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

Broekhuijsen, D.M.; Broekhuijsen D.M.

2 Efforts for multilateral international tax rules: 1920-1992

2.1 INTRODUCTION

It is not the first time that the aspiration for a multilateral agreement for international taxation has arisen. There were efforts for what used to be called a 'multilateral tax treaty' in the period preceding the 1963 OECD MTC: that of 1920-1960, and in particular in the interwar period of 1920-1939.[1] Also, an effort was made in the late 1950's. This 'old' or 'comprehensive' style multilateral tax treaty would have included substantive international tax rules and would be able to completely replace or supplant the bilateral tax treaty network,[2] solving the issue of double taxation in a comprehensive, multilateral way. It would have had the benefits of providing uniform interpretations of tax treaty law, solving triangular cases, deal with problems such as set out in the partnership report,[3] etc.[4]

But what in fact developed over the course of the 20th century was a sort of second-best solution to solving double taxation: a system of bilateral tax

---

1 Today's system is 'largely a creature' of the interwar period of 1920-1939: M.J. Graetz, *The David R. Tillinghast Lecture: Taxing International Income – Inadequate Principles, Outdated Concepts, and Unsatisfactory Policy*, 54 Tax Law Review 261 (2001) p. 261. See also: M.J. Graetz and M.M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 51 Duke Law Journal 1021 (1997) p. 1023.

2 K. Brooks, *The Potential of Multilateral Tax Treaties*, in: Tax Treaties: Building Bridges between Law and Economics (M. Lang, et al. eds., IBFD 2010) provides a synopsis of the different uses of the 'comprehensive' multilateral tax convention; see especially her footnote 25 at p. 219. A thorough evaluation of the concept is provided by M. Lang ed., *Multilateral Tax Treaties: New Developments in International Tax Law* (Kluwer Law International 1998). Also of interest is V. Thuronyi, *International Tax Cooperation and a Multilateral Treaty*, 26 Brooklyn Journal of International Law 1641 (2000) p. 1675-1680, who further develops and refines the approach of a comprehensive multilateral tax treaty, considering that it would require the constitution of an international organisation to be administered. The bilateral tax treaty network could simply 'phase out' during a transition period.

A comprehensive multilateral agreement would have many benefits. Apart from the advantage that it would facilitate the amendment of international tax rules, the agreement would also be able to deal with triangular cases, facilitate treaty interpretation and improve legal certainty. H. Loukota, *Multilateral Tax Treaty Versus Bilateral Tax Treaty Network*, in: Multilateral Tax Treaties (M. Lang ed., Kluwer Law International 1998) p. 90-91.

3 OECD, *The Application of the OECD Model Tax Convention to Partnerships* (1999) OECD, Issues ini International Taxation no. 6.

4 See e.g. H. Loukota (1998); V. Thuronyi (2000) and a reaction to that work by D.M. Ring, *Prospects for a Multilateral Tax Treaty*, 26 Brooklyn Journal of International Law 1699 (2000).

treaties, loosely coordinated on by a non-binding multilateral instrument: the OECD MTC and its Commentary. Where only in the 1990s the OECD explicitly abandoned the goal of concluding a 'comprehensive' multilateral tax treaty, the bilateral tax treaty, patterned on a non-binding model tax convention, became increasingly successful and popular.

Why did the efforts for an 'old' style multilateral tax treaty fail, and did the network of bilateral tax treaties develop in its stead? As we will see, the question sets the stage for all further discussions about a multilateral agreement for international taxation in the rest of the book.

2.2 AN ANALYSIS OF EARLIER EFFORTS FOR MULTILATERAL AGREEMENT IN THE AREA OF INTERNATIONAL TAXATION

2.2.1 1920-1943: The founding period of international tax law

At the start of the work of the League of Nations on the avoidance of double taxation in the beginning of 1920, the idea was to come to a coordinated multilateral solution to double taxation. Indeed, the League of Nations Fiscal Committee's initial objective was to draft a multilateral tax treaty by which tax jurisdiction would be allocated.[5] Although the efforts were aimed at concluding a 'comprehensive' multilateral tax treaty, and not at a multilateral tax treaty to amend bilateral tax treaties, it is worth examining these efforts here.

The efforts to conclude a multilateral tax treaty were dropped primarily due to disagreements on the formulation of a general principle to allocate tax jurisdiction, i.e., on the primacy of source or residence, which determined obvious winners and losers particularly for the division of tax jurisdiction over mobile capital, such as interests and dividends. In the words of Carroll:

> '[T]he discussions had revealed that [the adoption of a plurilateral convention] was hardly tenable in regard to certain classes of income, notably interest and dividends, because of the conflicts in opinions and methods of taxation'.[6]

And according to T.S. Adams, the key US Treasury tax advisor at that time, the different opinions regarding the taxation of interest and dividends prevented the adoption of a multilateral, uniform solution:

> 'Now, here is the point which interests me profoundly: on practically every subject except the taxation of bond interests and dividends from shares, they [the governmental experts] have come to a virtual unanimity of opinion. Income arises in

5 T. Rixen, *Bilateralism or Multilateralism? The Political Economy of Avoiding International Double Taxation*, 16 European Journal of International Relations 589 (2010) 591.

6 M.B. Carroll, *Prevention of International Double Taxation and Fiscal Evasion: Two Decades of Progress under the League of Nations* (League of Nations 1939) p. 33.

> hundreds of forms; compensation for personal service, rent of all types; interest of all kinds, annuities; royalties; pensions; gains and profits from hundreds of distinct trades, professions and businesses. The treatment of all these classes of income has been discussed and debated at length, from the standpoints of a score of different countries with divergent interests and different methods of administering the income tax. And as I have said, the experts have ended by endorsing three model conventions which in form and appearance are very different. But in substance they differ, practically, on nothing except the taxation of income from transferable securities. This agreement has been reached unconsciously almost'.[7]

Graetz and O'Hear describe the actions of Adams as follows:

> '[A]fter the League process generated substantial consensus on allocation rules except for those governing interest and dividends, Adams urged the nations of the world to sign a multilateral agreement institutionalizing all of the consensus rules, but leaving interest and dividends for another day'.[8]

Being unable to unite the source-residence differences among states in relation to dividends and interests in a multilateral convention, bilateral treaties were therefore the only outcome by which the different opinions regarding source and residence could be reconciled.[9] Indeed, in 1927, the impasse led to a conclusion of the League of Nations Committee of Technical Experts, which is worth reproducing here in full:

> 'It would certainly be desirable that the States should conclude collective conventions, or even a single convention embodying all the others. Nevertheless, the Committee did not feel justified in recommending the adoption of this course. 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. In the matter of tax evasion also, although unanimity

---

7 T.S. Adams, *International and Interstate Aspects of Double Taxation*, 22 National Tax Association Proceedings 193 (1929) p. 196.

8 M.J. Graetz and M.M. O'Hear (1997) p. 1096-1097.

9 M.B. Carroll (1939) p. 35. It is noteworthy that one multilateral treaty, the 1922 Treaty of Rome, was signed by multiple states but was eventually only ratified by Italy and Austria. See O. Bühler, *Prinzipien des internationalen Steuerrechts IStR: ein systematischer Versuch* (IBFD 1964), p. 50: 'Bemerkenswert ist hier u.a. der Anlauf zu einem Kollektivabkommen über die direkten Steuern zwischen den Nachfolgestaaten der Österreichisch-ungarischen Doppelmonarchie (Österreich, Ungarn, Italien, Polen, Rumänien, Jugoslawien von 1922, das aber in der Durchführung scheiterte. Das DBAbk Deutschland-italien von 1925 brachten als erstes eine systematische Durcharbeitung des Typs eines Abkommens mit *Freistellungs- und Aufteilungsprinzip* namentlich für die gewerblichen Einkünfte; nach dem Modell dieses Vertrages wurden in den folgenden 13 Jahren der Zwischenkriegszeit etwa 30 Verträge zwischen kontinental-europäischen Staaten abgeschlossen'. Also P. Verloren Van Themaat, *Internationaal belastingrecht: Een studie naar aanleiding van literatuur en verdragen over de uitschakeling van dubbele belasting* (H.J. Paris Amsterdam 1946) p. 41.

> would not seem to be unattainable, there is no doubt that the accession of all countries to a single Convention could only be obtained as the result of prolonged and delicate negotiations, while there is no reason to delay the putting into force of bilateral conventions which would immediately satisfy the legitimate interests of the tax-payers as well as those of the Contracting States.
>
> For this reason, the Committee preferred to draw up standard bilateral conventions. If these texts are used by Governments in concluding such conventions, a certain measure of uniformity will be introduced in international fiscal law and, at a later stage of that law, a system of general conventions may be established which will make possible the unification and codification of the rules previously laid down'.[10]

Despite the fact that the Technical Experts had concluded in 1927 that adopting a multilateral convention was hardly tenable due to differences between source and residence states, the aim to achieving a multilateral tax convention within the League of Nations) was not dropped.

Between 1929-1935, again efforts were made to draft multilateral tax conventions. However, these efforts were undertaken at a time when the bilateral tax convention became increasingly popular in solving the problem of double taxation in Europe, whilst political tension was on the rise or already existed.

Indeed, between 1929 and 1935, the League of Nations Fiscal Committee, urged by the resolution taken by the International Chamber of Commerce at its 1929 Amsterdam Congress,[11] again undertook an endeavour to conclude a collective tax convention. In its first three meetings, it looked into the possibility of 'framing plurilateral conventions for the Avoidance of Double Taxation of Certain Categories of Income'. To this end, a sub-committee was formed, which was instructed to submit a draft plurilateral convention based on four proposals by the Fiscal Committee. Each of these proposals dealt with very specific items of income, such as authors' royalties or rights, interest on public debt, annuities (proposal 1), the salaries of officials and public employees (proposal 2), immovable property (proposal 3), and, interestingly, the profits of an enterprise with a permanent establishment (proposal 4).[12] The Fiscal

---

10 League of Nations, *Double Taxation and Tax Evasion. Report Presented by the Committee of Technical Experts on Double Taxation and Tax Evasion* (1927) C. 216. M 85. 1927 II, p. 8. The same ideas can be found in the League of Nations, *Double Taxation and Tax Evasion: Report by the General Meeting of Governmental Experts on Double Taxation and Fiscal Evasion* (1928) C.562.M.178. 1928 II, at p. 5: 'The Meeting declared in particular that it agreed with the technical experts in recognizing that, although it would be desirable for States to conclude collective conventions, or even a single general convention embodying all the others, the extreme diversity of existing fiscal systems made it impossible at the present time to recommend a convention which could be unanimously accepted, unless the text were worded in such general terms as to be devoid of any practical value'.

11 League of Nations, *Fiscal Committee: Report to the Council on the Work of the First Session of the Committe* (1929) C516.M.175.1929.II, p. 6.

12 League of Nations, *Fiscal Committee: Report to the Council on the Work of the Second Session of the Committe* (1930) C.340.M.140.1930.II p. 8-9.

Committee considered that proposals on these items might be adopted by a considerable number of states, if carefully formulated.

Clearly, the proposals were on items of immobile income, and hence without many distributive concerns. Public employees, interest on public debt and immovable property were considered, particularly at the time the report was drafted, to be closely economically related to the territory or sovereignty of the source of income. Such sources of income could, after all, best be taxed in the jurisdiction where taxation could best be administratively enforced. Perhaps multilateral agreement on these items was possible. However, the problem was that the classes of income were not all-inclusive: articles on items of mobile capital (dividends, interest) were absent from the work of the Fiscal Committee. Double taxation would, even if a plurilateral convention was signed, not be fully prevented.

At the third session of the League of Nations Fiscal Committee, the sub-committee presented its draft ('Draft A') to the Fiscal Committee. The draft included articles on immovable property, profits of an enterprise with a permanent establishment, (the seat of management of) maritime and air navigation enterprises, public loans, frontier workers, authors' rights, life annuities, salaries of public servants, and public pensions.[13] But the Fiscal Committee, even after making some amendments, was not very enthusiastic about the proposed draft convention:

> 'these proposals could not at present be accepted by other countries because the clauses of Draft A settled the position of both residents and non-residents, with the object of entirely preventing double taxation for both, so far as concerns the classes of income contemplated in the draft – an arrangement which would impose upon Governments, in respect of their own residents, obligations which they are not prepared to assume'.[14]

The Fiscal Committee itself therefore attempted to provide another solution, which it set out in 'Draft B', which would settle the issue of double taxation for non-residents ('natural and juristic persons not domiciled in [the High Contracting Parties'] territory') only. Articles 2 and 3 of Draft B set out that each state could tax the income of non-residents, except in relation to certain classes of income (that is: maritime or air navigation, business income not derived from a permanent establishment, public loans, frontier workers, author's rights and life annuities).[15] But discussing both drafts, the Committee:

---

13 See Appendix I to League of Nations, *Fiscal Committee: Report to the Council on the Work of the Third Session of the Committe* (1931) C.415.M.171.1931.II.A.

14 Id. at p. 3.

15 Id. at Appendix III.

> 'does not feel that it can reach a final decision at present. It seems necessary to reconsider whether there is any real possibility of an adequate number of accessions to either or both of these two types of convention'.[16]

In order to see whether either of the two conventions would be feasible, the Fiscal Committee considered to forward both drafts to the members of the League of Nations, requesting whether they could accept one of the drafts, and if not, to offer observations on them.[17] In the subsequent session of the Committee, however, no further mention was made of either of the proposals.[18]

Why did the members of the Committee feel unfavourable towards both proposals? An educated guess: both Draft A and B, relating to certain items of income only, lacked practical relevance, particularly given the political climate at the time. From the time the Committee began its work to the end of 1939, the number of general (and mostly bilateral) tax treaties increased from about 30 to 60.[19] The drafts, however, left much of the double taxation problem intact.[20] Draft B, in particular, related to non-residents only. Moreover, Draft A required states not to tax their residents on their worldwide income in relation to the classes of income identified, which prevented states to take a taxpayer's full income into account (e.g., for the purposes of progressive income tax rates). And as the drafts were proposed at the end of the 1930s, political tensions in Europe were rising. As pointed out by Picciotto, Britain in particular proved to be an obstacle in this regard:

> 'The British Treasury took the firm view that it could see no reason to sacrifice a penny of revenue in order to stimulate British and German firms to set up business in each other's countries, or to encourage individuals to speculate in buying foreign shares. On the contrary, double taxation was a welcome deterrent to such activities'.[21]

16 Id. at p. 4.
17 Id. at p. 5.
18 League of Nations, *Fiscal Committee: Report to the Council on the Work of the Fourth Session of the Committe* (1933) C.399.M.204.1933.II.A.
19 M.B. Carroll (1939), appendix II; at the end of 1939, there were 60.
20 This was already pointed out by the Fiscal Committee when the work on the plurilateral convention was initiated. League of Nations, *Fiscal Committee: Report to the Council on the Work of the Second Session of the Committe* (1930).
21 S. Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (Cambridge University Press Electronic ed. 1992) p. 25-26.

2.2.2 1943-1946: Emerging consensus under model bilateral tax conventions, a comparison of the London and Mexico Drafts

To achieve uniformity among states in an area where no generally accepted rules existed, and where a comprehensive multilateral tax convention seemed unachievable, the international community set out to develop non-binding model bilateral tax agreements. Three non-binding model treaties, those spoken of by T.S. Adams, (see 2.2.1) were adopted by a 1928 League of Nations meeting of government experts.[22] These models in turn formed the basis for the 1943-1946 Mexico and London Model Bilateral Tax Conventions (the 'London and Mexico Drafts').[23] And the 1963 OECD MTC is considered 'a modern version of the models of Mexico and London'.[24]

The Mexico and London Drafts originated from the work of the League of Nations that continued during the Second World War. A meeting was organised in Mexico, where the Latin American (capital-importing) countries, Canada and the US were represented. The resulting draft predicated almost entirely on the principle of taxation at source.[25] Shortly after the Second World War in 1946, however, the texts were re-examined by the full League of Nations Fiscal Committee, which primarily consisted of capital-exporting countries.[26] This led to the London Draft, which reasserted the principles developed in the pre-war League models, and was grounded on the principle of residence.

Now, it is worth examining these Mexico and London Drafts, primarily because they reiterated the conflict between source and residence states hinted at in the previous section, but also contained some overlapping principles. Where did these conventions fundamentally differ and overlap? How close were states on agreeing on a multilateral treaty, as argued by Adams (see section 2.2.1)? As we will see, the main differences between the drafts, and therefore between the capital import and capital export countries of the post-war world, existed on items of mobile income. The following table summarises the results.

---

22 League of Nations, *1928 Report by the General Meeting of Governmental Experts on Double Taxation and Fiscal Evasion* (1928).

23 League of Nations, *Fiscal Committee: London and Mexico Model Tax Conventions Commentary and Text* (1946) C.88.M.88.1946.II.A, discussed in S. Picciotto (1992) p. 49-53.

24 A.J. Van Den Tempel, *Relief from Double Taxation: A Comparison of the Work of the League of Nations and of the Organisation for Economic Cooperation and Development* (IBFD 1967) p. 45.

25 M.B. Carroll, *International Tax Law*, 2 The International Lawyer 692 (1968) p. 708.

26 M. Kobetsky, *International Taxation of Permanent Establishments: Principles and Policy* (Cambridge University Press 2011) p. 143.

Table 1: A comparison between the Mexico and London drafts[27]

Item of income	*Mexico Draft*	*London Draft*	*Observations*
Interest	Source[28]	Residence[29]	No overlap
Dividends	Source[30]	Residence (unless 'dominant participation')[31]	No overlap
Royalties	Source[32]	Residence (unless affiliated companies)[33]	No overlap
Capital gains - real property	Source[34]	Source[35]	Overlap
Other capital gains	No rule	Residence, unless 'appertaining to enterprise'[36]	N.A.
Business income	'Where the business or activity is carried out'; in the case of isolated or occasional transactions and no PE: residence[37]	If PE: location of PE; if no PE: residence[38]	Overlap to a remarkably high degree
Real Property (and mining royalties)	Source[39]	Source[40]	Overlap

27 The comparison is based on League of Nations, *London and Mexico Model Tax Conventions Commentary and Text (1946)* (1946), and draws from M.B. Carroll (1968) (which contains such a comparison) and A.J. Van Den Tempel (1967).
28 Art. IX of the Mexico Draft.
29 Art. IX of the London Draft.
30 Art. IX of the Mexico Draft
31 Art. VI of the London Draft
32 Art. X of the Mexico Draft.
33 Art. X of the London Draft.
34 Art. XII of the Mexico Draft.
35 Art. XII of the London Draft.
36 Art. XII of the London Draft.
37 Art. IV of the Mexico Draft.
38 Art. IV of the London Draft.
39 Art. II and art. X of the Mexico Draft.
40 Art. II and X of the London Draft.

Item of income	*Mexico Draft*	*London Draft*	*Observations*
Employment	Working state, but in residence state when employment does not exceed 183 days in working state[41]	Working state, but in residence state when employment does not exceed 183 days in working state[42]	Overlap
Pensions	Residence[43]	Residence[44]	Overlap
Provisions on the allocation of business income	Similar[45]	Similar[46]	Overlap

As the table shows, overlap existed for almost all types of active income of individuals, as well as for income from real estate. Taxing real property in the source state is practical, as real estate is immobile: hence the overlap. It can only be guessed at why little distributive concerns existed on the other points: perhaps the presence of convincing pragmatic as well as theoretical arguments pointed at an existing preference for residence taxation. Residence taxation for the active income of individuals makes sense: an individual's place of residence is relatively easy to define, and it enables the taking into account of an individual's 'ability to pay' under a worldwide tax system. Moreover, taxation at residence overlaps with political allegiance, therefore functioning as a proxy for the maxim 'no taxation without representation'.[47] Finally, and perhaps most importantly, the residence state is best placed to enforce taxation, as it has the best means to administer taxes.

Rules for the allocation of active business income, as embodied by the permanent establishment concept and the arm's length standard, presumably had no obvious winners and losers, given the broad terms used for of both notions. The relevance of this observation will be explained in Chapter 5. But the point is that the comparison between the London and Mexico Drafts suggests that a compromise between creditor and debtor countries was not far-off, even though the Mexico draft employed a lower threshold for the

41 Art. VII of the Mexico Draft.
42 Art. VI of the London Draft.
43 Art. XI of the Mexico Draft.
44 Art. XI of the London Draft.
45 Art. VI of the Protocol to the Mexico Draft
46 Art. VI of the Protocol to the London Draft.
47 See e.g. R.S. Avi-Yonah, *International Tax as International Law: an Analysis of the International Tax Regime* (Cambridge University Press 2007) p. 11.

source country to tax business income.[48] Under both conventions, residence countries were given the right to tax residents on their worldwide income, whilst the concept of a permanent establishment or 'business activity' triggered taxation at source, provided this was limited to the profits of the establishment.[49] The permanent establishment concept, perhaps due to the pressure placed on the capital importing states by the big capital exporting countries of the time such as the US,[50] ultimately survived in the later OECD Models. As Kobetsky notes, the Fiscal Committee in London rejected the capital-importing countries' arguments for a lower threshold,[51] and considered that the concept of the permanent establishment, which had also played a part in the Committee's earlier work on the 1928 Draft Models,[52] already featured in nearly all tax treaties on business income.[53]

Likewise, under both conventions, the method used to allocate business income between permanent establishments[54] was considerably similar. It was primarily based on the rules set out in the 1935 Allocation Convention as developed by the League of Nations Fiscal Committee between 1929 and 1935.[55] As the 1928 Models had left open the question how profits were to be allocated between permanent establishments, the Fiscal Committee addressed this issue by means of a draft convention. Interestingly, this convention was multilateral, and was surprisingly close to be readied by the Fiscal Committee for signature. The Fiscal Committee held that:

48 The Mexico Draft employed the concept of the place of the 'business activity' instead of the 'location of the permanent establishment'.

49 M. Kobetsky (2011) p. 143-149.

50 Id. at p. 149-150.

51 Reasons can be found at p. 13-14 of League of Nations, *London and Mexico Model Tax Conventions Commentary and Text (1946)* (1946).

52 M. Kobetsky (2011) p. 144. The permanent establishment concept was already established in the 1927 proposal of the Technical Experts to the Financial Committee: League of Nations, *1927 Report on Double Taxation* (1927). To this proposal, two conventions (Conventions 1b and 1c) were later added by the Meeting of Governmental Experts in: League of Nations, *1928 Report by the General Meeting of Governmental Experts on Double Taxation and Fiscal Evasion* (1928). All three proposed model conventions of 1927 (1a, 1b and 1c) contained the same concept of a permanent establishment, which consisted of a list of undertakings, that for example included 'real centres of management, branches, mines and oilfields, factories, workshops, agencies, warehouses, offices and depots'.

53 League of Nations, *London and Mexico Model Tax Conventions Commentary and Text (1946)* (1946), p. 14.

54 The problem of the profit allocation between affiliated companies (i.e., the setting of transfer prices between associated enterprises) was less well recognised, as each affiliate was recognised as a separate legal person, for which its accounts could 'simply' be used. see: S. Picciotto (1992) p. 27 and also W. Schön, *International Tax Coordination for a Second-Best World (Part III)*, 2 World Tax Journal 227 (2010) p. 231.

55 League of Nations, 1935 Revised Draft Convention for the Allocation of Business Income between States for the Purposes of Taxation, printed in: League of Nations, *Fiscal Committee: Report to the Council on the Fifth Session of the Committee* (1935) C.252.M.124.1935.II.A, Annex I.

> 'in view of its limited scope, and of the intentional restriction of its provisions to the fundamental rules, this draft by itself might, in the Committee's opinion, form the basis of a multilateral Convention. The Committee therefore proposes to the Council that it should be transmitted to Governments, with a request that they express their opinion thereof'.[56]

However, governments' responses were not that definitely in favour. Only a few states declared themselves ready to sign a multilateral convention. Consequently, the Committee considered that more progress would likely be achieved by means of bilateral agreements. This was considered not to be problematic, as most of the draft's core principles were generally approved, and a model convention, insofar as it constituted the basis for bilateral agreements:

> 'creates automatically a uniformity of practice and legislation, while, on the other hand, inasmuch as it may be modified in any bilateral agreement reached, it is sufficiently elastic to be adapted to the different conditions obtaining in different countries or pairs of countries'.[57]

In this regard, the Committee was undeniably right: the arm's length standard has featured in the London and Mexico Drafts as well as in all later OECD Models. Hence, it seems that substantial multilateral consensus on the arm's length principle as well as on the permanent establishment standards existed.

So, the comparison shows that there are many rules of international tax law that were (and are) de-facto multilateral. The similarities between the London and Mexico Models suggest that multilateral consensus existed, at least for compromises on most immobile items of income. And it goes without saying that the allocation rules on which overlap existed under the London and Mexico drafts, continue to be used in a similar form worldwide in both bilateral tax treaties as well as in the OECD and UN Models,[58] with the arm's length standard and the permanent establishment concept as the most obvious demonstrations. It has even been argued that such concepts are part of an

56 League of Nations, Fiscal Committee: Report to the Council on the Work of the Fourth Session of the Committe (1933), p. 2.

57 League of Nations, Fiscal Committee: Report to the Council on the Fifth Session of the Committee (1935) p. 3-4.

58 Y. Brauner, An International Tax Regime in Crystallization, 56 Tax Law Review 259 (2003) sec. 2 ('Rules that are more purely international, like the source rules and the transfer pricing rules, seem to be closest to harmonization already').

'international tax language'[59] that practitioners all over the world recognise and apply.

2.2.3 1946-1992: Impracticalities of further efforts for a comprehensive multilateral tax treaty

There was another effort for a comprehensive multilateral solution to the avoidance of double taxation in the period after the Second World War, that is, in the Cold War and the decolonization period. But again, it proved difficult to achieve multilateral consensus on important tax policy issues among a greater group of states.[60] In 1958, but this time by the OEEC's (Organization for European Economic Cooperation, the OECD's predecessor) Fiscal Committee, another effort was made to draft a multilateral convention.[61] The International Chamber of Commerce, by means of its 1955 Tokyo congress, urged the international experts of the OEEC Fiscal Committee to consider drafting a multilateral tax treaty.[62] This multilateral treaty 'would have the great advantage of securing uniformity of principles and practice in double taxation matters in a vast area of world trade'.[63] The suggestion seemed welcome: all of the OEEC's member countries wanted to 'prevent further disintegration of international fiscal law and come to a greater measure of uniformity in its structure, rules and concepts'.[64]

But again, practical arguments prevented the formulation of a comprehensive multilateral convention. Around the time the Tokyo congress tried to intervene, the number of bilateral tax conventions concluded had risen rapidly (to about 130 in 1956).[65] Perhaps because of this, the Fiscal Committee proposed that it would first consider the drafting of a model bilateral tax convention, which could then function as a basis for proceeding towards harmonization by a multilateral convention. This seems a logical step: a model

59 K. Vogel, The Influence of the OECD Commentaries on Treaty Interpretation, 54 Bulletin for International Fiscal Documentation 612 (2000) p. 616: 'If a term – by which I mean not only individual words, but also coherent expressions or sentences – was already used by the Draft Convention of 1963 and explained by its Commentaries, I suggest that this term be considered to have become in the course of time part of the 'international tax language''.

60 Also within the UN, the UN's Fiscal Committee, working under the UN's Economic and Social Council, was unable to achieve agreement. S. Picciotto (1992) 48.

61 According to van den Tempel, the League of Nations was in fact 'hardly less western in character than the OECD'. See A.J. Van Den Tempel (1967) p. 9.

62 OEEC, Report by the Fiscal Committee on its Activities (1958) C(58) 118, part I, par. 16.

63 A.J. Van Den Tempel (1967), p. 10.

64 Id. at p. 13.

65 See OEEC, 1958 Report by the Fiscal Committee on its Activities (I) (1958) (the figure in par. 7) as well as Appendix A of this book (see on this Ch. 3.2), which can be found online at DANS, the Netherlands Institute for Permanent Access to Digital Research Resources: http://dx.doi.org/10.17026/dans-x22-k8wh.

bilateral tax treaty was achievable, whereas, in the words of the Committee, it was impossible to envisage how long it would take to implement a multilateral convention.[66]

It was not until 1992 that the OECD Committee on Fiscal Affairs, in the introduction to the OECD MTC, finally abandoned the efforts for a multilateral convention.[67] A multilateral agreement was, given the success of the OECD MTC, no longer considered practicable. It held:

> 'Despite these two conventions [the Nordic Convention and the Convention on Mutual Administrative Assistance in Tax Matters], there are no reasons to believe that the elaboration and conclusion of a multilateral tax convention involving all Member countries could now be considered a practicable solution'.[68]

2.3 CONCLUSION

From the start, the goal of the negotiators of the current system for the avoidance of double taxation has been to achieve a comprehensive multilateral tax treaty. But despite such efforts, states failed to reach agreement.

Reasons for the failure of reaching agreement on a comprehensive multilateral tax treaty were likely a deadly mix of strongly diverging interests, bad timing and the increasingly reducing relevance of the multilateral tax treaty. Indeed, whilst the Chamber of Commerce kept urging negotiators to adopt a multilateral treaty for international tax matters, bilateralism flourished. In the light of the quickly expanding network of bilateral tax treaties, an 'old' style multilateral tax treaty became increasingly unfeasible and impracticable.

So, the system of bilateral treaties that emerged was considered a kind of second-best solution to the comprehensive multilateral tax treaty that might one day prove feasible. It is in this light that an effort for a new multilateral treaty in the area of international taxation has to be understood.

On the one hand, any effort for a multilateral agreement for international taxation has to take the bilateral tax treaty network as a given. As Schön phrases it: 'any new move in tax coordination should take the existence of the current network of double taxation treaties as a proof of procedural success of the bilateral concept'.[69] And indeed, this might mean that full comprehens-

66 Id. at par. 14.

67 In the 1963 report of the Fiscal Committee on the draft Convention for the avoidance of double taxation, the ambition to draft a multilateral convention was reiterated, but it seems that no further action was taken. OECD, OECD, Report of the Fiscal Committee on the Draft Convention for the Avoidance of Double Taxation with respect to Taxes on Income and Capital Among the Member Countries of the O.E.C.D. (1963) C(63) 87, Part I, p. 6.

68 OECD, Introduction, in: Model Tax Convention on Income and on Capital: Condensed Version (2014), par. 40 (emphasis added).

69 W. Schön, International Tax Coordination for a Second Best World (Part I), 1 World Tax Journal 67 (2009) p. 86.

ive multilateralism in the field of international taxation might never be achieved. For instance, according to Vann, it is not possible for the bilateral network simply to evolve into a multilateral treaty.[70] He says:

> '[A]lthough it is possible to refine the actual terms of the OECD Model and to elaborate the Commentary so as to cover new cases as they arise, the time has passed for radical revision within the current bilateral framework (…) In other words, the OECD Model is the culmination of 50 years of development'.[71]

On the other hand, loosely coordinated on by non-binding bilateral tax treaty models such as the OECD MTC, multilateral consensus has not been absent from the system of bilateral tax treaties. Indeed, history shows that disagreement between states existed primarily in relation to items of mobile income. On source rules distributing items of income that could be considered immobile in the pre- and interwar economies, such as interest on public loans, public pensions, frontier workers and immovable property (e.g., in the proposals discussed in section 2.2.1) and later on employment and pensions (see, e.g., the table in 2.2.2), a form of multilateral consensus seemed to exist. And even today, multilateral consensus, expressed in model tax conventions, has been particularly strong in the field of concepts. The permanent establishment concept and the principle to price transactions at arm's length can be called part of the 'international tax language' that practitioners all over the world recognise and apply.

This finding implies that a distinction between bilateralism and multilateralism in the area of international tax cooperation should not necessarily be sharp. It has been argued that the 'weak' multilateralism of Action 15's BEPS Convention will, in the long run, end up in a full multilateral tax treaty to replace all bilateral treaties.[72] That is, perhaps, a premature conclusion. On the other hand, Avery Jones has argued that 'what countries really do is to sign up to variations on the Model Treaty. Practitioners would save a lot of time if treaties were presented as variations to the Model Treaty; we would not need to read the rest to see whether it has been changed'.[73] It follows that the existing network of bilateral treaties can be interpreted as a (long) list of reservations on the OECD MTC – from this perspective, the existing system can be seen as essentially multilateral in the 'strong' sense. In any case, this dichotomy of

70 R.J. Vann, A Model Tax Treaty for the Asian-Pacific Region? (Part I), 45 Bulletin for International Fiscal Documentation 99 (1991) p. 100.

71 Id. at p. 103. Likewise, Graetz has argued that it has become 'extremely difficult to move in the tax area toward the kind of multilateral negotiating practice that, for example, occurs through the General Agreement on Tariffs and Trade (GATT) in the international trade arena'. M.J. Graetz and M.M. O'Hear (1997) p. 1107.

72 A. Miller and A. Kirkpatrick, The Use of Multilateral Instruments to Achieve the BEPS Action Plan Agenda, [2013] British Tax Review 682 (2013), at p. 686.

73 J.F. Avery Jones, The David R. Tillinghast Lecture: Are Tax Treaties Necessary?, 53 Tax Law Review 1 (1999), p. 6.

'weak' and 'strong' forms of multilateralism in the field of international tax law is a theme to which we will return.