
Introduction

1.1 Introduction

In the 100 years of international tax coordination since the League of Nations (League) took up the study of double taxation in 1921,¹ there is generally a hiatus in tax history between 1946 and 1954 after the League's Fiscal Committee was dissolved² and before the Organisation for European Economic Co-operation (OEEC) adopted double taxation as its first international tax concern in 1955.³ This was the postwar decade in which the Fiscal Commission of the United Nations (UN) functioned as the successor to the League's Fiscal Committee, which had concluded its double taxation work with two conflicting and incomplete model conventions (the pro-source country 1943 Mexico Model and the pro-residence country 1946 London Model),⁴ urging the UN to review and further develop the two models in a forum of 'a balanced group of tax administrators and experts from both capital-importing and capital-exporting countries and from economically advanced and less-advanced countries'.⁵

¹ GWJ Bruins et al, *Report on Double Taxation Submitted to the Financial Committee*, League Doc E.F.S.73.F.19 (5 April 1923) 3 ('Economists' Report').

² *Resolution for the Dissolution of the League of Nations*, League Assembly, League Doc A.32(1).1946.X (18 April 1946) 12–16.

³ OEEC Council, Recommendation of 25 February 1955: see Organisation for Economic Co-operation and Development (OECD), *Model Tax Convention on Income and on Capital 2017 (Full Version)* (2019) vol 1, I-1 [4] ('OECD 2017 Model').

⁴ Fiscal Committee, *Report on the Work of the Tenth Session*, League Doc C.37.M.37.1946.II.A (25 April 1946) 7–8 ('Tenth Session Report').

⁵ *Ibid* 8.

The work of the Fiscal Commission has never been investigated in depth, but the reports⁶ and scarce accounts⁷ of its four sessions indicate that its international tax work became politically engulfed in the East–West, North–South dichotomies and suffered from a lack of financing. Importantly, these texts highlight that keen, even heated, debate arose concerning the allocation rules and preferred method of double taxation relief to apply for certain types of income with respect to relations between developed and developing countries. Moreover, the resolutions adopted by the Commission called not only for the widespread conclusion of double taxation agreements (DTAs) among UN member states, but also for developed countries to consider granting more source taxation rights to developing countries in view of their development needs. Despite these promising developments of the UN as a forum for double taxation matters and the interested participation of non-European, post-colonial developing countries in the subject, the UN did not make an official contribution to international tax law in the form of a model convention by the time of the Commission’s dissolution in August 1954.⁸ What is more, the reports and resolutions of this period would never be broached again in successive international double taxation efforts.

In March 1956, the OEEC (later succeeded by the Organisation for Economic Co-operation and Development (OECD)) established its Fiscal Committee whose model conventions and related work⁹ soon eclipsed the UN’s progress in the field, leading to DTAs flourishing in the developed world under international tax rules that favoured residence-based taxation. Efforts by developed countries to conclude DTAs with developing countries would only gain momentum when the UN re-entered the international tax arena through its 1968 Ad Hoc Group of Experts on Tax Treaties between

⁶ Fiscal Commission, *Report to the Economic and Social Council on the Work of the First Session of the Commission by ARF Mackay, General Rapporteur*, UN Doc E/440 (29 May 1947); Fiscal Commission, *Report to the Economic and Social Council on the Second Session of the Commission, Held at Lake Success, New York, 10 to 25 January 1949*, UN Docs E/1104/Add.1 and Corr.1 (also E/CN.8/49/Rev.2) (3 February 1949); Fiscal Commission, *Report to the Economic and Social Council on the Third Session of the Commission, Held at Lake Success, New York, 7–17 May 1951*, UN Doc E/1993 (also E/CN.8/62) (31 May 1951); Fiscal Commission, *Report to the Economic and Social Council on the Fourth Session of the Fiscal Commission, Held at Headquarters, New York, from 27 April to 8 May 1953*, UN Doc E/2429 (also E/CN.8/78) (8 May 1953).

⁷ See Section 1.2.

⁸ *Fiscal Commission*, ESC Res 557C II (XVIII), UN ESCOR, UN Doc E/2654 (15 August 1954, adopted 5 August 1954).

⁹ See *OECD 2017 Model*, I-1–I-3 [4]–[9].

Developed and Developing Countries (Group of Experts),¹⁰ which culminated in the 1980 UN Model.¹¹ Despite the success of the Group of Experts' work in bringing developing countries back to the negotiating table and into the bilateral tax treaty network, the UN Model was largely considered by many experts as too similar to the OECD Model to be considered a true compromise in securing source-based taxing rights for developing countries.¹² In this regard, the UN has been criticised for failing the objective set by the Secretary-General to safeguard the revenue base of developing countries,¹³ and for spreading the OECD's tax influence in the developing world¹⁴ through the regularly updated OECD Model and Commentary, which are widely held to be the most influential infrastructure in tax treaty design¹⁵ and the original locus of the OECD's soft law power.¹⁶ To this day,

¹⁰ The Group of Experts was set up pursuant to ESC Res 1273 (XLIII) (entitled *Tax Treaties between Developed Countries*), UN ESCOR, UN Doc E/4429 (1967, adopted 4 August 1967).

¹¹ Department of International Economic and Social Affairs (DIESA), *United Nations Model Double Taxation Convention between Developed and Developing Countries*, UN Doc ST/ESA/102 (UN, 1980) ('*UN Model 1980*'). Prior to this the UN published the *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries* (1979) and *Guidelines for Tax Treaties between Developed and Developing Countries* (1974).

¹² See, for example, Jan de Goede and Fraser Dickinson, 'The UN Model (2001) Special Issue – The Context and Contents' (2012) 66(11) *Bulletin for International Taxation* 587, 587; Leif Mutén, 'Double Taxation Conventions between Industrialised and Developing Countries' in International Fiscal Association (IFA), *Double Taxation Treaties between Industrialised and Developing Countries: OECD and UN Models, a Comparison* (Kluwer, 1990) 3, 3–4; JF Court, 'Some Reflections on the Experience of the UN Model in Tax Treaties between Developed and Developing Countries' in IFA, *Double Taxation Treaties between Industrialised and Developing Countries: OECD and UN Models, a Comparison* (Kluwer, 1990) 15, 18; NM Qureshi, 'Tax Treaty Needs of Developing Countries' in IFA, *UN Draft Model Taxation Convention* (Kluwer, 1979) 31, 33–9.

¹³ AH Figueroa, 'Comprehensive Tax Treaties' in IFA, *Double Taxation Treaties between Industrialised and Developing Countries: OECD and UN Models, a Comparison* (Kluwer, 1990) 9, 12–13.

¹⁴ Philip Baker, *Double Taxation Conventions and International Tax Law: A Manual on the OECD Model Tax Convention on Income and on Capital of 1992* (Sweet & Maxwell, 2nd ed, 1994) 5; Victor Thuronyi, *Comparative Tax Law* (Kluwer Law International, 2003) 288; Roy Rohatgi, *Basic International Taxation* (BNA International, 2nd ed, 2005) 3, 74–5.

¹⁵ Diane M Ring, 'Who Is Making International Tax Policy? International Organizations as Power Players in a High Stakes World' (2010) 33(3) *Fordham International Law Journal* 649, 700; Yariv Brauner, 'An International Tax Regime in Crystallization' (2003) 56(2) *Tax Law Review* 259, 310; Joseph Isenbergh, *International Taxation* (Foundation Press, 3rd ed, 2000) 224.

¹⁶ Allison Christians, 'Hard Law, Soft Law, and International Taxation' (2007) 25(2) *Wisconsin International Law Journal* 325, 326 nn 5–6, 331–2; Arthur J Cockfield, 'The

the UN's involvement in international tax coordination remains selective and supplementary to the OECD – a status quo that concerns many, no less the developing country caucus forming the bulk of the UN's 193 members, who consider the inclusive organisation as better poised to ensure that the promotion of foreign direct investment (FDI) in developing countries is done in an equitable manner that preserves sufficient taxing rights for source countries.¹⁷

For the past two decades, general discontent over these concerns has seen the rise of unprecedented international tax activity, in particular non-conformist responses by emerging economies towards the long-standing tax treaty principles;¹⁸ the revision of the UN Model in 2001, 2011 and 2017;¹⁹ the revisions of the UN Manual for negotiating DTAs between developed and developing countries published in 2003 and 2019;²⁰ the OECD/Group of Twenty (G20) Base Erosion and Profit Shifting (BEPS) projects launched in 2012 and 2017; the joint initiative of the European Commission, International Monetary Fund (IMF), Inter-American Development Bank, OECD, World Bank Group and Inter-American Center of Tax Administrations on the International Tax Dialogue (ITD) begun in 2002;²¹ the joint initiative of the IMF, OECD, UN and World Bank Group on the Platform for Collaboration on Tax (PCT) launched in 2016;²²

Rise of the OECD as Informal “World Tax Organization” through National Responses to E-commerce Tax Challenges’ (2006) 8 *Yale Journal Law and Technology* 136, 167.

¹⁷ See Michael Lennard, ‘The Purpose and Current Status of the United Nations Tax Work’ (2008) 14(1) *Asia-Pacific Tax Bulletin* 23, 30; Eva Andrés Aucejo, ‘The Primary Legal Role of the United Nations on International Tax Cooperation and Global Tax Governance: Going on a New International Organization on Global Tax Cooperation and Governance under the UN “Family”’ (2020) 21 *Revista de Educación y Derecho*, 31297: 1–34 <<https://revistes.ub.edu/index.php/RED/issue/view/2311>>.

¹⁸ See, for example, Lara Friedlander and Scott Wilkie, ‘Policy Forum: The History of Tax Treaty Provisions – and Why It Is Important to Know about It’ (2006) 54(4) *Canadian Tax Journal* 907, 908; Richard M Bird, ‘Taxing Electronic Commerce: The End of the Beginning?’ (2005) 59(4) *Bulletin for International Taxation* 130, 137.

¹⁹ Department of Economic and Social Affairs (DESA), *United Nations Model Double Taxation Convention between Developed and Developing Countries* (UN, 2001) (‘UN Model 2001’); DESA, *United Nations Model Double Taxation Convention between Developed and Developing Countries* (UN, 2011) (‘UN Model 2011’); DESA, *United Nations Model Double Taxation Convention between Developed and Developing Countries: 2017 Update* (UN, 2017) (‘UN Model 2017’).

²⁰ DESA, *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries* (UN, 2003); DESA, *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries 2019* (UN, 2019).

²¹ See *International Tax Dialogue* (Web Page) <www.itdweb.org/>. The last activity of the ITD was in 2015.

²² See *Platform for Collaboration on Tax* (Web Page) <www.tax-platform.org/>.

and the PCT's 2021 Toolkit on Tax Treaty Negotiations.²³ These manifold efforts have underscored core and persistent themes troubling international tax relations between the two groups of countries, which may be narrowed down to questions concerning the appropriate forum for dealing with international tax issues between developed and developing countries; the division of taxing rights between source and residence countries; the role of tax jurisdiction in influencing FDI in developing countries; and the suitability of tax treaties for application between developed and developing countries.

In the search for answers to guide future discourse, it is necessary to confront the neglected history of the UN's first attempt at global tax coordination to understand how and why the only genuine universal forum vacated its original mandate, leaving an organisation mainly formed of developed countries to assume its role in steering international tax policy development. The Commission story presented in this book will surprise many. It is rife not only with the tenacious endeavours of developing countries and the UN Secretariat to forge new international tax principles and practices, but also the Secretariat's efforts to secure the UN's position as the overarching world fiscal authority. It even has a genesis in the League's work in the Americas when the organisation sought refuge at Princeton during World War II. This narrative altogether will, firstly, reveal how the double taxation work of the 1940s, the initiation of developing countries into international tax coordination and the creation of the Commission were achieved under questionable circumstances, motivations and theories of economic development. Secondly, it will explain why the UN never reconciled the Mexico and London Models, how double taxation came to be imbued with a development purpose and why most developing countries were not motivated to conclude DTAs with developed countries despite official encouragement. Thirdly, it will show how the activism of the Secretariat led to its loss of broad fiscal jurisdiction, and how the activism of developing countries resulted in the abrupt abolition of the Commission and the loss of their place at the double taxation negotiating table. Finally, and above all, it will show how American²⁴ and, to a lesser

²³ PCT, 'Toolkit on Tax Treaty Negotiations' (May 2022) <www.tax-platform.org/publications>.

²⁴ With apologies to the broad Americas, the terms 'America' and 'American' in this book are synonyms for the United States and its citizens, except in the context of the American continent.

extent, British hegemony of this period controlled the double taxation policies and principles that could be developed.

In short, this book provides the historical foundation needed to better understand how the present international tax system came to be, demonstrating that past international tax coordination was more nuanced than a straightforward negotiation of technical rules but rather involved considerations of hegemonic influences, power imbalances, information asymmetries, global governance and private business pressures. This background in turn offers new perspectives to evaluating the fairness, inclusivity and comprehensiveness of current developments on global multilateral tax cooperation, especially regarding the UN's role as participant in the complex policy formation process and facilitator in reconciling the developed and developing countries' positions.

1.2 Prevailing Narratives

Modern tax literature regarding the Fiscal Commission is sporadic and sketchy. Many prominent works that outline international tax history overlook the Commission altogether, citing the OECD's Fiscal Committee as the effective successor to the League's Fiscal Committee.²⁵ Similarly, several texts (including the later UN Models) imply that the UN only made its debut in double taxation in 1968 with the creation of the Group of Experts.²⁶ Publications, including those by the UN, that do mention the Commission's existence indicate that it did not progress double taxation.²⁷ Very few have flagged this gap in history

²⁵ *OECD 2017 Model*, I-1-I-2 [4]–[6]; Ekkehart Reimer and Alexander Rust (eds), *Klaus Vogel on Double Taxation Conventions* (Kluwer Law International, 4th ed, 2015) vol 1, 1; Mitchell B Carroll, 'The Historical Development of Tax Treaties' in Jon E Bischel (ed), *Income Tax Treaties* (Practising Law Institute, 1978) 51, 58–9; Baker, *Double Taxation Conventions*, 1; David R Davies, *Principles of International Double Taxation Relief* (Sweet & Maxwell, 1985) 36.

²⁶ See, for example, Ring, 'Who Is Making', 698 n 232; *UN Model 2011*, vi–vii; *UN Model 2017*, iii–iv; Court, 'Some Reflections', 15.

²⁷ International Chamber of Commerce (ICC), *Settlement of Difficulties and Disputes Arising Out of Double Taxation Agreements: Statement Adopted by the Executive Committee of the ICC (February 1959) and Report of Its Commission on Taxation* (1959) 18–19; AJ Van den Tempel, *Relief from Double Taxation* (International Bureau for Fiscal Documentation (IBFD), 1967) 7–9; Richard J Vann, 'A Model Tax Treaty for the Asian-Pacific Region?' (1991) 45(3) *Bulletin for International Fiscal Documentation* 99, 103 n 15; Ken Messere, 'The 1992 OECD Model Treaty: The Precursors and Successors of the New OECD Model Taxation Convention on Income and Capital' (1993) 33(8) *European Taxation* 246, 246; Baker, *Double Taxation Conventions*, 1; Rohatgi, *Basic International Taxation*, 3, 65; Peter Andrew Harris, *Corporate*

as peculiar.²⁸ The following provides a brief overview of contemporaneous and subsequent works containing more than cursory insights into the Commission that have largely shaped prevailing narratives of that body.

1.2.1 Contemporaneous Narratives

During the Commission's lifespan, it was the subject of only one scholarly work,²⁹ which stemmed from lectures delivered by tax law professor Chrétien under the auspices of The Hague Academy of International Law (*Académie de Droit International de La Haye*).³⁰ Chrétien was a consultant expert to the Fiscal Division (the UN Secretariat staff serving the Commission) but did not attend the Commission's sessions so his knowledge of the deliberations was based on the content of the Commission's reports. Chrétien's account was part of a broader study directed at explaining the role of international organisations in developing the relatively new field of international tax law. This work covered the League's and UN's fiscal work

Shareholder Income Taxation and Allocating Taxing Rights between Countries: A Comparison of Imputation Systems (IBFD, 1996) 307–8; Peter Harris and David Oliver, *International Commercial Tax* (Cambridge University Press, 2010) 17. For UN sources, including works by its officials, see, for example, *UN Model 1980*, 8; *UN Model 2001*, xvii [26]; Lennard, 'United Nations Tax Work', 23.

²⁸ Vann, 'Model Tax Treaty', 103 n 15.

²⁹ Four other articles concerning the Commission's sessions were written by those privy to the Commission's meetings: Nathan N Gordon, 'The Second Session of the United Nations Fiscal Commission' (1949) 2(2) *National Tax Journal* 166; José Perez Cubillas, 'New Decisions of Fiscal Commission: Review of Third Session' (1951) 10(12) *United Nations Bulletin* 598; Mitchell B Carroll, 'Report on the Meeting of the United Nations Fiscal Commission, Lake Success, May 7–17, 1951' (1951) 5(5) *Bulletin for International Fiscal Documentation* 309; Mitchell B Carroll, 'Action on Tax Treatment of Foreign Income at Session of United Nations Fiscal Commission, April 27 to May 8, 1953' (1953) 7(5) *Bulletin for International Fiscal Documentation* 183. These narratives are of less assistance to academic study as they are a mix of historical narrative and advocacy for the bodies that the authors represented. The accounts of Gordon, as a member of the US delegation to the Second Session, and Perez, as the Cuban representative and Chairman of the Third Session, were generally descriptive overviews. Carroll's accounts were as an observer representing industry interests and focused on the deliberations of relevance to Western business concerns.

³⁰ The lectures were published in the Academy's *Collected Courses (Recueil des Cours)*: Maxime Chrétien, 'Contribution à l'Étude du Droit International Fiscal Actuel: Le Rôle des Organisations Internationales dans le Règlement des Questions d'Impôts entre les Divers États' (1954 II) 86 *Recueil des Cours* 5 (*Translation: Contribution to the Study of Current International Tax Law: The Role of International Organisations in the Settlement of Tax Matters among Various States*).

between 1921 and 1954³¹ and to date represents the most thorough academic exposition of the Commission. In it, Chrétien evaluated the Commission through a comparative lens with the League's Fiscal Committee, which included an examination of the institutional structures within which they operated, their functions and practices, and their scope and influence.³²

In summary, Chrétien considered that the League and UN counterparts were alike in most respects, including in their (1) advisory functions;³³ (2) role in settling tax issues to achieve a level of uniformity through DTAs and domestic laws;³⁴ (3) tasks in developing model conventions, publishing compendiums of DTAs and running a fiscal information service;³⁵ (4) priority responsibility over fiscal matters with little interference from the principal organs (i.e. the respective Assemblies and Councils), which largely adopted their recommendations;³⁶ (5) close collaboration with their respective Secretariats, the latter bearing a considerable burden of the preparatory and implementation work;³⁷ (6) use of temporary committees of experts to deal with specific issues, occasionally assigning projects to groups of experts or a single expert;³⁸ and (7) active work with the International Chamber of Commerce (ICC), which attended all their meetings.³⁹ He also noted the continuity between the League and UN Secretariats with Paul Deperon, the last Secretary of the League Committee, becoming the first Secretary of the UN Commission.⁴⁰

Nevertheless, Chrétien emphasised that the UN Commission's departure from the League Committee in composition and mandate ultimately hampered progress of the former's tax work. Regarding composition, the League Committee had comprised of both 'full' and corresponding members,

³¹ The study was completed before the Commission's abolition and Chrétien wrote of the Commission in the present tense, expecting it to continue in its activities: *Ibid* 7 [3], 22 [18], 33–4 [30].

³² *Ibid* 7 [3].

³³ *Ibid* 7–8 [3]–[4], 18–20 [13]–[14], 37 [37].

³⁴ *Ibid* 37 [37].

³⁵ *Ibid*.

³⁶ *Ibid* 21–5 [16]–[20].

³⁷ *Ibid* 21–2 [17], 29 [25], 34 [31].

³⁸ *Ibid* 22 [18], 35–6 [33]–[36].

³⁹ *Ibid* 28 [24], 28 [30]. Chrétien nevertheless pointed out that in the UN, the ICC was criticised by some members for using the Commission for capitalist purposes. He also highlighted that the Commission collaborated with IFA (at 29 [25]) and with universities, specifically Harvard, the latter cooperation being more promising and disinterested (at 28 [30]).

⁴⁰ *Ibid* 29 [25].

drawn from both League member and non-member states, who were technical experts appointed in their personal capacities primarily to represent a variety of tax systems, especially the major systems.⁴¹ Conversely, the members of UN Commission were only drawn from UN member states, acted in the capacity of government representatives, and were mostly from their state's Treasury or Finance departments.⁴² Chrétien criticised the latter composition for resulting in (1) a narrower range of expert skills and variety of world tax systems represented on the Commission (and accordingly its temporary committees);⁴³ (2) inequitable representation across large, medium and small states, because of the de facto permanent places given to the 'Big Five' UN powers (the United States, the Union of Soviet Socialist Republics, the United Kingdom, France and China); and (3) East–West ideological differences being played out at the Commission level with regard to China's representation despite the Commission having no jurisdiction to resolve the matter.⁴⁴ Regarding its mandate, the UN Commission had replaced both the League's Fiscal Committee and its Financial Committee,⁴⁵ which revived the status quo in the League as it was prior to 1928 when the taxation issues were dealt with by the Financial Committee.⁴⁶ Chrétien criticised this merger, indicating that it caused a duality in the Commission from the start as the Commission would divide into two working groups to deal, respectively, with tax and finance issues, sitting in plenary only at the beginning and at the end of each session. Nevertheless, the merger appeared only partial as the Commission's work programme showed it was more interested in taxation than finance and because the existence of the IMF and the International Bank for Reconstruction and Development (World Bank) reduced some of the public finance functions of the Commission.⁴⁷ The Commission's tax work, however, was deprioritised with the emergence of its function of providing technical assistance to underdeveloped countries, which it executed in cooperation with the Secretariat, other UN bodies and specialised agencies.⁴⁸ Eventually, this too was downsized by the creation of other ad hoc bodies.⁴⁹

⁴¹ Ibid 26–8 [23].

⁴² Ibid 29–31 [27]–[28].

⁴³ Ibid 26–8 [23], 35–6 [34].

⁴⁴ Ibid 30–1 [28].

⁴⁵ Ibid 29 [26].

⁴⁶ Ibid 32–3 [29].

⁴⁷ Ibid 34–5 [32].

⁴⁸ Ibid 37–8 [37]–[38], 86–9 [101]–[104].

⁴⁹ Ibid 34–5 [32].

In relation to the scope of double taxation work continued by the UN, Chrétien observed that the Commission's work on reconciling the Mexico and London Models had ceased by 1951 as the Secretariat did not receive sufficient or adequate government responses to enable it to establish new texts.⁵⁰ Instead, the Commission formulated principles on two difficult issues that were indirectly related to revising the model conventions, namely the general allocation principles to apply in relations between developed and undeveloped countries, and the taxation of international air transport. The first issue was examined in cooperation with the ICC and led to heated debates and nearly identical resolutions in 1951 and 1953 that, *inter alia*, recognised the primary taxation right of source countries.⁵¹ In addition, in 1953, faced with an impasse concerning the principle of exclusive source-country taxation of income from FDI advocated by the capital-importing countries but opposed by the capital-exporting countries, the Commission adopted a compromise that urged capital-exporting countries to sympathetically consider taxing such income only or mainly in underdeveloped countries. The second issue was considered in collaboration with the International Civil Aviation Organization (ICAO) and led to acrimonious debate and an inconclusive resolution in 1951.⁵² Chrétien concluded that the Commission and its Secretariat were still at the stage of preliminary studies for the revision of the Mexico and London drafts, and that the slow pace was justified by the need to proceed cautiously. Furthermore, the UN's fiscal information service, which was more extensive than that achieved by the League, was supplementing the international tax work by providing the background on tax systems to facilitate DTA negotiations.⁵³ He nevertheless doubted the Commission's ability to establish a model treaty providing a common solution for relations between developed and developing countries since the two groups could not reach consensus on what amounted to equality of sacrifice.⁵⁴

Chrétien generally found the influence of the UN's work on states' tax systems difficult to assess.⁵⁵ While there was high demand for its technical assistance activities, such work rarely resulted in publications in contrast to the League's more prolific taxation output, particularly the

⁵⁰ *Ibid* 62 [71].

⁵¹ *Ibid* 62–3 [72].

⁵² *Ibid* 64 [73].

⁵³ *Ibid* 83–4 [98].

⁵⁴ *Ibid* 65 [74].

⁵⁵ *Ibid* 90 [105].