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'Sharing the Burden – Tax Reform's Shifting Winners and Losers'**

'The Role of the League of Nations in the Development of Double Tax Agreements'

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I INTRODUCTION

There are currently more than 3,000 bilateral tax treaties addressing the avoidance of double taxation (commonly referred to as 'double tax agreements' or 'DTAs'). These treaties have their foundations in the work of the League of Nations in the 1920s which ultimately resulted in the publication of three 'model' treaties in 1928. One of these models, Model Ic developed by the French and German representatives, has emerged as the prevailing model.¹ This paper examines the League's role in the development of DTAs. Section II provides a brief introduction to the concept of 'international double taxation' and how it may be addressed in DTAs. Section III discusses the formation of the League of Nations and how the issue of double taxation was brought to its attention. It then turns to consider the League's approach in addressing the issue. Finally Section IV highlights some preliminary conclusions regarding the League's work on double taxation and the relevance of the League's experience to the current OECD/G20 work on base erosion and profit shifting ('BEPS').

II INTERNATIONAL DOUBLE TAXATION

Simply defined, double taxation is 'the taxation of the same person or the same thing twice over'.² The OECD states that international juridical double taxation arises where more than one country imposes comparable taxes on the same taxpayer in respect of the same subject matter and for the same time period.³ This is to be contrasted with economic double taxation which arises where the same amount is taxed twice in the hands of two different taxpayers. For example, the profits of a company may be taxed in the company's hands through a corporate income tax and then taxed again in the shareholder's hands when distributed as a dividend through a personal income tax. Tax treaties are generally concerned with international juridical double taxation.

International juridical double taxation can arise in a number of ways.⁴ The best known example is source-residence conflict whereby one country taxes an amount on the basis that it is sourced in that country while another country taxes the amount on the basis that it is the income of a resident of that country. For example, a resident of country A may own an investment property in country B and earn rental income in country B. Country A would tax the amount on the basis of residence while country B would tax the amount on the basis of source, resulting in the same amount being taxed twice for the same taxpayer. Addressing source-residence conflicts is one of the primary aims of DTAs. Double taxation may also arise due to a conflict of residence

* Melbourne Law School, University of Melbourne. This paper addresses one aspect of a much larger research project on the role of the League of Nations in the development of the first model tax treaties. This research is to be published in Sunita Jogarajan, *Double Taxation and the League of Nations* (Cambridge University Press, forthcoming). This paper should not be cited and is not to be lodged with Pandora (National Library of Australia) and/or Austlii.

¹ John Avery Jones, 'Categorising Income for the OECD Model', in Luc Hinnekens and Philippe Hinnekens (eds), *A Vision of Taxes Within and Outside European Borders* (Kluwer Law International, 2008) 93, 99.

² Edwin Seligman, *Essays in Taxation* (2nd ed, 1895) 95.

³ OECD, *Model Tax Convention on Income and on Capital: Condensed Version* (2014) 7.

⁴For a discussion of the different principles of taxation and examples of international double taxation in the 1920s, see: Clyde Crobaugh, 'International Comity in Taxation' (1923) 31 (2) *Journal of Political Economy* 262, 262-263; F Allemès, 'The Problem of Double Taxation' (1926) 17 *Economica* 148, 148-156.

whereby a taxpayer is considered a resident of two countries under each country's domestic tax rules. For example, a company may be a resident of country A as it is incorporated in that country but may also be considered a resident of country B where it has its management and control. Both countries would tax the income of the company on the basis of residence, resulting in double taxation. Residence-residence conflicts are addressed in tax treaties through tiebreaker rules. Finally, double taxation can also arise due to a conflict of source. For example, country A may tax royalties on a patent on the basis that the patent was developed in that country while country B may tax the royalty on the basis that it was paid in that country. Source-source conflicts may be addressed in tax treaties by stipulating source rules for particular types of income which help determine the country of source.

III THE LEAGUE OF NATIONS

A great change of heart among the peoples is necessary before a righteous international order can be set up. Brotherhood must drive away jealousy, and mutual service must take the place of mutual ill-will. The best available means for maintaining peaceful relations and diminishing the frequency and the horrors of war is the establishment of a League of Nations in which all or most civilised states shall bind themselves together for the purpose of settling disputes by justice instead of force.⁵

The League of Nations was established on 10 January 1920 as a result of the Paris Peace Conference which ended the Great War. The concept of an association of nations working together to promote and maintain peace has a long history.⁶ The idea was raised again at the outbreak of the Great War and gained support in Britain, the United States and the neutral European countries. The profound impact of the Great War on the political, economic and social systems of Europe and the precedent of Allied Cooperation during the War made the possibility of a League of Nations a reality. The Covenant of the League of Nations was signed by 42 founding member countries and has been described as a significant turning point in the evolution of the world toward international organisation.⁷ It would also prove to be a significant turning point in the evolution of the international tax regime.

The Covenant established the three main bodies of the League – the Assembly, the Council and the Permanent Secretariat.⁸ The Assembly comprised representatives of all member countries with each country allowed up to three delegates but only one vote. At its first session, the Assembly decided to meet once a year on the first Monday in September. An extraordinary meeting of the Assembly could be called at any time by a majority of the members of the Assembly or the Council. For example, an extraordinary meeting was held in March 1926, at the request of the Council, to admit Germany as a member of the League. The Council was initially made up of four permanent members (France, Britain, Italy and Japan) and four non-permanent members (elected by the Assembly). Germany became a permanent member of the Council when it joined the League and the number of non-permanent members changed from time to time. The division of responsibilities between the Assembly and the Council was intentionally not set out

⁵ T.J. Lawrence, *The Society of Nations: Its Past, Present and Possible Future* (1919) xi.

⁶ Skirbekk and Gilje note that Kant discussed the idea of an association of nations to regulate sovereign states in his 1795 essay 'Perpetual Peace': Nils Gilje and Gunnar Skirbekk, *A History of Western Thought: From Ancient Greece to the Twentieth Century* (2013) 288. See also, C Howard-Ellis, *The Origin, Structure and Working of the League of Nations* (1928) 61; Geoffrey Butler, *A Handbook to the League of Nations* (1925) 3-27.

⁷ C Howard-Ellis, *The Origin, Structure and Working of the League of Nations* (1928) 67. The 42 founding members were Argentina, Belgium, Bolivia, Brazil, the British Empire (with separate memberships for Australia, Canada, India, New Zealand, South Africa and the United Kingdom), Chile, China, Colombia, Cuba, Czechoslovakia, Denmark, El Salvador, France, Greece, Guatemala, Haiti, Honduras, Italy, Japan, Liberia, Netherlands, Nicaragua, Norway, Panama, Paraguay, Persia, Peru, Poland, Portugal, Romania, Siam (later Thailand), Spain, Sweden, Switzerland, Uruguay, Venezuela and the Kingdom of Serbs, Croats and Slovenes (later Yugoslavia).

⁸ Background on the League compiled from: C Howard-Ellis, *The Origin, Structure and Working of the League of Nations* (1928) 122-205.

and under Article II of the Covenant, both bodies could deal with any aspect of the League's work.⁹ Broadly, the Assembly operated as a general conference of all members, meeting once a year to vote on the budget, review the work done in the previous year and agree the work to be done in the year ahead. The Council was a smaller conference of fourteen to twenty countries, meeting at least every three months and supervising the work set out by the Assembly. The creation of both the Assembly and the Council was an attempt to balance the interests of all countries with all member countries given an equal vote on the Assembly but the great powers having permanent representation on the Council. The system has been described as analogous to the relationship between the Cabinet and the House of Commons in the British Parliament.¹⁰

The Secretariat was in essence an international civil service headed by the Secretary-General. The members of the Secretariat were not representatives of their countries and worked to fulfil the League's purposes. The Secretariat prepared all the material for the League's conferences and committees, served as a connection between the different parts of the League, kept the League's archives and acted as a clearing house for information. Members of the Secretariat were heavily involved in the League's work on double taxation.

A *The League of Nations and Tax*

As set out in the preamble to the Covenant, the League's purpose was 'to promote international co-operation and to achieve international peace and security'. The Covenant was primarily concerned with the prevention of war and dispute resolution but Article 23(e) provided for the 'equitable treatment for the commerce of all Members of the League'. This provision stemmed from the third of President Wilson's Fourteen Points: 'the removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance'.¹¹ Economic matters were not discussed at the Paris Peace Conference and in February 1920 the Council passed a Resolution stipulating that the League would convene an international conference to study the financial crisis and look for the means of remedying and mitigating the dangerous consequences arising from it.¹²

The International Financial Conference met at Brussels between 24 September and 8 October 1920. Eighty-six private and public experts, attending in their personal capacity and not as official government representatives, from thirty-nine countries attended the Conference.¹³ The financial problems were faced by all of the represented countries to differing degrees. The 'belligerent' countries of Europe (Belgium, Bulgaria, France, Germany, Britain, Greece, Italy and Portugal) were the hardest hit following the Great War and, with the exception of Britain, unable to meet the expenses of the War and the rebuilding effort from national revenue. Other economic factors such as inflation, severely depreciated currencies and impediments to international trade contributed to the financial crisis and impacted all represented countries. The Conference divided the work of examining these problems into four Commissions which were to

⁹ Geoffrey Butler, *A Handbook to the League of Nations* (1925) 68-69; Jean Siotis, 'The Institutions of the League of Nations' in United Nations (ed), *The League of Nations in Retrospect: Proceedings of the Symposium, Geneva 6-9 November 1980* (1983) 23-24.

¹⁰ Geoffrey Butler, *A Handbook to the League of Nations* (1925) 64.

¹¹ Martin Hill, *The Economic and Financial Organization of the League of Nations: A Survey of Twenty-Five Years' Experience* (1946) 18. 'Fourteen Points' was a speech by President Woodrow Wilson to the United States Congress on 8 January 1918 outlining the principles for enduring world peace.

¹² League of Nations, *International Financial Conference Brussels 1920 - Proceedings of the Conference (Volume 1) Report of the Conference* (1920) 3.

¹³ The thirty-nine countries represented were Argentina, Armenia, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, China, Czecho-Slovakia, Denmark, Esthonia, Finland, France, Germany, Greece, Guatemala, Holland, Hungary, India, Italy, Japan, Latvia, Lithuania, Luxemburg, New Zealand, Norway, Peru, Poland, Portugal, Roumania, Serb-Croat-Slovene State, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States of America and Uruguay.

examine general public finance; currency and exchange; international trade and commerce; and international action with special reference to credits. The Commission on International Credits recognised that general recovery would require a significant period of time and that some countries would require international financial assistance to restore their economic activity. The Commission's main recommendation was the establishment of an international organisation to provide credit to countries for the purpose of paying for their essential imports. However, the Commission was also concerned with the lack of capital globally and made a number of other proposals including recommending that the League promote certain reforms and collect the relevant information required to facilitate credit operations. In this context, the Commission suggested that progress should be made on 'an international understanding, which, while ensuring the due payment by everyone of his full share of taxation, would avoid the imposition of double taxation which is at present an obstacle to the placing of investments abroad'.¹⁴

Following a recommendation of the Brussels Financial Conference, the Provisional Economic and Financial Committee was created by the Council in October 1920.¹⁵ There were two sections to the Provisional Committee and each section had ten members, nominated by their governments but acting in their personal capacity and not as representatives of their governments.¹⁶ Each section had members from the four permanent Council members and neither section had more than one representative from a particular country. The members of the first section were mainly high officials from ministries of commerce and became the Economic Committee. The membership of the second section was more diverse, including bankers and public officials, and became the Financial Committee. The two sections operated quite separately and rarely met jointly.¹⁷ The issue of double taxation was allocated to the Financial Section in the division of responsibilities at the first joint session of the Provisional Committee in November-December 1920.¹⁸

The Financial Committee was primarily concerned with the financial reconstruction of individual countries and most of its sessions were spent on this issue. However, its second most important work, albeit a distant second, was the work done to address double taxation.¹⁹ Almost a year after the matter was referred to it, the Financial Committee adopted the following resolution in September 1921:²⁰

Representations have been made to the Financial Committee that there are grave objections, not only on grounds of equity, but also on economic grounds, to existing systems of taxation, in so far as they compel citizens and corporations of one country to pay taxes in more than one country in respect of the same taxable subjects.

¹⁴ League of Nations, *International Financial Conference Brussels 1920 - Proceedings of the Conference (Volume 1) Report of the Conference* (1920) 26.

¹⁵ Yann Decorzant, 'Internationalism in the Economic and Financial Organisation of the League of Nations' in Daniel Laqua (ed), *Internationalism Reconfigured: Transnational Ideas and Movements Between the World Wars* (2011) 115-129. Decorzant provides a broad examination of the establishment of the Economic and Financial Organization (as the Provisional Committee came to be known) and its role during the period of interwar internationalism.

¹⁶ Martin Hill, *The Economic and Financial Organization of the League of Nations: A Survey of Twenty-Five Years' Experience* (1946) 21-22.

¹⁷ Alexander Menzies, 'Technical Assistance and the League of Nations' in United Nations (ed), *The League of Nations in Retrospect: Proceedings of the Symposium, Geneva 6-9 November 1980* (1983) 295.

¹⁸ International trade was allocated to the Economic Section and the differences in the development of measures to address double taxation and international trade barriers is in part due to this division of responsibilities.

¹⁹ Martin Hill, *The Economic and Financial Organization of the League of Nations: A Survey of Twenty-Five Years' Experience* (1946) 34.

²⁰ Provisional Economic and Financial Committee, *Report to the Council Upon the Session Held at Geneva, August-September 1921 Communicated to the Assembly in Accordance with the Council's Resolution of September 19th 1921 (A. 95. 1921. II)* (1921) 6. For the detail of the Financial Committee's discussions leading up to the resolution, see Sunita Jogarajan, 'Stamp, Seligman and the Drafting of the 1923 Experts' Report on Double Taxation' (2013) 5 (3) *World Tax Journal* 368, 370-372.

The Financial Committee are of opinion that it is desirable that this question should be studied from the widest possible standpoint, and that expressions of opinion upon it should be obtained from recognised experts on taxation together with concrete recommendations, if experts think fit, for eliminating any drawbacks attaching to double taxation. The possibility of an international convention regulating the matter should be considered.

The Committee also agreed that the question would be submitted to four economic experts for assistance: Professor Bruins of Commercial University, Rotterdam; Professor Senator Einaudi of Turin University; Professor Seligman of Columbia University and Sir Josiah Stamp of London University ('the Four Economists'). Thus, the League's approach to the problem was initially to undertake a theoretical study, rather than examine existing practice.

1 *The Four Economists*

The terms of reference for the work of the Four Economists was eventually agreed to by the Financial Committee in February 1922 and communicated to them in March 1922.²¹ The Four Economists were asked to consider:²²

- (1) What are the economic consequences of double taxation from the point of view:
 - a) of the equitable distribution of burdens;
 - b) of interference with economic intercourse and with the free flow of capital?
 To what extent are these consequences similar in the different types of cases commonly described as double taxation?
- (2) Can any general principles be formulated as the basis for an international convention to remove the evil consequences of double taxation, or should conventions be made between particular countries, limited to their own immediate requirements? In the latter alternative, can such particular conventions be so framed as to be capable ultimately of being embodied in a general convention?
- (3) Are the principles of existing arrangements for avoiding double taxation, either between independent nations (e.g., the Rome Convention) or between the component portions of a federal State, capable of application to a new international convention?
- (4) Can a remedy be found, or to what extent can a remedy be found, in an amendment of the taxation system of each individual country, independently of any international agreement?
- (5) To what extent should the conventions on the subject of double taxation establish an international control to prevent fraudulent claims?

The Four Economists published their findings in March 1923.²³ The discussions leading up to the drafting of the Economists' Report were primarily concerned with double taxation of public securities, being the key concern of the time and reflecting the original trigger for the examination of the issue (international capital mobility).²⁴ The Economists' Report is in three parts. Part I of the Report addresses the first question in the terms of reference regarding the economic consequences of double taxation from the point of view of the equitable distribution of burden and interference with economic intercourse and the free flow of capital. This part is largely descriptive and discusses in some detail the difference between a 'burden' and a 'barrier' on investment. Stamp and Seligman were unable to agree as to the extent that double taxation hindered capital investment. Stamp thought that relief was only required in a limited number of situations whereas Seligman advocated for broader relief. This disagreement is reflected in the mixed messages of the Economists' Report. Part II of the Report discusses general theories of taxation and concludes that the doctrine of economic allegiance is the most appropriate basis. The four elements of economic allegiance which determine the country of taxation are the origin

²¹ Minutes of the Meetings of the 6th Session of the Financial Section of the Provisional Economic and Financial Committee held in London in February 1922; League of Nations Archives; Box R333; Document # 19223; United Nations Geneva; Letter from Stamp to Seligman; 29 March 1922; Edwin Robert Anderson Seligman Papers; Box 44, Folder Box 118, League of Nations – Committee on Double Taxation, Correspondence & Notes, 1921-23; Rare Book and Manuscript Library; Columbia University.

²² G.W.J. Bruins et al, *Report on Double Taxation: Submitted to the Financial Committee* (1923) 3.

²³ G.W.J. Bruins et al, *Report on Double Taxation: Submitted to the Financial Committee* (1923).

²⁴ For detailed discussion of the drafting of the 1923 Report, see: Sunita Jogarajan, 'Stamp, Seligman and the Drafting of the 1923 Experts' Report on Double Taxation' (2013) 5 (3) *World Tax Journal* 368, 372-392.

of the wealth, the situs of the wealth, the enforcement of the rights to wealth and residence or domicile. On this basis, the Economists' Report determined taxation at origin or domicile for various categories of income. Part III of the Economists' Report considers four methods for the avoidance of double taxation – credit (i.e. the US example where foreign taxes are credited against domestic taxes payable on foreign income), exemption (i.e. source country exemption for all non-residents); division of taxes (i.e. an allocation of a portion of taxes to origin and residence countries); and classification and assignment of sources (i.e. the classification of income into different categories and the allocation of taxing rights for each category). Again, disagreement between Stamp and Seligman resulted in a confused recommendation in the Economists' Report regarding the appropriate method for relief. Stamp strongly supported the second method (exemption) while Seligman and Bruins favoured the fourth method (classification and assignment). The Economists' Report recommends both methods depending on the circumstances of the countries involved. Although the Four Economists were academics commissioned to undertake a theoretical or intellectual study of the issue of double taxation, their considerations and final recommendations in the Economists' Report were ultimately tempered by practical considerations.

2 *The Technical Experts*

As early as February 1922 (before the publication of the Economists' Report), Bianchini (Italy) proposed a conference of government officials to reach practical solutions on the more pressing double taxation issues.²⁵ He provided the Rome Conference of 1921, which resulted in the conclusion of the first multilateral treaty on double taxation (the Rome Convention),²⁶ as an example of what the League could aspire to. The Committee agreed that such a conference would be useful but decided to wait until the Economists' Report was available as government officials were not sufficiently knowledgeable of the conditions in other countries to make any real progress in preparing an international solution. At the Genoa Conference (April-May 1922), the Financial Commission was concerned with capital flight and asked the League to expedite its enquiries into double taxation and examine measures to address tax evasion to prevent capital flight.²⁷ According to the British records, tax evasion was raised by the French at the Genoa Conference as a means of discovering hidden German wealth but the British did not want the question discussed and as such, the issue was referred to the League.²⁸ The Financial Committee eventually decided to consult with governments that had already concluded treaties on tax evasion (Belgium, France and Britain) and three other countries which were likely interested in

²⁵ Minutes of the First Meeting of the Sixth Session of the Financial Committee of the Provisional Economic and Financial Committee held at 11am on 23 February 1922 in Geneva; League of Nations Archives; Box R 333; E.F./Finance VI/P.V.I; United Nations Geneva. The members of the Financial Committee at this session were: Ador (Chairman of the Provisional Economic and Financial Committee, former Chairman of the Swiss Confederation, Switzerland); Arai (Japan) (Arai appears to have been a temporary member of the Financial Committee and no biographical data is available on him); Avenol (Inspecteur des Finances, France); Bianchini (Head of the Italian Banking Association, Italy); Condoya representing Figueras (Director of the Bank of Bilbao, Spain); Hawtrey (Director of Financial Enquiries, Treasury, representing Blackett, Great Britain); Janssen (Director of the National Bank, Belgium); Pospisil (Director of the Prague Savings Bank and Vice-Chairman of the Banking Committee of the Banking Authority at the Ministry of Finance, Czechoslovakia) and Wallenberg (Vice-Chairman of the Stockholm Enskilda Bank, Sweden).

²⁶ *Convention for the Purpose of Avoiding Double Taxation between Austria, Hungary, Italy, Poland, Roumania and the Kingdom of the Serbs, Croats and Slovenes*, concluded 6 April 1922 (reproduced in League of Nations, *Double Taxation and Fiscal Evasion: Collection of International Agreements and International Legal Provisions for the Prevention of Double Taxation and Fiscal Evasion* (1928) 73-75). The treaty was only ever in force between Austria and Italy. Hereafter referred to as the 'Rome Convention'.

²⁷ For more detail on the Genoa Conference and the referral of double taxation and tax evasion to the League, see: Sunita Jogarajan, 'The Drafting of the 1925 League of Nations Resolutions on Tax Evasion' in Peter Harris and Dominic de Cogan (eds), *Studies in the History of Tax Law (Volume 7)* (2015) 254-262.

²⁸ Letter from O.E.N. to the Chancellor of the Exchequer dated 7 November 1922; UK National Archives; IR 40/3419 Part 3; United Kingdom.

the issue (Italy, Netherlands and Switzerland).²⁹ Three months later, the Financial Committee decided to invite those six countries to attend a conference to discuss double taxation and tax evasion.³⁰ Thus, the impetus for the conference of government officials was in fact tax evasion and not double taxation as commonly thought. Further, the countries represented at the conference were chosen due to their interest in tax evasion and not for political reasons, as previously assumed.³¹ The only country represented at the conference due to double taxation was Czechoslovakia. The Czechoslovakian Minister for Foreign Affairs wrote to the Secretary-General and asked that their treaty negotiator, who had already concluded several DTAs, be permitted to join the conference. The request was accepted by the Council.³² The seven Governments nominated the following representatives ('the 1925 Experts'):

Belgium	Clavier	Director-General of Direct Taxation	Attended all five sessions
Czechoslovakia	Valnicek	Head of Department at the Ministry of Finance	Attended all five sessions
France	Baudouin-Bugnet	Director-General of Direct Taxation	Attended first three sessions
	Borduge	Director-General of Direct Taxation	Attended last two sessions
Great Britain	Thompson	Deputy Chairman, Board of Inland Revenue	Attended first three sessions
	Canny	Board of Inland Revenue	Attended last two sessions
Italy	d'Aroma	Director-General of Direct Taxation	Attended all five sessions
Netherlands	Damste	Director-General of Direct Taxation, Customs and Excise	Attended all five sessions
Switzerland	Blau	Director of the Federal Taxation Department	Attended all five sessions

The 1925 Experts met on five occasions at Geneva: First Session 4-9 June 1923 (11 meetings), Second Session 8-12 October 1923 (10 meetings), Third Session 31 March-7 April 1924 (15 meetings), Fourth Session 20-27 October 1924 (14 meetings) and Fifth Session 2-7 February 1925 (9 meetings). The League's process of inviting government experts to meetings in Geneva has been praised for creating a collegial atmosphere among participants thereby promoting subsequent fruitful bilateral negotiations.³³ Double income taxation was primarily discussed at the first three sessions but due to the delay between sessions, the 1925 Experts often ended up

²⁹ Minutes of the Fifth Meeting of the Seventh Session of the Financial Committee of the Provisional Economic and Financial Committee held at 3:30pm on 8 June 1922 in Geneva; League of Nations Archives; Box R 334, Doc No 21260, E&F/Finance/7th Session/PV5; United Nations Geneva. For the detail of these discussions, see: Sunita Jogarajan, 'The Drafting of the 1925 League of Nations Resolutions on Tax Evasion' in Peter Harris and Dominic de Cogan (eds), *Studies in the History of Tax Law (Volume 7)* (2015) 259-262.

³⁰ Minutes of the Fifth Meeting of the Eighth Session of the Financial Committee of the Provisional Economic and Financial Committee held at 10:30am on 6 September 1922 in Geneva; League of Nations Archives; Box R 334, Doc No 23159, EFS/Finance/8th Session/PV5; United Nations Geneva.

³¹ 'The underlying politics was obvious: while the 1923 Report was the product of creditor nations, a majority of the drafters of the 1925 Report came from debtor nations': Michael Graetz and Michael O'Hear, 'The Original Intent of US International Taxation' (1997) 46 (5) *Duke Law Journal* 1021, 1080. See also, Bret Wells and Cym Lowell, 'Income Tax Treaty Policy in the 21st Century: Residence vs Source' (2013) 5 *Columbia Journal of Tax Law* 1, 5.

³² Note by the Léon-Dufour (Secretary), 17 April 1923; League of Nations Archives; Box R 362; C.278.1923.II; United Nations Geneva; League of Nations, *Official Journal* (June 1923) 555.

³³ Mitchell Carroll, 'International Double Taxation' in Harriet Davis (ed), *Pioneers in World Order* (1944) 174-175.

revisiting and repeating previous discussions. There was no clear agenda for each session. The final two sessions focused on succession duties and tax evasion.

A review of the minutes of the 1925 Experts' discussions reveals that there were three broad influences on the work of the 1925 Experts: existing treaty practice; the Economists' Report and/or theory; and practical considerations. The Economists' Report was the starting point for the 1925 Experts' discussion and provided a lens through which they considered the issues. It was also used by individual Experts in support of particular arguments, such as Thompson (Britain) in advocating residence-based taxation. However, the usefulness of the Economists' Report was limited by the 1925 Experts' decision to examine personal and impersonal taxes separately whereas the Economists' Report only addressed personal taxes. D'Arma (Italy) and Valnicek (Czechoslovakia) often turned to existing treaties as a starting point but that was because they had negotiated those treaties and thus considered them the best solution. The existing treaties generally could not be replicated as the treaties were between European countries (which had both personal and impersonal taxes and generally preferred source-country taxation) and the 1925 Experts were conscientious in considering the British position (which only had personal taxes and preferred residence-country taxation).³⁴ As a whole, accord between the resolutions in the 1925 Report and existing treaty practice was largely a happy coincidence. The other Experts generally did not support a particular position because it was adopted in existing treaties but rather on the basis of theory or principle. The 1925 Experts were often persuaded by Clavier's (Belgium) plea for 'fairness' and the benefit theory of taxation in supporting source-country taxation.³⁵ This is especially evident in the drafting of the resolution on business profits. Thompson, on the other hand, often turned to economic theory on the free flow of capital to promote residence-country taxation particularly in the case of impersonal taxes on interest income. The taxation of shipping companies was the exception to the rule and in this instance, the 1925 Experts were clearly influenced by existing practice (ie. exclusive residence-based taxation of shipping profits) but this was primarily due to pressure from the League's Transit Commission and the International Shipping Conference. Even then, the 1925 Experts were unable to agree to an unequivocal resolution promoting residence-taxation as they considered it necessary as a matter of principle to protect 'smaller' countries without a domestic shipping industry and therefore treated shipping companies as an exception to the general rule.

Overall, practical considerations (domestic law or politics, tax evasion, administrative simplicity and revenue needs) arguably had the greatest influence on the drafting of the resolutions, in keeping with the 1925 Experts being government officials and despite their decision to act as technical experts rather than government representatives. There was a noticeable tension whereby the Experts felt compelled to put forward practical solutions to the problems of double taxation which could be immediately adhered to by countries on the one hand, but also driven to finding the 'best' solution as 'technicians' in line with the idealism of the League and the times. Idealism won when they could not agree to a practical solution. Many of the final resolutions (eg. income from immovable property, business profits and directors' fees) incorporated aspects of domestic law to maintain the *status quo* and increase the likelihood of countries accepting the resolutions. For example, in support of source-country taxation, it was considered politically acceptable domestically for source-countries to provide residence-countries with information regarding taxpayers to enable a country to properly tax its residents but it was thought to be completely unacceptable that residence-countries would provide information regarding their

³⁴ Seligman makes a similar point in noting that existing treaties were of limited guidance as none included a country with a comprehensive personal income tax as Britain did and the 1925 Experts were keen to include Britain in any arrangement: Edwin Seligman, *Double Taxation and International Fiscal Cooperation* (1928) 144.

³⁵ Under the benefit theory, the country where a person lives and works or where an enterprise is carried on or where property is located has a right to a share of the taxes as the taxpayer receives the benefit of the protection of that country's laws. See further, Graeme Cooper, 'The Benefit Theory of Taxation' (1994) 11 *Australian Tax Forum* 397, 397-509.

residents to enable them to be taxed in another (the source) country. Along similar lines, some decisions were made on the basis that it was not politically acceptable that a foreigner could pay less tax than a domestic taxpayer on income earned in the same country. Baudouin-Bugnet (France) in particular but also d'Aroma and Clavier often raised tax evasion concerns in supporting source-country taxation. This argument was particularly influential in the drafting of the resolutions on interest income and personal taxes. Similarly, the push for administrative simplicity influenced the resolutions on interest income, personal taxes and fiscal domicile. Finally, Coates was right in stating that 'as must in this imperfect world so often be the case, we see principles sacrificed to expediency, and the need for revenue dominant over every other consideration'.³⁶ Although sometimes couched in theory or concerns about tax evasion, revenue needs dictated the discussions on many of the issues. Baudouin-Bugnet, Clavier and Thompson specifically articulated revenue concerns in the discussion on interest income, business profits and personal income taxes.

3 *Development of Model Treaties*

The 1925 Report included a recommendation that the League convene an expanded conference of government officials to develop draft international treaties based on the resolutions in the 1925 Report. After some discussion,³⁷ the Financial Committee accepted the proposal and recommended that an expanded conference be convened. The Committee imposed one condition on the future conference – 'to take into consideration the disadvantage of placing any obstacles in the way of the international circulation of capital, which is one of the conditions of public prosperity and world economic reconstruction'.³⁸ Despite the addition of six new experts, including two luminaries on international double taxation,³⁹ the 1927 Report, which included the first draft model convention (DMC) on double income taxation, largely followed the resolutions of the 1925 Report.⁴⁰ This is especially obvious in the discussions on shipping companies and the development of an alternative convention without the distinction between personal and impersonal taxes. The research also demonstrates that several tricky issues, which continue to spark debate (e.g. the treatment of agents, the apportionment of business profits, the permanent establishment (PE) definition and tax sparing relief for developing countries), were discussed in developing the DMC but were ultimately left unresolved. The indecision over tricky or controversial issues was enabled by two factors: the decision to recommend the establishment of a permanent international organisation (PIO) on taxation, and the use of Commentary. Trickier

³⁶ W.H. Coates, 'Double Taxation and Tax Evasion' (1925) 88 (3) *Journal of the Royal Statistical Society* 403, 426.

³⁷ Niemeyer (Britain) preferred to wait until a large number of bilateral treaties were concluded before developing a multilateral solution, but d'Aroma (Chairman of the 1925 Experts who attended the Financial Committee meetings to explain the 1925 Report) responded that it was preferable to develop a multilateral solution at that stage, rather than for countries to develop different formulas in adopting the same principles. Dubois (Switzerland) supported d'Aroma: Minutes of the Fifth Meeting (Second Part) of the Eighteenth Session of the Financial Committee of the Provisional Economic and Financial Committee, Geneva, 12:00pm, 6 June 1925; League of Nations Archives; F/18e.Session/P.V.5(1) 2eme Partie; United Nations Geneva; Minutes of the Sixth Meeting (First Part) of the Eighteenth Session of the Financial Committee of the Provisional Economic and Financial Committee, Geneva, Evening, 6 June 1925; League of Nations Archives; F/18e.Session/P.V.6(1) 1ere Partie; United Nations Geneva.

³⁸ Report to the Council by the Financial Committee on the Work of its Eighteenth Session, Geneva, 4–8 June 1925; League of Nations Archives; C.335.1925.II; United Nations Geneva. The members of the Financial Committee at this session are listed in Appendix 1.

³⁹ Two of the new Experts, Adams (USA) and Dorn (Germany), had significant experience in international double taxation. On Adams, see Michael Graetz and Michael O'Hear, 'The Original Intent of US International Taxation' (1997) 46 *Duke Law Journal* 1021 at 1028–33. On Dorn, see Christoph Bräunig, *Herbert Dorn (1887–1957): Pioneer and Forerunner of International Tax Law* (Mohr Siebeck, 2016) (in German); Jörg-Dietrich Kramer, 'F.R.G. Federal Finance Academy's Tax Museum Honors Former Tax Officials' (1989) 1 *Tax Notes International* 489 at 490.

⁴⁰ The DMC was not thought to represent any real progress in the effort against double taxation, as the DMC largely followed the 1925 Report and continued the distinction between personal and impersonal taxes: W.H. Coates, 'Double Taxation and Tax Evasion' (1929) 92 *Journal of the Royal Statistical Society* 585 at 587.

issues or differences of opinion were simply left to be dealt with by the PIO or addressed in the Commentary. The role of Commentary in interpreting treaties has been extensively considered in the literature.⁴¹ This research shows that the architects of the DMC were undecided as to whether the Commentary should be binding or merely offer guidance. It is also clear that practical considerations were the main influence in the drafting of the DMC – the DMC was shaped by the desire to incentivise countries to conclude double tax agreements (DTAs), ties to domestic law and concerns regarding administrative complexity.

The DMC addressed countries with both personal and impersonal taxes and was considered of limited utility for countries with only one type of tax. The next step in the League’s work was to develop two alternative draft conventions that did not adopt a distinction between personal and impersonal taxes. The 1928 Report⁴² was a significant milestone in the evolution of DTAs as it contained three model conventions on double income taxation, one of which has prevailed as ‘the model’.⁴³ The first model, Draft Convention Ia, is an updated version of the 1927 DMC and distinguishes between personal and impersonal taxes. It was intended to apply to countries that adopted both taxes. The second and third models, Draft Conventions Ib and Ic, do not adopt such a distinction. The former was intended to apply to countries that only had personal taxes, while the latter was intended for countries that only had impersonal taxes. The development of three models, and especially the removal of the distinction between personal and impersonal taxes, was considered a significant improvement on the 1927 DMC. However, very little time was in fact spent developing the second two models. The majority of the 1928 session was spent on Draft Convention Ia, and on educating first-time participants of the work that had been conducted previously.⁴⁴ The Experts had different views based on their domestic law understanding of issues, but this was never adequately explained, and therefore the discussion was often at cross-purposes. Further, despite the addition of many new participants in the process (twenty-seven countries were involved in the drafting of the 1928 Report), many of the same issues (interest income, shipping, general income tax) were discussed by the same Experts from 1925 and 1927. Again, there was a strong push to maintain the *status quo* and, from the outset, the Experts were instructed that theirs was a practical mission and that the time for theory was over. Differences in opinion were dismissed on the basis that the Draft Conventions were only models and not binding on any country. Fundamental questions such as the role of the 1928 Models, and of the Commentary, were again raised but left unanswered.

IV CONCLUSION

Looking forward to the OECD/G20 Action Plan on BEPS, history suggests that the approach of addressing specific issues in the current OECD Model rather than wholesale reform is appropriate. Even in the idealistic period of the 1920s, the League’s Experts were ultimately more concerned with maintaining their existing domestic law or treaty positions. This may not have resulted in the best rules to target double taxation but the ease with which the 1928 Models could be adhered to undoubtedly contributed to its practical impact. More than a hundred DTAs

⁴¹ David Ward et al, *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (International Fiscal Association, 2006); Michael Lang and Florian Brugger, ‘Role of OECD Commentary in Tax Treaty Interpretation’ (2008) 23 *Australian Tax Forum* 95, 96–108; Ulf Linderfalk and Maria Hilling, ‘The Use of OECD Commentaries as Interpretative Aids: The Static/Ambulatory–Approaches Debate Considered from the Perspective of International Law’ (2015) 1 *Nordic Tax Journal* 34, 34–59.

⁴² League of Nations, *Double Taxation and Tax Evasion: Report Presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion* (1928).

⁴³ John Avery Jones, ‘Categorising Income for the OECD Model’, in Luc Hinnekens and Philippe Hinnekens (eds), *A Vision of Taxes Within and Outside European Borders* (Kluwer Law International, 2008) 93, 99.

⁴⁴ Carroll, a member of the American delegation to the 1928 Meeting, notes that the ‘first timers’ were confused over the language and concepts in Draft Convention Ia: Mitchell Carroll, *Global Perspectives of an International Tax Lawyer* (Exposition Press, 1978) 32.

based largely on the 1928 Models were concluded between 1929 and 1939.⁴⁵ Studies of other international regimes support this approach and indicate that countries are bound by a certain level of path dependence or inertia – straying too far from the path is likely to result in non-compliance.⁴⁶ The OECD/G20 work on BEPS parallels the League’s work, in which a package of measures first developed by a small group of countries, and the process to implement the package of measures, has now been opened up to all interested countries – as was the case in 1928.⁴⁷ As discussed in Chapter 7, the 1928 Meeting was mired in confusion over terminology, and essentially rehashed previous discussions to which newer participants were not privy. The BEPS project should be able to avoid a similar failure by ensuring that new participants are fully cognisant of all previous discussions, especially the reasons for measures that are to be implemented. The League’s process also demonstrates the value of bringing together policymakers from various governments in a single location, as connections made at these multilateral meetings enable future cooperation, even on a bilateral basis.⁴⁸ It is clear from history that the international tax treaty regime is inevitably an evolutionary one. The possibility of profit-shifting and double non-taxation had already been recognised by the 1925 Experts almost 90 years ago. These problems are not a consequence of the digital economy. However, the growth of the digital economy has undoubtedly exacerbated such problems, thereby generating a context in which economic circumstances and political will have resulted in treaty action to target them. The international political and economic environment will continue to evolve, and the historical narrative suggests that the OECD Model can adapt.

⁴⁵ Alexander Loveday, 'The Economic and Financial Activities of the League' (1938) 17 (6) *International Affairs* 788, 790; Arthur Sweetser, 'The Non-Political Achievements of the League' (1940) 19 (1) *Foreign Affairs* 179, 183; League of Nations, *Commercial Policy in the Interwar Period: International Proposals and National Policies* (1942) 30; 'Part 2: The Progressive Development of International Law by the League of Nations' (1947) 41 (4) *American Journal of International Law* 49, 55. However, Spitaler argues that the 1928 Models were of limited use and the early German treaties were more influential: Armin Spitaler, *Das Doppelbesteuerungs-problem: Bei Den Direkten Steuern* (1936) 32-46.

⁴⁶ Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995) 10.

⁴⁷ OECD, *Implementing the BEPS Package: Establishment of an Inclusive Framework* (2016), www.oecd.org/g20/topics/taxation/beps.htm. Non-member countries were consulted on the development of the package of measures, but the new framework is the first time that all countries will be on an equal footing.

⁴⁸ Mitchell Carroll, 'International Double Taxation', in Harriet Davis (ed.), *Pioneers in World Order* (Columbia University Press, 1944) 174–5.