CRITIQUE AND COMMENT

TAX STABILITY

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International tax law plays a large and significant role in the design of Australia's domestic tax laws and Australia, like many other countries, has implemented tax reforms based on internationally-agreed fiscal standards. However, despite the global move towards harmonised tax law, harmonisation of international rules and practices does not mean alignment, or consistency of, tax outcomes for an international dealing. This piece explores some of the reasons for inconsistencies and lack of cohesion in the taxation treatment of international dealings by sovereign states and issues and challenges for the courts in applying these tax measures.

CONTENTS

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I Introduction

The hardest thing in the world to understand is income taxes. — Albert Einstein[1]

The theme of this piece was prompted by the reflection that the paradigm tax case for judicial determination is shifting from the tax consequences of purely domestic transactions to taxation issues associated with cross-border transactions or involving international tax measures. We think of tax law as domestic law (which, essentially, it is), but we have moved from a domestic tax framework designed around local affairs to a complex tax design, concerned with protecting Australia's tax base and guarding against the abuse of domestic tax rules in international dealings by the enactment of measures directed at bringing an appropriate share of tax revenue from international dealings within Australia's tax jurisdiction.

Nowadays, international tax law plays a much larger and more significant role in the design of our domestic tax laws than it once did. In recent years there have been many important and complex legislative changes to Australia's tax laws responding to the rise of global trade and the digital economy. With the globalisation of the economy and growth in intra-group trade, the complexity of Australia's tax laws related to international dealings has increased enormously in the effort to ensure that Australia receives its fair share of tax on cross-border transactions. The years since the 2013 Organisation for Economic Co-operation and Development's ('OECD') *Action Plan on Base Erosion and Profit Shifting*,[2] in particular, have seen a great deal of change with an explosion of legislation directed at international dealings and multinational companies. Key pieces of legislation in recent times have included multinational anti-avoidance legislation,[3] which came into effect on 11 December 2015, the Diverted Profits Tax,[4] which came into effect on 1 July 2017, and the hybrid mismatch rules,[5] which took effect from 1 January 2019. Also on 1 January 2019, the *Multilateral Convention to Implement Capital Tax Treaty Related Measures to Prevent Base*

[1] Albert Einstein cited in Leo Mattersdorf, Letter to the Editor, *Time* (New York, 22 February 1963).

[2] OECD, *Action Plan on Base Erosion and Profit Shifting* (Report, 19 July 2013) ('*BEPS Action Plan*').

[3] See *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015* (Cth) sch 2.

[4] See *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act 2017* (Cth) sch 1. See also *Diverted Profits Tax Act 2017* (Cth).

[5] *Income Tax Assessment Act 1997* (Cth) div 832 ('*ITAA 1997*'), as inserted by *Treasury Laws Amendment (Tax Integrity and Other Measures No 2) Act 2018* (Cth) sch 1.

Erosion and Profit Shifting ('*MLI*'),[6] to which Australia became a signatory on 7 June 2017, came into force for Australia.[7] We have seen with these and other legislative measures a shift from the traditional taxation base of income and expenditure, profit and loss, to rights of taxation based on international standards, including anti-abuse measures, designed to counter and prevent base erosion and profit shifting in Australia.

In a paper titled 'Tax in a Changing World' the former Second Commissioner at the Australian Tax Office, Andrew Mills, observed that '[c]hange in tax has been the one consistent feature of the tax landscape for decades'.[8] Frequent changes in tax laws to keep pace with economic, social and commercial developments are not just to be expected; change is an integral part of the tax regime and taxation reform is necessary, but constant tax law changes have an impact on tax stability. However, it is undoubted that the complexity of the recent changes to our tax laws present a central challenge for tax stability. The changing tax environment and globalisation of tax policy also means that international tax law will take on more importance. With the rapid 'internationalisation' of Australia's tax laws, international tax practices and rules and international tax law jurisprudence will have much more significance and will have to be grappled with in the future development of the law. This piece examines some of the challenges for certainty and consistency in the development of that law in the Australian context.

II Unilateral International Tax Measures

It is a feature of business today that multinational groups have entities in more than one jurisdiction through which the group conducts its activities. Australia, like many other countries, has implemented tax reforms based upon internationally-agreed fiscal standards. It might be thought that domestic law giving effect to internationally-agreed fiscal standards, intended to produce a cohesive global approach, should mean certainty and uniformity between sovereign states in respect of the fiscal outcomes of an international dealing within a multinational group. However, that proposition assumes that the domestic tax laws of the sovereign states are in harmony, which is not a valid assumption to

[6] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, opened for signature 31 December 2016, [2019] ATS 1 (entered into force 1 July 2018).

[7] *Treasury Laws Amendment (OECD Multilateral Instrument) Act 2018* (Cth) sch 1 ('*Treasury Laws OECD Multilaterial Instrument Act*').

[8] Andrew Mills, 'Tax in a Changing World: Change is the New Black' (Conference Paper, Australasian Tax Teacher's Association, 17 January 2019).

make. Whilst around 130 countries have collaborated through the OECD Base Erosion and Profit Shifting ('BEPS') project on international tax rules designed to protect tax bases,[9] the differing tax policies and revenue laws within each country necessarily govern the tax treatment and fiscal consequences of an international dealing in accordance with the particular domestic laws of the country concerned. Harmonisation of international rules and practices for the taxation of international dealings does not mean alignment, or consistency of, tax outcomes for an international dealing. For example, the Australian hybrid mismatch rules include an integrity rule in sub-div 832-J of the *Income Tax Assessment Act 1997* (Cth) ('*ITAA 1997*') that was not part of the OECD BEPS Action 2 recommendations.[10] In a press release in November 2017, the Treasurer explained:

> Following the introduction of the hybrid mismatch rules, multinational groups investing into Australia may seek to achieve double non-taxation outcomes by using investment structures and arrangements that may not fall within the scope of the OECD's hybrid mismatch rules. For example, foreign headquartered groups investing into Australia may use financing arrangements through interposed entities in zero tax countries which reduce Australian profits without those profits being subject to foreign tax.
>
> The [g]overnment is concerned that such arrangements would undermine the integrity of the hybrid mismatch rules and will therefore be developing a targeted integrity rule to ensure such arrangements cannot be used to circumvent the hybrid mismatch rules.[11]

Despite the global move towards harmonised international tax law, the fiscal outcomes in jurisdictions may differ where a country implements a unilateral international tax measure. This lack of cohesion in taxation treatment by sovereign states is an inevitable consequence of purely domestic considerations shaping tax measures. Thus although international tax law is moving to a more uniform approach, each country through its own set of tax laws defines how, and the extent to which, those international tax laws operate.

[9] OECD, *OECD/G20 Inclusive Framework on BEPS* (Progress Report, 8 June 2019) 2.

[10] See OECD, *OECD/G20 Base Erosion and Profit Shifting Project: Neutralising the Effects of Hybrid Mismatch Arrangements Action 2* (Final Report, 5 October 2015) 15–16.

[11] Scott Morrison, 'Turnbull Government Clampdown on Multinational Tax Avoidance Hits Hybrids' (Media Release, 24 November 2017).

III Treaty Interpretation

Lack of cohesion in treaty interpretation is another potential source of inconsistent outcomes. The *MLI* and Australia's bilateral tax treaties form part of Australia's domestic law by Acts of Parliament,[12] but they are international agreements and because they are international agreements, the interpretative principles applying to the construction of those treaties are not governed by the domestic principles of statutory interpretation but by arts 31–3 of the *Vienna Convention on the Law of Treaties* ('*VCLT*').[13] Article 31(1) requires a treaty to 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 and purpose'.[14] Article 32 provides that

> '[r]ecourse may be had to supplementary means of interpretation … to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.[15]

Article 33(1) specifies that '[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in the case of divergence, a particular text shall prevail'.[16] These rules codify the customary rules under international law for the interpretation of treaties,[17] so that even with respect to bilateral treaties where neither country has adopted the rules of the *VCLT* or, where one party has but the other party has not (for example the United States ('US') has signed the *VCLT* but not ratified it),[18] there should not be a considerable difference in the general approach to the construction of such international treaties.

[12] See *Treasury Laws OECD Multilaterial Instrument Act* (n 7) sch 1 in respect of the *MLI* and the *International Tax Agreements Act 1953* (Cth) s 5 in respect of bilateral tax treaties.

[13] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*').

[14] Ibid art 31(1).

[15] Ibid art 32.

[16] Ibid 33(1).

[17] *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338, 356 (McHugh J) ('*Thiel*'); *CRI026 v Republic of Nauru* (2018) 355 ALR 216, 222 [22] (Kiefel CJ, Gageler and Nettle JJ).

[18] United Nations, 'Vienna Convention on the Law of Treaties', *United Nations Treaty Collection: Status of Treaties* (Web Page) ch XXIII <https://treaties.un.org/Pages/ParticipationStatus.aspx>, archived at <https://perma.cc/EP85-6YWM>.

A common interpretation of tax treaties is important for tax stability. In *Bywater Investments Ltd v Federal Commissioner of Taxation*,[19] which concerned the determination of corporate residency for income tax purposes, Gordon J explained as follows:

> If the terms of an instrument enacted into Australian law were interpreted strictly in accordance with domestic principles of statutory interpretation, there would be a risk that the treaty would be interpreted differently even though other countries had adopted the same instrument. That risk is significant with double tax agreements. The whole point of those agreements — to prevent double taxation across two jurisdictions — would be frustrated if 'they were to be interpreted in a manner which would permit or foster conflicting outcomes between the two States in question'.[20]

Where possible, the courts will interpret tax agreements to achieve consistency but tax treaty interpretation is not always cohesive, despite the applicable interpretative principles recognised by international law applying to the construction of international treaties. There is no global jurisprudence and the principle of judicial comity does not apply to a foreign decision on the construction of treaty texts.[21] Though it might be assumed that the application of common rules to a bilateral or multilateral agreement should have the consequence of the agreement being interpreted similarly by the courts of the contracting states, it does not necessarily follow and the results may not always be identical. Despite sovereign states ostensibly applying the same approach, the experience of both common law and civil law countries is that uniform interpretation rules have not led to uniformity in construction and harmonious global jurisprudence. A thorough analysis of the reasons why is beyond the scope of this piece but there are three aspects which are useful to consider.

A *Lack of Uniformity in Treaty Construction*

First, the application of uniform rules does not mean that there may not be differing views on the meaning of the text of the treaty, just as the well-established and oft-repeated canons of statutory construction applying to

[19] (2016) 260 CLR 169 ('*Bywater Investments*').

[20] Ibid 224 [148], quoting *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149, 186 [120].

[21] For a discussion of judicial comity, see Chief Justice James Allsop, 'Commerce and Comity' (Speech, Conference of Chief Justices of Asia and the Pacific, 8 November 2015).

domestic legislation can offer more than one construction.[22] Judge Michael Beusch of the Swiss Federal Administrative Court, writing extrajudicially, observed that, 'interpretation as such is not an exact science with only one solution'.[23] His Honour noted that the interpretative rules in the *VCLT* 'cannot ensure a uniform application of tax treaties' and '[t]he outcome of an identical case can therefore differ from jurisdiction to jurisdiction',[24] even where the treaty in question is based on the OECD *Model Tax Convention on Income and on Capital* ('*Model Convention*') and with the benefit of the OECD Commentary on the *Model Convention*.

Treaty interpretation is not an easy task and is open to more than one meaning. *Burton v Commissioner of Taxation*[25] is a very recent example of differing views reached by the Full Federal Court on the construction of art 22(2) of the double tax convention between Australia and the United States ('*Australia–US Convention*').[26] In that case, the taxpayer had paid tax in the US on gains made from the sale of assets. The gains were also taxable in Australia and subject to the 50% capital gains tax discount. The dispute was whether the taxpayer was entitled to a tax offset or credit for the whole of the amount of US tax which he had paid, or only of 50% of that amount.[27] Article 22(2) of the *Australia–US Convention* requires Australia to allow as a credit against Australian tax for the US tax paid 'in respect of income [gains] derived from sources in the United States' but that '[t]he credit shall not exceed the amount of Australian tax payable on the income'.[28] The majority held that art 22(2) only entitled the taxpayer to a credit in respect of 50% of the capital gain.[29] Justice Logan dissented on the construction and effect of art 22(2) although, like Steward J, his Honour was of the view that the construction he adopted was consistent with the text of the article, applying the interpretative principles in

[22] See, eg, *Application A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, discussed in *Commissioner of Taxation v Lamesa Holdings BV* (1997) 77 FCR 597, 604–5 (Burchett, Hill and Emmett JJ) ('*Lamesa Holdings*').

[23] Michael Beusch, 'Tax Treaty Interpretation and "Entscheidungsharmonie": The Swiss Approach' (June 2017) *International Association of Tax Judges Newsletter* 5.

[24] Ibid 6.

[25] (2019) 372 ALR 193 ('*Burton*').

[26] *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 6 August 1982, 1424 UNTS 37 (entered into force 31 October 1983) ('*Australia–US Convention*').

[27] See *Burton* (n 25) 195, 195–6 [1]–[6] (Logan J).

[28] *Australia–US Convention* (n 26) art 22(2).

[29] *Burton* (n 25) 220–31 [113]–[145] (Steward J), 237–8 [164]–[169] (Jackson J).

the *VCLT*.[30] Justice Steward reasoned that the requirement that the income be 'in respect of' or bear a nexus with 'Australian tax payable' required an identification of the income that Australia taxes.[31] As Australia taxed only 50% of the gain, only half of the US tax paid was with respect to income taxed in Australia and only half of the US tax paid could be credited against the Australian tax payable.[32] Justice Jackson agreed with Steward J and further observed that the phrase 'in respect of' requires a connection with the Australian tax that may not be 'distant, arbitrary or illogical', but which is still identified by the Australian tax law.[33] On Logan J's construction, neither the phrase 'in respect of' nor the word 'on' carried the meaning 'to the extent to which'.[34] In construing art 22(2) his Honour also had regard to the OECD's *Model Convention* Commentary, noting that the High Court decision in *Thiel v Federal Commissioner of Taxation* ('*Thiel*')[35] exemplified the appropriateness of reference to an OECD commentary for assistance in the construction of a double taxation agreement.[36] Justice Steward similarly referred to the *Model Convention* and Commentary, 'putting aside' that the Commentary was written some 12 years after the *Australia–US Convention* was signed, but considered that reference to that material was not of assistance as the *Australia–US Convention* was based not only on the *Model Convention* but was 'also based on the *United States Model Income Tax Convention* … [and] it was not established that the two Models were materially and relevantly the same'.[37] Thus, despite applying the same constructional rules, totally opposite constructions were reached.

B *Foreign Case Law*

Second, in Australia there is not as much attention given to foreign case law as there should be. In interpreting tax treaties, courts will take into account how courts in other jurisdictions have interpreted the same or similar articles within the treaty in question.[38] Judge Beusch similarly emphasised in his article that

[30] Ibid 204–12 [49]–[75], 212 [79].

[31] Ibid 223 [120].

[32] Ibid.

[33] Ibid 238 [168].

[34] Ibid 208 [62].

[35] *Thiel* (n 17).

[36] *Burton* (n 25) 210 [67].

[37] Ibid 225–6 [124].

[38] See, eg, ibid 206 [57], 207 [60], 208–10 [63]–[66] (Logan J), 225 [125], 236 [157]–[159] (Steward J).

being in a truly global context, tax treaty interpretation should necessarily involve consideration of foreign case law, especially of the other contracting state to a tax treaty, as an aid to interpretation.[39] His Honour observed that '[c]ourts can but learn from taking into account (and dealing with) other Court's [sic] decisions'.[40]

Tech Mahindra Ltd v Federal Commissioner of Taxation ('*Tech Mahindra*') is an example of a case where a relevant foreign authority should have been, but was not, brought to the attention of the Full Federal Court.[41] That case concerned the interaction of art 7 (the business profits rule) and art 12 (the royalties provision) of the Australia–India double tax agreement ('*Australia–India Convention*').[42] The Full Court was not told that a Full Bench of the Supreme Court of India had considered the construction of the Japan–India double tax agreement in relation to a not dissimilar factual scenario. It appears that the taxpayer, which lost before the Full Federal Court, later became aware of the decision, as the grounds of the taxpayer's special leave application included that the decision of the Full Court was contrary to the decision of the Supreme Court of India. It is apparent from the transcript of the special leave application that it was the fact of a potentially conflicting decision of a superior court of the other contracting state which caught the attention of the High Court and was a matter of importance.[43] In the event, the High Court refused special leave, saying it was not persuaded there was, in substance, any conflict between the Full Court decision and the decision of the Supreme Court of India.[44] In that case, the failure to make reference to the Indian decision at an earlier stage than the High Court special leave application did not ultimately impact the result, but it could well have. In other cases reference to foreign case law could make an important and decisive difference to the outcome.

Decisions of foreign courts are of obvious relevance to the consideration of the interpretation to be given to a tax treaty, particularly if there is an authority from a superior court of the other contracting state that is directly on point.

[39] Beusch (n 23) 8.

[40] Ibid.

[41] (2016) 250 FCR 287 ('*Tech Mahindra*').

[42] *Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 25 July 1991, 1680 UNTS 289 (entered into force 30 December 1991) ('*Australia–India Convention*').

[43] Transcript of Proceedings, *Tech Mahindra Ltd v Federal Commissioner of Taxation* [2017] HCATrans 58, 273–4 ('*Tech Mahindra Special Leave Application*') (Gordon J).

[44] Ibid 464–71 (Gageler J).

Commissioner of Taxation v Lamesa Holdings BV ('*Lamesa Holdings*') is authority that

> where the construction of an international treaty arises, evidence as to the interpretation of that or subsequent treaties in one of the participating countries forms part of a matrix of material to which reference could properly be made in an appropriate case.[45]

The decision does not have to be from a court of the other contracting state to be relevant and Australian courts are not restricted in the foreign case law to which they may have regard. Where there is a need to construe a tax treaty, any foreign cases that have considered the same or like articles in the agreement can assist the court in the construction of the agreement. Such decisions would not be binding on an Australian court but they can carry great weight and be highly persuasive. Factors which may bear on the persuasive value will include the status of the court, the degree of persuasiveness of the reasoning, textual differences in the agreement considered by the foreign case law, and the differences in statutes or law under which the foreign case was decided. *Satyam Computer Services Ltd v Federal Commissioner of Taxation*,[46] the sequel to *Tech Mahindra*, was a case where differences in domestic law led to conflicting results. In that case, Indian case law was relied on by the taxpayer to argue that the Commissioner's construction would have the consequence of the *Australia –India Convention* applying inconsistently between the contracting states. The Full Federal Court considered, but did not follow, the Indian authorities, holding that it was not the construction which the Commissioner urged 'which would produce that inconsistency, if there be one, but the effect of Australia's domestic law in ss 4 and 5 of the [*International Tax Agreements Act 1953* (Cth)] which would produce that result'.[47]

While Australian courts are not constrained in the foreign authorities to which they may have regard, the common law jurisdictions are rich sources of comparative law in Australia, particularly those of Canada, New Zealand, the United Kingdom and the United States, and are often cited in tax cases. The jurisprudence of civil law countries is not referred to as much, partly because of jurisdictional differences, but also because of some basic difficulties, such as not being available in English, only unofficial translations being available which may not be sufficiently accurate to be reliable, or relevant foreign case law being difficult to find. Some of those basic difficulties are diminishing with the

[45] *Lamesa Holdings* (n 22) 603 (Burchett, Hill and Emmett JJ). See also *Morrison v Peacock* (2002) 210 CLR 274, 279 [15] n 16 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

[46] (2018) 266 FCR 502.

[47] Ibid 507–8 [21] (Robertson, Davies and Wigney JJ).

availability of global and accessible legal resources and, particularly in the area of international tax law, it can, and should be, expected that Australian courts will look more and more to civil law jurisprudence as well as common law cases for assistance and guidance. *Macoun v Federal Commissioner of Taxation*[48] is an example where the High Court had regard to the jurisprudence of civil law countries in considering the *International Organisations (Privileges and Immunities) Act 1963* (Cth) to confer privileges and immunities on United Nations officials in accordance with the *Convention on the Privileges and Immunities of the Specialized Agencies* ('*Agencies Convention*').[49] The question was whether the taxpayer's pension was exempt from ordinary domestic taxation. The High Court considered whether the legislation was consistent with the immunities provided for by the *Agencies Convention*. In the course of that consideration, the High Court had regard to the practice of other states parties to the *Agencies Convention*, which, it stated, 'must' be considered.[50] The High Court referred to inconsistent practices among states parties before concluding that

> there is still no generally accepted State practice with regard to the exemption of retirement pensions from taxation. It cannot be said that the *Agencies Convention* properly construed in accordance with the principles identified in the *Vienna Convention* requires Australia not to tax [a taxpayer's] pension.[51]

The authorities to which the Court had regard were not the traditional sources to which we often confine ourselves, but included decisions of courts in France and the Netherlands,[52] a decision of an arbitral tribunal constituted by the government of the French Republic and the United Nations Educational, Scientific and Cultural Organisation,[53] and a judgment of the Administrative Tribunal of the United Nations.[54]

[48] (2015) 257 CLR 519 ('*Macoun*').

[49] *Convention on the Privileges and Immunities of the Specialized Agencies*, opened for signature 21 November 1947, 33 UNTS 261 (entered into force 2 December 1948) ('*Agencies Convention*').

[50] *Macoun* (n 48) 542 [80] (French CJ, Bell, Gageler, Nettle and Gordon JJ).

[51] Ibid 543 [82] (emphasis omitted) (citations omitted).

[52] Ibid 542 [81].

[53] Ibid 542–3 [81].

[54] Ibid 542 [80].

C *Language*

Third, the construction of tax treaties has the additional problem of language. Double tax agreements often use words differing from terms found in the domestic legislation or which have no clear or certain meaning under domestic law. For example, the construction issues in *Thiel* concerned the interpretation to be given by an Australian court to the words 'profits of an enterprise of one of the Contracting States' in art 7 of the Australia–Switzerland double tax agreement,[55] where the words 'enterprise' and 'profits' had no particular or established meaning under the laws relating to Australian income tax.[56] Tax treaties can also use terms that have no meaning under domestic law, such as the concept of 'beneficial ownership' which is not recognised by the domestic laws of many countries.[57] A further consideration is that a bilateral agreement is often written in the language of each of the contracting states, but in Australia only the English text is enacted as part of Australian law. Although by art 33(1) of the *VCLT* the text is equally authoritative in each language, the equivalent wording in the texts can bear entirely different connotations and, as a consequence, textual divergences may be overlooked and sovereign states may construe and apply provisions differently. As a result, just relying on the words of the English version of the treaty may give rise to an interpretation that does not reflect the common intentions of the contracting states. In *Thiel*, the majority noted that the meaning of 'enterprise' might have been ascertained by evidence of the meaning of the corresponding German text as the English and German texts of the agreement were agreed to be equally authoritative.[58] However, no such evidence was given and the parties were unable to agree upon a translation of the German text. In Australia, expert evidence on the meaning of the corresponding text is admissible to assist in construing the relevant article. For example, in *Lamesa Holdings*[59] expert evidence was given on the meaning and interpretation of the Dutch language version of the Netherlands–

[55] *Agreement between Australia and Switzerland for the Avoidance of Double Taxation with Respect to Taxes on Income, and Protocol*, signed 28 February 1980, 1242 UNTS 3 (entered into force 13 February 1981) (no longer in force).

[56] *Thiel* (n 17) 343 (Mason CJ, Brennan and Gaudron JJ).

[57] See, eg, *The Andres Bonifacio* [1993] 3 SLR 71, [36] (Lai Kew Chai J for the Court).

[58] *Thiel* (n 17) 344.

[59] *Lamesa Holdings* (n 22) 602 (Burchett, Hill and Emmett JJ); *Lamesa Holdings BV v Federal Commissioner of Taxation* (1996) 35 ATR 239, 247 (Einfield J).

Australia double tax agreement.[60] Thus, an important consideration may be whether evidence of the meaning of the corresponding text should be obtained.

IV Integration of Soft Law into Domestic Tax Laws

Another important issue for consideration is the increasing integration of international 'soft law' into Australia's tax laws, posing a number of questions as to how those taxes apply. 'Soft law' is a term used to describe principles which have no legally binding force but which nevertheless may have significance. In Australia, sources of international 'soft law' include the *Model Convention* and its commentary,[61] the OECD's 2010 *Transfer Pricing Guidelines*[62] and the commentaries on the *MLI*.[63]

Examples of the integration of soft law into Australian tax law include:

1 the transfer pricing provisions in div 815 of the *ITAA 1997*, which provide that for the purpose of determining the effect those provisions have in relation to an entity, the arms-length profits are to be worked out and the arms-length conditions are to be identified 'so as best to achieve consistency with' the *Model Convention* and its commentaries and the *Transfer Pricing Guidelines*;[64]

2 the development of the BEPS measures implemented by the *MLI* (which now has force in Australia) also included the development of commentary intended to be used in the interpretation of the rules in the *MLI*. The explanatory statement to the *MLI* states that as the object and purpose of the *MLI* is to implement the tax treaty-related BEPS measures,[65] the commentary which, it is stated, largely reflects the final BEPS reports, has particular relevance in the interpretation of the articles of the *MLI*;[66] and

60 *Agreement between Australia and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and Protocol*, signed 17 March 1976, 1536 UNTS 393 (entered into force 27 September 1976).

61 OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2019).

62 OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD Publishing, 22 July 2010).

63 See 'BEPS 2015 Final Reports', *OECD* (Web Page, 2019) <https://www.oecd.org/ctp>, archived at <https://perma.cc/RH9V-CM2X>. The commentaries on the *MLI* are contained within the individual BEPS.

64 *ITAA 1997* (n 5) ss 815-20, 815-135, 815-235.

65 OECD, *Explanatory Statement to the Multilateral Convention to Implement Capital Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (OECD Publishing, 2016) 2 [12] ('*Explanatory Statement to the MLI*').

66 See above n 63.

3 the explanatory memoranda to many of Australia's double tax agreements make express reference to the OECD *Model Convention* and its commentary to inform the interpretation and application of an article or articles.[67]

Soft laws play an important role in Australia's tax laws in defining the scope and application of tax treaties as well as the transfer pricing provisions. However, they are often generally expressed, can lack clarity in expression and be deliberately uncertain. They are also not static but are revised and updated with some regularity and revisions can entail significant changes, such as the 2017 edition of the OECD's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*.[68]

The Commentary to the *Model Convention* is often referred to by the courts in interpreting terms in treaties,[69] but there is little Australian jurisprudence on, and the courts in Australia have yet to grapple directly with, the question of the use of versions of the Commentary not existing at the time a treaty was signed as an interpretative tool in respect of that treaty.[70] This question may not be particularly contentious or matter where later versions do not conflict with the commentaries in existence at the time a specific treaty was entered into. However, the role and relevance, if at all, of commentaries published later than a treaty, where the new commentary not only 'updates' but departs from the commentary applying at the time of making the treaty, are far from settled.[71] It is likely that in the future the question of the use which can be made of, and the

[67] See, eg, *Agreement between the Government of Australia and the Government of the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and Protocol*, signed 27 August 1999, [1999] ATS 36 (entered into force 30 December 1999), discussed in Explanatory Memorandum, International Tax Agreements Amendment Bill 1999 (Cth) 112–113 [4.99]; the explanatory memorandum for the *Convention between Australia and the Republic of Chile for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion, and Protocol*, signed 10 March 2010, [2013] ATS 7 (entered into force 8 February 2013), discussed in Explanatory Memorandum, International Tax Agreements Amendment Bill (No 1) 2011 (Cth) 87 [3.60]; the explanatory memorandum for the *Convention between Australia and New Zealand for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion*, signed 26 June 2009, [2010] ATS 10 (entered into force 19 March 2010) discussed in Explanatory Memorandum, International Tax Agreements Amendment Bill (No 2) 2009 (Cth) 51 [2.82].

[68] OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators* (OECD Publishing, July 2017) 20 [19].

[69] See, eg, *Thiel* (n 17) 344 (Mason CJ, Brennan and Gaudron JJ), 349–51 (Dawson J), 356–8 (McHugh J); *Bywater Investments* (n 19) 228–9 [168]–[169] (Gordon J).

[70] See, eg, *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134, 144 [42] (Hill, Sundberg and Stone JJ).

[71] See David Marks, 'Tax Treaties: How to Read Them' (December 2018) 53(6) *Taxation in Australia* 314, 318–19.

weight to be attributed to, soft law sources will become a significant issue for consideration and determination.

V Foreign Tax Law As an Integer of Domestic Tax Laws

The presence and growing importance of foreign law as part of Australia's tax laws is another factor presenting challenges. By way of illustration, both the hybrid mismatch rules and the Diverted Profits Tax provisions require consideration of two bodies of law, namely, the Australian provisions and the foreign tax law consequences of a particular transaction. In applying the Australian law, the foreign tax law consequences must first be worked out. The hybrid mismatch rules provide an obvious example. In broad terms, these provisions operate to 'neutralise' tax advantages arising from differences in the tax treatment of an entity or financial instrument under the income tax laws of two or more countries resulting in double non-taxation, such as where a single payment results in a deduction in two countries simultaneously.[72] The application of these provisions requires the determination as to whether a particular payment gives rise to a 'foreign income tax deduction in a foreign country'.[73] The expression 'foreign income tax deduction' is defined in s 832-120 of the *ITAA 1997*. That section provides that a loss or outgoing is a foreign income tax deduction in a foreign country if the entity is entitled to deduct the amount in working out its tax base under an income tax law of the foreign country, but disregarding any provisions of that foreign income tax law that correspond to div 832. There is a presumption inherent in these provisions that the relevant foreign tax law, and foreign tax law consequences, are readily ascertainable and not controversial. However, working out the foreign tax law consequences is unlikely to be straightforward or definitive.

A *Ascertaining Foreign Law*

First, the foreign law must be ascertained. Merely identifying the relevant provisions bearing on the taxation questions is unlikely to be sufficient to resolve the taxation treatment. Relevant case law must also be considered and, in the absence of relevant case law, a view will have to be formed about the likely application of the provisions.

[72] *ITAA 1997* (n 5) div 832.

[73] Ibid s 832-110(1).

B *Proving Foreign Law*

Second, how is foreign law established? The content and operation of foreign law is a question of fact. As explained in *Neilson v Overseas Projects Corporation of Victoria Ltd* ('*Neilson*'), '[t]he courts of Australia are not presumed to have any knowledge of foreign law. Decisions about the content of foreign law create no precedent. That is why foreign law is a question of fact to be proved by expert evidence.'[74]

Proving foreign law has its own complexities. In addition to expert evidence, foreign law can be proved by the production of books or other materials in the manner prescribed by ss 174 and 175 of the *Evidence Act 1995* (Cth) ('*Evidence Act*'). However, without the assistance of evidence from a suitably qualified expert in that foreign law on how to interpret the provisions, proof by such means may not have any utility.

C *Adducing Evidence of Foreign Law*

Expert evidence about foreign law, 'like any other form of expert evidence, also presents questions about what limits there are to the evidence that may be adduced from an expert witness'.[75] Whilst the content and operation of foreign law is a question of fact on which expert evidence is admissible, the application of the foreign law to the facts of the particular case is a question of law for the court to determine and is not a matter for evidence.[76] As Lindgren J explained in *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd [No 6]* ('*Allstate*'):

> It is fundamental that the ascertainment of the law relevant to a matter before a court and its proper application to the facts of the particular case are of the essence of the judicial function and duty. Although those processes are properly the subject of submission, *evidence* of opinion, whether as to the identification of the relevant law or as to its proper application, is not admissible. The rationale underlying this fundamental principle may be expressed in various closely related ways: to admit such evidence would be to permit abdication of the judicial duty and usurpation of the judicial function; such evidence cannot be allowed to be probative or to rise higher than a submission; such evidence is necessarily irrelevant.

[74] (2005) 223 CLR 331, 370 [115] (Gummow and Hayne JJ) ('*Neilson*').

[75] Ibid 371 [119].

[76] Ibid 371 [120].

> In the case of foreign law, the only variation required to the foregoing statements is that foreign law is proved in the way in which facts are proved (this is what is meant by statements that foreign law is proved 'as fact'), whereas the court is presumed to know the public laws of the State. But foreign law remains law to be applied by the Court. It has been said that where there is a jury, 'the only sound view, either on principle or on policy, is that it should be proved to the judge, who is decidedly the more appropriate person to determine it' … . Accordingly, evidence of opinion as to the proper application of foreign law to fact is not admissible.[77]

In dealing with s 80 of the *Evidence Act*, which provides that evidence of an opinion is not inadmissible only because it is about an ultimate issue, Lindgren J stated that the words were 'not apt to refer to expert legal opinion which impinges upon the essential curial function of applying law, whether domestic or foreign, to facts'.[78] Although the case law makes that distinction, the distinction in practice is not so straightforward.[79] In *Idoport Pty Ltd v National Australia Bank Ltd* ('*Idoport*'), Einstein J drew a distinction between cases where the expert evidence of the application of the foreign law would 'impinge on the essential curial function' and those where it did not.[80] His Honour stated that if the court was concerned with foreign law as a subsidiary fact necessary to determine the rights and liabilities of the parties under the foreign law, then the receipt of evidence of foreign law experts as to the effect of foreign law did not usurp the function of the court.[81] Whether there is a tension between *Allstate* and *Idoport* is a matter that no doubt will arise for future judicial consideration in a tax case.[82]

However, the distinction between content and application evidence has been held not to preclude an expert from examining in evidence how a discretion would be exercised by a foreign court.[83] Thus, if the relevant law involves the exercise of a discretion, the expert evidence can include evidence about the factors bearing upon the exercise of that discretion by a foreign court.

77 (1996) 64 FCR 79, 83 (emphasis in original) (citations omitted) ('*Allstate*').

78 Ibid.

79 See, eg, ibid; *Noza Holdings Pty Ltd v Commissioner of Taxation* (2010) 273 ALR 621, 625–8 [13]–[21] (Gordon J). Cf *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640, 656–8 [43]–[47] (Einstein J) ('*Idoport*').

80 *Idoport* (n 79) 656–7 [43]–[45].

81 Ibid 656–7 [44].

82 But see *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd [No 8]* [2013] FCA 172, [16] (Perram J).

83 *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209, 226 (Gummow J); *Neilson* (n 74) 371 [123] (Gummow and Hayne JJ).

A further consideration is that in the absence of expert evidence on the operation of foreign law, or satisfactory proof, there is a general presumption that the foreign law is the same as the Australian law.[84] The presumption has been described as 'general, but not universal'.[85] *Damberg v Damberg* is a case where the New South Wales Court of Appeal refused to assume that the relevant foreign law was the same as the Australian law.[86] The foreign law in question was German law on avoidance or evasion of capital gains tax and, in the view of the Court, the assumption that the German law was to the same effect as the Australian law could not legitimately be made. Justice Heydon stated that '[t]axation law cannot be assumed to be a field resting on great and broad principles likely to be part of any given legal system'.[87]

Proof of the foreign law is thus a matter of some importance. A taxpayer asserting that the foreign law does not apply in a way that would enliven the application of the hybrid mismatch rules has the onus to prove the relevant content of the foreign law. Such evidence might need to include evidence about the relevant rules of statutory construction to apply because, in the absence of contrary evidence, an Australian court would approach the task of construing the relevant foreign provision as it would approach the construction of an Australian statute.[88] In *Neilson*, Gummow and Hayne JJ cautioned that

> an English translation of the text of foreign written law is not necessarily to be construed as if it were an Australian statute. Not only is there the difficulty presented by translation of the original text, different rules of construction may be used in that jurisdiction.[89]

Moreover, where foreign law is in a language other than English, the need for translation may complicate the proof of that law. In *Neilson*, Kirby J referred to the 'nuances and difficulties that exist[ed] because of the need to translate the Chinese law into the English language'.[90]

The value of any expert evidence on the foreign law consequences will also depend on the adequacy of the proof and whether the evidence is proved in a meaningful way. Merely referring to the provisions without analysis or

[84] *Neilson* (n 74) 343 [16] (Gleeson CJ), 352 [43] (McHugh J), 370 [116] (Gummow and Hayne JJ).

[85] JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 11th ed, 2017) 1563 [41005].

[86] (2001) 52 NSWLR 492, 522 [162] (Heydon JA, Spigelman CJ agreeing at 494 [1], Sheller JA agreeing at 494 [2]).

[87] Ibid.

[88] *Neilson* (n 74) 372 [125] (Gummow and Hayne JJ).

[89] Ibid 370 [115].

[90] Ibid 394 [198].

explanation is unlikely to be helpful. Similarly, citing cases that are too generalised is unlikely to provide meaningful guidance on the applicable principles. Compounding the difficulties is that our own case law demonstrates how reasonable minds can legitimately reach very different conclusions on matters of construction and application, even in areas where the principles are well settled.

VI Tax Laws and Expert Evidence

The need to rely on expert evidence to determine taxation issues in international dealings is not confined to proof of foreign law. For example, the fundamentally simple idea of the transfer pricing provisions is that an international non-arm's length dealing between related parties is to be taxed on the basis of the arm's length equivalent dealing of the actual transaction entered into, not upon the actual profits or expenditure. However, the ascertainment of the arm's-length price will often involve the consideration of matters involving specialist subject matter, such as economics, finance or valuation matters.[91] Expert opinion evidence has become an important aspect of tax cases, with courts increasingly reliant on experts to inform them of the matters of specialist knowledge which are necessary to have in order to apply the law. Many tax disputes involve expert evidence because of the nonlegal nature of the subject matter which must be considered in order to determine a case. Whilst the law has developed rules and procedures for the use of expert evidence, there are many problems with expert evidence as the case law demonstrates. Some of those problems arise because of the sheer complexity of the subject matter of the expert evidence. *Resource Capital Fund IV LP v Commissioner of Taxation* ('*Resource Capital*') is an example.[92] The questions in that case involved the interaction of arts 7 and 13 of the *Australia–US Convention*, s 3A of the *International Tax Agreements Act 1953* (Cth) and div 855 of the *ITAA 1997*. The case required complicated valuation evidence in order to undertake the task required by div 855 of determining whether the sum of the market values of the non-taxable Australian real property assets exceeded the sum of the market values of the taxable Australian real property assets or vice versa.[93] Five experts were retained by the parties who produced two joint expert reports for the purposes of the proceedings, from which emerged substantial disagreement

[91] See, eg, *Chevron Australia Holdings Pty Ltd v Federal Commissioner of Taxation [No 4]* (2015) 102 ATR 13; *Glencore Investment Pty Ltd v Federal Commissioner of Taxation* [2019] FCA 1432.

[92] (2018) 355 ALR 273 ('*Resource Capital*'). See also *Federal Commissioner of Taxation v Resource Capital IV LP* (2019) 266 FCR 1 ('*Resource Capital Appeal*').

[93] *Resource Capital* (n 92) 336–55 [103]–[125] (Pagone J).

about the appropriate methodology to adopt. At first instance, Pagone J observed that

> [t]he Court is not well placed to resolve theoretical differences between competing experts whose judgments are soundly based and are responsibly held within established disciplines in areas of non-legal expertise: see *Bronzel v State Planning Authority* (1979) 21 SASR 513 at 523 (*Bronzel*). It is common to find different opinions reasonably held in established disciplines, fields of learning, and areas of expertise which cannot be resolved by courts of law, and, as Wells J cautioned in *Bronzel* at 523, a judge should not be cast in the role of a third valuer. In *Riverbank Pty Ltd v Commonwealth* (1974) 48 ALJR 438 Stephen J observed at 484 that even the first step of selecting sales of properties thought to be sufficiently comparable may be attended with difficulty explaining why 'the stuff of valuation' was 'an art, not a science'. Ultimately, however, a court needs to be persuaded that one or other of the opinions is to be preferred by reference to the explanations and reasons given by the experts for their opinions.[94]

Tax laws which depend for their application upon the ascertainment of facts, which are matters of specialist knowledge, are problematic. Judges are often faced with the problem of making factual determinations about specialised areas of knowledge in respect of which the judge has no grounding. The increasing need to rely on specialist knowledge poses particular problems for courts which must receive evidence in a form that can be understood and applied by judges. Expert evidence, which is not presented in a plain and clear way, does not make complex concepts easily understandable to the judge or which is not supported by comprehensive reasoning, can distort the fact-finding process by the judge excluding or misapprehending the expert evidence.

The problems with expert evidence are not new and, for several years now, the Federal Court has sought partly to address these problems by using the concurrent evidence process.[95] At least from the Court's perspective, this is a very useful tool for narrowing down the areas of disagreement between the experts, helping the judge to grasp the reasons for the differences of opinions held by the experts, better understanding the reasoning of the experts and enabling a more meaningful engagement with the experts than the traditional adversarial system allows. The concurrent evidence process has its critics though and it does not always succeed in reducing the complexity of the

[94] Ibid 342–3 [112].

[95] Federal Court of Australia, *Expert Evidence Practice Note*, 25 October 2016.

evidence which the judge must understand in order to decide the case.[96] Perhaps the time has come to reignite the debate about whether an independent specialist tribunal, along the lines of the Australian Competition Tribunal, should be established to hear tax cases, having both legal and nonlegal members, with the nonlegal members suitably experienced in disciplines in which the judge does not have specialist knowledge, such as economics, finance and valuation. Such nonlegal members are able, as decision-makers, to bring their expertise and knowledge into understanding, evaluating and weighing competing expert testimony upon which the outcome of the tax case must depend.

A procedure which does not appear to have had traction in tax controversies yet, but which is also worthy of consideration where competing expert evidence is involved, is the appointment of an independent person with special expertise in the discipline concerned as a referee in accordance with s 54A of the *Federal Court of Australia Act 1976* (Cth) to inquire and report to the court on the matters the subject of the expert evidence.[97] In undertaking that task, the referee does not exercise delegated judicial power and the referee's report is not binding on the Court; the Court may choose to adopt the report in whole or in part, or vary or reject it.[98] In *Kadam v MiiResorts Group 1 Pty Ltd [No 4]* ('*Kadam*'), Lee J helpfully set out the background to the use of referees as a method of enabling discrete issues to be determined efficiently and there is a useful examination of the practice and procedure and the considerations to be taken into account in deciding whether to appoint a referee.[99] *Kadam* was not a tax case but, topically for this piece, Lee J appointed a referee to inquire and report to the Court on a question of foreign law in circumstances where there was conflicting expert evidence. In *Commissioner of Taxation v Caratti* (which is a tax case), Colvin J used the referee procedure to determine whether documents were properly the subject of legal professional privilege.[100] As many tax cases raise multiple complex questions of law and fact which must be resolved to decide the tax dispute, tax cases may lend themselves to greater and

[96] For a discussion of the criticisms of concurrent evidence processes, see Justice Steven Rares, 'Using the "Hot Tub": How Concurrent Expert Evidence Aids Understanding Issues' (2013) 95 (December) *Intellectual Property Forum* 28, 33–4.

[97] See also *Federal Court Rules 1979* (Cth) ord 72A, as repealed by *Federal Court Rules 2011* (Cth) r 1.03.

[98] *Federal Court of Australia Act 1976* (Cth) s 54A(3) ('*FCA Act*').

[99] (2017) 252 FCR 298, 301 [6], 307–314 [35]–[63].

[100] [2018] FCA 465.

wider use of the referee practice and procedure as another mechanism for facilitating an efficient resolution of the tax dispute.[101]

I have addressed some of the challenges in interpreting and applying international tax law measures. These challenges are not unique to Australia but are common issues for courts in civil countries as well as common law countries. With international tax law becoming more prominent in our tax system, I wish to make five concluding points.

VII Concluding Remarks

First, tax law framed on international standards is not novel, but construing and applying provisions based on international tax law standards should not be regarded as a purely mechanical task of statutory construction. It is important to understand the principles informing the international standards and practices underpinning many of the tax measures adopted by Australia and to consider how international tax reform has shaped many of these legislative measures. An understanding of the underlying policy frameworks will be an essential first step in construing and applying these new measures and it is reasonable for courts to expect appropriate assistance in that task by all relevant material being brought to the attention of the court. Such material will be useful, not necessarily to control meaning, but as an aid to construction by providing relevant context for the consideration of the interpretational arguments.

Second, it is also important to consider how international tax law intersects with Australia's tax laws. As the body of international tax law develops and expands, it becomes more and more important to be aware of the jurisprudence and learning on international tax law and to draw on that jurisprudence for assistance and guidance. In any case involving international tax questions, relevant international jurisprudence and learning can be informative and, in some cases, highly influential in resolving the tax outcomes. It is thus reasonable for the courts also to expect that they will be informed not just of

[101] See Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management*, 20 December 2019, para 8.5(g) which provides that one of the Court's case management imperatives is to consider 'how to best manage justiciable issues' and, as part of that process, to consider 'whether or not some or all issues are susceptible to being referred to a referee'. See also the Second Reading Speech for the Bill introducing s 54A of the *FCA Act* (n 98), in which the Attorney-General said that the reform would 'enable the court to more effectively and efficiently manage large litigation' and '[t]he procedural flexibility with which a referee can deal with a question — along with their technical expertise — will allow a referee to more quickly get to the core of technical issues and reduce the cost and length of trials for litigants': Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12296 (Robert McClelland, Attorney-General).

the relevant principles to apply but also of any comparative foreign jurisprudence.

Third, due to the increased coordination and adoption of international tax law principles, the body of relevant international tax law jurisprudence is likely to increase substantially as more and more countries look to foreign case law for assistance and guidance.

Fourth, tax stability depends on predictability and consistency of outcomes. The 2017 International Monetary Fund and OECD report on tax certainty noted that the lengthy decision-making process of the courts was a key concern for establishing certainty.[102] The time taken for some cases to be heard and determined is a constant challenge for the courts. Complex cases are both time-consuming to prepare for hearing and time-consuming to decide. Case management tools that reduce the time taken to get a matter on for trial narrow down the issues and put into place trial directions that produce targeted and focused lay and expert evidence all contribute to cases being heard more speedily and reducing the time taken to get decisions. In that process, practitioners have a crucial role and their contribution is central to achieving effective case management.

Finally, courts have an important and essential role in promoting tax stability through the development of a body of jurisprudence, both domestic and international, to provide guidance and certainty on the applicable legal principles. In Australia, the jurisprudence is still relatively small but as more and more tax cases involving international tax law issues are decided, judicial precedent will offer greater predictability and certainty as to meaning and application.

[102] International Monetary Fund and OECD, *Tax Certainty: Report for the G20 Finance Ministers* (Report, March 2017) 6.