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

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7 The design of a multilateral agreement for international taxation

7.1 INTRODUCTION

The last three chapters were concerned with the construction of a design strategy for a multilateral agreement for international taxation. First of all, we have learned that the agreement must emphasise procedural fairness: achieving procedural fairness is not only the 'right thing to do' (Chapter 4), but also indispensable to enable the international tax system to continuously adapt to and evolve in line with developments (Chapter 6). Continuous interaction, legal norms and building on shared understandings are vital for this. Secondly, we have seen the importance of flexibility for a multilateral agreement for international taxation. To avoid distributional conflict, interpretative flexibility is needed to accommodate divergent state interests, e.g., by reservations and 'rules of the road' (Chapter 5). Also, the multilateral agreement for international taxation itself must be flexible, so that states can easily respond as circumstances change (see Chapter 6).

With these understandings in mind, the question remains what legal tools of public international law best fit these outcomes. How should, looking at public international law, the agreement for international taxation be designed?[1]

Part 7A sets forth the central elements that a multilateral agreement for international taxation must possess. The design strategy, that proposes that the multilateral agreement is used to 'manage' international tax matters over time, points in the direction of using a robust forum that facilitates inclusive and transparent discussions. A robust forum leads to continuous interaction (discussed in section 6.3.2). Transparent and inclusive deliberation enables actors to build on shared understandings (see section 6.3.3). Understandings that have become common can, through interaction in the forum, be hardened into law (see section 6.3.4). At the same time, the institutionalization of such a forum provides for the mundane reduction of transaction costs of bilateral tax treaty negotiations (see section 6.2.2).

After having established the core elements of a multilateral agreement for international taxation, two types of agreement are discussed that meet the

1 The discussions below are informed by the toolbox set out in the 2015 – Final Report on Action 15: OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15: 2015 Final Report* (2015).

flexibility requirements set forth by the previous chapters: the framework convention-protocol design and the 'agreement to scope'.

Part 7B discusses the framework convention-protocol design. In the framework convention-protocol design, inspired by the regime on climate change (see section 6.4), states initially focus on the negotiation of broad, standard-setting commitments. Once consensus has built up, detailed commitments are fleshed out in protocols. Such broad standards set directions for further negotiation, whilst the institutional setup of the regime facilitates the gathering of further information on the problem and builds trust among participants. This prevents negotiation breakdown. Once parties start negotiating detailed commitments in protocols, the design allows for the inclusion of certain parties only, so that states wishing to engage in deeper cooperation are included in further deliberations, whilst states that do not wish to do so remain bound to the regime's core commitments. Interpretative flexibility mechanisms such as reservations, menu-options and 'rules of the road' may be used to tailor-make obligations to the taste of the individual state.

Part 7C deals with the design of an 'agreement to scope'. Under such an agreement, states commit to bilaterally (re)negotiating their (*inter se*) tax treaties on certain multilaterally agreed objectives or (soft-law) norms,[2] similar to a directive as used within the EU, which requires Member States to achieve a certain result without dictating the means of doing so. This type of multilateral agreement thereby 'limits the scope' of further bilateral tax treaty negotiations, as parties agree to (re)negotiate solely on the objectives multilaterally set. To ensure the expeditious amendment of the bilateral conventions, the multilateral regime can provide for a monitoring and reporting mechanism.

In practice, the line separating the framework convention-protocol design and the 'agreement to scope' may be thin. The framework convention-protocol design embodies the idea of *substantive* multilateralism; the 'agreement to scope' represents the idea of *formal* multilateralism (see section 6.2.2). As they see fit, states may mix and match the characteristics of either approach. Indeed, on the one hand, when the point of departure is to establish *substantive* multilateral agreement, a framework convention-protocol design may be used. But when a strong need for the use of reservations and 'menu options' exists, the effect of the resulting treaty may not be very different from a formal multilateral agreement. After all, reservations and 'menu options' lead to inter se agreements between parties. If the depth and number of reservations filed by states are extensive enough, such inter se obligations may very well end up as *bilateral* inter se agreements anyway. On the other hand, even though

2 Such an instrument is called a 'pactum de negotiando' in public international law, in which parties agree to subsequently agree on further legal acts. See e.g. H. Owada, *Pactum de Contrahendo, Pactum de Negotiando*, in: Max Planck Encyclopedia of Public International Law (R. Wolfrum ed., OUP 2010). Also: A. Miaja De La Muela, *Pacta de Contrahendo en Derecho Internacional Publico*, 21 Revista Española de Derecho Internacional 392 (1968).

states may agree to flesh out vague norms in bilateral deals under an 'agreement to scope' (i.e., formal multilateralism), the negotiation of these bilateral deals takes place at one central place and time and under common value-maximizing terms. So as to further save transaction costs, negotiations under the 'agreement to scope' may take place between groups of countries with converging interests. In this view, the 'agreement to scope' is the piece of rope that ties together bundles of bilateral, and where possible, trilateral or mini-multilateral relationships. Hence, the distinction between the 'agreement to scope' and the framework convention-protocol design, i.e., between formal and substantive multilateralism, should not be perceived as strict, but only serves to guide the discussions. Either option (or a combination thereof) is suitable to embody the design strategy formulated in the previous chapters.

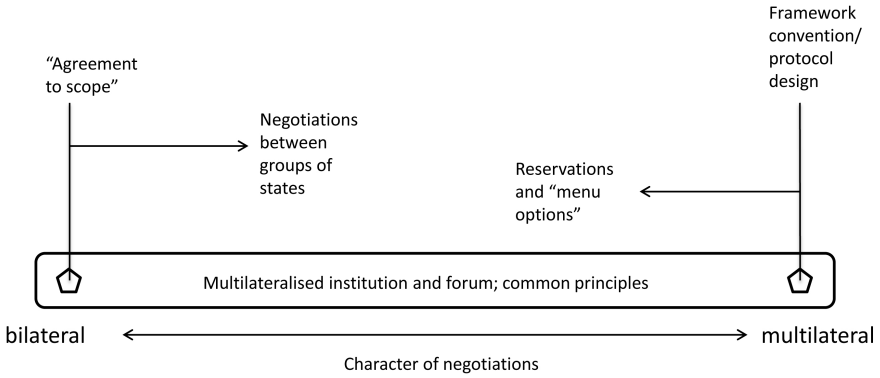

Figure 4: substantive and formal multilateralism in international tax law

A few remarks beforehand. First, it is conceivable that a wealth of literature will most likely develop on the effect and practical implementation of multilateral tax rules (such as the BEPS Convention) on/in bilateral tax treaties (think of language differences between treaties, the precise drafting of the multilateral texts, etc.).[3] However, for such an analysis, a more thorough understanding of the contents of substantive multilateral rules is required. The sole aim of the chapter is, in other words, to consummate the outcomes of the previous chapters. Secondly, the inventory of tools discussed is by no means exhaustive. An attempt has been made to select, in the light of the conclusions of the previous chapters, the most demonstrative examples. Thirdly, the word 'amendment' is understood to include changes to a treaty agreed upon by *all* treaty parties (which is termed an 'amendment' in international public law

3 See for a first exploration on such matters N. Bravo, *The Proposal for a Multilateral Tax Instrument for Updating Tax Treaties*, in: Base Erosion and Profit Shifting (M. Lang, et al. eds., Linde Verlag 2016) at sec. V and VI.

doctrine) as well as an amendment between specific particular parties only (which is named a 'modification' in international public law discourse). From the perspective of international public law, the distinction is purely terminological and does not lead to the application of different residual treaty rules set forth in the Vienna Convention on the Law of Treaties.[4] Finally, the interested reader may miss an explicit discussion and systematic consideration of dispute resolution and arbitration mechanisms. The reason this was left out is that it would introduce a more complicated political problem, that exceeds the ambit of Chapter 5's analytical tools.[5]

A model framework convention-protocol treaty as well as a model 'agreement to scope' are included in Annex A and B and referred to in the text.

PART 7A
The core elements of the multilateral agreement for international taxation

7.2 Introduction to Part 7A

What the multilateral agreement should do, is solve the issues related to the implementation of new norms in the network of bilateral tax treaties identified in Chapter 3, and create a level playing field, so that cooperation between states can converge on the necessary solutions for collective action problems. As argued, this can be achieved by the 'managerial' design strategy. The 'core' elements of an agreement based in this strategy, whether ultimately drafted on the basis of a framework-convention protocol design (Part 7B) or an 'agreement to scope' (Part 7C), or a combination of thereof, are discussed in this section.

The multilateral agreement requires a flexible institution or forum that does not function like a traditional international organisation (section 7.3), and legal principles that guide or inform negotiations and act as focal points for further coordination (section 7.4). Moreover, the question arises what the effect or

4 J. Brunnée, *Treaty Amendments*, in: The Oxford Guide to Treaties (D.B. Hollis ed., OUP 2012) p. 347.

5 First of all, the problem of dispute resolution does not resonate well with the analysis in sections 5.3.2 and 5.3.3, which is about the 'horizontal' distribution of gains in international tax law. Rules for dispute resolution mechanisms do not distribute gains themselves. Rather, the issue is one of agency/delegation (very briefly discussed in sections 6.2.1 and 7.10.3). Secondly, for dispute resolution in international tax law, individuals can request states to initiate proceedings, even if domestic remedies are exhausted. Hence, a different dynamic may be in play: dispute resolution is not purely a state-to-state affair but seeks to provide legal remedies for groups within the state. Such changes may not be fully comprehended without a domestic politics perspective. See e.g. R. Keohane, A. Moravcsik and A. Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 International Organization 457 (2000).

influence of the multilateral treaty is on third (non-participating) states (section 7.5). From international law follows that a multilateral treaty may be able to influence treaties between participating and non-participating states, i.e., that it may have 'network' effects. This deserves further examination. We have seen that the number of states participating in the decision-making processes should be gradually increased so as to increase the regime's fairness. But it is likely that some states, for whatever reason, will choose not to sign a multilateral agreement. This brings up the question what the relationship is between the multilateral agreement on the one hand and bilateral tax treaties concluded between treaty members and third states on the other. From a legal perspective, it is not unlikely that the multilateral agreement may influence the interpretation of such bilateral tax treaties, or that treaty parties agree to bring their bilateral tax treaties with non-signatory states in line with the obligations of the multilateral agreement. Such 'network effects' may further enhance the 'managerial' character of international tax cooperation, as it may evolve and influence the identities and interests of those outside the regime.

7.3 THE ORGANISATION MANAGING THE MULTILATERAL REGIME

7.3.1 The need for institutional flexibility

The organisation that has traditionally developed international tax law is the OECD. The previous chapters, however, raise the question whether the OECD is suited as the leading organisation for tax matters. The OECD is a 'club'-like organisation that restricts its membership to a few (rather homogeneous) developed nations. As this causes some legitimacy issues (see Chapter 4), law-making must be opened up to a more diverse groups of participants, so that 'other' states get an equal opportunity to influence law and decision making taking place. Only this can ensure that substantive international tax law ultimately developed is 'fair'.

In Chapter 5, this direction was then somewhat watered down: the group of participants may be broadened to a more diverse group of states and other actors, but increasing the influence of 'others' on international tax law-making process is not without limits. Extending the influence of 'others' must be gradual, rather than instant. Moreover, it cannot be denied that, in terms of effectiveness, the experience and expertise of the OECD in international tax matters is very important for the progress of international tax law. International tax is a technically difficult area of the law, and the OECD harbours a strong international network of practitioners and lot of expertise. The risk of quickly expanding participation is that this may cause the cooperative effort to implode or end up nowhere.

Be that as it may, the managerial design strategy requires a somewhat formal institutional arrangement. It must install robustness so that cooperation

is continuous and repeated over time, and allow the amount of participating states to be slowly increased. But, if on the one hand, the OECD is unsuited to function as the locus of decision making in international tax, and if, on the other hand, an abrupt shift of tax policy making to an established forum like the UN seems impossible and the OECD, with its network and expertise, cannot be fully kept out of the equation, what would be a suitable way forward? The solution lies on the spectrum somewhere in between, and again, we can learn from international environmental law with its quasi-formal 'treaty bodies'.

7.3.2 Treaty bodies in international environmental law

In international environmental law, regimes have been built with bodies that are neither international organisations (hereinafter: IOs) nor international courts in the traditional sense. These 'organisations', which are tasked with adopting treaty texts and the organisation of the annual conferences, are called treaty bodies.[6]

Treaty bodies provide the regime with flexibility, because they neither have a fixed membership nor are managed from a fixed location, as traditional IOs have and are.[7] Therefore, by the use of such treaty bodies, the costs and bureaucracies associated with traditional IOs are avoided. Hence, as Alvarez notes, the use of treaty bodies may be explained by the widespread dissatisfaction of states with existing IO bureaucracies and politics.[8] Quasi-formal treaty bodies do not compete with formal IOs, but can rather be used to establish mutually reinforcing networks and coalitions.[9] Indeed, treaty bodies can make use of institutional linkages with other international organisations, for instance by taking into consideration exogenous standards created by other, formal international organisations.

Yet, treaty bodies are not IOs in the traditional sense. Of the three elements used to define IOs (founded on international agreement; having at least one

6 G. Ulfstein, *Treaty Bodies*, in: The Oxford Handbook of International Environmental Law (D. Bodansky, J. Brunnée and E. Hey eds., OUP 2008) and G. Ulfstein, *Treaty Bodies and Regimes*, in: The Oxford Guide to Treaties (D.B. Hollis ed., OUP 2012). Schermers and Blokker also refer to these organisations: H.G. Schermers and N.M. Blokker (2011) at par 44, and in P. Sands and P. Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell sixth ed. 2009) they are referred to in Ch. 4 as 'other autonomous organisations'. Likewise: R.R. Churchill and G. Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 American Journal of International Law 623-659 (2000).

7 G. Ulfstein (2012) p. 430.

8 J.E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005) p. 320.

9 Id. at p. 320 at fn. 134.

organ with a will of its own; established under international law),[10] treaty bodies lack a will of their own. A treaty body is, in the words of Schermers and Blokker, no more than the sum of its members.[11] It hence does not have legal personality: it acts on behalf of its parties.[12]

The Conference of the Parties (COP), the body's central plenary organ, meets annually, if necessary in different locations. It is supported by a secretariat that facilitates the plenary body sessions, conducts studies, prepares draft decisions and circulates reports. Such administrative bodies are often located within existing international organisations. For instance, secretariats to global treaties on human rights and on the law of the sea are positioned within the framework of the United Nations.[13]

The competences of treaty bodies typically comprise internal as well as external ('decision-making') powers. Internal powers are for instance the power to adopt rules of procedure, financial regulations and the budget. Decision-making powers, on the other hand, are often related to developing the substantive commitments of the parties, and must be provided for in the treaty (see, e.g., art. 7(2) below: 'The Conference of the Parties, as the supreme body of this Convention (…))'. Treaty bodies therefore contribute to the dynamic character of the regime and are used to overcome the cumbersome treaty making process.[14] For instance, treaty bodies, by the Conference of the Parties, adopt amendments to the relevant treaty texts or adopt protocols or annexes (sometimes by opt out, see section 7.10),[15] facilitate the exchange of information, constitute subsidiary bodies, and seek cooperation with other international governmental and nongovernmental organisations.

In example, the treaty body of the UN Framework Convention on Climate Change is constituted and organised by the following procedural rules:[16]

> 'Article 2 Objective
> The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt (…)
> Article 7 Conference of the Parties
> 1. A Conference of the Parties is hereby established.

10 H.G. Schermers and N.M. Blokker (2011) par. 33.
11 Id. at par. 44.
12 V. Röben, *Conference (Meeting) of States Parties*, in: The Max Planck Encyclopedia of Public International Law (R. Wolfrum ed., OUP Online Edition ed. 2010)
13 G. Ulfstein (2012) p. 431-432.
14 Id. at p. 435.
15 V. Röben (2010) sec. 2.
16 See for a discussion: G. Loibl, *Conferences of Parties and the Modification of Obligations: The Example of International Environmental Agreements*, in: Interrogating the Treaty: Essays in the Contemporary Law of Treaties (M. Craven and M. Fitzmaurice eds., Wolf Legal Publishers 2005); UN Climate Change Secretariat, *United Nations Framework Convention on Climate Change: Handbook* (UNFCCC 2006).

2. The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. To this end, it shall:
(a) Periodically examine the obligations of the Parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge;
(b) Promote and facilitate the exchange of information on measures adopted by the Parties to address climate change (…);
(c) Facilitate, at the request of two or more Parties, the coordination of measures adopted by them to address climate change and its effects, (…);
(d) Promote and guide, in accordance with the objective and provisions of the Convention, the development and periodic refinement of comparable methodologies, to be agreed on by the Conference of the Parties, (…);
(e) Assess, on the basis of all information made available to it in accordance with the provisions of the Convention, the implementation of the Convention by the Parties, the overall effects of the measures taken pursuant to the Convention, (…);
(f) Consider and adopt regular reports on the implementation of the Convention and ensure their publication;
(g) Make recommendations on any matters necessary for the implementation of the Convention;
(h) Seek to mobilize financial resources in accordance with Article 4, paragraphs 3, 4 and 5, and Article 11;
(i) Establish such subsidiary bodies as are deemed necessary for the implementation of the Convention;
(j) Review reports submitted by its subsidiary bodies and provide guidance to them;
(k) Agree upon and adopt, by consensus, rules of procedure and financial rules for itself and for any subsidiary bodies;
(l) Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies; and
(m) Exercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention.
3. The Conference of the Parties shall, at its first session, adopt its own rules of procedure as well as those of the subsidiary bodies established by the Convention, which shall include decision-making procedures for matters not already covered by decision-making procedures stipulated in the Convention. Such procedures may include specified majorities required for the adoption of particular decisions.
4. The first session of the Conference of the Parties shall be convened by the interim secretariat referred to in Article 21 and shall take place not later than one year after the date of entry into force of the Convention. Thereafter, ordinary sessions of the Conference of the Parties shall be held every year unless otherwise decided by the Conference of the Parties.

> 5. Extraordinary sessions of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at the written request of any Party, (…).
> 6. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not Party to the Convention, may be represented at sessions of the Conference of the Parties as observers. (…)
> Article 15 Amendments to the Convention
> 1. Any party may propose amendments to the convention.
> Amendments to the Convention shall be adopted at an ordinary session of the Conference of the Parties. The text of any proposed amendment to the Convention shall be communicated to the Parties by the secretariat at least six months before the meeting at which it is proposed for adoption. The secretariat shall also communicate proposed amendments to the signatories to the Convention and, for information, to the Depositary. (…)'[17]

It is not uncommon for treaty bodies, as do 'normal' international organisations, to coordinate with other institutions by means of formal or informal coordination mechanisms. In this way, treaty bodies make use of the experience of other organisations in developing policy directions and solutions. In other words, interaction and interplay between treaty bodies and international organisations takes place.

As regards to formal cooperation: exogenous standards may be incorporated in the terms of a treaty. There are many examples of soft standards and guidelines that have been 'hardened' in this way.[18] In international conventions on for instance nuclear safety,[19] the terms of the conventions themselves cross-refer to nonbinding legislative standards, as updated from time to time. For instance, the Joint Convention on the Safety Spent Fuel Management and on the Safety of Radioactive Waste Management[20] recalls certain international non-binding standards in its preamble[21] and refers to these standards in some

17 United Nations Framework Convention on Climate Change.

18 See for such examples A.E. Boyle, *Soft Law in International Law-Making*, in: International Law (M.D. Evans ed., OUP 3d ed. 2010) p. 904.

19 See for further examples e.g. B.H. Oxman, *The Duty to Respect Generally Accepted International Standards*, 24 New York University Journal of International Law and Politics 109 (1991) p. 122; F. Kirgis Jr, *Specialized Law-Making Processes*, in: United Nations Legal Order (O. Schachter and C. Joyner eds., Cambridge University Press 1995); G. Handl, *The IAEA Nuclear Safety Conventions: An Example of Successful "Treaty Management"?*, 72 Nuclear Law Bulletin 7 (2004); D. French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 International and Comparative Law Quarterly 281 (2006).

20 *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* (adopted 5 September 1997), 2153 UNTS 357.

21 Par XIV of the preamble holds that the contracting parties: 'keeping in mind the principles contained in the interagency 'International Basic Safety Standards for Protection against Ionizing Radiation and for the Safety of Radiation Sources' (1996), in the IAEA Safety Fundamentals entitled 'The Principles of Radioactive Waste Management' (1995), and in the

of its articles.[22] Moreover, it is not uncommon for the staff of one international organisation to be able to act as observer in the work of another international organisation. As Schermers and Blokker note, many agreements between specialised agencies of the UN provide for reciprocal representation at meetings when interests are shared.[23]

But cooperation need not be formal. The informal consideration of external materials in treaty negotiations may influence the results achieved. For instance, guidelines developed by the International Atomic Energy Agency (IAEA) formed the basis for the swiftly adopted 1986 Convention on Early Notification of a Nuclear Accident.[24] And article 7(2)(l) of the UN Framework Convention on Climate Change, cited above, allows the Conference of the Parties to seek and utilize cooperation with another international organisation (e.g., by providing and exchanging information, etc.). Hence, cooperation may also exist on the basis of 'loosely structured, peer-to-peer ties developed through frequent interaction rather than formal negotiation'.[25] The bottom line is that ideas and knowledge built in one institutional environment impacts decision-making in another through networks among government officials.[26]

7.3.3 Can treaty bodies be used for the multilateral agreement for international taxation?

A treaty body such as a 'Conference of the Parties' may well work for an agreement for international taxation. Its membership can be slowly expanded and deliberations on international tax norms can take place on 'neutral' grounds (i.e., neither in the OECD nor in the UN). Nevertheless, it may be wise to start with a limited group of homogeneous states, with the aim of slowly increasing the level of participation in the Conference of the Parties.

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existing international standards relating to the safety of the transport of radioactive materials; (…) have agreed as follows: (…)'.

22 In articles 4, 11 and 24. E.g. art. 4: 'each Contracting Party shall take the appropriate steps to (…) (iv) provide for effective protection of individuals, society and the environment, by applying at the national level suitable protective methods (…) in the framework of its national legislation wich has *due regard to internationally endorsed criteria and standards*' (emphasis added). See further: G. Handl (2004), sec. 2.

23 H.G. Schermers and N.M. Blokker (2011) par. 186-187.

24 *1986 Convention on Early Notification of a Nuclear Accident* (26 September 1986), 1457 UNTS 133.

25 K. Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Virginia Journal of International Law 2 (2002) p. 5.

26 A. Slaughter, *A New World Order* (Princeton University Press 2004); K. Raustiala (2002). That the OECD already operates in networks in the international tax field is shown by A. Christians (2010a). She provides a word of caution, however: the way such transnational networks work is poorly understood and such networks are uneasy to access.

What would be required? At a minimum, states would need to agree to meet regularly in the future within the 'neutral' COP, and identify some 'guiding principles' to act as common value-maximising terms. In this regard, it should be noted that the first steps in the direction of institutionalising such a treaty body have already been taken. The OECD seems to be slowly expanding participation, by having built on the BEPS Project with its own experts as well as with the G20[27] and other, non-western, countries.[28] Talks about the multilateral instrument for implementing the BEPS Project are organized under the auspices of the 'ad hoc group', which consists of states interested in participating in the BEPS Project. The same can be said of the 'inclusive framework' that the OECD has constituted to involve non-OECD member countries on a more equal level in implementing and further developing the BEPS Project.[29] Finally, the BEPS Convention evidences that a COP may in fact be constituted within the area of international taxation (see Chapter 8).

Nevertheless, the design strategy formulated in the previous chapter requires that states will come to have a real and tangible opportunity to influence the debates and negotiations when developing and adopting international tax norms. On this point, current efforts still fall short. The participants of the ad-hoc group have not necessarily been part of the law-making processes that generated the BEPS Reports and hence the BEPS Convention. Instead, standard setting has taken place within the environment of expertise of the OECD. The non-binding outcomes of this process (i.e., the BEPS reports) have been proposed as *fait accompli* to the ad hoc group's participants (which includes OECD-members as well as non-members). And paradoxically, the more equal 'inclusive framework' calls non-OECD Members 'BEPS Associates' (i.e., not 'Members' or 'Participants').

It may be true that, in the short run, linkages with the OECD are unavoidable. A new (quasi-) formal institutional arrangement does not have the tax expertise necessary to develop international tax law and must therefore use or 'borrow' from the OECD's expertise. And there is another issue: the output of the OECD is nonbinding. One might wonder whether non-binding influence on multilateral treaty-making could be completely restricted or prevented. Even if the vital process of idea development and negotiation would fully take

27 The final package on BEPS measures has been endorsed by the G20 finance ministers on 15 and 16 November 2016. Still, the involvement of the G20 may enhance the effort's effectiveness but not its legitimacy. As Christians argues, the G20 does not enhance the participation of non-member countries in developing tax policy, so long as the 'framing, discussion, and consensus building takes place within an established order that continues to be dominated by the world's wealthiest economies'. A. Christians (2010b) p. 35-39.

28 The participation of non-members developing countries in establishing tax norms has been considered 'unprecedented' by the OECD. OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15: 2015 Final Report* (2015), p. 5.

29 OECD, 'Implementing the BEPS Package: Building an Inclusive Framework', http://www.oecd.org/tax/flyer-implementing-the-beps-package-building-an-inclusive-framework.pdf.

place at the level of the COP, where states have the ultimate vote in agreeing to international obligations, discussions may be heavily influenced by output generated within the OECD.

How to proceed? First of all, it may be best to formalise the COP's cooperation with the OECD (see e.g. articles 5 and 6(6) of the draft conventions taken up in Annex A and B), so that the OECD's input may be balanced against input from other sources. Moreover, as law-making should ultimately take place in an inclusive manner, a first step would be to, over time, move the COP's secretariat to the broader membership forum of the UN. This step should remove the 'membership bias' that characterises the development and negotiation of ideas and norms in current international tax law-making. Finally, it might be wise to start drafting neutral 'commentaries' and 'model provisions' within the ambit of the COP. Whereas the OECD's model provisions may serve as an inspiration, they should be openly discussed and seen as relevant ideas, and not as texts to be endorsed without any further discussion by participants.

For example, those new model tax provisions and commentaries could be used in the 'agreement to scope' scenario (Part 7C), in which states agree to flesh out common terms in further bilateral interactions. The new model provisions and commentaries might help to guide those bilateral negotiations. In this regard, in line with what De Goede argues, it may be advisable to move to a type of model convention that contains a set of universally accepted framework provisions (i.e., multilateral norms in the 'strong' sense) with commentaries, and a set of 'technically sound alternative provisions', with clearly stated pros and cons.[30] Alternatively, for the purposes of the *substantive* multilateralism effectuated by a framework convention-protocol design (Part 7B), commentaries on adopted norms may provide participants with further interpretative guidance. Where norms need to be amended, states can (re)enter into discourse.

7.4 Guiding principles

7.4.1 Objectives and guiding principles in international legal instruments

Managerial treaties often contain guiding principles under which substantive norms may further develop.[31] Such principles indicate a general direction

30 J.J.P. De Goede, *The BRICS Countries in the Context of the Work on the UN Model*, in: BRICS and the Emergence of International Tax Coordination (Y. Brauner and P. Pistone eds., IBFD 2015) p. 444.

31 Examples of such principles can be primarily found in Framework Conventions/Protocol Designs. See for instance the United Nations Framework Convention on Climate Change; the *1979 Convention on Long-Range Transboundary Air Pollution* (adopted 15 November 1979), 1302 UNTS 217 (containing the principle of reducing and preventing air pollution); the *WHO Framework Convention on Tobacco Control* (adopted 21 May 2003), 2302 UNTS 166

to inform process, treaty interpretation, and future negotiations.[32] Although such principles come across as 'rules of the road' (see further section 7.10.3), the principles are not meant to generate substantive treaty commitments, but rather to guide the development of the regime. In fact, as they codify shared understandings, they provide parties with directions to 'learn', that is, redefine and explore their interest.

Under the framework convention for climate change (see section 6.4) for instance, the main objective that guides the further development of the regime[33] is to achieve the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent serious anthropogenic interference with the climate system'. Moreover, the climate change convention states that 'the parties shall be guided, inter alia,'[34] by the principle of the common but differentiated responsibility between developing and developed states, the precautionary principle, the principle that all parties have the right to sustainable development, and the principle that 'a supportive and open international economic system' is promoted. As Birnie notes, these principles have the:

> 'important merit of providing some predictability regarding the parameters within which the parties are required to work towards the objective of the convention. In particular, they are not faced with a completely blank sheet of paper when entering subsequent protocol negotiations or when the Conference of the Parties takes decisions under the various articles empowering it to do so'.[35]

Because the climate change convention explicitly states that these principles are to guide the parties, these principles are not necessarily binding rules that must be complied with. Yet, they are not void of legal effects either. They are relevant to the interpretation and implementation of the convention and 'create expectations concerning matters which must be taken into account in good

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(containing the objective of protecting present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption, under the e.g. principle of informing every person of the adverse consequences of tobacco consumption and the need to take measures against tobacco consumption, see art. 3 and 4). Another interesting set of negotiation-influencing rules are the Draft Articles on a Law of Transboundary Aquifers, in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10). Although these rules have never become binding, they were meant by the ILC to serve as binding guidance for further bilateral negotiations on shared groundwater resources. The Law on Transboundary Aquifers would formulate some minimal legal standards to this effect. See: N. Matz-Lück, *Framework Conventions as a Regulatory Tool*, 1 Goettingen Journal of International Law 439 (2009) p. 449-450. These draft articles, in other words, have the characteristics of an 'agreement to scope'.

32 A. Chayes and A.H. Chayes (1995) p. 11.

33 P.W. Birnie, A.E. Boyle and C. Redgwell (2009) p. 357.

34 United Nations Framework Convention on Climate Change, art. 3.

35 P.W. Birnie, A.E. Boyle and C. Redgwell (2009) p. 358-359.

faith in negotiations of further instruments'.[36] This, as Bodansky notes, may be achieved by placing the objective and guiding principles in separate articles, giving them greater legal status than placing them in the convention's preamble would.[37] Also, it is possible that the formulation of principles in the manner above causes these principles to arise to become customary international law.[38]

So, in sum, including principles in the articles of the convention guides the conscious development of the commitments under regime.

7.4.2 The use of objectives and guiding principles in the multilateral agreement for international taxation

As for international tax law, the managerial approach requires the conscious development of the multilateral agreement towards commonly identified ideals. Once guiding principles have been identified, further negotiations can take place under the 'agreement to scope' or framework convention-protocol designs.

Let's examine several examples of guiding principles and objectives for a managerial multilateral treaty below.

– *Objectives*

The development and modernisation of the international tax treaty network. It is clear that international tax law needs a mechanism to more quickly respond to developments in, e.g. society, technology and business. As argued in this book, the multilateral agreement for international taxation is key in this regard.

Transparent, continuous and inclusive tax law-making. A general type of objective of a managerial multilateral treaty could be one that progressively aims to achieve the procedural requirements set forth in Chapter 4.

– *Principles*

The negotiations can be further influenced and guided by several principles. This section does not aim to make any normative claims as regards their contents, as this would require a separate study into the contents of 'better'

36 Id. at p. 359.

37 D. Bodansky (1993) p. 502.

38 This has for instance been argued as regards the precautionary principle: O. Mcintyre and T. Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 Journal of Environmental Law 221 (1997). In fact, to *prevent* such an effect, Bodansky notes, the United States pressed for several changes in the text of the climate change convention: the words 'to guide' was added, the term 'states' was replaced by 'Parties' to signify the limited scope of the principles, and the term 'inter alia' was added to indicate that other principles than those listed in the article could be taken into account in implementing the convention. D. Bodansky (1993) p. 501-502.

substantive international tax rules for the future. Besides, as argued in Chapter 4.1, views on substantive international tax law are likely to be heavily contested. For instance, it is likely that alternative accounts on what constitutes 'fair' corporate income taxation may arise. But when in a normative desert, actors can enter into a norm-generating discourse, emphasizing the need for structural, procedural managerial underpinnings to international taxation.[39] Nevertheless, as a way of illustrating an understanding of 'guiding principles' in a managerial tax treaty, some suggestions are provided here. These suggestions are based on the underlying ideas related to the BEPS Project.

For instance, states could agree on an equality principle, in which they agree to treat, for tax purposes, income derived from the cross-border business activities of firms equal to income derived from the non-cross-border (that is, domestic) business activities of firms.[40] Another suggestion is that parties adhere to the principle of single taxation of corporate income. The single tax principle prevents undertaxation as well as overtaxation, and as Avi-Yonah notes, its normative basis is thus:

> 'if income derived from cross-border transactions is taxed more heavily than domestic income, the added tax burden creates an inefficient incentive to invest domestically (…) if income from cross-border transactions is taxed less heavily than domestic income, this creates an inefficient incentive to invest internationally rather than at home'.[41]

The nexus principle (taxation at the location where economic substance is situated) might be another candidate, as it represents a conception that lies at the heart of the OECD's BEPS Project. Adherence to the nexus principle in guiding the development of international tax might propel evolution towards destination-based corporate tax systems, in which transactions rather than production factors determine a country's corporate tax claims.[42] Finally, treaty negotiators could agree on a principle that allows for the explicit consideration of the source taxation rights of selected developing countries in future nego-

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39 T. Risse (2000) shows that when international actors are faced with a 'normative desert', they argue, i.e., they engage in deliberative processes. For this, he refers to the work of Habermas.

40 M.F. De Wilde (2015a) p. 90.

41 R.S. Avi-Yonah (2007) p. 9. See also M.F. De Wilde (2015a) at p. 49 who holds that 'it is unfair to tax economic rents more than once or less than once'.

42 See e.g. A. Auerbach and M.P. Devereux (2013); A. Auerbach and M.P. Devereux (2015) and M.F. De Wilde (2015a) Ch. 6.3. As Ault says, some (non-BEPS related) developments in international tax can be interpreted as a general move in the direction of recognizing more taxing rights in the 'source' jurisdiction in the economic sense, away from the fixed base and physical presence tests as prerequisites for claiming taxing rights. Such developments include proposals for allocating taxing rights on the basis of the utilisation of services in a country and the ultimate consumption of goods. H.J. Ault, *Some Reflections on the OECD and the Sources of International Tax Principles*, 70 Tax Notes International 1195 (2013).

tiations. Part of the outrage caused by MNE BEPS activities relates to the position of developing nations. Developing countries have limited means to assess and collect taxes. Moreover, as Lang and Owens point out, a lack of transparency and the fear of losing foreign investment lead to weak domestic rules, making it hard for developing countries to counter tax avoidance.[43] This could for instance lead negotiators to consider tax treaties to function as development aid,[44] for instance by providing an exemption of foreign income instead of a credit as relief for double taxation.[45]

7.5 THE MULTILATERAL AGREEMENT'S NETWORK EFFECTS

7.5.1 Introduction

It is questionable whether the multilateral agreement for international taxation will be universally accepted, and, as argued, the amount of participating states involved in the nuts and bolts of international tax law making should be incrementally rather than drastically increased. Consequently, some states will – initially or permanently – not participate. It may also be likely that not all of a state's treaties will be covered by the agreement. Nevertheless, the multilateral agreement's 'network effects' might be of importance in the light of the design strategy. Network effects may lead to a more widespread use, development, and acceptance of the multilateral agreement's norms.

Treaties can however not be binding on third states due to the *pacta tertiis* rule of international public law. As Art. 34 VCLT holds:[46] 'a treaty does not

43 M. Lang and J.P. Owens, *The Role of Tax Treaties in Facilitating Development and Protecting the Tax Base*, WU International Taxation Research Paper Series No 2014-03 (2014), available at SSRN: http://ssrn.com/abstract=2398438.

44 See e.g. on tax treaties as development aid: K. Brooks, *Tax Treaty Treatment of Royalty Payments from Low-Income Countries: A Comparison of Canada and Australia's Policies*, 5 eJournal of Tax Research 169 (2007); P. Pistone, *Tax Treaties with Developing Countries: A Plea for New Allocation Rules and a Combined Legal and Economic Approach*, in: Tax Treaties: Building Bridges between Law and Economics (M. Lang, et al. eds., IBFD 2010).

45 Pistone for instance argues for a simplified allocation framework such as the one applied within the ILADT Latin American Model Convention. This Model provides for relief on the basis of an exemption method for almost all types of income it allocates, and favours taxation at source: P. Pistone, *Geographical Boundaries of Tax Jurisdiction, Exclusive Allocation of Taxing Powers in Tax Treaties and Good Tax Governance in Relations with Developing Countries*, in: Tax, Law and Development (Y. Brauner and M. Stewart eds., Elgar Publishing 2013). For a comparison of the ILADT MTC with the OECD MTC: P. Schoueri, *Comparison of the OECD and ILADT Model Conventions*, 68 Bulletin for International Fiscal Documentation (2014).

46 The pacta tertiis rule also follows from e.g. art. 26 and art. 2(1)(g) VCLT. Art. 26 holds that: 'Every treaty is binding upon the parties to it and must be performed by them in good faith'. A 'party' is defined in Art. 2 as 'a State which has consented to be bound by the treaty and for which the treaty is in force'.

create rights or obligations for a third state without its consent'. Sinclair summarises: 'in so far as the treaty may bear the attributes of a contract, third states are clearly strangers to that contract'.[47] However, a multilateral convention, albeit non-binding on them, may *affect* third states. And indeed, the principle of art. 34 can best be seen as establishing a general presumption that allows some exceptions.[48] After all, the multilateral agreement, once concluded, 'is there'.[49] In other words, any treaty that is in force is a reality for third parties as well.

Let's single out three potential exceptions to the *pacta tertiis* rule in public international law (section 7.5.2), to see whether the multilateral agreement can influence the tax treaties of third states, either 'automatically' (i.e., on the basis of the existing rules of public international law) or by design. Section 7.5.3, subsequently, considers the relevance of these three exceptions from the perspective of the design strategy.

First of all, there is a possible although remote chance that the institutionalisation of fiscal norms by means of a multilateral agreement could lead to a situation where its norms become a binding obligation on third states through state practice (action) or acquiescence or estoppel (inaction) (see section 7.5.2.1). Secondly, the multilateral tax agreement could influence the interpretation of bilateral tax treaties with non-signatory states. The institutionalisation of binding fiscal norms could require the treaty interpreter of a non-related tax treaty to take the norms of the multilateral agreement into account on the basis of art. 31(3)(c) VCLT when interpreting that tax treaty (see section 7.5.2.2). Finally, it is possible for signatory states to agree to bring their bilateral tax treaties in conformity with the rules of the multilateral agreement as it is updated from time to time (a 'pactum de agendo', see section 7.5.2.3).

7.5.2 Network effects in international public law

7.5.2.1 Can the norms of a multilateral agreement become a binding obligation on third states through estoppel or acquiescence?

There is evidence from international public law that suggests that the law of treaties permits some normative influence on treaties in which a third state is a party. Indeed, it can be argued that state practice can lead to the formation of such a normative influence. It is generally accepted that 'positive' state practice of the non-signatory state can indeed influence the interpretation of

47 I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press 2nd ed. 1984) p. 98-99.

48 Id. at p. 101.

49 B. Vukas, *Treaties, Third-Party Effect*, in: The Max Planck Encyclopedia of Public International Law (R. Wolfrum ed., OUP Online ed. 2011).

a treaty[50] and can even modify or amend it.[51] State practice in this regard could for instance relate to a third state's exercise of influence on the creation of norms adopted under the framework convention. A state could file a formal statement as regards its position on a norm. Also, state practice can be formed if a third state has not accepted the norm on a multilateral level, but nevertheless uses the norm in its subsequent bilateral tax treaties.

More interestingly, however, is the question whether the construction of state practice in a 'negative' way,[52] i.e., on the basis of *inaction*, can influence the treaty relationship between a member and a non-signatory state. Legal constructs that endow legal effects to inaction are called acquiescence and estoppel. Could it be argued that if one of the parties to a tax convention has accepted certain norms under the multilateral agreement, and a third party has not, the third state has acquiesced in, or is estopped from, denying to apply and interpret the norms of a bilateral tax treaty concluded after the date of adoption of the multilateral agreement in line with the norms created under the multilateral agreement, if that party has remained silent as regards the effects and functioning of these norms?[53] An example: could it be, in the

50 See art. 31(3)(b) VCLT.

51 See the advisory opinion of the ICJ in ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* (Advisory Opinion), [1971] IJC Reports 16, par. 22, where the ICJ interpreted the voting practice of abstaining members of the UN Security Council as to not constituting a bar to the adoption of resolutions. Also, see the ILC, which held that 'A consistent practice, establishing the common consent of the parties to the application of the treaty in a manner different from that laid down in certain of its provisions, may have the effect *of modifying the treaty*', ILC, *Draft Articles on the Law of Treaties with Commentaries* (Yearbook of the International Law Commission, 1966, vol. II 1966) p. 236 (emphasis added).

52 For this distinction see: I.C. Macgibbon, *The Scope of Acquiescence in International Law*, 31 British Year Book of International Law 143 (1954) p. 143; ICJ, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand),* (Seperate Opinion of Sir Gerald Fitzmaurice, Judgement of 15 June 1962), [1962] IJC Reports 3 p. 55.

53 This argument is based on F.A. Engelen (2004) p. 469-472. Engelen's argument runs as follows: 'It is submitted that the parties to a tax treaty concluded between OECD Member countries cannot assert in good faith that the provisions of the treaty must be given a different meaning than the one established in the Commentaries on the identical provisions of the OECD Model Tax Convention in so far as: (a) both parties have voted in favour of the recommendations concerning the Model made by the OECD Council pursuant to Article 5(b) of the OECD Convention; (b) neither party has entered a reservation on the provisions of the Model nor made an observation on the interpretation of those provisions as set out in the Commentaries thereon; (c). the treaty follows the pattern and the main provisions of the Model; and (d) neither party has indicated in the course of the actual negotiations that it understood the provisions of the treaty differently than as set out in the Commentaries on the identical provisions of the Model. In these circumstances, the presumption must be that the parties have acquiesced in the interpretation set out in the Commentaries. The acquiescence of both parties amounts to a tacit agreement to interpret and apply the provisions of the treaty that are identical to those of the OECD Model Tax Convention in accordance with the Commentaries thereon, and the context for the purpose of the inter-

situation described above, that the third state has acquiesced in the use of a principal purpose test (such as set forth in Action 6)?[54] If such a tacit agreement exists, this agreement could operate as 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions', which has to be taken into account together with the context, in the process of treaty interpretation, on the basis of art. 31(3)(a) VCLT.

A clue that the multilateral agreement can indeed have this effect on bilateral tax treaties with third states is art. 103 of the Charter of the United Nations. This provision holds:

> 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

In simple terms, the provision holds that the Charter shall prevail over other agreements, also in relation to agreements concluded between member states and *non*-member states. Although the issue is of limited relevance in practice considering the UN's almost universal membership,[55] authors writing at a time when the UN did not have such an extended membership questioned whether non-members were formally bound to the Charter by art. 103.[56] One argument that surfaced was that third states were bound on the basis of good faith or estoppel in respect to treaties concluded after the accession of a member-state.[57] Could the knowledge of the non-member state that its treaty party had limited its competence under the UN Charter estop the non-member state from denying the obligations under the Charter when applying a treaty concluded between it and the member state?[58] It seems clear that even though non-member states are not bound to the primacy of the UN Charter, they must

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pretation of the treaty comprises such an agreement on the grounds of Article 31(2)(a) VCLT. In addition, the acquiescence of both parties can also operate as estoppel in cases where one of the parties would later assert that a different interpretation was in fact intended'.

54 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: 2015 Final Report* (2015)

55 A. Aust (2013) p. 195.

56 A. Paulus and J.R. Leiss, *Article 103*, in: The Charter of the United Nations: A Commentary (B. Simma, et al. eds., OUP 3d edn ed. 2012), p. 2130.

57 Id. at p. 2130. It was also claimed that this was the case due to the special character of the UN as a peace keeping organisation and due to its extensive membership. See e.g.: W. Czaplinski and G. Danilenko, *Conflicts of Norms in International Law*, 21 Netherlands Yearbook of International Law 3 (1990) p. 15-17.

58 R.S.J. Macdonald, *Fundamental Norms in Contemporary International Law*, 25 Canandian Yearbook of International Law 115 (1987) p. 122-123.

recognise that *their treaty parties*, as member states of the UN, *are* bound to the Charter through art. 103.[59]

For acquiescence and estoppel to arise, however, the circumstances that an inaction or silence can be interpreted as consent or as estoppel need to be clear and convincing. 'Acquiescence is not lightly to be presumed'.[60] As the ICJ expressed in the *North Sea Continental Shelf* case:

> '[O]nly a *very definite, very consistent course of conduct* on the part of a State (...) could justify the Court in upholding [the contention that the rule for the delimitation of the continental shelf had become binding in another way]'.[61]

And in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria:*

> 'An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court (…)'.[62]

The *Temple of Preah Vihear* case is particularly noteworthy in relation to the concept of acquiescence and also estoppel.[63] The case concerned a boundary dispute between Cambodia and Thailand (then called Siam).

In 1904, the two governments signed a bilateral boundary treaty that held that the boundary would follow a watershed line that placed the Temple on (then) Siamese territory. Also, the treaty stipulated that a Joint Commission should delimitate the boundary between Siam and Cambodia. However, no records

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59 R. Liivoja, *The Scope of the Supremacy Clause of the United Nations Charter*, 57 International and Comparative Law Quarterly 583 (2008), p. 596. This idea seems to stem from E. Sciso, *On Article 103 of the Charter of the United Nations in the Light of the Vienna Convention on the Law of Treaties*, 38 Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht 161 (1987), who relates the argument to the operation of art. 30 VCLT. Since art. 30 VCLT explicitly exempts art. 103 of the UN Charter from the working of the *lex posterior* rule, it could be argued that the Charter's priority over treaties of non-members can be found in a general rule of international law, as codified in art. 30 VCLT. See p. 167-168 and in particular footnote 19.

60 See: K.H. Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, 54 British Yearbook of International Law 119 (1984) p. 126; *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* p. 55.

61 ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands),* (Judgement), [1969] IJC Reports 3, at par. 30.

62 ICJ, *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria),* Preliminary Objections (Judgement), [1998] ICJ Reports 275 par. 57.

63 ICJ, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand),* (Merits, Judgement of 15 June 1962), [1962] IJC Reports 3. In the case, like in the Namibia opinion, the line between treaty amendment and treaty interpretation by subsequent conduct is blurred, see above.

could be found of the Commission's decision on which side of the boundary the Temple of Preah Vihear lay, a beautiful and important religious monument for the peoples of both states. The Siamese representatives of the Commission requested the French authorities to map the border region. The resulting map, which placed the temple on Cambodian territory, was communicated to the Siamese government.

Fifty years later, this map was presented to the International Court of Justice by the Cambodian government, to show that the Temple was located on Cambodian and not on Siamese territory.[64] As regards this map, the Court held that, because the Siamese government had failed to react, it must have tacitly agreed with the boundary set out therein:

> 'In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset*'.[65]

There were two circumstances that called for some action on the part of Siam, leading the Court to consider that the Siamese government had acquiesced in the use of the map's boundary. First of all, the government of Siam *itself* requested French topographical officers to prepare the maps of the border regions. The map produced and subsequently communicated to the Siamese government and made public by the French was thus a product of this request. It could therefore be argued that the Siamese government accepted the risk of any mistakes in the map and it was up to them to verify the results.[66]

Secondly, the practice of the Siamese government 'on the ground' pointed in the direction of acquiescence.[67] Prince Damrong of Siam, formerly Minister of the Interior of Siam, had visited the premises of the Temple. At the time of his visit, he was president of the Royal Institute of Siam, charged with duties related to archaeological monuments:

> 'When the prince arrived at Preah Vihear, he was officially received by the French Resident for the Adjoining Cambodian Province (…) with the French flag flying. On the return [of the Prince] to Bangkok, [he] sent the French Resident some photographs of the occasion [and] he used language which seems to admit that France, through her Resident, had acted as the host country'.[68]

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64 See also for a discussion of the case: F.A. Engelen (2008) p. 53-55.
65 *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* p. 23.
66 *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* p. 58.
67 *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* p. 29.
68 Id. at p. 30 (emphasis added).

The circumstances in the Temple case thus clearly *provoked* a reaction on the part the authorities of the Siamese government. The French flag was flying, on disputed grounds. Yet, the Siamese representative did not say anything. On the contrary: the minister even sent his French host some photographs of the occasion!

The *Gulf of Maine* and the *Fisheries* cases provide further evidence that provocative circumstances must be present in order to interpret silence as consent. The *Gulf of Maine* case involved a boundary dispute between the US and Canada. Canada had issued permits, on its own side of what it regarded as the median line dividing the fish-rich Georges Bank, for the exclusive exploitation of hydrocarbons. According to Canada, the issue of these permits led to a circumstance under which the US had acquiesced in the idea to adopt a median line as the boundary between the two jurisdictions.[69] These permits were published in the *Monthly Oil and Gas Report*. The Court, however, considered:

> 'The facts being as described, the Chamber does not feel able to draw the conclusion that the United States acquiesced in delimitation of the Georges Bank continental shelf by a median line'.[70]

Clearly, the fact that Canada had issued the exploitation permits did not generate such circumstances as to provoke a reaction from the US. Canada had never issued an official proclamation or other publication for the purpose of advertising its claims internationally.[71] They concerned technical and an internal matter.

In the *Fisheries case*,[72] on the other hand, the circumstances were much more 'consistent' and 'clear'. Norway had drawn straight baselines to delimit a maritime area despite a very irregular and tormented coastline. The dispute concerned the validity of the use of these baselines, as by using these lines, the waters under Norwegian sovereignty were extended.[73] The Court reasoned that the system was consistently applied and enforced by Norway for more than 60 years. More importantly, the Court had encountered no opposition

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69 ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America),* (Judgement), [1984] IJC Reports 246 p. 305-306. See also: H. Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989: Part One*, 60 British Yearbook of International Law 1 (1990) p. 35

70 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America) para. 137.

71 This was in fact an argument used by the US. See: id. at p. 306.

72 ICJ, Fisheries Case (United Kingdom v. Norway), (Judgement), [1951] ICJ Reports 116

73 R. Kolb, Principles as Sources of International Law (With Special Reference to Good Faith), 53 Netherlands International Law Review 1 (2006) p. 21.

on the part of other states.[74] Particularly, as to the United Kingdom, the Court considered:

> '[A]s a coastal state on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the [delimitation] Decree of 1869, which had at once provoked a request for explanations (…)'.[75]

As a result, the court held that the United Kingdom must have acquiesced in the use of the lines,[76] as:

> 'The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom'.[77]

So, for a successful claim on acquiescence or estoppel,[78] circumstances must be present so as to clearly provoke a party to act. Such a provocation may occur when one party triggers another party to respond, for instance by claiming that it applies or interprets a bilateral treaty with a non-signatory state in line with the multilateral agreement, as this statement would run contrary to the *pacta tertiis* rule.

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74 Fisheries Case (United Kingdom v. Norway), p. 136-137.

75 Id. at p. 139.

76 See: R. Kolb (2006) p. 21-22; I. Sinclair, Estoppel and Acquiescence, in: Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (V. Lowe and R. Jennings eds., Cambridge University Press 1996) p. 112-113.

77 Fisheries Case (United Kingdom v. Norway) p. 139.

78 For an estoppel to arise, the same circumstances are required as for a claim on acquiescence, except as regards the requirement of detriment on the part of the claimant, which is unique to the concept of estoppel. This clearly follows from the case law of the ICJ: 'Since the same facts are relevant to both acquiescence and estoppel, except as regards the existence of detriment, [the Court] is able to take the two concepts into consideration as different aspects of one and the same institution'. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), par. 130.

7.5.2.2 *The influence of a multilateral agreement on the interpretation of treaties with third states*[79]

A second, more likely, but indirect influence is that of treaty interpretation: it is possible that the Vienna Convention requires the taking into account of rules established in the multilateral agreement in the process of interpreting tax treaties between third states and signatory states. Even if the multilateral agreement lacks binding force in relation to third states in the manner described above, that does not prevent it from having an impact on tax treaty interpretation. Indeed, a treaty does not exist in a legal vacuum. A treaty has a normative environment, or 'system', that cannot be ignored in the process of interpretation. This is in accordance with the principle of systemic integration, which is embodied in article 31(3)(c) of the Vienna Convention.[80] The principle requires 'the integration into the process of legal reasoning – including reasoning by courts and tribunals – of a sense of coherence and meaningfulness'.[81]

Article 31(3)(c) VCLT holds that:

> 'There shall be taken into account, together with the context (...) (c) any relevant rules of international law applicable in the relations between the parties'.

Considering the backdrop of the principle of systemic integration, article 31(3)(c) VCLT must be placed within the general rule of interpretation of article 31, which also includes the context, object and purpose and the ordinary meaning of a treaty phrase. It cannot be seen to act on a stand-alone basis.[82] Consequently, if the other elements of article 31, such as the treaty's text, context and object and purpose, cannot provide the interpreter with an argument to take into account the normative environment of a treaty which lies

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79 This section is partly based on D.M. Broekhuijsen (2013a), an article I previously wrote on art. 31(3)(c) VCLT and the status of the OECD Commentaries. The conclusion of the article is that, considering case law of the ECtHR, the ICJ's *Oil Platforms* case and the ILC's fragmentation report, it is possible to justify recourse to the OECD Commentaries on the basis of article 31(3)(c) VCLT when interpreting tax treaties.

80 ILC, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (2006) Report of the Study Group of the International Law Commission, par. 419.

81 Id. at par. 419.

82 Article 31 is headed 'general rule of interpretation', not 'general *rules* of interpretation'. Indeed, as the ILC expressed it in the Commentaries on the VCLT: 'Thus, article 27 is entitled 'General rule of interpretation' in the singular, not 'General rules' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule'. See: *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), UN Doc A/56/109, May 2011. See also D.M. Broekhuijsen (2013) sec. 3.1.

beyond its close proximity,[83] recourse to article 31(3)(c) may be made in order to proceed in a reasoned way.[84]

The article poses three basic requirements. It requires that the extraneous material is a (1) relevant (2) rule of international law that (3) is applicable in the relations between parties. It is argued that each of these elements must be read as an integrated whole 'to ensure some degree of coherence in international law'.[85]

Still, it is necessary to determine to what types of 'rules of international law' that are 'applicable in the relations between parties' article 31(3)(c) VCLT refers. Scholars agree that 'any relevant rules of international law' refers to any formal source of international public law such as a treaty, a rule of customary international law and a general principle of international law, if applicable in the relation between parties.[86] The ICJ referred for instance to the UN Charter and to customary international law in the *Oil Platforms* Case,[87] when interpreting the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States. It considered:

> '[I]nterpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Art. 31, para 3 (c)). The Court cannot accept that Article XX, paragraph 1(d) of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force (...) The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation'.[88]

And in the *Mutual Assistance in Criminal Matters* case, the ICJ considered that the 1977 Treaty of Friendship and Cooperation between France and Djibouti could bear on the obligations of another treaty in force between the same parties: the 1986 Convention on Mutual Assistance in Criminal Matters.[89]

Thus, as a matter of international public law, there seems no doubt that when interpreting the obligations of a treaty, *another* treaty in force between the *same* parties has to be taken into account on the basis of art. 31(3)(c) VCLT.

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83 ILC, *Fragmentation of International Law* (2006), par. 423.

84 See for this argument: D.M. Broekhuijsen (2013a) sec. 3.1.

85 Concurring Opinion of Judge Wojtyczek, ECtHR, *Case of the National Union of Rail, Maritime and Transport Workers v. The United Kingdom,* no. 31045/10 (judgement), 8 April 2014, p. 44-45.

86 M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff 2009) p. 433; R. Gardiner, *Treaty Interpretation* (OUP paperback ed. 2008) p. 267-268; C. Mclachlan, *The Principle of Systemic Integration and Article 31 (3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly 279 (2005) p. 290-291; ILC, *Fragmentation of International Law* (2006), par. 425-426.

87 DE: Bundesfinanzhof *Re Article 11(6) of the UK-Germany DTC – the 'Theatrical Producer' Case,* (1997) 1 ITLR 860; IR 51/96, par. 31.

88 See id. at par. 31.

89 M. Fitzmaurice, *Dynamic Intermigration of Treaties*, 21 Hague Yearbook of International Law 101 (2009) par 112-113.

The question therefore is: can the phrase 'applicable in the relations between the parties' also refer to treaties which one of the parties accepted, but the other did not? The matter can be discussed on two of the provision's elements.

First of all, what does 'the parties' mean? An important argument in this regard is art. 2(2)(g) VCLT, which holds that:

> 'For the purposes of the present convention: (…) (g) 'Party' means a State which has consented to be bound by the treaty and for which the treaty is in force'.

Thus, when considering this provision, a correct interpretation is one in which the term 'the parties' is held to mean 'all the parties to the interpreted treaty'.[90] However, it can be argued that this provision only applies to the parties *to the instrument interpreted*. When considering 'the parties' to *the instrument relied upon*, it can be argued that article 31(3)(c) VCLT leaves more room for interpretation.[91]

So, it is necessary to consider the provision's second element: what does 'applicable' in the relations between the parties mean? Article 31(3)(c) VCLT refers to *applicable* rules in the relations between the parties. When analysed textually, the term 'applicable' allows for more flexibility than 'in force' or 'binding' would.[92] Indeed, as Pauwelyn notes, a textual analysis lends support to the view that a rule can be considered as within the scope of article 31(3)(c) if this rule is at least implicitly accepted or tolerated by the parties to the treaty being interpreted; the rule should reasonably express the common intentions or understandings of all treaty parties as to what the particular term means.[93] Does, in other words, 'applicable' mean 'binding' or 'in force', or can it also refer to standards or treaties that are not binding on the treaty parties to a bilateral tax treaty?

Authors are cautious in extending article 31(3)(c) VCLT to soft law or to treaties that are not ratified or signed by all states to the treaty under con-

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90 See: U. Linderfalk, *Who are 'The Parties'? Article 31 Paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited*, 55 Netherlands International Law Review 343 (2008). Similarly: M. Samson, *High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties*, 24 Leiden Journal of International Law 701 (2011), sec. 3. However, it can also be argued that if *all* the parties to the treaty being interpreted must also be parties to the treaty relied upon, it would be unlikely that any reference to other conventional international law could be made in the interpretation of widely accepted multilateral treaties. Consequently, it has been suggested that 'the parties' means 'the parties to the dispute', see: ILC, *Fragmentation of International Law* (2006), par. 472.

91 J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press 2003) p. 261.

92 See: B. Simma and T. Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology?*, in: International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (C. Binder, et al. eds., OUP 2009), p. 696-697.

93 J. Pauwelyn (2003a) p. 261.See similarly: B. Simma and T. Kill (2009) p. 697-698

sideration.[94] Nevertheless, in practice, article 31(3)(c) is used to justify recourse to soft law materials,[95] as well as to other treaties not signed or ratified by (all) the parties to the agreement under consideration.[96] For instance, in the *Saadi v. The United Kingdom* judgement, the ECtHR held that 'the European Convention on Human Rights does not apply in a vacuum',[97] and by using art. 31(3)(c) VCLT,[98] referred to materials such as the guidelines of the UN High Commissioner for Refugees (UNHCR), Council of Europe recommendations and a recommendation of the UN Working Group on Arbitrary Detention.[99] Likewise, in *Demir and Baykara v. Turkey*, the European Court of Human Rights explicitly considered, by reference to its previous case law, whether it could rely on the European Social Charter, an instrument that Turkey had not ratified, on the basis of art. 31(3)(c) VCLT.[100] Turkey argued that an international treaty to which it had not acceded, could not be relied upon against it.[101] The Court however, considered:

> '76. Being made up of a set of rules and principles that are accepted by the vast majority of States, *the common international or domestic law standards of European States reflect a reality that the Court cannot disregard* when it is called upon to clarify the

94 See in particular M.E. Villiger (2009), p. 433, who holds that 'the term 'applicable' leaves no room for doubt: non-binding rules cannot be relied upon'. And see Orakhelashvili, who says that art. 31(3)(c) VCLT: 'covers only established rules of international law, to the exclusion of principles of uncertain or doubtful legal status, so-called evolving legal standards, policy factors or more generally related notions'. A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008), p. 366. Linderfalk holds: 'each and every one of those states bound by the interpreted treaty at the time of interpretation must also be bound by the relevant rule of law'. U. Linderfalk, *Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties*, 10 International Community Law Review 109 (2008) p. 112.

95 See for instance the case: ECtHR, *Demir and Baykara v. Turkey*, no. 34503/97 (judgement), 12 November 2008, par. 45-51 and 103-105. Other cases in which the ECtHR referred to non-binding standards by reference to art. 31(3)(c) VCLT were e.g. the *Case of the National Union of Rail, Maritime and Transport Workers v. The United Kingdom* and ECtHR, *Al-Adsani v. United Kingdom,* no. 35763/97 (judgement), 21 November 2001. For a discussion see: T. Barkhuysen and M.L. Van Emmerik, *Ongebonden binding: Verwijzing naar soft law-standaarden in uitspraken van het EHRM*, 35 NJCM-Bulletin 827 (2010) A. Mowbray, *The Creativity of the European Court of Human Rights*, 5 Human Rights Law Review 57 (2005). When looking at how the article is applied in practice, it seems to allow recourse to soft law and thus also to the OECD Commentary, see: D.M. Broekhuijsen (2013a).

96 See in particular *Demir and Baykara v. Turkey*, but also e.g. cases the ECtHR referred to: ECtHR, *Marckx v. Beglium,* no. 6833/74 (judgement), 13 June 1979. For a discussion see: H.C.K. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System* (Intersentia 2011), Ch. 10.

97 ECtHR, *Saadi v. The United Kingdom,* no. 13229/03 (judgement), 29 January 2008, par. 79.

98 H. Gribnau and A.O. Lubbers, *The Temporal Effect of Dutch Tax Court Decisions*, in: The Effect of Judicial Decisions in Time (P. Popelier, et al. eds., Intersentia 2014) par. 62 and 65.

99 Id. at par. 29-37.

100 *Demir and Baykara v. Turkey*, par 60 and 85-86.

101 Id. at par. 61.

> scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty. (…) 78. *The Court observes in this connection that in searching for common ground* among the norms of international law *it has never distinguished between sources of law according to whether or not they have been signed or ratified* by the respondent State'.[102]

Other courts have also referred to the normative environment of a treaty when giving meaning to that treaty's terms. To define the term 'exhaustible natural resources' as in Article XX(g) General Agreement on Tariffs and Trade (GATT) 1994,[103] the WTO's Appellate Body referred to the UN Law of the Sea Convention and to the Convention on Biological Diversity, which were not agreed to by Thailand and the US,[104] even though both states were parties to the dispute. The Court explicitly referred to art. 31(3)(c) VCLT when holding that 'our task here is to interpret the language of the chapeau [of article XX GATT 1994], seeking additional interpretive guidance, as appropriate, from the general principles of international law'.[105]

Given the above, article 31(3)(c) VCLT can provide an interpretative argument when interpreting a tax treaty with reference to the multilateral agreement, even if one of the parties has not signed this multilateral agreement. However, a few reflections are in order. First of all, caution is warranted when generalising the application of 31(3)(c) VCLT on the basis of the case law above.[106] The European Convention on Human Rights has the character of a constitution, which gives effect to universal moral standards. In order to protect these standards under varying and evolving circumstances, a more flexible approach to interpretation is required than under tax treaties, which are reciprocal exchanges of commitments.[107] Secondly, it follows from ECtHR case law that the point of using extraneous legal sources is to establish the common understandings of the parties to the treaty in dispute. It is submitted that the multilateral agreement for international taxation expresses such under-

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102 Id. at par. 76-78 (emphasis added).

103 WTO Appellate Body *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* Appelate Body Report, 1998 (WT/DS58/AB/R) and the reference to the ICJ's *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, opinion, p. 301.

104 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, par. 130 and footnotes 110-111.

105 Id. at par. 158 and footnote 157. See also: C. Mclachlan (2005) p. 303. Van Damme holds however that the reference to these materials was based on the principle of effectiveness, not on art. 31(3)(c) VCLT. See: I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press 2009) p. 370.

106 R. Gardiner (2008) p. XXV.

107 M. Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties: Part II*, 21 Hague Yearbook of International Law 3 (2009) p. 15-16; T. Barkhuysen and M.L. Van Emmerik (2010) at p. 834-845.

standing only when a third state enters into a tax treaty with a signatory state *after* the multilateral instrument has been concluded.[108]

7.5.2.3 A pactum de agendo: harmonising existing and future incompatible bilateral treaties with third states

A third option to influence the tax treaties between participating and third states is a *pactum de agendo,* which is, unlike the earlier two exceptions to the *pacta tertiis* rule, a conscious design option. A *pactum de agendo*[109] is a clause which establishes the commitment of states to amend their existing incompatible treaties in line with the obligations or 'guiding principles' of the multilateral treaty, and not to enter into incompatible agreements in the future. Such a clause will primarily apply to tax agreements with third states, as these are not included in the direct ambit of both types of multilateral agreement discussed in this chapter due to the *pacta tertiis* rule. A well-drafted *pactum de agendo* can cause the multilateral convention to generate network effects after its conclusion.

A clause that influences the conclusion of *future* agreements is for instance used in the North Atlantic Treaty (the NATO treaty). In this clause, states commit to making an effort not to conclude incompatible agreements in the future:

> 'Each Party (…) undertakes not to enter into an international engagement in conflict with this Treaty'.[110]

Clauses related to future agreements can be abrogated from by later mutual agreement between all the parties. Therefore, such clauses have a limited effect. Nevertheless, the contractual freedom of states seems to be slightly more limited by a *pactum de agendo*. Non-compliance with such a provision might cause the termination or suspension of the treaty into which it is incorporated. This might put states off concluding an incompatible agreement with a third state, as the breach of the *pactum* can cause other parties to the multilateral

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108 This is one of the presumptions of the principle of systemic integration. See: C. Mclachlan (2005) p. 311. However, Article 31(3)(c) is not explicit on whether it applies to the applicable rules of international law determined at the date on which the treaty was concluded (static interpretation) or to the applicable rules determined at the date on which the dispute arises (dynamic interpretation). ILC, *Fragmentation of International Law* (2006), par. 426. See for a discussion: U. Linderfalk (2008).

109 See for this term: P. Manzini, *The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law*, 12 European Journal of International Law 781 (2001) p. 782.

110 *North Atlantic Treaty* (adopted 4 April 1949), 34 UNTS 243, art. 8. For more examples: OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* (2014), p. 39- 40.

treaty to terminate it or suspend its operation.[111] Nevertheless, the norms of incompatible future agreements prevail over the rules set out in the multilateral convention, as the treaty applies that governs the parties' mutual relations.[112]

Consequently, the language used in the clause should not leave room for doubt. For instance, the word 'undertake' as in the NATO treaty leaves states some room to argue against a treaty breach. A stronger obligation to this effect follows from the Chicago Convention on International Civil Aviation:

> 'Subject to the provisions of the preceding Article, any contracting State may make arrangements not inconsistent with the provisions of this Convention'.[113]

A *pactum de agendo* can also relate to *existing* agreements with third states. A good example of such an obligation is art. 351 of the Treaty on the Functioning of the European Union, which is, as will be shown, strictly interpreted and applied by the ECJ, even in exceptional circumstances. The provision holds:

> 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
>
> *To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established*. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude'.[114]

The above rule is a consequence of the supremacy of EU law: it aims to strike a balance between the *pacta tertiis* rule on the one hand and European integration on the other.[115] To ensure the supremacy of the EU, the member states are under the obligation to 'take all appropriate steps' to get rid of the inconsistencies existing in their pre-accession treaties with third states. Case law suggests that such 'appropriate steps' could involve the denunciation of a pre-

111 If the 'independent' or inter se agreement infringes the rights of the other parties to the treaty in which the commitment clause is included, the normal consequences of a treaty breach follow. See ILC (1966), p. 216-217. This could for instance lead to the termination of the earlier agreement under art. 60 VCLT. See art. 30(5) and art. 41 VCLT.

112 See art. 30(4)(b) VCLT.

113 *Convention on International Civil Aviation* (adopted 12 July 1944), 15 UNTS 295, art. 83.

114 Treaty on the Functioning of the European Union, art. 351 (emphasis added). The provision was similarly worded in the older treaties: art. 234 of the EEC Treaty and art. 307 of the EC Treaty.

115 Treaty on the Functioning of the European Union, art. 2 and 3(2). See also: J. Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2009) p. 118.

Community agreement if efforts to adjust that agreement failed and the pre-Community treaty expressly provides for its termination or denunciation.[116]

Technically, the distinction between a *pactum de agendo* and a *pactum de negotiando* (see section 7.14) may be thin.[117] Both are, after all, procedural obligations under which parties agree to bring – in good faith – other existing and future treaty obligations in line with the treaty obligations of the multilateral treaty. The main difference between a *pactum de agendo* and a *pactum de negotiando* is that the expression of the intention to negotiate under a *pactum de agendo* is made by only one of the two contracting states to, e.g., a bilateral convention. Certainly, this means that the obligation of a *pactum de agendo* is less extensive, as the obligation needs only to be performed in good faith by the party that has expressed that intention.

7.5.3 The multilateral agreement's potential network effects

From section 7.5.2.1 follows that, generally speaking, the rules of a multilateral agreement can only become binding on third states by means of acquiescence or estoppel, for which a reaction of another state must be *provoked*. This may be the case when one party to a tax treaty with a non-signatory state claims that it interprets or applies the tax treaty in line with the multilateral instrument. A second possibility, set out in section 7.5.2.2, is that of treaty interpretation: article 31(3)(c) of the Vienna Convention compels treaty interpreters to 'take into account any relevant rules of international law applicable in the relations between the parties'. It, in simple terms, requires that treaties are not interpreted in a vacuum. As a consequence, the operation of the article may mean that the multilateral instrument may bear on tax treaties with third states concluded after the adoption of the multilateral agreement.

These arguments are, however, somewhat remote. For estoppel or acquiescence to arise under a bilateral tax convention, signatory parties must interact somewhat artificially by claiming to interpret the tax convention in line with the multilateral instrument. Likewise, article 31(3)(c) VCLT may prove of relevance in solving specific interpretative issues, but seems only able to

116 ECJ, *Commission v. Portugal,* 4 Juli 2000, C-62/98 and C-84/98. The Court considered that 'if a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce the agreement cannot be excluded', see par. 46-49. Later case law on the paragraph has followed the Court's analysis. See: J. Klabbers (2009) p. 139. For further analysis, see also: P. Manzini (2001).

117 C. Hutchison, *The Duty to Negotiate International Environmental Disputes in Good Faith*, 2 McGill International Journal of Sustainable Development Law and Policy 117 (2006) at sec. 4.4 says that as regards the law of watercourses and fish stocks, the obligation to negotiate in good faith resulting from international watercourse law and high seas fisheries law, as established by several court decisions on the matter, requires parties to take into account the interests of third states as well.

bear on obligations entered into after the conclusion of the multilateral agreement.

For a stronger grip on agreements entered into by states that fall outside of the ambit of the multilateral convention due to the *pacta tertiis* rule, states could choose to include a *pactum de agendo* (section 7.5.2.3), in which they agree not to conclude a treaty incompatible with the convention and to bring their applicable tax conventions with third states in line with its norms.

Such a clause might prevent signatory states to agree to future incompatible tax agreements with third states. Moreover, it would create an obligation to make an effort to amend or revise existing incompatible bilateral tax treaties with third states. The multilateral fiscal treaty should not go as far so as to require signatory states to denounce an incompatible tax treaty. But, as follows from the experience within the EU of the use of the provision, requiring signatory states to take appropriate steps to bring a pre-existing bilateral tax treaty in line with the obligations under the multilateral convention is tenable from the perspective of public international law. Disregarding the pactum could result in breaching the commitment clause and thus the multilateral treaty.

Would transformative flexibility devices be used in the convention, or would the convention's obligations be adapted over time, issues could arise as to the application of a pactum de agendo over time (see in particular the use of the dynamic amendment devices discussed in section 7.11). The pactum could be dynamically interpreted, i.e., relate to the latest obligations of the multilateral convention. Alternatively, it could also operate in a static fashion, i.e., that it only refers to the norms of the multilateral convention that exist at the time of the conclusion of a bilateral tax treaty. For legal certainty reasons, the solution should be explicitly taken up in the clause. Considering the 'managerial' approach to international tax law, it makes sense that states make an effort to keep their tax treaties in line with the norms of the multilateral convention, as it evolves from time to time. An example clause is taken up in article 8(2) of the draft framework convention and article 8(3) of the draft 'agreement to scope', set forth in the Annex.

7.6 Conclusion of Part 7A: The core elements of the multilateral agreement for international taxation

The design strategy requires some core infrastructure: a forum for repeated discussions between parties, a flexible organisation that manages the regime and to function as a place where states take legal decisions, and some guiding principles around which parties' negotiations (whether bilateral or multilateral in nature, see subsequent Parts 7B and C) can gravitate. The multilateral agreement would thereby constitute a level playing field and create a forum – for discussions – enabling international tax law to transform towards being more procedurally (i.e., more inclusive and transparent) and substantively

fair over time. Also, by bringing states together at the same time and place, it would reduce the transaction costs of bilateral tax treaty negotiations, potentially enabling states to more swiftly amend their bilateral tax treaty networks on common value-maximising terms.

At the heart of such a structure is the 'Conference of the Parties': a flexible, quasi-formal treaty body that has neither fixed members nor a fixed location for its meetings. A treaty body sets and supervises the periodical sessions of its conference, and usually 'borrows' a Secretariat from a formal international organisation, such as the OECD or UN. Where it may reap the benefits of co-operating with the OECD on tax technicalities (i.e., the OECD provides the relevant information such as model tax treaties, commentaries and reports), a treaty body is independent from the OECD and not limited by OECD membership restrictions, nor does it carry the costs involved with running an IO. Rather, a treaty body may establish formal and informal links with other international organisations such as the OECD, and provide for transnational collaboration and an intergovernmental network on international tax matters. At the same time, a treaty body is far from being as politically diffused as, e.g., the forum of the UN. Hence, the forum of a treaty body may prove a suitable in-between alternative.

The potential of a treaty body, then, is that its membership may be slowly expanded, and that the transparent development of and decision-making on (soft) international tax law may be gradually moved from the OECD to the level of its meetings. This may be achieved by 'borrowing' a secretariat from the UN, and by the development of independent model treaties and commentaries. What needs to be worked towards, from the design strategy formulated in the previous chapter, is that non-OECD member countries will slowly come to exercise their influence in the vital phase of discussion and deliberation on international tax norms (from 'norm-takers' to 'norm-makers'). A treaty body would, in other words, provide a first step in the direction of making international tax law 'procedurally fair', and, in doing so, propel states into deeper cooperation on substantive norms of international tax law.

To illustrate the approach, the core elements of the multilateral agreement have been taken up in articles 4-7 of the draft conventions of Annex A and B.

PART 7B:
The framework convention-protocol design

7.7 Introduction to Part 7B

Part 7B discusses the framework convention-protocol design. This design is characterized by 'layering', that is, the norms concluded under the multilateral convention are 'layered' on top of the bilateral tax treaty network. Unlike the

'agreement to scope', discussed in Part 7C, the framework convention-protocol design aims to establish *substantive* multilateralism, and its core purpose is that it provides the regime with transformative flexibility (i.e., it allows the substantive commitments of the regime to change over time).

Under a treaty characterised by 'layering', some additional issues arise. Therefore, after a brief discussion of the basic elements of the framework-protocol design in section 7.8, several additional legal characteristics of the treaty form are discussed.

First of all, the norms generated under the multilateral treaty must somehow relate to the rules set out in bilateral tax conventions. So, the question arises what the relationship is between the framework convention-protocol design and the network of bilateral tax treaties. This means that the rules on the conflict of norms, such as set out in the VCLT, must be considered, as the multilateral convention's rules may clash or supplement rules set out in bilateral tax treaties. As the residual rules of the VCLT on the conflict of norms may cause legal uncertainty, it may be wise to draft a conflict provision that explicitly regulates the relationship (section 7.9). A second issue relates to the findings of Chapter 5: *substantive* multilateralism requires flexibility so as to accommodate diverging states' interests. 'Rules of the road' may relax distributional conflict, or where these prove unsuitable, multilateral rules may be tailored to states' needs by means of reservations and 'menu options' (section 7.10). The third issue that arises is how the rules of the multilateral convention *themselves* can be changed. Changing multilateral norms may be hard, as this requires the same level of consensus as is required for accepting them: unanimity. For this reason, the decision-making processes under a framework convention-protocol design may be relaxed by dynamic treaty amendment procedures. These types of procedures have in common that states *ex ante* agree to consent to norms adopted *ex post*, so that parliamentary approval for an amendment, once adopted, can be skipped. The most relevant example is the opt-out procedure, under which states agree to have consented to an amendment unless they voice their disagreement with the amendment of the text of (a protocol to) a treaty. The use of the opt-out procedure and similar devices is discussed in section 7.11. Although the benefit of such procedures is that they allow the treaty regime to quickly adapt to changing circumstances, they are paired with legitimacy and sovereignty costs.

7.8 THE FRAMEWORK CONVENTION-PROTOCOL DESIGN

7.8.1 The use of the framework convention-protocol design in international law

Treaty drafters have attempted to increase a treaty's transformative flexibility over time by using the multilateral framework convention-protocol design.

The use of such a design enables the enactment of new international standards in a dynamic, gradual and continuous way: it requires, by definition, continuous interaction. The most striking example can be found in international environmental law, particularly in the regime on climate change, discussed in section 6.4.

Although a framework convention *as such* is not much different from a 'normal' treaty because the same rules with regard to adopting and ratifying amendments apply,[118] its design can facilitate said adoption and ratification. Indeed, a multilateral framework convention can be used to focus initial negotiations on broad standards and postpone more difficult discussions on detailed rules.[119] Five advantages in this regard are mentioned below. However, like negotiations on a 'normal' treaty, the relative open-endedness of the international legislative process can cause parties to (infinitely) defer negotiations on key issues to a later date,[120] an inherent risk to the 'managerial' design strategy advanced in the previous chapters.

Firstly, the ability to postpone the negotiation of certain specific issues has the political advantage that a general form of consensus can be reached whilst in the meantime more awareness or consensus on an issue can arise.[121] Indeed, a relatively weak framework convention upon which all parties can agree sets the stage for discussion and creates room for further negotiation.[122] Secondly, as the convention does not attempt to solve all issues in one single instrument, negotiation breakdown is prevented.[123] And protocols provide states with flexibility: not all parties to the convention necessarily have to consent to a protocol. Thirdly, the institutionalised environment of a framework convention can provide a basis for further research and information building on an issue, e.g., on scientific evidence or on possible solutions. This might benefit the negotiation process in relation to difficult questions. Fourthly, political momentum may develop as a consequence of discussions and law-making activities within the purview of a framework convention.[124] Finally, to ensure the timely and effective conclusion of new standards, a framework

118 These rules are set out in the VCLT, articles 11 and 39. See: N. Matz-Lück (2009) p. 453. For instance, amendments to the UNFCCC are adopted by the Conference of the Parties by consensus or by three-fourths majority. These amendments, like in 'normal' multilateral conventions, only come into force for those states that have ratified these amendments: 'The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits with the Depositary its instrument of acceptance of the said amendment'. See: United Nations Framework Convention on Climate Change, art. 15.

119 G. Blum (2008) p. 345.

120 G. Handl, *Environmental Security and Global Change: the Challenge to International Law*, 1 Yearbook of International Environmental Law 3 (1990) p. 6.

121 A.L. Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 Yale Journal of International Law 257 (1996) p. 294.

122 N. Matz-Lück (2009).

123 A.L. Taylor (1996) p. 294.

124 On experience in environmental law in this regard see T. Gehring (1990).

convention can set specific (timed) targets such as the periodic review and update of certain standards as well as timetables.[125]

7.8.2 The use of the framework convention-protocol design for the multilateral agreement for international taxation

A step-by-step solution to multilateral international taxation would provide the regime to transform over time. This enables incorporating changing global economic circumstances in decision-making, it means that consensus has the time to develop and that the search for solutions to difficult problems or questions can be pooled internationally. The framework convention-protocol design therefore perfectly fits the design strategy formulated in the previous chapters, as well as the broader objective set by the OECD to structurally address the method by which tax treaties are amended.

However, agreement on difficult political issues cannot be forced. Certainly, the framework convention-protocol design provides a platform for the evolution of the regime towards its objectives, but it does not *guarantee* such progress (see also Chapter 5).[126] Consequently, what a framework treaty can and should reasonably be able to achieve should not be overestimated.

7.9 THE RELATIONSHIP BETWEEN THE MULTILATERAL AGREEMENT AND THE BILATERAL TAX TREATY NETWORK

7.9.1 Introduction

One of the most important questions related to the framework convention-protocol design, is: how to 'implement' its substantive multilateral norms in the bilateral tax treaty network? The starting point of the analysis is that substantive multilateral norms, established in a (protocol to the) multilateral framework convention, are a bindingly legal obligation of their own. The Vienna Convention, after all, stipulates that 'a treaty may be amended by agreement between the parties'.[127] This 'agreement' is, in turn, constituted in the same way as any other treaty, as the VCLT's rules on the conclusion and entry into force of treaties, set out in the VCLT's Part II, apply to it.[128] The issue is hence not one of 'implementation', but one related to the interpretation

125 N. Matz-Lück, *Framework Agreements*, in: Max Planck Encyclopedia of Public International Law (R. Wolfrum ed., OUP 2011) par. 14-15.
126 S. Schiele (2014) p. 101.
127 Art. 39 VCLT.
128 See art. 39 VCLT: 'A treaty may be amended by agreement between the parties. The rules laid down in part II apply to such an agreement'.

and conflict of two sets of equally applicable norms, i.e., when a norm of a tax agreement and a norm of the multilateral agreement for international taxation apply simultaneously in the same circumstances to the same treaty party.[129]

First, let's look at the operation of the residual rules on the conflict of norms, as set out in the Vienna Convention. As it turns out, leaving the issue open can cause legal uncertainty, as the residual rules of the VCLT are ambiguous in their application (section 7.9.2). It therefore makes sense to draft a conflict clause (section 7.9.3).

7.9.2 The residual rules on conflict resolution

The starting point in solving any conflict of norms is treaty interpretation. For any residual conflict rule, such as the *lex posterior* or *lex specialis* rules, to apply, a conflict must exist. Indeed, a *prima facie* conflict should in the first place be solved by treaty interpretation: for instance by choosing an interpretation that harmonises the two norms.[130] This interpretative exercise is called the 'presumption against conflict', which presupposes that the parties to the treaty did not intend to create conflicting obligations.[131] A harmonised outcome can for instance be achieved by restricting a norm's scope or its temporal effects.[132] The presumption against conflict does however not have an overriding character: it cannot go against clear language.[133]

Only after a 'real' conflict has been recognised through the act of treaty interpretation, do the conflict rules such as the *lex posterior* and *lex specialis* rules apply. The *lex posterior* rule is set out in the Vienna Convention's provision on treaty succession (article 30 VCLT).[134] The third paragraph holds

129 N. Bravo, *The Multilateral Tax Instrument and Its Relationship with Tax Treaties*, 8 World Tax Journal (2016), sec. 2.1.

130 This is called 'the presumption against conflict'. See e.g. J. Pauwelyn (2003a) p. 240-241. See also: S.A. Sadat-Akhavi, *Methods of Resolving Conficts between Treaties* (Martinus Nijhoff Publishers 2003) p. 34-42.

131 A. Orakhelashvili, *Article 30: Application of Successive Treaties Relating to the Same Subject Matter*, in: The Vienna Conventions on the Law of Treaties: a Commentary (O. Corten and P. Klein eds., OUP 2011), p. 776.

132 W. Czaplinski and G. Danilenko (1990) p. 13.

133 C.W. Jenks, *The Conflict of Law-Making Treaties*, 30 British Year Book of International Law 401 (1953), p. 459.

134 Article 30 holds:
'Application of successive treaties relating to the same subject-matter.
1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

that in the case two treaties relate to the same subject-matter: 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'.[135] What the rule does, in effect, is protect the parties' new legislative intent.[136]

However, the Vienna Convention's provision on treaty conflict is ambiguous.[137] Most interestingly, it does not codify the *lex specialis* rule, which is widely supported in doctrine as relevant to treaty conflict.[138] Sinclair for instance notes that:

> 'the principle of the lex specialis is not expressed as such in Article 30, but is widely supported in doctrine; the concept that a specific norm of conventional international law may prevail over a more general norm can of course be seen as raising primarily a question of interpretation'.[139]

In the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, the ICJ explicitly referred to the *lex specialis* rule when it held that:

> '(…) the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party (…) but it is governed above all, by the applicable rules of the 1977 Treaty as a *lex specialis*'.[140]

In fact, two opposing arguments characterize the application and hierarchy of the rule of *lex specialis* and *lex posterior*.[141] The main argument in favour of the *lex posterior* rule is that it is codified in article 30 VCLT, whereas the rule of *lex specialis* is not. Aust, in his treatise on modern treaty law, for instance

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3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
(a) As between States parties to both treaties the same rule applies as in paragraph 3;
(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty'.

135 Art. 30(3) VCLT.
136 I. Sinclair (1984) p. 98.
137 Id. at p. 98. See for a discussion: J. Klabbers (2009) Ch. 5.
138 ILC, *Fragmentation of International Law* (2006) par. 58-65.
139 See: I. Sinclair (1984) p. 96.
140 ICJ, *Gabèikovo-Nagymaros Project (Hungary v. Slovakia)*, (Judgement), [1997] IJC Reports 7, par. 132.
141 N. Matz-Lück, *Conflict Clauses*, in: The Max Planck Encyclopedia of Public International Law (R. Wolfrum ed., OUP Online ed. 2010) par. 3.

does not discuss the *lex specialis* rule when addressing article 30 VCLT.[142] The main argument in favour of the *lex specialis* rule, on the other hand, is that based on the drafting history of the Vienna Convention, the *lex posterior* rule should only be used if the process of treaty interpretation, which includes the *lex specialis* rule, has failed to determine priority between two norms.[143] Hence, the *lex specialis* rule should be applied first. Consequently, as Czaplinsky and Danilenko point out: the *lex posterior* rule's codification in article 30(2) of the Vienna Convention suggests its priority in case of conflict, but judicial practice tends to favour the *lex specialis* rule.[144] A complicating factor is that article 30 VCLT stipulates that the subsequent treaty has to deal with 'the same subject matter' for the *lex posterior* rule to apply.[145] Consequently, it can be questioned what 'the same subject matter' means,[146] (e.g., does this encompass an application of the lex specialis rule?) and what happens if a subsequent treaty is *not* of the same subject matter.[147] As a result, the residual rules on treaty succession cause legal uncertainty not only as to how a treaty *should* be interpreted, but also how a treaty would *in fact* be interpreted, thereby reducing the value (or predictability) of that treaty in practice.[148]

Be that as it may, the standard rules on treaty conflict can be derogated from by an express provision regulating priority.[149] It is, as Aust notes, better to prevent than to cure.[150] It helps when treaty interpreters, in advance, know, which provisions are to are to be considered as modified.[151] Nothing prevents states from drafting a clause that stipulates that the multilateral treaty has priority over bilateral tax treaty obligations.

142 A. Aust (2013) p. 202-204.
143 J.B. Mus, *Conflicts Between Treaties in International Law*, 45 Netherlands International Law Review 208 (1998), p. 217-219. See also: N. Matz-Lück (2010) par. 13.
144 W. Czaplinski and G. Danilenko (1990) p. 20-21. Art. 30(2) reads: 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'.
145 See article 30 of the VCLT.
146 N. Matz-Lück (2010) par. 13.
147 R. Wolfrum and N. Matz-Lück, *Conflicts in International Environmental Law* (Springer 2003) p. 148-150.
148 C.J. Borgen, *Resolving Treaty Conflicts*, 37 George Washington International Law Review 573 (2005) p. 590.
149 The second paragraph of article 30 holds that 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'. Further: I. Sinclair (1984), p. 97.
150 A. Aust (2013) p. 194.
151 N. Bravo (2016a) sec. 2.2.

7.9.3 A conflict clause governing the relationship between the multilateral agreement and the bilateral treaty network

7.9.3.1 Introduction

Conflicts can thus to some extent be prevented *ex ante* by a treaty clause. The purpose of a conflict clause is to determine the relationship between two treaties when these two treaties overlap.[152] Although such a rule will not solve all conflicts because it is still a general rule at best,[153] the careful drafting of a conflict clause might prevent unpredictable outcomes as it gives the one seeking to apply the terms of the two instruments more guidance than the residual rules of the VCLT.[154] This is also recognised by the OECD in the 2014 report on the development of a multilateral instrument.[155] The Vienna Convention leaves room to treaty negotiators to draft a specific conflict clause. Article 30(2) stipulates:

> 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'.[156]

Practice in relation to the use of a conflict clause can be examined on three different elements. First, conflict clauses set out the relationship between two types of instruments. In the case of the multilateral agreement, the clause should determine that both instruments co-exist (section 7.9.3.2).[157] Secondly, conflict clauses address the consequences of conflict. In the case of the multilateral agreement: the clause should give the multilateral agreement priority over both existing and future tax treaties concluded between signatory states (and not the other way around), see section 7.9.3.3. Lastly, conflict clauses should not be read to influence tax treaties with non-signatory states. This runs against the *pacta tertiis* rule set out in art. 34 VCLT (see section 7.5). To prevent misunderstandings, conflict clauses therefore usually include a phrase that explicitly codifies the *pacta tertiis* rule (section 7.9.3.4).

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152 S.A. Sadat-Akhavi (2003) p. 85.
153 J. Klabbers (2009) p. 101-103.
154 Klabbers however argues that conflict clauses are of a limited value, since 'they merely reproduce the uncertainties that are associated with treaty conflict'. Id. at p. 103.
155 OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* (2014), p. 32.
156 See Article 30(2) VCLT.
157 I.e., the clause should not determine that the multilateral instrument *replaces* or *supersedes* the existing bilateral tax treaties; the point is that both types of instrument remain in force.

7.9.3.2 The relationship between the multilateral agreement and the bilateral tax treaty network

The multilateral agreement and the network of bilateral tax treaties it covers should both be applicable simultaneously. This relationship be regulated by a complex conflict clause that sets the relationship between specific rules of both instruments. The clause may refer to both existing as well as future treaties.[158]

For, instance, the conflict clause of the Agreement on Extradition between the European Union and the United States of America holds:[159]

> '(1) The European Union, pursuant to the Treaty on the European Union, and the United States of America shall ensure that the provisions of this Agreement *are applied in relation to bilateral extradition treaties* between the Member States and the United States of America (…) on the following terms:
>
> (a) Article 4 shall be applied *in place of* bilateral treaty provisions that authorise extradition exclusively with respect to a list of specified criminal offences; (…)
>
> (b) Article 4 shall be applied *in place of* bilateral treaty provisions governing transmission, certification (…)
>
> (c) Article 6 shall be applied *in the absence of* bilateral treaty provisions authorising direct transmission of provisional arrest requests (…)
>
> (d) Article 7 shall be applied *in addition to* bilateral treaty provisions governing transmission of extradition requests;
> (e) Article 8 shall be applied *in the absence of* bilateral treaty provisions (…)
> (…)', etc.[160]

The clause includes information on the provisions to be modified and provides what could be called 'connection language', i.e., language that sets the detailed circumstances under which the provisions of the convention apply to the texts that are to be amended ('in addition to'; 'are not listed', etc.).[161]

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158 For instance the conflict clause of the UN Charter, article 103, which at applies to any other agreement, in force now or in the future: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' Charter of the United Nations (adopted 26 June 1945), 1 UNTS XVI (emphasis added). For more examples: OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* (2014), par. A.1.2.

159 *Agreement on Extradition between the United States of America and the European Union (EU)* (adopted 25 June 2003), OJ L 181, 19.7.2003, p. 27, art. 3.

160 Id. at art. 3(1).

161 See also: OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* (2014), p. 37.

The 'connection language' of the above complex conflict clauses is expressed at the level of the conflict clause and not at the level of the texts of the specific amendments. But there are also examples of mechanisms that include such 'connection language' in the text of the amendment *itself*. The *Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea* (herinafter: Implementation Agreement) provides such an example.[162]

First, art. 2 of that agreement provides a general interpretation rule, i.e., that both sets of rules are to be interpreted as one instrument (in complex conflict clauses like the one above, this instruction follows from the clause by implication). It says that:

> 'The provisions of this agreement [the implementation agreement] and part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail'.[163]

Using a rule to this effect in the multilateral agreement for international taxation would imply that the agreement's norms would become an integral part of bilateral tax treaties it covers. This would also have the advantage that norms of the multilateral agreement, by implication, explicitly are meant to influence the interpretation of bilateral tax treaties.

But the instruction to interpret both treaties as one instrument can function in combination with the 'connection language' set out in the text of the substantive amendments. In the example of the Implementation Agreement, the amendments themselves are set out in an annex. They include specific language that sets the relationship between the amendments set out in the Implementation Agreement and the provision or part of a provision of the Law of the Sea Convention which it sought to modify.[164] For instance, such amendments hold:

> 'the provisions of article 161, paragraph 8 (b) and (c), of the Convention [on the Law of the Sea] *shall not apply*.[165]

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162 *Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 10 December 1982* (Adopted 28 July 1994, entered into force 28 July 1996), 1836 UNTS 3. This instrument is also discussed in D.M. Broekhuijsen, *Naar een multilateraal fiscaal raamwerkverdrag*, *WFR* 2013/1443, par. 3.2.

163 Id. at art. 2.

164 The implementation agreement was needed because part XI of the Convention of the Law of the Sea (UNCLOS) was problematic for a number of industrial states, which consequently refused to sign the Convention. The Implementation Agreement removed the obstacles, paving the way for broad support of the Law of the Sea Convention

165 Paragraph 8 of section 3 of the Annex of the Agreement (emphasis added). The Annex forms an integral part of the Implementation Agreement. See for more concrete examples: L.D.M. Nelson, *The New Deep Sea-Bed Mining Regime*, 10 International Journal of Marine and Coastal Law 189 (1995) p. 192 and B.H. Oxman, *The 1994 Agreement and the Convention*,

> (…)
> '*Notwithstanding the provisions of article* 153, paragraph 3, and Annex III, article 3, paragraph 5, of the Convention [on the Law of the Sea], a plan of work for the enterprise upon its approval shall be in the form of a contract (…)'.[166]

The advantage of using 'connection language' at the level of the norms of the envisaged amendments is that this enables negotiators to regulate the relationship between two instruments in detail. Separating the text of the relevant articles from their desirable effects would make the conflict clause overly complex,[167] particularly considering that the multilateral agreement would potentially only alter parts of a provision or even only parts of a sentence of a bilateral tax treaty. Moreover, bilateral tax treaties are rarely precisely similar in wording. Consequently, the approach of adding detailed connection language in the amendment itself seems more convenient. In example, the text of a substantive multilateral tax rule could for instance stipulate that it applies *in place of* a certain sentence in a bilateral tax convention, or *in the absence* or *in addition to* a certain provision.[168] Other possible language options are: '*articles x and y of the bilateral tax convention apply, provided that (…)*', '*except as otherwise provided in (…)*', '*where provision x or y of the bilateral tax treaty does not specify*', etc. More specifically, as Bravo shows, a compatibility clause that implements the minimum standard in the sense of the Action 6 Final Report[169] could read:

> 'The following LOB clause should be applied to existing tax treaties that do not contain an analogous provision or to existing tax treaties that, while containing an analogous provision, do not reflect the minimum standard …'[170]

The clause could then include, in detail, the standard that must be met in each of the bilateral tax treaties to which it applies. For instance, it could stipulate that as to the tax treaty between state A and B, the LOB clause makes an exception for pension funds. This, of course, dilutes the distinction between the framework convention-protocol design and the 'agreement to scope' set forth in Part 7C. But in this way, the relationship between a bilateral tax treaty and a multilateral agreement can be set in detail. As the precise wording of a particular bilateral tax treaty provision may differ from one bilateral tax treaty to another, the 'correct' design of such connection language is, as Bravo

88 The American Journal of International Law 687.

166 Paragraph 4 of section 2 of the Annex of the Implementation Agreement (emphasis added).

167 See also: N. Bravo (2016b) p. 336.

168 Similar language is used in the Agreement on Extradition between the United States of America and the European Union (EU), art. 3(1).

169 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: 2015 Final Report* (2015).

170 N. Bravo (2016a) sec. 3.3.

notes, indispensable for making the multilateral agreement for international taxation a success.[171]

To what treaties should the clause refer? A practical suggestion is that the clause captures both bilateral as well as multilateral tax conventions. Otherwise, the multilateral agreement would not be able to influence regional multilateral tax conventions such as the Nordic Tax Convention. Moreover, the clause could capture both existing and future tax treaties of the multilateral treaty's signatory states ('it could look forward').[172] However, a clause claiming priority over future treaties has a limited effect. It is limited by an application of the *pacta tertiis* rule, and the parties can always change their minds in the future by mutual consent: *pacta sunt servanda*.[173] This was also set out by the International Law Commission (ILC) in the Commentary to the VCLT:

> 'As is pointed out in the commentary to article 56 [on the termination of the operation of a treaty implied from entering a subsequent treaty], the parties to the earlier treaty are always competent to abrogate it, whether in whole or in part, by concluding another treaty with that object. That being so, when they conclude a second treaty incompatible with the first, they are to be presumed to have intended to terminate the first treaty or to modify it to the extent of the incompatibility, unless there is evidence of a contrary intention'.[174]

7.9.3.3 The consequences of conflict

The second element of the provision should stipulate what happens, after both instruments have been interpreted in an integrative manner (see the previous section). In the case of conflict or inconsistency between the two sets of norms: the multilateral agreement should be given priority. A rule to that effect, when applied to prior agreements, can be considered to be a restatement of the *lex posterior* rule codified in the VCLT.[175]

An explicit codification of the *lex posterior* rule of art. 30 of the VCLT enhances legal certainty, as it explicates the priority of the *lex posterior* rule over the *lex specialis* rule. Including it seems harmless. For this reason, it makes

171 Id. at sec. 4.
172 OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* (2014), p. 39.
173 See: ILC (1966), p. 216; J. Pauwelyn (2003a), p. 335.
174 ILC (1966), p. 215.
175 G. Plant, *The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 39 International and Comparative Law Quarterly 27 (1990), p. 50. Art. 30(3) VCLT reads: 'When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, *the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*' (emphasis added).

sense to use similar language as used in the VCLT so as to set the clause's threshold, is set by the word '(in)compatibility'.[176]
There are a number of treaty clauses that stipulate that a treaty prevails in case of conflict. For instance, the Implementation Agreement's second sentence holds that in the case of inconsistency, the implementation agreement *prevails*:

> 'In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall *prevail*'.[177]

And Article 39 of the Convention Concerning the International Administration of the Estates of Deceased Persons, which amended bilateral treaties between states, for instance, holds:

> 'The provisions of this Convention shall prevail over the terms of any bilateral Convention to which Contracting States are or may in the future become Parties and which contains provisions relating to the same subject-matter, unless it is otherwise agreed between the Parties to such Convention.'[178]

And article 103(2) of the North American Free Trade Agreement (NAFTA) reads:

> 'In the event of any inconsistency between this Agreement and such other agreements, *this Agreement shall prevail to the extent of the inconsistency*, except as otherwise provided in this Agreement'.[179]

Conflict clauses to the same effect may give priority to the treaty in which they are included by using other language. A conflict rule that holds that the multilateral treaty 'modifies' existing bilateral treaties has the same effect. For instance, the 1988 Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (the SUA Convention) makes use of the verb 'to modify':

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176 As an alternative, the word 'conflict' could be used. In the discussions on the VCLT's article 30 (then art. 65), the words 'in the event of conflict' were dropped and replaced by 'in the event of incompatibility'. The point was that no 'conflict' can occur between two successive treaties concluded by the same parties. UN, *Yearbook of the International Law Commission 1964: Summary Records of the Sixteenth Session* (1964), p. 124-125. It follows from literature that the word 'conflict' can have a very technical definition in the sense that a conflict only exists if two terms are *mutually exclusive*. Jenks, for instance, considered that 'a conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties'. C.W. Jenks (1953) p. 426. The term 'incompatible' is not prone to such a narrow interpretation. See for a discussion on the construction of 'conflict', J. Pauwelyn (2003a) p. 164.

177 Id., art. 2.

178 *Convention Concerning the International Administration of the Estates of Deceased Persons* (adopted 2 October 1973), 11 ILM 1277, www.hcch.net.

179 *North American Free Trade Agreement* (17 December 1992), 2 ILM 289, 605.

> 'With respect to the offences as defined in this Convention, the provisions of all extradition treaties and arrangements applicable between States Parties *are modified* as between States Parties to the extent that they are incompatible with this Convention'.[180]

Provisions with a similar wording are included in for example the European Convention on the Suppression of Terrorism[181] and in the International Convention for the Suppression of the Financing of Terrorism.[182] As these counterterrorism treaties were to be applied 'on top of' existing bilateral extradition treaties, the verb 'to modify' was used instead of 'prevail' in order to emphasise that extradition should not be rendered impossible in case the former extradition treaty excluded the new treaty's offences.[183] Indeed, as Aust explains: as there would not seem to be any conflict between, on the one hand, extradition treaties, and counterterrorism treaties on the other hand, the provision has been included in counterterrorism conventions 'perhaps more for the avoidance of doubt'.[184]

On the basis of these observations, the clause in the multilateral agreement could include a *lex posterior* rule, which could be based on either the wording used in the Implementation Agreement or the NAFTA. These provisions set out that those conventions *prevail*, signifying the agreement's priority. Alternatively, the multilateral agreement could stipulate that it 'modifies' the bilateral tax treaties it covers.

7.9.3.4 The relationship between the multilateral agreement and treaties with third states

Regardless of the wording of a conflict clause, the multilateral agreement cannot influence treaties with non-signatory states due to the *pacta tertiis* rule. This rule applies on the basis of the VCLT, regardless of the wording of a treaty. Indeed, the International Law Commission considered:

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180 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (adopted 10 March 1988), 1678 UNTS 397, Article 11(7) (emphasis added).

181 Art. 8(3), which holds: 'The provisions of all treaties and arrangements concerning mutual assistance in criminal matters applicable between Contracting States, including the European Convention on Mutual Assistance in Criminal Matters, are modified as between Contracting States to the extent that they are incompatible with this Convention', *European Convention on the Suppression of Terrorism* (adopted 27 January 1977), 113 UNTS 93.

182 Art. 11(5), which holds: 'The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this convention'. See*: International Convention for the Suppression of the Financing of Terrorism* (adopted 9 December 1999), 2178 UNTS 197.

183 This argument is based on S.A. Sadat-Akhavi (2003) p. 150.

184 For instance, the provision of the SUA Convention incorporates the offences of the convention in the existing extradition treaties between states. See: A. Aust (2013) p. 195.

> 'When on the other hand, the parties to a treaty containing a clause purporting to override an earlier treaty do not include all the parties to the earlier one, the rule pacta tertiis non nocent automatically restricts the legal effect of the clause. The later treaty, clause or no clause, cannot deprive a State which is not a party thereto of its rights under the earlier treaty'.[185]

Nevertheless, for reasons of legal certainty and to prevent unwanted (and unintended) effects, parties can codify the *pacta tertiis* rule in the conflict clause of their treaty. Article XIV of the 1962 Convention on the Liability of Operators of Nuclear Ships provides an example in this regard, and holds:

> 'This Convention shall supersede any international conventions in force or open for signature (…) however, nothing in this Article shall affect the obligations of contracting States to non-Contracting States arising under such international conventions'.[186]

7.9.3.5 Conclusion

In conclusion, a conflict clause may be included in a framework convention-protocol design type of multilateral treaty, as it serves legal certainty. Its first element guides the interpretation phase by using connection language on the level of the treaty amendment, taking into account that bilateral tax treaties may vary in wording. The second element may set out what happens if an inconsistency nevertheless arises. Since this second element imports the *lex posterior* of the Vienna Convention on conflicts, taking up the clause seems harmless. The same holds for the third element, which may express the *pacta tertiis* rule. An example clause to this end, on the basis of the discussion above, has been set forth in Article 6 of the draft framework convention in Annex A.

7.10 THE USE OF INTERPRETATIVE FLEXIBILITY MECHANISMS

7.10.1 Introduction

To mitigate the effects of distributional conflict underlying multilateral negotiations in international tax law (see Chapter 4), countries can make use of reservations, 'menu options',[187] and 'rules of the road'. As for reservations, these enable states to depart from certain 'default' multilateral rules accepted

185 ILC (1966), Commentary on article 26, p. 215.

186 The *Convention on the Liability of Operators of Nuclear Ships* (Concluded 25 May 1962), not in force. The text of the convention can be found in 57 (1963) American Journal of International Law 268 (emphasis added).

187 There are other treaty flexibility mechanisms, such as escape clauses and the provisional application of a treaty. See: L.R. Helfer (2012).

by others. 'Menu options' give states the flexibility to choose between alternatives when deciding on common policy options. 'Rules of the road' are norms that lead to a 'fair' treatment of all actors signing up to the rule, as the rule's operation is dependent on the circumstances at hand.

Obviously, there is a need for coherent and uniform multilateral norms (i.e., 'internal coherence'). Reservations and 'menu options' lead to rule fragmentation, and create inter se agreements between the reserving and non-reserving states. This increases the complexity and incoherence of the regime. But we have seen that there is a stark need for interpretative flexibility in international tax negotiations. Without interpretative flexibly devices, states may decide against participating in the agreement in the first place. And perhaps the complexity resulting from the use of interpretative flexibility devices can be somewhat softened by some smart editing of the *Materials on International Tax Law*.[188] After all, it does not lead to a more fragmented rule system than the bilateral one currently in place.

It goes without saying that the interpretative flexibility devices considered in this section are primarily of relevance in relation to the framework convention-protocol design. After all, the 'agreement to scope' already starts from the presumption that negotiations are ultimately bilateral in nature.

7.10.2 Reservations and menu options

7.10.2.1 Reservations and 'menu options' in international law

Reservations

By means of reservations, states can tailor the obligations of a treaty to their individual preferences. Reservations create inter se obligations between states.[189] And indeed, there are 'modifying reservations', which do not 'dissolve altogether the obligation (or right) that is expressed in a treaty provision, but permit it to prevail under modified forms',[190] and 'excluding reservations', which limit the multilateral obligations established and hence create a norm of the opposite effect.[191]

According to the Vienna Convention on the Law of Treaties, a 'reservation' is defined as a 'unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain pro-

188 As selected and edited annually by C. van Raad, ITC Leiden.

189 A. Pellet, *Article 19: Formulation of Reservations*, in: The Vienna Convention on the Law of Treaties: A Commentary (O. Corten and P. Klein eds., OUP 2011).

190 F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (Uppsala : Uppsala University, Swedish Institute of International Law 1988) p. 80.

191 Id. at p. 84.

visions of the treaty in their application to that State'.[192] States may formulate reservations, unless reservations are (partly) prohibited by the treaty or the reservation is incompatible with the object and purpose of the treaty.[193]

Most interesting for the purpose of international tax law is the effect of reservations.[194] As Giegerich notes, reservations are aimed at creating bilateral legal relationships. They have their intended legal effects only if another contracting party tacitly or explicitly accepts them.

Under an 'excluding reservation', the party that filed the reservation 'has neither rights nor obligations under those provisions in its relations with the other parties with regard to which reservation is established'.[195] And under a 'modifying reservation', 'the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which a reservation is established'.[196] The exclusions and modifications apply to the other party in its relations with the reserving state to the same extent.[197] Hence, reservations work both ways, i.e., on the basis of reciprocity.[198] It creates inter se reciprocal legal relationships between the reserving party and all the other parties that accepted it, and modifies their obligations in a mutual, reciprocal way.[199] However, reservations do not modify the provisions of the treaty for the other parties to the treaty,[200] and as to states that have objected to a reservation, 'the provisions to which the reservation relates do not apply as between the two states to the extent of the reservation'.[201]

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192 VCLT art. 2(1)(d).

193 Id. at art. 19.

194 As to their entry into force, the VCLT strikes a balance between the need for universality on the one hand and integrity of the treaty on the other hand. The VCLT holds (in art. 20(5)) that a reservation is considered to have been accepted by a state if it has not raised an objection to the reservation by the end of a period of 12 months after it was notified of reservation or by the date on which it expressed its consent to be bound by the treaty. So, the VCLT's regime on reservations functions on the basis of parties' tacit consent. To object to a reservation, a party must take action.

195 UN, *The Guide to Practice on Reservations to Treaties* (2011) Report of the International Law Commission on the Work of its 63rd session, Official Records, 66th Session, Supplement n° 10, Addendum 1, UN Doc. A/66/10/Add.1, par. 4.2.4.

196 VCLT art. 21(1) and id. at par. 4.2.4.

197 VCLT art. 21(1).

198 D. Müller, *Article 21: Legal Effects of Reservations and of Objections to Reservations*, in: The Vienna Convention on the Law of Treaties: A Commentary (O. Corten and P. Klein eds., OUP 2011) p. 548.

199 T. Giegerich, *Multilateral Reservations to Treaties*, in: The Max Planck Encyclopedia of Public International Law (R. Wolfrum ed., OUP Online ed. 2010), par. 2.

200 VCLT art. 21(2).

201 Id. at art. 21(3) (emphasis added). An objection by another contracting state to a reservation does not preclude the entry into force of a treaty between the objecting in the reserving state, unless a contrary intention is expressed by the objecting state. Id. at art. 20(4). Given the similarity of language, the legal effects of an objection that leaves the treaty in force on the one hand, and the legal effects of a 'normal' reservation which 'modifies' the

As has been stated, it is also possible that the treaty itself provides for 'negotiated' reservations, that is, reservations expressly authorised by the treaty. Under such pre-authorized reservations, subsequent acceptance by the other contracting states is not required, as this is considered superfluous.[202] Treaty provisions to this effect can limit the contents of the reservation itself, as well as which provisions states are authorised to make reservations on.[203]

It is possible that 'authorised reservations' are 'specified', in the sense that only those 'specified' reservations may be made by the parties (see article 19(b) VCLT).[204] All other reservations are null or void, and there is no need for other states to reject or accept a reservation prohibited by a treaty, for they have already expressed their objection in the treaty itself.[205]

'Menu options' (contracting-in and optional clauses)

'Contracting-in' and 'optional clauses', here referred to as 'menu options' are, in the words of Guideline 1.5.3 of the UN Guide to Practice on Reservations:

> 'unilateral statement[s] made in accordance with a clause in a treaty permitting the parties to accept an obligation that is not otherwise imposed by the treaty, or permitting them to choose between two or more provisions of the treaty'.[206]

Such statements look like reservations, but are not. Although their outcomes are the same as those of reservations, as the ILC notes, 'statements made under such clauses actually have little in common at the technical level with reservations, apart from the (important) fact that they both purport to modify the application of the effects of the treaty'.[207] Indeed, as Spiliopoulou Åkermark notes, contracting-in and optional clauses 'start from a presumption that parties are not bound by anything other than they have explicitly chosen',[208] while reservations, that *exclude* the application of an obligation, start from the opposite assumption.[209]

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provisions to the same extent for the other party (cf. art 21(1) VCLT), on the other hand, might not be so different. Sinclair discusses the issue and notes that most commentators believe that 'even in the case of a 'modifying' reservation, the legal effects of an objection to and acceptance of the reservation are identical, when the treaty remains in force between the objecting and reserving States'. I. Sinclair (1984) p. 76-77.

202 See art. 20(1) VCLT.

203 See UN, *Report of the ILC on the Practice on Reservations to Treaties* (2011) p. 59, as well as p. 437-442.

204 Id. at p. 340-347.

205 Id. at p. 334-335.

206 Id. at, p. 101.

207 Id. at, p. 100-101.

208 S. Spiliopoulou Åkermark, *Reservation Clauses in Treaties Concluded with the Council of Europe*, 48 International & Comparative Law Quarterly 479 (1999) p. 505.

209 UN, *Report of the ILC on the Practice on Reservations to Treaties* (2011) p. 103.

An example of a contracting-in clause, in which states have to choose *between* alternatives, is Article XIV of the IMF statutes, which holds:

> 'Section 1. Notification to the Fund
>
> Each member shall notify the Fund whether it intends to avail itself of the transitional arrangements in Section 2 of this Article, or whether it is prepared to accept the obligations of Article VIII, Sections 2, 3, and 4. A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept these obligations'.[210]

And an example of an 'optional clause' is set out in article 4(2)(g) of the UNFCCC. Under such a clause, a state has to *opt in* to increase the obligations[211] that would not be applicable on that state by the mere entry into force of a convention:

> 'Any Party not included in Annex I ma, in its instrument of ratification, acceptance, approval or accession, or at any time thereafter, notify the Depositary that it itends to be bound by subparagraphs (a) and (b) above'.

Contracting-in and optional clauses are alternatives to reservations, as they provide treaty parties with the opportunity to tailor the application of a treaty to their individual preferences. Moreover, like reservations, they are expressed by means of unilateral statements made at the time of signature or of expression of consent to be bound. Yet, as to 'contracting-in' clauses, in the absence of a state's selection of a 'dish' from the menu provided by the clause, a state cannot become a party to the treaty.[212] The 'optional' clause, on the other hand, does not prevent a state to become a party to the treaty. It can function as a pre-negotiated alternative to a reservation. It applies 'on top of' the obligations 'normally' applicable when a treaty enters into force. Optional clauses may therefore be particularly useful when negotiators feel that only a limited number of states is willing to accept an obligation.

7.10.2.2 Reservations and 'menu options' in the multilateral agreement for international taxation

We have seen that interpretative flexibility is required for parties to agree on multilateral norms. The treaty should therefore not disallow the formulation

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210 *Articles of Agreement of the International Monetary Fund* (22 July 1944 (as amended through 2008)), 2 UNTS 39.

211 The 'optional clause' should have been discussed in Part 7C ('the agreement to scope'), as it groups pairs of states with similar interests, rather than allowing states to 'relax' multilateral rules. For the sake of simplicity, however, it is discussed here.

212 UN, *Report of the ILC on the Practice on Reservations to Treaties* (2011) p. 107.

of reservations (or include clauses to a similar effect), otherwise it risks that states decide not to cooperate.[213]

Yet, in accordance with art. 21(3) VCLT, the consequence of a reservation of a reserving state is that an identical reservation applies *against* the reserving state. Hence, the reciprocity of commitments enshrined in the Vienna Convention regime on reservations departs from the presumption that state relationships are symmetrical.[214] However, in international tax law, relations are often *not* symmetrical. For instance, if a state reserves against the use of a rule that limits treaty benefits for entities with little or no economic significance, the reservation works against the reserving state too. But the non-reserving state, in an asymmetric relationship, may gain little from these consequences when its interests lie in protecting its tax base instead. Hence, the residual mechanism on treaty reservations, by working on the basis of symmetry (ignoring the effects of uncertainty for the sake of the argument), may upset the equilibrium under which multilateral tax negotiations are possible.[215] It, in other words, creates asymmetric costs and benefits for participants.

The other states may of course 'remedy' this asymmetry. In the extreme, a non-reserving state may, in accordance with the language of art. 20(4)(b) VCLT, declare that the treaty has not entered into force between itself and the reserving state.[216] But the ILC notes that state practice has developed an intermediate category of objections with effects in between those that modify the provisions to which the reservation relates (art. 21(3) VCLT)[217] and those that prevent the treaty from entering into force (art. 20(4)(b) VCLT). This intermediate category of objections excludes 'the application of certain provisions of the treaty that are not (specifically) addressed by the reservation'.[218] This requires, the ILC notes, that the provisions thus excluded 'have a sufficient link with the provisions to which the reservation relates'.[219] Hence, formulating objections with this effect (called 'intermediate' effect by the ILC) safeguards the balance of rights and obligations that result from a state's consent to the treaty as a whole. Nevertheless, the uncontrolled exclusion of the application of provisions not addressed by a reservation may upset the overall treaty

213 See specifically as regards reservations in this regard: E.T. Swaine, *Reserving*, 31 Yale Journal of International Law 306 (2006), p. 329-331 and in reaction L.R. Helfer, *Not Fully Committed – Reservations, Risk, and Treaty Design Response*, 31 Yale Journal of International Law 367 (2006).

214 F. Parisi and C. Sevcenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 Berkeley Journal of International Law 1 (2003). Also: J. Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 Virginia Journal of International Law 309 (2013).

215 See for this argument F. Parisi and C. Sevcenko (2003) p. 16.

216 See art. 20(4)(b) VCLT and the UN, *Report of the ILC on the Practice on Reservations to Treaties* (2011), p. 255.

217 The effects of 21(3) may be similar to those of art. 21(1) VCLT..

218 UN, *Report of the ILC on the Practice on Reservations to Treaties* (2011) p. 482.

219 Id. at p. 492 and 493.

balance between all parties and may be harmful to the treaty's integrity, as it further complicates relations through reservations and subsequent objections. Unsurprisingly, the ILC hopes that such objections continue to form exceptions to the practice of reservations.[220]

This is where the advantage of negotiated reservations and 'menu options' (i.e., contracting-in and optional clauses) comes in. Their difference is that of applicable system: a reservation prohibited by the treaty (a 'specified reservation'), is null or void. Hence, on the condition that a reservation is authorised by the treaty, negotiated reservations work on the basis of 'opting out' from the 'normal' obligations applicable at the time a treaty enters into force. 'Menu options', on the other hand, function on the basis of 'opt in'. Under an optional clause, a state's reaction is not required: it may still become a party to the treaty. Under a contracting-in clause, a reaction is required for a state to become a party.

Technicalities aside, these types of provisions are explicitly coordinated by the negotiators. This means they can be used to create 'package deals', that is, bundles of rights and obligations that go beyond the rights and obligations of one single treaty clause. If a state decides not to agree to a contracting-in clause set by the negotiators, it can, unlike under a 'normal' reservation, not become a party to the treaty. Similarly, if a state wants to reserve on a provision but that reservation is prohibited, that reservation is void. The reserving state may hence have no other option but to completely quit the treaty.

The negotiation of 'package deals' may hence be generalised to the level of the treaty negotiation as a whole, and may therefore be used to 'steer' the need of parties to tailor the convention to their needs without causing the commitments under the treaty to disintegrate. Indeed, 'by indicating which treaty clauses are reservable, by specifying the types of reservations that are permitted (….) negotiators can make treaties politically palatable to a larger number of countries'.[221]

7.10.3 'Rules of the road'

A core argument of Chapter 4 is that to increase the chances of multilateral cooperation in the international tax field, the focus must be placed on what have been termed 'rules of the road'. These are rules that create substantive tax treaty obligations for parties, but under which distributive effects are absent or uncertain. Remember the example of the two cars crossing an intersection (one south-northbound; the other west-eastbound, see section 5.3.4). To avoid car drivers having to bilaterally negotiate who yields the right-of-way to whom at each crossing, a coordination rule can be used that operates 'fairly', i.e.,

220 Id. at p. 495.
221 L.R. Helfer (2006) p. 378.

under which all actors get their preferred outcome half the time (section 5.4.3). From this perspective, the feasibility of several tax policy options that are currently on the negotiation table were discussed in section 5.4.4.

Let's first of all formalize this result by providing some suggestions for 'rules of the road' under a multilateral agreement for international taxation. Again, no normative claims as regards these rules shall be made, as they would require a study of their own. The point is rather to refine the argument and single out potential difficulties. As has been briefly discussed in section 5.4.6, a 'rule of the road' may cause uncertainty about the behaviour of others under the rule. This type of uncertainty (called 'Uncertainty about Behaviour' by Koremenos)[222] emphasises the need for centralized information and informal dispute resolution safeguards.[223] Incomplete contracts require tools, so to speak, to uphold the rule's application in specific cases. A centralized adjudicative body falls outside the scope of a 'managerial' approach to international tax law. But political and mediative ways of resolving disputes, in combination with facilitating the access to information, may also do the trick. The example treaty clauses in Articles 2 and 3 of the Protocol to the draft treaty set out in Annex A were drafted based on what is discussed below.

1. Treaty GAARs

We have seen that the open-endedness of GAARs, of which the PPT is the most relevant example, makes them dependent on context. It will be up to judges to further consolidate their operation, weighing the circumstances related to the case at hand, thus causing the rule to operate 'fairly'. However, the open-endedness of GAARs creates an incentive for countries to unilaterally expand their tax jurisdiction (and interpret the provision in a way that best serves their interests). But, as Bender and Engelen note, such uncertainty about the behaviour of other states may be relaxed by further 'consultation agreements' or a 'senior level approval process' between treaty parties.[224] Moreover, under a centrally agreed upon and implemented GAAR, it is not unlikely that judges will take into account the decisions of their foreign colleagues, strengthening a uniform interpretation of the clause.[225]

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222 See B. Koremenos (2016) Ch. 7. 'Uncertainty about Behaviour' is different from the types of uncertainty discussed in Ch.5. This latter type of uncertainty related to the uncertainty in respect of the state of the world (e.g. the consequences of different policy options, impacts of BEPS behaviour on revenue and welfare, etc).

223 Id. at Ch.7, also: B. Koremenos (2007); J. Mccall Smith (2000). In B. Koremenos (2016), Koremenos shows from her dataset that informal dispute resolution mechanisms may help actors to solve 'Uncertainty about Behaviour' problems.

224 T. Bender and F.A. Engelen, *BEPS-Actie 6: De maatregelen tegen treaty shopping – bedreiging en kans*, WFR 2016/51 sec. 7.

225 Decisions of foreign judges may be used for tax treaty interpretation. See D.M. Broekhuijsen, *Verschillen tussen wets- en verdragsinterpretatie*, in: Kwaliteit van belastingrechtspraak belicht (J.P. Boer ed., SDU 2013) and D.A. Ward, *The Use of Foreign Court Decisions in Interpreting Tax Treaties*, in: Courts and tax treaty law (G. Maisto ed., IBFD 2007).

2. A non-discrimination clause that captures cases of 'indirect discrimination'
This is a bit of a stretch, but to embody the idea that taxpayers engaged in internal or cross-border economic activities should be treated equally for tax purposes if all other circumstances are equal (see section 7.4), a non-discrimination clause analogous to that underlying the articles on free movement of the TFEU could be used.[226]

Of course, tax treaties based on the OECD MTC do traditionally contain a non-discrimination clause that prevents discrimination on the basis of nationality. But article 24 MTC does not apply to the tax treatment of non-residents (i.e., it does not cover forms of 'indirect discrimination').[227] As Van Raad notes, article 24(1) does not prohibit a state from differentiating in its taxation on the basis of residence,[228] and the other provisions of article 24 prohibit residence-based discrimination in certain specific circumstances only. Article 24 is, in other words, cast on the basis that 'corporate residence' is still a relevant criterion for treating cross-border and domestic economic activities differently.

But as Bammens notes, when art. 24 MTC is compared to the non-discrimination analysis applied under fundamental freedoms of EU law, the latter is broader.[229] EU law requires that cross-border economic activities are taxed in the same way as domestic economic activities and, if state aid rules were also considered, vice-versa. Hence, the underlying right protected under these freedoms is the prohibition of indirect discrimination on grounds of nationality or origin.[230]

Would the EU's non-discrimination rule be agreed upon in a multilateral agreement, the rule could function on the basis of the decision model that Douma proposes.[231] This approach balances the two competing principles in play, that is: the principle of state (tax) sovereignty and the principle of equality. If a rule is recognized as (dis)advantageous,[232] the task is then to identify a rule's respectful aim. Given the rule's respectful aim, a suitability

226 This follows of course from M.F. De Wilde (2015a), e.g. p. 75.
227 See also the 2014 OECD Commentary to art. 24, par. 1.
228 K. Van Raad, *Non-discrimination in International Tax Law* (Kluwer 1986)
229 N. Bammens, *The Principle of Non-Discrimination in International and European Tax Law* (IBFD 2012) p. 1013-1014.
230 B.J.M. Terra and P.J. Wattel, *European Tax Law* (Kluwer 4th ed. 2005) p. 38.
231 S.C.W. Douma, *Optimization of Tax Sovereignty and Free Movement* (IBFD 2011).
232 Douma's model is arguably also applicable as a decision model for EU state aid rules. These address the 'other' side of the discrimination coin: are cross-border economic activities treated more favourably than domestic (internal) economic activities? Following AG Kokott in *Sardegna:* 'the same questions arise with regard to the law of State aid as with regard to the fundamental freedoms, and there is no reason why the reply in relation to the latter should differ from the reply regarding the former. Rather, to avoid conflicting assessments as between the law of State aid and the law of fundamental freedoms, the same criteria must be applied in both cases'. ECJ, *Opinion of Advocate General Kokott, Presidente del Consiglio dei ministri v. Regione Sardegna,* 7 February 2009, C-169/08, para. 133-134.

test is applied (examining whether the rule at issue is 'apt to attain the objectives pursued'[233]), and then a proportionality test, to weigh the rule's over- and underinclusiveness, its subsidiarity and finally its proportionality *sensu stricto*.[234]

Such a non-discrimination rule, following the decision model that Douma proposes, is clearly a 'rule of the road'. It operates 'fairly' for all actors, and its effects are so uncertain that states might be willing to agree to such a rule. After all, parties to the European Union were able to agree to a rule to this effect within the aim of realizing the internal market. Nevertheless, the introduction of a non-discrimination clause might be an example of a 'rule of the road' that creates substantial uncertainty about the behaviour of others under the operation of the rule. Where under GAARS these problems may be relaxed by further bilateral consultations, the extent of uncertainty about the behaviour of others introduced by a non-discrimination clause is more substantial, making it likely that further centralization, e.g., a review mechanism, is required. After all, a non-discrimination clause inspired by the rules on the EU's fundamental freedoms requires states to cancel (or even reverse/review) the effects of discriminatory tax rules, and its impact is hence far more severe than that of a GAAR, under which states may protect their tax bases. It is therefore no wonder that as regards the EU, state behaviour under the fundamental freedoms is reviewed by the EU Commission and the ECJ. And also in other areas of international law where tax incentives are regulated, such as under the WTO, dispute resolution systems are used to review the obligations and behaviour of parties.[235]

So, a non-discrimination clause is toothless if not backed up by some form of dispute settlement mechanisms. Of course, the ideal solution would be a review by a centralized and independent adjudicative body. But the design strategy formulated in the previous chapter suggests that informal mechanisms are more feasible for international tax:[236] e.g., information exchange to facilitate interaction in the forum, the use of bodies that are able to issue authoritative interpretations so that domestic judges can be informed, or the use of mandatory nonbinding mediative procedures similar to the MAP now proposed under BEPS Action 14.[237] If this proves insufficient, the real reason for non-

233 S.C.W. Douma (2011) p. 59.

234 Id. at Ch. 7.

235 C. Micheau, *State Aid, Subsidiy and Tax Incentives under EU and WTO Law* (Wolters Kluwer Law & Business 2014) p. 325-333.

236 G.W. Downs, K.W. Danish and P.N. Barsoom (2000) say at p. 484 that advocates of the managerial approach find that dispute resolution mechanisms are 'too formal, overly cumbersome and difficult to initiate'. See also J. Brunnée and S.J. Toope (1997), p. 47, who note that states 'are most reluctant to cede any control when a decision may prove to be legally binding. It is noteworthy that despite the numerous dispute settlement provisions included in international environmental treaties, these mechanisms are not widely employed'.

237 A. Chayes and A.H. Chayes (1995) p. 207-225.

compliance is likely to be related to the fundamental lack of state commitment to the application of the rule, making an extended non-discrimination clause, although 'rule of the road', an unfeasible option.

3. Source or residence state priority in regulating certain categories of income
For the purposes of agreeing on multilateral standards, an attempt to negotiate on a 'rule the road' that prioritizes the tax treatment of either the source or residence state for a particular issue is appealing. Such a rule would obviate the need for detailed reservations. Indeed, in the cumulative totality of their treaty relations, 'asymmetric interests' that is, each state is predominantly a source state in one bilateral relationship, and a residence state in another, may hide a clear distributive conflict, as one treaty relationship cancels out the other. So, a 'rule of the road' that prioritizes the source or residence state jurisdiction may work in relation to 'new', tax treaty problems in relation to which the distribution of potential gains has not yet been fully realized or for which the operation of the current tax treaty regime remains ambiguous.

The tax treaty treatment of partnerships and transparent entities provides the obvious example of a priority rule: the main rule proposed by the partnership report is that the source state follows the resident state's classification of a transparent entity for tax purposes.[238] In extending the partnership's conclusions to transparent entities, a rule to this effect, insofar as the residence state actually taxes the income of the entity,[239] has been proposed in article 3 of the BEPS Convention. And perhaps, the idea of a 'rule of the road' that prioritizes the residence or source state may be extend to other issues too. Although the BEPS Convention does not include it (see Chapter 8), a priority rule might work for Action 6's clauses (for instance, in the selection of states between a PPT and extended LOB rule, preference could be given to the selection made by the state of source).

7.11 DYNAMIC DECISION-MAKING PROCEDURES

7.11.1 The need for dynamic decision-making procedures under the framework convention-protocol design

Multilateral treaties are rigid tools. Once in place, they are notoriously hard to change, as an amendment to a rule requires the same level of consensus as its adoption. Hence, to facilitate the framework convention's decision-making processes, the convention's decision making processes can be 'legally

238 OECD, *The Application of the OECD Model Tax Convention to Partnerships* (1999).

239 See also: OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2: Final Report* (2015) OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241138-en, p. 139.

engineered'[240] so as to relax the consent requirement traditionally needed to adopt international law.[241]

In short, the 'traditional' method to amend a multilateral treaty functions as follows. First, the text of an amendment needs to be adopted within the organisation tasked with adopting texts: an IO or a treaty body. Then, the text has to be consented to or ratified by participating states, an act by means of which the text becomes binding on them. This process is regulated by article 11 of the Vienna Convention. That article holds that to be bound by a treaty (amendment),[242] a state must have consented to that treaty:

> 'The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'.

In other words, the amendment of a multilateral treaty requires the renegotiation of the text (the 'adoption requirement') and the subsequent consent of the participating states (the 'consent requirement') before the amendment becomes binding on a participating state. Consequently, one of the main disadvantages of multilateralism – in the form of a binding multilateral convention – is that once a multilateral treaty is in place, changing the convention requires an amendment's acceptance on two levels. This makes the multilateral treaty amendment process cumbersome, particularly when for instance quick amendments are required to protocols or annexes.

And indeed, requiring the explicit consent of all participating states before a text has binding force has been considered a serious problem for the international system.[243] An inflexible arrangement may prevent the effective operation of the treaty in the long run, as the agreement, once adopted, does not enable the incorporation of further political, economic and scientific developments either in the situation of a particular state or in more global changes affecting all states. This could then cause states to take unilateral action instead, thereby undermining the multilateral cooperative effort.[244] As a result, the current system to amend treaties emphasises the interests of the individual

240 R. Lefeber, *Creative Legal Engineering*, 13 Leiden Journal of International Law 1 (2000).

241 See for a first exploration of these issues: D.M. Broekhuijsen (2013b); J. Luts, *Een 'multilateraal instrument' (BEPS actiepunt 15): Denkpistes en verhouding tot de Belgische interne rechtsorde*, Algemeen Fiscaal Tijdschrift 28 (2014).

242 Article 11 VCLT also applies to treaty amendment. See art. 39 of the VCLT and F.A. Engelen, *Fiscaal Verdragsbeleid en het OESO-Modelverdrag*, *WFR* 2011/548.

243 See e.g. A.T. Guzman, *Against Consent*, 52 Virginia Journal of International Law 747 (2012); B. Simma, *Consent: Strains in the Treaty System*, in: The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory (R.S.J. MacDonald and D.M. Johnston eds., Martinus Nijhoff 1983).

244 Palmer calls the conventional international environmental law making methods 'slow, cumbersome, expensive, uncoordinated and uncertain'. See G. Palmer, *New Ways to make International Environmental Law*, 86 American Journal of International Law 259 (1992) p. 259.

state and not that of the collective.[245] The consent requirement creates the possibility of strategic 'holding out' or 'opportunistic' behaviour,[246] and the 'lack of flexibility and fear of non-compliance in the face of unanticipated events might drive parties to MLTs to accept only shallower obligations'.[247]

7.11.2 Dynamic decision-making procedures in international law

In international law, the consent requirement has been relaxed by mechanisms in which texts are adopted by a majority vote, and by a softer variant, the so-called the *opt-out* method (which should be distinguished from the optional clauses discussed in section 7.10.2).[248] It is important to point out that both procedures do not affect the ability of states to influence the adoption of the text within the institution or COP. Indeed, a state can exercise its influence in the institutional decision-making process, for instance within a consensus or a (qualified) majority vote voting system.

The primary example of a system in which texts are adopted by majority vote is article 2(9) of the Montreal Protocol on Substances that Deplete the Ozone Layer (hereinafter: Montreal Protocol), which is a protocol to the Vienna Convention to the Ozone Layer.[249] This article provides for adjustments to the ozone depleting potentials already specified in the protocol's annexes.[250] These adjustments are, as a last resort, adopted by a 2/3 majority vote and are binding on all parties.[251] The only way 'out' of adjustments a party does not agree with is to withdraw from the convention, which a party can do after four years from the date the convention entered into force.[252] So, the Montreal Protocol's amendment system is quite rigorous. It implies that, at the moments of adoption and ratification of the amendment system *itself*, states acquiesced

245 E. Pan, *Authoritative Interpretation of Agreements: Developing More Responsive International Administrative Regimes*, 38 Harvard International Law Journal 503 (1997), p. 507.

246 A.T. Guzman (2012) p. 751.

247 G. Blum (2008) p. 353.

248 E.g. P. Széll, *Decision Making under Multilateral Environmental Agreements*, 26 Environmental Policy and Law 210 (1996); R. Lefeber (2000); J. Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 Leiden Journal of International Law 1 (2002); J. Brunnée, *Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements*, in: Developments of International Law in Treaty Making (R. Wolfrum and V. Röben eds., Springer 2005) and G. Ulfstein, *Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements, Comment*, in: Developments of International Law in Treaty Making (R. Wolfrum and V. Röben eds., Springer 2005); M. Fitzmaurice, *Consent to Be Bound – Anything New under the Sun?*, 74 Nordic Journal of International Law 483 (2005); G. Loibl (2005).

249 Montreal Protocol on Substances that Deplete the Ozone Layer.

250 Id. at art. 2(9)(a). To add new substances to the annex, the application of the 'normal' amendment rule is required where all States express their consent.

251 Id. at art. 2(9)(c) and 2(9)(d).

252 Id. at art. 19.

in the complete elimination of the use of harmful chemicals, leaving for further discussion and decision the timing of measures to that end.[253]

The opt-out rule is a softer, less legitimacy and sovereignty-intrusive variant of a dynamic amendment procedure. The idea of an opt-out rule is that, instead of requiring the explicit consent of a treaty state to a certain text (i.e., an opt *in*), states are 'automatically' bound to a certain treaty amendment *unless a state voices its disagreement*, mostly within a certain time period.[254] This is supposed to make objections to proposed changes politically unattractive, whilst the principle of state sovereignty is not abandoned.[255] In doing so, the opt-out procedure covers the middle ground between the necessity to change a treaty regime and the need to protect state sovereignty through the expression of a state's consent. It leaves states free to withdraw their consent if necessary.[256]

Opt-out methods are not uncommon: they are for instance used in treaties regulating the environment,[257] aviation,[258] and public health.[259] For example, the Constitution of the World Health Organisation is a multilateral treaty in which such an opt-out procedure exists. The *Health Assembly* can adopt regulations by a qualified majority.[260] As regards these regulations, Art. 22 of the Constitution holds:

> 'Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice'.

Perhaps unsurprisingly, experience learns that the opt-out procedure is particularly efficient in relation to amendments to treaty annexes of a technical, procedural or scientific nature.[261] For instance, the UN Framework Convention on Climate Change has an opt-out procedure to amend its annexes, which cover material of a descriptive nature and with a technical, procedural or administrative character:

253 P. Széll (1996) p. 213.
254 The main difference between an opt-out rule and a reservation is that a reservation is filed at the time of concluding, accepting, or ratifying a treaty text that is known to them; and opt-out rule applies to all *future* treaty texts adopted by the institution.
255 M. Fitzmaurice (2005) p. 488-489.
256 Id. at p. 488-489.
257 See for instance: the *Convention on Future Multilateral Co-operation in Northwest Atlantic Fisheries* (adopted 24 October 1978), 1135 UNTS 369 (1978 NAFO Convention).
258 See e.g. the ICAO Convention.
259 *Constitution of the World Health Organization* (adopted 22 July 1946), 14 UNTS 185.
260 Id. at art. 21.
261 J. Brunnée (2012) p. 359.

'Article 16 Adoption and Amendment of Annexes to the Convention

Annexes to the Convention shall form an integral part thereof and, unless otherwise expressly provided, a reference to the Convention constitutes at the same time a reference to any annexes thereto. Without prejudice to the provisions of Article 14, paragraphs 2 (b) and 7, such annexes shall be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character.

2. Annexes to the Convention shall be proposed and adopted in accordance with the procedure set forth in Article 15, paragraphs 2, 3 and 4.

3. An annex that has been adopted in accordance with paragraph 2 above shall enter into force for all Parties to the Convention six months after the date of the communication by the Depositary to such Parties of the adoption of the annex, except for those Parties that have notified the Depositary, in writing, within that period of their non-acceptance of the annex. The annex shall enter into force for Parties which withdraw their notification of non-acceptance on the ninetieth day after the date on which withdrawal of such notification has been received by the Depositary.

4. The proposal, adoption and entry into force of amendments to annexes to the Convention shall be subject to the same procedure as that for the proposal, adoption and entry into force of annexes to the Convention in accordance with paragraphs 2 and 3 above'.[262]

As these annexes are of a technical nature (i.e., they do not touch upon a regime's 'core' obligations), they are not fraught with political difficulties, and as a result, 'the potential shift of domestic authority over international commitments seems unproblematic'.[263]

The ability to quickly adapt a multilateral treaty to new scientific and technical circumstances greatly enhances the effectiveness and responsiveness of a regime. The introduction of an opt-out procedure at the forum of the International Maritime Organisation (IMO, formerly IMCO) is an example of this. The success of the IMO is to some extent attributed to this provision, as the procedure has enabled the IMO 'to keep abreast of the evolving technology in the maritime field and to respond promptly to urgent matters'.[264] In example, in relation to the IMO's International Convention for the Safety of

262 United Nations Framework Convention on Climate Change art. 16. The adoption or amendment of an annex is adopted by the Conference of the Parties by consensus, or if no agreement is reached, by a three-fourths majority votes of the parties present and voting. See art. 15(2).

263 J. Brunnée (2002) p. 20.

264 L. Shi, *Succesful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law*, 11 University of San Francisco Maritime Law Journal 299 (1998) p. 331. See also: A.O. Adede, *Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience*, 17 Virginia Journal of International Law 201 (1976) L. Shi (1998), p. 303.

Life at Sea (the 1974 SOLAS Convention),[265] an opt-out procedure enabled the regime to incorporate technical[266] changes in a quicker fashion,[267] preventing unilateral action to disrupt the international shipping industry.[268]

The success of the tacit amendment procedure in the IMO Conventions is shown by the fact that in practice, objections to amendments adopted under the procedure are rare.[269] Also, it turned out that the industry can prepare for upcoming amendments, as the committee adopting amendments may provide an indication of the date on which the amendment is deemed to be accepted and expected to enter into force.[270]

As regards opt-out procedures in relation to non-technical annexes, particularly in relation to environmental regimes with clear and obvious underlying distributive conflicts,[271] the procedure does not add any dynamic or

265 *1974 International Convention for the Safety of Life at Sea* (adopted 1 November 1974), 1184 UNTS 2.

266 The annex comprises standards on for instance the construction of ships, life-saving equipment and radio communications.

267 The amendment provision of the SOLAS 1974 Convention, art. VIII, reads: (emphasis added):
'(b) Amendments after consideration within the Organization: (…)
(vi) (2) An amendment to the Annex other than Chapter I shall be *deemed to have been accepted:*
(aa) at the end of two years from the date on which it is communicated to Contracting Governments for acceptance; (…) However, if within the specified period either more than one-third of Contracting Governments, or Contracting Governments the combined merchant fleets of which constitute not less than fifty per cent of the gross tonnage of the world's merchant fleet, notify the Secretary-General of the Organization that they object to the amendment, it shall be deemed not to have been accepted.
(vii) (…) (2) An amendment to the Annex other than Chapter I *shall enter into force with respect to all Contracting Governments, except those which have objected to the amendment under sub-paragraph (vi)(2) of this paragraph and which have not withdrawn such objections, six months after the date on which it is deemed to have been accepted*. (…)'.

268 L. Juda, *Imco and the Regulation of Ocean Pollution from Ships*, 26 International & Comparative Law Quarterly 558 (1977), p. 574. See also the resolution by the IMCO Assembly: *Amendment Procedures in Conventions of which IMCO is Depositary*, Resolution A. 249(VII) (1971). Under the old *explicit* amendment procedure used by the IMO, it became clear that it was impossible to secure the timely entry into force of amendments. The 1960 Convention on the Safety of Life at Sea was amended in 1966, 1967, 1968, 1969, 1971 and 1973, but none of these amendments has ever entered into force. See: M.J. Bowman, *The Multilateral Treaty Amendment Process – A Case Study*, 44 International and Comparative Law Quarterly 540 (1995), p. 551.

269 If states do object, it is only to allow for additional time to implement the amendment in domestic laws. See: J. Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011) p. 162.

270 Id. at p. 163.

271 O.R. Young (1989) also adds a 'veil of uncertainty' to distributive bargaining to explain why states have come to reach agreement in some environmental regimes, but not in others, emphasising the role of equity in bargaining solutions. Particularly fishery regimes are a good example of how, lacking a clear 'veil of uncertainty', actors may end up in an international deadlock under distributive issues. Indeed, '[the veil of uncertainty] also helps us understand the difficulties that plague efforts to devise mutually acceptable arrangements

problem solving value. Exemplary in this regard are regimes regulating biodiversity, such as those on fisheries. Setting fish quotas and moratoria has obvious distributive consequences for the participating states (preventing states to fish in waters directly harms its fishery industries, but fish stocks are mobile and hence not bound to states' rights over water). And opt-out procedures have helped little in mitigating or softening such distributive stalemates. A demonstrative example is the management of fishing stocks by the fisheries commission of the Northwest Atlantic Fisheries Organisation (NAFO), which can issue proposals on the total allowable catch.[272] Under the 1978 NAFO Convention,[273] proposals on fish quotas by the fisheries commission become binding on all contracting states after a certain time period, unless a party objects.[274] The possibility to object to these quotas has been used by members who were not satisfied with quotas, which then enabled those states to set their own (higher) quotas, leaving the door open for over-fishing. This, in turn, influenced the 'fish pie' (i.e., the total of fish stock that can be caught without endangering the area's biodiversity).[275] The alleged overfishing by Spain and the EU in NAFO waters[276] led to a conflict between the EU, in particular Spain, and Canada known as the Turbot War, that ultimately resulted in the renovation of the NAFO Convention in 2007.[277] Another example in this regard is the conflict regulated by the International Convention for the Regulation of Whaling (ICRW).[278] One of the most important objections filed by states in the history of the International Whaling Commission (IWC) was the one lodged by in particular Norway and Japan against the moratorium on commercial

dealing with acid precipitation, biological diversity, or the global warming trend. To put it simply, the key players find it easier to see through the veil of uncertainty in these cases than in a number of other areas referred to in this discussion', id. at p. 362.

272 Although these proposals have the character of a (binding) decision of a treaty body rather than a proposed amendment to the text or annex of a treaty, they are worth mentioning here because the method by means of which states can opt out to become bound by these proposals is analogous to the method used to amend a treaty's texts or annexes described above.

273 1978 NAFO Convention (1978 NAFO Convention).

274 The NAFO is established by the 1978 NAFO Convention. The procedure is regulated in art. XII

275 A. Rey Aneiros, *Spain, The European Union, and Canada: A New Phase in the Unstable Balance in the Northwest Atlantic Fisheries*, 42 Ocean Development & International Law 155 (2011), p. 164.

276 House of Commons, *Foreign Overfishing: Its Impacts and Solutions. Conservation on the Nose and Tail of the Grand Banks and the Flemish Cap* (2002) Standing Committee on Fisheries and Oceans, Tenth Report, June 2002, p. 8.

277 These amendments have been ratified by the EU and Canada. See: http://www.nafo.int/about/frames/convention.html, last accessed January 2016.

278 *International Convention for the Regulation of Whaling* (adopted 2 December 1946), 161 UNTS 72.

whaling that prohibited all whaling activities from 1985/86 onwards.[279] And clearly, the moratorium has obvious consequences for Norway and Japan. Although the ban was supposed to be temporary, it has been extended year after year, causing a deadlock in the discussions within the IWC between the pro and anti-whaling members of the Commission.[280] Article V(3), the convention's dynamic amendment procedure regarding the amendment of whale conservation rules and catch limits,[281] has helped little to prevent such deadlock.

7.11.3 The use of dynamic decision-making procedures in the multilateral agreement for international taxation

From the above, it can be generally concluded that dynamic decision-making procedures can be used to quickly change annexes of a technical nature. They are however no help in streamlining the decision-making process of issues characterized by clear distributive conflicts.

In combination with the outcomes of the previous chapters, it may hence be suggested that, *prima facie,* dynamic decision-making procedures can be successfully used for international tax law in relation to certain technical aspects, such as, e.g., transfer pricing regulation or the attribution of profits to PEs, or measures of administrative concern.

Nevertheless, tax literature has raised the question whether dynamic decision-making procedures erode the legitimacy of international tax law-making. What is the basis for the rule-making authority of these institutions? Does this authority follow from the 'general consent' of states to the law-making procedure,[282] which involves a much more significant surrender of authority than a state's specific consent to a specific rule? After all, under the majority vote mechanism, states can be bound against their will to commit-

279 The so called 'moratorium on commercial whaling' of 1982 is still in effect today. See: ICRW, *Schedule to the Convention* (July 2012), http://iwc.int/convention last accessed June 2016. For a discussion see: H.S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservations and Vetoes* (Martinus Nijhoff Publishers 2008), p. 80-86.

280 See for the discussion in the IWC: D. Goodman, *The "Future of the IWC": Why the Initiative to Save the International Whaling Commission Failed*, 14 Journal of International Wildlife Law and Policy 63 (2011).

281 ICRW. art. V(1) and V(2).

282 D. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 The American Journal of International Law 596-624 (1999).

ments they do not yet know.[283] And by agreeing to the opt-out procedure, states give their 'general consent' to amendments in the future.[284]

Under high degrees of 'generativity',[285] the erosion of the legitimacy of (and hence also of state sovereignty under) the tax law making process is a thorny issue. After all, taxation is an involuntary fee levied on individuals and corporations, enforced by government. In most jurisdictions, the exercise of the government's power is strictly defined by law. Legitimizing this authority is important: illegitimate tax law is nothing but brute force, and this undermines routine forms of voluntary compliance.[286] But as tax law making is becoming more and more removed from its domestic (democratic) basis of legitimation, these democratic underpinnings erode. The wariness of some authors in respect of the use of such procedures for international tax law is therefore completely understandable.[287]

The legitimacy perspective would in any case disqualify the use of a majority voting method. Such a procedure can bind a state to treaty amendments against its will. This implies a significant and unacceptable surrender of democratic legitimacy. But what of the opt-out procedure, when its use is limited to amending rules of a technical nature? After all, states remain in control under such a procedure: they ultimately have the possibility to withdraw the general consent already given.

Luts argues that the use of such procedures is very problematic from the perspective of the Belgian internal legal order.[288] But the Constitution of the Netherlands allows some leeway.[289] Indeed, art. 7(f) of the *Rijkswet goedkeuring en bekendmaking verdragen* (Kingdom Act on the approval and publication of treaties) says that Parliament does not have to consent to amendments to

283 Id. at p. 609.

284 A. Wiersema, *The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, 31 Michigan Journal of International Law 231 (2009) questions how, in a typology of international legal obligation, such types of 'treaty activity' can be classified. She evaluates such consensus-based law-making activities on the basis of four axes: voting and level of consent; the level to which the treaty delegates authority to such activities; the level of obligation contained in language used; the effect of the resulting rules.

285 This term is used by Raustiala and expresses the ability of international institutions to produce new substantive rules that modify or amend a given legal agreement. K. Raustiala, *Sovereignty and Multilateralism*, 1 Chicago Journal of International Law 401 (2000) p. 412.

286 H. Gribnau, *Equality, Legal Certainty and Tax Legislation in the Netherlands. Fundamental Legal Principles as Checks on Legislative Power: A Case Study*, 9 Utrecht Law Review 52 (2013) p. 56-57.

287 C. Peters (2014) p. 343-344 and J. Luts (2014).

288 J. Luts (2014).

289 The parliamentary consent requirement is set out in article 91 of the Constitution. Decisions of international bodies fall within the ambit of article 91 of the Constitution. They can also be considered a 'treaty' in the sense of that article, as they require an act of state consent. See: H.H.M. Sondaal, *De Nederlandse Verdragspraktijk* (TMC Asser Instituut 1986), p. 134-135.

integrated annexes of an 'executive' nature (the term used is '*uitvoerende aard*').[290] With this rule, the Netherlands tries to meet the requirements of a dynamic international legal practice, as the Netherlands might benefit from a quick and efficient government response.[291] What particularly seems to matter in this regard, is whether Parliament can anticipate or foresee the contents of future annex amendments.[292]

Hence, a workable dynamic mechanism for international taxation is one under which states have a real and tangible influence.[293] Such influence is of course best safeguarded by explicit state consent and hence by parliamentary control. But as regards annexes of a technical or 'executive' nature, the consent requirement may be somewhat relaxed by an opt-out procedure, such as the one drafted in Article 5 to the Protocol of the convention of Annex A. In this way, the state retains its influence in international matters that require a dynamic approach to cooperation, without severely violating legitimacy concerns.

7.12 Conclusions of Part 7B: The framework convention-protocol design

Under the framework convention-protocol design, exemplified in Annex A, states slowly expand and deepen their commitments over time by agreeing to protocols. It is not necessary for all states to the framework convention to agree to participate in them; only interested parties may agree to deepen commitments. Yet, parties that do not wish to sign a protocol remain included

290 Art. 7(f) of the *Rijkswet goedkeuring en bekendmaking verdragen*. In Dutch, the article holds: 'Tenzij een verdrag bepalingen bevat welke afwijken van de Grondwet of tot zodanig afwijken noodzaken, is de goedkeuring niet vereist (…) (f) indien het verdrag betreft wijziging van een integrerend onderdeel van een goedgekeurd verdrag vormende bijlage waarvan de inhoud van uitvoerende aard is ten opzichte van de bepalingen van het verdrag waar de bijlage onderdeel van vormt, voor zover in de wet tot goedkeuring geen voorbehoud terzake is gemaakt'.

291 *Kamerstukken II* 1992/1993, 21 214, 17, p. 1-2. Whether the annex is of an 'executive nature follows from a comparison of that annex with the main body of the convention. The correct interpretation of the provision therefore depends on the contents of the main treaty text.

292 In Dutch parliamentary history, it was argued by the Raad van State that the exception is to be narrowly interpreted. Only annexes of a very technical nature, such as those of the International Convention for Safe Containers and the Customs Convention on the International Transport of Goods under cover of TIR Carnets, are considered admissible under the exception. Nevertheless, the Administration has disagreed with this position, arguing that if Parliament fails to file a reservation as regards the use of the exception when consenting to the main treaty in which the amendment procedure was included, this forms an indication of its wish to follow the exception. At the time of consenting to the main treaty, Parliament knows the purpose of the annexes and can hence anticipate the contents of future amendments to the annexes. *Kamerstukken II* 1992/93, 21 214, 17, p. 2-3.

293 J. Luts (2014), p. 32.

in the deliberations that take place within the regime, potentially propelling them towards deeper cooperation at a later stage.

Because the framework convention-protocol type of treaty is 'layered' on top of the bilateral tax treaty network, a conflict clause is required that regulates the relationship between the two types of treaties. Such a clause has been considered in section 7.9, and an example clause has been drafted in art. 8 of Annex A.

Furthermore, the framework convention-protocol design should be supplemented by interpretative flexibility devices: reservations and 'menu options' provide solutions for states to tailor commitments to their needs. The advantage of using 'menu options' over reservations is that this makes the varying menu choices part of a package deal, as the different choices have been coordinated on by the negotiators. States can only become a party to the treaty or protocol after having selected one of the options provided for in the 'menu'. Reservations, on the other hand, function on the basis of symmetry. The uncoordinated formulation of reservations may therefore upset the consensual balance of reciprocity underlying the agreement, or may lead to further disintegration, as it is possible that non-reserving states file objections to these reservations that modify or exclude provisions not addressed by the reservation. Also, states may agree on 'rules of the road'. 'Rules of the road' increase the chance that states participate in a treaty or a protocol's substantive multilateral commitments. The point is, as shown in Chapter 5, that such a rule 'fairly' accommodates the diverse interests of a group of participants. To set the discussion for debate, three examples of 'rules of the road' were proposed: a non-discrimination clause, a GAAR and a rule that prioritizes the taxing right of either the source or residence state for 'new' categories of income or for categories of income in relation to which tax treaties currently operate ambiguously (see e.g. article 3(1) of the BEPS Convention).

Finally, to increase its resilience as a managerial regime, the drafters of the framework convention may consider the use of dynamic decision making devices such as the opt-out procedure. Article 5 of the Protocol to the draft treaty of Annex A is an example of such a clause. However, using such forms of legal engineering may erode the democratic legitimacy underpinning tax rules thus made (see section 7.11). Hence, the use of these procedures, with the aim to increase the regime's dynamic operation, must be balanced against the need to protect the legitimacy of tax law-making. Limiting the use of such devices to tax rules of a 'technical' rather than distributive nature (e.g., certain refinements to transfer pricing reporting requirements) may soften the legitimacy concerns somewhat.

PART 7C: The 'Agreement to Scope'

7.13 Introduction to Part 7C

In many respects, the 'agreement to scope' is easier to develop and envisage than a treaty based on the framework convention-protocol design, as it does not require that its norms are 'layered' on top of bilateral tax treaties.

The commitments of an 'agreement to scope' can be added to the multilateral treaty's 'constitutional' elements (see Part 7A). The purpose of the 'agreement to scope' is to further facilitate bilateral bargaining in the forum by means of some procedural obligations. These additional procedural obligations involve states' commitment to 'limit the scope' of the general principles or (soft law) model treaties in their bilateral tax treaty relationships by means of a *pactum de negotiando* or a *pactum de contrahendo*. The behaviour of states as regards this commitment may be monitored and reviewed. This ensures that a level playing field is upheld and that states' legal commitment to flesh out value-maximising terms in their bilateral tax conventions is put in practice.

Section 7.14.1 will first discuss the background of the procedural characteristics of an 'agreement to scope' in international public law. Section 7.14.2 considers its use for the purposes of international tax law.

7.14 The 'agreement to scope'

7.14.1 The 'agreement to scope' in international public law

Obviously, states do not necessarily have to bindingly agree on a rule that establishes the performance or omission of a certain act (an 'obligation of conduct'), such as is required by a framework convention-protocol design. States can also agree on a procedural obligation to implement norms, within a certain broad legal purview, in a treaty or in domestic law in the future (an 'obligation of *result*'),[294] see section 7.14.1.1. Soft-law model treaties may guide or inform the practical facets of such a future negotiation. An open norm is thereby 'made precise' by means of a future legal act. In this view, an 'agreement to scope' functions much like an EU directive does: it sets out a certain legal purview that states have to implement in future legal acts. By implication, and like the framework convention-protocol design, the 'agreement to scope'

294 See for a discussion: R. Wolfrum, *Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations*, in: Looking to the Future: Essays on International Law in Honor of W. Michael Reisman (M.H. Arsanjani, et al. eds., Martinus Nijhoff Publishers 2011).

is iterative in nature, as it requires subsequent (centralised) bilateral negotiations. If necessary, the obligation of result can be backed up by monitoring and reporting mechanisms (section 7.14.1.2).

7.14.1.1 Pactum de contrahendo and *pactum de negotiando*

An obligation of result can be designed in two ways: it can either require the conclusion of a future agreement (a *pactum de contrahendo*) or the (re)negotiation of a (later) treaty (a *pactum de negotiando*). Although the distinction between the two forms is considered hardly necessary or practical,[295] the latter obligation is less extensive as it does not require states to actually *arrive* at an agreement.[296] Nevertheless, both types of obligation are to be performed in good faith, which is a concept that lies at heart of such *pacta*.[297] Consequently, a *pactum de negotiando* is not without legal consequences, as it means that 'both sides have to make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken'.[298] Thus, the negotiation takes place 'with a view to concluding agreements'.[299] Keeping the requirements of good faith in mind, a refusal of one of the parties to negotiate or conclude an agreement is considered a breach of international law.[300] Likewise, breaking off discussions without justification, disregard of procedure, causing delays, etc., may be against the rule of good faith.[301]

Generally speaking, *pacta de negotiando* and *pacta de contrahendo* contain a procedural as well as a substantive element. The procedural element has the nature of looking ahead: what is to be done in future negotiations? The substantive element of *pacta*, on the other hand, cabins the object of future negotiations. Sometimes, the object of future negotiations is made explicit; sometimes, the substance of such negotiations follows from agreements already

295 U. Beyerlin, *Pactum de contrahendo und pactum denegotiando im Völkerrecht?*, 36 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 407 (1976); also: L. Marion, *La notion de "pactum de contrahendo" dans la jurisprudence internationale*, 78 Revue General de Droit International Public 351 (1974) p. 386-389.

296 H. Owada (2010) M.A. Rogoff, *The Obligation to Negotiate in International Law: Rules and Realities*, 16 Michigan Journal of International Law 141 (1994), p. 148.

297 H. Owada (2010) par. 43; S.L. Kass, *Obligatory Negotiations in International Organizations*, 3 Canadian Yearbook of International Law 36 (1965).

298 See the Arbitral Tribunal in *Claims Arising out of Decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Greece v The Federal Republic of Germany),* 19 RIAA 27, p. 56.

299 According to the Permanent Court of International Justice in PCIJ, *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys) (Judgements, Orders and Advisory Opinions),* PCIJ Rep Series A/B no 42, and later in: *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands),* p. 47.

300 H. Owada (2010) par. 34-45.

301 C. Hutchison (2006) p. 142.

in place (this particularly occurs in *pacta* related to international dispute resolution).

Examples of *pacta de negotiando* and *pacta de contrahendo* are related to: (1) the settlement of international disputes, (2) the initiation of a subsequent agreement on open questions and (3) the elaboration of further details at a later stage.[302] A pactum in the first category requires parties to negotiate their difference of views. For instance, art. 286 of the UN Convention on the Law of the Sea holds:

> 'Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section'.[303]

Another, perhaps more familiar, example of such a clause can be found in art. 25 of the OECD MTC:

> '2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States'.

A pactum in the second category obliges parties to continue or open negotiations on a certain issue, possibly under a time schedule. Consider for instance art. 18 of the Treaty on Conventional Armed Forces in Europe, which held:

> '1. The States Parties, after signature of this Treaty, shall continue the negotiations on conventional armed forces with the same Mandate and with the goal of building on this Treaty.
> 2. The objective for these negotiations shall be to conclude an agreement on additional measures aimed at further strengthening security and stability in Europe, and pursuant to the Mandate, including measures to limit the personnel strength of their conventional armed forces within the area of application.
> 3. The States Parties shall seek to conclude these negotiations no later than the follow-up meeting of the Conference on Security and Cooperation in Europe to be held in Helsinki in 1992'.[304]

302 U. Beyerlin (1976) p. 417-421.
303 *United Nations Convention on the Law of the Sea* (adopted 10 December 1982), 1833 UNTS 3.
304 *Treaty on Conventional Armed Forces in Europe* (adopted 19 November 1990), 30 ILM 6.

Pacta of the third category can usually be found in framework agreements, which set the scene for further technical or practical agreement at the implementation stage.[305] An example is article VII of the 1993 Declaration of Principles on Interim Self-Government Arrangements between the Palestine Liberation Organisation and Israel (the Oslo Agreement):

> '1. The Israeli and Palestinian delegations will negotiate an agreement on the interim period (the 'Interim Agreement')'.[306]

This Interim Agreement had to include the following specifications:

> '2. The Interim Agreement shall specify, among other things, the structure of the Council, the number of its members, and the transfer of powers and responsibilities from the Israeli military government and its Civil Administration to the Council. The interim Agreement shall also specify the Council's executive authority, legislative authority in accordance with Article IX below, and the independent Palestinian judicial organs'.[307]

Similarly, in the 1997 UN Convention on the Law of Non-Navigational uses of International Watercourses (hereinafter: International Watercourse Convention) it has been agreed that:

> '2. parties to agreements referred to in paragraph 1 [that is: watercourse agreements in force] may, where necessary, consider harmonizing such agreements with the basic principles of the present convention.
>
> 3. Watercourse States may enter into one or more agreements, hereinafter referred to as 'watercourse agreements', which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof'.[308]

Hence, the International Watercourse Convention functions as an 'agreement to scope' in that it may influence negotiations of watercourse agreements (predominantly: regional and bilateral) that already exist as well as those that are to be developed and concluded in the future. The principles that the International Watercourse Convention sets forth are the equitable and reasonable utilization and participation of watercourses (art. 5) and the obligation to prevent harm to other riparian states (art. 7). For the aims of article 5, the Watercourse Convention sets forth relevant factors that states have to take

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305 U. Beyerlin (1976) p. 420-421.

306 *Declaration of Principles on Interim Self-Government Arrangements ("Oslo Agreement")* (adopted 13 September 1993), 32 ILM 1525.

307 Id. at art. VII.

308 *UN Convention on the Law of the Non-Navigational Uses of International Watercourses* (adopted 21 May 1997), 36 ILM 700 art. 3(2).

into account to achieve the principle, such as the social and economic needs of the watercourse state concerned, and the conservation, protection, development and economy of the use of water resources of a watercourse.[309] Hence, the main function of the International Watercourse Convention is to influence inter se negotiations on specific shared watercourses. And as McCafferey notes, states have started to converge on these principles in their inter se conventions since 1997,[310] even though the Convention has only recently (in 2014) come into force.

So, in sum, *pacta de negotiando* and *pacta de contrahendo* cabin the outcomes of future negotiations (for instance by means of certain principles or by other forms of predetermined legal confines such as the terms of an existing treaty) and contain look-ahead provisions in which states procedurally agree on the result that is to be achieved in good faith.[311]

7.14.1.2 Monitoring and reporting mechanisms under the 'agreement to scope'

To oversee that states actually do negotiate their treaties in line with a pactum de negotiando or contrahendo, treaty drafters may make use of review and reporting mechanisms, commonly referred to as 'compliance control'.[312] Whereas such mechanisms are noncoercive, 'they exert strong pressure parties to comply with their obligations'.[313] Indeed, they rely on persuasion rather than coercion.

In a comparative study on treaty mechanisms that induce compliance in three areas of international law (human rights, environment and arms control), the authors note that compliance control is anchored in reporting requirements.[314] These reporting requirements relate to the implementation of measures as well as to indicators of performance toward specified outcomes, such as emission data of harmful substances in international environmental

309 See further: S.C. Mccaffrey, *The Law of International Watercourses* (OUP 2nd ed. 2007).
310 Id. at p. 361.
311 Another excellent example of a *pacta* of the second/third third category is a series of treaties between the United States and the Soviet Union governing strategic nuclear weaponry. These treaties are: *Interim Agreement on Certain Measures with respect to the Limitation of Strategic Offensive Arms* (26 May 1972), 94 UNTS 3 (also: SALT I); *Treaty Between the United States of America and The Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms, Together With Agreed Statements and Common Understandings Regarding the Treaty (signed but not entered into force)* (1979), S. Exec. Dox, Y, 96th Cong., 1st Session (also: SALT II). They are further discussed by J.K. Setear (1996) p. 224-227. SALT stands for 'strategic arms limitation talks'.
312 J. Brunnée, *Compliance Control*, in: Making Treaties Work: Human Rights, Environment and Arms Control (G. Ulfstein ed., Cambridge University Press 2007) p. 374.
313 A. Chayes and A.H. Chayes (1995) p. 230.
314 J. Brunnée (2007) p. 374.

law.[315] Generally, reporting plays two important roles in a treaty regime. Reporting enhances transparency as to the performance of parties, particularly when such reports are released to the general public. But reporting also provides the foundation for compliance assessment processes within regimes. Usually, such an assessment is made by a specific neutral or expert body that reviews the reports submitted.

For instance, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter: CITES) requires in art. VIII(7)(b) that parties shall transmit to the convention Secretariat 'a biannual report on legislative, regulatory and administrative measures taken to enforce the provisions of the present convention'.[316] The secretariat can then study these reports, request more information, and prepare annual reports on implementation.[317] For instance, the secretary to the convention has reviewed the implementation of domestic legislation. Parties that did not meet all of the requirements were required to provide national legislation plans and enact legislation within specified deadlines.[318] Likewise, the UNFCC requires parties to communicate to the Conference of the Parties 'a general description of steps taken or envisaged by the Part to implement the Convention'.[319] The Conference of Parties is able to:

> 'assess, on the basis of all information made available to it in accordance with the provisions of the convention, the implementation of the convention by the parties, the overall effects of the measures taken pursuant to the convention (…) And the extent to which progress towards the objectives of the convention is being achieved'.[320]

And a more innovative way of ensuring the implementation of treaty commitments is the 'peer review' practiced by the OECD, a method in which one State examines another State's performance on a particular area in the form of an open dialogue. In this way, countries exchange information, attitudes and views, which encourage compliance.[321]

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315 See e.g. LTRAP art. 8; United Nations Framework Convention on Climate Change art. 12 and its Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 7.

316 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (adopted 3 March 1973), 993 UNTS 243.

317 Id. at art. XII. See also: R. Reeve, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, in: Making Treaties Work: Human Rights, Environment and Arms Control (G. Ulfstein ed., Cambridge University Press 2007).

318 R. Reeve (2007) p. 144.

319 United Nations Framework Convention on Climate Change art. 12(1)(b).

320 Id. at art. 7(2)(e).

321 OECD, *Peer Review: An OECD Tool for Co-operation and Change* (2003) OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/9789264099210-en-fr.

All in all, such reporting and compliance control mechanisms are designed to use parties' interconnectedness as a way to apply pressure. States that work against prevailing norms are treated as outsiders of the system.[322] Being an 'outsider' hurts, as in the end, as the Chayeses note, sovereignty is status;

> 'the vindication of the state's existence as a member of the international system. (…) Isolation from the pervasive and rich international context means that the state's potential for economic growth and political influence will not be realized'.[323]

7.14.2 The use of the 'agreement to scope' design for the multilateral agreement for international taxation

The 'agreement to scope' adds the infrastructure to the basic 'managerial' requirements set out in part 7A. Its purpose is to entice participating states to enter into bilateral tax treaty negotiations that may converge around periodically held conference sessions of the treaty's main body and may be guided and informed by principles identified at the outset. Hence, the 'agreement to scope' provides the structure for the multilateral agreement for international taxation to operate successfully.

In many ways, the 'agreement to scope' is similar to a proposal on the parallel amendment of bilateral tax treaties proposed by Avery Jones and Baker.[324] Like the agreement to scope, the main idea of the Avery Jones and Baker proposal is that pairs of tax treaty parties bilaterally agree on multilaterally established norms. Their proposal is unique because it preserves the bilateral nature of the avoidance of double taxation to some extent. Indeed, Avery Jones and Baker suggest concluding a multilateral framework agreement with the purpose of amending the bilateral tax treaties:

> '[T] the OECD would prepare a multilateral agreement, (…) to provide a framework for the amendment. The agreement itself would not make any amendments. Instead, it would provide a framework within which individual pairs of states could agree that the amendment in the framework agreement would apply to their existing bilateral DTC'.[325]

The Avery Jones and Baker proposal would include the text of the proposed amendment, to which pairs of states would consent on the basis of 'declarations': bilateral agreements which include specific details such as the relevant tax treaty article and paragraph to be amended, the language in which the

322 M.P. Cottrell and D.M. Trubek (2012) p. 374.
323 A. Chayes and A.H. Chayes (1995) p. 27.
324 J.F. Avery Jones and P. Baker, *The Multiple Amendment of Bilateral Double Taxation Conventions*, 60 Bulletin for International Taxation 19 (2006).
325 Id. at p. 21.

amendment is to be adopted and the effective date of the amendment. The text of the multilateral treaty and thus the text of the proposed amendment would, in accordance with art. 9 VCLT, be adopted at an international conference by the vote of two thirds of the States present and voting.[326]

However, in the Avery Jones and Baker proposal, states are not allowed to deviate from the text in bilateral negotiations after this text is adopted at the level of the multilateral agreement. Indeed: 'no further changes would be permitted or necessary'.[327] But exactly in this respect, the 'agreement to scope' differs from the Avery Jones and Baker proposal. Bilateral negotiations should be used to further flesh out commonly identified terms. The OECD MTC may be used to inspire this process.

This means that, as regards the 'agreement to scope', state consent is needed on two levels: once at the level of the multilateral agreement and once at the level of the bilateral tax treaties. But this is not 'unnecessarily burdensome', as Innamorato argues in respect of the Avery Jones and Baker proposal.[328] The point is that the bilateral negotiations in step two add value by allowing states to deepen obligations, and this hence enables the regime to evolve over time. And, in terms of outcome, an 'agreement to scope' is comparable to the framework convention-protocol design, which also requires two rounds of negotiations and ratification (once at the level of the framework treaty, once at the level of the protocols).[329] To the end that parties need inspiration in fleshing out broad, multilaterally set norms, the Conference of the Parties may draft soft law: reports, model provisions and commentaries, etc.

In this regard, the BEPS Convention contains evidence of elements of an 'agreement to scope' (see Chapter 8). The choice of a state on implementing the BEPS Project's commitments may depend on the specific relationship with a treaty partner.[330] In this regard, the menu options that Parties may choose from to implement BEPS Action 6's minimum standard may create a difficult matrix: a country may decide to 'supplement' the PPT with an LOB clause with one state and favour just a PPT with another. The choice of menu may depend, in other words, on a state's company at the dining table, necessitating further bilateral fine-tuning.

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326 Id. at p. 21 and the draft convention prepared by the authors in the same work. See further: C. Innamorato, *Expeditious Amendments to Double Tax Treaties based on the OECD Model*, 36 Intertax 98 (2008), p. 119. Innamorato also discusses the framework convention- protocol solution at p. 118. She does away with the solution however on the basis of its infeasibility: 'it is rather improbable that many countries would join the agreement'.

327 J.F. Avery Jones and P. Baker (2006) p. 21.

328 In the Avery Jones and Baker proposal, subsequent rounds of 'declarations' are inflexible. The authors do not allow parties to bilaterally deviate from multilaterally set benchmarks. C. Innamorato (2008) p.120 critiques this approach as: 'seeking twice for the approval of the Parliament [to ratify the amendments] would indeed ensure the right and lawful level of democratic legitimacy, but at the expenses of streamlining the treaty amendment process'.

329 This is said to make its amendment sluggish. See e.g. A.L. Taylor (1996) p. 295.

330 T. Bender and F.A. Engelen (2016).

7.15 Conclusions of Part 7C: The 'agreement to scope'

The 'agreement to scope' adds some infrastructure to the 'core' elements (see Part 7A) required to make the multilateral agreement for international taxation work. This would involve states' agreement on procedural commitments to further flesh out certain broader norms in their bilateral tax treaties (a *pactum de negotiando* or *pactum de contrahendo*). Reporting and review mechanisms could be used to identify implementation obstacles and to assess whether the implementation and negotiation of common value maximizing norms takes place in a satisfactory way, keeping in mind the need for a level playing field. Although the 'agreement to scope' requires the consent of parliaments in two rounds (once at the level of the agreement itself, and once at the level of the bilateral treaties), this does not make interaction unnecessarily burdensome, as each (additional) bilateral interaction may add depth to parties' obligations. Indeed, it sets the common terms and conditions for negotiation and brings states together at one place and time, where parties agree, in pairs if necessary, to engage in further bilateral fine-tuning or matching.

7.16 Conclusions: The contours of the multilateral agreement for international taxation

This chapter illustrated the multilateral agreement for international taxation, using some prototypical tools of international public law. At its core, the treaty must contain a robust forum in which parties, time and again, engage to keep up with developments in society. A Conference of the Parties should be at the heart of this approach: a flexible quasi-institution, gathering regularly and at different locations. The Conference of the Parties is backed up by a secretariat that is set up within an existing international organisation (ideally: the United Nations). Negotiation takes place on the basis of objectives and some general principles set by the Conference of the Parties.

Depending on the type of policy objective under discussion, parties may then decide to use elements (or a combination) of the 'agreement to scope' or the 'framework convention-protocol' designs. Both are principally agreements of procedure rather than content. Under the agreement to scope, parties agree to further flesh out multilaterally set objectives in a bilateral fashion by means of a *pactum de negotiando* or a *pactum de contrahendo*. Where necessary, bilateral negotiation efforts can be subjected to monitoring and reporting mechanisms. Under the framework convention-protocol, parties agree on substantive multilateral norms, if opportune, in protocols. Such substantive multilateral agreements are layered 'on top of' bilateral tax treaties: a conflict clause prioritises rules of the multilateral treaty over those of bilateral conventions. Reservations and 'rules of the road' can be used to relax distributive

problems. Dynamic decision-making procedures will ease subsequent amendments to the multilateral convention.

It is not unthinkable that the locus of decision-making on international tax issues is slowly moved from the OECD to the Conference of the Parties. Whereas the influence of OECD soft law on tax law making within the environment of the COP cannot be prevented or prohibited, the independence of the COP vis-à-vis OECD non-member countries will prove indispensable to solve the (future) collective action problems of international tax law that affect OECD members and non-members alike. In fact, the COP itself may start to draft model tax treaty provisions and commentaries thereon so as to guide or inspire treaty negotiators in fulfilling their procedural obligations under the multilateral convention.

This does not (re)introduce the problems identified in Chapter 2. On the contrary: the multilateral agreement for international taxation fundamentally changes the way that tax treaty relationships are managed. It provides the opportunity to deal with the (future) collective action problems of international tax law, and in a fairer, coordinated, and more responsive way.