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Report of the Proceedings of the Eleventh Assembly of the International Association of Tax Judges Held Online on 22 October 2021

Bob Michel^[1]

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This report summarizes the proceedings of the eleventh Assembly of the International Association of Tax Judges, which was held online on 22 October 2021.

1. Introduction

On 22 October 2021, the eleventh Assembly of the International Association of Tax Judges (IATJ) was held. Due to the COVID-19 pandemic, the proceedings took place online. The digital assembly was attended by participant judges from countries of all continents.

Eugene Rossiter, President of IATJ and Chief Justice of the Tax Court of Canada, opened the proceedings. Wim Wijnen, chairman of the IATJ Programme Committee, presented the agenda of the webinar which consisted of two sessions. The first session dealt with the topic of the relationship and interaction between courts and other government institutions. The second session dealt with the topic of taxpayers and their rights in the courtroom as a follow-up of the series of articles presented by the IATJ on the occasion of the celebration of the 75th anniversary of the *Bulletin for International Taxation* in the Special Issue of September 2021.^[1]

2. The Relationship/Interaction between Judges/Courts and Other Institutions

2.1. Panel composition and agenda

The session was chaired by Justice Péter Darák, (Hungary, *Supreme Administrative Court/Kúria*). The panel consisted of Judge John O. Colvin (United States, *Tax Court*), Justice Manuel Hallivis Pelayo (Mexico, *Tribunal Federal de Justicia Administrativa/Federal Administrative Court*), Justice Anne Iljic (France, *Conseil d'État/Supreme Administrative Court*), Justice Mark O'Mahoney (Ireland, *Tax Appeals Commission*) and Justice Thomas Stadelmann (Switzerland, *Bundesgericht/Supreme Court*).

Péter Darák explained that the purpose of the session was to draw a general picture of a tax judge in relation to other institutions and of his or her position in society as a whole. The objective of the session was to, first of all, identify the elements that make up this position of a tax judge from a constitutional perspective. Secondly, the focus would also lie on aspects that shape the person of a tax judge. Darák mentioned that the session took place in the form of a question and answer dialogue between the chair and the panellists.

2.2. Question 1: How is a tax judge affected by or depending on other branches of government and/or external elements of society?

John Colvin started by referring to the three branches of government – the legislative, executive, and judicial branch – and identified a number of ways in which the US Tax Court is affected by or has contact with the legislative and executive branch of the US government and also other US courts. Colvin noted that these situations do not occur in the United States, but probably also occur in most other jurisdictions.

* Adv. LLM, international tax policy consultant. The author can be contacted at michel.bob@gmail.com.

1. 75 Bull. Intl. Taxn. 9 (2021), Journal Articles & Opinion Pieces IBFD.

As a first example, Colvin referred to the selection procedure of tax judges. US tax judges are nominated by the President, but in order for nominated judges to take office, the US Senate must “provide advice and consent”² to the nominator. During the nomination and confirmation process, there is often contact between the US Tax Court and the executive and legislative branch.

A second example was the interaction of the US Tax Court with other US courts. Colvin observed that the US Tax Court operates independently from the Administrative Office of the US Courts and is responsible for its own administration. There are, however, many overlaps. Tax Court judges are subject to the Code of Conduct for United States Judges and the financial disclosure requirements that apply to all Federal judges. Recent legislative changes further aligned the status of the Tax Court judges with other US court judges, like with regard to US Marshall Service protection and a similar personnel system. These enactments were the result of numerous interactions between the tax judges and the legislative branch.

A third example is the funding of the US Tax Court. The US Congress decides on the budget of the judicial and of the executive branch. The US Tax Court prepares its own budget request. Congress reviews the request, and meetings with the Appropriation Committees staff members are held during which the proposal is discussed.

A fourth example is the relationship of the US Tax Court with the legislative branch with regard to the laws that govern the court itself. The Senate Finance Committee and the House of Representatives’ Ways and Means Committee have jurisdiction over the US Tax Code. The Tax Court often proposes items to streamline its own operation or to expand the application of rules that are already in place with regard to other courts to also cover the Tax Court.

Finally, Colvin raised one item for future consideration and wondered whether it also affected tax courts in other jurisdictions. Sometimes tax judges would mention an opinion that a statute is using incorrect grammar, or uses terms inconsistently or its phrasing is ambiguous, which leads to a strange or unfair result. Should courts go beyond merely publishing these opinions and proactively cooperate with the legislative branch to correct these statutory flaws? Colvin referred to the book *Courts and Congress* by Robert A. Katzmann in which the author – a former US Court of Appeals judge – suggested that courts and Congress should find a systematic way for courts to bring these opinions to the attention of legislative staff to clean up statutes. Katzmann believed this exercise is policy neutral and would serve no other goals than pointing out drafting errors. Colvin observed that court opinions are already public and accessible by legislative staff. Often these errors will not affect a court’s decision, but if the statutory errors do affect the outcome of a court’s decision, then pointing these out to the legislative branch could create new winners and losers.

Anne Iljic discussed the situation in France and started by expressing her belief that it was inevitable that the legislative and the executive branch are influencing judges’ work because they are the ones setting legal standards. These standards include the administrative doctrine as determined by the executive, something which is very important in France. Especially in civil law countries where the judge’s role is considered to be restricted to interpreting legal standards and also to check whether the legal standards to be applied respect the higher legal standards. Iljic noted that the bar also influences judges’ work because a judge’s task is mainly focused on answering the questions in the dispute brought to the court by the litigants and their counsel.

Iljic observed that feedback by the bar, academia or even the press on how judicial decisions are received is also a relevant factor that could affect the work of tax judges, or at least, is worth taking into consideration by tax judges. Iljic noted that the crucial question is of course how a judge can protect his or her work from undue influence and preserve independence and impartiality.

In France, the judges’ neutrality and impartiality is protected by the Constitution and the Constitutional Court. Independence is also granted by the fact that French judges are civil servants appointed for life. Judges’ salaries are based on the national salary grid. Bonuses are awarded by peers, who are senior judges. Career advancements and disciplinary actions are decided within the court system. With regard to the budget, the French Supreme Administrative Court is responsible for its own budget and management and that of all lower administrative courts.

Any reforms of these rules have to respect the framework set out in the Constitution, which includes the principles of independence and impartiality.

In her own experience at various positions at the French Supreme Administrative Court, Iljic believed instances of explicit influence by the tax authorities or taxpayer representatives on her as a judge were rare and if occurring – for instance through a telephone call – the effect on her work at the court was non-existent, and if there was any effect, it was not necessarily in favour of the pressing party. Iljic noted that the French Supreme Administrative Court has lately been severely criticized for its presumed lack of independence and impartiality. The reason is that administrative judges are seen to be very close to the executive branch, given that some of them are recruited through the same schools as the high position civil servants in the various ministries, and because judges often after serving on the courts take jobs with the administration or as lawyers before

2. See Article 2, Section 2 of the US Constitution.

taking up positions as judges once again. Furthermore, the Supreme Administrative Court has a dual function. On the one hand, it has a litigation section that hears administrative disputes with citizens. On the other hand, it also has a section on draft legislation that functions as a counsel to the government and to parliament. This role as counsel is apolitical and merely has the purpose of ensuring that draft legislation is technically in good shape with regard to coherence, readability or respect with higher legal norms. Within the Supreme Administrative Court, there is, however, a so-called “Chinese wall” that separates the litigation section and the advisory section. A member of the litigation section cannot hear a dispute on a piece of legislation in which he or she was involved in the drafting process. In general, judges tend to withdraw in cases in which they could be or appear to be partial, be it for personal or professional reasons. No questions are asked by peer judges on the motives for such a withdrawal. The president of the chamber can suggest certain judges not to sit in cases to preserve the appearance of impartiality, if needed.

Iljic noted that despite all of these measures, the Supreme Administrative Court is still attacked from time to time for not being impartial. Iljic believed that especially in times of public crises, this criticism seems to appear. This is explained by the fact that in crisis circumstances – like during the COVID-19 pandemic – the role of the Court as resolving disputes between citizens and government becomes more visible. During the COVID-19 pandemic, the Court had to hear numerous claims by citizens who challenged the government measures, like the lock-down restrictions, etc. Initially, the Court was criticized for being on the side of the government. As the crisis went on, the Court was criticized for taking a position that was deemed anti-government.

As to the situation in Switzerland, Thomas Stadelmann emphasized that the country is a federal state with the Swiss cantons having a great many regulatory powers, including with regard to the organization of the judiciary. There are few federal rules and, unlike in the United States, there is no quasi-parallel structure of the federal judiciary at all levels. Only for a few areas there are federal first instance courts. The Swiss federal administrative court is responsible for hearing cases regarding orders by federal agencies, for instance, in relation to indirect federal taxes, like VAT. Stadelmann noted that besides general observations, making specific observations that applied to all Swiss judges was thus difficult.

Stadelmann observed that the situation of the Swiss judiciary was different from most other countries as to the tension with other branches of government. Unlike in most other countries, the tension is strongest in relation to the legislative branch and not the executive branch.

Stadelmann observed that there were three main points of conflict. First of all, the legislative branch elects and re-elects judges at the end of their relatively short terms. A Swiss judge’s term in office is usually between four and six years. Second, the judiciary administers its own functioning, but the legislative branch approves the budget. Third, the legislative branch has an overall mandate of supervision over the judiciary. The extent of this mandate is subject of dispute. For example, a recent parliamentary commission requested the Swiss Supreme Court to submit case completion figures by individual administrative judges. The Court refused this request as being “micro supervision” and not being within the mandate of “overall supervision”.

Finally, Stadelmann referred to a study by Feld and Voigt (2003)³ in which the authors research the connection between judicial independence and economic growth, differentiating between *de jure* and *de facto* independence. Switzerland was ranked in the top 5 on *de facto* independence and outside the top 50 on *de jure* independence. In practice, at the moment there are some minor problems of judicial independence in Switzerland. Stadelmann believed that the current system did have weaknesses which endanger the quality of the judiciary and might jeopardize judicial independence, and they might also be seen as the judiciary lacking a sufficient democratic underpinning. First of all, the election process tends to face a quality problem. Switzerland has a multi-party parliamentary system. Currently, there are six parties in parliament and these parties have agreed to allocate the appointments of judges in proportion to the party strength in parliament. Parties appoint candidates that belong to a party or at least are close to it. This means that for a certain appointment, the better candidate will not necessarily prevail if he or she does not have the right party affiliation. Candidates who for reasons of political impartiality refuse to declare a party affiliation stand no chance to be appointed as a federal judge in practice. Secondly, Swiss judges are elected for short terms, maximum six years (at the Supreme Court). This contradicts the international principles of enduring judicial independence and is very unusual from a comparative perspective. Few other states employ such a system and if they do, it is usually limited to state level, and not the federal level. Japan has a similar system, but the term of appointment is ten years. Stadelmann noted that this issue is subject of ongoing political discussions. In a referendum held in the end of November 2021, Swiss voters did reject a proposal for the supreme court judges to be elected by lot rather than by the Swiss parliament and to have full career span appointments instead of the current system of limited term appointments. Stadelmann noted that the opponents of the change argued that it was unnecessary because in practice judges are often re-elected for successive terms until retirement. Stadelmann notes that this is irrelevant. The only issue that mattered was whether the system of re-election is influencing the jurisprudence. Empirical research in the United States on partisan election of judges clearly showed that there was significant evidence of such an influence, for instance on the amount damages awarded to in-

3. See L. Feld & S. Voigt, *Economic growth and judicial independence: cross-country evidence using a new set of indicators*, 19 European Journal of Political Economy 3 (July 2003) pp. 497-527.

state voting plaintiffs, to be paid by out-of-state non-voting businesses,^[4] or in relation to the likelihood of state supreme court justices reversing death penalty sentences.^[5]

Mark O'Mahoney presented the Irish perspective. He mentioned that he was a member of the Tax Appeals Commission, a statutory appeals body established only in 2016 and thus without longstanding history or traditions like some other tax dispute resolution bodies. Prior to the establishment of this new body, it was widely accepted that there was a need for reform of the Irish appeals system. As such, any influence from other branches of government has been largely benign. The body with the greatest influence is the Irish Ministry for Finance. The Tax Appeals Commission is an independent body but it operates under the *aegis* of the Department for Finance and the Minister has the power to appoint and remove Commission members, to set the budget and the staffing levels. If the Commission finds legislative amendments are needed to improve its functioning, the Minister for Finance is the person to address. O'Mahoney noted that like in other jurisdictions, also the legislative branch, the bar and the press had a certain influence, but the main antagonist was the Ministry for Finance.

O'Mahoney noted that this influence was mostly positive. One example of negative influence lay in the Commission's initial difficulty to obtain from the Ministry sufficient resources to function properly in light of the new body's mandate and workload which had been expanded compared to the previous dispute resolution body. After review by an external party, the Ministry eventually did allocate more resources to the Commission so that the number of appointed commissioners and staffers can be expanded to an adequate level. O'Mahoney noted that the workload and the jurisdiction of the Commission had been increased in comparison to the previous dispute resolution organ.

O'Mahoney observed that the predecessor of the Tax Appeals Commission consisted in a dispute resolution body composed of two commissioners who were appointed in 1993 by the Minister for Finance without the positions having been advertised or without any competition or public consultation as to who should be appointed. One appointee was the then Minister for Finance's brother-in-law and the other one was politically connected to the two. That Minister became the Irish Prime Minister until 2008 when he resigned amidst corruption and tax evasion allegations. O'Mahoney noted that the requirements of taxpayer confidentiality did not allow him to confirm that the Irish Revenue Authorities ever raised such assessments of the former Prime Minister or whether these had been appealed. However, in a purely hypothetical scenario in which such assessments would give rise to an appeal with the Commission, neither of the then Commissioners could have heard the appeals due to conflicts of interest. In such scenario, the assessments would have remained technically under appeal but without anyone able to hear them and so there was no finding as to whether under Irish law there was a liability to tax or steps to collect tax were due. O'Mahoney believed this situation was one of the reasons for the call to overhaul the Irish tax system. Today, Commissioners are appointed pursuant to a public competition and recruitment process. In a situation in which none of the Commissioners are able to hear a case because of conflicts of interest, the new rules provide that a judge from another field can be made a temporary tax appeals commissioner to hear the case.

Justice Anthony Gafoor (Trinidad and Tobago, Tax Appeal Board) raised a question from the audience as to how courts deal with recusal and alleged conflicts of interest among sitting judges, and whether the two parties have the right to be heard in recusal procedures or only the litigant alleging (potential) bias. Mark O'Mahoney observed that in Ireland there is a statutory provision that requires tax appeals commissioners to be impartial in all matters that come before them. Either party can apply to have a judge recused if they feel there is a conflict. In such case, there will be a hearing before the judge who is asked to recuse him or herself, and both parties have the right to make representations in said hearing. If the recusal application is refused, the party who sought the recusal has a statutory right of appeal to the High Court. O'Mahoney noted that in Ireland, recusal applications almost invariably come from the taxpayer. Although tax authorities have also filed recusal applications in the past, for instance to recuse a tax appeals commissioner who in a previous life had been advising the taxpayer who lodged the appeal, Iljic stated that the situation in France was not very different than the one in Ireland. All parties can request a judge to recuse him or herself. If the latter refuses to do so, it is the court that will take the decision. In practice, when a party requests a recusal, the judge in question will decide not to hear the case. Stadelmann observed that Switzerland employed a similar system. The Swiss courts dealing with tax matters operate in panels of three or five judges. If there is a request for a recusal of one of the panel's judges and said judge does not recuse him or herself, then the panel will stick to its composition if there are no obvious reasons for recusal. If there are valid grounds or if it is not as clear, the composition of the panel will be altered. Stadelmann believed that, generally speaking, a judge disposing of the liberty to recuse him or herself without publicly disclosing his or her motives for doing so was not necessarily a good thing. Judges should not be at liberty to decide whether they will be sitting or not. A judge has a duty to hear a case and gratuitous recusals risk affecting the right of the appellant to have his case heard by the "right" (i.e. randomly assigned) judge.

4. See A. Tabarrok & E. Helland, *Court Politics: The Political Economy of Tort Awards*, 42 *The Journal of Law & Economics* 1 (April 1999), pp. 157-188.

5. See M.G. Hall, *State supreme court justices are more likely to reverse death penalty sentences when they are term limited*, USAPP/LSE USCentre, 17 July 2014, available at <http://bit.ly/1lvGUyH> (accessed 20 April 2022).

2.3. Question 2: How can tax judges and the tax judiciary continue to renew itself and what is the role of technology in this process?

Manuel Hallivis Pelayo emphasized that embracing modern technology is crucial for the purpose of modernizing the judiciary, but it is not the only approach. Better and simpler procedures also go a long way in making the judiciary more effective and efficient. Technology can, however, be instrumental in settling procedures in a more time-efficient manner. But new technologies and procedures need to be understood and endorsed by court personnel, including judges. Local capacity building is key in this regard. Hallivis Pelayo noted that since 1994, in Mexico, there has been an awareness that the number of cases was growing exponentially. In response, a technology reconversion programme was established to switch from paper technology to ICT. Early 2000s, a system was put in place that entailed the registration of each court document in standard forms. Since 2008, the switch was made to an online trial procedure system. The first “e-trial” materialized in 2011 with the highest standards in security. In 2019, an updated system was launched that is more user-friendly, accurate and secure. The new platform allows taxpayers to file claims and evidence through common file formats. Besides the online infrastructure, the personal structure of the judiciary itself was also modernized with emphasis on capacity building.

Mark O’Mahoney believed that the position in Ireland was roughly similar to the Mexican one apart from the fact that Ireland runs ten years behind Mexico with regard to the digitalization of the judiciary. There is progress towards implementing a full “e-trial”. Taxpayers can submit documents electronically and there is a robotic system to handle incoming notices of appeal. The digitalization of all case files is almost complete. Due to the COVID-19 pandemic, the concept of remote hearings has come to the fore in the last couple of years. O’Mahoney agreed with Hallivis Pelayo that the procedures underlying the technological advancements were, however, equally, if not more, important than the technology. He referred to pending changes to the tax appeal system in Ireland that will segregate cases in three categories depending on the amount of tax in dispute to provide a more tailored approach depending on the size of the dispute. O’Mahoney also mentioned that alternative dispute resolution procedures and the lack thereof in the Irish tax procedure is an area in which efficiency gains can be made in the future.

John Colvin referred to the new docket system that has been implemented by the US Tax Court in 2019. The system is accessible by all relevant stakeholders. The implementation was successful through the help of the General Services Administration, an executive branch agency, which has the facilities and a network of contractors that serves all elements of government.

2.4. Question 3: Can a tax judge identify him or herself with social movements, civil society, private life, etc., or is he or she condemned to the confinements of the ivory tower that is their courts?

Thomas Stadelmann observed that judges have to perform a balancing act between adjudicating cases independently and impartially on the one hand, and, on the other hand, not doing so in a bubble, completely detached from daily life. Stadelmann emphasized that tax judges are ordinary people, influenced by their backgrounds, education and the environments they frequent. All these elements shape a judge’s attitude and his or her values. Judges also participate in life like ordinary beings. They have personal relationships and maintain social and cultural lives. Stadelmann believed that there were no general pointers to be given in this regard. What constitutes the right behaviour for a judge could only be assessed on a case-related basis. In Switzerland, there are practically no legally enforceable principles regarding the conduct of judges. For Stadelmann personally, the United Nations Bangalore Principles of Judicial Conduct of 2006 and the relating Commentary served as very valuable guidelines.^[6] For example, “Value 3 – Integrity” of the Principles provides that: “Integrity is essential to the proper discharge of the judicial office”. Regarding the application of this principle, it is stated that: “A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer”, and “the behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary”. Stadelmann noted that the Swiss Judges’ Association has created an independent ethics commission, which serves as an advisory body and is composed of judges of all parts of the country and various levels. It examines cases submitted to it and expresses opinions on the ethically appropriate conduct. The anonymized opinions are published online. Various Swiss courts have also drawn up ethics charters, including the Federal Administrative Court and the Supreme Court. One of the Supreme Court’s guidelines provides, for example, that federal judges are not to comment publicly on political issues, and if in exceptional cases they do, they are to act with particular caution and restraint, especially on institutional issues. Another guideline provides that participation in online social networks is a matter of personal choice but requires special prudence so as not to cast doubts on the independence, impartiality, and integrity of the federal judiciary or to jeopardize the reputation of the courts.

6. United Nations (2006), “Strengthening Basic Principles of Judicial Conduct”, *ECOSOC 2006/23*, available at: https://www.judicialintegritygroup.org/images/resources/documents/ECOSOC_2006_23_Engl.pdf; and United Nations (2007), “Commentary on the Bangalore Principles of Judicial Conduct”, *The Judicial Integrity Group*, March 2007, available at: https://www.judicialintegritygroup.org/images/resources/documents/BP_Commentary_Engl.pdf.

Mark O'Mahoney observed that, in Ireland, the tax appeals commissioners are holders of a public office and, as such, they are obliged to comply with the same statutory standards as other members of the judiciary. Those obligations are imposed quite strictly: discussing political issues in a public forum or making reference to these in a written judgment is prohibited, and so is the discussion of policy issues. For example, a Commissioner might feel compelled by times to explain to taxpayers why case turnover times are so high, yet public discussion of the funding issues faced by the Tax Appeals Commission is frowned upon. There are exceptions which allow policy discussion, like the annual report submitted by the Tax Appeals Commission to the Ministry of Finance that is made publicly available, or during examinations of Commissioners before Parliament. O'Mahoney notes that Ireland enforces its standards of judicial independence and impartiality rather strictly. When a new commissioner takes up his or her position at the Appeals Commission, he or she is required to delete all his social media accounts and is strongly urged to stop posting on other persons' social media accounts. The new commissioner is also instructed not to socialize with people that could potentially appear before the Commission as barristers, solicitors or accountants. Especially if a new commissioner is hired from the private sector and has a big social network in the industry, this is no small sacrifice. O'Mahoney personally believed that such strict rules tend to ignore the simple fact that judges are human and have opinions which they should be able to express. Judges might even have something to contribute to society beyond their work in the courtroom.

In France, the approach is less rigid. Iljic noted that in France, judges of the Supreme Administrative Court interact with other stakeholders, especially with the administration. She believed this to be a good thing, not only because judges are only human but also because the interaction allows better understanding of all aspects of the cases submitted to the court so that the decisions can be rendered in a way that they are well understood and well executed. In France, this double objective of understanding and explaining is achieved by allowing and even encouraging judges to have contacts with the outside world and to pursue other activities, like teaching activities. Administrative court judges teach at universities, and *vice versa*, many academics also spend brief periods of time working as judges at the Supreme Administrative Court. The relationship with the press is channelled via a centralized press communications office at the Supreme Administrative Court. The office also issues official press releases covering decisions by the Court which are of high public interest.⁷ All these measures serve the purpose of making sure the Supreme Administrative Court speaks to the press and the public with just one voice. Iljic noted that in France, there is a longstanding and institutionalized tradition for the members of the litigation section of the Supreme Administrative Court to interact with the tax authorities to exchange views regarding the court's past decisions. Internal debates at the Court were held to assess whether such interactions were compatible with the taxpayers' right to a fair trial and equality of arms in tax procedures, given that taxpayers have no such opportunities. It was decided that the meetings could be held but only under certain conditions. Most importantly, the secret of judges' deliberations has to be respected at all times. Individual judges cannot disclose their personal opinions on legal questions brought to the court on cases they sat on. Similar meetings are also held with lawyers, and Iljic believed these had a lot of benefits as the meetings help adopting better court decisions and creating a more accessible and transparent judicial system. Iljic believed that all these interactions with the outside world by judges also carry a risk, namely they could hamper judges' subjective and objective impartiality. To address these concerns, a College of Ethics has been set up ten years ago for the administrative court system which answers ethics questions submitted to it by individual judges. For example, can a judge be a majority shareholder in his or her family business and serve as a tax judge at the same time, or can a tax judge accept a gift from the public to thank him or her for a decision taken in a certain case. The College of Ethics can also adopt general resolutions on certain issues that apply to all judges. All of the decisions of the College of Ethics are accessible online in an anonymous form. Iljic believed these to be very useful for judges seeking more guidance on the subject on a day-to-day basis.

2.5. Question 4: How do you see the future of the judiciary and were there any positive take-aways from the tax courts' measures adopted to deal with the COVID-19 pandemic? Will tax courts become redundant due to the increased use of alternative dispute resolution or the use of artificial intelligence to solve legal disputes?

John Colvin did not see arbitration and mediation as threats but rather as components of a dispute resolution process that is a less expensive and more efficient way for parties to obtain a satisfactory outcome to their disputes.

In France, the biggest issue faced by the administrative courts is the increasing number of disputes and the increasing complexity of these disputes. This presented the courts with various challenges. First of all, there is a clear need to lower or keep under control the turnover time of cases, even in light of the increasing complexity of the issues. There is a clear need for a quick administering of justice in the uncertain world of today, not just in health or civil liberties issues but also in tax issues, given the potential impact of tax issues on the economy. The second challenge is to create an accessible and understandable

7. See, for example: Supreme Administrative Court, Press Release of 6 August 2021, "Air pollution: Conseil d'État orders Government to pay 10 million euros", available at: <https://www.conseil-etat.fr/Pages-internationales/english/news/air-pollution-conseil-d-etat-orders-government-to-pay-10-million-euros>.

justice system for the public. Reforms have been made in this regard so that judges write their decisions in a more accessible language. Iljic believed increasing the oral component of the court procedure could also improve accessibility and efficiency. The third challenge is for the judiciary to fully incorporate new technological developments in its working methods. The administrative courts have digitalized court documents and digital platforms exist for parties to submit requests and file briefs. More challenging is the judiciary's position regarding predictive justice and artificial intelligence.^[8] Whether this technology or aspects of it can improve aspects of the courts' work is still an open question. A fourth challenge is to make the judiciary better reflect the pluralist society of today, for instance in terms of gender, religion, sexual orientation and so on.

Hallivis Pelayo believed that the COVID-19 pandemic had showcased the relevance of remote work. He emphasized that remote proceedings will however only be able to supplement in-person proceedings, without replacing them. Sometimes remote proceedings provide better results than in-person proceedings. Hallivis Pelayo believed that witnesses testifying in remote video conferences often provide better evidence than in the case of in-court testimonies simply because they are more relaxed in their familiar habitat, not being confronted with lawyers. Similarly, the forced working from home during the pandemic has settled the question whether remote working by judges and clerks can occur without a loss of productivity. On the contrary, remote work has shown to be instrumental to allow maximalization of quantitative and qualitative output of the courts.

Mark O'Mahoney observed that, unlike in Mexico, in Ireland there was a tremendous reluctance to adopt remote hearings during the COVID-19 pandemic. The legislative powers to adopt remote hearings were in place, but remote hearings never took place in Ireland in the midst of the pandemic. Today, in-person hearings are possible again, yet 40% of the hearings are done remotely. The apprehension by tax practitioners that remote hearings are cumbersome and inefficient have been completely disproved. O'Mahoney believed remote hearings were part of the future. He also noted that because of the pandemic, the Irish tax authorities briefly stopped doing field audits, which resulted in a lower number of (re-)assessments. This, in turn, eventually resulted in a lower number of appeal requests with the Tax Appeals Commission which allowed the judges time to look only at the backlog of cases. As a result, the term for initial hearing dates for new cases has been reduced from six to nine months to only three months.

With regard to the issue of the lasting impact of COVID-19 measures on courts, Thomas Stadelmann referred to a recent edition of the International Journal for Court Administration.^[9] As to the impact of alternative private dispute resolution mechanisms on the judiciary, he noted that traditional courts will have to become cheaper and more efficient to stay relevant. However, in tax matters, tax courts have a solid monopoly to settle disputes between the taxpayer and the tax authorities which cannot be replaced by private alternatives. This does not mean that tax courts should not improve their services. As to the incorporation of new technologies in the courts' work, Stadelmann emphasized the importance of judges to be on control of the modernization process, and not the executive branch or the ICT specialists. Judges are no technology experts so there is a need for multidisciplinary discussion with all relevant actors. Entities outside the tax realm like the International Association of Court Administration (IACA)^[10] and the Justice Administration Research Association do relevant work in this regard which is also beneficial for modernization of the tax judiciaries.

Justice Péter Darák concluded the session by emphasizing the overall conclusion that tax judges do have the willingness to leave their ivory towers but that the future of the tax judiciary is not necessarily in their own hands. Justice Wim Wijnen said that the crux of the matter is not whether the door of the judges' ivory tower is open, but rather how far it can or should be opened. He thanked the panellists for their efforts.

3. Taxpayers and Their Rights in the Courtroom

The second session consisted of presentations by two guest speakers, Prof. Philip Baker and Prof. Pasquale Pistone, sharing their insights on the rights of taxpayers in their final dispute in the courtroom, which was the topic of the joint IATJ publication offered to the *Bulletin for International Taxation* on the occasion of its 75th anniversary.^[11] Wim Wijnen introduced the speakers and made reference to the recent book on the topic, authored by Pistone and Juliane Kokott.^[12]

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8. "Predictive justice" refers to the use of data analysis and artificial intelligence technologies to predict the outcome of a judgment. It essentially provides for an evaluation of the well-foundedness/unfoundedness of a legal question in relation to a specific issue based on the processing of the complete, updated and available set of relevant past judicial data.
 9. See International Journal for Court Administration, Edition of 6 May 2021, No. 12(2), available at <https://www.iacajournal.org/36/volume/12/issue/2/> (accessed 20 April 2022).
 10. www.iaca.ws
 11. See 75 Bull. Intl. Taxn. 9 (2021), Journal Articles & Opinion Pieces IBFD.
 12. See J. Kokott & P. Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights*, Beck/Hart/Nomos (2022).

3.1. General perspective on taxpayer rights in the courtroom

3.1.1. The right to a fair trial under international human rights instruments

Philip Baker focused his presentation on the rights under international human rights instruments, and the right to a fair trial, and in particular on those matters under control of the tax judge. Baker started by referring to provisions in the conventions to which countries across the globe are party, like article 10 of the Universal Declaration of Human Rights (UDHR) of 1948^[13] and article 14 of the International Covenant on Civil and Political Rights (ICCPR) of 1966,^[14] and the provisions in regional conventions, like article 8 of the American Convention on Human Rights (ACHR) of 1969,^[15] article 6 of the European Convention on Human Rights (ECHR) of 1950,^[16] and article 47 in the Charter of Fundamental Rights of the European Union (EU Charter).^[17]

With regard to the ECHR, Baker then referred to the *Ferrazzini* fallacy, namely the (debateable) conclusion that the right to a fair trial under the ECHR does not apply to tax matters. *Ferrazzini* (2001) involved a tax litigation in Italy that had been pending for over 13 years without a first instance court hearing. The taxpayer appealed to the European Court of Human Rights and, by a slim majority, the Grand Chamber of the ECHR held, in line with its previous case law, that article 6 of the ECHR refers to the determination of criminal charges and civil rights and obligations^[18] but not to administrative charges and, as such, was not applicable to ordinary proceedings for the determination of a tax liability.^[19] The decision is increasingly subject to criticism and Baker believes that it is only a matter of time before the Court will reverse it. Baker further observed that *Ferrazzini* had been decided without a hearing, which means that the parties may not have been fully represented and that there was no discussion of equivalent protections under other human rights instruments. Article 8 of the ACHR does refer to the determination of obligations of fiscal nature as within the scope of the right to a fair trial.^[20] As a principle of human rights protection, the doctrine of equivalent protection provides that if protection in tax matters is afforded under other international instruments, it would be surprising if it would not be provided under the ECHR. As it stands today, the ECHR jurisprudence also makes a peculiar distinction between social security taxes which are covered by article 6 as held by the Court in *Schouten and Meldrum* (1994)^[21] and since *Vilho Eskelinen and Others* (2007) the scope of article 6 has been expanded by the Court to also cover jurisprudence on civil servants,^[22] whereas prior to this decision it was believed not to do so. Baker concluded that tax was thus one of the few areas that in principle is excluded from the scope of article 6 of the ECHR, yet a growing number of national courts seem to assume that *Ferrazzini* is wrongly decided.

Baker then set out to identify a common leitmotif in the provisions on the right to a fair trial in the various international instruments. Common themes across all instruments seem to be (i) the right to a fair hearing (ii) which takes place in public (iii) and within a reasonable time (iv) by a competent, independent and impartial tribunal.

3.1.2. Aspects of the right to a fair trial in tax cases

Baker then proceeded by explaining how certain aspects of the elements that make up the right to a fair trial in the international instruments are also relevant in the context of tax cases.

3.1.2.1. Right to a (oral) hearing

With regard to the right to a hearing, for instance, the question can be posed whether this implies that taxpayers have a right to an oral hearing in tax proceedings and prevents the hearing of a tax dispute from taking place entirely in written form. Baker observed that the judges' contributions to the special edition of the *Bulletin* on taxpayer's rights provided for examples of varied practices across countries. The case law of the European Court of Human Rights does give some guidance in this regard.

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13. Article 10 of the UDHR reads as follows: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."
 14. Article 14 of the ICCPR reads as follows: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [...]"
 15. Article 8 of the ACHR reads as follows: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."
 16. Article 6 of the ECHR reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial [...] where [...] the protection of the private life of the parties so require [...]"
 17. Article 47 of the EU Charter reads as follows: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."
 18. See, *supra*, n. 14.
 19. European Court of Human Rights: *Ferrazzini v Italy*, Application No. 44759/98, 12 July 2001, (2002) 34 E.H.R.R. 45.
 20. See, *supra*, n. 13.
 21. European Court of Human Rights: *Schouten and Meldrum v The Netherlands*, Application No. 19005/9144759/98, 9 December 1994, (1994) E.H.R.R. 44.
 22. European Court of Human Rights: *Vilho Eskelinen and Others v. Finland*, Application No. 63235/00, 19 March 2007, (2007) 45 E.H.R.R. 43.

In *Lehtinen* (2002), the Court had to establish whether a Finnish taxpayer who challenged an additional assessment and was subject to a procedure that was entirely taking place in written form with the taxpayer unable to challenge some of the evidence given or to cross-examine witnesses, was in line with the right to a hearing in article 6 of the ECHR. The Court held that there was not necessarily a right to an oral hearing under that provision. However, where certain issues, like the credibility of witnesses and the examination of those witnesses on the documentation, are critical to the case, then an oral hearing is required.^[23] The ECtHR held that not granting an oral hearing in such instances would violate article 6. In subsequent cases regarding tax penalties and tax surcharges, the ECtHR came to the same conclusion with regard to the right to cross-examine witnesses.^[24]

3.1.2.2. Right to a public hearing

Baker noted that the *Bulletin* articles revealed that this issue is alive in many jurisdictions. If there is a right to a public hearing, there is a potential conflict between the administration of justice in public, and the right to privacy of personal information. Taxpayers may be deterred from challenging a tax assessment for fear of (adverse) publicity. Baker observed that various solutions are contemplated across countries. For example, as a general principle, hearings could be held in public, but with the taxpayer having the option to request hearings to be held behind closed doors. This approach is followed in Germany where the taxpayer has the right to request closed-door hearings.^[25] A similar approach is followed in Ireland. Since the establishment of the new Tax Appeals Commission in 2016, 100% of taxpayers have, however, asked for *in camera* hearings.^[26] In Korea (Rep.), hearings are in public, but personal details may be withheld.^[27] The inverse system is also possible. In the Netherlands, for instance, hearings are behind closed doors as a general principle unless the court rules that the hearing is to be in public.^[28] In Baker's personal opinion, the German and Irish position was more in line with the ECHR than other countries. Given that the international instruments require a public hearing, this should be the starting point but with the taxpayer given the right (rather than a limited discretion) to ask for the hearing to be held in private. Baker noted that court reports may always be anonymized so that taxpayer personal details are kept private, which is the practice in various countries.

3.1.2.3. Right to a determination within a reasonable time

Baker explained that this was a rather contentious issue. The ECtHR has examined this issue on numerous occasions, but has generally held that there is no fixed standard for a reasonable time and that it depends on the complexity of the case. The time period is from the start of the audit or investigation through the ultimate determination by the highest court. Delays on the part of the government (including within the tax court system) require explanation. Baker noted that the ECtHR seems to use a rule of thumb according to which a five-year term from start to final resolution is considered the limit of what is a reasonable time. If it takes more time, an explanation is due by the government. If there is no valid explanation for the breach, the taxpayer is usually held entitled to a standard award of "just satisfaction" in the form of a monetary compensation usually between EUR 2,000 and EUR 8,000. Baker suspected that in this area, the current non-applicability of article 6 of the ECHR in the countries of Europe has the biggest impact. If article 6 would apply, like it does in criminal and civil cases, governments would need to make sure their legal departments and court facilities are up to the task to meet this five-year watershed. At the moment, many jurisdictions are confronted with serious delays in the turnover of tax cases.

Baker noted that there are solutions. Some countries employ fixed timetables for hearings and decisions. In the Netherlands, for instance, written decisions are to be rendered within six weeks of a hearing. Furthermore, a strict maximum term of two years is allowed for each of the two instances of Dutch courts that hear tax cases and a EUR 500 compensation is granted for each half-year delay.^[29] Baker observed that this was more or less in line with the amount of "just satisfaction" granted by the ECtHR. He believed that, generally speaking, courts should be more proactive. If a case comes to the tax court, and it has already exceeded a reasonable time frame of five years or more. As such, every day of delay by the court infringes the taxpayers' rights. Baker believed that monetary compensation is not an adequate remedy in such circumstances and that the court should have the case thrown out on the grounds that the taxpayer can no longer receive a fair trial. Only by effectively throwing out cases, governments will make sure adequate resources are allocated so that cases proceed promptly through the tax appeal system.

23. European Court of Human Rights: *Lehtinen v. Finland*, Application No. 32993/02, 22 July 2008.

24. See European Court of Human Rights: *Chap v. Armenia*, Application No. 15485/09, 4 May 2017; and European Court of Human Rights: *Pakozdi v. Hungary*, Application No. 51269/07, 25 November 2014.

25. See S. Tiedchen, *Taxpayers in the Courtroom*, 75 Bull. Intl. Taxn. 9 (2021), Journal Articles & Opinion Pieces IBFD.

26. See M. O'Mahony, *The Irish Taxpayer's Right to a Private Appeal Hearing*, 75 Bull. Intl. Taxn. 9 (2021), Journal Articles & Opinion Pieces IBFD.

27. See E. (EuiYoung) Lee, *Taxpayers' Rights in the Courtroom in Korea*, 75 Bull. Intl. Taxn. 9 (2021), Journal Articles & Opinion Pieces IBFD.

28. See R.J. Koopman, *The Taxpayer's Rights in Court*, 75 Bull. Intl. Taxn. 9 (2021), Journal Articles & Opinion Pieces IBFD.

29. Koopman, *supra* n. 28.

3.1.2.4. The right to an independent and impartial tribunal

Baker observed that several authors in the special IATJ edition of the *Bulletin* raised the question of how tax judges should deal with the problem of unrepresented or badly represented taxpayers in their courts, and whether the trial judge should step in risks hampering his or her appearance of impartiality.

A few interesting solutions were mentioned in the articles. One approach could be for a judge to merely indicate the relevant statutory rules that need to be satisfied and what evidence would satisfy these rules and then leave it to the taxpayer who is then guided in a very objective way, to satisfy those requirements. Other solutions are the availability of legal aid in tax matters and pro bono advisory services. External assistance would aid the tax court in satisfying its duty of providing a fair hearing by an impartial tribunal.

3.1.2.5. A hearing by a competent tribunal

Baker observed that not all international instruments referred to the right to a hearing by a competent tribunal. At least two instruments – the ICCPR and the ACHR – do refer to it. Baker believed that “competent” could be understood in two ways. The term might refer to the fact that the tribunal should have the legal power to resolve the matter. The term could also signify that the tribunal needs to be competent to deal with the issues in the sense that the judges should have the relevant technical expertise. Baker wondered, however, whether the growing complexity of tax issues made it altogether possible for a tax judge to be “competent” in all areas. Nowadays, tax advisors and barristers are highly specialized, dealing only with direct taxation matters, for example. So, the question should be asked whether there is a need or a right for specialized tax judges to hear certain cases and whether tax court administration should be required to direct cases to judges with specialized expertise in particular areas.

Baker noted that certain tax courts in Europe like the Dutch Supreme Court (*Hoge Raad*), the German Federal Supreme Tax Court (*Bundesfinanzhof*) and the French Supreme Administrative Court (*Conseil d'Etat*) have expertise at all levels and senates for all relevant areas of taxation. Another approach is for tax courts to rely on specialist assessors in certain cases, like transfer pricing cases.

3.1.3. Concluding observations

Baker concluded his presentation by reiterating that the right to a fair trial imposes relatively few, basic requirements. The contributions in the special IATJ *Bulletin* edition displayed a variety of practices amongst the national tax courts. Some countries may already comply with all requirements. Other countries may need to reconsider their practices, especially with respect to case turnover delays, which often arise from inadequate resources.

Pasquale Pistone provided remarks on Baker's presentation, starting with what he called the “tax taboo” of the *Ferrazzini* case. Pistone shared Baker's view that the case was arguably wrongly decided and emphasized the point that tax should not be a domain where the rule of law applies along a different standard. Pistone observed that, more in general, there was a constant tension between collective rights and individual rights. He emphasized that collective rights and society's fight against tax avoidance and evasion is absolutely important, given the importance of taxpayers paying their fair share of tax. However, the need to protect collective rights should not go to the detriment of safeguarding fundamental rights of individual taxpayers. Pistone observed that providing an effective remedy in the case of breach of individual rights touched upon the core of the rule of law.

Pistone then referred to the European Court of Justice's (ECJ) decision in *Banco de Santander* (2020)^[30] in which the ECJ was confronted with the Spanish tax procedure rules according to which access to the judiciary was conditioned on the exhaustion of administrative review. The ECJ held that the highest instance of the administrative review, namely the *Tribunal Económico Administrativo Central*, should not be regarded as a “tribunal” for the purpose of EU law. Pistone observed that the ECJ's holding was an example of an issue that would unduly delay the access to justice for taxpayers. He noted that the principle of exhaustion of administrative review was meant to serve as a filter to the access to the judiciary. Country analysis shows, however, that this filter function does not always operate adequately, which might be the case, for example, if the outcomes of administrative review procedures are on aggregate heavily skewed in favour of the tax authorities.^[31]

Finally, Pistone observed that there appeared to be a perception in certain national courts in Europe that taxpayers' rights are not to be regarded as human rights so that human rights courts are believed not to be equipped to provide taxpayers with the protection in line with the international human rights standards. This perception might result in different degrees of taxpayers' rights protection across various jurisdictions and different degrees of prevalence was attributed to the protection of collective rights over individual rights. Pistone emphasized that (individual) taxpayers are humans. As such, the fundamental rights of

30. European Court of Justice: 21 January 2020, *Banco de Santander*, C-274/14.

31. For more on this topic, see EATLP, Vol. 18 (2019), *Tax Procedures*, Books IBFD.

taxpayers are to be regarded as human rights. This basic assumption is essential to promote a global culture of the rule of law, also in the field of taxation.

3.2. *Ne bis in idem* and taxation: A missing dialogue between European and national courts

3.2.1. Conceptual framework

Pasquale Pistone started his presentation by focussing on the conceptual framework in the tax procedure of measures taken in case a taxpayer fails to pay assessed taxes in due time. National tax procedures operate differently, but in general non-payment has repercussions, like the obligation to pay interest or the administering of a penalty or sanction. The dividing line between penalty and sanction is not very clear. Pistone observed that a penalty was an administrative payment connected with the failure to timely and fully comply with tax obligations. One could argue, however, that this definition also captures a sanction or a surcharge. Pistone emphasized that a “penalty” implies an act of penalization, namely the function of creating unfavourable consequences for non-compliance. A surcharge lacks this component of penalization. It is an additional payment due merely for reason of the lack of timely compliance with a tax obligation. Sanctions and penalties both presuppose a violation of a norm. The term penalty might include the nuance that it serves to penalize only minor violations. The administering of a sanction, and especially a criminal sanction, requires the presence of a subjective element, namely the intention of the taxpayer to violate a certain norm. Penalties might also require such a subjective element, although some penalties are also administered in a (quasi-)automatic way, independent of taxpayer intent.

Pistone observed that countries across the world employ different procedures with regard to the administering of penalties and sanctions. In most countries, the tax authorities impose penalties within the framework of tax procedures and request the imposition of criminal sanctions for which the involvement of the judiciary is needed.

Pistone noted that in Europe, the dividing line between penalty and sanction has been clarified in settled case law by the ECtHR. According to the so-called “Engel criteria”,^[32] both the nature of the offence and the nature and intensity or degree of severity of the punishment are relevant to distinguish the two.

3.2.2. Applying *ne bis in idem* to tax penalties and criminal sanctions

The question then arises whether in light of the *ne bis in idem* principle a tax penalty and a criminal sanction can apply in respect of one and the same violation. As to whether and how the principle of double jeopardy applies in tax matters, the situation becomes more complicated. In *A & B v Norway* (2011),^[33] the ECtHR held that both can apply in respect to the same violation. The ECJ came to the opposite conclusion in *Åkerberg Fransson* (2013).^[34] Pistone noted that subsequent decisions, both courts had, however, come to opposite conclusions on this exact matter.^[35]

Pistone believed that these developments at the two courts illustrated the difficulties of drawing up common criteria to distinguish sanctions and penalties without looking at their function. In some cases, a penalty will be closer to a surcharge and in other cases they might be similar to criminal sanctions.

As to the question of whether two different procedures can be used to levy sanctions and penalties in respect of one single violation, Pistone observed that national systems often keep a separate jurisdiction for criminal matters, so it is difficult to keep precise control over the two proceedings, namely the administering of the penalty and the criminal sanction. An additional layer of complexity arises in case one violation (for instance of a VAT rule) has effects in two countries. Pistone referred in this regard to two non-tax cases currently pending before the ECJ, *Bpost* and *Nordzucker*. In those cases, Advocate General Bobek invited the Court to hold that if proceedings are different – as to the identity of the offender or the relevant facts or the protected legal interest – two fines on the same violation are acceptable. However, if there is identity and protection of the same legal interest across multiple countries, for instance in case two Member States are both issuing fines to enforce competition law on the same violation, then article 50 of the EU Charter prohibits the imposition of a second sanction.^[36]

32. The criteria were first developed by the ECtHR in its decision in *Engel* (1976). See European Court of Human Rights, *Engel and others v. the Netherlands*, Application no. 5100.71, 23 November 1976, at para. 82.

33. European Court of Human Rights: 15 November 2016, *A & B v. Norway*, application nos. 24130/11 and 29758/11).

34. Court of Justice of the European Union, 26 February 2013, *Aklagaren v Hans Åkerberg Fransson*, No. C-617/10, Case Law IBFD.

35. See European Court of Human Rights, *Kristjánsson v Iceland*, Application No. 12951/18, 31 August 2021; and Court of Justice of the European Union, *Menci*, No. C-524/15, 20 March 2018, Case Law IBFD

36. See EUCJ, *Bpost*, C-117/20, AG Bobek Opinion of 2 September 2021; and EUCJ, C-151/20, *Nordzucker*, AG Bobek Opinion of 2 September 2021.

3.2.3. Concluding observations

Pistone concluded his presentation by expressing his personal view that *ne bis in idem* should apply to tax matters just as it applies elsewhere. However, the lack of conceptual clarity on the concepts of tax penalties, surcharges and criminal tax sanctions makes this a difficult exercise.

In his concluding remarks, Philip Baker believed *ne bis in idem* did not raise a lot of trouble in tax matters. A typical case concerns a taxpayer who has committed an offence of tax evasion. This taxpayer will then face two sets of proceedings, one before a tax court for the recovery of the tax that might involve a tax surcharge, and another before a criminal court which might result in a criminal conviction. Baker believed that as long as there is proportionality in the sense that the criminal court takes into account that the taxpayer has already been subject to a surcharge or a penalty in a parallel proceeding, there is no infringement of human rights. Seen from this perspective, the amount of *ne bis in idem* cases in tax matters brought to the ECtHR was rather surprising to Baker. He also expected that the ECtHR's decision in *A & B* might not be the Court's last word on the matter, given that the test developed in said decision turned out to be not very workable in practice. For there (not) to be a violation of *ne bis in idem*, administrative proceedings and criminal proceedings are to be sufficiently connected in substance and time to form a single composite procedure. This turns out to be a very difficult test to apply in practice by judges required to decide whether a case has to be thrown out because of double jeopardy, after the taxpayer having been found guilty and liable in the tax assessment procedure.

As to Anthony Gafoor's question from the audience how to distinguish human rights and taxpayers' rights, Baker responded that individual taxpayers clearly enjoy human rights, but even corporate taxpayers will enjoy certain human rights and this is well established in settled case law by the ECtHR. There is no reason why a company should not be entitled to the right to a fair trial. A company merely represents the interests of the individuals behind it. Baker added that taxpayers' rights go beyond human rights. The majority of the rights of a taxpayer resort from national administrative law and national constitutions. Human rights instruments are not the only source of taxpayers' rights, they are merely a subset. Baker believed that a crucial question today is how far in tax matters one should be aware of collective human rights – the right to health, the right to education, the right to development – all of which require the government to have resources. A new debate is ongoing as to whether tax evasion and avoidance is per se infringing human rights in the sense of collective human rights.

4. Final Remarks

The session was closed by Wim Wijnen who thanked the two guest speakers for their interesting contributions which he believed showed once again that our current world is far from perfect. After thanking organizers and participants, the 11th assembly of the IATJ was closed by IATJ President Eugene Rossiter.