



Universiteit
Leiden
The Netherlands

A multilateral tax treaty: designing an instrument to modernise international tax law

Broekhuijsen, D.M.; Broekhuijsen D.M.

Citation

Broekhuijsen, D. M. (2017, November 16). *A multilateral tax treaty: designing an instrument to modernise international tax law*. The Meijers Research Institute and Graduate School of the Leiden Law School of Leiden University. E.M. Meijers Institute, Leiden. Retrieved from <https://hdl.handle.net/1887/57407>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/57407>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/57407> holds various files of this Leiden University dissertation

Author: Broekhuijsen, D.M.

Title: A multilateral tax treaty : designing an instrument to modernise international tax law

Date: 2017-11-16

A Multilateral Tax Treaty

A Multilateral Tax Treaty

Designing an instrument to modernise
international tax law

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op woensdag 16 november 2017
klokke 15.00 uur

door

Dirk Maarten Broekhuijsen

geboren te Leiderdorp

in 1987

Promotoren: prof. dr. F.A. Engelen
prof. dr. S.C.W. Douma

Promotiecommissie: prof. dr. H. Vording
prof. A. Christians (McGill University, Montreal,
Canada)
prof. dr. E. Reimer (Universität Heidelberg, Duitsland)
dr. N.J.G. van Willigen
prof. dr. T. Bender

Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

© 2017 D.M. Broekhuijsen

Behoudens de in of krachtens de Auteurswet gestelde uitzonderingen mag niets uit deze uitgave worden veeleenvoudigd, opgeslagen in een geautomatiseerd gegevensbestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.

Voor zover het maken van reprografische veeleenvoudingen uit deze uitgave is toegestaan op grond van artikel 16h Auteurswet dient men de daarvoor wettelijk verschuldigde vergoedingen te voldoen aan de Stichting Reprorecht (Postbus 3051, 2130 KB Hoofddorp, www.reprorecht.nl). Voor het overnemen van (een) gedeelte(n) uit deze uitgave in bloemlezingen, readers en andere compilatiewerken (art. 16 Auteurswet) kan men zich wenden tot de Stichting PRO (Stichting Publicatie- en Reproductierechten Organisatie, Postbus 3060, 2130 KB Hoofddorp, www.stichting-pro.nl).

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means without written permission from the publisher.

Short table of contents

LIST OF ABBREVIATIONS	XIII
1 Introduction	1
2 Efforts for multilateral international tax rules: 1920-1992	9
3 The prospects of a multilateral agreement for international taxation	25
4 In a perfect world: a normative view on multilateral cooperation in international taxation	41
5 In a less than perfect world: a realistic view on multilateral cooperation in international taxation	63
6 A design strategy for a multilateral agreement for international taxation	101
7 The design of a multilateral agreement for international taxation	137
8 An evaluation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting	215
9 Conclusions	237
SAMENVATTING (DUTCH SUMMARY)	243
REFERENCES	249
ANNEX – DRAFT CLAUSES TO THE FRAMEWORK CONVENTION-PROTOCOL DESIGN AND THE ‘AGREEMENT TO SCOPE’	273
INDEX	291
CURRICULUM VITAE	293

Table of contents

LIST OF ABBREVIATIONS	XIII
1 INTRODUCTION	1
2 EFFORTS FOR MULTILATERAL INTERNATIONAL TAX RULES: 1920-1992	9
2.1 Introduction	9
2.2 An analysis of earlier efforts for multilateral agreement in the area of international taxation	10
2.2.1 1920-1943: The founding period of international tax law	10
2.2.2 1943-1946: Emerging consensus under model bilateral tax conventions, a comparison of the London and Mexico Drafts	15
2.2.3 1946-1992: Impracticalities of further efforts for a comprehensive multilateral tax treaty	20
2.3 Conclusion	21
3 THE PROSPECTS OF A MULTILATERAL AGREEMENT FOR INTERNATIONAL TAXATION	25
3.1 Introduction	25
3.2 The relevance of the OECD MTC in modernising the tax treaty network	27
3.3 The relevance of the OECD Commentaries in modernising the tax treaty network	30
3.3.1 Introduction	30
3.3.2 Case selection	31
3.3.3 Coding and grouping	33
3.3.4 Analysis	34
3.3.5 Outcomes	34
3.4 A level playing field	37
3.5 Conclusion: the prospects of a multilateral agreement for international taxation	39

4	IN A PERFECT WORLD: A NORMATIVE VIEW ON MULTILATERAL COOPERATION IN INTERNATIONAL TAXATION	41
4.1	Introduction	41
4.2	Two cosmopolitan views on procedural fairness	46
4.2.1	Habermas' concept of legitimate law	46
4.2.1.1	Social and system integration	47
4.2.1.2	Deliberative democracy	48
4.2.1.3	Deliberative international tax law	50
4.2.2	Nussbaum's social contract	52
4.2.2.1	The sovereign duty	52
4.2.2.2	Interpreting the sovereign duty as a social contract	54
4.2.2.3	Mutual advantage	55
4.2.2.4	An open debate about the scope and content of the social contract	57
4.2.3	Continuous, inclusive and transparent deliberation on tax rules	58
4.3	Conclusions	60
5	IN A LESS THAN PERFECT WORLD: A REALISTIC VIEW ON MULTILATERAL COOPERATION IN INTERNATIONAL TAXATION	63
5.1	Introduction	63
5.2	Selecting the most promising international relations perspective for analysing international tax relations	64
5.3	The neoliberal institutionalist view on bilateral tax relations	72
5.3.1	Introduction	72
5.3.2	Bilateralism as a response to asymmetric interests	72
5.3.3	Bilateralism as a means to maximise membership surplus	74
5.3.4	The substance of tax treaties: distributive issues and 'rules of the road'	75
5.3.5	Introducing external effects	77
5.4	The neoliberal institutionalist view on multilateral tax relations	79
5.4.1	The substance of a multilateral agreement for international taxation	79
5.4.2	The veil of uncertainty	80
5.4.3	A synthesis: uncertainty on distributional issues	82
5.4.4	Some illustrations: The feasibility of a multilateral approach in some tax policy changes	83
5.4.5	Two rational design presumptions point towards using flexibility mechanisms	89
5.4.6	What type of flexibility mechanisms?	91
5.4.7	Procedural elements of a multilateral agreement for international taxation	92
5.4.7.1	Participants	92
5.4.7.2	Transparency	95
5.5	Conclusions	98

6	A DESIGN STRATEGY FOR A MULTILATERAL AGREEMENT FOR INTERNATIONAL TAXATION	101
6.1	Introduction	101
6.2	A forum for discussions	103
6.2.1	The level playing field	103
6.2.2	A quicker tax treaty amendment process	106
6.2.3	Introducing the managerial approach to international taxation	109
6.3	The design strategy: 'managing' international tax matters over time	110
6.3.1	Introduction	110
6.3.2	Continuous interaction	111
6.3.3	Building on shared understandings	114
6.3.3.1	Introduction	114
6.3.3.2	Norm entrepreneurs	115
6.3.3.3	Epistemic communities	116
6.3.3.4	Transparency and inclusivity	117
6.3.4	Legal norms	119
6.3.5	Transforming international tax law over time	123
6.4	An illustration: the climate change regime	128
6.4.1	Introduction	128
6.4.2	The problem structure of addressing climate change is comparable to that of addressing BEPS	129
6.4.3	Managing the climate change problem by multilateral agreement	131
6.5	Conclusions	134
7	THE DESIGN OF A MULTILATERAL AGREEMENT FOR INTERNATIONAL TAXATION	137
7.1	Introduction	137
<i>Part 7A: The core elements of the multilateral agreement for international taxation</i>		140
7.2	Introduction to Part 7A	140
7.3	The organisation managing the multilateral regime	141
7.3.1	The need for institutional flexibility	141
7.3.2	Treaty bodies in international environmental law	142
7.3.3	Can treaty bodies be used for the multilateral agreement for international taxation?	146
7.4	Guiding principles	148
7.4.1	Objectives and guiding principles in international legal instruments	148
7.4.2	The use of objectives and guiding principles in the multilateral agreement for international taxation	150
7.5	The multilateral agreement's network effects	152
7.5.1	Introduction	152
7.5.2	Network effects in international public law	153

7.5.2.1	Can the norms of a multilateral agreement become a binding obligation on third states through estoppel or acquiescence?	153
7.5.2.2	The influence of a multilateral agreement on the interpretation of treaties with third states	160
7.5.2.3	A pactum de agendo: harmonising existing and future incompatible bilateral treaties with third states	165
7.5.3	The multilateral agreement's potential network effects	167
7.6	Conclusion of Part 7A: The core elements of the multilateral agreement for international taxation	168
	<i>Part 7B: The framework convention-protocol design</i>	169
7.7	Introduction to Part 7B	169
7.8	The framework convention-protocol design	170
7.8.1	The use of the framework convention-protocol design in international law	170
7.8.2	The use of the framework convention-protocol design for the multilateral agreement for international taxation	172
7.9	The relationship between the multilateral agreement and the bilateral tax treaty network	172
7.9.1	Introduction	172
7.9.2	The residual rules on conflict resolution	173
7.9.3	A conflict clause governing the relationship between the multilateral agreement and the bilateral treaty network	176
7.9.3.1	Introduction	176
7.9.3.2	The relationship between the multilateral agreement and the bilateral tax treaty network	177
7.9.3.3	The consequences of conflict	180
7.9.3.4	The relationship between the multilateral agreement and treaties with third states	182
7.9.3.5	Conclusion	183
7.10	The use of interpretative flexibility mechanisms	183
7.10.1	Introduction	183
7.10.2	Reservations and menu options	184
7.10.2.1	Reservations and 'menu options' in international law	184
7.10.2.2	Reservations and 'menu options' in the multilateral agreement for international taxation	187
7.10.3	'Rules of the road'	189
7.11	Dynamic decision-making procedures	193
7.11.1	The need for dynamic decision-making procedures under the framework convention-protocol design	193
7.11.2	Dynamic decision-making procedures in international law	195
7.11.3	The use of dynamic decision-making procedures in the multilateral agreement for international taxation	200
7.12	Conclusions of Part 7B: The framework convention-protocol design	202

<i>Table of contents</i>	XI
<i>Part 7C: The 'Agreement to Scope'</i>	204
7.13 Introduction to Part 7C	204
7.14 The 'agreement to scope'	204
7.14.1 The 'agreement to scope' in international public law	204
7.14.1.1 <i>Pactum de contrahendo</i> and <i>pactum de negotiando</i>	205
7.14.1.2 Monitoring and reporting mechanisms under the 'agreement to scope'	208
7.14.2 The use of the 'agreement to scope' design for the multilateral agreement for international taxation	210
7.15 Conclusions of Part 7C: The 'agreement to scope'	212
7.16 Conclusions: The contours of the multilateral agreement for international taxation	212
8 AN EVALUATION OF THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING	215
8.1 Introduction	215
8.2 Explaining the BEPS Convention	216
8.2.1 Articles 3-15 avoid distributive concerns	216
8.2.1.1 Introduction	216
8.2.1.2 Multilateral consensus on 'rules of the road'	216
8.2.1.3 Agreement is facilitated by coordinated bilateral negotiations	218
8.2.1.4 Provisions that avoid distributive concerns altogether	219
8.2.2 The Convention employs elements of the framework convention/protocol and the agreement to scope designs	222
8.2.2.1 Introductory observations	222
8.2.2.2 Reservations and optional provisions	223
8.2.2.3 How is the relationship between the BEPS Convention and the network of bilateral tax treaties governed?	224
8.2.2.4 Adoption of protocols	229
8.2.2.5 Obligations to reach agreement: <i>pacta de negotiando</i>	229
8.2.2.6 Amendments to the Convention	230
8.3 The BEPS Convention: a structural solution to modernising international tax law?	230
8.4 Summary and conclusions	235
9 CONCLUSIONS	237
SAMENVATTING (DUTCH SUMMARY)	243
REFERENCES	249
ANNEX – DRAFT CLAUSES TO THE FRAMEWORK CONVENTION-PROTOCOL DESIGN AND THE 'AGREEMENT TO SCOPE'	273
A. The Framework convention-protocol design	274
B. The 'agreement to scope'	284
INDEX	291
CURRICULUM VITAE	293

List of abbreviations

ACE	Allowance for Corporate Equity
BC	BEPS Convention
BEPS	Base Erosion and Profit Shifting
BEPS Convention	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
BRICS	Brazil, Russia, India, China, South Africa
CCCTB	Common Consolidated Corporate Tax Base
CFA	Committee on Fiscal Affairs (of the OECD).
Ch.	Chapter
COP	Conference of the Parties
CPB	Centraal Planbureau (Netherlands Bureau for Economic Policy Analysis)
EBITDA	Earnings Before Interest, Taxes, Depreciation and Amortization
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FDI	Foreign Direct Investment
GAAR	General anti-avoidance rule
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBFD	International Bureau for Fiscal Documentation
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
ILC	International Law Commission
IMF	International Monetary Fund
IMO	International Maritime Organisation
IO	International Organisation
IPCC	International Panel on Climate Change
ITC	International Tax Center Leiden
IWC	International Whaling Commission
LOB	Limitation on Benefits
MNE	Multinational enterprise
NAFO	Northwest Atlantic Fisheries Organisation
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organisation
OECD	Organisation for European Economic Cooperation

OECD	Organisation for Economic Co-operation and Development
OECD MTC	The OECD Model Tax Convention on Income and on Capital
OUP	Oxford University Press
Par.	Paragraph
PCIJ	Permanent Court of International Justice
PE	Permanent Establishment
PPT	Principal Purpose Test
Sec.	Section
SSRN	Social Science Research Network
UN	United Nations
UNFCCC	UN Framework Convention on Climate Change
UNHCR	UN High Commissioner for Refugees
UNTS	United Nations Treaty Service
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WTO	World Trade Organisation