

# The history of international tax treaties from the Italian perspective (22<sup>nd</sup> 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 OECD model convention. Particularly, I will say, on Article 4 of the model convention, paragraph 1, 2<sup>nd</sup> 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, Italy 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 wording 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 can 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.