

Other income in tax treaty practice: the normative profiles used by contracting states

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1. Introduction

1.1 Aim and research question

The aim of this contribution is to identify the normative profiles used by contracting states when designing tax treaty provisions aimed at allocating taxing rights to income not dealt with by any other allocation. With this contribution, the author seeks to allow a better understanding of the current treaty practice in what concerns the such provisions.

A normative profile is not more than a model or archetype of a treaty provision designed based on an inductive reasoning (based on treaty observation). Each profile expresses a specific tax policy option, leading to a distinctive tax treatment of the (other) income falling within its scope. A normative profile gathers treaty provisions with different wordings insofar as their underlying policy goal and tax consequences are similar. In fact, treaty practice is rich in deviations that do not represent a different policy option (or interpretative outcome).

The identification of all these normative profiles, which is performed for the first time in this contribution (at least in what concerns “other income”), also aims at facilitating future research, providing a comprehensive analytical structure that researchers may namely for further statistical analysis on the occurrence of this provisions in treaty practice. It also facilitates the efforts of designing provisions to be included in bilateral and multilateral instruments.

1.2 Scope, methodological options and limitations

As mentioned, this study is focused on the normative profiles of the other income provision in treaty practice. Such provisions were individualised based on an inductive exercise, which departs from a comprehensive analysis of other income provisions in bilateral tax treaties, highlighting their convergent and divergent elements.

To avoid any research bias, the research was based on primary sources (i.e. income tax treaties). Secondary sources (such as doctrinal texts and case law) were only considered once research on research on primary sources was concluded.²

As in any study of this nature, methodologic options had to be made. Other income provisions were taken into account when included in treaties that were: i) bilateral; ii) in force on 1 August 2023; iii) in English³(covering both the original text and amending protocols); iv) made available by the IBFD’s Tax Research Platform⁴ From those treaties, we have considered both: i) clauses labelled “other

² There are already several contributions providing an analysis of divergent treaty practice, such as K. van Raad, Tax Treaty Practice Regarding Article 21 and Related OECD and UN model issues, in: G. Maisto (ed.), Current Tax Treaty Issues – 50th anniversary of the International Tax Group, IBFD, 2020, pp. 541 et seqs, A. Rust, Other Income, in: E. Reimer and A. Rust (eds), Klaus Vogel on Double Tax Conventions, Fifth edition, Vol. II, Kluwer, 2021, pp. 1766 et seq and See L.E. Schoueri, Article 21 - Other Income – Global Tax Treaty Commentaries, Global Topics IBFD, 2023.

³ Even if, in the absence of an English translation, the versions in French, Italian, Spanish and Portuguese were also considered. In a limited number of cases, automatic translation of other languages was used to understand the content of a treaty not made available in English.

⁴ Available at <https://research.ibfd.org/#/>.

income”; ii) non-labelled clauses or clauses labelled otherwise that followed a wording similar to that used in the “other income” clauses of the models,⁵ and; iii) clauses with a similar function.

Insofar as the research is based on IBFD’s Tax Research platform, it has the same limitations as such database. Accordingly: i) it only considers a treaty whenever it was included in such database; ii) when the original treaties are not drafted in English, it relies on IBFD’s non-official English translation; iii) does not consider treaties that are neither available in English nor in languages that the author cannot read; iv) does not consider amendments introduced by Protocols that were not inserted in the main body of the provision The treaty version taken into account was the latest one made available (including amendments).

This contribution is focused on the other income normative profiles, leaving aside the interaction between the profiles and other treaty provisions (or, more generally, other provisions including in public international law instruments)⁶ or domestic law.⁷ Due to the catch-all function of the other income provision, any broadening or narrowing of the scope of other treaty provisions may have an impact in the income that must be considered as other income. However, consideration of such interaction would require a comprehensive analysis of the full in-scope treaties which would not be feasible in the framework of this study. For the same reason, the impact of the commentaries⁸ on the interpretation is not taken into account.⁹

This contribution does not aim at being a repository or list of all treaties that include a certain normative profile. Accordingly, only a reduced number of wordings and, within each wording, of treaties were selected to illustrate each normative profile. However, in some instances (considering the provision's relevance and its limited use in practice), the author made an exhaustive listing of all treaties employing a specific normative profile or wording. That is the case, for instance, of treaties including a main purpose clause¹⁰ or of treaties granting exclusive taxation rights to the source state.

Whenever considered relevant to understand the modus operandi of each normative profile, a brief reference to the rationale or policy aim of the provision is included. However, this article does not aim at discussing the underlying policy goals pursued by the different normative profiles.

1.3 Structure and Sequence

⁵ OECD Model Tax Convention on Income and on Capital (21 Nov. 2017), Treaties & Models IBFD [hereinafter OECD Model(2017)], and United Nations Committee of Experts on International Cooperation in Tax Matters, United Nations Model Double Taxation Convention between Developed and Developing Countries 2021 (United Nations 2021), Treaties & Models IBFD [hereinafter UN Model (2021)].

⁶ For instance, Australian tax treaties often exclude insurance business income from the purview of the business income provision, reason why such income would fall under the other income provision. Those cases are outside the scope of this research, since they are not the result of the functioning of the other income provision. See P. Klank & M. Stewart, Australia - Global Tax Treaty Commentaries – Country Policy & Practice, Country Tax Guides IBFD, sec. 22.5.

⁷ Namely rules concerning the source of income.

⁸ OECD Model Tax Convention on Income and on Capital: Commentaries (21 Nov. 2017), Treaties& Models IBFD and United Nations Model Double Taxation Convention between Developed and Developing Countries: Commentaries (2021), Treaties& Models IBFD.

⁹ Accordingly, the evergreen discussion between static and an ambulatory approaches to the commentaries is not within the scope of this contribution.

¹⁰ Beyond the UK tax treaty network.

The following three chapters deal with the allocation of taxing right through the other income provision. The different normative profiles are addressed from those granting most to those granting less taxing powers to the residence. The author deals with clauses granting exclusive taxing rights at either end of the spectrum.

After those three, the author will cover special normative profiles, which do not have (at least primarily) an allocation function.

The sixth chapter deals with the normative profiles, which exclude a specific stream of income from the other income provision.

The final chapter is devoted to the customary conclusions.

2. Exclusive residence taxation

2.1 Regarding all income

The OECD Model Convention¹¹ recommends, as the default rule, exclusive residency taxation for all other income. The following wording is proposed:

“Items of income of a resident of a Contracting State, wherever arising, not dealt with the foregoing Articles of this Convention shall be taxable only in that State”.¹²

The overwhelming majority of treaties adopts this normative profile. Again, and following what was mentioned *infra* regarding the aims of this study, this should not be understood as meaning that most treaties opt for exclusive residence taxation. It only means that this normative profile is overwhelmingly used, even if combined with another one whose end result is shared taxing rights. The aim of this study is not to map the outcomes but the normative profiles that are used in treaty practice and which, individually considered, lead to a certain normative outcome. In this case, exclusive residence taxation.

Returning the OECD Model, since the 1963 draft,¹³ the wording of the clause has been amended, more than once within the same normative profile. Therefore, treaties patterned alongside prior version follow those prior wordings, which should not be understood as a misalignment with the OECD model or leading to a different profile.

Some treaties include wording variations, such as:

- instead of “resident of a Contracting State” they refer to “resident of the country of a Contracting Party”;¹⁴

- instead of “residence”, they refer to “fiscal domicile”;¹⁵

¹¹ OECD Model Tax Convention on Income and on Capital (21 Nov. 2017), Treaties & Models IBFD.

¹² See OECD Model Tax Convention on Income and on Capital, art. 21(1) (21 Nov. 2017), Treaties & Models IBFD.

¹³ See OECD Draft Tax Convention on Income and on Capital (30 July 1963), Treaties & Models IBFD.

¹⁴ See Art. 21 of the Indonesia-Taiwan Tax Treaty of 1995.

¹⁵ See Art. 25 of the France-Togo Tax Treaty of 1971, Art. 25 of the France Ivory Tax Treaty of 1966, and Art. 25 of the Central African Republic-France Tax Treaty of 1969.

- instead of “not deal with the foregoing Articles”, they refer to “which are not expressly mentioned”, following the wording of the 1963 Model Convention,¹⁶

- instead of “wherever arising, they refer to “whatever its source”.¹⁷

Within this normative profile, one can also find treaties that, instead of granting an exclusive right to residence, prohibits the other contracting state from exercising its taxing rights.¹⁸ The residency State remains competent from taxing income arising from its own territory, from the other contracting state (depending on the specific wording) and from third states, reason why we do not consider that this deviation amounts to a different normative profile.

2.2 Regarding specific streams of income or entities

In many treaties, the standard rule is shared taxing rights. Accordingly, exclusive residency taxation appears as an exception for some specific cases. This is reached by a certain normative profile that exceptions certain situations from such standard rule, leading to exclusive residency taxation of other income.

In some treaties, such exception applies to specific items of income, such as: i) income arising in third countries;¹⁹ ii) income from “the provision of a guarantee of indebtedness” not attributable to a permanent establishment;²⁰ iii) annuities arising in a contracting state.²¹

In one treaty, exclusive tax residency is foreseen for other income derived in the other contracting state when the beneficiary of the income is a “government”,²² giving expression to the idea that a state shall not tax the income of another state.

3. Profiles allowing cumulative exercise by residence and source

3.1 Introduction

Exclusive residency taxation is not a consensual policy choice. A considerable number of treaties deviate from this rule, allowing cumulative taxation by both contracting states.

¹⁶ Cited supra n. 13. For an example of a treaty with this wording see Art. 21(1) of the Argentina-Germany Tax Treaty of 1987.

¹⁷ Art. 22 of the Saudi-Arabia-Tunisia Tax Treaty of 2010. “Arising” and “source” are not synonymous and only the latter has a specific and pre-defined legal meaning. In any case, and for the purposes of our classification, the difference does not lead to a different normative profile.

¹⁸ See Art. 12 of the Belarus-France Treaty of 1985, stating: “[i]ncome not enumerated in the foregoing Articles of this Convention received by a resident of a State and derived from sources situated in the other State shall not be liable to taxation in that other State.”.

¹⁹ See, for instance, Art. 22(2) of the Sweden-Türkiye Tax Treaty of 1988, or Art. 21(2) of the Bahrain-Türkiye Tax Treaty of 2005.

²⁰ See Art. XXII(4) of the Canada-United States Tax Treaty of 1980.

²¹ See Art. 20(3) of the Hong Kong-Korea (Rep.) Tax Treaty of 2014.

²² See Art. 22(4) of the Laos-Singapore Tax Treaty of 2014. Art. 10(4) defines what should be understood by government.

Some jurisdictions have even inserted a reservation to the OECD model, expressing their willingness to exercise taxing rights as other contracting state.²³ However, the number of jurisdictions that stably allow shared taxing rights exceeds by far such list.

This section deals with all normative profiles that allow such an outcome and divides those clauses into two major constellations, depending on whether the normative profile allows for shared taxing rights:

- only to a segment of the income that could fall under the provision; this may be the result of: i) including an exception for income effectively connected to a permanent establishment located in the other contracting state; ii) allowing shared taxation to a subsection of the scope, such as a specific item of income, income paid or derived by a certain entity; iii) the inclusion of an anti-avoidance or an attribution rule; iv) the inclusion of a conditional clause; v) the restriction of taxing rights to a certain percentage; vi) the restriction of taxing powers to income sourced in the territory;
- regarding all the income falling within the scope of the provision and, within this, one can differentiate between: i) provisions which directly allocate taxing rights; ii) provisions that make a renvoi to domestic law; iii) treaties which do not include a reference to other income (allowing for the unrestricted application of domestic law and, consequently, an unrestricted cumulative exercise of taxing rights).

The two alternatives (and their respective sub-alternatives) will be addressed comprehensively in the following sections and subsections.

3.2 Limited source taxation

3.2.1 Introduction

As mentioned, a significant number of treaties allow for cumulative source taxation. Notwithstanding, source taxing rights are subject to a limitation in the overwhelming majority of cases, as mentioned above. The following sections deal with each one of those limitations.

3.2.2 The Permanent establishment exception

3.2.2.1 Introduction

The most frequent exception to exclusive residency taxation is the permanent establishment exception. This provision is recommended by the OECD Model Convention, with the following wording:

“The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein and the right or property in respect of which the income is paid

²³ With a non-restricted reservation: Australia, Canada, Chile, Mexico, New Zealand and Slovak Republic. With a reservation restricted to certain items of income: Finland and Sweden (regarding annuities and similar payments), Japan (certain contractual arrangements giving rise to deductions), and United States of America (regarding guarantee fees).

is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.”²⁴

This normative profile is the second most included in existing treaties. In short, it allows shared taxing rights regarding income meeting three cumulative conditions: i) is not dealt with in other treaty provisions; ii) is not derived from immovable property; iii) is derived from a right or property effectively connected with a permanent establishment. For some authors, this provision functions as a force of attraction rule on other income effectively connected to a PE.²⁵ However, and in practice, taking into account the wording of Art. 7 OECD MC, its application may be limited to a quite restricted number of cases.²⁶

Treaties following prior versions of the OECD or the UN model and including a specific provision for independent personal services normally extend this exception to income effectively connected to a fixed base. Such deviation is the reflex of an option exercised concerning other treaty clauses and is not considered an autonomous or alternative normative profile.

Treaty practice shows minor differences in wording, either resulting from following prior versions of the OECD model or from changing some words or expressions of the clause (for instance, instead of referring to “immovable property, a reduced number of treaties refer to “real property²⁷ or land²⁸).

Some treaties require the permanent establishment to be the beneficial owner of the income. This is particularly the case of the Algerian,²⁹ Bulgarian,³⁰ French,³¹ Irish,³² Israeli,³³ Georgian,³⁴ Japanese,³⁵ Hungarian,³⁶ Syria³⁷ and UK³⁸ and tax treaty networks, even if the requirement can be found in the treaty network of several other countries.³⁹

²⁴ See OECD Model Tax Convention on Income and on Capital, art. 21(2) (21 Nov. 2017), *Treaties & Models* IBFD. The UN model, *supra* n. 5, keeps a reference to the fixed base, which was suppressed from the OECD Model in 2000.

²⁵ C. Garbarino and A. Saffra, *Judicial Interpretation of Tax Treaties – the use of the OECD Commentary*, *Elgar Tax Law and Practice Series*, Elgar, 2016, p. 429.

²⁶ For its application in the context of the UK system, see J.F. Avery Jones, *Does Any Income Fall within Article 21(2) of the OECD Model?*, in *A Tax Globalist: Essays in Honour of Maarten J. Ellis* (H. van Arendonk, F. Engelen & S. Jansen eds., IBFD 2005), *Books* IBFD.

²⁷ See Art. 21(3) of the Australia-Czech Republic Tax Treaty of 1995.

²⁸ Art. 21(2) of the Australia-Malaysia Tax Treaty of 1980.

²⁹ See, for instance, Art. 21(2) of the Algeria-Austria Tax Treaty of 2003 or, Art. 21(2) of the Algeria-China (People’s Rep.) of 2006.

³⁰ See, for instance, Art. 22(2) of the Bulgaria-Cyprus Tax Treaty of 2000.

³¹ See, for instance, Art. 22(2) of the France-Georgia Tax Treaty of 2007.

³² See, for instance, Art. 21(2) of the Ireland-Kosovo Tax Treaty of 2021.

³³ See, for instance, Art. 21(2) of the Austria-Israel Tax Treaty of 2016.

³⁴ See, for instance, Art. 22(2) of the Bulgaria-Georgia Tax Treaty of 1998.

³⁵ See, for instance, Art. 21(2) of the Denmark-Japan Tax Treaty of 2017.

³⁶ See, for instance, Art. 21(2) of the Hungary-Iceland Tax Treaty of 2005, and Art. 22(2) of the Hungary-Uzbekistan Tax Treaty of 2008.

³⁷ See, for instance, Art. 21(2) of the Malta-Syria Tax Treaty of 1999, and Art. 21(2) of the Poland-Syria Tax Treaty of 2001, and Art. 23(2) of the Malaysia-Syria Tax Treaty of 2007.

³⁸ See, for instance, Art. 20 of the Albania-United Kingdom Tax Treaty of 2013.

³⁹ The following provisions were detected: Art. 22(2) of the Switzerland-Sweden Tax Treaty of 1965, Art. 22(2) of the Ecuador-Spain Tax Treaty of 1991, Art. 22(2) of the Hungary-Macedonia (FYR) Tax Treaty of 2001, Art. 22(2) of the Jordan-Syria Tax Treaty of 2001, Art. 22(2) of the Kuwait-Singapore Tax Treaty of 2002, Art. 22(2) of the Malaysia-Seychelles Tax Treaty of 2003, Art. 21(2) of the Azerbaijan-Luxembourg Tax Treaty of 2006, Art.

Treaties of the former-U.S.S.R. network (still in force with some of its former republics) introduce clarifications in this regard. First, “executive and general administrative expenses” shall be considered deductible. Second, the mere purchase of goods or merchandise shall not qualify as a deductible expense. Third, that income attributable to the permanent establishment is what it “might be expected to realise if it were a distinct and separate person engaged in the same or similar activities under the same or similar conditions and dealing wholly independently”.⁴⁰ Given the renvoi to the business profits provision, these clarifications (if not specifically addressed to other income) appear to be redundant.

3.2.2.2 Inclusions and exclusions in the scope of the exception

Treaty practice shows that there is a variety of explicit inclusions and exclusions from the permanent establishment exception.

In terms of exclusions, and in addition to immovable property, one treaty further excludes income from shares and other corporate rights in companies entitling the owner to enjoy the immovable property or income derived from its use, letting or any other form of enjoyment.⁴¹ Another treaty carves out of income “derived through a recognised stock market”.⁴² In both cases, given that this profile is always an exception to the exclusive residency rule, such income will just fall back into such rule.

In what concerns inclusions, some treaties, mainly of the Australian⁴³ and Belgian⁴⁴ tax treaty network, attribute to the permanent establishment also income derived from immovable property attributable to that permanent establishment.⁴⁵ This allows the other contracting state (i.e. the state where the PE is located) to tax such income, even if located in the state where the taxpayer has residency.

3.2.2.3 References in the OECD Commentary

The OECD Commentary alerts for two specific issues that could lead to the introduction of deviating provisions in treaty practice.

One of them refers to the insurance permanent establishment. The OECD MC Commentary recommends competent authorities to follow the OECD’s Report on Attribution of Profits to

22(2) of the Austria-Denmark Tax Treaty of 2007, Art. 21(2) of the China (People’s Rep.)-Denmark Tax Treaty of 2012, Art. 23(2) of the Cyprus-Ethiopia Tax Treaty of 2015, Art. 22(2) of the Angola-Portugal Tax Treaty of 2018, Art. 21(2) of the Iceland-Japan Tax Treaty of 2018, Art. 21(2) of the Chile-United Arab Emirates of 2019, and Art. 21(2) of the Chile-Netherlands Tax Treaty of 2021.

⁴⁰ Art. 6 of the Belgium-U.S.S.R treaty of 1987, still applicable in relations with former states such as Moldova Kyrgyzstan and Turkmenistan.

⁴¹ See Art. 21(2) and 6(4) of the Finland-Zambia Tax treaty of 1978.

⁴² See Art. 24(2) of the Angola-United Arab Emirates Tax Treaty of 2018.

⁴³ See Art. 21(3) of the Australia-Austria Treaty.

⁴⁴ See Art. 21(2) of the Belgium-Malta Tax Treaty of 1974, Art. 21(2) of the Belgium-Finland treaty of 1976, Art. 21(2) of the of the Belgium-Bosnia and Herzegovina Tax Treaty of 1980, Art. 21(2) of the Belgium-Kosovo Tax Treaty of 1980, and Art. 21(2) of the Belgium-Montenegro Tax Treaty of 1980.

⁴⁵ Besides what was indicated supra, see Art. 21(2) of the France-Philippines treaty of 1976, Art. 21(2) of the Italy-Malta treaty of 1981, and Art. 22 of the Indonesia-United Arab Emirates Tax Treaty of 2019.

Permanent Establishments⁴⁶ when assessing whether a right or property is effectively connected to them.⁴⁷ A careful examination of all treaties shows that this concern has not triggered a single deviation in existing treaties.

Another refers to the abusive transfers of assets to the state where the permanent establishment is located. This concern led to a change in the OECD MC commentary in 2010.⁴⁸ Schoueri considers that such an approach can only be implemented “if there is a provision in a tax treaty regarding abusive behaviour” since “this is a situation in which one of the contracting states invokes domestic anti-avoidance legislation to overcome the clear provisions of a treaty”.⁴⁹ As an alternative, since most treaties still miss such clauses, states could have adopted a specific provision explicitly addressing the abusive transfer of assets. Again, a careful review of existing treaties does not show a single deviation addressing such an aim.

3.2.2.4 Taxation in accordance with domestic law

Instead of allocating income attributable to the permanent establishment in accordance with the treaty allocation rules for business profits,⁵⁰ some treaties deviate and just make a renvoi to domestic law. This is done by substituting the last sentence of the model provision with “[i]n such a case, the items of income are taxable in that other Contracting State according to its own law”,⁵¹ or “with its own internal laws”⁵² or according to “its taxation law”.⁵³ Accordingly, both states can tax such income unrestrictedly⁵⁴ through their domestic laws. This deviation is not that frequent in practice.

3.2.2.5 Eventual mistakes in drafting the provision

The complexity of model conventions’ wordings is such that one cannot exclude that treaty negotiators may, when deviating (involuntarily), design wrong provisions. For instance, one treaty states:

“The provisions of paragraph 1 of this Article shall not apply to income from immovable property as defined in paragraph 2 of Article 6 of this Agreement, if the recipient of such income, being the resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal service from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent

⁴⁶ OECD, 2010 Report of the Attribution of Profits to Permanent Establishments (22 July 2010), Primary Sources IBFD.

⁴⁷ See Para. 5.2 of the OECD Model: Commentary on Article 21 (2017).

⁴⁸ See Para. 6 of the OECD Model: Commentary on Article 21 (2017).

⁴⁹ See L.E. Schoueri, Article 21 - Other Income – Global Tax Treaty Commentaries, Global Topics IBFD, sec. 2.1.3.1.1.

⁵⁰ Or, in case of a fixed base, according to the rules applicable to independent personal services.

⁵¹ See Art. 21 of the Italy-Malta treaty of 1981 (as amended through 2009). See also, Indonesia-Iran Tax Treaty of 2004.

⁵² See Art. 21(3) of the Canada-Italy Tax Treaty of 2002.

⁵³ See Art. 22 of the Germany-Portugal Tax Treaty of 1980.

⁵⁴ In the same vein, and interpreting the other income provision of the Italy-Egypt Tax Treaty of 1979, see M. Tenore & P. Arginelli, Italian Supreme Court Clarifies Taxation of Capital Gains Effectively Connected to an Italian Permanent Establishment Arising from the Alienation of Immovable Properties in the State of Residence, 75 Bull. Intl. Taxn. 6 (2021), Journal Articles & Opinion Pieces IBFD, sec. 3.

establishment or fixed base. In such, the provisions of Article 7 or Article 14, as the case may be, shall apply.”⁵⁵

Following the wording, the PE exception would only apply to income from immovable property with the consequence of excluding residency (which is default rule to this exception) from taxing income arising in its jurisdiction insofar as it is effectively connected with a permanent establishment located at the other contracting state. A contrario, any other income effectively connected with a PE located in the other contracting state, would be solely subject to residency taxation, amounting to a strange tax policy option. According to the author, most likely the wording is a result of a mistake in drafting the provision.

3.2.3 Limitations regarding the subjective and the objective scope

3.2.3.1 Introduction

There are many normative profiles, besides the PE exception, that limit the exclusivity of residency taxing rights for specific items of income or certain taxpayers. The following sections address each of those normative profiles.

These profiles are addressed as the second constellation in the cumulative exercise chapter since the extension to which the other contracting state can exercise its taxing rights remains quite limited (even if normally broader than the PE exception).

3.2.3.2 Restriction to certain items of income

Several treaties allow the other contracting state to tax certain types of income sourced in its territory. For the sake of clarity, to fall within the purview of these profiles, three cumulative conditions have to be met: i) the income is not dealt with in the other allocation rules; ii) the income belongs to a pre-defined category, activity or has a certain nature; iii) income is sourced in the other contracting state.

This normally takes place as an exception to the exclusive residency taxation rule. Such an exception, without precisely determining a specific tax treatment, ends up allowing both states to exercise their taxing rights according to their domestic law.⁵⁶ Alternatively, some treaties complement the exclusive residency rule by allowing the other contracting state also to exercise its taxing powers over a certain item of income. Unlike the previous normative profile, such taxation by the other contracting state will be “in accordance with th[e] convention”⁵⁷ and will allow claiming treaty relief.⁵⁸

⁵⁵ See Art. 22(2) of the Indonesia-Ukraine Tax Treaty of 1996 and Art. 21(2) of the Indonesia-Seychelles Tax Treaty of 1999. The automatic translation of the Indonesian wording confirms the provision that is cited in English. The same wording is used in the website of the ASEAN Community in what concerns the second treaty, (https://s3-ap-northeast-1.amazonaws.com/dsa-library/Resources/3318/ASEAN_Indonesia_Seychelles_DTA.pdf). Both appear to exclude the possibility of a typographic mistake on the inclusion of the provision in the IBFD database.

⁵⁶ This happens in the Indonesia Tax Treaty network regarding insurance and reinsurance premium. See, for instance, Art. 22(1) of the Indonesia-Syria Tax Treaty of 1997, Art. 22(1) of the Indonesia-Seychelles Tax Treaty of 1999 and Art. 22(1) of the Indonesia -Slovak Republic Tax Treaty of 2000.

⁵⁷ See OECD Model Tax Convention on Income and on Capital, art. 23-A and 23-B (21 Nov. 2017), Treaties & Models IBFD and corresponding articles of the UN Model, supra n. 5.

⁵⁸ This occurs frequently in the German and Indian tax treaty network.

The items of income to which this special treatment is allowed vary immensely.

One of the most frequent exceptions regards income derived from games of fortune, *lato sensu*. This is quite frequent in the India tax treaty network,⁵⁹ which usually refers to “lotteries, crossword puzzles, races including horse races, card games and other games of any sort of gambling or betting of any form or nature whatsoever”. References to winnings from gambling and lotteries are frequent in the Azerbaijan tax treaty network⁶⁰. In many countries, gambling and similar activities may be considered as illegal or even criminal activities. That does not have an impact in the application of the other income provision, which is merely dependent on whether such income is taxed in the contracting states. If both contracting states tax such income, there will be relief as this will be income taxed in accordance with the provisions of the convention. If only one of the contracting states taxes it, then double taxation will not even arise.

With a broader or narrower wording, this normative profile can be found in treaties from several other states.⁶¹ In some treaties, narrower formulas are used, such as “prizes from lotteries, horse racing and/or similar revenues”,⁶² “winnings from official lotteries”,⁶³ income “in the form of lottery prizes and awards”,⁶⁴ “winnings from gaming and lotteries”,⁶⁵ “gambling and lotteries”,⁶⁶

⁵⁹ See Art. 21(3) of the Croatia-India Tax Treaty of 2014. See also Art. 21(2) of the Germany-Indonesia Tax Treaty of 1990 (referring to “awards”), Art. 22(3) of the India-Switzerland Tax Treaty, Art.21(3) of the Germany-India Tax Treaty of 1995, Art. 22(3) of the India-Israel Tax Treaty of 1996, Arts. 22(1) Indonesia-Syria Tax Treaty of 1997, Art. 22(3) of the India-Russia Tax Treaty of 1997, Art. 22(3) of the India-Sweden Tax Treaty of 1997, Art. 22(3) of the India-Portugal Tax Treaty of 1998, Art. 22(3) of the Indonesia-Sudan Tax Treaty of 1998, Art. 22(3) of the Czech Republic-India Tax Treaty of 1998, Art. 22(3) of the India-Morocco Tax Treaty of 1998, Art. 22(3) of the India-Jordan Tax Treaty of 1999, Art. 22(2)(b) of the India-Trinidad and Tobago Tax Treaty of 1999, Art. 22(1) of the Indonesia-Seychelles Tax Treaty of 1999, Art. 22(1) of the Indonesia -Slovak Republic Tax Treaty of 2000, Art. 22(1) of the India-Ireland Tax Treaty of 2000, Art. 22(1) of the Indonesia-Suriname Tax Treaty of 2003, Art. 22(3) of the Hungary-India Tax Treaty of 2003, Art. 22(3) of the India-Slovenia Tax Treaty of 2003, Art. 22(3) of the India-Sudan Tax Treaty of 2003, Art. 22(3) of the India-Uganda Tax Treaty of 2004, Art. 23(3) of the India-Montenegro Tax Treaty of 2006, Art. 22(3) of the India-Serbia Tax Treaty of 2006, Art. 22(3) of the Iceland-India Tax Treaty of 2007, Art. 22(3) of the India-Syria Tax Treaty of 2008, Art. 22(3) of the India-Tajikistan Tax Treaty of 2008, Art. 22(3) of the India-Mozambique Tax Treaty of 2010, Art. 22(3) of the Ethiopia-India of 2011, Art. 22(3) of the Georgia-India Treaty of 2011, Art. 22(3) of the India-Nepal Tax Treaty of 2011, Art. 22(3) of the India-Tanzania Tax Treaty of 2011, Art. 22(3) of the India-Taiwan Tax Treaty of 2011, Art. 22(3) of the Albania-India Tax Treaty of 2013, art. 22(3) of the India-Latvia Tax Treaty of 2013, Art. 22(3) of the India-Malta Tax Treaty of 2013, Art. 22(3) of the India-Romania Tax Treaty of 2013, Art. 22(3) of the India-Macedonia Tax Treaty of 2013.

⁶⁰ See Art. 21(3) of the Azerbaijan-Germany Tax Treaty of 2004, Art. 21(3) of the Azerbaijan-Korea (Rep.) Tax Treaty of 2008, Art. 21(3) of the Azerbaijan-Greece Tax Treaty of 2009, and Art. 22(3) of the Azerbaijan-Vietnam Tax Treaty of 2014.

⁶¹ See, for instance, Art. 21(1) of the Bangladesh-Indonesia Tax Treaty of 2003, Art. 22(3) of the Georgia-Luxembourg Tax Treaty of 2007, Art. 21(3) of the Bangladesh-Switzerland Tax Treaty of 2007, Art. 22(3) of the Latvia-Morocco Tax Treaty of 2008, Art. 21(3) of the Armenia-Ireland Tax Treaty of 2011, Art. 22(1) of the Belarus-Sri Lanka Tax Treaty of 2013, Art. 21(3) of the Armenia-Slovak Republic of 2015, Art. 21(3) of the Latvia-Vietnam Tax Treaty of 2017, and Art. 22(3) of the Bulgaria-Pakistan Tax Treaty of 2019.

⁶² See Art. 22(2) of the Lebanon-Russia Tax Treaty of 1997.

⁶³ See Art. 21(1) of the Costa Rica-Spain Tax Treaty of 2004.

⁶⁴ See Art. 23 of the France-Pakistan Tax Treaty of 1994.

⁶⁵ See Art. 21(2) of the Moldova-Slovak Republic Tax Treaty of 2003, and Art. 20(2) of the Macedonia (FYR)-Slovak Republic Tax Treaty of 2009.

⁶⁶ See Art. 21(3) of the Estonia-Russia Tax Treaty of 2002.

“prizes from lotteries, horse racing and/or similar revenues based on fortune”,⁶⁷ “winnings from casinos”,⁶⁸ income from wagering,⁶⁹ and income from “games of chance”.⁷⁰

It is important to note that the Commentary to the UN model convention considers “lottery income” as a type of income falling within the scope of the other article provision.⁷¹ Reason why the exception is likely not aimed at including this income under this allocation rule but merely at allowing its taxation by the other contracting state.

Besides this, and much less frequently (i.e. mostly with a single occurrence), treaties allow cumulative source taxation on the following items of income:

- from trusteeships;⁷²
- from fees for technical services;⁷³
- from management fees;⁷⁴
- from insurance and reinsurance premiums;⁷⁵
- from capital gains derived from immovable property in land-rich companies⁷⁶
- from the lease of movable property;⁷⁷
- from withdraws from a supplementary retirement scheme;⁷⁸

⁶⁷ Art. 21(2) of the Russia-Syria Tax Treaty of 2000.

⁶⁸ See Art. 21(2) of the Azerbaijan-Germany Tax Treaty of 2004.

⁶⁹ See Art. 22(3) of the Switzerland-United States Tax Treaty of 1996.

⁷⁰ Art. 21(3) of the Ethiopia-Netherlands Tax Treaty of 2012 and Art. 21(3) of the Netherlands-Zambia Tax Treaty of 2015.

⁷¹ See Para. 2 UN Model: Commentary on Article 21 (2021). In the OECD model, the commentaries merely clarify that lotteries do not fit within the scope of the capital gains provision. See Para. 19 of the OECD Model: Commentary on Article 13 (2017).

⁷² See Art. 21(2) of the Germany-Venezuela Tax Treaty of 1995 and Art. 19(3) of the Russia-United States Tax Treaty of 1992 (allowing the income to be taxed “in accordance with the domestic law of that other state” i.e. locus rei sitae of the immovable property if situated in a contracting state).

⁷³ See Art. 21 of the Belarus-Pakistan Tax Treaty of 2004. There is already a significant number of judicial decisions dealing with the inclusion of fees for technical services within the other income provision in the absence of a treaty deviation reaching the conclusion that such fees should not be included under the other income provision. Accordingly, states wanting a different outcome must consider including a specific reference in the other income provision which will then carve out such income from the business profits provision. See E. Orellana Polo, The “Other Income” Article in Tax Treaties as Interpreted by the Courts: A Case Law Analysis, 71 Bull. Intl. Taxn. 3/4 (2017), Journal Articles & Opinion Pieces IBFD, sec. 2.2.1.

⁷⁴ Art. 21(2) and (3) of the Italy-Tanzania tax treaty of 1979.

⁷⁵ See Arts. 22(1) of the Indonesia-Syria Tax Treaty of 1997, of the Indonesia-Seychelles Tax Treaty of 1999 and of the Indonesia -Slovak Republic Tax Treaty of 2000.

⁷⁶ See Art. 19(3) of the Russia-United States Tax Treaty of 1992 which states: “[n]otwithstanding the provisions of paragraph 1, gains derived by a resident of a Contracting State from the alienation of real property (as defined in paragraph 2 of Article 9 (Income from real property)) situated in the other Contracting State, or of shares or other rights participating in profits in a company whose assets consist of not less than 50% of real property situated in that other Contracting State, may be taxed in accordance with the domestic law of that other State.”

⁷⁷ See Art. 21(2) of the Germany-Indonesia Tax Treaty of 1990 and Art. 21(2) of the Germany-Venezuela Tax Treaty of 1995.

⁷⁸ See Art. 20(4) of the Singapore-United Kingdom Tax Treaty of 1997.

- from withdraws from a supplementary saving scheme insofar: i) the source country grants a deduction on the contribution made to that saving scheme;⁷⁹ ii) the amount does not fall within the allocation rule for pensions;⁸⁰
- from pensions and social security benefits when arising in the other contracting state;⁸¹
- from compensation for damages⁸²
- from rewards from trade promotion, competition, income from inheritance and gifts and other income of similar nature.⁸³

In all these cases, it appears that contracting states consider that there is a strong(er) connection between these items of income and the country where they are sourced, justifying a targeted and tailored-made exception to the otherwise applicable exclusive residency rule.

3.2.3.3 Restriction to certain taxpayers

Another alternative for a limited-scope exercise of cumulative taxing rights is restricting them to other income derived by specific persons. The research carried out allowed the identification of several provisions of this kind, but all addressing dual residents.⁸⁴ This issue was already raised by Japan in the discussions leading to the 1977 OECD model.⁸⁵ However, a careful exam of this jurisdictions' treaties does not show any deviation in this direction.

Existing treaties including a provision on dual residents typically adopt the following wording⁸⁶:

“Where a person, who by reason of the provisions of paragraph 1 of Article 4 is a resident of both Contracting States but by reason of the provisions of paragraph 3 or 4 of that Article is deemed for the purposes of this Agreement to be a resident solely of one of the Contracting States, derives income from sources in that Contracting State or from sources outside both Contracting States, that income shall be taxable only in that Contracting State.”⁸⁷

⁷⁹ See Art. 21(3) of the France-Singapore Tax Treaty of 2015.

⁸⁰ See Art. 20(3) of the Singapore-Spain Tax Treaty of 2011.

⁸¹ See Art. 22(3) of the Jamaica-Sweden Tax Treaty of 1985.

⁸² See Art. 22(3) of the El Salvador-Spain Tax Treaty of 2008, and Art. 21(3) of the Dominican Republic-Spain Tax Treaty of 2011.

⁸³ See Art. 22(3) of the Azerbaijan-Vietnam Tax Treaty of 2014.

⁸⁴ Understood as persons which meet the residency criteria under domestic law of both contracting states.

⁸⁵ J.F. Avery Jones, What Can We Learn from the History of Article 21 of the OECD Model?, 75 Bull. Intl. Taxn. 11/12 (2021), Journal Articles & Opinion Pieces IBFD, p. 643.

⁸⁶ One should note that some treaties do not include such provision under the other income label, but as an autonomous provision addressing “dual-residents”. Since the modus operandi is similar to the other income provisions (albeit is restriction on the subjective scope) these clauses fall within the scope of this contribution.

⁸⁷ See Art. 21 of the Australia-Belgium Tax Treaty of 1977.

This clause could only be found only in the tax treaty networks of Australia,⁸⁸ New Zealand⁸⁹ and Germany.⁹⁰ According to this provision: i) other income (from sources in the residency state or in third states) shall be taxed only by the state winning the treaty's tiebreaker;⁹¹ ii) however, the state losing the tiebreaker may still tax (unrestrictedly), according to its domestic law, but solely other income from sources located in its territory. Likely, the cumulation of a personal and objective nexus within the territory of the other contracting state is the reason why states agree to deviate from the exclusive residency taxation rule. The residency state is obliged to relieve emerging double taxation.

In the Australian tax treaty network, this "income of a dual resident" provision is often inserted in lieu of the other income provision. In such cases, other income derived by a non-dual resident will not be allocated by the treaty allowing both states to tax.

The new wording of the tiebreaker rule for companies put forward by the 2017 version of the OECD Model Convention⁹² brings new challenges. It is quite difficult to fully understand its impact in what concerns the other income provision. Likely, in such cases, the provision may only be invoked as of the moment that, under the mutual agreement procedure, competent authorities decide which is the winning and the losing state.

3.2.4 Anti-avoidance and attribution rules

3.2.4.1. Introduction

For the first time, the 2017 OECD model included a provision addressing all instances of improper use of tax treaties,⁹³ which is now being rolled out bilateral and multilaterally.⁹⁴ Bilateral treaties in force (still) often miss such a provision, and older treaties either did not address or only addressed instances of improper use in areas considered particularly problematic. Similarly, attribution of income to specific entities (or individuals dealing with those entities) was only addressed whenever both countries considered it as something of particular concern (mainly in cases where the classification of certain entities as transparent or opaque was consensual.

⁸⁸ See Art. 22 of the Australia-Netherlands Tax Treaty of 1976, Art. 21 of the Australia-Belgium Tax Treaty of 1977, Art. 22 of the Australia-Philippines Tax Treaty of 1979, and Art. 22 of the Australia-Italy Tax Treaty of 1982.

⁸⁹ See Art. 19 of the Fiji-New Zealand Tax Treaty of 1976, stating: "1. This Article shall apply to a person who is a resident of Fiji for the purposes of Fiji tax and is also resident in New Zealand for the purposes of New Zealand tax.; 2. Where such a person is treated for the purposes of this Agreement solely as a resident of a Contracting State he shall be exempt in the other Contracting State from tax on income other than income which, under the law of that other Contracting State or under this Agreement, is derived, or is deemed to be derived, from sources in that other Contracting State."

⁹⁰ See Art. 21 of the Germany-Liberia Tax Treaty of 1970.

⁹¹ Art. 4(2) and (3) of the OECD Model Tax Convention on Income and on Capital, (21 Nov. 2017), Treaties & Models IBFD, depending on whether the dual resident is an individual or an other-than-individual. In what concerns the latter.

⁹² See OECD Model Tax Convention on Income and on Capital, art. 4(5) (21 Nov. 2017), Treaties & Models IBFD. For the impact of the version of Art. 4(3) of the OECD MC in the interpretation of EU directives referring to residency see Nogueira, João Félix Pinto, References to Domestic Law: Subjective Scope of EU directives and the new tie-breaker rule for companies in: Debelva, F. (ed.), book title to be confirmed, Kluwer Law International, 2024 (forthcoming).

⁹³ See OECD Model Tax Convention on Income and on Capital, art. 29 (21 Nov. 2017), Treaties & Models IBFD, including both a (simplified or extended) limitation on benefits provision) and a general anti-abuse rule.

⁹⁴ See Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting art. 7 (7 June 2017), Treaties & Models IBFD [hereinafter the Multilateral Convention or MLI].

Other income clauses leading to exclusive residency taxation were always considered susceptible to manipulation. In fact, taxpayers are free to elect where to set their residency (or how to arrange facts and circumstances so a certain state wins the tiebreaker). In case the residence is located in a state with low(er) or no taxation, the taxpayer would benefit from converting income that would otherwise fall within other allocation rules into income falling within the other income clause.

To avoid such manipulation, some treaties introduced a series of (positive or negative) requirements on which the functioning of the other income clause depends. The inclusion of anti-avoidance and attribution rules in the other income provision is particularly visible in the United Kingdom treaty network, where the overwhelming majority of other income clauses include some sort of anti-avoidance and attribution clauses. But also appears in many other provisions.

The following sections aim to identify the main normative profiles of conventional clauses adopted to prevent avoidance or regulating income attribution.

3.2.4.2 Main purpose rule

The most effective option for preventing improper use of the other income provision is through the inclusion of a main purpose test. This normative profile often receives the following wording:

“The provisions of this Article shall not apply if it was the main purpose, or one of the main purposes, of any person concerned with the creation or assignment of the rights in respect of which the income is paid to take advantage of this Article by means of that creation or assignment.”

This clause is included in most treaties of the United Kingdom network.⁹⁵ A notable exception is the UK treaty with the US. Likely given the US traditional rejection of general anti-abuse provisions, in the UK-US treaty, the main purpose test is replaced by an anti-conduit rule.⁹⁶

⁹⁵ See, for instance, Art. 20(5) of the Turkmenistan-United Kingdom Tax Treaty of 2016.

⁹⁶ See Art. 22(4) of the United Kingdom-United States Tax Treaty of 2001, stating that “[t]he provisions of this Article shall not apply in respect of any income paid under, or as part of, a conduit arrangement.”.

The main purpose test was also detected in the treaty networks of Azerbaijan,⁹⁷ China⁹⁸, France,⁹⁹ Georgia,¹⁰⁰ Japan,¹⁰¹ and the United States.¹⁰² It is rarely used outside of these jurisdictions.¹⁰³

In a limited number of treaties, the main purpose test is complemented with clauses requiring the competent authority to previously consult¹⁰⁴; or to previously notify¹⁰⁵ the other contracting state. This allows both contracting states to be alert of avoidance cases, enabling joint action in preventing and solving such issues.

This test was included in the 2014 version of the OECD Model Commentary but repealed in 2017. In the author's view, such removal (and the progressive abandonment of this profile of clauses) is linked with the introduction of the general anti-avoidance provision in the 2017 model.¹⁰⁶ In fact, UK tax treaties to which the MLI is applicable have already repealed and replaced this clause by the general anti-avoidance rule of the MLI.¹⁰⁷ The inclusion of a general anti-abuse provision in a tax treaties¹⁰⁸ makes all these provisions redundant. Therefore, the author expects new treaties (even from the jurisdictions listed supra) to refrain from introducing this normative profile any further and to repeal the existing provisions insofar as general anti-avoidance provisions are included in a specific treaty.

3.2.4.3 Beneficial owner

The wording recommended by the models refers merely to the recipient of the other income. However, some treaties tighten the attribution of other income benefits by restricting it to cases

⁹⁷ See Art. 21(3) of the Azerbaijan-France Tax Treaty of 2001, Art. 21(4) of the Azerbaijan-Belgium Tax Treaty of 2004, and Art. 21(4) of the Azerbaijan-Korea (Rep.) Tax Treaty of 2008.

⁹⁸ See Art. 22(3) of the China (People's Rep.)-Malta Tax Treaty of 2010, Art. 21(3) of the Botswana-China (People's Rep.) Tax Treaty of 2012, Art. 21(4) of the China (People's Rep.)-Denmark Tax Treaty of 2012, Art. 22(4) of the China (People's Rep.)-France Tax Treaty of 2013, Art. 21(4) of the China-Switzerland Tax Treaty of 2013, Art. 21(3) China (People's Rep.)-Russia Tax Treaty of 2014 and Art. 22(3) of the China (People's Rep.)-Romania Tax Treaty of 2016.

⁹⁹ See Art. 20(3) of the France-Qatar Tax Treaty of 1990, Art. 21(3) of the France-Uzbekistan Tax Treaty of 1996, Art. 22(4) of the Ethiopia-France Tax Treaty of 2006, Art. 19(4) of the France St. Martin Tax Treaty of 2010, Art. 20(4) of the France-Panama Tax Treaty of 2011, Art. 20(4) of the Andorra-France Tax Treaty of 2013 and Art. 21(4) of the Colombia-France Tax Treaty of 2015, and Art. 20(5) of the France-Kenya Tax Treaty of 2017.

¹⁰⁰ See Art. 20(3) of the Georgia-Norway Tax Treaty of 2011, Art. 21(4) of the Georgia-Korea (Rep.) Tax Treaty of 2016, and Art. 20(4) of the Georgia-Moldova Tax Treaty of 2017.

¹⁰¹ See, for instance, Art.21(1) of the Colombia-Japan Tax Treaty of 2018.

¹⁰² See Art.22(3) of the Italy-United States Tax Treaty of 1999. This clause was also introduced as Art. 22(3) of the Slovenia-United States Tax Treaty of 1999.

¹⁰³ The clause was only detected in the following other treaties: Art. 21(1) of the Estonia-Türkiye Tax Treaty of 2003, Art. 21(3) of the Oman-Thailand Tax Treaty of 2003, Art.22(3) of the Korea (Rep.)-Oman Tax Treaty of 2005, Art. 21(4) of the Italy-Panama Tax Treaty of 2010, Art. 21(5) of the Israel-Panama Tax Treaty of 2012, , Art. 21(3) of the Hong Kong-Italy Tax Treaty of 2013, Art. 21(4) of the Belgium-Norway Tax Treaty of 2014, Art. 21(4) of the Bulgaria-Norway Tax Treaty of 2014, Art. 21(3) of the Hong-Kong Romania Tax Treaty of 2015, Art. 21(3) of the Bulgaria-Romania Tax Treaty of 2015, Art. 22(4) of the Norway-Serbia Tax Treaty of 2015, Art. 23(3) of the Senegal-United Arab Emirates of 2015, and Art. 22(3) of the Luxembourg Senegal Tax Treaty of 2016.

¹⁰⁴ Art. 20(4) of the Panama-United Kingdom Tax Treaty of 2013.

¹⁰⁵ See Art. 22(4) of the Korea (Rep.)-United Kingdom Tax Treaty of 1996.

¹⁰⁶ See OECD Model Tax Convention on Income and on Capital, art. 29(9) (21 Nov. 2017), Treaties & Models IBFD.

¹⁰⁷ See Multilateral Convention, Art. 7, supra n. 94.

¹⁰⁸ Following OECD Model Tax Convention on Income and on Capital, art. 29(9) (21 Nov. 2017), Treaties & Models IBFD.

where the recipient is also the beneficial owner. This normative profile can be illustrated by the following wording:

“Items of income beneficially owned by a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.”¹⁰⁹

Such wording is primarily discernible in the tax treaty networks of France,¹¹⁰ Japan,¹¹¹ the United Kingdom¹¹² and the United States of America.¹¹³ Although rarely, it can also be found in the treaty network of other countries.¹¹⁴ In some treaties, this condition is waived whenever the beneficiary of the income is a contracting state or a local authority.¹¹⁵

The Japanese tax treaty network includes an interesting variation, which further (comprehensively) describes what should be regarded as an improper attribution of benefits to a mere recipient of income. The following wording is normally used:

“A resident of a Contracting State shall not be considered the beneficial owner of other income in respect of the right or property if such other income would not have been paid to the resident unless the resident pays other income in respect of the same right or property to a person:

(a) that is not entitled to benefits with respect to other income arising in the other Contracting State which are equivalent to, or more favourable than, those available under this Convention to a resident of the first-mentioned Contracting State; and

(b) that is not a resident of either Contracting State.”¹¹⁶

Finally, one can find a treaty adopting a provision which ends up combining traits of a beneficial ownership test, a base erosion test and a derivative benefits test.¹¹⁷ Likely, the ultimate goal

¹⁰⁹ See, for instance, Art. 21(1) of the Denmark-United States Tax Treaty of 1999, or Art. 20(1) of the Australia-United Kingdom of 2003.

¹¹⁰ See, for instance, Art. 22(1)(a) of the Albania-France Tax Treaty of 2002.

¹¹¹ See, for instance, Art. 21(1) of the Japan-Uruguay Tax Treaty of 2019.

¹¹² See, for instance, the supra cited Art. 20(1) of the Australia-United Kingdom of 2003.

¹¹³ See, for instance, Art. 21(1) of the Slovenia-United States Tax Treaty of 1999, or Art. 20(1) of the Bulgaria-United States Tax Treaty of 2007.

¹¹⁴ The clause was detected in the following treaties: Art. 21(1) of the Moldova-Uzbekistan Tax Treaty of 1995, Art. 21(1) of the Lithuania-Türkiye Tax Treaty of 1998, Art. 22(1) of the Seychelles-South Africa Tax Treaty of 1998, Art. 21(1) of the Latvia-Türkiye Tax Treaty of 1999, Art. 22(1) of the Seychelles-Thailand Tax Treaty of 2001, Art. 22(1) of the Malaysia-Seychelles Tax Treaty of 2003, Art. 21(1) of the Israel-Malta Tax Treaty of 2011, Art. 21(1) of the China (People’s Rep.)-Denmark Tax Treaty of 2012, Art. 21(1) of the Israel-Panama Tax Treaty of 2012, Art. 22(1) of the Angola-Portugal Tax Treaty of 2018, and Art. 21(1) of the Iceland-Japan Tax Treaty of 2018.

¹¹⁵ See Art. 22(1)(b) of the Albania-Libya Tax Treaty of 2005, and Art. 22(1)(b) of the Albania-France Tax Treaty of 2022.

¹¹⁶ See Art. 22(4) of the Japan-Switzerland Tax Treaty of 1971, Art. 20(4) of the Japan-United States Tax Treaty of 2003, Art. 20(4) of the Japan-United Kingdom Tax Treaty of 2006, and Art. 20(3) of the Japan-Netherlands Tax Treaty of 2016.

¹¹⁷ See Art. 21(3) of the Hong Kong-Switzerland Tax Treaty of 2011 stating that “[t]he provisions of this Article shall not apply in respect of any items of income referred to in paragraph 1 paid in the course of a transaction or series of transactions which is structured in such a way that a resident of a Contracting Party entitled to the benefits of this Agreement receives an item of income arising in the other Contracting Party but the resident pays, directly or indirectly, all or substantially all of that income (at any time or in any form) to another person who is not a resident of either Contracting Party and who, if it received that item of income directly from the

was to design a broad-spectrum provision even if, interestingly, its scope of application is limited to other income.

3.2.4.4 Trustees and estates of deceased persons

Concerns regarding a proper attribution of income may refer not only to the person receiving the income but also to the person paying it. This normative profile addresses the latter (and the other) side of the equation.

The United Kingdom tax treaty network,¹¹⁸ consider trusts and similar entities, when acting as paying agents, should be disregarded (regardless of any evidence of abuse and regardless of whether they are or not the beneficial owners of the income which is paid). In such cases, the income should be considered as paid by the entity that previously made the payment to the trustee. The UK has even reserved its position (regarding the OECD Model) and expressed the intention to include provisions allowing it to tax income from a trust or estates of deceased persons in the course of an administration whenever they are paid from a resident to a non-resident.¹¹⁹

The following wording is customarily used:

“Notwithstanding the provisions of paragraph 1, where an amount of income is paid to a resident of a Contracting State out of income received by trustees or personal representatives administering the estates of deceased persons and those trustees or personal representatives are residents of the other Contracting State, that amount shall be treated as arising from the same sources, and in the same proportions, as the income received by the trustees or personal representatives out of which that amount is paid.”¹²⁰ Sometimes, this provision only applies unidirectionally to cases where the source is in the United Kingdom.¹²¹

In recent treaties, this clause is often complemented by a rule allowing the imputation of tax paid by the intermediary to the beneficiary.¹²²

3.2.4.5 Arm’s length (excessive income provision)

Exclusive residency taxation may be exploited by related parties, who would benefit from designing their transactions in order to maximise the income taxable in the country with the lowest tax burden. The OECD MC Commentaries were amended in 1997, including a provision addressing

other Contracting Party, would not be entitled under an agreement for the avoidance of double taxation between the Party in which that other person is resident and the Contracting Party in which the income arises, or otherwise, to benefits with respect to that item of income which are equivalent to, or more favourable than, those available under this Agreement to a resident of a Contracting Party and the main purpose of such structuring is obtaining benefits under this Agreement.”

¹¹⁸ And can also be found in treaties regarding jurisdictions by which the UK is responsible for the external relations. See, for instance, Art. 20(2) of the Guernsey-Isle of Man Tax Treaty of 2013.

¹¹⁹ See Para 15, OECD Model: Commentary on Art. 21 (2017). See, for instance, the replacement of Art. 20(5) of the Australia-United Kingdom Tax Treaty of 2003.

¹²⁰ Art. 20(2) of the Turkmenistan-United Kingdom Tax Treaty of 2016.

¹²¹ See, for instance, Art. 20(2) of the Germany-United Kingdom Tax Treaty of 2010 and Art. 20(2) of the Iceland-United Kingdom Tax Treaty of 2013.

¹²² See, for instance, Art. 20(2) of the Algeria-UK Tax Treaty of 2015, Art. 20(2) of the Belarus-United Kingdom Tax Treaty of 2017 and Art. 20(2) of the Cyprus-United Kingdom Tax Treaty of 2018 and Art. 20(2) of the Gibraltar-United Kingdom Tax Treaty of 2019.

related parties' transactions to address this concern. Benefits from the exclusive residency taxation are, accordingly, limited to the arm's length part of the transaction.¹²³ The remaining amount will typically fall outside the scope of the provision, being exposed to potential cumulative and unrestricted taxation by residency and source according to domestic law. One should note that this provision solely applies to income already falling within the scope of Article 21.

According to the Commentary, this clause addresses "difficulties in dealing with income arising from certain non-traditional financial instruments when the parties to the instrument have a special relationship".¹²⁴ However, its wording is broader, allowing it to be used for any potential related-parties' transactions generating other income.

The provision recommended by the Commentary, and which is often reproduced in bilateral tax treaties, has the following wording:

"Where, by reason of a special relationship between the person referred to in paragraph 1 of this Article and some other person, or between both of them and some third person, the amount of the income referred to in that paragraph exceeds the amount (if any) which might reasonably have been expected to have been agreed upon between them in the absence of such a relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such a case, the excess part of the income shall remain taxable according to the laws of each Contracting State, due regard being had to the other applicable provisions of this Convention."¹²⁵

This normative profile is the one, outside of those recommended by the OECD and UN models, most used in practice, being introduced in many bilateral treaties of both OECD and non-OECD Treaties. It is particularly visible in the UK tax treaty network,¹²⁶ although it can also be found in the treaty network of several other countries.¹²⁷

3.2.5 Conditional clauses

3.2.5.1 Special tax regimes

The final report of Action 6 of the OECD BEPS project¹²⁸ suggested the inclusion of a provision aimed at neutralising the effects of domestic special tax regimes in the other income article. This aimed at avoiding double non-taxation (or low taxation) of items of income where the taxpayer benefited, at residence, from a more favourable tax treatment than the default one.

The provision suggested in BEPS had the following wording:

"Other income arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed in the first-mentioned Contracting State in accordance with domestic law if such resident is subject to a special tax regime with respect to other income

¹²³ See Para 7, OECD Model: Commentary on Art. 21 (2017).

¹²⁴ Para 7, OECD Model: Commentary on Art. 21 (2017).

¹²⁵ Art. 20(4) of the Australia-United Kingdom Tax Treaty of 2003.

¹²⁶ It is present in 57 out of 137 scrutinised UK treaties, representing 41,6% of those treaties.

¹²⁷ See Art. 21(3) of the Belgium-Japan Tax Treaty of 2016. See Art. 21(3) of the China-Denmark Tax Treaty of 2012, Art. 22(3) of the China-France treaty of 2013, Art. 21(3) of the China-Switzerland Tax Treaty of 2013, and Art. 21(3) of the Colombia-France Tax Treaty of 2015, and Art. 21(3) of the Colombia-Italy Tax Treaty of 2018.

¹²⁸ OECD, Action 6 Final Report 2015 – Preventing the Granting of Treaty Benefits in Inappropriate Circumstances pp. 75-77 (OECD 2015), Primary Sources IBFD [hereinafter the Action 6 Final Report (2015)].

in its Contracting State of residence at any time during the taxable period in which the other income is paid”.¹²⁹

The BEPS suggestion does not clarify what a special regime is. It is also unclear where disqualification would occur only if the special regime was addressed to other income or even in cases of more generic tax regimes that covered, among others, the amounts considered by applying the treaty as fitting within the other income provision.

This recommendation is not followed in practice, and none of the scrutinised countries includes this normative profile.

3.2.5.2 Sunset clauses

Countries may agree on allowing source taxation but only for a limited period. This is the case of the treaties signed by France with the Baltic Countries, where source taxation is limited to 10 years after the “date in which the Convention becomes effective”.¹³⁰ The provision, clearly designed to be applied by the Baltic states as other contracting states, is bidirectional, i.e. may also be applied from the French side.

3.2.6 Restriction to a certain percentage of the gross income

Similarly to the treatment of dividends and interest (and royalties, in the framework of the UN Model), some treaties allow the source country to exercise its taxing rights only up until a certain percentage of the gross income. Sometimes the limitation applies to all other income,¹³¹ but in most cases, limited source taxing rights (and the respective limitation) apply solely to income sourced in the other contracting state,¹³² and to a specific item.

Canada is, by far, the jurisdiction that most often uses this clause. Its treaty network usually allows source taxation of income derived from trusts (and estates) but restricts it to 15% of the gross amount.¹³³ In some cases, the provision further requires other conditions to apply such as: i) that the recipient is also the beneficial owner;¹³⁴ ii) that the payment is not deductible in the hands of the payor¹³⁵; iii) that the income is taxable in the recipient jurisdiction¹³⁶; iv) that the income is taxable¹³⁷

¹²⁹ Action 6 Final Report (2015), supra n. 128, pp. 96-97.

¹³⁰ See Art. 21(1)(b) of the Estonia-France Tax Treaty of 1997, and Art. 21(1)(b) of the France-Latvia Tax Treaty of 1997, and Art. 21(1)(b) of the France-Lithuania Tax Treaty of 1997.

¹³¹ See Art. 21(4) of the Peru-Korea (Rep.) Tax Treaty of 2012.

¹³² See Art. 21A(2) of the Canada-Netherlands Tax Treaty, limiting source taxation to 25% of the gross amount.

¹³³ See, for instance, Art. XXIII(3) of the Barbados-Canada Tax Treaty of 1980, Art. 21(2) of the Canada-Cyprus Tax Treaty of 1984, Art. 21(2) of the Canada-Chile Tax Treaty of 1998, and Art. 20(2) of Canada-Finland Tax Treaty of 2007.

¹³⁴ See Art. 21(2) of the Canada-Estonia Tax Treaty of 1995, and Art. 21(2) of the Canada-Croatia Tax Treaty of 1997.

¹³⁵ See Art. 21(2) of the Canada-Estonia Tax Treaty of 1995, Art. 21(2) of the Canada-Denmark Tax Treaty of 1997, Art. 21(2) of the Canada-Chile Tax Treaty of 1998, Art. 21(2) of the Canada-Czech Tax Treaty of 2001, and Art. 21 of the Canada-Ecuador Tax Treaty of 2001. This requirement is singled-out in Art. 20(3) of the Canada-France Tax Treaty of 1975 which states: “For the purposes of this Article, a trust does not include an arrangement whereby the contributions made to the trust are deductible for the purposes of taxation in a Contracting State”.

¹³⁶ See Art. 21(2) of the Canada-Egypt Tax Treaty of 1983, Art. 20(2) of the Canada-Finland Tax Treaty of 2006, and Art. 20(2) of the Canada-Colombia Tax Treaty of 2008.

¹³⁷ Art. 21(2) of the Canada-South Africa Tax Treaty of 1995.

or subject to tax¹³⁸ at residence; v) that the income arises in a territory in which the income tax law is administered by the Canada Revenue Agency. In some cases, such treatment is extended to alimony¹³⁹ or alimony and maintenance payments¹⁴⁰. In a more restricted number of treaties, the provision is applied unidirectionally whenever the source is located in Canada.¹⁴¹ One treaty carves out, from this percentually-restricted source taxation, income derived from a right or interest in an estate or trust effectively connected with such permanent establishment.¹⁴² In such cases, the permanent establishment exception will apply. Another treaty restricts the percentage to income derived from trusteeships.¹⁴³ In terms of the percentual threshold, it is normally set up as 15%. In a limited number of treaties, it is increased from 15% to 18%¹⁴⁴ or even to 25%.¹⁴⁵

This limitation can also be found outside the Canadian tax treaty network and regarding other cases, even if rarely. In the few treaties where this normative profile was found, the agreed percentages were 10%¹⁴⁶, 17,5%,¹⁴⁷ and even 50% of the gross amount.

3.2.7 Restriction to income sourced in the other contracting state and direct allocation

3.2.7.1 Allocation of taxing rights at the treaty level

In most cases mentioned above, the other contracting state is only allowed to tax income whenever sourced in its territory, subjected to each one of the limitations addressed supra. However, in other treaties the other contracting state is granted broad taxing powers insofar as other income is sourced in its territory. In all those cases, even if domestic law allows it to exercise its jurisdiction regarding income arising elsewhere, the treaty restricts the other contracting state to tax to tax income sourced in its territory.

The wording most often used in treaty practice is the one of Art. 22(3) of the UN model convention, which states:

“Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Convention and arising in the other Contracting State may also be taxed in that other State”,¹⁴⁸

¹³⁸ Art. XX(3) of the Barbados-Canada Tax Treaty of 1980, and 21(3) of the Canada-Sri Lanka Tax Treaty of 1982.

¹³⁹ See Art. XXI(3) of the Canada-Pakistan Tax Treaty of 1976.

¹⁴⁰ See Art. 20(3) of the Canada-Singapore Tax Treaty of 1976.

¹⁴¹ See Art. XXII(2) of the Canada-Jamaica Tax Treaty of 1978, Art. 21(2) of the Canada-Czech Republic Tax Treaty of 2001 and Art. 20(2) of the Canada-Colombia Tax Treaty of 2008.

¹⁴² See Art. 21(4) of the Australia-Canada Tax Treaty of 1980.

¹⁴³ See Art. 21(2) of the Germany-Venezuela Tax Treaty of 1995.

¹⁴⁴ See Art. XXI(2) of the Canada-Dominican Republic Tax Treaty of 1976.

¹⁴⁵ See Art. 21A(2) of the Canada-Netherlands Tax Treaty of 1986.

¹⁴⁶ See Art. 22(1) of the Malaysia-Netherlands Tax Treaty of 1988, See Art. 22(3) of the Korea (Rep.)-Mexico Tax Treaty of 1994 (regarding all other income), Art. 21(3) of the Belarus-Mongolia Tax Treaty of 2001 (restricted to fees from technical fees); Art. 21(3) of the Malta-United States Tax Treaty of 2008, Art. 23(3) of the Portugal-Timor Leste Tax Treaty (restricted to “telecommunication services”), and Art. 21(4) of the Korea(Rep.)-Peru Tax Treaty of 2012.

¹⁴⁷ See Art. 21(3) of the Mexico-Netherlands Tax Treaty of 1993.

¹⁴⁸ See Art. 21(3) of the UN Model Convention, supra n. 5. For an exam of this specific provision see E. Huisman & N. Oberbauer, Chapter 8: Pensions, Students and Other Income in The UN Model Convention and Its Relevance for the Global Tax Treaty Network (M. Lang et al. eds., IBFD 2017), Books IBFD.

Normally this clause complements Art. 21(1) and (2) OECD and UN. However, in a reduced number of treaties, Art. 21(1) OECD and UN model and 21(3) of the UN model are merged and synthesised, resulting in a provision with the following wording:

“Items of income of a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Agreement shall be taxable only in that State except that, if such income is derived from sources within the other Contracting State, it may also be taxed in that other State.”.¹⁴⁹

There is a wide variation in the wording of this synthesised provision, which does not lead to a different interpretative result and is considered part of the same normative profile. For instance:

“Items of income arising in a Contracting State which are not dealt with in the foregoing Articles of this Agreement, may be taxed in that State”;¹⁵⁰

or

“Items of income of a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Agreement may be taxed in the State where the income arises”.¹⁵¹

There are several other minor variations. Instead of “may also be taxed”, some treaties refer to “may be taxed” or simply “may tax”. In the authors’ view, the outcome is the same since such modal verbs have merely the function of allowing the other contracting state to tax, not preventing the residency state’s cumulative exercise of its taxing rights.¹⁵²

These synthesised provisions, in all cases that they do not include an explicit reference to the taxing rights of the residency state, end up excluding other income arising in third countries from the purview of the allocation rules, excluding it also from the mitigation or exclusion of double taxation as provided by the treaty’s relief clause.¹⁵³

Many US treaties, while not addressing other income directly, include a provision entitled “general rules of taxation”, which, in the absence of the other income provision, perform a similar role,¹⁵⁴ allowing shared taxation of income sourced in the territory of the other contracting state. The following wording is commonly used:

¹⁴⁹ See, for instance, Art. 21 of the Finland-New Zealand Tax Treaty of 1982 or Art. 22 of the Indonesia-Italy Tax Treaty of 1990.

¹⁵⁰ See, for instance, Art. XXI of the Argentina-Brazil Tax Treaty of 1980, Art. 21 of the Indonesia-South Africa Tax Treaty of 1997, Art. 21 of the Iran-South Africa Tax Treaty of 1997, and Art. 22 of the Fiji-Singapore Tax Treaty of 2005.

¹⁵¹ See, for instance, Art. 21 of the Pakistan-Thailand Tax Treaty of 1980, Art. 22 of the Indonesia-Thailand Tax Treaty of 2001 or Art. 22 of the India—Mexico Tax Treaty of 2007.

¹⁵² Differently, see B. Michel & B. (Bernard) Peeters, Belgium - Global Tax Treaty Commentaries – Country Policy & Practice, Country Tax Guides IBFD, sec. 22.3 sustaining that the exclusion of “also”, “might imply that, in those treaties, art. 21 provides exclusive allocation of taxing rights to the source state on income derived from the source state and nothing more”.

¹⁵³ Schoueri considers that this provision the effect of excluding the income from the treaty. See L.E. Schoueri, Article 21 - Other Income – Global Tax Treaty Commentaries, Global Topics IBFD, sec. 3.3.2 *in fine*. The author disagrees as the income will continue to fall within the (subjective and objective) scope of the treaty, and certain provisions (such as those enshrined in Articles 24, 26 and 27) may apply. The only consequence is that no allocation rule will apply to such income.

¹⁵⁴ See, for instance, Art. 22 of the Norway-United States Tax Treaty of 1971, Art. 4 of the Romania-United States Tax Treaty of 1973, Art. 6 of the Israel-United States Tax Treaty of 1975, Art. 4 of the Korea(Rep.)-United States

“A resident of one of the Contracting States may be taxed by the other Contracting State on any income from sources within that other Contracting State and only on such income, subject to any limitations set forth in this Convention.”¹⁵⁵

Very rarely, the other contracting state may also tax income arising in a third country. Those instances will be addressed later in this contribution.

3.2.7.2 Renvoi to domestic law

Some treaties, instead of allocating taxing rights, include a provision allowing both States unrestrictedly to tax income sourced in the territories of either contracting state. Such provisions allow both to tax other income: i) insofar as it is sourced in the territory of either contracting state; ii) insofar as the state effectively exercises its taxing rights through domestic law. The following wordings are normally used:

“However, if such income is derived by a resident of a Contracting State from sources within the other Contracting State, such income may also be taxed in the State in which it arises, and according to the law of that State.”¹⁵⁶

Despite the similarities with the previous normative profile, this wording leads to an autonomous and independent normative profile. As in the previous profile, the provision allows both contracting states to exercise their taxing rights.¹⁵⁷ However, whereas the prior profile directly allocates taxing rights, the current one simply remits to domestic law.

3.3 Unlimited source taxation (concurrent with residency)

3.3.1 Introduction

Cumulative source taxation may also be allowed without any restrictions (i.e., covering income from sources outside the territories of both contracting states). That may result from specific treaty provisions that expressly allocate taxing rights, from treaty provisions that do renvoi to domestic or from the absence of a specific treaty provision. The following two sections deal with each one of these normative profiles.

3.3.2 Provisions apply to all other income

Tax Treaty of 1976, Art. 20 of the Morocco-United States Tax Treaty of 1977, Art. 6 of the Philippines-United States Tax Treaty of 1976, Art. 6 of the Egypt-United States Tax Treaty of 1980, Art. 4 of the Cyprus-United States Tax Treaty of 1984, and Art. 28 of the Indonesia-United States Tax Treaty of 1988.

¹⁵⁵ See, for instance, Art. 28(1) of the Indonesia-United States Tax Treaty of 1988.

¹⁵⁶ Art. XXIII(2) of the Barbados-Canada Tax Treaty of 1980, Art. 21(1) of the Canada Gabon Tax Treaty of 2002, and Art. 20(3) of the Canada-Greece Tax Treaty of 2009. In the same direction but with a different wording see Art. 21 of the India-South Africa Tax Treaty of 1996. With minor deviations see also Art. 21(2) of the Canada-Ivory Coast Tax Treaty of 1983.

¹⁵⁷ In fact, treaties do not create taxing rights but simply allocate them, in case states exercise them through their respective domestic laws.

Some treaties expressly introduce a clause allowing both states to unrestrictedly tax the income, regardless of whether it arises (comprising income sourced in the territory of the contracting states as sourced in third countries). This normative profile usually follows this wording:

“Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention may be taxed in that State.”¹⁵⁸

Double taxation may arise as a result.¹⁵⁹ As taxation by the other contracting state is in accordance with the convention, the residence state has to apply the treaty’s relief clause (also regarding third-country income, since that is income that “may be taxed in the Other Contracting State in accordance with the provisions of this convention”).¹⁶⁰

3.3.3 Full renvoi to domestic law

Some treaties opt for full-fledged and explicit renvoi to domestic law. In such a normative profile, the most used wordings are:

“Notwithstanding the provisions of any other Article of this Agreement, items of income of a resident of a Contracting State, wherever arising, which are not expressly mentioned in the foregoing Articles of this Agreement, may be taxed by each Contracting State in accordance with the provisions of its domestic law.”¹⁶¹

or

“Items of income which are not expressly mentioned in the foregoing Articles of this Agreement may be taxed in accordance with the taxation laws of the respective Contracting States.”¹⁶²

or

“The laws in force in each Contracting State shall continue to govern the taxation of income in the respective Contracting States, except where express provisions to the contrary have been made in this Convention.”¹⁶³

In all these cases, double taxation may arise as a consequence of applying a treaty provision. The affected taxpayer may benefit from the mitigation or elimination of double taxation as provided by the treaty’s relief rule.

¹⁵⁸ See, for instance, Art. 22 of the Argentina-Italy Tax Treaty of 1979, and Art. 21 of the Argentina Canada Tax Treaty of 1993.

¹⁵⁹ As Van Raad notes, this provision allows the other contracting state to make “improper use of this opportunity and try to bring as many as possible ‘other income’ items of both (alimony-type and other-nexus) groups under the exception of paragraph 3 by (later) enacting domestic rules that define ‘arising’ in an unusual way”. See C. van Raad, Proposal for a Reform of Article 21 of the OECD Model, 75 Bull. Intl. Taxn. 11/12 (2021), Journal Articles & Opinion Pieces IBFD, p. 650.

¹⁶⁰ See OECD Model Tax Convention on Income and on Capital, Art. 23-A and 23-B (21 Nov. 2017), Treaties & Models IBFD and corresponding articles of the UN Model, supra n. 5.

¹⁶¹ See Art. 22 of the Indonesia-Venezuela Tax Treaty of 1997.

¹⁶² Art. 23 of the India-Singapore Tax Treaty of 1994.

¹⁶³ See, for instance, Art. 22 of the Brazil-India Tax Treaty of 1988, Art. 24 of the Bangladesh-India Tax Treaty of 1991, Art. 22 of the Iran-Sri Lanka Tax Treaty of 2000, or Art. 22 of the Seychelles-Sri Lanka Tax Treaty of 2011. With a similar wording, see: See Art. 22 of the Indonesia-Sri Lanka Tax Treaty of 1993.

3.3.4. Absence of a reference to other income

A pretty significant number of treaties include neither a other income clause nor a clause with a similar *modus operandi*. The rationale for such an option¹⁶⁴ is unclear. It may be due to: i) a lack of agreement on how other income should be allocated; ii) the understanding that other income should not be allocated, and each state's domestic law should be free to tax it without any (treaty) limitation.

The exclusion is more frequent in older treaties.¹⁶⁵ Nevertheless, research identified treaties from the seventies,¹⁶⁶ eighties,¹⁶⁷ nineties,¹⁶⁸ the first¹⁶⁹ or the second decade¹⁷⁰ of the century that do not include such a clause. The absence is particularly recurrent in the tax treaty network of Bermuda¹⁷¹ and of Switzerland.¹⁷²

In the absence of any other deviation, the effect of such policy choice is allowing both contracting states to tax unrestrictedly other income, favouring source taxation of such income.¹⁷³ Moreover, mitigation of the emerging double taxation may only occur through domestic law since such cumulative exercise cannot be considered "taxation in accordance with the provisions of th[e] Convention".¹⁷⁴ Some scholars point to the possibility of resorting to the mutual agreement provision to solve cases of double taxation emerging from the absence of the other income provision.¹⁷⁵ Others, consider that since the tax treaty does not curtail the source country from exercising its taxing rights, such taxation would still be in accordance with the convention and hence, the residence state would still be obliged to grant relief.¹⁷⁶ The latter interpretation would make all treaties including a relief clause as comprehensive and covering all income. This latter view is not shared by the author of this contribution.

4. Exclusive taxation at source

4.1 Introduction

¹⁶⁴ Assuming that this is an option, given that the other income provision is part of the models and of treaty practice for some decades.

¹⁶⁵ See, for instance, the Kiribati-United Kingdom Tax Treaty of 1950, the Israel-Sweden Treaty of 1959, the Japan-Sri Lanka Tax Treaty of 1967, and the Kenya-Zambia Tax Treaty of 1968.

¹⁶⁶ See, for instance, the Libya-Pakistan Tax Treaty of 1975, and the Korea (Rep.)-Netherlands Tax Treaty of 1978.

¹⁶⁷ See, for instance, the Thailand-United Kingdom Tax Treaty of 1981, the Netherlands-Sri Lanka Tax Treaty of 1982, or the Indonesia-Switzerland Tax Treaty of 1988.

¹⁶⁸ See, for instance, the Indonesia-United Kingdom Tax Treaty of 1993, the Mexico-Switzerland Tax Treaty of 1993, the Switzerland-Thailand Tax Treaty of 1996, or the Philippines-Switzerland Tax Treaty of 1998.

¹⁶⁹ See, for instance, the Libya-Ukraine Tax Treaty of 2008, or the Ireland-Jersey Tax Treaty of 2009.

¹⁷⁰ See, for instance, the Russia-United Arab Emirates Tax Treaty of 2011, the Peru-Switzerland Tax Treaty of 2012 or Pakistan-Switzerland Tax Treaty of 2017.

¹⁷¹ The other income provision is only included in four out of ten treaties in force (see, for instance, Art. 20 of the Bahrain-Bermuda Tax Treaty of 2010, Art. 22 of the Bermuda-Qatar Tax Treaty of 2012, Art. 22 of the of the Bermuda-Seychelles Tax Treaty of 2012 and Art. 23 of the Bermuda-United Arab Emirates of 2015).

¹⁷² See, for instance, Austria-Switzerland Tax Treaty of 1974.

¹⁷³ P. Klank & M. Stewart, *Australia - Global Tax Treaty Commentaries – Country Policy & Practice, Country Tax Guides* IBFD, sec. 22.1.

¹⁷⁴ Again, see Art. 23-A and 23-B of both OECD and UN models, *supra* n. 160.

¹⁷⁵ H.R. Hull & R. Scalia, Chapter 15: Other Income in UAE International Tax (IBFD 2021), *Books* IBFD, sec. 15.1

¹⁷⁶ R- Rawal, India, in G. Maisto (ed.) *Other Income in Tax Treaties*, IBFD (forthcoming), sec. 2.3.3.

Exclusive taxation at source may be the result of three different normative profiles: i) allowing shared taxation and then adopting exemption as the relief method; ii) the functioning of a subject to tax clause in cases of absence of taxation at residence; iii) a clause that, from the outset (and regardless of the relief method) determines that only the source state may tax; such clause may: a) apply in the absence of taxation by the residency state; b) apply merely to certain other income or certain taxpayers; c) apply unrestrictedly to all other income. This contribution deals only with the second and third profiles, which will be addressed in the following subsections.

4.2 Subject to tax clause

Double non-taxation is a concern for many jurisdictions.¹⁷⁷ Granting exclusive rights to residence can lead to double non-taxation insofar as the income is not effectively taxed at residence. This concern is explicitly mentioned in the OECD Model Convention Commentary.¹⁷⁸ To address this, some treaties restrict exclusive residence taxation to cases where this state effectively taxes other income.

This normative profile is primarily present in the Belgian network (a country that had introduced a reservation to the Model in this sense, which was later removed in 2014).¹⁷⁹ In this country's tax treaty network, source taxation would be allowed if other income is "not taxed",¹⁸⁰ "not effectively taxed",¹⁸¹ or not "subject to tax" (or equivalent)¹⁸² at residence. The subject-to-tax clause also appears in the German treaty network¹⁸³ as well as in the treaty network of several other countries.¹⁸⁴

¹⁷⁷ And already at the moment of the discussion on the 1963 Draft, the UK had pleaded for the inclusion of such condition in the wording of the Article. See J.F. Avery Jones, *What Can We Learn from the History of Article 21 of the OECD Model?*, 75 *Bull. Intl. Taxn.* 11/12 (2021), *Journal Articles & Opinion Pieces IBFD*, p. 643.

¹⁷⁸ Para. 3 of the OECD Model: Commentary on Article 21 (2017).

¹⁷⁹ The 2007 Belgian Model includes subject to tax as an additional provision – Art. 21(3) with the following wording: "Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting state, not dealt with in the foregoing Articles of this Convention and arising in the other Contracting State, may be taxed in that other State if such items of income are not effectively taxed in the first-mentioned State". On the interpretation of this provision see L. de Broe, *Belgium's tax treaty policy and the Draft Belgian Model Convention*, 62 *Bulletin for International Taxation* 8, p. 333 and F. Debelva and P. van Belle, *Belgium*, in G. Maisto (ed.) *Other Income in Tax Treaties*, IBFD (forthcoming).

¹⁸⁰ See Art. 22(2) of the Belgium-Mauritius Tax Treaty of 1995, Art. 22(3) of the Bulgaria-Lebanon Tax Treaty of 1999, Art. 20(2) of the Belgium-Georgia Tax Treaty of 2000, Art. 21(3) of the Albania-Belgium Tax Treaty, Art. 21(3) of the Azerbaijan-Belgium Tax Treaty of 2004, Art. 21(3) of the Belgium-San Marino Tax Treaty of 2005, Art. 21(3) of the Bahrain-Belgium Tax Treaty of 2007, Art. 20(3) of the Belgium-Congo (Dem. Rep.) Tax Treaty of 2007, and Art. 21(3) of the Belgium-Rwanda Tax Treaty of 2007.

¹⁸¹ See Art. 22(3) of the Belgium-United Kingdom Tax Treaty of 1987 which further clarifies that "[a]n item of income is effectively taxed when it is included in the gross taxable base by reference to which the tax is computed.". This clause, without the clarification, is also included in Arts. 20(3) of the Belgium-Macedonia Tax Treaty, of the Belgium-Uruguay Tax Treaty of 2013, and Art. 21(3) of the Belgium-Norway Tax Treaty of 2014.

¹⁸² See Art. 21(1) of the Belgium-Ecuador Tax Treaty of 1996.

¹⁸³ See Art. 22(1) of the Germany-Portugal Tax Treaty of 1980 and Art. 19 of the Germany-South Africa Tax Treaty of 1973.

¹⁸⁴ Art. XVIII of the Namibia-United Kingdom Tax Treaty of 1962, Art. 24 of the Kenya-United Kingdom Tax Treaty of 1973, Art. 23(1) of the Malta-Romania Tax Treaty of 1995, and Art. 22(1) of the Luxembourg-Portugal Tax Treaty of 1999.

Some treaties of the French network exclude from the subject-to-tax rule income beneficially owned by the contracting states, their respective administrative-territorial subdivisions, local authorities or their statutory bodies.¹⁸⁵

Subject to tax clauses may have limitations in their objective or subjective scope.

In terms of objective scope, one treaty restricts the functioning of the clause to alimony¹⁸⁶.

In what concerns the subjective scope, source taxation may be restricted to dual residents. Some treaties (notably from the German tax treaty network) allow the other contracting state to regain taxing rights whenever: i) it became the other contracting state due to loss in the tiebreaker; ii) the other income is not taxed at residence (i.e. state winning the tiebreaker), and; iii) in the other contracting state and in a third-country¹⁸⁷ or merely in a third country.¹⁸⁸

Finally, it is worth mentioning that China considers that this condition is somehow embedded in the treaty provision. In fact, whenever the residence state does not tax other income, China will subject it to taxation. Such condition is not considered applicable regarding other allocation rules.¹⁸⁹

4.3 Unconditional clauses for exclusive source taxation

4.3.1 Restricted exclusive source taxation (to specific sources of income)

The research allowed us to identify several clauses leading to exclusive source taxation on certain items of income.

One treaty considers that payments made from specific individual retirement savings plans shall only be taxed at source.¹⁹⁰ The overall goal is avoiding the residency state to nullify the advantages granted by source regarding a specific pension plan. This also considers that source state is more closely related to such income insofar as contributions took place (likely) when the beneficiary was a resident of that state.

All other provisions falling within this profile refer to alimony and other maintenance payments. This policy option is likely justified by the fact that: i) alimony payments are usually quite limited; ii) they refer to income of particularly fragile people, which may not have income above the minimum exempt under domestic law; iii) they are strongly related with the figure of the payor, and the income he is able to gather; iv) alimony is not considered income, or not subject to tax by some countries.

Sometimes, exclusive residence taxation depends on the absence of deduction by the alimony payor. The following provisions illustrate this policy option:

¹⁸⁵ See Art. 21(1)(b) of the Azerbaijan-France Tax Treaty of 2001, Art. 22(1)(b) of the Albania-France Tax Treaty of 2002 (not including “statutory bodies”), Art. 21(1)(b) of the France-Slovenia Tax Treaty of 2004, Art. 22(1)(b) of the France-Libya Tax Treaty of 2005 and Art. 22(1)(b) of the France-Georgia Tax Treaty of 2007.

¹⁸⁶ See Art. 21(3) of the Austria-Israel Tax Treaty of 2016 stating: “Income derived by a resident of a Contracting State from the other Contracting State under a legal claim to alimony payments may not be taxed in the first-mentioned State if such income would be exempt from tax according to the laws of the other Contracting State.”.

¹⁸⁷ See Art. 21(2) and Art. 13(5) of the Argentina-Germany Tax Treaty of 1978.

¹⁸⁸ See Art. 21 of the Germany-Liberia Tax Treaty of 1970.

¹⁸⁹ See STA Circular 75, of 2010 apud Y. Liao & D. Qiu, China (People's Rep.) - Global Tax Treaty Commentaries – Country Policy & Practice, Country Tax Guides IBFD, sec. 22.4.

¹⁹⁰ See Art. 21(3) of the Singapore-Switzerland Tax Treaty of 2011.

“Alimony or other maintenance payment paid by a resident of a Party to a resident of the other Party shall, to the extent it is not allowable as a deduction to the payer in the first-mentioned Party, be taxable only in that Party.”¹⁹¹.

or

“Alimony and other maintenance payments paid to a resident of a Contracting State shall be taxable only in that State. However, any alimony and other maintenance payment paid by a resident of one of the Contracting States to a resident of the other Contracting State, shall, to the extent it is not allowable as a relief to the payer, be exempt from tax in that other Contracting State.”¹⁹²

or

“Income derived by a person who is a resident of a Contracting State from the other Contracting State under a legal claim to maintenance may not be taxed in the first-mentioned State if, according to the laws of that other Contracting State, such income would have been exempt from tax had that person has been a resident of that other Contracting State.”¹⁹³

Or, even more broadly,

“Items of income under the social legislation received by a resident of a Contracting State from the other Contracting State shall not be taxed in the first-mentioned State if they were exempt from tax under the law of the other Contracting State”.¹⁹⁴

In many treaties, alimony is addressed explicitly in the pensions provision. By contrast, the above-mentioned provisions appear to deem alimony as other income, excluding it from the purview of other treaty clauses.

4.3.2 Unrestricted exclusive source taxation

A (still) relevant group of treaties takes an approach diametrically opposed to the one proposed by the OECD model, restricting taxing rights to the state where the source is located. As this is not a standard clause recommended by one of the models or its commentaries, the formula used varies significantly.

Exclusive source taxation can be particularly found in the Namibia tax treaty network regarding: i) all other income with the exception of other income attributable to a PE¹⁹⁵; ii) all other

¹⁹¹ See Art. 21(3) of the Hong Kong-Hungary Tax treaty of 2010, Art. 21(3) of the Hong-Kong Indonesia Tax Treaty of 2010, Art. 21(3) of the Hong Kong-Ireland Tax Treaty of 2010, Art. 20(4) of the Hong Kong-United Kingdom Tax Treaty of 2010, Art. 21(3) of the Hong Kong-Malta Tax Treaty of 2011, and Art. 21(3) of the Hong Kong-Spain Tax Treaty of 2011, and Art. 20(4) of the Canada-Hong Kong Tax Treaty of 2012.

¹⁹² See Art. 21(3) of the Norway-Ukraine Tax Treaty of 1996.

¹⁹³ See, for instance, Art. 20(4) of the Austria-Azerbaijan Tax Treaty of 2000, Art. 20(4) of the Armenia-Austria Tax Treaty of 2002, Art. 20(3) of the Austria-Belize Tax Treaty of 2002, Art. 20(3) of the Austria-Bosnia-Herzegovina Tax Treaty of 2010, Art. 20(4) of the Austria-Cuba Tax Treaty of 2003, and Art. 21(4) of the Austria-United Kingdom Tax Treaty of 2018.

¹⁹⁴ See Art. 21(3) of the Algeria-Austria Tax Treaty of 2003.

¹⁹⁵ Art. 22(1) and (2) of the Mauritius-Namibia Tax Treaty of 1995.

income insofar as attributable to a permanent establishment located in the state;¹⁹⁶ iii) all other income insofar as subjected to tax at source;¹⁹⁷ iv) i) all other income.¹⁹⁸

It is also present in the Egyptian tax treaty network for all other income. In such cases, the following wording is normally used:

“Items of income of a resident of a Contracting State, which are not expressly mentioned in the foregoing Articles of the Convention shall be taxable only in the State where the income arises.”¹⁹⁹

Exclusive source taxation, even if rare, can also be found in the tax treaty network of other countries.²⁰⁰

5. Special clauses

5.1 Introduction

The other income provision sometimes hosts provisions that either do not have an allocating profile or are not even directly related to other income. The following subsections address those special clauses.

5.2 Override of other provisions

Sometimes the other income provision is used to override other treaty provisions.

Some treaties of the Belarus network specifically target fees for technical services, allowing source taxation up to a maximum of 10%²⁰¹ or 15%.²⁰² Without this clause, this item of income would likely fall under the business profit rule. Accordingly, more than clarifying the tax treatment of an item of income insofar as it does not fall within the previous allocation rules, the function of this provision is to override the business income provision, allowing source taxation until 10% of the gross amount. Part of the override is mitigated by the negative delimitation of the expression “fees for technical services” by providing a specific definition.²⁰³

In one treaty, the other income article states that “[n]otwithstanding any other provision of this Convention” income derived “from the provision of telecommunication services for a fee directly

¹⁹⁶ See Art. 22 of the Namibia-South Africa Tax Treaty of 1998.

¹⁹⁷ Art. XVIII of the Namibia-United Kingdom Tax Treaty of 1963.

¹⁹⁸ See Art. 22 of the India-Namibia Tax Treaty of 1997, Art. 22(1) of the Namibia-South Africa Tax Treaty of 1998, and Art. 21 of the Namibia-Russia Tax Treaty of 1998.

¹⁹⁹ See Art. 22 of the Egypt-Norway Tax Treaty of 1964, Art. 22 of the Egypt-Finland Tax Treaty of 1965, and Art. 23 of the Egypt-Romania Tax Treaty of 1979, and Art. 24 of the Jordan-Romania Tax Treaty of 1983.

²⁰⁰ See Art. 22(3) of the Moldova-Romania Tax Treaty of 1995 and Art. 22 of the Nigeria-Philippines Tax Treaty of 1987 and Art. 23 of the India-Philippines Tax Treaty of 1990.

²⁰¹ See Art. 22(3) of the Belarus-Mongolia Tax Treaty of 2001.

²⁰² Art. 21(4) of the Belarus-Pakistan Tax Treaty of 2004.

²⁰³ . Art- 22(4) of Belarus-Mongolia Tax Treaty of 2001 defines them as “payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any services of a technical, managerial or consultancy nature. But it does not include payments for services mentioned in Article 14 and in Article 15 of this Agreement.”. See also Art. 21(6) if the Belarus-Pakistan Tax Treaty of 2004.

or indirectly to the public” may be taxed in the other contracting state, up to 10% of the gross amount.²⁰⁴ Again, the intention is to override the business profits provision.

Another treaty uses the provision to indicate that “items of income under the social legislation” (regardless of whether they would fall under the other income provision) shall not be taxed at source whenever they are not exempt at residence.²⁰⁵ As a result, the eventual functioning of the pensions clause is precluded. Here, the (partial) override refers to pensions.

There are also provisions overriding the treaty regarding income derived by a contracting state, local government or political and administrative subdivisions. In one treaty, the override refers to the business income provision by stating that immovable property income, when derived through the permanent establishment, shall be taxable only at residency (i.e. solely by the State).²⁰⁶ In another treaty, the override refers to several provisions and states that income (“including gains from the alienation of movable and immovable property”) received by such entities “and their financial institutions (...) shall be exempt from taxes on such income, profits and gains” sourced in the other contracting state.²⁰⁷

Finally, one treaty clarifies that other income should be deemed to be sourced in the other contracting state whenever the payer is “that State itself, a political subdivision, a local authority, a resident of that State or when the income is paid under the social security legislation of that State”.²⁰⁸

It is crucial to alert to the interpretative difficulties raised by these override clauses, as they are included in a provision that the interpreter would normally ignore when determining the tax treaty applicable to an item of income that (at least in accordance with the models) would clearly fit within one of the prior allocation rules.

5.3 Other special clauses

In addition to the override, there are clauses with non-allocating functions, which are likely the result of the idiosyncrasies of the negotiation.

For instance, one treaty grants the competent authority the power to decide how other income shall be taxed.²⁰⁹ Another treaty, even if allocating directly taxing rights, foresees the possibility of mutual consultations for the application of the other income provision, even if such

²⁰⁴ See Art. 23(3) of the Portugal-Timor-Leste Tax Treaty of 2011. Art. 23(4) of the treaty further defines what should be regarded as “telecommunication services”.

²⁰⁵ See Art. 21(3) of the Algeria-Austria Tax Treaty of 2003.

²⁰⁶ See Art. 22(2) of the Kyrgyzstan-United Arab Emirates of 2014.

²⁰⁷ See Art. 21(4) of the Turkmenistan-United Arab Emirates of 1998. The provision states: “Notwithstanding the provisions of Articles 5 to 7, 13 and 22 any income and profits derived by a Contracting State its political subdivisions and local governments and their financial institutions arising in the other Contracting State including gains from the alienation of movable and immovable property situated in that other State, shall be exempt from taxes on such income, profits and gains generated in that other Contracting State.”.

²⁰⁸ Art. 20(4) of the Cyprus-Sweden Tax Treaty of 1988.

²⁰⁹ See Art. 22 of the Sri Lanka-Thailand Tax Treaty of 1988, stating: “Items of income of a resident of a Contracting State wherever arising which are not expressly dealt with the foregoing Article of this Agreement shall be settled mutually by the Contracting States.”.

provision does not have any meaningful deviations regarding the models,²¹⁰ and even if such a treaty includes a mutual agreement procedure since its original version.²¹¹

Finally, it is important to note that some provisions are designed asymmetrically, i.e. only apply to inbound or outbound payments. This is not a normative profile per se but a form of designing the provisions.²¹² For instance, in the Canada-Quebec treaty:

“if the income received by a resident of Quebec arises from sources situated in France, it may be taxed in France and according to French law”.²¹³

This specific provision may be explained by historical reasons, given that a substantial part of the Quebec population were former French residents, and France wanted to secure taxing rights on outbound payments qualifiable as other income. The other way around would not be that common or frequent, reason why Quebec may not have claimed reciprocal treatment.

6. Exclusions from the scope of the provision

Art. 21 functions as a “catch-all”²¹⁴ or “blanket, sweep-up”²¹⁵ clause, aiming at offering an allocation rule for items of income not dealt with in the other allocation rules. However, treaty practice provides several examples where this catch-all function is trumped through the exclusion of certain items of income.

The research allowed to identify cases of exclusion of the following items of income:

- i) Public remunerations, pensions or life annuities;²¹⁶
- ii) Employment;²¹⁷
- iii) Income paid out of trusts²¹⁸ or the estates of deceased persons in the course of administration;²¹⁹
- iv) taxes withheld at source on winnings from gambling and lotteries;²²⁰

²¹⁰ Follows generally the structure of the UN model convention, supra n. 5.

²¹¹ See Art. 23(4) of the India-Poland Tax Treaty of 1989 stating: “The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities shall through consultations develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article.”.

²¹² Most of the provisions were identified and are cited elsewhere in this contribution.

²¹³ See Art. 21(2) of the Canada-Quebec Tax Treaty of 1987.

²¹⁴ See A. Rust, supra n. 2, p. 1752.

²¹⁵ E. Baistrocchi, United Kingdom - Global Tax Treaty Commentaries – Country Policy & Practice, Country Tax Guides IBFD, sec. 22.5.

²¹⁶ See Art. 19 of the Sweden-Tunisia Tax Treaty of 1981.

²¹⁷ See Art. 6 of the Belgium-U.S.S.R treaty of 1987, still applicable in relations with former states such as Moldova, Kyrgyzstan and Turkmenistan.

²¹⁸ See Art. 22(3) of the Mauritius-United Kingdom Tax Treaty of 1981.

²¹⁹ See Art. 21(1) of the Denmark-United Kingdom Tax Treaty of 1980.

²²⁰ See Art. 21(3) of the Azerbaijan-Denmark Tax Treaty of 2017.

- v) income from a lottery;²²¹ from “lotteries and prizes”;²²² or from “wagering, gambling or lottery winnings”;²²³
- vi) Winnings derived by individuals from “gambling and lotteries”,²²⁴
- vii) Management fees;²²⁵
- viii) Interest derived from sources in the other contracting state.²²⁶
- ix) Income paid out of trusts and estates of deceased persons in the course of administration, even if beneficially owned by the resident;²²⁷
- x) Income arising as a result of a transfer or acquisition of the right on ownership or management of property situated in a contracting state;²²⁸

The exclusion of the scope of the other income also dismisses such income from the scope of this contribution. The specific tax treatment of those income items depends on whether they fall within one of the allocation rules (case in which such rule will allocate taxing rights and the exclusion has a mere clarification function) or whether such income, by the functioning of the rule, falls outside the scope of all allocation rules. In the latter scenario, both contracting states may exercise their taxing rights unrestrictedly, and only domestic unilateral relief mechanisms would be available.

7. Conclusions

The research conducted on all other income provisions of bilateral tax treaties in force allows to identify the different normative profiles that are effectively used in practice. And those profiles vary immensely, from the OECD recommended exclusive taxation at residency to the rare but existing exclusive taxation where the income emerges.

Despite the diversity, the overwhelming majority of countries follow a specific pattern structured in two (to three) normative profiles:

- the first one, granting exclusive taxing rights to residency;
- the second one, designed as an exception to the first, grants (cumulative) taxing rights to the state where the PE is located, regarding the income effectively connected with it; most

²²¹ See Art. 21(3) of the Russia-Switzerland Tax Treaty of 1995, Art. 21(3) of the Belarus-Switzerland Tax Treaty of 1999, Art. 21(3) of the Switzerland-Ukraine Tax Treaty of 2000, and Art. 21(3) of the Switzerland-Uzbekistan Tax Treaty of 2002.

²²² See Art. 22(1) of the Indonesia-Ukraine Tax Treaty of 1996, Art. 22(1) of the Indonesia-Seychelles Tax Treaty of 1999, Art. 22(1) of the Indonesia-Korea (Dem. People’s Rep.) Tax Treaty of 2002, Art. 23(1) of the Indonesia-Netherlands Tax Treaty of 2002, Art. 22(1) of the Indonesia-Portugal Tax Treaty of 2003, Art. 22 of the Indonesia-Suriname Tax Treaty of 2003, Art. 22(1) of the Indonesia-Morocco Tax Treaty of 2008, and Art. 22(1) of the Indonesia-Serbia Tax Treaty of 2011

²²³ See Art. 21(3) of the Switzerland-United States Tax Treaty of 1996.

²²⁴ See art. 22(3) of the Denmark-Georgia Tax Treaty of 2007.

²²⁵ See Art. 22(1) of the Egypt-Italy Tax Treaty of 1979. Art. 22(3) defines management fees as “payments of any kind to any person, other than to an employee of the person making the payments, for, or in respect of, the provision of industrial or commercial advice, or management or technical services, or similar services or facilities, or hire of plant or equipment” and clarifies that “it does not include payments for independent personal services mentioned in Article 14.”. Reaching the same conclusion see C. Silvani, Italy in in G. Maisto (ed.) *Other Income in Tax Treaties*, IBFD (forthcoming), sec. 2 in fine.

²²⁶ Art. 20 of the Swaziland-United Kingdom Tax Treaty of 1968.

²²⁷ See Art. 23 of the Guyana-United Kingdom Tax Treaty of 1992.

²²⁸ See Art. 22(1) of the Indonesia-Ukraine Tax Treaty of 1996, Art. 22(1) of the Indonesia-Syria Tax Treaty of 1997, and Art. 22(1) of the Indonesia-Seychelles Tax Treaty of 1999.

treaties: i) exclude from this exception income from immovable property; ii) consider applicable to such income, the rules foreseen for business income (or personal independent services, in cases keeping this provision) even if, in a much more limited number of treaties, the PE income will be subject to domestic law;

- a third profile, included in a more reduced but still significant number of treaties, granting shared taxing rights to the other contracting state regarding income sourced in its territory, or, alternatively and in an even more limited number of treaties, also emerging from third countries.

Apart from those three, the fourth most used normative profile is the arm's length provision.

All remaining normative profiles, even if quite interesting from a tax policy perspective, are used in a residual amount of treaties without a real statistic expression. Most of those minor deviations have been comprehensively mapped and referred to above.

The research evidenced the existence of hidden treaty model clauses regarding the other income provisions, much beyond countries' reservations (regarding the OECD model). The most complex is, without any doubt, the UK "model provision", which is composed of the following normative profiles: i) the first, second and fourth profile referred supra; ii) a main purpose test;²²⁹ ii) disregard of trustees or estates when acting as paying agents.

However, stable deviating normative profiles can be found in the treaty network of some countries. Namely, and merely for illustration, see the treaty network of:) Austria, which includes a specific provision for alimony and income under a legal claim for maintenance; ii) Bermuda and Switzerland, which often do not include an other income clause; iii) Belgium, which normally includes a subject-to-tax clause; iv) Canada, allowing source taxation on income distributed by a trust or estate, although limiting it to 15% of the gross amount; v) Egypt and Namibia, allowing exclusive source taxation; vi) France, including the subject-to-tax requirement but excluding from its scope contracting States, local authorities or their statutory bodies; vii) India, allowing shared taxing rights regarding income arising from gambling and betting, defined *lato sensu*. Interestingly, most these deviations are not registered as deviations or Positions to the OECD Model Convention Commentary.

The research also allowed to conclude that smaller jurisdictions tend to deviate less from the tripartite structure mentioned above, likely due to the neglectable amount of income that they consider that would fall under this clause.

An interesting follow-up to this study would be mapping the statistical occurrence of these normative profiles with separate statistics for OECD-OECD countries, OECD-non-OECD countries and non-OECD countries. Given the dynamic nature of the income tax treaty network, it would be even better if such statistical mapping could occur yearly. It would also be interesting to roll out this effort on other treaty provisions (or, more realistically, paragraphs of provisions), allowing the understanding of the real treaty practice, which not rarely deviates from the models. Such studies appear to be fundamental to a comprehensive revision of treaty negotiation and become even more interesting when discussions on a new comprehensive multilateral income tax treaty have been brought back to the centre of the tax policy debate.²³⁰

²²⁹ In treaties not impacted by the MLI, see supra n. 94.

²³⁰ See UN Secretary-General, Report of the UN Secretary General on the Promotion of inclusive and effective international tax cooperation at the United Nations, Seventy-eight session, Agenda item 16, Macroeconomic policy questions, A/78/XXX, Advance unedited version of 8 August 2023 and UN, "Promotion of inclusive and

effective international tax cooperation at the United Nations” (document A/C.2/78/L.18/Rev.1), adopted in the 78th session, 25th meeting of the Second Committee of the UN General Assembly.