"SOFT LAW" IN INTERNATIONAL LAW-MAKING: HOW *SOFT* INTERNATIONAL TAXATION LAW IS RESHAPING INTERNATIONAL ECONOMIC GOVERNANCE

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ABSTRACT

This article offers a comprehensive analysis from the perspective of international economic law for understanding base erosion and profit shifting reform (hereinafter "BEPS") as a major example of modern soft law and its effect on the international taxation regime and, beyond, international economic law and governance. This article illustrates that soft law can be seen as a signal of maturation of international law as policy makers tend to consider the developments and legal systems of others areas in this pluralistic world. This article makes three main claims. The first claim is that, international taxation has a strong nexus with international trade and investment and that they interact with each other. This requires for trade, investment and tax norms to not be in conflict with each other. The article's second claim is that when compared with hard law, soft law has its own merits and can play a more vital role in the construction of the international economic regime. In particular it argues that, soft law is more suitable to making some experimental movements when compared with hard law. The article's third and final claim is that BEPS, as a form of soft law, is radically transforming the international taxation regime.

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KEYWORDS: s*oft law, hard law, international taxation, international trade, international investment, base erosion and profit shifting reform, BEPS, dispute resolution*

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I. INTRODUCTION

At present, international economic governance faces many crises. The financial recession of 2008 and resulting public austerity elevated international tax issues onto the global political agenda.[1] While international economic governance has seen a growing number of harmful tax competitions,[2] governments, companies and, most importantly, citizens around the world became more focused on the erosion of the corporate income tax base than ever before. The number of reported tax related scandals has seen a substantial increase. For instance, based on the Organisation for Economic Co-operation and Development (hereinafter "OECD") report on mutual agreement procedure (hereinafter "MAP") statistics has revealed that at the end of 2013, there were 4566 open MAP cases in OECD member countries in ending inventory, representing a 12.1% increase compared to the 2012 reporting period, and a startling 94.1% increase compared to the 2006 reporting period.[3] The ways how the wealthiest shelter their assets in the tax havens have been exposed recently.[4] This enables the super-rich to avoid paying up to 30% of the taxes they owe.[5] They have $7.6 trillion hidden from the tax authorities in tax havens, which is a greater figure compared with the combined gross domestic product (GDP) of the United Kingdom (U.K.) and Germany.[6] As a result, corporate tax avoidance—estimated by the OECD to cost countries between USD $100 and 240 billion annually—is of increasing concern to both developed and developing countries.[7] In this respect, interests of both government and civil society are aligned by facilitating international cooperation to mitigate tax avoidance.[8] Increased political salience moved international tax discussions beyond technical expert committees at the OECD and even brought it to the attention of the G20.[9] Higher political salience also increased the propensity

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[1] Itai Grinberg & Joost Pauwelyn, *The Emergence of a New International Tax Regime: The OECD's Package on Base Erosion and Profit Shifting (BEPS)*, 19(24) AM. SOC'Y INT'L L. (Oct. 28, 2015), https://www.asil.org/insights/volume/19/issue/24/emergence-new-international-tax-regime-oecd%E2%80%99s-package-base-erosion-and.

[2] JULIEN CHAISSE, INTERNATIONAL INVESTMENT LAW AND TAXATION: FROM COEXISTENCE TO COOPERATION 1 (2016), http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Chaisse-Final.pdf.

[3] *Mutual Agreement Procedure Statistics for 2013*, OECD, http://www.oecd.org/ctp/dispute/map-statistics-2013.htm (last visited Aug. 10, 2018).

[4] OXFAM, STOPPING THE SCANDALS: FIVE WAYS GOVERNMENTS CAN END TAX AVOIDANCE 2 (2017), https://d1tn3vj7xz9fdh.cloudfront.net/s3fs-public/bn-stopping-the-scandals-government-recommendations-081117-en.pdf.

[5] GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SURGE OF TAX HEAVEN 10 (2015).

[6] OXFAM, *supra* note 4, at 2.

[7] OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT: EXPLANATORY STATEMENT 16 (2015), https://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf.

[8] Grinberg & Pauwelyn, *supra* note 1.

[9] MAYA FORSTATER & RASMUS CHRISTENSEN, NEW PLAYERS, NEW GAME: THE ROLE OF THE PUBLIC AND POLITICAL DEBATE IN THE DEVELOPMENT OF ACTION ON INTERNATIONAL TAX ISSUES

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for consensus among the strongest states.[10] In two years, the base erosion and profit shifting (hereinafter "BEPS") initiative—spearheaded by the OECD—produced agreement on issues that technical experts had not even been prepared to address for decades. In a short period of time, soft law instruments have considerably reshaped international taxation and, simultaneously, international economic law and governance.[11]

In the recent period, the field of international trade has seen a growing number of tax related disputes. International trade law is directly related to international taxation. President Trump stated that he would impose a 25% tariff, or tax, on steel imports and 10% on aluminum, sparking a "big sell-off in stocks" in March 2018.[12] The stock market drop reflected a bigger concern: a possible "trade war." A trade war happens when other countries affected impose tariffs of their own in retaliation and the economic growth may be hobbled.[13] Such back-and-forth, may hurt the growth of economies.[14] An example for the same may possibly be seen in the case of Unites States (hereinafter "U.S."). The European Union (hereinafter "EU"), Canada and China have already threatened tariffs in response.[15] China will kick in retaliatory duties on more than one hundred U.S. imports and pork, fruit and wine are on that list.[16] A great group of U.S. exports makers, whose main exports are beef, corn, cars and motorcycles, will be hurt badly.[17] If a trade war happened, the world economy order would be destroyed to a large extent.[18] The tariffs made up of by U.S. government can be seen as a means of protectionism which aims to improve its local corporations' competitive status.

Tax also is important in decisions on how to structure an investment and

38 (2017), https://osf.io/preprints/socarxiv/kwysr/.

[10] Grinberg & Pauwelyn, *supra* note 1.

[11] For a fascinating theory explaining this global emergence of soft law instruments, see generally Bryan H. Druzin, *Why Does Soft Law Have Any Power Anyway?*, 7(2) ASIAN J. INT'L L. 361 (2016) (arguing that many areas of soft law exhibit strong network effects, which renders such soft law uniquely calibrated to induce voluntary adoption and even compliance). See also a related article articulating a similar model of spontaneous legal standardization through network effects, Bryan Druzin, *Towards a Theory of Spontaneous Legal Standardization*, 8(3) J. INT'L DISP. SETTLEMENT 403 (2016).

[12] Paul Davidson, *How Trump's Planned Steel, Aluminum Tariffs Affect You,* USA TODAY (last updated Mar. 6, 2018, 9:13 AM), https://www.usatoday.com/story/money/2018/03/05/tariffs-trump-impact/3953140 02/.

[13] Kevin K. Ho, *Trading Rights and Wrongs: The 2002 Bush Steel Tariffs*, 21(3) BERKELEY J. INT'L L. 825, 838 (2003).

[14] Kara Loridas, *United States-China Trade War: Signs of Protectionism in a Globalized Economy*, 34 SUFFOLK TRANSNAT'L L. REV. 403, 420 (2011).

[15] Davidson, *supra* note 12.

[16] Natalie Sherman, *Who Is Losing Out from Trump's Tariffs?*, BBC NEWS (Apr. 13, 2018), https://www.bbc.com/news/business-43731798.

[17] Davidson, *supra* note 12.

[18] Will Martin, *A Full-Scale Trade War with China Would Plunge the US into Recession, an Investment Bank Has Warned*, BUS. INSIDER (Mar. 23, 2018, 6:39 PM), https://www.businessinsider.com/economic-impact-trade-war-us-china-macquarie-2018-3.

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how to finance it, since these decisions can be important for the repatriation of profits. Currently, investment protectionism is growing fast, too. It can be mainly put into two categories: restrictions on inward foreign direct investment (hereinafter "FDI") and restrictions on outward FDI. Referring to the restrictions on inward FDI, states restrict the inflow of FDI on grounds of national security or consumer or environmental protection.[19] Many countries possess monitoring and approval mechanisms that place FDI under great scrutiny.[20] Such controls are imposed principally in strategic economic sectors, such as health.[21] Often, however, the measures are opaque and they are not always in fact necessary to protect the public interest.[22] Instead, states often exploit such measures to protect domestic businesses from foreign competition.[23] While measures on restricting outward FDI are designed to prevent domestic investors from investing abroad.[24] They include state demands for domestic companies to repatriate assets (including production facilities) or to refrain from making particular investments abroad.[25]

This article's aim is not to just illustrate the great increasing of tax related disputes, although these disputes have a bad effect on the fiscal safety of the whole world. Rather, the Article's aim is to enhance understanding of *how BEPS as soft law in resolving tax related disputes.* The Article finds that soft law is promising in creating an international taxation regime through the construction of BEPS. The Article makes three central claims. The first claim is that international taxation has a strong nexus with international trade and investment and they can interact with each other. A balance should be maintained carefully. For one thing, it is essential to avoid the protectionism with tax related measures in international trade and investment area and for another, the sovereignty of national taxation should also be protected. The Article's second claim is that when compared with hard law, soft law has its own merits and it can play more vital role in the construction of international law regime. Soft law is more suitable in making some experimental movements compared with hard law. The article's final claim is that BEPS, which is issued by OECD and contains a package of measures in resolving

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[19] JAMES K. JACKSON, FOREIGN INVESTMENT AND NATIONAL SECURITY: ECONOMIC CONSIDERATIONS 13 (2013), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com.tw/&httpsredir=1&article=2114&context=key_workplace.

[20] Christoph Sprich, *Growing Protectionism in Foreign Direct Investment*, FED'N GERMAN INDUS. (BDI) (Apr. 18, 2016), https://english.bdi.eu/article/news/growing-protectionism-in-foreign-direct-investment/.

[21] *Id.*

[22] Zhang Monan, *Investment Protectionism a New US Weapon*, CHINA DAILY (Sept. 9, 2017, 7:27 AM), http://www.chinadaily.com.cn/opinion/2017-09/09/content_31760047.htm.

[23] Sprich, *supra* note 20.

[24] Mihir A. Desai et al., *Foreign Direct Investment and the Domestic Capital Stock*, 95(2) AM. ECON. REV. 33, 37 (2005).

[25] Sprich, *supra* note 20.

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the disputes, as soft law can have a significant effect on the international taxation regime. In other words, the dispute resolution mechanisms under BEPS have their own potential. Because of Multilateral Instrument (hereinafter "MLI"), there is a trend that BEPS can transform from the soft law to the hard law gradually. This Article offers an analytic framework for understanding the BEPS as a major example of modern soft law and its effect on the international taxation regime and, beyond, international economic law and governance.

The article proceeds in four parts. Part I provides an overview of the tax treaties, its history and its development. Meanwhile, it considers the nexus between taxation and international trade and investment. Part II is that soft law is an important part in the international law regime and it has developed rapidly in these years. When compared with hard law, soft law has its own merits and it can play more vital role in the construction of international law regime. Part III is that a growing number of tax related disputes are arising and BEPS, which is issued by OECD, contains a package of measures in resolving the disputes faced upon. Part IV is that BEPS as soft law can have a significant effect on the international taxation regime and in resolving the current tax related disputes, the dispute resolution mechanisms under BEPS have their potential.

The article concludes that although currently BEPS is a kind of soft law in taxation areas, it can be a step from soft to hard law. The soft law can be beneficial when there is lack of consensus over the objective to be reached. Soft law stimuli are often essential to get the hard law moving.[26] This article argues that it is essential for policy makers to consider other spheres of international law in order to get a more mature international economic legal system; a global economic governance which can truly address contemporary regulatory needs and challenges.[27]

II. A BRIEF HISTORY OF INTERNATIONAL TAXATION IN THE CONTEXT OF INTERNATIONAL ECONOMIC LAW

International tax treaties were developed to avoid the assertion of taxing jurisdiction by more than one country over the same person or item of income and tax treaties attempt to provide a rational solution to such double taxation problems.[28] Meanwhile, the role of taxation receives significant recognition as it has a strong effect on the international movement of goods and services

[26] *See generally* HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE (John J. Kirton & Michael J. Trebilcock eds., 2004).
[27] *See generally* Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94(3) MINN. L. REV. 706 (2010)
[28] *See generally* Rebecca M. Kysar, *Interpreting Tax Treaties*, 101(4) IOWA L. REV. 1387 (2016).

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and the international movement of factors of production.[29] Transnational corporations (TNCs) are concerned about the international tax factors a lot as they affect the international movement of factors such as capital and know-how.[30] In order to have a better knowledge of tax treaties and its significance, the history of tax treaties will be introduced in the following part and at the same time, the relationship between the taxation and international trade and investment will be considered in detail.

A. International Tax Treaties: Normative History and Development

When taxation is levied on the same subject of the same taxpayer, it is more likely for the double taxation to occur.[31] Normally, as states tend to tax not only domestic assets, but also assets abroad, it may lead to overlap of taxation subject and double taxation may arise.[32] According to international law, it is permissible to tax foreign income as long as a strong relationship available between the taxpayer and the taxing state, like residence.[33] It is also permissible to tax foreign income for domestic aims based on principles of international law.[34] For example, it is admissible to tax the worldwide income referring to the resident principle.[35] Meanwhile, based on with the principle of source, states can also levy taxes or assets of residents and nonresidents within its own territory, the double taxation may arise in the end.[36] If one person is treated as a resident simultaneously by more than one state or more than one state finds the same subject can be taxed, double taxation may arise consequently.[37] Some states, like U.S. and Mexico, will levy taxes on their citizens' worldwide income even when they are residents of another state and double taxation can be caused, too.[38] In other words, the phenomenon of international juridical double taxation can be generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical

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[29] JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 2-3 (2d ed., 1986).
[30] T. Modibo Ocran, *Double Taxation Treaties and Transnational Investment: A Comparative Study*, 2(1) TRANSNAT'L LAW. 131, 132 (1989).
[31] *See generally* Marius Eugen Radu, *International Double Taxation*, 62 PROCEDIA: SOC. & BEHAV. SCI. 403 (2012).
[32] Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4(1) INT'L TAX & BUS. L. 1, 4 (1986).
[33] Louis Henkin, *Restatement of The Foreign Relations Law of the United States (Revised): Tentative Draft No. 2*, 75(4) AM. J. INT'L L. 990 (1981).
[34] Vogel, *supra* note 32, at 7.
[35] *Id.* at 6.
[36] *See generally* Fabian Barthel et al., *The Impact of Double Taxation Treaties on Foreign Direct Investment: Evidence from Large Dyadic Panel Data*, 28(3) CONTEMP. ECON. POL'Y 366 (2010).
[37] Vogel, *supra* note 32, at 6.
[38] *See generally* Barthel et al., *supra* note 36.

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periods.[39]

There are several methods in avoiding double taxation. States can avoid double taxation unilaterally as long as they can withdraw their taxation measures which may lead to double taxation.[40] A tax credit of home state which is levied on the income should not exceed the amount charged by the source country in terms of Anglo-American law.[41] Double taxation can also avoided by the allowance of exemptions: if the income is produced from permanent establishments abroad, Switzerland will give it an exemption; if the income has already taxed by the source country, some states, like Netherlands and Australia, will not tax the remaining amount of income.[42] As a rule, however, unilateral measures are insufficient to avoid double taxation because they generally do not cover all situations referring to double taxation, and they may apply to double taxation situations inconsistently depending on which state's measures are applied.[43]

The aim of The Organization of European Economic Cooperation (hereinafter "OEEC") and its successor organization, the OECD is to create an international system to avoid double taxation.[44] The model treaty (hereinafter "OECD Model") and an official commentary (hereinafter "the Commentary") were appended in 1963. The commentary is relied upon by the member states when they tend to make some reservations faced up with some particular recommendations. Based on Article 5(b) of its charter, OECD model and commentary can be seen as a recommendation of the OECD Council to the member states.[45] Bilateral double tax treaties of member states are still recommended by the Council and the model submitted by the Fiscal Committee can be the basis.[46] A number of member states included observations during the changing process of the model and commentaries and these observations "do not express any disagreement with the text of the Convention, but furnish a useful indication of the way in which those countries will apply the provisions of the Article in question."[47] An opposing model was created in 1971 by the member states of the Andean-Group, which is an alliance between Bolivia, Chile, Ecuador, Colombia, Peru and—since 1973—Venezuela and it is mainly based on the interests of developing states. The Andean Model was drafted as an alternative to the

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[39] COMM. ON FISCAL AFFAIRS, ORG. FOR ECON. COOPERATION & DEV., MODEL DOUBLE TAXATION CONVENTION ON INCOME AND ON CAPITAL: REPORT OF THE OECD COMMITTEE ON FISCAL AFFAIRS ¶ 3 (1977).
[40] Vogel, *supra* note 32, at 8.
[41] *Id.* at 9 n.22.
[42] *Id.* n.23.
[43] Barthel et al., *supra* note 36, at 372.
[44] Vogel, *supra* note 32, at 11.
[45] *Id.*
[46] John F. Avery Jones, *Understanding the OECD Model Tax Convention: The Lesson of History*, 10(1) FLA. TAX REV. 1, 4 (2009).
[47] Vogel, *supra* note 32, at 12.

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OECD Model; form the source principle, is can be illustrated the major concern of Latin American states.[48] United Nations (hereinafter "UN") published another model treaty for the interests of developing countries in 1980. The U.S. Treasury Department also published a revised model and the U.S. treaty negotiation is based on it.[49] This U.S. model treaty tries to comply with the OECD model.[50] Other tax authorities always depend on the OECD or UN Models to proceed negotiations. For the European Economic Community, a multilateral treaty has not been developed yet. Based on Article 220 of the EEC Agreement, the bilateral communication for countries is beneficial to eliminate double taxation.[51]

Tax Treaties (also known as Double Taxation Conventions) are instruments of international public law that address issues that arise when two countries attempt to tax the same income.[52] OECD models and UN models are two models which are commonly based on by the states when drafting tax treaties. The aim of the tax treaties is not to create new taxes, but to help the signatory states relieve from disputes created by domestic taxation.[53] Tax treaties can be a platform for states to resolve their taxation disputes especially when double taxation occurs.

B. Taxation and the Trade/Investment Nexus

The nature of tax provisions in systems of trade liberalization is not positively facilitative of liberal trade and the trade-related taxation system is designed negatively in order not to undermine some of the fundamental trade principles that facilitate the liberalization of international trade.[54] While referring to investment systems, the national tax policy is informed by both investment protection, as well as investment promotion aspects of investment systems.[55] On one hand, with reference to investment protection, national taxation is set to inform its capacity to erode investment protection and on the other hand, national fiscal policy has to positively respond to the promotion of investment and national tax policy has to engage with

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[48] *Id.* n.36.
[49] H. David Rosenbloom & Stanley I. Langbein, *United States Tax Treaty Policy: An Overview*, 19(3) COLUM. J. TRANSNAT'L L. 359, 362 (1981).
[50] Vogel, *supra* note 32, at 13 n.39.
[51] *Id.* at 13.
[52] Klaus Vogel, *The Domestic Law Perspective*, *in* TAX TREATIES AND DOMESTIC LAW 3, 3 (Guglielmo Maisto ed., 2006).
[53] Carlos Perez-Gautrin, *Basic Introduction to Tax Treaties*, 17(2) WILLAMETTE J. INT'L L. & DISP. RESOL. 157, 158 (2009).
[54] Asif H. Qureshi, *Coherence in the Public International Law of Taxation: Developments in International Taxation and Trade and Investment Related Taxation*, 10(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 193, 196 (2015).
[55] *Id.* at 197.

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investment.[56]

1. When Taxation Encounter International Trade Law — Alongside the developments in international taxation there have also been remarkable developments in world trade and international investment law.[57] These include—the advent of the World Trade Organization (hereinafter "WTO") and development of its jurisprudence, the mushrooming of free trade agreements along with investment chapters and the boom since the 1990s in bilateral investment agreements and related investment awards, especially under the International Centre for Settlement of Investment Disputes (ICSID).[58] The dimensions of this development can be seen at the country level. For example, in 2013 Korea was bound by eighty-seven double taxation agreements (hereinafter "DTAs") and five agreements on information exchange; in terms of Korea, it has informed WTO of its thirteen Free Trade Agreements (FTAs).[59] As of Dec. 2012 Korea was party to ninety-one Bilateral Investment Agreements. There is a strong connection between the international taxation and both trade and investment provisions.[60]

Foreign investment and trade have to comply with the tax laws of different countries.[61] For instance, referring to the multinational enterprises, taxation has always been an important factor in economic planning and performance, especially when multinationals plan to participate in foreign investment and trade.[62] As foreign investment and trade have continued to increase, the impact of the differences in tax laws of individual countries such as double taxation, tax avoidance and other tax laws which differ significantly from one country to another have been frequently considered. For foreign investment and trade, the most serious problems arise from differences in the taxation of income from local sources and income from foreign sources.

One extreme method is based purely on the territorial principle: income is taxed only where it originates, and thus when it originates in the host country the home country does not tax it.[63] For example, Hong Kong

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[56] *See generally* Zhaodong Jiang, *China's Tax Preferences to Foreign Investment: Policy, Culture and Modern Concepts*, 18(3) NW. J. INT'L L. & BUS. 549 (1998).

[57] Qureshi, *supra* note 54, at 195.

[58] *See generally* Asif H. Qureshi, *The FTA Paradigm for the Configuration of World Trade and Foreign Investment: The Case of Outward Processing Zones*, 48(1) J. WORLD TRADE 111 (2014); Julien Chaisse, *Assessing the Exposure of Asian States to Investment Claims*, 6(2) CONTEMP. ASIA ARB. J. 187 (2013); Congyan Cai, *China–US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12(2) J. INT'L ECON. L. 457 (2009).

[59] Qureshi, *supra* note 54, at 195.

[60] *Id.*

[61] *See generally* Hoil Yoon, *Taxation of Foreign Investment and Trade: The Need for Harmonization*, 5 KOREAN J. COMP. L. 48 (1977).

[62] *Id.* at 48.

[63] U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE IMPACT MULTINATIONAL CORPORATIONS ON

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(hereinafter "H.K.") takes this approach.[64] In the following parts, the nexus among taxation and international trade and investment will be analyzed in more detail.

The trade related tax norms do not facilitate trade positively and directly.[65] As such the tax provisions are not goal oriented or normative.[66] To sum up, trade-related taxation is not a kind of taxation and its aim is to boost the international trade though a negative way and it cannot decrease the basic principles of trade facilitation.[67] Any national taxation measures which have a negative effect on trade will be eliminated from the trade system.[68] National tax policy should be functional with the trading system.[69] As the national tax policy is not aiming to affect the international trade, it only relates to some parts of international trade system.[70] The national policy makers need to consider the national tax policies carefully in order not to conflict with other bilateral or multilateral commitments.[71]

Furthermore, the treatment standards of international trade can be applied in taxation of services and goods. In relation to services, the national treatment applies only to services set out in a member's Schedules of Concessions, except where necessary, to ensure equitable or effective imposition or collection of direct taxes.[72] This exception aims to avoid double taxation and possible double non-taxation.[73] With respect to the Most Favored Nation (MFN) standard, this applies to indirect taxes on goods.[74] But with respect to services, it applies both to direct and indirect taxes with a carve-out for DTAs, given that they are bilateral.[75]

Briefly, as is well understood, the WTO Agreement, in so far as tax is concerned, is mainly focused with the trade-related aspects of taxation. This interface has many aspects, but mainly the disciplines are focused on indirect taxes.[76] This is because such taxes directly impact upon prices of goods and

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DEVELOPMENT AND ON INTERNATIONAL RELATIONS, at 91, U.N. Doc. ST/ESA/6, U.N. Sales No.E.74.II.A.5 (1974).

[64] Inland Revenue Ordinance, (2017) Cap. 112, §§ 14 & 18 (H.K.).

[65] Qureshi, *supra* note 54, at 196.

[66] Asif H. Qureshi, *Trade Related Aspects of International Taxation—A New WTO Code of Conduct?*, 30(2) J. WORLD TRADE 161, 193 (1996).

[67] Qureshi, *supra* note 54, at 196.

[68] Qureshi, *supra* note 66, at 169.

[69] Qureshi, *supra* note 54, at 197.

[70] Qureshi, *supra* note 66, at 193.

[71] Qureshi, *supra* note 54, at 197.

[72] General Agreement on Trade in Services arts. XVII:I & XIV(d), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

[73] Qureshi, *supra* note 54, at 203.

[74] General Agreement on Tariffs and Trade art. I, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

[75] GATS, supra note 72, arts. XVII:I & XIV(d).

[76] Christian Pitschas, *GATT/WTO Rules for Border Tax Adjustment and the Proposed European*

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services, and can undermine the integrity of tariff concessions, if not regulated.[77] Nevertheless with respect to indirect taxes on goods, the starting premise of the WTO was explained by a General Agreement on Tariffs and Trade (hereinafter "GATT") panel as follows: "[T]hat the General Agreement reserved each contracting party a large degree of freedom to decide autonomously on the objectives, level, principles and methods of its internal taxation of goods."[78]

However, the panel qualified the extent of fiscal policy discretion in the application of the national standard and prohibition on protective taxes.

> [E]ven though each contracting party retained broad freedom as to its internal tax policy also in respect of its internal taxation of goods, the General Agreement did not provide for the possibility of justifying discriminatory or protective taxes inconsistent with Article III:2 on the ground that they had been introduced for the purpose of 'taxation according to the tax-bearing ability' of domestic consumers of imported and directly competitive domestic liquors.[79]

The taxation authorities in trade are restricted aiming to avoid the possibility of discrimination based on taxation measures.

2. When Taxation Encounter International Investment Law — The most common clause referring to tax related disputes with respect to the investment aspect is expropriation. Taxation measures are usually utilized to induce indirect expropriation and when such tax related disputes arise, they can be resolved by the mandatory arbitration provisions available under bilateral investment treaties (hereinafter "BITs").[80] An example of the same can be seen in the case of *Link Trading v. Moldova*. In this case, the claimant protested that the change of customs and the tax treatment issued by the defendant violated governmental guarantees of tax stability and as it substantially deprived it of its business, it constituted measures equivalent to expropriation.[81] In this case the investor utilized the mandatory arbitration

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Directive Introducing a Tax on Carbon Dioxide Emissions and Energy, 24(3) GA. J. INT'L & COMP. L. 479, 485 (1995).

[77] John Christensen & Sony Kapoor, *Tax Avoidance, Tax Competition and Globalisation: Making Tax Justice a Focus for Global Activism*, 3(2) ACCT. BUS. & PUB. INT. 1, 2 (2004).

[78] Report of the Panel, *Japan — Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, ¶ 5.13, L/6216 - 34S/83 (Nov. 10, 1987).

[79] *Id.*

[80] *See, e.g.*, Link-Trading Joint Stock Co. v. Department for Customs Control of Mold., Final Award (Apr. 18, 2002) [hereinafter *Link Trading v. Moldova*], https://www.italaw.com/sites/default/files/case-documents/ita0468_0.pdf; *see* Julien Chaisse & Lisa Z. Li., *Shareholder Protection Reloaded Redesigning the Matrix of Shareholder Claims For Reflective Loss*, 52(1) STAN. J. INT'L L. 51, 61 (2016).

[81] *Link Trading v. Moldova*, *supra* note 80, at 4.

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present in the US–Moldova BIT.[82] *Tza Yap Shum v. Peru* is another example and in its award, it notes that there is a "remarkable consensus" around the fact that taxation and the enforcement of tax measures can acquire an expropriatory nature if they are confiscatory, arbitrary, abusive or discriminatory.[83] However, the expropriation clause has its own limitations. The changes of the taxation policies do not always trigger the expropriation clause.[84] Although the sudden changes may lead to some disputes, as long as the taxpayers do not lose the actual control of their properties, it cannot be treated as an expropriation.[85] Faced up with this condition, actors can utilize arbitration clauses in BITs.

Additionally, states apprehensive of conceding sovereignty, have now narrowed the scope of taxation disputes that can be arbitrated upon under the BITs. This can be seen in the case of *Nations Energy v. Panama* where the BIT has been interpreted to exclude claims stemming from taxation matters based on the Fair and Equitable Treatment (hereinafter "FET") standard.[86] Meanwhile, if there are no explicit words or interpretations to the FET standard in the BITs, the tax measures are excluded from consideration in this treaty. It can be seen from the North American Free Trade Agreement (hereinafter "NAFTA") (1995), Article 2103(1); that if it is not explicitly set out in the treaties, nothing can be applied to the taxation measures and it does not mention FET standard in the context.[87] What's more, there is a growing trend that contracting parties will tend to limit, or even exclude the taxation part from the whole BIT. For instance, the 2015 India–EU model BIT carves out the taxation from the scope of the treaty.[88] Another example is the agreement between the government of H.K. and the government of New Zealand in the promotion and protection of investments. In this agreement, it states that "The provisions of this agreement shall not apply to matters of taxation in the area of either contracting party. Such matters shall be governed by the domestic laws of each contracting party and the terms of any agreement relating to taxation concluded between the contracting parties".[89]

Tax provisions also feature in investment systems—either in bilateral

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[82] *Id.*

[83] Señor Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, Award, ¶ 181 (July 7, 2011).

[84] *Link Trading v. Moldova*, *supra* note 80, at 5.

[85] *See generally*, Julien Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?*, 35(2) VA. TAX REV. 149 (2016).

[86] Nations Energy Corp. v. Republic of Panama, ICSID Case No. ARB/06/19, Award, at 39 (Nov. 24, 2010).

[87] North American Free Trade Agreement art. 2103(1), Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

[88] *See* INDIAN MODEL BILATERAL INVESTMENT TREATY (2015).

[89] Agreement Between the Government of Hong Kong and the Government of New Zealand for the promotion and Protection of Investments art 8.2, H.K.-N.Z., July 6, 1995, https://www.treaties.mfat.govt.nz//search/details/t/1434/180.

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investment agreements or investment chapters in free trade agreements. These are mainly concerned with tax related expropriations, including the enforcement of such issues.[90] Besides, national tax policy in terms of international investment is impacted in a more complex and intrusive manner.[91] First, national tax policy has to reach a balance between investment protection and investment promotion. It is negatively impacted with reference to investment protection—in that national taxation is set within parameters that inform its capacity to erode investment protection. On the contrary, national tax policy has to promote investment based on the requirements of national fiscal policy.[92] For instance, the investment agreements allow for tax discrimination to attract investment.[93] Second, it is essential to protect the safety of national tax policy faced up with the foreign investment and the effects the foreign investment agreements may have on the national regulatory system.[94] In investment regimes the level of negative and positive national tax policy relationships with the investment system it impacts upon it is more involved than in trade-related taxation.[95] In drafting the international taxation commitments, it is essential to make sure that the related tax measures referring to the trade and investment are no conflicting.[96]

II. DEFINING THE "SOFT LAW" PHENOMENON IN INTERNATIONAL LAW

When deadlocks emerge during the negotiation process, soft law is functional in helping parties to reach a general consensus. If a breakthrough, like an experimental agreement, is searched, soft law is beneficial as non-binding obligations are formulated and more flexibility is available for contracting parties. In the field of international law, soft law and hard law have their own benefits and they interact variously. In the following sections, the concept of soft law will be illustrated in the first section and the development of soft law in international law will be considered in the second.

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[90] Free Trade Agreement Between the Government of the Republic of Korea and the Government of the Republic of Singapore art. 21.4, S. Kor.-Sing., Aug. 4, 2005 [hereinafter Korea–Singapore FTA], http://www.fta.go.kr/webmodule/_PSD_FTA/sg/1/KSFTA.pdf; Free Trade Agreement Between the Republic of Korea and the Republic of Peru [hereinafter Korea-Peru FTA] art. 24.4(7), S. Kor.-Peru, Mar. 21, 2011, http://www.fta.go.kr/webmodule/_PSD_FTA/pe/1/eng.pdf.

[91] Qureshi, *supra* note 54, at 197.

[92] *Id.*

[93] *See generally* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009) [hereinafter THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT]; *see also* Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225 (2015).

[94] Qureshi, *supra* note 54, at 197.

[95] *See generally* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 93.

[96] Qureshi, *supra* note 54, at 197.

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A. Conceptualizing "Soft Law"

The treaties with soft obligations, voluntary resolutions, codes of conduct formulated and accepted by international and regional organizations and statements prepared by individuals in a non-governmental capacity can be soft law norms.[97] For example, Snyder describes soft law as "rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects."[98] David Trubek and his coauthors contend that "non-binding standards that can eventually harden into binding rules once uncertainties are reduced and a higher degree of consensus ensues."[99]

A soft law instrument can be used for those states which favor the final result and prefer not to make much commitments.[100] In relation to the reasons why soft law might be preferable to hard law in some circumstances at least six general (and related) explanatory themes may be drawn from broader literature:

1. Less contracting costs. The contracting costs exist through the whole negotiation process.[101] Soft law can decrease the costs, especially when the issue is complex, because of its non-binding nature.[102]
2. Costs of sovereignty is lower. In reaching binding agreements, actors may be faced up with the possibility of losing their decision-making sovereignty.[103] Soft law can resolve the dilemma mentioned above and promote cooperation.[104]
3. Coping with diversity. With soft law, actors can adjust their commitments in order to fit in their unique situations.[105] When some

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[97] *See generally* Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48(4) INT'L & COMP. L. Q. 901 (1999).

[98] Francis Snyder, *The Effectiveness of EC Law: Institutions, Processes, Tools and Techniques*, 56(1) MOD. L. REV. 19 (1993); Francis Snyder, *Soft Law and Institutional Practice in the European Community*, *in* THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL 197, 198 (Stephen Martin ed., 1994) [hereinafter *Soft Law and Institutional Practice*].

[99] David M. Trubek et al., *"Soft Law", "Hard Law" and EU Integration*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 65, 67 (Gráinne de Búrca & Joanne Scott eds., 2006); David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11(3) EUR. L.J. 343, 353 (2005).

[100] C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38(4) INT'L COMP. L. Q. 850, 861 (1989).

[101] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54(3) INT'L ORG. 421, 434 (2000).

[102] *Id.*

[103] Wolfgang H. Reinicke & Jan Martin Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-Binding Legal Accords*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75, 94-95 (Dinah Shelton ed., 2000).

[104] *Id.*

[105] Christine Chinkin, *Normative Development in the International Legal System*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM, *supra* note 103, at 21, 26-29.

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factors, like the differences in wealth and power, make it hard or even impossible to reach legally binding agreements, soft law can be used in resolving the deadlock.[106] Different cultural and economic structures and interests can be accommodated through the subjective application of "soft" language such as "appropriate measures," "best efforts", "as far as possible", or "with a view toward achieving progressively."[107]

4. Greater flexibility. The soft law provides greater flexibility in renegotiating agreements when things change.[108] At the same time, it can accommodate diverse legal systems and cope better with uncertainty.[109] To cite an example, actors cannot predict all the possible results if the problems faced up with cannot be understood well.[110] Flexibility is beneficial in the current world with fast changing conditions.[111] Under certain conditions, soft law's flexibility may be a primary reason for its use of soft law.[112] It facilitates innovation and experiment and it can provide the essential preparatory phase before people are ready for hard law commitments.[113] Besides it can also be used as an excuse for avoiding firm commitments and it can come apart under pressure.[114]
5. Simplicity and speed. To avoid the time consuming domestic ratification process and attract as many countries, no matter what their domestic legal systems are, as possible, soft law can be functional here.[115] If there is something unforeseen, soft law is useful in dealing with this condition to reach agreements.[116]
6. Participation. A wide range of actors are allowed to participate in the law making process based on soft law.[117] It is beneficial to get more actors to participate in the process and the transparency level can be promoted.[118]

In sum, although soft law is non-binding, it still have legal relevance.[119]

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[106] Jacob Gersen & Eric Posner, *Soft Law: Lessons from Congressional Practice*, 61(3) STAN. L. REV. 573, 624 (2008).
[107] Chinkin, *supra* note 105, at 41.
[108] Chinkin, *supra* note 100, at 852-53.
[109] Reinicke & Witte, *supra* note 103, at 94-95.
[110] Chinkin, *supra* note 100, at 855.
[111] Reinicke & Witte, *supra* note 103, at 94-95.
[112] Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2(1) J. LEGAL ANALYSIS 171, 184 (2010).
[113] Nicholas Bayne, *Hard and Soft Law in International Institutions: Complements, Not Alternatives*, *in* HARD CHOICES, SOFT LAW, *supra* note 26, at 347, 351.
[114] *Id.*
[115] Charles Lipson, *Why Are Some International Agreements Informal?*, 45(4) INT'L ORG. 495, 501 (1991).
[116] *Id.*
[117] Reinicke & Witte, *supra* note 103, at 94-95.
[118] Gersen & Posner, *supra* note 106, at 622.
[119] *See generally*, Guzman & Meyer, *supra* note 112.

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The resolutions by international organizations and international plans of action can be examples.[120] For instance, BEPS issued by OECD is an illustration of soft law. Besides, upon the construction of MLI, some requirements in BEPS are going to transform from soft law into hard law. Soft law can be a significant step in transforming into hard law.[121]

B. The Rise of "Soft Law" in International Law

Soft law plays a very significant role in the international system.[122] Because of some features of soft law norms, like flexibility, adaptability, speed and simplicity, soft law is frequently used in the WTO legal system.[123] When there is uncertainty and experimentation is required, soft law is more favorable for the states in resolving situations.[124] When the issue is quite sensitive and conflicts may arise because of the cooperation among the WTO members, soft law can be functional in resolving the dilemma.[125]

There are three main dimensions which can be applied in distinguishing hard and soft law. From what Abbott and Snidal proposed, the three aspects are: (i) precision of rules; (ii) obligation; and (iii) delegation to a third party decision maker, which when taken together can give laws a "harder" or "softer" legal character.[126] In this respect, hard law "refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law."[127] The international trade law can be a case in this situation.[128] By contrast with this ideal type of hard law, soft law is defined as a residual category: "the realm of 'soft law' begins once legal arrangements are weakened along one or more of the dimensions of

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[120] Jon Birger Skjærseth et al., *Soft Law, Hard Law, and Effective Implementation of International Environmental Norms*, 6(3) GLOBAL ENVTL. POL. 104, 104 (2006).
[121] Reinicke & Witte, *supra* note 103, at 94-95.
[122] Chinkin, *supra* note 100.
[123] Dinah Shelton, *Soft Law*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 68, 70 (David Armstrong ed., 2009); *see also* Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT'L ECON. L. 153 (2007).
[124] Trubek et al., *supra* note 99, at 67.
[125] Mary E. Footer, *The (Re)Turn to "Soft Law" in Reconciling the Antinomies in WTO Law*, 11(2) MELBOURNE J. INT'L L. 241, 248 (2010).
[126] Kenneth W. Abbott et al., *The Concept of Legalization*, 54(3) INT'L ORG. 401, 401 (2000). Abbott and Snidal work within a "rational design" approach to international institutions. *See* Barbara Koremenos et al., *The Rational Design of International Institutions*, 55(4) INT'L ORG. 761, 761-62 (2001). For an almost simultaneous use of these three attributes to differentiate harder from softer international law, see generally Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48(4) INT'L L. Q. 901 (1999).
[127] Abbott & Snidal, *supra* note 101, at 421.
[128] *See* Understanding on Rules and, Procedures Governing the Settlement of Disputes art. XXII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (1994).

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obligation, precision, and delegation."[129] If an agreement is not binding, it can be seen as soft to some extent.[130] If the implementation is totally decided by the parties because of the vague content of the agreement, this agreement is soft no matter how formally binding it looks like.[131] Finally, without supervision from third states, the agreement is soft in nature as there may be less sanctions when a violation of agreements occurs.[132]

Although states are more likely to enjoy more leeway and latitude depending on soft law, it does not need to move from hard law back to soft law as hard law also features many advantages compared with soft law. On one hand, in order not to cause serious costs to the countries' reputation when there is a violation of their promises, hard law norms can be utilized and it will make their promises more credible.[133] On the other hand, as hard law norms can require national implementation, they are more credible.[134] Being afraid of the possible high costs of violation, the treaty promises can be implemented better compared with the domestic legislation.[135] In addition, with a better dispute resolution mechanism, states can enforce their promised better through hard-law instruments.[136] Soft law and hard law norms have their respective merits in achieving the different policy aims of states and states can choose what to use based on the various conditions.

Despite the advantages of hard law, like better implementation, it still has some shortcomings when compared with soft law. Given an example, a lot of diversity exists among the states and hard law cannot be depended upon in resolving the dilemma.[137] Hard law norms may not deal with the possible uncertainties well in this changing world.[138] There is a saying that "[t]here is only one way to cooperate in prisoners' dilemma; there are many ways to cooperate in the real world."[139] In other words, referring to the soft law, states will have more choices compared with that under the hard law. Consequently, states often can be seen using instruments that embody the

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[129] Abbott & Snidal, *supra* note 101, at 422.
[130] *Id.*
[131] Shaffer & Pollack, *supra* note 27, at 715.
[132] Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45(4) WM. & MARY L. REV. 1229, 1236 (2004); Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9(2) CHI. J. INT'L L. 515, 516 (2008).
[133] *See generally* Andrew T. Guzman, *The Design of International Agreements*, 16(4) EUR. J. INT'L L. 579 (2005).
[134] Shaffer & Pollack, *supra* note 27, at 718.
[135] Abbott & Snidal, *supra* note 101, at 430.
[136] Shaffer & Pollack, *supra* note 27, at 718.
[137] DAVID M. TRUBEK ET AL., "SOFT LAW," "HARD LAW," AND EUROPEAN INTEGRATION: TOWARD A THEORY OF HYBRIDITY 3 (Nov. 2005) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=855447.
[138] *Id.*
[139] James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48(3) INT'L ORG. 387, 395 (1994).

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principles of soft law to counter existing hard law.[140] In large part, this choice reflects variation in the certainty of state interests and/or the ability of states to secure allies.[141] With respect to the former, states that are genuinely uncertain of their interests in a given issue area may prefer to avoid hard-law commitments that will be difficult to change at a later time, preferring the flexibility of soft-law instruments instead.[142] Referring to the latter, in the multilateral circumstance, to maintain the agreement of other states is essential to be considered even the hard law norms is more preferable for those states who have clear interests.[143] Large states have an advantage in this regard, since they are able to provide incentives to other states in multilateral fora or engage in serial bilateralism.[144] The soft law provisions are used sometimes by the large countries when they cannot require other states to adopt the hard law norms they prefer.[145] In reaching a multilateral treaty, the participation and ratification of powerful states is essential or a substantial risk may exist.[146]

States are likely to make a decision between hard and soft law based on different conditions. Actors prefer hard law norms if they have to spend more efforts and money in reaching agreements.[147] In other words, if actors know exactly what they want and they can get strong support from other states, they may be more likely to utilize hard law norms.[148] When the distributive conflict is low, states tend to utilize hard- and soft-law instruments based on their respective merits and soft law and hard law norms can interact with each other.[149] Soft-law instruments are often favoured for their capacity to generate shared norms and a sense of common purpose and identity, and lack the constraints raised by concerns over potential litigation.[150]

As it is more likely for the powerful states to reach an agreement, the merits of soft law norms are not that essential. In this condition, hard and soft law are most likely to be used as "complements in an evolutionary manner, consistent with the existing literature."[151] From the illustration of cases related to the most active and powerful players, U.S. and EU, the

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[140] Abbott & Snidal, *supra* note 101, at 421.
[141] Shaffer & Pollack, *supra* note 27, at 789.
[142] Abbott & Snidal, *supra* note 101, at 466.
[143] Shaffer & Pollack, *supra* note 27, at 789.
[144] Gregory C. Shaffer & Mark A. Pollack, *How Hard and Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonists* 1 (Soc'y of Int'l Econ. L., Working Paper No. 45/08, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156867.
[145] Shaffer & Pollack, *supra* note 27, at 789-90.
[146] Weber, Rolf H., *Overcoming the Hard Law/Soft Law Dichotomy in Times of (Financial) Crises,* 1(1) Journal of Governance and Regulation 11 (2012).
[147] Abbott & Snidal, *supra* note 101, at 429.
[148] Shaffer & Pollack, *supra* note 27, at 712.
[149] MARK A. POLLACK & GREGORY C. SHAFFER, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS 4 (2009).
[150] Shaffer & Pollack, *supra* note 27, at 708.
[151] Shaffer & Pollack, *supra* note 144, at 4.

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cooperation pattern mentioned is well displayed.[152] The agreement between the U.S. and the EU is treated as a "necessary and sufficient condition" for successful international regulation.[153] Benvinisti and Downs note, in particular, how "powerful states" are increasingly using "serial bilateralism . . . to shape the evolution of norms in areas such as intellectual property protection and drug pricing where they have vital interests at stake and where their position on issues is far different from those of the vast majority of states."[154] According to Abbott and Snidal, "these bilateral agreements constitute hard law along all three dimensions".[155] The negotiation process of protections related to investment under BITs has seen the same situation.[156] Similarly, in the area of international accounting rates for telecommunications, the OECD interviewee explained, "[t]he US wanted to set the agenda by expanding bilateral agreements until its agenda is a *fait accompli*."[157] With adequate resources and leading market status, powerful state enjoy more advantages at the international level.[158]

From the enforcement aspect, hard law norms may make the bargaining process harder while soft law norms may lead to a more problematic implementation.[159] With a different implementation system, weak developing states may be stronger in implementation compared with strong developed countries.[160] In this situation, even though the powerful states made the developing states to reach an agreement, without a common consensus, it would be hard to implement this agreement in said countries. Referring to the implementation, hard and soft law norms can be used as complements or opponents under different conditions.[161] In order to implement the policy aims better, hard and soft law norms can be made use of as complements in resolving the possible resistance.[162] With soft law norms, states do not need to worry about the implementation and deeper

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[152] Shaffer & Pollack, *supra* note 27, at 710.
[153] DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES 5-6 (2007).
[154] Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60(2) STAN. L. REV. 595, 611 (2007).
[155] Shaffer & Pollack, *supra* note 27, at 783.
[156] Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38(4) VA. J. INT'L L. 639, 642 (1998); *see generally* Julien Chaisse & Chistian Bellak, *Navigating the Expanding Universe of Investment Treaties—Creation and Use of Critical Index*, 18 J. INT'L ECON. L. 79 (2015) (explaining the lack of a general theory to analyze the expanding patchwork of international foreign investment).
[157] JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 337 (2000).
[158] Shaffer & Pollack, *supra* note 27, at 711.
[159] James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52(2) INT'L ORG. 269, 270 (1998).
[160] *Id.*
[161] Shaffer & Pollack, *supra* note 27, at 743.
[162] *See, e.g.*, Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43(3) WORLD POL. 336, 337 (1991).

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cooperation may be pursued.[163] It has been admitted that soft law is valuable even if some uncertainties referring to implementation remains.[164] Furthermore, the diversity can be resolved better with soft law norms.[165] Faced up with an ambiguous current international law system, the powerful countries may find it hard to implement agreements reached in negotiations in third states.[166] In order to have a better implementation, states tend to develop further hard-and-soft-law instruments to complement existing agreements. If actors are not satisfied with the existing agreements, the new hard or soft law norms can be functional as antagonists.[167] What's more, theoretically, the implementation of hard law is better than that of soft law. In reality, without much restrictions, it may be much easier to implement the awards of soft law.

The hard and soft law are not necessarily mutually supportive but also can counteract and undermine each other under certain conditions.[168] For instance, far from "filling in" the details of hard law, a growing body of soft law is being promulgated in the hope of undermining the foundations of existing hard law.[169] Besides, international negotiations typically involve conflicts over the distribution of the costs and benefits of cooperation and the specific terms of agreements affect such distribution.[170] Where states or other actors find that such terms impose greater costs or offer fewer benefits than they would like (possibly in a manner different than they initially envisaged), and hard or soft law norms may be created to countervail the existing terms.[171] When the distributive conflicts are intense among the states, the content of international norms and rules are contested by them.[172] Therefore, states tend to undermine hard law norms by utilizing soft laws measures faced up with something they disagree with or when they find some trends of soft law are not acceptable, they may use hard law norms to object them.[173] Countries intend to replace the existing norms which they disagree with and distributive conflict can be an excuse.[174]

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163 Shaffer & Pollack, *supra* note 27, at 719.
164 Weber, *suora* note 146.
165 Shaffer & Pollack, *supra* note 27, at 719.
166 Fearon, *supra* note 159.
167 Shaffer & Pollack, *supra* note 27, at 784.
168 Jan Klabbers, *The Redundancy of Soft Law*, 65(2) NORDIC J. INT'L L. 167, 181 (1996); Prosper Weil, *Towards Relative Normativity in International Law?*, 77(3) AM. J. INT'L L. 413, 423 (1983). Klabbers later wrote that soft-law tools are "detrimental" because, among other reasons, they can provide smokescreens for the exercise of administrative power to the detriment of citizens. Jan Klabbers, *The Undesirability of Soft Law*, 67(4) NORDIC J. INT'L L. 381, 383, 387-91 (1998) [hereinafter *Undesirability of Soft Law*].
169 Francis Snyder, *Soft Law and International Practice*, *supra* note 98, at 198.
170 Shaffer & Pollack, *supra* note 27, at 737.
171 *Id.*
172 Shaffer & Pollack, *supra* note 144.
173 *Id.*
174 Shaffer & Pollack, *supra* note 27, at 744.

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Sometimes the judicial body may be rather explicit, as the Appellate Body was in the famous *U.S. — Shrimp — Turtle* case, interpreting the meaning of WTO texts in a contemporary context that included soft-law environmental norms codified in treaties that it cited.[175] At other times, the judicial body may be silent, but still take account of those soft-law norms. But it cannot be concluded as the WTO panels will consider the soft law provisions from other areas.[176] Instead, the opposing party will press them to do so, and, in some contexts, this act will be successful.[177] WTO judges, both panelists and the members of the Appellate Body, have independent agency in interpreting and applying the WTO legal norms.[178] They can also play a mediating role in resolving disputes.[179] The WTO Appellate Body and judicial panels tend to reach slightly ambiguous decisions and different interpretations occur relate to implementation.[180] They can reach a more amicable decisions faced up with some hard cases in order to avoid possible normative challenges to the WTO legal system.[181] In this way, the WTO hard law text becomes less "hard" in nature. The WTO member states treat the declaration adopted at the end of one of the ministerial conferences of the organization as a kind of soft law.[182] It can be observed that dispute resolution in WTO is also a kind of soft law.[183] The soft law can be sourced from the recommendation of a WTO panel to the Dispute Settlement Body

[175] In interpreting GATT Article XX(g), an article "crafted more than 50 years ago," the Appellate Body in the *U.S. — Shrimp — Turtle* case focused less on the context of "the overall WTO Agreement" than on the contemporary context in which it must render its politically sensitive decision. Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 129, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US — Shrimp* Appellate Body Report]. Rather than analyze the "original intent" or drafting history of Article XX, the Appellate Body affirmed that the term "natural resources" is "not 'static' in its content or reference but is rather '*by definition, evolutionary*'." *US — Shrimp* Appellate Body Report, ¶ 130 (emphasis added) (quoting Namibia (Legal Consequences), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21)). The Appellate Body held that the words "must be read . . . in the light of contemporary concerns of the community of nations about the protection and conservation of the environment." *US — Shrimp* Appellate Body Report, ¶ 129. As evidence of the contemporary context, the Appellate Body emphasized the reference in the preamble of the WTO Agreement to "the objective of sustainable development," a reference which did not appear in the original GATT. *US — Shrimp* Appellate Body Report, ¶ 129. The Appellate Body stated that "it is too late in the day" to limit Art. XX(g) coverage to "the conservation of exhaustible mineral or other non-living natural resources," as the complainants desired. *US — Shrimp* Appellate Body Report, ¶ 131.

[176] Shaffer & Pollack, *supra* note 27, at 752.

[177] *Id.*

[178] *See* Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44(1) HARV. INT'L L.J. 271, 275 (2003).

[179] *See* Gregory Shaffer, *A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case*, 41(1) N.Y.U. J. INT'L L. & POL. 1, 50-61, 75 (2008).

[180] *See generally* Mackenzie & Sands, *supra* note 178.

[181] *See* Shaffer, *supra* note 179, at 70.

[182] Steve Charnovitz, *The Legal Status of the Doha Declarations*, 5(1) J. INT'L ECON. L. 207, 208-09 (2002).

[183] Footer, *supra* note 125, at 30.

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to require a respondent member to comply with its WTO commitments.[184] The decisions of different WTO working organizations and groups can be soft law in nature sometimes.[185]

In some situations, it may be essential to make use of soft law norms to reach an agreement in relation to WTO regimes.[186] In resolving possible dilemma, the soft law norms can be a great option.[187] Firstly, referring to the historical development of special and differential treatment (S&DT), soft law can supplement GATT/WTO hard law texts.[188] Secondly, as what happens to the former GATT, soft law norms can be used when parties cannot consent to the subject and these soft law norms may transform into hard law mechanisms later.[189] Thirdly, WTO law mechanisms can gain profits from the soft law norms of external organizations.[190] Soft law norms have an effect on the coming trade negotiations and bilateral dispute settlement procedures.[191] Lastly, based on the WTO experience, soft law and hard law can be antagonists sometimes.[192] The exception to the GATT commitments is created by Article XX(f) of GATT, which requires a measure is "imposed for the protection of national treasures of artistic, historic or archaeological value," and Article XX(a) does the same for measures "to protect public morals."[193] These GATT exceptions had been considered to be of a limited nature, but the existence of the Convention could, from a legal realist perspective, affect their application. The WTO may be softened to some extent because of the unpredictable situations created by the WTO trade liberalization measures related to the "cultural" products.[194]

Besides, non-state actors increasingly partake of the making, applying, and even the terminating of international law.[195] They can affect the public law system with their own ways, including finding states to represent them or making their own rules.[196] BEPS initiated by OECD can be an example. In contrast to the EU and WTO, the OECD works almost wholly through soft

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[184] Shelton, *supra* note 123, at 70.
[185] *Id.*
[186] Footer, *supra* note 125, at 14.
[187] Gunther F. Handl et al., *A Hard Look at Soft Law: Remarks*, 82 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 371, 373 & 376 (1988).
[188] Alan E. Boyle, *Soft Law in International Law-Making*, *in* INTERNATIONAL LAW 141, 146-47 (Malcolm D. Evans ed., 2d ed., 2006). On the ongoing WTO negotiations, see generally Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO's Supremacy in the International Trade Order – A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT'L ECON. L. 9 (2013).
[189] Footer, *supra* note 125, at 24.
[190] *Id.* at 36.
[191] Shaffer & Pollack, *supra* note 27, at 781.
[192] *Id.* at 730.
[193] GATT 1994 art. XX(f).
[194] Shaffer & Pollack, *supra* note 27, at 773.
[195] Handl et al., *supra* note 187, at 372.
[196] Krasner, *supra* note 162, at 337.

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law, that is, through voluntary co-operation.[197] Many so-called soft international norms are actually intentionally and functionally soft.[198] They would be unworkable were they made much harder.[199] Referring to the soft nature regulations, the MLI can be an example. As there is no mandatory dispute resolution provisions in the convention, it can be treated as a soft-law agreement.[200] Soft law norms are often relied upon by non-state players as only the creation of soft law is available to them directly.[201] This can partly explain the reason why the international soft law gets developed dramatically. The developing states and non-state actors tend to soften WTO legal obligations aiming to pursue more flexibility in implementing the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS Agreement"). They have done so both through attempting to renegotiate provisions of the TRIPS Agreement and through using countervailing soft-law norms to provide them with greater flexibility in practice in the shadow of the WTO and other international law.[202]

In order to achieve their own interests, the powerful states tend to make use of hard and soft law norms in forums which the respective merits of different nature of norms will be considered. There is no absolute limit between hard and soft law norms and sometimes hard law norms can be flexible while soft law norms can be determinate.[203]

III. THE NORMATIVE TRANSFORMATION OF INTERNATIONAL TAXATION

The hard and soft law norms can be made use of in affecting the current international legal system. The hard law norms are preferred when the states can implement their interests smoothly and they are certain about what they want.[204] Soft law norms can be functional when hard law norms might be prohibited. Hard law norms are more preferable for the powerful countries while the less powerful countries prefer the soft law norms more[205] As Roderick Macdonald writes from a legal pluralist perspective, "[d]ifferent

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[197] *See generally* David Henderson, *International Economic Co-operation Revisited*, 28(1) GOV'T & OPPOSITION 11 (1993).
[198] *See* Handl et al., *supra* note 187, at 375.
[199] *Id.*
[200] Shaffer & Pollack, *supra* note 27, at 771.
[201] Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law"*, 30(1) MCGILL L.J. 37, 72 (1984).
[202] Gregory C. Shaffer & Mark A. Pollack, *How Hard and Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonist*, *in* SYSTEMIC IMPLICATIONS OF TRANSATLANTIC REGULATORY COOPERATION AND COMPETITION 63, 118-19 (Simon J. Evenett & Robert M. Stern eds., 2011).
[203] Shaffer & Pollack, *supra* note 27, at 767.
[204] Shaffer & Pollack, *supra* note 202, at 100.
[205] Shaffer & Pollack, *supra* note 27, at 788.

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legal regimes are in constant interaction, mutually influencing the emergence of each other's rules, processes and institutions."[206]

The number of tax related disputes is growing rapidly and the current dispute resolution mechanisms in tax matters seem inadequate. BEPS packages, as a result, were issued by OECD in order to set up a global tax regime. BEPS has a great potential, for one thing, it has a global range of participants, including not only developed states, but also developing ones. For another, it is experimental and can be creative in resolving the current tax dilemma. In the following parts, on one hand, some typical tax related disputes will be illustrated and on the other, the BEPS package issued by OECD will be considered.

A. The International Taxation "Tipping Point": Scandals and New Research

The case issued by Panama against Argentina can be an example of a tax scandal. In December 2012, a group of measures, including tax, investment, and services, were imposed by Argentina against several countries which are classified by Argentina as "non-cooperative", Panama brought a complaint to the WTO. Those countries that prefer not to reach an agreement related to the exchange of tax information are treated as non-cooperative states by Argentina.[207] From the perspective of Panama, these measures constitute illegal discrimination. Based on the challenge, the market access for reinsurance and retrocession services from the listed countries is restricted by Argentina "for the purchase of foreign exchange and the repatriation of direct investments by entities in the listed countries". Panama challenged the measures issued by Argentina based on the Article II:1 of the GATS.[208] Argentina informed that it had now removed any references to 'countries with low or no taxation', including Panama, from the decrees.[209] These measures taken by Argentina comply with the OECD fiscal transparency coordination criteria effectively. From the perspective of Argentina, its measures comply with G20 Guidelines and the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes.[210]

Another case in which Panama used trade treaties to challenge anti-

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[206] Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15(1) ARIZ. J. INT'L & COMP. L. 69, 77 (1998).
[207] Teppo Eskelinen & Matti Ylönen, *Panama and the WTO: New Constitutionalism of Trade Policy and Global Tax Governance*, 24(4) REV. INT'L POL. ECON. 629, 640 (2017).
[208] *Id.* at 641 (quoting Bruce Zagaris, Keynote Address at the Financial Crime Conference & Exhibition: The Death of Tax and Secrecy Havens? FATCA, GATCA and What Comes Next for Global Financial Transparency (Apr. 20, 2015)).
[209] *Id.*
[210] *Id.*

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money laundering efforts was the case of Colombia in 2009.[211] Colombia is a prime example of a country suffering from the effects of money laundering facilitated in great extent by Panama.[212] Some Panamanian products are imported through a number of designated areas, which are provided by the Colombia government, in order to decrease the possible money laundering activities.[213] The reasoning of Panama is that these measures are inconsistent with Article III:2 of the GATT 1994.[214] There is one more case, in which a French financial prosecutor's office claimed the Hongkong and Shanghai Banking Corporation Limited's (hereinafter "HSBC") Swiss private banking unit helped clients evade tax and Europe's largest bank has acknowledged "control weaknesses" and said it had taken firm steps to address them.[215] HSBC has agreed to pay €300m ($353m; £266m) to French authorities to settle a long-running investigation into tax evasion by French clients.[216]

Faced up with the situations above the OECD felt that a global taxation system was needed, and hence the BEPS came into being. Based on the opinions of the famous economist, Thomas Piketty, A global wealth tax and not a consumption tax is the way to go when it comes to fixing wealth inequality around the world.[217] And Piketty, who laid out that vision in his book "Capital in the Twenty-First Century," said it isn't good for the economy when the largest multinational corporations pay a lower effective tax rate than small- and medium-sized businesses.[218] Except for the favourable policies issued by the related countries, the main reason why the largest multinational corporations pay a lower tax is because they have committed tax avoidance measures.

B. The Silent Revolution of International Taxation: OECD BEPS Package

As G20 and various policymakers worked toward greater transparency in tax administration, concerns about the operation of and effects of tax on cross-border activities were voiced.[219] The uncertainty and possible double

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[211] Rena S. Miller et al., *Trade-Based Money Laundering: Overview and Policy Issues*, CONG. RES. SERV. 2 (2016), https://fas.org/sgp/crs/misc/R44541.pdf.
[212] Jasper Liao & Arabinda Acharya, *Transshipment and Trade-Based Money Laundering*, 14(1) J. MONEY LAUNDERING CONTROL 79, 87 (2011).
[213] Eskelinen & Ylönen, *supra* note 207, at 644.
[214] Miller et al., *supra* note 211.
[215] *HSBC to Pay €300m to Settle Tax Investigation*, BBC NEWS (Nov. 15, 2017), http://www.bbc.com/news/business-41992985.
[216] *Id.*
[217] Michelle Fox, *Why We Need a Global Wealth Tax: Piketty*, CNBC (Mar. 10, 2015, 6:09 PM), https://www.cnbc.com/2015/03/10/why-we-need-a-global-wealth-tax-piketty.html.
[218] *Id.*
[219] Maria Theresia Evers et al., *Transparency in Financial Reporting: Is Country-by-Country*

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taxation resulted because of the unilateral tax measures have generated concerns.[220] At the G20 Leaders' Summit in June 2012, world leaders expressed the "need to prevent base erosion and profit shifting" and voiced support for the work being done in that area by the OECD.[221] In response to concerns raised by the G20, and the desire to provide an internationally coordinated approach, the OECD released a report in early 2013, presenting an overview of data and global business models, and discussing some of the issues related to base erosion and profit shifting.[222] The BEPS Report listed several key principles for the taxation of cross-border activities and the base erosion and profit shifting opportunities the principles may create. The BEPS Report concluded that it is often the interaction of various principles and the asymmetries among tax regimes of multiple jurisdictions with which a taxpayer has contact that allows base erosion and profit shifting to occur. The G20 leaders approved the OECD/G20 BEPS Action Plan (hereinafter "BEPS Action Plan") at the St. Petersburg summit in September 2013.[223] There are fifteen actions emphasized by the BEPS Action Plan in order to try to create a new international taxation system.[224] The BEPS Action Plan set a goal of completion within two years. There is a time limit for some proposals, like treaty abuse and the transfer pricing requirements and they should not exceed twelve to eighteen months.[225] For example, the work referring to Controlled Foreign Company (hereinafter "CFC") rules and dispute resolution can enjoy a longer period of time.[226] Lastly, the predicted two-year period is not enough and the work on transfer pricing of financial transactions and development of a multilateral treaty to implement commitments will be considered beyond the period.[227]

The plan required that the OECD conduct its work not only with

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Reporting Suitable to Combat International Profit Shifting? 1 (Ctr. for Eur. Econ. Research, Discussion Paper No. 14-015, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2394035.

[220] Joint Comm. on Taxation, *Background, Summary, and Implications of the OECD/G20 Base Erosion and Profit Shifting Project* 8 (Nov. 30, 2015), https://www.jct.gov/publications.html?func=startdown&id=4853.

[221] *G20 Leaders Declaration*, G2012 MEXICO ¶ 48 (June 18-19, 2012), http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131069.pdf. *See also Final Communiqué Meeting of Finance Ministers and Central Bank Governors*, G2012 MEXICO ¶ 21 (Nov. 4-5, 2012), https://www.treasury.gov/resource-center/international/g7-g20/Documents/G20%20Ministerial%20Communique%20November%204-5-2012-Mexico%20City.pdf.

[222] *See generally* OECD, ADDRESSING BASE EROSION AND PROFIT SHIFTING (2013) [BEPS Report], http://dx.doi.org/10.1787/9789264192744-en.

[223] *See generally* OECD, *Tax Annex to the St. Petersburg G20 Leaders' Declaration* (Sept. 2013), http://www.oecd.org/g20/meetings/saint-petersburg/Tax-Annex-StPetersburg-G20-Leaders-Declaration.pdf.

[224] Joint Comm. on Taxation, *supra* note 220, at 9.

[225] *See generally* INTERNATIONAL ARBITRATION IN TAX MATTERS (Michael Lang & Jeffery Owens eds., 2016).

[226] *See generally*, Philip Baker, *The BEPS Project: Disclosure of Aggressive Tax Planning Schemes*, 43(1) INTERTAX 85 (2015).

[227] Joint Comm. on Taxation, *supra* note 220, at 9.

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members of OECD and G20, but also with all interested nonmembers on an equal footing.[228] For each action item, working groups were organized to begin the process of consultation with stakeholders, development of recommendations and reports.[229] Prior to submission to the G20, the proposals were required to be the subject to public comment, necessitating release of discussion drafts, a period for public comment, publication of those comments, and in some instances public consultation meetings. Revised reports were then submitted through a review process within the OECD, ultimately requiring approval of the Council, before submission to the G20 Ministers, and if approved there, to the G20 leaders. The timeline included in the Appendix reflects the publication of drafts and final reports, the comment period, public consultation, and submissions to the G20, for each action item. The final reports on each of the fifteen action items identified in the BEPS Action Plan were delivered to the G20 leaders, who subsequently endorsed the reports at the Antayla Summit, stating:

> To reach a globally fair and modern international tax system, we endorse the package of measures developed under the ambitious G20/OECD Base Erosion and Profit Shifting (BEPS) project.[230] Widespread and consistent implementation will be critical in the effectiveness of the project, in particular as regards the exchange of information on cross-border tax rulings. We, therefore, strongly urge the timely implementation of the project and encourage all countries and jurisdictions, including developing ones, to participate.[231]

An inclusive framework of implementation issued by OECD is required by the G20 leaders in order to appeal more actors, including developing countries and non-G20 countries[232] The commitment of transparency in relation to tax administration is re-emphasized by the group and in order to meet some specific needs.[233]

As with the OECD, G7/8 discussions can be innovative and experimental.[234] The soft law can be innovative and experimental, and this suits the BEPS movement/the movement for BEPS. There are 15 actions in

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[228] Hugh J. Ault et al., *Base Erosion and Profit Shifting: A Roadmap for Reform*, 68 BULL. INT'L TAX'N 275, 276 (2014).
[229] *Id.* at 278.
[230] Joint Comm. on Taxation, *supra* note 220, at 9.
[231] *G20 Leaders' Communiqué, Antayla Summit*, 2015 TURKEY G20 ¶ 15 (Nov. 15-16, 2015), http://www.consilium.europa.eu/media/23729/g20-antalya-leaders-summit-communique.pdf.
[232] Joint Comm. on Taxation, *supra* note 220, at 10.
[233] *Id.*
[234] Colin Budd, *G8 Summits and Their Preparation*, *in* THE NEW ECONOMIC DIPLOMACY: DECISION-MAKING AND NEGOTIATION IN RELATIONS 139 (Nicholas Bayne & Stephen Woolcock eds., 2003).

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the BEPS packages and the measures are ranging from minimum criteria to best practices.[235] Four minimum standards were reached in order to maintain the consistency of implementation and the states have to obey their commitments as long as they attended the BEPS plan.[236]

IV. SOFT LAW RESHAPING INTERNATIONAL TAXATION AND INTERNATIONAL ECONOMIC GOVERNANCE

As the bilateral paradigm does not reflect the predominant reality of multinational tax planning today, which routinely involves use of intermediary entities located in tax-favorable countries.[237] In order to maximize operating, financial and tax efficiencies of multinational enterprises (hereinafter "MNEs"), the use of tax heavens has expanded.[238] In this situation, the BEPS project has acquired urgency from political level visibility of the failure of cross-border taxation rules to keep up with the realities of modern commerce and finance.[239] In the following paragraphs, the first part will discuss how the BEPS is implemented and the second part will take the tax dispute resolution mechanism in BEPS as an example in order to tell the importance of soft law in resolving tax related disputes.

A. The BEPS in Motion: Implementation and Domestic Reforms

BEPS is more focused on managing avoidance and evasion on the part of non-State actors. The elimination of double non-taxation is concerned much.[240] It has been defined by the OECD as follows: "BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid".[241] For developing countries, BEPS holds a significant role as they rely heavily on corporate income tax, which mainly comes from MNEs.[242] Without the requirement to produce legally binding results, the OECD is free to be more innovative and experimental.[243] Countries can get good ideas

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[235] ORGANISATION FOR ECONOMIC CO-OPERATION DEVELOPMENT [OECD], BACKGROUND BRIEF: INCLUSIVE FRAMEWORK ON BEPS 9 (2017), https://www.oecd.org/ctp/background-brief-inclusive-framework-for-beps-implementation.pdf.

[236] *Id.*

[237] H. Grubert & R. Altshuler, *Fixing the System: An Analysis of Alternative Proposals for the Reform of International Tax*, 66(3) NAT'L TAX J. 671, 699 tbl. 3 (2013).

[238] *Id.*

[239] Ault et al., *supra* note 228, at 275.

[240] Qureshi, *supra* note 54, at 201.

[241] *Id.* at 202.

[242] Vito Tanzi & Howell H. Zee, *Tax Policy for Emerging Markets: Developing Countries*, 53(2) NAT'L TAX J. 299, 311 (2000).

[243] *See generally* Nicholas Bayne, *Hard and Soft Law in International Institutions: Complements,*

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from the OECD, which they can reflect in their national policy and legislation.[244] The OECD approach to BEPS is fairly comprehensive in dealing with BEPS under different situations, including the digital economy, and focuses on strengthening further anti-avoidance rules both in national legislation and DTAs—such as CFC rules, Permanent Establishments, and Transfer Pricing.[245] This project is ongoing, with a set of Action Plans spread over a number of years. The BEPS process also involves an attempt to get a greater number of participants in the project from developing countries; including a set of capacity building proposals to deal with BEPS for developing countries, in conjunction with the International Monetary Fund (IMF) the UN/World Bank Group and other regional organizations.[246] In the absence of agreement on enforcement backed by sanctions, BEPS is in nature a kind of soft law.

When there are overlapping projects, soft law norms can be used to strength organizations which are based on hard law regulations.[247] Sometimes, the soft law norms are chosen intentionally because of its soft nature of implementation.[248] When it is difficult to reach more formal agreements, soft law can be used by actors to modify the dilemmas caused by the differences referring to economy or politics.[249] Referring to the contracting costs, soft law norms is easier to be accepted by the related negotiators compared with the binding hard law norms.[250] Because of the merits of soft law norms, which requires no domestic ratification and no mandatory compliance, participants to the conferences will find more room and feel less constrained.[251] For those who find it hard to comply with binding hard law norms at present, soft law regimes can be mentioned in order to leave more time for them and soft law norms can be treated as a development pace in the future.[252]

The current pluralistic international legal order also offers many advantages. It provides possibilities for states to consider other kind of development regimes which they may be unaware of. A better implementation can be achieved through the incorporation of soft law

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not Alternatives, *in* HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 347 (John J. Kirton & Michael J. Trebilcock eds., 2004).

[244] *Id.*

[245] Qureshi, *supra* note 54, at 201-02.

[246] Ernesto Crivelli et al., *Base Erosion, Profit Shifting and Developing Countries* 1 (Int'l Monetary Fund, Working Paper No. WP/15/118, 2015).

[247] Skjærseth et al., *supra* note 120, at 110.

[248] Chinkin, *supra* note 120.

[249] *Id.*

[250] Abbott & Snidal, *supra* note 101, at 434-36.

[251] Peter H. Sand, *Lessons Learned in Global Environmental Governance*, 18(2) B.C. ENVTL. AFF. L. REV. 213, 239 (1991).

[252] Oran R. Young, *The Politics of Regime Formation: Managing Natural Resources and the Environment*, 43(3) INT'L ORG. 349, 367 (1989).

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provisions into the existing hard law norms.[253] In negotiating binding rules, participants will be more careful with every aspect.[254] Because of the commitments binding rules contain, states tend to pay more strict attention to review it.[255] With soft law norms, an agreement is more likely to be achieved compared with binding hard law rules.[256] The flexibility of soft law regimes is the main reason to it.[257] The main targets which have been achieved in the soft law condition and watered down by some following measures decides the effectiveness of the governance[258]

Globalization is creating new problems in the field of tax policy.[259] As governments tend to use tax measures to attract financial profits, "can create harmful tax competition between States, carrying risks of distorting trade and investment and could lead to the erosion of national tax bases."[260] Harmful tax competition is a truly international problem.[261] In this condition, governments are required to cooperate with each other to resolve the possible problems together.[262] The OECD has developed and refined various soft law governance mechanisms. These non-binding instruments do not lack legal value. Engelen holds that Commentaries on the Model tax Convention constitute a form of "elaborative soft law" that can be described as "principles that provide guidance to the interpretation, elaboration, or application of hard law".[263] Such soft law reflects the consensus of the member countries as to the proper interpretation and application of the provisions of existing tax treaties that are based on the OECD Model Tax Convention (or other OECD soft law instruments), and in this way, it can be said, that hard and soft law are interdependent and the latter derives authority from, and extends the meaning of the former.[264]

The OECD Model Tax Convention and its Commentaries have authority in Non-Member Countries, due to the possibility of inviting the governments of these countries to participate in the activities of the OECD and because the ongoing process of revising this Convention and its Commentaries has "been opened up to benefit from the input of non-member States, other

[253] Skjærseth et al., *supra* note 120, at 116.
[254] Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47(2) INT'L ORG. 175, 202 (1993).
[255] Abbott & Snidal, *supra* note 101, at 426.
[256] Shaffer & Pollack, *supra* note 27, at 719.
[257] Skjærseth et al., *supra* note 120, at 118.
[258] *Id.* at 119.
[259] Hans Gribnau, *Soft Law and Taxation: EU and International Aspects*, 2(2) LEGISPRUDENCE 67, 79 (2008).
[260] OECD, HARMFUL TAX COMPETITION: A GLOBAL EMERGING ISSUE 7 (1998) [hereinafter HARMFUL TAX COMPETITION].
[261] Gribnau, *supra* note 259, at 81.
[262] HARMFUL TAX COMPETITION, *supra* note 260.
[263] Chinkin, *supra* note 105, at 21-42.
[264] FRANK ENGELEN, INTERPRETATION OF TAX TREATIES UNDER INTERNATIONAL LAW 455-58 (2004).

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international organizations and other interested parties."[265] Other international organizations, such as the UN, the International Monetary Fund, and the European Union, have increasingly adopted the OECD soft law model.[266] No matter it is hard or soft, as long as it is described as law, it creates expectations about how countries may behave.[267] Even though the countries are not required to obey the guidance issued by OECD, as it is described as a kind of soft law, they will comply with it.[268] OECD points out that:

> The BEPS outputs are soft law legal instruments. They are not legally binding but there is an expectation that they will be implemented accordingly by countries that are part of the consensus. The past track record in the tax area is rather positive . . . [A]ll OECD and G20 countries have committed to consistent implementation in the areas of preventing treaty shopping, Country-by-Country Reporting, fighting harmful tax practices and improving dispute resolution.[269]

In this way, the soft law of OECD has reshaped international economic governance.

To sum up, a new option of hard- or soft-law provisions is searched by the states and others in order to resolve the unfavourable situations faced up with because of the current international law system.[270] For instance, as many actors are not satisfied with the current tax related dispute settlement mechanisms, BEPS, especially the 14th movement has been issued to counter them. In this situation, BEPS can be seen as the soft law to counter the hard rule. Because of systemic concerns and the stickiness and normative pull of existing regimes, BEPS is essential when faced with the current international tax regimes.[271]

B. Towards a Revolution in International Tax Dispute Resolution

Although, the MAP process is the main dispute resolution method in tax related disputes in the bilateral tax treaties, inefficiency problem has ensued

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[265] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 143 (2004).
[266] Gribnau, *supra* note 259, at 92.
[267] Reuven S. Avi-Yonah, *International Tax as International Law*, 57(4) TAX L. REV. 483, 496-501 (2004).
[268] Allison Christians, *Hard Law, Soft Law, and International Taxation*, 25(2) WIS. INT'L L.J. 325, 332 (2007).
[269] *BEPS-Frequently Asked Questions: Top 10 FAQs About BEPS*, OECD, http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm (last visited Aug. 20, 2018).
[270] Shaffer & Pollack, *supra* note 27, at 798.
[271] *Id.*

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and many countries, including BRICS (referring to Brazil, Russia, India, China and South Africa), want to improve its efficiency. On Oct. 5, 2015, the OECD released its final report on improving the effectiveness of dispute resolution mechanisms (Action 14) under its Action Plan on BEPS.[272] A package is released with fifteen final BEPS actions in this report. The Action 14 report, Making Dispute Resolution Mechanisms More Effective (hereinafter "Final Report"), presents a commitment by countries to implement a so-called "minimum standard" on dispute resolution, according to the OECD.[273]

The Final Report also clarifies that its publication means that the G20 and OECD countries participating in the BEPS project have agreed to implement three overarching principles that represent a minimum standard, with respect to the MAP process, by incorporating these principles into domestic law and/or their treaty interpretation and application.[274] The minimum standards are listed as:

1. As long as the conditions are met, taxpayers can access to the MAP procedure;
2. Verifying that domestic administrative procedures do not block access to the MAP process;
3. Having countries implement Article 25 of the OECD Model Tax Convention in good faith.[275]

The mandatory arbitration is mentioned in 14th movement of BEPS and OECD model convention (2008 version).[276] Although, they are just suggestions for the states, some states, especially the developed ones have incorporated this dispute resolution method into bilateral tax treaties. Although it is clearly regulated in the model convention, it provides flexibility for states to incorporate it. For example, the mandatory arbitration can be seen in the US–Germany bilateral tax agreements.[277] But they have imposed some restrictions on it. To cite an example, competent authorities have the discretion to limit arbitration in certain circumstances. In the treaty, it states that "[i]f a disagreement cannot be resolved by the competent authorities it may, if both competent authorities agree, be submitted for arbitration."[278] In this situation, as long as the disagreement can be resolved,

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[272] *Base Erosion and Profit Shifting*, OECD, http://www.oecd.org/ctp/beps.htm (last visited Aug. 20, 2018).
[273] *BEPS Actions*, OECD, *http://www.oecd.org/tax/beps/beps-actions.htm* (last visited Sept. 13, 2018).
[274] *See generally* OECD, MAKING DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE: ACTION 14: 2015 FINAL REPORT (2015), https://read.oecd-ilibrary.org/taxation/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report_9789264241633-en#page1.
[275] *Id.* at 9.
[276] OECD, *Article of the Model Convention with Respect to Taxes on Income and on Capital* (July 17, 2008), http://www.oecd.org/tax/treaties/42219418.pdf.
[277] INTERNATIONAL ARBITRATION IN TAX MATTERS, *supra* note 225.
[278] *Id.* at 176.

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no matter whether the disputing parties are satisfied or not, the arbitration still cannot be issued.

For example, referring to multilateral convention to implement tax treaty related measures to prevent BEPS, mandatory arbitration in tax matters is not allowed by China.[279] Developing countries, like China and India, are more likely to make use of MAP to resolve tax related disputes. The MAP is a kind of diplomatic dispute resolution method, in which the national interests can be superb sometimes, and there are several concerns held by these developing countries in relation to tax related mandatory arbitration. In one way, the tax related arbitration is quite professional, and it needs a group of highly skilled professionals, tax lawyers and staff in the competent authorities and overall system.[280] Developed countries have the capacity to engage a lot of money and resources to get staff trained; whereas, in developing states, they may lack money and resources to do the same. In another, the arbitration fees are expensive, and the developing states do not want to bear the cost. If they win the case, maybe they can let the losing party to afford the fees. If they lost, they have to bear the fees all by themselves and it is quite hard for them. What's more, referring to the arbitration sample of OECD model convention, if it is essential for the arbitrators to have a meeting, the competent authority which provides the places to hold that meeting should bear the cost.[281] Besides, it doesn't matter whether it is mandatory arbitration in BIT or not, the cost of the arbitration is a big problem that the contracting states have to face. The cost of being a party to an investor-state arbitration is high. Awards can be large and the costs of participating in an arbitration, even if the state is successful, are significant.[282] Among the concerns, state sovereignty is the main concern especially for the governments of developing states such as China.[283] Soft law is suitable in resolving these concerns. Soft law has an informative and educative role which is well suited to non-judicial means of dispute settlement and to self-regulation between interested participants.[284]

In some circumstances, hard law can be complemented by soft law norms. Nonbinding soft law can fill in the gaps of binding hard law while the binding hard law can strengthen the soft law in some situations.[285] The concept of soft law is illustrated in a U.S. international law case book by

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[279] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*, OECD, http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (last visited Aug. 20, 2018).

[280] *See generally* OECD, COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION (2010).

[281] *Id.*

[282] *Id.*

[283] INTERNATIONAL ARBITRATION IN TAX MATTERS, *supra* note 225.

[284] Chinkin, *supra* note 100, at 862.

[285] Shaffer & Pollack, *supra* note 27, at 721.

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noting both that "soft-law instruments are consciously used to generate support for the promulgation of treaties or to help generate customary international law norms [i.e., binding hard law]," and that "treaties and state practice give rise to soft law that supplements and advances treaty and customary norms."[286] As unforeseen situations may be created when a standing body of hard law develops, soft law is treated as a flexible and cheaper way to fill in the gaps.[287] Another example can be seen from dispute resolution in tax matters. The Action 14 report of BEPS, presents a commitment by countries to implement a so-called "minimum standard" on dispute resolution, according to the OECD.[288] It means that the G20 and OECD countries participating in the BEPS project have agreed to implement the minimum standard, with respect to the MAP process, by incorporating these principles into domestic law and/or their treaty interpretation and application.[289] In both cases, hard- and soft-law instruments serve as complements to each other in dynamic processes of legalization, leading to greater international cooperation and coordination over time.[290] Hard and soft law norms can interact with each other.[291]

V. CONCLUSION

Taxation has become the new frontier of international economic law. Because of the financial crisis, international tax issues have been put onto the global political agenda.[292] Besides, corporate tax avoidance is of increasing concern in both developed and developing countries.[293] Interests are aligned facilitating cooperation.[294] Increased political salience moved international tax discussions beyond technical expert committees at the OECD and into the limelight of the G20.[295] Higher political salience also increased the propensity for broad agreements of principle among the strongest states.[296] Meanwhile, possible clashes with other rules of international law are common around the world. For instance, international economic governance has seen a growing number of harmful tax

[286] JEFFERY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 95 (2d ed., 2006).
[287] Shaffer & Pollack, *supra* note 27, at 722.
[288] *BEPS Actions*, *supra* note 273.
[289] *Id.*
[290] Chinkin, *supra* note 120.
[291] Janet Koven Levit, *Bottom-Up Lawmaking: The Private Origins of Transnational Law*, 15(1) IND. J. GLOBAL LEGAL STUD. 49, 56 (2008).
[292] Grinberg & Pauwelyn, *supra* note 1.
[293] OECD, OCED/G20 BASE EROSION AND PROFIT SHIFTING PROJECT: EXPLANATORY STATEMENT 8 (2015), https://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf.
[294] E.A. Herre et al., *The Evolution of Mutualisms: Exploring the Paths Between Conflict and Cooperation*, 14(2) TREE 49, 52 (1999).
[295] Grinberg & Pauwelyn, *supra* note 1.
[296] *Id.*

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competitions.[297] And harmful tax competitions are not just in the international trade, but also in the international investment scope. It is acknowledged that tax could be important in decisions on how to structure an investment and how to finance it, as these decisions can be significant for the repatriation of profits.

By reducing the cooperation, soft law is beneficial to promote the normative goals.[298] Hard and soft law norms have their respective merits and the hybrid of both of them in the same sectors may be helpful sometimes.[299] Sometimes, the states may agree in principle, but not on details or they may agree in the abstract, but are not yet quite sure as to the concrete.[300] Soft law instrument can be helpful from this perspective. Besides, soft law has an informative and educative role which is well suited to non-judicial means of dispute settlement and to self-regulation between interested participants.[301] If there is a consensus on the core issue among the parties, the soft law is functional here. For instance, faced up with the tax avoidance and evasion, most states are willing to resolve the related disputes. However, as they have divergence in making use of which dispute resolution method in tax matters, they have reached a soft law agreement-MLI and permit the reservation in mandatory arbitration clause. If mandatory arbitration is regulated as a hard rule, it is more likely that MLI will not be accepted by many states. As what has mentioned above, the soft law would be unworkable if they were made much harder.[302]

Taking from above, it can be seen that soft law is sometimes intended to be a precursor to the adoption of a later hard treaty text.[303] That's why, although BEPS is a kind of soft law currently in taxation areas, it can be a step from soft law to hard law. When no common view can be reached referring to the object or the methods, soft law can be functional in resolving this dilemma. To cite an example, in relation to mandatory arbitration in tax matters, although it has proposed in MLI as a soft law, some states do incorporate or promise to adopt it in their related tax treaties, while some others rejected to adopt it. If the OECD does not often make rules itself, its soft law activities profoundly influence the making of hard law elsewhere. The OECD makes a vital input into the rules drawn up by wider multilateral institutions.[304] Soft law stimuli are often essential to get the hard law

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[297] CHAISSE, *supra* note 2.
[298] Abbott & Snida, *supra* note 101.
[299] TRUBEK ET AL., *supra* note 137, at 3-4.
[300] *Undesirability of Soft Law*, *supra* note 168, at 384.
[301] Chinkin, *supra* note 100, at 862.
[302] Handl et al., *supra* note 187, at 375.
[303] Footer, *supra* note 125, at 13.
[304] *See generally* Michael Edwards & David Hulme, *Too Close for Comfort? The Impact of Official Aid on Nongovernmental Organizations*, 1(1) CURRENT ISSUES COMP. EDUC. 7 (1998).

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moving.[305] Thus the OECD and G7/8, soft law institutions themselves, make things happen in wider rule making.[306] In sum, any institution is better than no institution whatsoever; any form of cooperation is better than no form of cooperation at all; and any agreement, no matter how soft, is better than no agreement at all.[307]

[305] *See generally* HARD CHOICES, SOFT LAW, *supra* note 26.
[306] *See generally* Bayne, *supra* note 243.
[307] *Undesirability of Soft Law*, *supra* note 168, at 383.

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