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Tax Treaty Disputes: A Global Quantitative Analysis

EDUARDO BAISTROCCHI AND MARTIN HEARSON

1 Introduction

This chapter offers the first global quantitative analysis of tax treaty disputes emerging in the first almost 100 years of the international tax regime (ITR).[1] The time and space dimensions of the analysis are as follows. The time dimension covers the era that ran from 1923 – when four economists produced the League of Nations' Report on Double Taxation,[2] proposing a legal technology that is now encapsulated in the OECD Model Tax Convention on Income and on Capital (OECD MTC) – until 2015, when the G20 and the OECD published the Base Erosion and Profit Shifting 2015 Final Reports (BEPS Reports), which 'represents the first substantial renovation of the international tax standards in almost a century' (pre-BEPS Reports Era).[3] The space dimension of this analysis covers the G20 countries.

This chapter explores variations in the number, nature and outcome of leading tax treaty disputes along three axes: (1) across time, (2) between G20 countries and (3) among the different clauses of the OECD MTC. Using a new dataset of 1,610 leading tax treaty disputes in G20 countries compiled by working with the chapter authors of this book, this chapter sheds light on some of these trends for the first time.

[1] Literature on the ITR is broad and deep. Some excellent surveys on the ITR are listed in Volume 1, Chapter 1, 'Introduction', fn. 5.

[2] League of Nations, Economic and Financial Commission, *Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp*, League of Nations document No. E.F.S.73.F.19 (Geneva: League of Nations, 1923) (1923 Report). The authors of the 1923 Report were four eminent economists: Prof. Bruins of Commercial University, Rotterdam; Prof. Senator Einaudi of Turin University; Prof. Seligman of Columbia University; and Sir Josiah Stamp of London University.

[3] OECD/G20, *Base Erosion and Profit Shifting Project: Explanatory Statement. 2015 Final Reports* (Paris: OECD Publishing, 2015), p. 5, available at: www.oecd.org/ctp/beps-explanatory-statement-2015.pdf.

Our analysis reveals an important new aspect of the strategic interaction among G20 countries and non-G20 hubs in the pre-BEPS Reports Era (1923–2015).[4] It is widely understood that G20 countries compete against each other for capital, just as private firms compete for market share, using tools at their disposal such as their corporate tax rates.[5] Bilateral tax treaties concluded with non-G20 hubs, particularly with the Netherlands, Switzerland and Belgium, allow these hubs to serve as outlets for the bundled products that G20 countries offer to international investors. The importance of these non-G20 hubs as conduit jurisdictions for multinational tax structures, highlighted in the OECD's BEPS Reports, is reflected in our data showing the important number of court disputes in G20 countries related to tax treaties with non G-20 hubs.[6] One component of the bundle of products offered by G20 countries is the interaction of domestic laws with tax treaties, which serves as a vehicle to minimise investors' tax entry costs and/or tax exit costs. The main treaty articles subject to disputes in our datasets are the articles minimising such costs, and it is notable that taxpayers have increasingly been winning a majority of disputes in G20 countries that relate to treaties with these non-G20 hubs.[7] A second component of the bundle is an increasing set of procedures implemented in an opaque way, such as mutual agreements (MAPs), to address tax treaty disputes. Our data suggest a

[4] See Volume 2, Chapter 15, 'Tax Treaty Dispute Resolution: The Global Evolutionary Path'.

[5] Capital has a wide definition here. It includes, e.g., financial capital, human capital and intangible capital. See E. Todder, 'International Competitiveness: Who Competes against Whom and for What?' *Tax Law Review*, 53 (2012): 509.

[6] See Section 5 and Figures 17.8–17.12 below. These figures show that three non-G20 hubs are at the centre of the universe of tax treaty disputes in the G20: Switzerland since the 1970s, the Netherlands since the 1990s and Belgium since the 2000s. We call this dynamic the Copernican Revolution, as, since the 2000s, G20 countries seem to be orbiting these three non-G20 hubs.

[7] See Volume 2, Chapter 14, 'Patterns of Tax Treaty Disputes: A Global Taxonomy', Figure 14.10. Figure 14.10 shows the central patterns of tax disputes between G20 countries and Non-G20 Hubs of the ITR; it exhibits that there have been at least forty-six patterns of tax treaty disputes between G20 countries and non-G20 hubs in the pre-BEPS Reports Era. Thirty-five per cent of the patterns (sixteen out of forty-six) are on the improper use of the Convention. Tax treaty shopping to minimise source taxation on passive income (particularly capital gains, dividends and royalties) is the most frequent scenario. Thirteen per cent of the patterns (six out of forty-five) are on conflicts centred on the source country tax jurisdictions (particularly immovable property, dividends, royalties and capital gains). See also Volume 2, Chapter 16, 'Triple Non-taxation and BEPS: Global Implications'. It shows how tax treaty law facilitates triple non-taxation and argues that triple non-taxation under double tax agreements is safe under BEPS as it is not caused by BEPS practices.

decline in the number of disputes in OECD countries in recent years, corresponding to an increase in the number of MAPs.[8]

The chapter is organised as follows. In Section 2, we explain the methodology for developing the dataset, including its strengths and limitations. One important aspect is the approach to standardisation and comparison of results between countries. Section 3 then outlines the basic structure of the dataset, including trends over time, in terms of both absolute numbers and the average shares of disputes across countries. In Section 4, we highlight jurisdictions whose treaties are most subject to litigation in G20 countries and examine some of the variations in the nature of disputes within these jurisdictions. We expand this analysis further in Section 5 by presenting a dynamic network analysis, which shows for the first time the development of the international tax regime in terms of court cases, rather than simply by the presence or absence of a dispute. Section 6 sets out some surprising variations in the rate of victory in disputes, while Section 7 highlights the trends in the victory rate by article. In Section 8, we complete the analysis by comparing our data on court cases with the mutual agreement procedure data published by the OECD. Finally, Section 9 offers a conclusion for this chapter and the book as a whole.

2 Methodology

2.1 Rationale

The dataset used in this chapter is entitled the 'G20 Leading Tax Treaty Case Dataset' (hereafter referred to as 'the dataset').[9] It was compiled by the G20 country authors for this book as an expert survey. Each expert was asked to compile a list of leading tax treaty disputes in their country decided in the pre-BEPS Reports Era. The focus on leading cases, rather than all leading and progeny cases, was designed to create a more manageable task, but it also has substantive implications. Because leading cases involve pushing the boundaries of legal interpretation to create new jurisprudence, they have a different role from progeny cases, which can be resolved by the courts through existing leading cases.[10]

[8] See Section 8 below. It shows the move from transparent to non-transparent dispute settlement in countries that are both G20 and OECD members.
[9] The dataset is at the following link: www.cambridge.org/baistrocchi.
[10] Karl N. Llewellyn, *The Bramble Bush* (Oxford University Press, 1930).

All cases in the dataset meet the following double test:

1. The case should be a tax treaty dispute, meaning a controversy on the interpretation and application of tax treaty law to a set of facts. The dispute must relate to a specific treaty. So, for example, a transfer pricing dispute that does not relate to a treaty is not a tax treaty dispute. The tax treaty must be material to the court's holding in the case, and not merely part of its obiter dictum.
2. It should be a leading case, meaning a case so important in the rules of law determined that it has been cited by an administrative agency or court as of assistance in resolving a new question of law. We use an objective test here, which is that the case should have been cited at least once. This is to ensure that we have an objective and comparable definition of 'leading case'. 'Administrative agency' means a revenue authority at a national or local level.

The dataset includes the case name and reference, the treaty and the relevant article of the OECD Model Convention (rather than the article number from the actual treaty), the first and last tax years to which the dispute refers, the verdict year and the outcome. We take the view that that first tax year gives an indication of the decision by a taxpayer to put in place the particular disputed structure or transaction, while the last tax year gives an indication of the point at which the tax authority took issue with the taxpayer's interpretation of the treaty in its tax returns. The median number of consecutive fiscal years involved in disputes in our dataset is two, and the median gap between the final tax year involved and the final court verdict (including any appeals) is seven years. We do not have data to tell us when the letters of deficiency that triggered the legal proceedings were sent by tax authorities in our dataset, but we assume that, with a typical statute of limitations of five years, the typical letter of dispute might be expected two years after the final fiscal year concerned.

2.2 Standardisation and Reconciliation

The records of disputes were reviewed and standardised by a research team in London. Ideally, a dataset of this nature, which requires numerous decisions about how to code complex qualitative data into a standardised format, would have been double coded by two researchers working independently, with disagreements reconciled by a third coder; cases would have been assigned randomly among the team to eliminate any bias. Given the highly specialised nature of the work and, in particular, the specialist national knowledge required, this ideal-type coding was not possible. To reduce the likelihood of bias introduced by using different coders for each country, our G20 research team undertook two standardisation exercises.

First, the lists compiled by G20 country authors were reviewed against an alternative list of tax treaty disputes, the International Bureau of Fiscal Documentation (IBFD) online database.[11] This IBFD list of disputes was also compiled by country authors, but it is not rigorously standardised: according to one of its editors, the IBFD country authors are asked to include 'important' cases, but no objective definition of this term is supplied. Our G20 country authors were therefore asked to check the lists they had compiled against the IBFD's list, in particular to re-examine any discrepancies between the two lists and any differences in the particulars for cases appearing in both lists.

Second, the definition of leading tax treaty dispute was discussed among G20 country authors at the LSE G20 and Beyond Tax Conference held in London on 30–31 October 2015. This discussion revealed important differences in national legal systems in the G20 world and a number of ambiguities in the working definition. This led to the more specific definition of leading case set out above.[12] One result of this discussion was more detailed recording of case outcomes, where disputes include multiple articles or treaties. After this conference, the dataset was comprehensively revised to ensure that each entry was fully compliant with the objective definition of leading tax treaty dispute.

3 The G20 Leading Tax Treaty Dispute Dataset: Vital Statistics

3.1 Use of Simple Averages across Countries

The use of an objective measure – that a case should have been cited at least once – rather than a subjective definition of 'leading case' eliminates much of the subjective bias of individual country authors' application of the definition, but it introduces a different kind of bias. In certain legal cultures, it is common to cite previous court cases of relevance, even

[11] IBFD, 'IBFD Tax Research Platform', 2015, available at: http://online.ibfd.org.
[12] See Section 2.1, above.

when they are not materially relevant to the court's decision; in other legal cultures, it is not. This cross-country variation creates the impression that certain countries, in particular, Germany and India, have many more cases than others. Any comparisons on the basis of absolute numbers of cases become overwhelmed by these two countries in particular.

To make up for this, many of the figures in our analysis use the proportion of cases, rather than absolute numbers, and we have calculated the simple average of these proportions across all G20 countries.[13] (We have also given the results for two groupings: 'OECD members' and 'BRICS and others'.[14]) This has the result that, for example, one case in the United Kingdom, for which the dataset includes thirty-three leading cases, is given as much importance as around twenty cases in Germany, for which the dataset includes 618 cases. This means that our dataset is suitable for comparing variations in the composition of tax cases across countries over time and across articles, for example, but not absolute numbers of cases. We mainly draw conclusions about the relative importance of particular kinds of disputes in different countries based on the share in those countries' total disputes. While it is, of course, the case that there is a greater volume of tax treaty litigation in some countries than in others, the restriction of analysis to G20 countries means that we are only focusing on larger economies.

Cases are dated based on the final tax year under dispute. When we refer to 'cases in the 1990s', for example, we mean cases covering a

[13] We have referred to this technique as 'normalisation'. This term can have a range of meanings in statistics, but in this case we use it to refer to converting cases measured on different scales to a common scale, between 0 and 1. Each case is expressed as a proportion of all leading cases in the specific country over the time period of this study. Three sets of normalised values are used: the proportion of unique leading cases, the proportion of times an article is featured in a leading case and the proportion of times that a treaty is featured in a leading case. For example, consider the case of a dispute regarding Arts. 10 and 23 of the UK–US, UK–France and UK–Germany treaties. In counting the number of UK cases as part of the normalisation process, this dispute would be considered as one unique UK dispute, two different articles featured in UK disputes and three different treaties featured in UK disputes.

[14] OECD members includes Australia, Canada, France, Germany, Italy, Japan, Mexico, South Korea, Turkey, the United Kingdom, and the United States. BRICS and others includes Argentina, Brazil, China, India, Indonesia, Russia, South Africa. Mexico joined the OECD in 1994, and South Korea in 1996. Two South Korean leading disputes out of twelve relate to fiscal periods ending before its accession; all Mexican disputes relate to fiscal periods ending after its accession.

taxable period ending in the 1990s. On average, in the dataset, there is a 6.5-year delay between the final tax year under dispute and the final verdict in the case, including any appeals. Added to this, there will be a lag before a given case is first cited in a subsequent case, making it consistent with our definition of leading case. As a rule of thumb, this means that our dataset, which includes cases decided as recently as 2015, is only reliable for cases in which the final tax year under dispute is 2008 or earlier. Even for that year, representing a seven-year delay until a final verdict in 2015, it is likely that only around half of leading cases are included in our dataset.

3.2 Basic Description of the Cases Included

The dataset includes 1,610 leading tax treaty disputes across the G20 countries.[15] There are 2,290 entries because some disputes relate to multiple articles or treaties. Over 70 per cent of these disputes took place in two countries, India and Germany, which we believe is primarily an artefact of our objective definition of 'leading case', rather than a substantive finding.

Around 30 per cent of disputes in the dataset relate to tax years in the 2000s, part of a pattern of exponential increases in tax treaty disputes since the earliest in the dataset, which relate to tax years in the 1940s (note that figures for the 2000s are likely to be understated because of the lead time discussed earlier). As Figures 17.2 and 17.3 show, this trend holds for both the absolute number of disputes and for the average proportions across countries.

When the number of disputes is segmented between the eleven OECD members in the sample and the eight BRICS and other non-members, there appears to be a slowing down in the rate of increase in disputes in OECD countries, and an explosion in the number of disputes outside the OECD. The trend is much more pronounced when absolute numbers of disputes are used, because there is a drastic reduction in Germany and a huge increase in India in recent years; the simple average proportions across countries, which eliminate this distortion, show that the trend still holds, although it is less dramatic.

15 The G20, in fact, includes nineteen countries and the European Union. Figure 17.1 only shows eighteen countries, because there are no recorded leading tax treaty disputes in Saudi Arabia.

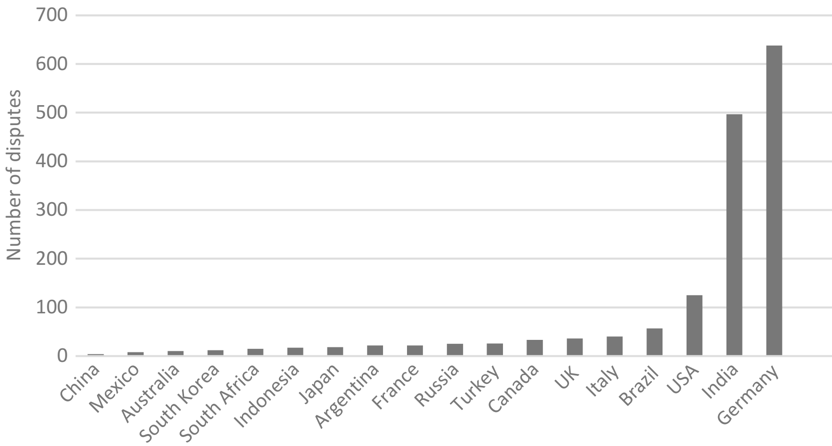

Figure 17.1 All Leading Tax Treaty Disputes by Country of Litigation, in Absolute Numbers

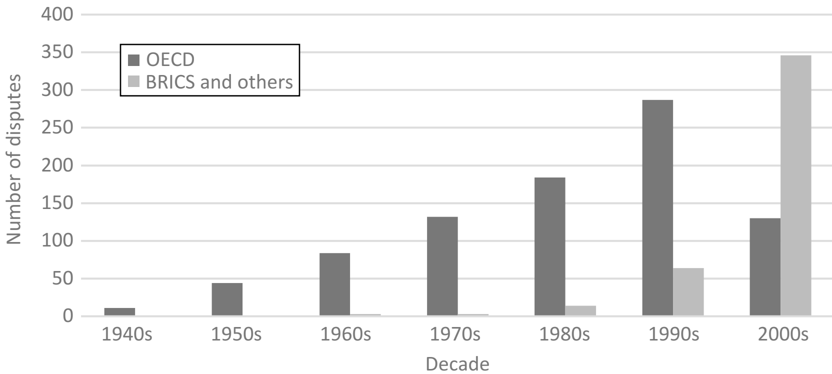

Figure 17.2 Number of Disputes by Decade, Segmented by Country Grouping, 1940s–2000s

4 Analysis by Treaty Partner

The dataset includes information on the particular treaties disputed, allowing us to see which countries' treaty networks are most disputed in (other) G20 members' courts. Unsurprisingly, given its economic importance, US treaties are the most commonly litigated in the G20: on average a third of disputes in each G20 country relate to that country's treaty with the United States (by comparison, the next largest country in Figure 17.4, the United kingdom, is on average the subject of 10 per cent of each country's disputes). Half of the

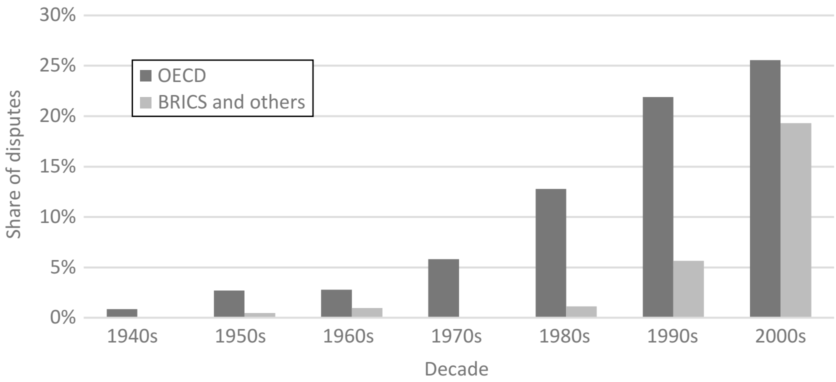

Figure 17.3 Share of Disputes by Decade of the Last Fiscal Year Concerned, Segmented by Country Grouping, 1940s–2000s (simple average across countries)

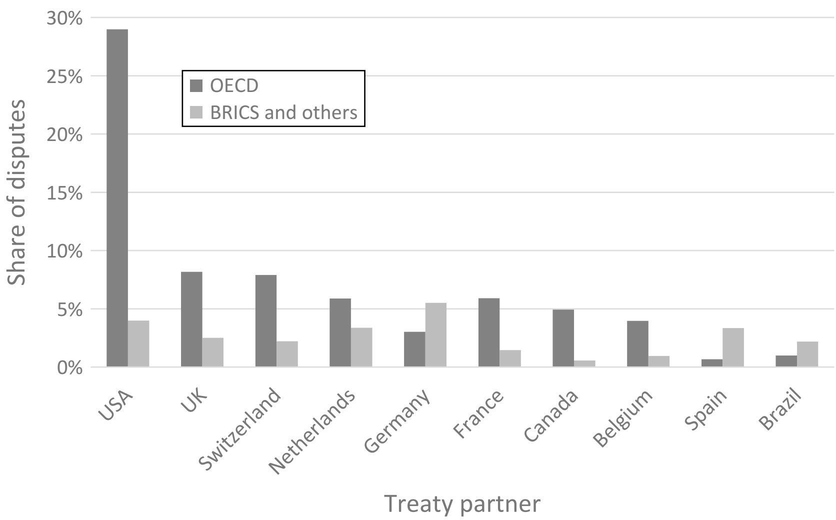

Figure 17.4 Share of Disputes by Treaty Partner, Segmented by Country Grouping in which the Dispute Took Place (simple average across countries)

non-G20 countries featuring in the top ten are hub countries – Switzerland, the Netherlands, Belgium and Spain – the latter the focus of a large share of disputes with Latin American countries. It is notable that disputes involving Germany are predominantly of most importance to non-OECD countries.

Analysis of the same data over time in Figures 17.5 and 17.6 shows that disputes with the United States have become much more important

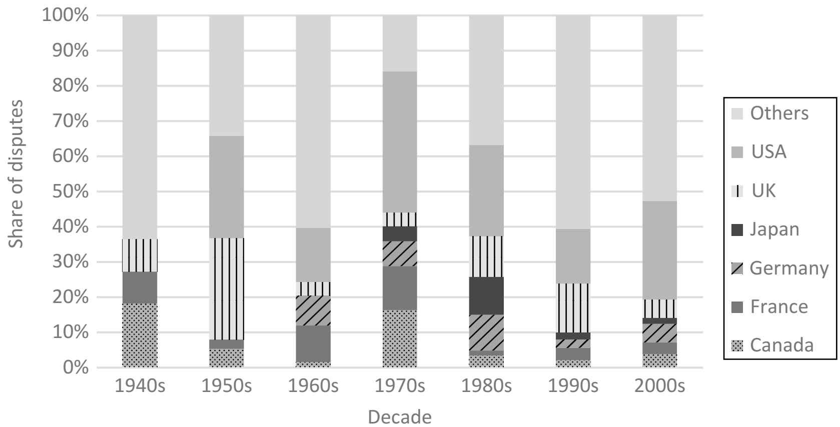

Figure 17.5 Share of Disputes Relating to the Six Most Common G20 Treaty Partners, by Decade of the Last Fiscal Year Concerned, 1940s–2000s (simple average across countries)

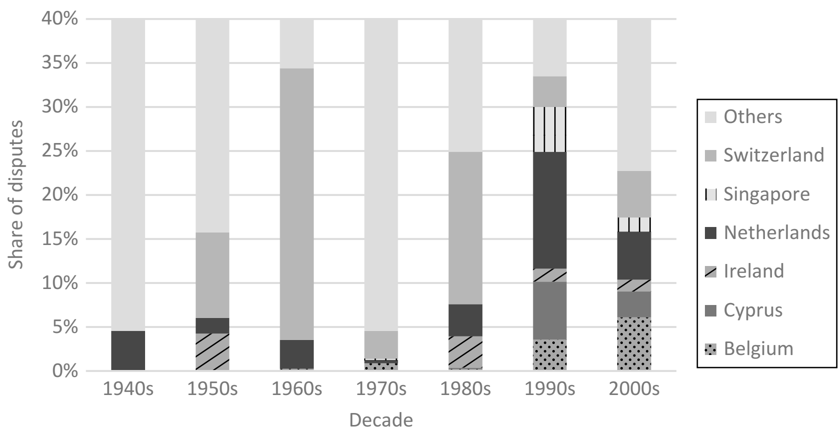

Figure 17.6 Share of Disputes Relating to the Six Most Common Non-G20 Hub Treaty Partners, by Decade of the Last Fiscal Year Concerned, 1940s–2000s (simple average across countries)

in G20 courts in the 2000s, compared with the 1990s when the Netherlands and the United Kingdom combined were more significant than the United States. Switzerland also seems to be less important in the 1990s and 2000s than in the 1960s and 1980s. Furthermore, Belgium and Cyprus have emerged as important hubs for G20 disputes in the 2000s.

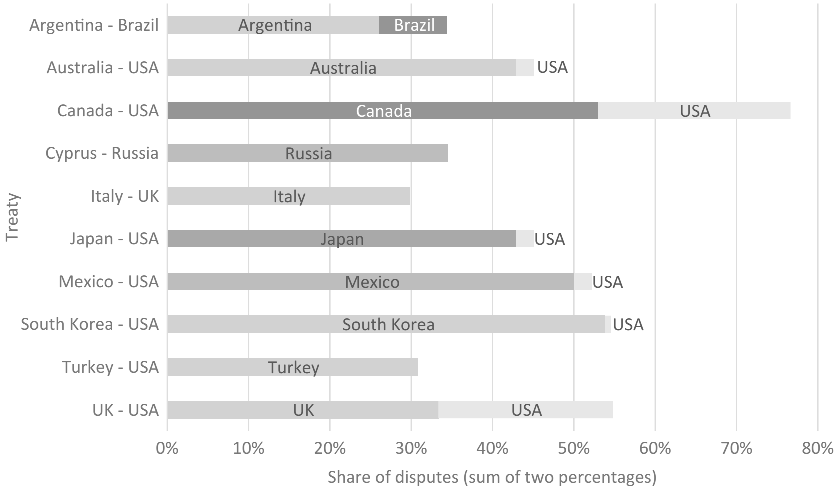

Figure 17.7 Ten Most Disputed Treaties in the G20, Measured by Each Treaty's Combined Share of Total Disputes in the Treaty's G20 Signatories

Finally, Figure 17.7 shows the ten treaties that are most litigated as a share of leading cases in any G20 country. For the reader's reference, the US–Canada treaty, the most important of all treaties in terms of normalised numbers of disputes, makes up just over 4 per cent of all 'normalised' disputes in the dataset.[16] In keeping with its economic significance, US treaties are by far the most commonly disputed, constituting seven out of the ten most disputed treaties. In Australia, Canada, Japan, Mexico and Korea, around half of all tax treaty disputes involve these countries' treaties with the United States. For the United States, on the contrary, its treaties with Canada and the United Kingdom are each responsible for around one-fifth of tax treaty disputes. The other treaties in the top ten are: Argentina–Brazil, which is the subject of one-quarter of Argentinian tax treaty disputes; Cyprus–Russia, the subject of one-third of Russian tax treaty disputes; and Italy–UK, the subject of around one-third of all disputes in Italy. It is perhaps interesting that Cyprus–Russia is the only treaty involving a non-G20 country in the top ten.

Figure 17.7 reveals that legal controversy concerning these most litigated treaties takes place overwhelmingly in the country of source. For example, most disputes related to the Argentina–Brazil tax treaty have emerged in Argentina, the usual country of source in its interaction with Brazil.

[16] See fn. 13 for a discussion of 'normalisation'.

A similar dynamic can be seen in the interaction between pair of countries like Australia and the United States, Italy and the United Kingdom, Canada and the United States, Japan and the United States, the United Kingdom and the United States. This suggests that tax authorities in the country of source have sought to resist the impact of tax treaty law in their country more so than tax authorities in the country of residence. This is perhaps a logical outcome of the residence bias inherent in the OECD Model Tax Treaty, under which tax treaties act more to restrict the taxing rights of the source country than those of the country of residence.

5 The Evolving Network of Tax Treaty Disputes

Figures 17.8–17.12 are an alternative way to show the information used in the previous section, which gave an idea of what share particular treaties and countries represented in the total disputes taking place in G20 countries. Here we use network analysis to represent graphically the full universe of leading tax treaty cases in G20 countries. Figures 17.8–17.12 show the network of tax treaty disputes in each decade, beginning in the 1960s (the first decade for which there are enough cases to draw such a diagram).

G20 countries are shown in black and others in grey. The size of each country's node indicates the average share of disputes in other G20 countries that relate to that country. For example, the United States has the largest node, which tells us that, on a simple average, US treaties make up the greatest proportion of disputes in G20 countries' courts (excluding cases in the United States itself). The thickness of each line indicates the average share of G20 disputes involving that treaty; between G20 members, it is the sum of the share of cases from both countries. A country's location within Figures 17.8–17.12 is determined using the technique of principal component analysis. Countries that play the most similar roles in the G20 dispute network are placed closest together. Countries at the edges are more different, but this includes countries with large numbers of disputes concerning their treaties, which form poles. Other countries' positions relative to these poles indicate how closely connected they are to the poles.

A striking feature of Figures 17.9–17.12 is the role of Germany and the United States as the two major poles of tax treaty disputes, from the 1970s to the present day. These two jurisdictions have the most distinct and comprehensive patterns of leading tax treaty disputes. From the 1980s onwards, the United Kingdom and India have gravitated towards

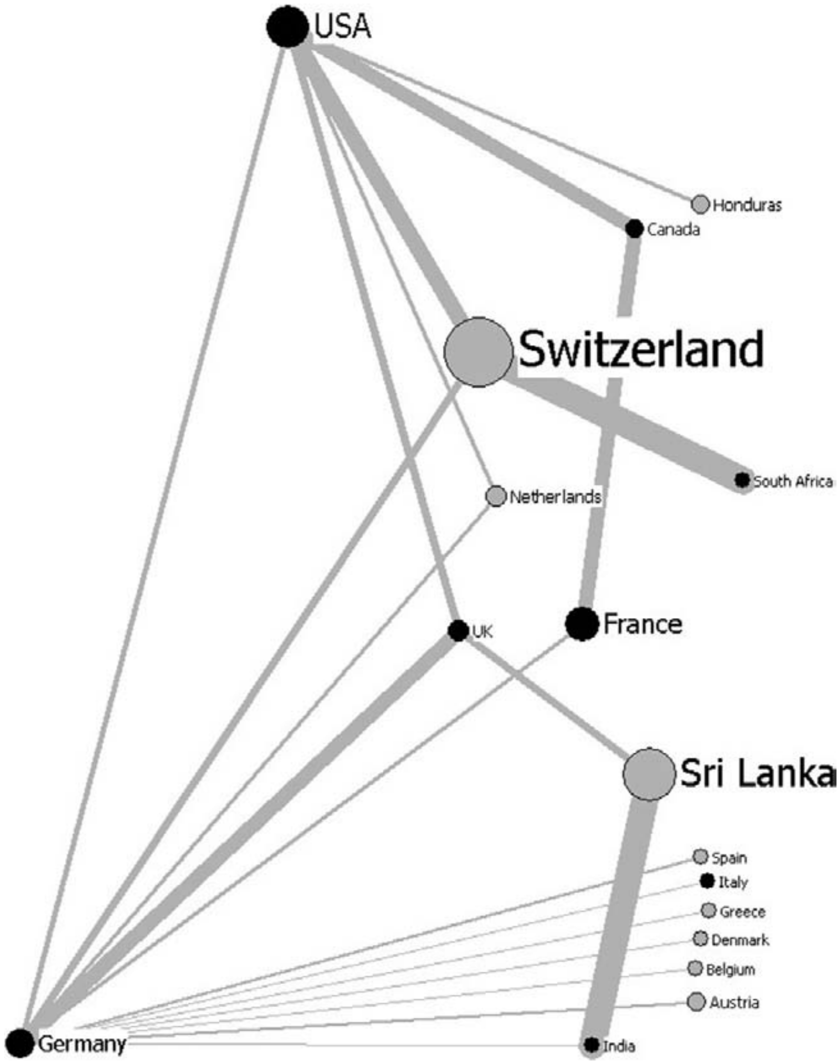

Figure 17.8 The G20 Tax Treaty Dispute Network, 1960s

the US pole, forming an 'Anglo-Saxon pole' of countries more closely connected in a web of similar tax treaty disputes. Meanwhile, in the 1990s and 2000s, the Ibero-American pole seems to form close to, but distinct from, Germany. Led by Brazil, this grouping also includes Spain, Portugal and Argentina, with Luxembourg a close associate. Between these two or three poles is a dense mass incorporating the remaining G20 states

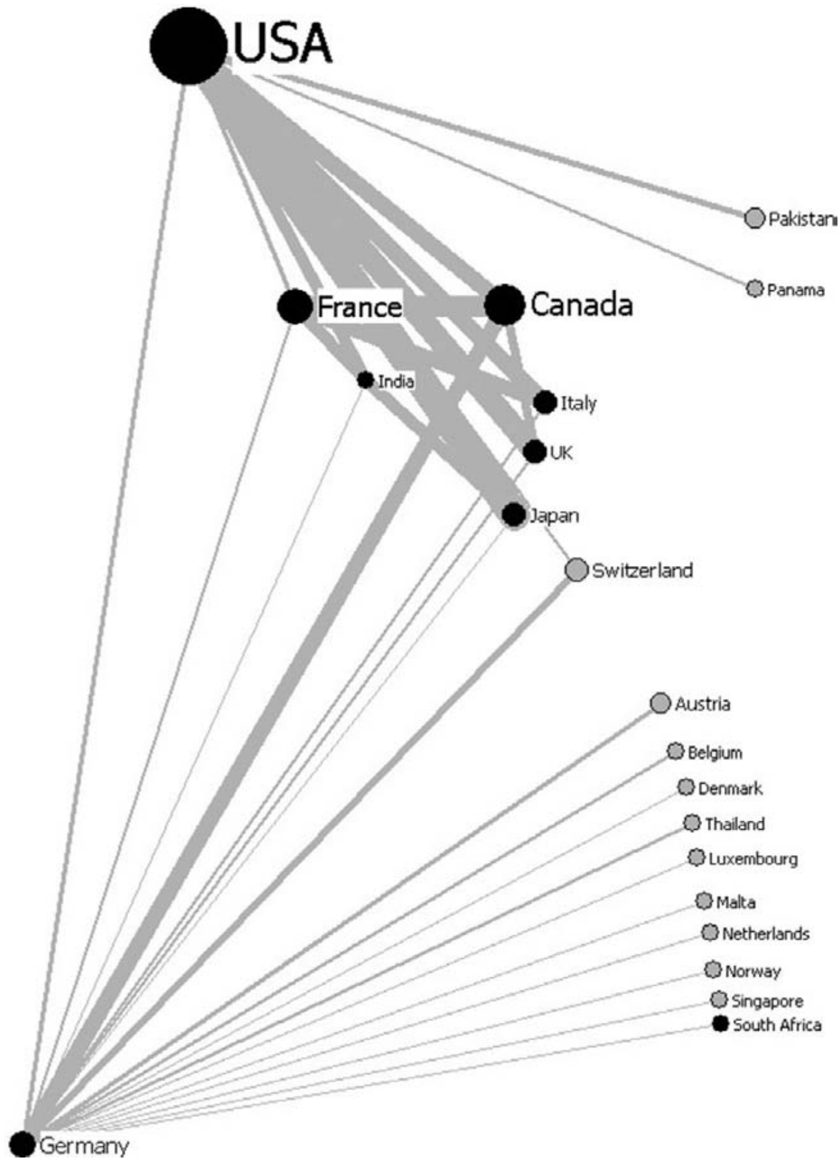

Figure 17.9 The G20 Tax Treaty Dispute Network, 1970s

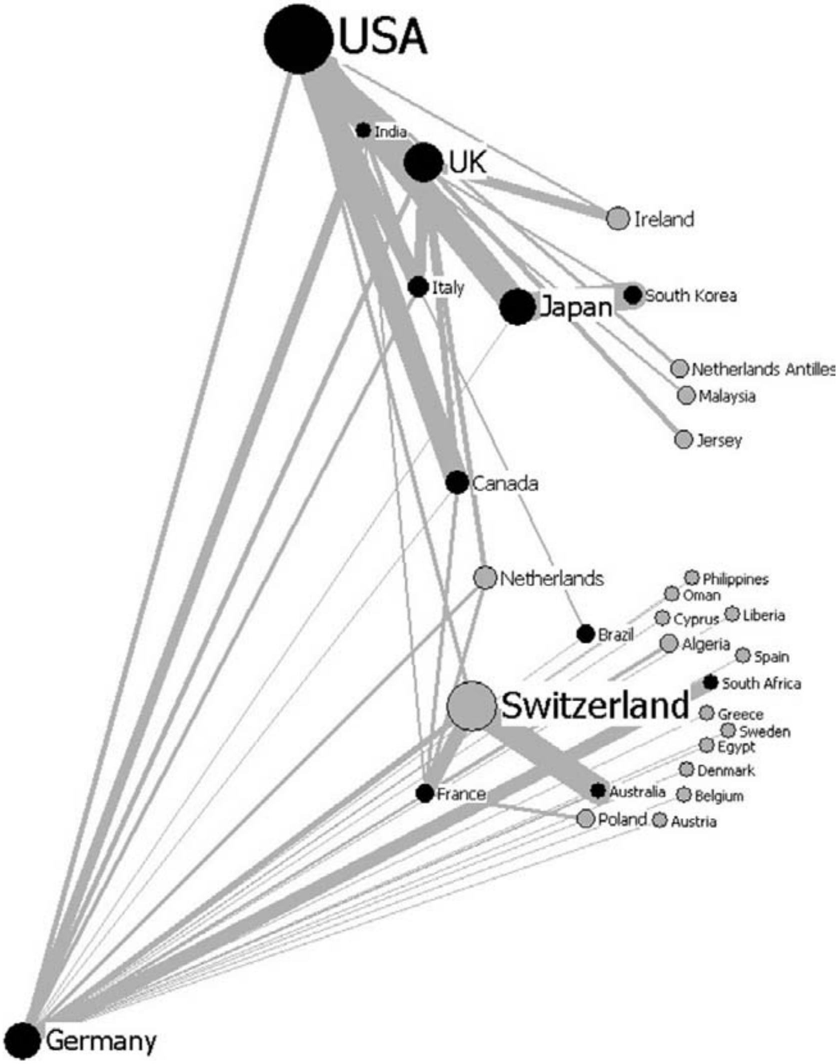

Figure 17.10 The G20 Tax Treaty Dispute Network, 1980s

(such as Italy, France and Japan) and a number of hub jurisdictions (Switzerland, the Netherlands, Belgium and Singapore); the location of these central countries implies that they are bound up in disputes linking them with the Anglo-Saxon pole and the Ibero-German poles.

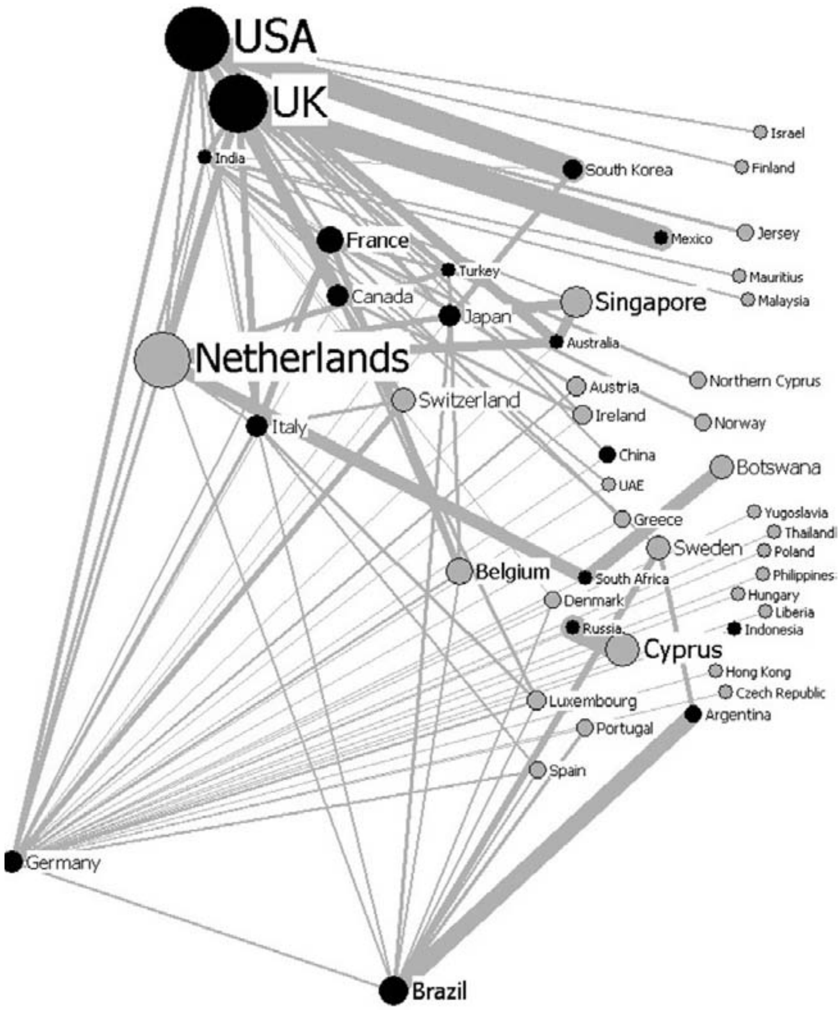

Figure 17.11 The G20 Tax Treaty Dispute Network, 1990s

The evolving size of the nodes also illustrates an interesting evolution in the role of different jurisdictions. Since the size of a node reflects the importance of a country in disputes taking place in its treaty partners, it tells us which jurisdictions are most important in tax treaty contention at a given time. During the 1980s, Switzerland is the most important non-G20 focus of tax treaty disputes and, in particular, disputes taking place

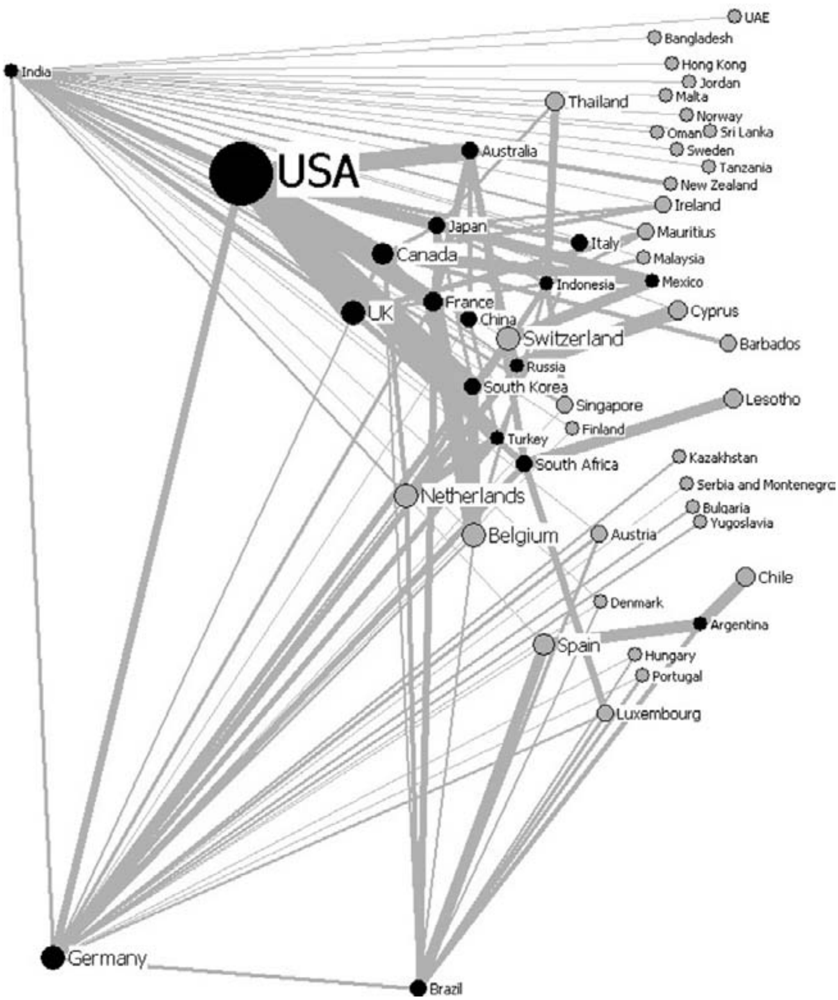

Figure 17.12 The G20 Tax Treaty Dispute Network, 2000s

in France and Australia, but also in Germany and the United States. By the 1990s, Switzerland, while still in the centre of the web, has faded in terms of the share of disputes, replaced in prominence by the Netherlands, whose treaties have become contentious in many different jurisdictions. At this point, UK treaties account for a particularly large share of disputes in other countries, whereas France has moved away from the 'European' pole, shifting towards the 'Anglo-Saxon' part of the diagram.

Finally, in the 2000s, the United States, which has consistently been among the largest foci of treaty disputes, becomes overwhelmingly dominant, dragging most other participants in the network in its direction. India, which experiences an unparalleled upsurge in tax treaty disputes in the 2000s, has pulled away from the system alone.[17]

For ease of reference, we call this dynamic the 'Copernican Revolution'. This is so because three non-G20 hubs are now in the centre of the universe of leading tax treaty cases in G20 countries. Indeed, Switzerland is in the centre from the 1970s; the Netherlands and Belgium are also in the centre from the 1990s and 2000s, respectively.

6 Success Rate

Where possible, we have recorded the outcome of disputes at the highest court reached by the case. This produces some surprising findings. First, as shown in Figure 17.13, the proportion of cases won by the taxpayer has steadily increased since the 1940s and has been consistently greater than 50 per cent since the 1980s. A higher success rate by taxpayers may reflect a number of trends, including the growing strength of private sector advocates, a change in the courts' attitudes (reflected, for example, by the shift in the United Kingdom from the Duke of Westminster view to purposive interpretations and the Ramsey principle). Another possible explanation is that tax authorities have become more aggressive in their approach to litigation, lowering the threshold for the likelihood of success at which they choose to pursue cases.

Figure 17.14 shows the success rate by country. There are marked differences within the OECD, ranging from a government success rate of around three-quarters in the United Kingdom to as little as one-third in France. There is no clear difference between the 'old' and 'new' worlds, with a wide range of results among non-OECD and emerging market OECD member countries. A particularly low government success rate in India is perhaps unsurprising, although the 100 per cent rate in China deserves an explanation: our data for China are based on tax authority

[17] The unique positions of Germany and India in this final diagram may also reflect the large number of leading tax treaty disputes in these countries according to our objective definition. Although normalisation prevents the overwhelming number of disputes from giving these countries undue weight, the larger number of disputes included for these two countries inevitably means that a greater number of different treaties signed by these jurisdictions are included within our dataset.

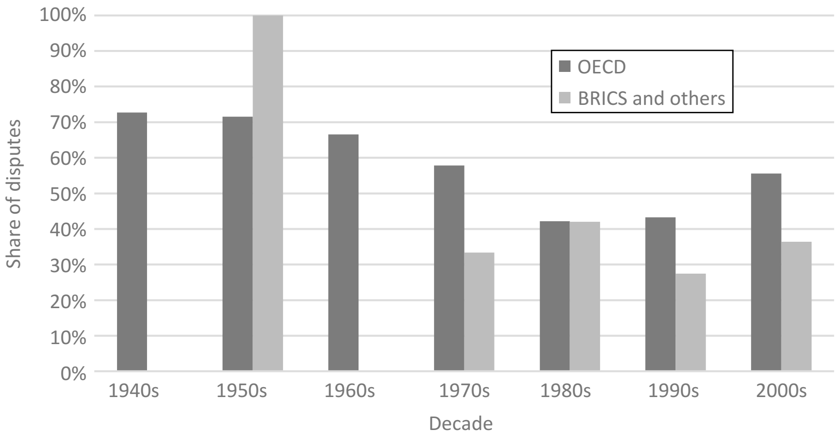

Figure 17.13 Government Victory Rate by Decade, Segmented by Country Grouping, 1940s–2000s (simple average across countries)

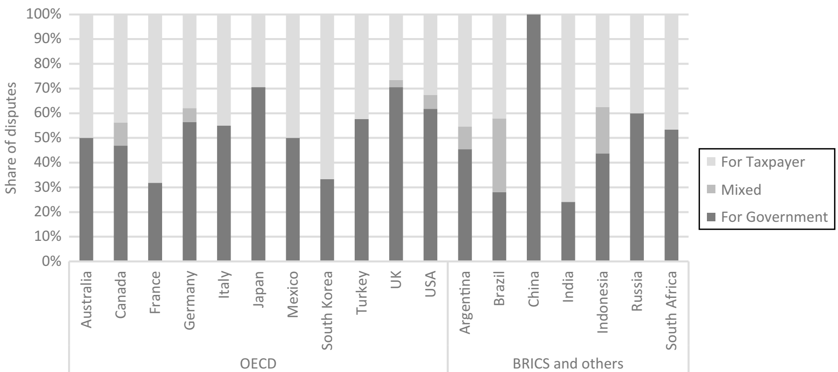

Figure 17.14 Government Victory Rate by Country in which the Dispute Took Place

rulings, not independent court judgments. There have been only four court judgments on tax treaty disputes in China in the pre-BEPS Reports Era. All judgments have upheld the decisions of the local tax authorities.

When the success rate is compared across the most commonly disputed treaty partners discussed previously, the variation is even more dramatic. Whereas French authorities have one of the lowest success rates, other G20 countries' authorities have the highest success rate in court cases involving French treaties. Taxpayers are particularly

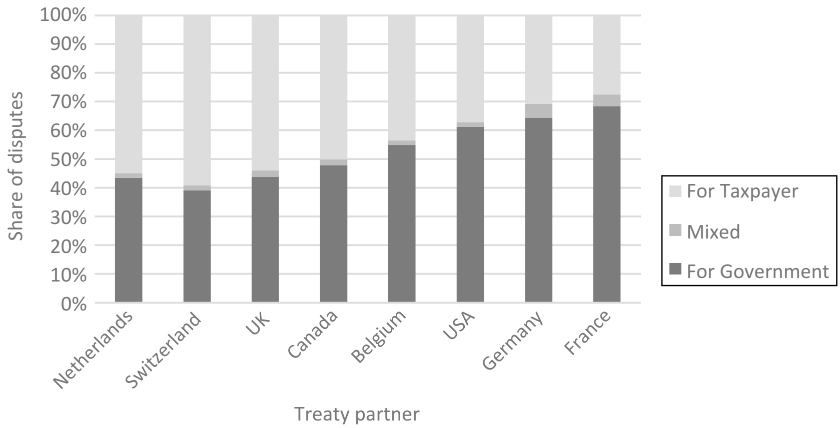

Figure 17.15 Government Victory Rate by Treaty Partner (simple average across countries in which the dispute took place)

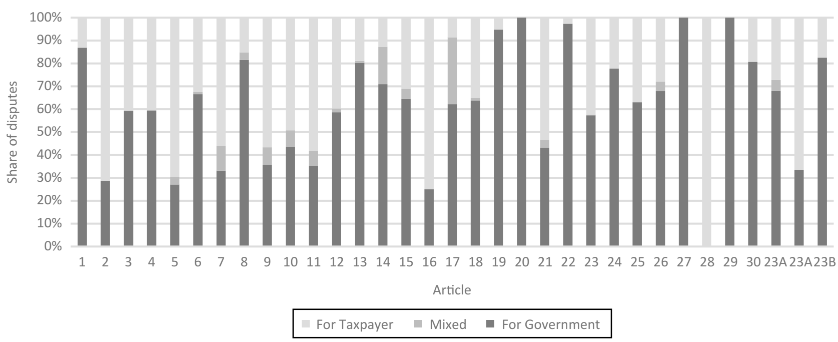

Figure 17.16 Government Victory Rate by Article, All Articles (simple average across countries)

successful in G20 court disputes involving treaties with the Netherlands and Switzerland, perhaps because tax authorities are more aggressive in challenging tax structures involving these two jurisdictions (Figure 17.15).

Figures 17.16 and 17.17 compare the success rate across each article, Figure 17.17 focusing on only the most commonly disputed articles. There are, again, dramatic variations. Among the most commonly disputed articles, taxpayers win in three-quarters of cases concerning the definition of permanent establishment (Article 5), but only one-fifth of

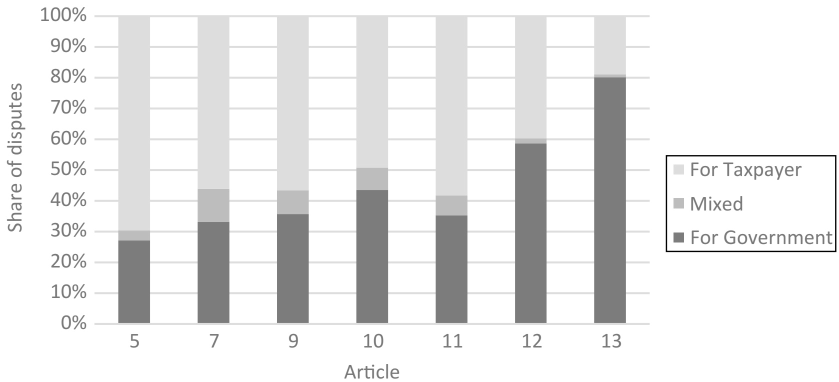

Figure 17.17 Government Victory Rate by Article, Most Commonly Disputed Articles (simple average across countries)

Figure 17.18 Number of Disputes Concerning the Most Commonly Disputed Articles, Segmented by Country Grouping

cases concerning capital gains (Article 13). Figures 17.17 and 17.18 may illustrate why the BEPS process has included significant work to reform Article 5.

7 Analysis by Article

As Figures 17.18 and 17.19 indicate, the most common disputes relate to Articles 5, 7, 9, 10–12 and 13 of the OECD Model Convention, a pattern

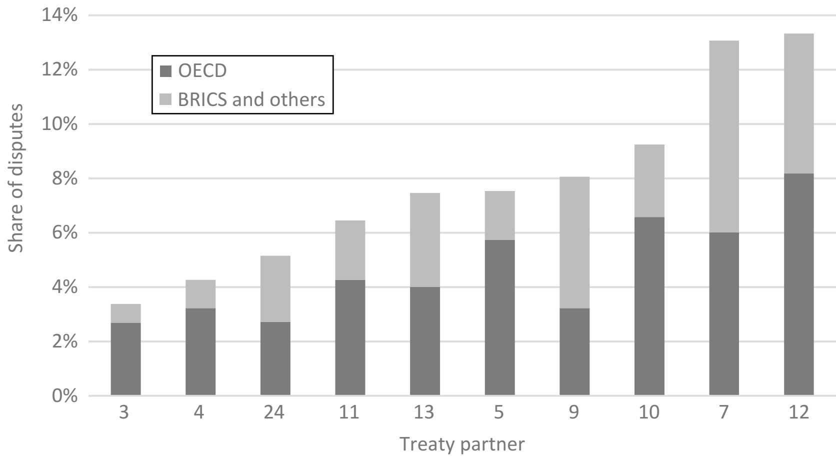

Figure 17.19 Share of Disputes Concerning the Most Commonly Disputed Articles, Segmented by Country Grouping (simple average across countries)

that holds whether absolute numbers or average shares of cases are used. Articles 15 and 23a are very common when absolute values are used, but not when the average share of disputes across all countries; in both cases, this is a result of the very large number of disputes concerning these articles taking place in Germany, for which the raw figures based on our definition of leading case are much higher.

Figure 17.20 gives a breakdown of the share of these disputes for each country. It reveals a very heterogeneous pattern, indicating that different articles are more controversial in different countries:

- Article 5 is rarely the subject of more than 10 per cent of disputes, and never more than 15 per cent.
- Article 7 is of particular importance in Brazil, where it is the subject of half of all disputes, and in Australia, where it makes up one-third.
- Article 9 constitutes a large number of cases in Japan, Argentina and India. Transfer pricing cases are normally fact-specific, so they hardly become leading tax treaty disputes within the wording of our definition of leading tax treaty dispute.
- Article 10 is of most importance to Italy, Korea, Turkey and Russia.
- Article 11 is most disputed in Mexico and Indonesia.
- Article 12 is most disputed in Italy, Turkey and Argentina.

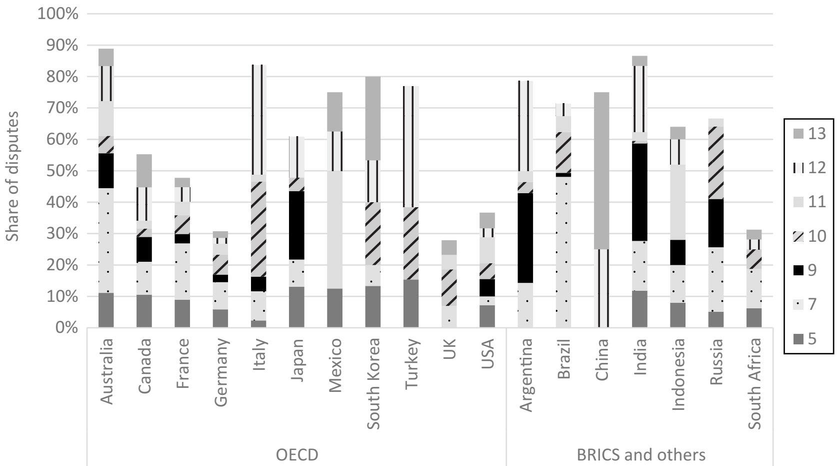

Figure 17.20 Share of Disputes Concerning the Most Commonly Disputed Articles, by Country in which the Dispute Took Place

- Article 13 is rarely contested in Europe and North America, but constitutes a high share of disputes in Mexico, Korea and China.

To understand these trends in more detail, Figure 17.21 presents a dynamic analysis of the growth in disputes concerning these articles over time, segmented between OECD members and non-members. Only disputes taking place since the 1980s have been included, because before this period, the number of disputes is too small for a meaningful analysis. A particular surprise from this figure is Article 7: there is a significant growth in the share of Article 7 disputes from the 1990s to the 2000s among non-OECD countries, but a huge decline within OECD countries. This may imply the dwindling importance of permanent establishments in multinational companies' structures in OECD countries and a growing importance for these same structures in BRICS countries. Another surprise is that, despite the high profile of certain capital gains cases outside the OECD (especially *Vodafone India*), Article 13 accounts for a small share of non-OECD disputes, and a larger share within the OECD. The consistently large role of Article 12 in both groups, however, supports the view that intellectual property has been important both for the global economy and for tax planning since the 1980s.[18]

[18] See Volume 2, Chapter 15, 'Tax Treaty Dispute Resolution: The Global Evolutionary Path'.

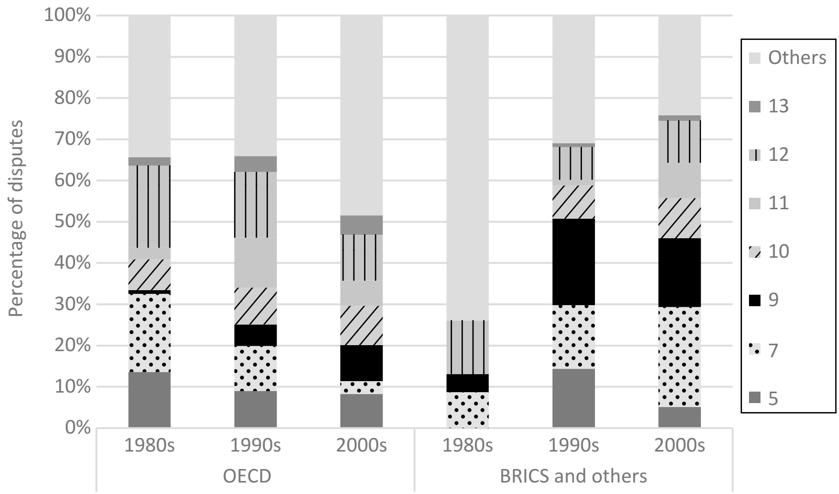

Figure 17.21 Share of Disputes Concerning the Most Commonly Disputed Articles, by Decade of the Last Fiscal Year Concerned, and by Country Grouping

Figure 17.22 in this section highlights the most contentious individual treaty articles, combining the figures for disputes in both treaty partners where they are G20 members.[19] Remarkably, over half of the sixteen entries for Korea relate to just two articles: Article 13 of the Korea–Belgium treaty and Article 4 of the Korea–US treaty. (For the reader's reference, the disputes related to these two articles make up 1 per cent each of all the normalised treaty disputes in our dataset.[20]) Royalty provisions in treaties between Argentina and Spain, and between Italy and the United States, are both the subject of a fifth or more of cases in Argentina and Italy, respectively, whereas the business profits and interest articles of the Australia–US treaty make up 40 per cent of all Australia's disputes. We saw above that the Cyprus–Russia treaty constitutes one-third of Russia's leading tax treaty disputes and Figure 17.22 reveals that all of these disputes concern this treaty's dividend article. Article 5 of the US–Canada treaty is the only article in the top ten list where contention is balanced between the two treaty partners, making up around 8 per cent of disputes in both countries.

[19] China is necessarily excluded, because with only four cases, each case represents 25 per cent of the total, and would automatically be included in Figure 17.22.

[20] See fn. 13 for a discussion of 'normalisation'.

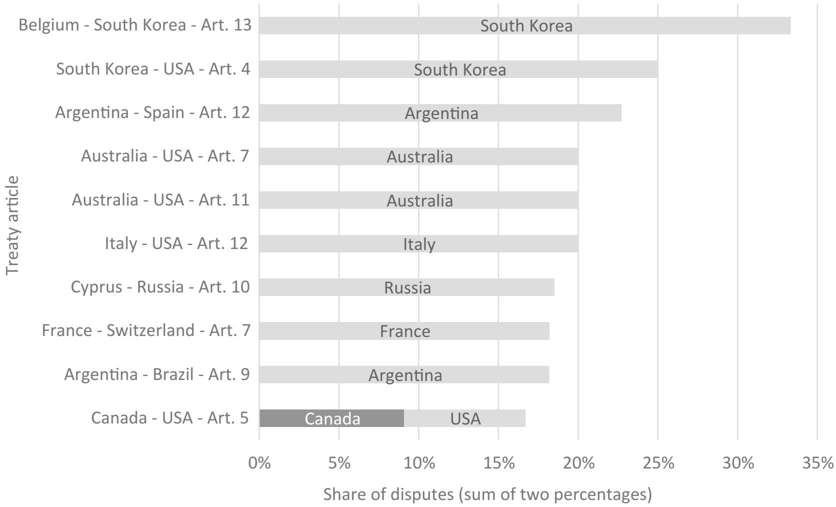

Figure 17.22 Ten Most Disputed Treaty Articles in the G20, Measured by Combined Share of Disputes in the Treaty's G20 Signatories

8 Comparison with Mutual Agreement Procedures

Mutual agreement procedures (MAPs) provide taxpayers with an alternative or, in some countries, a parallel route through which to challenge a tax authority's assessment. Taxpayers may choose MAPs instead of court cases for a number of reasons, including to avoid the costs of court representation, to ensure a result that eliminates double taxation and to prevent the publication of the particulars of the case in court records. Whatever the reason, our data below, when combined with the OECD MAP statistics,[21] effectively suggest an OECD trend towards MAPs and away from court cases.

First, while our methodology for court cases does not allow for a cross-country comparison of dispute numbers, we can make such a comparison for MAPs, where the reporting is comprehensive. It shows that the United States and Germany dominate the numbers of reported MAPs in countries that are both OECD and G20 members (we have used this subset of MAP statistics to maintain compatibility with our own dataset and maximise the number of years for which full OECD data are available).

[21] OECD, 'Mutual Agreement Procedure Statistics for 2014', 2015, available at: www.oecd.org/ctp/dispute/map-statistics-2014.htm, last accessed 21 May 2014.

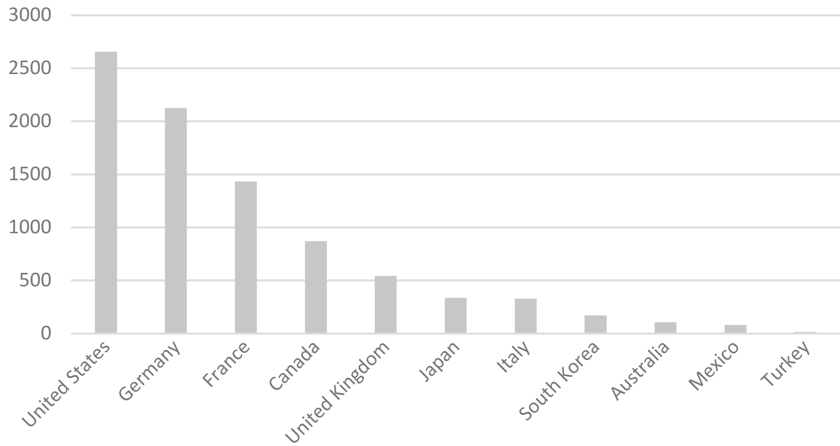

Figure 17.23 Number of New MAs Opened by OECD Member Countries, 2006–2014

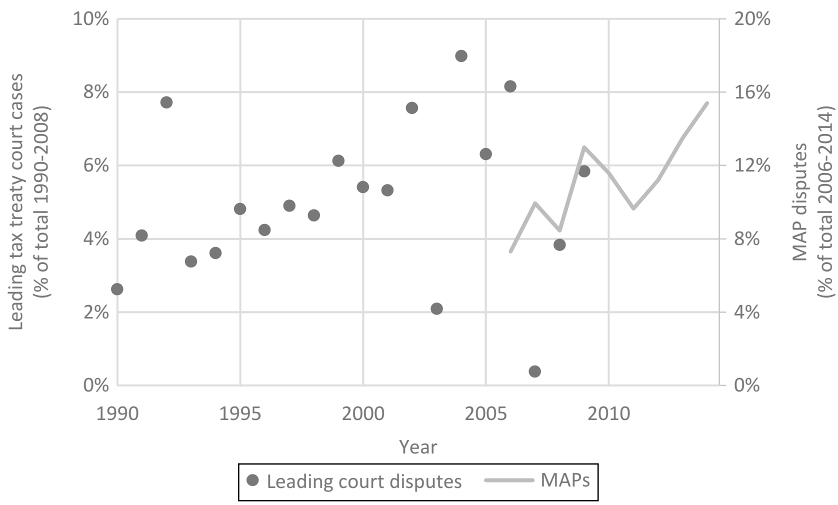

Figure 17.24 Share of All Leading Tax Treaty Court Cases, 1990–2008, by Last Fiscal Year Concerned, Compared with Share of MAP Disputes by Year Lodged, 2006–2014

Figure 17.24 compares the change in the number of new leading tax treaty court disputes in our dataset with the growth in the number of new MAP cases. Germany has the second largest number of MAP cases in the OECD data since 2006, while our new data on court cases up to

2008 show a big decline in German cases in the 2000s, which suggests that German taxpayers are moving from court cases to MAPs. Looking at the average share of cases each year, a steady increase during the 1990s and early 2000s appears to have been replaced by a decline in the share of leading tax treaty disputes since a high watermark in 2004.

9 Conclusion

The following theory can be inferred from the data offered in this book. The core architecture of the ITR is a 'co-opetition' game[22] implemented by means of a two-sided platform.[23] To infer this theory, five major assumptions are made here.

(1) The OECD and BRICS countries are market leaders for quasi-legal rules.[24] (Indeed, the OECD describes its Committee on Fiscal Affairs as 'a market leader in developing standards and guidelines in the core of International Taxation.')[25] This small group of countries cooperates on an ongoing basis in the production of international tax soft law (i.e., the OECD Model and related documents, including the 2015 BEPS Reports) with systemic feedback from international taxpayers, the global community of tax advisers and tax scholars.[26] The OECD can thus be seen as a

[22] A 'co-opetition' game is a game in which elements of cooperation and competition are mixed simultaneously. See E. A. Baistrocchi, 'The International Tax Regime and the BRIC World: Elements for a Theory', *Oxford Journal of Legal Studies*, 33(4) (2013), available at: http://ssrn.com/abstract=2336294. See also A. M. Brandenburger and B. J. Nalebuff, *Co-opetition* (London: Profile Books, 1996).

[23] A two-sided platform aims to minimise transaction costs between platform users who can benefit from coming together, facilitating the occurrence of value-creating exchanges that would not otherwise take place. The core role of a two-sided platform is to enable parties to realise gains from interactions by reducing transaction costs. D. S. Evans, 'Two-Sided Market Definition', *ABA Section of Antitrust Law, Market Definition in Antitrust: Theory and Case Studies* available at: http://ssrn.com/abstract=1396751, last accessed 26 December 2015.

[24] A. T. Guzman and T. Meyer, 'International Soft Law', UC Berkeley Public Law Research Paper No. 1353444, available at: http://ssrn.com/abstract=1353444, last accessed 26 December 2015.

[25] OECD, *Focus on Africa* (Paris: OECD Publishing, n.d.), available at: www.oecd.org/ctp/40998413.pdf, last accessed 22 May 2016.

[26] The OECD Committee on Fiscal Affairs consults with interested parties through a variety of means to inform on its work in the tax area. One important way of obtaining such input is through the release of requests for input or discussion drafts for public comment and through public consultations. See, e.g., OECD, 'Previous Requests for input', available at: www.oecd.org/tax/previous-requests-for-input.htm, last accessed 26 December 2015.

vehicle to minimise collective action cost for the production of international tax soft law (the OECD Model),[27] a focal point around which actors can converge in a negotiating context with multiple stable equilibria.[28]

(2) Virtually all countries are now increasingly using the OECD Model and related documents (including the UN Model) for two different purposes: (i) as a template for their own tax treaty network and relevant domestic law; and (ii) as a source of innovation for their tax treaties without the need for renegotiation. This approach to using international tax soft law may be explained by the delegation theory: 'states choose soft law when they are uncertain whether the rules they adopt today will be desirable tomorrow and when it is advantageous to allow a particular group of states to adjust expectations in the event of changed circumstances'.[29] As a result, the OECD Model and related documents are international tax soft law which is, in turn, a key driving force of the ITR. This is so because once the OECD Model and related documents are integrated into a relevant country's tax law, they become hard law.

(3) Countries are habitually engaged in international tax competition within a compatible standard (rather than between incompatible standards as it occurred before 1923).[30] The current compatible standard is the OECD Model, which channels international tax competition into areas that are not regulated by the OECD Model, such as corporate tax rates.[31]

See also A. Christians, 'Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20', *Northwestern Journal of Law and Social Policy*, 5 (Spring 2010).

[27] M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1971).

[28] T. Rixen, *The Political Economy of International Tax Governance* (New York: Palgrave Macmillan, 2008); C. M. Radaelli, 'Game Theory and Institutional Entrepreneurship: Transfer Pricing and the Search for Coordination International Tax Policy', *Policy Studies Journal*, 26(4) (1998): 603–19.

[29] Guzman and Meyer, 'International Soft Law'. See also J. E. Gersen and E. A. Posner, 'Soft Law', *Stanford Law Review*, 61 (2008): 73, which maintains that soft law consists of rules issued by law-making bodies that do not comply with the procedural formalities necessary to give the rules legal status. Nonetheless, soft law may influence the behaviour of public and other lawmaking bodies. See also A. T. Guzman and T. Meyer, 'International Soft Law', *Journal of Legal Analysis*, 2 (2011): 171.

[30] T. Dagan, 'Pay as You Wish: Globalization, Forum Shopping, and Distributive Justice', 20 June 2014, available at: http://ssrn.com/abstract=2457212.

[31] M. A. Sullivan, 'UK Road to Competitiveness Is Paved with Tax Increases', 23 April 2012, available at: www.taxanalysts.com/taxcom/taxblog.nsf/Permalink/UBEN-8TMJF8?OpenDocument, last accessed 26 December 2012.

(4) The OECD Model has the standard features of all network markets: network externalities, expectations and lock-in effects.[32]

(5) The OECD Model's compatible standard is capable of destroying incompatible standards (such as the Andean Model)[33] and preventing other different, albeit compatible, standards (such as the UN Model and emerging regional models as in COMESA, SADC and ASEAN) from converging significantly from the OECD Model.[34]

The data presented in this book suggest that OECD countries, BRICS countries and non-G20 hubs are different key nodes of the same global network tax market: the ITR. The net effect of the ITR has evolved over time and space, from avoiding international double taxation[35] to offering a two-sided platform that fosters international

[32] Network markets normally have three main features: network, expectations and lock-in effects. Network effects denote that the larger the number of members of the network, the better for each of them. The classic example of network effects can be seen in the telephone system. Indeed, the relative value of having a telephone is related to the number of telephones being used in the network. (For an analysis of network externalities in corporate law, see M. Kahan and M. Klausner, 'Standarization and Innovation in Corporate Contracting', *Virginia Law Review*, 83 (1997): 713.) Expectation is another feature in any network market. In effect, one standard may prevail over another, not because it is better, but because it is sponsored by an influential player. For example, the initial success of MS-DOS is usually attributed not to any technical superiority, but because it was supported by IBM. (The impact of expectations in banking law is focused on in D. W. Diamond and P. H. Dybvig, 'Bank Runs, Deposit Insurance, and Liquidity', *Federal Reserve Bank of Minneapolis Quarterly Review*, 24 (Winter 2000): 14.) Finally, a lock-in effect is frequent in any network market because better products that arrive later in time may be unable to displace a technologically inferior one that arrived earlier. An example of the lock-in effect is the QWERTY typewriter keyboard. See Baistrocchi, 'The International Tax Regime and the BRIC World: Elements for a Theory'.

[33] A. Atchabahian et al., *Fiscal Harmonization in the Andean Countries* (International Bureau of Fiscal Documentation, 1975).

[34] A fundamental element of the OECD Model technology is the distinction between active and passive income and the different allocations of tax jurisdictions depending on this distinction. For example, the OECD Model grants the country of source preeminent taxing rights on active income, whereas the country of residence is granted pre-eminent taxing rights over passive income. The Andean Model does not accept this distinction: all income, be it active or passive, is exclusively taxed by the country of source. Hence, the OECD and Andean models are incompatible. There are now only two bilateral tax treaties based on the Andean Model, i.e., those concluded by Argentina with Bolivia and Brazil. See S. Zebel, 'What Lies Beneath the Convention to Avoid Double Taxation Subscribed between Brazil and Argentina? An Argentine Perspective' (unpublished).

[35] See Volume 2, Chapter 14, in particular, Pattern 62 (94Nu7843, South Korea).

tax competition among jurisdictions.[36] The two-sided platform of the ITR is currently the OECD Model.[37]

On one side of the platform, the central users are leading jurisdictions, particularly OECD countries, BRICS countries and non-G20 hubs, specifically Switzerland, the Netherlands and Belgium.[38] On the other side of the platform, the central users are international investors (such as MNEs). All OECD and BRICS countries offer international investors different bundled products, including institutional quality, connectivity to markets (including connectivity to non-G20 hubs), talent clusters and regulations such as a mix of domestic and tax treaty laws that may minimise both tax entry costs and tax exit costs for the relevant jurisdictions.

There is reinforcing feedback between international tax competition for capital, tax treaty law and domestic law. International taxpayers have been demanding[39] that their G20 residence countries sign OECD-based tax treaties with G20 source countries and non-G20 hubs to minimise both their tax entry costs[40] and tax

[36] On the meaning of the two-sided platform and its application to the international tax systems, see Baistrocchi, 'The International Tax Regime and the BRIC World: Elements for a Theory'.

[37] See Volume 2, Chapter 16, 'Triple Non-Taxation and BEPS: Global Implications'.

[38] See Figure 17.12, above.

[39] Early examples of taxpayers' demands for regulations to alleviate international double taxation are found, for instance, in the appeals to the 1919 International Chamber of Commerce and the 1920 Brussels Financial Conference, where it was argued that the newly created League of Nations should do something to eliminate the 'evils' of double taxation. M. B. Carroll, *Global Perspectives of an International Tax Lawyer* (New York: Exposition Press, 1978), p. 29.

[40] The reductions of tax entry costs can be implemented, e.g., under Art. 5 of the OECD Model. The French case in *Zimmer* is an example. The issue was whether a commissionaire agent had constituted a PE of its foreign principal. The *Zimmer* case involved a commissionaire agreement between Zimmer Ltd, a UK company and Zimmer SAS, a French enterprise. The French enterprise was selling goods owned by the UK company in its own name. The risks were assumed by the UK company as it owned the goods until they were purchased by end-customers. In France, the Conseil d'État held that a commissionaire could not constitute a PE of its foreign principal, whereas the Court of First Instance and the Court of Appeal found that the UK company had a permanent establishment in France. As the existence of a PE was assessed on the basis of the dependent agent rule, a core issue involved whether or not a commissionaire had acted in the name of the principal and had had the possibility to bind the principal. According to French civil law, a commissionaire acts in its own name on behalf of the principal and the principal is not contractually bound with the end-client. The Court of First Instance and the Court of Appeal found that Zimmer UK had a PE in France on the basis of factual considerations such as the possibility of Zimmer France negotiating prices without

exit costs.[41] A similar demand can be seen in G20 source countries to sign tax treaties with G20 residence countries and non-G20 hubs.[42] A comparable demand can be seen in non-G20 hubs to sign tax treaties with both residence and source G20 countries.[43] Moreover, taxpayers have increasingly been winning tax treaty disputes in both the country of source and the country of residence in disputes on international tax planning techniques normally involving entities based on non-G20 hubs.[44] Tax treaty disputes have emerged more frequently in the country of source than in the country of residence.[45] Tax treaty disputes in non-G20 hubs are infrequent.[46] The South Korean case in *DM Food*[47] and the Brazilian case in

being authorised by Zimmer UK, as well as the control exercised by the principal on the commissionaire. The Conseil d'État adopted a purely legal view in the *Zimmer* case. Accordingly, it was held that a commissionaire could not bind the principal given the status of a commissionaire in French civil law; accordingly, by concluding contracts in its own name, a commissionaire did not bind the principal, thereby precluding the existence of an agent PE. The Conseil d'État seems to have paid less attention to the facts than is recommended by the Commentary on Art. 5 of the OECD MTC; it instead focused purely on the legal relationship between the principal and the commissionaire. See Conseil d'État, 31 March 2010, case Nos. 304715 and 308525, *Zimmer*. See also Volume 1, Chapter 7, 'France'.

41 The reductions in tax exit costs can be implemented, e.g., under Art. 7 of the OECD Model. The Australian case in *Thiel* is an example. The taxpayer was a Swiss resident who had purchased units in an Australian trust. He subsequently sold his units in the trust to a company for a purchase price to be paid in shares of the company. The company shares were subsequently listed on the stock exchange and the taxpayer sold his shares. When assessed on his profits from the share sale, the taxpayer argued that the profits from the share sale were exempt from taxation under Art. 7(1) or 13(3) of the Australia–Switzerland treaty. As the parties had agreed that there was no PE, the issue was whether or not the profits in question pertained to an enterprise carried on by a resident of Switzerland (application of Art. 7 depended on there being a PE). The Court's interpretation was guided by public international law principles as embodied in the Vienna Convention and the Court looked to the OECD Model and Commentary to conclude that an enterprise may be established by a single transaction if it was entered into for business or commercial purposes. Thus, the taxpayer's acquisition and sale of shares had been undertaken with enough business and commercial purposes to constitute an enterprise. As the taxpayer's enterprise was not carried on through a PE in Australia, the application of Art. 7(1) of the treaty to protect the taxpayer's profits from the transactions at issue were not assessable in Australia. See *Thiel* v. *Commissioner of Taxation* [1990] HCA 37. See also Volume 1, Chapter 3, 'Australia'.

42 See Volume 1, Chapter 16, 'Turkey'.

43 See Volume 2, Chapter 13, 'Singapore'.

44 See Volume 2, Chapter 14, Table 14.1.

45 See Figure 17.7.

46 See Volume 2, Chapter 3, 'Hong Kong'.

47 In the *DM Food* case, a Hong Kong resident company (HKCo.) held indirect ownership on stock of a Korean resident company through a chain of intermediate entities. HKCo. owned a 60 percent interest in a US LLC, which elected to be treated as a fiscally

Vale[48] are examples of this reinforcing feedback in OECD and BRICS countries, respectively; the *DM Food* case involved entities based in Hong Kong, the United States, Luxembourg, Belgium and South Korea; the *Vale* case, in turn, involved entities based in Belgium, Bermuda, Luxembourg and Brazil. The increasing success rate of taxpayers in tax treaty litigation since the 1960s[49] has had an increasing incentive on international taxpayers to demand more tax treaty law in G20 residence countries, G20 source countries and non-G20 hubs[50] in their search for triple non-taxation opportunities (the reinforcing feedback).[51]

Technological innovations, such as the international trade of intangibles, emerged in North America and Europe in the 1960s and then expanded to Asia and the rest of the world since the 1990s.[52] These technological innovations accelerated the reinforcing feedback because

transparent partnership for US federal income tax purposes. The US LLC owned a 35.3 per cent interest in a Luxembourg Sarl (LuxCo.) and LuxCo., in turn, owned an 88.75 per cent stake in a Belgian company (BelCo.). BelCo. was the direct owner of stock in a Korean company. When BelCo. disposed of the Korean stock and realised capital gains, the withholding agent did not withhold Korean taxes because the Belgium treaty exempts a Belgian resident's capital gains arising from the disposition of Korean stock. The Belgian National Tax Service (NTS), however, decided that BelCo. was a mere conduit, and the appellate court also disregarded BelCo. under the substance-over-form doctrine. The appellate court, however, held that HKCo.'s allocable share of BelCo.'s capital gains was not subject to Korean taxation, on the premise that the US LLC was regarded as a US tax resident under the US treaty (and subject to the benefits afforded under the Korea–US tax treaty). On appeal to the Supreme Court, even though the higher court agreed with the appellate court that LuxCo. and BelCo. should be disregarded under the given facts, it did not agree that HKCo.'s allocable share of capital gains was not subject to Korean taxation. In overturning the appellate court's decision and remanding it, the Supreme Court held that, under Art. 3(1)(b)(ii) of the Korea–US tax treaty, any US entity that is fiscally transparent in the United States and yet is considered a non-transparent corporation under Korean domestic law is entitled to the benefits of the US treaty, but only to the extent that its high-ranking members/partners are subject to taxation in the United States. *DM Food* v. *Head of Seocho Tax Office*, 2012 Du11836, Supreme Court of Korea, June 2014. See Volume 1, Chapter 14, 'South Korea' and Volume 2, Chapter 14, 'Patterns of Tax Treaty Disputes', Pattern 3.

48 The *Vale SA* case. See volume 2, Chapter 4, 'Brazil'.

49 See Figure 17.13.

50 The expansion of the tax treaty network has been exponential. See E. Neumayer, 'Do Double Taxation Treaties Increase Foreign Direct Investment to Developing Countries?', *Journal of Development Studies*, 43(8) (2006): 1501–19, available at: http://ssrn.com/abstract=766064.

51 See Volume 2, Chapter 16, 'Triple non-taxation and BEPS'.

52 E. Baistrocchi, 'Transfer Pricing Dispute Resolution: The Global Evolutionary Path', in E. Baistrocchi and I. Roxan (eds), *Resolving Transfer Pricing Disputes: A Global Analysis* (Cambridge University Press, 2012), pp. 835–83.

capital became increasingly mobile and this, in turn, triggered a sharp increase in tax treaty litigation over the scope of Article 12 (royalties), first in North America and Europe in the 1980s and then in Asia and the rest of the G20 world since the 2000s.[53] The evolution of the patterns in Article 12 litigation over time and space is a representative example of the impact of technological innovations on the ITR.[54]

The reinforcing feedback dynamic has probably produced at least three net effects on the structure of the ITR. First, three non-G20 hubs are at the centre of the universe of tax treaty disputes in the G20: Switzerland since the 1970s, the Netherlands since the 1990s and Belgium since the 2000s (the three non-G20 hubs). We call this dynamic the 'Copernican Revolution', as G20 countries seem to have been orbiting the three non-G20 hubs since the 2000s. Second, there has been an increasing number of triple non-taxation opportunities generated by the interaction of domestic and tax treaty law in OECD countries, BRICS countries and non-G20 hubs. The *Google* case in the United Kingdom and the *Andolan* case in India are two examples of these triple non-taxation opportunities based on both domestic and tax treaty laws of the relevant countries.[55] Triple non-taxation is not desirable because it induces, for example, free-riding behaviour. Third, there has been increasing opacity of the ITR given the increasing relevance of MAPS and tax arbitration implemented in a less than transparent way.[56] This increasing opacity is not desirable for at least two reasons: (a) it is not consistent with the core principles of liberal democracy because it substantially limits accountability and, thus, a well-functioning political process;[57] (b) it may induce countries to behave like cartels.[58]

The reinforcing feedback can hardly be changed because of the high collective action costs involved; there are at least sixty jurisdictions involved in this strategic game: the G20 and forty non-G20 countries.[59] All these G20 and beyond countries seem to have been orbiting the three non-G20 hubs since the 2000s. There is an option, however, that we

[53] See Figure 17.12. [54] See fn. 36. [55] See Volume 2, Chapter 6, 'India'.
[56] See Figure 17.24.
[57] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993). H. Spector, 'The Theory of Constitutional Review', in M. A. Jovanović (ed.), *Constitutional Review and Democracy* (The Hague: Eleven, 2015), available at: www.academia.edu/12191488/_The_Theory_of_Constitutional_Review_in_Miodrag_A._Jovanovi%C4%87_ed._Constitutional_Review_and_Democracy_Eleven_The_Hague_2015.
[58] See fn. 28. [59] See Figure 17.12.

think the OECD and G20 should attempt to move the ITR to a new and better equilibrium point: more transparency in all central dimensions of this strategic game. This includes the automatic exchange of information and more transparent MAPS and tax arbitration to deter countries from behaving like cartels and free-riders, in a further push to solve problems with the core principles of liberal democracy. The suggested procedural option is grounded on the fact that procedural articles (Articles 24–31) have been consistently less litigated than definitional and substantive articles in the pre-BEPS Reports Era.[60]

Countries are relatively more constrained by the ITR when enacting regulations such as tax treaties than when enforcing them.[61] The boundaries of a strategic enforcement of the ITR can be framed within the 116 patterns of the tax treaty disputes crystallised in the global taxonomy offered in Chapter 14. These patterns show the central role of non-G20 hubs in this network tax market during the pre-BEPS Reports Era.[62] The net effect of tax treaty dispute patterns has decreased tax entry costs and/or tax exit costs. Global tax competition has emerged in a number of areas, including competition for financial capital,[63] human capital,[64] tax revenue[65] and connectivity to other global network markets, such as business law.[66]

In sum, a new logic has emerged in the strategic interaction among G20 countries and non-G20 nodes in the pre-BEPS Reports Era (1932–2015). G20 countries increasingly compete against each other for capital, just as private firms compete for market share.[67] The ITR makes visible this new logic. In bilateral tax treaties that G20 countries conclude with non-G20 hubs, the latter serve as outlets for the bundled products that G20 countries offer to international investors. One component of the bundle is the tax treaty network in its interaction with the relevant domestic laws, which is a vehicle to minimise the tax entry costs and/or tax exit costs. A second component is a set of procedures implemented

[60] See Volume 2, Chapter 14.
[61] The *Bloomberg* cases emerging with similar facts in both Russia and South Korea are examples of the room local courts may have when interpreting and applying tax treaty law. See Volume 2, Chapter 14, Patterns 52(1) and 52(2).
[62] See Volume 2, Chapter 14, Table 14.1.
[63] Volume 2, Chapter 14, Pattern 13, *Prévost* case (France).
[64] Volume 2, Chapter 14, Pattern 73, *Swiss cyclist* case (Switzerland).
[65] Volume 2, Chapter 14, Pattern 1, *Molinos* case (Argentina).
[66] Volume 2, Chapter 14, Pattern 78, *George Anson* case (United Kingdom).
[67] See fn. 22 above.

in an opaque way, such as mutual agreements, to address tax disputes. Examples of the strategic interaction between G20 countries and non-G20 hubs[68] include the strategic interaction between Argentina and Chile,[69] Brazil and the Netherlands,[70] Canada and the Netherlands,[71] China and Hong Kong,[72] India and Mauritius,[73] Indonesia and the Netherlands,[74] Mexico and Switzerland,[75] Russia and Cyprus,[76] South Africa and Switzerland,[77] South Korea and Belgium,[78] Turkey and the Netherlands,[79] and the United States and the Netherlands.[80]

From a policy-making perspective, the international tax system is at a crossroads. One way to push forward is to preserve and encourage competition between G20 countries in the same way that competition among private firms is encouraged. Another option is to limit competition by implementing mechanisms to enhance transparency, limiting the scope for procedures implemented in opaque ways and encouraging the automatic exchange of information. The G20/OECD BEPS Reports is located somewhere in between these two alternative policy options. Indeed, the context is challenging given the emerging fourth industrial revolution.[81]

[68] This sort of bilateral strategic interaction between G20 countries and non-G20 nodes might be unstable, i.e., it may collapse. The Argentina–Chile strategic interaction and its collapse is a case in point. See Volume 2, Chapter 8, 'Argentina'. See also the India–Mauritius interaction and its potential collapse: 'India gets right to tax capital gain from Mauritius in new treaty', available at: www.moneycontrol.com/news/cnbc-tv18-comments/india-gets-right-to-tax-capital-gainmauritusnew-treaty_6607421.html.

[69] For example, US investors show a preference for investing in Argentina through a tax treaty partner. In this respect, US$1,270 million of US investments in the mining and automotive industries are channelled through companies located in Chile, and another US$760 million of investments in the oil industry are funnelled through companies domiciled in Denmark, another treaty partner of Argentina. See Volume 2, Chapter 8, 'Argentina'.

[70] See Volume 2, Chapter 4, 'Brazil'.

[71] See *Velcro Industries* 2012 TCC 57, Tax Court of Canada, in Volume 1, Chapter 4, 'Canada'.

[72] See Volume 2, Chapter 3, 'Hong Kong'.

[73] See Volume 2, Chapter 6, 'India'.

[74] See Volume 2, Chapter 11, 'Indonesia'.

[75] See Volume 1, Chapter 12, 'Mexico'.

[76] See Volume 2, Chapter 5, 'Russia'.

[77] See Volume 2, Chapter 7, 'South Africa'.

[78] See Volume 1, Chapter 14, 'South Korea'.

[79] See Volume 1, Chapter 16, 'Turkey'. For example, the tax treaty between Turkey and the Netherlands is the only one in the Turkish tax treaty network without the beneficial owner concept.

[80] See, e.g., the loopholes in the limitation of benefits provision under the US–Netherlands treaty. See also Volume 1, Chapter 2, 'United States'.

[81] See Volume 1, Chapter 1, 'Introduction'.