International Tax Fall on Tax Sustainability and Justice

1923-2023: 100 Years of the League of Nations Report on Double Taxation

Edited by Giuseppe Marino

Milano University Press

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UNIVERSITÀ DEGLI STUDI DI MILANO
DIPARTIMENTO DI SCIENZE GIURIDICHE
"CESARE BECCARIA"

INTERNATIONAL TAX FALL ON TAX SUSTAINABILITY AND JUSTICE

1923-2023: 100 YEARS OF THE LEAGUE OF NATIONS REPORT ON DOUBLE TAXATION

During the Course of
Theory & Practice of International Tax Law

Prof. GIUSEPPE MARINO

Milano University Press

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AIPSDT

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CALENDAR

18
October

9-15-20-22 -27
November

01
December 2023

PARTICIPATION
Participation is via Zoom or in presence and is free upon registration

REGISTRATION
chiara.gianoncelli@unimi.it
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1st LECTURE
Wednesday 18th October 2023
H:16.30-18.30

AULA 420
Via Festa del Perdono, 3 - Milano

THE HISTORY OF INTERNATIONAL TAX TREATIES FROM THE US PERSPECTIVE

PROF.
REUVEN AVI-YONAH

The Irvin I. Cohn Professor of Law and Director of the International Tax LLM Program at the University of Michigan Law School

2nd LECTURE
Thursday 9th November 2023
H:16.30-18.30

AULA MARINUCCI
Via Festa del Perdono, 3 - Milano

THE HISTORY OF INTERNATIONAL TAX TREATIES FROM THE DUTCH PERSPECTIVE

PROF.
PETER ESSERS

Professor of Tax Law at the University of Tilburg

3rd LECTURE
Wednesday 15th November 2023
H:15.30-17.30

AULA MARINUCCI
Via Festa del Perdono, 3 - Milano

THE HISTORY OF INTERNATIONAL TAX TREATIES FROM THE UK PERSPECTIVE

PROF.
PHILIP BAKER

Senior Visiting Research Fellow, Institute for Advanced Legal Studies, London University

Visiting Professor at the University of Oxford

4th LECTURE
Monday 20th November 2023
H:15.30-17.30

AULA SCARPELLI
Via Festa del Perdono, 3 - Milano

THE HISTORY OF INTERNATIONAL TAX TREATIES FROM THE BRAZILIAN PERSPECTIVE

PROF.
LUÌS EDOARDO SCHOUERI

Professor Titular de Direito Tributário da Facultade de Direito da Universidade de Sao Paulo

5rd LECTURE
Wednesday 22nd November 2023
H:16.30-18.30

AULA 420
Via Festa del Perdono, 3 - Milano

THE HISTORY OF INTERNATIONAL TAX TREATIES FROM THE ITALIAN PERSPECTIVE

PROF.
GUGLIELMO MAISTO

Professor of Tax Law at the Università Cattolica del Sacro Cuore, Piacenza Campus

6th LECTURE
Monday 27th November 2023 until
Tuesday 30th November 2023

VIA ZOOM

THE MAIN ACTORS OF THE INTERNATIONAL TAX POLICY

PROF.
RAFFAELE RUSSO

Senior Fellow at ACTL, University of Amsterdam

4 LECTURES

WEBINAR & SEMINAR
Friday 1st December 2023
H: 9.00-16.00
VIA ZOOM / AULA SCARPELLI

FROM DOUBLE TAXATION TO DOUBLE NON TAXATION: THE GLOBAL MINIMUM TAX

DISCUSSANTS

FABRIZIO AMATUCCI
ANDREA BALLANCIN
PAOLA BARTOLI
GIORGIO BIGONI
TOMMASO DI TANNO
MICHAEL LENNARD
MAURIZIO LOGOZZO
ANTONIO MARINELLO
PIERPAOLO ROSSI MACCANICO
RAFFAELE RUSSO
MARIA SACCOMANNI
NICOLA SARTORI
LUISA SCARCELLA
PIETRO SELICATO
LAURA STEFANELLI
IVAN VACCA
GIUSEPPE ZIZZO

DSG
Beccaria

Introduction

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This is an unusual book.

The reason is linked to its origin, being a series of seminars held at the Faculty of Law of the University of Milan during the Fall 2023, under the title "International Tax Fall on Tax Sustainability and Justice" to celebrate 1923-2023: 100 years of the League of Nations Report on Double Taxation.

The idea was to invite four eminent scholars to replace the four economists coming from the United States, the United Kingdom, the Netherlands and Italy, who drafted that Report, and to hear from them where the work done 100 years ago has conducted their respective countries and if they believe the work be still actual.

Hence, prof. Edwin Seligman from the United States has been replaced by prof. Reuven Avi-Yonah, prof. Josiah Stamp from the United Kingdom has been replaced by prof. Philip Baker, prof. Gerardus Bruins from the Netherlands has been replaced by prof. Peter Essers, and, finally, prof. Luigi Einaudi from Italy has been replaced by prof. Guglielmo Maisto. The voice of prof. Luís Schoueri from Brazil has been added to cover the continents that have been mostly influenced insofar by the Report. I wish to thank them all for the great honor they made to the University of Milan with their presence.

Nevertheless, the International Fall on Tax Sustainability and Justice would not be complete without the insights of Raffaele Russo, who has worked with the IBFD in Amsterdam, the OECD in Paris and the Italian Ministry of Economy and Finance in Rome. He has complemented the international tax scenario with precious information on future trends. And, last but not least, some other colleagues have outlined the Global Minimum Tax as a compromise between double taxation and double non taxation.

The originality of this book is with the language, dynamic, modern, as a podcast would be. All the speeches have been transcribed, and the editing has been a double check of transcriptions. The result seems to be more attractive since the impression is to participate live in the seminars and to bring, by reading, a feeling of genuineness, freshness that cannot be found in a book collecting reasoned writings.

It is just an experiment, nothing else, more in line with the way to debate within social networks. Forgive me if the tentative fails, just my fault and not of the colleagues that have participated in the seminars at the University of Milan to whom I address my deepest gratitude. Finally, a special thank goes to my young fellows Andrea Monaci, Francesca Nizzoli and Benedetta Maria Migliorati for the tremendous job of transcription, hope that through this experience they know more about international taxation.

The history of international tax treaties from the US perspective (18th October 2023)*

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DOI: 10.54103/milanoup.243.c488

Abstract

The first tax treaty of the United States, signed with France in 1932 and ratified in 1935, reflects the 1928 League of Nations model, with significant differences due mainly to the different tax structures of the two countries: a "global" jurisdiction for the United States and a "territorial" one for France. This treaty represents an important precedent for subsequent agreements between countries with different tax regimes and a key step in the development of the modern international tax treaties system.

Keywords: tax treaty; United States; France; League of Nations.

In 1945, the US negotiated a tax treaty with the UK[1]. This treaty was based on the London model, which was the last contribution of the League of Nations to international tax. Since it was a treaty between the two most important economies in the world, it precipitated the post-war rise in tax treaty negotiations. It also was similar to the first OECD model of 1963. In general, with a few exceptions (citizenship-based taxation, residence of corporations, limitation on benefits) the US models of 1981, 1996, 2006 and 2016 closely resemble the OECD model. This is not surprising given the close US involvement in OECD from its inception. This paper will however focus on another US treaty, the first one, concluded with France in 1932 and ratified in 1935[2]. This treaty is interesting as

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* This contribution has been published as Guest Editorial on *Intertax,* Volume 52, Issue 1, 2024, and it is here offered with the kind permission of the Editor-in-Chief of the Review.

1 US-UK tax treaty (1945).

2 US-France treaty (1932). The only other pre-1945 US tax treaty was with Canada (1942). See Mitchell B. Carroll, *Evolution of U.S. Treaties to Avoid Double Taxation of Income - Part II*, 3 *International Lawyer* 12 (1969).

it follows the League of Nations model of 1928 albeit with significant differences. It is also a treaty between a global jurisdiction and (at the time) a purely territorial one. This meant that while reductions in French taxes benefited the US fisc because they resulted in lower foreign tax credits (but the overall tax level was the same), French investors into the US could derive some types of income (*e.g.*, royalties) without any tax being imposed by either country. This may also explain why the treaty was more limited in scope than the League of Nations model.

Mitchell Carroll, who was active in negotiating the treaty, explains the circumstances as follows.

> A foreign corporation with a branch in France had been subjected to the tax that was withheld from dividends paid by French companies, but on the same proportion of dividends distributed at its head office abroad as its assets in France bore to total assets. In the 1920's the Boston Blacking Company of Massachusetts, in order to obviate the accounting adjustments necessitated by devaluations of the franc, had exchanged the assets of its branch in Paris for registered shares in a newly formed French company. This tax was presumably no longer due except when the French company distributed dividends. Nevertheless, the Bureau de l'Enregistrement, which administered the levy, served a "sommation" on the American corporation to pay the tax. The company contested the assessment but the fisc was upheld by the Tribunal de la Seine.

The United States company appealed to the Court of Cassation. Encouraged by the decision of the lower Court, the Bureau enquired into the relations between various French companies and their respective foreign parent corporations, which were for the most part in the United Kingdom, the Netherlands, Belgium, Germany, Switzerland or in the United States. Claims were made against a number of our largest corporations. The assessment against one of them was based on the assertion that the French subsidiary was "its emanation pure and simple". Another company objected strenuously, and in order to establish a basis for bargaining, the fisc obtained from Moody's the figures of its distributions over the previous 30 years and computed thereon the tax and penalties. The total of the claims was enormous. The American Embassy in Paris forwarded protests to the Department of State' in Washington.

When former Senator Walter Evans Edge was leaving Washington in the autumn of 1929 to serve as Ambassador to France, an official in the State Department asked the writer to brief him on the situation. Early in 1930 the claims were mounting so high and the protests were becoming so bitter that Ambassador Edge cabled to the Department of State to send "Carroll or other officials" to Paris in order to endeavor to persuade the French officials to desist.

At initial conferences in the Palais du Louvre, in May 1930, the Minister of the Budget, Mr. Germain Martin and French officials refused to settle the

matter unilaterally. They insisted on negotiating a bilateral treaty with reciprocal concessions, which would set a precedent to invoke vis-à-vis other interested governments.

Negotiations were suspended in September, 1930, because of the French request for a reduction of our custom duties on wines. After a change in the French Cabinet, the Treaty was signed on April 27, 1932. The United States Senate gave its advice and consent and the President promptly ratified on July 25, 1932; but France delayed, only ratifying the treaty in 1935[3].

The treaty contains ten Articles and a protocol. In what follows, I will compare these to the current OECD model to show what was included and what was missing.

Articles 1-4 of the OECD model are missing, but the protocol defines the taxes that are covered (like Article 2 of the OECD model). The protocol also contains a "saving clause" limited to deductions, credits, and exemptions under the domestic law of either state. This is important because it meant that the French territorial system applies even if the treaty prevents source taxation. For example, a French enterprise deriving active income from the US without a PE would not be taxed by either state.

The protocol also defines PE in a similar manner to Article 5 of the OECD model, including dependent agents and excluding independent agents. The protocol defines enterprise of a contracting state in a way similar to Article 3 of the OECD model. Finally, the protocol defines the geographic scope of the treaty like Article 3, excluding territories and colonies.

There is no limitation of the treaty to residents (like Article 1 of the OECD model) and therefore also no definition of resident (like Article 4). Presumably that means that treaty shopping was potentially unlimited.

Article 1 concerns taxation of business income, like Article 7 of the OECD model. It limits taxation by the source state to profits allocable to a permanent establishment in the other state. Purchasing is explicitly excluded from the scope of a PE, like in Article 5 of the OECD model.

Article 2 defines the obligations of a PE of either country to file tax returns, which is not found in the OECD model but follows from the right of treaty countries to tax PEs.

Article 3 prevents source taxation of aircraft (like Article 8 of the OECD model), but not shipping, which is remarkable given that shipping was much more common than air travel in 1932.

According to Article 4, the most important innovation of the treaty, when an American enterprise, by reason of its participation in the management or capital of a French enterprise, makes or imposes on the latter, in their commercial or financial relations, conditions different from those which would be made

3 Carroll, *supra*.

with a third enterprise, any profits which should normally have appeared in the balance sheet of the French enterprise, but which have been, in this manner, diverted to the American enterprise, are subject to the measures of appeal applicable in the case of the tax on industrial and commercial profits, incorporated in the taxable profits of the French enterprise.

The same principle applies *mutatis mutandis* in the event that profits are diverted from an American enterprise to a French enterprise.

As far as I know this is the first appearance of the arm's length standard (ALS) in a tax treaty. It precedes the US regulation embodying the ALS (1935) and the studies by Mitchell Carroll for the League of Nations that led to the inclusion of what is now Article 9 in the model[4].

This was a major innovation, and in my mind a highly problematic one, because it prevented the League from adopting formulary apportionment (FA) as suggested by the four economists in 1923 (method three of the 1923 report). Carroll was familiar with FA as practiced by US states but explicitly rejected it.

The ALS benefited both states even under the French territorial system, aiming to prevent double source-to-source taxation. However, even in 1932, it was doubtful that comparable cases could be found, resulting in a significant potential for double non-taxation and endless controversies compared to the FA.

There was already litigation on this subject in the US and it would just increase over time[5]. In my opinion, the inclusion of the ALS in the League and OECD models was mistaken from the start, and it was only in 2021 that the OECD began to rectify this mistake.

Article 5 addresses taxation of securities attributable to a PE, and it provides for a lower rate of tax on dividends or interest deemed to be distributed by the PE (set at 75% of the normal French rate, based on the normal pattern of distribution of dividends). This Article only applies to US corporations with French PEs, not to French corporations with US PEs, because France would not tax this income. This is an interesting early example of a non-reciprocal treaty provision between countries with fundamentally different tax regimes.

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4 See Art. 45-1(c) of Reg. 86 (1935) (Revenue Act of 1934). The entire regulation is quoted in *Essex Broadcasters, Inc. v. Commissioner,* 2 T.C. 523, 528 (1943). Before that it was unclear on what basis the IRS could reallocate income between related corporations, as it was allowed to do since 1928. Revenue Act of 1928, ch. 852, section 45, 45 Stat. 806 (1928) (mostly identical to the first sentence of current section 482). Before 1928, the IRS could require consolidation of foreign corporations with their US parents.

5 See, *e.g.*, *Asiatic Petroleum Co. v. Commissioner, 31 B.T.A. 1152, 1159 (1935)* (stating that a sale was not "arm's length" but not focusing on this issue); aff'd, *79 F.2d 234*. For cases immediately after the adoption of the ALS see *G.U.R. Co. v. Commissioner, 41 B.T.A. 223 (1940)* (sale of stock at seven times its market value not arm's length); aff'd, *117 F.2d 187, National Securities Corp. v. Commissioner, 137 F.2d 600 (3rd Cir. 1943);* cert. denied *320 U.S. 794*. This leading case for the application of section 45 to tax-free transfers to corporations, surveys the history of section 45 but does not mention the ALS.

The later adoption of mandatory reciprocity in the OECD model was from this perspective a mistake. It is also similar to the current US branch profits tax (1986). As Carroll explains, this Article addressed the issue that was the motivation for the treaty[6].

Article 6 provides for full taxation on dividends and interest paid by a French subsidiary to a US parent. This Article is also not reciprocal, because France would not tax dividends and interest paid by a US subsidiary to a French parent.

Article 7 provides for an exemption for wages paid by a contracting state to its citizens located in the other state. In practice this would only limit French taxation of US citizens in France. This is like the current protection of diplomats under Article 19 of the OECD model.

Article 8 provides an exemption for war pensions, like Article 18 of the OECD model. Article 9 provides for a similar exemption for private pensions and annuities.

Importantly, Article 9 provides for exemption from source taxation of amounts paid as consideration for the right to use patents, secret processes and formulas, trademarks and other analogous rights and Income received as copyright royalties. While this provision is reciprocal, in practice it would mean US taxation of royalties derived from France, but double non-taxation of royalties derived from the US. It is like Article 12 of the OECD model.

Finally, Article 10 provides for entry into effect upon ratification, like Article 31 of the OECD model.

Overall, the treaty contains provisions similar to Articles 2, 3, 5, 7, 8, 9, 10, 11, 12, 14, 15, 18, 19 and 31 of the OECD model. It does not contain any provisions like Articles 1, 4, 6, 13, 23, 24, 25 or 26. Presumably, in those cases the domestic laws would apply, *e.g.*, to provide a foreign tax credit in the US and an exemption in France. The treaty also does not limit source taxation of dividends, interest, rents, and capital gains of individuals. The focus is on taxation of corporations (including PEs) and on royalties. This probably reflects the dominance of FDI and the relative unimportance of portfolio investment.

Overall, the treaty reflects the 1923 compromise (the benefits principle) of taxing active income at source (subject to the PE and for the first time the ALS limits) and passive income at residence. But unlike the 1923 report it allows for double non-taxation, because it reflects the French exemption system. The French and other territorial countries rejected the 1923 report because it did not allow for exemption as a method to alleviate double taxation. The treaty therefore benefited the US by reducing foreign tax credits for dividends, interest, and royalties, but in the case of France it mostly benefited French investors.

Despite its limitations, the 1932 US-France treaty covered the most important areas to both countries, and it proved that a treaty can be negotiated

6 Carroll, *supra*.

between a global and a territorial country in a way that benefited both. It was thus an important precedent for the post war treaties between capital exporting countries that tended to be global and capital importing countries that tended to be territorial. But its enduring global importance derives from the first adoption of the ALS, with fateful results that are felt to this day (see Pillar 1 Amount B and the endless transfer pricing litigation)[7].

7 See generally Reuven Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, 15 *Virginia Tax Rev.* 89 (1995).

The history of international tax treaties from the Dutch perspective (9th November 2023)

Peter Essers
University of Tilburg

DOI: 10.54103/milanoup.243.c489

Abstract

The evolution of Dutch tax treaty law between the 19th and 20th centuries offers a unique perspective on the international scene. In the period between 1845 and 1904, the historical competition between France and Germany, both countries eager to consolidate their position and establish privileged economic relations with Belgium and the Netherlands, inevitably had an impact on tax policy. Germany attempted to assimilate the Dutch tax system, which today we would define as a tax haven, to its own, in the hope of a future economic union. After the Second World War, under the guidance of the economist Gijsbert Bruins, Dutch tax policy underwent a radical transformation, culminating in what is now the Base Erosion and Profit Shifting (BEPS) Project, through which the Netherlands became an active supporter of the fight against tax avoidance, regaining centrality and leadership in global tax regulation.

Keywords: Dutch tax treaty law; tax haven; BEPS Project; tax avoidance; global tax regulation.

[Prof. Marino]

Good afternoon, everyone, thank you for being here, all the students, friends, and colleagues, in present and via zoom from other places, and other universities. It is a great pleasure and honor to have with us this afternoon Prof. Peter Essers of the University of Tilburg in the Netherlands. Peter is an old friend, and I would also say a mentor because he has corrected a lot of papers from my end. He is also a tax law Prof., as well as a Senator of the Dutch Parliament. So, he has the sensibility to talk about tax law but also what is behind tax law, the political approach to taxation, and behind the political approach to taxation is

also the personal approach to the political issues. You will be hearing how the personalities of Professors and eminent scholars, the growth, the history of the Dutch tax treaty policies is important in order to understand why a country, a small country is a big country for international taxation. And we always look at the Netherlands with a lot of curiosity, I would say also sometimes with a lot of ways to compete, but without having the same capability to compete with the Dutch tax system. And we will be listening what is changing in the Dutch tax system in the past, I would say in the present years. So, thank you again for celebrating with us the century of the Report on Double Taxation. I would say simply that he is the descendant of Prof. Bruins, that was the Dutch Prof. of the four economists, jurists that composed the commission who drew the Report on Double Taxation. So, we were listening, a couple of weeks ago, to a descendant of Prof. Seligman and now it's the time to listen to Peter Essers as a descendant of Prof. Bruins. So, thank you again, Peter, for being with us, it is a great pleasure.

[Prof. Essers]

Thank you very much, it's really an honor to be here, and to speak about the history of national tax treaties from the Dutch perspective. I think it was an excellent idea, really, to celebrate 100-year anniversary of this committee of the League of Nations. If you read that report which is very precise, and with the BEPS reports, you can't believe what's happening, and that you can make a very broad clear lines, picture of international taxation at the level that there was not much study about international taxation, but there's still a classic. And for me, I think it's still an example that you should need to think about principles. And then you think about technical aspects to work them out. But yeah, now we have more and more the impression that we start already with very technical aspects. And then we start to think, what about the principles? Well, I would like to show you some elements of the Dutch treaty policy, of course, you only have two hours, so we can't be too detailed, I'll give you a broad big picture. And as my dear colleague said, you know, I've been in the Senate for 16 years in the Netherlands. It's not a full-time position. It's one day/one day and a half. At the end of the year, when we deal with the tax bill, then it's more, but on average is one day and a half. So, I could stay at university, otherwise I wouldn't have done it because I like to be an academic. I've been a tax Prof. since 1991. And I've been a member of the Senate, the period between 2003 - 2015 and then after a break of four years between 2019 and 2023. So, this year, I finalized my work as a Senator. When I started being a Senator for the Christian Democratic Party, out of 75 Senators, we were 23 Christian Democrat Senators. Now there are only six, just to give you an idea of changes happening in the Netherlands. I've been Chairman of the Finance Committee, and I dealt with practically every tax bill that was brought before the Senate. Just to give you an idea, I don't know much about the Senate in Italy. But in the Netherlands, the Senate is very

important because you do not have a Constitutional Court. So, you cannot test in the Netherlands tax bills against the Constitution. Because we are afraid for political interference of judges, that if you have no democratic estimation that might be dangerous. But others say, well, this is old fashioned, and we should have also a Constitutional Court, that is heavily debated. But because we don't have a Constitutional Court, the role of the Senate is more to deal with the taking care of the principles. So, we test the bills presented before the Senate against the constitutional principles, like equality, legal certainty. And we also look at their correspondence with international treaties. And that is the main task, I think, of the Senate, that we take over the position of a Constitutional Court. And the Senate is, of course, a political institution, but we try to be as neutral and objective in that perspective as possible. And this is especially important for tax laws, because then there is always a danger that there could be conflict with the equality principle, always the principle to have property. It is an enormous catastrophe that we don't have a Constitutional Court, although we have the Senate. If we have a bill pending, which is absolutely against the legal principles, we can, of course, always go to the European Court of Human Rights, because the treaty of human rights is positive law, and has a higher hierarchy than normal positive law. So Dutch persons can always go to the European Court of Justice in Strasbourg. Well, that's enough about this. What I would like to show you are the following aspects of the topic we are dealing with today, and my main question is, when we would have the four people of the committee as our guests now, what would be their reaction? Would they be proud? Would they be concerned? Or would they be very angry? Of course, what has happened with their report. That is the leading question I would like to ask, and we can't ask them anymore, they don't live anymore, but we might speculate a little bit about it. If you have questions, please interrupt me, no problem. I have enough to say, and we cannot deal with everything. But if you have some questions, please ask them. It is a combination of the general policy aspects. And also as Prof. Marino said, the personal aspects, because if you want to understand some developments, you should understand the people that were responsible for these developments, what are their characters, what have they experienced, and especially we will see that the influence of the First and Second World War has been very important for the topic we are dealing with. That goes for my country, the Netherlands, a small country with a lot of international relationships. But it also goes for those who were members of this committee. I would like to start with Prof. Bruins, because Bruins was the Dutch member of the committee, I will tell you something about his career and about his personality. And then I will start with the early history of Dutch tax treaty policy. And then I will introduce you with the characteristics of the treaties at that time, and especially the influence Germany had on these treaties. Germany was very much opposed against France at that time, and Germany wanted to conclude as much as tax treaties with its neighboring countries. Firstly, we look

at the period from 1845 till 1904, and then the period just before the Second World War. Then we have a closer look at the Dutch and German negotiators at that time, because at that time the Germany - Netherlands double tax treaty was negotiated. And on the Dutch side, the negotiator was J. Sinninghe Damsté who was the Director General of the Ministry of Finance. And at the German side, it was Herbert Dorn. He was an important civil servant working at the Ministry of Finance, and he became the Chairman of the German Finance Court. So, he was a very important person, but at that time, he was negotiator for the Ministry of Finance in Germany. Then we look at the tax treaty policy of the Netherlands after the Second World War until BEPS, the famous Base Erosion and Profit Shifting project. And then we look at some case law of the Dutch Supreme Court. Because it is very important to know what the Supreme Court judged about tax treaties. Because I know the Netherlands hasn't always received the best reputation, aggressive tax planning, always looking for the best sign for the taxpayers. That also has something to do with the attitude of the judges of the Supreme Court.

And then finally, the tax policy of the Netherlands after BEPS where we completely changed our attitudes, we, the Netherlands. Before BEPS, the Netherlands was rather aggressive, the bad boy in town. But after BEPS, we became the best boy we've ever seen. That's politics also.

Now let's start with Gijsbert Bruins. He was an important man in the Netherlands. He started as a lawyer, he had a Dissertation in Law at the University of Leiden, but then he went into the economic field, he became the professor of economy. He was an expert in monetary policy, coinage policy. That was a very important thing and if you remember, in the 20s, there was a huge issue about inflation in Germany, directly after the First World War. This was an important task for Bruins to be engaged with how to deal with hyperinflation. In 1921, he became member of the League of Nations, Economic and Financial Commission. But mind you, he was not a tax expert. He was an economist. Of course, he knew a lot about macro-economic effects of taxation. But he was not a tax law professor, knowing all the technical details and so on, he looked at the broad outlines. Well, in 1924, he went to the League of Nations, then to the issuance committee, the committee that dealt with monetary issues, and he spent a lot of time in Germany at the Deutsche Reichsbank. In 1926 he became commissioner of the Dutch Central Bank. And in 1934, he became a CEO of Dutch Clearing Institute, responsible for the international division and payment issues. Well, then, in 1940, he became the CEO of the Foreign Exchange Institute. And during the Second World War, he had a rather important resistance role, because he became Chairman of the Committee of the Dutch Association for Tax Science, and he was chairing a committee thinking about the new tax system after the war during the occupation of Germany. So, they were already thinking about what will happen if the Germans go out of the country.

Well, he ended his career as IMF governor for the Netherlands and South Africa. As you can see, he didn't have a very high age in 1948. In fact, he was meant to become the president of the Dutch Central Bank. But for some political reasons, that didn't work out. So that was his disappointment. But he had a very big influence on the tax system, after the war and before the war, and, of course, also on the international tax arena. Well, he, of course, had influence on the development of the Dutch tax treaties. First of all, in the period between 1845 and 1904, we had the dominance of France and Germany, they were opposing each other. And a very important target was Belgium because Belgium was rather rich, and both France and Germany wanted to be very close to Belgium. And the same was true for the Netherlands. They also wanted to be very close to Belgium. Because the Netherlands was that rich at that time, and they really needed Belgium to have more economic strength. Until 1830, Belgium and the Netherlands were one country. But in 1830, the Belgian said, we are fed up with this and we want independence, then the Netherlands tried to find arrangements with Belgium. That was in 1845, a mutual agreement, the assistance agreement between the Netherlands and Belgium. And the most important tax treaty at that time was the tax treaty between Prussia and Austria-Hungary. That was also a model for the Netherlands. Because the Netherlands wanted tax treaty with the neighboring countries, they were also very interested in a tax treaty with Germany, a tax treaty to prevent double taxation. Well, they already had these plans, in the beginning of the 20th century, but because of the First World War, that was delayed. You might know that the Netherlands was neutral in the First World War.

In 1917, we already had the first draft treaties, and they were passed by Sinninghe Damsté, the Director-General Taxation. And he was later judge of the Supreme Court, and he had worked out this tax treaty with the German negotiator Herbert Dorn. But they didn't find an official agreement. In 1926, Germans did another proposal, a counter proposal, and this was signed by the Dutch Embassy in Berlin. However, what was the issue? Before the Second World War, the Netherlands was the kind of tax haven, tax paradise. The taxation of capital and income from capital was very low, compared to the taxation of income from labor, so that the income tax on interest but also the net wealth taxes were, compared to Germany, very low. But even more important was that there was bank secrecy. So, the Netherlands did not give any information to other countries about the bank accounts of foreigners having accounts in the Netherlands. And that, of course, was not something the Germans very much likes because they saw millions of Deutsche Mark going into the Netherlands, and they couldn't tax it, because they didn't get the information. Well, Sinninghe Damsté, whom I will tell you something more about in the next slide, he was rather authoritarian personnel. He was in charge, and he was really also someone who had written a lot of books on taxation. He was an authority. No one dared to say something against him. But yeah, he would show keen in finding an

agreement with his German counterpart, Herbert Dorn, that he accepted the clause to exchange information on the accounts. And yeah, that would mean the ends of the bank secrecy in relation to the Netherlands and Germany. So, that was not very clever of Sinninghe Damsté. He couldn't expect a lot of political rumors because of this situation. And at a certain time, the taxpayers, the enterprises, they knew about this. And they started protesting, saying this is very bad for our competitive position. And they said, we have not been informed about these negotiations, that's really bad because it's our interest, and we are very much against it. The Council of State took over this protest, and said, this is not wise, we are now living in a situation of crisis in the 30s, we are not in a very favorable economic position, so we should not introduce this Article about exchange of information right now. And in the end, nothing happened. So, the treaty was not concluded officially. There were some treaties with Belgium, Sweden, UK, and Hungary, but no treaty with Germany. It lasted until the 50s before we had a treaty with Germany. However, in 1940, the Germans invaded the Netherlands as you know, and that is a very big story, because they had many goals, political goals, but also tax goals. And one of their tax goals was we want to make the Dutch tax system alike to the German tax system. They still had hopes that Germany and the Netherlands would be brother and sister nations, and that they would be members of the German nations. And you could not afford to have different taxes within this community of Germans. So, the idea of the Germans was that we would like to have the same tax system in the Netherlands compared to Germany. Well, there were a lot of negotiations about that. But in the end, civil servants, Dutch civil servants, they approved. The government was away in London, but the highest civil servants at the Ministry of Finance, in the end, agreed with the goals of the Germans to assimilate the Dutch tax system to the German tax system. I always wondered, first, why would they agree with that. But this assimilation was done in less than two years, where there was a complete change of the Dutch tax system. Which tax? Corporate income tax, personal income tax, dividend tax, there was no tax law that was get untouched. The reason for this attitude of the Dutch civil servants was frustration because they wanted to change the Dutch tax system already before the war, but they did not get a chance to do so. And if you've seen the example of the draft tax treaty with Germany, they have been member of the committee and they wanted to change, to modernize the Dutch tax system. But the second chamber, and the government didn't give them the opportunity. So, when the Nazis came in, they said, well, you've already developed excellent laws, and now the parliament isn't here anymore, you're not bothered by politicians anymore, we give you the freedom to do whatever you want. And of course, there were some discussions because they said, they, the Dutch civil servants said, we don't want any political interference in our tax laws. But on the other hand, the civil servants should also know that for the Germans, it was very important to keep the Dutch tax

administration intact, and not to interfere all kinds of Dutch National Socialists in the Dutch tax administration, because then those people would resist. But by keeping the Dutch tax administration intact, people would say, well, nothing has changed. So, the result was that the budgetary income increased tremendously. But what they forgot is that what is a good measure in peacetime is probably a very bad measure in wartime. Because Germans said, thank you very much, and they took all this extra money to Germany to finance the war with Russia. And I'll come back to that, there was much more that happened. First of all, is that the Germans said, hey, we don't have yet a treaty with the Netherlands on the relationship between the Netherlands and Germany, but let's do it now in our way. So, you have a unilateral Decree, saying that the bank secrecy, information from the Netherlands towards Germany, would be canceled. And there was opposition against that. But they accepted a compromise given by the Nazi saying, we asked you to waive the secrecy, so we will never do it by ourselves, we will never ask a bank or a Dutch tax inspector to give us information, now we ask it to you, and you should ask the authorities to give it. That was the beginning of the end as you will see. So, full exchange of information was the result. And in the end, the story was even worse, because the Nazi also used the information of the tax administration to know what the financial position of the Jews is. As of 1941, it's not to persecute the Jews, first by demanding them to put their home capital, all their belongings in a central bank, the Lippmann Rosenthal, that was a former Jewish bank. But the Nazi had transformed this bank into robbery bank. So, the Jewish taxpayers, the Jewish citizens had to deliver their belongings to this bank. And they received the kind of bank account as if it was a normal bank account. But in reality, they could not dispose of this bank account, only with special permission of the German authority.

The Nazi said, Jews can be allowed to emigrate, but one of the conditions is that they should have brought all their belongings to Lippmann Rosenthal bank, and secondly, we need a declaration by the Dutch tax authorities that they have paid their tax debts. So, before they could emigrate formally, before they could get this formal allowance, there was a special delegation of the Dutch tax administration that had to give allowance, that they have paid all the tax debts. And well, if you have brought all your money to this robbery bank, you cannot pay tax debts either. So that was the reason for the Dutch Finance department to make an agreement with Nazi, saying that we want the tax debts of the Jews to be paid from these accounts of this special bank. And they knew already that the usual accounts will be canceled, the counts used to finance the deportation of the Jews. And the Dutch tax administration raised this deal with the Nazis to get a lump sum payment for the Jewish taxes. So yeah, that was the result of this view with the Germans.

Well, a person who had very much to do with that was J. Sinninghe Damsté, the negotiator with the Germans. And he was also the Director - General

of taxation. But in the war, he was a member of the Supreme Court of the Netherlands. And he dealt with all the tax cases brought before the Supreme Court. The Supreme Court simply went on during the war, as if nothing had happened. Sinninghe Damsté, I already told you, he was an authority in taxation, and he had many tax books. And he was a very formal man. And well, there are a lot of stories about him. But he was not really a man of real life. He didn't look at society as it really was. And he didn't recognize either the real character of the Nazi doctrine. He was one of the judges who decided a case, which I still feel ashamed that Dutch Supreme Court decided this case. This had to do with the Lippmann Rosenthal bank. There was a Jewish civil servant, sorry, not a civil servant, a Jewish taxpayer, who was a journalist; he had to pay taxation on his net wealth. And his statement was, to the Dutch tax administration, I cannot pay that wealth tax if I cannot dispose of my wealth, because I cannot and I do not have entrance to the accounts. So, he went to court and finally he went to the Supreme Court with Sinninghe Damsté. And the question was, should we consider this account at the Lippmann Rosenthal bank as a real account, as a normal account? Or should we say no, in fact it's not a real account, so you cannot dispose of it. And that was what the Supreme Court with Sinninghe Damsté said, that in 1944, I looked at records and I saw that the address, the place where this taxpayer was unknown. In fact, he was already killed by the Nazi. In 1944, there were hardly any Jewish citizens anymore in the Netherlands. And still, they decided that, according to us, this is a normal account, and you have to pay the tax. And well, if there was one chance to show an act of resistance, this was the chance.

Then the story of another negotiator Herbert Dorn, born in 1887, and died in 1957. He started a career as a civil servant at the Ministry of Justice. And then, after the First World War, he was the assistant of the famous Enno Becker. Enno Becker is the inventor of the economic way of interpreting law. He was very famous, Enno Becker, but when the Nazi took over the power, they said to Becker, we would like to transform your theory into state theory and we would like to amend it a little bit. What do you mean? Well, we would like to amend it in such a way that if there is a doubt about the meaning of an Article in a law, you should always find a solution using the National Socialist doctrine. And Becker was so flattered, I'm not talking about Dorn, I was talking about Becker, that he accepted this honor, and that ruined his reputation. Going back to Herbert Dorn, he was really a brilliant civil servant. And he became an absolute tax expert, internationally recognized, he became the tax treaty negotiator on behalf of German.

You might know that after the First World War, Germany was not a member of the League of Nations, but since 1926 until 1933, they go by Hitler. They were member of the League of Nations, and they played a very important role. If you want to understand the history of international tax law, you should look

at the influence of the Germans during the Weimar Republic. Well, in 1929, he became an Honorary professor at the Handelshochschule in Berlin. And then his big step in 1931, he became president of the Reichsfinanzhof, the Fiscal Court in Munich. And he contributed to international tax law, model tax treaties, transfer pricing, source taxation, exchange of information, exit tax, all issues dealt with by Herbert Dorn. And the exit tax, well, that was in Germany, the Reichsfluchtsteuer. At the end of the First World War, a lot of rich people tried to evade Germany. And well, they had to pay taxes, but no one did. And so, Herbert Dorn, and others invented this exit tax for people who were evading Germany because of the war. Sadly enough, the Nazi took over this idea and used this exit tax to tax Jewish citizens who wanted to flee from Germany. And they had to pay enormous amounts of tax, even if they were not planning to go away. But then they said, well, we think you are planning to do so, so you have to pay already. The story of Dorn is very sad, because his grandparents were Jewish, he was forced to go away as president of the Reichsfinanzhof. Can you imagine? A very important person. He had to go away, he was fired as president of the Reichsfinanzhof. But he didn't accept it. He thought no, this is nonsense. So, he simply went on during his work in an office. But in November 1938, he was arrested. And yeah, he realized, I have to go away because there was a death threat. And yeah, in November 1939, he emigrated to Switzerland, after having paid the Reichsfluchtsteuer invented by himself, so he had to pay a large amount to be able to emigrate to Switzerland. His mother was deported to Lodz and murdered in Chelmno. He emigrated to Cuba, and finally he became a tax professor at Delaware University. And in 1952, he became the American nationality. And during a trip to back to Berchtesgaden in Germany, he died. It was in August 1957.

But he was an important man, that if you talk about the people, members of the League of Nations Committee, he should be mentioned. Okay, then, let's go now to the situation after the Second World War. Then there was an idea of the Dutch government, we should change our policy. So don't be afraid to conclude all kinds of tax treaties which could be dangerous for the position of Dutch citizens, think of exchange of information, but we should think about benefiting our country from an economic perspective. The Netherlands, small scale, is very much dependent on the foreign affairs, it's a very small internal market, open economy and very service oriented. So, the idea was we should emphasize free international trade. And therefore, they need to conclude tax treaties to avoid double taxation. So, they started to open all kinds of negotiations with countries all over the whole world. At present, we have 200 double taxation treaties, which is, of course, very good if you want to do trade with other countries, if you can rely on tax treaties, you have more certainties. And what has been from the beginning, the principle of the Dutch government in tax treaty policies was to follow as much as possible the Bruins reports. We apply capital

import neutrality for active income. So, for business income, for labor income, meaning that we fully accept, we, the Netherlands, fully accept the taxation abroad. So, we are not going to interfere in the tax burden in other countries. If you have a Dutch subsidiary doing work in another country, we're not going to levy extra Dutch tax, we accept the levy of taxation abroad. For passive income, for income out of capital, there we apply capital export neutrality, saying that we want the same treatments for people in one country, either they invest abroad, or either they invest in the Netherlands, then you only want to give the kind of credit, the credit for the tax you have paid abroad. And that's a totally different approach. It's interesting to read in the Bruins report, that there has been a lot of discussion about should we apply the exemption method, should we apply the credit method, should be apply apportionment, all kinds of principles were dealt with. And in fact, they concluded to a mixed system. They said, it depends on the income item, what is going to be done for the prevention of double taxation. Very important in this Bruins report is that they realized that you should tax the ability to pay, not only in a national way, but also in an international way. And that was quite revolutionary. In the Netherlands, we say you should not put all your eggs in one basket.

You are producing wealth, then you are possessing wealth, you have the wealth itself, and then you're consuming wealth. And the fourth aspect is that you dispose of your wealth without having it consumed. And they said all these four parts of the ability to pay should play a role in the tax system. So, you should tax the revenues out of the production of wealth, the possession of wealth, the consumption of wealth, and disposal of wealth when you die, the inheritance. And that should be dealt with in different ways. And I think this is still very important to realize that it's not only about income taxes, it's also about consumption taxes, and it's about inheritance, and gift taxes. And these all play a role in the international tax arena. What is important to understand the position of the Netherlands is that we did not like and still do not like withholding taxes on interests or withholding taxes on royalties, because we say, well, that always leads to double taxation, a lot of administrative burdens, so no withholding taxes on interest and royalties. That is the reason why in the Netherlands you find so many companies or famous popstars like Rolling Stones. They all have companies because they don't want to pay interest withholding taxes. So go to the Netherlands, they can save that. That's also the reason why we have so many letterbox companies. Because if you accept a letterbox company for treaty purposes, you can save a lot of money. So, treaty shopping is part of this deal, no withholding taxes on interest and royalties. By the way, as of 2021, we do have withholding taxes on interest and royalties, but only if they are paid to countries which do not tax or have a very aggressive tax policy. They are exceptions, the rule is still no withholding tax on interest and royalties. The only withholding tax we have is the dividends withholding tax, that used to be 25%, it's now 15%.

Important also for the Netherlands is the active advance ruling policy. I think that goes now for many countries, but for a long time, the Netherlands has been quite exceptional, that if you have an issue as a tax advisor, about what are the consequences of international tax planning, the tax inspector gets you clearance. But a lot of people think, well, you get this clearance for issues outside the boundaries of the rules, you can have deals about tax rates, for instance, you can have deals about tax exemptions. That is not true. It's only applicable if you stay within the boundaries of the law. So, if you think you can get a ruling, saying, well, the normal corporate income tax is 25.8% when you get it for 20%, that's wrong. But of course, in between, you can always, because it's not only about the rate, it's also about the base. And the base is always more flexible to negotiate. But in any case, that was very important.

And also, we have cooperative compliance, meaning that we do not consider the tax advisor as an enemy towards the tax inspector, they should work together. And only if you realize that this tax advisor is not honest, then rules change. But if you deal with each other on a horizontal level, and you deal with technical issues, you get clearance beforehand with tax inspector, but as a taxpayer, you are honest about your situation. Yeah, that is also a big advantage for companies. Companies are used to taking risks but they don't like to take risks if it is about tax issues. They want to have certainty. And if you have to pay, okay, let's do it. But they want to have certainty. And these are very important Dutch elements. But I realize that the reputation of the Netherlands is not always good because of these issues, actually, because a lot of countries think that we want to attract foreign investors, and we give away all kinds of tax situations. But the only idea is to give clearance beforehand, but yeah, in practice, it could be different. Well, there is also an important role of holding companies and conduit companies. You see a lot of issues with holding companies, and you will surely see that after the break. Because of the case law at the Supreme Court, there is not much leeway in interpreting the tax treaty in a way that is favorable for the tax administration. Dutch Supreme Court is very formal in applying abuse provisions with respect to tax treaties. Well, to conclude this, we more or less accepted international aggressive tax planning because if you apply capital import neutrality, you accept that you fully follow the tax rates, the tax burden outside the Netherlands, so that gives leeway to intelligent tax advisers to minimize the tax burden. And also, the Netherlands tries to promote activity, the attractiveness of the Dutch business and tax climate, and in the end about 200 tax treaties we have with respect to direct taxes. So that means that if you have the tax treaty with the Netherlands, you have the tax treaty. Okay, let's have a break, and then we'll come back with this case law on how it works in practice. Thank you.

Okay, now I will show you some specific cases. Some are still postponed, others are not, but this is just to give you an idea how the reasoning of the Supreme Court affects our issues about how to deal with tax treaties. And we're

talking about aggressive tax planning situations, abusive situations. And the first case I would like to deal with is the following case of 15th of December 1993, the holding structure. I said holdings are very popular in the Netherlands, not only for tax purposes, but also for other purposes. And we also have very flexible company law, and we have investment agreements where all economies can play a role. But this is a case, a tax case. The situation is as follows. We have Shareholder X. Well, he lives in, let's say, Belgium. And we have state B, the Netherlands, and there is an operating company, and the shareholder has emigrated from the Netherlands to Belgium. Suppose that there was no borrower. And this operating company has a tax property because they have been successful, and all the profits reserves are within.

Mr. X wants to benefit from these profit reserves. He sees a lot of money, but it is in the account of this company, of the operating company, and the company has paid corporate income tax, no problem, but this X wants to get this money out of this company. How to do so? The most logical way is to pay himself the dividends. So, pay himself the dividends of 1 million euro, and then he can benefit from the profits reserves. But if you do so, you have to pay dividends withholding tax, you have to pay income tax. So, that is not really the issue and at that time, the rates were very high. So, they thought about the following situation, Mr. X establishes a holding company and this holding company, he has all the shares in this holding company, and this holding company buys the shares in the operating company. So, Mr. X sells the shares in the operating company to the holding company. And then this structure arises, the holding has the shares of the operating company, and X has all the shares of the holding company and holds indirectly the shares in the operating company. Well, what is the idea behind it? If you sell your shares to this holding company, then you realize a capital gain on the shares in this operating company. You have bought the shares for the cost price and now the value is much higher because the profits reserves, so the shares have grown in value. By selling the shares, you will realize this profit. But how? The holding company doesn't have any money. So, you buy these shares against the debts. But wait a minute, the operating company can pay all its profit reserves to the holding company. And if you do so, this can be done tax free. Because we have a participation exemption. So, this profit transfer can be done without any taxation. And the next step is that the holding company pays back the loan to the shareholder by using his money, you see, by the operating company. Then we have the repayment of a loan, and the repayment of the loan is not taxable in the Netherlands. So, what you've done is you have changed a dividend distribution into capital gains followed by repayment of a loan. And that could be done either tax free or at a very low tax rate. If you did this within a pure national situation, a Dutch company with Dutch shareholder, this would trigger the abusive law doctrine. And the Supreme Court said, listen, the only motive you have selling these shares is for

tax motive, you want to save tax money. The second aspect is that you are doing now an exercise.

In the operating company, you've only changed the direct interest into the indirect interest, and this is so close to a normal dividend distribution. We tax you as if you had paid the dividend. Okay. But now, Mr. X has emigrated to Belgium, state A. And now the treaty between the Netherlands and Belgium is at stake. And there we have the same situation, if you have distributed dividends directly to Mr. X living in Belgium, you have to pay dividend withholding tax, 15 - 25% the dividend withholding tax. But if you transfer the shares in the operating company into the holding company, you have a capital gain, and then this capital gain is not taxed. The tax administration said that is applying literally the tax treaty between the Netherlands and Belgium, that says that if Mr. X makes a capital gain, and this capital gain is allocated to Belgium, and Belgium doesn't want to tax. And what people like to do is applying the doctrine, in the same way, before the tax treaty, what we have done nationally, we should also do internationally. But then the same Supreme Court came in and said, yeah, I know I have decided that this should be treated as dividend in national situations. But if the tax treaty is involved, this is only possible if both treaty partners, Belgium and the Netherlands agree, in the text of the treaty, that this situation should be seen as a dividend distribution. And since this is not part of the treat literally, this wasn't allowed. So here you see it, very formal approach of the Dutch Supreme Court. But the reason behind is that the Supreme Court accepts this treaty as something special. It's not a unilateral national situation, here you have two states. And if the other state is not involved in this similarity, then you cannot tax.

So, this is an example of how we apply very formally tax treaties. Because of that, this has changed. No more specific rules, and the Netherlands has applied the principal purpose approach to tax treaties. If you can show that the principal purpose of this scheme is to save taxes, and if you can show that this is against the object and purpose of the treaty, this is taxed. But before BEPS, this was fully accepted, and we always said, you only pay dividend withholding tax if you are a very lousy taxpayer, or lousy tax advisor, because this is very easy to circumvent dividend withholding tax. But this is the respect of Supreme Court towards a tax treaty. The same is true for treaty shopping. In this case, we have the operating company with a lot of shareholders, the families owning the shares, and the shareholders they live in the Netherlands, Belgium, Switzerland, and well, the operating company has a lot of profit reserves. They want to distribute, but when they do so they have to pay dividend withholding tax.

At that time, it was more or less, not too much anymore the tax. And then the relationship between operating company in the Netherlands and the Netherlands Antilles, they don't pay any dividend withholding tax. So, by interposing this holding company, you realize a situation where you don't have to

pay dividend withholding tax. The question to the Supreme Court was, do you consider this as dividend distribution? And again, these people said no, not even the fact that this holding company is a resident of tax haven, nor the fact that dividend has been declared but not been made payable yet. That is not the issue. We have to respect the tax treaty as meant between the Netherlands Antilles and the Netherlands. So, this is the basic example for treaty shopping. You can use treaties approved by the Netherlands to avoid taxation. Last example, that is the dividends stripping example where the concept of beneficial ownership is involved. Please try to follow me, we start from shell company, Royal Dutch company. They are now resident of UK. At that time, they were still resident of the Netherlands. They wanted to distribute dividends, and they had declared these dividends. But dividends were not made payable yet. And you're only taxed at the moment they are paid, made payable. The shareholder of this Royal Dutch company was a Luxembourg S.A. And between the Netherlands and Luxembourg, it was agreed that there would be a full dividend withholding tax of 25%. When these dividends were paid to the Luxembourg S.A. it was very special regime. And 25%, Luxembourg S.A. was not very happy with that, and they thought, can we think about the solution. And the solution was the fact that there was a UK stockbroker. And this UK stockbroker bought dividend coupons from Royal Dutch, sorry, from the Luxembourg S.A. and they paid 80% of the gross dividend. So, they bought these coupons before they were made payable yet. And, at the moment that the dividends were paid to the UK stockbroker, the treaty between the Netherlands and the UK was applicable, and they only had to pay 15% dividend withholding tax. So normally it's 25%, and now they only have to pay 15%. This is dividend stripping. Because if you look at what the Luxembourg S.A. now receives 80 the price for the dividend coupons paid by the UK stockbroker, they get 80. Normally, they would have received 75 because then they had to pay 25% dividend withholding tax. So, they have an extra five and what's in it for the UK stockbroker? They receive a hundred dividends from the Royal Dutch, and they paid only 15% dividend withholding tax because of the treaty with the Netherlands, so they earn 85. So, what has happened? Both Luxembourg S.A and the UK stockbroker have divided the reduction of the dividend withholding tax. Question, of course, is this possible? And, in the end, the Supreme Court said yes, this is possible, because the broker had become the beneficial owner of the dividend coupons. They didn't see any reason to doubt that they looked at the beneficial ownership concept from a very formal aspect, you could freely dispose of the dividend coupons.

Now, after BEPS, this has become much more difficult, and we have also agreed that in our legislation, that's still the ideas, the way Supreme Court looks at this case, although it's obvious that you want to save taxes, still they look in a very formal way with this concept of beneficial ownership. Last example, not

a concrete example, but in Dutch tax law, you have many fictions. If you are a shareholder, if you take a loan as a shareholder from your own company, if it exceeds a certain amount, the extra amount, the excessive amount is considered to be a dividend. Question? Are these national fictions also applicable for the tax treaties? The answer is no, only if the two treaty partners agree to accept these fictions also in the tax treaty, and also this gives leeway to the tax advisors. Is that clear? However, now we have a new situation of BEPS. And the Netherlands has changed completely its character from the bad boy, they have become the best boy in town. And that's really the situation because this specific position of the Netherlands with holding companies, letterbox companies, with all kinds of cases where we apply the treaty in a very formal way, do not apply abusive law situation. That was very bad for the political situation of the Netherlands all over the world, everyone was looking at us from a very peculiar perspective. It's also the small country against big countries, big countries are annoyed with the position of the Netherlands. And well, I've given many courses abroad, and I've always tried to defend the Netherlands by saying, the fact that we don't have any withholding taxes on interest and royalties, we have very good reasons for that. That is because of the economist Jan Bruins who said this is very bad for international trades, it leads to all kinds of administrative burdens, that can lead to double taxation, all the source taxes, so you should get rid of the source taxes, and do not blame us. Rulings, the same story, if you get clearance beforehand, to who company wants to be sure what are the consequences of their plans, what is wrong with this? As long as you stay within the boundaries of the law. And you have Starbucks case where they applied different systems in Europe, compared to the United States.

If you have a parent company giving a loan to a subsidiary, but the parent company doesn't charge any interest on this loan because that's good for the economy of the subsidiary. So, you have an interest of zero. If you calculate the profits of the subsidiarity, yeah, in fact, you have to deal at arm's length. And you have to take care at arm's length interest by determining the profit of the subsidiary. Because otherwise you tax the subsidiary too high. But you only want to tax them for what they have earned from their business. So, we call this an informal tax. You couldn't deduct the interest that you did not pay, perfect concept. But yeah, if you have another country on the other hand, that doesn't tax the deducted interest. But the Netherlands says, we apply our own concept and we're not responsible for what's happening outside. But in fact, we apply this doctrine, but this has changed after BEPS, because now BEPS says, we're not allowed to deduct if there's not an extra profit. So, yeah, that brings us to the fact that the Dutch government is now the champion of fighting international tax avoidance. So, they raise emphasis on international, multilateral measures. The Netherlands always accepted BEPS measures, although you can criticize them. And they always choose the most aggressive form to attack the

abuse. So, they have effectively implemented ATAD and are very much in favor of Pillar 2. In fact, the Netherlands was the first country that has already accepted this minimum taxation bill, accepted by the second chamber. And I guess the same will happen with Pillar 1, the transfer price for digital economy. The Netherlands endorses the necessity of the EU Wide Plan to fight abuse of shell companies and wants to become a front runner in that. If necessary, unilateral measures. But, if possible, we apply multilateral measures. Also, the Netherlands wants to pay more attention for a special position of developing countries. And they do so by assisting them, or better say, to give them an opportunity to ask professional assistance by the Dutch tax administration, they send people to developing countries to help them in their tax treaty. And that is also important, they stress the own responsibility of businesses and tax advisors. Multinational businesses, tax advisers, they all have their codes, their codes of ethical behaviors. If you don't do it, you are seen as a kind of criminal in tax affairs. So, shareholders, lobby groups, they all look at what's happening in the multinationals. So, if you apply for aggressive tax planning, then you could have problems with these ethical codes.

I think this is all good development, but it is too much emphasizing. And we also forget that if you look at the Bruins reports, first we have to start with the principles, what are the principles in tax in international arena. Then you have to look for the exceptions, and then you have to look for anti-abusive situations. But if you look at BEPS, we start with anti-abusive situations and that you can have problems because then you can go too far. So, this is for tax development, international tax evolution, every evolution starts with killing the old source. I want also to say that these are all measures that have been implemented for the last 15 years to show the Netherlands as a place of passive conduit companies, that we really want to attack the conduit companies. We don't want to be a country with billions of euros getting through the economy. So, these are all substance issues. Holding company doesn't have much substance. If you don't have substance, you cannot get, for instance, rulings anymore, that's also important. In the past, holding companies would get rulings. Now this is very much difficult.

Well, conclusions. At the beginning of the 20th century, bank secrecy was very important in relation to the exchange of information. It was a crucial topic in early Dutch tax treaty policy. We wanted to keep, more or less, the tax haven situation, and we wanted to keep the *status* of the position before BEPS, and the tax treaty policies were adapted to that. We had the very strong influence, first, of the Ministry of Finance, but later more influence of stakeholders because they saw important developments were going on in international taxation. And after Second World War, the attitude changed. Well we need tax treaties to benefit for our international position, to benefit for our service-oriented situation, to offer security, to offer certainty, to companies. But the price was

that we accepted because of the emphasis on the capital import neutrality. And now you see with Pillar 2 that this idea of capital import neutrality is for a big part away because we also tax for income activities that cannot be allocated to the Netherlands.

The main question was how do you think? Experts would say, if they were here, would they be happy? I haven't said already my biggest concern. You know I have been in the Netherlands Senate, but what about the democratic legislation? You see what happened and I really admire the work of the OECD, it was enormous with BEPS. Many people thought that they would never succeed but they did. But what about the legislation? Now we are dealing with the minimum taxation, Pillar 2. This is very technical, they have copied, in fact, the directive into the law. So now we have to wait and see how it will work out in practice. But what about the influence of the national sovereignty? Well, it affects tax sovereignty of all the countries. You always see the concerns of the developing countries. But also, if you are a full member of the OECD, who dares to say no against the directive? I always have to point at countries like Ireland, Portugal, Greece which have to implement all kinds of tax policies. I would say that is my biggest concern. All these technical aspects, well you can change them and over emphasize them. But OECD has no democratic legislation at all as an association of tax administration. But also the fact that we depend on the IRS in directives, we depend on the association of tax accountant, accounting firms. So that is my biggest concern. What about democracy? Thank you very much.

[Prof. Marino]

It is a surfing into the history of international taxation from 1923 to 2023, and I agree with Peter about the lack of principles. Probably it is a matter of age: back in 1923, the report was just a few pages, very simple but very heavy, that is giving you the direction of what is going on. An Anglo-Saxons direction, for sure, with the lack of reasonings behind. So, I fully agree with the idea that within the second part, double non taxation, maybe principles should have come first, rather than technical actions. And then, of course, the democratic legitimacy. We've been working on the politics of international taxation: no taxation without representation, taxation without representation, no representation without taxation, and representation without taxation. We are indeed going into the direction where we do not know. Actually, we know where the power of taxation is going, and it is indeed going with the OECD. And the OECD was clever enough in challenging the international community with the prisoner dilemma basically. Because it said, okay this is the chess, now it is up to you to play, if you do not want to play, you are going to lose money, so everybody now has to play. That's a very fascinating way to be sort of a barycenter into this international tax chess. So, thank you very much again. I wonder if there are questions from students. Please feel free to ask, any curiosity? Actually, I have

a question, just to break the ice, is it true, as you said, that the Netherlands is becoming a good boy? Actually, I think that from the policies, from the outside, the Netherlands is now making an upgrade in its tax reputation because you are selecting all the holding companies, conduit companies that for the past years have been feeding into the Dutch tax system, but this operation is very heavy. So, when you said the substance, now that means the place of management of the company must be in the Netherlands with a lot of people, with a cost of employees.

I think this is indeed a way to evolute the Dutch tax system. And then where I see the bad boy? No longer in tax law, but in corporate law. It is fascinating, the way how Dutch corporate law system is attracting a lot of corporations and a lot of ownerships from other countries, at least from Italy that is a family business country. There are a lot of businesses emigrating in the Netherlands, not really for taxation but because of corporate law. Because you have the opportunity of having just one share to voting rights. So, family businesses are going there because they can sell portions of shares, portions of shareholdings, but by keeping the control. So, I think this is a very interesting evolution into the field of competition, not really tax competition, but corporate law competition. What do you think about it?

[Prof. Essers]

I think that the two points that you made are really interesting. The first point is that there is a dilemma, we used to have very strict rules about what are substance, how much equity to you need. But once you put that exactly in the law, it is quite easy to convince because these tax advisors are very intelligent persons. So, the answer could be, don't make it too concrete, but make it an open norm. But then, legal certainty is the victim because then you never know if it is enough, and you depend on the vision of the authorities about that. So that's the problem we're facing. Taxpayers want to have certainty. But on the other hand, you know you can never get certainty of this kind of aspect, you always have to look from case to case and the idea behind is corporate compliance. And then the family businesses, we are now discussing whether we should have more rules to protect family businesses. Because they are, also in the Netherlands, very important. I don't believe in the competition between family businesses but we could still need some special rules to protect them. But then there is always the issue if this is against the equality principle because we give special rules to small businesses and enterprises. So, there are many questions, but, I think, we should protect family businesses.

[Prof. Marino]

Any questions? Well, thank you, Peter.

The history of international tax treaties from the UK perspective (15th November 2023)

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Abstract

The first tax treaty of the United Kingdom, dating back to 1872, concerned the regulation of double taxation, for inheritance tax purposes, for British citizens residing in the Canton of Vaud (Switzerland). The real development of the law of tax treaties occurred after the First World War, with the contribution of the League of Nations. However, the United Kingdom, despite its active participation in the organization, opted in the 1920s and 1930s for a different tax policy to the one recommended. Only after the Second World War, under pressure from the United States, the United Kingdom was asked to grant greater access to British markets. This led to the signing of the first tax treaty. From 1946, the United Kingdom launched a massive campaign to negotiate tax treaties, involving former colonies that had become independent and European countries, collaborating with the then OEEC and with the OECD.

Keywords: tax treaty; United Kingdom; League of Nations; Second World War; OEEC; OECD.

[Prof. Marino]

It is a great honor to have Philip Baker, from London, here, in the University of Milan for a few hours. Philip is a guru of tax treaties and cross-border tax, he is a barrister in the United Kingdom, as well as a visiting professor at the Oxford University, research fellow at the Institute of Advanced Legal Studies at the University of London. But I will simply say that he is the best actor that the international tax stage has ever had. And you will discover why, you will discover it. Because it's a mix of teaching, acting in a sort of Shakespearean flavor. But I want to leave the surprise to you. He plays many roles, especially in the field of taxpayer rights. Today, he will play the role of a descendant of Sir Josiah Stamp who was one of the four economists in drafting the famous masterpiece that I

showed you all the time. By the way, Sir Josiah Stamp was the economist who drafted the first draft of the report, and then he delivered the first draft to the other economists. And by the way, Josiah Stamp was a professor at the London University where Philip is a research fellow. So, I think that I only have to leave him the floor for this evolution of the tax treaties from the UK perspectives, and we will then match his perspective with the perspectives we already hear from Peter Essers, and then we'll hear next week from Guglielmo Maisto, and then the circle will be closed. So, Philip, thank you very much again for joining us for this short afternoon, but better than nothing, so the floor is yours, thank you very much indeed.

[Prof. Baker]

Thank you, Prof. Marino, for the invitation to come here. I've been asked to talk about the history of international tax treaties from the UK perspective, particularly to focus on the fact that this is 100 years since the report for the League of Nations that really started the whole development of modern international tax law, and particularly to talk about the British member of the four economists, Sir Josiah Stamp. And as you quite rightly said, it was Stamp and Seligman, who did all the work, I have to tell you, Einaudi didn't do any work. Einaudi was in the Senate in Rome, and he was playing politics there. So, it was actually left to others that did a lot of the writing, and Einaudi he just signed, I think, at the end of the day. When I teach history of international tax to my students, I always say, do any of you recognize the name Einaudi? And I have Italian students, and often they say, yes, he's a composer, and a musician. And I say no, no, not that one. The grandfather, who was, of course, effectively the first president. He was technically the second president. But he was effectively the first real president of Italy after the war. So very, very famous people. I'm going to try and cover quite a bit, I'm going to start by talking about what I call the pre-history of UK tax treaties. So, even before we were born, before I was born, before the First World War, then I talk about the period of the League of Nations between 1919 and 1945. And then the UK treaty policy between the two World Wars, because we had a very unusual policy. During that period of time in the United Kingdom, we were not following the policy of other countries like Italy, and I'll explain that. Then I will talk about the UK-US Treaty of 1946, which was probably one of the most important tax treaties in the history of taxation. And then a little bit about the 1950s, and the so-called colonial arrangements in the UK. Then coming closer to time, I'm going to talk about the OECD, and the UK's involvement. And then the UK's involvement with the UN and developing countries, finally coming to our current network of tax treaties, because I have to say things here, one thing here. In the United Kingdom, we are not very good at playing football, we are not very good at playing cricket, we are not very good at economics, we're terrible at politics. But

the one thing we are good at is negotiating tax treaties. We still have the largest network of tax treaties of any country in the world. Somebody recently from the Netherlands said maybe they're catching up, but I think we're still ahead. And then finally at the end, I'll talk about implementation and interpretation. That's the overall coverage of what I'm here to say, so that's the history from 1872, up to what year is it now? 2023. Still this year.

Let me start then with pre-history. We normally think about tax treaties, towards the end of the 19th century, many people say the first real tax treaty was in 1899, and it was between Austria Hungary and Prussia. But actually there were a few tax treaties before that. And we had our very first tax treaty actually in 1872 which is very, very early. It's possibly one of the first ever tax treaties concluded by any country. And it wasn't an income tax treaty. It was a death duties treaty, taxes on death, when somebody died, there was a tax paid on the amount of property that they owned when they died. And the problem that has arisen was that some English people went to live in Switzerland, in the Canton of Vaud, which is where you've got towns like Lausanne, and Montreux, and Montreux always attracted a lot of English people. And they went there, and they died. And then when they died, the Swiss Canton imposed death duties and the UK imposed death duties as well. So, there was double taxation, because the person died living in the Canton of Vaud, but they owned property in the UK. And our very first tax treaty was between the UK and not with the whole Switzerland, just with the Canton of Vaud, just with one Canton in Switzerland. Maybe English people didn't go to live in Geneva, maybe they didn't go to Bulle, maybe they didn't go to Zurich, but they went to Vaud and died there. And so, we had an issue that the treaty was quite unusual because apparently, the UK revenue knew nothing about it. It was negotiated with the diplomats in the Foreign Office, and the Treasury, the tax people didn't know anything about it. Until suddenly, in the 1950s, they got a request from the Swiss tax authorities saying, may we terminate this treaty. And the British tax authorities said, what treaty? We didn't know we had a treaty. And they said, yes, you've got this treaty since the 1870s. And from time to time, people are making claims under the treaty. And the tax authorities apparently knew nothing about it. And the finale, I've been to the British National Archives, and there's a file that is dealing with the termination of the treaty. And truly, they get a letter from a lawyer saying, my client has died in Montreux, and I want him to benefit from the treaty. And the British say, what treaty? And then the Swiss come along and say, oh, well, we've had this treaty, but we want to terminate it. So, it was terminated in, as I say, vaguely comical circumstances. If you want to read about it, Sunita Jogarajan wrote a whole Article in the British tax review on the conclusion and termination of the first double taxation treaty because it was the first ever tax treaty between two countries. And the tax people knew nothing about it, only the diplomats knew about it. So, it's not that significant, unless you happen to be

a British person, die in Montreux. But we did have at least one treaty at a very, very early time in 1872, which would make it much earlier than any other tax treaties. The real start of tax treaties, as you know, started after the First World War, when the League of Nations was set up. Before the First World War, many countries did not have taxes on income, or if they had it, the tax was very low. Often, it was only on local land, or local businesses. And so, the problems of double taxation were not that great. Before the First World War, there was little discussion in the United Kingdom about the problem of double taxation. Frankly, it wasn't a great problem, the rates of tax were very low, less than 5%. So, if you paid 5% in two countries, you know, that's less than 10% in total, it's not going to stop you from investing across countries. That changed during the war. The rates of tax went higher and higher, about 50% in some countries to pay for the war, countries like the United States, France that didn't have income taxes. Previously, they introduced income taxes. The taxes were extended to worldwide profits. And so, the problem of double taxation was much more serious as the result of the war. There was a financial conference in Brussels, just after the First World War, to discuss, amongst other things, problems of international taxation.

So, as you know, the Brussels economic conference after the First World War considered the issue of double taxation, and the whole question was referred to the financial commission of the League of Nations. The League of Nations initially had a financial commission, and then they set up a fiscal commission to deal with tax matters in the 1920s. The United Kingdom was involved with the League of Nations right from the very beginning. The UK sent delegates to these meetings, and regularly participated. And again, when I have time to do research, one of the things I like to do is to look at the archives of the League of Nations which is in Geneva. I go to Geneva to meetings of the UN committee of experts. There's a big library in the building, and just up a little line of stairs, there is the archive of the League of Nations. And I remember about 20 years ago, going up to the archive and asking the archivist, do you know anything about the fiscal commission? And the archivist said never heard of the fiscal commission, let me look and see. And he found that they had boxes of documents from the fiscal commission. And when you look at them, the documents are fascinating because they're things like telegrams from the UK representative to the secretary to the fiscal commission saying I'm coming by train to the meeting in a week's time, and I'm bringing my golf clubs with me, can we go and play golf together? Or I'm coming and I'm bringing my wife, can we go to do some visits on Lake Geneva? It's lots of sort of little personal stuff, including personal stuff of the four experts. That's how I know that Einaudi, for example, wrote that he was too busy as a senator. They never had a meeting of the four experts because Einaudi was too busy in Rome to actually travel for a meeting. So, the four of them never actually met, they all did it by

correspondence. And as you know, the League of Nations decided that they needed to have the advice of four fiscal economists on the problem of Double Taxation and Fiscal Evasion. That's the title of their report and they were asked to prepare a report. And they came up with this proposal for relieving double taxation. You know who the foreign economists are. I'm going to talk a little bit then about the British economist, Sir Josiah Stamp. He's not a hero of mine, because he clearly had defects in his character. But he's a very interesting person, Josiah Stamp. He was actually born quite near where I was born. I have his birth certificate, you can get it from the registry, I should have brought it with me. He was born in the area of London, North London, quite near to the Lord's Cricket Ground. If you're into cricket, and you think about Lord's Cricket Ground, his family lived about 200 yards from the cricket ground. The family was not a very wealthy one. The family ran a small shop near where I went to school when I was a little boy. And he didn't come from a very wealthy, nor really from a very poor family, very much sort of middle-class family. He left school at, I think, 16 or 17, and he joined the UK revenue service as the most junior, right at the bottom of the revenue service as an outdoor clerk, basically a messenger boy, sort of running messages. But he was obviously very clever, and quite ambitious, and quite interested in improving himself. At that time, this is the end of the 19th century, lots of opportunities for people to improve themselves by studying, joining discussion groups, and he studied as an external student at London University. I don't know whether you have that in Italy. But apart from being an internal student, where you actually come into lectures, you can be an external student, where you go to libraries, you read books for yourself, and then you take exams. And if you pass, then you get a degree from London University and London had that, partly because of the British Empire. There were many parts of the British empire where there were no universities. If you wanted to study for a degree in India, there was a university in India, but people could study for a London University degree, pretty much anywhere in the world. You still could do this. You could register in Milan to do a London University external degree and Josiah Stamp decided to do an external degree in economics. He was obviously successful because he then went on to become a research student at, I think, it was King's College London, and was obviously successful, he got his doctorate, and then he became ultimately a professor at King's College in London as well. I think he was also involved with the London School of Economics. That's all from his own studies, you know, he left school at 16, or 17, never went to university. And all the time while he was working for the revenue authorities, he was studying in his part time. So, he's clearly a very ambitious person.

He worked for the revenue authorities, and he got more and more senior until he became the secretary to the board of Inland Revenue. The Board of Inland Revenue collects all the taxes, they are responsible for collecting taxes,

the secretary to the Board is the most senior civil servant working with the Board. And that was really hard to get to the absolute top there. And that was as high as he could get as a civil servant. So, he left the civil service, and he joined a company which became, through parts of amalgamation, part of a huge chemical company, ICI Imperial Chemical Industries, and he was a member of the Board of ICI. He became one of the members of the board of governance of the Bank of England. This is a very senior position as an economist in the Bank of England. He achieved the huge amount during his lifetime which I find a bit difficult. In the 1930s, he began to admire fascism. There were people around Europe who looked at Italy, looked at Germany, looked at Japan, and they thought that fascism was an attractive political doctrine. And he had a little flirtation with fascism for a time there, which is a sort of a defect, shall we say? He was killed during the Second World War by a German bomb. The bomb from a German bomber fell on his house where he was living, killed him and destroyed all his reports as well, which is why we don't have significant records about Josiah. So, an interesting man, va self-made man who studied for himself but with these sorts of defects.

Stamp was the British representative. He did participate in the main work, as you said, he prepared the first draft. He and Seligman had been in correspondence for many years. They knew one another quite well, because Seligman was the professor of fiscal economics at Columbia University and had also came from a banking background. Stamp was at London University, and so they corresponded with one another, so a lot of their thinking underlays the report of the four economists, and really it's the two of them who did the main work in producing the report. You will know that the report came out 100 years ago from the four economists. Meanwhile, the League of Nations had decided that they needed another committee, not just the four economists who were theoretical experts, they needed technical experts, people who worked in the tax authorities, and who had dealt with these questions in practice in order to resolve questions of double taxation. And the Committee of technical experts invited tax authorities from members of the League of Nations, and the United Kingdom sent a technical expert. The UK was involved in the work of the League of Nations right the way through. In every meeting, if you look at the list of people who attended, there is always somebody, usually a senior official from the Inland Revenue in the UK, attending those meetings, right the way through to the very last meeting of the League of Nations Committee, which took place in London.

The fiscal committee of the League of Nations, fiscal commission, had a meeting in Mexico, which the delegates from Europe could not attend because of the war, and they couldn't travel. But then the very last meeting took place, actually about half a mile from my office in London, at the then headquarter of the Inland Revenue at Somerset House, and you can actually visit the room in

which they met the last meeting of the League of Nations, the London meeting, where they adopted the last League of Nations version of the tax treaty, which was the London model.

So, during the 1920s, and 1930s, the UK was very much involved with the League of Nations, from Stamp through the technical experts, right the way up until 1946, which is really very surprising. Because while the UK was participating in the League of Nations, we went completely our own direction on international tax. We did completely differently from what the League of Nations was recommending. In particular, we did not conclude any tax treaties. In the 1920s and 1930s, the United Kingdom had a completely different policy from what we were discussing in the League of Nations. So, we participated in all these discussions and all of the League of Nations drafts, but we were doing something completely different. Typical British: don't do what we say, do what we do, or don't do what we do, do what we say. They were saying one thing at the League of Nations and doing something completely different.

Why was that? During the 20s and 30s, we still had a focus on the British Empire. We had policy to encourage trade and investment within the empire. We had the so-called Imperial Preference. All our products, if they came from another part of the empire, could be sold without any duty. But if they came from elsewhere, then we put barriers against it. We had a very protectionist policy that kept out products from outside of the empire and protected products from within the empire, the system of Imperial Preferences, and that was reflected in our tax policy as well. On taxation, we were only concerned to relieve double taxation within the empire. We didn't care about the rest of the world. And you can actually see that. We had a Royal Commission on Taxation in 1920. Every now and then, we have a commission set up to discuss tax policy. We haven't had one for a good long time in the UK, but we had one in the 1950s. We had one in the 1920s. And Stamp gave evidence to that commission, and they discussed double taxation. And the report of the Commission said, within the empire, we must try to avoid double taxation, but with the rest of the world, we do not have the same concerns. If there's double taxation with France, or Germany or Italy, we don't do anything about that. But within the empire that is done. And so, what we came up with was something which is referred to as Dominion Tax Relief. The countries within the empire in those days, countries like Canada, Australia, South Africa, they were called the Dominions, they were self-governing within the British Empire. Talking about the Empire, it sounds like we are going back in Star Wars, but that's how people thought in the 20s and 30s, we had an empire, the king was Emperor of India. And it wasn't until Queen Elizabeth: She was the first queen not to have been Queen Emperor.

India was not a dominion, but it was within the empire, and we did apply this type of relief to India, as we applied it to any countries. Actually within India we have problems with double taxation, really, quite early on, because the

Indian Revenue Authority was much more advanced than in many other parts of the empire. India had an income tax from 1860, which was very, very early, within the Imperial context. But the Dominions were the old self-governing colonies, Australia, New Zealand, South Africa, they were the Dominions. For those countries, we invented a special form of tax sharing. It was not done by treaty, it was done in each country's tax law. So, you find Dominion Tax Relief provisions in the old tax rules of Australia, Canada, and the UK. And the way it worked was basically that I collect half of the tax I would normally collect, and you, Australia, Canada, you will collect half of the tax. So, if my tax would normally be 30%, I will collect only 15, and if your tax would normally be 20%, you will collect only 10. So, we don't quite get to a point where you get taxed in only one country, but each country collects half of what they would normally collect. So, you don't get completely double taxation. And if you look at the old tax laws of Australia, Canada, and New Zealand, you'll find these provisions for Dominion tax relief. But that was only within the British Empire. With regard to other countries, as I put down here, there was no common interest with non-Empire countries, we didn't do anything, with limited exceptions, to avoid double taxation.

So really, it was very strange. On the one hand, British officials were going to the League of Nations and discussing tax treaties and relief of double taxation through things like the London Model. But on the other hand, in terms of what we actually did, we didn't have any tax treaties. We didn't conclude a single tax treaty based upon the work that was being done in the League of Nations throughout that whole period. We did have a special arrangement with Ireland, that was a very unusual situation. As you should remember, Ireland was part of the United Kingdom until the rebellion which started on Easter Sunday in 1916, and led to a revolt against the British, and the Irish achieved their freedom from the British in 1922, and they formed the Irish Free State. And then, Ireland got divided between Southern Ireland, which is independent, and Ulster, in the north. Ulster is the Protestant part; the rest is the Catholic part. And the Catholic part of Ireland became independent. Well, up until independence, Ireland and the rest of the United Kingdom had the same tax system, exactly the same tax law applied because it was part of the United Kingdom. So, when Ireland separated, they wanted to have their own tax policy. And for the first time, we had a problem of double taxation, because there would be Irish tax in the south, and basically, United Kingdom tax. And so, there was an agreement between the British government and the government of the Irish Free State (now called the Republic of Ireland) to deal with double taxation. But it wasn't a treaty as such, it was an agreement between the two governments, given that the two governments both had the same tax law, at that time. It was an agreement to divide who was going to tax what, and it was actually contained in the UK legislation. You can find the agreement as a schedule to, I think, the Finance

Act of 1926. There's not an international agreement as such, it's part of the domestic law of the two countries. So, the position with Ireland was really quite unique, because of the history of two countries. Apart from the agreement with Ireland, we had some very limited agreements, I'm certain that you have studied that there are comprehensive tax treaties, treaties that deal with every type of income, income from land, business, profits, shipping profits, dividends, interest, royalties, employment income, all the rest of them. And then there are a small number of limited agreements that deal with just one type of income. And we had a few of those in the 1920s and 30s, we had a few shipping profits agreements that only dealt with profits from shipping, nothing else. So, for example, there's a lot of backwards and forwards from Denmark to the UK, France, Greece, even then big shipping country. So, we had shipping profits, we had agency agreements, and that was basically concerned with business profits through commercial agents in the country. If a Canadian company sold timber (wood) through an agent in the UK, then we would tax only the profits from that agency. So, there were agency agreements. And then towards the end of the 1930s, we started having air transport agreements. Quite a lot of countries start with air transport agreements between them to deal with the profits from air transport. So, we have a small number of limited agreements during that period of time, but the key points to make is we had comprehensive tax treaties and we were going to the league in Geneva, and we were talking tax treaties, but we weren't doing. We knew all about it, because we were discussing it in Geneva at the League of Nations but we weren't actually concluding treaties ourselves, which is very different from other countries. Italy was concluding treaties. Peter Essers should have talked about the Dutch treaties. We were in the discussions, but we weren't actually doing it.

Things then changed, in 1946, under the pressure of the Americans. Towards the end of the Second World War, the UK was massively in debt to America. We have borrowed huge amounts of money from America to fight against various countries. We were hugely in debt, and one of the things the American said was, we want greater access to British markets for our goods and our investment, no more of this Imperial Preference. You don't have an empire any longer, and we, the Americans, were not going to support this idea of an empire. We want to have access to your market, and then one of the things we want to do is that when American companies invest in the UK or trade in the UK, they don't get taxed. We're not happy with what happened in the 20s and 30s, where US businesses got doubly taxed. If they sold in the UK, they pay tax in the UK and they pay tax in America because there was no treaty between them. We want to have a tax treaty. And the UK-US convention that took about a year to negotiate between Washington and London, was signed in April 1945. That was the UK's first comprehensive tax treaty, much later than many other countries. Because we knew about treaties, it was in the League of Nations

discussions, we knew about what went into a treaty. But we've never done it before until the UK-US treaty.

So that's our first tax treaty in 1946. But it's not just important because it was our first treaty, it's probably - I'm going to sound a British nationalist - the most important treaty that two countries ever concluded, because it sits between the League of Nation's work that ended in the London Model in 1946 and the work of the OECD. And it's the link between the League of Nations periods and the OECD periods. If you look at it, it's clearly been derived from the League of Nations' work. But it has a number of features that were completely new, which then went into the OECD work. So, it's kind of the sort of missing ancestor, who is the ancestor between Neanderthals and Homosapiens. There's a missing ancestor. This is kind of the missing link between the League of Nations period and the OECD period. For example, it's the first treaty to contain the transfer pricing provision. The US had treaties before this, but they didn't have the equivalent of Article 9. It's the first treaty to have Article 3.2, the rule on interpretation of undefined terms, according to which undefined terms have the meaning they have under domestic law. It's one of the first treaties that have a difference between direct and portfolio dividends, with a 15% tax rate on portfolio dividends, and only 5% on direct investment. So, lots of the features of what became the OECD model are found in that convention. And if you don't believe me, believe my colleague, John Avery Jones, because he wrote an Article back in 2007, on the history of the United Kingdom's First Comprehensive Double Taxation Agreement. He analyzes the UK-US agreement and explains why it was groundbreaking, and why it's so important as a link between the pre 1946 League of Nations period and the post 1946 period that becomes the OECD. So that was our first ever tax treaty. And with that treaty, we got religion, we suddenly believed in tax treaties. And like every religious zealot, once we have found tax treaties, we loved them, and we wanted to have treaties with everybody. So, from having no treaties before 1946, after 1946 we started going around the world concluding many treaties, which is why we are now the world's leader in tax treaties. It all goes back to this sort of sudden change of thinking, change of heart under the American pressure in 1946.

So very soon after we concluded the treaty with America, we concluded the treaties with a number of our former colonies that are now independent, Australia, Canada, South Africa, India, Pakistan, New Zealand, and also with some of our close neighbors in Europe. France was one of our earliest treaties outside of the empire. And what you see here also is this abandonment of the idea that we were only concerned with double taxation within the empire, we haven't got Empire any longer. By the end of the Second World War, we had lost our empire. India becomes independent, Pakistan becomes independent, and eventually, all the countries in the 1950s and 60s become independent. But now for the first time, we're treating everybody the same. We're having treaties

with France, and Italy subsequently, and others, similar to the same way as we have them with the former British colonies like Australia and Canada. We really got into tax treaties in a big way. In particular, in the 1950s, we went from no treaties in 1945 to almost 100 treaties, amazing. I don't think any country has ever concluded that many treaties. But there was a secret. Many of the treaties that we concluded were colonial arrangements. We still had lots of colonies at that time, Rhodesia, Nigeria, Gold Coast, lots and lots of countries that became independent, but at that time, they were not independent. What we did was concluding colonial agreements, arrangements with those countries. And they must have been really strange negotiations, because the negotiations were basically between somebody from the UK revenue and somebody from the UK colonial office. So, a British civil servant from the colonial office would represent Nigeria. And somebody from the UK revenue would represent the UK. And the UK revenue would say, here's the terms of the agreement, sign it, and the Nigerian, the person from the colonial office would basically sign it, which is why many of these arrangements are very, very similar to one another. Because basically, the British just copied the same document again and again, and said, right, this is what we agreed with Nigeria last week, now we want this with the Gold Coast, or we want it with another colony, with Southwest Africa.

So, it was basically the British negotiating with the British. We do that very well. When we negotiate with ourselves, we usually come to very good agreements. And so, in the 1950s, we had a standard arrangement, many of these arrangements, you know, were concluded in 1951, 1952, 1953, 1954. Many of them existed for many years. Some of them have only recently been replaced. The agreement with Jersey was concluded in 1952, it was only replaced about five years ago. These agreements, many of them, existed for many, many years. And if you look at them, if you read them, you can immediately tell that they are colonial arrangements. First of all, they're called arrangements rather than conventions or agreements because they are not independent countries. You cannot have a treaty in international law with a country that is not independent. So, they are referred to as double taxation arrangements, not conventions or agreements. But also, they have a number of very common features. If you give me one of these documents, I can look through it, then I can say, oh, yeah, that's a colonial arrangement. For example, the definition of permanent establishment is very short, and it's contained in the interpretation definitions. They don't talk about business profits, they talk about industrial and commercial profits. There's a special rule for dual resident companies. So, these arrangements have some special features that are a little different from other treaties, to reflect the fact that they weren't really negotiated, they were basically dictated by the British revenue. But it did mean that we went from new treaties to pretty much 100 treaties in about 10 years. There was actually even a discussion at the time about having a multilateral convention, I am certain that you've discussed

at various times, there have been proposals to have a single multilateral convention. They were having a discussion in the UN at the moment about the UN multilateral treaty, and they were talking about a Commonwealth multilateral convention that never finalized. They never actually got to that. I think somewhere in my papers, I've got a draft of the multilateral convention, but it never actually achieved itself.

And one of the things that also happened in that 1950s was that the UK extended to some of its colonies its treaties with other countries. If you've studied the OECD model, you'll know at the very end, there's an Article for the extension of the treaty to basically its colonies, to territories that are not independent, but for which one of the countries is responsible in international law. We did that in the 50s. Treaties with Sweden, Denmark, the United States, they were extended to some of our colonies. So sometimes if you discover that places like the British Virgin Islands had an old treaty with Sweden and you think, how does the British Virgin Islands ever have a treaty with Sweden? They didn't. It was the UK treaty with Sweden that was extended to the colonies. So, some of our colonies actually got their first treaties by extension, that actually is how some of them started off their lives as tax havens, because they have treaties extended from the UK. So, in the 1950s, we had this very strange period when suddenly we concluded a lot of treaties. We concluded them with independent countries like Australia, Canada, with our close European neighbors, France, Spain, Portugal, Italy, but we also have this big growth of the so-called colonial arrangements at that time.

We come towards the end of the 1950s with the establishment of what started as the OEEC and became the OECD. I am certain that you know the history here. After the Second World War when the League of Nations ceased to function. The United Nations replaced it, and for a few years, there was a United Nations fiscal commission. But in one of the most significant developments for international tax, that commission was closed down in 1954. I don't think anyone realizes how significant that was, the United Nations stopped their work on tax in 1954, partly actually because the British were not supporting what they were doing. The United Nations stopped. And there was a period of time when nobody was doing anything about international tax. And then a few of the former delegates to the UN wrote to one another and said, it's a real shame that nobody is discussing international tax. There's this new body in Paris called the OEEC which is the Organization of European Economic Cooperation, maybe we can get them interested in international tax. And they sent out an invitation to a number of countries in Western Europe basically to attend meetings in Paris. Interestingly, the British were originally not very keen on the idea. Again, I've gone to the National Archives in the UK, and you can find the invitation letter, which was sent to the British saying, we're having a party in Paris, please come, we are going to talk about the international tax, not a great party, bring

your own food, whatever. And on it, the British official has written, this will probably produce nothing, but, just in case, we should attend. So, the British were not very keen on this at the beginning. They said, yeah, just in case it's a big party, and it becomes important, we're going to gain a lot. So initially, the British had real misgivings about whether this OEEC was going to be worth attending or not.

I don't know what happened at that first meeting. But the UK became completely convinced that this was the way to go. And from the setup of the OEEC down to the present time, the UK has been a very, very active participant in the OECD, right the way through. Even now, the UK is lobbying in the United Nations to keep the OECD the main discussion place and lobbying against the African countries and others to preserve the role of the OECD. And it depresses me that my government is doing that, trying to fight against them, that they, for various reasons, are very committed to the OECD. So, the UK was really participating and the UK has often had the former head of the OECD tax commission, Jeffrey Owens, he is Welsh. We've had British chairs of the Committee on Fiscal Affairs, we've been really committed to the OECD all the way through. And that's been reflected in some very British contributions to the history of tax treaties under the OECD. This was what the Brits did through the OECD. And I'm going to give you two examples, both of them are terrible. The first thing we did was we gave the world beneficial ownership. Have you had lectures on beneficial ownership? You know that problem was a pure British problem. In the 1960s, the British woke up for the first time to the problem of treaty shopping. And they said, the treaty at the time said, if a dividend is paid to a resident of Italy, then the tax on the dividend will be reduced. That simply requires that the dividend is paid. So, you could have a nominee or an agent in Italy. And they would get the benefit of the treaty, because it simply requires that it's paid to that person. And this is a very simple form of treaty shopping, we're giving benefits under our treaties, and all you need to do is to register your shares in the name of an agent or nominee. And we think that's a problem with treaty shopping. So, the rest of the OECD (and you can read the discussions in the OECD Committee on this because they're all on the website), basically, they said to the British, okay, come up with an answer, and the British answer was beneficial ownership. They'd come across this term, which we use in our domestic legal system in some particular context. And they said, what we should do is we should say, the recipient has to be the beneficial owner. What does that mean? Oh, it means agents and nominees. That's what we understood it to mean. But beneficial ownership is not limited just to agents, to nominees and this wording "beneficial owner", it's laying there in tax treaties for about 30 years, until suddenly, it started causing all these problems. Cases in Canada, in the UK, Denmark, Indonesia, all around the world. Problems about what is meant by beneficial ownership. And that was because the British sold to

the OECD this term. We didn't charge them, we gave them this term, without understanding what it meant. A couple of years back, I had to go to Norway to give evidence in a criminal case where a partner of Ernst and Young (EY) was on trial for a criminal case because he advised the client to sign a form saying that the client's company was the beneficial owner of dividends. And the Norwegian Criminal Investigation said this was criminal fraud because they were not the beneficial owner. I had to go and give evidence in Norway about the meaning of "beneficial owner".

And that was all because the British proposed this phrase without knowing exactly what it meant. If that wasn't bad enough, history has repeated itself a couple of years ago in the form of the PPT, the principal purpose test. I'm certain that if you have been studying BEPS, the MLI or the recent developments, the fact that in the BEPS project, it was decided to include in tax treaties, an anti-avoidance rule, the principal purpose test. And when you read the wording of that, there is absolutely no doubt where this comes from, it comes from the UK. That wording – if it is reasonable to conclude, having regard to all the relevant facts or circumstances, that the obtaining of the benefit was one of the principal purposes – is classic British drafting. It's come from British legislation, through British treaties, into the OECD. And it is the COVID virus of international tax. It is the most dangerous thing that has been introduced into international tax in the last couple of years. Because it means that nobody can be certain that they're going to get the benefits of a treaty. That is, other than absolutely, clearly non-tax avoidance, unless it's absolutely clear, potentially, that a tax authority can refuse on the basis of this, and it's a British invention. Clearly, it couldn't be more British, in the wording, we can find that in our UK domestic legislation. So, we've done it again, we've infected the world's tax treaties having given the world "beneficial owner", which was the SARS virus. Now we've given the world the COVID virus, the PPT. You mark my words, those of you who go into international tax, you will find that every time you look at a tax treaty these days, you're asking yourselves, do we satisfy the principal purpose test? So, the British contributed a great deal to the OECD, most of what we contributed was that we did lots of very awful things.

We're not just OECD people in the UK, we're also quite supportive of the United Nations. The United Nations, you know, set up in the 1970s an *ad hoc* committee of experts to help developing countries. And the UK has been quite involved with the work of the UN, right the way through its history. It's quite common that there is a UK representative, as one of the committee of experts. There isn't at the moment. But normally, there's a UK expert, and the UK government always sends a delegation to the meetings of the UN committee of experts. I was in Geneva a couple of weeks ago. So, we've been quite involved with the committee of experts. And we are also quite willing to adopt UN style provisions with developing countries. You'll know that there's a difference

between the OECD model and the UN model. When we're negotiating with developing countries, we're quite willing to accept the UN provisions, for example, things like tax sparing, giving credit for tax that has not been imposed because of a special development incentive. So, we do also participate in the UN work. Within this big network of tax treaties, some of them are very close to the OECD model, particularly with other OECD countries. Some of them have the UN elements in them if it's with the developing country.

We don't have a model treaty, like the Americans or the Dutch have. We tend to negotiate from treaty to treaty. So, if you look at what the last treaty was, the UK would like it to be similar to the OECD content. So, our treaties will now include the PPT, will include arbitration, will include, if necessary, the cross-border assistance in collection of taxes. We track changes to the OECD model, we're quite loyal to the OECD.

So, coming to our current network of tax treaties, we have treaties at the moment with 149 countries. I looked at the Inland Revenue list and counted it up, and we have treaties with 149 countries. They're not all independent countries. We also have them with jurisdictions like Jersey, Guernsey, the Isle of Man, San Marino, we have treaties with non-independent countries as well, treaties with 149 jurisdictions in the world. I think the Netherlands or maybe Sweden are usually our competitors. Italy, you've probably got about 100. But then again, you can play football. We do play football from time to time, but we're not as good: we are good at concluding treaties. Most of our treaties are comprehensive treaties based upon the OECD, sometimes the UN model. We have already a few of these old colonial arrangements, still in existence, but most of them have been replaced by new treaties. But occasionally, I think with Malawi, we have an old agreement from the 1950s. We have had some very recent new additions. Big new addition was Brazil, Brazil was the big prize. Very few countries have treaties with Brazil, and we've been trying for years to get an agreement with Brazil. Brazil always had its own approaches, particularly on transfer pricing, and on taxation at source. And though we've had discussions for years, we've never managed to reach agreement. But as you may know, Brazil has gone through a tax reform, bringing it much closer to some of the OECD principles, for example, on transfer pricing, and we managed to make the breakthrough. A year ago, we've got a very new treaty with Brazil, which people from Brazil are very excited about because it opens up cross border investment between Brazil and the UK, which was always a bit difficult when we didn't have the treaty. It's the last really big country that we needed to have a treaty with.

I talked about income tax treaties. We have a few treaties dealing with taxes on death. We only have about a dozen of those, because a lot of countries don't have death duties any longer. But we do have some estate duty treaties with places like India, Pakistan, South Africa, a couple of those in the US, we have

an estate duty convention. They are somewhat different from comprehensive treaties. And we don't give a lot of time or effort to double estate duties.

We have an interesting process: each year, the UK Revenue carries out a review of our treaties and asks for input from business and commerce and people like me on what we're doing with our treaty network. I had the email just a couple of days ago from the official of the Revenue saying we're carrying out our review, are there gaps in our treaty network? Are there countries that we don't have a treaty? Are there bits of our treaties that are not working very well? So, they do go proactively to consult and to get recommendations.

We have quite an active group of treaty negotiators. There're usually two teams of negotiators at any point in time that are traveling around the world for treaty negotiations. We've spent a lot of time recently updating our treaties with European countries, because as you noticed, we've left the European Union, and so we didn't have the directives any longer and we have to change some of our treaties to reflect the directives. I had lunch with a friend of mine from one country recently, she was in London, because she was negotiating an update to a treaty with the UK. And so, we've got quite an active process of negotiating treaties.

I thought I'd say a little word about implementation and interpretation.

The UK is a dualist country, meaning our international agreements are not automatically brought in as part of our domestic law. Our treaties bind the government at the international level, but they do not have an effect in the domestic legal system. They don't affect ordinary people, ordinary taxpayers. To have that effect, the treaty has to be transposed into domestic law. We have to take the treaty, and we have to give effect to it in domestic law. In Italy, once a treaty is concluded, it becomes part of the law under the Constitution, like France and others. We're not like that, we don't have a constitution, so we have to transpose them into domestic law. The way that's done is that one of our pieces of taxing legislation, the Taxation (International and Other Provisions) Act, Section 2 provides for the UK to conclude treaties with other countries, and it says once those treaties are included in an Order in Council, and that Order in Council is entered into effect, then the treaty has effect in domestic law. So, Section 2 says you have to take the treaty, wrap it, in what's called an Order in Council. An Order in Council is a form of subsidiary legislation made by the King in Council. So, the king, every two weeks or so, has a meeting of his Privy Council. And at that they will approve a number of Orders in Council and some of those Orders in Council deal with tax treaties. So, what we do is we take a tax treaty which we concluded with Italy, we put it in the wrapper of an Order in Council. That Order in Council is then debated in a Parliamentary Committee. So, there is Parliamentary scrutiny of it. Then, the Parliamentary Committee says yes (they always say yes) or no (they never say no).

So, we have this procedure that has to go through which involves a little bit of parliamentary scrutiny, not much. I mean, it goes before a Committee in Parliament and you can attend these committees, they're funny. And basically, it's the blind leading the blind. It's one or two members of parliament, who don't understand international tax, discussing it with another member of parliament, who doesn't understand international tax. So, they're quite pointless, but they do get some scrutiny. And I guess at the moment, if, for example, an Order in Council was presented with regard to a country that the UK didn't look very happily, there might be a debate.

So, there's a limited degree of parliamentary scrutiny, there's not very much. I hope if you've gained nothing from this lecture, the one thing that you will have learned is that we had no treaties until 1946, and since 1946, we have a lot of treaties, more than the rest of the world. Because we didn't have treaties until very late, we haven't until quite recently had lots of case law. The first disputes started in the 1960s, and maybe in the 1960s, there were one or two cases. And then, the 1970s, there were three or four cases. In the 1980s, eight or nine cases. Now for the first time, we're beginning to get quite a lot of tax treaty cases coming to the UK courts, which is a problem, because none of have much experience in tax treaties. We do have a growing number of cases, but we don't have much expertise amongst the judges. It's really weird. France has real expertise in international tax. You go to Germany, the First Senate has real expertise. We have nobody with international tax expertise, and we have really strange decisions.

For example, one of the issues – I am certain that you know there is a big discussion about the OECD commentaries – is whether you can refer to the later commentaries. We had a decision a couple of years ago, a case in our Supreme Court called "Fowler". Really without any discussion, the Supreme Court said, oh you can refer to later commentaries, but no explanation about when and why and what and any guidance. They just simply said, you can refer to later commentaries. And you compare that to some of the very detailed discussions in other countries about previous and later commentaries of the OECD. So, one of our problems is we don't have judges with a lot of expertise in international taxation.

[Prof. Marino]

It is really interesting, the perspective you posed within the UK treaty policies, the beneficial ownership, indeed, it is a very interesting information, going back to law of trusts, equity law, common law, and the limitation of beneficial ownership is within the United States as we discovered with my students. But I want to make a comparison with the speech of Peter Essers. Because Peter Essers, last week told us that the Netherlands has been a bad boy in terms of international tax treaty policies because they were using treaties to attract

investment, and also to play within the field of harmful tax competition. It was very transparent, very clear. Nevertheless, he also said that with the turnaround of the financial crisis, the BEPS project, the Dutch government decided to play the role of the good boy. So, they are now making a selection of corporations that will be establishing in the Netherlands in order to get the benefits of the treaties and so on. My question to you would be, in comparison with what I am telling you and what we heard from Peter Essers, how would you consider the UK treaty policies, as a bad boy, or a good boy, within the field of harmful tax competition? And by having, for example, the idea of the arrangements with the colonies, like the extensions, the UK treaties with the colonies, like the BVI, like the Channel Islands, how would you reply to this?

[Prof. Baker]

I think we have probably been a good boy in that respect. I think that we genuinely entered into tax treaties with the aim of relieving double taxation. We didn't do so in order to make the UK a more attractive location. We realized that, we assume that, we are, to some extent, a relatively attractive location for certain purposes. But if we didn't release double taxation, that would counter that advantage. We never had an arrangement with any of our colonies like, for example, the arrangement between the Netherlands and the Netherlands Antilles historically in the past. But in the past, we used to root the royalties through the Netherlands and out through the Netherlands Antilles because you had the royal agreement between the Antilles and the Netherlands that allows you to get the funds out. And we never had in the UK the ability that you have to go to Rotterdam and sit down with the tax officials there and say, if we leave 5% of the royalties in the Netherlands and they get taxed, will you give us the ruling? We never have ruling of that nature. So, if you think about things like the Starbucks state aid case, we never got that in the UK, we would never give a transfer pricing deal like Starbucks got with the Netherlands. And where the UK in the past might have started to be used for tax avoidance, we generally tackled that problem very quickly. For example, back in the 1980s, we were a bit like Ireland, and companies could be formed in the UK, but as long as they were managed and controlled abroad, they were not UK residents and that could be used for tax avoidance. We immediately changed it. It took Ireland almost twenty years to do the same thing under pressure of the European Commission. So, I understand we've been quite good. Where we do compete for wealthy individuals. We have a special *status* of non-domiciled persons and that is why we have lots of Russian oligarchs and Arab princes and others living in London because we have a very attractive status. I have clients living in the UK and coming to Italy because you have this similarity. We are almost certainly going to get rid of this *status* after the next election.

I don't think that the Labour Party has realized that, if we don't have a non-domiciled *status*, how are we going to get international football players to come and play with British clubs because if they have been playing for Inter or Milan a couple of years, they will have a lot of money in their Swiss bank accounts, and they will not want to go to the UK and pay 45% income tax on this. So, the Labour Party has not realized what I have realized, which is we have to do something for international football players. We could not play football if we didn't have foreign players, you know. I would have said I grew up in the Netherlands being, perhaps, the most attractive corporate tax planning jurisdiction, the Netherlands, maybe Switzerland. The UK is a good location for companies, but it doesn't really do that by tricks or by provisions in treaties.

[Prof. Marino]
Thank you very much, if there is any question from the floor, curiosity?

[Student]
Prof., do you think that with the Brexit, the UK will be more attractive? Because maybe the UK will have the possibility to negotiate freely agreements or new laws without problems within the EU legislation, or do you think that the attraction would be lower, just from a tax law perspective?

[Prof. Baker]
It is very hard to say. I mean, at the time of Brexit, there were big worries that people were talking about Singapore-on-Thames, that we would be like Singapore of Europe in the same way that Singapore pretends to be a big OECD member and to follow the OECD. But actually, if you were in Australia or if you were in Malaysia or China, you would know that Singapore is used massively for international tax planning. I don't think there is any inclination in the UK to be Singapore-on-Thames. The UK Revenue do not regard themselves as going to provide an opportunity for international tax planning through our treaties. We want to be competitive, we want to be an attractive jurisdiction, but not in a way that contradicts our membership of the OECD and our commitment to deal with international tax avoidance. We may not go ahead with some of the crazier ideas of the European Commission. For example, one of the things that we rolled back on after Brexit was DAC 6, the disclosure of cross border avoidance. We originated the whole idea of disclosure of tax avoidance schemes, but DAC 6 went much further than we did, in ways that we didn't think we needed. Clearly, I think we are concerned about the Commission's discussions of shell companies, the Unshell directive, and the possibility of the safe directive outside of the EU. I don't think we regard ourselves as a big target. It's an option. If the UK was planning to become Singapore-on-Thames, we would have seen that under the Conservative governments. On the assumption that,

I think, we are going to have the Labour government for at least the next five years, if not the next ten years, if not the next fifteen years. The Conservative Party is in such a mess that it will take probably ten years before they can realistically put forward an alternative government. The Labour Party is absolutely not in favor of international tax planning by multinationals. So, I don't think you need to worry about us, worry about other countries in Europe before you worry about Brexit. I have the embarrassing situation that I am traveling to Cyprus the week after next, but we've just had the massive disclosures yesterday of the Cypriot involvement in hiding money on behalf of Putin and politicians whatever, and I am certain that I am going to get asked about how Cyprus is seen in international tax in two weeks time. But I don't think we haven't had any of those sorts of embarrassing disclosures. It is true that there is a lot of Russian oligarchs' money hidden in London in very expensive properties, and we have not been very good at preventing money laundering. But you don't see multinational companies operating through the UK as part of a tax avoidance structure to avoid tax in Europe or the rest of the world.

[Prof. Marino]

I think it is pretty much your presentation. Consumers were against the fact that Starbucks was not paying the fair amount of corporation taxes. I think that was a leading behavior within the ESG, the environmental, social, and corporate governance approach.

[Prof. Baker]

After the 2008 financial crisis, the British Prime Minister led to the new deal with international tax avoidance which led to BEPS, and you have people like David Cameron going to conferences and saying multinationals have to wake up, smell the coffee and realize they have to contribute to the taxes. We do not appreciate big multinationals operating in the UK and not paying taxes. Little known fact: we have had a digital services tax on digital businesses in the UK, right the way through all of these useless discussions about the Pillar 1, and we have been collecting all the way through, and a lot of countries are now looking to us as a model for digital services tax. We do collect a real amount of tax from digital businesses.

[Prof. Marino]

Well, thank you very much. I think we can close this very precious lecture and I will meet you next Monday for the Brazilian approach. Thank you again.

The history of international tax treaties from the Brazilian perspective (20th November 2023)

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Abstract

Brazilian tax policy, strongly influenced in its development by Francisco Dornelles's theories, has always used the tax treaty instrument as a tool to attract foreign investment, following an approach based on the principle of territoriality. Nevertheless, peculiar measures such as matching credit and tax sparing, long debated globally, have influenced its negotiating capacity (consider, for instance, the persistent lack of a tax treaty with the United States). Following the BEPS initiative, despite not joining the Multilateral Instrument (MLI), Brazil decided to adopt LOB (Limitation on Benefits) and PPT (Principal Purpose Test) clauses, in an attempt to align its tax treaty negotiations with OECD and UN models, in order to gain greater tax competitiveness on a global level.

Keywords: Brazilian tax policy; principle of territoriality; marching credit; tax sparing; BEPS initiative; LOB; PPT; tax competitiveness.

[Prof. Marino]

Well, I think we can start. This is the fourth lecture. My old friend, Luís Eduardo Schoueri from the University of São Paulo in Brazil. It's a great honor to have with us the guru of international tax treaties, from the perspective of South America, especially from Brazil. Why I thought it was wise to have Prof. Schoueri here with us? Because Prof. Schoueri, as you will see from the slides, from his speech he is offering us a brand new perspective in comparison with the perspectives we have been hearing from the other professors. Because, even if, at the time of 1923, Italy, and the Netherlands were developing countries, certainly then became developed countries belonging to the big powers of the OECD, which we all know, is the club of the rich countries. And certainly, if the approach is to see international taxation from the side of the OECD, we

miss something. This is the reason why it is a great pleasure and honor that we have here, Prof. Schoueri that is offering us a totally different perspective, the perspective of a big economy, a big country, but very far away from the OECD perspective. And this is the reason why he could only enrich our idea of international taxation. And thank you again, Luís, for being with us. I hope this is not the last time, I hope there are other occasions, and it's a great pleasure also that you happen to be here with the Brazilian students, very lucky Luís. Thank you very much, the floor is yours.

[Prof. Schoueri]

Thank you for the invitation, it's an honor for me to be here, it is a pleasure. Well, talking about Brazilian perspective, Brazil doesn't have a huge number of treaties, 36 treaties we have now. Italy is among the treaties we have. But this idea is on our network, it is a country which is missing, very relevant for Brazil, who can guess which country is clearly missing there? The US. I'll try to explain you the reason, it is kind of important for the US to sign a treaty with Brazil. Giuseppe, this is not a problem, because if you are American, you want to invest in Brazil, as always…Holland. Holland is by coincidence, the second biggest investor in Brazil. And you will not certainly say that Holland is such a huge economy. So, when people are talking about treaty shopping and these things, I think, let's pick seriously. I mean, of course, when Brazil signed a treaty with Holland, it was in the 90s, 1990. I'll ask you, why did Brazil sign a treaty with Holland? To have Dutch investors? Or to have multinational investors in Brazil? Why did Holland sign a treaty with Brazil? Make sure that Dutch people would invest Brazil? Or to continue to be a place where international investors could have their holding companies and invest all over the world? I'm just saying this because it's a word in fashion, people talk about the abuse of treaties. And myself, Giuseppe, I don't know about your opinion, but I have problems with this expression. I say there is no abuse but there's the use of treaties. I mean, the treaty was signed by Brazil and by Holland for the purpose of catching international investors, allowing them to have their holding companies in Holland and to invest all over the world including Brazil. Is this treaty shopping? Yes. Is this abuse? No, this is the use of treaties. I am against this opinion. The only country which is being abused is the US because the US cannot force Brazil to sign a treaty. So, the parties involved in treaty are not being abused. I don't know what your idea about treaty shopping is, but I have a different position.

Anyway, talking about Brazilian perspective on tax treaties. Let's try to think Brazilian, let's try to think Latin America. Brazil got independence in 1822, so we have almost 400 years being exploited by the metropole, Portugal in case of Brazil, Spain in case of other Latin Americans. The idea of being dependent is to say, our gold is ours, you're not any more selling our gold abroad, we are independent. We're talking about a period to which the independence was

quite recent, 1960s. The mentality, we're talking about Latin America, would be territoriality, meaning, if income is produced within my borders, I'm going to tax. I don't recognize your right to tax income which is produced here. Because otherwise the money might go back to the metropole. Please try to understand, this was very strong for Latin American countries, the idea of territoriality to say income should only be taxed where it is produced. By the time we're talking about, the 60s, it was very normal that you have taxation at source at very high rates, 25% was a normal rate. Considering this, and somebody says, oh, you should sign a tax treaty. The very first question when you're asked to sign a treaty, and you're Brazilian, you say, okay, let's talk about this, why would I sign a treaty? Wow, you see, because if you sign a treaty, then you will reduce your taxation at source, and then there will be something for the residence state to tax. Authorities would say, what? Are you inviting me to not tax for you to be able to tax something? Why would I sign such a treaty? I'm not stupid, I continue saying there's no reason for you, residence state should get income, which was reducing my state, I need this taxation, I have no reason for signing a treaty. But then in the 60s, something happened in Brazil. Sorry, I am talking about Brazil, but you may also always extend to Latin America, but I was talking about Brazil. In the 60s, we had our military regime, and this military regime had a different mentality, it had a mentality for development and understood that the development would only come with foreign investments. So, they think foreign investments would be a way to develop the country. And also, of course, I am talking about military regime for several issues, not democratic and so on. Talking about economic perspective, they have the view, Brazil must develop, and it will develop if we can get investments. So now maybe we can sign a treaty, not to allow you to tax, but to get your investors. So, this was a different idea. So, the idea was to get investments and treaties would be a tool for catching investments, this was the idea. And if this is true, Brazil would be prepared to reduce its taxation, provided this is an incentive for the investor. Brazil will not sign a treaty and say, okay, I reduce my taxes for you to be able to tax. I've reduced my taxes for your investor to pay less taxes. Is it clear the difference? Because this will explain the main idea of our system. This guy here, Francisco Dornelles, is very relevant for us in Brazil, because he designed our policy. He was a member of the UN committee and so on, and he was very critical, even from the UN model. He said the UN model is said to be a model for developing countries, people say this, and he wrote a text saying this is wrong, UN model is not a model for developing countries yet. Because if they chose to start from the OECD model as a consensus measure, that means it's okay, it's better UN and then OECD, but it is not a source state model. It is merely a residence state model, moderated. He was very critical because he also has principles which should be the basis for any treaty policy. And the principles, if you are going to make a policy, to understand Brazilian policy, you must understand this guy.

He said, you must promote the flow of investments in technology from developed countries to developing countries. Second, you must ensure that the fiscal sacrifice resulting from the use of any method to eliminate double taxation is borne by the developed country. Third, you should allow the taxing power of the developing country to be exercised to its fullest extent, as much as possible due to the provisions in item B. And fourth, guarantee that the tax benefits granted by developing countries to attract foreign investments are not nullified or eliminated by the tax legislation of the investor's country of residence, and I will return to this. So, if you get these four topics, you can understand what the Brazilian policy was, because this guy designed the policy. This guy studied in Harvard, he was very intelligent guy. I mean, really, it is interesting to see that somebody in Brazil by the time was already thinking internationally, and thinking, not copying, because it's very normal that you get a Brazilian who comes abroad, who learns, suddenly begins to repeat. This guy was a guy who came abroad but said, this is not great. I mean, it means he made something further.

So, our negotiation began, and these are our very first tax treaties, Sweden, Japan, Norway, Portugal, France, all of them. This is a very important period. Italy is here as you can see. I need to just stop on this text very soon to explain about this issue, which is very important now to Italy and several other treaties. But also, although the OECD model has a very limited taxation for dividends and interests, Brazil always will have at least 15% at source. OECD model says for royalties, only residence, Brazil 15% at source. I'm going to return to technical assistance, something very specific for the Brazilian policies since the beginning.

I'm going to present this topic, so don't worry about this. What I would like you to understand is this, matching credit and tax sparing. If you get this notion, you can understand Brazilian policy. I'm talking about now what is the matching credit. As I said, If I would have normal slides, there will be some movements, which I don't have, so please help me in the movement. Try just to see here, just the first line. I have a situation, an original situation in which Brazil is taxing interests, dividends, at 25% and source. And here the state is a credit state. If you see the first line, it's clear for you that since Brazil is taxing up to 25%, the residence state will only be able to tax from 25 gross, 25 on. Is this clear? Because it's a credit state. That means up to this moment, whatever will be taxed in the residence state there will be a residence credit. So, there will be no taxation at residence. Is this clear? I mean, can you understand the first line here? Source taxation, residence taxation would be the amount which supersedes 25%. Clear or not clear? Now let's go to line number two, assuming a normal or regular treaty, assuming that Brazil would accept, I'm not taxing 25, I'm taxing 15%, who gains with this? Who gets a benefit from Brazil reducing its taxation? The residence state. And for the investor? What's the difference between line one and line two? What is the difference for the investor between

line one and line two? The amount I have not paid to Brazil, I am paying to my residence state. Is it clear or not? Yes, or no? If you understand this, you understand what a matching credit provision is. According to a matching credit provision, the source state accepts to reduce its taxation to 15% but the resident state will grant the credit as if there would have been no reduction in the treaty. So that means, in this case, the resident state is in the very same situation, there is a sacrifice by the source state. In a matching credit clause, who benefits from the reduction of taxation at source? Taxpayer, the investor, that means you taxpayer, you pay 15%, but you are granted a credit of 25%, that means you only pay taxes from 25 on. Is this clear? It is a very important notion you must have what the matching credit is. Because this is part of our policy in Brazil, several treaties of ours, including Brazil-Italy, have this matching credit provision. That means you will see that the tax at source will not be higher than 15%. There is a difference. So, this idea of Dornelles, which is any sacrifice must be to attract investments, I'm reducing my tax, I'm signing a treaty, not for you, residence state, to get your amount, I'm reducing my tax for your investor to choose my country. Clear or not clear?

I'm going to return to discuss several times. So, this concept was very clear for you, what matching credit provision is, okay? Now just to continue, tax sparing. Tax sparing is a bit different. Line 1, the same thing. Line two, I sign a treaty, I reduce my tax, and you, residence state, may take from 15 on. So, I'm prepared for this. But now, I am allowed to tax 15%. If I do not use my 15% because I granted the tax incentive internally, so I would be allowed to tax at 15, but I use only 10. You will grant the credit of 15 anyway. So, in case of the differences due to the internal incentive, I would be allowed to tax up to 15. But I grant an incentive. So, the idea is the same. If I want to grant investors an incentive, you should not nullify. Just for you to think and to understand the tax sparing issue. If there is no tax sparing issue, if only 10% will be taxed at source, what would happen? The resident state would have more taxation. That means any sacrifice made by internal law would not be benefit of the investor, but of the residence state. That means I would make a sacrifice, I would grant a tax benefit, which will be no tax benefits for you investors. You investors say what's the reason? It's not good for me to get the tax incentive. So, normal tax treaties, regular tax treaties will nullify any measure taken by source state to attract investments. Whatever the source state does to attract investments, whatever tax benefit which is given by the source state will be nullified by the residence state.

If a source state which is allowed to tax according to the treaty on 15%, if it does not tax, grant tax incentive, what will happen in normal treaty? What will happen in a normal treaty if a source state, in regular OECD treaty, source state may tax up to 15%, residence state shall grant the credit. Source state does not tax, what happens? What happens if the source state which would be allowed to tax, does not tax? Will the residence state grant credit? Because the residence

state grants the credit if there is a taxation at source. So, if source state does not tax, the resident state will grant no credit. Clear? So, that means if source state does not tax, the residence state says, well, if you're not taxing, I don't need to grant a credit. That means for the investor, he is not paying taxes at source, but the same tax will be paid to the residence. So yes, there is way to say I want to have the right, as a source state, not to tax and you must respect my decision, you will not nullify my decision. This is a very important part of the Brazilian policy, of the South American policy, to say, if I grant an incentive, I want this to be to be respected.

There was a law in Brazil, which reduced to zero the withholding tax rate on income derived from certain investment funds. So, it means, in principle, without this reduction, there will be a taxation of 15% at source, and the residence state will tax 30%, with credit of 15%. If you don't have a treaty, if Brazil decides to grant an incentive, what happens? Residence state says okay, Brazil is not taxing, but the residence state is still granting the same credit. If you compare situation 1 to 3, you see that the residence state is in the very same situation. I said, Brazil has no treaty with the United States because Brazil did sign a treaty with US with a tax sparing revision, and the US Congress never accepted a tax sparing provision. We had at the same time treaties with the US and Pakistan. The Treaty with Pakistan was not ratified. For the United States, from a US perspective, treaties are there to avoid double taxation. If there is no taxation at source, there is no reason for credit, full stop. I'm American, I'll say well, I have treaties to avoid double taxation, if you're not taxing, I'm taxing. I'm Brazilian, I say I'm signing a treaty to attract investments, if I'm not taxing, I want investors to come. So, you see, there's a shock of perspectives. As we'll see, Brazil moved from this policy to which you will guess, I wouldn't be in favor of the Brazilian policy.

This case also should be mentioned, it was the matching credit provision. So, Brazil will not tax more than 15%, and France will grant a credit of 20%. But there was a reduction to zero. I'll ask you, from what you know, what should France do if Brazil taxes 0%?

[Student]
Give a credit of 20%?

[Prof. Schoueri]
Good. You're a good student but you're not a member of the Conseil d'État of France. Just look at what they did with our obvious matching credit provision. It's unbelievable what they did. Here's the provision: interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State but shall not exceed 15%. So, interest should not be taxed more than 15%. Then you continue, talking about avoiding double

taxation: as regards income referred to in Articles X, XI, XII, XIII, XIV, XVI and XVII which has borne Brazilian tax in accordance with the provisions of those Articles, France shall grant to its residents receiving such income deriving in Brazil a tax credit corresponding to the tax paid in Brazil, within the limits which the French tax establishes in such income. As regards of income in Article 11, the Brazilian tax shall be considered as being levied at a minimum rate of 20%.

If there were any tax paid in Brazil, it would have been deemed to be 20%, but zero is no tax. That means they made a huge difference. They said that since there was no taxation, there would be no credit. If there was 1%, okay, there will be 20% of credit. It's simply a stupid mistake. So, the whole idea was if there was 1% that would be a credit. It makes no sense. But just to know how things work. Credit of 20% because there was a tax paid. Since there was no tax paid, there will be no credit. They did not understand what that matching credit provision is. Now, nevertheless, we do have several treaties with tax sparing or matching credit provisions in force today.

[Prof. Marino]

I want to be back on the abuse of treaties versus the use of treaties. Now, let's imagine that you have a treaty between Brazil and the Netherlands that is used by a US investor. The US investor made the investment directly in Brazil, there is no credit, correct? Through the Netherlands it would get the credit and would get amount of dividends back to the US. Now, who's being abused? Brazil?

[Prof. Schoueri]

No, Brazil signed a treaty for this. I mean, assuming there was an investment, why did Brazil sign a treaty? It doesn't happen.

[Prof. Marino]

Okay, this is clear. So, he said, I don't care whether the investor is coming from the Netherlands, from Japan or from the United States, I will always get the tax sparing clause. End of the story. So, you want to use the treaty with the Netherlands? Okay, fine.

[Prof. Schoueri]

Brazil was not aware that Holland was a place where international investors would have their holding companies to invest all over the world. Brazil wanted to compete to get a part of these investments, and Brazil is competing. I don't accept the word "abuse", let's say it's "use".

[Student]

So, referring to the structure where you are the investor in the US, holding company in the Netherlands and he is a resident in Brazil. So, I understand this is not an abuse of law. So, I'm asking, can we qualify it as a sort of aggressive tax planning?

[Prof. Schoueri]

I believe that you abuse when you find a loophole, which was not intended by the states, whether it is a mismatch or whatsoever. I'd say at least from a Brazilian perspective, it's happening exactly what should happen, from a Dutch perspective also. But somebody is being abused. It is because the only country which is really being abused is the US. The US should have the correct measure within the US saying okay, Holland, if my investor is in Holland as an investor in Brazil, I shall not grant the benefits from the treaty US-Holland. This may be correct. What I'm saying is that this has nothing to do with Brazil. I cannot accept because Brazil, due to the BEPS measures and so on, also accepted inclusive framework, Action number six, abuse of treaties. I'm saying we are playing the wrong music; this is not our problem. But the OECD hates tax sparing. They even wrote a paper report called "Tax Sparing: a Reconsideration", talking about the potential abuse offered by tax sparing, whether or not tax sparing would be an effective instrument for foreign aid, and in terms of tax incentives. I read this report, and I wrote an Article, which you can find afterwards, just look for my name, Schoueri.com.br, that's my site. And you can find all Articles published, including this one.

"Tax sparing: a reconsideration of the reconsideration". I tried to respond to all the arguments by saying, for instance, according to the OECD, tax sparing would be something in disuse. And I quote in my Article the research by Thuronyi saying that 1/3 of the treaties between 2000 and 2003 had some tax sparing clauses. So, it's not very true to say this is in disuse between. Half of them are OECD members. Let's speak seriously about this issue. Ah, there is no evidence that tax sparing would affect the level of foreign direct investments. This is true. But there is no evidence that treaties affect the level of foreign direct investments. I mean, this is a typical argument which logically is wrong. Because also, there's no such evidence. I even give an example. It happened. Brazil had a treaty with Germany. Germany denounced the treaty, so we don't have a treaty with Germany anymore. Since then, the volume of German investments in Brazil increased. So that means there must be several other explanations for foreign direct investments, but it is not a serious argument again. For you to get a tax sparing, you will have to reduce your taxation at source. So, you're paying a high price, source state, for getting this benefit. Come on OECD, you should be happy for this first, because that's what you want me to do. I mean, if I negotiate this, prepare to get to offer this, I will allow him or

her to do it. Ah, developing countries today are not what they were in their past, they have the standards of living in developing countries increased a lot today. So, they don't need this aid anymore.

Again, typical OECD, which data they are based on? Have they looked at data for this or the opposite? There's clearly a need for developing countries. So, this again, the OECD reporting, who dared to write it? There will be abuse of tax sparing clauses. That may be a sign of abuse. But then if the problem is abuse, not use, abuse, then you can write a LOB provision and PPT or whatsoever. But you should not consider the abuse of tax treaty because of this argument. It is very good to encourage an excessive repatriation of profits tax, real profits, and tax sparing will encourage excessive repatriation of profits here. It is not true. Once you have tax sparing, there is no reason for you to repatriate because you can use the tax sparing today or tomorrow, after one year or two years. There is no relationship between the speediness of repatriation and the fact of whether you have or not tax sparing because you always use it in the future. Tax sparing would be a subsidy for developing countries: I hope to have shown you that there is no subsidy because the developed countries knew that there is no subsidy of tax sparing. It continues on the very same situation. So, we cannot talk about subsidy, the one which is making sacrifices are the developing countries, not the developed countries.

Okay, you're saying if I, source state, don't tax, you may tax, I agree. But let's make it the opposite. If you grant an exemption for your resident, I'm going to tax with no limit at source. For instance, you grant participation exemption on dividends. Are you prepared to allow me to tax dividend at source with no limits since you're not taxing? Just make the other way around. If the residence state grants benefit, the source state may not increase its taxation, which should be at least both sides. I hope you're curious enough to read my "reconsideration on the reconsideration" to think about this, because I think we should reconsider the tax sparing, but not in the sense of the OECD's reconsideration.

Going into the second period after the 80s, we continue to have with developed countries more or less the same policy but then we begin to have treaties with equals, Argentina, India and then we had a different policy. I call this a Janus, the Roman God of the Gates who had two faces. I said Brazil in the 80s was a Janus, depending on who he was negotiated with, he had a different face.

Third period. In this period here we really believed Brazil was going to be a huge economy, and we had signed some treaties as a capital exporting country. This was mentality by the time and we had these treaties here. And there was no issue about tax sparing anymore, because now we're talking about, we are a big economy. I'm not supporting this policy. Once again, I believe that tax sparing should be in every treaty, I believe it is a matter of consistency. But as a reality, it is changing. And we began to adopt LOB provisions, we began to adopt LOB

provisions in our treaties, several treaties have already had this LOB provisions. As you have already noticed, I hate LOB provisions.

And after BEPS period, Brazil is not a part of MLI, we did not sign the multilateral instrument. We preferred to renegotiate treaty by treaty, as we are negotiating, renegotiating or we have new treaties following the BEPS minimum standards, but on a bilateral basis. So, all problems you have with this multilateral instrument and how to interpret it and so on, we say, we have a treaty. I think that this was correctly business side. Well, this being said, in this new treaty, we have the LOB, the PPT, we do not have matching credit, except Emirates. Emirates is a recent treaty after BEPS and still has a matching credit.

Now we're coming to the second part of the presentation, specific topics of the Brazilian policy. These are the topics which I want to cover now.

[Prof. Marino]

Before starting the second part, I'm curious to understand what is your relationship with the OECD? Because after the 2000, Brazil became an economic power basically.

[Prof. Schoueri]

Brazil is unfortunately applying for being a member of the OECD. Made the application and is going to be exposed with the acceptance. I am using the word unfortunately. I mean, I prefer to be the head of an ant, not the tail of an elephant. But Brazil is going to be a member of OECD. And it's interesting, because in the 2000, the OECD wanted Brazil to be a member. And Brazil, by that time, doesn't want. It's a pity because if Brazil would have become a member in 2000, I would dare to say by the time that we had a very strong negotiating power into 2000s. Because the OECD wanted to have one of the BRICS as a member. And I would dare to say that Brazil is one of the 10 biggest economies in the world, that Brazil being admitted in the OECD by the time, it would have been even a change in the OECD itself. But as time goes by, when Brazil applies, Brazil is not as strong as it was earlier. And now it's accepting several of the demands from the OECD. No economy with the size of Brazil has ever accepted them. I mean, if we get the big economies in the OECD, they are members of the OECD, but they follow their own policies. The US couldn't care less about the OECD, the OECD does whatever it wishes, and the OECD will say, well, this is what we believe. I can see also Europe. Brazil now is trying to follow the OECD line by line, which is a pity.

May I continue to the second part, is the first part clear? This was the more historic. Now I'm getting this topic with several provisions. The first one is one of the most relevant. The issue of Article 12, technical assistance. Usually, historically, Brazil would not have an Article dedicated to technical services. I'm generalizing, it is wrong. If you're studying international tax law, it is a huge

mistake to generalize, to believe once you saw one treaty, you saw of all of them, each treaty has one wording, even if they follow the same model. I always tell my students, international tax law, I would compare the role of a treaty to when you want to buy a new dress, you have three options. First, you go to a shop nearby and see a nice dress, you buy it or suit, for a very reasonable price. Most probably if you go to a party, you'll find your best friend, I'm talking to ladies now, with a dress which is just like yours. Because you bought in the same shop and it was like this because the dress was not for you. But it was quite cheap so you are using the dress as you could, or your suit. You have a second option, a good tax lawyer gets paid a lot, so you go to have your tailor-made suit or dress, perfect, very expensive. The third option, you go to shop, you see this dress is nice, this suit is nice. When you went there, the dress is not ready, it is almost ready. But there will be a tailor who will come, will see your measures, and will make sure it is for you. You don't pay as a tailor-made suit, but it is still a dress tailor-made. If you find your friend at the party, you will look alike, but each suit will have a different measure. When you think about a model, think about this kind of thing, of an almost-ready suit. That means all suits look alike, but each one has different measures. You have models, but each treaty derives from one negotiation. Every single word may have a small change and can be relevant. Don't ever get a conclusion from one treaty to another treaty, what you call parallel treaties, because you will very likely run into mistakes. So, generally a tax treaty will have a Protocol, which will stay in the Article addressing the royalties, also encompasses fees for technical services. There is no meaning of what technical services would be. When you go now to the treaties, there are situations in which there was no protocol. So technical services will not be considered in a treaty as something separate, which are Japan, Sweden, France, Austria, Ecuador and Finland. In some treaties, you have in the protocol, saying that technical assistance is comprehended in the concept of industrial, commercial, and scientific experience. Others will see differently, will extend the application of Article 12. This will be the type of royalty or type of technical services. And we continue this, let me try to explain to you this.

Well, group one is easy. So technical services, not comprehend, no reference, it is easy. So, there's not a problem. Get to the second one. I'm here in 1974, and this is something, if you like this idea of a military interpretation versus a static interpretation, how should we interpret the treaty, looking or not at the history of the treaty, when it was signed. I'd like to see how it was signed. I like to ask Brazil and Denmark negotiators, go back to 1974 and ask, why did you say that expression "for information concerning industry, commercial or scientific experience includes income derived from the rendering of technical assistance and technical services"? Is this an explanation? Or is the extension? Are you saying that Article 12 should be applied to royalties and to technical services? Or should it be applied to royalties? And technical services are a kind

of royalties? I'm going to 1974 and I would have said why, because this happened to several Brazilian treaties. So, this was clearly not a Swedish position but the Brazilian one. But in case a company would pay dividends, which would be more than 12% of the capital invested in the country, so that will be super dividends, dividends which will be more than 12% a year, you may distribute, but there will be an extra income tax. So, there will be a normal income tax for dividends, but for extraordinary dividends, there will be an extraordinary taxation. So, if you want to pay more dividends than 12%, okay, but there is higher taxation. Now, you're a Brazilian company wanting to pay dividends. And you know, there's a taxation and you have a shift idea. I mean, we are in the 70s, please remember. I think well, I am not paying the dividends, I'm going to pay royalties. Because technology is so difficult for you to know, and I'll pay royalties. This is a deductible expense for me and there will be no supplementary taxation on royalties. For instance, there would be a limitation for the deductibility. Royalties would not be deductible if they would supersede 5% of the revenues of the company. And royalties, this was the biggest barrier. So, it's not deductible because Brazil has our central bank which was very strong. If you need to buy foreign currency, you need authorization by the Central Bank. Central bank would not authorize a payment of royalties which would supersede these 5% of the revenues. So, you will not be able to pay royalties. So, you have the problem of dividends, you could not pay royalties. But I have an idea, I'm going to sign with you a technical assistance agreement, the service agreement. And through the service agreement, I'll pay you what I want to pay. Then this came to Brazil government authorities, royalty authorities, who understood that in case of technical services, there would be embedded in a technical service a royalty. They created a theory which was called the parrot of the pirate. They said if somebody is rendering a service, there will always be, Brazil will be there watching and he will be learning this.

So Brazilian authorities, since there was a limitation on payment of royalties, would see in any technical assistance agreement a disguise payment of royalties. Is this clear? So, this explanation why Brazil would say to their partners, hey, pay attention. These expression for information concerning industrial, commercial, or scientific experience includes income derived from the rendering of technical assistance and technical services, that means they will not try to get a regular service of a lawyer who is hired abroad. This was not the idea. The idea was to get industrial commercial scientific experience transferred through technical assistance. So, I would say here the idea was interpretation.

Amazingly, Brazil signed a mutual agreement procedure with Spain, and both countries agreed in an exchange of letters that all technical services are included in the concept of royalties, regardless of whether in themselves they involve the transfer of technology or not. This is a very interesting case from a scientific perspective because they are changing the treaty. But they agreed on this.

Because by the time they already had clear policy to see the protocol, not an interpretation, but rather an extension, which clearly appears in several treaties of Brazil, such as: the provision of paragraph 3 shall apply to payments of any kind received as a consideration for the rendering of technical assistance and technical services. This is the change in the Brazilian perspective because Brazil saw an opportunity to catch any service, because technical service is any service. Please, if you can nominate one service, which is not a technical service, we might get a count. But the idea certainly what should be an interpretation meant to get the strength of know-how. You see this kind of wording is completely different. Again, here with Hungary: the provisions shall apply to payments of any kind received as a consideration for the rendering of technical services. As you can see, from the treaty itself, I can see that there are two different policies, one extension, the other, interpretation, and I should say that each treaty should be different. However, from what you're seeing, Brazil began to change its wordings again, extension.

Here Singapore. Singapore is a bit different, because it has an Article for technical services, Article 13, which will be Article 12 of the UN Model. But suddenly, it says that Article 12 shall apply for technical assistance. I don't know really how to apply this treaty. Thank goodness, they have the same result. Because what's the difference between technical assistance and technical services? Because fees for technical services are in Article 13, technical assistance is Article 12. I also don't know the difference, I'm glad they have the same result.

[Prof. Marino]

I was thinking since during the course we have been also talking about the digital economy that is letting these kinds of services disappearing basically. How do you catch the technical services if you don't see the service, because everything is just a swipe of a credit card? Now, my question is, do you believe that all these policies are overridden by the new economies?

[Prof. Schoueri]

It's just the opposite. I believe that due to this new approach of Brazil, this extension approach, Brazil says, well, you may discuss this pillar, this issue, and so on, I don't need it. Now, everything is a technical service, full stop. Just explain to you, if Brazil becomes a member of the OECD, it will be a problem. Because presently, since we are not the member of the OECD, you may not, in Brazil, get any foreign currency without the central bank being informed. Every bank in Brazil is obliged to follow the central bank, every single exchange transaction. And to make this clear, Brazil has adopted some years ago a tax on credit cards. And the rate was 6.8%. I will say that Brazil doesn't need to tax the operations. It's a sort of digital service whatever you pay. But due to the OECD,

Brazil has committed to reduce its taxes on this, and it is reducing. So, Brazil will face this problem. This is going to be a happy member of the OECD.

Well, Uruguay, again, you have these technical services here. And Peru, because I mentioned, Peru was interesting, because Peru, they have some kind of tax on digital services. I don't know about these types of Peru. All I know is that Peru says that the provision of Article 12, which is royalties, applies to any kind of payment received for the provision of technical services and technical assistance. So, we do have in one treaty a clear reference to digital services because of Peru.

[Student]

What are the different effects of a clause being an interpretation, or an explanation?

[Prof. Schoueri]

Thank for your question. Imagine I'm going to hire a lawyer, is he a technical? Is this a technical service? Yes. So, if our protocol is extended, if Article 12 applies then Article 7 does not apply. So, if now I am hiring a lawyer, if I'm at an Article 12 I may tax at source. If I'm not at Article 12, I come to Article 7, and unless the lawyer has a PE in Brazil, which is not the case, decision is all in the residence. Is it clear? So, if the protocol is extending, Brazil always says I can tax, if it's only interpreting, then I'll say well depends on whether or not there's a transfer of technology. And I was saying you should not generalize because as I've tried to show you, in some treaties, there is a good argument to say you're extending. In other arguments, it's clear you're interpreting. The generalization should not be done. Just to say for technical services, we still have in Brazil a second issue, which is now in tax policies, we still have Article 14. Article 14 does not exist for the OECD anymore, but we still have this independent personal services. So, all our treaties have these independent personal services, which allow for taxation at source. If it is paid by a resident in Brazil, Brazil will tax at source. So, if you're not in Article 12, the protocol still has Article 14 to consider. I just want to say this, Brazil had a stupid position. Brazil wanted to tax technical services, but instead of trying to apply the protocols, the very first tentative was even worse, it is just an argument so stupid. Oh, first, you know what other income Article means? Article 21, if an item of income is not comprehended in any of the Articles, it is under Article 21. Article 21 of the Brazilian treaties provide for a limited taxation at source. The OECD says in Article 21, the income is only taxed with the residence. Brazilian treaties, all of them say items of income which are not described in the treaty, may be taxed at source. So, Brazil said if I pay for technical service, I'm under Article 12, protocol. But now, if I'm not in Article 12, you come to Article 7. Brazil had a stupid interpretation, saying if you're not in Article 12, you come

to the Article 21 and Brazil may tax. Then somebody says, hey, come on, before going into Article 21, there's Article 7, business profits. Then Brazil says, come on, Article 7 is for profits, not for revenues, profits are net, and when you're paying a service, you're not paying profits, you're paying revenues. So, Article 7 is not applicable for any payment. Article 7 provides only for a taxation of the profit in the company, but none of the items of income, this is wrong. This was declared wrong by the courts. But Brazil had this position for several years. It was difficult to convince that come on you are wrong. But at the end they learned. Once again, they are generalizing what should never be generalized. They're talking about all treaties as if they were the same wording, we saw we are not the same wording. Brazilian official position is that the tax treatment to be given to income paid, credited, delivered, employed or remitted by a source located in Brazil to an individual or legal entity resident abroad for the provision of technical services and technical assistance, with or without the transfer of technology, based on an agreement or convention to avoid double taxation of income… by Brazil shall be as provided in the respective Agreement or Convention. In Article dealing with royalties, when the respective protocol contains a provision that technical services and technical assistance receive equal treatment, in case where the Agreement or Convention authorizes taxation in Brazil. If there is no such protocol, in the Article dealing with independent professions, Article 14, in case of the provision of the technical services and technical assistance related to the technical qualification of an individual. Or in Article dealing with business profits, which relates to the third solution. So, Article 21, not anymore. But they generalized the idea of the protocol, you see that each protocol is different. For Brazil, any service, technical service will be Article 12, except the case where you can apply Article 14. Well, just finish the idea of services, we have this case interesting with China. Maybe you have the concept of service PE. That means, this was an idea created by the OECD. The OECD itself created it in commentary, it was never introduced in the model, but China got it and we have this, that the furnishing of service, including consultancy services, by an enterprise of a Contracting State through employees or other engaged personnel in the other Contracting State, shall be a PE, provides that such activities continue for the same project or a connected project for a period or periods aggregating more than six months within any 12 months. So, any product, service which you have in the country for more than six months, will be deemed to be a PE. This is not a Brazilian traditional approach, but I just mentioned we do have this clause with China. And also, Brazil does follow the OECD model, for example, we have sales outlet, as a PE. Just continuing here, I already mentioned that Brazil has Article 21. This is all of our treaties, the same, we do not have the exclusive taxation at source. So, any item of income which is not dealt with in the previous Articles is taxable in Brazil at source with no limitation, it is a part of our policy. For the service issue, any questions? I

am going to another part of Brazil's policy, which is the LOB, Entitlement of Benefits which, as you may have already saw, I don't like it, but we do have it. So, it was mentioned what we have, Brazil has before BEPS already, it began to adopt these ideas of entitlement of benefits. Here's an example, here's a typical LOB clause. The beneficiary of the convention has some business here, which are banking, shipping, and so on, and it is taxed at a very low rate, and it will not be entitled to the benefit. It is a typical LOB, because it will limit the benefit of the treaties to some companies which, according to the to both parties, should not benefit from the treaty.

But usually what we do have is LOB MPPT. LOB is the first part here, Brazil-Israel here, this is before BEPS. We have this, if the controlling company has more than 50% of foreign companies, so it's a typical company, it will not benefit from the treaty. It is a typical LOB, limitation of benefit. But then we have this here, which is much more than a PPT. I'd like to read this, and imagine, Giuseppe, if I had to really enforce these before court: A competent authority of a Contracting State may deny the benefits of this Convention to any person, or with respect to any transaction. Believe me or not, this is written and signed in its opinion. So, a couple of top authorities may deny if, in its opinion, the granting of those benefits would constitute an abuse of the Convention according to its purpose. This is what you call legal certainty zero. I always say I didn't sign it, I'm just showing you.

Here's the treaty with China, again, you have the LOB, the qualified person but then you have here, a clear PPT clause. So that's showing Brazil is now following. Although Brazil has no MLI, Brazil adopted a clear PPT: obtaining that benefit was one of the principal purposes of any arrangement or transaction, and the benefits shall be denied. So that means, unfortunately, Brazil is part of this inclusive framework. Brazil is actually an active part of the inclusive framework, and now we are paying the price, this is part of our policy to have PPT and LOB combined. Giuseppe, do you want me to make a summary of the Brazilian policy? I hope I've been clear enough for you, but then of course, open to any questions you may have.

[Prof. Marino]

Thank you, I was fascinated by the Brazilian approach because actually it's an approach which makes a lot of sense with reference to the territoriality principle, because we have been facing with the other income case of Vodafone. If you remember, the case between the Indian and the Mauritian treaty, behind there was always the Netherlands. When the Indian tax ministration challenged the treaty saying I want to tax as a state of source, but they lost the case. Meanwhile, Brazil has solved the problem at source by saying, no way, other income means that the state of source may tax, full stop. That is a very interesting approach actually and I can certainly make a comment, and I wish you may give

a word on the new era that we are facing with. Because maybe the OECD with the Global Minimum Tax, Pillar 1, Pillar 2, arrived at the top of the tax world supremacy, and is now starting maybe to decline, because the United Nations are starting again to take in all the beliefs. So, I wonder whether all this Brazilian policy could help the United Nations to, maybe, face a better world.

[Prof. Schoueri]

I was trying to show that Brazil is following the UN model. I mean, we are introducing Article 12.A with technical services. Well, Brazil and India, the two countries were forced to avoid the 12.B, this idea of having services whatsoever. Because, reading the PE Article, Permanent Establishment Article, and thinking whether those people in the 1920s or whoever were thinking about services. The PE was done for an industrial economy, it was not done for the reality, when the OECD creates this service PE, it's very artificial also to know what the service PE is. Sorry I was saying the solution is let's stop, the PE has nothing to do with what we want here. But the taxation at source works much better. It's the only way of doing, I don't believe in Pillar 1, I don't think it is a good solution, not a workable solution. And taxation at source is much more realistic. Article 12.A requests for no limitation of taxation at source, there should be some limitation here.

[Prof. Marino]

Very interesting approach from the state of source and we really needed it because the OECD is getting how the world works. Not only the western countries, but it's much bigger than that. So, thank you very much. Any questions, desires? I think it will be very helpful from the Brazilian colleagues.

[Student]

OECD has a report on international taxation in developing countries, right? What do you think about that?

[Prof. Schoueri]

I could not say this is a response. I think that the OECD is still behind. I don't think the OECD has the legitimacy to discuss about this issue again.

[Prof. Marino]

Maybe I can make the final words because we will be facing with the Global Minimum Tax. What is your opinion? And now Brazil is facing the Global Minimum Tax.

[Prof. Schoueri]

If you ask my opinion, I don't like tax incentives. But my opinion is also that every country should be independent to decide whether or not to grant tax incentives. And when you talk about minimum taxation, you're saying you may not grant tax incentives.

Again, I think if I was deputy in my country, I would not vote for tax incentives. I am against them. But I don't think that this is the role of tax treaties.

Then it comes to legal issues, because this whole OECD plan was not made by lawyers, it was made by economists. I am going to judge it; I am going to see this. I mean, it is very difficult for me, from legal perspective, to say that my tax would be higher or lower due to the fact that in another country of my group, in a third country, it is not being taxed. I have problems with this, question of justifying. From an equality perspective, if you have two taxpayers in the same situation making the same payment, but depending on the fact that one taxpayer belongs to a group, when another company has a lower taxation, this company should be taxed. It is difficult to understand this because this will require revolution which we are not talking about. The revolution to say okay, let's assume that now taxpayer is not a company anymore, it is a group, I am taxing the group, but then the question is why some taxpayers have to pay me tax on individual basis, and some of them pay from the group perspective. What I am trying to say is that Pillar 1 and Pillar 2 have not been thought from a legal perspective. The legal system must be renewed before it can be adopted.

[Prof. Marino]

I agree. Okay, thank you very much, Luís, and we keep in touch.

[Prof. Schoueri]

Thank you very much.

The history of international tax treaties from the Italian perspective (22nd November 2023)

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Abstract

The fiscal influence that Italy has developed internationally has played a key role in shaping modern international taxation, both in the period between 1922 and 1946, when Italy ratified a multilateral tax treaty that constituted the first model of an international tax convention drafted by the League of Nations, and between 1956 and 1963, culminating in the formulation of the OECD Model. Italy also played a leading role in the adoption of several bilateral tax treaties, such as those signed with Czechoslovakia in 1924 and with Germany in 1925, which introduced key concepts such as "permanent establishment" or "dual tax residence". Over time, through reservations, observations and a skilled interpretative strategy, Italy has successfully preserved its fiscal policy, aimed at favoring the source-based taxation.

Keywords: Italy; key role; modern international taxation; multilateral tax treaty; League of Nations; OECD Model; bilateral tax treaties; permanent establishment; dual tax residence; source-based taxation.

[Prof. Marino]

We will start, we have today the presence of Prof. Guglielmo Maisto.

Guglielmo is, I think, the most important international tax scholar we have in Italy. Today, he is the global President of the International Fiscal Association, which is the most important association of tax scholars and practitioners, that is very much involved into influencing international tax policy all over the world, not only for western countries, but also for developing countries. He is also a leading tax practitioner, he deals with many cases, both in the courts here in Italy and at the European Court of Justice. The most recent one, I think, is the

Fiat case, which by the way is one of the cases for state aid that we've been talking about, close to the Apple case. My short comments would only come with the personal memory, because he was also the co-discusser of my dissertation. He doesn't remember that but when we graduated, we were both students of the same professor who ran much faster than I do. It's a great pleasure to have you here today before all our international students, PhD students, researchers. So, thank you again, Guglielmo. The floor is yours.

[Prof. Maisto]

Thank you, Giuseppe and good afternoon, anyone, present and visually present. Yes, I will address the history of international tax treaties, actually I will focus on income tax treaties. Because we have an equally long history of estate tax treaties. As you may know, estate tax treaties are very few worldwide, not only today but also in the history. A lot of attention was paid to estate tax treaties in the period between 1922 and 1927, and a few years later as well. But in practice, a few estate tax treaties have been concluded since then. Today in the world we have something like 40, 50 estate tax treaties compared to the 1000s of income tax treaties. This is because the revenue generated by estate tax is very limited. But I will suggest and recommend to anyone studying the history of international taxation also to look at the history of estate tax treaties, because the history of estate tax treaties, especially the history of the model tax convention on the estate tax, influences also the changes and revisions to the income tax model, particularly the OCD model convention. Particularly, I will say, on Article 4 of the model convention, paragraph 1, 2nd sentence relating to a resident of a contracting state, which is not eligible for treaty protection, because it is taxable solely on income from sources within a state. This sentence might have been influenced by work done by the OECD Fiscal Committee on the estate tax treaty model. And to conclude on this minor point, Italy does have 6 or 7 treaties in force on estate tax. All of them are quite old, with the US in 1956, and so on. So, what I will do, I will address solely the income tax and also some limited agreements on income tax, namely, income tax treaties relating to some taxes or to some items of income. So, you will have here the segments and the major documents that I will comment through my review. The first one is the temporal segment between 1922 and 1946, it was an early history for Italy, it was an early history for all of the other countries. Italy played a key role politically and in drafting the model convention, especially in the period between 1956 and 1963, which was the most relevant period close to the final draft of the OECD model convention. And then I will focus on some observations and reservations made by Italy. I will also address the difference between what an observation is and what a reservation is, for those who are not aware of the distinction. And finally, I will address, if time so permits, also the position Italy has adopted under the multilateral instrument which Italy signed in 2016, and on which Italy

made some reservations with a warning that the multilateral convention has not been ratified yet by Italy and that there might be the possibility for Italy to lift some of the reservations. So, this is basically my presentation.

So, I will start with the early history of the treaties between 1922 in 1946. We had, first of all, and you just have to look at the title, you can look at me, not at the text of the slide. So basically, I will start with a double taxation treaty, it is a multilateral convention which Italy signed in 1922. But there is some disagreement about the date of signatures. Some people say the agreement was signed in 1921 in Rome, but most likely the official signature was made in 1922. It is a multilateral convention, why is that convention important? That convention is important because we need to look at the context, at the historical background. If today, Italy signs a multilateral convention, it will not be something amazing. No, it will be something typical because we have 1000s and 1000s of bilateral, multilateral convention around us. But if you look at how many treaties were in existence at that time in the entire world, then I will not count more than 15. All of them, they are short, they are very short treaties. Sometimes, treaties, primarily signed by Germany or Hungary, treaties which had the limited scope of application, sometimes even treaties between a country and a region, or a country and a county, or a country and a city or a county in Switzerland. Maybe it is only for business income, or the employment income. But none of the treaties has a really wide scope, and the text was very limited, just a very few provisions. So that is the context and that is the reason for which this treaty was signed by Italy with big countries which were the result of the old Empire, Austria, Hungary, Poland, Romania, Serbia, Croatia and Slovenia. These treaties inspired the work of the League of Nations between 1923 onwards, in the drafting of the first OECD model Convention which was actually released in 1963, after the report of the tax committee of the League of Nations in 1923. The treaty never entered into force between all of those countries. In the end it entered into force only between Italy and Austria because the treaty enacted on income taxes. I find in that treaty two provisions which are very remarkable. Basically, two provisions which were not in existence in private treaty because of limited scope. The first one is on director's fees, one can imagine how much relevant could have been, a director who is an individual residing in one state serving as a director of a company residing in another contracting state in 1922. Today it is rather obvious, but it was not obvious at the time. And authorities of the contracting states decided to include this provision that certainly inspired the inclusion of such a provision in the model and in later treaty. Then we also have another provision, which, I believe, is quite interesting, which is a provision which is anticipating Article 25 of the current OECD model convention on mutual agreement procedure. So, it was a way to accommodate and resolve disputes between the contracting states, there was a reference to double taxation as a condition for activating this procedure. And the provision made a reference to

an agreement to enable arrangement for avoiding double taxation. So that also was basically the inception of the provision which now we have in Article 25 of the OECD model convention. If we look at the special features, the additional special features of this convention, basically I will mention two other features of the convention. The first one is that the domestic tax regimes which were in force in the different countries were not having the same structure. When you have a double taxation agreement concluded between two countries, it basically starts and relies on domestic law of the two countries. So, it's very important to basically look at the starting point, and if the two tax systems are similar, then obviously, they reach an agreement much more easily, the two states understand each other. I give an example, if one country does have a territorial system and the other country does have a territorial system, then it's easier to accommodate both contracting states. If one country does have a territorial system, the other country does have a worldwide system, it becomes more difficult to make an agreement. Or when a county does impose taxes on the basis of citizenship and the other country does impose taxes on the basis of a residency, again, you may have a difficulty. And difficulty did exist because Italy, unlike other parties, has the tax system based on what we call the real taxes, "*imposta reale*", or personal taxes, "*imposta personale*". I assume you know the difference. Personal tax means that we will look at the tax of a person, or look at the attachment of a person, an individual or a corporation or legal entity, and look at the income attached to the person. So, there is a focus on where the person is having annexes. On the contrary, when you have a real tax, disregard where the owner of an income actually resides, and you look more at the source of income, where the asset which is generating the income is located. Italy had, at the time, a system where relied on the real tax and also a supplement, a personal tax, a limited personal tax. And so, there was a difficulty for other jurisdictions to understand this system and there was also a disagreement between the countries as to whether one should have given priority to the real concept or to the personal concept. And so, that is also one of the reasons for which the convention never entered into force. Because some of the countries disagreed with the final version of the agreement and only two countries actually decided to have the convention entered into force, iItaly and Austria, because they were neighboring countries and because of the Südtirol situation, there was a large flow of individuals in business between this region of Italy and also there was really a need to conclude the double tax agreement. For the other jurisdictions, the conclusion of the agreement with Italy was not a priority. So that is, I believe, an important treaty and the discussion within the League of Nations, between countries having real tax system and countries having the personal tax system, giving priority to residence or giving priority to source of income, is something which you may find frequently in the works of the League of Nations in reference to what is

called the Rome convention, which was signed in Rome. The convention which was signed in Rome is mentioned in the later work of the League of Nations.

Then we move to another convention, which was concluded in 1924. I mention this basically to make a reference to the fact that, again, that is a reference to the Rome convention, the 1922 convention to say that Italy was consistent in applying the principles laid down in the 1922 convention. And I mention the convention concluded with Czechoslovakia in 1924, because Czechoslovakia is one of the countries which at the time had the most significant number of treaties concluded. And so, it was quite an influential country. For those who wish to study the history of international taxation, you have to realize we are not in the year 2023, we are in the year 1922. So, in year 2023, when you sit with other delegations you look at the United States of America, Australia, Canada, Japan, the G7. In those years, Czechoslovakia was very influential, so other countries which today are big countries were less influential countries. So, you need to put everything in that context, that is the difficulty of studying history, because you have to go back with your memory to those years. Another treaty, perhaps equally important, perhaps even more important compared to the 1922 treaty concluded with Austria, is the treaty which Italy concluded with Germany in 1925. And there are multiple factors for which this treaty is very significant. First, it was a good treaty, good wording, good text of the treaty. The treaty was structured very well, and indeed the treaty remained in force for almost 50 years. So, until the 80s, almost 90s it remained in force. And taxes were different, they changed over time. The taxes we had in 1925 have changed. And indeed, when in 1973, the Italian domestic tax system evolved and changed, we replaced all the taxes with personal income tax, a fully-fledged personal income tax. And a local income tax, which was basically a sort of similar tax, basically very similar but considered to be, let's say, of a different dimension, compared to the personal income tax. At the time the Italians and the Germans decided to basically interpret the 1925 treaty which made a reference to personal taxes and impersonal taxes. We have no longer such a distinction, it was no longer relevant, because all the taxes were personal taxes, we did not have any taxes there were not personal income tax. And so, to say that this treaty remained in force for more than 50 years. Second, the treaties negotiators included the German delegate, Dorn, one of the very influential drivers and drafters of the model convention in later years. And so, in the discussion which took place at the League of Nations in the period 1927-1938, the main actors included - probably you have learned that in prior presentations - Damsté from the Netherlands and Dorn. Dorn also wrote very interesting papers, one of such papers in German was written shortly after the treaty between Germany and Italy was concluded. In 1927 he wrote an Article where he's basically commenting and to some extent also pointing out the difficulties in terms of policy of a treaty concluded with Italy. So, that treaty remained a very important treaty for

the history of the double taxation agreement, not only for Italy but worldwide. I make reference to three provisions here. The first provision has to do with what today we call a business income. And you see here in Article 3 something which may sound obvious if you compare this provision with a current Article 5 in the OECD model. But it's not so obvious if you compare this provision with the provision of older treaties, in order to establish jurisdiction or a taxing right of a source state based on the existence of a permanent establishment. I mean the business income is taxable in the source state if there is a permanent establishment. There was no definition, no general definition of permanent establishment, there was a reference to some types of permanent establishment, a factory, a warehouse, but there was no general definition. Here in the 1925 treaty, from the first line, bilateral treaty provides a general definition: the term establishment means a permanent business organization in which the activity of the enterprise is wholly or partially carried on if the enterprise has establishments. And only in the protocol you have examples of permanent establishment. Basically, a permanent establishment includes place of management, branches, and agency. In former treaties, only the text of the protocol was included, the text of Article 3 was not included. So that is quite a significant development because the structure of Article 5 of a model convention today and also in 1963 model. It is precisely what you see on the screen, the general definition is in paragraph one of Article 5 and the list of non-exhaustive examples in paragraph two. But you'll see in Article 5 of the protocol, you'll see that in the last sentence, it says "other business premises having the nature of a permanent productive organization". The wording "productive organization" is of primary importance because if you look at the definition today, the term permanent establishment under the current model is a fixed place of business through which the enterprise is conducting its business activity. But there is a need for the enterprise to produce income. So, a fixed place of business by itself will never be a permanent establishment. It is required that through the permanent establishment you are conducting a business activity, and indeed paragraph 4 of Article 5 of the current OECD model convention does exclude from the definition of permanent establishment any fixed place of business through which the activities are conducted. That concept led to the drafting of Article 5.1 and Article 5.4 of the treaty model having the word "productive". You will not find that term in any prior treaty or model. There was no model at the time in 1925, so, it is very relevant that was inspired by Italian domestic law, which at the time put an emphasis on the productive nature of the income. So, that is another major aspect which is relevant. The second, the additional aspect which is relevant is Article 13 on the residence. For the first time, to my knowledge, there is a reference in a bilateral treaty to have this situation. Article 13 makes reference to the situation where the individual does have a definition of residence and so situation where there is a residence in both contracting states.

So, these are the main features of the treaty and there will be several more points. Maybe I can add one, which is the one that is related to subsidiaries. Subsidiary companies were considered to be permanent establishments, and one may wonder why a subsidiary company will be a permanent establishment. You can see that in Article in the protocol, it is not quoted here but the treaty with Germany also includes subsidiaries in the definition of permanent establishment. But today a subsidiary is unlikely to be a permanent establishment. Why was there a subsidiary? Why was subsidiary regarded as a permanent establishment? It is very simple, at the time, there was no transfer pricing legislation, at least in both countries. And so, a German company could incorporate a company and could sell goods for, you know, what was the currency at the time? The Deutsche Mark, and even if the value was significant, there was no need to observe arm's length rules and so on. So, there was a way to shift the income from one country to another, and the way to avoid shifting of income was to consider a subsidiary as a permanent establishment. Because at that point, no matter whether you are located the income here or there, the subsidiary was regarded as the permanent establishment. So, you could get around the absence of the transfer pricing legislation and that was basically the logic behind the concept of a subsidiary being a permanent establishment. Again, if you look at the history of this treaty, thinking that in 1925, the treaty was a strongly benefited by the progress of the studies carried out by the League of Nations and the International Chamber of Commerce. So, you can see that there is a reciprocal influence. Because in 1925, there was no model convention yet at the level of the League of Nations. So, the only benefit the treaty would have obtained from the League of Nations was, on the one hand, the work of the four economists back to 1923 as some of you may recall, and also the work done by the technical experts, which between 1923 and 1925 met five times and delivered that report in 1925, the resolution which provided the guidelines for the 1927 model. This commentary on the 1925 treaty with Germany makes reference to the influence of the work of the League of Nations. It is, by definition, making reference to the four economists' report and the technical experts resolution. And I will mention a bit later, one of the main actors an individual in the technical aspects, Bruce, he was an Italian, a few people paid lots of attention to that person, but I will mention it in a minute. And you can see also that a significant influence was taken also from the 1922 Convention, which Italy concluded with Austria and the other countries. So, here just to fix the main factors, personal versus real, the compromise between the real tax system and the personal tax system, affiliated companies being permanent establishment, and a permanent establishment having a productive character.

Then we move on, and we have the double tax convention with Hungary, that is a sign again of the important treaty concluded with Germany. Then, I think we can look at the big influence of the treaty concluded with Germany,

if we compare the draft model convention of 1927 with a convention concluded between Italy and Germany. You see that there are similar definitions, and you can see that in Article 5 of the protocol that I've highlighted, "productive organization" is included but is not included in the draft model convention in 1927. And you can see also that there is no reference to a residence in Article 10 of the draft model convention, but some of the provisions are similar. So, there was that reciprocal influence between the 1925 Italy-Germany tax treaty, which is real inspiration from the technical experts, and the draft model convention, which followed a little later. Italy signed, obviously, other treaties later years, and all treaties of this kind basically have worlding which was similar to the wording of the treaty concluded with Germany. We also concluded some "limited treaties". The limited treaties were limited because, for example, the treaty with the US, which was very important in 1926, was limited to shipping, what we call a reciprocal exemption, and better to do with the international taxation on shipping, where in order to avoid double taxation of shipping, countries concluded treaty having a limited scope, whereby only the country of incorporation or the country of the effective place of management was entitled to tax the income, subject to reciprocity. So, a treaty signed with the US basically said if an Italian shipping company wants to do business in the US, Italy only would tax, and if an US company wants to do business in Italy, only the US would tax. So, I will not tax your citizens, and you will not tax my citizens, it was basically the arrangement.

The Spanish agreement of 1927 was limited to corporate tax. Basically, it was a sort of non-discrimination provision, commitment of both countries not to tax companies of the other contracting state at a greater rate of tax compared to the rate otherwise applied to a local corporation. Not only the rate, but also the tax base. For the Spanish, tax authority will not tax an Italian company at a rate of tax which was discriminatory compared to the taxation of a Spanish company. Then we had limited agreements on shipping with Canada, which was even more limited in scope. The treaty with Switzerland relating to the very minor aspects regarding the income of teachers and income of schools.

Now we move to something which I'd like to mention which is the role of Italian individuals who play their role in the history of tax treaties. I've noticed that previous speakers have made a reference to the four economists. Maybe only two or three because the Italian was not mentioned. The four economists played an important role because they delivered the very important report in 1923. But if we look at the subsequent work, the work of the technical experts, which started in 1923, the experts, when they discussed how to draft resolutions, and then how to draft a model, did not just copy and paste. The economists' report, it's not a coincidence, included also the UK's economist. But in principle, you might see that the role of the economists was important, but it will not undermine the role of members of a technical experts committee. And

if I look at the Prof. Einaudi who was one of the most important economists of Italy and also the President of the Italian Republic, he wrote extensively about public finances and also the difference between the real tax and the personal tax, what he called the fragmentation tax. Because some scholars say, how can you have two taxes, you are taxing twice, double taxation. And he said well, I can fragment the tax, if I want to tax 100, that doesn't matter if you pay 80 plus 20 or if you pay 100, that is the logic. But I think that other individuals played a very important role in the drafting of the rules because Prof. Einaudi was an economist. But when the technical experts in 1923 took the lead and had to discuss the principles and converted them into rules, they had to take into account the drafting, they had also to take into account the budget of each state, because they cannot take a conclusion intellectually, they had to take the conclusion which was also favorable to their own jurisdiction. And they considered a debate between capital exporting countries and capital importing countries. There was obviously confliction between countries such as the UK and countries such as Italy, which was more a source country. So, if we look at the individuals, I will draw your attention first to Bianchini. Bianchini was basically the one who promoted this creation, this study of double taxation, international double taxation, and that is one of reasons for which the League of Nations set up the subcommittee precisely on taxation. Then I would say the most important profile was D'Aroma. He was the director general of Italian Ministry of Finance, he was a chairman of the committee of technical experts. He was the chairman between 1923 and 1927-1928. He played a very important role. He also had some interesting views on certain provisions, which were all in favor of a source state. For instance, many of you may know the concept of exemption, exemption with progression, which means if I am a resident of country A, and country A does have a personal income tax on progressive basis (the more income, the more the rate of tax), and I have income from a foreign state, then that income is exempted but the rate of tax of my domestic source income is applied, the rate, based on the overall income. So, I have income of 100, domestic source, and the income of foreign source, which is 50, I can tax on the income of 100, 50 is exempted. But a 100 is subject to tax at the rate which would apply to 150, exemption with progression. So, I exempt but I apply the rate of the entire income. He suggested to have the same concept applied to a source state. So, also a source state, which is the state where my 50 was taxable, could have taxed that 50 at the rate of the overall income of individual. So, he said that it is unfair if only the residence state can apply the progressive tax based on the overall income, also the source state should be entitled to tax the domestic source income of a foreign individual at a rate which is the rate which applies globally to the individual. But the proposal was not accepted, also because it requires an exchange of information between the countries. So, he was a brilliant profile and very influential at the time. Some

of the individuals that have been quoted by some of the other speakers, like Damsté from the Netherlands, Thompson from the UK, were also members of the same tax committee.

Then, we move to 1956, 1963. So, of course, after 1946, with the Mexico and London model convention that was the convention basically, there is a blackout in the word of international organizations on treaties. Then we move to 1956 when the OEEC then turned into the OECD, started to work on an OECD model convention. Italy was a member, as you know, of the OEEC and of the OECD, and the different rules regarding the different items of income were allocated to Working Parties. So, one Working Party for business profits and other Working Party for income from capital, and subcommittees were set up with leaders. So, for example, business income was assigned to countries A and B, and other income was assigned to another jurisdiction. Italy was included in some of these committees, so in Working Party 3 on income for capital, which was quite important issue for Italy as a source state that was included in that Working Party. Also, the Working Party regarding immovable property, and in the Working Party regarding taxation of dividends. So, the most critical items of the income for the source state were indeed supervised. So, Italy played a role in the drafting, suggesting and successfully obtaining some positive results.

Then we move to the 1977-2010, let's say, model convention. As you know the 1963 model convention does include the reservations and observations and they are very important because they indicate what is the policy of a state with regard to bilateral treaties. You have the model and if you disagree on a provision of a model (for example, a provision of a model says I tax business income on permanent establishment), within the fiscal committee of the OECD, you can input a reservation. You cans say, everyone will tax business income on permanent establishment but I disagree, I will not follow this provision in adopting this policy in my treaty. So, you have a reservation. Italy also finds some observations, observations are not reservations. Reservations start on the provisions; observations start on the commentary when there's the commentary to the model provisions. And when Italy doesn't agree with that interpretation, then it finds an observation. So, you see the difference between reservation and observation. So, I will go through briefly some of those reservations and observations. I will start with Article 5. Article 5, of course, is very important, one of the key provisions of the model of business income on the definition of the permanent establishment. And so, the third one has to do with the commentary in Article 5. In order to understand what paragraph 7 of the commentary on Article 5 said, I need to basically refresh your memory and to go back to Article 5. Article 5, paragraph one, provides a general definition of permanent establishment and paragraph two provides a list of examples. But, as quite rightly, the commentary said in 1963 that this paragraph, the list of examples, contains a non-exhaustive list of examples, each of which can

be regarded, *a priori*, as constituting the permanent establishment. *A priori*, one could think, I don't know whether that is a business activity or not, you are the permanent establishment. So, in order to clarify that was not the meaning, but the meaning was, *prima facie*, namely, at first sight, you seem to be a permanent establishment because you have the warehouse. So, probably, you're the permanent establishment. But of course, you must carry on a business activity because if the warehouse where there is no activity, then that is not a permanent establishment. The commentary will change that and the expression "*a priori*" was replaced by "*prima facie*". And indeed, there was a qualification which I have underlined in the text. The commentary says such places of business, that is the additional condition, reflect the permanent establishment only if they meet the requirements of paragraph one, it does remain so far.

Italy made an observation. That observation was withdrawn in 2010, there was no reason to withdraw. So, there was no change in anywhere else in the commentary. So, evidently, someone wants to replace at the time, took a different position, by saying that Italy has not taken or find better observation. It was not relevant and it makes sense, but you can be taxable only if you are producing businesses income. If you are not realizing any income, there is no reason to basically tax because we start from domestic tax. Then we have another provision. This is a reservation, not an observation, and in order to explain these, you'll need not to read the provision but to listen to something which is not reflected in the provision here. Article 5, permanent establishment, is a provision which does crystallize taxation when you have business income, but the same provision might also tax income from a profession, from income of the lawyer, income of the dentist, income of an architect. Previously, the income of some professional activities was taxable in the source state solely if the person has a fixed base in the other states. At some point, everyone realized that fixed place, fixed base, or permanent establishment, these days, were basically the same. So, it was decided to have just one same terminology. So, income from independent worker is subject to tax in the source state, to the extent if the person has a permanent establishment. The terminology was changed, and fixed place, fixed base was replaced by permanent establishment. Italy made the reservation, they say, no we don't want to do that, we will continue to adopt Article 14 titled income from independent profession. So, they probably mixed up domestic law, not tax law, with the concept of allocation of income, which was the purpose of the changes to the model convention. Then, I will conclude the reference to observation with some observations which were the result of changes made by the commentary in response to an Italian case law. Italian case law addressed in early 2000 the issue of a definition of permanent establishment in one of the leading cases. In the Philip Morris case, I was the lawyer of the company, and the Supreme Court came to some conclusion that you can find here in 2002, and the OECD commentary reacted few years later to such

conclusion, basically denied, disagreed with the position of Italian Supreme Court. You can see that, if you look at the first bullet, the Italian court basically says the enterprises of the same group can be permanent establishments of the same group. And you can see the reaction of a commentary, the commentary immediately, after a few years later, said that the determination of the existence of permanent establishment must be done separately for each company of a group. So, basically the Supreme Court adopted a group approach, where you can be permanent establishment of a group and the Commentary says you can only be permanent establishment of a company, you cannot be permanent establishment of a group. Another change was that the Italian Supreme Court said that you must have participation to a meeting to amount to the authority of concluding contracts and therefore amounting to a permanent establishment. But the action of the Commentary was that attending to the negotiation does not entail the exercise of an authority to conclude a contract. It is quite interesting, because it is a sort of dialogue between a Supreme Court and the OECD Commentary. The Court said something, and Commentary is reacting in order to adjust and basically tell the Italian court that all the other countries disagree. So, what Italy had to do? Basically, Italy made the following observation (paragraph 45.10): Italy wishes to clarify that, with respect to paragraph 33 *etc.*, its jurisprudence is not to be ignored in the interpretation of cases falling in the above paragraphs. So, basically Italy is saying that when the OECD commentary was changed in order to take jurisprudence from the Italian case law, Italy said I disagree because I follow my own case law. So that is another example of the policy of Italians on Article 5 of the OECD model, and the interpretation of Article 5 in the treaty.

The last few words about the options and reservations on permanent establishment in other multilateral conventions. Here it is very simple. You know that we have a few provisions in the multilateral instrument where signatory parties could opt out or could endorse and sign for these provisions to be applicable. So, Article 12 makes a reference to the artificial avoidance of permanent establishment. Italy basically adopted this provision, but you'll see that the *status* of treaties concluded by Italy on this. Italy has reserved in the multilateral convention, Italy decided not to have Article 12 in the multilateral instrument. But in some bilateral treaties, Italy included Article 12 of multilateral convention. So, there is a sort of inconsistency since Italy did not include the Article 12, it did not sign for Article 12 in multilateral convention. So, Italy did not want that Article 12 become part of its changes at multilateral level. But then when, bilaterally, Italy concluded treaties with other countries in the same period, Italy did include the same provision. So, it's not clear why Italy, on one hand, developed multilateral instrument and made the reservation on the provision, and, on the other hand, Italy is adopting the provision in a bilateral treaty. The only reply is that because Italy might like for old treaty not to contradict itself and

to basically take the position that there is no need for existing treaties to change the language. Because Article 12, in essence, is the clarification of a treaty, it is not a modification of a treaty. Otherwise, I would have no argument to justify the position of the Italian multilateral convention. The same attitude, you can find in Article 14 on splitting-up of contracts, and Article 13 on the specific activity exemptions. The same, let's say, discrepancy between the position adopted in the multilateral convention, and the provision adopted in bilateral treaties concluded by Italy and other countries.

[Prof. Marino]

Thank you very much, Guglielmo, for your presentation, within 45 minutes, of the entire evolution of the Italian tax treaties. I would immediately open the floor for questions. And I will start with one question that is also making reference to what we've been hearing from the other speakers. You remember the position of the other professor that was clearly in favor of the worldwide taxation policy on the side of the United States. Then we hear from Peter Essers, sort of a hybrid approach of the Netherlands, he said that the Netherlands played the role of the bad boy through the treaties because there was treaty shopping in order to get a lot of flow of investments. And that was confirmed by Luís Schoueri because the treaty between the Netherlands and Brazil indeed is one of the most important in terms of revenues, in terms of values, of all the tax treaties in Brazil. And then Peter Essers said that the policy of the Netherlands switched into the sort of a good-boy policy after BEPS. Then Philip Baker said, no way, the UK system clearly has worldwide treaty policy, and we certainly use the treaties in order to make our interest that mainly deal with the effective business, with effective transactions, so very much different from the Dutch perspective. Luís Schoueri was very much in favor of the territorial taxation, and he described perfectly that through the matching credit and tax sparing clause between the treaties. Now, having said that, the question to Guglielmo is, what is your feeling after your description about tax policy of the Italian government all over the century? What is coming out in terms of philosophy for the benefits of all of us, and even for the benefits of the officers and the government, if they have to, you know, try to find out a track record when they negotiate treaties, multilateral treaties and so on? What was the philosophy behind?

[Prof. Maisto]

I can comment based on what I see, and maybe there is a philosophy behind that. But what I can see is that the history of the last 50 years seems to indicate that politicians have never addressed, to my knowledge, an issue of allocation of income between countries, so taxing rights at international level in every political campaign. So, for instance, assume that we have elections in a year

or two, and you basically look at the campaign of the politicians. Somebody who, as a candidate for prime minister, is saying that, in our program, we want to change the worldwide system of taxation to a territorial system, to spend a few words on international tax. But I've been seeing that in some countries, for sure Germany in the past, reference to international taxation was made in some political campaign, just an indication. The second is that in the policy, traditionally, we have always a big distinction between Treasury and Revenue Agency. Because Treasury is a part of a ministry, which is drafting rules, negotiating treaties. And then you have the corresponding of the Internal Revenue Service of the US, the Revenue Agency, which is applying the rules. The way the rules are applied and the interpretation may be different from theory to practice, and what maybe the Treasury believes when negotiating the treaty may be different from what we are actually applying. In Italy we are continuing to develop ourselves as a source state to protect the revenue interest, so to apply withholding taxes on payments, on the interest, on dividends or royalties. You may recall all the political message on international taxation in 1985 when the then Minister of Finance, Giulio Tremonti, published what they call the white book, white paper with some proposal ideas, one of which was to abolish interest withholding tax on the basis where basically we want the tax on interest, it was an additional cost for borrowers, for international borrowers. Basically, only theoretically, it is a tax on the foreign lenders, but in practice it is a cost for the borrowers. Just to make an example, I am an Italian resident, and I need a hundred euro to buy my home and I ask a foreign bank to lend me a hundred euro. And if there is no tax on the interest, the foreign lender pays 5%, so 5 euros. There is a tax on interest, no problem, you pay five plus the amount of the tax because I want to have 5% net. So, at the end, the tax of the foreign lender is an additional cost for the borrower. And so basically the idea was to eliminate that and to eliminate taxation on interest. But we continue also in the negotiation with other countries to have a policy. It is like the one in 1923, it's the same policy. It is different from capital importing countries, so taxation of royalties, taxation of interest. So, I'm not saying this is necessarily bad but what I'm saying is this is a perception that I have but there is no clear policy. They don't publish policy on the direction that Italy wants to go on tax treaties in terms of specific provisions. Because there is no debate in this area. So, it is not a criticism to the authority since this is also a responsibility of scholars, the responsibility of tax practitioners to enter the discussion and have a public debate on the subjects, but there was no such a debate. So obviously, we don't see any policy because there is no debate behind. But when I look in practice, I would regard that Italy as being a source country compared to a resident country. We had some changes in 2015, when the Renzi's government introduced good rules on international taxation, the rules of individuals, in order to attract more individuals into the country and other rules on traditional taxation. And that was the sign to attract more foreign

investors, that was a strong sign. Now we have the reform, so the reform will be also an opportunity for Italy to basically take a stronger position and provide a strong sign on the direction Italy wants to go. But we don't have the reform completed, so we have to wait for the final result.

[Prof. Marino]

At least it would be an occasion to understand what is the tax identity we would like to have for the future. And I share your opinion about the source country feeling because if I just recall all the recent investigations on the digital economy, they just demonstrate that we always look for money within the country made in ways other than the real and material permanent establishment. If you read newspapers, recent investigation is trying to collect money also abroad, working on corporations not having any physical presence. So, the idea to be a source country is very sound. Thank you, Guglielmo. Any questions?

[Student]

What do you think about the global tax provided by the OECD?

[Prof. Maisto]

Italy is adopting the minimum tax, but that is basically not a decision of Italy, you know, it is basically the European directive driven by the work of the OECD. So, it's not one country taking the lead, just one country being a member of the European Union. So, basically implementing, obeying literally what the directive said. Because the directive is very detailed. So, in my view, I don't want to oversimplify it, but there is very little room of maneuver on the implementation of Pillar 2, the minimum tax. So, in terms of minimum tax, in my view, it is not a big deal for many companies. Because, first of all, it applies to companies having significant size, more than 750 million euro, and then our level of tax is quite high compared to the minimum tax, the 15% minimum tax. So, the impact for Italy should be limited, I believe it is more burdensome for compliance for large groups. But honestly, I don't see much of a policy issue there, and I find the subject mostly related to tax treaties. There is some debate as to whether the adjustments, which have to be made based on the application of the minimum tax, so the Pillar 2, fall within or without the tax treaty. Because if they fall within a tax treaty, a state will be prevented from the application of a medium tax. That is the only debate between some scholars. But as far as Italian position, Italian position is the position which you find in the directive basically.

[Prof. Marino]

It's something entering into the corporate tax compliance program. The question mark is about the sanctions.

[Prof. Maisto]

I don't know whether the work done by the government is going to lead the direction, but they allow certain standards in order to be eligible for that corporate compliance program. And I believe that one of the standards could be: if you are an entity or a group which applies the Pillar 2, then you will become eligible for the cooperate compliance program. So, you would have to go through the procedure, but it could be the way to basically provide the tool in order to soften the burden of companies.

[Prof. Marino]

Okay, other question? It was a pleasure that Guglielmo Maisto was available to spend with us one hour of his precious time. Thank you again, Guglielmo, and we will take a chance to see you again.

[Prof. Maisto]

Thank you.

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INTERNATIONAL TAX FALL ON TAX SUSTAINABILITY AND JUSTICE

1923-2023: 100 YEARS OF THE LEAGUE OF NATIONS REPORT ON DOUBLE TAXATION

In the course of
Theory & Practice of International Tax Law
Prof. Giuseppe Marino

4 LECTURES WITH RAFFAELE RUSSO

Senior Fellow at ACTL
University of Amsterdam

CALENDAR
27-28-29-30
NOVEMBER 2023

via Zoom
and in presence

PARTICIPATION
Participation is via Zoom or in presence and is free upon registration

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27th November
via Zoom and Aula Scarpelli h.15:00 -17:00

IDENTIFYING MAIN ACTORS IN INTERNATIONAL TAX POLICY

28th November
via Zoom and Aula Scarpelli h. 09:00 -11:00

INTERNATIONAL ORGANISATIONS AND THEIR IMPACT

29th November
via Zoom h. 16:30 -18:30

FOCUS ON THE CONTENT OF OECD AND UN WORK

30th November
via Zoom and Aula Scarpelli h. 16:30 -18:30

GEOPOLITICS AND THE CURRENT DEBATE ABOUT INTERNATIONAL TAX POLICY

DSG Beccaria

Identifying main actors in international tax policy (27th November 2023)

Raffaele Russo
University of Amsterdam

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Abstract

The landscape of global tax policy takes shape as a complex ecosystem, shaped by the interaction of a wide range of actors: state institutions, tax administrations, businesses, NGOs, academics, and even individual members of civil society. Regional organizations such as the African Tax Administration Forum (ATAF) and the Inter-American Center of Tax Administrations (CIAT), together with institutions like the World Bank and the International Monetary Fund (IMF), guide cooperation and government decision-making in a context where the balance between technical expertise, political pressures, and media dynamics is becoming increasingly decisive.

Keywords: Tax Administrations, OECD, World Bank, International Monetary Fund, African Tax Administration Forum, Inter-American Center of Tax Administrations.

[Prof. Marino]

It is a great pleasure to have Raffaele Russo as a visiting professor at the University of Milan for the International Tax Week this year. Raffaele is really an old friend having a prestigious career until now and more prestige is yet to come. He graduated in International Taxation at the University of Naples, then, after some experiences, he went to work at the OECD. He was an officer at the OECD, but saying he was just an officer of the OECD is reductive. He was the drafter of the BEPS project, that we've discussed in several classes during the course at the university. So, he knows, besides the technical details, the politics of the BEPS project. This is very important in order to understand what could be realized, what could not be realized, by having the feeling of how governments react to the OECD recommendations, especially the most recent ones. Then after the OECD, he was seconded at the Ministry of Treasury in

Rome, he acted as an advisor of the former Ministry of Treasury on matters of international tax. And then he decided to join the private business. He engages in dialogue with a lot of foreign governments with reference to the Global Minimum Tax, that is currently on the table of both multinationals as well as the governments all over the world. But I want to emphasize again his scientific approach which is precisely the reason why he has been appointed as a visiting professor at the University of Milan. Because he is involved with the Amsterdam Center of Tax Law of the University of Amsterdam, within a very interesting project, the project of designing the tax system for a cashless, platform-based and technology driven society. So, he really looks at the future with reference to the tax matters. And so, I'm particularly happy for that because, you know, the technical rules generally become very rapidly obsolete, while the behaviors, the philosophical approaches, they remain. So, this is the reason why when we talked about the topics, immediately, we agreed that the most important issue to transmit to students was to talk about what is into the philosophy of the players, the tax players, beyond any technical rules. So, I am particularly happy for that, and I immediately leave the floor to Raffaele for his speech. Thank you, again, the floor is yours. The screen is yours by the way.

[Prof. Russo]

Thank you very much Prof. Marino. It's a pleasure for me to be here, and, as Prof. Marino was saying, we took this opportunity to actually have a cycle of four lectures, which are strictly connected to one another, that look at the issues related to international taxation, not necessarily from a technical angle, even though we will enter into some technical details during the week, but looking at it more from a geopolitical perspective. This is basically the plan for this week. Today, the idea is to talk in general terms about the different actors that play a role and have an impact on international tax policymaking. Then, tomorrow, we will dive in the international organizations that work on international tax policy matters, all of them, and you will see that there are quite a number. And then, on Wednesday, we will be more focusing on technical issues and trying to compare the outputs of the work that has been done and this being done at the level of the two key international organizations in this space, namely the OECD, and the United Nations. And then on Thursday, we will focus on the current debate because, as you can imagine, when we decided to address this topic, it was already quite a few months ago. And nicely enough, in the last couple of weeks, there have been recent developments, that have really shaken up the international tax community, and therefore it is quite timely to discuss these topics. Now, in terms of process, if you guys don't mind, please switch on the camera and feel free to digitally raise your hand and interrupt and ask questions as they come along during the course of the presentation.

I actually ask a question for anyone of you that would like to intervene. How would you divide the main categories of actors in this space? Who are the ones that you tend to hear about, or write about, or lecture about? I'll start from the national level. Because obviously, international taxation is something that exists because there is domestic national taxation. And therefore, I would probably start with the way through which tax policy, which can be domestic tax policy with cross border aspects, is addressed in different countries around the world. First, you have Parliament. Second, Government, usually Ministry of Finance, Treasury, or, in some instances, a specific ministry for tax, and, depending on the setting within the country concerned, tax administrations, when tax administrations are set up as autonomous bodies from the Ministry of Finance or the Ministry of taxation. And this is something that, you know, some people in the public management space have called the "uglification" of governments. So that often, revenue agencies are set up because it is considered that there is a need to have a sort of more agile body dealing with the operational aspects of managing the taxes. We will go into the details of all these. The second group, at least in my categorization, is stakeholders, and I think stakeholders can be divided into different categories. Certainly, businesses and trade groups play a key role in shaping tax policy and have played a key role since the very beginning as we will see later on. Second, nongovernmental organizations and labor unions, which is not something that was common in the past, but certainly we have witnessed an increase attention by a number of NGOs and labor unions, in particular, the taxation of multinational enterprises. Academics certainly play a key role in influencing the debate, identifying topics that deserve a debate or providing solutions to complex situations. And finally, what I call influencers, and influencers for me are those people that, even though they do not necessarily have a formal role in the design of the tax system, with their personality, fame, position, do actually influence tax policy and international tax policies. Now, who would you identify as an influencer of tax policy? Can anyone give me an example of someone that, in his or her view, may have influenced tax policies, without necessarily being a tax expert?

[Prof. Marino]
Raffaele Russo first, of course, I would say.

[Prof. Russo]
Let's say people that don't necessarily work on tax.

[Prof. Marino]
I would say Thomas Piketty, for example.

[Prof. Russo]
Exactly, that's one of those that I was thinking.

[Prof. Marino]
Gabriel Zucman also, that is also a former student of Piketty.

[Prof. Russo]
In this category, I will also put Warren Buffett. You remember when he made this famous statement according to which his personal assistant paid the tax rate higher than the one he paid. And that obviously triggered a debate on the taxation of carried interest, which is the forum through which people like him are often remunerated. I will also put, in this space, let's say influencers, let's say those that have an influence, but sometimes against their will. If you look at the history, for example, of what's happened in the last 20 years about tax transparency, tax havens and exchange of information, the entire work was mandated by the G20, the OECD, you know, to lift bank secrecy as an obstacle to the exchange of information. Because in the night of Valentine's Day of a few years ago, the German tax police knocked at the door of the CEO of Deutsche Post because they had found out that the gentleman has a bank account in Liechtenstein, that hadn't been disclosed to the tax administration. So, in the category of influencers, we have those that willfully influence tax policy, but also those that, because of their actions or because of things that happened to them, have had an impact on the shaping of the policies that we see now on the tables of those that are interested in international taxation. Then, if we move up one level, we have regional tax organizations that usually group together government and tax administrations from a certain region, and there are quite a few, and as we will see in a few minutes, some are very active in this space, while others are less known. Fourth group, multilateral development banks, and again this is not something that many people see in the open space. But as we will see, at least in my personal view and in my personal experience, they do play a role. And finally, international organizations like the OECD, the UN, but certainly I will put into this group, the European Union, probably the G20, even though it is not an international organization. Any comments or questions on this categorization of key actors?

[Student]
In 2021, the US Congresswoman Alexandria Ocasio-Cortez caused a sensation at the social gathering wearing a white dress with the words "tax the rich".

[Prof. Russo]
Excellent, thank you. She has obviously focused a lot on tax issues. Returning to our topic we were talking about national governments. As we said, first, it

depends on the constitutional system, on the legal system. But Parliaments are the ones that approve the laws, and very often that is constitutionally reserved to Parliament to approve laws that impose a tax charge on someone. The reality is also that very often the expertise doesn't rest with Parliaments but more often with Governments. And what you see, for example, following the current evolution regarding the Italian tax reform, is that you have a sort of framework legislation which is approved by parliament and then it's the government that can issue the decrees that provide the details regarding the application of these rules. But what I wanted to highlight here is that when there is not a strong majority within parliament you have a lot of oversight from the opposition. At the moment, for example, I'm working for a government that in the parliament has effectively all the seats, 22 out of 22, and therefore in that case, because of the relationship between the ruling party, which expresses both the government and parliament, the role of parliament tends to be less relevant than in a situation where, because of the composition of parliament, you are forced to find compromise solutions to certain problems or to certain situations. Second point is that when a tax administration is set up as an independent or as an autonomous body (as it is, for example, in Italy, the UK, and in Spain, but as it is not, for example, in France, or in Germany, or in other countries), also the tax administration plays a role in the making of tax policies. And this is one of the topics that has occupied me the most lately. I am a believer in the fact that you cannot have good policy without good administration, and you cannot have good administration without good policy. So, for me, in an ideal world, and that's what happens in countries where things work well, you have a collaborative relationship between the tax administration and the ministry, and this cooperative relationship makes it so that the overall policy objectives are set by the ministry, but they are implemented in a way that makes the administration easier. And when I say it makes the administration easier, I refer both to the job that the tax administration itself has to do, but also to the job of taxpayers that have to be compliant with these rules. Very often this concurrence of responsibilities between the tax administration on the one hand, and the ministry on the other hand, is a source of internal conflict. For example, in relation to who should issue the interpretation of the rules that are passed and become legislation. For example, in relation to whom should make the estimates in relation to certain proposed measures and the impact that these measures may have on tax revenue. For example, in terms of identifying the additional resources that are needed in order to apply the rules that are being passed. So, in a way, I don't think that this is necessarily due to the fact that there are two different bodies, two different entities, because you may actually end up with exactly the same type of conflict even within a single ministry where the functions are located to different directorates and they have to cooperate. Last point on this is the fact that, and maybe Prof. Marino can also confirm given his long-standing

experience, this group of actors that we have identified on this slide tended to focus more on domestic tax policy issues than on international tax policies. My former boss, Pascal Santomauro, wrote a book about tax heavens, and he basically noted that, before the involvement of the G20, for example, in tax matters, the Office of the Head of the International Relations Department of the Ministry of Finance was completely somewhere else compared to the room of the Ministry, in a different building, different floor. Then once the issue became so visible at the police level, they reorganized things, and the Director's office was moved next to the Minister's, symbolizing the increased importance of international tax. This is to say what? This is to say that basically, also at national level, there has been an increased focus on the international aspects of tax policies. And this is obviously a consequence of the effects of globalization and the interconnectedness that characterizes our economies. Now, this was very visible to some in the past, but I think now it's very visible to many people across the world.

Please, feel free to intervene and share your perspective. But historically, trade groups, business associations have had the key role in the shaping of international tax policies. Tomorrow, when we will look at the origins and the genesis of the rules that we have today, you will see that the work was started at the level of the League of Nations, which was an international organization that existed at the beginning of the 20th century, it was the International Chamber of Commerce. Now, in my personal view, this is extremely important and possible. Obviously, there are different ways to evaluate this participation of business in tax policymaking. Because some that like to sort of create a confrontational framework to bring forward their ideas, basically, are quick enough to conclude that the policymakers are captured by business, and basically, like the rules are drafted so that business is the winner of the game. My view is completely different and it's always been completely different than this, that you need to talk, you need to listen to, you need to get the support of those that in real life, then apply the rules, to understand the difficulties and to be able to draft rules in a manner that is workable. If people think that policymakers can be captured because they talk to business, for me, the problem is not that they talk to business, the problem is that they're not the right policymakers. Because they should be able to make up their minds after having gathered the input from stakeholders. Second group is, as I was saying, NGOs, and labor unions, and this is something that is relatively new, which may be for those of you that, you know, I've only recently started to focus on international taxation, it is a given, but, it's a novelty of the last decade or so. And what we have seen is that basically, a number of civil society organizations that used to focus on the environment, used to focus on child labor, used to focus on issues that are very far away from taxation, have become very central in presenting their views, and in a way also in framing the debate at the level of the public regarding taxation, and in particular

regarding taxation of multinational enterprises, and taxation of wealthy individuals. I think a good exercise in this respect is, for example, to look at the comments that are published on discussions. And see, you know, how many of these comments come from business? How many of these comments come from the civil society organizations? And look also at the content of these comments. Now in terms of input, this can be provided in many ways. So, you may have hearings and I refer to hearings to refer both to official hearings in parliament, in congresses, or on board where, you know, experts are called to provide their views on certain measures, but also more informal hearings. For example, when we launched the BEPS project, we called several professors, CEOs, economists, to just come to us and you know, explain their point of view on a number of subjects where we thought it would be relevant to get the input of business. And to me, going back to the point that I raised before, that was a good example of the fact that it's important to listen to stakeholders, but it's even more important that policymakers make up their minds independently and autonomously. So just to give you an idea, we had one of the, I would say, probably one of the top five economists in the world, coming to the OECD in Paris, in front of the task force that was looking at the issues related to the taxation of the digital economy. And when the question was asked regarding the value of data for certain businesses, the reply was data has no value, the only value we have is in the servers and in the investments that we made in order to ensure connectivity. And that came as a surprise to many, and a surprise as such that, you know, someone in the room then put out the consolidated financial statement of a very large tech companies, I don't make names for obvious reasons, and in the consolidated financial statements of this big company it was written that one of the main sources of value for them was the data of their users. And again, this is just an example. Now you can conclude, well, you better not listen to anyone. That's not my approach, my approach is you better listen to everyone, but then you make up your mind based on the information that you have gotten. Other input can be provided by written testimony, and this is something that happens very often, together or separate from hearings. Comments on discussion drafts, I think some of the people that are here today have spent some time commenting on various drafts that have been issued, and meetings that can be official, formal, or unofficial, informal, where technical issues are discussed. But input may also be provided, as you see in the box on the right of this slide, by supporting campaigns that attract attention and center the debate on a given topic with a specific category. And here, I think this is certainly one of the things that civil society and NGOs have done very well. Because the combination of a number of scandals, the economic and financial crisis of 2008 and the following years, the search of over the top companies in a number of areas, has made it so that, frankly, when I started doing this, when I started working in this field 20 years ago, people like my parents didn't know

what I was doing. It was very difficult to explain, you know, I'm a lawyer, I'm an advisor. But now it's like, you go to a dinner and like oh, so you do this, what do you think about? People tend to become curious about these issues as I said, because I think a number of well-organized campaigns have put this issue front and center in the debate.

I recognize that it is always easier to frame context in a conflictual way. Because it allows people to say, you know, I belong to this group, or to this other group, and then, you know, feel a sense of ownership for the position of this or the other group. But my view is fundamentally different, and I don't pretend that it's the right view. But what I'm trying to say here is that, if there is no business, there is no taxable profits, and there is no taxable revenue. So, to me, it's a given that, you know, we are all on the same boat, and I think we are all legitimately trying to find solutions that take into account the interests of the wider possible group of stakeholders. And in some cases there may be disagreement, in some cases, you know, there may be different ways to do the same thing. But from that, to say that, you know, like, lobbying is, by definition, bad, and lobbying, is by definition, something that is in the interest of a small group of the interest holders, versus a larger group of interest holders. I'm not sure that it is the way I would picture the relationship. Obviously, this also has a very strong cultural component. And therefore, you have jurisdictions where the dialogue between the public and the private sector is happening daily, where people, where mobility between the private and the public sector is the norm. And you have jurisdictions where this doesn't happen at all. And once you are a civil servant, you are a civil servant for life. Once you work in the private sector, you work in the private sector for life. Again, I think we shouldn't, or personally, I don't judge, I respect the differences that may exist in between, among different systems. But what I'm trying to say here is that I think, in the ideal world, in an ideal system, there is this continuous, transparent, objective, and accountable exchange of views, with all those that carry an interest in what is being done. And the reflection, ultimately, is when people then go to vote. This is the way I see. But as you see on the slide, obviously, I will say that, if you take, for example, the United States, it's a given that the government talks with business and tries to introduce rules that are in the interest of business. And you have a number of organizations. You see a couple of logos here, USCIB, NFTC, which is the National Foreign Trade Council, the Business Roundtable, which is a gathering of CEOs, very influential. These are basically the people whose actions are then reflected in the GDP numbers of countries around the world at the end of the year. So, for me, the idea that you want to alienate policymaking from these people is not something that I share. Within Europe, you have Business Europe, which is basically the aggregation of a number of national trade groups like Confindustria in Italy, CBI in the UK, the MEDE in France, and then you have BIAC, which again, aggregates all those national

organizations in the representation of those interests before the OECD. So BIAC is the committee that has been set up in order to represent the views of businesses at the level of the OECD. And as I said, they gather the input of different national groups, and then present these inputs in a coordinated fashion to the policymakers. Why did I want to highlight these? Because obviously this part, too, has an element of judgment. Because maybe what is in the interest of French multinationals may not necessarily be in the interest of Italian multinationals, just to take the two whose logos are on this slide. And that's a factor, which basically is part of the life of anyone that works on policy. Policy is about making compromises. And you know, that's something that I perceive is often escaping the debate. And the compromise is due in order to try to accommodate the widest possible number of interests that are represented, which may mean that sometimes you end up with a solution that is different from the one that you had originally thought. That probably in certain aspects is not as perfect as the one that you had originally thought. But maybe it's more relevant in relation to other aspects that you had not thought of. And that's on the business side, if you go on the NGO side, you will see some logos of like ActionAid, Christian Aid, Save The Children. If someone would have told you 15 years ago, you know, Save The Children is going to do work on tax, the reaction that probably be like why? Children don't pay taxes, so why should they focus on them? And actually, what you see on this slide is basically a table that shows the number of reports related to international taxation that were published over time by NGOs. And you see that up to 2002, 2003, but even 2004, even 2008 wasn't much. And then if you look at 2015, you see that the numbers are going up dramatically. And it is also because a number of very specific civil society organizations were set up and started working and provided input in relation to international tax policy. And here, I'm referring to the work that is carried out by the Tax Justice Network, by the work that is carried out by the BEPS Monitoring Group, and also by the South Centre. Well, overall, you know, as I said, very often, the way the input is framed, is conflictual, is controversial, is, you know, they are robbing you of your money, and you know, rich people become richer and poor people become poorer, and multinationals don't pay taxes. So, there is this framing that tends to attract attention. But at the same time, I have to say that over time, also the content of the input that has been provided, has dramatically increased. And what I would like to ask you is, in your view, what is, let's say, the biggest development of the last 10 years, that would have not taken place without the NGOs? Anyone that wants to try?

[Prof. Marino]
But you mean on the tax perspective? Or generally?

[Prof. Russo]
In the field of taxation.

[Prof. Marino]
Certainly, the Tax Justice Network has been pushing a lot on the issue of aggressive tax planning, and then Global Minimum Tax. So, I see them behind, as well as it's not written here, but the international group of journalists that was another name which is behind the scandals like Panama Papers. Certainly, I would strongly say that it's not an NGO, but it is an agreement among the various investigative journalists that work like an NGO, I can be precise.

[Prof. Russo]
Yes, the International Consortium of Investigative Journalists.

[Prof. Marino]
Exactly.

[Prof. Russo]
Absolutely. But for me, again, that's my view, then everyone is entitled to disagree. The one thing that NGOs have pushed, and probably wouldn't have happened, is country-by-country report. Country-by-country reporting has been like a key battle for many NGOs, since, I would say, 2010. And now it's reality. In the space of exchange of information, automatic exchange of information, has been pushed ahead a lot by NGOs. So, just to make it very clear what my point of view is, I recognize that the language that they use, the techniques that they use, are sometimes aggressive. But at the same time, I think one cannot avoid recognizing that certain things have happened also because a number of civil society organizations have been able to frame the debate in a certain way. And you know, now we are all calm, here in a Zoom meeting in our room. But look at these pictures, this is something that we have not seen before. So, the actual people taking the street and protesting about how certain multinationals manage their tax affairs.

I don't think it has helped in the sense of creating an environment where people could debate in a frank and neutral and honest manner, because it has a bit polarized the groups. But at the same time, I think one cannot underestimate the impact that this has had on tax policymaking over the recent past.

[Student]
I'm sorry, if I may ask, maybe a provocative statement. Do you think that they also influence the US tax reform?

[Prof. Russo]
Tough question. When you refer to the US tax reform, you mean the Trump reform?

[Student]
That's why it's provocative.

[Prof. Russo]
Well, I have to say that I guess everyone that was working on international taxation at that time, at least myself, I would say, was surprised by the content of the reform that was enacted by the Trump administration. Because leaving aside, you know, the repatriation of earnings that had been stashed offshore, which was a consequence of the system that had been devised by other administrations thanks to the interaction between subpart F, which is the US CFC rules and the check the box that is the entitlement of US taxpayers to choose the tax treatment of certain foreign entities, whether they should be treated as transparent or not. Certainly, what the Trump administration did with GILTI and with the BEAT, which are like two strong anti-avoidance measures, one that applied in relation to outbound, and another one that applied in relation to inbound investments, were clearly something that one would have not expected from a very business friendly environment. And that brings me to say that at the end, I think the evaluation should always be done on the basis of the facts, and in our case on the basis of the rules. And so, I don't know if they have had an influence, but certainly some of the measures that were enacted were in line with what they had been suggesting at that time. Other questions or comments? Okay, if you don't mind, I will say we take exactly a five-minute break just to refresh ourselves, and then we come back and we look at regional tax organizations, multilateral development banks and then what the World Bank and the IMF do.

[Prof. Marino]
Sure, I have a question for you.

[Prof. Russo]
Okay, so see you in five minutes.

[Prof. Marino]
In the meantime, that everybody connects again, my question, actually my observation to you, is the role of the media communication, the new technology with reference to these think-tanks, these influencers and so on. So, the issue that you were rightly pointing out that all these NGOs are entering into a field that is certainly not within their social purpose, social object, has also to do with

the fact that through internet, through a communication that arrives with the tweets, millions of readers, they could certainly, you know, derogate any kind of world. So, sensible world like that on tax is immediately caught on. So, the role of the new technology that is changing our way of communicating, communicating to each other, talking to each other, I think that had a tremendous impact also on taxation. What do you think?

[Prof. Russo]

It's a fantastic point, I fully agree. Well, it's the democratization of media that we have experienced, you know, with positive and negative effects because we have also seen, you know, all the consequences of fake news influencing behaviors in terms of elections or certain famous referendum that took place in Ireland. So definitely, yes, I think the game changer has been the capacity of these groups, even if not equipped with enormous resources to reach an extremely wide group of recipients with their messages. And to do that, as I was saying, in a timeframe where, you know, we were in the middle of a crisis. Now, you know, we tend to forget. Now with some of the effects of the, you know, the high inflation that we have these days, but the, let's say, the dissatisfaction with the way in which problems are addressed, has certainly helped in fueling a message that, as I said, has always been put out as conflictual, and controversial. But as I was trying to say, I think overall, the effects have not been that bad, even though what remains is still a polarized world, where people that have different ideas, sometimes, you know, do not discuss these ideas, and try to understand the point of view of the other, but they have fights on Twitter or other social media. So, my judgment is a bit, it is not straightforward. But certainly, what Prof. Marino mentioned is one of the key engines through which these messages are spread around *vis-à-vis* a wide part of the population. So, in a way, this is also lobbying. What I always say is that, you know, people tend to conceive lobbying as something done by big business, but this is also lobbying. And so that's why for me, there is no negative judgment in the word lobbying. It depends on what you're lobbying for. And I was having this conversation with my wife yesterday. Because in Italy, in the last 10 days, one of the central issues of the debate has been the role of women, violence on women, remuneration gaps between genders. And I'm obviously, let me be clear, I fully agree with the content and what has been said, but I'm still very surprised by the capacity to link these to several different events, and to make this mainstream so that nowadays everyone is talking about and in a way, because it's for a good goal, we tend to say, well, this is not lobbying. Well, this is lobbying too. And as in anything in life, in many things in life, there is good and bad lobbying. And to me, it's not how you do it, but it's actually what you do it for, that counts.

[Student]

If I may, Raffaele, I think that may be interesting. One thought that I had, I mean, something that disappointed me about the NGOs proposing in my subject, transfer pricing, the formulary apportionment. It's not so much that they seem to be so obsessed about the formulary apportionment, but the fact that they came always not with a real proposal, in my view, but something simple and typically they were mentioning, says assets but not intangible assets, because they are easy to manipulate and labor. And I've always been thinking about well, be careful what you wish. Because if you have a formula like that, where you put profit where labor is, I have seen multinational moving thousands of jobs in another place because of similar reasons. So that, I think, is another example of, I mean, well-spirited lobbying, but may they bring people to lose jobs or people to get jobs actually, but there are consequences.

[Prof. Russo]

Indeed, but at the same time, I think, in order to go across, messages have to be simplified. That does not mean that there must not be a strong analytical basis. And in that case, as you were saying, was probably missing. Because more than a proposal, it was an idea. There was no underlying proposal to them. But in a way, if you think about it in abstract terms, what pillar one is supposed to do is formulary apportionment on part of the profits of a subset of a group of multinationals, subset is those that have margins above a certain rate. But conceptually, it is a formulary apportionment. And, you know, one may say, if that simplified message had not come across, maybe we would have never had at least the draft of the pillar one of the multilateral convention. But I agree with you that once an idea is launched, it has to be supported with the analysis that will allow others to test the idea, to identify this, and to be able to decide on whether that's the right solution or not. And that part was probably missing in the in the work of civil society.

[Prof. Russo]

Okay, let's move on to regional tax organizations. And here, as I said, what I tried to do was to put on the first line the ones that are more active, and on the second the ones that also exist but probably are less active. What do they do? Well, let me start by saying that often these regional tax organizations tend to pull together tax administrations rather than ministries of finance. Obviously, depending on whether there is such a sharing of responsibility in the country concerned, as we said. Second point, that they are often organized on a regional basis. Because the underlying idea is that those in the same region tend often to share the same challenges, and therefore addressing them together would make it easier. Second, it is often also because of the common languages in certain regions that facilitate the dialogue. But what are these key regional tax

administrations? Certainly, the ATAF which is the African Tax Administration Forum. And here, I have to say, I think they've done a tremendous job in terms of, on the one hand, trying to translate the policies that are agreed at the multilateral level to the context of African countries. Look, for example, one of the recent pieces of work that they did was like their report on the application of the minimum tax in developing countries, and the different ways through which developing countries could implement a Qualified Domestic Minimum Top-up Tax, that would obviously bring in revenue for them that otherwise would go into the coffers of other governments that would apply the minimum tax rules. But the African Tax Administration Forum has also been very relevant in shaping a number of the outputs of what is now the Inclusive Framework on Base Erosion and Profit Shifting. If you think, for example, about the subject to tax rule which provides for source taxation of certain intergroup payments that are subject to a nominal tax rate below 9%, these had always been a request of African countries and developing countries. And ATAF was good enough to actually bring these inputs together, do the technical analysis, make proposals at the level of the inclusive framework, and then show that these proposals moved forward. So, to me, this shows the relevance of consolidating regional input into one single input, into the multilateral exercise as a way to exercise more influence on the process. Because obviously, something is to say, you know, the subject to tax rule is supported by Nigeria. Something is to say the subject to tax rule is supported by Nigeria, Kenya, South Africa, Tanzania, Congo, Angola, Morocco, Tunisia, Egypt, *etc.* So that, I think, and, you know, once we get to the end of this week, hopefully, we can also discuss, you know, what could be the future, what will the future look like, but I can already tell you that I think at least in my view, one of the areas where there should be more focus is on this regional gathering in order to consolidate common positions. The second relevant regional tax organization is CIAT. And CIAT is pretty old, established 1967, and CIAT stands for Inter American Center of Tax Administrations, mostly Spanish speaking with the participation for historical reasons, for some reason, also countries outside of Latin America. So, for example, France is a member, Italy is a member. And there, what you see is, first, a lot of work in terms of capacity building, in terms of developing tools, also from a pure IT perspective, from a tax technology perspective, that help tax administrations in carrying out their work more efficiently.

Third is IOTA, which is the Intra European Organization of Tax Administrations which effectively gathers tax administrations from Europe in a geographical sense. So not in a political sense at the level of the EU where there are several groups like fiscal policy *etc.* But here, too, the ideas is the same, is let's pull together administrations that have very similar level of development, very similar issues, very similar challenges, and let's try to develop tools that allow them to work better. So different from ATAF, and in certain respects, from

CIAT, I will say that IOTA is less involved into the policy debate and is more involved into supporting tax administrations' daily work. And the last one, let's say, a tier one is CREDAF which is the organization of French Speaking African Tax Administrations, and therefore gathers countries that fundamentally are French speaking. And their roles are similar to the one of ATAF and CIAT because these organizations, they sit in the meetings. When at the level of the inclusive framework on BEPS, the working party, the topics are discussed, these organizations have a seat at the table. So, they can listen to the debate, they can contribute to the debate, they can coordinate the position slash voting of their members and as such, be influential in the way the deliberations are then taken at the multilateral level. Then, there are a number of other organizations that I have to admit, you know, they exist, and they probably do good work for their members, like ATAIC, which is the Association of Tax Authorities of Islamic Countries, the Caribbean Organization of Tax Administrations, the Pacific Island Tax Administration Association, the West Africa Tax Administration, which are basically, I think, much more inward than outward in the sense that they tend to work more for their members and less in consolidating the positions of these members at the international level. Any comments or questions on regional tax organizations? I don't see in the chat. So, if there is anything in the chat someone has to tell me. Okay.

I would like to talk about multilateral development banks. They are all involved in taxation in different matters. First, it may be via technical assistance. So basically, there are funds that are used to support a given country in doing a given project. What usually happens is that these funds are deployed in specific projects, and people like me – and perhaps like you in the future, for those who are studying – can apply to provide expertise in drafting transfer pricing legislation in Pakistan, training the Pakistani tax authorities on transfer pricing, and developing guidance on the application of the rules. And then these projects are funded by these multilateral development banks. And basically, this contributes to enhancing the situation in this jurisdiction. Second, some of them also participate in the meetings, like ADB has a seat as an observer in the inclusive framework. And that allows them to also identify topics that may be relevant for their members and on which technical assistance can be deployed. And lastly, you have specific reports that are issued, that may, for example, relate to, you know, the tax issues arising in the extractive industry, or the tax issues that may arise in the case of large development projects, or the tax issues that arise in relation to major events, like, you know, sports events, the cricket, final of the World Cup, or the Soccer World Cup that takes place in a jurisdiction. How do you tax them? And in a way they are doing this work less from a policy perspective and more from a public administration improvement perspective. But obviously, in many cases, the two items are very much intertwined because of what I was saying before, there is no good policy without good administration,

and the other way around. One thing that I wanted to underline to you, which is often not necessarily, widely perceived by the public, is that fundamentally these are banks. So fundamentally, they provide loans. Now, they provide loans for projects that enhance the capacity of a given country. Now forget about tax, we are in the space of what these entities do. You know, you have to build the, you can finance the building of a dike in Thailand, so that basically all the agricultural sector of that region can get water all year round, or you finance the building of a bridge, or you finance the building of a highway. But what they have all done, and this is also one of the types of work they do is that they have introduced within their own rules, some sort of code of conduct or integrity rules that very much impinge on the international tax policy work that we were discussing before. Now, if you take the European Bank for Reconstruction and Development, they have called it the domiciliation of EBRD clubs. If you look at the Asian Development Bank, they talk about tax integrity. If you talk about the African Development Bank, they use the term "policy on non-sovereign operations". If you look at the Inter-American Development Bank, they call it the "integrity framework". But all of them have a very similar object and what is the objective? Well, the objective is to ensure that their role as lenders for large projects becomes a factor to influence behaviors of both countries and operators. How? By basically saying, you have applied to get the financing to build this dike in Thailand, well, in order to get the financing, you have to show me that you have no operations in secrecy jurisdictions, that you have disclosed the beneficial owners of the company. Now what does this mean? It means that countries where there are still secrecy provisions obviously see themselves cut off because no one wants to be there because being there prevents me from getting financed. And operators themselves pull out of these countries because otherwise they wouldn't get the financing that they want. And fundamentally, the policies of these different multilateral banks are not necessarily fully aligned but they all tend to rely on the standards that have been developed at international level, for example in relation to BEPS or in relation to exchange of information. So that basically being on the list of non-cooperative jurisdictions or of not-meeting-the-standards-as-agreed-at-the-multilateral-level, not only triggers potential retaliation measures adopted by other countries, but also cuts them off of financing provided by multilateral development banks. As I said, this is something that is not very often in the public domain or seen as, you know, but I have to admit that from my limited perspective, I have seen a number of instances where groups have changed their structure because of these rules, or countries have changed their laws because of these rules. And if you consider that in many instances, the recipient countries of these referential financing, of this aid in a way, are the countries themselves that have certain secrecy provisions or are not entirely aligned to the standards, you see that this becomes a very powerful incentive for these countries to comply with what has

been agreed at the multilateral level. So, in a way, these policies in relation to integrity, domiciliation, illicit flows, however we want to call that, are an additional element that forces or provides a very strong incentive for countries and multinational groups to comply with the standards agreed that the multilateral level.

The last two institutions for the introduction of today are the World Bank. And the World Bank is obviously one of the largest sources of funding and knowledge for developing countries. They also provide financing and they also have their own policies on tax and AML integrity, but they also provide policy advice. So, they come into the country and say well you know what you should do, you should do this and that because this will increase your tax revenues and will allow you to reduce your fiscal imbalance. And as also the others, they provide, they are a massive provider of technical assistance. Well, again, technical assistance may be provided directly by the staff of the World Bank or may be provided via a roster of external experts that can be both from the public sector and/or from the private sector. In addition to that, the World Bank participates as an observer in more than 30 OECD bodies, including the key body of the OECD that looks at aid, and that basically ensures that part of this aid is also devoted to tax matters. So, in a way, the World Bank is really entrenched into all the different projects of the OECD. They are at the table, they have their own banner, you know, Banque Mondiale, because it's in Paris, it's in French. And again, while they do not necessarily represent the point of view of developing countries, they certainly participate in the debate and obtain input in relation to the items where technical assistance will be relevant. So, you can imagine that now, all these organizations are effectively focusing on implementing the Global Minimum Tax, and that's the type of work that they do, as I said, internally or via externals. So, you take a developing country, first question, you know, is it worth for them introducing the Global Minimum Tax? Yes/No? Which parts of the Global Minimum Tax? Which type of economy do they have? How do we ensure that we can do that, but at the same time taking into account that the resources, the human resources that they are available are not the human resources of developed country tax administration? And this is the type of work that is carried out by the World Bank. Here too, if you're curious, there is in this space a specific report on the use of tax incentives in developing countries and the Global Minimum Tax. Because obviously the question is now you know, what do I do with my tax incentives. If as a developing country, I have introduced, I don't know, a special economic zone in order to attract businesses that manufacture chips for servers, and they are taxed at a very low rate or they're not taxed at all. Now with the minimum tax, assuming that they are in scope, they will have to pay a 15% effective tax rate. And if the country does not levy the tax, some other country will levy it. This is the kind of debate and reasoning that is currently taking place. Because obviously we have a number of first movers, like the European countries following the EU directive, the UK,

Canada, Australia since, I think, last Friday, Singapore. But then what about all the others? What shall they do? What is the optimum tax policy for them in this environment? Well, that's where often the World Bank comes in and with the combination of economic and legal analysis, they then provide their advice and their recommendations to these parties. I would definitely focus on illicit flows and the informal sector. To be honest, I think these are the most relevant and pressing issues in these countries in addition to all the issues related to resources. Sometimes, you know, these countries don't have electricity all day in the tax administration. So, you know, rather than going straight into Alberto telling them whether to apply the TNNM or the profit split, there are a number of more fundamental issues that would have to be addressed. And frankly, another big issue, unfortunately, in these countries, is often corruption. So, I am only in favor of, you know, addressing also these international tax policy issues, but my personal view is that there are a number of issues that are much more pressing for these countries that have to be addressed and that in part are being addressed via the work of these organizations.

Last one for today, the IMF. The IMF is different. World Bank and IMF are the consequence of the Washington consensus and, you know, the Bretton Woods system that was set up after World War Two, when, as humankind, we were still able to take decisions that would last for decades, decided to set up new international organizations and *etc.*, but they are like the two pillars of this system. And the key role of the IMF is the surveillance powers that they have and the capacity to provide financial assistance. Now there are a number of countries in the world that survive thanks to the financial assistance provided by the IMF. And as in effect, tax is always with us, obviously part of this work is also about taxation. Now it can be in different forms because one form is the staff reports, and the analytical papers that the IMF historically puts out. And here on the slide, you know, we reference the 2014 paper which was during the first phase of BEPS and was basically their economic analysis on the spillover effects of the rules regarding cross-border corporate taxation, which then was followed up by another report in 2019. And these are analytical reports, these are reports that basically provide the views of the IMF staff based on their ability and capacity to analyze the data that they have available. But to me the most important role that they have is in relation to what is called the Article 6 reviews. Article 6 reviews are basically the reviews that are done in order to ensure that certain fiscal measures that are necessary to be taken to reduce the fiscal imbalances of the country concerned are taken. And now again here, depending on the lenses that you put on, you may see this as something extremely bad and negative. Because you know, well, you know it's the IMF that tells poor countries what to do, and that's the way it has been picked by some. The other is, well, at the end of the day, the IMF is, you know, the collection of money of several countries that is being borrowed by other countries. So as a lender,

if I give you money, that's what I always tell, you know, my family, you know, something is to say, I take a loan because, I don't know, my son wants to go to Harvard. Something is to say, I take a loan because I want to have a three-week holiday in Thailand. And I think it's normal if I take a loan to send my son to Harvard, that someone comes and says, hey, can you show me that you send your son to Harvard and that he's doing well at the university. Because the reason why we gave you this money is that because we think that they will find a job and be able to repay the loan. And if they find out that basically he didn't go to Harvard or to University of Milan, let me say, to University of Milan, just because we are here, and they find out that the money we're spending in Thailand for a holiday, they may have something to say. You are getting money; you are getting money at a very favorable rate because you are part of a monetary union or institutional group. So again, as in many things in life, depending on the perspective you adopt, you may take one conclusion or another. And to me, this is in a way, sort of the lay of the land on these and on the main actors in international taxation.

I have kept the most relevant ones for tomorrow because hopefully it's morning and we are in better shape. The idea is that tomorrow we focus effectively on OECD and the UN. Maybe with a glimpse of the role of the G20 in all these and what the EU has done. Then on Friday I want to go into the work of the OECD and the UN and try to dissect with you the differences in terms of the outputs and how these differences may affect countries' tax revenues. And then on the last day, I talk about the current, now very visible fight between the OECD and the UN, that, as you may know, but if you don't know, I suggest you go and read it, the UN approved a resolution last week according to which the UN should take care of international tax issues and draft a framework convention in that respect. So, when we discussed it with Giuseppe, with Prof. Marino, the topic was still in its infancy, and you know, well, maybe it's an interesting topic. But this week, I think if you look at the Financial Times, if you look at Bloomberg, I mean, it was everywhere, because it was striking, the result of the vote. And that will be the conclusion of this four-part lecture on the main actors of international taxation.

If there are no questions or comments, I think for today we are done, and as I said, tomorrow we come back with the, let me share my screen, with topic number two, which is OECD, UN, G20 and what they have done in this space.

[Prof. Marino]

Very interesting, Raffaele. Thank you very, very much. To be honest, I didn't realize the role of the international banks into the tax policy. But I fully agree with you that they exert influence behind the scenes which is as well as important in comparison with those of international organizations. And it's absolutely true that the influence of the international taxation is much more complex

than we generally see through the organizations. That's very helpful in order to have a better picture of what is the international tax chess, by the way. Any questions? If not, I just thank Raffaele for this first speech and I wait for all of you tomorrow at 9:00 for the second lecture. Thank you very much again, everybody.

[Prof. Russo]
Have a good day.

[Prof. Marino]
Thank you, Raffaele.

International organizations and their impact (28th November 2023)

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Abstract

After tracing the evolution of international taxation – from its early 20th-century developments to the current balance of power between the OECD, G20, UN, and EU – key tensions emerge between source-based and residence-based taxation, alongside the growing political relevance of global crises. The G20 acts as a catalyst for reform, while the UN moves to redefine the rules of the international tax system.

Keywords: International taxation, OECD, G20, United Nations (UN), BEPS, European Union (EU).

[Prof. Marino]

Hi Raffaele, good to see you. Good morning, everybody. Yesterday was very interesting.

What emerged from Raffaele's lecture is that beyond the classic organizations – those we'll focus on today – many other institutions, like think tanks and development banks, also influence international tax policy. These actors are less visible in the media, but they are equally important. Today's session will focus on formal international organizations, and we're fortunate to have Raffaele with us, who knows the OECD inside and out. So, thank you very much for being with us. The floor is yours.

[Prof. Russo]

Thank you very much Giuseppe, and good morning, everyone.

Yesterday we looked in general at the main actors in defining international tax policy. Thanks to the comment of Giuseppe, I think for the next presentation I will add also journalists as a category because thinking about that I don't think it's only the International Consortium of Investigative Journalists that

basically did a lot of the analysis of the documents that were leaked in the past, you know, from the Panama Papers to the recent Cyprus files. But also, I think there are a number of journalists, like individual journalists, some of them are still around that have actually influenced the debate. If you google it and you google Jesse Drucker, Double Irish Dutch Sandwich. Jesse was the first one that actually, you know, put in the public domain the details of the structure that is used by most US tech companies, or was used, at least in the past, and that was the Double Irish Dutch sandwich. And that Article on Bloomberg attracted a lot of attention. Another one is Tom Bergin from Reuters, who did something extremely interesting in my view, and which at that time we were talking about, it was probably 12 years ago. So basically, the representation of what was happening at the level of the UK subsidiary of a big technology company that used to have the most used search engine, just not to make names, Google. Basically, the way Google UK represented its way of working was to provide support to Google Ireland, and that they were not entitled to enter into any contract that was binding on Google Ireland, which would have created the tax liability in the UK in the form of a permanent establishment. Now what this journalist did was actually go to the LinkedIn page of the employees of the UK company of this tech group. And basically, on LinkedIn, a number of these employees were posting news saying today I concluded the biggest contract of my entire professional career, or I'm so happy because today we closed a very important contract. So, he published that on Reuters and these two elements together with the Article of another journalist called the Kaczynski who, by the way, won the Pulitzer Prize on the way general electric managing its tax affairs. It actually had an impact in putting the issue front and center into the debate. So, thank you Giuseppe for the suggestion. And as I see that also some of my colleagues are connected, I'm sure they've taken notes, and so we can update the presentation. Now, today, we will focus on certain international organizations. So yesterday, we looked at the entire landscape from national authorities, including parliaments, tax administrations, ministries of finance, stakeholders at large, business, NGOs, academia, regional tax organizations, multilateral development banks, the Bretton Woods institutions, IMF, and World Bank. And now today to complete the picture of the landscape, we will look at the international organizations that are most active in tax matters. And we will also discuss a little bit the impact they've had. While tomorrow we will go more into constant issues in terms of comparing the work that they have done and that they're doing. Now, before looking at these four organizations, the OECD, the G20, United Nations and the EU, I would like to talk for a few minutes about the role of international organizations in the genesis of international tax rules. As I said, I am a person that tends to not take things for granted. So, I think, you know, we should always be able to question the status quo, but at the same time, I think it's always helpful to understand where we're coming from when looking at what we have

in front of us today. And that often helps in the analysis and when decisions have to be taken, in taking decisions. So, if we go back to the very beginning of the 20th century. In 1919, the International Chamber of Commerce was formed, and it was formed to represent international business interests. Obviously, the world was very different from the world we have today. So, there was less focus on cross-border issues, and most of the focus was on domestic issues. But in a way, there were already exchanges across borders, and double taxation that would result from the lack of coordination of different countries' laws, was obviously an impediment to reconstruction after the First World War. The ICC, the International Chamber of Commerce, provided inputs, push the League of Nations to do work in this space. And remember what we discussed yesterday, like, don't look at this as, or if you want to do it, but at least my perspective is not, you know, the institutions are captured by business, and when business tells them to do something, they do things so that they can create loopholes and not pay taxes. This is one way of looking at things, as I told you, it's not my way. I think cooperation with stakeholders is extremely important from the perspective of policymakers and policymakers should have the brain in order to take informed decisions. So here, what you see is a sort of interconnection between the public interest and the private sector interests that says look, if we need to send our enterprises abroad to build a bridge or to build what has been destroyed during the war, and these enterprises will be taxed in that country and then will be taxed again in our country, they will not go because obviously they prefer to stay here and be taxed only once. This was the underlying economic crash and therefore, the League of Nations set up a committee of experts that would develop principles that would allow for the avoidance, or at least, the reduction of double taxation that would otherwise arise. And as it was common, and I have to say, it is happening also today, in certain instances, the decision was, okay, let's appoint a group of academics, a group of economists that are appointed by the national government, and that can effectively encapsulate these principles into a report. And this is the famous 1923 report of the four economists, which by the way, is the one we are celebrating this year with the anniversary of the first century, thanks to the idea of Prof. Marino Giuseppe. Who were the four economists? Seligman from the US, Einaudi from Italy, Bruins from the Netherlands, and Stamp from Great Britain. Now all these documents are actually available. And you know, if you're passionate about this topic, I suggest that you have a look at what was written there. Because sometimes, it's actually striking how current the statements that are included in the report are still today. And that's something that I think tells us some, gives us certain indications of where we are today and what will be the sense of direction that will be the last part of the presentation that we will do online on Thursday. But the report is based on the concept of, basically, identifying criteria that would economically justify the allocation of the right to tax a

certain item of income to one jurisdiction or to another. And in that analysis, and in that exercise, the elements that were considered were the production of wealth, the possession or the disposition of wealth, and the concepts of residence or domicile. Remember, we are at the beginning of the 20th century, like even income tax legislations in a number of countries were not as developed as we have today. Taxation systems were also very different one from another. So, it was a sort of exercise to pull together people from different legal and economic backgrounds and try to get to the identification of one or more principles. And this principle is the principle of economic allegiance, which, if you go forward 100 years, and you look at, you know, the statements that are made, for example, in the context of the BEPS project, or in the context of the two pillars solution, or even if you look at what's written in the resolution that has been approved by the General Assembly of the UN on the 22nd of November, which we will discuss on Thursday, you have reference to concepts like value creation, when value is created, where activities take place, so we have always been struggling to identify concepts that would provide the economic justification for the allocation of the right to tax to one country or another. And what this report tried to do was basically to try to do that. And the way they did that, now, if you have seen the countries where they were coming from, you see that they were effectively, like, I will say countries that were exporting capital more than they were importing capital. And therefore, what you see is a preference in the report for residence-based taxation over source-based taxation, and what was the reasoning there? Well, the reasoning was, well, you know, if you do your production activities, your manufacturing activities in this country and then you take the goods and sell them in another country, effectively, what you're doing is using the resources of the first country, that has, you know, put at your disposal as an entrepreneur, its territory, its workforce. So like, you are benefiting from being in that country, and therefore, you have to contribute to public expenses. This was the underlying reasoning which still, if you think about it in a creative manner, it's what we have today. Because then, once in the source state, you, let's say, pass this threshold according to which you can be considered to be part of the economic life of that jurisdiction, and therefore using the resources of that jurisdiction etc., then you should pay taxes in the source country, which is, in other words, the concept of permanent establishment, which is conceived as a threshold. So up to that threshold, you pay only in the resident state because that's where you should contribute to public expenses. But once your involvement in the economic life of another country reaches a certain level, and the level is the definition of permanent establishment, then you pay taxes in that country, on what? Well, on the profits that are attributable to that permanent establishment. And the resident state may still tax the income, but it has to provide the relief in order to avoid the double taxation. In a nutshell, this is what they agreed upon, and this is what we still have today in our

international taxes. The work continued because obviously, this was a report. So, there were no rules, there was no actual text of law that will be used in order to apply the principles contained in the report. And these four people that drafted the report being economists were probably not the right people to write rules. And this is also an important lesson for all of us, and therefore a technical committee was set up to actually draft a model treaty, a model convention that countries could then use when bilateral negotiating the introduction of these rules into their system via an international treaty.

This, once you look at things in this way, you know, you understand also provisions like the definition of permanent establishment where it is stated that the fact that there is a subsidiary in the country doesn't mean that that subsidiary is a permanent establishment because at that time, things were unclear, you know, it was like, okay, I have a US company that is doing things or selling things in France, or in Italy, how do they do that? Well, they set up a company, but then, so like, don't think that all the elements that are firm in our system today were firm at that time. And that's also one of the reasons why it was immediately clear that once you had defined the criteria according to which the right to taxes should be located, you also have to determine the amount on which these rights to tax had to be allocated. Because when different parts of the same enterprise were dealing with each other, obviously they would have had an incentive to ensure that the most taxable base will be allocated to the country that had the law with tax applicable. And at that point, it wasn't clear how to do that, and the League of Nations entrust an expert, Mitchell Carroll, who is now a famous name, we also have scholarships at the level of the International Fiscal Association entitled to him, but basically he wrote a report on the methods to allocate taxable income, the taxable income of a multinational group, so a group that will be economically the same entity, but that would operate in a number of different countries via a number of different legal forms. And the 1933 Mitchell Carroll's report is often considered to be the start, to be the beginning of what today the arm's length principle, and the transparent pricing principle. Even though I think, again, you know, if you have no more interesting things to do, but it's an interesting read because I think already in that report, there are a number of indications that, let's say, try to square the circle between what is today's debate, arm's length versus formulary apportionment. But the decision that was then taken at international level was to include in model convention a provision which encapsulates the arm's length principle. And the arm's length principle fundamentally tells you that, you know, when you are dealing with someone to which you are related, you cannot play games with the price that you determine, but that you should basically price the transaction as an independent party will have done at market rates. But here I see on the camera top experts on transport pricing, so I'm trying to also reach to the undergraduate students. So, maybe it is boring for some of you. The activities regarding the drafting of the model

convention didn't start effectively. And what's funny is that the last component of the first phase of international tax policymaking, and in particular tax treaty making, was the issuance of two different models, the Mexico model in 1943, and the London model in 1946. Now, what is striking about these two dates in your view?

[Student]
A war in between.

[Prof. Russo]
Yes, in 1943, there was the World War Two. So, that also tells you something on how the world goes. Now, if you look at the 1943 Mexico model and you look at the 1946 London model, you will say, well, you know, they didn't change much in three years. But then if you look at the comparison, the main provisions, that's what you get. If you look at the Mexico model, there is much more, there are many more instances of source taxation. In particular, as regards royalties, dividends, business profits. And why is it so? Well, because when there was the meeting in Mexico in 1943, most capital exporting countries were busy with the war. So, the Mexico model was effectively agreed mostly among the Latin American jurisdictions. And again, you know, this comes back today with the recent creation of the platform for tax cooperation in Latin America, which has been pushed forward by former minister Ocampo and just a few months ago, they decided to get together and sort of present new approaches to international taxation. So, at least what I find fascinating about history is that it tends to come back. And that's probably where we are at the moment.

[Prof. Marino]
Raffaele, I have a question about the Mexico model and the London model, do we know who is behind? Which countries are behind the approval of the two models in order to understand also the application of the models themselves?

[Prof. Russo]
Yeah, in fact, the Mexico model was mostly Latin American jurisdictions, while the London model then everyone was back, the US, the UK, the Netherlands.

[Prof. Marino]
We could also say that there was a sort of gain between the two models, because I believe that in the table of negotiations between a European country and a South American country, both countries were bringing their respective models, is that correct?

[Prof. Russo]

Yeah, absolutely, these are models. So effectively, these rules do not create legal rights or legal obligations until they are inserted into an actual double tax treaty, which is negotiated by two sovereign countries. And as Prof. Marino was saying, when you start the negotiation, you start with your own model, or with what you have in mind in relation to your double tax treaties, and the other country does the same. If you are a good student, you have also studied the legislation of the other countries so that you are prepared, you have possibly confronted with your stakeholders to see, you know, what are the relevant items for purposes of your enterprises investing there or doing business there. And then you go into the negotiation and the negotiation then, you know, may end with the treaty that is then signed and ratified then becomes law, or it may end with no agreement, because the positions are very different. And that's, for example, the reason why several Latin American jurisdictions, if you take Brazil, the treaty network of Brazil is not that large. As of 2023, we still don't have a treaty between Brazil and the United States, for example. So, you know, obviously you are sovereign, and we are all living in an era where many people, well, I don't want to say things that are the object of tomorrow, but let's say, when Max and myself studied in the Leiden 20 years ago, there was no discussion that treaties were a good thing. And, you know, they were important to provide certainty, to provide predictability, to attract investment, to avoid double taxation, *etc*. Today, there is an increasing number of people that is questioning the usefulness of double tax treaty from an individual country perspective. Because in many cases, treaties limit the taxing rights of the source jurisdiction and source jurisdictions may not be very happy about that. And that may also relate to what we were discussing yesterday, the way national power is allocated among different entities. Because maybe, you know, the people that work in the ministry of taxation or in the tax administration are not very happy. But people that work in economic development or international commerce are very happy, and that's what they want to achieve. And that's where it's done at the domestic level that you need to find a common position on the economic policy that the country wants to carry out. But something that I will say no one 20 years ago would have said treaties are not good. Today, you have an increasing number of people saying, well, you know what? And what we have seen, also recently, is that double tax treaties have a very strong political component. When did we see this extreme political component in the recent past in your opinion?

[Student]

The Russia and Ukraine conflict.

[Prof. Russo]

Very good. We terminated the treaties with Russia. Most countries that are supporting Ukraine, the first thing they did was, we terminate the treaties, the double tax treaty with Russia. Why? Because effectively, it's part of the economic strategy, in this case against Russia. Which is to say, we don't want our people to invest there, we don't want our people to create prosperity there, and therefore we cut the bridges so that they cannot go there. In addition to imposing specific sanctions in the case they do. So, this is not only like a very fascinating tax technical topic to write a PhD about, but it's also very much entrenched with politics.

Now, going back to where we were, the differences between the Mexico and the London model, as you can see, are clear, but then what happens afterwards? And this is, I think, something that is also, to be honest, I wasn't able to find out properly what happened. I think I have a gap of about 10 years. Because remember where we started, the League of Nations, then the League of Nations issued the four economists report, then the Mitchell Carroll's report, then the League of Nations model conventions, then the Mexican, the London models. But then the League of Nations basically disappeared. It disappeared and there is a new international organization called the United Nations. But if you look at the tax work, the tax work was actually carried forward by an organization which at that time was called the OEEC, the Organization for European Economic Cooperation, which is basically the current OECD. But what was the OEEC doing? The OEEC was effectively the organization that was set up in the Château de la Muette in Paris in order to administer the Marshall plan, which was the plan of funding substantially from the US and Canada to reconstruct Europe after the World War Two, and also geopolitically to counterweight the influence of the of the Soviet Union at that time. You remember that phase where the wall in Berlin that divided the two parts of the world. Now, from a tax, international tax policymaking perspective, funny enough, it was the OEEC that took over the work and set up a fiscal committee with the objective to promote and support stronger economic ties between different sovereign countries. In 1960, it was then decided to basically transform the OEEC into the OECD, which took care not only of the remaining parts of the Marshall Plan that by then had already been deployed. Again, think in, particularly for those of you that come from Europe, think in today's terms into the recovery and resilience plan at the level of the EU, and like what we are trying to reconstruct, even though there has not been a war, but there has been a pandemic, which also tells us something now that sometimes in order to make progress in certain areas, you need the big crisis. But what matters for our purposes here is that the OECD immediately took an important role in international tax policymaking. And in 1963, it issued its first draft model convention. And if you want, that is probably the time when a new era starts in international tax policy. Now, if you

look at the updates that were made to this model, look at the dates, first model in 1963, the first update in 1977, 14 years, then in 1992, 15 years. So, in a way the model was pretty stable. And it is only from 1991 that it was clear that the pace of economic, technological, political development was going much faster than in the past. It's the beginning of globalization of hybrid connectivity, but like, there was an immediate realization that things had to speed up in order to match the speed of the developments that the rules were trying to regulate. And therefore, since 1992, effectively, the OECD model is updated every two or three years. It was updated in 1994, in 1995, in 1997, in 2000, in 2002, in 2005, in 2008, in 2010, in 2014, and the last update called BEPS project was in 2017. Now, what is the relevance of the model of the OECD? As we said, it's not a binding document because what's binding is the treaty, like if you're advising a client that, I don't know, he is deriving royalties from the Netherlands where he or she has published a book and gets paid royalties for the use of the copyright, you don't look at the model, you look at the actual treaty in this case. But the influence of the model has always been on two things. First, in actually providing the template of the rules that then are included in the actual treaty. And second, because the model also contains a very long commentary that basically provides explanations of what the rules mean with examples, with guidance. So effectively, what was being updated, in many instances, was not the model itself, but was the commentary to the model. And if you look at the updates to the commentary, to the model, you realize that what we saw before with the League of Nations, the prevalence of the resident principle as a sort of like cognitive prejudice, was the residence-based taxation rules. And in many instances, what you see in the commentary is clarifications that very often respond in an almost direct manner to the positions taken by certain source jurisdictions, whether at the level of the tax administration, or at the level of the judiciary. Anything that comes to your mind when I'm making these examples? What is a famous court decision that got the honor of being officially criticized in the commentary to the model tax convention?

[Student]
Philip Morris.

[Prof. Russo]
Thank you very much. Prof., you wanted to comment?

[Prof. Marino]
I was just thinking that I experienced that moment together with Guglielmo Maisto. By the way, Guglielmo Maisto last week was talking about the case law that he tried to defend before the Supreme Court with no success. But nevertheless, to be honest, I see behind the reaction of the OECD, certainly a way

for the US government to show its power by reacting, what could have been a wave spread all over many other countries other than the Italian jurisdiction. And it comes to my mind that a similar approach is not arriving with reference to the digital PE because we indeed are experimenting a lot of other, you know, solutions circling around the same concept, while much simpler it would be to intervene within the PE definition, within a concept of digital PE, which would certainly be easier for comprehension about practitioners, scholars and so on. So, for analogy, I think that it is a similar experience we are facing with today, with reactions from the United States mainly, in order not to go into that direction. That is what I wanted to share with you.

[Prof. Russo]

Thank you very much. I fully agree, and I also think that in a way, and to be honest, I wrote this 15 years ago, so it's not now, but the Philip Morris decision was actually, clearly going beyond the rules that were applicable, but was also sending a signal that something had to be done. Otherwise, the system would just not continue to be as strong as it was. And this is where I think there was a missing recognition from the site of many, like if we will not be in a university, but we will be in a bar drinking spritz, I will tell you, frankly, Italy was criticized because of the Supreme Court decision in Philip Morris. Brazil was bashed for the fixed margins in its transparent pricing legislation for 20 years. Now we end up with pillar one and pillar two where we have focus on transparent pricing and we have consideration of tax rules at group level. So, you know, if instead of frontally confronting those state Supreme Court judges, you know, presenting certain view and just thinking more in strategic terms, probably we wouldn't have ended up in the mess in which we are today. The influence of the US, for sure, it's what we're seeing today, and those that know, if I am a digital service tax guy, I am very much in favor of, you know, thought about it when we were doing BEPS, work on it when I was in Italy, it's bringing in money, it's not creating any particular issue for taxpayers, it works. It has maybe, you know, some improvements that could be made also based on experience in terms of territoriality and now we apply the rules. It's not an income tax, it's closer to an excise tax on the value of data whose approximate determination is considered to be revenue. But if in three years, we have a better way to value our data, and frankly, business is already helping us because those of you that are in Italy. So not to talk about tech companies, just go on the website of any Italian newspaper, what do you get? Either you give us your data and you can read the Articles for free, or you pay five euros per month, or whatever that is. Well, we are starting to get to the point where we can price it. And at that point, we may have to consider what tax implications this triggers. So now, everyone is also thinking, again, the crazy Italians because as you know, there is an audit undergoing on a big tech company actually saying what I was just saying. This

is a barter transaction. The idea that you get because it is in our mind, like if I tell Sara, Sare are you there? Yes, you're Sara. If I tell you, you have to pay for your email account, what will be your reaction? You will say, wow, it's strange, like, why do I have to pay for my email account? If I tell Prof. Andrea Ballancin, I give you a cell phone for free, and you can use and call everyone, no worries, you don't pay. That will seem strange to me because it's in our mind, it's entrenched in our mind, but the two things are exactly the same. And in both cases, like you are paying, but you are paying with your data, and you're not paying with your money. This is the point. Now if someone comes in and says, well, this is a barter transaction, and therefore barter transactions should be subject to tax, direct and indirect. Personally, I don't think that's such a crazy position, particularly now, when people themselves are telling us either you pay me or you give me your data. But again, maybe 10 years ago, when digital service taxes were conceived in this way, because that's how they were conceived. It was too early and maybe you know, we were not there. I think now slowly we are getting there. Comments, views, criticism? Well, I have done a bit offline, but you know, this is a topic.

[Prof. Marino]

No, this is an interesting issue. But before arriving to, because I think that the most delicate issue within your reasoning is the exchange value, because you are not receiving money, but you are receiving data. So, this is certainly creating also an issue of transfer pricing, what is the value of data rather than the value for money? What is the value for money? But if we just stick on the money, for example, the case of Spotify. I think it's one of the easiest examples, or the case of Netflix, for example. Everybody now uses Spotify and probably uses Netflix, so I pay for something like Spotify, I have a registration, and I swipe my credit card, I don't even swipe the credit card, it is automatic, the billing on my credit card. So certainly, there is an Italian resident consumer that is billed through a credit card for the registration for the use of Spotify. And this is going somewhere, certainly, either in Ireland or straight to the United States. And it is part of the revenue of Spotify. Those revenues are certainly transparent. Everybody knows within the balance sheet of Spotify that those revenues are coming from market jurisdictions, because those, we are talking of corporations that are listed on the stock exchange, the values, so they maybe don't pay taxes, but certainly the shares value are going up because of the money that is entering into their bank account. So what I don't catch is, why would it not be possible to isolate the revenue, at least the revenue, then certainly we have the problem of the costs, because if I get the revenue from Giuseppe Marino for registration for Spotify, that is not the income, it is just the revenue, because then I certainly have to attribute also some costs in order to get proportion of the income that I have produced into the market jurisdiction. But certainly, that

is the starting point, the revenue is clear, the cost is less clear. But certainly, it is to say that this world is going into another direction because I can say, listen, I assume that the income is equal to the revenue and for me that it is clear the revenue that you have taken into my jurisdiction, if I look at my consumers, if I look at your accounts, it is not clear the costs that we should attribute to those revenues in order to get the income. But that is up to you, not up to the local tax administration. So, I frankly don't understand why there's no solution into this dynamic, at least this is the simplest example. Then of course, the data is introducing certain complications, but at least for these assumptions, I frankly have difficulties in getting into other ways, I see other ways not to solve this very easy approach. At least, that's what I want to share with you.

[Prof. Russo]

That's what we are here for, and others please come in because I give you my point of view. I think while in the first case, what we are discussing is the fact that there is value extracted from the country in the form of data or user contribution and therefore from an economic point of view, I think it is justified and justifiable to levy a tax on it. In your second example, so you know, I log in and I benefit from the service, you have taken Netflix, but these days, you know it can be the Indian math teacher that teaches to highest school students math, it can be the doctor that looks at the X ray online and gives you a diagnosis. It can be the lawyer that works in Milan to provide an opinion to someone somewhere else.

[Prof. Marino]

Raffaele, I give you, give all of you another easier example, banks. If we keep bank accounts out of our country, for example, in Luxembourg, or in Switzerland, as individuals, the banks are obliged to exchange automatically information to the Italian tax administration on the bank accounts. I do have, together with other Italian resident taxpayers, into the Swiss bank. The Italian tax administration at today is just considering the positions of Giuseppe Marino, Giuseppe Rossi, and so on *vis-à-vis* the information they receive from the Swiss bank through the automatic exchange of information. If they just switch, and through a sort of algorithms, they take all the information coming from a single Swiss bank saying I don't want to know about Giuseppe Marino, I want to know, I want to add all the information arriving to me from UBS. They have automatically the idea of what is the Italian market of UBS in Italy because they can see all the bank accounts that are managed in Switzerland belonging to Italian resident taxpayers. Certainly, that is a measure, then the commissions will be taken in Switzerland, the bankers are in Switzerland, nothing is within the Italian territory. But nevertheless, they have the information of the magnitude of what are the portfolios managed abroad. So, it's then the easiest way to

understand the commissions and to get a revenue, it is indeed a digital, a sort of digital PE because I do not have any material presence, but there is indeed an economic presence. And to give you a detail on that, the banks, the Swiss banks, generally were providing their balance sheet book where they were dividing the fund raising countries, they are no longer publishing it anymore, they are no longer publishing it with the locations of their clients, because that is a clear indication. Certainly, I manage the money in Switzerland, but if the client is resident in Italy, the commission is generated basically in Italy, then of course, the bank, the banker has a cost, the salary, whatever, but the money comes is linked to the Italian territory because of that. That is a very easy example because through the automatic exchange of information, you can immediately know everything.

[Prof. Russo]

I see the one but what I am trying to say is that while in the first case, I see a clear economic rationale for levying the digital service tax. In these cases, I'm not sure I see the rationale because what seems to be the rationale that you're putting forward is the fact that the customer is in Italy, and probably I read into your mind, but you will say once you reach a certain level of revenue, and therefore of customers, I am deeming you to have a significant presence in the country, and therefore you have to pay taxes. What I am saying is that I'm not sure I share that point of view. And I'm not sure that in the world in which we are today, income taxation would be the best way to capture it. Because there is a tax on consumption, it's called VAT, and it is actually levied in these instances that you are describing. And to me, this is one of the things that I would say 80% of the people I spoke to didn't recognize and not because it was the people's fault, it was the report's fault. But this is the biggest achievement of the Action one report of the first BEPS project. Before, when you are ordering on Amazon, you will pay Luxembourg VAT, today you pay Italian VAT. And that's, too. Now, you know, we are really talking about relevant and complex issues, but in my view, if I had, you know, the possibility of designing the system, I would say the best way to capture that manifestation of economic capacity is through VAT, it's not through income taxation, because otherwise, like, I would had to have a system where effectively I have to set the threshold which is going to be a monetary threshold that will assume and say, you know, once you derive, which is exactly what we do in the VAT space. And also the information you were referring to, because of these VAT rules, in the case of digital services, now you get this information. So, to me, the point I'm trying to make is that we should not look at these things in isolation, but from a wider tax system perspective, but fascinating discussion. And effectively what Prof. Marino is saying is already being done by a number of countries, particularly in Latin America, and you know, who is bearing the administrative costs? It is the banks. In many

Latin American jurisdictions, once the bank knows that the bank account of the recipient is the bank account of Netflix, to make the example of before, they have to levy tax. And so, what I'm trying to say that it is something that is very central in today's debate. If you don't mind, I will say let's have a five-minute break, and then we resume, let's say at 10:20.

[Prof. Russo]

First of all, thank you Prof. Marino, it was a very interesting discussion. And I think, effectively, it's the elephant in the room, and it's the elephant in the room even more so today because as we may have all seen, let's say, the chair of the presidency, what should be done in international tax matters has been exercised in the last few years by someone else, and effectively, the G20. Now, the G20 is interesting because it's not an international organization. It doesn't have a legal form or legal personality, but it's a gathering of heads of state of the 20 biggest economies in the world. And as you will see from the membership, many of them are not members of the OECD, which as we have seen since the end of World War Two until today, is the depository of the model tax convention and also as we will see tomorrow, the transfer pricing guidelines, the work on tax transparency *etc.*, but a sort of new player is in town now. And what we have seen with the financial crisis of 2008, the G20 in reality exists since 1999, but it was, I would say, an almost unknown gathering. And then this is a funny story. So, this is one of the behind-the-scenes things that I can say. But when there was the financial crisis in 2008, you remember this moment, this was when the people from Lehman Brothers were going out of the office with boxes, and we thought that the entire financial system would collapse, and that a couple of bigger insurance, conglomerates and banks would collapse too. So, this was a moment where it's like it's the end of the world in financial terms. And the first proposal was to gather a G8+. So, the first proposal was, let's gather the G8, which had already been existing and visible, but let's also invite what is now widely known as the BRICS, Brazil, Russia, India, Indonesia, Saudi Arabia, South Africa, and China. And that's also another funny story not because the BRICS like now, they are also a bloc now, they have created their own bank. But the BRICS didn't exist, it's an invention of a trader from Goldman Sachs that put them together, you know, in a bucket because they had similar growth perspectives, but then if you look at the economy, natural resources, population. But anyway, the BRICS said forget about it, we're not coming to your place as invited as plus. Let's do it with the G20, which already exists, but let's upgrade it to the level of heads of state rather than keeping it as a meeting of ministers of finance and central bank governors. And that's how the G20 comes about, and it comes about with a very strong mandate, which is to save the financial and economic system as we have known. And what is the result of this is the G20 mandates, in this case, the OECD to do work in the tax field.

Because if you remember, you know, in a way the link is not evident, but if you remember the causes of the financial crisis, it was fundamentally the subprime and what characterizes this instrument, in addition to the fact you know, that they were pulling together risk and therefore, get something, was the use of secrecy jurisdiction, use of jurisdictions that would not provide the information on tax matters when asked because of domestic law limitations. And that's why the G20 decided to attack tax transparency. This is the G20 in London, Gordon Brown comes out of the meeting, he was then Prime Minister in the UK and says the era of bank secrecy is over. And that's the work on exchange of information on request. At that time, it was only on request, you know, before this development if, say, the Italian Revenue Agency suspected that Raffaele Russo had an account in Switzerland where he was bringing money to Switzerland, they will ask the Swiss: can you tell me if Raffaele has a bank account, and the Swiss would say no, we can't because it's against our Constitution, because it's thanks to us that a lot of Jews were able to save their wealth when the Germans went after them and we're not going to compromise that just for a stupid tax assessor. This was the situation. Then G20, financial crisis, G20 had views of the bank secrecy, well, if I ask, I can get the information. But then countries realize that you know, there was a space and so the question became, can I ask for information not about Raffaele but maybe about a group of taxpayers? Can you tell me the people whose family name is Russo and we have two here, Raffaele and Max, that have a bank account in Switzerland. And then, I'm taking Switzerland as an example, but you know, only in the OECD, it was Switzerland, it was Luxembourg, it was Ireland, Austria, that had bank secrecy, in addition to all the more traditional so-called tax havens, you know, Cayman, BVI, Jersey *etc.* So, we moved from bank secrecy, from I cannot tell you anything, to I will give you something if you ask, to well, actually, it can also be a big ask, and you can ask also about group of taxpayers. And then boom, Obama comes in in the United States, and the United States passes FATCA, Foreign Account Tax Compliance Act. So basically, all of a sudden, either Swiss banks, or Lux banks or Austrian banks provide information to the United States about United States account holders, or they will be subject to a 30% withholding tax on any payment that goes through them. And that's when the era of automatic exchange of information starts. And that's where the G20 mandates the OECD to develop the Common Reporting Standard, which is the mechanism through which today, every financial institution has to provide information to its local tax administration about non-resident account holders, and the local tax administration automatically shares it based on the template with the tax administration of the country of residence of the account holder. So, if you have a bank account in Switzerland, you better declare it now because your tax administration is going to know it anyway. Frankly, all these will have not been possible without the G20. The second piece that the G20 decided to attack after, you

know, this concept of tax transparency and global individual wealth was the taxation of multinationals. And again, it was always in this environment where you know, people were upset, there was the crisis. And then you had these headlines about large multinational groups paying very low effective tax rates or not paying taxes at all. And that's the BEPS project, and then the two pillars that are under discussion these days. But if you look at post-G20, look at some of the numbers of the OECD. Here on the left, you have the member countries. But here you have the number of countries that are involved in the OECD work, whether it's the inclusive framework on BEPS, whether it's the Global Forum on transparency and exchange of information, whether it's the coordinating body of the Multilateral Convention on Mutual Assistance in Tax Matters, whether it's the multilateral instrument to implement the treaty measures that were developed in the work of BEPS. So, what I'm trying to say here is that if we look at where we started from, it was League of Nations, First World War, League of Nations, Second World War, the two models Mexico, London, then it's taken over by the OECD, which was the OEEC. And then the G20 comes in, and also the nature of the OECD work changes, the governance of the OECD work changes. So now, it's not only open to member countries, but it's open also to non-member countries. To be fair, it was already the case before, but they were invitees, you know, come and listen. Now it's come and you know, you have the same rights and the same obligation that I have as a member of the organization. If, conceptually, if you think about the inclusive framework on BEPS, the Global Forum, the coordinating body of the multilateral on the MAAC, on the Mutual Administrative Assistance Convention, the link with the OECD is the fact that they are served by the OECD Secretariat, which is people like I was that, like, we don't represent, they don't represent any country. They do the technical work, and then at the political level, countries agree or not. But this is the OECD tax work today. And why I'm saying it? I'm saying it because it's closely related to what's happening. And there too, I find myself in the same position where I found myself 20 years ago with the Philip Morris decision, thinking like why people can't just look beyond. And what's beyond? On one side, you have the UN, and we haven't talked about the UN so far. Now, the UN was officially established in 1945. It has now roughly 200 members. It's well known because it does many things. It's supposed to promote peace, security and cooperation. We know the function, we know the General Assembly, we know the Security Council, we know that there are certain permanent members and other rotating members. But from our perspective, what did the UN do in tax matters, because you would have expected that, you know, the UN is the legitimate successor of the League of Nations. So, you will have expected them to take over the work of the League of Nations, they didn't. Look, set up in 45, it's only 1967 that they do what? They established a committee of experts on international cooperation in tax matters. Now, mind you, this is very

different from the committees of the OECD, the Committee on Fiscal Affairs. Why? Because the people that are in this committee of experts are there in their personal capacity. They are appointed, they are nominated by governments, but they are there in their personal capacity, which means they can say whatever they want, they can do whatever they want, it doesn't bind the government that has appointed them. Historically what they have been doing at the UN? Well, another model convention, the UN Model Convention, which was for the first time published in 1980, and was in a way, taking the OECD model and on the margins, amending it in order to ensure increase source taxation which was perceived as to be in the interest of developing countries. And then, for 20 years, the model was not updated. Then there was an update in 2001, one in 2011, and then 2017, and 2021, which have become more substantial updates. As I mentioned in the previous slide, when I started at the OECD in 2007, one of my main tasks was to visit non-member countries, and to explain to them the model tax convention and the transfer pricing guidance. It's not an easy task, if you can imagine that, like you go to India with the 40 Indian tax officials telling them that the OECD model is the best thing in the world and they should follow it. Well, I never did that because I didn't think that was the case. What I did when I went to India, when I went to China, when I went to Indonesia, when I went to Brazil, was to tell them, this is what the model says, if you adopt a provision, which is the one of the model, the expectation is that to interpret it as the commentary says. I'm not telling you this provision is good or bad, I'm telling you this is what this provision says, then it's your policy decision to decide to negotiate treaties with this provision or with another one. And you know, the usual thing was, oh, no, we follow the UN model, we follow the UN model, we follow the UN model, and what I usually told them, and I think it's still right today, if I was a developing country with no treaty network, and I had to develop my treaty network, the best thing I will do is instead of looking at the OECD, or at the UN model, to look at the treaty network of New Zealand. To me, it's the country that has secured in the most balanced and effective way source taxation. And if you look at the observations and the reservations of New Zealand, you recognize that, and this is to say that the idea that the OECD is made only of resident countries, it's just stupid. Turkey, Mexico, New Zealand, Australia, Czech Republic, Poland, Slovak Republic, all these countries see themselves as recipient of investment. Then you have another group of countries that, depending on the situation, may be resident or source country. Italy is a very good example, France. You can be both on the inbound or on the outbound side. So, this idea that, you know, the model is entirely made to secure residence taxation, to me, it's only a way to frame the debate in a controversial and conflictual way, as we said yesterday, which has been the frame that has been put forward also thanks to civil society and NGOs. The model favors resident taxation because it considers that to be more aligned with the

underlying economic principles that should govern the allocation of taxing rights. Or because in some cases, it is considered to be a simplification. The question is, is this model a good model for the relation between the developed and the developing countries? Remember the example we were discussing before with Prof. Marino, if I am Italy, and you are India and let's say you have 100 billion coming into India because Indian math professors are teaching online to Italian students. I'm making this example because I saw that yesterday, I saw a number of friends of mine and I found it fascinating. On the other hand, Italy gets 100 billion from, I don't know, selling brakes for Tata Motors. And then you say, you know what, instead of me taxing yours and you taxing mine, we just say that everyone taxes his own, and that's it, and we simplify the life of everyone. This was the basis of the OECD model. So, I am all in regarding the idea of having different models depending on what are the economic objectives that one wants to achieve. And to me, that is not the UN model, and particularly in the recent past, the UN model has been stuffed with provisions that, to me, don't make much sense. I'm talking about 12A and 12B. But what we will do is that tomorrow, tomorrow is the one where we will focus more on content. So now we're still on the strategy, geopolitics, what's happening. Tomorrow, I want to go deep into the OECD versus UN content wise. First of attraction, what does it mean? What does it not mean? Definition of royalties, 12A, 12B, taxation of services. I want to discuss with you these differences and provide you with the tools to make up your mind on the current debate, which is the topic of the last presentation on Thursday, which is who should draft the rules? Should it be the UN or should it be the OECD?

Now, pausing for a moment, the EU, because, in a way, they do play a role in international taxation, a very important role for EU countries in indirect taxation, but a relatively irrelevant role also in relation to direct taxation. In the field of indirect taxation, obviously we have harmonization and that makes sense because at the moment we are a single market. So, in a single market you cannot have excise or VAT creating obstacles to the free movement of goods or services. In the area of direct taxation, basically, it is left to Member States, but the Commission can make proposals, but they have to be approved with unanimity, which is the reason why not much has been done in the area of direct taxation, with the exception of two directives, the Parent-Subsidiary and the Merger directives that were issued in 1990. Then Interest and Royalties Directive that was a bit later, was in 2003, and then ATAD I and ATAD II in 2014 and 2015, and then the minimum tax of last year. But basically, if you dis-count the last two, the ATAD and the minimum tax which effectively were the tool through which the results of the BEPS project as regards ATAD, and the results of pillar two as regards the minimum tax directive, were implemented into EU legislation, which then itself is transposed into national legislation as we are seeing these days. You must have seen it, Luxembourg put out to the minimum tax yesterday,

and the number of countries are including it in their budget law for this year so that it starts from next year. Then there was Parent-Subsidiary Directive and Interest and Royalties Directive that basically eliminated any withholding tax on certain payments. And according to some, in particular, the Interest and Royalties Directive, but also the Parent-Subsidiary Directive were sort of the legal tools through which income was shifted out of Europe into low tax jurisdictions. Because effectively what happened was that all countries that had the withholding tax on outbound payments were not in the position to apply this withholding tax when the recipient was another EU company belonging to the same group. And usually, this EU company belonging to the same group was itself established in a country which did not have an outbound withholding tax, so that they would, what they would get, they would be able to pay out, to someone in a zero or no tax jurisdiction, and therefore what you had was a deduction at the level of the first payer without taxation anywhere, and the income shifted in a low or nominal tax jurisdiction. When they were proposed, they were considered to be, you know, the tool through which to ensure additional integration within the single market. 'm saying this because sometimes decisions that seem like a good idea at the time can later appear questionable. It's like the story of the guy in the desert who sits on a cactus. When asked why he did it, he replies that It seemed like a good idea at the time.

This illustrates how perceptions – especially in tax policy – can change significantly over time. So, the Interest and Royalties Directive from being, you know, a tool for integration, supporting investment, cross-border activity, has then become a tool for tax avoidance, bad tax planners and shifting income into no-tax jurisdictions. And in general, my approach is, in these cases, I tend not to trust extremists, on one side or on the other, and we have a lot of extremists in tax policy and in the position that they present. So, probably both of them are true and as always, we need to find the right balance between conflicting interests.

Other work that the EU has done is in the area of eliminating economic double taxation, particularly in the case of transfer pricing adjustments and we have a convention, so which is a separate legal instrument that provides for procedures to eliminate double taxation, plus all the work that has been done at the level of the EU to implement the same standards that we discussed before in relation to tax transparent, which now will be updated with the new Common Reporting Standard and eventually within the EU, also with the automatic exchange of information on crypto assets, which at the moment are not covered but considering their relevance, again, at the request of the G20, the OECD did the work and published the Crypto Asset Reporting Framework for comments. People sending comments, the OECD analyzed comments and arrived at the final version of the CARF. The CARF was approved by the Inclusive Framework and it was welcomed by the G20. Now it is not an international standard yet because in many countries crypto assets are banned, so these countries don't

want to implement regulations that appear to allow the circulation of crypto assets. And therefore, at the moment it's not an international standard but there are already 50 countries that have signed up to it and will implement it. But this is just to tell you that one of these blocs is the EU, which has already approved a new directive for the implementation of the CARF, of the reporting framework on crypto assets. So, what you see is G20, OECD, EU, and on the side of this, we see the UN. The UN has been carrying out a different type of game and also different type of work from a content perspective. And my idea, if you agree, is that tomorrow we go into the details of what the UN does and what the OCD does and what are the differences there and what countries will do in relation to one or another, and then on Thursday we go back to, sort of, the overall government. But I can already tell you and I'm writing an Article on this which I hope will be published soon that on the 22nd of November, the General Assembly of the UN, the Second Committee of the General Assembly approved a resolution according to which the tax work has to be done at the UN via a group of representatives of government. So, stepping up the group of experts and calling for a framework convention that would allow the UN to officially and formally compete with the OECD. Personally, I think this is going to be a disaster and I have an alternative proposal which I will discuss with you on Thursday. So, for today, I think we are done. I thank you again for your attention and I pause to see if there are comments, questions, remarks.

[Prof. Marino]

Actually, thank you again Raffaele, I do have a question for you, it has to do with the EU. I would like to have your impression on what is the relationship between the OECD and the EU as far as the taxation policy is concerned. I mean what is your impression on the powers into the field?

[Prof. Russo]

Well, certainly the EU has been implementing all of the minimum standards and common standards developed by the OECD. This is the fact. So, certainly I think it's good. I think it is not good when, first, there is agreement at the level of the OECD of the inclusive framework, and then the EU, via implementation, changes that agreement. This is something that we have seen, for example, with the so-called tax haven, on which Prof. Marino is an expert, because the OECD model rules for the exchange of information by platform operators that had been agreed by consensus by all countries, including all the EU countries, and the Commission, which is a member of the OECD, participates in the OECD's work as a member. It didn't include the sale of goods, and then the EU directive that implemented it included the sale of goods. So, this is something that I don't think it's useful because if there is agreement, there is agreement. But if, like when I have to act as a father with my kids, I say let's

agree that we watch one cartoon, okay fine, one cartoon, then the cartoon is over, well, let's do another one. But no, we agreed one. And if you start getting into that loop, then you never stop, and that means you don't have agreement anymore. Second, as a truly convinced European integration supporter, I wish the EU could do more. And to be honest, the proposals that I see, I don't see them as having success. We have been discussing, Alberto knows that very well, you know, a common consolidated corporate tax base which will be, you know, formal apportionment in the EU for 20 years, 25 years, no success. We have, the things that were approved are the ones on the slide. So, all the rest hasn't been approved and also, if you look at the resources that are there, I think much more could be done. But as the history of the EU tells us, it's always a step-by-step process, and also in that space with much wider implications and because of what we were discussing before of the recovery and resilience plan, and because, you know, what's happening with the stability mechanism, and you know the mandate that has been given to Mr. Mario Draghi to come up with the proposal for a new governance, makes me hopeful that you know, we could be closer to an additional step *vis-à-vis* European integration, and this will certainly have an impact also on tax matters.

[Prof. Marino]

That's true, let's hope for that, for sure.

Well, thank you very much for your speech, Raffaele, and thanks everybody for having the patience to stay with us, and tomorrow the lecture is going to be on presence at the university. Nevertheless, there's going to be also the zoom link, so be there.

Thank you very much again and enjoy the rest of the day.

Focus on the content of OECD and UN work (29th November 2023)

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Abstract

While international cooperation in tax matters continues to face both technical and political challenges, the OECD plays a leading role in global tax governance, particularly through its Model Tax Convention and the BEPS project, promoted by the G20 to enhance transparency and fairness in the global tax system. The comparison between the OECD and UN models highlights the different approaches of these two organizations regarding the allocation of taxing rights, with significant implications for the relationships between developed and developing countries.

Keywords: BEPS, OECD, UN, model tax convention, transparency, double taxation, global minimum tax.

[Prof. Russo]

Good afternoon, everyone. It's nice to be here in presence after the first two lectures online. So going back to today's presentation, we focus on the content of the OECD and the UN. So first, I would like to talk a little bit of how the work is actually carried out, who are the people that actually carry out this work and in which form in both organizations and then look at the key outputs of both organizations and then try to understand the difference between these outputs. So how do they function? First of all, you remember that we said the OECD was founded after World War Two, before it was called OEEC and was meant to administer, manage the Marshall Plan. And standards of the OECD apply in the area of taxation but apply in many different areas. There are, for example, standards regarding corporate governance, there are standards regarding the functioning of financial markets, the standards on anti-money laundering which are developed by the Financial Action Task Force, which is a subsidiary body of the OECD, and there are standards in the area of taxation.

Now, what is the structure of the OECD. At the top you have the Council and each member country of the OECD has an ambassador. They fundamentally set the strategic direction of the organization, and this strategic direction is then implemented via the Secretariat of which I was part, and the secretariat is composed by people like me, like you, hopefully one day in the future that go and work for the organization, without representing any member countries. So even though I am an Italian national, I was not representing the interests of Italy, but I was doing the groundwork in order to do what? To allow the committees to discuss and agree on a given topic. So, the role of the Secretariat is very important because as you may understand, the way you frame a question, the way you frame a topic, the way you frame a discussion may have an influence on the answer to the question, on the solution to the problem that has been presented. You know, Einstein used to say, if I had one hour to solve the problems of the world, I will spend 59 minutes identifying the problem and one minute identifying the solution. Well, that's the role of the Secretariat and that's very important because if you imagine, just put, you know, 40 of you around the table and you have to decide what to have for dinner. It's not going to be an easy exercise because maybe someone wants to eat meat, someone wants to eat fish, someone is vegetarian, and the role of the secretariat is to try to frame the discussion in a way that could be conducive to results. And these results are then approved by committees, and depending on the topic, there are a number of committees. The committee that is of relevance for us is the Committee on Fiscal Affairs. So usually what you see there is country representatives that traveled to Paris or in COVID times and post COVID, those that also online and meet with their counterparties in order to agree on a given topic. Who are these people? Usually, it's the Director General of Finance, the Director of International Affairs, in the US it is the Deputy Assistant Secretary for International Taxation, in France it is the Director General for International Taxation. It varies depending on the organization of the country. Now, already here, you may see some tensions, because usually, like you have one seat at the tables and therefore you have to decide who is going to be sitting at the table, is it going to be the minister? Or is it going to be the revenue agency? Obviously, the committee is at the level of the directors general, usually are the last step in the approval process. Because under the committee, there are a number of so-called working parties, working parties that are, as regards the Committee on Fiscal Affairs, structured in this manner. You have the Forum on Tax Administration that gets together the Commissioners, the Director General of the Revenue Agencies of the IRS, of the Spanish Revenue Agency, *etc.* Then you have a working party that is in charge of the model tax convention. So, tax treaty is working party one, working party two is in charge of tax policy analysis and statistics. Working Party six is on the taxation of multinational enterprises, which is a bit of a misleading title because effectively all the working parties

affect, all the working parties' outputs affect the taxation of multinational enterprises. What really working party six is in charge of is the transparent pricing guidelines, it is the guidelines that establish how transactions between different parts of the same multinational group are priced in order to avoid base erosion and profit shifting. Working Party nine works on consumption taxes, VAT, and the like. Working Party ten is the one in charge of exchange of information and tax compliance. So, Working Party then is the one that developed the common reporting standards that we discussed briefly the other day, the standard under which bank account information is shared annually by financial institutions with the local tax administration, and then the local tax administration sends it over to the tax administration of the countries of residence of people that have bank accounts in. Working Party eleven which I have to say I contributed to setting up on aggressive tax planning. This is, I'll open a parenthesis here, so when I started at the OECD in 2007, I had just published a book, which was called the Fundamentals of International Tax Planning, and I wrote it with a number of very skilled practitioners. And the idea was, you know, just to show to the public that certain things were going on and were used effectively to minimize tax liability in a number of high tax jurisdictions. So, when I arrived at the OECD with a group of colleagues, we said, well, why don't we try to reproduce what happens in the private sector in the public sector. So, in the private sector, usually when you have an idea, or when you have a transaction that has to be made and you're thinking how to structure the transaction in a tax efficient manner, you usually call colleagues, partners, partner firms in other countries and say, hey, how does this work in your country? Is this something that can be done? And we tried to do the same at the level of revenue agencies. So once tax administration found out a specific scheme, a specific structure that they thought created concerns, either according to the existing rules or from a policy perspective, so something that was allowed under the existing rules but seemed to be wrong in terms of the policy result that was achieved by that structure, we developed a sort of standard form that each tax administration could send them, and then we developed a sort of database of schemes. And we were doing that in a confidential manner, obviously, everything was anonymized. So, we didn't know who were the taxpayers involved, but we knew about the scheme. And that's where some of the early reports that were issued, there was a Report on Hybrid Mismatch Arrangements, there was a report on, at that time, there were huge losses in financial institutions because of the crisis and there was a lot of trading going on with these losses. We did the report on after tax hedging that is probably one of the most complex things I've ever looked at in my life. But we sort of started to develop some know-how about a number of structures that we saw as increasingly common. And then, as Giuseppe was saying, the scandals were thrown out to the public, and everyone was like, oh, what do

we do? That's when we launched the BEPS project and we formalized this work into a real working party with representatives of all countries concerned.

The other relevant working groups are the so-called Forum on Harmful Tax Practices which basically looks at the legislations of countries to ensure that they meet certain standards that fundamentally try to avoid that the legislation of one country damages the tax revenues of another country. The task force on the digital economy, that I also, let's say, contributed to set up because that was a working group that we set up when we launched the BEPS project, whose first action was addressing the challenges of the digital economy. And there, again, was 2012, so it was 10 years ago and many of the things that today we know were not really known, but what was clear to a number of us was that these issues were actually cutting across all the different topics that I just described. And this taskforce effectively brought together experts on tax treaties, experts on transfer pricing, experts on anti-avoidance rules, experts on reporting obligations, experts on VAT and indirect taxation, trying to address the issues in a holistic manner rather than going straight into one specific problem. And then, in this one too, I have to say I contributed to set up, was the taskforce on tax crimes and other crimes that basically gets together here the criminal tax investigators. In Italy will be the tax police, in the US will be the IRS, criminal investigation division. So, in a number of countries, you have within the tax administration or outside of the tax administration a specific group of people that deals with structures that clearly are not within the law and therefore are illegal. And so here we are really, we're not talking about planning, we're not talking about avoidance, we're really talking about tax fraud. Even though, even that, in some cases it may be difficult to find the dividing line between one and the other. If you think about, I don't know, if you heard about the scandal, the so-called Cum-Ex scandal, which was basically a structure that had been put in place by many investment banks that fundamentally was something like this. Say, you knew that at certain point in time during the year there was the season of dividend payments from listed companies, and obviously if the company pays these dividends to the shareholders, depending on where the shareholders were, there will be a withholding tax. So, what this scheme implied was that just a day before the payment of dividend, the shares were loaned to someone that was entitled to a 0% withholding tax rate. At that point, that person would receive the dividends tax free and then would repay them back to the lender of the shares as so-called manufactured dividends. So, it was an agreement purely based on the tax saving and probably at the time when people were putting that in place, it was considered more in the space of avoidance. Today, there are a number of people that are either in jail or under criminal investigations because of these schemes. Just for you to know that sometimes these categories can be blurred, and obviously they change from a legal system to another, and they also change from a certain period of time to another depending on legislative

development. So, this is, in a nutshell, the, let's say, inner cuisine of the OECD work. So, the UN, as we discussed yesterday, is different because effectively there is a group that works on international tax matters at the level of the UN, but that group is composed of experts that act in their personal capacity. So, they do not represent the governments that have appointed them. And obviously that makes a huge difference because they did the Vienna Convention on the Law of Treaties. But fundamentally, because of the international public law rules that apply in the interpretation of international treaties, when, let's say, something is agreed at the governmental level, it obviously has more influence in the interpretation than something that is written by someone acting in a personal capacity, which may also be relevant as can be relevant to an Article written by Giuseppe Marino when deciding a certain case or taking a position, but it's different from something that has been agreed by those that represent governments in their functions. In the group of experts at the moment that are 25 experts, but then there are also a number of observers and you can also observe if you want, you register and you get the link and you can listen to the discussion. So, if you're passionate about this, I strongly suggest you to try to do that. And it's a fascinating exercise because in a way you see how the sausages are made but you know what Bismark used to say, never show people how sausages are made. I mean, when you get really into the inner cuisine, and you probably better understand also why certain results are then put out in the public. The expert group basically does works on the UN model convention, works on a number of practical guidance, manuals, however you want to go them. And also, together with the OECD, together with the IMF, together with the World Bank, it is involved in so-called capacity building. So, strengthening the skills of tax officials, in particular of developing countries. Now, if you look at the key outputs of both organizations, OECD model tax convention, we discussed that yesterday, it's a model that now it's updated every two or three years. And as I was telling you, why is this model so relevant? Because the model comes with a commentary, and the commentary explains the provisions of the model tax convention. So, once you are faced with the interpretation of an actual treaty, and that actual treaty follows the model tax convention, the logic assumption is that the countries that agreed to use that model provision agreed with the interpretation of that model provision. And that's the relevance of the model, and that's also one of the reasons, in my view, why as from 92, it has been updated every two or three years. Because obviously, cross border trade and investments have increased over time, and many issues that were not taken into account when the model was developed had to be addressed by way of interpretation.

I remember when I started, the first job I had was about the application of the model tax convention in the case of satellite operations. Now, so someone from the Secretariat writes a note and says, you know, this is the issue, these are

the rules, these are the possible interpretations, and then the committee, then the note gets sent to the, in this case, Working Party number one on the model tax convention, you get comments from different countries, you will elaborate on these comments, you provide a revised note, and then once you are ready you submit it for approval. Approval happens in which way? This is very important, applies under the rule of so-called consensus. Consensus is different from unanimity in the sense that consensus means that no one has objected to the approval, which also means that if you have only one country saying I disagree, it's not passed. But that's if you want the beauty and the strength of the guidance once it is agreed because it means that effectively everyone agrees. Or in the specific case of the model tax convention, if there is a disagreement, either with the provision of the model or with the interpretation included in the commentary, countries can launch a reservation on the model tax convention, or an observation on the interpretation that is given. So, I don't agree with this, or I will never put a provision like this into my treaties. So, in a way it's meant to increase transparency regarding the position of different countries.

[Prof. Russo]

So, I repeat the question for those that are online. So, the question is can country slot reservations that are against the object and purpose of the model tax convention and therefore the treaties that follow them? I would say in principle, yes, because there are no limitations to the reservations that you can make.

[Prof. Marino]

Could you explain better the difference between the so-called consensus versus the unanimity?

[Prof. Russo]

Unanimity, you have to vote yes. Consensus, you don't have to vote no. That is the difference between the two models. So, in a way, it's a bit less than unanimity. But in practical terms, if someone disagrees, then there is no consensus. However, if there is disagreement, but we are talking about the model tax convention, there is the possibility still to approve, but with the reservation of certain countries. For example, when Switzerland, Austria and Luxembourg had bank secrecy in their domestic law, when Article 26 of the model said, you know, you have to exchange information also if you have bank secrecy, they had the reservation saying we cannot apply this provision because under our domestic law we have bank secrecy. So, it's a sort of balancing act. And in a way, if you ask me, it is also a reflection of the fact that while way back in the past, the position of the country members of the OECD were more aligned, over time, differences started to emerge more clearly. And second, very important point, as from a certain point in time, also non-member countries that were participating in the work as invitees were allowed to launch their position on the

model tax convention. That's why if you open the model tax convention today, you also see the positions of China, you see the positions of India, you see the positions of Brazil. And again, it's a matter of transparency. Then what happens is that sometimes some of these non-member countries become members of the OECD. I worked, for example, on the accession of Israel into the OECD, and in order to become a member of the OECD, you have to adopt the so-called OECD acquis, in the French word. So, you have to sort of respect the standards that have been agreed by the organization. And therefore, once this happened, when there are the standards, countries have to change their position. And is there anyone from Brazil? Wow, three, okay, so that's the case as regards Brazil because as you may know, Brazil has started the accession process to the OECD. And it's no coincidence that one of the first thing that Brazil has done has been to change its transfer pricing legislation, because Brazilian transfer pricing legislation until last year was very peculiar and considered by many not to be in line with the transfer pricing guidelines of the OECD, and now Brazil has amended.

[Student]
In relation to Article nine?

[Prof. Russo]
Yes, in relation to Article nine, yes. But funnily enough, they don't exist in relation to the transfer pricing guidelines. And I think we can have, like, the educated guess is that it was also discussed whether observations or reservations or positions should have been put forward also on the transfer pricing guidelines, but the decision was no. And I have to say, if you read the transfer pricing guidelines, you realize that in many instances they are the result of a compromise. And every time there is a compromise, there is less clarity than if there was a straightforward decision. But this is the other key output of the OECD, and these were the key outputs for 50 years, or as I wrote in an Article that possibly is going to be published tomorrow, the transfer pricing guidelines on one hand and the model tax convention on the other hand, in my view, at least have been like the engines of globalization, have allowed cross-border trade and investment to be magnified. Also thanks to the technological revolution of which we are all part now. But these guidelines are very important. Why? Well, because once you will start working in practice and you will have to determine whether the entity in your jurisdiction has been remunerated as if it was an independent party from its fellow subsidiaries, you will have to apply the transfer pricing guideline. And this is, let's say, the strength of multilaterals to have one standard that all different countries can apply. And that also means that taxpayers will have to comply with one standard rather than many different rules and standards in many different countries in which they operate.

Then, we go to the BEPS project and I go back to the question of Alberto before. As I told you, the BEPS project was, so, this was a very distinct moment, and it was actually the Article about the Double Irish and the Dutch sandwich that was published on Bloomberg. And this Article was actually published the day when there was a meeting of the Committee on Fiscal Affairs, actually of the Bureau of the Committee on Fiscal Affairs, which is like the inner body that organizes the work and takes strategic decisions. So once this Article was published, and you had all these government officials in the room, and then everyone was reading it, because obviously it went viral and then like we started discussing, okay, but you know, what is the problem here? And one person said, well, the problem is because, anyone from the United States? You're from the US? Great, you know what subpart F is? Subpart F is basically the US controlled foreign company rules. These are rules that basically say, if someone who is resident in my country has a controlling interest in an entity which is subject to low taxation or is subject to low taxation and only derives passive income, I basically tax that income upfront at the end of each year so that you cannot use what were called tax havens to postpone indefinitely your tax liability. And people said, well, you know, these schemes work because there is a loophole in the US CFC rules. Other people said well, but actually all these schemes are based on hybrid mismatch arrangements. So, arrangements that smart tax planners develop to basically make use of the arbitrage that exists between different tax systems. So, assume that Alberto is in France and I am in Italy, and I have to give some money to Alberto for him to do something. I give him a loan, he pays interest, right? He pays interest and deducts the interest and I am taxed on the interest. But I can also give him, make an equity contribution to Alberto Corporation. If I make an equity contribution, he will pay dividends. So, he will not be able to deduct the dividend and usually I will benefit from a preferential treatment on the dividends. So, in a way, you see that there is some symmetry, deduction, taxation, no deduction, no taxation. Then a smart tax planner like Marco sitting on the first row and working with me says, well, but why don't you do profit participating loan? Because if you do a profit participating loan, effectively France treats it as a loan, and therefore the payment is treated as an interest and is deductible. But Italy doesn't look at the label loan but looks at the substance and says well, but in effect, this is an equity contribution, it's a capital contribution, and therefore what you're receiving is a dividend which is exempt. So, what you get? You get a deduction in France and an exemption in Italy, and many of the, let's say, large part of the structures that are used, that were used, or probably, I don't know if they're still used. But that was clear in the Article that was published was based on this hybridity, on these arbitrage opportunities. So, people were saying the problem is hybrids. Then other people said, the problem is that general anti avoidance rules don't work. Others said the problem is that we don't have enough information because we

would like to know, you know, how many employees there are in each country, how much revenue is allocated to that country, what's the value of the assets that are in that country. Others said, and this was also the very strong position of the NGOs, the problem is transfer pricing. So, the transfer pricing guidelines from a tool meant to prevent tax avoidance were framed as a tool that would allow tax avoidance. And so, the solution of the NGOs was, we have to move to formulary apportionment, because the arm's length principle is rotten, doesn't work, it's too easy to abuse *etc*. So, imagine this situation, imagine that we had the database on aggressive tax planning schemes, and then we said look, if you close one hole but you'll leave another one open, everything will go out from that one. So, either we addressed this holistically or we're never going to solve problem.

[Prof. Russo]

All of them, all of it. For them, it was the arm's length principle in itself that is the cause or was the cause of the problem. Now, there are different methodologies through which you can determine the price of a transaction between two related parties. But for them, they were all wrong, or they were all too easy to abuse. Alberto, I was expecting you because Alberto is a transfer pricing guru. So, I was expecting him to say something.

So, I repeat for those that are online, I paraphrase, so basically, some people like Alberto said, well, but you cannot do this under the transfer pricing guidelines already today because it's also, everything is subject to interpretation. So, if you take a formalistic approach, some people were taking that approach, I think Alberto is usually taking a substantial approach being an economist. And so, you know, the bottom line is, if I have a company in Cayman Island that has no employee, no one, it's managed by a service provider, but it has the legal ownership of the trademark, whatever trademark you want, and receives royalties from all over the companies around the world. Is this something that according to the arm's length principle, is something that could be done and could be priced? This was ultimately the question. And some people said, well, already now, we think you cannot do that, other people say by now you can do that, because you know, you have to look at the legal reality and the legal reality says that they are the owner of the intangible. I am oversimplifying it, but so, at that point in time, we decided to launch the BEPS project, and we said, in order to do this we need first of all, to do a proper assessment of the situation, what we called the diagnosis. And we were given three months to do the diagnosis, which it's doable. If you tell me Raffaele, write the diagnosis in three months, I had already written the book so I was facilitated by that. But that was not the problem, the problem was that you had to do it in three months and get the 40 plus countries that were participating in the work to agree that that was the right analysis. And that was challenging to say the least. Then we issued this

diagnosis, and we thought, okay, now we can go back to our normal way of working and you know, at a more relaxed life and at least enjoy the families or friends during the weekend. But then the G20 came and said, you know what, we need an action plan and we need it in two months. Okay, let's start all over again, and that's when we developed the 15-point action plan on BEPS. So, we basically tried to identify the causes of base erosion and profit shifting and tried to tackle all of them. And these are the 15 actions which were organized around three main concepts, coherence, coherence meaning coherence among the different tax systems. And in fact, all the actions that you see there are actions related purely to domestic legislation, but it's domestic legislation that has an impact, that has an effect on the legislation of other countries. The second one was substance. So, how do I avoid that artificial arrangements are used in order to erode the taxable base and shift profits to low tax jurisdictions. And these are the actions in the space of tax treaties and transfer pricing. And then there was the third concept which was the one of transparency. So, first of all, well, let's gather the data and let's see how much profits are shifted. And to me when I looked at the data, that's when I realized that something was fundamentally wrong with the system. It's an interesting report, the assessment report, it's an interesting one to read, because nowadays we go so fast that we always look at the present. But I remember there is something that if you look, anyone from China? But tell me who are the five biggest investor countries in China? Or who were in 2012? I don't know now, the five biggest investors into China in terms of countries, have a guess, imagine from what you read on the newspapers and everything else.

[Students]
USA, Russia, New Zealand, India, Australia.

[Prof. Russo]
None of these, it was BVI, Cayman, Hong Kong, Netherlands and Singapore. So, in fact, after we published this report, also the statistics on FDI, on foreign direct investments changed, because they started to compute separately all the investments via hubs to use a neutral terms and real investment. So, we also realized that all our data on FDI were polluted by these schemes.

What is new about this is that the BEPS project was launched at the request of the G20, and within the BEPS project, the countries of the G20 participated on an equal footing with OECD member countries. So, it was the first time that China, India, Brazil, South Africa, Russia were sitting at the table with the same rights and obligations as of member countries. And nowadays, it seems like a given, at that time it was a very difficult choice to make. But many of us were convinced that in order to do things properly, you needed to have at least all the G20 countries around the table, and at the same time try to involve as

many countries as possible, also outside of the G20. And that's the inclusive framework on BEPS that was constituted after that.

The other two or three items on which I wanted to focus your attention are the work on harmful tax practices, because that has been having a massive impact on the way countries design their tax legislation. And I'm not talking only about tax havens, you know, at that time, there was a new legislative development that basically started out in the UK and the Netherlands and then started mushrooming all around the world and was called the Patent Box. So, it was basically a preferential tax treatment of certain income from intellectual property. And what this Forum on Harmful Tax Practices did said, well, you just cannot do that, because you are attracting artificially profits that belong to someone else, and if you want to do a preferential regime on intellectual property, you have to do it according to certain criteria. And even countries like Italy, like France, they had to change their Patent Box regime in order to meet these criteria. And the other thing that the new work on harmful tax practices did was to force countries to exchange rulings that they issued to taxpayers, that may be relevant to other countries. Why? Because in a number of jurisdictions, there was, sometimes there is the law, but then you can go to the tax administration and agree on something different. Or there is the law and you can go to the tax administration and agree on the interpretation of what's written there.

You may have heard that some of these rulings, in particular, issued by Luxembourg or by Ireland, have also been the focus of state aid investigations at the level of the EU, and cases are currently pending before the European Court. So, the idea was, if you give a ruling to a company saying, well, effectively, you know, you can get all the income here but we're not going to tax it, you are obliged to exchange that ruling with the tax administration of the other country concerned. So that tax administration can be in the position to do something about that. And the other item that was upgraded in this work was the so-called the substantial activities required. So, you can provide for a preferential tax treatment, but you only can do that in relation to substantial activities. Well, usually substance is seen as based on employees and physical assets, rather than intangibles and cash that are obviously much easier to move than a factory or than two hundred people. Tax transparency, this we discussed it yesterday. So, the standards on exchange of information and the standards on exchange of information on request. And finally, the two pillars and here is the point.

Well, because you are providing transparency to the tax administration of the country of residence of the person that has, in this case, the bank account abroad. So, while before they will be in the dark, now they can see. I guess that will be, but can you tell me, what is your doubt?

So, you are talking about Action 14 dispute resolution, why is it under transparency? Because the feeling was that there is also to be more transparency in the process related to the mutual agreement procedure. Now, for those of you

that have never heard this word, the mutual agreement procedure is a procedure according to which, if I think that I am being subject to taxation, not in accordance with the treaty, the example of the satellite. Imagine now that country says, you have to pay taxes here because the satellite is beaming into my territory. And then I will say, well look, but why, this is not a permanent establishment, so I shouldn't pay taxes here. They say we don't care, you have to pay taxes. Then I go to my resident country, and I say, can you give me a credit for the taxes that they have paid in the other country? And my resident country says, forget about it, why did you pay taxes, you shouldn't have paid taxes there, you should have paid taxes only in my jurisdiction, resulting in double taxation. And in this case, the taxpayer can go to the tax administration and say, can you please talk to your colleagues of the other country and solve this issue? Now, the tax administration is not obliged to solve the issue but is obliged to try to find a solution. And that is now changed because now following the BEPS project, there is a provision that says if after two years, the two tax administrations have not agreed on how to solve the problem, then the taxpayer can ask that the problem is solved by an arbitration committee. So, you appoint three people, Alberto, Giuseppe and Raffaele, you submit the case to these three people, and they decide. Plus, there have been a number of standards in the way that the mutual agreement procedure is to be carried out, such as that they are more transparent *vis-à-vis* taxpayers. But your point is taken, the bottom line is that we didn't know where to put it so we put it there. But this also forces me to say something else, that this was also, in the entire plan, it was the only action that was in favor of taxpayers.

Or in other words, it was the carrot which came with 14 sticks. But it was also a recognition of the fact that because of the complexity, also of the new rules that were being introduced, disputes will increase, the number of disputes will increase. And therefore, there was a need to ensure that the only mechanisms that exist to solve the dispute cross-border will be strengthened and would work better and in a more transparent way.

Now, let's move to the two pillars because that's the point of Alberto. After the BEPS project, it was decided to set up the so-called Inclusive Framework on BEPS. Why? Well, first, because if you look at this chart, you'll see that there are lines in relation to Action 5, Action 6, Action 13, and Action 14. Why? Because these are so-called minimum standards, so standards that countries within the project committed to implement and also committed to be checked by other countries on whether they had effectively done what they were supposed to do. And in order to engineer this process where, you know, you say, okay, it's true, I will amend my pattern box legislation in order to make it compliant. But then who checks that? And these checks were done at the level of this new body, the Inclusive Framework on BEPS, which in a way is parallel, but also together with the structure of the working parties that we have seen. So, the inclusive

framework now is a sort of super committee of fiscal affairs. And then there are certain parts of the Committee on Fiscal Affairs that are still carried out only for the members. But in effect, the entire infrastructure is an infrastructure where all countries are on an equal footing, on an equal footing meaning that if they object, the decision is not taken. If they have to contribute financially to the work because obviously you have to pay for the Secretariat, you have to pay for the expense. So, they are really on an equal footing even though they are not members of the OECD. And at the moment, I think there are around 140 countries that are members of the Inclusive Framework on BEPS. The other thing that the Inclusive Framework on BEPS had to do was to continue to carry out the work that had not been finalized within the BEPS project. And one of these items was actually the one on addressing the tax challenges of the digital economy. When the Biden administration came in, they fundamentally made the link between the work on the taxation of the digital economy and the work on the so-called Global Minimum Tax. And they said, we will agree on what is done in relation to the taxation of the digital economy if everyone agrees to do the Global Minimum Tax. So, they sort of created the political dynamic according to which these two pillars, as they're called today, were politically linked, and that's how the work continued. And that's how the work then resulted in what we have today as the Global Minimum Tax as regards pillar two, and the so-called multilateral convention as regards pillar one. The difficulty is that the multilateral convention needs to be signed by countries and needs to be ratified by national parliaments. And the US Congress has been extremely clear that they will never do that. So that's where we are today. At the same time, Europe, and a number of other countries said, okay, but let's start with the minimum tax and let's do it. And in fact, within the EU the decision was blocked for almost one year by Hungary because Hungary said, we're not going to do the minimum tax unless there is also pillar one. But then, at the end, there was a political agreement which related to the recovery plan of Hungary, and Hungary decided to agree and so we have a directive in the EU on the minimum tax, and actually we are implementing it these days in most jurisdictions including the one where we are now.

[Prof. Marino]

Raffaele, may I ask you a question. What is the inclusive framework? And what is the, I would say, legal qualification of the inclusive framework of the OECD versus the European Union versus the United Nations. How do we identify the inclusive framework within the international tax chess?

[Prof. Russo]

There is no answer. Well, the best possible answer is that it is a group of countries that is larger than the OECD, it's about 140, it's almost the entire

world. It is in technical terms of part two program of the OECD. So, it's a program of the OECD where also nonmember countries can be part of and can sit in there on an equal footing with member countries. But it does not have legal personality, it's not an international organization by itself. It remains a group of public officials, but in a way, it's also the consequence of our times because it's the same, the exactly the same issue arises with regards to the G20. What is the G20? What is the legal value of a G20 declaration? No, but it is very influential.

[Prof. Marino]

This is true, but for the G20 I can assume that in any case it is just a combination of the most powerful countries, while 140 countries is a number that is closer, for example, to the United Nation. So, the question is why the inclusive framework has not grown within the United Nations.

[Prof. Russo]

Well, that's what we will discuss tomorrow. But fundamentally because people at the OECD are better, no, I'm joking. I'm joking but I'm not joking, it's true. I fundamentally believe that for three reasons. First, because there are many more people in the OECD Secretariat than in the UN Secretariat on tax matters. Second, because different from many other international organizations, including the EU, the Commission, the selection process is very target. Now why if you want to work for the commission, you do a general application and then you may end up doing agriculture, taxation, competition, and sometimes you also have to rotate. Within the OECD, you usually hire people that have tax expertise, competition expertise and work on that field. And when I started in 2007, within the Secretariat, we were 25 people. Today, there are about 200 people. We were working in an apartment in Paris, in a small apartment in a residential building close to the OECD. And we 20 of us and then, because you know, we launched a number of new projects, we put forward new proposals and new ideas, we got more funding, and we are in more people. We got more funding and we are more people, we are more people and we launch new projects. All these projects take time, take resources, you have people that think about that, think about the design, think about the government, think about the content of the rules.

[Prof. Marino]

Raffaele is just describing the future by looking at the past because when he was saying that the OECD is growing from the ashes of the OEEC monitoring the Marshall Plan transformed into a better organization, it is exactly what is happening now. We are affecting the base through a number of people for something other than the OECD itself. And we have a question mark on how

to name each other. Today is the inclusive framework, who knows what is coming after the inclusive framework.

[Prof. Russo]

We focus a lot on this tomorrow, but you have the inclusive framework for BEPS, but now you also have the inclusive framework on carbon pricing. You also have the Global Forum on Transfer Pricing and Exchange of Information. And these are all similar in terms of the legal nature. So, they effectively, they are not an international organization. But the rules of functioning are those of the OECD, they are served by the OECD Secretariat. But all member countries are on an equal footing and that also means that people from Brazil can now apply to work for the ICT Secretariat if the work is related to the work of the inclusive framework. So, there is this, if you want the enlargement, and again, you know, 10 years ago when we started this, I was always fully convinced and I'm still fully convinced. There were people that said, no, we shouldn't do that, you know, we should be only among ourselves, you know, Western countries with similar mindset, we shouldn't open up because otherwise we will not be able to agree on anything and we ended up like the UN. Because this is also the other legitimate question. Yes, certainly, the UN is very representative, but can you tell me what's the most relevant thing that they have done in the last five years? It's a question mark. So, there is this balance between being inclusive but also getting things done. Because the world moves on in an era where, by the time you have identified the problem, the problem has already changed, by the time you have identified the solution you have another problem, by the time the solution is implemented you have another problem. That's what we're seeing today. When we started on the digital economy, artificial intelligence didn't exist, the Metaverse didn't exist. So, you know, assume this case, you have a provision in the treaty that says that if you do work on an oil rig in the territorial waters of the country for more than two weeks, that is deemed to be a permanent establishment. There are provisions like that in treaties. So, you have a problem on an oil rig, you take the engineer, you send him in business class to the country, go to the hotel, go to the rig, do all the work there for two three weeks, solve the problem, get paid a lot of money and then go home. And in that case, taxation in that country because the treaty so allowed. Nowadays, that engineer to put the fancy suit and you just have a robot on the oil rig that basically does the same thing that the person is doing in Italy or in France. Who is going to tax that? So, you see we cannot tell the word, well, wait because we need time to decide. The world goes on, technological developments happen every day. And that's the difficulty we all face and if you're doing this course because one day you want to go into policy, this is probably the most important thing to focus on. What is the trick if you want? Well, to try to look ahead and identify problems before they are problems, build solutions and then once the problem

arrives and all the politicians say what should we do, that's what you should do and guarantee that they will take it. That was BEPS with the aggressive tax plan.

[Student]

So you have 140 countries in tax inclusive framework agreement and 193 countries in UN organization. Now what I understand is that other than being representative of the higher number of countries, what matters for you is the quantity of tax experts that can be appointed in one rather than another organization, that matters in the end in order to drive a tax policy worldwide, is this correct?

[Prof. Russo]

So, the question is so for you it is all about money and depending on how many people either the OECD or the UN can hire, one or the other would win. I would say it's an oversimplification, but fundamentally yes. You know, you always need money to do things in the world in which we live. But certainly, one of the things that, maybe Prof. Marino can ask to Michael Lennard on Friday, because we will have the chair of the Secretariat of the UN Tax Committee with us on Friday. They have always been complaining about the fact that they don't have enough resources.

So now the sound is better, we can move on. So where were we? We were talking about the UN, OECD, the different legal frameworks, the different bodies that exist. But that's more for tomorrow. Today, I wanted to focus more on the content and show you what has been done by the OECD, and what has been done by the UN. So, the UN now, certainly the Model Tax Convention, which I told you has a different legal nature compared to the OECD Model Tax Convention, at least in my view. And also, this model is now being updated more frequently, and what I would like to do between now and the end of the presentation is just to look at the two models and see what are the main differences and see what is the impact of these differences on a number of real life cases. But before doing that, let me tell you that the UN has also developed a manual for negotiation of double tax treaties which is not model rules and interpretation, but it's more like a guidance on how to do negotiations and what issues to take into account when negotiating with another country. And they have also done the practical manual on transfer pricing which is, in many different instances, different from the OECD transfer pricing guideline. So, we have already been confronted since 2013 with the coexistence of different pieces of guidance in relation to the same standard, which is the arm's length principle. And this is not something that makes life easy for those that work in practice, both from the perspective of the tax administration and from the perspective of taxpayers. But now let's go to the content of the two treaty models.

What are the main differences, definition of permanent establishment, attribution of profits to a permanent establishment, the taxation of so-called passive income, the taxation of services, the taxation of independent personal services, and the taxation of all the other items of income that are not covered by other provisions of the treaty. Now, what does this mean in practice? Take this for example, definition of permanent establishment. The UN model says you have a permanent establishment if you have a building site or construction or installation project that lasts more than six months in my country. If you look at the OECD model, the OECD model says you have a PE if the construction site, building site, installation project *etc.* lasts more than 12 months. So, if you have a construction project that lasts, say, nine months, if the treaty is based on the OECD model, the only country that will be able to tax the profits derived from that activity is the country of residence, because there is no permanent establishment in the other country, and therefore the income shall be taxable only in the resident state. But if the treaty instead follows the UN model, the source country, the country where the building site or construction project is, will be able to tax it, and the resident country will either exempt the income or will tax it but giving a credit for the tax that has been paid in the source state. So, you see that, from the perspective of the taxpayer, particularly if the rates and the basis are similar, there is not such a big change. But from the perspective of the countries concerned, in one case you pay to the residence country, in the other case you pay to the source country. And this, in relation to the UN model, is the usual situation. So, the UN model tends to grant more taxing rights to the source state than what the OECD model does. But as I told you, I think yesterday, if you look, for example, at treaties concluded by New Zealand, you will see that they depart from the OECD model in many instances and seek to additional source taxation. So, the point is not the model, the point is your capacity to negotiate the introduction of these provisions into the treaty. Because as, is there anyone from Argentina? But it takes two for a tango, you cannot conclude a treaty with yourself, like because I want to tax it so I'll put construction site PE after three months, but you need the other country to agree. And that's usually a negotiation that is also affected by wider economic implications. Maybe, you know, the resident country has a large company based in its jurisdiction that does one a very large contract in the other jurisdiction to build a dike to produce electricity, and that enterprise goes to the government and says, why don't you conclude the treaty with the other country? And then the government goes to foreign affairs and says, can you start contact with the ambassador of the other country because we would like to conclude a treaty. And then they have a meeting, they start with each other's model, and they start to negotiate.

The other big difference, look at it, this is fantastic. I would like to have your interpretation of this provision because this is another provision that it's creating a lot of tensions. Why it's creating a lot of tensions? Because the UN has

put out certain documents according to which a certain interpretation of the UN provisions is possible. Now, it's about the taxation of services. So, services in general terms under the OECD model fall within the concept of business profits, which means that they are taxable in the source state only if they are attributable to a permanent establishment. So, the permanent establishment, you can take it as a threshold. Once you pass that threshold, you pay taxes in the other country. And there was not a single provision on services in the OECD model until a provision was inserted, not in the model, but in the commentary as an alternative provision. In the commentary, it was inserted an alternative provision, because, again, a number of OECD countries wanted to include a service fee provision. New Zealand and Australia are some of the countries that regularly include the provision in their treaties, but there was also a feeling that the drafting of the UN model was a bit clumsy. And therefore, you see the provisions on services, permanent establishment in the OECD model commentary as an alternative for countries that would like to use it. Now, look at the UN model, look at this provision, please read it carefully for one minute and then I will tell you the case and you tell me which country should tax. All of you, because I will ask you to raise your hand. So don't get distracted now, you can get distracted later or before but not now. The furnishing of services including consultancy services by an enterprise through employees or other personnel engaged by the enterprise for such purpose constitutes a permanent establishment, but only if such activities continue within a contracting state for a period or periods aggregate in more than 183 days in any 12-month period. So, if these conditions are met, there is a service permanent establishment in the source state and the source state is allowed to tax the profits that are attributable to this permanent establishment. Now, let's assume that Alberto is working for a company resident in state A, or let's say state S, and I am a company resident in state R. And Alberto says, Raffaele, I need you to review all my tax control framework, to take a topic that is near to Prof. Marino, and provide me with your advice on that. I say, Alberto, fine, I can do that, I will do that from state R and it will take eight months. Okay, we signed the contract. How much do you want to pay me? 1 million. I worked for eight months, and I then sent them my paper on what they should do on the tax control framework, which got me paid 1 million. Let's say my expenses are 300,000 so I make a profit of 700,000. Who should tax this 700,000? Country S or country R? Who thinks that under the rule it should be country S? No one. Who thinks that it should be country R? So, the majority, and the others, they don't know. You don't know because you don't know or you don't know because you're lost? Because if you're lost, we repeat it, don't be shy. The information is the work lasts for more than 183 days in any 12-months period. I told you eight months and the work is entirely carried out in state R.

[Prof. Russo]

So, you are saying that because the rule says that the activities of that nature need to continue within state S, in this instance, as I am not in state S for more than 183 days, then state S cannot tax, it's 100% correct in my view. But there are countries that have been saying, wait a moment, it's written nowhere that you have to be present there for 183 days. It says that you have to be furnishing these services for 183 days, and because it lasted 8 months then in this case you have a permanent establishment in state S, and you should pay taxes there. It's completely crazy but that's what several countries were doing. And I can complicate because I can also add that maybe I went to state S for two weeks in total. But this is to give you an example of how, when you have competing standards, you may have competing interpretations, and I'm not sure that is a good thing.

No, state S taxes, then you get into the point of starting a mutual agreement procedure and hoping that the two countries will find a solution and shall resolve the double taxation by mutual agreement. And if they don't, and the treaty provides for arbitration as the new OECD model, you can submit the provision of arbitration.

In this case, yes, because to me it was very clear the intention of the drafters of this rule, which was, if you are present in this country for more than a certain period of time then you pay taxes.

The other difference between the OECD and the UN model is the so-called force of attraction. So, according to the OECD model, you can only tax the profits that are attributable to a permanent establishment. According to the UN model, this also extends to profits that are derived from sales in that country, in the country where there is a permanent establishment of goods or merchandise of the same or similar kind. So, assume that I. So, according to the UN model, there is the so-called force of attraction principle, which means that once you have a permanent establishment in a country, not only the profits that are attributable to that permanent establishment, but also the profits that are attributable to sales that are made directly from the head office of same or similar goods are attracted within the permanent destination. Imagine you have, where are you from? Denmark, assume you have a Lego, Lego as a shop in Cameroon where they sell the Lego bricks. That shop is no doubt a permanent establishment. The UN rule tells you that if Lego sells online directly to customers in Cameroon, the profits derived from the sales of the bricks online are attracted and therefore taxed at the level of the permanent establishment. Again, it's a way to enlarge the cake that the source country can eat. Passive income, this is where it is very visible because if you look at the OECD model, there is the possibility to tax at source dividends and the interest, but only up to a certain amount. Instead, if you look at the Article on royalties, it is stated in the OECD model that they can only be taxed in the resident state, so the

source state cannot tax at all. And that's where I say, you know, sometimes there are inconsistencies because then you look at the reservations on that part, effectively almost all OECD countries also want to tax royalties and so on. But the UN model provides for both dividends, interest, and properties the possibility to tax them at source without setting a limit and saying this is discussed bilaterally. Again, a way to enlarge source taxation. And this is the new one. So, the new one is these two new Articles that were included in the UN model. And in particular the first one, 12A is heavily based on the treaty practice of India. India has been taxing fees for technical services, Brazil has a lot of issues with fees for technical services. I just brought, how many pages was it again? 60-page opinion on the application of the treaty between Brazil and Argentina on fees for technical services, fascinating. But basically, under the UN model there is an additional provision that says I don't care about the service PE discussion that we had before furnishing service and present. When we are talking about technical services, they are taxable at source, anytime someone in my country is paying. And the rationale is different, the rationale is because the person in my country is paying, and therefore it's getting a deduction for that payment, I want to tax that payment at source. Now, it's a very legitimate position. I have always gone out saying you know, fine, if you find agreement with the other country, but at the same time you have to take into account the economic effects of something like this. Because what happens in this case, particularly if I know that Italy will not give me a credit or Italy will not exempt the income, is that I will tell the client, okay, fine, it was 1 million, now it's 1 million grossed up for the amount of tax that I have to pay in your country. Because for me, what matters is what I get into the pocket. The reasoning that has to be made in respect of the application of taxes at source on certain payments is the fact that this may increase the cost for the local taxpayers but doesn't mean that you cannot.

12B instead is revolutionary because it talks about automated digital services and within automated digital services there are a number of services, including cloud, cloud space. And the reasoning is the same, I don't care whether you are physically in my country or not, what I want to do is to tax something that is deductible at the level of the person that is paying it. This is relatively new, as far as I know, it's in the UN model but it's not in a single treaty. And here the competition is with the pillar one of the OECD because pillar one of the OECD does sort of, as we were saying, formulary apportionment of part of the profits of large multinationals, which is extremely complicated. And the UN said, look, the developing countries, we need to do something easy, let's just apply a withholding tax, maybe at a low rate, and off we go. And then you have people like me that says, forget about option one and option two, just do a digital service tax and move on. Someone is upset with what I'm saying.

Concluding remarks, which are more questions for you to reflect upon, and which link with what we will be discussing tomorrow, which goes back to the

more geopolitical side of things. But I wanted to do at least one presentation where we discuss a little bit of real-life issues. First of all, what is in your view a developing country? Can anyone give me a definition of a developing country?

[Student]
Ukraine.

[Prof. Russo]
Ukraine is a developing country, why?
So, you see the word developing as improving, but many countries, I would say, are improving, even the United States is improving its IP skills on chips, on cloud computing, so I'm trying to look for criteria.

[Student]
Non-industrialized countries.

[Prof. Russo]
Non-industrialized, so a country that lives on agriculture.

[Student]
Low human developing index.

[Prof. Russo]
Low human developing index. Okay let me rephrase the question. I think there is no definition. You can look at, you know, the definition of GDP per capita, you can look at the definition, you can look at the numbers regarding education, regarding unemployment. But if I ask you, who are you from? Brazil. Is Brazil a developing country? You think it is? So, you see, she thinks Brazil is a developing country. When I was in Brazil and there were elections, I thought how long do we take in order to get to the results of the election? 24, 48 hours? In Brazil 5 minutes. But that's not really what you would expect from a developing country. Do you know how long it takes to download the cargo in Brazil at customs? 0 seconds because it's done online with an online scan. What I'm trying to tell you is that I think very often, the word and the concept of developing country is used and abused in order to support certain points of view, and to me there is a question about least developed countries and for me it's the countries that don't even have electricity in the tax administration that have to work with the generator. And there are countries like that, but beyond this notion of developing countries, you have countries like Brazil, like China, like India, that in my view, are all but developing countries in this sense. What are the concerns? Well, the concerns of the least developed country that I was mentioning before is probably to have electricity. The concern of a country

like India, like China, like Brazil, like transition economies, is probably different than having electricity. The concerns of countries in Western Europe that we call developed, but frankly if you come to some areas of the south where I am, I don't think they are more developed than several areas in other developing countries or transition economies. So, to me, this is a fake debate and I think rather than using labels developed and developing, because this is what you see and what you will hear tomorrow, OECD, the rich countries club, the developed countries that want to impose their views on the poor developing countries. Developing countries, we want to have a voice, we want to say something. Do you think that when China is negotiating a treaty with Peru or with Cameroon or with Egypt, they are acting as they are both developing countries? Not sure.

If you look at the debate today and we will talk about this tomorrow, it's polarized, developed, developing. And what I'm saying is these categories don't mean much in reality. Because within the so-called developed economies, you have many countries that need support in terms of their tax administration, in terms of their capacities, their skills, their IT. And within the developing countries you have countries that have very different needs among themselves. And if we don't, it's the Einstein thing, if we don't identify well the problem we can't identify well the solution. And what I see is that we're not identifying well the problem, we're just going into something. Are there developing countries in the OECD? What do you think? Is Turkey a developing country? Is Poland a developing country? Again, it depends on what is your definition. But at the end of the day, the questions that are in front of us are the last two, who should develop global standards? And should there be global standards or different global standards depending, for example, on the level of development of the country concerned? This is the topic of today, this is what is on the table because of what has been happening at the UN and the resolution that was approved on the 22nd of November, and that's what we will be discussing tomorrow, the geopolitics and what will happen in the near future. So, for today, thank you very much also for those that are screaming into the mic, and we see each other tomorrow at the same time.

[Prof. Marino]
We wait for you tomorrow.

[Prof. Russo]
Thank you very much.

Geopolitics and the current debate about international tax policy (30th November 2023)

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Abstract

International taxation has become a central issue in geopolitical discourse, marked by governance challenges and growing tensions between the OECD and the United Nations. While the Inclusive Framework has expanded participation beyond OECD member states - addressing critical matters such as the taxation of multinational enterprises and the exchange of information - the United Nations has advocated for a global convention aimed at fostering more inclusive governance, culminating in the adoption of a resolution to this effect in 2024. Against this backdrop, the proposal to establish a new, neutral international tax body is increasingly gaining traction.

Keywords: BEPS, OECD, UN General Assembly, multinationals.

[Prof. Marino]
I think that we can start the last lecture of Raffaele Russo. Yesterday it was very interesting, we entered into the understanding of the administrative architecture of OECD, as well as the history and the administrative architecture of the United Nations. I give you the floor and the screen for your last lecture on the geopolitics and the current debate about international tax policy. Thank you again.

[Prof. Russo]
Thank you, Giuseppe, and good afternoon, everyone. So, we are at the end of this week where we started with the identification of the main actors in international tax policy. Remember, we divided them into national authorities, stakeholders at large, multilateral development banks, and international

organizations. Then we looked in more detail at international organizations' work and the impact they have, focusing in particular on the two main organizations that work on tax matters: the OECD and the United Nations.

As we discussed yesterday, there is obviously tension if you have more than one standard, because by definition it's not a global standard anymore if you have competing standards. First, whatever we do, tax is always involved. Second, it's about money – and money counts. Third, we have undergone two major crises: the first was the financial and economic crisis in 2008-2009; the second was the health-related crisis, the pandemic.

If you think about it, tax played a very important role during the pandemic. Many countries used the pipelines that usually connect tax administrations with taxpayers – normally to collect taxes – to do exactly the opposite: to provide economic support measures to those suffering from the consequences of the pandemic. I think Italy was probably one of the first, as it was hit before many other countries, as you may recall. Several countries did the same; many decided to suspend tax payments because obviously most economic activities had been suspended.

These elements, together with the fact that in one way or another the world is changing, and that we have a number of economies severely damaged in terms of GDP, infrastructure, and development, have created this combination of factors that brings us to where we are today. Fundamentally, it's geopolitics. It has very little to do with tax content - such as the definition of permanent establishment, the force of attraction, or the taxation of royalties that we discussed yesterday. It's more in the space of international public governance.

What I think we can use as a frame for discussions is what we call the "battle for international tax policy". This is not a battle that starts now; it has been ongoing for a few decades but has never reached this level of development. Fundamentally, the question underlying this battle is: who should be the international organization that sets the rules in international tax? The international tax rules – as I told you, everything is connected – regard double tax treaties, transfer pricing, but also domestic rules that have an impact on other jurisdictions.

A recent example is the Global Minimum Tax, which is clearly something that is purely a domestic law exercise but, because of the effects of choices that can be made, has a global reach. As we discussed, I present this as a general perception because it is fair to say that this is the common view. I don't think it is entirely the reality, but it's my point of view, and you should make up your own mind.

The general perception is that the OECD favors developed countries – their main interest – and the UN favors developing countries. If you oversimplify, that's where we are. I have already told you that I think this is a misleading perception. First, because it's not clear to me what we mean when we talk about

"developed" and "developing" countries. Second, because I think within both organizations there are countries at different stages of development.

Now, if you look at the OECD, fundamentally, the standards developed by the OECD since the 1960s – referring to the Model Tax Convention and the Transfer Pricing Guidelines – have been the enablers of globalization of the last few decades, for obvious reasons. They were meant to prevent double taxation and thus foster cross-border trade and investment, coupled with the technological revolution and the internet, which, for many of you, has been part of your life since birth, but for many of us was not.

All these developments, and the crises I mentioned, have made it so that now, while in the past similar demands from a group of countries had always been dismissed one way or another, that is not the case anymore. As I said, I will try to look at these also taking into account the overall situation we have endured: two large superpowers composed of very strong economies focused on growth; other economies that are more stagnant; and other economies that, for me, are the real developing and least developed countries facing other types of problems. But all these things are strictly connected.

Now, regarding the work done with the support of the OECD – and I use this term intentionally – this was a question posed by Alberto yesterday: What about the Inclusive Framework? How does it affect the governance and working methods of the OECD, its Committee on Fiscal Affairs, and so on? We discussed that these gatherings, as I said, are not international organizations; they don't have legal personality from a public international law point of view. They are hosted by the OECD, supported by the OECD Secretariat, but open to any country willing to join. Once they join, they join on an equal footing. So, they have the same rights and obligations as OECD member countries, even if they are not members.

Currently, there are three main bodies, plus others. The three main ones are the Global Forum on Transparency and Exchange of Information, the Inclusive Framework on BEPS, and the Inclusive Forum on Carbon Mitigation Approaches, which is new and was launched this year. It is closely related to discussions happening today in Dubai at COP28 on climate change. We will return to climate change shortly.

In terms of key items, the first is the exchange of information, both on request and automatic. The second relates to the taxation of multinationals. The third concerns optimizing the reduction of CO_2 emissions. There are others, and I tried to list them with some numbers: on the left-hand side of the slide, you see 38 member countries; on the right, the number of countries or jurisdictions participating in the various gatherings. More than 135 countries participate in the Inclusive Framework on BEPS; more than 160 jurisdictions participate in the Global Forum on Transparency and Exchange of Information.

There is also another body that originates from a legally binding convention initially drawn up by the OECD and the Council of Europe – a separate international organization based in Strasbourg, different from the European Council – focused on respecting human rights. This is the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, prepared in the 1980s. After the abolition of bank secrecy for tax purposes, this convention was opened to nonmembers of the OECD and countries outside Europe. At the moment, it has 140 countries.

Regarding one of the BEPS Action Plan steps – Action 15 – it aimed to develop a multilateral instrument allowing countries to insert changes into their bilateral treaties agreed upon in the BEPS context. For example, BEPS agreed to modify, in certain respects, the definition of permanent establishment, i.e., the threshold upon which a non-resident pays taxes in the source state, because the old definition was seen as prone to abuse, so it was important to change it to prevent circumvention.

Imagine a country like Italy, which has 80 to 90 double tax treaties, having to start negotiations with each treaty partner to amend the bilateral treaties – it would take ages. Twenty to twenty-five years ago, treaty shopping was quite normal. For instance, an Italian company paying dividends to a Cayman Islands company would face a 25% withholding tax. People would say: just transfer the shares to a company in Luxembourg; Italy pays to Luxembourg with no withholding tax; then Luxembourg pays to Cayman with no withholding tax on outbound payments. You benefit from the treaty, domestic law, and save money.

[Prof. Marino]

Raffaele, sorry to interrupt, I told the students about my time at the IBFD, when a Danish entrepreneur contracted us to monitor global treaties to find optimal investment routes tax-wise. For example, to invest in Argentina, the route was Netherlands – Luxembourg – Italy, exploiting different withholding tax rates. Treaty shopping was very profitable.

[Prof. Russo]

And that's also something we discussed. Who is from Turkey? You are from Turkey. Okay, there is a very funny, nice movie from Oliver Stone. It's called Midnight Express and it's actually the last paragraph of the book I wrote on international tax. The book starts with the quote from Karl Marx about globalization and ends with a quote from Oliver Stone in Midnight Express. And so, you have this American guy that is put in jail because he's found to have some hashish or marijuana, I don't remember. And then at certain point, he does his speech and he says something like, you know, what is a crime and who decides what is a crime, and sometimes something that it is legal in the past, all of a sudden it becomes illegal in the present, or something that is illegal doesn't

become so because everyone is doing it and you cannot put everyone in jail. And that has always attracted my attention, because over time we have seen how the perception and therefore the reaction in relation to certain tax planning opportunities changed. So, treaty shopping was considered to be normal. And we included these provisions in the BEPS project to go back to where we started in order to prevent treaty abuse. And I described that to the journalist, and the journalist asked me how long it would take to implement this. I replied that we are developing a multilateral treaty that would amend the bilateral tax treaties concluded by all the countries participating in the multilateral treaty. Without this approach, implementation would likely not happen until the time of my grandchildren. That's what I said. What goes out on TV is that this will be applied at the time of my grandchildren. This is exactly the opposite of what I said! I've never understood why I thought they were supportive of the project, but that's what happened. And here too, it was something that didn't exist. Check if you go on the IBFD, there is an Article that I wrote, again, probably 15 years ago, which is called STAP. And I wanted to do something like, you know, when you open a bottle of champagne like STAP, and STAP stood for streamline the treaty amendment process, and was based on an idea of Philip Baker who you had for this presentation. At the time people were saying things like: it's impossible, it cannot be done, it's not constitutional. But this is life, this is the life of innovators in whatever field you are, you know, you will always have people telling you it's not possible, just don't listen to them and find more energy out of this conventional thinking. And what we did was we put together a group of public international law experts, and we said, look, we have this situation, this is the problem, we would like to apply this solution, what do you think? And they were like, oh yeah, sure, it's already been done in strange fields, I think one was the multilateral convention on archaeological discoveries in contested territories, but it had been done. So, we did the report and then we did the multilateral convention. And today there are 95 countries that have signed to the convention, and this has allowed them to modify 1700 treaties in one document with one signature and one ratification. At the level of the Secretariat, as you see, there are people from more than 40 countries, why? Because of this enlargement to nonmember countries, also nationals of countries that are part of the inclusive framework, of the global forum can be part of the Secretariat. So now you have, for example, people in the head of the Secretariat of Global Forum on Transparency and Exchange of Information is from Brazil. The head of the Secretariat on Tax Inspectors Without Borders that is actually something that helps a lot in developing countries, the head of this Secretariat is from Georgia. You have a sort of enlargement also of the people as we discussed yesterday to the technical work, so that then officials from the relevant countries can sit down and agree or disagree. And this is the OECD as we are as of today, literally.

The UN, he will come to the seminar tomorrow? So tomorrow, there will be the head of the UN Secretariat on tax matters speaking at the seminar that Prof. Marino has organized. Now, what has happened in the UN since last year? I didn't go back too much. On the 30th of December last year, the General Assembly adopted the resolution on promotion of inclusive and effective tax cooperation at the United Nations. And the idea was we need to scale up the work that we do at the level of the UN committee of experts that, if you remember, is not the intergovernmental body but it's a body of people that act in their personal capacity, even though nominated by governments. The member states requested in the resolution that was approved that the Secretary General of the UN prepare a report in order to outline the status quo of international cooperation on tax matters and what would be the options. And this is the report that was presented by the Secretary General on the 8th of August of this year. Now, it seems that it's made on purpose to spoil the holidays of people because 30th of December you're starting New Year's Eve, on the 8th of August in Italy we're starting our holidays. And the Secretary General report was put out for comment and input, and more than 80 submissions were received from member states of the UN, from academics, from the IBFD, the IBFD wrote a very lengthy report on these topics, from businesses, and from NGOs. What does this report say? Because this is now real, the report says, well, while the UN seems to be engaged in an efficient and effective manner in being inclusive for international tax cooperation, this is not the case for the OECD. The OECD serves the interests of developed countries, and this is the reason why the OECD rules, standards, guidance are not aligned with the interests of developing countries, and this is the reason why many developing countries feel excluded from the process. So, very different from what we saw here, the equal footing and so on. What are the consequences? The consequences are that effectively developing countries often don't implement the rules that are developed at the level of the OECD because they are too complex. And in many instances, these rules provide for reciprocity which they cannot assure, and here I find it very worrying. For example, in relation to the automatic exchange of information of bank accounts. Here, I think, you know, they could have phrased them in a different manner. But effectively, you know, the same UN that protects human rights and the right to confidentiality is taking a different approach here, because banking information is very sensitive information. Imagine, you know, in relation to countries where criminality is right and you get to know how much people earn, and you may decide that you want to kidnap and ask for ransom. In countries where, let's say, there is not a full democratic control of parliaments, you can use the information against your political opponents. So, it's a big risk if you don't ensure confidentiality. It concludes that there should be an intergovernmental process that can leverage on the strengths of the UN working methodology and governance and address the gaps that exist at the

level of the OECD. And it provides three options. Option one is a Multilateral Convention on Tax. So, we forget about everything else, we forget about all the things that you have started this week, the League of Nations, the developments over time, the model tax conventions, the bilateral tax treaties, the anti BEPS, and we just pull everything into a big multilateral convention. This convention would address a number of tax issues, would be able to restrict, or I would say to allocate than to restrict, taxing rights on cross-border income, and would include obligations that are relevant to domestic resource mobilization, which according to the UN, includes tax information reporting and the monitoring mechanism together with dispute resolution. Ask any development expert, what do you think is important for domestic resource mobilization? I'm not sure that this will be the first answer that you get, but that's what the report says. Then it says obviously this convention needs a political agreement, but maybe if there is not a full political agreement, there can be sideline agreements on topics on a common way of looking at it. Second option, and that's where we go back to the climate change, and what's happening now. It's the Framework Convention on International Tax Cooperation. So, the way we understand, because we don't know much, and you can read the report and resolution because they are online, this will not be a convention that establishes actual tax rules, but it will be a convention that establishes the rules in order to develop tax rules. So, more from the point of view of governance, overall objectives and aim, but then the details will be developed through a different instrument. And countries will be free to enter or not into the convention. This is exactly what happened with the UN Framework Convention on Climate Change. That's what we're now studying with Marco that is here. But you know, if you're interested in these topics, it may be a nice topic for a thesis, for a paper, for an Article, because that's the model that they had in mind. And then what happened was that to this convention, as you probably know, a number of protocols have been attached over time, the Kyoto Protocol, the Paris Protocol, and if things are successful, the Dubai Protocol of today and the next few days. The third option is a Framework, not a convention, not legally binding, for International Tax Corporation. Fundamentally, it would mean upgrading the committee of experts to not being any more a group of people that act in their personal capacity, to a group of people that represent the countries that have appointed them. And these are the three options, now what do you think that has been the reactions to these options? The reaction of the OECD, the reaction of NGOs, the reaction of business, the reactions of the stakeholders that we saw before?

This is the OECD, Manal Corwin is the director of the OECD Center for Tax Policy and Administration who is the head of the Secretariat of the OECD working on tax matters, one of the most skilled and visionary people I have met in the international tax world. And basic, obviously, they were disappointed, because the report pictured a reality that is not the perception of the people

that do this work. The report is full of inaccuracies and misleading statements. At the same time we are very keen to work on improving the inclusiveness of the process and were listening closely to the concerns of those that consider that our, the OECD's processes are not inclusive. Plus, we were working together with the UN, with the IMF, with the World Bank on tax issues and avoid duplications, and at the same time, increasing the resources that are needed by countries in order to represent a number of different countries. This is Manal Corwin.

Second, Mr. Guterres has confirmed beyond any doubt the unsuitability of the OECD to lead international tax rules and put his weight behind the tax justice movement's campaign for a UN framework convention on tax. This has been the idea of NGOs for a while, the objective that they've had for a long time. For the last 50 years, the OECD has been at the forefront of international decision-making regarding global tax regulation. The outcome is an international tax framework marred by inefficiency, complexity, and numerous loopholes. Additionally, this system exhibits a bias towards wealthier nations and tax havens. Wow, okay, I didn't know that I've been working for tax havens, but now I know. What we require are transparent and equitable global tax discussions, overseen by an organization in which all nations have an equal say, the United Nations stands as the sole entity capable of fulfilling this need. The USCIB said effectively, this is a turf war with the OECD, but if we have to choose between the different options, probably the third option would be the easiest to start from. At the same time, you have to consider that we are in the middle of developing the pillar two rules, the minimal minimum tax and the multilateral convention and this may actually block the progress that had been done in that. And I have to say here, I didn't put it on the slide, but one of the, I would say, strongest and skilled members of the NGOs is a UK accountant called Richard Murphy who has a very successful blog. He founded the Tax Justice Network and he left because he thought that this was unfair. It's maybe sometimes what happens in couples, like you have one partner that is doing a lot of stuff and is doing things and the other that is not appreciating it, because probably they don't see it, because probably it's not important for them, and it was the same here. For 10 years, we removed the bank secrecy for tax purposes, we have a system of automatic exchange of information, we changed the rules of the taxation of multinationals, we did all these with countries on an equal footing. We have scaled up all the capacity building initiatives in order to support real developing countries that needs them, and you come and say, well, actually, this is worth nothing, and we need to move everything to the UN, at least the perception of many people that have worked in this.

The discussion started at the level of the UN General Assembly in its second committee and the positions that were expressed by the G77. So, it's the group of African nations plus a number of other countries, said that they were in

favor of option one or option two. US, Japan, and Canada complained, saying that, again, the report did not recognize all the progress that has been made in the recent past. The EU also decided to vote against. The EU being the EU and its member states to vote against and as a last resort, only considering the third possibility, the third option, upgrading the group of experts to an intergovernmental group of experts. So, this was the layout as from the 5th of October. On the 11th of October, the text of the draft resolution which is the legal instrument through which a decision is taken based on the content of the report was submitted by Nigeria on behalf of the group of African countries, and it called for a comprehensive convention and the establishment of an ad hoc committee to finalize the work by June 2025. So, fundamentally, option two.

At certain point during the process but I have not put it on the slide, there were suggested amendments to the draft resolution of Nigeria by the United Kingdom. This is all at the level of ambassadors and permanent representatives and economic council, permanent delegations to the UN, tried to find a sort of common ground, moving toward from option two into an option two and a half slash three. 22nd of November, these are the results of the votes. I leave to you, can you read the names of the countries? So, the one in green is the ones that approved the draft resolution submitted by Nigeria, the one in red are the ones that voted against, and the one in yellow are the ones that abstained. And if you're interested in geopolitics, I think you should print this slide and look at it. Tomorrow, I think we will share the full package of slides that were used this week and we consolidate them in one and send it to you. But if you look at it, fundamentally, all OECD countries voted against with the exception of Norway, Mexico, Turkey.

[Prof. Marino]

It's strange. Mexico is more associated with OECD policies than Turkey. Turkey is in the middle of a geopolitical battlefield between Russia and Israel. That has nothing to do with tax, but tax is always in these discussions. I may understand Turkey's position, but not Mexico's, or Norway's for example.

[Prof. Russo]

Interesting. Mexico has historically been active in the Committee of Experts. Mexico is mostly a source country receiving US investments. Norway is one of the biggest donors supporting development via Norad, their development agency. Norway found oil 30–40 years ago, which changed its landscape.

So, there was some recognition by these countries. Iceland, also OECD member. In a way, there was no point going phase by phase; it would have been better to find a compromise. Fundamentally, on 22 November, the UN General Assembly approved the resolution. What does it say? It provides for an intergovernmental committee that, by summer 2024, must develop the terms

and references for the framework convention on international taxation. They have to draw up the terms and conditions of the contract that countries will sign. Members will be selected to ensure fair representation, considering needs and capacities of all countries. The Secretary-General must allocate resources necessary for the group's work.

[Prof. Marino]

I have a question: the terms of reference for a framework convention on international taxation seem more aligned with option one, while option two outlines a Framework Convention on International Tax Cooperation.

[Prof. Russo]

It's a good question and I think we will see it when we see the terms of reference and we may ask tomorrow, but I think what they have in mind is option two. And first, let's agree on the terms to reach option two within one year, and then we have another year to actually draft the text of the convention. But that's my educated guess. But exactly, because I knew you would ask this question, I've put the actual text of the core parts of the resolution on the slides. And that's what it says after it's designed or something like that, it's agreed. So, Emphasizes that a United Nations comprehensive convention on international tax cooperation is needed to strengthen international tax cooperation and make it fully inclusive and more effective; Recognizes that this will also help in reaching the Sustainable Development Goals; Decides to establish a Member State-led, open-ended ad hoc intergovernmental committee for the purpose of elaborating a comprehensive convention on international tax cooperation; Also decides that the ad hoc intergovernmental committee shall convene in New York for up to 15 working days (so three weeks) with the contribution of international organizations and civil society. My view, civil society in UN terms includes both NGOs and business. Even though sometimes we use civil society to only refer to NGOs, but in UN jargon, civil society means everyone interested, business, NGOs, academia, journalists, as we have added them now to our categorization. Further decides that there should be a bureau for a more restricted group, sort of steering group only, of maximum 10 members with the chair, vice-chairs and a rapporteur, again, ensuring geographical and gender balance with each of the five regional groups being represented by two members. So, we have already decided that, or they have already decided that the grouping will be based on a regional basis, which is also something that we will discuss. Because maybe even within the same region, there are countries that have different interests, different levels of development, but that's what it is, again, written in the resolution that has been approved by the General Assembly.

Now, when you're elaborating this Comprehensive Convention on International Tax Cooperation, you have to take into account the needs of all

countries, but in particular, of developing countries and countries in special situations. You have to look at what you're doing. So, you have to consider the interaction of international tax rules with other important economic and social policy areas such as trade and investment. Interesting, because usually developing countries used to forego taxing rights in order to attract investment. Sometimes they even do that in a contract so-called sub-realization agreements because you have certain jurisdictions where it's not safe to do business, because you know, you start a business and after six months, there are riots, there is a revolution and then there are different people in charge which may decide not to respect what had been agreed before. So usually, this is something that is used as an argument to say, you know, tax is not the first important thing, the first important thing for that country is that that bridge is built and they don't have enterprises that can build that bridge, so they have to ask an Italian company, a French company, an American company, a German company that have the skills to do that. But that's what's written in there. Resilience is a buzzword, so we have to use it. Fine, we know there're a lot of generic concepts that don't really provide any real hint on what will happen but the political posturing. The UN is defending developing countries against the BEPS, developed countries that steal money from them. And remember what we discussed yesterday, Article 12A and 12B, the taxation fees for technical services and automated digital services. And income derived from the provision of cross-border services in an increasingly digitalized and globalized economy. If you don't have money to hire skilled people that know the work, it's very difficult to do any progress. So, August 24th, they should be able to sketch out the scope and the mechanisms, the functioning of this Comprehensive Convention on International Tax Cooperation. And therefore, this item is included on the agenda of the next session. According to many people, this is an historical moment and it may change the course of history going forward. I am a little bit more relaxed and it's not only because I worked for 12 years at the OECD and I don't think that I was working only for developed countries, and I think a lot of the work that I did was benefiting developing countries. And there are actually numbers that show us that, in terms of the increased tax revenue derived by developing countries thanks to exchange information, the increase of the tax revenue collected by developing countries because of tax inspectors without borders, the capacity building efforts, with the difficulty that sometimes it's a double edged sword because if you form a very good tax official in a developing country, and that person becomes an expert of transfer pricing, very often they move to the private sector, because the pay rates of the public sector in these countries is very low. So, you have also this element to be taken into account. But all these completely disappeared from the debate. So in a way, what I'm trying to say is that despite what people say when they speak at conferences, when they speak at seminars, the reality is that the Secretary General Report and the resolutions

and the campaign, you remember when we discussed the day one actors and I said another way to influence the debate is to support and organize campaigns in order to launch the debate on a given topic. Like what's happening these days in Italy with gender issues. And for me, it has been fantastic. It's like, if you study these things, it's the way campaigns are built. Read the propaganda, it's a book written 40 years ago, it describes exactly this process. So, how do you create awareness? How do make sure that that is the point of the debate? For me, this is what has been happening with this. And my view, which I have expressed today in an Article that was published on Il Sole 24 Ore, I think I will translate it in English and see if I can publish it anywhere else, it is following. Clearly, there is this content with the OECD work by certain people in certain quarters, I think it's a matter of fact, what I don't understand is now that we have these two blocs one against the other, and let's say that this fantastic bloc, intergovernmental group sits down and agrees on the terms of reference and decides that service fees should be taxed at source with the withholding tax of 10%. All the other countries are not going to agree. So, what is the purpose of this fight, of this battle, I don't understand. I may have a view but I'm not going to tell you because I would like you to make up your mind with this topic. The risk that I see is the one of polarization. Usually the result is no progress, it is like two forces that push against each other, they don't move, and that's the real risk. So, we are moving from a system where clearly there has been an improvement. I don't think anyone can deny that in terms of inclusiveness, in terms of content of the work and the interest that it safeguards. Tomorrow we should discuss this, with the Global Minimum Tax and the priority that is given to the qualifying domestic minimum tax. In practice, we have given priority over taxing the low tax the profits of multinationals at the source country. As a matter of fact, while the rules would have said, this income has to be taxed in the country of the headquarters, giving priority to the resident country. But also, this is not considered. There is a subject to tax rule, which has been requested by developing countries that is included now in the multilateral instrument. So that's when I think I start to get unhappy with the process. And then you get to the point, it becomes ideological, and to me, there is no point in discussing this. It is like when we were discussing vaccines, and if you had the discussion with the person that said that, you know, this is the project of the specter of the world that will inject chips into our bodies so that they can control us by the vaccine. A lot of people thought that that was true. And to me, there was no point in engaging in a discussion. We are in a very similar situation, we're not listening to each other, the different groups. So, what I'm proposing, my small words, so that in 10 years I will say I said it 10 years ago, I'm joking, is that we probably should move on. And probably it's the right time to create a new international organization that works on taxes, that is neither the OECD nor the UN.

Historically, we have created international organizations after wars. I was in Geneva when there was the UN meeting in mid-October, I was working there, I was looking at all the flags, I was like, wow, 60 years ago, no internet, no telephone, nothing and we were able to do these great things. And in 2023 with the hybrid connectivity that we have, with the analytical capacity that we have, with artificial intelligence, we never think about doing something like this.

[Prof. Marino]

With this wishful thinking of Raffaele that I fully agree, and I fully share actually in a lower capacity I draw a similar idea as far as the European Union is concerned. Within the European borders it is certainly necessary to have an agency that is dealing with all the administrative cooperation in tax matters, as well as with the idea to create European, true European tax system, and that certainly could have the creation of the world tax as Raffaele has suggested. So, thank you very much Raffaele for this last lecture. I don't know whether you would say something as a last drop.

[Student]

What I find frustrating is to see that basically, nobody cares about the very small multinationals that are more and more.

[Prof. Marino]

I think this goes into the direction of what Raffaele is suggesting, through the world tax, maybe the rights of the so called small multinational enterprises will be taken into account. Because the large majority of Italian corporations are based on very small dimensions. So, at the very end of the story, the governance is a family governance issue. And so, they believe that they are spending a lot of money for taxation, tax compliance and bureaucracy, and so on. So, they don't appreciate all the efforts. So maybe through an enlargement of this tax interest, there could be space for small enterprises.

I don't know what is your opinion, Raffaele?

[Prof. Russo]

That's a matter of fact, it's so also because of increased lobbying. If you think about remote work which is now common, you can even have a small company with five employees that are in five different countries. And then, which tax rules do we apply? We apply the tax rules that we have developed for the very large multinationals that have the capacity to comply and the resources to comply. If we do that probably they will be out of business. And so, there is, in my view, a trend, which in a certain way we have already experienced, because if you think about country-by-country reporting, it applies only to multinational companies with a combined revenue of 750 million euros or more. Global

Minimum Tax, same, 750 million euro or more. Pillar one, 20 billion turnovers. So, in a way, we are already sort of plastering the huge multinational, the over the top, the ones that basically the CEO can meet the prime minister of any country. Then you have the large multinationals, the more traditional ones, then you have the medium multinationals, and now you also have the small multinationals because of this connectivity issue. And sometimes the small multinationals are run by people like you, people that are out of university, they have ideas, they work with friends that they may have met during the Erasmus project, and they go back to their countries, and they work together on an idea and they ended developing it. Thinking about imposing the same obligations to the entire clustering that we've made, is simply crazy. But from there to, first when do you discuss these issues? How do you address them? That's where we are. Or, as I was telling you yesterday, what's fascinating about this exercise is that if you think about some of the largest transition economies, they are both importing and exporting. It would be really funny. I would laugh the moment because the taxation of service at source has a long-standing battle of India. India has always been pushing for source taxation on service fees, both in the laws, in their interpretations, in their negotiations of treaties. But once you start having 5, 6, 10 million Indians that are providing services online to other countries, the math teacher that I was telling you, the friend of mine is hired for his son in high school, the doctor that will be cheaper because they can examine your documents live, it will backfire. And to me, let's say, my limited but intense experience in international tax policymaking, the only rule that I have understood that is the only principle that is, in my mind, and I tried to apply, is that you should not make a decision regarding one interpretation or another, or a policy decision or other, based on whether you gain or lose. Because things may change, you hope you were on the gaining side, but you find yourself on the losing side. There has to be coherence in what you do and the analysis and then you respect the consequence of that analysis. Thank you very much, come to the seminar tomorrow that covers very interesting topics.

[Prof. Marino]

Yes, those who are via zoom, tomorrow the meeting is in room, an interesting seminar on Global Minimum Tax that will be conducted with some speeches in Italian, and some speeches in English.

So, be there, thank you, bye.

From double taxation to double non taxation: the global minimum tax (1st December 2023)

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Abstract

Since its establishment in 1919, the International Chamber of Commerce has advocated for stable and transparent tax policies, endorsing initiatives such as the BEPS project and the global minimum tax. The international tax debate, despite encountering some resistance within the OECD, increasingly involves developing countries, which express support for a United Nations-led framework convention on taxation. Against this backdrop, the European Commission is confronted with legal challenges concerning the protection of fundamental freedoms and the regulation of state aid.

Keywords: International Chamber of Commerce (ICC), BEPS, Global minimum tax, European Commission.

[Prof. Marino]

Thank you very much for being with us. We just scheduled the seminar in the afternoon since I know that certainly Michael but also Luisa are on the New York side. So, we didn't want to wake up so early and now it should be after breakfast time. Thank you for being with us, I would leave the floor by considering your topics.

[Luisa Scarcella]

Thank you very much Prof. Marino, the idea for me today is just to take you through ICC World in navigating the century of international taxation and what has been the business contribution, let's say, to the centuries of policy developments which indeed, as I showed in previous presentations, have been quite significant, especially in the last decades. So just a few words, the International Chamber of Commerce, I know many of you have already a good idea of what we do, who we are, and where we are. But just to be mindful of the presence of students, I will give you a very short few points on what we do and what we are basically. So, we were founded in 1919. So, as you can see, we were always kind of present when these tax policy developments have been occurring. And indeed, there's been quite an active role also from the business community when it comes to the importance of addressing double taxation, with the increasing tax certainty, but by seeing taxation in the broader picture of macroeconomic policies and trade, fostering cross border trade and investment. We're presenting in 130 countries, that wasn't the case in 1919, but now we are, and we have about 90 national communities in developed and developing countries. That makes quite my job interesting because when we talk about international taxation, we have to make sure that we have a consensus among companies of both sizes, industries, and from every region in the world. And we have 11 Global Policy commissions, we don't just focus on taxation, but we have to look at taxation also through the lenses of other policy developments, so really in a holistic way. And indeed, as probably all of you know and the students as well, our arbitration represents the gold standard when it comes to commercial international arbitration practice. But that's on ICC from a general perspective. What I do in ICC is I coordinate the international global tax commission. So, what we do is we focus on international tax policy, and we will present the voice of businesses in the different institutions that works on tax policy. And as I said in the previous slide, we've been there since 1919. And so, we've been there when there was the four economists report, something that we welcome very much at the time of the League of Nations as well as the League of Nations to address the problem of double taxation. But there's been very much development in the tax policy space. And so, from the economist report, we have done the model tax treaties, the OECD and the UN model tax convention. And I'm not going in depth into that because I know you have been having classes and different conversations into that, the London - Mexico model tax conventions in between the League of Nations models, and the OECD, the UN model. And finally, from Models to address double taxation, we are moved to a Base Erosion and Profit Shifting, our BEPS project. So, in the previous presentation, we were hearing about global solutions to global problems. And that's exactly the type of shift we've seen in the decades, right. So, from model on double taxation, treaty agreements between countries, we pass to multilateral type of solution with the

challenges that entails. Along all these decades, when it comes to the ICC and the business community, there's always been a focus point on the importance of addressing double taxation. But we recognize also the need to move to this global solution because it was a globalized economy that wasn't there in 1919. And that there are the limits of bilateral solution. But we always also call for the need for tax certainty and tax instrument to prevent and resolve disputes that can occur that is particularly relevant for businesses that operate in more than one country. And now from the BEPS, we heard already that we pass to our global tax reform through the two pillars tax reform. From the OECD, G20, inclusive frameworks that bring together what I'm referring for the countries. So, what has been the role of companies into these policy developments? Well, one positive side, for sure, was the presence of public consultations and the fact that there was at least a way to engage in the discussion by providing what are the concerns and the challenges the business would face when these new rules are going to be introduced. So, indeed, for us the focus still will remain after the publication of the model rules and some of the administrative guidance principally on tax certainty and administrability. So, two of the points that have been made, also in the previous slides, so the century has passed, the decades have passed, but still these still are the focus and pillars of our type of preoccupations. So, when we look at the Global Minimum Tax and ask members and companies about their concerns, the challenges they face and how we can eventually address them, we must recognize that there is significant heterogeneity in how the rules have been implemented around the world. And also, the different ways that companies would respond is also like the industry sector, but also the resources that have to put into compliance to these new rules. So, the interesting thing I was saying at the beginning in my job is that we have members from all over the world and of different sizes and different industries. What this entails is that when we had a recent conversation about the Global Minimum Tax, it was interesting to see how the occupation that concerns diversify, also based on which countries are we talking about and which regions of the word that we're talking about. But going back to tax certainty and administrability, today I'll try to summarize the concerns and the challenges that are common and shared among businesses all over the world. So, indeed, in terms of tax certainty, what is the concerns now is how the QDMTT, the income inclusion rules are going to be implemented and whether they will qualify to be according to the model rules and when it comes to the peer review. And OECD Model Rules, Commentary and Administrative Guidance are the model for the implementation of these rules. And if you are a business and operate in more than one country, indeed you want to make sure that is consistent so that you can be in a position to easily comply to all these rules. In the end I can assure that our members are asking to comply and so it is important that the rules are made in such a way that is easy. And then indeed there must be a binding dispute

prevention and resolution mechanism in place because this is the way we can solve any potential dispute that can arise. And so, it's really important when new rules are introduced and are introduced to our global scale, that these mechanisms are in place. When it comes to administrability, as I was saying before, business wants to comply, and they want rules to be workable for both tax administration and taxpayer because the success of global rules, it depends on really making the rules workable. And they want to implement systems once, what does it mean? That we need stability on the rules and when there is a lot of dispense of resources, both for tax administration and taxpayer in introducing new systems, it's important that these systems that are put in place, can stand time, and can stand the different implementation around the world. So, this is why it connects also to the need for adding UTPR and CbCR fibers that are permanent and not just transitional. This way, the system that they put in place, both tax authorities and taxpayers can really be efficient and effective for the purpose of having some rules that work. And we also have noticed, which is something that Prof. Marino was hinting at the beginning is that we see that the compliance burden is far too out of proportion in relation to the pillar two tax at stake. So, it should be taken into account too, so that there are some reality checks to be done on that. And still the automation of pillar two, it's not possible yet. So, there is no software provider that is able to provide that to the QDMTT global module solution, given the QDMTT country specific. So that's a challenge that we will have to face. Indeed, it was mentioned of tax incentives before. And this is something that when we talk to companies in developing countries it is a point that they raise quite often. And the fact that countries are now looking into how their tax incentives will be workable or not under pillar two. So, indeed, that's an area where we hope like additional guidance would come and already has been done. And capacity building is another key area, there is a benefit in having a tax administration of work that is well equipped and that knows how to apply the rules also for the taxpayer. And so, it's important and we hope that further capacity building will be provided. We know by talking to our colleagues in the different situation that is on the agenda, and this is something to be welcomed. And what we will welcome is also the engagement of private sector in explaining how the rules will affect them and implementation on the business model. There is an added value in having a very transparent and constructive dialogue, such as the one we had in the public consultation. And then I won't go into that otherwise, I'm going to be too long in my 15 minutes. But indeed, besides talking to the developing country companies, US companies, we also talked to the EU companies. The EU has been at the forefront of implementation of the tax directive on the Global Minimum Tax. And there are some questions that apply to EU headquartered companies that we need to be answered in a short time. But I'm sure the colleague from the European Commission will give more insights into that. And finally, what is the

future ahead? So, in this slide I said that something is still the same because the fact that we started with this short intervention by the four economists report of 1919, and now we move to a global type of solutions, but we also witnessed the adoption of a resolution at the UN level last week. I know Michael will get in depth into that. It's indeed a historical moment when it comes to international tax policy developments and the different policy, this discussion on which solution should be adopted. But indeed, even if the scenario, even if the policy for changes complements each other, coordinates each other hopefully, there are some key tenets that for the business community are still key and vital throughout the century and still stays the same. So indeed, there is still a need for focus on tax certainty ever stable, predictable rules that can be easily followed and implemented in order for companies to be compliant. And then it's for further instruments or strengthened instruments for effective prevention and resolution of controversies still is key, especially when we're talking on our global scale. I know of course, at European level, there are already some solutions that have been adopted in the years. But again, if we're talking about global scale, this is a priority. Rule is not only need to be clear, but also easily implementable and administrable. When we look at pillar two, we see that there is a lot of intersection with accounting, technologies, so companies have to have these keys in their employees. But we also have to make sure that this can be easily implementable, and not too overly burdened. So sustainable compliance burden is also key to make sure that we can and companies can apply and comply easily, as well as it is beneficial for the overall economy. And then corporate income tax is part of our tax policy mix. So, there are other tax measures that should be looked at and focused at, both at the domestic level and international level. And then the importance of stakeholders' engagement. At the ICC, we always try to respond to all the public consultation and engage constructively. And I think these policy developments show, from 1919 to now, that there is a very added value in talking to the different stakeholders in order to make rules easily manageable and really get to the finish line and be a success overall. So, with this, I'll thank you very much, I hope I stayed within my minutes, and I pass the floor to my fellow panelists. Thank you very much once again.

[Prof. Marino]

Thank you, Luisa. I very much appreciate two points of your speech that is part of the work we are doing. The workable, administrative, good governance, I think that is very much important on the side of taxpayers to know that the tax administrations will apply administrative, good governance in order to prevent the application of administrative if not criminal sanction, so sometimes I have in mind the Italian environment. And that is matched also with the need of solutions for dispute resolutions, so that if something happens within the application of the Global Minimum Tax in our cross-border level,

that tax administrations talk to each other much earlier than talking before a judge, that will be extremely important. Then I get your point that there still is not software for the determination of the Global Minimum Tax. That's a very interesting point, very pragmatic point, no software for the application of the Global Minimum Tax. So, thank you very much, Luisa.

[Michael Lennard]

Thank you very much. Well, I'm going to talk a little bit broadly today, not specifically on the Global Minimum Tax, but about something which I think is a response to the recent developments in terms of norm setting internationally. And it's significant because it basically reflects developing countries saying, we need more inclusion in that process. And as I'll talk about, there's a bit of a division between the developed and the developing world and the task before us is to try to bridge that in some way. So, what I'm going to do is give you some background and up-to-date developments; things are happening even at the moment in this area. The background to this is that at the end of 2022, the General Assembly of the United Nations had a vote which called for greater inclusiveness and effectiveness of international tax cooperation, effectively that's talking about norm setting. That's quite important because a lot of the discussion really lately has been about a possible greater role of the UN in terms of capacity building. But whenever you hear this discussion, it is really about, not so much about capacity development, which is very important, but about what the underlying norms are, and the concern of developing countries that despite the presence of the inclusive framework and some good work, they didn't really feel that it was inclusive as it needed to be. So, the UN Secretary General was tasked by that resolution to give a report on how more inclusive and effective tax cooperation could occur internationally, and it's not an easy task. The conclusions of the report are that true effectiveness and inclusiveness require sufficient inclusion, particularly of developing countries. That needed some UN involvement because of the way the UN is set up with 193 countries, one country, one vote, and because we have a secretariat that is representative of all those countries, the UN would need to take a greater role in this area if there was going to be greater inclusiveness and effectiveness. The report recognized the important work of the OECD and its technical capacity, and that any work going forward would involve the OECD. But it also recognized several options going forward. The three options were: a comprehensive international tax convention; secondly, a framework convention with some basic ideas including the importance of avoiding double taxation and double non-taxation and the effectiveness of dispute resolution; thirdly, the second option including a Framework Convention plus some protocols. Many countries found the latter attractive, as a comprehensive convention might be too much at once, so focusing on basic principles and urgent issues, particularly for developing countries, seemed better. The vote on the resolution showed a clear division: most of

Europe and the OECD didn't want a UN convention, arguing duplication; others said there's no duplication because there is no sufficiently inclusive forum at the moment, called a red herring by the South African delegate. The resolution called for the framework convention and protocols, including on illicit financial flows, which has driven much of the push for this resolution. The vote showed 9 abstentions, including some OECD countries, showing a north-south divide, reflecting strong feeling in the developing world that a UN tax convention is needed but also that bridging work remains. The next step was in the Budget and Finance Committee, to go before the plenary of the General Assembly. Given the numbers, no major changes are expected; a consensus resolution would be nice, but this one may be more difficult. There will be a budget for the next step: for one year, a committee will be set up to define terms of reference for organizational work and elements of the Framework Convention and potential protocols. They will not draft yet, just make recommendations, and then a convention will be negotiated. This ad hoc open-ended committee will have about 20 persons as a steering group, probably four from each of the UN's five country groupings. The recommendations will return to the General Assembly, which will decide how to begin treaty negotiations. It is a member states-led process, not driven by the Secretariat. A good aspect of the resolution, also in the Secretary General's report, is the importance of input from civil society - including business, academics, NGOs. One issue is how they participate in a member states-driven process where other stakeholders are recognized as important. There will be issues about decision making; the UN is often thought of as a majority decision body but most UN decisions are by consensus, meaning countries avoid votes even if they disagree strongly, to maintain systemic harmony. The OECD seeks consensus too but has backup rules if consensus fails to avoid vetoes by single countries. The framework might include recognition of market country rights balanced with source and residence country rights, and reference dispute settlement importance, but specifics depend on committee recommendations. Likely first protocols will address tax-related illicit financial flows and cross-border services, influenced by pillar one discussions. After the committee work, the General Assembly will again decide, with budget issues always challenging further negotiations, followed by actual negotiations, ratification, entry into force, and implementation. Issues remain, such as whether countries like the US will join, and outreach to those not voting for the resolution is ongoing. Some OECD countries are expected to engage further, especially if business and academics see this as a valuable path forward, which will increase OECD involvement. So, these are the next steps. The signal is expected to be completed by the General Assembly plenary, and the vote suggests a UN convention should exist. The importance of OECD work is recognized with several references in the resolution. However, developing countries feel inclusiveness is lacking from "nose to tail" – it's not just sitting at the table, but deciding what to negotiate, options, peer review, dispute resolution,

enforcement, interpretative decisions, Secretariat roles, and membership interaction. There are many issues ahead, making it an exciting and challenging time. The hope is for openness and transparency to include good ideas and collegial processes recognizing all stakeholders are important for an effective system. It won't be perfect but can approach perfection using expertise, goodwill, and ensuring developing countries feel the deal is fair, which is key for stability and certainty. Thank you very much.

[Prof. Marino]

Thank you very much, Michael. You mentioned challenging times; I'd add it's complex too. The vote shows 125 countries in favor versus 48 mostly OECD countries, with some abstentions from Mexico, Turkey, UAE, Iceland, and Norway. So, it will be complex and challenging. Thank you, and now I turn to Raffaele Russo, who has been with the OECD and involved in the BEPS project and is a leading expert in international tax. Thank you for joining.

[Prof. Russo]

Good afternoon, everyone. Hello Luisa and Michael. It's a pleasure to be with you today, even if only online. I'd like to look at the evolution of thinking on tax competition and tax practice, and then revisit some points Michael made. Starting from 1998, the first report on harmful tax competition focused on geographically mobile activities, excluding tax incentives designed to attract real investments in plant, building, and equipment. The report targeted preferential regimes meant to attract artificial profits. Due to political changes, the work didn't advance as planned, so the BEPS project in 2012-13 revived it. The BEPS Action Plan contains 15 actions developed in 2015. While I was involved, there was a great team working on it. The BEPS project was designed to address digital economy taxation, the first action of the plan. It stated the actions did not directly aim to change existing standards on allocating taxing rights, summarized as the source vs residence conflict, which relates to the earlier Italian seminar discussion. One BEPS action revamped harmful tax competition work, emphasizing economic substance. The focus wasn't on tax competition per se but on harmful competition based on criteria such as transparency, transfer pricing, and from 2015, requiring regimes providing incentives to justify income allocation by substance. By 2015, this was the state. Work continued as the digital economy action one report did not reach consensus solutions, though VAT consensus solutions brought in more revenue worldwide than pillar two is expected to. The controlled foreign company legislation work was less impactful than expected. The two-pillar solution agreed in October 2022, mentioned by Michael, continues the work. Now, a key point is the shift from tackling harmful tax practices to tackling tax competition tout court. This massive impact affects tax incentives introduced for substantial activities attracting real economic activities; these incentives will not work for multinationals with turnover above

750 million euros (pillar two scope). Meanwhile, we are in a double transition: digital (AI, cloud, blockchain) and environmental (fossil fuel subsidy removal, green economy). Recent developments in Dubai exemplify this. This means while we have the Global Minimum Tax, trillions in tax incentives promote these transitions, creating a strong contradiction unresolved so far. The first consequence is favoring large economies since global rules pool income within jurisdictions; large jurisdictions can blend high-tax and low-tax sectors to meet the 15% minimum tax, impossible in smaller jurisdictions. Secondly, global rules favor source or market jurisdictions, as Michael said, indirectly but effectively. This reflects the rule order decided by the inclusive framework with 140+ countries: if income is taxed below 15%, the first taxing right goes to the source country (QDMTT). This applies to income inclusion, undertaxed profit rules, and controlled foreign company rules globally. This important outcome isn't widely recognized, showing how public debate uses unhelpful categories. We often hear developing vs developed country conflicts, but these categories are confusing. For example, China negotiating with Gabon or Zambia – who is developing or developed? When New Zealand negotiates with China? These labels don't help progress. I fear the artificially created polarizations between developed/developing, North/South, right/left could hinder progress or reverse gains achieved through inclusive participation. It will be interesting to see if a third way can emerge. Thank you.

[Prof. Marino]

Thank you, Raffaele, it was very interesting, the point of the two transitions at the same time, digital transition and environmental transition, and we want to avoid the digital transition that brings tax competition, but at the same time, we stimulate the environmental transitions through incentives. So, it's indeed a sort of a paradox that is happening right now. And then again, another truth, what you said about the developing and developed countries because at the same time, Italy is a developing country within negotiation with the United States, with China, and by the way, we were talking with Paola Bartoli about the new negotiation, the new treaty with China that is not yet into a proper direction, but maybe when we negotiate a treaty with an African country, we are a developed country. So, again, it's confusing sometimes, the media, the idea that there are developing and developed countries on ground while the situation is more complex. Last but not least, I see Pierpaolo, thank you for being with us. Pierpaolo is a senior, I would say, tax legal expert at the Legal Service of the European Union Commission. So, he is strongly a lawyer, I would say, so he looks at all the discussions with, I would say, a surgery lens of the lawyer, and I thank you for enriching our discussion with the position of the European Union with what is going on around the world.

So, thank you Pierpaolo the screen is yours.

[Pierpaolo Rossi-Maccanico]

I work at the European Commission Legal Service, separate from DG TAXUD which develops EU tax policy. We advise DG TAXUD and foresee legal problems from new proposals. The new international tax framework will bring many legal issues. We focus on the effects of new taxing rights allocation discussions from the OECD and EU on rights of taxpayers and undertakings competing in the single market under different tax burdens. I'll outline main issues we'll face in the near, medium, and long term in Europe. EU law intersects national taxation mainly via two areas: prohibitions on tax restrictions protecting fundamental freedoms in the internal market, and state aid control. I will briefly describe the challenges these legal frameworks pose regarding the new international tax framework. National tax laws may restrict fundamental freedoms (free movement of goods, services, capital, persons) affecting cross-border investments; such restrictions may be justified, especially to preserve taxing rights and fight evasion/avoidance, even if resulting in double international taxation - which EU law accepts currently. The second intersection is state aid control, where the Commission has direct responsibility to ensure a level playing field. Tax advantages causing selective advantages to companies altering competition can be illegal state aid, especially when they cause international double non-taxation. This creates a paradox: from a state aid perspective, the EU fights double non-taxation to prevent undue advantages, but accepts double taxation justified by taxing rights exercise. We therefore have two conflicting trends. Our Legal Service tries to distinguish genuine tax measures (physiological) from unnecessary ones that may be challenged under EU law for restrictions or state aid issues. This must be seen cautiously, as EU law generally prevails over international agreements, including tax treaties, between member states (Article 3(5) TEU). The EU also respects international law externally and must align its tax directives with international frameworks, respecting customary international law and double taxation principles. Recent EU directives addressing anti-tax avoidance include two Anti-Tax Avoidance Directives (ATAD I and II) and a forthcoming "Unshell" proposal. The EU harmonization process fights international double non-taxation mainly via the general principle against abuse of law, developed through CJEU case law (e.g., 2020 Danish cases on beneficial ownership in Parent-Subsidiary and Interest-Royalty Directives). The EU extends anti-abuse rules conceived for cross-border situations also to domestic contexts to ensure a level playing field. The most recent legislation is the Pillar Two Global Minimum Tax Directive, which poses new challenges. It introduces a new way to allocate taxing rights dissociated from income allocation, raising legal issues on equity and fundamental rights (property rights), as taxpayers might be taxed on income they don't own. It also creates disparities among taxpayers in similar commercial situations facing different tax burdens. This challenges treaty overrides and coordination with existing double tax treaties and

customary international law, posing further legal questions. Calculating effective tax rates for top-up taxes excludes certain tax incentives, raising concerns on tax competition, as Raffaele mentioned. The global race to provide incentives for digital and green transitions complicates the picture, as some incentives are excluded while others are not, raising questions. These issues are likely to be debated in the EU Court of Justice. Regarding state aid control, the Commission faces complexity. Two notable decisions show opposite outcomes for similar double non-taxation cases: the 2003 Belgium tax rulings on US Foreign Sales Corporation and the more recent Amazon Luxembourg case. The Belgium case led to finding illegal state aid due to double non-taxation from US and Belgian systems combined, ordering recovery (waived due to legitimate expectations). The Amazon case involved the US treating a Luxembourg permanent establishment as transparent, and Luxembourg exempting its income, causing double non-taxation, but the Commission did not find state aid since no selective advantage was granted, the general rule applied. This inconsistency illustrates difficulties in applying EU rules on double taxation elimination. Emerging consensus focuses on taxing rights allocation rather than income allocation via treaties, impacting taxpayers facing non-uniform tax levels in comparable situations, leading to potential legal challenges from the Court, which prioritizes fundamental rights over sovereign tax interests. These issues will likely be resolved case by case, with future Court pronouncements providing guidance. Our Legal Service is actively reflecting and advising DG TAXUD, but progress is complicated by competing sovereign interests and complex international agreements. The EU seeks to accommodate and accompany these changes, hoping for a stable, acceptable new international tax order. Thank you.

[Prof. Marino]

Thank you very much, Pierpaolo. It was very interesting your approach to describe how the EU is fighting international double non taxation. And when you were talking, I was just reflecting what Raffaele said before, that we are switching from a fight to tax competition, to a fight to tax competition *tout court* because certainly, I agree on the fighting of the international double non taxation, but now we are switching over the need that Ireland has to increase the tax rate from 12.5 to 15%, which has nothing to do with the double non taxation, because it's certainly another field, another level playing field. So, I'm going to be curious about your thoughts within the legal services, you are always reflecting on the legal frameworks on how to avoid that this kind of minimum tax is going to make dangers, may jeopardize some issues within the European Union. Thank you very much and thank you to colleagues on the international side. Thank you, Michael and Luisa, Pierpaolo and Raffaele.

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International Tax Fall on Tax Sustainability and Justice

1923-2023: 100 Years of the League of Nations Report on Double Taxation

Edited by Giuseppe Marino

This volume collects the lectures delivered during the seminar series "International Tax Fall on Tax Sustainability and Justice", held at the Faculty of Law of the University of Milan in Fall 2023, on the centenary of the League of Nations' Report on Double Taxation (1923–2023). The lectures, entrusted to scholars of recognised academic and institutional standing, provide a historical, critical, and comparative analysis of the evolution of international tax law, with particular attention to the role of international organisations (OECD, United Nations), tax cooperation, and recent developments in the field of global minimum taxation.

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