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Multilateralism in Tax Treaty Law

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Multilateralism in Tax Treaty Law

Why this book?
It is generally agreed that treaties for the avoidance of double taxation are usually international agreements between two countries, i.e., bilateral international treaties. This is also how the major international treaty models of the OECD and the UN are structured. With its roots deep in the early 1920s, "bilateralism" shapes the structure of today's international tax framework, the backbone of which is formed by around 3,000 bilateral tax treaties. In fact, there are very few historical or current examples of multilateral tax treaties. Skepticism prevailed, due to the lack of consensus on the allocation of taxing rights in situations involving many states. However, the last decade has seen a surge in multilateralism in international tax law.

It is against this background that this book explores the topic of multilateralism in tax treaty law. The book investigates one broad research question: "How has multilateralism in international tax treaty law been used in the past, what are the advantages of a multilateral approach and how could a multilateral tax treaty be used as a tool for inclusive cooperation?" It establishes a historical basis and conceptual framework to argue for increased multilateralism, which, drawing from past and present examples of multilateral tax treaties, offers many advantages over bilateral approaches that may outweigh the difficulties of a multilateral approach. The book concludes with a proposal for a "Draft Multilateral Tax Treaty" that draws on the most common model treaties, existing multilateral agreements and research findings.

To put it in the author's words:
"The advantages of a comprehensive MTC both in aspects of concrete distributive issues as well as underlying principles are significant and should be used as a new starting point for discussions on the matter".

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Stefanie Gombotz

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To my daughter Liora Jay,
the greatest blessing of my life.

Table of Contents

Abstract

This book aims to provide a comprehensive analysis of the concept of multilateralism in tax treaty law. The objective of this book is threefold. First, it lays out the fundamental principles underlying multilateralism in tax treaty law by analysing its emergence and historical basis, its development over the past century and the different workstreams on the subject coming out of the various international organizations and institutions concerned with international tax policy. This book identifies the most notable current multilateral tax treaties and provides a thorough analysis of past and present multilateral tax conventions and multilateral tax instruments.

Second, a core part of this book is dedicated to an analysis of the advantages of a comprehensive multilateral approach in tax treaty law. The dedicated chapters investigate advantages of multilateralism facilitating trade, advantages in counteracting tax evasion and avoidance strategies, advantages for tax administrations and advantages in counteracting global inequalities. This analysis reveals the broad spectrum of advantages that a comprehensive multilateral tax convention would offer while addressing selected issues to be considered in a multilateral approach.

Third, this book provides an in-depth analysis of the necessary institutional framework for a comprehensive multilateral tax treaty. While international tax governance has largely been dominated by the OECD in the last decades, the UN has increasingly advocated playing a more inclusive and effective role in international tax governance. Basing the analysis on the concept of legitimacy, this book provides a critical investigation of current structures and makes proposals for future governance structures. This work demonstrates the role that a comprehensive multilateral tax convention could play in the future and presents a draft version in its annex.

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Abbreviations

ADS	Automated digital services
AEoI	Automatic exchange of information
APA	Advance pricing arrangement
ATAD	Anti-Tax Avoidance Directive
BEPS	Base erosion and profit shifting
BMG	BEPS Monitoring Group
BRICS	Brazil, Russia, India, China (People's Rep.) and South Africa
CA	Competent authority
CbCR	Country-by-country reporting
CFA	Committee on Fiscal Affairs
CIT	Corporate income tax
COP	Conference of the Parties
CRS	Common Reporting Standards
CTA	Covered tax agreement
CTPA	Centre for Tax Policy and Administration
DAC	Directive on Administrative Cooperation
DST	Digital services tax
DTC	Double tax convention
ECJ	Court of Justice of the European Union
ECOSOC	UN Economic and Social Council
EEA	European Economic Area
EoI	Exchange of information
ET	European taxation
Eurodad	European Network on Debt and Development
FACTI	Financial Integrity for Sustainable Development
FDI	Foreign direct investment
FHTP	Forum on Harmful Tax Practices
GAAR	General anti-avoidance rule
GATJ	Global Alliance for Tax Justice
GDP	Gross domestic product
GloBE	Global Anti-Base Erosion
ICC	International Chamber of Commerce
IF	Inclusive Framework
IGO	Intergovernmental organizations
IIR	Income inclusion rule
LOB	Limitation on benefits
MAP	Mutual agreement procedure
MCAA	Multilateral Competent Authority Agreement
MCMAA	Multilateral Convention on Mutual Administrative Assistance in Tax Matters

MLC	Multilateral Convention on Amount A of Pillar One
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
MNE	Multinational enterprise
MTC	Multilateral tax convention
PE	Permanent establishment
PPT	Principal purpose test
SAAR	Special anti-avoidance rule
SDG	Sustainable Development Goal
SG	Secretary General
STTR	Subject-to-tax rule
SWI	Steuer und Wirtschaft International
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TIEA	Tax information exchange agreement
TJN	Tax Justice Network
ToR	Terms of reference
UN FTI	UN Fast Track Instrument
UNFCCC	UN Framework Convention on Climate Change
UNFCITC	UN Framework Convention on International Tax Cooperation
UTPR	Undertaxed payments rule
VCLT	Vienna Convention on the Law of Treaties
WHT	Withholding tax

Chapter 1

Introduction

1.1. The rise of multilateralism in international tax law

Eliminating double taxation by means of concluding bilateral double tax treaties has been common practice for much of the past century. Ever increasing globalization efforts in the areas of business, investment and labour markets have resulted in virtually all areas of business and life being influenced by globalization. The field of international tax law has been significantly impacted by the result of globalization, leading to a steady increase of bilateral double tax conventions (DTCs), which currently amounts to a total of over 3,000 worldwide. Somewhat surprisingly, globalization and, with it, numerous developments in business structures leading to businesses servicing much of the global market, have not yet led countries to consider a more globalized approach when it comes to their DTCs.

Contrary to bilateral DTCs that aim at creating a legal framework for cross-border tax cases involving two countries, multilateral DTCs aim at involving numerous countries and creating a legal framework among these countries. Multilateral DTCs have long been considered the antidote to issues arising from the use of bilateral DTCs in a globalized world. Whereas bilateral DTCs aim at solving issues of double taxation arising from cross-border taxation of two countries – one being the residence state and the other being the source state – multilateral DTCs expand the scope covering cases involving three or more countries. However, multilateral DTCs are not a new concept. In fact, one of the first DTCs concluded constituted a multilateral tax treaty signed on 6 April 1922 with the signatory states being Austria, Hungary, Poland, Italy, Romania and the Kingdom of Serbs, Croats and Slovenes.[1] However, the treaty never fully entered into force due to a lack of ratifications by the signatory states.[2] Subsequent efforts for a multilateral DTC have been made on various institutional levels.[3]

1. *Übereinkommen zwischen Österreich, Ungarn, Italien, Polen, Rumänien und dem Königreiche der Serben, Kroaten und Slowenen zur Vermeidung der Doppelbesteuerung (BGBl 341/1926)* (4 June 1922); and S. Seibold-Freund, *Stand und Entwicklung des österreichisch-deutschen Doppelbesteuerungsabkommens* p. 5 f. (E. Schmidt 1998).
2. *See* sec. 4.2.
3. *See* chapter 3.

More recently, international tax law has seen a number of significant initiatives. The most notable is the BEPS Action Plan[4] by the OECD. Commissioned by the G20,[5] the OECD has developed the BEPS Action Plan, a report comprised of 15 actions with the common goal of addressing tax avoidance and aligning taxation with value creation and economic activity.[6] Following suit, the European Union has passed the Anti-Tax Avoidance Directive (ATAD)[7] and the Amending Directive to the 2011 Directive on Administrative Cooperation [on reportable cross-border arrangements] (2018/822) (DAC6)[8] with the goal of counteracting tax avoidance within the EU internal market. The processes and developments stemming from these actions are still ongoing. Action 1,[9] which deals with the tax challenges arising from digitalization, saw significant developments from 2021 to 2023 with the OECD-led Inclusive Framework (IF),[10] publishing a statement on a two-pillar solution to address the tax challenges arising from the digitalization of the economy.[11]

There is a strong desire to mitigate harmful international tax competition in recent years, much of which was largely enabled by bilateral DTCs making use of differing national tax systems. Although the current (mostly bilateral) global DTC network is impressive, the concept of a multilateral DTC serving the globalized world as a means of tackling remaining shortfalls of the bilateral system, such as tax evasion and avoidance arrangements, must once again garner the attention and commitment it deserves. Given this

4. *See* https://www.oecd.org/tax/beps/beps-actions/ (accessed 1 Aug. 2024).
5. The G20 is an informal intergovernmental forum comprised of the world's largest economies, including both developed and developing countries.
6. OECD, *Addressing Base Erosion and Profit Shifting* p. 5 et seq. (OECD 2013), Primary Sources IBFD.
7. Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD), OJ L193 (2016) [hereinafter ATAD].
8. Council Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC6), p. 6, OJ L139 (2018) [hereinafter DAC6].
9. OECD, *Addressing the Tax Challenges of the Digital Economy – Action 1: 2015 Final Report* (OECD 2015), Primary Sources IBFD.
10. The IF is an OECD-led group consisting of 135 jurisdictions currently working on the implementation of the OECDs BEPS initiative. *See* further https://www.oecd.org/tax/beps/about/ (accessed 1 Aug. 2024).
11. OECD, *Outcome Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (OECD 2023); OECD, *October Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy* (OECD 2021); OECD, *July Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy* (OECD 2021); and OECD/G20, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy* (OECD 2021). *See* sec. 3.4.

background, it is time to conduct a comprehensive study of the previous role that multilateralism played in tax treaty law and its development, complemented by an in-depth analysis of its potential role in the future. Recent approaches and concepts will be analysed in order to identify weaknesses and opportunities going forward.

1.2. Objectives and relevance

The topic of multilateralism in tax treaty law has been explored in academia from various angles in the past.[12] The existing literature on the subject can be divided into three main strands.[13] The first is the literature that focuses on establishing and promoting a worldwide multilateral tax treaty approach. The second is the part of the pertinent literature that focuses on a multilateral tax treaty for regional or trading blocks, also known as regionalism. Regionalism aims to mitigate a major point of criticism that multilateral tax treaties often face – the difficulties of applying it to conflicting national economic and fiscal systems. The third strand of literature focuses on the idea of establishing a multilateral tax treaty for specific aspects of international taxation. This strand of literature includes research on multilateral instruments – especially the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI)[14] by the OECD[15] and the Multilateral Convention to Implement Amount A of Pillar One (MLC).[16]

12. *See* infra n. 14-38.
13. *See also* K. Brooks, *The Potential of Multilateral Tax Treaties*, in *Tax treaties: building bridges between law and economics* (M. Lang ed., IBFD 2010), Books IBFD.
14. OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (OECD 2016).
15. N. Bravo, *A Multilateral Instrument for Updating the Tax Treaty Network* (IBFD 2020), Books IBFD; D. Blum & R. Szudoczky, *Chapter 5: Unveiling the MLI: An Analysis of Its Nature, Relationship to Covered Tax Agreements and Interpretation in Light of the Obligations of Its Parties*, in *International and EU Tax Multilateralism: Challenges Raised by the MLI* (A.P. Dourado ed., IBFD 2020), Books IBFD; R. García Antón, *Chapter 1: Substantive Multilateralism in the Context of the MLI*, in *International and EU Tax Multilateralism: Challenges Raised by the MLI* (A.P. Dourado ed., IBFD 2020), Books IBFD; M.L. Gomes, *International Taxation and the Challenges for Multilateralism in the Context of the OECD Multilateral Instrument*, 72 Bull. Intl. Taxn. 2 (2018), Journal Articles & Opinion Pieces IBFD; G.S.-A. Hidalgo, *Reflections on Multilateral Tax Solutions in a Post-BEPS Context*, 45 Intertax 11 (2017); N. Bravo, *The Multilateral Tax Instrument and Its Relationship with Tax Treaties*, 8 World Tax J. 3 (2016), Journal Articles & Opinion Pieces IBFD; and J. Kim, *A New Age of Multilateralism in International Taxation?*, 21 Seoul Tax Law Review 2 (2016).
16. OECD, *The Multilateral Convention to Implement Amount A of Pillar One* (OECD 2023).

The existing literature on comprehensive multilateralism in tax treaty law mostly dates back more than a decade, showing that awareness and urgency for the topic has declined recently. Research gaps especially exist in the broader international context and possible comprehensive integration measures concerning multilateralism in tax treaty law. Furthermore, the recent urgency in tackling tax avoidance and harmful tax competition, as well as how these issues could be tackled by a comprehensive multilateral DTC, have not been reflected. These research gaps in the literature form an integral part of this work and highlight the necessity and added value of this project. As internationalisation of trade and human capital will undoubtedly increase in the future, it poses a major opportunity for countries to cooperate and take a lead role in the development of international taxation. The research carried out on comprehensive multilateralism until now predates the vast developments that have changed international tax and treaty law, including the OECD BEPS Project, which has led to the amendment of the OECD Model and the development of the MLI and the MLC, as well as several measures on the European level such as the ATAD and DAC6. This book aims to be a significant step in contributing to the research on multilateralism and further advancing the existing literature on this topic, filling the gap that has developed in research in the last 10 years. Given the age of many of the bilateral DTCs worldwide and their inability to tackle current abuse and avoidance structures, this book will further identify how a multilateral DTC could contribute to strengthening international tax policies and systems among participating countries.

This book shall contribute to further academic and legal policy discussions on the topic of multilateralism in tax treaty law. Its aim is to comprehensively analyse the arguments for a multilateral approach in tax treaty law as a tool for harmonization and cooperation, while analysing the most pressing concerns. It will further extensively examine the institutional framework and relevant procedures necessary for the conclusion of such a multilateral treaty as an instrument of international law. This book will primarily focus on international law but will draw on national and EU law when appropriate. This book will discuss multilateralism in tax treaty law, its history and development, as well as current multilateral tax treaties. These fundamentals will be the basis for subsequent elaborations on multilateralism as a tool for substantive multilateral cooperation.

Given the increasing media coverage that international tax (avoidance) structures have attracted in recent years, the topic has often been discussed from a political perspective. This research will be conducted on a purely legal basis. The overall aim of this book is to critically analyse and discuss

the strengths and weaknesses of a comprehensive multilateral tax treaty from a legal point of view.

1.3. Research questions and structure

This book will be written under the presumption that the vast bilateral DTC network among countries constitutes a problem and, hence, the development of a possible solution is desirable. The aim of this book is to first establish the historical and conceptual fundamentals of multilateralism and its role in tax treaty law. Building on this, the goal is to explore the necessity and institutional framework of a multilateral DTC. Therefore, the research question reads as follows: *How has multilateralism in international tax treaty law been used in the past; what are the advantages of a multilateral approach; and how could a multilateral tax treaty be used as a tool for inclusive cooperation?*

This comprehensive research question can be clustered into four areas that are reflected in the table of contents. Each chapter raises and addresses more specific sub-questions.

Part I (chapter 1) of this book will set the scene of this contribution and the subsequent chapters. It will cover the rise of multilateralism in tax treaty law and the most recent developments, such as the BEPS Project and the resulting MLI, that brought the topic of multilateralism back on the international tax agenda.

Part II (chapters 2 and 3) of this book deals with the historical development of multilateralism in tax treaty law in detail. What is the role of tax treaties, and how did the status quo of the institutional form of bilateralism develop? What is multilateralism by definition; when did it emerge in the context of tax treaty law; and how did it further develop over time? What contributions regarding multilateralism have the League of Nations, the OECD, the United Nations and the European Union made?

Part III (chapters 4 and 5) of this book will focus on current multilateral tax treaties. Which types of multilateral tax treaties are there? How was the first comprehensive tax treaty drafted and conceived, and how can its effects be described? What can be learned from other comprehensive multilateral tax treaties? Contrary to comprehensive multilateral tax treaties, which other forms of multilateral cooperation in tax law are there? How has the MLI influenced the recent developments and discussions on multilateralism in

tax law? What further multilateral instruments have the OECD and United Nations produced, and how can their effects be described?

Part IV (chapters 6 and 7) of this book is dedicated to the arguments in favour of a multilateral approach in tax treaty law. What are the advantages of multilateralism in facilitating trade? What are the advantages of multilateralism in counteracting tax evasion and avoidance strategies? What are the advantages of multilateralism for tax administrations? What are the advantages of multilateralism in counteracting global inequalities? Additionally, do the advantages of a comprehensive multilateral tax treaty as a tool for inclusive cooperation outweigh possible issues of such an approach? What are the selected issues to be considered in multilateral cooperation?

Part V (chapter 8) of this book will focus on the international framework for a multilateral tax treaty. What does the institutional framework concerning international tax governance currently look like? What should the institutional framework for a multilateral tax treaty look like, and what role can the United Nations play?

1.4. Methodology

This book is written in the field of law using the classical methods of legal research. Traditional legal research consists of a (at least) two-step process, including the compilation of legal sources and the subsequent interpretation and analysis thereof.[17] The research of this book undertakes both steps.

To apply an abstractly formulated legal provision to a specific situation, a thorough analysis of the provision culminating into a conclusion is necessary.[18] This conclusion is vital as the principle of legality forms a general principle of most national legal systems.[19] As legal provisions are abstractly formulated so as to ensure their applicability to a number of specific cases, they need to be interpreted prior to application.[20] Irrespective of the area of law in which research is conducted, jurisprudence has developed what

17. T. Hutchinson & N.J. Duncan, *Defining and Describing What We Do: Doctrinal Legal Research*, 17 Deakin Law Review 83 1, p. 110 (2012).
18. W. Gassner, *Interpretation und Anwendung der Steuergesetze: kritische Analyse der wirtschaftlichen Betrachtungsweise des Steuerrechts* p. 5 (Orac 1972).
19. *Consolidated Version of the Treaty on the Functioning of the European Union* art. 2 (2012) [hereinafter TFEU]; and J. Kokott, *Das Steuerrecht der Europäischen Union* sec. 2, para. 11 (C.H. Beck 2018).
20. Gassner, *supra* n. 18, at p. 5.

is known as the "classical canon of interpretation" for research done in all areas of law.[21] This uniform methodology for legal research stems from the universal difficulties that the application of the law, irrespective of its specific area, faces: bridging the gap between a general-abstract legal provision and a concrete specific situation. The classical canon of interpretation is comprised of a textual (grammatical), contextual, teleological and historical interpretation.[22]

The starting point for any legal interpretation is the text and its wording.[23] The literal sense of the wording represents the meaning of an expression in the general or specific language use.[24] Referring to the specific language use of an expression may especially be relevant in the field of tax law.[25] Therefore, the specific language use of an expression, i.e. its technical use, may not be the same as the colloquial understanding of the expression.

The contextual interpretation takes into account that every expression, combination of words or whole sentences are integrated into a structure of a norm and the underlying regulation. Thus, contextual interpretation aims at taking into account the overall structure in which a specific sentence is incorporated. The full meaning of each sentence can therefore only be understood when taking into account the context of the relevant legal norm and the entire legal system in which it is embedded.[26]

By means of the historical interpretation, a law's legal history and origin are taken into account. Thus, the intention of the historical legislator is determined in order to establish why a certain legal norm was introduced.[27] To establish the intention of the historical legislator, all relevant materials may be drawn upon.

The teleological interpretation draws upon the *telos*, the specific purpose or aim of a legislative measure.[28] By means of teleological interpretation, the legislator's objective is taken into account in order to develop the legal

21. S. Douma, *Legal Research in International and EU Tax Law* p. 22 ff. (Kluwer Law International 2014).
22. W. Brugger, *Concretization of Law and Statutory Interpretation*, Tulane European & Civil Law Forum 207, p. 232 ff. (1996).
23. M. Potacs, *Rechtstheorie* p. 169 et seq. (2nd ed., Facultas 2019); and K. Larenz, *Methodenlehre der Rechtswissenschaft* p. 320 et seq. (Springer 1991).
24. Larenz, *supra* n. 23, at p. 324 et seq.
25. Brugger, *supra* n. 22, at p. 234 et seq; and Gassner, *supra* n. 18, at p. 12.
26. Brugger, *supra* n. 22, at p. 237 et seq.; and Larenz, *supra* n. 23, at p. 310 et seq.
27. Brugger, *supra* n. 22, at p. 240.
28. Id., at p. 242.

measures *ratio legis*,[29] the object and purpose of the relevant legal measure. Taking teleological interpretation a step further, teleological-systematic interpretation aims to avoid contradictory interpretations within the law.[30]

The interpretation of international tax treaties and models is governed by the interpretive principles for international treaties of the Vienna Convention on the Law of Treaties (VCLT).[31] According to article 31 of the VCLT, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Thus, the interpretation of international treaties must take into account the object and purpose of a provision. Therefore, the interpretation of international treaties is largely aligned with the general principles of interpretation as mentioned before.

In this book, the relevant legislative provisions for a multilateral DTC will be examined by applying the described legal interpretation methods and taking into account relevant case law, literature and administrative practice on this subject. For meeting the requirements and standards of scientific work, a comprehensive review of the literature, judicature and administrative practice that have been published on the specific subject areas is fundamental. Primarily, international literature will be examined, drawing on national contributions and literature when appropriate. The research will be carried out by means of procuring the relevant pertinent case law, monographs, commentaries, contributions in anthologies, administrative instructions, articles in professional journals, judgements and the respective legal texts with their associated materials.

1.5. Delimitation

As proves true for many research projects, not every aspect that a research topic may include can be covered. The same is also true for this book. For this reason, two main areas that are relevant when researching and writing about multilateralism in tax treaty law will be excluded from this book.

First, this book will only cover a selected number of substantive measures that a multilateral DTC may include in a detailed manner. Substantive measures and provisions of DTCs largely remain subject to negotiations by

29. Potacs, *supra* n. 23, at p. 183 et seq.; and Gassner, *supra* n. 18, at p. 12 et seq.
30. *See* further Larenz, *supra* n. 23, at p. 339 et seq.
31. *UN Vienna Convention on the Law of Treaties* (23 May 1969), Treaties & Models IBFD.

the participating countries. The Draft Multilateral Tax Treaty, which can be found in the Annex of this book, serves as a model for negotiations and aims at forming a basis incorporating the most recent developments in international tax treaty law. Second, this book will not cover possible participating countries. This is due to the fact that it is of primary interest that international multilateral tax cooperation progresses and that a multilateral DTC will be established. For the purpose of this book, the question of which countries sign such a multilateral DTC is not of primary interest. The concept of regionalism as a possible approach to multilateralism will therefore be excluded.

Notes

Notes

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