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Book Review: *Customary International Law and Tax Jurisdiction* by Céline Braumann

Professor Peter Hongler reviews *Customary International Law and Tax Jurisdiction* by Céline Braumann.

Céline Braumann's *Customary International Law and Tax Jurisdiction*[1] presents a comprehensive and systematic assessment of the relationship between public international law and international tax. The book examines whether and how norms of customary international law constrain states' jurisdiction to tax in an increasingly digitalized and globalized economy.

The introduction lays out the significance of the topic, the selection of case studies and the gaps in prior scholarship, positioning the work as a response to the under-theorization of customary norms in international tax law.

Chapter 2 provides a thorough overview of the background and foundations of international tax law in state sovereignty, including the role of the OECD in this arrangement. Contemporary issues are analysed, including the OECD's Base Erosion and Profit Shifting (BEPS) Project and the subsequent two-pillar solution. This chapter grounds the reader in both the traditional and evolving dimensions of tax policy. It also bridges the existing broad gap between international law and international tax law scholarship.

The international law of state jurisdiction is the focus of Chapter 3, where the assessment is based on legal theory. The discussion moves from general principles of jurisdiction under international law – including prescriptive and enforcement jurisdiction – to specific considerations about tax jurisdiction, such as the principles of source and residence, physical presence and concurrent jurisdiction. The limitation to questions of tax jurisdiction is well-chosen, although there are other questions in relation to customary international tax law.[2] On one hand, the question of jurisdiction is highly relevant in the current environment, both with respect to Pillar One (re-defining nexus) and Pillar Two (expanding jurisdiction based on existing nexus definitions), but also technically it is one of the most interesting and most challenging cases for the application of customary norms.

Chapter 4 considers the role and various aspects of customary international law such as its formation and identification, including the theoretical framework, *opinio juris* and state practice. This is complemented by a critical discussion of how these concepts apply specifically in the tax law context, such as in tax treaty practices and jurisdictional norms. This chapter should be of great interest to tax lawyers who want to better understand how customary international law works. There have already been several studies on customary international tax law;[3] however, Braumann, with her international law background, is able to approach the topic in an in-depth manner that, in its very form with a strong international law anchoring, has been missing within scholarship. Most studies on the topic have so far been conducted by tax law scholars viewing the issue through a tax-centric lens.[4]

In Chapter 5, a case-study method is used to evaluate the formation of customary international law in the field of taxation. A mixed-method approach is used to combine qualitative and quantitative techniques. The proposed four-stage model covering internal practice, inter-state practice, *opinio juris* and synthesis is robustly defended. Personally, I have observed that tax professionals – both academics and practitioners – are often puzzled and uncomfortable when they first encounter customary international tax law. This is primarily because its identification process differs significantly from more traditional sources of tax law, such as treaties or domestic legislation. It is not just the fact that we use different requirements – i.e. state practice and *opinio juris* – but also that the way these requirements are tested is different; or, in the words of Braumann:

> State practice and opinio juris are exclusively ascertained through material evidence as opposed to being deduced from logic or abstract principles. For all its weaknesses and haphazard implementation in practice, inductive law-ascertainment

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1. C. Braumann, *Customary International Law and Tax Jurisdiction* (Wolters Kluwer 2025).
2. A rather well-known but still underdeveloped question is to what extent the rules of interpretation according to article 31 et seq. of the *UN Vienna Convention on the Law of Treaties* (23 May 1969), Treaties & Models IBFD, have become part of customary international law.
3. *See*, for example, R. Avi-Yonah, *International Tax as International Law*, 57 Tax L. Rev., pp. 483 et seq. (2004); D. Broekhuijsen & I. Mosquera Valderrama, *Revisiting the Case of Customary International Tax Law*, 23 Intl. Community Law Rev., pp. 79 et seq. (2021); S. Gadzo, *Nexus Requirements for Taxation of Non-Residents' Business Income: A Normative Evaluation in the Context of the Global Economy* (IBFD 2018); P. Hongler, *Justice in International Tax Law: A Normative Review of the International Tax Regime* (IBFD 2019); and R. Martha, *The Jurisdiction to Tax in International Law* (Kluwer 1989).
4. For a recent exception, *see* C. Ryngaert, *Nexus and International Tax Jurisdiction* in *Finding the meaning of nexus for taxes – past, present, and future*, Cahiers de Droit Fiscal International, vol. 108a (International Fiscal Association, The Hague, 2024), pp. 103 et seq.

> remains the least common denominator in customary international law theory – and is likely here to stay.[5]

The core of the book lies in Chapters 6 to 8, where Braumann applies her methodology to three key case studies. Chapter 6 examines the nexus principle, evaluating whether there is a customary international law requirement for a jurisdictional link (e.g. source, residence or market) before a state may tax. Braumann confirms the common (but partly disputed) claim that "tax jurisdiction is not limitless".[6] Moreover, a key finding for the present debate on Pillar One is also that it would not infringe customary international tax law if countries tax business based on market presence.[7] Linked to such question, Braumann reviews in Chapter 7 whether there is any discernible customary definition of what the source of a (business) profit is (i.e. whether there is any PE requirement or physical presence requirement derivable from customary international law). She concludes that no such definition exists. This also means that states are free (outside tax treaty obligations) to redefine what source means, for instance, relying on the *economic presence* or *digital presence*. Conclusively, the redefinition of source under Pillar One was in line with customary international law.

Finally, Chapter 8 addresses the nexus of ownership and control, particularly in relation to controlled foreign corporation (CFC) rules and the OECD Pillar Two measures (Income Inclusion Rule (IIR) and Undertaxed Payments Rule (UTPR)). Braumann concludes that while CFC rules appear compatible with customary norms, the status of the newer Pillar Two instruments remains unsettled. To be more precise, she argues that "we are, to the very least, on a trajectory of the IIR's and UTPR's jurisdictional nexus being accepted as law"[8]. An important part of her position lies in the fact that so far there have not been any major protests by other countries.[9] I would challenge such a position, inter alia, based on most recent developments that the author could not yet cover in her thesis. The retaliatory tax as suggested in the proposed section 899 as part of the so-called "One Big Beautiful Bill" is a rather strong protest by the United States against the UTPR due to its extraterritorial reach. But apart from this, it is indeed (from my perspective quite surprisingly) a fact that we have not seen more official diplomatic or similar protests by states against the UTPR.

In this regard, her remarks on the missing diplomatic protests should also be a learning lesson for state representatives in the tax field. Unlike in other fields, tax representatives are not typically tasked with issuing diplomatic protests in response to overly far-reaching policies. However, they should become aware of their role in the creation of customary norms;[10] otherwise, I fear that some countries will push the limits of tax jurisdiction too far. From a more technical perspective, a challenge to her position relates to the fact the focus regarding the UTPR topic was, from my perspective, too much on the first version of the UTPR – i.e. a denial of a deduction under an undertaxed payments rule.[11] The impact on other jurisdictions' sovereignty is different whether it is "only" a denial of a deduction or of an inclusion of under-taxed profits as foreseen under the latest understanding of the UTPR as an undertaxed profits rule.

In the closing chapter, Braumann's summation of findings leads to the main conclusion that customary international law does impose limits on state jurisdiction to tax, although the limitation is not exhaustive and subject to nuances. Braumann's work is important as it also reflects on the epistemological and methodological challenges of identifying custom in this domain and the role of international lawyers in future norm development. Overall, the book is an important contribution to both international law and international tax law. Its strengths lie in its conceptual clarity, methodological innovation and the relevance of its case studies. Braumann's blend of doctrinal rigor and empirical inquiry makes this work particularly valuable for legal scholars, policymakers and practitioners interested in customary international tax. There are many lessons to be learned from international law scholars such as Braumann. Looking back on one of the main topics of the 2024 IFA Cape Town Congress on nexus and looking forward to this year's congress,[12] I am persuaded that her work will be appreciated both by academics and practitioners. Personally, I specifically hope that we will soon also see court decisions (most likely on the UTPR or the German *Registerfälle*) that will help us to better understand the limits of international tax jurisdiction. Braumann's work has confirmed that there are limits; however, courts have yet to examine in detail where those limits are.

5. Braumann, *supra* n. 1, at p. 119.
6. Id., at p. 175.
7. Id., at p. 177.
8. Id., at p. 206.
9. *See*, in general, Braumann, *supra* n. 1, at pp. 83 et seq.
10. *See*, on this, the conclusion of Braumann, *supra* n. 1, at p. 216.
11. *See*, in particular, Braumann, *supra* n. 1, at p. 206, last paragraph.
12. *See* J. Hattingh & P. Hongler, *General Report* in *Finding the meaning of nexus for taxes – past, present, and future*, Cahiers de Droit Fiscal International, vol. 108a (International Fiscal Association, The Hague, 2024), p. 11.