



## Article

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# The Emergence of Denmark's Tax Treaty Network — A Historical View\*\*

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**Abstract:** This contribution analyzes the origin and creation of Denmark's tax treaty network in a historical perspective. The development of the Danish treaty network is studied through an international perspective and by discussing a number of milestone events. It is concluded that the general tendency has pointed toward a continuously growing Danish treaty network and also that the question on abuse of the treaties has become of greater concern during the past decades. Moreover, it is argued that the growing number and importance of Denmark's tax treaties over time created a need for the Danish parliament to be more directly involved in the conclusion of new tax treaties.

**Keywords:** Tax treaties, model conventions, tax policy, international taxation, Danish income tax, Nordic multilateral tax treaty, legal history

## 1 Tax treaties

If citizens and businesses are subject to international double taxation when they operate or invest across borders, it may have harmful effects on the exchange of goods and services as well as on movements of capital, technology, and persons. As a consequence, approximately during the past 100 years, a global network consisting primarily of bilateral tax treaties has been developed with the purpose of removing the obstacles that double taxation constitute

for the development of economic relations between countries.<sup>1</sup>

Historical knowledge on the topic of tax treaties is not without practical relevance, as knowledge concerning the underlying motives may be conducive in connection with the interpretation of tax treaties and because knowledge about previous breakthroughs and missteps may improve the policy choices made by countries and international organizations (Vann 2011). Thus, historical insights do create a more thorough understanding of the principles that have developed in the treaties over time and of the choices that were made (Freiherr von Roenne 2011). In addition, other research has shown that, generally, a strong element of path dependence occurs when it comes to the historical development of the global tax treaty network (Jogarajan 2011). In other words, previous events (*i.e.*, the entering into the first treaties between a series of Central European countries and the creation of the first model conventions) seem to have affected the development up until today (Avery Jones *et al.* 2006). Thus, it does not surprise that, in the later years, there seems to be developing an increasing interest in the creation and history of tax treaties (Friedlander and Wilkie 2006; Huber and Rentzsch 2018).

A tax treaty is an international agreement between states, and the amount hereof has increased considerably over time. As a consequence, today, more than 3,000 tax treaties have been entered into on a global level (OECD 2015). There can be hardly any doubt that this extensive treaty network is of great importance for a well-functioning world trade, even though—naturally—it does not solve all problems. Consequently, the development of this impressive treaty network aptly has been called a "flawed miracle" (Avi-Yonah 1996).

International juridical double taxation can generally be defined as the imposition of comparable taxes in two (or more) states on the same taxpayer in respect of the same subject matter and for identical periods.<sup>2</sup> Double tax-

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<sup>1</sup> Cf. the introduction to the OECD (Organisation for Economic Cooperation and Development) Model Tax Convention (2014), para. 1.

<sup>2</sup> Cf. the introduction to the OECD Model Tax Convention (2014), para. 1. In contrast, the so-called economic double taxation occurs

ation may occur in situations where a person or a company is resident and thus fully liable to taxation in one country but, at the same time, is limited liable to taxation in another country, as income is received from sources there. The tax treaties, in brief, seek to hinder such double taxation by initially defining which taxes are included, which of the states that are considered to be the domicile state (*i.e.*, the state where the taxpayer is considered to be resident according to the treaty), and which state is the source state. Hereafter, the right to tax is divided between the domicile state and the source state according to the treaty's allocation clauses. In this regard, the general rule is that when one state has been granted the right to tax an amount of income, the other state must grant a relief (Schmidt *et al.* 2015).

In the present contribution, the earliest tax treaties will be dealt with initially, as elements from these will be traceable all the way up until today's treaties—including Denmark's treaties. Afterwards, the creation of the model treaties will be covered, as these have influenced both Denmark's treaty network and the global network of tax treaties. Subsequently, focus will be on the development in Denmark from the 1920s, during which Denmark entered into the first tax treaties, and up until today. Finally, a number of conclusions will be drawn.

A topic such as the emergence of Denmark's tax treaty network is quite extensive and may be pursued from many angles. Hence, a demarcation is necessary. In the present contribution, focus is on the creation of the Danish treaty network in a historical context. The more material legal questions, such as the practical use and interpretation of Denmark's treaties, will only be sporadically referred to, where it has been deemed necessary.

## 2 The first international tax treaties

Problems of double taxation have more or less existed since man began to impose taxes, and all the way back to the antiques, sources have reported about challenges in this context. Also, sources from the Middle Ages mention problems with double taxation, for example, in relation to the trade relations between the Italian city-states from the 12th century and onwards. These problems have thus been known for long and were, to some extent, addressed in in-

dividual provisions of trade and tariff treaties (Freiherr von Roenne 2011).

The first agreement, which is commonly acknowledged to be an international tax treaty, is, however, a tax treaty between Prussia and Austria-Hungary from 1899.<sup>3</sup> Beforehand, a period with increasing industrialization had caused multiple European countries to alter old and more primitive forms of taxation with a system based on income tax. This change toward income tax—combined with the increasing business relations between the countries—clarified the need to address the problems with international double taxation (Hemetsberger-Koller and Kolm 2006).

The fact that it was between Central European states that the first proper international tax treaty was entered is nevertheless not surprising. At the time, the German Empire consisted of federal states that had kept their sovereignty in regard to taxation. Hence, the increasing domestic trade between the federal states, and the free movement between these, created a need for “internal” solutions that could hinder situations with double taxation from occurring within the German Empire.<sup>4</sup>

These internal German experiences, alongside corresponding experiences in Switzerland and Austria-Hungary, formed the grounds for the first genuine international tax treaties. The abovementioned tax treaty between Prussia and Austria-Hungary was the starting point and was followed up by treaties between Saxony and Austria-Hungary (1903), Bavaria and Austria-Hungary (1903), Prussia and Luxemburg (1909), Prussia and the city of Basel (1911), Hessen and Austria-Hungary (1912), and the German Empire and Greece (1912). The construction and content of these treaties were quite similar, and the basic principles were collected from the first domestic German tax treaty and the German law of 1870 concerning the avoidance of double taxation within the German Empire. A couple of these principles have (in moderated form) survived up until today. Among them, the surviving principles are that the economic/actual affiliation with a state is more important than nationality/citizenship when it comes to the allocation of the right to tax (Freiherr von Roenne 2011)

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when the same income is taxed in the hands of (two) different tax subjects.

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<sup>3</sup> As early as the middle 19th century, a number of international agreements on administrative assistance in tax matters had been entered into, for example, the agreement between Belgium and France of 1843 (Jogarajan 2011). In 1872, the United Kingdom and Switzerland (the canton Vaud) concluded an agreement concerning the relief of double taxation in cases of inheritance tax upon death (Jogarajan 2012).

<sup>4</sup> The first example hereof was the treaty between Sachsen and Prussia in 1869/1870.

and also the principle concerning reciprocity (Jogarajan 2011).

However, the First World War (1914–1918) dramatically changed the economic and political relations in Europe. Several countries needed to charge and collect increasing taxes as a consequence of the war's major economic costs and also as part of the incipient creation of a welfare state. This especially applied to Germany, which was forced to pay an enormous compensation of war damages. Moreover, the First World War caused essential changes to the European map, where old empires ceased to exist while new national states arose. Thus, there was a need to rebuild the economic relations, and the new tax treaties could contribute to this. Once again, Germany was one of the driving forces and the country *inter alia* entered into tax treaties with Czechoslovakia (1921) and Italy (1925) (Freiherr von Roenne 2011). The latter tax treaty has since been highlighted as a milestone in the development (Huber and Rentzsch 2018), as it contained multiple elements that may be recovered in today's tax treaties. As an example, the idea that an enterprise is liable to pay taxes in another contracting state, if it has more permanent business operations there, came to light with this agreement. In other words, this agreement covered the later widespread principle of *permanent establishment*, alongside the beginning contours of the so-called *arm's length principle*.

### 3 The emergence of the model conventions

As an extension of the abovementioned development, in 1921, the League of Nations asked four Professors—Bruins, Einaudi, Seligman, and Stamp—to prepare a rapport that would investigate the economic consequences of international double taxation. The purpose was, against this background, to develop some fundamental principles on how to solve situations of double taxation. The rapport was made public in 1923 and emphasized the principles of *ability to pay* and *economic affiliation* as being decisive for a suitable solution (League of Nations 1923). As stated above, these are principles that were also given significance in the first tax treaties.

During 1926–1927, this work led to the preparation of a draft model convention that was discussed in a revised version in 1928 by representatives from 27 different countries, including Denmark (League of Nations 1928). Moreover, a standing committee (with taxation as its field of responsibility) was created in order to facilitate the continuous development. The result hereof became the so-called Mexico

Model Tax Convention of 1943 and the London Model Tax Convention of 1946.<sup>5</sup>

Even though the dominating perception in the literature appears to be that the League of Nation's work in general did not have overwhelming practical influence on the creation of this period's bilateral tax treaties,<sup>6</sup> it was not completely without significance, as a couple of underlying principles, for example, on economic affiliation (domicile and permanent establishment) and reciprocal assistance in tax affairs, were further promoted. Also, the work had influence in the sense that the OEEC (Organization of European Economic Cooperation), which was a front-runner of the OECD (Organisation for Economic Co-operation and Development), used the League of Nation's preparatory works as point of departure when the organization took over the field of taxation after the Second World War (Vogel 1986).

In 1956, the OEEC created a committee with the purpose of developing a model convention to hinder double taxation. The committee consisted of delegates from all 16 Member States, including Denmark (OEEC 1956). During the subsequent years, the committee prepared a series of reports and representatives from Denmark were involved in the composing of a report on tax law domicile (OEEC 1958) and a report on double taxation relief (Avery Jones 2012). As the OEEC became the OECD in 1961, the committee continued its work under the OECD. In 1963, the committee was able to present a final draft of the OECD Model Tax Convention with commentaries, and the Council encouraged the Member States to strive toward negotiating bilateral tax treaties with each other based on the proposed convention (OECD 1963).

In the 30 articles, which the OECD Model Tax Convention consisted of, the committee covered a series of underlying principles, of which several were also apparent in the first bilateral tax treaties and later in the League of Nations' model treaties. The OECD Model Tax Convention with commentaries has since been updated and extended multiple times to accommodate the changes that have occurred over time in regard to the composition of the countries' tax systems, increasing international relations, new forms of businesses, new technologies, the appearance of multinational corporate groups, and challenges in

<sup>5</sup> For additional information on the League of Nation's work in relation to the hindrance of double taxation, see Souza de Castelo Branco (2011).

<sup>6</sup> See Huber and Rentzsch (2018); Nielsen (1972), and Freiherr von Roenne (2011). For the opposite view, see Vogel and Rust (2015, p. 20).

connection with tax avoidance and tax evasion.<sup>7</sup> A more thorough revision was conducted in 1977 and 1992. Afterwards, it was decided to make continuous, but limited, updates more regularly, which resulted in updates in 1994, 1995, 1997, 2000, 2003, 2005, 2008, 2010, 2012, 2014, and 2017. Generally, these multiple continuous updates have affected the commentaries more than the model tax convention itself (Vogel and Rust 2015, p. 21).

Today, besides the OECD Model Tax Convention with commentaries, the UN Model Tax Convention with commentaries also exists. Even though the two model conventions have many similarities in regard to the structure and the content, the UN Model Tax Convention, to a greater extent, assigns the right to tax to the country of source (*i.e.*, the host country) at the expense of the domicile state. This ought to be an advantage for the developing countries that are normally importing capital. The initiative to the UN Model Tax Convention was made in 1968, but it was not until 1980 that the final edition with commentaries was made available. This has since been revised in 1999 and 2011.<sup>8</sup>

In particular, the OECD Model Tax Convention with commentaries is a significant factor with respect to the negotiation and interpretation of bilateral tax treaties. Several countries, including Denmark, thus use the OECD Model Tax Convention as a starting point for negotiations, while taxpayers, tax authorities, and courts use the Model Tax Convention with commentaries to achieve a better understanding of the content of the bilateral tax treaties. To what extent the Model Tax Convention with commentaries is used depends, for example, on the legal tradition and the degree to which the given tax treaty has been based on the Model Tax Convention (Garberino 2016; Lang 2001; Engelen 2004).

## 4 The development in Denmark

The Danish State Tax Act from 1903 settled the *universality principle* in Danish tax law.<sup>9</sup> Accordingly, taxpayers fully liable to Danish tax should include Danish as well as foreign sourced income in their taxable income. This obvi-

ously created ground for situations where international double taxation could arise.<sup>10</sup>

With the changes to the State Tax Act in 1922, a specific provision was introduced regarding tax treaties.<sup>11</sup> The provision gave the Danish Government the right to conclude tax treaties with other countries in order to (wholly or partly) avoid double taxation. It follows from the preliminary remarks to the bill that the purpose, among other things, was not only to protect the taxpayers in the border region from unreasonable double taxation but also to relieve the tax burden for Danish businesses operating in foreign countries. Moreover, the increasing level of taxation in Denmark appeared to be playing a role, as well as the fact that the Governments of Denmark, Norway, and Sweden had already agreed to start implementing solutions to counteract international double taxation.<sup>12</sup>

By adopting this provision, the Danish Parliament provided the Government with the necessary consent to enter into tax treaties with binding effect for the Danish state, as required in the Danish Constitution.<sup>13</sup> At the same time, the legislation secured that tax payers could obtain relief for international double taxation once the tax treaties had been officially announced (Winther-Sørensen 2003).<sup>14</sup> In 1953, the Government's right to conclude tax treaties was extended with the approval of the so-called *Enabling Act* that provided the Government with a more broad authorization to conclude tax treaties and treaties about reciprocal assistance in administrative matters.<sup>15</sup>

The Government's right to conclude tax treaties without the Danish Parliament's intervention was eliminated

<sup>10</sup> In reality, companies (and the alike) were exempted from the universality principle for many years, because of the special domestic rules on foreign relief (*udlandslempelse*), cf. SL sec. 6(f) (Den.). Upon the passing of the Corporate Tax Act in 1960, the advantages stemming from foreign relief were reduced, cf. Selskabsskatteloven [SEL] (Corporate Tax Act) (Den.), Law no. 255 of June 11, 1960. However, the access to foreign relief was not completely terminated until the passing of Law no. 486 of June 30, 1993. For more details on the Danish rules on foreign relief, see Winther-Sørensen (2000).

<sup>11</sup> Cf. SL 50, introduced by the adoption of Law no. 149 of April 10, 1922.

<sup>12</sup> Cf. the preparatory remarks to Bill of November 23, 1921, Rigsdagstidende 1921/22, column 3165 et seq.

<sup>13</sup> The principle is now stated in Grundloven [GRL] [Danish Constitution] sec. 19 (Den.), Law no. 169 of June 5, 1953.

<sup>14</sup> In the literature, it was stated by some that the adoption of SL 50 did ensure that the Government could enter into the treaties, but that the treaties could not necessarily be seen as implemented into Danish law. However, the predominant part of the literature does not appear to agree, cf. (Winther-Sørensen 2000, p. 42–46) with references.

<sup>15</sup> Cf. Bemyndigelsesloven [BL] [Enabling Act] (Den.), Law no. 74 of March 31, 1953.

<sup>7</sup> Cf. the introduction to the OECD Model Tax Convention with commentaries (2014), para. 7–8.

<sup>8</sup> Cf. the introduction to the UN Model Tax Convention with commentaries (2011), para. 1–11. See also Laursen (2014).

<sup>9</sup> Cf. Statsskatteloven [SL] [State Tax Act] sec. 4 (Den.), Law no. 104 of May 15, 1903.

in 1994 when the Enabling Act was abolished.<sup>16</sup> According to the explanatory remarks to the bill, it was emphasized that the tax treaties in reality meant that tax regulations, which were passed by the Danish Parliament, would be annulled to the extent it was necessary in order to comply with the treaties. From this perspective, the tax treaties ought to be approved by the Danish Parliament. After all, there was nothing new about the fact that the treaties meant a disregard of the tax regulations passed by the Danish Parliament, but it may have played a role that the Danish treaty network and the importance hereof was much greater in 1994 than in 1922 and 1953.<sup>17</sup> Moreover, the procedure of entering into tax treaties without the Danish Parliament's intervention had been much criticized during the years, as being problematic from a democratic point of view.<sup>18</sup>

#### 4.1 The interwar period

The authorization was initially used to conclude tax treaties with Iceland in 1927 and Germany in 1928. Both treaties were, however, quite limited in their content and scope, which explains why the treaty with Sweden from 1932 is normally considered to be Denmark's first genuine tax treaty (Rørdam 1953; Weizman 1994a, p. 58). The Icelandic treaty was based on citizenship and provided the citizens, who were liable to pay taxes in both countries, with the right to demand that the given income tax and capital tax would be reduced by half in both countries. In relation to double taxation of real estate and income from a business, the source state was assigned the right to tax, while the domicile state had to provide relief. Additionally, the treaty contained provisions on change of domicile during the income year and about temporary residence.<sup>19</sup> The treaty with Germany also concerned income tax and cap-

ital tax, but this agreement solely contained an up-listing of the covered taxes as well as a statement expressing that double taxation should be solved through mutual agreement between the tax authorities.

The fact that Denmark's first genuine tax treaty was entered into with the neighboring country, Sweden, is not surprising when the terms of geographical connection and the substantial trade relations between the two countries are considered. Hence, a parallel can be drawn to the first international tax treaties, which neighboring countries in Central Europe concluded with each other by the end of the 1800s and the beginning of the 1900s.<sup>20</sup> As the treaty with Sweden, to some extent, seems to have created the foundation for subsequent Danish tax treaties, a few additional words should be added regarding the content of this treaty.

The tax treaty with Sweden from 1932 had quite extensive similarities with other European tax treaties from that period of time, including the agreement that was entered into in the previous year between Germany and Switzerland (Weizman 1994a, p. 58). The Danish–Swedish tax treaty only concerned direct taxes and was applicable to the citizens of the two countries, as well as Danish and Swedish legal persons. The point of departure for the allocation of taxing rights was that the income and capital could be subject to taxation only in the country where the taxpayer was resident, unless a specific deviation appeared in the relevant provision of the treaty.

An individual would be considered resident in a given state if he or she had a permanent home and domicile there. If no permanent home and domicile existed in any of the states, the taxpayer should be considered a resident in the state of habitual abode, that is, in the state where the intention was to stay not only temporarily. An individual liable to pay taxes with no permanent home/domicile, and no habitual abode, should be considered resident in the state in which he or she was a citizen. However, should doubt occur, the question should be decided through an agreement between the tax authorities, who in this situation would need to take into account in which state the tax payer had his or her closest relations (vital interests). If that did not solve the situation either, the focus would need to be on the taxpayer's citizenship. In cases of legal persons, they would be considered resident in the state where the Board of Directors or the top management had its seat.

A number of provisions deviated from the main rule and gave the source state the right to tax certain enumer-

<sup>16</sup> Cf. Law no. 945 of November 23, 1994.

<sup>17</sup> The relationship between internal Danish law and international law is based on a dualistic principle (Germer 2010, p. 94). The Danish tax treaties do neither constitute *lex superior* nor *lex specialis*, and constitutionally, there is no principle that hinders the Danish Parliament from passing a law that is in conflict with the Danish treaties. However, it must be assumed that a newer statutory provision should be interpreted in such a way that it is not in conflict with international law (Michelsen 2000).

<sup>18</sup> See, for example, the discussion in the editorial to Skattepolitisk Oversigt (1971); Foighel (1982), and Weizman (1994b).

<sup>19</sup> A new and more comprehensive treaty was entered into with Iceland in 1939, which was broadly identical with the tax treaties that were entered into in 1932 and 1937 with Sweden and Finland, respectively (Glistrup 1957, p. 19–24).

<sup>20</sup> See Section 2.

ated types of income. This concerned income from real estate in the source state (country of location) and income from a permanent establishment in the source state. Moreover, the income from enterprises, where the business consisted of shipping and airline transport, could only be taxed in the state where the place of effective management was located. A specific provision dealt with diplomatic and consular representatives. Moreover, it was determined that even though the treaty with Sweden was based on the principle that only the domicile state or the source state should be able to impose taxes on a given income, the domicile state was entitled to make the tax calculations on the basis of the full income (*i.e.*, relief after the method exemption with progression).

It is interesting to see that the first genuine Danish tax treaty contained numerous principles that, to a smaller or larger extent, are still applicable in Denmark's current tax treaties. As an example, modern tax treaties are still founded on the initial determination of which state is the domicile state and source state and, afterwards, on the allocation of the taxing rights between the domicile state and source state. In this connection, it is also worth noting that greater importance is still attached to the economic affiliation rather than nationality/citizenship, which is a principle that can be traced back to the first international tax treaty between Prussia and Austria-Hungary. Moreover, it is noteworthy that the persistently relevant term of permanent establishment had already been given importance in Denmark's first genuine tax treaty. The content of the previous definition even seems to be quite similar to the current definition's content, even though it was worded in a slightly different manner. Thus, *permanent establishment* should be understood as a site at which a special facility was placed or where business operations took place. Moreover, a permanent establishment should not be perceived to exist simply because a subsidiary was established in another state or through the use of an independent representative.

As stated above, to some extent, the tax treaty with Sweden appears to have created a pattern followed in subsequent treaties, including the treaty with Finland from 1937 (even though it did not rely on relief after the exemption method with progression and treated a change of domicile differently) as well as the new treaties with Iceland and Germany 1939.<sup>21</sup> By the start of the Second

World War, Denmark had entered into tax treaties with four countries. Moreover, Denmark had entered into numerous agreements with other countries about reciprocal exemption for income originating from shipping businesses.<sup>22</sup>

## 4.2 The years following the Second World War (1946–1962)

During the Second World War, Denmark did not enter into any new tax treaties. For this reason, the treaty with Norway from 1946 was the first extension of Denmark's treaty network for a couple of years. As such, the treaty with Norway was not particularly groundbreaking, as it, to a great extent, corresponded with the treaties concluded with the other Nordic countries before the War's eruption.<sup>23</sup>

As a contrast, the tax treaty entered into with the United States in 1948, alongside the London-treaty from 1946, seems to have affected Denmark's conclusion of tax treaties all the way up until the origin of the (draft) OECD Model Tax Convention from 1963 (Weizman 1994a, p. 58). Hence, in the following, a few additional comments will be made about the Danish-American tax treaty.

The treaty with the United States only concerned direct taxes and not taxes on capital. As a contrast to the previous Danish treaties, the treaty with the United States did not only cover citizens in the two treaty states but all persons who met the requirements for being liable to pay taxes in the two states. Another new creation, from the Danish perspective, was the treaty's relief provision, which prescribed that the relief provided in the domicile state should be based on the *ordinary credit* method, while the previous Danish treaties hitherto had been based on the exemption method (usually with progression). This involved that the domicile state could impose tax on the entire income of the tax payer but should allow a deduction from the tax of an amount equal to the tax paid in the source state (maximized to the part of the tax, computed before the deduction was given, which was attributable,

<sup>21</sup> Denmark's treaties with Sweden, Iceland, and Germany at the time were based on the fundamental assumption that double taxation was a situation where the taxpayer—in the same taxable period—was fully liable to tax in both countries. In contrast, the treaty with Fin-

land was based on the more modern assumption that double taxation was a situation where the taxpayer was being liable to tax on the same income in both countries, for example, as the taxpayer was fully liable to tax in one country, and liable to limited taxation in the other country. The abovementioned fundamentals were, nevertheless, not used unaltered, and the importance of these differences became most clear when people moved between the contracting states. For more details on this issue, see Thielsen (1959) and Blume (1960).

<sup>22</sup> For more details, see Møller (1963b).

<sup>23</sup> About Denmark's first tax treaty with Norway, see Rørdam (1959).

as the case may be, to the income which could be taxed in the source state). Moreover, the treaty with the United States contained a more detailed description of permanent establishments; a provision concerning the regulation of the income base; specific provisions on the allocation of taxing rights concerning dividends, interest, and royalties; provisions about income from government services and income from employment including pensions; and special rules for students and professors. Moreover, the treaty included provisions concerning non-discrimination, assistance with respect to tax collection, and exchange of information.<sup>24</sup>

In general, the contemporary opinion seemed to be that the treaty with the United States was complicated, and especially the use of the credit relief method was criticized for being too difficult (Glistrup 1957, p. 23; Rørdam 1957; Blume 1960).<sup>25</sup> Nevertheless, the treaty with the United States was used as a foundation for the subsequent treaty with the United Kingdom in 1950. However, there were also differences between the two treaties, as the US treaty, for example, used the principle of *force of attraction* for the allocation of income to a permanent establishment. Furthermore, the treaty with the United Kingdom included a rule of interpretation, which later became common practice, entailing that any term not defined in the treaty should be ascribed the meaning which the expression had in domestic law, unless the context otherwise required.

The US treaty, alongside the adjustments which followed the treaty with the United Kingdom, appears, to some extent, to have created the foundation for many of Denmark's new or renegotiated treaties in the subsequent years, including the treaty with Canada from 1955. However, there was also room for further development. Among other things, the treaties with the United States and the United Kingdom did not contain a genuine double-domicile clause which the subsequent treaties from that era did with the exception of the treaties with India, Japan, and Pakistan (Nielsen 1972, p. 542). As an example, the new treaties with Norway and Sweden from 1957 and 1958, respectively, included a genuine, quite modern double-domicile clause for individuals.<sup>26</sup> The clause initially established that an individual should be considered resident in one of the states if he or she had a permanent home and

domicile in that state, a habitual abode in that state, or otherwise was treated for tax purposes in a manner similar to a person resident there. If that entailed that the taxpayer would be considered resident in both contracting states, the taxpayer should—when applying the treaty—be considered resident in the state where he or she had the closest personal and economic relations (centre of vital interests). Could the question not be answered on this ground, the individual should be considered resident in the state in which he or she was a citizen. If the individual was not a citizen in either state, the competent authorities should settle the question by mutual agreement.

Besides the previously mentioned tax treaties, Denmark entered into or renegotiated tax treaties with the following countries in the period up until and including 1962: France (1957), the Netherlands (1957), Switzerland (1957), Japan (1959), India (1959), Pakistan (1961), Austria (1961), and Germany (1962). Hence, Denmark had—by the end of 1962—concluded 16 tax treaties and had, in addition, entered into a number of more specific agreements on reciprocal exemption from income originating from shipping and air transportation, on avoidance of double taxation of inheritance, as well as on administrative assistance in tax matters.<sup>27</sup> In general, the period from the end of the Second World War and up to 1962 was thus characterized by a quite large expansion of Denmark's treaty network. Moreover, the content of the treaties had in many ways been expanded and the treaties had become more detailed.<sup>28</sup> This desire to conclude additional treaties may, among other things, have been driven by the vast increase in the size of the taxes during this period as well as the wish for stronger international relationships (Foighel 1964).

### 4.3 The years after the creation of the OECD Model Tax Convention (1963–1976)

As previously mentioned, a final draft version of the OECD Model Tax Convention was published in 1963. Even though Denmark's negotiation of tax treaties has since been based on the OECD Model Tax Convention (Loft 2000, Hansen and Bjørnholm 2002, p. 30–31), the release of the model did not fundamentally change Denmark's negotia-

<sup>24</sup> For more details on the tax treaty with the United States from 1946, see Rørdam (1957).

<sup>25</sup> Blume, however, added that credit relief should be considered the most reasonable method.

<sup>26</sup> A new agreement was also entered into with Sweden in 1953, but this was almost similar to the first treaty entered into in 1932.

<sup>27</sup> For an overview, see Møller (1963b, 1966). Moreover, it should be mentioned that the geographical scope of the treaties (especially with the United Kingdom and the Netherlands) were expanded multiple times over the years in order to also include the colonies of these countries.

<sup>28</sup> For more details on Denmark's tax treaties from this period, see Rasmussen (1958); Sørensen (1960), and also Møller (1963a).

tion practice with respect to concluding tax treaties (Weizman 1994a, p. 58). This was primarily due to the fact that the OECD Model Tax Convention was based on the London Model Tax Convention from 1946 and a series of reports that had been published continuously in the time up until 1962. Hence, these already had an effect on Denmark's newly concluded treaties. Moreover, the OECD Model Tax Convention was, to some extent, built upon the experiences that the Member States had already made through the negotiations of their bilateral treaties.

In contrast to some other OECD countries, Denmark had not made any reservations to the OECD Model Tax Convention of 1962. This was indirectly, although firmly, criticized by Professor Thøger Nielsen in connection with a discussion of the Model's preference for domicile state taxation, as a contrast to source state taxation (Nielsen 1972, p. 483):

*"A small country like Denmark, which to a large extent would be interested in an increased access to tax income that flows out of the country, appears to follow the OECD proposal without any objections. Thus, Denmark only seems to conclude treaties benefiting the source state, when this is favored by the foreign treaty partner. In international relations, Denmark lacks both the inventiveness and the political strength needed to take an independent stance."*[The author's own translation].

The tax treaty of 1966 with Italy was the first treaty Denmark concluded with another OECD member state after the OECD Model Tax Convention of 1962 had been published. The treaty with Italy did also, to some extent, follow the Model, even though it also had deviations that reflected Denmark's particular preferences in relation to the treatment of pensions, hydrocarbon business, and the state-owned airline company, SAS.<sup>29</sup>

Altogether, Denmark entered into and renegotiated an essential amount of treaties in the period between 1963 and 1976, and as a result, Denmark had—by the end of the period—entered into more than 30 tax treaties. Some were concluded with developing countries and often contained an expanded right to tax for the source state as well as a relief provision based on the *matching credit* method, for example, the tax treaty concluded with Israel in 1965 (at the time, Israel was considered a developing country). Moreover, by the end of the period, Denmark entered into tax treaties with countries from the Eastern bloc, for example, the treaties with Poland and Romania from 1976.

Even though the period—from a Danish perspective—appeared to be driven by a great desire to enter into new tax treaties, Denmark was, by the end of the period, slowly becoming aware of some of the problems that the tax treaties could also result in, especially the problem of abuse of tax treaties. Hence, in 1973, a particular anti-avoidance rule was implemented in the Inventory Valuation Act.<sup>30</sup> The aim of the rule was to hinder abuse of tax treaties based on the exploitation of the exemption relief method. In brief, the abuse was carried out by creating a situation in which the income of a foreign permanent establishment or a foreign real estate fluctuated from year to year, for example, through the use of the domestic provisions concerning re- and devaluation of inventory. Consequently, in years during which the foreign activities resulted in a loss, the tax losses incurred abroad could be set off against other taxable income in Denmark, while Denmark, in the years with profit abroad, was unable to impose tax on the foreign income, because relief had to be offered based on the exemption method.<sup>31</sup> This domestic anti-avoidance rule was later accompanied by a series of additional rules that should mitigate the possibility of abusing the Danish tax treaties.<sup>32</sup>

The increasing attention regarding the abuse of tax treaties also influenced the Danish negotiation policy. Hitherto, the choice between the use of the exemption method and the credit method had largely depended on the wishes of the other contracting party, and the majority of Denmark's tax treaties at the time actually prescribed the use of the exemption method.<sup>33</sup> However, now, this has been changed dramatically, as Denmark has insisted on using the credit method both when negotiating and renegotiating tax treaties (Loft 2000; Winther-Sørensen 2003).

#### 4.4 The years following the first update of the OECD Model Tax Convention (1977–1991)

In 1977, the OECD published an updated version of the Model Tax Convention with commentaries. Compared against the version from 1963, the alterations were relatively insignificant and primarily concerned the commen-

<sup>29</sup> As stated in Section 4.5, this is also one of the areas where Denmark has made reservations to the OECD Model Tax Convention.

<sup>30</sup> Cf. Varelagerloven [Inventory Valuation Act] sec. 5a (Den.), Law no. 200 of June 3, 1967, as amended by Law no. 202 of April 12, 1973.

<sup>31</sup> For more details, see Winther-Sørensen (2003).

<sup>32</sup> See Section 4.4. For an overview, see also Wittendorff (2015).

<sup>33</sup> For an overview of the relief methods used in Denmark's treaties at the time, see Nielsen (1972, p. 581–582).



taries that were elaborated. The amount of reservations made by the Member States had increased, while some countries had also made observations in the commentaries (Vogel 1986). However, Denmark had neither included reservations nor inserted observations. Thus, overall, the 1977 model did not cause any notable changes to the Danish negotiation policy (Weizman 1994a, p. 62–63).

The Danish treaty network continued to grow extensively in the period, and by the end of the period, Denmark had entered into around 50 tax treaties. In this connection, it must be taken into account that Denmark's bilateral tax treaties with Sweden, Norway, Iceland, and Finland had been replaced by one multilateral Nordic tax treaty in 1983. A preliminary attempt at a multilateral Nordic treaty was already made in 1964, where the Nordic Council recommended that the Member States should investigate the presupposed conditions for a shared, common Nordic multilateral treaty. At first, it was decided to await the works that were in progress between the EFTA Member States, where the purpose was likewise to establish a multilateral treaty. As the efforts of EFTA fell to the ground, the Nordic countries continued their work on constructing a multilateral treaty. The negotiations hereof finished in 1980, and in 1983, the representatives from the five Nordic countries signed the Nordic multilateral treaty, which then became the first of its kind (Andersson *et al.* 1986).

The hope was that a multilateral treaty, as a contrast to a bilateral treaty, would make it easier to solve double taxation situations that involved more than two states and would be more effective with respect to stopping *treaty shopping*. However, a multilateral treaty presupposes that the involved countries' rules on tax liability and their negotiation preferences are not too dissimilar. This seemed to be the case of the Nordic countries, which meant that the multilateral treaty could be a reality. The treaty was not only mainly built on the OECD Model Tax Convention but did also contain a number of deviations. Some deviations were a result of the countries' particular preferences, for example, Denmark's desire to make the source state eligible to impose taxes on pensions, while other deviations were caused by the fact that a multilateral treaty requires a series of additions that could regulate situations where more than two countries were involved. The Nordic tax treaty was subject to an update in 1989, where the Faroe Island also became included as a contracting party (Rasmussen 1990).

Although Denmark still seemed keen to continuously enlarge its treaty network, the 1980s illustrated an increasing attention to the problems of abuse of the tax treaties. In 1983, the Danish Government appointed a committee with the purpose of trying to investigate the problems of

the so-called exodus of taxpayers from Denmark (*Skatteflugtsudvalget*). The committee's report was published in 1985 and stated—about the tax treaties—that it was still the treaties based on the exemption method which presented the greatest problems (despite the abovementioned amendment to the Valuation of Inventory Act). In this connection, the committee recommended that Denmark should continue its processes of demanding the use of the credit method when negotiating and renegotiating the tax treaties. The committee rightly anticipated that a considerable amount of time would pass by before all the exemption treaties could be changed and thus suggested that internal Danish anti-avoidance rules should be implemented, in order to hinder abuse of the treaties based on the exemption method.<sup>34</sup>

The committee also concluded that some problems of abuse were caused by the lack of Danish source taxation and the use of Denmark as the so-called *stepping stone jurisdiction*. Hence, the committee suggested that the scope of the rules concerning limited tax liability to Denmark should be extended to also cover royalties and possibly interest. Moreover, it was also suggested by the committee that Denmark should introduce domestic rules mitigating the possibility of obtaining a double deduction, Denmark should introduce anti-avoidance provisions and provisions on subsidiary taxing rights in Denmark's tax treaties, and, finally, Denmark should alter some of its tax treaties concluded with low-tax jurisdictions. The committee was attentive to the fact that some of the initiatives would primarily protect other countries from losing tax revenue and also stated that Denmark ought to be “putting its own house in order”, as Denmark demanded the support of other countries in the fight against international tax avoidance and evasion.<sup>35</sup>

As will be apparent later on, some of these initiatives were subsequently introduced in domestic legislation and in Denmark's tax treaties.<sup>36</sup> This happened for example, in connection with the passing of the so-called taxpayer exodus package (*skatteflugtspakken*) which also included rules on exit-taxation of, for example, capital gains on shares and larger pension contributions.<sup>37</sup> Moreover, from

<sup>34</sup> Cf. Betænkning [Government Recommendation] (Den.) no. 1060, 1985, p. 124–127.

<sup>35</sup> Cf. Betænkning [Government Recommendation] (Den.) no. 1060, 1985, p. 127–135.

<sup>36</sup> For details on the development of the domestic provisions concerning companies' limited tax liability to Denmark, see Ferniss (2010).

<sup>37</sup> For more details on the proposed legislative package, see Bjerre-Nielsen (1987).

1985 and onwards, Denmark began to terminate a number of treaties primarily concluded with countries overseas, which had previously been belonging to the United Kingdom or the Netherlands as colonies. In connection with the great decolonization, many of the former colonies had succeeded in the treaties with the United Kingdom and the Netherlands. As some of the jurisdictions had developed into genuine low-tax countries, Denmark chose to terminate these treaties (Grav 1986, Weizman 1994a, p. 77).

In relation to the committee's suggestions concerning the introduction of general anti-avoidance provisions and of treaty provisions entitling Denmark to subsidiary taxing rights, the results appear more meager. Thus, no tradition for introducing general anti-avoidance clauses in the Danish tax treaties arose. Moreover, it did not become common to include provisions in the Danish tax treaties, which would explicitly establish that the states could apply domestic anti-avoidance rules (Bundgaard and Schmidt 2010). However, provisions providing subsidiary taxing rights began to appear in a number of the Danish treaties (Wittendorff 2015).

#### 4.5 The years after the second update of the OECD Model Tax Convention (1992–2002)

In 1992, another new and revised version of the OECD Model Tax Convention with commentaries was published. The changes were, to some extent, based on the initiatives that a series of OECD reports had brought into play in the years before the publishing of the 1992 model. Only few of the alterations concerned the model convention itself. In return, multiple important alterations and additions were made in the commentaries. A couple of the alterations concerned the increasing problems with international tax avoidance and abuse of tax treaties. Additionally, the alterations also concerned, for example, permanent establishment, payments for computer software, leasing payments, employee contributions to foreign pension schemes, non-discrimination, as well as situations on triangular taxation. Moreover, it was an innovative feature that the model with commentaries was published in a loose leaf format in order to enable continuous updating (Wittendorff 1992; Rasmussen 1992).

In connection with the update of the OECD Model Tax Convention with commentaries in 1992, Denmark had taken the opportunity to make a number of reservations to particular articles of the convention, where a deviation would have significant interest for Denmark. To a great extent, these reservations reflected how the Danish negotia-

tion policy already was.<sup>38</sup> In the 1992 model, Denmark inserted a reservation to article 5, concerning permanent establishment, and article 13 concerning capital gains with respect to hydrocarbon businesses. More precisely, the two reservations entailed that Denmark reserved the right to insert specific provisions which prescribed that an enterprise using an installation, a drilling rig, or a ship for investigation of natural resources on another country's territory would constitute a permanent establishment.<sup>39</sup>

With respect to the government-owned airline company, SAS, Denmark—as well as Sweden and Norway—had made reservations in relation to article 8 on international traffic, article 13 on capital gains, article 15 on income from employment, and article 22 on taxation of capital gains. The reservations concerning articles 8, 13, and 15 should indicate that Denmark desired only to make the tax treaties cover the Danish share of an international consortium that ran the international shipping or airline businesses. The reservation for article 15 indicated that in instances where a person was resident in Denmark and would receive remuneration for work conducted on an airline run by SAS in international traffic, the remuneration should be taxed only in Denmark.

Moreover, Denmark had also—in connection with articles 10 and 13—inserted a reservation in regard to the repurchase of shares by an issuing company, as Denmark desired to treat the transfer sum as dividends rather than a capital gain. Finally, and probably most essential, Denmark had inserted a reservation concerning article 18 on pensions, as Denmark desired to allocate the right to tax to the source state. The reason was (and continuously is) that Danish taxpayers' pension payments were deductible pursuant to domestic Danish rules. From a Danish perspective, it was, therefore, important that Denmark as source country could continue to tax the subsequent pension remunerations, as Denmark had suffered the cost of providing the deductions. Also, with respect to social pensions, Denmark desired to maintain the right to tax as source state. Here, the background was that the Danish social pensions were set at a quite high level, in order to take into account that such remunerations are taxable. Accordingly, if these social pension remunerations were only taxed in the domicile state, and the domicile state applied a low tax

<sup>38</sup> For more details on Denmark's negotiation policy before the 1992 model, see Sneum (1990).

<sup>39</sup> For more details on the Danish deviations to the model convention, see Ulstrup (2001). The author also describes how previous Danish treaties have often contained a comprehensive provision about hydrocarbon activities.

rate, or did not impose tax on the given type of income, it would result in a net amount of social pension remunerations which would be above the intended (Ulstrup 2001).<sup>40</sup>

Despite the fact that Denmark, in this period, continuously extended its treaty network, Denmark also focused on renegotiating numerous tax treaties in order to hinder different kinds of tax avoidance. An example hereof was the tax treaty with Ireland, where the parties—after a number of years—reached agreement about a new treaty in 1993. The Danish desire for a new treaty was caused by the fact that Ireland, according to the Danish authorities' treaty interpretation, had the right to tax dividends distributed from companies domiciled in Ireland to shareholders resident in Denmark. As the relief provision in the treaty was based on the exemption method with progression, the result was that dividends from Irish companies were not subject to taxation at all for shareholders resident in Denmark. Combined with the fact that Ireland only imposed a tax of 10% on some financial companies, the overall amount of taxes levied on the Danish shareholders' investments in such companies were thus considered improperly low (Michelsen 1994).

Although the negotiations with Ireland were not at all simple, the relationship between Denmark and Portugal developed even more drastically, as Denmark chose to terminate the tax treaty with Portugal in 1995. The background was a tax planning model that utilized the fact that Denmark had to provide relief after the exemption method with respect to dividend distributions from Portuguese companies and that Portugal had implemented a very generous tax regime on the island of Madeira (Hansen 1994). Accordingly, if a Danish company took a large loan, and on-lent the amount to a subsidiary on Madeira, a situation could arise where the Danish parent company would get a deduction of the interest expenses, the company on Madeira would not be subject to taxation of its income, and the Danish parent company (according to the treaty) could bring home the income of the subsidiary as tax-exempt dividends. The termination could obviously have created some significant fiscal consequences for individuals and companies with cross-border activities between the two

countries, but a solution was not found until 2000, where the countries agreed on a new treaty that, to a great extent, was equivalent to the OECD Model Tax Convention.

However, it was not only through the amendment of tax treaties that Denmark in the period made efforts to prevent abuse. Hence, the period also saw the introduction of new anti-avoidance rules in domestic law, which was added to the legislation that had already been put in place earlier, including the previously mentioned alteration of the Inventory Valuation Act of 1973 and the taxpayer exodus package of 1987. Among other things, in the beginning of the 1990s and onwards, additional anti-avoidance provisions were introduced in order to limit the deductibility on losses of foreign shares in certain situations, secure the recapture of previously deducted foreign tax losses, ensure that only expenses incurred in relation to income taxable in Denmark could be deducted, ensure that income eligible for relief was determined pursuant to a net principle,<sup>41</sup> hinder the exploitation of treaties based on the exemption method in connection to debt financed acquisitions of debt claims and shares, ensure exit-taxation in case of change of domicile, and prevent the depreciation rules from being used to regulate income in foreign permanent establishments and jointly taxed subsidiaries (Michelsen 1999; Wittendorff 2015).

These anti-avoidance rules all had a close connection to the Danish efforts of hindering the abuse of tax treaties. However, in the meantime, Denmark also introduced numerous anti-avoidance rules that did not directly concern abuse of tax treaties but that still had a definite international scope. Prominent examples hereof were the rules on thin capitalization and CFC taxation that were introduced in 1995 and 1998, respectively.<sup>42</sup>

Despite the fact that there are no examples in Danish tax law of the legislator consciously passing a law that entails taxation contrary to Denmark's obligations following from international law, the literature began to discuss whether some of the abovementioned anti-avoidance rules could potentially be contrary to Denmark's obligations following from the tax treaties. In particular, the discussion concerned whether or not the Danish rules on exit-taxation of capital gains on shares were in line with Denmark's obligations. The opinions expressed in the literature were opposing, and the uncertainty caused Denmark to include a provision in a number Danish tax treaties that

<sup>40</sup> With the exception of the reservation to article 18 concerning pensions, all of the Danish reservations are still in place, cf. the OECD Model Tax Conventions with commentaries (2014). Denmark's reservation to article 18 was probably terminated as a consequence of the alterations of the commentaries in 2005 that contained a number of alternatives providing more room for taxation at source. It is thus still Denmark's strict negotiation policy to attempt to ensure that Denmark, as source state, is able to impose taxes on pension remunerations. For more details, see Wiberg (2012).

<sup>41</sup> For more information with respect to the net principle, see Bundgaard *et al.* (2014).

<sup>42</sup> For more information about the origin of these rules, see Tell (2012) and Schmidt (2013).

explicitly declared that Denmark was entitled to levy exit-taxation.<sup>43</sup> Moreover, the discussions primarily concerned whether the CFC rules, and later on, the rules about hiring-out of labor, were contrary to Denmark's tax treaties.<sup>44</sup>

Even though the Danish legislator's efforts in the period, to a great extent, concerned the combating of tax avoidance and abuse, it is worth noting the alteration of the rules on companies' limited tax liability on dividends, which was passed in 1998.<sup>45</sup> The amendment entailed that dividends distributed to foreign parent companies were not subject to limited Danish tax liability, regardless of where the parent company was resident. The amendment was partly caused by administrative difficulties with handling the rules valid at the time and partly caused by a desire to become a more attractive country for foreign investment. The latter actually seemed to become true, as foreign groups and investors began to establish Danish holding companies with the purpose of avoiding other countries' dividend taxation. As a consequence, Denmark received criticism internationally, and in a report from the so-called Primarolo-group, the Danish rules on taxation of outbound dividends were listed as contrary to the code of conduct for business taxation (Council of the European Union 1998). As a reaction to the criticism, the rules were tightened again in 2001.<sup>46</sup>

With the tightening of the rules in 2001, Denmark was back on its previous track, and at the end of the period in 2002, Danish tax legislation contained a significant amount of anti-avoidance rules. However, Denmark's treaty network had again been growing again, and by the end of the period, around 60 genuine tax treaties had been concluded with other countries. Moreover, several tax treaties had been renegotiated in the period.<sup>47</sup> This included a new treaty concluded with the United States in 1999, which replaced the oldest treaty in force at the time (as it went all the way back to 1948), and, for the first time, introduced a *limitation of benefits clause* in a Danish tax treaty (Rasmussen and Bernhardt 2000).

<sup>43</sup> About this discussion at the time of the events, see Michelsen (1996, p. 283–285).

<sup>44</sup> About the discussion on CFC taxation, see Schmidt (2013). For an overview of the latest discussions concerning hiring-out of labor, see Wittendorff (2015).

<sup>45</sup> Cf. SEL 2(1)(c) (Den.), as amended by the adoption of Law no. 1026 of December 23, 1998.

<sup>46</sup> Cf. SEL 2(1)(c) (Den.), as amended by Law no. 282 of April 25, 2001. For more details on the tightening of the rules and the background for this, see Føgh and Vinther (2001) as well as Bjørnholm (2000).

<sup>47</sup> For more details on the new and renegotiated treaties in the period between 1994 and 2002, see Rasmussen (2001).

## 4.6 The period up until today (2003–2017)

Following 1992, the OECD had—as previously mentioned—gone over to more continuous updates of the Model Tax Convention with commentaries. The individual updates will not be discussed here, even though it is worth noting that the OECD, in the 2003 update, took a tougher stand against tax avoidance (Hilling 2016, p. 88–102). As an example, it became explicitly mentioned in the commentaries that tax treaties should also contribute to the prevention of tax avoidance and evasion.<sup>48</sup> Moreover, the commentaries were now more accommodating toward the states' use of domestic anti-avoidance rules. This development was consistent with how Denmark's tax legislation had evolved in the previous years, where a series of domestic anti-avoidance rules had been added to the legislation.<sup>49</sup>

Up until today, Denmark continuously appears to be interested in renewing and expanding its treaty network, and at the time of writing of this article, Denmark has entered into genuine tax treaties with around 70 countries. In addition, Denmark has entered into numerous special agreements concerning the shipping industry and the air transportation industry, as well as an increasing amount of agreements on exchange of information.<sup>50</sup>

Although the tendency still pointed in the direction of a stronger and more comprehensive Danish treaty network, a few obstacles appeared on the way. As an example, Denmark chose to terminate its tax treaties with France and Spain as of 2009.<sup>51</sup> This was a consequence of lengthy negotiations, where the primary disagreement concerned Denmark's demand for access (as source state) to impose taxes on remuneration of private and social pensions. As mentioned above, in general, this issue had been of significant interest to Denmark for many years. However, France and Spain were not prepared to meet the Danish demands, as the pensioners with Danish background was presumed to participate in the social life of the community in the two countries, and in that connection use the infrastructure and public community services and so on. Thus, the result hereof became a termination of the two treaties, and despite criticism in the literature and from the business com-

<sup>48</sup> Cf. the introduction to the OECD Model Tax Convention (2003), para. 7.

<sup>49</sup> For more details on the historical development of the commentaries to the OECD Model Tax Convention, in regard to the use of domestic anti-avoidance rules, see Wittendorff (2015).

<sup>50</sup> For a recent overview, see Askholt (2017). On agreements concerning exchange of information, see Christensen and Buchholtz (2013).

<sup>51</sup> Cf. law no. 85 of February 20, 2008.

munity, today, Denmark has still not entered into new tax treaties with France and Spain (Hansen 2007; Bundgaard and Dyppel 2009).

Finally, it must be mentioned that, in 2013, the OECD launched a project aiming at *countering base erosion and profit shifting* (the BEPS project). This project will influence Danish tax law, including Denmark's tax treaties (OECD 2013, 2014). In connection with this project, the multilateral instrument, which Denmark signed on June 7, 2017, is of particular relevance (OECD 2015). The purpose of the multilateral instrument is to enable flexible alterations in the participating countries' tax treaties in order to avoid having to renegotiate and alter a large number of separate bilateral tax treaties. The alterations, which are covered by the instrument, will primarily address different types of abuse of the tax treaties. More precisely, the instrument consists of a number of alterations that the countries have to ratify if they want to take part (*the minimum standard*), alterations that the countries can make reservations to, as well as alterations that the countries can opt for. Denmark has—to a great extent—made use of the opportunity to make reservations, and thus, the Danish treaties will, at least as a starting point, only be affected by the minimum standard.<sup>52</sup>

## 5 Summary and conclusions

When the Danish Government in 1922 was given the right to conclude tax treaties with other states, the purpose was to protect taxpayers from unreasonable double taxation as well as relieving the burden of taxation for Danish businesses operating abroad. Thus, to a great extent, the underlying motives for Denmark's tax treaties appear to correspond to the motives that had previously encouraged a series of Central European states to enter into the first international tax treaties.

With respect to the content of Denmark's first genuine tax treaty, which was concluded with Sweden in 1932, the two Scandinavian countries seem to have gathered inspiration from the Central European tax treaties. The treaty with Sweden somewhat became the inspiration for the subsequent treaties that Denmark concluded with other neighboring countries in the following years, and it is interesting to see how these early tax treaties contain several

principles that, to a greater or lesser degree, are still valid and present in Denmark's current treaties.

The treaty concluded with the United States in 1948 seems to constitute another milestone in relation to the development of Denmark's tax treaty network, among other things, because the treaty contained a relief provision based on the ordinary credit method. In general, the contemporary opinion seemed to be that the treaty with the United States was complicated, but the US treaty anyway served as foundation when Denmark entered into a treaty with the United Kingdom in 1950. The US treaty, with a few additions from the treaty with the United Kingdom, therefore, seemed to become the basis for Denmark's new, or renegotiated, treaties in the following years.

Even though the finalization of the draft OECD Model Tax Convention in 1962 did not immediately alter the way Denmark concluded tax treaties, it ended up having a significant role, as Denmark has since used the OECD Model Tax Convention as a point of departure for treaty negotiations. Moreover, the period following the creation of the Model Convention was characterized by a considerable expansion of Denmark's treaty network. However, Denmark became increasingly aware of the fact that the treaties could also provide basis for abuse. The introduction of the anti-avoidance rule in the Inventory Valuation Act thus appear to mark the beginning of a new era, where the aim of countering tax avoidance and abuse of tax treaties became of increasing interest. This increasing interest also influenced the Danish negotiation policy, as Denmark has since then—consistently—insisted on including relief provisions based on the credit method.

Altogether, the issue surrounding avoidance and abuse have since attracted great attention, with the *taxpayer exodus package* as one of the more decisive events. Nevertheless, it was not just in domestic law that the problems concerning tax avoidance and abuse were addressed, and Denmark has repeatedly demonstrated a will to protect its tax base, for example, by terminating tax treaties with a number of states overseas in the 1980s and, later, the treaty with Portugal in 1995.<sup>53</sup>

Despite the fact that the problems concerning the abuse of tax treaties has become more in focus since the 1970s, and still is in focus today with the OECD BEPS project, it does not change the general tendency to continuously expand the Danish treaty network. And although Denmark, to some extent, has simply followed in the foot-

<sup>52</sup> Cf. Status of List of reservations and Notifications at the Time of Signature, The Kingdom of Denmark, June 7, 2017, OECD.

<sup>53</sup> The more recent termination of the treaties with France and Spain was not a result of avoidance considerations but was caused by disagreement on the right to tax pensions at source.

steps of others, Denmark has still left some footprints on its own on the international stage, for example, in terms of active participation in the works of the OECD and—not the least—the participation in the World’s first multilateral tax treaty, which were concluded with the other Nordic countries.

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