

**Martin Hearson**

## The UK - Colombia tax treaty: 80 years in the making

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***Sweet & Maxwell***  
**5 Canada Square**  
**Canary Wharf**  
**London**  
**E14 5AQ**  
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# Current Note

## The UK–Colombia tax treaty: 80 years in the making

On 2 November 2016, the UK and Colombia concluded their first double taxation treaty, the Convention between the UK and the Republic of Colombia for the Elimination of Double Taxation with respect to Taxes on Income and on Capital Gains and the Prevention of Tax Evasion and Avoidance (the 2016 Treaty).<sup>1</sup> The bilateral treaty is the 12th Colombia has signed, while for the UK, with the biggest tax treaty network in the world, it was its eighth in Latin America alone.<sup>2</sup> The UK has been the third largest source of foreign direct investment into Colombia over the past 10 years, constituting 10 per cent of its inward investment during this time.<sup>3</sup> In contrast, Colombia ranks at least 54th in destination countries for the UK.<sup>4</sup> Yet it is the UK that has consistently pushed for a tax treaty with Colombia, not the other way around.

The treaty comes at a time when tax treaties between developed and developing countries have become increasingly controversial. An IMF Board paper in 2014 urged “considerable caution” on the part of developing countries,<sup>5</sup> and several developing countries have cancelled, renegotiated or reviewed their tax treaties in recent years.<sup>6</sup> Civil society organisations have also begun to campaign both for a re-balancing of the balance of taxing rights between source and residence countries, and to target particular tax treaties.<sup>7</sup> The development NGO ActionAid, in particular, launched a global campaign with a report entitled *Mistreated: The Tax Treaties That Are Depriving the World’s Poorest Countries of Vital Revenue* and has lobbied at country level for the renegotiation of a number of treaties, including those between Zambia and Ireland, Uganda and the Netherlands, and the UK and Malawi.<sup>8</sup> These developments build on a long-standing body of legal literature that is critical of the tax treaty regime and its effect on developing countries.<sup>9</sup>

<sup>1</sup> Convention between the UK and the Republic of Colombia for the Elimination of Double Taxation with respect to Taxes on Income and on Capital Gains and the Prevention of Tax Evasion and Avoidance. Signed in London on 2 November 2016. This Convention has not yet entered into force. (Colombia–United Kingdom) (2 November 2016).

<sup>2</sup> IBFD, *IBFD Tax Research Platform*, available at: [https://online.ibfd.org/kbase/#topic=d&N=3+10+5302&ownSubscription=true&Nu=global\\_rollup\\_key&Np=1](https://online.ibfd.org/kbase/#topic=d&N=3+10+5302&ownSubscription=true&Nu=global_rollup_key&Np=1) [Accessed 9 August 2017].

<sup>3</sup> Central Bank of Colombia, *Flujo de Inversión Extranjera Directa En Colombia (IED)*, available at: [http://www.banrep.gov.co/sites/default/files/paginas/C2Flujo\\_Paises\\_2007.xlsx](http://www.banrep.gov.co/sites/default/files/paginas/C2Flujo_Paises_2007.xlsx) [Accessed 8 August 2017].

<sup>4</sup> OECD, *International Direct Investment (Data downloaded: August 2016)*. UK Data Service, available at: [http://stats.ukdataservice.ac.uk/index.aspx?DatasetCode=FDI\\_POSITION\\_PARTNER](http://stats.ukdataservice.ac.uk/index.aspx?DatasetCode=FDI_POSITION_PARTNER) [Accessed 8 August 2017].

<sup>5</sup> IMF, *Spillovers in International Corporate Taxation* (2014).

<sup>6</sup> M. Hearson, *Measuring Tax Treaty Negotiation Outcomes: The ActionAid Tax Treaties Dataset* (ICTD Working Paper 47, February 2016).

<sup>7</sup> An early example is K. McGauran, *Should the Netherlands Sign Tax Treaties with Developing Countries?* (SOMO (Stichting Onderzoek Multinationale Ondernemingen/Centre for Research on Multinational Corporations), 2013).

<sup>8</sup> ActionAid, *Mistreated: The Tax Treaties That Are Depriving the World’s Poorest Countries of Vital Revenue* (ActionAid UK, 2016).

<sup>9</sup> T. Dagan, “The Tax Treaties Myth” (2000) 32(939) *Journal of International Law and Politics*; C.R. Irish, “International Double Taxation Agreements and Income Taxation At Source” (1974) 23(2) *International and Comparative Law Quarterly* 292; K. Brooks and R. Krever, “The Troubling Role of Tax Treaties” in G.M.M. Michiels and V. Thuronyi

In the UK, tax treaties are usually ratified by parliament through a statutory instrument that undergoes largely token scrutiny in the delegated legislation committee. The last such hearing, which included an agreement with Senegal, saw the most detailed questioning of an agreement's content, although the eventual approval of the treaty never seemed to be in doubt.<sup>10</sup> A Private Members' Bill brought by Roger Mullin MP last year would have changed this, requiring much more detailed reporting to parliament and imposing a duty to "have regard to reducing poverty overseas in entering negotiations".<sup>11</sup> During the debate on that Bill, Minister of State Jane Ellison welcomed the increased scrutiny, stating that:

"There is also both the power and the precedent for referring treaties to the Floor of the House. That has not been done since 1984, but I would be delighted to discuss any of these on the Floor of the House if Members were moved to bring them forward."<sup>12</sup>

At the time of writing, however, the arrangements for ratification of the UK–Colombia agreement have not been set out.

This particular agreement is no doubt a result of Colombia's recent decision to seek accession to the OECD, as are various other negotiations between Colombia and OECD states. For the UK, however, it represents the realisation of a long-held goal. As civil service files obtained from the National Archives reveal, the 2016 Treaty<sup>13</sup> has a history stretching back 80 years. The UK's many attempts to negotiate with Colombia illustrate both the Inland Revenue's persistence, and also how it was at the mercy, ultimately, of domestic political events in the developing country.

The impasse that was broken by Colombia's OECD accession also demonstrates the importance of a critical area of disagreement between developed and developing countries: the imposition of withholding taxes on management, consultancy and technical service fees. The new edition of the UN Model Tax Treaty due to be launched later in 2017 introduces a new clause permitting the inclusion of such taxes, but only after years of wrangling among committee members. This is an area that has, in the past, created problems for negotiations between the UK and developing countries.<sup>14</sup>

## The early years

The UK's first approach to Colombia was for a limited double taxation agreement covering profits from international transport, such as it subsequently concluded with Argentina, Brazil and Venezuela, among others. According to a pessimistic note by an Inland Revenue official

(eds), *Tax Design Issues Worldwide* (Kluwer Law International, 2015); D. Paolini, et al., "Tax Treaties with Developing Countries and the Allocation of Taxing Rights" (2016) 42 *European Journal of Law and Economics* 383; V. Thuronyi, "Tax Treaties and Developing Countries" in M. Lang, et al. (eds), *Tax treaties: building bridges between law and economics* (IBFD, 2010).

<sup>10</sup> Draft Double Taxation Relief and International Tax Enforcement (Senegal) Order 2015, *Hansard*, Fourth Delegated Legislation Committee, Deb, cols 9–16 (21 October 2015).

<sup>11</sup> Double Taxation Treaties (Developing Countries) Bill (HC Bill 16) (2016–7) 56/2.

<sup>12</sup> *Hansard*, HC, Deb, Vol 618, col 1146 (16 December 2016).

<sup>13</sup> The 2016 Treaty, above fn.1.

<sup>14</sup> M. Hearson, "The UK's Tax Treaties with Developing Countries during the 1970s" in P. Harris and D. de Cogan (eds), *Studies in the History of Tax Law* (Oxford: Hart, 2017), Vol.8.

written 50 years later, this approach was made “as far back as 1937 ... But this and subsequent approaches have met with no positive response.”<sup>15</sup> British Airways and the General Council of British Shipping (GCBS), the main beneficiaries of such a limited agreement, both indicated over the years their enthusiasm for such an agreement with Colombia.

The first evidence in the National Archives of an attempt at a comprehensive income tax treaty is a letter dated 21 January 1957 from a D.G. Daymond of the Board of Inland Revenue, in response to an earlier letter from a Foreign Office official.<sup>16</sup> That letter had brought with it “the encouraging news that the atmosphere in Colombia might soon be more propitious for double taxation agreement negotiations”.<sup>17</sup> Daymond explained that his swift and positive reaction to the news was in part because

“for years we have been unsuccessfully trying to conclude an agreement with a South American country without any success ... This is, therefore, the only area of the world, apart from the countries behind the Iron Curtain, in which we have made no progress.”<sup>18</sup>

Daymond continued that, “in general, these countries are capital importing countries, and they have always taken the line that so far as the flow of income is concerned the balance of advantage in a double taxation agreement is always on our side”,<sup>19</sup> a position with which the UK, naturally, disagreed. Daymond observed that, “the conclusion of a double taxation agreement goes a long way towards establishing a suitable climate for foreign investment”,<sup>20</sup> which should compensate for any tax revenue lost.

The Inland Revenue’s draft double taxation agreement was despatched to the British Embassy in 1957, with a request to “approach the Colombians concerning an agreement”.<sup>21</sup> There the Foreign Office file documenting these early attempts ends, possibly because the country’s military dictatorship was overthrown later that year. In a letter from the High Commission to the Inland Revenue some years later, reference is made to “a letter of ours, dated 10 March 1961, on file which talks about ‘the possibility of re-awakening the interest of the Colombian government in a double taxation agreement.’” As a result, states the author, “I must confess that I find this to be a very depressing subject.”<sup>22</sup>

## The 1980s

Some possibility of opening negotiations was apparently expressed as early as 1982, but deferred due to ongoing reforms to Colombia’s tax system. By September 1983, when Paul Channon, Minister of State in the Department of Trade and Industry (DTI) visited Bogota, “the Colombian

<sup>15</sup> Letter of 6 August 1985 from Allen (Inland Revenue) to Donaghy (General Council of British Shipping) (National Archives file IR40/17808) (Letter from Allen to Donaghy).

<sup>16</sup> Letter of 21 January 1957 from Daymond (Inland Revenue) to Honeyford (Foreign Office) (National Archives file FCO317/126504) (Letter from Daymond to Honeyford).

<sup>17</sup> Letter from Daymond to Honeyford, above fn.16.

<sup>18</sup> Letter from Daymond to Honeyford, above fn.16.

<sup>19</sup> Letter from Daymond to Honeyford, above fn.16.

<sup>20</sup> Letter from Daymond to Honeyford, above fn.16.

<sup>21</sup> Letter of 12 February 1957 from Hanky (Foreign Office) to Joint (Foreign Office) (National Archives file FCO317/126504).

<sup>22</sup> Letter of 28 January 1986 from R. James (Foreign Office) to A. Pardoe (Inland Revenue) (National Archives file IR40/17808).

Vice Minister of Finance and Public Credit indicated that Colombia would be interested” in a double taxation treaty.<sup>23</sup> This positive news was followed by remarks by the Director of the Colombian Department of National Planning in May 1984 in a meeting with British officials, to the effect that “Colombia now wishes to negotiate seriously with the UK on a double taxation agreement.”<sup>24</sup> A memo following that meeting observes that “the Inland Revenue would also wish to break into South America”.<sup>25</sup>

In August 1984, the British passed a draft convention to the Colombians with the intention of opening discussions. The UK’s proposed draft was surprisingly generous in comparison to the OECD Model Treaty in two areas. On the taxation of royalties, where the OECD Model prohibits any source taxation, “we prefer to extend limited rights to the country of source as being a more realistic approach in dealing with developing countries”, according to an explanatory note from the Inland Revenue.<sup>26</sup> Perhaps more importantly, in the area of management, consultancy and technical service fees, which were not mentioned in the OECD Model and thus could not be taxed at source through a withholding tax: “Our current practice with particularly source-minded countries, as in South America, is to include such an article in our initial draft.”<sup>27</sup> The UK’s opening position thus offered Colombia the possibility of a treaty that would leave more of its taxing rights intact than might have been expected.

A year later, the staff at the embassy wrote back to the Foreign & Commonwealth Office (FCO) that, “we have heard nothing further from the MFA [Colombian Ministry of Foreign Affairs] ... the reality of the matter is that the Germans have made no more headway than we have”.<sup>28</sup> The Inland Revenue adopted a pessimistic view, with officials stating that: “The Colombians have since indicated that they are not yet ready to begin talks and we are at present uncertain of their intentions.”<sup>29</sup>

Part of the problem here was apparently Decision 40 of the Community of Andean Nations (CAN), of which Colombia was a member. Decision 40 was a multilateral tax treaty between the CAN Members, which also included Bolivia, Chile, Ecuador and Peru.<sup>30</sup> As well as applying among its Members, the CAN treaty bound its Members to be “guided” by a standard agreement in tax treaty negotiations with Members outside the community, and to consult with other CAN Members before signing such treaties. Both the CAN multilateral treaty and the standard bilateral agreement gave exclusive taxing rights to the country of source for most types of income, creating a fundamental incompatibility with the OECD Model Treaty. Natalie Quinones Cruz observes that by the 2000s, “none of the other Members had applied it in their treaties and it was a known fact that most OECD Member countries would not even consider the CAN Model as a reference for negotiating a bilateral treaty with Colombia”.<sup>31</sup>

<sup>23</sup> Anonymous, undated note (National Archives file IR40/17808) (Anonymous, undated note).

<sup>24</sup> Anonymous, undated note, above fn.23.

<sup>25</sup> Anonymous, undated note, above fn.23.

<sup>26</sup> Letter of 17 August 1984 from Allen (Inland Revenue) to Greaves (Foreign & Commonwealth Office (FCO)) (National Archives file IR40/17808) (Letter from Allen to Greaves).

<sup>27</sup> Letter from Allen to Greaves, above fn.26.

<sup>28</sup> Letter of 23 July 1985 from James (FCO) to King (FCO) (National Archives file IR40/17808).

<sup>29</sup> Letter from Allen to Donaghy, above fn.15.

<sup>30</sup> Andean Community Decision 40 of 1971, which was replaced by decision 578 of 2004. Chile is no longer a member.

<sup>31</sup> N. Quinones Cruz, “Colombia” in M. Lang, P. Pistone and J. Schuch (eds), *The impact of the OECD and UN model conventions on bilateral tax treaties* (Cambridge: CUP, 2012), 295.

Pressure from shipping and airline companies is quite apparent at this time. In June 1985 the GCBS wrote to the Inland Revenue enquiring about progress, the reply indicating that: “For our part we are keen to start talks, whether on a limited or comprehensive agreement, whenever the Colombians are ready and of course if there are any developments we will keep you informed.”<sup>32</sup> In a further exchange of letters in December, the Inland Revenue wrote again to the GCBS that:

“As you know, we are not making much progress in getting talks going with the Colombians on a comprehensive agreement ... there might perhaps be some scope for a limited agreement covering shipping and air transport. We shall have some soundings made through the embassy in Bogota but I would not wish to raise false hopes as experience suggests that the Colombian Ministry of Finance are not keen on double taxation agreements at present.”<sup>33</sup>

British Airways, too, were interested in some form of agreement, according to a note of a telephone conversation, in which their head of tax

“said they would be interested in having the protection of a DTA vis a vis Colombia. I said we would consider an approach but warned that past experience was not encouraging. Colombia had in the past expressed an interest in a DTA from time to time but whenever we responded positively the Colombians had subsequently back-tracked, giving one excuse or another.”<sup>34</sup>

The matter was raised with the British embassy in Bogota, and according to a note some years later, “in 1988 we were told our draft still presented legal problems which would require domestic legislation to resolve”.<sup>35</sup>

## The 1990s

By May 1992, the UK had successfully broken its Latin American duck, having opened negotiations with Mexico and Venezuela, and would eventually conclude agreements with these two countries as well as with Argentina and Chile (Table 1). According to the DTI:

“One further priority is Colombia, which is one of our most promising markets in Latin America (BP have invested and are about to invest significant amounts in the energy sector following their large oil find at Cusiana; there are many other investment opportunities in this and other sectors.)”<sup>36</sup>

**Table 1: UK tax treaties with Latin American countries<sup>37</sup>**

Treaty partner	Year signed
Mexico	1994

<sup>32</sup> Letter from Allen to Donaghy, above fn.15.

<sup>33</sup> Letter of 31 December 1985 from McGivern (Inland Revenue) to Donaghy (General Council of British Shipping) (National Archives file IR40/17808).

<sup>34</sup> Anonymous, handwritten note of 15 July 1985 (National Archives file IR40/17808).

<sup>35</sup> Crozier (Home Office), *Investment Promotion and Protection Agreements (IPPs)* (undated) (National Archives file IR40/17808).

<sup>36</sup> Letter of 8 May 1992 from anonymous (DTI) to Shepherd (Inland Revenue) (National Archives file IR40/17808).

<sup>37</sup> *IBFD Tax Research Platform*, above fn.2.

Treaty partner	Year signed
Bolivia	1994
Venezuela	1996
Argentina	1996
Chile	2003
Panama	2013
Uruguay	2016
Colombia	2016

In 1992, Prime Minister John Major visited Colombia, where “President Gaviria asked that a double taxation agreement be concluded. The Prime Minister said that we would give this favourable consideration.”<sup>38</sup> The matter was discussed in a subsequent meeting with the Chair and Chief Executive of BP, in which one of the participants indicated that “because of the small size of the Colombian bureaucracy they would look to us for help in drawing up, for instance, the double taxation agreement”.<sup>39</sup> A draft agreement was swiftly despatched, with the covering note from the Inland Revenue stating: “We understand that the Colombians will be looking to us for help in drawing up the eventual agreement. To this end I have appended to each draft a note explaining certain provisions to it.”<sup>40</sup>

An Inland Revenue note from July 1992 records that:

“The 1992/3 Treaty Network Overview served to illuminate the intense commercial interest in Latin America ... Colombia is a lower order priority and we discussed this informally the other day. Since the Prime Minister’s visit it has climbed a bit in political significance.”<sup>41</sup>

The last record in the Inland Revenue file is a letter from a Senior Tax Manager at BP noting that: “I understand that negotiations are likely to be delayed until 1993.”<sup>42</sup> In addition to BP, however, it seems that the shipping industry was still anxious to obtain some form of agreement with Colombia. A follow-up letter from the GCBS after a meeting with the Inland Revenue in October 1992 concludes that:

“Developments towards conclusion of a treaty with Columbia [sic] were most encouraging. As I mentioned, British shipowners are currently experiencing serious difficulties with regard to the interpretation of the income tax regulations by the authorities.”<sup>43</sup>

<sup>38</sup> Memo, undated, from Lawson (Inland Revenue) (National Archives file IR40/17808).

<sup>39</sup> Anonymous, *Meeting between the Prime Minister and the Chairman of BP* (16 July 1992) (National Archives file IR40/17808).

<sup>40</sup> Letter of 29 July 1992 from Fawcett (Inland Revenue) to Boyles (FCO) (National Archives file IR40/17808).

<sup>41</sup> Shepherd (Inland Revenue), *Aide Memoire — Latin America* (14 July 1992) (National Archives file IR40/17808).

<sup>42</sup> Letter of 23 November 1992 from Whitear (BP) to “International Division” (Inland Revenue) (National Archives file IR40/17808).

<sup>43</sup> Letter of 7 October 1992 from Udall (GCBS) to Shepherd (Inland Revenue) (National Archives file IR40/17808).



## The 2000s to the present day

The 1990s were a tumultuous time for Colombia, and the Gaviria administration was replaced by the scandal-plagued Samper administration in 1994. It was not until the election of President Álvaro Uribe Vélez in 2002, and his subsequent decision to begin negotiations “after a long period of non-treaty policy implemented under the philosophy of protecting the Colombian tax base” that discussions could really begin.<sup>44</sup> Beginning with Spain in 2005, Colombia now has nine bilateral tax treaties in force (Table 2), and a similar number currently under negotiation.

**Table 2: Colombian tax treaties currently in force<sup>45</sup>**

Treaty partner	Year signed	Royalties MFN?
Spain	2005	Royalties and technical services
Chile	2007	Technical services only
Switzerland	2007	Royalties and technical services
Canada	2008	Technical services only
Mexico	2009	Technical services only
Korea	2010	No
Portugal	2010	Technical services only
India	2011	No
Czech Republic	2012	Technical services only

It should be noted that, at this time, Colombia’s negotiating approach was far from strategic. The source-based CAN Model having been deemed unrealistic, Colombia opened negotiations with Spain before it had formulated its own Model to guide negotiations. It did subsequently develop its own Model, which combined elements from the OECD and UN Model treaties, but as Natalie Quinones Cruz describes: “In view of the negative response from its trade partners, the Colombian Model was abandoned and negotiations were undertaken using the OECD Model or the trade partner’s model.”<sup>46</sup>

The newfound Colombian flexibility and willingness to negotiate had one problematic red line: the ability to levy withholding taxes on “payments received as consideration for the furnishing of technical assistance, technical services and consulting services” (hereafter “technical service fees”).<sup>47</sup> All Colombia’s treaties in force, perhaps most importantly its first treaty with Spain, include such provisions within Article 12, the royalties article, by expanding the definition of royalties to include technical service fees. To obtain this concession, Colombia had agreed to most favoured nation (MFN) clauses within its royalty provisions, and seven of its agreements in force contain such clauses. Those in the agreements with Spain and Switzerland are the most expansive, covering all royalties and technical service fees, as in the case of its agreement with Spain, which states:

<sup>44</sup> Quinones Cruz, above fn.31.

<sup>45</sup> *IBFD Tax Research Platform*, above fn.2.

<sup>46</sup> Quinones Cruz, above fn.31, 295.

<sup>47</sup> Convention between Canada and the Republic of Colombia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital 2008, Art.12.3.

“In case of Colombia, if after the signature of this Convention it is agreed with a third State to a tax rate on royalties lower than the one established in Article 12 of this Convention, then this rate taxation shall automatically apply to this Convention and it shall have effect as from the date when the provisions of the Convention signed with this third State become effective.”<sup>48</sup>

The other five MFN clauses are more specific, limited to taxes on technical service fees, for example in the agreement with Mexico:

“If after signing this Convention, Colombia agrees with a third state a tax rate on royalties applicable to payments for technical assistance and technical services which is less than that provided in Article 12 of this Convention, or characterise such payments to be of a nature different from royalties, the new tax rate or the nature shall automatically apply under this Convention as if expressly provided for therein and shall take effect from the date of effect of the agreement with the third state.”<sup>49</sup>

If Colombia concluded any treaty that placed greater restrictions on its ability to tax technical service fees paid to residents of the new signatory, the more generous provisions would therefore also apply to the residents of most of its existing treaty partners, making this a much bigger concession.

At the same time as the MFN clauses reduced Colombia's room to manoeuvre, policy on the British side was also becoming more inflexible. The UK has not concluded a treaty that permits withholding taxes on technical service fees since its agreement with Botswana, signed in 2005, and it is understood that since this agreement it has not been willing to conclude tax treaties that include such clauses. None of its agreements with Latin American countries permit them, apart from its 1996 agreement with Argentina, which permits withholding taxes on payments for “the rendering of technical services”.<sup>50</sup> The only terms on which Colombia could reach agreement with the UK would therefore effectively eliminate its ability to tax service fee payments to residents of its other treaty partners as well. As recently as 2012, Quinones Cruz observes that:

“This position has created significant conflicts in the negotiation of treaties with major trade partners such as the UK and the USA ... Colombia has been unable to resume negotiations with the UK or the USA, and with any other country that will refuse to include consulting and technical services in the definition of ‘royalties’.”<sup>51</sup>

In 2013, Colombia formally began the process of accession to the OECD.<sup>52</sup> As part of this process, technical reviews of its policies in areas of relevance to the OECD, including international

<sup>48</sup> Convention between the Republic of Colombia and the Kingdom of Spain for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, 2005.

<sup>49</sup> Convention between the Republic of Colombia and the United Mexican States for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, 2009.

<sup>50</sup> Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital 1996.

<sup>51</sup> Quinones Cruz, above fn.31, 301.

<sup>52</sup> OECD Council, *Roadmap for the Accession of Colombia to the OECD Convention* (Roadmap) (adopted by Council at its 1285th session on 19 September 2013) C(2013)110/FINAL.

taxation, were undertaken. Colombia currently sets out a formal position on Article 12.2 of the OECD Model Treaty, in which it “reserves the right to include payments received for the furnishing of technical assistance, technical services and consulting services within the definition of royalties”.<sup>53</sup> As an OECD Member, however, it will be required to comply with OECD standards on a range of tax areas, including: “Eliminating international double taxation on income and capital through complying with the key substantive conditions underlying the OECD Model Tax Convention.”<sup>54</sup> That this precludes any insistence on levying withholding taxes on technical service fees is indicated by the fact that no OECD Member expresses such a reservation on Article 12 of the OECD Model.

Colombia’s agreement with France<sup>55</sup> is the first to prevent all source taxation of management fees, and, while it is not yet in force, it is reasonable to conclude that it will trigger the MFN clauses in all of Colombia’s tax treaties apart from those with India and Korea.<sup>56</sup> The agreement signed with the UK therefore does not break new ground on this matter; it is merely consistent with what has de facto become Colombia’s tax treaty negotiating practice. The domestic withholding tax rates on technical service fees and some other forms of payment in Colombia are also set to be reduced from as high as 33 per cent to 15 per cent, meaning that this particular treaty benefit, while still significant, is less important than it would have been in the past.<sup>57</sup>

## Conclusion

The demands of OECD membership, combined with the unusually liberal use of MFN clauses during an era of less-than-strategic negotiation, seem to have backed a country once insistent on a “red line” over technical service fees, and before that sceptical of accepting the limitations on its taxing rights that come with a tax treaty, into a corner. Having been constrained in its negotiating position by the pro-source taxation stance of the Andean community, Colombia now finds itself pulled in the other direction by the OECD. Is this further proof that the world is moving inexorably towards an OECD-type tax system? The gradual but steady expansion of the OECD, given a fillip most recently by the announcement that Brazil would begin accession talks,<sup>58</sup> might lead us to such a conclusion. In contrast, however, the continued expansion in the use of the technical service fees Article by developing countries,<sup>59</sup> together with its imminent introduction into the UN Model Treaty, point towards a growing divide between states on this topic.

The long history of negotiations between the UK and Colombia perhaps demonstrates more than anything the extent to which the tax treatment of international transactions today is a product

<sup>53</sup> OECD, *Model Tax Convention on Income and on Capital: Condensed Version* (OECD Publishing, 2014), 477.

<sup>54</sup> OECD Council, Roadmap, above fn.52, 12.

<sup>55</sup> Convention between the Government of the French Republic and the Government of the Republic of Colombia for the avoidance of double taxation and the prevention of fiscal evasion and fraud with respect to taxes on income and on capital, 2015.

<sup>56</sup> C. Hoyos, “Colombia May Have to Grant Most-Favoured-Nation Treatment to Some Foreign ‘royalties’ as Double Tax Treaty (DTT) with France Comes into Force”, *Kluwer International Tax Blog*, 2016.

<sup>57</sup> Congress: Law 1819 of 2016, adopting the structural tax reform bill approved on 23 December 2016.

<sup>58</sup> Reuters, “Brazil Is Seeking to Join the OECD Despite Its Political Crisis”, *Fortune*, 31 May 2017.

<sup>59</sup> W. Wijnen, J. de Goede and A. Alessi, “The Treatment of Services in Tax Treaties” [2012] *Bulletin for International Taxation* 27; Hearson, above fn.6.

of historically specific events. Each side's positions changed radically over time, from a refusal to accept each other's terms to a willingness to concede them outright. The UK's constant enthusiasm for a treaty with Colombia stands in contrast with the latter's oscillation between hot and cold. If Colombia turns cold again, however, it will be left with a fossilised relic of its negotiating position in 2016. Given the rarity with which tax treaties are terminated or their terms substantially renegotiated, treaty networks are collections of these fossils. Hence Colombia is stuck with its MFN clauses, regrettable outcomes of its negotiating spree in the 2000s. The biggest irony, however, is reserved for the UK. Despite its apparent willingness in the 2000s to forgo a treaty with Colombia over withholding taxes on technical service fees, Britain retains, as a legacy of its negotiations from 1973 until the turn of the century, the largest number of treaties of any OECD Member containing just such a clause. <sup>☞</sup>

**Martin Hearson\***

<sup>☞</sup> Colombia; Double taxation treaties; Income tax; Legal history; Most favoured nation treatment; Tax evasion  
\*Fellow in International Political Economy, Department of International Relations, London School of Economics and Political Science.