IBFD
GTTC Universities Project 2022

Individuals – Non-Business Active Income

Winner: Team Brazil (Instituto Brasileiro Direito Tributário)

Finalist: Team Portugal (Lisbon University Law School)

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The GTTC and Its University Project

Prof. Dr Pasquale Pistone

Academic Chairman of IBFD

The GTTC University Project is a part of the IBFD GTTC Project. This short explanation summarizes the object and purpose.

The IBFD Tax Research Platform is a comprehensive source of information on tax treaties from around the world. Our research and publication teams make all necessary efforts to keep it reliable across the different languages (in some cases, even going as far as translating into English the text of treaties not authenticated in this language) and periodically invent new tools for extracting content and facilitating the analysis of such treaties. This helps all users navigate through the increased complexity of international taxation and facilitates research on tax treaties.

A few years ago, IBFD introduced the Global Tax Treaty Commentaries, which has meanwhile become familiar to all treaty researchers as the GTTC. As its name indicates, the GTTC is a unique project for a global approach to the analysis of tax treaties, which combines a top-level theoretical analysis of model tax conventions with a hands-on perusal of their practical implications. Its unique features are also due to the circumstance that it encompasses the study of possible deviations of bilateral treaties across the globe from model conventions and that it is fully integrated into the IBFD Tax Research Platform. Specific hyperlinks allow the readers to cross-check the treaty analyses provided by the authors with the actual wording of the models and bilateral treaties, including relevant case law and further topical studies.

But the GTTC Project offers much more to discover!

The core part of the GTTC Project, which we usually call “Global Tax Treaty Commentaries – Model Articles & Issues”, provides a general analysis of the clauses contained in tax treaties, thus allowing the users to become familiar with possible interpretations of such clauses throughout the world.

However, the GTTC includes a side entrance to its content, through the so-called “Global Tax Treaty Commentaries – Country Policy & Practice”, which allows for a per-country analysis of such treaty material and enhances the liaison and links with other parts of the IBFD Tax Research Platform.

This basically means that if someone is interested in knowing the position of a specific country on a specific treaty clause, they can access the GTTC from the Country Policy & Practice section and then continue their navigation to the Model Articles & Issues section through the dedicated hyperlinks that are included in the specific clause. The seamless connections between the two GTTC pillars was conceived in line with the “single input” concept, which prevents duplications of the content, but allows for common content between said pillars. This allows the Country Policy & Practice section to feed the Model Articles & Issues section in line with the following concept: the Country Policy & Practice section steers the content of the Model Articles & Issues section towards a selection that allows the latter to meet global interest while preserving a more comprehensive overview of each country within the boundaries of the Country Policy & Practice section.

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However, there is yet another important component of the GTTC Project – namely the GTTC University Project – to which this white paper directly belongs.

The GTTC University Project is a competition between university students' teams to extract tax treaty materials from the IBFD Tax Research Platform on a specific topic of relevance for the overall GTTC Project. The ultimate goal of the GTTC University Project is the promotion of empirical methodologies for the legal analysis of tax treaties. This reflects a long-standing tradition of IBFD, which has periodically embarked on such studies and then made them available to the global tax community in its journals.[1]

The concept of the GTTC University Project is to have university students' teams extract specific data concerning tax treaties and process them under the guidance of their mentors, which are normally university lecturers or professors.

The production cycle of each edition of the GTTC University Project is divided into four phases.

In the first phase, the IBFD academic research team selects the relevant topic for the empirical research and elaborates the technical outline, including the key points and the boundaries within which the students' teams should conduct their analyses.

In the second phase, the students' teams are given free access to the IBFD Tax Research Platform in order to make an overall empirical assessment of the topic from the perspective of their countries' tax treaties. This phase is concluded with written studies that are submitted to an IBFD jury.

In the third phase, the two best teams are invited to present their findings to the IBFD jury in Amsterdam and defend their empirical research in line with the concept of a moot court, thus competing for the award of the best university team.

The fourth and final phase consists of processing this information together with the IBFD academic research team and making it available to the international tax community on the IBFD Tax Research Platform in line with the open access concept. This community also includes the GTTC authors themselves, whom the IBFD academic research team prompts to take into account the outcome of the processed empirical findings in the periodical updates to the GTTC chapters.

IBFD is proud to promote the dissemination of the legal culture of international taxation through this Project and will do its best to further enhance future editions of the GTTC University Project and the overall shape of the GTTC Project.

We look forward to receiving applications for future editions of the GTTC University Project and reading any comments on the GTTC and its University Project at gttc@ibfd.org!

[1] *See*, for instance, W.F.G. Wijnen & J.J.P. de Goede, *The UN Model in Practice 1997-2013*, 68 Bull. Intl. Taxn. 3, pp. 118-146 (2014), Journal Articles & Opinion Pieces IBFD.

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Foreword to the Brazilian report addressing “Individuals – Non-Business Active Income”

Audrei Okada Teixeira, Erlan Valverde, Fabio Gaspar and Renata Emery

Instituto Brasileiro Direito Tributário – Brazil

Directors’ Fees – Article 16

Treaty language on directors’ fees is materially similar to the language found in the OECD and UN mModels. The small variance relates to the definition of taxing rights, which can be split into two groups. One group of treaties read: “will be taxed in that other state” and another group of treaties read: “may be taxed in that other state”. While some believe it is a mere translation issue, and that in all cases the clause should be construed as to allow competing taxing rights, the Brazilian Revenue Authorities have decided a case where “will be taxed” shall mean will be taxed only in the source state.

Performers – Article 17

Brazil’s treaty policy is largely aligned with that of the OECD and the UN Models in the sense that taxation may be levied at source. However, one difference is an additional feature included in the third paragraph of certain treaties. In general, it provides that if the relevant event or spectacle is materially sponsored by public funds from the residence state, then that state will retain sole taxing rights to the applicable income.

Case law is scarce on this topic. However, one notable court decision analysed the reach of the term “entertainers” under article 17. In that case, a soccer coach sought treaty protection and the Brazilian Superior Court ruled that a coach is encompassed in the broader definition of entertainer.

An often controversial issue around article 17 is the use of star companies. In Brazil, private law has for a long time forbidden personal activities to be undertaken by companies. Laws have been changing and so have courts. Very recently, Brazil’s Supreme Court recognized certain personal activities undertaken through companies, which has sent ripple effects to taxation. While this is not yet explicitly recognized for sports activities, a similar rationale may pave the road to more cases involving the application of star companies in the context of article 17.

Employment Pensions – Article 18

Of all the articles covered by the report, article 18 is the article that would be subject to greatest number of variations. Although Brazil has largely accepted the inclusion of alternative provisions, the country has, as a rule, secured either exclusive or limited taxation rights at source.

Such alternative provisions include (i) exclusive source taxation of pension payments; (ii) non-exclusive source taxation of pension payments; and (iii) limited source taxation of pensions, under which the power to tax is initially granted to the residence jurisdiction and above certain fixed limits/amounts (ranging from USD 3,000 to USD 5,000) is allocated to both contracting states.

This approach differs significantly from the OECD model and alternative A of the UN Model, which proposes that pensions and other similar remuneration of past employment should be taxable only at residence, or alternative B of the UN Model under which pensions and other similar remuneration of past employment should be taxed at residence as a rule, but if paid by a resident or permanent establishment of the source country then both residence and source states would have the right to tax.

Private pensions or personal retirement schemes are common in Brazil therefore, in almost 80% of the treaties signed by Brazil, the term “annuity” is expressly included under article 18 and encompasses such private pensions besides employment pension schemes.

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Therefore, it is fair to state that Brazil does not have a clear policy for this article and it seems that Brazil has been quite flexible by accommodating partners' requests concerning article 18, both from developed and developing jurisdictions, as long as the right to tax at the level of the source country (which is generally the case of Brazil) is preserved.

Government Service Pensions – Article 19

Although there are some variances, in most of the treaties signed by Brazil, this article is aligned with OECD and UN Models in the sense that the taxing right for pensions resulting from government services is allocated exclusively to the paying state, unless the individual receiving the pension or similar remuneration is both a national and a resident of the other state. In such cases, the exclusive taxing right is then shifted to the residence state.

Deviations from the models include (i) a more restrictive situation, under which pensions for governmental service are taxed exclusively at source, without exceptions, (ii) the exclusive taxation at source is the general rule but with a provision that precludes such taxation in cases where the recipient is a national of the other state, and (iii) the allocation of taxing rights is granted to both contracting states.

With regard to article 19(3), all treaties signed by Brazil are consistent with the wording in the relevant model conventions.

Students – Article 20

Brazilian treaty policy regarding students is largely aligned with the concepts of the model language suggested by both the UN and OECD Models. In that sense, students shall not be taxed in the visiting country if the income is sourced from outside of that state. Variance is found on certain treaties signed by Brazil, where paragraph 2 can be found. It contains either the old (controversial) provision recommended by the UN in the 1980 Model or additional benefits negotiated by the relevant contracting states, generally to exempt students from taxes that would otherwise arise from income sourced in the visiting state, or to at least grant same exemptions provided to persons in an equal situation in the visiting country.

Conclusion

The most relevant deviations between the OECD and UN Models and the treaties signed by Brazil identified in the paper are those that aim at protecting source taxation, which not only reflects a consistent policy adopted by Brazil throughout the years but is also in line with the policy of other developing countries in the Latin America region.

Especially concerning article 18, Brazil preserves its power to tax at source as a general rule, but, in some exceptional case, Brazil seemed to be quite flexible and accommodating to partners' requests.

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BRAZIL – GLOBAL TAX TREATY COMMENTARIES –

COUNTRY POLICY & PRACTICE

GTTC UNIVERSITIES PROJECT VI:

INDIVIDUALS – NON-BUSINESS ACTIVE INCOME

(last reviewed: 30 August 2022)

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0. Abbreviations and Terms

Carf	:	Administrative Council of Tax Appeals (*Conselho Administrativo de Recursos Fiscais*)
Cosit	:	General Coordination of Taxation (*Coordenação Geral de Tributação*)
CSLL	:	Social contribution on net profit (*Contribuição social sobre o lucro líquido*)
DTT	:	Double tax treaty
EET	:	*Exempt-exempt-taxed*
IN	:	Normative Instruction
OECD	:	Organisation for Economic Co-operation and Development
PE	:	Permanent establishment
RE	:	Extraordinary appeal, i.e., appeal to the STF (*Recurso Extraordinário*)
REsp	:	Special appeal, i.e., appeal to the STJ (*Recurso Especial*)
SRRF	:	Regional Superintendence of the Federal Revenue of Brazil
STF	:	Brazilian Supreme Court (*Supremo Tribunal Federal*)
STJ	:	Superior Court of Justice (*Superior Tribunal de Justiça*)
TEE	:	Taxed-exempt-exempt
TET	:	Taxed-exempt-taxed
TIEA	:	Tax Information Exchange Agreements
VCCR	:	Vienna Convention on Consular Relations
VCDR	:	Vienna Convention on Diplomatic Relations
WHT	:	Withholding income tax

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1. General overview of domestic policy and history

Brazil has a total of 38 bilateral tax treaties signed, from which 35 are in force[2], 23 of them with OECD member countries and all of them with UN countries, except for Ukraine which is not a member of both organizations.

From this total, 19 tax treaties were signed with European Countries, mostly West Europe, but also Oriental and Center-Oriental European countries like Ukraine or Slovakia and Asian-Europe country as Turkey.

Moreover, 10 of these treaties[3] are among the first ones signed (in the 70's) with countries such as Portugal, Spain, Germany and Italy. Not coincidently, these jurisdictions are among those where most Brazilian immigrants came from so the cultural and economic ties between Brazil and these nations are patent.

Among its network, 9 tax treaties were signed with countries located in the Americas, the first one being with Argentina, the main economic partner of Brazil in Latin America, but the list does not include

[2] Brazil currently has in-force tax treaties with the following countries: 1) Argentina (1980), 2) Austria (1975), 3) Belgium (1972), 4) Canada (1984), 5) Chile (2001), 6) China (1991), 7) Czech Republic (1986), 8) Denmark (1974), 9) Ecuador (1986), 10) Finland (1996), 11) France (1971), 12) Hungary (1986), 13) India (1988), 14) Israel (2002), 15) Italy (1978), 16) Japan (1967; 1976), 17) Luxembourg (1978), 18) Mexico (2003), 19) Netherlands (1990), 20) Norway (1980), 21) Peru (2006), 22) Philippines (1983), 23) Portugal (1971; 2000), 24) Russia (2004), 25) Slovakia (1986), 26) South Africa (2006), 27) South Korea (1989), 28) Spain (1975), 29) Sweden (1975), 30) Switzerland (2018), 31) Trinidad & Tobago (2008), 32) Turkey (2010), 33) Ukraine (2002), 34) United Arab Emirates (2018) and 35) Venezuela (2005). The years refer to the date of signature, although many of these tax treaties only entered into force years later. The tax treaty with Singapore (2018) was approved by the Brazilian Congress but awaits the Presidential Decree. The tax treaty with Germany was terminated in 2006. The tax treaty with Paraguay was rejected by the Paraguayan Congress. The tax treaty with Uruguay (2019) awaits the approval of the Brazilian Congress.

[3] For the purpose of this comment, it has been considered the first tax treaty signed with Portugal (1971), which was terminated by Brazil. However, after the termination, a new treaty between Brasil and Portugal was signed and became effective in 2000.

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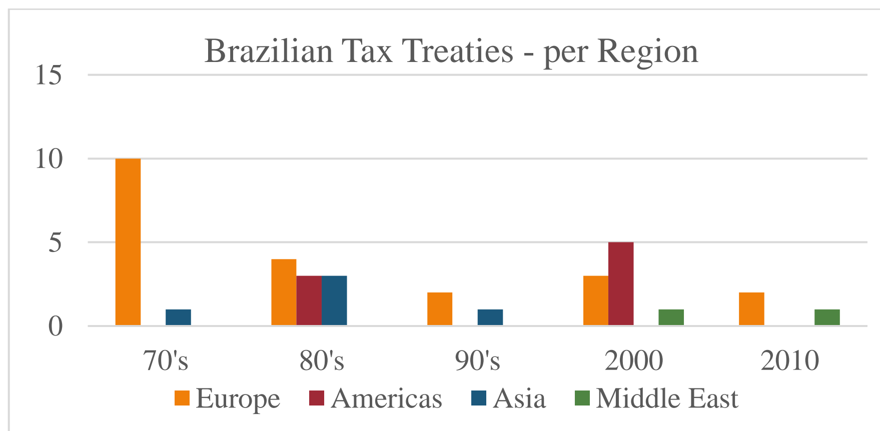
another relevant commercial partner, i.e., the United States of America. Furthermore, 6 tax treaties were signed with east countries, including China, 2 with middle east countries and 1 with an African jurisdiction.

The figures indicate the tax treaties with the different regions, although from an economic standpoint China is Brazil's number one trade partner, followed by the U.S.



1.2. Brazilian Tax Treaty Policy from the 60's until the 80's

Brazil does not have an official model tax convention, but after a careful analysis of its treaty network, it is possible to conclude that, as a general rule, the country has a well-established tax treaty policy that evolved throughout the years, reflecting some of the changes of the OECD model convention and its commentaries, the change in Brazil's economic position and its growing internationalization.

Brazil's tax treaties generally follow the OECD and/or UN models, but several deviations can also be found, which are mainly driven by Brazil's tax policy. The country is a member of the UN, but not a member of the OECD, however, in recent years Brazil is putting effort to ascend the organization.

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Brazil experienced a strong economic growth in the end of the 60's and in the beginning of the 70's, followed by a decline and a decade of severe economic crisis in the 80's, which lead to the country's moratory in 1987.

In 1964, in the middle of the Military dictatorship, Brazil changed its foreign exchange regulation eliminating the limitations to distribute profits abroad and allowing the payment, to foreign investors, of dividends generated by reinvested profits. Nevertheless, Brazil maintained a foreign exchange regime, which was not aligned with Bretton Woods rules.

The changes in the economic policy, including in the foreign trade sector, were introduced slowly and gradually, but were very important to attain the balance of foreign accounts, and were accompanied by a policy to restructure the foreign debt, with the attraction of foreign investors and active technical and finance cooperation with international finance agencies, which also included the creation of the Brazilian Central Bank (Law 4,595/1965).

During this period, the importation of technology and capital to Brazil grew. Data shows that foreign investments grew from an average of only USD 127Millions to USD 525 Millions between 1969 until 1973. Also, Brazil relaxed foreign exchange regulations and introduced tax incentives and subsidies to exports, as well as access to export finance. Due to the efforts of the Brazilian Government during this period, foreign trade thrived, widening exported volumes and products from different regions of the country.

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In the same period, the remittances of large amounts in interest, profits and payment of international freights caused a growing deficit and Brazil's foreign debt grew substantially from USD 3,4 Billions to USD 14,9 Billions.

In the context of this growing internationalization, the first tax treaty signed by Brazil was with Japan on January 24th, 1967, later modified by an additional agreement executed on March 23rd, 1976. The 70's is the decade that most tax treaties of the Brazilian network were signed.

The 1973 oil crisis affected Brazil external accounts since the country was heavily dependent on the importation of crude oil. This initiated a long cycle of economic decadence that would last until the beginning of the XXI century.

As mentioned, most tax treaties (20[4]) of the Brazilian network were signed in that phase, between late 60's and 80's, when the country was still under the military dictatorship regime. Despite the economic distress, the Brazilian international relations were being amplified, mainly due to the modernization of the country's foreign currency policies. Under this political and economic scenario situations involving individual non-business active income were quite limited.

[4] For this comment, it has been considered the first tax treaty signed with Portugal, which is already terminated. A new treaty was signed and became effective in 2000.

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Despite so, it was during this period that the Brazilian Federal Revenue Service Secretary at the time stated the main goals of the Brazilian tax treaty policy were[5]:

(i) to increase the inflow of foreign investment into Brazil;

(ii) to reduce the cost of funds and imported technology required for the development of the country;

(iii) the use of the tax system, especially the income tax legislation as a tool for economic policies, preventing tax incentives granted by Brazil to the development of specific regions or economic sectors be annulled by third countries;

(iv) to facilitate the expansion of Brazilian companies' operations abroad;

(v) to eliminate obstacles to the exportation of Brazilian goods and technology;

(vi) to create conditions for Brazilian banks operating overseas to compete abroad with foreign financial institutions;

(vii) to create an atmosphere of certainty to foreign investors, limiting taxation on their revenues and capital in Brazil.

In order to achieve such objectives, the Brazilian Government tax treaty policy focused on[6]:

a) Obtaining exemption to the revenues from Brazilian sources from taxes in the country of the foreign investor or, if taxed, a tax credit should be granted to the foreign investor on the same amount of the tax levied in Brazil;

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5 *See* F. Dornelles, *Tax Treaty to Avoid Double Taxation. International Competence: the Brasil position in the tax treaties to avoid double taxation* in *Revista de Direito Administrativo*. vol. 117, pp. 441–446 (1974).

[6] *See* Op. cit. F. Dornelles.

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b) When income tax on profits, dividends, interest, royalties or technical assistance paid to a foreign party were reduced or eliminated, including by means of our domestic law, the investor's country should exempt such revenue from taxes or, instead of taxing it, grant to the investor resident in such State a credit corresponding to the Brazilian taxes, as if such tax had not been reduced or eliminated (tax sparing);

c) Any tax reduction granted by the Brazilian Government should correspond to an advantage to the foreign investor and not a transfer of resources from the Brazilian Treasury to the foreign investors' residence country;

d) Reduction of the income tax of the Brazilian companies in the countries where they operate;

e) Reduction or elimination of the taxes levied abroad on the distribution of profits of foreign branches of Brazilian companies;

f) Maximum taxation over a certain period of time on profits, dividends, interest, royalties and technical assistance derived from investments and operations in Brazil by foreign entities.

As aforementioned, Brazil's treaty policy was always oriented towards protecting its tax base. As a result, limits to taxation at source are generally established at 15%, which in most cases matches with domestic law tax rates, and several deviations from the OECD and UN models can also be found with the objective to protect the tax base[7].

Although there was an attempt of the military regime to widen its diplomatic relations and attract foreign investors with a progressist speech, in practice the Brazilian economy was still very closed and the foreign exchange regulations rigid. Additionally, due to its political scenario, Brazil did not have the

[7] The main deviations, which do not relate to individual non-business income are the taxation at source of royalties and capital gains; the qualification of technical services and technical assistance as royalties; specific provisions regarding interest paid to Governmental entities; tax sparing and matching credit clauses.

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appropriate atmosphere to allow an intense exchange of workers, directors and students, so, a modest movement in and out of the country was seen during this period, which limited the country's opportunities to apply the tax treaties provisions on individual non-business income[8].

1.3 Brazilian Tax Treaty Policy from the 90's until today

The Brazilian dictatorship ended in 1985, but the Brazilian economy slowly started to open to foreign investments in the 90's. In this decade, Brazil achieved economic, political, and legal stabilities. However, only 3[9] tax treaties were signed during this period.

Due to the increase internationalization of Brazil, the country modernized its tax system introducing international tax rules, such as the worldwide taxation principle[10] and its first controlled foreign corporate provisions[11], transfer pricing rules[12] and a black-list policy, under which certain payments to beneficiaries domiciled in low tax jurisdictions became subject to higher withholding tax rates[13].

8 It is important to mention that at that time many Brazilians decided to move abroad to escape from the dictatorship regime. These individuals, however, normally transferred their tax residence to other countries, where they established themselves.

9 Netherlands, on March 8, 1990; China on August 5, 1991; Finland on April 2, 1996.

10 Worldwide taxation always applied to natural individuals, however, after 1995 it was introduced for companies.

11 BR: Law 9,249/95, art 25.

12 BR: Law 9,430/96, arts 18 through 24-A.

13 BR: Law 9,778/99.

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In 2000, Brazil was once again experiencing a strong economic growth. The privatization of companies in various economic sectors and the boost of commodities attracted a great inflow of foreign investments to the country and international taxation conflicts begin to arise, including with respect to the interpretation of tax treaties. This new period coincides with the re-democratization of the country.

Due to the lack of experience in treaty matters and not being an OECD member, Brazil adopted a unilateral interpretation of certain treaty provisions, which lead to conflicts with other countries, including the termination by Germany of the tax treaty with Brazil, effective as of 2006.

The movement of independent professionals, directors, students, professors in and out of the country increased in this period (2000) and in the years to come, demanding improvement not only of treaty provisions, but also of domestic legislation.

In the same period, Brazil also terminated the tax treaty with Portugal, to force the renegotiation with that country, aiming at preventing the Madeira Islands from having access to the treaty’s benefits. A new treaty with Portugal was signed only in 2000.

A total of 10 tax treaties were signed in the first decade of this century, plus 1 (one) complementary tax treaty with Finland. Only 4 (four) tax treaties were signed from 2011 until 2020, plus 2 (two) complementary tax treaties (Norway/2014 and Denmark/2021).

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In 2010, Brazil introduced its thin capitalization rules, general limitation of deductibility to payments made to beneficiaries domiciled in low tax jurisdictions ("LTJ") or operating under tax favored regimes ("TFR") and specific anti-avoidance rule to individuals transferring their residence to LTJ or TFR[14], thus, adopting OECD recommendations to tackle harmful tax competition regimes.

In the context of transparency, Brazil decided to adhere to the various international initiatives. In 2007 Brazil signed a tax information exchange agreement (TIEA) with the United States of America[15], and in 2014 an Intergovernmental Agreement (IGA) was signed to regulate the automatic exchange of information between the two countries for FATCA purposes[16].

In 2011, Brazil adhered to the OECD Convention on Mutual Administrative Assistance in Tax Matters, enacted by Decree 8,842/2016 and in force since August 29, 2016. Further, in 2016 Brazil also adhered to the MCAA and CRS.

The aim to achieve more transparency and international cooperation was one of the reasons that lead Brazil to widen its tax treaty network in the recent years, including the new version of the exchange of information clause of the OECD model.

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[14] BR: Law 12,249/2010.

[15] BR: enacted by Presidential Decree 8,003/2013.

[16] BR enacted by Presidential Decree 8,506/2015.

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In this sense, Brazil engaged in a series of joint actions involving the signature of new tax treaties (such as with Singapore, Switzerland and the United Arab Emirates), the renegotiation of previously signed tax treaties to include new provisions focused on the information exchange and avoiding tax evasion (such as with Argentina and South Korea), and the signature of tax information exchange agreements (including the FATCA Intergovernmental Agreement with the U.S.). Brazil has also worked to comply with key BEPS policies, as enumerated by the OECD. Those efforts are in line with Brazil's goal of acceding to the OECD as well as with Brazil's current international and economic policies.

Thus, the tax treaties signed by Brazil in this century represent this change in the Brazilian tax treaty policy to search for greater alignment, adopting new wording in several clauses, including the limitation on benefits and the updated version of the exchange of information.

Specifically with respect to the individual non-business active income clauses, in our analysis the following main deviations in the Brazilian tax treaties, as compared to the OECD and UN model conventions, were identified:

ARTICLE	BRAZIL
Article 15	Adopts allocation rules of the OECD and UN models, but some tax treaties also subject article 15 to articles 20 and 21. Post 2010 tax treaties does not provide for the precedence of other articles over article 15. Tax treaties with Latin Countries (Argentina, 1980; Chile 2001; Peru 2006; and Venezuela 2005), provide for services exercised on land with transportation

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	vehicles operated in international traffic. Except for Chile, all other LATAM countries have territorial borders with Brazil Deviations from the OECD model are specially found in article 15 (2), "c".
Article 16	Normally follows the OECD model, adjusting the language to "*member of the board of directors and any other board of a company*" or to a "*supervisory board or of a similar body*" in order to be in line with its domestic laws.
Article 17	Pre 90's treaties follow the 1963 OECD version, but a few of them already foresaw the second paragraph. Apparently, this results from the policy of third countries (Austria, 1975; Denmark, 1974; Spain, 1974; Sweden, 1975), not Brazil. After 90's, Brazil followed the 1992 OECD version with the second paragraph. All tax treaties after 2010 and a few signed before that date adopt the third paragraph excluding the taxing rights of the source country when the activities are performed with the financial aid of the Contracting States or non-profit organizations or in connection with cultural agreements between the countries, which seems to reflect Brazil's current policy.
Article 18	Brazil has largely accepted the inclusion of alternative provisions, as long as either the exclusive or limited source taxation rights is secured. Such alternative provisions include: a) exclusive source taxation of pension payments; b) non-exclusive source taxation of pension payments; and c) limited source taxation of pension, under which the power to tax is initially granted to the residence jurisdiction and above certain fixed limits/amounts (ranging from USD3,000 to USD5,000), is allocated to both Contracting States.
Article 19	The variation found in article 19(1) of the Brazilian Double Tax Treaties (henceforth DTTs) with respect to the definition of income covered is explained by the mutations of the OECD Model.

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	19(2) Although there are some variances, in most of the treaties signed by Brazil, this article is aligned with OECD and UN Models. Deviations include (a) a more restrictive situation, under which pensions for governmental service are taxed exclusively at source, without exceptions, (b) the exclusive taxation at source is the general rule but with a provision that precludes such taxation in cases where the recipient is a national of the other State, (c) the allocation of taxing rights is granted to both Contracting States. 19(3) No deviations.
Article 20	Brazil generally follows the OECD 1980 Model, but in some treaties a time limit to enjoy such exemption is provided, ranging from 183 days to a maximum of 5 years. In other treaties, temporal and quantitative limits may apply cumulatively. Professors' remunerations are normally exempt in the visiting State and covered in a separate article, except for the treaty with Argentina. The provision deals the remunerations received by professor for a limited period, generally not exceeding two years. Only the tax treaties with Austria, Canada, Chile, Finland and Peru does not have such a provision. In more recent treaties, Brazil does not impose any limit and also extends any existing exemptions, reliefs and reductions in respect of taxes available to residents of the State visited to grants, scholarships and remuneration paid during the education or training period.
Article 28	No deviations.

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Individuals – Non-Business Active Income

Authors: Winner: Team Brazil (Instituto Brasileiro Direito Tributário)
Finalist: Team Portugal (Lisbon University Law School)

2. Employment income

2.1. General rule - Article 15

The Brazilian experience on the interpretation of article 15 is a subject that has mainly been discussed on the academia. From a practical standpoint, several factors contribute to the limited usage of such treaty provision in practice.

First and foremost, Brazil is a jurisdiction with continental extension, with main developed areas located in the inner regions of the country.

Differently from Europe, for example, the border regions are underdeveloped zones with limited flow of frontier workers. As the flow of employees that are resident in one jurisdiction and exercise work in another jurisdiction is not material, the discussions in this context are also limited.

Exception is made to the Iguazu region, with a tri-border area between Argentina, Brazil and Paraguay. With a population of approximately one million people, friction related to taxing rights may arise, especially with Paraguayan residents, who are not protected by a treaty with either jurisdiction.

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Individuals – Non-Business Active Income

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Despite of few practical situations and the lack of discussions in court cases, the debates around article 15 became more relevant in the last two years, given the rising trend of remote work, recently accelerated by the world's pandemic, with relevant effects to the post-pandemic world as well.

As it happens with the OECD Model tax convention, Brazilian treaties are still focused on an environment where the work is provided physically and do not consider current practical issues such as: a) the increasing trend of jurisdictions granting residence to individuals based on flexible criteria; b) the changes related to the way the work is exercised; and c) the changes on the relationship between employees and employers.

In addition, another important topic of practical discussion in Brazil is the differentiation of articles 14 (independent professions) and 15, giving the country tradition of taxing the performance of services by non-residents at the source State.

With this scenario in mind, article 15 of the Brazilian treaties generally follows the recommendations of the OECD Model, although Brazil is not an OECD member. Giving the similarity of the OECD and UN Models, it is fair to say that the country also observes the UN Model, although these model conventions are not generally invoked in treaty negotiations.

Despite the similarity of both models, it is interesting noting that some of the treaties that Brazil has signed deviate from these usual patterns. We will address the specific deviations in the next sections.

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2.1.1. Main rule - Article 15 (1)

Under article 15 (1) of the OECD model, the salaries, wages, and other similar remuneration derived by a resident from a contracting State in respect of an employment shall only be taxable in the residence State, unless the employment is exercised in the other contracting State, which in case would also have taxing rights over the remuneration, as is derived therefrom.

One important topic contained in the article 15 of both OECD and UN Models is that the rules of article 16 (directors fees), article 18 (pensions) and article 19 (Income from Government services) have precedence over article 15.

However, after thorough review of all Brazilian treaties, it is possible to identify this is not the general rule on treaty negotiations.

In fact, although the OECD language is adopted in a reasonable number of treaties (15), it is possible to identify that a reasonable number of other treaties clarify that articles 20 and 21 also have precedence over article 15. A minor number of treaties grants precedence to article 20 only, as follows:

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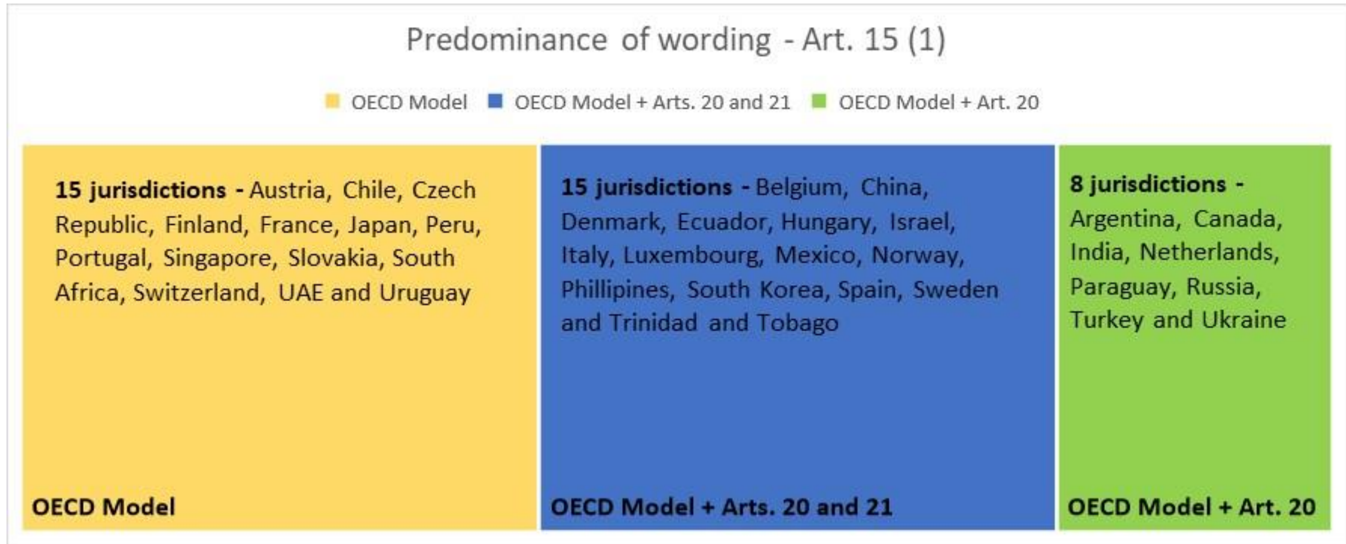

The three different Brazilian templates for article 15 (1) are found spread in all decades and in treaties signed with jurisdictions located in different continetnts and state of development. Therefore, it is not possible to trace back the reasons of fiscal policy that lead Brazil to adopt one model or the other, being the subject likely an indirect matter discussed during treaty negotiations.

The most important trend on this particular matter is found in the most recent treaties, that follow the OECD Model, with no additional rules of precedence. This is the language of the four latest treaties signed by Brazil, i.e.; Singapore and Switzerland, UAE, all three signed in 2018, and Uruguay, signed in 2019.

2.1.2. Source-state taxation - Article 15 (2)

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As mentioned, the article 15 (1) may grant taxing rights to the jurisdiction where the work is exercised. It is important to note, however, that there are some exceptions to this rule, which are listed on article 15 (2) of the OECD Model convention.

The first exception is listed on paragraph 2 (a) of the mentioned article and excludes from taxation of the source State the individuals receiving remuneration from the source State with physicall presence of less than 183 days. The current language of article 15 (2) (a) of the OECD Model, adopted since the modifications on the OECD Model convention back in 1992, establishes that the remuneration would be exclusively taxed at the residence State if the recipient is present in the source State for a **period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned.**

Before the publication of the 1992 OECD Model, Brazil adopted the language present in the 1963 and 1977 Models, as well as in the 1980 UN Model, which established that the residence State would have exclusive taxing rights when individuas spend less than 183 days for a given **official year considered**. The exception is made to the treaty with Trinidad and Tobago, which uses the old version of the OECD Model, although the treaty was signed in 2008.

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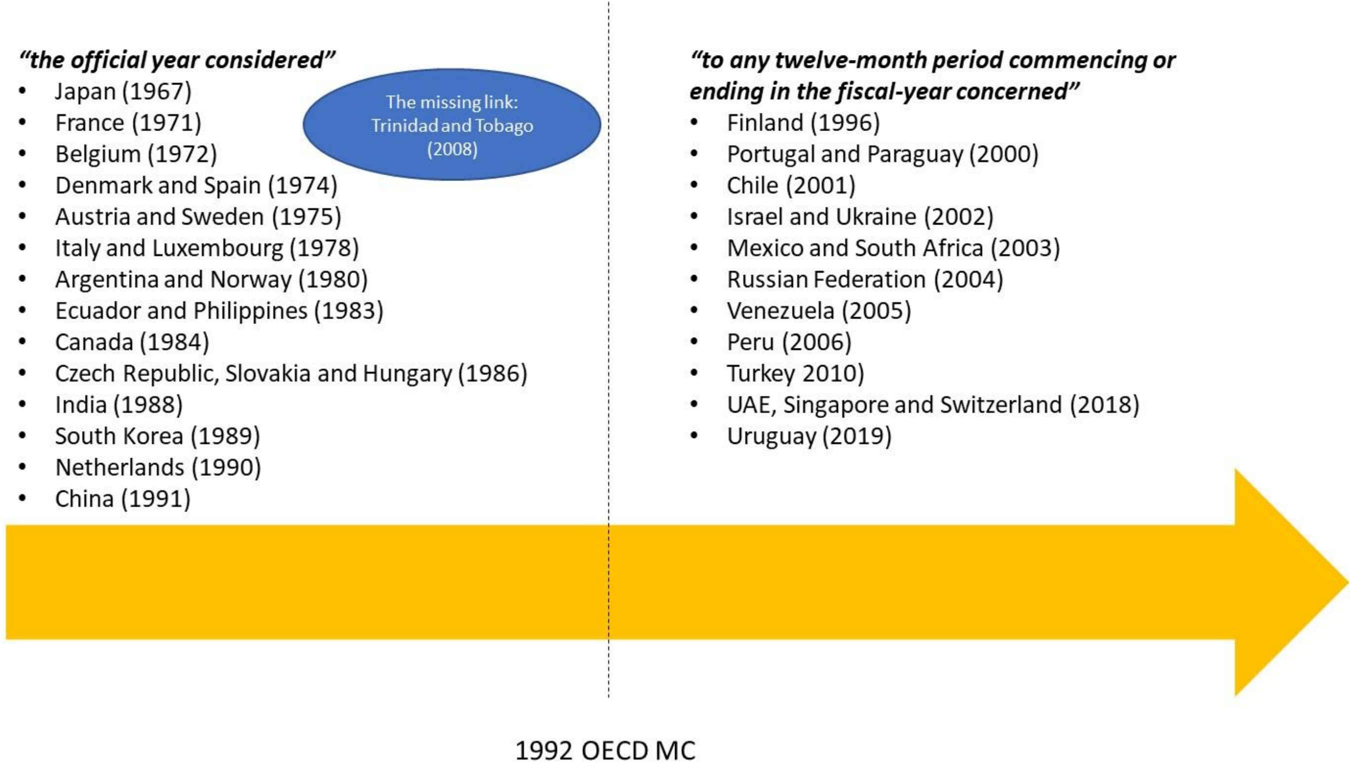

The paragraph 2 (b) of the OECD Model preserves the taxation at the resident State where the remuneration is paid by, or on behalf of, an employer resident in a third State, not protected by the treaty. In that regard, the Brazilian treaties follow the OECD model, with no exceptions.

Finally, the paragraph 2 (c) avoids the taxation at the source State when the the remuneration is not borne by a permanent establishment which the employer has in the other State. As to the paragraph "c", it is important to note that prior to the year 2000, the OECD Model also included a "fixed base" among the exceptions of the paragraph "c", but the term was repealled by the 2000 update to the Model Tax Convention.

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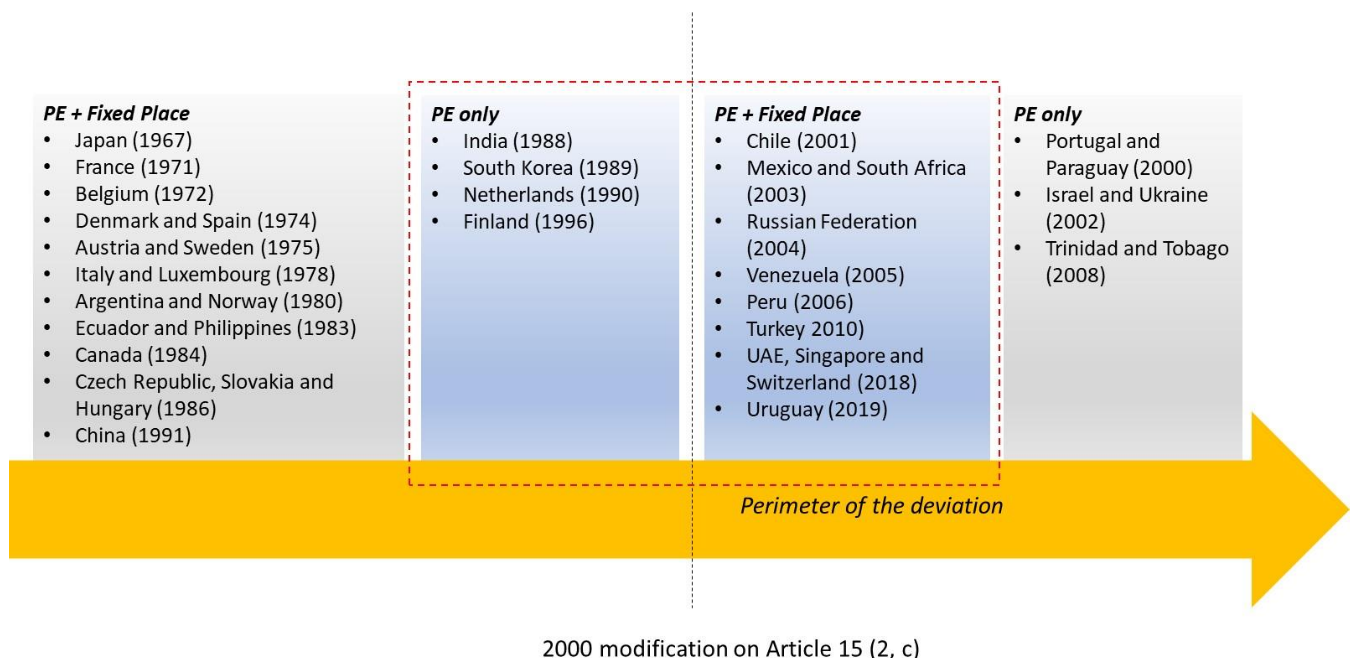
Differently than in the case of paragraph "a", Brazil did not adopt the changes on the Model in most of the treaties. As it may be observed in the graphic below, some treaties were early adopters of the fixed place exclusion whereas others still adopt the term "fixed base" after the changes of the Model in 2000:



2.2. Employment in international traffic - Article 15 (3)

The paragraph 3 of the OECD Model establishes that the remuneration in respect of an employment exercised aboard a ship or aircraft in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated. Brazilian treaties generally follow this principle, with slight deviations.

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Given the proximity of the Brazilian borders, the treaties with Argentina, Peru, Venezuela and Chile, for example, include in the scope of such paragraph the employment exercised on land with transportation vehicle operated in international traffic.

The treaties with Denmark and Norway also introduced subsidiary tie-breaking rules to establish taxation rights in vessels. To a large extent, if it is not possible to determine the place of effective management of a shipping enterprise, the employment remuneration should be taxable in the country where the vessel is registered.

The treaty with Norway extends the application of such rule to fishing vessels in general and grants exclusive rights to the residence of the employee for the income related to the employment in aircrafts.

2.3. Government service – Art. 19

2.3.1. Main rule – Art. 19(1)

In general, article 19 (1) of the Brazilian treaties follow the *Kassenstaatsprinzip* whereby the income shall be taxed in accordance to the domestic legislation of the paying entity. Some treaties contain exceptions if the recipient is a national of the other country (i.e.; Belgium, France and Denmark). The always unique treaty with Japan allocates the taxing rights to the source country only if the recipient is a national of the

source country and is providing services to the source country. Lastly, the treaties with Portugal and Sweden grants concurrent competence to the source and resident States, except if the remuneration is paid to a national of the source country, which would have exclusive taxing rights in that case.

Moreover, it is worth pointing out that the scope of article 19(1), depending on the treaty, cover remuneration and pensions,[17] remunerations but not pensions,[18] salaries, wages and other similar remuneration, excluding pensions expressly,[19] including it expressly[20] or not making reference to pensions at all.[21] These variations can be explained by the different versions of the OECD Model that modified the definitions of income covered. throughout the years

2.3.2. Employment in government business – Art. 19(3)

In 100% of the tax treaties negotiated by Brazil until now, Article 19(3) is consistent with the wording of OECD and UN Models.

[17] In line with the wording of the *OECD Model* (1963), this formulation is found in the treaties signed with Austria, Belgium, Denmark, France and Sweden. Although phrased differently, the treaty with Portugal can also be considered similar to the *OECD Model* (1963).

[18] This wording of the *OECD Model* (1977) appears in the treaties with Argentina, Canada, China, Czech Republic, Ecuador, Finland, Hungary, India, Italy, Luxembourg, Netherlands, Norway, Philippines, Slovakia, South Korea, Spain, Trinidad and Tobago and Ukraine.

[19] This formulation is inspired by the *OECD Income and Capital Model Convention and Commentary* (1 Sept. 1996), Treaties & Models IBFD, and is found in the treaties with Chile, Israel, Mexico, Peru, Russia, South Africa, Switzerland (signed but not yet in force), Turkey and Venezuela.

[20] That is particularly the case with the treaty signed with Japan.

[21] The wording of the *OECD Model* (2005) and onwards is employed in the treaty newly signed (but not yet ratified) with Singapore, the United Arab Emirates and Uruguay.

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In 30 of the 38 treaties analyzed, article 19(3)[22] does not make reference to article 17. This is because the majority of the treaties are based on older versions of the OECD Model.

2.4. Diplomats – Art. 28

All treaties signed by Brazil include the provision of Members of Diplomatic Missions and Consular Posts and, in all cases, such provisions overall correspond to the OECD Model.

Therefore, under the application of article 28, Brazil secures that members of diplomatic missions and consular posts, do not receive a less favorable treatment as compared to the treatment provided by the international law, except if the activities are carried out in non-governmental areas.[23]

This is also aligned with the domestic legislation that, to a certain extent, mirror the Vienna Convention on Diplomatic Relations (VCDR) and the Vienna Convention on Consular Relations (VCCR),[24] providing additional clarification for local purposes.[25]

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[22] Article 17 (or equivalent) is only mentioned in the treaties signed by Brazil with Peru, South Africa, Turkey, Venezuela, Switzerland, United Arab Emirates, Singapore and Uruguay.

[23] According to article 20, paragraph 1 of Decree 9,580/2018, in such cases, the agents are will be regularly taxed on capital gains and other types of income produced in Brazil. This rule is aligned with article 34 of the Vienna Convention on Diplomatic Relations.

[24] The VCDR and VCCR were signed by Brazil in 1961 and 1963 and approved by the Brazilian Congress in 1964 and 1967, respectively. The immunity granted by such conventions covers not only federal, but also state and municipal taxes alike. *See* L.E. Schoeuri & M.C. Barbosa, *Chapter 5: Brasil*, in *Tax Rules in Non-Tax Agreements*, pp. 155-156 and pp. 159-160 (M. Lang et. al. eds., IBFD 2012).

[25] *See* BR: Law 4,506/1964 art. 5 and BR: Law 7,713/1988 art. 30.

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Finally, note that Belgium, Canada, France and Luxembourg, likely aiming at preventing undesirable tax reliefs, have added in the treaties with Brazil the caveat that article 28 does not apply to international organizations or individuals that, although members of diplomatic or consular missions, are not deemed to be residents of one or the other Contracting State with regard to taxes on income.

3. Director's Fees – Article 16

When it comes to director's fees, the Brazil treaty network mostly favors source taxation and provide that the relevant fees WILL be taxed ('são tributáveis') "in that other State" where the company is a resident of. That deviates from the OECD and UN Models to the extent that they include the verb MAY ('podem ser tributadas'). That trend seems to make sense in the context of Brazil being a developing country and, therefore, aiming at taxing the income of foreign individuals performing directorial duties in Brazil.

That trend is not absolute, however. Many treaties entailed by Brazil do adopt the OECD and UN recommended provisions in the sense that they use the verb MAY. It is rather difficult to affirm a clear rationale for Brazil's position and to explain the policy behind it. However, there seem to exist a pattern of WILL generally relating to older treaties signed with developed nations and MAY relating to newer treaties signed with developing countries.

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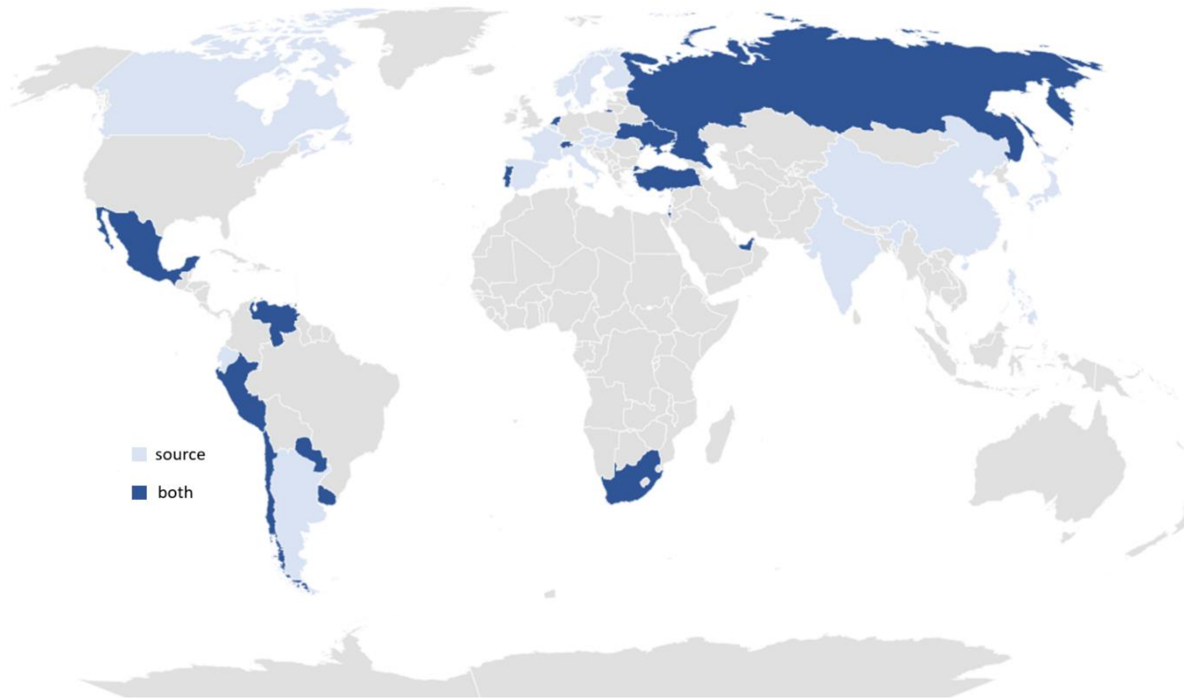
The following map shows the situation of each treaty signed by Brazil in relation to its position around director's fees, whether source based (WILL) or both (MAY):



The prevailing source position seen in Brazil has sound technical grounds for it and it is aligned with the benefits theory[26]. Important to assert however that, despite the close connection to the OECD's article 16 model language, as well as that of the paragraph 1 of the UN Model, no treaties signed by Brazil

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[26] Andy Cool explains as follows: *"For historical reasons, article 16 of the OECD Model is based on this benefits theory. In the source state, the director benefits from the ability to hold positions in companies and derive income by way of compensation for these positions. In general, this view goes back in time to the Report of the League of Nations of 1923. This Report was based on the principle of the economic allegiance.151 The doctrine stated that the real place of economic interests of a person had to be determined. It is important to note that the report by no means required a physical presence in a state to levy taxes on certain income. Consequently, it is sufficient that being the state where the company is established gives rise to the possibility to generate taxable income from this company. Schanz (1982) has argued the primary economic nexus is with the source state, rather than the resident state, and, for this reason, the source state should be able to levy a considerably larger share of the taxes. (…)*

Consequently, residence-based taxation is justified by individual interests of a person. In the author' s opinion, the criterion of serving the corporate interest is a conditio sine qua non to qualify as a director for the purposes of article 16 of the OECD Model. In particular, directors should serve the corporate interest, not their personal interest. A taxation regime for directors' fees based on personal interests conflicts with this. The activities of a director affect the company for which they perform duties and their personal situation is irrelevant in this perspective". In Cool, Andy. Article 16 of the OECD Model: A Plea to Extend the Scope of the Ratione Personae. BULLETIN FOR INTERNATIONAL TAXATION. OCTOBER 2016.

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explicitly adopt the content included in the UN Model's paragraph 2. For Andy Cool, the OECD Model is outdated in its limited scope and advocates for an extensive interpretation that also includes top-level managers, similarly to the UN Model.[27]

In some treaties, like the one with Canada, there is an issue of translation: in the Portuguese version, the expression is "are taxable" ("são tributáveis"), but, in the English version, the expression is "may be taxed", which asserts, clearly, different meanings.

In this context, the Brazilian tax authorities position about the interpretation of the expression "are taxed" can be found in the Tax Ruling SRRF06 121/2009, involving a Brazilian expatriate working as a director of a company in Argentina. In that case, Brazilian tax authorities interpreted the expression "are taxed" as "are taxed only". The summary of the decision in the Tax Ruling is as follows:

> "*BRAZIL AND ARGENTINA TREATY. Income from work performed in Argentina, received by a person considered resident in Brazil, arising from the exercise of a management position in a company based in that country, is taxable only in Argentina, from the moment the employee started working in that country, regardless the fact that the Brazilian legislation still considers him/her as resident in Brazil.*"

Therefore, from the perspective of the Brazilian authorities, the right to tax of the country where the company (which pays the director's fees) is located should prevail.

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[27] "*In the author' s opinion, article 16(2) of the UN Model makes it clear which managers serve the corporate interest and execute a global strategy, notwithstanding the fact that the wording differs from article 16 of the OECD Model. The UN Model demonstrates that top-level managers can be distinguished from other managers. In the author' s view, this could be an instructive source of inspiration in extending the scope of article 16 of the OECD Model de lege ferenda (...); the title of article 16 of the OECD Model is no longer fit for purpose. It is clear that the title 'Directors' fees' does not adequately reflect all the individuals who can, de facto, lead a company. The author would suggest that the title of article 16 of the OECD Model is, therefore, recast as 'Company managers'. In this context, it should be noted that there is no requirement that the form of the income covered by the article is cited in the title*". In Cool, Andy. Article 16 of the OECD Model: A Plea to Extend the Scope of the Ratione Personae. BULLETIN FOR INTERNATIONAL TAXATION. OCTOBER 2016.

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3.1. DTT application in light of domestic law

Treaty coverage for the matter of taxation of directors' fees addresses the allocation of taxing rights between contracting nations. Domestic law presents challenges of more practical nature, however. Historically, Brazilian legislation[28] has, for a long-time, forbidden non-residents from taking management positions in companies incorporated in Brazil. With the revocation of such law in 2017[29], the practice may be slowly shifted.

The categorization of the company's director can be controversial[30]. Based on domestic labor law, the director may or may not be considered an employee. Whether or not it will constitute an employment relation depends on several facts, but mainly in linked to the subordination. In the event the employment nature of the relation is present, article 15 should apply. If not, article 16 may still prevail[31].

Brazil is well known for its extensive withholding taxes (WHT) policy. Based on local legislation, payments made to non-residents for labor-related or independent services are subject to WHT at a 25%

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[28] BR: Federal Law 6,815/1980.

[29] BR: Federal Law13,445/2017.

[30] See more in D. Bellan. *Individual's Income under Double Taxation Conventions: A Brazilian Approach*. Kluwer L. Intl. 2010. pp. 156.

[31] There are other local practical issues such as the debate whether the director needs to be an individual, or if the role could be exercised through a legal person, and the issue around whether a directing position would trigger social contribution taxes. These local discussions do make the case more complex but do not directly impact treaty application.

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rate[32]. In light of article 16 of the treaties, Brazil upholds the source taxing rights it has retained in all of its treaties.

For those treaties in which both contracting States have retained taxing rights (see map above), the residence State shall apply article 23 for the elimination of double taxation.

4. Performers – Article 17

4.1. Main rule – Art. 17(1)

Notwithstanding slightly different wording applied in the treaties signed by Brazil, Brazil's treaty policy is largely aligned with that of the OECD and the UN Models in the sense that taxation may be levied at source.

Out of Brazil's signed treaties, 15[33] contain paragraphs 1 and 2 only; 4[34] contain only paragraph 1; and 19[35] contain a third paragraph, in addition to 1 and 2, that is not found in either the UN or OECD

[32] BR: Normative Instruction 208/2002, art. 37.

[33] Austria (1975), Belgium (1972), Chile (2001), Denmark (1974), Ecuador (1983), Finland (1996), Italy (1978), Mexico (2003), Norway (1980), Peru (2006), Spain (1974), Sweden (1975), The Netherlands (1990), Ukraine (2002) and Uruguay (2019).

[34] Argentina (1980), France (1971), Japan (1967) and Luxembourg (1978).

[35] Canada (1984), China (1991), Czech Republic (1986), Hungary (1986), India (1988), Israel (2002), Paraguay (2000), Philippines (1983), Portugal (2000), Russia (2004), Slovakia (1986), South Africa (2003), South Korea (1989),

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models[36]. Expectably, the 4 treaties comprising only paragraph 1 refer to older treaties and reflect negotiations that were based on the 1963 OECD Model, which did not include a second paragraph.

That additional feature included in the third paragraph provides, in general, that if the relevant event or spectacle is materially sponsored by public funds from the residence State, then that State will retain sole taxing rights to the applicable income. However, two variances can be found in such third paragraph:

1. If the event is presented within cultural exchange programs undertaken between the relevant governments, then the income is exempt from taxes[37];
2. If the income is received by a certified non-profit organization, then article 17 does not apply[38].

4.1.1. DTT application in light of domestic law

In treaties signed by Brazil, except for the events treated under article 17, paragraph 3, the source country retains taxing rights. In cases where Brazil qualifies as the source country, no specific rule is established as to the collection procedure.

Trinidad and Tobago (2008), Turkey (2010), Venezuela (2005), Switzerland (2018), Singapore (2018), and the United Arab Emirates (2018).

[36] The concept is, however, included in the OECD commentary, per paragraph 14. Model Tax Convention on Income and on Capital: Condensed Version 2017 | READ online (oecd-ilibrary.org).

[37] China (1991), Czech Republic (1986), Hungary (1986), and Slovakia (1986).

[38] Canada (1984).

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Alike the comments made to article 16, the local rules establish that payments made to non-residents for labor-related or independent services are subject to WHT at a 25% rate[39]. Where the residence country's domestic law taxes the same income and provided that no limitation of taxing rights is found in the relevant treaty[40], article 23 shall apply to eliminate double taxation.

There are scarce examples where Brazilian Courts had to decide disputes specifically involving article 17. One of the rare examples is the case of soccer coach Falcão, which involved the treaty with Japan, and the Brazilian Superior Court (STJ) ruled in favor of the taxpayer. The judges ultimately understood that a soccer coach is included in the broader treaty definition of entertainer and, as such, would only be liable to tax in Japan as a result of the relevant treaty and underlying facts and circumstances.[41]

Historically, Brazil domestic law was structured in a way not to allow personal activities (intellectual, artistic and related to sports) to be undertaken by companies; any attempt to do so would result in taxation as if the relevant activities had been executed by an individual.[42]

Subsequent changes in the legislation introduced over the last couple of decades in Brazil has slowly changed the scenario when it comes to companies exercising personal activities.[43] Because of such changes in the private legislation, courts have been shifting the traditional position towards recognizing

[39] *See* Normative Instruction 208/2002, art. 37.

[40] China (1991), Czech Republic (1986), Hungary (1986), Slovakia (1986) and Trinidad and Tobago (2008).

[41] BR: STJ, Resp nº 882.785/RS, 2008.

[42] CARF, rulings 104-18.641, 104-19.111, 104-20.574 e 104-21.583; 106-14.244 e 104-20.915; 106-17.147; 2101-00.979; and others.

[43] Federal Law nº 9.615/98, Federal Law nº 11.196/05, article 129, Federal Law nº12.441/11.

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nuances in the nature of personal activities, segregating assignability of rights and labor activities, with different taxing outcomes for each.[44]

Very recently, however, Brazil's Supreme Court opened the doors to allow personal activities to be undertaken through companies rather than by an individual[45]. Based on that (among other grounds), the Brazilian Administrative Tax Tribunal (CARF) has already recognized that, in the case of intellectual services, the applicable tax regime is the one applicable to companies, not to individuals[46].

As it seems, Brazil might be on the verge of a radical shift in the matter of the performance of personal activities through companies. The road is paved when it comes to certain categories of personal activities, namely intellectual. It is not such a huge step for a similar rationale to be applied to sports activities. Should that happen in what might be a near future, it may lead to more cases involving the application of star companies in the context of article 17.

4.2. Artiste companies – Art. 17(2)

As noted above, the 4[47] treaties comprising only paragraph 1 refer to older treaties and reflect negotiations that were based on the 1963 OECD Model, which did not include a second paragraph.

[44] CARF rulings 104-21.954, 2202-00.252, 2101-00.980, 2801-01.870, 2201-001.496, 2102-002.441 e 2102-002.623.

[45] STF, ADC nº 66, 2021.

[46] CARF, case nº 12448.730776/2014-91.

[47] Argentina (1980), France (1971), Japan (1967) and Luxembourg (1978).

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5. Employment pensions

In order to provide the context for this article, it is worth explaining some basic features of the Brazilian tax system in respect of pensions.

The social security system in Brazil is structured as a pay-as-you-go scheme. However, the domestic legislation allows for the creation of private pension plans, which are generally exempt-exempt-taxed (EET) or a taxed-exempt-taxed (TET).[48] The most common private pension systems are: (a) Free Life Benefit Generating Plan (VGBL)[49], under which contributions are not deductible, the investment income derived by the fund is tax-exempt during the build-up period but the pensions received are taxed only on the portion attributable to investment income[50], and (b) Free Benefit Generating Plan (PGBL)[51], under which the contributions are generally deductible up to certain limits[52], the investment income derived by the fund is also tax-exempt during the build-up period, and pensions received are fully taxed.

[48] For further details about the different systems for the taxation of pension schemes and terminologies usually applied, see P. Brown, *Articles 18 and 19(2): Pensions* sec. 1.1.2.2., Global Topics IBFD (access on 05 March 2022). *See also* OECD, *Financial incentives for funded private pension plans – OECD Country profiles*, available at http://www.oecd.org/tax/tax-treatment-funded-private-pension-plans-oecd-eu-countries.htm.

[49] VGBL is the acronym, for the term in Portuguese *[Plano] "Vida Gerador de Benefício Livre*". Other similar plans are those that start with the letter V, such as VAGP (*Vida com Atualização Garantida e Performance*) and VRGP (*Vida com Remuneração Garantida e Performance*). *See* Gaudenzi, *supra* n.415, at pp. 82-87.

[50] The classification of PGBL (and similar plans) as a TET and not as a taxed-exempt-exempt (TEE) system is based on the taxation of returns on investment upon future pension payments or withdrawals. The OECD report (http://www.oecd.org/tax/tax-treatment-funded-private-pension-plans-oecd-eu-countries.htm) is not categorical with regard to the terminology applicable to these cases but, apparently, the countries that present some sort of partial taxation of withdrawals were classified as TET. Perhaps a better label for the VGBL would be TET, due to both the partial taxation (only investment income is taxed) and the lower rate potentially applicable to such investment income.

[51] PGBL is the acronym for the term in Portuguese "*Plano Gerador de Benefício Livre*". Other similar plans are the Fapi (*Fundo de Aposentadoria Programada Individual*), PAGP (*Plano com Atualização Garantida e Performance*), PRGP (*Plano com Remuneração Garantida e Performance*), FGB (*Fundo Garantidor de Benefícios*) and other products whose acronym normally starts with the letter P. *See* P.B.L. Gaudenzi, *Tributação dos Investimentos em Previdência Complementar Privada* pp. 80-82 (Quartier Latin 2008).

[52] The deduction of the contributions to the PGBL fund is limited to 12% of the contributor's annual taxable income.

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Historically, the EET was the Brazilian pension scheme in place between 1979-1988, which was then replaced by the TEE system between 1988 and 1995. In 1996 the EET was reestablished [53] but the individuals who moved abroad could keep the exempt status on the amounts of contributions made during such period even after the change of their pension plans to EET.[54] Currently, both EET and TEE plans coexist.

Under the domestic rules, pension payments to foreigners are generally subject to a 25% WHT,[55] except when such pension plan, due to its features, is viewed as 'life insurance', under which a 15% rate applies.[56] In the absence of a DTT, pensions received from abroad by a Brazilian resident are ordinarily taxable in Brazil,[57] unless they qualify for specific exemptions, such as serious illness pensions.[58]

5.1. General rule - Article 18

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[53] However, the exemption was preserved for withdrawals and pension payments related to contributions made during the TEE period. *See* BR: Provisional Measure 2,159-70/2001, art. 7; BR: Normative Instruction RFB 1,343/2013; and BR: Tax Ruling Cosit 541/2017.

[54] The continuity of the exempt condition was confirmed by Tax Ruling Cosit 541/2017, which involved an individual who moved his residence to Germany after having contributed to a private pension plan in Brazil for many years, including the TEE period of 1989-1995. The argument for non-taxation is based on the absence of income.

[55] BR: Law 9,779/1999, art. 7.

[56] Which is the case of VGBL based on BR: Decree 9,580/2018 art. 744. *See* the reasoning in Tax Rulings SRRF08 163/2013 and SRRF10 19/2013.

[57] BR: Tax Ruling Cosit 69/2013 confirmed the taxation of social security payments received by a Brazilian resident from the Venezuelan government in a situation where the relevant DTT was not yet in force.

[58] BR: Tax Ruling Cosit 118/2016 confirmed the exemption for serious illness pensions received by a Brazilian resident from the American Social Security.

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Although under some of the treaties signed by Brazil article 18 has some similarities with the OECD Model or the UN Model (both alternatives A and B), detailed comparison relevant deviations from such Models were found as a result of the adoption of alternative provisions. In fact, of the 38 DTTs herein analyzed, 66% of the treaties have significant disparities as compared to the base case provided by the models.

Of the 38:

(a) 13 treaties (34%) establish, as a rule, the taxation of pensions and other similar remuneration at the source State, among which 7 provide for exclusive taxation at source[59],

(b) 25 treaties provide for taxation of pensions and other similar remuneration in the State of residence of the recipient, only 2 adopting the principle of exclusive residence taxation[60] as suggested by the OECD Model and other 4 a combination of taxation at residence as a rule, but at source for social security payments[61] (similar to Alternative A). Another 7 treaties clearly have their basis on the UN Model Alternative B, establishing the taxation at residence as the rule but allowing concurrent taxation of employment pensions and similar remuneration when the payment is made by a resident or a permanent establishment situated in the source jurisdiction[62]. In the same sense, another 10 treaties, and therefore the majority (10 of 25), establish the taxation at residence as a rule and the concurrent taxation for payments of pensions and similar remuneration exceeding certain annual threshold amounts[63].

[59] Argentina, Austria, Chile, Denmark, Ecuador, Venezuela and Singapore (not yet in force).

[60] Japan and France. Although the English version of the Brazil – France DTT states “may be taxed”, both the Portuguese and French versions state “only taxable”.

[61] Belgium, Finland, Portugal and Turkey.

[62] China, India, Israel, Mexico, Trinidad and Tobago, Ukraine, Paraguay.

[63] Concurrent taxation applies above the following thresholds: Canada (CAD 4,000), Czech Republic (USD 3,000), Hungary (USD 3,000), Italy (USD5,000), Luxembourg (USD 3,000), South Korea (USD 3,000), Spain (USD 3,00), Netherlands (USD5,000), Slovakia (USD 3,000), Sweden (USD 3,000).

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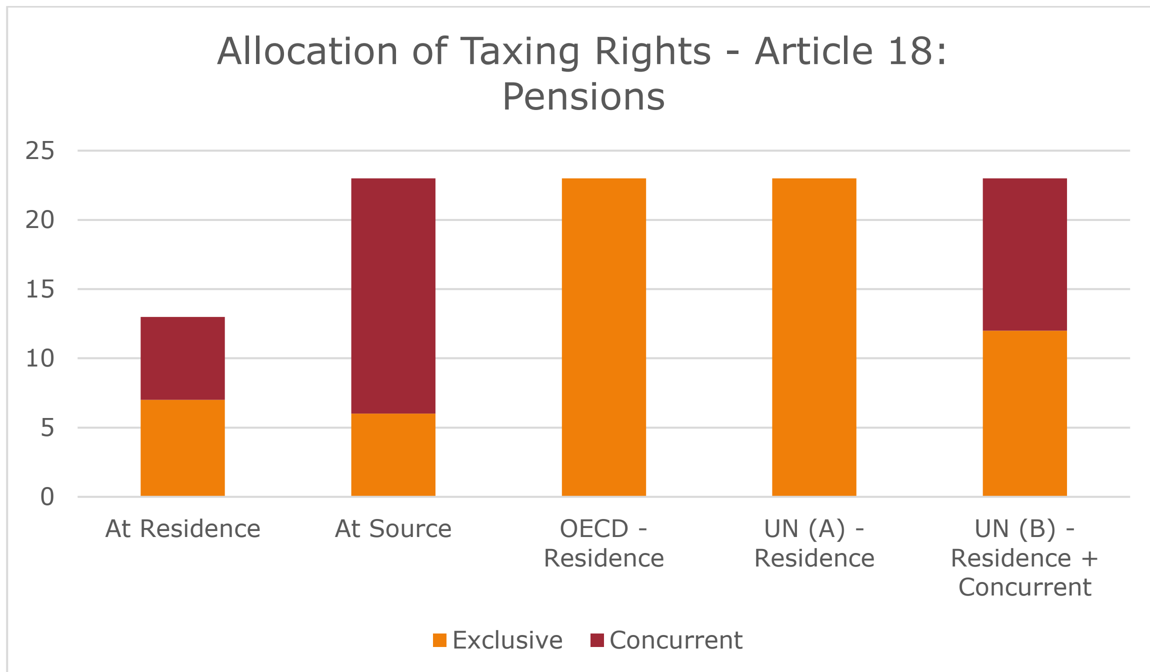

With regard to the income covered, pensions and other similar remuneration are generally described as "*periodic payments made after retirement in consideration of past employment or by way of compensation for injuries received, in connection with past employment*".[64]

Annuities are, very often, also defined in the treaties and, differently from the OECD Model that restricts the annuities to payments in consideration of past employment, annuity generally means "*a stated sum payable periodically at stated times during life, or during a specified or ascertainable period of time, under an obligation to make the payments in return for adequate and full consideration in money or*

[64] A similar concept can be found in the treaties signed with Argentina, Belgium, Canada, Czech Republic, Ecuador, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Norway, Peru, Philippines, Russia, Slovakia, South Korea, Spain, Sweden, Trinidad and Tobago, United Arab Emirates (not yet in force), Uruguay (not yet in force) and Venezuela.

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money's worth (other than services rendered)"[65]. Based on such broad definition, it is clear that, in such cases, the scope of this provision is not limited to pensions paid in respect of employment.

As previously mentioned, private pensions or personal retirement schemes are common in Brazil so, transporting the treaty provisions to the Brazilian environment, it is possible to better understand the reason why in almost 80% of the treaties signed (approximately 30), this broad definition for "annuity" is expressly included under article 18. Alimony, another payment that does not have basis in the cessation of employment, is also included under article 18 in 9 of the treaties signed by Brazil.[66]

[65] A similar concept can be found in the treaties signed with Argentina, Belgium, Canada, Czech Republic, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Netherlands, Norway, Peru, Philippines, Russia, Slovakia, South Korea, Spain, Sweden, Trinidad and Tobago, Turkey, United Arab Emirates (not yet in force), Ukraine, Uruguay (not yet in force) and Venezuela.

[66] Canada, Chile, Czech Republic, France, India, Italy, Netherlands, Norway and Slovak Republic

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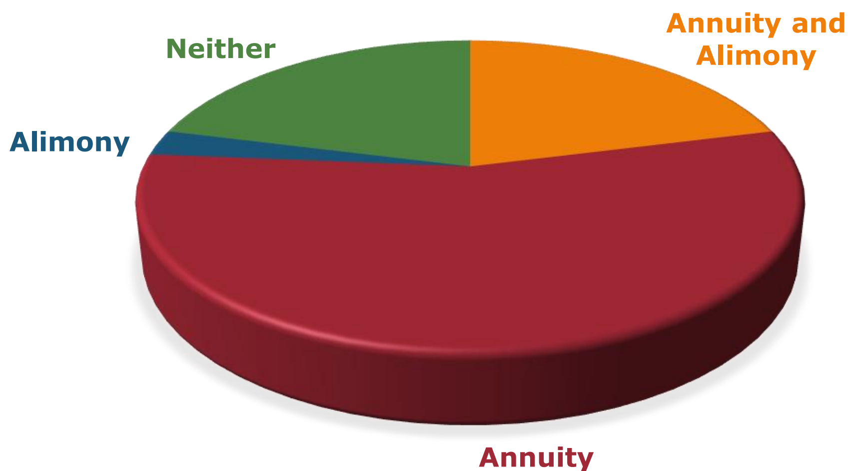

Additionally, in 21 treaties social security payments are included under article 18, being the rule the taxation exclusive in the paying jurisdiction, with few exceptions[67].

In terms of trend, the first treaties signed by Brazil[68], which happened between 1967 and 1971, are the only 2 treaties that establish the taxation exclusive at the residence for pensions and similar remunerations paid, without dealing with social security, similarly to the OECD Model in this respect. From the mid-70s to mid-80s the predominance was the taxation of pensions exclusive at source (the opposite of the first treaties signed) and a combination of residence and source taxation on excess amounts based on preset thresholds. The latter continued to be negotiated in the treaties until the late 80s when a new trend started, i.e., the taxation of pension at residence and concurrent taxation in case of payments made by a resident

[67] Finland, Norway, Switzerland and Uruguay (not yet in force). For Canada the taxation exclusive at source changes to exclusive at residence if the recipient is a national or resident of the residence State.

[68] Belgium, France and Japan.

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or a permanent establishment situated in the source jurisdiction, in line with alternative B of the UN Model.

Around the same time, some treaties also determined the exclusive taxation at the residence for pension and similar remuneration, but included a provision for social security, which is taxed at source in the treaties as a general rule. As of early 2000, a trend is less obvious, and we see different provisions being negotiated for article 18[69]. However, particularly for treaties signed with Europe, from all 6 treaties most recently signed[70], only the treaty signed with Switzerland - the most recent one - establishes that pensions may be taxed in the State in which they arise.

Therefore, it is fair to state that Brazil does not have a clear policy for this article and, it seems that Brazil has been quite flexible to accommodate partners' requests concerning article 18, both from developed and developing jurisdictions, as long as the right to tax at the level of the source country (which is generally the case of Brazil) is preserved. It was also possible to observe that, of the 19 treaties signed with European countries[71], 8 have established a combination of residence and source taxation on excess amounts based on fixed thresholds while, for Latam countries, half of the treaties establish the taxation exclusive at the source[72].

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[69] Such as: taxation exclusive at residence for pension and similar remuneration and exclusive at source for social security, which is the case of the treaty signed with Portugal; concurrent taxation if the pension is paid by a resident or Permanent Establishment situated in the source country, which is the case of the treaties signed with Paraguay and Israel; taxation exclusive at source, which is the case of the treaty signed with Chile.

[70] Signed between 1996 and 2018.

[71] Including Russia.

[72] This includes the treaties with Argentina, Chile, Ecuador, and Venezuela.

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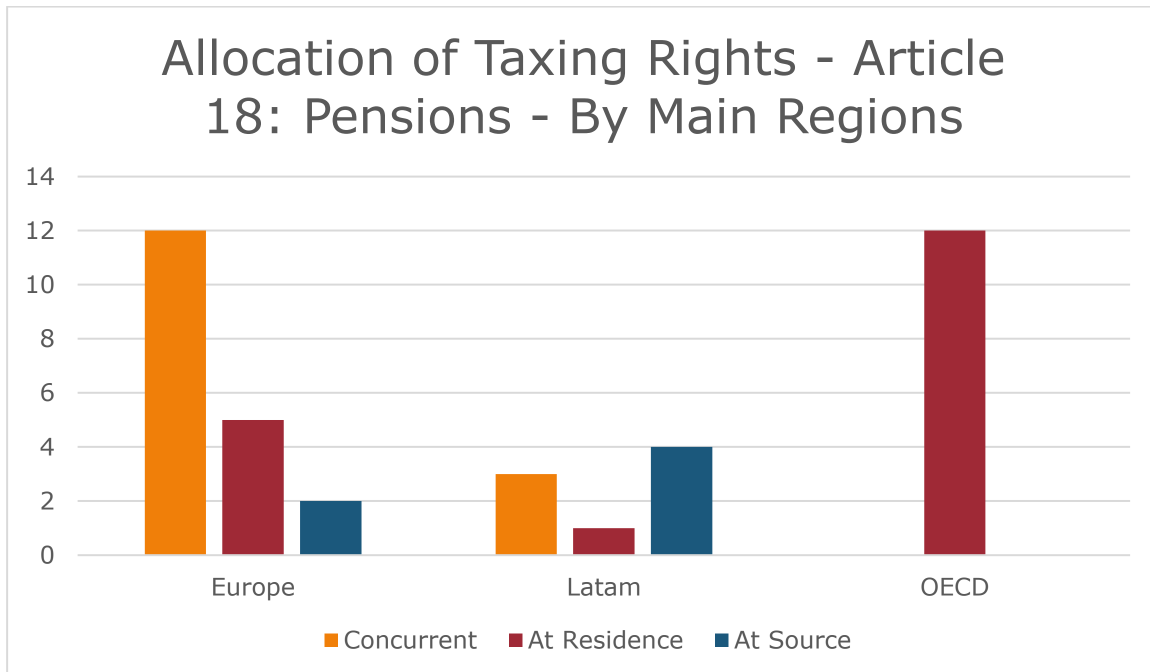

5.2. Government service pensions – Art. 19

5.2.1. Main rule – Art. 19(2)

Although there are some variances, in 61% of the treaties signed by Brazil, article 19(2), which deals with pensions resulting from government services, allocates the taxing right exclusively to the paying State, unless the individual receiving the pension or similar remuneration is both a national and a resident of the other state. In such cases, the exclusive taxing right is then shifted to the residence state,[73] in line with OECD and UN Models.

[73] This includes the treaties signed with Canada, China, Czech Republic, Finland, Hungary, Israel, Italy, Luxembourg, Mexico, Netherlands, Philippines, Russia, Singapore (not yet in force), Slovakia, South Africa, South Korea, Spain, Trinidad and Tobago, Turkey, United Arab Emirates (not in force yet), Ukraine, Uruguay (not yet in force) and Venezuela. In the case of Canada, in the lack of art. 19(2) under such treaty, the rule applicable for pensions for governmental service is the same applied to social security pensions (based on the art. 18(4)).

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The other cases include (a) a more restrictive situation, under which pensions for governmental service are taxed exclusively at source, without exceptions[74], (b) the exclusive taxation at source is the general rule but with a provision that precludes such taxation in cases where the recipient is a national of the other State [75], (c) the allocation of taxing rights is granted to both Contracting States.[76]

In this sense, there is no clear trend of policy over time or by region in the sense that older and newer treaties, as well as treaties signed with jurisdictions located on different continents are, in some cases, but without any particular consistency, in some cases based on the OECD Model, in some cases not.

5.2.2. Previous employment in government business – Art. 19(3)

In all Brazilian treaties, if the pension or similar remuneration relates to previous employment services performed in connection with a business carried on by the State, or one of its political subdivisions or local authorities, then article 18 applies instead of article 19(2). Further analysis of article 18 is provided in the previous section. In any case, with regard specifically to article 19(3), as previously stated under section 2.3.2, all treaties signed by Brazil are consistent with the wording in the relevant Model Conventions.

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[74] *See* the DTTs with Argentina, Austria, Ecuador, India, Japan, Peru and Switzerland (not yet in force).

[75] *See* the DTTs with Belgium, Denmark, and France

[76] *See* the treaties with Chile, Norway, Portugal and Sweden. In the case of Chile, in the lack of art. 19(2) under such treaty, the rule applicable for pensions for governmental service is the same applied to pensions in general (i.e. art. 18). However, note that in the case of Portugal and Sweden, if the recipient is a national of the source state, then the taxation exclusive at the source country prevails.

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5.3. Diplomats - Art. 28

Please note that the same comments made under section 2.4 apply herein.

6. Students - Article 20

Brazilian treaty policy regarding students is largely aligned with the concepts brought under model language suggested by both the UN and OECD Models. In that sense, students shall not be taxed in the visiting country as long as the income is sourced from outside of that state.

Students are tackled under specific provisions in the Brazil treaties, generally under articles 21 or 22, while income of teachers and professors are covered by other provisions[77].

Most treaties signed by Brazil have a paragraph 2 on its students provision. Such paragraph 2 contains either the old provision recommended by the UN in the 1980 Model[78] or additional benefits negotiated by the relevant contracting states. The scope of said benefits, beyond what is present in the provisions included under paragraph 1, is to generally exempt students from taxes that would otherwise arise from

[77] Which is anyway aligned with the UN recommendation under paragraphs 11 to 13, of the commentary on article 20. https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2022-03/UN%20Model_2021.pdf.

[78] The provisions recommended under the 1980 Model focused on grants, scholarships and remuneration from employment not covered by paragraph 1 and were removed from the UN Model in 1999. The item rendered much controversy, much of which is captured under paragraphs 3 to 10, of the commentary on article 20. https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2022-03/UN%20Model_2021.pdf.

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income sourced in the visiting state, or to at least grant same exemptions provided to persons in equal situation in the visiting country[79].

While students are tax exempt in the visiting country on income from a foreign source, the relevant remittance may be subject to tax depending on the source rules. In cases where Brazil is the source country, the following situations should be observed:

Student continues to be resident in Brazil[80]		Student ceases to be resident in Brazil[81]	
Donation	Labor	Donation	Labor
No WHT	WHT at domestic progressive rates	15%[82] WHT	25%[83] WHT

From the above table, it can be inferred that in most cases taxing rights will be retained in Brazil should this be the payment source country. Solely condition-free scholarships (donation) should be exempt.

7. Conclusions

[79] China, India, Israel, Mexico, Peru, Switzerland, T&T, Turkey, Ukraine, Venezuela, South Africa and Chile.

[80] Article 2, V, Normative Instruction 208/2002.

[81] Article 3, V, Normative Instruction 208/2002.

[82] Federal Decree 9.580/2018.

[83] Article 37, Normative Instruction 208/2002.

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Individuals – Non-Business Active Income

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The most relevant deviations between the OECD and UN Models and the treaties signed by Brazil identified as a result of the comparisons performed in this paper are those aiming at protecting the source taxation, which not only reflects a consistent policy adopted by Brazil throughout the years but is also in line with the policy of other developing countries in the Latin America region.

It is worth emphasizing that, although Brazil, as a developing country, needs to be closer to the international community to attract foreign investment, in the case of some articles of the treaties, the Brazilian government and tax authorities are very reluctant to adopt principles aligned with international standards.

This, however, is not the case with the articles analyzed in this paper, as Brazil seemed to be quite flexible to accommodate partners' requests, especially concerning article 18 as long as its power to tax, as the source country as a general rule, is preserved.

Although there are tax policies and administrative considerations that may support the principle that the taxing right with respect to pension and other similar remuneration should be granted to the State of residence, Brazil does not encompass such policy in the majority of its treaties.

Instead, with respect to pensions in consideration of past employment, Brazil has largely adopted the inclusion of alternative provisions, securing either exclusive or limited source taxation rights.

Such alternative provisions include: a) exclusive source taxation of pension payments; b) non-exclusive source taxation of pension payments; and c) limited source taxation of pension, under which the power to tax is initially granted to the residence jurisdiction and above certain fixed limits/amounts, is allocated to both Contracting States.

A touch from the Brazilian tax policy side has also been the inclusion of "annuities" in almost all Conventions signed. Differently from what is suggested by OECD commentaries, annuities are not

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restricted to payments in consideration of past employment, and therefore should encompass personal retirement schemes, which are common in Brazil.

When it comes to Director's fees, while similar in wording to the OECD and UN models, Brazil has chosen a treaty language that may give rise to the interpretation of exclusive source rights in several treaties. This interpretation is possible based on a Tax Ruling issued by the Brazilian authorities.

On the matter of entertainers and sportspersons, Brazil's treaty policy is largely aligned with that of the OECD and the UN in the sense of a prevailing source profile. However, all Brazilian tax treaties after 2010 and a few signed before that date adopt the third paragraph, excluding the taxing rights of the source country when the activities are performed with the financial aid of the Contracting States or non-profit organizations or in connection with cultural agreements between the countries. Moreover, there are relevant variation is found on treaties where it was agreed that events sponsored with public funds might escape that route. On the matter of star companies, while not currently common practice given the history of prohibition stemming from private law, recent case law seems to open the possibility. Novelty may be lurking in that space.

On Students, Brazil materially follows the OECD and the UN models when it comes to not subjecting students and apprentices to tax in the visiting state, as long as the income is sourced from outside that state. Most relevant variations can be found on provisions setting forth certain exemptions for situations covering income from within the visiting state, and some time limits or quantitative limits. The most recent Brazilian tax treaty follow the OECD and the UN models without deviations.

7.1. Other relevant considerations

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It is undeniable, however, that Brazilian tax treaties have been influenced by the OECD and UN Models with respect to the articles herein analyzed, although the domestic legislation plays an important role in the acceptance of some suggestions from both models.

Although Brazil is a non-member economy, it has demonstrated a strong interest in becoming a member. In this sense, it has made some movements toward the OECD approach. While the tax treaties signed by Brazil in this century represent this change in the Brazilian tax treaty policy to search for greater alignment, adopting new wording in several clauses, including the limitation on benefits and the updated version of the exchange of information, this does not necessarily apply specifically to the individual non-business income clauses.

Brazil's limited international tax treaty case law limits the deep knowledge in respect of the treaty application and respective policies.

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Individuals – Non-Business Active Income

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Foreword to the Portuguese report addressing "Individuals – Non-Business Active Income"

Maria Afonso d'Albuquerque, Leidson Rangel and Maria Serra

Lisbon University Law School – Portugal

The double taxation agreements (DTAs) concluded by Portugal are generally in accordance with the then-recommended OECD model conventions and corresponding updates. However, the application of the research methodology on articles related to "individuals – non-business active income" allowed the identification of some deviations among which the following can be accentuated.

Regarding income from employment, all DTAs concluded by Portugal accord with the default rule of article 15(1). Most deviations from the OECD Model, even though not particularly striking, are essentially concentrated in paragraphs 2 and 3. The calculation of the 183-day period in subparagraph 2a) can assume five variations, however, most tax treaties currently in force adhere to the wording recommended by the OECD Model Commentary on Article 15. Other deviations can be ascertained in subparagraph 2b) of the Norway-Portugal treaty (2012) which requires the employer to be a resident of the employee's residence state and expressly requires that the activity does not consist of hiring out labour.

Portuguese tax treaty policy does not include variations regarding article 15 to reinforce source taxation and prevent double non-taxation issues from arising. Hence, only Timor-Leste-Portugal (2012), subparagraph 2d) requires the remuneration to be subject to tax in the residence state to benefit from exclusive taxation therein.

With respect to the taxation of income from employment exercised aboard a ship or aircraft operated in international traffic, most Portuguese DTAs still allocate taxing rights considering the enterprise's place of effective management. Accordingly, only the Angola-Portugal (2019) and United States-Portugal (1995) treaties adhere to the most recent rule prescribed in paragraph 3 of the OECD Model.

Concerning the taxation of performers, most DTAs accord with the wording of article 17(1) of the OECD Model. The most noticeable deviations can be ascertained in the DTA concluded with the United States that includes the *de minimis* rule prescribed in the US Model. Although most Portuguese DTAs allow the taxation in the source state of income derived by a performer even when it accrues to another person, a restricted group of DTAs does not contain this rule. Finally, a considerable number of Portuguese DTAs include a special provision regarding activities subsidized by public funds.

Other highlights identified in the research concern article 19 that refers to government services. There are variations, for example, in the adoption of a rule in some DTAs for the allocation of taxing rights that is different from the general rule provided in article 19, i.e. the paying state principle, which is suggested by most models and updates and adopts the exclusive allocation of the right to tax to the paying state. Additionally, variations were observed in the elements provided in the exception rules such as the nationality and residence criteria provided in the subparagraph of the main rule according to which the right to tax is allocated to the other contracting state. Finally, different references

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were identified to the articles mentioned in the *lex specialis* contained in paragraph 3 that deals with remuneration and pensions paid for services provided in the context of a business conducted by a contracting state. In this aspect, when compared to the models and updates then recommended, some DTAs can be considered innovative while others are restrictive.

With regard to directors' fees, two aspects should be highlighted. The first is the adoption in some treaties of the additional paragraph recommended by the UN Model that refers to remuneration derived by an individual in the capacity as an official in a company's top-level managerial position. The second is the adhesion of some DTAs to the reservation made by Portugal that is maintained between the OECD Model (1977) and the update of the OECD Model (2008). According to it, Portugal reserved the right to tax any remuneration to a member of the board of directors or any other body of a company for the exercise of a permanent activity under the terms of article 15.

Regarding the taxation of pensions under article 18, many treaties follow the OECD Model provision. Consequently, the principle of exclusive residence taxation prevails despite its solution being no longer adequate to rule complex cross-border situations in light of current globalization phenomena and complex interaction of different pension systems. The allocation of taxing rights regarding pensions often leads to disagreements between states and resulted in the termination of the DTA's with Sweden and Finland (which have not been in force since 2022 and 2019, respectively) mainly due to reasons related to the Portuguese Non-Habitual Residents beneficial tax regime.

Deviations to article 18 are usually connected to the meaning of the word pensions and its definition for tax purposes, specifically the fact that some states opt for a broader scope in order to include pensions not related to past employment. This includes those for injuries suffered while performing services, alimony, maintenance payments, child support and war pensions, among others. They would ultimately fall under the scope of article 21 of the OECD Model in the absence of a specific provision aimed at dealing with these types of pensions.

As for public pensions, the Portuguese treaty network is usually in accordance with the provisions from the models. In some cases, article 19 (2) and article 19 (3) are, nevertheless, non-existing. Once absent, there will be different outcomes depending on whether it consists of a government service or a government business pension.

Pensions received by diplomats and members of consular posts are regarded, for tax purposes, as those paid in respect of services rendered to a contracting state and consequently fall under the scope of article 19(2) of the models.

Finally, regarding the taxation of students, teachers and professors, many DTAs contain rules on taxation of these individuals that are usually in line with the OECD and UN Models. Some treaties subject other types of payments to an exemption, such as remunerations obtained in the study state, while others broaden their subjective scope to other individuals. For the taxation of teachers, some DTAs restrict their subjective scope by conditioning the exemption to prior invitations from the educational institution or granting the exemption in both states.

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GTTC Universities Project VI: Individuals – non-business active income

Working Paper

Portugal – Lisbon University Law School

Coordination: Prof. Dr. Ana Paula Dourado / Prof. Dr. Paula Rosado Pereira

Authors: Maria Afonso d'Albuquerque / Leidson Rangel/ Maria Serra

0. Abbreviations and Terms

BRICS	Acronym for economical group composed by Brazil Russia India China and South Africa
CAAD	Centro de Arbitragem Administrativa (Arbitration Court)
CGA	Caixa Geral de Aposentações (welfare institution managing social security schemes in respect of retirement, retirement, survivor's and other special pensions)
CITC	Corporate Income Tax Code
CJEU	Court of Justice of the European Union
CPLP	Comunidade dos Países de Língua Portuguesa (Community of Portuguese Speaking Language Countries)
CRP	Portuguese Constitution (Constituição da República Portuguesa)
DGAEP	Direção-geral da Administração e do Emprego Público (Directorate-General for Administration and Public Employment)
DTA	Double Taxation Agreement

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G20	The Group of Twenty
GTTC	Global Tax Treaty Commentaries
INE	Instituto Nacional de Estatística (National Statistics Institute)
MTSS	Ministério do Trabalho, Solidariedade e Segurança Social (Ministry of Labour, Solidarity and Social Security)
OECD	Organization for Economic Co-operation and Development
OECD Model	OECD Model Tax Convention on Income and on Capital
PALOP	Países Africanos de Língua Oficial Portuguesa (African Portuguese Speaking Language Countries)
PE	Permanent Establishment
PITC	Personal Income Tax Code
SEF	Serviço de Estrangeiros e Fronteiras (Immigration and Border Service)
STA	Supremo Tribunal Administrativo (Portuguese Supreme Administrative Court)
TFEU	Treaty on the Functioning of the European Union
UN Model	UN Model Double Taxation Convention between Developed and Developing Countries

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1. General overview of domestic policy and history

International agreements come into force and become legally binding under Portuguese legislation by virtue of the principle of full reception of international law provided that these instruments are duly approved, ratified, and published in the Portuguese Official Journal (Article 8 (2) CRP). Governments play the active role in drafting, negotiating, and signing the tax treaties[84] that will be subject to the approval of the parliament[85] and later ratified by the president of the Republic of Portugal[86]. Rules derived from treaties assume a supra-legal nature and shall not be subject to modifications by virtue of internal law, and the effectiveness of such rules may only cease when the agreement is terminated under rules of international law (Article 8 (2) CRP).

Portugal is a founding member of the OECD and has a wide treaty network on income taxation that is formed by 81 conventions of which two were denounced by the signatory countries (Finland and Sweden) and two were signed but are not yet in force (Kenya and Timor Leste). Thus, the network currently has 77 conventions in force. When comparing important economic and demographic indicators and some cultural and geographical aspects with the Portuguese network, it will be observed that it is consistent with the interests of the country. It includes conventions signed with all European Union, G20 (except Argentina and Australia), BRICS, PALOP, and CPLP (except Equatorial Guinea) countries.

At the economic level, for example, the Portuguese treaty network covers the most representative jurisdictions for foreign investments in Portugal in which China, France, Luxembourg, the Netherlands, Spain, and the United Kingdom are the largest investors[87] [88]. These peculiarities may be reflected, for example, in the way in which the conventional rules applicable to the taxation of dependent work and the remuneration of board members are negotiated.

Migration flows are also reflected in treaty policy. In this respect, the Portuguese network also reaches all of the main countries from which foreigners immigrate and to which Portuguese citizens emigrate. In this context, in 2020, the number of foreign citizens holding a residence permit in Portugal[89] totaled 662,095. Brazil, United Kingdom, Cape Verde, Romania, Ukraine, Italy,

[84] Paragraph 1 b) of Art. 197 CRP.

[85] Paragraph i) of Art. 161 and paragraph 5) of Art. 166 CRP.

[86] Paragraph b) of Art. 135 CRP.

[87] From the perspective of the final investment counterparty, Spain, France, the United Kingdom, and China emerge, in this sequence, as the largest investors. From the point of view of the immediate counterparty, Spain, the Netherlands, Luxembourg, France, and the United Kingdom are the main countries in terms of foreign direct investment.

[88] Banco de Portugal, Investimento direto - Investidor final, available at https://bpstat.bportugal.pt/dominios/162 (accessed 14 April 2022).

[89] SEF, Relatório de Imigração, Fronteiras e Asilo 2020, available at https://sefstat.sef.pt/Docs/Rifa2020.pdf (accessed 14 April 2022).

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China, France, India, and Angola, in that order, are the most representative nationalities (68.5% of immigrants)[90]. On the other hand, in 2019, the total number of Portuguese emigrants residing abroad was 2,631,559. Here, the top ten destination countries stand out, in that order: France, Switzerland, the United Kingdom, the United States, Canada, Brazil, Germany, Spain, Luxembourg, and Belgium[91].

With regard to the educational profile of residents in Portugal, an aspect that may reflect on the average income of workers and be the object of evaluation when the conventions are signed is that, in 2021, 17.4% of its residents had university education while 21.3% had secondary and post-secondary education[92]. On the other hand, in 2014, 27.4% of second-generation Portuguese emigrants[93] residing in European countries had university education, a proportion greater than that recorded in Europe (26.2%) and among first-generation emigrants (11.7%). Additionally, 42.5% of that group had a secondary education which is a rate similar to that of European countries covered in the research (44.3%).

Additionally, with regard to the characteristics of the population, in December 2021, Portugal had an estimated employed population of 4,879,000 individuals[94] of which 733,495 were workers in the public administration[95]. Another equally relevant indicator is the number of pensions paid in Portugal[96] [97] [98] which totaled 3,618,375 in 2020.

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[90] In 2020, 118,124 new residence permits were issued. According to the SEF, the most relevant reasons for granting these new titles were family reunification (35,736), professional activity (29,715), and study (12,285).

[91] R. P. Pires et alii (2021), Emigração Portuguesa 2021: Relatório Estatístico, Lisboa, Observatório da Emigração e Rede Migra, CIES-IUL, ISCTE-IUL. DOI: 10.15847/CIESOEMRE082021, available http://observatorioemigracao at.pt /np4/file/8218/OEm_Emigra__oPortuguesa2021.pdf (accessed 14 April 2022).

[92] INE, Censos 2021 – Resultados Provisórios, available at https://www.ine.pt/scripts/ db_censos _2021.html (accessed 14 April 2022).

[93] C. Oliveira & S. Neves, Emigrantes portugueses e seus descendentes no mercado de trabalho europeu, available at https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_estudos&ESTUDOSest_boui=299950104&ESTUDOS modo=2&xlang=pt (accessed 14 April 2022). The researched covered the EU Member States (except Denmark, Germany, Ireland, and The Netherlands), and Norway and Switzerland. The 1st generation of emigrants refers to individuals born in Portugal but residing in another country. The 2nd generation comprises those who were born in a country other than Portugal but whose father or mother or both were born in Portugal.

[94] INE, Estatísticas do Emprego (9 February 2022), available at https://www.ine.pt/ngt _server /attachfileu.jsp?look_parentBoui=545884277&att_display=n&att_download=y (accessed 14 April 2022).

[95] Direção-geral da Administração e do Emprego Público, Síntese Estatística do Emprego Público (SIEP), available at https://www.dgaep.gov.pt/index.cfm?OBJID=ECA5D4CB-42B8-4692-A96C-8AAD63010A54 (accessed 14 April 2022.

[96] Base de Dados Portugal Contemporâneo, Pensões: total, da Segurança Social e da Caixa Geral de Aposentações, available at https://www.pordata.pt/Portugal/Pens%C3%B5es+total++da+Seguran%C3%A7a+Social+e+da+Caixa+Geral+de+Aposenta%C3%A7%C3%B5es-851 (accessed 14 April 2022).

[97] CGA, Os Números da Caixa Geral de Aposentações, available at https://www.cga.pt/num

eros.asp (accessed 14 April 2022).

[98] MTSS, Síntese de informação estatística da Segurança Social (dezembro de 2021), available at https://www.seg- social.pt/10152/17989164/SIESS202112.pdf/2f1bb5e4-d326-4042-afcf-afad5fae4dd0 (accessed 14 April 2022).

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These and other indicators act as drivers for the adoption of a treaty policy. As can be seen in the following analysis that encompassed the articles of the conventions related to "individuals - non-business active income", in general, the DTAs concluded by Portugal follow the then-recommended OECD model conventions and corresponding updates, and few deviations are identified.

2. Employment income

2.1. General rule – Article 15

2.1.1. Main rule – Article 15 (1)

The general rule contained in Article 15(1) of the OECD Model and the UN Model[99] prescribes that income from employment shall be taxable only in the state of residence thereby limiting the source state taxation rights and preventing international juridical double taxation from arising. This is the case due to the fact that the state of residence is still considered as sharing a closer allegiance with the taxpayer and because the ties between the individual and the source state *lack the necessary closeness*[100].

If, however, the employment is exercised in another state, the remuneration derived from it can also be taxed in that state provided that the three conditions listed in subparagraphs 2a) to 2c) are not cumulatively satisfied. When this occurs, the taxpayer may be subject to international juridical double taxation[101] which the state of residence must eliminate (or relieve) according to the terms prescribed in Articles 23-A or 23-B.

All DTAs concluded by Portugal follow the default rule of Article 15(1), and articles 16, 18, and 19 take precedence over former, and even though not all DTAs include the same reference in paragraph 1 to those other articles[102], the application of Article 15 will be excluded by the wording of the applicable article itself[103]. Furthermore, some DTAs that contain special provisions regarding professors, researchers, and students also include an express indication in paragraph 1 of the prevalence of these rules

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[99] The wording of Article 15 is essentially the same in both the OECD Model and the UN Model; therefore, the focus will be on the authors' analysis of the OECD Model.

[100] K. Vogel, *Klaus Vogel on Double Taxation Conventions: A Commentary to the OECD-, UN- and US Model Conventions for the Avoidance of Double Taxation of Income and Capital with Particular Reference to German Treaty Practice*, 3rd edn, p. 886 (Kluwer L. Intl. 1999).

[101] See further on this subject in M. Pires, *International Juridical Double Taxation of Income*, Series on International Taxation: 11, Kluwer Law and Taxation Publishers, the Netherlands, 1989.

[102] This is the case, among other treaties, of United Kingdom-Portugal (1969) which only refers to Articles 17 (pensions) and 18 (public pensions).

[103] M. Mesquita, *As Convenções sobre Dupla Tributação*, p. 236, Cadernos de Ciência e Técnica Fiscal, 179, Centro de Estudos Fiscais, Lisboa, 1998.

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over Article 15[104]. Most deviations from the OECD Model, even though not particularly striking, are essentially concentrated in paragraphs 2 and 3, as will be mentioned in sections 2.2.1 and 2.3, respectively. In addition, it was also possible to detect that some DTAs include special provisions, for instance, for frontier workers or offshore activities. These particularities will be further analyzed in section 2.3.

The lack of definitions in Article 15 may present difficulties. The terms *"salaries, wages and other similar remuneration"* and *"employment"* can be particularly problematic to ascertain. Firstly, according to the OECD Model Commentary on Article 15, the term "*salaries, wages and other similar remuneration*" must be deemed to include all forms of income that constitute a direct consequence of rendered dependent personal services and other forms of compensation such as bonuses, allowances, and benefits in kind[105]. Consequently, determining the scope of Article 15 must be done by examining the "nature of the payment, the status of the recipient and the capacity of the payor"[106]. The OECD Model establishes a broad concept of what constitutes income from employment, and thus tax treaty interpretation shall be done in light of these considerations. This intellection can be confirmed in the examples stated in the OECD Model Commentary on Article 15[107]. Accordingly, even severance payments should be incorporated in the term "*remuneration*" for the purpose of Article 15(1). This is not the case, however, for punitive damages awarded for discriminatory treatment or injury that should be encompassed within the provisions of Article 21 according to the OECD Model Commentary on Article 15[108].

According to Portuguese tax law, under Article 2 of the PITC, income from employment includes all labour income regardless of the form of payment[109]. Domestic law also establishes a broad concept of income from employment[110], and it therefore seems to have a similar scope as that in the OECD Model. Secondly, the definition of the term *"employment"* in Article 15 (1) is also object of discussion[111] considering that the OECD Model Commentary[112] states that the concept is to be determined according to

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[104] This is the case, among other treaties, of Spain-Portugal (1995), Ireland-Portugal (1994) and Germany-Portugal (1982).

[105] Paragraph 2.1 of the Commentary on Article 15 of the OECD Model (2017).

[106] L. De Broe, *Article 15. Income from Employment*, in K. Vogel, *Klaus Vogel on Double Taxation Conventions*, Vol. 2, 5th edn., p. 1296 (eds. E. Reimer & A. Rust.,Kluwer L. Intl. 2015).

[107] Paragraphs 2.4 to 2.7 of the Commentary on Article 15 of the OECD Model (2017).

[108] Paragraph 2.8 of the Commentary on Article 15 of the OECD Model (2017).

[109] In the Portuguese Labour Code (Article 258), it is possible to find a narrower concept of the term *"remuneration"*. See further on this in P. Martinez, *Direito do Trabalho*, 9ª Edição, Almedina, Coimbra, 2019 and M. Ramalho, *Tratado de Direito do Trabalho Parte II – Situações Laborais Individuais*, 8ª Edição, Almedina, Coimbra, 2021. Notwithstanding, the definition of such income according to tax law takes precedence over other definitions.

[110] Article 2 of the PITC includes a list of examples of what can constitute income from employment.

[111] De Broe, *supra* n. 23, p. 1319

[112] Paragraphs 8.4 and 8.7 of the Commentary on Article 15 of the OECD Model (2017).

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the domestic law of the state that applies the convention. Under domestic law, to establish whether an employment relationship exists, it should be taken into consideration if the individual who makes his work available and provides the services, i.e. the employee, is subject to the authority and direction of the one who requires such services, i.e. the employer. Accordingly, to determine the existence of an employment relationship, the principle of substance over form applies[113].

2.1.2. Source state taxation – Article 15 (2)

The first exception to the general rule of Article 15 results from paragraph 2. This provision establishes that income from employment exercised outside the state of residence may also be taxed in the source state provided that the conditions listed in subparagraphs 2a), 2b), and 2c) are not cumulatively satisfied.

Throughout the Portuguese DTA network, it is possible to find slightly different formulations within subparagraphs 2a) to 2c). Beginning with subparagraph 2a), this condition serves the purpose of facilitating the merely temporary international operations. If the individual remains for no longer than 183 days in the source state while providing the dependent services and provided that the other two conditions are also satisfied, the employer does not have the legal obligation to withhold tax nor does the taxpayer have to pay tax therein. If, however, the individual is *physically*[114] present in the source state for longer than 183 days, it is considered that they meet the minimum presence test and, therefore, the state in which the employment is exercised shall also tax the remuneration. In the Portuguese DTAs, subparagraph 2a) can essentially assume one of five wordings – fifty-seven of the seventy-seven tax treaties currently in force follow the exact wording recommended by the OECD Model Commentary on Article 15, and thus the 183-day period is calculated *in any twelve-month period commencing or ending in the fiscal year concerned*[115]. A very similar formulation that calculates the 183-day period in any 12-month period commencing or ending in the *calendar year* can be found in Canada-Portugal (2001), Cyprus-Portugal (2013), Indonesia-Portugal (2007), Israel-Portugal (2008), San Marino-Portugal (2015), Singapore-Portugal (2001) and Turkey-Portugal (2006). Another variation can be ascertained in the Hungary-Portugal (2000), the Czech Republic-Portugal (1997), and the Slovak Republic-Portugal (2004) which only refer to the calculation of the 183-day period *in any* 12-month period without mentioning either the fiscal or the calendar year. Apart from these groups of DTAs, another two groups of DTAs can be determined that simply refer, on one hand, to *"the fiscal year concerned"*[116] (following the 1963 Draft Convention and the 1977 Model Convention) and, on the other, to *"the calendar year*

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[113] P. Pereira, *Manual de IRS*, p. 64, Almedina, Coimbra, 2018.

[114] Paragraph 5 of the Commentary on Article 15 of the OECD Model (2017).

[115] In any case, some states, like Switzerland, reserve their right to continue to use the words *"in the fiscal year concerned"*. Notwithstanding, as it is suggested in the OECD Model Commentary on Article 15, the new formulation eliminates tax avoidance opportunities and difficulties when the fiscal years of the contracting states do not coincide.

[116] This is the case of Austria-Portugal (1972), France-Portugal (1972), Ireland-Portugal (1994), Italy-Portugal (1983), United Kingdom-Portugal (1969), Switzerland-Portugal (1975) and Tunisia-Portugal (2000).

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concerned"[117]. Although noteworthy, these two wordings fundamentally achieve the same result when the fiscal and calendar year coincide, which is the case of the Portuguese legal framework. Secondly, subparagraph 2b) prescribes that the employer paying the remuneration must not be a resident of the state in which the employment is exercised. This provision does not require the employer to be a resident of the employee's residence state. Thus, even a fiscally transparent partnership that cannot qualify as a resident under Article 4 can be an employer[118]. Nevertheless, paragraph 6 of the OECD Model Commentary on Article 15 indicates that some countries may not want to extend the exception of paragraph 2 to cases in which the employer is not a resident of the employee's state of residence due to "*administrative difficulties in determining the employment income of the employee or in enforcing withholding obligations on the employer"*[119]. Accordingly, an alternative wording of subparagraph 2b) is suggested to which the contracting states can adhere in their bilateral negotiations. Portugal does not seem to adopt this alternative formulation in its tax treaties.

Subparagraph 2b) does not present many deviations from the OECD Model in Portuguese DTAs except for the Norway-Portugal (2012) that requires the employer to be a resident of the employee's state of residence and also expressly requires that the activity does not consist of hiring out labour. In such cases, the exception in paragraph 2 does not apply. Consequentially, the DTA *supra* imposes an extra, fourth, condition that should be satisfied in order to determine the exclusive taxing rights of the residence state. The triangular relationship created in the hiring-out of labour situations allows for abusive arrangements, hence, the removal from Article 15(2).

Finally, subparagraph 2c) establishes that the exception in paragraph 2 does not apply if the remuneration is borne by a permanent establishment in the state in which the employment is exercised. Subparagraph 2c) is also not subject to many deviations. Respectively, the wording of this subparagraph can assume a slightly different formulation as some DTAs still include the term *"fixed base"*[120]. Meanwhile, other DTAs follow the exact formulation that is present in the 2017 OECD Model. This is a result of the alterations to the OECD Model made in 2000 when Article 14 which mentioned the term *"fixed base"* was deleted.

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[117] This is the case of Germany-Portugal (1982), Belgium-Portugal (2001) and China (People's Rep.)-Portugal (2000). It was also the case of Finland-Portugal (1971), however, this DTA is no longer in force as of 01/01/2019.

[118] K. Dziurdz, *Article 15 of the OECD Model: The 183-Day Rule and the Meaning of 'Not a Resident' in Cases of Hybrid Partnerships*, (2013), 41, Intertax, Issue 10, p. 492 – 498. See also M. Brabazon, *Application of Tax Treaties to Fiscally Transparent Entities – Global Tax Treaties Commentaries*, Global Topics IBFD.

[119] In 1992, Portugal had reserved the right, with reference to subparagraph 2 b), to require that the remuneration be paid by or on behalf of an employer who is a resident of the state of which the recipient is a resident. This reservation was deleted from the commentary in the 1998 update of the OECD Model. See Paragraph 18 OECD Model: Commentary on Article 15 (1992).

[120] This is the case of all the DTAs currently in force, except for Andorra-Portugal (2017), Angola-Portugal (2019), Brazil-Portugal (2001), Japan-Portugal (2013) and Montenegro-Portugal (2017).

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2.1.3. Frontier workers and offshore activities

The OECD Model Commentary on Article 15[121] considers more suitable for problems regarding frontier workers to be resolved bilaterally by the contracting states, and therefore specific rules regarding these issues are absent both in the OECD and UN Models. The term *"frontier worker"* usually refers to an individual who lives near a frontier and performs their work on the other side of the border that they must regularly cross [122]. Due to the geographical proximity with Spain, in Spain-Portugal (1995) , a special provision can be identified for these cases pursuant to which remunerations derived by frontier workers shall be taxable only in the state of residency. This provision solves any incompatibility with the free movement of workers (Article 45 of the TFEU)[123].

The special provision regarding frontier workers established in Spain-Portugal (1995) includes the expression *"usually every day"* to determine the scope of what constitutes the status of frontier worker[124]. Certain tax treaties include a threshold of calendar days on which the employee could stay overnight in the state of work[125], but this is not the case in the DTA *supra*. It could be argued that such a formulation does not afford legal certainty.

Other special rules can be found under Article 15 such as those related to employment income connected with offshore activities. Some states such as Greece, Ireland, Latvia, Norway, and the United Kingdom reserved their right to include a special provision regarding income from employment relating to offshore activities in connection with the exploration or exploitation of the seabed and its subsoil as well as its natural resources, hydrocarbon exploration, exploitation, and other related activities[126]. Consequentially, Norway-Portugal (2012)[127] and Latvia-Portugal (2003)[128] include the *supra* special provision regarding offshore activities. Additionally, Denmark and Norway[129] reserved their right to insert special provisions regarding remuneration derived in respect of an employment exercised aboard an aircraft operated in international traffic by the air transport consortium

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[121] Paragraph 10 of the Commentary on Article 15 of the OECD Model (2017).

[122] Vogel, *supra* n. 17, p. 926.

[123] See: CJEU, 14 February 1995, Finanzamt Köln-Altstadt v Roland Schumacker, Case C-279/93.

[124] Article 15(4) of Spain-Portugal (1995) defines a frontier worker as an individual who has his habitual residency in the other contracting state to which he returns *usually every day.*

[125] De Broe, *supra* n. 23, p. 1394, footnote 571.

[126] Paragraphs 17, 18, and 21, OECD Model: Commentary on Article 15 (2017).

[127] Article 21 of Norway-Portugal (2012).

[128] Article 22 of Latvia-Portugal (2003).

[129] Also applicable to Sweden, however, Sweden-Portugal (2003) does not contain this provision. Furthermore, this DTA is not currently in force (since 01/01/2022).

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Scandinavian Airlines System (SAS)[130]. Hence, in Denmark-Portugal (2002) and Norway-Portugal (2012), it is possible to find special provisions[131] that prescribe that income derived from employment exercised aboard an aircraft operated in international traffic by an air transport consortium formed by companies from different countries, including a company that is a resident of that state, shall be taxable only in that state. A similar provision can be found in Malta-Portugal (2002)[132].

2.1.4. Internal policy and Case Law

Article 15 has been the subject of discussion in the Portuguese courts over the years. The most notorious cases regarding Article 15 concerned the taxation of income derived by Portuguese citizens in Germany[133]. In Case n. º 0126/06, the taxpayer who was employed in Germany argued that he should not be subject to tax in Portugal considering he had already been taxed in Germany. Taking into account that the members of his family were residents in Portugal, the tax authorities concluded that the taxpayer was resident in Portugal under domestic law[134] and thus subject to tax therein on his worldwide income. Notwithstanding, the court ruled in favour of the taxpayer and stated that the amount paid in Germany should be deducted from the personal income tax in Portugal[135]. Additionally, later court rulings[136] established that the criteria to determine who is a resident under domestic law cannot take precedence over the rules established in bilateral tax treaties, specifically Article 4. Similar cases were discussed in the Arbitration Court (CAAD)[137] regarding the application of Article 15 and considering the difficulties arising from determining the taxpayer’s state of residence.

2.2. Employment in international traffic – Article 15 (3)

Paragraph 3 deals with the taxation of crews of a ship or aircraft operated in international traffic and constitutes another exception to the general rule of Article 15. In 2017, paragraph 3 was amended along with Article 8, therefore, it is possible to find somewhat different formulations of this paragraph in tax treaties concluded previously to 2017. Currently, the remuneration derived by a resident of a contracting state in respect of employment as a member of the regular complement of a ship or aircraft

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[130] Paragraph 15 of the Commentary on Article 15 of the OECD Model (2017).

[131] Paragraph 4 of article 15 of Denmark-Portugal (2002) and Norway-Portugal (2012).

[132] Paragraph 4 of Article 15 of Malta-Portugal (2002).

[133] See STA Cases n. º 0834/04 and n. º 01211/05.

[134] Article 16(2) of the PICT. This article has since been altered.

[135] See further on this in G. Courinha, *Ainda a propósito da tributação dos trabalhadores portugueses na Alemanha – Algumas notas ao Acórdão do Supremo Tribunal Administrativo, de 12 de Julho de 2006*, *in* Revista de Finanças Públicas e Direito Fiscal, Ano I, N. º 1, 2008, pp. 289-297 and *A tributação dos cidadãos portugueses trabalhadores no estrangeiro à luz do artigo 15.º do Modelo de Convenção OCDE*, in Fiscalidade, n. º 17, 2004, p. 55-71.

[136] See STA Cases n. º 068/09 and n. º 1679/13.9BALSB.

[137] See CAAD Case n. º 462/2015-T.

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operated in international traffic shall no longer be taxable in the state in which the place of effective management of the enterprise is situated but shall instead be taxable only in the residence state. Nonetheless, some states, as indicated in the OECD Model Commentary on Article 15[138], may prefer to attribute the exclusive right to tax profits from shipping and air transport to the state in which the enterprise's place of effective management is situated rather than the residence state. The place of effective management refers to the place where key management and commercial decisions that are necessary for the conduct of the entity´s business as whole are fundamentally made[139]. Difficulties may arise when determining this concept as this term is ambiguous.

The Portuguese DTA network does not seem to follow the most recent wording of paragraph 3. Accordingly, most Portuguese DTAs still allocate taxing rights considering the enterprise's place of effective management . As a matter of fact, only a small group of DTAs adhere to the most recent rule prescribed in paragraph 3 of the OECD Model. This is the case of Angola-Portugal (2019) and United States of America-Portugal (1995).

Other deviations can be observed in Bulgaria-Portugal (1996), Ukraine-Portugal (2002), Poland-Portugal (1998) and Turkey-Portugal (2006) which include a reference in paragraph 3 to remuneration derived in respect of employment exercised aboard a road vehicle. It can be questioned if the rule established for ships and aircrafts can be extended to other means of transportation when an express reference to it cannot be ascertained in paragraph 3. Ultimately, when such an express reference cannot be identified, it is at the discretion of the contracting state's courts to decide this matter[140].

Furthermore, Spain-Portugal (1995) and Mozambique-Portugal (1994) also include a reference to remuneration from employment that is exercised on board a ship used in inland navigation. Finally, some tax treaties prescribe that the remuneration derived in respect of employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a contracting state shall be taxable only in that state[141].

2.3. Government service – Article 19

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[138] Paragraph 9.5 of the Commentary on Article 15 of the OECD Model (2017).

[139] Paragraph 24 of the Commentary on Article 15 of the OECD Model (2017).

[140] The Belgian Supreme Court extended the scope of Article 15(3) to truck drivers. See further on this in De Broe, *supra* n. 23, p. 1390-1391.

[141] This is the case of Cyprus-Portugal (2013), Hong Kong-Portugal (2012), South Korea-Portugal (1997) and Ukraine-Portugal (2002).

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Article 19 of the current model conventions of both the OECD and the UN[142] that deals with remuneration from government services has the same provision regarding to the allocation of taxing rights. As the main rule that was adopted from the OECD Model (1977)[143], those rights are allocated exclusively to the paying states. The OECD Model (1963) had adopted a different provision under which the taxing rights were shared between the contracting states.

As a rule, the wording and scope adopted over the years in the Portugal tax treaty network accord with the proposals from the then-recommended model conventions and corresponding updates, using these expressions in their article titles: "Government functions" or "Government Service". The expression "Public remuneration and pensions" is an exception and was adopted in Belgium-Portugal (1969). However, it is possible to point out temporal variations related to the standard. For example, the following DTAs concluded after the 2005 OECD Model update deleted the words "other than a pension" in Article 19(1)(a): Koweit-Portugal (2010), San Marino-Portugal (2010), Hong Kong-Portugal (2011), Cyprus-Portugal (2012), and Ethiopia-Portugal (2013). They adopted the proposed wording prior to the update. In the same context, there are DTAs concluded after the 1994 OECD Model update that replaced the term "remuneration" with "salaries, wages, and other remuneration", adopting the proposed wording from the OECD Model (1977): for example, Pakistan-Portugal (2000) and Algeria-Portugal (2003).

2.3.1. Main rule – Article 19 (1)

Article 19(1) of the OECD Model (2017) has two provisions on the allocation of taxing rights to the contracting states: one in Article 19(1)(a) and another in Article 19(1)(b). According to the first rule, taxation rights concerning "salaries, wages and other similar remuneration" paid by a "Contracting State or a political subdivision or a local authority" to an individual as a result of services rendered to them, irrespective of where they were provided, are allocated exclusively to the state that makes the payment. This rule established the paying state principle[144]. On the other hand, the provision in Article 19(1)(b) is an exception to the paying state principle and grants exclusive taxation rights to the other contracting state,

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[142] According to the Commentaries on the UN Model update (2017), as a result of changes made in 2011 by the Committee of Experts, Article 19 of the United Nations Model Convention reproduces Article 19 of the OECD Model Convention.

[143] In terms of wording, the title of the article was amended by the OECD Model (1977) from "Governmental functions" used in the OECD Model (1963) to "Government service", and the article was split into two paragraphs. Paragraph 1 has subparagraphs a) e b) concerning "remuneration, other than a pension" and paragraph 2, also with subparagraphs, concerns "pensions". Paragraph 2 of the OECD Model (1963) was renumbered as paragraph 3. In the 1994 Update to the Model Tax Convention Article 19(1)(a)(b) and (3) was amended to clarify the scope of the article. The term "remuneration" was replaced by the words "salaries, wages, and other similar remuneration". In the 1995 Update to the Model Tax Convention, Article 19(3) was amended, and a reference to Article 17 (entertainers and sportspersons) was added. After, the 2005 Update to the Model Tax Convention amended Article 19(1)(a) by deleting the words "other than a pension".

[144] R. Ismer and M. Blank, *Commentary on article 19*, in K. Vogel, Klaus Vogel on Double Taxation Conventions, 4th edn, p. 1687, paragraph 2 (eds. E. Reimer & A. Rust.,Kluwer L. Intl. 2015).

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if the service is rendered there and if the recipient is both resident and national from that state or if, without being a national, he did not become a resident solely for the purpose of rendering the services.

However, other provisions refer to the "services … rendered in that state", the "payment recipient resid(ing) there" and "being the resident individual" who receives the payment "a national of such state" or "not having become … resident solely for the purpose of providing the services" in that contracting state.

All agreements concluded by Portugal have an article on remuneration resulting from government services, and most of them adhere to the rules of the model conventions' and corresponding updates. However, some deviations occur.

Regarding the allocation of taxing rights, Brazil-Portugal (2000) is the only one to maintain a wording in paragraph 1 that was apparently influenced by the OECD Model (1963) in which the allocation of taxing rights is shared between both contracting states. However, paragraph 2 states that, if the payment recipient is a national of the state that makes the payment, the taxation will take place exclusively in such state.

Austria-Portugal (1970) and Denmark-Portugal (2000) have only one provision concerning the allocation of taxing rights assigning it exclusively to the state that makes the payment without following the special rule of Article 19(1)(b) of the models recommended at the time. Denmark-Portugal (2000) does not adopt the rule of Article 19(1)(b) mentioned above according to the then-recommended model. It is a strong deviation compared to the model and the treaty policy adopted by Portugal in other conventions concluded before[145] and after[146] that.

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[145] This is the case, among other treaties, of Cuba-Portugal (2000), Russia-Portugal (2000), Pakistan-Portugal (2000).

[146] For example, Malta-Portugal (2001), Slovak Republic-Portugal (2001), Latvia-Portugal (2001).

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In the Portuguese tax treaty network, the reference to remuneration covered by Article 19, currently "salaries, wages and other similar remuneration (…) in respect of services rendered to", generally adheres to the wording proposed by the model convention recommended at the time of each treaty conclusion[147].

Protocols of conventions with Austria and Macau provide additional information on aspects related to the activity giving rise to the remuneration of Article 19. The protocol of Austria-Portugal (1970) states that Article 19 shall be also applied to remuneration earned by employees of a commercial delegation that one of the contracting states maintains in the other one. The protocol to the Macau-Portugal (1999) stipulates that only remuneration derived in the discharge of duties of a public character is included in Article 19.

With respect to the entities that make the payment, in addition to the payment made by "Contracting State or a political subdivision or a local authority", some treaties include other types of entities in the scope of Article 19. Portugal generally adopts not only "political subdivisions" but also "political or administrative subdivisions"[148]. Others include "land"[149], "statutory body"[150], "territorial authority (...) or statutory body"[151], "administrative-territorial unit"[152], and "local government"[153].

The United Kingdom-Portugal (1968), concluded in 1968, adopts a completely different wording with one paragraph for each country. They refer to remunerations "paid out of public funds of the United Kingdom or Northern Ireland or of the funds of any local authority in the United Kingdom" and "paid by, or out of funds created by, Portugal or a local authority thereof". Some other particularity is found in South Korea- Portugal (1996) which states that Article 19 is also applied to remuneration and pensions paid by some specific institutions[154].

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[147] The OECD Model (1963) used the expression "Remuneration, including pensions". In the OECD Model (1977), UN Model (1980) and 1992 OECD Model update, the expression "Remuneration, other than a pension" was adopted. The expression "Salaries, wages and other similar remuneration, other than a pension" was used in the 1998, 2000, and 2003 OECD updates as well as in the 2001 UN Model. Then, both the OECD and UN Models began to adopt "Salaries, wages and other similar remuneration" currently found in most recent models.

[148] While the English version of Bulgaria-Portugal (1995) provides for "political or administrative subdivision" in Article 19(1), the Portuguese version only covers "political subdivisions".

[149] Used in Germany-Portugal (1980).

[150] Found in Singapore-Portugal (1999), Indonesia-Portugal (2003) and Oman-Portugal (2015). In the Portuguese version, "statutory body" was translated as "organismo criado por lei" in Oman-Portugal (2015) and as "órgão estatutário" in Singapore-Portugal (1999) and Indonesia-Portugal (2003).

[151] This is the case of France-Portugal (1971) which was translated into the Portuguese version as "pessoa jurídica de direito público".

[152] Expression used in Romania-Portugal (1997).

[153] Wording of United Arab Emirates-Portugal (2011).

[154] In the case of South Korea, it is paid by the Bank of Korea, the Korean Export- Import Bank, the Korea Development Bank, or the Korea Trade Promotion Corporation. In the case of Portugal, it is paid by the Bank of Portugal, the Caixa Geral de

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On Article 19 (1) b), the United Kingdom-Portugal (1968) and Belgium-Portugal (1969), although adopting the exclusive taxation for the paying state as a general rule, stipulate that taxation rights shall be shared between the states in the event that the income recipient is a national of the other contracting state while not being a national of the state that makes the payment at the same time. This bilateral tax treaty is innovative since the nationality criterion was not established in the OECD Model (1963) recommended at the time.

Macau-Portugal (1999) stipulates that the rule of nationality is only applicable when the activity is carried out in Portugal with Macau as the source of payment. Thus, taxation rights of a payment originated in Portugal and made to a national of Macau who has become a resident in the country only to render services covered by Article 19 will be assigned to Portugal and not to Macau.

France-Portugal (1971), in accordance with the France reservation[155] on Article 19, establishes that taxation in the state other than the source of payment shall apply if the services are rendered in that state and the individual is a resident and national of that other state while not being a national of the first-mentioned state at the same time. Thus, the article does not consider the possibility of allocating taxation rights to the contracting state other than that of the payment source where services are rendered by non-national resident individuals who have not become residents for the purpose of rendering services. Similarly, Germany-Portugal (1980) – that does not require residence – states that "the remuneration shall be taxable only in that other state" if the employment is exercised by a national of that state who is not a national of the state that makes the payment.

2.3.2. Employment in government business – Article 19(3)

The provision in Article 19(3) of the OECD Model (2017) neutralizes the effect of paragraphs 1 and 2 which allocate the taxing rights exclusively to the paying state or to the state where the services are rendered and the recipient is resident, as provided therein. According to paragraph 3, the provisions of Articles 15 (income from employment), 16 (directors' fees), 17 (entertainers and sportspersons), or 18 (pensions) shall be applied to remuneration and pensions paid for services rendered in connection with a business conducted by a contracting state, a political subdivision, or a local authority.

Depósitos, the Banco Nacional Ultramarino (BNU), the Bank for the External Development (BFE), the Banco Borges e Irmão, the ICEP - Investment, Trade and Tourism of Portugal, and the COSEC - Credit Insurance Company.

[155] See paragraph 11 of the Commentary on Article 19 of the OECD Model (2017).

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There is a similar provision in all model conventions and updates issued by both the OECD and the UN. However, the wording adopted in the models and corresponding updates edited until 1995 only included Articles 15, 16, and 18. The reference to Article 17 was included only after the 1995 OECD Model update, and it has also been included in all updates since then.

In general, the Portugal tax treaty network has adopted the provision corresponding to Article 19(3) with slight deviations compared to the model convention and updates at the time of each treaty conclusion.

Although Brazil-Portugal (2000), it refers only to Articles 15 and 18. Germany-Portugal (1980) does not resemble any of the models and updates that preceded it. Concerning the provision in paragraph 3, it determines the application of Articles 15, 16, and 17. While they were concluded after the publication of the 1995 OECD MC update, Tunisia-Portugal (1999), Malta-Portugal (2001), and Algeria-Portugal (2003) do not refer to Article 17. On the other hand, Canada-Portugal (1999) and Chile-Portugal (2005) do not adopt the wording containing reference to Article 18 possibly because they also failed to adopt that wording, proposed by paragraph 2 of the convention models, for pensions derived from government services. In addition to the references to income from employment, directors' fees, entertainers and sportspersons, and pensions, United States of America-Portugal (1995) also refers to the article that provides for independent personal services.

United Kingdom-Portugal (1968) and Belgium-Portugal (1969) include Article 19(3), but they do not explicitly elicit the application of Articles 15, 16, 17, or 18. They merely state Article 19 (3) does not apply to remuneration or pensions paid in respect of services rendered in connection with "any trade or business" (United Kingdom-Portugal (1968) and "commercial or industrial activities" (Belgium-Portugal (1969)). Under Spain-Portugal (1993), the wording does not deviate from the model agreement. According to the tax ruling 1661/14, the remuneration paid to doctors who worked in hospitals, transformed into public business entities, and who chose to maintain the legal system of the civil service[156] shall not be regarded as a government service for the purpose of determining the taxing rights under Spain-Portugal (1993). They thus fall under Article 15 of such treaty and not under Article 19[157]. In another tax ruling (3085/19), also related to Spain-Portugal (1993), the understanding was endorsed that "income paid by the Portuguese State for services rendered in the national territory to a worker resident in Spain and with Portuguese nationality, is applicable the article 19(1)(a), that is, the tax right is exclusive of Portugal".

In the tax ruling 7502/20 that has approached the application of Ireland-Portugal (1993), the wording does not deviate from the model agreement. It was endorsed that, according to Article 19(1)(b), the right to tax income from working in government

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[156] Transitional regime provided for in Article 15 of Decree-Law No 233/2005 of 29 December.

[157] The Supreme Administrative Court, in case law nº 0810/14.1BELLE, when assessing the case of which remuneration was of a public nature decided that Article 19 (Government Service) of Spain-Portugal (1993) constitutes a special rule in relation to Article 15 (Dependent personal services) of the same convention and that the right to tax is granted exclusively to Portugal.

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service provided to Portugal online in Ireland by a national of the country is exclusive of that state. This conclusion was based on comments made on Article 15 of the 2008 OECD Model update according to which the taxing right is exclusive to the state where and when the service has been provided online.

Finally, the tax authorities endorsed tax ruling 5106/2009 on Denmark-Portugal (2000) in which it established that Article 19(1) grants exclusive taxing rights to each state concerning the remuneration paid to local employees of their corresponding embassies.

2.4. Diplomats – Article 28

All treaties in the Portugal tax treaty network have an article with the provision of Article 28 of the OECD Model (2017)[158]. In general, they adopt the wording proposed by the model to secure that fiscal privileges of members of diplomatic missions and consular posts under the general rules of international law or under the provisions of special agreements will not be affected by the provisions of a DTA. This reflects a legal framework in accordance with the general rules of international law, specifically those established under the VCDR and the VCCR[159].

Consequently, by virtue of the VCDR and VCCR, members of diplomatic missions and consular posts benefit from an exemption in the receiving state on their remuneration to the extent that the income derived is related to the exercise of government functions. Nonetheless, the former states that members of diplomatic missions and consular posts will not be exempt from income derived in the recipient state that is not associated with the exercise of government functions. In this later case, the receiving state will exercise its taxing powers in accordance with its domestic law and under the relevant allocation rules of the tax treaty.

In addition to the provision of the article within the model convention, the comments on Article 28 encourage the contracting states to adopt additional paragraphs regarding certain issues. Paragraph 2 of the commentaries recommends the adoption of an additional paragraph to Article 28 when contracting states wish to avoid unintended tax reliefs that could result from the simultaneous application of the provisions of a double taxation convention as well as diplomatic and consular privileges granted by virtue of general rules of international law. This paragraph has been adopted in Switzerland-Portugal (1974) and Norway-Portugal (2011). Paragraph 3 of the commentaries on Article 28 is addressed to OECD member countries, and it proposes the

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[158] According to commentaries on 2017 UN Model update, Article 28 of this model reproduces Article 28 of the OECD Model Convention.

[159] Vienna Convention on Diplomatic Relations (18th April 1964), United Nations, Treaty Series, vol. 500, p. 95 and Vienna Convention on Consular Relations (24th April 1963), United Nations, Treaty Series, vol. 596, p. 261, both available in https://treaties.un.org.

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adoption of a special provision for cases in which the domestic legislation of these countries provides that members of diplomatic missions and consular posts while abroad shall be deemed to be residents of the sending state for tax purposes. Aligned with this proposal, Switzerland-Portugal (1974), Germany-Portugal (1980), Canada-Portugal (1999), and the Netherlands-Portugal (1999) adopt a provision in this context with slight deviations. Finally, paragraph 4 of the commentaries proposes the adoption of an additional paragraph to expressly settle issues related to members of diplomatic missions and consular posts of a third state accredited to a contracting state, to international organizations established in a contracting state as well as their officials; and also to prevent undesirable tax reliefs. This issue is pointed out in the wording of Switzerland-Portugal (1974), Canada-Portugal (1999), and the Netherlands-Portugal (1999).

In addition to the conventions mentioned above that adopted the paragraphs proposed by the OECD Model, other treaties present wording that consists of some deviations when compared to the text of the model convention. In Koweit-Portugal (2010), the wording of Article 28 also includes members of an international organization. In the same context, Andorra-Portugal (2015) includes members of permanent delegations of international organizations.

3. Directors' fees – Article 16

With the exception of United Kingdom-Portugal (1968), all other Portuguese tax treaties include a provision related to "directors' fees". Under that DTA, the "directors' fee" is likely taken as income from employment in the case of individuals or as business profit for companies.

In general, the Portuguese tax treaty network adheres to Article 16 of the models for which directors' fees derived by a resident in his capacity of the board of directors of a company "may be taxed" in the state of company residence. Thus, taxing rights are attributed to the source and the resident states in accordance with the OECD Model.

Regarding covered income, the Portuguese tax treaty network generally follows the wording of Article 16 of the OECD Model "directors' fees and other similar payments"[160]. Some treaties include expression "attendance fees" in the wording of an article[161]. France-Portugal (1971) uses the expression "remuneration, of whatever nature, fixed or variable". The protocol of Greece-

[160] In the Portuguese version of tax treaties, the wording "directors' fee and other similar payments" is translated as "percentagens e outras remunerações". However, in some tax treaties, the expression "directors' fee" is translated as "remunerações de direcção" (Brazil-Portugal (2000) and Russia-Portugal (2000)).

[161] This expression was adopted in Austria-Portugal (1970), Cape Verde-Portugal (1999), Luxembourg-Portugal (1999), Macau-Portugal (1999), Mozambique-Portugal (1991), Spain-Portugal (1993), and Tunisia-Portugal (1999).

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Portugal (1999) states that, in Portugal, the article also comprises the remuneration of any manager of a limited liability company or a partnership.

In line with the paragraph 3 of the commentary on Article 16 of the OECD Model, most Portugal tax treaties extend the scope of the covered income as they also refer to the payment derived in the capacity as a member of other company entities similar in function to the board of directors.

Despite that most parts of treaties adopt terminology including "board of directors and similar organ" or "board of directors, supervisory board and similar organ"[162], a few tax treaties do not mention a "similar organ/body". In such case, it is mentioned "board of directors"[163], or "board of direction or supervisory board"[164].

In addition to the board of directors, supervisory board, or any other similar entity, Brazil-Portugal (2000) mentions "member of directorate" and France-Portugal (1971) mentions "administrator" and "partner in a partnership".

Besides the tax treaties that adhere to the OECD and UN Models, some treaties present serious deviations such as France-Portugal (1971), United States of America-Portugal (1995), and Koweit-Portugal (2010). France-Portugal (1971) states that the remuneration is subject to the provisions of the national legislation of each state and that double taxation shall be avoided in such a case in the manner established in Article 24. Under United States of America-Portugal (1995), the provision related to directors' fees (Article 18) is only applicable to payments for a resident of a contracting state derived from "services performed outside" the state to a company resident of the other contracting state. Some bilateral treaties such as China (People's Rep.)-Portugal (2000), Macau-Portugal (1999), Pakistan-Portugal (2000), and Angola-Portugal (2018) include an additional provision that is identical or very similar to Article 16(2) of UN model which states that "salaries, wages and other similar remuneration

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[162] Canada-Portugal (1999), Cuba-Portugal (2000), Denmark-Portugal (2000), Germany-Portugal (1980), Greece-Portugal (1999), India-Portugal (1998), Ireland-Portugal (1993), South Korea-Portugal (1996), Mexico-Portugal (1999), Netherlands-Portugal (1999), Singapore-Portugal (1999) and United States of America-Portugal (1995) mention that a Portugal supervisory board corresponds to "conselho fiscal". On the other hand, the wording of the corresponding articles in Georgia-Portugal (2012), Hong Kong-Portugal (2011), Norway-Portugal (2011), and Japan-Portugal (2011) does not state "supervisory board" or "conselho fiscal" but covers them due of the information contained in the protocols.

[163] This is the case of China (People's Rep.)-Portugal (2000), Macau-Portugal (1999), Malta-Portugal (2001), and Poland-Portugal (1995). The Portuguese version of Poland-Portugal (1995) mentions the expression "conselho fiscal" (supervisory board) which is not mentioned in the English version. Other translation issues are found, for instance, in the Andorra-Portugal (2015). The English version uses the expression "another similar organ" ('outro orgão semelhante') which is not mentioned in the Portuguese version.

[164] This wording is found in Algeria-Portugal (2003), Austria-Portugal (1970), Cape Verde-Portugal (1999), Cuba-Portugal (2000), Mexico-Portugal (1999), Morocco-Portugal (1997), Mozambique-Portugal (1991), Spain-Portugal (1993), Tunisia-Portugal (1999) and Turkey-Portugal (2005). A few tax treaties indicate the wording "conselho fiscal em Portugal".

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derived by a resident of a Contracting State in his capacity as an official in a top-level managerial position of a company which is a resident of the other Contracting State may be taxed in that other state".

Between the OECD Model (1977) and the 2008 OECD Model update, Portugal maintained a reservation expressed in Article 16[165]. According to it, Portugal reserved the right to tax under Article 15 any remuneration to a member of the board of directors or any other body of a company for performing a permanent activity.

Aligned with the Portugal reservation, some tax treaties[166] with minimal deviations from the reservation wording set out that remuneration may be taxed according to the provisions of Article 15 of the OECD Model. This includes the income of an employee when derived by a person referred to in Article 16(1) for performing (in terms of carrying it out) "continuous activity"[167], "permanent function"[168], "activity permanently exercised"[169], "permanent or regular activity"[170], "daily activity"[171], and "day-to-day functions of a managerial or technical nature"[172]. Spain-Portugal (1993) adopts wording in which Article 15 will be applied on all income not derived from "participation in the activities" of the board of directors or supervisory board. Likewise, the protocol of Israel-Portugal (2006) provides that Article 16 shall not apply to any remuneration paid in connection with the performance of any function other than as a member of such body or organ.

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[165] See more details in Manuel Pires, *Da dupla tributação jurídica internacional sobre o rendimento*, Imprensa Nacional-Casa da Moeda, Lisboa, 1984, p. 693 and Alberto Xavier, *Direito Tributário Internacional,* 2.ª Ed., Almedina, Coimbra, 2014, p. 640.

[166] Belgium-Portugal (1969) and Austria-Portugal (1970) were concluded before the Portugal reservation. Despite the reservation being deleted on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", Portugal stopped adopting the provision and the wording in 2003. After being concluded that year, the Algeria-Portugal (2003) no longer contained such a provision.

[167] This is the case of Austria-Portugal (1970), Canada-Portugal (1999), Germany-Portugal (1980), Greece-Portugal (1999), Ireland-Portugal (1993), Luxembourg-Portugal (1999), and Netherlands-Portugal (1999). The expression was translated into the Portuguese version of such treaties as "atividade permanente". In Canada-Portugal (1999), this provision is found in item 11 of the protocol. The Portuguese version of Austria-Portugal (1970) applies this provision only to members of the board of directors despite that the article covers both members of the board of directors and supervisory board.

[168] This is the case of Italy-Portugal (1980).

[169] This expression was adopted in Belgium-Portugal (1969). Additionally, paragraph 2 of this treaty states that "remuneration derived by a person referred to in paragraph 1 from the company in respect of services rendered in the discharge of day-to-day functions of a managerial or technical nature and remuneration derived by a resident of a Contracting State in respect of personal services rendered in his capacity as a member of a company - other than a company with share capital - which is a resident of the other Contracting State, may be taxed in accordance with the provisions of article 15, as if the remuneration were derived by an employee in respect of an employment and the employer were the company".

[170] This is the wording of Denmark-Portugal (2000).

[171] South Korea-Portugal (1996) adopts this expression.

[172] Found only in Indonesia-Portugal (2003) and Belgium-Portugal (1969).

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The analysis of the ADTs concluded during this reservation's period suggests that its adoption constituted a treaty policy for Portugal for the ADTs concluded with countries with a higher level of economic development.

Finally, since Article 16 of most Portuguese tax treaties allocates shared taxing rights, it is assumed that a source state has the unlimited right to tax the directors' fees. However, Koweit-Portugal (2010) is an exception. It contains different terminology and rule for the scope of Article 16. According to paragraph 2, the fees and other similar payments may also be taxed in the contracting state of the company residence, but the tax to be charged shall not exceed 15% of the gross amount of such fees or payments. In fact, the treaty allocates the taxing right to the directors' state of residence, however, it grants limited taxing rights to the state of company residence.

4. Performers – Article 17

4.1. Main rule – Article 17 (1)

Performers are not taxed according to the general allocation rules, meaning that Article 17 takes precedence over the rules of Articles 7 and 15 as *lex specialis*[173]. Paragraph 1 of Article 17 establishes the general rule regarding the taxation of performers according to which the individuals who are residents of a contracting state and perform activities that fall under the scope of the provision *supra* may be taxed in the source state, where the activities are exercised. Thus, even when the performer does not have a permanent establishment in the source state, the income derived can still be taxed therein. Furthermore, performers who are employees can be taxed in the place in which the performance takes place no matter where the employer is based.

The formulation of paragraph 1 should be taken into consideration, specifically, the expression *"personal activities"* which is a clear indicator that paragraph 1 applies only to individuals[174]. When the income derived from a performance is not paid individually to the performer for each performance but is instead paid as remuneration, Article 17 is still applicable. Thus, the state in which each performance takes place can still tax a proportion of said remuneration paid to the performer[175].

Most DTAs accord with the wording of paragraph 1 established in the OECD Model. The most noticeable deviations can be ascertained in the DTA concluded with the United States[176]. The differences are present both in paragraph 1 and paragraph 2, but the authors will begin by addressing those existing in paragraph 1. Firstly, paragraph 1 of United States of America-Portugal

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[173] J. Esteves & J. Sarmento, *Article 15 – Income from employment*, Portugal – Global Tax Treaty Commentaries – Country Policy & Practice, Country Tax Guides, IBFD, 2021.

[174] Mesquita, *supra* n. 20, p. 247.

[175] Paragraph 8 OECD Model: Commentary on Article 17 (2017).

[176] Article 19 is the corresponding article in United States of America-Portugal (1995).

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(1995) includes the *de minimis* rule prescribed in the US Model[177]. Consequentially, the income derived by the performer may be taxed in the source state only if it exceeds USD 10.000 dollars or its equivalent in Portuguese escudos (now euro). The DTA *supra* came into force in 1996 and, since then, the United States has increased the threshold amount to USD 30.000 dollars.

4.2. Artiste companies – Article 17 (2)

Paragraph 2 prescribes that income derived by a performer may be taxed in the source state even when that income accrues to another person. Thus, even if the source state does not have the statutory right to look through the person receiving the income to tax it, paragraph 2 allows it.

Paragraph 2 was not initially in the text of Article 17 but was later introduced in the 1977 OECD Model with the purpose of targeting star companies usually located in offshore jurisdictions. The practices and sophisticated tax schemes used by performers led to the *mistrust*[178] of these individuals, hence the introduction of paragraph 2. Paragraph 2 was also included in the text of Article 17 with the purpose of allowing the taxation of a team, troupe, orchestra, etc. that is constituted as a legal entity[179].

Although most Portuguese DTAs include paragraph 2 of Article 17, a restricted group of DTAs does not contain this rule. This is the case of Austria-Portugal (1972), France-Portugal (1972), and United Kingdom-Portugal (1969). Within this group, Switzerland-Portugal (1975) also originally excluded paragraph 2. However, this rule was introduced in the DTA in 2013 by the Modifying Protocol[180]. This is also the case of Belgium-Portugal (2001) which originally did not include paragraph 2 though the rule was posteriorly introduced in 2012[181]. It should be noted that, in France-Portugal (1972), Article 17 is divided into two paragraphs, however, paragraph 2 does not correspond to the rule contained in paragraph 2 of the OECD Model. Rather, the content of paragraph 1 of the OECD Model is distributed in two different paragraphs.

Canada, Switzerland, and the United States reserved their right to apply the rule in paragraph 2 only to the tax avoidance schemes described in paragraph 11c) of the OECD Model Commentary on Article 17[182]. Thus, in Canada-Portugal (2001), the protocol

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[177] Accordingly, in the OECD Model, the United States reserved the right to limit paragraph 1 to situations in which the entertainer or sportsperson earns a specified amount. See Paragraph 20 OECD Model: Commentary on Article 17 (2017).

[178] D. Molenaar, *Taxation of International Performing Artistes: The Problems with Article 17 OECD and How to Correct Them*, p. 40, Doctoral Series: 10, IBFD, 2005.

[179] Paragraph 11 OECD Model: Commentary on Article 17 (2017).

[180] Article XI of the Modifying Protocol (2013).

[181] Article VIII of the Additional Convention (Resolução da Assembleia da República n. º 82/2000, 14/12) that modifies Belgium-Portugal (2001).

[182] Paragraph 16 of the Commentary on Article 17 of the OECD Model (2017).

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clarifies that paragraph 2 shall not apply if it is established that neither the entertainer, the sportsperson, nor persons related thereto participate directly or indirectly in the profits of the person referred to in that paragraph.

Finally, the protocol of Singapore-Portugal (2001)[183] clarifies that paragraph 2 applies to any income that is associated with the personal activities exercised by an entertainer or a sportsman relating to his reputation as such therefore broadening the scope of paragraph 2 in this particular tax treaty.

4.3. Activities supported by public funds

The OECD Model Commentary on Article 17[184] establishes the possibility of excluding events supported by public funds from its scope . Accordingly, the contracting states have the option of including an extra provision regarding activities subsidized by public funds and, in fact, a considerable amount of Portuguese DTAs include this special provision. This practice allows the Portuguese state to safeguard its taxation rights as, historically, it has been considered to be an exit state.

This provision corresponds to paragraph 3 in the bilateral treaties concluded by the Portuguese state. This is the case of Argelia-Portugal (2006), Angola-Portugal (2019), Barbados-Portugal (2017), Brazil-Portugal (2001), Bulgaria-Portugal (1996), Cape Verde-Portugal (2000), Canada-Portugal (2001), China (People's Rep.)-Portugal (2000), Croatia-Portugal (2015), Cuba-Portugal (2005), Czech Republic-Portugal (1997), Denmark-Portugal (2002) , Estonia-Portugal (2004), Ethiopia-Portugal (2017), Greece-Portugal (2002), Georgia-Portugal (2016), Guinea-Bissau-Portugal (2012), Hungary-Portugal (2000), India-Portugal (2000), Indonesia-Portugal (2007), Israel-Portugal (2008), Ivory Coast-Portugal (2017), South Korea-Portugal (1997), Koweit-Portugal (2013), Latvia-Portugal (2003), Lithuania-Portugal (2003), Macau-Portugal (1999), Mexico-Portugal (2001), Morocco-Portugal (2000), Mozambique-Portugal (1999), Netherlands-Portugal (2000), Norway-Portugal (2012), Oman Sultanate--Portugal (2016), Pakistan-Portugal (2007), Poland-Portugal (1998), Qatar-Portugal (2014), Romania -Portugal (1999), Russia-Portugal (2002), São Tomé and Príncipe-Portugal (2017), Saudi Arabia-Portugal (2016), The Slovak Republic-Portugal (2004), Slovenia-Portugal (2004), Spain -Portugal (1995), Turkey-Portugal (2006), Ukraine-Portugal (2002), United States of America-Portugal (1996), and Vietnam-Portugal (2016).

Notwithstanding, it is still somewhat difficult to determine what exactly constitutes the expression *"mainly supported by public funds"* due to the lack of objective criteria. Since the addition of paragraph 3 regarding public funds seems to be widely

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[183] *Ad* Article 17.

[184] Paragraph 14 of the Commentary on Article 17 of the OECD Model (2017).

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adopted[185] by the contracting states (not only Portugal), it can be argued that perhaps it is time to incorporate this provision into the official text of Article 17 rather than keeping it hidden in the commentary.

Before 1995, Portugal had reserved the right[186] to apply the provisions of Article 17, not 19, to government entertainers' and sportsmen's income. This reservation has since been deleted following the alterations of paragraph 13 of the commentary on Article 17 and paragraph 6 of the commentary on Article 19[187].

Other particularities can be identified regarding Article 17. For instance, the DTAs concluded with Bulgaria-Portugal (1996), South Korea-Portugal (1997), Morocco-Portugal (2000), Mozambique-Portugal (1999), Poland-Portugal (1998), and Czech Republic-Portugal (1997) include a special rule in paragraph 3 according to which income derived by performers shall be exempt from tax in the contracting state in which the activity is exercised, provided that the activity is exercised under a cultural agreement or arrangement between the contracting states.

Mexico-Portugal (2001) also includes noteworthy deviations concerning Article 17. Besides including the special provision with respect to activities supported by public funds as previously alluded to, the DTA *supra* also establishes a broader concept of what constitutes income derived from the professional activity of spectacles or sports. Thus, the income derived by any personal activity that results from a person's reputation as an entertainer or sportsperson is also included in paragraph 1. Furthermore, paragraph 3 deems income earned by a resident of a contracting state from the performance of independent personal services or the direct use, authorization of use, or use in any other form of goods connected to the personal activities exercised by an entertainer or a sportsperson in such a capacity as income derived by them. This applies unless it is demonstrated that the entertainer or a sportsperson did not participate in earning such income[188].

4.4. Internal policy and Case Law

Article 17 is not frequently discussed by Portuguese courts. However, the Arbitration Court (CAAD) was presented with two cases. Both cases[189] discuss if the image rights of the sportsperson in question fell within the scope of Article 17 (2). The two cases share similarities since both concern football players and the transfer of image rights. The court concluded they did not fall

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[185] D. Molenaar, *Article 17(3) for Artistes and Sportsmen: Much More than an Exception*, (2012), 40, Intertax, Issue 4, p. 270-278.

[186] Paragraph 19 of the Commentary on Article 17 of the OECD Model (1992).

[187] Mesquita, *supra* n. 20, p. 248-249.

[188] J. Esteves & J. Sarmento, *Article 17 – Entertainers and sportspersons*, Portugal – Global Tax Treaty Commentaries – Country Policy & Practice, Country Tax Guides, IBFD, 2021.

[189] CAAD Cases n. º 346/2016-T and n. º 97/2017-T.

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within the scope of Article 17 as there was no clear evidence that the income paid to the companies in Portugal accrued to the football players and, therefore, the income was not liable to tax in Portugal. It should be noted, however, that the decision in the second case (2018) was not unanimous since one of the arbitrators opined the situation differently and concluded that the income fell within the scope of Article 17(2). It seems as though this rule is not as easily applicable as first perceived since, in both cases, the court concluded that the tax authorities did not provide the necessary evidence for the application of the provision established in paragraph 2.

5. Employment pensions

5.1. General rule – Article 18

5.1.1. The principle of exclusive residence taxation and its implications on taxation of cross-border pensions

Article 18 of the OECD Model and paragraph 1 of both versions of Article 18 of the UN Model grant to the residence state the exclusive taxing rights on pensions and other similar remunerations[190] paid to retirees in consideration of former past employment[191]. Exclusive residence state taxation is defended by the OECD in its commentary on Article 18 for it is considered that the state of residence is in a better position to take into account the recipient's overall ability to pay[192]. Such a rule was drafted at a time when mobility and cross-border pensions were not so relevant within the international context as they are currently. Increased mobility and the globalization phenomena play important roles in the interaction between states regarding the allocation of taxing rights concerning cross-border income and specifically pensions. This is particularly noticeable within the context of the European Union where free movement of persons allowed pensioners to retire to other countries (usually with warmer climates). This increased the tension between Northern Europe and Southern Europe states as several Northern Europe states were in favour of a greater source taxation while Southern Europe states preferred the traditional residence taxation

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[190] Such as annuities and non-periodic payments qualified as lump-sum distributions from pension funds.

[191] Pensions in respect of former independent services are therefore excluded and should, in principle, fall under the scope of Article 15 or 21 depending on bilateral negotiations between contracting states.

[192] See paragraph 1 of the Commentary on Article 18 of the OECD Model (2017). Other arguments such as excessive administrative burdens for the retiree in the case of cumulative or exclusive source taxation as well as budgetary state costs associated with supporting an aging population by the residence state are usually invoked (notably in respect of healthcare and welfare). For further information regarding arguments in favour or against taxation in the residence state, this latter is also known as origin principle of taxation, see C. Blum, *U.S. Income Taxation of Cross-Border Pensions*, 3 Fla. Tax Rev. 6, p. 315 (1996) and E.C.C.M. Kemmeren, *Principle of Origin in Tax Conventions/ A Rethinking of Models*, p. 35 – 38 (Dongen 2001), respectively.

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approach. Questions related to disagreements regarding Portuguese internal policy on cross-border pensions led to the termination of tax treaties with Sweden and Finland[193].

The increasing international cross-border interaction due to the globalization phenomena and movements of people developed a stronger interaction between states and their respective pension arrangements. This therefore raised issues of higher complexity against which the rule from Article 18 of the OECD Model was simply not designed. Article 18 does not provide a definition nor a source rule. It also does not establish proper coordination between paragraphs 2 and 3 of Article 19[194].

The UN Model offers a clearer approach by establishing two different alternatives to the provision of Article 18. Both alternatives contemplate the exclusive residence taxation principle in their respective first paragraphs. Hence, private pensions paid in consideration of past employment will be taxed solely in the recipient's state of residence . As for pensions derived from social security systems, both versions also establish exclusive source taxation of social security payments. Alternative B also allows taxation by both states (payer's state of residence and recipient's state of residence) which is also applicable in the event that the payer corresponds to a permanent establishment.

5.1.2. Internal policy

Under Portuguese legislation, the definition of pensions for tax purposes includes pensions paid in consideration of former past employment (made under occupational plans, individual retirement schemes, complementary social security regimes) as well as old age, disability, and survivor's allowances and others of identical nature and respective supplements. Temporary or life annuities are also regarded for tax purposes as pensions as well as alimony and other types of pensions and subsidies.

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[193] Finland-Portugal (1971) was terminated by Finland with effect from 1 January 2019 onwards by virtue of Aviso 146/2018 available at https://dre.pt/dre. In the Swedish case, Sweden-Portugal (2003) was terminated on 16 July 2021 with effect from 1 January 2022 onwards. The reasons for these terminations are mainly connected with the Portuguese non-habitual residents tax regime (NHR) under which several tax reliefs are granted in relation to cross-border income, notably pensions. Hence, those who decide to move to Portugal, thus becoming residents for tax purposes in Portugal, would be exempt from tax on cross-border pensions regardless of being taxable income in the origin state. States against this type of beneficial regime claim double non-taxation issues and losses of revenue. Therefore, since April 2020, pensions are taxed at a 10% rate under Portuguese domestic law, see J. Carvalho Esteves & J. Miranda Sarmento, Portugal - Global Tax Treaty Commentaries – Country Policy & Practice, Sec. 19.1., Country Tax Guides IBFD.

[194] See Patricia A. Brown, *Articles 18 and 19(2): Pensions – Global Tax Treaty Commentaries*, Sec. 1.1.1., Global Topics IBFD. Furthermore, Article 18 focuses solely on the distribution of the recipient in complete disregard for the source of the pension, i.e. government, private employer, separate trust, or financial institution; the nature of the pension arrangement, i.e. social security, occupational plans, individual retirement schemes; the tax treatment of the contributions, i.e. whether it consists of an EET or TEE system, among many other issues. Consequently, in 2005, the OECD made several amendments to the commentary on Article 18 in order to provide other additional paragraphs or alternatives to the wording of the present article, leaving it up to the states to bilaterally agree on the interaction of their respective pension arrangements. Hence, the commentary on Article 18 includes alternatives such as exclusive source taxation, cumulative taxation, cumulative limited source taxation, subject-to-tax clause, treatment of social security pensions (exclusive source taxation or cumulative), taxation of pension contributions, rules on portability of pension rights, and individual retirement schemes.

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Compensation aimed at reimbursing losses of income and lump-sum payments also encompassed within this category. All of the payments mentioned above are deemed to be taxed from the moment that they are paid or made available to the taxpayer. Hence, Portuguese tax law offers a broad definition of pensions thus qualifying payments, whether or not related to former past employment, as pensions regardless of consisting of periodic or non-periodic payments and compensations for losses of income within the context of this category[195]. Furthermore, pensions paid by entities with a head office, place of effective management, or permanent establishment in Portugal are qualified as income derived in the Portuguese state[196] and are thus taxed at a 25% rate when paid to non-residents[197].

As previously stated[198], since the beginning of 2010, Portugal has provided tax benefits to several income categories, specifically pensions, under its NHR regime under which cross-border pensions were exempt from tax to the extent that certain conditions would be met. However, since 2019, Portugal taxes cross-border pensions subject to this regime at a single rate of 10% following a complaint from Sweden (which nevertheless terminated its tax treaty with Portugal in 2021).

Concerning the taxation of occupational pensions, Portugal taxes them according to the EET system (exempt contributions, exempt investment income and capital gains of the pension institution, taxed benefits). Hence, contributions to pension funds and other complementary social security systems are deductible from the employee's taxable income at 20% of its value and subject to certain thresholds[199]. On the other hand, pension funds are exempt from Portuguese corporate income tax[200], and contributions to pension funds and to any complementary social security schemes are deductible from the employer's corporate income tax [201].

5.1.3. Treaty policy

Article 18 or its equivalent in the bilateral treaties concluded with the Portuguese state is generally in accordance with Article 18 of the OECD and UN Models notwithstanding that it is common to find modifications to the original wording of its provisions. Nonetheless, when Article 18 does not fully correspond, it usually coincides with the alternative or additional provisions included in the commentary to this article or to some of the paragraphs included in both of the UN Model versions. However, some states

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[195] See article 11 of the Portuguese PITC, available in https://info.portaldasfinancas.gov.pt.

[196] See paragraph 1 d) of article 18 of the PITC, available in https://info.portaldasfinancas.gov.pt.

[197] See paragraph 4 c) of article 71 of the PITC, available in https://info.portaldasfinancas.gov.pt.

[198] See Sec. 5.1.1.

[199] See paragraph 2 of Article 21 and paragraphs 3, 5, and 6 of Article 16, both from the Estatuto dos Beneficios Fiscais, available at https://info.portaldasfinancas.gov.pt.

[200] See paragraph 1 of Article 21 and paragraph 1 of Article 16, both from the Estatuto dos Beneficios Fiscais, available at https://info.portaldasfinancas.gov.pt.

[201] See paragraph 2 d) of Article 23 and paragraph 2 a) of Article 43 of the Portuguesa Corporate Tax Code, available at https://info.portaldasfinancas.gov.pt.

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broaden the scope of this article and the definition of a pension in order to include pensions not related to past employment which would ultimately fall under the scope of Article 21 of the OECD Model[202] in the absence of a specific provision aimed at dealing with these types of pensions. For instance, Japan-Portugal (2012) makes no reference to former past employment and thus only mentions pensions without considering whether such pensions should be derived from former past employment. As for Denmark-Portugal (2002), it states in its article that it is applicable to pensions regardless of whether they derive from former past employment. Cape Verde-Portugal (2000) indicates the source of the payment and is thus encompassed within the scope of its article pensions paid by a resident of one state to a resident of another state. It states that such payments may be taxed in the source state (naturally covering situations that are not related to former past employment). Pakistan-Portugal (2003) includes in its definition of pensions those received as compensation for injuries suffered while performing services. In respect of alimony, maintenance payments, and child support, some treaties expressly refer to these payments by including them in the scope of their articles. This is the case of Chile-Portugal (2006) which covers alimony and maintenance payments. Such payments should, in principle, only be taxable in the state of residence of the recipient provided that they are deductible from the payer's taxable income in the source state. However, when it consists of non-deductible payments, the source state is granted the exclusive taxing right over those pensions. United States of America-Portugal (1995) also covers both alimony and child support and offers a precise definition for such payments. Alimony is subject to exclusive residence taxation (recipient's state of residence) whereas child support is exclusively taxed in the source state (payer's state of residence). Canada-Portugal (2000) also covers alimony (and other similar payments) as well as war pensions and allowances paid to war veterans as a result of damages or injuries suffered during of a war (these latter shall be exempt from tax in the recipient's residence state to the extent that they would be exempt from tax in the source state). As for alimony and other similar payments, such payments shall only be taxable in the recipient's residence state provided that they are effectively subject to tax in that state. With the exception of United States of America-Portugal (1995) and Japan-Portugal (2012), most treaties that include this deviation were signed in the same time period (between the years 2000 and 2006, respectively).

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[202] Indeed, Article 18 of the OECD Model only covers pensions paid in respect of past employment; see paragraph 2 of the Commentary on Article 18 of the OECD Model (2017) thus excluding from its scope payments corresponding to alimony and child support paid by an individual to a beneficiary resident of another state that should be regarded as other income by virtue of Article 21. This interpretation was followed by the Portuguese Supreme Administrative Court which ruled that the Portuguese tax authorities held no right to tax alimony paid by a Portuguese tax resident to a recipient resident in Spain due to the fact that such payments did not qualify as pensions for the purposes of Article 18. They therefore consisted of income falling under the scope of Article 21 of Spain-Portugal (1995) that they did not consist of payments paid in respect of past employment but rather by an individual. T , Article 22 (other income) of the Spain-Portugal Income and Capital Tax Treaty (1995) was thereby applicable, and Spain was granted the exclusive taxing right; see Ac. STA, Case 0859/16, 12th July 2017, available at http://www.dgsi.pt.

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5.2. Government service pensions – Article 19

5.2.1. Main rule – Article 19 (2)

Taxation of pensions paid by virtue of services rendered to a state (commonly described as public pensions) follow the principle of exclusive source taxation thus conforming with rules of international courtesy and respect to states' sovereignty[203]. Both the OECD and the UN Models include this principle, and the majority of the tax treaties concluded with the Portuguese state have fully adopted the wording of this article or have alternatively granted cumulative taxing rights to both contracting states as foreseen in the OECD and UN Commentaries in their respective Article 19[204].

In some cases, Article 19 (2) is nevertheless non-existing as both public pensions and remunerations are addressed in one single paragraph and impose a nationality criterion. This is the case of Switzerland-Portugal (1974), Belgium-Portugal (1970), and United Kingdom-Portugal (1968). It was also the case for France-Portugal (1971). However, in this last case, the wording was changed by virtue of the protocol signed in that same year of 1971 in order to be in accordance with the OECD Model. Exclusive source taxation is still regarded as the primary principle in the treaties mentioned above except for United Kingdom-Portugal (1968). It grants cumulative taxing rights to both states concerning taxation of public pensions provided that the recipient is only a national of the residence state without simultaneously being a national of the source state. All of the remaining DTA's grant the exclusive taxing right to the source state unless the individual is only a national of the residence state without also being a national of the source state.

5.2.2. Previous employment in government business – Article 19 (3)

Article 19 (3) of both the OECD and the UN Models deals with pensions paid to individuals by virtue of services rendered to a contracting state within the context of a business activity performed by it. Despite being regarded as pensions of a public nature, specifically due to the source of such payments, these pensions do not fall within the scope of Article 19 (2) but rather under Article 18, being directed to this regime by virtue of Article 19 (3) [205]. However, some treaties do not distinguish between private

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[203] See paragraph 2 (1) of the Commentary on Article 19 of the UN Model (2017).

[204] This is the case, among other treaties, of Norway-Portugal (1970); the latter was only in force until 2012 which granted both Portugal and Norway the right to tax public pensions. The application of this DTA led to a dispute when a Norwegian retiree became a Portuguese tax resident and derived a disability pension paid by a fund created by the Norwegian Government. He claimed that the Portuguese tax authorities held no right to tax the pension as he considered that it fell under the scope of Article 18 thus being exclusively taxed in Portugal, being nonetheless exempt under Portuguese legislation. However, the administrative court ruled in favour of the Portuguese tax authorities and considered that such a pension would fall under the scope of Article 19 of Norway-Portugal (1970). It would thus be taxed in Norway and Portugal and only be partially exempt under Portuguese law like any other Portuguese resident; see Ac. TCA Sul, Case 05768/1, 4th June 2015, available in http://www.dgsi.pt.

[205] Hence, even though the source of the payments would, in principle, make these pensions solely taxable in the source state by virtue of Article 19, paragraph 2 (notwithstanding the article's exceptions to this rule), the nature of the activity undertaken is

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employment pensions and public employment payments for tax purposes and thus tax all pensions under Article 18 regardless of the nature of the pension. This means that the rule provided in Article 19 (3) is indirectly fulfilled given that public employment pensions by virtue of business activities will fall within its scope as was foreseen by the provision previously mentioned. Nonetheless, countries that include such a rule in their treaties will extend the principle of exclusive residence taxation to all public employment pensions and go beyond the wording of Article 19 (3). They will subject pensions to tax in the residence state in respect of past employment regarded in Article 19 (2) which would be, in principle, solely taxed in the source state should the wording of the OECD and UN Models be adopted. Consequently, in the absence of a rule allocating taxing rights as per Article 19 of the OECD and UN Models, all pensions will fall under the scope of Article 18. This is the case of Germany-Portugal (1982) and Chile-Portugal (2006) that only refer to pensions within the framework of Article 18. As for Canada-Portugal (2000), Article 18 provides a more complex allocation rule. Firstly, it grants both contracting states taxing rights over pensions regardless of their nature. Secondly, it establishes limited taxation in the source state in the event of periodic pension payments by setting a threshold that shall not exceed 15 % of the gross amount of such periodic pension with its rate being calculated under the foreseeable domestic rules of the country of the payment thereof.

5.3. Diplomats – Article 28

Pensions received by diplomats and members of consular posts are regarded for tax purposes as those paid in respect of services rendered to a contracting state and consequently fall under the scope of Article 19 (2) of the OECD and UN Models, which was the subject of the analysis *supra* in sec. 5.2.1.

Furthermore, Article 28 is present in all treaties concluded with the Portuguese state and is thus a consistent rule in Portuguese tax treaty policy and practice.

6. Students, teachers and professors – Article 20

6.1. Taxation of students under Article 20 of the OECD and UN Models

Article 20 of the OECD and UN Models is present in all bilateral treaties concluded by the Portuguese state with the underlying policy of encouraging cross-border education exchanges. This thereby ensures that support payments received by students or apprentices in the study state who are or were immediately[206] before moving to the study state a resident of the other contracting

considered to be closer to those carried out in the private sector and thus be within the scope of Article 18. Naturally, this will be the case for all treaties that adopt this approach.

[206] The word "immediately" was inserted in the 1977 Model Convention in order to clarify that only those who have switched from the origin state to the study state directly without having being residents of a third state in between may benefit from the exemption; see paragraph 2 of the OECD Model (2017). Moreover, it simultaneously encompasses individuals who lost their

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state are not taxed in the former state. This is provided that such payments arise from sources outside of the study state[207] and are received solely for the purpose of the recipient's maintenance, education, and training there[208]. Hence, by virtue of the present legal framework, students and apprentices shall not be placed in a rather disadvantageous position which would otherwise occur should such qualifying payments be taxed in the state where the studies are undertaken[209].

6.1.1. Internal policy

On a purely domestic level, payments received by students or apprentices for the purpose of their maintenance or education are not regarded for tax purposes under Portuguese tax law. The Portuguese system additionally exempts income derived by students in respect of remuneration from work or by virtue of services rendered up to a maximum threshold of EUR 2194,05 provided that the student is still part of a family household and continues to undertake his studies in an approved educational institution[210]. As for grants and scholarships, such payments are not considered to be made by virtue of labour nor service provision relationships[211] and, in principle, are not subject to income tax[212].

6.1.2. Treaty policy and policy drafting

Article 20 has somewhat of a peculiar nature when comparing to other articles of the OECD and UN Models. Unlike other articles of the convention, Article 20 does not allocate taxing rights nor grant the exclusive or cumulative taxing rights to neither contracting state. It rather imposes a restriction on the study state by grating an exemption[213] in respect of qualifying payments

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residence in the origin state by virtue of moving to the study state and are not yet deemed to be residents of the study state, see R. Vlasceanu, *Article 20 – Students, Teachers and Professors*, Sec. 2.1.1.1., Global Topics IBFD.

[207] Usually, the source state of such payments corresponds to the state where the student or apprentice was a resident prior to moving to the study state, notwithstanding that the payment is exempt provided that it arises from a source outside the study state, thus any other state. However, when the support payment has its origin in the study state or none of the conditions laid down in the article are met, Article 20 shall not apply, and those payments will fall under the scope of other articles of the convention, notably Article 15 or Article 21. Moreover, if the recipient is a resident of the study state for tax purposes, it shall consist of a purely domestic situation and, therefore, the convention will not apply to those payments.

[208] See paragraph 3 of the Commentary on Article 20 of the OECD Model (2017).

[209] The taxation of students and apprentices is addressed in multiple other multilateral instruments and tax treaties; see US Model Tax Convention on Income (1981-2016), Treaties & Models IBFD, German Income and Capital Tax Treaty (2013), Treaties & Models IBFD, ASEAN Income Tax Treaty (1987), Treaties & Models IBFD, SADC Model Tax Agreement on Income (2011), Treaties & Models IBFD.

[210] See Article 12, paragraph 9 of the PITC available at https://info.portaldasfinancas.gov.pt.

[211] Therefore, the grant or scholarship holder should not be considered a public servant; see Article 4 of the Lei 40/2004, 18 August.

[212] Only in respect of grants where the existence is detected of economic advantages deriving from the purpose of the grant; see Nota Informativa da Direcção de Serviços do Imposto sobre o Rendimento das Pessoas Singulares, available in https://info.portaldasfinancas.gov.pt.

[213] Provided that all conditions in the article are fulfilled. For further information regarding the particularities of this article within the legal framework established by the convention and its susceptibility of not being considered an allocation rule, see L. De Broe, *Commentary on article 20*, in K. Vogel, Klaus Vogel on Double Taxation Conventions, 4th edn, p. 1524, paragraph 24

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and thus takes precedence over other articles of the convention[214]. This is particularly noticeable in situations when the student or apprentice becomes a resident of the study state. Despite transitioning to a domestic situation, Article 20 imposes an exemption on the study state regardless of the way its student residents are treated for tax purposes under its domestic law. Identically, the provision will also apply in the case of dual residence. Furthermore, double non-taxation situations often arise for it is common for the source state to also provide an exemption in respect of these qualifying payments[215]. Nonetheless, such situations are far from being unintended and therefore create a scenario in which double non-taxation is rather allowed and thus atypical.

Article 20 is subject to different variations, and Portuguese treaty practice includes treaty versions of this article that are either drafted in more detail or have their scope extended in order to cover other types of payments (specifically, remunerations[216], grants, and scholarships adhering to the Commentary on Article 20 from the UN Model) or sources of those payments. As for the exemption, it is usually limited to a period of 2 years with some exceptions[217]. Additionally, some treaties even extend their subjective scope in an effort to cover other individuals.

6.1.2.1. Extension of subjective scope mobility workers seeking to acquire professional experience

Some treaties concluded with the Portuguese state have their subjective scope extended in order to cover situations in which an individual who is assigned to a company of one of the contracting states temporarily moves to the other contracting state with the objective of acquiring professional experience. This goes beyond the wording of the OECD and UN Models which, despite not offering a definition of student nor apprentice[218], should nonetheless be interpretated in light of the policy objectives of this

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(eds. E. Reimer & A. Rust.,Kluwer L. Intl. 2015) and C. Staringer & A. Binder*, Students and Business Apprentices According to Art 20 OECD Model Convention*, in the OECD Model -Convention and Its Update 2014, Series on International Tax Law, sec. III.B. (eds. M. Lang et al., IBFD 2015), Books IBFD.

[214] See Vlasceanu, supra n. 123, Sec. 1.1.1.

[215] Notwithstanding the exemption imposed on the study state by virtue of Article 20, taxation in the source state is not regarded for the purposes of this article. Consequently, there is nothing in the convention nor in the wording of Article 20 that prevents the source state from taxing these support payments. Hence, the source state taxing rights remain unaltered.

[216] Many treaties concluded by Portugal tend to exempt not only support payments that have their source outside of the study state but also remuneration that is obtained. This is particularly relevant in the case of students and apprentices from developing countries who may face difficulties in supporting higher living costs in the study state than in their home state. Portuguese treaty policy is consistent with this premise, and multiple DTAs concluded with developing countries tend to follow this pattern.

[217] Both the OECD and UN Model Conventions are silent in respect of the timing of the making of support payments, although it could be interpretated that such an exemption shall only be granted while the individual is present in the study state. This is notwithstanding that a strict interpretation of this reading may result in unexpected scope exclusions such as excluding payments from the scope that are made while a student is abroad on a field trip or visiting home. For further information, see J. Wheeler, *Time in Tax Treaties - Global Tax Treaty Commentaries*, Sec. 4.4.4.6.1., Global Topics IBFD. In an attempt to clarify which moment determines the entitlement to the exemption, see Japan-Portugal (2012), Mozambique-Portugal (2009 Protocol), Romania-Portugal (1999), Vietnam-Portugal (2016) and Ivory Coast-Portugal (2016).

[218] Some treaties tend to clarify the definition of student and apprentice in order to avoid complications arising from broader interpretations of the term that may lead to an unintended extension of the scope of the exemption such as Germany-Portugal (1982), Tunisia-Portugal (2000), Mozambique-Portugal (1992) and Mozambique-Portugal (2009 Protocol), Cape Verde-Portugal

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article, i.e. encourage cross-border educational exchanges, thus individuals who are currently undergoing any type of education or training falling within its scope [219]. Notwithstanding the wording of the provision and its underlying objective, Cape Verde-Portugal (2000), Tunisia-Portugal (2000), and Germany-Portugal (1982) extended their subjective scope to individuals temporarily present in the other contracting state with the purpose of acquiring professional experience thus exempting their income provided that it remains below a certain threshold. Mozambique-Portugal (1992) also enlarged its subjective scope only to be later removed from the wording of its article following the Mozambique-Portugal (2009 Protocol).

6.1.2.2. Restriction of subjective scope

Contrastingly, Macau-Portugal (1999) has the strictest objective and subjective scope of all treaties. According to its article, a student or apprentice may only benefit from an exemption in respect of grants and scholarships to the extent that such payments have their source outside of the study state.

6.2. Taxation of visiting teachers and professors

Taxation of visiting teachers and professors is not addressed in Article 20 of the OECD[220] and UN Models per se, though the possibility of such a regime is mentioned in the Commentary on Article 20 of the UN Model[221].The underlying policy of a provision dealing with the taxation of visiting teachers and professors relies on the same fundamental policy aspect as that foreseen for students. It encourages cross-border cultural exchange and transfer of knowledge by facilitating short-term visits to individuals who temporarily move from one state to the other for the purpose of teaching, research, or investigation activities[222].

(2000), Netherlands-Portugal (2000), Norway-Portugal (1970) – in force until 2012, and the United States of America-Portugal (1995). The United States made a reservation to Article 20 specifically to include a definition of business trainee in accordance with the US Model Tax Convention on Income. Estonia-Portugal (2004) and Latvia-Portugal (2003) reserved their right to amend the article in order to refer to any apprentice or trainee which were definitions that were included in their bilateral treaties concluded with Portugal.

[219] In the case of students, it may range from primary school up to academic institutions and vocational courses. As for trainees or apprentices, this implies someone who is still in the process of learning and therefore still does not provide all of the necessary legal requirements to exercise his job autonomously; see Vlasceanu, supra n. 123, Sec. 5.1.1.2.

[220] Within the OECD context, divergences between OECD member countries made it difficult to achieve consensus regarding the inclusion of a specific provision dealing with taxation of visiting teachers and professors. Given the lack of agreement, the WP10 concluded that a specific provision should not be included in the model; see OEEC, Fiscal Committee, Minutes of the 6th Session held in Paris on 25-27 November 1957, doc. FC/M (58) 1 (6 Jan. 1958), available in https://www.taxtreatieshistory.org.

[221] See paragraph 10 of the UN Model (2017). The German Income and Capital Tax Treaty (2013), Treaties & Models IBFD also provides an exemption in respect of payments received by visiting teachers and professors.

[222] Nevertheless, in the absence of a provision dealing directly with taxation of visiting teachers and professors, the remuneration received is likely to be subject to Article 14 when the teaching services are to be performed in an independent capacity (and if such a provision is adopted. Alternatively, Article 7 might apply regarding independent services). In the case of a remuneration likely to be qualified as a salary, Article 15 should be applicable. Furthermore, Article 19 is also to be considered to the extent that the remuneration is paid by a contracting state. Some treaties specifically refer to Article 19 under their provisions regarding taxation of visiting students by stating that, despite the rules regarding the taxation of visiting teachers and professors, Article 19

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6.2.1. Internal policy aspects

On a domestic level, income derived from teaching and research is either qualified as a salary paid by an employer (public entity or in the private sector) thus in the context of a labor relationship. Alternatively, it could be remuneration obtained by virtue of a service rendered to a certain entity or person and therefore consisting of income that, in either case, is subject to tax at a progressive tax rate. Nevertheless, certain payments that are funded through grants and scholarships and paid to an individual with the purpose of conducting a) research initiation work and research associated with obtaining degrees and diplomas of higher education or b) research work by doctorate holders whose academic degree has been obtained less than three years previously are exempt from taxes under Portuguese legislation[223].

6.2.2. Treaty policy

The inclusion of a separate provision addressing taxation of visiting teachers and professors is widespread under Portuguese treaty policy and thus grants an exemption of income derived from teaching and research by reference to a certain period of time. Generally, such a benefit shall not be granted over a period exceeding 2 years[224]. Typically, the provision dealing with taxation of visiting teachers and professors exempts remuneration obtained by virtue of the teaching, investigation, or research activity conducted in the teaching state[225] while some treaties clarify that the remuneration obtained must be sourced outside of the teaching state in order to qualify for the exemption there[226].

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is nonetheless applicable, specifically, Germany-Portugal (1982), Greece-Portugal (2002), Ireland-Portugal (1994), and Luxembourg-Portugal (2000).

[223] See Article 4, paragraph 1 of the Lei 40/2004, 18 August. See also Sec. 6.1.1. and footnote 128.

[224] Although, in some cases, the period is extended to 3 years which is the case of China (People's Rep.)-Portugal (2000) and United Arab Emirates-Portugal (2012). Morocco-Portugal (1999), on the other hand, reduced its exemption period to a period of 12 months.

[225] Some treaties specifically state that it is in the teaching state that such exemption shall occur. This is the case of Guinea Bissau-Portugal (2009), Netherlands-Portugal (1999), India-Portugal (2000), Indonesia-Portugal (2006), Ireland-Portugal (1994), Israel-Portugal (2008), Koweit-Portugal (2011), Latvia-Portugal (2003), Lithuania-Portugal (2003), Macau-Portugal (1999), Montenegro-Portugal (2017), Pakistan-Portugal (2003), Poland-Portugal (1997), Qatar-Portugal (2012), Kenya-Portugal (2020), Republic of Moldova-Portugal (2010), Republic of Uruguay-Portugal (1997), Romania-Portugal (1999), Republic of San Marino-Portugal (2014), São Tomé e Principe-Portugal (2016), Senegal-Portugal (2014), Oman Sultanate-Portugal (2016), East Timor-Portugal (2012), Turkey-Portugal (2006), Ukraine-Portugal (2002), Venezuela-Portugal (1997), and Luxembourg-Portugal (2000). Apart from Luxembourg-Portugal (2000), bilateral treaties usually remain silent regarding taxation of such payments in the origin state and provide no allocation of taxing rights. Hence, the origin state's taxing rights usually remain unaltered and are not dealt with in the context of this article. Nonetheless, Luxembourg-Portugal (2000) specifically indicates that those payments are subject to tax in the origin state.

[226] Such as South Africa-Portugal (2008), Germany-Portugal (1982), Greece-Portugal (2002), Morocco-Portugal 1999), Russia-Portugal (2002), and Ukraine-Portugal (2002).

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In order to avoid double non-taxation situations[227], a subject-to-tax clause might be included to ensure that income derived from teaching or research and investigation activities in the teaching state is only exempt to the extent that such income is subject to tax in the origin state, like in Poland-Portugal (1997).

6.2.2.4. Exemption in both states

Other bilateral treaties include a more generous approach and exempt income derived from teaching in both states. These include Brazil-Portugal (2001), Cape Verde-Portugal (2000), United States of America-Portugal 1995), Mexico-Portugal (2000), Mozambique-Portugal (1992), and France-Portugal (1971) with the latter exempting income originating in the teaching state in both states. Spain-Portugal (1995) proceeds further by specifically stating that such income shall be exempt in the teaching state to the extent that it is not taxed under the rules of the origin state[228].

6.2.2.7. Restrictions on the subjective scope

Most treaties tend to focus more on the nature of the activity, i.e. teaching, research, and investigation, as opposed to the quality of the individual performing them thereby usually referring to an individual. Nonetheless, some treaties are specific regarding who can benefit from the exemption, thus excluding from its scope any person carrying out a teaching, research, or investigation activity that is not a teacher, professor, researcher, or other recognized academic title. A provision as such is identified in France-Portugal (1971), Greece-Portugal (2002), Netherlands-Portugal (2000), India-Portugal (2000), Ireland-Portugal (1994), Luxembourg-Portugal (2000), and Russia-Portugal (2002).

6.2.2.8. Exemption conditioned to prior invitation by the institution

Some ADTs impose that, in order to qualify for the exemption, visiting teachers and professors are invited by the institution where the teaching, research or investigation activity is to be undertaken. This is in addition to other conditions that have already

[227] As previously stated in Sec. 6.1.2., double non-taxation situations arising within the context of the taxation of students and apprentices do not create a major problem. However, it does not appear to be the same case when considering taxation of visiting teachers and professors, and many bilateral treaties include provisions aimed specifically at avoiding double non-taxation through the inclusion of subject to tax clauses or by offering a more precise definition of residency for these individuals, thus imposing limits on the benefits.

[228] However, some treaties remain silent regarding the source of the payments received by visiting students and professors thereby only mentioning that such income is exempt, which is the case of Angola-Portugal (2019), Barbados-Portugal (2014), Bahrein-Portugal (2016), Cyprus-Portugal (2013), South Korea-Portugal (1997), Ivory Coast-Portugal (2016), Croatia-Portugal (2015), United Arab Emirates-Portugal (2012), Spain-Portugal (1995), Estonia-Portugal (2004), and Ethiopia-Portugal (2014). Only Netherlands-Portugal (2000) exempts the income in the origin state. Other treaties make the exemption only available for payments that are funded directly out of grants and scholarships, such as Indonesia-Portugal (2006), Senegal-Portugal (2014), and Venezuela-Portugal (1997). Venezuela-Portugal (1997) only exempts income if the grant or scholarship is tax exempt under the domestic law of the teaching state.

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been hereby subject to analysis in the previous sections. This is the example of Brazil-Portugal (2001), Germany-Portugal (1982), South Korea-Portugal (1997), United States of America-Portugal (1995), Ethiopia-Portugal (2014), Koweit-Portugal (2011), Morocco-Portugal (1999), Mexico-Portugal (2000), Mozambique-Portugal (1992), Montenegro-Portugal (2017), and Oman Sultanate-Portugal (2016).