



Cees Peters

On the Legitimacy of International Tax Law

IBFD DOCTORAL SERIES

31

On the Legitimacy of International Tax Law

Why this book?

The legitimacy of international tax law has been taken for granted for a long time. The approval of double tax treaties in national parliaments would guarantee the democratic foundation of this field of law. However, changes in society have significantly affected international tax law. Allocation rules to avoid juridical double taxation are complemented with increasingly substantive norms that have a significant impact on national taxing systems. Is the democratic legitimacy of modern international tax law as self-evident as assumed? Current international discussions, e.g. on base erosion and profit shifting (BEPS), clearly illustrate that this is a topic that requires attention. This study will demonstrate that there is a strong need to reconsider the structures for democratic international tax governance in the 21st century.

The purpose of this study is to not only assess the legitimacy of contemporary international tax law, but to also find ways to improve it. The book focuses on two constitutive elements of this legitimacy: the democratic underpinnings of the legal framework of international tax law and the contribution of social-scientific knowledge to the legitimacy of international tax law. Furthermore, it puts forward some recommendations to safeguard the legitimacy of international tax law for the long term.

The first part of the book comprises a study of the sociology of international tax law in the period following the Second World War, including an analysis of the role of international tax neutrality for the development of this field of law. Specific attention is paid to recent developments relating to the exchange of information and the taxation of multinational corporations. The second part constructs a theoretical framework to assess and improve the legitimacy of international tax law, which is mostly based on a thorough analysis of the work of Jürgen Habermas. His views on law and democracy – including the role of civil society and the media – provide a useful perspective to value the legitimacy of international tax law. The third part contains recommendations for the future.

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Table of contents

Preface	xiii
Abbreviations	xvii
Chapter 1: Introduction	1
1.1. Setting the scene	1
1.2. What is at stake? Two propositions about international taxation	3
1.3. Subject of this study	8
1.3.1. A few words on the history of this study	8
1.3.2. The changing pendulum of international taxation	9
1.3.3. Towards an improvement of the legitimacy of international tax law	11
1.4. Structure and methodology	13
1.4.1. General overview of the structure	13
1.4.2. An exercise of fiscal sociology	14
1.4.3. Normative framework	16
1.4.3.1. Introduction	16
1.4.3.2. A Habermasian perspective on the legitimacy of international tax law	16
1.4.3.3. The contribution of social-scientific knowledge to the legitimacy of international tax law	19
1.5. Limitations of this study	20
1.6. Relevance of this study	23
Part A The Changing Pendulum of International Taxation	
Chapter 2: The State in the Changing International Society	29
2.1. Introduction	29
2.2. The “traditional” state-society interaction	30
2.2.1. National paradigms of law and society	30
2.2.2. The external relationships of states	32
2.2.3. Conclusion	33
2.3. The changing state-society interaction	34
2.3.1. Introduction to the changing state-society interaction	34

2.3.2.	States as a matter of fact	38
2.3.3.	States and the changing role of international economic law	42
2.3.4.	States and the growing importance of markets	48
2.3.4.1.	The countervailing logics of states and markets in the changing society	48
2.3.4.2.	Regulatory competition as a matter of fact and as an idea	51
2.3.5.	The evolution of the tax law market	55
2.3.5.1.	What is the tax law market?	55
2.3.5.2.	The institutional complexity of the tax law market	58
2.3.6.	Conclusion	60
2.4.	Conclusion	61
 Chapter 3: International Tax Law in the Changing State-Society Interaction		 65
3.1.	Introduction	65
3.2.	Different approaches to the study of international tax law	65
3.3.	International tax law in the traditional state-society interaction	70
3.3.1.	The OECD legal framework dealing with the problem of juridical double taxation	70
3.3.2.	Scope and characteristics of international tax law	73
3.4.	The transformation of international tax law in the changing state-society interaction	77
3.5.	Conclusion	83
 Chapter 4: The Norms of International Taxation in the Changing State-Society Interaction		 85
4.1.	Introduction	85
4.2.	Norms of international taxation – The traditional presentation	86
4.2.1.	Economic efficiency	86
4.2.2.	Equity considerations	88
4.2.3.	The division between efficiency and equity	89
4.3.	Equity norms in the changing state-society interaction	92
4.3.1.	Inter-individual equity	92
4.3.1.1.	The traditional presentation	92
4.3.1.2.	Sociological reflections	94

4.3.2.	Inter-nation equity	96
4.3.2.1.	The traditional presentation	96
4.3.2.2.	Sociological reflections	100
4.3.3.	Concluding remarks	105
4.4.	International tax neutrality in the changing state-society interaction	106
4.4.1.	The “class” of international tax neutralities	106
4.4.1.1.	Introduction to international tax neutrality	106
4.4.1.2.	Contemporary evaluations of the international tax neutralities	108
4.4.1.3.	CIN and CEN as autonomous legal concepts	111
4.4.2.	The evolution of international tax neutrality	114
4.4.2.1.	The second wave of economic scholarship	114
4.4.2.2.	The third wave of economic scholarship	115
4.4.3.	Sociological reflections	122
4.5.	Conclusion	127
Chapter 5:	Analysis of International Tax Law in the Changing State-Society Interaction	131
5.1.	Introduction	131
5.2.	Understanding the transformation of international tax law in the changing pendulum of international taxation	132
5.2.1.	Introduction	132
5.2.2.	The evolution of the tax law market and the political-economic conflict of international taxation	132
5.2.3.	The transformation of international tax law as a symptom of a changing concern with fairness	135
5.2.4.	Conclusion	137
5.3.	Responding to the changing pendulum of international taxation	139
5.3.1.	Transparency	140
5.3.2.	Taxation of multinational companies: The BEPS project	147
5.3.3.	Conclusion	155

5.4.	Social-scientific knowledge and the legitimacy of international tax law in the changing state-society interaction	156
5.4.1.	International tax neutrality in the traditional state-society interaction	156
5.4.2.	Ordoliberalism and the legitimacy of international tax law	158
5.4.3.	The problem of conceptualizing international tax neutrality in the changing state-society interaction	162

Part B

Improving the Legitimacy of International Tax Law in the Changing State-Society Interaction

Chapter 6:	A Habermasian Perspective on the Legitimacy of International Tax Law	167
6.1.	Introduction	167
6.2.	Brief introduction to the work of Habermas	168
6.3.	A different conceptual model of society	175
6.3.1.	Lifeworld and systems	175
6.3.2.	Social integration and system integration in the changing state-society interaction	179
6.4.	On the social genesis of law and politics	181
6.4.1.	Introduction	181
6.4.2.	Language and society: Between “facticity and validity”	183
6.4.3.	The sociological need for legitimate law	187
6.4.4.	The normative justification of law and the characterization of law	193
6.4.5.	Conclusion	197
6.5.	Implications of the Habermasian perspective on legitimacy for matters of direct taxation	200
6.5.1.	Normative considerations about legitimacy	200
6.5.2.	The legitimization of taxation and Habermas’s model of society	202
6.6.	Understanding the legitimacy problems of international tax law with the help of Habermas’s theoretic framework	206
6.6.1.	Introduction	206
6.6.2.	Analysis of the legitimacy problems of international tax law	207

6.6.2.1.	Social integration and system integration in international taxation	207
6.6.2.2.	Between the facts and norms of international tax law: The role of civil society and the media	213
6.6.2.3.	The procedures of the traditional institutions of international taxation	218
6.6.2.4.	Conclusion	224
6.6.3.	Analysis of the state consent model of legitimacy	227
6.7.	The cautious constitutionalization of international tax law	235
6.8.	Conclusion	239
Chapter 7: Social-Scientific Knowledge in the Changing State-Society Interaction		243
7.1.	Introduction	243
7.2.	Knowledge in a web of links: Conceptualizing and understanding the autonomy of international tax law	244
7.2.1.	Understanding taxation within society	244
7.2.2.	The taxonomy of the autonomy of (international) tax law	246
7.3.	Methodological issues	249
7.3.1.	Introduction	249
7.3.2.	Methodology in the social sciences	250
7.3.3.	The separation within the social sciences	254
7.4.	Improving the longstanding alliance of economic and legal research in the field of international taxation	257
7.4.1.	The alliance of economic and legal research to obtain knowledge about taxation	257
7.4.2.	The need to study international taxation in a more endogenous way	260
7.4.2.1.	Introduction	260
7.4.2.2.	The separation of political and economic considerations	260
7.4.2.2.1.	Structural power and the split of international political economy	261
7.4.2.2.2.	The risk of being blind to structural power	264
7.4.2.3.	The separation of legal and economic considerations	268
7.4.2.4.	Conclusion	270

7.4.3.	The need to look beyond a positivist methodology to understand the economy	273
7.4.3.1.	Introduction	273
7.4.3.2.	The two meanings of “economic”	274
7.4.3.3.	The two identities of tax neutrality	276
7.4.4.	Evaluation of the alliance between economic and legal research	279
7.5.	Methodological foundations of social-scientific knowledge in the changing state-society interaction	280
7.6.	Conclusion	286

Part C
Future

Chapter 8:	Democratic International Tax Governance in the 21st Century	291
8.1.	Introduction	291
8.2.	The future of international taxation in a changing society	292
8.3.	International tax law in a changing society	297
8.3.1.	The changing functions of international tax law	297
8.3.2.	A “law and society” perspective on international tax law	304
8.3.2.1.	Introduction	304
8.3.2.2.	International tax law and the behaviour of taxpayers	304
8.3.2.3.	The need to develop the institutional function of international tax law	307
8.3.2.4.	The trade-off between the effectiveness and the legitimacy of international tax law	309
8.4.	A vision of international tax law for the future	311
8.4.1.	Introduction	311
8.4.2.	The template of deliberative supranationalism	311
8.4.3.	Deliberative international tax law	316
8.4.3.1.	Introduction	316
8.4.3.2.	Horizontal and vertical conflicts of international tax law	317
8.4.3.3.	The creation of a forum for deliberations	321
8.4.3.4.	The role of supranational tax law and the function of the court	324
8.5.	Communicative action in the international society of states and individuals	328

8.6.	Evaluations and observations	334
8.6.1.	Evaluation of the BEPS project	334
8.6.1.1.	Introduction	334
8.6.1.2.	Hybrid mismatch arrangements (action 2)	335
8.6.1.3.	Development of a multilateral instrument (action 15)	339
8.6.1.4.	Conclusion about the BEPS project	346
8.6.2.	Concluding observations about international tax governance and the development of international tax law	347
Chapter 9:	Recommendations about the Use of Social-Scientific Knowledge	355
9.1.	Introduction	355
9.2.	International tax neutrality	355
9.2.1.	Evaluation of international tax neutrality as a source of social-scientific knowledge about international taxation	355
9.2.1.1.	Introduction	355
9.2.1.2.	The forgotten face of international tax neutrality	356
9.2.1.3.	The burden of schismatic thinking	359
9.2.2.	Improving international tax neutrality	360
9.2.3.	Recommendations about the application of international tax neutrality in international tax policy	364
9.3.	The limits of social-scientific knowledge as a source of legitimacy	366
9.4.	Conclusion	369

Part D
Summary and Conclusions

Chapter 10:	Summary and Conclusions	375
10.1.	Introduction	375
10.2.	Transformations of international tax law in the light of the changing state-society interaction	376
10.2.1.	The state in the changing international society	377
10.2.2.	International tax law in the changing state-society interaction	378

10.2.3. The norms of international taxation in the changing state-society interaction	379
10.3. Analysis of international tax law in the changing pendulum of international taxation	380
10.4. Social-scientific knowledge and the legitimacy of international tax law in the changing state-society interaction	383
10.5. A Habermasian perspective on the legitimacy of international tax law	385
10.6. Methodological foundations of social-scientific knowledge in the changing state-society interaction	388
10.7. Recommendations about democratic international tax governance in the 21st century	390
10.8. Main conclusions about the BEPS project	393
10.9. The future of social-scientific knowledge as a source of legitimacy of international tax law	394
10.10. Concluding observations	396
References	399

Introduction

1.1. Setting the scene

The world is in turmoil and international taxation is exactly in the eye of the storm. Taxation has taken centre stage in the ongoing political and economic crisis where states are struggling to make ends meet. Any source of tax revenue is badly needed and therefore there is no shortage of new initiatives to improve the collection of taxes, such as the conclusion of “tax information exchange agreements” (TIEAs) and the initiative of states to create a system for the automatic exchange of information about taxpayers. The actions of states are however not limited to the improvement of the collection of taxes only. States are also attempting to deal with “aggressive” tax planning of multinational companies. Driven by the mandate of the G20, the Organisation for Economic Co-operation and Development (OECD) is attempting to deal with a phenomenon that is called “Base Erosion and Profit Shifting” or “BEPS” as it is usually called. At first sight, the scope of this BEPS project seems very broad, as there are no less than 15 different items on the list of action plans. This initiative is supposed to establish an “update” of international tax law in order to reflect the changes in society.

These initiatives of states obviously give rise to many questions and observations.

One may wonder, for example, whether these plans of states imply that the days of international tax competition are counted. Has the implicit consensus about the benefits of international tax competition been substituted by a new paradigm of cooperation between states? At the time of finishing this book it is still too early to assess the successfulness of the initiatives of these states, but there should be no doubt that states are still actively using their taxing systems to attract capital (and labour) in order to stimulate the economy. It would therefore be erroneous to conclude that the political and economic crisis is substantially changing the mainly competitive relationships between states.

In addition to this ostensible continuation of the status quo about international tax competition, there is the question of which states are actually in agreement about the current international tax system. One of the fascinating

developments of this period of time is that a substantial group of states is more and more questioning the authority of an organization (i.e. the OECD) that represents only a relatively small group of states. In other words, the initiatives of the OECD to change the international tax system should also be regarded as a very serious battle about the power to make norms of international taxation.² The composition of the international society of states is changing and the question is what this changing balance of power implies for the realm of international taxation.

The political and economic crisis does however not only put to the test the mutual relationship between (western) states and the distribution of power in the international society of states as a whole. There is also the undeniable fact that the relationship between states and society at large is changing. International taxation has become a prominent topic in civil society. Associations such as The Tax Justice Network, Oxfam and Christian Aid are raising the concerns of voices that were not sufficiently heard in the past. In this climate, there is a continuing host of articles about tax havens, letterbox companies, the “exploitation” of developing countries, bank secrecyes and “tricks” of multinational companies and wealthy individuals in the international newspapers. It should therefore be clear that it is a mistake to put the described initiatives of states in the context of their budgets only. There can be no doubt that states are also responding to this vivid and intense debate in society about the “fairness” of our taxing systems.

All in all, there are therefore many reasons to discuss international tax law against the background of the changes in society. This study is an attempt to contribute to the ongoing debate. It focuses on the legitimacy of international tax law in the light of the changes that are taking place in the international society. For this matter, the study starts from two propositions about international taxation (*see* section 1.2.). Obviously, it deals with the initiatives of the OECD and some other international organizations to make changes to the current international tax system. Most importantly, the BEPS project and the initiatives to improve transparency will serve as the sparring partners along the way.

2. Compare Baker (2013), p. 606.

1.2. What is at stake? Two propositions about international taxation

As explained, this study departs from two propositions about international taxation in the midst of the current political and economic crisis. These propositions make clear what is at stake in the debate about international taxation.

The first proposition is that the confusion and controversy about international taxation are rooted in the dazzling changes of the international society. An essayistic sketch of the metamorphoses could, for example, start with an overview of a process that is called economic integration.³ For a long time it was claimed that trade liberalization would make national societies better off whereas at the same time the international society would benefit from it. What started as a concern for protectionism⁴ eventually evolved into “universal liberalism”⁵ and the construction of a framework for a cosmopolitan approach⁶ to the economy as a whole.⁷ In this view, the economic benefits were regarded in close unity with non-economic benefits.⁸ Because of this process and due to many other reasons, the world is a completely different place than it was 60 years ago. Mostly, there has been an evolution from an international society of states that was “ruled” by states to an increasingly “global” society with a range of new forms of “governance”.⁹ In this society, the sovereign power of states is more and more “dispersed”.¹⁰ States

3. Compare Schön (2009), p. 67.

4. Compare, for example, in the context of the European Union, Sundberg-Weitman (1977), p. 2.

5. Compare Erler (1956), pp. 97-107. He recognizes “der Vorstoß zu universaler Liberalisierung am Ende des Zweiten Weltkrieges”.

6. Compare Brown & Stern (2006), p. 263. In the heydays of economic integration this process was regarded to be a gradual evolution towards a “borderless” world that is entirely “flat”. Compare Ohmae (1990) and Friedman (2005) in this respect.

7. The factual implementation of such a “universal economy” is based on the ideas of Adam Smith and his predecessors concerning the economic benefits of free trade. Compare Irwin (1996) for a historical overview of this doctrine.

8. After all, the idea of Immanuel Kant that free trade is the best recipe for peace among states found recognition after the Second World War. The link between free trade and peace between states is however difficult to proof. Most research does however show that there is a positive correlation between the factors. Compare Hoekman & Kostecki (2001), pp. 24-25 and Irwin (2002), p. 46.

9. Compare, for example, Barnett & Sikkink (2010) for an overview of this process (and its consequences) from the point of view of international relations (i.e. (international) political science). The same process is described from a merely (although certainly not exclusively) legal perspective in, for example, Kingsbury (1998) and Tanzi (2010).

10. Compare, for example, Nanz (2006), p. 60. She writes: “State sovereignty is dispersed: vertically to supranational bodies such as the European Union (EU) institutions

need to share their authority with international organizations, multinational companies, non-governmental organizations and transnational networks.¹¹ Moreover, power is being lost to another device that is able to organize the international society: “the market”. These developments may be summarized as the changing “state-society interaction”.¹²

The turmoil about international taxation is therefore making painstakingly clear that the transformations in the international society are not properly reflected in the current collection of norms of international taxation. Unsurprisingly, there is considerable debate about the question whether these norms are still appropriate.¹³ The spirit of the age is aptly described by Christians et al. as the belief that “the international flow of capital, goods, and, to a lesser extent, people, presents a fundamentally and significantly changing role for legal systems and institutions that tax scholarship has not confronted as fully as other fields”.¹⁴ Consequently, the first challenge of this study is to contribute to the academic efforts of bringing the norms of international taxation more in line with the steadily changing society. There is a strong need to relate international tax law to the changing international society, as taxation is a “global socio-legal phenomenon”¹⁵ that cannot and should not be studied in isolation from developments in society at large.

The second – closely related – proposition concerning the confusion and debate about international taxation is that international tax law is seriously

and the World Trade Organisation (WTO); and horizontally to private or mixed (private-governmental) authorities and networks at both national and transnational level.” Also compare Jayasuriya (2001), p. 443.

11. Compare, for example, Barnett & Sikkink (2010), p. 63.

12. The term “state-society interaction” is frequently used in sociological literature. Compare, for example, McCormick (2009).

13. There is a lot of literature about this topic and many authors are initiating the discussion to prepare the international tax system for the future. Graetz (2000-2001) claims, for example, at page 316 that “(i)nternational income tax law is now composed of legal concepts and constructs that no longer reflect the economic realities of international business, if they ever did”. McLure (2001) writes at page 333 how “most of the existing tax rules were formulated in – and for – a world that no longer exists”. In these studies, well-established fundamentals of international tax law are subject to an in-depth discussion and new fundamentals are being developed in order to improve the old existing system of international taxation (compare, for example, the study of Kemmeren (2001)). Such an improvement requires, as Schön puts it, a reconsideration of international tax coordination, or, in the same vein, international tax allocation (Schön (2009) and Schön (2010)). These studies are only a selection of the relevant literature. Other relevant studies are, amongst others, the works of Warren (2001), Brauner (2003) and Dean (2009-2010).

14. Christians et al. (2007-2008). In the footnote that is omitted in this citation reference is made to a range of scholars who share this conviction.

15. Christians et al. (2007-2008).

struggling with legitimacy problems in this changing society. Obviously, this proposition should be regarded with an appropriate amount of prudence and nuance. It should not be forgotten – as Gribnau is emphasizing – that most taxpayers are still happy to contribute to the general cause and that they are therefore faithfully completing their tax returns.¹⁶ The consideration that they might be caught when they do not do so, plays no role whatsoever in the view of these taxpayers.¹⁷ However, in spite of this nuance, there are good reasons to believe that the legitimacy of international tax law is seriously lacking behind.

There is, for example, a group of taxpayers who simply does not accept that the power of the government to impose taxes also affects their individual position. These taxpayers do – in the absence of proper enforcement mechanisms – not follow the rules and put their money on a secret bank account without including their income in their tax returns “at home”.¹⁸ Moreover, there is a faltering “belief” that there are good reasons to comply with our taxing systems.¹⁹ Building on the writings of Habermas, Menéndez alludes to the legitimacy crisis of our modern taxing systems.²⁰ He writes the following about this problem:

The main problem is that taxpayers increasingly do not find rational grounds for the recognition of their obligations. This is the result of the divorce between the design of the tax system in constitutional terms ... and the reality of its implementation, mediated by an increasingly incoherent set of positive tax norms.²¹

16. Gribnau (2013a), p. 98.

17. Gribnau (2013a) refers, amongst others, to a study of Tom Tyler (*Why People Obey the Law*, Princeton University Press, 2006) in this respect.

18. This is an example of empirical (or descriptive) legitimacy. Nanz (2006) writes at page 63: “In descriptive or empirical terms, legitimacy refers to the belief, on the part of the subjects of rule, in the legitimacy of the system. It means the *de facto* support and compliance of the people with the decisions of a political order that goes beyond coercion.” (Italics in the original.)

19. This is mostly an example of normative legitimacy. Nanz (2006) writes at page 63: “In normative terms, legitimacy refers to the validity of a political order (or its elements) and its claim to legitimacy. It means that they ‘deserve support and compliance in accordance with certain normative criteria’.” (Nanz refers to B. Peters in this quote.)

20. Menéndez (2001), p. 111. The specific study of Habermas is *Legitimation Crisis*; Habermas (1975).

21. Menéndez (2001), p. 111. A comparable view can be found in the publications of Happé. In his view, our approach to taxation is exclusively constituted by thinking in terms of the legality of the provision of tax law. Against this positivist perspective on tax law, he pleads for a more ethical approach to taxation, which should – with the help of a more principle-based view on tax law – enhance the legitimacy of our taxing systems. Compare Happé (2006a), Happé (2006b), Happé (2011a) and Happé (2011b).

In addition, there is an increasing concern and aggravation about the “tax behaviour” of fellow citizens who are more affluent than average. Why would one be paying taxes when the rich are not paying their “fair” amount of taxes?²² This concern with fellow citizens mostly finds expression in the public opinion, which is an important indication of the legitimacy of a taxing system.²³ In addition, the uproar in civil society might be regarded as an indication that international tax law is struggling with legitimacy problems.²⁴ This concern about the need to pay taxes in a changing society can, for example, be discerned in the increasing sense of indignation about some multinational companies that are apparently rather successful at paying only a small amount of taxes. Companies like Starbucks, Google, Amazon and Apple are being victimized in the public opinion for purposively searching the very limits of the existing body of international tax law. Their international tax structuring schemes may have been completely in line with those rules of international tax law, but the increasing bafflement in public opinion about these practices is making clear that those rules may no longer be in accordance with the contemporary ideas about international taxation in society.

Governments seem to be reacting rather determinedly to (some!) of the problems, but – at the same time – these responses are also creating new legitimacy concerns of their own. After all, the reactions are coordinated through international institutions such as the OECD, the European Union and the G20. These forums of international “governance” seem to be struggling with legitimacy problems of their own. Wheatley writes in this respect:

The consolidation of democracy at the level of the state has coincided with a proliferation of sites for the production of social, economic, and political norms in global governance without any attempts, outside of the European Union, to replicate the institutions of democracy that legitimate authority at the domestic level.²⁵

22. Compare Gribnau (2013a), p. 33.

23. This is recognized in the writings of Habermas and Luhmann. Compare Guibentif (2010), p. 81. *See* section 6.6.2.

24. *See* section 6.6.2.

25. Wheatley (2010), p. 1. Compare Wheatley (2010), pp. 22-33. The criticisms described by Wheatley build on the work of José Alvarez. In this view, it is possible to distinguish the “vertical” complaint, the “horizontal” complaint and the “ideological” complaint. Wheatley summarizes at pages 22 to 23: “The vertical complaint concerns the relationship between global governance institutions and individual citizens; the horizontal complaint applies to relations between states (and between states and international organisations); whilst the ideological complaint concerns the fact that global governance functions to promote certain (liberal) values.”

With respect to the (democratic) legitimacy of the European Union it is interesting to point at a recent advice of the Council of State of the Netherlands to the Dutch Senate.

These developments are illustrating that the legitimacy of international tax law should at least be questioned and subjected to research. After all, there is only very little academic debate about the legitimacy of international tax law. The study of Picciotto that was published back in 1992 was probably the only one to raise this particular problem for a long period of time. He wrote how “(i)nternational tax planning, especially by the exploitation of the tax treaty system and of tax havens, has greatly undermined both the effectiveness as well as the legitimacy of the international tax arrangements”.²⁶ Caldéron questioned the legitimacy of the OECD transfer pricing guidelines in an article back in 2007.²⁷ In the ongoing BEPS project this subject has also not received wide attention.²⁸ This is an unfortunate state of affairs, since this project is crucial for the legitimacy of international tax law on the somewhat longer run and for the legitimate power of the OECD in this context. Baker correctly writes that in case the OECD fails to bring the BEPS project to an acceptable end, “the leadership and the legitimacy of the OECD in tax matters will have been fatally undermined”.²⁹ This study is therefore an attempt to contribute to the necessary debate about the legitimacy of international tax law. Accordingly, the second motivation to perform this research is a sense of concern about this problem in combination with the need to analyse this phenomenon and to come up with solutions that could improve the situation.³⁰

In this advice the Council points at the faltering public support for the political and economic decisions of the European Union. It concerns advice W01.12.0457/I which can be found at www.raadvanstate.nl.

26. Picciotto (2013), p. 67.

27. Caldéron (2007).

28. Compare Brauner (2013), p. 11 about this shortcoming. The only exception is the contribution of Essers (2014).

29. Baker (2013), p. 606.

30. Obviously, this problem is closely related to the proposition that the international society is quickly changing. Crucial in this respect is that there is an entire spectrum of ideas of how the changing society ought to be organized. At a fundamental level it is therefore safe to argue that we are still struggling to find an “acceptable” blueprint for the organization of the global society. Should there be a society governed by a hegemonic power, which might just as well include the option of market power, or should there be a society governed by norms and values? In fact, one could argue that little has changed since Keynes claimed that “(t)he political problem of mankind is to combine three things: economic efficiency, social justice and individual liberty”. (Keynes, *Essays in Persuasion*, quoted in Sapir (2001), p. 179.) These struggles are shared by contemporary lawyers, like Von Bogdandy (2004), who are attempting to “square democracy, globalization and international law” and international political economists, like Rodrik (2011), who are claiming that there is a need to choose between national self-determination, (hyper-) globalization and democracy.

In conclusion, the overall motivation to perform this research is that international tax law is struggling with some challenging legitimacy problems in an international society that is changing at a staggering speed. It is the objective of this study to analyse the transformation of international tax law within a changing society in the period following the Second World War and to explore the improvement of the legitimacy of international tax law in the (near) future. This obviously results in some concrete recommendations and therefore this study should be of interest to both policymakers and academics dealing with international tax law.

1.3. Subject of this study

1.3.1. A few words on the history of this study

The previous sections outlined how the motivation to perform this study is to be found in the legitimacy problems of contemporary international tax law in the changing state-society interaction. The purpose of section 1.3. is to explicate the subject of this book in more detail. In this respect, it is first of all useful to look back at the history of this study. After all, any creative composition can only be understood when the coming into being of the work is appreciated. It is therefore helpful to pause for a moment and to pay attention to the birth of this study.

The original idea was to write about equality and non-discrimination in international tax law. This idea incubated in a period that there was little social doubt that “barriers to trade” would need to be removed. It affected the field of international tax law through the direct effect and supremacy of EU law. Scholars of international tax law started to study how “barriers to trade” could also be removed outside the borders of the European Union. There were studies concerning the desirable scope of the free movement of capital in relation to third countries,³¹ the application to the law of the World Trade Organization (WTO) to matters of direct taxation,³² and it was considered whether the scope of the non-discrimination provisions of article 24 of the OECD Model Tax Convention would need to be broadened.³³ In this

31. The most thorough study of this subject matter is without a doubt the dissertation of Smit (2012). It summarizes and criticizes all the relevant case law and literature on this subject matter including the article written by Peters & Gooijer (2005).

32. Compare the extensive study of Lang, Herdin & Hofbauer (2005), including the Dutch contribution of Peters (2005).

33. Compare the IFA Conference in 2008 culminating in the General Report of Hinnekens & Hinnekens (2008), including the Dutch contribution of Peters (2008).

context, this study was supposed to analyse these different legal instruments in these different contexts and to conclude on the most viable way forward to establish “global equality” – as the working title was unabashedly suggesting – in international tax law.

The challenge of that study was to find a normative framework that would suit the institutional context of the international society. This turned out to be a very thorny problem. Does “global equality” in international tax law simply imply the removal of as many barriers to trade as possible? And if this were the case: how should this “as much as possible” be determined?³⁴ Moreover, at a certain point, the quickly spreading political and economic crisis was making painstakingly clear that there is still an enormous gap between the ideal of equality and the everyday reality in the international society. In this way, the idea to write a book about equality and non-discrimination in international tax law clearly lost its appeal. Great novels and poems mediate flawlessly between “truth” and “fiction”, but academic research should without a doubt focus on “truth” in an attempt to make some practically feasible solutions for the improvement of that world.

During the beginning of the global political and economic crisis the writings of Jürgen Habermas emerged and literally opened up a different world. His work is renowned for many reasons. One of these is his continuous methodological attempt to combine social-theoretic research with philosophical views on society. Different than many of his contemporaries this enables him to find an appropriate balance between the “factual situation” and the “desirable situation”.³⁵

Being both inspired and agitated by the changes in society and at the same time *begeistert* by the scope and depth of the writings of Habermas, it became crystal clear that this study would need to take a somewhat different course. The result is the present study about the improvement of the legitimacy of international tax law.

1.3.2. The changing pendulum of international taxation

Looking back at the intellectual maturation of this study it is therefore increasingly clear that the actual driving force behind this study is – as a matter of fact – the very pendulum of international taxation: the intricate

34. See section 2.3.3. of this study in this respect.

35. Compare chapter 6 of this study.

balance between the authority of states to impose taxes in the international society and the moral, legal, political and economic limits to that authority.³⁶ Obviously, the solutions to this pendulum vary throughout time. When, for example, the perception of “justice” changes there will eventually also be a different solution to the pendulum of international taxation. Peggy Richman, for example, describes how in the course of the 19th century “a rising sense of justice in the taxation of foreigners” changed the understanding of international taxation.³⁷ It became more and more accepted that “the foreigner and his wealth should not be the subject of discriminatory taxation”.³⁸ At the same time, the pendulum of international taxation will also oscillate when the distribution of power in society changes. In this respect, the dispersion of the sovereign power of states as described in section 1.2. is likely to affect the pendulum of international taxation.

It is put forward that the legitimacy problems of contemporary international tax law (*see* section 1.2.) are clearly suggesting that the international society is compelling a different solution to the contemporary pendulum of international taxation. Any improvement of the legitimacy of international tax law therefore requires a better understanding of the changing pendulum of international taxation. For this reason, this book is in the first place a study of international tax law in the changing state-society interaction. Any improvement of the legitimacy of international tax law needs to be based on a proper understanding of the changes in society and in the institutional environment of international tax law in this society.³⁹ With the help of a better understanding of those changes it will be possible to analyse how the legitimacy of international tax law can be improved.

The need to understand the transformations of international tax law in the changing state-society interaction in order to improve the legitimacy of international tax law therefore explains how this study differs from the initial research project about “global equality” on one crucial element. The book is not concerned with an analysis of some different solutions to the

36. Compare chapters 2, 3, 4 and 5 of this study.

37. Richman (1963), p. 1.

38. *Id.*

39. The increasing need to relate “law” to the understanding of “society” is clearly articulated by the following quote of Cotterrell. He writes: “I suggested earlier that law had often been able to avoid entanglement with social theory because it could take the nature of the social for granted. Law constitutes in regulatory terms what it treats as the social but it has to presuppose an overall conception of the social in which its regulatory actions can make sense. For a long time, Western legal thought presupposed the political society of the modern nation state as its overall conception of the social.” Cotterrell (2006), p. 26.

pendulum of international taxation in different constellations of the international society, but it is in the first place an analysis of the changes of this balance throughout modern time.⁴⁰ In other words, in this analysis time is the relevant variable of this study and not place.

Section 1.3.3. explains in more detail what this implies for the very subject of this study.

1.3.3. Towards an improvement of the legitimacy of international tax law

Legitimacy is obviously a complex and multifaceted concept. Nanz writes how, “(g)enerally speaking, legitimacy designates the relationship between a people governed and a political order or parts of it (law, decision, policy, etc.). Legitimacy authorises particular governors or institutions to make and interpret rules; it gives them ‘the right to govern’”.⁴¹ It is not uncommon to distinguish descriptive perspectives to legitimacy from normative perspectives to the subject matter.⁴² In the descriptive perspective on legitimacy the relevant question is whether there is “*de facto* support and compliance of the people with the decisions of a political order that goes beyond coercion”.⁴³ Such a perspective should be distinguished from normative perspectives to legitimacy, which give substance to the subject matter by means of normative elements that ought to ensure the “creditably” of acts of governance.⁴⁴

For a long time, the legitimacy of international law in general was more or less taken for granted.⁴⁵ States were regarded to be exercising legitimate power in the international society. This legitimate power was based on the so-called “*state consent*” model of legitimacy.⁴⁶ In this view, international law is supposed to be legitimate, since it is (explicitly or implicitly)

40. It is tempting to quote one of the most famous contemporary American poets John Ashbery in this respect. He said in an interview with *The Paris Review* in 1983: “I think I am more interested in the movement among ideas than in the ideas themselves, the way one goes from one point to another rather than the destination or the origin.” Source: <http://www.theparisreview.org/interviews/3014/the-art-of-poetry-no-33-john-ashbery>, as quoted in J. Bernlef, *De tweede ruimte. Over poezie*, Querido, Amsterdam and Antwerpen, 2010.

41. Nanz (2006), p. 61.

42. Compare, for example, Nanz (2006), p. 63, Meyer & Sanklecha (2009), p. 2, Buchanan & Keohane (2009), p. 29 and Van Steenberghe (2013).

43. Nanz (2006), p. 63. (Italics in the original.)

44. Nanz (2006), p. 63.

45. Compare Kumm (2004), pp. 907-908 and Besson (2009a), p. 61.

46. Compare, for example, Buchanan & Keohane (2009), p. 36, Buchanan (2010), pp. 90-92, Besson (2009a), p. 61.

consented by (democratically) chosen national parliaments.⁴⁷ Accordingly, as explained by Besson, states “are both the authors and the subjects of international norms and hence bind themselves by agreeing to them”.⁴⁸ In the changing society this state consent model of legitimacy seems to getting more and more outdated.⁴⁹ Krisch specifically explains how the problems of delegation and control undermine the foundations of this model of legitimacy.⁵⁰ These factors could obviously be some of the underlying causes of the legitimacy problems of international tax law.⁵¹

This book is concerned with an improvement of the legitimacy of international tax law in the changing state-society interaction. The purpose is to research the improvement of the legitimacy of international tax law. For this matter, the study proceeds along two different tracks. These are the possibility to improve the legal framework of international tax law and the possibility to resort to social-scientific knowledge to improve the legitimacy of international tax law.⁵²

The first track should be mainly seen in the light of the observations about the state consent model of legitimacy. It is put forward that the improvement of the legitimacy of international tax law requires in the first place a different legal framework. Such a framework should contribute to the improvement of the legitimacy of international tax law in the changing state-society interaction. This study is therefore in the first place concerned with the question of in what way the legal framework of international tax law should be changed in order to improve the legitimacy of international tax law.

The second track is the assertion that social-scientific knowledge⁵³ can contribute to the legitimacy of international tax law. This assertion is based on the thesis that such knowledge has – as a matter of fact – always contributed

47. Buchanan (2010) writes at page 90 about this model that “rules are legitimate international laws if and only if they are produced through *the institution of state consent*, that is, if they are created in accordance with the procedures that states have consented to for the making of international laws, which include the requirement that states must consent to laws”. (Italics in the original.) Also compare Wheatley (2010), p. 16 (where he calls it a “two-track model of democratic self-determination”) and pp. 123 et seq.

48. Besson (2009a), p. 61.

49. Compare Kumm (2004), pp. 907-908, Besson (2009a), p. 61 and Krisch (2010), p. 3.

50. Krisch (2010), p. 18.

51. Compare chapter 6 for an analysis of the state consent model of legitimacy.

52. Compare Ashenden (2010b) about the need to consider both “sources” of legitimacy.

53. The term “social-scientific knowledge” should be regarded in a broad sense. It is an umbrella term for the numerous ways in which the numerous social sciences can

to this legitimacy. After all, it is, for example, well known that economic research has always contributed to our understanding – and therefore also to the legitimacy – of international taxation.⁵⁴ An excellent example of this combination is international tax neutrality, which has been – as a matter of fact – one of the dominant norms of international taxation. The problem is however that the changing state-society interaction is requiring a different methodology to understand society. There seems to be a need for a more multifaceted approach to obtain knowledge about our society⁵⁵ and there is a need to regard meta-theoretical issues more seriously.⁵⁶ What does this imply for the possibility to resort to social-scientific knowledge to improve the legitimacy of international tax law? This study is therefore in the second place concerned with the question of under what conditions social-scientific knowledge should contribute to the legitimacy of international tax law.

1.4. Structure and methodology

1.4.1. General overview of the structure

This study is organized into three main constitutive parts. This structure is based on the methodological starting point that any improvement of the legitimacy of contemporary international tax law requires an appreciation of the factual situation in society before it is feasible to make normative recommendations about the improvement of the legitimacy of this field of law. Part A (“The Changing Pendulum of International Taxation”) is the inductive part of the study that describes and analyses the relevant transformations in the international society ever since the Second World War. Part B (“Improving the Legitimacy of International Tax Law in the Changing State-Society Interaction”) is the deductive part of the study. It presents the framework for a Habermasian perspective to analyse and improve the legitimacy of international tax law in the changing state-society interaction. Moreover, this part of the study offers methodological and epistemological starting points to improve the understanding of taxation in the changing

produce “knowledge claims” about society. The term includes, for example, knowledge produced in economics, political science and sociology.

54. Compare chapter 7 in this respect.

55. In this respect, the following observation of Higgott may be quoted. He writes: “No one set of disciplinary lenses has the capacity to cope with globalization. To paraphrase Alexis de Tocqueville, we need a ‘new science for a new world’.” Higgott (2007), p. 165.

56. Marsh, Smith & Hothi (2006), p. 172. Marsh, Smith & Hothi put forward that these meta-theoretical questions are the relationship between structure and agency, and the questions of the nature of society being material or ideational.

state-society interaction. Part C (“Future”) finally does some recommendations about an improved legal framework for international tax law and the role of the international tax neutralities in international tax policy. A summary of this study and the conclusions can be found in part D.

The next sections explain this structure in more detail on the basis of the methodology that is being used.

1.4.2. An exercise of fiscal sociology

The first step in this study is to look at the past in order to learn about the present. The purpose of part A of this study is to acquire a better understanding of international tax law within the changing pendulum of international taxation and to acquire a better understanding of the contribution of social-scientific knowledge to the legitimacy of international tax law in the changing state-society interaction. For this matter, this part of the study attempts to put international tax law into the context of the more general rebalancing of the relationship between power and law in the international society. After all, in a strictly national context it is common to think in terms of a very strict relationship between the power of the state and law,⁵⁷ whereas this relationship has always been different at the international plane.⁵⁸ With the dispersion of the sovereign power of states throughout the global society (*see* section 1.2.), a new – more unstable – balance between power and law is evolving.⁵⁹ This rebalancing obviously correlates to the legitimacy problems of international tax law that are the subject of this study.⁶⁰

57. Compare, for example, Gribnau (1998), pp. 99-102.

58. Habermas (2006), p. 120.

59. Compare Schulte (2011) who writes at page 138 about the “erosion” of the balance between power and law. He claims: “In diesem idealisierten, aus seinem historischen Entstehungszusammenhang heraus entwickelten Erklärungsmodell des Verhältnisses von Recht und Politik werden allerdings in jüngster Zeit verstärkt Erosionerscheinungen sichtbar.” Jayasuriya (2001), p. 444, calls this process the “uncoupling of law and territorial state”.

60. It is appropriate to quote Ashenden (2010a), pp. 10-11 in this respect. She writes: Debates about legitimacy can [*no*; CP] longer presuppose the existence of static state structures or unitary societies as its objects of analysis; ... Above all, the fact that law now originates in many diverse environments and that political power is routinely applied across national limits and outside enforceable legal constraints means that the central normative presupposition that law is a simple and controllable medium for constituting, rationalizing and regulating power as legitimate has become problematic: indeed, it is no longer tenable.

Please note that the highlighted word “no” is omitted in the original text. Given the context, this must be incorrect so it has been corrected.

The methodology to place the transformations of international tax law in the context of the changes in the international society in the period following the Second World War may be aptly called an exercise in “fiscal sociology”.⁶¹ Fiscal sociology may be described as a research tradition that is attempting to obtain a better understanding of the relationship(s) between the development of tax law (or taxation in general) and (some developments in or a characteristic of) society.⁶²

Consequently, part A of this study starts with an overview of the changing institutional environment of the state. This is the subject of chapter 2 of this study. Subsequently, the development of international tax law is put in the context of these developments in society. Chapter 3 focuses on the evolution of the scope and characteristics of international tax law. It is attempted to relate these to the characteristics of the changing state-society interaction described in chapter 2. Subsequently, chapter 4 studies the major objectives and values that have been at the basis of the transformation of international tax law in the period following the Second World War. This chapter analyses the evolution of the equity norms (i.e. inter-individual equity and international equity) and the international tax neutrality norms in the light of the findings of chapter 2. Chapter 5 finally attempts to analyse the transformations of international tax law in the changing state-society interaction with a view to a better understanding of the major challenges of this field of law in this period of time. Needless to say the initiatives to improve transparency and the BEPS project will play an important role in this analysis.

61. It should be added that this study is not an attempt to study the influence of different social powers such as lobby groups on the development of international tax law.

62. There is a considerable amount of literature about fiscal sociology. Some scholars regard the field to be a reaction to the separation of economics and sociology (Backhaus (2005), p. 523). Prior to that detachment, taxation was – as explained by Backhaus – studied in a multidisciplinary way within a field of research concentrating on an understanding of “the state” (i.e. “Staatswissenschaften”). This view may be linked to social scientists like Goldscheid and Schumpeter who regarded the phenomenon of “taxation” to be a useful “symptom” for other social phenomena. Compare in this respect Martin, Mehrotra & Prasad (2009), p. 2. They write: “We chose the name fiscal sociology to honor the economist Joseph A. Schumpeter, who borrowed that term from his Austrian contemporary Rudolf Goldscheid (1917) to suggest a science that would transcend increasingly narrow disciplines and unite the study of economics with the study of history, politics, and society.”

Another classical view is related to the work of F.K. Mann. He claimed that fiscal sociology is concerned with (i) the research on the consequences of taxation on the behaviour of individuals and groups of individuals; and (ii) the research on the impact of social forces on the process and structure of taxation. (Quoted in Brüll (1976).)

In the Dutch tradition, the study of the relationship between taxation and society is heavily indebted to the writings of Hofstra and Brüll. Compare, for example, Hofstra (1970) and Brüll (1975).

An element of the analysis in part A of this study concerns – as a matter of fact – a particular objective of fiscal sociology as defined by Hofstra. It concerns an analysis of the relationship between ideas about society and tax policy.⁶³ The analysis of the evolution of international tax neutrality in the changing state-society interaction attempts to relate the conceptualizations of these concepts to the ideational developments in society. It consequently attempts to establish a relationship between the development of our understanding of international tax neutrality in academic writing and two important ideas about the organization of the international society: embedded liberalism and ordoliberalism.⁶⁴ With the help of this particular exercise of fiscal sociology it becomes possible to assess the contribution of social-scientific knowledge to the legitimacy of international tax law in the changing state-society interaction.

1.4.3. Normative framework

1.4.3.1. Introduction

Part B of this study is concerned with the normative foundations of the two “tracks” that should improve the legitimacy of international tax law in the changing state-society interaction. There is the path of improving the legal framework of international tax law and there is the path of giving substance to the methodological prerequisites of social-scientific knowledge. Sections 1.4.3.2. and 1.4.3.3. explicate the methodology used to define these normative foundations of this study.

1.4.3.2. A Habermasian perspective on the legitimacy of international tax law

The purpose of the first part of the normative framework is to analyse the legitimacy of contemporary international tax law and to formulate the improved legal foundations of international tax law. These foundations should eventually (in part C) serve as a framework that makes it possible to assess and improve the legitimacy of international tax law in the future. This view is based on the starting point that legality contributes to the legitimacy of law.

63. Hofstra (1970), p. 68.

64. Compare chapter 2 of this study.

In order to define the foundations of an improved legal framework this study invokes the writings of Jürgen Habermas on law and democracy.⁶⁵ It is put forward that his understanding of modern law in the context of his particular conceptualization of contemporary society is able to provide the legal foundations for the improvement of the legitimacy of international tax law in the changing state-society interaction. In this respect, this chapter puts forward an outline for an improved legal framework to deal with the relevant developments as outlined in part A of this study.

The publications of Jürgen Habermas on democracy and law in a modern constitutional state offer a fresh and valuable point of view to the relationship between legality and legitimacy within such a state. For good reason, Menéndez has translated Habermas's perspective to the area of direct taxation in a strictly national context.⁶⁶ The objective of this study is to introduce Habermas's writings on this subject matter to the problems of international tax law. It is put forward that this approach can contribute to the discussions about the legitimacy of modern international tax law. This claim may be substantiated as follows.

Basically, these reasons have their basis in Habermas's continuous attempts to combine social-scientific research with normative philosophical considerations.⁶⁷ In this way, Habermas fits well (or better: iconizes) in the German tradition of studying and criticizing the relationship between law and society.⁶⁸ Consequently, Habermas has always been at pains to withstand the conflation of power and law. After all, in his view, postmodernist (and overtly pragmatic) claims about the relativity of knowledge pose a serious threat to academic research and, more broadly, to the organization of society that has, at least in our "modern" times, been based on the belief that it can

65. The main contribution in this respect was published by Habermas in 1992. The complete title of the original German work was: *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. In the present study, the English translation of this work is being used as a source of reference. The full title of this English translation is: *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*. This work, which was translated into English by William Rehg, will be referred to as "BFN".

66. Compare Menéndez (2001).

67. See section 6.2. about his views on post-metaphysical thinking.

68. This tradition, as explained by Joerges, attempts to find "adequate reconstructions of the relation of law and society, with which to specify the social functions of law and determine the possibilities for law to exercise an influence on society".

Compare Joerges (2011a), p. 591. In this article Joerges contrast this view with the American tradition of critical legal studies.

be (increasingly) based on “reason”.⁶⁹ Post-modernist claims transform any empirical or normative claim into “just another opinion” and that makes any rational discussion impossible. In this cynical view, “knowledge” is simply in the hands of those who have “power” and the rational evaluation of taxation would simply be impossible either.⁷⁰ After all, those who are most powerful in society determine what the taxing system will look like. In other words, the division of power is simply decisive for the content of the body of law that is known as “tax law”.

These foundational elements of Habermas’s writings open up a completely new perspective on the analysis and the improvement of the legitimacy of international tax law. After all, they make it possible to analyse the legitimacy of contemporary international tax law and to make recommendations for improvement. In this way, such a new perspective will be able to offer a strong response to the strong but cynical voices that international tax law is no more than the law of the jungle.⁷¹ At the same time, the emphasis on the combination of social-theoretic research with normative philosophical considerations makes sure that the new perspective does not result in an overtly idealistic understanding of international tax law.

Obviously one may wonder whether it is justified to start from the writings of Habermas without having regard to his contemporaries such as Rawls⁷² and Luhmann. The straightforward response would be that any study has to start somewhere and that it is simply impossible to study the different interpretations of the relationship between legality and legitimacy in a comprehensive way.⁷³ At the same time, it is obviously needed to make plausible why the choice for Habermas is justified. For these purposes, and

69. Compare, for example, Pensky (2011), pp. 28-31. The horrors of the Holocaust have had a decisive role in this context. Compare Aboulafia (2002) who writes at page 4: “I once asked Habermas in a public forum what was the most difficult aspect of his philosophy to defend. He didn’t hesitate to answer: quasi-transcendentalism. And when I then asked why he thought that he had to defend it – not an unusual question from a pragmatist vantage point – his answer was straightforward: the Holocaust.” In other words, in Habermas’s view, the Holocaust should always be remembered as the principal event of what happens when reason is set aside.

70. Compare for a famous example of such a view Eisenstein (1961).

71. Compare for a recent example – in the tradition of Van Brunsschot – the inaugural lecture of Marres (Marres (2012)). It is better to follow the analogy of Brunnée & Toope (2010) who write at page 3 how the jungle can be “turned into a zoo, with legal institutions acting as the zookeeper”.

72. At this point it is important to refer to the dissertation of Valta who invokes the writings of Rawls to deal with “international tax justice”. See Valta (2014).

73. The relationship between legality and legitimacy, i.e. the contribution of the legal framework to legitimacy, is described by Luhmann as “the basic question of modern legal

completely in accordance with Habermas's own methodology, the analysis of international tax law in the changing state-society interaction in part A of this study serves as a critical starting point of the analysis in part B of this study. Only if the analysis of the changing pendulum of international taxation can be transposed to Habermas's social-theoretical analysis of contemporary societies it will be possible to rely on Habermas's normative views concerning the improvement of the legitimacy of law. In this way, it will be possible to make plausible why this particular starting point is fully justified. Eventually, this implies that Habermas's "communicative paradigm" is transposed to the realm of international taxation. This is the subject of part C of this study.

1.4.3.3. The contribution of social-scientific knowledge to the legitimacy of international tax law

The purpose of the second part of the normative framework is to formulate the methodological foundations of social-scientific knowledge if this knowledge is supposed to contribute to the legitimacy of modern international tax law. The intellectual inspiration for this methodology is found in the writings of Habermas and other scholars operating on the "borderline" of the study of law and the social sciences. In one of his studies about the European Union Christian Joerges wrote that legitimacy problems require a better understanding of the "terra incognita" in between law and the various different social sciences. He wrote that "(t)he Community's 'legitimacy problem' is an abbreviated (but less precise) description of this interface between law and social science".⁷⁴ In the same vein, the view of Stevens about the relationship between the autonomy of tax law and the epistemological and methodological "independency" of disproportionately separated research disciplines should be regarded as inspiring and visionary at the same time.⁷⁵ These observations are increasingly resonating in these times of change, as the understanding of the connection between "the social realm" and the "legal realm" is a topic that is becoming increasingly relevant.⁷⁶

and political philosophy and one of the most deeply constitutive conceptual problems in the history of theoretical sociology". See Luhmann, *Soziologie des politischen Systems*, p. 159, as quoted in Ashenden (2010a), p. 7.

74. Joerges (1997b), p. 3.

75. Stevens (1979), p. 33.

76. Compare the debate in legal philosophy about the proper "concept" of law in a changing global society. In this respect, for example, Dworkin has been criticized for his claim that the sociological perspective on the study of law "has neither much practical nor much philosophical interest". Compare Twining (2009), pp. 27-30 and Von Daniels (2010), pp. 189-190 for references and comments.

The interest in this topic is certainly not new. A good example is the controversy in the

The methodological starting point is that international taxation should *also* be studied from a sociological point of view in order to maintain a “holistic” perspective on international taxation in the changing state-society interaction.⁷⁷ Only with the help of such a perspective it is possible to relate “law” to other “devices” to organize society such as politics, the economy and morality. With the help of some general methodological difficulties of the social sciences it is subsequently attempted to evaluate the contribution of legal and economic research to our understanding of international tax law. The purpose of this evaluation is to assess whether this combination is appropriately equipped to acquire knowledge about the changing state-society interaction. On the basis of this evaluation it will be possible to outline how international taxation should be studied in the changing state-society interaction. This outline constitutes the methodological foundations of social-scientific knowledge if such knowledge is supposed to contribute to the legitimacy of international tax law. This will eventually result in recommendations about international tax neutrality and the limits of social-scientific knowledge as a source of legitimacy in chapter 9.

1.5. Limitations of this study

As usual, an overview of what is *not* studied in a book is just as helpful as a summary of the factual subject matter. As a matter of fact, there are three main limitations concerning the scope of this work.

First of all, there is a limitation about the number of concrete rules and norms of international tax law that are being studied. A study about the improvement of the legitimacy of international tax law with the help of a “law and society” perspective presupposes a bird’s eye view on the subject matter. This problem is even exaggerated by the nature of the first part of the study. The effort to obtain an understanding about the transformation of international tax law in the changing state-society interaction requires a helicopter perspective. Most importantly, a proper understanding of the current institutional environment of international tax law would require an analysis of the different powers that affect international taxation in the international society on the one hand and the different moral, legal and economic limits to these powers on the other hand.

first decade of the previous century between Kelsen and Ehrlich. This debate has been republished in Kelsen & Ehrlich (2003).

77. Compare my premature observations in Peters (2010).

In order to deal with these difficulties this book focuses in the first place on two main problems of international taxation. These are the problem of the exchange of information about taxpayers and the ongoing BEPS project of the OECD. They serve as the sparring partners along the way towards the improvement of the legal framework of international tax law. In order to deal with the issue of the contribution of social-scientific knowledge to the legitimacy of international tax law, the choice is made to focus on the international tax neutrality norms. The choice for these norms is rather self-evident in the light of the subject matter of this study. The international tax neutrality concepts are generally considered to be some of the most relevant norms of international tax law. In the eyes of many scholars and policymakers these are the “normative universe”⁷⁸ of international tax law and it is being questioned whether that domination is desirable.⁷⁹ In addition to this argument, the international tax neutralities are an excellent way to acquire an understanding of the factual and desirable contribution of social-scientific knowledge to the legitimacy of international tax law. After all, international tax neutrality is probably the exemplar of the team play between economic and legal research that has been so decisive for our understanding of international taxation. In this way, through the analysis of international tax neutrality it becomes possible to understand and improve the contribution of social-scientific knowledge to the legitimacy of international tax law in the changing state-society interaction. This does obviously not mean that this is a study about international tax neutrality.

The second limitation is the period in history that is the subject of study. This study is limited to the development of international tax law in the period following the Second World War. Obviously, this is – to some extent – a somewhat random limitation. It would however become too comprehensive to study the main developments of international tax law within a longer period of time.⁸⁰ Moreover, the period following the Second World War is an adequate time frame, since it encompasses the development (and criticisms) of the writings of Peggy and Richard Musgrave, which have been pivotal to the legitimacy of contemporary international tax law. Consequently, this period of time offers an adequate limitation of the past in order to obtain

78. Graetz (2000-2001), p. 271.

He writes: “Thus, policy discussion of international income tax policy is now dominated by a simple matrix, where capital export neutrality and capital import neutrality generally constitute the normative universe.”

79. Compare, for example, Graetz (2000-2001) and Li (2010), pp. 122-123.

80. Obviously, there can be no doubt that the investigation of a longer period of time would increase the understanding of the “*problématique*”. Tax neutrality, for example, has its roots in many different writings well before the studies of Peggy and Richard Musgrave. Such a research would however amount to a specific dissertation of its own.

a better understanding of the legitimacy of contemporary international tax law. Seen from this perspective it also becomes clear why this study makes a distinction between the “traditional state-society interaction” and the “changing state-society interaction”. This will be explained in more detail in chapter 2.

The final limitation of this study concerns the possibility to design an optimal “institutional framework of international taxation” for the future. The best way to illustrate this limitation is to invoke the well-known distinction of Lon Fuller between the “morality of aspiration” and the “morality of duty”.⁸¹ The mere morality of aspiration of this study would be to develop a full-fledged and highly detailed institutional framework of international taxation for the proper integration of domestic matters of taxation into a new (single) political and legal framework for the international society. Such a framework would serve as a foundation for truly legitimate “international tax governance”.⁸² Although chapter 8 does recommendations in this direction, the more limited objective of this study (i.e. the morality of duty), is the attempt to improve the legitimacy of international tax law. In this respect, the study takes for granted that the power to impose direct taxes is and will continue to be a strictly national matter, as a supranational taxing system still seems to be some bridges too far.⁸³ This limitation does not imply that this study does not make any recommendations. The recommendations to improve the legitimacy of international tax law are obviously – and insuperably⁸⁴ – based on a certain idea about the organization of the international society. In accordance with proper academic research this view is explicated when the concrete recommendations are put forward in chapter 8.

81. Fuller (1969). Fuller wrote at pages 5 and 6: “Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark.”

82. This term is borrowed from Rixen (2008).

83. Obviously, it is acknowledged that taxation is increasingly a supranational matter in the European Union. Section 2.3.5.2. considers some of the relevant directives in the area of direct taxation. Moreover, there is of course positive integration in the area of indirect taxation.

84. It should never be underestimated that truly value-free science is impossible. This is a lesson learnt from the research tradition called “critical theory” under which heading also Habermas’s writings can be categorized. One of the life-long convictions of this research tradition has been that it is actually impossible to perform an academic research without making some (often implicit) value choices. In this view, value-free science is an illusion for the simple reason that also the academic research is part of social reality. It is impossible to study the tradition of “critical theory” in greater detail within the scope of this study.

An historical overview of this tradition can be found in Jay (1973) and Held (1980), whereas a more substantive overview is available in Benhabib (1986). Ingram (2010)

1.6. Relevance of this study

In the first sections of this study about the motivation to perform this research the societal relevance of this study was actually formulated. The purpose of this section is to expound on this claim and to explain how this study should appeal to both policymakers and academics dealing with international tax law.

In order to explicate the relevance of this study it is first of all useful to comment on the methodological choices.⁸⁵ The choice to study international tax law from a “law and society” point of view is a rather unusual one.⁸⁶ Discourses about international tax law are usually of a highly specialized nature. This self-evidently implies that some (mostly) implicit assumptions are made about a concept of law and the nature of the international society. Although there is obviously nothing wrong with such a perspective, it is put forward that in such times of specialization there is also a need to consider the big picture in order to be critical about some of the assumptions that are usually made. Only with the help of such an external and more holistic perspective it becomes possible to improve the legitimacy of international tax law in the changing international society. One of the main values of this study is therefore that international tax law is (also) studied from the point of view of a (tax) sociologist. This different choice of perspective does not mean that this study is directed at sociologists or social scientists to whom international taxation is only a minor rather than a major issue.⁸⁷ The target

briefly summarizes the views and works of the latest generation of critical theorists such as Honneth at page 283 (in footnote 13). Traditionally, Habermas and other scholars operating “under this umbrella” were concerned with a “single” society. More recently, other scholars are increasingly concerned with the “global society”. As such, this perspective on the international relations of states is “in competition” with different, more frequently applied theories such as realism and neoliberal institutionalism. An overview of this particular tradition – with authors such as Cox and Linklater – is available in Griffiths, Roach & Solomon (2009), Shapcott (2010) and Eckersley (2010).

85. See section 1.4.

86. There are however some scholars who do take such a perspective. This includes the writings of Picciotto (compare Picciotto (2007)), Deák (compare Deák (2008)) and Gribnau (compare Gribnau (2008)).

87. Obviously, such sociologists and social scientists are cordially invited to study this book. It would be appreciated if this book would convince them to cooperate with academics and policymakers who are specializing in international tax law. These scholars should however appreciate that this book is written by a scholar of international tax law who is willing to look beyond the borders of his specialism. It is not written by a sociologist or social scientist who takes a minor interest in international tax law.

audience is composed of policymakers and academics dealing with international tax law who are (willing to be) open to the need to put the subject matter into a broader perspective.

One of the consequences of the sociological perspective is that this study does not take the specific goals and objectives of the OECD Model Tax Convention and the European Union as the unquestionable starting points for the study of international tax law. The idea is that in order to deal with the uncertainties and challenges of a world that is changing into an unknown direction it is essential to look critically at some of the assumptions that form the basis of the present stumbling world. Borrowing the word and the idea of the magisterial Italian writer Italo Calvino, it is therefore suggested that a proper amount of “lightness” is absolutely essential in order to find solutions for our contemporary problems.⁸⁸ Such an emphasis on “lightness” implies that there is a need for a research that does not have, in the words of the international political economist Robert Cox, a problem-solving nature, but a critical nature instead. A problem-solving study would have the purpose of evaluating the norms of international tax law in the light of the given specific conceptions of law and society as laid down in the OECD Model Tax Convention and the European Union. A “critical theory” is, on the other hand – in the words of Cox –, “directed toward an appraisal of the very framework for action, or problematic, which problem-solving theory accepts as its parameters”.⁸⁹ This means that this study attempts to understand the coming into being and the transformation of modern international tax law in order to evaluate and improve its legitimacy.

As explained before, the fact that this study is of a critical nature does not imply that the subject matter is not relevant for the everyday practice of international taxation. This claim is explained in more detail below.

88. Calvino (2009) explains at page 3: “... my working method has more often than not involved the subtraction of weight. I have tried to remove weight, sometimes from people, sometimes from heavenly bodies, sometimes from cities; above all I have tried to remove weight from the structure of stories and from language”. Calvino therefore suggests to consider another perspective. He writes at page 7:

Whenever humanity seems condemned to heaviness, I think I should fly like Perseus into a different space. I don’t mean escaping into dreams or into the irrational. I mean that I have to change my approach, look at the world from a different perspective, with a different logic and with fresh methods of cognition and verification. The images of lightness that I seek should not fade away like dreams dissolved by the realities of present and future.

89. Cox (1996b), p. 89.

The study should be of relevance to policymakers for different reasons. Most of all, the study introduces the Habermasian “communicative paradigm” to the realm of international taxation. It is an attempt to introduce an alternative way of thinking about this subject matter. We are moving towards an international society of states and individuals where it is increasingly impossible for states, taxpayers and other stakeholders to act as if they are not part of this society. It is this very observation that necessarily leads to the conclusion that a certain “communicative” attitude towards other players in this society is required in order to find solutions for the shared problems of international taxation. The thesis is that the transformation to this communicative way of acting and thinking will establish a realistic development towards democratic international tax governance in the 21st century. The study transposes the “communicative paradigm” to international tax law. This includes a different understanding of international tax law and an improved legal framework for this field of law for the longer run, and a framework to perform a trade-off between the legitimacy and the effectiveness of international tax law on the shorter run. In this way, the study contributes to the ongoing discussions about the BEPS project. For these reasons, the study should be relevant to contemporary policymakers dealing with international taxation.

The study should also be relevant to policymakers, because it performs an analysis of the international tax neutralities. It comes up with a critical evaluation of the evolution of the international tax neutralities in the period after the Second World War. Subsequently, some suggestions are made to improve our understanding of the international tax neutralities. Moreover, the study does some concise suggestions for policymakers on the very application of the international tax neutralities in international tax policy decisions. These concrete recommendations also make sure that the study establishes useful connections with the specialized discourses about international tax policy and international tax law.

In addition to these reasons why the study matters for policymakers, it should – for at least two reasons – also be of interest to academics who are studying international taxation and international tax law. The writings of Habermas that are presented in this study are not widely known in this academic community⁹⁰ and that is regrettable, because they focus explicitly on a crucial element of taxation: the legitimacy of the actions of those who

90. To my best knowledge, the only real exception is the study of Menéndez (2001), which is dealt with in chapter 6 of this study. The other exception is Vogel (1988b) who refers to Habermas in a footnote, but does not elaborate on his ideas in greater detail.

are in power to impose taxes. His innovative communicative perspective opens up a world of possibilities that need to be explored in more detail in the future. It is hoped that the introduction of this paradigm in this study will create some interesting discussions in this respect. Moreover, the study bears academic relevance, as it reflects (very) critically on the current team play between legal and economic research to obtain knowledge about (international) taxation. It is put forward that this collaboration is not able to capture the challenges of modern (international) taxation and that academic research in this field should change its course in order to keep presenting research that is relevant to society. This provoking thesis should also provoke a certain interest in the academic community.

The conclusion is that there is a close relationship between the societal, practical and the theoretical relevance of this study. This study should be of interest to the general public debate about international taxation. More importantly, it should appeal to policymakers and academics dealing with international tax law. It is hoped that it will improve international tax policy decisions and stimulate the academic community to research international tax law in a more critical and interconnected fashion.

More recently, Essers (2014) invoked the ideas of Habermas in order to explicate his view on international tax justice. Deák (2011) writes about “deliberative democracy” and “discourse ethics” from a different perspective.

Notes

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