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SYMPOSIUM ON RUTH MASON, "THE TRANSFORMATION OF INTERNATIONAL TAX"

SHIFTING DESIGN PARADIGMS: WHY TOMORROW'S INTERNATIONAL ECONOMIC LAW MAY LOOK MORE LIKE THE TAX REGIME THAN THE WTO

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Rampant unilateralism, insistence on national sovereignty, a wariness of multilateral institutions and third-party adjudication—for international trade lawyers, this is the stuff of nightmares. For international tax lawyers, these are the normal operating parameters of the international tax regime. In fact, the same forces that are currently unraveling the World Trade Organization (WTO) are simultaneously enabling pragmatic and creative reforms of international tax law. Ruth Mason's account of the *Transformation of International Tax* invites us to draw broader lessons on how international economic law could adapt to survive and even thrive in a political environment increasingly hostile towards WTO-style multilateralism.

The Tax Regime Could be Replacing the WTO as a Model for Regime Design

Since its inception in 1995, the WTO has attracted "the envy of the international law world"[1] and served as a benchmark for a generation of international economic lawyers. As a permanent, multilateral organization with a broad, detailed rulebook and compulsory third-party dispute settlement, the WTO epitomized the pinnacle of the rules-based international economic order and its design inspired reform efforts in neighboring fields. In the late 1990s negotiations (unsuccessfully) sought to replace bilateral investment treaties with a WTO-like multilateral investment agreement;[2] in the 2000s the WTO's general policy exceptions motivated the inclusion of similar clauses in investment agreements;[3] and aspects of the WTO's dispute settlement architecture served as a blueprint for a permanent investment tribunal with an appeal instance proposed by the European Union to replace ad hoc arbitration for the settlement of investment disputes.[4]

Today, however, the WTO is losing its appeal. The renewed rise of unilateralism and nationalism as well as growing divisions among leading economies have dead-ended WTO negotiations, and a distrust of multilateral institutions and legalized third-party adjudication has paralyzed the WTO's dispute settlement arm. Even though the WTO as an institution is likely to survive, the WTO as a design ideal for international economic law may not.

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[1] Gabrielle Marceau & Julian Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, 1 J. Int'l Disp. Settlement 67, 68 (2010).

[2] Peter T Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, Int'l Law. 1033 (2000).

[3] Amelia Keene, *The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements*, 18 J. World Inv. & Trade 62 (2017).

[4] Naboth van den Broek & Danielle Morris, *The EU's Proposed Investment Court and WTO Dispute Settlement: A Comparison and Lessons Learned*, 2 Eur. Inv. L. & Arb. Rev. Online 35 (2017).

International tax law—an area long overlooked by international economic law negotiators, policy-makers and scholars—could replace the multilateral trading system as design baseline for tomorrow's international economic law order. As Mason highlights, international tax law has long struggled with and has been able to accommodate and even leverage the very forces that have put a strain on the trade regime. Historically, states have jealously guarded national sovereignty over taxation, unilaterally decided what and how much to tax, and preferred bilateral treaties to prevent double taxation over multilateral rules and diplomatic negotiations over binding third-party dispute settlement. While the more recent tax base erosion and profit shifting (BEPS) reform produced a more tightly knit global tax regime, this transformation of tax happened not by overcoming these forces, but by harnessing them. National sovereignty remains a cornerstone of the regime, but under the proviso that income should be taxed exactly once. Unilateralism remains a crucial tool to achieving the single taxation goal, but is simultaneously reigned in through coordination, transparency, and peer-review. States' divergent preferences are accommodated by a new multilateral opt-in convention, the Multilateral Instrument (MLI), that, on the one hand, harmonizes international obligations on tax treaty abuse and dispute settlement, while, on the other hand, leaves bilateral treaties in place and allows states the flexibility to contract out of multilateral obligations that are not minimum standards.

In short, at a time when cries for national sovereignty, rampant unilateralism, and a preference for bilateral deals over multilateral institutions have plunged the trade regime into crisis, the tax regime was able to accommodate these forces and build a more integrated multilateral architecture. In an international landscape increasingly hostile towards WTO-style multilateralism, the transformation of tax law therefore holds valuable lessons for the future (re-)design of international economic law.

To be sure, generalizing across international economic law regimes comes with caveats. Liberalization of trade, the protection of investment, and the allocation of tax rights raise different economic and political economy considerations that justify divergent design choices.[5] Structures or reforms adopted in one field cannot blindly be transposed to another field. At the same time, there are similarities, too. All three regimes concern economic transactions, are based on multi-level treaty structures, and operate in the same international political environment. A cautious comparison across fields, mindful of differences as well as similarities, can thus highlight avenues for learning. In that spirit, I revisit the two institutional transformations identified by Mason, (1) the MLI and (2) coordinated unilateralism. I suggest that they offer design alternatives for international economic law more generally.

The MLI as a Pragmatic Model for Squaring Bilateralism, Plurilateralism and Multilateralism

The trade regime is hierarchically layered into distinct treaty categories. On top are the multilateral WTO agreements, the universal rules that apply to all WTO members. One layer below are plurilateral agreements. Explicitly permitted by the WTO's Marrakech Agreement, they bind some, but not all WTO members.[6] At the bottom of the trade regime hierarchy are hundreds of bilateral (or regional) free trade agreements (FTAs) whose decentralized rules are tolerated by the WTO as long as they advance trade liberalization and do not harm trade interests of third states.[7]

[5] *See, e.g.*, Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005); Thomas Rixen & Ingo Rohlfing, *The Institutional Choice of Bilateralism and Multilateralism in International Trade and Taxation*, 12 INT'L NEGOT. 389 (2007).

[6] Marrakesh Agreement Establishing the World Trade Organization art. II(3), Apr. 15, 1994, 1867 UNTS 154.

[7] *See, e.g.*, General Agreement on Tariffs and Trade art. XXIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

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International tax law offers an alternative design paradigm in two ways. First, it incorporates aspects of all three levels—multilateral, plurilateral, bilateral—into a single treaty instrument. The MLI contains mandatory multilateral elements, the BEPS substantive and procedural minimum standards, that modify all covered double taxation treaties (DTTs). The MLI thereby creates a common core of multilateral tax principles. The MLI also contains a number of plurilateral elements that signatory states can contract out of (e.g., hybrid mismatches) or into (e.g., tax arbitration) if they want to go beyond the BEPS minimum standards. Finally, the MLI leaves room for bilateralism as parties can tailor the convention's application through their notifications, e.g., by excluding specific DTTs that already meet BEPS best practices.

Second, the tax regime is horizontally integrated rather than hierarchically layered. Whereas the WTO agreements, WTO plurilaterals, and FTAs create parallel sets of rules that operate independently, the MLI and DTTs form a single, interdependent and integrated norm network. On the one hand, this interdependence creates baffling complexities. The original text of a DTT has to be read together with the MLI and its notifications to patch together the rules that govern a bilateral relationship (the OECD had to build a dedicated database to navigate the ensuing normative maze!). On the other hand, integration rather than layering facilitates regime reform and adaptation. In the trade regime, bottom-up innovation in FTAs has to be multilateralized through an independent WTO treaty and incorporating top-down innovation from the WTO would require renegotiating hundreds of FTAs. Multilateral tax reform through the MLI, in contrast, instantaneously spreads to bilateral agreements, and innovation in DTTs could swiftly pave the way for a future multilateral reform convention.

The MLI design thus seeks to achieve multilateralization without thereby forgoing flexibility, customization, decentralization, and dynamic adaptation. In WTO negotiations, famously, nothing is agreed until everything is agreed. With every state having a de facto veto over all issues, little multilateral rule-making progress has been achieved at the WTO over the past twenty-five years. As rule-making shifts to FTAs, the WTO becomes increasingly sidelined. The MLI, in contrast, pragmatically spreads multilateral reform through bilateral treaties and accommodates issues characterized by different levels of state consensus in the same instrument. Issues that every state can agree on become multilateral minimum standards, issues that most states can agree with are subject to plurilateral opt-in or opt-out rules, and everything else is left to the bilateral level. The result is a multilateral convention that a majority of states are comfortable joining. At the time of this writing ninety-eight states, including most G20 countries, have signed the MLI and forty-three states have ratified it.

The MLI model has already begun to replace WTO analogies in investment law reform. Whereas multilateral talks to reform investment arbitration under the auspices of the United Nations initially started under the shadow of the prominent EU proposal to create a WTO-inspired multilateral investment court, the discourse among states has shifted towards a multilateral instrument that could accommodate a menu of reform options.[8] Colombia even proposed to model investment law reform explicitly on the tax MLI.[9] If successful, the investment regime of the future will look more similar to the tax regime than the trade regime.

But even within the trade regime, novel and pragmatic ways to square bilateralism, plurilateralism, and multilateralism could take root. Consider ongoing WTO negotiations to create new rules on electronic commerce. Most recent bilateral and regional FTAs already contain electronic commerce chapters that converge around a few principles (e.g., on electronic authentication).[10] A future WTO-led opt-in agreement could expand these rules to all covered FTAs. Converging e-commerce principles in existing FTAs could form the basis of multilateral minimum

[8] Anthea Roberts & Taylor St. John, *UNCITRAL and ISDS Reform: Visualising a Flexible Framework*, EJIL: TALK! (Oct. 24, 2019).

[9] Submission from the Government of Colombia, UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session, UN Doc. A/CN.9/WG.III/WP.173, 14 June 2019.

[10] Ines Willemyns, *Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations*, 23 J. INT'L ECON. L. 221 (2020).

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standards to update agreements currently lacking such provisions. WTO members that want to go further could additionally agree on plurilateral rules within the same instrument, e.g., on data localization, binding only those states that opt into them. Such a WTO-led MLI on e-commerce would constitute a radical departure from current WTO thinking. It would intertwine bilateralism, plurilateralism, and multilateralism under the WTO umbrella in novel, pragmatic ways and produce a multilateral agreement that all WTO members could sign onto without having to accept all of its rules.

Coordinated Unilateralism as an Alternative Means to Govern Trade Remedies

The coordinated unilateral enforcement of international tax (soft) law standards is the second innovation Mason identifies. Mason argues that states are more willing to agree to international tax cooperation in the first place when implementation occurs flexibly through domestic acts rather than international law. To prevent enforcement unilateralism from going rogue, the tax regime puts fail-safes in place: if one state does not make the unilateral decision to tax an income, the other state automatically gets to tax it. Furthermore, tax unilateralism is placed in check through a reporting and peer review mechanism, whereby compliance with agreed standards is monitored by the Inclusive Framework, a group of around 140 countries implementing the BEPS project. At a time when unilateralism is resurgent, the tax regime's mode of coordinated unilateralism may offer inspiration to trade lawyers.

Unilateralism is already built into the WTO system in the form of so-called trade remedies. The WTO allows these unilaterally imposed trade restrictions on limited grounds, i.e., to react to "unfair" trade (dumping or harmful subsidization) or to safeguard against an unexpected surge of imports that causes or threatens to cause serious injury to an import-competing industry. Trade remedies act as political safety valves that allow governments to temporarily restrict trade to protect domestic industries. In political economy terms, they are vital because they incentivize governments to make (politically harmful) trade liberalization concessions ex ante knowing that these concessions can be withdrawn (under the prescribed circumstances) ex post.[11] The political economy rationale of institutionalized unilateralism is thus similar in tax and trade.

In contrast to tax, however, trade unilateralism is kept in check through third party adjudication. The underlying WTO agreements carefully circumscribe the grounds for imposing trade remedies and their legality is routinely challenged and assessed before WTO panels. In fact, almost half of all WTO disputes in recent years concern trade remedies.[12] Furthermore, the WTO Appellate Body's interpretation has gradually clarified and tightened the grounds for their imposition, which is a chief reason for the United States' attacks on the Appellate Body and its critique of judicial overreach.[13] As a result, at the time of this writing, the WTO's governance of trade remedies has effectively broken down. With narrowing grounds for their imposition, states are falling back on other justifications for imposing trade restrictions, such as national security, forcing the WTO dispute settlement system to evaluate the legality of politically charged issues, which it is unable to do in any case since the blockage by United States has rendered the Appellate Body (and through possible "appeals into the void" the WTO dispute settlement system more generally) defunct.

The tax system offers an alternative mode for coordinating unilateralism based on fail-safes, transparency, peer monitoring, and ultimately politics. Instead of the current legalized and litigation-centric WTO mechanism, a moratorium on trade remedy claims could make them subject to peer-review alone. The WTO Trade Policy Review

[11] Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 282 (1991).

[12] Joost Pauwelyn & Weiwei Zhang, *Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload*, 21 J. INT'L ECON. L. 461, 470 (2018).

[13] *See* U.S.Trade Rep., Report on the Appellate Body of the WTO (Feb. 2020).

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Mechanism together with the WTO's committees on anti-dumping, countervailing duties and safeguards already provide the necessary infrastructure for transparency and peer review. Furthermore, trade law is somewhat self-enforcing since unilateral withdrawals of tariff concessions can be reciprocated, which places a natural check on unilateralism both as a deterrent of excessive trade restrictions and, through retaliation, as a response to it. Hence, reciprocity acts akin to a fail-safe.

Shifting the task of interpreting and policing trade remedies from panels to the WTO membership is an imperfect solution. It may strike trade lawyers as a regression to the pre-WTO days when parties resolved disputes through negotiation rather than litigation. Moreover, long-standing trade remedy controversies, such as the practice of zeroing, would likely persist. More diplomacy and less litigation may nevertheless be desirable to help accommodate the diverse and often diverging interests of WTO members. Here, the politically controversial implementation of BEPS, which pits low tax against high tax jurisdictions on a global scale, offers fitting parallels. In tax as in trade, coordinated unilateralism is more about encouraging and managing compliance than strictly policing it. As underlying normative grounds remain contested, peer-review and diplomacy help diffuse global tensions, build normative consensus, and keep states at the bargaining table. The tax regime thus offers a potential blueprint for coordinating trade unilateralism through a political rather than judicialized mechanism.

Changing Design Requires a Changing Mindset

Transitioning from a design paradigm based on the WTO to one inspired by the tax regime will require an intellectual adjustment for international economic lawyers. To many, consistency, centralization, stability, legalization and judicialization are more than descriptors of WTO design and instead embody core values underpinning international economic law. Yet, conceiving of these design descriptors as values risks inhibiting creativity and obscuring design alternatives, as one settles on default responses along the lines that more consistency (or centralization, hierarchy, and so on) is always better and less is necessarily worse. In that respect, Mason's account of tax law's transformation is intellectually liberating and refreshing. It demonstrates that a successful multilateral transformation can be grounded in other design choices than those we have to come to accept as defaults and can thrive in what many would consider an environment hostile to multilateralism.

Going a step further, once consistency, centralization, and the like are recognized as design options rather than design virtues, one can start seriously assessing the trade-offs that they may entail. Consistency stifles experimentation and differentiation, centralization reduces regime resilience, stability comes at the expense of flexibility, and too much law and adjudication can mean not enough politics and negotiation. The current crisis of the WTO and the concurrent successful transformation of the tax regime suggest that different points along the axes of these design trade-offs are possible, but also that different international political environments may favor different design combinations. International economic law is not (exclusively) an immutable, technical response to relatively static policy problems of economic cooperation. It is also a dynamic reflection of underlying politics and changing circumstances. In the 1990s, the WTO design achieved significant buy-in from states. Today, the tax regime seems better placed to attract widespread state backing.

In conclusion, Mason's work invites trade and investment lawyers to engage more seriously with the reforms and pragmatic design choices that are transforming the tax regime. These design choices accept a greater role for unilateralism and politics and strike a balance between multilateral harmonization and flexibility, differentiation and customization. The tax regime thereby provides a blueprint for how international economic law can thrive in a more challenging international political landscape.

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