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

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# 4 In a perfect world: a normative view on multilateral cooperation in international taxation

## 4.1 INTRODUCTION

The previous chapter has shown that what the multilateral treaty should, most importantly, do, is solve the issues related to the implementation of new norms in the network of bilateral tax treaties, and create a level playing field, so that cooperation between states can converge on the necessary solutions for collective action problems. But these objectives do not provide any insight in what the multilateral agreement can and should look like. E.g., how can and should international tax law of the future be made? Who can and should participate? What types of norms can multilaterally be achieved and should be aimed for?

This chapter will set forth a normative view on multilateral cooperation in the area of international taxation. In this chapter, the aim is to construct an 'ideal' model of international tax cooperation by considering how states could enhance the 'fairness' of international tax law, addressing the 'should' part of the questions above. The chapter provides, in other words, the compass on which the designers of a multilateral solution for international tax should navigate. The next chapter moderates this ideal by providing a 'realistic' or 'instrumental' perspective on multilateral cooperation in international taxation. The aim of Chapter 5 is, in other words, to explore what is, in fact, politically feasible in the international tax arena (the 'can' part of the questions above). In the considerations of states whether to enter into a multilateral agreement, 'achieving fairness' is unlikely to be the dominant determinant: defending the national interests is a more likely motive. Chapter 6 brings the outcomes of Chapters 4 and 5 together by formulating a design strategy for a multilateral agreement for international taxation.

Why consider the 'fairness' of international tax rules as a compass to guide the design of a multilateral agreement for international taxation? It goes without saying that 'norms' and 'values' have increasingly come to matter in international tax. The idea that MNEs should pay a 'fair share' is on the rise.[1] And indeed, concepts of 'fairness' have likely been the catalyst for state cooperation on the BEPS Project. After all, the BEPS Project aims to 'restore the

1 See for a Dutch pioneer in this regard: R.H. Happé, Belastingethiek: een kwestie van fair share, in: Belastingen en ethiek, geschriften van de Vereniging voor Belastingwetenschap no. 243 (Kluwer 2011) and R.H. Happé, *Fiscale ethiek voor multinationals*, WFR 2015/938.

trust of ordinary people in the fairness of their tax systems';[2] as 'governments are harmed (…) individual taxpayers are harmed (…) businesses are harmed'.[3] A multilateral agreement for international taxation provides an exciting opportunity in this regard: it enables states to articulate and promote emerging ideas of 'fair' international tax rules. A multilateral tax deal can, in other words, be seen as a launching pad for coherent action to make international tax law, which has been eroded by the effects of globalisation, 'fair' again.[4]

But what does 'fairness' mean in international tax law? The answer proves elusive. First of all, the world has evolved through globalisation (i.e., states engage in tax competition for mobile capital), whereas the existing norms of 'fairness' are based on a concept of international tax rules that stems from the 1960's, where states, and not taxpayers, were the most relevant actors in international law. Bilateral tax treaties were, after all, designed to coordinate the issue of jurisdictional overlap for the matter of direct taxation. As a consequence, traditional theories on fairness of international tax rules[5] do not

2 OECD, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15: 2015 Final Report (2015), p. 4.

3 OECD, BEPS Action Plan (2013) (2013) p. 8.

4 See for this point generally R. García Antón, The 21st Century Multilateralism on International Taxation: The Emperor's New Clothes?, 8 World Tax Journal 147 (2016), who wants to use a multilateral treaty to replace the benefits principle with 'tax fairness' and 'solidarity'. These terms comprise a solution for the source-residence dichotomy, and may accordingly also require a redistribution of tax revenue between rich and poor. 'Stamping out global inequalities and poverty constitutes enough member surplus to justify the leap to a world-wide multilateral framework, but within a different, truly universal, platform, such as the United Nations'.

5 In the traditional conception of international tax, bilateral tax treaties were designed to coordinate the issue of jurisdictional overlap, and to reduce barriers to international trade. The related concepts of 'fairness' of this traditional understanding of international tax law are that of inter-nation equity, which concerns the fair allocation of tax in the relationships between sovereign states, and that of inter-individual equity, which concerns the fair distribution of tax burdens among taxpayers. See e.g. M.J. Graetz (2001) 294-297. The concept of inter-individual equity most of all relates to the division of tax burdens within the state, and the inter-nation equity concept, first and most famously set out by the Musgraves, relates to the division of taxing rights *between* states. In both concepts, state borders are, hence, important. R.A. Musgrave and P.B. Musgrave, *Inter-nation Equity*, in: Modern Fiscal Issues: Essays in Honor of Carl S. Shoup (R.M. Bird and J.G. Head eds., University of Toronto Press 1972); also: C. Peters (2014).
For those interested in 'fair' international tax rules, the work of the Musgraves provides a first foothold. Their point of departure was 'national neutrality': cross-border investments should at least generate the same before-tax return as domestic investments, and to the excess, the source state has a claim which may be stronger as the residence state is richer and the source state is poorer. The Musgraves hence departed from the commonly accepted bases for the taxation of international income: source and residence. See N.H. Kaufman, *Fairness and the Taxation of International Income*, 29 Law and Policy in International Business 145 (1998). In their view, the residence state had the strongest claim to tax. The reason for this stronger claim, the Musgraves suggested, is firstly that taxpayers owe their tax allegiance to their country of residence for the rights and privileges that adhere to them as residents. Secondly, inclusion of the foreign source income in the resident country is

address the fact that enterprises operating in a cross-border context are treated differently from those who do not. In other words, in the globalised world, state borders have become increasingly immaterial in international economic society,[6] and consequently, fairness theory based on the existence of state borders, has become outdated. Secondly, it proves very difficult to isolate a concept of 'distributive fairness' – i.e., 'the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits'[7] – from notions of economic neutrality.[8] Yet, the question of the 'fair' distribution

necessary to achieve equity (inter-individual equity, that is) among resident taxpayers. After all, the collection of the necessary information (including that on the personal circumstances) of the taxpayer is most easily to administer in the residence state. Thirdly, the resident country has tax sovereignty over the property of residents that is part of that country's natural resources. Finally, the resident claim 'may be justified in benefit terms, as a payment for productivity-enhancing benefits provided by the country of residence to its own factors of production prior to transfer abroad'. P.B. Musgrave, *Consumption Tax Proposals in an International Setting*, 54 Tax Law Review 77 (2000) p. 79. The view that the resident state has a stronger claim seems to have stuck in international tax law. The fact that a taxpayer is a resident of a particular country makes that taxpayer different from non-resident taxpayers, justifying a different tax treatment of residents and non-residents. See e.g. K. Brooks, *Inter-nation Equity: The Development of an Important but Underappreciated International Tax Policy Objective*, in: Tax Reform in the 21st Century: A Volume in Memory of Richard Musgrave (J.G. Head and R. Krever eds., Kluwer Law International 2009).

6 C. Peters (2014) p. 105. As M.F. De Wilde, 'Sharing the Pie': Taxing Multinationals in a Global Market (Erasmus University Rotterdam 2015) p. 47 expresses this: 'I fail to see why a taxpayer's tax residence would constitute a different circumstance and therefore justifies this different tax treatment [depending on where the taxpayer has its tax residence]. In today's reality where economic operators move increasingly effortlessly across tax-borders in an emerging global market place, the tax residence is economically immaterial'. Id. at p. 47.

7 T.M. Franck, Fairness in International Law and Institutions (Clarendon Press 1995) p. 7.

8 See e.g. the recent work of M.F. De Wilde (2015a) at p. 59-60: 'It is argued that the notion of fairness in corporate taxation is founded on the equality principle, thereby conforming to the historically widely acknowledged notion of equal treatment before the law. Economic equal circumstances should be treated equally for tax purposes. Unequal economic circumstances should be treated unequally for tax purposes insofar as the circumstances are unequal. From the equality postulate it can be deduced that everyone in an economic relationship with a taxing state has the obligation to contribute to the financing of public goods from which one benefits in accordance with one's means – 'equity'. And production factors should be distributed on the basis of market mechanisms without, or at least with as little as possible, public interference – 'economic efficiency'. Taxation should be in line with economic reality; it should not affect business decisions – tax neutrality, including the neutrality of legal form. Income should be taxed once, as close as possible to its source.' Also: A.H. Rosenzweig, Defining a Country's "Fair Share" of Taxes, 42 Florida State University Law Review 373 (2015), who advocates that the residence state has a claim to some minimum return, to be calculated at arm's length; any MNE profits in excess of this normal return should be divided among all states involved, using formulary apportionment. This, he considers, would truly maximise the efficiency of the international tax regime. See also: D.M. Broekhuijsen and H. Vording, *Multilaterale samenwerking ten aanzien van het BEPS-Project: een prognose*, WFR 2016/53.

of the tax burden is not only an economic one, but also one that is philosophical and, ultimately, political.[9]

So, absent an easy (re)definition of distributive fairness, it makes sense, for the purposes of the design of a multilateral agreement that aims to create international legal obligation, to emphasise 'the extent to which the rules are made and applied in accordance with what the participants perceive as right process'[10] instead.[11]

But more importantly, the question what a fair distribution entails in international tax law will be heavily debated or contested in practice (see further sections 5.4.3 and 5.4.4), emphasising the relevance of procedural fairness in international cooperation.[12] After all, where establishing a justifiable and fair distribution of costs and benefits proves difficult, it makes sense that actors enter into norm-generating discourse and partake in inter-state discussions. The point is, of course, that if such discourse and discussions are

9 That tax theory should not exclusively be approached by economic thought was, as Gribnau shows, already recognized by Nicolaas Gerard Pierson (1838-1909), who had an important role in formulating tax theory in the Netherlands. See: H. Gribnau, Tweehonderd jaar belastingwetenschap, in: Tweehonderd jaar Rijksbelastingen (H. Vording ed., SDU 2015) p. 208. The importance of a philosophical perspective on distributive justice has also been stressed by, among others, the founder of the academic study of tax law in Leiden: H.J. Hofstra, *Over belastingbeginselen*, WFR 1979/1212 ('De belastingheffing vormt enerzijds een juridisch, rechtsfilosofisch, staatkundig probleem, maar heeft anderzijds ingrijpende economische en sociale gevolgen. Historisch hebben de juristen de fiscale problematiek grotendeels verwaarloosd (…) Het gevolg is geweest dat de theoretische beschouwingen in hoofdzaak aan de economen werden overgelaten. Hun benadering is echter een geheel andere dan die van de jurist'.) But, as Vording notes, it has proven difficult to 'translate' political philosophy to substantive tax principles, as 'using' such principles to 'test' a substantive tax rule is contingent on what society aims to achieve with that rule. It therefore makes sense to turn to a 'procedural' concept of fairness instead. H. Vording, *Vooruitgang in de fiscale rechtswetenschap*, in: Vooruit met het recht (J.H. Nieuwenhuis and C.J.J.M. Stolker eds., Boom Juridische Uitgevers 2006) p. 104.

10 T.M. Franck (1995) p. 7.

11 Indeed, as Tsilly Dagan points out, 'Since the normative goals of international taxation are unclear, one could point to procedure as an answer. Perhaps – it may be argued – including all the potential stakeholders in the design of multilateral accords would lead to better results in terms of promoting the interests of the entire international community. Indeed, if actual voice and genuine input for all the actors on the international scene is attained, such a procedure may yield results that actually promote the collective good. The decision making process that is required in order to achieve such results must be carefully designed. Such a procedure should carefully identify the stakeholders involved and find paths to allow for an open deliberative process where the variety of normative considerations can be honestly discussed and seriously considered. It may even be the case that making decisions on international taxation requires a full-blown political institution.' T. Dagan, Community Obligations in International Taxation, Global Trust Working Paper Series 01/2016 (2016), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736923.

12 Indeed, as one author generally phrases it: international law 'gives states the tools to achieve certain outcomes, rather than telling them what outcomes they should reach'. F. Mégret (2012) p. 67.

perceived as unfair, as actors are prevented to voice their opinions and interests, outcomes will also be perceived as biased or unfair. Hence, 'correct' procedure is indispensable to ensure that all relevant political, moral and social factors can be integrated in actual legal outcomes, making those outcomes 'neutral' or 'fair' in the eyes of all actors.[13]

To construct an outline of what is required by a 'correct' decision making process for international tax law, let us take two cosmopolitan views on procedural fairness. The cosmopolitan viewpoint provides a move away from the state-centred, traditional concept of state relations in the world (i.e., a world in which borders between states are material and important), and leads to a worldview which centralises on the individual. Cosmopolitanism encompasses 'the idea that all human beings, regardless of their political affiliation, are (or can and should be) citizens in a single community'.[14] The concept is said to relate to Diogenes of Sinope, who had a reputation of sleeping and eating wherever he chose to and defecating in public. When asked where he came from, he declared himself a citizen of the world,[15] presumably because he hoped this would disqualify the local authorities to fine him for his behaviour. At the core of (modern) cosmopolitanism lies, as Brock says, 'the view that every human being has standing as an ultimate unit of moral concern and is entitled to equal consideration of her interests no matter what other affiliations, especially national affiliations, she might have'.[16] The attractiveness of the cosmopolitan view is hence that it seeks to provide solutions for the erosive effects of globalisation by recasting the state-border oriented international system. By centring on the individual as a citizen of the world, the cosmopolitan view is able to provide 'ideal' solutions for countering the temptation of states to engage in individually rational but collectively irrational behaviour, of which tax arbitrage and tax competition are the effects.[17] It places international political processes as well as the market forces under

13 Such principles are of course relevant at all levels. See e.g. H. Gribnau, Belastingen als moreel fenomeen: vertrouwen en legitimiteit in de praktijk (Boom fiscale uitgevers 2013), who stresses the importance of legitimacy and trust in relation to domestic tax law.

14 P. Kleingeld and E. Brown, Cosmopolitanism, in: Stanford Encyclopedia of Philosophy (E.N. Zalta ed., Stanford University Fall 2014 ed. 2014).

15 Diogenes Laertius, Lives of Eminent Philosophers, Volume II: Books 6-10 (R.D. Hicks *trans.*, Loeb Classical Library 2015, Harvard University Press 1925), book VI, p. 65.

16 G. Brock, Global Justice, in: Stanford Encyclopedia of Philosophy (E.N. Zalta ed., Stanford University Spring 2015 ed. 2015) sec. 2.3.

17 See also Ring on the value of cosmopolitan views on tax competition: D.M. Ring, Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation, 9 Florida Tax Review 555 (2009) at p. 589: 'perhaps we can find room for a moderate variant of cosmopolitan theory which grants a special, and possibly dominant, obligation to fellow citizens but maintains a heightened set of duties to all persons. (…) If the currently incomplete cosmopolitan theories could develop a framework for the stable world order that would implement their vision of global justice, the sovereign state system might be flexible enough to accommodate it'.

greater political control.[18] Therefore, the cosmopolitan view is relevant in addressing the problem of BEPS. After all, the BEPS Project seeks to resolve the issues caused by the inability of governments to collectively deal with the mobility of capital and the increased interconnectedness of their economies.

The two views on procedural fairness that guide and inform the design of a multilateral agreement for international taxation are Jürgen Habermas' concept of legitimate law (section 4.2.1) and Martha Nussbaum's social contract (section 4.2.2). Both perspectives, further developed for the area of international taxation by Peters[19] and Christians,[20] lead to similar models of procedural fairness in international taxation (section 4.2.3).

## 4.2 TWO COSMOPOLITAN VIEWS ON PROCEDURAL FAIRNESS

### 4.2.1 Habermas' concept of legitimate law

The work of Habermas, in particular his *Between Facts and Norms*,[21] provides fertile ground to consider the fairness of international tax law. The legitimacy viewpoint matters, as societies are stable and fair over the long run only when they are perceived as legitimate by their members.

In *Between Facts and Norms*, Habermas seeks to provide a normative account of legitimate law. Ultimately, Habermas' point is that that the quality of procedures and public participation in these procedures is of importance to guarantee that the law created is perceived as 'fair' by its addressees. In particular, Habermas advances the need for fair process in the form of 'deliberative democracy', in which participants are treated equally and discussions take place on the basis of rational argument. This guarantees that law is legitimate, i.e., that it includes all relevant moral, social and economic perspectives.[22]

Some writers, and particularly Cees Peters, have applied Habermas' work to assess current international tax law making as well as to construct an

18 For instance, a cosmopolitan idea of democracy, e.g. that of David Held, requires democracy on all levels, so that 'globalised' issues can be placed under an overarching form of democratic control. It requires in the short run e.g. the strengthening of the UN, compulsory jurisdiction before the International Court of Justice and an enhanced engagement of civil society, and in the long run e.g. a global parliament. D. Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance (Polity 1995).

19 C. Peters (2014).

20 A. Christians, Sovereignty, Taxation and Social Contract, 18 Minnesota Journal of International Law 99 (2009).

21 J. Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (W. Rehg trans. Polity 1996).

22 For a further exploration on these types of issues in relation to EU and OECD soft law: H. Gribnau, Soft Law and Taxation: EU and International Aspects, 2 Legisprudence 67 (2008).

exemplary type of legitimate governance structure for the future of international tax law.[23] Since Peters summarises the complex work of Habermas adequately for the purposes of international tax law,[24] I will only briefly reflect on Habermas' work here (doing some damage, obviously, to his extensive theory).

#### *4.2.1.1 Social and system integration*

Habermas argues how societies have evolved through globalisation, whereas the existing norms and law-making processes of these societies have not been able to accommodate this evolution. As we will see, this view can be applied to the area of international tax law to show that international tax law-making taking place within the OECD as well as within domestic settings is flawed.

Central to applying the Habermasian argument to international taxation is the claim that state borders prevent states to act coherently on globalised issues: it is 'no longer appropriate to identify 'society' with the state and to regard this society as an association of individuals only'.[25] The point is that where state borders have become increasingly immaterial for the economic world,[26] they have not become irrelevant for the world of law-makers. Tax systems differ from one state to the other, and are used by states to attract investment. Cooperation on the international level functions on the basis of competition rather than collaboration. The work of Habermas, when applied to the area of international taxation, can be used to better understand this situation.

To further understand Habermas' argument, it is relevant that he distinguishes between two opposing forces that make up society: 'social integration', the result of intended actions of individuals, which are brought about by 'a normatively secured or communicatively achieved consensus', and 'system integration', a structural effect, which relates to a mechanism that coordinates individual decisions by means of consequences that extend beyond the actors' consciousness.[27] As Peters expresses it: on the one hand, there are ways in which we can take control of our lives ('agency'), but on the other hand, we are being directed by society (the 'system'), such as the market.[28] Habermas' claim in this regard is that systems, such as the market, are 'increas-

23 See C. Peters (2014) and P. Essers, International Tax Justice between Machiavelli and Habermas, 68 Bulletin for International Taxation 54 (2014).
24 C. Peters (2014) Ch. 6.
25 Id. at p. 175.
26 Id. at p. 25.
27 J. Habermas, The Theory of Communicative Action, Volume 2: Lifeworld and System: A Critique of Functionalist Reason (Polity Press 1987) p. 117.
28 C. Peters (2014), p. 178.

ingly removing the possibilities of society to get organised on the basis of communicative processes in the lifeworld'.[29]

*4.2.1.2 Deliberative democracy*

What is needed, according to Habermas, is to react to this situation, so that the influence of social and communicative processes in society is restored. First of all, this requires democratic self-determination: legal persons can be autonomous only when they understand themselves as the authors of the law, i.e., of the legal order ('*public autonomy*').[30] In the words of Habermas:

> 'the principle of democracy should establish a procedure of legitimate law-making. Specifically, the democratic principle states that only those statutes may claim legitimacy that can meet with the assent (Zustimmung) of all citizens in a discursive process of legislation that in turn has been legally constituted'.[31]

But at the same time, the law thus created must secure a space of *private autonomy* of those subject to it, i.e., it must secure a space for individual freedom (including equality before the law, negative human rights and the right of political participation). State power, in other words, has to be restricted or restrained by law.

Each of these two concepts, that is, public and private autonomy, is 'equiprimordial', which means that each can only be fully realized if the other is fully realised and vice versa. Habermas therefore has very influentially struck a middle ground in between the liberal tradition (i.e., citizens must be protected from arbitrary governmental influence by basic rights) and the republican tradition (i.e., popular sovereignty leads citizens to agree on the common good). In the words of Bohman and Rehg,

> 'the exercise of public autonomy in its full sense presupposes participants who understand themselves as individually free (privately autonomous), which in turn presupposes that they can shape their individual freedoms through the exercise of public autonomy'.[32]

In simple terms, legitimate law-making requires that certain civil rights are recognized, so that citizens can live free of government bounds. At the same time, drafting these rules requires that all those interested have the possibility to participate in the law-making process, so that it may be presumed that all

29 J. Bohman and W. Rehg, Jürgen Habermas, in: Stanford Encyclopedia of Philosophy (E.N. Zalta ed., Stanford University Fall 2014 ed. 2014), p. 3.1; C. Peters (2014) p. 178-179. This reflects Habermas' colonization thesis.

30 J. Habermas (1996) sec. 9.2.2. J. Bohman and W. Rehg (2014) sec. 3.4.

31 J. Habermas (1996), sec. 3.2.1.

32 J. Bohman and W. Rehg (2014) at sec. 3.4.

citizens in society can assent to the law thus created. This is what 'deliberative democracy' favoured by Habermas requires.

The point seems to be then, that both public and private autonomy are required for 'legitimate law'. And indeed, specifically in relation to tax law, this point is shared by others. Gribnau, albeit on the basis of different theory,[33] comes to a similar conclusion: legitimation through 'correct' legal procedure is necessary but not sufficient for legitimate tax law. Law cannot be separated from the needs and interests of the society that it means to affect. This means that tax law needs to be constructed in accordance with 'correct' process, but also that it must protect those it addresses by reflecting basic principles and values such as legal certainty, equality before the law and proportionality.[34]

Peters, but also Essers,[35] have applied the idea of Habermas' deliberative democracy to international tax law. Applying the idea of 'deliberative democracy' to international tax law exposes a gap in respect of where the norms of international taxation are generated. Either they are created domestically, under the influence of the 'tax law market',[36] and are lacking because they are purely driven by 'systemic' and uncommunicative forces of tax competition, or they are created within the current framework of the OECD, which suffers from being exclusive and non-transparent.[37] As Peters notices, this tension features in the acts of domestic policy makers. On the one hand, governments claim to seek international cooperation on international tax issues, whilst on the other hand, they praise the competitive strength of their domestic tax systems.[38]

That a pure domestic law-making setting, influenced by the 'tax law marketplace', does not present the ideal location for the formulation of legitimate norms of international taxation makes sense from a Habermasian viewpoint: absent a level playing field or further integrative cooperation, governments have been given no other choice but to compete to attract investors. Some of the tax rules created under the influence of the 'marketplace' have in fact been invented primarily for that purpose. At the same time, taxpayers have had the utmost freedom to benefit from the rules thus put in place, necessitating governments to shift the tax burden to those who cannot take advantage of cross-border activity. It is therefore no wonder that tax rules are

33 Gribnau centralizes the citizen rather than the state, leading him to consider thinkers such as Spinoza and Sloterdijk.

34 H. Gribnau, Soevereiniteit en legitimiteit: Grenzen aan (fiscale regelgeving) (SDU Uitgevers 2008). He applies his perspective to law-making and law-application in The Netherlands in H. Gribnau (2013a).

35 P. Essers (2014).

36 See C. Peters (2014).

37 Id. at p. 212.

38 Id. at p. 213.

increasingly considered to operate unequally,[39] and have consequently led to public outrage and calls for MNEs to 'do more than the law requires'.[40]

The other place where international tax norms are created inadequately is within the institutional framework of the OECD. According to Essers, what is especially lacking in this regard is the participation and influence of national parliaments, citizens and taxpayers in the OECD. 'Parliaments can only discuss the results of the OECD meetings with the ministers of the national government; citizens can only hold their national parliamentarians accountable in the elections every four years'.[41] Therefore, from the Habermasian perspective 'it is essential that national parliaments and citizens are truly involved in the process of achieving international tax justice'.[42] Likewise, in Peters' view, the legitimacy of the law-making framework of the OECD falters in two respects: it falters in terms of the inclusiveness of the deliberations, and in terms of the transparency and openness of the law-making procedures.[43] Peters points, for instance, at the use of public discussion drafts. These, in the absence of empirical research on the diversity of responses to these discussion drafts and on the relationship between responses and decisions eventually made, run the risk of turning into a wildcard for the international business community to 'steer' deliberations towards its particular interests, at the expense of other ideas.[44] As a consequence of this, Peters argues, the quality of the decision-making processes (i.e., 'input legitimacy') is lacking.[45] Tax measures should be the result of true and inclusive democratic deliberation between and within countries.[46]

#### *4.2.1.3 Deliberative international tax law*

On this basis, it is then possible to develop the characteristics of a framework that would ensure the legitimacy of international tax law in the long run. Indeed, Peters extends the Habermasian national model of legitimate law to the level of international tax law (note that Habermas himself has not yet fully applied his theory to the international level). This leads Peters to consider a set of cosmopolitan procedures called 'deliberative international tax law'.[47] Ultimately, he says, 'it is completely up to the taxpayers themselves – in their capacity as citizens – to formulate the normative content of international tax

39 See e.g. M.F. De Wilde (2015a).
40 E.g. R.H. Happé (2015).
41 P. Essers (2014) p. 57.
42 Id. at p. 57.
43 C. Peters (2014) sec. 6.6.2.3.
44 Id. at sec. 6.6.2.3.
45 Id. at p. 341. This terms derives from the work of F.W. Scharpf, Governing in Europe: Effective and Democratic? (OUP 1999).
46 P. Essers (2014) p. 65.
47 C. Peters (2014) sec. 8.4.

law'.[48] Therefore, according to Peters, legitimate international tax law 'requires a never-ending rational discussion – i.e., an exchange of arguments – about the norms of national and international tax law'.[49] Ideally, the main characteristic of this set of procedures is that it should allow 'taxpayers the possibility to express their disagreement about the existing set of norms and to be actively – and on equal terms – part of the deliberations'.[50] This requires:

> 'procedures that are at the basis of the deliberations about the (normative) meaning of law. These procedures should ensure a free and continuous discussion about which laws should prevail.[51] (…) Taxes need to originate from a political and legal system that has its roots in the communicative processes of society. The members of a society need to recognise themselves in their taxing system and in the norms that are at the basis of this system. This implies in the first place that there needs to be a never-ending rational discussion – i.e. an exchange of arguments – about the norms of national and international tax law'.[52]

This cosmopolitan 'deliberative international tax law' framework should eventually replace the state consent model of legitimacy that is currently applied.[53] But Peters recognises that in the short run, e.g., for the design of the multilateral instrument,[54] this would be a bridge too far. As state consent is still the basis for public international law,[55] he proposes a more moderate form of his 'deliberative international tax law', in which states and stakeholders (e.g., business communities and networks such as Tax Justice), on the basis of equality, rationality, openness and transparency, discuss the shared problems of international taxation.[56] So, in sum, 'more Habermas' would be required

48 Id. at p. 307. Another way to extend Habermas' work to the international level could have been the centralization of the self-determination of the democratic nation state rather than the individual. This would not have led to a model in which taxpayer involvement would be increased, but would have emphasized the bargaining between democratic states. As Bohman notes, the Habermasian 'idea of a self-legislating *demos* of citizens ruling and being ruled in return, requires a delimited political community of citizens, consisting of all those and *only* those who are full citizens and thus *both* authors and subjects of the law'. But international rule-making includes not *demos* but *demoi*. See J. Bohman, *From Demos to Demoi: Democracy across Borders*, 18 Ratio Juris 293 (2005).

49 C. Peters (2014) p. 386.

50 Id. at p. 308.

51 Id. at p. 196.

52 Id. at p. 200

53 Id. at p. 308.

54 Id. at sec. 8.6.1.3.

55 Peters' view could therefore be in line with what Buchanan and Keohane suggest: state consent should be taken into account as a necessary, but not as a *sufficient* condition for legitimate international rules. A. Buchanan and R.O. Keohane, *The Legitimacy of Global Governance Institutions*, in: Legitimacy, Justice and Public International Law (L.H. Meyer ed., Cambridge University Press 2009) p.40

56 C. Peters (2014) sec. 8.4.3.

when considering reforms of international tax law.[57] This suggestion emphasises the need for transparent and inclusive deliberation.

### 4.2.2 Nussbaum's social contract

The work of Martha Nussbaum, who makes the social contract the focus of her book *Frontiers of Justice,* may also be used to develop a cosmopolitan normative framework for international tax law.[58] Nussbaum's approach is helpful because it provides a different normative framework for achieving a 'correct' level playing field. Unlike Rawls and Habermas, who work from fair procedure to just rules (which is called 'the procedural model' of fair societies), Nussbaum works backwards: from outcomes (she calls these 'capabilities') to process. This allows her to take into account the asymmetries of power and capacity that exist in the world, for which she believes the traditional social contractarian approaches provide unsatisfactory answers.[59] If, in other words, we know what the basic capabilities of human dignity are, Nussbaum's reverse approach enables us to make normative claims on how to make sure that the entitlement to these capabilities can be exercised by people everywhere.

#### *4.2.2.1 The sovereign duty*

The author who has 'translated' this approach to the area of international taxation is Allison Christians,[60] one of the rising stars of international tax academia and recently named one of the most influential tax leaders worldwide.[61] To apply Nussbaum's approach to international tax law, Christians first needs some evidence of outcomes ('entitlements') in international tax law that, in order to be effectuated, need to be protected by others. For this, she uses the OECD's project on harmful tax competition as evidence of the fact that states have come to 'consider the impact of national tax policy decisions on the revenue policies of other states'.[62] She terms this 'the sovereign duty'. The sovereign duty encompasses the paradox that in order to protect their tax sovereignty, states have no choice but to cooperate and respect

57 P. Essers (2014).
58 M.C. Nussbaum, Frontiers of Justice (Harvard University Press 2006), as applied to international tax by A. Christians (2009).
59 M.C. Nussbaum (2006) p. 18-22. See also A. Christians (2009) p. 132-137.
60 A. Christians (2009). See also: A. Christians, et al. (2007) p. 311: 'Interpreting the work of the OECD on harmful tax competition as a forging, or defining, of a social contract is one way to frame the issues [on tax cooperation] for debate on both substantive merits (which rules, standards, and principles are being chosen) and instrumental ones (how the goals are being developed, implemented and monitored)'.
61 See: http://www.internationaltaxreview.com/Article/3525537/The-Global-Tax-50-2015-The-leaders-creating-an-impact-around-the-world.html.
62 A. Christians (2009) p. 147.

the tax systems of other states.[63] Where traditionally the concept of sovereignty was equated to the ultimate and complete autonomy over tax matters,[64] the sovereign duty resembles the idea that states cannot do as they please, but rather, that they have the duty to adhere to some baselines in tax system design.[65] Christians says that the rhetoric found in the OECD's work on harmful tax practices evidences that such a duty has come to exist:

> 'By means of the harmful tax practices project, the OECD shifted its emphasis from a principal concern for protecting the tax base of OECD countries toward a principal goal of creating a level playing field for all countries. This shift demonstrates a deliberate effort to resolve practical issues but it also reflects the unresolved tension of simultaneously trying to cement the sovereign right to tax and identify the contours of a positive sovereign duty to protect that right'.[66]

It is important to realise that Christians wrote her article before the BEPS Project was launched. At that time, the concept of the sovereign duty was perhaps still implicit in the OECD's work on harmful tax practices. However, it barely needs explaining that Christians' concept of 'sovereign duty' can be even more clearly recognised in relation to the OECD's work on BEPS.

> 'When designing their domestic tax rules, sovereign states may not sufficiently take into account the effect of other countries' rules (…). The global economy requires countries to collaborate on tax matters in order to be able to protect their tax sovereignty'.[67]

Indeed, a core concept of the BEPS report is that cooperative action is necessary, on the one hand, to prevent the erosion of the domestic tax base, and, on the

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63 For the term 'sovereignty paradox', see H.G. Schermers and N.M. Blokker, International Institutional Law: Unity Within Diversity (Martinus Nijhoff 5th rev edn. ed. 2011), par. 1887.

64 A. Christians (2009) p. 101.

65 Christians' work resembles that of P. Dietsch, Rethinking Sovereignty in International Fiscal Policy, 37 Review of International Studies 2107 (2011), who argues that 'sovereignty' in international tax theory may also be seen as responsibility, that is, consisting of both duties as well as obligations of states. At p. 2115: 'Not only may the recognition and legal international sovereignty of states depend on their fulfilling certain standards with respect to the treatment of their own citizens, but states also have obligations to take into account the effects of their policies on the citizens of other states'. Deutsch breaks this responsibility down in three 'increasingly demanding duties', namely 1. Transparency of income and tax information; 2. Respect for the fiscal choices of others and 3. Distributive justice.

66 A. Christians (2009) p. 127. She for instance quotes the OECD: '[a]ll countries, regardless of their tax systems, should meet [certain] standards so that competition takes place on the basis of legitimate commercial considerations rather than on the basis of lack of transparency (…)', citing OECD, *A Process for Achieving a Global Level Playing Field* (OECD Global Forum on Taxation, June 2004). Further examples can be found id. at p. 120-129.

67 OECD, *BEPS Action Plan (2013)* (2013) p. 9.

other hand, to prevent an international tax chaos caused by unilateral anti-abuse rules:

> 'These weaknesses put the existing consensus-based framework at risk, and a bold move by policy makers is necessary to present worsening problems. Inaction in this area would likely result in some governments losing corporate tax revenue, the emergence of competing sets of international standards, and the replacement of the current consensus-based framework by unilateral measures, which could lead to global tax chaos (…)'.[68]

So, a 'sovereign duty' can be recognised in the OECD's harmful tax competition project as well as in the OECD's BEPS Project. The bottom line is, then, that the 'sovereign duty' is a sign of a changed attitude of governments towards international tax: in order to exercise their tax sovereignty, governments must take into account the effect of their tax systems on that of others. This provides the basis for Christians to introduce Nussbaum's work on the social contract in the area of international tax law. And this, in turn, allows her to make some normative claims as to the scope and contents of the 'sovereign duty'.

#### *4.2.2.2 Interpreting the sovereign duty as a social contract*

Indeed, Christians turns to Nussbaum to 'provide a structure for thinking about duty in tax system design that is already implicitly at play in the attempts of OECD officials to create an international consciousness regarding tax policy'.[69] Remember that Nussbaum's approach is outcome rather than procedural-driven: her argument works backwards. Before the duties under a social contract may be assigned to those under the social contract, one must first turn to the question what people need and are entitled to. Or as Christians explains it: 'to the extent that all people have certain basic entitlements, we must believe that all people similarly have the duty to promote and preserve these entitlements in others'.[70] For Nussbaum, in other words, establishing the contents of the social contract is to construct entitlements of individuals first, and duties afterwards. Nussbaum expresses this as follows:

> 'I would argue, indeed, that so far as definiteness goes, the shoe is squarely on the other foot: we can give a pretty clear and definite account of what all world citizens should have, what their human dignity entitles them to, prior to and to some extent independently of solving the difficult problem of assigning the duties (…). The list of capabilities, deriving from the concept of a life worthy of human

68 Id. at p. 10.
69 A. Christians (2009) p. 130. She does not use the work of Rawls as, in line with what Nussbaum argues, this approach is not coherent when applied to states instead of people. See id. at p. 138.
70 Id. at p. 140.

> dignity, is much easier to draw up and justify than any particular assignment of the correlative duties (…). But if human beings have such entitlements, then we are all under a collective obligation to provide the people of the world with what they need'.[71]

As people acting individually may neglect or overlap in exercising such duties, Nussbaum argues that people must turn to institutions, such as the state. States can be assigned the task of seeing that duties are met collectively.[72] So, states are the institutions to which these duties are delegated, and they consequently have the duty of ensuring that capabilities, which society wishes to protect, may be exercised by others. Thus, the outcome-oriented approach enables a consideration of fairness in relation to those outside the state (it is, therefore, cosmopolitan). This subsequently enables Christians to normatively assess the work of the OECD on tax competition, in which the OECD has strived for a global level playing field:

> 'The explanation might be that, at least among many of the most powerful actors on the international tax stage, the belief is growing that the sovereign right to tax is a liberty that cannot be enjoyed by any one state without a single, global social contract under which every person in the world agrees to vest in their states a duty to protect that right, by preventing individuals from engaging in behaviour that, while potentially advantageous to the individual, and even to the state, may cause others in the world to be worse off'.[73]

#### *4.2.2.3 Mutual advantage*

A first insight that Christians provides by applying Nussbaum's inverse social contract to international tax, is that a social contract for mutual advantage can only be identified when there is mutual advantage to be gained. In other words: only after economic opportunities ('entitlements') can be identified, can a sovereign duty (i.e., fiscal responsibility) under an implicit social contract be recognised.

In other words, for those who benefit from cooperation rather than competition, a social contract, that ultimately protects the sovereign right to tax, can be identified. Membership in the social contract's group of participants may imply that unilateral, isolated action in tax system design is neither possible nor desirable.[74] For states with large budgets and large internal markets, for instance, advantages can easily be recognised. Such states are potentially disadvantaged, in a Hobbesian state of nature, by 'poaching by tax havens

71 These quotes can be found on p. 277-280 of M.C. Nussbaum (2006).
72 A. Christians (2009) p. 140.
73 Id. at p. 143.
74 Id. at p. 145.

via predatory practices such as bank secrecy'.[75] A similar account would seem to hold for the states actively participating in the BEPS Project, as in the state of nature, states compete for mobile capital, eroding such budgets. It might be in the interests of such states to seek cooperation for mutual advantage. What Nussbaum's account in relation to those states teaches us, therefore, is that cooperation between those 'within' the contract should be based on a mutual respect for each other's sovereignty. For Nussbaum, sovereignty 'has moral importance, as a way people have of asserting their autonomy, their right to give themselves laws of their own making'.[76]

However, for those that do not expect to be advantaged by entering a contract, the identification of such a contract, and the duties connected to it, is problematic.[77] And perhaps, a Hobbesian state of nature has more to offer certain states than cooperation, even in the face of development aid[78] and technical assistance in tax cooperation[79] that cooperation with other states might bring. Consequently, for some states, engaging in tax competition might remain more beneficial than tax cooperation would.[80] Indeed, what Christians, by means of the work of Nussbaum, teaches us in relation to such states, is that a social contract only exists when opportunities can be identified. But the consequences for states 'outside' the social contract could be severe. Following the theory of the social contract, states outside of the group of the social contract are:

75 Id. at p. 138.
76 M.C. Nussbaum (2006) p. 314.
77 A. Christians (2009) p. 145.
78 Christians suggests that in the project on Harmful Tax Competition, one of the potential benefits of cooperation for tax havens could be the promise of continued financial assistance from OECD Countries. See id. at p. 138.
79 The OECD suggests in the progress report on the multilateral instrument that for developing states the 'practical problems that are encountered in trying to address BEPS from within the bilateral tax treaty system alone are even more relevant than for developed countries Developing countries find it more difficult than other countries both to conclude double tax treaties, and to interest other countries in tax treaty (re)negotiation, and their tax treaty negotiation expertise is often more limited than in the governments of developed economies. A multilateral instrument therefore offers the best opportunity to ensure that developing countries reap the benefits of multilateral efforts to tackle BEPS'. OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* (2014), p. 16. However, the claim that such states might benefit from the BEPS Project is not free of criticism. Dagan for instance points out that the anti-tax competition rhetoric found in the OECD's BEPS Action plan does not fundamentally depart from the source/residence 'distributive baseline' found in current tax treaties, which is tilted in favour of residence states. T. Dagan, *BRICS: Theoretical Framework and the Potential of Cooperation*, in: BRICS and the Emergence of International Tax Coordination (Y. Brauner and P. Pistone eds., IBFD 2015). Also, but specifically in relation to the LOB/PPT clauses: L. Wagenaar, *The Effect of the OECD Base Erosion and Profit Shifting Action Plan on Developing Countries*, 69 Bulletin for International Taxation 84 (2015) p. 89-90.
80 T. Dagan (2015) p. 21.

> 'at least in the realm of taxation, in a Hobbesian-style state of nature with respect to all other states, engaged in perpetual conflict, capable of cooperation for mutual advantage where it exists, but not required to cooperate and therefore subject to perpetual uncertainty regarding how other states may act and what possible reactions may be pursued without resorting to violence'.[81]

Being outside the social contract means being in a Hobbesian state of nature. Hence, states are free to use whatever fiscal policy is necessary to protect their tax bases, subject only to the limits of self-interest. Coercion is, in these situations, allowed.

*4.2.2.4 An open debate about the scope and content of the social contract*

A second insight relates to the content and scope of the social contract's sovereign duty, and to the way this content is established. Christians suggests that the implicit social contract 'appears to involve a basic list of economic rights and obligations owing to all persons, regardless of their affiliation with any one particular country, region or locale'.[82] For tax, this might imply that:

> 'if every person is in fact entitled to be spared an inequitable tax burden, then every person must have a duty to every other person to be honest and pay a 'fair share' of taxation. Since that concept is then and, even if definable, difficult (perhaps impossible) to implement, we may come back to the state as a logical institution in which to rest the power to determine what constitutes fairness and then to figure out how to compel everyone – associated with whatever particular state – to comply with that determination'.[83]

This, in turn, requires a re-assessment of the concept of equity or fairness.[84] Christians considers:

> 'it is no longer coherent for states to adhere to tax policy assessment tools that rely for their implementation on the concept of the state as a closed system. (…) We cannot rationally talk about fairness, or what equity means, by looking only at persons within a given territory or subject to a given sovereign authority – we can only hope to determine whether a given system approaches equity by examining how a given rule impacts every person, both within and without the system'.[85]

A consideration of what the sovereign duty entails requires some 'guiding principles' to 'connect ideas about sovereignty to what people owe and are

81 A. Christians (2009) p. 150.
82 Id. at p. 149.
83 Id. at p. 147.
84 Id. at p. 145.
85 Id. at p. 147.

owed as taxpayers in an increasingly open global economic system'.[86] These procedures 'deserve to be explicitly stated and subjected to rigorous analysis. Defining what sovereignty requires for tax system design necessitates an inclusive dialogue'.[87] And indeed, Nussbaum herself proposes, in order to implement her capabilities approach, a 'thin, decentralized, and yet forceful global public sphere': a world state is not an appropriate aspiration.[88] Christians' conclusion is similarly modest: 'reassessment should open up a discussion about how ideas about sovereignty, taxation and social contract emerge, are shaped and ultimately impact people around the world'.[89]

This brings us closer to the normative development of a level playing field, by means of which the exercise of entitlements, by people everywhere, can be assured. Christians' work demonstrates that fair consideration should be given to the impact of one tax system's design on other tax systems. The principles that guide such design need to be drafted in an inclusive and open manner.

### 4.2.3 Continuous, inclusive and transparent deliberation on tax rules

From the two views considered above, two conclusions can be drawn. First, procedurally 'fair' international tax law making should be approached from a perspective of the influence of law-making on citizens, and, vice-versa, of citizens on law-making. Following Habermas, as explained by Peters: tax law-making should be inclusive, in that citizens (in the form of civil society, taxpayer communities, and states) should be able to have a real and tangible opportunity to influence tax law-making. Norms are only legitimised by means of free and continuous deliberation by the members of a society. Likewise, from Christians' and Nussbaum's work, it follows that states 'inside' the social contract should take account of the impact of their tax system design on that of others. By implication, this means that deliberation on the principles that guide this design should take place in an inclusive manner. But what also follows from Christians is that a social contract can only be constructed when there is mutual advantage to be gained. For those 'outside' the group of the social contract, i.e., in relation to those who gain no economic opportunities from cooperating, a Hobbesian state of nature exists. This suggests that nothing would prevent countries to act out of their pure self-interests, in which states may strategize on the basis of power and coercion, rather than principle.

Secondly, an analysis of the work of Habermas and Nussbaum leads to the conclusion that transparency of the law-making deliberations is essential

86 Id. at p. 152.
87 Id. at p. 152.
88 M.C. Nussbaum (2006) Ch. 6 section IX.
89 A. Christians (2009) p. 153.

for fair international tax norms. Absent a 'global democracy' – which is unlikely and in today's world hard to conceive[90] – it is important that the procedures establishing international tax rules should promote every taxpayer being able to follow the law-making processes and scrutinise the tax laws that are proposed. Transparency enables taxpayers to hold law-makers accountable, for instance through actions of a domestic democratic nature or the media. Or in Christians' terms: to connect ideas about sovereignty to what people owe and are owed in a global society, all those involved should in openness discuss the nature and the scope of the 'sovereign duty'. Only when law-making is both transparent and inclusive can it be guaranteed that the rules resulting from such process are 'neutral' and hence 'fair'.

It might seem that this account on procedural fairness is quite static, and promotes stability rather than change. But the cosmopolitan concepts of procedural fairness discussed above appear to attach important consequences to the passing of time. Correct procedures can also ensure that *outcomes* are considered fair *in the future*. Let's suppose that at a particular moment in time, the international community shares a common understanding of what 'fairness' entails in international taxation. The point of the discussion above is that continuous fair deliberation can also ensure that the norms of today remain in line with social criteria of the future. As soon as a norm of appropriate behaviour is contested, deliberation allows actors to try to figure out and justify whether the norm still applies under changed circumstances.

From this follows that current tax law-making suffers from some procedural fairness issues. International tax policy is currently set by the OECD, a 'club' like organisation.[91] This 'club' underperforms in truly involving citizens in its law-making processes. Moreover, non-member (particularly developing) countries have, thus far, within the existing law-making processes, mostly been included in the 'endorsement phase of policymaking rather than in the vital stage of idea development and negotiation'.[92] Non-member countries are unrepresented in OECD working groups,[93] may have little influence in setting

90 The sheer size of such an enterprise would make a global democracy unlikely. Think of cultural barriers, the amount of citizens that would have to be involved, different languages, etc. The communicative process would hence be difficult. Moreover, even if states would function as 'federal entities' in such a system, the system itself would lack legitimacy as many states themselves are undemocratic. See M.C. Nussbaum (2006) p. 313-314 and e.g. A. Buchanan and R.O. Keohane (2009).

91 For this type of terminology: R.O. Keohane and J.S.J. Nye, *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in: Power and Governance in a Partially Globalized World (R.O. Keohane ed., Routledge 2002). Also called 'closed' organisations by H.G. Schermers and N.M. Blokker (2011), par. 53-57.

92 A. Christians, *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, 5 Northwestern Journal of Law & Social Policy 19 (2010) p. 36.

93 There are some major non-member economies that have 'observer status' in the CFA: Argentina, Chili, China, Russia, South Africa and India. See: http://www.oecd.org/ctp/oecdinvitesindiatoparticipateinitscommitteeonfiscalaffairs.htm. As to the work on the BEPS

the agenda of the work undertaken by the CFA,[94] and have a more limited ability to file observations of and reservations to the texts of the OECD Model and Commentaries than OECD Members do.[95] But most importantly, non-members have no vote in the OECD Council, the OECD's most important legislative body. This means that, even if non-members are granted the role of observer, their formal status and influence in the organisation remains diffuse.

A multilateral agreement for international taxation may alleviate these issues. The multilateral agreement can enable states to enter into a continuous and inclusive norm-generating discourse, where they search for the best arguments. Moreover, the multilateral agreement should promote transparency. This would allow state parties and other citizen-led groups such as NGOs and businesses to continuously check and evaluate norms. A tentative conclusion is, therefore, that the multilateral agreement should establish a recurring forum that facilitates such elements.

## 4.3 Conclusions

Two cosmopolitan accounts of procedural fairness were helpful in providing a normative framework for a multilateral agreement for international taxation. Both emphasise the position of the taxpayer rather than the state, and can be used to guide the conscious design of this agreement in a globalizing world.

The work of Nussbaum (represented by Christians) and Habermas (represented by Peters) aims to show how societies can create rules that are 'fair' in a procedural sense. To achieve substantively fair (tax) rules in the long run, Habermas argues, law must be legitimate. For this, it is important that laws, that protect a space of individual freedom, are the result of a process of self-determination: only if the members of a society perceive themselves as the

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Project, a number of non-member countries from a cross-section of regions have participated directly in the CFA's work on the project, such as Albania, Bangladesh, Kenya, Tunisia and Vietnam. See http://www.oecd.org/tax/developing-countries-and-beps.htm#participation, last accessed 22-10-2015. Obviously, it is clear that such influence does not include all countries affected.

94 Ault says that the agenda is set by the CFA Bureau, an 'executive committee that meets periodically between CFA Meetings'. H.J. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 Brooklyn Journal of International Law 757 (2008) p. 760. The public servants that influence such processes do not formally belong to any country, but are drafted from OECD Member countries, bringing with them prior experiences and ways of thinking. E.g.: 'For official positions in the OECD, you will be recruited as an international civil servant and you are required to hold the nationality of an OECD member country'. See http://www.oecd.org/careers/whatwelookfor.htm. The agenda is important as it 'is one of the most important structural aspects of any negotiation as well as a significant determinant of negotiating power and influence'. W.R. Pendergast, *Managing the Negotiation Agenda*, 6 Negotiation Journal 135 (1990) p. 135.

95 The positions of some non-member economies are taken into account under the heading 'positions of non-member countries' in the respective sections of the OECD Commentary.

authors of the laws of that society, can law be seen as legitimate. This requires procedures in which the members of a society deliberate, on the basis openness, inclusivity and transparency, on the formation of that law. Nussbaum works backwards: from 'capabilities' to procedure. In order to be entitled to certain capabilities, we must protect and guarantee the same entitlements of others. Interpreting the work of the OECD on harmful tax competition as evidence of Nussbaum's 'reverse' social contract, allows Christians to argue that in designing tax systems, those 'inside' the social contract may be expected to act responsible, that is, to take into account the impact of their tax systems on that of others (the 'sovereign duty'). Consequently, what is required, is an open and inclusive discussion between actors on this 'sovereign duty'. In this regard, a multilateral agreement could provide a promising platform for the future creation of 'fairer' international tax rules.