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Reuven Avi-Yonah and Eran Lempert*

The Historical Origins and Current Prospects of the Multilateral Tax Convention

This article has three aims. First, it surveys the pre-BEPS efforts to create a multilateral tax convention (MTC) from the 19th century onward, and explains why these efforts have failed, leading to an international tax regime dominated by unilateralism and bilateralism. Second, it contrasts the success of multilateralism in investment and trade law. Third, it examines the BEPS era efforts to create an MTC and suggests that, while there has been more convergence of the tax laws of countries, a fundamental divergence of interests persists that will likely doom any such efforts to failure. The article concludes that, at this time, tax law still remains unsuitable to multilateralism, in contrast to investment and trade law, mainly due to the monetary impact.

Contents

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1. Introduction

The current OECD/G20/IF effort to create a new international tax regime (ITR) for the 21st century is built primarily around multilateralism.[1] Both pillars of BEPS 2.0, and especially Pillar One, require a multilateral tax convention (MTC). This is a significant step away from the development of the ITR between its origins a century ago and the beginning of the BEPS effort a decade ago. In the 1923-2013 period, the ITR was built on bilateral treaties and unilateral actions, not on multilateralism. Unilateralism and bilateralism in tax law stand in sharp contrast to other areas of international tax law such as trade law (already often based on multilateral treaties ever since its origins in 1947) and investment law (often based on bilateral treaties with most favoured nation (MFN) clauses that make it effectively multilateral).

The thesis of this article is that a true MTC has been very difficult to achieve because it involves many countries that have fundamentally different interests. It proposes that the same causes for the failed past attempts at developing a global MTC from the days of the League of Nations remain true today. The failure to achieve a global MTC is evidenced, in part, by the difficulty of reaching consensus on Pillar One (as opposed to Pillar Two, which is going forward in part because it does not absolutely require an MTC). Where multilateralism demonstrates success is in the administrative arena addressing the need to combat tax evasion, which led to the successful adoption of the Multilateral Agreement on Administrative Cooperation in Tax Matters and the Common Reporting Standard.

This article's main contribution is to provide a historical analysis of the (failed) efforts to create a global MTC from the beginnings of the ITR until the League of Nations (as contained in section 2. of this article). Section 3. of the article addresses the question why tax law is dominated by bilateralism while the other two major areas of international economic law (trade and investment) have traditionally been dominated by multilateralism. Section 4. serves to provide a brief modern context to the historical analysis from section 2., covering why the multilateral instrument (MLI) that was included in BEPS 1.0[2] is not a true MTC, and furthermore points to the BEPS 2.0 effort to develop a true MTC and why it is likely to fail. Section 4. concludes by discussing what will likely happen in the absence of an MTC.

1. The authors assume that an ITR exists, as argued in e.g. R.S. Avi-Yonah, *International Tax as International Law*, Law & Economics Working Papers, University of Michigan Law School, Paper #04-007 (2007); R.S. Avi-Yonah, *Commentary on Rosenbloom*, 53 Tax L. Rev. 167 (2000); R.S. Avi-Yonah, *International Taxation of Electronic Commerce*, 52 Tax L. Rev. 507 (1997). In recent years, more authors have agreed with this view because of the OECD BEPS Project. *See*, e.g. R. Mason, *The Transformation of International Tax*, 114 Am. J. Int'l L. 353 (2020) and W. Schön, *Is There Finally an International Tax System?*, in *Thinker, Teacher, Traveler: Reimagining International Tax, Essays in Honor of H. David Rosenbloom* p. 475 (G. Kofler, R. Mason & A. Rust (eds)., IBFD 2021), Books IBFD. This has been an ongoing debate for a long time and is beyond the scope of this article; for a collection of the relevant literature on both sides of the debate, *see* R.S. Avi-Yonah (ed.), *International Tax Law*, 2 vols. (Edward Elgar 2016). However, it should be noted that over 80% of the words of the more than 3,000 bilateral tax treaties are identical, which is strong evidence of the existence of an ITR. *See further* E. Ash & O. Marian, *The Making of International Tax Law: Empirical Evidence from Natural Language Processing*, 24 Fla. Tax. Rev. 151 (2020).
2. OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: 2015 Final Report* (OECD 2015), Primary Sources IBFD [hereinafter *Action 15 Final Report* (2015)]; and OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties & Models IBFD [hereinafter *MLI* (2017)].

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2. Historical Efforts[3]

2.1. Early background – Attempts at unilateral, bilateral and multilateral options

For good reasons, it is not unusual for any research that reviews the historical development of the current ITR to start with the post-World War I era[4] (and more specifically with the publication of the so-called Economists' Report by the League of Nations in 1923).[5] However, although the Economists' Report was the first international report on the subject, it was developed and written in a certain context. Even before World War I, countries took actions to prevent (or at least alleviate) international double taxation through unilateral and bilateral measures.[6] These efforts to avoid double taxation constituted the background against which post-World War I efforts to deal with double taxation took place. By examining the pre-World War I period, the authors hope to provide a better understanding of the development of the initial features of the ITR in the post-World War I era. The first significant developments in the pre-World War I period in the field of international taxation occurred during the last quarter of the 19th century.

2.1.1. The development of trade and the problem of double taxation

In the 19th century, measures to eliminate double taxation evolved in three somewhat different contexts. First, within a federation, where members of the same federation were concerned about intra-federation double taxation. Second, within an empire, where attempts were usually focused on the elimination of double taxation between a colony and the mother state and not among the colonies.[7] Third, in the international context, where sovereign states independent of each other took measures to eliminate double taxation. In this article, the authors will focus only on the third type.

Only in the last decade of the 19th century did bilateral agreements among sovereign states start to become a common tool for the elimination of double income taxation. In 1899, Germany entered into a special agreement with the Netherlands regarding income tax to be collected from a railway company that was constructing a railroad located in these two countries.[8] Germany and the Netherlands agreed to assess taxes on the railroad company in proportion to the length of the railroad located in their respective territories.[9] A more

3. This part is based on E. Lempert, *Crossing the Barrier: Towards a Multilateral Tax Treaty*, unpublished JSD dissertation (NYU 2005).
4. *See* R.S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 Tex. L. Rev. 1301 (1996); H.D. Rosenbloom & S.I. Langbein, *United States Tax Treaty Policy: An Overview*, 19 Colum. J. Transnat'l L. 359 (1981); M.J. Graetz & M.M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 Duke L. J. 1021 (1997); H.J. Ault, *Colloquium on Corporate Integration: Corporate Integration, Tax Treaties and the Division of the International Tax Base: Principles and Practices*, 47 Tax L. Rev. 565; *see also* M.B. Carroll, *The Historical Development of Income Tax Treaties*, in *Income Tax Treaties* (J. Bischel ed., *Practicing Law Institute* 1978). Carroll notes that in fact the first bilateral tax treaty was concluded in 1899, but he does not add much more than that.
5. League of Nations, *Report on Double Taxation Submitted to the Financial Committee*, Doc. E.F.S.73.F.19 (1923) [hereinafter *The Economists' Report* (1923)].
6. *See* sec. 2.1.1.
7. This is understandable taking into account that most of the international activity involving colonies was carried out by nationals of the mother state; the British Empire is the best example.
8. *Convention Concerning the Construction of a Railway from Ahaus to Enschedé* (27 June 1899), League of Nations Double Taxation and Fiscal Evasion: Collection of International Agreements and Internal Legal Provisions for the Prevention of Double Taxation and Fiscal Evasion, League of Nations Doc. C. 345.M.102.1928.II., p. 111 [hereinafter *Ger.-Neth. Railroad Treaty*].
9. *See* J.G. Herndon, *Relief from International Income Taxation: The Development of International Reciprocity for the Prevention of Double Income Taxation* p. 15 (Chicago Callaghan and Co. 1932).

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general bilateral double tax treaty, which is also considered to be the first tax treaty signed, is the one concluded between Prussia and the Austro-Hungarian Empire on 21 June 1899.[10] The general principle of this treaty was that nationals of the states would be subject to direct taxation (income tax) only in their state of domicile or residence. Nevertheless, real properties and business enterprises would be taxed according to their location or the location where the business was conducted. In the case of cross-border business, each country would be allowed to tax only the business income that was generated within its jurisdiction. Mortgages and interest therefrom would be taxed according to the place of the mortgaged property. It is interesting to note that the treaty included a provision according to which the signatory countries committed themselves to not changing their internal laws regarding the taxation of interest on bonds, annuities or pensions.[11]

This treaty initiated a series of double tax treaties concluded before World War I. Similar treaties were signed in the following decade between the Austro-Hungarian Empire and Liechtenstein (1901),[12] Saxony (1903),[13] Bavaria (1903),[14] Württemberg (1905),[15] Baden (1908)[16] and Hesse (1912).[17] Prussia also signed similar agreements with Luxembourg in 1909,[18] and with the Canton of Basel in 1910.[19] The Canton of Basel signed a similar agreement with Baden in 1913,[20] as did Luxembourg with Hesse.[21] These tax treaties were very simple, and basically divided the taxing rights along the lines that were drawn by the treaty entered into between Prussia and the Austro-Hungarian Empire in 1899, as described above.

10. *Treaty of June 21, 1899 Between Austria-Hungary and Prussia for the Avoidance of Double Taxation which Can Result From the Application of the Tax Laws in Force in the Kingdoms and Lands Represented in the Imperial Council and in the Kingdom of Prussia*, League of Nations Doc. E.F.S.40, F. 15. RGB1 158/1900 [hereinafter *Austro-Hungarian-Prussian Tax Treaty* (1899)]. Although Prussia and Saxony entered into an agreement regarding direct taxes on 16 Apr. 1869, and an agreement regarding the taxation of business enterprises entered into force between Austria and Hungary on 18 Dec. 1869 (it was ratified in Hungary only on 7 Jan. 1870), the treaty between Prussia and the Austro-Hungarian Empire is still considered by many as the first international tax treaty; *see* Graetz & O'Hear, *supra* n. 4; Carroll, *supra* n. 4; and M.B. Carroll, *Double Taxation and International Fiscal Coöperation. By Prof. Edwin R. A. Seligman. New York: The Macmillan Co., 1928. Pp. x, 203, Index*, 23 American Journal of International Law 2, pp. 496-496 (1929); however, *see* K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* p. 17 (3rd ed., Kluwer Law International 1997), stating that the first tax treaties were those concluded between Saxony and Prussia and between Austria and Hungary. It might be that the early treaties were seen as federal arrangements rather than agreements between independent countries: Austria and Hungary were parts of the Austro-Hungarian Empire and Saxony and Prussia were both parts of the German Empire that was declared in Jan. 1871, two years after the conclusion of the treaty. Another explanation might be that in *Ger.-Neth. Railroad Treaty*, *supra* n. 8, the first two treaties were not listed.
11. Nowadays, countries that are signatories to a double tax treaty are free to change their internal law. However, with the exception of the United States in most cases the treaty law overrides domestic legislation, although this is changing. *See* R.S. Avi-Yonah, *Pacta Sunt Servanda? The Problem of Tax Treaty Overrides*, 1 British Tax Rev. 15 (2022).
12. *See* Herndon, *supra* n. 9, at pp. 16-17, commenting on the treaty between the Austro-Hungarian Empire and Liechtenstein of 1901.
13. *See* id., at pp. 16-17, on the treaty between the Austro-Hungarian Empire and Saxony, 1903.
14. *See* id., at pp. 16-17, on the treaty between the Austro-Hungarian Empire and Bavaria, 1903. Later a new treaty was signed on July 3, 1913.
15. *See* id., at pp. 16-17, on the treaty between the Austro-Hungarian Empire and Württemberg, 1905.
16. *See* id., at pp. 16-17, on the treaty between the Austro-Hungarian Empire and Baden, 1908.
17. *See* id., at pp. 16-17, on treaty between the Austro-Hungarian Empire and Hesse, 1912.
18. *See* id., at pp. 16-17, on the treaty between Prussia and Luxemburg, 1909.
19. *See* id., at pp. 16-17, on the treaty between Prussia and the Canton of Basle-Town, 1910.
20. *See* id., at pp. 16-17, on the treaty between the Canton of Basle-Town and Baden, 1913.
21. Id. Other tax agreements were signed involving Italy, Greece and Romania.

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It is interesting to note that even though double taxation could have been eliminated unilaterally (and this had been done),[22] countries chose to enter into bilateral agreements. There are several possible explanations for this. First, looking at the Dutch experience with a unilateral exemption for foreign ships conditioned on reciprocal exemption,[23] it can be seen that when a unilateral measure was conditioned on receiving reciprocal treatment, it was not followed by other countries. On the other hand, granting such a relief without receiving reciprocal treatment may have been considered too costly. Second, the tendency was to tax individuals according to their domicile and this could not be achieved by providing unilateral relief (by exemption, since there was no foreign tax credit before 1918).[24] Therefore, it may have been thought that the appropriate solution for the double tax problem was to enter into a treaty. The pre-World War I treaties were simple: they did not contain elaborate definitions or mechanisms to apportion cross-border tax revenues,[25] but rather assigned the rights to tax certain taxpayers and types of income. Thus, these treaties, which heavily relied on the domestic tax systems, were made between countries with similar tax systems and policies.[26] Tax treaties today also rely on domestic law but there are at least two very crucial distinctions. First, the modern tax treaty is a closed scheme (though based on domestic laws): it contains definitions,[27] including what constitutes a taxable business activity,[28] how to source certain types of income[29] and who is entitled to benefit from the treaty provisions.[30] Second, and related to this, today there are internationally accepted standards and as a result it is easier for two countries, even with distinct tax systems (and policies), to negotiate a tax treaty because the starting point usually stems from international standards which are embodied in (and reinforced by) the OECD and UN work.[31]

An interesting question to pose here is why no multilateral treaty emerged during that period. Taking into account that only a few tax treaties were concluded during the pre-World War I period, and that those treaties were concluded among countries with similar tax systems, one could expect to see a multilateral treaty emerging in the area of international taxation, particularly after taking into account the fact that such treaties regarding customs and tariffs were concluded.[32] Nonetheless, there are no records indicating any efforts

22. *See*, e.g. CH: *Bundesverfassung*, 1848 (amended 1874). *See also* A. Thier, *Traditionselemente des Finanzföderalismus in der Schweiz: Zur Geschichte des interkantonalen Doppelbesteuerungsverbots* (2014).
23. *See* Herndon, *supra* n. 9, citing the Act of 21 May 1819, Official Journal of Laws No. 34, Table XVI, subdivision E; *See also* M.B. Carroll, *Double Taxation Relief, Discussion of Conventions Drafted at International Conference of Experts, 1927, and Other Measures*, Trade Information Bulletin 523 (1927).
24. Even though in theory the source jurisdiction could have provided an exemption to foreigners so that individuals would be taxed only in their residence jurisdiction, this was never the case. Naturally, this is understandable due to the fiscal interests of the source country. *See the Economists' Report* (1923), *supra* n. 5, which endorses this method but considers it unrealistic.
25. *See* e.g., the *Austro-Hungarian-Prussian Tax Treaty* (1899), *supra* n. 10.
26. For example, the United Kingdom and the United States did not enter into such a tax agreement and France did not have an income tax before 1909 and thus did not enter into any income tax treaty. The United Kingdom adhered to pure residence taxation and thus refused to recognize the source country's right to tax income derived from real property or business located outside the United Kingdom and owned by a UK resident.
27. *OECD Model Tax Convention on Income and on Capital* arts. 3 and 4 (21 Nov. 2017), Treaties & Models IBFD [hereinafter *OECD Model* (2017)].
28. *See* the definition of "permanent establishment" in art. 5 *OECD Model* (2017).
29. For example, art. 11 *OECD Model* (2017) on sourcing interest payments.
30. *See* the limitation on benefits and non-discrimination provisions in art. 29 and art. 24 *OECD Model* (2017).
31. The *OECD Model* (2017) will be discussed in sec. 2.3.
32. This *Zollverein* was signed in 1833 by all the German states.

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to reach such a multilateral accord. We can only hypothesize as to why such multilateral agreement did not emerge. One explanation might be that it was easier to conclude agreements where only two parties were involved. Another explanation might be that at that time, when capital did not flow so freely and easily, there was no need for a multilateral approach. Most cross-border activities involved two countries (there were no tax havens),[33] and thus it might be that double taxation was perceived as a two-country problem that required a two-country solution (i.e. a bilateral agreement). In the trade field, the drive to conclude a multilateral agreement was the desire to eliminate the opportunity of a country to discriminate against another country's products and commodities, and it seems that these concerns did not apply in regard to income tax.[34]

2.1.2. Summary

In the pre-World War I period, the growing cross-border activity and the shift of governments from property taxes to income taxes as a significant revenue raiser were the triggers causing the issue of double income taxation to come to light (whether in a federal, imperial, or international context). Consequently, in the last quarter of the nineteenth century bilateral tax treaties started to emerge as a tool to eliminate international double taxation, and it was at these moments that the modern international taxation regime first started to crystallize. By 1914, there were about twenty tax treaties in force among several European countries.[35] In the pre-World War I era, the two main principles behind efforts to abolish double taxation were that individuals (and entities) should be subject to income tax in their state of domicile and that business income and real properties should be taxed in the place of their location.[36] In 1914, World War I broke out and new developments in the area of international taxation occurred only after the war.

2.2. Post-World War I – Bilateralism becomes more entrenched (and the continued failure of multilateral treaties)

2.2.1. Double taxation and international organizations

Following World War I, governments needed to raise revenues to fund the war costs and this encouraged the shift toward using direct taxation (income tax) instead of relying on certain levies, duties and customs. Moreover, income tax rates were substantially increased compared to the modest income tax rates before the war.[37] This trend, together with the growing volume of international trade and investment, increased the income tax burden on businesses. The business community in turn reacted by increasing lobbying efforts (mainly through the newly established International Chamber of Commerce (ICC)) to solve the international double taxation problem. Thus, not surprisingly, the ICC was the first orga-

33. For a general survey of the creation and spread of tax heavens in the 20th century, *see* S. Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* pp. 117-135 (Cambridge University Press 1992).
34. It is only in the last few decades that governments have started to use direct taxes to protect domestic industries from foreign competition. *See* generally J. Slemrod & R.S. Avi-Yonah, *(How) Should Trade Agreements Deal With Income Tax Issues?*, 55 Tax L. Rev. 533; M.A. Desai & J.R. Hines, *The Uneasy Marriage of Export Incentives and the Income Tax*, NBER Working Paper No. W8009 (2000).
35. *See supra* n. 4 and n. 5 for a survey of tax treaties concluded before World War I.
36. *See* the *Austro-Hungarian-Prussian Tax Treaty* (1899), *supra* n. 10, which was followed by the other tax treaties.
37. For example, between 1906 and 1918 in the United Kingdom the income tax rate rose from 5% to 30%. In the United States the federal income tax rate went from 1% in 1913 to 6% in 1918.

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nization to put the issue of international double taxation on the international agenda[38] and called the League of Nations to start dealing with the issue of double taxation. Thereafter, the ICC appointed a committee on taxation (the ICC Committee) with representatives from six nations: Belgium, France, Italy, the Netherlands, the United Kingdom and the United States.[39] The ICC Committee held meetings during 1921 and presented its conclusions to the ICC Congress held in London later that year.[40] Contrary to the opinion of the American representative,[41] the resolutions of the ICC Congress suggested that progressive taxes should be levied only on citizens, without regard to their residence, while flat rate taxes should be imposed on citizens and foreigners in the source jurisdiction.[42] The requirement for non-discrimination between citizens and foreigners in the tax context was one of the first discussions of this common principle.[43] Following the pressure from the business community, the League of Nations' international financial conference held in Brussels in 1920 declared that double taxation should be handled in such a way as to facilitate cross-border investment.[44] Based on this resolution and following the increasing pressure, the Financial Committee of the League of Nations decided in September 1921 to ask four distinguished economists[45] to prepare a report dealing with the theoretical aspects of international double taxation. The report, published in April 1923, laid out the theoretical principles for taxing cross-border activity, which greatly relied on the economic allegiance principle.[46] This principle held that the source jurisdiction had the first right to tax income from land and from businesses having a fixed location within the source state jurisdiction,[47] and the residence state had the residual right to tax those types of income and the first right with respect to all other types of income.[48] Regarding ways to prevent double taxation, the report suggested four methods. The first two methods were to grant an exclusive taxing power to either the residence or the source jurisdiction.[49] The other two ways were to apportion the taxing rights between the two jurisdictions either according to an agreed formula or according

38. Resolution No. 11 of the International Chamber of Commerce (ICC) in the organizational meeting held in Paris on 28 June 1919; *see also* Herndon, *supra* n. 9, at p. 20; *see* Graetz & O'Hear, *supra* n. 4, at p. 1051 for the American perspective.
39. *See* Resolution No. 11, *supra* n. 38.
40. The International Chamber of Commerce Protocol of the London meeting held between 27 June and 1 July 1921 [hereinafter ICC Protocol].
41. *See* Graetz & O'Hear, *supra* n. 4, at pp. 1051-1053.
42. *See* ICC Protocol, *supra* n. 40, at p. 5.
43. Art. 24 *OECD Model* (2017). For a general discussion on the development of the principle, *see* K. Van Raad, *Nondiscrimination in International Tax Law*, Series on International Taxation No. 6 (Kluwer Law International 1986).
44. League of Nations, *Double Taxation and Tax Evasion: Report Presented by the Committee of Technical Experts on Double Taxation and Tax Evasion*, Doc. C.216.M.85.1927.II., p. 5 (1927), reprinted in *Legislative History of United States Tax Conventions*, pp. 4111-4150 (Joint Committee on Internal Revenue Taxation vol. 4, 1962) [hereinafter *1927 Double Taxation and Tax Evasion Technical Experts Report*].
45. Prof. Bruins from the Commercial University, Rotterdam (the Netherlands); Prof. Senator Einaudi from Turin University (Italy); Prof. Seligman from Columbia University (United States); and Sir Josiah Stamp, K.B.E., from London University (United Kingdom). For interesting information regarding the relative contributions of each of these professors to the final report, *see* Graetz & O'Hear, *supra* n. 4, at the text accompanying fn. 215; A. Muster, *The First Step to the 'International Tax Regime'*: Edwin R.A. Seligman, New York, and the League of Nations, Geneva, in 1923, working paper; S. Jogajaran, *Stamp, Seligman and the Drafting of the 1923 Experts' Report on Double Taxation*, 5 World Tax J. 3 (2013), Journals and Opinion Pieces IBFD, R.S. Avi-Yonah, *The 1923 Report and the International Tax Revolution*, 51 Intertax (2023).
46. *The Economists' Report* (1923), *supra* n. 5.
47. Id., at pp. 28-30 and 31-34.
48. Id., at Part II, Section II.
49. Id., at pp. 41-42.

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to the various types of income.[50] Finally, the economists expressed their preference for the method which granted the exclusive taxing right to the residence jurisdiction.[51]

In March 1922 (after the appointment of the four economists but before the publication of the report), the ICC Committee sent a request to the League of Nations urging governments to address the problem of double taxation according to the principles adopted by the London Congress.[52] This was, in fact, the business community asking governments to adopt its guidelines on the issue of international double taxation, and this may have been intended to indirectly influence the results of the Economists' Report. In December 1922, the ICC Committee approved detailed suggestions, along the same lines as the London Congress, to be submitted to the Rome Congress in 1923.[53] The recommendations of the ICC committee included, among other things, the application of a non-discrimination principle, the understanding that an international agreement for the definition of domicile (residence) should be reached, some understanding as to the limitations on relief from double taxation, and some agreements regarding how income should be sourced.[54] These principles constituted the main lines on which the later model convention of 1928 was based. In March 1923 in Rome (one month before the publication of the Economists' Report), The ICC Congress considered a clear statement of the double taxation issue and ways to approach it. However, no broad agreement could be reached, mainly because of the different views held by the French and Italian delegates, and the matter was returned to the ICC Committee for further discussion.[55] Clashes between capital-importing and capital-exporting states can be observed in the work of the ICC Committee. For example, Italy objected to the approach that taxation on the basis of residence would take precedence over source taxation.[56] Eventually, in March 1924, the ICC Committee reached certain agreements and expressed its preference for adopting bilateral conventions on the issue of international double taxation; provided, however, that a general treaty (multilateral treaty) which would recognize a few definite principles was concluded.[57]

2.2.2. Outside the forums of the international organizations

During the 1920s, several bilateral tax treaties were concluded. Some of them distinguished between personal and impersonal taxes. During that time, this was not an uncommon distinction.[58] Impersonal taxes are taxes that are levied on a specific type of income regard-

50. Id., at p. 42.
51. Id., at p. 51. It might be that this preference was expressed due to the lack of adequate representation of capital-importing countries on the committee (Senator Einaidi did not attend the meeting), *See* Graetz & O'Hear, *supra* n. 4, at the text accompanying fn. 225.
52. International Chamber of Commerce, Brochure No. 25, pp. 16-17 (ICC 1923) [hereinafter ICC Brochure No. 25 (1923)].
53. Id., at pp. 26-28. For a more detailed description of the process, with a special focus on the American Section of the ICC work led by Prof. Adams, *see* Graetz & O'Hear, *supra* n. 4, at pp. 1093-1097.
54. ICC Brochure No. 25 (1923), *supra* n. 52, at pp. 26-28.
55. Id., at pp. 22 and 29-48.
56. Id., at p. 9; *see also* League of Nations, *Double Taxation and Tax Evasion: Report Presented by the Committee of Technical Experts on Double Taxation and Tax Evasion*, Doc. F.212. (1925), reprinted in *Legislative History of United States Tax Conventions* pp. 4057-4110 (Joint Committee on Internal Revenue Taxation vol. 4, 1962) [hereinafter *1925 Technical Experts Report*]; Herndon, *supra* n. 9, at pp. 33-34.
57. ICC Brochure No. 25 (1923), *supra* n. 52, at pp. 7-8 (sec. I.5); Herndon, *supra* n. 9, at pp. 30-31.
58. *See* ICC Protocol, *supra* n. 40, Herndon, *supra* n. 9, at pp. 21-22. This distinction goes back to the medieval and early modern tradition under which citizens could be taxed wherever they reside but foreigners could only be taxed based on the location of their property, *see* Thier, *supra* n. 22.

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less of the identity of the taxpayer, while personal taxes are taxes levied on a person, and were usually progressive. The treaties that distinguished between these two types of taxes included the treaties Italy concluded with Czechoslovakia,[59] Germany[60] and Hungary;[61] and the treaties Hungary concluded with Yugoslavia, Poland and Germany.[62] The rest of the treaties (around thirteen treaties by the end of the 1920s) did not contain this distinction.[63] The bilateral tax treaties that did not make this distinction were very similar to each other and this might have encouraged the view that a multilateral treaty was achievable at that time. However, an expert who examined this possibility at the time reached the conclusion, similar to the Technical Experts' conclusion in 1928 (described below), that the fiscal laws and interests of each state were so different that it was not possible to merge these bilateral tax treaties into one general multilateral treaty.[64]

On 6 April 1922, representatives from Austria, Hungary, Poland, Romania, Yugoslavia (the successor states of the old Austro-Hungarian Empire), and Italy met in Rome and signed a multilateral tax treaty for the avoidance of double taxation on income and capital.[65] This was the first time a multilateral agreement on double taxation was signed. However, it was ratified only by Italy and Austria and eventually the treaty entered into force four years later as a "regular" bilateral tax treaty between Austria and Italy.[66] It should be noted also that this proposed multilateral treaty followed the method adopted in other bilateral treaties of allocating tax jurisdiction according to the classification of income. This proposed multilateral treaty did not have an adequate solution to the problem of allocating business profits among the signatory countries and with respect to passive income it required that further agreement be reached by the signatory countries. Thus, overall, the proposed multilateral treaty did not provide a comprehensive solution, which is probably the reason for the failure of its ratification as a multilateral treaty.[67] Austria and Italy were more interested than the other states in concluding the multilateral treaty because of complicated cross-border issues

59. *Convention Between Italy and Czechoslovakia for the Prevention of Double Taxation and the Settlement of Other Questions Concerning Direct Taxation* (1 Mar. 1924), League of Nations Doc. C.345.M.102 1928 II.
60. *Convention Between The German Reich and Italy for the Prevention of Double Taxation and the Settlement of Other Questions Connected with Direct Taxes* (31 Oct. 1925), League of Nations Doc. C.345.M.102 1928 II.
61. *Convention Between The Kingdom of Italy and The Kingdom of Hungary for the Prevention of Double Taxation and the Settlement of Other Questions Connected with Direct Taxes* (25 November 1925), League of Nations Doc. C.345.M.102 1928 II [hereinafter Hun.-Italy 1925 Tax Treaty].
62. ICC Protocol, *supra* n. 40.
63. This comprises the treaties between France and the Saar (which joined Germany in 1935) signed on 5 July 1922; United Kingdom and the Irish Free State in 1926; Denmark and Iceland on 11 Aug. 1927; Germany and Czechoslovakia on 31 Dec. 1921; Austria and Czechoslovakia on 18 Feb. 1922; Germany and Austria on 23 May 1922; Hungary and Czechoslovakia on 13 July 1923; Germany and Hungary on 6 Nov. 1923; Danzig and Poland on 17 Mar. 1924; Austria and Hungary on 8 Nov. 1924; Poland and Czechoslovakia on 23 Apr. 1925; Austria and Switzerland on 24 Oct. 1927; and Germany and Sweden on 25 Apr. 1928.
64. *See* Herndon, *supra* n. 9, at p. 261, who concludes, after a careful analysis of all the relevant tax treaties, that such an agreement is not possible. *See also* the Technical Experts' conclusion in League of Nations, *Double Taxation and Tax Evasion: Report Presented by the Committee of Technical Experts on Double Taxation and Tax Evasion*, Doc. C.562.M.178.1928.II. (1928), reprinted in *Legislative History of United States Tax Conventions* pp. 4151-4195 (Joint Committee on Internal Revenue Taxation vol. 4, 1962) [hereinafter *1928 Technical Experts Report*].
65. H. Loukota, *Multilateral Tax Treaty Versus Bilateral Treaty Network*, in *Multilateral Tax Treaties: New Developments in International Tax Law* pp. 85, 86 (Linde 1998).
66. DE: Bundesgesetzblatt, 30 Nov. 1926, Doc. C. 345, p. 73.
67. A. Spitaler, *Das Doppelbesteuerungsproblem bei den direkten Steuern, Bad Reichenberg* pp. 284-285 (1936).

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related to the fact that, after World War I, parts of the population of the former Austro-Hungarian Empire were under Italian dominion.[68]

2.2.3. Concluding the First Model Conventions: 1925-1928

Prior to the publication of the Economists' Report in 1923, the League of Nations was asked by the International Economic Conference to consider issues of international tax evasion in addition to that of double taxation.[69] Following this request, the Financial Committee of the League of Nations decided in June 1922 that a committee of technical experts should be appointed to study the practical aspects of double taxation and tax evasion.[70] The Technical Experts Committee was appointed and had delegates from several European countries.[71] Between 1923 and 1925, the Committee held several meetings and in February 1925 it published the Technical Experts Report, which was submitted to the Financial Committee of the League of Nations.[72] The Technical Experts' conclusions are somewhat less important for the purposes of this study as the experts avoided taking an explicit position on the ways to coordinate tax systems.[73] The work of the Technical Experts Committee was dominated by the Italian and French delegates, who preferred to follow the method of allocating taxing rights according to types of income, because that method allowed more leeway to the source state to tax income generated in its jurisdiction.[74] Retrospectively, the Technical Experts Committee's most important recommendation was to suggest that the League of Nations Council invite technical experts from other states to sit on the committee and draft a model convention. This suggestion resulted in the addition of a representative from the United States, which effectively weakened the Italian and French dominance.

Meanwhile, following an invitation from the League of Nations, the ICC sent representatives to participate in the League of Nations discussions on double taxation. The next few years of discussions should be viewed and examined in light of the model conventions adopted by the League of Nations in 1928, discussed below.

The ICC Committee gathered in May 1925, representatives from the League of Nations and the International Shipping Conference were present, and the ICC Committee adopted as a recommendation the principle of reciprocal exemption for foreign vessels.[75] The ICC Committee also considered the League of Nations Technical Experts Report issued in February 1925. Finally, The ICC Committee drafted resolutions to be submitted before the Brussels ICC Congress, which was held in June 1925. Some of these resolutions were a direct response to the League of Nations Technical Experts Report. Eventually, each one of the ICC Committee's resolutions found its way into the model conventions approved by

68. Mainly in South Tyrol, but also in other areas around Trieste.
69. *See 1925 Technical Experts Report, supra* n. 56, at p. 5.
70. *See 1925 Technical Experts Report, supra* n. 56, at p. 3.
71. Belgium, Czechoslovakia, France, the United Kingdom, Italy, the Netherlands and Switzerland. At that time, among these countries only the United Kingdom and the Netherlands were net exporters of capital and this, as mentioned above, influenced the Financial Committee's conclusions.
72. *See 1925 Technical Experts Report*, *supra* n. 56.
73. Id.
74. The categorization of income was followed by a distinction between personal and impersonal taxes. The source state could impose impersonal taxes on income which was not derived from a business within its jurisdiction.
75. International Chamber of Commerce, Brochure No. 34, pp. 9-12 (ICC 1925).

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the League of Nations in 1928.[76] Following the proposals in the Technical Experts' model conventions, which were proposed at the London meeting in 1927,[77] the Stockholm ICC Congress adopted several resolutions.[78] It should be noted that, by that time, it had become clear that, even though the ICC was the first organization to put the issue of international double taxation on the agenda and was urging the League of Nations to take measures to eliminate it, by 1925 the League of Nations had in fact taken the lead in finding ways to handle international double taxation. Being a governmental organization (and taxes are, after all, levied by governments), the League of Nations was probably the more appropriate organization to take the lead on this matter, and it did so by establishing the Economists' Committee and the Technical Experts Committee.

Following its own recommendations from 1925, the Technical Experts Committee was expanded and experts from Argentina, Germany, Japan, Poland, Venezuela and the United States were added. The American delegation was led by Professor Thomas S. Adams (who is considered responsible for adoption of the foreign tax credit provision in 1919 and the revision of it in the Act of 1921),[79] who hoped to limit the extent of source taxation.[80] Another American interest in joining the Committee was to try and convince the Technical Experts Committee of the approach of the American Double Taxation Committee of the American Section of the ICC (chaired by Professor Adams),[81] which was in favour of a multilateral tax treaty instead of a network of many bilateral agreements.[82]

In April 1927, the Technical Experts Committee convened for the eighth time and approved four draft conventions dealing with income taxation, succession duties, administrative assistance, and judicial assistance in the collection of taxes.[83] One of the resolutions regarded the bilateral nature of tax treaties: "In the matter of double taxation in particular, the fiscal systems of the various countries are so fundamentally different that it seems at present practically impossible to draft a collective convention, unless it were worded in such general terms as to be of no practical value."[84] The Committee also stated that it had refrained from discussing some questions relating to international law, such as the doctrine of reciprocity and the principle of the most-favoured nation. It might also be interesting to quote another part of the report which relates directly to this work: "It considers, moreover, that the fiscal laws throughout the world will undergo a gradual evolution and that this will, in the future,

76. *See* the ICC Committee's resolution from Brochure No. 34 (id.) and the League of Nations model conventions from 1928.
77. *See* discussion below of the London meeting of the Technical Experts Committee.
78. International Chamber of Commerce, Brochure No. 60, pp. 21-22 (ICC 1927).
79. *See* Graetz & O'Hear, *supra* n. 4, at p. 1031; *see generally* R.S. Avi-Yonah, *All of a Piece Throughout: The Four Ages of U.S. International Taxation*, 25 Va. Tax Rev. 2, p. 313 (2005).
80. *See* M.B. Carroll, *International Tax Law: Benefits for American Investors and Enterprises Abroad*, 2 The International Lawyer 4, pp. 692-694 (2018).
81. *See* Graetz & O'Hear, *supra* n. 4, at p. 1105.
82. On the American interests in joining the committee, *see* Herndon, *supra* n.9, at pp. 62-65. A reason for opposition to the bilateral treaty network can also be found in the objection of the Secretary of the US Treasury in 1930, who said, in a hearing before the House Ways and Means Committee, the following: "The objection to this method [the bilateral tax treaty method] ... appears to me to be that the concessions are more likely to be based on bargaining than on sound principles of taxation." Hearing before the House Ways and Means Committee on H.R. 10165, *A Bill to Reduce International Double Taxation*. *See also* Graetz & O'Hear, *supra* n. 4, at pp. 1081-1082.
83. *See 1927 Double Taxation and Tax Evasion Technical Experts Report*, *supra* n. 44, at p. 4111.
84. Id., at p. 4122.

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make it possible to simplify the measures it has recommended and possibly even to unify fiscal legislation."[85]

In 1928, the General Meeting of Government Experts on Double Taxation and Tax Evasion convened in Geneva to discuss the Technical Experts Report from 1927; it approved the four draft models proposed in the Report. The model on direct taxes allowed source states to tax business income owned by non-residents only if derived from a permanent establishment located within the source jurisdiction. The questions of whether a source state could impose tax on passive income and what constitutes a permanent establishment were left open because no broad agreements were reached on these questions.[86]

By that time, the practice of concluding bilateral tax treaties was common in continental Europe. However, by adopting a model convention based on the principle of allocating taxing rights according to different types of income,[87] the League of Nations reinforced this practice. The implication of this choice was the rejection of the other solutions mentioned in the Economists' Report, namely allocating the taxing rights exclusively to the residence state or to the source state.[88] Consequently, this choice made it clear that a single multilateral treaty would not be possible at that time. Retrospectively, it seems that this choice of the 1928 conference (which was the result of a decade of research) set the course of the international tax system for the next decades.[89]

2.2.4. Reconsidering the multilateral option: 1928-1931

Based on the recommendation of the Government Experts meeting of 1928, the League of Nations established a Fiscal Committee,[90] which continued the Technical Experts' work. The Fiscal Committee consisted of a smaller number of delegates and one observer from the ICC.

During its first session, in Geneva in October 1929, the Fiscal Committee identified the issues left open by the General Meeting of Government Experts in 1928. Among the issues the Committee discussed were: measures to avoid double taxation regarding income derived from patents and authors' rights, rules for the apportionment of profits of enterprises operating in several countries, measures for the avoidance of double taxation of trusts and companies owning large amounts of easily transferable securities, and some clarifications about the definition of a permanent establishment.[91] Additionally, the Fiscal Committee referred to the views expressed by the meeting of Government Experts (in 1928) and by the Committee of Technical Experts (London 1927), according to which it would be desirable to achieve a multilateral agreement instead of a network of bilateral tax treaties. The Fiscal Committee also referred to the fact that the bilateral solution was adopted because at that time it seemed impossible to reach an agreement regarding a multilateral convention. Through the ICC, the business community also encouraged governments to adopt a mul-

85. Id.
86. Id.
87. *See 1928 Technical Experts Report, supra* n. 64; *see also* Rosenbloom & Langbein, *supra* n. 4, at p. 365.
88. *See The Economists' Report* (1923), *supra* n. 5, at pp. 41-42.
89. *See* R.J. Vann, *A Model Tax Treaty for the Asian-Pacific Region?*, 45 Bull. Int'l Fisc. Documentation 99 (1991), who links the current OECD Model to the League of Nations' model of 1928.
90. *See 1928 Technical Experts Report, supra* n. 64, at p. 224.
91. *See* League of Nations Fiscal Committee*, Report to the Council on the Work of the First Session of the Committee*, Doc. C516. M.175.1929 II, Geneva, 17-26 Oct. 1929, p. 3.

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tilateral solution to double taxation.[92] This suggests that, although four different bilateral models were adopted, the dominant view after the 1928 conference was that the bilateral solution was to be considered only temporary, until a broader agreement could be reached. Until 1931, the Fiscal Committee made great efforts to reach such broader agreement but with no significant success (later other topics were placed on the Fiscal Committee's agenda and the efforts to conclude a multilateral convention were abandoned). In its first session's report to the Council, the Fiscal Committee stated that it believed a multilateral agreement could not be reached until a more precise definition of the term "permanent establishment" was determined, and that hopefully such a determination would lead to a multilateral accord in the future.[93] At its second session, held in Geneva between 22-31 May 1930, the Fiscal Committee approved a proposal to adopt a multilateral convention that, although it would not wholly eliminate double taxation, would encourage countries to move toward partial elimination of double taxation according to a uniform law.[94] For this purpose, the Fiscal Committee appointed a subcommittee to submit to the Fiscal Committee at its next session a draft of a multilateral convention.[95] The Fiscal Committee provided the subcommittee with some guidelines to be followed when drafting a multilateral convention. The guidelines included the following: income from annuities, authors' rights, interest on public debt and wages of workers living on one side of a frontier and working on the other (frontier workers) should be taxed only in the state of residence;[96] income from immovable property should be taxed only in the place where situated; and businesses should be taxed only in the country in which "the real center of management of the company" was situated, unless it had a permanent establishment in another country".[97]

The Fiscal Committee convened again for its third session between 29 May and 6 June 1931, and the topic of achieving a multilateral treaty was high on the agenda.[98] The subcommittee, which consisted of Dr Damste from the Netherlands (chairman), Dr Bolaffi from Italy, Mr Carey from Ireland, and Mr Clavier from Belgium, submitted to the Fiscal Committee a draft of a multilateral convention designed to eliminate double taxation of cross-border transactions.[99] In the preamble to the draft it was stated that the treaty was based on the principle of reciprocity and that it intended to handle double taxation only of persons having their residence in one of the contracting states.[100] It will be useful to describe the methods which this proposed multilateral ("plurilateral" as it is called there) treaty used to eliminate double taxation. The definition of residence under the treaty was, for natural

92. The ICC at its congress held in Amsterdam in July 1929 stated: "The International Chamber of Commerce considers that it would be highly desirable for an international conference to be convened as soon as possible ... for the purpose of unifying as far as possible the systems applied for the abolition of double taxation and preparing a multilateral convention for this purpose."
93. League of Nations Fiscal Committee, *supra* n. 91, at p. 12.
94. League of Nations Fiscal Committee, *Report to the Council on the Work of the Second Session of the Committee*, Doc. C.340.M.140.1930.II, Geneva, 1930, p. 13.
95. Id., at p. 14.
96. Id.
97. Id. Another guideline is that salaries of officials and public employees who are serving abroad, as well as public pensions, would be taxable only in the state which paid such salaries or pensions.
98. League of Nations Fiscal Committee, Report to the Council on the Work of the Second Session of the Committee, Doc. C.415.M.171.1931.II.A., Geneva, 1931 [hereinafter *League of Nations Report of the Second Session* (1931)].
99. *See* id., at pp. 3-4, and Draft A in Appendix I to the report: though instructed to draft a multilateral treaty that would only partially eliminate double taxation, the subcommittee drafted a treaty that was supposed to entirely eliminate double taxation.
100. Id., at p. 9.

persons, the place of their normal residence, which meant their permanent home, and for legal entities the "real center of management".[101] After the definition article, the proposed treaty provided many rules allocating taxing rights among the relevant jurisdictions. The draft basically took the same approach as the model bilateral treaty from 1928 and allocated taxing rights according to the different types of income.[102] However, unlike the model bilateral treaty, the multilateral treaty adopted a whole-or-nothing approach, meaning that in each case either the source or the residence jurisdiction was granted the right to tax the income, but never both.[103] For example, income from immovable property was subject to tax only in the state where the property was situated.[104] Income of frontier workers was subject to tax only in the country of residence.[105] Authors' rights and income from patents were subject to tax only in the country of residence of the beneficiaries.[106] Income from a business was subject to tax only in the state of residence of the owner, whether a natural person or a legal entity; unless such income was derived from a permanent establishment in the source country, in which case it was subject to tax at source, and to the extent the residence country levied tax on such income, the owner would be entitled to a partial relief.[107] There are some other interesting rules in the draft treaty,[108] but for our purposes it is sufficient at this point to note its overall approach of allocating taxing rights according to the different types of income conferring taxing rights in each case exclusively either to the source or the residence jurisdiction.[109] It might be that it was thought easier to adopt such a whole-or-nothing approach to relieving double taxation on a multilateral basis (rather than allowing both residence and source jurisdictions to tax the same income and then requiring the residence jurisdiction to grant a relief for taxes paid at the source jurisdiction).

The Fiscal Committee made some changes to the subcommittee's draft and both versions of the multilateral treaty were submitted to the Council.[110] The two interesting changes that the Fiscal Committee made were that, first, income derived from a permanent establishment would be taxed *only* in the permanent establishment jurisdiction[111] (and this fixed the problem noted above);[112] and, second, income from employment in "liberal professions" would be taxed only in the state in which they were regularly exercised.[113]

Although the Fiscal Committee was of the opinion that the revised multilateral draft could be used to eliminate double taxation, it also acknowledged that this draft might not be

101. Id., at art. 1. No further rule as to how to determine permanent home or real center of management was provided.
102. Id.
103. Id., at arts. 2-11.
104. Id., at art. 2.
105. Id., at art. 7.
106. Id., at art. 8.
107. *See* id., at art. 4 and art. 15. It is not clear how if it only granted partial relief this multilateral treaty could claim to wholly eliminate double taxation.
108. *See*, e.g., id., at art. 12.
109. With the exception of the case of permanent establishment, in which the subcommittee draft did not state explicitly that income derived from a permanent establishment would be taxed only in the country in which the permanent establishment was situated.
110. *See League of Nations Report of the Second Session* (1931), *supra* n. 98, at p. 6, Appendices I and II.
111. *See* id., at art. 4 in Appendix II to the report.
112. *See* id.; the fact that according to art. 15 the taxpayer was entitled only to partial relief from the residence country regarding income derived from a permanent establishment that might have resulted to a certain extent in unrelieved double taxation. However, if only the source state was allowed to tax income derived from a permanent establishment, there would not be any double taxation issue.
113. *See* id., at art. 7 in Appendix II to the report.

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adopted by all countries.[114] The concern was that the multilateral treaty might not be adopted because it required the signatory states to refrain from taxing their own residents with respect to income earned in cross-border transactions.[115] In light of this concern and due to the desire to present a practical solution on a multilateral basis, the Fiscal Committee also provided another version of a multilateral convention based on a different approach.[116] As the Fiscal Committee's main concern was related to the taxation of residents by their home countries, the second multilateral draft was based on the idea of limiting the contracting countries *only* with respect to the taxation of non-residents.[117] The second multilateral treaty declared that all contracting states reserved the right to tax their residents irrespective of the source state.[118] Then the treaty provided that the signatory countries had the right to tax non-residents on income originating in their territories; however, this right was subject to the exceptions specified in the treaty.[119] Though not specified explicitly as an exception, the non-discrimination principle which was incorporated into the treaty[120] definitely limited the right of the source state in taxing non-residents. Then the treaty went on and identified the exceptions of certain types of income from the tax jurisdiction of the source state.[121] Article 3 listed six exceptions, which included maritime or air navigation income, business income derived from sources other than a permanent establishment, income from public loans, income earned by frontier workers, income from authors' rights and patents, and income from life annuities.[122] These exceptions entailed the taxation of such types of income only in the state of residence. Comparing the second version of the multilateral treaty to the first suggested draft, it can be noticed that the main differences with respect to the allocation of taxing rights were that in the second draft, unlike in the first, the source state was allowed to tax income derived within its jurisdiction from liberal professions, salaries of officials and public servants, and public pensions.[123] In addition, the residence state was not, in any event, limited in taxing its residents, including with regard to income derived from a permanent establishment and from immovable property located in the source state.[124] Moreover, the residence state was not obliged to provide any relief for taxes paid to the source government. The Fiscal Committee recognized that the second version of the multilateral treaty eliminated double taxation only to a certain extent;[125] in fact, double taxation would be entirely eliminated only with respect to the types of income that could not be taxed in the source jurisdiction (which were specified in the exception clause). The proponents of the second version believed that countries would sign it in order to secure relief for their residents operating abroad; and that they would consequently also be inclined to provide unilateral relief for taxes paid in the source jurisdiction (even though they were not obliged to do so by the treaty).[126] Thus, the proponents believed that the second version

114. *See* id., at p. 6.
115. Id., at p. 6.
116. *See* id., at p. 6 and the draft in Appendix III.
117. *See* id., at p. 6.
118. *See* id., at art. 1.
119. *See* id., at art. 2.
120. *See* id., at art. 1 (second para.).
121. *See* id., at art. 3.
122. *See* id., at art. 3 (subsections (a) through (f)).
123. Compare Appendices II and III.
124. This is the result of the fact that in art. 1 of the second multilateral draft (*League of Nations Report of the Second Session* (1931), *supra* n. 98), there are no limits whatsoever on the residence countries.
125. *See* the *League of Nations Report of the Second Session*, *supra* n. 98, at pp. 4-5.
126. Id., at p. 8

of the multilateral treaty would result in more relief for double taxation than was actually required by the treaty. As mentioned, the second version of the multilateral treaty was based on the notion that countries would be reluctant to change the way they taxed their own residents.[127] It seems that this explanation was based heavily on sovereignty arguments. However, taking revenue interests into account and adopting a source perspective, it is not clear why capital-importing countries would refrain from taxing foreigners without having at least some assurance that relief for the taxes paid at source would be granted by the residence jurisdictions.[128]

Neither of the aforementioned multilateral treaty versions was ever adopted or even negotiated. Following the third session in 1931 (in which the two multilateral agreements were proposed to the Council), the multilateral option was never again discussed so seriously. The Fiscal Committee fulfilled its responsibility by responding to the views expressed by the Committee of Technical Experts in 1927[129] and in the Government Experts meeting in 1928,[130] as well as to the call made by the business community[131] for a multilateral solution. However, the governments never followed up on the multilateral initiative. It might be that this first proposed multilateral treaty with its whole-or-nothing approach was seen, by both source and residence states, as asking for too much of a sacrifice, because both source and residence states were used to taxing cross-border transactions. On the other hand, the second draft of the multilateral treaty probably was asking too much from capital-importing countries without providing them enough benefits. Also, the fact that by 1931 bilateral treaties were a common tool to eliminate double taxation indicated the enormous complexities of negotiating and reaching an agreement on a multilateral basis. For these reasons, the multilateral approach to the issue of double taxation was abandoned.

2.2.5. Reinforcing the bilateral approach: 1933-1946

2.2.5.1. A final attempt at a multilateral approach

After the two multilateral drafts of 1931 failed to gain any significant support from governments, the Fiscal Committee tried, in fact for the last time, to advance a multilateral solution. At its next session (the fourth session) held in Geneva between 15-26 June 1933, the Fiscal Committee found itself already heavily involved in its next project, which was the issue of profit allocation (an issue that had been left open by the 1928 conference). With a generous grant from the Rockefeller Foundation the Fiscal Committee continued its research on, and drafted a convention regarding, profit allocation.[132] The Fiscal Committee expressed the view that the convention for the allocation of profits could be adopted on either a multilateral or a bilateral basis (or could even be incorporated by countries into their own domestic laws),[133] and that a broad agreement on this issue might form the basis for a broader multilateral convention in the future.[134] Thus, the Fiscal Committee suggested that the Council commu-

127. Id., at p. 6.
128. The Fiscal Committee consisted of more than a few representatives from capital-importing countries, thus it does not seem that there was any bias against such countries built into the Committee's work.
129. *See* the text in *supra* n. 92.
130. Id.
131. *See supra* n. 92.
132. League of Nations Fiscal Committee, *Report to the Council on the Work of the Second Session of the Committee*, Doc. C.399.M.204.1933.II.A, Geneva, 1933.
133. Id., at p. 2.
134. Id., at p. 4.

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nicate to governments the convention of profit allocation and inquire about the possibility of entering into a multilateral convention for the issue of profit allocation.[135]

During its fifth session, in 1935, the Fiscal Committee decided that because of the low number of countries that had responded positively to the option of negotiating a multilateral convention regarding profit allocation, it would not recommend that the Council call an international conference on the topic.[136] The Fiscal Committee also stated that the fact that most countries were not receptive to the multilateral proposal was not due to any substantive disagreement with the Fiscal Committee's draft; to the contrary, the countries had in general approved the principles laid down in the multilateral draft.[137] The reason for declining the multilateral solution, according to the Fiscal Committee, was that governments considered bilateral agreements to be more appropriate. However, no explanation was provided as to why bilateral agreements were perceived to be more appropriate.[138] The Fiscal Committee also expressed its belief that in the current situation progress was more likely to be achieved by using bilateral means, and therefore the convention for profit allocation should be negotiated and advanced on a bilateral basis. The Fiscal Committee was of the opinion that developing a broad agreement on the subject through bilateral agreements might contribute in the long run to the coherence of the international tax system and enable the conclusion of a multilateral treaty in the future.[139] In its next report to the Council, the Fiscal Committee stated that the new clauses regarding profit allocation that had been drafted[140] should be communicated to governments together with a note that these clauses could be used in either a bilateral or multilateral agreement.[141]

After this attempt, the Fiscal Committee gave up on any further efforts to advance the notion of alleviating double taxation on a multilateral basis. It seems that the rejection of the two multilateral drafts of 1931, and the implicit negative response to the Fiscal Committee's suggestion to negotiate the convention for allocation of business income on a multilateral basis, determined that it would be the fate of the international tax system to be dominated by bilateral agreements. As mentioned above, in their response to the Fiscal Committee's proposal governments did not provide an explanation as to why bilateral agreements were considered to be more appropriate, but a reasonable guess might be that the powerful states preferred bilateral negotiations in which they had a better bargaining position and better chances to reach an agreement that suited their fiscal interests.

2.2.5.2. The last contribution of the League of Nations: 1936-1946

After the publication of the report on the allocation of business income[142] and the publication in 1935 of the model convention regarding business income,[143] the Fiscal Committee

135. Id., at p. 5.
136. League of Nations Fiscal Committee, *Report to the Council on the Fifth Session of the Committee*, Doc. C.252.M.124.1935.II.A., Geneva, 1935, p. 3.
137. Id., at pp. 3-4.
138. Id.
139. Id., at 4.
140. New clauses regarding allocation of profits of insurance enterprises, and the allocation of taxes on property, capital or income of such international enterprises.
141. League of Nations Fiscal Committee, *Work of the Fiscal Committee during Its Sixth Session*, Doc. C.450.M.266.1936.II.A., Geneva, 1936, p. 10.
142. M.B. Carroll, *Taxation of Foreign and National Enterprises*, Volume 4: Methods of Allocating Taxable Income (League of Nations 1933).
143. *See infra* n. 146.

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abandoned the option of advancing solutions on a multilateral basis. During the next few years, the Fiscal Committee was mainly engaged with the issue of tax evasion, some more general topics like the evolution of fiscal systems, and the general study of principles of taxation.[144] In 1939, World War II broke out. Nonetheless, the Fiscal Committee's work was continued during the war through a subcommittee, which met at the Hague in April 1940, and was succeeded by two regional tax conferences held in Mexico City in June 1940 and July 1943. The regional conferences in Mexico also included several Latin American countries, which the United States thought would be interested in industrial and business expansion after the war.[145] These meetings were dominated by capital-importing countries (the Latin American countries and Canada). Eventually, these meetings resulted in a new draft of a bilateral double tax treaty (usually referred to as the Mexico draft)[146] along the lines of the previous League of Nations drafts from 1928 but aimed at strengthening source taxation.[147] After World War II, the Fiscal Committee convened for its tenth session in London from 20-26 March 1946 and published a new draft[148] that amended the Mexico draft and was designed to move the balance towards residence-based taxation.[149] The Fiscal Committee, instead of combining these two drafts or adopting one of them, published both together with a commentary.[150] This act underlined once again the tension between source and residence countries. The publication of the London and Mexico drafts were the last contributions of the Fiscal Committee to the international tax field; thereafter, the League of Nations was replaced by the United Nations (UN).[151] Although the United Nations' Economic and Social Council set up a Financial and Fiscal Committee, which planned to continue the League of Nations Fiscal Committee's work,[152] no further progress was made. This was mainly because of the politicization of the debate due to the broad membership in the organization, which included developing countries and states from the Soviet bloc.[153]

144. *See* generally the Fiscal Committee report *supra* n. 136 and n. 141; League of Nations Fiscal Committee, *Report to the Council on the Fifth Session of the Committee*, Doc. C.490.M.331.1937.II.A, Geneva, 1937; and League of Nations Fiscal Committee, *Report to the Council on the Ninth Session of the Committee*, Doc. C.181.M.110.1939.II.A. Geneva, 1939.
145. *See* Carroll, *supra* n. 142, at p. 707.
146. *See Model Bilateral Conventions for the Prevention of International Double Taxation and Fiscal Evasion*, League of Nations Second Regional Tax Conference, Mexico, D.F., July 1943, published in League of Nations, *London and Mexico Model Tax Conventions – Commentary and Text*, Doc. C.88.M.88.1946.II.A (1946), reprinted in *Legislative History of United States Tax Conventions*, pp. 4319-4442 (Joint Committee on Internal Revenue Taxation vol. 4, 1962) [hereinafter *London and Mexico Model Tax Conventions – Commentary and Text* (1962)]**.**
147. The Mexico draft (*see supra* n. 146) determined the primacy of the source jurisdiction. Business income derived from a permanent establishment would be taxed *only* in the source country, while payments of interest, royalties and dividends could be taxed in the source jurisdiction as well. Countries were allowed to tax their residents' worldwide income but were obliged to grant credit for the foreign tax paid in the source country.
148. League of Nations Fiscal Committee, *Report on the Work of the Tenth Session of the Committee*, Doc. C.37.M.37.1946.II.A, London, 1946.
149. The London draft (*see supra* n. 146) reaffirmed the League of Nations' pre-war draft according to which the source jurisdiction's taxing right was limited to income derived from a permanent establishment. It is interesting to note that both drafts used the same definition for a permanent establishment.
150. *See London and Mexico Model Tax Conventions – Commentary and Text* (1962)*, supra* n. 146.
151. The League of Nations ceased to exist after World War II and the United Nations was founded in its place on 24 Oct. 1945.
152. *See* Picciotto, *supra* n. 33, at p. 51.
153. *See* Picciotto, *supra* n. 33, at pp. 50-51; and R. Vann, *International Tax Policy and International Tax Institutions: Never the Twain?*, in *Current tax treaty issues: 50th anniversary of the international tax group* pp. 52-55 (G. Maisto ed., IBFD 2020), Books IBFD.

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On another front, following pressure from the business community regarding the need for a tax treaty with the United States, and pressure from the British Foreign Office, which was concerned with shaping the liberalized post-war world economy, the British Treasury eventually agreed to implement a foreign tax credit regime in the United Kingdom.[154] Moreover, it agreed to consider the option of a tax treaty based on a foreign tax credit. This paved the way for the American and British governments to negotiate a bilateral treaty.[155] The United Kingdom-United States tax treaty concluded in 1945 (before the publication of the London draft) brought into alignment the two powers which dominated the post-war international trade and investment field and was thus a significant step in the development of the bilateral tax treaty network. The content of the treaty was close to the London draft, according to which the source country was entitled to tax business income derived from a permanent establishment and had only a limited right to tax investment income, while the residence state was obliged to credit the tax paid to the source government.[156] The fact that these two powers adopted a bilateral treaty seemed to prove that the bilateral treaty was the preferable way for governments to coordinate taxation of cross-border transactions. This treaty was the opening shot in the post-war era for the enormous growth in the number of bilateral tax treaties. In a way, this meant the loss of an opportunity for the international community to use the post-World War II atmosphere to reshape the ITR and maybe to conclude a multilateral tax treaty, as was done in the trade area.[157]

2.3. *Post-World War II – Bilateralism is alive and well (with a few attempts at multilateral treaties)*

2.3.1. *The developed countries club: 1946-1963*

As mentioned above, the Financial and Fiscal Committee of the UN could not make any progress in the international tax field, mainly because of unbridgeable gaps between its many members.[158] On the other hand, the Organization for European Economic Cooperation (OEEC), which was established in 1948,[159] had a relatively narrow membership, consisting mainly of developed countries with interests in common.

During the 1950s, as result of the inability of the Financial and Fiscal Committee of the UN to deal with double international taxation, the business community, through the ICC, began to urge the OEEC and governments to deal with this issue. In 1954, the Executive

154. UK: The 1945 Finance Act (No. 2). This foreign tax credit was on a country-by-country basis.
155. *See* C.J. Gregg, *Double Taxation*, in *Transactions of the Grotius Society* vol. 33, p. 77, Problems of Public and Private International Law (Cambridge University Press 1947).
156. *Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains* (16 Apr. 1945), Treaties & Models IBFD; and the Supplementary Protocol, signed on 6 June 1946, effective (for the purposes of US income and excess profits taxes) for the taxable years beginning on or after 1 Jan. 1945.
157. Id.
158. Basically, the developing-developed divide, the East-West political tension, and also, to some extent, the gap between Anglo-Saxon and Continental European countries. For a description of the UN Fiscal Committee meetings in 1951 and 1953, *see* M.B. Carroll, *Action on Tax Treatment of Foreign Income at Session of United Nations Fiscal Commission, April 27 to May 8, 1951*, in 5 Bull. Intl. Fisc. Docn. 5, pp. 309-323 (1951), Journal Articles & Opinion Pieces IBFD; and M.B. Carroll, *Report on the Meeting of the UN Fiscal Commission, Lake Success, May 7-17, 1951*, in 7 Bull. Intl. Fisc. Docn. 3/4, pp. 183-189 (1953), Journal Articles & Opinion Pieces IBFD.
159. The OEEC was founded in 1948 to administer the Marshall Plan and to bring economic recovery to Europe after World War II.

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Committee of the ICC adopted a resolution urging the Council of the OEEC to recommend that as soon as possible all OEEC governments (i) conclude bilateral tax treaties for the avoidance of double taxation based on the London draft; and (ii) adopt unilateral measures under domestic laws in order to eliminate double taxation. The ICC also expressed its belief that it would be desirable for the OEEC to engage in a study as to the possibility of concluding a multilateral treaty on double taxation among OEEC countries; and, were the possibility found to be practical, the ICC asserted, a multilateral approach has a great advantage in promoting uniformity in the area.[160] In its response to the ICC, the OEEC did not explicitly respond to the call for a study on the possibility of concluding a multilateral tax treaty. The OEEC expressed the view that methods for eliminating double taxation could be implemented on a unilateral, bilateral or multilateral basis, and then noted that the goal of the ICC was urging the OEEC to realize one of these methods of eliminate double taxation. The OEEC pointed out that the process of eliminating double taxation among countries with different legal and fiscal systems is a complicated process that takes time. Furthermore, it noted that even the London draft (to which the ICC had referred) was, and still is, subject to objections by several countries, and that, considering other efforts being made in the field of international taxation by the UN, the OEEC could not achieve any further progress in this area at that time. Based on the OEEC response and the lack of response to the call for a study on the possibility of a multilateral tax treaty, it can be inferred that the OEEC did not view the multilateral option as feasible, mainly because of differences among the various fiscal and legal systems, and because countries had already concluded bilateral tax treaties amongst themselves. In a letter to the OEEC dated 24 March 1955, the Secretary General of the ICC noted that the query regarding a multilateral treaty was merely a suggestion, and that the ICC was aware of the difficulties in the way of achieving a multilateral accord.[161] In connection with suggestions regarding indirect taxes, the Swiss delegation expressed its view that because of the complexity of national tax laws and the legal, financial, and technical difficulties, the solution of a multilateral treaty had not seemed possible thus far, and consequently, Switzerland preferred to conclude bilateral tax treaties.[162] In December 1955, Germany, the Netherlands and Switzerland suggested that the OEEC establish a group of experts on the issue of double international taxation in order to advance the study in this field.[163] Their proposal also advanced that this group of experts should consider whether the multilateral option was possible.[164] Following this suggestion, and given the fact that the Fiscal Commission of the UN had been dissolved without its tasks being transferred to another body, together with continuing pressure from the business community, the Council of the OEEC resolved, on 13 January 1956, to establish an ad hoc group of experts.[165] Based on reports from the group of experts to the OEEC regarding issues it should consider, it

160. *See* the OEEC Council, *Double Taxation in Europe: Resolution Adopted by the Executive Committee of the International Chamber of Commerce*, Note by the Secretary-General, OJ C(54)294 and addendum (12 Nov. and 8 Dec. 1954), citing the ICC letter.
161. OEEC Council, *Recommendation of the Council Concerning Double Taxation*, Adopted by the Council at its 274th meeting on 25 Feb. 1955, OJ C(55)37 (28 Feb. 1955).
162. OEEC Council, *Further Note From the Swiss Delegation Concerning Double Taxation in Relation to Indirect Taxes,* Secretary-General, OJ C(55)88 (19 Apr. 1955).
163. OEEC Council, *Double Taxation; Memorandum by The Delegations for The Netherlands Switzerland and Germany*, Secretary-General, OJ C(55)307 (9 Dec. 1955).
164. Id., at p. 3.
165. OEEC Council, *Council Resolution on the Study of Fiscal Questions*, Adopted by the Council at its 307th meeting on 13 Jan. 1956 after consideration of C(55)307, OJ C(56)1 (19 Jan. 1956).

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was decided that the issue of a multilateral treaty would be left for future study and consideration.

In conjunction with its panel of experts, the OEEC, through its Fiscal Committee, basically continued the League of Nations' work from where it had ceased at the London draft, published in 1946.[166] Eventually, the OEEC Fiscal Committee responded to the ICC call to explore ways of reaching a multilateral convention, and in its first report (May 1958) stated its belief that the current best way to advance tax coordination was by promoting greater uniformity among bilateral tax treaties, and that this could, in the long run, be the basis for establishing a multilateral treaty.[167] The OEEC Fiscal Committee expressed the same views again in its second report (July 1959),[168] its third report (1960)[169] and its fourth report (1961).[170]

In 1961, the OEEC became the Organization for Economic Co-operation and Development (OECD), and in 1963 it published its first draft of a model for a double tax convention on income and capital (1963 Draft Model), together with a commentary.[171] In its report to the Council of the OECD, the Fiscal Committee extensively discussed the option of a multilateral tax treaty. The Committee again expressed the view that because of the number of outstanding issues, reaching a broad agreement on a multilateral basis was not feasible.[172] It suggested, however, that it might be feasible to reach a multilateral regional accord among specific groups of member countries. It also expressed the hope that such a multilateral treaty could be achieved among member countries of the European Economic Community.[173] The Fiscal Committee also noted that ministers of the member states of the European Free Trade Association had agreed that it would be desirable to remove double taxation impediments via a multilateral agreement.[174] In its conclusion to the report, the Fiscal Committee proposed that the OECD Council instruct the Committee to report when and if the approach to international double taxation might be based on a multilateral agreement among OECD countries.[175]

166. As an organization that mostly represented the developed countries' interests, it was only natural that the OEEC's starting point was the London draft, which tended toward a residence-based tax, rather than the Mexico draft. *See* A.J. Van den Tempel, *Relief from Double Taxation*, Developments in Taxation Since World War I, vol. 7 (IBFD 1967), for the determination that the *OECD Model* followed the London draft more than the Mexico draft. *See* also Vann, *supra* n. 153, at pp. 52-56, for pointing out the long delay (from 1946 to 1956, when the OEEC eventually continued the League of Nations Fiscal Committee's work) in the evolution of the tax treaty system.
167. *See The Elimination of Double Taxation*, Report of the Fiscal Committee of the O.E.E.C. (OEEC 1958), reprinted in *Legislative History of United States Tax Conventions* pp. 4451-4509 (Joint Committee on Internal Revenue Taxation vol. 4, 1962).
168. *See The Elimination of Double Taxation*, Second Report of the Fiscal Committee of the O.E.E.C. (OEEC 1959), reprinted in *Legislative History of United States Tax Conventions* pp. 4513-4563 (Joint Committee on Internal Revenue Taxation vol. 4, 1962).
169. *See The Elimination of Double Taxation*, Third Report of the Fiscal Committee of the O.E.E.C. (OEEC 1960), reprinted in *Legislative History of United States Tax Conventions* pp. 4571-4617 (Joint Committee on Internal Revenue Taxation vol. 4, 1962).
170. *The Elimination of Double Taxation*, Fourth Report of the Fiscal Committee of the O.E.E.C. (OEEC 1961), reprinted in *Legislative History of United States Tax Conventions* p. 4651 (Joint Committee on Internal Revenue Taxation vol. 4, 1962).
171. OECD, *Draft Double Taxation Convention on Income and Capital*, C(63)87 (OECD 1963) [hereinafter *1963 OECD Draft Model*].
172. Id., at Part I, para. 61.
173. Id., at para. 58.
174. Id., at para. 59.
175. Id., at para. 64.

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After the foundation of the OECD and the publication of the 1963 Draft Model with its accompanying commentary, bilateral tax treaties became virtually the sole device for coordinating national tax systems.[176] The OECD itself was and still is of the opinion that a multilateral tax treaty (although desirable) is not a feasible way of eliminating double taxation, and that countries should therefore adhere to the bilateral system.[177]

2.3.2. Multilateral efforts following the OECD 1963 Draft Model

In 1968, the European Economic Community (EEC) prepared the draft of a multilateral convention for double taxation[178] but it was too general, and the project never matured into anything practical. The European Free Trade Association (EFTA) also tried to advance a multilateral treaty, but following the EEC's experience, it abandoned the project in 1969, under the impression that tax systems were too different to be dealt with on a multilateral basis.[179] However, leaving aside mutual assistance and arbitration agreements, a few multilateral treaties have emerged on a regional basis in the last decades. In South America, the Andean countries of Bolivia, Chile (which withdrew later), Colombia, Ecuador and Peru signed a multilateral tax treaty in November 1971 (Venezuela joined the treaty later) that eliminated double taxation by adhering to the source principle.[180] The Nordic countries picked up on the EFTA project abandoned in 1969, and in March 1983, Denmark,[181] Finland, Iceland, Norway and Sweden signed a multilateral tax treaty, replaced with new treaties in 1987, 1989 and the current version signed in 1996.[182] To a certain extent, the Nordic treaty operates more like a network of bilateral treaties than a multilateral treaty.[183] In July 1994, eight countries of the Caribbean Community signed a multilateral tax treaty which, similar to the Andean treaty, deals with double taxation by adopting the primacy of source taxation.[184] But all of these are limited in scope. The failure of the EEC and the EFTA to conclude a general multilateral tax treaty shows once again that governments prefer the bilateral method, even within free trade zones. Moreover, even in the European

176. Among the few exceptions are the Nordic multilateral treaty, *see* H.M.A.L. Hamaekes, *Multilateral Instruments on the Avoidance of Double Taxation*, 40 Bull. Intl. Fisc. Docn. 3, pp. 99-114 (1986), Journal Articles & Opinion Pieces IBFD; the Andean multilateral treaty, *see Bolivia – Colombia – Ecuador – Peru Income and Capital Tax Treaty (Andean Community)* (unofficial translation) (16 Nov. 1971), Treaties & Models IBFD [hereinafter the *Andean Multilateral Treaty* (1971)]; and the Caribbean multilateral treaty, *see Agreement among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment (with schedules)* (6 July 1994), Treaties & Models IBFD [hereinafter the *Caribbean Multilateral Treaty* (1994)].
177. Nevertheless, the OECD encouraged countries to reach multilateral treaties on a regional basis in cases where national tax systems had similarities that would enable them to reach such an agreement; *see 1963 OECD Draft Model*, *supra* n. 171; and *OECD Model Tax Convention on Income and on Capital* (19 Oct. 1977), Treaties & Models IBFD. *See also*, regarding the unfeasibility of reaching a multilateral treaty, R.J. Vann, *Origins of the OEEC Work on Tax Treaties: Continuity or Fresh Start?*, 76 Bull. Intl. Taxn. 9 (2022), Journal Articles & Opinion Pieces IBFD.
178. *See* Loukota, *supra* n. 65, at p. 86.
179. Id.
180. *Caribbean Multilateral Treaty* (1994), *supra* n. 176. The treaty is reproduced herein in Annex I. *See* also A. Atchabahian, *The Andrean Subregion and its Approach to Avoidance or Alleviation of International Double Taxation*, in *Fiscal Harmonization in the Andean Countries* pp. 7-34 (IBFD 1975).
181. The local government of the Faroe Islands joined Denmark as a signatory of its own in 1996.
182. For a translation of the 1983 treaty, *see* Hamaekes, *supra,* n. 176. For the 1989 version, *see Convention Between the Nordic Countries for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital* (unofficial translation) (12 Sept. 1989), Treaties & Models IBFD.
183. *See* Vann, *supra* n. 177, at pp. 447-448.
184. *See Andean Multilateral Treaty* (1971), *supra* n. 176.

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Union (which nowadays is more than a free trade area) a multilateral tax treaty is still far from being achieved.[185]

2.3.3. Unilateralism and bilateralism post-1963

Between 1963 and 2013, the ITR was dominated by unilateralism and bilateralism. Unilateralism was primarily the result of a series of reforms adopted by the United States and copied by other countries. This was true even before the 1963 Draft Model since the United States invented the foreign tax credit (1918), the arm's length standard (1932), foreign investment funds (1937) and CFC regimes (1962). After 1963, the United States was the creator of the classical transfer pricing methods (1968) and the profit-based methods (1995), the taxation of capital gains from real estate at source (1980), limitation on benefits (1981), the branch profit tax (1986), and most recently the Foreign Account Tax Compliance Act and its progeny the Common Reporting Standard (2010). The United States also influenced the ITR more negatively by adopting the portfolio interest exemption (1984) and "check the box" (1997), both of which contributed to massive tax evasion and avoidance. Bilateralism was developed through the fast-growing network of double tax treaties based on the OECD and UN Models.

2.4. Why multilateralism failed before BEPS

At this point, it is useful to stop and ask why unilateralism and bilateralism dominated the ITR before BEPS.

The issue of double income taxation emerged in the 19th century in several distinct contexts. In the last quarter of the 19th century, countries started to use bilateral tax treaties to coordinate their tax systems and eliminate double taxation. From the outset the two main principles around which such coordination evolved were (i) that persons should be subject to income tax in the place of their domicile and (ii) that businesses and real properties should be subject to tax in the place of their location. By 1914, there were about 20 bilateral tax treaties among continental European states and all these treaties were dominated by these two principles.[186] The Economists' Report that was published in 1923 reinforced these principles with its economic allegiance analysis. When the Technical Experts Committee chose to adhere to these principles it reflected the common practice of classification and assignment of taxing rights.[187] During the first half of the 1930s, the multilateral option was discussed extensively but without practical results. From then on, the bilateral approach only became more and more common and with the failure of the international community to reshape the international tax system after World War II, the multilateral approach started to be viewed as impractical.

When, during the late 1920s, the Technical Experts Committee concluded that a multilateral treaty was not practical to achieve, it may be that the Committee could have facilitated a

185. There are no direct clauses about income tax in the EU treaties; the European Court of Justice (ECJ) cases on income tax are all about discrimination and ensuring the exercise of the four freedoms. For the rejection of the notion of replacing the bilateral tax treaties with a multilateral treaty, *see* NL: ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst*, [2005] E.C.R. I-5870-71, paras. 60-61, Case Law IBFD.
186. *See* sec. 2.1.1.
187. *See 1927 Double Taxation and Tax Evasion Technical Experts Report, supra* n. 44.

future multilateral treaty by recommending the practice of granting exclusive taxing rights (in each case either to the source state or the residence state).

By not doing so, the Technical Experts Committee may have unintentionally imposed a significant obstacle to the achievement of such a multilateral treaty in the future. If taxing rights with respect to cross-border transactions were allocated among states on an exclusive basis (i.e. so that with respect to each type of income either the source state or the residence state would have the exclusive right to impose tax), it might have been easier to conclude a multilateral treaty. This is because, unlike the current practice, which grants the residence jurisdiction the residual right to tax income derived in the source jurisdiction, the tax revenues of the residence jurisdiction would not be directly affected by the tax imposed by the source government. However, such a practice of granting exclusive taxing rights was not introduced, and tax revenues of capital-exporting states continue to be directly affected by the extent of taxation in the source jurisdiction. This situation in fact perpetuates the desire of powerful states to have a network of bilateral tax treaties (which allows them to maximize their bargaining positions when negotiating tax treaties).[188]

It seems that the two main reasons for rejecting the multilateral solution over the years have been, first, that the tax and fiscal systems of the various states were so different that a multilateral coordination was considered impossible to achieve, and second, that the interests of the most influential states were (and still are) to preserve the bilateral system, which allows them to maximize their bargaining positions when negotiating tax treaties.

3. Why Does Multilateralism Work in the Areas of Investment and Trade Law?

The dominance of bilateralism in international tax law stands in sharp contrast to the two other main areas of international economic law, namely trade and investment. This raises the question, why is tax different?

Part of the reason is simply a matter of chronology. Before World War II, there were very few multilateral treaties in any area of law. Trade law and investment law were both creations of the post-World War II era when multilateralism became the norm (e.g. the human rights treaties). The ITR is based on pre-World War II models and actual treaties, and when it was developed there were no precedents for a multilateral treaty in an area as crucial to sovereignty as taxation. In addition, the pre-World War II era was characterized by a retreat from globalization evidenced by increasing tariffs and immigration restrictions, while the 1945-2001 period was the heyday of globalization.

But there are also other, more specific reasons.

Trade law has been multilateral since the General Agreement on Tariffs and Trade (GATT) (1947).[189] Between 1947 and 1995, trade law developed through a series of multilateral negotiation rounds that resulted in sharp reductions in tariffs on goods. Finally, in 1995 the Uruguay Round culminated in the establishment of the WTO and in extending trade law to services and intellectual property (IP).[190]

188. The rejection of the exclusivity approach is also reflected in *The Economists' Report* (1923), *supra* n. 5, which followed Seligman's insistence on rejecting double non-taxation. *See* Avi-Yonah, *supra* n. 45.
189. WTO, *General Agreement on Tariffs and Trade*, No. 814 United Nations Treaty Series (30 May 1950).
190. On the history, *see* generally M. Trebilcock, R. Howse & A. Eliason, *The Regulation of International Trade* (4th ed., Routledge 2012).

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Since 1995, there have been no new multilateral agreements and the Doha Round has failed. Instead, there have been a series of bilateral and regional trade agreements (e.g. NAFTA) and unilateral actions (e.g. US tariffs).[191] The explanation is that as trade law expands beyond traditional tariffs at the border to address matters such as services, IP and non-tariff barriers, it becomes harder to reach consensus.[192] Still, trade law continues to be built on a series of multilateral agreements (GATT, General Agreement on Trade in Services (GATS),[193] the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[194] etc.), unlike tax but also investment law.

Same as tax law, international investment law has been built on a dense set of bilateral investment treaties (BITs), primarily between developed and developing countries. But unlike tax treaties, BITs generally contain an MFN clause, and over time this has led to effective multilateralization as provisions are transposed from a later BIT to earlier ones because of the MFN.[195] There is also a current effort to negotiate a multilateral investment agreement, although its prospects are unclear.[196]

The traditional explanation for why there is no MTC relates to the differences between the tax laws of various countries. As we have seen, this is the explanation given by the League in the 1930s.[197] But tax laws have since then been converging. For example, territorial countries now tax individuals on worldwide income and adopt CFC rules, thereby becoming more global, and global countries refrain from taxing corporations on active foreign source income even when repatriated, thereby becoming more territorial.[198] Another example is the convergence around dividend exemption methods of achieving corporate/shareholder tax integration.[199] Finally, the bilateral tax treaties have grown from 60% identical to each other to over 80% identical.[200] So, this is unlikely to be the answer.

191. *See*, e.g., R. Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 Chi. J. Int'l L. 2, pp. 597-629 (2011), available at https://ssrn.com/abstract=1768208 (accessed 5 July 2023); M. Wagner, *The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?* in *The Appellate Body of the WTO and Its Reform* (C. Lo ed., Springer 2019), available at https://ssrn.com/abstract=3399300 (accessed 5 July 2023); G. Sacerdoti, *The WTO Dispute Settlement System and the Challenge to Multilateralism: Is the Rule of Law in Peril?*, Bocconi Legal Studies Research Paper No. 3343455 (2018), available at https://ssrn.com/abstract=3343455 (accessed 5 July 2023).
192. *See* generally *Understanding the global trading system*, available at https://www.oecd.org/trade/understanding-the-global-trading-system/ (accessed 5 July 2023) and OECD, *Current trade challenges and opportunities*, available at https://www.oecd.org/trade/understanding-the-global-trading-system/trade-challenges-and-opportunities/ (accessed 5 July 2023).
193. WTO, *General Agreement on Trade in Services* (1 Jan. 1995).
194. WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1 Jan. 1995).
195. *See*, e.g., S.W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 Am. J. of Intl. Law (2018), available at https://ssrn.com/abstract=3116691 (accessed 5 July 2023).
196. *See* generally OECD, *The Future of Investment Treaties*, available at https://www.oecd.org/investment/investment-policy/investment-treaties.htm (accessed 5 July 2023); T. Voon, *Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules*, World Trade Review (2017), available at https://ssrn.com/abstract=2929145 (accessed 5 July 2023); M.K. Lewis, *The Origins of Plurilateralism in International Trade Law*, 20 J. of World Invest. & Trade 5 (2019), available at https://ssrn.com/abstract=3456137 (accessed 5 July 2023).
197. *See* sec. 2.
198. *See* generally R.S. Avi-Yonah, N. Sartori & O. Marian, *Global Perspectives on Income Taxation Law* (Oxford Univ. Press 2011).
199. Id.
200. Ash & Marian, *supra* n. 1.

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It is also said that it is hard to negotiate an MTC because investment flows differ from country to country: they are sometimes reciprocal in both directions, but in other cases the flow is only from capital-exporting to capital-importing countries, i.e. non-reciprocal.[201] But this problem could be resolved by negotiating an MTC but leaving the withholding tax rate to bilateral negotiations, as the UN Model does.

So, what is the reason for the difference between tax on the one side and trade and investment on the other? The authors would suggest it is simply the monetary stakes involved.

The multilateralization of trade law results in part from the fact that tariffs are not a major source of revenue for most developed countries. In the United States, for example, tariffs went from being the most important source of revenue for the federal government before 1913 to an insignificant one before World War II.[202] Thus, the United States and other developed countries could afford to reduce tariffs after 1947 to almost zero without significant consequences for the budget. Moreover, tax-related trade disputes such as the series of confrontations between the United States and the European Union from the 1970s onward typically involve tax expenditures that are contingent on export performance so that if the WTO strikes them down the result is more revenue to the losing country, not less.[203]

Similarly, BITs do not have immediate negative revenue implications, and may even increase revenue if they attract more foreign direct investment that can eventually be taxed.[204] So having an MFN clause in a BIT does not result in lower revenues when it causes earlier BITs to conform to a later one.

In tax, on the other hand, entering a tax treaty reduces revenue in non-reciprocal situations: Both countries agree to lower withholding taxes on passive income, but since the investment flows are non-reciprocal, the capital-importing country loses revenues. Because of this, various authors have argued against developing countries entering bilateral tax treaties, but they still do because of the widespread belief that they result in increased foreign direct investment (the evidence is inconclusive).[205]

To illustrate, consider why tax treaties generally do not contain MFN clauses. Suppose Country A has a tax treaty with Country B and the investment flows are reciprocal so that neither country loses revenue by reducing withholding taxes (any reduction is offset by lower foreign tax credits for flows in the opposite direction). As a result, the tax treaty follows the OECD Model and reduces withholding taxes to zero on royalties, 10% on interest and 15% on dividends. But, suppose Country A enters into a treaty with Country C and that the investment flows are mostly from Country C to Country A. As a result, the treaty between Country A and Country C has higher withholding tax rates so that Country A does not lose too much revenue by entering into the treaty. But if the treaty between Country A and Country C contained an MFN clause, Country A would lose revenue because the lower

201. T. Dagan, *The Tax Treaties Myth*, 32 NYU J. of Intl'l. Law and Pol. 939 (2000), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=379181 (accessed 5 July 2023).
202. White House Office of Management and Budget, *Historical Tables*, Table 2.1 "Receipts by Source: 1934–2025", and Table 2.3 "Receipts by Source as Percentages of GDP: 1934–2025", available at https://www.whitehouse.gov/omb/budget/historical-tables/ (accessed 5 July 2023).
203. *See* R.S. Avi-Yonah, *Treating Tax Issues Through Trade Regimes*, 26 Brooklyn J. Int'l L. 1683 (2001).
204. UNCTAD, *The Impact on Foreign Direct Investment of BITs*, in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (1 May 2009), available at https://doi.org/10.1093/acprof:oso/9780195388534.003.0012 (accessed 5 July 2023).
205. *See* Dagan, *supra* n. 201.

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rates in the treaty between Country A and Country B would apply to the treaty between Country A and Country C. That result applies even if the Country A-Country B treaty is signed after the Country A-Country C treaty and the MFN clause in that case constrains Country A's ability to negotiate future tax treaties.

In a multilateral treaty, more may be at stake than just withholding taxes.[206]

4. The Current Effort to Negotiate an MTC and Its Prospects

4.1. BEPS 1.0 and the multilateral treaty that never was

The first effort in this century to develop a multilateral tax treaty (other than a treaty like the Multilateral Agreement on Administrative Cooperation in Tax Matters which only addresses tax evasion) was arguably Action 15 of the 2015 BEPS Action Plan (BEPS 1.0).[207] But the MLI that followed from BEPS 1.0 is not a true MTC.

BEPS 1.0 was the result of the financial crisis of 2008-2010, which led to austerity in the European Union and the political necessity of imposing tax on multinationals (especially the US digital giants). BEPS 1.0 was essentially a compromise between the EU positions (e.g. Action 2, which was aimed at "check the box") and the US positions (deferring action on the digital economy). On the key problematic elements of the treaty network, namely the permanent establishment threshold and the arm's length standard in transfer pricing, not much was done.[208]

An important innovation of BEPS 1.0 was the MLI (2016), designed as a mechanism to amend many treaties at once to incorporate BEPS 1.0 changes. The OECD stated that:

> The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS will implement minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies.[209] It will also allow governments to strengthen their tax treaties with other tax treaty measures developed in the OECD/G20 BEPS Project….
>
> The new instrument will transpose results from the OECD/G20 Base Erosion and Profit Shifting Project (BEPS) into more than 2 000 tax treaties worldwide. A signing ceremony will be held in June 2017 in Paris.[210]

The OECD went on to explain that:

> The multilateral convention was developed over the past year, via negotiations involving more than 100 jurisdictions including OECD member countries, G20 countries and other developed and developing countries, under a mandate[211] delivered by G20 Finance Ministers and Central Bank Governors at their February 2015 meeting…

206. *See* sec. 5.
207. *See MLI* (2017) and *Action 15 Final Report* (2015), *supra* n. 2.
208. For a critique of BEPS 1.0 and an exploration of the limits of its achievements regarding PEs and transfer pricing, *see* R.S. Avi-Yonah & H. Xu, *Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight*, 6 Harv. Bus. L. Rev. 185 (2016). Pillar One of BEPS 2.0 made significant progress in both areas but its prospects for success are not clear, as discussed in sec. 4.2.
209. *See MLI* (2017), *supra* n. 2.
210. OECD, *Countries adopt multilateral convention to close tax treaty loopholes and improve functioning of international tax system* (24 Nov. 2016), available at https://www.oecd.org/tax/countries-adopt-multilateral-convention-to-close-tax-treaty-loopholes-and-improve-functioning-of-international-tax-system.htm (accessed 5 July 2023).
211. OECD, *Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS* (OECD 2015), available at https://www.oecd.org/ctp/beps-action-15-mandate-for-

> The OECD will be the depositary of the multilateral instrument and will support governments in the process of its signature, ratification and implementation. A first high-level signing ceremony will take place in the week beginning 5 June 2017, with the expected participation of a significant group of countries during the annual OECD Ministerial Council meeting, which brings together ministers from OECD and partner countries outside the OECD.

The OECD MLI is not an MTC, because it does not cover all the areas that are covered by the tax treaties. It is rather a global consensual treaty override intended to amend tax treaties where the relevant countries agree. The MLI applies only where two countries agree to apply it to a bilateral treaty between them, and then generally only to the extent that they agree on particular items. The question of whether to conclude a real MTC was left for future discussions.[212]

4.2. BEPS 2.0 – The need and prospects for a multilateral treaty

BEPS 2.0 (2018-present)[213] was the result of countries responding to the problem of how to tax the US digital giants (Amazon, Apple, Facebook, Google, Netflix) in the absence of a permanent establishment. Beginning with the United Kingdom in 2015, over 30 countries (as well as the European Union) have adopted or proposed gross-based digital services taxes (DSTs).[214] These DSTs were considered discriminatory by the United States, leading to threats of trade sanctions.[215] In addition, since they were not income taxes and therefore not subject to tax treaties, the OECD regarded them as a threat to its dominance of the ITR via the OECD Model.[216]

In BEPS 2.0, the OECD in Pillar One finally abandoned both the permanent establishment limit and the ALS for part of the revenue derived from a market by large MNEs (over €20 billion in revenue), but only if the MNE earns over EUR 1 million in profit. This "Amount A" constitutes 25% of the profit that exceeds 10%.

Because Amount A requires modifying articles 5, 7 and 9 of all the treaties, it requires an MTC to come into effect. Thus, if Pillar One succeeds, the world will finally have an MTC. In this section, this article will examine the prospects for such an MTC.

The first condition for the creation of a successful MTC is that the tax systems of the relevant countries need to be sufficiently similar. Tax systems today have more in common than they did in the 1920s, and, more importantly, most states now use very similar regimes in their domestic tax laws[217] and very similar arrangements in tax treaties in order to coordinate their tax systems (basically along the lines of the OECD and UN Models, which are over 80% identical).[218] In the period between 1963 and 2013, there has been very significant convergence in the international tax systems of most countries, as indicated by the data assembled by Ash and Marian (2020).

development-of-multilateral-instrument.pdf (accessed 5 July 2023).

212. It should also be noted that the *MLI* (2017) is subject to numerous reservations, but this is true of most multilateral treaties.
213. *See MLI* (2017) and *Action 15 Final Report* (2015), *supra* n. 2.
214. *See* Mason, *supra* n. 1.
215. Id.
216. Id.
217. For example, the tax systems of most countries are no longer purely worldwide or purely territorial. Even the United States, the paradigmatic worldwide country, has now adopted a participation exemption, while formerly territorial countries often have extensive CFC rules.
218. *See* Ash & Marian, *supra* n. 1.

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In this respect, it seems that the world has reached the stage at which the Technical Experts Committee thought a multilateral treaty would be achievable: "fiscal laws throughout the world will undergo a gradual evolution and ... this will, in the future, make it possible to simplify the measures it has recommended and possibly even to unify fiscal legislation."[219]

The second condition is that there needs to be a significant convergence of interests. That is what enabled the Multilateral Agreement on Administrative Cooperation in Tax Matters/ Common Reporting Standard system to succeed, because all countries have an interest in combating tax evasion. But such a convergence is unlikely to exist between capital-exporting and capital-importing countries. Thus, it seems that the main obstacle to reaching a multilateral treaty is that countries will continue to want to negotiate tax arrangements on a bilateral basis in a way that is most beneficial to their fiscal interests based on the capital flows into and from the relevant jurisdictions.

In the specific context of Pillar One, this divergence of interests can be seen in two ways. First, even if an MTC is ratified by sufficient countries to come into effect, it is highly unlikely to be ratified by the US Senate, and US participation is essential because most of Amount A will be paid by US-based Big Tech MNEs.[220] The United States has a fundamental interest in opposing the MTC.Second, Pillar One requires the abolition of all DSTs, but over 30 countries have them in place. They are politically popular and, in many cases, may raise more revenue than Pillar One, so it will be a challenge to abandon them. These countries also have an interest in opposing Pillar One.

A recent economic study has attempted to estimate, per country, revenue gains and losses from the adoption of Pillar One. The authors write as follows:

> [We have estimated] the revenue gains from Amount A for the top 20 countries with the largest net gains. *The US, China, and Germany are the top 3 countries that would collect the most revenues, around 74% of total net gains. The net revenues that the EU would benefit from are around 2.6 billion euros, mostly collected by six EU countries: Germany, France, Italy, Spain, Netherlands, and Austria*. Another important result relates to the losses incurred due to the elimination of double taxation. Countries classified as tax havens would bear most of the burden of Amount A, giving away taxing rights on around Euro 62 billion which constitutes around 66% of total Obligations to Eliminate Double Taxation (OEDT). *As a consequence, tax havens are net losers of around Euro 1.2 billion …*
>
> Countries were classified into 3 categories: developed, developing, and least developed, following the UN country classification. *Developed countries would collect more than 77% of the net revenues, with the G7 countries alone collecting 71% of the total net revenues of Amount A, driven mainly by the US collecting Euro 7 billion*. The developing countries would collect around 23% of the total net revenues, *with China collecting most of it*. The remaining developing countries that would gain revenues above Euro 100 million are: Argentina, Brazil, Korea, Malaysia, Mexico, Russia, and Turkey. In absolute terms, the least developed countries do not benefit much from Amount A, as their net revenues are almost null. In relative terms, gains from Amount A would represent 0.15% of total tax revenues for least developed countries while this figure is 0.15% for developing countries and 0.17% for developed countries (0.2% for G7 countries) …
>
> Amount A would bring almost the same level of revenues as a digital tax for France, the UK, Poland, and Italy. *Spain is expected to gain more with a digital tax. Hungary and India are worse off with Amount A as they have negative net gains.* Adding to that, the European Commission

219. *See* sec. 2.2.
220. R. Goulder, *Pillar 1, Tax Treaties, And Congressional Approval*, Forbes (11 Aug. 2021), available at https://www.forbes.com/sites/taxnotes/2021/08/11/pillar-1-tax-treaties-and-congressional-approval/ (accessed 5 July 2023).

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> estimated that Euro 5 billion a year could be generated for Member States if the tax was applied at a rate of 3%. Our estimates indicate that under Amount A the revenues would be halved to around Euro 2.5 billion. [Emphasis added.][221]

This assessment illustrates some of the problems with reaching agreement on a Pillar One MTC. First, the largest revenue gainer from Pillar One is the United States, but it is highly unlikely that it will ratify a Pillar One MTC in the foreseeable future. Second, another revenue gainer from Pillar One is the European Union, but it would gain more than that amount from a DST, as would India, Hungary, and Spain. Third, tax havens and most developing countries either lose or do not gain anything from adopting Pillar One. Fourth, the total amount of revenue to be gained from Pillar One is miniscule. The authors estimate the total annual gain to be EUR 15 billion, but that includes EUR 7 billion for the United States, who will not participate. Thus, the actual gain from all the covered MNEs would be EUR 8 billion, but this is perhaps not even the case because, if Pillar Two is adopted first, it reduces Pillar One revenues.[222] For comparison's sake, the 2022 profits of Google, Apple and Microsoft were USD 257.64 billion, USD 167 billion and USD 198.27 billion, respectively.

Finally, Pillar One is very complicated. Many countries would ask themselves why they must deal with such complexity when the DST alternative is much simpler and, in many cases, raises more revenue.

4.3. If the MTC efforts fail once again: A return to unilateralism and bilateralism?

If Pillar One fails, then what? A failure of Pillar One would presumably lead countries to adopt unilateral alternatives to taxing Big Tech companies. Currently, there are over 30 countries with suspended or proposed DSTs.[223] These DSTs will come into force on 1 January 2024, if there is no Pillar One MTC.

Another alternative to Pillar One is to adopt article 12B of the UN Model, which imposes a withholding tax on income from digital services. Countries are free to adopt this article in bilateral negotiations.[224]

Finally, there is the option of adopting Pillar One unilaterally, as India had proposed to do before the negotiations on Pillar One began. The Indian proposal ("fractional apportionment") involves applying a three-factor (assets, payroll and sales) formula to allocate profits to India based on publicly available financial data.[225] Since such a formula ignores the arm's length standard and permanent establishment limits of all the tax treaties, it will have to be

221. M. Barake & E. Le Pouhaër, *Tax Revenue from Pillar One Amount A: Country-by-Country Estimates*, Working Paper nº 2023-12 Paris School of Economics, HAL Open Science.
222. Id.
223. In Europe, eight countries have already put in place DSTs: Austria, France, Hungary, Italy, Poland, Portugal, Spain and the United Kingdom. In addition, there are several countries that have published proposals or announced a DST such as the Czech Republic, Denmark, Norway, the Slovak Republic and Slovenia. More than 36 countries worldwide have started either implementing or proposing a DST such as Argentina, Brazil, Canada, Colombia, Costa Rica, India, Indonesia, Laos, Kenya, Nepal, New Zealand, Nigeria, Pakistan, Paraguay, Sierra Leone, Tunisia, Turkey, Uruguay, Vietnam and others.
224. *United Nations Model Double Taxation Convention between Developed and Developing Countries* art. 12B. (21 Nov. 2017), Treaties & Models IBFD.
225. *See* R.S. Avi-Yonah & A. Kir, *India's New Profit Attribution Proposal and the Arm's-Length Standard*, 93 Tax Notes Int'l 1183 (2019).

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a treaty override in those countries that can override treaties by domestic legislation (primarily the United Kingdom and its former colonies, but recently other countries as well).[226]

These steps will mark a return to unilateralism and bilateralism. But despite the OECD's concern, they are unlikely to result in a collapse of the ITR. DSTs may lead to US trade sanctions, but the amounts involved are small in comparison with other trade disputes.

The US will deny foreign tax credits to income taxes imposed by destination countries.[227] But the amounts involved are relatively small, and if significant double taxation arises, it can be expected that the US digital giants will lobby and litigate to change this outcome.[228]

5. Conclusion

This article provided a historical analysis of the (failed) efforts to create an MTC from the beginnings of the ITR until the involvement of the League of Nations in section 2. of the article. The main conclusion from this historical analysis is that the early efforts to conclude an MTC failed because the tax systems of various countries were too different and there was no convergence of interests between them.

The article then considered (in section 3.) why multilateralism has worked in investment and trade law, concluding that the monetary stakes are different, and the authors hypothesize that this has been the reason for success in these other areas.

In section 4., the article provided a brief modern context to the historical analysis from section 2., covering why the multilateral instrument (MLI) that was included in BEPS 1.0 is not a true MTC, and further summarized the BEPS 2.0 effort to develop a true MTC.

226. *See* Avi-Yonah, *supra*, n. 11.

227. *See* US: 2022-26 CFR Treas. Reg. 1.901-2(b)(5), which imposes an "attribution requirement" to obtain the foreign tax credit, as follows (emphasis added):

> (5) *Attribution requirement*. A foreign tax satisfies the attribution requirement if the amount of gross receipts and costs that are included in the base of the foreign tax are determined based on rules described in paragraph (b)(5)(i) of this section (with respect to a separate levy imposed on nonresidents of the foreign country) […]
>
> (i) *Tax on nonresidents*. The gross receipts and costs attributable to each of the items of income of nonresidents of a foreign country that is included in the base of the foreign tax must satisfy the requirements of paragraph (b)(5)(i)(A), (B), or (C) of this section.
>
> (A) *Income attribution based on activities*. The gross receipts and costs that are included in the base of the foreign tax are limited to gross receipts and costs that are attributable, under reasonable principles, to the nonresident's activities within the foreign country imposing the foreign tax (including the nonresident's functions, assets, and risks located in the foreign country). For purposes of the preceding sentence, attribution of gross receipts under reasonable principles includes rules similar to those for determining effectively connected income under section 864(c) *but does not include rules that take into account as a significant factor the mere location of customers, users, or any other similar destination-based criterion, or the mere location of persons from whom the nonresident makes purchases in the foreign country*. In addition, for purposes of the first sentence of this paragraph (b)(5)(i)(A), *reasonable principles do not include rules that deem the existence of a trade or business or permanent establishment based on the activities of another person* (other than an agent or other person acting on behalf of the nonresident or a pass-through entity of which the nonresident is an owner), or that attribute gross receipts or costs to a nonresident based upon the activities of another person (other than an agent or other person acting on behalf of the nonresident or a pass-through entity of which the nonresident is an owner). […]

228. The new attribution requirement was only adopted in the context of the Pillar One negotiations and is vulnerable to a legal challenge because it is not based on any statutory language or Supreme Court precedent.

Section 4. concluded by discussing under what conditions a true MTC can emerge. It argued that while the tax systems of the various countries have converged enough to provide the basis for a true MTC, there is still too much divergence of interest (e.g. between the United States and the European Union), so an MTC under Pillar One is unlikely to be realized in the near future. Therefore, the most likely outcome is a return to bilateralism and (especially) unilateralism.[229] It is instructive to return to some key observations in this regard.

Consider the proposed Pillar One MTC. There is a fundamental divergence of interest between the United States and other large capital-exporting countries that tax MNEs on a global basis, and capital-importing countries that can only tax their local operations. Entering into a Pillar One MTC would mean that such capital-importing countries would be able to impose tax on Amount A, and that tax would be creditable in the United States even though it is currently clearly not creditable because it is not in line with both tax treaties and domestic US regulations. In other words, it would mean exposing US resident MNEs to increased taxation at the expense of the US Treasury. Not surprisingly, therefore, the likelihood that there will ever be 67 votes in the US Senate to ratify a Pillar One MTC is very low. But, at the same time, Pillar One is primarily about taxing US MNEs and is difficult to implement without the support of the United States.

Conversely, entering a Pillar One MTC requires source countries to give up on DSTs and other types of unilateral tax measures imposed on US MNEs. But this is costly from a revenue perspective as well as politically unpopular. In some cases, such as the Indian fractional apportionment proposal, a large developing country can achieve better results unilaterally than under Pillar One. Moreover, because Pillar One is very complicated to implement, even large developing countries have doubts about its revenue potential and some (e.g. Nigeria) have explicitly rejected Pillar One on revenue grounds.[230]

Taxes are essential to a functional government, and in the case of developing countries that cannot easily tax rich individuals the corporate tax is a more important source of revenue than in OECD countries. This divergence of interests involving revenue is the fundamental reason that Pillar One is likely to fail and that there will be no MTC. The same problem doomed the previous efforts to negotiate an MTC before World War II.

The contrast in this case is with Pillar Two, which is successfully advancing (it has been adopted by the European Union and will likely be adopted in 2023 by many other countries; even in the United States, it was only one vote short in the Senate for it to become law). The key difference is that most countries are unlikely to lose revenue from Pillar Two. Capital-exporting countries will likely gain revenue both directly from imposing the income inclusion rule and the undertaxed profits rule, and indirectly from reduced profit shifting (this indirect route will even benefit capital-exporting countries that do not adopt Pillar Two, such as the United States). Capital-importing countries will gain revenue if they adopt the qualified domestic minimum top-up tax, and if Pillar Two applies globally they are unlikely to lose foreign direct investment because MNEs will not be able to escape the minimum tax

229. Luís Eduardo Schoueri has a more pessimistic view about the future of bilateralism in tax law because of the increasing prevalence of treaty overrides, but even he agrees that "it is still too early to dismiss bilateralism. Despite the setbacks from the last decades, these conventions are still the primary source of international tax law and will remain as such in the foreseeable future". L.E. Schoueri, *The Twilight of Bilateralism*, 51 Intertax 5, p. 354 (2023).

230. For a recent attempt to evaluate the revenue gainers and losers from the adoption of Pillar One, *see* Barake & Le Pouhaër, *supra* n. 221.

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by shifting such foreign direct investment to another country. Most importantly, Pillar Two is consistent with existing tax treaties and does not require an MTC.[231]

Ultimately, this article has attempted to explore why international tax is bilateral and likely to remain so despite current efforts to negotiate an MTC. The main reason is money: multilateralizing tax leads to revenue losses more than multilateralizing trade or investment. The sharp contrast with trade and investment law is therefore likely to continue, despite the rise of unliteralism and bilateralism in the area of trade law: the bilateral investment treaty network, however growing, is currently facing increased criticism.

231. On Pillar Two and the Treaties, *see* R.S. Avi-Yonah, *The UTPR and the Treaties*, 109 Tax Notes Int'l 45 (2 Jan 2023) and R.S. Avi-Yonah, *What Does the United States Get from Pillar 2?*, International Tax Journal (2023, forthcoming).

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