspirations of the “99%”. This voluntaristic universal pursuit *de lege ferenda* would sanction state-driven surveillance *to improve the current design of international taxation*, with the ultimate aim of upholding all citizens’ rights while making corporations and their executives/shareholders contribute their fair share (yes, that’s a pun) towards social welfare.

In passing, another exercise *de lege ferenda*—which mostly vests the semblance of an *ars technica* digression—will be proposed, with the purpose of overturning *technically* the way tax surveillance works, through the adoption of an ad-hoc jurisdictional solution for the automated report and taxation of financial transactions via a parallel Internet network. The ingredients of this speculative exercise

are tentative and possibly visionary – probably warranting deeper reality-checking. In any case, such an inspection is merely tangential—yet not exogenous—to the conceptual architecture of the present Thesis: it only features here as its *divertissement* – mimicking the European XVIII-century-music tradition of an incidental and lighter piece of instrumental dance inserted *ad libitum* during the performance of a classical opera for the sake of delightful and playful, yet artistically brilliant wandering.

KEYWORDS

1%; 99%; jurisdictionality; algorithmic customisation; automatic exchange of tax information; Benjamin; China; data-doubles; digital dignity; élite; European Union; G20; fairness; global code of capital; Hong Kong; illegitimacy; inter-regime fragmentation; legal fiction; legal person; Marcuse; multinational corporation; natural person; normative conflicts; OECD; offshoring; policy coherence; redistributive global constitutionalism; regulatory capture; revolving doors; right to privacy; Russia; social contract; sovereignty; sustainable development; state violence through taxation; surveillance capitalism; surveillance through taxation; Surveillant Contract; tax avoidance; tax evasion; transnational human rights; United States; Westphalia.

THESIS ORIGINALITY

Eventually, this Thesis will embrace the perilous challenge of reforming relevant tenets in international legal scholarship, by contributing to multiple law sub-disciplines in at least five distinct ways. Namely, it will:

- 1) Argue that the OECD's AEOI is to be framed against a broader trend towards corporate-aided state surveillance of individuals *through* (as opposed to *for*) taxation, stemming from a number of concurrent phenomena including surveillance capitalism as well as the regulatory capture of both domestic

regulators and factually unaccountable transnational bureaucracies. [chs. 1;6;11]

- 2) Suggest that such an expansive trend towards StT is manifesting both across domestic jurisdictions and transnationally, also thanks to the prominent role played by IOs such as the OECD, thus hardening into international customary norms, *ipso facto* lawful. [chs. 4-5]
- 3) Submit that AEoIs, and StT generally, emerge as unlawful under IHRL not only from a legalistic reading of the (domestic, international, EU where applicable) derogable “right to privacy” as data protection and/or individual dignity, but also out of a more systemic understanding of human rights as quests for sustainable mode(1)s of global justice towards policy coherence between natural and legal persons, as well as between the élite and the rest. Accordingly, indiscriminately surveilling all natural-person taxpayers is disproportionate and incoherent a policy response unless tax avoidance is not satisfactorily addressed beforehand. [chs. 9-12]
- 4) Posit that the normative conflict between a measure’s lawfulness under ICL and unlawfulness under IHRL is irresolvable and thus cannot be settled through traditional legal-integration devices, including systemic integration and inter-legality; hence, only teleological horizons on what IL stands for and should be about can untangle the normative dilemma. To do so, this legal irresolution is originally framed as expressive of structural state-corporate violence, drawing interdisciplinarily from critical social theorists such as Walter Benjamin, Paul-Michel Foucault, Axel Honneth, and Herbert Marcuse. [chs. 16;18]
- 5) Hypothesise that if we adopt a global constitutionalist perspective on IL, if we assume that the OECD’s AEoI is a form of state-implemented violence

exercised through corporate entities and in favour of corporate strategies ultimately benefitting the wealthiest individuals, and if we accept that StT is regrettably here to stay in most jurisdictions, we are at least in need of renovating our SC on different premises – chiefly among them, that surveillance can transitionally be accepted as lawful (*deference to ICL: apology*) only insofar as it serves redistributive and policy-coherence goals as well (*IHRL aspirations: utopia*). These conclusions frame the problem of tax surveillance within long-standing controversies surrounding legal personality as politicisable and capital-prone fictionalism, maintained to serve corporate structures. They also unearth significant systemic implications of the 1%/99%, natural/legal person, and evasion/avoidance dialectics for the future of IL as a vision of justice and a project of global governance. [chs. 17;19]

PRELIMINARY STYLISTIC-ORGANISATIONAL NOTES

At this juncture, I am only left with the task of cautioning the reader about a few matters of style, language, design, concept, and format that have informed the drafting of this work.

References

- Complete citations are only provided in the final bibliography; any other solution would have made this work redundant and, to my taste, unreadable. Scholarly works and grey literature are cited in footnote in surname-year-page

format. Case-law, legislation, institutional documents, etc. are cited in brief denomination in the main text or footnotes with the relevant article, paragraph, or else; searching the document for the brief denomination provided, the reader will find the full reference in the final bibliographic tables. In extremely rare cases, I have opted for reporting social-media posts or anonymous weblinks integrally in the footnotes, as it would have been nonsensical and/or impractical to place them within the bibliography.

- Judgement details, too, are reported in the relevant case-law tables of the final bibliography; footnotes only report their short denomination, italicised.
- Whenever a journal article appears online-only as a preview but has not yet been accommodated into an Issue, or journal articles' pagination is not standard, those articles' DOI has been reported; when it comes to online-first articles, the date I have put in brackets, integrated by the indication “forthcoming”, usually corresponds to that of first online publication and not necessarily to that of the print/definitive version.
- The aforementioned bibliographical details, as well as any law and judgement reported in this Thesis, are accurate and current as of December 24, 2021.
- To save paper and protect the environment, latest webpage visit-dates are not specified link-by-link. The reader may assume that all weblinks were last checked as safe and live on December 31, 2021.
- In the footnotes, verbs such as “see”, “refer to”, “read”, or “check” hold roughly the same valence. Nevertheless, their qualifying adverbs and expressions—such as “for instance”, “further”, “also”, “extensively”, etc.—do have a specific purpose as to indicate how crucial and/or exhaustive a source has proven towards the development of my point.

- In the footnotes, “cf.” denotes soft disagreement, while “*contra*” introduces to hard disagreements.
- When footnotes report several sources one after the other, the order of appearance is neither chronological nor alphabetical; it might be random (if the sources are equally important) or sorted by importance (starting from the most important).
- Small caps are used for surnames to help identify the sources being referred to in the footnotes or the main text. Other surnames which are not referred to bibliographical entries are kept in normal font.

Concepts

- Of course, both natural and legal persons can pursue both tax evasion and tax avoidance; however, unless otherwise specified, I have intended evasion with reference to individuals and avoidance with reference to corporations.
- When I make reference to the 1%/99% without further specifying, I intend to operate a rough conceptual distinction between the corporate-state élite and the rest. However, when other Authors are quoted when mentioning the %/99%, they might intend to draw more specific implications of relevance for more specific groups, therefore the reader is invited to double-check this meaning with the original source. Furthermore, whenever I intend to be more specific, I do pinpoint to the relevant categories (e.g. UHNWIs), figures, or statistics.
- By “the West” I refer to “the cultural West”, and particularly to the Anglo-Saxon (legal) corporate culture. Similarly, “the South” is not a geographical denomination.

Structure

- As previously noted, this Thesis is divided in Parts → Chapters → Sections → Sub-Sections.
- Parts' concluding Chapters are structured in bullet-points; I surmise this is the most effective manner to summarise and convey non-redundant, consequential, easy-to-remember, ready-to-check take-home messages.

Format

- I avail myself of the double inverted commas (“...”) to emphasise decontextualised, sarcastic, exoticist, or anyhow particular terminology as well as challenging concepts – with the same function as italicised passages; of the single inverted commas (‘...’) for book chapters and journal articles’ titles; and of French *guillemets* symbols («...») for maximum-45-word-long direct quotes. Indented longer quotes, where “...” might rather signal a “quote within the quote”, constitute the only exception to this rule. I prefer to use *guillemets* over inverted commas for direct quotes because I believe that in English literature the latter cause confusion with apostrophes (quite widespread in English language), forcing the reader to mentally keep track of the start and end of each quote in order to distinguish quotation marks from apostrophes; the problem is this way avoided: quotes are marked by *guillemets* only, so that any ...’ sign the reader encounters will definitely be an apostrophe and not the end-point of a quote. While I was forced to abide by English-language-

academia conventions for my 20+ scholarly publications, I am joyful to defend here my informed freedom to choose the quoting marks which work best according to my own judgement and standards.

- British spelling is adopted, except for standardised denomination and American-English direct quotes.
- As a noun, “State” is capitalised to emphasis its status as a sovereign under IR and IL; instead, whenever it is used as an adjective (e.g. “state surveillance”) or in a generic sense (e.g. the state of the art”), it is not capitalised. When “states” are within federations (eg in the US or India), they are not capitalised: only “States” as (federal) sovereigns are so. At times, when quoting from literature, “state” has been turned into “State” where applicable, but inappropriate capitalisations as “State” have not been readjusted to “state”.
- “ff.” (“and the following”), “i.e.” (“that is”), “e.g.” (“for example”), “t.” (“table”), “chs.” (“chapters”), “s.” (“section”), “para.” (paragraph”), and so forth are dotted. Other symbols, e.g. for paragraphs, might have been transposed unaltered from their sources.

Terminology

- “CJEU” is also employed extensively to stand for the first-instance (European) General Court; when historical passages are at stake, it might also encompass the former ECJ, depending on the context.
- The United States of America are abbreviated as “US”, but quotes from sources preferring the dotted abbreviation “U.S.” or other solutions (e.g. USA or U.S.A.) might have been left unaltered.

Style

- The analysis is conducted in first singular person; the *plurale maiestatis* might be used rarely, on occasion. I do not generally abide by false pretences of objectivity that endeavour to turn subjective, critical statements into detached, impersonal ones by means of cooling-off and abstracting linguistic artifices such as “it is argued that...” or “the concern is that...”. I profoundly believe that there is no such a thing as absolute impartiality in legal scholarship – nor should there be, if one asks me. As law scholars, we stand (and perhaps should feel) accountable to the communities we write for, and we are patently moulded into writing and thinking by our background and life experiences. Trying to hide it will prove unsuccessful an enterprise.
- While upholding its scientific mission as well as tone, this work is traversed by a fair degree of waves of both rebel polemics and untamed, value-laden frustration. May the reader be assured of the fact that this is a conscious choice, and perhaps even a conscionable one; after all, «[e]motional reactions, such as [...] indignation, [...] can also serve to highlight the hypocritical nature of a legal order by juxtaposing the impact of a law’s publicly stated purpose, against its impact».⁹⁷

Final observation

⁹⁷ WHITE 2021, p. 505.

- This work demands of the reader a consistent and thorough, patient commitment – especially at its outset. This is because of its length, overall structure, and complexity, but also because it purposefully takes the reader on a long panoramic journey before connecting all of its juridical and extra-juridical threads. Nevertheless, I am both confident and hopeful that the reader will find the destination was worth the ride, and deserving of their patience.



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Part II

The lawful customarisation
of individuals' surveillance through taxation



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Chapter 3

Introduction to Part Two



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Overview of Part II

This Part of the Thesis aims at evidencing that StT is customarising both across domestic jurisdictions worldwide and under IL. This claim will be supported in three steps. First, a theoretical overview of ICL as a source of international obligations will be provided {**Ch. 4**}; while several innovative comments are made, this is to be appraised mainly as a doctrinal-review chapter. Second, I will illustrate the key instances of StT customarisation at the international level, i.e. the “Grotian Moments” that catalysed international policymakers’ resolution in fighting tax evasion by individuals through the enactment of surveilling policies {**Ch. 5**}. Third, the policies that are increasingly turning StT to the norm rather than its exception will be debunked {**Ch. 6**}, as to prove that StT is anything but a transient phenomenon and is indeed vesting the authority of an international custom. **Ch. 7** draws a range of conclusions in a schematic, bullet-point format.

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Chapter 4
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While several and authoritative compendiums on ICL have been published—and keep being published—over the decades, **Ch. 4** is structured in such a way as to focus on the core matters of relevance for the application of this source of law to our digital and algorithmic age, to the input by IOs, as well as to the accelerating features of today’s legal reality. These are all essential aspects of ICL that will be retraced all throughout the Thesis, and that inform the emergence of StT as a custom more specifically. **Section 4(a)** introduces the reader to ICL, highlighting its enduring importance for the regulation of international affairs, and explaining the reasons why

certain selected sub-topics have been shed light upon in the upcoming sections.

Section 4(b) highlights the historical significance of ICL, and exposes a number of fractures between the stability and certainty theoretically demanded of legal norms and the rather obscure manner international customs emerge and are recognised as such. In particular, our fast-paced times of digitised networking, technological advancement, and business consumerism challenge the very foundation of customs as a source of law, once crystallised in slowness and consensus-by-reiteration; this friction disrupts the traditional meaning of customisation, and devotes itself to stimulating cognitive conflicts in the minds of international lawyers. New norms emerge faster (but not necessarily better), and once-endorsed practices and beliefs more rapidly fall into (legal) desuetude, to the point that international courts face harder and harder dilemmas as time goes by, e.g. on what exactly the threshold for sanctioning an accomplished customisation or un-customisation process is. **Section 4(c)** fishes into these challenges and explains that not all international customs are alike, i.e. different customs may hold varying degrees of validity depending, for instance, on the scope of their geographical projection and geopolitical recognition. Customs may apply only locally, or on the regional scale, or “worldwide” (only a few of them are actually this global), in observance to the practices and beliefs underpinning them, which might be tied to specific cultural or territorial conditions and understanding of what “law” stands for. The subsequent **Section 4(d)** unfolds the existence of instantaneous crystallisations of practices and beliefs that may be granted the status of international customs in the aftermath of “Grotian Moments” that sanction the impetus of their emergence and their centrality to the system of IL and its dynamics as a whole. One note shall be taken in relation to the role played by private actors in fostering people’s adherence to such practices and policymakers’ awareness and enactment

thereof. One facet of this latest trend is explored further in **Section 4(e)**, which endeavours to capture some of the distinctive elements of digital and algorithmic customs, as originated by behavioural patterns e.g. in the cyberspace; “cyber-customs” may display accelerated tendencies to become consuetudinary or fall into desuetude, drawing relatively rapid cycles of customary-uncustomary nature. The very same fact or belief may escalate or de-escalate a custom depending on the legal regime at stake, and even on the subjective positioning of identifying actors such as international judges, diplomats, as well as publicists. In some way, this signals a “privatisation” of ICL which comes as coupled with its “informalisation”, that is, the presence of diluted and disordered mechanisms for ascertaining the actual status of a possibly customary norm {**Section 4(f)**}. In my account, customs are “informalised” whenever negotiations about agreeing on whether a norm is customary or not are held informally (and mostly secretly) by representatives of States, IOs, and even NSAs. These occurrences are increasingly frequent in international diplomacy and lawmaking, within the perimeter of a broader shift towards the informalisation of global governance, so much that their legitimacy is rhetorically—if not yet doctrinally—normalised by those same State which denounce this practice in the first place. A portfolio of factors contribute to ICL’s informalisation: the enhanced assertiveness of private actors; the blurring line between IOs and other types of state-participated organisations; the wider phenomenon of legal transnationalism (from which the hybrid domestic-international law expression “transnational law” stems); as well as, again, the development of technologies which make it easier for diplomats and policymakers to communicate instantly (and in fact, informally) beyond the veil of institutional fora and their institutionalised control mechanisms and delegation procedures. Besides the fiction of an orderly box of international legal sources, sliding scales of softening and

hardening customs—and soft/hard laws generally—may be appreciated instead.

Section 4(g) situates the “sliding” problem within the already arduous and politicised identifiability of the two constitutive elements of international customs as long-standingly fixated in scholarly literature: practice and *opinio*. States might decide to tailor their involvement into a customarisation process depending on their degree of interest in the relevant norm, but also on the extent of participation by fellow States, the forum where discussions are conducted, and even the technological means that enable such discussions. Furthermore, States may more or less explicitly endorse the customary status of a norm by means of declaratory hierarchy (the endorsement by e.g. a Minister of Foreign Affairs will carry more weight than that by a lower representative) and more or less direct engagement; to exemplify, an explicit endorsement via a bilateral commitment will be far easier to detect and isolate compared to expressed *opinio* to be retrieved from voting patterns of state delegates to IOs where multilateral conferences are organised. When States are duly committed to the recognition of a certain norm as internationally customary, they will go the long way in demonstrating its practical diffusion, theoretical viability, and—when referring to like-minded partners at least—value-based validity. One of the (sometimes intended, other times less so) effects thereof, as reported in **Section 4(h)**, is the hardening of existing treaty law through customarisation; for example, the actuality of a treaty norm may be “confirmed” by its renewed practice, or the norm expressed in a treaty between twenty parties might become common legal heritage of further thirty or forty States regardless of their treaty subscription, e.g. through customary acquiescence (also by silence, understood as lack of protest or as disregard for multilateral initiatives in the field upon invitation to contribute). One distinguished case, addressed in **Section 4(i)**, is that of the regionalisation (and possible later

globalisation) of once-treaty-based local customs, operated by a small group of “specially affected” jurisdictions for whose foreign policy such a normative “export” proves fundamental. Of course, the process works in the opposite direction as well: an equally small group of States might *not* want a treaty norm to socialise across further jurisdictions, and will thus try to oppose the recognition of mentioned norm as a custom in any available forum, starting from their own consistent high-level declarations as “persistent objectors”, whose weight increases with that of the jurisdiction of issuance. Certain jurisdictions are so geopolitically powerful that their opinion suffices for the international community to accept or reject the customisation of a once-treaty-based norm, charting the course for the hardening of previously localised obligations, or insisting of the inconvenience thereof. In fact, States’ approach to ICL is almost always utilitarianistic: the malleability of this source of international obligations is exploited instrumentally for the attainment of strategic objective, as a fundamental component of legal statecraft. States seek to increase their normative appeal by selective recourse to customary norms that may also *ex post* justify their actions and facilitate other States’ adjustment to their posture in global affairs, which also explains why judges are often regarded as “last-instance” guardians of the legal substance of this IL source, but also why ICL is still deemed to work as a West-driven enterprise {**Section 4(j)**}, where forthcoming non-GN superpowers such as China attempt to carve their own room for policy manoeuvring. Sometimes it proves strategic for States to socialise their standpoint on a norm in less visible a way compared to more direct forms of endorsement, and it is exactly at this juncture that IOs come into play as multilateral policy aggregator where the stances of groups of States are collected, re-elaborated, and—so to write—anonymised {**Section 4(k)**}. In other terms, States endorse a custom by means of necessary intermediation by non-

State fora where their stance may be more easily concealed; they might decide to opt for this solution, for example, when their democratically elected representatives could not justifiably account for a specific choice to their electorate (or to the whole body of citizens), but even autocracies may decide to take this path for the sake of more feasibly preserving their dominion and *ex ante* quell potential dissent. This way, people's opposition is suffocated, while elitist norms irradiate from jurisdiction to jurisdiction with an IO (or even informal arrangements) as the link in the chain. Hereby, sorting state practice within IOs (e.g. state voting patterns) from those Organisations' own practice (e.g. motions by their assemblies and constitutive organs), i.e. international state practice from IOs' established practice, is of the essence for the most accurate attribution of legal weight to decisions emerging as the outcome of negotiations taking place within IOs – which, again, might be simply *hosted* by an IO, or *driven* by the latter {**Section 4(l)**}. Proper distinctions to this end may also assist in making sense of slight or even gross inconsistencies between customs seemingly endorsed by States but unendorsed by IOs to which said States are parties (and vice versa); as the reader will immediately grasp, considering that hundreds of States and IOs exist, combinations in this sense are virtually infinite, and incongruences almost unavoidable, adding to the epistemic and foundational complexity of PIL. Nonetheless, owing to the variety of existing arrangements and the procedural peculiarities of each of them, the boundaries between state and IOs' practice should never be set aprioristically, and legally meaningful interfaces between the “two practices” are to be valued as well {**Section 4(m)**}. Even assuming that all IOs were bureaucratically alike, that would be no discount to the unlikeness of States in IR, with democracies and autocracies, Global North (GN) and Global South (GS) countries, great powers and microscopic island-States coexisting under the formalistic telos of

sovereign equality, yet bearing uneven degrees of influence over the substantial decisions as well as the procedures issued by—or anyway negotiated within—I/Os {Section 4(n)}. Certain jurisdictions may prove more prominent vis-à-vis a dossier and less influential in other domains, but in any event, customary law never ceases to feature political ordeals being devised prior to, during, and after its service as a source of international obligations. Needless to recall, politics also enters the realm of technology and “progress”; when outstandingly life-changing devices are first marketed—think e.g. of personal laptops or algorithm-fed applications—how does ICL react? What if customs could help us regulate unforeseeable deployments of new technologies and thus, somehow... the future? Far from being a banal or abstract problem, this embodies the most controversial of all issues pertaining to the realm of ICL. As hypothesised in Section {Section 4(o)}, not only revolutionary technology may disrupt the priorities and values of global governance to the point that most of its customs fall into virtually immediate desuetude, but most saliently here, the operation of a new technology may change the function and meaning of a certain practice, and/or the values attached thereto; similarly, it might twist the stances of major actors with reference to mentioned practices. Previously lawful practices accepted as customs might suddenly metamorphosise into different ones, thereby losing the chrism of lawfulness they were endowed with, the problem being that these modifications occur mostly underground, with inexistant or delayed re-negotiation taking place, to the effect that the promptest powers may misappropriate the course of these denaturalised customs. This, too, adds to the intricacies of ICL, which tempted many into buying into relativistic solutions: if customs are politicised on an ongoing basis, they can only be identified as *roughly* applying to a defined region at any given time, just like electrons in quantum mechanics; in harmony with this indecipherability, one may

conceive of competing customs as multiple self-contained universes sharing the same pluridimensional multiverse, whose overall shape is inaccessible to all those who are positioned within—and observe their (legal) surroundings from—one single system of reference {**Section 4(p)**}. The closing **Section {4(q)}** of this Chapter recaps all these considerations, while offering a few concluding thoughts on the edge between regulatory and interactional overreliance on customary norms and their unmissable role as a shared legal heritage for mankind.

Chapter 5

Building on the just outlined theoretical framework, the subsequent **Ch. 5** (decidedly briefer than the preceding one) streamlines the main directions the international tax regime has been traversed by in recent years, positing that customary norms on international taxation do exist, and that they are rapidly becoming engulfed within previously independent moves towards enhanced surveillance on the global plane. **Section 5(a)** introduces the reader to these ideas, arguing that in order to ascertain the scope of such surveillance-taxation customs and to track the trends thereof, it seems wise to refer to a “triumvirate” of representative (as factually dominant) world powers, which I identify with China, the EU, and the US. In other words, my methodological premise is that for the sake of discerning global customs in tax matters, scrutinising the practice and stances of these three jurisdictions suffices; while this might sound pretentious a statement, I contend that because the Sino-Euro-American convergence stands as demonstrative of the same rationales which underpin international rules on the same issues, which are joined by virtually all jurisdictions worldwide, their representativeness should not be contested. Furthermore, I submit

that these three jurisdictions have consistently charted leading normative paths ahead: the US as the only remaining superpower (not for much longer though), the EU with the well-known “Brussels effect” underscoring its normative standing, and China as the flagship coalescer of formerly subaltern voices which are now reclaiming their policy space within the global community. These are three actors that usually hold divergent stances and uphold uneven priorities across most dossiers of the global-policing spectrum, an insight which only confirms the exceptionalism and depth of their unorthodox convergence around StT methods and narratives which—we shall see in the next Parts of the present Thesis—are indicative of an elitist alignment of neoliberalism-by-surveillance interests. Before turning to the current and prospected situation, however, unearthing the roots of individuals’ taxation by reference to taxes in Medieval Europe seems promising; indeed, a sort of centralised administration of tax revenues—when not yet a centralisation of their collection—would not be unprecedented in complex societies, with several precedents having shaped European taxation in the Middle-Ages and beyond {Section 5(b)}. What differs today is that the globe is artificially segmented in slices of territory called “States”, inhabited by human beings defined as “citizens”, who supposedly enjoy rights and are bound by duties managed by and filtered through the constitutional order of their State of citizenship. Thus, centrally administering taxation beyond the State might infringe upon their citizenship-tied legal rights (or, as a minimum, their legal interests understood as legitimate expectations) whenever obligations are not matched by equiextensive procedural rights, and whenever surveillance tools are deployed to enforce said obligations but equiextensive safeguards against abuse are not provided. Naturally, “equiextensive” bears a jurisdictional salience here, as it is not merely a matter of territory: it sits at the conjunction of executive, judicial, and legislative expectations

citizens hold on the part of their State, and whose outsourcing via delegation, centralisation, or transnationalisation should only concretise once rights and obligations have been carefully balanced and approved by the relevant state institutions (including the voting body, when applicable). The disruption of the Westphalian order caused by market forces and global finance in the field of taxation shall not be charged on citizens by tightening surveillance and enforcing right-stripped laws beyond the State. **Section 5(c)** delves into the enumeration of some of those disruption strategies which have been devised by market operators to break into Westphalia by creeping into the most obsolete of its facets: formal equality of States. Captured by an elitist counter-ethos, state sovereignty has gone the extra mile to accommodate the global mobility of (digitised) capital while preserving its appearance of jurisdictionally uniform regulatory space, the result being the established of *regulatorily unregulated* spaces where to transact money rule-free, i.e. freed from the rules as applicable to the rest of the jurisdiction – which shall be thought of in terms of regulatory (as opposed to territorial) space. These spaces for the wealthy function as “offshore” destinations for foreign capital held by individuals who are rich enough to transfer savings and investments from jurisdiction to jurisdiction irrespective of the actual location of their main activity, looking for the most profitable deal to be sealed with “sovereign” authorities in need of downward competition. It is not all about tax havens, figuratively depicted as sunny tropical islands with showy boats and robust palms, but rather about a-jurisdictional pockets of privilege concealed under the flag of capital attraction, powered by a global elite whose interests are shared well beyond national borders and who were cynical enough to engineer an articulated system of exploitation extending to the whole planet. The offshore industry is “chaired” by

London and its network of former colonies,⁹⁸ but no jurisdiction can be deemed totally unaffected by the scale of this phenomenon, to the extent that one may reasonably assert that Westphalia has succumbed to the market's will – all the more so as no agreement on global taxes on wealth, nor on common tax rules for corporations, has ever been stipulated internationally. The hidden-wealth industry offers regulatory freedom, but also secrecy, arbitration, logistics, consulting, transport, luxury accommodation, and related services, representing no less than a monstrous black-hole for IL as conceptualised under the ill-seasoned paradigm of Westphalia. The disaggregation of the latter is not a novel phenomenon to be exclusively charged on Cold-War-era neoliberalism, although the latter contributed to its unprecedented momentousness; in fact, the first regional attempts by Westphalian sovereigns to redeem themselves trace back to the end of the WW2, when the Benelux first and then Nordic European and Latin American jurisdictions decided to serve each other with agreements on mutual tax-collection assistance {**Section 5(d)**}. These first embryonic moves were closely monitored by the US and replicated decades later by the US Administration through the FACTA, the most intrusive system of tax surveillance ever crafted; just like its predecessors, the FACTA, as I will illustrate *infra*, suffers from two major deficits: it does not successfully prevent profit-shifting, while it erodes the rights of all US citizens—or, arguably, all world citizens with any ties to the US—without setting any priority listing. Reverting to the post-WW2 scenario, the Benelux and Nordic arrangements remained “isolated incidents” for most of the XX century, with tax-dedicated IOs like the OECD routinely reiterating their “concerns” over systematic profit shifting and tax-base erosion by the wealthy, but proving unable to

⁹⁸ Besides referring to (a seemingly incalculable number of) academic sources, the reader might want to watch *The Spider's Web*, a documentary on the British onshore/offshore industry; *check* <https://deutsche-wirtschafts-nachrichten.de/2017/09/18/city-london-capital-invisible-empire/>.

face the challenge {**Section 5(e)**}. Remarkably, OECD failures in obstructing the channels of corporate tax avoidance proved so grave and frustrating that the Organisation turned its attention to the easier-to-attack tax evasion by individuals. Eventually, this response was sanctioned by the international community and strengthened multilaterally as a result of three concomitant factors, which from an ICL perspectives, can be identified as the “Grotian Moments” of StT {**Section 5(f)**}. First, the massive leaks of confidential tax documents from banks and law firms around the world by a capillary network of journalists and whistleblowers {**Sub-Section 5(f)(i)**}; second, the counterterrorist rhetoric flourished after the 9/11 and transplanted onto the public-revenue discourse via the rhetorical-emotional link of money laundering – *to tax capital, we need to know where it is parked and kept off-radars, which comes handy as this will also help us fight its illicit use for antiterrorist purposes* {**Sub-Section 5(f)(ii)**}; as well as, third, the 2007-2013 financial (subprime plus sovereign-debt) crisis, intersecting with wider politics of corporate and individual bankruptcy {**Sub-Section 5(f)(iii)**}. If it were not for its misguided target on *all individuals randomly* rather than on *MNCs and their wealthy shareholders and top executives*, this whole machinery would have even made sense. Conversely, operated this way, it missed out on its objectives and violated world citizens’ rights unlawfully.

Chapter 6

Ch. 6 digs deeper into the customarisation of StT, illustrating the path conducive to today’s corporate-State surveillance of global citizens as a result of the three Grotian Moments recalled *supra*. Following the above-mentioned uncertainties and failures, and once resolved to devote its efforts to countering individuals’ evasion

rather than the far more problematic corporate avoidance, the OECD joined forces with the G20 in launching the most resolute campaign ever conducted against tax privacy. One remark is due here: as addressed by this Thesis, tax surveillance—more accurately, StT—does not merely stand for the control of a taxpayer’s movements, expenditures, and accounts as a follow-up to (algorithmic or not) suspicion. Rather, it is the systematic mutual capture between private and public élites, whose purpose is the acquisition of data-doubles (information from different sources that, once merged, discloses an accurate profile on the target), the safe perpetuation of capitalist privileges, the permanent disempowering of subaltern social classes, and the dismantling of the welfare-State via the permanent surveillance and (hopefully undeliberate) humiliation of the poorer {Section 6(a)}. This is why I define this surveillance as *through*—as opposed to *for*—taxation: the latter is the slogan for citizens to digest in order for policymakers to legitimately entrust tax agencies (and *de facto* aiding corporations) with the surveillance of everyone indiscriminately under the excuse of fighting tax evasion. Such a data-mining practice is often executed algorithmically, by recourse to self-learning AI and advanced neural networks, as to ensure total coverage and superior inferential performance. From France to Australia, and from the Netherlands to the US and India, tax agencies have been found to pursue almost exclusively the little taxpayers, while the superrich are treated with deference and eventually obtain impunity; this trend only worsened with the advent of social media, GPS tracking, and recorded cashless payments, which turned daily reality into a dystopian observation chamber for the overwhelming majority of us, to the benefit of tax agents as incognizantly exploited messengers of élite apparatuses {Section 6(b)}. Obviously, from politicians’ standpoint, the rhetoric of “prosecuting fraudsters” sells well among the public opinion, and even though it frequently concretises in

welfare reduction and overprosecution for the indigent and minorities, it appears to score proficiently in terms of electoral gains. On the contrary, this tactic is nearly negligible for public revenues, with a serious campaign against tax avoidance being expectedly far more rewarding, so that the pervasive “efficiency” of these technologies only invests their elitist mandators but scores fairly modestly in addressing the central preoccupation as ostensibly propounded by policymakers: public revenues {**Section 6(c)**}. To my much regret, as recounted in **Section 6(d)**, the CJEU seems insensitive to these systemic claims: for its judges, violating (small groups of) individual taxpayers’ rights is legitimate as a matter of proportionate “public interest” and “good administration” (*sic*), regardless of the fact that to be violated might be the privacy of a little taxpayer, while mentioned “public interest” is lawfully violated every day via massive corporate tax avoidance in the billions, which definitely cannot represent a model of “good administration”. Privacy seems more and more of a market where administrations acquire and release violation entitlements under increasingly contested public-good flags, whose systemic rationale rests on quicksand; the apparent neutrality of tax investigations makes tax agencies the best candidate to this surveilling role, as they can scrutinise virtually limitless amounts and types of sensitive data in such a normalised manner that just a few citizens will find it unusual, derogatory, or suspicious {**Section 6(e)**}. While tax agencies turn to secrecy whenever a deal with major corporations stands on the horizon, individuals are witnessing their privacy space being suppressed in the name of “overriding societal interests” which are not, in fact, proportionate to the aim to be attained. If it is public revenues that we are talking about, then secrecy should be lifted on tax-avoidance agreements with corporations, while individuals—and especially little taxpayers—should retain their right to “public illegibility”; our lives are rightly immersed in a “penumbra of informality” which

should never be intruded into by public authorities unless the intrusion is due to *truly overriding* (unavoidable and undelayable) priorities of the entire citizenry. I submit that for the latter, institutional legibility is far more relevant than the narrowing of individual citizens' living penumbræ by way of algorithmic mining, which is not to be rejected aprioristically but shall remain the exception rather than elevating itself to a risky normalcy status in public policing. These trends can be witnessed, with higher or lower intensity, throughout jurisdictions all around the world, but this Thesis is particularly concerned with StT as an emerging custom from an international perspective, to which **Section 6(f)** is dedicated. First of all, **Sub-Section 6(f)(i)** draws the reader's attention to Internet, algorithms, and the blockchain as ontological game-changers in the field of taxation under international law, with jurisdictions being enabled to share and cross-check tax data almost in real-time and automatedly, in a borderless and instantaneous fashion which traditional PIL sources are not tailored to. Prior to algorithms, especially, the international tax regime was premised on the assumption that sharing data among sovereigns required compliance with specific procedures and the submission of detailed reasons on a case-by-case basis, which stands in syntony with the ability of individuals to exercise their privacy rights on a timely and informed basis, and make recourse to courts when necessary. This is no longer the case, with scrutiny being factually globalised while corresponding safeguards remain anchored to a territorial conception of citizenship and sovereignty, with no assurance for taxpayers that their own jurisdiction will not let other jurisdictions process their data and prosecute them in defiance of the legal principles which are in force in taxpayers' own jurisdiction. Self-evidently, mechanisms of this sort originate asymmetries which are not catered for under IL as traditionally conceived, so that the latter's doctrines and redress mechanisms should have been

updated *before* the enactment of said mechanisms. This is the context where the newly assertive role of the OECD, as outlined succinctly in **Sub-Section 6(f)(ii)**, has managed to find fertile terrain to develop its BEPS Project and Country-by-Country Reporting (CbCR), addressing corporate tax avoidance, which never hardened into anything more binding than soft law. The reverse happened to provisions dedicated to individuals' evasion, fated to harden immediately into binding treaty law, whose legal basis is the updated MAATM Convention as technically enacted by the Common Reporting Standard (CRS) MCAA, which built, in turn, on America's FATCA. These provisions on individuals aim at exchanging tax information automatically (AEoI) rather than on-demand (EoIR) as it previously occurred. The reader will have immediately noticed the watershed between the rapidity and seriousness of States' commitments against tax evasion, compared to the unfruitful attempts to harden any guidelines concerning tax cheating by corporations. Indeed, this Sub-Section is meant not so much at restating the long (and quite complicated) process that led to the BEPS, CbCR, MAATM/MCAA, and CRS—this has been done up to exhaustion by countless scholars already in hundreds of monographs and journal articles—but rather to immediately evidence the divide between the former two and the latter two. No matter how many jurisdictions (dozens, for that matter) eventually sign the MAATM/MCAA, this is already noteworthy and can be coupled with the existence of unilateral and regional AEoI schemes in the US and the EU to claim that the *modus operandi* of surveilling people on the legal basis of automatic information exchanges in the tax field is gaining prominence in IL, showing convincing signs of customisation (which encompass AEoI schemes implemented bilaterally and multilaterally from the local to the global levels, but also other forms of StT which are of exclusive pertinence for specific jurisdictions domestically). In the opposite, the reiterated and explicit

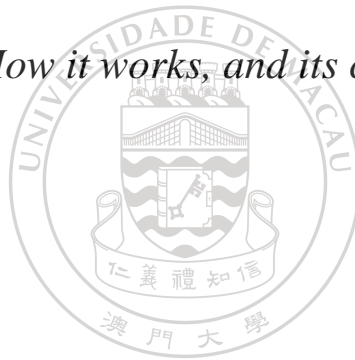
unwillingness to harden anti-avoidance provisions multilaterally, together with the blatant unguineness of their formulation (let alone implementation), attest to the non-customarisation of anti-avoidance techniques in PIL, contributing to my theory that StT is confined to individuals and in fact aimed at surveilling humans systematically. StT's customarisation with reference to individuals is further evidenced by the role and path of the upcoming superpower: China; this is discussed extensively in **Sub-Section 6(f)(iii)**, with reference to both the Chinese own domestic StT and the rule-shaper attitude displayed by China in its international diplomatic endeavours towards strengthening AEOI mechanisms, also performed through IOs such as the OECD as identity reinforcers along its long-term plans towards global capital-exporting financial hegemony. China stands out from the developing-countries crowd, signalling *inter alia* the unserviceability of this label, and marking anything but scant a difference from other GS countries, whose embracing of the OECD policies has been unrarely mild, singling out the GN's hypocrisy in selectively addressing evasion but not avoidance through hard laws {**Sub-Section 6(f)(iv)**}. **Sub-Sections 6(f)(v-vi)** elaborate on issues which have already been introduced in previous (Sub-)Sections, preparing the reader for the next Part on human rights. In particular, **Sub-Section 6(f)(v)** applies the general observations already enucleated on the algorithmic revolution in information exchanges under IL to the transition from theoretically automated to actually automated exchanges in the field of taxation, starting from the Nordic Convention through the original MAATM, and up to the Protocol updating the latter. Here, I argue that multilateral frameworks originally conceived for the "paper age" have been readapted to the digital-algorithmic one only on the enforcement side, while disregarding the need for reformulating taxpayers' rights just as much, to match the new powers factually granted to their own and foreign jurisdictions in collecting,

handling, and prosecutorially acting upon their personal data. Finally, **Sub-Section 6(f)(vi)** extends a similar reasoning to the FACTA, which, as recalled above, represents the pioneering intervention in tax exchanges in the digital-algorithmic context. The FACTA derives its rationale from the Nordic Convention and similar earlier experiences (which had materialised, e.g., in Russia and Latin America⁹⁹), but while those were incorporating automatic exchanges as a mostly theoretical solution, the FACTA is the first piece of tax-exchange legislation being adopted with our current technological means in mind, and because of this, it also served as a model for the multilateral solutions which immediately followed (as described *supra*). At the same time, in doctrinal ICL terms, the US distinguishes itself as a permanent objector to mentioned multilateral solutions, in that it never endorsed the CRS and relies on its own scheme (the FACTA, indeed) on a unilateral basis, asserting its jurisdiction abroad undemocratically through economic coercion, and surveilling-through-taxation other countries' citizens as a component of its general tendency to unilaterally surveil all individuals around the world.

⁹⁹ The CIAT represents a remarkable effort in this respect; *read further* ANDRÉS-AUCEJO 2018, p. 59 ff.

Chapter 4

ICL: How it works, and its capturability



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a Introduction

Quod consuetudo dat, homo tollere non potest.

«Unlike in domestic legal systems where customary norms have been almost entirely eradicated by acts of sovereigns' representatives, international custom continues to play a crucial role in international law».¹⁰⁰ Not only: as a spillover effect from the area of criminal law¹⁰¹ to other fields, international customs are able to infiltrate domestic legal systems back.¹⁰² «Some national legal systems incorporate customary international law as part of national law, or hold that domestic statutes should be interpreted, if possible, in a manner consistent with customary international law».¹⁰³

Customary international law has attracted countless scholars over the last couple of centuries, with a rapid inflation in the most recent decades. Considering in particular how so numerous and lengthy analyses have been already published on the matter, a wide-ranging analysis of international customary norms falls far outside the scope of this Thesis. Therefore, this Section will adopt a narrower focus by aiming at exploring the transformation of customary norms underwent by OECD members, China, and the international community more generally with regards to the global tax discourse; as such, it will shed light on a number of specific sub-issues involving customs internationally which are of relevance to this discussion, with express regard for those concerning IOs engaged with tax governance in both the Eastern and Western

¹⁰⁰ POLAŃSKI 2017, p. 372.

¹⁰¹ BAKER 2010, p. 175.

¹⁰² «[C]ustomary international law could be used in domestic law on the basis of legislative enactment; as part of the common law; as a limit on legislative power; as a tool in administrative law; or as an influence on constitutional interpretation» – WALKER and MITCHELL 2005, p. 110.

¹⁰³ LEPARD 2010, p. 177.

hemispheres, in their interface with advancements in digital and algorithmic technologies. Contextually, the present chapter will contribute to the most pressing contemporary discussions on what “international customary law” stands for and what the main dilemmas at stake concerning its place in the system of sources of international law are; it will also eviscerate the relationship between States’ customs and organisations’ customs within the international arena.

It will be argued *inter alia* that when international negotiations on the existence and validity of existing or in-formation customs are meant at not simply their declaratory recognition, but their codification as well, the interpretation to be attached thereto is dependent as much on the typology of source as on the initial substantive stance of the negotiators. Due emphasis will also be placed on doctrinal controversies surrounding IOs’ relationship with customs, particularly in terms of problematics arising from “instant customs” and “established practices” within IOs as well as between the latter and States.

b The historically enduring functions and lacunae of international customs

[T]he problems which have been identified in the processes of identification and determination of CIL [...] are of such a serious and institutionalized nature that I now presumptively distrust any statement about what is or is not a rule of CIL. Basically, [I have] stopped believing in CIL as a supportable source for the creation of international legal obligation. [...] Neither courts nor the ILC nor academics can be relied upon to do a comprehensive, rigorous, systematic analysis of the

available evidence of state practice and *opinio juris*.¹⁰⁴

Despite all phenomena of levelling standardisation connected to globalisation,¹⁰⁵ self-effectuating norms trump their grave shortcomings¹⁰⁶ and continue to play a «useful and credible»¹⁰⁷ role worldwide;¹⁰⁸ arguably, their importance is even on the rise, thanks to the increasing number of States and inter-state arrangements composing the global village.¹⁰⁹ Customs are important normatively for States to justify their stances and collective law-making processes by arguing or assuming those processes' accordance to identifiable or imagined global “trends”. As legal devices, they bear practical repercussions as well, for instance judicially: the more international law penetrates all areas of legally relevant human behaviour, the more international customs may fill the gaps between the potentially harmful activities of state and non-state actors and the protection of individuals. For example, a landmark judgement delivered by the Supreme Court of Canada in February 2020 affirmed such Court's jurisdiction over Canadian corporate acts allegedly violating international customary law abroad.¹¹⁰ This is only of limited surprise, as

municipal international law litigation has primarily been concerned with customary international law, rather than treaties. This is because governments have not ratified many human rights treaties or governments have expressly declared them not to be self-executing. [...] Further, contrary to the traditional theory, in many jurisdictions,

¹⁰⁴ JOYNER 2019, pp. 33;38.

¹⁰⁵ By way of exemplification, TRACHTMAN (2016, p. 173) predicted that [w]ith the rise of globalization, and the rise of the regulatory [S]tate, there are increasing demands for the law of cooperation. [It] will increasingly be contractual and legislative: it will be made by treaty and by non-unanimous voting in international organizations[, ...] as distinct from customary international law, which is generally not self-consciously “legislated” [...].

¹⁰⁶ See WORSTER 2013, pp. 2-3.

¹⁰⁷ SENDER and WOOD 2016, p. 369.

¹⁰⁸ See BYERS 2004, pp. 155-156.

¹⁰⁹ See DELLAPENNA 2001, p. 267.

¹¹⁰ Refer further to SARABIA et al. 2020; BAXI 2020.

including Australia, Canada, Britain[,] and the [US], customary international law is part of the “law of the land” even in the absence of formal transformation into municipal law. In turn, individuals can enforce their international legal rights in the municipal arena even without the formal incorporation of these international rights into domestic law.¹¹¹

For this reason, corrupting customs’ direction to the advantage of the powerful—for example by purposefully employing large-scale (and costly) distortive technologies—is an exceedingly impactful way to erode individuals’ rights, so that all those who are concerned with such rights should remain on-guard against said trends. Furthermore, at the international level, customs are essential to international law as a discourse, as a discipline, as a practice, as much as a collegial belief; they have played the essential function of filling the gaps left by a legal regime transitioning from the regulation of hostilities to an “international law of peace”.¹¹² In this respect, one should be aware (and wary) of one paradox, though: in certain circumstances, customary “peace” can be easily mistaken for normalisation of oppression and perpetuation of the rulers’ rule; in other words, for the best conditions for established power to prosper.

Since the time ICL was nestled into the sources of international law, information transferring has undergone significant change, carrying pervasive effects on the way customs are conceived, formed, recognised, and even transplanted. The historian Alessandro BARBERO, currently based at the University of Oriental Piedmont in Italy, reminds us of a peculiar situation we seldom devote our attention to: in an epoch when the average Middle-Ages European man perished at around forty and both lords and knights often died in combat,¹¹³ Charlemagne lived and reigned for so long that most of his servants could not even remember having been ruled by any other king

¹¹¹ CASSIDY 2008, pp. 40;43-44 (internal citations omitted).

¹¹² See BEDERMAN 2002, pp. 164-165.

¹¹³ Watch <https://youtu.be/B9iGM7p59d0> [04:15-04:20].

or emperor,¹¹⁴ and such servants being illiterate, they could not be aware of monarchs' genealogy in history. The meaning of this is that to most of those servants, Charlemagne must have looked *absolute* inasmuch *eternal*; no alternative could even be thought about, because his rule was simply deemed to be the unfathomable state of things *as they had always been and will have been forever*. In the post-WW2 world, information accelerated at unprecedented rate, and individuals—who are ultimately the crafters and referents of any existing and yet-to-appear norm¹¹⁵—lived longer enough to “know alternatives were possible” – which does not necessarily translate into action, though.

The influence of these observations on customary law should come as obvious: in an age of permanent and fast-paced transformation like the contemporary one, when every single individual (...the population is increasing as well) lives long and intensely enough to experience multiple normative transformations within the range of a lifetime, customs are necessarily less stable and hardly universally accepted. It is not simply about facts succeeding one another faster and faster, and not even about the available amount of those increasingly faster facts (the higher the number of individuals and the more active their lives, the more interactions are originated and networks established):¹¹⁶ what matters is how extemporaneously and pervasively all facts can “socialise”, especially in a segmented manner towards each individual's informational bubbles and echo chambers. Thus, for example, “populists” (neutrally

¹¹⁴ Watch <https://youtu.be/b2Pkqoq9ioQ> [00:50-00:53].

¹¹⁵ NEUWIRTH 2014, p. 340.

¹¹⁶ Almost three decades ago, GAMBLE (1996, p. 783) prophesised that with the Internet, it would have been possible to complete an exhaustive search of the national legislation and judicial decisions of most [S]tates in a matter of minutes in order to assess the consistency of behavior and sense of obligation required for customary international law.

Besides the obvious ethnocentrism of this claim which takes in no account linguistic barriers as much as States' willingness to publish a consistent record of their stances in an open-access repository, the other side of the story is that with the Internet, the number of potentially relevant pieces of information as well as their overwhelming diffusion could both grow exponentially, resulting in fragmentation and dispersion rather than systematisation. With the benefit of hindsight, one can now safely admit with much regret that the second option prevailed.

addressed) may react to state-imposed wisdom before it customarises, endeavouring to challenge what they perceive to be the state-sanctioned *status quo*. Hence, today, one can expect customs to be rather fragmented, contested, and shifting faster themselves: customs' rationale was to survive those who turned contingent facts into "heavier facts" and thus customs,¹¹⁷ but with life expectancy and legal transactions multiplying at exponential thread, communities which are aware that "alternatives are possible" arguably engage with law-making with a deeper sense of otherness, precarity, regret, and nostalgia, whereby "contestation" cannot even keep pace with the destabilising amount of events – while for the élite the foundations, possibly, stay the same. Beyond the deliberate advancements and drawbacks in the international legal order per se, life extension on the one hand, and time shrinking on the other,¹¹⁸ are disrupting the traditional pace ICL formed, evolved, and was assessed at. The same desynchronisation from society that parliaments are experiencing due to the slippery acceleration of legislative undertakings as for accommodating a more and more hectic society,¹¹⁹ is being arguably shaping societally desynchronised customarisation processes. Together with additional variables, this might also contribute to explaining the different value indigenous customs hold, and the *legal* significance of the gap separating the core of the global "industry-intensive" community from its own

¹¹⁷ See RANCHORDÁS 2015, p. 77.

¹¹⁸ Customs have formed at increasingly accelerated speed over the last two centuries. Nowadays, even one single disruptive event can trigger the formation of international custom, but up to the XX century facts had always sedimented for centuries before being recognised as such. Indeed, an old-school leading Chinese textbook was surprised for the "expeditious" emergence of the law of the continental shelf *in around twenty years*, in the aftermath of WW2 – WANG and WEI 1981, pp. 29-30. The philosophical dilemma is whether the law (doctrinally and legislatively) should contribute to this whirling, destabilising acceleration, or rather try to resist it. At any rate, it seems wise to argue that «[t]he world should not have to wait for a cyber Pearl Harbor to try to make this space safer *and more predictable*» – CHERNENKO et al. 2018.

¹¹⁹ Refer extensively to LONGO 2017, pp. 34-36.

periphery, where people live shorter and arguably less intense lives, characterised by relaxed habits filtered through an alternative sense of time.

Conceptually—cemented over «the duality of Is and Ought»,¹²⁰ trapped in the “dynamism vs. legitimacy” dilemma,¹²¹ and situated at the heart of the “law as power” versus “law as norm” *apparent* dichotomy—,¹²² international customary law stands in a permanent paradoxical fashion and possibly unresolvable state of crisis.¹²³ It is the most ancient, debatable, arbitrary, intangible, problematic and controversial—almost “mythological”, and yet still essential—amid all sources of international law as they are enunciated in Article 38 of the ICJ Statute. Who its actors are is an open debate,¹²⁴ and its process is «chaotic, unstructured, and politically charged. The participants make and respond to competing claims on the law as they advance their own agendas. Because the process lacks any structure, these claims and counterclaims can take multiple forms and appear in varied arenas».¹²⁵ Since the times of the *travaux préparatoires* of the PCIJ and later of the ICJ, customs have been an obscure legacy from the past that no scholar or judge has properly had idea of how to manage.¹²⁶

The landscape is so confused that even the ICJ itself, to circumnavigate methodological inquiries, makes (unavoidable, yet discretionary¹²⁷ and possibly *arbitrary*) case-selections in examining state practice,¹²⁸ and at times refers to either

¹²⁰ KAMMERHOFER 2004, p. 546.

¹²¹ JOVANOVIĆ 2019, pp. 105-106.

¹²² BYERS 2004, p. 47.

¹²³ See ACKERMANN and FENRICH 2017, pp. 766-767.

¹²⁴ See ARAJÄRVI 2014, p. 30.

¹²⁵ HAKIMI 2016, p. 149.

¹²⁶ See SCHARF 2013, p. 32; BODANSKY 2014, p. 179.

¹²⁷ Out of around 200 States, selectivity comes as an obvious necessity; nonetheless, there should exist some stricter internal guidelines or State themselves' guidance in how to perform it.

¹²⁸ JOVANOVIĆ 2019, p. 103; WORSTER 2013, p. 70; ARAJÄRVI 2014, p. 21. Drawing a parallel with the work of a natural scientist, a judge must obviously avoid to perform «like crazed historians, simply to gather up a record of everything that has ever happened»; on the model of the «Gödel's theorem[,]equivalent to the fact that one cannot prove a sequence to be incompressible, [the judge should rather search for] a deeper and simpler unification waiting to be found» – BARROW 1995, p. 47. Said “unification” is a pattern of behaviour which can trace a *legally meaningful* trend able to describe and *explain* the true intentions of the international community members. There is in fact some striking similarity between physical laws and legal ones. The same Author goes on to say (p. 52): «[t]he broken symmetries around us may not allow us to deduce the

customs or principles as “general international law”: a move—this last one—which has been met favourably by part of the scholarly community¹²⁹ and received criticisms from others.¹³⁰ In a recent revised doctoral dissertation at the University of Hamburg, a junior scholar tended to avail himself of these terminological loopholes to ease his descriptive endeavours about not-yet-customary state practices, ending up in say-nothing sentences like that in the context of cyberattacks, «[w]hile [s]tate practice does not give rise to a specific obligation under customary international law, it nevertheless does give support for the emergence of a general duty of prevention». ¹³¹ To further complicate the lexical scenery, “principles”, “customs”, and “general law” are complemented by “standards”: to exemplify, the so-called “due diligence” is referred to in doctrinal work as a standard, while the ICJ calls it a customary principle.¹³² The confusion on principles or general law does not bear serious consequences for the international legal order, but the same cannot be said of the standard/principle distinction: ingraining principles in the “rules” boxes, the most significant observation is that «rules already contain their principal substance before the occurrence of whatever activity they regulate, while adjudicators supply content to standards only

underlying laws, and a knowledge of those laws may not allow us to deduce the permitted outcomes»: the applicability of this concept to the practice/*opinio* circularity is evocative. Customs’ appraisal is doubtlessly an abductive exercise, which is why the reasoning must be at least supported by a minimal threshold of acceptability. «Given our data and our background beliefs, we infer what would, if true, provide the best of the competing explanations we can generate of those data (*so long as the best is good enough for us to make any inference at all*)» – LIPTON 1992, p. 58, emphasis added. A doctrinal problem is, therefore, where to place the bottom threshold to case-law selectivity as much as to the interpretation of their patterns as to fix trends; attempting at solving this problem doctrinally may prove fallacious an enterprise: in keeping with analogies from the natural sciences, when factual concerns come at play, the object of contention shifts from the terrain of epistemologically-correct methodological enquiry to that of scientific politics – GOWER 1997, p. 255. Science differs from “its” philosophy as much as the law does from its abstract doctrine: when philosophers of science investigate science through the actions of scientists rather than the detached power of reasoning, their investigations have no reason to be performed.

¹²⁹ See e.g. LEPARD 2010, p. 163.

¹³⁰ See e.g. TESÓN 2017, pp. 97-100; BODANSKY 2014, p. 180.

¹³¹ WOLTAG 2014, p. 109. First, it is not clear why these practices are not leading towards a custom but do support the emergence of a new rule, considering that the Author claims the four world-top players (China, India, Russia, US) to be on the same page; second, the qualification of such a rule is left disattended (e.g., is it a general principle? if not that, nor a custom, what else?).

¹³² BERKES 2018, p. 437.

after the fact». ¹³³ Due diligence as a standard, applied to obligations of conduct rather than result, ¹³⁴ allows for the flexibility which is necessary for States to participate more actively in customary law regimes; simultaneously, it provides more relaxed a room to domestic and international judges for impactful standard-filling exercises. The latter are in fact the legal operations which keep customs alive.

In evidentiary terms, the plethora of individuals and institutional bodies deemed able to represent state-relevant views is broadening, and

[a]nyone cataloguing the circumstances in which customary international law might be found is hesitant to exclude anything, even conditions that generally seem unpromising [...]. Perhaps the cost of a false negative is objectively more substantial than that of a false positive. Perhaps those [...] who consider international law to be a worthy enterprise are likely to hesitate before casting doubt on some aspects of its existence. ¹³⁵

ICL is virtually never challenged as for its abstract existence, but constantly put into question as for its value and ultimate convenience as a source of law, ¹³⁶ in light of the truth that no mainstream IL theory manages to explain e.g. how customs emerge from chaos, or how they evolve with technologies. ¹³⁷ One of the problems is that *communis error facit ius*: States mistakenly (or pretentiously) convinced to act in accordance with already lawful precepts, eventually deposit a label of lawfulness over those precepts themselves. ¹³⁸ «a practice has to be accepted as *already* legal in order to *become* legal». ¹³⁹ Pragmatic claims have been made it helps preserve the decentralised, fictitious political abstraction of international law, necessary for the

¹³³ MCGEVERAN 2019, p. 1197.

¹³⁴ BERKES 2018, p. 444.

¹³⁵ SWAINE 2014, p. 185.

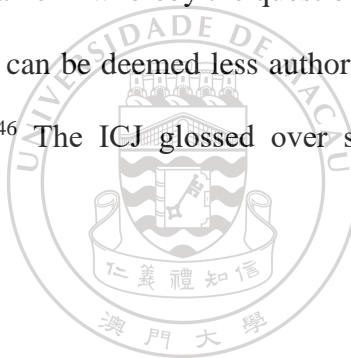
¹³⁶ CHARLESWORTH 1987, pp. 15 ff.

¹³⁷ GOLDSMITH and POSNER 1999, p. 1119.

¹³⁸ TASIOULAS 2014, p. 331.

¹³⁹ Ibid., p. 332, emphasis added.

international legal order to survive.¹⁴⁰ This notwithstanding, its importance derives from its ability to infiltrate any area of international law left disattended by treaties;¹⁴¹ moreover, the *Lotus* principle implies that whatever state action is not prohibited by international law is then allowed, therefore, agreeing on the *exact remit of customs as they uninterruptedly evolve*—yet another paradox—is essential for a peaceful conduct of international relations.¹⁴² Just like any source of public international law besides *jus cogens* (*jus dispositivum*), international customary law is based on state consent as the precondition for the exercise of States’ sovereign rights;¹⁴³ as such, the practice/*opinio* dilemma is a balancing game¹⁴⁴ whereby the question is whether the informal consent expressed via practice¹⁴⁵ can be deemed less authoritative than the one expressed in writing more formally.¹⁴⁶ The ICJ glossed over several of customs’ constitutive



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¹⁴⁰ BEDERMAN 2002, p. 95.

¹⁴¹ Some scholars refer to the product of this legal phenomenon as “residual ICL”; in ITL, check e.g. BROEKHUIJSEN and MOSQUERA VALDERRAMA 2021, p. 99.

¹⁴² RUDOLF 1988, p. 26.

¹⁴³ KLEIN 1988, pp. 353-354. *Jus cogens* is not consensual since it denies the formulation of exceptions, whether by treaty, custom, or any other formal or informal source of international law – BYERS 2004, p. 188.

Yet societies are dynamic, even if the fundamental rules which structure their legal systems purport not to be. In the absence of an overarching sovereign the international legal system may be considered a particularly dynamic legal system. At some point its members may therefore conceive – or perhaps they have already conceived – differently of their requirements in terms of fundamental, peremptory rules. Most international lawyers would accept that *jus cogens* rules themselves have not always existed. As a result, it would seem that *jus cogens* rules cannot be rules of natural law, nor be based on such rules

– *ibid.*, p. 189. In any case, «general and regional customs cannot be inconsistent with *jus cogens*» – TALAIE 1998, p. 41. See further this enlightening and instructive account of these discussions: JOVANOVIĆ 2019, pp. 110-123.

¹⁴⁴ Some academics have situated the combination pawns of this game on a sliding scale resembling fuzzy logic – KIRGIS 1987, pp. 149-150; more generally, refer to a later work by the same Author (2002), p. 423.

¹⁴⁵ It is necessary to distinguish States’ consent to perform actions *by intending to achieve certain outcomes* from their consent to endorse such actions *by considering them a legal obligation*: only the second (belief, not intent) is relevant for assessing customary law. This dissimilarity gains special momentum in, e.g., cyberlaw: whilst the kinetic attacks within the remit of traditional IHL are mostly plain as per their rationale, the cyber non-kinetic ones are often ambiguous about their intended results, but their intent remains legally insignificant under IHL (it only matters for individuals under national and international criminal law) – BROWN and POELLET 2012, p. 136.

¹⁴⁶ ORAKHELASHVILI 2008, pp. 80-81.

problems as a source of law even when called upon at adjudging on it, like in the *Nicaragua* or *Continental Shelf* cases.¹⁴⁷

Customary law assists emerging countries in shaping the course of international law via leverages which are more accessible compared to the traditional negotiating tools centred on treaty-making. It is grounded in the assumption that a conscious, consistent, and widespread practice displayed by the (large) majority¹⁴⁸ of States forming the international community, when combined with their conviction that such a practice is required by law, makes the latter indeed lawful. The most argued-about link in the chain is exactly that combination, in terms of both the balance between state practice and *opinio juris*, and the methods for their assessment. But even beyond that, questions abound. Should this balance be kept the same for both the emergence and the revision of customary rules? How consistent and widespread does state practice need to be for a custom to arise, persist, or be abrogated? How can one's belief be ascertained? And is it truly possible to distinguish the evidence corroborating or inhibiting the first criterion from that proving or disproving the second one? Are soft-law documents increasingly accepted as evidence for either of the two? Do deliberate abstentions and passive inactions as non-practice count? Does the intensity of practice (or inaction) play any role? How should (or should not) States clarify their definitive official position with respect to a specific custom? What is ICL's relationship with peremptory norms?¹⁴⁹ May several bilateral or regional treaty

¹⁴⁷ CHARLESWORTH 1987, p. 17; BEDERMAN 2002, p. 98. Also, *see generally* TALMON 2015.

¹⁴⁸ Other slightly different expressions, too, are used by courts and tribunals, including “overwhelming majority”; *refer e.g. to* VAN DER WILT 2019, p. 796, fn. 51. Similar terminological issues arose with *jus cogens*, with contended expressions being, *inter alia*, “large majority”, “very large majority”, and “quasi-unanimity”; *see* ILC (*jus cogens*), para. 16.

¹⁴⁹ Is the distinction between customary law and *jus cogens* a matter of “threshold”? According to BEDERMAN (2002, p. 109),

[j]us cogens are customary [and non-customary] norms that may not be derogated by treaties. *Erga omnes* obligations are owed to the entire international community, while *actio[n]es popularis* are those violations for which any member of the international community can seek redress.

arrangements originate a global custom?¹⁵⁰ Where does the watershed rest between the breach of an old custom and the recognition of a new one? Overall, should customary law be even considered a primary source of international law? No definitive answers can be provided here, but the reader is advised to recall that these all—and several more—are open questions, meaning that customarisation is a process one can (even persuasively) argue for or against, but hardly “prove”. In the coming Sections, I will tackle some of these dilemmas with no pretention of exhaustivity, but simply for the sake of clarifying *my reasons* for arguing, later in this study, in favour of the accelerated customarisation of an elitist techno-legal device which I will define as “individuals’ surveillance through taxation”.

c Local customs, instant customs, and persistent/subsequent objectors

[W]e can speak of the existence of international law as a system of legal relationships when there is a system of customary norms that governs relations between separate political entities that have some degree of independence from each other or any other superior authority. While treaties can be one-off arrangements, customary norms emerge (*or at least they historically used to emerge*) over long period of relatively stable interactions.¹⁵¹

All previously reported, plus several other poignant questions have been already put forward and over-abundantly discussed (but never solved) in legal

See further BAKER 2010, p. 177, and BASSIOUNI 1990, pp. 802-803. Remarkably, as stressed by TOMUSCHAT (2015, p. 25), peremptory norms permit

to rely on [them] for the review of acts of international organizations of which one often does not know exactly to what extent they are bound by customary international law and, in particular, which normally do not count among the circle of parties to international treaties.

¹⁵⁰ Refer to CHARNEY (1986, pp. 980-981) for meaningful considerations in this respect.

¹⁵¹ MÜLLERSON 2000, p. 89, emphasis added.

scholarship, originating long-standing debates. While not all of them can be examined extensively here, there are three issues which hold high stakes in the international-tax-law developments that the present study aims to unfold: “local customs”, “instant customs”, and “persistent objectors”; each one of them being found in ICJ case-law.¹⁵² The first refers to customary norms understood as binding by a restricted number of countries rather than the international community as a whole; this concept, anything but new, traces back to the roots of the XX century.¹⁵³ Furthermore, certain regions long anticipated Westphalia in developing legal regimes for regulating inter-state affairs and related commercial intercourses, including in Ancient China and Ancient India.¹⁵⁴ The second issue entails that certain customs in a number of rapidly developing (usually technology-driven) fields may be established via lowering the time-length standards ordinarily required by the word “custom” itself; in other words, it would take “less time” for these customs to arise and to be recognised as such. The third envisions the possibility of accepting the binding force of a custom even when one or a few countries consistently behave to its overt dismissal in practice and/or contestation in theory, those countries being that custom’s *persistent* objectors.

Originally, i.e. vis-à-vis ordinary customs, it was held that

[u]nless a [S]tate persistently objects to a rule of custom in its formative phase, it is assumed to have tacitly accepted the rule. Objection to a rule subsequent to its formation cannot prevent a [S]tate being bound by it.¹⁵⁵

¹⁵² *Check*, for the first: *Asylum*, p. 276; *Rights of Nationals*, p. 200; *Right of Passage*, p. 39; *Military and Paramilitary Activities*, para. 199. For the second: *North Sea*, p. 43 para. 74. For the third: *Anglo-Norwegian Fisheries*, pp. 131, 138-139; *Nuclear Tests*, pp. 286-293 (Separate Opinion by Judge André Gros); *Asylum*, pp. 277-278. On persistent objectors and ICJ case-law thereabout, refer extensively to GREEN 2016.

¹⁵³ See TALAIE 1998, p. 40, fn. 57.

¹⁵⁴ See MÜLLERSON 2000, p. 89.

¹⁵⁵ CHARLESWORTH 1987, p. 3.

Hence, when not satisfying consistency criteria generally accepted by the international community,¹⁵⁶ claimed “persistent objections” would simply fall into the category of national interests.¹⁵⁷ Indeed,

States do not always want to set a precedent. Sometimes “organized hypocrisy” or “double standards” characterize the norm application. Such exceptionalism occurs when a [S]tate implements a claim that others would consider to contradict the frame. When the norm is well-established, we would expect the [S]tate to be secretive and to deny its behavior when questioned in order to avoid reputational costs.¹⁵⁸

But does the persistent-objection doctrine remain valid as far as “instant customs” are concerned? Although this kind of custom necessarily privileges *opinio* over practice,¹⁵⁹ one may however posit that the accelerated formation of a custom cannot force States to join an acceptance race whereby their possible concerns with that custom need to be formulated in too short a period of time. However, the fact that good faith shall be upheld diligently holds true as well: only subsequent concerns which were previously unforeseeable (e.g. due to the very technical nature of the subject-matter of the custom concerned, or to unimaginable technological developments that radically altered the nature of such a custom) might be justifiable at a later stage for a State to disregard that custom after having tacitly (or even expressly) consented to it. The point just addressed makes it evident that instant customs and persistent objectors are strictly interconnected, their relationship standing as exceedingly troublesome.

¹⁵⁶ «If the “subsequent objector” is confronted with general opposition by other States, its conduct constitutes a violation of the rule; if other States, however, accept this altered behavior, a modified law may emerge» – ACKERMANN and FENRICH 2017, p. 777.

¹⁵⁷ See YEE 2014, pp. 140-141.

¹⁵⁸ STIMMER 2019, p. 276.

¹⁵⁹ See BANDEIRA GALINDO and YIP 2017, p. 263.

If «duration has an inverse relationship to consistency: the shorter the duration of a practice, the more consistent it must have been»¹⁶⁰—in this respect, some authors talk of “density” rather than duration per se¹⁶¹—then someone may observe that the definition of persistent objector is misplaced with reference to instant customs,¹⁶² so that the qualification of “subsequent objector” should be preferred instead.¹⁶³ The hypothetical scenario of a legal regime for Antarctica based on customs rather than treaty-law may serve as an illustrative exemplification:

Here, a special legal regime was developed, with only a limited number of [S]tates being active in Antarctica. Nevertheless, [S]tates’ activities resulted in the *quick adoption* of a treaty, later backed up with further treaties, not in a customary law regime. Furthermore, there was general acceptance of that treaty, after considerable discussions, by most other [S]tates that later became interested in Antarctica as well. [...] If, by contrast, international law on Antarctica would have developed as customary international law, quite possibly various [S]tates would have taken the opportunity to *become* persistent objectors [...].¹⁶⁴

This example works just as much if applied, e.g., to developments in the area of outer-space law,¹⁶⁵ but it cannot be transposed directly into, e.g., the cyberlaw field; indeed, the latter is already overcrowded with participating countries, therefore there is no longer any possibility for a few of them to arrange a treaty—let alone quickly—and “make others sign”. Paying due attention to relevant differences, the cyberlaw regime would be, in terms of overcrowdedness, similar to that of the law of the sea, although it is hard to predict whether States will ever achieve a codification result

¹⁶⁰ CHARLESWORTH 1987, p. 7.

¹⁶¹ *Refer e.g. to* RANCHORDÁS 2015, p. 77.

¹⁶² This is because States would not have enough time for objecting to the rule during the whole process of its formal establishment, i.e. from before its formation to after its general acceptance as binding law.

¹⁶³ *Cf.* ESTREICHER 2010, p. 61; BRADLEY and GULATI 2010, p. 253.

¹⁶⁴ VON DER DUNK 2017, pp. 357-358, two emphases added.

¹⁶⁵ MALANCZUK (1995, p. 159) observed that the essential principles of the Outer Space Treaty [...] have been accepted by all States active in outer space by practice and *opinio juris* after ratification, and [...] no evidence of dissenting practice on the part of non-ratifying States is available. It seems to be agreed that such principles include the freedom of exploration and use of outer space by all States as well as the prohibition of national appropriation of outer space.

comparable to UNCLOS in the cyberspace. UNCLOS resulted from three negotiation rounds whose main aim was to agree on the scope of several maritime customs, and to update them in light of the hectic civilian and military technological developments of the pre-Cold War season. One can spot a number of similarities with the international tax regime and its long-standing customs, now challenged or substantially transformed by technology-powered instantaneous communications and transborder money transfers.

One more observation is that an “objection” does not always come as straightforward and overarching: it might rather be partial, comparably to a “reservation” attached to a treaty.¹⁶⁶ In such cases, closer scrutiny must be placed on the scope of these objections and on States’ actual intent: just like reservations attached to important multilateral treaties, partial objections to the formation and recognition of a custom may make it so lenient and exception-filled as to render it practically unserviceable. The more “foundational” the subject-matter is, the more these choices are dangerous and warrant inspection into. When the objection to a custom overlaps with the reservation to a treaty on the same subject, attention shall be paid that the scope of the two is not necessarily congruent: a treaty reservation cannot automatically exclude that the reserving State is still bound to broader—or more recently evolved—customs on the matter. This holds all the more true when considering that even in the theoretical scenario of perfect congruence between a custom and its treaty homologous, the former never ceases to apply: a treaty in itself cannot overrule a

¹⁶⁶ One of the most eloquent cases of reservations attached to treaties which later “customarised” concerns the VCLT and its provision on violation of peremptory norms as a valid ground for treaty termination: referring to the P5, the UK joined without expressing reservations to this point, China and Russia signed but attached a reservation, whereas France and the US never signed the Convention. One could be tempted to conclude that the VCLT has customarised to such an extent that France and the US are bound to it nonetheless, and the Chinese and Russian reservations hold a merely declaratory value; and yet, authoritative bodies have argued otherwise: *see e.g. ILC (jus cogens)*, paras. 45;51.

custom¹⁶⁷ (provided the fulfilment of strict conditions, only the reverse might prove possible¹⁶⁸). The case of fundamental human rights is exemplary in this respect: as treaties remain filled with reservations, «States and international organisations have settled on a compromise. This compromise accepts the development of some human rights as rules of customary international law but limits the international community to a “*droit de regard*”: a right to monitor and encourage from the outside the protection of those rights within non-consenting States». ¹⁶⁹

d Private actors, “Grotian Moments”, and instantaneous crystallisations of customary laws

The [NSAs] that emerge within [S]tates either have an effective relationship with central domestic governing actors or are in opposition to them, but in either case, they wield significant power. These dynamics foster an environment of reciprocal responsibility and equal concern toward actors and the international community. [NSAs] influence state behaviour domestically by working together with or applying pressure on governmental and transgovernmental decisionmaking. They also work collectively with governments by participating in international forums and negotiations, as well as treaty- and resolution-drafting. [... NSAs] deserve a more official seat at the international lawmaking table.¹⁷⁰

When one endeavours to address the problem of “time” within ICL, one conceptual distinction—though of limited practical serviceability—is due: it is not customs themselves that create legal obligations, but the underlying legally relevant

¹⁶⁷ See BYERS 2004, p. 172.

¹⁶⁸ See *ibid.*, pp. 173-179.

¹⁶⁹ *Ibid.*, p. 44, first emphasis added.

¹⁷⁰ BANTEKA 2018, p. 328. On the same wavelength, see BYERS 2004, p. 13, emphasis added: one particular consequence of the statist assumption is that it precludes consideration of those non-State actors that operate entirely within individual States, influencing what those States perceive and manifest their interests to be. The way that *competing interests are balanced at the national level in order to determine which interests are expressed internationally* is clearly relevant to understanding why States behave the way they do.

facts.¹⁷¹ This is time-wise important as it emphasises how “customarisation” is more a *threshold of recognition* than one of accumulation of relevant facts: obscurely and straightforwardly at once, «there is a moment when the accumulation of practice and belief in it gain normative standing».¹⁷² Phrased otherwise, the legal obligation had already been in effect for some time before its recognition as custom, that is, before its customarisation was successfully “completed”. Paradoxically, by the time an obligation is identified as a custom, its underlying practice might already be falling into desuetude, because a certain time lag always exists between how legal obligations establish themselves in real life and the moment when they are accepted as law on paper.

Despite the customarisation of any behaviour requires at first sight considerable time to be accepted as law, exceptions to this rule are provided by the paradoxical “instant”, “accelerated”, or “instantaneous” (and alike expressions) customs.¹⁷³ The doctrine operates some distinctions which have garnered no universal acceptance; for instance, a claim was made that

the Grotian Moment concept is to be distinguished from the controversial notion of instant custom. Grotian Moments represent instances of rapid, as opposed to instantaneous, formation of customary international law. In addition to General Assembly resolutions and international court decisions, Grotian Moments require some underpinning of State practice, whereas advocates of the concept of instant custom argue that customary law can form in the absence of State practice.¹⁷⁴

¹⁷¹ “Archeologically”, as illustrated by HAGGENMACHER (2021, p. 804, emphases in the original), [t]his view corresponds in essence to the theories of the nineteenth century historical school, which granted custom a fundamental place in national legal orders, not as a law-creating agency, but precisely as *evidence* inasmuch as it *revealed* the existence of legal rules mysteriously emanating from each nation’s specific *Volksgeist* in harmony with its core ways and creeds. That sort of conception has [later] found some adepts also among internationalists [...].

¹⁷² DELEV 2019.

¹⁷³ See ACKERMANN and FENRICH 2017, pp. 770-771; MALANCZUK 1995, pp. 160-161.

¹⁷⁴ SCHARF 2014, p. 340.

For the sake of the present Thesis, I will abide by the tenet that instant customs are rapidly emerging and affirming practices and beliefs, whose most prominent (and readily identifiable) points of departure and—evolutional or involutional—development may be labelled “Grotian Moments”.

In any case, these accelerated customary regimes are usually of concern to «context[s] of fundamental change»,¹⁷⁵ that is to say, to newly developing fields which due to their transnational or universal vocation, require the emergence of a framework of legal (pseudo-)certainty on the international plane. Compared to a treaty-making process, the advantages of an “instant customs” regime lie in the circumvention of two transaction costs: that of deciding to negotiate and eventually of negotiating the agreement, and that of waiting for its ratifications and eventual (uncertain) entry into force.¹⁷⁶ Another advantage is the recourse to analogical reasoning from similar fields, where *similarity* is assessed in terms of potential re-applicability of practices and underlying reasonings to other areas of law, through *abstraction* and *generalisation*.¹⁷⁷

From the perspective of the protection of state interests and of individual human rights, there can be no relevant distinction between online and offline state action. The lack of state practice with respect to online activity is simply irrelevant for the applicability of all “offline duties” to [S]tates’ online activity[.]¹⁷⁸

This does not prejudice that specific customs may be identified with respect to online activities only, it rather means that the latter are never operated in a vacuum, thus, recourse to analogical analysis from the “offline world” as far as (international) customs are concerned is warranted, or even imperative. One should be aware of the reverse process, too: customs which do exist but whose actions have been transposed

¹⁷⁵ Ibid., p. 306.

¹⁷⁶ Refer to Ibid., pp. 309-310.

¹⁷⁷ BENVENISTI 2018, p. 77.

¹⁷⁸ Ibid., p. 78.

from the offline to the online dimension should not be assumed to have survived such a transposition neutrally; in other words: moving online, certain actions transform not simply their medium, but their nature as well, so that their actual degree of customisation should be rediscussed.

Relatedly, a salient question is whether negotiating the codification of customs would be easier and/or faster than bargaining about the legislation of norms conceived from scratch by bureaucratic policymakers arguably disconnected from social life (i.e., from the actual practice of the addressees of their decisions). The answer seems obvious; however, recognising customs is a two-steps procedure: first, States have to discern the “status” of customs from that of other minor habits and behaviours; second, they have to agree on customs’ exact scope and on the opportunity to codify such a scope, thus potentially fixing it (and constraining it, in both directions). To exemplify, the legalisation of outer space activities by recognition of a certain number of rapidly established customs, six decades ago, represented the most obvious example of this legal phenomenon:

[i]n 1958, just one year after the launch of *Sputnik*, the UN General Assembly created a committee to settle on the peaceful uses of outer space. By 1963, the United Nations had put forth the *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, formally recognizing what had become customary law applicable to space activities. Since then, most space law has been generated through international agreements, beginning with the first outer space treaty signed in 1967.¹⁷⁹

Nowadays, one of the most active nobody’s (or everybody’s) lands juridically speaking is the cyberspace *broadly understood*, the regulation of which has swiftly become a pressing topic in leaders’ agendas worldwide. Addressing the broader

¹⁷⁹ BROWN and POELLET 2012, p. 128.

dimension of cyberspace regulation equates to rethinking entire legal areas—international tax law being a case in point—whose customs have been disrupted *on the substance* because of the relevant operations (e.g. financial transactions) now occurring online rather than offline when the legal regime was first conceived. Obviously, this is else from addressing the regulation of the cyberspace *stricto sensu*. In this latter narrower sense, one should start from emphasising that for the most part of its brief yet intense history, the cyberspace has been largely “governed” by its users, at best overseen by a few corporate private actors; nonetheless, the situation is fairly different today: governments have stepped in, and private regulators have shared most of their powers with—or entirely transferred them to—public actors performing similar functions.

Today, transnational networks of non-governmental advocacy groups target States as much as international organisations, as part of a wider trend which proceeds beyond cyber affairs.¹⁸⁰ Against such a backdrop, it would make sense to refer to those private-regulation experiences as part of the relevant practice to verify what the customs in the cyberspace are, thus assessing consistency over a more extended time-length and endorsing the legal meaningfulness of international cyber-related instant customs. In this sense, studying customs vis-à-vis the regulation of the cyberspace is a meaningful exercise for all those who are premised to scrutinise the impact of Internet-related technology, (captured) international bureaucracies, “new” norm-shaping States, intermediaries, and (multinational) corporate actors on the development of customs in other PIL fields which are highly susceptible to the disruptions brought about by the “dematerialised” catalysation and globalisation of

¹⁸⁰ See e.g. BAKER 2010, p. 198, fn. 165.

information transfers – including financial, criminal, and indeed tax information among others.

e The cyberspace between *consuetudo* and *desuetudo*

It is just like walking into a huge candy store packed with goods: [... s]ome Internet users [...] lack restraint to the transmission of network information. This can lead to unsound Internet practices by some Internet users with low moral self-discipline and moral concepts, resulting in the disclosure and invasion of individual privacy, the flow of unhealthy information[,] and the consistent invasion of hackers.¹⁸¹

Specific technologies like blockchains, decentralised autonomous organisations, and algorithms are increasingly self-governed by rules developed by their own artificial form of “intelligence”,¹⁸² some of which might be even labelled as “artificial customs” (a legal fiction?); and yet, this does not equate to arguing that the cyberworld as a whole can be governed exclusively by technological “legal sources”. Although, domestically, the stratified and spontaneous proliferation of behaviours on the Internet may be deemed to represent a quasi-autonomous “source of law” from a non-technical standpoint,¹⁸³ it seems unthinkable, at present, to develop a *sui iuris* globalised regime for the cyberspace where bottom-up decision-making processes replace States in a sort of self-policed *Internet-ional* law falling beyond the policing reach of the classic international order¹⁸⁴ – though this might have been the original plan. Likewise, much time has yet to pass-by before any form of Internet-enabled

¹⁸¹ QIZHENG 2001, p. 372.

¹⁸² See also NEUWIRTH and SVETLICINII 2019, p. 63.

¹⁸³ See *ibid.*, p. 103.

¹⁸⁴ Refer to the absurd (because unworkable) propositions advanced in CHIK 2010, p. 187.

peer-to-peer decision-making could shake the foundations of any legal order, save the latter's ability to provide sufficient standards of clarity and certainty.¹⁸⁵ There exists the need to distinguish between States' regulation of the Internet under (public) international law—including regional arrangements—and what online actors do (put differently, what “laws” they adopt for themselves, understood as rules of organisation) *within the boundaries* established by said state regulatory performance.

At any rate, it does make sense to stress the private component of customs which, in cyber-related affairs, simply cannot go unnoticed (especially in the so-called “emerging markets”, whose statutory law is often more updated but arguably less stringent and/or wide-covering¹⁸⁶).

Usus in cyberspace can be established quickly as state agencies often adopt a uniform practice developed in a private sector to protect sensitive information or fight illegal content. Alternatively, as often is the case, governmental bodies employ private actors in order to assure the highest possible level of technological expertise. [...] The nexus between state actions and industry practice is stronger [...] than in any traditional branch of [IL].¹⁸⁷

Between States and “netizens” stand the normative mediators,

such as service, access or content providers and hosts, [...] intermediaries[,] and architects of information technology. Giving these intermediaries unfettered powers of creation may lead to abuse and undue influence on the development of custom. Governments have

¹⁸⁵ Cf. ABRAMOWICZ 2016, p.367. See also ZEKOS 1993, according to whom

[w]hat is absent in the virtual world is the degree of uniformity and unanimity defining a custom which has the capacity to metamorphose into a legal rule and become both binding and obligatory. The success or failure of regulation by means of customary rules will depend to a large extent on the stability of the cybercommunities and the development of their accepted norms.

This was argued three decades ago, and the fact that it holds true today stands as self-telling. Disturbingly enough, States are no longer intentioned to wait for “peer communities” to regulate their cyberspace activities, thus are increasingly stepping in and “forging” customs with induced (thus fabricated) behaviours, expectations, and codes of conduct.

¹⁸⁶ MUKHERJEE 2017, pp. 224-225.

¹⁸⁷ POLAŃSKI 2017, p. 374.

been grappling with their role and the limits of their liability since the popularization of the Internet.¹⁸⁸

One could report another example. Although responding to—or at least, protesting—cyberattacks from foreign powers is routinary for States today, this has not always been the case. Until very recently, States had appeared reluctant to formulate precise accusations against foreign governments, probably because of the apprehension of being considered in turn accountable for those attacks which launched from their own jurisdiction. Still

[i]n 2010, Google reported Chinese hackers had infiltrated its systems and stolen intellectual property[, and] released a statement explaining what it discovered through its investigation and what steps it was taking in response to China's action, including limiting its business in and with China.¹⁸⁹

The interesting fact is that besides business strategic choices, the right and duty to respond to China as deemed most appropriate should have been a US responsibility, in its status as the violated State.

In sum, the cyberattacks domain had originally been largely left in the hands of private actors, which replacing (or, more accurately, preceding) public authorities, *created most of the customs States today avail themselves of*, when denouncing the supposed unlawfulness of foreign actors' behaviours. At a later stage, when governments tightened their control over cyberaffairs, they faced attribution-related evidentiary obstacles that businesses were found able to cope with more informally, while States needed to avert them before accusing a third country – and one question

¹⁸⁸ CHIK 2010, p. 189.

¹⁸⁹ BROWN and POELLET 2012, p. 131.

is whether similar dynamics will be at play in equally technology-intensive legal domains. In fact,

[a]tribution problems will continue to plague this area of law. It is more difficult for custom to develop if the source of the action is unknown. The actions of criminal gangs or recreational hackers do not set precedent for international law, and as long as the actor remains unknown, the events have no precedential value.¹⁹⁰

One consequence is the prominent role attributed to declarations over facts: out of necessity, if in the digital sphere certain facts are hard to prove and state practice is opaque to trace, statements as evidence of state intentionality about what is to be considered acceptable rise to unprecedented prominence. This theory is confirmed by its opposite: in more traditional fields, it is the erratic, extemporaneous, or “impulsive”—so to speak—behaviour of “key” States which might endanger the crystallisation of a new customary rules whose theoretical foundations sounded reasonable; for instance,

the United States’ invasion of Iraq in 2003 and the Russian invasion of Georgia in 2008 renewed concerns that a doctrine permitting unilateral humanitarian intervention would be easily subject to abuse, thereby derailing the momentum that had been gaining behind the responsibility to protect concept as legal justification for humanitarian action outside the U.N. framework.¹⁹¹

The example just provided refers to a *global* setback, but similar dynamics can occur regionally just as much: if a norm is favourably being negotiated among the members of an IO, the sudden extremisation (on the expansive end) of its application by one norm-enthusiast party may cause the redefinition of said IO’s policy choices in the direction of restraint. It should not be forgotten that several IOs are enthusiast

¹⁹⁰ Ibid., p. 133.

¹⁹¹ SCHARF 2014, p. 340.

norm-crafters in cyberspace law, and several States and NGOs have permanent diplomatic delegations officially accredited to IOs (the best example is the *sui generis* EU, but the same holds true for most—more traditional—international organisations); this explains why the impact of a sudden setback can be momentous. Even States’ sub-territories progressively engage in “protodiplomacy” with IOs:

[a]s the power of the nation-state declines in respect of [...] organisations of which it is a member, sub-state national societies look increasingly beyond the [S]tate directly towards these organisations and the new roles which they can play within them.¹⁹²

This may be pursued up to different degrees of formality and, in international tax law (ITL), might prove strategic for certain OFCs or even special economic zones (SEZs) – not to mention, in the case of China, the powers of international representation conferred to its two Special Administrative Regions (SARs).

On a different note, it is increasingly accepted that customisation is counterpointed by processes of desuetude or obsolescence,¹⁹³ which would presumably

require general if not universal neglect, a kind of general “practice” (or non-practice), but would not require a counterpart to *opinio juris*, such as a sense from the beginning that the norm was *not* obligatory.¹⁹⁴

As for the “intensity” of this process, it was suggested that desuetude would need to be justified by violently profound overturns in States’ actions and beliefs.¹⁹⁵ Nonetheless, it seems legitimate to wonder whether the “set of tools” deemed rational for “positive” customs—regional/local scope, objections, and so forth—can be

¹⁹² TIERNEY 2004, p. 227.

¹⁹³ WOUTERS and VERHOEVEN 2008.

¹⁹⁴ HENKIN 1995, p. 303, fn. 88, emphasis added.

¹⁹⁵ See e.g. BEDERMAN 2010, p. 38.

mimicked straightaway for these “negative” ones; apparently no literature, nor empirical studies, exist on such topic. Of the highest relevance for the development of my study is whether, in particular, “instant/accelerated desuetude” could prove meaningful a concept to describe certain normative mechanisms, and if so, what relations and balances tie together a custom to “its” desuetude. It shall be pointed out that desuetude in practice does not theoretically equate to—and does not necessarily bear the same practical legal consequences as—“untrending” solutions favoured by judges: a custom may “naturally” de-escalate, thus decaying legally too, or it might be “untriggered” by judicial restraints when it comes to endorsing or, in fact, rejecting areas of progressive development of the law. Judges—domestic ones and *a fortiori* international ones—are part of the nebulous community of customs’ “positivisers” which «allow the law to accommodate custom while pretending that the law is unchanged [...]. If too much congruence between law and custom means stagnation, then too little congruence means violence».¹⁹⁶

Ex fictione iuris, these processes expose the inconsistency of customs allegedly belonging to a PIL of “global” reach rather than to distinct regional and sectoral transnational legal orders which, although in communication with each other, may present customs which are similar subject-wise but are placed at uneven stages of evolution or involution, depending on regionalised and sectoral behaviours of state and non-state actors but also on the different roots, orientations, standing, and powers of the different (international) judiciaries presiding over them. *The same fact may represent the customarisation of a practice or the symptom of the same practice’s desuetude*, depending on its temporo-logical “positioning” within the legal regime at stake and the trends underpinning it; when one considers that almost any legally

¹⁹⁶ MURPHY 1990, p. 790.

relevant fact may be argued before different international fora and from different legal perspectives, this adds to the complexity of this unfocused, “dispersed”, and easily politicisable source of legal obligations. Regrettably, ICL’s politicisation easily lays the foundations for “the rule of the powerful”, especially in the context of neoliberal market disputes; for the sake of exemplifying, in the infamous arbitration between Vodafone and the Government of India arising from the former’s tax-avoidance strategies, the company successfully «invoked customary international tax law to argue that India had no nexus to tax an indirect transfer of shares that took place outside of India».¹⁹⁷

Desuetude might even function as an unlawfulness-circularity disperser, in cases where cumulating actions and beliefs leading to custom would paradoxically amplify the stances of actors acting unlawfully. For instance,

international armed conflicts typically arise because one side unlawfully resorts to force against the other. It is only a slight exaggeration to say that empowering those who violate the law of inter-State force to substantially shape the customary law of international armed conflict violates the general principle that law does not arise from illegality.¹⁹⁸

Against such instances, desuetude intervenes when a majority of external actors try to disrupt this paradox and reset the paradigms of normalcy; in this sense, consuetude and desuetude would not need to coincide *ratione personae* even when overlapping *ratione materiae*. Importantly, desuetude is also a means for disapplying treaties by “tacit abandonment”, which is a technique known and operated since the Ancient Romans epoch.¹⁹⁹

¹⁹⁷ BROEKHUIJSEN and MOSQUERA VALDERRAMA 2021, p. 87.

¹⁹⁸ AHMAD 2019, p. 142.

¹⁹⁹ See KADENS 2019, p. 176, fn. 61.

f Soft laws, “soft customs”? Informalising customary-law formation processes

The assumption is that there is “one best way” or that human problems, like technical ones, have a solution that experts, *given sufficient data* and authority, can discover and execute. Applied to politics, this reasoning finds interference from vested interests, ideologies, and party politics intolerable. Its antithesis is decision making through the weighing of forces and compromise. Technocrats thus tend to [...] prefer the “rule of the fittest” and a [technologically] managed polity. [...] *T[technology] is a paradigm* for the technocrat[: its] productive potential holds the promise of a society of abundance. Its link with science [...] bears] the *allure of modernity*.²⁰⁰

A relatively new phenomenon linked to the “privatisation” of customary law formation is that of its “informalisation”, i.e. its openness to non-traditional negotiating platforms and unpublicly-delegated actors (both individual and collective). This is consistent with the general trends of «a world of hegemons [...] in which informal power [...] increasingly challenge[s] the legal order of sovereign [S]tates».²⁰¹ However, it must be stressed from the outset that what a legal process loses in formalisation is not necessarily gained in *democratic* efficiency (democratisation), especially when the lengthy publicness of formal procedures is replaced by agile but privatised interests. Formal procedures are performed by appointed (or even elected) public officers—politicians, diplomats, and other institutional subjects—who are more or less directly accountable to their countries’ populations for the outcomes of their

²⁰⁰ KUISEL 1981, p. 76, three emphases added. The publication time speaks volumes!

²⁰¹ BREUILLY 2015, p. 33.

work; even in authoritarian States, dictator-nominated diplomats are certainly more accountable to the “general public” than ghost corporate lobbyists, “hybrid scholars” colluded with the regime’s élites, and anonymous legal or financial experts. «Technocracy means elitism tending to authoritarianism, in the interest of productivity and [market] efficiency»,²⁰² which responds to the maximising logic of capitalism but not necessarily to that of (parliamentary) democracy – which is, by constitution, anything but “efficient” from an economic perspective. Phrased otherwise, “maximisation” (of time, economic resources, and so forth) is the hypocritical altar where values and representativeness are too often sacrificed under the deceiving flag of the “common good”. Despite this, informalisation is not necessarily a negative trend for policymaking, as certain decisions are so technical in nature that they might require institutionally unaffiliated technicians to oversee and “direct” them. “Brexit” is probably the most embarrassing example of the consequences of leaving immensely complex decisions in the hands of the electorate at large. Thus, one shall disagree with simplistic observations like the one that «increased public participation in policy-making [...] is considered to improve the quality of decisions»;²⁰³ it is rather essential to understand *whom* by it is considered so, as well as what “quality” stands for in this context.

At any rate, discussing informal customary law formation, recognition, and codification is not the same as scrutinising the relationship between customs and informal law:²⁰⁴ in terms of *informality*, the focus here is rather on the process, more than on the raw-material. Phrased differently, the issue is not about an informal law(making) which is replacing customs; conversely, the emphasis is placed on new

²⁰² PORTER 1995, p. 146.

²⁰³ SLOCUM-BRADLEY and VAN LANGENHOVE 2011, p. 297.

²⁰⁴ For this latter scrutiny, *see among others* WOUTERS and HAMID 2016.

non- or sub-official actors who help *shape and direct* customs: are they serving their own private unaccountable interests,²⁰⁵ or supporting policy-drafting mechanisms in being more precise, informed, participated (i.e. inclusive), forward-looking, productive, “experienced”? Both outcomes are possible, so that it is crucial for democracies to have control systems in place as to ensure that the second result is attained *en lieu* of the first.

Importantly, informal *procedures* have little to do with informal *objects of investigation* (to ascertain a fact’s “status as custom”): the ILC made it clear that in general, «a single approach—one that remains loyal to the two elements found in the formula, now almost a century old, of “a general practice accepted as law”—ought to be applied in identifying any customary rule of international law».²⁰⁶ This is the doctrine, which has already moved away significantly from the most orthodox positions which excluded any actors different from States and required considerable amount of time for a custom to emerge. The ILC tends to be more conservative than progressive due to its intense, direct ties with governmental authorities, at odds with scholarly fora such as the International Law Association – whose *Statement of Principles Applicable to the Formation of General Customary International Law* (2000) included some disrupting visions.²⁰⁷ Conversely, the *Institut de Droit International* tends to be a truly conservative assembly, on account of the average seniority of its associates and, most importantly, their immediate background as diplomats or high state legal officers; considering it too dangerous an exercise, the IDI has never pronounced itself thoroughly on customary law matters.

²⁰⁵ HAMELINK (2000, p. 168) reasoned that

[i]f the principle of public accountability makes all key players accountable for their decision-making on behalf of others[,] it applies to both public and private power holders. This has important implications for domains such as CyberSpace where the decision-makers are increasingly private parties which are neither elected nor held accountable.

²⁰⁶ SENDER and WOOD 2016, p. 368. TALAIE (1998, p. 36) shares the same opinion.

²⁰⁷ SWAINE 2014, p. 184.

Notably, more conservative countries like China tend to vehemently oppose any custom whose scope and content are negotiated in unofficial fora such as the BRICS or the G20,²⁰⁸ but do *not* reject the very idea of “negotiating” customs, which is still a first-class shift from the most doctrinally orthodox PIL purviews providing that «where treaty parties have traded off different things in order to reach agreement, a customary rule is thereby precluded from being formed».²⁰⁹ Nevertheless, despite «these non-treaty-based fora, which exhibit some of the organizational characteristics of treaty-based organizational support, have generated soft law but not, apparently, custom»,²¹⁰ they might well end up creating customs indirectly,²¹¹ e.g. by paving the way to soft laws able to customaries rapidly. Indeed, «[a]s with treaty bodies that “co-generate” parallel custom, soft law bodies, too, can generate custom insofar as the normal requirements for doing so have been met».²¹² Soft laws themselves may be less demanding or formalistic “codifications” of customs (especially when the latter are met with fierce opposition by part of the international community): a diluted crafting of provisions which some States prefer not to harden (yet), or an urgent measure pursuable when customs would take too long and treaties are politically too costly.²¹³ This is why, beyond the rhetorical public stances purported by its government, China practically supports these informal custom-making mechanisms – otherwise, it would

²⁰⁸ This occurs despite China itself having long identified more “traditional” multilateral fora as biased in favour of the Global North or “the West”; *refer to* MULLER 2013, p. 94.

²⁰⁹ LIM 2016, pp. 224-225.

²¹⁰ *Ibid.*, p. 225.

²¹⁰ SENDER and WOOD 2016, p. 368.

²¹¹ If we assume “the law” in its strictest meaning to be a binding manifestation of state coercion, the only possible law is the “hard” one, while “soft law” is an exemplification (“social contracts” being another one) of quasi-law or even “non-law” that is however capable, under certain circumstances and due solicitation, to trigger legal effects – thus transforming itself into hard laws, including customary ones. In fact, «it is possible to keep a distinct conceptual boundary between law and non-law, while at the same time admitting that legal effects may arise from output that falls below the normativity threshold» (KASSOTI 2017, p. 193).

²¹² LIM 2016, p. 226.

²¹³ Some scholars claim the choice of soft laws instead of customs be based on the subject-matter, with individuals’ protection being pursued through combinations of soft laws supporting narrower treaty arrangements, and customs coming into play together with treaty-law exclusively when a clash exists between state interests and the need to protect individuals – *see e.g.* WELLENS 1995, p. 11. This is intellectually fascinating, but hardly provable empirically.

just simply quit such non-treaty-based platforms. Even if one argues that being part of the G20 or the BRICS is convenient for China in an all-encompassing “networking” sense and this does not preclude the same country from keeping its rigid posture with specific reference to ICL, still, this preference would entail that *contesting* such an unconventional custom-making path is less a priority for the Chinese ruling class than *benefitting* from those platforms by taking advantage exactly of the non-formal policy geometries they allow for.²¹⁴

The common denominator between customs and soft laws is represented by concepts of claimed-universal standing known as “principles”. The uncertain relationship²¹⁵ between principles and customs is a momentous one,²¹⁶ for the entire course of international law, as much as for the increasing prominence of international organisations. A principle like that of territorial sovereignty can be argued in a diametrically opposite fashion by two actors thanks to the often immaterial (i.e., uncodified in either hard instruments or judgements) nature of customs. The case illustrated hereinafter draws on the *customary law* on jurisdiction, which is indeed one of the most frequently debated customs in its intersections with the *principle* of territorial sovereignty; within this framework, unilateral assertions of jurisdiction²¹⁷—also relevant for the governance of the cyberspace as well as for international tax law—are of special complexity and recent doctrinal identification.

²¹⁴ See also PAUWELYN et al. 2014, p. 742, fn. 56.

²¹⁵ For BASSIOUNI (1990, p. 791),

in applying “General Principles”, the [ICJ has] not always been clear on where the demarcation line should be drawn between customary law and “General Principles”. In some instances, “General Principles” are barely distinguishable from customary international law. In other cases, “General Principles” and customary law are clearly set apart. However, it does appear that some principles that are not encompassed in customary law may be implicated by the term “General Principles”. [... C]ertain principles cannot be evidenced in customary law because they are fairly broad in scope and have not yet been applied in State practice, or have been applied only in a limited form.

²¹⁶ Among others, check generally KLEINLEIN 2017.

²¹⁷ The classic volume on jurisdiction in PIL is RYNGAERT 2015^a. For a more thorough examination of unilateral assertions of jurisdiction, check the same Author (2015^b).

[T]he locality of [polluting emissions] is irrelevant for the climate. [...] Accordingly,] a unilateral extension of authority that could at some point lead to the emergence of a customary rule does not seem impossible. [...] When the EU extended the EU Emissions Trading System [...] to aircraft operators, it also required non-EU airlines to purchase emission permits for flights to and from the EU. These permits were required for the whole distance of the flight even if only part of it took place over European territory. This regulation was challenged by the Air Transport Association of America and some major U.S. airlines before the European Court of Justice [...]. The applicants claimed that the regulation violated the customary [rule] of territoriality. The ECJ disputed the argument.²¹⁸

Another jurisdiction-related custom rapidly forming and relevant for the legal governance of the cyberspace concerns universal jurisdiction, which is generally welcomed by European and Latin American countries whilst cautiously approached by States in Asia and Africa²¹⁹ – not to mention the US.

g Balancing practice and beliefs between formal and informal arrangements

According to the Israeli Supreme Court, “all of the parts of article 51(3) of The First Protocol express customary international law”. In contrast, according to the United States Department of Defense, “as drafted, Article 51(3) of AP I does not reflect customary international law”. How should we resolve such disputes?²²⁰

For the purpose of delineating one State’s understanding of what is legally binding internationally in a particular field, the problematicness with customary law lies in the possible unreliability and inconsistency of: 1) state declaratory statements—

²¹⁸ PETERSEN 2016, pp. 271-272. For a lengthy analysis of this case focused on its ICL implication, *refer to* MICHAELIDES-MATEOU 2017, pp. 337-344.

²¹⁹ *See* HELFER and MEYER, p. 321.

²²⁰ AHMAD 2019, p. 140.

even oral ones²²¹—over time; and/or b) state policy choices and informal (or quasi-formal) arrangements across multiple fora/jurisdictions – also over time. These might be mere rhetorical expedients, without mirroring the genuine belief of their negotiators and drafters; to exemplify, peer-pressure is probably the reason why States in ITL emphasise their willingness to comply with BEPS 1.0’s anti-abuse Standard,²²² despite state officials’ conviction that compliance would harm the economy (understood narrowly as the neoliberal business success of a few kleptocrats). This is why informal agreements and leadership’s statements must be appraised with the most scrupulous caution against state practice requirements: informal acts can be as misleading and mutually contradictory as spoken words, and when these two are too uneven, one shall wait to see how the State and its citizens implement them in daily practice; perhaps, in such scenarios, an adjudicator should pronounce a *non liquet*.²²³ Considering the case of non-binding UNGA Resolutions voted by a large majority of nations belonging to all “voting blocks”, they may

qualify as state practice if they purport to state a rule of *lex lata* rather than *lex ferenda*. The probative force of such statements will be affected by the voting figures, the reasons given by [S]tates for their votes[,] and whether the resolution is later confirmed by practice²²⁴

(implementation measures). One must record, however, that a stream of contemporary scholarly approaches to ICL prefers to dismiss any expression of state behaviour that merely *acknowledges* the existence of a certain norm instead of *conforming* to it (e.g. voting positions *per se*); the aim of these scholars is to make sure States actually conform to a certain rule rather than disengagedly opting for the approval of or paper-

²²¹ Refer to TALAIE 1998, p. 36, fn. 41.

²²² See BROEKHUIJSEN and MOSQUERA VALDERRAMA 2021, p. 102.

²²³ Cf. BEDERMAN 2002, p. 99.

²²⁴ CHARLESWORTH 1987, p. 6; see also SCHARF 2014, pp. 324-325, and BARKHOLDT 2020, p. 22. Cf. ARAJÄRVI 2014, pp.29;63,fn.78.

support for the latter.²²⁵ Another advantage is that to avoid double-counting the same documents as both practice and *opinio*, which risks creating a vicious circle of mutual confirmation that de facto halves the requirements for customary identification and recognition.²²⁶

As for the “psychological element”, «a presumption should operate that all uniform conduct of governments evidenced an *opinio juris* unless the contrary was proved»,²²⁷ which may be reformulated as to posit that—contrary to the inverse proportionality of duration and consistency (the lesser the time, the stricter the assessment²²⁸)—uniformity of conduct and strength of belief are directly proportional. «This is effectively to subsume the two elements of custom into one: to imply the existence of a psychological element from state practice unless there is some form of explicit²²⁹ disclaimer. A similar tactic is to reduce *opinio juris* to acquiescence or lack

²²⁵ See TASIOLAS 2014, p. 329.

²²⁶ See *ibid.*, p. 330.

²²⁷ CHARLESWORTH 1987, p. 10.

²²⁸ This is of extreme importance to prevent false claims of customs which have never actually been recognised as such. For TESÓN (2017, p. 87),

the phenomenon is more acute in international law because researching state practice is hard and time-consuming, so few people bother to check the truth of the assertion. [...] The lawyer who asserts fake custom, then, trades on the indeterminacy of the applicable rule of recognition and on the public's high informational costs of determining what [S]tates have done and not done in the past. [...] Propositions of domestic law are easier to test.

However, it shall be noted that the increasing availability of online sources, coupled with the terrific expansion of ICT in quality (but beware of “fake news”!) and coverage, somehow closes the gap between domestic and international systems – ARAJÄRVI 2014, p. 35. This is all the more verifiable in cyberlaw, as the practices of States related thereto might come as more visibly and universally accessible to the members of the international community compared to other fields of human activity. Limitations lie more with the lack of the same kind of cultural proximity to domestic systems which allows for a sharper contextualisation and interpretation of the culturally relative socio-legal *meaning* attributed to such a national practice. Another paradoxical issue is that state practice related to certain jurisdictions and/or international organisations and/or subject-areas might even prove quantitatively *overwhelming* – DUMBERRY 2016, p. 57.

²²⁹ Explicitness is particularly important. It is exceedingly so in the context of negotiations, when discussing the supposedly customised status of a norm, in order for negotiators not to trump or misjudge other States' real intentions with their own ethnocentric biases and beliefs. The challenge to face is similar to the one scientists have to cope with when drawing inferences from events; the trap they might fall into was described by LONGINO (1990, pp. 39-41) as follows:

Any attempt to find some unique or direct relation between state of affairs and those hypotheses for which they are taken as evidence reveals, in fact, that there is no such relation and that anything that is the case or is imagined to be the case can be taken to be evidence that something else is the case. What determines whether or not someone will take some fact or alleged fact, *x*, as evidence for some hypothesis, *h*, is not a natural (for example, causal) relation between the state of affairs *x* and that described by *h* but are often beliefs that person has concerning the evidential connection between *x* and *h*.

This way, “*x* is evidence that *h* ...” should rather become “*x* is evidence for the hypothesis that *h* ...”.

of protest»,²³⁰ considering how «it is permissible to presume that deviations from a usage are reflective of a violation and not the emergence of a competing norm»,²³¹ and «it has long been accepted that customary law binds [S]tates which have not contributed to its formation or *deliberately* acquiesced to it». ²³² Somehow, this traces back to what the norm was in earlier natural-law-imbued *ius gentium* scholarship, where a

consensus gentium, or custom, [could] be evidence of rules [...] but it ha[d] no independent binding authority. It [wa]s not law simply by being a consensus. [...] For Grotius, natural law may be discovered by *a priori* reasoning as well as *a posteriori* evidence. *Its deduction from first principles is just as “objective” as drawing inferences about it from sovereign behaviour*[, as] the sovereign is merely an agent of the normative [divine] order.²³³

The implication of this doctrine is that when arguing a case before the ICJ, the State asserting the existence of a custom would need to prove its state-practice component, whereas instead the State rejecting said claim would need to disprove it by opposing evidence of a contrary *opinio juris* (as a minimum);²³⁴ in other words, the second State should argue that the alleged practice claimed by the former, even if confirmed, is not custom because the claimant does not accompany it officially with a sense of duty.

Switching the two components whilst leaving their appraising mechanism untouched is equally possible: this combination is of the utmost importance when pleading on instant customs, whose supporting States benefit from little practice to be shown.²³⁵ However, this second path paves the way for lack of clarity as to what a principle is (as per Article 38.1.c ICJ Statute) and what a custom is: if «the deductive

²³⁰ CHARLESWORTH 1987, p. 10.

²³¹ BEDERMAN 2002, p. 171; *see also* BAKER 2010, p. 176, ftn. 19.

²³² FORTIN 2018, p. 352, emphasis added.

²³³ KOSKENNIEMI 2006, p. 98, emphasis added.

²³⁴ CHARLESWORTH 1987, p. 10, ftn. 62.

²³⁵ *Check* *ibid.*, p. 11.

process is one that begins with general statements of rules rather than particular instances of practice»,²³⁶ then how can a general principle of law be distinguishable from an international custom?²³⁷

One way to recompose the two methodological formulations is that of focusing on the actual evidence brought forward by the initiating (i.e. suing) State: if that evidence comes in the form of state practical actions, then the respondent State would need to oppose a contrary *opinio juris* at least; if the claimant State makes its case through documents, the respondent State may oppose a number of factual occurrences able to disprove the declaratory intents contained in the documentary policies and laws presented before the Court. Another path is that of a field-by-field remodulation,²³⁸ whose declension has yet to be explored in literature vis-à-vis most fields. In any case, customs must be proven, the burden of proof resting on the asserting country,²³⁹ and the standard of proof depending on the tribunal and matter involved (the higher the claim and—perhaps contrary to common sense—the more local in geographical scope

²³⁶ BANTEKA 2018, p. 303.

²³⁷ In LEPARD (2010, p. 164)’s view, general principles can usually be distinguished from customary international law because they are derived from national legal systems alone, whereas customary norms [...] arise from the views of [S]tates expressed in many fora, but principally international ones, including diplomatic meetings and international organizations.

Quantitative assessments of the *actual* tenability of such principles in domestic jurisdictions around the globe are even less precise than those ascertaining customs, as in practice it is fairly rare that States spend their efforts on “general principle”-arguments while pleading their case. And yet, someone described general principles as the “essence” of any legal system, their barycentre justice-wise – BASSIOUNI 1990, pp. 771-772. Resultantly, for IL principles to keep their qualification as “general”, to exemplify, “Eastern”/“Western” approaches thereto cannot be maintained: a Soviet scholar noted that a principle, to be *general*, has to be considered favourably by «all existing groups of States: socialist, western, and developing» – DANILENKO 1988, p. 16. Conversely, customs can be local, regional, etc. and as such display culturally relativist features, subject to change due to economic globalisation, protectionist counterreactions thereto, and related phenomena. Termed otherwise, customs are *not necessarily* universal in aspiration and can be regionalised when suitable. Although precise methodologies are still offshore, one might claim that for the sake of assessing general principles, a survey of the major *typologies* of world’s legal systems—e.g. Islamic (sharia-based), Continental European, Anglo-Saxon, Confucianist, ...—may suffice – *see also* BASSIOUNI 1990, p. 812. Fortunately, principles in domestic jurisdictions are more easily recognisable and consistent than those rumoured across international circles (*ibid.*, p. 774). One must however strongly disagree with the assumption—formulated in the writings of some scholars (*see for example* *ibid.*, p. 776—that general principles can overrule conventional or customary law: at best, as rightly noted *ibid.* (p. 800), they may serve as a means for textual or finalistic interpretations of treaty wordings whose ordinary meaning is deemed outdated, tentative, or unknown (i.e. missing).

²³⁸ *See* FORTIN 2018, p. 345.

²³⁹ *See* TALAIE 1998, p. 42.

the alleged custom is thought to be, the more demanding to reach the expected threshold²⁴⁰).

It is always important to evaluate the presence of a practiced or tolerated behaviour *contextually*, that is, in light of the normative convincement of the State; the two cannot proceed disjointly. The claim that detaching a belief from its related practice is a positive move to expand the plethora of IL actors involved in ICL formation²⁴¹ is deceiving for two reasons: because it is not the cause at the root of such an expansion (a lukewarm one, anyway), and because there is no formal accommodation of actors like individuals, “civil society”, or NGOs (yet).²⁴² Actions and motivations should always be considered together, as a whole, even though the methodology for their ascertainment should and can be independent from one another.²⁴³ For instance, although Russia and China, among (many) others,

are notorious places for organizations that launch spam attacks and even openly offer their services on a commercial basis[,] it would be hard to classify these [S]tates as persistent objectors to customary norms prohibiting sending spam, due to the fact that these [S]tates officially support anti-spam policies.²⁴⁴

Conversely, just for the sake of exemplification, the so-called “Great Firewall of China” represents a coherent combination of ideological canons, pieces of legislation, administrative provisions, enforcement habits, and deployment of technological tools,

²⁴⁰ WORSTER 2014, p. 464; TALAIE 1998, p. 33 and ftn. 28.

²⁴¹ TASIOULAS (2016^b, p. 328) observed that

[b]y detaching *opinio juris* from any *necessary* connection with state practice, the interpretative account of custom enables us to deny that it is only the *opinio juris* of [S]tates that counts in the process of customary norm formation. Instead, we can accommodate within the formal structures of international law creation a role for various non-state actors, such as international organizations (e.g. the UN General Assembly, the ICJ, the WTO etc.), peoples (understood as collectivities conceptually distinct from [S]tates), non-governmental organizations (e.g. the International Committee of the Red Cross, Human Rights Watch, Amnesty International, etc.), and so on.

²⁴² DUMBERRY 2016, p. 120.

²⁴³ TASIOULAS 2014, p. 333.

²⁴⁴ POLAŃSKI 2017, p. 377.

which may flag up the People's Republic of China (PRC) as a persistent objector to the general understanding that access to the Internet shall be restriction-free by default.

Occurrences of mismatch between a pretentiously strong *opinio juris* and an in compliant state practice also exist, even when peremptory norms are concerned: for example, torture

is recognized by most [S]tates as violating human rights principles that have attained the status of customary international law [or even *jus cogens*]. Yet, actions amounting to torture continue, and [S]tates sponsoring those actions are not often condemned, so it cannot be said there is complete[, genuine] international agreement on the issue.²⁴⁵

Claims have been put forward that «human rights norms of *jus cogens* status are a subclass of customary norms of human rights [...] whose grounding *opinio juris* and state practice establishes them as universal, peremptory, and non-derogable».²⁴⁶ A *contrario*, others posit that «custom as positivistically conceived [...] is no panacea for the legal embodiment of norms of global justice».²⁴⁷ There are scholarly outsiders going so far as to claim that no human right—a *fortiori* so important ones like freedom

²⁴⁵ BROWN and POELLET 2012, p. 127. Cf. TASIOLAS 2014, p. 332. To seek a balanced approach, one should not automatically equate non-condemnation (technically, abstention from denunciation) with acquiescence or tacit consent,

when the [S]tate in question has taken care to communicate its views on the legal issues raised by the situation through other means. For this reason, attention should be paid to the adoption of general declarations such as those adopted by groupings of states such as the Non-Aligned Movement, the BRICS [...] or the [G20], even though they do not necessarily contain explicit condemnations of (or even references to) a specific incident. Such collective declarations are as valid a means to communicate *opinio juris* as individual statements, provided that individual [S]tates do not dissociate themselves from their content

or themselves act in blatant disregard for their own collective stance – HENRY 2017, p. 29. Furthermore, assuming that silence is synonymous with approval represents an ethnocentrically biased standpoint tailored to Western diplomatic tactics: in “the East”, for example, silence might rather stand for contrariness, and tacit dissent could be more likely than tacit consent – see *ibid.*, p. 10, fn. 46. Eastern “tacit dissent” gains momentum if one considers how differently from the most powerful Western States, no big player in the East (e.g. India, Russia, or China)—apart from Japan with its *Japanese Yearbook of International Law*—regularly publishes scholarly views on its stances on international law affairs (e.g. systematic yearly/biannual reviews/digests/case-notes on international jurisprudence) – see also BYERS 2004, p. 153, fn. 30. The US does not publish any collection of this sort, either (although its stances can be extrapolated from extensive executive papers on military, foreign relations, and commercial strategy), which might well signal its dismissal of international law as a tool for regulating international relations and pursuing global good governance.

²⁴⁶ TASIOLAS 2016^a, p. 116.

²⁴⁷ TASIOLAS 2016^b, p. 308.

from torture—should have any *a priori* place in ICL textbooks;²⁴⁸ given that e.g. torture is common daily practice or at least an option in most powerful States²⁴⁹—from Russia to the US, from India to China, from Israel to Saudi Arabia, Iran, the United Arab Emirates, Mexico, and Egypt, to name but a few—they might even see it right. And yet, the fact that «as a matter of international responsibility, formal protest can in principle only be voiced by the victim of an alleged violation»²⁵⁰ is no excuse in these cases, as serious breaches of obligations *erga omnes*²⁵¹ violate the whole international community—and ideally the “international-law project” overarchingly—rather than specific States. Indeed, the ICJ held (by majority: Judge Xue from China dissenting) that when the treaty formulation of a norm includes an obligation *erga omnes*, said norm’s standing as *jus cogens* confers on any treaty party *locus standi* to sue other state parties for alleged violations of mentioned norm.²⁵² Arguably, once the treaty norm has customarised (for instance due to the virtually universal subscription to the relevant treaty), this right to sue *erga omnes partes* is extended to all members of the international community. The foundational problem with *ius cogens*, in any case, remains that of “proving” its existence methodically, besides common-sense declarations; the potential strength of *ius cogens* as a universally participatory, state-consent-independent IL source helps one understand «why a scholar might be willing to cite a judicial identification of *jus cogens* status even if it has not been reasoned, as a basis for furthering an argument that is ethically appealing».²⁵³

²⁴⁸ Refer e.g. to WEISBURD 2001. Cf. e.g. BYERS 2004, pp. 135-136.

²⁴⁹ See further HURD 2013.

²⁵⁰ HENRY 2017, p. 12.

²⁵¹ It is worth noticing that unfortunately, still decades after the introduction of this concept, the almost totality of the IL literature – see e.g. BYERS 2004, p. 196 – cannot grasp the real meaning of “obligation *erga omnes*”, which is not a variation of *jus cogens*, but simply the positive linguistic formulation of the negative “breach of *jus cogens*”: when a State breaches a *jus cogens* norm, it violates an obligation held “towards all members of the international community” (that is, “*erga omnes*”).

²⁵² See further URS 2021, pp. 512-513.

²⁵³ SAUL 2015, p. 40.

Not less worryingly, the doctrine according to which «widely ratified multilateral conventions or treaties which have established human rights prohibitions against genocide, torture, and slavery actually form confirmation of customary international law *binding upon all [S]tates*, not just the signatories»²⁵⁴ might turn out counterproductive: States might feel disincentivised to join a convention if their participation is not necessary for the custom to arise and others would join “in their place” anyway, rather opting for a less explicit—and as such, less politically responsible—indirect, unexpressed consent. Moreover, joining a human-rights treaty is a political act of (domestic as much as international) propaganda, whose effects are hindered if the main stakeholders are aware of its scarce legal difference from the State being “soon” bound by related customs regardless. The most viable solutions seem to stand half-way between the urgency of upholding the consent-based design of the international legal order and the teleological interpretation of the law’s mandate to offer protection and organisation to humans as well as social life. While respecting consent comes as straightforward in certain fields, in others the mentioned balancing exercise may prove tough: the latter case holds particularly true, e.g., in humanitarian law.²⁵⁵

h Hard laws, “hard customs”? Customarising treaties and related fictions

²⁵⁴ BAKER 2010, p. 174, emphasis added.

²⁵⁵ BETHLEHEM (2007, pp. 6-7) stressed that

[w]hile the 1949 Geneva Conventions enjoy universal adherence today, the same is not yet the case for the other major treaties in this field, notably the Additional Protocols of 1977. While treaties bind only their parties, rules of customary international law [also stemming therefrom] bind all States. Customary international law *is therefore a means for achieving* the universal application of principles of international humanitarian law, and notably of those enshrined in the Additional Protocols. [...] States not parties to Additional Protocol I include: Iran, Iraq, Pakistan, India, Myanmar, Nepal, and most of the south-east Asian States – Philippines, Indonesia, Thailand, Malaysia; the United States is not a party, nor are Israel, Somalia, Sudan, Sri Lanka, Eritrea and Morocco. This is a “Who’s Who” of many of the States that have been engaged in conflicts over the past 30 years.

Not less importantly—and this is relevant e.g. for cyber-conflicts—customs “fill the gaps” among differentiated treaty-based regimes when the “status” of a conflict is controversial or still unclear: *see* PEJIĆ 2007, pp. 79-80.

ILC's mission to progressively develop international law may well backfire: does progressive development not *reinforce* rather than upend the *status quo*?²⁵⁶

In strictly *legal* terms, beyond some of the considerations above which winked at *political* dimensions, customs' codification is a process of outstanding sophistication. First, whereas treaties do not apply retroactively, customs' rationale is exactly that of tracing back to a relatively ancient past; consequently, when the outcome of codification is narrower than the original custom's scope, arguably the narrower part can no longer be invoked retroactively (at least by the codifying parties),²⁵⁷ whilst the remaining norms maintain their retroactive applicability. Second, once a custom is recognised upon its formation and not objected to upon its recognition, a State cannot unilaterally withdraw from it;²⁵⁸ contrariwise, the *rec sic stantibus* doctrine allows for unilateral withdrawals *from treaties* due to fundamental changes of circumstances, and derogations may void a treaty participation of any effectiveness. Third, and pre-eminently, when a custom is codified, it can be either "hardened" or "softened", depending on whether it is codified in a treaty(-like provision) or in a soft(er) document.

This process of customs' hardening or softening explains the flexibility of customary norms, but also the unreliable volatility thereof in terms of bindingness. If one randomly assumes a non-recognised custom to feature a bindingness value equal

²⁵⁶ RYNGAERT 2020, emphases in the original. The Author argues the above, I suppose, because an élite grants itself the prerogative to decide how to develop rituals and beliefs which should rather be left to the course of nature and the passage of time, and by so doing, such élite reinforces its élitist dominion over the unfolding of international affairs.

²⁵⁷ This is a tentative conclusion only: to this Author's best knowledge, there are no primary or secondary IL sources examining this argument yet.

²⁵⁸ States «can only rely on the specific clauses of the law of State responsibility like force majeure, distress, or necessity in order to avoid accountability» – TOMUSCHAT 2015, p. 19.

to, say, 3 on a 0-10 scale, a declaratorily recognised upgrade²⁵⁹ adds little to such a value (let me say e.g. 5 out of 10), whereas its codification process is way more impactful: if the original non-recognised custom (3/10) is transposed into a soft document, it becomes a recognised custom but it is perceived as a written yet soft norm, thus diminishing its perceived binding force (1/10) because the underlying intention could have been to “downgrade” it. At odds with it, when said non-recognised custom (again, 3/10) is transposed into hard law, its bindingness reaches the highest value (10/10), as it merges the original force of the custom itself with the undebatable binding nature of the treaty now “reporting” it.²⁶⁰ This holds even truer in light of the scholarly contested, yet frequently judicially upheld doctrine that «treaties codifying customary rules [...] have a special status and many of their rules are binding on non-parties as custom»,²⁶¹ representing therefore a convenient procedure for State to “force” under-complied-with customary norms into treaty-based provisions of de-facto-universal reach. A norm may be a custom and be transposed in treaties at once.²⁶² Indicatively, in ITL, «the Dutch Supreme Court recently ruled that the interpretative rules of the VCLT are of a customary nature and therefore apply to tax treaties concluded before the VCLT came into force»,²⁶³ and two decades ago already,

²⁵⁹ Verbally, which may include written transcripts of such a declaratory statement.

²⁶⁰ An illustrative exemplification might draw from the hectic experience of the first post-WW2 international criminal tribunals: arguing on customary laws of war,

[i]n its inaugural case, the Appeals Chamber of the Yugoslavia Tribunal rendered a revolutionary decision that for the first time held that individuals could be held criminally liable for violations of Common Article 3 and Additional Protocol II of the Geneva Conventions for war crimes committed in internal conflict. This decision closed a gaping gap in the coverage of international humanitarian law and was soon thereafter affirmed by the Rwanda Tribunal and Special Court for Sierra Leone. It was codified in the 1998 Statute of the International Criminal Court, which has been ratified by 122 States

– SCHARF 2014, p. 336, emphasis added. More generally, as recounted by BRADLEY (2016, p. 8), although CIL has played a significant role in adjudication in the ad hoc criminal tribunals for former Yugoslavia and Rwanda, the establishment of the International Criminal Court has led to a decline in CIL’s role in international criminal law.

²⁶¹ CHARLESWORTH 1987, p. 12.

²⁶² GASBARRI 2017, p. 105.

²⁶³ BROEKHUIJSEN and MOSQUERA VALDERRAMA 2021, p. 85.

the Swiss Federal Court, by reference to the OECD Commentaries and academic writing[s], held that the doctrine of abuse of rights applied to double[-]taxation conventions even in the absence of specific anti-abuse provisions in the applicable bilateral tax treaty.²⁶⁴

Even when those treaties include both “customarised” rules and progressive ones, distinguishing between the two after codification becomes less straightforward an exercise, so that the customarised ones go diluting into the progressive ones – but arguably not vice versa. This is facilitated by a trend that witnesses both States and international courts trying to blur the distinction between “subsequent (re-)interpretations” of a treaty according to Article 31(3)(b) VCLT—which are rarely relied upon by international adjudicatory bodies²⁶⁵—and amendments to that treaty under VCLT’s Part IV:²⁶⁶ while progressive provisions had been arguably discussed in greater detail during the negotiations, those treaty sections incorporating customs somehow pretend to “crystallise” a customary norm which after the treaty signing in fact continues to live by its own motion. In *Namibia*, the ICJ ruled there is a need for balancing the intention of the parties at the time of signing a treaty with the *prevailing customary understandings of the overall legal framework* against which such a treaty

²⁶⁴ Ibid., p. 98.

²⁶⁵ See SINGH 2020, p. 69.

²⁶⁶ ACKERMANN and FENRICH 2017, pp. 778-779. TLADI (2018, emphases in the original) voiced the concern that in recent ILC work,

the title of [A]rticle 31 [VCLT], “General Rule”, is used to justify a subtle elevation of subsequent agreement and subsequent practice, in the interpretation of treaties, so that [A]rticle 31(1), which provides for the *main rule* of interpretation, namely that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object to purpose”, no longer “possess[es] a primacy” in interpretation. This elevation in subsequent agreements and subsequent practice is also advanced in the blurring of the line between modification and interpretation, which hints at the possibility (or at least makes it possible to conclude) that *through the process of interpretation*, subsequent agreements and subsequent practice can modify a treaty. [...] Having made clear that the modification by interpretation is not permitted, the commentaries then engage in a slight backtracking. [...] At some places, the line between subsequent agreements and practice as modifiers of treaties and subsequent agreements and practice as tools for interpretation become[s] blurred.

For the sake of the present study, such “elevation” might appear especially worrisome in the event States must seek domestic parliamentarian approval to join a treaty, while later acting freely (and being thus easily captured by transnational business forces) towards the reinterpretation of the terms of said treaty by means of subsequent practice.

is scrutinised at the time of interpretation.²⁶⁷ This is however an artificially created, “privatised”, double-edged sword:²⁶⁸ for the time being, the game might work, but on the long run, States will become increasingly aware of this «concept of law formation that appears more revolutionary than evolutionary»,²⁶⁹ and accustomed to the idea that their sovereign stances are watered down²⁷⁰ in unclear mixtures of customs and progressive developments of international law. The game has been efficaciously described as the «“fiction” of claiming to be simply codifying existing norms within negotiated conventions, rather than asserting that new norms of international law [are] being created».²⁷¹

Not only States may not be willing to participate actively towards certain treaty-making processes out of fear of their intentions one day being broadened; equally possible and worrying is that States, aware of this trend, do not sign a convention as for avoiding its progressive elements only:

[t]hus the [US] could play down the significance of its non-signature of [UNCLOS] on the ground that everything contained in the Convention, with the exception of the deep seabed resources regime, formed part of customary international law and thus bound the [US] in any event.²⁷²

The just-recalled US attitude seems to endorse the theory that customs cannot originate treaties,²⁷³ as to prevent one from «saying that a customary norm is binding on [S]tate

²⁶⁷ BEDERMAN 2002, p. 103.

²⁶⁸ CHARLESWORTH 1987, p. 15.

²⁶⁹ SCHARF 2014, p. 341.

²⁷⁰ PETERSEN (2017, p. 113) remarks that

[t]reaty law is an opt-in system. A [S]tate is only part of the legal regime if it has explicitly consented to it. Customary law, in contrast, is an opt-out system. States are bound by customary rules unless they explicitly object to their formation. Despite this difference, there is one common denominator: [i]n principle, a [S]tate cannot be bound by a customary norm against its will [...].

²⁷¹ BAKER 2010, p. 181.

²⁷² CHARLESWORTH 1987, p. 16.

²⁷³ KAMMERHOFER (2004, p. 539) posits what follows:

No practice is possible with respect to rules creating rule-creating rules, creating rules, unmaking rules (formal abrogation), because such a “practice” would necessarily be in the ideal realm and precisely not real—which is what practice *per definitionem* is. If one therefore were to either assume a *Grundnorm* or to have a non-customary norm which would

A by citing treaties to which A is not a party and even which A has expressly declined to join or has repudiated. The claim is that the rule is binding on nonparties as custom», but must be rejected as the “treaty fallacy”-argument of “fake customs”²⁷⁴ so widely perpetrated by biased lawyers, courts, norm entrepreneurs, state officials, and even politicised scholars. The proposal of «three methods of ascertaining the relationship between a treaty and customary norms: reference to *travaux préparatoires*, the text of the treaty referring directly to custom, and a comparison of the text with customary norms»²⁷⁵ promises to be a vicious circle, as the latter “comparison” lacks a certain and stable second term of comparison.

The ILC Reports are crafted in a similar vein (customs codification mixed with progressive elements), with the difference that they remain non-binding (although highly authoritative) and complementary sources of international law under the ICJ Statute (as scholarly works), unless they are assimilated to (one component of) customs: on the one hand, the positive reaction or diplomatic protest by governments to the ILC drafts are highly indicative of legal *opinioes*;²⁷⁶ on the other hand, the ICJ

seems to accord the status of state practice to statements made by the [ILC] and decisions of the International Court itself. As members of these two bodies are not state representatives, the characterisation of their statements as the practice of States is a considerable extension of this notion.²⁷⁷

The ILC is said to be traversing a phase of crisis due to political stalemate in the UNGA, which is causing the abandonment of its historical backstage treaty-crafting

make customary law a formal source of law, then customary law could not itself create further “steps” of the normative pyramid.

²⁷⁴ Refer to TESÓN 2017, p. 93.

²⁷⁵ CHARLESWORTH 1987, pp. 12-13, fn.76.

²⁷⁶ See SCHARF 2013, pp. 34;44.

²⁷⁷ CHARLESWORTH 1987, p. 18.

functions in favour of a less evident (yet truly influential) drafting activity privileging commentaries and recommendations in the form of Draft Articles.²⁷⁸ Indeed,

ILC members appear to be conscious of the risks involved in the adoption of unsuccessful conventions, and States no longer appear to be interested in convening conferences to discuss matters of general international law.²⁷⁹

The ILC work on ICL has been persuasively invoked in ITL scholarship to assess the state of the field. For example, thanks to said work it has been possible to clarify that the repetition of similar clauses across multiple tax treaties may be indicative of ICL norms, but also adduce evidence to the opposite claim, depending on the circumstances²⁸⁰ – in fact, if a rule is customary, there is no need to report it in treaty form, unless variations are so salient, numerous, and widespread that the intended one is worth specifying.

i The regionalisation of “once treaty-based” customs specially affecting certain States

The customarisation process of once-progressive treaty provisions has been met with resistance by the ICJ,²⁸¹ but it cannot go underestimated, particularly when it binds “specially affected States” (e.g., in technology-intensive fields, those owning or

²⁷⁸ See HELFER and MEYER 2016, p. 307.

²⁷⁹ BORDIN 2014, p. 541.

²⁸⁰ Refer to BRAUMANN 2020, pp. 754-755.

²⁸¹ BAKER (2010, p. 179) reports that

[i]n the *North Sea Continental Shelf* decision, the ICJ rejected claims by both Denmark and the Netherlands that West Germany was bound by Article 6 of the 1958 Geneva Convention on the Continental Shelf [...] in delineating the boundaries of its continental shelf *vis-à-vis* Denmark and Norway. West Germany was not a signatory to the Convention, and thereby not formally bound by its provisions, but Denmark and the Netherlands argued that the provisions of the Convention had transformed into customary international law (and were thereby binding on West Germany), and that West Germany itself had shown predilection to be bound by the rules contained in Article 6. The Court rejected this argument, and held that predilection was not enough; rather that there had to be some showing of *opinio juris* to demonstrate that the behaviour in question had transformed the conventional norm into a customary one.

standing at the forefront in the development of a certain technological device/expertise) who had previously appeared reluctant or hesitant to join the treaty concerned. This may occur at both the regional and the global levels, in both cases stemming from multilateral treaties, and in the first from bilateral ones as well: progressive provisions once binding as included in a treaty between two regional actors may customarise—by widespread and representative practice and/or, as outlined above, through “political expedients”—regionally, up to subsequently bind all countries belonging to that region. It is easier to argue that a process of customarisation has taken place when a new and more comprehensive or participated treaty on the same subject-matter is being planned/negotiated²⁸² or will likely be negotiated soon with substantial qualitative contribution and politico-diplomatic endorsement by the most subject-relevant nations. Also, when the majority of initially non-signatory States declare said treaty provisions to have become binding as customary law, it becomes arguably harder for the rest of the same group of initially outsider States to demonstrate the reverse, the *onus probandi* shifting onto them.

Regionally, customarised “variations” of an originally treaty-based provision may arise over time, although such a phenomenon is not yet contemplated in either judicial decisions of law literature (beyond broader discussions on “fragmentation” and the like): the only rather self-evident consideration currently appearing in literature is that

[t]he existence of [regional customs] confirms that it would be overly cautious to conclude that the principle of unity in the framework of [ICL] prevents all or some [S]tates [from] creating customary obligations which are limited to certain duty-bearers.²⁸³

²⁸² See CHARLESWORTH 1987, pp. 14-15.

²⁸³ FORTIN 2018, pp. 347-348.

Undergoing regionalisation, ICL would cease to be «a potential antidote to fragmentation», thus justifying the anxieties of those international lawyers who disagree with their colleagues who try to portray it as «an integrating, anti-particularistic element of the international legal order»²⁸⁴ – and possibly even ending up worsening those anxieties. This way, ICL could be better studied through the lenses of CpIL,²⁸⁵ for «invoking and considering regional customary laws [...] in their common cultural tradition»;²⁸⁶ far from representing a new discipline,²⁸⁷ CpIL has received a boost in recent years thanks to the abatement of linguistic and “aesthetic” barriers in scholarship and lawyering,²⁸⁸ the multilateralisation of global governance, as well as more audacious stances advanced by previously PIL-isolationists States (which one could have defined as “norm followers”). The boundaries between regional expressions of arising customs and flagrant violations of “current” IL are unclear, though, particularly so in the human-rights legislative sphere. For instance,

the Organization of the Islamic Conference[] has recently sponsored, with some success, UN resolutions calling for the criminalization of blasphemy. They have done this at the international level, but, as important, they have enacted this offense in their domestic legislation. The problem is that the criminalization of blasphemy is in grave tension with the norm of freedom of expression recognized in human rights law. If repeated domestic enactment of a norm creates customary law, then these [S]tates would have succeeded in introducing a permissive norm that authorizes governments to criminalize blasphemy.²⁸⁹

To the advantage of the most technologically and scientifically developed countries, the more a custom concerns itself with technicalities, the more (sub-)regional variations are likely to arise as a natural consequence of developmental gaps

²⁸⁴ GRADONI 2015, p. 375.

²⁸⁵ See MAMLYUK and MATTEI 2011, p. 388.

²⁸⁶ ANANTHAVINAYAGAN 2020, p. 39.

²⁸⁷ See further CARCANO 2018, p. 28.

²⁸⁸ Refer e.g. to MÄLKSOO 2021, p. 79.

²⁸⁹ TESÓN 2017, p. 95.

(in infrastructure, raw-material supply, qualified labour, and regulatory preparedness) among regions which were previously lumped together by the same—or very similar—starting blocks. Nevertheless, the contrary is also possible: regionalised customs originally «supplementary or contradictory to an international custom»²⁹⁰ may come together through a process of convergence catalysed by the reduction of the divide among regions over a certain field. This seems to be the case with the Internet and the digital divide, where the original fragmentation over regionalised customs might at some point converge over a number of shared principles and “good habits” or “fair practices” applicable internationally, due to the worldwide scope of the Web and the increasingly rapid, cheap, and widespread access to broadband networks as well as diffused ownership of “smart” multitask devices such as smartphones. Someone labelled this convergence as “global cyberdemocracy”,²⁹¹ but I would rather caution against its inevitability, in terms of both its globality and its democratic governability.

Not by accident, in the opinion of some commentators, our “2.0 society” has inaugurated a season of time-shrinking not only as far as our general lifestyle is concerned, but in IL just as much; this has to do with lack of sedimentation,²⁹² which diagnoses, in turn, the contemporary anxiety stemming from most policymakers’ inability in—or, in democracies, electoral disinterest for—seeking the long term. Customs being a direct (or at least less mediated, when compared to treaty provisions) expression of the “real life” of societal actors across populations and regions, the fact that customary law is the most affected law’s manifestation in this respect cannot catch any scholar off-guard. *Prima facie*, we can either abolish customs altogether, or reform

²⁹⁰ TALAIE 1998, p. 40.

²⁹¹ See e.g. DOMINGO 2010, p. 173.

²⁹² DE SOUSA SANTOS (2020, p. 522)’s diagnosis concludes that [t]he pace, the scale, the nature[,] and the reach of social transformation are such that moments of destruction and moments of creation succeed each other in a frantic rhythm without leaving time or space for moments of stabilization and consolidation.

our expectations related thereto in terms of timing. Evidence of state practice cumulates—and sometimes contradicts itself—at impressive speed, and influences an unparalleled number of third parties as it spreads instantaneously all over the Internet²⁹³ – although in the age of “fake news”, echo chambers, English-language domination, and state-engineered Internet firewalls, the authenticity, completeness (which derives from multiple partialities rather than one single pretended “impartiality”), representativeness, and *legal* quality of such a practice are anything but a given.²⁹⁴ After all, as humans we are all wired in linear storytelling, whose more shady truthfulness—assuming there is any—matters to most only marginally, i.e., exclusively insofar as it aligns with already formulated assumptions or unwittingly imposed socio-cultural breeding. Online, any individual becomes a storyteller of themselves and, subconsciously, of the power system which is watching them from above *and around*, through particular time-compressed, record-keeping dynamics that never had been at play before: a quarter of century ago already, concerns were raised that

[i]n cyberspace, a person's [...] total existence, both past and present can be accessed by computer-assisted search engines. With these capabilities, life online begins to feel like being inside a panoptic machine more efficient even than Bentham's.²⁹⁵

This same mechanism modulating individuals reiterates (or even reinvigorates) itself collectively. The Internet «renders it easier for [S]tates party to [a treaty to] locate and apply evidence for customary international law»²⁹⁶ in order to align their behaviours to the actual technology-savvy, digitality-aware treaty interpretations that other States

²⁹³ SCHARF 2014, p. 310, ftn. 22.

²⁹⁴ See also MEGIDDO 2019, p. 6.

²⁹⁵ MALTZ 1996, emphasis removed.

²⁹⁶ MAAS 2019, p. 9.

have been developing, but this process risks turning into an endlessly circular “catching game” whereby each State cherry-picks the new developments (i.e. deviations) it finds convenient to its own narrative, while other sovereigns within its sphere of influence are forced to follow suit or lag behind. Counterintuitively, this type of customisation might be more likely to materialise when a regionalised “transnational civil society” takes distance from the “international community of nations” more traditionally understood, and the two entities start conveying opposite messages by adopting divergent agendas, pursuing unmatched goals, and upholding uneven priorities. This is so because although both treaty-making and custom-recognition can be bottom-up activities carried out by States taking into consideration the expectations, policy preferences, and anxieties of their respective citizens, it cannot be disproven that customary laws are, again, more direct an expression of daily-life, legally relevant behaviours. Therefore, customs’ regionalisation trends ordinarily mark

the shift away from international legislation made in general international fora, such as the [UN], to law[-]making in limited regional fora from which many of the newer members of the international community are excluded.²⁹⁷

However, as stated *supra*, when it comes to the (re-)regulation of activities *because they are now performed in the digital sphere*, the contrary is more likely to occur: regionalised customs may converge over a set of basic principles of universal acceptance and applicability. Hence, inspecting the Internet’s impact on an IL field such as ITL stands as a suitable case-study to decipher the “ontological” transformation the online revolution has brought about in the way international

²⁹⁷ CHARLESWORTH 1987, p. 16.

customs work. This might imply a “watering-down” process of the original stances, a remodulation of them, or their complete redefinition; for sure, it entails a “clash of *legal* civilisations”, and it is anything but immediate to achieve. Just like in the ITL field,²⁹⁸ it comes with negotiation costs, lengthy bargaining processes, and attempts by the most powerful States at privatising the IL discourse. Furthermore, if one considers that the “cyber-(super)powers” are not necessarily overlapping with the traditional ones (India may serve as a meaningful example of such unevenness), then the way global legal governance may be reshaped through new models of and approaches to ICL as applied to—or stemming from—cyber behaviours of state and non-state actors emerges clearly.²⁹⁹

A related dilemma invests what countries may be considered “specially affected” within the meaning introduced above; this is not tangential a consideration to weigh in, since

[t]he practice of politically powerful and active [S]tates carries more weight than that of smaller nations, especially ones not actively engaged in the area under consideration. For example, actions of the [US] or [the UK] will have more bearing on the development of international law governing naval operations than those of Switzerland.³⁰⁰

²⁹⁸ See BROEKHUIJSEN and MOSQUERA VALDERRAMA 2021, p. 90.

²⁹⁹ This would not be the first attempt of this sort: both developing countries (including “emerging markets”) and prospected superpowers have tried to re-channel the course of ICL to their own advantage; a significant exemplification comes from (non-binding) UNGA Resolutions calling for a New International Economic Order in the 1960s and 1970s – BEDERMAN 2002, pp. 182-183. More generally, the emphasis attributed to UNGA Resolutions to identify *opinioes* tries to democratise the recognition process, by offsetting the West-tailored records of state practice – ACKERMANN and FENRICH 2017, p. 774. Preeminent Chinese jurists like WANG Tieya take the view that although they are not sources of international law, UNGA Resolutions may be regarded as subsidiary means for its interpretation and, among those subsidiary means, they may bear higher relevance than scholarly writings and even judicial pronouncements, because of their ability to consolidate principles of law, not to mention their impact on international relations. QIN “Julia” Ya (Tsinghua University) goes the extra mile, by claiming that UNGA Resolutions are primary sources of international law when expressive of large majorities – CHIU 1988, pp. 15-18. When relevant, UNGA documents generally are also increasingly employed to counterbalance the obsolescence and “overweight” of the UNSC – particularly the P5 privileges.

³⁰⁰ BROWN and POELLET 2012, p. 128.

As no government (nor, arguably, a proper governance still) presides over the cyberspace, are all jurisdictions equally entitled as far as the formation of cyber-customs is concerned? This “horizontalist” and formalistic approach holds some truth, but the alternative one is equally convincing: it presents some countries—the cyber-powerhouses like the US, Russia, or China—as “most affected States” even though the Internet per se is technically quasi-global and its original conception was bottom-up democratic as well as stateless. Before any virtual or conceptual construction, the cyberspace is a concrete network of technical infrastructure owned by States and managed by state-tied or state-backed private consortia within their physical sovereign territories; as such, those countries which demonstrate superior cyber-capabilities or record the largest user-bases possibly deserve to be considered “most affected” by international negotiations on what constitutes ICL in the cybersphere. Put differently, they should have a greater say, which calls for enhanced responsibility as a corollary.

It should be borne in mind that the “specially affected” doctrine works equally in the negative: «[j]ust as the practice of specially affected States can have a disproportionate influence on the formation of new rules, so too can their opposition prevent a rule from coming into being».³⁰¹ *This is exactly the case with international taxation in the digital era, namely with the taxation of tech giants registered in the Global North.* Proceeding even farther, the “specially affected” doctrine may help one see through completely new lenses. For example, when a State reacts vigorously (i.e. protests formally, or issues countermeasures, *et similia*) against another State because of the latter’s supposed breach of a customary rule, despite the reacting State would benefit (practically or declaratorily) from such a breach, its belief about the normative status of the custom concerned holds the highest possible legal strength.

³⁰¹ SCHARF 2014, p. 316. See also DUMBERRY 2016, p. 137.

Similarly, trade sanctions imposed by a small, economically vulnerable State against its main trading partner may be accorded more legal significance than if the State imposing the sanctions were larger, wealthier, or if it had only limited trading links with the other State.³⁰²

In keeping with the same line of reasoning, States contributing the most towards the budget of an IO *proportionally with their total GDP and/or GDP per capita*, should be regarded as politically supporting more convincingly the policies implemented by such IO and taking said IO's mandate more seriously; legally, this translates into a stronger *opinio juris* that the actions performed by that IO are lawful and legitimate, and therefore meritorious of public endorsement. All in all, practice may present itself in the form of action, non-action, reaction to action, reaction to non-action, and all shades in between, with each scenario bearing its own distinctive degree of normative force depending on the most relevant circumstances. For example, «States are seldom in a position to react to specific military operations by other States, since typically the relevant facts will be inaccessible, concealed, or denied»;³⁰³ when a reaction is carried out despite the original action was hard for the reacting country itself to discover, and probably unknown to most other members of the international community, then the normative weight might be strong because of the negligible political (reputational) dividend the country sought for through its reaction. And yet, the reverse argument can also make sense in certain circumstances.

j Emerging customs and emerging powers: redesigning international law to reshape global governance

³⁰² BYERS 2004, p. 153; *see also* *ibid.*, pp. 156 ff.

³⁰³ AHMAD 2019, p. 143.

Determining the existence and content of custom on the basis of general and consistent state practice and *opinio juris* is often more of an art than a science. [... Western] books typically explained that the primary sources of international law were treaties and custom and that judicial decisions were simply a subsidiary means for the determination of international law. But in identifying the existence and content of custom, they routinely looked to domestic and international case law.³⁰⁴

Besides ICL being regarded as a West-driven enterprise³⁰⁵ (historically as a doctrine, and most typically in fields such as IIL³⁰⁶ or ITL³⁰⁷), it is «unsurprising that international courts and tribunals show a preference for Western countries in their analysis» of international customs.³⁰⁸ Most worryingly, «[c]ustomary international law is seen as essentially conservative and lagging behind social and political development»;³⁰⁹ in other words, if the West is the hegemonic macro-region in world affairs—or at least, if it has been so over the last five centuries all throughout the development of the modern discipline called “public international law”—, then the international legal framework it crafted and the customs it identified must have been modelled on its policy preferences and reading of the world society. This is undisputable; what remains to be ascertained instead is to what extent emerging powers may change the course of affairs rather than limiting themselves to replacing

³⁰⁴ ROBERTS 2017, pp. 2;135.

³⁰⁵ In fact, as recalled by KELLY (2017, p. 49),

many international legal norms were not developed by the participation or acceptance of the overwhelming majority of [S]tates. If customary international law is an inductive, decentralized method of lawmaking formed by consistent state practice and the general acceptance of norms, then historically few customary international law norms met either of these requirements. Significantly, non-Western nations and societies as well as less powerful Western nations played little role in the formation of international legal norms. [... The] tendency to ignore non-Western views about customary norms continued throughout the twentieth century, and is only gradually dissipating.

³⁰⁶ DUMBERRY 2016, p. 62.

³⁰⁷ See Gadžo 2018, p. 2.

³⁰⁸ ACKERMANN and FENRICH 2017, pp. 768-769.

³⁰⁹ CHARLESWORTH 1987, p. 16.

not only the countries, but also the power-mechanisms in charge of the conduct of international (legal) relations as we know them.

For example, China seems well aware of its “right” (or , more neutrally, “historical chance”) to rebalance its current function as ICL recipient rather than shaper, but might take advantage of its former recipient experience for the sake of simply turning the old recipients into new shapers and the old shapers into new recipients, rather than designing a fairer system where ICL norms are underpinned by and arise from more balanced views and/or novel paradigms (e.g. on wealth concentration and redistribution). In the short term, replacing recipients with shapers and vice versa might turn favourably to China, which is arguably moving from selective normative adaptation³¹⁰ (or engagement³¹¹) to selective normative (re)shaping³¹² – or most probably, integrating the two attitudes across the spectrum of all policy domains; however, its long-run legitimacy as a global (re-)shaper would benefit from a wiser and fairer approach with an outlook on normative innovation or even *regeneration*. As I write, China displays the world-largest GDP PPP, the second-largest nominal (per-exchange-rate) GDP, and is projected to be the world’s only superpower over the second half of the current century; expectably, despite this strength should come with equal responsibilities, China will devise and apply all possible strategies as for reshaping the international legal order to its own advantage, which means, as it sees more suitable to its global vision and the pursuance of its economic and diplomatic interests, while contextually paying due attention to its set of officially celebrated values.

³¹⁰ On this expression, refer e.g. to BIUKOVIĆ 2008; SCHRIVER 2017, p. 96, fn. 392.

³¹¹ On this expression, refer e.g. to ART 1998.

³¹² See further WANG 2020; check also WANG and WANG 2020, p. 10.

To compare regionally, India's enigma stands impenetrable between the drive to fasten itself onto Chinese growth perspectives, thus acquiescing to Beijing's ambitions of rewriting the mechanisms and institutions of IL's architecture, and the comfort of keeping its spot within the postcolonial discourse of British influence and US security provision. The dialectic between the Atlantic (EU/US) and Sino-Russian blocks having become quite marked, India might be approached as the true swing in the game of tomorrow's ICL; to exemplify, New Delhi could play a pioneering role as "customs' entrepreneur" (or "initiator") within the Asia-Pacific region, enticing regional policymakers around certain themes thanks to its double-faced legal identity. Regrettably, when it comes to human rights, many of whom are relevant for cyberspace governance and namely for cyber terrorism (which played a role, as I will demonstrate *infra*, in triggering instant customs in the ITL field), India's posture as a "swing State" is nothing short of dangerous, as it opens the gate for discursive references to its democratic and Western-fashioned normative status in order to gloss over even the most severe violations of basic human dignity. In terms of customary law, this bears significance internationally as it paves the way for arguing that refraining from certain violations is not customary, given that, beyond slogan and declarations, even supposedly rule-of-law-championing Western jurisdictions pursue the choice of impunity, and therefore, practice and *opinio* do not overlap. This is, e.g., the case with inhuman and degrading treatments, which are widespread all throughout India, with other countries raising little or no concern behind the excuse of an Indian pretended democratic standing³¹³ (such a standing shining even lighter, they imply, within the South-East Asian region). As mentioned *supra* in similar terms,

³¹³ Check WEISBURD 2001, p .88.

[i]f a given [S]tate could be said at least to acquiesce in the use of torture by its servants, it would also be relevant to know how other [S]tates reacted to that situation. On this view, behavior in which large numbers of [S]tates engaged and which evoked no significant reaction from other [S]tates could not be said to violate customary law.³¹⁴

When treaties are impervious to renegotiate and the negotiation of new ones calls for too burdensome a bargaining cost, arguing about and factually redefining customs seems wiser a *modus operandi*. Understanding how emerging powers approach and understand customs is thus a crucial task; indeed, despite the cultural ethnocentrism previously hinted at, customs adhere more proximately than treaty-norms to the intellectual and societal status of a given population: they express its legally pertinent habits and beliefs more accurately. Furthermore, the language of treaty-making might not cater for the flexibility required by a rapidly changing world, and since customs are often identified and “endorsed” by domestic and international courts, they are constantly re-tailored to emerging factual trends and adapted more rapidly to evolving circumstancing, without necessarily losing in authoritativeness.

In the context of treaty law, such as that of the World Trade Organisation (WTO), the judiciary

has given precise and narrow meaning to language that was intentionally left vague by negotiators, because they could not agree on more specific language, or wanted to permit a range of alternative behaviors or national practices.³¹⁵

When it comes to customs, judicial intervention is even more sensitive³¹⁶ and sometimes arguably asynchronous.³¹⁷ A guardianship role is demanded of judges³¹⁸

³¹⁴ Ibid., p. 89.

³¹⁵ STEINBERG 2004, p. 252.

³¹⁶ Refer generally to DE VRIES-ZOU 2020, pp. 88-89.

³¹⁷ See e.g. ibid., p. 92.

³¹⁸ BEDERMAN 2002, p. 165. Cf. DUMBERRY 2016, p. 277, fn. 909, advocating for judicial self-restraint.

who are mandated to provide—through their selection and application of certain customs over others—the best balance between the detriment to legal certainty and stability and the advantage of normative adaptability, with the ICJ preserving «its *de facto* monopoly on the final determination of customary norms».³¹⁹ Judiciaries are also required to reject insincere claims of States which after having conformed themselves to a particular legal regime, disapply its relevance for a particular case which would turn to their disadvantage.³²⁰ This notwithstanding, international judgements are persuasive opinions only, and not expression of state practice *stricto sensu*,³²¹ in tune with an analogy from the (domestic) theory of separation of powers.³²² Grossly mistaken judicial decisions on customs—particularly when they are issued by the ICJ—are in fact extremely dangerous for the entire IL project,³²³ as they will be erroneously perpetuated in literature as well as by other judges, ultimately creating the fictional *opinio* (and possibly even, in turn, the fictional practice) initially lacking.³²⁴ The court-custom bound in PIL diverges significantly from that in domestic settings, where it is the custom that provides authority (power-delegation) for judicial

³¹⁹ ACKERMANN and FENRICH 2017, p. 775; *see also* DANILENKO 1988, p. 21.

³²⁰ *See* HENRY 2017, pp. 33-34.

³²¹ *See* ARAJÄRVI 2014, p. 27; DEBARTOLO 2014, p. 177.

³²² Similarly, at the domestic level,

so-called state conduct concerns only the conduct of the executive branch of a [S]tate. However, if various [S]tates enact similar laws on certain matters or the courts of various [S]tates render similar judgements on certain cases, these factors also will demonstrate the general practice of various [S]tates toward such matters or cases

– CHIU 1988, p. 9. In sum, judicial decisions and legislative documents are not state practice per se, but can be demonstrations of the latter; *de facto*, they can be considered for assessing a State's practice.

³²³ A historical parallelism may shed light on the linguistic and non-methodological way ICJ judges are often said to guild-like “privatise” ICL, by “creating” rather than “finding” it. In Middle Ages’ Europe,

[t]he criteria by which the Scholastics distinguished between fact and superstition were [...] decidedly unempirical: “facts” were the data reported or confirmed by the *litterati* (those who wrote in Latin [...]), while “superstitions” were the data that circulated among the *illiterati* (identified with [...] vernacular traditions). [...] The goal of scholastic science in general was not to uncover new data by empirical research, but to *assign causes to data already accepted as factual*

– EAMON 1994, p. 55, last emphasis added.

³²⁴ *See* TESÓN 2017, pp. 96-97. It shall be noted, however, that even when error-propagation works this way, the propagation itself might be so genuine that after a while, it could be deemed comparable to “honest” *opinio juris*. This is because the Court walked the wrong path initially, but subsequent actors along the “supply chain” of custom-reinforcement could not attune themselves with more satisfactory a judicial outcome.

lawmaking,³²⁵ and not a court that by endorsing the existence, boundaries of, or exceptions to a custom provides for its standing, credibility, and discursive “exploitability”.

In (international) customary law, any state choice should come at a cost. However, I disagree with those who claim that States behave cautiously and balance their short- and long-term goals under the threat that «by behaving in a particular way, they increase the chances that similar behaviour will subsequently be required by law».³²⁶ Under certain circumstances, States can pursue divergent short-term goals without damaging their long-term objectives, simply by limiting the scope of application of the customs argued about, or by objecting to the latter later on (also by forming alliances to that end). This has occasionally proven difficult, but it becomes feasible (and almost automatic) when rapid technological development is involved, whereby the technical features proper of systems and devices unroll so swiftly that a consequent evolution of customs associated thereto looks reasonable. In plainer words, fast-paced technology enables States to argue about the existence of customs in a more distorted-principle-filled,³²⁷ unpredictable, aggressive, and “selfish” manner, given that this path might be perceived as unavoidable for external partners to rapidly adapt to an equally swift change. This way, the credibility of the State is not as much at stake as it would have ordinarily been, neither are its long-term aspirations as far as its normative appeal towards the consensual recognition of other (i.e., unrelated) customs is concerned.

k International organisations as customs’ aggregators and policy dispensers

³²⁵ STONE 1964, p. 113.

³²⁶ BYERS 2004, p. 154.

³²⁷ Cf. BASSIOUNI 1990, pp. 778-779.

A State, instead of pronouncing its view to a few States directly concerned, has the opportunity, through the medium of an organization, to declare its position to all members of the organization and to know immediately their reaction on the same matter. [...] In the contemporary age of highly developed techniques of communication and information, the formation of a custom *through the medium of international organizations* is greatly facilitated and *accelerated*; *the establishment of such a custom would require no more than one generation or even far less than that.*³²⁸

A certain degree of osmosis characterises regionalism and universality in ICL, so that regional and (quasi-)universal customs may stem from either (quasi-)universal or regional treaty-arrangements, and both regional and (quasi-)universal treaty-negotiations may either originate in regional customs or initiate from (quasi-)universal ones. When two States make their case before the ICJ and mention customary norms, what is customary *exactly between them* is way more relevant than what is customary in general. General (i.e. universal, or quasi-so) customary international law might also be customary between the parties and the reverse, of course, but what matters is precisely the extent of “customarisation” of the norm argued about by the two contending parties. There might also be cases where two States have exceptionally regulated their mutual affairs by diverting from the norm they still officially endorse as custom. In sum, variability is the normal pattern.

As if this was not sufficiently complicated, IOs—increasingly entrusted with vital functions for and by the international community and regional arrangements in the aftermath of WW2—further complexify the picture.³²⁹ The proliferation of rules

³²⁸ *South West Africa*, p. 291 (Dissenting Opinion of Judge Tanaka), two emphases added. On the same line, see DUMBERRY 2016, p. 139.

³²⁹ DELLAPENNA 2001, pp. 265-266; ARAJÄRVI 2014, p. 18. See also CHOI 2016, p. 142.

and sources of law enabled via the increasingly central role played by IOs contributes to the trend of IL fragmentation,³³⁰ raising doubts circa the credibility and legality of IOs' work (*in primis*, with regards to their acceptance to be bound by IL).³³¹ Rarely yet distinctly, though, IOs act as normative filters and mediators between the claims of one State and its reporting thereof to all others: the ICRC vindicates that «acts which are not made public do not contribute to the process of custom formation, because other States cannot react to them», simultaneously conceding that «State practice need not be communicated *to the whole world* to be pertinent to the custom formation process; it suffices that it is conveyed to at least one other State *or competent international organisation*».³³² I disagree with this bold second assumption: transparency stands as a foundational requirement for the concerted dialogue which keeps ICL alive,³³³ thus, secrecy about the practices and opinions of States cannot be expected to contribute any step towards the formation of customs internationally;³³⁴ perhaps only the gravest intelligence-related dossiers (warfare, antiterrorism, disaster prevention, ...) could mark an exception to this obvious rule, when a State's survival is at stake. In any case, biosystems' collapse and the current pandemic have demonstrated—or, more accurately, confirmed—that a State's social cohesion depends on all other States' performance, so that secrecy is not going to be much of assistance in crafting meaningful survival-oriented customs – neither fictionally as “States”, nor anthro-biologically and/or cognitively as a human species.

³³⁰ Refer to NEUWIRTH and SVETLICINII 2019, p. 71.

³³¹ See DAUGIRDAS and SCHURICHT 2020, pp. 75-77.

³³² SCOBIE 2007, p. 25, two emphases added.

³³³ See also ARAJÄRVI 2014, p. 12; TASIOLAS 2014, p. 328.

³³⁴ For instance, Navarrete and Buchan (2019^a, pp. 947-952) have demonstrated that

[w]here there is no opportunity to protest, silence cannot be interpreted as acquiescence [...]. Although States engage in espionage on a regular basis, they do so in secret, which precludes such conduct from qualifying as State practice under CIL.

Despite having been sized by Pakistan on this point of law, the ICJ failed to deliver its opinion; refer to NAVARRETE and BUCHAN (2019^b).

In most situations, however, in a world society where States «have to see and believe that they are responsible to each other»,³³⁵ IOs function as aggregators and controllers of national interests expressed through customary law, as well as catalysts for regional patterns of change; somewhat paradoxically, they dilute sovereign rights in order to keep them current for a globalised society chiefly made of transnational transactions. IOs allow customs to socialise interregionally and cross subject-specific boundaries, supported by informal and unaccountable networks of IL theorists and practitioners who more or less purposively, shape the course of international customs (although this is «not to say that international governance has been handed over entirely to unaccountable networks»);³³⁶ That States take decisions within IOs depending on political considerations rather than out of a sense of legal obligation³³⁷ is tenable; however, the political stances States originally carried over to IOs' legislative sessions are often softened and redesigned in the course of negotiations, not only for mere bargaining reasons, but because new normative views are socialised *through* IOs and unforeseen alliances coalesce around those views. This way, new standpoints become integral part of the concerned States' stances, and rise to legal significance. Connected to this is the importance to keep track of States' norm-negotiating attitudes across multiple fora, as to split their extemporary political choices in one-by-one fora from convinced postures incorporated during negotiating sessions in others IOs they are parties to, and then transferred unaltered to other negotiating tables whose agenda covers the same policy areas. When this genuine transfer occurs, States act as normative carriers among IOs rather than the contrary, and socialisation concretises inter-organisationally up to slowly redirecting the normative patterns of all

³³⁵ BANTEKA 2018, p. 327.

³³⁶ WORSTER 2013, p. 50.

³³⁷ DEBARTOLO 2014, p. 175.

(or most) international organisation—a *fortiori* within the same geo-cultural region—focused on the same subject-matter.

Depending on their legal personality, membership structure,³³⁸ and functional scope, IOs can work as either regional hegemony centralisers or state power dispersers; in either case, their expansion is fraught with tangled legal implications. The UNGA initially declared IOs to be bound to the rule of law,³³⁹ but subsequently eclipsed the expression.³⁴⁰ After the ICJ's *Interpretation of the Agreement* Opinion, there is no doubt IOs are full IL subjects,³⁴¹ almost on an equal footing with States; however, this is not necessarily the same as to say they are bound to the whole spectrum of international obligations States are bound to.³⁴² Together with the attached consequences for a violation, the nature of their responsibility differs even with regards to the same subject-matter obligations; put differently, «there is no reason to assume that international organisations have the same obligations as [S]tates, just because they have international legal personality».³⁴³ However, this is a matter of typology, not just of extent (like that of the “Common but Differentiated Responsibilities” among signatories to the UNFCCC): States and IOs may be bound to different sets of norms within the same field, and the breaches of customary norms they possibly commit give rise to dissimilar consequences under international law. «One thing is clear, however: what a State is not permitted to do, cannot be done by an international organization».³⁴⁴ Another salient question is whether «international organizations created by States are subject to [... *those exact*] customary rules that bind their [*exact*] creators».³⁴⁵

³³⁸ IO's membership can be analysed through several variables – regional coverage and NGOs/quasi-States admittance (often as observers) among them.

³³⁹ *Refer to* RoL Declaration, para. 2.

³⁴⁰ For instance, no mention of IOs is made in UNGA Resolution 68/116.

³⁴¹ *See* TOMUSCHAT 2015, p. 53.

³⁴² *See* FORTIN 2018, pp. 342-344.

³⁴³ *Ibid.*, p. 347.

³⁴⁴ TOMUSCHAT 2015, p. 54.

³⁴⁵ DEBARTOLO 2014, p. 178.

Reasoning by analogy, one shall posit that in just the same fashion as IOs enjoy the prerogative to conclude treaty-like arrangements among themselves and with States (although it took quite a while for international courts to admit this³⁴⁶), similarly they are endowed with the standing and capability to shape international customs.³⁴⁷ Indeed, differently from that of other non-state actors, IOs' practice is recognised as relevant by the ILC for identifying the emergence and consolidation of new customs;³⁴⁸ with a disclaimer: the ILC finds «it difficult to accept the relevance of the practice of international organizations for the identification of customary international law, where this practice is not in line with that of its members».³⁴⁹ At times—not rarely—«the Court accepts General Assembly resolutions and resolutions of other international organisations, particularly those [to which the disputing States are party], as forms of state practice».³⁵⁰ This makes perfect sense, whereas instead accepting them as *opinio juris* would be legally misleading; considering that unfortunately, as

³⁴⁶ See Brölmann 2018, p. 87.

³⁴⁷ See Barkholdt 2020, p. 12.

³⁴⁸ BLOKKER 2017, p. 4 (but cf. p.5).

³⁴⁹ Ibid., p. 9.

³⁵⁰ CHARLESWORTH 1987, p. 18. See further BYERS 2004, p. 41. State practice

may also arise, in certain cases, where member States have not transferred exclusive competences, but have conferred powers upon the international organization that are *functionally equivalent* to the powers exercised by States. The practice of secretariats of international organizations when serving as treaty depositaries, in deploying military forces (for example, for peacekeeping), or in taking positions on the scope of privileges and immunities for the organization and its officials, might contribute to the formation, or expression, of rules of customary international law in those areas. The acts of international organizations that are not functionally equivalent to the acts of States are unlikely to be relevant practice

– ILC 2016, emphasis added. These situations must be clearly distinguished from the opposite ones where IOs' practice is determined by power-delegation by States: «there is one “clear cut” case where an international organization can contribute to the formation and identification of rules of customary international law in its own right, that is, where States have assigned competences to an organization in a particular field» – ODERMATT 2017, p. 501. This practice should be considered as important as that of States for the development of customary norms in those fields, *not to deprive States of a vehicle for norms formation*. The EU being the most obvious example of such a subject-specific competence-delegation, «[i]n areas such as the law of the sea and international fisheries, where [it] exercises significant competences conferred by its Member States, the EU can and does contribute to the development of customary international law» – *ibid.* Another example, most relevant for the present study, is that of the OECD in the field of international taxation, although distinguishing state-mandated actions from state-participated ones is not necessarily clear-cut an exercise.

explained *supra*, distinguishing where one criterion ends and the other starts in anything but settled a task,³⁵¹ this is highly problematic.

In the humanitarian field, «[s]ome of the [...] obligations binding [S]tates are of customary nature and applicable to non-state parties to armed conflicts»:³⁵² disagreement remains as to *what* non-state parties are bound to customs applicable to *what* States, especially when it comes to occupying powers. More generally, in terms of *opinio juris*, stating that «scholars disagree as to whether [non-state actor] groups can bound by customary international law if their practice [and belief] is not consulted in its formation»³⁵³ reads like an understatement; the actual problem is whether, the belief of a State and “its” non-state actors coinciding,³⁵⁴ the practice of the second can be relevant as practice of the first for the purpose of assessing the existence of customary norms (and perhaps vice versa).³⁵⁵ In addition, what makes *opinio juris* inadequate with reference more specifically to IOs is the difficulty in clearly identifying patterns of belief; the case of consensual voting best uncovers this flaw. Let us assume that States A and B are debating their case before the ICJ, and the latter would like to investigate a customary law issue by looking at the organisation C to which A and B are parties. If the voting procedures within C over the relevant policy area are by majority with open voting systems, establishing whether A or B agreed on a certain document is relatively easy (although pre-voting power dynamics may still play a role, despite being doctrinally deemed legally irrelevant). If voting procedures are, again, open and individual-based, *but veto-shaped* (such as those within NATO), preferences are expressed on a country-by-country basis but the political weight of the

³⁵¹ ARAJÄRVI 2014, p. 21.

³⁵² *Follow the discussion in* BERKES 2018, pp. 453-459.

³⁵³ FORTIN 2018, p. 348.

³⁵⁴ The case where they do not coincide is not treated here; *refer to* *ibid.*, p. 352.

³⁵⁵ This is easier to argue when the State concerned, by exercising diplomatic protection, *indirectly* endorses the stances of “its” non-state actors and their claims with regard to the customary status of certain acts and behaviours.

always-impending veto is considerable; as such, extrapolating the true will, ideological backdrop, and value-stance of a particular member State from such sorts of decisions—even harder if unanimity-requiring—may prove deceptive and unhelpful. The late esteemed Wuhan University professor and ICTY judge WANG Tieya warned that

a [S]tate may cast its vote on political considerations [i.e. power-bargaining], or a voting [S]tate may not consider its vote as an act of accepting legally binding force; thus under that circumstance, a resolution does not have legally binding force.³⁵⁶

Even worse is the case of collegiate documents adopted by consensus: frequently in such cases—especially where no definitive trace is left by preparatory works—no abstention or negative vote is recorded, power-bargaining trumps any legal transaction on the merits, and no country individually can be assessed with regards to its *opinio juris* towards said policing activity. State A might have overcome and *de facto* forced B to consent upon the outcome, and “consensual lawmaking” usually translates into hegemonic actors dismissing most contributions and aspirations voiced by subordinated countries which contrast with their original project. As such, whenever the documentary issuance is the fruit of consensual procedures whereby (groups of) less powerful States are factually sided by (groups of) more powerful ones,³⁵⁷ no reasonable Court would ever take B’s participation into the organisation issuing that document as evidence of the *opinio juris* by B that such a document represents its posture under international law. Consensus-based voting by States in international organisations originates problems of accountability of those States

³⁵⁶ Retrieved from CHIU 1988, p. 19.

³⁵⁷ Of course, there are also instances where the reverse happens, with a small minority holding the majority hostage of their consent; this happened multiple times e.g. in international environmental law, during the negotiations leading to the 2009 Copenhagen Accord – refer to RACHED 2013, p. 114.

towards their citizens—which will not be discussed at length in this Thesis—and the impossibility for a Court to extrapolate anything decisive from such voting sessions when it comes to considering whether a certain voting outcome expresses *opinio juris* about a custom. Among mentioned accountability problems, one should note at least the risk that not only “secondary” jurisdictions are “phagocytised” by major world powers, but that both small and big States are regulatorily captured by transnational private entities *operating exactly through the mediation of IOs’ bureaucratic apparatuses*, so that States’ within-IO stances are even less capable of generating genuine practice or expressing their actual *opinio*, thus proving even more unserviceable as far as customs’ ascertainment is concerned – in fact, that custom would have been manipulated through capture. More broadly, and exemplificatorily, «international financial institutions have a high leverage of interference with domestic actors without being, themselves, subject to the conventional web of accountability arrangements that domestic actors face»;³⁵⁸ in fact, «intra-shareholder conflicts often [...] impede the ability of [...] S]tates to create coherent systems with which to monitor and control IOs».³⁵⁹

Regrettably, when proper voting is replaced (rather than supported³⁶⁰) by background consensus-crafting, States are also less encouraged to release explanatory statements accompanying their voting preferences, not to mention that most would-be proposals do not even reach the negotiating table due to what is informally known as “hidden veto”.³⁶¹ Past WTO experience is instructive on the influence exercised by

³⁵⁸ Ibid., p. 13.

³⁵⁹ CLEGG 2010, p. 30.

³⁶⁰ According to BESSON and MARTÍ (2018, p. 535), «the increasing use of consensus-shaping *before* votes are taken and the growing recourse to adopting memoranda of understanding as intermediary deliberative products before treaties are concluded» (emphasis added) could represent viable solutions «to enhance the participatory dimension of state consent in international law-making». In the main text, instead, I refer to consensus-based *voting* per se, or to extreme forms of “preventative” consensus-building which make the actual voting a formulaic rite from which no meaningful state purpose can be extracted.

³⁶¹ WOUTERS and RUYS 2005, p. 9.

major powers in consensual-voting procedures, where «[w]hile large trading entities [we]re in a position to block consensus more frequently, smaller nations need[ed] to dose the usage of their blocking rights very carefully».³⁶² Additionally, when proper State-by-State voting schemes are not even in order, the IO's agenda is also fluidly compiled “as matters are tabled”,³⁶³ pre-conference consultations are even more informal—and thus secret—than usual,³⁶⁴ and interested third-parties have less (if any) opportunities to engage with the process, e.g. by responding to negotiating drafts if they deem themselves having been called into question. As such, the agenda-setting preferences that States would otherwise attempt to uphold are not available,³⁶⁵ nor even the actual agenda itself of an organisation can be taken at face value for the purpose of distilling that organisation's priorities and “positioning” in regional and global affairs.

³⁶² COTTIER and TAKENOSHITA 2004, p. 56.

³⁶³ Refer e.g. to CLEGG 2010, p. 94.

³⁶⁴ Relevantly here, RACHED (2013, p. 40, two emphases added) propounds that transparent authority is not, in and of itself, accountable. *Accountable authority, though, cannot but be at least minimally transparent one.* Total opacity and accountability do not match. Accountability interactions may also be put into a temporal perspective, [...] Mechanisms of preventive control illustrate the latter whereas the posterior ascription of responsibility exemplifies the former. A combination between the two possibilities may jointly form a single accountability relationship. *Occasionally, when the power-holder anticipates the potential reactions of the account-holder and acts accordingly, the distinction itself may partially lose its grip.*

The concept of “stakeholder” is key to this reasoning. CLEGG (2010, pp. 127;181, in-text citations omitted) suggests that

[i]n contrast to idealistically driven analyses, the more pragmatic accounts recognise the potential legitimacy of several different structures of stakeholder accountability at international organisations. Rather than holding the legitimacy of accountability structures to be a “natural” property possessed only by an ideal type, [...] depending on the form and function of particular IOs, it is equally possible that a “delegated” or “participatory” model of stakeholder accountability could emerge as the preferred structure. [...] A consensus that readily identifiable groups of “stakeholders” exist is a logical prerequisite that must be met before pressures to forge closer links to these groups emerge.

In this respect, see also XAVIER 2015, p. 243. If this is the path to be taken, then what matters is that citizens generally—and especially those “impacted” by any decision—do feature among the “stakeholders” through lawful and democratic mechanisms of *objective* representation. Otherwise, the state-centred Westphalian design of the international order turns into even less people-oriented a project, whereby IOs produce even greater distance between decision-making institutions and their ultimate addressees: natural individuals, not legal persons! The more inclusive the scope of stakeholders, the less likely that regulatory capture offsets the benefits of pre-negotiation openness and consulting – for multidisciplinary insights on this take, see also HENCKELS 2020, p. 701, POWELL 2019, p. 2704, DAVIS 2015, pp. 283-284, as well as LANTRIP 2013, p. 215.

³⁶⁵ DEBARTOLO 2014, p. 174.

The only mechanism which is not affected by consensus-based voting is that of state responsibility, as «a failure to uphold the commitments associated with supporting or opposing votes will not generally give rise to [it]»,³⁶⁶ although open (that is, non-secret) voting allows for (political) liability to be attached to specific jurisdictions.

I From internationally relevant state practice to the established practice of international organisations

IL negotiations in general, and those on Internet-shaped or Internet-transformed legal regimes in particular, take place predominantly *within* generalist or specialised international fora nowadays, most of which qualify as IOs. The considerations made above have illustrated the relevance of IOs' documents and practices for assessing international customs among States, whereas the latter's subsequent practice might more or less substantially "update" the original obligations they contracted to by acceding to a treaty. For example, in line with Article 31(3)(d) VCLT, subsequent state practice may expand or readapt the intended scope of a humanitarian treaty-provision as for encompassing cyberwarfare, this way diluting the need for a specific new convention on the matter. Similarly, States may rely on location-based tax-surveillance procedures conceived for an offline world and readopt them for the digital age without redesigning them with updated built-in safeguards by rethinking their potential impact on those who are surveilled.³⁶⁷ While this sounds

³⁶⁶ BYERS 2004, p. 157.

³⁶⁷ Besides the OECD level, an illustration comes from the EU context: according to HADZHIEVA (2019, pp. 59-60, emphasis added), the Commission has recently proposed that a digital tax

be levied based on the location of the advert being displayed, the user who generated the data being transmitted, the user who concluded the transaction or the user of a multi-sided digital platform. Hence, the companies [would] have to report on the number of times an advert appeared on user's devices, the number of times the account is used, user's location etc. through IP address or other methods of geolocation. [... This would require] keeping

reasonable as far as e.g. cyberwarfare is concerned, strategically employing IOs' legislative power in order to adopt measures which are unpopular at home, bypass national checks-and-balances, or displace domestic political opposition is not uncommon a decision for (democratic) States, which end up advancing IL without mandate from their representative bodies. Countries may even circumvent their international obligations by delegating unlawful choices to IOs, which are not bound by the same treaties; against this reality, «if international organizations are not to carry out their increasing number of activities in limbo, in a vacuum, unbound by law, then customary law is [essential] to fill this void».³⁶⁸ No surprise, then, if it is increasingly believed that IOs are bound to ICL and participate in shaping the latter,³⁶⁹ contrary to the States-exclusive orientation still prevailing in old-guard academia as a synthesis of unity of duty-bearers (only States) and unity of lawmakers (only States, again).³⁷⁰

What is more, the practices of *States within IOs* and those of *IOs per se* are two distinct phenomena,³⁷¹ even conceptually:

[i]f international practice is understood as being comprised of the acts of international organs instead of merely relying on those expressions as descriptive of state practice, it is, indeed, a development away from the State-domination of international law.³⁷²

extensive data on users and *their* location for many years, which is another privacy concern.

Having such volumes of data could be misused by national authorities for surveillance.

These solutions, while leaving the foundational issue of corporate giants operating multi-jurisdictionally in “digital-intensive” business sectors unaddressed, thus not concerning themselves with the mobility of *digitised capital*, devise short-term “solutions” which are still conceived with a territorial taxation scheme in mind (i.e. one where the location of the *natural-person taxpayer* matters), and whose burdens are factually shifted onto consumers (often even “prosumers”) as further erosion of their privacy rights and interests. Indeed, these solutions straightforwardly and dangerously translate in a rhetoric of state-sanctioned, corporate-enabled *necessary and undelayable surveillance* of individuals as to superficially cater for the “new needs” of tax agencies in the digital era.

³⁶⁸ BLOKKER 2017, p. 11.

³⁶⁹ See *ibid.*, p. 10.

³⁷⁰ FORTIN 2018, p. 340.

³⁷¹ See further BLOKKER 2017, p. 6; DUMBERRY 2016, p. 258; DEBARTOLO 2014, p. 174.

³⁷² ARAJÄRVI 2014, p. 59.

Regrettably, although the practice of States within IOs and the latter's own practice are two separate concepts underpinned by uneven rationales and processes of formation, States tend to address them interchangeably, thus either rejecting both as components of customs, or recognising both for the same purpose – the first directly, the second as a “secondary rule of recognition” in a Hartian³⁷³ fashion, whose authority indirectly descends from the (other) IO's state parties themselves.³⁷⁴ Operating this distinction, increasingly topical in the ILC's debates but «admittedly easier said than done»,³⁷⁵ becomes more straightforward when one observes the work of monitoring IOs,³⁷⁶ which are made of States and yet supervise the latter's conduct, by issuing non-binding reports, recommendations, and observations on how to adjust their policies: if IOs advocate for policy change to occur within the domestic jurisdictions they scrutinise, said IOs' practice and belief obviously cannot coincide with those of their state parties – especially those whose trajectory is being deemed imperfect. IOs observe their own customs, relevant within the organisations themselves as autonomous legal persons, bureaucratic machineries, and decision-making apparatuses endowed with a variable yet demonstrable degree of independence from their state parties.³⁷⁷ IOs' established practice forms their customary law similarly to the way ICL's state-practice component forms that among countries.³⁷⁸ Although *established* means “certain” and “unquestioned” (and indeed, this is a relationship of direct proportionality whereby the more a practice is impactful legally, the more it shall stand

³⁷³ Refer generally to MICHAELS 2017.

³⁷⁴ «But, although the fact that other [S]tates generally accept a customary rule might *cause* a [S]tate to accept the rule, it does not provide a [legally valid] *reason* to accept the rule» – BODANSKY 2014, p. 182, original emphases.

³⁷⁵ ODERMATT 2017, p. 499.

³⁷⁶ One might think of most human-rights bodies, as well as, for instance, the IAEA.

³⁷⁷ Cf. the more moderate approach in LEPARD 2010, p. 280: «an independent customary law of international organizations should be recognized *if member [S]tates come to believe* generally that a particular practice of the organization should be legally required, permitted, or prohibited» (emphasis added). In other words, the quoted Author submits that independent IOs' customs may exist, but the only agents for their ascertainment are States.

³⁷⁸ See BLOKKER 2017, p. 8.

cleared of controversy), one might go so far as to theorise a sort of “cumulative effect” in the customary law of IOs, whereby several acts (by different IOs?) lead to and eventually set an “overall custom” which counts higher than all single acts summed to each other, and tells more about what the IOs’ constituent agreements have become over time.

As per Article 5 VCLT, “established practice” is an informal mechanism for amending and “updating” the constituent document and secondary legislation of an IO;³⁷⁹ although «only formal amendment procedures are guarantors of legitimacy»³⁸⁰ (already jeopardised by the voting modalities mentioned *supra*), this mechanism is expressive of resourceful potential for organisations *and States alike*. Indeed, it is resourceful for States because even domestic practice which is relevant for the organisation’s objective as well as representative of its members’ stance on a certain dossier, can qualify as established practice.³⁸¹ At the same time, it is resourceful for IOs as no procedure exists for States to unilaterally and suddenly withdraw from a custom (which is rather permissible under most treaties);³⁸² therefore, practices are less prone than treaty arrangements to the whims of political will, partisanship, orientations, regime changes, dictators’ blackmailing threats, and so forth.

Under Article 2 VCLTIO (not yet entered into force), established practice—together with constituent and other documents—forms the binding rules of said IO; this way, established practice evolves into a rule to be interpreted, rather than representing the interpretation of founding and non-founding documents forming the other IO’s rules.³⁸³ IOs’ established practice is part of the IOs’ rules under Article 5

³⁷⁹ PETERS 2011, p. 632.

³⁸⁰ Ibid., p. 620; *check also* p. 642.

³⁸¹ Ibid., p. 629-630.

³⁸² SCHARF 2014, p. 309.

³⁸³ Refer to PETERS 2011, pp. 623;633.

VCLT as well;³⁸⁴ furthermore, it holds exactly the same value as the founding charter—differently from ordinary IOs’ legislation which is subordinated in hierarchy to the former—,³⁸⁵ a finding which is supported by evidence that «in many cases[,] the constituent instruments of international organizations do not contain the necessary regulations for the proper functioning of the organization».³⁸⁶ Differently from *subsequent* practice in ICL, the fact that this “customary law of IOs” stands at par with treaty provisions (IOs’ charters) and can contribute to their factual abandonments justifies the «necessity of stricter requirements for modification than for interpretation through practice».³⁸⁷

Subsequent practice in IL is contractual in nature and bound to the treaty provisions it stems from, way more than the consent-based *established* practice in the law of IOs is bound to any IO’s “constitutional charter”: whilst organisations are strictly reliant on their membership via treaty, «the international community as a whole can cope with some persistent objectors to rules of customary law».³⁸⁸ This is a momentous finding, since IOs’ non-practice rules are formulated by countries, while practice-based ones are made by IOs themselves through their own bureaucratic structure (the practice of an IO and that of each of its members are conceptually distinct and might factually differ remarkably). This might amount to practice rules contrasting to and even overriding those originally made by state parties, to the detriment of an IO’s accountability not only to its own members but also—when relevant—to the latter’s citizens. The extent of state contribution to IOs’ constituent documents, adopted documents, and established practices is placed on a sliding scale, where the

³⁸⁴ See *ibid.*, p. 626.

³⁸⁵ See *ibid.*, p. 627.

³⁸⁶ *Ibid.*, p. 628.

³⁸⁷ *Ibid.*, p. 632, fn. 55.

³⁸⁸ *Ibid.*, p. 633.

third element may testify to members' *opinio juris* up to a limited degree, whereas instead constituent documents hold a more direct imprimatur by the State. Thus, when it comes to established practice, the politicisation of legal processes helps shed light on the loopholes through which States try to modify written agreements by virtue of non-compliant behaviours; whenever their attempt fails, said non-compliance amounts to an international wrong, hence the State may be held responsible under IL for the unfulfillment of its treaty obligations. Eviscerating the tension between endogenous constitutionalism and exogenous contractualism in the law of IOs³⁸⁹ is thus essential for crediting the right weight to *the purpose* and legal consequences of their and their members' practices respectively, in harmony with the relevant political circumstances on a case-by-case basis but also consistently with the trends depicted by those same IOs' teleological discourses aimed at affirming normativity.³⁹⁰ In ITL, for instance, the aims *supposedly* pursued by the OECD reflect the tension between constitutionalism and contractualism, with these two forces having being potentially captured by market priorities to different degrees, so that even if the constitutional normativity consistently affirmed by the OECD rests with combating tax avoidance, this IO's state-substantiated contractual constraints may shift the IO's work towards different outcomes – or vice versa.

m Reconciling the bureaucratic attitudes of IOs per se, their organs, and their state parties

³⁸⁹ See CLARK 2021, p. 540.

³⁹⁰ See further *ibid.*, pp. 23-34.

As a source of international obligations, IOs' established practice is exposed to limits and potentialities which are typical of customary norms generally. To begin with, one shall consider that

[a]ll provisions of the VCLT are, when applied to the constituent instruments of international organizations, subject to Art. 5 VCLT and the rules of the organization. On condition that established practice really amounts to such a rule, it can influence the application of the VCLT to the constituent instruments and thus the entire relationship between the law of treaties and the law of international organizations.³⁹¹

This holds validity for IOs' constituent instruments as well. They are *sui generis* "constitutional" tools which isolate them from general multilateral treaties,³⁹² and this makes them on average more exposed to *instant* customs, as these were described as "constitutional moments" in international law.³⁹³ As much as special deference should be bestowed upon national constitutions as the most authoritative reference points to identify the values around which domestic legal systems are theoretically construed,³⁹⁴ IOs' constitutive charters are of special serviceability for the assessment of *opinioes* and thus customs.

Similarities do not end here. As stated above with reference to States, customs and general principles are often jointly cited to support IL claims, and this praxis is all the more true (but no less challenging to demonstrate) when it comes to IOs:

Even though Art. 5 VCLT refers to *rules* of the organization, [...] it is also possible that principles repeatedly adopted in unanimous non-binding resolutions of a plenary organ eventually become a binding rule, if they are supported by a strong intention to make them binding. However, this will be rare and consequently difficult to prove and can be assumed only in exceptional circumstances. In any case, the *opinio*

³⁹¹ PETERS 2011, pp. 621-622.

³⁹² Ibid., pp. 629;636.

³⁹³ See SCHARF 2014, p. 307.

³⁹⁴ See LEPARD 2010, p. 175.

behind established practice forming a rule of the organizations must be backed up by the organs and the Member States represented in them.³⁹⁵

Through this backdoor-expedient, the ICJ Statute's "general principles of law recognized by civilized nations" rise to prominence for constitutional infra-organisational negotiations, well beyond the state-centred legal dimension of international affairs. Hence, customary norms developed by Member States and an IO's institutional organs are strictly interrelated, especially as far as the *opinio juris* with respect to a shared topic is concerned. Consequently, they can also be interrelatedly captured. This is one of the soundest reasons to reject the proposal³⁹⁶ of considering IOs' rules as simply "internal law" which would have no bearing whatsoever on the shaping of international norms.

Mentioned duplicity triggers complex legal tangles particularly when a State joins an IO, bringing its *opinio juris* within a forum which already holds its own *opinio*, largely modelled on and shaped by the *opinionones* of its older and/or most respected/feared parties. Relevant questions are for instance: is the newly admitted State immediately bound to the *opinio* of the other members? And is there any duty bearing upon the organisation to seek the impending newcomer's (written) approval of all *established practices* and related normative beliefs *prior to* granting admission? Because e.g. acquiescence and tacit consent do play a role,³⁹⁷ it has been proposed that not necessarily all members of an organisation need to explicitly agree on its practices for the latter to be formally deemed *established*;³⁹⁸ this might turn out reasonable, especially when a country has just acceded to an organisation, or is not particularly affected by the specific practice under scrutiny due to geographical or politico-cultural

³⁹⁵ PETERS 2011, p. 631.

³⁹⁶ Refer e.g. to MEJÍA-LEMONS 2014.

³⁹⁷ See also BARKHOLDT 2020, p. 45.

³⁹⁸ PETERS 2011, p. 638.

reasons, or both these conditions.³⁹⁹ Relying on tacit approval internally is also diplomatically strategic in order for a new-joiner to please the peers it will be working with on expectedly sensitive dossiers, while simultaneously *not explicitly—and thus not “externally”, either—agreeing* on policies it finds at odds with its propensity and inclinations. Moreover, even sub-organs of the same IO may well have developed their own established practices,⁴⁰⁰ especially on procedural matters,⁴⁰¹ which are not shared by either the member States or the other organs of the same IO. This follows also by analogy with municipal law, where the practice of specific state organs does not necessarily align with that of the State as an institutional whole.⁴⁰² In such a scenario (an IO’s practice distinct from that IO organs’ practice), it is resultantly necessary to operate a distinction—when relevant—between permanent and temporary rotation/election-based members of those sub-organs: in order for that organ’s practice to be *established*, the overall practice of at least its permanent members should be congruent as it holds higher legal stakes.

It is of the highest importance to notice that the documentary records produced by IOs can stem from either exogenous assemblies of state parties (when IOs become mere infrastructural—or at best coordinating—settings for members’ meetings) or indigenous plenary/organ structures of the organisations’ bureaucracies themselves.⁴⁰³ If one considers e.g. UNESCO, several options among recommendations, declarations, conventions, and other instruments are available,⁴⁰⁴ and a common expression such as “UNESCO Convention ...” rather means “Convention negotiated among and

³⁹⁹ Cf. the situation of countries which, by gaining independence, join the international community and are «deemed to be bound by the entire corpus of customary international law existing upon the date they become sovereign [S]tates» – SCHARF 2013, p. 30. See also BYERS 2004, pp. 77-78, and TESÓN 2017, p. 89.

⁴⁰⁰ PETERS 2011, p. 637.

⁴⁰¹ Ibid., p. 639.

⁴⁰² DUMBERRY 2016, pp. 275-276, fn. 903.

⁴⁰³ BYERS 2004, p. 78.

⁴⁰⁴ For an extremely synthetic overview, refer to

http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html.

approved by (the majority of) UNESCO's state parties", not UNESCO's bureaucracy itself. Likewise, «[i]t is difficult to regard behaviour on the part of bodies such as the [UN] High Commissioner for Refugees, the [WTO] or the organs of the [EU], as in all cases the behaviour of States». ⁴⁰⁵ Disturbingly, even the ILC—in its latest report on customary law—reiterates the misunderstanding, ⁴⁰⁶ where it

equates resolutions of international organizations with resolutions of intergovernmental conferences, even though the two are different: in the case of the former, resolutions emanate, strictly speaking, not from the members but from the organization; in the case of the latter this is not so, because conferences are not separate international legal persons. ⁴⁰⁷

Some cases are more borderline, ⁴⁰⁸ like that of the UNSC: on the one hand, States conferred “hegemonic” powers upon it for maintaining peace and security regardless of the position of its members in on-the-ground situations, ⁴⁰⁹ whilst on the other hand, veto-holders do control the organ and influence its supranational institutional mandate through their particularistic stances. Furthermore, the hardship in discerning «between IO practice and the practice of States when the latter acted within a plenary organ adopting its decisions by consensus» was noted as well. ⁴¹⁰

State-signed conventions hosted by IOs obviously bind the signatories among themselves only, while the IO might be entrusted with administrative functions related thereto; conversely, in the event of binding treaties signed by the IO itself *within its own functions*, member States

⁴⁰⁵ BYERS 2004, p. 170.

⁴⁰⁶ DEBARTOLO 2014, p. 175.

⁴⁰⁷ BLOKKER 2017, p. 9.

⁴⁰⁸ See BARKHOLDT 2020, p. 15.

⁴⁰⁹ DEBARTOLO 2014, p. 176.

⁴¹⁰ See BARKHOLDT 2020, p. 13.

shall observe the obligations, and may exercise the rights, which arise for them from the provisions of a treaty to which that organization is a party if: (a) the relevant rules of the organization, applicable at the moment of the conclusion of the treaty, provide that the States members of the organization are bound by the treaties concluded by it; or (b) the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged that the application of the treaty necessarily entails such effects.⁴¹¹

That States are not bound directly by treaties concluded by an IO does not place said IO's practice due to its adherence to the treaty under question; however, it remains dubious whether such a practice can be regarded as evidentiary of an IO-wide *opinio juris* which is distinct from that/those of its non-bound members. This would depend on several factors, including the way negotiations were performed, the identity of the chief negotiators (belonging to the IO, to the States, or a mix of both), and the latter's formal degree of awareness of the stances of all actors involved (States and IOs, but also potential third parties).

n Tailoring standard theories of customary law to unequal States and IOs

Different types of IOs populate the IR stage: some are multipurpose like the UN, and in such cases, specialised organs have more say in developing their own practices (compared to the secretariat-general); some others are narrower in scope, and as such, their sub-organs will probably not develop their own separate customs. And again, some IOs are supranational and power-delegation-fashioned like the EU;⁴¹² others barely work with their own administrative staff or procedural guidelines. The relationship between States and IOs, as well as the extent of cooperation among

⁴¹¹ ILC 1978, p. 28.

⁴¹² It has been observed that «[t]he narrative of the E[U] project as a positivistic cooperative regime and [its] character of a “club” may enhance the sense of an *opinio juris* with (presumptive) member [S]tates» (AGIUS 2010, p. 240).

parties, are also relevant: the more an IO is built upon a strong commitment of collaboration and companionship among members, the more States are expected to react *bonae fidei* when a practice does not meet their preferences, as for it not to establish itself as a custom of said IO or its organs.⁴¹³ Conversely, the more an IO functions independently from its members, and the more it is endowed with direct executive, legislative, and even judicial prerogatives, the more its practices will acquire and consolidate legal significance as customs over time.⁴¹⁴

Just like IOs, member countries differ from one another, and the assessment of customarisation processes cannot overlook these gaps.⁴¹⁵ The banal truth that «international law is a system that is designed *inter alia* to combat the *de facto* diversity of its subjects and provide a means of regulating equal [S]tates»⁴¹⁶ cannot conceal the fact that treating unequals equally does not equate to justice. On top of that,

[e]quality is a legal principle which requires “positivization” in every field of law. Since [...] S]tates are no longer the only subjects of international law[,] there is also a need for realization of equality elsewhere. And since the individual in particular will play an increasingly important role in international law, a closer study of the demands of justice and equality is not superfluous [...].⁴¹⁷

As such, one shall disagree with the conjecture that «[t]he uniform application of customary law between [S]tates is a key means of allowing “common interests” to

⁴¹³ PETERS 2011, pp. 638-639.

⁴¹⁴ See BLOKKER 2017, p. 8. See also BARKHOLDT 2020, pp. 18-19.

⁴¹⁵ For instance, the Chinese case is illustrative in this respect; LIU (2018, p. 116, four emphases added) remarked that

[c]apitalist relations between *juridically* equal sovereigns, abstracted of social context, sees the distinction between political and legal wither away. China’s political decisions bring about economic division in the region, executed through capitalist rules governing commodity exchange and wage-labour exploitation. When participating in (*formally* equal) politico-economic relations, [S]tates have unequal access to the means of coercion. Regulatory violence is exerted by (or implicit within) [S]tates themselves *as juridical subjects*, upholding the “legality” of these interactions. [...] Political and economic might translates into an *internationally* “legal” exploitation of resources to generate capital [...].

⁴¹⁶ FORTIN 2018, p. 339.

⁴¹⁷ KOOIJMANS 1964, p. 246.

prevail above diversity»:⁴¹⁸ it just perpetuates or worsens the usual structural unbalances, compelling small States to follow major powers in return for protection, favourable treatment, stability, and resources.⁴¹⁹ In fact, this mechanism starts now being employed by emerging powers for supporting their quest for primacy, i.e., their assertiveness on a global scale; it works, more or less overtly, in most policy areas, even though ITL has long been regarded as an exception in this respect. Some consequences of this inequality-perpetuation are specific to IOs; for instance, «smaller States simply lack the resources to stay informed about every practice taking place in every organ»,⁴²⁰ especially vis-à-vis complex umbrella organisations like the UN. Also, authoritarian States might be unexpectedly prone to infra-organisation negotiations, as they carry over the stances of their “citizens” (one should rather write “subjects”?) with a much-relaxed sense of solemnity, responsibility, and accountability to multiple organs.⁴²¹

This latter exercise is deemed problematic by some scholars, according to whom not only customary norms allow authoritarian States to legitimise their power and dismiss the will of their populations,⁴²² but similarly, even in the most “advanced” Western democracies, those norms represent the unaccountable and swingy views of

⁴¹⁸ FORTIN 2018, p. 339. At least, the same Author rightly acknowledges that «an argument that all entities with legal personality have equal customary international law obligations ironically risks causing more disruption to the unity of the system than a more flexible approach» (ibid., p. 343).

⁴¹⁹ See CHUNG 2012, p. 662.

⁴²⁰ PETERS 2011, p. 639. See further HENRY 2017, p. 14, fn. 69, and JOVANOVIĆ 2019, p. 107. However, the assessment to be made is comprehensive, as it depends on countless circumstances. A claim can in fact be tabled that whereas not all countries can be expected to keep themselves updated on any dossier of the global agenda in general, member States of an IO should be expected to do so instead (even more so when they sit in subject-specific commissions/committees and working groups, or take part to certain debates leading to the adoption of common declaratory positions on IL issues).

⁴²¹ SWAINE 2014, p. 187.

⁴²² Refer also to CHUNG 2012, p. 626, fn. 68. This is controversial reasoning, which might be disappplied in accordance with the chosen standpoint. Being heavily dependent upon continuous multi-layer elections (from the municipality to the federal level) and capricious electorates, which encourage politicians to seek immediate—and thus often necessarily superficial—consensus over policies to be adopted without any sort of long-term perspective, democracies are in fact inherently politically unstable. Drawing on wholly different instances, GOLDSMITH and POSNER (1999, p. 1556) had already noticed that, e.g.,

[w]hen [S]tates have unstable political institutions, their leaders weigh short-term payoffs more heavily than leaders in other [S]tates do. As a result, they are more willing to risk retaliation in order to obtain any payoffs from violating diplomatic immunity in the present.

country leadership rather than the general citizenry.⁴²³ Customary laws—or the customisation of practices—bear the defect of being sensitive to the contribution of the most powerful regimes and influential States, whether dictatorial or democratic⁴²⁴ (with all shades in between); this way, the international legal order is subject to the will of countries which use to step aside from the principles of “good governance” generally understood as preferable by the international community. «The idea that the practice of some [S]tates may be representative of all [S]tates is a further illustration of how customary international law functions as an important scaffold in the system of international law»:⁴²⁵ this sounds *prima facie* reasonable, but closer inspection unveils how it holds somewhat true only insofar as the consequence does not become the cause. For an example of such mechanism causing disparity (rather than being simply a reflection of it), let us assume that a small group of developed countries holds a package of sophisticated technologies to counter lethal diseases and increase food harvesting and soil rendition. If customary laws on countering diseases and increasing agricultural productivity are shaped by those countries almost exclusively, only those temporary interests will be reflected in the norms, and such interests will suffocate most viable legal channels for emancipation that would have possibly stood within the reach of developing countries willing to develop similar technologies without having being able to concretise their will yet.

⁴²³ Compared to treaty arrangements which are contractual in nature, ICL rules have the characteristic of being one degree further removed from whatever validity there is to representative participation in lawmaking at the national level. Analysis of State practice and *opinio juris* gives no weight to expressed popular sentiment within a nation but focuses rather on the actions and intent of the nation's leaders. While it may be maintained that these leaders, elected in many cases by the citizenry of a nation, do represent their interests, the representation in international fora by a very few of those elected (and more often appointed) officials constitutes a tenuous hold on principles of true representation of a nation's citizens

– JOYNER 2001, p. 153, emphasis added. Further on this, «[t]he advantages of international assemblies lie in their ability to ensure the representation of the plurality of domestic political opinions, [so that] debates within [IOs] no longer reflect exclusively the single voice of the executive» – WHEATLEY 2012, p. 161.

⁴²⁴ See THOMPSON 2015, p. 6.

⁴²⁵ FORTIN 2018, p. 340.

Customary law stems internationally «not only from general State practice accepted as law, but also from *limited* State practice *generally* accepted as law». ⁴²⁶ Nonetheless, States may at least be said to share similar legal functions, status, and capacities, whereas instead the majority of non-state actors like armed groups are way too heterogeneous and fluid (and numerous) for the practice of some to become sufficiently representative of the practice of many on a steady manner. ⁴²⁷ Conversely, IOs are, in the view of this author, sufficiently stable, trackable, and documented for the practice of a group of them to acquire larger legal significance, provided certain conditions are met. An IO can be sorted along the lines of its institutional

mandate, competence, and authority; the degree to which it represents the views of [S]tates and develops its own views through open-minded consultation; and the extent to which these views expressly relate to the question of whether [S]tates believe a norm should be universally implemented as a legal norm. ⁴²⁸

Furthermore, whereas the process of decolonisation and the consequent expansion of the number of countries brought developing ones to acquire quantitative majority in most one-State-one-vote (organs of) IOs, ⁴²⁹ wealthy Western powers still retain a qualitatively larger share of key institutions worldwide – but this is obviously changing, especially vis-à-vis East Asia.

More specifically, IOs may be categorised along the streams of objective parameters such as their decision-making system (e.g. supranational, intergovernmental, ...) or voting procedure (by consensus, majority, unanimity, ...), whereas instead other more subjective categorisations (size, macroeconomic region, scope of activity, degree of formality, leadership nationality, etc.) should be taken less

⁴²⁶ AHMAD 2019, p. 144, two emphases in the original.

⁴²⁷ Refer to FORTIN 2018, pp. 350-351.

⁴²⁸ LEPARD 2010, p. 180.

⁴²⁹ Refer to BYERS 2004, pp. xii;40.

seriously or dismissed altogether. Within objective categories such as those suggested above, a few IOs can possibly stand representatively for those fitting the same category, for the sake of contending the existence of customs socialising from “specially affected organisations” – which are more easily capturable by meta-regulators. Referring once more to the comparison with another category of NSAs, scholars have claimed that the latter’s volatile, faceless functionalism represents a good reason not to take them seriously enough as contributors to customs’ development from a legal—when not political just as much—point of view:

armed groups are only tolerated legally, in the sense that they are recognised to be the bearers of a restricted number of legal obligations for a limited period of time, due to specific factual circumstances (ie the existence of an armed conflict) rather than the nature of their identity per se. This raises the important practical observation that an acceptance that armed groups can contribute to the creation of international norms binding upon them would not necessarily solve the problem of ownership of norms that is sometimes raised as a reason for their practice to be included in law-making processes.⁴³⁰

At first sight, another type of NSA, that of IOs, could not be discriminated along analogously weak credentials: after all, IOs are largely long-lasting, bureaucratically sound, and structured entities, entertaining formal relationships with States and interactive exchanges amongst themselves, and identifiable by a set of commonly accepted features. Nonetheless, my stance is that this is far from straightforward. As for the “stability” criterion, IOs do change over time, and even those which apparently do not, rebalance their *raison d’être* over time rather remarkably. Some of them, like NATO, shift from traditional military threats to concerns with hybrid warfare;⁴³¹ some others, like the Warsaw Pact, simply cease to

⁴³⁰ FORTIN 2018, p. 351.

⁴³¹ One shall therefore disagree with those realist accounts depicting the survival of NATO as an institutionally void, yet US-driven project maintained alive for the only sake of furthering American interests – see e.g. WALTZ 2000, pp. 19-20. Conversely, and besides the intermitted but overall confirmed willingness

exist – in fact, even if one considered the CSTO or the SCO as its inheritors, their focus is on asymmetrical warfare (terrorism, separatism, extremism, radicalisation) rather than state-centred defence and security. This is of relevance as it is difficult to trace their stances and practices, and to systematise them as they evolve (at times, drastically) over decades and centuries; most relevantly for our discussion here, this means that one shall be cautious about recognising—and *a fortiori* so, codifying—customs on the basis of practice and *opinio juris* of organisations. Otherwise put, the time and consistency requirements should feature higher stakes for IOs than for States – but again, for *IOs themselves*, which is something distinct from *States within IOs*.

To summarise, the beliefs and practice of *IOs proper* may be deemed germane to the emergence of customary rules exclusively when the *ratione personae* of those rules extends to IOs⁴³² and their *ratione materiae* invests a) IOs per se; b) IOs in their relationship with one another; c) the interaction between IOs and their state parties; d) the relationship between IOs and third States; e) the osmosis between IOs and the broad “international community” understood as conceptually deeper than the simple summing of all States in the world. In any other case, and bearing in mind that closer involvement frequently translates into higher rates of compliance,⁴³³ reasonableness, and proportionality, it might be worth assuming that States are allowed to codify customary norms encompassing IOs without necessarily seeking their opinion, let alone consent. This is because, as noted—once again, with reference to another type of non-state actor: armed groups—in literature already,

by the US in keeping the Alliance running, NATO did not cease operations as it was able institution-wide to adapt its strategies to rapidly changing warfare environments, actors, tools, narratives, and tactics (including hybrid confrontations in the cyberspace). NATO’s only—although decisive—short-sightedness seems to lie with its expansion towards Russia (ibid., pp. 22-23); the consequent Sino-Russian rapprochement is no surprise, and it is now being institutionalised and consolidated by means of IL discourses and prospected alternative mode(s) of global governance.

⁴³² *Mutatis mutandis*, see FORTIN 2018, pp. 352-353, fn.78.

⁴³³ See ibid., p. 356.

the *pacta tertiis* rule does not apply in the same way to non-state actors, as it does to [S]tates and finds that [S]tates can bind third parties to treaty law, by virtue of being the main architects of the legal order. There is no reason why there should not be scope for a similar dynamic to be at play within the customary international law framework.⁴³⁴

This is all the more true from a human-rights perspective, as States expect all members of their social fabric as well as all actors of the international community to cooperate with them in fulfilling their obligations (first, the negative ones) and bettering global governance.⁴³⁵ This is externally conveyed as an ethical before than legal expectation, for «all actors in the international system, including [...] organizations, have an ethical duty to serve as trustees for the welfare of their constituents».⁴³⁶ States whose practice is distant from the generally accepted precepts tend not to oppose human-rights customs carrying high degrees of normative or ethical authority;⁴³⁷ they also tend to avoid openly violating them, to conceal their own violations, yet most times condemning others'. In treaty-law, someone goes as far as to argue that the good-will concerns of humanitarian law also provide scope for an exception to the *pacta tertiis nec nocent nec prosunt* principle;⁴³⁸ if this is the argument, then similarly human-centric concerns might form exceptions to the *tertiis* rule in other fields, too.

o Conceptualising customs to regulate the future, between technological neutrality and humanly planned customarisation of could-be technology-triggered practices

⁴³⁴ Ibid., p. 354.

⁴³⁵ Cf. an invariably labelled “cynical”, “rational”, or “conservative” approach in GOLDSMITH and POSNER 1999, p. 1174.

⁴³⁶ LEPARD 2010, p. 281.

⁴³⁷ BYERS 2004, pp. 5-6.

⁴³⁸ FORTIN 2018, p. 354, ftn. 85.

Progress *happens*: someone claims it is the fruit of a precise design by human élites, others suggest it ensues from predictive programming, but sidelining these “conspiracy” conjectures for a moment, it is possible to regard it as an inevitable reality that (certain) humans constantly strive to accomplish and later force others into compliance with. Given, suppose, the impending release of an unprecedentedly disrupting technology, how should it comply with States’ will? Such a question is ill-formulated, as it presupposes that States always hold precise an intentionality for their actions, i.e. that they conceive of “a plan”. At odds with it, if progress chaotically *happens*, so does the regulation of its outcomes. Honest it to observe that in most jurisdictions, technologies are approved before being released; truth is, nonetheless, that some of their possible uses are most times overlooked in the initial stages of development and even commercialisation. Not incidentally, «[t]echnology focuses on what *can* be done, rather than the normative question of what *should* be done»;⁴³⁹ in other words, it envisions an enthusiastically possibilistic *opinio* (normative neutrality) rather than a cautiously value-oriented one (normative craftsmanship). Building on this discriminant, the most controversial of all possible questions about (international) customs is whether current ones might apply to future—i.e., yet- but soon-to-come—scenarios, like the possible application of an expected technological tool coming about.

Manifestly, this is not the same as to say that «new customary norms come into existence when [S]tates generally believe that it is desirable now *or in the near future* to implement them as authoritative legal norms»;⁴⁴⁰ the point with “future customs” is about locating the custom itself wholly in the future, thus not only the decision about codifying an existing custom or enforcing it by endowing it with stronger authoritativeness. It is not even a matter of agreeing on value-frameworks to then wait

⁴³⁹ CROFTS and van Rijswijk 2021, p. 3 (emphases in the original).

⁴⁴⁰ LEPARD 2010, p. 277, emphasis added.

and see *whether* they will ever be confirmed by practice.⁴⁴¹ that would amount to an «imperceptible passage from wishful thinking into law»;⁴⁴² it is more about establishing precise stances on policies to be implemented *for sure* once a given condition has been fulfilled, foreseeing a sort of “planned customisation”. *Prima facie*, this would sound counterintuitive, when not doctrinally heretical;⁴⁴³ however, the issue would deserve perhaps not to be dismissed so categorically.

Customs applicable to existing technologies might regulate upcoming or expected practices whose main features are roughly known, when supported by strong and widespread consensus on how those features should be subjected to the law within a given society, upon their materialisation. After all, the primary function of the law is that of regulating social life (possibly beforehand),⁴⁴⁴ and in the case of PIL more specifically, the affairs of the global community of all States. In this sense of recurrent pattern of preference (should-be norm), this concept might amount to nothing different from a traditional custom but assessed through its *opinio* component only, as if history was not situated on a unidirectional stream but rather on a circular trajectory whereby

⁴⁴¹ This would be the approach advocated by “modern custom”-scholars; see this classic text, for all: D’AMATO 1971.

⁴⁴² TESÓN 2017, p. 92.

⁴⁴³ «Article 38 of the International Court’s Statute describes customary law as the general practice accepted as law. This implies that practice is an element *antecedent* to its acceptance as law» – ORAKHELASHVILI 2008, p. 86, emphasis added. Nonetheless, that Art. 38 represents international law’s *Grundnorm* is not a given, and even in the positive, *Grundnorms* are little else than legal fictions (see e.g. DELACROIX 2019, para. 22). Several scholars hypothesise that although the ICJ Statute is an accurate and “constitutional” enunciation of the theory of IL sources, it is not necessarily the foundation of that theory, meaning that other background sources may exist or that, relevantly for this discussion, the formulation of those which are present therein should not be crystallised in that it only serves as an indication – see e.g. KAMMERHOFER 2004, pp. 541-542. The reader should however be mindful that overstepping the Statute’s wording for defining the scope of customary laws might prove a dangerous—and allegedly politicised—exercise, in that the ICJ’s case-law stands today as the only “factual authority” on the recognition of certain norms as customary. Some academics rightly remind us that thinking in so relativistic a fashion as to write that the «*law has no role in determining what procedure creates law* is certainly extreme» – *ibid.*, p. 540, emphasis added. Even if deemed philosophically sensical, it is certainly unhelpful for lawyering purposes.

⁴⁴⁴ Cf. TESÓN 2017, p. 93:

If the precautionary principle [was] part of customary law, many [S]tates using technologies with uncertain consequences (do not *all* technologies have potential unforeseen bad consequences?) would be in continuous violation of international law. This is implausible (emphasis in the original). I would say: it depends on the technology, and on the *actual*, genuine unforeseeability of its downsides to the experts.

practices change appearance while always preserving recognisable patterns which can be addressed similarly. As logical as it might appear on a first reading, one shall nevertheless take into account that «positivists *need* human-willed activity to recognize a norm as positive. Customary international law, on the other hand, seems to be *unintentional*, *undirected* and *unwilled* human activity, which cannot be described as an “act of will”». ⁴⁴⁵ On top of that, an act of will is not the only possible source of normativity: it is so only when it *happens* to be this way. Indeed, «one must make a distinction between the source-norm and the conditions for the creation of that derivative norm specified in the source-norm. The human(s) whose act of will creates the norm *do not give validity*, the norm specifying that human act of will as *condition* for the creation of a norm does». ⁴⁴⁶ In this sense, I can conclude that facing new technologies, customs work in the same vein: the source-norm, or “planned custom”, tells how such a technology *should be potentially treated* if coming about, thus falling almost exclusively within a domain of projected *opinio*; the derivative norm, instead, would consider how such a once-planned custom has *actually been practiced* through the—indeed largely “unwilled”—course of human history. And yet, one can easily understand that the more the *driven* source-norm is authoritative and powerful, the more the distortionary-by-capture risk for *casual* derivative norms in daily practice is concrete. Echoing Kelsen, this would be unavoidable, since «[a]ny endeavour to derive legal norms from social practices misunderstands the different epistemological status characterising legal norms and social facts»: ⁴⁴⁷ norms are there to be captured by definition; as for facts, they will follow suit.

⁴⁴⁵ KAMMERHOFER 2004, p. 546, emphases in the original.

⁴⁴⁶ Ibid., p. 548, emphases in the original.

⁴⁴⁷ DELACROIX 2019, para. 13.

Without having elaborated the concepts above, it would probably come spontaneously to theorise that in arguing about “future customs”, the lawyer is left reliant on deductive validity controllers only:⁴⁴⁸ however, the fact that such customs are located in a future time does not prevent the lawyer from finding past occurrences of customs then identified as “future”, so that their formation and recognition may assist lawyers in making the argument that the custom under scrutiny will follow similar patterns (customary induction). Besides the binary approach to customs characterising (...still!) the almost totality of positivistic sources, constructivist theorisations did offer a few blended views standing half-way between inductive (injecting in the law expectations grounded in what happened in the past, as well as principles stemming therefrom) and deductive (identifying the law from the facts as they *actually* and currently stand) systems, by

impos[ing] purpose on a practice in order to put it in the best possible light within the constraints of its factual *history* and shape. Very often, competing interpretations will arise for the same practice, in which case the preferred interpretation is the one that proposes the most value for the practice, all other things being equal.⁴⁴⁹

This way, ICL’s pseudo-positivistic frontiers are debunked, to favour an approach that values this source of law as a powerful political tool in the arsenal of interpretive communities to direct the course of IL. It is a process of *interpretation*, not one of mere

⁴⁴⁸ See KAMMERHOFER 2004, p. 537 (emphasis added):

The criterion of the inductive method is the correspondence of the thesis [...] with the “facts” of international life. Authors who espouse that method will try to induce the law on customary law-making from instances where customary law has been created *in the past*, a sort of state practice concerned not with rules of customary law, but with the way in which these rules [repeatedly, cyclically] come about. The criterion of the deductive method is an abstract affair. Since this method deduces the rules from more general propositions, international lawyers who take this as their method are left with an argument from logic or another normative order (“natural law” or morals); in any case they must use extra-legal, non-factual “authorities” [...].

⁴⁴⁹ BANTEKA 2018, p. 304, emphasis added.

identification of customs; one in which, just like in any constructivist process, «the identity of the interpreter matters»⁴⁵⁰ more than the object being interpreted.

p Customary-law orders as quasi-identical universes of the same multiverse?

It is [a] matter of abandoning simplified dichotomous visions such as *systems* or *nonsystems*. It is [time] to apply also to systemics the concept of *quasi* not intended as *state* of incompleteness but as *structural* partiality, transience and multiplicity of properties that can be at different levels of diffusion and temporarily simultaneous or subsequent, similarly to the phase transitions of the first kind, like water ice vapour, where it is possible the coexistence of phases as opposed to those of the second kind such as paramagnetic-magnetic, where contemporary different phases are not possible. Other cases are given by multiple coherences, multiple emergences and dominions [...]. Even in these cases, the ability to detect *partiality* of properties, considerable as *quasi*, allows to detect the dynamics of properties and the possibility of directing them by identifying and facilitating evolutionary paths otherwise equivalent or identical. Quasi-systems are understandable as systems in continuous structural becoming eventually waiting for events to collapse, i.e. assume converging evolutionary paths and coherences when quasi-systems transform into systems. Conceptually it occurs when *quasiness* gives way for any reasons to structural stability and homogeneity of properties.⁴⁵¹

At any rate, deductive theories remain easier *and capture-wise less dangerous* to adopt for theorising *future* customs, in that «the origin of the normative order is assumed [as a fact] and a system is deduced from it»;⁴⁵² thus, that origin (tracing back to some sort of past) needs no longer be proven, and the system to be deduced shall work along all lines of temporality as to cover the whole spectrum of possible human activities to be regulated at any time. If the origin needs not be proven, it must be assumed as universal by all those who advance any (expectably divergent) stances,

⁴⁵⁰ DURKEE 2021, p. 438. *Read more generally* KREPS and AREND 2006, pp. 342-345.

⁴⁵¹ MINATI and PESSA 2018, p. 157 (extensive emphasis removed, supplanted by minor emphases).

⁴⁵² KAMMERHOFER 2004, p. 542.

which makes IL epistemologically closer to a culturally relativist ideal or *belief* than to a shared collegial *science* of global remit. If what all countries agree upon is in fact the method to discern the supposedly universal order from any particular system and to derive the latter from the former, but not the disciplinary shape—let alone contents—of the former itself, it seems inevitable that an order aprioristically assumed to be universal will rather be construed through different cultural (one may say “regional”) screens, giving origin to quasi-identical but slightly-diverging *derivative systems*. If the affirmation that «the interpretive process of adducing a customary norm from state practice and *opinio juris* characteristically requires some moral judgement on the part of the interpreter»⁴⁵³ represents accurately the most recent doctrinal stances, then judges are left with the *political* task to decide whether their own moral grounds (closer to ethics than to law) coincide with those of the claimant State.⁴⁵⁴ And States themselves feel compelled to decide whether to endorse a possible custom having regard not only to their preference, but equally, to the moral suitability of such a rule within their societies (among their citizens).⁴⁵⁵ Suitability today does not ensure sustainability (for tomorrow), though; no legal universe is *koinós* in an Aristotelian sense:⁴⁵⁶ several universalities are juxtaposed to one another and scrutinise each other from a *pretentiously* absolute standpoint, mutating with time. On this score, all these derivative systems might explain the different regionalised approaches to what the “international” customary law project is and should be all about.

Perilously disembowelling a pretended unity of normative intent, this theorisation draws on equally divisionary theories of natural sciences, namely

⁴⁵³ TASIOULAS 2014, p. 328.

⁴⁵⁴ For instance, FORTUNA (2020, p. 330) maintains that «the ECtHR remains *but one universe within a “multiverse”* of international courts, whose freedom to interpret, including that of customary international law, is difficult, if not impossible, to limit» (emphasis added).

⁴⁵⁵ See TASIOULAS 2014, p. 331.

⁴⁵⁶ See MURPHY 2016, p. 64.

astronomy and physics, who portend to demonstrate the existence of *almost* equal yet non-identical self-governed universes. No claim is put forward here that these concepts are orthodoxically acceptable, uncontested, or disciplined in formulation:⁴⁵⁷ they are suggestive intuitions instead, which deeply split, still, natural science and humanities' epistemic communities between believers and non-believers. The physics theory of "parallel" or "alternate" universes postulates the existence of a group of multiple bubble-looking universes kept together by a "multiverse" or "omniverse" which comprises all possible physical laws.⁴⁵⁸

In effect, each of the bubbles is an outcome of the underlying laws of Nature which endow each bubble with some common features but many different ones. Some of those differing features are things that we have long regarded as so fundamental—like the number of dimensions of space—that they must be programmed into the Universe irrevocably, now turn out to be things that can fall out differently as outcomes of the laws of gravity and particle physics.⁴⁵⁹

This builds on the ceaseless effort on the part of physicists to find a grand-theory that can explain all physical forces and the functioning of the universe at once; in fact, the multiverse is a by-product of the M-Theory that proposed the merging of the five superstring theories previously elaborated into just one comprehensive theoretical framework to read reality's constituencies. If one looks at this from a humanistic cognition-centred perspective, it is fascinating to imagine that «all universes (implying a "multiverse"), including our three-dimensional one, are only states of consciousness hidden within the brain states and a cognitive experience»,⁴⁶⁰ a law of the mind, a

⁴⁵⁷ In fact, «theoretical descriptions are often not *absolutely* true or false, they are *approximately* true or false», provided that "truth" and "falsity" do actually exist or mean anything tangible (that is, *measurable*) – SUÁREZ 1999, p. 173, emphases in the original. More generally, *check* GIERE 1999.

⁴⁵⁸ LICATA 2016, p. 90. If seeking a discursive introduction to the concept, *watch* LICATA (2011) for a *lectio magistralis* delivered by the same epistemologist of physics at "Festival Filosofia" in Modena, Italy.

⁴⁵⁹ BARROW 2007, p. 40.

⁴⁶⁰ SREEJITH 2010, p. 15.

(made-)coherent system of belief. These considerations are highly prone to contestation and misunderstanding, which is why preliminary contentions shall be dissipated here already. It is essential to distinguish “regional/local customs” as *systems* from regionalised customary experiences as *orders*: the first are those which have been already ascertained in literature and can be easily retrieved from the jurisprudence of the ICJ; the second are more foundational in momentum and proceed to the very roots of international law and its theory of sources: their claims face the *universal*. Furthermore, the theories of multiple customary orders do not entail a rethinking of what the law is for, in terms of positive aspirations of bindingness, observance, or adhesion to: the fact that fundamental theories of physics (starting with Newtonian ones) no longer explain all measurable phenomena in this universe—let alone all universes—does not strip them of their scientific positivity *confined to their “domain of competence”*, nor prevents physicians from relying on those theories to describe the real-life facts of their reference universes or daily-life events. The true concrete problem is understanding to what degree these orders (multiple universalities, so to speak) are permeable to one another, and how they can co-exist peacefully and harmoniously despite their relatively tiny differences, for the purpose of sharing resources, opportunities, and I would say also *epistemic hope*, rather than competing while trying to impose their “universal truth” onto other—equally entitled and qualified—universes.

This work posits that technologies such as algorithms and the Internet represent the very first inter-order shared “commons” which impacts visibly, intrusively, and extemporaneously the daily life of billions of individuals throughout the planet. Obviously, other remits—like outer-space activities, nuclear weapons’ non-proliferation, commerce in the high seas, shared environmental resources, *et similia*—

have a similar overall inter-order influence; however, they do not create and call for customs as fast, nor reshape existing ones, since their repercussions on human activities performed on a daily basis, although large-scale, is still less pervasive and less self-evident to “the masses”. Indeed, what marks the watershed between these technologies and other realms is the former’s ability to transform the ontology of practices across almost all spectrum of regulated life (including taxation, finance, and the global capital more generally), regenerating their legal significance and often turning entire legal frameworks and policies to obsolescence in a matter of months or few years. Consequently, one dilemma invests the way to put these orders to work by establishing a dialogue among them, any dialogue requiring a common code for deciphering qualitative and quantitative variables in the conversation. Scientists work across physical realms by employing the standard language of mathematics, whose constitutive elements are numbers; moreover, even when the laws and formulas employing such numbers differ slightly from one order to another, the fundamental unities of measurement are standardised, and thus remain valid.

What is the standard language of lawyers, and what are its fundamentals? If not numbers, then one should turn to the verbal side of logics, but such words would have to be understood as variants of ancestral symbols, not as language-manifesting sounds. And what does a differentiation in fundamental laws (and consequently formulas) entail? Taking as an example the celebre $E=mc^2$ formula, one may assume that in a parallel universe it is verified when transformed “slightly” into, say, $E=mc^3$: the existence *and meaning* of E , m , c and mathematical powers remain equal, what mutates is the relationship and balance among symbols in order to reach the same result (E). One should note that the absolute value of E might change from universe to universe in relation to the empowerment to 2 or 3, but what matters for the sake of this

discussion is that all variants of E —objectively uneven—would look equal in the eyes of those researching and policing in each universe, because the E relational outcome is verified everywhere. In the long run, this could not avoid causing conflict and idiosyncrasy among universes, with each of them convinced of having agreed on the same terms (E), whilst in practice the reciprocal behaviours unearth E' , E'' , E''' etc. absolute-value variations. Similarly, the existence and abstract (conceptual) meaning of politico-legal expressions such as “freedom” or “security” stand even, but the formulaic combinations of elements to operationalise them change from universe to universe: as such, lawyers from different universes may agree on the endpoint (e.g. “freedom”), but not on the elements concretising “freedom” within each universe. Eventually, this discrepancy in the inner functioning of each order triggers communication asymmetries when negotiations are in place, as all parties believe they are talking about E , while they are actually propounding their experience with E' , E'' , E''' , etcetera.

In other words: E is the endpoint all parties seek, but the combinations of elements (m , c , powers, etc.) to obtain E differ from order to order; negotiations on reaching E evenly among orders is complexified by the facts that not only E is obtained differently in each order and each order presumes its E to be the only possible one, but most dangerously, those orders cannot agree on the same recipe to reach E , thus making it hard for transnational processes to flourish and be governed by congruent positivist laws. In politico-legal terms, this means that order A will want to produce “security” by combining elements (armies, prevention, budget, private contractors, ...) differently from the way order B would prefer to distribute the very same elements in order to reach the same “security”.

As such, negotiations would better strategise their approach for the specification of the practical endpoint to be achieved (e.g., fair taxation), rather than for the tools underlying it (e.g., compliance with the tax code, whatever its mandate is). Word-construed symbols are not as pure as number-composed formulas, so that choosing an order over the others cannot be done by convention like deciding what is the most fruitful among different geometrical systems:⁴⁶¹ given the impossibility to agree on the means (or more properly: on a common language to *speak of* the means, symbolically), the focus should rather lie on the practical result to be achieved. This is because

[t]he normative sense of behaviour can be determined only once we first know the “internal aspect”—that is, how the State itself understands its conduct. But if, in custom-ascertainment, we have to rely on the internal aspect, then we lose custom’s normativity.⁴⁶²

This Thesis will claim that surveillance practices operated by means of tax enforcement are customising not because States necessarily understand them as such (to exemplify, they might neutrally comprise them within the concept of “compliance”, without acknowledging their surveilling facet), but because they are indeed aimed at surveilling natural persons as a matter of fact – open to demonstration and rebuttal, *ça va sans dire*.

q Hyperregulation or *ius commune*? Takeaways and concluding thoughts

⁴⁶¹ Refer to COOPER 2014, chs. 23-24.

⁴⁶² KOSKENNIEMI 2006, p. 437. Similarly, see DUMBERRY 2016, p. 296.

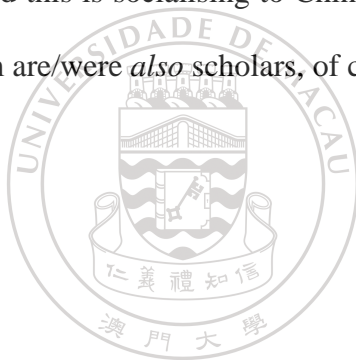
This extensive inspection on the literature on ICL confirms the dread that everything and its contrary has been argued about it, even considering the “most authoritative” sources only. On the whole, it is however possible to witness a trend of increasing reliance on the *opinio* element over the practice-based one, to the effect of what has been termed an IL ontological revolution, from behavioural to discursive,⁴⁶³ from empirical to normative, from operational to speculative, from managerial to declarative, from universal to comparatively regional, and eventually from universal to “multiversal”. For some authors, ICL is playing its last shots as a perishing legacy of ancient, primitive, rudimental ways of regulating social life locally, nationally, and internationally. For others, it encodes the most decentred yet sophisticated methodology for creating (or ascertaining) factual convergence regionally as much as globally, when other means and tools (treaties, mediation, informal arrangements, recourse to abstract principles, case-law sedimentation, ...) are ruled out in toto or in part. In my view, neither claim makes any hint at sense unless it is supported by empirical research, i.e. verified by quantitative data⁴⁶⁴ framed against substantial quality observations controlled both *ratione materiae* and *ratione temporis* (as no quantitative-qualitative investigation would be possible on (international) customs taken as a whole).

Taking due note of the overall limitations—but also of the hopefully refreshing multidisciplinary perspectives—situated in the general discussions above, my thesis will aim at analysing customs from a specific *ratione agentis* corner: that of capital-élite-captured States and IOs in the field of ITL. My argument will be that *with*

⁴⁶³ Refer to ARAJÄRVI 2014, p. 148, fn. 20.

⁴⁶⁴ Statements such as those that practice counts *more* than *opinio*, or that *opinio* is the *primary* element of customs, and the like, are qualitative in nature and do not assist in clarifying their terms of comparisons in quantitative terms; differently phrased: knowing abstractly that practice counts “more” than *opinio* is a loose expression with no practical implication whatsoever, which assists neither the lawyer in arguing his case nor the judge in adjudicating it.

reference to the precise scope of investigation just outlined, customary laws are not only vibrantly alive, but even paid special public tribute and lawmakers' dedication to, thanks to their disposability for being disputed *legally* while employed *politically* to reshape the international legal order – starting from the custom-distortionary worldwide surveillance opportunities materialising with algorithmic and Internet-powered technologies both disciplinarily and factually. Major powers are at the forefront of these transformations, with China carving no exception: «Chinese writers generally support [the] codification of customs in order to make those customs more clear and specific»,⁴⁶⁵ and this is socialising to Chinese international lawmakers just as much – some of whom are/were *also* scholars, of course.



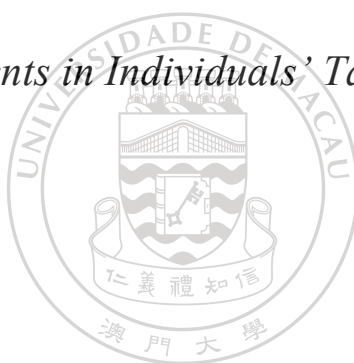
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⁴⁶⁵ CHIU 1988, p. 10.

Chapter 5

Grotian Moments in Individuals' Taxation



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a The international tax triumvirate: A customarising focus on individuals' tax evasion

The international tax regime, starting with its customary component, is at times presumed like a foundational myth. In fact, scholarly opinions on the existence and contents of an ICL regime regarding taxation could not be more diverse, with academics being unable to agree on whether international-taxation customs do exist and, for those who maintain they do, what are their precepts. Those who negate the actuality of a an international tax regime based on customs observe that no multilateral hard-law agreement is in place, most bilateral tax treaties are only golden cosmetics, and no supranational authority is entrusted with the enforcement of bilateral and multilateral arrangements.⁴⁶⁶ To the contrary, scholars who advocate for a custom-friendly view postulate that the existence of an international customary view on the way taxation should be managed internationally can be easily retrieved by looking at the degree of similarity (or at least convergence) among most domestic tax regimes, on most issues. Both contestants' arguments enshrine deserving elements, yet one element that nobody seemingly objects to is the customarising focus on individuals' tax evasion, whilst the attention being paid to corporate avoidance remains steady in literature but gradually loses track in international policymaking.

A methodological note is due here. Throughout this thesis, frequent reference—at least, more frequent compared to other jurisdictions—will be made to policies domestically adopted or internationally/transnationally negotiated mainly by China, the EU, and the US. This is done in harmony with that stream of scholarship⁴⁶⁷ that considers these three actors to be the actual shapers of the “global order” (although

⁴⁶⁶ See e.g. DE LILLO 2018, pp. 12-14.

⁴⁶⁷ Refer e.g. to YIZHOU 2010; BRADFORD and POSNER 2011, p. 44.

I acknowledge the loose boundaries of such expression), as well as with subject-specific literature where these three entities are granted particular emphasis in matters of taxation and finance,⁴⁶⁸ along with matters of technology governance and free flow of information.⁴⁶⁹ To be sure, this is not a move towards classifying these three players as “superpowers”, “great powers”, and the like,⁴⁷⁰ nor towards suggesting that their prominence exclusively pertains to the geoeconomic, diplomatic, normative, strategic, or geopolitical projections of their endeavours and appeal, or to them being the three biggest markets in the world. It is more about identifying these three jurisdictions as those whose *overall contribution* to global affairs’ practice and codification—including the subject-matter of the present work and cognate matters⁴⁷¹—is essential and decisive for norm-crafting initiatives to succeed, fail, or stall (and often to be initiated, too), which comes also handy for pro-customarisation arguments. Intelligent proposals have also been formulated by leading economic thinkers for a “new Bretton Woods” between China, the EU, and the US to rewrite the rule(s) of finance as well as the whole global “economic superstructure”⁴⁷² – whose taxation component is inspected here. The stance I will defend is that Westphalian States—and meta-federations stemming therefrom, such as the EU—are irreparably captured and cannot rewrite financial rules any meaningfully; nonetheless, for the sake of dissecting the cathedral of contemporary finance, I subscribe to the claim that these three are the pillars, the mainstays to primarily look at. In any case, contrary to certain critical voices which confine taxation to the minutiae of geopolitics,⁴⁷³ I contend that

⁴⁶⁸ Refer e.g. to HAKELBERG 2020, pp. 29-30.

⁴⁶⁹ Check for instance GAO 2021, p. 265.

⁴⁷⁰ See generally ROSS et al. 2010; BROOKS and WOHLFORTH 2016, pp. 32-33.

⁴⁷¹ Check e.g. LÉVÊQUE 2021, chs. 9-13 (especially 11-13), or ATTALI 2021^a, pp. 407-408.

⁴⁷² Watch e.g. VAROUFAKIS 2020^c, 37:16-37:58;45:19-45:46. Others confine this and closely related endeavours to “Chimerica”; check e.g. SVARTZMAN and ALTHOUSE 2021, pp. 9;16.

⁴⁷³ Refer further to MCCONNELL 2013, p. 112.

international tax strategies rest, in fact, on these major powers' grand strategies for the import/export of capital entitlements and the (de)regulation of financial flows.

b Back to history: Individuals' taxation in pre-Westphalian societies

PARIS⁴⁷⁴ expounded the way taxation came to represent a cornerstone of modernity and Westphalian sovereignty, with the intent to signalling that a possible internationalisation of taxation would not represent the first-ever centralisation of tax powers to the upper-level administrative units with no correspondence in scope with citizens' rights. He recalled that Medieval Europe was ruled through bundles of feudal domestications of political power built on personal control over a portion of territory, which was further subdivided into different and legally tangled lines of affiliations and kinships (meta-territoriality). Meta-taxation adapted to meta-territoriality in such a way that "peripheral" taxes (not geographically, but in a jurisdictional sense) down the feudal lineage rarely reached the highest feudal authority (for simplicity, I might say "the king"). This system changed—but not as abruptly as our State-centric one would seem next to being revolutionised today—when the king realised that his taxing powers were not sufficiently capillary to sustain the costs of the latest "technological" advancements in weaponry, and indirectly to cover the costs of protracted military campaigns. Thus, PARIS argues, tax centralisation became a necessity yesterday (within each feudal system) due to new technologies being available on the "market", just like it would become a necessity today (globally) owing to technological

⁴⁷⁴ 2003, pp. 156-157.

revolutions such as algorithmic scrutiny of big data (and, with the benefit of hindsight, the Internet).

This scheme works well if one omits rights-related complications, but cannot stand as a meaningful comparison if one considers that taxpayers' expectations today are shaped (...theoretically, at least) by some sort of residual nexus between the tax paid to the State and the investment in public services received in return. Furthermore, the nexus is also one featuring citizenship right-and-duty balances, which was either irrelevant for or unenforceable by a large majority of quasi-servant taxpayers back in Middle Ages' feudal systems. True, the Church's *plenitudo potestatis* encompassed taxation as well and embodied a model for modern States,⁴⁷⁵ but those late-medieval and early-modern systems of power, even past the Middle Ages, remained mostly absolutist institutionally and non-reciprocal citizenry-wise. At that juncture of history,

[g]iven the [S]tate's reliance on capital for the purposes of taxation in money, the [S]tate increasingly intervened with legal and punitive measures to make sure that the landless masses would become disciplined workers. [...] This contingency produced its own necessities, as the [S]tate assumed functions that became essential for the establishment and reproduction of the capitalist mode of production. The existence of a centralised, bureaucratic [S]tate, which is separate from society and enjoys a monopoly over the legitimate use of force, is intrinsic to the process of reproduction of the social relations of production. In turn, the existence of such a [S]tate became essential for the uniform application of laws necessary for the harmonious reproduction of capitalist relations of production.⁴⁷⁶

This is why that of taxation largely remained a gloomy tale «of subjugation and extraction of wealth, of administration of populations and oppression of social groups, of war-making».⁴⁷⁷ Instead, in theory at least, most humans today live in political systems underpinned by institutionalised conceptions of the rule of law (RoL), nestled

⁴⁷⁵ See REINHARD 1999, p. 261.

⁴⁷⁶ TZOUVALA 2020, pp. 62-63.

⁴⁷⁷ BONADIMAN and SOIRILA 2019, p. 317.

in the separation of powers, which the transition from feudal to tax-based systems itself catalysed.⁴⁷⁸ Today, the State may still enjoy the monopoly of enforcement powers, but it is a monopoly constrained by judicial actors and (elected, where applicable) lawmakers; in essence, by Law. In other words, PARIS' parallelism might stand as to how centralising processes of taxation are believed to be needed and are thus enforced, but legal-expectation-grounded taxpayers' reactions today would be fairly different – and legal dilemmas arising therefrom, with reference to citizenship and jurisdiction, would differ as well. I would rather call for a radical cognitive shift.

PARIS⁴⁷⁹ concluded that

[t]he fiscal crisis of the European feudal system elicited efforts to raise revenues more effectively, which in turn contributed to the formation of centralized state bureaucracies, thereby increasing the capacity of [S]tates to extract further taxes, and helping the modern territorial states to prevail over *competing political forms*[.]

and I subscribe to this reasoning. Nevertheless, the limit of his analysis rests on the assumption—unfortunately implicit in the world-reading paradigms of most realist IR and IL specialists—that the “competing political forms” at play in our contemporary time are the “global village” versus Westphalian States, whilst it is probably truer that before reaching the global-governance level, the *political* (thus, not only economic) formation to be countered (in the sense of “disciplined”) is the multinational corporation and the market generally – particularly that in digital services, as well as the financial market. The power-struggle societies are facing today is shaped by MNCs that relentlessly erode sovereign powers by insinuating themselves in the interstices of jurisdictional laws, with sovereigns perpetually endeavouring to catch up and re-

⁴⁷⁸ Refer to AOYAMA et al. 2011, p. 167.

⁴⁷⁹ 2003, p. 175, emphasis added.

establish their primacy; only one of these two formations will survive the excesses of the present unsustainable model of globalisation, and taxation will need to be rearranged accordingly.

Consequently, the priority for States to regain taxing powers in the digital age is not that of globalising tax scrutiny over individuals without being able—because times are premature in that regard—to globalise their rights and citizenship-linkages too; it should be rather that of regulating MNCs both “inside” and “outside” the cyberspace and reaffirming the primacy of constitutional designs over financial instincts. The power of MNCs is anything but unavoidable or historically obvious, and its dominion on the part of the State depends on which of these two actors “plays its cards” smarter extraterritorially. As NEWMAN and POSNER⁴⁸⁰ explained, the

e]xpansion of market scope beyond existing political borders creates problems for regulators with high, relatively demanding regulations and tax regimes and pressures them to make adjustments in the direction of low, relatively lax regulatory jurisdictions. By contrast, an expansion in the jurisdictional boundaries of a high-regulatory regime ultimately creates problems for foreign regulators of weak regimes. Foreign firms come under pressure as they face the possibility of market exclusion and the potential of having to comply with multiple regulatory standards across jurisdictions. These costs may prompt foreign firms to support the emulation of relatively powerful authorities’ policies, even if these regulations are more demanding. [...] As market and jurisdictional boundaries change and asymmetries shift, the underlying character of both the “problem” and the “solution” within a regulatory domain evolve. [...] The scope of markets and jurisdictions sets the stage, benefiting private actors when markets are extra-national and jurisdiction remains national. Firms are best positioned to exert their preferences when exit remains an option. Public authority, by contrast, benefits under favorable market asymmetries or when jurisdiction is extra-national. Here jurisdictions may leverage their rule-making authority to define the terms of market entry and access, forcing firms to confront the potential loss of vital markets. When jurisdictions expand, they capture foreign firms, which formerly operated under several authorities governing smaller portions of the foreign firms’ businesses. The greater concentration of revenues produced in a single jurisdiction makes these companies more vulnerable to the rules, decisions, and retaliatory actions of its officials. Such scenarios are thus likely to increase the influence over firm compliance. The new

⁴⁸⁰ 2011, pp. 602-604.

vulnerability is also likely to prompt multinational companies to pressure home governments to change rules in accordance with the foreign regulation or alter policies to avoid retaliatory actions. Private actors may, then, be both the active force behind regulatory change and the reluctant recipient of public authority demands.

Thus, economic power can only be constrained by tying it to a territory where it will be regulated, and from which it will not be able to escape oversight. In fact, it is *liquidity* to be the defining issue of our times, also when it comes to taxation. In pre-Westphalian societies, even emperors were tied to a territory, no matter how supposedly universal their empire and imperium were. Any emperor

had an interest in supporting subjects against their princes lest the latter become too powerful, but he could not exploit this role to increase his own power at the princes' expense because he could not be emperor against their opposition.⁴⁸¹

Emperors' *ius dicere* options were space-specific, land-dependent, *de facto* time-limited, and *relationally bound*.⁴⁸²

In sum, what we can learn from pre-Westphalian societies is that human beings—even the most powerful ones—were subjected to a number of restraints due to their tie to a jurisdiction—just like today's natural persons through the legal device of citizenship. The problem is that MNCs (i.e. today's emperors, in many ways), as jurisdiction-untied legal entities whose assets are protected under a global code of corporate capital, are not so.

c Loopholes in the Westphalian system: Offshore finance and tax havens

⁴⁸¹ OSIANDER 2001, p. 277. As for princes themselves, contrary to popular imaginary, they not seldom preferred to «tax the[ir] subjects only modestly in order to avoid disturbance and rebellion» – KOSKENNIEMI 2021, p. 278.

⁴⁸² See e.g. TESCHKE 1999, p. 81.

To clamp down on piracy [...] at sea, it took a two-pronged approach that went beyond just shoring up defences or threatening massive attack [...]. The first strategy was to go after the underlying *havens* [...] that harbored the corsairs [...]. The second strategy consisted of] a network of treaties and norms, [...] where it] was established that [...] maritime sovereignty would only be respected when a nation took responsibility for any attacks that emanated from within its borders. Slowly, but surely, they paved the way toward a global code of conduct.⁴⁸³

Somehow comparable—yet not thoroughly so—is the operation of *tax* havens. As “properly jurisdictional spaces” made of States that decide—or are, so to speak, “forced”—to compete aggressively, explicitly, and consistently (i.e., as per their general norm, rather than in derogation to it) with other jurisdictions by lowering (especially corporate) taxes, tax havens are at least as old as capitalism itself; however, today’s financial underbrush of wealth offshoring is not made of tax havens only.

The most pernicious manifestation of the offshoring world is made of within-jurisdictions “non-jurisdictions”, or “jurisdictional voids”, and originated in London back in 1957, when

the Bank of England came to an informal agreement with the City’s merchant banks to treat certain types of financial transactions between non-resident parties and denominated in foreign currency *as if they did not take place in London, even though they occurred in London*. Paradoxically, the Bank created, in effect, a new regulatory space outside its jurisdiction, and a new concept[:] “offshore” finance. [As] the transactions that took place in London were deemed by the Bank of England to be taking place elsewhere, they ended up under no regulation at all,⁴⁸⁴

following a legally tangled offshoring scheme which might be labelled as “a-jurisdictional”. There is a long tradition engineering London as a world reference for

⁴⁸³ SINGER and FRIEDMAN 2014, pp. 178-179, emphasis added.

⁴⁸⁴ PALAN and NESVETAILOVA 2014, p. 190, emphasis added.

these arrangements, and it backtracks to the late XVII Century, when this metropolis established its Stock Exchange relatively independently from the central administration.⁴⁸⁵

Regulation-wise, these solutions are, in the present author's opinion, to be considered part of those «[l]iminal [...] practices [that] owing to their “in-between-ness” and ambiguity, deserve close attention because of their potential to transform the meaning [...] of sovereignty».⁴⁸⁶ They are so much a-jurisdictionally detached from the jurisdiction within which they are physically incorporated that they

display a great deal of stability and continue to function successfully, even after the economic and political power of their home countries fades away. In fact, history teaches us that it typically took revolutions and wars [almost inconceivable nowadays] to make [O]FCs decline considerably or disappear.⁴⁸⁷

These a-jurisdictions are the only true “offshore” non-spaces of contemporary finance, whilst tax havens properly defined are simply jurisdictions where transactions take place mostly *onshore*, under conditions which are business-friendly to the extent that they cause competition friction with major capital-exporting countries. From the world-flattening and saturated viewpoint of the GN, such transactions occur “offshore” in the sense that they do not undergo compliance checks in other heavily regulated jurisdictions, and yet, in and of themselves, they are still on-shored in sovereign States under rules that do not represent “suspended exceptions” for those same States, but their very norm (however questionable such norm *per se* is). Some tax havens may stem from or transform themselves into OFCs (and vice versa),⁴⁸⁸ yet the two terms

⁴⁸⁵ Refer extensively to NEAL 2011.

⁴⁸⁶ LOH and HEISKANEN 2020, p. 299.

⁴⁸⁷ PAŽITKA et al. 2021, p. 1790.

⁴⁸⁸ Refer to PALAN and NESVETAILOVA 2014, p. 191.

should not be used interchangeably⁴⁸⁹ – at least when rather than wider socio-economic trends, one is describing the technicality of the respective money-flows and regulatory features.

Interestingly, the 1957 “London trigger” did not remain an isolated incident, but spelt-over all throughout the Empire, whose legacy endures today by still defining the geography of the offshoring networks,⁴⁹⁰ with former British imperial territories cumulatively accounting for over the 38% of all outstanding international loans and deposits by 2010, in spite of China’s growth.⁴⁹¹ This is unastonishing: competition over OFCs is a form of economic belligerence by proxy between former colonial powers, which also helps explain why countries endowed with enormous private wealth but no substantial colonial past, such as Italy, do not preside over a flourishing capital-offshoring industry. Curaçao excellently exemplifies this proxy economic war: it was once prompted by the Dutch government to serve as a “lawful” rerouting path for capital to be invested from/into The Netherlands, also thanks to top US banks and corporate lawyers’ proactive assent; and yet, it soon lost its centrality to competing powers’ own OFCs, including indeed British ones, thus becoming just secondary a spot for local tax avoiders.⁴⁹²

In his contribution to an academic volume, an accountant that often serves companies wishing to channel their investments through tax havens explained that Jersey, a British Crown dependency located close to Normandy, is perfectly fine with

⁴⁸⁹ Other authors, such as ALEGRE (2018, p. 205), employ the term “offshore financial centres” for proper tax havens, and “onshore financial centres” to describe the “a-jurisdictional” spaces mentioned above. There is no scientific agreement on these terms; what matters is that different phenomena are distinguished from one another, and that every source adopts and sticks to a consistent terminology all throughout.

⁴⁹⁰ See WINTOUR 2018. *See further* AALBERS 2018, p. 920:

[t]he outer rings around the supercentres include former British territories, such as Hong Kong, Singapore, the Bahamas, Ireland[, Doha,] and Dubai, that are fully independent, outside of the UK’s control, but still maintain strong links to the UK in general and the City of London in particular, and typically have “inherited” part of their legal system from the UK.

⁴⁹¹ PALAN and NESVETAILOVA 2014, p. 191.

⁴⁹² This whole history can be retraced in VAN BEURDEN and JONKER 2021.

complying with the OECD's Common Reporting Standard,⁴⁹³ provided specific tax rates are not imposed upon Jersey by international bodies and "tax lobbyists".⁴⁹⁴ In his view, it is just alright that certain jurisdictions keep offering "tax neutrality" by providing tax-free investment channels, insofar as they collaborate with tax authorities of other countries in confirming that those channels actually exist, even if for those "other countries" taxing wealth held abroad would be considered an interference with the sovereign affairs of the former collaborating countries. In other words, he corroborated the assertion that the CRS is not going to make wealthy people pay their fair share of taxes until tax havens exist⁴⁹⁵ and unless common taxation rules (at least on harmonised bands) are agreed upon globally in order to tax wealth once, but to a fair degree, wherever it is transferred. In agreement with this, PIKETTY's grand theory of capital and inequality suggests the adoption of a global tax on wealth.⁴⁹⁶ One example that supports the accountant's viewpoint relates to the EU:

a significant fraction of the offshore wealth managed by Swiss banks is assigned to the British Virgin Islands, Panama, or Jersey [...]. The use of shell companies increased after 2005, when in the context of a law known as the Saving[s] Tax Directive, the [EU] introduced a tax on interest income earned by [EU] residents in Switzerland and other tax havens. Because the tax did not apply to accounts nominally owned by shell companies, European depositors massively shifted their assets to shell companies [...]. Before the Directive, there is no particular evidence that residents of some countries used shell corporations more than others (while after 2005, Europeans [we]re more likely to do so).⁴⁹⁷

⁴⁹³ On the Standard, see CASI-EBERHARD et al. 2020 and *infra* Ch. 6(f). Check also OEI and RING 2019, pp. 723-724; BOUVATIER et al. 2017.

⁴⁹⁴ See COOK 2018, p. 194.

⁴⁹⁵ Indeed, even in the case of Switzerland, it was not banking secrecy per se to determine its enduring success. According to VOGLER (2006, p. 70),

[t]he real stand-out characteristics were in fact the comparative advantages offered by Switzerland's outstanding operating conditions, including political and economic stability, a stable monetary policy, and the highest possible level of legal security over the long term. These are the keys to the success of the Swiss financial center [...].

See also ALSTADSÆTER et al. 2018, p. 98, fn. 19.

⁴⁹⁶ Refer further to JAKOBSEN et al. 2019, p. 329; NGUYEN and KHIEU 2020. Curiously, BRAND (2017, p. 1) branded PIKETTY's proposal as «hopelessly visionary» in a Westphalian world.

⁴⁹⁷ ALSTADSÆTER et al. 2018, p. 93.

These are all money-games played by the rich (for whom the risk is worth taking), that have nothing to do with the average taxpayer/citizen⁴⁹⁸ nor are in any manner countered by exchange-of-information arrangements, which can at best picture the problem without making these transfers and (mostly well-known) “stratagems” any less viable or easy for wealthy individuals. Any exchange-of-information solution will always be rendered ineffective by even one single non-party or party-but-incompliant jurisdiction, while making the citizens of all remaining jurisdictions far worse-off in terms of privacy.

As remarked, major “tax havens” represent just a minor part of the offshoring problem. Most—yet not all—of the former are small and isolated islands or peninsulas, or anyway either remote or small jurisdictions⁴⁹⁹ that cope with several economy-of-scale-related economic comparative disadvantages due to the territorial smallness of their jurisdictions.⁵⁰⁰ Finding it difficult to attract businesses owing to their unfavourable production costs, these small jurisdictions usually display a non-diversified economy and tend to rely on offering financial offshoring in order to capitalise on their (basically only one) comparative advantage.⁵⁰¹ This holds true not only for the large majority of them, belonging to the African, Caribbean, and Pacific Group of States (ACP), but also for those located in the industrialised “hemisphere”, even within developed and relatively well-integrated regional architectures such as the EU.⁵⁰² High-end touristic locations are often the *alter ego* of offshore financial centres

⁴⁹⁸ Indeed,

[o]ffshore private banks typically require customers to have a minimum amount of financial assets to invest (e.g., \$1 million, or \$10 million—levels of financial wealth above which one is typically in the top 1% or top 0.1%, respectively)

— *ibid.*, p. 97.

⁴⁹⁹ See LÉVÊQUE 2021, p. 127.

⁵⁰⁰ See PRASAD 2009, p. 47.

⁵⁰¹ CASSEE (2019, p. 244) reports that

smaller countries will have stronger incentives to become tax havens, as the influx of foreign capital is comparatively more relevant for them than the reduction of tax revenue from capital already present in the country.

⁵⁰² See PRASAD 2009, pp. 48-49.

because they require similar supporting services⁵⁰³ and, in some way, *those* tourists are conceptually similar to offshored capital: they seldom reside, yet find it convenient to “pass by”; moreover, «being small helps these countries to change the existing rules and laws quickly to react to new opportunities»⁵⁰⁴ arising on the international policymaking landscape. OFCs are carve-outs of spatial, exotic sovereignty where «globalisation is experienced as late-imperial travel culture» to be exploited first (in order to sustain the proliferation of deep financial networks ruled by increasingly wealthier onshore financial hubs), and demonised later (as soon as it becomes normatively convenient) by «epistemic communit[ies] of largely Western experts [who] are busily constructing norms in international tax policy and financial transactions *through newly constituted international authority structures*».⁵⁰⁵ As will be seen, the OECD stands prominently among the latter.

Tax havens properly defined, lacking the logistical and basic rule-of-law support that surrounds a-jurisdictional offshore financial centres instead (like London or the specially designated areas of Shēnzhèn, Riyadh, or Abu Dhabi) often face geographical and ill-governance obstacles to sustainable development and growth despite their appealing fiscal and regulatory benefits dedicated to foreign investors, to the extent that someone suggested that those havens should offer special “tax arbitration” services as well, as to “diversify” their related offerings portfolio.⁵⁰⁶ In order for such arbitration sites to work efficiently, a proposal was made that developing countries should join the baseline part of OECD members’ preferences, in return for

⁵⁰³ Check *ibid.*, p. 50.

⁵⁰⁴ *Ibid.*, p. 51.

⁵⁰⁵ MARSHALL 2009, p. 221, emphasis added.

⁵⁰⁶ BACKHAUSEN and MAZUMDAR 2018, p. 254.

factual burden of proof placed on developed countries;⁵⁰⁷ this was proposed in accordance with

the “weaker link” theory of global public goods, in which the total amount of global public goods is determined in reference to the least contributor rather than by the sum of total contributions. This theory is best exemplified by an analogy to a community building a protective dike around a city, where each citizen controls the construction of a portion of the dike on their land. The entire city will be flooded if any one landowner does a poor job building their portion of the dike or does not build the dike on their land. The wealthiest landowners with the largest homes would benefit the most from building the dike. Building a dike is expensive, however, meaning the poorest landowners would have little incentive to do so[, also because they possess less goods to protect]. By contrast, the wealthiest landowners have a large incentive to build the dike, but cannot do so alone. Rather, they need the poorest to build the dike on their land in order to protect their more valuable land. As becomes readily apparent, the solution to the problem would be for the wealthy landowners to pay the poorer landowners to build dikes to protect the wealthy landowners. The same [reasoning may be applied to] tax agreements[, if] the wealthier country receives cooperation from the poorer country that it prefers and, in exchange, concedes that close cases will come out in favor of the poorer country.⁵⁰⁸

In order to attract international investors, host States often provide tax incentives under bilateral investment treaties,⁵⁰⁹ and in that respect, it is legit to wonder whether tax confidentiality is part of the host’s obligations towards the investor. Generally, information on the host country’s legal and economic environment must be publicly and readily accessible to the investor, who shall in turn accept reasonable policy changes which they could expect or should have expected. When investors engage in morally unacceptable yet lawful practices of tax avoidance, they legalistically have the right to be made aware of what levels of coercion they may expect of state authorities over their conduct. Accordingly,

⁵⁰⁷ See ROSENZWEIG 2016, pp. 1238-1239.

⁵⁰⁸ Ibid., pp. 1234-1235.

⁵⁰⁹ Refer e.g. to KLASSEN 2020, p. 17; BENVENISTI 2017, p. 459.

retroactive legislation that violates the legitimate expectations of taxpayers is impermissible. This raises a number of questions, however, surrounding just what precisely constitutes the legitimate expectations of taxpayers when taxpayers are engaged in tax avoidance, and whether the described impermissibility is absolute or only cautionary.⁵¹⁰

Besides expectations on the applicable administrative fines or criminal charges for tax offenses themselves, investors might well rely on tax-related privacy rights and exclusive confidentiality arrangements with governments, whose one-off *ex post* violations cannot be accommodated under the rubric of social justice, as it is the system that has to change comprehensively, *ex ante*. As no tax exception can be systematically found in investment treaties, the BEPS project and collateral initiatives are likely to increase the number and momentum of substantial tax disputes under BITs;⁵¹¹ it is too early to assess investment tribunals' ability to cope with these new challenges, but for the sake of non-proliferation and with a view of countering the already problematic treaty-shopping trend,⁵¹² it seems not advisable to introduce a parallel system of tax-exclusive arbitration at this stage.

d Nordic-continental European jurisdictions and the US as precursors: Tax sovereignty and unilateral assertions of jurisdiction

⁵¹⁰ ALARIE 2015, p. 89.

⁵¹¹ This issue has been thoroughly explored in literature, most notably by Julien CHAISSE (夏竹立教授) at the City University of Hong Kong; *refer to* CHAISSE and MARISI 2017; CHAISSE 2016. For the protection of investments under bilateral tax treaties in the wake of the BEPS project, *see* GARBARINO 2019 instead.

⁵¹² On treaty shopping between tax and investment disputes, *see e.g.* CHAISSE 2015, p. 232. For an examination of treaty shopping in taxation strategies from an economic perspective, *refer to* PETKOVA et al. 2019 (p. 576, in-text citations omitted):

[w]hile preventing international double taxation, [double taxation treaties] shift taxing rights from capital-importing countries to capital-exporting countries, denying investors the benefits from lower source taxation. Moreover, in order to avoid high host-country withholding taxes on outgoing passive income, many multinational companies divert FDI via a third country with a more favourable tax treaty, a practice that has been labelled treaty shopping in [economic] literature. The OECD highlights that treaty shopping is one of the most significant sources of concerns regarding [its BEPS] project.

See also BROEKHUIJSEN and MOSQUERA VALDERRAMA 2021, p. 93, fn. 64.

While inter-jurisdictional *cooperation* in the field of taxation had been featuring consistently all throughout history, the actual *enforcement* of foreign tax claims was traditionally considered a taboo, on the verge of illegality. In common-law jurisdictions, for example, States expecting other sovereigns to enforce the former's claims within their own jurisdictions were regarded as inobservant of diplomatic comity, acting contrary to the so-called "revenue rule".⁵¹³ This deeply rooted custom was rapidly retracted by a number of States in the immediate aftermath of a colossal paradigm-shifter: WW2.

The first agreement appeared in 1950 as a multilateral convention among Belgium, the Netherlands, and Luxembourg (the Benelux countries) for tax collection assistance. Under the convention, the Benelux countries agreed to enforce the collection of tax in their territory for the foreign country. In 1972, the Nordic convention was signed with similar principles. Following the success of the Nordic convention, the OECD started to draft a new convention in 1988 to reverse the lack of cooperation between OECD countries in collecting taxes. At first, only a few countries signed the convention. Two decades later, the OECD opened the convention on MAATM for signature. In the first two years, about fifty countries signed the MAATM convention. By 2016, the convention had over eighty signatories. [...] One advantage of the convention is the flexibility that it offers to countries by reserving the right to provide no information or assistance in the collection of taxes. A country can exclude the collection of taxes in its jurisdiction either at the time of signing, ratification, or a later date.⁵¹⁴

Just like non-assistance to foreign countries in the enforcement of their tax claims was a truly consolidated custom which was wiped away (save for the reservations reported *supra*) in a matter of few decades (accelerated desuetude?), particularly in a number of civil-law jurisdictions, other international customs related to taxation may change relatively quickly, and they often do so under the aegis of the

⁵¹³ Read *e.g.*, with regards to two Canada-US tax disputes: *Reynolds*, pp. 125-126; *Pasquantino* (extensively). See further COLLINS 2009, pp. 147-157. Check also: *Ryan*, pp. 23-24.

⁵¹⁴ AVI-YONAH and XU 2016, pp. 203-204; see also PARIS 2003, pp. 158-159.

incumbent superpower, with other countries following suit – first its geopolitical allies, then “the periphery”. For example, a centuries-long custom prevented countries from taxing non-residents with no connection to them on foreign-source income, the US itself feeling bound to this custom to the extent that

in adopting the [FPHC] and [CFC] rules, [it did] not tax [foreign corporations controlled by US residents] directly, but rather tax[e]d the US resident shareholders on imaginary (deemed) dividends distributed to the shareholders. [... Today, t]he United States no longer feels bound by this rule[.]⁵¹⁵

and most other jurisdictions do not, either. Conversely, the US feels anachronistically bound to the old tenet that *natural* persons should be taxed based on citizenship, and thus on their worldwide income (as also evidenced recently via the enactment of FATCA, worldwide in scope).⁵¹⁶ Economic and migratory reality has long brought all jurisdictions to abandon the idea that they could tax the worldwide income of their non-resident citizens, but the US and Eritrea remain anchored to the past.⁵¹⁷ In ICL terms, they are persistent objectors to the subsequent practice (residency-based taxation) stemming from the original custom (citizenship-based taxation), as if citizenship was bearing the same connotations now as centuries ago. Individuals cannot parcel the unity of their legal personality as to disseminate it across jurisdictions like MNCs routinely do, therefore taxing their worldwide income is unfair, outdated, and nonsensical a policy.

e The initially non-incisive role of the OECD, the G20, and other (quasi-)IOs

⁵¹⁵ AVI-YONAH 2007, pp. 5-6.

⁵¹⁶ See further CHRISTIANS 2017^a.

⁵¹⁷ Refer further to JOGARAJAN 2018, p. 10.

The OECD is often labelled as a partisan club do to its membership made of “rich countries”, and its projects on taxation have gathered related criticisms over time. Still in 2002, «high income countries claimed almost 90 per cent of the total inflows of portfolio investment»,⁵¹⁸ and one of the most common objections to the OECD’s pretended neutrality is that it started to aggressively tackle tax havens only recently, once investment inflows had started to change direction and tax havens had already conquered a central place in the global economy, providing a well-oiled “wealth-industry” platform for the rich from those very same countries. In fact, the Organisation’s involvement in international taxation had started decades earlier, but centred on “peer-reviewed”⁵¹⁹ bilateral tax treaties as a means of FDI enhancement,⁵²⁰ and not on taxation as an issue of income redistribution, fairness, development, transnational crime, public-debt control, equality, and so forth. Nevertheless, debunking the opportunistic reasons behind this renewed interest in tax havens would not automatically delegitimise the positive outcomes of such interest, if there were any; unfortunately, by the end of this work I will have hopefully demonstrated that mentioned built-in bias conditioned not only the moral reception of the project, but most saliently, the misery of its design and of the authoritarian, élite-driven, rights-stripping deviation it has taken.

Initially, the OECD possibly intended to imprint a relatively soft good-governance turn to the excesses of neoliberalism, by warning that radical deregulation of the financial markets was leading to a chaotic and wealth-concentrating form of globalisation for the relatively few, thus running contrary to the declared aspirations

⁵¹⁸ CLARKE 2007, p. 237.

⁵¹⁹ That is, part of a system whereby «each member country reports on its [treaty negotiation and implementation results], and periodically the other members, and OECD technical staff, assess and comment on this performance» – WALKER 2004, p. 17.

⁵²⁰ See PICCIOTTO 2011, pp. 156-157.

of a globalised society, that is, of a world village built on free trade, reasonable levels of taxation *for all*, and widespread fair opportunities.⁵²¹ Beginning with its 1998 report, these early initiatives were mainly concerned with macroeconomic distortion effects attributed to tax havens in guiding incorporation preferences by MNCs,⁵²² which on the long run would have corroded healthy competition across jurisdictions to attract businesses based on the competitive quality of their socio-economic system (e.g. institutional framework, civil and administrative justice,⁵²³ job market, knowledge spillover) climate, and natural resources.⁵²⁴ Indeed, MNCs

break up the production chain into different links that occur in different localities, taking advantage of the free movement of capital and operations; thus, they can not only benefit from different standards of production, but also shape those standards and impose them on host governments vying for foreign money.⁵²⁵

The convenience of assessing the negotiating path which led to the AEOI as a *policy alternative* to the one which should have led to the outcome of a fairer and more

⁵²¹ See PALAN et al. 2010, p. 211.

⁵²² To exemplify, the «misallocation of resources through increased investment in activities that have lower pre-tax returns but higher after-tax returns» – CHOUDHURY and PETRIN 2019, p. 327.

⁵²³ Incorporation is also decisive in terms of private international law (also known as “conflict of laws”), in order to shield shareholders from any liability which is not contemplated in the (corporate) law of the seat of incorporation; ROTES (2013, pp. 19-21, emphasis added) reported an illustrative instance of attempted tax-related jurisdictional shopping, eventually frustrated by imperfect *locus standi* and a “last-minute” judicial call for coherence:

In Israel, [...] a District Court was [...] called to approve the filing of a derivative suit brought by Israeli minority shareholders of a company incorporated in the Dutch Antilles (for tax purposes) against the company’s controlling shareholders its and officers, all of whom were also residents of Israel. The complaint against the defendants focused on allegations of misconduct by the defendants, which allegedly inflicted serious economic damage on the company. Examined from the perspective of the substance-procedure distinction, [...] the *lex causae* was determined to be the law of the place of incorporation. [...] The Israeli court decided to frame the matter brought before it as one of extraterritoriality rather than to discuss the substance-procedure characterization. [...] Regarding extraterritoriality, the court ruled that a proper interpretation of the Israeli Company Law of 1999, which defines “a company” for the purpose of the statute as one that has incorporated under Israeli law, brings about the conclusion that those sections of the Israeli statute that concern a derivative action do not apply to any foreign incorporated entities, including the one in the case at hand. The court went on to reject the plaintiff’s argument that application of the foreign law, which forbids a derivative action, is inconsistent with Israeli public policy. In this context, the court emphasized that *the plaintiff, who enjoyed the tax benefits associated with incorporation in the Dutch Antilles*, cannot argue that application of Dutch Antilles law is against public policy.

⁵²⁴ Refer to PALAN et al. 2010, p. 213.

⁵²⁵ BENVENISTI 2017, p. 458.

effective taxation for MNCs as a matter of priority, is confirmed by the negotiating history itself at the OECD. In fact, it was the OECD's failure in eroding tax avoidance impartially (that is, without unduly favouring OECD members) that caused its own shift in focus towards individuals' tax evasion.⁵²⁶ Such a pivot, which was initially set as a rhetorical device to pretend being on-track towards eliminating tax havens despite the above-reported failure, happened by chance to become the new "flagship" initiative of the OECD after the financial crisis, when Western governments suddenly strived to gather extra resources from taxes and citizens sought regulatory answers. This is very revealing of the reasons subsumed under the OECD's priorities, corroborated by evidence that some exchange-of-information agreements signal nothing better than mock-compliance:⁵²⁷ the OECD was endorsing the call for gathering more money through taxation, as rapidly and certainly as possible, instead of addressing the complex and long-standing systemic challenges deriving from jurisdictional loopholes in Westphalian taxation.

Resultantly, later OECD initiatives on financial transparency and sovereign exchange of information represent the consequence of its failure in addressing the problem of tax havens (and offshoring more generally),⁵²⁸ starting with Switzerland and Luxemburg,⁵²⁹ which still thrive upon their tax industries nowadays. The failure was motivated by regulatory capture, too, with the OECD exonerating «accountants and lawyers when it came to creating complex structures, on the curious grounds that tax malpractice resulted from the demand for sophisticated products from taxpayers rather than from supply by professionals».⁵³⁰ This incapsulated a blatant lie:⁵³¹ the

⁵²⁶ See ROTBLAT 2018, p. 86.

⁵²⁷ See *ibid.*, p. 87.

⁵²⁸ Refer to PALAN et al. 2010, p. 230.

⁵²⁹ See *ibid.*, p. 214.

⁵³⁰ *Ibid.*, p. 231.

⁵³¹ Tellingly enough, MUGLER (2018, pp. 383-384) reports that:

more financial experts sit on corporate boards and “maximise” corporations’ efficiency, the more likely such entities are to engage in tax dodging and malpractice;⁵³² indeed, tax «avoidance leads to declining market values, unless the corporate board is skilled enough to use the extra money to increase growth opportunities».⁵³³ Simplistically put, regulatory capture is the GN’s counterpart to the GS’s phenomena of lawyering rent-seeking and corporate path-dependency.⁵³⁴

By that time, once realised the impossibility to jail the “big fishes”, the mantra became that if tax havens could not be eroded owing to their sovereignty, then as a minimum all cooperating States should have come together and started to exchange all information they could retrieve on the assets owned by private citizens (mostly, by far, “small fishes”) within their jurisdictions. Nevertheless, this reasoning presents a double fallacy: it shifts the burden onto billions of citizens, whose privacy is eroded preventatively and automatically; and it still fails to extend its reach over assets nominally “parked” in tax havens, paradoxically making such havens even more attractive to those individuals who can passively move their assets from jurisdiction to jurisdiction as they perform no productive activity in any of them. Indeed, this policy fails to extend its reach over MNCs that can move (and keep moving, in a sort of endless chasing game where authorities will always by definition fall behind) their profits across controlled entities incorporated in formally or practically uncooperative

Public Consultation Meetings take place at the OECD conference centre in Paris as part of the “transparent and inclusive consultation with business and civil society”, as required by the BEPS Action Plan. [...] While, in theory, everyone who has registered [...] can voice their opinions during the meetings, in practice this is not the case. The public consists mostly of private tax professionals, either working directly in-house for large multinational companies, or as tax lawyers for globally active law firms, or as tax advisers for globally active accountancy firms, or for associations representing large multinational businesses in general, or of a specific country, or of a specific sector. Most tax professionals at these events come from the [US], the UK and the Netherlands. This set of countries represents some of the largest capital-exporting countries of the world, the home of the world’s largest corporations and/or their European base[,] and the home countries of the two top financial cities of the world.

⁵³² See also MICHAEL and GOO 2019, p. 185.

⁵³³ Ibid., p. 194.

⁵³⁴ On these phenomena, check BRANSON 2012, pp. 373-374.

tax havens,⁵³⁵ as much as over those individuals who own offshore accounts in tax havens as to use such money just there or by transferring it to other havens (or even to cooperative jurisdictions where they can rely on reasonably stable political protection).⁵³⁶ Eventually, the only category of addressees of this bundle of initiatives is made of active citizens who hold offshore accounts in cooperative jurisdictions and use them there for productive activities genuinely related to such territories: given that in most cases part of the money held offshore is reinvested in the source country, and is anyway free from political collusion, this is arguably the most “innocuous” among the three categories.

f Three “Grotian Moments” towards multilateral responses

The “Grotian moments” of international information exchange in tax matters have been the global financial crisis⁵³⁷ and the massive leaks uncovering tax-haven operations; prior to that, the securitisation of public policing⁵³⁸ ensuing from the never-concluded GWOT represented another relevant turning point that prepared the terrain for the public opinion to take the dark sides of offshoring activities more seriously.⁵³⁹

Indeed,

⁵³⁵ Check BENVENISTI 2017, p. 456.

⁵³⁶ Inherent to “peer-reviewing” are the dangers of «binging foxes in to help guard the hen coop[, and] that cooperative compliance can become embedded in a network of professional relationships constituting a closed interpretative community» – PICCIOTTO 2015, p. 180.

⁵³⁷ PALAN and NESVETAILOVA 2014, p. 195; ALEGRE 2018, p. 204.

⁵³⁸ Check also FERRARI 2020, p. 522.

⁵³⁹ As MARSHALL (2009, p. 223) recounts,

[t]he sneak terrorist attacks on New York and Washington of 9/11 provided the basis for enhancing the search for anomalies in the international financial system to prevent terrorist financing. Previously, the anti-money laundering regulation of the 1980s and 1990s was aimed at tracing the illicit gains of the criminal underworld (particularly in the narcotics and arms trade) and of corrupt public officials. Since 9/11 the emphasis is on security through prior identification and exposure of suspicious transactions. Know-Your-Customer guidelines have been amplified by the new imperative to shut down terrorist-funded networks[, to the effect that] the negative spiel produced after 9/11 about sham havens, terrorist cells and the like, could lead to a disassembling of the confidentiality framework

[t]hrough incremental processes that establish security and safety as the ultimate goals of data governance, often enabled by the convergence of public and private interests, an *existentially threatened community* is created[.]⁵⁴⁰

and when it comes to tax data, all taxpayers can be paternalistically coerced or nudged into serving for the protection of such a supposedly “threatened community”. In order to fight its equally imaginary enemy, *all* taxpayers will thus be persuaded or forced to grant authorities permission to scrutinise their accounts and financial transactions *preventatively* and *de facto permanently*.

The sustained pace of the change, its coherent development subsequent to a rather sudden outbreak, its formalised intertwining with long-standing policy areas such as anti-money laundering and financial monitoring, the number and “weight” of jurisdictions engaged, the involvement of IOs, and the consistent—however hypocritical—rhetorical apparatus built therearound, are all factors that *taken as a whole*, make me argue in favour of *preliminarily* identifying a customarisation phenomenon in the making, triggered by the three Grotian Moments outlined *supra* and focused on the taxation of *individuals generally*. I will now draw a few more inferences from each of those Moments, as to confirm the accuracy of this preliminary finding.

i Whistleblowing as exposure from within: The Panama and Paradise Papers, Lagarde List, Luxemburg Leaks, et similia

that allows for attractive investment in the OFCs on the part of legitimate businesses and individuals.

“Just in time”, one year before 9/11, the OECD had published a report providing evidence to support the intuitive link between tax havens and money laundering, on the wake of concerted efforts with other organisations such as the Financial Action Task Force and the Financial Stability Forum – PALAN and NESVETAILOVA 2014, p. 194. More generally, *see e.g.* LOEW 2020, pp. 7-8.

⁵⁴⁰ OBENDIEK 2021, pp. 5-6, emphasis in the original.

High-profile revelations (LuxLeaks and Panama Papers) prove that a segment of the population in most countries actually lives in a parallel society, *removed from the norms* that others seek to comply with.⁵⁴¹

Such single monumental scandals⁵⁴² as the 2012's Lagarde List,⁵⁴³ 2014's Luxemburg Leaks ("LuxLeaks"),⁵⁴⁴ 2015's HSBC Suisse Files,⁵⁴⁵ 2016's Panama Papers,⁵⁴⁶ 2016's Bahamas Leaks,⁵⁴⁷ 2017's Paradise Papers,⁵⁴⁸ 2019's INA Papers,⁵⁴⁹ 2019's Mauritius Leaks,⁵⁵⁰ and 2020's FinCEN Files,⁵⁵¹ together with the protracted, coordinated whistleblowing actions by groups and organisations such as WikiLeaks, the ICIJ, and Anonymous,⁵⁵² exposed the real magnitude of the divide between "those who can" and the rest of us. In October 2021, the Pandora Papers, i.e. the largest-ever leak of financial secrets (with close to three terabytes of data pertaining to almost twelve million documents being released to the public), disclosed the wealth illicitly and systematically amassed through tax evasion—or, most often, tax avoidance—across fourteen jurisdictions by heads of States (and their spouses), corporate "leaders", top models, youtubers, "instagrammers", "tiktokers", celebrities from the

⁵⁴¹ HAUGEN 2018, p. 43, emphasis added.

⁵⁴² The following ones are representative only, and should be integrated with those mentioned in the tables retrievable from TANASIĆ and PETROVIĆ 2020, p. 152, as well as FERWERDA and UNGER 2021, p. 76.

⁵⁴³ See e.g. CHRISTIANS 2018, p. 419.

⁵⁴⁴ See e.g. KAYE 2016, pp. 1154-1158; 1182-1196; JONESA et al. 2018, p. 177. *Explore further* HARDECK and WITTENSTEIN 2018.

⁵⁴⁵ Refer extensively to ALLDRIDGE 2017, pp. 37-40.

⁵⁴⁶ See e.g. FIELD 2017; VAIL 2017.

⁵⁴⁷ Refer for instance to OMARTIAN 2018, pp. 49-53.

⁵⁴⁸ See e.g. YEOH 2018; BERGLEZ and GEARING 2018; HEEMSBERGEN 2018.

⁵⁴⁹ This scandal, involving Ecuadorian president Lenin Boltaire Moreno Garcés and his ties to a Chinese company laundering and offshoring money in Panama, caused the political friction that led to the arrest of Ola "Bini" at the Mariscal Sucre International Airport as well as to the immediate expulsion of the whistleblower Julian Paul Assange from the Embassy of Ecuador in London, who had—rather controversially, under PIL—sheltered him till then (2,487 days) from prosecution in both the UK and the US. For newspaper recounting of the facts, refer to COLLYNS 2019 and OTT 2019; for a legal analysis of diplomatic asylum and whistleblowing also referred to this occurrence, see OGG FÁBREGA 2020, p. 118.

⁵⁵⁰ Check e.g. SARIN 2019.

⁵⁵¹ Check for instance RAYAAN 2020; TJN 2020, p. 7.

⁵⁵² Read also DEMAS 2021, p. 318; JOARISTI et al. 2019; MORE O'FERRALL 2019, p. 271.

movie star-system, powerful *mafiosi* and global criminals, drug dealers, football champions, fitness trainers, pop singers, fashion designers, bankers, insurers, regulators, auditors, IOs' officials (including from IFIs and the OECD itself!), finance ministers, parliamentarians, supreme-court judges (!), secret-service representatives, military generals, and so forth, from two-hundred countries all over the planet, for a total estimated value of 32,000 billion USD.⁵⁵³

All together, these leaks and revelations provided governments with a leverage on the public opinion in order to step on citizens' rights, under the slogan of a fairer taxation system where no one would have been able to "hide money" offshore any longer.⁵⁵⁴ Hypocritically, this represented a somewhat sudden policy awakening,⁵⁵⁵ for instance,

[f]rom the time of adoption of the CFC rules (1963) until the time that the BEPS Action 3 (concerning CFC rules) was published (2015), only 30 [...] of the 193 countries around the world ha[d] adopted CFC legislation.⁵⁵⁶

Thus, one may conclude that the underlying policy objectives were (at least *also*) other from the declared ones. It is not by chance if, for Deleuze,

[w]e are moving in a direction whereby the direct monitoring of the person [as a physical, biological entity] is less relevant than monitoring their digital shadow[, and] given the revelations of Wikileaks, this observation now seems irrefutable.⁵⁵⁷

⁵⁵³ Check further GOODLEY et al. 2021; BIONDANI et al. 2021. Other top coverages were from the BBC and, in the Italian language, by the newspapers *Il Fatto Quotidiano* as well as *Il Sole 24 Ore*.

⁵⁵⁴ Read COCKFIELD 2020, pp. 383-384. See also BROEKHUIJSEN and MOSQUERA VALDERRAMA 2021, p. 101; MOON 2019.

⁵⁵⁵ On the ways (and reasons why) tax-information leaks have generated irrational and somewhat "privatised" responses on the policymaking side, read extensively OEI and RING 2018.

⁵⁵⁶ BROEKHUIJSEN and MOSQUERA VALDERRAMA 2021, p. 88.

⁵⁵⁷ BUCHANAN 2017, pp. 121-122.

As alienating as it may sound, governments capitalised on the aforementioned leaks to impress momentum to their campaigns about surveilling taxpayers worldwide, pretending to witness the events as exogenous agents with respect to such “money-hiding” practices rather than being exactly those policymakers who allowed them to occur in the first place. Several governments were even involved first-hand in those practices, either through corrupted individual political leaders (mostly in the GN) or through entire ruling classes as institutional actors (especially in the GS). In fairness, and regardless of the involvement of any particular government or leader in these tax-haven schemes, the fact that governments capitalised on the leaks in order to catalyse diplomatic processes to make taxes fairer is obviously commendable. However, the manner in which such a project was executed leaves ample room for criticism when it comes to accelerating on an already hyped policy area (tax surveillance) without bothering about engineering countervailing legal mechanism in terms of human rights and personal freedoms.

One may be fooled into believing that mentioned scandals were isolated incidents, or only surfaced from relatively small jurisdictions, but no claims would be more misleading; not only scandals multiplied—and are still mushrooming—from major jurisdictions, too, but they depict a seemingly ineradicable mechanism: that the 99% struggles while the 1% enjoys. As a result, while firms were most often allowed to obfuscate and bury their unethical conduct,⁵⁵⁸ the focus of policymakers’ counteraction pivoted to individuals, and not even starting from the most probable evaders: *all* individuals began to be targeted in an unprecedented campaign for “tax justice”.

⁵⁵⁸ Refer extensively to SCHMAL et al. 2021.

In June 2021, the NYC-based non-profit organisation ProPublica *unlawfully yet legitimately* obtained and then publicly released the tax records of dozens of American centimillionaires and centibillionaires, confirming the obvious truth that most of them paid little to no federal taxes thanks to their tax lawyers as well as to well-remunerated lobbying activities vis-à-vis policymakers.⁵⁵⁹ The revelation, popularised as “Secret IRS Files”, was no surprise to the US political establishment (nor—probably—to the US citizenry), but helps support the present author’s view that the tax privileges accorded to MNCs as legal persons not only allow the latter to grow disproportionately (eventually leading to *de facto* monopolies), but have a direct bearing on the natural persons’ 99%/1% divide, factually originating an above-the-law, self-referential, and regulation-immune global capitalist élite counterpointed by the law-abiding (or anyway law-constrained) rest of humanity (encompassing *inter alia* the “working class” and the indigent). Worse, even: while this happens, such “rest” not only remains *relatively and comparatively* poor, but its poverty is being surveilled as part of anti-laundering policies which *hit everyone indiscriminately in order not to hit the most relevant few big ones first and harder*. These tax-related surveillant programs expand their scope as well as surveilling tools (and thus operative capabilities, with a technical change becoming *de facto* a change in legal mandate) at fast pace; this trend stems from similar tendencies in the financial-regulation field, where preventive surveillance is for everyone but systemic change to the core of finance keeps being postponed indefinitely. The Anti-Money Laundering Directives (AMLDs), which transpose the Financial Action Task Force (FATF) Recommendations into EU law, stand as a case in point, with their Customer Due Diligence (CDD) procedure enacted

⁵⁵⁹ Refer to FATURECHI 2021; EISINGER et al. 2021.

under the pretence of protecting society from crime and [preserving] the stability and integrity of the [European] financial system. [...] T]his regulatory monster seems to grow insatiably, with every edition swallowing up new sectors, employed to execute surveillance work for the [Member S]tates. [...] The negative human rights introduced to protect individuals from state interference are swiftly avoided [...] by employing private parties to do the groundwork and offering them a legal basis to pass the gathered information on to government authorities.⁵⁶⁰

Both EU-wise and globally, the “war” on criminally recycled money is proving more harmful to common citizens than detrimental to criminals,⁵⁶¹ thanks to hyper-emphasised rhetoric which obfuscates poor results, lack of data, and chaotic enforcement under unsupported pretences of effectiveness which are deployed to justify even stricter surveillance measures on billion humans every day. Tax data leaks, which were supposedly pursued to inform the public about the 1%/99% divide and promote change, turned against that very same 99% as a powerful rhetorical premise for enhanced tax-surveillance regimes. I would frame this situation against wider paradigms of re-emotionalisation of public policy that work through unspoken assumptions on human nature in order to exploit the emotional component of sold-as-emergency lawmaking; mentioned urgency-premised lawmaking serves the ultimate purpose of compressing human rights and freedoms to introduce repressive, punitive measures against the poor.⁵⁶² Emotionalising the art of lawmaking to make citizens accept abuses they would otherwise repeal, turns it into a cynical pursuit of unreciprocated political agendas, most often captured by business élites. One of the most effect-producing consequences from an international legal perspective is the customarisation of deviated responses; in this case, the tax-surveilling policies enacted

⁵⁶⁰ LOEW 2020, pp. 2;40. *Refer also to* FERRARI 2020, pp. 523;525.

⁵⁶¹ *Read further* POL 2020.

⁵⁶² *Check e.g.* BARTELS and HOPKINS 2021, p. 274 ff.; *see also* WHITE 2021, p. 497.

in the aftermath of aforementioned leaks, in lieu of implementing thorough anti-tax-avoidance strategies. Debunking the systemic hypocrisy of operations of this sort, their ordeal to «bringing people’s emotions about law into alignment with the law» in a manner that «seem[s] “natural” because [it maps] onto [...] what are in effect embodied emotions», represents «a mode of resistance in itself: the better we understand emotional manipulation, the more effectively we can resist it».⁵⁶³ In fact, «[r]ule-following is a customary practice» whose substantive prescriptions can be easily internalised by a polity, as long as no matter what penalties and punishments their non-observance brings about, citizens are «urged to view them as [necessary and thus] freely chosen».⁵⁶⁴

ii The 9/11 and the GWOT: Tracking money laundering to defeat international terrorism

Since the advent of commercial algorithms, anti-money laundering has consistently featured as the premier pretence for corporations in banking and finance to track and pattern their customers’ digital behaviour.⁵⁶⁵ Along similar lines, language and policy priorities have witnessed a spillover from the counterterrorism domain to the tax-recovery one, unleashing conceptual linkages that endorse and normalise pervasive surveillance techniques in tax policy regimes. Regrettably, counterterrorism narratives in tax regulation are conceived to further the hegemonic economic interests of the élite by fabricating new invisible enemies rather than to hit money laundering where it most probably thrives: MNCs. To exemplify,

⁵⁶³ TEMPLE 2021, pp. 423-424.

⁵⁶⁴ Ibid., pp. 421-422.

⁵⁶⁵ See REICHMAN and SARTOR 2021, p. 154.

in the first months of the Bush administration in 2001, the US [...] undertook several policy changes that weakened efforts to track down offshore financial flows and tax evasion by American corporations and wealthy individuals[, ... which it] replaced with the image of a mysterious Arab other transferring money to sponsor terrorism.⁵⁶⁶

The International Monetary Fund (IMF) itself, whose role in contrasting tax evasion and avoidance has increased sharply over the last two decades, often frames taxation issues in a counterterrorism fashion⁵⁶⁷ which is only relevant for a very tiny minority of these occurrences, and mostly when it comes to individuals' evasion;⁵⁶⁸ on the other hand, corporate tax avoidance is mainly an issue of macroscopic ill-distribution of wealth and power, which calls for regulatory instruments of a truly different sort, freed from the logic of personal surveillance targeting individual citizens worldwide. One paper analysed the policy recommendations formulated by the IMF to three tax havens—Seychelles, Panama, and The Netherlands—in taxation matters, especially as far as compliance with internationally codified standards of transparency and cooperation is engaged; the unfortunate conclusion is that corporate tax avoidance is addressed as a second-tier concern, while most inputs are delivered with regards to individual, relatively small-scale evasion. The fact that all these three jurisdictions facilitate corporate avoidance but only the first two present evasion issues holds true, but all evidence pointing at The Netherlands being a global hub for corporate avoidance on a massive scale⁵⁶⁹ is disregarded:

[w]hile one could argue that the Netherlands does not have any loan programmes either with the World Bank or the IMF, the IMF has nevertheless issued and monitored policy recommendations to the Dutch government in various reports. Hence, *should the IMF be serious about its commitments to tackle corporate tax flight from*

⁵⁶⁶ ATIA 2007, p. 461, fn. 15.

⁵⁶⁷ Check YLÖNEN 2017, p. 6.

⁵⁶⁸ For instance, SCHLENTHER (2017) unveils the linkages between money laundering, counterterrorism, and anti-evasion policies across Africa.

⁵⁶⁹ See also KUŹNIAK 2017, p. 8.

*developing countries, it should address the international structures in which the Netherlands plays a significant role. [...] All of the case studies highlight the dependency of the IMF on policy assessments made by other IOs. [...] They underline] the need for an international dialogue that goes beyond simplistic directives and policy statements and takes seriously the loopholes left in the existing initiatives[, ... as to] underline the important inter-linkages between tax governance, politics of debt, and the overall economic policy monitoring conducted by the IMF and other IOs.*⁵⁷⁰

To examine domestic institutions again, the Executive's informal recourse to private entities in order to spy on citizens has a long tradition in the US and other jurisdictions, which is not confined to taxation and received a boost as soon as the conceptual lexicon of antiterrorism provided the best catalyst for cynical suspicion and freed-from-judicial-control public-surveillance purposes. In fact, governments are keen on outsourcing their privacy-infringing activities because

private companies are both cheaper and better positioned to collect intelligence on private activities than government officials[: ...] companies interact more frequently with the public and in ways that often require the sharing of private information. In terms of strategic benefits, private actors are legally and politically less constrained than the government. By relying on such companies for intelligence, *the Executive can benefit from a weak regime regulating corporate privacy while avoiding the political costs associated with "big brother" watchdog programs.*⁵⁷¹

When said reliance is placed upon transnational corporations, spying on transnational activities and "transnational citizens" (or on any citizen, but transnationally) is greatly facilitated, and regulatory loopholes widen, while judicial oversight is close to inexistent; at the same time, *fulfilling governmental expectations best positions legal persons to cement their unwritten do ut des ties with domestic and transnational bureaucracies.*

⁵⁷⁰ YLÖNEN 2017, pp. 15-16, emphasis added.

⁵⁷¹ KATZENSTEIN 2015, p. 299, emphasis added.

These suddenly legalised spying devices, first implemented within counterterrorism narratives, underwent a granitic process of normalisation whereby their legal standing is to date no longer questioned, or is questioned in part by a minority but starting from an overall government-friendly position.⁵⁷² Legal solutions first elaborated with the aim of tracking terrorism finance, thus insulating terrorism from financial lifelines,⁵⁷³ became subtly normalised and rerouted towards then-unrelated policy areas (among which, indeed, taxation). The scheme was initially motivated by the necessity to overcome the obstacles and inefficiencies inherent in classical policy-design alternatives, particularly sanctioning regimes:

[s]anctioning only the transactions of domestic banks likely would not suffice. Even if the [US] and the [EU] were to coordinate cutting their ties with a designated entity, a steady stream of finance and trade from other countries would likely fill the gap. In this respect, traditional domestic sanctions are inevitably self-undermining. In theory, multilateral cooperation holds more promise than domestic action for placing sustained economic pressure on designated entities. But for the same reasons that purely domestic sanctions are inadequate, multilateral agreements on sanctions tend to be elusive. [...] The new strategy of dollar unilateralism responds to these limitations. It targets foreign banks, which have the potential to bridge the gap between domestic and multilateral approaches: harnessing foreign banks prevents designated actors from easily finding new sponsors or new venues for their illicit activities. Moreover, with the cooperation of foreign banks, the [US] is less dependent on the cooperation of foreign governments and multilateral organizations. [...] Foreign banks offer the same advantages as domestic private actors: better access to private information and reduced costs of enforcement. [...] Furthermore, as revolving doors to international commerce and capital, foreign banks provide a vast repository of international financial information that U.S. banks may lack. [...] To implement dollar unilateralism, the government has deployed three innovative, overlapping tactics: financial sticks, high-profile blacklists, and direct diplomacy.⁵⁷⁴

The US' worldwide *tax* strategy abides by a comparable logic, with the difference that those being targeted are millions of US citizens and not a relatively

⁵⁷² Refer e.g. to HAKELBERG 2020, p. 76.

⁵⁷³ See KATZENSTEIN 2015, p. 310.

⁵⁷⁴ Ibid., pp. 310-312.

small number of suspected (US or non-US) terrorists or money launderers. In taxation, too, the US leverages on its economic might and political influence to compel financial institutions located abroad to disclose financial data, contrary to the laws of the States where those institutions are based.

All these processes, however, are operated within formal and informal supranational schemes devised within IOs and complementary or alternative cooperation fora. In this respect, it is of the utmost importance to operate one distinction. Policymaking in international taxation is handled by transnational bureaucracies, yet it is still somehow a centralised process: governments convene at the OECD and a handful of other IOs, at times together with NSAs, and *agree multilaterally upon initiatives to be later transposed into webs of bilateral agreements* and the like. Hence, such a mechanism is quite far from, e.g., the regulation of international securities and banking operations. The latter occurs through transnational regulatory networks that epitomise a

disaggregation of the [S]tate in the conduct of its international relations[, whereby] individual government agencies and actors negotiate directly with their foreign counterparts and reach informal understandings relating to their areas of responsibility.⁵⁷⁵

Mentioned disaggregation is a characteristic mark of our times, and surfaces from the same time-contraction that accelerates the emergence of customs (themselves hybridised by non-state actors): it is about the *parliamentary precarisation of the State*, to be conceptualised as its Parliament's inability to chase societal change rather than being engulfed within it, with no chance to react legislatively before being forced to transpose or ratify other entities' laws.⁵⁷⁶

⁵⁷⁵ VERDIER 2009, p. 115.

⁵⁷⁶ See e.g. LONGO 2017, pp. 258-259.

Needless to remark, the two international policymaking strategies (transnational bureaucracies and transnational regulatory networks) often represent a continuum more than two opposite strands of a segment, with regulatory areas blurring the distinction so much that the two almost coalesce around or converge onto common objectives. This has been exactly the case with taxation and banking, the rhetorical device used to collate the two being the most abused one of our times: “terrorism”.

The rapid expansion of offshore finance in the 1990s caused increasing concern in developed countries that OFCs might serve as havens for tax evasion, international securities fraud, money laundering, and terrorist financing. After the [9/11], developed [S]tates turned to a coercive approach to secure greater cooperation by OFCs. While these efforts focused primarily on terrorist financing and money laundering, they affected securities fraud cooperation as well. By 1999, the [FATF], an international body created at the G7’s initiative to combat international money laundering and terrorist financing, had launched a process aimed at identifying countries that failed to cooperate with international anti-money laundering efforts. [...] *The FATF criteria [...] expressly required countries to remove laws prohibiting the exchange of information and provision of enforcement assistance to foreign authorities.*⁵⁷⁷

This event-line is compatible to the one leading to AEoI in international tax policing, and indeed, the common root-cause and similar policy output signal remarkable degrees of convergence between the two policy areas, shaped by surveillance purposes—however allegedly justified—of (primarily Western) governments in the wake of 9/11.

Within this framework, multinational banks are agents of surveillance capitalism, too, not simply because they cooperate with governments in disclosing accounts information—in most cases they are forced to, and for a good cause—but because they externalise the financial risks inherent in operating globally onto their

⁵⁷⁷ VERDIER 2009, pp. 147-148, emphasis added. HELGADÓTTIR (2021, p. 190) confirms that more and «more regulatory and surveillance bodies acknowledge the overlap between tax dodging and money laundering».

customers by private-law contractual means that straightforwardly *bypass any procedural safeguard ordinarily available to said customers within each relevant domestic jurisdiction*. For instance,

foreign financial institutions may be subject to US investigatory demands for confidential information through subpoenas under the [2001 US Patriot Act] and the freezing and forfeiture of assets through correspondent bank accounts. The extraterritorial enforcement of [this and similar] laws has resulted in the imposition of hundreds of millions of dollars in fines on financial institutions and generated new legal and reputational risks in conducting international business. [... Thus,] *banks have attempted to reduce their risks by increasing their legal capacity to cooperate with foreign authorities*. Under new and revised contracts, customers have purportedly consented *ex ante* to banks supplying confidential information directly to foreign [S]tates and agreed to the freezing of their bank accounts based on a possible breach of foreign law. Financial institutions have also used new indemnity clauses to transfer to their customers the risks of non-compliance with foreign laws. The justification for using private law is that neither the domestic courts nor the legislature has provided adequate legal tools to protect financial institutions when those institutions are faced with extraterritorial demands by law enforcement or regulatory authorities in relation to their customers. *Such contractual provisions are controversial because they circumvent the legal procedures that would otherwise apply* in cases of international criminal, civil or regulatory assistance.⁵⁷⁸

Because data-retention laws are also enforced on financial institutions extraterritorially, the latter attempt at defying data-localisation laws whenever possible, storing customer information in “data havens” which are supposedly shielded from foreign enforcement agencies. This solution is part of broader trends whereby firms «carefully choose where to store data based on the location of users, fiber optic cable placements, storage cost, and national laws»;⁵⁷⁹ yet, it is not always possible to achieve, so that customer information is often left exposed to multijurisdictional

⁵⁷⁸ CHAIKIN 2010, p. 36, two emphases added.

⁵⁷⁹ WOODS 2018, p. 354.

claims, not rarely in the form of fishing expeditions – occurrence which materialises regardless of domestic privacy statutes, whose effectiveness is thus confuted.

iii The 2008 financial crisis: Recovering economic resources for public welfare

The creditors usually are in a somewhat stronger position since they can impose certain conditions on their debtors in order to be paid back, but they have to be careful not to be too harsh since they risk losing everything in the case of a sovereign default.⁵⁸⁰

Notwithstanding the foregoing, the reckless adventures of international investors in providing credit to defaulting sovereigns are less risky whenever, expectedly, those sovereigns can “exceptionally” turn to a large base of taxpayers for the sake of honouring their debts.⁵⁸¹ In times of recessions, expansionary economic policies should be preferred, while decision-makers often opt for increased tax burdens and trade protectionism.⁵⁸² That particularly the poorer citizens, in relative terms, are left pay for the crises mainly caused by the short-sighted decisions of wealthy élites is much more than a feeling, especially when it comes to the enforcement of “emergency” taxation policies that easily metamorphosise from supposed exception to new normalcy. To exemplify, when Greece defaulted in the aftermath of the global financial crisis,

the poorest Greeks witnessed a 333.7 percent increase in their tax burden between 2009 and 2013, contrasting sharply to the 9 percent increase for the tax-evading upper decile. [...] The sacrifices of Greek workers, pensioners, and the unemployed contrast sharply to the preferential treatment and financial privileges of the country’s wealthy élite, most of whom were able to evacuate their wealth from Greek banks by depositing it in Swiss bank accounts or routing their incomes via various tax havens like Cyprus, Luxembourg, and the Netherlands,

⁵⁸⁰ MATTHIJS 2014, p. 212.

⁵⁸¹ See TENNANT and TRACEY 2016, pp. 17;79.

⁵⁸² Refer to BALTENSPERGER and HERGER 2011, p. 412.

avoiding both taxes and a possible post-Grexit devaluation in the process. [...] The struggle over the burden of adjustment was no longer a question of how much European bankers would have to pay for the excessive lending they had engaged in during the lead-up to the crisis, but how much European *taxpayers* should be made to pay to alleviate the burden on their Greek counterparts.⁵⁸³

After all, one of sovereign debtors' most frequent forms of moral hazard concretises in «transferring borrowed money to rich people who are free to put it in tax havens overseas, exposing the country to currency risk and the budget to a loss of tax revenue»,⁵⁸⁴ with pro-rich distribution of tax burdens being equivalent to mentioned wealth transfer. In this scenario, a balanced EU (or EEA) tax system that monitors the most suspected rich whilst persuasively combating tax havens would have still prevented the evasion of the by-far-major part of their wealth, whereas the current indiscriminate exchange-of-information system would have concomitantly led to disclosing and taxing (thus, here, basically purloining) the totality of savings held abroad by little taxpayers, for whom those savings might have represented the last-resort “insurance” against family default or even life peril in an economically unstable country.

Either way, one shall be reminded of the fact that even when exchange-of-information frameworks theoretically hit everyone equally, élites have educational, logistic, and especially legal tools to turn personal (privately owned) wealth into corporate investments, that the poorer lack. Moreover, a tiny (although virtually impossible to quantify) percentage of information-gathering related to the ruling class

⁵⁸³ ROOS 2019, pp. 271;281. Something very similar happened e.g. in Ireland, with «changes to taxation [...] which place[d] a higher burden on ordinary income earners, while the low corporate tax regime [wa]s protected and *corporate* welfare enhanced» – DUKELOW 2016, p. 88, emphasis added. It is rather striking to note that the then-MD at the IMF, Ms Christine Madeleine Odette Lagarde, who repeatedly urged Greek taxpayers to pay all their taxes despite the collapse of Greece's economy, paid zero taxes on her own generous income; *check* WILLSHER 2012 or HERN 2012. Of course, inconsistencies of this sort never prevented her from receiving further career promotions and prestigious roles, such as her current function as the President of the ECB.

⁵⁸⁴ GHOSAL and MILLER 2004, p. 292.

is rendered ineffective by corruption, *de facto* or *de iure* immunities, power-complicity for preserving the *status quo*, pro-establishment administrative discretion and implicit bias, or even state secrets, and other lawful or unlawful shields and escape routes.

Even more unacceptably – and this is the true discriminating mark of the crisis, the public facet of indebtedness which makes recourse to taxpayers to recover resources plays out as a reversed mirror game with what happened to the poor and *their* indebtedness: the crisis represented the perfect leverage for credit institutions to raise the stakes for borrowing money,⁵⁸⁵ which entails more credible guarantors, more demanding security deposits, and... more pervasive scrutiny and legalised surveillance. Not by chance, defaulting on debt has long been regarded as a shame for individuals and households, while corporate recourse to bankruptcy, «though unfortunate, [has been] less frequently cast as a moral failure, but rather, a necessary vulnerability of participating in the market».⁵⁸⁶ Many

laws dealing with consumer credit and finance still principally are premised on the idea that people should try to pay their debt as much and as hard as possible before [the] law helps them. In comparison, laws dealing with business debt are premised on the idea that the legal system should promote the entrepreneurship gamble.⁵⁸⁷

To make things worse, in the US, creditors—e.g. the same corporations which had benefitted from lax bankruptcy laws for decades—publicly campaigned against softening the legal treatment for those citizens who go bankrupt not out of greed, but genuine (and demonstrable) protracted despair.⁵⁸⁸

⁵⁸⁵ See also CASE and DEATON 2020, p. 13.

⁵⁸⁶ FOOHEY 2021, p. 217.

⁵⁸⁷ Ibid., p. 223.

⁵⁸⁸ Refer to *ibid.*, p. 218.

Chapter 6

Surveillance through taxation as an instant custom:

Assessing customarisation



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a Defining tax surveillance

Expressions such as “tax surveillance” are frequently employed by institutions and scholars alike to refer to programs and procedures which are exogenous to the mechanisms this section intends to focus on; hence, it is important to make a few remarks on what the present section *is not* about. Tax surveillance as analysed here should not be confused with public-spending monitoring programs known as “fiscal surveillance” (implemented e.g. by the European Commission versus EU Member States as to ensure their finances are kept in good order, respecting the relevant parameters),⁵⁸⁹ nor with States’ programs of mere (passive) compliance-checking that literature usually refers to as social welfare surveillance.⁵⁹⁰ Further, it should not be mistaken for elementary state-level as well as local surveillance mechanisms for citizens simply to pay their dues,⁵⁹¹ nor for prerogatives exercised in the domain of customs tax by the EU⁵⁹² or other entities.⁵⁹³

Therefore, I am here concerned not with the surveillance *of* tax policies,⁵⁹⁴ but rather with surveillance *through* tax policies, or if one prefers, with tax policies *for* surveillance. Also, while I am concerned with legal provisions, I am far less so with operational manoeuvres⁵⁹⁵ which might be State-backed but are not officially sanctioned by that State’s laws. Other times, surveillance is not functionally meant at surveilling the populace generally, but rather at excluding certain segments of it from

⁵⁸⁹ See also MURILLO LÓPEZ 2017, as well as BROOS and GRUND 2018, on the “surveillance program” operated by the IMF. Refer also to BRUFF 2014, pp. 122-124, for a Marxist reading of the Troika’s fiscal “surveillance” of Eurozone members.

⁵⁹⁰ Refer e.g. to HENMAN and MARSTON 2008, p. 191.

⁵⁹¹ Refer e.g. to WRIGHT and RAAB 2021, p. 621.

⁵⁹² Check https://ec.europa.eu/taxation_customs/dds2/surv/surv_consultation.jsp?Lang=en.

⁵⁹³ See e.g. ALINK and VAN KOMMER 2016, p. 88.

⁵⁹⁴ See extensively VAN DEN NOORD and HEADY 2001.

⁵⁹⁵ Refer e.g. to DILANIAN 2020.

accessing a number of welfare benefits; even if these occurrences might feature an element of taxation,⁵⁹⁶ they will not be included here in that their main purpose is that of limiting access to welfare services per se (ultimately making targeted people leave), and not that of surveilling citizens by means of taxation.

In sum, surveillance through taxation refers to the situation whereby the State controls its citizens, or at least their socio-economic activities and movements, by means of taxation policies and their enforcement (thus regardless of citizens themselves actively requesting a specific welfare benefit), therefore availing themselves of taxation to surveil citizens *for other purposes* or to surveil them without a specific purpose but anomalously *through tax agencies*.⁵⁹⁷ Within this framework, States do not tax their citizens because they genuinely need their money (or money from *all of them*), nor do they tax them *mainly* to redistribute wealth, but first and foremost to take cognizance of their habits and oversee what they do, who they are familiar with, what they believe in, what their consumptions are, what their spending capacity or professional plans are, and so forth. As an Indian parliamentarian representing the state of Odisha reportedly put it, tax surveillance is nothing else than «[t]axpayers' money spent on snooping on taxpayers' privacy».⁵⁹⁸ In fact, to exemplify, algorithms designed for taxation purposes reflect the values and priorities of those who design them;⁵⁹⁹ as such, they are conceived and deployed to gradually dismantle as many public-welfare benefits as possible *for those who cannot afford their expensive, private alternatives*. They come

⁵⁹⁶ See e.g. NAGY 2019, p. 177.

⁵⁹⁷ See e.g. https://www.irs.gov/irm/part9/irm_09-004-006 for an exemplification of institutionalised surveillance operated through a tax agency.

⁵⁹⁸ Check KAZMIN 2018.

⁵⁹⁹ See also BINNS 2020, p. 10.

accompanied by harsher sanction regimes while narrowing the beneficiary pool, even as proponents of these systems justify their adoption in the language of modernization, personalization, and responsiveness.⁶⁰⁰

As the last premise for this chapter, one shall be clear about one aspect of the “AI revolution”: perusing data through one technology or another *should never be considered equivalent*; even though the legal mandate underpinning any scrutiny, regardless of the technology employed, might stay the same, this should never be the case. Investigations through algorithms, for instance, are not *and should not be considered legally equivalent* to non-AI-powered investigations, which had been already boosted by Internet and related technological developments. Algorithms bring about a *qualitative* change, not simply the ability to track *more* facts and discover *more* information, eventually pushing tax investigations «towards source-based rather than taxpayer-[produced] assessments of income».⁶⁰¹ Publicly deployed algorithms in tax matters allow for status determination, risk assessment, and population management,⁶⁰² but their “comparative effect” is even more profound: by chilling the 99%’s behaviour through surveillance,⁶⁰³ they contribute to the perpetuation of systemic grounds for economic unfairness whereby the rich, whose corporation-tied avoidance is deemed lawful, continue to externalise the risks of their recklessness, while the poor witness the absolute sealing off of any minimal and residual (and tax-wise negligible) room for inscrutable private autonomy beyond the letter of the law. Prior to the algorithmic age, millions of people across all societies have survived on casual, informal jobs placed down the underground (i.e., unreported or underreported)

⁶⁰⁰ ULBRICHT and YEUNG 2021, p. 3.

⁶⁰¹ WALKER-MUNRO 2020, p. 96.

⁶⁰² See PEETERS and SCHUILENBURG 2021, p. 6; check also MORMANN 2021, p. 55.

⁶⁰³ A diverse stream of scholarly interventions has long held that the pre-emptive monitoring of individuals’ movements and social ties may hinder their potential relationship and compress their identity formation, originating lasting, durable, and often irreversible “life-retraction” effects both for them individually and, where applicable, for the survival of democracy; read further ANDREW 2018, pp. 20;130;150;167;270-271.

economy, beneath the radar of tax agencies. In developing economies, in particular, this has always represented a survivalist strategy for millions of households.⁶⁰⁴ If algorithms spot and report these situations while contributing nothing towards the downsizing of onshoring and offshoring strategies for the rich to “lawfully” avoid taxes, they will factually install a noose around the indigents’ neck while the hangmen are left free. In the long run, the indigents’ behaviours will be chilled and more social elevators will face disruption.

b Tax surveillance as a multipurpose policy instrument

Prior to specifying what categories tax-surveillance activities can be sorted into with regards to their professed aim, it seems important to note that contemporary States tend to spend inadequate resources and efforts to deliver a tax surveillance which could truly hit the “big evasion”, while in fact the common wisdom that only the “little fish” is caught finds support in literature as well as in the way counter-evasion is conceived and operated. In geopolitics and geoeconomics literature, it is often wondered whether we will be «*condamnés au choix binaire entre le consensus de Washington et le consensus de Pékin*»,⁶⁰⁵ but as far as tax surveillance is concerned, this choice is a no-brainer: far from dichotomous, its rationale is validated at all latitudes. Later in this work I will often refer to the US, the EU, and China, but the example I would like to make at this stage borrows from Australia, where it factually appears there are «two different taxation laws for business: one for large corporations and wealthy individuals who can *negotiate their level of taxation*, and one for small businesses and individuals

⁶⁰⁴ See also TAHMASEBI 2015, p. 5.

⁶⁰⁵ BOILLOT 2021, p. 379.

who will be pursued by the tax office with interest and penalties».⁶⁰⁶ This politically sanctioned discrimination remains true in spite of evidence that—by admission of the Australian government’s own data—«\$7.53 of increased revenue would be returned for every dollar spent by the Australian Taxation Office taskforce chasing tax avoiders, while only \$1.94 would be returned through the Department of Human Services compliance activity around social security fraud».⁶⁰⁷ Not yet satisfied, Australia is rumoured to be on the verge of passing laws which would provide its tax offices with the right to access (potential and actual) taxpayers’ phones and intercept their communications.⁶⁰⁸

Although States do not avail themselves of tax surveillance because they genuinely need to fix their budgets through increased tax revenues from the 99%, the first reason why they “tax-surveil” is to raise more taxes in a generalised and aprioristic fashion, under the operative mantra of “doing what they can with the resources they are endowed with”. In The Netherlands, tax authorities independently relied on camera surveillance from the Dutch highways to conclude that an «employee’s reported information did not correspond with the locations where the car was seen with the road cameras, and therefore imposed additional taxes. The employee lodged objections» based on his privacy rights, and the Advocate-General agreed with him after the first and second-instance judgements had found against the employee;⁶⁰⁹ eventually, the Dutch Supreme Court subscribed to the reasoning of the Advocate-General.⁶¹⁰ On the same track, one can place the French scrutiny of social-media accounts⁶¹¹ that I already

⁶⁰⁶ HENMAN and MARSTON 2008, p. 197, emphasis added.

⁶⁰⁷ Ibid.

⁶⁰⁸ Refer to TILLET 2021.

⁶⁰⁹ WOLTERS RUCKERT and VAN SLOTEN 2016.

⁶¹⁰ Read further at <https://www.lexology.com/library/detail.aspx?g=42e7f76f-51a6-4141-8f6c-f623edf25773> and <https://www.lexology.com/library/detail.aspx?g=61da7a31-a84f-420f-aa9e-9c3fbf56b968>.

⁶¹¹ Refer to <https://www.bbc.com/news/world-europe-50930094> and PHILLIPS ERB 2018.

mentioned in the Introduction to this Thesis. Simultaneously in France, curiously enough, «[a]s minister for the budget, former cosmetic surgeon [Jérôme André] Cahuzac hid his wealth [in tax havens] at the same time as he was leading the government's fight against tax evasion»;⁶¹² the “Cahuzac affair” surfaced thanks to the Panama Papers, and sent shockwaves throughout the French electorate.⁶¹³

The second *declared* reason to tax-surveil is to assess one's right to welfare services. The Netherlands is again a cardinal paradigm, with one of the most intrusive welfare surveillance systems in the world (called SyRI) having been challenged in court and declared unlawful.⁶¹⁴ The system guaranteed no transparency on its algorithmic inferences, generating a significant (but unknown with precision by the public) number of false positives and keeping them under investigation for years; repercussions were felt on the mental-health side, too, with targets developing social anxiety disorders and panic attacks as a result of clinically relevant fear.⁶¹⁵ Moreover, it was designed secretly with no consultation with civil society, spiralling the poorer into further debt because of the presumption of guilt (welfare fraud, in this case) attached to their conduct.⁶¹⁶ While these were the legal issues at stake which prompted the court to rule on the unlawfulness of the system, what matters for the sake of this Thesis is that the Dutch Government had no need to improve the country's balance-sheet through these operations. In fact, all of these costly undertakings were engineered in one of the wealthiest jurisdictions on earth, where foreign corporations receive green-light to operate close to tax-free, and undisclosed arrangements are tirelessly stipulated to pave the way to foster “business-friendliness” and ease “code-based”

⁶¹² <https://www.irishtimes.com/news/world/europe/french-ex-minister-jerome-cahuzac-jailed-for-tax-fraud-1.2898333>.

⁶¹³ See MALAN et al. 2017, p. 98.

⁶¹⁴ See further TOH 2019; HENLEY and BOOTH 2020; FERRARI 2020, p. 533.

⁶¹⁵ Read for instance BEKKER 2019, pp. 291-292.

⁶¹⁶ Refer extensively to RANCHORDÁS and SCARCELLA 2021, pp. 7-8;26-33.

attraction of capital. The Government could have achieved comparable or even far higher welfare objectives by, e.g., prioritising anti-avoidance strategies and ensuring that corporations pay their fair share of taxes, regardless of the hypocritical claims that the Dutch economy would become unsustainable if taxes started to be applied to today's "haven industry". Those claims are indeed untenable as a fairer point of balance could be probably sought, and in any case, it is not reasonable that the benefits of a thriving "first-world" economy are only felt by a minor part of the population while the rest is heavily surveilled to ensure they do not commit "fraud" by accessing a few hundred euros of welfare protection more than what they would be "entitled" to. This is truly a paradigmatic example of the distortion that "welfare States" are witnessing throughout the West (...and not only) in order to favour the rich not simply by means of *taxation*, but rather, *surveillance through taxation*, meaning that under the justification of "fair welfare distribution" (including tax discounts, or tax-exempted services, tax reimbursements, deductions, etc.), governmental agencies acquire and merge extensive amounts of personal data which generate permanent records and might drag the unfortunate targets into preventative legal problems for years. It is no accident that when welfare agencies turn into surveillance spots (or are reasonably perceived as such), the poor tend to avoid interacting with them out of fear that their data will be shared with other enforcement agencies, eventually chilling their access to social care and benefits they are entitled to.⁶¹⁷ In the UK, too, many more officers and pounds are deployed to verify that no frauds are committed against the welfare system than to fight corporate tax avoidance and even evasion, despite the latter's cost to the UK's taxpayer scores higher.⁶¹⁸ The same occurs in Denmark: an exceedingly vast array of algorithmically automated welfare procedures has been implemented,

⁶¹⁷ Check SADOWSKI 2020, p. 150.

⁶¹⁸ See COLEMAN and MCCAILL 2011, pp. 4-7.

with Danish authorities justifying the impairment of citizens' privacy and autonomy with, *inter alia*, the possibility to optimise public-hospital operations (*sic*) as a result.⁶¹⁹ I am not quite sure that the easiest, fastest, cheapest, and *fairest* solution Danish policymakers could devise to attain wider medical treatments and increased hospital capacity was to scrutinise everyone pre-emptively through (costly) AI machines: what about starting from fighting corporate tax avoidance and ameliorating the tax system towards refined progressivity, instead?

The third official reason why tax surveillance is conducted is to identify or investigate other (non-tax) financial crimes—such as money laundering—and manage the security concerns—such as terrorism—related thereto.⁶²⁰ The powers of tax agencies, in this context, often include the planning and execution of covert surveillance and undercover operations,⁶²¹ *sua sponte* but also upon solicitation by and in cooperation with law-enforcement departments.⁶²² However, these multi-agency collaborations on tackling tax evasion as a proxy for clamping down on other financial crimes were recently declared illegal in India, where the Bombay High Court held that intrusive surveillance for tax matters and by tax agencies was not justifiable;⁶²³ it is relevant to note, though, that this Order concerned alleged financial crimes by conglomerates of corporations operating offshore, rather than individual taxpayers.⁶²⁴

Relatedly, the fourth reason invests the gathering of circumstantial/corroborative evidence to prosecute generic crimes, even far beyond the realm of financial crimes.

The fifth reason has to do with political aims – less nobly put, electoral gains.

⁶¹⁹ Read JØRGENSEN 2021, p. 7 ff.

⁶²⁰ Refer also to DOYLE 2013, p. 104. For an exemplification, check DEWAN 2014.

⁶²¹ See e.g. OECD 2017, pp. 36-37.

⁶²² See e.g. OECD 2006, p. 15.

⁶²³ See RAGHAVENDRA 2019^a.

⁶²⁴ See RAGHAVENDRA 2019^b.

For instance, in 1969, [US] President Richard Nixon, concerned that tax-exempt funding assisted anti-Government groups, pressed the [IRS] to create its own surveillance arm to «collect relevant information on organizations predominantly dissident or extremist in nature and on people prominently identified with these organizations». [...] The IRS distributed this information to the FBI, Secret Service, Army Intelligence, and the White House. The IRS conducted targeted audits and investigations of those on its list.⁶²⁵

The sixth and last reason I could identify is less straightforward and thus harder to demonstrate, as it relates to largely sociopathic tendencies of capitalist education⁶²⁶ which are widespread in captured state bureaucracies, inspired by the more or less conscious objective of chilling the behaviours and choices of the non-capitalist class compared to the capitalist one.

Part of what gets and keeps the rich rich is not only the hardly universal desire to become and/or stay rich, but a willingness to bend and break rules and compromise ethics to achieve or sustain hyper-affluence.⁶²⁷

This extreme sociopathy manifests itself in corporate form, too,⁶²⁸ and according to some, it also displays a univocal generational characterisation.⁶²⁹

c As technology improves, tax surveillance worsens

Not everything has to be equipped with sensors and connected to the cloud. Indeed, most things should not be. Strip out the sensors! Switch off the signals! Think of it: [...] Does this thing contribute to human well-

⁶²⁵ DONOHUE 2006, p. 1090, internal citation details omitted. *See also* GOITEIN and PATEL 2015, p. 13.

⁶²⁶ *See also* ROOTS 2004, pp. 14-15.

⁶²⁷ STREET 2014, p. 90.

⁶²⁸ *See* BRUECKNER 2013.

⁶²⁹ *Refer e.g., extensively, to* GIBNEY 2017.

being and/or social welfare? If not, toss it away!⁶³⁰

Tax agencies are often the custodians of the highest amounts of private information related to citizens among all governmental departments and services.⁶³¹ For the longest part of the history of humanity, and still well into the first half of the XX century, paper libraries embodied the primary repositories of collective memory, as well as the archives that tax collectors would frequently consult to improve their investigatory skills.⁶³² Contrariwise, tax surveillance as characterised here enjoys a shorter and slightly less physical history, mostly intertwined with technological development in the ICT sector; indeed, when «tax collectors and welfare agencies started using computers in the early 1960s, people started to worry about the privacy implications if all [their] transactions could be collated and analyzed».⁶³³ And yet, the matter has been consistently confined to in-passing mentions in engineering and, rarely, sociological studies, while no thorough exploration of its legal implications has ever been undertaken; in this sense, it stands closer to being *unstudied* than *understudied*. For instance, with reference to the studies on surveillance performed by Christian Fuchs, it was rightly noted that in between *corporate* managerialism as economic surveillance and public security apparatuses as *state* surveillance, he is unable to categorise instances of surveillance that fall in between those two boxes, «such as the enforcement of taxation».⁶³⁴

In fact, tax data shall be framed against a broader trend towards centralisation of data-gathering supported by extensive networks of surveillance, established under

⁶³⁰ SADOWSKI 2020, p. 172.

⁶³¹ BELLETT (2017, p. 1, fn. 1) provides the example of New Zealand, and discusses recent developments towards ensuring a fairer balance between taxpayers' privacy rights and the overall integrity of the domestic tax system.

⁶³² Read also JOHNSON 2020, pp. 55-56.

⁶³³ ANDERSON 2021, p. 859.

⁶³⁴ DOYLE 2013, p. 48.

the hypocritical rubric of improved “efficiency”,⁶³⁵ where the relevant question becomes then: efficient, maybe, but *whom for?*⁶³⁶ Recasting the wisdom of the Frankfurt School, here, too, «what seems to have been a democratization of information exchange is in fact an expedited élite-capture of information[-]exchange processes».⁶³⁷ The wealthy avail themselves of the law (at length) and of customised enhanced encryption coding to try to protect their privacy interests, thus disproportionately draining public resources in litigation and recovery costs, so that States are enticed into regaining funds through persecuting and overfining the poor cheapishly.⁶³⁸ Most tax agents are rewarded through ruthless incentives, and because the poor are easier to target with fines and likely unsuccessful in their legal resistance, they are frequently identified as the perfect route to higher stipends and benefits on the part of tax officers. Subsequently, under a pretention of “neutrality”, these data records where those poor scored badly are fed into algorithms which will learn to reiterate the original privilege disparity, repositing it in the form of an algorithmic divide between the rich and the poor.

The automation of tax-incompliance notifications, indeed, has worsened what was already known as “government anxiety”, triggered by the overwhelming pressure felt by the poor when it comes to interacting with a state bureaucracy that approaches them through oppressive and disproportionate forms of state-backed digitised managerialism.⁶³⁹ Their despair is eventually unleashed in the form of self-policing,

⁶³⁵ Refer e.g. to UK House of Lords 2009^a, paras. 89-91; see further LUFORD 1992, pp. 14-21;53-57;85.

⁶³⁶ INNES (2021) commented as follows:

For Britain’s neoliberal governments, [...] the more the [S]tate can be “got out of the way” or made more “business-like” where it remains, the better.[...] The seeds of state capture are sown in materialist utopias because as an article of faith they privilege the interests of one social group as the virtuous, transformative vanguard that will lead us to the Promised Land of seamless allocative efficiency.

⁶³⁷ DELANTY and HARRIS 2021, p. 95 (paraphrasing James Bridle).

⁶³⁸ Refer to PASQUALE 2018, pp. 33-34;39.

⁶³⁹ Read extensively RANCHORDÁS and SCARCELLA 2021, p. 21. For a few examples, check also WIDLAK et al. 2021, pp. 72-77. More generally, algorithmic processes of this type have been defined as “neoliberal managerialism”; refer to PASQUALE 2021^b, p. 43.

whereby in order to lower the probability of future problems (that is, of both sanctions and shame), the poor are made to believe in the fairytale of a fair, “just society” they should align themselves to, and they thus tend towards embracing the endeavour of performing as model individuals, of securing their non-suspectability.⁶⁴⁰ Citizens’ feelings hit even higher stocks of despair when the tax software employed by their government to file tax records or detect tax frauds is privately contracted and thus even less accountable—both legally and “epidermically”—to the citizenry.⁶⁴¹ Ideally, privately outsourced algorithms for public use should result from transparent procurement strategies and published code.⁶⁴²

If one takes, again, the example of the US, the most immediate finding is that little has changed since the times of Nixon, apart from the de-personalisation of tax-based persecution and its technology-aided massification, intensification, and, consequently, normalisation.⁶⁴³ Phrased differently, new technologies make an already borderline practice far more problematic, meaning: pervasive, powerful, comprehensive, depersonalised (but still personalisable, of course), rapid, steady, and collaborative (yet not participatory).⁶⁴⁴ When challenged in court, US authorities tend to replace the ruled-out technology with a slightly more acceptable one and restart the process by exactly the same procedures, underpinned exactly by the same rationale. Most recently, the IRS was advised that its surveillance software to spy on taxpayers was unlawful,⁶⁴⁵ so it simply replaced it with GPS data drawn from mobile apps,⁶⁴⁶ while keeping exactly the same *ratio agendi*, mindset, and *modus operandi*. When

⁶⁴⁰ Read also LIKHOVSKI 2007, pp. 683-684.

⁶⁴¹ See PASQUALE 2018, p. 38.

⁶⁴² See also COGLIANESE 2021, p. 46.

⁶⁴³ Check PASQUALE 2018, pp. 10-11;39-40.

⁶⁴⁴ See e.g. HATFIELD 2015, pp. 330-347 on technology-catalysed third-party handing-over of information to the IRS.

⁶⁴⁵ Refer to TAU 2020.

⁶⁴⁶ Refer to TAU 2021.

President Bush jr. prematurely announced his crusade against tax cheaters but was hastily halted by both tax-haven lobbyists (for corporations) and privacy advocates (on behalf of households), his Secretary of the Treasury only bothered to accommodate the first class of concerns.⁶⁴⁷ Two decades later, when President Biden announced his intention to “get serious” about chasing tax cheaters, his plan included the obligation for all US banks to report to the IRS any account whose total annual deposits or withdrawals were worth more than... 600 USD (*sic*).⁶⁴⁸ admittedly, that was not the most courageous possible testimony to his leadership to rapidly drive out the wealthiest tax evaders and avoiders.

d Courts’ unpreparedness, and societal implications for the 99%

Besides the preventive and de-individualised character of tax-justified searches which was already mentioned *supra*, these factual findings expose several grounds for political suspicion as well as legal fightback, which is not the same as to say that courts appear ready to catch up with these phenomena. To exemplify, while in most cases the targets of tax-surveillance programs are not notified of their “special observed” status, thus having their privacy impaired without even knowing when, why, and whom by, the CJEU decided that blacklisting taxpayers without consent or even notification is lawful as a matter of *proportionate* public interest.⁶⁴⁹ Amusingly enough, the criteria to be employed to assess “proportionality” (especially from a systemic standpoint) were not specified, which is quite interesting considering that surveilling an average

⁶⁴⁷ See further HAKELBERG 2020, p. 14.

⁶⁴⁸ Check for instance KELLY and RAPPEPORT 2021; LYBRAND 2021. To peruse the proposal’s technical details, access <https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf> (p. 88).

⁶⁴⁹ Puškár, paras. 112-117. For a summary of the Advocate-General Opinion in this Case, refer to ZANFIR-FORTUNA 2017.

taxpayer is considered proportionate despite the billions in revenues wasted at the same time due to legalised (and legalistic) corporate tax avoidance. The CJEU's is an extremely problematic take, whose potential far-reaching implications are not confined to individuals: groups of individuals may be targeted, too, adding to the precarious—if any at all—protection offered to natural-person groups in terms of privacy rights and interests.⁶⁵⁰

And yet, what matters the most for the sake of the present Thesis is that tax surveillance exposes the way the legal code of capital accords a preference to legal persons (and thus the 1%) over humans. In Russia, contrary to big businesses, SMEs are not subjected to digital tax surveillance;⁶⁵¹ although it is a policy to be welcomed,⁶⁵² it demonstrates higher regard for corporations than for individuals – in fact, the 99% would deserve to be exempted from surveillance under the same impact-based rationale. More generally, (tax) surveillance negatively alters

the power dynamic between the watcher and the watched. This disparity creates the risk of a variety of harms, such as discrimination, coercion, and the threat of selective enforcement, where critics of the government can be prosecuted or blackmailed for wrongdoing unrelated to the purpose of the surveillance. [...] Even if we are ultimately more concerned with government surveillance, any solution must grapple with the complex relationships between government and corporate watchers.⁶⁵³

In *Deutsche Post*, tasked with deciding whether it was legitimate on the part of German tax authorities to collect the tax history of a company's employees in order to

⁶⁵⁰ See SCARCELLA 2019, pp. 7-8.

⁶⁵¹ See MIKHALEVA et al. 2019, p. 342.

⁶⁵² However, for big Russian corporations, being surveilled also means they can be considered “bona fide taxpayers” (see <https://www2.deloitte.com/ru/en/pages/tax/solutions/tax-monitoring.html>), therefore even this policy may be regarded as playing favourably to them eventually. In any case, these scale-based distinctions are operated with regards to legal persons only.

⁶⁵³ RICHARDS 2013, p. 1935.

entrust such a company with quasi-public functions and thus “trust” *it* financially, the CJEU decided that the privacy violation had to be deemed proportionate in that the public aim of “good administration” may take precedence over individual privacy.⁶⁵⁴ From my viewpoint, the problem here should be phrased, again, in overall terms of good administration *relative to what*: in a jurisdiction such as Germany that loses dozens of billions euros in taxes every fiscal year due to corporate tax avoidance,⁶⁵⁵ should it be considered legitimate for the State to violate natural-person taxpayers’ privacy in the name of “good administration”, scrutinising employees—not even the shareholders!—in order to assess the trustworthiness *of their employer*? In fact, in any avoidance-prone jurisdiction, “good administration” seems a conceptual oxymoron! To be sure, my legal take is *not* that individual privacy can never be obscured by administrative overriding interests, but that violating natural persons’ tax privacy should be an absolute exception; indeed, *prior to having addressed corporate tax avoidance*, it stands tantamount to *surveillance through taxation* rather than upholding any expression of “public good”. This court case was even more severely captured by normalised capitalist mindsets, in that employees were being surveilled not even to address *their* conduct, but that of their corporate employer, displaying once more the privilege and limits of legal-person fictionalisms. Despite all this, the CJEU considered it right to overrule the German court and side with Germany’s capital-captured administration.

While most courts and lawmakers seem often ill-equipped to face these challenges and rather acceptive of this trend as an ineluctable consequence of

⁶⁵⁴ Refer extensively to LINDROOS-HOVINHEIMO 2021, pp. 121-127.

⁶⁵⁵ MEINZER (2019, pp. 94-95) recounts that

[i]n the German financial system, the amount of tax exempt interest-bearing assets held by non-residents ranged between €2.5 - 3 trillion as of August 2013. [...] Of the total interest bearing assets held by all non-residents in Germany, only ca. 1% was subject to information exchange according to the European Savings Tax Directive in 2013.

technologisation and digitisation, surveillance through taxation reigns unhindered through either the empowerment of tax agencies, or the conflation of their duties and capabilities with those of intelligence services and generalist law-enforcement agencies.⁶⁵⁶

Of course, just like most human phenomena, tax surveillance is not exclusively negative. Although I submit that its consequences are mostly chilling, degrading, and humiliating,⁶⁵⁷ especially for the most vulnerable citizens,⁶⁵⁸ when performed moderately it might also trigger windfalls such as an increased civic engagement with and popular support for the welfare state and its institutions; nevertheless, these positive effects are only felt in specific polities and domestically,⁶⁵⁹ whereas tax surveillance, even when pursued on the domestic plane at first, is also of relevance internationally as far as the human rights violations it entails are concerned.

e Narrowing penumbrae

Speaking in plenary on Monday 26 March 1984, Commissioner Narjes suggested that the possible creation of “data havens” would impede Community-based legislation to protect the individual Community citizen from abuse of his personal data in the course of computerized data processing. Does not the Commission accept that the existence of “tax havens” has never deterred legislators from introducing necessary taxation measures

⁶⁵⁶ See e.g., in India,

<https://www.indianmandarins.com/news/ideas-on-tax-surveillance-mushroom-in-official-debates/21997>.

⁶⁵⁷ A largely similar submission was forcefully and persuasively presented in HATFIELD 2017, p. 616.

⁶⁵⁸ For relevant comments on tax-contextualised “vulnerability”, refer to RANCHORDÁS and SCARCELLA 2021, p. 45.

⁶⁵⁹ For the example of Italy, see CERQUETI et al. 2019.

(including provisions to combat tax avoidance)?⁶⁶⁰

Despite the pretentious urgency for “recovering resources” being repeated like a mantra, States make recourse to their tax agencies (also) to spy on us and surveil us, engendering sense of guilt and desires for compliance that penetrate our minds profoundly.⁶⁶¹ This is because differently from law-enforcement and intelligence, taxation sounds *prima facie* neutral (i.e., applicable to everybody) and justifiably finalised. If States aimed at succeeding at a concerted action to increase their revenues rather than surveilling their citizens and directing the 99% daily choices, they would have pursued individual tax evasion through surveillance but only beyond a certain threshold, while targeting corporate avoidance with equal emphasis. Instead, they keep addressing the latter softly while “tackling” evasion by targeting just anyone indiscriminately, corroborating other evidence about mutual capture and shared elitism between corporate and institutional actors. States *surveil through taxation* not only because it sounds neutral and righteous, but because tax agencies can scrutinise *any kind of data* for taxation purposes, which makes them almost uniquely placed in the enforcement landscape in terms of freedom to intrude into citizens’ private affairs. Any piece of information that “falls” into their hands (or hard-disks) can be used by them *at least investigatorily*, «including material which may have been gathered illegally or subject to legal professional privilege».⁶⁶²

Interestingly, corporations have availed themselves of the governments of certain tax havens such as Ireland to lobby European regulators to soften privacy

⁶⁶⁰ Written Question No. 144/84 by Mr Michael Gallagher (CDI — GB) to the Commission of the European Communities (17 April 1984), 84/C 225/09, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1984:225:FULL&from=EN>.

⁶⁶¹ Read further LIKHOVSKI 2007, pp. 691-692.

⁶⁶² WALKER-MUNRO 2020, p. 95.

requirements for businesses to comply with and reduce their transparency exposure to public scrutiny, leaving for overseas “data havens” when unsatisfied;⁶⁶³ obviously, the overwhelming majority of individuals can do neither, so that they are routinely subjected to both privacy violations and tax surveillance. There is no theoretical reason why the mantra, too, that «full participation in society is tied to economic participation»⁶⁶⁴ would only apply to natural persons! One shall disagree with those who see the market as a privacy ally in relative terms just because the government, too, collects increasingly extensive amounts of information about us through taxation and other means.⁶⁶⁵ In fact, it is increasingly meaningless to distinguish privacy violations ostensibly for security and welfare from those operated for profit: States and markets regulate and even manage each other as mutually captured entities tied to a shared élite (which also happens to operate more and more transnationally thanks to capital’s digitisation and “apolidness”) whose exclusive interests are protected in the current configuration of (global) society.

From a wider sociological perspective, *very small and low-scale* evasion (e.g. the one related to so-called “moonlighting gigs” in the “underground/shadow economy”) in overall functioning economies was once a state-unsanctioned (and thus, by definition “free”) social elevator available to all, regardless of state policies, family constraints, and other limitations. Today, the digitalisation of money and an exceedingly penetrating surveillance through taxation are depriving individuals of even this residual space for private, “tax-free” autonomy. Indeed, the problem with (tax) surveillance and the perception thereof does not lie exclusively in the loss of

⁶⁶³ See ANDERSON 2021, pp. 860-861. Indeed, already a couple of decades ago, it was suggested that «data havens may be created [in the cyberspace] in the same way that tax havens may in the real world» (TSIAVOS et al. 2003, p. 358, drawing on the studies by Jack Landman Goldsmith); although the apparent dichotomy between the cyberspace and the “real world” has not aged well, the comparison between the two “havens” is still remarkable. In a similar vein, see EDELSTEIN 1996, p. 274.

⁶⁶⁴ MARÉCHAL 2015, p. 60.

⁶⁶⁵ Refer e.g. to CALO 2015, p. 680.

illegibility (which makes freedom, contestation, dissent, and therefore innovation, emancipation and hope possible) States rely upon to make taxation more “efficient”⁶⁶⁶— which, again, bags the “whom for?” and “to whose detriment?” fundamental questions. Another even deeper consequence invests the hibernation of “informal” social elevators that nurture themselves of healthy degrees of statelessness, pockets of autonomy where individuals can reinvent themselves before and after subscribing to state-sanctioned channels. Nowadays, in most countries, the average living experience has turned to acting under the (mostly correct) assumption that we are constantly shed wide-spectrum regulatory lights upon, whereby no space for privacy agency unknown to state algorithms is left,⁶⁶⁷ *with no chance or even reasonable hope for current or future occasional exception*. Casual labour, even at the lowest possible ends, has become machine-readable not only to faceless platform-employers,⁶⁶⁸ but before tax agencies just as much.

Roughly speaking, what once was a dialectic between institutional legibility and private illegibility, has now turned overarchingly to private sphere’s legibility versus public institutions’ illegibility (at least about the ways *their* algorithms can “read” us), evidencing «the fast[-]growing abyss between what people can know and what can be known about them»,⁶⁶⁹ but referred vertically to the relationship between citizens and state authorities. At odds with this trend,

[i]f we are to preserve public space as both a space of exposure and obscurity (which plays an essential part in the complex public-private relationship), the increasing technological possibility to make people and their behaviour—both in public and in private—more transparent should be regulated in a more sufficient way than has been until today.⁶⁷⁰

⁶⁶⁶ See BREWSTER and HINE 2013, p. 3.

⁶⁶⁷ See also DEVILLERS 2020, ch. 7.

⁶⁶⁸ Refer for example to GREGORY and SADOWSKI 2021, p. 670.

⁶⁶⁹ ZUBOFF 2020, p. 175.

⁶⁷⁰ GALIČ 2019, p. 203.

Tax authorities are stepping into this game, making the most of a simplistic rhetoric of “public good” that sits upon the exploitation of the poor’s privacy, while the wealthy keep flaunting their privilege more and more arrogantly as economic inequalities widen. Privacy violations in the name of public-policy priorities or the “common good” are supposed to be the exception rather than the norm,⁶⁷¹ so that the most worrisome aspect of surveillance capitalism through taxation is its smooth transition towards normalisation; as not much glamour was constructed around the shift, popular opposition has not concretised in any visible manner. These trends are terrifying and, as far as tax surveillance is concerned globe-wide, arguably unlawful – which is exactly what this Thesis seeks to demonstrate, with its challenge to the broken *systemic* premises of said surveillance.

The preceding sections exposed the surveillance-through-taxation ordeal conceptually, as well as through domestic or regional exemplifications when relevant. The next sections will build on this effort to transpose this concept internationally, applying it to ITL’s endeavours that are turning this typology of surveillance into widely accepted customary norms.

f International tax policing as surveillance

i Internet and algorithms as anthropological, ontological game-changers: Catalysing and automating information processing and transmission across borders

⁶⁷¹ See KANG and BUCHNER 2004, p. 256.

International taxation, as it currently stands, does not recognise taxpayers as data subjects, that is, as individuals endowed with privacy rights;⁶⁷² this shortcoming makes sense of the alarm-bell sounded by Jürgen Habermas, when he prophesied the «transmutation of [...] privacy into the domain of “public” issues regarding the management of socioeconomic life».⁶⁷³ In fact, the claim that the digital interconnectedness of policy areas and segments of daily life, with its widespread recourse to multiple digital apps and platforms, presupposes or demonstrates people’s repudiation of the centrality of privacy for their mental and social wellbeing shall be rejected.⁶⁷⁴ In truth, «the conceptions of “privacy” carried over from the analog world have not aged gracefully»,⁶⁷⁵ and call for a radical rethinking, especially when States’ coercive actions have been simply transposed from the analog to the digital world, inadvertently or deliberately transforming the very “ontology” of such measures, their intrusive potential, as well as their checks-and-balances.

The Internet has transformed quantitatively and qualitatively the fate of IL, its most profound ontology; in qualitative terms, it has redesigned—more or less radically, depending on the sub-field—not only the forms (statehood, jurisdiction, territory, border, sovereignty, liability, constitutional identity, and so forth), but also the very substance of international legal sources, transactions, authorities, investigations, and disputes. Against this backdrop, few policy areas have been transformed so radically by the advent of the Internet as international taxation – Internet being the enabler (or at least, the catalyst) of capital “digitised mobility” and thus immediate transferability and offshoring, but also the tool that triggered public outrage at tax-haven operations and provided the means for tax agencies to respond to

⁶⁷² See COCKFIELD 2020, pp. 391-392.

⁶⁷³ SOMERS 2008, p. 192.

⁶⁷⁴ See TOY and GUNASEKARA 2019, pp. 722-723.

⁶⁷⁵ DEVRIES 2003, p. 283.

such critical pressure. In that sense, Internet has been misused by both offshoring champions such as “serial tax avoiders”, and tax agencies which repressed selected phenomena disproportionately whilst leaving others virtually untouched. The Internet atomised the access to OFCs⁶⁷⁶ and tax-evasion practices, but their counteractivities even more so, unleashing unrestrained potential on the part of collecting agencies to exert control over “their” taxpayers, wherever in the world and at any point in time. While no doubt exists that tax agencies should improve their IT skills and AI equipment in order to enhance their ability to tax e-commerce activities,⁶⁷⁷ this cannot be used as a scapegoat to systematically tax-surveil any citizen through the Internet, regardless of the latter’s online or offline activities.

This abrupt shift towards global tax surveillance was enabled by dramatic technical improvements and cost-abatement in Internet-related surveillance techniques, and by information technology more generally. What is more, AI started to enter the field of taxation and assist governments in collecting, sharing, and comparing real-time financial data from taxpayers worldwide,⁶⁷⁸ in a massive and indiscriminate (“bulk”) fashion and disregarding any safeguards citizens may enjoy under domestic law (constitutional provisions, privacy statutes, foreign immunities, tort law, personality rights, etc.) and especially IHRL. In fact, tax data can feature among the most sensitive information about human beings,⁶⁷⁹ as it systematically pictures their habits, preferences, relationships, movements, and ultimately, their identity, agency, and even beliefs. The only levee against this phenomenon was embodied by uncooperative jurisdictions, which by resisting foreign interferences and upholding their sovereign rights, decided to continue sheltering tax data behind the

⁶⁷⁶ *Read for instance* VLCEK 2009, p. 268.

⁶⁷⁷ *Refer e.g. to* COCKFIELD 2001.

⁶⁷⁸ *Check* COCKFIELD 2020, p. 379.

⁶⁷⁹ *Check* *ibid.*, p. 380.

wall of bank and administrative secrecy. The paradoxical outcome is that whilst an irreducible bunch of tax havens continues to operate and is increasingly sought after by criminals worldwide as well as big corporations (especially tech giants and e-commerce players⁶⁸⁰), the rest of the world—that is, its very large majority—is dealing with a new, increasingly pervasive form of state surveillance. Such trend, adding to pre-existing surveillance practices from both state and non-state actors, is shaping an international customary norm which looks more and more Kafkaian as time goes by and information globalises, heading towards an altered surveillance-friendly legal governance of the relationship between States and their (and foreign) citizens.

Whilst tax havens have been attracting capital since the advent of capitalism in the XVI century, and already in the XIX century the most powerful countries endeavoured more or less successfully to assert their jurisdiction unilaterally over other States in order to collect taxes, a truly global cooperation in exchanging taxpayers' information has become feasible only recently with the dematerialisation of financial transactions and diffusion of Internet-related technology. Large-scale information-sharing and cross-checking arrangements in tax-related matters are problematic privacy-wise, while bearing overall significance for the architecture of IL, too, where practices of enforcement outsourcing by treaty result in shapeless, diluted forms of pseudo-cosmopolitan citizenship rebranded as hypocritically solidaristic projects of income justice and wealth redistribution.⁶⁸¹ The inability of world leaders

⁶⁸⁰ See e.g. JONES 2014, pp. 31-35.

⁶⁸¹ Relatedly, PEDERSEN (2020, pp. 146-149) notes that the opposite yet complementary imaginaries of market and justice globalism are bypassing the intermediary step of turning an internationalist view of societies fragmented along the lines of States into a wide-encompassing cosmopolitan spirit adjusted to the aspirations of a radical world citizenship. I may add that such aspirations would be indeed radical in that they would tend to deterritorialise rights and duties and enfranchise them from the boundaries of state administration. This way, a “cosmopolitan” market would face citizens' rights extended on the very same scale, and no social formation would take undue advantage of globalisation via exploitation, “bigness”, and dominance. Markets would be left incapacitated to capture States, and prevented from constraining them into tightening surveillance on individuals just for the sake of untying the hands of multinational corporate entities (through uneven and unfair taxation rights, in this case).

to actualise a *real* world citizenship gives way to decoupled scenarios whereby the “virtuous jurisdictions” get together to “demonise” their own citizens, and the “incompliant jurisdictions” benefit from this dynamic insofar as they are regarded as the last-resort solution by the actual “demons” of the former array. Regardless of the privacy risks inherent to—and of the just-outlined *teleological non-sense* of—most of these operations, algorithm-collected and algorithm-scrutinised big data is routinely *and increasingly* relied upon by tax agencies around the world—especially throughout Western democracies—to enforce their anti-evasion rules onto individuals,⁶⁸² pursuant to what one should read as a trending normalisation of surveillance through taxation.⁶⁸³

To exemplify,

Canadian authorities have been applying big data analytics for tax fraud prevention purposes – so-called “robo taxes” are being designed for the future development of automated taxation systems. Although, *stricto sensu*, tax evasion may not be entirely prevented, losses can be made up for by linking individual consumption with tax data. For instance, the ex-chief of the Financial Administration of the Republic of Slovenia proposed how the administration should link spending patterns with declared personal income tax declarations and use the existent legal possibility to impose 75 per cent [!] taxation on undeclared personal income.⁶⁸⁴

The combination of Internet and AI benefitted tax agencies remarkably, especially thanks to information asymmetries with taxpayers and the non-

⁶⁸² Refer e.g. to Government of Spain 2021, enucleating the relevant rules as per the *Resolución de 2021* (available online at

https://www.agenciatributaria.es/AEAT.internet/Inicio/La_Agencia_Tributaria/Planificacion/Plan_General_de_Control_Tributario/Plan_General_de_Control_Tributario.shtml) and the *Plan Estratégico* (available online at

https://www.agenciatributaria.es/static_files/AEAT/Contenidos_Comunes/La_Agencia_Tributaria/Planificacion/PlanEstrategico2020_2023/PlanEstrategico2020.pdf). See generally ALM 2021, pp. 328-329. Regarding China, see also OUYANG 2020, p. 48.

⁶⁸³ In fairness, there is still some resistance on the part of domestic courts – but definitely not on the governmental or administrative sides. For instance, in *Pintarich*, the Full Federal Court of Australia held that tax communications issued automatically on the basis of algorithmic outputs could not constitute “decisions” for the taxpayer to comply with; refer to NG et al. 2020, pp. 1056-1058. This is perhaps exaggerated on the conservative end, but it does vividly outline the tension between old-fashioned tax rights and new technological decision-making processes.

⁶⁸⁴ ZAVRŠNIK 2018, pp. 140-141.

accountability of both algorithms and state agencies themselves to taxpayers for privacy violations. The process canvassed here is not that algorithms, fed with large quantities of records on *past cases* of tax evasion and avoidance to then “learn by themselves”, draw a list of situations and targets potentially at risk so that data about *those taxpayers and instances potentially at risk* is shared across governments. This, in itself, would already prove fraught with shortcomings, because of the internalisation of a relationship—that between tax agencies and taxpayers—which is quintessentially domestic and framed within an overall rubric of rights and duties internal to a country and its specific legal system. However, it would still “teleologically” make sense, in that it would probably result in the identification and prosecution of major evaders first. Instead, the mechanism discussed in this Thesis is even graver: big data is collected indiscriminately and shared—equally indiscriminately—with other jurisdictions the taxpayer is not even aware of, under the slogan that “one never knows what one may find and therefore it is legit to fish broadly”; subsequently, this data is analysed by AI devices of each tax agency independently (or even jointly) in search for “suspicious” behavioural patterns.⁶⁸⁵ Even without considering the potential social-group discriminations that might originate from or be perpetuated through the employment of algorithms, the fact that AI is used to cross-check data acquired on all taxpayers (or anyway, millions, soon billions of them) across dozens of jurisdictions is already, per se, extremely severe from a moral *and legal* standpoint. In the US alone, «tax authorities cross-reference a taxpayer’s refund request against billions of records from public and commercial databases to catch the tax cheats».⁶⁸⁶

The only technological development to the benefit of taxpayers’ rights is the blockchain, that at least ensures the traceability of data and offers taxpayers the chance

⁶⁸⁵ See COCKFIELD 2020, p. 382.

⁶⁸⁶ Ibid.

to check the validity of their own recorded information⁶⁸⁷ through so-called “smart disclosures”.⁶⁸⁸ In the near future, any exchange of tax information between governments might be thought of and redesigned as a GDPR-compliant smart contract whose linear and simple rules are translated into code language and channelled through AI-powered machines with less or no human oversight.

ii The renewed role of the OECD, beyond the traditional “rich countries’ club”

The OECD Global Tax Forum,⁶⁸⁹ established in 2000 and administratively semi-independent from the OECD itself, pursued the BEPS Project and developed the CRS⁶⁹⁰ starting 2013 and 2014 respectively, in response to solicitations by the G20.⁶⁹¹ Further, the Multilateral Instrument (MLI) applies the recommendations of the BEPS Project to 83 signatories and amends accordingly the hundreds of Double Taxation Treaties among those signatories (most of which were already modelled after the 2012 OECD Model Tax Convention on Income and on Capital).⁶⁹² Despite resulting from work performed within this IO and never formally negotiated—let alone adopted—by States, the OECD Model Convention is of extreme influence on several procedural

⁶⁸⁷ See *ibid.*

⁶⁸⁸ See CORRALES et al. 2019, pp. 198-199.

⁶⁸⁹ Aka “Global Forum on Transparency and Exchange of Information for Tax Purposes”.

⁶⁹⁰ More formally known as “Standard for Automatic Exchange of Financial Account Information in Tax Matters”.

⁶⁹¹ See *extensively* SCHUKNECHT and SIEGERINK 2021. In 2014, the G20 endorsed the High-Level Principles on Beneficial Ownership Transparency, but implementation remains vacant, starting with G20 countries themselves (MARTINI and MURPHY 2015, p. 7). As BECKETT (2018, p. 88) put it,

[t]he ten Principles appear to resonate with an almost biblical authority, as if carried down the mountain on stone tablets, but on closer examination are less than they seem – though are almost certainly what the G20 intended them to be.

⁶⁹² JANSEN et al. 2020, pp. 296-298. Pursuant to the OECD Model, «[t]he taxing right of the source country is acknowledged, but may be restricted. The taxing right of the residence country is confirmed, but is conditional on the obligation to eliminate possible double taxation» – SCHREIBER 2013, p. 14. MUGLER (2018, p. 382, in-text citation omitted) observed that this Model Treaty,

although technically soft law, informs the content of [bilateral tax treaties] in a way that is [...] “surprisingly self-enforcing”. When changes are made to the OECD Model Treaty, these changes are often incorporated into domestic law and given direct effect by tax administrators and courts, even if the bilateral tax treaties are not renegotiated.

and substantial aspects of the relationship between natural-person taxpayers and their tax administration. In the EU, for instance, the ECJ (in *Berlioz*) concurred with the Advocate-General that the Model, and even the Commentary thereto, can and should be used as guidance to illuminate the intentions underpinning EU tax law.⁶⁹³ This exemplifies cardinally the impact that transnational bureaucracies' outputs, codified as soft law, may exercise on global tax governance and directly on citizens worldwide.

As for the Standard, in turn modelled after the FATCA,⁶⁹⁴ it adds to the previous “on-demand” EoIR standard⁶⁹⁵ and provides the framework for the *automatic* disclosure of banking information, thus impacting individuals and businesses alike.⁶⁹⁶ However, whilst businesses enjoy lower expectations of privacy, the subject-scope and geographical coverage of the violation of individual privacy introduced with the Standard is unprecedented in history. Cogently, after experimenting for some years with on-demand exchanges, the international community directly tapped into the FATCA and other earlier automatic-exchange solutions, thus skipping any potential intermediary scheme – like the “Rubik model” which had been proposed by Switzerland to automate exchanges while offering opt-out options for ensuring privacy protection.⁶⁹⁷ As a result, quite hastily,

⁶⁹³ Refer further to ARGINELLI 2018, pp. 61-62.

⁶⁹⁴ For example, FERREIRA DE ALMEIDA (2015, p. 226, three emphases added) explains that Brazil's TIEA with the [US] was primarily based on exchange of information *upon request*. But on September 23, 2014, the two countries agreed on the *automatic* exchange standard through an [IGA], whose main goal was to expand the TIEA's scope *to coalesce with FATCA*.

⁶⁹⁵ On the AEoI standard, refer e.g. to NEVE 2021, pp. 89-95.

⁶⁹⁶ See also TOURNIER 2017, p. 62. For comparative notes on the FATCA and the CRS, see LEVINE et al. 2016; check in particular this passage:

the [US], as a non-signatory to the CRS, receives certain unique, favorable treatment ([...] CRS exempts the U.S., a non-CRS signatory, from recharacterizing financial institutions as nonfinancial entities. Such recharacterization rule was designed to prevent the use of non-signatory jurisdictions to circumvent CRS reporting obligations. The U.S. is the only non-signatory jurisdiction that receives the exemption), which, combined with some features of FATCA, raises a valid question of whether the U.S. is becoming the big black hole in the global transparency network that it pioneered in building.

⁶⁹⁷ Refer further to BOURTON 2021, pp. 170-171.

[t]he G-20 finance ministers endorsed [the Standard], as did thirty-four OECD member countries and several non-member countries. The [S]tandard requires [S]tates to obtain specific financial account information from their financial institutions and automatically share it with other [S]tates on an annual basis. In addition, more than 101 jurisdictions have publicly committed to implementing an automatic information exchange, with more than fifty-five of them committing to an ambitious timetable beginning in 2017 (early adopters).⁶⁹⁸

As provided for in the Standard, the Multilateral Competent Authority Agreement (MCAA), specifying what information will be exchanged and when, was signed in Berlin on 29 October 2014 to automatically exchange information in line with Article 6 of the 2010-amended MAATM Convention.⁶⁹⁹ Moreover, BEPS Action 13 recommends countries to adopt the CbCR scheme, under which very large

multinational firms for the first time would need to disclose to home and foreign tax authorities their tax and other payments in every country where they operate. [...] Unlike FATCA and CRS that try to reveal hidden bank accounts to combat offshore tax *evasion*, CbCR is directed at helping governments identify risks of aggressive international tax *avoidance* for possible auditing.⁷⁰⁰

From a comparative evasion-avoidance perspective, LI⁷⁰¹ noted that the 2010 edition of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations mentioned the allocation of international tax base and the prevention of double taxation as its objectives, leaving the prevention of tax avoidance or artificial income shifting through transfer pricing aside. This improved only slightly in the 2017 edition, but to compensate that, the 2021 edition of the relevant UN Manual⁷⁰² has incorporated further specifications on transfer pricing *as tax avoidance*.

⁶⁹⁸ DAGAN 2018, p. 157.

⁶⁹⁹ «Originally developed in 1988 to set an international standard on exchange of information on request and open it to all countries, the convention had little impact until its 2010 amendment. Since then, more than sixty countries have signed it» – Ibid., pp. 155-156. The 2010 Protocol amending the Convention entered into force on June 1, 2011.

⁷⁰⁰ COCKFIELD 2020, p. 385, two emphases added.

⁷⁰¹ 2012, p. 72.

⁷⁰² UNDESA 2021; specifically about China, *check* p. 557 ff.

Eventually though, while the information-exchange initiatives rapidly hardened into treaty law, the CbCR was long discussed, remained soft law, and gained uneven support,⁷⁰³ to the extent that the new emergency with corporate taxation seems to be their “double non-taxation” rather than their “non-double taxation”.⁷⁰⁴ After all, this could be easily envisaged: in IOs’ working,

output types are likely to be associated with certain output instruments: declarative policy is almost certain to be soft law, whereas regulatory or administrative policies are likely to be hard law.⁷⁰⁵

Of course, this is problematic practically (for compliance), not just theoretically (for justice);

[t]he argument that (some of) the [international tax] coordination rules [...] are customary international law, i.e., applicable even in the absence of a bilateral tax treaty, is [...] mistaken: it overlooks the fact that [S]tates enter into and comply with tax treaties out of self-interest only.⁷⁰⁶

Other authors advance even bolder claims, postulating that no international custom would be at play within the ITL regime because even when States showcase deference to (selected aspects of) such regime, they anyway tend to mask their *opinio iuris* behind a more cynical and in compliant *opinio necessitatis*:⁷⁰⁷ while I disagree

⁷⁰³ Refer to DAGAN 2018, p. 162. See also JANSKÝ et al., pp. 135-136.

⁷⁰⁴ Check e.g. DE LILLO 2018, p. 3. This is “new” as an emergency, meaning that it remains unaddressed by BEPS and related projects, but not in the sense that the “double non-taxation” dynamic is per se novel; in fact, check e.g. RAINSFORD 2011, pp. 79-80.

⁷⁰⁵ TALLBERG et al. 2016, p. 1089, emphases removed.

⁷⁰⁶ BROEKHUIJSEN and MOSQUERA VALDERRAMA 2021, p. 90. Notably, thresholds in bilateralism (e.g. on what accounts should be disclosed to either party) are arranged in accordance with those same self-interest criteria, as much as power-politics.

⁷⁰⁷ Refer e.g. to GARCÍA 2019, pp. 332-333. Of course, the two expressions doctrinally come together in the *opinio iuris sive necessitates* formula; however, the fact that the second part is seldom reported might testify to the prevalent idea that customs should be supported by a sincere and coherent sense of legal obligation rather than by a tactical feeling of constraint or realisation of practical unavoidability out of “peaceful coexistence”. These Austrian diplomatic notes referred to most recent ILC elaborations on the ICL dossier are enlightening in this respect:

with the all-encompassing scope of such claims, I do concur with the importance of distinguishing genuine belief from hetero-compelled normative advertising⁷⁰⁸ with regards to *each and single* norm one intends to scrutinise. Indeed, all too often, States «seek to use the corporate form of the IO, to obscure their own role as voters in multilateral fora or implementers of UN mandates»⁷⁰⁹ to the contrary effect, or to conceal their actual “belief”. Combating tax evasion *has customarised*, and doing so (and more) through tax-related surveillance *is customarising rapidly*, but I concede that States’ multilateral, bilateral, and even unilateral impetus against corporate tax avoidance is mere hypocritical façade – all the more so in comparative terms, if one considers tax agencies’ aprioristic treatment of individuals!

iii *China as an unexpected champion of multilateralism, international lawmaker, and even “norm entrepreneur”*

Transfer pricing is a structural cause for factual indeterminacy in international taxation,⁷¹⁰ as well as a major drainer of tax revenues; it occurs, for example, when MNCs shift profits by

moving valuable [IP] to low-tax jurisdictions and then charging artificially high licensing fees to related companies in high-tax jurisdictions. The related group member in the high-tax [S]tate gets a

Austria regrets that neither the [D]raft [C]onclusions nor the [C]ommentary discuss the significance of the second aspect of the subjective constitutive element of customary international law, the *opinio necessitatis*. The term “*sive*” in “*opinio iuris sive necessitatis*” has a disjunctive function which gives the *necessitas* a separate status. Doctrine has shown that certain, otherwise unlawful conduct of states was considered to be politically, economically or morally necessary. The commentary should address the question of the separate function of the “*opinio necessitatis*”.

– ILC Report on the Work of its sixty-eighth Session, Chapter V (“Identification of customary international law”), Written comments by Austria, https://legal.un.org/ilc/sessions/70/pdfs/english/icil_austria.pdf, as also retrievable from ILC 2018, p. 3. In other contexts, however, “or” can be—perhaps improperly—used more conjunctively than disjunctively (or at least, we cannot be sure which solution is correct); *see for instance* KRITSIOTIS 2009, p. 304, fn. 21. For another interesting example of would-be *opinio necessitatis*, but in the law-of-the-sea realm, *refer to* VUKOVIĆ 2020, p. 605.

⁷⁰⁸ Check also CAPPELEN 2001, pp. 109-110.

⁷⁰⁹ MÉGRET and BOON 2019, p. 7.

⁷¹⁰ See e.g. BOGENSCHNEIDER 2016, p. 77.

large deduction, and, by design, the recipient of the fee is taxable in a low-tax [S]tate. The group's overall profit remains the same, but it saves tax due to the rate differential.⁷¹¹

One decade ago, before enacting stringent rules on transfer pricing, China was a major victim of this phenomenon, due to foreign companies reporting losses hidden behind transfer pricing whilst benefitting from preferential treatment from the PRC government.⁷¹²

The remarkable growth of China's economy over the last decades shifted the country's priorities and preferences in international cooperation on capital control⁷¹³ as well as taxation matters. Inward investments figures were already inflated due to round-tripping,⁷¹⁴ but the unabating rise of China resulted in financial capital being increasingly exported in compliance with the imperialist land-investment-infrastructure axioms of capitalism (the so-called "spatial fix"),⁷¹⁵ to the extent that outward investments no longer represent the exception.⁷¹⁶ As it started to stagnate demographically as a result of the one-child policy, and as it moved from a manufacture-oriented to a service-centred economy (especially domestically),⁷¹⁷ and from a capital-importing⁷¹⁸ economy to a capital-exporting one, with investors accordingly starting diversifying their investments more aggressively in order to reduce their domestic risks,⁷¹⁹ China reoriented its taxation strategy with the aim of keeping as much capital (and people) as possible within its borders.⁷²⁰ To achieve such

⁷¹¹ MASON 2020, pp. 357-358. *See also* LÉVÊQUE 2021, pp. 127-128, and TIROLE 2018, pp. 571-573.

⁷¹² *See* LI 2012, p. 82.

⁷¹³ *See* GALLAGHER 2015, pp. 182-185.

⁷¹⁴ *See* CHEN 2013, p. 200; PALAN et al. 2010, p. 181; BROWN 2008, pp. 46;50;57-59;109.

⁷¹⁵ *Refer e.g. to* CARMODY et al. 2021; *cf. further* ZHANG 2014.

⁷¹⁶ *See also* SVARTZMAN and ALTHOUSE 2021, pp. 11-14.

⁷¹⁷ BROWN 2008, pp. 65-67.

⁷¹⁸ *Cf.* WEI 2000.

⁷¹⁹ Because capital markets are still generally unfree in China, investors in the Mainland tend to rely on domestic consumption, and Chinese consumers tend to be overfocused on savings; this has been the norm for a long time. *Check generally* AMIGHINI 2020.

⁷²⁰ *See further* BRONDOLO and ZHANG 2017, pp. 87-88.

an outcome, increasing the efficiency of its tax administrations and related agencies, as well as cooperating with international authorities in limiting the supposed “race to the bottom” that fiscal competition among countries entails, became essential. This way, a usually norm-importing China turned itself into a law-shaping protagonist of international tax policymaking,⁷²¹ in harmony with broader proactive undertakings by China vis-à-vis the international legal order.⁷²² In other words, China aimed at reorienting taxation rights towards itself, thus contributing to the redesign of international tax-allocation mechanisms as a norm entrepreneur rather than recipient;⁷²³ indeed, international fiscal competition favours the countries of incorporation of businesses⁷²⁴ rather than those wherefrom those businesses are controlled.

One can witness a wider trend towards the «destabilisation of the global North/South axis», in turn expressive of

geo-economic and geopolitical reordering [...] including, *inter alia*, the changing role of state power in the territorial organisation of the planetary circuits of capital, mutations in the construction and expression of political authority in and through capitalist markets, [and] the organisation of political and economic domination via transnational networks of state and business élites[;]⁷²⁵

evidence that China has shifted its role to that of a norm crafter in international taxation is to be framed against such a geo-economic backdrop. Races to the bottom are not caused only by States’ definition of their own tax policies, but also by regulatory competition between IOs formed by those very same States with the purpose of

⁷²¹ See LI 2016, p. 1.

⁷²² On the way these assertive undertakings interface with China’s official historical narrative on its encounter with IL, refer to D’ASPREMONT and ZHANG 2021, p. 913. Read further AHL 2021.

⁷²³ Refer to DAGAN 2018, p. 163.

⁷²⁴ See KARMEL and KELLY 2009, p. 949, fn. 366.

⁷²⁵ ALAMI et al. 2021, pp. 2-3.

elaborating standards of international use, often remaining soft law (especially when addressing corporate schemes).⁷²⁶ In a global arena tending to multipolarity, IOs may become regional or cross-regional expressions of particularistic interests of great powers cultivating their spheres of influence through multilateral identity reinforcers and geographical projections; for example, the OECD has traditionally vested the role of West-rooted democracy, open market and human rights promoter grouping industrialised economies,⁷²⁷ which seems to impede any *consistent* involvement by China, beyond short-term matters of vital national interest. China's representatives have, indeed, consistently voiced their preferences for a UN mandate on tax matters,⁷²⁸ which could also be more credible a legal platform for structuring consensual customary norms in the field.

Besides its relatively novel multilateral commitment, China also prides itself on a long history of signing tax agreements with other States, including (non-automatic) exchange-of-information clauses. As a mere exemplification, the EoI clause in the 1995 China-Turkey treaty⁷²⁹ recites as follows:

UNIVERSIDADE DE MACAU
ARTICLE 26
EXCHANGE OF INFORMATION
UNIVERSITY OF MACAU

1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Agreement or of the domestic laws of the Contracting States concerning taxes covered by the Agreement, insofar as the taxation thereunder is not contrary to this Agreement, in particular for the prevention of evasion of such taxes. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that Contracting State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of or the determination of appeals in relation to, the taxes covered by the Agreement.

⁷²⁶ See KARMEL and KELLY 2009, p. 886.

⁷²⁷ Refer to *ibid.*, pp. 903-904;944.

⁷²⁸ See LAAGE-THOMSEN and SEABROOKE 2021, p. 19.

⁷²⁹ Available online at

<http://www.chinatax.gov.cn/n810341/n810770/c1153450/5027030/files/9ca1fff865154184bfce0197d3fce743.pdf>.

Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:
 - a. to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
 - b. to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
 - c. to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

In fact, China's cooperation in international taxation efforts is nothing unprecedented, starting with its 2001 Working Regulations and related 2002 Rules on Confidentiality as well as Circular on International Tax Administration.⁷³⁰ In 2006 already, it was one of the ten countries to join the so-called "Leeds Castle Group", a predominantly Western «forum to discuss issues of global and national tax administration, particularly the compliance challenges each administration faces»,⁷³¹ taking over from the legacy of the Pacific Association of Tax Administration⁷³² and of the 2004 JITSIC between the tax authorities of Australia, Canada, the UK, and the US.⁷³³ What is new is the content of such cooperation (i.e., the outward-privileging policies China strives for), as well as its intensity. When it comes to AEoI, China even *championed* the whole enterprise: it

acquired in 2013 Associate Status at Working Party 10 level—subsidiary body of the OECD Committee of Fiscal Affairs [...] in charge of the work on Exchange of Information—and has since then taken a leadership role in developing this standard.⁷³⁴

⁷³⁰ Read further OUYANG 2020, p. 49.

⁷³¹ OECD 2008, p. 31.

⁷³² Check MIYATAKE 2011, p. 460.

⁷³³ See KOBETSKY 2011, p. 60.

⁷³⁴ SAINT-AMANS 2016, p. 8.

Another trail of double standards between individuals and corporations can be traced in the Basel Framework, which concedes that

[i]n exceptional cases, disclosure of certain items required by Pillar 3 may reveal the position of a bank or contravene its legal obligations by making public information that is proprietary or confidential in nature. In such cases, a bank does not need to disclose those specific items, but must disclose more general information about the subject[-]matter of the requirement instead.⁷³⁵

Such a discretion would be relevant for taxpayers, too, but the exchange of their information being automatic, no filter can be applied (by taxpayers themselves, at least) to shield certain types of sensitive information from foreign scrutiny. The Basel Committee has improved its positioning within the system of international financial institutions, becoming the most important supervisory body on financial transactions at the global level.

International standards that are consistently applied across jurisdictions will help ensure market discipline and deter accounting arbitrage. Under a consolidated global regime, the IFIs with responsibility for setting accounting standards—the Basel Committee, IOSCO, IASB, and IFAC—should continue their work, but *with more input from developing and emerging-market countries*. Regarding actual surveillance, the [IMF] has extensive experience, through its Article IV surveillance programs, in monitoring compliance by its member [S]tates with various international financial standards.⁷³⁶

Given that the Basel Committee would enact this reshaping of global institutional responsibilities and powers regarding surveillance of countries' financial systems, thus shifting authority away from Bretton Woods institutions, China has obvious interest in actively participating into the process and building trust and consensus around its

⁷³⁵ Basel Committee on Banking Supervision, DIS – Disclosure requirements, Version effective as of 15 Dec 2019, para. 10.12, available at https://www.bis.org/basel_framework/. See also ALEXANDER et al. 2006, p. 247.

⁷³⁶ ALEXANDER et al. 2006, p. 167, emphasis added.

initiatives. This is also due to the well-known obsolescence of voting rights and representation at the IMF and the World Bank (WB); for instance, fifteen years ago,

China ha[d] over twelve times the population of the [UK] and its economy [wa]s twice as large; yet the value of its [IMF] quota [wa]s only 59 percent of the UK quota, and the UK ha[d] a permanent chair on the Executive Board, whereas China d[id] not.⁷³⁷

In the aftermath of the 1997 East Asian financial crisis, China opposed the foundation of an Asian Monetary Fund alternative to the IMF,⁷³⁸ possibly because it preferred to avoid confrontation or it was not politically independent or integrated enough in the global economy to express confidence towards such a bold step. More recently,

the fact that China has overtaken Japan as the second economy worldwide makes these countries' economic power more equivalent. Consequently, this might strengthen their collective leadership in pushing forward regional financial cooperation or might conversely lead to increasing tensions between these two powerhouses.⁷³⁹

For the time being, China is circumventing the lack of adequate representation in the IMF by leading the way in financial and taxation matters at alternative negotiating tables.

China, however, is contributing to StT's customarisation well beyond its leadership in international fora: more profoundly, state-driven, state-sanctioned, or—as a minimum—state-tolerated fintechocratism plays a non-negligible role towards mentioned customarisation, both practically and conceptually. In fact, in the uncompassionately quantitative age of AI, normo-situational and power-distributional

⁷³⁷ Ibid., p. 112. As things currently stand, «[w]hile China has gained quota share in the IMF, its share still lags far behind its weight in the world economy» – DOLLAR 2020.

⁷³⁸ See ZWARTJES 2014, p. 100.

⁷³⁹ Ibid., p. 106.

judgements are more needed than ever.⁷⁴⁰ West-triggered financial crises originate first and foremost in the hubris of the 1% (especially along the NYC-London axis), that is, in its excessive and unjustified confidence in both themselves and the overpositivistic, pseudo-scientific financial models they utilise to formulate predictions and assess risks. Most of those unfactored-in risks eventually externalise on all—thus, by default, mostly poor—taxpayers, who are asked to patch up the outcomes of said hubris (thus often contracting new debts to make a living) as just any crisis unfolds.⁷⁴¹ In continental Europe, too, banking systems’ financialisation—«defined as the increased trading of, and exposure to, risk»⁷⁴²—represented the main factor leading to asset deterioration in banking activities, so much that for example large French commercial banks suffered to a lesser extent compared to their German counterparts, as the former «were far smaller investors in the assets that became toxic, and less involved in setting up off[-]balance[-]sheet vehicles».⁷⁴³ Regrettably, although «[t]he appetite for debt-fuelled spending stands in complete contrast to the traditional Chinese philosophy of thrift and prudence»,⁷⁴⁴ China—which was supposed to represent an at least partially alternative model of growth, social solidarity, and development—is going down the same path of alienated, undignifying (and undignified) financial consumerism. Before anything, this implies that *no conceptual alternative or societal ideal is made available to younger generations any longer*; secondly, it means that repercussions are unavoidable on the novel taxation strategies China upholds domestically and successfully socialises internationally, *in alignment with the West*.

⁷⁴⁰ See KASY 2019.

⁷⁴¹ Check further KISHAN 2019, pp. 44-46.

⁷⁴² HARDIE and HOWARTH 2009, p. 1018.

⁷⁴³ Ibid., p. 1023.

⁷⁴⁴ KISHAN 2019, p. 47.

The violent and digitised proletarianisation of middle classes unleashed with neoliberalism,⁷⁴⁵ particularly in the West yet throughout the whole world, is being further exacerbated by extractive, predatory, and socially biased tax policies as designed by transnational bureaucracies deferring to the OECD; considering that the expansion of the “middle class” was believed to stand as one of the greatest achievements of capitalism, this is a remarkable tax-driven setback into an age of *relative* poverty and unavoidable social conflict. China seems to have joined this ill-advised effort, at least transitionally, possibly in order to acquire credibility and a red-carpet invitation to previously precluded diplomatic tables. This should raise concerns on the part of Chinese and non-Chinese citizens alike, as China’s influence will not be directed at liberalising and democratising its domestic market,⁷⁴⁶ but rather at tightening its political grip on the latter. This notwithstanding, residual hopes might still be in place for a new global economic order, where China plays a prominent role and such a role contributes to redress certain unbalances among nations, promoting a «developmentalist international order»⁷⁴⁷ and engendering a slightly more moderate (i.e., considerate-to-the-99%) transnational capitalist élite.

iv Developing countries’ reluctant compliance: Between coercion and consensus

OECD-promoted tax initiatives have been met with severe criticisms over the decades, particularly from third-world or anyway critical IL perspectives. According to DWYER,⁷⁴⁸

⁷⁴⁵ Refer also to THEMISTOCLEOUS 2014, p. 31.

⁷⁴⁶ See *ibid.*, p. 33.

⁷⁴⁷ BRADFORD and POSNER 2011, p. 47.

⁷⁴⁸ 2000, p. 66.

the OECD cannot legitimately complain about countries which take a differentiated or schedular approach to income taxation [...]. If, for example, Brunei does not collect a personal income tax for itself[,] why should it be expected to assist other countries enforce their residence-based income taxes within Brunei's territory?

In another publication one year later, the same Author voiced his privacy-related reservations out loud; in his view, accommodating the OECD project equates to

the destruction of sovereignty and the principle of no extra-territorial enforcement of other countries' taxes. (It would be a curious historical irony if a US Congress agreed to US citizens being obliged after 225 years to render assistance to Her Majesty's revenue officers!). It means the complete destruction of privacy as a social value in OECD societies, notwithstanding its status as a human right under some Constitutions, e.g. in the [US]. Non-OECD countries are expected to legislate to force their citizens to divulge information to OECD authorities not merely for the purpose of prosecuting common criminals but for the purpose of preventing both evasion and avoidance of OECD countries' taxes. No decent person wishes to support drug cartels[,] but many would feel that the loss of all personal financial privacy is *too high a price to pay* for their elimination [...].⁷⁴⁹

Notably, all these criticisms were mounted in the context of on-demand exchanges, fifteen years before the crafting of the *automatic* exchange system, which is even more pervasive but has built more solid a state consensus around its goals, perhaps by exercising economic and political leverage on developing countries.⁷⁵⁰ Nevertheless, non-OECD States keep demanding

the establishment of a level playing field, in which both OECD and non-OECD countries played by the same rules with respect to such [issues] as the exchange of information on tax matters.⁷⁵¹

And yet, a critical reading was also voiced from within:

⁷⁴⁹ DWYER 2001, p. 18, emphasis added.

⁷⁵⁰ Refer e.g. to VLCEK 2009, p. 265.

⁷⁵¹ COOPER 2009, pp. 212-213.

[r]eservations towards both the scope and approach of the project were expressed by several smaller members of the OECD, and were explained in some detail in an annex to the OECD's first report, but were subsequently relegated to minor references buried in footnotes.⁷⁵²

I do *not* subscribe to those who reconfigure the issue in racialised terms, under claims that «from a Caribbean perspective, the OECD project was viewed as a campaign by large white [S]tates against small black [S]tates»;⁷⁵³ this makes no sense, in that the OECD strives to target offshore operations even when they are conducted in “white States”. Neocolonialistic paradigms are indeed at stake, but have nothing to do with race, being rather related to a West-centred conception of IL whereby citizens are factually disempowered, and besides formalistic equality of domestic sovereigns, élites in the most powerful countries accord to themselves most foundational decisions on whether core injustices and inequalities are problems to counter or shall be allowed or even reiterated by policy instead. With regards to AEoIs, the OECD consulted with developing countries (apart from China⁷⁵⁴) only after having tabled all substantive issues and pressed consensus around them among its own members.⁷⁵⁵

I posit that a dangerous disconnection exists between the (laudable-in-itself) aim to be achieved and the priorities and manners expressed by the OECD via its policymaking, with such organisation problematising selected issues brought to surface by the globalisation of capital without questioning the latter (and its main beneficiaries) first and comprehensively, and without contributing to cementing the path towards an inclusive global governance *whereby citizens are scrutinised globally only insofar as they hold (actionable) rights and are effectively represented on the same global scale.*

⁷⁵² VLCEK 2009, p. 265.

⁷⁵³ Ibid., p. 268.

⁷⁵⁴ Refer also to HAKELBERG 2020, p. 114.

⁷⁵⁵ See MEINZER 2019, p. 99.

v The automatic exchange of information in tax matters

OECD's original MAATM (1988) draws inspiration from the 1972 Nordic Convention, the first multilateral instrument to provide for exchange of information in tax matters. The updated MAATM requires no link between a taxpayer and a signatory State gathering information about them or enforcing tax claims by other signatories on them. It applies to any category of taxes with the only exception of custom duties (addressed instead by the CMAA Convention), save for signatories' reservations expressed when joining the treaty.

However, due to the reciprocity principle in [A]rticle 30(5) [...], a [S]tate that has filed a reservation cannot require from another contracting [S]tate without such reservation assistance in a matter for which the requesting [S]tate has reserved its rights. If no reservation is made, a [S]tate has to provide assistance in respect of all categories of taxes even if it does not levy a certain type of tax [...]. *The minimum requirement for acceding to the Convention is to provide information concerning income, profits, capital gains, and net wealth taxes levied at the central government level.*⁷⁵⁶

Exchanges of information under the MAATM may be on-demand, automatic, or spontaneous, with no detriment to equivalent arrangements signatories opt for through other instruments, and encouraging the application of the broadest possible interpretation or solution. Nevertheless, the “multilateralism” of this instrument can be questioned on several grounds, in that it resembles a general framework for further bilateral agreements among signatories rather than a comprehensive instrument providing for States' obligations directly. From the viewpoint of privacy rights, such a “framing” design surfaces not only from the fact that the Convention invited States

⁷⁵⁶ WÖHRER 2018, p. 56, emphasis added.

to agree on what information should be shared automatically and how the process would have worked,⁷⁵⁷ but also from the absence of procedural rights granted to taxpayers under the Convention.⁷⁵⁸ In this sense, it is only deficient as a treaty in PIL terms, and it stands as completely irrelevant under an IHRL perspective because it grants no (new) rights to its eventual addressees (the taxpayers), neither directly nor through their States of citizenship; it merely reinstates that rights already codified under domestic law hold relevance.

Notwithstanding these considerations, it shall be conceded that in 1988 any “automatic” exchange of information could not be *truly* automatic (and thus problematic from a human-rights perspective) under the meaning we accord to the term today: the Internet was still an embryonic experiment confined to a few laboratories in the US and Switzerland, and “big data” was not even loosely foreseeable in its current dystopian form. This is a core observation for evidencing how the same legal solution on paper might mean extremely different things in practice, when it is embodied within a legal text a few years before or after the emergence of a disruptive surveillance tool. Nothing in the preparatory works suggests that lawmakers negotiated the Convention with the Internet in mind, let alone big data; hence, performing what has been agreed upon back then *but by means of more advanced, intrusive, rapid, “intelligent” technologies* cannot be straightforwardly considered lawful, and calls for a re-discussion on the substance in the first place.⁷⁵⁹ Indeed, as briefly recalled *supra*, technology is not simply a more or less efficient support for the actions that lawmakers agree upon in a treaty; in fact, it might revolutionise those actions’ “ontology”, that is, their inherent nature and social

⁷⁵⁷ Ibid., p. 58.

⁷⁵⁸ Ibid., p. 59.

⁷⁵⁹ See MAAS 2019, p. 22.

function. It may also leave States unable to verify the other parties' compliance with the procedures agreed upon, especially when it comes to rapid AI developments,⁷⁶⁰ with «not all [S]tates [enjoying] the requisite technological know-how to understand what regulation is needed, or even to appreciate that it is needed».⁷⁶¹

One related argument would be that deterrence alone—surveillance, in this case—has never prevented any crime from being committed, and tax crimes are no exception; this is because «the most effective way to enforce a law is to vivify a corresponding cultural norm»,⁷⁶² so that if the 99% does not deem it morally compelling (as everyone should in fact) to pay taxes because they sense the 1%'s ability to find (or create, or lobby for) loopholes in the laws as to lower their fiscal burden, deterrent measures alone would not suffice to make the 99% pay. However, when it comes to technical solutions like an AEOI, the consideration above does not stand: the AEOI is not a traditional deterrent measure, as it leaves almost no room (beyond human error, FIs' bribery, and a few loopholes⁷⁶³) for incompliance or any other exit strategy; as long as one's money is deposited in a bank account and digitised, the bank's system will inform the State concerned about its deposit, and such State will share the information with other relevant States, mechanically, impersonally. The more AI improves, Internet penetrates societies, and objects are interconnected “online” in the IoT, the more detachedly and “smartly” each step of the process will be performed, and the sooner and more frequently all steps will be completed. Put differently, this is a mechanism that once normalised, risks becoming potentially uncontrollable: in the range of a few years, it might substantially metamorphosise into

⁷⁶⁰ Check *ibid.*, p. 26.

⁷⁶¹ *Ibid.*, p. 25.

⁷⁶² SCHULZ 2015, p. 40.

⁷⁶³ BOURTON (2021, pp. 176-178) has listed the most important of them, including residency-on-sale schemes, the US' non-subscription to the CRS, and the exclusion of movable assets such as gold, artworks, or cryptocurrencies.

something more dangerous and pervasive due to technological “progress”, *despite grounding its legal basis in the same treaties that were designed years earlier, based upon the less intrusive technologies then available.*

The 2010 Protocol amending the MAATM achieved wider consensus, so that

137 jurisdictions currently participate in the Convention, including 17 jurisdictions covered by territorial extension. This represents a wide range of countries including all G20 countries, all BRIICS, all OECD countries, major financial centres and an increasing number of developing countries.⁷⁶⁴

In this respect, it has been remarked that

for some developing countries, it might not be that easy to join [...] as it requires a decision by consensus of the existing parties. When deciding whether to invite a country [...], a number of factors, e.g. the confidentiality rules and practices of the country and whether the country is a member of the Global Forum, have to be taken into account.⁷⁶⁵

If this is the formal criterion, then I am unsure its assessment truly follows logical steps rather than succumbing to inscrutable power-politics. All in all, the 2010 Protocol places additional burdens on the taxpayers and further erodes their (already minimal) rights: it broadens the scope of information administrations can collect; it allows for group requests whereby it is not necessary that the requesting State identifies each target individually; it aligns data confidentiality standards to those of the *receiving* country,⁷⁶⁶ while having due (non-binding) regard for those of the sending one; it broadens the portfolio of state authorities who can access the data; and it removes the

⁷⁶⁴ From the OECD’s official website at <https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm>.

⁷⁶⁵ WÖHRER 2018, p. 60.

⁷⁶⁶ It seems worth noting, in this respect, that «[t]he ICJ held [...] that according to normal practice when joining treaties there is no duty on [S]tates to familiarize themselves with the domestic law of other [S]tates» (WOOLAVER 2019, p. 101). This is what IL mandates; however, similar legal (as well as moral, perhaps?) duties can still be occasionally retrieved from domestic-law regimes.

requirement of obtaining the sending country's consent before data could be disclosed publicly in court proceedings initiated in the receiving country.⁷⁶⁷ These and others are umbrella provisions, applicable to several typologies of information exchange, whilst the CRS specifies the conditions for executing automatic exchanges, exclusively. Through the CRS,

[a]ll types of investment income (interest, dividends, income from certain insurance contracts, [etc.]), account balances, and sales proceeds from financial assets will be exchanged. Information about accounts held by persons who are not (*only*) resident in the same [S]tate as the financial institution will be collected by banks and forwarded to the tax authorities. The tax authorities will, [as] the next step, send that information to the tax authorities of the [S]tate(s) where the account holder is a resident. Not only banks are required to collect and report information but also other financial institutions such as brokers and certain collective investment vehicles. Just as under FATCA, financial institutions have to report accounts of individuals and entities and look through passive non-financial entities to report these accounts to the tax authorities of the [S]tate in which the individuals ultimately controlling these entities are resident.⁷⁶⁸

In the same way as the MAATM, the CRS is not a truly multilateral instrument, but only a “bundle of model obligations”, to be operationalised bindingly *mostly* bilaterally. It includes a Model Competent Authority Agreement that can be implemented by the parties via signing an MCAA; at the time of writing, around a hundred jurisdictions opted for such a bold step. When signing an MCAA, the parties (not necessarily two) shall specify what jurisdictions they intend to exchange tax data automatically with, and whether they only send data to the agreeing partners (but not the reverse), or both.⁷⁶⁹ Needless to say, two-way exchanges among more than two partners are the most complex cases to monitor for privacy purposes.

⁷⁶⁷ Read WÖHRER 2018, pp. 60-61.

⁷⁶⁸ Ibid., p. 65, emphasis added.

⁷⁶⁹ Refer to *ibid.*, p. 66. See also MEINZER 2019, p. 101.

As exchange of information on request requires extensive investigations and strong indications for requesting further information from other tax administrations, automatic exchange of information could tackle tax evasion to a greater degree. However, it has been criticized that there is a lack of input legitimacy as the CRS has been developed and endorsed mainly by the G20 and OECD with only limited participation from developing countries. International tax evasion is a global problem which needs a global solution. [...] The [US], however, will not sign the CRS MCAA but will instead be continuing automatic exchange of financial account information on the basis of FATCA agreements. Even though the FATCA agreements do not provide for full reciprocity but allow the [US] to provide less information than their counterparty is required to provide, the OECD has acknowledged the compatibility and consistency of the FATCA agreements with the CRS. Nevertheless, the unequal implementation of automatic exchange of financial account information has been widely criticized and leads to the [US] being labelled [as] “The World’s Favorite New Tax Haven”.⁷⁷⁰

Not by chance, creditor-friendly US corporate law has long served the hegemonic interests of transnational elites by vesting the depoliticisation and marketisation of social institutions and state decision-making with a semblance of rule-of-law respectability,⁷⁷¹ in a sort of “rhetorical laundering” (that is, legalisation and subsequently attempted justification-by-law) of imperialist practices of neoliberal exploitation and resource privatisation. Regrettably, as far as finance is concerned,

the power of New York creditors, the transformation of [US] judicial territory has meant the unilateral extension of [US] state space over other countries, and it has helped ensure the continued extraction of resources and capital from less powerful countries into the [US]. In doing so, it has perpetuated long-standing uneven economic relations and undermined the sovereignty of other [S]tates despite formal international equality. The way this has been done, however, has simultaneously helped make these relations *appear natural and apolitical*.⁷⁷²

Dichotomic thinking about what is private and what is public, and what is domestic and what is not so, has been selectively forced onto other countries as to expand a

⁷⁷⁰ WÖHRER 2018, pp. 67-68.

⁷⁷¹ Refer to POTTS 2020, p. 1202.

⁷⁷² Ibid., emphasis added.

selectively biased judicial reach that could work as a legalised echo chamber for elitist privileges.⁷⁷³ The US is now replicating the same pattern in taxation matters, via a combination of unilateralism (that disfavors foreign jurisdictions) and corporativism (which plays to the detriment of the average natural-person taxpayer and to the advantage of corporations, especially big ones), whilst making it look like a scientific (thus reasonable and unescapable) way of approaching capital flight that should straightforwardly be sanctioned by lawmakers, rather than a precise techno-political preference expressed through the politics of positive law.

*vi The US as a formalistic persistent objector: Defying multilateralism?
The case of FATCA*

In a democracy, political institutions should be designed as «a necessary corrective to the tendency to tunnel vision and insensitivity on the part of senior officials focused primarily on technical considerations»;⁷⁷⁴ conversely, when it comes to taxation, it is often the case that technocracy trumps democracy even within the constitutional system of a single country. In other words, citizens see their data is made available to foreign governments without their consent, and at the same time, they realise they are left with emptied democratic control over the state agencies which determined to do so in the first place. The most obvious example is probably the Securities and Exchange Commission (SEC) in the US, which

in 2007, [...] made 556 requests to foreign regulators for assistance and information under MOUs and responded to 454 requests. [...] Theoretically, if MOUs were considered treaties, they would fail to satisfy the [US] constitutional framework. They are negotiated and agreed to by an independent agency, the SEC. They cannot be characterized as executive agreements, as it would be very difficult to

⁷⁷³ Ibid., p. 1196.

⁷⁷⁴ WALKER 2004, p. 13.

argue that the matters they concern fall under inherent presidential powers; nor are they congressional-executive agreements. Assuming *arguendo* that one could view the SEC as negotiating on behalf of the executive, there is no *ex ante* congressional authorization to do so. Subsequent congressional authorization that speaks to only one class of MOUs does not validate the process in all instances. [...] *The nondelegation doctrine prevents the abdication of lawmaking power by Congress.* Congress must give an agency an intelligible principle in order to fulfill its legislative mandate. The SEC's negotiation of MOUs seems dangerously close to agency lawmaking without an intelligible principle and without sufficient safeguards.⁷⁷⁵

This is disquieting, as governmental transparency requires that citizens be aware of their rights and able to enforce them efficiently, and that the enactment of laws ultimately depends upon popular mandate to that effect. Relevantly, the SEC has a long history of unilateral assertions of jurisdiction,⁷⁷⁶ that is, of decisions «to apply its laws extraterritorially without consultation or cooperation with foreign countries».⁷⁷⁷

The US approach to taxation has been displaying the same load of aggressive unilateralism, in defiance of common initiatives. To begin with, Article 26 of the US model tax treaty contains its exchange-of-information provision, which is so important to American policymakers that several bilateral treaties have been delayed or foregone because of insufficient written assurances of cooperation on tax-information disclosure.⁷⁷⁸ As for non-US tax havens, when autonomous (but not independent) overseas territories such as the Cayman Islands did not succumb to its blackmailing, the US tried to extend its jurisdiction over them by means of treaty arrangements with their respective sovereign States, often unsuccessfully.⁷⁷⁹ More recently, following a consolidated *modus operandi*, the US contributed to crafting the common OECD projects and later reverted to its usual suspicion towards multilateral solutions,⁷⁸⁰ even

⁷⁷⁵ KARMEL and KELLY 2009, pp. 940-941, emphasis added.

⁷⁷⁶ Check e.g. PARK 2014, pp. 82-83; cf. RYNGAERT 2015^a, p. 201, ftn. 45.

⁷⁷⁷ VANCEA 2003, p. 838, ftn. 25.

⁷⁷⁸ See Avi-YONAH 2007, p. 174.

⁷⁷⁹ Refer to PALAN et al. 2010, p. 196.

⁷⁸⁰ Check *ibid.*, p. 212.

if the latter were based on its own precursory approach. Washington signed exchange-of-information agreements with virtually all developed countries, but several of them remained executive agreements—that is, they were never converted into ratified treaties—because of the Senate’s concerns about taxpayers’ privacy.⁷⁸¹ In sum, the “inspirator” of the OEDC model, the US, is not participating in the same project; this choice is criticisable in several respects, but it makes sense geopolitically insofar as it provides the US with a more tailored tax instrument to deal under «constructive vigilance»⁷⁸² with its main global competitor, rightly or wrongly perceived as a threat: China.

Core to the US “anti-evasion” strategy, the FATCA aims at recovering money held offshore by US citizens—who are taxed on their worldwide income, wherever they reside—by compelling foreign banks to disclose bank accounts traceable to Americans.⁷⁸³ Following a first phase of diplomatic tensions with jurisdictions around the globe, several of them “decided” to collaborate and provided US tax agencies with the required banking details,⁷⁸⁴ which the US has yet to reciprocate for the most part. This way, the IRS acquired a thoroughly extensive amount of data from all over the planet, resulting in the stabilisation of said collaborations by means of international agreements with those cooperating jurisdictions,⁷⁸⁵ which were seeking a reduction in compliance and litigation costs. Resultantly, the FACTA became a miniature version of the cooperative model that would have been adopted a few years later by the international community.

⁷⁸¹ See KAYE 2017, pp. 323-327.

⁷⁸² DIAMOND and SCHELL 2019, p. 13.

⁷⁸³ Check further PASQUALE 2018, pp. 49-50.

⁷⁸⁴ Refer to DAGAN 2018, p. 155.

⁷⁸⁵ See COCKFIELD 2020, p. 384.

Under this approach, a participating country such as Singapore is supposed to pass laws that mandate the automatic collection by banks of foreign investor account information then transfer this information to the Singaporean government then onto other participating countries.⁷⁸⁶

Meanwhile, the US' lack of reciprocity has been acknowledged by US lawmakers, but not yet remedied to, also thanks to mild foreign protests which have never concretised into serious political acts.⁷⁸⁷



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⁷⁸⁶ Ibid., p. 385.

⁷⁸⁷ Read e.g. PIERLOT 2020, pp. 62-64.

Chapter 7

Conclusion to Part Two



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Part II of my Thesis has inspected the doctrinal tenets of ICL and applied them to politico-legal trends that witness the normalisation of StT practices, and particularly of the OECD's AEoI, across both domestic jurisdictions and international lawmaking, recasting debates on structural surveillance and its relationship with technological developments on the wake of Westphalia's legacy. The following points rearrange and recap some of the key findings from my review of doctrinal sources on ICL generally:

1. Started as a European project (just like PIL more widely), ICL now involves new (actual and potential) superpowers competing for regulatory space.
2. Such competition is heavily charged politically because no definitive agreement exists over the sources, methods of ascertainment, hermeneutical techniques, and process of formation of *consuetudo* (and *desuetudo*, when applicable) internationally.
3. Indeed, the just-mentioned disagreement permits States—especially the most powerful ones—to advance their own reading of the current state of affairs, for preserving or challenging the *status quo* of global (legal) governance through diverging understandings of customary norms.
4. Those understandings may diverge to such an extent as to make it possible to conceive of the existence of multiple self-governed yet interconnected realities, where the fundamental laws of customs formation and recognition are only *almost* the same, despite employing the same standardised language to communicate and find “workable” compromises with each other.
5. Disagreements are exacerbated in cyberaffairs and the governance of the Internet, where customs form and fade at extremely high speed, themselves contributing to the IL phenomenon of time-shrinking, which bears precise legal

effects for the legal governance of transactions, information, complexity, and systemic risk.

6. One of those effects invests the need to pre-emptively identify and sanction “future customs”, for the sake of not being caught off-guard when new trends make changes in regulation undelayable.
7. Similar considerations hold validity regarding the manipulative effects of big data on international legal sources—and particularly treaties—which did not develop or were not perfected with algorithms as their *modi operandi*, meaning that the deployment of AI machines gives effect to “new normalcies” which may eventually harden into fortuitous dystopian customs – would they be fully *human* customs, though?
8. The development of technology-driven ICL, both in the cyberspace and vis-à-vis algorithmic diffusion, has recorded a prominent role played by private actors, with public ones “borrowing” and sometimes “misappropriating” (i.e. distorting) practices and beliefs at a subsequent stage.
9. Due to their lobbying activity and the compenetration with States’ increasingly informal assertiveness on the international plane, the aforementioned private actors bear a deep ascendancy over IOs’ established practice as well.
10. Customary norms developed by a State a) with other States bilaterally/multilaterally, and b) quasi-constitutionally within an IO, may slightly misalign between the two processes, despite covering the same subject-matter and addressing similar substantive concerns.
11. IOs, their full status as IL subjects notwithstanding, are not bound to the whole package of customs binding on States, as only certain classes of customary obligations are relevant for IOs.

12. A critical counterpoint to the previous conclusion is that IOs do not enjoy full-spectrum rights (i.e., rights comparable to those of States), either; of relevance for the purpose of this study, they cannot shape the course of ICL autonomously to any significant extent, so that it is ultimately States that drive custom-sanctioning or custom-crystallising initiatives through IOs.
13. The just-mentioned non-autonomy implicates that distinguishing the customary outcomes of IOs' own outputs from those outputs which result from the input of States "as States" is a crucial and taxing exercise, whose convolution is rendered even more intricately by States' own non-transparency in conducting negotiations both formally (within IOs) and informally (through unstipulated governance fora).
14. Appreciating the peculiar features of regional variations of an emerging custom does not foreclose the chance to compare quasi-identical regional systems to then extrapolate overarching tendencies in an aggregated way as a matter of probability (i.e., appraising whether it is *more likely than not* that a custom is forming or that it sediments a certain conduct and/or belief).
15. For the sake of attributing "probative weight" to acts and declarations concurring to one's arguing in favour or disfavour of a custom's emergence, those performed, issued, accepted, or even not-objected-to by "great powers" are of special standing.

Upon inspecting the practice of StT and its global policy discourse, I was able to assert that this typology of surveillance is indeed (lawfully) customarising; among other circumstances, these probative elements concurred to my conclusion:

1. StT draws both techniques and narratives from broader-in-scope and already manifesting global trends towards a generally derogative normalisation of individual surveillance, performed through online policing and covert intelligence operations and abetted by governmental programs of mass-surveillance.
2. StT actions are accompanied by a magnificent apparatus of rhetoric and endorsements that accredit policymakers' *opinio iuris* – whether genuine or not.
3. Three “Grotian Moments” could be clearly identified to support its exceptionally rapid customisation:
 - a. The operational and discursive spillover from the public agenda on counterterrorism and financial transparency.
 - b. The 2007-2009 financial crisis and ensuing Great Recession, with several States falling close to insolvency and most of them warranting higher contribution towards state finances for emergency public spending.
 - c. Major and coordinated tax-record leaks by whistleblowers to specialised press around the globe.
4. The acceleration of these Grotian Moments’ impact thanks to the unprecedented conjunction of Internet-based and algorithmic technologies, making policy resolution even more legally transformative.
5. Several instances of StT could be identified in domestic jurisdictions across most regions, signalling its worldwide audience and pertinence.
6. The OECD’s AEOI process has been not only participated, but explicitly engineered and contributed to by all three main global powers:

- a. The upcoming superpower and current economic and AI powerhouse, China.
 - b. The EU as the prominent regional precursor, assisting its originally regional customisation in vesting more global ambitions.
 - c. The US as a persistent objector to the international effort towards AEOIs but also as one of its *de facto* precursors, on par with EU jurisdictions (though on a unilateral rather than reciprocal basis); indeed, by enacting FATCA without joining the CRS, the US has simply emphasised its *primus inter pares* status in global affairs, as per its use across a multitude of policy areas of global concern.
7. While not necessarily supporting or feeling ready for the OECD-modelled AEOI, developing countries have eventually subscribed to its rationale; it stands to mind that such a move cannot be explained through simplistic lenses of coercion – although economic retaliation from GN jurisdictions was certainly worth its share.
8. A relatively prominent IO has facilitated States' endeavour, with several NGOs contributing as well. Notably, the role played by the OECD here is more substantial and proactive than, for instance, UNESCO's when it hosts its "Conferences of State Parties". Hence, although tax agreements cannot be effectively defined as "OECD conventions", they do embody elements derived from this IO's own "legislative" practice, independent from its parties.
9. The customising process is lawful insofar as:
 - a. International customs are generally assumed to be lawful by default under PIL.

- b. The only exception to the above rule, i.e. *ius cogens* constraints, does not apply here. With reference to a category of StT practices, AEoIs, one might object that the sharing of sensitive information with certain regimes where the the RoL is vacant might elicit torture or degrading treatments, whose forbiddance is a peremptory norm of IL; upon considering the remoteness of such a scenario, I would tend to argue that it would amount to a legit yet tenuous objection to the *general* lawfulness of StT customarisation.

Taking stock of the above, my final thesis for this Thesis' Part is that no matter how captured by privatised interests, StT is a wide phenomenon that is generally customarising domestically and internationally; in particular, its international expression is customarising lawfully under PIL, absent aforementioned *ius cogens* exceptions to be assessed on a case-by-case basis. As a result, as far as ICL is concerned, surveilling natural persons for tax purposes—i.e. ostensibly to replenish state coffers “fairly”, in fact to restate the élite’s power to surveil everyone while contributing little to public welfare—is to be regarded as a lawful project.

Part III

The unlawful incoherence
of individuals' StT under IHRL



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Chapter 8

Introduction to Part Three



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Overview of Part III

The preceding Part has endeavoured to demonstrate that StT policies and practices, and AEoIs more specifically, are customising domestically as well as under IL; as such, AEoIs—and StT more generally—are lawful under IL as far as the ICL regime is concerned. Yet, other international legal regimes might lead us to different conclusions, and IHRL seems especially relevant in this respect due to its focus on individuals rather than state sovereignties. Hence, the present Part investigates the same policies and practices through HR lenses, eventually issuing the opposite verdict: they are unlawful under IL as far as the IHRL regime is invoked. The path to reach this conclusion unrolls from the most doctrinally traditional IHRL assessment based *inter alia* on necessity and proportionality criteria narrowly received, to a more systematic approach which places StT into the wider context of law-sanctioned economic inequality unleashed with neoliberalism, which factually burdens the 99% with tight reporting obligations while the élitist 1% witnesses a sharp declension on effective public monitoring of its financial empires. More in detail, **Ch. 9** demonstrates that if assessed against traditional right-to-privacy criteria, StT falls short of lawfulness. In so arguing, it sanctions theorisations of the holistic value of privacy as informational self-determination and as a space for dignity preservation, autonomy, and tranquillity of each human being individually and collectively; moreover, it unveils the lack of dedicated sets of privacy rights for global citizens, to match the already globalised collection and processing of their data through public-private synergies. **Ch. 10** posits that even those scholars who would not feel persuaded by my conclusion that StT is unlawful under the doctrinally traditional right to privacy, should adopt a “coherence approach” and consider anti-evasion policies against the

backdrop of fraught-with-loopholes or unenforced rules against corporate tax avoidance, as to fill the “necessity” criterion above with a broader meaning and necessarily conclude that StT is actually unnecessary a violation of citizens’ privacy rights. **Ch. 11** accepts the challenge to effectively show that corporate tax avoidance is such an extensive and improperly addressed black hole in contemporary societies that its mere perpetuation renders StT on individuals practically meaningless and rhetorically dangerous, when not even counterproductive. **Ch. 12** takes this demonstration one step further, penetrating international policymaking processes on taxation in all depth, with special reference to the regulatorily captured failures to counter corporate evasion through BEPS 1.0 and 2.0, as well as by means of appreciable yet structurally deficient EU initiatives. **Ch. 13** concludes with takeaway bullet-points, confirming that AEOIs, as currently designed, are unlawful under IHRL. Let me now introduce these Chapters’ contents slightly more extensively.

Chapter 9

Section 9(a) comments upon the general wisdom (in scholarship but particularly across policymaking circles) which contests the abuse of privacy entitlements for rigging the tax system and preventing authorities from accessing essential indicia of tax crimes; here, I argue that while this wisdom sounds, in fact, wise with regards to corporations, it proves misdirected when referenced to individuals. Indeed, my position is that no serious analysis of this divergence has even been scholarly performed – which is exactly why this Thesis has been conceived along the legal/natural-person interfaces. Because StT is operated by States via banks and other private entities’ complicity (or, less often, coercion), **Section 9(b)** touches upon

the question whether conflict-of-laws models of corporate privacy could be of assistance in examining the lawfulness of AEoIs, finding in the negative insofar as the ultimate liability for the operation of mentioned exchanges shall be attributed to States themselves. Only PIL methods and concepts are therefore relevant in this case, and indeed the purpose of **Section 9(c)** is that of justifying my selection of a range of HR criteria to proceed with the assessment of these policies under IHRL as a specialised regime of PIL. While IHRL is a diverge regime where universal agreement on the scope and function of most rights is virtually non-existent and regionalised applications speak with the loudest voice, one may draw on the most authoritative among the latter, i.e. the European regional HR system as entrusted in the CoE, to retrieve high-quality reasonings which, although crafted for the specific instances ruled upon the ECtHR, prove of ample normative breath and can be usefully generalised. Equipped with these reasonings, I thus move on to the actual assessment of AEoI-like StT practices, paying particular attention to the inspection of ECtHR's case-law on Arts. 6(1) and 8(1) of the European Convention on Human Rights (ECHR), in **Section 9(d)**. If the analysis could stop here, it would end up being relatively straightforward, but as it often happens, this is not the case. In fact, "privacy" as phrased in and protected by the ECHR is a dignity-intensive entitlement which does not exhaust the possible complementary or competing understanding of this right. In order for the reader to grasp this complexity in the specific realm of taxation, **Section 9(e)** provides the EU-centred exemplification of the tension between the state-filtered citizens' rights as enshrined in the EU Charter of Fundamental Rights (CFR) and the supranationalised execution of tax investigations and surveillance in compliance with EU law and related judgements by the CJEU; this tension demonstrates that even within a relatively cohesive regional system such as the EU, the territorial

compartmentalisation of citizens' rights comes as exceedingly problematic when confronted with the supranationalisation of enforcement prerogatives. Further on this, **Section 9(f)** explains that even if EU law encompasses one alternative understanding of privacy, based not on dignity per se but rather on data protection, and even though this alternative angle is indeed of relevance when it comes to algorithmic tax surveillance and digitised financial transactions, the GDPR (just like other Regulations and Directives) is of no concrete service in safeguarding EU citizens' privacy rights when information-exchanges extend beyond the EU borders. Hence, comprehensive data assessments based on dignity as upheld by the ECtHR are overall to be preferred; to this end, additional specifications on the reasons why these exchanges are problematic for human dignity are warranted and, I believe, worthy of policymakers' consideration. One of these aspects consistently falls off radar in high-level debates, despite it seems to me core to the inherent perilousness of indiscriminate information exchanges: the risk of cybersecurity attacks, leading to massive leaks of sensitive information {**Section 9(g)**}. Drawing on convincing scholarship by critical sociologists Haggerty and Ericson (plus many others), the cybersecurity argument sounds even stronger if one realises that no information even transits or is collected in a vacuum: it is extremely simple and convenient for governmental agencies—especially where auditing procedures are weak or bureaucratic power cascades in rigid hierarchies—to gather information from supposedly independent sources and through purportedly siloed procedures and then merge them into multipurpose sophisticated profiling of our habits, relationships, and thoughts. This is the danger which conceals itself in so-called “data doubles”, whose cumulative effect might prove just catastrophic {**Section 9(h)**}. Does this mean executive agencies should not collect information on us? Of course not, but the potential for jeopardy is inherently there and

stands as extremely serious, so that the risk is worth taking only proportionally (for instance, by establishing priorities rather than exchanging data on just everyone at the same time) and societally justifiably (i.e. when the benefit to society at large copiously overrides the risk for all individuals whose data is going to be shared). The risk should be appraised *a fortiori* cautiously vis-à-vis autocratic jurisdictions, whose citizens could hide assets abroad for survival rather than cheating purposes, for instance to defy politicised or unsustainable dictatorship-tied creditors' persecution {**Section 9(i)**}. Counterarguments in defence of the transition from EoIRs to AEoIs are, in my view, untenable, with the partial exception of the unforeseeability variable which, however, does not displace the need for preventative privacy nets that could allow taxpayers to actively monitor any exchange of their information {**Section 9(j)**}. The dangers of exchanging data with autocracies—but also, to an extent, the realisation that most of those dangers are not exclusive to autocracies after all—are exemplified in **Section 9(k)**, presenting a case-study from East Asia, namely from the PRC and its HK SAR. I have selected the privacy interactions between these two jurisdictions because of the stereotypes that too often accompany them in literature, but also due to the centrality of both jurisdictions for the radicalisation and expansion of capitalist surveillant modes of sociality in recent years. In particular, I explore the securitised approach to privacy which enables Chinese authorities to “lawfully” access any data and device in a vertical fashion {**Sub-Section 9(k)(i)**}, while horizontal privacy is counterintuitively upheld with the highest standards of care. Lastly, **Sub-Section 9(k)(ii)** compares the horizontal safeguards available in the Mainland to those still enshrined in HK law after the promulgation of the local version of the National Security Law.

Chapter 10

As far as I am concerned, **Ch. 9** would suffice to rule out both StT in most jurisdictions and definitely AEOI on the international plane as unlawful, at least from a HR perspective. And yet, I assume that not all scholars and practitioners would be ready to buy into these arguments, which are devised under seasoned doctrinal approaches to HR and could be subject to multiple interpretations and culturally relativistic visions of what HR should be about. This is why I have decided to venture further: the rationale of **Ch. 10** is to prove that even if human rights narrowly understood are deemed insufficient to stand in the way of AEOI's lawfulness, holistic HR appraisals eventually will. Appraising a HR violation holistically as I conceive of it, entails identifying the necessity and proportionality criteria reported *supra* and “zooming them out” from their self-containedness; this needs to be done in order to compare them competitively to alternative policies which could have been otherwise enacted to attain the same objectives without violating rights – or violating them to a lesser *ratione materiae* and/or *ratione personae* extent. Thus, the key socio-legal inquiry may be phrased as follows: even though it is generally lawful for public authorities to violate derogable human rights, could the same policy goal be attained without violating them? Have all viable alternatives been exhausted, or pursued as a priority before being discarded? To my mind, this is the meaning of assessing HR violations in context; logically, political contestation will surround the selection of what policies are essentially “alternative” or genuinely “viable”, which remains open to question but is worth inspecting nonetheless. **Section 10(a)** argues that, in the case at hand, seeking coherence in the field of taxation can be translated into due rebalancing of natural and legal persons' respective tax obligations, as well as in the (at least attempted) resolution of long-standing gaps in the governance of corporate

taxes prior to committing to any form of surveillance of individuals for “tax purposes”. In zooming out from contingency to appreciate “the big picture” through policy coherence, it is essential to discern between *political* coherence and *legal* coherence, or more properly, the political and legal dimensions of policy coherence, the first being more generally understandable as policymakers’ expected tension towards policies which do not collide with each other, the second standing more precisely for a component of assessments in HR-violations instances {**Section 10(b)**}. In fact, as recounted in **Section 10(c)**, evaluating legal coherence in a HR sense should not be confused with the search for harmonious resolutions to legal disputes before a court; it is not a matter of interpreting laws for the sake of establishing which party interprets them more appropriately in light of their intended purpose (assuming the latter can be truly ascertained), instead, it is about judging the lawfulness of those very laws if they entail the violation of rights prior to having exhausted all possible means for accomplishing their aim otherwise. If violations are authorised by law incoherently with alternative paths which could have been pursued in their place, said law needs not be complied with, in fact it will need to be retracted, and the rights it violates will stand deserving of restoration. In this sense, zooming out is tantamount to a search for external validity to justify the envisioned HR violation: is the latter proportionate to the contribution it will make towards the attainment of the policy objective? If alternative policies which entail no HR violations contribute to a non-negligible share, they should be approved first, and pursued to the highest possible extent {**Section 10(d)**}. To design fairer tax obligations that can match developmental and justice-grounded expectations, States should calibrate their intervention against parameters of quantitative and qualitative coherence, with the wider society serving as the external controller for the coherence of a policy affecting any entity X with those addressed to

all other entities. For example, contriving a superficially “fair” tax system through inter-individual progressivity proves only tangentially helpful if public revenues are constantly drained owing to corporate tax-avoidance schemes which are neither prevented nor contrasted {**Section 10(e)**}. Hence, both quantitative and qualitative insights help States adjust their policy action and aims to the most pressing societal needs, in harmony with their leaders’ rhetoric. **Section 10(f)** delves deeper into this connection, hypothesising that the extent to which policies are coherent to their stated aims should inform the appraisal of the genuineness of such aims for customary purposes: if the State implements policies which are incoherent with each other towards the attainment of an aim, even if one of those policies positively contributes towards the aim, that policy’s effect should not be deemed expressive of customary *opinio*, as the other policies run contrary to the aim nevertheless. More broadly, *opinionones* cannot be assessed in isolation: aims are always polyhedric and the causes of their successful realisation are multifactorial – as well as, more and more frequently, transnational, so that coherence shall be sought transnationally as well, as opposed to just domestically. An important remark is that transnational coherence is distinct from foreign-policy coherence, because of their different scope of protection: to be transnationally coherent, policies shall violate a State’s citizens’ human rights to be minimum possible extent, wherever those citizens are located and the violation is felt, whilst foreign-policy coherence in HR terms accounts for a measure of the standard of care a State exercises vis-à-vis foreign individuals through a policymaking which stands harmoniously with the principles of sustainability, justice, non-exploitation, and the like. Most often, States fail to act coherently tax-wise in that they succumb to neoliberal hierarchies, logics, priorities, and mindsets which are rooted deeply in our cognition and pervade bureaucracies at all levels; one interesting exemplification of

this failure is the EU's loss-recapture legislation, which could serve anti-avoidance undertakings well, but refrains from accomplishing this result due to incoherent embodiments of naturalised exceptions and market prioritisations {**Section 10(g)**}.

Chapter 11

Once the need for policy coherence is acknowledged, one shall identify the major sources of incoherence in order to police in the opposite direction; when it comes to StT, as recounted above, the main symptom of incoherence resides in permissive attitudes vis-à-vis corporations, particularly MNCs' tax-avoidance strategies and related lobbyism. Why is tax avoidance through legal persons deemed legit, and is as such unincorporated in tax codes as a crime? **Ch. 11** is set to investigate the most disturbing facets of these phenomena, for the sake of debunking the apparent "fairness" of our tax systems and SCs, by showing what lies beneath economic injustice and the perpetuation of the 1%'s privilege by means of taxation. **Section 11(a)** introduces the reader to the well-oiled machinery of tax avoidance, relying on States' weakness and complicity as much as on MNCs' arrogance and territorial unboundedness. I argue here that because differently from tax evasion, tax avoidance pertains by definition to the opportunities of a relatively limited number of subjects, its outcome should be approached as a profit-maximising but also—and most relevantly—as a risk-shifting strategy, whereby risks of systemic failures are charged onto the entire body of taxpayers, the majority of whom are little savers with no involvement in systemically eroding financial activities; this is one reason why tax avoidance is so problematic for society, although differently from individuals' evasion, it never makes it to the list of top concerns which are "sold" to citizens by

politicians as policy priorities. To thrive, the shifting of financial risks through avoidance relies on extensive networks of lightly regulated top-tier lawyers, accountants, and other tax professionals whose loyalty to the wealthy élites they serve has never been stronger.⁷⁸⁸ Banks themselves—i.e. those same entities that share with governments our tax data under AEOI arrangements—have spent decades offering élites the option of “yield enhancement” (read: tax avoidance) through opaque hedge-fund operations – not to mention that the 1% makes recourse to a parallel system of “shadow banking” for a vast portion of their investment portfolio {Section 11(b)}. Thanks to these transactions and the banks which accepted or even favoured them, élites have cumulated so much untaxed wealth that their children and grandchildren will belong to the same apparatus of privilege for dozens of generations to come (think e.g. of the value of immovable property located in strategic capital crossroads like Singapore or Abu Dhabi). The exposure of this terrible truth inevitably follows: far from being confined to political regimes which are usually linked to endemic clientelism, like certain African hereditary autocracies or Latin American corruption-prone weak democracies, phenomena of élite-accomplished regulatory capture, *do ut des* appointments, and bidirectional revolving doors represent more the norm than the exception thereof in Western and all other societies as well, at least when it comes to legislating on tax matters. The retreat of state politics to pave the way for captured technocracies (often masked behind veils of populist pretention) is so rooted and radical that the neologism “regulatory capitalism” indicates States’ defeat in the wake of an economic system whose main exponents are granted leeway to regulate themselves (...and others) as they place {Section 11(c)}. Of course, this mode of conducting domestic affairs, which corrupts the foundations of the RoL up to engaging

⁷⁸⁸ Read extensively RUSSELL and BROCK 2016.

auditors and even judges, is regularly transposed at the transnational and international levels, entering the policy space of “technical” IOs such as the OECD, as unmistakably surfacing from multiple legal-ethnographic studies. To be fair, States do try—however unevenly—to counter some of these tendencies; for instance, that aggressive tax-planning strategies cannot be concealed from investigatory authorities via trade-secrecy claims is certainly a praiseworthy move on the part of some jurisdictions. Regrettably, these meritorious awakenings are offset by a largely lethargic and deceptive attitude which signals both unwillingness and inability by Westphalian sovereign to detach themselves from the quid pro quo elitist mindset as well as from the allures of neoliberal hubris. But why does it look so easy for élites to deceive billions of individuals? The answer is tragically simple: individuals are both surveilled and nudged by a complex corporate-state apparatus whose two ends have come to be undistinguishable from one another and from the rest of reality. As already expounded in the inaugural Part of the present work, **Section 11(d)** reminds the reader that not only our data is acquired by politicians to understand us and anticipate us, but even to “nudge” us into selecting solutions and preferring options which we would have never otherwise considered. This is of course an extremely long-term process, people cannot be nudged and thus surreptitiously incapacitated overnight; and yet, consistent rhetorical hammering in a precise direction is likely to shift individuals’ perceptions of what they can forego as well as of what they feel is acceptable and fair, or immutable. If someone convinces us that a situation cannot be altered, we will gradually come to believe that everything is fine after all, and will likely not invest our mental and physical resources towards its overhaul, which is exactly how the combination of surveillance and nudging works to synergistically compel us into parasitic acquiescence – both intellectually and factually. Taking stock from these

somewhat introductory scenarios, the **remaining Sections of Ch. 11** are meant to provide examples and suggest how they concretise on average in daily life. For instance, **Section 11(e)** illustrates that not only GN democracies' politicians tend to deliver for the upper classes, including on tax policing, but they also encourage a system whereby taxes owed by MNCs are literally negotiated in advance between States and MNCs but also between States themselves, in defiance of any residual ethics, in such a way that tax credits/breaks/holidays and customised exemptions couple with Advance Pricing Agreements (APAs) and other advance tax deals or administrative settlements negotiated bilaterally by every MNCs with the relevant sovereigns {**also Section 11(g)**}. This does not sound like a solid legacy of Westphalia, does it? And when it comes to transnational state-owned corporations, sovereigns “allocate” “their” firms on the global tax market, to favour their expansion into those markets where they are granted the lowest tax rate and collateral benefits – this is slightly more Westphalian a move, but not one indicative of uncaptured sovereigns; the contrary, if anything. That States are captured by corporate “bigness” and meta-regulatory power up to a previously unthinkable degree is further confirmed by the dynamics explored in **Section 11(f)**, related to the scandal of TBTF entities and “socialist” restructuring of failing corporations to the expense of all taxpayers; a shame which represents itself cyclically at any crisis, no matter its trigger (we have witnessed it most recently with the pandemic), and that stands very much in line with the risk-shifting problematic which I mentioned a few paragraphs above. When the poor cannot make ends meet, it must be their fault (they were probably lazy, undeserveful, reckless, antisocial, financially illiterate, wanted by the justice system, etc.) and double-checking their bank accounts to see whether they evaded 5 or 10 USD is anyway “a standard procedure”; if a market-leading air carrier is troubled and exhibits overdrawn

records despite its shareholders, CEO, and other executives being millionaire, no one cares and all taxpayers are going to restructure the “strategic” company. This may sound like rhetoric, but when it comes to policy priorities, reality can exceed our worst fantasies by far. Alternative solutions such as emergency (temporary) taxes on financial transactions for national-interest debt-restructuring operations, although very much cited in discourses and electoral wishlists, never make it to tangible commitments – even less are they ever turned into laws. In these circumstances, States prefer to keep borrowing from banks and demand higher taxes of the middle and working classes, while implementing austerity programs which make life unliveable for the indigent and further disrupt any residual trust between the 99% and their “elected” representatives. Regardless of large youth movements of protest routinely expressing their discomfort at the fate of our lives in the current extremised neoliberal climate, captured politicians keep playing their game, with countless senior corporate executives recklessly or knowingly destabilising the financial system but seldom facing jail – if anything, they get promoted (the *promoveatur ut amoveatur* paradigm, reversed). This is the best epitome of a legal code of capital that protects the rich who write the laws and disparages the poor who have to endure their discriminatory and sometimes humiliating effects {**Section 11(g)**}. As companies are bailed out and accumulating debt through cheap borrowing turns out easier and easier, crises unfold more frequently, and States become complicit of the private sector in making the poor poorer and the rich richer by shifting increasing amounts of systemic risk onto the former’s shoulders collectively. The triad of debt trapping, deregulation, and privatisation combines into deferential stances of state institutions towards MNCs in times of prosperity, casting a lawful cage around policymakers’ room for manoeuvre that will chill them when things take the wrong path. Then, needless to say, lump-sum

wealth taxes which could accomplish both redistributive and socially mobilising effects are routinely considered and equally routinely discarded out of hidden vetoing by regulatorily capturing forces. To their judgement, the poor should take on all risks but never become risky enough to represent a threat for the status quo, thus subvocally adhering to a data-powered soft enslavement where turned into right-stripped and weak prosumers, they can be surveilled as to ensure “everyone contributes”, while in fact capturing agents keep legislators from hitting the wealthiest taxpayers and the tax-avoidance shortcuts they rely upon resolutely. Often praised as an egalitarian force for good, algorithms exacerbate these divides by diligently discovering all minor instances of evasion, while complex geometries of tax crime—and obviously, constantly renovated tax-avoidance channels—go undetected. No surprise, then, if citizenship-on-sale practices are increasingly common, nor if all available evidence points to the finding that most undeclared bank accounts along the main arteries of the financial industry between the East and the West belong to the top 0.1% richest households. Taking note of all these observations formulated in **Section 11(h)**, I conclude that unless legislators are keen on delaying chasing the very few taxpayers that matter most, there *really* is no need to massively surveil everyone in the same way through indiscriminate AEOIs. To appreciate how tax avoidance works in practice, the reader may want to inspect the case-study I redeem, once again, from the multifaceted interdependence between Mainland China and its HK SAR, exposing the frequency of capital outflows and inflows from and to the Mainland through HK, due to Chinese investors’ willingness to allocate their capital in foreign financial stocks, but also to that of a few Chinese defectors to make sure their savings are not frozen or seized by the Party’s representatives for political-punishment purposes. By contemplating the Mainland-HK dynamics in **Section 11(i)**, I hope to supply one of the most meaningful

possible windows on exceedingly intricate capitalist rituals whose unfolding quietly shapes our international economic and legal order every day.

Having described the core facets of economic injustice through tax avoidance, it is time to navigate the failures of domestic, regional, and international institutions in addressing the issue through dedicated lawmaking processes; because it would be impossible to cover all processes and jurisdictions, I have selected for **Ch. 12** the two of them which stand to my judgement as the most instructive: the BEPS Project and the EU's supranational attempts at countering tax avoidance. The latter are recounted in **Section 12(c)**, while the two phases of the BEPS Project are related in **Sections 12(b) and 12(d)** respectively. As both of these are supradomestic attempts at redesigning tax governance, **Section 12(a)** analyses the limits encountered by traditional mechanisms of parliamentary oversight over the crafting of foreign policy when decisions are taken transnationally by means of informal or heterogeneous forms of unaccountable transnational policing.

Chapter 12

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As for the inaugural **Section {12(a)}**, its first **Sub-Section {12(a)(i)}** serves the purpose of reminding the reader of the cognitive change traversed by taxation in the age of neoliberalism: till then (from Westphalia onwards), tax affairs had always represented a (more or less direct) policy area of two-way bargaining between the rulers and the citizens – the sovereign and the taxpayers. As MNCs accrued their power and weighed in, this bilateralism was disrupted by the disintermediation of corporate entities which increasingly granted themselves the title of prominent interlocutors for governmental choices, to the effect that natural-person taxpayers have found

themselves more and more marginalised in mentioned bargaining process. A long-standing bilateral fiduciary relationship was this way altered and pluriactorialised, which is anything but to claim that it was made more competitive: mutually captured States and MNCs joined forced at one pole of the stream, with natural persons being left to face an overwhelmingly oppressive rent-seeking coalition to which all decisions are factually delegated or outsourced. **Sub-Section 12(a)(ii)** contributes to this debate by observing that this power-shift away from the citizens has found a para-institutional reallocation in unaccountable networks of governance—a sort of “policymaking supply chains”—where the barycentre of decision-making could not stand farther away from traditional constitutional fora. Indeed, while it is often argued that IOs are external to States and their citizens while transnational arrangements are more state-driven, lack a stable independent bureaucracy, and as such would be more directly amenable to citizens’ directives and criticisms, the reverse holds true: *exactly because* transnationalism as a form of governance lacks appropriate foundations in terms of representatives and institutions, it proves prone to capturability to even higher an extent compared to classic forms of international cooperation. Transnational decisions are often taken by appointed-on-occasion techno-experts, in secrets, and with little to no accountability mechanisms back home – neither electoral, nor parliamentary. The danger for democracy—but even for the sort of “output accountability” autocracies survive by—materialises when the two dimensions coalesce to the extent that technocratic decisions are “absorbed” by IOs and are subsequently transplanted into state parties’ legal framework without discussion and further screening on the substance, so that accountability rests on the final outcome, but control over the process is lost. Decision-making externalities are internalised by taxpayers without them being able to hold the source of such externalities to account through voting,

parliamentary inquiry, or constitutional conflicts of attribution; once again, this means that while inter-state distributional questions might be satisfied, elitist-technocratic lawmaking will be uninterested in accounting for infrasocietal distributions between corporate élites and “the rest of us”. When it comes to unleashing their bureaucracies against their subjective class enemies rather than neutralising actual moral and law defiers such as hyper-wealthy tax avoiders, transnationally operating neoliberal Executives are truly skilled artisans. **Section 12(b)** comments upon BEPS 1.0’s unfinished work in extreme succinctness, as thousands of scholars have already dissected every possible angle from which its inconclusiveness could be asserted; because, as enunciated above, my Thesis mainly relies on the US, the EU, and China to advance its arguments, in this case, too, I put forward the US example to illustrate how many (and essential) agenda items were not successfully tackled by this first round of BEPS at the OECD. More expansive is my examination, in **Section 12(c)**, of the EU’s regional endeavours—well before BEPS as well—to cater for the cohesion of its internal market while contrasting the most unacceptable and unedifying excesses of deregulated neoliberalism. **Sub-Section 12(c)(i)** dwells on the extraterritorial and para-extraterritorial effects of EU tax legislation, to hypothesise that while Europeans’ tax evasion is fully covered both within and outside the region due to the EU’s legislation symbiosis with concurrent anti-evasion efforts on the international plane, corporate avoidance is only apparently addressed by EU policymakers, in that European corporations can easily shift profits outside the region by making the most of international efforts on anti-avoidance being nothing more than soft law. Once again, then, we are faced with an improperly tough regime on *all* natural persons, implemented in advance of acceptable solutions being formulated to counter tax cheating by the wealthiest corporate-tied taxpayers; needless to remark, this is both

incoherent and unjust. The second reason why anti-avoidance efforts at the EU level have not yet displayed impressive success is EU institutions' reliance on competence powers in cognate areas such as competition law, which can scratch the surface of businesses' tax-planning schemes but neither prevent nor fully prosecute them in court {**Sub-Section 12(c)(ii)**}. In fairness, this fault cannot be entirely charged on the Commission or any other EU body per se; rather, this seasoned limitation is rooted in the *sui generis* political configuration of the EU itself, in the *à la carte* geometries of competence between supranational bodies and MSs (which do expand over time, but are still anchored to the founding treaties' mandate), and especially on resistant-to-change intergovernmental inertia on the part of European tax havens – which is problematic due to unanimity voting being required in the Council. Conversely, what can and indeed *should* be attributed to the Commission and other relevant EU bodies, including the Court of Justice itself, is the EU's market-friendly approach to unwholly artificial entities which are de facto allowed to transfer their taxable assets around the EU freely where most convenient, in that the bar for labelling them as *wholly artificial* and thus “pure avoiders” is set so high that it proves virtually impossible to meet {**Sub-Section 12(c)(iii)**}. Eventually, the EU-devised CCCTB—currently still a proposal—would originate further mismatches rather than untangle current fraught-with-loopholes tax-code complexities, due to: taxation being still cognitively framed as a cornerstone of state sovereignty by EU national policymakers; regional insulation being probably unachievable in the field of taxation, especially in the wake of digital trade and information flows; and tax competition being a key feature of the internal market as it is currently designed, particularly if one reckons that taxation was deliberately unassigned to the EU as a competence, and there is no fiscal coordination at the EU level intergovernmentally, either. Eventually, and with distant echoes of a

paradox, the EU can only rescue itself from this impasse by simultaneously integrating further regionally while also aligning itself more closely to the G20/OECD agenda; put differently, it should integrate without insulating, but rather for the sake of coordinating itself more proficiently with international anti-avoidance trends, with more unitary and competent a voice. **Section 12(d)** unearths the frailties of the ongoing BEPS 2.0 debate, the analysis thereof being obviously partial because, as I am writing, works toward the Project's re-edition are undergoing a sort of "pause for reflection". After disclaiming the novelty of my review {**Sub-Section 12(d)(i)**}, the latter embarks onto a recall of the rationale underpinning States' will to reopen the BEPS process, incardinated not so much upon anti-avoidance generally as upon the apportionment of profits derived from the global industry of digital services. Despite this inauguration, BEPS 2.0 has become an interesting platform to rethink the much-contested arm's length principle as well as territoriality as the essential parameter to attribute a nexus between a jurisdiction and the delivery of corporate services {**Sub-Section 12(d)(ii)**}. Both these innovations would compose the so-called First Pillar of BEPS 2.0, while its Second Pillar (or "GloBE") would be the agreement over a global minimal tax rate; a potential Third Pillar exploring possible solutions to redistribute tax revenues in favour of GS country has been discussed, too, but later rejected as overambitious and out-of-scope for the time being {**Sub-Section 12(d)(iii)**}. A number of common threads have been running through both editions of BEPS, particularly with reference to the burden of compliance, with several jurisdictions striving to discount certain corporations from complying with States' possible domestication of BEPS 2.0 rules; as reported in **Sub-Section 12(d)(iv)**, exceptions have been proposed for corporations of a certain revenue-size, and/or in determinate sectors, and/or operating under defined business models, and so forth (up to excluding certain intangible assets such as IP!),

with every State obviously pressing for approving carve-outs which could best accommodate its own flag-businesses. I also briefly take note of further misalignments which would invest *inter alia* these rules' enforcement, as well as their potential conflicts with existing norms across numerous legal systems and order, including EU law, international trade law, international commercial law, and international investment law. The key lessons to be learnt from BEPS 2.0—as far as its uncertain legacy for a coordinated fight against tax-avoidance is concerned—are listed in **Sub-Section 12(d)(v)**, while **Sub-Section 12(d)(vi)** wraps up by advising the reader that even if BEPS 2.0 is luckily approved and implemented in the end, the US would not be joining its concept fully, originating (or, more accurately, not sealing) a huge black-hole in global tax governance. Moreover, agreeing on tax rates and apportionment (even if it was pursued by hard-law outputs) does not equate to devising enforceable methods for aggressive tax-planning strategies to become outdated, all the more so as pre-emptive surveillance mechanisms are somewhat fruitful vis-à-vis illegal acts such as individuals' evasion but not to contrast immoral yet “lawful” conduct like some forms of profit-shifting. And just as importantly, one shall have due regard to the bittering truth that even once all jurisdictions would have set common rules for themselves, infrajurisdictional deregulated spaces such as SEZs, multi-service data havens, or free ports would still harbour privileged channels for cheating the international community, unless a moratorium on all these solutions were to be stipulated and implemented – which is *decidedly* unlikely at this stage.

Chapter 9

Surveillance through Taxation under traditional IHRL



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a Privacy entitlements: HR shields or tax-cheating swords?

In policing tax havens,

human rights have been invoked not to force the disclosure of information the withholding of which could facilitate abuse, but on the grounds of privacy to prevent that very disclosure. The right to privacy has ceased to be a shield and has become a sword in the war of aggressive tax planning and in the concealment of the ownership and purpose of an evolving range of increasingly complex [...] structures.⁷⁸⁹

Whilst I do subscribe to this general wisdom, the latter holds true for corporations' tax avoidance only; individuals, instead, enjoy a range of privacy rights which should be duly acted upon as to prevent abuse on the part of tax authorities. Indeed, when it comes to individuals' tax evasion, I disagree on the route taken to reverse the trend, which mostly results in global architectures of unaccountable surveillance crafted under the semblance of tax-recovery strategies; in fact, those architectures both *fail their stated mission (tax recovery)* and disregard the space of freedom, agency, and independence any human being is worthy of, which we use to call "privacy".

One thing is to strive for real beneficial owners to be disclosed and for MNCs to pay their fair share of taxes where they actually operate their businesses and/or make profits; this is to avoid that the economic freedom of those who can afford to rig the system to their extractive benefit turns to neo-colonialism for all others by means of extraterritorial legal exploitation,⁷⁹⁰ and these are concerns I embrace fully and would like to see fixed. In that sense, an efficient international tax arena represents the necessary premise for a healthier globalisation and a more distributed form of

⁷⁸⁹ BECKETT 2018, pp. 78-79;164.

⁷⁹⁰ Ibid., pp. 155-156.

internationalism.⁷⁹¹ For the time being, «isn't th[e] OECD platform in fact a somewhat hidden meeting point for the business élite to mould the concept of beneficial owner into their preferable understanding?». ⁷⁹²

Another thing, however, is to continuously share the data of billions of people with dozens of governments (of any HR record) worldwide, as a phony panacea, through the supranationalisation of preventive policing unaccompanied by an equally extensive socialisation of actionable protections⁷⁹³ (such as judicial gatekeeping and HR-based jurisdictional screening) – mentioned supranationalisation of policies being agreed upon and enforced by those very same officers who originated the problem and exploited the system in the first place.

Also, I am unsure about the “right to privacy” having been examined anywhere close to thoroughly in comparative legal/natural-person taxation IL and IR scholarship; this seems to be of the utmost importance, because HR assessments are often contextual ones, and determined by the ready availability of alternatives for accomplishing the relevant public aim. Such an analysis will be thus performed here, arguing that no degree of tax surveillance is a priori to be accepted or rejected, but that against a comparative context of aggressive corporate planning that still reproduces itself across the globe, *this* level of simultaneous tax surveillance on *each and every* individual is unacceptable IHRL-wise.

b The unserviceability of private corporate privacy models

⁷⁹¹ Refer to PIETERSE 2010, p. 105.

⁷⁹² PETERS 2013, p. 171.

⁷⁹³ See also FERREIRA DE ALMEIDA 2015, p. 227.

TOY and GUNASEKARA⁷⁹⁴ posit that there are currently three corporate models for citizens' data privacy: the data-transfer one, whereby corporations are prevented from transferring certain categories of data abroad; the accountability model, whereby data *is* transferable, but corporations are accountable for its uses (this sounds very much idealistic, as *to whom* they would be accountable remains often unclear); and the limited extraterritoriality one, according to which

where an organisation (data controller/processor) conducts business or activities in the location of the data subject and where the privacy interests of the data subject have been prejudiced in that place, then the data privacy laws in force in the place of the data subject could properly apply to the data controller. The test being put forward recognises legitimacy of extraterritorial applications of data privacy laws but at the same time limits the scope of extraterritoriality and is thus consistent with goals of the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data of not restricting the flow of personal data.⁷⁹⁵

Prima facie, these schemes would not apply to the case at hand, that involves sovereigns – and indeed, they are not directly applicable. Nevertheless, when sovereigns cannot be held accountable directly and yet they obtain data through the assistance by non-state actors, they can be restrained in their mediated data-collection exercises by holding private entities to account. If State A collects taxpayers' data from (i.e., in agreement with) a bank located in State B, the interference is straightforward; however, extraterritorial privacy rights should extend also as to capture those cases whereby State B collects taxpayers' data from a bank located in State B itself, but such data will be then transferred to State A in compliance with an A-B agreement. In any case, while this is mostly a matter of private international law (conflict of laws), the

⁷⁹⁴ 2019, pp. 719-720.

⁷⁹⁵ *Ibid.*, p. 722.

present Thesis will now focus on the appraisal of these (and related) phenomena under PIL.

c Privacy rights on the public international plane: The ECtHR's tests

As far as PIL is concerned, governments are not under a *general* obligation to uphold the secrecy of private information they gather or not to disclose it to foreign governments; however, under domestic law, certain categories of information represent an exception to this non-obligation, and in the US, for instance, tax returns enjoy exactly such protection from disclosure to third public or private parties.⁷⁹⁶ Along the same line, the reason why institutions such as the EU's would strive to protect EU citizens' data abroad⁷⁹⁷ whilst simultaneously sharing it in an automatic and warrant-free manner with other governments is not clear; said protection usually binds private entities and extends over data used for commercial purposes, but its rationale is that of ensuring that the privacy safeguards applicable to Europeans in Europe extend to their data when it is collected, stored, processed, transferred, or shared outside the EU. These considerations are valid for privacy *merely as data protection*, but there is in fact a dignity dimension that calls for emphasis when it comes to comparative tax analyses.

Internationally, individuals' privacy is protected under Article 12 UDHR and Article 17 ICCPR but thoroughly defined in neither of these documents, nor is it

⁷⁹⁶ Check ROWE and SANDEEN 2015, p. 133.

⁷⁹⁷ Refer e.g. to the 2016 Commission Implementing Decision; the Umbrella Agreement; the Binding Corporate Rules; the 2004 Commission Decision (relevant for transfers from EU controllers to non-EU/EEA controllers); the 2010 Commission Decision (relevant for transfers from EU controllers to non-EU/EEA processors); and the 2017 Commission Communication. The provisional post-Brexit framework on data protection (which has been drafted once EU law ceased to apply to the UK on 1 January 2021) includes the 2021^a and 2021^b Commission Implementing Decisions.

defined regionally under Article 8 ECHR and Article 11 of the American Convention on Human Rights (ACHR);⁷⁹⁸ the African Charter of Human and Peoples' Rights (ACHPR) does not even mention it, though it might be inferred from e.g. its Article 4.⁷⁹⁹ This notwithstanding, privacy is broadly conceived as a relatively private (ideal and material) space for personal development, family life, identity building, creativity, growth, imagination, decisional autonomy, mental comfort, and physical peacefulness.⁸⁰⁰ Most importantly, it seems useful to define what test courts have developed and are expectedly bound to apply when they are seized on privacy matters, to decide whether a violation occurred (or whether an occurred violation was justifiable, and thus lawful).

Pursuant to Article 8(2) ECHR, for an interference with this right to be lawful, such an interference shall be «in accordance with the law *and* [...] necessary in a democratic society».⁸⁰¹ The “and” qualification makes the second segment of the definition a qualifying requirement: any violation, to be lawful, *shall* be necessary. Yet, how to measure “necessity”? International publicists have long (and much controversially) debated matters of necessity as far as the “state of necessity” is concerned, that is, regarding five cumulative circumstances that a State shall meet before *lawfully violating* the international obligations it subscribed to at a time when such circumstances had not yet materialised, nor were they foreseeable. Furthermore, a stream of literature regards such circumstances as tailored to the developmental

⁷⁹⁸ See e.g. BEDUSCHI 2019, p. 3. However, General Comment No. 16 might provide relevant definitory guidance; refer e.g. to HUMBLE 2021, pp. 2-3. For a summary scheme, check Privacy International 2019, pp. 3-5.

⁷⁹⁹ Refer to MAVEDZENGE 2020, p. 361.

⁸⁰⁰ See also ÇINAR 2020, pp. 28-29.

⁸⁰¹ Emphasis added. It also needs to satisfy one of the listed purposes (national security; public safety; economic wellbeing of the country; prevention of disorder or crime; protection of health or morals; protection of the rights and freedoms of others), yet I will disregard this criterion for analytical convenience, due to its vagueness and disposability for abuse: the listed aims are so generally phrased and numerous that virtually any policy may be channelled through such a broad array of definitions on a case-by-case fashion, depending on the subjective preferences and political inclination of the Court/parties. Hence, they add nothing to the “necessity” and “lawfulness” cumulative criteria.

classification of the State concerned, yet for the sake of the present analysis I will assume this variable to be irrelevant or not applicable. The state-of-necessity doctrine is routinely applied by courts and investment tribunals alike, particularly with regards to trade, environmental, financial, and security dossiers, but a more fact-intensive, tailored-to-privacy jurisprudence has flourished around “necessity” considerations.

Most notably, being entrusted with the application of an instrument entered into force back in 1953 to more contemporary issues of online data protection, digital reputation, data automation, big data, and cognate ones, the ECtHR has developed a flexible and “evolutionary” approach to privacy, especially when it comes to authorities’ recourse to new-generation surveillance technologies in order to spy on their citizens and amass information about the latter. Alongside the applicable test, another issue is to be assessed: plaintiffs’ legal standing, that is, whether a potential privacy harm *by legislation* could represent an actionable claim on the part of citizens, without the latter being able to prove a direct and personal link to the harm or distress such legislation allegedly causes.

These matters will be explored in the ensuing paragraphs and sections, bearing in mind that although the ECtHR—labelled as «the world’s most effective international human rights tribunal»⁸⁰²—is a regional judicial forum whose judgements only apply to the relevant ECHR parties, its jurisprudence has frequently been regarded as a global reference for anticipating, discerning, and influencing intricate legal disputes concerning both procedural and substantial human rights. To an appreciable degree, it has vested the role of landmark judicial authority in the field. Indeed, while the Court is exclusively entrusted with the application of the related Convention, the rationale underpinning its reasonings may be extended *pari passu* to

⁸⁰² HELFER 2008, p. 126.

wider human-rights problems in order to assess the lawfulness of a practice theoretically under the IHRL regime, besides the factual specificity of given disputes between particular parties. Further support to this ECtHR potential emanates from the porousness of the Court's decision-making process itself towards broader inputs coming from other human-rights judicial and non-judicial fora,⁸⁰³ signalling an overall tendency towards convergence in IHRL⁸⁰⁴ – at least from a theoretical, beyond-dispute standpoint. While I concede that the ECtHR's approach to Article 8 ECHR on the right to privacy has often deferred to state parties' so-called "margin of appreciation",⁸⁰⁵ it is equally true that over decades of pronouncements, this Court has developed a substantial—if not yet impressively consistent—body of jurisprudence in privacy and surveillance matters, which currently stands as the most prominent of its kind among regional HR courts.

d An assessment of international tax-related privacy rights through the ECtHR's jurisprudence on Articles 6(1) and 8(1) ECHR

One of the possible applications of Article 8(1) ECHR concerns the confidentiality of one's correspondence, free from interference, interruption, or censorship. Had the ECtHR interpreted it strictly by confining its *ratione personae* to physical persons, this would not have been relevant to the situation scrutinised here, and yet, the Court decided the opposite: legal persons may prove relevant just as much.⁸⁰⁶ Nevertheless, even if conversations with physical or legal persons alike are

⁸⁰³ See DZEHTSIAROU 2018.

⁸⁰⁴ Refer generally to BUCKLEY et al. 2017.

⁸⁰⁵ Refer e.g. to MADSEN 2018, p. 94.

⁸⁰⁶ See ÇINAR 2020, p. 30. In *Colas Est*, too, the ECtHR upheld legal entities' entitlement to enjoy privacy rights under Article 8 ECHR, for instance against searches of their business offices; this can be linked to a wider trend in ECtHR's judicial decisions that tends to legitimise corporations as bearers of human rights in addition to HR obligations – refer further to KULICK 2021, pp. 547-548;565. In fact,

in principle safeguarded regardless of their private or professional contents, protecting “conversations” (that is, exchanges of information) with legal persons may prove challenging under Article 8(1). In *Bernh*,

[t]he applicant companies complained [...] about a demand by the [Norwegian] tax authorities that they make available for inspection at the tax office a backup copy of a computer server used jointly by the companies, in the context of a tax audit.⁸⁰⁷

This was an exceedingly complex case, both legally and technically, which raised a number of salient questions; it is not possible to retrace its whole context and steps here,⁸⁰⁸ but a few points might shed light on the difficulty to rely on Article 8 when it comes to online processing of personal data operated by companies. After cursorily mentioning Articles 5 and 7 of Convention 108 (which was not further referred to for deciding the case), the Court observed that

the applicant companies’ interest in protecting the privacy of their employees and other persons working for them [constituted] an aspect of their wider complaint under Article 8 of the Convention. *The fact that no such individual person was a party to the domestic proceedings nor brought an application under the Convention should not prevent the Court from taking into account such interests* in its wider assessment of the merits of the application.⁸⁰⁹

corporations are [also] “social realities”. They play an important role in socio-economic life, not least because they constitute separate legal entities that hence may accumulate tremendous economic and even political heft that is self-standing and distinct from the individuals behind the corporation. *Acknowledging them as legal subjects under private law, but denying them the status as human/constitutional rights subjects altogether on the premise that they are not “natural” because they are not “human” beings, is unsustainably inconsistent. [... D]enying corporate human rights altogether is mainly not feasible because it, in fact, considerably undermines human rights protection.* This is because the exercise of certain human rights by associations of human beings taking on the corporate form constitutes social phenomena that are distinct and different from the human rights exercise of the individuals behind the corporation.

– *ibid.*, p. 559, emphasis added.

⁸⁰⁷ *Bernh*, para. 3.

⁸⁰⁸ For a brief commentary, check ANDERSSON 2017, pp. 216-218.

⁸⁰⁹ *Bernh*, para. 90, emphasis added.

In other words, legal persons fall within Article 8's *ratione personae* scope in that their representatives may bring claims on behalf of individuals related thereto, and because companies themselves have a legal interest in protecting the confidentiality of people communicating with them.⁸¹⁰ On this take, the Court commented that

[s]uch an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to "interfere" [...], which might well be more far-reaching where professional or business activities or premises were involved.⁸¹¹

Most relevantly for the purpose of the present analysis, the judiciary affirmed that tax searches may in principle fall within the scope of privacy protection afforded under the ECHR:

[a]lthough the disputed measure was not equivalent to a seizure imposed in criminal proceedings or enforceable on pain of criminal sanctions [...], the applicant companies were nonetheless under a legal obligation to comply with the order to enable such access. The imposition of that obligation on the applicant companies constituted an interference with their "home" and undoubtedly concerned their "correspondence".⁸¹²

Despite this all, in the case at hand, the Court decided that the interference was mandated under Norwegian law and foreseeable to the claimants (principle of legality),⁸¹³ thus finding against the latter; this is because the target companies' data was stored in a mixed fashion with that of other companies, so that the authorities were authorised to discern by themselves between the documents belonging to the target companies and those referred to third users. Moreover,

⁸¹⁰ Ibid., para. 107.

⁸¹¹ Ibid., para. 104.

⁸¹² Ibid., para. 106.

⁸¹³ Ibid., paras. 123-134.

[i]n determining whether the impugned measure was “necessary in a democratic society”, the Court [had] consider[ed] whether, in the light of *the case as a whole*, the reasons adduced to justify it were *relevant and sufficient*, and whether it was proportionate to the legitimate aim pursued. In so doing, the Court [has taken] into account that the national authorities are accorded a certain margin of appreciation, the scope of which [depends] on such factors as the nature and seriousness of the interests at stake and the gravity of the interference [...].⁸¹⁴

This paragraph is of the utmost important in that it sorts the “necessity” requirement into two appraisals: 1) relevancy as a whole; and 2) proportionality. The judges went on to posit that although

the backup copy comprised all existing documents on the server, regardless of their relevance for tax assessment purposes [...], the fact that the measure was aimed at legal persons meant that a wider margin of appreciation could be applied than would have been the case had it concerned an individual.⁸¹⁵

Furthermore, no prior judicial authorisation was required, potential fines for non-disclosure were administrative only (rather than criminal), representatives could be present during the data scrutiny, and be informed of all steps being taken.⁸¹⁶ Notably, justice Julia LAFFRANQUE and the same President of the Court, justice Isabelle BERROLEFÈVRE, disagreed with the majority and attached their Dissenting Opinion, whereby they lamented, in particular, that

the Government d[id] not explain why a measure on such a scale was necessary, although an on-site inspection of the server [...] *would have enabled the same objectives to be achieved*[...; hence,] the majority attach[ed] decisive weight to the interests of the taxation authorities, without giving sufficient consideration to the interests of the *other parties affected*.⁸¹⁷

⁸¹⁴ Ibid., para. 158, two emphases added.

⁸¹⁵ Ibid., para. 159.

⁸¹⁶ Ibid., paras. 163-174. On this issue, but with reference to Brazil, *see also* FERREIRA DE ALMEIDA 2015, p. 237.

⁸¹⁷ Two emphases added.

Although in *Bernh* the necessity test concretised as “relevancy as a whole” and “proportionality”, this is not always true in ECtHR’s case-law, where several shades of these criteria are employed with no apparent factual—let alone terminological—consistency. Previously, in *Olsson*, the Court had already mentioned the as-a-whole element,⁸¹⁸ but specified that «the notion of necessity implies that the interference corresponds to a *pressing social need*».⁸¹⁹ In turn, the pressing-social-need element was mentioned in *Coster*, too,⁸²⁰ where the Court detailed its reasoning in a manner that appears of interest for this analysis. First, it reiterated that

it remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities. In these circumstances, the *procedural safeguards available to the individual applicant* will be especially material in determining whether the respondent State has, *when fixing the regulatory framework*, remained within its margin of appreciation.⁸²¹

Secondly, and most relevantly, the Court dismissed the invitation to refer to recent developments in international standards of conduct, *expressed in the form of soft law*; the judges preferred to exercise self-restraint and stressed that the soft quality of the suggested document made it a general policy aspiration rather than a law States were able to agree upon.⁸²²

Generally, the requisite of being “in accordance with the law” is satisfied by compliance with «statutes, decree laws, codes, regulations[,] and court judgments [that

⁸¹⁸ The Court’s

review is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith [...]. In [...] exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned decisions in isolation, but must look at them *in the light of the case as a whole*; it must determine whether the reasons adduced to justify the interferences at issue are “relevant and sufficient”

— *Olsson*, para. 68, emphasis added.

⁸¹⁹ *Ibid.*, para. 67, emphasis added.

⁸²⁰ *Coster*, para. 104.

⁸²¹ *Ibid.*, para. 106, two emphases added.

⁸²² *Ibid.*, para. 108. Similarly, see *Jane Smith*, para. 101.

are] sufficiently precise and incorporate a provision to protect against arbitrary measures by the authorities».⁸²³ Yet, is that law, by itself, susceptible to scrutiny? Put differently: could *the existence of a law per se* trigger a violation of Article 8, simply due to its potential applicability, or to its probable application if the violation occurs without knowledge by the potential addressees and thus cannot be proven? Obviously, a case would still need to be submitted by someone, but rather than regarding their life in particular, it might challenge the very enactment of a piece of legislation in terms of likeness of having been harmed or of future harms materialising. This is an all the more salient scenario when the law operates internationally by intergovernmental agreement, with citizens being potentially violated by such operation in jurisdictions other than their citizenship's one, and being left with no remedy for—nor actual certainty about—having been violated.

Big Brother Watch concerned mass-surveillance programs revealed by Edward Snowden and operated by the UK as part of its online “antiterrorism” activities; there, the applicants did not suffer any provable and specific harm, but they

believed that *due to the nature of their activities*, their electronic communications were *likely to* have either been intercepted by the [UK] intelligence services; obtained by the [UK] intelligence services after being intercepted by foreign governments; and/or obtained by the [UK] authorities from Communications Service Providers.⁸²⁴

After restating that on a general take, a supranational court is not best placed in striking the best balance between the legal interests of a country as a whole and those of *some* of *its* citizens,⁸²⁵ it stipulated that

⁸²³ CJNAR 2020, p. 31. See e.g. *Handyside*, paras. 48-49.

⁸²⁴ *Big Brother Watch* (first instance), para. 8, two emphases added.

⁸²⁵ *Ibid.*, para. 245.

[w]here an applicant is challenging the general legal framework for secret surveillance measures, the Court has identified the *availability of an effective domestic remedy* as a relevant factor in determining whether that applicant was a “victim” of the alleged violation, since, in the absence of such a remedy, widespread suspicion and concern among the general public that secret surveillance powers were being abused might be justified [...].⁸²⁶

From this non-exhaustive survey,⁸²⁷ I shall conclude that when 1) an effective⁸²⁸ and readily available domestic remedy against a legislative provision per se is missing, or 2) citizens cannot meaningfully recur to said remedy because the content or “operationalisation” of the relevant provisions is partly vague or secret, in those two cases the Court may deem itself satisfied that local remedies have been exhausted and the claim can be heard on the merits.

Nonetheless, the appeal judgement should be read cautiously and framed against wider IL trends in the West and globe-wide; this was brilliantly captured in literature claiming that with this holding, the ECtHR found privacy violations in the way the UK’s bulk surveillance system was designed, while at the same time “slowly” but certainly “normalising” bulk surveillance itself as if it were somehow “necessary” in democratic societies:

[L]ike the Chamber judgments before them, [this verdict] normalize[s] mass surveillance/bulk interception. The Court rejects the key argument made by privacy activists ever since the Snowden revelations that such surveillance programmes are *categorically* disproportionate. On the contrary, the Court finds these programmes—or at least their Anglo-Swedish varieties—to be “valuable” and [of] “vital importance” to the security of member [S]tates, despite the lack of evidence before it on their actual functioning [...]. And yes, the Court finds violations [...], but these require comparably easy fixes [...]. *All but one* of the 17 judges of the Grand Chamber accepted the necessity and proportionality

⁸²⁶ Ibid., para. 249, emphasis added.

⁸²⁷ For a more extensive examination of these criteria, refer to the Court’s own compilations of case-law, including its “Guide to the Case-Law of the of the European Court of Human Rights: Data Protection”, last updated on 30 April 2021 and freely available online.

⁸²⁸ «To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success [...] in theory and in practice at the relevant time» – *ibid.*, paras. 247-248.

of bulk interception [...]. So, no – not a “landmark victory” for privacy, but a grand, *definitive normalization of mass surveillance* by a virtually unanimous Grand Chamber for decades to come. [...] The price of that normalization is the subjecting of such surveillance to more rigorous regulation and administrative and judicial safeguards, but without really questioning the substantive merits of these programmes. [...] Some major issues lurk in the background but are avoided or not addressed – extraterritoriality foremost among them, but also *whether any distinctions can justifiably be made between the [S]tate’s own citizens and foreign nationals*.⁸²⁹

Because any all-encompassing bulk-surveillance program is self-evidently unnecessary,⁸³⁰ but rather a governmental policy *choice* premised to perpetuate the informational asymmetry and power-unbalance between the governors and the governed, this deference thereto signals «procedural fetishism»⁸³¹ and indeed a “normalisation” trend which one should appraise in the context of the customarisation of state mass-surveillance – citizens’ surveillance *through taxation* is a sub-set of such customarising surveillance practices. Of particular noticeability for this study, *Big Brother Watch’s* appeal judgement

focused solely on safeguards in the UK [concerning] the receipt of communications data *from foreign authorities*, including the legal rules for requesting and receiving intelligence and the safeguards for examination, use, storage, transmission, erasure and destruction of the material received (¶¶ 500-516). The [Grand Chamber wa]s silent on a reversed transfer scenario (when the UK would send intelligence abroad), and it is unclear whether the *safeguards provided by third countries receiving information* from the UK would also have to be scrutinized. In comparison, [outside the CoE’s framework, which is supposed to be HR-protecting one,^[832]] the recent CJEU decision in

⁸²⁹ MILANOVIĆ 2021, first emphases in the original, last two emphases added.

⁸³⁰ Nor is it effective, as several—pretty rudimental—terrorist attacks on European soil have recently demonstrated.

⁸³¹ ZALNIERIUTE 2021.

⁸³² DAVIO (2021, emphasis added) identified a common trend with the migration crisis investing Europe, and conjectured that

the EU legal order seems to offer a higher level of protection of fundamental rights than the ECHR system. [...] This may seem somewhat unexpected. Traditionally, the EU legal order has lagged behind the ECHR system as regards the protection of fundamental rights and has often sought to accommodate its specificities, such as the principle of mutual trust. [...] This phenomenon is likely to increase in the future given the proactive stance of the EU legislator in the field of fundamental rights. Although the EU does not have a general competence dedicated to fundamental rights, the EU legislator has increasingly developed fundamental rights standards in areas ranging from criminal law to data protection

Schrems II [...] invalidated the EU-US Privacy Shield, which enabled transatlantic data transfers between the two regions, due to lack of adequate safeguards in the surveillance framework in the US. If in the reversed scenario, the [Grand Chamber]’s emphasis would remain on *internal safeguards only, ignoring those in the country with whom data is shared* (e.g., USA), such a focus could leave UK residents vulnerable to the misuse of personal data by US authorities, without a remedy.⁸³³

Also of notice for this study is the issue of technological development: the Grand Chamber judgement built on partly concurring and partly dissenting opinions issued in the context of the lower chamber’s case, arguing that even in keeping the same conceptual design for addressing the legal conundrums of privacy in human-rights terms, *technological development per se* calls for the *continued recalibration* of lawfulness criteria that frame surveillance practices against their enabling technologies, so as to keep the substance of thresholds—rather than their formalistic identification—unaltered.⁸³⁴ In simpler terms, it was argued that because surveillance technology becomes more and more pervasive and ubiquitous (and public concern mounts accordingly), it might well be that a previously lawful surveillance *technique* is later rendered unlawful by a court relying on exactly the same legal provisions, because devices and technologies through which such technique is operated have evolved up to representing a legally qualitative *else*. Regrettably, this praiseworthy call was somewhat “misappropriated” by the Grand Chamber to codify a system of criteria whereby mass-surveillance is irrefutably legitimised and unequivocally set as the “new normal”.

— cf. SAJFERT 2021. In this respect, one shall obviously be mindful not only of the different legal mandate underpinning the ECtHR and the CJEU, but of the uneven jurisdictional scope of these two courts as well, with the former having to mediate certain “European values” with more conservative stances upheld by other jurisdictions such as the Russian Federation, Azerbaijan, or Turkey.

⁸³³ ZALNIERIUTE 2021, three emphases added.

⁸³⁴ See also SAJFERT 2021.

I will now turn to the Court's takes on privacy problems *more specifically stemming from taxation*; indeed, while the ECtHR defers to States for substantial tax and financial matters, it does have a say in procedural issues related thereto.

As for the right to a fair trial (Article 6 ECHR), the ECtHR held, in *Funke*, that the right against self-incrimination makes it unlawful for tax authorities to compel the disclosure of bank statements from the accused, even when such a power derives from statutory law; three years later, in *Saunders*, the Court indicated that information whose disclosure is forced under threat of imprisonment shall not be relied upon in criminal proceedings.⁸³⁵ In this sense, because opening a bank account represents *ipso facto* a mandatory disclosure of tax information to authorities across multiple jurisdictions under AEOI frameworks, and considering that the use of cash money is increasingly discouraged (when not banned altogether) so that opening bank accounts is necessary for survival in our virtualised cashless societies, one may go so far as to claim that the recourse to AEOI-retrieved tax information in criminal proceedings would be tantamount to coerced self-incrimination. Nonetheless, there is no jurisprudence on this potential application of Article 6 yet.

Turning to Article 8 ECHR again, the ECtHR held, in *Sommer*, that German authorities' collection, analysis, storage and sharing of private banking details of Mr Sommer (a lawyer) with «an unknown number of people»⁸³⁶ in the context of criminal investigations about his clients, having been grounded on suspects only regarding the clients themselves, was unreasonable and disproportionate and thus in breach of Article 8 ECHR. With this judgement, the Court reiterated that «States have a certain margin of appreciation, yet the exceptions provided for in the Convention are to be interpreted narrowly and the need for such exceptions must be convincingly

⁸³⁵ Refer to ALLDRIDGE 2017, pp. 92-93.

⁸³⁶ *Sommer*, para. 39.

established»;⁸³⁷ it further restated that «[c]ollecting personal information [...] affects the right to personal autonomy in establishing individual identity».⁸³⁸ Any interference with private life should be authorised in accordance with the law, which «does not only mean that the measure in question should have some basis in domestic law, but also that the law should be accessible to the person concerned and foreseeable as to its effects»⁸³⁹; procedural safeguards must be in place and preventively established,⁸⁴⁰ and this holds true not only when client-attorney privilege is at stake. As for the criterion of *necessity in a democratic society*, such a need has to represent, as seen already *supra*, a pressing social concern, and the response to it shall still conform to proportionality criteria.⁸⁴¹ Scrutinising *all* transactions through both private and professional bank accounts *to the extent that it provides authorities with the complete picture of one's life is not legitimate under circumstantial suspicion*,⁸⁴² therefore it is even less so when such scrutiny is automatic (or, even worse, automated), indiscriminate, and unrelated to individual suspicion supported by preliminary evidence, *a fortiori* in non-criminal cases. Furthermore, banks should not be compelled (or threatened) by enforcement agencies to disclose clients' details, unless they are executing a specific warrant issued by relevant judicial authorities.⁸⁴³ These safeguards are applicable *pari passu* under EU law as far as natural persons are concerns, whilst legal persons may rely on lower “privacy” rights.⁸⁴⁴

In *Sommer*, the Court found that suspicion of criminal activity does not suffice to legitimise the scrutiny of private banking details, even when such scrutiny takes

⁸³⁷ GERARDS 2018, p. 503.

⁸³⁸ LASAGNI 2019, p. 333.

⁸³⁹ *Sommer*, para. 50.

⁸⁴⁰ *Ibid.*, para. 53.

⁸⁴¹ *Ibid.*, para. 55.

⁸⁴² *Ibid.*, para. 57; at para. 61, the suspicion is deemed «vague and unspecific».

⁸⁴³ *Ibid.*, para. 62.

⁸⁴⁴ *See* LASAGNI 2019, pp. 335-336.

place within the relatively controlled environment of a domestic prosecution. As hinted at above, one would therefore expect that indiscriminate collection of such data is unlawful, too; in fact, the ECtHR's inexplicable decision in *G.S.B.*, two years earlier, contradicts this assumption. Incidentally, it shall be recalled that these judgements are very much fact-intensive and fact-sensitive, and perhaps also politically adjusted to the expected on-the-ground reality of each state party, so that apparent miscoordination between them should never surprise. In *G.S.B.*, Strasbourg's judges held that the collection of data from thousands of Swiss bank accounts and their sharing with US tax authorities did *not* amount to a violation of the same aforementioned Article 8, despite the transferring occurred beyond Switzerland's borders and the entire jurisdiction of CoE's countries. This seems more a deference to reasons of judicial comity in international affairs than the outcome of a sound examination of the Convention, although the Court confined itself to upholding the validity of said actions under the relevant US-Switzerland tax treaty, without entering the merits of the treaty itself and the lawfulness of its provisions. The reason why two commentators opined that «declaring the treaty between Switzerland and the U.S. unconstitutional or illegal under international law could have led to the suffocation of the Swiss banking sector»⁸⁴⁵ is unclear, as the latter has historically prospered exactly due to its secrecy guarantees: there seems to be no ground to believe that the survival of the State or its economy were anywhere near to be threatened, and this ground missing, the privacy violation was similar or even graver than that in *Sommer*. «To wit, before the trial at Strasbourg, the plaintiff hadn't been accused of a single financial offence».⁸⁴⁶

Seeking legal explanations for the inconsistency between the *Sommer* and *G.S.B.* approaches proves frustrating an exercise; most probably, the wide margin of

⁸⁴⁵ RIETIKER and BELIVEAU 2017, p. 22.

⁸⁴⁶ LYTVYENKO 2019, p. 318.

appreciation granted by the ECtHR to Switzerland represented a judicial move of self-restraint, that is to say, a preference for non-interference with the long-standing and fruitful collaboration between the two countries at stake in matters of bilateral taxation.

e The non-Europeanisation of individual rights in (Europeanised) tax enforcement

Taxation is one of the constitutive remits of sovereignty, and stands core to the relationship between States and citizens, to the effect that a supranational court like the ECtHR upholds the principle of state discretion to the highest possible extent, even when States' measures are extremely intrusive on individuals' life, property, or freedoms.⁸⁴⁷ Whilst this is understandable, it is much less so when it comes to international agreements that derogate on the State-citizen relationship by shifting the latter to a dimension that transcends the domestic jurisdiction at stake. The delicate balance of rights and duties which was previously investing the relationship between a citizen and its State, and that the ECtHR refrained from judging, it is now broadened as to encompass foreign interests which the citizen might not be willing to buy into with the concours of its own State, without the guarantee of equally broadened procedural and substantive rights. In other words, taxation is similar to a SC whose parties—both of them—should not outsource the contract's enforcement unless it was so agreed with the other party; this applies to any State in its web of treaty arrangements with third sovereigns, but especially within the EU, where citizens' rights are sidestepped twice – when enforcement is outsourced to Brussels first, and to extra-EU entities in second place.

⁸⁴⁷ See e.g. *Faccio*.

The *Sabou* case is enlightening about this problematic: in the words of the European Fiscal Confederation, the CJEU

held that the [1977 Council] Directive did not provide sufficient legal basis to confer rights to taxpayers at a European level in the exchange of information procedure on the investigation stage. In respect of this stage, the Directive only stipulated explicit rights and obligations enforceable *between Member States* and not *between Member States and taxpayers*. The competence to confer rights to taxpayers in the investigation stage still belongs to the Member States.⁸⁴⁸

Put differently, and focusing on the substance, the EU declares itself competent for supranationalising tax obligations, but not tax rights. Liabilities are supranationalised, whilst safeguards remain state-based, this asynchrony finding the taxpayer unable to effectively challenge supranational investigatory procedures before domestic courts, under the same EU law which was apparently competent enough to supranationalise those liabilities in the first place. Even assuming that the CJEU draws the competences' boundaries right, the problem is that obligations should never be supranationalised prior to making sure that *correspondingly supranational* rights can be (and are in fact) enacted; otherwise, the delicate balance between rights and duties in the State-citizen relationship is broken. From a non-discrimination⁸⁴⁹ perspective, this means that equals (EU citizens subjected to the same Europeanised interferences with their private life) are treated unequally (depending on the relevant domestic law). The evidence that the CJEU explicitly disregarded the EU Charter⁸⁵⁰ is also worth noticing; also, the Luxemburg's Court specified that not only mentioned Directive

⁸⁴⁸ *Confédération Fiscale Européenne*, Opinion Statement, April 2014, available at <http://taxadviserseurope.org/wp-content/uploads/2018/05/CFE-Opinion-Statement-ECJ-TF-2-2014-on-the-case-Sabou.pdf>, two emphases added.

⁸⁴⁹ For a concise examination of this principle in EU tax law, refer to GREGGI 2013.

⁸⁵⁰ Check MIHAESCU EVANS 2015, p. 143.

conferred no rights on taxpayers, but even the general principle of the right to defence could not be made recourse to as it only applies from the time of tax contestation.⁸⁵¹

No EU-law provision was applicable to the investigatory phase, to the effect that EU taxpayers could be scrutinised about what they did, what they bought, who they met, where they resided or travelled to, and so forth, over the whole territorial jurisdiction of the EU, without a judicial mandate, without notifying the interested taxpayer, and thus with no possibility for the latter to challenge the accuracy of the information so gathered (or even the convenience to start an investigation in the first place, which is funded, after all, through taxpayers' money). Phrased differently, the problematic aspect of this procedure under a human-rights perspective is that it could be executed indiscriminately, secretly, and automatically, with the outcome that whilst tax-related surveillance is supranationalised, taxpayers are left with no remedy and see their data transiting from MS to MS without limits of any sort (neither as to the subject-matter of the information gathered, nor as to the ground for initiating a EU-wide information-gathering procedure).

This issue revolving around the 1977 Council Directive demonstrates that three decades before the OECD began to concretise its information-sharing plans, the European Community was already on track to the same end,⁸⁵² although its cooperating momentum originated in a spirit of solidarity among European tax agencies and not in a communitarian response to unilateral assertions of jurisdiction like in the case of the US with the international community. Back then, the now-EU had already expressed considerable degrees of legal harmonisation, such that one would have expected a regionalisation of rights paralleling that of the investigatory powers granted to the agencies; with the benefit of hindsight, we can now affirm that

⁸⁵¹ Refer e.g. to FERRARI ZUMBINI 2019, pp. 135-136.

⁸⁵² See further DAGAN 2018, p. 153, fn. 43.

this is not what happened. Said Directive was replaced in 2011⁸⁵³ and amended in 2014,⁸⁵⁴ as well as integrated by another Directive in 2016 focusing on legal persons;⁸⁵⁵ its “twin” Directive tracing back to 2003⁸⁵⁶ became obsolete with the 2014 reform and was thus repealed in 2015.⁸⁵⁷

In any event, if even the supposedly rights-championing EU failed to simultaneously strengthening tax agencies’ powers and taxpayers’ safeguards, one can hardly imagine how taxpayers would be not even loosely protected in an exchange system which extends internationally. Hence, the argument may unfold in three steps. First, it can be argued that although information-sharing is laudable an initiative per se, it becomes palliative propaganda whenever it is not preceded (or at least accompanied) by concrete, decisive, and widespread actions to tackle the real massive sources of evasion, *residing in the very existence of tax “havens” and offshoring*, in MNCs’ profit-shifting, as well as in neoliberal excesses owing to regulatory capture and capitalists’ hubris. Second, it can be posited that information-sharing shall be accompanied by adequate safeguards (both substantially and procedurally) and thresholds, and that in any case, an exchange which is automatic and indiscriminate seems disproportionate an exercise of monopoly in state coercion. Third, and by reason of the inherently high degree of confidentiality of tax information, it will be explained that unless the Westphalian order is rethought radically, even the most cautiously designed system shall be applied gradually and carefully, due to implementation asymmetries (especially with reference to safeguards) in certain “partners” (cooperating jurisdictions) and to an unacceptable disruption of the State-citizens

⁸⁵³ 2011 Council Directive.

⁸⁵⁴ 2014 Council Directive.

⁸⁵⁵ ATA Directive.

⁸⁵⁶ 2003 Council Directive.

⁸⁵⁷ 2015 Council Directive.

dialectic whereby States extend their quasi-legislative and executive prerogatives globally whilst their citizens' citizenship is not supranationalised accordingly.

Paying taxes is indeed «a signifier of belonging to one's political community»,⁸⁵⁸ but that community cannot be globalised *à la carte* unless both rights and duties are so, in a transparent, gradual, and accountable manner; obviously, world politics stands very far from achieving anything close to this. Hence, for the time being, information should never be shared indiscriminately and automatically, also considering that any human-controlled exchange of this kind inevitably ends up being only “selectively” automatic in disfavour of the least politically connected – who also happen to be, arguably, the least relevant for countering tax evasion.

f The standpoint of the EU's data-protection regime

Amusingly, the same exorbitant increase in availability and disposability of big data—in terms of both the quantity of data retrievable “from” each individual, and the number of individuals (data pool, or subjects' “data base”) subjected to such retrieval—concomitantly urged lawmakers to adopt data-protection provisions and enabled administration to exchange large amounts of tax information accurately, sophisticatedly, and timely. The purposes and operational facets of these legal regimes often collide, to the extent that frictions and overlaps are unavoidable and too often resolved as the outcome of power bargaining between agencies or even States. Problems can be sorted in mainly two categories: those pertaining to the scope of the “subjects” who are scrutinised; and those referred to the scope of the information which is collected about those “subjects”. In this sense, compliance with GDPR

⁸⁵⁸ DAGAN 2018, p. 22.

provisions is—or should be—a central preoccupation for tax authorities in Europe, who shall always be able to explain what data they collect, why, on whom, together with details on whom they share such data with, for what purposes, in what manners (through what procedures, applying what safeguards, respecting and demanding observance for what security and confidentiality standards, etc.), and under what timeline. Compliance with EU data-protection law does not represent the backbone of my analysis, particularly because other scholars have analysed the issue in sufficient depth already, and I am more concerned with privacy as dignity. Nonetheless, drawing on their pioneering work, a few essential considerations shall be transposed here too, *en passant*, with the aim of placing the balance between privacy and taxation into context, also due to the ground-breaking role played by the GDPR in *global* privacy discourses (i.e., not exclusively in “the West”).

Financial data falls within the exception as per Article 23 GDPR, but any law-enforcement derogation relying on such provision shall demonstrate its necessity and proportionality.⁸⁵⁹ These are not absolute rights; in fact, they remain satisfied only when the principles of administrative transparency and individual explanation are duly upheld, even—or *most importantly*—when the data is shared with non-EU parties outside the EU territory and subject to third-party jurisdictions (that is, tax authorities and case handlers in non-EU countries). As explained *supra*, the then-ECJ held that EU taxpayers subjected to EU-wide tax provisions are not granted EU-wide rights, but have to rely on their Member States to be granted specific domestic rights which appropriately cater for the new scale of intrusions undertaken by tax authorities into their private lives. In order to do so, however, they shall know their data is being scrutinised, but as I have argued above, taxpayers are frequently unaware that tax

⁸⁵⁹ See further FERRARI 2020, p. 526.

authorities in (at least one) MS are gathering information on them. At any rate, MSs should ensure that *minimal* updated safeguards are put in place, not least because in *Berlioz*,

the ECJ confirmed that, when an EU Member State exchanges information on the basis of the [2011 Council Directive], it is clearly covered by the CFR. Domestic rules that provide for exchange of information in accordance with the D[irective], therefore, have to be undoubtedly in line with the CFR. Furthermore, not only the exchange of information as such but also the procedure to gather information required to answer a request for information is covered by the CFR. [...] An information exchange between them can also be carried out on the basis of a double tax treaty or another bi- or multilateral instrument which provides for exchange of information in tax matters [...]. As the EU Member States are free to choose the most favourable instrument applicable in a particular case, the information exchange may be conducted on the basis of an instrument that does not stem from EU law. Nevertheless, *insofar as the scope of exchange of information does not go beyond EU requirements*, exchange of information is determined by EU law as it obliges the EU Member States to implement exchange of information at least to the extent required by secondary EU law. The exchange of information provisions in a tax treaty can, in that respect, be considered a means to implement the EU obligation. Consequently, whether exchange of information is based on domestic law implementing the D[irective] in a specific situation or on e.g. a double tax treaty should not be decisive for the application of the CFR. [... For the same reason,] every situation that is governed by the GDPR—or by the DPD until 2018—automatically also falls under the CFR and has to be in line with the fundamental right to data protection.⁸⁶⁰

More generally, there are two kinds of international agreements entered into by MSs alone or “multi-bilaterally” (that is, together with EU institutions) with extra-EU counterparts: those that outsource human-rights compliance to said counterparts, and those that place an obligation on the EU itself and its MSs to ensure human rights are complied with by their counterparts as well. In either case, I maintain that the EU bears a due-diligence obligation in selecting partners it reasonably deems able *and* willing to respect the stipulated rights to the extent that is necessary for the matter being agreed upon. Dismayingly, tax data is shared without these reasonable expectations being

⁸⁶⁰ WÖHRER 2018, pp. 319-320, emphasis added.

assessed on a customised basis, and will be treated by the receiving jurisdiction according to its own preferences.

One may make recourse to general theories of HR extraterritoriality under EU external-relations law, but at this stage it seems more convenient to inspect the problem through the lenses of data protection. Hence, as for the GDPR, a case was made in favour of its applicability to *infra-EU* tax-information exchanges: pursuant to its Article 2(2)(a), it is inapplicable to matters falling outside the scope of EU law, which is certainly not the case with taxation agreements and cooperation among tax agencies.⁸⁶¹ Such applicability becomes far less obvious when extra-EU agreements are examined instead, because in order to argue that the processing of EU tax data in a foreign country falls within the scope of EU law, one needs to avail themselves of extraterritoriality clauses. Identifying the tax authorities of the (EU's) sending country as data controllers together with the financial institutions which are tasked with disclosing tax data to said authorities, the GDPR—pursuant to Articles 3, 4(7), and 45-50—applies even in the event those authorities transfer the data outside the EU,⁸⁶² at least until it falls into extra-EU control. When EU and non-EU authorities exchange data cross-border on a “peer” basis, a special regime takes precedence over the general safeguards, mandating that the

transfer of personal data to recipients outside the [EEA] is generally prohibited unless the jurisdiction in which the recipient is located is deemed to provide an adequate level of data protection, the data exporter puts appropriate safeguards in place, or a derogation or exemption applies. When an adequacy decision [...] is not in place, [...] Article 4 (1) and (2)(a) of the GDPR allow the cross-border data transfers between public authorities on the basis of a legally binding instrument between public authorities. The public authorities, however, must ensure compliance with the GDPR requirements and include provisions for enforceable and effective data subject rights. Consequently, *tax authorities in the [EU] and tax authorities in a third*

⁸⁶¹ Ibid., p. 322.

⁸⁶² Ibid., pp. 324-325.

country may exchange personal tax information on the basis of a tax treaty, a TIEA, or the CoE/OECD Multilateral Convention. The provision used for exchange of information, however, must ensure compliance with data protection safeguards. [A]ccording to [A]rticle 49(1)(d) of the GDPR [...], even in situations where neither an adequacy decision is available nor appropriate safeguards are in place, cross-border cooperation between tax authorities may nevertheless take place on the condition that it is necessary for important reasons of public interest. This exception, however, allows *only non-repetitive transfer of information to a third country that only concerns a limited number of data subjects*. In addition, the transfer must be necessary for the purposes of compelling legitimate interests pursued by the controller that are *not overridden by the interests or rights and freedoms of the data subject*. The controller must also have assessed all of the circumstances surrounding the data transfer and must have provided suitable safeguards with regard to the protection of personal data on the basis of that assessment ([A]rticle 49(1) of the GDPR). Furthermore, the controller has to inform the supervisory authority *and the data subject* of the transfer. *Whereas the Preamble to the GDPR states that the derogation for important reasons of public interest should apply, inter alia, to international data exchange between tax or customs administrations or between financial supervisory authorities, it does not allow automatic exchange of information with third [S]tates as this form of exchange of information is typically repetitive and concerns more than a limited number of data subjects*. When data is exchanged between an EU [MS] and a third country, it is consequently necessary to ensure that data protection safeguards according to EU standards are also available after the personal data has left the [EU].⁸⁶³

Besides the GDPR, one may observe that

the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection[,] or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data

is regulated by a separate piece of EU secondary legislation,⁸⁶⁴ and as such, tax crimes might fall under such legislation rather than the GDPR. However, arguably,

subsequent criminal proceedings against tax evaders are merely a result of the efforts to make correct tax assessments[;] therefore, exchange of information is not covered by the exception for criminal law.⁸⁶⁵

⁸⁶³ Ibid., pp. 326-327, five emphases added.

⁸⁶⁴ Directive 680.

⁸⁶⁵ WÖHRER 2018, p. 321.

In sum, one may conclude that *to the extent that tax information on EU citizens is shared with jurisdictions with which no sufficient special arrangements on security and confidentiality safeguards are in place*, the GDPR cannot provide for the legal protection of those citizens' privacy; in those cases, specific international regimes capturing privacy in its dignity dimension take precedence, and should be thoroughly and preventively established.

g *Ab imo ad summum*: Exponentially increasing the risk of cyberattacks, data leakages, and other losses of private information upon malicious conducts

Dignity-uptaking safeguards are not only legalistic, but also and most cogently *technical*. Indeed, till now I have mainly referred to two components of proportionality in HR assessments of AEOI mechanisms: the lack of reasonable-suspicion requirements (indiscrimination *ratione materiae*), and missing financial thresholds (indiscrimination *ratione quanti*). And yet, an exceedingly delicate point which is barely touched upon in existing literature but would deserve much more space in future one, is the actual scope of AEOI in terms of what jurisdictions are involved and exactly on what ground. This can be rephrased as follows: *is the risk worth taking?* In other words: is the risk of data leaks worth it, *proportionately* to the public purpose of the operation under scrutiny?

Most countries signed bilateral AEOI agreements with several jurisdictions, to the effect that potentially, information on any individual residing, being domiciled, conducting business, or even (financially or physically) transiting through one country could be shared with several other countries at the same time, with said individual

being unable to check what countries their information has been shared with. Let us suppose there is an individual {A} who is citizen of and fiscally residing in a country {A'} but owning a bank account in another country {B'} and conducting a business in another third country {C'}; {B} and {C} are other individuals who are citizens and fiscally residents of B' and C' respectively. The first question is whether citizenship, residency, domicile, and so forth are criteria for a country to exchange information about A at all; if they are, then it remains to be seen in what way. A moderate policy could be that if B' or C' have an agreement with A', they automatically share any information on A' citizens/residents with A', with A' sharing any information about B or C with B' or C' respectively in order to reciprocate, and none of these countries could theoretically share information so obtained with third jurisdictions. One dilemma is: could B' and C' also share information bilaterally about A if they have an agreement on their own, perhaps in order to communicate more accurate information to A' and be more proficiently reciprocated? Moreover, in this scheme, A is going to be overmonitored in compliant jurisdictions but escape controls in any non-compliant ones, or in those which are compliant but uphold such a low level of integrity and/or efficiency that developed countries are able to resist their treaty commitment, thus sharing little information therewith. Assuming A' has received information from B' and C' about A, such information now forms the “A dossier”, that is, the information A' now holds on A; therefore, if A holds or acquires any temporary or permanent tie with another country D' in the future, D' will receive information previously disclosed by B' and C' even if theoretically, such information could not be disclosed by B' and C' to D' directly. And if a country E' manifests a “justified interest” in A' and a bilateral arrangement with D' but not with A', B', or C', it might anyway receive an “A dossier” from D' already “filled” by A', B', and C' as well. *De facto*, this means

that after a few passages (in potential, very rapid or almost instantaneous here), anyone's information is disclosed to most jurisdictions worldwide under a factual "multilateralisation" of initiatives which were supposed to be bilateral, through a sort of multistep "dossierisation" of any individual.

The one just described is the paradigmatic exemplification of how the ontology of the Internet and bulk-data (dematerialisation, big numbers, rapidity, distributed design, data non-erasure, administrative secrecy, transnationalisation of information processing, etc.) transforms a *formally bilateral* process into a *factually multilateral* one; a permutability lawmakers are certainly aware of (to their advantage), but should be legally bound to take into account as well. Perhaps with this in mind, a few AEoI subscribers are opting for a partner-wise cautious approach, by partnering with extremely selected jurisdictions only; this is e.g. the case of Switzerland, which after surprisingly relinquishing its long tradition of banking secrecy, joined the AEoI in 2014 (and started to exchange tax data in 2018) but limited to a few partner-jurisdictions whose rule-of-law standards are supposed to be comparable to Swiss ones.⁸⁶⁶ This seems quite balanced an attitude—which not many countries, regrettably, are replicating, even though it did display some traction effect on e.g. the Bahamas—although it effectively marginalises most global havens.⁸⁶⁷ Still, in my view, seriously implemented exchanges "on demand" with virtually all jurisdictions (despite the hurdle of foreseeable relevance as per EoIRs⁸⁶⁸), or a HR-retailored AEoI system, would provide a more proficient and HR-upholding compromise for Switzerland and similarly "cautious subscribers".

⁸⁶⁶ Read further CRASNIĆ 2017, pp. 108-112.

⁸⁶⁷ See *ibid.*, pp. 112-113. See also CRASNIĆ 2020, pp. 6;15-16.

⁸⁶⁸ MEYER-NANDI (2017, p. 148) reports one example of this limitation with regards to African jurisdictions.

On top of that, “multilateralising” tax exchanges means that the “A dossier” (or substantial-enough parts of it to constitute a privacy violation leading to plausible safety threats and other harms) undergoes risk-multiplier procedures in facing exponentially higher probabilities of being leaked: 1) to States for which it was not intended, owing to the mechanism described above and to the rapidity—and related unmanageability—of big data; 2) to more administrative officers than necessary, due to overbroad data-access policies—plus potential bribery—in each administration; and 3) to the general public of each country concerned over the “sharing chain”—or even them all if the information is later released online and turned widely accessible—as a result of human error, cyberattacks, or IT systems’ failure. Points of cyberattack are both storage and transmission ones,⁸⁶⁹ and the more the process is multilateralised, the more the former points increase linearly while the latter increase exponentially. Moreover, “developed” and technologically advanced countries are not immune to cyber risks: if anything, due to the number and “political appeal” of potential “attack points” they have to simultaneously defend, they are even more exposed thereto. Major known cyber incidents related to tax data occurred for instance in the US, the UK, the Isle of Man, and Greece, resulting in the exposure of private information about hundreds of millions of taxpayers;⁸⁷⁰ class-action lawsuits involving tax-data breaches have been filed, for example, under the California Consumer Privacy Act (CCPA)⁸⁷¹ – which includes a data-breach clause featuring tax data as well,⁸⁷² and which will

⁸⁶⁹ Obviously, this holds true in the offline world as well – just, less frequently and/or massively; CHESTERMAN (2011, p. 75, emphasis added) reports for instance that

[i]n October 2007, the British tax authority lost two discs containing the personal details of 25 million Britons—*almost half the population*—when they were sent between offices as unrecorded internal mail. The weakly encrypted data included names, addresses, dates of birth, National Insurance [N]umbers, and bank account details. The Chairman of Her Majesty’s Revenue and Customs resigned over the scandal.

⁸⁷⁰ WÖHRER 2018, p. 174. *Read also* SCHNEIER 2016; PARRY 2015.

⁸⁷¹ Check e.g. <https://www.clearlygottlieb.com/news-and-insights/publication-listing/robinhood-sued-for-failing-to-protect-customers-accounts>.

⁸⁷² Amendment AB 1330 (September 2019).

soon be integrated by the California Privacy Rights and Enforcement Act (CPRA).

One salient (and open) question, then, concerns what jurisdiction should ultimately ensure the security of taxpayers' data, which also relates to the location of servers and troublesome phenomena of "data outsourcing" to low-regulation and low-tax jurisdictions. This is also linked to the issue of data localisation, which is felt particularly strongly in e.g. Mainland China, but will not be examined further in the present work.

h The "cumulative effect" of data-doubles

Another issue is that of data (and metadata) originally tendered to the Government for other purposes, but later "recycled" by the same Government for tax compliance (and thus shared with fellow governments as well).

This was e.g. the case with India's *Aadhaar*, a nation-wide identity-monitoring system launched on 28 January 2009, whereby citizens could receive social assistance by subscribing to a centralised service with their biometric data: originally employed to ensure that the distribution of food aid and other social-relief programs effectively reached the intended targets, it later metamorphosised into a sort of omnipresent and all-monitoring surveillance agency deployed to track individual tax compliance (alongside countless more matters) and mandatorily linked to the Permanent Account Number assigned to each Indian taxpayer.⁸⁷³ This is already an abuse in itself, which worsens if data so acquired is further shared around the planet against the understanding, will, consent, and even foresight of and notification to the interested

⁸⁷³ HENNE 2019, pp. 232;235.

parties. It is only on 26 September 2018 that the Supreme Court of India, in *Puttaswamy*, ordered that contract-based services such as opening a bank account could not be denied on the ground of a refusal on the part of a citizen to provide their *Aadhaar*'s unique identification number.⁸⁷⁴

Two decades ago already, it was predicated that

[w]hen almost every activity leaves a digital trail, government and private monitoring become less about analog surveillance and more a matter of “data mining” [...]. The digital trail each individual generates can be tracked by investigators, both public and private, easily and cheaply [...]. The problem is [...] the “dehumanization” of having one’s most intimate information circulated by an indifferent and faceless infrastructure without any control over the process or content. [...] Banks and financial institutions have gradually realized that they sit atop a horde of digital gold: their customers’ personal information.⁸⁷⁵

I believe that the three ages of privacy—from the analogical to the digital, and eventually to the AI era—could be summarised as follows. In the first phase, I concur with the suggestion that

public records were all available, but languished in “practical obscurity” in courthouse basements or isolated file cabinets. The records were difficult to locate *or assemble into a useful dossier* short of hiring a team of investigators to traipse into government offices around the country.⁸⁷⁶

The second phase witnessed «[g]overnment records [being] stored digitally, and often linked to the Internet or other networks»,⁸⁷⁷ initially in an open-source fashion, later confined to the scrutiny of state bureaucrats. The third and current phase is characterised by «the intelligent search for new knowledge in existing masses of

⁸⁷⁴ See *ibid.*, p. 236.

⁸⁷⁵ DEVRIES 2003, pp. 292;294;298.

⁸⁷⁶ *Ibid.*, p. 301, emphasis added.

⁸⁷⁷ *Ibid.*

data»⁸⁷⁸ (such knowledge being rigorously kept for state officials and related power apparatuses), which is typical of “data mining” in the algorithmic era.

Through AEoI, tax data joins the other “data doubles”⁸⁷⁹ in signalling «the increasing convergence of once discrete systems of surveillance»⁸⁸⁰ so famously adapted by Kevin D. Haggerty and Richard V. Ericson to the longstanding socio-criminological concept of “data assemblage”.⁸⁸¹ One concrete problem springing therefrom is that while algorithmic data assemblage that encompasses tax data is operated transnationally in a fluid and unchecked fashion, «human rights wield universal protection from their geopolitically fragmented implementation by [S]tates»,⁸⁸² which makes it virtually impossible for privacy rights to cater for such a massive, blatant-yet-secret, and immediate violation of everyone’s privacy across jurisdictions. This means that algorithmic collusion with state power is more of a systemic violence-reinforcer against the already disadvantaged than an infallible societal regulator,⁸⁸³ not secondarily when applied to the realm of taxation (and extensive surveillance practices “instrumental” therefor).

i Poor due-diligence requirements and absence of jurisdictional discrimination based on the “rule of law”

As financial and non-financial crises loom and “growth” plummets (mathematically and, hopefully, conceptually) throughout the industrialised economies, tax agencies are increasingly assertive or even aggressing, collecting,

⁸⁷⁸ FULDA 2000, p. 106.

⁸⁷⁹ On data doubles, *refer further to* GALIČ et al. 2017, pp. 22-23.

⁸⁸⁰ HIER 2003, p. 400.

⁸⁸¹ On data assemblage, *refer further to* ROBERTS 2019, p. 112; ERWIN 2015, pp. 42-47; ARADAU and BLANKE 2015; GALIČ et al. 2017, pp. 20-23.

⁸⁸² BELLANOVA et al. 2021, p. 140.

⁸⁸³ *See also* TRÉGUER 2019, p. 158.

cross-checking, and confiscating more and more assets and sources of information. Taxation is always an exercise of absolute coercive violence by the State on its citizens, but the relationship between the two varies significantly depending on whether the country is a democratic or an authoritarian one, meaning that democratic States possibly enjoy superior HR records and have their citizens involved in decision-making on all policy areas, including taxation.

While many democracies now have a rigorous rule of law along with a variety of taxpayer protections, the connection between liberty and taxation is more acute within illiberal regimes[,] whose residents often transfer monies offshore to protect them against improper seizure by their home governments.⁸⁸⁴

When state discretion approaches arbitrariness (e.g. in authorising asset expropriations), tax havens can represent the only exit strategy, and any form of AEoI may be tantamount to extraterritorial violations of human rights in that they communicate sensitive data from escaping citizens or foreign taxpayers. To prevent this, indiscrimination *ratione loci* is not an option: AEoI procedures should periodically undergo strict due-diligence assessments on both ends – preferably transparent ones, whose results are published open-access. In certain jurisdictions, a seemingly innocuous or sporadic compression of liberty or incompliance with privacy expectations may generate unwanted socio-administrative effects such as the seizure of assets (starting with the foreclosure of the family house), accounts freezing, renegotiation of insurance premiums, political and professional reprisals (up to being made redundant), frivolous litigation (*liti temerarie*) by third parties, blackmailing, as

⁸⁸⁴ COCKFIELD 2020, p. 387.

well as more traditional security perils such as the kidnapping of the wealthy out of ransom-seeking.⁸⁸⁵

Tax havens and other “uncooperative jurisdictions”, as well as further offshoring strategies, are sought after by UHNWIs for perfecting a wide array of criminal and malicious activities, but they also serve as the last shelter for the savings of those who are persecuted within their jurisdiction on the basis of race, religion, political opinions, sexual orientation, professional affiliation, outstanding medical bills, or else.⁸⁸⁶ Of course, a few amid those who are persecuted might *also* happen to be eminently rich and selfish individuals, but this does not seem like a very strong argument for the codification of an all-targeting international policy that sets no (combined jurisdictional and class) priorities and seeks no gradualism, whilst placing the financial security of all those who are persecuted automatically at risk.

When an information exchange occurs between an authoritarian and a non-authoritarian government *and the exchange is operated under reciprocally acceptable standards*, the higher standard of the non-authoritarian country will prevail, thus favouring the citizenry of the authoritarian country, too, thanks to the socialisation of those higher standards — assuming they will be upheld in reality. The exchange between two authoritarian countries, instead, might turn out problematic. One immediate rebuttal would be that two authoritarian countries do not need an exchange agreement in order to overtly share their citizens’ data, as no accountability mechanism troubles them, nor does a legal procedure they are bound to observe exist. Such a rebuttal however, besides oversimplifying relationships of accountability between authoritarian countries and their citizenry, does not account for the reputational costs those two authoritarian countries would have incurred into *before the international*

⁸⁸⁵ See *ibid.*

⁸⁸⁶ Refer *e.g.* to McLAREN and PASSANT 2010, pp. 11-12.

community by proceeding that way. Even taking international reputational costs into account, the counter-rebuttal would highlight that the two countries could have shared their citizens' data secretly rather than unveiling their will to do so by law; however, banks could have tried to resist—especially the foreign ones, possibly less subjected or more resilient to domestic political blackmailing—and inform their clients, equally secretly.

COCKFIELD⁸⁸⁷ duly summarised the core privacy concerns with international transfers of taxpayers' data; he warned that transferred information

(a) [...] will not be protected to the extent provided by the law of the transferring country; (b) [...] may be misused for political purposes such as helping domestic companies against foreign competitors; (c) [...] may be misused to sanction taxpayers for political reasons, potentially leading to human rights violations; (d) [...] may be illegally accessed or altered by third parties; and (e) [...] may be inaccurate leading to foreign investigations that target innocent taxpayers.

These concerns are substantiated by safeguards that are applied—on paper, but no one can check—according to the destination-country standards rather than to the ones of the sending country; this signals a detachment between the taxpayer and their State, and a disconnection in the rights-duties dialectic as well as in the separation of powers internal to such jurisdiction. Evidently, it is not submitted here that the only disruption of mentioned dialectic is operated by tax authorities: noncompliance with tax regulations puts the blame on those who evade in the first place; nevertheless, one should recall that the data-sharing process scrutinised here is not suspicion-enacted but rather completely independent from any indicia. It is a preventative, perpetually ongoing, massive, and indiscriminate one; practically put, it is an enormous

⁸⁸⁷ Ibid., p. 388, in-text citation omitted.

mechanism that attaches presumption of guilt on all taxpayers⁸⁸⁸ belonging to cooperative jurisdictions (and to the remaining jurisdictions too, which are anyway left uninvolved) while stripping those taxpayers of a comprehensive protection of their rights on the part of their own State.

j Fragile counterarguments to mid-path solutions

The intermediate phase of global cooperation in combating tax evasion, that is, the one where exchange-of-information requests were examined on a case-by-case basis and thus the exchange was not automatic, represented in my view the closer-to-best approach to balancing privacy and taxation, which could have been further empowered without turning to automation and automaticity.

Three objections were frequently raised as to demonstrate its inefficacy and therefore the need to turn to automatic exchanges: the length of the procedures; relatedly, the risk that dossiers would satisfy their statutes of limitation and expire (*cadere in prescrizione*); and the fact that knowledge *ex ante* frustrated the true sense of these operations, that is the discovery of new tax crimes authorities were not aware of. My submission is that the first two arguments do not hold, given that bureaucratic reforms would solve them to their roots, for example by exempting international tax recovery from *prescrizione* terms. Moreover, a significant number of exchange requests did succeed in recovering unpaid taxes relatively expeditiously – though I acknowledge that this might turn out easier in autocratic jurisdictions. As for the third argument, it does seem well-founded, yet in light of the actual kind of evasion these

⁸⁸⁸ On this point, with specific reference to Brazil, *read also* FERREIRA DE ALMEIDA 2015, p. 233.

procedures are able to extend their reach over, one may conclude that the effort is not worth it.

In any case though, if the traditionally domestic (or at best bilateral) domain of tax cooperation is globalised, equally globalised privacy safety nets shall be codified first.

k A Case-study from East Asia

i China's "total approach" to vertical disclosure of personal information, from banking institutes and otherwise

Chinese scholars have postulated that China's Company Law last-resort (and rarely upheld by PRC courts) exception to the fiction of separate legal personality for businesses, as to "pierce their corporate veil",⁸⁸⁹ applies to cases of tax evasion as well, thus, whenever a shareholder avails themselves of a corporate entity in order to evade taxes.⁸⁹⁰ In practice, this means that abuses of the corporate legal fiction to escape creditors—and more specifically, in this case, taxes—will be charged on that corporation's shareholders and all relevant legal consequences will be borne by them.⁸⁹¹ Yet, this does not address tax-avoidance strategies pursued by corporations

⁸⁸⁹ On the importance of piercing-the-corporate-veil doctrines for countering tax avoidance, *see generally* MARAIS 2019.

⁸⁹⁰ *See* HAN et al. 2018, p. 49.

⁸⁹¹ This is similar to the way tax authorities in other States make recourse to piercing the corporate veil for disapplying the limited-liability paradigm and countering tax *evasion* domestically; *refer e.g. to* KÄRKI 2020, pp. 87-92; EZENAGU 2019, pp. 77-78. This technique is, however, irrelevant for countering tax *avoidance*, which is international by definition because it involves corporations spanning across more than one jurisdiction (although a few cases of avoidance, such as those between Mainland China and its Hong Kong SAR, cannot technically be identified as "international"). Significantly, with regards to Panama, [t]he use of the Panamanian *sociedad anónima* on a domestic level [...] differs from the use that a foreigner commonly gives to [it]. Panamanian domestic corporations are employed for their traditional purpose, which is to participate in a commercial enterprise and benefit from the rule of limited liability. However, the fact that Panamanian nationals also use the *sociedad anónima* for other purposes such as tax avoidance [...] should not be overlooked. Certainly, there are differences between the Panamanian offshore and domestic *sociedades anónimas* regarding the objective of their existence.

directly through the exploitation of Westphalian jurisdictional asymmetries: it is a welcome strategy for limiting corporate impunity over the most blatant violations of the tax code (corporate tax *evasion*) confined to a single jurisdiction, which represent nonetheless the very minor part of the problem with corporate taxation, especially vis-à-vis MNCs. Moreover, a claim has been made that prejudice against the PCV doctrine is sometimes abused by PRC authorities to subtract market shares from a private company in favour of a state-owned competitor; this occurs when the local government prefers to liquidate a company rather than (or in addition to) charging its shareholders with tax crimes,⁸⁹² which only reinforces the argument that this doctrine's overall contribution to fighting corporate tax dodging within China remains disputable.

Chinese individuals have been long coping with more stringent a system. For example,

to promote the use of real names in banking, the [PBoC], under mandate from the central government, introduced in mid-2007 a system that allows (and also requires) banks to access the Ministry of Public Security database to verify the authenticity of identity cards used to open or change bank accounts or conduct other major financial transactions.⁸⁹³

needless to remark, this also gives the government a clear picture of who owns bank accounts and what institutes with. As most transactions—especially small payments—are executed through the WeChat app, if the government enjoys easy access to WeChat

— LEZCANO NAVARRO 2013, p. 169.

⁸⁹² See e.g. WEI 2015, pp. 215-217. This may be labelled as “state-induced insolvency”, which would be lawful and even desirable if it were not pressured by state authorities; in fact, several countries around the world allow for shareholders’ evasion charges if their company is liquidated before complying to its duties as a separate legal-person taxpayer. In Denmark, for instance, as reported by BUNDGAARD (2003, p. 89),

Section 33 of the [C]ompany [T]ax [A]ct [aka “Danish Corporation Tax Act”] implies that tax claims may be addressed to shareholders in so far the corporation in case of insolvency distributes the proceeds without sufficient payment for tax claims. A similar rule is introduced to counteract the sale of companies to commercial robbers who empty the corporation of assets without any payment of tax claims. Identification is seen to apply even when the corporation-shareholder relationship no longer exists.

⁸⁹³ MANION 2015, p. 248.

data, payment records are shown there as well, and can be cross-checked real-time with all other data passing through or stored by said app. Indeed, WeChat practically manages the daily life of Chinese people through a never-ending proliferation of built-in applications and related services, creating new artificial “needs” (and thus data) as days go by, operating indirectly as part of «the most sophisticated and extensive system for Internet [surveillance and] censorship in the world».⁸⁹⁴

As for foreign taxpayers doing business (or conducting any other personal affair) in China, provisions are numerous and complex. To begin with, these taxpayers’ information may face overdisclosure in China through routes that are not commonly thought of in the West, like the *informal* mobility of professionals between administrative and political élites and the major fintech corporations. When borders are *informally* this porous and «[a]rmies of employees of big financial firms are often “borrowed” by the government to work on government projects, without much of a contract»,⁸⁹⁵ data is easily transferable from entity to entity without scrutiny or concern. Hereby, a governmental tax specialist today may be Tencent’s marketing strategist tomorrow or a secret services’ specialist the day after (...or the very same day), and whilst this phenomenon is definitely not confined to China, the combination of its scale, rapidity, technology-intensiveness, *and informality* is in fact peculiar to the Chinese system of statist power-capitalism. Along similar lines, one could well claim that OECD rules forbid the administrative sharing of tax information with uninvolved branches of the administration, governmental agencies, or other third parties,⁸⁹⁶ but state administrations in China are so tied to the Party’s executive

⁸⁹⁴ Ibid., p. 249.

⁸⁹⁵ WÓJCIK 2018, p. 274.

⁸⁹⁶ See e.g. the OECD’s paper on “Establishing and Running an Effective Exchange of Information Function: A joint Global Forum and ATAF Toolkit” (https://www.oecd.org/tax/transparency/documents/EOI-Unit-toolkit_en.pdf), pp. 33-38. The IO has even prepared a “Confidentiality and Information Security Management Toolkit” (available at https://www.oecd.org/tax/transparency/documents/confidentiality-ism-toolkit_en.pdf).

hierarchy⁸⁹⁷ that no one could take the actual implementation of such rules seriously for the time being. Other jurisdictions, such as Ireland,⁸⁹⁸ are more comforting in this respect – at least on paper. The frustratingly vague phrasing of Chinese regulations does not help one feel safe about their data, either: in the SAT Notice, Article 9(9) prohibits China to provide tax information to its exchange counterparts «in the case of any information that cannot be acquired through normal administrative procedures», but Article 10(3) forbids Chinese tax authorities from refusing to provide such information when they are «obliged to keep confidential the information of taxpayers».⁸⁹⁹

Internationally, China was exceedingly active in on-demand information exchanges well before the establishment of automated ones.⁹⁰⁰ As for the latter, according to the OECD's 2019 AEOI Implementation Report,⁹⁰¹ the PRC committed to delivering on the first AEOI exchanges in 2018, partnering with 52 countries in 2018 and 64 in 2019; news reports from various city tax bureaus confirm that automatic

⁸⁹⁷ Check for example KUI 2018, pp. 101-102.

⁸⁹⁸ Refer to Irish Tax and Customs, "Guide to Exchange of Information under Council Directive 2011/16/EU, Ireland's Double Taxation Agreements and Tax Information Exchange Agreements and the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters – Part 35-01-01a: Role of International Tax Division", September 2020, available at <https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-35/35-01-01a.pdf>, pp. 11-14.

⁸⁹⁹ I have availed myself of the unofficial English translation retrievable from <http://www.lawinfochina.com/>.

⁹⁰⁰ See e.g.

<http://www.chinatax.gov.cn/chinatax/n810219/n810744/n1671176/n1671191/c2041322/content.html>, reporting that in 2015, the Fujian State Taxation Bureau provided a total of 295 pieces of intelligence to the US, Japan, South Korea, Australia, and other jurisdictions. *Read also* DONG et al. 2018, referring to the 2017 case of a singer whose tax details were requested by Spain's tax authorities and successfully shared by China. Other cases proved more burdensome, but this was due to gaps in individual income tax legislation rather than to shortcomings in information exchanges. For instance, LIANG (2016) recounts that in December 2012 the Canadian tax agency applied to its Chinese counterpart in order to investigate the tax affairs of a businessman whose reported income in Canada was extremely low although he was living lavishly; China discovered several businesses conducted within its jurisdiction by this man under figureheads' accounts, but faced difficulties in taxing him directly, ending up recovering just a minor part of the unpaid levies by taxing his mother still residing in China instead. The Author advocated for the intensification and automation of tax-information exchanges, while the case suggested that the request on demand worked satisfactorily, and the hurdles faced by China's tax agency related to domestic tax laws instead.

⁹⁰¹ Available at <https://www.oecd.org/tax/transparency/AEOI-implementation-report-2019.pdf>.

exchanges are being implemented⁹⁰² and produced the first effects in the Mainland,⁹⁰³ at times via cross-checking with data acquired through special on-demand requests.⁹⁰⁴ To compare, HK, «which has been very slow in activating [Automatic Information Exchange (AIE)] relationships»,⁹⁰⁵ first actualised the exchanges in 2018 with 36 partners, furthering in 2019 with 45; and Macao showed exactly the same commitment of Hong Kong, but furthered the collaboration with up to 48 partners in 2019.⁹⁰⁶

China's Due Diligence Measures stipulate

the principles and procedures for [financial institutions] established in China to follow, [as] to identify any reportable non-residents of China that hold financial accounts with the institutions and to collect the required financial account information for the Chinese authorities.⁹⁰⁷

China is an extremely “articulated” polity, with several administrative compartmentalisations, an enormous territory, and the largest population (and population density, along the coastline) on earth; as such, the fact that said Measures are largely drafted on the OECD model but are not detailed enough to withstand the burdens of real-life implementation across different kinds of financial institutions all throughout the country is unsurprising. Just like what happened with China's Cybersecurity Law and its subsequent (countless) implementing regulations (often titled—*nomen omen est*—“Specifications”), as well as with China's Data Security Law, these Measures warrant more detailed and institution-specific guidelines to be

⁹⁰² Check e.g. this one from the city of Lishui:
http://zhejiang.chinatax.gov.cn/art/2021/1/18/art_12633_490338.html.

⁹⁰³ Check e.g. this one from the Shunyi District in Běijīng:
https://www.sohu.com/a/313787649_611489.

⁹⁰⁴ Check e.g. this case from the city of Yángzhōu:
https://maimai.cn/article/detail?fid=276776161&efid=1RVAHeqqcPrqwFq0dmwo_g.

⁹⁰⁵ JANSKÝ et al. 2021, p. 13.

⁹⁰⁶ Implementation Report, pp. 4-5.

⁹⁰⁷ KINSLEY and ZHOU 2017.

correctly interpreted and uniformly applied. Relevantly here, in that piece of legislation

[n]o specific guidance [was] provided on what type of notices and how frequently FIs should inform their customers about the implementation of the CRS in China and the possibility that their information will be reported if certain conditions are met.⁹⁰⁸

It is suggested that «[f]orward-looking FIs could take th[e] opportunity [of these Measures] to enhance their business models, improve data quality and analytics capabilities, resulting in more efficient operations and a better customer experience»,⁹⁰⁹ yet the extent to which this is going to improve customer experience is far from clear. Conversely, customers may well have their data further scrutinised, cross-checked, grouped, and aggregated by algorithms under the slogan of “combating tax evasion” or the pretence of performing imperative tasks to comply with domestic law, thus “respecting international standards” – which were striven for by China in the first place. As a minimum, similarly to what has been suggested in other fields (such as international lending⁹¹⁰), it is advised that China—and the countries it exchanges information with—should observe the principle of *most protective standard*, rather than automatically deferring to the policies which are operated under the laws of the receiving jurisdiction. This is a fortiori necessary if China will resolve to employ exchanged information for establishing an exit tax-clearing system for foreign individuals.⁹¹¹

It seems crucial to put the above into context, very briefly. In China, privacy is framed as a component of the security *of the State* rather than of that of citizens (and

⁹⁰⁸ Ibid.

⁹⁰⁹ Ibid.

⁹¹⁰ See BOHOSLAVSKY 2019, p. 74.

⁹¹¹ The general establishment of such a system was recommended by a research group in CUFÉ et al. 2018.

individuals generally); when it comes to digital data, this turns to the concept of “data protection” enforced from the standpoint of cybersecurity. In turn, cybersecurity itself is broadly construed as securitarian agency from above rather than as diffused capability of and empowerment for Internet users. Coherently, a well-known Xiamen-based law scholar argued that China’s Cybersecurity Law operates within the framework of 2015 China’s Security Law and shall be assessed against the same objectives:⁹¹² security as *the* overarching and supreme policy goal for the State to pursue and citizens to observe.⁹¹³ “Individual dignity”, online and offline alike, is subordinated to the State, which holds the monopoly over the interpretation of such a concept.

ii Contrasting China’s safeguards with those applicable in HKSAR after the National Security Law

As for HK, it is a GTF member and significantly enhanced its international cooperation over the last decade:⁹¹⁴ it fully embraced the OECD cause as «to avoid being labelled as an “uncooperative” jurisdiction[,] which [would have] affect[ed its] position as an international financial centre». ⁹¹⁵ Indeed, its reputation as a free financial centre has already been impacted by the enactment of HK’s Security Law.

Prior to the 2016 Revenue Ordinance, HK had already signed 29 Comprehensive Avoidance of Double Taxation Agreements (CDTAs) with its major trading and economic partners (including Mainland China, on 21 August 2006), featuring an EoI clause that paraphrases the one reported in the 2004 version of the

⁹¹² Refer to CAI 2017, p. 77.

⁹¹³ Check *ibid.*, pp. 80-82.

⁹¹⁴ For an overview, refer to HALKYARD 2017, pp. 159-161.

⁹¹⁵ “Consultation Paper on Automatic Exchange of Financial Account Information in Tax Matters in Hong Kong”, <https://www.fstb.gov.hk/tb/en/docs/AEOI-ConsultationPaper-e.pdf>, p. 2.

OECD Model Tax Convention.⁹¹⁶ Under such provisions, information was exchanged upon request, only if foreseeably relevant for taxes covered by the CDTAs, non-retroactively, for tax purposes only, under non-disclosure obligation to third parties, and never within broader requests of assistance in tax collection (although information-provision by itself may be considered a form of assistance). Before the international community, this commitment was deemed insufficient: the “peer-review” system in place suggested this SAR to perform a number of amendments in order to align itself to the OECD expectations. Such “invited amendments” include the removal of restrictions on the types of taxes encompassed by the agreements; the lifting of disclosure limitations for confidentiality reasons; the discretionary relaxation of non-retroactivity;⁹¹⁷ and the employment of shared information for non-tax matters common to both parties.⁹¹⁸ HK’s administration expressed its concerns about the required amendments, in particular regarding taxpayers’ right to privacy, which was claimed to be protected by means of safeguards as follows:

to exchange information only upon request; only to disclose information which is “foreseeably relevant”; to treat information received as confidential; to disclose information to the tax authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of and the determination of appeals in relation to taxes falling within the scope of EoI but not for release to their oversight bodies unless there are legitimate reasons given; not to disclose the information requested to a third jurisdiction; no obligation to supply information under certain circumstances, for example, where the information will disclose any trade, business, industrial, commercial or professional secret or trade process, or which will be covered by legal professional privilege, etc.;

⁹¹⁶ “Paper for the House Committee meeting Report of the Bills Committee on Inland Revenue (Amendment) Bill 2013”, LC Paper No. CB(1)1385/12-13, Ref: CB1/BC/7/12, <https://www.legco.gov.hk/yr12-13/english/hc/papers/hc0621cb1-1385-e.pdf>, paras. 2-4 and Appendix I.

⁹¹⁷ Non-retroactivity does not yet stand as a general principle of international law *in administrative matters*, particularly in the field in taxation where laws, especially domestic ones, are still often applied retroactively; however, due care shall be placed on AEOIs for the data so retrieved not being recycled for criminal-justice purposes, where non-retroactivity *is*, in fact, a binding international-law norm. *See further* KRYVOI and MATOS 2021, pp. 51-55.

⁹¹⁸ “Paper for the House Committee meeting Report of the Bills Committee on Inland Revenue (Amendment) Bill 2013”, LC Paper No. CB(1)1385/12-13, Ref: CB1/BC/7/12, <https://www.legco.gov.hk/yr12-13/english/hc/papers/hc0621cb1-1385-e.pdf>, paras. 5-9.

and not to accede to requests for tax examinations abroad and assistance in collection of taxes. [...] For an approved EoI request, CIR will notify in writing the person who is the subject of the request (including the taxpayer concerned even if the information requested is in the possession of a third party) of the nature of the information requested by a CDTA partner and of his right to request within 14 days after the date of notification a copy of the information that CIR is prepared to disclose to the CDTA partner concerned. [...] The Administration has advised that it will apply the same mechanism to EoI requests under the future TIEAs. [...] Some deputations have suggested that provisions should be introduced to allow taxpayers recourse to the court or an administrative appeals tribunal in the event of a dispute concerning any tax information to be exchanged. The Law Society of Hong Kong has urged that individuals should be allowed to challenge information disclosures not merely on the basis that the information is factually incorrect [...]. The Administration has responded that [... the] OECD requires that a jurisdiction's internal procedures cannot unduly delay effective EoI and considers that the existing approach has taken into account various considerations and struck a balance between protection of taxpayers' rights and facilitation of effective EoI.⁹¹⁹

Expectedly, things did not go quite as planned. Just to exemplify succinctly, according to the HK Bar Association,

the Government has not justified the need to change from the [...] "upon request" basis to "automatic" E[o]I which results in the CIR no longer acting as the gatekeeper to vet each individual request on a case-by-case basis, and completely does away the need for justification of the disclosure request [...], leaving to the AE[o]I partners to abide by the "foreseeable relevance" requirement as they see fit. [...] Furthermore,] the Government has not justified the need to disclose the *magnitude* of the personal and financial data, and *indiscriminately* to all AE[o]I partners. For instance, one fails to see the relevance of one's date and place of birth [...], especially when the specific tax regimes of different AE[o]I partners are not identified.⁹²⁰

HK's PCPD contextually expressed similar concerns, but no consequences ensued therefrom. Among the points of dissatisfaction outlined by the Commissioner, one specified that it is illegitimate, on the part of the Government, to compel FIs into

⁹¹⁹ Ibid., paras. 22;25;29-30.

⁹²⁰ "Response from the Hong Kong Bar Association on Consultation on Automatic Exchange of Financial Account Information in Tax Matters in Hong Kong", 30 June 2015, [https://www.hkba.org/sites/default/files/Automatic Exchange of Financial Account in Tax Matters in HK %28webpage%29 6 15.pdf](https://www.hkba.org/sites/default/files/Automatic%20Exchange%20of%20Financial%20Account%20Information%20in%20Tax%20Matters%20in%20Hong%20Kong%20-%202015.pdf), paras. 35;37 (two original underlines turned into italics).

disclosure of customers' data which was not collected for tax purposes.⁹²¹ This would hold especially true, I would argue, insofar as those customers had not been preemptively warned in writing, as genuinely clearly and comprehensively as possible, that their data might have been transferred to the Government as soon as it would have been processed by those credit institutions.



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⁹²¹ "PCPD's Submissions in response to the Public Consultation on Automatic Exchange of Financial Account Information in Tax Matters in Hong Kong", 30 June 2015, <https://www.pcpd.org.hk/english/enforcement/response/files/AEOI.pdf>, para. 8.

Chapter 10

*An aim-based policy-coherence approach
to international human-rights assessments*



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a Approaching taxation from a legally pertinent “coherence”-based angle

Needless to recall, this is not the first scrutiny of international taxation through IHRL lenses; in truth, countless appraisals have been published over the last decade or so, across all continents. Existing studies mainly advance two claims broadly of relevance for the IHRL regime, namely for sustainable development and privacy: 1) corporate taxation, especially of MNCs, is unfairly weak, inconsistent, and loophole-pierced compared to the demands of global justice, non-exploitation, equality, resource reallocation, wealth redistribution, postcolonial reparative justice, and overall sustainable development being submitted by the poorest (members of depleted) communities and societies; 2) natural-person taxpayers’ privacy rights are inherently impaired through information-exchange procedures because of the latter’s own unlawful design.

As for the first argument, a few excellent articles have undertaken an examination of international taxation through the prism of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Guiding Principles for HR Impact Assessments, the Guiding Principles on B&HR,⁹²² and the Maastricht Principles on Extraterritorial Obligations, bemoaning that the «current international tax regime could be said to be un-governed in many practical respects, embodying in practice the principle of “might is right”».⁹²³ Those works detail what the obligations binding on States are for the latter to ensure that taxation serves the legitimate interests of all countries equitably, rather than operating macroscopical redistributions of taxation rights in favour of the advanced economies; they posit that

⁹²² See for example DARCY 2017.

⁹²³ DE SCHUTTER et al. 2020, p. 1382.

[t]oday's global economy rests on a stark division of labour between richer on the one hand, and poorer countries on the other. High-income countries on the whole capture the highest value-added portions of a company's value chain (such as research, [IP], design, branding, marketing, sales[,] and service) while poorer countries contribute lower value-added parts of the value chain (including the provision of raw materials and low-wage manufacturing). Without enhancing the value of the economic activities these countries are involved in, simply assigning these countries' taxation rights as a function of how much value they add to the economic chain will put them in a consistently inferior position with regard to the revenue they can mobilise.⁹²⁴

There is an interesting perspective, one of the implications thereof being that States in the GN may let themselves be captured by MNCs because the latter, eventually, contribute to shifting tax wealth from the least advanced economies to the most economically powerful ones. Because international tax policymaking is chiefly pursued at the OECD and the OECD is captured by the aligned public-private interests of *those* companies and *those* countries, a relative recalcitrance from States to regulate business conduct would follow coherently.

Nevertheless, I reckon that an overlooked *and legally significant* intersection stands in between these two arguments: argument 2 is valid not necessarily per se, but *in light of argument 1*. Hence, my approach differs fundamentally from all others available to date on several grounds; most relevantly, the present research displaces the North/South, haven/non-haven, high/low-tax-rates false or irrelevant dichotomies, to focus on the corporate/individuals dialectic instead, and on the arguably unlawful optimisation of tax policies to maximise corporate strategies worldwide. It is indeed necessary to focus on the corporation as the epitome of a «largely depoliticised world dominated by formal and functional expertise, a world of struggles in which private interests shape the public discourse and institutions to achieve dominance».⁹²⁵

⁹²⁴ Ibid.

⁹²⁵ BONADIMAN and SOIRILA 2019, p. 325.

To summarise, previous IHRL approaches to international taxation have contrasted the taxation of corporations *in developed and developing economies*, or addressed the privacy rights of natural-person taxpayers per se,⁹²⁶ while this study is concerned with the distribution of tax-related rights and duties *between natural and legal persons*, with specific reference to the desirability and lawfulness to violate privacy rights of natural persons prior to having successfully addressed the much more significant issue of corporate tax avoidance owing to regulatory capture. In some sense, I analyse the problem of tax privacy intersectionally, i.e. as a multi-variable problem that does not confine its scrutiny to the privacy entitlement held by individuals, but it rather asks the *compared-to-whom question*; in my view, only the poor get instrumentally surveilled, because even if everyone—including the rich—is so, wealthy people conceal their assets in sophisticatedly “lawful” ways which fear no surveillance or defy it through legal recourse. Indeed, I believe that persecuting *all* individuals indiscriminately adheres to a surveillance-capitalist strategy more than satisfying a welfare policy objective, which could be accomplished more rapidly, more justifiably, and more fairly by prioritising a serious solution to the tax-avoidance plague. *It is in these disproportionate responses to evasion compared to avoidance that I situate IHRL violations applicable to all individuals* – from both the GN and the GS, so that these latter two geoeconomic specifications lose significance. This is not about the poor in a predefined region, but about all those who—also because of uneven taxation—are relatively poor compared to the excesses of MNCs-tied individuals who exploit the tax system through tangled corporate structures globally.

Global-redistribution and universality-appealing proposals based on powerful States’ good will have been consistently rejected; infamously, when the UN Secretary-

⁹²⁶ Refer e.g. to NEVE 2017, p. 95 ff.

General Boutros-Ghali suggested to levy a modest tax on financial transactions to fund the UN system and its collective endeavours, US presidential candidate Bob Joseph Dole even felt the urge to table a law to shield Americans (*de facto* only the wealthiest ones) from UN-proposed taxes.⁹²⁷ As a consequence of these reiterated failures, targeting MNCs and reformulating their tax duties from scratch seems to me the only viable option to eradicate the anachronistic privilege and wealth concentration of UHNWIs, which is by its own existence an affront to any conception of an international legal regime protecting human rights. Otherwise phrased, the emphasis here is placed—to begin with, at least—on fairness *within*, not *between* countries under the relevant supranational arrangements; it investigates the dignity of *all* individuals in having their rights protected unless strictly necessary, arguing that UHNWIs represent the only undelayedly necessary starting-point to improve international tax rules. If «[a] State’s legitimacy to enact public policies, including tax policies, depends upon its realisation of the human rights of individuals and communities»,⁹²⁸ then no IHRL-compliant State is allowed to favour the violation of all of its citizens’ right to privacy unless this is compelled by reasons of extreme severity and urgency. Considering that the overwhelming majority of the problem lies in a tiny minority of individuals and in related corporate legal artifices, neither severity nor urgency are confirmed at this stage for a privacy violation involving all citizens indistinctly.

To sum up, this Thesis seeks to extend a *policy coherence* approach over international taxation, arguing that *the pursuance of incoherent policies towards a public aim makes rights’ violations allegedly exercised to achieve such aim unjustified and thus unlawful*. So how may one theorise “coherence” in human-rights terms, as to endow it with legal relevance?

⁹²⁷ Refer to NEWMAN 2006, pp. 172-173.

⁹²⁸ DE SCHUTTER et al. 2020, p. 1384.

b Meaningful shapes of coherence in lawmaking

As human societies steadily grow in complexity (understood for instance as the number and diversity of inter- and metahuman, potential and actual interactions), “coherence” seems more and more of a holy grail for policymakers: how to ensure that societies are run according to *their* preferences and aspirations? As this study expounds, the phagocytising and tax-escaping influence of MNCs (also on regulators and institutions) stands, in this respect, as increasingly controversial: are market forces distorting societies’ ability to seek and pursue the “common good” – admitting, without conceding, that we can define the latter?

This tension is *not*, in fact, easily resolved. In actually-existing liberal market societies, the forever war over tax policy and compliance shows that, even when the domain distinction between the private economy and the public civil sphere is more sharply drawn, conflicting values and reasons frustrate social coherence.⁹²⁹

What about the *legal* emanation of coherence, though? What is *legally coherent* within a society? To think of it, it might be useful to defer to human-rights language and rationales, to be considered by lawmakers when deciding what is lawful or unlawful within the regulatory perimeter of a market society. Owing to its centrality to policymaking processes generally, I will thus discuss this “propriety” under the comprehensive expression “policy coherence”.

c Policy coherence as a systemic justification for derogating from human rights

⁹²⁹ RECTOR 2021, pp. 602-603, emphasis in the original.

Because human rights (apart from non-derogable ones) may be generally violated by States if such violations are necessary to attain a policy goal which is considered more important, strategic, or urgent than the respect for those rights, establishing stricter and somehow “measurable” criteria to assess said “necessity” should be a primary concern for lawmakers, not necessarily to be delegated to the Judiciary alone. I submit here that besides considerations on priority or hierarchy, *policy coherence* should be one of those criteria; despite this, quite surprisingly, scholarly literature has never explored this matter organically, nor has it argued that policy coherence should in fact be a criterion against which to assess the legitimacy of human rights violations against competing interests.

Legal coherence as an academically endorsed interpretative device (for laws already issued) in domestic and comparative law enjoys a long history tracing back to the Italian jurist Giovanni Tarello (and possibly earlier).⁹³⁰ The need for coherence may also be acknowledged in certain jurisdictions as a unifying principle of legality all laws should tend to,⁹³¹ and in this sense even the ECtHR, in an Article 8 case, remarked that «[p]our l’appréciation à effectuer sous l’angle de l’article 8 de la Convention, il y a lieu d’attacher de l’importance à la cohérence des pratiques administratives et juridiques dans l’ordre interne».⁹³² In contrast, *policy coherence as an assessment criterion to measure the necessity and thus proportionality of violations of derogable HR* is utterly (and quite unbelievably) unexplored in literature, a fortiori with reference to international norms and global governance.

⁹³⁰ Refer to MALERBA 2017, pp. 53-54.

⁹³¹ Phrased under the term “consistency”, see e.g. Art. 13 TEU. While most of the literature focuses on coherence in EU’s *external* affairs, EU law clearly provides for a legal obligation binding on institutions to seek coherent decision-making in *internal* affairs, too.

⁹³² Goodwin, para. 78.

KOSKENNIEMI⁹³³ argues that coherence could be theoretically salient but it is practically unattainable, since the law's point is to persuade adjudicators and "win" against contrary arguments, instead of seeking harmony. I believe his stance is only valuable insofar as we are discussing judicially oriented legal coherence, i.e. the coherence among norms employed to plead a dispute in court: if pleaded norms could be made coherent, perhaps there would be no dispute at all, or if the parties bothered about the possibly achievable coherence, probably they would not try to win the case inamically through a selection of sided arguments undermining the coherent whole. After all, technically resolving legal conflicts is also possible within incoherent legal systems, as long as the parties to each dispute insulate their claims from such an incoherent system and confine their non-universal "battle" in the courtroom within the perimeter of their own submissions.⁹³⁴ Indeed, what I am disserting about here is *not* this court-tied expression of coherence, but rather the *one which should inform policymakers' decisions within the relevant jurisdiction if they intend to pursue HR violations within such jurisdiction under the flag of overriding public interest*: in order for the latter's qualification to be acceptable for derogating from those rights, policymakers should *police coherently* within said jurisdiction, at least limitedly to the policy area(s) of concern for mentioned rights' violations. This coherent policing is often taken at face value, but it definitely should not: while it might be reasonable to assume that «a legislator cannot possibly have the intention to create inconsistent reasons for action for its subjects»,⁹³⁵ such an assumption is inadvisably dangerous to human rights and democracy. Policymakers' will to police coherently should be

⁹³³ 2011, p. 19.

⁹³⁴ See MICHAELS and PAUWELYN 2012, p. 350.

⁹³⁵ PULKOWSKI 2014, p. 252.

inspected closely, kept monitored over time, and tested against reality (e.g. legislative outcomes) whenever possible.

In order to violate a human right, a State should first prove not only that the policy aim is more important (priority) or impellent (urgency) than that right, but also that the rights-violating measure through which it seeks to reach such aim is the last-resort one (necessity) and stands commensurately compared to the aim itself (proportionality) without unduly burdening certain targets (non-discrimination) in the absence of a compelling reason (reasonableness). In so doing, States and IOs' lawyers should keep in mind that «necessity necessarily incorporate[s] a weighing of the probability that the measure(s) chosen *will achieve the purpose*»,⁹³⁶ which in turn depends on the psychology of decision-makers, stemming from their consciously and sub-consciously perceived priorities, and the true meaning they credit such “purpose” with. In essence, policy coherence means that the five criteria just recalled (priority, urgency, necessity, proportionality, non-discrimination) shall be scrutinised not only with reference to the contested measure itself, but *in light of the other policies pursued by the State either in the relevant policy area or in other areas which might influence the one being assessed*. As this might sound slightly complicated, it is worth “operationalising” this concept with an example from taxation before further theorising what policy coherence stands for.

In some scholars' view, state-corporate surveillance mechanisms along the lines of AEoI, a fortiori so if pursued indiscriminately, massively, and automatically through AI technologies, would be *unlawful by definition when applied to relatively minor alleged contraventions* of positive laws (or towards the prevention thereof); indeed, that would make such mechanisms disproportionate, and the justification their

⁹³⁶ VAN AAKEN 2021, p. 261, emphasis added.

operators claim in order to violate the right to privacy through them would stand as unacceptable:

The cooperation with public authorities, in the form of providing data or [...] receiving data, represents maybe the most important challenge for companies in the sphere of data input-related human rights violations. The main reason is that the relationship between data receiver and data provider is asymmetric and that the right to privacy might be derogated [from] in norm conflicts. The usage of data by the police or investigative units, for example, requires balancing the right to privacy with the public's general interest in investigating criminal or administrative offences. [Under said purpose], not all ends justify specific means, as the usage of such data inputs for "minor" crimes such as drug consumption, *tax evasion*[.] or undeclared work would render the notion of data privacy as a defence right vis-à-vis the [S]tate [...] obsolete.⁹³⁷

My reasoning concedes even wider margins to the State in violating human rights: in my view, state-corporate violations of the right to privacy, even through AI, *could be in fact* soundly justified by the policy aim of contrasting tax evasion, also because I contend that the latter is *not* truly "minor" an offence. Nonetheless, in order for mentioned aim to be sound—and for the violation to be deemed lawful—it should be pursued *genuinely* and *coherently*; in other words, the problem I have with these privacy violations is not that they are disproportionate because tax evasion is a minor issue per se, but because this issue itself is not fought against coherently by the State, e.g. within the context of a priority-based overhaul on tax cheating that identifies tax avoidance by the superrich as the first target of its enforcement agenda. The superrich cheat the tax system in two ways, both formally and/or practically unavailable for the 99%. The first way is through corporate tax avoidance: corporations grow wealthier, and their shareholders will compute share value as security⁹³⁸ to borrow money from

⁹³⁷ KRIEBITZ and LÜTGE 2020, p. 97, emphasis added.

⁹³⁸ And indeed, «[m]uch wealth of the Forbes 400, for example, is currently held in publicly traded stock» – SCHEUER and SLEMMOD 2021, p. 221.

banks and become even wealthier, and repeat the same game all over again with no limit in sight. As underscored by an established political economist from Berkeley, these levels of tax *avoidance* are conceptually and economically—not yet legally, regrettably—tantamount to «tax *evasion*, plain and simple».⁹³⁹ It does not matter if a few legal scholars keep advising that «[a]ttempts to equate “aggressive” or any other form of avoidance with evasion should be resisted»,⁹⁴⁰ because it is exactly this legalistic non-equation that has provided capitalist conglomerates with enough policy room to thrive.

The second way is through *massive* tax evasion, which is incomparable quantity- and quality-wise with that pursued by “the rest”.⁹⁴¹ Alarming enough, in September 2021 a report commissioned by the US Treasury has found that «the wealthiest 1% of US taxpayers are responsible for an estimated \$163bn in unpaid tax each year, amounting to 28% of the “tax gap”»,⁹⁴² «while the top 5% evaded about \$307 billion, or nearly 53% of the overall sum». ⁹⁴³ Despairingly, this occurs while tax rates on high incomes are already comparatively lower than for low and middle households, both statutorily and effectively. And in the very few cases where they are statutorily high, the rich “find” (read: they are provided *by law* with) escamotages to decrease their tax burden through corporate structures of convenience. For instance, it was observed that in the US

the estate tax is [reportedly] designed to target the superrich, but in practice many features of the law allow the wealthy to reduce their exposure significantly. Notably, the effective estate tax rate is reduced by extensive undervaluation of wealth transfers *via, for example, family limited partnerships, which are holding companies owned by two or more family members created to retain a family’s business interests,*

⁹³⁹ WEZEREK and ZUCMAN 2021, emphasis added.

⁹⁴⁰ ALLDRIDGE 2017, p. 40.

⁹⁴¹ Refer to SCHEUER and SLEMMOD 2021, p. 221.

⁹⁴² PENGELLY 2021.

⁹⁴³ PONCIANO 2021.

real estate, publicly traded and privately held securities. Due to the lack of control and lack of marketability that limited partners possess, these interests can be transferred to future generations at a discount to market value.⁹⁴⁴

One more example from the real-estate sector can be retrieved from the UK, where the marketized outsourcing of public services to private entities entailed, for instance, that

tax incentives that encourage businesses to work on essential projects, such as the law of Real Estate Investment Trusts (REITs), common in many jurisdictions, [...] typically *permit housing developers to avoid paying corporation tax*. [...] The regulatory State model is therefore not hands-off laissez-faire economics, but entails the State actively shaping markets.⁹⁴⁵

Thus, persecuting the other 99% (or 95%, considering the second quoted figure) prior to having solved or at least aggressively countered both 1%-tied phenomena is unnecessary; even assuming that tax agencies establish StT mechanisms for all to then prioritise the wealthier's untaxed assets in their actual enforcement, this policy would fail. Indeed,

large firms and wealthy individuals who are most closely monitored by large-taxpayer units prefer to lower their tax burden through avoidance, which entails use of legal loopholes, rather than through evasion, which is illegal. Accordingly, [contrary to exchange-of-information solutions,] reforms that close loopholes directly affect their tax burden.⁹⁴⁶

One cannot but conclude that *StT is about surveillance, not about taxation*.

My argument that the solution for poor tax revenues in languishing public finances is countering tax avoidance as well as the evasion by the superrich (which, as demonstrated throughout this work, are technically and operatively tied), or at least

⁹⁴⁴ SCHEUER and SLEMMOD 2021, p. 216.

⁹⁴⁵ BIRCHALL 2021, p. 4, emphasis added.

⁹⁴⁶ FAIRFIELD 2015, p. 9.

prioritising them over the (rather inefficient) persecution of *all* taxpayers through grave privacy breaches, holds theoretical validity for any jurisdiction, especially from a global-justice perspective. Nonetheless, in practice, and for the short term, developing countries display remarkably low tax-compliance rates by their citizens; at the same time, their law-enforcement capabilities score lower compared to GN jurisdictions (even when the former adhered to the AEOI system), so that my whole intellectual edifice might *prima facie* prove slightly less relevant for those jurisdictions – first because tax evasion is more “distributed” across the population there, but most importantly because privacy breaches are less likely to occur in a generalised fashion for the time being. On the other hand, it is equally true that

[d]eveloping countries rely heavily on indirect taxation and have almost no margin to increase the tax burden associated with excise taxes. By contrast, direct taxes—in particular, personal income taxation—play a relatively minor role in the[ir] overall tax structure.⁹⁴⁷

This means that tax evasion, though more distributed there, is also less impactful on public finances, resulting in the State being less legitimised in heavy countering such evasion at the expense of all taxpayers’ privacy.

⁹⁴⁷ BERGOLO et al. 2021, p. 2726. One due remark is that I adopt the developing/developed apparent dichotomy for the sake of brevity and convenience, just to hint meta-intuitively at macroscopic differences between classes of countries, although I am aware of the analytical limits of said linguistic opposition. On its limits, indeed, *refer to* NEUWIRTH 2010 (for a legal reasoning); SVARTZMAN and ALTHOUSE 2021, p. 20, ftn. 1 (for a political-economy reasoning). In particular, it seems unavoidable to perpetuate such an outdated lexicon here because when reporting about negotiations, it is not up to scholars, I believe, to radically overturn the language negotiators themselves use; scholars should emphasise its outdatedness, as I am doing it here, but as long as policymakers do not receive this advice, scholars are somehow forced to analyse negotiations in the negotiators’ own terms. Regrettably, international tax negotiators have so far proven unwilling to abandon this unhelpful terminology; examples are countless, but *check e.g.* UNDESA 2014, HEARSON 2018, pp. 234-236, or the UN Draft Revised Manual. Furthermore, there are specific negotiating blocks which do resemble long-standing developed/developing classifications; one exemplification thereof is the “BEPS 44 Group”, which *roughly* corresponds to the “developed world” as it incorporates OECD members, OECD accession countries, as well as G20 countries (although the latter includes a few “developing” economies, too) – *refer to* BURGERS and MOSQUERA 2017, p. 30.

d Non-prioritisation as a negative variable towards the HR-compliant crafting of public policies

In my view, *it is the lack of coherence and priority that makes AEoI's intrusion (and those by cognate systems) unlawful under IL, not the nature of the agenda item per se*. Put differently, my take is that almost any offence is serious enough to justify, on the part of the State, even assertive violations of privacy rights; this notwithstanding, I believe that mentioned violations should occur as the last-resort policy only, i.e. once more effective means have been exhausted and no alternative is left. My inquiry rebuts the siloed conception that HR violations are to be assessed in a vacuum (in this case, about natural persons among themselves); instead, what I seek to define is the *external validity* of impairing natural-person taxpayers' rights, i.e. the validity of the violating policy when compared to both its stated aim and alternative (or simultaneously available, but unpursued) policy solutions which would defer, minimise, or render unnecessary mentioned violation. Even assuming (without granting it) that policymakers are abstractly legitimised to violate a human right for the superior cause of "the common good", less harmful alternatives shall be explored and appraised *genuinely*.⁹⁴⁸ In this case, the external validity of *natural-person* taxpayers' rights can thus be defined by the way the same authorities who violate such individuals' rights to combat tax evasion address *legal-person* taxpayers in disarticulating the system of corporate tax avoidance within each relevant domestic society (and its transnational agreements as well as international obligations).

⁹⁴⁸ Indeed, though in another context, HARRIS (2016, p. 14, emphasis added) reminded us that [e]ven a good deed done might displace a better that might have been done. So even deeds that might seem "good in themselves" might not be "good all things considered", might not be moral because something better might have been (*should* have been) considered and done instead.

Let me further illustrate what the legal reasoning underpinning my stance is. AEOIs are outstandingly intrusive mechanisms, which severely impact individuals' privacy; however, for the sake of the argument, let me assume for a moment that AEOIs were, when considered stand-alone, a priority (reducing inequality, curbing terrorism, reinvigorating welfare), and that they were urgent (post financial crisis), necessary (relevant to accomplish the aim), proportional (non-automated measures have proven insufficient), *apparently* non-discriminatory (they target any account owned by any individual), and reasonable (the aim is so important that vigorous responses are warranted): in the abstract, this would suffice for AEOIs to legitimately impair the enjoyment of derogable human rights. Conversely, the concept of *policy coherence* introduces another dimension of relatedness and relativity: those five (rather blurred) criteria—along with others one may deem relevant, such as fairness⁹⁴⁹—do *not* suffice if the rights-violating policy is pursued by the State simultaneously to other policies which offset its effects or blatantly question its necessity, reasonableness, and so forth. In our case, AEOIs lose in legitimacy if while the accounts of *billions* of individuals (mostly of whom are poor) are disclosed as to mitigate tax evasion, trillions of dollars are stolen from welfare budgets every year⁹⁵⁰ due to corporate tax avoidance (which eventually enriches the wealthiest people (*a few thousand* individuals), i.e., those responsible for the overwhelmingly large majority of tax cheats), especially through transfer-pricing manipulation. Tax avoidance is, of course, only one of the several facets of incoherence displayed by contemporary, capital-captured governments when

⁹⁴⁹ In the view of UNCTAD (2014, p. 193, emphasis added),
the negative consequences of secrecy jurisdictions, transfer pricing, profit shifting and all the other practices leading to an erosion of the tax base go well beyond their impact in terms of public revenue losses; *they also affect the fairness of the tax system*, undermine taxpayers' confidence in its integrity and distort trade and investment patterns as well as human and physical capital allocations.

⁹⁵⁰ *Ibid.*, p. 175.

allocating, enforcing, and redistributing wealth-related rights and duties, and it stems from a general discriminatory stance adopted *ex ante* by policymakers. In fact,

one of the most ingenuous mechanisms in the neo-liberal (or neo-conservative) dissolution of the welfare [S]tate was simply to reduce the taxes on the wealthy [up] to the point where the [S]tate was no longer able to afford its social services,⁹⁵¹

and should have thus started to assertively attract foreign investments through aggressive interjurisdictional tax competition, along with an increase in taxes for the non-wealthy (i.e., the large majority of the population) *and the surveillance thereof*, as to ensure that said non-wealthy actually paid “their dues”.

If AEoIs violated no human right, there would be no objection to adopting them at any cost, that is, even if their contribution to solving the problem would stand at the 5% or less, and even if contrasting policies were implemented at the same time; indeed, the State has no absolute or omni-comprehensive duty of coherence, such duty being only relative, i.e. contingent on rationally justifying its violation of human rights. However, because AEoIs in fact violate human rights, and due to the pervasiveness of the violation they entail, systemic considerations are also due. To clarify theoretical distinctions—and further delimit the perimeter of what I am arguing here, investing the doctrine of human-rights policing—another example is due, this time a less hypothetical one.

In December 2020, the highest court in HK decided a case where it was argued by the appellant that prohibiting facial masks to prevent anonymity-boosted violent disorders during the 2019 mass protests from erupting was unlawful in that, *inter alia*, other policy measures could have been employed *in lieu* of violating protesters’ right

⁹⁵¹ JAMESON 2005, p. 220.

to privacy; this example thus fits well with the issue at stake in the present study, because it concerns privacy, too. In the case, the court reached consensus as follows:

That there might have been some other means of achieving a suitably defined set of circumstances in which to impose a prohibition on the wearing of facial coverings does not affect the conclusion that the [law] is proportionate as no more than reasonably necessary[.:]⁹⁵²

this assertion built on previous jurisprudence which enunciated the principle in these terms:

If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

Without entering the merits of the judgement, HK's last-instance court found the appeal in the negative as other measures to achieve the same objective were deemed not to be available. Conversely, this study demonstrates that to reach the policy objective of funding the welfare state, an exceedingly less intrusive (e.g., not violating individuals' privacy) measure does exist: fighting tax avoidance resolutely and definitely, which leads the present Author to conclude that AEoIs are unlawful. But as far as the just-mentioned argument is concerned, unlawfulness would be confined to mere matters of preference by proportionality; my case goes even further, in that it questions the holistic need for such AEoIs through the lenses of systemic coherence, in terms of Legislature's most legitimate priorities to attain a policy aim. Furthermore, in the HK example, judges had to decide between the measure adopted and possible

⁹⁵² *Kwok*, para. 138.

alternative measures *still violating privacy to a certain extent*, while my stance on AEOIs is reinforced by considering that the proposed alternative does not sacrifice any legitimate freedom or compromise on any human right. Corporate tax avoidance symbolises systemic injustice at its highest, therefore it needs to be contrasted accordingly *and coherently*. As explained by the UNHRCt in its General Comment No. 24, as long as markets dominate and States fail to comply with their obligations to prevent and close avoidance schemes by corporations and their subsidiaries across jurisdictions, no meaningful economic justice under IHRL can be attained.⁹⁵³

What is more, a tax-rate system that overprivileges corporations should be inherently unlawful, since

lowering the rates of corporate taxes *with a sole view to* attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilise resources domestically to realise [ICESCR] rights.⁹⁵⁴

The legitimacy question could be then rephrased as follows, reshaped by a preliminary relativising reference: “*in light of the State’s inertia vis-à-vis tax avoidance through its rapacious politics of corporate-friendly taxation*, which represents by far the largest share of the problem, is the same State entitled to subscribe to privacy-violating measures like AEOIs which seriously impair human rights while not proving resolute to accomplish the intended outcome?”.

⁹⁵³ See further BIRCHALL 2021, p. 8.

⁹⁵⁴ General Comment No. 24, para. 37 (emphasis added). And indeed, not even pro-innovation/pro-entrepreneurship arguments are tenable: across GN jurisdictions, corporate income taxes declined sharply over the last four decades, but not necessarily for SMEs; in fact, for instance in France, the larger the company, the lower the statutory and/or actual tax rates for them to comply with – refer to ATTAC 2021, pp. 82-83;86-87. See also GARDNER and WAMHOFF 2021, p. 7: «most of the profits that American corporations report earning through their offshore subsidiaries are not subject to U.S. taxes at all. When they are, the tax rate they pay does not exceed 10.5 percent».

e The teleology of human-rights policing for distributive justice

Evidently, policy coherence as understood here is a systemic reference that conditions the legitimacy of a human-rights violation upon the overall direction taken by state policies, and that incorporates a time variable which I may define as “consistency” (vertically intended, and over time); this latter distinction is arguable,⁹⁵⁵ which is why despite appreciating their non-overlapping, I will encompass both *policy coherence* and *policy consistency* within the borders of what I am describing here, and of what can be retrieved from legal and political documents.⁹⁵⁶ Indeed, although systemic coherence has not been mainstreamed in scholarship as a standard to review HR violations, references to this concept can be found sparingly and sparsely in laws and court cases, but also political statements and policy guidelines at all levels. The OECD itself acknowledged that «[p]olicy coherence is essential to fully understand and address the interrelated causes of inequality, exclusion and disempowerment», but as far as taxation is concerned, it only mentioned the unidimensional category of «regressive tax systems»;⁹⁵⁷ it further recognised that «the financial crisis strained the relationship between government and citizens and weakened trust in public

⁹⁵⁵ Others have sorted the two otherwise. For instance, MIEDZINSKI et al. (2019, p. 9, in-text citation marks omitted) maintained that

[c]onsistency, coherence[,] and coordination are different elements of policy integration. Policy consistency means ensuring that individual policies are not internally contradictory. Policy coordination means getting the various institutional and managerial systems, which formulate policy, to work together. Policy coherence goes beyond coordination and consistency, and is defined as a process of ensuring the systematic promotion of mutually reinforcing action, by the concerned government and non-government players, in order to create and maintain synergies towards achieving the defined objective.

⁹⁵⁶ Indeed, several documents employ the expressions “policy coherence” and “policy consistency” either interchangeably or indistinguishably. BARRIO LAMARCHE et al. (2019, p. 88), for instance, observe that «full and effective implementation of the climate legal and policy frameworks remains a challenge, as does ensuring policy *consistency and coherence*» (emphasis added). A similar problem arises with the expression “policy convergence” and with concepts such as “mutual reinforcement”, “interaction”, or “synergy”. “Policy misfit” is also used, to express for example the misalignment between the policies agreed upon by the EU and those pursued individually by Member States; see e.g. YOUNG 2018, p. 72.

⁹⁵⁷ LINDBERG et al. 2019, p. 17.

institutions[, ... affecting] compliance with regulations and tax obligations»,⁹⁵⁸ without expressing any disappointment at the lack of systemic coherence between tax policies affecting individuals and those targeting businesses.⁹⁵⁹ In its 2019 Recommendation on Policy Coherence for Sustainable Development, the OECD builds on «SDG Target 17.14, which calls on all countries to enhance [PCSD] as an essential means of implementation for all the Goals»,⁹⁶⁰ but fails to mention tax matters, so that the theme of harmonising measures against tax evasion with those countering tax avoidance is yet another time eluded.

A few samples of scholarly writing emphasise the double quantitative-qualitative side of policy coherence, where “quantity” may be phrased with logics of cumulation, or cumulative effect; referring to budget cuts, for example, it was posited that

[p]olicymakers must take into account the cumulative impact of different recovery measures on particularly vulnerable and disadvantaged groups and should periodically monitor the implementation and impact of such [measures]. They should ensure policy consistency and coherency between various measures to avoid exacerbating the situation of the poorest sectors of society.⁹⁶¹

Translated into taxation lexicon, this would mean that designing, e.g., progressive tax systems—the first measure experts routinely mention to address tax-worsened inequality⁹⁶²—would not suffice per se to protect the poor if mentioned design was not harmonised with(in) coherent sets of policies that prevented other actors from draining

⁹⁵⁸ Ibid., p. 22.

⁹⁵⁹ The only generic pinpointing is to «[i]nternational co-operation of tax policy and implementation of the OECD/G20 BEPS package [being] needed to level the playing field, while also promoting responsible business conduct» (ibid., p. 46), which is unhelpful for the purpose of the present analysis in that such “package” is made of fallacious and non-binding norms, while AEOI is enforced on individuals bindingly.

⁹⁶⁰ OECD 2019, p. 3.

⁹⁶¹ CARMONA 2014, p. 50.

⁹⁶² With reference to e.g. France, check for instance BERR et al. 2021, pp. 186-189.

public resources or dodging tax systems. Foreclosing tax avoidance is the chief prerequisite for progressive taxation,⁹⁶³ so much that achieving the latter is economically impracticable *as well as meaningless for the sake of HR-termed “fairness”* within the former’s persistence. More specifically, the critique to progressive taxation as an over-celebrated solution has been long encapsulated within individuals-only economic paradigms, that is, arguments that progressivity per se cannot attain redistributive-effects-by-taxation in isolation;⁹⁶⁴ however, what is highlighted here differs from that prism in that it suggests that *even assuming* progressive tax codes did suffice to redistribute wealth taxation-wise, such a function would be *systemically* annihilated by *natural/legal-person policy incoherence within the same field of taxation*, i.e., by the taxes corporations are allowed to “avoid”, and have in fact been avoiding for decades (and centuries). As another example, it would also mean that overburdening *all* individuals (mostly of whom are poor) by tightening privacy violations to counter tax evasion is illegitimate if *first, or at least simultaneously*, States do not fight corporate tax avoidance (which ultimately benefits UHNWIs⁹⁶⁵). Furthermore, coherence in taxation with an outlook on development also entails aligning the policies of aid donors and recipients,⁹⁶⁶ e.g. as to ensure that tax cheating in the first does not offset the benefits derived from development cooperation in the second; self-evidently, it is mostly about seeking coherence in *corporate* taxation.⁹⁶⁷

The kind of human-rights trade-off I am proposing here does not rest on the surface between policy domains (privacy versus taxation), but concerns intra-domain

⁹⁶³ See also BUSSOLO et al. 2018, p. 202.

⁹⁶⁴ Refer e.g. to MARTINEZ 2018, pp. 57-66.

⁹⁶⁵ UNCTAD 2014, p. 171.

⁹⁶⁶ Read also MEYER-NANDI 2021, p. 65.

⁹⁶⁷ Refer e.g. to ATES et al. 2021.

preferences and priorities (anti-evasion versus anti-avoidance, that corresponds, indirectly, to wealth distribution versus wealth concentration); in this sense, it is teleological, not legalistic (nor economicistic). Distributive justice is premised upon greater policy coherence,⁹⁶⁸ which is, in turn, an attribute of state sovereignty;⁹⁶⁹ in fact, the argument here is that a State can be recognised as such when its internal coherence makes it not only *appear* like a unit (e.g. because of shared traditions, language, etc.), but also *move* like a unit across time, with all components of society coalesced around a number of key principles *promoted by state lawmakers* that guide their actions and provide them with a direction collectively.⁹⁷⁰ Likewise, distributive justice requires the reprioritisation of so-called “second-generation” rights in the global political agenda, whose disregard is a feature common to both GC as it stands today and neoliberalism.⁹⁷¹ Funding the welfare state through fighting tax avoidance is not solely about equality, but a systemic issue which should enter policymakers’ agenda as a top priority: tax avoidance represents an overarching distortion of public

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⁹⁶⁸ See GOLDMANN 2020, p. 1301.

⁹⁶⁹ Check e.g. ATILGAN 2018, p. 16.

⁹⁷⁰ This is not as to say that a State is coherent internally when its citizens believe in the same policy priorities; indeed, for example, one might still have those who believe that tax avoidance is only fair and uphold this preference through all the diplomatic channels available to them. Internal coherence as understood in this study is a matter of policy rather than customs: it is the direction indicated by the policies adopted by a State, which can obviously result from a compromise between different social groups/orientation, but should never be contradictory to the extent of violating the rights of some to reach an objective which is concomitantly offset by opposite policies or could be reached alternatively without violating those rights. In this sense, the focus of our coherence is on policy as decided by an Executive, and not on societal preferences. This is why it is without hesitation that I join ATILGAN (2018, at 283) in arguing that

when referring to contemporary constitutionalism, a constitutional culture does not imply a coherence of ideas and values. Different interpretive ideologies and perspectives are indeed viewed as prerequisites of well-being of a constitutional culture. In this regard, constitutional culture rather appears to indicate diverse meanings and uncertainties of a [C]onstitution. Therefore, when examining a constitutional culture, the target is not to find out a set of coherent ideas or values.

Contrariwise, the conclusion that «global or transnational constitutional issues can emerge in different contexts, and therefore *their values and other cultural norms can also be different from national constitutions*» (ibid., emphasis added) is, in the present Author’s view, problematic. In fact, natural persons who belong to a State through the legal artifice of citizenship (that, in most cases, they have not even chosen) should not endure a unilateral breach of their “Social Contract” just because the State adopts a certain policy through out-of-sight transnational arrangements or by reason of its membership status within an IO.

⁹⁷¹ See further TUSHNET 2019, p. 35.

policy to be urgently rectified, in that it belittles human-rights fulfilment in an alarmingly comprehensive fashion that delegitimises the State and its Institutions.⁹⁷²

One might argue this approach is “biased” in favour of the poorer, which is, however, exactly the same “bias” which *presumptively* shaped the entire human-rights project, while being often and regrettably betrayed in subsequent practice. In Australia, “policy consistency” is a foundational principle of taxation⁹⁷³ which «refers to whether discretionary components or applications of a tax undermine its overall objectives»,⁹⁷⁴ meaning that «rules in one part of the system should not contradict those in another part of the system».⁹⁷⁵ What is more, coherence bears intergenerational implications; New Zealander scholars recognised that «time consistency is necessary for sustainable intergenerational contracts» and that «[m]ost of the world’s social security systems [that] are financed on a pay-as-you-go basis, with few or no assets accumulated to meet future liabilities, and liabilities funded as they arise by taxes», are in fact unsustainable and tantamount to intergenerational misappropriation and burden-shifting.⁹⁷⁶

f Transnational human-rights coherence as foreign policy and international customary law

Policy coherence and ICL are inextricably tied. Indeed, the former is also of the highest importance for customs, to ascertain the congruence between the practice of a State and the latter’s *opinio*; it is rather obvious that if a practice itself exists and the *opinio* on it seems consolidated, but said practice is disproven by concomitantly uneven practices which place the State on a different track overall, the former *opinio*

⁹⁷² UN Report on Extreme Poverty 2018, paras. 71-72;82.

⁹⁷³ DU PREEZ 2015, pp. 76-79; STEWART et al. 2015, p. 1.

⁹⁷⁴ COMRIE 2013, p. 31.

⁹⁷⁵ EDMONDS 2015, p. 397.

⁹⁷⁶ EVANS and QUIGLEY 2013, pp. 6-11.

is to be deemed diluted (at best), rendered obsolete (e.g. by acquiescence to a new rule), or hypocritical, and thus not verified. This is why “coherence” proceeds well beyond the legal concepts of “integration” and “compliance”: it purports to show the underlying intention of the State as retrievable from the overall direction of the policies it pursues, the priorities it upholds, and the (even apparently lawful) decisions it takes, rather than resting content with mere observance of multiple legal obligations to be formally integrated and “mechanically” complied with. Said differently, it is not just a matter of coherence among legal *obligations*, but of harmonious aspirations and meaningful pursuance of policy *aims* as well. This is significant because «policy coherence should start with a problem definition» built on and identified through societal trust, holistic cognitive openness, and systemic thinking.⁹⁷⁷

Furthermore, there is another dimension of policy coherence that transcends the State, and that stands as increasingly dominant compared to its purely domestic counterpart. In fact, when a right is impaired domestically due to transnationally agreed-upon measures without the enactment of an equally transnational system of safeguards, policy coherence is to be assessed not only domestically, but at the transnational level as well. In other words, a State cannot violate the rights of its citizens owing to a transnational policy that is not matched in substance by other policies which are being striven-for by the State transnationally or that is not operated harmoniously with other policies beyond the State. To put it practically, there is little or no point in violating everyone’s privacy *transnationally* if *transnational* cooperation of equal momentum is not afforded to fixing tax avoidance by corporations, or if other policies that erode welfare systems are kept in place rather than discontinued. It shall be stressed that *policy* coherence differs from *outcome*

⁹⁷⁷ NILSSON and WEITZ 2019, pp. 256-257; *see also* SWE and LIM 2019, p. 303.

coherence: even coherent sets of policies may lead to uneven implementation or unexpectedly unsatisfactory results across policy areas, but achieving coherence systemically in terms of policies already ensures that the burden of human-rights violations is not borne entirely by some to the exclusive advantage of others, and that the rights-violating measure is truly the last-resort one the State could choose (domestically or, when relevant, transnationally).

Seeking policy coherence transnationally as to justify HR violations is not the same as to claiming that human rights should be respected consistently across a country's foreign-policy domains. In this regard, DONNELLY expounded that

human rights interests *should* be balanced against other national interests—which sometimes appropriately take priority—and [S]tates in their foreign policy should aim for *foreign policy* consistency, even if that means treating similar human rights violations differently.⁹⁷⁸

Phrased otherwise, DONNELLY believes that a State is not obliged to ensure the same human-rights-protection standards when dealing with the citizens of every other State. While I only partly subscribe to this statement, I do agree on the fact that human-rights coherence *in foreign policy* (which is what DONNELLY referred to) and human-rights coherence *transnationally* (which is what I am examining here) are not equivalent. They simply do not address the same problem: while the former entails affording equal rights to all citizens of third countries by projecting a coherent foreign policy *across jurisdictions*, the latter requires a State to act consistently in transnational policymaking as to ensure that its policies as agreed upon “beyond the State” point towards the same direction *for its own citizens* within the domestic jurisdiction.

⁹⁷⁸ DONNELLY 2013, p. 205, emphases in the original.

Tailoring this theoretical point to our discussion, I do not believe that a State bears an obligation to chase corporate tax “avoiders” prior (or, at worst, simultaneously) to fighting tax “evaders” *in third jurisdictions*; however, I do assert an obligation binding upon States to agree transnationally upon policies that do not result in (itself and third countries) violating individuals rights *of all of its own citizens* prior to ensuring that corporate evaders impacting on its own welfare system and revenue stream are effectively persecuted.

Most frequently, international documents mention “policy consistency” in “foreign policy” without clarifying what they actually mean by either. To exemplify, a Study for the European Parliament advised MEPs that

[e]conomic, social and cultural rights should be more thoroughly incorporated into the mainstreaming framework to ensure that concerns related to *all human rights* are taken up at the moment of designing, implementing and evaluating policies and initiatives undertaken in the field of external relations

as a measure «to enhance policy consistency»;⁹⁷⁹ yet, it is unclear whether such “field” encompasses initiatives impacting third-country citizens, EU citizens abroad, or both, although it almost surely does *not* refer to the impact of EU-negotiated policies (“foreign policy”) on the rights of EU citizens *generally* (i.e., not necessarily abroad). The same Study went on to specify that «the EU [should] do in its external relations what it is committed to doing internally by incorporating norms and principles stemming from the EU Charter of Fundamental Rights», and that

[a] reference to human rights in all policy measures related to external relations would thus contribute to making the internal and external policies of the Union more consistent one with the other.⁹⁸⁰

⁹⁷⁹ BENOIT-ROHMER 2009, p. 13, emphasis added.

⁹⁸⁰ Ibid., p. 104.

This is, once again, a different perspective on policy coherence, whose aim is to avert double-standards between what the EU does in third countries and what it does internally⁹⁸¹ and to extend its good-administration normative reach.⁹⁸² Instead, the standpoint on policy coherence which is overlooked in literature and finds only spared references in policy documents is the coherence between policies a State agrees upon transnationally and impact human rights of its own citizens: I submit that if those policies are not harmonious and trigger human-rights violations occurring *before or, as a second-worst option, during* the implementation of most relevant measures useful to achieve the same objective, said violations *cannot* be justified even though the rights in question are derogable ones.

The purpose is to discourage compartmentalisation of policy responses, but also—and primarily—to avoid that a State discursively relies on the IO-mediated transnationality of a policy in order to defy accountability domestically, for example by disrupting the traditional systems of checks-and-balances that characterise human-rights obligations within its domestic jurisdiction. After all, civil society is the ultimate depository of the need for policy coherence, as was rightly recalled (in another context) at the UN level:

The three “Ps” – civil society participation in decision-making, promotion of civic space[,] and protection of civil society – are interdependent. Effective participation in international processes and bodies relies on free and vibrant spaces for civil society participation at the national level, which in turn requires respect for fundamental

⁹⁸¹ See further BIJLMAKERS 2017, p. 355. “Policy coherence” is employed in this sense also by SHEN 2012, p. 168, and several others; this is indeed the most common way to understand this expression.

⁹⁸² See also Tax Governance Communication, p. 14 (emphasis added):

improved policy consistency and coordination at EU level would assist in promoting good governance in the tax area on a wider geographical basis, the objective being to ensure that the deepening of economic relations between the EU and its partner jurisdictions would be accompanied by agreement on principles of good governance in the tax area followed up by tax co-operation agreements where appropriate. The EU should also seek a more coordinated approach worldwide between donors as regards the coherence of policies.

freedoms [...]. Policy consistency across the [UN] on all three “Ps” would make civil society engagement more effective and would improve the overall results of the organization’s work. [...] All relevant bodies and agencies should develop their own policies and strategies on participation, promotion and protection of civil society actors in the contexts of their mandates, with mechanisms to monitor and measure progress.⁹⁸³

Higher legal focus on civil-society interests in transnational decision-making helps averting the risk of an elitist society that disregards pluralism and enforces policies onto the poorest strata of society through the shield of outsourced mechanisms of legislation.⁹⁸⁴ Such a scenario would feature «the business élite as prominent policy-influencers[,] while the differing opinion of the masses will be more generally unsuccessful in achieving its policy goals».⁹⁸⁵ In the worldwide village of globalised markets, both “the masses” and “the élites” are global, too, triggering further enlargement of the base and restriction of the apex also by means of taxation.

g Constraining capital in a borderless world: When unmaking fictionalities is all about coherence...

If States were prevented from violating individuals’ privacy to increase their public budget unless they fought tax avoidance first, possibly they would act less rhetorically and more resolutely towards a solution for the Westphalian dilemma that

⁹⁸³ UNHCHR Report on Civil Society, paras. 58-60.

⁹⁸⁴ In fact, as propounded by KUDRLE (2003, pp. 54-62),

[s]cholars have often explained a great deal of state behavior with the simplifying assumption of a unitary, rational, purposive actor, whether that purpose be national welfare or the welfare of consistently dominant domestic groups. But policies confronting economic globalization seldom permit such an assumption. For hegemony to be useful here it must illuminate policies with major internal distributive consequences. This national interest may be hard to define and difficult to pursue in the face of special interests. [...] The strongest case can be made for the realm of finance where continuing American leadership, expertise, and share of activity along with the élite character of the associated politics have allowed for a singular U.S. role even three decades after the collapse of Bretton Woods. [...] Conversely, in the field of international taxation, the U.S. seemed uncomfortable with its own potential leadership in opposing and retaliating against tax havens]. The Clinton administration’s strong support for the OECD initiative faded quickly with the new administration. Treasury Secretary O’Neill expressed concern that the U.S. was interfering with the tax prerogatives of other [S]tates, particularly many that were small and weak.

⁹⁸⁵ PRIES 2007, p. 94.

makes capital so difficult to track down to a jurisdiction. Such dilemma goes that «if only some jurisdictions agree to prevent illicit flows and tax leakages, those practices will simply shift to other, non-cooperative locations»,⁹⁸⁶ and the absurd fact when it comes to capital is that even one single non-cooperative jurisdiction theoretically suffices to disrupt the efforts of all others; this is because capital (and thus corporations), differently from people, has no citizenship: MNCs' is a passport-free, borderless world. Taxable assets are constantly recycled through the «fictional spaces»⁹⁸⁷ that for centuries already, but more and more importantly since services started to globalise, have made the fortune of corporations and the superrich. This happens while short-sighted public international lawyers keep lamenting *Westphalia's fatigue* in a world of States in crisis, disguising the consequence (the weakening of the State) behind its cause (regulatory capture and, indeed, tax-policy incoherence that favours the wealthy and feeds exceedingly influential conglomerates of business power).

In fairness, several States have constantly attempted to solve or at least resize the problem of corporate tax avoidance, especially in the EU; my claim is not that they have integrally refrained from trying, but that due to regulatory capture, exacerbated by the concededly unmanageable complexity of the discipline itself, they have not yet succeeded and are still remarkably far from succeeding in tackling the issue, *starting at the regulatory level*. Meanwhile, in order to regain resources, they decided to place a heavy burden on individuals worldwide by compromising on their privacy, relying on the fact that individuals, unlike corporations, are unlikely to oppose resistance out of their inability to take advantage of “jurisdictional carveouts” and related fictional escape-routes. At least rhetorically, though, EU institutions should refrain from

⁹⁸⁶ UNCTAD 2014, p. 193.

⁹⁸⁷ Ibid., p. 171.

perpetuating the myth that tax competition favours the internal market *and thus consumers and ultimately European citizens*; in fact, it does favour the internal market, but meaning that it exclusively favours businesses⁹⁸⁸ (mostly non-EU ones), their management, and above all their (again, mostly foreign) shareholders. Indeed, the 100 largest non-financial firms in the world

maintained approximately 73,000 subsidiaries worldwide in 2016. Of these, 22,582 or about 31 per cent were incorporated in the European Union. In addition, of those 22,582 European subsidiaries, 6,208 were controlled via one or more OFC in-betweeners, or type 2 holding structure. In other words, roughly 27 per cent of all EU[-]held subsidiaries of the 100 largest non-financial firms in the world were controlled through a type 2 holding pattern. More remarkably, *non-Europeans firms have used these structures far more intensely in Europe than European companies have in their investment in EU countries.*⁹⁸⁹

One example of policy which would reduce tax avoidance in Europe but is still, after at least two decades, debated and opposed is the so-called “recapture of losses”, to be included

in the rules for intra-group loss transfer. Under a recapture system, the net losses of one taxpayer would be deducted against the profits of its parent corporation, or of another subsidiary within the corporate group; when the loss-making corporation returns to profitability, this tax accounting transaction would be unwound, and the amount originally deducted would be transferred from the taxable income of the loss-making corporation to the corporation that had previously claimed the deduction for losses. Under a recapture system, loss relief for a taxpayer is explicitly temporary, which may alleviate some concerns about the double deduction of losses in cross-border situations.⁹⁹⁰

⁹⁸⁸ PIKETTY (2020, p. 320) joins this reading, by remarking (two emphases added) that *[un] cadastre financier n’a malheureusement pas été prévu par les traités de libre circulation des capitaux mis en place dans les années 1980-1990, en particulier en Europe dans le cadre de l’Acte unique (1986) et du traité de Maastricht (1992), textes qui ont fortement influencé ceux adoptés ensuite dans le reste du monde. Cette architecture légale ultrasophistiquée, toujours en vigueur aujourd’hui, a de facto créé un droit quasi sacré à s’enrichir en utilisant les infrastructures [légales] d’un pays, puis à cliquer sur un bouton afin de transférer ses actifs dans une autre juridiction, sans possibilité prévue pour la collectivité de retrouver leur trace.*

⁹⁸⁹ PALAN et al. 2021, p. 46 (emphasis added).

⁹⁹⁰ RICHARDSON and SMART 2013, p. 19.

Several models of loss recapture have been proposed,⁹⁹¹ but none is consistently applied throughout Europe⁹⁹² where, *inter alia*, the distinction between ordinary losses and final losses is still unsettled.⁹⁹³ This is a hindrance «to avoid tax avoidance by way of loss relief shopping, by which a group of companies would be free to choose where to have their losses set off»;⁹⁹⁴ it is further problematic because

[c]laiming tax avoidance issues has not generally been effective for Member States, as the [then-ECJ] has [almost] always rejected the risk of losing tax revenues as a reason to accept a given tax provision.⁹⁹⁵

Business restructuring *through merging* operations,⁹⁹⁶ which frequently embody elements of tax avoidance, are also treated “lightly” as far as loss recapture is concerned; this is due to anti-avoidance being only voluntary under the Merger Directive:

Although tax avoidance is presumed in the absence of valid commercial reasons, Article 15(1)(a) of the Merger Directive is silent on the division of the onus of proof between the taxpayer and the tax inspector if valid commercial reasons exist. [... Moreover, even in the absence of valid commercial reasons, w]here Member States retain their fiscal sovereignty, as is the case in direct taxation, the combat of tax avoidance is left to the discretion of the Member States. This should also hold true where certain areas (e.g., cross-border restructuring operations) are regulated by common minimum rules, such as the Merger Directive.⁹⁹⁷

⁹⁹¹ Check e.g. Commission WP on Company Taxation, p. 337, Box 52.

⁹⁹² See SPENGEL et al. 2019, p. 34.

⁹⁹³ See DEN TOOM and VAN DEN BROEK 2018, p. 68.

⁹⁹⁴ RUIZ ALMENDRAL 2010, p. 490, emphasis omitted.

⁹⁹⁵ Ibid., p. 491.

⁹⁹⁶ Regulated within the EU under the Cross-Border Directive.

⁹⁹⁷ BOULOGNE 2016, pp. 252-253.

Loss recapture could be reorganised under the CCCTB regime,⁹⁹⁸ which is still stuck in unanimity-driven legislative limbo, victim of its own ambition and opposed by low-tax jurisdictions such as Ireland and Luxembourg.⁹⁹⁹ It is hardly surprising that these jurisdictions oppose the CCCTB: specifically on the operations I am describing here, tax avoidance currently occurs especially when tax-base step-ups are granted by receiving countries for losses incurred in the transferring countries, through asset evaluations that rely on transfer pricing's arm's length standard.¹⁰⁰⁰ The CJEU acknowledged the problem but ruled that «a parent company can deduct a loss incurred by a subsidiary if the loss is final and cannot be offset in the host [M]ember [S]tate».¹⁰⁰¹

In sum, loss recapture within the EU is a relevant exemplification of a tax policy dedicated to corporations that could highly contribute to fighting tax avoidance, while in fact it does so only marginally and tangentially, in an exception-filled fashion, owing to an extremised market-friendly prioritisation of neoliberal logic.¹⁰⁰² Thus, it paradigmatically exemplifies the uneven pursuance of anti-avoidance and anti-evasion policies, and the need for greater policy coherence if the latter's burden on individuals' rights has to find any credible and lasting justification in *IHRL lexicon*.

⁹⁹⁸ See PANAYI 2011, p. 17.

⁹⁹⁹ See GULLIVER et al. 2018, p. 115. Check also PEROTTO 2021, p. 338; VIEGAS and DIAS 2021, pp. 172-173.

¹⁰⁰⁰ See ZOTTERMAN 2020, pp. 22-23.

¹⁰⁰¹ WOJTYLA 2016, p. 128.

¹⁰⁰² Indeed, the scheme usually works as follows:

[i]n an international setting, it is common to expand a business into a new country through a PE and then, when the business is profitable and established, to convert it into a subsidiary. In this way, early year losses, a common feature of new expansion overseas, may be granted relief in the residence/home country [...]. When the new overseas presence becomes profitable, conversion into a subsidiary may ensure that the profits are not taxable in the residence/home country, at least not before repatriation. This makes the availability of incorporation relief when a PE is converted into a subsidiary important

– OLIVER and HARRIS 2010, p. 431.

Chapter 11

*Debunking corporate tax avoidance
as regulatorily captured systemic incoherence*



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a Individuals vs corporations, evasion vs avoidance, and lost-at-the-start catching-up games

Tax avoidance is a “quasi-lawful” but arguably immoral practice exercised by corporate entities in order to reduce their tax liabilities,¹⁰⁰³ whilst tax evasion is an unlawful (and often criminalised) practice exercised by individuals to the same end, although the underlying reasons may vary from selfishness to true need or systemic disenchantment.

Whatever the reasons, the lawfulness of the first practice does not stem from its negligible impact compared to the second; to the contrary, tax evasion by individuals is a relatively innocuous phenomenon for States’ finances compared to the figures of corporate tax avoidance,¹⁰⁰⁴ which remains lawful only thanks to States’ inability and unwillingness to contrast this practice as decisively and promptly as they do with individuals’ tax evasion. Staggeringly enough, States insist on implementing extremely expensive (and surveillant) anti-evasion programs—the FATCA stands prominent in this respect—despite their ineffectiveness in making any substantial difference towards state revenues, compared to the massive figures of corporate tax avoidance.¹⁰⁰⁵ Granted, a few avoidance schemes, like the infamous *cum ex* one in

¹⁰⁰³ More in detail,

the term [“tax avoidance”] may be identified with terms such as “aggressive tax planning”, “impermissible or abusive tax avoidance”, “unacceptable tax avoidance”, “tax abusive shelters”, “circumvention of tax law”, etc. It refers to actions by taxpayers that are usually not penalized by criminal law but have two cumulative elements: (i) taxpayers formally comply with the letter of tax law and submit requisite information to tax authorities to determine their tax liability; (ii) but their actions lack a valid economic purpose, apart from obtaining tax benefits typically by deferring taxation, by achieving lower tax rates or by avoiding income tax altogether. The first element removes tax avoidance behaviour from the scope of tax evasion, the second from tax planning. The second element contradicts the spirit of tax law, which accounts for the fact that tax avoidance is usually not tolerated by tax authorities, courts and legislators[, except for those of tax havens]

– KUŹNIAK 2017, p. 5. Another assimilated expression is “creative compliance” with the tax code; *refer for instance to* DONOVAN 2016, pp. 29-69.

¹⁰⁰⁴ To exemplify, «the US fisc loses at least twice as much annual tax revenue to corporate profit-shifting as to tax evasion by households with offshore accounts» – HAKELBERG 2020, pp. 15-16.

¹⁰⁰⁵ *Refer e.g. to* BOURTON 2021, pp. 164-166.

Germany,¹⁰⁰⁶ are criminalised and turned to (corporate) evasion schemes by courts (mostly in common-law jurisdictions) or legislators (in civil-law ones), but the overwhelming majority of avoidance schemes stay current for as long as the code allows, to be then replaced by alternative strategies that can more proficiently exploit the new law('s lacunae). States, however, seem recalcitrant to seriously combating tax avoidance, at least compared to their emphasised efforts towards countering tax evasion. MASON¹⁰⁰⁷ recalled that in multiple instances, once

income fell through the gaps between [...] two [S]tates' systems, neither [S]tate felt obliged to catch it. [...] As long as neither [S]tate regarded itself as losing revenue owed to it, why should either be concerned about the taxpayer's activities or income elsewhere?

Another question which was posed in literature is: «*Why did the Obama administration use US power to curb tax evasion by US households but not to limit tax avoidance by US multinationals?*». ¹⁰⁰⁸ The answer to both questions clearly lies in the preponderant economic weight gained by MNCs thanks to at least half-a-century-long acrobatics of this sort, translating—in the long run at least—in MNCs surpassing States as the economically most powerful actors in IR theory and practice. Today, MNCs are so manipulative and aggressive that they shamelessly blackmail politicians and regulators domestically,¹⁰⁰⁹ and «play jurisdictions against each other to get the best tax deal» internationally.¹⁰¹⁰ What is more, this is problematic under a competition perspective, insofar as MNCs grow in “bigness” through tax competition (resulting in asset mobility and cheapest products) rather than competing for the most high-quality

¹⁰⁰⁶ Refer to ERMASOVA et al. 2019, p. 126.

¹⁰⁰⁷ 2020, p. 362.

¹⁰⁰⁸ HAKELBERG 2020, p. 17.

¹⁰⁰⁹ Read e.g. *ibid.*, p. 18 ff.

¹⁰¹⁰ Check MASON 2020, p. 363. GUIMARÃES (2019, p. 101) employs a similar expression.

products, services, staff, and processes and contending market shares owing to their innovativeness and creativity.

The unlawfulness of tax-evasion practices makes individuals reliant on the non-cooperativeness of and secrecy afforded by tax havens, but the latter are being outpaced by those “jurisdictional spaces” (only a minority of which happens to be in traditional “havens”) that overtly favour corporate tax avoidance by according corporations a special fiscal treatment (which is, in turn, often kept secret) through dedicated State-corporation agreements¹⁰¹¹ or networks of avoidance-friendly bilateral treaties with other jurisdictions.¹⁰¹² What is worse, whilst one “does not need to be rich” for *evading* taxes, tax *avoidance*, for instance through CFCs,

is a feasible option only for the very wealthy, since establishing and exploiting CFCs is efficient only if the income diverted to the CFCs is substantial. It consequently benefits the taxpayers who have the kind of resources that enable them to avoid taxes in this way [...]. This is contrary to the principle of horizontal equity, i.e., the principle of the taxpayer’s ability to pay taxes. CFC tax avoidance [does] also likely widen the gap between the poorest and the richest, and may adversely affect sustainable development. Second, it erodes the tax base of the CFC participants’ resident [S]tates and undermines the integrity of the tax system insofar as [...] ordinary taxpayers perceive the low-taxation levels enjoyed by MNEs and very wealthy individuals as unfair. [...] Thus, CFC tax avoidance fails to meet the expectation according to which all members of the socio-economy should [...] contribute to the [...] missions run by the [S]tate as a collective entity.¹⁰¹³

More prosaically, tax evasion is in many ways a more “democratic” and “egalitarian” form of tax crime, motivated by and perpetuated through an exceedingly matted range of games and strategies,¹⁰¹⁴ available to all, exploited by many in relative indigence, tightly repressed, and severely punished, while tax avoidance is the new oligarchy and

¹⁰¹¹ See MASON 2020, p. 361.

¹⁰¹² Refer to YLÖNEN 2017, p. 3.

¹⁰¹³ KUŹNIAK 2017, p. 6.

¹⁰¹⁴ For the example of France, refer extensively to JACQUEMET et al. 2021.

business elite's way not to pay their fair share of taxes – or to pay no taxes at all. As such, tax avoidance: a) is often not criminalised by those same people who practice it through their corporations or are tied to or under the influence of those who practice it; and b) it is much higher in both actual and potential numbers (also depending on what one means by “fair share”), hard to track for captured enforcement agencies, socially harmful, and—I would argue—morally repellent. According to independent estimates released by the Tax Justice Network (TJN), every year \$500bn are lost due to corporate tax avoidance, and \$189bn due to private tax evasion.¹⁰¹⁵

Foundationally, tax-avoidance is not simply a profit-maximising strategy, but also a risk-shifting one, in that it shifts certain entrepreneurial risks onto the whole body of taxpayers; the most blatant exemplification comes from risk insurance¹⁰¹⁶ and reinsurance. Insurance is a notoriously risky business, which is why insurance companies themselves reinsure their risk portfolio with third parties operating B2B rather than B2C; most of those third parties offer such service at extremely convenient rates, because they are based in tax havens, which means that by recourse to international tax arbitrage,¹⁰¹⁷ insurers not only collate and transfer their risks onto third parties, but they do so tax-free, in turn increasing their capital gains and risk propensity.¹⁰¹⁸ Risk is further minimised—and the propensity to it accrued consequently—due to consultant-lobbyists who lobby the government for introducing (or not withdrawing) certain tax policies while they advise clients on complex financial

¹⁰¹⁵ Check e.g. <https://www.taxjustice.net/topics/more/estimates-of-tax-avoidance-and-evasion/>.

¹⁰¹⁶ Read e.g. the vicissitudes of insured Citigroup's riskiest financial products in PANI and HOLMAN 2013, pp. 228-230.

¹⁰¹⁷ PHILLIPS et al. (2021, p. 292) explain that

[t]he concept of jurisdictional arbitrage refers to “corporate structures”, that is two or more corporate entities, embedded in the MNE's ecology, organized to exploit gaps, loopholes and blind spots in national regulations in order to lower overall corporate taxation. Understanding arbitrage begins with an analysis of the legal structure of firms. The legal structure of firms refers to the organization of corporate holdings and the construction of corporate groups with legal tools including agency, contract and property rights.

¹⁰¹⁸ Read SCARDOVI 2013, pp. 189-193.

packages whose strategies are built on the prospected success of mentioned lobbying activity. In turn, those financial packages are designed to fetishize risk expertise while offshoring risks in an endless touch-and-move spiral, till the system falls apart and collapses.¹⁰¹⁹ Thus, the risk of risky financial products is socialised—with insurance against risk being factually the rapid transfer of the risk itself onto others—and both products themselves and their “insurers” never get taxed.

Unsurprisingly, political complicity with corporate power is one of the key reasons why laws appear to be drafted in a way that loopholes can always be spotted by “creative” tax planners in consulting firms,¹⁰²⁰ with the consequence that no matter how efficient tax enforcement is, tax agents will always play one step behind those consultants and their wealthy clients, who have «emerged as a powerful international lobby group»¹⁰²¹ and are the most responsive to legislative changes to their detriment. Ultimately, this scheme

contributes to the growth of tax avoidance and, if governments are not responding with counter-measures that are carefully calibrated to match threats, the resulting equilibrium will favour sophisticated taxpayers who will constantly be innovating in the tax avoidance context in order to respond to competitive pressures in product and capital markets. It will only be when governments act collectively and effectively with respect to both domestic and international tax rules that the resulting equilibrium will be socially satisfactory. [...] Thus, from the international and collective perspective, the only real choice is to embrace the reality that relatively high-rate income tax jurisdictions will need to work together to be more dynamic, flexible and responsive in exerting counter-acting pressure *on taxpayers advised by leading accounting and law firms*.¹⁰²²

¹⁰¹⁹ Refer also to PANI and HOLMAN 2013, pp. 218-219.

¹⁰²⁰ See e.g. the case of Enron, as briefly reported in TRICKER 2012, pp. 49-50. See further DARCY 2017, pp. 9-10.

¹⁰²¹ PALAN and NESVETAILOVA 2014, p. 189.

¹⁰²² ALARIE 2015, pp. 90-91;96, emphasis added.

In these cases, “professionalism” turns to immorality to such a degree that the former seems more of a mask for the latter. To say it all, these “consultants” are exactly the sort of “professionals” our society would fare far better-off without; they earn money from the thriving industry of *bullshit jobs*,¹⁰²³ constructed upon the hypertrophy of white-collar intermediaries who disgracefully sharpen job precarity for all other workers, including essential ones, escalating prices for (mostly digital) marketing-intensive “services” that no one truly needs.¹⁰²⁴

The awfulness of the corporate legal industry does not stop at the stage of devising avoidance schemes; of course, it also extends to potential legal troubles deriving therefrom: corporations’

objective is to play the game as close to the rules as possible, and if the rules need to be bent or ignored, to try to avoid being caught. And if caught, to try, by using a phalanx of lawyers, to find the most recondite and specious explanations for this behavior. And if that fails, then to settle. Financial settlements spread amorality further afield: the aggrieved party has to choose between, on the one hand, the pleasure of righteous anger and satisfaction in punishing the villain, and, on the other hand, swallowing their pride and accepting a monetary compensation that makes them to some extent accomplices in the wrongful behavior.¹⁰²⁵

Post factum settlement, of course, is still pursued judicially: extrajudicial settlements of tax disputes do occur, if rarely, but never *ex aequo et bono*, and mostly inconclusively, as the State is bound to nominally ensure that all taxpayers are treated equally before the law.¹⁰²⁶ Conversely, as recalled extensively in this work, *ex ante* tax agreements—even secret ones—are a daily business for corporations and States – so

¹⁰²³ On the meaning of this expression, *read further* GRAEBER 2015, p. 42.

¹⁰²⁴ *See also* GIRAUD and SARR 2021, pp. 202-203.

¹⁰²⁵ MILANOVIĆ 2019, p. 183.

¹⁰²⁶ Making the example of Canada, *read* JACKSON 2013, pp. 63-64. In Russia, alternative resolution of domestic tax disputes is wholly forbidden by law; *refer to* ADAM 2021, p. 137.

that the systemic substance of the “treating all taxpayers equally”-principle is anyway eluded.

b Banks and the enduring jurisdictional holes of international taxation

Just like the disciplinary orthodoxy of economics is unfit for capturing the essence of shadow banking and tax shifting,¹⁰²⁷ in that it is unable to describe what economic actors desire and actually do,¹⁰²⁸ in the same way the doctrines of (international) law are too outdated to address the challenges raised by said phenomena, especially as far as negotiating actors and definitory traditions about sovereigns are concerned. Politicians’ proclamations and slogans¹⁰²⁹ make it look like

[a]ggressive tax avoidance perpetrated by multinational corporations, rich individuals and banks are now high on the public agenda. The casino-like behaviour of the financial industry is a source of consternation and ridicule.¹⁰³⁰

I agree in full that this should be the case, thus wondering why the core instrument implemented by the OECD to eradicate tax evasion exposes preventatively the data of billion private citizens rather than focusing on—or at least, starting from—the relatively few who certainly hold the highest stakes in the business of hiding money from state authorities. This feeds my suspicion that combating tax evasion just happens to be an argumentatively laudable side-effect of policies primarily implemented for surveilling citizens’ transactions regardless of *reasonable potential* for evasion. It is

¹⁰²⁷ For instance, with regards to «the interaction between alternative modes of profit shifting» – BEER et al. 2018, p. 28.

¹⁰²⁸ Check PALAN and NESVETAILOVA 2014, pp. 189;198.

¹⁰²⁹ Refer e.g. to those reported in DARCY 2017, pp. 3;6.

¹⁰³⁰ PALAN and NESVETAILOVA 2014, p. 187.

worth noticing that the HRC, too, expressed concerns about «the increasing reliance of Governments on private sector actors to retain data “just in case” it is needed[, a practice which ...] appears *neither necessary nor proportionate*». ¹⁰³¹

Furthermore, data disclosures involve official banking institutions governments may gain access to, ¹⁰³² whilst more than half of global wealth—and there are good reasons to believe this is the portion where most illicit/criminal money (money to be laundered in that it results from opaque transactions) lies—is unregulated and unofficially managed through the so-called “shadow-banking” (anti-)system, ¹⁰³³ based on underground disintermediation (or “alternative/parallel intermediation”) of capital movements outside the State-backed banking circuits. ¹⁰³⁴ When one considers this incongruence, combating tax evasion through such a surveillant policy targeting official credit institutions, if genuinely designed for the purpose of debunking money “parked” in tax havens, would appear even more clueless. As a side comment, shadow banking is used to make money untraceable, but also for ostensibly benign experiments in financial innovation, ¹⁰³⁵ whose usefulness to the general public for “improved living” is anyway yet to be demonstrated – if anything, the reverse is true. ¹⁰³⁶

It shall be borne in mind that corporate tax avoidance *ultimately favours wealthy individuals*. For at least two decades before the 2008 crisis, financial banks have offered products of “yield enhancement”—an euphemism for “tax avoidance”,

¹⁰³¹ Annual Report 2014, para. 26, emphasis added.

¹⁰³² According to PALAN and NESVETAILOVA (2014, p. 195), one decade ago already, three models of tax information agreement [we]re emerging: (1) the OECD’s authorized intermediary project, (2) the EU’s Directive on Administrative Cooperation in the Field of Taxation and proposed revision of the EU Savings Directive [...], and (3) the United States’ [FATCA] legislation. [...] We [we]re moving, in other words, in the direction of automatic exchange agreements, where the onus of collecting, storing and retrieving information is placed on the financial actors themselves.

¹⁰³³ Ibid., p. 188. See further PONS 2021, pp. 99-101.

¹⁰³⁴ See PALAN and NESVETAILOVA 2014, pp. 192-193.

¹⁰³⁵ Ibid., p. 197.

¹⁰³⁶ LIBICH and LENTEN (2021)’s research suggests that the pivot from traditional finance (retail banking, insurance, saving portfolios, etc.) to modern financial products (complex “financial engineering” and “financial innovation”, debt asset trading, and so forth) has made the large majority of individuals comparatively more miserable, relative to the prosperity enjoyed by the corporate élites.

which is in turn an euphemism for tax evasion—such as the dividend washing, a technique through which corporate shares were sold to corporations registered in tax havens (thus bought at extremely low or no tax rates) to then reacquire those same “tax-washed” shares.¹⁰³⁷ Those same banks often reinvested the capital so acquired in hedge-funds operations, assisting the latter’s managing partners and limited partners to take over and restructure failing corporations by investing enormous amounts of debt. If those corporations regained profitability, the resulting capital gains were taxed as such rather than personal income, to the effect that equity investors could pay virtually no taxes;¹⁰³⁸ this scandal brought President Obama to consider applying the so-called “Buffett Rule” to wealthy individuals, but his proposal was never enacted into law.¹⁰³⁹ When most economists criticised the proposal for being probably ineffective vis-à-vis the US economy, they failed to appreciate that its intended purpose had nothing to do with boosting the American GDP: it was rather a matter of perceived and factual fairness, which is by itself a value in (democratic) societies.¹⁰⁴⁰

c Regulatory capture, endemic private-public clientelism, and revolving doors

That of identifying clientelistic regimes with «many African countries» only,¹⁰⁴¹ without breaking through the comfortable surface of the law as to appraise whether the extremisation of neoliberal aggregations has brought about comparable results in the “developed world”, too, is a rather ungenuine and paternalistic view. The overall economic conditions may obviously differ, and a few distinctions are still

¹⁰³⁷ Read SCARDOVI 2013, pp. 163-164.

¹⁰³⁸ Ibid., pp. 184-186.

¹⁰³⁹ See HAUGEN 2018, p. 54.

¹⁰⁴⁰ Check also SCHEUER and SLEMMOD 2021, pp. 226-227.

¹⁰⁴¹ MILLER 2007, p. 246.

meaningful to draw, yet the crony power-dynamic¹⁰⁴² is astoundingly similar: a country's economic élite is allowed (often by acquiescence) to forge closer and closer ties with those who are serving in an institutional capacity, to the extent that replacing the latter or disappointing the non-élite components of society has no bearing on the preservation of those ties over time as well as on their protracted profitability.

MILLER¹⁰⁴³ argued that

[a] nation may lack self-determination entirely, as when it is subject to imperial rule from outside. Next, it may possess its own [S]tate, but have a despotic or authoritarian form of government, where the ruler or ruling élite is drawn from the people and claims to be acting in their name, but there is no mechanism that subjects them to popular control. Finally, the nation may be governed democratically with major decision-takers answerable to the citizen body as a whole at periodic elections.

This is not sophisticated enough, and exactly self-complacent categorisations like the ones above are arguably responsible for citizens' acquiescence to surveillance capitalism in "neoliberal democracies"; there, being answerable in elections becomes an empty ritual whenever it is not substantiated by effective oversight that prevents surveillance-devoted public-private élites from forming in the first place, and then enduring.

When ties become structural, regulation itself becomes trapped in particularistic interests which are else from the pursuance of the public good. Regulatory capture occurs when the regulator's choices are overinfluenced—or even informally compelled—by the regulated, i.e. by the entities the regulator was supposed to regulate, or even by an affluent minority of them. In the way I employ the expression here, it also refers to a "higher" form of *cognitive capture* that proceeds beyond the

¹⁰⁴² For a classic disquisition on the meaning and effects of "crony capitalism", see for instance WEI 2001, p. 21.

¹⁰⁴³ 2007, p. 126.

economic dividends of corporate-state deviated cooperation.¹⁰⁴⁴ it is about systemic, soft subjugation-through-persuasion and assonance-of-interests rather than blackmailing, bribing, or otherwise forcing; it is about regulators being surrounded by and eventually “absorbing” the regulatees’ mindset up to disguising their original public-good mandate.¹⁰⁴⁵ This results in boundaries between fraud and truth, genuineness and deception being lacerated, and in cognitive misrecognition—an oxymoron?—of *substantial* fraudulent and societally dangerous financial behaviour¹⁰⁴⁶ that transcends the superficial letter of the law after having captured the (supposedly well-premised) intentions of its codifiers. For this to recede, we shall ask ourselves more pertinent and perhaps even *irritant* questions about what aims and whose interests “the law” truly serves in our societies, and what “capture” has to do with this state of affairs. We should want to appraise whether the neoliberal transformation of regulatory agencies has brought about diffused wellbeing or rather exposed «evidence of the criminality at the top of the contemporary social hierarchy», starting from the “global periphery”.¹⁰⁴⁷ And we should expel taxation from its coffer of epistemic discreetness, therefore acknowledging it as a core theoretical tenet of the relationship between any human being—especially the most vulnerable ones—and “their” States.¹⁰⁴⁸

In democratic societies, capture originates from a market-shaped combination of behaviors, beliefs, casual chance, and historical circumstances, and its degree may vary. In “the West”, *regulatory capitalism*—a concrete degeneration of capital that proves capable of regulating itself and others, hence, *everything*—capitalises on the

¹⁰⁴⁴ Refer also to AZEVEDO et al. 2019, pp. 51;81.

¹⁰⁴⁵ See further LANGBEIN 2010, p. 580.

¹⁰⁴⁶ Refer also to BEEK 2019, pp. 426-427.

¹⁰⁴⁷ See WIEGRATZ 2019, p. 357.

¹⁰⁴⁸ See MUMFORD 2019, p. 12.

neoliberal «retreat of governments from [the] direct management of economic activity»,¹⁰⁴⁹ to outsmart and indeed “capture” governmental prerogatives when governments’ “built-in” defences against external pressures are only residual. The technicality and complexity of the areas in which captured institutions operate is also a factor, as demonstrated e.g. by British street-level performative campaigners who exposed UK’s captured tax agencies more effectively than the (much appreciable) high-advocacy actions staged by the more sophisticated TJN.¹⁰⁵⁰ «This reinforces the arguments for both the democratization of expertise and the strengthening of professional accountability norms for experts»,¹⁰⁵¹ where the former shall not be intended as populistically corrosive of knowledge and experience (even in their inevitably elitist manifestations), but rather as a *submission of even the highest expertise to parliamentary oversight and to procedural safeguards for the addressees of such expertise*, these procedures being legally retrievable from relations of citizenship – and secondarily of residence, where applicable. While populist resentment has been misappropriated and leveraged by the élites to accelerate towards a corporate-tailored political economy of and for the few,¹⁰⁵² demanding that state representatives be accountable can be addressed as “populist” only under the best of this term’s acceptations.

When it comes to international taxation as “filtered” through the OECD, but also more generally, scholars have struggled to identify: a) what exactly amounts to regulatory capture; b) whether it is by definition undesirable; and c) whether it necessarily leads to unwarranted policy outcomes as received by other addressees

¹⁰⁴⁹ PICCIOTTO 2017, p. 680.

¹⁰⁵⁰ See ÜBERBACHER and SCHERER 2019.

¹⁰⁵¹ PICCIOTTO 2017, p. 689.

¹⁰⁵² See e.g. BONADIMAN and SOIRILA 2019, p. 310. Beyond the examples mentioned by the Authors, I would add the most recent environmental policies pledged in the US to respond to the COP26 demands: they often translated into further tax incentives for businesspeople and generally those who are already rich; check EGAN 2021.

thereof.¹⁰⁵³ In fact, one may *prima facie* argue that if the Big Tech captures international tax meetings in order to advance their stances and achieve close-to-zero taxation for themselves, this represents an unfair advantage granted to those corporations but it does not necessarily implicate, per se, negative externalities on other taxpayers. However, this is only superficially true: self-evidently, all natural and legal persons falling within a tax jurisdiction share a polity, so that if in times of abundance, wellbeing, and prosperity the capture by some does not immediately translate onto worsening conditions for all others, in times of structural or recurring crisis—like those we seem to be living now¹⁰⁵⁴—the consequences of regulatory capture for the non-capturing addressees of such regulatory process may be drastic. One highly suggestive case of capture involving the OECD witnessed—how strange!—the watering down of international efforts to combat tax avoidance:

Following the OECD's call for written comments on the first draft of CbCR at the beginning of 2014, 135 submissions were made. Fully 87% of these were from the private sector. Of these, Deloitte and PwC made two submissions each and KPMG made one submission. Apart from two, *all private sector submissions rejected public country-by-country reporting*. Of the responses, 130 came from developed countries, with the largest proportion from the [US] and the [UK ...]. Following the consultations, KPMG Switzerland welcomed the weakened CbCR proposals on 4 April 2014, and in particular, the intention not to make the data public. Just *one day before*, a KPMG partner from the [UK] had been appointed as head of the OECD Transfer Pricing Unit, which has been responsible for CbCR through the OECD BEPS Action Plan since 2013.¹⁰⁵⁵

Ethnographic work in the field of international taxation, pursued by non-legal academics who are «interested in the core, and not the margins, of [...] the capitalist

¹⁰⁵³ See MUGLER 2018, pp. 380-381.

¹⁰⁵⁴ It is ATTALI (2021^b, pp. 86;93, emphasis added)'s authoritative opinion that the Covid-19 pandemic *est une crise immense: même si la pandémie s'arrêtait à l'été 2020, c'est une crise d'une tout autre ampleur que celle de 2008, et même que celle de 1929 [...]. Au lieu de pousser les gens à se réinventer, ils les installent dans l'idée confortable qu'il suffit d'attendre le retour à la normale.*

¹⁰⁵⁵ MEINZER 2019, p. 123, two emphases added.

tax [S]tate»,¹⁰⁵⁶ concluded that OECD meetings are a crossway for the regulators *and the regulated* alike, both attending these events with the explicit purpose of socialising an understanding of taxation which dismisses its wider socio-political impact whilst focusing on maximising technical standards to the exclusive or primary benefit of businesses. Remarkably, this occurs despite the absence of skill asymmetry between the two “counter”-parts, and goes so far as to involve those who are in charge of adjudicating administrative tax disputes, and up to the criminal as well as constitutional level: the judges.¹⁰⁵⁷ Notwithstanding the foregoing, mutual *engagement* is not synonymous with mutual *alignment*: capture cannot be derived from the “complicity” of the social atmosphere or the friendliness of those exchanges per se, nor even from their hard-to-measure underlying intentions:

while these different actors share a close professional network which meets on a regular basis in public, *and also exclusive private settings*, this does not facilitate a policymaking environment where the views of multinational enterprises necessarily prevail, or a general disposition towards the values and worldviews of businesses the tax policy makers are trying to regulate exists.¹⁰⁵⁸

Hence, capture should rather be identified in the captured *outcomes* of mentioned exchanges, sufficiently corporate-oriented for one to reasonably argue that state engagement with business representatives brought more capture than it added “insiders’ perspectives”. This is also due to tax professionals acting «as “double agents” in representing transnational interests while also playing off their embeddedness in [captured] domestic institutions»:¹⁰⁵⁹ domestic capture “upholds its status” transnationally by rhetorically “arguing the transnational”, by engaging

¹⁰⁵⁶ BIRSCHENK 2018, p. 398.

¹⁰⁵⁷ Check MUGLER 2018, pp. 384-388.

¹⁰⁵⁸ Ibid., p. 389, emphasis added.

¹⁰⁵⁹ CHRISTENSEN et al. 2020, p. 2.

selectively and deceptively with narratives on the common good far beyond the State.

Indeed, it is not infrequent that

national regulators collude with the national firm by hiding information from a supranational regulator or pushing for decisions that favor the national firm over [global taxpayers and third countries]. This is because the national government has an incentive to increase the market share of domestic firms since they provide jobs and tax revenue—an incentive that is likely to be even stronger if institutional limitations already encourage capture.¹⁰⁶⁰

Because of this,

[h]ighlighting forms of professional action through national legal systems and private international governance is necessary to identify how multi-jurisdictional loopholes are created that impose a substantial cost on taxpayers.¹⁰⁶¹

GRAZ and NÖLKE contradict themselves when they first join those who propound an idea of privatised global governance that reflects «an increased homogeneity of values among the *relatively circumscribed group of actors* able to positively identify themselves as part of the process [...] in the larger picture of the achievement of hegemony» and immediately after they report that the same privatisation «mirrors *middle-class preferences* towards post-materialist orientations».¹⁰⁶² As it stands today, privatised global governance reflects the preferences and priorities of the *capitalist* class (i.e., corporate shareholders and high management), their aspirations and privileges, as it is cognitively *and legally* tied to capital's freedom of movement besides Westphalia. This notwithstanding, what could be maintained from GRAZ and NÖLKE's reasoning is that such privatisation is indeed

¹⁰⁶⁰ AURIOL et al. 2018, p. 930.

¹⁰⁶¹ CHRISTENSEN et al. 2020, p. 13.

¹⁰⁶² 2012, p. 130, emphases added.

the outcome of a “value”-convergence across elitist private and public actors, which still hold an interest in not alienating themselves from the consensus of the globalised middle class, thus endeavouring to communicate and explain their governance strategies *through normative voices of political correctness* (e.g. “we have to do everything in our power to go after the tax cheaters!” – a statement that almost nobody, in principle, would disagree upon). In this sense, interest-pursuance is monopolised by élites, but on the surface, its politically correct manifesto *sounds appealing* if not to all, at least to most of the world’s middle classes, too.

Several jurisdictions around the globe putatively have been undertaking to eradicate regulatory capture in taxation matters, starting from professional firms’ involvement. For example in Japan, where almost any commercial and technical information may potentially fall under the rubric of “trade secret”, corporations cannot claim information concerning tax evasion (e.g. the “tax planning” schemes proposed by accountants to firms¹⁰⁶³) to be protectable as confidential information under the

¹⁰⁶³ On the moral and possibly legal responsibilities of accounting/consulting firms (starting with the “Big Four”) in relation to the tax-avoidance business, *refer to* MITCHELL et al. 2002, pp. 4;13;18, and PONS 2021, pp. 66-67. A vivid representation of these firms’ contribution to corporate tax avoidance can be found in ROBERT 2020 (pp. 147-157), a financial thriller which, despite being a work of fiction overall, contains a reliable picture of the Big Four’s corrupted advisory services delivered to BlackRock Inc., the world’s largest asset manager and, as claimed by many, the world’s largest shadow bank and investor in weapon manufacturers. Together with its two largest “competitors” (Vanguard and State Street), this NYC-listed and Beijing-“based” TBTF firm manages almost 16 trillion USD in combined global assets: this sum is bigger than China’s GDP (for what is worth comparing the two figures)! If anyone was wondering how lobbying and transnational regulatory capture became powerful global cancers yet. For sure though, BlackRock has not been *negatively* impacted by the pandemic:

Revenue	▲ US\$16 billion (2020) ^[1]
Operating income	▲ US\$6 billion (2020) ^[1]
Net income	▲ US\$5 billion (2020) ^[1]
AUM	▲ US \$9,01 trillion (2021 annual) ^{[1][2]}
Total assets	▲ US\$165 billion (Q3 2020) ^[3]
Total equity	▲ US\$34 billion (Q3 2020) ^[4]
Number of employees	▲ 16,500 (2020) ^[5]

{retrieved from Wikipedia English on July 11, 2021 }

2018-amended Unfair Competition Prevention Act;¹⁰⁶⁴ this means that if an accountancy firm profits from certain “consultancy products” aimed at assisting clients in evading taxation, such products can be scrutinised by the authorities (who might learn therefrom), as well as disclosed by the government both domestically and, in potential, to foreign authorities as well. Besides trade secrets related to aggressive tax planning, confidential information is generally protected under the OECD initiatives: pursuant to Article 26(2) of the OECD Model Tax Treaty, for instance, tax authorities shall maintain tax information confidential, and the Commentary to said Article¹⁰⁶⁵ explicitly mentions trade secrets. Moreover, the OECD Standard for Automatic Exchange of Financial Information in Tax Matters¹⁰⁶⁶ holds that information transferred under the CbCR should not result in public disclosure of trade secrets. These provisions sound wise, but prove either unserviceable or hypocritical in practice. They are unserviceable if tax authorities exchange information for the real sake of countering corporate tax avoidance rather than collecting bulk information on businesses: if countering avoidance is the aim, then trade secrets are too relevant not to be scrutinised, even though such a scrutiny is exceedingly dangerous for the preservation of said assets, which form the majority of business assets in the digital age, especially for certain sizes and categories of businesses. One foreseeable side-effect is that

if a firm feared revealing an important [IPR] then it may be reluctant to transfer this resource via a licensing agreement with a related foreign affiliate, which could ultimately interfere with the efficient allocation of resources throughout the global economy[;]¹⁰⁶⁷

¹⁰⁶⁴ See ROWE and SANDEEN 2015, p. 237. Obviously, the Article refers to a previous version of such legislative text.

¹⁰⁶⁵ Para. 19(2).

¹⁰⁶⁶ Para. 44.

¹⁰⁶⁷ COCKFIELD 2020, p. 388.

put differently, this alone would offset the beneficial effect of tax recovery in terms of state economy (in GDP terms), with detrimental effects on productivity and innovation, too – but public finances would perhaps still benefit from said operation. This concern is amplified when trade secrets are to be disclosed to tax agencies of jurisdictions where the separation of powers and the independence of the judiciary (including in administrative justice) are not yet fully implemented principles. The same holds true when destination jurisdictions do ensure institutional independence from political power, but whose laws explicitly mandate no trade secrets protection from governmental oversight. In fact, “the public” is not the only agent businesses should worry about when it comes to trade secrets disclosure: authorities may be equally detrimental to confidentiality, and in any case, their scrutiny alone increases the probability of “incidents” (cyber intrusions, traditional unauthorised access, etc.) exponentially. This is the reason why those assurances could be labelled as hypocritical as well: requiring authorities to protect trade secrets in a country, such as the PRC, where trade secrets are routinely accessed by the government bears no practical effect. To make it worse, Article 26(3)(c) of the OECD Model Tax Treaty states that a government *may* deny information requests from other governments on the ground of trade secrets protection, not that it *shall*: these discretionary powers are wide enough to inhibit R&D and innovation strategies in corporate environments. Overall, while Japan’s initiative is potentially laudable, it breeds the seeds of its own perils; considering that other actions would address regulatory capture more incisively, it is worth considering whether the disclosure of trade secrets, balanced against its downsides, is truly beneficial. Tax transparency is an objective to be pursued in principle, but this study clarifies that it is not the major obstacle to a fair taxation of MNCs. In fairness, «[c]ertain tax forms [...] reveal a corporation’s business structure,

trading strategy, compensation of high-level employees, and research expenditures»:¹⁰⁶⁸ all data which might be indeed economically valuable for a business competitor to strategise; all in all, this makes a «concern regarding exposure of proprietary information [...] the only compelling argument presented by opponents of public disclosure thus far».¹⁰⁶⁹ In sum, there are perhaps more proficient manners to eradicate the corporate capture of regulators, and in any case, this Thesis is mostly concerned with businesses that are spied on by governmental agencies *in order to spy on citizens in turn*, rather than with the protection of corporate information per se. Nevertheless, the example of trade secrets is useful to outline the dangers of surveillance compared to its benefits: if downsizing tax avoidance is of the utmost importance, and yet there are dangers lying in the disclosure of corporate assets, one can easily imagine how comparatively risky and unworthy surveilling natural persons for the sake of limiting tax evasion would be.

Another important phenomenon warranting examination is that of public-private cross-appointments, joint appointments, and exchange appointments. Indeed, revolving doors often pave the way to regulatory capture:¹⁰⁷⁰ they do not necessarily imply or implicate it, but they represent a valuable indicator for the latter's *potential* pervasiveness within a given politico-economic system; in the US, for example, revolving doors are the norm rather than the exception, and regulatory capture follows suit.¹⁰⁷¹ As far as tax regulation is concerned, «the normalization of revolving doors-type careers may encourage undue close communication between regulators and

¹⁰⁶⁸ BLANK 2019, p. 292.

¹⁰⁶⁹ *Ibid.*, p. 286.

¹⁰⁷⁰ Check e.g. SCHEFFER et al. 2020; YATES and CARDIN-TRUDEAU 2021; DE CHIARA and SCHWARZ 2021; BAXTER 2011, pp. 197-198; PAGLIARI 2012, pp. 13-15; DAL BÓ 2006, pp. 214-215; ZHENG 2015. *Contra*, MAKKAI and BRAITHWAITE 1992; older literature looks more permissively at these phenomena, but most of its arguments are now considered outdated, also due to the increasing sophistication of private-public crossovers generated by sensitive “big data” and technological advancements.

¹⁰⁷¹ For two well-documented exemplification, see TABAKOVIĆ and WOLLMANN 2018; LUCCA et al. 2014. Refer further to KATIĆ 2015; COX and THOMAS 2019.

professionals providing services and protecting clients»,¹⁰⁷² as well as explain why the IRS fails to audit private-equity firms.¹⁰⁷³ Hence, that incremental financial-information-disclosure policies like the FATCA have consistently run the risk of FIs' disproportionate regulatory influence¹⁰⁷⁴ turning to mere mock (or selective) compliance and reputational signalling¹⁰⁷⁵ is no surprise. Most times, revolving doors are not even monodirectional two-stop journeys, with managers laundered into politics or politicians laundered into business:¹⁰⁷⁶ they allow certain individuals to jump from one environment to the other *and return to the former, with both these passages being purely formal*, as both environments are mutually captured at both stages of such process, on a continuum. This could nowhere be more evident than in the field of surveillance, an infamous exemplification being John Michael McConnell: the NSA director from 1992 to 1996, subsequently a consultant at a top private contractor for intelligence agencies, then in high politics again as the Director of National Intelligence, to then return to his “private” consulting firm.¹⁰⁷⁷ Along similar lines,

service providers—from Western Union and AT&T in the early days, to Sprint and Verizon in the “Baby Bells” era, to Microsoft, Google, and the other pioneers of the Internet age—[have] long enjoyed mutually beneficial arrangements with the NSA and FBI.¹⁰⁷⁸

These conflicts of interest shall be deemed absolutely normal in the US as well as most “advanced” democracies (though slightly less intensively), which is not like saying they are unproblematic for democracy, citizens' right, and the rule of law. To

¹⁰⁷² CHRISTENSEN et al. 2020, p. 4; *see also* the examples mentioned in PICCIOTTO 2015, p. 181. Most recently, *read further* SORKIN et al. 2021.

¹⁰⁷³ *Read* DRUCKER and HAKIM 2021.

¹⁰⁷⁴ *See* MORSE 2012, p. 733.

¹⁰⁷⁵ *See* *ibid.*, p. 736.

¹⁰⁷⁶ *Check* the example reported in CHRISTENSEN et al. 2020, p. 10.

¹⁰⁷⁷ *See further* KAPLAN 2016, pp. 171-178.

¹⁰⁷⁸ *Ibid.*, p. 194.

the contrary, they may jeopardise public welfare and corrupt democracy from its foundations up: when the same individuals publicly regulate and are regulated by themselves, information asymmetries with non-captured institutional chains emerge, and captured chains of wealth¹⁰⁷⁹ phagocytise democratic institutions, individual (economic) freedom, and human rights more widely. While “simple” phenomena of regulatory capture may produce only vertical information asymmetries whereby, at a certain time, some actors are informationally disadvantaged,¹⁰⁸⁰ revolving doors perpetuate this verticality over time—like drawing verticalities on a horizontal axis—too; this crystallises the mechanism, turning regulatory capture into a “new normal” that replicates itself over time, sometimes even through dynastic replicability for the super-rich.¹⁰⁸¹ Regulators may be captured to such an extent that not only their politico-regulatory function (or the judicial one, if they were judges) is compromised, but they themselves may decide to become clients of their capturing entities and exploit the system even further; after all, the captured and the capturing might be rooted in similar élites, already sharing a common breeding terrain of secluding privilege and co-opted unaccountability.

¹⁰⁷⁹ On these “chains of wealth”, see further CHRISTENSEN et al. 2020, pp. 6-7.

¹⁰⁸⁰ This is also restated by VAN UYTSEL (2012, p. 249) with specific reference to China, although it could be extended to virtually any jurisdiction just as much: remarking on wider legal *interests* rather than *rights* strictly conceived, he writes (emphasis added) that

the information advantage the industry has regarding the market makes the enforcement authority often rely on the industry to obtain this kind of information. Interaction with the enforcement authority increases the chances of the domestic industry trying to bend the agency to act in favor of their commercial interests, especially when the concentration involves foreign firms. In this situation of regulatory capture, which facilitates extensive rent-seeking, *the interests of the public* are no longer served.

¹⁰⁸¹ CHRISTENSEN et al. (2020, p. 11, emphasis added) confirm that

[p]rofessional socialization has been crucial for the development of ABS and cultivated by professionals to homogenize the production of ABSs into a range of services that can be provided to a range of wealthy clients. [...] Expatriate professionals are often especially important for the transnational knowledge management of legal practices in a range of jurisdictions [...]. ABS products also include the creation of investment vehicles, the management of stock options for corporate executives, the creation of corporate entities with limited liability for wealth management, and use of securities and derivatives markets [...]. *Professionals actively work not only with their current clients but also foster relationships with their offspring and grandchildren to provide continuity to their client base.*

d Captured surveillance capitalism as an instrument for “nudging” natural-person taxpayers

Before offering an overview of typical captured behaviours by state authorities with regards to taxation, and corporate-privileging outcomes thereof, it is necessary to clarify what the nexus between regulatory capture and (corporate) surveillance capitalism exactly is, prior to their eventual merging into the state-driven surveillance capitalism which was described in the Thesis’ opening Part.

In order to capture their regulators, to-be-regulated entities may offer the former several advantages, one among them being of particular interest here: vote(r)s.¹⁰⁸² From examining surveillance capitalism, we have learnt that users’ behavioural surplus is recorded, analysed, cross-checked, and sold to third parties as predictive behaviour, including electoral preferences and voting orientations; while this would be enough for regulators—or their background political institutions—to seek after this data, behavioural surplus could even be employed proactively to realign users’ ideas and worldviews according to pre-set strategies that involve advertisement, policing, and institutional relations.¹⁰⁸³ «With that assumption of power, consulting firms and data corporations [are] more likely to receive investment and earn contracts, thus shoring up the data industry and firms doing that type of work».¹⁰⁸⁴ Regrettably, this is the daily job of the Big Tech, and the main asset on which they keep thriving, aided by exceedingly relaxed, wait-and-see, and complacent opposition on the part of governmental privacy watchdogs.

While there appears to be no definitive evidence yet—of the kind that would stand in a court of law—that *behavioural surplus* is extracted to be sold (or anyway

¹⁰⁸² See further EYAL-COHEN 2018, pp. 888-889.

¹⁰⁸³ Refer further to BASHYAKARLA 2019; BURKELL and REGAN 2019.

¹⁰⁸⁴ BALDWIN-PHILIPPI 2019, pp. 12-13.

tendered) to policymakers in order to reorient the electorate's preferences and manipulate citizens' acquiescence to injustice,¹⁰⁸⁵ it is likely that informal channels do exist for this data to be communicated to and taken into account by policymakers, who will in turn reward the data providers with customised legislation (or absence thereof), including on taxation matters. This creates a politico-corporate environment of mutual reliance and collusion which depends on extractive practices of voters' metadata and thus, by definition, can only work at its best in—those that at least on paper are—fully democratic polities. There, citizens are factually “nudged” through heuristics¹⁰⁸⁶ into thinking, behaving, voting, consuming, *believing*, and literally... paying taxes the way regulatorily captured policymakers desire,¹⁰⁸⁷ thanks to the insightful data they are provided with by private corporations,¹⁰⁸⁸ in exchange for favours (...including *not* paying taxes!).

Scholars have characterised privacy intrusions to nudge taxpayers into smooth compliance as a form of systemic paternalism¹⁰⁸⁹ which has little—if anything—to do with the public good.¹⁰⁹⁰ If the government, through psychological engineering and already widespread BI units,¹⁰⁹¹ as well as potential positive rewards,¹⁰⁹² nudges

¹⁰⁸⁵ Mine is a cautionary take; nevertheless, less conservative scholars believe evidence is sufficient: *check e.g.* CHESTER and MONTGOMERY 2019.

¹⁰⁸⁶ On human decision-making through “heuristics”, and the way these can be exploited by tax agencies, *check e.g.* WALSH 2012, p. 456; LEICESTER et al. 2012, pp. 15-19;86. More generally, *see* BLAUFUS 2020, pp. 22-23.

¹⁰⁸⁷ *See also* DOSHI 2017; HERN 2021; BENARTZI et al. 2017; LUTS and VAN ROY 2019; GANGL et al. 2019, p. 3.

¹⁰⁸⁸ For instance, data-driven smart cities are incorporating public-private nudging systems powered by or advised for via MNCs such as Deloitte, McKinsey, Accenture, IBM, or Alphabet Inc.; *refer extensively to* RANCHORDÁS 2020; WOLFE 2020, pp. 9-10.

¹⁰⁸⁹ *Read further at* BLANK 2011, pp. 338-339.

¹⁰⁹⁰ Some academics, rather enigmatically, find this is true but unproblematic; *refer e.g. to* de QUINTANA MEDINA 2021. She observed, however, that it is unproblematic only insofar as nudges «promote ethically consistent goals» (p. 27). The point, here, is defining what “consistent” could stand for in our complex societies, vis-à-vis taxation; in my view, consistency shall be measured *between natural and legal persons*, too. Furthermore, in real life (and real policymaking), being consistent requires formulating and pursuing ethically justifiable priorities! In fact, I agree that «[i]f public policy nudging is used to control or counteract [...] private influences, a nudge program could increase rather than diminish the democratic control we can exercise over our choice environments» (SCHMIDT and ENGELN 2020, p. 7), but this counteracting purpose does not seem to be any core to tax-related nudging strategies, at least at this stage.

¹⁰⁹¹ *See* MILLANE and STEWART 2019, p. 502; OLIVER 2013, pp. 692-694; HALPERN and SANDERS 2016.

¹⁰⁹² *Check* BROCKMANN et al. 2016.

citizens into embracing the faith that their tax burden is fair both relative to other taxpayers (including legal persons) and in the absolute, citizens will stop protesting and happily pay.¹⁰⁹³ So why do not governments “nudge” corporations, too/first? Rather than (or prior to) nudging the average citizen/employee into patronising charity,¹⁰⁹⁴ why not nudging employers—corporate executives and shareholders—into stop exploiting society through data-intensive resource extraction and tax avoidance? *Just a rhetorical question.*¹⁰⁹⁵

e Customising and transnationalising taxation besides the code, through special corporate-State agreements

States seem to having been regulatorily captured by their “flag-MNCs” on taxation matters since the time of the League of Nations.¹⁰⁹⁶ After all,

on the basis of which policy justifications should a jurisdiction care about what is happening elsewhere when, according to its own system, its tax base is not under threat of being eroded?¹⁰⁹⁷

Indeed, the richest countries may simply agree upon a *una tantum* payment or *sui generis* tax-rate with each of “their” major MNCs in accordance with the latter’s business model and market forecasts, thus making sure those MNCs continue to benefit the country where such agreements are signed to the detriment of all or most other jurisdictions. In the US, taxation is one of the several domains of legislative life where regulatory capture has thrived as an omnipresent sin, relying on an intricate

¹⁰⁹³ Refer also to HASSAN et al. 2021, p. 6.

¹⁰⁹⁴ Refer to GALLE 2014, pp. 892-893.

¹⁰⁹⁵ Read also OLIVER 2013, pp. 697-698.

¹⁰⁹⁶ Refer to DE LILLO 2018, p. 9.

¹⁰⁹⁷ Ibid., p. 10.

network of corporate-executive ties as well as on direct and indirect forms of law-making opacity. In fact,

“[s]ecrecy” does not have to involve closed doors and secret deals; in complex pieces of legislation, it can be functional. In the USA, a common tactic is that provisions or earmarks for special interests are slipped into huge omnibus bills at stages in which they are unlikely to be noticed. The harms to democracy are direct and extensive: corruption of this sort severs representative linkages, breaks the relationship between deliberation and decision-making and undermines the creative elements of democratic conflict resolution.¹⁰⁹⁸

In the immediate aftermath of the latest financial crisis, the ability of the financial sector to influence the Congress and the White House decreased dramatically across most policy areas,¹⁰⁹⁹ yet this proved to be just a transitional phase.¹¹⁰⁰ In fact, banks (especially the largest ones) continued to behave recklessly, also due to an excessive use of debt funding: the

tax treatment of corporate debt and the various explicit and implicit guarantees banks enjoy perversely encourage and reward reckless risk taking and borrowing. [...] Corporations may be able to save on their taxes by borrowing, since many governments, including the [US], consider the interest paid on corporate debt as a deductible expense.¹¹⁰¹

The vicissitudes of legal developments in international taxation confirm that regulatory capture remains the overwhelming factor of resistance to change, so that change does happen but leaves real problems—and especially real targets—unaddressed, buried behind the political manifesto of “fair” measures adopted to “finally catch the tax evaders”. This narrative cannot surprise all those who are aware of the relatively recent empirical studies conducted for instance by UCLA and

¹⁰⁹⁸ WARREN 2015, p. 51, in-text citation omitted.

¹⁰⁹⁹ See KASTNER 2018, pp. 51-54.

¹¹⁰⁰ See further IGAN et al. 2019, pp. 5-12; 17-20.

¹¹⁰¹ ADMATI 2019, p. 2.

Princeton's scholar Martin GILENS, showing how policymakers in democratic parliaments are prone to deliver on the stances of the wealthy, even summoning their representatives directly, whilst proposals from the middle class and the poor reach the legislator later and more mediated, and more frequently fail to be accommodated.¹¹⁰² Hence, scholars talk literally of *precarious laws* being enacted within Western constitutional framework under the invisible hand of permanent lobbying, worsened by time-shrinking: the time to legislate is shorter and shorter, while lobbying displays an increasingly unmistakable status of permanence.¹¹⁰³ In this sense, regulatory capture is not only a phenomenon (at times deliberately criminal, other times less so – as more on the cognitive side) built on corruption, revolving doors, political connivance, and distorted clientelism. It is also—and possibly primarily—a natural side-effect of neoliberalism, «the farthest thing in human history from a system for provisioning human needs»,¹¹⁰⁴ encoded in the essence of *law as capital*: lawmaking as capital-seeking (rent-seeking by capital accumulation and labour exploitation).

This implies breaking with the popular idea of [S]tates and “markets” as opposed principles or systems in the international environment. [...] S]tates and corporations can both subjugate or dominate each other in specific constellations [...]: S]tates can own and control firms in order to participate in global capitalism; and firms can create ties through internationalisation that have a feedback on state power.¹¹⁰⁵

Taxation is indeed not immune to this rule: regulatory capture in taxation matters means that at a higher or lower conscious level, the preferences of the wealthy are upheld even within the framework of policies whose overall *stated* purpose would run contrary to their class interests. This is due *inter alia* to the normalisation of tax-

¹¹⁰² The most representative work analysing these dynamics is GILENS 2012. Check also PAGE and GILENS 2017.

¹¹⁰³ See extensively LONGO 2017, pp. 36-37;228;298.

¹¹⁰⁴ DESAI 2020, p. 1356.

¹¹⁰⁵ BABIĆ et al. 2017, pp. 30-31.

exemption regimes, secret advance deals between MNCs and tax administrations or governmental authorities,¹¹⁰⁶ the levelling responsibility-attribution of state policies enforced from the base up (i.e., starting from the poorer) rather than from the source of the problem down, benefits such as accelerated depreciation¹¹⁰⁷ and tax credits, and to a disconnection between individual citizenship and corporate nationality in facing duties before being granted rights. Such a disconnection is accomplished by means of an international legal system whereby accommodating the *transnational* claims of MNCs in legal proceedings is made more feasible than enforcing the *transnational* rights of individuals before international bodies (or before national bodies enforcing IL) – the international investment law regime is well oiled compared to the complaint mechanism of IHRL, for instance. One reason is that

corporate actors are more or less detached from the respective nation [S]tates and dominate international politics as their owners and managers are tightly interwoven with state élites. The centres of power are moved to the transnational level, where national regulations and controls are suspended or at least limited.¹¹⁰⁸

These dynamics may play out transnationally in countless different shades; yet, for the sake of simplification, one shall at least distinguish between the macroprocesses of competition-based liberalism (championed by Western democracies) and more authoritarian forms of politico-economic governance, whereby for example China presides over «the transnationalisation of *state capital* in the form of *state ownership*

¹¹⁰⁶ For two analyses of these advance deals within the EU, refer to VAN DE VELDE 2015 as well as HADZHIEVA 2016, pp. 19;27.

¹¹⁰⁷ Referred to the fact that, as illustrated by GARDNER and WAMHOFF (2021, p. 6), corporations are allowed to write off the costs of investments in equipment more quickly than the equipment wears out and loses value. [...] In theory, accelerated depreciation is merely a shift in the timing of tax payments. Deductions that would otherwise be taken later are taken now, and taxes that would otherwise be paid now are paid later. But companies that continue to take advantage of accelerated depreciation can make this benefit last a very long time or indefinitely and essentially enjoy interest-free loans from the IRS.

¹¹⁰⁸ BABIĆ et al. 2017, pp. 27-28.

of firms». ¹¹⁰⁹ Thus, perhaps contrary to common sense, corporate oligarchism and crony capitalism runs China, too, ¹¹¹⁰ and the Party itself is fully captured, even though the economic system still differs slightly from Western deviated models of crony growth and developmental trajectories. ¹¹¹¹ Indeed,

[t]he translation of the geopolitical (or financial or other) interest of [S]tates in the global system can be advanced via [TSOEs], but then [S]tates are dependent on the ability, performance and will of corporations (or, in fact, their managers) to do so. This is therefore not a one-way relationship, ¹¹¹²

but rather one that will inevitably place sovereigns in an uncomfortable position of vulnerability by exposing them to dependency, blackmailing, and unwritten expectations. It is worth recalling that even when it comes to TSOEs, boundaries between the Chinese model and other ones are not finely drawn; for instance, a non-negligible number of “Western” TSOEs exists, too. ¹¹¹³

f “Selective socialism” as a derogatory pseudo-emergency outcome

Popular discontent with the growing levels of income and wealth inequality in many countries suggests that there is an imbalance between the degree of tax avoidance now achieved by many sophisticated taxpayers and the tax collection by governments to support expenditures that are socially just and in the public interest. ¹¹¹⁴

Just before the 2008 financial crisis, CEOs’ earnings in the US were skyrocketing, regardless of (or disproportionately compared to) corporations’ financial success, and

¹¹⁰⁹ Ibid., p. 32, emphases in the original.

¹¹¹⁰ Refer extensively to PEI 2016; ANG 2020.

¹¹¹¹ See also ALIGICA et al. 2014, p. 160; SINGH and ZAMMIT 2006.

¹¹¹² BABIĆ et al. 2017, p. 32.

¹¹¹³ See ibid., p. 35.

¹¹¹⁴ ALARIE 2015, p. 97.

the way it was achieved or not achieved;¹¹¹⁵ what mattered was quantity: cumulating and reselling as many *junk assets* as possible.¹¹¹⁶ “Responding” to the crisis, Western governments not only granted bail-out treatments¹¹¹⁷ (often informally, or relying on emergency powers¹¹¹⁸) to financial institutions deemed “too big to fail”,¹¹¹⁹ but also ring-fenced the domestic assets of failing MNCs as to maximise the returns for domestic asset-holders;¹¹²⁰ both are market-engineering operations that while not necessarily insulating credit institutions from similar crises,¹¹²¹ rescue market-failed entities and reduce the liability of their ill-advised management at the expense of *all* taxpayers. Through the first operation, especially, subsidies were contributed towards by all taxpayers, which equates to an inverse redistribution of wealth from the poorer (the overwhelming majority of mentioned taxpayers) to the richer (the banks to be bailed out, as legal persons, and thus to their natural-person shareholders).¹¹²² Gravely enough, no lesson was learnt through the crisis, so much that TBTF banks¹¹²³ have mostly preserved their bigness—and thus exposure to systemic risk *for the general public*—thanks to a combination of lobbying, regulatory capture, geoeconomics, and financial engineering (including “quantitative easing”).¹¹²⁴ At the same time, States considered several taxes on financial markets (e.g. a bank balance-sheet tax, a currency transaction tax, and a broader financial transaction tax) in order to gain more resources to be spent for domestic welfare policies and the global commons, but consistently

¹¹¹⁵ See FEINMAN 2012, p. 277; CONYON and SIMON 2012.

¹¹¹⁶ See MOOSA 2016, p. 142; MARKHAM 2015, pp. 522-528.

¹¹¹⁷ See further PIETERSE 2010, pp. 109-110; BLAIR 2012, p. 73; ARONOWITZ 2017, p. 348.

¹¹¹⁸ Refer to KAUFMANN and WEBER 2012, pp. 242-243.

¹¹¹⁹ See also LANGFORD 2019, p. 153.

¹¹²⁰ See TRACHTMAN 2013, p. 186.

¹¹²¹ Refer extensively to CULLEN 2018.

¹¹²² See e.g. TALBOT 2016, p. 528.

¹¹²³ These are technically defined as SIFIs, from the domestic (D-SIBs or N-SIFIs) to the global (G-SIFIs) plane.

¹¹²⁴ Refer extensively to IOANNOU et al. 2019. On the lobbying aspect, see e.g. SILVA 2019, p. 279. On the confluence of quantitative easing, central-banks-driven inequality, and systemic injustice, read for instance MONTANARO and VIOLI 2020, pp. 318-319; CHUNG 2017, pp. 277-279; VAN 'T KLOOSTER and FONTAN 2020, p. 866; BAKER and MURPHY 2020, p. 463.

failed to deliver on that intention: a few successful domestic efforts by e.g. the US and the UK were hindered by the lack of concerted international agreements, and related arbitrage by credit institutes.¹¹²⁵

This renewed tax assertiveness is no dismay: Western countries are the new poor-in-sight, because their governments and banking systems “live”

on debt and, therefore, on borrowed time. [...] Falling deeper into debt is toxic for democracy and its citizens because it becomes a vicious cycle [...]. There exists a great deal of difference between the [S]tate having a beneficial role to the citizenry and having as its *raison d'être* the survival of the State Supermarket. Democracy pays the greater price, as *the [S]tate becomes too dominant and intrudes too far into its citizens' privacy. Both personal freedom and efficiency are at stake.* Basic human liberties are abandoned as the State Supermarket not only buys and distributes goods and services it cannot afford, but also looks over the shoulders of every citizen.¹¹²⁶

Against this backdrop, cracking down on *all* individuals, without scale or priority considerations, just for recovering relatively small amounts of money hidden in offshore private accounts seems unfair, *if to do so, essential freedoms and fundamental rights are to be violated*, and faith in “the system” is further eroded. Part of this erosion translates in higher confidence in the virtues of digital currencies, which are partly free from state control, ensure anonymity, thus *de facto* proving untaxable or challenging to regulate.¹¹²⁷

¹¹²⁵ See further ALEXANDER 2012. Meanwhile,

despite a brief wave of Keynesian-type stimulus policies immediately after the outbreak of the financial crisis in 2007, governments have relied predominantly on austerity measures [...], the new hegemon within a neo-liberal paradigm [...]. This includes the use of flexible contracts to facilitate labour market participation but, biased to the advantage of employers, toughened access to unemployment and other benefits, as well as curtailing public expenditure in the areas of healthcare, pensions and education [...]. The welfare [S]tate is still a key institution in modern capitalist democracies, but it has undoubtedly changed in character—more lean, more mean—following the sovereign debt crisis.

— DE LA PORTE and HEINS 2016, p. 4.

¹¹²⁶ CHORAFAS 2011, pp. 23-24, emphasis added.

¹¹²⁷ See MBAREK et al. 2019, p. 30; RYZNAR 2019, pp. 71-73. More generally, refer to DUROS 2018.

The underlying motto “all to pay in order for each to pay less” is an oversimplistic one, which confines itself to perpetuating the current legal-economic structural injustices and amplifying them from the national to the global sphere: enforcing taxation “horizontally” in an equally aggressive way across societal strata conceptually equates to arguing that everyone should pay the same taxes in absolute terms *under the principle that we are all formally equal before “the law”*. Even those who advocate for trust to guide all actions on both the taxpayers and tax agencies sides, admit that «the claim of fair benefit taxation requires the premise that the distribution of income must also be just»,¹¹²⁸ and acknowledge that quantitative overloads of information are not going to foster real transparency, as the jeopardy to trust lies in active deception *on the substance* rather than mere secrecy.¹¹²⁹ If the most recent economic theories suggest expansive policies be implemented but governments (and institutions such as the IMF¹¹³⁰) insist on enforcing all-in-all austerity measures, diversifying one’s deposits in foreign accounts as to secure one’s self-maintenance seems justifiable. Austerity should not be the primary target of governments and tax agencies, whose overfocus on small savers (or on savers in general, with no distinction or due priority) is counterproductive for and thus damages the economy,¹¹³¹ and equates to stepping on citizens’ privacy and limiting their freedom summarily (when not arbitrarily).

¹¹²⁸ SEDMAK and GAISBAUER 2015, p. 27.

¹¹²⁹ Ibid., pp. 26-27.

¹¹³⁰ Refer to NELSON 2014, p. 163.

¹¹³¹ This is because small savers—those, say, roughly at the bottom of the “middle class”—may be considered to fall within the most cautious category of investors, far from the excesses that cyclically trigger global crises in an age of capitalism. Indeed,

the proportion of an investor’s wealth held in risky assets increases as the relative risk aversion of his indirect utility for wealth decreases. For this reason, one might expect that the poorest and the richest investors (in terms of wealth, not income) would be the most inclined to invest in risky assets

– BEWLEY 1993, p. 319.

All in all, «it is unrealistic to assume that attitudinal support for tax cuts for the wealthy and austerity programs for the poor is unrelated to the social dimension of ideology».¹¹³² In fact, it has been argued that austerity measures, *by intersectionally discriminating* e.g. those who are both poor and ill (which is a fairly common combination), impact citizens' lives up to the point of *de facto* sorting them into law-sanctioned classes of biological sub-citizenship.¹¹³³

g Clear reasons to protest – and to deem AEoI morally troubling, as well as unlawful

Among protestors gathered in the Occupy Wall Street (OWS) movement,¹¹³⁴ Spain's *Indignados*, the French *Mouvement des Gilets jaunes*, the World Social Forum's "Porto Alegre Consensus", and well beyond,¹¹³⁵ the feeling was (and is)

that *wealthy* individuals and large corporations often have the motive and opportunity to influence the design of tax rules so as to minimize their tax burdens and, where the rules are ambiguous, engage in tax planning that ranges from run-of-the-mill compliance to aggressive tax avoidance.¹¹³⁶

Tax avoidance was (and is) paralleled by explicit tax breaks especially designed for large corporations, which only contributed to soaring public debt, class divide, inflation, unemployment, misery, and ultimately overaccumulation *and overconcentration* of capital at once.¹¹³⁷ Tax holidays were discussed as well.¹¹³⁸ The

¹¹³² AZEVEDO et al. 2019, p. 83.

¹¹³³ *Read extensively* SPARKE 2017.

¹¹³⁴ *Read further* KELLNER 2017, pp. 221-228.

¹¹³⁵ *See also* BOILLOT 2021, pp. 124-125, DE LAROSIÈRE 2021, p. 166, and BERR et al. 2021, pp. 184-186.

¹¹³⁶ ALARIE 2015, p. 84, emphasis added.

¹¹³⁷ *See* THEMISTOCLEOUS 2014, pp. 28-29.

¹¹³⁸ Actually, they are periodically repropounded: *see e.g.* ELKINS 2017^a, p. 10.

protestors’ was not just a feeling: as best summarised in the abstract of a political-economy analysis by HAKELBERG and RIXEN,¹¹³⁹ the

downward trend in capital taxes since the 1980s has recently reversed for personal capital income. At the same time, it continued for corporate profits. Why have these tax rates diverged after a long period of parallel decline? [...] The answer lies in different levels of change in the fights against tax evasion and tax avoidance. The fight against evasion by households progressed significantly since 2009, culminating in the multilateral adoption of [AEoI ...]. In contrast, international efforts against base erosion and profit shifting [...] failed to curb tax avoidance by corporations.

Even assuming a few households did play a negative role in the crisis (and financial—but only only—crises generally), only the richest minority of said households would have proven impactful. Accordingly, the fairest and most credible solution would have been to start from those wealthy individuals and large corporations (by far those who benefit the most from tax havens¹¹⁴⁰), not as an end-target but as an identifiable *and fair* starting point. This would have represented a meaningful policy turn, because most of today’s wealthy are no longer so owing to nobiliary titles, but due to corporation giants¹¹⁴¹ that are too frequently granted relaxed tax environments, in derogation to unwritten SCs on which nations are based.¹¹⁴²

By disclosing «how Wall Street is enmeshed in unjust structures of predatory capitalism and government corruption», OWS was advocating for *structural* change, not simply for the attribution of individual culpability.¹¹⁴³ What OWS protestors were

¹¹³⁹ 2021.

¹¹⁴⁰ See COCKFIELD 2020, p. 388.

¹¹⁴¹ According to ZUCMAN (2018, p. 4),

[a]lthough tax havens do collect revenue on the huge bases they attract, profit shifting significantly reduces corporate income tax payments globally: for each \$1 paid in tax to a haven, close to 5\$ are avoided in high-tax countries. More than redistributing tax revenues across countries, profit shifting thus redistributes income to the benefit of the shareholders of multinational companies

in the form of dividends as well as “performance” bonuses.

¹¹⁴² See SOMERS 2008, p. 34.

¹¹⁴³ SRIVASTAVA and MUSCOTT 2021, p. 578.

faced with instead is a new form of state-backed surveillance which exchanges information pertaining to all, worldwide, without any popular approval, wealth threshold, investigatory notice, judicial oversight, court remedy, or other procedural safeguard, whilst regulatory capture is as vibrant as ever, unfettered capitalism reigns unhindered, the management who was responsible for the crisis retires with multimillion bonuses rather than facing jail,¹¹⁴⁴ rating agencies—exactly the same which culpably got it all wrong before the crisis—are accountable to no one, neither are index providers,¹¹⁴⁵ and large corporations keep benefitting from privileged tax treatments, especially in the digital industry.¹¹⁴⁶ This posture is consistent with the political economy’s finding that

governments are likely to tax those who are least likely to take measures to avoid taxation at the highest rates, [thus tolerating] tax avoidance in [their] own self-interest[: ...] a Leviathan model, which features a government that seeks only to maximize its revenue, and is subject to few constraints.¹¹⁴⁷

¹¹⁴⁴ See also LAÏDI, p. 134.

¹¹⁴⁵ FICHTNER et al. (2021, p. 2) note that

the major index providers have become crucial gatekeepers of capital, yielding infrastructural power over international investments. They have become key counterparts to [S]tates in global finance, and their central position in the index investing ecosystem confers them the role of new de facto private regulators that exert standard-setting power.

¹¹⁴⁶ A few countries (mostly in Europe) are introducing new taxes on digital services provided by “Tech Giants”, but this effort is strenuously opposed by some US/Canadian scholars and “think tanks”; refer e.g. to KENNEDY 2019 or GOVINDARAJAN et al. 2019. Without polemics, but simply to outline a fact, most of these scholars have clear conflicts of interests related to their consulting activities in the industry of MNCs providing digital services. At any rate, the US Government itself is “investigating” France for taxing major US-based digital service providers; check the “Report on France’s Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974” (December 2, 2019) available at [https://ustr.gov/sites/default/files/Report On France%20s Digital Services Tax.pdf](https://ustr.gov/sites/default/files/Report%20On%20France%20Digital%20Services%20Tax.pdf). This issue is not the main focus of the present work, but the reader who wishes to engage further with it may find briefs on the latest developments at <https://taxfoundation.org/digital-services-tax/> or UNDESA 2018, pp. 138-143. On my part, whilst I join MITCHELL and MISHRA (2018, pp.1093-1094;1098) in their warning that imposing taxes on cross-border digital data flows would interfere with the principle of free flow of information on the Internet, I believe that digital sales and the commercial exploitation of user-bases should be taxed fairly, catching up with the extravagances, asymmetries, and inequalities triggered by our Internet-enabled economic globalisation. On taxation issues triggered by international e-commerce operations, see further PARIS 2003, pp. 160-175.

¹¹⁴⁷ ALARIE 2015, pp. 87-88, referring to an unpublished paper by Phillip Doerrenberg, Denvil Duncan, Clemens Fuest, and Andreas Peichl, and to their precursors. Interestingly, about the Leviathan, “Leavitt” means

of the tribe of Levi, whose members were guards and musicians, with particular responsibility for the protection and maintenance of the Temple. Further, [...] hearing the “wide sound” in the name, is to find “levy” in “Levi,” a word whose several meanings ratify the Hebraic dimensions of “Leavitt”. “To levy” may be to enlist a body of men for war. The

It is a metastasis¹¹⁴⁸ of

market fundamentalism[, whose] ideology of absolute market freedom is almost totally at odds with actually existing successful market societies, which *rely heavily on social institutions (e.g. laws and tax codes) to protect the rich* from full market exposure while forcing market “freedoms” on the rest of us [...] Market-driven freedom may only be an illusion, but [as] a capacious vision, it has conquered the current social imaginary. Nowhere has this conquest been more complete than in the [US. ...] It is, in effect, *socialism for the rich*, and capitalism for everyone else.¹¹⁴⁹

A similar trend has marked the WB’s response to the ongoing pandemic, with «public–private partnerships to deliver ostensibly public services» and the prioritisation of the corporate private sector over the natural-person indigent in public spending.¹¹⁵⁰ Thus, no wonder why it is exactly from the US that the practice of surveillance normalisation for taxation purposes gained momentum.¹¹⁵¹ The results of this effort transposed onto the international plane are now starting to show their darker face: while the major-by-far actors of global tax evasion over decades, most of whom senior, are hardly prosecuted either retroactively or prospectively, younger generations of small savers face presumption of guilt and tough restrictions on their personal privacy and economic freedom, exacerbating the generational divide on labour rights

verb may also refer to the imposition of a toll or tax, or to the collection of a debt. A combination of monetary and military inflections

– GODDEN 2019, p. 180. This is fascinating, although philologists seem to converge on the etymology לַיִּיָּתָן or לַיִּיָּתָן (Liwyāthān) from the Hebrew Bible – see MALCOLM 2007, p. 25.

¹¹⁴⁸ This term is not employed here lightly: the geography of tax-avoidance-driven, onshoring/offshoring structuring of multinational groups resembles—conceptually but even visually—a chaotic web of oversized, overproliferating, and metastatic cells spreading wherever they see it viable; see e.g. PHILLIPS et al. 2021, p. 294, f. 2.

¹¹⁴⁹ SOMERS 2008, pp. 4;40, two emphases added.

¹¹⁵⁰ Refer extensively to DIMAKOU 2021. Anecdotally, my personal experience confirms this: in my own country (Italy), while profit-making activities, usually related to the showbusiness or sponsored by big firms (e.g. in the luxury sector), have been performed as usual (including the European football championship, with subsequent “march of triumph” by footballers through the streets of Rome, in the middle of a deadly pandemic), all universities, libraries, museums, theatres, cultural and research centres, and so forth have been forced to shut down for a year and a half. Most of their employees became unemployed, changes in clients habits have radicalised, and little to no compensatory financial assistance or aid was provided by the State.

¹¹⁵¹ See also GADŽO and KLEMENČIĆ 2017, p. 209.

and income due to a “Strong with the Weak, Weak with the Strong” (SWWS) approach. Indeed, several jurisdictions still enforce

financial secrecy laws that mask the true identities of owners of cross-border investments for wealthy or criminal taxpayers, leaving less well-resourced taxpayers at the mercy of the uneven legal regime.¹¹⁵²

Such a paradigm frustrates the legitimate interests of the average citizens,¹¹⁵³ stands as highly erosive of the social texture and detrimental to human-rights protection, and when it is upheld to the international level, it might even prove unlawful (as the present Thesis holds) or at best illegitimate.

The same SWWS approach can be traced in transfer pricing:¹¹⁵⁴ APAs are implemented, whereby

the company sits down with the IRS and negotiates an [APA] instead of doing its transfer pricing and documentation and then waiting until the IRS complains. [...] These APAs can be multilateral, meaning that the [US] is willing to negotiate APAs together with the taxpayer and tax authorities of other parties.¹¹⁵⁵

In order to negotiate those agreements, corporations disclose trade secrets (e.g. business plans, market-targets, competitors, etc.) and other confidential business information, which becomes problematic in the event of freedom-of-information submissions. This is how AVI-YONAH¹¹⁵⁶ explained the issue:

¹¹⁵² COCKFIELD 2020, p. 390.

¹¹⁵³ See *ibid.*, p. 388.

¹¹⁵⁴ This expression incorporates the arm’s length principle which, as summarised by VAN APELDOORN (2019, p. 166),

requires that that the prices of transactions between affiliated parties (such as subsidiaries of an MNE) are set in accordance with market prices, or in accordance with the price that would be agreed upon between two unrelated market participants operating at arm’s length. In [GVCs], where several subsidiaries contribute intermediate goods or services to the final products, MNEs can, in the absence of the arm’s length principle, lower their tax burden by manipulating the prices of (intermediate) goods transacted between their subsidiaries.

¹¹⁵⁵ AVI-YONAH 2007, p. 118; see also TRAN 2019, p. 221.

¹¹⁵⁶ 2007, p. 119, emphases added.

The argument against the secrecy of APAs in this case is that it is unfair to small taxpayers that the government would enter into agreements with big, rich taxpayers to determine how much these taxpayers should pay, whereas small taxpayers have to live with the audit process. This argument was appealing *because of its populist motivations*, but it was troublesome because it had the potential to bring an end to the APA program, *which is arguably the best development in transfer pricing* since the [OECD] guidelines were established. When it recently became evident that the IRS was going to have to make APA information public, Congress intervened and enacted legislation to protect the privacy of APAs.

AVI-YONAH labels small (corporate) taxpayers' grievances as "populist", and rejects their legitimacy simply because there is reportedly no alternative; in other words, he believes small taxpayers' claims are not worthy of consideration, and even if they were, they would not account for reality. This second observation might be true, yet AVI-YONAH could at least acknowledge that such "reality" is exactly *the problem*: it equates to saying that rules are only valid insofar as you are not "big" enough to negotiate their application, which mimics the self-defeating logic of bailing-out morally hazardous banks¹¹⁵⁷ *because they have already become "too big to fail"*. Taken to the core, his argument sounds like: "better APAs than the previous nothing"; mine is: if APAs are arranged because the IRS is ostensibly unable to catch the big avoiders, then the small ones can—and should!—legitimately feel entitled to avoid taxation as much as they can. In fact, in my view, these sorts of rescue programs (and justifications, as well as expectations) are exactly those that *argumentatively normalise and legitimise the "exception"*, those that make those private entities grow up to being "too big" in the first place; this is widely known (and was fairly known before the 2008 crisis, too),¹¹⁵⁸ yet governments keep operating to the opposite flavour.

¹¹⁵⁷ See further COLEMAN and SAJED 2013, p. 130 (paraphrasing Eric Helleiner).

¹¹⁵⁸ As illustrated by MUSSA (2004, pp. 47-48;50),

many government interventions that seek to ameliorate losses by some members of society at the expense of the general taxpayer generate moral hazard that results in distortionary

«Without published APAs, watchdog groups expect the worst and multinationals wonder whether their competitors are getting a better deal»,¹¹⁵⁹ which inexorably triggers a race to the bottom whereby MNCs seek to capture the state administration both through economic blackmailing and by instructing the most well-connected tax advisors and public-private mediators and negotiators. Indeed, from the public standpoint, APAs can be deemed a manifestation of the broader phenomenon of “regulatory States”, weakly governing by proxy as they find themselves unable «to employ unilateral, discretionary control via command, [and thus] necessitating reliance on more *arm’s length forms of oversight*, primarily through the use of rules and standards *specified in advance*». ¹¹⁶⁰

From the private standpoint, at first sight, one might assume that APAs are a “necessary evil” for corporations to circumvent transfer-pricing rules which are not only extremely complex and uncertain, but so abstract and misinformed about ground reality that one cannot reasonably expect corporations to comply with them.

To illustrate, in 2013, [EY ...] surveyed twenty-six countries regarding transfer pricing, including the [US]. The results indicated that 15% of companies litigated a transfer pricing case in the past year and 28% reported unresolved transfer pricing examinations, which is up from 17% in 2010 and 12% in 2007. Additionally, interest charges stemming from transfer pricing adjustments affected 60% of the companies surveyed, 24% of which suffered penalties from an adjustment. These numbers demonstrate that even companies in developed countries remain unsure about the arm’s length standard and are not immune from penalties for implementing the standard incorrectly.¹¹⁶¹

costs for society as a whole. [...] The result of these policies is typically to generate a good deal of moral hazard – because people rationally anticipate that some risks that they undertake will be partially subsidised by the general taxpayer. [...] These bail-outs are not usually loans that must be repaid with interest; they are outright gifts or loans likely to be forgiven.

Regrettably, these do not seem to be isolated incidents, but rather, systematic behaviours; *see e.g.* CASTELLI and SCACCIAVILLANI 2012, p. 98.

¹¹⁵⁹ TRAN 2019, p. 211.

¹¹⁶⁰ YEUNG 2010, p. 67, two emphases added.

¹¹⁶¹ TRAN 2019, pp. 219-220.

This occurs because data and assumptions corporations rely upon to make their case are partial, unofficial, provisional, and/or so difficult to interpret for tax agencies that divergent readings stand equally, so that the outcome of an audit could well be decided by mere chance;¹¹⁶² in this sense, corporations' inability and unwillingness to risk could be justified.¹¹⁶³ However, if they truly aimed at cooperating with tax authorities, they would lobby for either a completely different rationale for business taxation (some of which have surfaced during BEPS 2.0-related discussions¹¹⁶⁴), or transparency with regards to the deals they strike with said authorities and the foresights such deals have merited approval for. Regrettably, corporations tend to do exactly the opposite: on the one hand, «business leaders and industry representatives lobbied Congress to ensure these documents would not become public information»;¹¹⁶⁵ on the other hand, they inconsistently raise the issue with policymakers, factually acquiescing to the transfer-pricing status quo. In fact,

[t]here is no one “correct price”; instead[,] transfer pricing is to a significant extent about negotiation and the *narrative authority* of different price analyses. Such narratives are tied to professional identity claims of competence and technical superiority, advantaging professionals in the Big Four.¹¹⁶⁶

Justices, too, are often left with no grounds to choose one potentially subjective calculation over another calculation which is, in principle, just as subjective, thus they prefer to exercise self-restraint:

Even when governments contest transfer prices, they have found it difficult to persuade courts that their estimations of arm's-length prices

¹¹⁶² See *ibid.*, pp. 210-219.

¹¹⁶³ See generally WHITFORD 2010, pp. 272-276.

¹¹⁶⁴ Check *infra*.

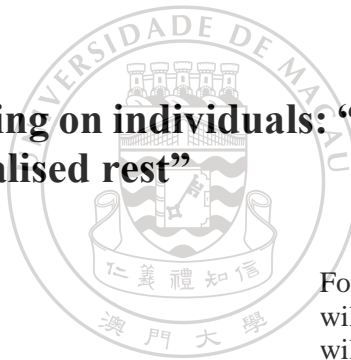
¹¹⁶⁵ TRAN 2019, p. 222.

¹¹⁶⁶ CHRISTENSEN et al. 2020, p. 8, in-text citation omitted, emphasis added. See further WHITFORD 2010, p. 289, and SCHNIDER 2019, pp. 99-100.

ought to prevail over taxpayers' estimations. Indeed, the arm's-length standard is said to produce a "range" of correct answers, such that the choice of a point within that range is arbitrary. Courts are understandably reluctant to impose unfavorable results on taxpayers based on subjective, unclear, or arbitrary standards and regulations. The subjectivity of the standard and taxpayers' successes in fending off adjustments by governments have emboldened taxpayers to aggressively manipulate transfer pricing in order to shift income.¹¹⁶⁷

All in all, transfer (mis)pricing—its inherent complexity, worsened by wilful misuse—is the primary reason hiding behind tax avoidance,¹¹⁶⁸ and consequently a major factor exacerbating underdevelopment, inequality, structural injustice, and poverty worldwide,¹¹⁶⁹ at odds with what PIL theoretically strives for.

h Comparatively zooming on individuals: “the prudentialist 1%” and “the prudentialised rest”



For to every one who has, will more be given, and he will have abundance; but from him who has not, even what he has will be taken away.

— *Matthew 25:29, RSV.*

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Alongside lobbying,¹¹⁷⁰ corruption, elitism, neo-imperialism, and interest convergence, another phenomenon resulting in regulatory capture is that of debt-trapping, as admirably described by a number of US-based scholars¹¹⁷¹ and recently

¹¹⁶⁷ MASON 2020, p. 360.

¹¹⁶⁸ See also WHITFORD 2010, p. 277.

¹¹⁶⁹ Check e.g. CHRISTENSEN et al. 2020, p. 9. See also BROCK and POGGE 2014, pp. 3-4.

¹¹⁷⁰ Notably,

[t]he recent ramp-up of major technology companies' spending on lobbying has raised concerns that those firms may acquire unfair advantages through political means. [...] For example, Google alone spent more than \$17 million in lobbying in the [US] in 2017, whereas Facebook spent more than \$11.5 million; other tech giants such as Amazon and Apple also set company records in lobbying in 2017

— UNDESA 2018, p. 133, in-text citation omitted.

¹¹⁷¹ Check extensively MIAN 2019; MIAN et al. 2021.

summarised by STROPOLI.¹¹⁷² All across developed economies, wealth is increasingly concentrated in the hands of the few (1% of the population or far less), and given that high-income earners save a larger share of their income compared to the remaining 99% or more of the population (*a fortiori* when facing crises),¹¹⁷³ such financial surplus is “parked” in banks at the disposal of the financial sector. As investments in new businesses remain constant, an increasingly larger share of said surplus ends up financing the ever-expanding demand for credit by governments, satisfied by credits that are increasingly low-cost exactly due to their oversupply (and disproportionate availability in the first place). This way, governments are more and more credit-reliant vis-à-vis High-Net-Worth Individuals (HNWIs). The consequent side-effect of this trend is that, asset markets being more prone to bubbles when credit is too cheap, crises become both more probable and more devastating, then encouraging governments to bail-out the companies they are more financially dependent on, which turns into higher urgency of contracting further debts – thus increasing credit demand once again, and so forth. «Expanding public debt has thus become a core indispensable feature of capitalist finance».¹¹⁷⁴ To tackle the issue, permanent or lump-sum wealth taxes with redistributive and socially mobilising effects are resolutory (or as a minimum, they represent a coherent and justifiable starting point),¹¹⁷⁵ whilst information exchanges targeting *everyone* (thus, targeting *no-one* from a public-policy perspective) further erode the savings of the 99% and chill their spending without going after the embarrassing surpluses generated by the 1% in any significant, resolute, or sophisticated manner. Debt-trapping also exposes the reason why

¹¹⁷² 2021.

¹¹⁷³ On this passage in the debt-trapping reasoning, *see also* MA and TODA 2021.

¹¹⁷⁴ WOODLEY 2015, p. 113.

¹¹⁷⁵ *Read also* SCHEUER and SLEMROD 2021, pp. 219-220;224.

[i]n countries with high income inequality[,] higher levels of debt can be sustained[. ... T]he level of income inequality in a country is positively correlated with the supply of assets and the interest rate in that country. When international financial markets open, to clear the world financial market at a common interest rate, capital flows from (previously) low-interest rate countries to high-interest rate ones. Equivalently, capital flows from equal to unequal countries.¹¹⁷⁶

It seems meaningful to note, here, that the concept of “surplus”, which we may generally define as *systemic over-cumulation for the sake of dispossessing others* (“competitors”) while not accounting for its externalities onto wider groups of human beings and the environment,¹¹⁷⁷ is a main thread in the current late-capitalist mode of action: the reader will recall the “behavioural surplus” extracted through corporate analytics,¹¹⁷⁸ but there is also a better known labour dimension to it,¹¹⁷⁹ which only worsened with digitisation and globalisation. Perhaps even more gravely, though, land also features into this plan, with enormous areas of territory being “lawfully” bought by private entities, integrated into global supply chains, and exploited, originating internal displacement and vast arrays of “surplus humanity” which nobody will bear accountability for.¹¹⁸⁰

Furthermore, there is a transnational dimension to this 99-vs-1 policy capture and systemic incoherence. The global *economic* market (MNCs’ interests) is taking over the global *political* market (international community of citizens) by having «the sovereigns delegate regulatory functions to private actors or endorse practical immunity for markets through deregulation and privatization».¹¹⁸¹ Standing unindulgent to the 99% and lenient with the 1%, international tax coordination as it is

¹¹⁷⁶ DE FERRA et al. 2021, p. 26.

¹¹⁷⁷ Cf. the working definition by NITZAN and BICHLER (2009, p. 40): «an output that is over and above what is necessary to merely reproduce society at a given level of production and consumption».

¹¹⁷⁸ Please refer extensively to Ch. 1 in this Thesis.

¹¹⁷⁹ Read REITZ 2018, p. 199.

¹¹⁸⁰ Check e.g. ROBINSON 2018, p. 243.

¹¹⁸¹ BENVENISTI 2017, p. 458.

implemented today resembles a wider double-faced tension towards global integration «in enabling the pursuit of private economic interests internationally while restricting political responsibility to the domestic sphere»,¹¹⁸² whereby the abstractly aspired-to «democratization of globalization»¹¹⁸³ remains much of a mirage as it is replaced by coordinated surveillance for the masses and self-indulgence by transnational élites. After all, neoliberalism is a process of *soft enslavement* for the masses and lubricated freedom for the few: «in order to act freely, the subject must first be shaped, guided and moulded into one capable of responsibly exercising that freedom through systems of domination»,¹¹⁸⁴ backed by systematic policy neo-prudentialism¹¹⁸⁵ (a selected version of “private prudentialism”,¹¹⁸⁶ which applies to all) that insures the élites against masses’ deviation and “irresponsibility” in non-submitting themselves to the system’s desiderata of the powerful. Translated into taxation rationales, this roughly means: “we shall surveil everyone to ensure that most of the 99% pays its taxes as stipulated by law, so that we can continue to afford an economic model whereby MNCs and their shareholders avoid paying theirs (as equally stipulated by law)”. In fact,

neoliberalism has always been about governance, not merely the virtues of a self-regulating invisible hand [...]. What now gets transformed under neoliberalism is not merely the economy, but the whole of social life as *the market becomes the template* for curating which issues, communities, and people are acknowledged, which are exploited, which are criminalized, and which are simply ignored.¹¹⁸⁷

¹¹⁸² JAHN 2013, p. 124, fn. 7.

¹¹⁸³ Ibid., p. 137.

¹¹⁸⁴ DEAN 2009, p. 193.

¹¹⁸⁵ See *ibid.*, pp. 194-195.

¹¹⁸⁶ Refer to COLLINS 2013, p. 138.

¹¹⁸⁷ EVANS and GIROUX 2015, pp. 84-85, emphasis added. This concept is reinforced by AZEVEDO et al. (2019, p. 60, emphasis added) in the ensuing terms:

when contemporary political actors—the heirs of Reagan and Thatcher, economic conservatives like Paul Ryan and self-described libertarians like Rand Paul—move to deepen tax cuts for wealthy individuals and corporations and cut back on public health care provisions or unemployment benefits or funding for public education[,] they are not merely exhibiting confidence in the free market and defending individual freedom. In practice, they are *determining* which members of society are well-situated to thrive and which are not.

Within mentioned framework, surveillance capitalism is the most effective when States and market entities' control techniques converge and reach similar outcomes, with someone going so far as to compare this convergence to a new form of human slavery that meta-owns individuals by controlling the performance of their actions—and thus their true living—in the form of big data:

When this data is acquired by governments or corporations, legally or illegally, [...] the body-subject is enslaved in an ownership sense. Indeed, the conjunction of linked personal data (the “mosaic” effect), coercive and automated information gathering[,] and pervasive “forever storage” has enabled the rise of new types of information “slave owners” exploiting growing power asymmetries with “prosumers” and an ever-increasing concentration of reach. Personal data is commodified, assetized[, ...] and trafficked. From the traders' perspective, this virtual slave trade rests on a fantasmatic belief that aggregated personal data is an “unowned” raw resource in new territory. [...] P]ersonal data should not be considered a “free” resource to be extracted and [...] its collection, aggregation and trafficking [...] beyond the understanding, and without the informed consent of prosumers is in itself a form of chattel enslavement.¹¹⁸⁸

As examined *supra*, AI-powered surveillance devices are widely deployed by enforcement agencies worldwide, and most recently, AI entered the field of tax enforcement too, by way of algorithms deemed able to spot the most “at-risk” taxpayers to be reported to the relevant agency for closer inspection. Not only those algorithms “learn-by-doing” and become unintelligible to their own programmers after a few “learning rounds”, but the criteria algorithms are initially “fed” with in order to “start learning” are obscure too, reportedly because their disclosure would facilitate morally hazardous taxpayers by providing them with undue time-advantage on law enforcers. Buying into such

¹¹⁸⁸ CHISNALL 2020, p. 502.

anti-circumvention argument [...], the [IRS] will not disclose the “checklist used by agents to detect fraudulent tax schemes” or the precise specifications that it uses to automatically flag returns for an audit. Disclosing those flags would give tax fraudsters a roadmap to avoid detection. Similar arguments have been featured prominently in debates regarding the [NSA]’s surveillance activities. For instance, the NSA vigorously resisted disclosing the rules governing its treatment of information about “U.S. persons” on the grounds that doing so would imperil “sources and methods” of intelligence.¹¹⁸⁹

Although this solution might sound convenient *prima facie*, there are several persuasive arguments that urge law-enforcement authorities to consider how far their anti-circumvention “doctrine” might backfire. Besides its potential unlawfulness per se, secrecy undermines institutional checks-and-balances between administrative authorities, the legislature, and the judiciary, not to mention the public trust in and moral support for enforcement. Moreover, no credible empirical evidence exists that anti-circumvention would truly provide an advantage to tax evaders, also because public scrutiny may qualifiedly improve enforcement’s technological precision as to avoid redundancies and collateral surveillance.¹¹⁹⁰

Public trust, which is also a culture-sensitive variable,¹¹⁹¹ is probably the most underrated and “unweighed against” among these “counterarguments”, in that if taxpayers suspect that, for example, an algorithm is accurate in identifying simple tax-evasion schemes (thus, mostly pointing to little savers) but not in reporting complex schemes used for corporate avoidance by the superrich (either for the way it was programmed from the outset, or due to the data it was fed with over time for “learning”), their overall confidence in the tax system might be frustrated, thus encouraging tax evasion – or collateral antisocial behaviours, if the former is technically inapplicable. I believe that taking stock of the actual operational practices

¹¹⁸⁹ MANES 2019, p. 508, quotation footnoting mark omitted.

¹¹⁹⁰ See *ibid.*, pp. 510-511.

¹¹⁹¹ Check *e.g.* NURKHOLIS et al. 2020.

of the IRS, this suspicion would be more than justifiable. The wealthiest individuals are usually segmented for statistical purposes into ultra-high-net-worth individuals (net worth > US\$30 million), very-high-net-worth individuals (>\$5 million), and high-net-worth-individuals (>\$1 million). In 2007 (quite a topical year...), the IRS audited the returns of just the 9.25% of these three classes of superrich people taken together,¹¹⁹² although it is quite obvious that *any serious large-scale operation of tax recovery would start exactly from them*, as their quota of evaded taxes is higher not only in absolute terms, but in relative ones too. Unfortunately,

[t]ax enforcement is costly, and *the more organized the fraud is, the more costly enforcement is likely to be*. [...] Tax fraud has become a crime whose effects are to be managed, rather than a crime to be suppressed. This has a profound effect upon our tax systems, which are a cornerstone of our societies. Tax systems are dependent on enforcement as much as on policy. *Selective tax enforcement that gives primacy to revenue maximization and short-term efficiency concerns fatally damages the neutrality and equity of our overall tax systems*; it results in a decrease in the long-term efficiency of those systems; and, crucially, it undermines the rule of law [...].¹¹⁹³

If tax havens were previously known in legal/IR scholarship as “*sovereignties on sale*”, those same jurisdictions are now under the OECD radar for even more sophisticated practices of “*citizenship on sale*”, whereby «individuals [...] avoid reporting in their true residence jurisdiction by documenting nexus in the countries where citizenship was purchased (e.g., by providing a passport and a utility bill)». ¹¹⁹⁴ Yet, automatic exchange of information seems to sit short of its advocates’ expectations (although, to be fair, the program is just at its technical inception) even in the US, the jurisdiction that first enforced such a model – even though it did so unilaterally:

¹¹⁹² See MCLAREN and PASSANT 2010, p. 5.

¹¹⁹³ DE LA FERIA 2020, pp. 266;269-270, two emphases added.

¹¹⁹⁴ BEER et al. 2019, p. 11.

FATCA was projected to generate \$8.7 billion in revenue between fiscal years 2010-2020 [...], a yearly average of \$792 million. [...] S]ince the launch of the Offshore Voluntary Disclosure Program, a partial amnesty program that allows persons not under audit to disclose unreported offshore activities and benefit from reduced civil and criminal penalties, in 2009, more than 56,000 taxpayers paid a total of \$11.1 billion in back taxes, interest and penalties. However, the bulk of these proceeds are believed to come from anti-money laundering penalties applied against individuals' foreign assets for failure to file the [FBAR] form, instead of being based on non-compliance with tax obligations [...]. Also, while the IRS has spent approximately \$380 million to implement and administer the FATCA program, a recent report from the [TIGTA] concludes that the IRS is still not prepared to enforce compliance with FATCA.¹¹⁹⁵

Facing all these figures—those on effectiveness, as well as those (more compelling, I believe, because less time-dependent) on fairness—it is far from clear why *all* American taxpayers—the large majority of whom is from the relatively poor countryside—should be forced to undergo a process of data sharing in pursuance of which their information can be sent all around the globe in order to “combat tax evasion”. One observation could be that sharing tax data also helps the other ends of the sharing, but this is a particularly irrelevant consideration in the case of the US, notoriously conservative in reciprocating the cooperation it receives from other States in this field¹¹⁹⁶—let alone in offering it first.¹¹⁹⁷ Furthermore, it is extremely unlikely (and certainly, statistically negligible) that through these exchanges alone, superrich

¹¹⁹⁵ Ibid., pp. 10-11.

¹¹⁹⁶ See e.g. JANSKÝ et al. 2021, pp. 4-5;18.

¹¹⁹⁷ Check HAKELBERG 2020 (e.g. p. 77) for the most comprehensive study on this point; at pp. 104-105 (two emphases added), the Author reports that

the Obama administration managed to get only anti-*evasion* measures through Congress. Anti-*avoidance* proposals affected the tax-planning schemes of US multinationals, thus creating powerful domestic opposition. In contrast, anti-*evasion* measures put the regulatory burden mainly on foreign banks, because the US government does not reciprocate automatic information exchange requested from the rest of the world. As a result, US wealth managers now enjoy a competitive advantage in attracting hidden wealth instead of facing additional regulatory costs. The US government's ability to maintain such a strongly redistributive outcome points to the importance of coercion for the emergence of the global AE[o]I regime. In fact, the United States triggered the process by forcing foreign banks to routinely report information on US clients to the IRS. FATCA credibly linked noncompliance to partial exclusion from the US financial market. Accordingly, virtually all internationally active banks submitted to US demands [...].

individuals the IRS has never heard of would come to the fore; in any regard, this shall not represent the policy priority, as long as obvious “treasure troves” are well known yet remain largely unaudited, and loopholes in the law go unfilled.

In 2016, a number of prominent offshore financial centers—including Switzerland, Luxembourg, the Channel Islands, and [HK]—started disclosing bilateral data on the amount of bank deposits that foreigners own in their banks. [... Even considering bank deposits alone,] offshore wealth turns out to be extremely concentrated: the top 0.1% richest households own about 80% of it, and the top 0.01% about 50%[, this data not even accounting for financial instruments such as] portfolios of equities, bonds, and mutual fund shares that households entrust to offshore banks[.]¹¹⁹⁸

which are by definition an exclusive domain of wealthy people who own enough money to be allocated for risky games in this liquid global financial casino. The above explains why wealth is increasingly concentrated at the top, why wealth inequality is growing to staggering figures both within and between countries, why the proliferation of tax havens coincided with the pivot to deregulation and neoliberalism, and why any serious (international) operation of tax recovery inspired by social-justice aims would start from there (i.e., *them*), rather than dispersing its momentum from the bottom whilst impairing the residual private life of low-income individuals across continents. The effects of these dynamics on society are shocking; just by way of exemplification, Russia, whose entire population would enjoy a high standard of living due to the country’s unparalleled natural resources (e.g. natural gas and hydropower), declares a relatively low GDP per capita because 60% of the wealth not only is concentrated in the hands of a few Kremlin-tied oligarchs, but it is also held offshore¹¹⁹⁹ (starting with that of President Putin himself) twenty times more¹²⁰⁰ (as a percentage of GDP)

¹¹⁹⁸ ALSTADSÆTER et al. 2018, pp. 89-90.

¹¹⁹⁹ Check *ibid.*, p. 95.

¹²⁰⁰ Check *ibid.*

compared to China. I am unsure about how an information-exchange mechanism that shares with foreign authorities the data of millions of low-waged Russian workmen, fishermen, and farmers would improve the scenario; it is just a rhetorical device for the masses, as we already know who those oligarchs are and where their wealth hides – at least for the most amount. The 2022 aggression of Ukraine by Russia has casted further light on the importance of these dynamics.

On balance, policy reasons for going after *all taxpayers in an indiscriminate manner* are sided and tenuous, and policymakers must be well aware of this;¹²⁰¹ thus, theirs shall be regarded as a disgraceful choice of connivance with the super-rich. Eventually, the argument defended here is that these policy priorities bear legal relevance under IL when these exchanges are assessed through the lenses of HR.

i Resuming the case-study from East Asia: SPVs and other investment solutions to circumvent legislation barring outward and inward investments, between Mainland China and its HKSAR

[W]e are living through a curious combination of the technology of the late twentieth century, the free trade of the nineteenth, and the rebirth of the sort of interstitial centres characteristic of world trade in the Middle Ages. City[-S]tates like Hong Kong and Singapore revive, extraterritorial “industrial zones” multiply inside technically sovereign nation[-S]tates like Hanseatic Steelyards, and so do offshore tax-havens in otherwise valueless islands whose only function is, precisely, to

¹²⁰¹ Indeed, the problem of tax avoidance (rather than evasion) by the superrich, and the main loopholes “lawfully” exploited by their legal consultants to legitimise such avoidance schemes, have been meticulously explained in literature since at least the 1990s – *see extensively* MCBARNET 1992. Digitisation and globalisation have just worsened those well-known phenomena.

remove economic transactions from the control of nation-[S]tates.¹²⁰²

«By the end of the nineteenth century, [...] China was linked by rail and sea to the USA and Europe[, and] Hong Kong island was starting its illustrious history [...] as one of the great ports of the region and the world».¹²⁰³ Yet from an alternative standpoint, as a result of the Opium Wars, «China virtually ceased to be the center of a “world in itself” (the East Asian system) to become a subordinate member of the UK-centered global capitalist system».¹²⁰⁴ As we now enter the third decade of the XXI century, capturing China’s trajectory towards being either a satellite of US-based financial dominance or a potentially renovated pseudo-capitalist “world in itself”,¹²⁰⁵ seems of the utmost importance – not secondarily for the future of IL and taxation. These moves draw complex tax-related geometries of finance, commodities, and labour, with analysts wondering about the implications of China reshaping «existing monetary and ecological hierarchies in such a way that supports its own regime of accumulation».¹²⁰⁶

¹²⁰² HOBBSAWM 1992, p. 182, emphasis added.

¹²⁰³ BROWN 2008, p. 5.

¹²⁰⁴ ARRIGHI et al. 2003, p. 293.

¹²⁰⁵ Some scholars envisage China as the next world’s financial superpower; recalling what I have reported *supra* about debt-trapping, this credits itself as a reasonable scenario:

During the [2007-2009] Great Recession[, not to be mistaken for the 1929-1930’s Great Depression,] it became evident that in some (not all) respects the [US] was unable to fulfil its responsibility as the international economy’s manager. After all, an economic hegemon is supposed to solve global economic crises, not cause them. But it was the freezing up of the US financial system triggered by the sub-prime mortgage crisis that plunged the global economy into hot water. The economic hegemon is supposed to be the lender of last resort in the international economy. *The [US], however, has become the borrower of first resort—the world’s largest debtor.* When the global economy falters, the economic hegemon is supposed to jump-start recovery by purchasing other nations’ goods. From the end of [WW2] until the Great Recession struck, it was America’s willingness to consume foreign goods that constituted the primary firewall against global economic downturns. When the Great Recession hit, however, *[i]t fell to China to pull the global economy out of its nose-dive by stepping up to the plate with a massive stimulus programme.* Barack Obama acknowledged the deeper implications of this when, at the April 2009 G20 meeting in London, he conceded that, in important respects, the United States’ days as the economic hegemon were numbered *because it was too deeply in debt* to continue as the world’s consumer of last resort. Instead, he said, *the world would have to look to China [...] to be the motor[] of global recovery*

– LAYNE 2018, p. 97, three emphases added. In this case, however, China would need to caution itself against replicating the same hubris-fuelled US mistakes. Furthermore, consequences from Covid-19 restrictions might play a decisive role towards relative insulation of China’s labour market and—to an extent—economy.

¹²⁰⁶ SVARTZMAN and ALTHOUSE 2021, p. 13.

Since the time it legalised the first non-state companies in 1979¹²⁰⁷ and proclaimed the establishment of an array of “Open Coastal Cities” in 1984,¹²⁰⁸ China’s efforts to catching up with the global corporate and investment networks resulted in astounding accomplishments,¹²⁰⁹ although some of them are still coping with State-market asymmetries which by now, worldwide, are almost exclusive to China. To elude these asymmetries, Chinese corporations heavily shift their profits to tax havens, as well as to BRI jurisdictions where, *inter alia*, statutory corporate tax rates are lower¹²¹⁰ – indeed, together with its capital, China also exports its tax-free-SEZs “developmental” model.¹²¹¹ In 2004, almost 34% of FDI worldwide were estimated to be directed to tax havens,¹²¹² including by Chinese state-owned enterprises (SOEs).¹²¹³ Fifteen years ago already, more than half of outbound investments from China were directed to two tax havens in particular: the Cayman Islands and the BVI;¹²¹⁴ the same havens were primary sources of inbound investments,¹²¹⁵ although the figures are less prominent.¹²¹⁶

Doing business through offshore centres has become standard procedure among Chinese companies and entrepreneurs. Offshore havens feature frequently in corruption cases involving Chinese businesses. The Bank of China has revealed in a 2011 report on capital flight that since the mid-1990s, state-owned companies and other public officials have moved more than US\$120 billion away from China, the bulk of this passing through the [BVI]. This may be a massive underestimate.¹²¹⁷

¹²⁰⁷ Refer to PICCIOTTO 2011, p. 110, fn. 3.

¹²⁰⁸ Refer to WALCOTT 2006, p. 57.

¹²⁰⁹ For a brief overview, see REZAEI 2018, pp. 43-45.

¹²¹⁰ See OUYANG 2020, p. 43.

¹²¹¹ Read KNOERICH et al. 2021, p. 8.

¹²¹² Refer to PALAN et al. 2010, p. 56, f. 2.3.

¹²¹³ See PAUL and BENITO 2018, p. 102.

¹²¹⁴ See CERETTI 2017, p. 57.

¹²¹⁵ This phenomenon is not exclusive to China; for example, about Australia, see MCLAREN and PASSANT 2010, p. 6.

¹²¹⁶ Check further CERETTI 2017, p. 58; PALAN et al. 2010, p. 54, t. 2.2. In 2010, the BVI were the second-largest investor (14%) in China after HK (45%) – KUŹNIAK 2017, p. 8.

¹²¹⁷ BECKETT 2018, p. 37.

Since the signing of the (first commitments under the framework of the) Closer Economic Partnership Agreement in 2004 between China and HK,¹²¹⁸ the latter has grown rapidly as a source and destination country of and for Chinese investments.¹²¹⁹ Official Chinese data showed how over the first five months of 2007, HK was the first contributor to new Chinese ventures, ahead of major economies such as Japan, the US, or South Korea.¹²²⁰

While BVI continues to handle most of [HK] and the Mainland's offshore incorporations, other jurisdictions (notably Samoa, Seychelles and British Anguilla in recent years) have succeeded in gaining more market share than in the past. The practices of opening and using offshore vehicles, which served [HK]'s corporations well, also helped serve their Chinese counterparts.¹²²¹

Having started to enforce British common law in 1843,¹²²² HK was originally a preferential market for foreign manufacturers benefitting from natural resources obtained from the Mainland at a lower price; it then transformed itself into an urban district of real-estate entrepreneurialism¹²²³ and then into a third-sector powerhouse,¹²²⁴ with China as the cheap-labour and vast-land supplier for its investments in the Mainland's infrastructure.¹²²⁵ Moreover, triangulating with Dubai

¹²¹⁸ Access the list of the original, supplementary, and updated CEPA commitments at https://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html.

¹²¹⁹ See CERETTI 2017, pp. 58-59.

¹²²⁰ See PALAN et al. 2010, pp. 56-57.

¹²²¹ MICHAEL and GOO 2019, p. 182.

¹²²² See for instance LI 2014, p. 55.

¹²²³ Refer to KAN 2016, p. 43.

¹²²⁴ See MARK 2017, pp. 270-271.

¹²²⁵ Check e.g. LU 2007, pp. 125-129; LIN 1997, pp. 66;85;109. See further HOU 2019, pp. 25-26:

China's real estate sector started high-speed development soon after Deng [Xiaoping]'s 1980 conversation on housing provision reform, but the sector's start was limited to two cities in the Pearl River Delta, Guangzhou and Shenzhen [...]. Guangzhou, then the metro city closest to Hong Kong needed new housing, especially for investors; Shenzhen, then newly created as the first [SEZ], needed to construct housing for new settlers. Though limited to just one area, it was a very successful start. Other regions of the country soon began to imitate and catch up.

Along similar lines, on the role played by HK's proximity to newly created SEZs, see MARK 2017, p. 269:

To attract foreign direct investment and Western advanced technology, in August 1979 Deng established four "Special Zones" at Shenzhen, Zhuhai, Xiamen, and Shantou. Deng's selection of the four districts, strategically located in Guangdong, was intended to fully utilize Hong Kong as China's southern gateway to the outside world. As early as April 1978,

and Mumbai, it long served as a major conduit for capital flight through complex Indian “*hawala* schemes”.¹²²⁶ In fairness, HK is not merely a leading hub for incorporation of fictitious companies:¹²²⁷ more sophisticatedly, it did and does still serve as an easy-to-access point of intermediation and convergence between strongly regulated European and Asian markets,¹²²⁸ and as a melting pot for the Chinese capitalist diaspora.¹²²⁹ By all accounts, bearing the legacy of this financially illicit past, HK is now seeking to rebrand itself with a new identity able to survive (or accompany?) China’s own transformation into a modern, diversified, and service-based developed economy – which was rightly defined as «*un totalitarisme modern d’abondance*».¹²³⁰

Part of mentioned Chinese investments to and from the Cayman Islands, the BVI and HK are obviously due to mere entrepreneurial logics of tax minimisation, which are common to any jurisdiction globally; nevertheless, China features a number of peculiar reasons for relying on tax havens,¹²³¹ also considering that taxation in China is already kept to reasonable levels.

Deng had indicated in a Politburo meeting that China should attract foreign exchange from Hong Kong (and Europe) by liberalizing its economic policy, including the adoption of “capitalist” methods.

¹²²⁶ Refer to KASHYAP 2021, pp. 151;157.

¹²²⁷ A study which analysed the Panama Papers concluded that out of its sample, one in six firms in Hong Kong availed themselves of secret offshore vehicles; see O’DONOVAN et al. 2019, p. 4130. See also ATEŞ et al. 2021, p. 103; PONS 2021, pp. 63-64.

¹²²⁸ See PALAN et al. 2010, p. 141; POLATO and FLOREANI 2013, p. 280. Possibly as a result of the general “Asianisation” of the global economy, HK (like Singapore) has grown significantly in recent years as a tax haven:

[w]hile Switzerland has been declining since the financial crisis of 2008-2009, Asian offshore centers have been on the rise. [...] In 2007, Hong Kong managed less offshore wealth than Jersey, the Bahamas or the Cayman Islands. From 2007 to 2015, its assets under management have been multiplied by a factor of 6, and Hong Kong now ranks second behind Switzerland.

– ALSTADSÆTER et al. 2018, p. 92. The impact of the Hong Kong National Security Law, which entered into force on July 1, 2020, will most probably represent a setback.

¹²²⁹ See ARRIGHI et al. 2003, pp. 314-315.

¹²³⁰ BOILLOT 2021, p. 216.

¹²³¹ See also VLCEK 2010, p. 113 (emphasis added):

Given that the Cayman Islands, [HK], the [BVI,] and the Bahamas are leading destinations for China’s outbound direct investment, the situation seems at first glance to be decidedly incestuous. [...] Sophisticatedly, the OFC provides *arbitrage opportunities beyond solely the taxation aspect* explicit in the use of the term “tax haven” favoured by some commentators.

If Chinese companies simply used Hong Kong based incorporation agents to spirit funds offshore, we would expect strong links mainly between these two jurisdictions. We see though, that both jurisdictions have many jurisdictions in common—with many BVI entities starting in Hong Kong and ending on the Mainland (for example). Some jurisdictions relate primarily to one jurisdiction or the other (like the Cook Islands and Hong Kong[, respectively]). Yet, Hong Kong and the Mainland have more links with these other jurisdictions than either random luck or other jurisdictions' experiences would suggest. [...] Hong Kong and China form poles in a broader network of offshore corporate relations, which likely “layer” across numerous jurisdictions.¹²³²

Most of those “special reasons” relate to explicit or implicit policies implemented by China’s ruling class, and the observation that Chinese offshoring strategies are relatively straightforward compared to the tangled complexity of those belonging to other States,¹²³³ validates the suspicion that the Party is not only aware but also complacent with such strategies. To begin with, political tensions should not aprioristically stop money inflows, therefore investors from e.g. Taiwan who are willing to do business with China should not face insurmountable obstacles, and may use tax havens exactly to circumvent said frictions between governments.¹²³⁴ Secondly, offshoring is a portfolio diversification¹²³⁵ and risk-management *escamotage* for investors in the Mainland who fear their asset-recovery requests would not be satisfied in the event of a bankruptcy or default, with debt holders and offshore creditors taking advantage of offshore corporate structures

to secure judgments in key jurisdictions that have JRE treaties or de facto reciprocity with China [...]. Judgments against Chinese companies in favor of creditors of entities using offshore structures are often in vain because the Chinese companies fail to pay voluntarily, forcing the court to appoint an equitable receiver. An equitable receiver has broad powers that enable plaintiffs to use a corporate governance

¹²³² MICHAEL and GOO 2019, pp. 190-191.

¹²³³ Read CERETTI 2017, pp. 60-61.

¹²³⁴ Refer to DWYER 2000, p. 51.

¹²³⁵ See also PONS 2021, p. 65.

approach—such as changing the ownership structure of offshore firms—to pursue multi-jurisdictional strategies to capture assets and create substantial recoveries for equity holders.¹²³⁶

Furthermore, China's stock market is notoriously inefficient due to the concurrence of several factors inextricably linked with Party politics and the unorthodox architecture of Chinese capitalism, and this inefficiency compels hundreds of thousands of businesses to move part of their investments or corporate structure offshore as to circumvent political, regulatory, administrative, and economic constraints.¹²³⁷ For example, investments in China are jeopardised by «the lack of credible, decent quality information on open sources than can inform investor decisions»,¹²³⁸ and Chinese tech giants like Sina, Tencent, Baidu, DiDi, or Alibaba file for Initial Public Offerings (IPOs) in US stock exchanges by availing themselves of tangled contract-based VIE structures (equity without control), as to gain market capitalisation whilst circumventing licensing and other state restrictions on foreign investments in strategically sensitive sectors.¹²³⁹ Similar narratives fit privates' behavior, with scholars advancing the hypothesis that «Chinese residents do not use shell companies to conceal wealth in foreign banks, but to circumvent a number of regulations that restrict cross-border investments in and out of China». ¹²⁴⁰ Yet the most evident Chinese “deviation”¹²⁴¹ is that despite the country having been officially

¹²³⁶ LONGLEY 2018, pp. 8;17.

¹²³⁷ See also MUASYA 2018, p. 25.

¹²³⁸ BROWN 2008, p. 83.

¹²³⁹ See WHITEHILL 2017; SOMMER 2021; COPPOLA et al. 2021, p. 1503, fn. 4. On the case of DiDi specifically, see CHAN and KWOK 2021, pp. 13-14.

¹²⁴⁰ ALSTADSÆTER et al. 2018, p. 97.

¹²⁴¹ However, someone claims Western capitalism to be just a façade, and in light of recent occurrences such as the extensive bailouts granted to big corporations in the aftermath of any crisis (2008, but also e.g. the Covid-19 emergency, etc.), I join this opinion. Indeed, neoliberalism has become an oppressive means to subjugate all those who have not early-positioned themselves as protagonists of unfettered capitalism; this phenomenon is commonly known as “masked socialism for those who can, exploitative capitalism for the rest”. As recalled by PAKULSKI (2010, p. 337),

[c]orporations like Wal-Mart, with high economic profiles (in employment, technology, innovation, import-exports, and so forth) are as protected and supported as the “government sponsored” enterprises, even if they are privately owned and their ownership and operations are international in scope. If they find themselves in trouble, like Microsoft in the 1990s,

recognised as a free economy upon approval of its WTO membership, most of its major corporations are state-owned or state-controlled, and the others need to be aligned with the regime in order to obtain the Party's acquiescence to operate (a sort of "licence" of political conformity), often by recourse to bribes which someone compared to a non-written transaction tax.¹²⁴² Private firms are unreached by the incentives the Communist Party rewards tax-virtuous SOEs with, which «taps high tax-paying SOE-managers for promotion and other benefits more frequently».¹²⁴³ Moreover, SOEs enjoy

a privileged access to capital through the state banking sector[, ...] to government networks and monopoly production rights. [...] By contrast, private firms have to face an unsupportive business environment and they are often discriminated with regard to the access to domestic capital market and natural resources.¹²⁴⁴

International listing before the NYC, London, HK, and other stock exchanges as a means for accessing international capital markets¹²⁴⁵ occurs through offshore listing vehicles; the most usual route is that of vehicles registered on the Cayman Islands, holding a BVI-incorporated subsidiary which in turn holds the China-based seat of operations.¹²⁴⁶ This way, Chinese investors «engage in a form of arbitrage by choosing

national political leaders let them off the hook. If they go broke, like the loan mortgage giants Freddie Mac and Fannie Mae in recent years, the US government bails them out. Their interests are protected by national élites.

If the claims reported here hold true, then the pretentiously remarked distinction between the Chinese "variant" of capitalism and the "doctrinally orthodox" one operated in the US blurs significantly. In fact, there is a transnational capitalist class whose interests are similar at all latitudes and striven for rather coherently across "variants". ALAMI et al. (2021, p. 7, two emphases added) support the plausibility of this approach:

In our neoliberal heyday, *the state logic has become increasingly linked to its market counterpart*: flexible regulations for capital, market competition for the poor, and "socialism for the rich", with taxpayer money deviated to subsidise and protect capital. Thereby, rather than a negation of markets, state capitalism represents perhaps a last "logical" step in the *coupling of the two preponderant political-economic logics under capitalism*.

¹²⁴² See MCGREGOR 2010, p. 267 (Afterword).

¹²⁴³ MICHAEL and GOO 2019, p. 184. *Read also* ACEMOGLU and ROBINSON 2012, pp. 438-439.

¹²⁴⁴ CERETTI 2017, pp. 63-64.

¹²⁴⁵ *Refer to* LONGLEY 2018, pp. 10-11.

¹²⁴⁶ *Refer to* CERETTI 2017, pp. 64-65.

to bring their capital in offshore jurisdictions for the purpose of exploiting their efficient institutional environment [and] better protection of property rights».¹²⁴⁷ The latter is improving fast, and the uniformity brought about by the new Civil Code is helping strengthen private entitlements,¹²⁴⁸ but a qualitative gap (especially enforcement-wise) with close-by common-law jurisdictions lingers. Mergers and acquisitions (M&As) are also easier in the Virgin Islands, where cross-border M&As are allowed and procedures are seedless.¹²⁴⁹ Furthermore, Chinese private domestic companies, which are disfavoured legislatively to SOEs on the one side and foreign private entities on the other,¹²⁵⁰ seek in offshoring a chance for rebalancing their market opportunities compared to both categories of internal competitors.¹²⁵¹ Overall, as Chinese companies seize the opportunity to improve their corporate governance through comprehensive reforms,¹²⁵² their demand for offshore incorporation decreases, especially in HK;¹²⁵³ on the other hand, «bad corporate governance in Hong Kong correlates with bad governance on the Mainland».¹²⁵⁴ In sum, havens are (legitimately, from the corporate viewpoint) exploited by Mainland companies as a

¹²⁴⁷ Ibid., p. 66; *see also* JONES and TEMOURI 2016, p. 241.

¹²⁴⁸ For a general overview of these legislative improvements, *refer to* GLUECK et al. 2020.

¹²⁴⁹ *See* CERETTI 2017, pp. 66-67. This M&A facilitation holds true for American MNCs just as much; *refer e.g. to* TOURNIER 2017, pp. 173-174.

¹²⁵⁰ *See* PALAN et al. 2010, p. 181; *cf.* WANG 2015, pp. 7;13;80:

Interest groups, represented by state-owned enterprises (SOEs), domestic private enterprises, and enterprises owned by ethnic Chinese, have strong political connections in China, whereas those represented by foreign-invested enterprises (FIEs) do not. [...] Chinese local officials are more likely to promote judicial fairness when they rely on foreign capital from outside the “China circle” for tax revenues and economic growth. Conversely, Chinese local officials are less likely to promote judicial fairness when they depend on Chinese SOEs, domestic private enterprises, and foreign capital from within the China circle for revenues and growth [...]. Legal means of favoring local firms include making unfair adjudications or postponing/expediting case proceedings.

¹²⁵¹ *See* CERETTI 2017, pp. 68-72.

¹²⁵² For instance, regarding Chinese ODIs to Australia, LI and HENDRISCHKE (2020, p. 710) noted that [o]nly when the [PRC] central government ended the compulsory foreign exchange settlement and sales system (*wàihuì qiángzhì jiésuàn zhìdù* 外汇强制结算制度) in 2012 were domestic firms able to buy or use their self-earned foreign exchange for outbound investment. Between 2010 and 2015, China’s [SAFE] issued several guidelines on external guarantees to improve the availability of commercial loans for ODI (*nèi bǎo wài dài* 内保外贷).

¹²⁵³ *See* MICHAEL and GOO 2019, p. 187.

¹²⁵⁴ Ibid., p. 188.

regulatory safe corner, to then invest elsewhere therefrom (“inward-journeying”);¹²⁵⁵ this carries an element of tax avoidance which is, so to write, “incidental” compared to the overall purpose of the regulatorily shielding operation.

Alongside matters of market inefficiency and policy distortions, and although it is hard to reconcile it with Beijing’s “light hand” towards evasion schemes (especially compared to its—apparent?¹²⁵⁶—“heavy hand” with respect to corruption and other practices detrimental to the public interest), there is also a human-rights, idealistic argument which might apply to HK vis-à-vis the Mainland.¹²⁵⁷

For the time being, and despite the more assertive role played by both dematerialisation of trading¹²⁵⁸ and SEZs in the Mainland,¹²⁵⁹ China appears to be

¹²⁵⁵ Check further IVES 2016, pp. 39;64-65.

¹²⁵⁶ See extensively SHUM 2021.

¹²⁵⁷ It reads as follows:

[w]hile in other developing countries it might be unacceptable to shift profits to divisions abroad in order to ease the company’s total tax burden, in repressive countries it might actually be morally mandatory to do so in order to reduce the resources available to the regime

– KOLSTAD 2009, p. 576, fn. 16; see also KOLSTAD 2012, p. 277. In fairness, this is a minority argument, mostly due to the difficulty of sorting “repressive countries” from the rest, but also because the former would rapidly shift their financial sourcing elsewhere. Moreover, for the sake of this study all countries are somehow “repressive”, in that it is the State *as a Westphalian institution* to have been captured by corporatist élites, regardless of it being an autocracy or a democracy. This is not to say, of course, that even apparently “second-tier” human-rights violations such as those to privacy may not lead to more severe outcomes (e.g., politicised persecution) in countries less observant of the rule of law, compared to those observing it more. And yet, the nature of HK—in this respect, too—is changing fast; while in 2013 Edward Snowden chose exactly this city to launch his global whistleblowing campaign against Western government-backed surveillance because it was considered a hybrid “safe harbour” in between the Anglo-Saxon and Chinese worlds, today HK’s surveillance regime has steadily outsmarted any Western precedent, and is closely aligned to the one operated in Mainland China – check e.g. MCDEVITT 2021, DATT 2021, or Human Rights Watch 2021.

¹²⁵⁸ «[C]ross-listing is no longer needed to reach distant investors. With computers, the Internet, and an ever-increasing array of financial products, investors can seek out the companies rather than the other way around» – BRANSON 2012, p. 372.

¹²⁵⁹ KEEN (2016, p. 23, b. 2) recounts that

[o]f the 66 million workers employed in the [SEZs] worldwide, China accounted for over 60 percent and the rest of Asia 22 percent. [...]he Shanghai Pilot Free Trade Zone, which was launched in September 2013 in order to test and refine economic reforms before their potential roll-out nationwide, [has loosened] restrictions on foreign investment in 23 service sectors, including banking, financial services, healthcare and technology. FTZs are viewed as a useful tool to enhance productivity, and therefore competitiveness, by attracting [FDIs] as well as associated technology and managerial know-how.

Also due to the most recent protests and geopolitical/security developments in Hong Kong, the most important Chinese special economic zone “to watch” is Shēnzhèn’s one, the first Chinese SEZ (established in 1980). While first conceived as a “service city” for the then-British HK, it grew up to be a major investment hub in the Mainland and a “business card” for China’s competitiveness and modernity before the outside world – BROWN 2008, pp. 21-22; see further LAM and GUO 2021, pp. 331-334. As far as international tax law is concerned, SEZs have been gradually integrated within the transnational order that regulates corporate taxation; the latter aims at preserving sovereign rights to tax companies according to domestic preferences, while dispelling risks of meta-jurisdictional corporate superstructures that exploit economic liberalisation to

aware it still needs HK to mediate between its market-state contradictions and the “free world” outside,¹²⁶⁰ so much that it exposes the whole of its geoeconomic might to this effect; for example, in 2017 it obtained the delisting of the SAR from the OECD’s tax-haven list, following «complex diplomatic wrangling».¹²⁶¹ Even the family of President Xí, so irremovable and merciless when it comes to financial crimes committed by others, availed themselves of tax havens multiple times,¹²⁶² which is particularly worrisome in the aftermath of the “Constitutional amendments” that allowed Mr Xí to hold office potentially for life: *ad vitam aut culpam*, with the difference that his *culpa*e can be ascertained (let alone acted upon) by practically nobody. It is certainly the case to polemise that «[f]or members of China’s red aristocracy, the problem isn’t billionaires—it’s billionaires *they’re not related to*».¹²⁶³ Chinese scholars have long advocated for an amendment to China’s Administrative Litigation Law under the purpose of legalising tax reconciliations between wealthy taxpayers and the State, in line with the principles of a harmonious socialist society.¹²⁶⁴ The truth is that “reconciling” may indeed limit “capital-flight” responses to increased tax assertiveness and unlock lengthy administrative procedures, but at the expense of

circumvent said domestic preferences and effectively pay little to zero taxes. SEZs have historically served a more or less purposeful function vis-à-vis those exploitative games, and exactly due to the “anomaly” they represent, light has been recently shed upon them as disruptors of the international tax (and economic more generally) order, although no one would deny the role they play in certain contexts (e.g. protectionist and/or autocratic regimes) to facilitate business engagement with the rest of the world, not least as “regulatory sandboxes”. In this sense, the new challenge is that of preserving SEZs’ *raison d’être* while ensuring they do not serve as jurisdictional loopholes for corporations to escape taxation in the “host country” as much as in the ones who avail themselves of such SEZs in order to do business with the former. *See extensively* HEITMÜLLER and MOSQUERA 2021, pp. 473-476. SEZs also matter for tax exemptions (or the lack thereof) provided for under BITs, and although SEZs do *not* legally equate to SARs, the latter *practically* serve, for China, as “next-door” tax-free areas as well; this is exactly why the PRC’s central government protested vigorously against a Singaporean court judgement which decided that the China-Laos BIT also covered Macanese investors – CHAISSE 2021, p. 447. An intriguing—though somewhat displaced—comparison has been made by PARISH (2010, p. 314) between SEZs and state-granted «immunity from tax obligations [in specific sub-regions within a jurisdiction] as an incentive for international organizations to locate their seats there»; China, however, does not extensively avail itself of this form of jurisdictional loophole to attract IOs.

¹²⁶⁰ Check also COPPOLA et al. 2021, pp. 1527-1533.

¹²⁶¹ BECKETT 2018, p. 121.

¹²⁶² Check extensively WALKER GUEVARA et al. 2014.

¹²⁶³ PALMER 2021, emphasis added.

¹²⁶⁴ See for instance OUYANG 2020, pp. 55-56.

overall societal fairness: the poorer taxpayers will have to pay their dues wholly, whilst the wealthy ones will “reconcile” with the State by effectively lowering their tax burden through opaque lawyering manoeuvres.

In sum, «the better-known cases of arbitrage invariably implicate *intermediating* offshore-registered corporate entities»,¹²⁶⁵ and HK, for China, holds exactly that function, although there are *perhaps* more “morally acceptable” arguments for HK-mediated triangulations with China than for triangulations operated by other jurisdictions with countries where corporate freedom is a given.¹²⁶⁶ Chinese companies incorporated in HK in order to establish, from there, their network of subsidiaries, are at times investigated by the Mainland’s tax authorities under the Comprehensive Double Taxation Arrangement,¹²⁶⁷ but this is hardly sophisticated enough to deter most corporate triangulations with third jurisdictions.

From the viewpoint of private corporations operating within China’s domestic market, China’s dysfunctions—those that prompt those corporations to seek “conduit jurisdictions” such as HK or the BVI, amenable to corporate-friendly investment strategies—have to do with domestic corporate policy and policies, which are then mirrored in China’s negotiating stances internationally on taxation, finance, and related dossiers. Thus (from their viewpoint, again), seeking conduit jurisdictions is unavoidable business-wise and morally justified. Chinese SOEs¹²⁶⁸ generate the

¹²⁶⁵ PHILLIPS et al. 2021, p. 291, emphasis added.

¹²⁶⁶ Indeed, the constant threat of sanctions in authoritarian regimes may suffocate private business activities and jeopardise their competitiveness vis-à-vis their state-owned competitors, so that jurisdictional arbitrage can be *also* regarded as an escape route from overregulation and competition-hindering state oversight; conversely, «regulations, regulatory trends, and risk of sanction are less effective where there is high economic freedom, and that in that circumstance [...] workplace ethos comes to the fore» – KILLIAN et al. 2020, p. 13.

¹²⁶⁷ Check e.g. the 2014 case from China’s Jiāngsū Province which was reported in <https://www.shui5.cn/article/e0/72462.html>.

¹²⁶⁸ Accounting, economics, finance, and political-economy literature distinguishes between several sub-typologies of Chinese SOEs, such as those subjected to the central government’s control and those under the control of local branches of the Party, or those which use after-tax (as opposed to before-tax) profit as a performance evaluation index. I believe that these extremely salient distinctions are however unnecessary to make my points in the context of the present work.

highest tax-revenue for the government, not only because their nominal tax rate is the highest, but especially owing to the largest share of public tenders awarded to them. This advantage (over private companies) enables them to bargain for and demand additional favourable treatments on the governmental side, including acquiescence to (that is, non-prosecution for) tax-avoidance practices and SOEs-targeted partial tax expenditures which will make SOEs capable of lowering their costs and being assigned further tenders, thus feeding a seemingly unbreakable vicious cycle of concealment from public scrutiny and double-wire ties with the political power.¹²⁶⁹

Foreign firms responded by importing their government-lobbying practices and crystallising them in China too,¹²⁷⁰ crafting a superstructure of power that merges the worst of the business world (rent-seeking¹²⁷¹) with that of the Chinese government (authoritarianism, thus unaccountability). They also obtained the territorial expansion of and legislative support for “jurisdictional shields” known, as said, as “special economic zones”, where taxation is lower¹²⁷² and investments are highly facilitated.

To resist these anticompetitive facilitations and carve out their own economic space between foreign firms and Chinese SOEs, “autochthon” Chinese private companies have informally merged into large financially manipulative conglomerates

¹²⁶⁹ See further WANG 2015, pp. 30-39. See also *ibid.*, pp. 100;114:

bigger firms (measured by tax and employees) are better protected, more likely to have a public relations office, and more likely to trust the courts. This suggests that governments differentiate among firms not only by ownership but also by size: governments tend to favor firms that pay a large amount of tax and hire a large number of people. This is intuitive, given that the cadre evaluation system emphasizes tax revenue and social stability as criteria for career advancement. It also shows that firms that pay more taxes sell less to the government, but firms with more employees sell more to the government. This implies that business relations with the government serve as a substitute for tax. Firms doing business with the government are more likely to evade taxes[, as] taxes and bribes substitute for each other.

¹²⁷⁰ See WANG 2015, p. 40.

¹²⁷¹ In LU (2007, p. 18)’s opinion, it

may include all of the ways by which individuals or groups lobby government for taxing, spending and regulatory policies which confer financial benefits or other special advantages upon them at the expense of [...] taxpayers, consumers or of other groups or individuals with whom the beneficiaries may be in economic competition. It is patent that in rent-seeking or lobbying, the social relationship is a means, not an end, of the exchange.

¹²⁷² See WANG 2015, p. 45.

that—to borrow from the rather strongly-worded analysis by researchers at USC and Harvard¹²⁷³—are akin to mafia, as well as very much in disfavour (...ostensibly at least) before the CPC.

To sum up, tax avoidance is practiced: 1) by domestic SOEs, through captured governmental acquiescence and domestic tunnelling;¹²⁷⁴ 2) by foreign companies operating in China, by transplanting into China their own avoidance-by-capture strategies, as well as through lavish gift-giving and political rentierism;¹²⁷⁵ 3) by domestic private companies, by channelling their investments through conduit jurisdictions, sometimes under a tacit-consent custom perpetuated by Chinese authorities (which prefer to acquiesce to these escape-routes rather than endeavouring to overturn the rules and practices underpinning their SOEs-privileging domestic market). In China, regulatory capture is as much a decentralised issue as it is a central-government one, with

local governments [...] maintaining “small coffers” (off-budget accounts) to pay for lavish hospitality and reward local bureaucrats who perform well in maintaining stability, obtaining special purpose grants and attracting investments[.]¹²⁷⁶

with related tax breaks. SOEs stand at the centre of these capture moves (not only in China), with politicians trying to exploit them for career advancements, and being appealed-to back when SOEs look for regulatory favours.¹²⁷⁷

For policymakers, taxation seems to be not about ethics and fairness, but about strategy and interstate competition. In democracies, it is still supposed to be one clause of the tacit contract that binds the governed to the governors, and vice versa, but it also

¹²⁷³ Read RITHMIRE and CHEN 2021, pp. 2-3.

¹²⁷⁴ See further TANG 2016.

¹²⁷⁵ Refer to TANG 2020, p. 24, fn. 14.

¹²⁷⁶ WANG and YAN 2020, p. 627.

¹²⁷⁷ See LIM 2021, pp. 669-670.

manifests itself as a major pillar of unwritten ties between the different components of the country's élite – in authoritarian regimes, too. In either case, governmental choices on what to approach relaxedly policy-wise may change even swiftly depending on the economic environment; when it comes to China, the replacement of the Foreign Income Tax Law with the Enterprise Income Tax (EIT) Law signalled a paradigmatic exemplification of change in strategy.¹²⁷⁸ The newer law introduced the

concept of “tax resident enterprise”. Previously, only [...] enterprises incorporated in China under Chinese law, were taxed on their worldwide income; [...] enterprises incorporated outside China under foreign law, were not taxable in China. Non-resident enterprises were taxed only on the income derived from activities within the country. This general rule [...] did not take into consideration the nationality of the ultimate owners of the business and the location where the effective management and control took place. [Thus,] taxation was easily avoided by Chinese businesses just by incorporating their holding company in an offshore jurisdiction, while the management decisions and the effective control were in fact undertaken by Chinese parties within China. Differently, under the EIT Law, it is made a distinction between resident and non-resident enterprises based on the location of the actual management organ.¹²⁷⁹

This shift was not underpinned by renewed awareness of tax minimisation mechanisms, but by ameliorated market conditions and sustained growth, which led China to design policies for retaining capital rather than attracting it at any cost.¹²⁸⁰ public strategy, not principled righteousness. On the same line, the new law

eliminated the incentives for round-tripping, that is, it eliminated the differential tax rate which was one of the main drivers for Chinese capital to be invested in offshore location[s] in order to disguise its Chinese identity and return into China in the form of foreign capital. Indeed, under the EIT Law, the income that originate[s] inside China, produced both by domestic and foreign-invested enterprises, has to be taxed at the same rate.¹²⁸¹

¹²⁷⁸ *Refer to* WANG 2015, p. 89.

¹²⁷⁹ CERETTI 2017, pp. 74-75, in-text citations omitted.

¹²⁸⁰ Previously, and especially since 1992, lower taxes were one of the several preferential treatments accorded to foreign enterprises investing in the Mainland; *refer to* LU 2007, pp. 103-106.

¹²⁸¹ CERETTI 2017, p. 77.

Round-tripping previously worked by «moving funds across the Mainland Chinese border through trade, typically to [HK] or an offshore tax haven, before re-entering China as FDI»;¹²⁸² the fact that SOEs resorted to this scheme more than private ones¹²⁸³ would sound nonsensical at first, but it stands in line with the peculiar market-Party environment of China. Indeed, not only SOEs might be subject to more “amicable” regulatory oversight, but most relevantly and demonstrably,

[w]hen an exporting firm is state-owned, public assets are being transferred to managers (who are private individuals) through export underreporting. Underreporting exports and linking up with an agent offshore *facilitate the transfer of public assets to private hands*.¹²⁸⁴

Once more, *corporate tax avoidance eventually benefits the richest private individuals*. Differently from instances of simple outward avoidance, and definitely differently from natural-person evasion, state authorities (not only in China) are reluctant to report “structural” round-tripping schemes through international exchanges of tax information, owing to their concern for

the potential reduction of the inflow from offshore hiding spots[, that could] reduce general welfare. The reason for this is that cash that is hidden offshore *and eventually [repatriates] to its country of origin*, round-tripping[,] will under the [AEoI] regime not come back home any more.¹²⁸⁵

¹²⁸² FUNG et al. 2011, p. 153. Check also KASHYAP 2021, p. 200.

¹²⁸³ Check *ibid.*, p. 171.

¹²⁸⁴ *Ibid.*, p. 159, emphasis added.

¹²⁸⁵ GERBRANDS and UNGER 2021, p. 275, in-text citation omitted, emphasis added. I am not sure, though, about how “general” (i.e., distributed) such return on welfare would be.

In the banking sector, procedures are not much more transparent in the PRC. Just like trade secrets and tax information, data on China's shadow-banking is available to Party officers only;¹²⁸⁶

a corresponding lack of availability to the public, particularly to scholars and analysts, as well as to financial market participants, [results from the fact that] the government keeps private individual firm data and makes available only aggregated, industry-level data.¹²⁸⁷

This is problematic for two reasons: first, it «greatly limits the evaluation and understanding of both firm-level and systemic risk»;¹²⁸⁸ secondly, it encourages rumours on data fabrication or alteration, with negative consequences not only for transparency and fairness, but also for the long-term trust granted to China by financial markets themselves. In any case, shadow banking often turns on offshore jurisdictions to further escape regulatory oversight. If the assumption that in *relative* terms, the rich get richer and the poor get poorer—which means, the gap between the rich and the poor widens in *absolute terms*—holds true for China as well, then the legalistically artificial “fabrication” of new super-rich people shall be addressed as a problem of social justice. Empirical research on twenty-four key Chinese cities (including Běijīng, Shànghǎi, Guǎngzhōu, Hángzhōu, and Shēnzhèn) found a direct correlation between the increased number of clients of offshore incorporation services and the increased number of millionaires.¹²⁸⁹ Offshoring money is enabled by a combination of sophisticated financial techniques and political expedients. One of the most classical examples of the former—already mentioned above—is an SPV (or SPE), that is,

¹²⁸⁶ Unless otherwise specified, “the Party” and “the Chinese government” are used interchangeably; this is because there is no clear-cut distinction between the tasks and sphere of public influence of the two, neither *de iure* nor *de facto* – see also BROWN 2008, pp. 74-75.

¹²⁸⁷ LI and HSU 2018, p. 74.

¹²⁸⁸ Ibid.

¹²⁸⁹ Read MICHAEL and GOO 2019, p. 184, f. 3.

a legal entity created by a firm (known as the sponsor or originator) by transferring assets to [it], to carry out some specific purpose or circumscribed activity, or a series of such transactions. *SPVs have no purpose other than the transaction(s) for which they were created*, and they can make no substantive decisions; the rules governing them are set down in advance and carefully circumscribe their activities. Indeed, no one works at an SPV[,], and it has no physical location. The legal form for an SPV may be a limited partnership, a limited liability company, a trust, or a corporation. [...] SPVs are essentially robot firms that [...] make no substantive economic decisions [...] and cannot go bankrupt. [...] One argument for why SPVs are used is that sponsors may benefit from a lower cost of capital, because sponsors can remove debt from the balance sheet, so balance sheet leverage is reduced. [...] The key issue concerns [the reason] why otherwise equivalent debt issued by the SPV is priced or valued differently than on-balance sheet debt by investors. [...] The difficulty lies in the distinction between formal contracts (which are subject to accounting and regulatory rules) and *relational or implicit contracts*. Relational contracts are arrangements that circumvent the difficulties of formally contracting (that is, entering into an arrangement that can be enforced by the legal system). While there are formal requirements, reviewed subsequently, for determining the relationships between sponsors and their SPVs, including when the SPVs are not consolidated and when the SPVs' debts are off-balance sheet, this is not the whole story.¹²⁹⁰

Relational contracting materialises more spontaneously within the regional Chinese cultural community than elsewhere because of the *guānxi* (关系) style adhered to by Chinese businessmen throughout the centuries. If «Chinese business networks [...] in Taiwan, on the [M]ainland (especially in south China) and among the widespread Chinese diaspora, [a]re based on family firms and kinship and other informal cultural ties»,¹²⁹¹ the *guānxi* legacy is a determinant factor,¹²⁹² together with *chàxù géjú* (差序格局), the daily practices of social interaction. Counterintuitively, other studies have found that extended networks of personal relationships in emerging markets like Taiwan may in fact act as a counterforce against—rather than a sprouting factor for—immediate reliance on intermediary business structures aimed at evasion;

¹²⁹⁰ GORTON and SOULELES 2006, pp. 550-551, two emphases added.

¹²⁹¹ PICCIOTTO 2011, p. 141. *See also* REZAEI 2018, pp. 42-43.

¹²⁹² *Refer to* LU 2007, pp. 16-17;195.

however, the personal ties these studies refer to involve societal stakeholders such as caring and schooling institutions rather than “peer” business actors:

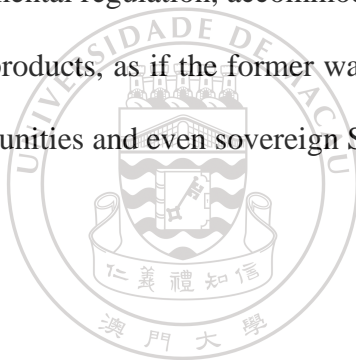
business groups’ ties with secondary stakeholders might yield social benefits because such ties can reduce the tendency of the groups to engage in practices that are socially controversial. Since business groups often develop relationships with secondary stakeholders by establishing nonprofit organizations, such as schools and hospitals, [...] even the nonprofit affiliates of business groups may have a critical role in shaping the business groups’ overall behaviors.¹²⁹³

Although I remain sceptical on the fact that, “X” being a corporation, “Foundation X” may truly impact X’s policies towards tax-avoidance schemes, the findings of these studies remain meaningful in that they show the way cultural screens such as the *guānxi* may work both ways depending on the community of reference: if expressed within the business landscape, *guānxi* is likely to reinforce tax avoidance (and, arguably, regulatory capture), whereas it operates as a constraining factor if the community of reference is “non-business” (i.e., from civil society broadly understood). While this is *a fortiori* true in Chinese societies, it can be extended to the relationship between businesses and their reference communities more generally, meaning that business groups tend to compare their tax performances with those of their competitors, while non-business communities primarily compare the way tax codes treat natural persons to how legal persons avoid taxes;¹²⁹⁴ we may label these as race-to-the-bottom (or revenue-maximisation) approach versus comparative-fairness approach, respectively, signalling a corporation-to-corporation versus corporations-to-society cognitive prioritisation.

¹²⁹³ SU and TAN 2018, p. 1068.

¹²⁹⁴ See HILLENBRAND et al. 2019, p. 422.

Cynically but truthfully, when “socially responsible” attitudes are adopted by corporations, the latter, too, are socialised, for instance by taking into account the number of competing “altruistic” (CSR-spending) investors in the relevant market, which will be a determinant of their share price.¹²⁹⁵ This finding is supported by evidence that CSR’s “altruism” is undermined not only by competitive selectivity¹²⁹⁶—which, in an absolute sense, would still be fine—but by true sectoral bargaining; for instance, *the voluntary component of* environmental disclosure is often traded-off with weaker tax contributions.¹²⁹⁷ On top of this, higher tax compliance may be exchanged for lenient environmental regulation, accommodating labour standards, or overindulgent safety rules on products, as if the former was a favour corporations generously granted to local communities and even sovereign States.



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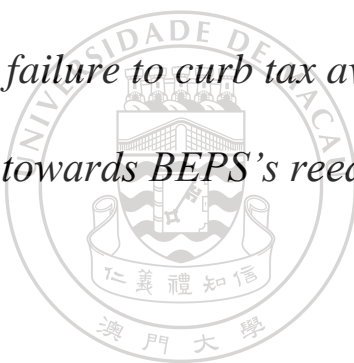
¹²⁹⁵ See BARNEA et al. 2013, p. 1082.

¹²⁹⁶ Refer generally to MARAKOVA et al. 2021.

¹²⁹⁷ See FALLAN and FALLAN 2019, pp. 2-3;12-13.

Chapter 12

*The failure to curb tax avoidance,
towards BEPS's reedition*



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a Made-unauthoritative parliaments facing captured transnational agendas

i Globalised physical persons versus globalised legal persons: Subjugation and dominance in the age of neoliberalism

Heavy (and/or brutally enforced) taxation on natural persons has consistently represented the preferred governmental response (though not necessarily a successful one)¹²⁹⁸ to periods of crisis, especially to fund war campaigns¹²⁹⁹ or to recover from other major disruptions of civil life. This was done both to refinance States' debts and to broaden taxed citizens' willingness to engage participatorily with States themselves,¹³⁰⁰ capitalising on war-driven patriotism where applicable.¹³⁰¹ When this mechanism was triggered, most times it was the poorer strata of the population who were compelled to sacrifice their relative wellbeing the most. Companies, however, were not necessarily overlooked; for instance, in the US,

[d]uring World War I, the federal corporate income tax rose to 12 percent in 1918 from 1 percent in 1915. In addition, in 1917 a new "excess profits tax"—on profits above the payer's pre-war level—was imposed, and it ranged as high as 80 percent. The increase came amid public outcry against wartime "profiteering". People were angry to see men who stayed at home becoming millionaires from war profits, while the soldiers overseas were fighting and, often, dying.¹³⁰²

Today, people are disappointed as well for comparable reasons underpinned by a similar rationale, but no government seems inclined to bother much. Nonetheless, the point I wanted to make is that throughout history, till recently, taxation had always

¹²⁹⁸ See for instance HYMAN 1989.

¹²⁹⁹ See e.g. KOBETSKY 2011, p. 57.

¹³⁰⁰ Check e.g. WEIGEL 2020.

¹³⁰¹ Refer to McCAFFERY 2000, p. 409. However, the exploitation of this cognitive bias often backfired as soon as the bias ceased to cloud citizens' minds.

¹³⁰² SHILLER 2018.

been confined to an internal affair of the State concerned, that is, to an issue of relational and bargaining power between each jurisdiction and its citizenry, with quite direct an osmosis of ideas, stances, needs, claims, and counterclaims between the two “parties”. This included a fair degree of physical violence, but was still processed as a negotiation.

From the 1970s instead, digitally accelerated and neoliberalised globalisation has exponentially exacerbated the divide between labor and governments on the one hand, finding it difficult or impossible to relocate, and those mobile factors of production which can be moved from jurisdiction to jurisdiction with relatively negligible efforts.¹³⁰³ This renewed globalisation has “recreated” (i.e. readapted to a digitally fluid world society) and normalised the MNC, thus granting it blank leave to thrive, up to challenging sovereigns’ instruments to exercise their sovereignty – the power to tax (and to *actually collect* taxes) first among them. Therefore, any attempt to limit the damage by outsourcing its solution to a change in citizens’ behavior—for instance, through chilling effects owing to international tax enforcement—mistakes its target, and is doomed to fail. The erosion of taxing powers is grounded in neoliberalism, not in the average citizen’s behaviour. In fact, one of the uncountable negative effects of the globalisation of neoliberalism is that the economic power of corporate giants has eroded the factual sovereignty of States, which have lost ground in negotiating pre-eminence and thus in the faculty to intervene in and impact international affairs.¹³⁰⁴ Against this backdrop,

pressures to further consecrate capital mobility world-wide continually run up against the limitations of the primary political unit (the nation-

¹³⁰³ See HEILBRONER and MILBERG 2012, p. 154.

¹³⁰⁴ Refer to KOBETSKY 2011, pp. 55-56.

[S]tate) and arrangements for global governance structures that lack political legitimacy and accountability.¹³⁰⁵

This inaugurated a dangerous trend for taxation, that relies heavily on and functions better when policy goals are generally supported by taxpayers, and when those in charge of the accomplishment of such goals are somehow accountable to taxpayers themselves, in a two-way fiduciary relationship. Historically, too, bottom-up legitimisation of taxation assisted governments in collecting more taxes, reducing tax evasion, and legitimising the same tax policy objectives, even in non-democracies.¹³⁰⁶

In IL scholarship and further geopolitics and geoeconomics literature, the supposed decline of the State as the only or most prominent subject of IR is an established *tópos*; *inter alia*, it is widely conjectured that States would have lost their grip on competing (non-state) actors, thus proving increasingly unequipped for directing global governance, and undeserving of popular legitimisation. Yet, I submit that the issue is not whether States have witnessed their influence decreasing, but *whom to*. When States are captured by globalised capitalist élites and join a super-cupola of indistinguishable financial-techno-political powers therewith, their influence on world affairs is even higher than the one traditionally theorised for a system where States are sovereign while in need to mediate and respond to the bottom-up solicitations of a myriad of non-state actors. When States are fully captured, they no longer need to prove responsive to mentioned solicitations: they may dispose of their citizens as they please, and are incentivised to do so by the protection offered by unaccountable market structures they (in)formally entered into an agreement with. This way, the citizenry, finding itself trapped in between two coalesced and symbiotically integrated coercive powers, observes an *apparent* decline of the State

¹³⁰⁵ MARSHALL 2009, p. 219; *see also* *ibid.*, p. 224.

¹³⁰⁶ *See e.g.* TUNÇER 2015, p. 155.

whilst facing the latter's coercion even more brutally and pervasively. Italy is a cardinal exemplification of this mechanism also intergenerationally, in that following decades of generous public spending for privileges and welfare, mostly generating additional revenue streams for corporations' senior executives and family dynasties (whose roots, not infrequently, trace back to the Middle Ages), the State entered a period of protracted budget crisis—so stable that it cannot be labelled as “crisis” anymore—and is making today's average citizen pay for such a rent-distribution by pursuing (or trying to pursue) exceedingly aggressive fiscal policies and related restrictions to personal freedom and self-determination – albeit hardly enforced due to administrative inefficiency. This is incardinated within a policy system that already *consistently* prioritises the elderly, the Covid-19 pandemic having marked no exception to this pattern.¹³⁰⁷

Nowadays, States work under the pressure of international tax competition unleashed by globalisation to the benefit of corporations (the bigger, the better),¹³⁰⁸ encouraged to move their assets—especially the intangible ones¹³⁰⁹—and continuously seek *the most convenient parcelling and allocation* of their activities and profits, in what looks like a never-ending catching game between States and MNCs. As noted in preceding chapters, this endless game is facilitated by an array of highly paid white-collar tax advisors, helping clients keep their taxes to a minimum without

¹³⁰⁷ ATTALI (2021^b, p. 84) emphasised how faced with a portfolio of alternative compromises, (on average senior) policymakers during the pandemic have deliberately pursued «une société [où] la solitude s'installe; [...] une société où les jeunes sont contraints de ne pas travailler pour que les vieux, qui ne travaillent pas, survivent». Arguably, youth's mental health across several regions has been seriously violated through these decisions, leading to long-term living impairments which might impress a lasting impact onto humanity over the generations to come. HARRIBEY (2021, p. 180) has also warned against poor categorisations of needs into “essential” and “non-essential” streams, because those social needs usually categorised as non-essential, including travelling for affective reasons, might be actually essential to those involved, exactly because mental health is as important as the physical one, and people may be used to different lifestyles endowed with equal dignity before the law.

¹³⁰⁸ KOBETSKY 2011, p. 57.

¹³⁰⁹ For two exemplifications, refer to WIGAN 2021, pp. 195;198;205;209, and PONS 2021, pp. 219;229-230.

facing criminal charges,¹³¹⁰ and often subjected to client privilege standards comparable to those applicable to lawyers.¹³¹¹ In Italy, for instance, it is directly the *notai* (supposedly public officers!) who advise one on how to avoid paying the *tassa sulla plusvalenza* (a sort of capital-gain tax on property assets).

Being too captured to be willing or able to stipulate an international tax level-playing field or to overcome legislative resistance (aka “tax resilience”) by global businesses, States choose the shortcut and close-in on natural persons—the large majority of whom is represented by little savers (low-income taxpayers)—hoping to recover at least some resources via a general crackdown on them. Of course, such a misdirected crackdown can later be sold discursively to misguide public opinion, enhance consensus, and dispel popular naïve criticisms of “being light-hand on evasion”.

Whilst hyper-taxing all individuals is of little harm to the conduct of international affairs, chasing corporations unilaterally does more harm than good even from this governance perspective:

[i]f tax authorities operate solely out of self-interest in seeking to tax international enterprises or associated enterprises in a multinational enterprise group, the gain may be temporary because it may hinder cooperation with other tax authorities[;]¹³¹²

a representation *par excellence* of what globalised neoliberalism is all about. To improve on this record, politicians would not even need to be particularly sensitive to the demands of the working class:

¹³¹⁰ Check further KOBETSKY 2011, p. 58.

¹³¹¹ Refer extensively to MITCHELL 2015.

¹³¹² KOBETSKY 2011, p. 58.

when policymakers are *neither wholly benevolent nor wholly unconcerned* about the welfare of citizens, it is clear that, irrespective of whether the tax base is fully or partially mobile, a small *multilateral* increase in the tax on mobile capital from the noncooperative equilibrium will increase the welfare of the representative citizens.¹³¹³

It is not the tools which are missing. It is policymakers' will—and perhaps even ability—to do what is “right” (i.e. morally edifying) from the 99%'s standpoint.

ii The transformation of transnational bureaucracies into unaccountable élites with their own agenda, frequently acting ultra vires in the absence of a popular, constitutional mandate

Whenever IOs' policy outcomes display bureaucrats' «rampant indifference in the face of human suffering» and unduly privilege the already privileged without improving the lives of the 99%, public outcry inevitably follows suit, and the legitimacy of the policy process decays accordingly.¹³¹⁴ Along these lines, the international dimension of tax regulation represents one of the most obscure bureaucratic networks in transnational governance, whereby supranational bureaucracies (such as, indeed, IOs) have been *apparently* discarded and secretive but state-rooted forms of cooperation have been preferred instead.¹³¹⁵ Needless to state, this best serves the aims of those who enjoy enough “relational capital” and financial resources to co-opt themselves into such networks. Unofficial, hyper-technical, closed-door negotiations might be also interpreted as a reaction to ever-increasing demands for governmental transparency in acts of international state representation:

¹³¹³ Edwards and Keen, as paraphrased in BRATTON and MCCAHERY 1997, p. 248, fn. 194. Noncooperative “Nash” equilibria are defined as those involving two or more players where each player is assumed to be aware of the equilibrium strategies of the other players and to act rationally, and no player can profitably change its own strategy alone; *see e.g.* OSBORNE and RUBINSTEIN 1994, pp. 14-15.

¹³¹⁴ AMAYA 2021, pp. 121-122.

¹³¹⁵ *See* WARNING 2009, p. 42.

As an unprecedented degree of global transparency in public affairs, enabling individuals and groups to acquire information directly, makes the quest for diplomatic confidentiality during negotiations ever harder to maintain[.]¹³¹⁶

transnational élites seek off-the-circuit fora and opportunities to bargain over their interests beyond States' borders. In fact, «consensus about the importance of public diplomacy is not matched by a similar consensus regarding the consequences of its use for what remains an international society of [S]tates». ¹³¹⁷

Transnational forms of cooperation are, on paper, more transparent than *supranational* ones to the citizens of each cooperating State: power still residing with States directly, citizens may hold their governments accountable for the decisions of and actions by such networks. Conversely, it is common belief that supranational networks drain the power of States, whose citizens are then deprived of their traditional channels for governmental accountability.¹³¹⁸ This simplistic dichotomic scheme generally holds as long as the transnationality of decision-making mirrors the transnationality of rights enforcement, that is, insofar as the actions performed by a State transnationally against its own or foreign citizens are covered by the same rights citizens would enjoy domestically in similar circumstances (i.e. if the State had taken the same action against them within the domestic order – under the safeguards and in compliance with the procedures thereof). When the contrary occurs, however, transnational networks of semi-stable unaccountable bureaucracies are formed, and a disconnect is enforced between the policymaking “extension” of the State on the one side, and its non-extension as far as its citizens' rights are concerned on the other side. The disruption of this prerogatives-accountability balance is furthered by the lack of

¹³¹⁶ HOCKING 2005, p. 31.

¹³¹⁷ SHARP 2005, p. 106.

¹³¹⁸ See also GHEYLE and DE VILLE p. 344.

parliamentarian oversight on transnational activities which too often hide weak political (and legal) mandates behind the veil of *informality as pragmatism 2.0*, originating a legitimacy deficit and serious circumventions of rule-of-law mechanisms inherent to any polity (except, perhaps, those subjected to authoritarian rule).¹³¹⁹ While it is true that excessive transparency may lead to representatives' "pandering" or "posturing" in negotiations,¹³²⁰ such risks cannot translate into a blatant rejection of the popular foundations of democratic polities: *alternatives to any potentially opted-for negotiating stance and policy outcome* should be presented genuinely, and their dismissal in favour of the actual stance and/or outcome should duly justified.

Exercising the preferences of a global élite, for a State, does not mean succumbing to the outsized power of MNCs, as it is too often simplistically argued; in fact, it means that the State *maintains* its formalistic supremacy but is substantially *emptied* of uncaptured representatives. In other words, neoliberal transnational élites exercise influence *through and by means of* the State and not *on or above* the State, meaning that the State continues to exercise its *formal* powers *informally*, that is, in transnational networks where traditional, uncaptured state representatives are either excluded, or recaptured, or deprived of real authority. «This is because the key organizational bases of élites, nation[-S]tates, remain the major containers and the principal *loci* of power». ¹³²¹ Thus, the so-called "élite" is not an *alternative* power or a *deviation* of the State, but *the State itself* in the whole of its formality, once it has become unable or unwilling to defend its representatives from capture and therefore it turns against its own electorate or it disregards the pursuance of the long-term common good for the citizenry. The latter, as already argued before, warrants policy coherence

¹³¹⁹ Check WEBER 2012, p. 155; WARNING 2009, pp. 199-203.

¹³²⁰ See STASAVAGE 2004, pp. 672-673.

¹³²¹ PAKULSKI 2010, p. 335.

and thus contextual consistency as well as proper priorities be pursued. Eventually, at odds with it, captured state representatives have contracted out the policing of transnational networks to their own formality, managed by someone who *is not electorally interested in the externalities of their decision-making*.

Some of these networks have coupled with more stable supranational technocracies to deliver on more demanding policy packages. “Technocratic”, though, is not a guarantee for fairness – for problem resolution even less; in fact, when the OECD’s inability to revolutionise transfer-pricing rules made it impossible for the Organisation to rely on its own expert primacy to validate the soft-law outcomes of the BEPS project (that is, its fifteen “Actions”),¹³²² it turned to the political rhetoric of its state parties to support its authority.

As experts have increasingly bemoaned, transfer pricing has become subject to national imperatives rather than technocratic consensus, leading to a diminishing capacity of the expert community to re-unify, facilitate consensus and secure coherence on the arm’s length principle. [... T]he BEPS process has completely lost the focus of its original intention to curb BEPS, but has almost entirely been occupied by distributional questions between state representatives.¹³²³

Put otherwise, “state” delegates to the OECD and related fora proved more concerned with questions of distribution of taxing rights between States than on the far more fundamental issue of redistributing tax burdens between the corporate élite and the rest of natural persons. This may occur whenever States are fully captured by oligarchic, plutocratic, and nationalistic power-élites endowed with *their own nationally biased* technocratic apparatuses, which play so aggressively up to eventually displacing the originally more neutral platform constituted by “international civil servants”.

¹³²² Check e.g. BÜTTNER and THIEMANN 2017, p. 13.

¹³²³ Ibid., p. 11.

Resultantly, the once deputed “technocratic” forum becomes a battlefield for contended supremacy games among world powers in order to enforce *their particular* “expert” solution onto the other state technocracies, with proper civil servants acting as embarrassed bystanders, puppet invitees, or, at best, *super partes* “expert witnesses”. Not by chance, the current superpower and its main contender stand at the two extremes of the policy spectrum vis-à-vis the BEPS project, with the US as its main forerunner-yet-detractor and China as its most prominent advocator and promoter.¹³²⁴

One of the several democratic shortcomings of these OECD processes is the reluctance of their proponents to gain parliamentary approval and to involve the citizenry in a bottom-up dimension. The Constitution of several countries excludes taxation matters from passing through referenda—in Italy, for instance, tax-related topics are ruled out as “*quesiti non referendum*”—but this cannot equate to holding that tax data can be shared across the globe with little or no awareness, if not full consent, on the part of taxpayers. The OECD process went ahead very much behind the curtains, disregarding the principle that «the publication of the law in force [...] will only be efficient if it reaches both the holder of obligations and the holder of rights»;¹³²⁵ banks, for instance, should make sure to inform their clients that as soon as they open a bank account, their tax-related data might be automatically and indiscriminately shared with tax agencies in dozens other jurisdictions across all continents. This could be compared to a situation where, in order to prevent terrorism or any other crimes, the contents of each and every device held by any individual worldwide was automatically shared with and searched by investigating authorities all over the world: something similar reportedly happens with intelligence sharing, yet it

¹³²⁴ See ROTBLAT 2018, pp. 87-88.

¹³²⁵ KAUFMANN and WEBER 2012, p. 239.

understandably triggers resistance as well as a sense of outrage and betrayal, and in any event, it remains formally illegal; because of this, it cannot be pursued as systematically as an enforcement mechanism as the one under scrutiny here.

Under disclosure and access-to-information laws, citizens across a wide range of jurisdictions can petition to know how much information is being shared with other governments, generally when, how, and of what sort; for example, through one of this petitions it has been possible to ascertain that despite Canada's federal PIPEDA, «the Canadian government transfers roughly 1 million information slips and records to the [US] each year»,¹³²⁶ this number increasingly steadily every year. Transparency and information are also important due to the centrality of trust in any market transaction: when taxpayers feel the confidentiality of their private life is no longer guaranteed, they lose confidence in the system and behave more conservatively.

Confidence means expecting a specific behaviour of people or institutions because they *must* behave in a specific way. Generally, such a “must” can be based on a variety of reasons, such as rules, conventions or moral.¹³²⁷

However, this right to access information is not sufficient to make sure individual rights are fulfilled when AEoI come into the picture.

The dynamics just described, both transnationally and supranationally, evidence once more the pervasiveness of interest convergence between policymakers and corporate élites; after all, that governments are captured is not a new finding. When Chicago School's economists argued against public-interest-motivated involvement of

¹³²⁶ COCKFIELD 2020, p. 381. For a thorough analysis of Canadians' privacy concerns related to international tax cooperation, *check* HAWKSHAW 2014; note, however, that such work pre-dates the most recent developments on automatic cross-border information exchanges, thus, it scrutinises those concerns *inter alia* under the 2002 Model Tax information Exchange Agreement, which is no longer applicable. Today, safeguards for Canadians are even lower than those described in said work.

¹³²⁷ KAUFMANN and WEBER 2012, p. 240, emphasis in the original.

the State in the economic life of society, they advanced three main arguments: that the market can absorb its failures; that in the rare occurrence it cannot correct itself, private litigation between affected parties effectively solves all problems; and that in any case, governments are captured, corrupted, incompetent, and inefficient.¹³²⁸ Their approach evidenced the way «public intervention relies crucially on the presumptive failure of market discipline to control disorder».¹³²⁹ The first two arguments they justified their approach with have been disproven multiple times, whilst the third too often still holds; it is not so because governments are really incompetent or inefficient in pursuing the public interest, but because they are so captured that they do not even pursue one anymore. In other words, their inefficiency stems from the fact that they deploy only a negligible part of their energies to the public interest, whilst cultivating their own interests *as a new kind of particularistic interest* that ties influential state and non-state actors together, to the detriment of social priorities (or at least, not seeking the latter's most readily available advantage, as they should).

This problematic is so old, widespread, and societally rooted that democracies introduced systems of check-and-balance to make sure governments sought the best solutions for their voters and society as a whole rather than their particularistic interest; the most obvious of these systems is the parliamentary oversight on the executive's respect for the popular mandate. Domestic systems have developed significantly this way, without stripping themselves of regulatory capture completely, but providing factual and legal limitations to its influence on the overall outcome of executive decisions. However, the formalistically horizontal, Westphalian international system has no beyond-State executive nor parliament, let alone citizenry, besides the widely

¹³²⁸ See SHLEIFER 2005, pp. 440-441.

¹³²⁹ Ibid., p. 444.

spoken-about (and equally porous) “international community”;¹³³⁰ as such, it represent an optimal political space to be plundered by States’ élites benefitting from loose mandates on the one hand, and no citizenry to be accountable to on the other, in addition to a narrative of “outsourcing” which distances domestic decision-makers from decisions taken by international bodies whilst subscribing to them confidentially via the secrecy allowed by international meetings. In this sense, which is not what the Chicago School meant to theorise, governments have indeed been *inefficient* in pursuing the public interest: once their regulatory capture at home had been circumscribed, they “relocated” their decision-making extradomestically by permitting regulatory capture, to infiltrate the international dimension of policymaking whilst formally deferring to the highest standards of domestic human-rights accountability.

Domestically, one should never underestimate

the risk of public abuse of market participants by an official who [...] is captured by a particular group, including the regulated industry itself. Politicisation and over-enforcement are a particular problem in societies with few checks and balances: *the executive can selectively turn its regulators against its enemies rather than violators of rules*. Moreover, [...] regulation can be subverted by competitors who want to use it to deter entry or to maintain cartels[; in fact,] regulated industries have developed a range of techniques to turn regulation into a mechanism of protecting their rents rather than public welfare.¹³³¹

The same scheme can be transposed at the international level, where *the executive (governments, captured by financial markets) selectively turns its regulators (tax agencies and public opinion) against its enemies (all citizens indiscriminately) rather than violators of rules (mostly MNCs, by far)*. «[R]egulation is a particularly poor idea

¹³³⁰ Someone refers to the international community as to indicate the community *of States*; in that event, to refer to the global village *of people* instead, an alternative expression may be “global society” (or, in some instances, “world’s public opinion”).

¹³³¹ SHLEIFER 2005, p. 446, emphasis added.

in undemocratic countries and in countries with extremely powerful executives, where the risks of abuse are the greatest»,¹³³² and for cognate reasons, it is a poor idea on the international plane whenever risks of abuse are foreseeable due to the lack of accountability, scrutiny, and safeguards.

If who is responsible for particular regulatory decisions [is not defined], then it is harder for citizens to exert pressure at the appropriate level. The risk is that governments or regulatory agencies can blame performance failures on supranational policy and in so doing decrease the accountability of national bodies.¹³³³

If the distribution of interest-group favours is normatively undesirable domestically, it is even more so transnationally, where even the not-yet-corrupted sections of the élites are not answerable to citizens through electoral processes and the like.¹³³⁴

b BEPS 1.0's inconclusive attempt

Corporate taxation is coordinated at the international level according to long-standing international customs, codified in a tangled net of thousands of bilateral tax treaties in addition to minor matters regulated only by customs. Generally, the scheme works as follows:

Corporate tax residence is [...] defined as a company's place of incorporation or its place of management and control. Under tax treaties and international custom, a [S]tate may tax a non-resident corporation only on income "sourced" in its territory. Unlike source [S]tates, the company's state of residence may tax all of the company's worldwide income. Treaties require residence [S]tates to relieve any resulting double taxation either by exempting income taxed at source or by crediting the source tax against residence tax due. In the absence of tax

¹³³² Ibid., p. 447.

¹³³³ AURIOL et al. 2018, p. 930, in-text citation omitted.

¹³³⁴ See MASON 2020, p. 361, fn. 49.

treaties, residence [S]tates typically relieve double tax unilaterally. [...] There are] two limits on source taxation of business profits. First, a [S]tate may tax non-resident companies only if the company has a “permanent establishment” there, meaning a physical presence or dependent agent. Second, if a non-resident has a permanent establishment in the source [S]tate, then that [S]tate may tax only the income “attributable” to that permanent establishment. To determine the attributable income, the source [S]tate imagines that the permanent establishment is its own entity, independent of its head office, and then imputes an “arm’s-length” return to the permanent establishment.¹³³⁵

One shall be cautious before endorsing a principle—that of single taxation of corporations—that at first sight might seem only fair; this principle, in its easiest formulation, provides that cross-border profit should be taxed one time, and one only (neither more, nor less): passive income in the jurisdiction of residence, active income in the source country (or vice versa).¹³³⁶ In fact, if this principle concerns the number of levies only, whilst leaving tax rates (i.e., the “quantum”) unspecified, it incapsulates the best exit-strategy for MNCs to pay almost no taxes through jurisdictional arbitrage, even when the jurisdiction theoretically placed to tax renounces to do so (indeed, the other jurisdictions involved in the cross-border *negotia* might still decide to tax “competitively” low rates). To address this issue, rate parameters should be introduced: «income should be taxed once, *regardless of where* the single levy is imposed, at a rate that does not exceed the residence jurisdiction’s rate and is not lower than the source jurisdiction’s rate». ¹³³⁷ Any other solution would be unfair: whenever jurisdictional arbitrage is left to MNCs as an option, they will exploit it aggressively and creatively.¹³³⁸ This is unfair both because international investments would be overincentivised compared to domestic ones (typically made by SMEs), and due to the

¹³³⁵ Ibid., pp. 355-356.

¹³³⁶ See also DE LILLO 2018, pp. 5-7 (check in particular p. 6, fn. 6, and p. 7, fn. 8).

¹³³⁷ Ibid., p. 8, emphasis in the original.

¹³³⁸ For instance, by availing themselves of the infamous Dutch CV-BV scheme; refer to *ibid.*, pp. 19-22. See further VLEGGEERT and VORDING 2019. For an exemplification of the way the CV-BV structure is adopted, check HIETLAND 2021, p. 23, illustrating its employment by the CBS Corporation. See also CASSEE 2019, p. 259, fn. 4; GUIMARÃES 2019, p. 100, fn. 107.

undertaxation of capital income compared to labour income (which is typically more territory-dependent).¹³³⁹

Furthermore, MNCs should be taxed on sales where they occur rather than on profits or production,¹³⁴⁰ in such a way that exploiting favourable jurisdictions would be no cure to MNCs' tax liability, given that most sales are not perfected in tax havens. This solution is so straightforward that the only possible explanation for its non-implementation is the lack of both political will and lawmakers' independence from the "new sovereigns" of neoliberalism. As will be seen *infra*, BEPS 2.0 is moving in this direction, but what strikes me is the way the BEPS was originally conceived to combat tax fraud without addressing this foundational mismatch between old taxation customs and the digital reality we have all been living in for several decades now. One could compare this semi-lethargy with the rapid onset of information-exchange mechanisms against individuals' tax evasion: the dyscrasia manifests itself self-evidently.

States' wilful reluctance to tax MNCs cannot be explained in purely competitive terms, which is why the answer shall be sought more comprehensively in regulatory capture – taken first and foremostly, rather than as a background argument. MASON¹³⁴¹ noted that source States might have renounced to tax excessive outbound investments to corporations' foreign affiliates as not to miss out on the jobs and wealth brought by those corporations: this concern directly impacts society, thus a race to the bottom among source States might be understood this way. But what about States of residence? In fact, resident corporations whose activities are mostly developed abroad (i.e., in source jurisdictions) do not tender any assistance to welfare or any other

¹³³⁹ See DE LILLO 2018, p. 17.

¹³⁴⁰ Refer to NAIDU et al. 2019, p. 6.

¹³⁴¹ 2020, p. 358.

socially relevant policy-area in resident jurisdictions; they do not create jobs, nor do they significantly impact the country's finances (if not indirectly via jurisdictional marketing as market appeal). Thus, in this case, regulatory capture (built on connivance, élite's transnationality, and corporate reciprocation) is the only rational explanation for not taxing resident MNCs, which in turn raises legitimate doubts on whether the non-choices of source countries should be scrutinised through similar lenses first, and only later under the light of jurisdictional competition.

Unilateral initiatives which endeavoured to signal a potential uncapture of policymakers have consistently failed to deliver on the expectations placed upon them, starting with the 1960s'

[CFC] rules[, under which] shifting profits *to or among foreign subsidiaries* triggered tax for the [US] *parent* on the shifted income [...]. But in the late 1990s, the [US] Treasury Department gutted the CFC rules when it implemented the “check-the-box” regulations. Weary of fighting with taxpayers about how entities should be characterized for tax purposes, Treasury decided that, within certain limits, [US] taxpayers could elect whether their business entities would be taxed separately.¹³⁴²

This choice reopened Pandora's box – which has not been resealed through the BEPS project. Quite to the contrary, the vicissitudes at the US Treasury demonstrate once more the endured validity of the SWWS attitude by tax authorities. Curiously, the same US Treasury felt instigated by and entitled to complain vociferously through a formal letter about the EC's post-BEPS moves to curb tax avoidance through antitrust probes (that I will discuss *infra*), and yet, it itself admitted that the BEPS project had left many loopholes open and formulated yet-in-the-abstract proposals; among the open issues with the US tax code, the Treasury's witness before the Senate mentioned interest

¹³⁴² Ibid., p. 359, emphases in the original.

expense deduction (aka “tax-deductible interest”, some of which worsened by hybrid arrangements), tax deferrals (also through so-called “hopscotch loans”), stateless income, corporate tax inversion,¹³⁴³ and tax-base erosion from digital services.¹³⁴⁴ As for the European Commission (EC) antitrust cases against US corporations, the Treasury added that America’s inability to tax corporations or agree on fairer internationally accepted standards is no excuse for the EU to act unilaterally.¹³⁴⁵ Once again, this is unsurprising: Americans’ idea of IL is that they are welcomed to apply their own domestic laws extraterritorially while all other jurisdictions should just accept the interferences and... quite verbatim, *mind their own business*.¹³⁴⁶

c The EU’s recalcitrant agenda

i *Disguised extraterritoriality and selective miscoordination in information exchanges*

The EU’s undertakings towards fighting corporate tax avoidance and individual tax evasion by means of AEOI embody, before anything, a tale of *ultra vires*, double-standard extraterritoriality, which drew inspiration from the US’ FATCA.¹³⁴⁷ “Extraterritoriality” is a contested doctrine of prescriptive jurisdiction in PIL. As far as the EU is concerned, it primarily and most traditionally refers to the applicability of EU law (both primary and secondary legislation) outside the territorial borders of the

¹³⁴³ On this technique, refer to CHOUDHURY and PETRIN 2019, pp. 325-326.

¹³⁴⁴ Check the Testimony attached to this official letter by Jacob Joseph Lew (the then US Secretary of the Treasury) to Jean-Claude Juncker (the then EC President) dated February 11, 2016: <https://www.treasury.gov/resource-center/tax-policy/treaties/documents/letter-state-aid-investigations.pdf>, pp. 2-6.

¹³⁴⁵ From the same document, p. 8:

The mere fact that the U.S. system has left these amounts untaxed until repatriated does not provide under international tax standards a right for another jurisdiction to tax those amounts. We will continue to monitor these cases closely.

¹³⁴⁶ See further TOURNIER 2017, p. 76.

¹³⁴⁷ Refer to SAUVÉ 2019, p. 304.

EU as a whole, including the “effects doctrines” which have been developed over the decades.¹³⁴⁸ Yet, extraterritoriality in EU law may also refer to the application of EU secondary legislation within the legal order of the MSs in policy areas where the EU lacks competence. The paradigmatic exemplification of this *sui generis*, creeping form of extraterritoriality is retrievable from the field of taxation, and I will call it “para-extraterritoriality” to distinguish it from the proper one.

Despite Articles 45, 55, 65, 110-113, 115, etc. TFEU have been often made recourse to by EU policymakers to justify their trespassing into taxation matters for the sake of regulating the internal market, the free movement of capital, social security, non-discrimination, and other relevant issues, the EU has neither exclusive nor concurrent competence in taxation. As harmonising tax rules is too urgent for EU policymakers to defer to their lack of competence, the same policymakers have resorted to legal instruments which formally circumvent the obstacle. Among those legal instruments, some display an “extraterritorial” dimension due to their ability to impact EU citizens’ capital both within and outside the EU territory, by means of MSs’ legislation.

The first, rudimental attempts by the (now-)EU to intervene in this field trace back to Directives 77/799/EEC, 90/434/EEC, 90/435/EEC, 2003/48/EC, and 2003/49/EC, mostly concerned with double-taxation, supervision of tax-enforcement efforts, and EoI. For the purpose of the present work, I can focus on this latter aspect and note its extraterritorial implications, in light of the fact that the EU’s aim is not simply to combat profit shifting *between MSs*, but also—and possibly foremostly—to combat profit erosion for the EU as a whole *vis-à-vis non-EU jurisdictions*. Notwithstanding this appreciable objective, the EU only partially achieved its

¹³⁴⁸ See further ZELGER 2020, pp. 616-618.

purported goals: while its design of exchange-of-information on natural persons proved to be effective and became a normative model for broader multilateral efforts on the international plane, the EU failed dramatically to pursue similar initiatives against legal persons (that is, corporations) beyond its borders. Directive 2010/24/EU, repealing Directive 2008/55/EC, applies to both natural and legal persons pursuant to Article 3(c). Directive 2011/16/EU, which brings the para-extraterritoriality of EU law significantly further by establishing a system for AEoI, applies to both persons, too, pursuant to Article 3.11. In integrating the latter, Directive 2015/2376 announces that

[i]n developing such a standard form for the mandatory automatic exchange of information, it is appropriate to take account of work performed at the OECD's Forum on Harmful Tax Practices, where a standard form for information exchange is being developed, in the context of the Action Plan on [BEPS]. It is also appropriate to work closely with the OECD, *in a coordinated manner and not only in the area of the development of such a standard form for mandatory automatic exchange of information*. The ultimate aim should be a global level playing field, where the Union should take a leading role by promoting that the scope of information on advance cross-border rulings and advance pricing arrangements to be exchanged automatically should be rather broad.¹³⁴⁹

Regrettably enough, Directive 2015/2376 has pushed EU law extremely far not only without exercising self-restraint as for its competences, but more alarmingly, without taking into account the effects of this acceleration on the asymmetries already reverberating internationally between individual and corporate taxation. While the EU's early (and increasingly sophisticated and pervasive) tools to fight individuals' tax evasion by means of information exchanges has been reflected in the OECD work since the 1988 MAATM, no *resolutive* multilateral instrument has been agreed upon through the OECD/G20 involvement as to fight corporate tax avoidance (which is far

¹³⁴⁹ Preambulatory Clause 13, emphasis added.

more devastating for MSs' revenues and Europeans' welfare), most probably due to priority miscalculation and regulatory capture. The result is that whilst an EU citizen sees its (rather sensitive) data exchanged automatically both within and outside the EU with dozens of jurisdictions, an EU-based corporation easily escapes EU-designed rules on the same exchange because MSs—which bear the actual competence in taxation matters—are unable to agree upon equally compulsory and pervasive measures to fight tax avoidance at the international level.

Income information is shared multilaterally, while information on corporate capital is not so because corporations may establish their “residence” in a third territory. It is true that the OECD Model Tax Convention «shall apply to persons who are residents of one or both of the Contracting States» and that «the term “person” includes an individual, a company and any other body of persons»,¹³⁵⁰ but while common individuals are citizenship-wise bound to a territory, corporations and the 1% are freer to move their assets and legal seat across jurisdictions, and only need one non-cooperative jurisdiction to conceal their capital from information exchanges.¹³⁵¹ This problem is less relevant within the EU because all jurisdictions comply with minimal disclosure requirements, but it is of relevance vis-à-vis MNCs operating *also*

¹³⁵⁰ Articles of the Model Convention with respect to Taxes on Income and on Capital [as they read on 21 November 2017], Arts.1.1;3.1a).

¹³⁵¹ OUYANG (2020, p. 50, emphasis added) reports that through the enactment of CRISs, *[a]s long as taxpayers provide a certain amount of investment or financial support, [local governments] will help them submit sufficient “evidence” to the financial institution to “prove” that the taxpayers are citizens or residents of the area and thereby they can escape their original tax resident status and tax obligations.*

For example, O'HALLORAN (2021) has recently reported on this phenomenon from China. For similar practices around the globe (including from EU's MSs Portugal, Cyprus, and Malta) and their assessment under EU and international law, *check e.g.* DŽANKIĆ 2015; CHRISTIANS 2017^b; SURAK and TSUZUKI 2021; DŽANKIĆ 2019; WEINGERL and TRATNIK 2019. By way of exemplification, JANSKÝ et al. (2021, p. 11) report about

the possibility of jurisdictions voluntarily choosing only to send, but not receive, tax information; to do so, these jurisdictions enlist in Annex A of the MCAA. Moreover, banks in other jurisdictions are not required to report accounts held by residents of Annex A countries. This tactic enables secrecy jurisdictions to attempt luring foreign residents into taking up fake residency or citizenship, resulting in bank accounts falsely being classified as belonging to an Annex A jurisdiction resident. Information on these accounts' owners is then neither collected nor exchanged.

outside the EU, where the concern is non about non-disclosure per se, but the very existence of even one single jurisdiction where corporate profits can be shifted to and become tax-transparent. A few consequences are borne extraterritorially by corporations, too,¹³⁵² but in general, EU workers are exposed to the exchange system both within and beyond the EU, while EU corporations may conceal their profits abroad: neither the original BEPS project nor its draft new version (the so-called “BEPS 2.0” analysed *infra*) are in fact sufficiently detailed, accurate, and binding to prevent profit-shifting to low-tax jurisdictions or other offshoring solutions.

Ultimately, I believe that the extraterritorial facets of Directives 2011/16/EU and 2015/2376 are proving inadequate to address tax avoidance as successfully as tax evasion, because their *combined effect with the OECD process* has provided MSs with extraterritorial tools to exchange information both within and outside the EU, while failing to implement an effective system for EU corporate profits not to be shifted abroad as to avoid taxation. Because those directives are grounded in the presumption that an overall solution to tax cheating—by both individuals and corporations—would have been offered globally, this stalemate is legally problematic from a teleological perspective, and is perpetuating incoherent asymmetries already shaping international taxation.

ii Straight to the summit but not down at valley: Probing (a few) MNCs’ taxation through competition rules

¹³⁵² For instance,

[t]he Alternative Investment Funds Directive regulates the management and marketing of [AIFs]. [Pursuant to this Directive, n]on-EU fund managers (firms) are required to meet conditions relating to capitalization and liquidity, remuneration, conflicts of interest, risk management, and the like. The third countries in which the firms originate are required to have appropriate cooperation arrangements with the EU in place and to avoid being listed as a Non-Cooperative Country and Territory by the [FATF]. [... The Directive] also sets out a third condition which requires that *the country in question has signed a tax agreement complying with the standards laid down in Article 26 of the OECD Model Tax Convention and which ensures an effective exchange of information in tax matters*. [Tellingly, t]he FATF is an inter-governmental body concerned to combat money laundering, terrorist financing and the proliferation of weapons of mass destruction

– SCOTT 2014, pp. 104-105, fn. 76, emphasis added.

To no one's surprise, EU institutions' efforts taxation-wise have been focusing on redistributing wealth across MSs rather than among individuals,¹³⁵³ perhaps hoping for (and expecting) MSs themselves, then, to implement horizontal redistribution domestically. And yet, whilst for EU citizens the exchange-of-information rules applicable among EU MSs were becoming more and more intrusive, EU decision-makers were apparently incapable of stopping multinational corporations (especially Apple, Google,¹³⁵⁴ Microsoft, Hewlett-Packard, Amazon, Pepsi, FCA, Caterpillar, and Starbucks¹³⁵⁵) from evading (or, technically, "avoiding") *hundreds of billions* USD of taxes and engaging in Directive and treaty shopping.¹³⁵⁶ This inability was also catalysed by new countries' accession to the EU, which granted them freedom of corporate establishment in the most profitable EU jurisdictions (Ireland, Luxemburg, The Netherlands, Malta, Cyprus – and before Brexit, the City of London) and free movement of capital within the internal market.¹³⁵⁷ Businesses from those newly acceded countries were enabled to exploit the imperfection of the EU's politico-legal configuration, where for example taxes are not harmonised whilst the rule of law is, which means that corporations can free-ride when it comes to taxes, but benefit from EU rights in any EU jurisdiction. Intuitively, this scheme runs contrary to the one applicable to individuals, whose tax rights continue to be *de facto* unenforceable at the EU level whilst harmonised procedures for scrutinising and circulating taxpayers' data are harmonised at that same level. The EU report that explains how tax havens are listed by Brussels (*carefully overlooking* the aforementioned Ireland, Netherlands,

¹³⁵³ See further BERAMENDI 2012, pp. 67-102.

¹³⁵⁴ Refer further to GUIMARÃES 2019, pp. 74-99.

¹³⁵⁵ For an overview of the EC's antitrust-based (rather than tax-based) approach to counter Starbucks' CV-BV structure, refer to VAN DUIN 2016.

¹³⁵⁶ See KUŹNIAK 2017, p. 9.

¹³⁵⁷ Check *ibid.*, pp. 10-11.

Luxemburg, etc.) itself acknowledges that the matter concerns «some global taxpayers—multinational enterprises [...] and high net worth individuals (HNWI)[— and it is] connected with tax fairness (not all taxpayers are able to use global aggressive tax-planning schemes)».¹³⁵⁸ Therefore, the reason why policymaking does not deploy (at least as its first step) all means for *going after those “some global taxpayers”, rather than launching a massive operation of indiscriminate information-sharing of all taxpayers at once*, is unfathomable to me.

From another standpoint, policymakers *are*, in fact, going after MNCs and particularly the Big Tech; just, they are not doing it under the aegis of taxation, but availing themselves of competition regulation instead.¹³⁵⁹ While such a move could be met with superficial commendation, it is essential to highlight that the outcomes are fairly less momentous and distributed than those a tax overhaul would bring about.¹³⁶⁰

¹³⁵⁸ REMEUR 2018, p. 2.

¹³⁵⁹ See HAKELBERG 2020, pp. 127-128. This holds true—and increasingly so!—across all three main jurisdictions inspected in the present work: in China (as highlighted by the 2021 Alibaba saga), in the EU (with the almost decade-long engagement by Margrethe Vestager), and most recently even in the US (with the surprising appointment of antitrust-advocator Lina M. Khan as the chairperson of the FTC in the Biden Administration) – *refer also to* PONS 2021, p. 226. To reinforce this stance, Section 1 of Biden’s Executive Order on Promoting Competition reads as follows (three emphases added):

[...] Robust competition is critical to preserving America’s role as the world’s leading economy. Yet over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality. *Federal Government inaction has contributed to these problems*, with workers, farmers, small businesses, and consumers paying the price. [...] The American information technology sector has long been an engine of innovation and growth, but today a small number of dominant Internet platforms use their power to exclude market entrants, to extract monopoly profits, and *to gather intimate personal information that they can exploit for their own advantage*. [...] It is also the policy of my Administration to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, *the surveillance of users*, and the presence of network effects. [...]

This is to be welcomed, and results will hopefully follow-up to these wishful and strongly worded text, but as far as taxes are concerned, we shall remain mindful of one key element of the debate: hopes that any antitrust probe, however assertive, will concomitantly contribute to fighting tax avoidance *also pre-emptively* will soon be frustrated. Furthermore, the problem is that each of these antitrust approaches is pursued domestically, in isolation from other jurisdictions and no harmonisation of rules or at least of rationales therefor; this results once again in a globally fragmented and unconvincing pursuit of anti-avoidance policing, which cannot produce appreciable results in a world where avoidance schemes are in fact global.

¹³⁶⁰ Different is the case of violations of data-protection laws, rephrased in antitrust terms as violations of competition law; the interfaces here are so close and relevant (...particularly from a surveillance-capitalism perspective, to phrase it in line with the present work’s intellectual background) that might actually prove mutually supportive and strengthening, even before positivistic courts of law. Indeed, as far as EU law is concerned, VOLMAR and HELMDACH (2018, p. 214) have a case in this respect. Moreover, tax-avoidance schemes bear potentially far higher creative variability than data-protection infringements, whose triggering

Closer antitrust enforcement might well contribute to inverting the inequality trend that has shaped the most recent decades of deregulation;¹³⁶¹ equally, it might well reinject a Schumpeterian spirit of *human-oriented* creative-disruption innovation into the giants-captured market;¹³⁶² however, it will not significantly affect the tax-grounded co-variables¹³⁶³ which shaped mentioned inequality outcomes. As empirical evidence of this, all those competition-based challenges to tax-avoidance schemes which have been pleaded before courts have either failed or anyway proven unfit for preventative systemic change beyond the contingent facts being contested. To exemplify, when the EC sanctioned Apple and asked Ireland to recover billions in lost taxes, it decided to do so for competition purposes (selective advantage as unlawful state aid)¹³⁶⁴ endowed with market-protectionism aspirations through geopolitical normative projection,¹³⁶⁵ rather than under an anti-tax-avoidance rationale, which would have rather required Ireland, the EU, and possibly extra-EU jurisdictions, too, to change their tax codes. Currently, the Commissions insists with its one-by-one antitrust-grounded approach to anti-avoidance, with the latest probes having been launched against Nike and Converse for connivance with Dutch tax authorities.¹³⁶⁶

The move against Apple was anything but a last-minute impulse: since the very inception of the European integration process, antitrust had been standing—both

unlawful procedures are (perhaps) more standardised and thus categorisable – so that once one of them has been addressed, several similar others are ruled out pre-emptively. Notably, on 16 July 2021 the Luxembourgish data protection authority (*Commission nationale pour la protection des données*) imposed a record-breaking €746 million fine on Amazon’s European subsidiary, Europe Core S.à.r.l., for GDPR violations; this fine was comminated in data-protection terms, but will bear competition effects, too, and EU authorities might take note for future legal strategies to be elaborated to constrain MNCs’ factually monopolistic market dominance.

¹³⁶¹ With a focus on American competition agencies, *check further* BAKIR et al. 2021.

¹³⁶² *Refer to* ARTUS and VIRARD 2021, pp. 71-73.

¹³⁶³ *Refer e.g. to* SALVATI and DILMORE 2021, pp. 95-97.

¹³⁶⁴ *See* BARRERA and BUSTAMANTE 2017, pp. 151;156; DiSALVO 2018, pp. 373-377; KRMEK 2017, p. 54 ff; GORMSEN 2016, pp. 373-375.

¹³⁶⁵ *Check generally* ARESU 2020.

¹³⁶⁶ *Refer to* General Court of the EU, “Tax rulings issued to Nike and Converse by the Netherlands tax administration: the General Court dismisses the action brought against the Commission’s decision to initiate the formal investigation procedure”, Press Release No. 124/21, 14 July 2021.

intellectually and operatively—at the core of public legitimate interventionism in the market, as to ensure the latter abided by a minimum set of rules oriented to socialised efficiency and distributional wellbeing:

Social market economy supporters generally agreed on most points of economic policy with the ordoliberals, [...] and the terms are often used almost interchangeably. [...] The ordoliberal vision of society was defined by [...] the search for a “third way” between democracy and socialism, between the American “West” and the Soviet “East”. [...] The focus of ordoliberal thought was on the role of the economy in society. They accepted the two basic starting points of classical liberalism – that competition is necessary for economic well-being and that economic freedom is an essential concomitant of political freedom. [...] But the ordoliberals expanded the lens of liberalism. For them, it was not sufficient to protect the individual from the power of government, because governments were not the only threats to individual freedom. Powerful economic institutions could also destroy or limit freedom, especially economic freedom. [...] This meant that *the [S]tate had to be strong enough to resist the influence of private power groups*. [...] From a non-ordo perspective, [any] distinction between governmental “intervention” and constitutional implementation seems suspect, because governmental action necessarily interferes with the economic system to the extent that it creates incentives and disincentives for economic conduct external to those produced by the market itself. One might assume, therefore, that the ordoliberal scheme inevitably creates a highly regulated economy with all the problems of discretion and uncertainty associated with high levels of regulation. The ordoliberals, however, saw no reason why constitutional discourse could not be applied to governmental conduct in the area of economic regulation just as it was to governmental conduct generally. If it is legitimate to ask whether particular governmental conduct conforms to the political constitution, it ought to be legitimate to ask whether such conduct conforms to an economic constitution. *Decisions about the legal environment of the market would thus be subject to the economic constitution in the same way that political decisions were subject to the political constitution*. [...] Competition law was the institutional anchor for the ordoliberal program, and it was also *tightly interwoven with the theoretical component of the system and with the overall constitutional framework*. [...] For entire communities that have been taught to view the market as an enemy of community, this set of insights [wa]s necessary to generate confidence that the market not only can create wealth, but can do so in a fashion that comports with deep-seated values of community and equity.¹³⁶⁷

¹³⁶⁷ GERBER 1994, pp. 32;35-37;46;56;79 (three emphases added).

Obviously, the historical incident that (should have) compelled a rediscussion of this whole project is the failed adoption of the EU's constitutional text, which left the EU with a quasi-constitutionalised economic order truncated of its politico-institutional counterpart; this notwithstanding, the antitrust-framed approach to all-encompassing market regulation—thus including tax aspects thereof—did not exhaust itself then. Indeed, the 1997 “Monti Package” had already made an attempt at draining tax competition through the stringent application of antitrust rules;¹³⁶⁸ almost a quarter of century later, regrettably, Apple appealed, and the Commission's courageous but short-sighted approach failed.¹³⁶⁹

Limiting aggressive and harmful tax avoidance through state-aid rules entails, for instance, the reinterpretation of APAs in anticompetitive terms as “aid of State” rather than as tax privileges accorded to certain MNCs;¹³⁷⁰ in certain borderline cases the two rationales might partly overlap,¹³⁷¹ of course, but from a legal standpoint the justification for objecting to these APAs changes remarkably under the two regimes, mining the chance for a case to succeed in a court of law. Among other discrepancies,

[t]he OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* [...] refer to Article 9(1) of the OECD Model Convention as the authoritative statement of the arm's length principle, but that does not give it legal effect without national law that imposes an arm's length rule. If the Commission has doubts about the compatibility of the arm's length principle as applied under OECD Guidelines and incorporated in national tax laws, it ought to focus on national tax legislation rather than individual rulings. An examination

¹³⁶⁸ Refer to PEROTTO 2021, p. 315.

¹³⁶⁹ See REGAN 2020; PHILLIPS et al. 2021, pp. 290-291; LÉVÊQUE 2021, p. 128. Arguably, the root of the Commission's “courage” lies in its relative independence from MSs, compared to the other two components of the EU's “triumvirate” (especially the Council). Among those three public institutions, the Commission is the only one representing the “interests of the Union as a whole”, which might possibly explain its—futile, yet somewhat admirable—drive in combating tax avoidance within the EU.

¹³⁷⁰ See PEROTTO 2021, pp. 320-322.

¹³⁷¹ For example, see PEROTTO 2017, p. 1028. In these instances—relevantly for policy-coherence considerations I have been delineating all throughout this study—the linking element has been competitive fairness, which unconsciously draws on HR's conceptual toolbox and applies it to capital and legal persons rather than individuals. Similarly, see also PEROTTO 2021, pp. 324-325.

of national tax rules must be undertaken as those rules are, and not as the Commission feels they ought to be.¹³⁷²

Of course, the Commission opted for this solution as the EU is endowed with no competence in tax matters, therefore there is no way for the EC to scrutinise MSs' provisions on transfer pricing, so that drastic intergovernmental adjustments—very unlikely to be approved due to unanimous voting rules—would be required.¹³⁷³ However, the EC's competition-phrased approach to tax avoidance (and APAs more specifically) is legally untenable, so that its underlying purpose should be rather sustained intergovernmentally by MSs themselves.¹³⁷⁴ Even those scholars who look less critically at the Commission's state-aid approach to countering tax avoidance have conceded that while this tactic might work to redress specific past legislative mishandlings, it cannot replace a more systematic intervention to avert the complex dodging schemes yet to come.¹³⁷⁵ In other words: once an avoidance scheme has been identified, the Commission's state-aid approach might restore justice “teleologically” with regards to that specific occurrence,¹³⁷⁶ but state-aid tools are *inefficient to prevent*

¹³⁷² GORMSEN 2016, p. 370.

¹³⁷³ See also SALVATI and DILMORE 2021, pp. 93-94.

¹³⁷⁴ See also *ibid.*, pp. 380-381.

¹³⁷⁵ Refer *e.g.* to COLINO 2020, p. 402.

¹³⁷⁶ One temporarily successful initiative in this respect, the *Engie* case, currently pending appeal before the CJEU, was based on the Commission's argument that the French energy multinational Engie (formerly GdF Suez) had received state aid in the form of fiscal advantages by the relevant Luxembourgish administrations, worsened by evidence that Luxembourg's tax authorities «had assessed each transaction in isolation, and moreover apparently without an anti-abuse test based on the domestic GAAR» (Engisch 2021, p. 2). The General Court accepted the EC's argument on 12 May 2021, by assessing

in meticulous detail why Engie used a financing structure that the national legislator would “reasonably” regard as inappropriately complex, and why Engie could not invoke any valid commercial reasons for so doing. The Court did not limit itself to reviewing whether the assessment of the Luxembourg authorities that the GAAR was not applicable was seriously flawed and suffered from manifest errors. In so doing, the Court effectively supplanted the interpretation of the GAAR by the national tax authorities by its own understanding of the provision. Moreover, if consistent, it would have to pursue the same approach vis-à-vis national court rulings concerning the application of the GAAR. The Court thereby act[ed] like a (supreme) administrative court that polices the application of the domestic GAAR. [...] Arguably, a certain degree of deference to the legal assessment of the competent national institutions is required when testing the alleged misapplication of national tax law. Article 107(1) TFEU has not been conceived to vest European institutions with ultimate interpretative authority over non-harmonised national (tax) law

– *ibid.*, p. 3. See also BAKER 2021. However, my take is that because States are captured and the EU seems unable to overcome its hybrid (and perhaps unsustainable) semi-sovereign legal-political configuration, this is the only way for the time being to ensure that MNCs do not play around with said semi-sovereignty and

these avoidance schemes from being sought and exploited in the first place (particularly by the market's "non-giants", much more numerous and less intensively scrutinised by antitrust agencies than the European subsidiaries of global quasi-monopolists like Apple). Mentioned approach «allows the Commission to directly tackle individual tax rulings without examining the question whether they form part of a scheme for (international) group companies which should otherwise be examined». ¹³⁷⁷ In practice, this means that most of those schemes will successfully be operated and kept off-the-radars for years, and might never be uncovered. Administrative fines are not going to amount to a credible deterrent for other corporations, either.

Moreover, and perhaps most cogently, it is the *underlying legal rationale* to differ in antitrust and tax law: the first is concerned with the *relevant market(s)*, so that no single competition authority would ever be concerned about the market power an MNC amasses *overall*, as what matters is its weight *in each market* artificially insulated from all others. Debates obviously ensued as to what nature should be attributed to such "markets" and whether they still stand or make sense in our digitised society, but for the time being this is the way antitrust agencies work *and think*. Instead, to address MNCs (particularly the Big Tech) satisfactorily tax-wise, the only possible "relevant market" for analysis is *the world*, exactly because differently from products, labour, or even (to an extent) services, capital embodies the paradigmatic outcome of capitalism's legal-person artificialism: mobility. In fact, MNCs' profits are currently freely transferable worldwide (with a few minor exceptions) because *this is what the captured, global legal code of capital (i.e., what we call "the law", especially*

that, consequently, the substance of tax fairness is safeguarded. As I am writing, whether the CJEU will depart from its previous state-deferent jurisprudence or (more safely) reject this judgement's teleological rationale remains to be ascertained.

¹³⁷⁷ GORMSEN 2016, p. 379.

corporate law) was conceived for. Markets are artificial, and technology-aided capital's "freedoms" are too: if regulators think of the former «as collections of trades occurring in a specific *place*, rather than as exchanges occurring in some abstractly defined regulatory *construct*»,¹³⁷⁸ they will keep failing to coherently address MNCs' derivative fictionalism tax-wise.

These problematics surface particularly cogently when it comes to the so-called "IP boxes",¹³⁷⁹ or anyway to taxing the transfer of intangible assets such as intellectual property (IP),¹³⁸⁰ transfers which often lead to tax avoidance owing to transfer (mis)pricing and other techniques,¹³⁸¹ even after infamous loopholes such as the ones enabling the Double-Irish scheme and the UK's Patent Box have been (temporarily?) closed.¹³⁸² In this respect, too, the Commission's approach revolves around anticompetitive practices,¹³⁸³ while a more far-sighted attitude would strive to rethink the legal identity of MNCs from scratch, perhaps within wider reforms to encompass international-trade aspects of global taxation.¹³⁸⁴ The EU's input towards reforming "offshoring" in tax law could indeed benefit from an overhaul of "offshoring" in international trade, starting from a more assertive posture against the neo-imperial facets of US' FTZ-routed trading-tax activities. There is a whole

global fabric of production across the [U.S.] that is extraterritorial for the purposes of U.S. customs regulation so that goods and parts can be imported and exported multiple times as long as they remain within that *archipelago of highly securitised foreign-trade zones in the U.S.*, in transit, and in similar zones in other countries before they "enter" the U.S. or another country as part of a manufactured product (like a BMW car) or processed product (like Starbucks coffee) and *become visible for taxation or tariff regulation*. [...] *Potential employers are courted under*

¹³⁷⁸ PARDO-GUERRA 2020, p. 265, second emphasis added.

¹³⁷⁹ See extensively JEDLIČKA 2018.

¹³⁸⁰ See e.g. KUŹNIACKI 2017, pp. 15;25, and KRMEK 2017, pp. 69;84-96.

¹³⁸¹ See extensively EVERS et al. 2015.

¹³⁸² Refer to BEGLEY 2021; CHOUDHURY and PETRIN 2019, p. 325.

¹³⁸³ Refer e.g. to the Commission DP on Fair Corporate Taxation, p. 2.

¹³⁸⁴ See also BLAIR-STANEK 2015, p. 14; ABENDIN and DUAN 2021, pp. 12-13. On US taxation and the WTO, check also TOURNIER 2017, p. 184.

*this veil of secrecy, often promised exemption from local taxes, locally provided land and facilities, workers not inclined to unionise, training partnerships with local community colleges (leveraging public funds for corporate needs), [...].*¹³⁸⁵

The US is not alone in this game, of course, nor is it historically unprecedented: I have described its Chinese counterparts *supra*, and one could cite several historical forerunners, including an interesting one from Japan.¹³⁸⁶ However, FTZs and similar offshoring a-jurisdictional areas are also where money laundering best nestles and blossoms from:¹³⁸⁷ was not the US urgently busy with tackling money laundering, as reported above?

iii The artificiality of EU's cross-border companies and the artificialism of the EU as a polity beyond the market union

Unfortunately, upon a rare move of self-restraint, the CJEU itself, through its case-law, endorsed the general perception that tax avoidance amounts to a legitimate exercise of business freedom under Articles 49 and 54 TFEU; relying on their legal personality, companies «may choose to structure their business so as to limit their tax liability».¹³⁸⁸ Similar holdings were reiterated, e.g., in *Kofoed*, *Foggia*, *Egiom*, *Deister*, and *Cadbury*. The whole ordeal has been reported by KUŹNIACKI¹³⁸⁹ so extensively and exemplarily that it does not call for a re-summary here; suffice it to mention that solely the establishment of *wholly artificial* arrangements (basically, the old-styled “letter-box companies”) whose *only possible* purpose is tax avoidance may be

¹³⁸⁵ KINGSOLVER 2021, pp. 114;116, four emphases added.

¹³⁸⁶ Refer to HOWLAND 2012, p. 201.

¹³⁸⁷ The reader might want to check FATF 2010.

¹³⁸⁸ *Halifax*, para. 73.

¹³⁸⁹ 2017, pp. 17-22; 2019, pp. 267-279.

legitimately limited,¹³⁹⁰ but the test for distinguishing between “genuine” CFCs and “wholly artificial” entities is yet to be perfected¹³⁹¹ and risks becoming yet another proforma to the advantage of businesses. After all, this EU-law test was borrowed from ITL’s PPT; in fact, it «is by its own nature general, vague and imprecise[,] and consequently follows some of the main features highlighted by international law scholars when addressing [ICL]». ¹³⁹² For both the Luxemburg’s Court and the EC, natural persons are bound to their State of residence for tax purposes, whereas States may pursue tax-competition strategies for more proficiently “placing” their companies in the market, thus not only tolerating but actively encouraging tax avoidance and aggressive tax planning. Because of this, even provisions which might appear strict, are in fact devoid of concern for cross-border arrangements, including that on the retroactive application of the DAC6 Directive:¹³⁹³ if tax-avoidance schemes performed under these arrangements are mostly lawful, enhanced disclosure to tax authorities will only prove of fairly limited impact.

EU institutions did join the CJEU in banishing *wholly artificial* entities, but they also declared themselves “unsure” about how financial companies and holdings should be framed within this scheme, given that they are “*artificial*” by *definition* (that is, without territorial connections and production lines).¹³⁹⁴ Hence, the EU seemingly rejects the comparable doctrines of *Ökonomische Betrachtungsweise* and *substance over form* as previously elaborated in Germany and common-law respectively.¹³⁹⁵ And

¹³⁹⁰ Notably, the applicable test in other jurisdictions is less demanding and slightly more discretionary. For instance, in the PRC, arrangements need not be *wholly* artificial in order to be classified as tax avoiding; *refer e.g. to the Children’s Investment* case.

¹³⁹¹ *See further* CERIONI 2012, pp. 1103-1108.

¹³⁹² BROEKHUIJSEN and MOSQUERA VALDERRAMA 2021, p. 96.

¹³⁹³ Art. 1(2)12:

[...] to require intermediaries and relevant taxpayers to file information on reportable cross-border arrangements the first step of which was implemented between the date of entry into force and the date of application [...].

¹³⁹⁴ *Check further* CERIONI 2012, pp. 1116-1119.

¹³⁹⁵ *Refer to* RUIZ ALMENDRAL 2013, p. 137.

yet, even assuming that the primary concern of EU law is the optimal functioning of the internal market in terms of efficiency and resource allocation,¹³⁹⁶ no society—thus no market—can run efficiently when citizens perceive or can advance reasonable claims that they are being treated unfairly – in this case, that policymakers are blatantly captured by economic élites which are exclusively serving their own interests rather than being regulated also for the common good. Even prior to and beyond any economic consideration, the “whole-artificiality” doctrine is a legal construct whose inherent harm resides in the values it “certifies” and conveys to EU citizens; it is tantamount to accepting that MNCs can avoid paying taxes by relocating more or less fictitiously as they please within the EU *because the latter is a single market*, whilst citizens—by definition bound to a territory and to a passport (or, rarely, more, or none at all)—remain dependent on the coercion of territoriality for tax purposes *despite the EU defining itself as a single market*. Put differently, sanctioning this doctrine stands tantamount to asserting that whilst companies are free to select legal artifices as they please insofar as they are lawful in the country where they are chosen, such a freedom is labelled as unlawful when it comes to individuals and the allocation of their savings and investments as they see fit, even when such allocation is lawful under the laws of the (low-tax) “destination” country. An obvious unbalance is unearthed here between natural and legal persons, grounded in a profound disconnection between citizenship rights and duties of legal and physical persons,¹³⁹⁷ but Brussels seems not intentioned to rearticulate its approach. Interestingly,

¹³⁹⁶ On the EU being primarily concerned about the endurance of the single market when legislating on tax matters, *see for instance* KUO 2009, pp. 203-204; SCHARPF 2010, p. 111. *See also* SMIT (2011, p. 268), according to whom, for the EU,

any *national* tax avoidance measure must be proportionate in that it must be specifically designed to combat the contested tax avoidance or tax evasion. Anti-abuse tax measures of a mere generic nature which also catch *bona fide* cases are not allowed under the Treaty freedoms

(first emphasis added). Thus, as both good will and ill intentions are difficult to prove, corporations are relieved with the benefit of the doubt. *Contra* (but outdated), ENGLE 2006, p. 394.

¹³⁹⁷ *See* CERIONI 2012, pp. 1125-1126.

three recommendations [by] the OECD—applying CFC rules to both resident and non-resident companies, designing CFC rules to explicitly ensure a balanced allocation of taxing power, and applying CFC rules to transactions that are “*partly wholly* artificial”—put forward [...] under BEPS Action 3 with a view to strengthening Member States’ CFC rules in a way that is compatible with EU law do not meet CJEU requirements on the compatibility of CFC rules with EU law on a standalone basis. Only the recommendation which refers to “substance analysis that would only subject taxpayers to CFC rules if the CFCs did not engage in genuine economic activities”, can be said to meet the CJEU’s requirements insofar as it falls within the ambit of the CJEU’s “*wholly* artificial arrangements” limitation. [...] EU law still seems to facilitate tax avoidance by both EU and non-EU taxpayers rather than prevent[ing] this phenomenon. Hopefully we are very close to achieving a truly tangible shift towards an effective prevention of tax avoidance under EU law so that the internal market will be built and function properly, ensuring optimal and fair allocation of resources within the EU. Fuel to boost anti-avoidance policy under EU law seems to have triggered the international initiative of the OECD addressing BEPS, since the EU has been cooperating in the realization of the BEPS project via its membership in [the] G20. [...] C]urrent developments at the level of the EU and the OECD may lead the US to shift from explicitly praising US MNEs for their tax[-avoidance] practices in the EU through the voice of high positioned US politician[s], to more robust anti-avoidance legislative actions.¹³⁹⁸

Other Authors reached equivalent conclusions: CFC rules, as presently drafted, are still insufficient to tax the control of foreign passive companies; being «sensitive to the group’s legal structure, the legal form, and the structure of the shareholdings[, they] offer room for manoeuvre».¹³⁹⁹

iv Global osmosis or insulated regionalism? A regional proposal for taxation within the EU

Perhaps, on the part of the EU, a common system of taxation rules that “insulates” EU tax law from external standards, soft laws, and conventions—on the model of the effect the *Achmea* judgement exerted on infra-EU investment

¹³⁹⁸ KUŹNIAK 2017, pp. 23;25-26, two emphases added.

¹³⁹⁹ KOLLRUSS 2021, p. 28.

arbitrations—would be worth considering. The ATA Directive has not persuasively homogenised the applicable test and the interpretation of the CJEU case-law (nor it could do so, in fact, as a Directive), so much that doctrinal discussions are not exhausted on the issue.¹⁴⁰⁰ Unsurprisingly, the EC itself

fears that a unilateral and divergent implementation of the OECD/G20 BEPS measures by each member [S]tate could fragment the single market by creating policy clashes, distortions, and tax obstacles for businesses, and at the same time create new loopholes and mismatches that could be exploited by companies seeking to avoid taxation.¹⁴⁰¹

This is because in such an integrated regional system, EU rights for companies do not correspond to equally extensive EU obligations for the same companies, encouraged by their States to avoid other (EU and non-EU) countries' taxes, and at times even their own ones (that is, those stipulated by legislation and theoretically applicable without positive discrimination). For instance, in response to ATAS II, the Dutch Government announced it would repeal its 2005 law legalising the CV-BV scheme, but will reserve the right to seek further opportunities and policy solutions in order to keep the “corporate-friendliness” and “competitiveness” of the Dutch economy regardless of its statutory laws;¹⁴⁰² translated, it means that while the old conduit for tax avoidance will be closed, new schemes will be devised and tapped into.

Eventually, mentioned *Achmea*-styled “insulating moment” would be worth pursuing yet difficult to achieve: taxation remains a symbolic cornerstone of state sovereignty even for EU countries, especially after the other major symbol of any State—its currency—has been relinquished by most MSs in order to coin the Euro. Moreover, agreeing on distribution of taxes would mean no longer effectively

¹⁴⁰⁰ Refer e.g. to SCHMIDT 2016, p. 102.

¹⁴⁰¹ Ibid., p. 91.

¹⁴⁰² Refer to KU et al. 2019.

competing through corporate tax rates, which in turn implies that retaining sovereign prerogatives over such quantum would become meaningless; indeed, taxation is not a policy area that can be communised in part: either it becomes an exclusive EU competence, or it remains tight in the control of States, with all the consequences¹⁴⁰³ this entails. «Paradoxically, an issue caused by the level of integration of *the internal market [i.e., of capital]* can be tackled effectively only through further integration».¹⁴⁰⁴ This is one of the reasons why the CCCTB initiative outlined hereinafter, even if eventually approved, would not suffice to bring corporate tax avoidance and the problem of EU tax havens to an end.¹⁴⁰⁵ A global minimum effective tax rate for corporations is as urgent as never before, and the EU—or even just one of its MSs—could be a first-mover to this end;¹⁴⁰⁶ other global measures would close even more gaps, but this one needs no subscription by all low-tax jurisdictions worldwide, thus the EU could proceed expeditiously.¹⁴⁰⁷

The CCCTB was initially designed as an opt-in system;¹⁴⁰⁸ essentially, it

determine[s] company income on an EU-wide basis and allocate[s] the income to the [MSs] on the basis of a formula. [...] The tax rules applicable to a company or group of companies are the same, irrespective of where its headquarters is located. [...] Thus, the taxable profits of an EU company would be allocated to the [MSs] in which the company operates using [an] EU formula [...] Said taxable profits would then be taxed in the [MSs] to which they are allocated at th[ose MSs'] tax rate. [...] The CCCTB would provide significant simplification and compliance benefits to the EU companies operating in several [MSs, yet t]he current transfer pricing and double tax issues

¹⁴⁰³ See also PEROTTO 2021, p. 319; GUIMARÃES 2019, p. 103.

¹⁴⁰⁴ PEROTTO 2021, p. 320, emphasis added. Actually, once tax harmonisation within the EU is accomplished, the Union would face the representation of exactly the same problem, just one layer above, i.e. vis-à-vis its external dimension: the global market. Indeed, the present study takes the view that global capital being a reality, no shortcut is available to policymakers other than the *global* harmonisation of tax rules – or, even better (but *a fortiori* unrealistically), the rethinking of corporate law and of the true convenience of MNCs' existence, not to mention "shareholding".

¹⁴⁰⁵ Cf. *ibid.*, pp. 336-337.

¹⁴⁰⁶ Check CASSEE 2019, p. 254.

¹⁴⁰⁷ See further BARAKÉ et al. 2021, pp. 7-8; 29-30.

¹⁴⁰⁸ See REMEUR 2015, p. 25, fn. 66.

will remain for cross-border transactions between EU entities subject to the CCCTB and their non-EU branches or associated enterprises.¹⁴⁰⁹

This means that tax avoidance performed via arrangements partly external to the EU would still be hard to tackle; similarly, at the international level,

tax avoidance would not be eliminated by a worldwide multilateral tax treaty using formulary apportionment [...]. But one of the advantages of formulary apportionment is that it will eliminate opportunities for some forms of avoidance such as transfer pricing manipulation. Under such a multilateral tax treaty, international enterprises would still be able to shift profits to low-tax jurisdictions, but they would have to engage in an active business in tax havens. Under formulary apportionment, a company is taxed on its combined income, and this prevents it from shifting profits between locations through transfer pricing. Transfer[-]pricing manipulation to shift profits to tax havens would be pointless under formulary apportionment because the profits would still be the profits of a unitary business and subject to tax. But with formulary apportionment, profits might be allocated to low-tax countries by manipulating the formula, which would be achieved by locating the factors in the formula in low-tax countries.¹⁴¹⁰

Whilst some businesses would find such a relocation inconvenient and prefer to pay their fair share of taxes, others—especially those operating on intangible assets¹⁴¹¹—would face no significant hurdles in relocating as to keep avoiding taxes despite mentioned formulary apportionment schemes. They would also devise group-payroll arrangements to fictitiously assign employees working in higher-tax MSs to lower-tax MSs, and adopt strategies towards beneficiaries grouping in lower-tax MSs.¹⁴¹²

[I]n addition to shifting profits to low-tax rate jurisdictions, multinational groups also shift profits from profitable affiliates to unprofitable affiliates in order to make use of losses in the high tax jurisdiction, despite the costs of conducting such a scenario.¹⁴¹³

¹⁴⁰⁹ KOBETSKY 2011, pp. 412-413; 418-419.

¹⁴¹⁰ Ibid., p. 426.

¹⁴¹¹ See Ibid., pp. 426-429.

¹⁴¹² Check extensively DE WILDE 2014, pp. 33-37.

¹⁴¹³ CHEN 2019, p. 5.

The principle of territorial alignment between operational losses and tax-relief claims dependent thereupon has been upheld by the ECJ in *Marks*,¹⁴¹⁴ which seems to exclude the legality of turning losses abroad into home tax reduction. However, alongside the OECD BEPS project's inability to capture such a scenario owing to its overfocus on tax havens traditionally understood as generally low-tax jurisdictions,¹⁴¹⁵ the EC proposed a CCCTB¹⁴¹⁶ that accepts, worsens, and even encourages this fiscally wrongful phenomenon:

Corporate losses can play a role in multinationals' tax planning scenarios because the process offsetting corporate losses has the same effect of making part of income subject to the zero-tax rate. To utilize losses incurred from a relative high tax rate jurisdiction, can de facto make more taxable income subject to the zero-tax rate because the not-yet-offset taxable income in a relative high tax rate jurisdiction will result in a heavier tax burden than these in a relatively low tax rate jurisdiction. Theoretically speaking, there is an incentive to shift profits to a high tax rate jurisdiction in order to let losses incurred in this relative high tax rate jurisdiction be offset. Empirical evidence shows that losses incurred in a high tax rate jurisdiction can also be an incentive for multinational taxpayers to shift profits to that jurisdiction. Such scenarios of Shifting-To-Losses can also take place under the proposed CCCTB Directive Proposal under EU law according to its current text and the *EU legislators do not seem to be quite aware of this problem*.¹⁴¹⁷

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¹⁴¹⁴ See further SCHREIBER 2013, p. 104.

¹⁴¹⁵ Refer to CHEN 2019, p. 22.

¹⁴¹⁶ See SCHREIBER 2013, c. 5. The positive elements of the CCCTB are summarised in HENTZE 2019; in particular, taxation is refocused on where the creation of socio-economic value occurs: following the currently applicable arm's length principle,

the main share of the generated profits is allocated to the subsidiaries where IP is registered. As a consequence, other steps in the value chain, e.g. production and distribution, are valued less. This leads to the remarkable result that production and distribution entities – despite their high number of employees – only receive a small share of the total profit generated in the value chain of an MNE

(p. 6). Under the new CCCTB scheme instead, MNEs profits

would no longer be assessed by using the arm's length principles and (hypothetical) market prices, but split based on a formulaary apportionment. This implies that an allocation key consisting of sales volume, number of employees and capital invested would be applied to distribute the taxable profits of an MNE. [...] The EC argues that profits shall be allocated where value is created

(pp. 4;9).

¹⁴¹⁷ CHEN 2019, p. 25, emphasis added. Cf. PEROTTO 2021, pp. 336-337.

Given that the EC regularly gathers with some of the most experienced international tax planners, that EC lawyers form a cohesive “interpretive community” with deep ties to academia and the industry,¹⁴¹⁸ and that accredited lobbyists in Brussels are particularly well-connected to political power at both the domestic and EU levels, it seems rather obvious that one should speak of culpable negligence rather than “unawareness” of the problem. This is yet another—and probably the most powerful, given the relative independence of the Commission when compared to other EU bodies—exemplification of the misalignment regulatory capture gives rise to, not only between stated purposes and actual legislative outcomes, but on the unevenness between the ultimate bearers of such incongruences. In other words, the misplaced focus on tax havens and the purported naivety of policymakers is making little savers¹⁴¹⁹ pay for truly aggressive and rights-eroding anti-evasion campaigns which *persecute the weak whilst turning a blind eye on the powerful*: for European institutions, it appears to be just “business as usual”. Will the next CCCTB proposal’s drafts improve on these aspects? Without expressing overconfidence, I would say there is some marginal room for it to happen, although the scenarios outlined here did not account for potential MNCs’ business adjustments to the CCCTB, which could start moving jobs rather than assets to tax havens, in order to benefit the most from apportionment criteria rewarding R&D and production.¹⁴²⁰ Indeed, the State where MNCs’ actual production takes place would collect the highest apportioned share of such MNCs’ total taxable assets, so that if jobs are moved (perhaps even fictitiously,

¹⁴¹⁸ Read LEINO-SANDBERG 2021, pp. 25-57.

¹⁴¹⁹ Besides amounts per se, savers are indeed “little” when they do not diversify their money-allocation strategies: interest rates on passive accounts (“*rendimento sui depositi*”, in Italian) has been low for decades all across developed countries, and the trend has now stabilised. Furthermore, one shall consider that before the ongoing pandemic, careers were increasingly and somehow “forcibly” global (especially in some sectors), so that it was more and more common for even a very modest saver to own a few savings accounts in jurisdictions other than the one(s) of their (fiscal) residence or citizenship.

¹⁴²⁰ Refer also to HAKELBERG 2020, p. 141.

particularly managerial and communication ones) to a tax haven within the EU, the favourable tax rate allows MNCs to pay little in the jurisdiction where they would pay they most.

d Hope and fallacy on the path to BEPS 2.0

i Heading towards BEPS's 2.0 version

Because the BEPS Project was hastily finalised in the form of a soft-law, watered-down compromise, shortcomings, and fallacies started to emerge quickly after its adoption, making way for a re-edition to be agreed upon with considerable degree of urgency. Accordingly, States started negotiations towards a “BEPS 2.0” agreement that could update or even wholly replace its “1.0” edition (whose negotiations had spanned from 2013 to 2015).

In what follows, I will assume the reader is accustomed to the main tenets of both editions; in fact, I will not delve into a comprehensive and step-by-step account of the politico-legal process that led from the first to the second edition here. This was magisterially accomplished, *inter alia*, by another scholar through a two-part paper¹⁴²¹ which scrutinises all relevant details and recounts most information one needs to be aware of in order to grasp the point of this section: contrary to the expeditious progress against tax evasion, countering tax avoidance is a fraught-with-interference, overcaution-underpinned process which is constantly held hostage by (certain?) States’ unwillingness to move forward swiftly. Through the following sections, I will

¹⁴²¹ Refer to KADET 2020^(a;b). A similarly informative account, but performed through diagrams and tables, can be retrieved from HO 2020, pp. 35-38.

thus highlight specific matters which might help one understand why BEPS 2.0—just like BEPS 1.0—does still not address the gist of the problem, being equally well placed to become a policy failure.

Dissimilarly to most sections of the present Thesis, this part is not premised to advance any novel original argument; it is simply a basic review of what BEPS 2.0 is mainly about according to scholars and professionals, *as a necessary digression to frame the failures, efforts, and delays of global governance vis-à-vis corporate tax avoidance.*

ii Policy “unawareness”, digital giants, and the rationale for a BEPS reedition

Prior to entering the merits of BEPS 2.0, the reader is reminded that besides the technical asymmetries illustrated *infra*, the whole process finds it hard to progress because of the inherent capture of those who should strive for it foremostly: *all citizens’* representatives. Indeed, as was widely evidenced by BEPS 1.0 already, tax avoidance is developed countries’ kingdom of hypocrisy and corruption; illustratively, this working session of the UK’s House of Lords¹⁴²² dedicated to the UK’s stance vis-à-vis BEPS 2.0 displays unelected, privileged-by-birth public officials being ostensibly “unaware” of the way the policies they themselves crafted are being used to shield huge amounts of profits from taxation:

Lord Sikka (Lab): My Lords, I draw attention to my entry in the register of interests: I am an unpaid senior adviser to the Tax Justice Network. The OECD has released aggregate country-by-country data from 26 countries including the US, China, Japan, France and India. This suggests that there is considerable international consensus around transparency. The UK has blocked the OECD from releasing its

¹⁴²² Parliamentary Debates (Hansard), House of Lords: *Official Report*, 2 November 2020, Vol. 807, No., 137 p. 493, three emphases added.

aggregate data. It would be helpful to know why. Furthermore, the analysis of the OECD's data shows that Bermuda, a British Overseas Territory, is responsible for \$10.9 billion of tax avoidance and evasion. This is particularly hitting low-income countries. Why do the UK Government continue to indulge these fiddle factories?

Baroness Penn (Con): *I am not aware of the particular issue* that the noble Lord raises, but I will look into it and write to him. The UK is committed to progress on this initiative, which we started back in 2013 when we hosted the G20.

Baroness Sheehan (LD): My Lords, the UN[CTAD] estimates that developing countries lose up to \$200 billion every year in fiscal revenues due to a lack of in-country tax take. Why does CDC, the UK's FDI, regularly use tax havens, which results in less money for health and education, the undermining of good governance and the consolidation of conditions in which corruption can flourish?

Baroness Penn (Con): *I do not recognise the picture* that the noble Baroness painted. The UK stands behind the international action being undertaken through the OECD and the progress being made in tackling tax avoidance and evasion. Since 2010 the UK has *invested more than £2 billion extra in HMRC to tackle evasion*. This has brought dividends in narrowing the tax gap, which is at a near record low.

Another curious—and truly telling—approach surfacing from the way this debate was conducted is that all responses by Ms Joanna Carolyn Penn to the objections raised by her “noble” peers were tantamount to either generalisations or postponements. Furthermore, her laughable, excuse-prone approach to corporate tax avoidance consists in “investing money” (what does that even technically mean?¹⁴²³) for tackling avoidance (which she wrongly calls “evasion”), rather than closing the legislative gaps and jurisdictional loopholes that make it possible in the first place. This results in a double waste of money and a consequent further contraction of welfare services for the average taxpayer, whose possible tax *evasion* is, in contrast, fought against with “admirable” resolution.

¹⁴²³ Several commentators have emphasised that the main problem with late capitalism is not the disparity in wealth per se; rather, it is the fact that most of such wealth is employed not to produce and invest in the real economy, but just to be amassed as a security to then borrow even more money, in an endless vicious cycle of cumulation that fails to touch base with reality. This leads *inter alia* to increased speculation and lower profit rates from economic activity, and thus weaker incentive to entrepreneurship. Refer for instance to SMITH 2018, pp. 322-324.

At the UK's House of Commons, the hearing-debate followed roughly the same path,¹⁴²⁴ but because the majority of this House's members need to work in order to survive, the language shifted in favour of urgency, concern, and openness:

Ms Eagle: Alex, one thing that really infuriates people, especially when times are tough, is to see companies like Starbucks, which has a very large turnover in the UK, pay virtually no corporation tax or company tax. Organisations like Amazon are the same. You have been hinting at what might be done to put this right, but can you give us a bit more information about how you think this problem could properly be dealt with?

Alex Cobham: The OECD process has identified the key issues. *It just has not been able to get there because of all the lobbying against it so far.* The issue is this. We have major multinational companies that make a large part of their global profits, often 10%, in the UK, but only declare perhaps 1% of their global profits here for tax purposes. We need a system that ensures that multinational companies, like domestic businesses, have to declare their profits in the same place [where] they make their money [...]. The second stage of the BEPS process, the one we are in now, began from the recognition that the old rules, the arm's-length principle, are not fit for purpose [...]. We have seen small businesses in the UK respond extremely well and often very creatively to the pandemic. That is not where you are looking to hit with this. You are looking at these businesses where the profits are genuinely unearned, the likes of Amazon that have been able to do very well simply because they were there when the [S]tate shut everyone else down. *It is the unearned profits we need to go after.* I would not target it by sector, but certainly by size. It is multinational companies that have really been able to do well, at everyone else's expense and not from their own efforts, but *just because of the [S]tate's intervention.*

As a tangential comment, after readings these excerpts, one is left with no wonder in learning that through *and thanks to* the 2008 financial crisis, while the poorest British citizens were facing austerity and house evictions—many children among them—and homelessness skyrocketed all around the UK, a new class of (informally tied) global corporate landlords found in London (and the tax avoidance it allowed for) its secret Eden, fuelling unprecedented waves of exploitative, extractive, financialised

¹⁴²⁴ House of Commons, Treasury Committee, Oral evidence: "Tax after coronavirus", HC 664, 16 December 2020, <https://committees.parliament.uk/oralevidence/1444/pdf/>, Qs 393;403, three emphases added.

municipal entrepreneurialism (even relying on Council-owned SPVs, operatively similar to those I have commented upon *supra* with regards to HK).¹⁴²⁵

The momentum to rethink taxation, however, does not originate in the challenges of tax avoidance per se, but it draws on the specific desire of States to capture a higher portion of digital-services profits through taxation, as to adapt themselves to the challenges brought about by the “digital economy” in the fourth industrial revolution.¹⁴²⁶ The Model OECD Convention is so obsolete with regards to this policy aim that countries, notably within the EU, have recently started imposing their own domestic taxes on digital services, giving rise to a fragmented web of uncoordinated policy responses to the problem of taxing online services.¹⁴²⁷ This race to taxing providers of digital services signals a broader shift in favour of a

value-in-use meaning of value where the roles of producers and consumers are not distinct, meaning that value is always co-created, jointly and reciprocally, in *interactions among providers and beneficiaries* through the integration of resources and application of competences, where [...] value creation becomes an ongoing process that *emphasizes the customer’s experiences*, logic and ability to extract value from products and other resources used.¹⁴²⁸

As a result, in 2016 the OECD developed a mandate on «how features of highly digitalized business models and digitalization in general should affect international tax rules»,¹⁴²⁹ which is not to be received in a strict sense. As I write, one may sense the whole economy is “digital”, or at least “digitised”, insofar as any good or service is—as a minimum—exchanged, advertised, or sold through digital platforms and economic codes; nowadays, services are traded digitally worldwide, regardless of

¹⁴²⁵ Refer extensively to BESWICK 2020.

¹⁴²⁶ On these challenges, see generally HADZHIEVA 2016.

¹⁴²⁷ See also BAKER 2020, p. 845; WAERZEGGERS et al. 2021, p. 346.

¹⁴²⁸ CALABRESE 2019, p. 79, two emphases added.

¹⁴²⁹ KADET 2020^b, p. 207.

physical borders (although new “digital” forms of sovereignty and seclusion are on the rise).¹⁴³⁰ In fact, the core transformation invests not so much the digital sales of products, but the extension of the sphere of service-delivery to the user, who becomes in turn a service provider whose data is sold to third parties¹⁴³¹ for scrutiny through algorithm-powered analytics; hereby, the conceptual yet also very concrete manifestation of surveillance capitalism. In OECD language, profits originating for these new “prosumer”-based economic models of user-platform circular (or “symbiotic”) exploitation are labelled as “non-routine returns”.¹⁴³² The EP, too, had tried to craft and uphold its own stance vis-à-vis the digital industries and related profits, but failed its mission due to the unanimity required of the Council (of the EU) to fulfil its co-legislative role.¹⁴³³

And yet, not only BEPS 2.0 has mutated into what many feel is the last-resort opportunity to systemically revise international taxation as to tackle tax avoidance, but importantly, it is also premised upon a remarkably more sophisticated, evidence-based, data-driven appreciation of both the major routes of aggressive tax planning¹⁴³⁴ and what a tax haven is all about, beyond the stereotype of sunny, palmy islands dispersed somewhere remote across the oceans.¹⁴³⁵

Far from focusing on digital activities only, BEPS 2.0 has placed two paradigms at the core of its mandate: the overhaul of the arm’s length principle, and the rejection of physical presence as the exclusive proxy for taxable nexus.¹⁴³⁶ These shortcomings existed way before the digitisation of the global economy, and have to do with the latter being “global” much more than with it being “digital”; in fact, they

¹⁴³⁰ See also European Parliament 2019, para. 14.

¹⁴³¹ See also KADET 2020^a, pp. 58-59.

¹⁴³² See also van WEEGHEL 2019, pp. 5-6.

¹⁴³³ See European Parliament 2019, paras. D-E; 5-7.

¹⁴³⁴ See also BAKER 2020, p. 846.

¹⁴³⁵ See ATEŞ et al. 2020, p. 5.

¹⁴³⁶ See also KADET 2020^b, p. 208; BAKER 2020, p. 845; COBHAM and JANSKÝ 2020, pp. 127-128.

do *not* exclusively concern the digital sector. For instance, from a human-rights standpoint,

the *de facto* and disproportionate power of some nations to better administer, regulate and enforce their tax prerogatives leads in practice to a disconnect between the *de jure* jurisdiction to tax defined in economic terms [and] the actual behaviour adopted by States as a result of their effective power as manifest in superior administrative capacity, economic positioning or geo-political weight.¹⁴³⁷

Admittedly, BEPS 2.0 will not necessarily reconcile these disparities, but the latter provide yet another theoretical foundation to the urgency of overcoming economic nexus as the sole premise for taxing rights.

Once clarified what its founding rationale is, it seems important to point to its actors: while BEPS 2.0 is an OECD initiative, several other IOs are playing a marginal or pivotal role in shaping its destiny. The EU, for example, is sparing no efforts to find a legal basis for “speaking with one voice” vis-à-vis this process; in other words, pursuant to a European Parliament’s mandate, it is assessing under what treaty competence it is permissible to frame said participation in order to serve in a more decisive function.¹⁴³⁸

iii The two-pillar cathedral

BEPS 2.0 is being negotiated around two “pillars”—also known as “Pillar 1” and “Pillar 2”—extending worldwide *ratione loci*; at their core, Pillar 1 concerns profit allocation and nexus rules, while Pillar Two focuses on a global minimum tax rate. Hypotheses around one more Pillar were informally circulating, but for the time being,

¹⁴³⁷ DE SCHUTTER et al. 2020, p. 1381.

¹⁴³⁸ See OVÁDEK 2020, pp. 89;182.

they have been dismissed.¹⁴³⁹ «There has been some mention recently of a “Pillar 3”, which would focus more on the fiscal interests of developing countries», but it is reasonable to observe that «this should be an agenda item all of its own» beyond the BEPS project per se,¹⁴⁴⁰ also due to the fact that combating tax avoidance is *in itself* a process that rebalances the tax relations between different areas of the world, both geographically (or “geopolitically”) and, so to speak, developmentally. In other words, «[t]he proposed measures will lead to reallocation of investment to jurisdictions where productivity is higher and will enhance global growth»¹⁴⁴¹ through reincentivising the so-called “real economy” (i.e., the “non-financialised” one, assuming but not conceding this is a meaningful watershed). The effects on the business-friendliness of small tax havens such as HK could easily prove devastating:

the imposition of a global minimum tax rate could undermine the attractiveness of Hong Kong’s low tax policy to MNEs[, insofar as] the [jurisdiction of] overseas parent companies could [gain] a right to tax the interest income since the income is exempt from tax in Hong Kong.¹⁴⁴²

The same can be argued about sovereign territories such as Ireland.¹⁴⁴³

Nonetheless, analysing BEPS 2.0 through a State-centred prism might not yield interesting results. While scholars who slightly amusingly recall that BEPS 2.0 background studies should be open and «willing to conclude that there may, in fact, have been little or no base erosion or profit shifting»¹⁴⁴⁴ can be reassured that profit

¹⁴³⁹ And yet,

[w]hile the OECD [...] said a third pillar is not being considered that would focus on a global excess profits tax as a means to raise revenue following the coronavirus pandemic, [it] suggested there could be a third pillar internally at the OECD that would focus on BEPS rules for lesser developed countries that may not benefit sufficiently from the original BEPS projects

— FITZPATRICK and RULAND 2020.

¹⁴⁴⁰ BAKER 2020, p. 846.

¹⁴⁴¹ HO 2020, p. 39.

¹⁴⁴² Ibid.; see further NG and MORRIS 2019, p. 19.

¹⁴⁴³ See O’ROURKE et al. 2020, p. 18.

¹⁴⁴⁴ BAKER 2020, p. 846.

shifting is a constant and pervasive phenomenon, the latter will remain mostly invisible as long as we reiterate the State-centred paradigm and try to assess «which countries are benefitting from these activities, and which are disadvantaged».¹⁴⁴⁵ Rather, the lenses to be adopted are those that facilitate the identification of the transnational capitalist élite who, “suprajurisdictionally”, has gradually normalised and quasi-legalised those erosions of States’ tax bases.

1 The first pillar

Although, as explained elsewhere in the present study, customary norms were already undergoing profound transformation before BEPS 1.0, the latter’s impact “normalised” CFC rules well beyond the initial US’ “exceptionalism”. With BEPS 2.0, paradoxically, but not less effectively, this new custom seems to take a downward turn: the focus shifts from “reaching out to” foreign taxable profits on a State-by-State basis, to rather allocating taxing rights across relevant States *a priori* over the total profits of each internationally taxable legal entity. But what are those “relevant States”?

“Pillar 1” is aimed at rethinking profit allocation and nexus rules, through the redefinition of the concept of “permanent establishment”; hopefully, this will also disallow corporate “independent agents” from defying corporations’ duty to formalise mentioned establishments wherever they stably operate.¹⁴⁴⁶ More concretely, the first Pillar «seeks to reallocate part of the profits of [MNCs] in the direction of the market economies»,¹⁴⁴⁷ that is, towards those jurisdictions where they actually sell their services or those they rely upon for generating profits according to their business

¹⁴⁴⁵ Ibid.

¹⁴⁴⁶ On the problematic relationship between “independent agents” and “permanent establishments”, and the reasons why BEPS 1.0 failed to solve the issue, *refer to* LEDUC and MICHIELSE 2021, pp. 149-150.

¹⁴⁴⁷ BAKER 2020, p. 844.

models. The US represents one of the largest markets for profit generation, but prior to this, it is the home jurisdiction of most of the MNCs concerned, to the effect that the overall shift towards market jurisdictions¹⁴⁴⁸ does not play to its favour. This explains why the US has recently withdrawn its support for Pillar 1,¹⁴⁴⁹ playing by the «logic of pure dominance»¹⁴⁵⁰ and declaring that joining it should be a discretionary choice of each State, regardless of whether they also join Pillar 2.¹⁴⁵¹ Pursuant to this Pillar,

routine and some residual profits will be allocated through a combination of transfer-pricing rules, formulary apportionment and a distribution-based approach. The routine profits will be allocated under transfer pricing rules. The difference between total group profits and the sum of its routine profits will constitute “deemed residual profits” (“Amount A”). A portion of Amount A will be apportioned under the sales-based formula, plus market countries will be allocated a “fixed remuneration for baseline marketing and distribution functions that take place in the market jurisdiction” (“Amount B”) and a compensation amount “where in-country functions exceed the baseline activity compensated under Amount B” (“Amount C”).¹⁴⁵²

Repercussions are expected across several realms, with further Pillar-1 rules regulating, for instance, the levels of profitability, the segmentation of lines of business, the application of the ability-to-pay principle, and that of investment neutrality;¹⁴⁵³ the latter is particularly relevant in global systemic terms insofar as it prevents investment-recycled profits from claiming exemption from the above-reported scheme. The lines-of-business dilemma has been causing evident friction

¹⁴⁴⁸ Market jurisdictions «typically have large populations of consumers that use the services or buy the products from multinationals that may have limited or no physical presence in the country of the consumers» – LIU et al. 2019, p. 9.

¹⁴⁴⁹ Tellingly, the US official in charge of the BEPS 2.0 negotiations under the Trump administration was Steven Terner Mnuchin, a former hedge-fund manager and Goldman Sachs’ investment banker who had long advocated for even lower corporate tax rates domestically. On top of that, the US response shall be read «in the context of a threatened trade war and the imposition of retaliatory tactics by the US if a number of countries—not all of them European—go ahead with their proposed DSTs» – BAKER 2020, p. 845.

¹⁴⁵⁰ HAKELBERG 2020, p. 135.

¹⁴⁵¹ See further GOULDER 2020^a.

¹⁴⁵² PLEKHANOVA 2020, p. 307.

¹⁴⁵³ See further VAN WEEGHEL 2019, pp. 12-17.

between industrial groups, lobbyists, and regulators, with every business category trying to argue for sector-specific carveouts from the general Pillar mandates. In fact, said dilemma embraces cross-border antitrust considerations, too:

In the country of destination, the new nexus rules will mostly target certain business models, especially if thresholds are being applied. This may result in a selective advantage to the benefit of undertakings that will not have a taxable presence, or for which little or no income will be allocated to the newly created taxable presence. These potential conflicts with the State aid rules are not surprising, since the purpose of [Pillar 1] is to design tax rules that better capture the income earned by multinationals in the market jurisdictions, especially in the digital sector.¹⁴⁵⁴

However, as warned above, one should consider competition-law rationales only insofar as they prove useful to read through tax trends, but without perpetuating the short-sightedness of applying antitrust rules to a field like taxation, whose only possible scope is global.

2 The second pillar

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[Offshor[ing] is a pervasive aspect of the world economy, rather than a group of troublesome (small) jurisdictions¹⁴⁵⁵

Broadly concerned with a minimum tax rate applicable to all jurisdictions, and building on consistent evidence that corporate income tax rates have literally shrunk in all “advanced” economies (and not only there) over the past fifty years,¹⁴⁵⁶ “Pillar 2” is also known as “GloBE”. Its goal lies with an «effective minimum tax on

¹⁴⁵⁴ MONSENEGO 2019.

¹⁴⁵⁵ COBHAM et al. 2015, p. 286.

¹⁴⁵⁶ See generally TITIEVSKAIA et al. 2020, p. 14.

multinational enterprise profits»¹⁴⁵⁷ to be accomplished by “taxing back” when other States do not tax MNCs or tax them only fictitiously or anyway below-threshold. Though coming from different disciplinary traditions, both internationalists and cosmopolitans subscribe to the convenience of this solution.¹⁴⁵⁸

Differently from its stance regarding the first Pillar, the US will most probably not try to halt the process by rejecting this second Pillar; in fact,

[w]hen a jurisdiction gives a tax benefit to a CFC, the residence jurisdiction where the parent company is located will be entitled to collect taxes at a stipulated minimum tax rate. [Thus], it is easy to predict which countries may find a minimum tax proposal, such as the GloBE, attractive: export-driven economies, such as the US (which already adopted it via the GILTI), Japan, and Germany.¹⁴⁵⁹

This makes, however, not necessarily good news: deprived of Pillar 1, import-driven economies will be left with a take-it-or-leave-it choice regarding the second Pillar, without trade-offs between the two elements of what was supposed to be a comprehensive “package deal”.¹⁴⁶⁰

With the CCCTB, the EU, too, has already designed (but not yet approved, let alone implemented) tax policies which roughly resemble Pillar 2,¹⁴⁶¹ and because the latter would come to overlap with the CCCTB, BEPS 2.0 would have the merit to require no harmonisation with EU rules at least as far as this Pillar is concerned,¹⁴⁶²

¹⁴⁵⁷ See KADET 2020^b, p. 208.

¹⁴⁵⁸ Refer to CASSEE 2019, pp. 253-254.

¹⁴⁵⁹ DA SILVA 2020, p. 123.

¹⁴⁶⁰ See BAKER 2020, p. 844. The complementarity of these two pillars is also highlighted in European Parliament 2019, para. 40.

¹⁴⁶¹ Refer to European Parliament 2019, para. 2. In fact, the original—possibly overambitious—EU proposal for a CCCTB has been watered down so much that only tax policies resembling BEPS 2.0’s Pillar One are still included in the latest draft, while those seeking to harmonise tax rates and thus mirroring BEPS 2.0’s Pillar Two have been (temporarily?) sided; see also GUIMARÃES 2019, p. 108. Notably, EU’s tax havens have also resisted the G20’s deal towards a global-in-scope minimum tax rate for corporations which was agreed upon in July 2021; refer to SALVATI and DILMORE 2021, p. 186.

¹⁴⁶² See PISTONE et al. 2020, p. 63.

with the only possible caveat regarding non-discrimination.¹⁴⁶³ Nevertheless, it would also showcase the same shortcomings the CCCTB is weakened by—including the inability to solve transfer-pricing mishandling¹⁴⁶⁴—because of an exclusive focus onto race-to-the-bottom competition among Westphalian sovereigns. Pillar 1 alone might not suffice to close the transfer-pricing regulatory gap,¹⁴⁶⁵ and it would require coordination with the EU,¹⁴⁶⁶ which regulates the transfer-pricing phenomenon only marginally (due to an apparent lack of competence *ratione materiae*).

The intended effects of GloBE would be achieved through the simultaneous application of four rules, relevantly combined: an income inclusion rule, a switch-over rule, an undertaxed payments rule, and a subject-to-tax rule; the first and the third resemble US' Global Intangible Low-Taxed Income (GILTI) and Base Erosion Anti-Abuse Tax (BEAT), respectively,¹⁴⁶⁷ which is unsurprising given the way the US

¹⁴⁶³ Elaborating on this,

[i]f the compensation of low or no taxation only needs to operate in the presence of a risk of profit shifting, GloBE should not create a tax bias in favour of domestic investment. This would occur insofar as [S]tates, on the one hand, require a compensation for foreign low or zero taxation in order to prevent profit shifting and, on the other hand, leave domestic investors free to take advantage of domestic regimes that would lead to low or zero taxation. This asymmetry would favour some [S]tates (namely, large ones and those with strong domestic investors) over others and could raise some issues of compatibility both *with EU law (as indirect discrimination)* and WTO law

– *ibid.*, emphasis added.

¹⁴⁶⁴ As a confirmation, the problem of transfer pricing is not even tangentially touched upon by the secretive EU Code of Conduct Group (Business Taxation) and their “quasi-legal” Code of Conduct for Business Taxation, either:

National tax bases have been broadened, and statutory tax rates have come down. The downside is that the in itself impressive work of the Group has also contributed to a tax[-]rate race to the bottom and to “smart” tax competition based on exploitation of transfer pricing and (hybrid) mismatches resulting from disparities between member States’ transfer pricing approaches for which no particular Member State may be blamed separately

– NOUWEN 2020, p. 422. *See further* PEROTTO 2021, pp. 316-319.

¹⁴⁶⁵ Indeed,

[o]nce it is determined that a jurisdiction has the right to tax profits of a non-resident enterprise under the new nexus rule approach, the next issue is to determine how much profit should be allocated to that jurisdiction. The new profit allocation rule *largely retains the current transfer pricing rules based on arm’s length principle* but complements them with formula[-]based solutions

– HO 2020, pp. 34-35, emphasis added. *See also* European Parliament 2019, para. 25.

¹⁴⁶⁶ *See also* European Parliament 2019, para. 41.

¹⁴⁶⁷ *See* DA SILVA 2020, pp. 116-117; *see also* SCHWARTZ and EDGAR 2020, pp. 270-271. On GILTI and BEAT per se, *see further* KYSAR 2020, pp. 1769-1787; 1813-1817; WAERZEGGERS 2021, pp. 345-353.

manages to perpetuate a “normative export” fed by university education that succeeds particularly in the field of taxation.¹⁴⁶⁸

On another note, GloBE’s intended effects would be so overarching, especially if combined to those enabled by the first Pillar, that several commentators have argued they exceed the original BEPS mandate; their argument contends that

[i]f low or no taxation is not a concern of BEPS, then Pillar Two does not align with BEPS nor does it address BEPS-related risks. A new BEPS 2.0 project is still under consideration, while BEPS 1.0 has not yet been fully implemented in many countries and economic outcomes generated by the measures are still being evaluated.¹⁴⁶⁹

Concerns related to the poor implementation of BEPS 1.0 do have some merit, but this is not convincing a reason to halt the ambitions of BEPS 2.0; if anything, it should prompt negotiators—if the latter were regulatorily uncaptured—to be wary of simply replicating the same shortcomings, continuity with the past, lukewarm ambition, and unenforceability BEPS 1.0 was endowed with. Those who argue that BEPS 2.0 is exceeding the BEPS mandate are preoccupied with state sovereignty being eroded due to supranational policies which would constrain States’ ability to compete through taxation, and yet, the right question is not whether sovereignty is eroded, but whether that kind of sovereign prerogatives are still meaningful against the current geoeconomic climate.¹⁴⁷⁰ In fact, trapped between unaccountable global private actors and the lack of equally global but public ones, welfare States—in part counterintuitively—enjoy increasingly lower room for manoeuvre to manage their

¹⁴⁶⁸ See LIVINGSTON 2020, p. 53.

¹⁴⁶⁹ DA SILVA 2020, p. 119.

¹⁴⁷⁰ To reiterate that annulling tax competition would restore sovereignty rather than degrading it, other authors claimed that mentioned race-to-the-bottom distortions primarily fall within the reach of international trade, and should consequently be addressed through the WTO system (assuming the latter will not ultimately collapse); refer e.g. to VALLESPINOS 2021; WAERZEGGERS 2021, pp. 347-353. There seems to be a trend, however, towards including tax carve-outs in trade and investment agreements; see extensively ROLLAND 2020.

sovereign prerogatives over political economy (including meaningful domestic fiscal policies), with international tax competition contributing to this factual erosion of sovereignty.¹⁴⁷¹

Drawing on this question, I stand fundamentally in opposition to those who maintain that «[t]ax competition is *not necessarily negative*, so long as tax incentives are linked to effective business activities in the location where value and income are generated».¹⁴⁷² as it will be illustrated in detail in Chapter 17 of the present study, jurisdictional tax competition is in fact *always necessarily negative* so long as serious redistributive policies are not enacted first, because MNCs' "excess profit" deriving from tax breaks, exceptions, and so forth does not unburden citizens' pockets; instead, it eventually boosts elite's gains only. Otherwise phrased, a sovereign prerogative which, in democracies at least, *lies constitutionally in the citizenry*—that is, the executive power by parliamentary delegation—is deployed not to redistribute wealth among the ultimate sovereigns (i.e., the citizens), but to further concentrate it in the hands of a transnational capitalist elite. For this reason, inter-jurisdictional tax competition is an absolute evil both morally and legally,¹⁴⁷³ so much that, from a teleological perspective, it is perfectly justifiable for the OECD to design proposals in order to counter mentioned phenomenon. Discussing the scope of the original mandate, DA SILVA argued as follows:

Action 5 outputs were guided by concerns about preferential tax regimes being used for artificial profit shifting. Therefore, Action 5 specifically required substantial activity for any preferential tax regime

¹⁴⁷¹ See also RONZONI 2012, p. 585.

¹⁴⁷² DA SILVA 2020, p. 123.

¹⁴⁷³ See also WAERZEGGERS et al. 2021, pp. 342;345, two emphases added:

the current trend to strengthen existing rules and develop more novel rules [...] has [...] made the current international tax system relatively more complex and uncertain. [...] At the same time, *tax competition issues remain fundamentally unaddressed*, in particular through the continued existence of no or nominal tax jurisdictions, which, *in combination with the existing arm's length principle*, effectively enable substance (assets or risks) to be shifted to low- tax jurisdictions[.]

aimed to align taxation with substance. [...] Paragraph 24 of the Action 5 final report clearly stated [it. ...] Seen in the wider context of the work on BEPS, this requirement contributes to the second pillar of the BEPS project, which aligns taxation with substance, by ensuring that taxable profits can no longer be artificially shifted away from the countries where value is created. Again[,] this demonstrates that regimes that are compliant with Action 5 minimum standard should be carved out, as they meet BEPS concerns as defined by the original premise of the 2013 BEPS project. Including these regimes under the GloBE represents a contradiction: [i]f Pillar Two aims to address other BEPS risks, but Action 5 already addresses BEPS risks related with preferential tax regimes, it can be assumed that such regimes are automatically compliant under Pillar Two.¹⁴⁷⁴

This approach is, however, simplistic owing to at least a couple of reasons. First, it is legally problematic to extrapolate one rule from its normative context and transpose it automatically onto another normative arrangement: the “compliant regimes” were so with reference to the light requirements of BEPS 1.0, while BEPS 2.0 is premised on higher ambitions. Second, on a more systemic level, such an approach fails to recall that to be implicated in tax avoidance schemes are not only MNCs, but States themselves that support the latter’s games, for instance by declaring the existence of business “substantial activities” where in fact there are none. As trenchant as it might sound, BEPS 1.0’s Action 5 has not worked;¹⁴⁷⁵ on top of that, it is not binding, and it established no compliance mechanism or effective third-party monitoring procedure. And yet, the same Author went on to write:

Fundamentally, there should be a distinction between a simple tax haven that operates to facilitate tax avoidance and a jurisdiction that provides lower tax rates or special exemptions for certain types of resources, skillsets, locational advantages, historical background, development agendas, transparency models, etc. It does not seem fair to address them in the same way. It would be more balanced and effective to identify tactics normally deployed for profit shifting and to address them appropriately. Adopting a minimum tax for all types of activities seems arbitrary.¹⁴⁷⁶

¹⁴⁷⁴ DA SILVA 2020, p. 124.

¹⁴⁷⁵ See also BRAUNER 2014, p. 25. For example, according to its indicators, HK is “not harmful” tax-wise; check the latest reports and interactive maps at <https://www.oecd.org/tax/beps/beps-actions/action5/>.

¹⁴⁷⁶ DA SILVA 2020, p. 125.

Because distinguishing between the two is impossible an exercise, and pretending to do so—let alone to *predict what avoidance schemes* will be devised and executed—only enables or at best facilitates avoidance, those remarks sound rather nonsensical.

Indeed, as I will demonstrate—or, to the extent to which it was already demonstrated by others, confirm—later in this study, most jurisdictions can operate as onshore and offshore *temporary* or *selectively functional* havens at once,¹⁴⁷⁷ resulting in the traditional idea of “tax haven” as an easily identifiable jurisdiction exclusively or predominantly dedicated to—or aiming at, or legislatively designed for—tax avoidance being obsolete and substantially misleading.¹⁴⁷⁸ The static, formulaic understanding of havens (“to be a haven”) should be refreshed with a dynamic,

¹⁴⁷⁷ See also HABERLY and WÓJCIK 2020, p. 1264: «the growing importance of home-state consolidated capital supervision encouraged the rise of “shadow banking”-based strategies of bank regulatory arbitrage—wherein the regulatory significance of on/off-balance sheet increasingly superseded onshore/offshore in the traditional sense»; HABERLY and WÓJCIK 2017, p. 236: «the [SIVs], [CDOs], and credit arbitrage conduits issuing the most problematic forms of [ABCP] were disproportionately concentrated in “small islands”, whereas more stable issuers were mostly based in “onshore-offshore” Delaware» (emphasis added); BINDER 2019, pp. 329-331: «in Mexico bad governance, expressed in form of informality, curbed offshoring by creating onshore havens for tax planning and money laundering[, so that while tax planning and money laundering stayed mostly onshore throughout time, the Mexican government and corporations did issue debt offshore]»; CHRISTENSEN and HEARSON 2019, p. 1077: «the classic dividing line between large “onshore” jurisdictions seeking to protect themselves from revenue losses, and smaller “offshore” tax havens, breaks down[, and while large [S]tates themselves have historically had interests in protecting certain parts of the offshore industry, recent evidence is demonstrating that the conceptual distinction between onshore and offshore is now even more blurred»]; and MAURER 2008, pp. 167-170. For an example of the onshore/offshore dichotomy which is being questioned here, see instead NERUDOVA et al. 2020, p. 931: «[t]he tax haven countries were separated into onshore havens based on the Financial Secrecy Index and offshore havens based on the OECD’s first criteria of low or no tax on corporate income» (in-text citation omitted); either criterion/index could actually identify both sorts of havens, thus reiterating the double-faced nature of the operations carried out by/in most of them.

¹⁴⁷⁸ As PLATT (2015, pp. 52-53, three emphases added) remarks,

many onshore centres offer the same or very similar products and services as offshore centres, rendering the distinction between “on” and “off” shore jurisdictions almost meaningless. [...] “Offshore” in a financial sense simply means somewhere other than where a customer’s assets or activities are located (regardless of whether the customer in question is a legal or a natural person). So[,] if a person is a resident of Spain but chooses to bank in Luxembourg, then Luxembourg for that purpose is offshore to that person’s place of residence. Similarly, if a US company bases certain of its subsidiaries in Ireland, then Ireland is offshore to the US. Neither Ireland nor Luxembourg is palm fringed. Still less so the United Kingdom which is, in fact, one of the world’s leading offshore centres as a result of the beneficial treatment it provides to UK resident non-domiciliaries.

That of terminology surrounding onshore/offshore financial centres is a long-standing dispute; for an early treatment of the topic focused on Singapore, which overall maintains but starts to question the rough, old-fashioned “island vs continent” interpretation, refer to VENARDOS 2005, pp. 14-26. One possible reading is that said initial “misunderstanding” was exploited by the OECD to force into compliance only those “offshore” centres identified as palmy islands rather than those settled within the continental shelf too, because the latter are overwhelmingly represented in its membership; see also *ibid.*, p. 215.

relational, and functional one (“to *act as a haven for this or that entity*”), both conceptually and operationally: a centre may be onshore or offshore *to a specific taxpayer taken as reference*, never aprioristically or in an absolute sense, so that most centres are both onshore and offshore at once, depending on the *relational endpoint* we adopt.

“Offshore” can be thought of therefore as an ingenious device, reconciling two incompatible trends. Instead of confronting the [S]tate directly, the more mobile economic sectors are provided with a separate regulatory space where the flow of economic activities can develop more or less without government interference[.]¹⁴⁷⁹

regardless of whether such space is geographical within or outside its borders: it is a matter of *juridical dependence, relatedness, and fiction*, not of physical geography. These considerations also explain why it is *impossible* to distinguish States competing through taxation in order to erode other States’ tax basis and States doing so out of “configuration” or necessity: “offshoring” as a trait can be common to most States and exclusively characteristic of none of them. Resultantly, it seems overformalistic to argue that GloBE has «departed from addressing tax avoidance to focus on tax competition»:¹⁴⁸⁰ the second is the reason why the first thrives; no one who is intellectually honest could spare to notice this. Other authors, although to different extents between one another, agree on this holistic (and finalistic) interpretation; for instance, GADŽO and JOZIPOVIĆ¹⁴⁸¹ reasoned that

the anti-competitive nature of GloBE is explicitly acknowledged, with the aim of curbing the harmful race to the bottom in attracting a CIT base, which disproportionately affects developing countries. [Such] argument resonates with some earlier scholarly pleas for a global minimum tax as an instrument to attain the principle of “fiscal state-

¹⁴⁷⁹ PALAN 1999, p. 19.

¹⁴⁸⁰ DA SILVA 2020, p. 140.

¹⁴⁸¹ Ibid., pp. 443-444.

determination”. This [...] allows us to appreciate how the minimum tax approach [...] may actually lead to a “restoration” of States’ capacity to effectively tax cross-border income, even if *prima facie* GloBE may be seen as a sovereignty-limiting instrument. [...] Indeed, in a global minimum tax scenario, MNCs’ incentives to engage in profit shifting are significantly reduced, since such activities no longer bring the same marginal gains. Concurrently, the imposition of a minimum tax burden on outbound investment effectively sets a floor on (real) tax competition, signalling to States that further reductions in CIT would not result in attracting a larger portion of the global tax base.

In sum, «[b]y ensuring that income is subject to a minimum tax rate, the GloBE proposal expects to reduce the incentive to allocate income for tax reasons to low taxed entities»,¹⁴⁸² thus rewarding corporate decisions grounded in genuine business (production, management, personnel, customers, innovation, raw material, etc.) rather than *exclusively* in favourable taxation. The GloBE design is still imperfect compared to its stated ambitions,¹⁴⁸³ but criticising it because it exceeds the BEPS mandate misses the point, and seems to represent an assist to MNCs’ resistance against any profound project for change.

The last GloBE-related matter I deem worthy of mentioning here concerns certain scholarly and industry arguments aimed at discouraging a globally applicable minimum tax rate because it would disfavour developing economies. Some among

¹⁴⁸² Ibid., p. 116.

¹⁴⁸³ Indeed, regardless of my disagreement on his previous arguments, I agree with DA SILVA (ibid., pp. 121-122, emphasis added) when he observes that

[t]he minimum tax will still incentivize multinationals to inflate the income in low-taxed jurisdictions where CFCs are located and therefore engage into aggressive transfer[-]pricing practices[, without mentioning secret *sui generis* agreements]. This is due to the fact that the income obtained by the foreign companies will only be subject to the minimum tax either because the foreign country has leveled its income tax rate to the minimum tax or otherwise because the residence country imposes additional tax on the foreign company income in order to top up the foreign tax to the minimum tax. [...] If the underlying idea is to address income-shifting activities, [...] reforms require governments to adopt a residence-based taxation regime on worldwide-earned income. No deferral should be provided for offshore corporate income and foreign income tax credits should be applied at the source. [...] T]he minimum tax will not remove incentives to locate businesses in low-tax jurisdictions or provide special tax regimes. Conversely, the adoption of a worldwide taxation regime would remove such an incentive.

However, if the residence-based taxation regime on worldwide-earned income for legal persons as proposed by DA SILVA does not meet States’ availability, the current GloBE proposal is a step in the right direction: without it, captured States would definitely tax corporations far less, and avoidance through transfer pricing would remain the norm rather than its exception.

these tax scholars and practitioners even called for two minimum tax rates: roughly speaking, one for GN jurisdictions and another for GS ones.¹⁴⁸⁴ Their stance reads as follows:

The OECD's discussion documents mention the need to «shield developing countries from pressure to offer inefficient tax incentives» as a reason to address tax competition. Yet, not all *tax policy stakeholders* in developing countries share this understanding. On the contrary, establishing low tax rates or introducing special incentives is often viewed as necessary for developing countries to attract foreign investment. Hence, the inclusion of so-called “tax sparing” clauses in double tax treaties has been considered by some stakeholders as a policy favouring developing countries. The logic of a tax-sparing clause is the exact opposite of the GloBE rules' logic.¹⁴⁸⁵

In this regard, it would be interesting to know more about the identity of those “stakeholders”, my suspicion being that most of them are experienced insiders, i.e.—overtly or disguisedly—business lobbyists. Beyond this, their stance itself is poorly crafted in that it stands tantamount to circular thinking: *given that today's regime systemically discriminates developing economies so that they offer West-based corporations tax incentives in order to compete in the global arena, the current system somehow works and banishing such incentives would discriminate developing economies*. Obviously, the truth lies elsewhere: today's tax regime is rigged to favour GN's corporate giants (not secondarily thanks to money which had been “parked” in tax havens after its removal from former colonies at the empire's capitulation¹⁴⁸⁶), therefore we need to realign the system and make it fairer for all, rather than preserving the workaround developing economies currently adopt out of necessity in order to survive it. Jurisdictional tax competition never favours the poor; contrariwise,

¹⁴⁸⁴ Refer to CASSEE 2019, p. 258.

¹⁴⁸⁵ HEITMÜLLER and MOSQUERA 2021, p. 488, emphasis added, internal footnote omitted.

¹⁴⁸⁶ Read extensively OGLE 2020. On the case of post-French Algeria and Tunisia, see ALVAREDO et al. 2021, p. 17.

jurisdictions compete in offering advantageous tax regimes for investors and companies, shifting taxation burdens from corporate revenues to income from labour. Therefore, workers find themselves to be losers in at least three interconnected ways: stagnant or decreasing wages, higher taxation, but less public services.¹⁴⁸⁷

One segment of the scholarly reasoning reported above is, however, worth reflecting upon, as it concerns SEZs—of special relevance to economies like China’s¹⁴⁸⁸ and others in East Asia (such as Taiwan, South Korea, Japan, and even North Korea)¹⁴⁸⁹ as well as South Asia¹⁴⁹⁰—and other infra-jurisdictional carveouts which might be maintained or even incentivised if GloBE is eventually adopted in its fullest form, obsequious to the logic of “zoning taxation”.¹⁴⁹¹

Due to the controversy surrounding the desirability of tax competition for real investment, it is still unclear what version of the GloBE proposal would be adopted by countries. In its least effective version, it would contain wide “substance-based carve outs” and a low minimum tax rate. In this case, the GloBE rules would primarily be an extension of the BEPS Project and would not signify a fundamental departure from the idea that a [S]tate is free to impose the tax rate that it considers appropriate—provided that the features of its tax system do not facilitate profit shifting. [...] In its most efficient version (without substance-based carve outs and a high minimum tax rate),

¹⁴⁸⁷ BONADIMAN and SOIRILA 2019, p. 318.

¹⁴⁸⁸ See e.g. SAPIR 2021, p. 208. Read also RODRIGUES and STEENHAGEN 2021; LI and COSTA 2021; YIP and LIM 2021; XIE 2021; LEOU and LI 2021.

¹⁴⁸⁹ Refer to ALAMI et al. 2021, pp. 18-19, and NGUYEN 2021, p. 38. Check also the fourth chapter from UNCTAD’s World Investment Report 2019 at https://unctad.org/system/files/official-document/WIR2019_CH4.pdf.

¹⁴⁹⁰ By way of exemplification, the Indian government looks particularly keen on favouring SEZs’ success via the concession of tax holidays and other waivers; see LEVIEN 2013, p. 74. For the cases of Nepal, Cambodia, Malaysia, Myanmar, and Laos, check respectively THAPA 2021; JUSOH and RAZAK 2021; HAGA 2021.

¹⁴⁹¹ Most notably, this logic is anything but unheard of to IL, especially in East Asia; in fact, it is the very product of law-embedded Western imperial legacies of jurisdictional carving-out and in-land territorial exceptionalism that have been shaping taxation in the region for a truly long time. One remarkable exemplification is that of Shànghǎi, a now-cosmopolitan metropolis whose port (and contiguous areas) was subjected to special tax treatment over the late XIX century out of bilateral international agreements, in order to please both Chinese and Anglo-American empires – without necessarily making (the poorer strata of) their populaces more prosperous overall. Arrangements of this type are astoundingly similar to today’s SEZs, both legally and conceptually; in fact, while the latter are a product of endogenous governmental planning rather than compelled bargaining with foreign powers (let alone foreign powers’ right to tax indigenous citizens), they nonetheless serve as onshore territorial *fictiones iuris* for foreign capital to land and thrive, free from bureaucratic and/or regulatory over-hassle. On the case of Shànghǎi historically, also through comparative lenses with HK, read further CONG and MÉGRET 2021, pp. 922-924.

however, [GloBE] would create strong incentives for [S]tates to adapt corporate tax incentives provided in SEZs (and elsewhere), regardless of whether these encourage profit shifting. [... Indeed, e]ven in its strongest version, the GloBE proposal would not “legally” require any country to eliminate tax regimes that provide for a low rate such as those of many SEZs.¹⁴⁹²

This point is indeed valid and should be thoroughly considered by international policymakers; indeed, the risk is that previous tax-avoidance schemes mostly relying on *interjurisdictional* tax misalignments will be simply shifted to *infrajurisdictional* (between a State and its SEZs, or between a State’s different SEZs) or *infra-interjurisdictional* (between SEZs belonging to different States) ones. It is probably too early to formulate precise expectations on how these new misalignments would work, but corporate lawyers’ talented imagination has always proven unbounded, henceforth we need to make sure that new legal loopholes are not devised/empowered while others are being shut down. This is *a fortiori* essential when SEZs are privately owned and/or operated: across several jurisdictions, SEZs are actually run by private companies through Build-Own-Operate (BOO) arrangements with little to no accountability mechanisms to the citizenry.¹⁴⁹³

iv General dossiers

One recurring concern, primarily relevant for the first pillar, relates to the burden of compliance, and relatedly, to the *ratione personae* scope of BEPS 2.0. Because of administrative costs, negotiators are wondering whether to place a threshold by size (so that only major MNCs would be regulated by BEPS 2.0),¹⁴⁹⁴

¹⁴⁹² HEITMÜLLER and MOSQUERA 2021, p. 489.

¹⁴⁹³ See for instance MANGAL 2019, pp. 4-5.

¹⁴⁹⁴ The current OECD proposal tables an arrangement whereby

[t]he applicable threshold for in-scope businesses will consider the group gross revenue threshold (which may be the same threshold of EUR750 million as for the Country-by-

and/or by jurisdiction (e.g., with reference to Facebook's business model, if customers reside within a jurisdiction while advertisers in another, where does Facebook need to pay that portion of its taxes?).¹⁴⁹⁵ There are also attempts to reintroduce *ratione materiae* exceptions by sector, e.g. for London's financial industry.¹⁴⁹⁶ As for the threshold-by-size, it was posited that «the lower [the minimum tax] rate will be, the less will be the need for carve-outs»,¹⁴⁹⁷ which stands as reasonable but it is curiously not applied when it comes to natural persons; also, someone went so far as to conceive of a GDP-dependent minimum tax rate.¹⁴⁹⁸

In opposition to the just-mentioned solutions, a cognitive revolution which frees regulators from their pro-capital mindset is hereby urged: there is no reason why tax codes should constantly grant corporations exceptions, carveouts, profit thresholds, time extensions, payments deferrals, and so forth, while individuals cannot pursue jurisdictional arbitrage regardless of the sum involved because they are citizenship-bound and thus deprived of mobility leverage. For the sake of the present study, the striking comparison is between the lengthy negotiations on thresholds vis-à-vis tax avoidance, while individuals' privacy is violated with no thresholds having been agreed upon internationally. Once again, this is a restatement of legal-person privilege within a global society that values liquid capital before and above any other entitlement.

Country reporting), with carve-out for situations where the total aggregated in-scope revenue is less than a specified threshold, and where the total profit to be allocated is less than a minimum amount

– HO 2020, p. 34; *see also* DA SILVA 2020, p. 125. Exemplifying the repercussions of the above with reference to HK, *see* CHIANG 2020, p. 3; along similar lines, via a strikingly self-entitling, elitist rhetoric, it was recounted that «[a]s a key global financial hub, [HK] is responsible for providing financing to innumerable investments around the globe that *provide value, growth, and jobs* to local economies», and should thus resist BEPS 2.0 – HO and BREWIN 2019, pp. 29-30, emphasis added.

¹⁴⁹⁵ Refer to VAN WEEGHEL 2019, pp. 7-9.

¹⁴⁹⁶ Check GILES and PARKER 2021.

¹⁴⁹⁷ PISTONE et al. 2020, p. 64.

¹⁴⁹⁸ *See e.g.* VAN WEEGHEL 2019, p. 11.

Parallel to the problem of whether to establish a threshold and, in the positive, where to set the bar, dispute might arise over the methodology to assess those limits. For example, if a threshold-by-size is opted for and made dependent on global *taxable* turnover, all parties need to agree on how to measure said turnover. This illustrates why,

apart from its four components, the GloBE triggers several technical and design issues. One of them is the level of income blending, i.e. the extent to which an MNE can combine high-tax and low-tax income from different sources by taking into account the relevant taxes on such income for the purposes of determining the effective tax rate on such blended income.¹⁴⁹⁹

Another outstanding issue invests the enforcement of BEPS 2.0 rules, which, in turn, depends on the degree of bindingness of said rules themselves. A complex, all-encompassing (that is, not project-based) multilateral APA seems unfeasible,¹⁵⁰⁰ therefore alternative solutions shall be found.

One last matter of general concern regards the potential conflicts of rules which BEPS 2.0 might originate. Harmonisation with the EU framework was briefly addressed *supra*, but on a wider level internationally, BEPS 2.0 might call for an overhaul of OECD/UN Model Tax Conventions, of the MLI, as well as of the rather tangled patchwork of bilateral tax treaties,¹⁵⁰¹ boosting the trend to make recourse—on the part of MNCs—to the principle of non-discrimination in order to resist much-needed change through an abuse of rights. Needless to state, in order to institute a global dispute-settlement forum for international disputes concerning the apportionment of taxes across jurisdictions,¹⁵⁰² the international community needs first

¹⁴⁹⁹ DA SILVA 2020, p. 118; *see also* *ibid.*, pp. 126-127.

¹⁵⁰⁰ *Refer e.g. to* VAN WEEGHEL 2019, p. 41.

¹⁵⁰¹ *See* DA SILVA 2020, pp. 127-140.

¹⁵⁰² *See* TRACHTMAN 2013, p. 10.

to establish a mechanism for knowing how much taxes should be payable, without necessarily disclosing personal details with dozens of governments in an automatic and individuals-identifying fashion. The problematic node of this process is compelling banks and other financial intermediaries to renounce to opacity, on which part of their profits depends.¹⁵⁰³

v Takeaway summary

At the time of writing:

- 1) Prospected BEPS 2.0 measures are not yet ambitious and tradition-breaking enough: the existence itself of MNCs, taxation-wise, should be thoroughly revisited; furthermore, formulary apportionment would still be accompanied by transfer pricing, which should be abolished altogether.
- 2) The preferred solution would thus entail the adoption of formulary apportionment¹⁵⁰⁴ and, as an end-goal, the abolition of MNCs as a legal fiction for the purpose of taxation.

¹⁵⁰³ See PALAN et al. 2010, p. 234.

¹⁵⁰⁴ ICRIC (2019, pp. 12-13) reports that

[t]he digitalisation of the economy clearly demonstrates why formulary apportionment is the efficient and equitable method to allocate taxing rights between countries. When the marginal cost of production for digital companies is zero, the revenue accruing to them is equal to a rent and it is therefore important to tax this rent effectively and fairly. Because the returns are basically rents, its taxation does not affect output. [...] For digital companies, using formulary apportionment will ensure that the majority of the profits are not allocated to tax havens but taxed in the countries where sales are made and most of the employment takes place. [...] While double taxation would be a possible outcome, it is already happening under the current system when tax authorities disagree on how to allocate the taxable profits of multinationals and would be much more transparent under a formulary approach. A system of tax credits would ensure that double taxation is minimised. The current problem of non-taxation or under taxation is clearly far worse than the potential problem of double taxation, which could easily be remedied.

- 3) As a second-best, one may convene «to adopt a worldwide, annual taxation regime without tax deferral. If the goal is to address income-shifting activities, this solution allows all income to be taxed as earned».¹⁵⁰⁵
- 4) If the two just-reported solutions are not politically viable, BEPS 2.0's two Pillars—as per their current¹⁵⁰⁶ draft—represent nevertheless a step in the right direction, even without the so-called “third Pillar”. Not only would they complicate tax avoiders' life: they would concomitantly *start* addressing systemic issues of redistribution-by-taxation with a view to reduce endemic poverty.¹⁵⁰⁷
- 5) Those who engage in criticisms of BEPS 2.0 as exceeding the original BEPS mandate might express correct legal arguments in the abstract, but find themselves trapped in legalistic boundaries which are unable to appreciate this negotiating process in broader, systemic terms – also considering the discipline's complexity.
- 6) Apart from Covid-19 being employed as an excuse to (temporarily?) halt or delay the process,¹⁵⁰⁸ the US will not endorse the two Pillars unless they are markedly watered down, e.g. by introducing overarching carveouts.¹⁵⁰⁹ Even the EU might eventually prove itself an obstacle to the finalisation of an agreement rather than speaking with one voice.¹⁵¹⁰ Furthermore, the US makes its possible joining conditional upon EU jurisdictions withdrawing their DSTs.

¹⁵⁰⁵ DA SILVA 2020, p. 141. For an exemplification of tax deferrals being detrimental to countering avoidance, refer to NEALE 2016, p. 37.

¹⁵⁰⁶ That is, by the day of the final submission of the present work.

¹⁵⁰⁷ This goal was advocated for, e.g., in ORDOWER 2021.

¹⁵⁰⁸ See e.g. BAKER, p. 844, fn. 1.

¹⁵⁰⁹ Even the European Parliament (2019, paras. 15;30) voiced its concerns regarding unambitious scoping (by size, sector, etc.) thresholds being applied, «particularly in order to ensure that the international reform respects the EU's *Policy Coherence* for Development initiative» (ibid., para. 17, emphasis added); conversely, different thresholds for establishing the “nexus” would be acceptable (ibid., para. 21).

¹⁵¹⁰ Ibid., paras. 35-36.

- 7) Even if an agreement is reached relatively soon, additional delays shall be factored in during the implementation and enforcement phases, which would require the adoption of a new binding instrument. Indeed, differently from BEPS 1.0's soft law,¹⁵¹¹ «[w]ith the OECD of the view that changes to treaties would need to be “implemented simultaneously by all jurisdictions, to ensure a level playing field”, a second multilateral instrument (MLI 2.0?) seems inevitable».¹⁵¹² Furthermore, someone proposed the institutionalisation of BEPS 2.0's enforcement through a system of investment tribunals,¹⁵¹³ but alternatives seem more promising,¹⁵¹⁴ especially if politically endorsed through free democratic choices, thus weighing the need for subsequent “light adjustment” to the agreement which might prove necessary with democratic legitimacy and parliamentary oversight.¹⁵¹⁵ Alternatively, the route of an independent third entity entrusted with keeping the agreement current might be explored; what matters is that States do not take on and exercise prerogatives which would lie—however indirectly—with their citizens.
- 8) Tangentially, BEPS 2.0 does not set any clear mandate to or regulation for mining legal-person taxpayers' data through algorithmic analytics, not even at a rudimentary “framework” level. This is alarming not only because professionals do expect their companies to be targeted through AI,¹⁵¹⁶ but because on the natural-person side instead, this has already become routine.¹⁵¹⁷
- 9) Due to the reasons recalled *supra*, the potential of BEPS 2.0 is set to become yet another failure in addressing tax avoidance concertedly and resolutely.

¹⁵¹¹ See DAGAN 2018, p. 163.

¹⁵¹² RAJATHURAI and CLAYSON 2019, in-text reference omitted.

¹⁵¹³ See generally MOTALA 2021.

¹⁵¹⁴ Refer e.g. to VAN WEEGHEL 2019, pp. 30-34.

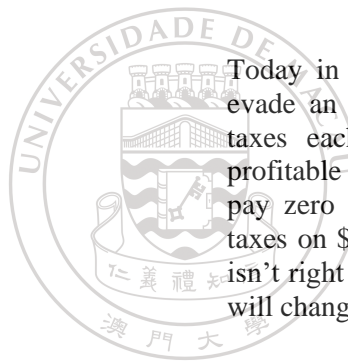
¹⁵¹⁵ See further BROEKHUIJSEN 2017, pp. 202-203.

¹⁵¹⁶ Refer e.g. to EY Global 2020.

¹⁵¹⁷ See e.g. RAMGULAM and BOURTON 2021, p. 145.

Meanwhile, binding international measures to fight individuals' tax evasion gain momentum as time goes by; how rapidly they had been approved is striking, but not surprising: they are rhetorically powerful and practically safe for the élite, who can that way claim to rescue resources for the welfare-state while actually pursuing the reverse and maintaining the status quo. After all, the 1%'s untaxed overprofits gained through avoidance are formally lawful.

vi *Concluding thoughts*



Today in this country, the top 1% evade an estimated \$160 billion in taxes each year. 55 of the most profitable corporations in America pay zero dollars in federal income taxes on \$40 billion in profit. It just isn't right — and my economic plan will change it.¹⁵¹⁸

Prima facie, one could argue that legal persons and natural persons are not approached macroscopically differently by world powers as far as international taxation is concerned: BEPS 2.0 is largely inspired by the US system, but this notwithstanding, the US seems not ready to accept that other States may adopt its own system; in other words, it objects to the “socialisation” of its precursory model. Meanwhile, an estimated 3 trillion USD are “parked” in non-residents accounts registered in US banks.¹⁵¹⁹ Moreover, US policymakers are evaluating further proposals like that for a Destination-Based Cash Flow Tax (DBCFT),¹⁵²⁰ which are anyway domestically oriented rather than inspired to principles of *global* justice. This

¹⁵¹⁸ A tweet from President Biden's official Twitter account: <https://twitter.com/POTUS/status/1438880204408172547>.

¹⁵¹⁹ Read MEINZER 2019, p. 94.

¹⁵²⁰ Refer to WAERZEGGERS 2021, p. 346.

non-socialisation policy is replicated in the natural-persons realm, with AEOI being designed after FATCA (and enthusiastically supported by the EU¹⁵²¹) although the US chose not to join what is factually a multilateralisation of its pioneering but unilateral information-exchange procedure.

And yet, even assuming BEPS 2.0 will be turned into law, substantial divergence remains, with these surveillance mechanisms proving far more impactful on individuals than on corporate entities. Apart from the bindingness distinction, the core difference is that while individuals cannot “offshore” themselves *ajurisdictionally*, MNCs play with their legal-person juridical fiction to escape regulation, to the effect that even one single incompliant or self-serving jurisdiction (or part thereof, as in the case of SEZs and the like) suffices for the whole edifice to lose stability and for capital to be shielded from welfare claims; for taxation purposes, MNCs should not even exist.

In both cases (natural and legal persons), America’s self-ascribed hegemony results in the US unwillingness to grant others the right to apply to itself (and, to the extent possible, among themselves) the same rules it forces those others to accept unilaterally, but surveillance-wise, consequences are most felt by individuals: differently from legal entities, they cannot escape the rules attached to their citizenship. One might say that while individuals are bound to substantial legal *formality*, corporations are only bound to apparent legal *formalism*, which can be escaped through jurisdictional arbitrage and systemic or *sui generis* capture of the regulators.

A scholar advised that «[t]he pace [of BEPS 2.0 negotiations] has been frantic, and an enforced pause for refreshment and reflection would be advantageous»,¹⁵²² which sounds strikingly else from the covetous impetus of arrangements regarding

¹⁵²¹ See further MOLÉ 2015, pp. 866-873.

¹⁵²² BAKER 2020, p. 846.

individuals; it seems that senior tax experts who have benefitted from a solid welfare system throughout their lives do not feel any sense of urgency¹⁵²³ in ensuring that corporate tax avoidance does not prevent future generations from enjoying equivalent life standards. States are slowly becoming privatised domains where individuals as such count little, as long as the élite can keep perpetuating its privileges by delaying responses on the corporate side and enforcing ruthlessly privacy-demeaning arrangements onto natural-person citizens.

All of this occurs while individual taxpayers' confidence in and trust for their governments is as low as never before, not only with reference to what taxpayers' money will be used for, but for the confidentiality of tax-related information governments acquire in increasingly higher quantity and level of detail.¹⁵²⁴ Rather paradoxically, international negotiations on tax matters are on hold also due to the US' unwillingness to sign further treaties out of «purported objections that the information sharing provisions of tax treaties violate the constitutional right to privacy».¹⁵²⁵ Disturbingly, taxpayers' data might also be collected and “distorted” by illiberal regimes for the most absurd (and arguably unintended by the OECD) purposes. To exemplify, a group of Russian scholars suggested that BEPS 2.0 is to be understood as a platform for disincentivising individuals and companies from attracting foreign talented individuals, under the excuse that favourable taxation would cause brain

¹⁵²³ Similarly, *see* GOULDER 2020^b:

I hesitate to describe the effort as a rush job, but it has certainly been pushed along at an expedited pace. There's a good reason for this. The longer an instrument of change sits around, the greater the opportunity for opponents to pin a bull's-eye on its back. Any delay, however rationalized, can serve as the enemy of a smooth buy-in from stakeholders. Once critical mass is lost, you might never gain it back.

These considerations also help explain the development of “instant customs”, often forming via extemporary accumulation of critical mass through the ranks of international public opinion; the latter is virtually impossible to measure scientifically, which does not mean its existence cannot be indirectly observed and—to an extent—“proven” (or at least “argued for”).

¹⁵²⁴ *See e.g.* BAKER 2020, p. 847. This is, in fact, a seasoned issue which only gets worse with algorithms and mass cybersurveillance, but whose roots trace back to the first digital data archives; *see also* VENARDOS 2005, pp. 209-211.

¹⁵²⁵ SCHWARTZ and EDGAR 2020, p. 272.

drain;¹⁵²⁶ although reducing brain drain is a legitimate and even commendable public policy, it should be pursued by improving the sending countries' socio-economic conditions (perhaps including democracy) rather than by trapping talents by means of (possibly algorithm-allocated) tax measures.

At any rate, BEPS 1.0 and 2.0 have caught the attention of philosophers, too,¹⁵²⁷ and because taxation defines the power relationship between real and fictitious entities within any society as well as outside of it, this cannot come as a surprise. Throughout this study, I respond to this challenge by trying to deconstructing the concept of MNC taxation-wise, wondering whether multinationals should be formed, allowed to operate, and whether they serve any societal purpose. To do so, framing their tax treatment against those of individuals is of the essence, if anything to debunk myths and unveil collective hypocrisy¹⁵²⁸ related to the unavoidability of *so designed* AEOIs.

Later in this study, my argument will be that the major obstacle to a fair tax system for all lies with *the very existence* of multinationals, since these structures operate *ajurisdictionally* while pretending to comply with laws which are drafted to preside over Westphalian intra- and inter-States relations. The global transnational elite owning and managing MNCs is rather concentrated in a few financial hubs and little hyper-capitalist niches (metropolises like NYC, city-States like Singapore, SEZs like Shēnzhèn, hybrid regions like HK's, desert islands which still atone for their colonial past, and tiny sovereigns like The Netherlands or Bahrein), and moves money therefrom and thereto relentlessly. «If industrial towns and cities were considered the

¹⁵²⁶ Read MILOGOLOV and BERBEROV 2019, pp. 223-224.

¹⁵²⁷ Refer e.g. to LOUTZENHISER 2020, pp. 923-924.

¹⁵²⁸ By studying the underlying “politics of AEoI agreements”, JANSKÝ et al. (2021, p. 17) have confirmed hypocrisy on the part of OECD countries, in that their controlled secrecy jurisdictions—above all those of the former colonial powers, i.e. the UK and the Netherlands—are found to be using selective resistance far more intensely than OECD member [S]tates. This complements earlier findings of US hypocrisy in international tax governance [...] and supports the notion of AIE under CRS being a sham standard.

geographical anchors of industrial capitalism, “tax-friendly” urban regimes and lifestyle destinations are now the new spatial fix of the super-rich capital in the contemporary age». ¹⁵²⁹ This shall be kept in mind when it comes to appraising the value of BEPS 2.0: lost in the *mare magnum* of overly technical details, one easily ends up losing sight of the land, eventually missing out on the big dark picture which offshored neoliberalism is.



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¹⁵²⁹ Pow 2016, p. 61.

Chapter 13

Conclusion to Part Three



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Besides their incompliance with normatively landmark local and regional data-protection regimes (such as the CCPA/CPRA and the GDPR respectively), the OECD's AEOI, and AEOIs generally, are unlawful under IHRL because they

1. violate the right to privacy understood holistically as dignity, freedom, autonomy, tranquillity, emancipation, and informational self-determination, and despite this right being derogable (e.g. under the ICCPR), acting in derogation of it is putatively not justifiable in this case (following e.g. well-known ECtHR-developed tests of *necessity and proportionality in a democratic society* and the like). In fact, the scrutinised measures

2. are not proportionate, as they
- a. lack reasonable-suspicion requirements (indiscrimination *ratione materiae*);
 - b. lack financial thresholds (indiscrimination *ratione quanti*) – unless transposition into domestic law provides otherwise;
 - c. are operated automatically through algorithmic analytics (indiscrimination *ratione personae*);
3. feature no homogeneous procedural safeguards, namely
- a. a judicial mandate;
 - b. protection against exacted self-incrimination;
 - c. international remedies and avenues for redress (asymmetry: multilateral surveillance vs domestic remedies, which are even rendered meaningless this way);
 - d. jurisdictional due-diligence based on rule-of-law records (indiscrimination *ratione loci*), e.g. with reference to autocracies;

- e. trustworthy techno-political mechanisms to prevent information leaks and mishandling
 - i. due to cybersecurity incidents caused by state and non-state actors alike;
 - ii. owing to interdepartmental administrative mismanagement and data sharing, originating data-doubles cumulative effects resulting in public-private data-assemblage;
- 4. might apply retroactively and be used in criminal trials (indiscrimination *ratione temporis*).

Furthermore, as far as democracies are concerned, they are also

- 5. unlawfully established by transnational or domestic elites by sidestepping parliamentary oversight and abusing executive (emergency) powers.

Even if one deemed these four (for democracies) or five (for all States) reasons insufficient to declare these measures unlawful under IHRL, said measures are also

- 6. unnecessary to achieve the stated policy aim, as
 - a. they have proven ineffective (*cessante ratione legis, cessat lex ipsa*);
 - b. preferable or at least equally (in)effective alternatives that do not violate the right to privacy (or violate it to a lesser extent) are available, including
 - i. empowering non-automatic EoI;
 - ii. seriously countering corporate tax avoidance;
 - c. they are systemically incoherent policy-wise (indiscrimination *ratione causae*)
 - i. between legal and natural persons;
 - ii. between individuals' tax evasion and corporate tax avoidance;

- iii. between the 1% and the 99%;
- iv. intergenerationally (a fortiori so as a result of pandemic-related policy preferences);
- v. geopolitically and geoeconomically.

This sixth point (non-necessity) is relevant for democracies, but also in terms of human rights to be framed as global justice, development, emancipation, and socio-economic sustainability.

Indeed, corporate tax avoidance, systemic incoherence, and unsustainable global injustice are caused by and/or perpetuated through

1. individual income tax rates being set too high compared to both corporate income tax rates and capital gains tax rates (also on natural persons), with the first mostly impacting the 99%, while the second and third prove most relevant for the 1%;
2. untaxed financial products and nominal corporate-share value used as assurance paper by the wealthy to borrow money from connivant credit institutions for financing their luxury living, while keeping their taxable stipend to a minimum;
3. the failures to agree on financial taxes (i.e. taxes on financial transactions or finance-sector products);
4. the shortcomings of the BEPS 1.0 and 2.0 projects, including about country-inclusiveness, non-bindingness for most corporate rules, digital sales and transactions, IP boxes and other intangibles, as well as unresolved transfer (mis)pricing, also owing to a sort of negotiational “insider trading”;

5. capital round-tripping, export underreporting, and other means for multifaceted regulatory avoidance (e.g. in the case of HK and Mainland China);
6. *cum ex*-type schemes, CV-BV manoeuvres (with The Netherlands), corporate inversions through M&A, re-domiciliation, double-dipping, “disregarded payments” (in the US), beneficial ownership, trade misinvoicing, *hawala* transactions (mainly in India, Pakistan, and the UAE), and other historically persistent tax-avoidance strategies;
7. the persistence of jurisdictional black holes for capital tunnelling (shifting from old-styled tax havens to more sophisticated offshoring strategies) in international taxation, despite supposed progress in ending banking secrecy, with the paradox of even more élitist and sought-after non-compliant jurisdictions to serve as combined, multipurpose “data-tax havens”;
8. avoidance-friendly bilateral treaties and mock anti-avoidance treaty compliance;
9. state strategising through corporate taxation, including by lending support to in-land exceptionality regimes and jurisdictional carveouts such as those of SEZs (especially privatised ones and TFZs), other regulatory sandboxes, as well as “a-jurisdictional” financial/business centres;
10. secret corporation-State agreements, customised tax amnesties, exceptions, and reconciliations, interest expense deductions, accelerated depreciations, thin-capitalisation allowances, and tax deferrals;
11. economies’ financialisation, sustained *inter alia* by a substantially fraudulent approach to the law’s letter and by a well-oiled system of shadow banking;
12. flourishing regulatory capture, vested interests, white-collar corruption, cronyism, gift-giving, spoils systems, revolving doors, and generally a rent-

seeking behaviour, worsened by path-dependency caused by the vicious circle of public debt-trapping, and coexistent with misdirected “moral suasion” by civil servants and other public officers onto all taxpayers;

13. practices of citizenship and residency on sale, including “golden visas”, citizenship-by-investment, and residency-by-investment schemes to attract the wealthiest individuals by shielding them from foreign tax authorities and/or by granting special “flat tax” discounts on imported wealth;
14. transnational networks of democratically unaccountable (but still state embedded) financial consultants, corporate lobbyists, tax planners, and decision-makers, all of whom pursue their interests self-freed from parliamentary oversight and transparency requirements;
15. banking and hedge-fund operations favouring corporate-debt collation, risk reinsuring, and post-misconduct ring-fencing;
16. the short-sightedness and incomprehensiveness of approaching tax benefits as antimonopoly issues;
17. a dangerous rhetoric of perpetual crisis, flag TBTF businesses, golden severance packages, and the opportunist “selective socialism for the rich” relying on a collectivisation of corporate risks (funded by all taxpayers) that contrasts starkly with the unforgiving privatisation of corporate profits;
18. the proactive intervention of central banks through programs like the “quantitative easing”, which only manage to redistribute wealth to the top;
19. the unserviceability of corporate tax data disclosure through information-exchange mechanisms, insofar as the problem lies with the lawfulness of most tax-avoidance schemes under the legal code of capital rather than with the non-disclosure thereof;

20. the rights/duties disconnection in corporate nationality compared to natural-person citizenship, at the domestic level but *a fortiori* transnationally, leading to the factual erosion and meaning-voidance of citizenship-based privacy rights for humans, and simultaneously to the ideal dislodgement of corporations from the values and needs of the social fabric in which they are hosted and operate;
21. exchange-of-information systems that impact taxpayers (because their tax evasion is unlawful) but not corporations (because their tax avoidance is mostly lawful), thus representing a burden for the former but only empty rhetoric for the latter.

As for the EU specifically, the incoherence just described is exacerbated by

22. the non-Europeanisation of individual rights in the domain of (supranationally Europeanised and factually “extraterritorialised”) tax enforcement, due to double-standardism grounded in supposed lack of treaty competence;
23. intergovernmental inertia (when not overt resistance to change), especially by the Governments of The Netherlands, Belgium, Luxembourg, and Ireland – although Brexit has dispelled the “UK obstacle” from the chessboard, in agreeing to a minimal effective tax rate within the EU;
24. the controversial CJEU pronouncements on artificial arrangements, aimed at safeguarding the EU *as an internal market*, and facilitating e.g. tax-motivated M&A operations;
25. circumstantial evidence that even if the regional design of the CCCTB is improved (e.g. with regards to potential employees and beneficiaries grouping tactics), the same matters it addresses would remain problematic regarding the extra-EU dimension of profit-shifting, thus calling, once again, for a hardly achievable global solution.

In conclusion, OECD-modelled AEOIs, as well as any StT mechanisms enacted so long as the variables outlined above hold true, are unlawful as they violate the human right to privacy systemically and contextually, with no reasonable derogative justifications for the violation of such right.



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Part IV

(Re)constitutionalising privacy

in international law:

Towards a new Surveillant Contract

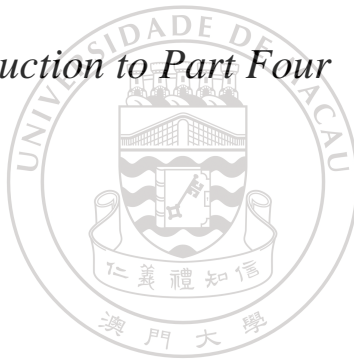


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Chapter 14

Introduction to Part Four



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Overview of Part IV

In **Part Two and Part Three**, I have demonstrated that the same policy package is lawful under ICL and unlawful under IHRL; how to reconcile these opposite legal outcomes? In this fourth Part, I endeavour to offer a teleological rapprochement between the two verdicts, through the discernment of their potential contribution towards the subjectively chosen meta-political reference paradigm: global constitutionalism. The question “is StT lawful under IL?” can be thus reformulated as “acknowledging the unresolvable legal outcome of StT being both lawful and unlawful under IL, and assuming GC to be the most meaningful international legal teleology against which to frame the dilemma, which solution should prevail *from a global constitutionalist perspective*?”. But why inconveniencing meta-political subjective paradigms? **Ch. 15** unravels the reasons why StT’s lawfulness under ICL and unlawfulness under IHRL cannot simply be displaced by technical Internet-based solutions that remove the need for it to be HR-compliant while accommodating its customarisation. Similarly, **Ch. 16** expounds that law-grounded normative-conflict resolution mechanisms cannot supersede the irresolvable coexistence of lawfulness and unlawfulness in a norm when the latter is not contested *in concreto* before a court or tribunal. As such, **Ch. 17** elucidates one possible path humanity can take towards lawful renditions of StT: the global constitutionalisation of citizens’ rights, in such a way that the jurisdictional scope of procedural and substantial safeguards applicable to every human being consistently matches that of potential violations of their legal entitlements. Surveillance being a yardstick to gauge the extent to which state-corporate power conglomerates exert structural political violence onto the citizenry, this updated configuration of HR protections is as urgent as never before (**Ch. 18**). In

fact, what citizens need is the stipulation of a renewed and global SC that excludes corporations as bargaining subjects and encompasses sovereign protection related not so much to military security, as to automated intrusion into one's private sphere of living. A global anti-surveillant pact would represent the utopian outcome of this reconstitutionalist momentum, but to keep a more balanced and realistic tone, we could rather strive for a partly surveillance-apologetic compromise which results in a global surveillant pact whereby States, although not renouncing to surveilling their and other jurisdictions' citizens, commit to uncapture themselves from corporativistic logics of data surplus and exploitation (**Ch. 19**). This solution, which I name the Distributive Surveillant Contract (DSC) and still sits somehow on the distant legacy of Westphalia, would help the 99% secure a fairer and socially just tax system, whereby their tax data can still be surveilled by States but this is pursued against a context of enhanced economic equality between natural and legal persons – which in turn translates into resized gaps between the bottom corporate-untied 99% and MNCs' shareholders and top executives sitting in the 1%. The scope and rationale of "my" suggested DSC conclude the Thesis, but further publishing efforts may wish attempting to elaborate a first potential draft thereof, along the lines of a constitutional Charter.

Chapter 15

Disserting about alternative technological solutions to AEoIs sounds and in fact is premature, both because technology has not yet progressed enough to fulfil this role, and because our bordered planet places infrastructural (from procurement to cybersecurity), managerial (from distributed capabilities to auditing procedures), and political (from digital sovereignty to supranational trust) constraints upon IO-overseen

outsourced-to-technology centralised solutions to the problem of tax dodging. Despite this, I believe it important to start reflecting about these alternatives, as to cognitively prepare ourselves for the time when technology and society will enable their pursuit {**Section 15(a)**}. Indeed, this seems necessary and topical: States keep rejecting redistributive tax agreements internationally because taxation is still conceived as the benchmark of sovereign prerogatives, but rent-seeking among world powers and the unmanageable world-scaled privacy violations operated by and through businesses are turning human life into a meaningless (and quite miserable) exercise of consent-giving, made futile through capture, coercion, or nudging. HR safeguards phrased in reciprocity terms are obsolete and cannot be dealt with in the digital age {**Section 15(b)**}. Rather than lamenting the externalities caused by aggressive tax competition among themselves and “their” businesses, States should share their jurisdiction over a common technical solution to the private sharing of tax data; for example, they could assert common jurisdiction over an alternative (and fully publicly owned, differently from today’s one...) Internet network, exclusively dedicated to the safe and privacy-upholding exchange of financial data, to be supervised by an independent authority where the say of all States is accounted for but no state representative has access to. If dataveillance cannot be renounced to because fighting tax(-related) crimes is deemed essential, then a permanently shared Internet network where to channel all financial data could provide an original escape route from unwanted privacy intrusions by unauthorised third parties. Data would be communicated by financial institutions directly through this closed system, and analysed algorithmically (the algorithm’s source code being published) under the technical supervision of an institution with virtually no need for human intervention. Suspected transactions would be flagged up to relevant authorities through the same closed-circuit channel, with all other data

being fully anonymised and encrypted or, preferably, destroyed real-time. What is more, the same circuit could prove of use for automatically taxing all financial transactions that exceed a certain amount, regardless of who authorised them and where from, and even to redistribute the so-gained amount to States' public balance sheets. In sum, transactions would be either taxed real-time or forward to state authorities for further scrutiny; data on all those transactions which are neither to be taxed nor to raise suspicion about would be immediately discarded. The takeaway point is: if automation is the way to go, then it should be *ratione temporis* immediate, *ratione materiae* selective, *ratione personae* applicable to all; it should also prove anonymous, fair, redistributive, technically safe, efficient, and dignity-compliant {Section 15(c)}. The technical accomplishment of this result would debunk the cyberspace as a *locus* of physicality rather than suspension thereof: the IO-managed switch point would require the granting of neutral land where to establish the central servers of such a jurisdictionally neutral Internet, which, in turn, should be operated through a separate infrastructure. Being already routed through said separate cables, financial information could still be exchanged through the most efficient paths depending on traffic {Section 15(d)}. While disadvantages should be considered before entrusting a centralised authority under the aegis of just a few humans with the management of such an essential public service, two facts are worth recalling: first, weak security protocols and storage solutions like clouds are already putting the security of our communications—and the exchange of information about us in mechanisms such as the AEOIs—in jeopardy; second, the Internet is already *de facto* centralised, and what is worse, it is centralised in the hands of a few capitalist champions in the digital industry: they own Internet infrastructure, influence Internet policies, and manage Internet exchanges. In fact, the situation can only improve. This

is *a fortiori* true as mentioned IO would be mandated to respect stringent cyber-hygiene requirements, and to reject any request for contact or any transaction originating from untrusted (i.e. non-party) state or non-state entities. Interestingly, as I admonish in **Section 15(e)**, such an AI-powered model would allow humans to disregard trust for others, and jurisdictions to rely on the diplomacy of comity and reciprocity: transactions would be recorded automatically, and equally automatically checked, taxed, and destroyed. This is both frightening for the future of our species—trust outsourcing, which is already gaining ground through the blockchain hype, is not particularly healthy for our residual humanness—and outright promising when it comes to levelling long-standing socio-inequality grounded in the wealthy's chance to conceal their assets and dodge tax systems to their preference.

Chapter 16

Once ascertained that technical escape-routes for the StT's lawfulness/unlawfulness dilemma would be extremely efficient but should be deemed, for the time being, unviable, and prior to resorting to meta-political ventures, one would rightly try to recompose the two legal assessments of StT through legal means for normative conflict resolution. Just like interpretative conflicts, normative conflicts are frequent encounters in IL, but not as easy to grapple with; they may arise from uneven sources, regimes, or both, and are of special relevance here when States omit to consider the HR implications of a potentially customarising practice before endorsing its emergence and contributing to the crystallisation of its status {**Section 16(a)**}. These normative conflicts are so widespread that publicists and courts, over centuries, have refined a set of doctrines and tools to overcome most of them on a

systemic or case-by-case fashion. Among these instruments, systemic integration, hierarchy, and the *lex posterior/specialis* rules have been long mainstreamed and in fact contributed to untangling a considerable amount of complex disputes before international courts and tribunals; other devices insisting on semantics, pragmatism, neuroscience, or formalistic dualism have often proven of assistance as well. And yet, none of these mediums are of use in this case, mostly because the conflict I have proposed is abstractly presented rather than pleaded situationally by two parties in front of judges or arbitrators *in concreto* {**Section 16(b)**}. Provided the impossibility to extricate myself from the proposed dilemma through legal means, I am left with an option which is widely considered second-tier, but I would rather deem top-quality: teleological orientation. Indeed, in **Section 16(c)** I table the choice between an ICL-friendly positioning and a posture more sympathetic to the *pro homine* stances of IHRL, and explain my reasons to walk the second path; this is a fundamental choice, in that the two positionings express a totally different vision if not of the substance of IL as it stands, at least of its foundational purposes – including the ends it should strive for and tend towards. While being evidently an extra-legal move if we define “legal” as “pertaining to positive law”, solving normative conflicts teleologically is not just about personal politics, in that it appeals to the law as its value-based authority in order to legitimise the preference it accords to one or the other argumentative side. Both those who take one route and those who prefer the alternative one will appeal to “the law” to argue their case, even though such law itself cannot decide in favour of either contestant. One can only hope to advance reasonable and persuasive claims which will make the IL project shift towards the preferred harbour. Who gets to act and decide though? Remarkably, IL-phrased claims and counterclaims revolve around a plethora of stakeholders which I assume, in the case at hand, to be essentially legal-person-tied

and legal-person-untied natural persons, or, so to write, the 99% and 1%; in any case, individuals rather than States or other institutions. And because humanity as a whole is my eventual addressee, I cannot but adopt a global constitutionalist perspective on tax justice, fairness, redistribution, and related surveillance. GC's perspective is optimal time-wise, too: AEoIs, which are currently unlawful under IHRL in a globally unconstitutionalsed world, might acquire a lawful status when customarising not so much in the current reality, but in a constitutionally ordered global society where rights and obligations for all humans are matched-in-scope and centrally enforced. Far from tending to discursive patronage, this is in fact an autopoietally responsabilising path for the entire humanity, which should choose to endow itself with these legal safeguards and battle for this to happen relatively soon, in opposition to the transnational modes of governance I repeatedly criticise in my Thesis. **Section 16(d)** defends the idea that in this case, siding with IHRL is less of a choice and more of a necessity for anyone who trusts and supports the regulatory function of the law, primarily in democratic societies but more broadly just as much: every complex society predicates itself on the expectation that its leaders (whether elected or not)—and perhaps the “international community”, too—will try to accomplish what they declare manifestly. Here, we are reasonably confronted with people's expectation that government would do everything in their power to increase public revenues by fighting tax dodging, and it is rather straightforward that surveilling everyone at once without establishing priorities and refraining from terminating well-known gaps exploited by corporations is not going to emerge as a winning strategy. Observed from this angle, the reader will appreciate the enduring centrality of the concept of coherence—and of that of consistency, workably definable as “coherence over time”: political fitness assumes the vestiges of legal coherence when it turns aspirations, manifestos, and

demands into workable policies ahead. Here, GC's rights-obligations matching could have *ex post* legitimised the customarisation of StT, making it “fit”—or at least acceptable—for featuring in States' toolbox against tax crimes and illicit operations – even though, *repetita iuvant*, StT is now unfit from a global constitutionalist perspective (exactly because GC's safeguards are nothing but a theory for the time being). And yet, I suggest that this is open to argument as state-based customarisation processes are of secondary interest to GC, so that StT might prove unfit even after individuals' rights and obligations are jurisdictionally matched. The tangle gets even more articulated when IOs are brought into the picture: how to assess their coherence and fitness? While ICL deals with IOs' *outputs* and *outcomes*, GC shares with IHRL the tendency to concern itself with IO actions' *impact* (on global citizens). However, the ability of IOs and, *a fortiori*, transnational governance networks to originate customs could not be less straightforward; while “global citizens” do exist and frame their claims as such, the work of unaccountable transnational bureaucracy should not be considered innocuously informal customs-*in-fieri* if they are then to be introduced within domestic systems from the backdoor and replicated across jurisdictions through transplant. Because they often end up working this way, the customarisation processes these governance networks compel ultimately inform multi-origin single-area customs (e.g. surveillance customs triggered by different sets of motives) whose legitimacy will be clear only once a global administrative legal framework will have been accepted and routinised {**Section 16(e)**}. What should such a framework look like? Theorising an entirely borderless world is naïve and probably irrational, as it seems to oppose not only the current design of our geopolitics, but also our true nature as competition-prone and selfishly oriented humans. What could be achieved instead is a multi-layered framework whereby further layers of quasi-citizenship are “added” to the main State's

one in order to satisfy the exigencies of individuals when it comes to shielding themselves from the consequences of beyond-the-State decision-making outcomes. To exemplify, if an Indian's tax data is shared with Venezuelan authorities under a transnationally convened policy, transnational rights should be granted to that Indian in Venezuela as well, and if said policy was agreed globally by directly representative institutions (think of a sort of second-level parliament elected by citizens globally), citizens should appeal to a set of enforceable global rights that adds to their national one. As I recount in **Section 16(f)**, tax-expenditure reporting can provide just another example: if one's taxes are collected by countries other than those of primary citizenship, the former individual should be granted the right to be informed about their money's destination, and potentially to have a say towards it – this is somewhat a global or transnational re-edition of the old *no taxation without representation* adagio, which could even be rephrased as *no tax-information without HR-representation*. On the whole, current proposals to reify a global tax governance are misleading and potentially detrimental for the 99%, in that global exchanges of information are devised prior to having redressed the structural imbalances which granted leave to the 1% to “lawfully” thrive. If the BEPS project aspires to be the equivalent of a constitutional moment for global tax governance, it should probably place enhanced emphasis on these foundational redistributive and inclusive aspects before moving forward, which is yet another reason for standing by the IHRL assessment of StT prior to these surveillant mechanisms customarising alongside the progress of non-resolutive BEPS plans {**Section 16(g)**}.

Chapter 17

Let us explore, in **Section 17(a)**, what a potential path towards a Global Constitution for all humans—and its inevitable pitfalls—could be, starting from the assumption that the ongoing globally constitutionalising tendencies only benefit the global mobility of capital and, consequently, the 1%, while the endeavour towards a Redistributive Global Constitutionalism (RGC) is advocated for in these pages. To move forward with any global constitutionalist project, though, identifying the modes of normal constitutionalism today is of the essence; to begin with, one should learn from the Westphalian State whether its normalcy status as the fundamental constitutional component of PIL is still upheld or so much eroded that while projecting itself on paper, it stands emptied of its status and functions nowadays. An essentialist historical perusal suffices to appreciate the transformation of the Westphalian State over these four centuries vis-à-vis the pressures of capitalist élites, with exceptionality a-jurisdictional arrangements for the rich turning more and more frequently and acceptably into novel patterns of normalcy. This (plus the forthcoming ones) is probably the denser and most complex portion of my Thesis, which I invite the reader to enjoy closely as it cannot be fairly summarised here. In any case, the core element to be remembered is that while Westphalia has never truly worked as a constraint against the jurisdictional exceptionalism of the wealthy, lawmakers did defend *at least the idea* that Westphalia *should have* worked for all as the capital organisational paradigm for the global village. With neoliberalism, instead, even this somewhat soft expectation expired, succumbing to the ubiquitous penetration of Anglo-Saxon corporate law in all aspects of our lives, at all uttermost corners of the Earth **{Section 17(b)}**. Evolutionistic explanations of social structures cannot straightforwardly account for this phenomenon, nor can they satisfactory prognosticate its transience or permanence; I advise, however, that MNCs are a by-product of Westphalia “by

reaction”, and it stands with States in a parasitic relationship where MNCs are joined by public regulators in facilitating the global mobility of capital while enforcing territorial-based citizenship on natural persons. As I describe in **Section 17(c)**, this contributes to making sense of corporate transparency proving unimpactful when it comes to resetting corporate taxation: evasion planning resembles a variation of Pulcinella’s Secret, who is separately known by all parties while each of them pretends to ignore it while engaging with all others. Another non-secret from the same genealogy is that despite all the doctrinal fictions corporate lawyers are keen on perpetuating, from an economic and social-justice standpoint the divide does not rest between lawful avoidance and unlawful evasion, but rather between the 1%’s avoidance-evasion conglomerate and the rest of our behaviours {**Section 17(d)**}. In fact, the wealthiest individuals are richer than the overwhelming majority of States, as well as far more influential than the latter on the conduct of human life, with their mistakes propagating globally through financial crises and externalising onto the poorer by means of legal protectionism and classism. The law has always been, to an extent, a privilege-preserving fiction, but the qualitative disruption from the past nowadays lies with surveillance, which makes it impossible for the status quo to be challenged by the masses before the latter are discovered and automatically annihilated; only those aspirations which can be expressed through the hypocritical linguistical and legal codes of the élite have their manifestation approved, while all others are suppressed pre-emptively or need to revise their claims downwards. Rhetorical pipelines come this way to coincide with the liquidity pipelines that grant capital the ability to move borderlessly: the vehicle for both is the neoliberalised and globalised corporate law. Moreover, the embodied disembodiment of idealised “legal persons” has naturalised the anthropomorphisation of legal structures and their

unanthropomorphisation at once, though a legal-theory construct by which corporations are like human bodies but can place their organs and apparatuses far from each other and still keep functional. By contrast, and not confined to geography, a human who migrates has to keep its whole together, and cannot be simultaneously *here* and *there* – not even socially. These discrepancies cannot but expose MNCs, the transnationally embodied-disembodied entities *par excellence* which most benefit from, lobby for, and rely on these coincident pipelines, as the most absurd and well-engineered legalised fraud ever conceived; if Westphalia exists, it should work for all personae, otherwise it will end up favouring those natural persons which tie themselves to legal ones to escape Westphalia and “lawfully”. MNCs are no doubt a fraud that despite having unleashed decades (and centuries) of, *ex multis*, artificial money emission, frivolous anthropisation, as well as financialised taxation and welfare, keeps shamelessly telling us it is absolutely alright and we should continue walking along the same path conservatively {Section 17(e)}. I am wary of those scholars who claim that States would be victims of the situation and resistant agents against the hubris of neoliberalism: those States use to depict tax benefits to MNCs in developmental terms, which signals either their bad faith or their utter unpreparedness on themes of sustainability, distribution, fairness, emancipation, and social justice {Section 17(f)}. Thus, as far as I am concerned, they are co-responsible for their own corporate-captured fate. Tax avoidance is not an inevitable consequence of policies for growth, and I am not even convinced of the claim that growth is what States should tend to, considering the disastrous impact it has on both ecosystems and the marginalised social classes, not to mention mental health and our future as a species. Similarly, dismissing market-corrective options which would run against the interests of the wealthiest tax(non)payors by deploying free-riding theories is nonsensical and unethical, and

pretty much of an élite-sponsored procrastinating strategy {**Section 17(g)**}. Where to start, in order to deescalate these hypocrisies and threats? **Section 17(h)** dares submitting a few initial thoughts. GC is an interesting end-point, but a reformed version of its classical theorisation is essential as to strip it from capitalist interests which would capture the whole process with their secluding priorities. In fact, my preliminary assumption is that to empower the 99% as rapidly as possible, any conception of GC we might want to work towards should free itself of the irremediably captured State as the necessary mediator in all political transactions, to rather opt for natural-person-oriented deliberative assemblies of global scope which work according to the subsidiarity principle and the strictest possible independence from corporate entities; without forcing diversity at all costs, these assemblies should nonetheless embrace inclusivity, especially in terms of social classes and intersectional economic disadvantage – I emphasise the distinction between *diversity* and *inclusivity* because very diverse humans can share the same socioeconomic privileges. These criteria should feature in all public commitments, visions and strategy papers, and HR impact assessments should be conducted before implementing any tax reform, paying close attention to the aggregate impact of tax avoidance and benefits on the physical and mental health of the disadvantaged and the poorer. Attention shall also be directed to the process of impact-assessment filling not becoming yet another ticking-box exercise in the hands of faceless bureaucrats: first, it should be politically driven from the bottom up; second, it should deproceduralise it by placing the substance of policymakers’ intended actions before any peripheral consideration on procedures. I am particularly keen on stressing this element due to my judgement that AEOIs represent one of those instances where proceduralisation of international lawmaking has been pursued to delay deciding on what matters as well as to rhetorically divert

citizens' attention from the actual content of the policies being proceduralised. To put it briefly, it should never turn out that procedural fairness ended up serving and concealing substantive inequality – StT mechanisms whereby everyone is surveilled but no tax-avoidance scheme is sealed being the perfect exemplification of the risks inherent in the proceduralisation of IL {**Section 17(i)**}. As I illustrate in **Section 17(j)**, exactly the same rationale should underpin popular referenda on tax issues, held to ensure citizens' anti-establishment voice being heard and not to proceduralise policy enactment while leaving its substance confined to domestic or transnational elitist debates. All in all, genuine anti-avoidance policies should reverse the miserable trend of corporate contributions to social welfare, as to ensure that market forces are unleashed to feed the Chronically Excluded as well as to re-engage the Global Middle Class, in a way that life is deemed more liveable by all; as a first after half a century of neoliberalism, the legal code of capital would this way restrain the hypertrophy of the Capitalist Class rather than pumping further legally sanctioned social irresponsibility into it {**Section 17(k)**}. Heading towards the conclusion of this Chapter, I note that Westphalia implicitly lay its legitimacy on the then-contemporary enthusiasm for the Leviathan, which is one of the countless variables now turning oldish SCs into corporate-driven enterprises; indeed, mentioned enthusiasm vanished over time, both because hard security has largely come of age, and owing to intrusions and interferences by legal-person private parties. The old-styled Leviathan being rapidly archived, one is left pondering what's next for natural persons, as the current configuration of the SC approximates to a social bipolar disorder whereby the two ends (the State and "its" MNCs) strive to appear in constant clash over policing while actually tending towards the same state-corporate captured equilibrium. Be it as it may, StT can be deemed a product of bipolar ascendances whose objective is to keep the

99% under control and tailor its living-satisfaction levels to the highest level not to engage in protests, and to the lowest to conquer social positioning and economic bargaining power. Even worse than this degenerated Leviathan would be the degeneration of two-end contracts into tripartite arrangements where corporate participation is legitimised and citizens can only occupy the third seat. To embody the values of a RSC, the SC of the future will need to “undo” territoriality, value non-exploitation, and enhance accountability; furthermore—and here resides the key of this Thesis’ proposal—it will need to come intrusion-proof from the abuses *and the surveillance* of the powerful {**Section 17(l)**}. If surveillance shall be implemented and States are keen on furthering its exercise, the 99% shall be such surveillance’s beneficiary actor as well, rather than its victim only; moreover, corporations should be set aside and involved as mere objects as needed. Put differently, States, finally acting for society through society, will need to surveil out of genuine globally minded redistributive aspirations corroborated by the internal and external coherence of their overall policy portfolio, for the purpose of getting the sense of their taxpayers’ base as scientifically as possible and tailor their efforts accordingly. Contrariwise, States shall never anymore surveil everyone while leaving tax avoidance unaddressed, just for the sake of rhetorical reward, focus diversion, and citizens’ appeasement – which is the shameful posture they mostly adopt as I write. The touch I wished to conclude this rather profuse Chapter with, in **Section 17(m)**, is an intergenerational one: the challenge of reconstitutionalising capital as for bringing it back under the wings of legal reason (just not the Westphalian, nor the Anglo-Saxon corporate ones) should include all those who wish to join, and yet it is evidently and chiefly placed on the youth’s shoulders as the legacy of shameful greed and indolent inaction inherited from previous generations.

Chapter 18

Why should intrusion-proofing be identified as such a defining feature of any future SC? Ch. 18 endeavours to answer this question briefly, by drawing on studies of pervasive surveillance as structural violence. **Section 18(a)** enunciates this Thesis' approach to privacy, which I understand as protective of the informational extension of our cognition and bodies across society, to the extent that privacy management can be listed as a corollary of contemporary biopolitics. While the shift from EoIR to AEoI has greatly facilitated the job of tax agencies worldwide, neither is proving decisive to chase the most serial tax evaders, and even less is it redressing the major fallacy of global tax governance which lies with corporate avoidance {**Section 18(b)**}. To be sure, my stance is not that AEoIs' privacy impairment is aprioristically and unreservedly unjustifiable, but that it is transitionally unacceptable before a serious operation to stop corporate avoidance is launched globally. Such an initiative would prove easier to accomplish in a world society where HR are no longer tied to territories and citizenships but recognised *and enforced* on the global scale; in fact, it would make little sense to subject to or elect a world government if HR remain territorially and jurisdictionally anchored to one's State of citizenship. Thus, the first step is not to globalise institutions, but to globalise HR entitlements, meaning for instance that the privacy standards of information exchanges should be uniformised globally rather than left to the domestic provisions in force in the receiving country, with reciprocal trust being well-earned *before each country's citizenry* and never taken for granted by the States that represent them. When it comes to exchanging citizens' data for supposedly beneficial purposes for the entire society, a State should not trust another State's

authorities unless the former's citizenry has accepted the trustworthiness of the process; in order words, I posit that personal data being an inalienable extension of our identity, the power to enact said exchanges cannot be derived from general delegated powers of politic representation. The contract between any individual and society is confined to that society, so much that the communalisation of governmental prerogatives involving personal data shall never be exercised in the absence of popular explicit consent; exceptionalism cannot derogate from this postulation, with ordinariness only being allowed. Even when coded through the most advanced technologies—self-learning algorithms being the most pertinent example thereof—, the political salience of our identity shall never witness its public sacrality being watered down through externalisation, outsourcing, or dispatch to other sovereigns, which is further necessary to preserve the genuineness of customs, whose underpinning practices and beliefs should not be artificially chilled through (either reasonably foreseeable or actual) global networks of surveillance {**Section 18(c)**}. What we assist to nowadays is somehow the reverse of the above, i.e. the dystopian spectacle of States' indifference towards the political imagination and contractual status of "their" citizens. The Leviathan has abandoned national defence as its primary objective, embracing an all-encompassing national-security purpose instead, which is highly symptomatic of an inward-looking attitude which socialises the lexicon and practice of securitisation both within and outside the State's border; and with almost every policy, including taxation (the reader is reminded of the anti-money-laundering—and thus counterterrorism—narrative) being sold to the masses in security terms, one can immediately grasp how dangerous the situation is. I submit that via AEOI mechanisms, the 99% is enemised by a self-entitled "righteous" minority and turned against itself as the culprit of mankind's problems—inequality, terrorism,

high personal income taxes, unsustainable public finance, poor delivery of public services, declining welfare safety nets, and the like—without even realising this twisting game is being played. It seems wise to remark here that mine is not a conspiracy theory, but a slightly more sophisticated remake of the infamous “war among the poor to catch the falling crumbs from the rich’s dining table” picture – which, in turn, is the basic ideal subsuming “trickle-down” theories of political economy,¹⁵³⁰ consistently endorsed by neoliberals. And because this rhetorical threat, those imagined—or, more accurately, cynically construed—enemies’ guilt is global, they cannot appeal to their State, nor other options are available: they become disposable ends in the era of biopolitics, with their data being stripped of citizenship rights to be shared, processed, and captured information from worldwide. Joining forces, institutional and corporate élites get the job done: instilling sentiments of unfairness in the taxpayers’ body, to subsequently direct them against the wrong target, which is instrumental to both surveilling the poor, and keeping the *true* enemies of a fair society safe. This really look like the kakotopian reversal of GC institutional delivery: societies penetrated by globalised technology-driven enemisation, while the global élite feasts and jubilates at their backs {**Section 18(d)**}. As exposed in **Section 18(e)**, it also helps explain what lies beneath legislative hypertrophy, which is a typical phenomenon of our time: an impressive number of laws—more and more coercive and surveilling for the general population—are constantly issued but main problems like tax avoidance always stay the same, bringing the well-known adagio that “sometimes we pretend to change everything in order to change actually nothing” to surface. This is the State that either makes a parody of itself to keep feeding its élite, or that is reduced to a parody by MNCs to keep feeding theirs. Borrowing from Walter

¹⁵³⁰ Check e.g. CHOUDHURY and PETRIN 2019, pp. 327;331.

Benjamin, state violence—as expressed e.g. via StT—is thus *mythical*, as founded upon a parody; I would say it is also *mystical*, i.e. grounded in an irrational act of faith on the part of citizens. The latter should avoid being caught off-guard: theories of structural violence warn us against the risks of permanent states of parody where ridiculous ostentation turns into perpetual *panem et circenses* politics, to then metamorphosise into discursively justified violence and eventually into (techno-)fascist politics. Resistance should be conveyed through any possible channel, including organised tax strikes – to be societally compensated through widespread solidarity action (so that are not again the poorer those who are going to bear its consequences). Paying taxes to keep feeding the wealthy’s lifestyle—legal services, infrastructure, higher education, scientific research, personal security—is so unreasonable that an “ethical anarchism for value-embedded lawmaking” manifesto is advocated for, and (moderate, progressive, horizontal) tax strikes can indeed be ascribed to the plan. Action is required to displace the “inevitability” claims advanced by global élites: we humans are inherently selfish and will cause their own extinction out of hyper-fierce and under-solidaristic competition, but before that happens, there is room for a cognitive change that paves the way to more concrete and diffused sentiments of (tax) citizenship and public resource sharing. It is all about *pars construens et destruens* coming together for a project of the commons that turns the 1% into a nightmare from some distant violent past {**Section 18(f)**}.

Chapter 19

Till this point, the present Thesis has been developing a critique of the state of affairs in global taxation: corporate élites keep avoiding taxes, while the 99% is

surveilled to make sure they pay them – and to exploit tax data in other ways. This particular mode of surveillance is lawfully-by-default customising, but it is to be deemed unlawful under IHRL. The Thesis’ Part Four has demonstrated that no technical solution is politically and economically affordable for the time being, and that no legal tool for conflict-resolution is applicable to this normative misalignment; furthermore, it has sought to justify my choice for GC as a meaningful and feasible framework reference to address the dispute teleologically, and it proceeded to incorporate violence scholars’ observations on the visible and hidden risks of pervasive surveillance to SCs in contemporary societies. Hence, the outstanding dilemma concerns the features of the SC to be striven for in order to redress the state of the art just recalled: **Ch. 19** is devoted to this topic, and will argue that while an Anti-Surveillant Contract would highly benefit the 99%, it is unlikely it would take shape anytime soon, also due to quasi-totalitarian jurisdictions where surveillance is a *condicio sine qua non* for the exercise of autocratic power. Resultantly, for the purpose of designing a global (tax) governance system whereby the 1% is made accountable to public institutions and contributes its fair share towards collective wellbeing, an explicitly Surveillant Contract is warranted, where the resizing of the aspiration to withdraw pervasive surveillance is devised as an apologetic counterbalance to the utopian fulfilment of social justice between natural and legal persons – or to be more accurate, between legal-person-tied and legal-person-untied natural persons (tax-wise). **Section 19(a)** identifies the historical junction when—in Europe at least—SCs democratised and secularised without necessarily stripping themselves of their elitist connotation; in fact, with capital gradually supplanting both nobility and religion as the universal generator of all life values, people started to gear towards existential nihilism. One element, though, could escape the pessimism of such analysis: trust,

which SCs increasingly placed to the core of human relationships within any given society {**Section 19(b)**} but is now challenged by its outsourcing to algorithmic machines and other digital and non-digital technologies, not least the blockchain. The legalistic humiliation of non-humanness brought about by algorithmically powered sorting strategies has come to tie itself closer and closer to the cognitive and public-policy habits of neoliberal welfare-dissipation, meritocracy, *et similia* {**Section 19(c)**}. Trust has turned into a self-reflective account, a self-defined measure to track reality with no external validation setting in the broader society, and if one inspects earlier conceptions of SC, the roots of this approach are to be traced exactly to them: back then, the SC was about survival and practicalities, not ethics, so much that Hobbes anticipated the survival-of-the-fittest evolution-derived reading and Locke dived into it with his idea of common prosperity being nothing but a cultural construction with no natural justification or metaphysical potential. The Chinese formula for SCs has consistently upheld solidaristic notions (though not infrequently disregarded in imperial practice), while in the West it is only with Leibniz that solidarity was transposed into SC theory, and in the wake of the tax-avoidance industry and surveillance machinery exposed in this Thesis, one could legitimately ponder the question whether we are sliding backwards to pre-Leibnizian modes of socio-legal thought {**Section 19(d)**}. The answer does tend to the positive: not only the wealthy as well as corporations—though for different reasons—are incited to free-ride on public resources, but the fictionality of corporate law and its disguising human-like nomenclature for legal persons motivates a counterintuitive call for enhanced materiality in ITL, not as a means to displace aspirations or values, but as a reminder of the necessity to exercise tangible lawyering (and write tangible laws) in order to improve the integrity of tax governance {**Section 19(e)**}. For instance, tangibility

would be much needed to reverse the trend of infra-jurisdictional “free zones” that factually commercialise sovereignty by placing it on sale internationally to wealthy corporate shareholders or executives, to the detriment of the SC between the jurisdiction instituting them and the non-privileged segments of its population {Section 19(f)}. Similarly, a tribute to materiality would perhaps help transnational networks realise the extractive patterns of their unaccountable contribution to tax governance and IL, in terms of both elitism and techno-seclusion which does not question itself frequently enough about its humanness {Section 19(g)}. This enquiry, which cannot be expected of or delegated to third parties, is of the essence to interrogate the meaning of SCs today and in particular to illuminate their domestic ‘authoritativeness’ decay, thus fostering a culture of re-responsibilisation, motivating participatory proactivity, and treating the contracting natural-person citizens less exosystemically, ultimately rejecting valueless SCs as unserviceable *fictiones iuris* {Section 19(h)}. To be useful and actionable, SCs also need to extend supranationally the same way financial transactions, technocratic networks, and information exchanges do {Section 19(i)}, also with a view to reabsorbing the asymmetry between citizenship-tied taxpayers and techno-globalised tax agencies that I mention in Section 19(j). Furthermore, renewed SCs should be stipulated as a defence against the narrative of ineluctability which has already allowed corporations to join supposedly bilateral (State-citizenry) contracts as extemporary third parties thereto; corporations could sneak in thanks to the culture of legal correctness that politically correct corporate lawyers have managed to socialise, in an era where the empty forms of law are indeed often preferred to its substantive contents and messages. I am not sure whether social licences for corporations would improve the situation, but certainly urgency is felt at all corners to stop this colossal money-making (and tax-avoiding) machine as

inequality and exploitation-driven disasters loom for the youth as well as humanity generally {**Section 19(k)**}. If “Faustian pacts” are being signed between corporations and citizens, it is because the latter—especially the youth—believe that digital realities and devices will integrate the services and security which are no longer being provided by States’ central administrative authorities, but this is obviously an illusion: as repeated *ad nauseam* throughout my Thesis, corporations and States have become *alter ego* to each other, pooling together their élites around common conservative stances and manoeuvres to maximise power, routinise subservience, enhance compliance, and suppress dissent {**Section 19(l)**}. Those inauspicious pacts are also signed out of capital’s regime-neutrality, which means that capitalism is not just a way of doing economics but fundamentally a way of thinking and being in the world; worse even, it is *the only* survived way, which speaks volumes on our nature as human animals. Politically, not only capitalism exercises no working preferences between democracies and autocracies (and all those in between, of course), but it equally applies to any political regime through slight variations of itself – more on the surveillant side than on its economic models. It sides with anyone who wishes to buy and sell, “produce” (from an anthropophobic perspective, no product is actually “produced” on Earth, insofar as raw material is stolen from nature and labour is made compulsory for the masses to survive) and invest, transact and compete ceaselessly – no matter their beliefs or backgrounds; in a religiously and civilisationally sectarian “global” society, profit is the only bond that keeps all of us together. This allowed a till-relatively-recently peripheral regime like the Chinese one to candidate itself as the next superpower and to influence global affairs through its understanding of the function of capitalist structures within society – not least its surveillance, security-aimed component {**Section 19(m)**}. It is worth recalling, however, that even Western

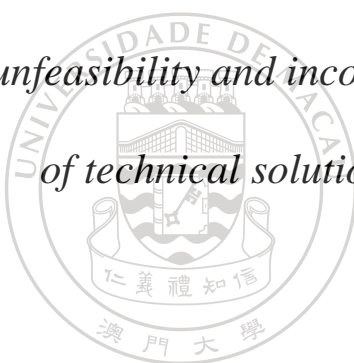
democracies have built their economic success (infrastructure, research, raw material, free labour) on the exploitation of all other models, phagocytising them first abroad and then even at home. No regime comes clean to the appointment for a renovated SC, so that no one can reasonably hope the latter will overturn exploitation-based domestic models into fairer and healthier ways of producing and living; nevertheless, one arrangement can still be carved out of the impasse: *international* (as opposed to global) democracy, meaning a system where the State is not yet erased, and all States cooperate efficiently in strengthening their service to the 99% while liberating themselves from 1%'s enchainment. Under this scheme, the SC would acquire a consensually redistributive teleology whereby surveillance, maintained as a concession to move forward with the project soon, is intended to socialise wealth rather than assisting in its proto-oligarchic concentration in fictional corporate personae and the relatively few humans tied thereto {Section 19(n)}. “Consensual” does not equate to “voluntaristic”: any individual is forcibly born “into” a contract regardless of their preferences, and imagining a society where people would be entitled to relinquish all SCs and exist anarchically is probably counterproductive at this stage. This aside, the old captured SCs would be reformed with a HR agenda in mind, which values sustainability and tax justice above any compromise with legal persons, to be addressed as objects—and no longer *de facto* subjects—of this popular enterprise. For this to be attained, as mentioned above, surveillance would be accepted as a cornerstone of contemporary sovereignty, thus sanctioning a customarisation process which is already occurring nonetheless; the acceptance of surveillance should pave the way to its democratic (or at least diffused) control, accountability, and reorientation towards social-justice goals to be pursued also vis-à-vis MNCs and legal persons more widely {Section 19(o)}. In the era of geoeconomics, where traditional large-scale wars

cannot be waged anymore due to the widespread possession of WMDs, States' oversupply of hard security compared to human security is a strategic and moral disguise, and sovereigns' pivot to welfare should be charted through closer scrutiny of data's political salience for both individuals and the conduct of international affairs. Put otherwise, data, which is already unanimously considered the engine of the digital economy, should also be identified as the core redistributive asset in dataveillance-shaped contemporary societies, as well as the true marker of privilege and dispossession. Importantly, besides the West, redistributive data-based SCs would not necessarily be disparaged by autocracies like China, where paternalistic good-administration is already incardinated in Confucian thinking and does manifest positive traits as well {**Section 19(p)**}. While elaborating all these thoughts on paper, we shall not forget that civic engagement would be imperative for the successful accomplishment of socially refounded societies, so much as it has been neglected for the current malaise to spread with impunity. If the 1% is the culprit to be pointed at, the 99%'s satisfaction hypocrisy and remissive, apathetic, sluggish relative comfort is to be deemed *interactionally responsible*. It is our daily commitment to remind ourselves that while every human arguably enjoys the "right" to be selfish and maximise its comfort relative to its capabilities and fate (for instance because none of us comes to life by choice, and most of us are indecently overworked and underpaid), we all hold a "duty" to prevent toxic excesses of greed and exploitation from taking our species and planet over, so that those sociopaths who intend to detach themselves from compliance with these minimal safety nets should be either (preferably) cured or ostracised from the SC and treated as international white-collar criminals. It is what our cognition acknowledges as "unjust" which should experience an overhaul before moving farther {**Section 19(q)**}. After all, my proposed SC—just like all SCs—is not

strictly binding, so that anyone would be free to place themselves outside its protective scope and suffer the consequences from such a choice. Often times, practicing and experiencing the law first-hand paradoxically makes us cynical, robotised, socially distracted, and inhumane, but legal imagination for yet unattained projections of fairer living is the utopianism that keeps law itself (as well as our faith in its potential) alive; this is why, as I maintain in **Section 19(r)**, conceiving of kinder and more solidaristic societies through the meta-legal semantics of social contracting is so important for the incessant refreshing of legal thinking (scholarly and non-scholarly alike). Taking note of customising StT as a symptom of the transition from the Westphalian Contract to the Captured Surveillance Contract, I urge consensus-building over a slight variation of the latter into its Distributive form. Eventually, adapting from Koskenniemi's terminology, mine is no more ambitious than an apologetic utopia: it grants States surveillance prerogatives while demanding of them a vigorous page-turning on issues of fairness between legal and natural persons, and between the 1% and the 99%. Despite this, as I clarify in **Section 19(s)**, the DSC is also an inclusive, humanistic, and perhaps even humanitarian endeavour, which stands in solidarity with the 100% of the *gens humana* and our inherently wandering intellectual and experiential condition.

Chapter 15

*The unfeasibility and inconvenience
of technical solutions*



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a A pivot to technology: The potential of exchanging without disclosing

As submitted in preceding chapters, AEoI is a lawful and unlawful mechanism at once, depending on one's perspective privileging either ICL or IHRL respectively. While potential legal devices could be deployed to try to untangle this apparent insolvable dichotomy (as analysed *infra*), assistance might also emanate from technology itself: is it possible to conceive of technological infrastructure and software that ensures all taxpayers pay their dues while preserving their privacy rights? Admittedly, I will delve into this question just very briefly, both because technology seems still unready to take on this challenge, and due to political constraints bearing upon the deployment of such solutions even in the event technology was ready. Nonetheless, I deem it salient to draft the following few notes, as we shall still keep our mind open to possible alternatives which although inoperable for the time being in our border-fenced planet, might disclose operational potential in not too distant a future.

b A chance for radical technology solutions to step in?

As we have learnt from scrutinising the loopholes which might well jeopardise the prospected fairness and feasibility of the BEPS 2.0's project, conceiving of a global tax system where sovereigns retain taxation rights but enforce taxpayers' obligations extraterritorially will inevitably breed distortions, trigger competition, and thus preserve structural asymmetries between natural and legal persons. Current tax initiatives at the international level are designed for and theoretically premised upon reciprocity, yet formal reciprocity—much like the formalistic equality of States in PIL

doctrine—translates practically into political rent-seeking, interest-distribution, and power-bargaining among sovereigns, obviously impacting their citizens as a result.

Globalisation has not made the world borderless, instead turning physical and ideological borders into market segmentation and digital-space grabbing, where identities are dematerialised and AI-outsourced transactions are so numerous that no individual can help but feel disoriented, eventually giving up their rights due to practical inability to track and manage their multidirectional violations by others (including those institutions which were supposed to act as shields rather than enablers). In such a chaotic and dispersed living village, new obligations and globalised surveillance should not be enforced onto taxpayers whilst leaving their rights at the margins: a new jurisdictional correspondence between rights and duties shall be elaborated; needless to say, tax law, with its obsolescence vis-à-vis the digital world society,¹⁵³¹ is unhelpful to fulfil this purpose.

Even if obsolete, the “power to tax” remains a core prerogative of sovereign States,¹⁵³² which retain the monopoly over tax-enforcement violence and are reluctant to either «cede their tax sovereignty in order to create a supernational tax organization [or] enter into a multinational tax treaty».¹⁵³³ A global financial registry¹⁵³⁴ as well as global withholding taxes on cross-border investments have been proposed too,¹⁵³⁵ under these schemes,

¹⁵³¹ See for example GRÖNING et al. 2020, p. 67.

¹⁵³² See COCKFIELD 2020, p. 386.

¹⁵³³ LI 2012, p. 79.

¹⁵³⁴ This registry would be indeed part of the solution, a concrete step towards the eradication of the “real”, massive tax avoidance which is not made of little savers owning “traditional” bank accounts abroad, but of wealthy individuals and MNCs who hide money together with the concealment of their identity. In fact, “automatic” exchanges of information “automatically” exchanges only data the State (through “its” FIs) is aware of, but if the “big evasion” conceals itself behind beneficial-ownership avoidance (see BECKETT 2018, pp. 78;88), such exchange will only target the minor part of the problem and make those little savers pay for everybody else, whilst violating the privacy of billions of taxpayers indiscriminately. The question is: what—or whom—for?

¹⁵³⁵ Refer to COCKFIELD 2020, p. 392.

[i]n lieu of disclosure under a global registry, a payment to someone from a non-cooperative [S]tate to someone living in a participating state will be subject to the withholding tax. There would need to be a way to identify the jurisdiction of the beneficial owner of the payment so that this country could enjoy the revenues associated with the withholding tax.¹⁵³⁶

Nonetheless, caution is prevailing under human-rights arguments, but equally saliently out of diplomatic reasons of international comity, in that such taxes would be tantamount to a sovereign interference in domestic affairs by proxy.

Resultantly, beyond soft legal “solutions”, a way—perhaps a more “technologically radical” one—around mentioned obsolescence needs to be articulated, making sure it is technically amenable to cost-effective implementation: transaction costs shall be worth the game. For the time being, AEOI mechanisms protect sovereignty (exchanges are mostly reciprocal, and States still design their tax systems as they please) to the detriment of citizenship (because domestic rights are rendered factually unactionable for privacy violations occurring transnationally and/or according with third jurisdictions’ administrative-law exceptions).

c Selectively IO-centralising the Internet for enhancing taxing powers through the circuitisation of tax-related data

States condemn the non-distributional effects of regulatory asymmetries like tax (or data) havens as negative externalities,¹⁵³⁷ but insofar as taxation is exercised globe-wise through State-to-State competition rather than convergence towards and effective system of global (albeit field-limited) confederation, said “externalities” are perfectly legitimate; the failure of States in coming together around fixed criteria for tax apportionment cannot retort against citizens’ privacy and fundamental freedoms.

¹⁵³⁶ Ibid., p. 393.

¹⁵³⁷ See TRACHTMAN 2013, pp. 25-26.

Every individual bears the negative consequences of a financial globalisation which missed out on a world government of capital, and whenever possible, tries at the same time to exploit such *new normal*'s loopholes to their advantage, in order not to succumb to capital-deregulated globalisation itself.

Whilst tax havens are indeed a shameful phenomenon in the abstract, aggravating inequality, opacity, corruption, poverty, trafficking, plutocracy, white-collar crimes, classism, and terrorism, the solution cannot normalise the indiscriminate and massive disclosure of personal data of billions of taxpayers around the globe – at least until their rights are not socialised accordingly, and integrity and safeguards cannot be guaranteed equally to all.

Given that the Internet has stimulated, enabled, and globalised low-cost regulatory competition,¹⁵³⁸ the same tool might prove instrumental in devising and managing a solution.

[U]nder circumstances where externalities could cause unstable regulatory competition—races to the bottom—the availability of contingent intervention by a centralized authority, such as an [IO], can act to provide a stable equilibrium. This latter insight provides an additional reason for States to form an organization to share jurisdiction under certain circumstances,¹⁵³⁹

including jurisdiction over Internet infrastructure. In other words, certain policy goals in need to be pursued internationally call for the communalisation of the Internet—with regards to certain classes of data only—under the supervisory authority of an IO (which would set to be accountable to States without being manoeuvred by them). Generally, infrastructure is a key, tangible component of securitisation through data governance—and algorithmic data governance more specifically—which is often

¹⁵³⁸ Check e.g. *ibid.*, p. 108.

¹⁵³⁹ *Ibid.*, p. 109.

neglected in political parlance and legal analysis, despite representing the actual material enabler of data policies and a subject of contention in negotiations thereabout.¹⁵⁴⁰ Infrastructure constrains and channels not just data, but also the values and bargaining powers underscoring it. How would infrastructure play out here?

There seems to be no empirical evidence that States ever shared their Internet prescriptive jurisdiction (let alone infrastructure) in order to permanently address a policy issue, but the—sometimes genuine, other times less so—expansion of surveillance as a universal problem-solver (from terrorism and drug cartels to health emergencies, and from food distribution to street-crime control) elicits the adoption of novel and courageous solutions towards more privacy-compliant forms of dataveillance in the realm of taxation. Even the imposition of a tax on inward or outward transactions involving tax havens—but then, defining what a “tax haven” is would still engage “high politics”—might be conceptualised, on the model of Pigouvian taxes already theorised¹⁵⁴¹ for addressing climate change, transboundary pollution, and other environment-related issues involving externalities. Such a tax would be collected and retained at the international level, to be later redistributed to cooperating countries as an incentive (compensatory scheme) to keep supporting their centralised system. Due to its target and design, this would be tantamount to a Tobin tax,¹⁵⁴² too, and as these transactions are Internet-performed, one might even make recourse to an energy-equivalent DAVT.¹⁵⁴³

These ideas would be operated through circuitisation, meaning the dissection of the Internet into a globally wired versus open-spaced double shape, able to cater for unsurveilled communication (the latter) versus surveilled transactionism (the former).

¹⁵⁴⁰ Read BELLANOVA and DE GOEDE 2020, p. 2.

¹⁵⁴¹ See e.g. TRACHTMAN 2013, p. 149.

¹⁵⁴² On this concept, refer e.g. to O'HARA 2006, pp. 218-219.

¹⁵⁴³ On the economics of this form of taxation and its socio-environmental rationales, check BARTENEV 2014.

In other words, these ideas would be technically sustained by an “alternative Internet” whereby all jurisdictions renounce to part of their sovereign rights over their own Internet in order to share that portion globally with all other sovereigns, placing it under the administration of a dedicated IO. Such alternative Internet would collect and interconnect financial-transaction information about every natural and legal person to a global centralised system, without including any other online data or service.

Several aims would be achieved this way: 1) surveillance of the whole Internet would be dispelled and turned unjustifiable, to favour selective surveillance over delimited portions thereof instead; 2) cyberattacks bearing on tax data and related information-exchanges would be remarkably reduced in number, intensity, and scope, with tax-data leaks being rendered highly unlikely or less harmful compared to an unsegmented Internet where accidental or untargeted leaks can equally occur; 3) taxes can be applied directly onto transactions as recorded and processed by the system, which would not even require human supervision and biased decisions; 4) tax-avoidance schemes would no longer matter, as every transaction would be centrally tracked and taxes applied thereto and collected therefrom in real time, to the effect that individuals would remain surveilled, but MNCs—and legal persons generally—would finally pay their dues without tricks, captures, bribe, deception, “legal engineering”, lobbying, and so forth. This is quite visionary and futuristic, but the prospect is, in my view, worth pursuing and preparing for.

d Exploring the technicalities of a tax-dedicated Internet for everyone to effectively pay “their fair share”

Someone compared States' jurisdiction on data transiting between Internet-connected devices in the cyberspace to that on vessels in the high-seas,¹⁵⁴⁴ yet whereas this might hold true as far as adjudicative jurisdiction is concerned, enforcement and especially prescriptive jurisdiction on the Internet resembles more closely the model of territorial waters, in that each State extends its jurisdiction over part of the infrastructure that taken together, constitutes what we call "the Internet". No portion of the cyberspace is truly governed like the high-seas: even IOs, whose online activities might be immune from prosecution, are still bound to the policies adopted by the country on whose territory their connections are located – to exemplify, if such countries switch off their access points to the Internet, those IOs are going to remain offline as well. For this reason, if an IO-managed "switch point" is to be established neutrally, it shall be granted its own jurisdiction (and technical tools to exercise it) over a portion of the Internet infrastructure as relevant for the activities said IO is entrusted with.

Its "sub-Internet" should also be communicating with the Internets of several jurisdictions other than the one surrounding the IO, so that the latter may continue being reached by data through the most convenient routes, wherever it is delivered from. In fact,

[s]ince the Internet is structured to transit data based not on geography but on technical parameters[, ...] it may no longer be feasible to differentiate between transborder data flows and those that do not cross national borders.¹⁵⁴⁵

I disagree about feasibility, but I would concur about the unserviceability of said distinction, especially from a legal perspective. Indeed, as it stands today (which is not

¹⁵⁴⁴ See GUILLERMO JIMÉNEZ and LODDER 2015, p. 269.

¹⁵⁴⁵ KUNER 2013, p. 6.

a technical *conditio sine qua non*), the Internet is a web of infrastructure where each data segment is transported according to the most efficient route (by bandwidth) rather than by reasons of jurisdiction or route-length.¹⁵⁴⁶

Internet addresses have no fixed location. They are purely conceptual. There is no central office. The routers which direct packets to the packet address at rates between 100,000 and 500,000 a second can know only the next logical point in a routing table and which outbound circuit is available to carry the packet. Packets are free to traverse the globe on countless circuits to geographically indeterminate end points. The technology provides assurance that the packets are reassembled in the right order and are very likely not corrupted by data errors.¹⁵⁴⁷

As «material infrastructures representing the heritage of world economic development continue to shape current socio-technical dynamics» also when it comes to the Internet, this routing design has become increasingly contested and resisted.¹⁵⁴⁸ Any Internet operation multiplies exponentially the risk of data being spied on, misappropriated, or altered by actors *having proxy access to* (and not simply “based in”) any transit jurisdiction, regardless of where such operation is executed and the location of the device it is intended to reach.

Being it as it may, the only manner to ensure data is routed through a dedicated channel is to build a separate infrastructure: a sort of “alternative Internet” which could be hardly cyberattacked from machines connected to the outside, traditional, “general” Internet. As alternative Internets—that is, Internets relying on different protocols but insisting on the same infrastructure—would be exposed to security threats similar to

¹⁵⁴⁶ Refer to SINGER and FRIEDMAN 2014, pp. 17-18;196. Specifically, around 80% of Internet data packets pass through the US; refer to KAPLAN 2016, pp. 191-193. Perhaps this figure should be slightly toned down now, but its essence for my argument still holds.

¹⁵⁴⁷ MATHIASON 2009, p. 10.

¹⁵⁴⁸ MCCARTHY 2015, p. 89.

those threatening the original Internet,¹⁵⁴⁹ conceiving of a wholly separate infrastructure seems the only solution.

A hybrid system combining peer-to-peer and client-server models among credit institutes worldwide, but secluded from the rest of the Internet, may attract obvious criticisms related to its supposed concentration of communication network and financial power in the hands of one single switching point, a situation that raises legitimate doubts about its legitimacy and security: if the entry is single, those who access that entry could gain control over the whole system.¹⁵⁵⁰ In this regard, four points shall be noted. First, other critical security assets (or information thereabout) are already extremely concentrated in the hands of few decision-makers: one may just think of nuclear arsenals, satellite coordinates, aerial transportation, search-engine algorithms, or energy grids. Second, Internet infrastructure itself is already owned and operated by corporate giants with negligible accountability to public authorities (especially of transiting countries), and even under self-serving profit interests. Third, most financial transactions are already rooted through central ever-wealthier global nodes¹⁵⁵¹ organised in assortative intracity network structures,¹⁵⁵² at times endowed with their own separate jurisdiction under domestic law. After all, as literary works sagaciously observe, “global cities” are the neoliberal spaces *par excellence*, ostensibly flourishing through their engineered twinkle made of wealth concentration and non-distribution, of «massive transnational flows of finance capital, [...] of corporate hegemony and worker exploitation, of gross excesses of consumerism,

¹⁵⁴⁹ Read e.g. SINGER and FRIEDMAN 2014, pp. 166-169.

¹⁵⁵⁰ A similar point was raised by HAKSAR et al. (2021) when they claimed that we should break down market-concentrating Internet platforms because increased competition results in decreased likelihood that one single cyberattack could switch off multiple services and/or misappropriate massive amounts of personal data.

¹⁵⁵¹ Such as New York City, London, Hong Kong, Shanghai, Tokyo, Milan, Sydney, Beijing, Toronto, Paris, Amsterdam, Chicago, Seoul, Zurich, San Francisco, Riyadh, Frankfurt, and Singapore; refer e.g. to the latest-available edition of the Global Financial Centres Index.

¹⁵⁵² Refer to PAŽITKA et al. 2021, pp. 1791;1805-1806.

themed spatial planning, and monumental architecture».¹⁵⁵³ These expressive meta-spaces of modernity are entrusted with safeguarding the rich's fortunes through a privileged reliance on the “rule of law” (e.g. overassertive property-rights protection),¹⁵⁵⁴ and find collocation «on a singular grid/axis of “modern” or “primitive” (undeveloped), “global” or “non-global” (forgotten), or “core” versus “peripheral”».¹⁵⁵⁵ Fourth, although such a solution would not insure the system against external attacks, it would effectively prevent at least some of the most common ones; for example, it would be immune to botnets,

network[s] of nodes controlled by a hacker [...]. Hackers can join many and distributed bots together to form a botnet. As a consequence of the potential of hackers to form huge botnets, this could pose serious threats, such as [DDoS] attacks. [...] An attack of this nature can be difficult to resolve as many machines *belonging to several organisations* may be involved.¹⁵⁵⁶

In fact, it has been already noted that although a generally open Internet is a precious commons for humanity, «a completely open Internet is considered suboptimal for various reasons. [... For example], a certain degree of fragmentation may be necessary for greater security».¹⁵⁵⁷ If a network is exclusive to a limited number of institutions—the IO and credit institutions, in this case—attacks can still be perpetrated, but only from inside such curtailed network; consequently, an intruder needs to be (or be aided by) an insider, thus restricting the suspects range and possibly their motivations.

A more feasible and flexible, yet less resolute option would be to code a privately searchable system of domain names under the same “.bank” denomination, or a grouping of TOR addresses, centrally managed by a global institution, for

¹⁵⁵³ WALONEN 2016, p. 108 (referring paradigmatically to Dubai).

¹⁵⁵⁴ See e.g. PAŽITKA et al. 2021, pp. 1792;1799;1803-1804.

¹⁵⁵⁵ MARSHALL 2009, pp. 219-220.

¹⁵⁵⁶ CURRAN and FEENEY 2009, p. 195; see further SINGER and FRIEDMAN 2014, p. 44.

¹⁵⁵⁷ MISHRA 2019, p. 483.

jurisdictions worldwide to submit and share tax information among themselves. In this case, two obstacles/drawbacks would be: 1) the political inconvenience of politically endorsing the use of—and of themselves using—TOR on the part of public authorities; 2) the subjection of such a global institution to ICANN—thus, again, States and corporations—for the project’s rules and technical implementation.

e Displacing human trust through the entrustment of subscription-powered tax automation

SHKABATUR¹⁵⁵⁸ explored the possible introduction of a global panopticon whereby IOs ensure States’ compliance with international policies across several policy areas by means of IT infrastructure enabling online reporting from private parties globally. She briefly mentioned several cyber and non-cyber measures States may adopt to counter this practice, but omitted to focus on the cyber-hygiene measures IOs themselves should have in place.

The issue of compulsory cybersecurity measures for IOs becomes a poignant one when IOs are not conceptualised as entities tasked with the oversight of States’ compliance with international policies, but as entities to which a special intermediary function between citizens’ transactions worldwide is assigned. In the case of my proposed solution, for example, the IO would be entrusted by States (and hopefully, yet unlikely, their citizens) to monitor and record all transactions pertaining to a certain subject-matter (e.g. trade finance transactions such as commercial advance payments), and to do so, it would need to ensure the protection of such data and to be granted jurisdiction over its own Internet (possibly on a geographically, geopolitically, and

¹⁵⁵⁸ 2011, pp. 201-208.

legally neutral territory), with no possibility for any single State to fend its Internet access off or anyway to interfere technically with the IO's operations.

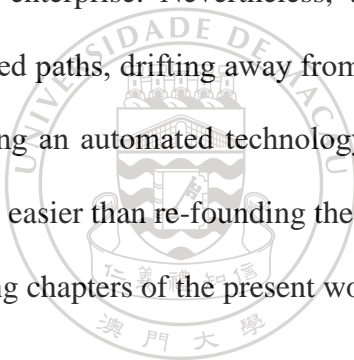
All bank transactions, deeds of sale, property transfers, letters of credit, investments, and any other financial operations would be certified as originating from and/or being addressed to a “trusted entity”, such control being automatic and entrusted to an AI system whose coding—differently from the algorithm (whose source code, according to some, should perhaps be published)¹⁵⁵⁹ which sorts information into categories to be dispatched, taxed, or eliminated—is only accessible to a limited number of international officers; this would entail the necessary registration of all banks worldwide to a dedicated protocol, with the exclusion of informal platforms for money transfers as well as banks which do not fulfil the transparency, timeliness, accuracy, cybersecurity, and other requirements. This way, tax havens would be outplayed without the need to share taxpayers' information with dozens other governments, as transactions would be checked anonymously and rejected only when *either the sending or beneficiary institution* is an untrusted entity, without the need for recording, storing, and scrutinising personal information *a posteriori*. This sort of “outsourcing of trust” would eliminate problems of trust in financial transactions, as tax havens as well as any other jurisdictional or a-jurisdictional tax-free-area would be technically cut off from the rest of the world in a few years' time. Of course, existing funds “parked” in tax havens and the like could remain trapped there and relied upon by individuals and corporations among non-cooperating jurisdictions,¹⁵⁶⁰ but from implementation-time onwards no funds could

¹⁵⁵⁹ Publishing algorithms' coding helps secure an AI environment where algorithmically powered machines cannot be “bribed”; *refer extensively to* NICHOLS 2019. However, insider knowledge on e.g. tax-audit algorithms might help serial evaders “game” the system; *see e.g.* MCGREGOR 2019 et al., p. 322.

¹⁵⁶⁰ Indeed, CHOUDHURY and PETRIN (2019, p. 325) have criticised this idea of profits being “trapped” or “parked” in low-tax jurisdictions, as those profits are actually disposable to be mobilised across a wide range of investment opportunities.

be transferred from IO-subscribed to unaffiliated institutes, and the reverse, thus disincentivising any further engagement with the latter (provided enough States subscribe to my model).

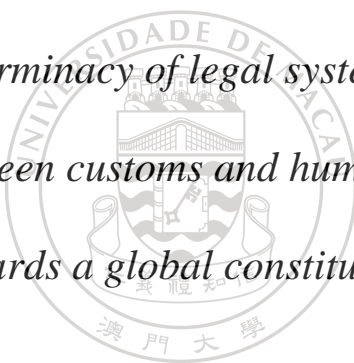
To restate the obvious, these prospects are merely speculative and rudimental at this stage, and definitely unfeasible in the short to middle run. Centralised technical solutions to tax avoidance (and evasion) are politically and practically inconvenient for the time being, both because politics is not mature enough to afford centralisation, and because machines are fallible, so that any fault in the centralised system might cause the collapse of the entire enterprise. Nevertheless, technology and human cognition may both take unexpected paths, drifting away from today's socio-political living "normalcy", so that adopting an automated technology-driven solution along these lines might eventually prove easier than re-founding the SC on more egalitarian bases as advocated in the upcoming chapters of the present work.



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Chapter 16

*The indeterminacy of legal systemic integration
between customs and human rights:
Towards a global constitutional fix?*



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a Lawfulness and unlawfulness at once: Inter-regime fragmentation between a state-led process and an individual-centred paradigm

Resembling other areas of global legal governance, which some publicists have long qualified as “self-contained”,¹⁵⁶¹ human rights constantly collide with competing state obligations under general PIL. Since the latter is a horizontal (no higher centralised authority)—or even “dispersed”—and multi-regime (*ratione materiae*) as well as multi-source (e.g. customs, treaties, peremptory norms, principles, judicial precedents, ...) legal order, simple (inter-regime or inter-source only) or multi-level (both) fragmentation is an ordinary phenomenon States have to cope with¹⁵⁶² while attempting to bring themselves in line with all their relevant obligations under each (sub-)regime.¹⁵⁶³ Granted, «interface conflicts are [frequently] embedded in broader processes of contestation and social change which, over time, can establish more settled normative expectations about the respective weights of the different norms involved»,¹⁵⁶⁴ somehow naturally recomposing the original friction as time goes by. Nonetheless, it is equally true that the doctrinally non-hierarchical horizontality of international law «often serves to conceal or trivialize material hierarchies of influence, rendering them immune to critical scrutiny».¹⁵⁶⁵ In fact, while textbooks report that “obligation” is a unitary concept in IL – i.e. that all obligations are, self-evidently, obligatory to fulfil, one may readily identify weaker and stronger international obligations.¹⁵⁶⁶ As for “regime”, it may acquire different meanings,

¹⁵⁶¹ Check for instance MARSCHIK 1998, pp. 222-234.

¹⁵⁶² This holds true even in its easiest forms, for instance when customary norms are incompatible with preceding or subsequent treaty obligations on exactly the same subject-matter; see e.g. CZAPLIŃSKI and DANILENKO 1990. Even two customs may appear irresolvably contradictory: check JEUTNER 2017, p. 22, fn. 39.

¹⁵⁶³ Check also JEUTNER 2017, pp. 51-52.

¹⁵⁶⁴ KRISCH et al. 2020, p. 360.

¹⁵⁶⁵ PROST 2017, p. 643.

¹⁵⁶⁶ Refer e.g. to VERHOEVEN 2005, p. 304.

referring for example to the terms in which an IL problem is phrased (e.g. an international environmental law issue might well be phrased in international investment law or international cultural heritage law as well, etc.) – triggering different sets of obligations, whose rationale and compelled outcome are not necessarily coherent with one another.

In the preceding sections I have argued that OECD's AEoI, as it is currently conceived, designed, and operated, is simultaneously unlawful (by analysis) under IHRL and lawful (by default) under ICL, thus representing a genuine normative conflict, that is, a situation

where giving effect to one international obligation unavoidably leads to the breach of another obligation or right[, and that remains] irresolvable despite attempts to apply methods of harmonious interpretation.¹⁵⁶⁷

In this case, StT is an emerging custom, but for the sake of illustrating the consequences of its normative incongruence with human rights, I will hereby assume it has already customarised. Such an emerging custom unharmoniously coexists with privacy as a human right; here, privacy belongs to a legal regime—IHRL—in all of its possible manifestations, being them customary or, when relevant, treaty-based, but it might also be understood as a general principle of law as retrievable from most domestic legal orders. Thus, the conflict is not “simply” between, say, two customs (*surveillance as a custom* and *privacy as a custom*), and not even between a custom and a treaty (e.g. *surveillance as a customary obligation* and *privacy as a treaty-based obligation* – or the reverse); rather, it is between a custom (StT) and a human right *conceptually*, addressed in the whole spectrum of their legal implications *in abstracto*.

¹⁵⁶⁷ DE WET and VIDMAR 2013, pp. 197-198.

Should not States consider the privacy implications of an emerging custom before paving the way to it (that is, before encouraging its practice, acquiescing to its emergence, and/or endorsing its righteousness), by referring to general criteria of proportionality, necessity, and fairness as retrievable from IHRL as a (supposedly) coherent legal regime, regardless of the specific source (treaty-based or otherwise) of each potentially applicable IHRL rule? My answer lies in the positive, although this is more of an aspirational commitment than about legal obligations: as PIL currently stands, States are *not* strictly *obliged* to consider the privacy implications of customs they contribute to shape or accept; on the practical side, however, when States fail to consider them, *irresolvable* conflicts with newly establishing customs will most probably arise.¹⁵⁶⁸

Remarkably, these conflicts are rarely tangential: their momentousness resides in the fact that according to a qualified line of scholarship—to which I tend to subscribe here—«while [...] treaties are of paramount importance when determining the rights and duties of States *inter se*, [...] it is custom [...] that defines the basic constitutional structure and general principles of international law *as a system*».¹⁵⁶⁹

b The irrelevance of inter-regime systemic integration, and the failure of traditional methods to address inter-source fragmentation in IL

When the piece of law to be applied to a given situation is unchallenged and it comes to interpretative conflicts “only”, resolution is relatively straightforward; two sets of resolution techniques exist: first-level rules, identifying the approaches to be pursued (terminological, teleological, etc.) for trying to recompose said conflicts, and

¹⁵⁶⁸ See also JEUTNER 2017, pp. 70-77.

¹⁵⁶⁹ PROST 2017, p. 652, second emphasis added.

second-level rules, determining the sequence and priority those first-level rules have to be applied with.¹⁵⁷⁰

Different is the case of normative conflicts, where *what law* should be applied first, or in the absolute, to given circumstances is open to challenge. For example, customary norms almost inevitably collide with human-rights ones on the same subject-matters, because HR claims, which are grounded in a pretence of inalterable universality, sit uneasily with the essentially—however unhurriedly—“becoming” (and thus not *ab origine* necessarily “being”) nature of customs.¹⁵⁷¹ The complexity of these occurrences has persuaded many publicists to posit that normative conflicts are best addressed as conflicts of jurisdiction between specialised judicial fora.¹⁵⁷² Their concern is unambiguous: defragmenting rules are far more complex than interpretative ones, and their unclear application is fraught with *indiscrete discretion* – which ultimately embroils itself in questions of power. In fact, «[a]s norm conflicts arise only between irreducible norms, norm interpretation precedes the identification of a norm conflict»,¹⁵⁷³ and usually provides an interpretative device to prevent normative conflicts from arising. Here, however, we are faced with the latter. In the absence of a *lex superior*, when international disputes are submitted before international or domestic courts, judges avail themselves of two main conflict-resolution techniques¹⁵⁷⁴ to address and recompose inter-regime fragmentation: hierarchy and systemic integration;¹⁵⁷⁵ in this case, neither proves helpful to untangle the (un)lawfulness dilemma posed by AEoI procedures.

¹⁵⁷⁰ Check for instance DYRDA and GIZBERT-STUDNICKI 2020, p. 7.

¹⁵⁷¹ Read also KRATOCHWIL 2014, p. 207.

¹⁵⁷² Refer e.g. to WORSTER 2009, p. 130 ff.

¹⁵⁷³ JEUTNER 2017, p. 23.

¹⁵⁷⁴ Besides *lex posterior* and *lex specialis*, in addition to—less doctrinally—*lex localis* (referred to the priority accorded to relevant regionalised arrangements) and *lex universalis* (supposed priority of the UN Charter as per its Art. 103).

¹⁵⁷⁵ DE WET and VIDMAR 2013, p. 198.

Pure hierarchy comes into play when “naturalist” *ius cogens*¹⁵⁷⁶ (usually referred to absolute HR: prohibition of slavery, torture, and genocide) takes precedence over non-peremptory norms (usually referred to non-absolute HR or other obligations),¹⁵⁷⁷ which has recently come to be a somewhat abused normative-conflict settler,¹⁵⁷⁸ and proves anyway irrelevant for the case at hand. Hierarchy also comes into play when more HR shape the substance of a dispute, despite their interrelation and interdependence; yet, the problem here does not lie in a contended arena for multiple rights, but in a captured state-driven tendency (StT) contraposed to resistance thereto (privacy entitlements).

Systemic integration¹⁵⁷⁹ is routinely made recourse to in order to ascertain the scope of an obligation in relation to other obligations contracted by the same parties, yet this is only workable in light of the specific circumstances of the case and the specific parties to the dispute, where—borrowing from Koskenniemi’s observations on a closely related matter—«which [one] is to prevail is always relative to a measure outside the dichotomy, a measure whose validity is equally relative to what one isolates as the significant elements of the individual instance».¹⁵⁸⁰ Significance, read as “proximity”, might be identified in similarities among competing obligations, i.e. mutual relevance thereof – for example as far as terminology, drafting history, cultural identity, or temporal overlap are concerned.¹⁵⁸¹ Here, instead, we are presented with a systemic issue which transcends the single conflictual instance between specific parties (unless we assume, as I would *not* do, that those “parties” are the 99% and the

¹⁵⁷⁶ KOSKENNIEMI 1997, p. 566:

The concept of “fundamental”, used in human rights law, as well as the ideas of *jus cogens* or imperative norms and rules valid in an *erga omnes* way each presuppose relationships of normative hierarchy that implicate some form of moral naturalism.

¹⁵⁷⁷ See DE WET and VIDMAR 2013, pp. 203-206; JEUTNER 2017, p. 63.

¹⁵⁷⁸ Refer extensively to LINDERFALK 2009.

¹⁵⁷⁹ Either through explicit recourse to Art. 31(3)(c) VCLT or more implicitly.

¹⁵⁸⁰ KOSKENNIEMI 1997, p. 577.

¹⁵⁸¹ Most recently, check MERKOURIS 2015, p. 57.

1% as defined in the present work – which would anyway enjoy no *locus standi* before international courts and tribunals). Furthermore, systemic integration is not predicated upon the initial equal standing of the two conflicting sources; rather, it presupposes the existence of a treaty provision as the principal and applicable norm, whose interpretation can be enriched via recourse to external (i.e. not directly disputed in the same judicial case) legal sources.¹⁵⁸²

In sum, neither hierarchy nor systemic integration are of assistance in attributing an *a priori* pre-eminence to ICL or IHRL norms or arguments, outside the circuit of specific, party-confined disputes.¹⁵⁸³ Formalistic dualism as conflict-avoidance¹⁵⁸⁴ is not applicable, either, because of the equally global reach of both the ICL and IHRL norms under scrutiny. Reductionist pragmatism, too, is not advisable concerning abstract conflicts of norms, because «reduced friction in one case may generate greater instability later on, as actors do not find guidance as to future behaviour and continued contestation may ensue».¹⁵⁸⁵ Another range of normative conflicts—hinging on semiotics—are increasingly classified as “borderline” or “essentially oxymoronic” due to the semantically irreconcilable terms in which they are expressed,¹⁵⁸⁶ but these analytical categories, too, have been attached to concrete court cases, rather than to doctrinal collisions arising from legal systems and orders at a more conjectural, pre-litigatory stage. Lastly, judges and arbitrators increasingly

¹⁵⁸² See for instance SJÖSTEDT 2016, p. 270.

¹⁵⁸³ More generally, see PROST 2017, pp. 644-645.

¹⁵⁸⁴ DE WET and VIDMAR (2013, p. 215) commented that

[t]he *Kadi* case before the ECJ was a prime example of withdrawal behind the dualist veil for the purpose of conflict avoidance. The ECJ reshaped the norm conflict as a “domestic” one that had to be resolved on the basis of [EU] law. Although effectively giving precedence to human rights protection over security concerns, this decision was based on the value system of the [EU] itself. The ECJ did not address the conflict between the international human rights obligations of its member [S]tates and their obligations pertaining to international peace and security under the Charter.

¹⁵⁸⁵ KRISCH et al. 2020, p. 347. Nonetheless, it is wise to remark that «[w]here a norm is already subject to societal contestation, the invocation of a competing norm does not so much *create* uncertainty as *express* it» – *ibid.*, p. 349, emphases in the original.

¹⁵⁸⁶ Read further NEUWIRTH 2021, para. 20.

evoke hard-sciences research to solve legally irresolvable conflicts,¹⁵⁸⁷ but this, again, only applies to litigation or arbitration. In fact, it is through institutional contention that most PIL dilemmas are disbanded, so much that scholars have long supported a hierarchically pre-eminent role for the ICJ,¹⁵⁸⁸ whose judges, besides deciding on contentious matters between defined parties, can be entrusted by the UNGA or the UNSC with the release of advisory opinions.

c GC as a feasible teleological framework for interpreting this multi-level fragmentation

Because the conflict I am scrutinising here has not (yet) been brought before a judge and cannot be recomposed legally (at least through positive law), one shall position themselves within a teleological backdrop; this is because «legal positivism as a conceptual theory of legal validity does not develop any specific theory of legal interpretation [... , nor does it] determine how [legal] rules should be [...] applied» among each other.¹⁵⁸⁹ Put differently, faced with competing IL claims and with the impossibility of establishing either claim's priority or absolute unlawfulness, one should resolve themselves to *take side*. And rather than questioning the lawfulness of StT, its legitimacy *relative to the preferred analytical framework* (GC here) should be inspected instead. Some have referred to these solutions as “second-order justifications”,¹⁵⁹⁰ but I will not subscribe to this definition as I am convinced value-legitimacy justifications are in fact of first-tier quality. “Taking side” is about proposing a *meaningful* angle from which to scrutinise the contested norms – which,

¹⁵⁸⁷ Check e.g. RAGONE and VIMERCATI, p. 364, ftn. 111.

¹⁵⁸⁸ Refer for instance to LEATHLEY 2007.

¹⁵⁸⁹ DYRDA and GIZBERT-STUDNICKI 2020, p. 3.

¹⁵⁹⁰ Refer to ILC 2006, p. 25, ftn. 35.

in turn, resolves around interpreting the foundations of IL as a system of values and policy priorities. Indirectly, it is also about acknowledging that legal argumentation «could cement relations of privilege between powerful actors [or] it could [...] serve as an instrument of the weak [...] to address their collective [grievances]». ¹⁵⁹¹

At this point, one might wonder on what grounds, if any, such a teleological *taking side* would differ from making recourse to a relatively recent (though already trendy) concept, “inter-legality”, as an analytical tool. ¹⁵⁹² Indeed, inter-legality as a normative conflict-resolution route may be applied «mostly to situations where actors are confronted with a variety of norms stemming from a variety of legal orders [...] and all are valid and applicable in principle», ¹⁵⁹³ which resembles exactly the situation at hand. The difference between inter-legality and my approach is that the former is still formulated under a pretence of, indeed, *legality*; it purports to seek a *legal* resolution, i.e. to hold a legal formula to resolve clashes among competing and equally entitled norms. Contrariwise, I drop the objectivity mask and simply accept that legal resolutions are not always possible, so that teleological positioning becomes not a legal operation, but a meta-political one. The problem it factually overcomes is legal, but its rationale and substance are not, because teleological positioning is inherently political, it speaks to what *should* matter in a given legal regime – here, to the way we understand the fabric, future, and meaning of international law. It embodies an intellectual expedition which resolves into a moral or even ethical exercise of *subjective* stance-taking. Inter-legality, too, is about turning «the clash of different legal regimes [into] an opportunity rather than an obstacle, a situation rarely highlighted in international

¹⁵⁹¹ MALLAVARAPU 2020, p. 431.

¹⁵⁹² For a recent employment of this tool, check KLABBERS 2021.

¹⁵⁹³ KLABBERS and PALOMBELLA, pp. 9-10.

law»,¹⁵⁹⁴ but my claim of situationability renounces to pretend being a merely (or purely) legal one.

In this case, to *take side*, one may opt for the most doctrinally cautious IL foundations as a toolbox for obligations among sovereigns, or, as I will prefer here, for a *pro homine* (aka *pro personae*) approach which privileges the solution whose empathy stands more proximate to the fragile condition of any human being. Hence, as I aim to frame the controversy against one of the countless possible paradigms, that of “global constitutionalism” (GC), it is first salient to verify under what conditions applying such a paradigm to the present dispute would be *meaningful* or even feasible a choice. “Taking side” is also compelled by the irreducibility of these disputes on a merely doctrinal level, and by the residual hope to recompose them extra-doctrinally:

Metaphysically undecidable dilemmas reflect *entrenched conflicts of values, rationalities, political theories, objectives, principles, or ideals* among relevant international legal actors. [...] In dilemmatic situations of this kind, judicial actors will not be able to find the answers to such questions in international legal texts or custom. Instead, *dilemmas that concern metaphysical undecidability call for an “explicitly political” debate with all affected stakeholders* (inside and outside of judicial fora) in order to identify whether and how a given conflict could be solved. For as long as these underlying metaphysical questions remain unresolved, and they may well turn out to be irresolvable when the interests concerned are incommensurable, absolute, or indivisible, dilemmas which are rooted in such divergent views will remain uncured.¹⁵⁹⁵

Of course, this type of debate does not exhaust itself within the realm of politics, insomuch as there is still an appeal to legal authority attached to said “taking side”: it is authority of law *qua* law, which specifies no conflict-resolution preference on the substance (otherwise taking side would prove unnecessary), but represents a functional

¹⁵⁹⁴ HOGIĆ and IBRAHIM 2021, p. 133.

¹⁵⁹⁵ JEUTNER 2017, p. 54, two emphases added, footnoting marks omitted.

petition to a “sphere of authority” somehow grounded in international legality, to a universal righteousness to be filled with actionable legal expedient.¹⁵⁹⁶

But who are, then, the “stakeholders” here? GC should not merely derive from constitutional experiences in domestic legal systems, but draw from the peculiarity of IL and emphasise the potentially constitutionalising forces behind its equally peculiar history and doctrines – for instance, one that appreciates IL as a project of *both* human dignity and authoritative decision-making, that is, *of* States (at least transitionally) but not *for* States. It is on the globality of people and their legal prerogatives—rather than on the globality of institutions per se—that the focus should be placed. If the attainment of a policy aim by States results in violations to individuals’ rights materialising beyond the State, then it is beyond the State that State themselves, paradoxically, should provide remedies for those violated individuals. If necessary, transnational “constitutional fragments” should be temporarily crafted to address specific supranationally occurring corporate-enables HR violations through people-centred networks of quasi-formal authority¹⁵⁹⁷ – this would be, again, just a middle step forward. By all means, while

existent conceptions of [GC] cannot be regarded as an original approach to fragmentation, since they aim at restoring coherence in [IL] without addressing normative conflicts[, ...] a possible way to frame the debate on constitutionalism as a remedy to the phenomenon of fragmentation is to conceive constitutionalism as an autonomous concept of [IL] rather than a concept derived by analogy from the domestic conception of constitutionalism.¹⁵⁹⁸

Framed in these terms, GC can aspire to represent a meaningful and feasible approach to explore global matters of tax fairness¹⁵⁹⁹ and recompose the fracture

¹⁵⁹⁶ Refer also to BIRKENKÖTTER 2020, pp. 337-338.

¹⁵⁹⁷ Refer to GONZÁLEZ HAUCK 2019, p. 136.

¹⁵⁹⁸ DEPLANO 2013, p. 77.

¹⁵⁹⁹ See also CASSEE 2019, p. 243.

between StT (ICL) and the violations it engenders under IHRL. On the question of method, whilst “meaningfulness” lies in the eyes of those who adopt the paradigm, “feasibility” as a criterion for decision-making in global governance bears the burden and privilege of a long-standing tradition in political and legal philosophy. This tradition is too often ignored by scholarly arguments that

render immediately problematic the oversimplification and lack of clarity too often present in the literature on global democracy, where [...] critics of ambitious accounts of global democracy, such as cosmopolitan democracy, routinely deride these proposals as being unfeasible, lauding their own as being feasible.¹⁶⁰⁰

To avoid this, the strongest response is to remain vigilant about the fact that feasibility in global governance pertains to the realm of what is intentionally desired by key stakeholders, and not simply of what is abstractly achievable in the architecture of IR.¹⁶⁰¹ feasibility arguably resides at the intersection of «probability, conditional ability, possibility, restricted possibility, rational-volitional capacity, [and] costliness».¹⁶⁰²

Another variable to be considered is time;¹⁶⁰³ in this case, the issue revolves around GC being adopted as an *ex ante* perspective according to which tax surveillance should be constrained, or as an *ex post* horizon the latter should tend towards. In fact, time is *the key* feasibility factor at play: from an *ex ante* perspective, the AEoI might be already illegitimate, even if GC is not yet realised; from the *ex post* one, AEoI stands as a temporarily legitimate cure which would anyway necessitate an overhaul before being declared compliant with a new global order that truly follows GC tenets.

¹⁶⁰⁰ ERMAN and KUYPER 2020, p. 313.

¹⁶⁰¹ See *ibid.*, pp. 312-313.

¹⁶⁰² *Ibid.*, p. 314; in-text citations (of the authors who had presented these criteria as alternative to one another) omitted.

¹⁶⁰³ See *ibid.*, p. 316.

In the first case, the AEoI is illegitimate regardless of GC being already a reality, provided one believes GC *should* be the reality or it is so already; in the second case, the AEoI is legitimate unless we picture a GC scenario which is anyway yet to come, but in this case, too, the perspective is that *eventually*, sooner or later, GC should be the path to take. In sum, either way, the intentionality of the tension towards GC (or of the current situation, if one believes—definitely without merit—that GC is somehow already here) as righteous cannot be departed from. Indeed, framing AEoI against GC aspirations means affirming that the former can only be legitimised in the event IL constitutionalises globally, thus granting everyone rights whose jurisdictional scope corresponds to that of the violations (to the right to privacy, in the case under scrutiny) perpetrated against them.

As long as the case is inconclusive, [...] uncertainty about whether or not circumstances—in which suggested principles are both applicable *and justifiable*—are possible to reach within the constraints set by the temporal aspect is *not* sufficient to reject the account.¹⁶⁰⁴

Following this account, what remains to be defined is the stakeholders' identity: if the chosen perspective is that of GC, we shall assume all "global citizens" as its primary stakeholders, and if democracy is all about «the idea that those who are supposed to abide by the rules also should be the authors of them»,¹⁶⁰⁵ then global citizens shall approve their laws directly or indirectly. There is no need to fly so high up to theorising a global government or similar directly democratic arrangements of universal suffrage: devising uncaptured, effectively accountable transnational bureaucracies would suffice. As a minimum, whenever the machinery of global bureaucracy intrudes global citizens' life, those same citizens should be entitled to seek

¹⁶⁰⁴ Ibid., p. 317, first emphasis added.

¹⁶⁰⁵ Ibid., p. 319.

remedies *at the same global level*, thus (indirectly) contributing to global policy formulation and simultaneously overseeing the process through dedicated institutional solutions.

GC is indeed a responsabilising and participatory path, like any democratising process should be.¹⁶⁰⁶ According to ERMAN and KUYPER,¹⁶⁰⁷ global democracy rests on three principles:

(P1) *The all-affected principle*: All those persons who are significantly affected by a public decision have a moral right to due consideration.

(P2) *The equal say principle*: All and only those agents who are subjected to a system of laws have an equal say in the decision-making about its basic form and the overarching societal goals and aims.

(P3) *The rightful capacity to impact principle*: All agents with the rightful capacity to impact the decision-making process, to level out inequalities, should do so.

Needless to remark, models of wealth-shaped capture of transnational quasi-legislative processes stand exactly at the opposite end compared to the emancipatory project GC embodies, due to unreasonable barriers to access *effective*, result-based decision-making in the overall public interest of all.

d Coherence as fitness for the legitimacy of GC as a teleological framework

It is often recalled, in legal textbooks, that States must honour their promises on the international plane; indeed, in PIL, *pacta sunt servanda*, and they shall be

¹⁶⁰⁶ Ibid., p. 320, emphasis in the original:

When feasibility considerations are made in the current literature, it is typically the “upper limit” that is discussed: if the suggested principles demand too much of people, the account is not feasible. But [...] the question of a “lower limit” is equally important. If an account of democracy demands too little of people, the account is equally infeasible *as an account of democracy* [...].

¹⁶⁰⁷ Ibid., pp. 319-320.

observed *bona fide*.¹⁶⁰⁸ What is too often forgotten, however, is that States—at least democratic ones—owe *their own citizens* similar obligations, which make them answerable to their citizens in terms of loyalty to the common cause, regulatory effectiveness, synergetic action, and ultimately systemic coherence between their (electoral) promises and policy outcomes (as well as the implementation and enforcement thereof). But are these second obligations “legal”, or just moral ones? Where does the perimeter of legal accountability encounter that of political answerability? Moreover, claims are often advanced about a supposed humanisation of IL, which would be increasingly concerned with community-oriented obligations besides the traditional interstate focus of its disciplinary boundaries.¹⁶⁰⁹ How does this play out with systemic coherence?

More technically, i.e. as a sub-set of argumentative justifications for the necessity criterion in IHRL, “policy coherence” draws on the “fitness” *dynamic* variable political theorists (should) employ in order to verify if and how a public claim by policymakers (or their agenda) “fits” the overall claims ecosystem. And yet, this does not merely speak to politics. Instead, coherence represents the realm where social and legal norms tend to converge and overlap, «an entry point into new avenues for research on the regulatory function of norms»¹⁶¹⁰ and their socio-legal legitimacy. Notwithstanding this, just like by lawyers, coherence is often (and wrongly) considered trivial by political theorists, too.¹⁶¹¹ Perhaps apart from the long-standing (and quite fertile) intellectual reflection on the desirability of consistency in EU external action¹⁶¹² for complying with the EU’s primary and secondary legislation as

¹⁶⁰⁸ See e.g. UÇARYILMAZ 2019.

¹⁶⁰⁹ Read e.g. TZEVELEKOS and LIXINSKI 2016, p. 52.

¹⁶¹⁰ JACOB 2021, p. 7.

¹⁶¹¹ Refer to ERMAN and KUYPER 2020, p. 317.

¹⁶¹² Refer e.g. to ESTRADA CAÑAMARES 2016.

the European integration project develops, similar neglect was experienced by “consistency” as well (which can be thought of as *coherence measured across time*):

Despite the fact that “consistency” is inscribed into our moral grammar as a precondition for legitimacy and justice [...], the concept has received limited attention in the literature. Scholars, policymakers, and practitioners alike, while lamenting the absence of consistency, have had little to say about [its] meaning [...], and how it could be measured.¹⁶¹³

I submit that while envisioning a universal methodology for “measuring” *consistency* is probably overambitious, due to the hurdles inherent to historical comparability and periodisation selection biases, one can at least identify a point in time (*t*) and assess the *coherence* of a relevant number of policies among each other and the overall policy context within the chosen jurisdiction(s) at time *t*. Applied to the scrutiny at hand, and simply put, this means that if States enhance the surveillance on billions of people (the large majority of whom belongs to the middle class or below) in order to regain the resources they lose out to tax evasion and avoidance, yet *at the very same time* MNCs are allowed to keep hiding trillions,¹⁶¹⁴ this does not work (practically but, relevantly here, also discursively). Said “not working” reflects *policy incoherence* in legal terms, as much as unfitness under a political-theory rationale: policies do not paint «a coherent whole».¹⁶¹⁵ The law’s «incoherence reinforces unprincipled relativism and opportunism[, and] legitimizes moral loopholes», thus contributing «to the perception [of being] fundamentally capricious»;¹⁶¹⁶ it is pejorated by «the inclination of lawyers to address immediate but relatively minor problems

¹⁶¹³ CROSSLEY 2020, p. 442.

¹⁶¹⁴ ALM (2021, p. 331) comments that «regardless of the specific magnitudes of profit shifting, there is little doubt that its extent is substantial, even if there is still no consensus on its exact magnitude».

¹⁶¹⁵ ERMAN and KUYPER 2020, p. 322.

¹⁶¹⁶ MILHIZER 2004, pp. 828;861. This observation was formulated with reference to criminal law, but it can be extended to other legal fields and, I would say, generalised.

whilst ignoring great dangers that seriously threaten continued human existence»,¹⁶¹⁷ such as indeed the evasion by the 99% compared to the systemic neoliberal deviations granting the 1% a licence to exploit others, avoid taxes “lawfully”, deplete planetary resources, and ultimately threaten the economic and ecosystemic sustainability of our environment as well as of the societies living therein. In essence, this is what ontological insecurities in the Anthropocene are all about, whose burden should not be charged on humanity as a whole,¹⁶¹⁸ but on those easily identifiable privatised mechanisms of exploitation-through-law which have been sanctioned by policymakers out of capture, culpable negligence, or rent-seeking.

I have emphasised above that fitness is a dynamic variable, and indeed what is deemed to be (legally) coherent and (politically) fit may change over time following societal transformations in value preferences and collective aspirations.¹⁶¹⁹ In other words, coherence—just like law more broadly—is *relative to a system of values at a specific time of history*: depending on the value-system one adopts, MNCs’ avoidance and StT might be regarded as mutually exclusive or simultaneously acceptable, just like under colonial law, enslaving humans was lawful while stealing a fruit at the city market was not, and scholars seemingly embraced the paradox for centuries by claiming the “rule of law” was being brought to colonies.¹⁶²⁰ Relatively abrupt shifts may occur, so that for example a minor practice which is incoherent one day under IHRL may customarise rapidly in the aftermath of a Grotian Moment, being endowed top-down with the coherence it was lacking (at least theoretically, from a doctrinal IL standpoint), but under another legal source – just like the StT under scrutiny here.

¹⁶¹⁷ KIRBY 2019, p. 27.

¹⁶¹⁸ Refer to RODRIGUES BESSA MATTOS and GRANDA HENAO 2021, pp. 118-119.

¹⁶¹⁹ See ERMAN and KUYPER 2020, p. 318.

¹⁶²⁰ Refer further to BROWN 2018; CHALMERS 2019.

Fitness and its contrary may also extend and recompose over time, that is, be assessed from a teleological perspective; for example, «a democratic theory may consist of a principle of democracy which is construed under the constraint that it must be realizable within the long-term future».¹⁶²¹ In this scenario, the appraisal of fitness is suspended until when such future realises and its features become clear; transposed to the case at hand, this could mean that although AEoI mechanisms are incoherent now (under IHRL) yet possibly made coherent through customs in the near future, thus originating the clash I am discussing here, their eventual legitimacy will depend on the eventual concretisation of the chosen teleological design, such as GC. GC realising, it will no longer matter that StT customarised enough to acquire—under ICL at least—the coherence it was lacking under IHRL: contrasted to the long-term (and conclusive) aim of GC, it will prove “unfit for purpose” (the “purpose” being, obviously, GC itself). After all, the whole ICL enterprise is conceived for a texture of Westphalian States which have nothing in common with a true global society, so much that one might wonder whether international customs based on *state* practice and convincement rather than on those of global citizens should be afforded any relevance whatsoever once a GC order has affirmed itself as the closer-to-actual articulation of reality in global affairs. *To counter unwise claims that this discarding would amount to a political act, one shall replicate that “the law as it is” represents already a political act, exactly because it is as it is and not else from it. Lex lata and lex ferenda are nothing but two political expressions: if one endorses the former rather than striving for the latter, that is a normative choice of conservation, nonetheless.*

What role, if any, might organisations play towards teleology-positional normative posturing (i.e. the aforementioned “taking side”)? If the mediation of non-

¹⁶²¹ ERMAN and KUYPER 2020, p. 318.

state actors representing the stances of non-democratic States' citizens before IOs appears reasonable,¹⁶²² the same reasoning cannot be extended to those citizens whose democratic governments are already supposed to bring their stances before international decision-making bodies. In the second case, in fact, if governments are captured, no reasonable ground exists to assume that non-governmental actors will not be so as well (and probably for the same reasons, and due to the same actors). Whereas non-state actors are generally positive agents of mediation and resistance in the former case, they might serve as generally negative agents of collusion and elitism conduits in the latter. Either way, the role of IOs as policy filters and re-elaborators, gathering stances from state and non-state actors alike, is as sensitive and complex an issue today as possibly never before, due to the ever-increasing bargaining power of civil-society and technocratic formations that fall outside the original scope of the IL project, forming informal alliances with and *de facto* feeding (with political and experiential support) transnational bureaucracies whose working styles and circles appear difficult to penetrate. When IOs' legitimacy is measured against the effectiveness of their policy outputs, wondering *on behalf of whom* said outputs were to be effective is even more salient a prerequisite. One may articulate that IOs' legitimacy *under IL* builds on their effectiveness *towards the fulfilment of IL's objectives*, but then the question remains substantially unaltered: who decides what those objectives are or should be?

Besides this objective-dependent aspect of policy legitimization, and more to the technicality of this, maintaining a distinction between the concepts of output, outcome, and impact seems rather useful:

Output refers to the policies of an institution; outcome to the implementation of these rules and programmes through behavioural

¹⁶²² Check *ibid.*, p. 324.

change by targeted actors; and impact to the contribution of these behavioural changes to the solution of the underlying problem.¹⁶²³

As far as the subject-matter of the present Thesis is concerned, “output” refers then to the *corpus* of OECD policies on tax matters; “outcome” is the effect of such policies on the actual behavior of individuals and corporations in terms of tax evasion and avoidance, respectively; and “impact” is the contribution performed by the outcome towards the accomplishment of a fairer society where every natural and legal person pays their fair share of taxes and participates to collective welfare, mental and physical wellbeing, pacification, scientific research, and other common objectives. Having clarified this, the next assessment step pertains the *legal relevance* of these three elements under current IL.

In terms of customary law, for example, verifying the impact is irrelevant, what matters lies at the intersection of output and outcome: in this case, because the outcome mainly invests individuals and corporations but ICL is edified on *state* practice, such an outcome constitutes a valid argument in ICL only insofar as behavioral changes bear repercussions at the state level; as for the output, it is an indication of States’ *opinio*, although the higher the extent of regulatory capture, the lower the reliability of such an indicator. This latter consequence comes as a disgrace, as an overly factual ICL «fails to account for the process whereby facts are constructed in the act of cognition by the human mind».¹⁶²⁴ When approached through IHRL lenses instead, it is the outcome to be negligible: one should relate the output (HR violation) to the impact (did it work?), in order to ascertain the necessity and proportionality of the former compared to its actual role in accomplishing the intended aims (although this operation implies some degree of retrospective bias, which should be tempered with

¹⁶²³ TALLBERG et al. 2016, p. 1079.

¹⁶²⁴ KOSKENNIEMI 1997, p. 578.

considerations on necessity and proportionality by design) as well as to potential non-violating or less-violating alternatives. GC is less straightforward to frame within this narrative; yet, oversimplifying, I might conclude that it makes output redundant: its focus is on the configuration of global governance to be attained (impact), and the practical solutions to attain it (outcome).

e Could global rights be attained under customary law? Global citizenship and ICL's desuetude

As explained above, international taxation resembles a multilateral system although it is not based on a multilateral treaty, but rather, on a complex web of thousands of bilateral treaties adopted in conformity of a bundle of OECD-elaborated soft laws and other reciprocal expectations based on (rapidly evolving) customary norms. Because the surveillance effect of these treaties and soft laws parallels similar developments towards surveillance normalisation throughout other international legal domains, such a surveillance factor in international taxation shall be deemed capable of originating multi-regime customs by “coupling with” the surveillance factor embodied in other IL regimes. But does it so in fact?

As rules are generalized, reciprocity is important as a background rule in view of the legal equality of [S]tates. In the context of customary international law, any [S]tate claiming a right has to accord the same right to all other [S]tates.¹⁶²⁵

To this end, let us suppose to examine the reciprocal position of the US with China.

As evidenced *supra*, the US has not joined the OECD's initiative on automatic exchanges of tax information, although the latter draws inspiration from Washington's

¹⁶²⁵ PARIS and GHEI 2003, p. 120.

unilateral assertions of tax jurisdiction against China, Switzerland, and other sovereign States via the FATCA (and its predecessors). Chinese citizens enjoy a truly limited room for privacy (at least, from a Western viewpoint) domestically, and those same rules are applied to foreigners in the country, partly because of China's own domestic rules, and partly as an effect of FATCA. This clarifies the reason why unilateral assertions of jurisdiction are a dangerous game to play. In fact, an argument can be made that in order for assertions of (extraterritorial) jurisdiction to be lawful or at least "legitimate" under IL, reciprocity should be granted, under the same reasoning underpinning the recognition of foreign judgements,¹⁶²⁶ which is usually granted only insofar as mutual recognition was stipulated first – this framework for asserting jurisdiction is alternatively known under the paradoxical formula of "reciprocal (or reciprocated) unilateralism", especially in the WTO context.¹⁶²⁷ And yet, acquiescing to Chinese initiatives of the same extraterritorial sort would equate to subjecting US taxpayers to the scrutiny of a regime under which civil and political rights remain largely a mirage, or at least an arbitrium; consequently, acquiescing would be unlawful under US domestic law.

In sum, unilateral assertions of jurisdiction from the US to China are illegal under either domestic (PRC) or international law, and in this second case, unless their acceptance turns clearly overwhelming (thus "customary") worldwide, they should not be of inspiration to the emergence of any new custom (as they seem to be doing instead). This notwithstanding, more in the strategic purview, international tax information exchanges *prima facie* exemplify what PARIS and GHEI defined as common-interest game with structural reciprocity, where «[t]here [i]s no need for an

¹⁶²⁶ Check e.g. CHILDS 2006, p. 237.

¹⁶²⁷ Of course, this is else from "reciprocity" understood as the basis for responding to internationally wrongful acts by asserting countermeasures – see ORAKHELASHVILI 2015, p. 13.

external enforcement mechanism because the alignment of the parties' incentives [i]s sufficient to transform the [initial US unilateral assertion] into binding custom». ¹⁶²⁸ A closer look, however, reveals that international tax-information exchanges rather illustrate an example of what the same Authors call "induced reciprocity", a choice-optimisation pattern of state behaviour that «compels the parties to take into account the effect of the opponent's reciprocal choice when selecting their optimal strategy» in a multilateral setting. ¹⁶²⁹

As long as we consider two countries within the international tax framework, doctrinally conservative ideas of ICL may still apply, but international taxation sits far beyond the borders of States: endowed with its own transnational bureaucracy, it has become an irreducible component of a global quasi-administration which escapes the classic paradigms of PIL and domestic law at once, contributing to postmodern digital anxiety ¹⁶³⁰ – especially when its policies are enforced through algorithmic profiling tools. Indeed,

the traditional mechanisms based on State consent as expressed through treaties or custom are simply no longer capable of accounting for all global activities. A new regulatory space is emerging, distinct from that of inter-State relations, transcending the sphere of influence of both international law and domestic administrative law: this can be defined as the "global administrative space". IOs have become much more than instruments of the governments of their Member States; rather, they set their own norms and regulate their field of activity; they generate and follow their own, particular legal proceedings; and they can grant participatory rights to subjects, both public and private, affected by their activities. Ultimately, they have emerged as genuine global [PAs]. One of the key factors in identifying the administrative nature of the organization and activities of these global regulatory institutions is the absence of any effort to make them legislative or judicial in nature (within the traditional conceptual structures of international law); and this alone gives rise to particular problems in terms of their legitimacy and accountability. ¹⁶³¹

¹⁶²⁸ PARIS and GHEI 2003, p. 111.

¹⁶²⁹ *See* *ibid.*, p. 106.

¹⁶³⁰ On the meaning of this anxiety, *refer* to BRENNAN-MARQUEZ 2018.

¹⁶³¹ CASINI and MACDONALD 2008, p. xx.

The fact that global regulatory institutions—referred to here as synonymous with “transnational bureaucracies”—are not turned legislative or judicial in nature, builds on the assumption that there is no such an entitlement as “global citizenship”,¹⁶³² the problem being that to the extent of being subjected to obligations whose scope is global, “global citizens” (or “subjects”?) do exist *de facto*, insofar as supranational bureaucracies are able to carve out policy spaces for subjecting them to transnational decisions they have no say about and perhaps even no interest in. In terms of customary law, the salient dilemma concerns the validity of customs originating from those policy practices, and their congruence with traditional forms of state practice. Indeed, transnational bureaucracies’ «ability to set the international agenda and, most importantly, influence what topics are never considered for inclusion on that agenda»¹⁶³³ does not simply control the contingent outcome of short-term policy preferences: in the long run, it shapes behaviors and sanctions deviations therefrom, ultimately writing customary laws.¹⁶³⁴

The power to establish what is normal is more than simply controlling the agenda, for it succeeds in shaping the surrounding discourse for an emerging agenda such that competing perspectives are never revealed,¹⁶³⁵

and the dominant narrative becomes *the only possible one* by undergoing a process of compelled customarisation (that is, legalisation by formalised exclusion—and outlawing—of actual and potential alternatives) across generations. But is “global administrative law” governed by different (compared to State-based ones) rationales

¹⁶³² See e.g. CUSHMAN 2010, p. 601.

¹⁶³³ VLCEK 2009, p. 264.

¹⁶³⁴ See DE LILLO 2018, p. 11.

¹⁶³⁵ VLCEK 2009, p. 266.

for the formations of customs? If so, who should observe those customs, and who will ensure their enforcement? Because these are open questions still, claiming that the surveillance component of StT can be merged with surveillance components embodied by other frameworks of the same transnational type into an overall surveillant custom would be overconfident. However, no doubt exists that several transnational policies, whose crystallised outcomes over time might be deemed customs *stricto sensu* or not, express a surveillant component which is “made proper” by States *as if* it was customary, and legal channels for resistance thereto are warranted on the part of all policy addressees.

f A global constitutionalism for natural-person global citizenship: Aligning duties with rights

If global “citizens” are moulded as a legalistic construction for the sake of exploiting their supposedly global legal projection, such an ideal should be matched by the right tools to resist potential abuses and to finally—so to speak—*become itself*: if globalised bureaucracies implement policies¹⁶³⁶ as if a globalised citizenship did exist, then all those subjected to these decisions should not passively withstand mentioned bureaucracies,¹⁶³⁷ but rather resist by *formalising, codifying, and operationalising their “global citizenship”*. Popular concerns over the democratic accountability of international tax regimes are expected¹⁶³⁸ and justified, and can only be defied by codified coincidence between globalised tax procedures (with related obligations) and HR stemming from a new conception of global citizenship, whereby

¹⁶³⁶ ERMAN (2019, p. 132) commented that «some laws [...] look more like policies (e.g., global administrative law)[, which] should make us see the differences between law and policy in gradual rather than binary terms».

¹⁶³⁷ Check ANANTRAM et al. 2010, p. 608.

¹⁶³⁸ See e.g., a couple of decades ago already, PARIS 2003, p. 174.

the latter either complements the national one or represents an additional (and *ratione materiae* more restricted) layer over the latter. Resultantly, global citizenship should be designed to respond to the challenge of providing a counterbalancing individual entitlement to the more and more pervasive powers of transnational arrangements whose decisions are taken outside the constitutional (democratic, where applicable) fora of informally “participating” States.

Misalignments between individuals’ *jurisdictionally tied* rights and *factually globalised* obligations are most powerfully illustrated through exemplifications. I will thus follow up to the above with one pertinent example.

Tax expenditure can be defined as the sum of domestic revenue losses attributable to legal provisions allowing for a special exclusion, exemption, or deduction from gross income or providing for a special credit, preferential tax rate, or deferral of tax liability.¹⁶³⁹ Tax expenditure reporting is—or should be—the *alter ego* of taxation: if the latter is a tacit contract between citizens and their State, taxpayers have—or should have—the right to know how their money is spent, and who benefits from it.¹⁶⁴⁰ This is true in general terms as far as public expenditure and investments are concerned, but *a fortiori* so when privileging treatments and exceptionality carveouts to the commonly applicable tax regime are at stake. Obviously, when it comes to physical persons, what is reasonably required of state bureaucracies is not to publish the way money is spent in a beneficiary-to-beneficiary fashion; in this case, externally-audited aggregated data sorted by policy area or by service provision would suffice, thus preserving individual privacy, which shall always be factored in. Nevertheless, when beneficiaries are legal persons, and especially in the event of bailouts to corporations costing on the whole million, billion, or even trillion USD to

¹⁶³⁹ Adapted from one of the most widely quoted definitions, provided in the US Budget Act.

¹⁶⁴⁰ See LEROY 2008, paras. 22;26-27.

taxpayers, disclosure should be thorough and timely. Millions of quasi-indigent taxpayers should enjoy the right to be informed real-time (collectively, of course) whenever their money is being spent for further increasing the wealth of shareholders and “top” private managers, which may concretise directly via bailouts or indirectly via tax exemptions, grants, and countless other special arrangements. If citizens were more widely and rigorously made aware of all this, such occurrences would probably cause social unrest and—hopefully—severe protests, which is exactly the reason why said publication is a good practice to implement: for a democracy at least, inflamed episodes of street violence are much healthier than protracted decades of stagnant and structural economic violence worsening people’s quality of life and triggering underground resentment as well as political detachment in the body of the polity.

Furthermore, if tax information is increasingly globalised on the side of taxpayers, the same should gradually occur on the side of those public authorities who spend such money. Today, *ad absurdum*, a citizen of country A fiscally residing in country B may still have its tax data disclosed *automatically* by B to A because A exercises a citizenship-based taxation, or a citizen of country C residing in country D may have its tax data disclosed *automatically* by C to D because D exercises a residence-based taxation. In either case, taxpayers’ data are exchanged effortlessly, yet those same taxpayers enjoy no right to know in detail what taxes are spent for in either country; moreover, in the second example, the taxpayer holds no citizenship that entitles them to claim governmental disclosure of this data by country D. In sum, an evident mismatch exists between the way governments can exchange taxpayers’ data without citizenship links, and taxpayers’ entitlement to know how (their) taxes are or would be spent¹⁶⁴¹ by those countries where information is collected. Besides the most

¹⁶⁴¹ If the policy aim of this surveillance was to decrease evasion, mentioned entitlement would prove convenient for jurisdictions themselves, as literature widely agrees on the view that taxpayers are less prone

doctrinally conservative PIL theorems endowing States with the monopoly over both coercion and information, no human-centred legal theory would support such a misalignment or deem it unproblematic from a cosmopolitan HR perspective.

Encouraged (yet never directly or indirectly compelled) by the OECD, WB, and IMF to do so, and following Germany, Japan and US' embryonic efforts to that effect, several industrialised countries started to devise their tax-expenditure reporting four decades ago, along the lines of societal calls for budget (and off-budget) transparency.¹⁶⁴² Nowadays, most developed countries issue tax-expenditure reports, although they are merely showing a breakdown of percentages and other figures sorted by expenditure macro-areas instead of—or without being complemented by—details on the most resource-depleting corporate beneficiaries, that is, MNCs. Therefore, international recommendations are not complied with, yet. For instance,

the IMF recommends that the government budget or other fiscal papers should include a statement of the main central government tax expenditures. The statement should set out the public policy purpose of each provision, its duration, and *the intended beneficiaries*. Fiscal estimates of the revenue foregone from major tax expenditures should be provided and compared with the estimated results of previous tax expenditures compared with their policy purposes. This helps in assessing the effectiveness of tax expenditures compared to expenditure provisions.¹⁶⁴³

Regrettably, developing countries' reports are even less detailed, and delivered far more rarely.¹⁶⁴⁴ China is no exception to this rule, although its circumstances of displaying an authoritarian system to which developmental classifications prove particularly difficult to attach are no doubt exceptional. In any case,

to evade taxes if they feel they are consulted about or participate into the public-spending mechanism and its short- and long-term priorities; *see e.g.* JACQUEMET et al. 2021, p. 154.

¹⁶⁴² Refer to STEWART 2012, pp. 48-49;55.

¹⁶⁴³ Ibid., p. 52, emphasis added.

¹⁶⁴⁴ Check *ibid.*, p. 57.

because of the lack of administration, systematic control, and monitoring, the Chinese tax expenditure system has many problems. Those problems include the large number of tax expenditure policies, their misuse, and policy objectives that are ambiguous,¹⁶⁴⁵

especially with regards to SOEs. China's system of tax expenditures is biased in favour of direct expenditures (exemptions, deductions, but refunds and grants even more) which facilitate rent-seeking, eventually widening class inequality.¹⁶⁴⁶ Whilst tax expenditures in China are indeed unfortunate in that they embody yet another unaccountable policy device in the hands of the Party to exercise politicised, preferential redistribution of wealth,¹⁶⁴⁷ over the last two decades they also served the function of levelling the playing field with HK by (selectively) bringing the effective tax rate in the Mainland closer to that in the SAR.¹⁶⁴⁸

g From the BEPS Project to a novel constitutional moment for IL through taxation

In macroscopic terms, too, beyond the fate of individuals as missing global citizens, the substance of current attempts at redesigning tax governance are flawed and rhetorically misleading from a global-justice perspective, in that they avail themselves of cosmopolitan discourses without priorly readjusting power-redistribution between the élites and “the rest”. A debate persists in cosmopolitans’

¹⁶⁴⁵ SHI 2004, p. 175.

¹⁶⁴⁶ See MA 2004, p. 198.

¹⁶⁴⁷ WANG (2015, pp. 5-6) remarked that

[a]uthoritarian regimes, like all [S]tates, need to collect revenues from their citizens in the form of either tax or rents. Authoritarian rulers consume part of the revenues themselves, distribute some to their loyalists, and spend the rest on providing public goods to maintain a minimum level of public support. [...] By granting asset holders’ preferred policies, the ruler can secure their compliance. Otherwise, asset holders can hide, destroy, or move their assets. In this bargaining process, [...] the ruler is willing to sacrifice some of [its] benefits to seek the cooperation of asset holders. [...] M]obile assets empower interest groups by enabling them to withdraw (or threaten to withdraw) urgently needed cooperation from the ruler.

¹⁶⁴⁸ Refer to LI 2007, p. 13.

writings on the degree of redistribution that is warranted to eradicate poverty on a global scale, with someone claiming that «the West will have to accept radical cuts in their living standards in order to meet the requirements of global justice» (“the West” being here an epitome for the excesses of GN’s financialised economies), and others contending that the actual required efforts would be modest.¹⁶⁴⁹ Either way, the current design of “tax-justice” initiatives does little to nothing to redress the true roots of world poverty, to be identified in the legalised wealth-concentration that characterises “developed” and “developing” societies alike, and that is still addressed exceedingly mildly by those same captured policymakers who simultaneously fill their agenda on global tax matters with justice-themed, pseudo-cosmopolitan aspirations. The Chinese élite, who strives for «China to be seen as a trustworthy and responsible member of the international community, capable of and willing to contribute actively to world peace»,¹⁶⁵⁰ often joins such fabricated aspirations in order to display a glaze of responsibility, whilst paving its way towards a mainstreamed position within the global financial establishment. In this sense, China is still «trapped between its aim at perfection in image projection and the structural lack of openness of its society, as well as its inability to give up control»¹⁶⁵¹ and seek alternative routes (compared to the US’ one) towards global supremacy.

Cutting a notably long story short, «in a world where [S]tates set their tax rates independently from each other, a company that can choose where to declare its income also can choose its tax rate».¹⁶⁵² Given that the same does not apply to individuals, multinational legal persons—the champions of lawless globalisation—are unduly advantaged over physical persons, who are subjected to the enforcement violence of

¹⁶⁴⁹ BROWN 2012, p. 82.

¹⁶⁵⁰ D’HOOGHE 2005, p. 93.

¹⁶⁵¹ Ibid., p. 102.

¹⁶⁵² Ibid., p. 357.

the State under a PIL which trudged through its obsolete doctrines and fails to catch up with the cosmopolitan legal person's take-it-all greed. To exemplify,

Apple [...] famously exploited a difference between the [US] and Irish definitions of tax residence. Ireland considered a company to be a tax resident only if it was managed and controlled in Ireland. In contrast, the [US] determined residence by place of incorporation. By incorporating subsidiaries in Ireland, but managing and controlling them from the [US], Apple created companies that resided *nowhere* for tax purposes. By shifting income to these stateless subsidiaries, Apple moved a large portion of its global profits to nowhere, thereby escaping tax.¹⁶⁵³

Worse even, MNCs' code-of-capital privileges are reflected in the privileges of the 1%: all people are surveilled, but the 1% makes its fortunes lawfully as a result of their corporations' tax avoidance. This confirms that the mere existence of tax havens is not per se the problem, and that these tax-planning schemes are, with the benefit of hindsight at least, so banal that specialist state regulatory agencies ought to have known such loopholes existed and could have been exploited that way. To make things worse, regulators show reluctance towards closing future gaps they themselves created by legislating and whose effects they are already aware of.

Even more saliently, a diversion like the one implemented by Apple would never be available to individuals, who are always necessarily bound to one fiscal residency and cannot "replicate themselves" or, practically, keep changing residencies to circumvent said formal condition. Indeed, several millionaires, who find themselves abroad while they are wanted by e.g. the US tax authorities, relinquish their citizenship and remain "stateless" (*apolidi*) to avoid paying taxes, although the end is almost never worth the stake – for the 99% at least. Whilst holding multiple citizenships is exceptional an entitlement for individuals worldwide, legal persons easily conflate into

¹⁶⁵³ Ibid., p. 358, emphasis in the original. See also LÉVÊQUE 2021, p. 128.

conglomerates holding several “business citizenships” of convenience, to be played with in order to avoid taxes as much as and for as long as possible, so that one might wonder whether MNCs should even be legally allowed exist in the first place, and what their supposed benefits for the broader society are, if any at all. From my standpoint, the (tax) “efficiency” the legal code of capital grants them does not benefit society at large, serving the exclusive good of corporate shareholders and overpaid private managers. Indeed, out of several theories of corporate governance and corporate taxation, perhaps the most convincing one indicates that we tax corporations not so much because taxing shareholders directly would be unfeasible or unfair, but rather to place a legal constraint over corporate overgrowth and promote managerial accountability to the wider society after having granted corporate entities the privilege of fictitious separate legal existence.¹⁶⁵⁴ Hence, if MNCs—being fictitious aggregated bundles of already fictitious entities (corporations)—manage to contribute close-to-zero in taxes, their harm to societies far exceeds the added value they might bring.

Because the BEPS project has been described as a potentially transformative constitutional moment for ITL,¹⁶⁵⁵ it might indeed be worth assessing its strengths and weaknesses through GC lenses, thus reorienting its priorities, fairness, and overall incisiveness accordingly. And because under the pressure of globalisation States have been yielding much of their formal powers to hybrid transnational regulatory formulas, for rethinking global governance we might need to take such formulas seriously and start therefrom, rather than counting on States to replicate their obsolete domestic democratic settings onto the global level.¹⁶⁵⁶ To understand why our domestic privacy rights keep being eroded while our tax obligations keep unfolding and increasing

¹⁶⁵⁴ *Read further* CHOUDHURY and PETRIN 2019, pp. 311-319.

¹⁶⁵⁵ *See* MASON 2020, pp. 354-355.

¹⁶⁵⁶ *See also* LITTLE and MACDONALD 2013, p. 796.

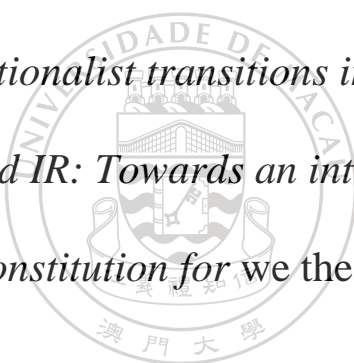
transnationally, we may ourselves of function-sensitive approaches to IL and global governance which accommodate both procedural fairness and political autonomy *lato sensu*,¹⁶⁵⁷ readapting them to our technology-intensive—and yet, paradoxically, as border-segmented as never before—era. These considerations are further explored in Chapter 17; Chapter 19 will conclude that for the time being, also considering non-democratic polities, we still need States to make StT fairer transitionally. A sort of “intermediate”, apologetic-and-yet-utopian SC will serve the cognitive function of overturning the current state-corporate regulatory conglomerate; certain lawmakers still list taxation as an inherently sovereign prerogative,¹⁶⁵⁸ failing to admit that in the current state of affairs, decisional sovereignty is captured by corporate forces that tend to transnationalise decision-making and turn it to their exclusive advantage. This profoundly urgent cognitive resetting—one that frees States from corporate capture but still acknowledges the former as indispensable and indisposable entities—shall be pursued as a necessary passage, while aspiring to and tending towards a cosmopolitan design for our global village where all citizens could bear globally scoped rights and obligations, both to be exercised before (capital-uncaptured) supranational institutions.

¹⁶⁵⁷ Refer extensively to ERMAN 2021.

¹⁶⁵⁸ Refer e.g. to MÉGRET 2021, p. 477.

Chapter 17

*Right-enacting constitutionalist transitions in élite-captured
and capital-embedded IR: Towards an intrusion-proof,
global(ised) Constitution for we the people*



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[W]e should [...] ask ourselves what sovereignty actually means in the 21st century. For me, it is about [...] pooling our strength and speaking together in a world full of great powers.¹⁶⁵⁹

a The closest-to-best approximation to a Constitution for all

As demonstrated in the preceding Chapter, what to prioritise between a customarising practice and a human-rights obligation represents a dilemma that cannot be dissolved through positive law, a fortiori the “dispersed” international one; rather, it calls for a teleological exercise that clarifies what the purpose of the choice is, who are its addressees or beneficiaries, and ultimately, who (and what) is IL for.

As far as this study is concerned *ratione materiae*, it has been demonstrated that States are *irreversibly* captured by profit-maximising capitalist élites, and because of this, I cannot but adopt a globalist state-decentring perspective that addresses *all individuals* in the world and their overarching needs and aspirations *as humans*. Otherwise put, what we need is a constitutional framework that embraces individuals *as individuals* so that, differently from IHRL, it does not necessarily rely on a State to attach individuals’ rights to a subject on an individual-to-individual or community-to-community basis *because of their sovereign-sanctioned citizenship status*.¹⁶⁶⁰ In sum, we need the best-possible approximation to a “World Constitution” that *works for all* regardless of States, freed from the dictates of financial power and capitalism more

¹⁶⁵⁹ European Commission, ‘Remarks by President Ursula von der Leyen at the press conference on the outcome of the EU-UK negotiations’, 24 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_2534.

¹⁶⁶⁰ Check also PETERSMANN 2016, pp. 164-165.

generally. This is the end goal, but as we will see, its weak attainability necessitates of intermediate passages and transitional SCs.

If capital can move across borders and exist ubiquitously and these ephemeral flows cannot be stopped, perhaps it is time to rethink the limits to natural persons and globalise their access to rights, dignity, and freedom up to matching the “juridical privileges” granted to mobile capital, which I will explicate *infra*. Resultantly, in this essay I will make a case for transitioning from a form of constitutionalism designed for capital—that is, an exploitative-extractive legal code that facilitates the globe-wide constitutionalisation of capital accumulation¹⁶⁶¹—to one that supports a (perhaps transitional) RGC where rights and duties are matched at each and any layer of policymaking. This seems to make historical sense, too: the discipline of constitutional law was born out of popular demands for human rights generally but more in particular for fairer taxation;¹⁶⁶² these demands are repropounded today on the transnational scale, and constitutionalism should adhere to their renewed scope.

b PIL as a *fictio legis*: Westphalia for the 99%, privatised jurisdictionalism for those who can afford it

History of political economy’s literature,¹⁶⁶³ urbanism archival research, and various chronicles from the Empire have abundantly proven that tax havens, offshoring, as much as any other jurisdictional carveouts for the rich to conceal their assets are not an invention of contemporary neoliberal societies; if anything, these capital-acquiescing exceptionality regimes *normalised legally* with neoliberalism, but had been already conceived and operated from the Middle Ages onwards, and probably

¹⁶⁶¹ See further BLANCO and GREAR 2019, p. 90.

¹⁶⁶² Check e.g. GUIMARÃES 2019, p. 92.

¹⁶⁶³ Most recently, refer extensively to MIHATSCH and MULLIGAN 2021; OGLE 2020.

even prior to the medieval epoch. Why is this problematic for PIL? Prior to PIL's mythical founding moment called "Westphalia", exceptionality was unexceptional in that any legal codification of sovereignty was somewhat exceptional compared to all others, insofar as no legal arrangement had been thought of for all these sovereigns to coexist under the same broad framework (except for loose conceptions of "empire" as a kingdoms-made chimeras). Westphalia sanctioned such a framework as the "normal" one: with PIL gradually taking shape, sovereignty came to coincide with the positive power of a sovereign authority over a defined territory and a population, with newly branded "States" forming the basic unit of this new geopolitical puzzle slowly emerging as the "Westphalian global order". Thenceforth, speaking of jurisdictional "normalcy"—and thus of exceptions thereto—was vested with new meanings: the first coincided with the State, the second with self-governing non-state entities, in addition to the global commons, and so forth.

It is exactly against this backdrop that the new capitalist class, richer and richer as decades passed by, felt the urge to preserve their privileges against the consolidating state bureaucracies: in their minds, capitalist champions were special humans, whose class deserved special treatment well beyond the basic law of Westphalia. Under this slogan, all the way towards imperialist expansion and subsequent retraction, the superrich started to negotiate for themselves regimes of self-governance with state sovereigns, obtaining from the latter self-governing "space" (and most importantly, *legal* prerogatives) carved out from the Westphalian map of the world, at times in between—but most times within—the territory of identifiable Westphalian States. This is what I would label as "jurisdictionalism on sale": the division of the globe in "sovereign" States for the 99%, and exceptions thereto for the 1%, who could literally "buy" their corners of self-governance and enjoy their capital free from the

Westphalian laws applicable to the 99% of States' citizens under the Westphalian touch.

To keep the fictionality of Westphalia alive, sovereigns made generous recourse to a hybridised concept of “extraterritoriality”,¹⁶⁶⁴ not infrequently turned into a disposable lawyering device to mask legality with capitalist coercion:

Extraterritoriality allowed the creation of enclaves within [S]tates where favourable tax regimes, the reassignment of criminal and civil jurisdiction, but also grandiose architectural developments took place at the personal choice of the traders or businessmen who had secured these privileges. These jurisdictional rights or privileges were sometimes granted by freely agreed treaties or concessions, but at other times imposed.¹⁶⁶⁵

This is exactly what made PIL a *fictio legis*: it premised itself upon equal sovereigns, while reality was that the order it created only applied to the unprivileged ones, subjected to sovereign rule, while the latter could be negotiated at ease by the owners of capital – back then, already, most of them were MNCs shareholders. What I shall note at this point is that before neoliberalism, “jurisdictionalism on sale” represented still a portfolio of exceptions—so to speak—to an ordered globe built on sovereigns’ will; the qualitative leap forwards for capitalists today is that their ability to negotiate exceptionality regimes for themselves and their MNC-derived capital has normalised to such an extent that Westphalia has succumbed to normalised regulatory capture, and jurisdictional carveouts have blossomed under the “normal” legal code of capital.

While I hold that MNCs have long captured States, other scholars claim it is States that deploy “their” MNCs strategically to erode competing States’ market-

¹⁶⁶⁴ Check further ANDROUS et al. 2021 and upcoming contributions introduced therein.

¹⁶⁶⁵ MIHATSCH and MULLIGAN 2021, p. 8. In a few instances, however, sovereignty is subsequently reasserted and capitalist privileges abrogated, even retroactively; the oil-production tax case of 1966-1970 Libya is illustrative: see DIETRICH 2021, pp. 13-16.

shares and thus the international RoL and global governance,¹⁶⁶⁶ but I submit that wondering who captured whom first is a meaningless exercise: what matters is that they captured each other thanks to a shared global élite which codified exploitative neoliberal tenets into legalistic claims of legitimacy, later socialised into standard cognitive habits for lawmakers and the general populace alike. “The law”, namely Anglo-Saxon corporate law,¹⁶⁶⁷ assumed the role of standard vehicle for mentioned normalisation process, with such a capacity for pervasiveness that the PIL regime witnessed the unforgiving erosion of its founding myths: sovereignty, jurisdiction, primacy of the State in international affairs, politics over economics, borders, custom duties, and the like. No borders are any longer in place—even assuming they partly ever were—for the élite’s moves and their globalised capital. PIL became (or definitely confirmed to be) a fiction as while the 1% could buy their way to self-governance, “the rest” was tied to a territorial legal code and its rulers through the concept of “citizenship”; and if citizenship can be sold, and territorial sovereignty *de facto* can, too, then there is no international legal order to speak of anymore. This unbalance spread to sovereigns themselves, with a new “core-and-periphery” dialectic being elaborated among unequal sovereign States, via “onshoring” and “offshoring” as misguided conceptual clusters to frame the new geography of global political economy beyond Westphalia.¹⁶⁶⁸

And yet, even in the XX-century global village, which presented itself as much more “Westphalian” than the current one, the nominal preservation of sovereignty, with its founding myths and implicit privileges, was preferred *as a default mode of thinking legally* over coming to terms with the reality of an increasingly transnational

¹⁶⁶⁶ See for instance PETRICEVIĆ and TEECE 2019, p. 1490 ff.

¹⁶⁶⁷ Read also TOURNIER 2017, p. 121 ff.

¹⁶⁶⁸ Read especially MURRAY 2017, pp. 247-249; HUDSON 2013, pp. 93-103; ALAMI et al. 2021, p. 24.

capital that elicits tax avoidance from corporations.¹⁶⁶⁹ In other words, it was not yet acknowledged or, when it was so, it was *unaccepted and contrasted* “cognitively”, that “Westphalia-land”¹⁶⁷⁰ was traversed by porous power-voids which could be easily infiltrated by an increasingly liquid—when not evanescent—capital whose transfers, if not yet digitised (...not to mention today’s virtual currencies!), were already detached from the so-called “real economy” and its jurisdiction-anchored formalities. To be sure, polities worldwide had been adapting to proto-international capital, in various forms (including limited preferential tax rates and *ad hoc* tax reliefs), since the most ancient times¹⁶⁷¹—after all, *lex mercatoria* has been one of the first transnational regulatory frameworks to customise in the West¹⁶⁷²—and the ideological struggle to counter after-tax economic inequality as *forma mentis*, even prior than as *forma legis*, is deeply embedded in human “civilisational” history.¹⁶⁷³ Paradoxically, even contrasts among different élites at several junctures in history helped redistribute wealth entitlements and scale-down inequality.¹⁶⁷⁴ This notwithstanding, never were this to equate to a full-spectrum surrender of politics and citizens to supra-domestic, “extra-sovereign” capital’s actors and policy preferences.¹⁶⁷⁵ On top of this, eloquent archaeological and anthropological evidence at all latitudes has demonstrated that inequality is *not* the price to pay for civilisation, meaning that contrary to complacent narratives, complex human societies have not just survived, but thrived while pursuing

¹⁶⁶⁹ See CHRISTENSEN 2020, p. 18.

¹⁶⁷⁰ While “Westphalia” is used by lawyers and political scientists to refer to the traditional configuration of international relations built on formally equal sovereigns, with an emphasis on the doctrinal and legalistic implications of such design, “Westphalia-land”, in this study, will hint at the spatial distribution of the power deriving by the aforementioned configuration, in a more geographical, territory-oriented sense. The second is however just a specification of the former (“variation on a theme”), carrying no significant theoretical distinction therefrom.

¹⁶⁷¹ Refer to TAMANAHA 2017, pp. 168-70. See also PALAN 2020, p. 176.

¹⁶⁷² See BUGEJA 2018, p. 34.

¹⁶⁷³ Refer e.g. to MOTADEL and DRAYTON 2021. For a far more exhaustive analysis, see VALK and SOTO MARÍN (eds) (2021).

¹⁶⁷⁴ Check for instance DENNISON 2021, para. 11.

¹⁶⁷⁵ At least, as far as we presently know from history research on diplomatic exchanges between ancient civilisations.

and observing egalitarianism.¹⁶⁷⁶ In other words: rampant inequality is always the result of policy choices, selfishness, and greed, never of organisational necessity and unavoidability – though unmissably, the frequency with which we have come to choose it speaks loudly about our nature as self-declared *sapiens*.

Moreover, sovereignty is by definition a concept in flux, whose prerogatives depend on the needs of the eventual inhabitants of the territories whereupon it extends: if people inhabit a world where politics erects borders but capital sneaks through regardless, people's rights will need to be equally global and States' duties will be expected to follow suit, e.g. with regards to designing a level-playing field in taxation matters that readapts sovereignty to the violent quests of a globally unconstrained capital.¹⁶⁷⁷ To make an obvious but essential analogical remark, the Covid-19 pandemic itself has demonstrated that the only entity or asset which is allowed to operate globally *no matter what* is financial capital:¹⁶⁷⁸ neither all goods/merchandise and non-financial services, nor—even less—the overwhelming majority of natural persons¹⁶⁷⁹ are legally entrusted with this privilege. MNCs are the only type of entities which is granted the chance to fictitiously exist, operate, and profit borderlessly, even during a global pandemic.

Therein lies the fundamental rationale for international business, which will persist in the post-pandemic period, since inequalities and fragmentation will continue to create *aggregation and arbitrage opportunities for MNEs*, and for traders and alliances. [...] After the

¹⁶⁷⁶ Refer extensively to GRAEBER and WENGROW 2021.

¹⁶⁷⁷ See further CHRISTIANS 2009, pp. 138-142.

¹⁶⁷⁸ On the response asymmetries this has been causing at the EU level as well, refer to PEROTTO 2021, pp. 333;335.

¹⁶⁷⁹ This will further exacerbate existing inequalities between those natural persons. Exemplifying about researchers, STEVANO et al. (2021, p. 12) expect that «if research practices become increasingly governed by digital access, the most vulnerable and marginalised are likely to be on the other side of the digital divide. This will deteriorate their invisibility». It is often objected that virtual meetings widen the audience and potential participation pool of academic conferences, but this is a first-world semi-truth: one needs to be *already* part of certain extractive networks in order to benefit from travelling less and rejoining them virtually, while *initial* participation and access to the professional arena is highly facilitated by in-person interaction, cultural exchange, and knowledge transfers (all things that have historically made us human).

pandemic, the “new normal” may be marginally different, but globalization in its various manifestations will continue, and global coordination will be even more important for collective intergovernmental action to meet [...] emerging technologies [...] and international tax-avoidance [...].¹⁶⁸⁰

Indeed, if financial transactions are globalised and unregulated, this is not because differently from other assets, their globalisation originates no deficiencies and distortions, but because this choice was sealed and consistently upheld by global institutions under the flag of stability and legality – put differently, under the code-of-law argument: for decades, capital-control solutions have been discouraged as counterproductive or, most often, even condemned as *unlawful*.

So extensive and wide-ranging have the web of treaty obligations and rules of international organisations become, [that] this retreat from globalisation will not be a simple process, at least for nations that wish to abide by their legal commitments and respect the rule of law. [...] A]s finance became increasingly prominent in the global economy, the interests of the US, Europe[,] and their banks were supported by the free movement of capital globally. [...] And yet, i]t is particularly important during crises that national governments have recourse to the full panoply of macro-economic policy measures. This recourse could be undermined when imposing capital controls would breach these broad obligations and render governments liable for monetary damages to aggrieved investors. [...] The potential liability associated with prohibiting capital flows, whether temporary in the context of a crisis,

¹⁶⁸⁰ CONTRACTOR 2021, pp. 3;9, emphasis added. The only term I disagree with is “intergovernmental”, for the reasons which are going to be exposed over the forthcoming sections. In any case, while I can support the claim that the economic “liability of foreignness” for the average company as well as the business strategies of global supply chains will be reshaped remarkably by the ongoing pandemic also in an inward-looking direction (*see e.g.* BRAKMAN et al. 2021, pp. 1218-1219; HARRIBEY 2021, p. 182, talks of companies’ “relocalisation”, too), it is hard to conceive a world where—if the fundamentals of international public policy stay unchanged—the globalisation of financial capital will be constrained. In fact, even if the production (manufacturing) and labour turned domestic, hence “deglobalising”, and export lost ground to domestic consumption, these changes in isolation would not prevent domestic companies across several jurisdictions from coming together in the legally fictitious form of a “multinational” corporation (especially in certain corporate-friendly jurisdictions), for the sake of moving capital (understood as financial assets) around subsidiaries under the purpose of increasing “efficiency” – which means, avoiding corporate taxes. In other words, nothing in the realm of untaxed capital accumulation will change by itself only because commodity and labour markets might “domesticise”; TITIEVSKAIA et al. (2020, p. i) share the same opinion:

In 2019, the term “slowbalisation” spread, to signify the waning of globalisation as we know it. For instance, international trade and investment relative to [GDP] started to decline. Supply chains began to contract after years of global outsourcing and offshoring. In terms of international cooperation and multilateralism, the pace of the world’s economic integration waned. [...] Notwithstanding this, d]eepening inequality has been a by-product of hyperglobalisation, has continued during the slowbalisation phase, and is likely to continue after Covid-19. The causes are rooted in government policies affecting income distribution, including taxation and the strength of multinational corporations.

or long-term with the goal of maintaining financial stability, is substantial.¹⁶⁸¹

Global financial governance went all the way from free capital movements in the early XX century, to capital controls in the middle of the century (though currency swaps were already eroding their effectiveness), to then opt for their removal again with neoliberalism.¹⁶⁸² Why is this return problematic? Because meanwhile, the services industry has globalised and digitised, including the one offering “tax optimisation”,¹⁶⁸³ feeding the growth of an a-jurisdictional creature: the MNC. This signals the end of Westphalia as scholars thought they had known it, hence the argument here is not that Westphalian capital controls should be reintroduced, but rather, that equivalent-in-essence new forms thereof should be devised and implemented in order to constrain the staggering expansion in speculative financial transactions as well as in tax-avoiding capital movements between MNCs’ subsidiaries.

c Moving away from an increasingly fragmented and capital-captured Westphalia

I subscribe to the ambition of an international-law scholarship refocused on framing traditional legal disputes (on trade, investments, territorial demarcation, armed conflicts, etc.) against the wider political economy of distribution, consumption, dispossession, and commodification underwent by the relevant parties in recent history,¹⁶⁸⁴ but am not exceedingly sympathetic to political-economy accounts of

¹⁶⁸¹ MERCURIO et al. 2021, pp. 61;100. My study seeks to demonstrate, *inter alia*, that these controls—in the widest sense—have been outlawed and delegitimised because States have been gradually and irreversibly captured by the meta-regulatory power of global capital and its well-identifiable elite, through unguine recourse to purely formalistic narratives of legality (encompassing both “lawfulness” *stricto sensu* and legitimacy) and bureaucratically enforced procedural fairness.

¹⁶⁸² Refer e.g. to ABDELAL 2007, p. 2.

¹⁶⁸³ On the relationship between capital-control policies and the proliferation of tax havens (and related “spaces”), read also HEARSON and TUCKER 2021, p. 8.

¹⁶⁸⁴ See QUIROGA-VILLAMARÍN 2020, p. 140.

corporate structures that tend to force their “humanisation” by establishing conceptual parallelisms with Darwinist evolutionary trajectories.¹⁶⁸⁵ Indeed, when ethologists and biologists refer to the “survival of the fittest”, they assume it to happen *everything else being equal*, that is to say, in an environment where all species are in principle, history-transcending treated equally (or equally probabilistically) by nature/destiny and *equally unequally* by chaos/chance – two exogenous variables, whose interaction is studied as “complexity theory”.

As far as ITL is concerned, instead, not all protagonists are treated *equally unequally*, because the most significant variable is in fact *endogenous* as it pertains to one’s belonging to either the 1% (environment-shaper) or the 99% (environment-shaped), in that the relevant norms in this system are not externally validated (by “nature”, “chaos”, etc.) but created *ab origine* by a component thereof (the 1%) to the detriment of the rest (99%). This is also why from a distributional perspective, it makes little sense to talk about infra-99% (or even infra-100%, for that matter) equality—think e.g. of “gender equality”,¹⁶⁸⁶ “diversity”, and the like—as long as these fundamentally inequal premises between the elitist regulators and “the rest” remain unaddressed. In the age of globalised capital, all *economic* inequalities one might spot within society stem from major foundational discriminants between 1% and 99%, so much that addressing the former *within the latter*—a trend which is being made increasingly popular, especially in the West, owing to combative feminists advocating for superficial “diversity”—is mere cosmetics that shakes the system’s foundations softly, without replacing them with anything truly fairer and more diverse.¹⁶⁸⁷

¹⁶⁸⁵ See e.g. CODY 2006, pp. 265-266.

¹⁶⁸⁶ Curiously (but quite normally nowadays), while chairing gender-equality panels, flaunting charity activities, and disbursing donations worldwide, Cherie Blair was evading taxes and concealing her ownership of luxury buildings in downtown London and elsewhere.

¹⁶⁸⁷ And indeed, for instance,

the US has exceptionally high inequality of disposable household income [... One can] disaggregate the working-age population into household types, defined by the number and

Ensuing from these reasons is the fact that the evolutionary free-rider is not the individual tax evader under the current code of capital, but rather the *formalistically tax-compliant* legal-person fiction and its 1% natural-person *alter ego*.¹⁶⁸⁸ Without waiting for solidaristic, altruistic, or at least collaborative societies to triumph over self-serving, 1%-populated ones, it would be perhaps smarter to address the issue more rapidly through the right set of policies, also considering that while, in ethological-biological modelling, solidaristic societies trump the selfish ones *because both types of societies simultaneously develop and compete for resources*, in this case only one (global) society exists interconnectedly, and the subject of contention is to what extent the 1% should be set free to continue capturing said society's legal codes – thus sorting what is “lawful” from what it is not. Socially solidaristic human societies, so it is usually claimed, conceived and enacted beyond-instinct positive laws as

law's peculiar discursive and institutional qualities give [IL] a transformative dimension. Absent law, individuals confront one another as subjects of interests and preferences. Interactions follow an instrumentalist logic, as each actor seeks to satisfy her private and idiosyncratic desires.¹⁶⁸⁹

However, this only works insofar as law-making processes stay capture-free. While the logics of (social) evolution might eventually reward the 99%'s patience and make solidarity triumph, it is probably wise not to passively wait for such a turn to

gender of the household's earners and the partnership and parenting status of its members. [... What emerges from mentioned disaggregation is that t]he roots of US inequality exceptionalism are not to be found in an unusual demographic composition, *nor in unusually high or low mean incomes of some demographic groups*, but in pervasive high inequality *within each of these [scrutinised] groups*. [... The] overall conclusion, clearly, is that the US' high level of market income inequality, in cross-national perspective, is found *across* diverse subgroups

– GORNICK et al. 2021, pp. 1;25, three emphases added. Importantly to restate, this discussion is confined to the *economic* aspects of inequality, which is however a far more complex and multidimensional phenomenon; for instance, society-mediated matters such as “job insecurity” or “job casualisation” alter the *perception* of inequality without necessarily impacting economic indicators in the aggregate – *refer further to* BUSSOLO et al. 2018, pp. 12-13.

¹⁶⁸⁸ Cf. PIEVANI 2013, 38:08-43:09.

¹⁶⁸⁹ DUNOFF 2013, p. 327.

spontaneously manifest itself, if we are to try to prevent extinction! Rebalancing policy action is called for, and quite urgently.

Notwithstanding the limits of biological models, one shall *de minimis* concede that “evolutionarily speaking”, Westphalia created its own *alter ego* monster (the MNC) by reaction, and (first possibly inadvertently, then deliberately) nurtured it,¹⁶⁹⁰ evolving *with* it¹⁶⁹¹ in an increasingly parasitic relationship where it is more and more difficult to identify who the parasite is between the State and “its” MNCs as time goes by. «[A]s capital grew into a [S]tate, the interaction between its organizational bodies of corporations and governments multiplied and intensified». ¹⁶⁹²

Of course, close dependency comes at a price. It is often posited that only progressive tax systems can be fair, but an even more radical proposal would be to initiate dependency paths from cooperative corporations rather than the financial industry; in fact, if a State “taxes the rich” to then depend on their financial performance to run its services, it develops a risky and counterproductive relationship of dependency from those very same people it identifies as paradigmatic of systemic neoliberal distortion, thus perpetuating the distortion itself.¹⁶⁹³ This is a conceptually sound remark, and although I am not confident it would prove of immediate practical serviceability, I subscribe to the call for a more radical rethinking of the nature of corporations—especially from MNCs to “third-sector” cooperatives—in the mid-run.

Speaking of parasitism, the figures of “meta-Westphalian” tax-aimed strategising (already approximate by default) by corporations are staggering: «US firms alone have amassed between US\$1.9 to 3.0 trillion in cash or near-cash deposits

¹⁶⁹⁰ See PALAN 2020, p. 176.

¹⁶⁹¹ See NUNN 2005, p. 12.

¹⁶⁹² NITZAN and BICHLER 2009, p. 297.

¹⁶⁹³ Check the blogpost by WORTEL-LONDON (2021^a), the response thereto by DESAI (2021), and the rejoinder by WORTEL-LONDON (2021^b).

“trapped” [...] in OFCs[, while] about 30% of all foreign direct investments are “phantom investments” operating through shell corporations». ¹⁶⁹⁴ What is more,

[t]he top 100 non-financial firms have established *between them* 73,864 subsidiaries[, ...] creat[ing] what are in effect “opportunity spaces” for aggressive tax avoidance. Furthermore, they have placed those structures strategically in control of a considerable portion of the respective group’s operating revenues and net income. [...] Also, [e]ither coincidentally or by intent, a greater portion of these firms’ *operating revenues* is in jurisdictions that make the filings available, compared to the reported *net income* [which is taxable]. ¹⁶⁹⁵

Public pressure and citizens’ activism have contributed their share to exposing the ordeal, but not to changing it. ¹⁶⁹⁶ they can do little against e.g. corporate conglomerates in the financial sector which—unlike in cases like Starbuck’s—have no direct contact with a wide client-base and thus express little regret in losing public appeal or not being considered ethical or respectable. ¹⁶⁹⁷ Today, corporations are required to disclose their tax-payments across all BEPS-compliant jurisdictions where they operate, ¹⁶⁹⁸ in the US (and possibly soon in the EU as well) even publicly, ¹⁶⁹⁹ but this is else from saying that they cannot keep operating the same avoidance schemes they have relied upon till now: differently from individual tax evasion, the main problem with corporations lies in what the rules of the game are, ¹⁷⁰⁰ that is, *in the taxes they are “legally” entitled to avoid*, rather than with the non-disclosure of their budgets or non-publication of the relatively few illegal tactics they may adopt in open disregard for already overgenerous tax codes. ¹⁷⁰¹ Indeed,

¹⁶⁹⁴ PHILLIPS et al. 2021, p. 291.

¹⁶⁹⁵ Ibid., pp. 298-300, three emphases added.

¹⁶⁹⁶ See BLANK 2019, pp. 283-284.

¹⁶⁹⁷ See FISHER 2014, p. 355; see also GRIBNAU and JALLAI 2017, pp. 77-78.

¹⁶⁹⁸ See CHRISTENSEN 2020, p. 25.

¹⁶⁹⁹ Refer to VIEGAS and DIAS 2021, p. 168.

¹⁷⁰⁰ See also ZICARI and RENOARD 2018, p. 248.

¹⁷⁰¹ Cf. LENNERFORS 2019, p. 359; GRIBNAU and JALLAI 2017, pp. 82-83.

scholars have found that while the *speed* of change on both exchange of information to combat tax evasion (FATCA and the [CRS]) and on corporate tax avoidance (BEPS) has been high, the *scope* and *depth* of change has been much higher in the former case.¹⁷⁰²

Truth be told, compared to the inconclusiveness and hesitation characterising the tax-avoidance dossier, OECD-sponsored exchange-of-information solutions targeting individuals have progressed at impressive pace and gathered world-powers' consensus in just a few years' time:¹⁷⁰³

As far as individuals are concerned, bank secrecy and the resulting evasion from income and wealth taxes is largely a thing of the past. [...] The efficiency and equity issues raised by reform of the international regime for corporate taxation in the digital economy are an order of magnitude larger. [...] Hence, no equivalent result to individual tax evasion has been reached as regards multinationals [...].¹⁷⁰⁴

Transparency requirements for legal persons may even prove counterproductive for the sake of fighting tax avoidance, rather triggering behavioural mimicking.¹⁷⁰⁵ The unserviceability of information-exchanges for corporations revolves around the loopholes-by-design in what the risk-assessment forms require them to declare (stemming from policymakers' *pretended* ignorance), but also, as just mentioned, on the fact that publicising legalised tax-avoidance strategies does not

¹⁷⁰² CHRISTENSEN 2020, pp. 37-38, three emphases in the original. The few scholars who argue the reverse—see e.g. BERETTA 2019, p. 70—have evidently not kept themselves current with the developments in the field, which are not even too recent anymore.

¹⁷⁰³ To check the initial phases of this almost flawless progression, see generally ECCLESTON and WOODWARD 2013. See also AIREY 2020, p. 285, fn. 645.

¹⁷⁰⁴ PAPAConstantinou and PISANI-FERRY 2021, p. 14.

¹⁷⁰⁵ For instance, OATS and TUCK (2019, p. 579) concluded that «the performativity of transparency will most likely lead to changed behaviour, but not necessarily in the form desired by those who call for greater transparency». Indeed, MNCs may *avail themselves of the way requirements are formulated as to learn how to more sophisticatedly deceive tax authorities* while using their own hyper-simplistic criteria. One banal exemplification: if authorities check whether the income declared by an MNC across its subsidiaries roughly corresponds to the number/function/productivity of employees and transactions assigned to each of those subsidiaries (check e.g. VIEGAS and DIAS 2021, p. 171), corporate executives may opt for a *nominal* reassignment of employees across their offices worldwide in order to give an impression of higher homogeneity between income generated in (or derived from) a jurisdiction and effective presence therein with operations and staff. Obviously, this example is basic, but reality resembles the just described rationale.

make their pursuers prosecutable judicially (or even truly accountable in a broader sense: the matter is too complex, and the information-asymmetry with the public too high). The partiality, accounting inconsistency, and, ultimately, failure of these ill-designed and unenforceable CbCR requirements¹⁷⁰⁶ was uncovered with particular emphasis in the case of EU banks and financial institutes vis-à-vis European regulators under CRD IV, resulting in incomparable data being released.¹⁷⁰⁷

Meanwhile, reputedly novel polyarchic and polycentric challenges to the Westphalian order,¹⁷⁰⁸ in fact resembling Medieval hyper-fragmentation of public authority,¹⁷⁰⁹ have concretised and become unavoidable; and yet, for the time being, only the demands of capital are accommodated at a global “constitutional” level. In such a composite international stage where multifaceted shades of sovereignty and jurisdictional claims coexist, built around cities and onshore financial hubs competing with traditional nation-States and offshore finance in sovereign islands,¹⁷¹⁰ state-centred responses to tax avoidance cannot work; even DIETSCH and RIXEN, who

¹⁷⁰⁶ For a more optimistic take, see JANSKÝ 2020^b, p. 5.

¹⁷⁰⁷ See, *extensively*, MURPHY et al. 2019; cf. MEINZER 2019, p. 127. More specifically, it seems that EU multinational banks started to cheat more through subsidiary-to-subsidary operations, thus recalibrating the prevalence of head-to-subsidary avoidance schemes, arguably in an attempt to bring themselves ostensibly in compliance with the regulators’ (soft) expectations – see JOSHI et al. 2020; FATICA and GREGORI 2020. Some of the biggest banks, instead, have blatantly resisted the disclosure request (see JANSKÝ 2020^a, p. 5977). The figures of evasion and particularly the preferred jurisdictions for profit-shifting are also notable: as clarified several times throughout the present work, there is no clear-cut watershed between tax havens and non-havens; most jurisdictions are both, depending on the sector and time-period one considers, and the accounting method(s) one adopts. This is confirmed by JANSKÝ (2020^b, p. 2), according to whom «the EU list of non-cooperative tax jurisdictions, i.e. the blacklist, does not provide an adequately informative answer to the question of which countries are responsible for harmful tax practices outside the EU» (bold omitted); see further JANSKÝ 2020^a, pp. 5975-5976.

¹⁷⁰⁸ See NAGELMACKERS-VOINOV 2014, paras. 64-65.

¹⁷⁰⁹ Check REILLY 2015, p. 106.

¹⁷¹⁰ To further complicate things, the “offshore” for a jurisdiction can be the “onshore” of another jurisdiction, depending on the jurisdictional perspective one assumes. Most financial centres are both “onshore” for themselves and “offshore” for several third jurisdictions exploiting them as such. Clearly, there are extreme cases: an unpopulated island is more likely to be mostly offshore than onshore, as it has no local economy to financialise and “work for”; conversely, the City of London will be at least as much onshore as it functionally serves as an offshore centre for others. Focusing on jurisdiction A, both onshore financial centres in A and offshore ones in B, C, D etc. may cooperate on a massive scale towards the same avoidance effort pursued by one single MNC – refer to PHILLIPS et al. 2021, pp. 294-295. All in all, “offshoring” and “onshoring” activities are remarkably unhelpful and inaccurate expressions of convenience, which are specular and should never be attached to any jurisdiction in exclusive terms.

devised a scheme¹⁷¹¹ to sort corporate-friendly policies into either legitimate or erosive ones, had to admit that distinguishing “sincere” tax strategies from those intentionally designed for eroding third States’ tax-base would prove politically unfeasible and, legally, highly contentious¹⁷¹² (not least, I would add here, because States can be more or less captured by different factions but have technically no humanised “intent” *on their own*).

For the time being, the only three proposals which would probably work *when adopted together* do not need a unitary tax rate¹⁷¹³ but are still hard to achieve as they are global in scope and in shape: 1) abolition or universalisation of ring-fencing; 2) shift from transfer pricing to formulary apportionment, aided by a common accounting standard as well as by a centralised and inclusive multilateral forum¹⁷¹⁴ for the audit and administration of corporate taxation and the resolution of disputes arising therefrom – improving on the model of the WTO as well as of the tabled proposals for the reform¹⁷¹⁵ of investor-State dispute-settlement procedures; 3) definitory and enforcement reformulation of “economic activity” in harmony with the membership principle, with particular regard to Internet services and other intangibles rather than physical goods and other tangibles.¹⁷¹⁶ Most importantly, the new premise should be that MNCs are global and enjoy no true residence: they should be taxed by activity

¹⁷¹¹ 2016, pp. 86-90.

¹⁷¹² *Ibid.*, pp. 91-93.

¹⁷¹³ However, JANSKÝ (2020^b, p. 4) posits that leaving *statutory* tax rates aside, a minimum *effective* tax rate would be of assistance in halting jurisdictional races to the bottom and thus profit-shifting. I agree this would be important, but in our view, it is not decisive: it is nothing more than an important palliative to temporarily alleviate the main issue.

¹⁷¹⁴ *See also* SYDNESS 2010, p. 46.

¹⁷¹⁵ The current system of investment dispute resolution, instead, does not stand well as a model for anti-avoidance institutions. In fact, its shortcomings resemble those permeating the field of international taxation, starting with *forum* shopping, which finds in *jurisdiction* shopping its tax alter ego:

[i]nvestment treaties [...] establish varying levels of legal protection for capital flows between different [S]tates—depending on whether a treaty is in place and on its terms—which in turn creates an incentive for multinational enterprises to adapt their corporate structure to maximize their legal security

— Van HARTEN and LOUGHLIN 2006, p. 137. *See, more extensively*, VANHONNAEKER 2020, pp. 182-193.

¹⁷¹⁶ *See also* DIETSCH and RIXEN, pp. 78;82-85;94. *Cf.* KANE 2019, p. 108.

and not by domicile, since in their nature as superstructures *on* (and not *of*) Westphalia, *they have actually none*. Corporate residence for the sake of taxation is problematic domestically, too,¹⁷¹⁷ but on the international plane it represents «an irresolvable predicament [... ,] both conceptually and practically inapplicable».¹⁷¹⁸ Should the three aforementioned proposals not suffice—that is, «whenever a normative approach [still] based on tax sovereignty (entitlement approach) does not provide satisfactory guidance for how to divide the international tax base[—]taxing rights [could] be allocated to the benefit of less affluent countries so as to address global poverty and inequality (differential approach)».¹⁷¹⁹ Nonetheless, this last suggestion will not be considered in detail here, as I am primarily concerned with the uneven rights-wise treatment of natural and legal persons, as well as with the definitive closing of Westphalian gaps in international tax governance *as a means to eradicate corporate tax avoidance* rather than to redistribute wealth among nations *as a self-standing redress-premised objective*.

It was argued that

[a]s long as there is no reform of international taxation of the sort that implements legal cosmopolitanism by introducing global institutions with taxing rights of their own, taxing rights can—by definition—only be distributed among [S]tates.¹⁷²⁰

While I substantially subscribe to this statement, I believe that standing back is not helpful, either: thinkers cannot just wait for policymakers to enact cosmopolitan taxing

¹⁷¹⁷ For an extensive examination of the US case, *refer to* ELKINS 2017^b.

¹⁷¹⁸ ELKINS 2017^a, p. 31.

¹⁷¹⁹ OZAI 2020, p. 60. Building on reflections and expectations by *inter alia* HARARI (2018, 17:42-27:54) and NEUWIRTH (2020, pp. 82-83) respectively, I bet that solutions along this line will be compelled by the combined effect of the big-data and robotics revolutions, as to relax two interconnected processes: the already-happening “data-colonisation” towards just a few “global data hubs” (which are not far from the concept of “data havens”), and the tax/employment disruptions brought about by job automation across several sectors in labour markets worldwide. *Read also* VON BRAUN and BAUMÜLLER 2021, p. 94.

¹⁷²⁰ STARK 2021, p. 16.

rights, especially without practical *and conceptual* mid-steps being performed first. Among the latter, my advice is that we cannot believe cosmopolitan taxing rights will become reality any time soon, unless we first craft global institutions which protect, at least, taxpayers' rights *globally* whenever those rights are violated by jurisdictions other than those of their citizenship, or by those same jurisdictions but transnationally (thus leaving no available remedy), or by “a-jurisdictional” institutions such as IOs. This step forward would “globally constitutionalise” taxpayers though the cosmopolitanisation of their rights as natural persons, finally equated to the global protection offered to capital in its legal-person expressions relevant for taxation.

d The multinational corporation as the refuelling octopus of a hidden geography of capital pipelines

The overwhelming external pressure [for equality] obliges the owners of industrial and landed wealth to conceal their luxury.¹⁷²¹

In quasi-sovereign jurisdictional spaces such as Taiwan, capital-accumulation practices are so detached from people's wellbeing and sense of justice that frustration is mounting up to dramatic levels;¹⁷²² this means that capital is hegemonic on paper but fails to deliver on its promises when measured against individuals' fulfilment, arguably because it comes accompanied by unacceptable feelings of falsehood, disconnection, and seclusion at the societal level in everyday life. This hegemony of capital stands all the more evident in self-contained yet exceedingly powerful quasi-judicial regimes spread across all regions, such as the investor-State¹⁷²³ and investor-

¹⁷²¹ François-René de Chateaubriand, *Mémoires d'Outre-Tombe* – Livre 42, 1850. Interestingly, it obliges them to hide—rather than *not to cumulate*—it!

¹⁷²² See CHENG 2006, pp. 118-121.

¹⁷²³ Indeed, corporations

investor arbitration systems, mainly governed by ICSID and UNCITRAL rules respectively: arbitral tribunals have almost consistently found that tax planning and forum shopping aimed at tax minimisation are legitimate business practices that although possibly unethical, stand as lawful.¹⁷²⁴

This legalised dominance of capital is also the only rational explanation for the net worth of *one single individual*, Jeff Bezos, being roughly equivalent to one fifth of the “Next Generation EU” coronavirus-relief package implemented by the EU27 for its *448 million citizens* after five months of arduous negotiations between twenty-seven Prime Ministers and Heads of State.¹⁷²⁵ It is the same Mr Bezos who inaugurated environmentally unfriendly, scientifically irrelevant outer-space tourism, and who started lobbying the Biden’s Administration as soon as the latter seemed proximate to get tougher on tax avoidance (obviously while Amazon was publicly announcing its support for Biden’s strategy).¹⁷²⁶ The list of idiosyncrasies that make our global society a terrifyingly unfair habitat to live in could continue endlessly; suffices it to mention that Cristiano Ronaldo makes from 1.4 to 1.6 million USD *per Instagram post*,¹⁷²⁷ with both these “labour” gains and corporate profits stemming therefrom being self-evidently undertaxed and unregulated. Meanwhile, in Mainland China, housing financialisation has pushed for the construction of around 90 million apartments which

engage large expensive legal teams both to oppose national and international proposals including treaties and suchlike considered detrimental to their perceived interests and/or, in the few cases in which governments or other bodies do successfully take a stand that curbs aspects of the activities of these companies, to achieve substantial compensations for claimed losses of profits

– LAWSON 2019, p. 126.

¹⁷²⁴ See KUBE 2019, p. 150, ftns. 116;118.

¹⁷²⁵ 185.3 billion USD (as of December 29, 2020) and 750 billion € (*check* <https://www.consilium.europa.eu/en/policies/coronavirus/covid-19-economy/>), respectively. Regrettably, billionaires’ fortunes keep growing billion-by-billion as days go by, and have especially skyrocketed during the pandemic. For instance, on January 7, 2021 the press bombastically announced the surpassing by Elon Musk over Jeff Bezos, with 186 billion USD (*see* NEATE and PARTRIDGE 2021). This was roughly equivalent to the 55% of Hong Kong’s GDP, and almost four times Macao’s! As of November 5, 2021 Elon Musk’s net worth hit 316.5 billion USD (...that is almost the GDP of Singapore or Malaysia!).

¹⁷²⁶ Refer to MEYER 2021.

¹⁷²⁷ Check JOHNSTON 2021 or COOPER 2021.

could shelter more than 200 million humans but are being abandoned empty as no middle-class Chinese can afford them,¹⁷²⁸ while millions of disadvantaged-by-family young individuals all around the planet are forced to work up to 105 hours per week under indecent conditions¹⁷²⁹ if they wish to afford a few metres squares where to breathe (...without going much farther, think of the housing situation in HK); put otherwise, (young) people «work more (and more productively) to earn less».¹⁷³⁰ What is left of socialism in the PRC? *Dulcis in fundo*, in September 2021, the wealth amassed by the 0.00025%-richest Americans equated to 19% of the US's GDP.¹⁷³¹

If once the concern related to the revenue and/or market capitalisation of *some* MNCs taking over the GDP of most countries,¹⁷³² as I write, the net worth of a few individuals, too, outperforms the GDP of some countries; as it happens, all these individuals are MNCs' CEOs and/or main shareholders, evidencing that the problem with public resources does not lie with billions of taxpayers generally, but with tax-avoidance schemes granting MNCs fictitious legal "arguments" to accumulate unspeakable amounts of untaxed capital across the jurisdictions where they operate (sometimes worldwide), in turn feeding their shareholders' pockets beyond any reasonable limit. This is why, leaving the fictitious arrangement of *legal persons* aside, countering tax avoidance equates conceptually and economically to countering tax evasion, as it targets the wealth retained and redistributed by MNCs to their

¹⁷²⁸ See KYNGE and YU 2021; ROGOFF and YANG 2020. Although reporting out-of-date figures, check also AUSLIN 2017, p. 25. For context, see also DAVIDSON and FARRER 2021.

¹⁷²⁹ On the systemic reasons why (the poorer strata of) the younger generations (with a focus on the US) are being forced to work more intensely and less rewardingly (career-wise as much as welfare-wise) than any other generation in documented human history, read generally PETERSEN 2020; SCHOR 1993; HERMANN 2015.

¹⁷³⁰ BONADIMAN and SOIRILA 2019, p. 315.

¹⁷³¹ Check e.g. this tweet and the graph reported therein:

<https://twitter.com/profgalloway/status/1434670091203977219>. Of course, someone will be prompted to claim that one cannot compare stocks with flows, but I submit that because this is a Thesis in law rather than accounting, the comparison still holds insofar as it evidences the profound inequalities shaping our societies through law. See more generally GOLD 2017.

¹⁷³² See GILL 2008, p. 131.

shareholders worldwide, whose value should have been lowered by taxes as for such wealth to contribute to welfare policies. There is a “class-struggle” dimension in reappraising the urgency of counter-avoidance action *as a matter of natural persons* (i.e., of its ultimate beneficiaries): once one has abandoned the culturally induced and lost-in-technicisms cognitive habit of thinking of corporations as separate entities “on a different level”, what surfaces is that countering tax avoidance is exactly equivalent to repressing *the 1%*’s way to evade taxes,¹⁷³³ the trick being that their evasion is called avoidance and it is pseudo-legalised by the global code of capital that captured States succumbed to. Indeed, if shares are taxable as capital gains and dividends (often at very low levels already,¹⁷³⁴ compared to individual income taxes¹⁷³⁵) but those shares themselves are overpriced because of aggressive tax avoidance pursued by the corporation that distributes them,¹⁷³⁶ the two phenomena offset each other, and shareholders (especially the executive ones) ultimately achieve an undue benefit from

¹⁷³³ One more element confirming this assertion is that «offshore vehicle users can be either corporations or individuals» – O’DONOVAN et al. 2019, p. 4130.

¹⁷³⁴ According to White House’s Council of Economic Advisers analysts LEISERSON and YAGAN (2021, emphasis added),

[w]hen an American earns a dollar of wages, that dollar is taxed immediately at ordinary income tax rates. But when they gain a dollar because their stocks increase in value, that dollar is taxed *at a low preferred rate, or never at all*. Investment gains are a primary source of income for the wealthy, making this preferential treatment of investment gains a valuable benefit for the wealthiest Americans. Yet the most common estimates of tax rates do not fully capture the value of this tax benefit [...].

¹⁷³⁵ Refer e.g. to the comparative graphs in SAUNDERS 2021; ICRIC 2019, p. 6. Policymakers’ justification for keeping low tax rates for capital gains and dividends draws on considerations

that small and newly established firms have limited access to financial resources from banks and other traditional sources of finance due to asymmetric information. Alternative sources of finance, represented by venture capital, should be encouraged. [...] Because a large part of the returns to investment is obtained by venture capitalists in the form of capital gains, a reduction in capital gains taxation, by increasing the after-tax return, may encourage their involvement as providers of capital

– CASARICO et al. 2017, p. 205. This is indeed reasonable for SMEs (especially innovative startups and perhaps even scaleups), but fails to explain the reason why so low tax rates are kept in place for investors in the quasi-monopolistic Big Tech and generally in *established and big* corporations as well (whose ROI pays out significantly more, thus representing the overwhelming majority of tax losses for the State).

¹⁷³⁶ Cf. O’DONOVAN et al. 2019, p. 4140, claiming that in some instances, shareholders might have benefitted only negligibly from such manoeuvres, while being reputationally damaged in the aftermath of a leak. However, small gains multiplied for hundred or even thousand companies—most investors are globally multiportfolio—may make up huge gains overall; moreover, data leaks involve a relatively small fraction of the underground university of tax avoidance. As a side note, reputational damages are only (or mostly) relevant in certain industries, but negligible or even wholly irrelevant in others. For these three reasons considered together, I deem O’DONOVAN et al.’s claim to be hardly persuasive.

the overall broken working of this system.¹⁷³⁷ Toxic and obsessive—some would say maniacal—status-seeking is the first plague of contemporary times, and aggressive corporate “tax planning” is one of the reasons why, borrowing from competition literature, «[w]ealthier people impose a negative externality on poorer people».¹⁷³⁸ As long as foundational gaps are not closed, as counterintuitive as it might sound, *legal certainty is the problem with and not the solution to aggressive tax planning*, in that no matter how frequently the law is revised, updated avoidance schemes (also hailed as “financial innovation”) will always be devised; this owes to financial and managerial reasons, but it also caters for the true logic of pride that characterises most humans’ darker compulsions and instincts. In this context, ameliorated legislation

¹⁷³⁷ It is not necessarily my position here because it would require more tailored and refined research (especially on the mental element), but given that relatively few MNCs account for the large majority of profit-shifting worldwide (*see generally* WIER and REYNOLDS 2018), one may even go so far as to argue that the executive shareholders of these “top” MNCs—together with those who supported them legislatively—should be prosecuted for crimes against humanity by a special court (or ICC chamber) to be set up and endowed with jurisdiction over international financial (i.e. poverty) crimes—or by domestic courts via universal jurisdiction. Indeed, from a systemic viewpoint, they indirectly cause or directly trigger significantly more misery (and thus frustration, inequality, exploitation, ultimately erupting in violence and conflict) than some corrupt state officials per se. According to *inter alia* political philosophers Peter Unger and Peter Singer, «the failure to donate *almost all* of one’s wealth and income to charity organizations is *morally comparable to murder*» (HUEMER 2008, p. 374, emphases in the original), which is far more extreme a take on similar contentions as mine: furthering poverty massively and voluntarily—rather than more softly *not alleviating* it, as they (and several others) contend—is a behavior that may be placed on the criminal spectrum. Nevertheless, theirs is a *moral* stance, mine is a *legal* one, which makes it in a way heavier (if harder to uphold). Indeed, one should never forget that all forms of extreme human violence—including the so-called “dehumanisation” unleashing genociders’ brutality—are consciously or subconsciously rooted in competition over limited yet would-be-sufficient resources, therefore they are more likely to escalate within highly unequal societies and to be exacerbated by real or perceived misappropriation, cronyism, and theft. Effectively, tax avoidance *is* systematic theft performed at the largest imaginable scale and for the most selfish and power-concentrating reasons possible. Not all shareholders are alike, though. Besides individuals’ different moral imperatives on a personal basis, which may result in more or less socially responsible non-professional investments tax-wise (*see further* EMERSON et al. 2020, pp. 68-69), PARDO and de la CUESTA-GONZÁLEZ (2020, p. 21) argue that

long-term investors, [who] tend to remain in [charge] for several economic cycles[, ... and] “universal owners” [...], that is, investors who have such large portfolios that they [hold] a minority stake in most companies listed on the stock exchange[, ...] are more concerned with matters of general interest such as climate change, good governance, the welfare [S]tate, employment and inequality since these factors affect sustainable growth and therefore the profitability of their portfolios in the long term. Normally these investors do not seek to obtain returns above the market [...], instead, they generally try to have an influence on improving business practices.

Further empirical research is warranted on these supposed differentiations.

¹⁷³⁸ STUCKE 2013, pp. 187-188.

might amount to qualified silence rather than rhetorically rewarding yet fundamentally inconclusive catching-up regulatory games.¹⁷³⁹

To emerge supra-constitutionally and design its own novel constitutional geography spanning throughout the globe, capital relies on multinational corporations,¹⁷⁴⁰ prerogatives and on the persuasiveness of their managers before the élites to claim authority transversally, i.e. cutting through the sovereignties of the anachronistic Westphalian order.¹⁷⁴¹ MNCs draw an invisible line between what constitutes part of the contemporary global constitutional order of capital, and what is excluded from it; such a watershed does not resemble traditional conceptions of legal borders and state-centric hierarchies: it is rather implanted on the *factual* power to defy the rules of the Westphalian order while apparently refraining from challenging them in an overt fashion. «[T]he praxis of offshore finance provides “liquidity pipelines” transporting global capital» through both sovereign and non-sovereign territories,¹⁷⁴² encouraged by an invisible global Constitution specifically tailored to the facilitation of capital shifting and asset concealing. Onshore financial centres complement the project as the jurisdictional *alter ego* of offshore finance, effectively joining the same network of capital-channelling geography.¹⁷⁴³

e The contractual disembodiment of the legal person: Corporate fictions, privileges, and frauds

¹⁷³⁹ See DEMIN 2020, pp. 19-20.

¹⁷⁴⁰ Tons of paper have been deployed to distinguish *multinational* corporations (MNCs) from *transnational* corporations (TNCs) or even multinational *enterprises* (MNEs), but the outcomes of this effort are so contradictory, conceptually unpersuasive, and practically meaningless that I will use these three expressions interchangeably; namely, I will generally opt for “MNCs” but also refer to literature which prefers “TNCs” or “MNEs” as if they meant exactly the same thing. If distinctions were truly there—and I am unsure about this—I believe they have lost any characterisation and functional relevance today.

¹⁷⁴¹ See BELOV 2018, p. 23 (paraphrasing Saskia Sassen).

¹⁷⁴² VLCEK 2018, p. 174.

¹⁷⁴³ See *ibid.*, p. 176-178. See also AOYAMA et al. 2011, pp. 205-206.

Unlike the facts-and-circumstances test for residence of individuals, the common[-]law test for corporate residence is more formalistic. A corporation can reside virtually anywhere it chooses.¹⁷⁴⁴

Our economy is built around the financialisation of risk¹⁷⁴⁵ and its shift towards the (real of fictitious) place where it proves more legally manageable for corporations. The predatory logic sustaining this move is powered by proprietary algorithms which fuelled the financialisation of practically all spheres of the economy – even those which had been ignored by speculators till a decade or so ago.¹⁷⁴⁶ If “financialisation” refers to «the structural significance and power of finance relative to production, especially the disciplining of corporations to deliver shareholder value»¹⁷⁴⁷ and the economy has become financialised,¹⁷⁴⁸ it is due to the code of capital having financialised, too, under gradual yet constant erosion by lobbyists and captured policymakers, thus shaping a comfortable legal environment to accommodate financial assets, while hardening procedures for and impoverishing (the comparative value and holders of) non-financial assets. Taxes have been walking the same path for at least five decades now, almost in any jurisdiction, by accommodating finance and its assets while comparatively increasing the tax burden for all other economic realms and individuals.

Such developments in asset ownership [...] were furthered from the 1970s and 1980s through the political promotion of tax-favoured mutual fund products and “shareholder democracy”[, ... and] also given greater governmental impetus by “asset-based welfare” policies from the mid-1990s onwards that served to individualize the responsibility and risk of material well-being and security.¹⁷⁴⁹

¹⁷⁴⁴ HOGG et al. 2010, p. 72.

¹⁷⁴⁵ See ADLER 2019, p. 229.

¹⁷⁴⁶ See further SASSEN 2018, p. 66.

¹⁷⁴⁷ LANGLEY 2021, p. 383.

¹⁷⁴⁸ See further PANI and HOLMAN 2013, pp. 217-218.

¹⁷⁴⁹ LANGLEY 2021, p. 389.

If risk is tied to assets, welfare itself is made dependent on assets, and assets are financialised, this means that financial assets will comparatively gain access to higher welfare in terms of overall favourable political environment and regulatory framework – *not secondarily through tax policies favouring financial assets* (light tax burden, inheritance, mobility). This process was already in the making, but has witnessed further catalysis through Internet-based and AI-powered mass (welfare) surveillance, concomitantly with asset digitalisation. Liquid capital has facilitated accumulation, and therefore dispossession, indebtedness, and precarity, also owing to the truth that “mobility” in asset-preservation is only granted to those entities whose obligations territorially co-extent with their rights: MNCs’ subsidiaries – hence, their shareholders, also known as “the capitalist class”. Policymakers, captured by or members of such a class, are anchored¹⁷⁵⁰ to an absurd idea of fairness based on a supposed capitalist meritocracy which finds no evidence in the real world.¹⁷⁵¹

Narrowly speaking, there is not even such thing as “money” anymore: what we call “money” is a positional negotiation of power¹⁷⁵² which is not backed or guaranteed by—and does not correspond to, by any means—tangible resources. Money is created¹⁷⁵³ out of backless borrowing, it is as simple as a promise to repay being digitised by a bank officer,¹⁷⁵⁴ and subsequently insured, sold to a third party, reinsured, collated with other debts, transferred, reinsured again, resold to another party, and so forth, countless times, till its origin becomes almost untraceable.¹⁷⁵⁵

¹⁷⁵⁰ This term is employed here in a cognitive-psychology technical sense, with reference to the “anchoring bias”, which is also useful to explain certain socio-legal phenomena; *refer to* VAN AAKEN 2021, p. 260.

¹⁷⁵¹ If anything, there is ample evidence to its contrary; *check e.g.* MILANOVIĆ 2019, pp. 59-61.

¹⁷⁵² *See* LAWSON 2019, p. 151, fn. 13.

¹⁷⁵³ Illustratively, consider the English expression “to *make* money”, corresponding to the Italian “*fare i soldi*”, and equivalent sayings in dozens of languages and dialects.

¹⁷⁵⁴ *See* WERNER 2016, p. 377.

¹⁷⁵⁵ The blockchain might bring about change in this respect, though.

Similarly, there is no such thing as a “multinational corporation”, which is a rather inappropriate term we adopt for convenience to refer to a number of theoretically distinct legal entities, each tied to a specific jurisdiction, bound together by contractual arrangements;¹⁷⁵⁶ the latter are “legal enablers” that project one corporate entity (the parent company) “exojurisdictionally” by granting it rights “as a whole”, i.e. applicable to itself and simultaneously to it *in relation to all its subsidiaries*.¹⁷⁵⁷

The law [...] still treats each individual corporate entity as separate and independent, whereas MNEs are controlled and managed centrally. A gap opened up between entity law, the treatment of each corporate unit as a separate legal personality, as opposed to centralised group decision-making.¹⁷⁵⁸

An increasingly tax-minimisation-driven legal artifice is this way coined, recognised, and even encouraged by transnational codes of capital, while lacking a natural-person counterpart. In more refined terms, «the legal disembodiment of the corporate body is precisely what enables it to evade core vulnerabilities attaching to corporeal human bodies»,¹⁷⁵⁹ and while the present Author distances himself from any disgracefully simplistic, unhelpfully divisive, and stereotyped claims that MNCs represent the «Eurocentric *male* subject»¹⁷⁶⁰ (“transnational” businesswomen, too, have radically shaped Europe’s long history of capital transactions and power-concentration¹⁷⁶¹), one

¹⁷⁵⁶ See PALAN 2016, p. 103; PHILLIPS et al. 2021, p. 288.

¹⁷⁵⁷ Read also ROGGE 2020, pp. 165-167.

¹⁷⁵⁸ PALAN 2016, p. 177, in-text citations omitted. For example,

[p]ublicly traded groups present consolidated accounts for the entire group and provide a group-level view of taxes owed and taxes paid. But each corporate entity in the group, including the [GUO] or subsidiaries located in the same country, is considered an independent taxpayer

– PHILLIPS et al. 2021, p. 290 (paraphrasing Eilís Veronica Ferran).

¹⁷⁵⁹ BLANCO and GREAR 2019, p. 105.

¹⁷⁶⁰ Ibid., p. 106, emphasis added.

¹⁷⁶¹ Refer for instance to the personal and properly *capitalist* vicissitudes of the wealthy Jewish merchant (Doña) Gracia Mendes-Nasi (1510-1569) – check BARBERO 2010, pp. 36-38; BIRNBAUM 2003, pp. 94-102; ROZEN 2010, p. 240. This exemplifies in fact an uninterrupted line of powerful women who exploited and continue to exploit—just like their male “counterparts”—the system of unfettered transnational capital flows. Most recently, see the network of tax-havens’ corporate investments led by Isabel dos Santos, exposed via the International Consortium of Investigative Journalists’ “Luanda Leaks” report on January 19, 2020 – see

can subscribe to the observations that transnational corporate power represents the «very personification of capital» and that «it is the corporation, rather than the human being, that supplies the ultimate instantiation of liberal law’s idealized person».¹⁷⁶² And while «[p]olitical theories for CSR emphasize the role of the company as a citizen»,¹⁷⁶³ little—if anything—has changed, in practice, thus far.

It is exactly this «longstanding body-politics of quasi-disembodiment underwriting the juridical order»¹⁷⁶⁴ that I urge to unmake. As the legal person itself is juridically a fiction,¹⁷⁶⁵ MNCs are *the legal fiction within the legal fiction*. They can register their formal seat in a country claiming they should not pay taxes there because their actual activities are carried out abroad, and choose to incorporate subsidiaries for those activities in foreign jurisdictions that, conversely, subject to taxation only entities which are centrally managed there.¹⁷⁶⁶ They can also claim losses in high-tax jurisdictions and profits in low-tax ones. These two basic schemes have obviously complexified and refined over decades of legalistic sophistication¹⁷⁶⁷ (for instance, they have moved to intangibles—especially IPRs and financial derivatives—rather than manufacturing production or other physical assets, and from goods to services more generally¹⁷⁶⁸), but their essence remained the same and is still not being addressed in a concerted manner. To further tarnish already murky waters, the

BIONDANI et al. 2020. *Ceteris paribus*—namely, provided with the same power and opportunity to do so—women act exactly under as profit-maximising an attitude as men.

¹⁷⁶² BLANCO and GREAR 2019, p. 106; *see also* GREAR 2020, p. 354.

¹⁷⁶³ ZICARI and RENOARD 2018, p. 255.

¹⁷⁶⁴ GREAR 2020, p. 356.

¹⁷⁶⁵ Just like most by-products of the art of lawyering, “legal fiction” is controversial to define. Without attempting a self-standing *definition*, I may however join the *description* which was set forth in the following terms:

If we think of all legal rules in a specific community as applying to a given set of situations, then it is possible in law to extend the application of legal rules to an additional set of situations in that same community by misrepresenting these additional situations as conforming to those of the set for which the legal rule was originally intended, *even though in reality they do not*. The misrepresentation of the facts of these situations in order [for] a pre-existing rule [to] be appli[cable] to them is known as a legal fiction

– LAWSON 2019, p. 102 (emphasis in the original).

¹⁷⁶⁶ *See* PALAN 2020, pp. 177-178.

¹⁷⁶⁷ *See* PHILLIPS et al. 2021, p. 290.

¹⁷⁶⁸ *See also* LAWSON 2019, pp. 126-127.

perception is that «the OECD, the UN, the EU, the [US] and the rest introduce series of rules and legislations that have the effect only of creating additional complexities, but never touch the core».¹⁷⁶⁹ Indeed, from the incipit of their involvement in international-tax matters, and throughout the development of the two-phase BEPS project, the institutions revolving around these IOs/federations struggled to cope with «the reality of TNCs as [...] internationally-integrated businesses».¹⁷⁷⁰

Differently from a corporation, an individual cannot “project themselves” exojurisdictionally in that their rights cannot be extended abroad upon their holders’ autonomous initiative and will,¹⁷⁷¹ if not exceptionally, due to those rights’ dependence on the jurisdiction(s) of citizenship.¹⁷⁷² Obviously, natural persons can occasionally migrate for reasons of tax minimisation—which is not necessarily the case for millionaires, who might tend *not* to physically migrate because «in the place where they live [...] they have become deeply embedded insiders, rich not only in income but also in personal connections and social capital»¹⁷⁷³—but cannot *constantly* move their (fiscal) residency/domicile, as it would be either impractical or impossible.

¹⁷⁶⁹ PALAN 2020, p. 179.

¹⁷⁷⁰ PICCIOTTO 2016, p. 20.

¹⁷⁷¹ See also WEIGEL 2019, pp. 66–67.

¹⁷⁷² MOCHELLE (2001, p. 164) suggested—rather futuristically—that a worldwide media campaign should be enacted

demanding that the [UDHR] be amended to include the moral right of individuals to act impartially toward all humans with the corollary *right not to belong* to any nation (emphasis in the original). To the contrary, I believe that humans *should* belong to a nation, while also being acknowledged as mobile “entities” whose rights should walk alongside them. The same Author (ibid., p. 124) argued in favour of an Internet-shaped world society built on *priaction*, where e.g. trade and investments would respond to those in need (necessity-based priority) rather than to those who can afford them (market-efficiency-based priority). Somewhat inconsistently, the Author believes instead that taxation is incompatible with *priaction*:

being a coercive institution, a much disliked “necessary evil”, the taxation system generates a resource-wasteful redistribution industry involving accountants, financial advisers and lawyers devoted to the production of tax minimisation and avoidance schemes. Such production requires an immensely counter-productive investment on the part of the taxation department to analyse complex and suspect tax returns, identify and close tax loopholes, and apprehend defaulters. From a *priactive* viewpoint, such redistribution effort represents a gross waste of human and material resources, an investment that public compliance with the *priaction* principle would render unnecessary

(ibid., p. 128, emphasis added). However, one may also strive for a redistributive necessity-based taxation on the model of necessity-based investments. In any case, these futuristically idealistic projects ignore or downplay the persistence of (unfortunate) bioanthropological, innate evolution-sharpened factors that make humans inapt for thriving in hyper-solidaristic egalitarian societies.

¹⁷⁷³ YOUNG 2018, p. 16.

Alternatively, individuals may endeavour to live tax-nomadically,¹⁷⁷⁴ but this would entail a constant forgoing and acquiring of temporary citizenship or residency arrangements for the sole purpose of avoiding taxes: this is not problematic for legal entities, but probably not the most comfortable or meaningful way for a human being to spend their existence, either.¹⁷⁷⁵ And even «with jurisdictions competing to attract taxpaying migrants by offering the most attractive mixtures of policies»,¹⁷⁷⁶ natural-person taxpayers will never be able to multiply and dislocate themselves and their profitable activities fictitiously across multiple jurisdictions *at once* the same way corporations do.

Lengthy debates have taken place in both legal theory and philosophy-of-economics scholarship on these aspects, one outcome being that a single individual may functionally acquire multiple positions in society as long as those positions are accompanied by sets of rights and duties;¹⁷⁷⁷ however, this implies *voluntary agency* and an everything-else-being-equal environment which holds true *within a single jurisdiction only*: extrajurisdictional “expansion” requires the approval of both “home” and “receiving” sovereigns, which may decide (as they always do in fact) to grant unequal sets of rights and duties where the latter far exceed the former, and to revoke rights at their caprice and convenience. In other words, while the capital of a “multinational corporation” takes advantage of jurisdictions A, B, C, and so forth, each of them in its own right and *also* cumulatively¹⁷⁷⁸ by means of contractual

¹⁷⁷⁴ See VLCEK 2017, pp. 28-30.

¹⁷⁷⁵ And yet, for the 1%, even citizenship is on sale: *see generally* van FOSSEN 2007; ARMSTRONG 2014; FREIMAN 2019; BARBULESCU 2014; SHACHAR 2018, pp. 10-11. Once again, this consolidated and, one might argue, permanent “exception” reinforces the idea that the real divide comes between the corporate-1% tax avoidance (practiced by *all* those individuals in order to be part of that 1%, being it *the only way* to amass and keep such astounding amounts of capital) and the evasion by *some of* those ranking within the 99% (relatively negligible—and certainly not the priority one in macroeconomic terms—compared to the avoidance just mentioned).

¹⁷⁷⁶ BENNETT 2020, p. 4.

¹⁷⁷⁷ See LAWSON 2019, pp. 99-101.

¹⁷⁷⁸ SAUVANT (2015, p. 75) explains that:

arrangements, an individual may, at best, benefit from other jurisdictions (B, C, etc.) only insofar as those other jurisdictions permits and to the extent that their primary jurisdiction A arranged for it – and in practical terms, hardly simultaneously.

Taken to the core, this asymmetry is rooted in Westphalia having been originally conceived for apportioning individuals as much as material resources and for “sorting” the rules applicable thereto, rather than for partitioning flows of capital. This is one of the main reasons why PIL, as it stands today, may be deemed to represent an élites-driven project of hegemony which cannot cater for a postcolonial, globalised, fluid, and digitised (thus instantaneous as well as, somehow, “invisible” and “uncountable”) cumulation of wealth.

In essence, tax minimization techniques exploit a blind spot *in revenues surveillance techniques* that results from the differences between the economic control of firms and the legal foundations of territorially bounded companies. On one hand, companies are bound by national rules and regulations, and if those are shown to be duly observed, they are sufficient to raise companies above legal suspicions. Firms, on the other hand, are organizations that are put together by accountants [...] as strings of companies registered in different locations [...] in such a way as to minimize their overall tax footprint. [...] Considerable resources are spent on tax avoidance – and indeed, many corporate entities are created for no other purpose.¹⁷⁷⁹

although the foreign affiliates of individual TNCs are separate legal entities established in many jurisdictions, they nevertheless are under the common governance of their parent firms – and parent firms seek to maximize their *global* competitiveness, not the competitiveness of any one of their individual foreign affiliates.

Moreover,

[e]ven within a single overarching polity like the European Union, [S]tates construct tax shelters or offer preferential tax deals to attract corporations while depriving fellow [M]ember [S]tates of their share of revenues. [...] Currently emerging is a new type of “competition [S]tate” whose central priority is to create a favorable investment climate for transnational capital. And on the field [...] are TNCs, savvy economic entities relentlessly pursuing wealth *with little national allegiance*

– TAMANAHA 2017, p. 172, internal quotation marks omitted, emphasis added. *See also* WEIGEL 2019, p. 97. Lastly, *offshore* financial centres are not linked to the local economy, either; *see* HAMPTON and CHRISTENSEN 2003, p. 208.

¹⁷⁷⁹ PALAN 2016, p. 104, emphasis added.

Those blind spots are nothing but «zones of untrammelled market freedoms and vertiginous profitability»¹⁷⁸⁰ which elude *de facto* any regulatory authority and—until fairly recently at least—escape public accountability, while often denouncing self-restraint in exploiting the “unfortunate” loopholes in the system.

Leaving legalistic jargon¹⁷⁸¹ and scholarly soft-diplomacy aside, this is not just idiosyncrasy, but basically the largest-scale masked-as-freedom¹⁷⁸² legalised fraud the world has ever witnessed, as well as the most ludicrous manifestation of its *establishment*’s collective, self-preserving, only superficially responsive, hypocritical, and eternally perpetuating culture of impunity. The combination of pretentiously value-neutral legal formalism and unethical business creativity brings corporate (and state) lawyers’ formalistic mindset up to a new extreme of nihilist techno-sociophobia and antisocialism,¹⁷⁸³ resulting in depreciation for either the substance of norms (when they would be applicable) or their enactment (when deregulation wiped them away already). Overall, today, goods travel, services travel, but especially *capital* travels thanks to the most extensive level playing field, in such a way that the current form of global “constitutionalism” can be said to address global privileges relevant for trade exchanges¹⁷⁸⁴ and capital transfers, while disregarding individuals’ global juridical

¹⁷⁸⁰ CLUNIE 2015, p. 111.

¹⁷⁸¹ Indeed, I concur with BROOKS (2020, pp. 406-407) where she writes that the proliferation of terms to describe tax planning on a spectrum—“tax avoidance, tax minimization, tax evasion, tax fraud, tax planning, tax dodging, tax aggressiveness, tax sheltering, tax abuse, tax mitigation, and tax resistance”—is a way to use language to create categories (and as a result concepts) that can be used by strategic tax planners to argue that the devised plan has not run afoul of legality. In other words, the more we use language to draw fine lines between types of tax planning on grounds that should be largely irrelevant for the purposes of applying the income tax act, the more we create a sense of meaningfulness where none should exist.

See also POLLMAN 2019, p. 10 (ftn. 33), and PEROTTO 2021, pp. 314-315 (ftn. 19). The unfortunate outcome is that the gravity and pre-eminence of corporate misbehaviour are anything but apprehended by the general public:

[l]egal and illegal decisions—avoidance, evasion, tax flight, cuts—, have similar economic effects, but different sociological effects: tax evasion is perceived rather negatively, tax flight neutrally, and tax avoidance positively

– LEROY 2008, para. 43 (paraphrasing Erich Kirchler et al.). See also GRIBNAU and JALLAI 2017, p. 83; ATTAC 2021, pp. 89-96.

¹⁷⁸² See GIROUX 2019, p. 8.

¹⁷⁸³ See also GRIBNAU 2015, p. 235.

¹⁷⁸⁴ In this respect, RUGGIE (2018, p. 325) observed that

dimension and their correspondingly “global” rights. Besides formal state institutions, the embryonic “transnational civil society” itself proves «heavily corporatist and often, elitist»,¹⁷⁸⁵ which adds to—and to an extent, overlaps with—the regulatory “purchasing power” of transnational *legal* persons.

f Inevitably acquiescent? Unmasking the State behind the oxymoron of its “proactive capture”

[W]hat was generally described as a “market” economy seemed to me quite different from my conception of a market, since it was dominated by corporate behemoths. Liberalisation was not a “retreat of the [S]tate”, but its transformation, into a *new type of public-private corporatocracy*. [...] However, the aim is not to denounce hypocrisy, but to understand how and why these understandings developed, and point the way to a transformation.¹⁷⁸⁶

trade is far freer today in the sense that tariff barriers are lower, markets are more open, and more goods and services are exchanged than ever before. But at the same time, a rapidly shrinking portion of trade takes place internationally as traditionally understood: among nations, at arms-length, and at prices determined by demand and supply in the marketplace. What we call “international” trade today [...] is increasingly “internal” trade within multinationals and with parties related to them contractually[, exploiting *inter alia* public infrastructure, information, and security]. But no public institution anywhere has the mandate or capacity to collect systematic and universal data on such trade. [...] A strong case can be made that the WTO itself, not knowing “what is actually happening on the ground” when it comes to firm-level trade activities, constitutes a significant source of multinationals’ structural power.

¹⁷⁸⁵ THIEL 2018, p. 89.

¹⁷⁸⁶ PICCIOTTO 2016, pp. 10;20, emphasis added. On the concept of “corporatocracy”, more rarely spelled as “corpocracy”, see further GARE 2013, pp. 340-343; in light of the normatively entrepreneurial role of China in the OECD-managed dossiers on taxation, the following passage is of particular interest:

With the collapse of Eastern European communism, the mutation of China into an *authoritarian free market economy* and the conversion of Western European social democratic parties to neoliberalism, an alliance emerged between former Marxists and free marketeers, with bureaucracies being used to impose markets on all facets of life throughout the world

(p. 341, emphasis added). LIU (2018, pp. 103;116, two emphases added) has brilliantly captured the essence of these transformative phenomena, upon observing that

social apparatuses that shape everyday consciousness have proliferated Western prestige, and captured the allegiance of China’s civil society. Obsession with U.S. education, [...] wealth, [...] and most importantly, its market economy, has diffused U.S. mass consumption into the texture of China’s self-identity. The People validate social practice, in part, by the criteria of neoliberalism; the U.S. has demarcated the “appropriate” boundaries of the *People’s social reality*. This nonviolent social control yields conduct and standards that correspond with hegemony’s intellectual governance. It is not in China’s political interests to liberate itself; China’s maneuvers *normalise capitalist architecture and reflect enthusiastic appropriation* of core production status. Memories of attempted revolutionary breaks from neoliberalism weigh on the living élite, avoiding the potential for history to be repeated. Suspicions of Western motives besides, China, in character, participates in the

The major transformation orchestrated by the capitalisation of societies lies with the structure and orientation of the State, with “whom it works for”: the contemporary State seems to have diligently digested and appropriated the neoclassical liberalist interpretation of «welfare politics through income transfers and taxation [a]s the product of [social] envy».¹⁷⁸⁷ According to such misleading and selfish interpretation, reclaiming a basic degree of fairness in the manner tax codes are penned equates to advancing envious policies against the wealthy (who would be—according to said rhetoric—also “the successful ones”, those who have “deserved it” through their “hard work”, ingenuousness, patience—of course one can be patient, when not in need to make for a living every day—and business brilliance...¹⁷⁸⁸ and those who never “waste time” talking to fellow humans without capitalising on their conversations).

States use to declare their lack of alternatives to submitting to mobile capital hegemony due to their inherent economic weakness¹⁷⁸⁹ and the rule-of-law constraints that bind their decisions;¹⁷⁹⁰ they publicise a pretence of capital-neutrality and unavoidable subservience that is anything but credible or unassertive. In fact, States still pursue long-term power-maximising strategies, just, they do so via international agreements whenever they realise they ran out of geopolitical strength or internal support (resources, capabilities, engagement, endorsement) to do so alone.¹⁷⁹¹ In so

agreed, symbolic space of ideological conflict that is international law[, ... which] expedites China's proliferation of socio-economic relations subservient to its core processes.

From an international-law perspective, indeed, China's posture as the champion of an apparently oxymoronic “state-driven neoliberalism” helps explain the accelerated customisation of certain international-tax practices as well (that is, in socio-political terms, their diffused “standardisation” and “normalisation”).

¹⁷⁸⁷ JUUTINEN 2020, p. 91.

¹⁷⁸⁸ *Ex multis*, CASE and DEATON (2020, pp. 260-261) debunked this non-sense.

¹⁷⁸⁹ See LESAGE et al. 2014, p. 197.

¹⁷⁹⁰ See PALAN 2020, p. 162; SCHNEIDERMAN 2013, pp. 38-40.

¹⁷⁹¹ See HATHAWAY 2008, pp. 142-143. See also MALCOLM 2008, p. 117, pointing to the example of TRIPS having been proactively concerted by the US Administration with the pharmaceutical multinational Pfizer and several more “IP-intensive” corporations.

doing, they never cease to pursue precise interests simply because they abandon “humanist” purposes or betray assumed-to-be-established societal values of sharing. They might lose in wider legitimacy, “patriotism”, or integrity by dismissing the human, and yet, from the standpoint of capitalism, they rationally comply with and commit to the logic of accumulation that is now championed by private transnational actors rather than statual entities,¹⁷⁹² up to «the adoption of corporate administrative practices by state bureaucracies».¹⁷⁹³ Furthermore, «in finance-centric regimes[,] much of the value realised by capital is produced elsewhere»;¹⁷⁹⁴ as a result, after witnessing the control over poverty and wealth having been stripped away from their autonomous policy portfolio over the last four/five decades,¹⁷⁹⁵ States are transforming themselves into market-friendly racing-to-the-bottom competitors for profit maximisation,¹⁷⁹⁶ where *in whose name* and *to whose eventual benefit* become unspecified notions as well as secondary—when not at all negligible—concerns,¹⁷⁹⁷ only subjected to captured scrutiny.

One court case speaks loudly in this respect: in *Vodafone*, the Supreme Court of India ascertained the existence of a complex network of foreign corporate subsidiaries aimed at tax avoidance (by holding the totality of shares of Indian investments and transferring them to each other in tax havens), but decided that several developing States are “legitimately” legislating “lightly” and allowing these investments to escape taxation in order to attract foreign capital, foster development and growth, and compete in the global market.¹⁷⁹⁸ *To whose benefit* and *how*

¹⁷⁹² See CLUNIE 2015, pp. 19;114.

¹⁷⁹³ ADLER 2019, p. 243.

¹⁷⁹⁴ CLUNIE 2015, p. 113, emphasis omitted.

¹⁷⁹⁵ See WEIGEL 2019, p. 48 (paraphrasing Pankaj Mishra). On the different wealth distribution and allocation of capitalist/labour claims before and after the 1970s’ neoliberal turn, see further IRELAND 2018, pp. 16-25.

¹⁷⁹⁶ See HOLDEN 2017, p. 45; HENNIG 2015, p. 289.

¹⁷⁹⁷ See UN Report on Extreme Poverty 2017, para. 4.

¹⁷⁹⁸ More extensively, check the commentary of the *Asian Yearbook of International Law*, Vol. 18 (2012) at pp. 269-277.

sustainably they are competing, “growing”, and “developing” is not clear, though: certainly not to the benefit of their own poorest societal strata and of domestic SMEs,¹⁷⁹⁹ not to mention the environment. Phrased otherwise, the problem is not to «provide reasons (quantified or otherwise) for believing that the harm caused by tax avoidance is in fact *greater* than the benefits»,¹⁸⁰⁰ but to wonder *whom to* tax avoidance is beneficial, and consequently, why it should be contrasted by the State (at least, by any “democratic” one): it is about *qualitative* reasoning.

Taxation-wise,

[t]aken as a whole, transnational management and (national) markets serve as contemporary self-transformation of the constitutional [S]tate necessary for it to survive the challenges of global tax competition. These two conceptual paradigms and their related institutional machineries reflect the [S]tate's *resilience* more than the *decline* of the nation-[S]tate[.]¹⁸⁰¹

which is to be deemed, however, no longer a Westphalian one. Against these premises, one should wonder at whose expense (or to whose detriment) they have become resilient, or, most compellingly, whether “resilience”—in itself an omnipresent buzzword in contemporary law-making—could not be mistaken for regulatory capture. Someone claimed that States do respond to «[i]ncreased transnational interdependence [that] recasts domestic issues into global ones», including corporate tax avoidance, with the creation of international superstructures,¹⁸⁰² but the claim being defended here is that this is mainly cosmetics: not only we depend «on cooperation between nation [S]tates involving decentralized forms of implementation

¹⁷⁹⁹ See UN Study on HR and Financial Flows, para. 20; UN Report on Financial Flows and Development, paras. 8-15.

¹⁸⁰⁰ WEST 2018, p. 1146, emphasis added.

¹⁸⁰¹ KUO 2009, p. 222, two emphases added.

¹⁸⁰² See SHAFFER 2012, p. 670.

and enforcement to advance collective goals»,¹⁸⁰³ but such goals themselves are misleading for the whole “segment” of humanity that falls outside the 1%. In this sense, tax avoidance is exploiting not only the margins between the text and teleology of the law,¹⁸⁰⁴ but also a cognitive bias which perpetuates purportedly merit-based (or entrepreneurship-based) wealth hyper-accumulation within a system whose goals themselves are, from the 99%’s viewpoint, foundationally broken.¹⁸⁰⁵

In fact, tax-neutral internationally mobile capital pursues a kind of «distributional neutrality [where] maintaining or increasing utility matters, not its distribution»,¹⁸⁰⁶ with the result that “neutrality” actually equates to the perpetuation of ontologically expansive¹⁸⁰⁷ trends of structural inequalities.¹⁸⁰⁸ Untaxed globalised financial services are an outstretched hand to the wealthy to *perpetuate* (and thus, automatically *exacerbate in relative terms*) disadvantages for all others.¹⁸⁰⁹ macroeconomic research has demonstrated that tax avoidance «lowers government revenues, *leads to higher taxes by other tax payers*, disadvantages small and medium enterprises, and increases industry concentration». ¹⁸¹⁰ The State is an undeferent

¹⁸⁰³ Ibid., p. 675.

¹⁸⁰⁴ See BROWNSWORD 2017, pp. 155-156.

¹⁸⁰⁵ KULICK (2021, pp. 564-566), however, stressed that corporations are legal fictions but might still be entrusted by the State with teleological ends which are else from simple profit-maximisation; indeed, the United States Supreme Court (USSC) itself, in *Burwell*, reasoned that maximising profits cannot be regarded as the only legitimate purpose of corporate entities.

¹⁸⁰⁶ CORKERY and ISAACS 2020, p. 1276.

¹⁸⁰⁷ Meaning that they tend to widen by the own nature of the socio-economic models on which they are founded.

¹⁸⁰⁸ Similarly,

[s]ince there is a correlation between neoliberal policies and the type of people who tend to support them (economic élites), and since content neutrality empowers those with money to speak more “loudly” toward their preferred economic views, it follows that the core rights advanced by global constitutionalism work to serve, *albeit perhaps unintentionally*, a neoliberal agenda

– SHINAR 2019, p. 20, emphasis added; however, the present study challenges the unintentionality of this subservience to neoliberal politics. Human rights (development, equality, welfare, emancipation, participation, etc.) and concepts such as “fairness” are selectively made recourse to as rhetorical distractions in order to shift attention onto peripheral issues (tax evasion by *any* individual) without having first solved or at least convincingly addressed the core one (corporate tax avoidance, ultimately profiting the 1%).

¹⁸⁰⁹ See BONICA et al. 2013, p. 121.

¹⁸¹⁰ JANSKÝ 2020^b, p. 6, emphasis added.

market apologist that does not prevent inequality spirals from actualising,¹⁸¹¹ the solutions to this issue lying before everyone's sight (at least the macroscopically corrective ones) notwithstanding.

g Market and bureaucratic elites as one: Disguising Utopia as a project of selectiveness for the few

If you paid \$120 for a pair of Nike Air Force 1 shoes, you paid more to Nike than it paid in federal income taxes over the past 3 years, while it made \$4.1 billion in profits and Nike's founder, Phil Knight, became over \$23 billion richer.¹⁸¹²

Building on the above considerations, one may argue that despite States' *rhetoric of inevitability*,¹⁸¹³ submission to transnational capital is most accurately the result of four concomitant factors: 1) regulatory capture, materialising both officially and during the meetings of "masonic" «global corporate-dominated planning bodies»,¹⁸¹⁴ not less than in the televised ritual of authorities' powerlessness spectacles;¹⁸¹⁵ 2) a superficially rhetorical engagement with discourses of equality, which does not place *wealth* at the core of most unequal treatments individuals face today; 3) coercive powers anchored to obsolete epistemologies of sovereignty which are relatively effective in pinning down natural persons while failing to regulate corporate entities; and 4) the recourse to transnational decision-making as a shield against parliamentary activity and scrutiny by the citizenry,¹⁸¹⁶ resulting in distortions

¹⁸¹¹ See also IYER 2017, p. 20.

¹⁸¹² Excerpt from a tweet (April 2, 2021; 6:05pm) by Mr Bernie Sanders, U.S. Senator for Vermont, available at <https://twitter.com/BernieSanders/status/1378015683745824770>.

¹⁸¹³ Check also HEARN and BANET-WEISER 2020, p. 1056.

¹⁸¹⁴ VAN APELDOORN and DE GRAAFF 2017, pp. 148-149.

¹⁸¹⁵ For probably the most infamous amid these spectacles, refer to LAWSON 2019, pp. 147-148, fn. 2.

¹⁸¹⁶ See further RIXEN 2011, pp. 220-221.

to would-be progressive steps towards a fairer coexistence between natural and legal persons.

Certain deregulation-savvy commentators hold an extreme exclusionist view, aimed «to allow the market to determine tax revenue rather than trusting technocrats to redistribute social resources through the design of tax regimes»;¹⁸¹⁷ these claims¹⁸¹⁸ take side radically against any interference by state bureaucracies in taxation matters, possibly neglecting that taxation is the cornerstone of any sovereign order. On the more practical side, one should object that even if the market were to take the lead on taxation, technocrats and markets today have inextricably tied themselves to one another, so that neither the social constitutional State, nor the deregulated market, but only a self-referential pseudo-regulatory elite that combines (the worst of) both, distributes wealth to the top while impoverishing (in relative terms) and surveilling all of its “others”. This is facilitated by such elite’s both corporate and bureaucratic components operating “beyond the State”, thus shielding themselves from standard mechanisms of balance-of-powers, democratic accountability, and institutional oversight. In a vicious circle, impoverishment and delusion further inhibits the citizens from democratic participation as well as from their struggle for institutional accountability.¹⁸¹⁹

«Is there something in current institutional designs that reproduce democratic deficits in the manner in which international authority is constituted and subsequently

¹⁸¹⁷ KUO 2009, p. 217.

¹⁸¹⁸ On a slightly different tone, WEISS (2001, pp. 117-118, emphasis added) posited that whether the private or public sector actually administers a country’s redistributive system may merely turn on which one has achieved economies of scale. In a competitive environment, groups—i.e., firms, communities, countries, etc.—are formed in response to economies of scale. It is either necessary or cheaper for a number of members to pool together their resources, and so groups are formed. Thus, whether the government or a multinational firm should redistribute the country’s wealth should necessarily depend on which one can do it more efficiently; that is, which one has achieved (but not exceeded) economies of scale. Answering this question, however, is difficult, if not impossible, *because [... of] the presence of multinationals [which] come and go*.

¹⁸¹⁹ See also GOLDMANN 2020, p. 1294.

dispenses its tasks?». ¹⁸²⁰ Of course there is. Missing meaningful participation, the tied market-bureaucratic élite gains free hands to execute connived projects of international-law selectiveness. For example, the élite can assist with the establishment of tax havens offshore and vest them with formal sovereignty (alluding to their “autonomy” as sovereigns under public international law after “recognizing” their statehood), to then employ them as an apologetic leverage not to “discriminate” its own havens and close them down. Unsurprisingly, onshore financial centres, which are as much a-jurisdictional as their “offshore” counterparts, often claim there is little point in shutting down their financial industry as tax avoidance could not be averted by only some of them as long as others are left running. ¹⁸²¹ It is a purported *commune naufragium, omnibus solacium* situation that rather leans on the free-riding ¹⁸²² paradox according to which if all parties free-ride, no one free-rides, because if one of those parties stopped free-riding, it would be simply pushed out of the game. I disagree this is «owed to democratic preferences of citizens who lack transnational solidarity», ¹⁸²³ because ordinary citizens gain little or no advantage from these games – all the contrary! As argued above, MNCs, and legal persons more generally, have been granted (and have acted cynically ¹⁸²⁴ enough to obtain and maintain) «unrivalled levels of juridical privilege and power to evade jurisdictional responsibility» ¹⁸²⁵ compared to individuals. On the macroscopic plane, transnational élites, released from citizenship bonds, prove less and less accountable, ¹⁸²⁶ with technology playing a non-secondary

¹⁸²⁰ MALLAVARAPU 2020, p. 432.

¹⁸²¹ Refer e.g. to LESAGE et al. 2014, p. 203.

¹⁸²² I shall note that terminological disagreement exists. For instance, with reference to natural persons, BOGOVIZ et al. (2019, p. 119) suggest that a

[t]ax “free rider” is different from [a] tax opportunist, because [a] tax free rider violates the law with [their] lack of action, without full awareness of the consequences, while [a] tax opportunist performs [...] conscious actions, clearly realizing their consequences.

¹⁸²³ PETERS 2018, p. 332.

¹⁸²⁴ Cynicism can be fairly identified here because these people are often educated enough to understand the broader implications of their privilege and actions.

¹⁸²⁵ BLANCO and GREAR 2019, p. 87. See also LÉVÊQUE 2021, pp. 128-129.

¹⁸²⁶ See LESAGE et al. 2014, p. 198.

role through the online nature of capital transactions.¹⁸²⁷ Decreased public budget for welfare services and the consequent urgency to attract resources push towards policies even more eager to welcome capital through low taxation and tax competition;¹⁸²⁸ palindromically,

[t]he anticipation of such relocation to cheap and low-standard countries incites policymakers, anxious to maintain tax revenues and jobs, to lower taxes. This in turn reduces the [S]tates' means which could finance social projects.¹⁸²⁹

Multinational banks and financial institutes are primary masters of this game: for instance, when HSBC was informed that the UK might have increased tax rates for the banking sector, it simply threatened to move its headquarters back to HK, with the UK government eventually finding this threat persuasive enough to give up its plans.¹⁸³⁰

All considered, this corporate-shaped global constitutionalism «more or less freezes a political-geographical mismatch between market promotion and market correction».¹⁸³¹ At the same time, States have responded to their financial distress by surveilling (and in certain instances also taxing) individuals' income worldwide, unveiling their uneven priorities and their scarce policy coherence: the same sovereigns claiming to be too weak compared to corporations are those that cooperate with one another when it comes to surveilling individuals.¹⁸³² To be true, overstretching tax rules so far as to tax the worldwide income of all individuals is unnecessary if States cooperate on recovering the concealed taxable assets of the wealthiest ones as a priority: since «only a few wealthy citizens will emigrate for tax

¹⁸²⁷ See ROTH-ISIGKEIT 2020, p. 7.

¹⁸²⁸ This is often coupled with austerity measures that cut or reduce essential public services; *see e.g.* the case of Brazil: CARVALHO BOSSOLANI 2020, pp. 239-240.

¹⁸²⁹ PETERS 2018, p. 281.

¹⁸³⁰ See LANGFORD 2019, pp. 118-119.

¹⁸³¹ DIERCKX 2013, p. 806. *See also* PETERS 2018, p. 332.

¹⁸³² See LESAGE et al. 2014, pp. 205-206.

reasons, the residence principle remains a powerful asset for extraterritorial tax enforcement», while the US can pursue its indiscriminate worldwide taxation only thanks to its market power, a tool that remains unavailable to most countries.¹⁸³³

h HR impact assessments: Unhinging corporate-oriented delegated capture?

One may wonder, at this stage, what should be done to redress this situation. Capital does not change, but our habits of thoughts—«collective human experiences and observations that congeal into collective narratives about the nature of the world»¹⁸³⁴—can. There are no totally safe or immediate options, otherwise they would have already been adopted or at least imagined, but a deep cognitive change could well sustain novel perspectives on the priorities and interactions which should reshape global governance, perhaps starting from the distributive fairness triggered by a global deliberative assembly¹⁸³⁵ that brings democracy to a multi-level subsidiarity on the merits.¹⁸³⁶ If corporations should «help [States] provide mechanisms through which those affected by their activities are able to contest corporate decisions»,¹⁸³⁷ in the case of tax avoidance the forum for contestation would need to be global because the whole 99% would call itself forward to testify.

To begin with, the interaction among sovereigns or, more accurately, between States and the transnational civil society, should be strengthened and reformed

¹⁸³³ Ibid., pp. 207-208.

¹⁸³⁴ PALAN 2020, p. 170.

¹⁸³⁵ On these proposed assemblies and why they might work, *refer to* VLERICK 2020^b, p. 311. Nonetheless, they will only function if they are subsumed by and reflective of an equally extensive community, namely a world polity; in fact,

[t]he establishment of a global Parliament or introduction of a range of parliamentary assemblies [...] would not [...] ensure the democratization of global governance [...] nor] provide democratic legitimacy in the absence of a political community, or *demos*

– WHEATLEY 2012, p. 161.

¹⁸³⁶ Cf. DIETSCH and RIXEN 2016, pp. 97-98.

¹⁸³⁷ HSIEH 2004, p. 658.

explicitly *for social inclusion*.¹⁸³⁸ I do intend to reject the current globally constitutionalist tendencies while standing among those who «highlight the democratic deficiencies of global processes but ignore many of the current constitutional malfunctions of the State both in terms of inclusion of outside interests and participation of certain domestic interests». ¹⁸³⁹ Conversely, I believe that States are inherently captured,¹⁸⁴⁰ and upon noticing that the current GC agenda is replicating transnationally the same neoliberal models¹⁸⁴¹ and priorities that permeate captured States, I argue in favour of a more natural-person inclusive, wealth-deescalating, and individuals-oriented global constitutionalist order.

Combating tax avoidance would express transformative authority on the part of citizens and the public institutions they entrust with regulating social life. For instance, with reference to the EU, scholars have made the case for a more integrated taxation system not so much with market neutrality or other economically phrased principles in mind, but as a concrete move to catalyse value-change in other areas of concern for social justice broadly conceived, as well as to more proficiently put the EU on track towards fulfilling the Sustainable Development Goals (SDGs).¹⁸⁴² And yet, while said Goals only hinted at the plague of tax avoidance by and tax breaks for

¹⁸³⁸ See ARCURI 2020, pp. 337-338.

¹⁸³⁹ POIARES MADURO 2006, p. 248.

¹⁸⁴⁰ See also ROACH 2005, pp. 41-42. BLANK (2019, p. 289) offers an enlightening example: [d]espite then candidate Donald J. Trump's criticism of corporate inversions throughout the 2016 presidential campaign, his 2017 executive actions placed the viability of some of the most comprehensive anti-inversion measures in doubt.

Through inversion, MNCs keep switching their head-office across the jurisdictions where they formally exist or substantially operate, in order to avoid taxes by responding to actual—or anticipating expected/forthcoming—regulatory measures. Some of the most ingenuous schemes entail hidden inversion or inversion through M&A – on the negotiations towards merging between Pfizer and Allergan in Ireland, refer to TALBOT 2016, pp. 531-532. The State frequently engages quite assertively against these schemes, but the latter will continue ceaselessly as each regulation will find its financial-innovation-by-response; these loopholes will only be definitely sealed when States decide to seriously solve the upstream problem with corporate taxation at the global level. In my view, States are already too captured to be willing to address the issue as thoroughly and conclusively as would be needed.

¹⁸⁴¹ On some of these models, see also DA CRUZ QUEIROZ 2018, 7-9.

¹⁸⁴² Refer extensively to SPANGENBERG et al. 2019.

MNCs,¹⁸⁴³ just like the negotiating parties to the (hopefully forthcoming) binding treaty on B&HR,¹⁸⁴⁴ the 2019 Guiding Principles on Human Rights Impact Assessments for Economic Reform Policies, developed under the mandate of the UN Independent Expert on Debt and Human Rights, may provide fertile tools for more radical policy change that re-empowers “ordinary” humans while disapplying the over-juridification of legal entities. To exemplify, the HR impact of tax avoidance should feature in any human-rights impact assessments (HRIAs) at the global level for a new setting for GC, based on entirely different conceptual premises, in line with the 2019 Guiding Principles. One new premise is that «[f]iscal, tax, debt, trade, aid, monetary and environmental policies should be designed and implemented so that they are “deliberately directed” towards the realisation of human rights»:¹⁸⁴⁵ this shall be their priority rather than their incidental effect after pleasing market forces.

On a concrete note, I agree that «[r]ather than being a “once-off” exercise, HRIAs should be carried out regularly – i.e. both *ex ante* and *ex post*».¹⁸⁴⁶ However, if States implement a policy through an IO such as the OECD, they should not outsource or somehow “delegate” these assessments wholly to said IOs: a process witnessing democratic parliaments involved and bottom-up participation should be preferred to the highest possible extent. This bears relevance also to counter the trend that sees soft law being agreed upon internationally not because negotiating its contents in hard form would lead to no or watered-down outcomes, but because lawmakers attempt to deprive parliaments of the authority of formally commenting upon—and if necessary amending or even rejecting—the “soft” deals.¹⁸⁴⁷ Indeed,

¹⁸⁴³ See GUPTA and VEGELIN 2016, pp. 443-444; see further GRIBNAU and JALLAI 2019, pp. 344-347.

¹⁸⁴⁴ Refer *e.g.* to UN Report on B&HR, para. 95.

¹⁸⁴⁵ NOLAN and BOHOSLAVSKY 2020, p. 1254.

¹⁸⁴⁶ Ibid, p. 1255.

¹⁸⁴⁷ Refer also to TAMANAHA 2017, p. 192.

[e]conomic policy decisions are increasingly made in multi-stakeholder networks, in which government officials participate alongside representatives from the private sector and civil society. Power asymmetries in such networks are immense. While it is important to see impact assessments as one tool that can be leveraged to address such asymmetries, complementary efforts will also be needed,¹⁸⁴⁸

starting from domestic checks-and-balances. Whatever the complimentary tools, however, what matters most is that HR assessments are holistic: the impact of policies should be appraised in the aggregate, i.e., cumulatively.¹⁸⁴⁹

i No privacy? No data! Deproceduralising the rhetoric of (unnecessary) legalised intrusions

Personal privacy has a role to play in setting the stage for this refounded GC discourse; privacy testifies to dignity, freedom, deliberation, autonomy,¹⁸⁵⁰ and its violation is one of the most flagrant abuses stemming from the discrepancies between natural and legal persons. Taxation-wise, privacy is currently adopted by States to divert attention from the market promotion/regulation asymmetry I mentioned earlier compared to the rights “granted” to individuals. Indeed, tax-related privacy violations join the ranks of «management of violence» and attacks on personal dignity that have been ascribed¹⁸⁵¹ to MNCs’ exploitative-of-otherness logic, because although those violations per se are performed by States through IOs, the root-cause behind this mass-surveillance project (possibly the largest and most pervasive in human history) resides with MNCs’ elusion of welfare contributions as well as capture of state executives and representatives. This is indeed a paradigmatic illustration of human-rights

¹⁸⁴⁸ CORKERY and ISAACS 2020, p. 1283.

¹⁸⁴⁹ See BOHOSLAVSKY 2020, p. 1420.

¹⁸⁵⁰ See further GUMBIS et al. 2011, pp. 78-85.

¹⁸⁵¹ See e.g. BLANCO and GREAR 2019, p. 94.

interdependence and indivisibility, whereby first- and second-generation rights cannot be protected without one another.

Funnily enough though, it is corporations that complain of their privacy being compromised because, differently from that of (most) individuals, their tax returns might be made public.¹⁸⁵² Not only is this claim inappropriate because it fails to acknowledge the systemic imbalance between corporate tax strategies and States' assertive persecution of individuals through privacy breaches; most importantly, it stands as absurd as it equates legal persons to natural persons as far as privacy is concerned. While the vindication that corporate information, too, should enjoy a certain degree of confidentiality (as it does already, even in the US) is legitimate, lamenting that corporate privacy is less extensive than individuals' completely misses the point. Although individuals' tax information is not exposed to the public, it is exchanged across governments and agencies all around the world without actual safeguard and under concrete risks for their security; this process was decided by States through the OECD in order to divert attention from the real tax problems, as well as to regain resources that, for the overwhelming part, are in fact dissipated through corporations' avoidance rather than individuals' evasion.

This "surveillant (non-)solution" to tax dodging stands regrettably in line with the broader rhetorical and solution-postponing proceduralisation of international law, which was noted as follows:

An important driver of the [...] trend towards proceduralisation is the disagreement among the members of a pluralist and even deeply divided international society about proper [...] substantive outcomes[, which] is exacerbated by the complexity of problems and lack of knowledge about [...] ways to solve them. In this constellation, negotiators may find it easier to agree on procedures, because these are less burdened with ideology, and are to some extent open-ended. The

¹⁸⁵² See BLANK 2019, pp. 280-281.

underlying idea is that fair procedures will also lead to normatively acceptable and in fact accepted results. Thus, the elements of deliberation inherent in the procedural approach complement more traditional forms of justifying international law.¹⁸⁵³

For instance, I concede in principle to the argument that

it is necessary that Automatic Exchange of Financial Account Information agreements be effective in order to acknowledge the final beneficiary of a transaction and establish responsibilities in cases of loss of useful resources needed to guarantee [welfare-related] rights[.]¹⁸⁵⁴

but this sounds fair and reasonable only in the abstract. Reality is that for the time being, there is little need to “establish responsibilities” by stepping over the privacy of billions of individuals *indiscriminately and simultaneously*, because the overwhelmingly top-tier responsible—corporate tax avoidance—has never been resolutely persecuted. Such value-empty procedure harms the dignity and autonomy of all individuals by intruding into their life (consumption, movements, relationships, preferences, purchases, “social status”, deals, habits, and other personal affairs), while the tiny minority which is directly “responsible-in-chief” for public-revenue losses is allowed to perpetuate its current operational schemes of tax avoidance through the design of borderless, “tax-efficient” corporate arrangements able to trump any meaningful form of accountability to the “international community” of world citizens. In fact, well before the “awakening” of this ITL program, it had been already noted that «procedural fairness may be consistent with a significant measure of substantive inequity», to such an extent that any comfort at the idea of living in *actual* rule-of-law societies rationally evanishes.¹⁸⁵⁵

¹⁸⁵³ PETERS et al. 2020, p. 132.

¹⁸⁵⁴ BOHOSLAVSKY 2020, p. 1413; *see also* ECCLESTON and WOODWARD 2013, pp. 222;224-225.

¹⁸⁵⁵ ROSENFELD 2021, p. 1314.

Thus, my argument is that by fixing what is grossly wrong with corporate tax avoidance, States would already regain tremendous resources to finance their public spending; once this is achieved, they could proceed gradually with targeted privacy violations (which are indeed to be legitimised when performed on a need-by-need basis). In Norway, for example,

[w]hile the [...] publishing of tax payments of *all* citizens was found to violate the human right to privacy, one can obtain information on the 100 individuals with highest incomes in each municipality.¹⁸⁵⁶

A gradual policy designed on this model would work well and comply with my *coherence approach* to human rights protection, but only if applied *once tax avoidance has been systemically solved (or at least resolutely addressed)* by States through concerted action at the global level. To be clear, addressing only the “100” richer people rather than *all of them, but progressively* is a random choice, too. I also disagree with Norwegian courts with respect to publishing the tax data of all citizens being *a priori and by definition* a human rights violation: I posit it is so *only insofar as it entails an unnecessarily disproportionate response towards the most negligible targets, while the gist of the issue is left wholly or partly unattended, resulting in policy miscoordination and irresponsive hypocritical incoherence.*

Instead of being deployed to inspect individuals, privacy should first fit in the toolbox that is to be used to rebalance the natural/legal person juridical asymmetry; indeed, privacy can catalyse uplifting, right-redistributive effects as well. PETER’s argument is that the «mismatch could be theoretically remedied by moves in two directions: either by bringing the economy back down (on a national level) or by

¹⁸⁵⁶ HAUGEN 2018, p. 55, emphasis in the original, in-text citation omitted.

“bringing up” the social and redistributive policies». ¹⁸⁵⁷ I sympathise for the second path, but specifically meaning that humans should be freed (read “uncaged”) as much as capital, rights should walk alongside them as much as duties do, and privacy should be implemented *a fortiori* when surveillance is legalised: the new principle is not just “no *international* taxation without *international* representation”, but equally importantly, “no *international* surveillance without *international* privacy”.

While certain *legal* rights do stop at borders or depend on one’s citizenship, *personhood is agency* and the violation of one’s personhood is far broader—and in any case, else from—the violation of rights legalistically understood; «the conditions of personhood that can be violated involve violations of the grounds on which a person exercises their personhood», ¹⁸⁵⁸ the first thereof being, indeed, agency, standing at the opposite shore of chilling transnational surveillance. There is no need to stretch the rights discourse as to include moral tensions towards a capabilities approach that elevates MNCs to the ranks of policing agents; ¹⁸⁵⁹ in fact, this might well prove counterproductive. This notwithstanding, Westphalian human rights—those already existing—do need to match the “universal” aspiration originally underpinning their institution (or “recognition”, if one understands them as natural law), especially when their violations are supra-Westphalian. Not secondarily, their assessment shall be systemic and systematic, and their violations considered unlawful when failing to meet the policy-coherence test.

j Rejecting unaccountable transnationalism through informed referenda

¹⁸⁵⁷ PETERS 2018, p. 332.

¹⁸⁵⁸ MORGAN 2019, p. 182 (paraphrasing Nicholas Rescher).

¹⁸⁵⁹ Cf. PÄIVÄNSALO 2010, pp. 575-576.

We need to shift from a GC for corporations to one for individuals; meanwhile, we should find a solution for tax-related surveillance to stop impairing our autonomy and baselessly inquiring into our lives. If the proposition that «as capitalism evolved so too did institutional capacity»¹⁸⁶⁰ holds true, there is valid reason to be concerned: States *decide* not to probe tax-avoidance practices rather than *being unable* to. Consequently, compared to those who believe that «free statehood is a plausible normative ideal, and that there is therefore an urgent need to address its possible institutionalisation»,¹⁸⁶¹ I adopt a more cautiously realist stance: free statehood does not *and cannot* exist because States already are unrectifiably captured, and the concept itself of “State” cannot free itself from such capture as it was not elaborated to cope with globalised-capital-by-contract. At the same time, I join the contention that «international justice requires the protection of the joint basic non-domination of all [S]tates, and this requires countering the forms of arbitrary power that economic globalisation sets off by institutional means».¹⁸⁶² Someone labels this as «international background justice»;¹⁸⁶³ I find this denomination too passive.

In fact, what is needed is a grassroot movement *from below* that strives not for the freedom *of States* from economic super-domination, but for that *of global citizens* from any State-backed attempt to impose on them international duties, burdens, and limitations which are not matched by equally extensive rights and which stand at odds with legal persons’ pseudo-legal libertinage (legalised arbitrage). The symbolic step which was taken «in Ecuador in 2017, [when] voters approved a referendum to amend their [C]onstitution to ban public officials from holding assets in tax havens»¹⁸⁶⁴

¹⁸⁶⁰ HOLDEN 2017, p. 44 (paraphrasing Harold L. Wilensky).

¹⁸⁶¹ LABORDE and RONZONI 2016, p. 290.

¹⁸⁶² *Ibid.*, emphasis omitted.

¹⁸⁶³ DIETSCH and RIXEN 2016, pp. 99-100, emphasis omitted.

¹⁸⁶⁴ DIXON and SUK 2018, p. 380.

represents an example of the initiatives citizens should pursue vis-à-vis corporate tax avoidance and its beneficiaries more pertinently. Indeed, as underlined *supra*, tax avoidance does not necessarily rely on tax havens: it is a wider expression of capital's detachment from the Westphalian system, which manifests itself through non-havens, too. Even more importantly, referenda should be held on rejecting any illicit piece of legislation that results from international agreements where citizens' duties before third sovereigns are not matched by equally *internationalised* rights (privacy violations without safeguards being an excellent illustration of the trade-off at stake). Relatedly, yet tangentially, it is exactly through referenda that Swiss citizens keep upholding the tax Switzerland imposes on wealth.¹⁸⁶⁵

Nevertheless, referenda cannot be regarded as solutions-in-isolation, Brexit being the most recent incarnation of the paradigm of an elitist project advertised and sold to largely uneducated masses as an independence mirage from much-despised Brussels' "technocratic" apparatuses, while in fact, it will further exacerbate competition—and therefore, as we have seen above, neoliberal deregulation¹⁸⁶⁶—and unleash London's primacy in tax avoidance worldwide.¹⁸⁶⁷ In Gramscian terms, Brexit

¹⁸⁶⁵ See SCHEUER and SLEMMOD 2021, p. 214.

¹⁸⁶⁶ Check also HELLEINER 2021, p. 230.

¹⁸⁶⁷ Interestingly, prior to this referendum, the EU had initiated the negotiating process to establish a common tax (0.1% or less) on financial transactions, including share acquisition, bonds exchange, and derivative contracts; although it does have its own "stamp tax" covering roughly the same operations, the UK vehemently opposed the project unless the whole world adopted the tax. It is worth emphasising that this European project was already a watered-down version of the original one, after years of (especially British) unforgiving industrial lobbying had forced the Council to revise its early ambitions (see SCHULMEISTER 2015, pp. 39-49; QUAGLIA 2017, p. 3). This apparent UK-tax/EU-tax dyscrasia has found no persuasive explanation in literature yet, so that one is tempted to hypothesise that this is due to the City's holdings escaping taxation more easily under the current UK's legislation than they would have done pursuant to the new EU project; nevertheless, this is just speculation which calls for dedicated research to be confirmed or disproven. HARDIMAN and METINSOY (2019, p. 1606) found «a strong *correlation* between the presence of a large [hedge] funds sector in an economy and that country's opposition to the FTT» (emphasis added), but what unites most objectors is rather their function as tax havens (Ireland, Luxemburg, The Netherlands). In any case, with Brexit the problem does not arise, as the City will maintain or worsen its current deregulated financial market. Even before the separation took effect, several banks and credit institutes had announced they would have relocated their derivatives dealings to non-FTT jurisdictions, primarily the UK (see DAVIS et al. 2013, p. 42). In fairness, it shall also be remarked that the FTT might not have been per se the most efficient policy instrument to achieve its intended goals:

[i]f it is the prospect of distributing huge financial profits in the form of generous salaries and bonuses that is the chief motivation for excessive leverage and other types of excessive

thus represents the capitalist State engaged in «a web of social relations embedded in all levels of society[,] and operating for [a] [re]production of consent»¹⁸⁶⁸ that only serves the purpose of crystallising ruling-class customs and exposes institutions to unchecked oligarchic capture. The UK's departure from the EU attests to the *resilience* of the global capitalist class vis-à-vis the street-level resurgence of “populist” movements as a reaction thereto. This is unsurprising: immunised against populism and authoritarianism alike, the corporation and its élite seems to survive any societal transformations and capitalise on them to accrue its actual and symbolic power.¹⁸⁶⁹ Financial-industry lobbyists even went the extra mile by declaring that they found themselves so finely attuned to the government that banks themselves, in return, felt “recaptured” by the State about delivering on their preferred post-Brexit scenarios.¹⁸⁷⁰

k The struggle for globalised rights as counterhegemonic enablers of power redistribution

Even if we cannot agree on *the* theory of justice, this should not prevent us from starting to correct situations we perceive as manifestly unjust.¹⁸⁷¹

According to the *Irish* delegate to the CoE's Parliamentary Assembly, «[l]ong-term viable solutions to global poverty and inequality are being undermined by the scale of global corporate tax avoidance, which drains much-needed financial resources from low-income countries».¹⁸⁷² Indeed, tax avoidance is a double-faced plague

risk taking in the financial sector, then [...] the most effective way of dealing with this problem is to tax financial profits *before they can be privately distributed* (GRAHL and LYSANDROU 2014, p. 248, emphasis added). One of the manners to obtain the just-mentioned result is to definitely close the tax-avoidance a-jurisdictional loopholes.

¹⁸⁶⁸ CLUNIE 2015, p. 116.

¹⁸⁶⁹ See ADLER 2019, p. 141.

¹⁸⁷⁰ See JAMES and QUAGLIA 2019, p. 265.

¹⁸⁷¹ CLOOTS 2019, p. 86.

¹⁸⁷² 2019 Report, p. 14, emphasis added.

draining public resources both *within* and *between* States, and that needs to be mainstreamed in international public debates through multiple normative channels, including those enabled by HR practices and discourses. In legal parlance, “justice”—also beyond the State—is not exhausted with human rights, but it can be at least partly exemplified and/or enhanced by them. This holds especially true in the Internet era we are living in, where any possible form of constitutionalism would more or less directly coagulate the interests of private actors involved in the governance of the Internet,¹⁸⁷³ which has already «produce[d] territorial detachment of the people and the élites [... as well as ...] several challenges to Westphalian constitutional law and its constitutional geometry».¹⁸⁷⁴

To accomplish justice – or the best approximation to it, we do need international human rights that exceed minimal-core obligations and strengthen meaningful political participation and accountability.¹⁸⁷⁵ Rather than rhetorical neoliberal constitutionalism, where the only rights such ghost Constitution protects are those of transnationally fluid capital, I picture the manifesto of an RGC that redistributes rights—including privacy—and wealth as an exercise of bargaining power and thus emancipation: both pass through taxation. This RGC shall be designed for furthering the early-capitalist success of lifting masses of humans out of poverty, which was achieved by empowering and mobilising key segments of the middle class especially in developing countries¹⁸⁷⁶ (“Global Middle Class”), while, on the contrary, aiming at resizing the embarrassingly disproportionate amass of wealth managed by the neoliberal élite (“Capital Class”) and restoring hope in those GN citizens who

¹⁸⁷³ See SUZOR 2019, p. 170. Indeed, the hybrid online/offline regulatory landscape where state and non-state actors are struggling for “dominance by summation” is characterised by «the increased overlap between the cyberspace and the corporate social orders, because of the dominant role that corporations such as Google and Facebook play *in both*» – ADLER 2019, p. 140.

¹⁸⁷⁴ BELOV 2018, pp. 39;48.

¹⁸⁷⁵ See GOLDMANN 2020, p. 1297.

¹⁸⁷⁶ See further GILL 2008, p. 133.

remained trapped under the stagnating cap of unfettered capitalism without participating in the successful effects of its more moderate manifestations (“Chronically Excluded”).¹⁸⁷⁷

There is an increasing awareness that effective legislation can only be introduced in ways that will have profound implications to the narratives of closure and habits of thought that are at the very core of [the] contemporary order,

and this might announce the end of Westphalia as IL textbooks have come to crystallise it: individuals’ emancipation from a State that has come to be «both a creature and an agent of imperial capitalism, [...] with] the capitalist corporation [...] as [its] “externality machine”». ¹⁸⁷⁸ Deregulated capitalists’ sole *raison d’être* is to relentlessly

exploit market opportunities and operate across the sociopolitical spectrum, leaving problems behind for others to clean up. [...] It] highlights not the corporation’s inhuman efficiency, but its capacity to disorganize markets and send resources crashing into useless (though lucrative) ventures. ¹⁸⁷⁹

Consequently, to be clear, what is being advocated here is not the end of the State, but of *this* State, nor the end of the global market, but of *this* global market, where the expedient of “sovereignty” is misappropriated selectively by mutually captured state-corporate entities in order to escape what was supposed to be the founding principle of democracy and modernity: people’s sovereignty over their own destiny and individual dignity. Even in the event the RGC I am proposing here, «in turn, would imply some limitations on the notion that the “people” are the sole

¹⁸⁷⁷ These three definitions are borrowed and adapted from AFILALO and PATTERSON 2019, pp. 349-352; *see further* HENNIG 2015, pp. 263-264.

¹⁸⁷⁸ MARWAH et al. 2020, p. 284.

¹⁸⁷⁹ LIPARTITO 2016, p. 124 (partly paraphrasing Stanford’s historian Richard White).

sovereign over the “people”»,¹⁸⁸⁰ those limitations will be accepted as remarkably fairer (because more distributed) than those which *de facto* pervade contemporary capital-prone experiences of individual citizenship vis-à-vis legal persons. A fairer and rights-oriented tax system which is agreed upon globally, and that appears to dispel what remained of States’ ability to formulate their separate tax policy, will not necessarily fulfil sociologist Fritz Karl Mann’s wish that taxation will help us transition to a post-capitalist economic order,¹⁸⁸¹ but it will restrain the distorted abuses of *this* capitalism more decisively, and grant individuals worldwide rights matching the reach of globalised markets and surveillance alike.

1 How surveillance captured West-rooted SCs

The secret dies in its older manifestations in conditions of greater visibility, and at the same time new visibilities produce new paradoxes around (in)visibility and open new routes to invisibility, secret places and lives, and forms of hiding.¹⁸⁸²

In conclusion, those who wonder about, e.g., «[w]hat is the social contract equivalent to that which is often said to have existed in the 1930s in the [US] between big business and the New Deal»,¹⁸⁸³ or whether «various conceptions of [State-citizens] reciprocity [may] result in different approaches to the legal obligation to pay tax»,¹⁸⁸⁴ have their research questions fundamentally misplaced at both ends: the social

¹⁸⁸⁰ PALAN 2020, p. 179.

¹⁸⁸¹ See LEROY 2008, para. 3.

¹⁸⁸² NUTTALL and MBEMBE 2015, p. 323.

¹⁸⁸³ MAZLISH and MORSS 2005, p. 185.

¹⁸⁸⁴ GRIBNAU and DIJKSTRA 2020, p. 48.

contract of tomorrow is *not* embodied by the old-fashioned Hobbesian security-provider called “Leviathan”, but it not to be stipulated between States and businesses, either, as these are the two poles of the same mutually captured superstructure of globally hegemonic power. Tripartite agreements are to be repelled or repealed, too. As an example,

[i]n 2016 Pakistan lost an estimated 40% of tax revenues to MNCs. Theoretically, such tax avoidance threatens the assumptions of fairness and egalitarianism on which the social contract between [S]tate and individuals rests. Citizens of Pakistan would be unlikely to actively agree to enter into an agreement with MNCs and the [S]tate, if such unfavourable outcomes were known.¹⁸⁸⁵

Outsourcing developmental and economic activities to MNCs and favouring their tax-avoidance practices in order to “let them stay” or “let them invest” exposes the State to the same position of a contractor who tries to mount a defence over their contractual breach by claiming that it was their trusted agent’s fault. Before anything, tax avoidance is a privilege-harboured belief system edging ethics-disinhibited hubris (*grenzmoral*),¹⁸⁸⁶ in harmony therewith MNCs are given (of feel entitled to obtain or grab) free pass to benefit from a Contract which is not theirs, at the only expense of said Contract’s weaker party. As if this were not sufficient to breach the Contract, States and MNCs stand as the poles, in fact, of a state-driven, market-embedded surveillance-driven variation of the Contract (the “Surveillant Contract”) which avails itself of surveillance-through-taxation as one of its mediums to perpetuate its subjugating power. While Locke could conceive of the SC politically and juristically as a trade-off between rights, the contract is now being increasingly reframed

¹⁸⁸⁵ TJN 2018.

¹⁸⁸⁶ See IRELAND 2018, p. 8.

economically in terms of market interests,¹⁸⁸⁷ which claim legitimacy for class and partisanship and are, by definition, not universal, nor encompassing all components of a polity. The partisan interests protected by the “contract” would come to coincide, this way, with those of the capitalist élite.

Instead, *global citizens* and the hopefully forthcoming *institutional framework of the global redistributive constitutional space* (those institutions being not granted separate legal personality) to represent them dialogically, are the alternative two interlocutors I would suggest for rewriting the Contract: *natural persons*, as to avoid reproposing the legal fictions that brought corporations to monopolise the legal code of capital.¹⁸⁸⁸ If it is true—as I believe it is—that

[t]he transnationally constituted power of financial capital is valorized politically through the global state form of capital which transcends the Hobbesian antinomy of disorder and territorial sovereignty in an attempt to escape traditional categories of territorial political authority[.]¹⁸⁸⁹

then my submission is that *all* natural persons, too, should transcend such an antinomy and match said escape route, which cannot be left to capitalists as a corporate privilege. They can do so by forming an organisational authority able to grant them rights and duties in equal scope, up to the global one; for instance, if the right to privacy is impaired through global tax-surveillance mechanisms, remedies must be available at the same level, with matching scopes.

¹⁸⁸⁷ See DA CRUZ QUEIROZ 2018, p. 2.

¹⁸⁸⁸ Consistently with this stance, I do not welcome poorly conceived proclamations like the one according to which «[t]he New Social Contract, *between Governments, people, civil society, business and more*, must integrate employment, sustainable development and social protection, based on equal rights and opportunities for all» (DE OLIVEIRA GUTERRES 2020, emphasis added). These are empty statements that work through their (conscious) absence of meaning with the purpose to retain the *status quo* for as long as possible, without disrupting any of the links-in-the-chain (like the over-attribution of legal privilege to legal persons) that made elitist unfettered capitalism the factually unchallenged legal code of contemporary times.

¹⁸⁸⁹ WODLEY 2015, p. xiv.

The old-fashioned, Westphalia-proof SC, which tacitly metamorphosised into its Surveillant degeneration, is in need of an intrusion-proof overhaul that rejects Spinoza's surmise that «someone's right extends as far as [their] power does»¹⁸⁹⁰ as profoundly wrong and outdated. The rights of those who are most (economically) vulnerable need to be protected first, and indiscriminate violations thereof can only be authorised *if* they are strictly unavoidable and *after* the most relevant actors (no matter how powerful) have been brought to compliance; starting from the first while the latter go free is unethical and, I argue here, *unlawful*. Hence, before anything, this refounded covenant would stipulate that any portrayed-as-necessary violation of human rights *beyond the State* needs to be matched by human-rights safeguards and avenues for recourse *beyond the State*, too, as well as encapsulated against an all-round-coherent and priority-shaped policy framework—again, *beyond the State*—that refrains from persecuting all individuals before engaging with the transnational-capital side of any given issue. Indeed, the current state of the art is manifestly unacceptable:

While most [S]tates recognize and enforce foreign law for contracts and financial collateral [...], laws that regulate responsibility do not travel well, and are “cut” by jurisdictional and temporal limitations. Such a partitioning of global economic relations into neat units of potential responsibility hampers a social legal imagining of global value chains as integrated, border-transcending economic entities and social institutions. [... T]he depth and breadth of global entanglements are beyond law's conceptual grasp. The mismatch between the structure of global production, harm and law culminates in an “organized irresponsibility” that Ulrich Beck identified as one of the central features of today's “global risk society” [...]. Such organized irresponsibility is not a by-product of global value chains, but a central reason for their profitability. [...] Legal tools are employed in a manner that *diverts the focus away from core issues of corporate capitalism*. By concentrating attention on individual injuries, existing instruments *leave unaddressed the regulations that provide for the structural*

¹⁸⁹⁰ GRIBNAU and DIJKSTRA 2020, p. 66. Otherwise put, «the rights of individuals (and agencies) are coextensive with their powers» (ibid., p. 67). If humans act together and “join forces”, this theory might even work out promisingly because their power expands as their number increases. However, this is a quantity-based argument whose premising speculation (power-dependent rights) is to be deemed morally unacceptable, and thus unserviceable for our purpose to suggest a more equitable way out of the current “corporate *laissez faire* vs. individuals' surveillance” impasse.

*conditions of possibility of such injuries – such as investment and tax regimes. [...] These are the “legal black holes” [...] that current legal institutions leave us to grapple with, where [...] the people harmed are left without any means of remedy.*¹⁸⁹¹

To this end, the Contract which is sought after here corresponds more genuinely to the Lockean stipulation whereby «men agree to pool their powers and resolve to act jointly and collectively [by transferring] their rights to the society as a whole rather than to the sovereign»;¹⁸⁹² slightly departing from this, my suggestion envisions a cosmopolitan variation of Locke’s enunciation where the relevant “society” is the global one rather than being confined to one pre-set polity. Natural persons from the 99% shall resist the alienating rent-seeking of the transnational order of capital¹⁸⁹³ which

[b]esides protecting negative liberty in the maximization of individuals’ well-being[, thus perpetuating and worsening wealth concentration,] does not provide any concrete rights. [...] With neoliberalism, d]espite the interdependence of all individuals, individuals always remain separate unities and are thus deprived of the right to claim a common share of the fruits of their relationships—as if belonging to a common body entailed personal indifference and the abandonment of private interests.¹⁸⁹⁴

Nonetheless, although transnational kleptocracy and indiscriminate attacks on individual privacy are threatening Western democracies *from within* (without mentioning their normative appeal as a civilisation),¹⁸⁹⁵ how to involve illiberal States’ rulers in a reform project oriented towards a redistributive GC which would empower

¹⁸⁹¹ ECKERT and KNÖPFEL 2020, pp. 1-2, two emphases added, in-text citations omitted.

¹⁸⁹² GRIBNAU and DIJKSTRA 2020, p. 56.

¹⁸⁹³ On the potential socio-legal meaning to be attributed to individuals’ value-based “alienation” in capitalist societies, *check e.g.* HERTOIGH 2018, pp. 52-53. Ultimately, comprehensive and enduring legal alienation erodes citizens’ alignment with the dominant value system and thus their compliance with the positive law stemming therefrom, but without necessarily overturning the foundational premises on which said law is predicated.

¹⁸⁹⁴ DA CRUZ QUEIROZ 2018, p. 6.

¹⁸⁹⁵ *See* HUG 2020, p. 18; ALLEN 2020, p. 24; PRANGE-GSTÖHL 2017, p. 179.

all individuals debunks an even more troubling open question.¹⁸⁹⁶ GC remains a Western discourse surfacing out of liberal democracies,¹⁸⁹⁷ so that possible variants in a redistributive sense might not be able to break this ethnocentric barrier as much as one would hope for. The Surveillant Contract unveils the West's decadence, but authoritarianism's last-resort survival-strategy just as much. No project of surveillance-free emancipation can start at the upper floor while its pillars are built on quicksand: even assuming—without conceding to it—that Europe rediscovers the natural-person-centred essence of the Contract its political philosophy first developed, the Surveillant Contract in China and elsewhere is there to stay. Any globally inspired framework will be compelled to account for this reality.

m A cognitive and intergenerational challenge towards a fairer future

While spying on its own and foreign citizens matches—to different degrees—the interest (and practice) of any country, so that tax evasion becomes *yet another* discursive strategy in States' toolbox to garner public support (or at least tolerance) around surveillance, the central problem with taxation will never be addresses until a cognitive change gains momentum and is translated into action from the bottom.¹⁸⁹⁸

¹⁸⁹⁶ Indeed, «social contracts solve *coordination problems* in which the interests of the individual participants are (relatively) aligned, not *competition problems* in which individual interests compete with group interests» – VLERICK 2020^a, p. 182.

¹⁸⁹⁷ See SHINAR 2019, pp. 18;24.

¹⁸⁹⁸ Action *from* the bottom does not necessarily overlap with action *by* the bottom: besides concrete actions performed first-hand at street-level politics, it is about soliciting States as well; state institutions should be coerced through popular mandate to pass legislation with an anti-corporatist mindset, i.e., oriented to corporations that benefit the broader societies rather than themselves. This is to rebalance the current *malaise* and to ensure that purely exploitative models are met with fierce opposition and social stigma, and eventually abandoned. For example, CLOOTS (2019, pp. 53-54) suggests that managers' financial reward (stipend, incentives, etc.) should be *inversely* proportional to their exploitation of the environment, tax codes, labour, and so forth in producing “value for shareholders”. The concepts of “shareholding value” and “for-profit” themselves should be urgently rediscussed: if a healthy competition on salaries is rolled out and merit/entrepreneurship is rewarded through them, there is no need whatsoever for *passive* income (share price increase, resulting in dividends and their distribution) to steer innovation and “growth” (?), which were supposed to be the only reasons why societies accepted the existence and management of corporate entities

We cannot expect companies to change by themselves,¹⁸⁹⁹ for instance—as someone suggested—by turning their shareholder-capitalism business model into a stakeholder-capitalism one which embraces the broader society beyond empty political slogans,¹⁹⁰⁰ or to subscribe voluntarily to a non-binding SC,¹⁹⁰¹ or to take «the values of reciprocity and solidarity seriously»,¹⁹⁰² unless the State is uncaptured or “disarmed”. Overcoming the “State” in our political imagination is the best way to get rid of its re-captured neocolonial metastases. In fact, long-standing tax-avoidance schemes primarily benefit the richest countries, which happen to be so exactly because they

in the first place. To be true, there is no *need* for shareholders at all, either; passive profiting and shareholding are the only reasons why 1%-benefitting corporate exploitation exists, including any aggressive tax-planning *escamotage* to dodge Welfare States and their 99%. Most market-minded professionals (and, regrettably, scholars) will disagree with—or even feel nervous or uneasy about—these somewhat “radical” assertions; and yet, «a lack of theoretical agreement on *the* theory of the company should not prevent us from correcting corporate legal incentives that are widely perceived as manifestly inefficient» for the wellbeing of the broader society and our planet (CLOOTS 2019, p. 87). VAROUFAKIS (2020^b, 1:18:09-1:18:41; 2019, 58:09-59:11)—though somewhat less radically—agrees: to rethinking the discipline of economics in a pluralist sense, as well as to reform corporate law, one revolution in companies’ business model should entail the distribution of reasonable margins among workers (relatively to their performance, role, and perhaps seniority), adding to the suppression of any profit-concentration in shareholders’ hands. This would stand as an original and probably unexperimented form of capitalism, rather than the negation thereof; indeed, the main problem with capitalism lies with neoliberalism, brought about by the excesses of profit verticalization and consequent power asymmetries between not only the management and the shareholders themselves, but corporations comprehensively vis-à-vis other societal actors (including public institutions and semi-private initiatives such as NPOs).

¹⁸⁹⁹ And yet, it is also true that

awareness can occur at the level of local country management, functional-area management, or at the senior management level. The ways in which individuals become aware of and then take action regarding B[&]HR issues is an understudied area that has implications for how organizations in turn respond to [said] issues

– SCHREMPF-STIRLING and VAN BUREN 2020, p. 49. In fact, «[i]t is not unusual for boards and CEOs to justify a controversial action on the grounds that fiduciary duty to shareholders requires them to do it» (HART and ZINGALES 2017, p. 263), so that if shareholding becomes more responsible, the management (particularly the senior executives) may adjust its levels of attention to the broader society accordingly, and vice versa.

¹⁹⁰⁰ Cf. CRAMER et al. 2020, p. 20. For example, stakeholder capitalism would reject the theory that accords to profit legitimacy as the first corporate concern; from a people’s viewpoint, the first duty of a corporation is obeying the law (especially its substance), while profit comes in second place. This would probably make philanthropy largely unnecessary: if one does not oppress their fellow people for profit, there is no need for the former to give those fellow people back (a tiny amount of) what they had “legally” stolen therefrom – on this latter point, *see also* SHARON 2020, p. 9, and CAGÉ 2018, pp. 204-218. Cf. the infamous Archie B. Carroll’s corporate-social-responsibility pyramid, which is premised on—in the present Author’s view—misleading theoretical grounds, at GRIBNAU and JALLAI 2017, p. 80. *See further* ZICARI and RENOARD 2018, pp. 253-256. Importantly, TALBOT (2016, pp. 518-519) reminds us that a form of “stakeholder capitalism” that delivers value to the shareholders simply cannot stay alive; indeed, this means—my addition—that shareholders should not even exist, and corporate law should be entirely rebuilt with stakeholders in mind, and profit redistribution among all workers (relatedly to their level of responsibility) rather than amid the holders of nominal shares. On this last take, *refer extensively to* JOSSA 2017 as well as JOSSA 2018, chs. 3;9.

¹⁹⁰¹ *See* WEST 2018, p. 1148.

¹⁹⁰² GRIBNAU and JALLAI 2017, p. 84. *See also* VELDMAN and WILLMOTT 2019, pp. 415-417; LAWSON 2019, p. 131.

practiced and/or encouraged exploitation for a long while through their flagship corporations,¹⁹⁰³ originating a recursive causation-chain that warrants disruption,¹⁹⁰⁴ although imperialism was replaced—so to say—by *formal* equality of state sovereigns, the tax habits which were conceived for and exercised within an unequal world-society have remained macroscopically the same¹⁹⁰⁵ and still cause similar damage.¹⁹⁰⁶

One more note is due here. To my understanding, taxation is subconsciously recruited by policymakers as an emotionally distancing device in order to keep the *status quo* well alive while superficially adhering to all sorts of humanitarian, environmental, feminist, queer, antidiscriminatory, animal-rights, etc. “progressive” campaigns. Political philosophers Peter Singer and Peter Unger, among others, have long defended the existence of moral obligations on the affluent to alleviate others’ poverty no matter where they live, curtailing physical distance as a justification behind indifference.¹⁹⁰⁷ There is a tangible critique, which one could more readily exemplify through a moral obligation on the rich to renounce to their non-essential wealth to fund charities and aid programs for the sake of deflating world poverty.¹⁹⁰⁸ Obviously, poverty stands at the crossroad of an exceedingly tangled conjunction of variables which cannot be averted as easily as via money transfers, but beyond my reservations on the ingenuity of Singerian and Ungerian perspectives developmentally,¹⁹⁰⁹ societally,¹⁹¹⁰ as well as economics-wise, I sense that the core conceptual dilemma of “distancing” is well worth perusing further, insofar as it could shed light on selected

¹⁹⁰³ Refer e.g. to INCE 2013, p. 193, fn. 466; LAWSON 2019, p. 138.

¹⁹⁰⁴ See also MOLÉ 2015, pp. 429-430.

¹⁹⁰⁵ To this end, perhaps surprisingly, China is perfectly positioned: it displays both the most extensive domestic surveillance regime on the planet, and the economic strength to join the ranks of the countries which highly benefit from tax-avoidance schemes (which are, in fact, unofficially encouraged in China as well, particularly through its SEZs and SARs).

¹⁹⁰⁶ Refer e.g. to NKOSI 2019, p. 168; IYER 2017, p. 21.

¹⁹⁰⁷ See further DAVIS 2014, pp. 190-196.

¹⁹⁰⁸ See also PHILIPS 2007, pp. 187-188; LICHTENBERG 2014, p. 59.

¹⁹⁰⁹ Read also BADHWAR 2006.

¹⁹¹⁰ Read also MILLER 2004, pp. 116-118.

aspects of what is wrong with taxation today ethically and legally. In fact, what we need is political action systemically, not the mere transferring of resources; and yet, despite the sophistication of their philosophy, these Authors read not particularly sensitive to these criticisms.¹⁹¹¹ The whole engineering of “offshoring” is, to its essence, an enormous fabrication of legal crafting, built around the exploitation of distance as a device through which one may try to hide the damage they inflict to societies, both nearby and afar. If Singerian and Ungerian insights are conceptually retailored to offshoring phenomena, the systemic effects thereof become harder to ignore, in that even assuming that the offshoring industry benefits its surroundings in the short run, its systemic consequences for structural inequality worldwide cannot be dismissed. Hence, redistribution can also be phrased in counter-distancing terms, as a means towards abridging tax policies from their systemic effects on relative poverty as a global-scale plight: through these lenses, there is no such thing as a *domestic* tax policy anymore.

While almost everyone appears from the statistics to be living slightly better-off thanks to centuries of capitalism,¹⁹¹² inequality in relative terms (i.e., the “99% vs 1%” dialectic) has scaled-up to unimaginable figures with neoliberalism, so much that the true pandemic of our societies has become *being poor within booming aggregate-wealth figures*;¹⁹¹³ this awareness makes fighting this massive legalised fraud a major challenge for the upcoming generations.¹⁹¹⁴ Indeed, «[c]redit constraints do not only influence income inequality within [a] generation, but also between generations, as

¹⁹¹¹ Read also NATHOO 2001, p. 108.

¹⁹¹² See generally HAMMAR and WALDENSTRÖM 2020.

¹⁹¹³ Watch VAROUFAKIS 2020^c, 1:00:54-1:02:48.

¹⁹¹⁴ See further BERETTA 2019, pp. 71-75; check also TAPSCOTT 2018, pp. 13-14.

they induce lower income growth both at the individual and aggregate levels», and thus suffocate social mobility.¹⁹¹⁵

JACOBS¹⁹¹⁶ identified two typologies of redistributive transfers:

redistributive *between* different people or redistributive *across* one person's life. A social program providing everyone with the same benefits is an example of a program redistributive between people if it is funded through a progressive income tax with the effect that high earners are subsidizing the benefits received by low earners. A mandatory contribution scheme for old-age pensions is an example of a program that is primarily intended to be redistributive across one person's lifetime.

I would argue that another way exists for interpreting redistribution between different people: the intergenerational dimension of taxation, whose pursuance would also make across-life redistribution possible for individuals belonging to the generations to come. Indeed, an essential factor to treat people equally

requires that any distributive scheme be sensitive to the cost of each person's life to other people. That cost is to be measured by how valuable the resources and other elements of circumstances consumed—interpreted broadly to suggest also use, and so on—by that person are to those other people.¹⁹¹⁷

All in all, “reconstitutionalising” the code of capital as to cater for the needs of all people is a particularly challenging yet meaningful policy aim for today's youth, if they intend not to express their citizenship within captured States that spy on them just to occult the true, depraved roots of their own financial and non-financial declension.

¹⁹¹⁵ PALAGI et al. 2021, pp. 21-22.

¹⁹¹⁶ 2004, pp. 156-157, emphases in the original.

¹⁹¹⁷ JACOBS 2004, p. 181, referring to the conceptual elaboration by the late American legal philosopher Ronald Myles Dworkin.

Chapter 18

*Surveillance as state-corporate political structural violence
in socio-legal philosophy*



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a Beyond data protection: Privacy as dignifying autonomy and emotive emancipation

The ensuing discussion of “privacy” will be situated on the bodily experience of biopolitics: privacy as dignity, not as property (and not even as liberty per se); although the two ends are frequently over-extremised,¹⁹¹⁸ key differences should still be marked. Confining privacy to its personal-data protection aspect, and thus treating it somehow as property, is dangerous as it gives one the idea that such property—just like any other—can be traded and sold, thus renounced to or dispossessed. Instead, data privacy is treated here as a human aspiration and inalienable entitlement which cannot be relinquished, since it professes the natural informational extension of the physicality and cognition of any human being all throughout their acting in society. In our post-industrial pseudo-globalised societies where the «instrumental use of emotions is linked to support of capitalism and the market»,¹⁹¹⁹ it seems legit to remind ourselves of the urgency of cultivating market-uninvaded spheres of humanness and dignity that can feed our emotional being profoundly.

From a liberal standpoint, privacy can be defined as «a “space” free from public [and private] interference[, ...] a sacred and intangible area where each individual [i]s the absolute sovereign»,¹⁹²⁰ and in this sense, it can be equated to a self-ruled “jurisdiction”, personal space not for property, but for action and reflection. In contemporary times, action displays—unfortunately, someone would add—both an offline and an online manifestation, with most of our daily activities transposed onto a gigantic machinery we call “the Internet” (and now even the Internet *of Things*), where the mind-reality interaction is technologically before than physically mediated.

¹⁹¹⁸ See KANG and BUCHNER 2004, pp. 258-259.

¹⁹¹⁹ WETTERGREN and BERGMAN BLIX 2021, p. 159.

¹⁹²⁰ GARGARELLA 2010, p. 162.

All this online body-subject activity has a physical existence in digital storage farms throughout the Internet. Like the electrochemical neural pathways of the brain the data storage farms track, and mostly retain digitally, bit by bit, the body-subject's memory, behaviour, relationships and travel in this virtual world.¹⁹²¹

As this new memory gets wired through data transactions, storage, and sharing, it seems particularly urgent to update the boundaries of privateness and publicness, without necessarily buying into the common-placed belief that these two dimensions will stay—or have ever been—discernible.

b Financial transactions and the privacy substance of banking secrecy

Within one's assumed space for personal privacy, banking secrecy was one of the very last privacy domains for individuals in an age of pervasive surveillance, although its centrality for tax havens' attractiveness was no longer possible to dismiss. In 2009, the G20—an informal organisation—drafted a much-politicised list of tax havens, defined as those jurisdictions which could not demonstrate to having signed and implemented a sufficient number of tax-exchange agreements. Because the G20's list would have also informed the policies of IOs such as the IMF, it was strenuously resisted by small jurisdictions and criticised for its unlawful bypassing of formal domestic and multilateral mechanisms to stipulate international arrangements and instruct IOs' tasks.¹⁹²² However, those tax-exchange agreements differed from the automatic ones which are enforced today: they

¹⁹²¹ CHISNALL 2020, pp. 501-502.

¹⁹²² *Refer to* VIOLA 2014, p. 122.

proved to be almost wholly ineffective while the system of creating [them wa]s extremely cumbersome, time-consuming, and expensive. To operate an existing [agreement], a tax authority [needed] first present the jurisdiction requesting information with evidence of fraud and tax evasion linked unambiguously to a person resident in their domain—precisely the kind of evidence that is difficult to obtain because of tax haven secrecy. Tax campaigners claim[ed] that only a system of automatic exchange of information, such as the one introduced by the EU, [would have had] the necessary deterrence effect and at the same time provide the “smoking gun” evidence that the [information-exchange] system need[ed].¹⁹²³

This burden-of-proof reversal is exactly what happened, and whilst it greatly improved authorities’ tools for combating tax dodging, it furthered a dehumanisation of data gathering which enforced surveillance upon billions in order to catch the few (and not even prioritising the by-far most problematic ones).

It is unsurprising that a decade ago already, PALAN et al. were highlighting how suppressing secrecy per se—automatically or on demand—is not decisive if the architecture of financial governance and business practices is left unaltered. This would have held true even if the international community were able to pressure tax havens into ending their secrecy policies, because a major source of tax-base erosion, MNCs’ tax-reduction agreements with governments, would have survived (read “thriven”) regardless. *A fortiori*, it holds even truer in a *realpolitik* scenario where certain jurisdictions cannot be coerced into policies they are unwilling to uphold, to the effect that the only secrecy that “cooperating countries” can curb is that of private citizens operating at least partly in non-havens – if they just operate and live across havens, the latter will not exchange meaningful data about them anyway.

Another source of avoidance which would have continued to flourish is the tax-ruling abuse, already hinted at *supra*, through which a corporation

¹⁹²³ PALAN et al. 2010, p. 244.

secure[s] a tax ruling in one country that gives [said] corporation written permission to exercise an abusive interpretation of the country's tax law in a way that ultimately enables the [MNC] to underpay tax in other countries where it operates. [...] To make matters worse, instead of a formal tax ruling, the same effect may be achieved by an informal tax ruling such as an information letter [...].¹⁹²⁴

It seems cogent to specify that such atypical “rulings”, either formal or informal, are not issued by courts of law but rather *pre-emptively* by administrative authorities, so that they stand closer to (captured) executive acts than to judicial pronouncements *stricto sensu*.

c The call for a renovated SC addressing surveillance in light of contemporary (and possibly forthcoming) technologies

IHRL protects individuals' privacy as a primordial, ancestral, emancipatory aspiration of all human beings within non-nomadic societies,¹⁹²⁵ as well as one of the highest expressions of human dignity.¹⁹²⁶ In Kantian terms, human dignity stands for humans' capacity (or right?) not to be treated as mere means to an end but rather as *the end in itself*,¹⁹²⁷ for example—I would say referring to the contemporary human condition—by not having their identity captured and released, coalesced, and disaggregated just for the sake of discerning patterns of use for corporate profits or state surveillance. Treating identities this way resumes the most profound reason why Kant, despite being often acknowledged as the most excellent modern cosmopolitan philosopher, rejected the idea of a world government as a soulless exercise.¹⁹²⁸

¹⁹²⁴ ATEŞ et al. 2021.

¹⁹²⁵ Check e.g. ÇINAR 2020, p. 27.

¹⁹²⁶ See *ibid.*, p. 1.

¹⁹²⁷ See ULGEN 2017, p. 70.

¹⁹²⁸ Refer to *ibid.*, p. 66. See further ERMAN and KUYPER 2020, pp. 323-324, according to whom recent literature on global democracy circulates around two nodes: a civil society view and a statist view [...]. The former [...] sees civil society as either exercising international decision-making in democratic ways, or fixing the democratic deficits created by [S]tates

Drawing on his thought and only slightly departing from its absoluteness, my submission here is that no world government makes sense *insofar as citizens' rights are tied to a jurisdiction* and thus to a citizenship and a territory: *they* shall go global first, and only later—if ever—followed by global executive institutions.

Back then, Kant could not know about today's transnational bureaucratic formations, and he could not be wary of a detached world government made of obscure and market-prone bureaucrats, but he was already persuaded that dignity can only be upheld by a community of States in which each State respects other States' citizens. Respecting (others' and one's own) citizens means, *inter alia*, that trust in (and by) foreign authorities should be two-way deserved, and never automatised *as a means to an end*. This is particularly true in our age of big data: «[o]nce the technology is developed, *can we trust* those who will make use of it to do so for benevolent rather than malevolent purposes?». ¹⁹²⁹ Indeed, not only the «inherent ability of such technologies to capture sensitive details from information that, to the average [individual], might seem mundane or meaningless» ¹⁹³⁰ should be factored in, but their human employment in the form of state secrecy, administrative discretion, prosecutorial activism, or persecutory strategism adds complexity to complexity, and risks to risks, warranting a prudential approach in any non-emergency scenario. This is why it is so essential to detach the international tax discourse from any semblance (and parlance) of emergency, urgency, and the like: circuits of lawless or right-derogative exceptionalism shall be rejected *ab initio*.

through representation in the policy process of IOs [...]. The latter view, operating in a Kantian vein, suggests that a principle of state consent should ground a global democracy in which democratic [S]tates—*qua* representatives of their citizens—construct international laws, treaties, and IOs that bind [S]tates and their citizenry.

¹⁹²⁹ ULGEN 2017, p. 77, emphasis added.

¹⁹³⁰ BURRI 2019, p. 87.

Following up to the above, I can posit that privacy is a person's exclusive circle of trust,¹⁹³¹ whose perimeter is drawn by each individual according to their own will, and whose violation cannot be directly outsourced by a State to other sovereigns: the SC binds an individual to its State only, and only said State may, relying on the contract itself as a justification (under pre-determined conditions, and again, avoiding exceptionality claims), break into mentioned circle and redefine its perimeter. Otherwise put, privacy is a matter of “relational” balance between a citizen and their State of citizenship: if any other sovereigns aspire to step in, they first have to establish a meta-contractual relationship—in short, a new relation of citizenship—between themselves and the citizens of the foreign jurisdiction. Indeed, privacy cannot be sold, nor waived, and thus its violation cannot be outsourced or delegated, either; the presumption shall be that any citizen's activity is private, *unless otherwise stipulated as a clause to a SC*. A citizen of a State may entertain commercial, trade, and investment relationships with other (citizens of third) States, and even conclude a number of formal transactions related to such activities in order to enable or facilitate them, yet these arrangements *ad regulanda negotia mercatorum* should never be confused to a wholesale yielding of citizenship rights in favour to said third jurisdiction – privacy standing exactly as one of those “citizenship rights”. Yet, these SC-skipping trends are anything but surprising, as

[p]olitics has not only become dysfunctional and corrupt in the face of massive inequalities in wealth and power, it has also been emptied out of any substantive meaning. At the same time, under neoliberal regimes of surveillance, citizenship has become depoliticized [... T]he political identity of citizens *loses its public character as it becomes a function of new digital technologies* [...] that reduce all citizens to suspects and objects of state control. Rather than being defined through one's relations to others and the larger society, citizens are increasingly defined under regimes of surveillance through an amalgam of unlimited

¹⁹³¹ See also ÇINAR 2020, p. 27.

biometric information [...] assembled from technologies once conceived for criminals. [...] *As the line collapses between corporate fascism, authoritarian power, and democratic governance*, repression intensifies and engulfs the nation in a toxic climate of fear and [behavioural] self-censorship.¹⁹³²

Hereby the link between customary laws, chilling effects, and the legal concept of citizenship is debunked: if being stripped of once SC-tied rights becomes routine, after-surveillance behaviours will result from self-restraint and eventually customise, thus becoming the novel model-behaviour of reference for all, our expected “code of sociality 2.0”. This despicable outcome is conceptually worsened by evidence that citizenship entitlements which should be made global to address this problem, are easily sold to the powerful and the wealthy nonetheless. In the pre-exchanges era of tax evasion, at least, only tax havens marketed themselves by offering price-based “packages” of all-inclusive residency and/or citizenship (from the bronze to the diamond package, so to speak). Today, *virtually all* jurisdictions appear delighted to sell their citizens’ rights away just to favour a global project of surveillance and fake justice that does little to address the roots of tax inequality while widening the gap between “those who can” and all the rest.

d Citizenship as the biopolitical mantra of security-powered, obsolete SCs

That the Leviathan is in need of a reform—and with it, the whole “institutional anthropology” of the State—had been already theorised by Paul Virilio, whose work, four decades ago, was long-sighted enough to demonstrate how the

¹⁹³² EVANS and GIROUX 2015, pp. 202-203, internal citation omitted, two emphases added.

concern with national defence ha[d] become supplemented by national *security*, a concern with threats *to* our way of life and threats emerging *from* our way of life. [...] National defence is about shields, defending and extending territory in a world where sovereign [S]tates are the enemies you need to be worried about; security is about a threat horizon that is both inside and outside the [S]tate, threat orchestrated by non-state actors [...] or that] emerge from the way we live [...].¹⁹³³

One of the threats originating haematopoietically—i.e. from within the State—emerges from States' control over “their” biopolitical bodies by means of a legal code: citizenship. To reverse Carl von Clausewitz's celebre aphorism,¹⁹³⁴ battles of citizenship over biopolitical bodies are the continuation of war by other means: they mark the politics of spatiality between a predetermined inside and “its” outside. Yet, the most troublesome step is the one that follows, which encodes the whole humanity under the same pretended aspirations and establishes the unfit, the in compliant as *common enemies of mankind*, without first hearing from either the supposed “enemies” or the supposed “mankind” what their reasons and priorities would be, respectively. If they did, they could realise, for instance, that those “enemies” have no intention to be surveilled while “mankind” keeps avoiding taxes under their “business-as-usual” normalisation, and that perhaps “mankind” is far less representative of all global citizens compared to those supposed “enemies” – in fact, it is just an entitled minority (“the 1%” or less) used to reflect their own sectarian identity and to project their own élitist agenda onto all others.

Once reached this step of sorting global policy addressees into those who are compliant and those who are not (biopolitics by transnationalism – or by internationalism, depending on the actual shape of the agreements), the

¹⁹³³ LACY 2017, pp. 169-170, all emphases in the original.

¹⁹³⁴ «War is the continuation of politics by other means».

bio-political imperative removes the inevitability of epiphenomenal tensions, nothing and nobody is necessarily dangerous simply because location dictates. With enmity instead depending upon the complex, adaptive, dynamic account of life itself, what becomes dangerous *emerges* from within the liberal imaginary of threat. Violence accordingly can only be sanctioned against those newly appointed enemies of humanity – a phrase that, immeasurably greater than any juridical category, *necessarily* affords enmity an internal quality inherent to the entire species [...].¹⁹³⁵

In other words, policy addressees (e.g. those of OECD's AEoI policies in ITL) are not guilty *by citizenship* – which would help them seek rehabilitation or handle their case domestically. They are guilty transnationally or internationally, *as pure biopolitical servants* to unaccountable supra-SC claims of righteousness, bearing citizenship-independent obligations and automatically endowed with *omni-territorial searchability* but no corresponding-in-scope rights.

With the macro-crystallisation of the global order under the UN Charter and the *relative* geopolitical stability ensuing thenceforth, violence has obviously not disappeared from social human endeavours: reasserted in economic terms, it simply transmigrated from the military-territorial sphere to the meta-territorial imaginary of “market shares”, battling over natural resources just like before, but also over humans’ attention, time, sentiments, “democratic” votes, and... data. Since—as Foucault most acutely explained—surveillance is a manifestation of power over bodies that magnifies the embeddedness of biopolitical violence within the subjects’ everyday life, when biopolitics by citizenship metamorphosises into biopolitics by transnationalism/internationalism, *a farcical reversal of cosmopolitanism* is enforced onto all global citizens treated as factually citizenship-stripped biopolitical entities. For that to concretise, a supranational cupola legitimises itself towards separating a new inside from a new outside through law as capital, a new legality from a new

¹⁹³⁵ EVANS 2017, p. 86, second emphasis added.

illegality, with no election, no representation, no parliamentary oversight; this is conceived through appraisals of companionship and likeness, instantiated under the instinct of joined or dissimilar visions of the global society, who it should serve first, and where it should be heading to.

And yet, under a democratic light at least, citizenship means that legality and illegality are determined by a law which is placed, directly or (almost always) indirectly, under the control of the citizenry, that is contingent upon the latter's preferences and inscribed into the direction identified by it; pursuant to this model, rights and duties coincide either territorially *stricto sensu*, or territorially by extension, that is to say, depending on citizenship wherever the relevant facts occur. Biopolitics by transnationalism/internationalism disrupts this equilibrium, exacerbating the already deviant power-manifestations which are so typical of biopolitics by citizenship: under the former, surveillance comes to be portrayed as *a necessary compromise in order to identify the enemies* of a supposed global order which the global citizenry has neither voted for nor vetoed, and that such global citizenry is subjected to without being afforded the normal counterbalancing, citizenship-rooted substantial remedies and procedural guarantees. The reader must have appreciated the resonance between the *necessity* of such a compromise and *necessity* as a criterion for transforming extensive HR violations into lawful enterprises.

To put it straightforwardly: we are presented here with global duties *because of one of the country-citizenships forming the global citizenry*, but missing out on global rights *because global citizenship is not enacted and country-citizenship's rights are not extended to the global community*. In sum, I am discussing “new global citizens” who are suddenly prevented from exercising half of the prerogatives of their normal, State-based citizenship: their duty-correspondent (domestic) rights.

e Pretentious legislating endeavours as mythic violence: When necessity is not necessary

In Benjaminian language, States' unremitting recourse to *lex ferenda* should be received as a standard manifestation of the mythic (because fictitious¹⁹³⁶) violence of the State, that keeps projecting its apparent authority through ordinary legal devices by pretending to satisfy the eternal, unanswerable demands of its subjects. State violence presupposes itself as necessarily ineluctable, and it is exactly in this pre-constitution that its mystery and tragedy lie:

The “making” of law does not reflect an objective state of things; instead, it signifies the installation of a limit (*Grenze*) that did not exist before, but which nevertheless presents itself as always having been there. [... T]he penalty imposed [...] by the gods is not a simple punishment resulting from a transgression of the law, but amounts to the violent institution of an originary division between men and gods, which, from the moment it is effectuated, presents itself as eternal.¹⁹³⁷

As a result, this violence is mythic but also somehow mystic, upon residing in ungrounded belief and commonly experienced acts of faith, not less than in rites of transcendence. States' satisfaction of their subjects' demands is indeed an overpretention: the violence of the law does not rectify societal deviations which stand as harmful to the masses; rather, the empirical ends of the legislator are later to be attained by means of legal arbitrariness, as much as power expressionism through distorted, paternalistic, “aggravated” law. This pervasive and subtle violence is, for Benjamin, «the very fabric of the world»,¹⁹³⁸ and it embeds its unresolved problematicness. The oppressed need to be made aware of their subordinated

¹⁹³⁶ Meaning “built on fiction”, and not “inexistent”: see MARTEL 2017, p. 20.

¹⁹³⁷ MILISAVLJEVIĆ 2012, p. 4.

¹⁹³⁸ MARTEL 2017, p. 24.

condition,¹⁹³⁹ rather than having their realityedulcorated (chances for redemption being offered as achievable), or their thoughts manipulated.

Surveillance indeed manifests itself as showy ostentation of mentioned distorted *power expressionism* that articulates the language of necessity, of claimed ineluctability. In fact,

the arbitrary imposition of law and rules (erroneously attributed to higher and transcendental principles) means that, in effect, the law is enforced haphazardly and according to the whim and interests of those in power.¹⁹⁴⁰

it is the deformation of the law made practice, its transmutation into a hypocritical, self-interested, and easily adjustable state of necessity whose potential speaks of perpetuity.

For Benjamin, the [S]tate is marked by a condition of *permanent* anxiety about its status as legitimate, precisely because of the way it falsely attributes its authority to sources that it has no true access to,¹⁹⁴¹

sources that I may refer, in the case under scrutiny, to the pretentiously distributional and delegated authority of transnational decision-making, which in fact turns out groundless and conservative in most of its facets.

Domestic decision-making is a social contractual arrangement between the delegators and the delegated, and any extension of this instruction beyond the State's borders can only be deemed legitimate insofar as it is sanctioned by both parties to the SC. The ubiquity of mythic violence compels citizens to seek refuge into peaceful agreements,¹⁹⁴² including that with a protector, the State itself, in the form of a

¹⁹³⁹ Refer to ORDÓÑEZ 2019, para. 9.

¹⁹⁴⁰ MARTEL 2017, p. 18.

¹⁹⁴¹ Ibid., p. 19, emphasis added.

¹⁹⁴² Refer to *ibid.*, p. 21.

Leviathan; and yet, its acting is so captured and obsolete that *the threat has come to originate from the very source of its supposed solution*. Benjamin has never really engaged intellectually with the idea of Leviathan, but this evocative concept transfigured, through Benjaminian thought, into a renovated search for protection – though no longer from the old Westphalian security threats: if surveillance is violence, violence is deviated law, the State exercises monopoly over legal production and enforcement, and the violent deviating capture extended to the State, then the latter is paradoxically called upon *to protect citizens from itself*, to allow for a reform of its foundations, of its ancient SC as a renewed temporary state of uncapture.¹⁹⁴³

Instead, picking taxation with illustrative purposes, the State rearranges the capitalist paradigm of captured exploitation under the flag of a pretentiously negotiated fairness (“we agreed that we need to find out who cheats on taxes and make them pay till the last cent”), whilst in fact leaving the intimate code of exploitation—Anglo-Saxon corporate law and its unregulated or misregulated globalisation—untouched. To put it bluntly and perhaps slightly simplistically, but fundamentally in truth, the contemporary State opts for enhancing tax-related surveillance for the 99% whilst leaving neoliberal inequality through liquid capital and corporate tax avoidance substantially unamended.

Uncapturing the State is not just a quest for citizens’ ideal emancipation, but allows for an equally salient device of commonality and sociability: recognition. For Honneth, the State is the guarantor of the possibility for citizens to establish connections based on mutual recognition, which is in itself a concrete emancipatory act because it is only when we are recognised as right bearers that we internalise the

¹⁹⁴³ After all, it is Benjamin himself to remark that institutionalised violence will never cease but only transform itself perpetually (*see* *ibid.*, pp. 25-26); this means that the response to it—also as embodied by the Leviathan—shall change accordingly, on a continuous basis – seeking to “cushion the blow”.

urge to afford others specular rights.¹⁹⁴⁴ And if we believe we should ourselves deserve and afford others rights regardless of what is current, then we are capable of acting upon rights deprivations via imagining alternative worlds through organised struggle (*Kampf*).¹⁹⁴⁵ This is the role of revolutions, which in our age are to be conceived as primarily cognitive, to oppose

status quo-reinforcing false consciousness[, which] might not just be a bad guide for deciding whether active support of social practices renders them progressive, but might extend so far that even our faculties of theorizing and imagination are chained, ultimately, to reproducing the *status quo*.¹⁹⁴⁶

In *One-Dimensional Man*, Marcuse had warned us about this annihilation: a society is not enslaved when it is mastered by identifiable rulers who can be fought against at least ideally, but when the slaves are subconsciously brought to believe they are getting the best-possible deal, and are thus no longer prone to strive for any better. This tenet encapsulates the post-Marxist (relative) contemporaneity of Marcusean political philosophy compared to those of, e.g., Adorno and Horkheimer,¹⁹⁴⁷ and the challenge it implicitly launched against States, too. It wrangles over conformity, homologation, factually totalitarian democracies,¹⁹⁴⁸ and neoliberal public institutions, whose influences are anti-dialectically «absorb[ed ...] without contemplation [... and reproduced ...] through social fragmentation». ¹⁹⁴⁹ It anticipates political moves such as those we have recently witnessed over and over again throughout the West, for example in the US where the Democrats pretend to side with the tax challengers of the 1% while asking the latter to submit *reasonable* demands which could be processed

¹⁹⁴⁴ Read e.g. CAMOZZI 2012, para. 8.

¹⁹⁴⁵ Refer to *ibid.*, para. 11.

¹⁹⁴⁶ FREYENHAGEN 2015, p. 143, emphases in the original.

¹⁹⁴⁷ Read further ARONSON 2014.

¹⁹⁴⁸ Refer further to RITIVOI 2014, pp. 133-135.

¹⁹⁴⁹ BAILES 2020, pp. 37;69.

within and somehow accepted by *the system*.¹⁹⁵⁰ These are politics of small changes that never subvert the system,¹⁹⁵¹ and rather allow it to found its legitimacy on the existence of those very changes, sold to voters and taxpayers as testimonies to the existence of free opposition whose work can and in fact leads—so the élite emphasises—to tangible outcomes.

To retrieve Honnethian terminology, when a State is captured, it fails to act as a guarantor of recognition among its citizens, so that the viability of mentioned recognition as social currency is compromised. In that context, establishing external norms of conduct proves insufficient: it is mutual recognition that generates normatively original behavior, and not the rhetoric of leaders; the State should act as a guarantor, but does not generate recognition, and when it claims an ability to do so, the pseudo-recognition it generates will be illusionary¹⁹⁵² and deviated. Neoliberally, and critically “correcting” Honneth, market-shaped (and State-incorporated) «norms of social freedom themselves could be implicated in generating a widespread unwillingness to fight for an ever more perfect realization of these very norms»,¹⁹⁵³ thus chilling recognition-driven norm-generation rather than supporting its functioning. For example CSR, through which corporations set an ethical bottom-line to then display a beyond-expectation commitment to society, is misleading in that it provides for an inadequate self-issued standard of ethics as moral reference (the bottom-line) to then free ride just above it, including through tax avoidance – rather

¹⁹⁵⁰ See FORMAN 2017, p. 46.

¹⁹⁵¹ Read extensively BOX 2011, p. 182.

¹⁹⁵² Indeed, in Honnethian social philosophy,

[i]f the law had any function at all, it was often that of retrospectively legalising improvements that had already been gained through social struggles. The motor and the medium of historical processes of realization of institutionalized principles of freedom is [...] not in the first instance the law but are the social struggles for their adequate understanding [...].

– BROEKHUIZEN 2013, p. 112.

¹⁹⁵³ SCHAUB 2015, p. 125.

than simply respecting the rules.¹⁹⁵⁴ And if «the social security that workers gained through the introduction of the welfare [S]tate did not transform the sphere of labor into a sphere of social freedom»,¹⁹⁵⁵ that is definitely due to taxation as well, i.e. to it being enforced as a tool for extraction (and, it is defended here, surveillance) rather than recognition-based liberation.

Recognition values the emotional substratum of justice,¹⁹⁵⁶ while (welfare) surveillance, by definition, hinders the expression of emotions, arguably impairing Honnethian recognition in turn (*Mißachtung*). In my view, it should thus be listed amidst the “pathologies of recognition”,¹⁹⁵⁷ together with borders for sorting natural persons’ room for action (and recognition): «the full articulation of one’s self-respect necessitates a borderless dimension to rights – [a cosmopolitan extension of legal rights] – so that one’s agency could be expressed throughout the world».¹⁹⁵⁸

f Tax evasion as an emancipatory quest for justice, with surveillance as attempted restoration

Borrowing once again from Benjamin, who in turn was partly referring to Georges Eugène Sorel’s works, one may allocate to States the same struggle workers engaged in when striking: they did «not fundamentally challenge the hierarchy of capitalist forms of production. Instead they simply tr[ie]d to readjust the way resources [we]re distributed in that system».¹⁹⁵⁹ Appreciated through this prism, tax evasion by the 99%, *if and only if the State randomly subjects them to generalised and right-stripped tax-predicated surveillance whilst leaving unaddressed the fundamental*

¹⁹⁵⁴ Check also VISSER and ARNOLD 2022, p. 12.

¹⁹⁵⁵ JÜTTEN 2015, p. 199.

¹⁹⁵⁶ See D’AVILA and AGOSTINI SAAVEDRA 2011, pp. 326-329.

¹⁹⁵⁷ On this expression, refer further to HARRIS 2019, pp. 53-60.

¹⁹⁵⁸ BRINCAT 2016, p. 20.

¹⁹⁵⁹ MARTEL 2017, p. 22.

asymmetries and disparities caused by corporate tax avoidance, resembles «a nonviolent action, a form of resistance to endemic forms of state and capitalist violence»¹⁹⁶⁰ where States and capitalism functionally come to coincide. This way, «a deliberate separation from the law»¹⁹⁶¹ becomes the manifesto of renewed societal emancipations and quests for *authentic* justice; ethical anarchism¹⁹⁶² by the 99% resists captured capitalist degeneration benefitting the 1% masked as aspirational lawmaking, embodied here by the non-solutions advocated by the OECD (members) and the like. Indeed, drawing on Foucauldian reflection on modernity, tax surveillance should be distrusted

not as part of a progressive trajectory of growing individual liberty but instead in terms of growing constraints on the freedom of action of individuals, who become subject to various practices designed to make them self-policing, model citizens.¹⁹⁶³

Eventually, Benjamin's critique of state violence questions «the ways in which authority is created, how we make decisions and on what basis»;¹⁹⁶⁴ it concludes that because neoliberal exacerbations of capitalism are prone to accommodate minor, superficial quests for justice whilst replicating unabatingly their overall and profound patterns of subjugation, action through law and, paradoxically, through *non-law* is called for. Although I disagree with Benjamin that only the most radical stances should be welcomed against capitalism because the latter is inherently evil, I do concur with him about the unserviceability of downward, patronising, and possibly even counterproductive compromises like the OECD's against the wider context of neoliberalism. Indeed,

¹⁹⁶⁰ Ibid., p. 23.

¹⁹⁶¹ Ibid., p. 25.

¹⁹⁶² See *ibid.*, p. 24.

¹⁹⁶³ LIKHOVSKI 2007, p. 667.

¹⁹⁶⁴ MARTEL 2017, p. 27.

[o]nce we get into such a stance, we are returned to a relationship with (false) ends; we become re-ensnared within the operations of violence and, insofar as [neoliberalism] will always have both a greater affinity to this violence as well as the greater stock of money and weapons, [it] will always win this fight.¹⁹⁶⁵

Regulatory capture, and accompanying surveillance, ultimately fit into the puzzle as neoliberal élites' last cards against societal emancipation and resistance; surveillance, in particular, is about preservation and hoped-for containment.¹⁹⁶⁶ Those cards are played to several ends, but especially to keep the latest generation under a pall of annihilated, distrustful, and thus catatonically discouraged *qualunquismo*:

For Benjamin[,] the very concept of fate is a capitalist conceit, a sense of inevitability that causes despair in its enemies and allows the status quo to carry on. But beneath that bold assertion of fate lies, once again, capitalism's greatest anxiety. It is [...] capitalism's greatest vulnerability that is not based on any real substance, that *it must "jut manifestly and fearsomely into existence" in order to exist at all*. Here, too, its necessary turn to violence is both its most fearsome weapon and the sign that it is not, in fact, invulnerable, and that nonviolence and the breaking up of capitalist systems are possible. This is not to say that capitalism or some other forms of mythic violence will vanish once and for all [...]. In fact, a politics of pure means—an anarchist politics, in other words—must remain constantly engaged with a kind of endlessness, not just in the sense of rejecting false ends but also in the sense of not assuming that those ends will actually end. For Benjamin, it could be said that nonviolence is a practice, a way of life and a method of engaging with material reality. *We have all already been practising it for all of our lives but we always have the opportunity to turn that practice into something bigger and more collective*. The more widespread and sustained this practice, the more we can flip the relationship between violence and nonviolence wherein it is violence that is occasionally and intermittently practiced and wherein nonviolence dominates and prevails, *at least for a period of time*.¹⁹⁶⁷

¹⁹⁶⁵ Ibid., p. 28.

¹⁹⁶⁶ EVANS (2021, pp. 132-133) paints the phenomenon via these evocations:

Physically separated from a world it could no longer understand or control with any political and ethical surety, liberal regimes increasingly compensated for their distance by carrying out [...] surveillance[] and containment through digital means. [...] The political and philosophical significance of this should not be underestimated. The strategic confluence between the remote management of populations and new modes of violence-at-a-distance prove[] to be indicative of the narcissism of a liberal project that exemplifie[s] the worst excesses of technological determinism and its full abandonment of any serious claim to humanism.

¹⁹⁶⁷ MARTEL 2017, pp. 29-30, three emphases added.

Benjamin was probably thinking of more corporeally gruesome situations; hence, most certainly he could not have conceived of an application of his critique of state violence to a field as apparently “cold” and distant from the corporeal fighting arena as that of taxation. However, reflecting carefully upon it, one easily realises that tax enforcement is also a story of police, criminal law, incarceration, seclusion, and marginalisation, which *occasionally hits the rich but routinely targets the poor*, ending up worsening the very discriminations States always claim to be intentioned to waive.

I believe that Benjamin’s profound philosophical and sociological legacy may shed meaningful light on the underground dynamics of StT and therefore, ultimately, of corrupted surveillance capitalism itself. His ostensibly anarchist surface as *pars destruens* conceals a rather sophisticated *pars construens* that is worth considering, although he himself warned about its transient nature. Despite this instability, it is my argument that nonviolence should be translated into a new SC which serves as a transitional bridge until another contract is urged, with this scheme expectedly replicating itself unendingly.

Pure means will never suffice, and violent ends will never placate or entirely exhaust themselves, but *any* violence may be temporarily resisted through a *dedicated* form of nonviolent practice that empowers the redefinition of the function of the Leviathan within *each* renovated contracting that invests the whole of our society.

Chapter 19

*Uncapturing (or recapturing?)
the Surveillant Contract*



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As Dr David Murakami Wood, [...] representative of the [SSN], observed: “We exist in a society of a kind of tacit social contract where we expect to be free and to have those freedoms protected and *the main reason for security is to protect our rights* to go about our daily business unhindered. Where that protection starts to remove those freedoms themselves, I think that tacit contract is challenged”.¹⁹⁶⁸

a Absolutism, supernaturalism, and the advent of God-free capital as nihilism

That of “social contract” *between natural persons*, most often components of the same political community (or “polity”), is a notion almost as old as humanity itself; it has been elaborated upon and undergone countless mutations over the centuries, taking on additional pseudo-legal connotations with modernity, when laicism, anti-absolutism, concepts of “citizenship”, formal(istic) equality, and thus HR discourses (re-)gained prominence.

The prominent reason why European absolutist SCs in Early Modernity started to collapse owes to the decaying sacrality of the king – not to mention emperors, popes, caliphs, or any other worldly authority, who found it increasingly challenging to root themselves into divine ascendancies. And yet, kings’ desacralisation—or even democracy—has not immediately accounted for or resulted in equality of means, or displaced élitist designs to recreate their own circles of quasi-slaves. Supranatural time is articulated and spelled by humans through the promise of eternity, but what if reason causes such horizon to fall, and life becomes an end in itself?¹⁹⁶⁹

¹⁹⁶⁸ UK House of Lords 2009^b, para. 104, emphasis added.

¹⁹⁶⁹ Most recently, *refer e.g. to* ENGEL 2021 (reviewing *L’Occident aux prises avec le temps* by François Hartog, October 2020).

Coherently with this new toxic yet understandable anxiety of earthly-life confinement, the only metamorphosis which actually materialised invested money as the new symbolic generator of *all* possible practical and metaphysical values;¹⁹⁷⁰ to enter the new aristocratic circles, one needs now to be born within them *and/or to pay for admission*, to an extent that could probably never be traced before, at least in terms of collapse of the public into the private (and vice versa). This way, a new capitalist class has risen to prominence and come to dictate the conditions underpinning SCs, to its exclusive money-measured benefit, no sense of the limit, and, in fact, no limits whatsoever – *especially on the legal side*. Tangentially, yet tellingly, once's *mecenatismo* has turned to patronising “charity” and advertisement-led pseudophilanthropy, with little to no genuine solidarity left for either capital-free scientific inquiry, or self-standing pursuit of potentially universal Beauty disenchained from meta-economic rationales. *Neoliberalism has penetrated us profoundly, captured our imaginary and mindset, intoxicated our relationships, joined the darkest declensions of our bioanthropological nature, and hired us as co-agents of its own corrosive, self-destructing, nihilist mission.*

b From atomistic to relational social contracts

Although originally transposed into modern-politics literature monolithically and self-servingly, the “identity” of SCs, their inherent constitution, slowly metamorphosised into a dimension of necessary *and desirable* relatability and relatedness among peer-humans, built on *what we are profoundly*, i.e. on subconscious

¹⁹⁷⁰ Refer also to GALIMBERTI 2011, p. 132; GALIMBERTI 2010, p. 122.

relations of recognition and trust¹⁹⁷¹ (in ICL terms, one may perhaps draw a conceptual parallel with *opinio?*) never agreed upon per se, but on which the law has later codified the legitimacy *and desirability* of its binding powers. It is trust rhetorically employed to *enforce itself*, but at least it no longer descends from hyper-human (e.g. divine) sources of legitimation: it is rather relational *among supposed peers*. Indeed,

in this type of society, trust will never be all-encompassing enough to work entirely without a legal system to reinforce it. We therefore still need the law but the right type of law, one that does not dissect holistic relations and reduces them to binary ones, but one that “follows” and even “enhances” transitive and dynamic network foundations.¹⁹⁷²

Clearly enough, the law is moving in the opposite direction; the hype surrounding “blockchain solutions” for every single aspect of our existence stands as a vivid exemplification of this trust-automating trend.

c Technological intrusions: is success meritocratic? Can we give away with trust?

Most recently, our lives came to be defined after technologies like the Internet and AI, whose centralising and decentralising (depending on how they are used, and whom by, and for what purpose) prerogatives are so powerful that any framing of SC cannot ignore these developments: they shape what we do, how we are, and *the way we (mis)trust life, and others*. A few among these technologies bear unmistakable revolutionary potential, distributed ledgers first among them; are trust and delegation no longer necessary to perform most legally binding acts among peers and between citizens and their State?

¹⁹⁷¹ See DANIDOU 2015, pp. 49-50.

¹⁹⁷² Ibid., p. 51.

Different IR theories, *as always*, propound divergent views on the issue, but what one can take as a given is that no SC will prove immune to challenge on the wake of all these revolutions' combined effect – so rapid, so extensive, so *foundational*. One problem is that technology is born neutral (most times) but immediately appropriated by minded forces, which in contemporary societies tend to be primarily market-aligned; the same occurred to these transformations, of course. This way, trust, outsourced to machines which are supposed to “know us” better than we do, becomes largely unnecessary, in what one can deem *a fortuitous coincidence* with the instances of neoliberalism. The latter was meant at emancipating individuals while making them responsible for their own living conditions, under slogans such as “will is power” or “working hard will buy you a decent future”, because we would live “in a meritocratic society” where “if you fail, the fault is yours, and yours only”.¹⁹⁷³ The same, of course, reverberates in the legal field: “if you commit crimes, you—implying no one other than you—are at fault”.

With neoliberalism, when things go wrong for those who are “left behind”, general wisdom deduces that the latter have caused the problem by being unable or unwilling to prevent it (in sum, undeserving second-class humans), but when things go the same way for the 1%, it would be because “you know, life happens”, and taxpayers' money should cash in. Because the unsettling consequence of such a mindset is that economic discrimination is thought of (and taught in business and law schools) as “fair”, societies easily turn to “merit-pretending dictatorships” whose

¹⁹⁷³ At odds with this “internalised” (because daily forced onto all of us) general wisdom, wealth is mainly about combining two parasitic elements inherited from one's family/dynasty/tribe over time: movable/non-movable assets (especially real estate), and consolidated networks of relationships, ties, outstanding favours, contacts, past secrets to be mutually kept hidden, titles, affiliations, etc. Both of them have virtually nothing to do with the inheritors' own merit acquired through academic outcomes, labour efforts, and personal character (the latter being, in turn, not wholly meritocratic, but mostly genetically determined). In other words, “becoming rich” through honest labour alone, starting from seriously disadvantaged backgrounds, is close to impossible. For one historical exemplification, *refer to* PIKETTY et al. 2014.

founding rationale can be discursively legitimised and eventually transposed into law. In fact, reality is that élitist circles *take it all* but this has not stopped them from capturing the general imaginary with this regime of pseudo-egalitarian (“we are all born free and equal”, “opportunities are there for all *if one wants* to pick them up”, “if you work hard enough, you will eventually get there”, “well if they got it that means they deserved it”, “ok but have you worked as smart as them?”, and so forth) legalistic humiliation.¹⁹⁷⁴ Trump himself, when publicly probed, used to highlight the cleverness of his tax-avoidance strategies.¹⁹⁷⁵

d Towards *Anarchia*: Are we doing it without trust, again? Outsourcing relationality to monitoring

As gaunt as it sounds, individuals have been gradually encouraged to trust themselves only: *their own* personal (intellectual, emotional, material) resources, *their own* (recourse to) technological devices, and the righteousness of *their own* will. Along this process, the State has been gradually deresponsibilising itself and the entities it regulates, including corporations, making the fate of human beings dependent upon (i.e., the responsibility of) their choices alone.¹⁹⁷⁶ Attributing responsibility in such a manner is obviously simplistic, and does not account for visible and invisible choice constraints which come upstream in the choice-making cascade.

To make one step further, it seems relevant to distinguish between SC experiences subsumed under different civilisations and legal roots. In Western political

¹⁹⁷⁴ See also GRAETZ and SHAPIRO (2005, pp. 177;235), describing how Americans still tend to buy into the middle-class meritocratic fairytale and to be deceived into thinking that untaxed or lightly taxed inherited property is fair because the rich “must have worked hard” to build their wealth in the first place and thus they shall have supposedly “deserved it”. In fact, what America’s élite displays is exacerbated *patrimonialism*; for a critical reading of this terminology, check BAKKER 2018.

¹⁹⁷⁵ Check also BROWN 2018, p. 77, ent. 39.

¹⁹⁷⁶ See also BAKKER 2020, p. 7.

philosophy, as introduced *supra*, the SC was originally understood as value-neutral, or even worse, value-transparent. “Each other” was simply not a valid framework of reference: the Contract was all about survival, and definitely not premised upon considerations that caring about one another is ethically right, nor that—most importantly here—it is ethical *for the State* to care about its subjects. In other words, the Contract was inherently right insofar as it proved practically useful for individuals not to engage in constant conflict, *no matter what the Contract on the substance actually provides or accepts*. For Hobbes, life is governed by brutal forces that do not account for any complex social or metaphysical theory of the human mind’s specialty or distinguishness: in a state of nature, humans are beasts, programmed to be selfish and survive the environment, hetero-driven animals like any others, with their mind being determined by mechanical instincts of reaction and counterreaction.¹⁹⁷⁷ Unorganised humans have no higher aspiration than surprise and survival, no ultimate philosophical abstraction, no ecosystemic awareness, no collective goal as a species, other than *material perpetuation and reproduction* as individuals. To elevate them, the Contract extends these instincts to the city-level community and more broadly to a species as a whole, transforming their preservation into tacit law which everyone factually accepts at birth.¹⁹⁷⁸ This holds true economically just as much: in Locke’s works, for example, humans’ state of nature «is defined as a state of *natural* rights of individuals, which excludes any notion of common wealth before the social contract»

¹⁹⁷⁷ Refer further to LICATA 2008, p. 8; LINDROOS-HOVINHEIMO 2021, pp. 109-111.

¹⁹⁷⁸ Indeed, WEST (2021, pp. 50;58-59, two emphases added) remarked that [i]ntegrity and moral connectivity is inconsistent [...] with [...] lack of law altogether, or the presence of a law that fails to protect or protect equally. [...] *Private* sovereigns emerge, exist[,] and thrive in the shadow of law’s absence. [...] O]utside the protection of law, *the narrative arc of life is Hobbesian*[, ...] governed by authorities who [are] in turn insulated and protected by law’s absence. [...] When it works *for all* and is not captured by corporate élites, [l]aw creates conditions for equality [...] by regulating private regimes, [...] protecting us against the abuses of the stronger parties within them. [...] T]he protection of law is a condition [for] moral sentiments.

as *culturally* construed.¹⁹⁷⁹ And yet, it was Locke himself to believe that «natural liberty leaves the fruits of nature to man in common, but the fruits of labor to the individual worker»,¹⁹⁸⁰ which calls post-modernity into question in minimum two ways. Firstly, in the overwhelming majority of cases, shareholders' hypertrophic profits are *not* the fruit of their own labour (neither directly, nor indirectly), but rather a combination of privilege-by-birth, chance, immorality, and white-collar corruption. Secondly, what is left of freely accessible and equally exploitable "fruits of nature" (i.e. the "commons", in contemporary lexicon), in such a commodified, jurisdictionally boundaried, pre-scheduled, pre-screened, pre-allocated (but not by peers...), land-fragmented, militarised, and "lawfully" hyper-privatised society and territory? By market-championing neoliberal economists,

[t]he act of tax avoidance is seen as a utility-maximizing adaptation to a change in relative prices, not different in nature from similar adjustments to market-induced price change. On the basis of entitlement to use one's own resources to advantage, avoidance [would be] not only efficient but also just. Avoidance [would have] standing and deadweight loss [would be] a cost to be allowed for in setting the benefit tax. This reasoning, however, overlooks an essential point. The reduction in the net wage rate caused by insertion of the tax wedge differs from a market-induced change in factor prices. *Market-induced changes, like the weather, happen upon taxpayers without their own doing, while the tax in line with Lockean entitlement, is to charge for benefits, reflecting as closely as possible the consumer's marginal evaluation at the given level of supply.* Ideally, the benefit tax would be imposed in lump-sum form, so as to match the taxpayer's offer price had the same benefit been provided qua private good. But with preferences unknown, that tax cannot be assessed in lump-sum form. The liability has to be set as a function of the base, so that the taxpayer can now reduce [their] tax by avoidance. A deadweight loss is incurred but is more than offset by the tax reduction; and acting as one among many, public good benefits remain essentially unchanged. Tax avoidance is profitable, but also offends the spirit of benefit taxation. A breach of contract occurs and deadweight loss loses standing. [...] *Given that the natural order defines the just distribution of real income by competitive pricing, that rule should hold not only for the general case of private goods, but apply also (if by approximation only) to that of social goods.* [...] Tax avoidance generates a deadweight loss which

¹⁹⁷⁹ MERCIER-YTHIER 2018, p. 271, fn. 3, emphasis in the original.

¹⁹⁸⁰ MUSGRAVE 1992, p. 370.

becomes part of the burden that is to be minimized. [...] Put differently, the optimal tax solution is not quite as optimal as the term suggests[...], also because] avoidance is hardly consistent with the principle of impartiality. *Individuals, in agreeing to choose from behind a veil, thereby also agree to disregard their own advantage.* [...] Tax avoidance once more interferes with the intent of such rules, meant to define fair contributions and based on ability-to-pay in the absence of tax.¹⁹⁸¹

In any case, conceived as such, modern-age Western “model SCs” stood particularly far from the less rigid but solidaristic notion of SC that has accompanied the Chinese along most part of their civilisational journey.¹⁹⁸² In the West, the idea of morality (not specifically *in* the SC but to justify the role of law within society more generally) as the Contract’s foundational value was only restored with Leibniz.¹⁹⁸³

Having illustrated the above, one preliminary question could be: *are we back there?* Are we slipping into a value-emptied SC again, where relational care—no matter how genuine, but still tangible in its impact—is being gradually sided, and replaced by self-serving technicism? Regrettably, there are persuasive arguments to this effect. In a society where the individual is part of no *demos* other than the overarching technical apparatus designed, established, and engineered by the élite, those who are left behind—“the 99%”, for the sake of the present work—can be monitored and discarded.¹⁹⁸⁴ More in detail, they are discarded *by being monitored*, meaning that they are not affiliated to that 1% who can afford to escape monitoring – or at least who will not suffer the consequences thereof under the legal code of capital, exactly because the 1%’s *modi operandi* and *modi vivendi*, such as tax avoidance, and in fact their *modi essendi et intelligendi*, are (or are easily turned) “lawful”, no matter how fictitiously so.

¹⁹⁸¹ Ibid., pp. 373-379, three emphases added – please note how seasoned (but still compelling!) these warnings are.

¹⁹⁸² See LIU 2018, p. 107.

¹⁹⁸³ See further CARTY 2017, pp. 158-160.

¹⁹⁸⁴ See also LAWN and PRENTICE 2015, p. 11.

More and more individuals, frustrated at this situation (especially in decaying, pretended democracies), go so far as to theorise the preferability of an *anarchic system* (which might sound like an oxymoron... but isn't *empty social contract* also one?):

[T]ime and time again in capitalist representative democracies, the interests of capitalism significantly clash with the species-interests of democratic populations, but due to the vast economic power of the small number of élites who control them, it is the species-interests of the “people” which invariably lose out. Through this rapacious economic system, innocent people suffer and die needlessly each day from [waste of resources,] preventable wars and unnecessary poverty; billions of people around the world find themselves without access to, or means to procure, the abundance of food, water, shelter and other necessary material goods for survival that *exist but cannot be afforded* [this is by far the most absurd outcome of the rule-of-capital dictatorship]; lives are sold on an alienating job-market into existence-consuming careers which limit one's freedoms, creativity, solidarity, and ability to meaningfully pursue any other interests; and individual thought and opinion is meticulously controlled and manipulated through pervasive systems of hegemonic propaganda. *All of which leaves these contemporary democracies incapable of fulfilling the political teleology for which they were built, and on which their claims to legitimacy rest.* That the radical change from such state systems to anarchism ought to be made, therefore, now has a compelling ethical basis; for what unearthing the underlying principles of social compact has shown us is that the creation of external structures of political power is ineluctably predicated on a specific ethical objective; justified only as a purpose-driven instrument to help achieve a specific set of goals, universal to all, which are necessary for living a fulfilling human life.¹⁹⁸⁵

In my view, it is also for international law, as a component of global governance, to rescue itself from capture before the majority of humans starts turning to anarchic

¹⁹⁸⁵ MCKEE 2008, pp. 292-293, two emphases added. Interestingly, in the monograph serving as the follow-up to his doctoral thesis, he defended the recursive but thought-provoking «claim that every single political system in the world is ultimately justified on an argument *for which anarchism is the only ethically legitimate answer*» (MCKEE 2020, Preface). I subscribe to all premises, yet I disagree on anarchism being the safest or most forward-looking option to respond to the tragedy of the code of capital. Indeed,

the strategy of rejecting concrete improvements in the law in the name of the clearly more difficult task of *achieving an overall reform of the system*—which is even more difficult to obtain internationally than domestically [...]—seems morally problematic, as it may take some individuals—those who would benefit from the concrete improvements—as means to an uncertain end. [...] In the case of international law, this is crucial, because [...] the—real—deficiencies of the system are frequently used as excuses by state officials to operate in the clearly suboptimal realm of international anarchy

— MAISLEY 2021, p. 165, emphasis added. However, the “overall reform” warrants a renewed SC, not anarchy!

systems as potential “solutions” to the value-sense distortions they experience, and as appealing alternatives to the current unsustainable market-driven model of society as well as *mode of being*. Now that «[t]he chaos of the world [is] all felt on our doorsteps», time is probably ripe for young IL scholars to rejuvenate the field and make their voice heard.¹⁹⁸⁶

e Contract-bound material humans, contract-unbound immaterial corporations: Is taxation fit for purpose?

Most areas of social life are tacitly regulated by derivatives of general SCs, and this holds true in the field of taxation as well. The latter fits into the idea of SC as it works on unsubscribed-to agreements between individuals and “their” State(s): as long as a human being is a citizen of a State, they will be liable to pay taxes as set by the State itself, which means that besides a few apolides, any individual on Earth is forced to be subject to at least one tax code, i.e. to be a party to tax agreements they have never subscribed to and cannot unsubscribe from.

The most immediate reason to stay in these contracts is obviously a rational *do ut des* between services received/organised by and taxes paid to the State; and yet, besides persuasion and evasion deterrence, taxpayers’ implicit—mostly even subconscious—assessment is arguably more comprehensive, encompassing governmental genuineness in handling taxpayers’ money and concerned with wider culturally shaped perceptions of institutional and societal fairness, including reciprocity, substantial equality, and trustworthiness.¹⁹⁸⁷

¹⁹⁸⁶ HASKELL 2021, p. 5.

¹⁹⁸⁷ See e.g. SEBELE-MPOFU 2021, pp. 12-15.

When individuals depart from taxation, it is because they either free-ride with public services or decide to detach themselves from the latter to rather rely on private alternatives;¹⁹⁸⁸ this holds particularly true in contexts where the SC is weakened (if not utterly broken), such as “fragile States” in Latin America, where corruption and clientelism reign unhindered. There, wealthy citizens

who are independent from state provision of public goods are still more likely to evade. These individuals are less likely to evade as free riders, but rather, as individuals who actively reject state-provided goods.¹⁹⁸⁹

When it comes to legal persons instead, one striking observation is that *often*, the more “efficient” the State is, the less corporations pay and the more encouraged they are by the State itself to *lawfully* free-ride on public resources. *Corporations seem to be deciding how the SC runs tax-wise, without submitting themselves to its rule, and are getting away easily with the game.* This cannot owe to else but regulatory capture and revolving doors.

Even in the rare cases where bureaucracy is not yet fully captured, as exemplified by the somewhat praiseworthy actions taken by the EC against Amazon and other corporate giants, bureaucrats still miss the point: *it is not about unlawfulness* (and indeed, the CJEU often turns down such actions), but about demanding that corporations are *treated as IL objects*, and above all, about wondering how it is possible that such a blatantly unfair mechanism is lawful to begin with. Of course, in the specific institutional setting of the EU, mechanisms so designed are lawful because

¹⁹⁸⁸ However, economists have long demonstrated that this narrative on privateness owing to non-benefit from publicness is broken, as wealthy taxpayers often gain indirect advantages from the public services they contribute to fund even when they do not directly benefit from or request them. For instance, «[i]nterventions that contribute to human capital building [...] may protect those who fund them from higher crime, resulting in a better educated citizenship and psychologically healthier children» – WEBB 2010, p. 2373. As a result, not funding said services seems illegitimate under any light.

¹⁹⁸⁹ CASTAÑEDA et al. 2019, p. 1195.

of the MSs' will, which are themselves captured – it seems to me a good argument to strive for federalist solutions rather than “output legitimacy”, hardly participated or deliberated upon by the masses.

Treating corporations as IL objects stems from the urgency of bringing back legal persons within the remit of *substantial* legality, i.e. one that transcends their fictionality in order for them to finally stop feeding a self-entitled corporate élite. In fact, as SCs stand today, such an élite repeatedly ends up regulatorily capturing the rest, factually discriminating those natural persons who do not belong to the capitalist class as MNCs' shareholders or top managers. This urgency is attuned to the grand theory that seeks to refocus on the “materiality” of IL, on its tangibility, as for transcending, indeed, all those abstract fictionalities (such as “legal persons”) that keep IL at distance from its declared flags of emancipation, socio-economic uplifting *for all*, interjurisdictional solidarity, and eventually universal peace. In fact, «beginning with materiality might help to dissolve “law” as a stable body of [...] regulation»,¹⁹⁹⁰ raising international lawyers and policymakers' awareness on the fact that MNCs are fictional entities whose profits cannot be a priority for any lawyering practice that intends to value the human individual and its interactional, unlegalistic naturalness. Indeed, although humans are not the immutable sovereigns of their lives and spaces, their osmotic interaction and interconnectedness happens to materialise with porous nature, organic matter, sensibility, and energetic concreteness,¹⁹⁹¹ rather than with fictionalities created through the legal code of capital. Capital is ethereal, but humans are not, and nature is not, either. Rather than corporations being unbordered and fluid, humans are inherently so, and should be legally acknowledged as such. Hence, a pivot to legal materiality would also prove auxiliary in «recovering fundamentally more

¹⁹⁹⁰ HOHMANN 2021, p. 589.

¹⁹⁹¹ See *ibid.*, pp. 594;603.

relational and connected worldviews, to push toward re-creating international law as sustainable and inclusive»¹⁹⁹² and less trapped into fictional definitions of law-created entities, included the State itself¹⁹⁹³ with its borders and checkpoints. Relatedly, technology that “unborders” reality should serve *humans as such*, not capital or MNCs. Indeed,

the most pressing question is whether, in these continuously emergent human/machine amalgamations, the losing subjectivity/ies are very likely to be those who have *always* suffered materially in an actually existing legal, political and economic landscape of unequal power, rights, and status.¹⁹⁹⁴

Insofar as materialistic thinking does not end up representing another market distraction but helps us, instead, to connect to our bodily naturality rather than to entities which only exist *and can only exist* on paper, it will prove a meaningful framework for displacing the fictional, painting a novel—less economic, more political—political economy,¹⁹⁹⁵ and disrupting the 1%’s corporate privileges from the bottom up.

f Commercialising sovereignty: An extractive war against the indigent

Unfettered competition among States for attracting businesses favours tax avoidance not only owing to spoiled tax codes and preferential agreements,¹⁹⁹⁶ but also due to a true “commercialisation of sovereignty” whereby jurisdictions “sell” themselves (their laws, reputation, citizenry) to the wealthiest corporate bidder for

¹⁹⁹² Ibid., p. 591.

¹⁹⁹³ See *ibid.*, p. 595.

¹⁹⁹⁴ Ibid., p. 597, emphasis in the original.

¹⁹⁹⁵ See *ibid.*, pp. 599-602;605.

¹⁹⁹⁶ Check also SAUVÉ 2019, p. 299.

“investing” therein.¹⁹⁹⁷ Because the balance between what these jurisdictions lose and gain through these political games—neither singularly, nor cumulatively—does not undergo parliamentary scrutiny or vetting in most cases, one can reasonably argue that commercialised sovereigns have commercialised the SC they supposedly preside over, as well.

Just like any captured process, this, too, started as “exceptionalism”—with its infrajurisdictional “Free Zones”, Dubai is exemplificatory in this respect¹⁹⁹⁸—to later normalise, breaching the 99%’s trust in governments which feel entitled to trade “exceptions” with the 1% (that is, as already illustrated throughout this study, with its private *alter ego*), lacking popular mandate. This might also be conceptualised in terms of SC extractivism:

The crisis of reformism, which in the core countries took the form of the crisis of the welfare [S]tate and in the peripheral and semiperipheral countries, the form of the crisis of the developmentalist [S]tate – through structural adjustment and drastic cuts in the incipient state social expenses – meant, in political terms, the reemergence of conservatism and an ideological tide *against the agenda of a gradually expanding inclusion in the social contract which, in different forms, was common to demoliberalism and demosocialism*. Thus, the legal avenue towards social emancipation seemed (and seems) to be blocked. Such an avenue, however structurally limited – an emancipatory promise regulated by the capitalist [S]tate and therefore consistent with the ceaseless and inherently polarizing accumulation needs of capitalism – accounted in the core countries during many decades for the compatibility between capitalism – always hostile to social redistribution – and democracy based on either demoliberal or demosocialist policies of redistribution. The collapse of this strategy led to the disintegration of the already highly attenuated tension between social regulation and social emancipation. But because this tension inhabited the political model as a whole, the disintegration of social emancipation carried with it the disintegration of social regulation. Hence, the double crisis of regulation and of emancipation in which we are now, a crisis in which conservatism thrives under the misleading name of neoliberalism. Neoliberalism is not a new version of liberalism but rather a new version of conservatism.¹⁹⁹⁹

¹⁹⁹⁷ Refer also to PICCIOTTO 2008, p. 465.

¹⁹⁹⁸ Check *ibid.*, p. 466.

¹⁹⁹⁹ DE SOUSA SANTOS 2020, p. 525, emphasis added.

“Extraction” here concretises with the progressive exclusion of certain *natural-person components* of society—the 99%—from the mechanisms of social regulation; instead, the “extraction” of (and non-inclusiveness towards) SC-diluting *corporations* from the Contract itself would be much welcomed an outcome.

g Proceduralising values to resist the machinery of business-complacent consumerism

Neoliberalism has socialised a promise of self-emancipatory, self-entrepreneurial, consumeristic freedom, while in reality by freeing individuals *from a social contract* which is indeed increasingly broken and replacing it with the illusion of a self-regulatory *tékhnē*, it has left the large majority of those individuals behind. This was perhaps unintended originally, and yet it turned dramatically from its side effect to its core one, by restating the ancient aristocracy/rest divide (but on a planetary scale, this time) *through the legalisation (and thus, legitimate perpetuation) of a global capitalist élite* and its metameritocratic narratives imposed through advertising and an omnipresent rhetoric of resilience and self-reliance. It is a *self* which comes as atomised, disaggregated, emptied of its social meaning, so as for it to be readily disposable to the capital’s benefit.

Even if we accept the old adagio that «[t]he art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the smallest amount of hissing»,²⁰⁰⁰ did we depose absolutist kings to embrace similar policies pursued by absolutist corporations? Why is democracy allowing this to happen to the 99%, *today*? Posing this dilemma is somewhat equivalent to wondering whether we are

²⁰⁰⁰ The finance minister of France’s Luigi XIV, as reported in PARK 2009, p. 179.

reembracing a valueless SC; the response thereto seems to verge towards the positive. This is rather problematic for IL, as its sources and institutions tend towards democratisation: scholars submit that while *being* a democracy is not an obligation for States under PIL, *tending towards* a democratic system in fact is;²⁰⁰¹ self-evidently, if this holds true but democracy empties itself of its functions and meaning, the IL project will follow suit in this systemic decay.

To begin with, the *domaine réservé* of States in the conduct of international affairs, including on taxation, hyper-emphasises a culture of secretive pseudo-technical knowledge which is easily distorted to favour transnational corporatised élites, in that it fails to frame its purposes and frameworks for action against both philosophical questions of societal value that work for all, and a broader source of legitimacy embedded in global law.²⁰⁰² Should we then “proceduralise” our rationale for conceiving of and thus joining a SC, notwithstanding the latter’s supposed voluntaristic spontaneousness? To resist the ill sides (i.e. captured deployments) of technology, perhaps the answer lies in the positive, but with a disclaimer: as mentioned previously in this work, procedural approaches to HR and law generally are to be looked at suspiciously insofar as they tend to formalise and bureaucratisate the substance of the societal instances they were premised to advocate for; hence, understood this way, we should actually *not* proceduralise the SC, either.

What I am suggesting here, instead, is to proceduralise our approach to rationality, as for testing it over and over again against that of machines, and value our “humanness”.²⁰⁰³ We should make testing it a habit, without overbureaucratising this thought-process. The *ratio* underpinning τέχνη (*téchne/technē*) as a *legal modality of*

²⁰⁰¹ Check e.g. PETERSEN 2009.

²⁰⁰² Read also PETERS 2013, pp. 257-258.

²⁰⁰³ Check also *ibid.*, pp. 138-139.

being shall always be tested and retested against its foundational values (decided *ex ante* but constantly renegotiated), rather than left to the hermeneutics of its élitist, machine-assisted custodians and developers. In fact, theirs—I am here pinpointing to, e.g., the OECD and EC as well—is an “anthropology of bureaucracy” that selectively employs references to the “public interest” while serving through highly extractive forms of pseudo-meritocratic technical specialism²⁰⁰⁴ – a specialism that extracts because it *excludes and discriminates by policy*, not because it is technical, nor—even less—because it would be “selective” or “merit-based”.

h “Contractual” values as expressive of unreducible human-life complexity

We need to constantly, tirelessly confront our values, too: are they fit for purpose? Are they coherent with the SC we believe we subscribed to? Are we actually aware we have been subscribed to one at birth? How can we make ourselves accountable, ensuring we do not join the very same capitalist machinery we were resolved to counter? This is a *ceaselessly transformative* procedure of self-inquiry:

[S]tructural responsibility requires a critical stance and *continual interrogation* of current structures and norms, given that we cannot presume existing structures or norms provide an adequate basis to evaluate injustice. [...] The goal of allocating responsibility in the structural framework is not to return to a prior “just” state, but to transform unjust structures and *continually push* in the direction of justice, recognizing that *justice is a regulative ideal rather than achievable reality*. [...] Bending toward justice is a disposition of *acknowledging complicity* and working to change the conditions. [...] Rather than focusing on discrete interactions that produce [specific, instance-based] harm, the structural framework focuses on identifying practices that (re)produce injustices. [...] Key to enacting structural responsibility is an explicit linkage to *systemic harms* [...] and the

²⁰⁰⁴ Read further BENS and VETTERS 2018, p. 247.

promotion of] a capacity-based[, contributonal] “connected activism” model in global capitalism[.]²⁰⁰⁵

Ensuring that we entrust ourselves with our future rather than leaving it to algorithmic calculations “meritocratically” managed by the 1%, and that we thus proceduralise these sort of “ultimate-rationale checks”, should ideally be seen in continuation to a (perhaps interrupted or disaggregated by neoliberalism) process of congregation which is core to humanity as societies progress and evolve in interactional (some prefer to write “exosystemic”), ecosystemic, and epistemic *complexity*. In fact, that of a valueless SC is (yet another) *fictio iuris*, as meant by Thomas Mann and Paul Ricœur when submitting

that there is no way an ahistorical contract can be binding on an historical community, if we do not have recourse to the solicitous mediation of others that is continually fostered in the institutions of society. The process of acculturation {...*and not accumulation!*} is both historical and ethical. [...] The monological, self-constituting nature of the social contract of Hobbes is possible and necessary only if we remove ourselves from that cultural history which expresses our will to live together.²⁰⁰⁶

Resultantly, the desirable SC is made of humans, as many as possible, as free as possible, as machine-independent as possible; despite its complexity, it needs to be managed by the ultimate repository of complexity itself, i.e. by the 99% *just as much*. But what about its institutional configuration? Indeed, to participate into and shape their own fate, humans anyway need to come in organised forms.

i The incumbent globalisation of once-domestic contractual organising

²⁰⁰⁵ SRIVASTAVA and MUSCOTT 2021, pp. 576;578;580, five emphases added, in-text citation removed.

²⁰⁰⁶ CARTY 2017, pp. 167-168.

Throughout history, human (more or less structured) organisation happened mostly “domestically” (even when no concept of “jurisdiction”—let alone “nation State”—existed), with tacit contracts among members of society being either compelled or more participatorily entered into, perhaps to an extent regionally, but never domestically trumped by transnational forces. In other words: before globalisation, SCs have always extended regionally at best (including self-proclaimed “universal” empires), and normally on a very local scale – at times as local as to encompass one city alone, think e.g. of Italian medieval *comuni*. This is no longer the case: SCs cannot be but supranational today; this is so for a number of reasons, six thereof being quite significant for the reasoning I am developing here.

First, capital itself is the most globalised social phenomenon of our time. This can be drawn from the infamous paradox of the capitalist system, predicated on competition, but itself enduring no competing systems anymore – only increasingly converging “variants” of itself.

Second, States nowadays tend to share information about “their” citizens (as well as, to a lesser extent, non-citizens), acting as if the informational, wealth-guarding Leviathan was one, globally.

Third, capital flows are (or can be made) instantaneous and global, and capital itself is increasingly mobile, digital, and thus volatile and borderless – all these practices and proprieties being allowed and progressively normalised by technology. On top of this, the potential introduction of capital-control policies internationally has been consistently resisted by States themselves, under the usual “development”, “growth”, and “attraction of investments” flags.²⁰⁰⁷

²⁰⁰⁷ Refer e.g. to GISMONDI 2008, pp. 197-199.

Fourth, domestic legal systems are rigged in favour of capital and its *claimed necessary* transnationality, the most cogent expression thereof being the corporate code of capital.

In fifth place, supranational technocrats are increasingly entrusted (read: increasingly entrust themselves, while not being properly resisted) with public or public-like functions and the management of the “commons” (including everyone’s wellbeing and societies’ “sustainable development”), usually through IOs. This is a self-enforcing praxis reflecting human nature: when gathered into organisations and actively entrusted (or passively accommodated) with legally bearing functions, humans tend to work on their competence, inevitably expanding on it, i.e. pushing its boundaries till the point where opposing forces or actors contrast them. As a minimum, most humans endeavour to advance claims to legitimise and normalise their competence’s expansion, more or less successfully.

Finally, and more generally, the State itself is retracting, not necessarily as *the fundamental unit* of the international order, but most certainly as the *sovereign and relatively independent* particle thereof. In fact,

through processes such as deregulation, privatization, cost-sharing, and marketization, the [S]tate is losing its privileged status as the central unit of political, economic, and cultural analyses. [... True,] the [S]tate never managed to obtain a monopoly over the law, and [...] has always incorporated *a multitude of legal codes and illegalities*. [...] However, one of the major differences in today’s paradigmatic transition is that the [S]tate can no longer claim to *guarantee trust and security*.²⁰⁰⁸

Indeed, the difficulty for IR/IL scholars (and generally for all those who try to make sense of global governance, possibly anticipating its moves and conceiving of less harmful alternatives) no longer resides in «understanding the relations between [one]

²⁰⁰⁸ DARIAN-SMITH 1998, pp. 100-101 (paraphrasing Boaventura de Sousa Santos), two emphases added.

dominant capitalist [S]tate and a whole range of other [S]tates in the international system»,²⁰⁰⁹ but in grasping the true identity and legal credentials of a transnational capitalist class which factually keeps “the rest” under the oppression of pseudolegalised financial games, also thanks to the involvement of IO-advising consultants and industry lobbyists which subtract entire policy areas from the parliamentary oversight of States’ citizenries.

As previously argued in the present work, this almost invisible dualism is worsened, perpetuated (thus “fixed”), and even enforced *through taxation*, whose surveillance agencies have resorted to powerful algorithmic technologies to widen the gap between the wealthy and, indeed, the just mentioned “rest” (which I have referred to throughout this study as “the 99%”).

j “And the rest? Let it be surveilled!”. Exploiting asymmetries

Pervasive surveillance is not a quantitative enterprise: it represents a *qualitative* step forward in the elite’s capability to maintain and increase their *comparative* (*relative*) privileges through taxation. This advantage is enabled by the smart combination of technological developments in the fields of IoT and AI which *are presented as ineluctable happenings* while emerging, in fact, as the outcome of patient policy deliberation *by cumulation*. Amidst natural persons,

changing technology will make evasion increasingly difficult for most taxpayers, especially those subject to employer withholding and third-party information reporting, but [...] evasion will be increasingly viable for a small number of taxpayers, especially very high income taxpayers. Regardless of the overall impact of technology on the level of tax

²⁰⁰⁹ CARTY 2017, p. 179.

evasion, [...] the effects of technology will likely increase economic inequality.²⁰¹⁰

What this study has endeavoured to demonstrate, *inter alia*, is that such a technologically aided manoeuvre is *de facto* confined to natural persons, as the same surveillance which impacts individuals' lives profoundly, although operated vis-à-vis corporations, too, is irrelevant for legal persons (namely, here, MNCs) because they *lawfully* escape taxation and can thus afford to be surveilled in perpetuity with no consequences (other than lightly reputational ones). Phrased otherwise: while *information asymmetry* between taxpayers and tax agencies was the dominant problem before these technologies were introduced, the outstanding problem today is that of *lawfulness asymmetry* between natural-person and legal-person taxpayers.²⁰¹¹

That the first asymmetry was drastically shortened, through AEoI *et similia*, before addressing the second is *legally* problematic (from the HR-coherence standpoint I have illustrated, at least), insofar as it exposed natural-person taxpayers' existences to public-private intrusion quite aggressively, while corporations could afford being surveillance and easily continue to circumvent taxation *thanks to the foundational legal fiction upon which their multijurisdictional personhood is construed and endowed with normalcy – and even societal desirability*.

Even considering that «[t]echnology may increase the information that taxpayers have about the tax system» as to “cheat better”,²⁰¹² one shall concede that this ability will primarily lie with sophisticated taxpayers²⁰¹³—mostly corporate ones, plus natural persons from the 1%—whose capital is such that the marginal time spent

²⁰¹⁰ ALM 2021, p. 322.

²⁰¹¹ See also *ibid.*, pp. 10-11.

²⁰¹² *Ibid.*, p. 14.

²⁰¹³ *Contra*, see e.g. PONS 2021, p. 52.

on perusing the intricacies of and loopholes in the system is rewarded by the final amount saved from unpaid taxes.

k The untaxed corporations as a gerontocratic, privilege-reproducing fiction

Through the picklock of their fictional personality, legal entities have gradually but certainly crept in the originally natural-person-confined SC, becoming concealed parties thereto – uninvited by most citizens (at least in an ideal advertising-free society), but regrettably welcomed by sovereigns, behind the mask of a legalistic “rule of law” as codified in the corporate-friendly culture sanctioned by the global code of capital. The latter only serves the powerful, but assertedly *lawfully* and *righteously*, signalling a shift from the *politically correct* to the (far more dangerous) *legally correct*. To reflect NSAs’ embodiment within the SC, PIL doctrines themselves—even the most conservative ones—have started to engage with NSAs as subjects, and no longer objects, of international formal and informal norm-crafting, thus accommodating NSAs’ influence rather than contrasting it. One might observe that States, too, are legal persons as much as legal fictions,²⁰¹⁴ and that is certainly accurate; however, humans created it and entered into meta-contractual relationships with it out of need and, so to write, out of choice, while that of MNCs (and NSAs generally) is mere self-invitation via economic coercion through the global legal code of capital.

Also thanks to this sneaky incorporation within both SCs and doctrines, market forces have acquired such a capability for dominance that they fear no regulatory competition from public powers which were supposed to regulate them in the first

²⁰¹⁴ In these terms, refer for example to SOIRILA 2017, pp. 1171-1172.

place. To recent days, capital was mostly serving technological progress, not the reverse,²⁰¹⁵ but by harvesting the combined effects of digital scalability, surveillance networks, big data, pulverisation of jurisdictionally tied societal duties, and fake competition,²⁰¹⁶ mass-scale corporations are now giving rise to a mega-conglomerate of politico-economic interests which already appears too complex—hereby, again, the operational centrality of “complexity”—to disentangle.

Speaking of objects and subjects as far as natural persons are concerned, the SC has increasingly (re-)become an exclusive club for the 1% of them who are sponsored by global capital; as for “the rest”, it has gradually shifted role towards becoming *an object* of the SC, and should endeavour to regain its role as a contracting party with full rights (and duties) as to re-establish its primacy over extractive market logics. Taxation-wise, for instance, the accepted wisdom has sneakily become that *tax avoidance might be unethical but what can we do if it is lawful*, which makes recourse to the same deresponsibilising narrative of ineluctability, unavoidability, and unspecified third-partiness which I was outlining *supra*; this is all the more alienating if one thinks that at the same time, tax evasion is prosecuted as unlawful. It is hopefully trite that what I am submitting here is not that the latter is morally legitimate;²⁰¹⁷ rather,

²⁰¹⁵ See also MILNER 2021, p. 7.

²⁰¹⁶ See also BABEAU 2020, pp. 36-42.

²⁰¹⁷ *Contrary to, e.g., MORRIS 2012. More accurately, he suggests *inter alia* (pp. 193;199) that [a] system integrating the means of taxation with the ends for which tax revenues are employed would offer the basis for a moral duty to pay taxes. [... Conversely,] tax cheating, if done to bring pressure on the government to reform a broken system, becomes not only permissible but morally obligatory.*

Note that in excusing tax cheating, EABRASU (2020, p. 521) encompassed tax evasion only, as tax avoidance “merely” exploits loopholes in the law – although it often ensures they are there in the first place. In a subsequent article, MORRIS (2013, pp. 186-187;189;191-193, emphasis added)—to my intellect, persuasively—went on to expounding how

authority in enforcing and collecting taxes does not include personal considerations regarding a taxpayer’s economic status or condition, educational background, medical history or existing medical conditions, mental health, moral standing in the community, stress factors, family circumstances, employment or unemployment, criminal record[,] or other factors otherwise considered relevant to fairness in other arenas of life. [...] However, [...] *t]he law that is administered neutrally was not borne of neutrality but of the partisan forces that have shaped the tax code. [...]* One reason for the tax code’s complexity is the attempt by lawmakers to take account of numerous differences between taxpayers. [...] Some of what are popularly called earmarks are tax laws affecting a few or only one taxpayer. Though special-interest tax legislation is nothing new, [...] the complexity of the tax code

my take is that neither natural nor legal persons should be allowed to cheat *on the substance* (or to “rig the system”, if we understand the SC as such), and paths should be explored for tax avoidance to either be made impossible *practically* or to be deemed unlawful *legally*. Tax avoidance should also be made unacceptable *socially*, through a sort of social license that extends the SC onto corporate entities as for making their executives and shareholders (feel) socially accountable.²⁰¹⁸ Some scholars claim that «[e]ven the most self-interested shareholders will likely have some moral and non-financial interests that will limit the extent to which they want the corporation to pursue unconditional profit goals»;²⁰¹⁹ assuming this is true (which I doubt), the discovery of said residual radiations of morality should be actively incentivised through regulation.

Some expressed the expectation that the ongoing pandemic would have favoured a renewed control of the State over the economy, while in fact, the former’s retraction widened and worsened.²⁰²⁰ Since January 2020, States have been losing further ground to the Big Tech, which have witnessed their profits increasing and, most importantly, their “daily-life utility” and thus bargaining power boosted; through (this public mismanagement of) the pandemic, inequality sharpened, especially to the youth’s detriment,²⁰²¹ which already represented the most hopeless and helpless social category well before the pandemic.²⁰²²

Their hopelessness originates from the fact that SCs with state entities are becoming double-edged swords in the era of aging, with senior politicians only responding to senior electorates, and SCs where corporations creep in are equally

clouds a taxpayer’s vision of what a fair share might be. The civic duty problem is due in part to the inability of any taxpayer to know with any assurance that what he or she is paying represents a fair share of the national tax burden.

²⁰¹⁸ See e.g. POLLMAN 2019, pp. 16-23.

²⁰¹⁹ CHOUDHURY and PETRIN 2019, p. 54.

²⁰²⁰ Refer e.g. to DESSERTINE 2021, p. 320. *Contra*, YOU 2021, pp. 175-176.

²⁰²¹ Refer e.g. to ARTUS and VIRARD 2021, pp. 33-37.

²⁰²² Check also LANGMAN 2017, pp. 375-376.

senior-serving, as most wealthy consumers are seniors and thus market logics will be primarily tailored to them while disregarding what matters (or should matter) the most to younger individuals for their long-run wellbeing: relationships, environmental sustainability, job creation, healthy lifestyles²⁰²³ (also—if not chiefly—on the mental side²⁰²⁴). More generally,

large firms with abundant capital have expanded as their small rivals are driven out of business by the pandemic closures. Capital is being concentrated even more by this plague. It has also increased individual insecurity and reduced social capital as people cannot congregate and socialize[.]²⁰²⁵

let alone remember that they should stand as the *principal agents* of the SC implicitly regulating the societies they live in. Those people's agency has been annihilated via incessant thought-depleting market consumerism, trapped into a GDP-growth rhetoric whose links to human wellbeing (at any latitude) are tenuous at best. At odds with it, humans feel safe and rooted when their longing for human affection is both expressed and satisfied profoundly, rather than incessantly commercialised or—worse even—securitised and chilled.²⁰²⁶ In fact, unevenly distributed “growth” only catalyses clinical depression and anxiety disorders,²⁰²⁷ and indeed, as an aggregate measure,

²⁰²³ A significant *corpus* of research has confirmed that increasing workloads, competitive loneliness, and screen-time, correlated with stagnant wages, precarity, digital insecurity, and declining faith in the ill-seasoned lexicon of “shared progress”, is what makes people particularly unsatisfied in what was once considered the golden age: young adulthood. It is not about poverty per se, but about life purpose and broken welfare systems. It was thus advised, *inter alia*, that

in constructing new kinds of economic and social policies in the future, where wellbeing rather than real income is likely to be a prime concern, there are grounds for economists to study people's blood pressure

— BLANCHFLOWER 2009, p. 193.

²⁰²⁴ In particular, ROBERTS (2020, pp. 25-26, emphases in the original) highlighted that [v]arious economic measures have been proposed to address inequality, such as the implementation of universal basic incomes, progressive taxation on the wealthiest in society, and workplace measures such as wage ratios. These measures [...] may also have benefits for more sociopsychological consequences of neoliberalism. [...] While arguing against poverty itself is relatively simple, our arguments should include more nuanced positions that highlight the sociopsychological destructiveness of inequality *itself* and job precarity *itself*—independent of their direct effects on poverty.

²⁰²⁵ MILNER 2021, p. 7, in-text citation omitted.

²⁰²⁶ See also SCHULENBURG 2015, p. 268.

²⁰²⁷ *Ex multis, check e.g.* DIAS PORTO et al. 2013.

GDP is not a proxy for human well-being, or social value, and was never intended to be [...]; rather, it is a measure of the total market price of commodity production. Unsurprisingly, *there is no causal relationship between aggregate commodity production and social outcomes*. What actually matters for human well-being is people's access to the resources they need to live long, healthy lives: universal healthcare and education, affordable housing, public transport, nutritious food, and so on. Societies that focus on these [aspects] are able to achieve high levels of human well-being with modest GDP.²⁰²⁸

The US represents the most immediate exemplification of these apparent paradoxes: in the richest country on Earth, so-called “despair deaths” have become such a pressing concern that economists and public-policy thinkers are endeavouring to offer insights on how to prevent both its worsening in the US and its replication in other GN societies, including the affluent Continental European ones.²⁰²⁹

I The Faustian pact between States and corporations: Corporatising the social contract

Let me restart from the SC being originally tacitly joined by natural persons only: even though capital was self-evidently shaping the course of history already, before the codification of (fictional) multinational forms of (in turn fictional) corporate personhood it had not yet *institutionalised* to the extent of threatening the genuineness or anyway altering the essential meaning of SCs. To cut a long story short, the SC was conceived for pre-capitalist or at least pre-globalised societies, where surveillance, too, harboured little to no tools to be operated as pervasively as today. Even the concept of “person” was redundant back then: law was intimately connected to human life, which is “natural” regardless of its “persona” legalistic appellative.²⁰³⁰

²⁰²⁸ HICKEL and HALLEGATTE 2021, p. 5, emphasis added, in-text citation omitted.

²⁰²⁹ Read further BECCHETTI and CONZO 2021.

²⁰³⁰ See SOIRILA 2017, p. 1181.

Contrariwise, also due to mentioned technological “advancements”, States now tend to surveil preventively (assumption of guilt), massively, *ordinarily*, coordinately, and indiscriminately,²⁰³¹ and to outsource compliance and monitoring to private actors such as MNCs, or even surveillance altogether – which paints a whole new panorama of cybersecurity troubles.

Worryingly, because those private entities act transnationally and possess data, and data is the new engine of the world economy, they are gradually gaining power vis-à-vis sovereigns, and joining *or even replacing* them in most domestic SCs, originating new informational and prescriptive asymmetries among jurisdictions and across different citizenship entitlements. Beholding any good effect out of it is hard a task: SCs should not be “signed” with non-human entities, whose accountability and responsibility are sources for endless contention and contestation; when these “Faustian pacts” are finalised, ascertaining whether future faults are to be charged on Faust or Devil is going to prove a meaningless and somehow “posthumous” exercise.

Faust, though, was an old guy: for today’s youth, instead, it will be increasingly hard to bargain for a valuable place in *any* SC, with both States and corporations’ contractual leverages almost exclusively advantaging class conservation, power-structure preservation, and thus the reiteration of societal stratification. It is not by chance if citizens (in majority the youth, and especially in “liberal democracies”, particularly from the GN) generally feel that governors (as much as elected representatives) no longer act on their behalf and/or in their interest, with regulatory capture, lobbyism, and self-delegation being widely perceived to be the most probable explanations subsuming said governors and representatives’ detachment from the public good. Indeed, «[i]n many developed countries, representative democracy has

²⁰³¹ Refer also to COBBE 2019, pp. 144-150.

failed to progress, succumbing to the influence of multinational corporations and leaving many citizens disenchanted and effectively disenfranchised». ²⁰³²

To exemplify, when the (...second, *of course*) Obama administration expressed its will to curb tax avoidance, and especially to close a few specific loopholes in the US tax code which were being exploited by vice-president Biden himself, ²⁰³³ corporate executives illogically «claimed to serve the public good by stressing their obligation to maximize profits *on behalf of shareholders*», with Congress apparently buying into the nonsense of this “argument”, ²⁰³⁴ which resembles a long-standing American “theory of the firm”. ²⁰³⁵ In the post-pandemic season, many young people are deemed ready to embrace closer digital surveillance in exchange for security and fairness, as they apparently feel that those in power are failing them; ²⁰³⁶ nevertheless, this reaction would rest on a naïve take which I hope to have dissected and confuted convincingly enough throughout the present Study.

m How to supranationally rehumanise a regime-neutral contract?

All afore-recalled phenomena—which speak volumes, regrettably, about human nature—shall *and can only be* countered, as paradoxical as this might sound, by human beings themselves, all together, *suprajurisdictionally* (just like legal persons are entitled—or entitle themselves—to get combined across jurisdictions, depending on the opportunistic business aim to serve).

²⁰³² HARVEY 2019, p. 22.

²⁰³³ See further RUBIN 2019.

²⁰³⁴ AHRENS et al. 2021, p. 119, emphasis added. For an interesting examination of the reasons why shareholders’ profit-maximisation situates itself at odds with the common good, refer generally to BONNIFET and PUFF ARDICHVILI 2021, pp. 71-226.

²⁰³⁵ Read CHEFFINS 2021, p. 16.

²⁰³⁶ See e.g. YOU 2021, pp. 177-178.

Consequently, as introduced above, the “next” SCs should be humanised and supranationalised, meaning: 1) merged into one; 2) global in scope; 3) revaluing natural persons as subjects, particularly from the 99%; 4) encompassing legal persons *as objects only*. Someone optimistically announced that «*l’entreprise de domain sera contributive ou ne sera pas*»,²⁰³⁷ which is a wish I would subscribe to and strive for, but let us make sure that they contribute *to serve us, rather than—once again—for being served* by humanity.

Needless to stress, this whole scenario is pretty idealistic, thus it is expectedly not going to come true any time soon. Unfortunately, one “merit” of the corporate code of capital resides in the success of its socialisation and readaptation processes, i.e. in having left somehow *no systemic alternative* to itself; in some way, the code of capital is “regime-neutral”, in that its immediate (yet superficial) comparative advantages have lured and subsequently enchained democracies and autocracies alike. Indeed, by penetrating the daily lives of us all, what we do, our priorities as well as “desirabilities”, the way we behave in society, but most importantly the profound structures and mental representations through which *we conceive of ourselves and reason*, capital has captured the *social* capital of all societies to such a degree that social capital acts and believes *in terms of capital, with its language and purpose* regardless of the actual kind of jurisdiction and societal latitude one appraises.

This reading extends a previous finding of neutrality concerning social capital, which was deemed to incapsulate «in and of itself a regime-neutral phenomenon because its collaborative tendency can work in favour of any type of regime [... ,] either democracy or autocracy».²⁰³⁸ Here, neutrality stands for “applicability to any regime”, rather than for principled non-positioning/non-involvement, nor does it refer

²⁰³⁷ BONNIFET and PUFF ARDICHVILI 2021, p. 9.

²⁰³⁸ WELZEL 2020, p. 81.

to a defined, self-standing posture between democracies and autocracies.²⁰³⁹ The fact that the code of global capital would have proven capable of subjugating *any and all* jurisdictions was neither obvious nor, in fact, was it taken for granted or seriously in political economy, politological, and socio-legal scholarship. Truth be told, far more optimistic readings were frequently offered, even up to a few years ago:

[I]t could be posited that, to an extent, the Chinese state authorities have been captured by the newly emerged financial interests in the economy[, and] that the power relations in Chinese society have been to some extent dominated by agents of accumulating speculative capital. Yet the fact that the Chinese state leadership adopted [a] wide range of market-supplanting policies in the 1998-2002 period suggests that the indicated capture and dominance are far from absolute or unconstrained. [...] Entering the new century, there are signs that the state leadership has even attempted to reinstate the importance of socialist concerns in the actual process of economic transformation – as is evident in *the slogan* of “constructing a harmonious society” and the policies associated with this slogan. All these suggest that, in the face of the unfavourable world environment for late development under globalization, Chinese political economy on the whole is unlikely to be subdued by the logic of speculative financial capital, *domestic or international*. In line with the East Asian model of development, China is likely to stick to the logic of production (industrialization) rather than that of exchange (the “natural path of economic development”) in the foreseeable future.²⁰⁴⁰

In fact, China *has been* captured by international financial interests, if not domestically—finance has not (yet) eradicated the supremacy of the Party’s directives over the main pathway of Chinese economy, investments are still planned sector-wise, and (mild) capital controls are still implemented—at least internationally. Meanwhile,

²⁰³⁹ Notably, GINSBURG (2020, p. 228) sorts all possible regimes into three boxes: «pro-democratic, general or *regime-neutral*, and authoritarian» (emphasis added). He goes on to write (p. 259):

Many would argue that general or regime-neutral international law has had an inherently authoritarian character because it insulates areas of governance from the domestic sphere. But in the end, when democratic governments reinforce autocracy abroad or cooperate across borders to lock in their particular partisan interests, they can be thrown out of power by their citizens, if those citizens are not benefitted by greater security and wealth.

I disagree with this conclusion. Taxation is indeed an instance of partisan interests’ locking-in, but citizens have few to none chances to realise how it works (due to its complexity), to even know about it (due to lack of transparency and transnational removed-from-parliaments regulation), and to be aware of the whole process’ inherent capture.

²⁰⁴⁰ Lo 2012, pp. 166-167, two emphases added.

surveillance under Xi's party leadership has been tightening its grip, with Chinese civil society becoming overburdened with authoritarianism, to the extent of finding itself at once welfare-stripped and psychologically unable to cope.²⁰⁴¹

As reiterated in the present study as well, this surfaces with particular emphasis in ITL, with China converging more and more assertively towards GN interests which, paradoxically, support Chinese leadership's endeavours to control the population (both internally and abroad) through internationally cooperative and pretentiously praiseworthy forms of algorithm-powered state surveillance. And beyond convergence, which is conducive to apparent like-mindedness, China is leading to or *de facto* imposing new narratives, urgencies, and constraints, first among them the securitisation of all aspects of (digitised) life – even the few that American hegemony had not yet phrased that way; this is a securitisation which, of course, only applies to the 99%, and it is in this evidence that its danger hides. Because international tax cooperation is increasingly depicted as a global public good,²⁰⁴² the leadership thereover and narratives stemming therefrom should be handled with the highest caution. By any means though, the projection which posited the advent of a comprehensive, deep-seated “Global-Asian Era”²⁰⁴³ tainted with Chinese shades is proving accurate to its deepest possible configuration – economic, legal, and somehow “anthropological”, too.

n The international democratisation of surveillance and the “rule of capital”

²⁰⁴¹ See further SHIEH 2021.

²⁰⁴² Check e.g. HORNER 2020, p. 419.

²⁰⁴³ Refer to HENDERSON 2008.

Balancing democracy with globalised capitalism, even though—or probably *because*—contemporary expressions of the first have built their ephemeral primacy on the latter’s exploitation of its own periphery *as much as core*²⁰⁴⁴—is increasingly challenging in a multipolar international order.²⁰⁴⁵ In China, the economic thinking by Sun Yat-sen is proving to hold influence, except for its pro-democraticisation component.²⁰⁴⁶

If *domestic* democracy is not attainable in all jurisdictions, any attempt to craft a global people-subscribed SC should be premised upon hybrid geometries of *international* democracy,²⁰⁴⁷ whereby both domestic democracies and dictatorships adopt an *internationally democratic*, consensual-based decision-making process – aimed, in this case, at “rewriting” the SC and ensuring it stays effective and well regarded by populations in jurisdictions with either system of government. As a result, «[t]he requirement for democratic legitimacy for global norms will have the practical consequences of requiring global regulators to engage in a process of democratization, in order to overcome the problem of compliance»²⁰⁴⁸ and dispel claims of transnational regulatory élitism.

If *this* is the case, then the wish could be that China and other autocracies agree on adopting, still, a surveillance-based form of contract, but one where at least surveillance-through-taxation operates under redistributive purposes (increasing governmental awareness on who is wealthy and where wealth is amassed) rather than élitist ones (tightening the enforcement grip on the poor while executives and shareholders keep shifting their profits to low-tax jurisdictions or anyway adopting

²⁰⁴⁴ Check e.g. MILNER 2021, p. 6.

²⁰⁴⁵ Check also *ibid.*, p. 11.

²⁰⁴⁶ See HELLEINER 2021, pp. 234-236.

²⁰⁴⁷ See also WELLER 2021.

²⁰⁴⁸ WHEATLEY 2011, p. 547.

low-tax solutions for them). In literature, too, several SC schemes have been devised with a *public-private* welfare-redistribution component *through taxation*,²⁰⁴⁹ and for this to make sense, of course, taxes shall be paid by all those who profit from welfare (broadly conceived) in the first place, including MNCs, their shareholders, as well as their top management.

Saliently, and perhaps counterintuitively, the abrupt disruption of the “development versus obedience” paradigm (which had crystallised as China’s SC before its opening-up to global markets) proved instrumental in fuelling protestors demonstrating in favour of that contract’s endurance:

The Tiananmen square demonstrations, wishfully misread by the Western press as a stand for American-style liberal democracy, were in fact a coalescence of students, workers, and immiserated farmers *against a deteriorating social contract*. The former two were agitated by vulnerability and exploitation engendered by the market transition, while the latter had come to Beijing to petition the central government to ameliorate the landlessness, poverty, and vulnerability that emerged in the wake of decollectivization of rural communes. It was, in fact, a demonstration against the dismantling of state commitments and the socialist safety net.²⁰⁵⁰

What this entails for the present discussion, *inter alia*, is that market-constraining SC remodulations which stand in syntony with those popular revendications may still find an audience in China. As the SC between the Chinese and the Party is being increasingly questioned and rediscussed through digital means enabled by the massive Internet and 5G-technology penetration even in the inner rural areas,²⁰⁵¹ perhaps this is a good time to revisit those claims and revive campaigns in their favour.

²⁰⁴⁹ Refer e.g. to MERCIER-YTHIER 2018, p. 269: «The government can also use [...] taxes to redistribute *private* welfare» (emphasis added).

²⁰⁵⁰ KLINGER 2017, p. 227, in-text citations omitted, emphasis added.

²⁰⁵¹ See further XIONG 2017, pp. 3-31;189-217.

o Let them surveil us, but with a human-rights purpose!

At this stage, no globally applicable Anti-Surveillant Contract could be operated, so that for the time being, a novel Surveillant Contract is a more credible mid-step, as it could enthusiastically be joined by dictatorships, too – *assuming, without conceding, that they are not chronically captured by market forces, and able to retain power only through the latter’s tacit support.*

Because we have come this far, it is time to wonder whether a SC could ever be imposed: should it not ground itself on voluntaristic subscriptions? Or is “voluntarism” a typically ethnocentric conception of SCs, when observed instead from a non-Western standpoint? Several analyses try to answer these questions by referring to Eastern and “third-worldist” theories of contract, inspecting the meaning of contractual freedom and the “internal” variables and external controllers thereof, particularly when it comes to joining them and rescinding therefrom. What does “freedom” imply? After all, also in a corporate or commercial context, several contracts are factually forced onto us through subliminal techniques even when we are convinced we aspire to adhere thereto. Well beyond corporate scenario, one may think of traditional—domestic—SCs themselves: what happens to us if we “unsubmit” ourselves from them? Are we not somewhat “compelled” to join them depending on the place we are born in, the parent we are born from, and our jurisdiction of citizenship, etc.? Besides theory, could we *truly* exist outside our reference society, in such a jurisdiction-fragmented planet where no one can any longer escape territorial patrolling, satellite watching, and physical surveillance? For the time being, I leave these here as open questions.

Furthermore, what do I mean by *surveillant* contract here? Tentatively, it would stand for an attribution to the State (rather than the latter's self-adduced prerogative) to shield us if not from its own surveillance, then at least from all manifestations of third-party surveillance, including that from our peers as well as other States, but particularly from corporate-enabled surveillance. And yet, I have extensively endeavoured to demonstrate that States are inherently *and most probably irreversibly* captured by the logic of unfettered capitalism; hence, a “surveillance contract” would imply, more realistically, that we do accept constant surveillance from our own State of citizenship but claim higher respect for fairness *and consistency* in the way the law addresses natural and legal persons vis-à-vis capital, in exchange for such concession. This is what makes it essential that legal persons *are* encompassed by the SC, but *not* as contracting parties: as its *objects*; conversely, granting States permission to surveil us fiscally (as to know how we behave tax-wise) would be meaningless, because corporate tax avoidance would persist regardless, therefore we would achieve neither privacy, nor fairer policy coherence.

Put otherwise, under this scheme, dictators and autocrats' surveillance would not be resisted by citizens and the “international community” alike, insofar as it helps ensuring that the 1% does not abuse of its privileges. Only if corporations are included as objects—e.g. through binding due diligence, corporate duty of citizenship, jurisdictional “loyalty schemes”, profit redistribution among employees (and perhaps local stakeholders, too), as well as other proposals²⁰⁵²—one can be sure that all natural persons enjoy a meaningful degree of formal equality under the law, as declared and warranted by IHRL.

²⁰⁵² Check also SALVATI and DILMORE 2021, p. 191.

In a sense, then, this solution would be tantamount to bringing corporations under the aegis of IHRL discourses on wealth, poverty, sustainable development, and socio-economic rights more generally. Indeed, in the current state of affairs, equality goes unfulfilled not only substantially—which is obvious, and to some extent unavoidable—but even formally, with corporations and the few natural-persons tied thereto rigging the whole system (code of capital *in primis*) to their favour, by pushing bindingness always and exclusively onto the 99%, while upholding non-bindingness as a privilege for the upper class. A few exceptions and transitional phases do exist, of course, but they are *exceptions* for a reason, and most of them seem however just show.

p Crafting the way ahead: A new SC for all

Eventually, the core assumptions and tenets of my proposal, building on the disastrous comparative situation of taxation and privacy for the 99% compared to the 1%, are relatively straightforward.

To begin with, the SC can no longer be confined to old-times provision of hard security: it shall be pivoting towards counterbalancing the excesses of globalised, neoliberally deregulated capital.²⁰⁵³ The overproduction of “security” over welfare in fact breeds human *insecurity*, normalises submission to the powerful, and fosters neglect of social elevators, ultimately enhancing societal atrophy, which in turn—through an apparent paradox—«increases the degree of entropy (disorder) in the societal system»,²⁰⁵⁴ and thus structural violence. In truth, the prevailing paradigm to

²⁰⁵³ These excesses and the societal distortions they generate are often termed as “neoliberal hubris” or “neoliberal anxieties” respectively; furthermore, neologisms such as “late/end(-stage) capitalism” or “fascist capitalism” are also widely employed – especially in grey literature.

²⁰⁵⁴ MARSHALL 1999, p. 85.

analyse and trace current global processes seems to be “geoeconomics” rather than “geopolitics”, and against this backdrop, «[d]ata policies have the potential to massively reallocate wealth and authority in ways unfathomable to the designers of the current legal infrastructures».²⁰⁵⁵ This also means that PIL, as it stands, is not suitable to grasp the significance of *tax data* within a context of regulatory competition among jurisdictions as well as among natural/legal persons for geoeconomic dominion – and more generally, the current IL design, its most profound doctrinal texture and *ratio legis*, makes it very sensitive and adaptable to the élite’s whims, but unresponsive to the daily concerns and lifelong aspirations of the 99%. If, till recently, citizens gathered to allocate certain *security surveillance* powers to the sovereign in order to contrast human hard insecurity (related to potentially overwhelming military powers from *enemy populations or internal subversive groups*), that is no longer the case in our digital, remoteness-vested societies. Nowadays, citizens even intuitively sense the global wrapping of threats, resulting in the removal or unserviceability of traditional jurisdictional safeguards based on territory;²⁰⁵⁶ as such, they might want to gather to allocate certain *fiscal/economic surveillance* prerogatives to the central government, aimed at preventing insecurity caused by *globally hegemonic powers*, most identifiable with the phagocytising economic and political arrogance of MNCs. Dataveillance is the new battleground for people’s power.²⁰⁵⁷ States compete for data, are captured by corporations to more efficiently compete for data, and *tax data*, too, plays a role in this picture, setting “new” winners and losers within the geoeconomic arena. To put it otherwise,

²⁰⁵⁵ COHEN 2020, p. 815.

²⁰⁵⁶ Refer to BERMAN 2019, pp. 127-128.

²⁰⁵⁷ See also LOEW 2020, p. 1.

[o]nce capital accumulation is unburdened of the subtractive imposition of state taxation regimes and restrictive legislation on data privacy, the economy and spatialization of data are free to play to the highest bidder.²⁰⁵⁸

From an anthropological viewpoint, one should not be surprised by MNCs' hyper-assertiveness in gathering and exploiting data patterns (including tax ones): humans have witnessed and formed autolegitimising transnational powers all throughout history, the only difference now is that we have replaced emperors, popes, caliphs, pharaohs, and chief warriors with bankers-insurers initially (think, e.g., of medieval Florence and renaissance Genoa²⁰⁵⁹ and Venice in the XIV-XVI centuries) and multinationals of IT/consulting services today. Why is it particularly problematic now? Two are the main reasons: first, the informal conflation of all transnational political and economic powers,²⁰⁶⁰ mutually capturing their interests up to convergence and coalition; second, and most compellingly here, the *legal sanctioning* of these merges, triggering (or made possible by?) the normalisation and passive acceptance thereof.

Moreover, States' surveillance of their own citizens is to be deemed acceptable, *as long as the legal-person privilege is addressed and solved beforehand*. Emotionally, élites behavior and choices might also matter for the *psychology social contract*, the concept that theorises the socialisation of *psychological citizenship*;²⁰⁶¹ even tax compliance rates by natural persons may improve as a result of the fairer engineering of the sub-cognitive SC that each individual (subconsciously yet influentially) stipulates with their reference society.²⁰⁶² Concerned with the élite's survival through

²⁰⁵⁸ NEILSON and ROSSITER 2019, p. 194.

²⁰⁵⁹ See also KOSKENNIEMI 2021, p. 182.

²⁰⁶⁰ Check further MATTEI and QUARTA 2018, ch. 2, as well as GEORGE 2015.

²⁰⁶¹ See further MOGHADDAM 2008.

²⁰⁶² See further FELD and FREY 2007^a; FELD and FREY 2007^b, pp. 8-9. Refer also to the country case-studies reported in eMBed 2021.

mass control, surveillance represents the governmental side of the contract, the legalised benefit it gains from it, but as far as taxation is concerned, it would be optimal for e.g. Chinese citizens to witness that while their assets, (mis)fortunes, movements, and transactions are surveilled, surveillance is also deployed to scale back inequality and privileges on the corporate-capital side, and restore “socialist” welfare. This is actually achievable: notwithstanding autocrats’ concern with their own regime’s survival, contractual thinking has traversed almost all seasons of China’s civilisational history, and it appears well rooted in its self-conception still today, framed within Confucius’ precepts on benevolent administration²⁰⁶³ – however patronising they may sound to Westerners. In this fashion, that of “social contract” might be more of an Eastern idea than a Western product, although China’s contract, since ancient times, has been consistently grounded in *universal order as immutable harmony* and “*result delivery*” by *policy* rather than in bottom-up power-delegation legitimisation of governors as per Continental European modern-age political-philosophy traditions.

On the global level, consistently with the realistic take above, States *are* allowed to participate in global surveillance networks, but before doing so, *equally global* safeguards will need to be approved and put in place, as for citizens of non-autocratic regimes not to be *de facto* forced to subscribe to third-jurisdictions’ *domestic* surveillant contracts. These safeguards are for a SC among world citizens to provide remedy for excessive privacy violations, which is not the same as to prefigure a SC *among States*. For this to make sense theoretically, one should have to abandon

abstractions of Statehood for a political sociology of democratic, historical nations – at least for the West and much of Asia – that function as collective systems of epistemological reference. They have inherited traditions, prejudices, [...] which all contribute to the style and content of their behaviour. There can be no search for a unitary State-

²⁰⁶³ Refer also to PAN 2008, pp. 56-68.

will, but rather an at least heuristic acceptance of a psycho-social collective as a framework in which to pursue concrete individual behaviour in both reflective and unreflective forms. [...] So, for instance, the US is a historically situated, territorially based people (subject), not a population (object) with inherited traditions, prejudices, strivings, and aspirations [...]. This may open up the possibility, in relations characterised by grave inequalities and coercive power, of disentangling the contradicting intentionalities of the collective entities in relations with one another.²⁰⁶⁴

Transposed into the lexicon of the present work, it means that the 99% could this way find a conceptual and quasi-institutional channel for challenging the 1% on the global plane, rather than—pretty much frustratingly, when it comes to taxes and surveillance...—on a jurisdiction-to-jurisdiction level.

q Are we able to *angrily* pause the decline of our civilisations?

In considering that, as demonstrated by this study, surveillance through taxation is *customarising fast* (...an oxymoron²⁰⁶⁵) despite its non-compliance with IHRL, the 99% needs to act rapidly in order to single out improper practices and encourage the “stipulation” of a new SC—perhaps on the model outlined here. Ideally, world people should start from a general tax strike, till avoidance—or at least the formal lawfulness thereof—is not eradicated from tax codes and possibly practice. One cannot emphasise enough that sure, capitalists have failed all of us, *but we did help them fail ourselves* through operational servilism, legal subservience, and intellectual parasitism. In this sense, we are *interactionally co-responsible*²⁰⁶⁶ for neoliberal excesses. Anger’s *pars construes* is almost always neglected to favour pseudo-

²⁰⁶⁴ CARTY 2017, pp. 58;179-180.

²⁰⁶⁵ This is not surprising: our reality *as reflected by law* is increasingly permeated by oxymora; *see generally* NEUWIRTH 2018.

²⁰⁶⁶ To decipher this technical expression in context, *see* SRIVASTAVA and MUSCOTT 2021, p. 574.

responsibilising cautionary tales on its *pars destruens* instead; and yet, the 99%’s sense of civic engagement should be sanctioned by legit epistemic and practiced anger, and expressed (moderately) angrily as to hopefully catalyse systemic change.²⁰⁶⁷

Evenly urgent is to reverse gear with regards to the seemingly unstoppable decline of civilisation globally, which appears more and more fragmented and *hypocritically* “busy” with its own malaise:

It is impossible to tax corporate profits that can so easily move to cheaper locations. As a percentage of US revenue[,] they are down from 39 per cent in 1939 to 12 per cent in the 1990s, resulting in huge public borrowing commitments and budget deficits. The greater inequality of the new capitalism means a propensity to uncontrollable structural change, merging, and downsizing, with a consequent breakdown of all connective ties of family, friendships, and communities. This is the economic background to crime, divorce, and other social breakdown—an untrammelled individualism in transactional societies—where long-term co-operative relationships are replaced by short-term market transactions, governed by expediency and self-interest. These market values spread into medicine, education, etc. and signify the end of common interest. *Some predict an immanent disintegration of the global capitalist system, with a new capitalism locked into a negative dialectic with tribalist identity politics, where a mounting scarcity of resources and conflicts of interests are matched by a decreasing capability for cooperation [...], pointing to a general culture indicating marks of clinical depression.* Global capitalism leads individuals into feeling trapped, with no control over their lives. Rampant individualism is accentuated by maladaptive social comparisons, pressurizing with overwhelming idealized standards, in an environment of unprecedented levels of competitive assessment in education and employment – a modern plague of the law of self-esteem. [... Authors such as Graham Dunkley’s diagnose is] that while it is difficult to distinguish between

²⁰⁶⁷ To this end, the following philosophical remarks by SRINIVASAN (2021, pp. 123-128, second emphasis in the original, other emphases added) sound encouraging:

Apt anger can be counterproductive, making the angry person worse off, and indeed exacerbating the very situation at which [they are] angry. Plausibly, this is especially true for victims of *systematic injustice*, whose apt anger at their oppression may well invite further violence. If so, victims of injustice sometimes face a conflict between getting aptly angry at injustice, and bettering (or at least not worsening) their situations. Just what sort of conflict is this? [... G]etting angry is a means of *appreciating* the injustice of the world, and is valuable in much the same way as our capacity for aesthetic appreciation. [... T]here might well be a value to appreciating the injustice of the world through one’s apt anger – a value that is distinct from that of [passively] *knowing* that the world is unjust. [... T]o get aptly angry is not merely to appreciate the disvalue of an unjust situation. Anger is also a form of [contestation], a way of calling for the shared negative appreciation of others. [... A]gents should be guided by both a concern for appreciating the world as it is, and making the world as it ought to be. [...] If a rational politics has no room for anger, then it has no room for one of the few weapons available to the oppressed. Thus the invocation of “rationality” (like the invocation of “civility”) becomes *an invocation of the status quo*. [... A]pt anger is [...] an intrinsically worthwhile thing not only to *know* but also to *feel* the ugly facts that structure our political reality.

the effects of globalization and anti-welfarist ideological trends, it is likely that the downward pressure on taxation and welfare will continue worldwide, with cost considerations becoming more important. What this really means is the destruction of the very idea of the right of economic self-determination of peoples.²⁰⁶⁸

According to well-known studies, our societies—at all latitudes—may be on the right track to begin experiencing significant institutional, ecological, demographic, and health collapse by 2040.²⁰⁶⁹ Surplus-pursuing decisions ruthlessly taken by the élite constitute a remarkable countdown clock ticking towards this possible outcome, which élites themselves might be the only societal components to escape from and survive. It is no chance that the champions of contemporary capitalism are, as recalled more extensively in previous parts of this study, mostly sociopathic and/or schizophrenic, severely mentally disordered and behaviourally disturbed individuals, who are urgently in need of psycho-medical care or compulsory isolation – for theirs and our own wellbeing. If, in general, *«le capitalisme fonctionnerait parce qu'il est en phase avec la nature humaine, alors que le collectivisme est exactement à l'opposé de celle-ci»*,²⁰⁷⁰ neoliberal extremisations thereof cannot be deemed in line with human interests and aspirations broadly conceived,²⁰⁷¹ but should be rather pointed at as mental disorders, whose ruthlessness stands as equally perilous for those who are affected as much as for the rest of humanity.²⁰⁷² The alternative, which is obviously unacceptable, is that millions or even billions of human beings, whose lives have been getting longer but definitely not easier or happier, will continue to live in misery and experience avoidable pain on both the physical and emotional side. «Social and community distress, the labor market, politics, and corporate interests all collide

²⁰⁶⁸ CARTY 2017, pp. 226;234. The italicised passage seems to anticipate the in- and post-pandemic dooming scenario.

²⁰⁶⁹ Refer to HERRINGTON 2021.

²⁰⁷⁰ STAUNE 2018, p. 190.

²⁰⁷¹ Check further *ibid.*, pp. 191-247.

²⁰⁷² See also OLIVIER 2015, p. 12.

around pain, and pain is one of the channels through which each of them affects deaths of despair».²⁰⁷³ After all, «[m]arket competition functions only when economic agents *don't* reason on grounds of solidarity with their fellow citizens: they have to pursue plans that succeed *only when* the plans of their rivals fail»,²⁰⁷⁴ and by the point the State succumbs to this necro-logic, too, then the law becomes an extractive, sociopathic expression of the powerful's power *only*, and a legalisation of induced suffering.

We all need to react to this, in action and thought alike: if injustice is structural, it is everyone's responsibility to fight against it, including the oppressed's.²⁰⁷⁵ From nature onwards, we are urged to stimulate and accommodate those *cognitive changes* which may endow us with the ability to reformulate international legal structures on a more environmentally, financially, and “anthropologically” sustainable manner for the 99%,²⁰⁷⁶ with *global* rights and safeguards matching *global* duties and surveillance. This has as much to do with the (mostly unexplored) complexity of our mind as it pertains more traditional legalistic concepts pointing at territories, borders, inequalities, or liabilities.

r Dreaming it all: From legal coherence to preemptory norms

One may *prima facie* dispute that this proposed contract is prospective and not retrospective like some traditional ones, but this is in fact untrue, as the ethical

²⁰⁷³ CASE and DEATON 2020, p. 83.

²⁰⁷⁴ RECTOR 2021, p. 602, second emphasis added.

²⁰⁷⁵ See e.g. SRIVASTAVA and MUSCOTT 2021, p. 575.

²⁰⁷⁶ Check generally FUKURAI and KROOTH 2021.

demands it builds upon are already known, and mine is just an attempt at formally reconfiguring them *ex post*. In this sense, “my” SC could be credited as

more of a metaphorical event – a hypothetical thought experiment which we can utilize to plausibly determine not just historically, but now, as situated beings ourselves living within a formal society, why such a society might have justifiably first come about, and under what terms and conditions such a society would have to have been created in order to ensure the existence of the kinds of obligations we believe political power has towards its citizens, and they to it, within these societies today. Indeed, it is a hypothetical thought experiment by which we can rationally ascertain, through a reasoned assessment of justificatory arguments, *what the underlying principles must be that would legitimate erecting an externally authoritative artificial structure of political power over a hitherto autonomous people in the first place*, in order for that decision to be willingly agreed upon, and entered into consensually by all.²⁰⁷⁷

Of course, “consent” and “will” are problematic aspects of the SC, but they shall never be received in absolute terms; in fact, they may also be shaped by communitarian values in a non-Western fashion, as illustrated *supra*. Furthermore, “my” SC does not suggest that States today are missing out on enforcing *any* SC, but rather, that *the one* they are enforcing is (or at least *has become* by extremised practice) illegitimate, and that to be endowed with legitimacy again, it would need to undergo reformatting. Alternatively phrased, my argument is that, under the light of “legal coherence”, the current contract States *believe* they are enforcing does not correspond anymore to the one they are *actually* backing: this urges to call on any citizen-party who can deem the former illegitimate to ask for the necessary amendments to be applied.

Yes, mine prefigures a non-binding contract, but in the end, this choice represents the only realistic option on the table, and would not *really* prejudice its impact *a priori*:

²⁰⁷⁷ MCKEE 2008, p. 62, two emphases added.

The term *global governance* itself has even been invented to denote governance *beyond* the [S]tate [...]. As international lawyers, we may have to resist the temptation to cast all international social relationships in [PIL] terms or even in legal terms to begin with. We should not exclude the possibility that transnational regimes may function effectively via domestic regulation, non-state multi-stakeholder regulation, *or without any regulation whatsoever*.²⁰⁷⁸

While the SC may indeed remain non-binding without sacrificing efficacy, one might still prefer to phrase the hitherto proposal in PIL jargon, with the highest possible aspiration residing in its incorporation into *ius cogens* as part of States' sovereign obligations to ensure their own citizens' wellbeing *as well as global fairness*: similar scenarios have already been identified as utopistic,²⁰⁷⁹ but the *ius cogens* solution would be fundamental in order to counter the “cynicism” and “bad faith” tax avoidance has been long identified with.²⁰⁸⁰

Is this just naivety, a hopeless *proiezione onirica*? Probably, yet not certainly.

In any case though,

law in liberal legal regimes not only has no need for moral sentiments, but further, [...] our liberal legalism *creates us, or recreates us*, as basically unsentimental subjects: un-empathetic regarding the inner lives of others and unsympathetic to their suffering. [Worse even,] the law that grounds contemporary legal legalism *actively* alienates us from our moral sentiments[, as it] is both premised upon and generative of self-regarding utilitarian individual motivations [...].²⁰⁸¹

To cure this arguably unacceptable deviation from what the law ought to be, «the imaginative creation of possible worlds of law and justice»²⁰⁸² is what keeps legal

²⁰⁷⁸ RYNGAERT 2016, pp. 188;193, second emphasis in the original, first emphasis added. As for the third (added) emphasis, the reader may want to recall relevant passages *supra* regarding people's leaning towards expanded rooms for anarchism.

²⁰⁷⁹ See e.g. LINDERFALK 2020, p. 149.

²⁰⁸⁰ Check e.g. HAYDEN 2021.

²⁰⁸¹ WEST 2021, p. 44, two emphases added.

²⁰⁸² WEBB 2011, p. 224.

thinking alive, starting from value-laden and even “emotional” legal education.²⁰⁸³ In fairness, the idea of Utopia has a deeply rooted and “accomplished” intellectual history in both Eastern and Western civilisations,²⁰⁸⁴ and specifically in the field of taxation.²⁰⁸⁵ Building on this legacy, time might have indeed come to strive for Utopia to gradually come true, such graduality being also manageable and managed through the tools of a claimed-“humanistic” international-law project that favours the left-behind. If it *does* favour them, this is the time to bring itself in line with its claims and dream bigger.

Truth be told, at least in those autocratic jurisdictions where surveillance is a *sine qua non* of the governmental apparatus, the “Surveillant Contract” could be valued as the compromise in equilibrium between Apology (of the current neoliberalism-prone, captured-States-crafted IL) and Utopia (of a distributive, people-shaped IL).²⁰⁸⁶

s A post-Westphalian code by the 99% for all

[R]ather than international law being a creation of the [S]tate, making and remaking the [S]tate is a project of international law.²⁰⁸⁷

What this Thesis strives towards is a post-Westphalian reappropriation of the SC by the 99%, that is, its uncapture and recapture, and its refounded opening for all

²⁰⁸³ See CALDER 2021, p. 76.

²⁰⁸⁴ Refer e.g. to BOILLOT 2021, pp. 188-189.

²⁰⁸⁵ Check for instance, generally, MORRIS 2020.

²⁰⁸⁶ This is a patent *citatio ad captandam benevolentiam* of Martti Antero KOSKENNIEMI’s homonymous famous work.

²⁰⁸⁷ ESLAVA and PAHUJA 2020, p. 118.

to join. All in all, my *apologetic utopia*, or *utopistic apology*, may be rephrased and summarised as follows.

IL has factually metamorphosised into a humans-extracting SC between States and corporations to surveil the 99% (the Captured Surveillant Contract). Ideally, we might want to re-establish natural persons' primacy over SCs, by responding to this trend with an Anti-Surveillant Contract between States and all world citizens. If neoliberal surveillance, as many others and I have argued, is a form of structural corporate-state violence, we might well aspire to «“unrealistic” forms of insurrectionary solidarity that turn against authoritarian and tyrannical rule [... , which is] an anthropomorphism sustained by networks of power»,²⁰⁸⁸ but such an impulse would not make our aspiration any more realistic. This is merely a dream, so much that one might rather want to consider my proposal instead, deducted from the observation that digital and AI-powered technologies are here to stay, to surveil us, and there is little we can do to avoid so for the time being.

As a compromise between the *absolutely desirable* and the *potentially achievable*, humanity could think of adhering to a corporate-uncaptured (...or “recaptured”, but by the overwhelming majority of natural persons) reformulation of the Surveillant Contract, featuring corporations as objects only. Such refreshed (or Uncaptured, or—as I prefer here—Distributive) Surveillant Contract would be premised to make capitalism fairer by *disintermediating* and regrettably *legalising* surveillance while, in exchange for that, disrupting the 1%'s ability to get richer and richer on everyone else's shoulders thanks to transnational loopholes, corruption, and secrecy permeating the Westphalian system in our no-longer-Westphalian era.

²⁰⁸⁸ BUTLER 2021, p. 168.

Importantly, whenever I referred to the 1% throughout this chapter and this whole work, never did I intend to exclude them from any new SC or more sustainable future; the Distributive Surveillant Contract is designed *with the 99% in mind* in order to address (and possibly redress) the systemic distortions which are currently capturing domestic and global institutions' endeavours, but a more equal future is, of course, for all – thus, inclusively, for “the 100%”. Other authors have already taken care of contesting simplistic one-sided views of events; for instance, phrased as societal risk-management, it was reported that

[m]any wealthy investors lost great sums of money in the [2007] financial crisis. And wealthy people contributed to the US tax funds used in the bailout along with other Americans. Moreover, many poorer Americans became able to purchase homes for the first time as a result of the interest in subprime mortgages created by structured financial products like [CDOs and especially CMLTI]. In this sense, *the equitable system approach, though helpful, seems vague* at key points in its analysis [...] Most importantly, it does not clearly prohibit large financial institutions from transacting in tranching securities in highly interconnected financial systems that are prone to systemic risk. *The shared aims approach, in turn, might challenge the idea that transacting in tranching securities in highly interconnected financial systems that are prone to systemic risk really is a shared aim of the people of the United States.* Although transacting in tranching securities does create advantages for society as a whole—in particular, by making funds available for entrepreneurial activities [...]—it could be argued that *people's shared aims include only more limited forms of risk.*²⁰⁸⁹

This passage elucidates evidently why we are in need of an “enlightened capitalist” system that works *for all*, standing far away from stereotypes, but also departing from an exclusively *rhetorical* acknowledgment that we can no longer continue along the path we have taken over the last half century. We need to acknowledge it *genuinely*, and be ready to change accordingly. There are countless instances of policymaking capture, also through surveillance, corporate misconduct, legal persons' abused

²⁰⁸⁹ SCHARDING 2018, pp. 14-15, three emphases added.

fictionalism, and tax avoidance, operated by a tiny capitalist minority to keep “the rest” subjugated; the former will hopefully realise, before it turns too late, that a fairer and more balanced society is a perspective for *all of us* to treasure and work towards. We all should become “citizen pilgrims”, on our way to more sustainable and humane a global-governance for the future.²⁰⁹⁰



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²⁰⁹⁰ Such a progressive, beyond-one's-lifetime pilgrimage was also advocated for in FALK 2014, p. 48.

Chapter 20

Conclusion to Part Four



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In Parts II and III I have demonstrated that OECD-modelled AEOIs, as well as StT policies more generally, are lawful and unlawful under PIL, respectively; indeed, they are both customarising (and thus lawful-by-default) and incompliant with systemic—and arguably, even traditional—approaches to IHRL. Given this *lex lata* horizon, this fourth Part has explored potential paths *de lege ferenda*.²⁰⁹¹

1. It ruled out a visionary, quasi-feasible techno-legal solution for a “neutral” jurisdiction over Internet-mediated financial transfers and exchanges of tax information, alternative to the Internet-based means for StT which are currently in place. In fact, that alternative could prove technologically viable but would require a degree of political and organisational maturity that cannot be retraced in the current global-politics landscape.
2. It illustrated the reasons why the toolbox publicists rely upon to resolve international legal disputes proves unhelpful towards deciding in favour of either ICL or IHRL for the sake of establishing the “overall” lawfulness or unlawfulness of mentioned policies under PIL. This is a legally irresolvable dichotomy which can only be recomposed through consistent argumentative positioning vis-à-vis an extra-juridical teleology:
 - a. Interpretative conflicts, addressing the question of whether a norm should be interpreted in this or that way, are solved through exegetic tools which are irrelevant here as the scrutinised conflict is normative rather than interpretative.
 - b. Normative conflicts which are premised on identifying the law which, among many competing laws from different systems and/or orders, would apply to a given case between specific parties, are also

²⁰⁹¹ I include in this definition both hard-law scenarios and voluntaristic solutions.

exogenous to raised ICL/IHRL dilemma as the latter is theoretical rather than submitted before a judicial/arbitral body. As such, their portfolio of conflict-resolution options (including e.g. systemic integration, formalistic dualism, reductionist pragmatism, scientific insight, oxymoronic semantic) is rendered unaccommodating.

- c. Normative conflicts which revolve around what law should generally prevail in abstract situations prove equally unserviceable in this case, as hierarchy relies on *lex specialis/posterior* rules-of-thumb having no bearing on the captioned situation, and no peremptory norms are at stake.

3. It resolved to proceed meta-politically by taking a subjective stance and reading the teleology of IL accordingly.
4. It selected GC and its view of SCs as the most functional and meaningful conceptual framework to pursue a coherent *pro homine* teleology with regards to surveillance through taxation, and to formulate a few policy recommendations that could improve the current situation in harmony with the meta-political value-set as defined.
5. It convened that from a GC perspective, although the “lawfulness” dilemma cannot be dissolved, StT policies are to be deemed illegitimate so long as the institutional configuration of citizenship, legal personality, and global governance remains substantially unaltered. In particular, AEoIs globally quasi-constitutionalises obligations for citizens without globally constitutionalising their safeguards, thus perpetuates systemic distortions between natural and (relevant) legal persons (namely MNCs) in terms of legally sanctioned transnationality.

6. It deduced that for a constitutionalisation for the 99% to materialise, domestic SCs ought to be refounded as to make state-operated surveillance “transitionally” legitimate under GC.

My historical and socio-philosophical perusal has returned an essential thread running through the evolution and involution of modern SCs: capital. Drifting away from Westphalia in essence while preserving the vestiges of its Westphalian rhetoric, the State has gradually succumbed to the volition and power-concentration of major legalistic creatures of globalised finance and corporate law: MNCs. Traditionally and long-standingly hard-security-focused SCs have been subjected to neoliberal priorities, up to metamorphosising into deviant arrangements which I labelled as Captured Surveillant Contracts; they are premised on the diffused exercise of pre-emptive surveillance in order to pretend to cater for their economic deficiencies, while in fact thriving on the 99%’s exploitation and feeding their own élites’ legally sanctioned privilege. While I would have instinctively urged consensus-building around a global state-free Anti-Surveillant Contract that could have rebalanced the excesses of the ongoing financialisation of and privacy dispersion in human living, I have eventually opted for a more moderate and apologetic Distributive Surveillance Contract which could coalesce the utopia of social justice with the intrinsically securitarian nature of human power through the State. This is meant to represent a temporary (though not necessarily short-lived) solution along humanity’s long transition towards truly participatory forms of shared and humanistic governance – or, if that would fail, extinction. Moreover, any immediate pivot to state-coalescing constitutionalisations of the globe would have run the risk of globally

constitutionalising, together with States, also the capital codes which have already captured them, eventually delivering a captured-*ab-origine* global contract.

For once more, then, let me summarise the key characteristics of the present state of affairs (the Captured Surveillance Contract), the discarded wholly-utopistic solution (the Anti-Surveillant Contract), as well as the proposed framework for action (the Distributive Surveillance Contract). As I am writing, the Captured Surveillant Contract features:

1. Pervasive intrusion into citizens' lives as a manifestation of structural violence, precipitating chilling effects, humiliation, and social disruption.
2. Hypocritical convergence but substantive divergence in the way tax avoidance by corporations and tax evasion by natural persons is addressed.
3. A discrepancy between jurisdictionally tied rights of natural persons versus factually global-in-scope capital-tied rights for corporations, with particular emphasis on mobility and legal protection from state courts in transnational disputes.
4. A techno-corporate global élite which captured (the overwhelming majority of) lawmakers through large-scale lobbying and bribing exercises.
5. Several regionalised or political-regime-dependent variants revolving around one sole economic system—capitalism—admitting of no competitors.
6. Jurisdictional loopholes in the Westphalian order, exploited through vast arrays of offshoring and onshoring exceptionalism-grounded operations which are approved and vested-with-law in order to accommodate affluent capitalists' demands.

7. Widespread mental-health implications (mainly generalised anxiety disorders as well as somatisation/conversion disorders, but also clinical depression, panic attacks, social phobias, personality disorders, chronic fatigue and burnout, PTSD, etc.) for all those who stand in the 99% crowd and are aware of being exploited by a society where abundance is the norm but gets tirelessly confiscated via ruthless elitist plans.
8. Systemic public and private risk outsourcing on the poorer.
9. Transnational networks of unaccountable decision-making which elude and circumvent the appropriate democratic procedures to pursue the common good, emptying both voters and parliaments (where applicable) of institutional fora and mechanisms to challenge leaders' decisions *on the merits*, beyond dysfunctional take-it-or-leave-it, all-or-nothing mantras (which are almost never justified in practice).
10. The *fictio iuris* of corporate structures coexists and interacts with the legal fiction of the State to normalise the corporate code of capital.

To overcome these disfunctions and deficiencies (from the 99%'s standpoint), the global Anti-Surveillant Contract would have needed to:

1. Dismantle the “State” as the legal-political unit of international affairs.
2. Forbid newly established global multi-layered institutions from surveilling individuals aprioristically, both within and outside their enforcement jurisdiction.
3. Grant “global citizens” formal world citizenship and status.
4. Revise the *raison d'être* of corporate entities as well as of the entire capitalist edifice, through a radical rethinking of the shares model, and in favour of horizontally competitive systems that still account for our selfish and

fundamentally uncooperative nature as humans while redistributing profits to workers rather than concentrating them in shareholders' hands.²⁰⁹²

5. Taken to the extreme, abolish legal personality altogether, and consequently corporate entities, too.

As a middle ground between the 99% emancipation and my sense of realism, I have therefore called for convergence towards a Distributive Social Contract whereby:

1. Corporations are ousted from the Contract as *de facto* parties but involved as objects of regulation.
2. States are not dismantled but rather allowed to surveil their citizens under the “data-sovereignty” slogan, for the sake of providing horizontal freedom from third-party (public and private, i.e. third countries, private companies, and fellow citizens’) surveillance.
3. Mentioned surveillance serves public-policy aims oriented at wealth redistribution and social justice, also through universal taxation of natural and legal persons alike.
4. Rights and safeguards are equiextensive with obligations and liability, transnationally as well.

Under these conditions, whose “field operation” could be further explored in subsequent literature, AEoIs would acquire lawfulness under IHRL – and resultantly, *full* lawfulness under PIL as well.

To conclude not only this fourth Part, but the entire intellectual endeavour, I would like to recap the overarching premises and findings of the present work.

²⁰⁹² Read also extensively VAROUFAKIS 2020^a.

This Thesis was premised to investigate the alignment between the OECD-sponsored AEoI model and the teleological predicaments of IL as a long-term, RoL-based project of distributive justice, societal (as opposed to simply interstate) peace, and healthy emancipation for all humans. Methodologically, in pursuing this project, I have followed in the footsteps of what SCHWÖBEL-PATEL did for the international-criminal-law field: drawing extensively from both political-economy and sociological insights, among others, I have scrutinised

the transformation of political actors into consumers[, i.e. the way] marketised global justice in its legalised and punitive form not only uses marketing practices, but also helps stabilise and legitimise the protection of the market from democratic contestation. [...] The narrowing of what is *seen* as global justice and the emphasis on the *seeing* [...].²⁰⁹³

The Thesis found that AEoI is simultaneously lawful (under ICL) and unlawful (IHRL), thus reverberating the key fragmentation of IL along the apparently irreconcilable dichotomic lines of territorial Westphalia (ICL) and global-in-potential individuals (IHRL). Because of this, it went on to arguing that a cognitive revolution ought to be enacted in order to appreciate the potential and risks inherent in StT, and to situate them within broader concerns about the future of IL and its role in humanity's collective aspirations of dignity and more distributed access to opportunities.

In other words, because AEoI, legalistically treated, is both lawful and unlawful, perhaps the question should be circumnavigated and rephrased as a

²⁰⁹³ SCHWÖBEL-PATEL 2021, pp. 59;121, emphases in the original.

normative matter of siding and purpose: what *should* IL achieve through mechanisms such as AEoI? This means addressing the issue teleologically, in contrast with the superficial proceduralisation of international lawmaking, and lined up with justice as an unaccomplishable yet deserving tension, i.e. a regulatory ideal that warrants its constant reworking.

Eventually, this Thesis has found that in those contexts where a surveillant SC is (temporarily?) unavoidable, IL should at least afford coextensive rights and obligations to all global citizens, and turn surveillance from a state-corporate tool to an instrument *of States* to keep the hubris and excesses of corporate capitalists under control. My conviction is that all citizens of the world find themselves desperately in need of a renewed SC which welcomes legal persons (namely corporations, particularly MNCs) only as objects but no longer as *de facto subjects* of the international legal framework – basically ostracising them from direct and indirect decision-making.

I believe that because capitalism speaks to our indole of social-but-not-too-social animals, thus somehow marking our alignment to the seemingly universal (and yet nonlinear and somewhat contradictory) bio-metaphysical laws of evolutionism and chaos, capitalist inequities and verticalisations cannot be wholly defeated. And yet, the fictitious code of capital can and should be audited and restrained if we want the proto-nihilist forces it unleashes not to cause our extinction via natural depletion and human overfierce competition.

From my situated and thus outright biased standpoint, my proposal would somehow represent a viable compromise between utopian leaps (IHRL) and apologetic conservatism (ICL) in IL, with a view to making surveillance at least partly a redistributive tool *for* the people and not *against* their individual rights and collective

interests. My proposal also aligns with the Rousseauian preposition—so cogent for theorising social contracts—that situated justice shall stand halfway between people as they are and laws as they should be,²⁰⁹⁴ not the reverse. Is there no way for States to stop spying on us? Granted. But at least they should pursue surveillance programs for genuinely progressive purposes as well, not secondarily to ensure that the 1% pays its taxes, and that corporations are no longer permitted to exploit Westphalia's loopholes to the exclusive benefit of their shareholders, executive, and other top management.

The legalistic distinction of persons in “natural” and “legal” runs along the lines of the 99%/1% divide, perpetuating a misleading conception of fairness and justice whereby everyone is paternalistically surveilled in order to address their potential tax-related abuses. Truth is, such a surveillance is only perilous for the poor, in that the structures of legal power and fiction which allow the 1% (mostly MNCs' top shareholders) to preserve their corporation-tied privilege are sanctioned by and perpetuated through law and thus mostly “lawful”: their discovery or public exposure via surveillance impact their juridical status negligibly. Hence, in practice, surveillance is operated as a privilege-neutral device: both the 99% and the 1% are surveilled, but only the former bear serious consequence out of it, and most importantly, this process leaves power structures unaltered insofar as tax avoidance remains “lawful”. For this to change, the 99% should accept surveillance (an apologetic move) but turn it into a device for the service to all people (this is the utopian part): only when legal persons will cease being accorded special privilege by Anglo-Saxon (and factually global) corporate law, will surveillance debunk them and their shareholders as benefitting from both unjust and unlawful tax practices.

²⁰⁹⁴ See GAJEVIC SAYEGH 2019, p. 16.

Scholars have long wished that the «vast inequality between the 1% and the 99% [would] become a mobilising force for popular resistance and radical change in favour of the 99%»: ²⁰⁹⁵ my take is that a corporate-neutralised, right-endowed, redistribution-aimed, and SC-monitored surveillance, if the latter cannot be dismantled altogether, could *and should* become exactly one of those leverages for profound and genuine change in both IL as a discipline and global governance more comprehensively. The law should stop being a talisman for the few, to embrace compassion for humanity instead.



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²⁰⁹⁵ LAWRENCE 2020, p. 355.

SYNOPSIS

Paying taxes is considered the epitome of modern social contracts based on the rule of law, as well as a primary moral and legal duty for citizens all around the world: it is said to contribute to societal development and security, to equality and welfare, to massive long-term public investments in infrastructure and social care, to collective wellbeing and safety nets for the poorer, to scientific advancement, cultural cohesion, collective progress, and—recent research claims—even to people’s happiness (provided it could be truly measured...). Nonetheless, since the time capitalism has imposed itself as the dominant economic model for virtually all countries and the only accepted paradigm for international trade in goods and services, it has also engulfed its own carve-outs for individuals and companies not to pay their fair share of taxes, that is, methodologies and strategies for unlawful tax evasion by individuals and legalistically lawful tax avoidance by corporations. If the latter is quasi-lawful and the former is lawful is not because tax evasion harms economies and societies more; to the contrary, tax avoidance by major multinational corporations represents by far the highest share of capital that is kept hidden from tax authorities and exacerbates the already dramatic inequality most societies are coping with.

Tax evasion and tax avoidance are as old as capitalism itself, yet over the last five centuries the problem was mostly confined within domestic jurisdictions, at times as extensive as an empire (think for instance of the British and Dutch tax systems during imperialism). Globalisation has reversed this truth, with tax agencies facing novel extrajurisdictional hurdles they had scarcely—if at all—faced before, but lacking or deprived of the instruments to do so. Indeed, taxation had consistently represented a cornerstone of state sovereignty, and the antonomastic exemplification of a State’s territorial jurisdiction, to the extent that international collaboration in tax matters was traditionally understood as either unfeasible or wholesale

unlawful, but certainly unusual. Customary international law seemed consolidated and unchallenged in this respect: exchange of information in tax matters was limited to exceptional dossiers (paradoxically, those involving the most notable people), and (direct or indirect) enforcement by one State of the tax claims of another State was not permitted.

Subsequently, in the immediate aftermath of WW2 and until extremely recently, States have collaborated reluctantly still, but starting to establish embryonic forms of judicial (extradition agreements), administrative (procedural-bureaucratic standardisation), and even legislative (common regulations) cooperation in order to tackle the plagues of tax evasion and tax avoidance. They were particularly concerned with tax havens and offshore financial centres: small jurisdictions (mostly Caribbean micro-islands, but also “minor” EU members like The Netherlands, metropolises like London, federated US states like Delaware, etc.) offering unordinarily low tax-rates, together with banking secrecy and often even special and classified agreements between foreign companies and public authorities in order to further minimise tax duties and pre-emptively quash any legal controversy surrounding taxes. Legal, sociology, and economics scholarship has analysed tax havens in detail, scrutinising their functioning, virtues, and perils from virtually all possible standpoints. Whilst the US (federally) championed this first phase of “globalised” tax-enforcement efforts by means of aggressive and unilateral assertions of jurisdiction (facilitated by its status as the world’s only remaining superpower – at least for the time being), other regions in the world approached the issue relatively softly, confining themselves to basic on-occasion coordination and the production of “intent” policy documents as well as non-binding guidelines/recommendations.

Three events revolutionised the lethargy of this process: 1) the 9/11 and the GWOT, which raised public concerns internationally over the financial means available to terrorist organisations; 2) the 2008 financial crisis, which exposed the fragility and interconnectedness of our economies, urging countries to rapidly find resources to refinance their collapsing markets and unsustainable public debt; 3) the Panama Papers and similar leaks, exposing a global and extended network of corruption, child-labour exploitation, and other fraudulent activities, frequently financed through wealth occultation and unlawful tax shifting to

complacent jurisdictions assisted by law and/or consulting firms (e.g. Mossack Fonseca or KPMG respectively). For them, tax burdens were just about lawlessness. The Internet accompanied each of these three “Grotian Moments” towards a redefined international custom in tax matters, by either enabling them (3) or amplifying their reach (1 and 2). In fact, the Internet is not merely a protocols interface or a communication toolbox through which international law manifests itself, but the true ontology, identity-changer, underlying foundation of new international legal phenomena bearing relevance on taxation. To exemplify, tax havens have always existed, but it is thanks to the Internet if their use has become a mainstream exercise for individuals and corporations worldwide, and it is equally thanks to the Internet if authorities are served with the means to track financial operations or even be knowledgeable about the actual scale of these behaviours.

Consequently, the XXI century approaching, States were forced into taking the problem more seriously, thus renouncing to shares of their sovereign executive space in order to combat illicit profit shifting collectively. Meanwhile, as first disclosed by Wikileaks and the reiterated in countless other scandals, agencies like the NSA were secretly spying on citizens (including prime ministers and other top policymakers) worldwide, and legislation across the “Global North” increasingly legalised and normalised such surveillance by transposing it into positive law under the rubric of often (though not always) pretentious—yet always overbroad—security concerns. Simultaneously, artificial intelligence was breaking into both security apparatuses and global markets, bringing decipherable benefits to humanity but also unforeseeable threats, just like any disruptive technology. In the case of AI, one of the most worrisome threats resides in self-learning machines’ ability to gather enormous amounts of data (“big/bulk data”), analyse it thoroughly (“data mining”), cross-check it to find patterns and hypothesise inferences according to pre-set instructions (algorithms), and share the outcomes with companies (for sale) or governments (for control) which will later act upon them in order to accomplish their business or policy goals – including customising advertising, orienting voters, and nudging people to act and think in a certain manner.

All these revolutions, societal pressures, and governmental (permanent) emergencies unleashed a new wave of tax enforcement globally, with international organisations (or quasi-organisations) such as the G20 and the OECD taking the lead and practically enforcing their standards on a global scale to the highest possible extent (that is, even whenever non-compliant jurisdictions opposed their plans but proved unable to resist international pressure). Within this package of initiatives, particular prominence is due to mechanisms of automated exchange of information across countries: contrary to before, when information about a country's citizens was disclosed to a third jurisdiction's authorities only upon specific and motivated request, taxpayers' information is now being shared in an automatic fashion. Trillions of broadly covering and extremely confidential information packages are released, to flow jurisdiction to jurisdiction, globally, ceaselessly (almost real-time), indiscriminately (regardless of reasonable and individualised suspicion), automatically (lacking judicial oversight or administrative requests), and freed from the scrutiny of taxpayers themselves, who cannot even know whom exactly their information is being shared with, when, why, how, where, and enjoy no recourse to safeguards of any sort against such "preventive disclosure" – nor, for that matter, to its criminal or administrative consequences.

What originated as a laudable initiative to protect human rights (by reducing transnational crime and possibly improving wealth equality and the overall fairness of tax systems) turned into yet another systematic erosion of privacy rights for citizens worldwide, who enjoy no "separate domain of living sovereignty" anymore and are inextricably trapped into a pervasive system of semi-privatised neoliberal surveillance whereby fully regulatorily captured States (that is, States whose decision-makers are colluded with corporate entities) relentlessly expand their surveillant reach, often as a result of unaccountable negotiations hosted and encouraged by equally unaccountable transnational bureaucratic fora. This is an issue of extreme concern, so much that the relative silence of scholarly literature in this respect comes as unintelligible and alienating.

The first doubt concerns whether the OECD's AEOI complies with the dicta of international human rights law. Privacy rights in IHRL are notoriously idealistic and difficult

to enforce internationally, and yet their formulation has been incorporated in far more effective regional arrangements (such as the ECHR) as well as in constitutions, civil codes, and self-standing privacy statutes of dozens of domestic jurisdictions around the globe. In the ICCPR and in all texts inspired by, drawing from, or incorporating it, privacy is not an absolute right, therefore derogations are permitted, and violations might be justified. Pursuant to the ECHR, for instance, privacy derogations are only permissible insofar as they are proportionate as well as necessary in a democratic society.

To begin with, societies need to be “democratic”; under the OECD framework, however, data is automatically exchanged even with authoritarian countries such as the PRC. The commonsensical assumption that China enforces no privacy rights is wrong: privacy rights do feature as a recognition of private personality, and are encapsulated in both the new Civil Code and in the “integrated” cybersecurity-data protection legislation recently enacted. This notwithstanding, because privacy in China is a component of the State’s hard-security and geoeconomic discourse rather than an entitlement to shield one’s private sphere from unwanted interference, those rights address *horizontal* privacy only, that forbids scrutiny from fellow citizens/companies whilst (re-)endowing the PRC Government with the faculty to *vertically* acquire any information however stored/transmitted as it pleases, with no explanation needed, no notice or notification, and for the purposes it deems most appropriate.

As for the necessity criterion, it is an essentially contested concept (internationally as much as in any domestic jurisdiction), yet one might assume it means that the policy aim is worth pursuing and there are no reasonably available alternatives on the part of the right’s violator to accomplish the intended objectives. In this case, the international policy aim is certainly worth pursuing: it is only fair that taxes are paid by everyone and globalisation does not provide loopholes or escape routes for businesses and private citizens alike. However, “necessity” embodies both a qualitative and quantitative connotation; in other words: is the way the exception is enforced reasonable? And is the extent to which it is enforced unavoidable to achieve the goal, also in comparative terms? Moreover, necessity calls into question matters of policy coherence and priorities, to the effect that if privacy is violated in order to satisfy a

stated need, those who violate it shall not deceive the violated parties/targets by concomitantly pursuing other policies that run contrary to the satisfaction of that same need, nor should they deliberately or negligently ignore paths that could have been chosen alternatively at the outset as to avoid violating privacy rights.

In the case under scrutiny, exchanges occur worldwide on a massive and uncontrolled scale, regardless of administrative suspicion over specific taxpayers, and without respecting thresholds of any kind: for example, if a citizen in country A owns a 1-USD-worth bank account in jurisdiction B, the existence of such an account will be automatically disclosed to authorities in country A, and vice versa, together with personal information, online-transaction and cash-withdrawal history, payments details, and any other “relevant” information at the authorities’ discretion. Among several other issues, this is problematic because of the disconnection between the procedures undertaken against citizens’ rights, with data shared across jurisdictions worldwide (where they will be processed according to their own domestic rules), and those citizens’ safeguards and rights which remain generally confined to their jurisdiction of citizenship. Hence, “anonymity” no longer stands for the non-identifiability of an individual, but rather for their mechanistic eradication from a subscribed-to and known-beforehand system of rights and duties.

Individuals’ duties are transnationalised and surveillance goes global, with sovereigns unaccountably entrusting other sovereigns with the processing of their citizens’ data just for the sake of reciprocity; simultaneously, procedural and substantive rights are left anchored to a conception of citizenship which remains rooted in the citizenship of one State (...or a few States, for the lucky ones) and cannot account for the risks and consequences of these information exchanges. The asymmetry and disconnection between surveillance and safeguards runs contrary to all aspirations frequently enunciated by “global constitutionalism”-scholars and articulated in optimistic understandings of the “global society”, “international community”, and the like. At the same time, corporate giants like the Big Tech pay ridiculously low taxes because legislators prove apparently “incapable” of updating the relevant legislation as to cater for digital sales, complex cross-border structures,

and intangible IP entitlements. Appallingly enough, these trends could be already witnessed in what is widely (and naively) considered the leading normative reference for human rights, the EU, even prior to the most recent OECD-triggered legislative developments. On the one hand, the CJEU held that whilst authorities in any EU country could scrutinise “relevant” information for tax assessments of any EU citizen without judicial mandate, procedural safeguards against such moves were only available—if they were available—domestically. On the other hand, the same Court ruled that with a view of upholding the privileges of the internal single market, aggressive tax-avoidance in the EU is lawful (*sic*) in all cases except for the few that blatantly display an “exclusive” (!) tax-avoidance purpose. In other words: EU corporations have the right to benefit from EU tax havens, insofar as they “also” perform some minimal business there (moving a few employees suffices) and their subsidiaries in tax havens are *not exclusively* shell companies.

These European trends manifested the priority accorded to markets over values, or the disconnection between Europeanised duties/enforcement versus the non-Europeanisation of the corresponding rights/safeguards. They demonstrated something more profound, too: that whilst private individuals can be aggressively monitored in a preventive fashion, regardless of grounded suspicion and of the actual volume or nature of their activities abroad, policy measures against corporate tax avoidance (which, again, subtracts from the public budget much higher resources compared to natural-person evasion) are premised on the opposite assumption (corporate righteousness) and always purposively leave loopholes to be exploited with impunity. It is a sort of reversal of the “burden of proof”.

Similar instances of incoherence between individuals and corporations represent themselves over and over again at any crisis as well, when “socialist” bail-outs are available for companies, investment banks are “too big to fail” and must then be rescued with *all taxpayers’* money, managers are rewarded rather than jailed, and unaccountability and impunity reign unhindered for all those who are responsible for financial crimes and yet find protection in States’ regulatory capture, “tied hands”, white-collar clubs, and private-public revolving doors.

One cannot but conclude that the OECD's framework for automated exchange of information in tax matters is unlawful under IHRL due to its radical and indiscriminate design: it is not sufficiently "necessary" before other and more effective policy tools are implemented. Moreover, it is illegitimate from the standpoint of global constitutionalism in that it creates empty niches of transnational elitist, bureaucratic rule without constitutionalising supranationally the rights of those who are forcibly subjected to the informal-yet-factually-binding prerogatives of such agencies. Eventually, such a framework is unduly contributing to the crystallisation of an "instant custom" that elicits "a-jurisdictional" surveillance through taxation, regardless of citizenship, rights, safeguards, priorities, or reasonableness.

My conclusion is a troubling and concerning confirmation of the fears expressed by several sociologists and theorists of structural violence years ago, with regards to the deterritorialization and intrusiveness of forms of monitoring which disassemble the body and reassemble it as patchwork of information collected from different sources under different regimes of hypocritical and permanent exception. In particular, elaborated StT mechanisms incarnate what Haggerty and Ericson described as the "data doubles" of "surveillant assemblages": in practice, a new typology of social "contract" whereby misleadingly politically-correct narratives makes it feel increasingly acceptable (or overwhelmingly ineluctable) that private citizens are intrusively surveilled, whilst neoliberal champions' interests, market forces, and corporate preferences are given green light to prosper up to phagocytising what remains of the contract itself. Also thanks to tax-avoidance schemes, MNCs gain momentum and erode public confidence in policymakers' ability and willingness to solve citizens' real problems in our age of unrestrained, pseudo-policed, unethical corporatisation for the few.

In general, and abstractly, individuals gain a number of societal benefits from paying taxes. And yet, taxation policies, priorities, and privileges easily become the reflection of wider social disruptions: are they just another form of surveillance capitalism? Corporate and non-corporate forms of surveillance capitalism have come a long way to represent the elitist convergence of economic and predictive interests between private and public agents. Against

the backdrop of said convergence, anti-evasion campaigns against *all individuals* might be conceptualised as an expression of public-private exacerbations of capitalist distortions, and as a proxy for ritualised exercises of enhanced, ubiquitous surveillance. A bottom-up moderate utopia towards an SC that permits surveillance but demands redistribution, and that ousts corporations but institutionalises multi-layered global citizenship, has seldom proven more topical.



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Mainland China (PRC Law)

China’s Security Law	National Security Law of the People’s Republic of China (中华人民共和国国家安全法; <i>Zhōnghuá rénmin gònghéguó guójiā ānquán fǎ</i>), promulgated by the Standing Committee of the National People’s Congress on 1 July 2015, entered into force the same day.
China’s Administrative Litigation Law	Administrative Litigation Law of the People’s Republic of China (2017 amended version) [中华人民共和国行政诉讼法(2017修正); <i>Zhōnghuá rénmin gònghéguó xíngzhèng sùsòng fǎ (2017 xiūzhèng)</i>], enacted by the National People’s Congress Standing Committee on 27 June 2017 and effective as of 1 July 2017, replacing the previously amended version adopted by the National People’s Congress Standing Committee on 1 November 2014, entered into effect on 1 May 2015.
China’s Circular on International Tax Administration	Circular on Regulating and Strengthening International Taxation Administration, issued by the People’s Republic of China’s State Administration of Taxation [Letter No.1153] in 2002.
China’s Civil Code	Civil Code of the People’s Republic of China (中华人民共和国民法典; <i>Zhōnghuá rénmin gònghéguó mǐnfǎ diǎn</i>), adopted at the Third Session of the Thirteenth National People’s Congress on 28 May 2020, and entered into force on 1 January 2021.
China’s Company Law	Company Law of the PRC (2018 Amendment) [中華人民共和國公司法 (2018修正); <i>Zhōnghuá rénmin gònghéguó gōngsī fǎ (2018 xiūzhèng)</i>], adopted at the Fifth Meeting of the Standing Committee of the Eighth National People’s Congress and promulgated by Order No. 16 of President of the PRC on December 29, 1993, amended for the first time at the 13 th Meeting of the Ninth National People’s Congress on December 25, 1999 in accordance with the Decision on Amending the Company Law of the PRC, and amended for the second time at the 11 th Meeting of the Tenth National People’s Congress on August 28, 2004 in accordance with the Decision on Amending the Company Law of the PRC, and {...} amended for the fourth time in accordance with the Decision of the Standing Committee of the National People’s Congress on Amending the Company Law of the PRC (2018) adopted at the Sixth Session of the Standing Committee of the 13 th National People’s Congress on October 26, 2018, as promulgated through Order No. 15 of the President of the PRC.
China’s Cybersecurity Law	Cybersecurity Law of the People’s Republic of China (中华人民共和国网络安全法; <i>Zhōnghuá rénmin gònghéguó wǎngluò ānquán fǎ</i>), enacted by the Standing Committee of the National People’s Congress on 7 November 2016 and entered into force on 1 June 2017.
China’s Data Security Law	Data Security Law of the People’s Republic of China (中华人民共和国数据安全法; <i>Zhōnghuá rénmin gònghéguó shùjù ānquán fǎ</i>), promulgated by the 13 th National People’s Congress on 10 June 2021, entered into force on 1 September 2021.

China's Due Diligence Measures	Due Diligence Administrative Measures about Non-resident Financial Account Information in Tax Matters (非居民金融账户涉税信息尽职调查管理办法; <i>Fēi jūmín jīnróng zhànghù shè shuì xīnxī jìnzhí diàochá guǎnlǐ bànfǎ</i>), Announcement No. 14/2017, jointly issued by the State Administration of Taxation, the Ministry of Finance, People's Bank of China, China Banking Regulatory Commission, China Insurance Regulatory Commission and China Securities Regulatory Commission on May 9, 2017, entered into force on July 1, 2017.
China's Enterprise Income Tax Law	Enterprise Income Tax Law of the People's Republic of China (Revised) [中華人民共和國企業所得稅法 (已被修訂); <i>Zhōnghuá rénmin gònghéguó qǐyè suǒdeshuì fǎ (yǐ bèi xiūdìng)</i>], adopted at the Fifth Session of the Tenth National People's Congress of the People's Republic of China on 16 March 2007, promulgated by Order No. 63 of the President of the People's Republic of China Mr Hu Jintao on the same date, and entered into effect on 1 January 2008.
China's Foreign Income Tax Law	Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises (中華人民共和國企業所得稅法, <i>Zhōnghuá rénmin gònghéguó qǐyè suǒdeshuì fǎ</i>), adopted at the Fourth Session of the Seventh National People's Congress on 9 April 1991, promulgated by Order No. 45 of the President of the People's Republic of China on the same date, and effective as of 1 July 1991.
China's PIPL	Personal Information Protection Law of the People's Republic of China (中華人民共和國個人信息保護法; <i>Zhōnghuá rénmin gònghéguó gèrén xīnxī bǎohù fǎ</i>), adopted at the 30 th meeting of the Standing Committee of the 13 th National People's Congress of the PRC on August 20, 2021, promulgated by the President of the PRC on August 20, 2021, and effective as of November 1, 2021.
China's Rules on Confidentiality	Rules on the Confidentiality of Tax Information Exchange, issued by the People's Republic of China's State Administration of Taxation [Letter No. 931] in 2002.
China's Working Regulations	Working Regulations for the International Exchange of Tax Intelligence, issued by the People's Republic of China's State Administration of Taxation [Letter No. 3] for Trial Implementation in 2001, revised on 12 June 2006.
SAT Notice	Notice of the State Administration of Taxation on Issuing the Rules for the "International Exchange of Tax Information", 國家稅務總局關於印發《國際稅收情報交換工作規程》的通知, Document No. 70 [2006] of the State Administration of Taxation, issued on and effective as of May 18, 2006.
HKSAR (HK Law)	
Comprehensive Double Taxation Arrangement	Specification of Arrangements (The Mainland of China) (Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income) Order (Cap. 112, section 49).
HK's National Security Law	Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, enacted by the Standing Committee of the National People's Congress of the People's Republic of China on 30 June 2020, entered into force the same day.
Revenue Ordinance	Inland Revenue (Amendment) (No. 3) Ordinance of HKSAR, No. 22 of 2016, enacted on 30 June 2016.
other Domestic Jurisdictions	
2016 Circolare	<i>Circolare</i> No. 16/E of April 28, 2016 by Italy's <i>Agenzia delle Entrate</i> .
2018 Circolare	<i>Circolare</i> No. 1/2018 of December 4, 2017 by Italy's <i>Guardia di Finanza</i> .
Canada's PIPEDA	Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, assented to on 13 April 2000 and enacted by the Parliament of Canada.
Plan Estratégico	<i>Plan Estratégico de la Agencia Tributaria 2020-2023</i> .

Resolución de 2021	<i>Resolución de 19 de enero de 2021, de la Dirección General de la Agencia Estatal de Administración Tributaria, por la que se aprueban las directrices generales del Plan Anual de Control Tributario y Aduanero de 2021.</i>
Unfair Competition Prevention Act	Unfair Competition Prevention Act of Japan, Act No. 47 of 1993 (promulgated on May 19), last amended by Act No. 33 of 2018.

EU Legal and Policy Instruments (including Founding Treaties)

1977 Council Directive	Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, Document 31977L0799.
2004 Commission Decision	Commission Decision 2004/915/EC of 27 December 2004 amending Decision 2001/497/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries.
2010 Commission Decision	Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council.
2011 Council Directive	Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (Directive on Administrative Cooperation) and repealing Directive 77/799/EEC, Document 32011L0016.
2014 Council Directive	Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, Document 32014L0107.
2015 Council Directive	Council Directive (EU) 2015/2060 of 10 November 2015 repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments.
2016 Commission Implementing Decision	Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield.
2017 Commission Communication	Communication from the Commission to the European Parliament and the Council: “Exchanging and Protecting Personal Data in a Globalised World”, COM/2017/07 final, Document 52017DC0007, 10 January 2017.
2021^a Commission Implementing Decision	Commission Implementing Decision of 28 June 2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom [part relevant for the applicability of the GDPR], C(2021) 4800 final.
2021^b Commission Implementing Decision	Commission Implementing Decision of 28 June 2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom [part relevant for the applicability of the Law Enforcement Directive], C(2021) 4801 final.
AEoI Directive 2015	Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, Document 32015L2376.
Alternative Investment Funds Directive	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, Document 02011L0061-20210802 (consolidated version).

AMLDs	Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance).
	Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance).
	Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, PE/30/2018/REV/1.
ATA Directive	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 (Anti-Tax Avoidance Directive).
ATA Directive Bis	Council Directive (EU) 2017/952 of 29 May 2017 (aka ATAS II) amending Directive (EU) 2016/1164 (aka ATAS I) as regards hybrid mismatches with third countries, Document 32017L0952.
Binding Corporate Rules	Binding Corporate Rules to be adopted by any MNCs processing EU data and approved by the EU in accordance with the consistency mechanism set out in Art. 63 GDPR.
CCCTB	EC, Proposal for a Council Directive on a Common Corporate Tax Base, {SWD(2016) 341} {SWD(2016) 342}, COM(2016) 685 final, 2016/0337 (CNS), 25 October 2016.
	EC, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), {SEC(2011) 315} {SEC(2011) 316}, COM(2011) 121/4, 2011/0058 (CNS), 1 December 2011.
Commission DP on Fair Corporate Taxation	EC, Platform for Tax Good Governance: Fair Corporate Taxation – Achievements and Remaining Challenges’, Discussion Paper for the Platform on Tax Good Governance, Meeting of 19 December 2018, Doc: Platform/38/2018/EN, 5 December 2018.
Commission WP on Company Taxation	Commission of the European Communities, Commission Staff Working Paper: “Company Taxation in the Internal Market”, COM(2001)582 final, 23 October 2001.
CRD IV	Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance, OJ L 176, 27 June 2013, pp. 338-436, Document 32013L0036.
Cross-Border Directive	Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance), Document 02019L2121-20191212 (consolidated text).
DAC6 Directive	Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, ST/7160/2018/INIT, Document 32018L0822.
Directive 680	Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free

	movement of such data, Document 02016L0680-20160504, repealing Council Framework Decision 2008/977/JHA.
DPD	Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Document 31995L0046 (Data Protection Directive, no longer in force).
EU Charter	Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, pp. 391-407.
European Parliament 2019	European Parliament Resolution of 18 December 2019 on fair taxation in a digitalised and globalised economy: BEPS 2.0 (2019/2901(RSP)), P9_TA(2019)0102.
Former Merger Directive	Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, valid until 14 December 2009.
Former Mutual Assistance Directive	Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (Codified version), Document 32008L0055, valid until 31 December 2011.
Former Subsidiaries Directive	Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, valid until 17 January 2012.
FTT Proposal	EC Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax {SWD(2013) 28 final} {SWD(2013) 29 final}, COM(2013) 71 final, 14 February 2013.
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
Interest and Royalty Payments Directive	Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, Document 02003L0049-20130701 (consolidated version).
Merger Directive	Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, Document 32009L0133.
Mutual Assistance Directive	Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, Document 32010L0024.
Savings [Tax] Directive (or 2003 Council Directive)	Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, Document 02003L0048-20151208 (consolidated version), valid until 31 December 2015.
Subsidiaries Directive	Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), Document 02011L0096-20150217 (consolidated version).
Tax Governance Communication	Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: "Promoting Good Governance in Tax Matters", COM(2009) 201 final, 28 April 2009.
TFEU	Treaty on the Functioning of the European Union, signed on 25 March 1957, effective on 1 January 1958 (1 December 2009 under its current name), 298 UNTS 3 (EEC Treaty or Treaty of Rome), Document 12012E/TXT (consolidated version).
Umbrella Agreement	Council Decision (EU) 2016/920 of 20 May 2016 on the signing, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the protection of personal

information relating to the prevention, investigation, detection, and prosecution of criminal offences.

Other Regional Instruments

1972 Nordic Convention	Convention between Denmark, Finland, Iceland, Norway, and Sweden regarding Mutual Assistance in Tax Matters, signed on 9 November 1972, later amended in 1976, 1982, and 1987.
1996 Nordic Convention	Denmark – Faroe Islands – Finland – Iceland – Norway – Sweden Income and Capital Tax Treaty, signed on 23 September 1996.
ACHR	OAS, American Convention on Human Rights “Pact of San José, Costa Rica”, 1144 UNTS 123, signed on 22 November 1969, entered into force on 18 July 1978.
ACHPR	OAU, African [Banjul] Charter of Human and Peoples’ Rights, 1520 UNTS 217, signed on 27 June 1981, entered into force on 21 October 1986
CMAA Convention	International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences, 1226 UNTS 143, signed in Nairobi on 9 June 1977.
CoE 2019 Report	CoE, Report of the 2019 Ordinary Session (Second part), AA19CR12, 9 April 2019, http://assembly.coe.int/Documents/Records/2019/E/1904091000E.pdf .
Convention 108	CoE, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS 108, signed in Strasbourg on 28 January 1981, entered into force on 1 October 1985.
ECHR	CoE, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, signed in Rome on 4 November 1950, entered into force on 3 September 1953.

International (bilateral) Instruments

China-Turkey Tax Treaty	Agreement Between the People’s Republic of China and the Republic of Turkey for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, stipulated in Beijing on 23 May 1995.
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International (multilateral) Legal and Policy Instruments

Annual Report 2014	HRC, Twenty-seventh Session – Agenda items 2 and 3: “Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development”, <i>The right to privacy in the digital age</i> , A/HRC/27/37, 30 June 2014.
General Comment No. 16	CCPR, General Comment No. 16 on the Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, HRI/GEN/1/Rev.9 (Vol. I), 8 April 1988.
General Comment No. 24	CESCR, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24, 23 June 2017.
Guiding Principles for B&HR	UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (Professor John Gerard Ruggie), “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, presented to the HRC at its 17 th session, A/HRC/17/31, 21 March 2011.
Guiding Principles for HR Impact Assessments	UN Independent Expert on the effects of foreign debt on human rights, “Guiding Principles for human rights impact assessments for economic

	reform policies”, presented to the HRC at its 40 th session, A/HRC/40/57, 19 December 2018.
ICCPR	International Covenant on Civil and Political Rights, 999 UNTS 171, adopted on 16 December 1966, entered into force on 23 March 1976.
ICESCR	International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, adopted on 16 December 1966, entered into force on 3 January 1976.
ICJ Statute	Statute of the International Court of Justice, 33 USTS 993, adopted on 18 April 1946.
ILC (<i>jus cogens</i>)	ILC, Seventieth session, Third report on peremptory norms of general international law (<i>jus cogens</i>) by the Special Rapporteur (Professor Dire Tladi), 12 February 2018, A/CN.4/714.
ILC 2006	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, Fifty-eight Session, finalized by Martti Antero Koskeniemi, A/CN.4/L.682, 13 April 2006.
ILC 2016	ILC, Report on the work of the sixty-eighth session of the ILC (2016), Commentary 6 to Conclusion 4 of Chapter V on the “Identification of customary international law”.
ILC 2018	ILC, “Identification of customary international law: Comments and observations received from Governments”, A/CN.4/716, 14 February 2018.
Maastricht Principles on Extraterritorial Obligations	International Commission of Jurists, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights”, 28 September 2011.
MAATM	Multilateral Convention on Mutual Administrative Assistance in Tax Matters, 3014 UNTS, adopted on 25 January 1988, entered into force on 1 April 1995, amended by the Protocol adopted in Paris on 27 May 2010 and entered into force on 1 June 2011, as well as integrated by a Multilateral Competent Authority Agreement in 2014.
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, also known as “Multilateral Instrument”, adopted on 7 June 2017, entered into force on 1 July 2018.
RoL Declaration	UNGA, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 30 November 2012, A/RES/67/1.
UDHR	UNGA, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
UN Charter	Charter of the United Nations, 1 UNTS XVI, 24 October 1945.
UN Draft Revised Manual	Committee of Experts on International Cooperation in Tax Matters, Seventeenth Session (Geneva, 16-19 October 2018), Item 3(c)(iii) of the provisional agenda: “Update of the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries”, Draft Revised Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries – Note by the Subcommittee on Tax Treaty Negotiation, E/C.18/2018/CRP.11, 2 October 2018.
UN Report on B&HR	HRC, Thirty-fourth session, Agenda item 3, “Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”, A/HRC/34/47, 4 January 2017.
UN Report on Extreme Poverty 2017	HRC, Thirty-fifth session, Report by the UN Special Rapporteur on extreme poverty and human rights (Professor Philip G. Alston), A/HRC/35/26, 22 March 2017.
UN Report on Extreme Poverty 2018	UNGA, Seventy-third session, Report by the UN Special Rapporteur on extreme poverty and human rights (Professor Philip G. Alston): “Extreme poverty and human rights”, A/73/396, 26 September 2018.
UN Report on Financial Flows and Development	HRC, Nineteenth Session, “The Right to Development and Illicit Financial Flows: Realizing the Sustainable Development Goals and

	Financing for Development”, Report by independent consultant Ms Bhumika Muchhala, A/HRC/WG.2/19/CRP.3, 18 April 2018.
UN Study on HR and Financial Flows	HRC, Thirty-first Session, “Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights”, A/HRC/31/61, 15 January 2016.
UNCLOS	United Nations Convention on the Law of the Sea, 1833 UNTS 397, adopted on 10 December 1982, entered into force on 16 November 1994.
UNFCCC	United Nations Framework Convention on Climate Change, 1771 UNTS 107, adopted on 19 June 1993, entered into force on 21 March 1994.
UNGA Resolution 68/116	UNGA Resolution 68/116 on “The Rule of Law at the National and International Levels”, 18 December 2013, A/RES/68/116.
UNHCHR Report on Civil Society	HRC, Forty-fourth Session, Report of the United Nations High Commissioner for Human Rights, “Civil society space: Engagement with international and regional organizations”, A/HRC/44/25, 20 April 2020.
VCLT	Vienna Convention on the Law of Treaties, 1155 UNTS 331, adopted on 22 May 1969, entered into force on 27 January 1980.
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, adopted on 21 March 1986, not yet entered into force.

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