The history of international tax treaties from the UK perspective (15th November 2023)

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Abstract

The first tax treaty of the United Kingdom, dating back to 1872, concerned the regulation of double taxation, for inheritance tax purposes, for British citizens residing in the Canton of Vaud (Switzerland). The real development of the law of tax treaties occurred after the First World War, with the contribution of the League of Nations. However, the United Kingdom, despite its active participation in the organization, opted in the 1920s and 1930s for a different tax policy to the one recommended. Only after the Second World War, under pressure from the United States, the United Kingdom was asked to grant greater access to British markets. This led to the signing of the first tax treaty. From 1946, the United Kingdom launched a massive campaign to negotiate tax treaties, involving former colonies that had become independent and European countries, collaborating with the then OEEC and with the OECD.

Keywords: tax treaty; United Kingdom; League of Nations; Second World War; OEEC; OECD.

[Prof. Marino]

It is a great honor to have Philip Baker, from London, here, in the University of Milan for a few hours. Philip is a guru of tax treaties and cross-border tax, he is a barrister in the United Kingdom, as well as a visiting professor at the Oxford University, research fellow at the Institute of Advanced Legal Studies at the University of London. But I will simply say that he is the best actor that the international tax stage has ever had. And you will discover why, you will discover it. Because it's a mix of teaching, acting in a sort of Shakespearean flavor. But I want to leave the surprise to you. He plays many roles, especially in the field of taxpayer rights. Today, he will play the role of a descendant of Sir Josiah Stamp who was one of the four economists in drafting the famous masterpiece that I showed you all the time. By the way, Sir Josiah Stamp was the economist who drafted the first draft of the report, and then he delivered the first draft to the other economists. And by the way, Josiah Stamp was a professor at the London University where Philip is a research fellow. So, I think that I only have to leave him the floor for this evolution of the tax treaties from the UK perspectives, and we will then match his perspective with the perspectives we already hear from Peter Essers, and then we'll hear next week from Guglielmo Maisto, and then the circle will be closed. So, Philip, thank you very much again for joining us for this short afternoon, but better than nothing, so the floor is yours, thank you very much indeed.

[Prof. Baker]

Thank you, Prof. Marino, for the invitation to come here. I've been asked to talk about the history of international tax treaties from the UK perspective, particularly to focus on the fact that this is 100 years since the report for the League of Nations that really started the whole development of modern international tax law, and particularly to talk about the British member of the four economists, Sir Josiah Stamp. And as you quite rightly said, it was Stamp and Seligman, who did all the work, I have to tell you, Einaudi didn't do any work. Einaudi was in the Senate in Rome, and he was playing politics there. So, it was actually left to others that did a lot of the writing, and Einaudi he just signed, I think, at the end of the day. When I teach history of international tax to my students, I always say, do any of you recognize the name Einaudi? And I have Italian students, and often they say, yes, he's a composer, and a musician. And I say no, no, not that one. The grandfather, who was, of course, effectively the first president. He was technically the second president. But he was effectively the first real president of Italy after the war. So very, very famous people. I'm going to try and cover quite a bit, I'm going to start by talking about what I call the pre-history of UK tax treaties. So, even before we were born, before I was born, before the First World War, then I talk about the period of the League of Nations between 1919 and 1945. And then the UK treaty policy between the two World Wars, because we had a very unusual policy. During that period of time in the United Kingdom, we were not following the policy of other countries like Italy, and I'll explain that. Then I will talk about the UK-US Treaty of 1946, which was probably one of the most important tax treaties in the history of taxation. And then a little bit about the 1950s, and the so-called colonial arrangements in the UK. Then coming closer to time, I'm going to talk about the OECD, and the UK's involvement. And then the UK's involvement with the UN and developing countries, finally coming to our current network of tax treaties, because I have to say things here, one thing here. In the United Kingdom, we are not very good at playing football, we are not very good at playing cricket, we are not very good at economics, we're terrible at politics. But the one thing we are good at is negotiating tax treaties. We still have the largest network of tax treaties of any country in the world. Somebody recently from the Netherlands said maybe they're catching up, but I think we're still ahead. And then finally at the end, I'll talk about implementation and interpretation. That's the overall coverage of what I'm here to say, so that's the history from 1872, up to what year is it now? 2023. Still this year.

Let me start then with pre-history. We normally think about tax treaties, towards the end of the 19th century, many people say the first real tax treaty was in 1899, and it was between Austria Hungary and Prussia. But actually there were a few tax treaties before that. And we had our very first tax treaty actually in 1872 which is very, very early. It's possibly one of the first ever tax treaties concluded by any country. And it wasn't an income tax treaty. It was a death duties treaty, taxes on death, when somebody died, there was a tax paid on the amount of property that they owned when they died. And the problem that has arisen was that some English people went to live in Switzerland, in the Canton of Vaud, which is where you've got towns like Lausanne, and Montreux, and Montreux always attracted a lot of English people. And they went there, and they died. And then when they died, the Swiss Canton imposed death duties and the UK imposed death duties as well. So, there was double taxation, because the person died living in the Canton of Vaud, but they owned property in the UK. And our very first tax treaty was between the UK and not with the whole Switzerland, just with the Canton of Vaud, just with one Canton in Switzerland. Maybe English people didn't go to live in Geneva, maybe they didn't go to Bulle, maybe they didn't go to Zurich, but they went to Vaud and died there. And so, we had an issue that the treaty was quite unusual because apparently, the UK revenue knew nothing about it. It was negotiated with the diplomats in the Foreign Office, and the Treasury, the tax people didn't know anything about it. Until suddenly, in the 1950s, they got a request from the Swiss tax authorities saying, may we terminate this treaty. And the British tax authorities said, what treaty? We didn't know we had a treaty. And they said, yes, you've got this treaty since the 1870s. And from time to time, people are making claims under the treaty. And the tax authorities apparently knew nothing about it. And the finale, I've been to the British National Archives, and there's a file that is dealing with the termination of the treaty. And truly, they get a letter from a lawyer saying, my client has died in Montreux, and I want him to benefit from the treaty. And the British say, what treaty? And then the Swiss come along and say, oh, well, we've had this treaty, but we want to terminate it. So, it was terminated in, as I say, vaguely comical circumstances. If you want to read about it, Sunita Jogarajan wrote a whole Article in the British tax review on the conclusion and termination of the first double taxation treaty because it was the first ever tax treaty between two countries. And the tax people knew nothing about it, only the diplomats knew about it. So, it's not that significant, unless you happen to be a British person, die in Montreux. But we did have at least one treaty at a very, very early time in 1872, which would make it much earlier than any other tax treaties. The real start of tax treaties, as you know, started after the First World War, when the League of Nations was set up. Before the First World War, many countries did not have taxes on income, or if they had it, the tax was very low. Often, it was only on local land, or local businesses. And so, the problems of double taxation were not that great. Before the First World War, there was little discussion in the United Kingdom about the problem of double taxation. Frankly, it wasn't a great problem, the rates of tax were very low, less than 5%. So, if you paid 5% in two countries, you know, that's less than 10% in total, it's not going to stop you from investing across countries. That changed during the war. The rates of tax went higher and higher, about 50% in some countries to pay for the war, countries like the United States, France that didn't have income taxes. Previously, they introduced income taxes. The taxes were extended to worldwide profits. And so, the problem of double taxation was much more serious as the result of the war. There was a financial conference in Brussels, just after the First World War, to discuss, amongst other things, problems of international taxation.

So, as you know, the Brussels economic conference after the First World War considered the issue of double taxation, and the whole question was referred to the financial commission of the League of Nations. The League of Nations initially had a financial commission, and then they set up a fiscal commission to deal with tax matters in the 1920s. The United Kingdom was involved with the League of Nations right from the very beginning. The UK sent delegates to these meetings, and regularly participated. And again, when I have time to do research, one of the things I like to do is to look at the archives of the League of Nations which is in Geneva. I go to Geneva to meetings of the UN committee of experts. There's a big library in the building, and just up a little line of stairs, there is the archive of the League of Nations. And I remember about 20 years ago, going up to the archive and asking the archivist, do you know anything about the fiscal commission? And the archivist said never heard of the fiscal commission, let me look and see. And he found that they had boxes of documents from the fiscal commission. And when you look at them, the documents are fascinating because they're things like telegrams from the UK representative to the secretary to the fiscal commission saying I'm coming by train to the meeting in a week's time, and I'm bringing my golf clubs with me, can we go and play golf together? Or I'm coming and I'm bringing my wife, can we go to do some visits on Lake Geneva? It's lots of sort of little personal stuff, including personal stuff of the four experts. That's how I know that Einaudi, for example, wrote that he was too busy as a senator. They never had a meeting of the four experts because Einaudi was too busy in Rome to actually travel for a meeting. So, the four of them never actually met, they all did it by correspondence. And as you know, the League of Nations decided that they needed to have the advice of four fiscal economists on the problem of Double Taxation and Fiscal Evasion. That's the title of their report and they were asked to prepare a report. And they came up with this proposal for relieving double taxation. You know who the foreign economists are. I'm going to talk a little bit then about the British economist, Sir Josiah Stamp. He's not a hero of mine, because he clearly had defects in his character. But he's a very interesting person, Josiah Stamp. He was actually born quite near where I was born. I have his birth certificate, you can get it from the registry, I should have brought it with me. He was born in the area of London, North London, quite near to the Lord's Cricket Ground. If you're into cricket, and you think about Lord's Cricket Ground, his family lived about 200 yards from the cricket ground. The family was not a very wealthy one. The family ran a small shop near where I went to school when I was a little boy. And he didn't come from a very wealthy, nor really from a very poor family, very much sort of middle-class family. He left school at, I think, 16 or 17, and he joined the UK revenue service as the most junior, right at the bottom of the revenue service as an outdoor clerk, basically a messenger boy, sort of running messages. But he was obviously very clever, and quite ambitious, and quite interested in improving himself. At that time, this is the end of the 19th century, lots of opportunities for people to improve themselves by studying, joining discussion groups, and he studied as an external student at London University. I don't know whether you have that in Italy. But apart from being an internal student, where you actually come into lectures, you can be an external student, where you go to libraries, you read books for yourself, and then you take exams. And if you pass, then you get a degree from London University and London had that, partly because of the British Empire. There were many parts of the British empire where there were no universities. If you wanted to study for a degree in India, there was a university in India, but people could study for a London University degree, pretty much anywhere in the world. You still could do this. You could register in Milan to do a London University external degree and Josiah Stamp decided to do an external degree in economics. He was obviously successful because he then went on to become a research student at, I think, it was King's College London, and was obviously successful, he got his doctorate, and then he became ultimately a professor at King's College in London as well. I think he was also involved with the London School of Economics. That's all from his own studies, you know, he left school at 16, or 17, never went to university. And all the time while he was working for the revenue authorities, he was studying in his part time. So, he's clearly a very ambitious person.

He worked for the revenue authorities, and he got more and more senior until he became the secretary to the board of Inland Revenue. The Board of Inland Revenue collects all the taxes, they are responsible for collecting taxes, the secretary to the Board is the most senior civil servant working with the Board. And that was really hard to get to the absolute top there. And that was as high as he could get as a civil servant. So, he left the civil service, and he joined a company which became, through parts of amalgamation, part of a huge chemical company, ICI Imperial Chemical Industries, and he was a member of the Board of ICI. He became one of the members of the board of governance of the Bank of England. This is a very senior position as an economist in the Bank of England. He achieved the huge amount during his lifetime which I find a bit difficult. In the 1930s, he began to admire fascism. There were people around Europe who looked at Italy, looked at Germany, looked at Japan, and they thought that fascism was an attractive political doctrine. And he had a little flirtation with fascism for a time there, which is a sort of a defect, shall we say? He was killed during the Second World War by a German bomb. The bomb from a German bomber fell on his house where he was living, killed him and destroyed all his reports as well, which is why we don't have significant records about Josiah. So, an interesting man, va self-made man who studied for himself but with these sorts of defects.

Stamp was the British representative. He did participate in the main work, as you said, he prepared the first draft. He and Seligman had been in correspondence for many years. They knew one another quite well, because Seligman was the professor of fiscal economics at Columbia University and had also came from a banking background. Stamp was at London University, and so they corresponded with one another, so a lot of their thinking underlays the report of the four economists, and really it's the two of them who did the main work in producing the report. You will know that the report came out 100 years ago from the four economists. Meanwhile, the League of Nations had decided that they needed another committee, not just the four economists who were theoretical experts, they needed technical experts, people who worked in the tax authorities, and who had dealt with these questions in practice in order to resolve questions of double taxation. And the Committee of technical experts invited tax authorities from members of the League of Nations, and the United Kingdom sent a technical expert. The UK was involved in the work of the League of Nations right the way through. In every meeting, if you look at the list of people who attended, there is always somebody, usually a senior official from the Inland Revenue in the UK, attending those meetings, right the way through to the very last meeting of the League of Nations Committee, which took place in London.

The fiscal committee of the League of Nations, fiscal commission, had a meeting in Mexico, which the delegates from Europe could not attend because of the war, and they couldn't travel. But then the very last meeting took place, actually about half a mile from my office in London, at the then headquarter of the Inland Revenue at Somerset House, and you can actually visit the room in which they met the last meeting of the League of Nations, the London meeting, where they adopted the last League of Nations version of the tax treaty, which was the London model.

So, during the 1920s, and 1930s, the UK was very much involved with the League of Nations, from Stamp through the technical experts, right the way up until 1946, which is really very surprising. Because while the UK was participating in the League of Nations, we went completely our own direction on international tax. We did completely differently from what the League of Nations was recommending. In particular, we did not conclude any tax treaties. In the 1920s and 1930s, the United Kingdom had a completely different policy from what we were discussing in the League of Nations. So, we participated in all these discussions and all of the League of Nations drafts, but we were doing something completely different. Typical British: don't do what we say, do what we do, or don't do what we do, do what we say. They were saying one thing at the League of Nations and doing something completely different.

Why was that? During the 20s and 30s, we still had a focus on the British Empire. We had policy to encourage trade and investment within the empire. We had the so-called Imperial Preference. All our products, if they came from another part of the empire, could be sold without any duty. But if they came from elsewhere, then we put barriers against it. We had a very protectionist policy that kept out products from outside of the empire and protected products from within the empire, the system of Imperial Preferences, and that was reflected in our tax policy as well. On taxation, we were only concerned to relieve double taxation within the empire. We didn't care about the rest of the world. And you can actually see that. We had a Royal Commission on Taxation in 1920. Every now and then, we have a commission set up to discuss tax policy. We haven't had one for a good long time in the UK, but we had one in the 1950s. We had one in the 1920s. And Stamp gave evidence to that commission, and they discussed double taxation. And the report of the Commission said, within the empire, we must try to avoid double taxation, but with the rest of the world, we do not have the same concerns. If there's double taxation with France, or Germany or Italy, we don't do anything about that. But within the empire that is done. And so, what we came up with was something which is referred to as Dominion Tax Relief. The countries within the empire in those days, countries like Canada, Australia, South Africa, they were called the Dominions, they were self-governing within the British Empire. Talking about the Empire, it sounds like we are going back in Star Wars, but that's how people thought in the 20s and 30s, we had an empire, the king was Emperor of India. And it wasn't until Queen Elizabeth: She was the first queen not to have been Queen Emperor.

India was not a dominion, but it was within the empire, and we did apply this type of relief to India, as we applied it to any countries. Actually within India we have problems with double taxation, really, quite early on, because the

Indian Revenue Authority was much more advanced than in many other parts of the empire. India had an income tax from 1860, which was very, very early, within the Imperial context. But the Dominions were the old self-governing colonies, Australia, New Zealand, South Africa, they were the Dominions. For those countries, we invented a special form of tax sharing. It was not done by treaty, it was done in each country's tax law. So, you find Dominion Tax Relief provisions in the old tax rules of Australia, Canada, and the UK. And the way it worked was basically that I collect half of the tax I would normally collect, and you, Australia, Canada, you will collect half of the tax. So, if my tax would normally be 30%, I will collect only 15, and if your tax would normally be 20%, you will collect only 10. So, we don't quite get to a point where you get taxed in only one country, but each country collects half of what they would normally collect. So, you don't get completely double taxation. And if you look at the old tax laws of Australia, Canada, and New Zealand, you'll find these provisions for Dominion tax relief. But that was only within the British Empire. With regard to other countries, as I put down here, there was no common interest with non-Empire countries, we didn't do anything, with limited exceptions, to avoid double taxation.

So really, it was very strange. On the one hand, British officials were going to the League of Nations and discussing tax treaties and relief of double taxation through things like the London Model. But on the other hand, in terms of what we actually did, we didn't have any tax treaties. We didn't conclude a single tax treaty based upon the work that was being done in the League of Nations throughout that whole period. We did have a special arrangement with Ireland, that was a very unusual situation. As you should remember, Ireland was part of the United Kingdom until the rebellion which started on Easter Sunday in 1916, and led to a revolt against the British, and the Irish achieved their freedom from the British in 1922, and they formed the Irish Free State. And then, Ireland got divided between Southern Ireland, which is independent, and Ulster, in the north. Ulster is the Protestant part; the rest is the Catholic part. And the Catholic part of Ireland became independent. Well, up until independence, Ireland and the rest of the United Kingdom had the same tax system, exactly the same tax law applied because it was part of the United Kingdom. So, when Ireland separated, they wanted to have their own tax policy. And for the first time, we had a problem of double taxation, because there would be Irish tax in the south, and basically, United Kingdom tax. And so, there was an agreement between the British government and the government of the Irish Free State (now called the Republic of Ireland) to deal with double taxation. But it wasn't a treaty as such, it was an agreement between the two governments, given that the two governments both had the same tax law, at that time. It was an agreement to divide who was going to tax what, and it was actually contained in the UK legislation. You can find the agreement as a schedule to, I think, the Finance

Act of 1926. There's not an international agreement as such, it's part of the domestic law of the two countries. So, the position with Ireland was really quite unique, because of the history of two countries. Apart from the agreement with Ireland, we had some very limited agreements, I'm certain that you have studied that there are comprehensive tax treaties, treaties that deal with every type of income, income from land, business, profits, shipping profits, dividends, interest, royalties, employment income, all the rest of them. And then there are a small number of limited agreements that deal with just one type of income. And we had a few of those in the 1920s and 30s, we had a few shipping profits agreements that only dealt with profits from shipping, nothing else. So, for example, there's a lot of backwards and forwards from Denmark to the UK, France, Greece, even then big shipping country. So, we had shipping profits, we had agency agreements, and that was basically concerned with business profits through commercial agents in the country. If a Canadian company sold timber (wood) through an agent in the UK, then we would tax only the profits from that agency. So, there were agency agreements. And then towards the end of the 1930s, we started having air transport agreements. Quite a lot of countries start with air transport agreements between them to deal with the profits from air transport. So, we have a small number of limited agreements during that period of time, but the key points to make is we had comprehensive tax treaties and we were going to the league in Geneva, and we were talking tax treaties, but we weren't doing. We knew all about it, because we were discussing it in Geneva at the League of Nations but we weren't actually concluding treaties ourselves, which is very different from other countries. Italy was concluding treaties. Peter Essers should have talked about the Dutch treaties. We were in the discussions, but we weren't actually doing it.

Things then changed, in 1946, under the pressure of the Americans. Towards the end of the Second World War, the UK was massively in debt to America. We have borrowed huge amounts of money from America to fight against various countries. We were hugely in debt, and one of the things the American said was, we want greater access to British markets for our goods and our investment, no more of this Imperial Preference. You don't have an empire any longer, and we, the Americans, were not going to support this idea of an empire. We want to have access to your market, and then one of the things we want to do is that when American companies invest in the UK or trade in the UK, they don't get taxed. We're not happy with what happened in the 20s and 30s, where US businesses got doubly taxed. If they sold in the UK, they pay tax in the UK and they pay tax in America because there was no treaty between them. We want to have a tax treaty. And the UK-US convention that took about a year to negotiate between Washington and London, was signed in April 1945. That was the UK's first comprehensive tax treaty, much later than many other countries. Because we knew about treaties, it was in the League of Nations discussions, we knew about what went into a treaty. But we've never done it before until the UK-US treaty.

So that's our first tax treaty in 1946. But it's not just important because it was our first treaty, it's probably - I'm going to sound a British nationalist - the most important treaty that two countries ever concluded, because it sits between the League of Nation's work that ended in the London Model in 1946 and the work of the OECD. And it's the link between the League of Nations periods and the OECD periods. If you look at it, it's clearly been derived from the League of Nations' work. But it has a number of features that were completely new, which then went into the OECD work. So, it's kind of the sort of missing ancestor, who is the ancestor between Neanderthals and Homosapiens. There's a missing ancestor. This is kind of the missing link between the League of Nations period and the OECD period. For example, it's the first treaty to contain the transfer pricing provision. The US had treaties before this, but they didn't have the equivalent of Article 9. It's the first treaty to have Article 3.2, the rule on interpretation of undefined terms, according to which undefined terms have the meaning they have under domestic law. It's one of the first treaties that have a difference between direct and portfolio dividends, with a 15% tax rate on portfolio dividends, and only 5% on direct investment. So, lots of the features of what became the OECD model are found in that convention. And if you don't believe me, believe my colleague, John Avery Jones, because he wrote an Article back in 2007, on the history of the United Kingdom's First Comprehensive Double Taxation Agreement. He analyzes the UK-US agreement and explains why it was groundbreaking, and why it's so important as a link between the pre 1946 League of Nations period and the post 1946 period that becomes the OECD. So that was our first ever tax treaty. And with that treaty, we got religion, we suddenly believed in tax treaties. And like every religious zealot, once we have found tax treaties, we loved them, and we wanted to have treaties with everybody. So, from having no treaties before 1946, after 1946 we started going around the world concluding many treaties, which is why we are now the world's leader in tax treaties. It all goes back to this sort of sudden change of thinking, change of heart under the American pressure in 1946.

So very soon after we concluded the treaty with America, we concluded the treaties with a number of our former colonies that are now independent, Australia, Canada, South Africa, India, Pakistan, New Zealand, and also with some of our close neighbors in Europe. France was one of our earliest treaties outside of the empire. And what you see here also is this abandonment of the idea that we were only concerned with double taxation within the empire, we haven't got Empire any longer. By the end of the Second World War, we had lost our empire. India becomes independent, Pakistan becomes independent, and eventually, all the countries in the 1950s and 60s become independent. But now for the first time, we're treating everybody the same. We're having treaties with France, and Italy subsequently, and others, similar to the same way as we have them with the former British colonies like Australia and Canada. We really got into tax treaties in a big way. In particular, in the 1950s, we went from no treaties in 1945 to almost 100 treaties, amazing. I don't think any country has ever concluded that many treaties. But there was a secret. Many of the treaties that we concluded were colonial arrangements. We still had lots of colonies at that time, Rhodesia, Nigeria, Gold Coast, lots and lots of countries that became independent, but at that time, they were not independent. What we did was concluding colonial agreements, arrangements with those countries. And they must have been really strange negotiations, because the negotiations were basically between somebody from the UK revenue and somebody from the UK colonial office. So, a British civil servant from the colonial office would represent Nigeria. And somebody from the UK revenue would represent the UK. And the UK revenue would say, here's the terms of the agreement, sign it, and the Nigerian, the person from the colonial office would basically sign it, which is why many of these arrangements are very, very similar to one another. Because basically, the British just copied the same document again and again, and said, right, this is what we agreed with Nigeria last week, now we want this with the Gold Coast, or we want it with another colony, with Southwest Africa.

So, it was basically the British negotiating with the British. We do that very well. When we negotiate with ourselves, we usually come to very good agreements. And so, in the 1950s, we had a standard arrangement, many of these arrangements, you know, were concluded in 1951, 1952, 1953, 1954. Many of them existed for many years. Some of them have only recently been replaced. The agreement with Jersey was concluded in 1952, it was only replaced about five years ago. These agreements, many of them, existed for many, many years. And if you look at them, if you read them, you can immediately tell that they are colonial arrangements. First of all, they're called arrangements rather than conventions or agreements because they are not independent countries. You cannot have a treaty in international law with a country that is not independent. So, they are referred to as double taxation arrangements, not conventions or agreements. But also, they have a number of very common features. If you give me one of these documents, I can look through it, then I can say, oh, yeah, that's a colonial arrangement. For example, the definition of permanent establishment is very short, and it's contained in the interpretation definitions. They don't talk about business profits, they talk about industrial and commercial profits. There's a special rule for dual resident companies. So, these arrangements have some special features that are a little different from other treaties, to reflect the fact that they weren't really negotiated, they were basically dictated by the British revenue. But it did mean that we went from new treaties to pretty much 100 treaties in about 10 years. There was actually even a discussion at the time about having a multilateral convention, I am certain that you've discussed at various times, there have been proposals to have a single multilateral convention. They were having a discussion in the UN at the moment about the UN multilateral treaty, and they were talking about a Commonwealth multilateral convention that never finalized. They never actually got to that. I think somewhere in my papers, I've got a draft of the multilateral convention, but it never actually achieved itself.

And one of the things that also happened in that 1950s was that the UK extended to some of its colonies its treaties with other countries. If you've studied the OECD model, you'll know at the very end, there's an Article for the extension of the treaty to basically its colonies, to territories that are not independent, but for which one of the countries is responsible in international law. We did that in the 50s. Treaties with Sweden, Denmark, the United States, they were extended to some of our colonies. So sometimes if you discover that places like the British Virgin Islands had an old treaty with Sweden and you think, how does the British Virgin Islands ever have a treaty with Sweden? They didn't. It was the UK treaty with Sweden that was extended to the colonies. So, some of our colonies actually got their first treaties by extension, that actually is how some of them started off their lives as tax havens, because they have treaties extended from the UK. So, in the 1950s, we had this very strange period when suddenly we concluded a lot of treaties. We concluded them with independent countries like Australia, Canada, with our close European neighbors, France, Spain, Portugal, Italy, but we also have this big growth of the so-called colonial arrangements at that time.

We come towards the end of the 1950s with the establishment of what started as the OEEC and became the OECD. I am certain that you know the history here. After the Second World War when the League of Nations ceased to function. The United Nations replaced it, and for a few years, there was a United Nations fiscal commission. But in one of the most significant developments for international tax, that commission was closed down in 1954. I don't think anyone realizes how significant that was, the United Nations stopped their work on tax in 1954, partly actually because the British were not supporting what they were doing. The United Nations stopped. And there was a period of time when nobody was doing anything about international tax. And then a few of the former delegates to the UN wrote to one another and said, it's a real shame that nobody is discussing international tax. There's this new body in Paris called the OEEC which is the Organization of European Economic Cooperation, maybe we can get them interested in international tax. And they sent out an invitation to a number of countries in Western Europe basically to attend meetings in Paris. Interestingly, the British were originally not very keen on the idea. Again, I've gone to the National Archives in the UK, and you can find the invitation letter, which was sent to the British saying, we're having a party in Paris, please come, we are going to talk about the international tax, not a great party, bring your own food, whatever. And on it, the British official has written, this will probably produce nothing, but, just in case, we should attend. So, the British were not very keen on this at the beginning. They said, yeah, just in case it's a big party, and it becomes important, we're going to gain a lot. So initially, the British had real misgivings about whether this OEEC was going to be worth attending or not.

I don't know what happened at that first meeting. But the UK became completely convinced that this was the way to go. And from the setup of the OEEC down to the present time, the UK has been a very, very active participant in the OECD, right the way through. Even now, the UK is lobbying in the United Nations to keep the OECD the main discussion place and lobbying against the African countries and others to preserve the role of the OECD. And it depresses me that my government is doing that, trying to fight against them, that they, for various reasons, are very committed to the OECD. So, the UK was really participating and the UK has often had the former head of the OECD tax commission, Jeffrey Owens, he is Welsh. We've had British chairs of the Committee on Fiscal Affairs, we've been really committed to the OECD all the way through. And that's been reflected in some very British contributions to the history of tax treaties under the OECD. This was what the Brits did through the OECD. And I'm going to give you two examples, both of them are terrible. The first thing we did was we gave the world beneficial ownership. Have you had lectures on beneficial ownership? You know that problem was a pure British problem. In the 1960s, the British woke up for the first time to the problem of treaty shopping. And they said, the treaty at the time said, if a dividend is paid to a resident of Italy, then the tax on the dividend will be reduced. That simply requires that the dividend is paid. So, you could have a nominee or an agent in Italy. And they would get the benefit of the treaty, because it simply requires that it's paid to that person. And this is a very simple form of treaty shopping, we're giving benefits under our treaties, and all you need to do is to register your shares in the name of an agent or nominee. And we think that's a problem with treaty shopping. So, the rest of the OECD (and you can read the discussions in the OECD Committee on this because they're all on the website), basically, they said to the British, okay, come up with an answer, and the British answer was beneficial ownership. They'd come across this term, which we use in our domestic legal system in some particular context. And they said, what we should do is we should say, the recipient has to be the beneficial owner. What does that mean? Oh, it means agents and nominees. That's what we understood it to mean. But beneficial ownership is not limited just to agents, to nominees and this wording "beneficial owner", it's laying there in tax treaties for about 30 years, until suddenly, it started causing all these problems. Cases in Canada, in the UK, Denmark, Indonesia, all around the world. Problems about what is meant by beneficial ownership. And that was because the British sold to the OECD this term. We didn't charge them, we gave them this term, without understanding what it meant. A couple of years back, I had to go to Norway to give evidence in a criminal case where a partner of Ernst and Young (EY) was on trial for a criminal case because he advised the client to sign a form saying that the client's company was the beneficial owner of dividends. And the Norwegian Criminal Investigation said this was criminal fraud because they were not the beneficial owner. I had to go and give evidence in Norway about the meaning of "beneficial owner".

And that was all because the British proposed this phrase without knowing exactly what it meant. If that wasn't bad enough, history has repeated itself a couple of years ago in the form of the PPT, the principal purpose test. I'm certain that if you have been studying BEPS, the MLI or the recent developments, the fact that in the BEPS project, it was decided to include in tax treaties, an anti-avoidance rule, the principal purpose test. And when you read the wording of that, there is absolutely no doubt where this comes from, it comes from the UK. That wording – if it is reasonable to conclude, having regard to all the relevant facts or circumstances, that the obtaining of the benefit was one of the principal purposes – is classic British drafting. It's come from British legislation, through British treaties, into the OECD. And it is the COVID virus of international tax. It is the most dangerous thing that has been introduced into international tax in the last couple of years. Because it means that nobody can be certain that they're going to get the benefits of a treaty. That is, other than absolutely, clearly non-tax avoidance, unless it's absolutely clear, potentially, that a tax authority can refuse on the basis of this, and it's a British invention. Clearly, it couldn't be more British, in the wording, we can find that in our UK domestic legislation. So, we've done it again, we've infected the world's tax treaties having given the world "beneficial owner", which was the SARS virus. Now we've given the world the COVID virus, the PPT. You mark my words, those of you who go into international tax, you will find that every time you look at a tax treaty these days, you're asking yourselves, do we satisfy the principal purpose test? So, the British contributed a great deal to the OECD, most of what we contributed was that we did lots of very awful things.

We're not just OECD people in the UK, we're also quite supportive of the United Nations. The United Nations, you know, set up in the 1970s an *ad hoc* committee of experts to help developing countries. And the UK has been quite involved with the work of the UN, right the way through its history. It's quite common that there is a UK representative, as one of the committee of experts. There isn't at the moment. But normally, there's a UK expert, and the UK government always sends a delegation to the meetings of the UN committee of experts. I was in Geneva a couple of weeks ago. So, we've been quite involved with the committee of experts. And we are also quite willing to adopt UN style provisions with developing countries. You'll know that there's a difference between the OECD model and the UN model. When we're negotiating with developing countries, we're quite willing to accept the UN provisions, for example, things like tax sparing, giving credit for tax that has not been imposed because of a special development incentive. So, we do also participate in the UN work. Within this big network of tax treaties, some of them are very close to the OECD model, particularly with other OECD countries. Some of them have the UN elements in them if it's with the developing country.

We don't have a model treaty, like the Americans or the Dutch have. We tend to negotiate from treaty to treaty. So, if you look at what the last treaty was, the UK would like it to be similar to the OECD content. So, our treaties will now include the PPT, will include arbitration, will include, if necessary, the cross-border assistance in collection of taxes. We track changes to the OECD model, we're quite loyal to the OECD.

So, coming to our current network of tax treaties, we have treaties at the moment with 149 countries. I looked at the Inland Revenue list and counted it up, and we have treaties with 149 countries. They're not all independent countries. We also have them with jurisdictions like Jersey, Guernsey, the Isle of Man, San Marino, we have treaties with non-independent countries as well, treaties with 149 jurisdictions in the world. I think the Netherlands or maybe Sweden are usually our competitors. Italy, you've probably got about 100. But then again, you can play football. We do play football from time to time, but we're not as good: we are good at concluding treaties. Most of our treaties are comprehensive treaties based upon the OECD, sometimes the UN model. We have already a few of these old colonial arrangements, still in existence, but most of them have been replaced by new treaties. But occasionally, I think with Malawi, we have an old agreement from the 1950s. We have had some very recent new additions. Big new addition was Brazil, Brazil was the big prize. Very few countries have treaties with Brazil, and we've been trying for years to get an agreement with Brazil. Brazil always had its own approaches, particularly on transfer pricing, and on taxation at source. And though we've had discussions for years, we've never managed to reach agreement. But as you may know, Brazil has gone through a tax reform, bringing it much closer to some of the OECD principles, for example, on transfer pricing, and we managed to make the breakthrough. A year ago, we've got a very new treaty with Brazil, which people from Brazil are very excited about because it opens up cross border investment between Brazil and the UK, which was always a bit difficult when we didn't have the treaty. It's the last really big country that we needed to have a treaty with.

I talked about income tax treaties. We have a few treaties dealing with taxes on death. We only have about a dozen of those, because a lot of countries don't have death duties any longer. But we do have some estate duty treaties with places like India, Pakistan, South Africa, a couple of those in the US, we have an estate duty convention. They are somewhat different from comprehensive treaties. And we don't give a lot of time or effort to double estate duties.

We have an interesting process: each year, the UK Revenue carries out a review of our treaties and asks for input from business and commerce and people like me on what we're doing with our treaty network. I had the email just a couple of days ago from the official of the Revenue saying we're carrying out our review, are there gaps in our treaty network? Are there countries that we don't have a treaty? Are there bits of our treaties that are not working very well? So, they do go proactively to consult and to get recommendations.

We have quite an active group of treaty negotiators. There're usually two teams of negotiators at any point in time that are traveling around the world for treaty negotiations. We've spent a lot of time recently updating our treaties with European countries, because as you noticed, we've left the European Union, and so we didn't have the directives any longer and we have to change some of our treaties to reflect the directives. I had lunch with a friend of mine from one country recently, she was in London, because she was negotiating an update to a treaty with the UK. And so, we've got quite an active process of negotiating treaties.

I thought I'd say a little word about implementation and interpretation.

The UK is a dualist country, meaning our international agreements are not automatically brought in as part of our domestic law. Our treaties bind the government at the international level, but they do not have an effect in the domestic legal system. They don't affect ordinary people, ordinary taxpayers. To have that effect, the treaty has to be transposed into domestic law. We have to take the treaty, and we have to give effect to it in domestic law. In Italy, once a treaty is concluded, it becomes part of the law under the Constitution, like France and others. We're not like that, we don't have a constitution, so we have to transpose them into domestic law. The way that's done is that one of our pieces of taxing legislation, the Taxation (International and Other Provisions) Act, Section 2 provides for the UK to conclude treaties with other countries, and it says once those treaties are included in an Order in Council, and that Order in Council is entered into effect, then the treaty has effect in domestic law. So, Section 2 says you have to take the treaty, wrap it, in what's called an Order in Council. An Order in Council is a form of subsidiary legislation made by the King in Council. So, the king, every two weeks or so, has a meeting of his Privy Council. And at that they will approve a number of Orders in Council and some of those Orders in Council deal with tax treaties. So, what we do is we take a tax treaty which we concluded with Italy, we put it in the wrapper of an Order in Council. That Order in Council is then debated in a Parliamentary Committee. So, there is Parliamentary scrutiny of it. Then, the Parliamentary Committee says yes (they always say yes) or no (they never say no).

So, we have this procedure that has to go through which involves a little bit of parliamentary scrutiny, not much. I mean, it goes before a Committee in Parliament and you can attend these committees, they're funny. And basically, it's the blind leading the blind. It's one or two members of parliament, who don't understand international tax, discussing it with another member of parliament, who doesn't understand international tax. So, they're quite pointless, but they do get some scrutiny. And I guess at the moment, if, for example, an Order in Council was presented with regard to a country that the UK didn't look very happily, there might be a debate.

So, there's a limited degree of parliamentary scrutiny, there's not very much. I hope if you've gained nothing from this lecture, the one thing that you will have learned is that we had no treaties until 1946, and since 1946, we have a lot of treaties, more than the rest of the world. Because we didn't have treaties until very late, we haven't until quite recently had lots of case law. The first disputes started in the 1960s, and maybe in the 1960s, there were one or two cases. And then, the 1970s, there were three or four cases. In the 1980s, eight or nine cases. Now for the first time, we're beginning to get quite a lot of tax treaty cases coming to the UK courts, which is a problem, because none of have much experience in tax treaties. We do have a growing number of cases, but we don't have much expertise amongst the judges. It's really weird. France has real expertise in international tax. You go to Germany, the First Senate has real expertise. We have nobody with international tax expertise, and we have really strange decisions.

For example, one of the issues – I am certain that you know there is a big discussion about the OECD commentaries – is whether you can refer to the later commentaries. We had a decision a couple of years ago, a case in our Supreme Court called "Fowler". Really without any discussion, the Supreme Court said, oh you can refer to later commentaries, but no explanation about when and why and what and any guidance. They just simply said, you can refer to later commentaries. And you compare that to some of the very detailed discussions in other countries about previous and later commentaries of the OECD. So, one of our problems is we don't have judges with a lot of expertise in international taxation.

[Prof. Marino]

It is really interesting, the perspective you posed within the UK treaty policies, the beneficial ownership, indeed, it is a very interesting information, going back to law of trusts, equity law, common law, and the limitation of beneficial ownership is within the United States as we discovered with my students. But I want to make a comparison with the speech of Peter Essers. Because Peter Essers, last week told us that the Netherlands has been a bad boy in terms of international tax treaty policies because they were using treaties to attract investment, and also to play within the field of harmful tax competition. It was very transparent, very clear. Nevertheless, he also said that with the turnaround of the financial crisis, the BEPS project, the Dutch government decided to play the role of the good boy. So, they are now making a selection of corporations that will be establishing in the Netherlands in order to get the benefits of the treaties and so on. My question to you would be, in comparison with what I am telling you and what we heard from Peter Essers, how would you consider the UK treaty policies, as a bad boy, or a good boy, within the field of harmful tax competition? And by having, for example, the idea of the arrangements with the colonies, like the extensions, the UK treaties with the colonies, like the BVI, like the Channel Islands, how would you reply to this?

[Prof. Baker]

I think we have probably been a good boy in that respect. I think that we genuinely entered into tax treaties with the aim of relieving double taxation. We didn't do so in order to make the UK a more attractive location. We realized that, we assume that, we are, to some extent, a relatively attractive location for certain purposes. But if we didn't release double taxation, that would counter that advantage. We never had an arrangement with any of our colonies like, for example, the arrangement between the Netherlands and the Netherlands Antilles historically in the past. But in the past, we used to root the royalties through the Netherlands and out through the Netherlands Antilles because you had the royal agreement between the Antilles and the Netherlands that allows you to get the funds out. And we never had in the UK the ability that you have to go to Rotterdam and sit down with the tax officials there and say, if we leave 5% of the royalties in the Netherlands and they get taxed, will you give us the ruling? We never have ruling of that nature. So, if you think about things like the Starbucks state aid case, we never got that in the UK, we would never give a transfer pricing deal like Starbucks got with the Netherlands. And where the UK in the past might have started to be used for tax avoidance, we generally tackled that problem very quickly. For example, back in the 1980s, we were a bit like Ireland, and companies could be formed in the UK, but as long as they were managed and controlled abroad, they were not UK residents and that could be used for tax avoidance. We immediately changed it. It took Ireland almost twenty years to do the same thing under pressure of the European Commission. So, I understand we've been quite good. Where we do compete for wealthy individuals. We have a special *status* of non-domiciled persons and that is why we have lots of Russian oligarchs and Arab princes and others living in London because we have a very attractive status. I have clients living in the UK and coming to Italy because you have this similarity. We are almost certainly going to get rid of this *status* after the next election.

I don't think that the Labour Party has realized that, if we don't have a non-domiciled *status*, how are we going to get international football players to come and play with British clubs because if they have been playing for Inter or Milan a couple of years, they will have a lot of money in their Swiss bank accounts, and they will not want to go to the UK and pay 45% income tax on this. So, the Labour Party has not realized what I have realized, which is we have to do something for international football players. We could not play football if we didn't have foreign players, you know. I would have said I grew up in the Netherlands being, perhaps, the most attractive corporate tax planning jurisdiction, the Netherlands, maybe Switzerland. The UK is a good location for companies, but it doesn't really do that by tricks or by provisions in treaties.

[Prof. Marino]
Thank you very much, if there is any question from the floor, curiosity?

[Student]
Prof., do you think that with the Brexit, the UK will be more attractive? Because maybe the UK will have the possibility to negotiate freely agreements or new laws without problems within the EU legislation, or do you think that the attraction would be lower, just from a tax law perspective?

[Prof. Baker]
It is very hard to say. I mean, at the time of Brexit, there were big worries that people were talking about Singapore-on-Thames, that we would be like Singapore of Europe in the same way that Singapore pretends to be a big OECD member and to follow the OECD. But actually, if you were in Australia or if you were in Malaysia or China, you would know that Singapore is used massively for international tax planning. I don't think there is any inclination in the UK to be Singapore-on-Thames. The UK Revenue do not regard themselves as going to provide an opportunity for international tax planning through our treaties. We want to be competitive, we want to be an attractive jurisdiction, but not in a way that contradicts our membership of the OECD and our commitment to deal with international tax avoidance. We may not go ahead with some of the crazier ideas of the European Commission. For example, one of the things that we rolled back on after Brexit was DAC 6, the disclosure of cross border avoidance. We originated the whole idea of disclosure of tax avoidance schemes, but DAC 6 went much further than we did, in ways that we didn't think we needed. Clearly, I think we are concerned about the Commission's discussions of shell companies, the Unshell directive, and the possibility of the safe directive outside of the EU. I don't think we regard ourselves as a big target. It's an option. If the UK was planning to become Singapore-on-Thames, we would have seen that under the Conservative governments. On the assumption that,

I think, we are going to have the Labour government for at least the next five years, if not the next ten years, if not the next fifteen years. The Conservative Party is in such a mess that it will take probably ten years before they can realistically put forward an alternative government. The Labour Party is absolutely not in favor of international tax planning by multinationals. So, I don't think you need to worry about us, worry about other countries in Europe before you worry about Brexit. I have the embarrassing situation that I am traveling to Cyprus the week after next, but we've just had the massive disclosures yesterday of the Cypriot involvement in hiding money on behalf of Putin and politicians whatever, and I am certain that I am going to get asked about how Cyprus is seen in international tax in two weeks time. But I don't think we haven't had any of those sorts of embarrassing disclosures. It is true that there is a lot of Russian oligarchs' money hidden in London in very expensive properties, and we have not been very good at preventing money laundering. But you don't see multinational companies operating through the UK as part of a tax avoidance structure to avoid tax in Europe or the rest of the world.

[Prof. Marino]

I think it is pretty much your presentation. Consumers were against the fact that Starbucks was not paying the fair amount of corporation taxes. I think that was a leading behavior within the ESG, the environmental, social, and corporate governance approach.

[Prof. Baker]

After the 2008 financial crisis, the British Prime Minister led to the new deal with international tax avoidance which led to BEPS, and you have people like David Cameron going to conferences and saying multinationals have to wake up, smell the coffee and realize they have to contribute to the taxes. We do not appreciate big multinationals operating in the UK and not paying taxes. Little known fact: we have had a digital services tax on digital businesses in the UK, right the way through all of these useless discussions about the Pillar 1, and we have been collecting all the way through, and a lot of countries are now looking to us as a model for digital services tax. We do collect a real amount of tax from digital businesses.

[Prof. Marino]

Well, thank you very much. I think we can close this very precious lecture and I will meet you next Monday for the Brazilian approach. Thank you again.