

The Concept of Multilateralism and its Importance in Tax Law

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1. Introduction

This thesis aims to cover the concept of multilateralism, presenting a general concept as well as its relation and importance in tax law. It appraises the development of multilateralism in tax law, taking into account the historical developments and the economic and political power shifts that directly impacted the interactions between the different stakeholders that led to different ways of cooperation and relations.

The constant change in the relations of the different stakeholders involved in the global tax policy directly influences the way of cooperation between them. The current global economy and challenges brought by that also contribute to such a relationship. Cooperation has not been so much in debate as it is today since, ever more, the states and nonstate stakeholders need to support each other in the discussions as well as the relevance of multilateral cooperation.

From a perspective of cooperation, it is possible to identify the multitude of possibilities that multilateralism can bring to the actual discussion be it in a more general concept or focused on its application for tax law. Within that field, who is, in fact, legitimate to produce the policies and enforce them? How should the not so relevant stakeholders interact with such policy makers? A full acceptance of the rules should be the way.

The elaboration and application of policies have significant impacts on the modern economy, globalization, and interstate relations. Policymakers must consider the potential implications of their decisions on the complex interdependencies of the modern economy. Trade policies, for example, can protect domestic industries but also raise prices and limit access to foreign markets.

Moreover, conflicts between states seeking to rule alone and those prioritizing cooperation have become more evident in recent years. Nationalistic tendencies can lead to a breakdown in international cooperation, creating insecurity and mistrust between states. Policies that prioritize mutual benefit can help mitigate these tensions and promote a more peaceful international order.

Policymakers must be mindful of the far-reaching impacts of policies on various aspects of society. Crafting policies that prioritize cooperation and mutual benefit can help to mitigate tensions between states and foster a stable international order.

In a world that is constantly changing, relations and transactions follow the same principle. It is even more evident with the change of the economic relations between the countries and taxpayers when in comparison to the analogue era. Some flows happen in the matter of seconds, sometimes bouncing in different jurisdictions in digital form. Within that, the possibilities and ways of taxing such operations get even more complex, and it seems that the systems will keep evolving and bringing more complexity. Multilateral cooperation and its application in tax law could be an efficient way to address such items and will be one of the things covered in this thesis.

Another very important aspect is exactly the main stakeholders involved in the operations as well as their interactions and the process of law making, being by means of hard law or soft law. How are the common standards for the solution of collective problems set up, or what is the real influence of different stakeholders in such a process? Is it possible to also make some relation with the 2008 financial crisis and COVID-19 impacts in the interactions as well as with the multilateral organizations' participation in addressing the challenges brought by that?

The thesis has the following structure. Chapter 2 will cover the broader and general concept of multilateralism with some historical descriptions and developments. Then, Chapter 3 will analyse the relationship between multilateralism and tax law, providing the concept behind it as well as the historical developments and causes of such changes. In the following Chapter 4, the interaction of different stakeholders will be covered with their efforts to find common standards for the solution of collective problems and the ways to produce such solutions and possibilities of enforceability. Chapter 5 will cover some of the challenges addressed by multilateralism, also in a sense if effectively addressing the issues or some discussions that are still ongoing. As a conclusion, Chapter 6 will cover the

possible future of multilateralism in tax law, taking into account the changes in the global economy and relations between the stakeholders.

2. General Concept of Multilateralism

When it comes to a general concept of multilateralism, initially, it is often defined in opposition to bilateralism and unilateralism¹. Moreover, at its core, multilateralism refers to coordinating relations among three or more states in accordance with certain principles². Such an understanding is also corroborated by the Oxford English Dictionary which provides the following definition of multilateralism: “The principle of participation by three or more parties, especially by the governments of different countries”³.

However, defining multilateralism solely based on the number of participants is not adequate. It is not just a matter of numbers but a shared political commitment to shared values and norms. Multilateralism is founded in principles such as consultation, inclusiveness, and solidarity guided by collectively established rules for sustainable and effective cooperation. These rules treat all actors equally, providing consistent rights and obligations, rather than ad-hoc arrangements. In conclusion, multilateralism is not only a method for collaboration but also a structure of the international system. It is also referenced by the UN that “Multilateralism is therefore both a method of cooperation and a form of organization of the international system.”⁴

In some perspectives, it is possible to view multilateralism as a way of evolution of unilateralism and bilateralism where the power balance that rules the relations of different states shifts with the appearance of players with similar relevance or the need to achieve a collective goal that requires collaboration. It is important to highlight that reciprocity behavior between individuals integrates the economy only if symmetrically organized structures, such as symmetrical system of kinship groups, are given⁵. This means that multilateralism does not represent a balance between the parties involved; it simply means establishing a mutually acceptable balance between the parties, however, that is determined in practice⁶.

1 United Nations, *About Multilateralism* (Geneva: United Nations), <https://multilateralism100.unog.ch/about> (Accessed 17 June 2022).

2 John Gerard Ruggie, *International Organization, Multilateralism: The Anatomy of an Institution* (1992), p. 568, <http://www.jstor.org/stable/2706989> (Accessed 17 June 2022).

3 *Multilateralism*, <https://www.lexico.com/definition/multilateralism> (Accessed 17 June 2022).

4 United Nations, *About Multilateralism* (Geneva: United Nations), <https://multilateralism100.unog.ch/about> (Accessed 17 June 2022).

5 Karl Polanyi, *The Economy as Instituted Process*, in Karl Polanyi, Conrad M. Arensberg, and Harry W. Pearson (eds.), *Trade and Market in the Early Empires* (Glencoe, Ill.: Free Press, 1957), p. 251.

6 John Gerard Ruggie, *International Organization, Multilateralism: The Anatomy of an Institution* (1992), p. 572, <http://www.jstor.org/stable/2706989> (Accessed 17 June 2022).

The term “multilateralism” emerged in the late 19th century in the discourse of international relations and diplomacy referring to situations involving multiple nations participating in negotiations or forming agreements. The term was likely introduced to differentiate these arrangements from bilateral agreements between two countries, emphasizing the broader participation of multiple parties. This evolution in language reflects the changing nature of international relations as the number of actors and complexity of diplomatic relations grew but without any kind of formalization nor real institutionalization.

While the term “multilateralism” may be a recent addition to the diplomatic lexicon, the practice of multilateral diplomacy can be traced back to antiquity. For instance, the Greeks established the Delian League in the 5th century BC to foster cooperation among Greek city-states against Persia. Similarly, the Han dynasty in China established the “Heqin” system in the 2nd century BC to maintain peace with nomadic tribes through diplomatic marriages and tribute payments.

However, the Westphalia treaties that ended the Thirty Years’ War in 1648 are often considered a critical turning point in the development of modern multilateral diplomacy. The treaties established the principle of state sovereignty and recognized the equal standing of all states regardless of their size or power. This led to the emergence of a system of international relations based on the balance of power and the respect for national sovereignty that remained dominant until the end of the 19th century.

Since then, multilateral diplomacy has evolved significantly with the creation of international organizations such as the United Nations, the World Trade Organization, and the International Monetary Fund. These institutions provide a platform for states to cooperate and coordinate their actions in addressing global challenges such as climate change, poverty, and security threats.

The view of Ruggie⁷ is that the creation of multilateral norms and institutions following World War II and the Cold War has contributed to stabilizing their international consequences. Today, these norms and institutions are playing a vital role in addressing a diverse range of regional and global changes in the global system.

Multilateralism does not comprise only the relations of three or more parties but also the relationship between such parties. Robert Keohane⁸ provided one interesting definition for multilateralism aside from the relation between three or more parties:

7 John Gerard Ruggie, *International Organization, Multilateralism: The Anatomy of an Institution* (1992), p. 561, <http://www.jstor.org/stable/2706989> (Accessed 17 June 2022).

8 Robert O. Keohane, *The Contingent Legitimacy of Multilateralism* (2006), p. 1, https://www.researchgate.net/publication/228621543_The_contingent_legitimacy_of_multilateralism (Accessed 7 September 2022).

The definition that is more consistent with ordinary usage conceives of multilateralism as institutionalized collective action by an inclusively determined set of independent states. Truly multilateral organizations are open to all states meeting specified criteria. The rules of multilateral organizations are publicly known and persist over a substantial period of time. This definition, defining multilateralism in strictly institutional rather than normative terms, makes it possible meaningfully to ask causal questions about whether multilateral institutions promote norms such as those of diffuse reciprocity. Such a definition also facilitates inquiry into whether strictly institutional forms are normatively legitimate.

Ricardo Antón's⁹ perspective is that every multilateral treaty aims to attain the status of customary international law, embodying the agreement of the global community on binding legal norms. This agreement is protected from national influence by restricting reservations, establishing an impartial dispute resolution mechanism, and preventing parties from altering the multilateral consensus bilaterally. However, not all provisions in multilateral treaties are universally accepted, and some remain controversial. In these instances, bilateral and unilateral legal measures may overlap with multilateral solutions that are not consistently supported by the international community.

He¹⁰ also points out regarding the regionalism impact in multilateralism:

together with the blossoming of informal multilateral arrangements, we face a rise in the phenomenon of regionalism (the European Union, NAFTA, Mercosur, Unión Andina, etc.). In the field of trade, for example, economists and political scientists have grappled with the proliferation of preferential trade agreements (PTAs) versus the multilateralism represented by the WTO. Whereas decision-making at the WTO is based on consensus amongst all WTO members before the negotiation round finishes, PTAs enable a high capacity of bargaining and are, therefore, preferred over multilateral rounds. In the field of international taxation, multilateral tax treaties CARICOM, Unión Andina and the Nordic Multilateral Tax Treaty (the Nordic Treaty) are examples of a multilateralism linked to regional integration processes.

3. Multilateralism in Tax Law

In a very broad concept, multilateralism in tax law would be the cooperation of three or more states to solve topics related to taxation. Being multilateralism itself is a way to have better and more efficient solutions when compared to bilateral cooperation or tentative unilateral enforceability.

It is important to highlight that taxation has been an issue and material for disputes between states for a long period in history. In essence, taxes are collected not only for the tasks being performed within a country's territory but extended

9 Ricardo García Antón, *Chapter 1: Substantive Multilateralism in the Context of the MLI in International and EU Tax Multilateralism: Challenges Raised by the MLI* (IBFD 2020), p. 15.

10 Ricardo García Antón, *The 21st Century Multilateralism in International Taxation: The Emperor's New Clothes? in World Tax Journal* (2016), pp. 159-160.

to the earnings that such business makes in other jurisdictions to make sure that the profits earned by the same taxpayer are taxed at least once. Taxation takes place either in the country where the taxpayer conducts the activity (active income-source taxation) or in the country from where the efforts to conduct the activity take place, meaning the residence state of the taxpayer (passive income-residence taxation)¹¹.

The multilateralism in tax law shows its real importance when compared with the other possibilities to address the taxation issues like unilateral enforceability and bilateral cooperation. The first one would be the tentative enforceability of unilateral measures that would have the possibility of enforcing some possible taxation or having access to information for tax purposes as obstacles. Considering the sovereignty of the states and the limitation of information, such methods tend to have high chances not being efficient or sometimes generating conflict with multilateral cooperation when generating a tax burden without the agreement of other states.

Pistone¹² states that, from a legal standpoint, the traditional model of formal bilateralism for mutual assistance in tax matters as established in Articles 26 and 27 of tax treaties is slowly becoming irrelevant. The internationally agreed standards for fiscal transparency that have been in place since 2009 have shifted the balance of power away from individual states towards a global community that prioritizes cooperation and information sharing.

As a result, states have lost their ability to negotiate the content of their bilateral agreements regarding mutual assistance as any inconsistency with international standards exposes them to opposition from a significant portion of the global community within the forum for fiscal transparency. Therefore, maintaining mutual assistance solely at the bilateral level through a series of treaty clauses that are increasingly standardized in wording and scope no longer seems sensible.

This trend has led to a growing number of states embracing multilateral legal instruments for mutual assistance, such as the joint Council of Europe and OECD multilateral convention, which has enjoyed considerable success. Looking ahead, the future will likely see further growth in this direction as the formal bilateral dimension of mutual assistance in tax matters becomes increasingly obsolete. Ultimately, it will be up to policymakers to determine the exact nature of this transition and the shape that future multilateral cooperation in this area will take.

11 Cubillos J., Heitmüller F. and Mosquera Valderrama I.J., *Chapter 14: Multilateral Cooperation in International Tax Law in The Future of Multilateralism: Global Cooperation and International Organizations*, Ed. M. Hosli, T. Garrett, S. Niedecken and N. Verbeek. Rowman & Littlefield, p. 6 (Pre-print version).

12 Pasquale Pistone, *Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law* (IBFD, 2014), p. 3, https://research.ibfd.org/#/doc?url=/document/wtj_2014_01_int_4 (Accessed 23 June 2022).

A clear shift from bilateralism to multilateralism is deeply assessed by many studies and will be covered in a different approach in another chapter of this book “The Limits of Bilateral Treaties and the Blending between Bilateralism and Multilateralism”. It exposes the limitations of bilateral treaties, covering that the current challenges of the international taxation could not be solved only with bilateral efforts.¹³

For many years, the majority of the international (and multilateral) organizations in fact did not produce any kind of multilateral agreement or convention. The focus was to elaborate bilateral ones, such as the OECD Model Convention or UN Model Convention, that are templates for bilateral agreements that have been elaborated jointly by the many participants of the OECD and UN organizations. One of the main reasons for such an approach has been pointed out by Cubillos, Heitmüller and Mosquera Valderrama¹⁴:

One of the reasons for the failure to reach a multilateral agreement were the differences between developed and developing countries and the problems in the (fair) allocation of taxing rights between residence (mainly developed) countries and source (mainly developing) countries. Although, compared to the OECD model, the UN model allocates more taxing rights to source countries, provided that developing countries were usually perceived as source states, it rests on a compromise of alternating taxing rights between source and residence. This consideration reflects the general principle that dominates international taxation and is the setting upon which countries preserve their power struggles limiting the options for achieving multilateral cooperation. This does not mean that multilateralism is to be hindered by bilateralism, moreover than both currents will blend for international taxation.

Philip Baker¹⁵ made a descriptive analysis that, when it comes to existing mutual tax treaties (MTTs), they can be classified into two broad categories. The first category deals with substantive international tax law such as international double taxation relief and related issues. The second category focuses solely on cooperation in tax administration. Within each of these categories, MTTs can be further subdivided into regional instruments that are only available to members of a particular regional grouping and global instruments that are open to all countries.

Finally, there is the multilateral instrument (MLI) which stands out as a unique category in itself. The MLI has the potential to revolutionize the development of MTTs, and its impact may prove to be a game changer. This innovative legal instrument allows signatory countries to implement multiple tax treaty-related measures through a single instrument rather than having to renegotiate individ-

13 See, for more details, the chapter “The Limits of Bilateral Treaties and the Blending between Bilateralism and Multilateralism” by Megumi Unami.

14 Cubillos J., Heitmüller F. and Mosquera Valderrama I.J in *International Tax Law in The Future of Multilateralism: Global Cooperation and International Organizations*, Ed. M. Hosli, T. Garrett, S. Niedecken and N. Verbeek. Rowman & Littlefield, p. 7 (Pre-print version).

15 Philip Baker, *Multilateral Tax Treaties in Bulletin for International Taxation* (IBFD, 2021), pp. 600-601.

ual bilateral tax treaties. By doing so, the MLI streamlines the process and increases efficiency in updating and implementing international tax standards, paving the way for a more harmonized and coordinated approach to international tax policy. The MLI will be further analysed in another chapter of this book “The Multilateral Instrument as an Opportunity to Enhance the Coordination of International Tax Rules”¹⁶.

The MLI¹⁷ itself is a multilateral agreement, in essence, signed by various countries that identified the need for a multilateral approach to solve the issues of the modern economy. The document in its Preamble has a very important list:

- a) Recognizing that governments lose substantial corporate tax revenue because of aggressive international tax planning that has the effect of artificially shifting profits to locations where they are subject to non-taxation or reduced taxation;
- b) mindful that base erosion and profit shifting (hereinafter referred to as “BEPS”) is a pressing issue not only for industrialized countries but also for emerging economies and developing countries;
- c) recognizing the importance of ensuring that profits are taxed where substantive economic activities generating the profits are carried out and where value is created;
- d) welcoming the package of measures developed under the OECD/G20 BEPS Project (hereinafter referred to as the “OECD/G20 BEPS package”);
- e) noting that the OECD/G20 BEPS package included tax treaty-related measures to address certain hybrid mismatch arrangements, prevent treaty abuse, address artificial avoidance of permanent establishment status, and improve dispute resolution;
- f) conscious of the need to ensure swift, coordinated, and consistent implementation of the treaty related BEPS measures in a multilateral context;
- g) noting the need to ensure that existing agreements for the avoidance of double taxation on income are interpreted to eliminate double taxation with respect to the taxes covered by those agreements without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining relief provided in those agreements for the indirect benefit of residents of third jurisdictions); and
- h) recognizing the need for an effective mechanism to implement agreed changes in a synchronized and efficient manner across the network of existing agreements for the avoidance of double taxation on income without the need to bilaterally renegotiate each such agreements.¹⁸

16 See, for more details, the chapter “The Multilateral Instrument as an Opportunity to Enhance the Coordination of International Tax Rules” by Alessia D’Andrea.

17 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (“MLI”).*

18 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI)*, Preamble.

Rita Szudoczky and Daniel Blum¹⁹ criticize the MLI as a formal multilateral agreement, providing that

when used formally, they clearly define the MLI as a multilateral instrument, as it has 83 signatories and parties. However, it cannot be inferred from the actual obligations and rights of the parties to the MLI that there is a core multilateral commitment between the parties which they can only change with the consent of all the other parties. Therefore, in a substantive sense, the MLI lacks an essential multilateral feature. In addition, because of its objective – implementing the tax treaty-related BEPS recommendations in the network of existing bilateral treaties – the MLI essentially preserves the bilateral nature of international tax relations. The limited objective of the MLI prevents it from going beyond the boundaries of the BEPS Project.

What is possible to infer from the arguments presented is that the multilateralism poses as another tool to address the challenges brought by the modern and digital economy. It is supported by some authors that it should be some kind of evolution from the bilateralism to the multilateralism, while others prefer a combined approach or even some kind of new use. So far, the efforts of the countries are moving toward having substantive multilateralism implemented in a way that could really support them for the challenges that are already in place.

4. Stakeholders Interactions

The next chapter of this book, “Different Stakeholders in Multilateral Cooperation in Tax Law”, will cover in a detailed way the interplay of stakeholders such as the League of Nations, UN, OECD, G7/G20, EU, US, BRICS, IMF, World Bank, developing countries, civil society, taxpayers, regional tax organizations, etc.. In the following chapters are some of the interactions and outcomes of such interaction.²⁰ In this sense, an introductory assessment of the stakeholders and its interactions will be covered in this chapter.

Cubillos, Heitmüller and Valderrama²¹ already point out that taxation has been a longstanding topic on the agenda of various multilateral organizations, such as the League of Nations, the United Nations (UN), the Organization for Economic Cooperation and Development (OECD), the European Union (EU), the International Monetary Fund (IMF), and the World Bank. Despite this, the mere existence of such organizations does not automatically translate to Member States engaging in meaningful multilateral cooperation. Instead, their relations are often

19 Rita Szudoczky and Daniel Blum, *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* (IBFD 2020), p. 16

20 See, for more details, the chapter “Different Stakeholders in Multilateral Cooperation in Tax Law” by Marc Gonzalez Gonzalvo.

21 Cubillos J., Heitmüller F. and Mosquera Valderrama I.J. in *International Tax Law in The Future of Multilateralism: Global Cooperation and International Organizations*, Ed. M. Hosli, T. Garrett, S. Niedecken and N. Verbeek. Rowman & Littlefield, p. 5 (Pre-print version)

based on general principles of conduct that apply to all parties involved. While multilateral institutions can serve as a platform for developing such principles, they are not always effective in doing so.

As highlighted by Ruggie²², the effectiveness of multilateral institutions in developing international principles can be limited by various factors. For instance, political considerations, power dynamics, and conflicting interests among Member States can impede the development of consensus-based international principles. Additionally, some issues may be too complex or sensitive to be addressed through a multilateral approach thereby requiring alternative means of cooperation.

Therefore, while multilateral institutions remain a vital platform for the development of international principles, they are not a panacea. Member States must also be willing to engage in meaningful cooperation and compromise to achieve common goals. As such, it is essential to recognize the limitations of multilateral institutions and explore alternative forms of cooperation when necessary.

Cubillos, Heitmüller and Valderrama²³ identified that the role of the United Nations in multilateral decision-making has been diminished. This is partly due to the rejection by developed countries during the 2015 Financing for Development Conference to grant intergovernmental status to the UN Tax Committee despite the urging of developing countries and civil society to do so. Developed countries have raised concerns about the legitimacy of international tax standards and their applicability to their economies. As a result, the OECD and G20 have created forums such as the Global Transparency Forum that facilitates exchange of information and transparency and the BEPS Inclusive Framework that aims to adopt the BEPS 4 Minimum Standards, including measures against harmful tax competition, tax treaty abuse, transfer pricing documentation, and dispute resolution. Through these forums, developing countries are able to participate on equal footing in the implementation of these standards. By February 2023, the Global Transparency Forum had 165 tax jurisdictions and the BEPS Inclusive Framework had 142 tax jurisdictions.

Even with such efforts for multilateral cooperation between the different stakeholders involved in the global economy, the taxation rights discussions keep raising issues to the current structures. The OECD, UN, and other main stakeholders try to provide relevant policies to regulate and tax operations not fully covered by bilateral or unilateral initiatives. An example of this is the global anti-base erosion (GLoBE) rules including a minimum tax rate that will be covered by the chapter “The Global Minimum Tax Proposal as a Victory for Multilateral Cooperation?”²⁴

22 John Gerard Ruggie, *International Organization, Multilateralism: The Anatomy of an Institution* (1992), pp. 561-598, <http://www.jstor.org/stable/2706989> (Accessed 17 June 2022).

23 Cubillos J., Heitmüller F. and Mosquera Valderrama I.J in *International Tax Law in The Future of Multilateralism: Global Cooperation and International Organizations*, Ed. M. Hosli, T. Garrett, S. Niedecken and N. Verbeek. Rowman & Littlefield, pp. 2-3 (Pre-print version).

24 See, for more details, the chapter “GLoBE: Victory for Multilateral Cooperation?” by Nuno Domingues.