

# The other income clause in bilateral models and multilateral tax treaties

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## **1. Introduction**

### **1.1 Aim and research question**

This contribution aims to identify and discuss the recommendations incorporated in the other income provisions of treaty models other than (the over-scrutinized) OECD and UN model conventions.<sup>2</sup> Moreover, it aims at understanding the *modus operandi* of other income provision as included in multilateral treaties, ascertaining whether jurisdictions use such opportunity to follow solutions other than those recommended by the OECD and the UN.

Scholarly literature emphasizes the importance of studying the OECD and UN models to understand treaty practice. However, in addition to such models (of a global reach), there are several other (regional or national) models drafted by governmental representatives in the framework of international organisations, which often propose different normative profiles.<sup>3</sup>

Besides the understanding of the recommendations embodied in other models and in multilateral treaties, this study also provides strong interpretative guidelines, aimed at allowing the decision maker an easier and more effective interpretation and application: i) of the provisions, in case of multilateral treaties in force; ii) of the treaties following the pattern recommended by a certain (non-global) model.

### **1.2 Scope, methodological options and limitations**

As mentioned, this study focuses on the model bilateral and multilateral comprehensive income tax treaties.

The research was based on primary sources (i.e. the text of the models and the multilateral treaties). Scholarly literature and case law were only considered subsidiarily, once the author completed the assessment of the text of the models and treaties.

The research takes into account a series of methodologic options from which limitations emerge.

First of all, it only takes into account comprehensive income treaties and models, understood as those aiming at regulating the allocation of taxing powers of all items of income of a person among the contracting states. This option is genetically linked with the topic of this contribution since the other income clause makes sense if incorporated in an instrument that *prima facie* aims at allocating taxing rights regarding all items of

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<sup>2</sup> 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)].

<sup>3</sup> The concept of normative profile is further developed by the author in another study published in this book.

income. Instruments primarily or mainly focused on mutual assistance between tax or competent authorities were not considered. Instruments for implementing an initiative (such as the GloBE model rules) were also not considered. To avoid analytical gaps, treaties covering a broad range of income items, even if not clearly comprehensive, were also included as they may include a general clause (such as the tax jurisdiction clause) whose function is similar to the other income clause.

Secondly, the study only takes into account publicly available materials. The author is aware that international organisations and states (or their representatives) often produce draft models which play an important role in treaty negotiation. Nevertheless, given the lack of publicity and to draw a clear dividing line in the definition of the research scope of the research, all non-publicly available materials were disregarded. Whenever also made publicly available, it also takes into account protocols, exchanges of notes and other documents aimed at amending the treaties or impacting their interpretation. It considers prior versions or treaties that have never entered into force, insofar as they considered important to understand the underlying options of countries initializing such instruments. The author cannot exclude the existence of other models or multilateral treaties; accordingly, this contribution does not have any pretension of comprehensiveness.<sup>4</sup>

As models, international organisations and country models are considered. In fact, both share the goal of providing a stable roadmap for treaty negotiation and are designed to influence a significant number of bilateral treaties. It should be noted that some country models are notoriously more impactful in treaty practice (particularly of the respective country) than international organisations' models.

In what concerns multilateral treaties, all concluded treaties (covering in-force and not yet in-force treaties) were considered. Prior versions of those treaties were also considered, as they allow to understand changes in multilateral treaty practice. Outside of the treaty's scope are terminated treaties insofar as they neither apply nor clearly express the tax policy options of those countries.

Third, the research is based on the versions made available by IBFD on its Tax Research Platform<sup>5</sup>, with a small number of instruments being retrieved from public websites or through colleagues. Any inaccuracies in available versions on the platforms and/or the websites will impact this research.

Fourth, the research was based on the languages spoken by the author. Accordingly, study of the Arabic and Russian language instruments relied on English translations (either made available on the IBFD platform or through software, with results being confirmed by native speakers).

Fifth, within those instruments, it considers both provisions labelled as "other income" as other provisions with similar wording or *modus operandi*. It focuses solely

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<sup>4</sup> The author would be pleased to receive notice of any model or multilateral treaty not covered by this study, to include it in future versions of this contribution or to take into account in future studies.«

<sup>5</sup> Available at <https://research.ibfd.org/#/>.

on such clauses and does not take into account the relations between such provisions and: i) other treaty provisions; ii) other tax treaties or, more broadly, public international law instruments; iii) domestic law.

Sixth, considering the numerous studies on the other income provision as included in the OECD and the UN models,<sup>6</sup> hereinafter global models, they were excluded from the scope of this research. For the same reason, no further consideration is made regarding clauses that merely or mostly reproduce such models. The reader may either already be acquainted with the *modus operandi* (and rationale) of such provisions or easily get acquainted with them through the numerous studies and commentaries on those models.

Seventh, this contribution is not aimed at being a repository of other income clauses as incorporated in those models or treaties. However, given the difficult access to those sources, whenever a provision significantly deviated from the global models, the author decided to reproduce them exceptionally.

Any time-sensitive information provided in this contribution (namely regarding effectiveness, entry into force and membership of a certain public organisation or international law instrument) refers to 1 August 2023.

### **1.3 Structure and Sequence**

This contribution is divided into two main parts, one focused on bilateral and the second on multilateral instruments.

The second chapter, devoted to bilateral instruments, covers only models other than global models (i.e. other than the OECD and UN models). Treaty practice regarding bilateral treaties and the eventual impact of such models is addressed in a separate contribution by the author. It starts with an assessment of models from international organisations (others than the OECD and UN models, for the reasons mentioned above) and then moves to country models.

The third chapter covers multilateral income tax treaties.

In both cases, the instruments are addressed by order of the year of adoption, publication or release. In case of different versions or amendments, the date of the last modification is the one taken into account. Only instruments meeting the conditions mentioned in the previous section were considered.

The contribution ends with the customary conclusions.

## **2. Bilateral models**

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<sup>6</sup> See *supra* n. 2.

## 2.1 Introduction

The overwhelming majority of income tax treaties are bilateral. Moreover, treaties are not drafted from scratch and, in general, follow a similar structure patterned along models. Instead of negotiating every single clause, treaty negotiators often agree on taking a certain model as the basis for negotiation and then discussing the bilateral deviations from such model in article-per-article discussions.<sup>7</sup>

Besides the OECD and the UN models (which aim at a global reach), one can find a series of regional models, which aim at addressing the specific needs of a certain area of the globe or of countries with similar economic profiles. Such models are hardly addressed in scholarly literature.<sup>8</sup> The following subsections will address other income clauses included in bilateral models other than the OECD and the UN ones.

## 2.2 Bilateral models from international organisations

### 2.2.1 Introduction

The following section addresses bilateral tax treaty models from international or intergovernmental organisations. As mentioned, they will be addressed in chronological order, taking into account the year of its most recent version (in case of multiple versions).

### 2.2.2 Andean Community bilateral model (1971)<sup>9</sup>

The Andean Community was instituted by the Cartagena Agreement in 1969. Its original members were Bolivia, Chile, Colombia, Ecuador and Peru. Venezuela joined in 1973 but withdrew in 2006. Chile, a founding member, had already withdrawn in 1969. It is now composed of four states and is a free trade area aiming at creating a customs union between its members.

The “Standard Agreement for Executing Agreements on double taxation between Member Countries and other States Outside the Region” (hereinafter Andean Community model) was released in 1971.<sup>10</sup>

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<sup>7</sup> See Y. Brauner, Tax Treaty Negotiations: Myth and Reality, 4 Intl. Tax Stud. 8 (2021), Journal Articles & Opinion Pieces IBFD.

<sup>8</sup> As an exception, see C. West, Regional Double Tax Treaty Models, in F. Haase and G. Kofler (eds), The Oxford Handbook of International Tax Law, Oxford University Press, 2023.

<sup>9</sup> The full text of the treaty, in its official English translation available at: [https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt\\_a1\\_02\\_eng\\_1971\\_mo\\_td1.html](https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt_a1_02_eng_1971_mo_td1.html). The original Spanish version can be found at: <http://www.sice.oas.org/trade/junac/decisiones/dec040e.asp#annlt>.

<sup>10</sup> It was included as Annex I of Decision 40 of the Commission of the Cartagena Agreement, following Art. 89 of the agreement of Cartagena and Art. 47 of decision 24 of the Commission which approved “[t]he Agreement among Member Countries to avoid double taxation and the Standard Agreement for executing

This model lacks a specific other income model. However, Art. 4, entitled “tax jurisdiction”, performs a similar role. According to that provision:

“Irrespective of the nationality or residence of the persons, such income of any kind as they may obtain shall be taxable only in the Contracting State where the source of production of that income is located, save in the exceptional cases provided for in this agreement.”

The last segment of the provision indicated that this clause was drafted aiming at being a catch-all provision, a role which is commonly performed by the other income clause in the global models. At odds with the 1963 draft OECD Model,<sup>11</sup> the Andean Community model recommends the exclusive source rule, i.e. other income should be taxable only where the “source of production is located”, which is explicitly defined by the treaty as the “activity, right or good that produced or that could produce an income”.<sup>12</sup>

The objective scope of the clause is formulated quite broadly, covering “income of any kind”. In terms of geographic scope, the wording would technically cover income sourced in third countries. However, the exclusive source taxation rule does not allow (and prevents) contracting states from taxing income insofar as not sourced in its territories. Therefore, other income is covered but excluded from the taxing rights of both contracting states. However, and as noted by Van Raad (even if in a different context) this rule does not prevent improper use by Contracting States, which may (later) enacting domestic rules that define source in an unusual way”.<sup>13</sup> The above mentioned definition of “source” does not prevent this.

The “tax jurisdiction” provision is the most evident expression of the strong preference of the Andean Community for source taxation. Accordingly, other allocation rules are only included insofar as they are needed to deviate from this “tax jurisdiction” provision. This rule will also be incorporated in the multilateral treaty between the states forming part of this community, as mentioned *infra*.

### 2.2.3 ASEAN model (1987)<sup>14</sup>

The Association of Southeast Asian Nations (hereinafter ASEAN) was instituted by the Bangkok Declaration<sup>15</sup> on 8 August 1967. The founding fathers were Indonesia, Malaysia, Philippines, Singapore, and Thailand.

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Agreements on double taxation”. The multilateral agreement also approved by this Decision was in the meanwhile replaced in 2004 and will be referred *infra*, in this contribution.

<sup>11</sup> OECD Draft Tax Convention on Income and on Capital (30 July 1963), Treaties & Models IBFD.

<sup>12</sup> See Art. 6 of the Andean Community bilateral model.

<sup>13</sup> 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.

<sup>14</sup> Text available at: [https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt\\_a4\\_01\\_eng\\_1987\\_mo\\_td1.html](https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt_a4_01_eng_1987_mo_td1.html).

<sup>15</sup> Also known as Bangkok declaration, as it was signed on this city.

The “Intra-ASEAN Model Double Taxation Convention on Income” (hereinafter the ASEAN model) was adopted on 15 December 1987. At the moment of the adoption, the following countries were part of the ASEAN: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), Philippines, Singapore, Thailand, and Vietnam.

This model includes an “other income” provision in its Art. 22, which has the following wording:

“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.”

This allows both contracting states to tax, even if the other contracting state is limited to sources in its territory. In case of double taxation, taxpayers may claim the relief clause.<sup>16</sup> Other income arising from sources located outside both contracting states will not be covered by this provision, with the consequent exclusion of the treaty’s relief clause in case of double taxation.

Even if deviating from the global models, the wording is quite similar and results from merging para. 1 of the other income clause of global models with para 3 of the UN model.<sup>17</sup>

#### **2.2.4 East African Community model (2012)<sup>18</sup>**

The East African Community (hereinafter EAC) was created on 30 November 1999 by the Treaty of Establishment of the EAC and became operational on 7 July 2000. It is formed by Burundi, Kenya, Rwanda, Tanzania and Uganda.

The “East African taxation convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income” (hereinafter EAC model) was released in 2012.<sup>19</sup> The East African Community is formed by Burundi, Kenya, Rwanda, Tanzania and Uganda. The model instrument was designed to serve as guidance for the negotiation of bilateral tax treaties between the members of the Community and third countries.

Other income is included in its Art. 23. This provision comprises three paragraphs, which are a textual reproduction of the UN model text, apart from the non-significative replacement “Convention” by “Agreement”.

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<sup>16</sup> Art. 23 of this model, which introduces an ordinary tax credit provision taking into account not the tax effectively paid at the other contracting state but the tax that would be “otherwise payable” in such state had such tax not been “reduced or exempted in accordance with the special incentive laws designed to promote economic development in that other State”.

<sup>17</sup> See supra n. 2.

<sup>18</sup> This model is neither made available at the IBFD Tax Research Platform nor elsewhere, online.

<sup>19</sup> It was adopted following Art. 83(2)(e) of the Treaty for the Establishment of the East African Community

### **2.2.5 COMESA model (2013)<sup>20</sup>**

The Common Market for Eastern and Southern Africa (hereinafter COMESA) is a free trade area established by a treaty signed on 5 November 1993 and ratified on 8 December 1984.<sup>21</sup> It is formed by the following African countries: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

The “COMESA model on the conventions for the prevention of double taxation”<sup>22</sup> (hereinafter COMESA model) was adopted in November 2013.

Other income is dealt with by Art. 20, which is a textual reproduction of the UN model, except for para 2 (the “permanent establishment exception”), which only refers to the business profits provision (as the treaty does not include a separate provision for independent personal services).

### **2.2.6 SADC model (2013, revising the 2011 version)<sup>23</sup>**

The Southern African Community Development (hereinafter SADC) is a regional economic initiative to promote economic development and cooperation among its members. It was created on 17 August 1992 with the signature of the Treaty of the Southern African Development Community. It is formed composed of the following 16 Southern African countries: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic Tanzania, Zambia, and Zimbabwe.

The “SADC Model Agreement on Income” (hereinafter SADC model) was released in 2011 and revised on 24 July 2013.

Other income is covered in Art. 22, which is the same in the 2011 and 2013 versions. The provision is a textual reproduction of the UN model, except for para. 2, which only refers to the other business profits (since the treaty has no separate clause for independent personal services).

### **2.2.7 ATAF (2019, revising the 2016 version)<sup>24</sup>**

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<sup>20</sup> This model is neither made available at the IBFD Tax Research Platform nor elsewhere, online.

<sup>21</sup> It replaces for former Preferential Trade Area existing since 1981.

<sup>22</sup> Author’s translation from the French original “Modele du COMESA sur les Convention Preventives de la Double Imposition”.

<sup>23</sup> The 2011 full text is available at: [https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt\\_sad\\_01\\_eng\\_2011\\_mo\\_td1.html](https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt_sad_01_eng_2011_mo_td1.html).

The 2013 is neither made available at the IBFD Tax Research Platform nor elsewhere, online.

<sup>24</sup> The full text of the 2016 model is available at: [https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt\\_ataf\\_01\\_eng\\_2016\\_mo\\_td1.html](https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt_ataf_01_eng_2016_mo_td1.html).

The African Tax Administration Forum (hereinafter ATAF) is an intergovernmental organisation aiming at facilitating mutual assistance between African Tax Administrations. It was created by the “Agreement on the Establishment of the African Tax Administration Forum”, signed on 14 September 2009, in Pretoria, South Africa. It is currently formed by thirty-eight African countries.

The “ATAF Model Agreement for the elimination of double taxation with respect to taxes on income and the prevention of tax avoidance and evasion” (hereinafter SADC model) was first released in October 2016 and further revised in 2019.

According to its preamble, the goal is to promote the “elimination of double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Agreement for the indirect benefit of residents of third States)”.<sup>25</sup>

As most of the regional models already addressed, the ATAF model’s “other income provision”, which is a textual reproduction of the UN Model,<sup>26</sup> with the two (minor and non-significant) deviations which were already observed in previous models: i) replacement of Convention by Agreement; ii) no reference to fixed base since the model does not include an autonomous provision for independent personal services.

As concluded by West, the “ATAF models meet with the common expectation that the regional model represents a hybrid of the OECD and the UN model”.<sup>27</sup> This is certainly the case in what concerns the other income provision, almost reproducing the UN model.

## **2.3 Bilateral models from countries**

### **2.3.1 Introduction**

This section focuses on bilateral treaty models from countries.

As mentioned, research is limited to publicly released models. Only identified five national models meet this condition: the Dutch, Russian, Belgian, German and the one from the United States. It should be stressed that many others models exist, defined at each country’s governmental level (often within the Ministry of Finance) or developed by each team of negotiators. Of course, each treaty negotiation is preceded by an analysis of the domestic law and of the economic indicators of the relevant relations with the other (contracting) state, which may lead negotiators to deviate from their own

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<sup>25</sup> See Preamble of the ATAF Model Convention.

<sup>26</sup> As highlighted by West, “regional models borrow heavily from the OECD and the UN MCs. Variations from these models is limited, and, where found, can lead to difficulties”. See C. West, *Regional Double Tax Treaty Models*, in F. Haase and G. Kofler (eds), *The Oxford Handbook of International Tax Law*, Oxford University Press, 2023, p. 471.

<sup>27</sup> C. West, *Emerging Treaty Policies in Africa – Evidence from the African Tax Administration Forum Models*, 75 *Bull. Intl. Taxn.* 1 (2021), *Journal Articles & Opinion Pieces IBFD*, p. 24.

countries' model. Accordingly, even if important, the models are not necessarily followed in every single negotiation regarding each of its provisions. That is also the case for domestic models.

As referred by Pickering, “both the policy framework and the country Model should be reviewed regularly to ensure that future tax treaties continue to provide beneficial and appropriate outcome for the future and remain up to date with international developments”.<sup>28</sup> This does not appear to be the case, at least with the published models, which were not revised following the publication of the different actions of the OECD’s Base Erosion and Profit Shifting project, even of several of them entailed changes in tax treaties.

Moreover, models and their proposed policies “do not necessarily translate into treaty practice, i.e. models often support the initial negotiating position but these are won or lost during bilateral negotiations”.<sup>29</sup> This conclusion does not remove but, and by the contrary, emphasises the importance of studying country models: unlike treaty practice, that is a result of those negotiation victories and losses, models express clearly the tax policy of a country, i.e. their ideal provision in the absence of any objection by the other contracting state.

### **2.3.2 The Dutch model (1987)<sup>30</sup>**

The Dutch model was incorporated in the Memoranda on the Netherlands tax treaty policy, released by the Dutch State Secretariat for Finance in 1987.<sup>31</sup> Since then, several other memoranda have been released, but none included a full-fledged model. In the 2011 Memoranda, the Dutch State Secretariat for Finance clarified that the model released in 1987 was no longer in use. However, no other draft has, in the meanwhile, been released.<sup>32</sup>

The model remains relevant, if not more, from a historical perspective. Other income is covered by Art. 22, which is a textual reproduction of the UN model.

The provision allows the other contracting state to tax income sourced in its territory. This is particularly interesting since the Netherlands qualifies as a developed country, as an investment hub, and as an (active) OECD member. Moreover, The Netherlands had not included (and continues not to include) any reservation to the

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<sup>28</sup> A. Pickering, Tax Treaty Policy Framework and Country Model, Papers on Selected Topics in Negotiation of Tax Treaties for Developing Countries, Paper n.º 2-N, United Nations – Department of Economic and Social Affairs, May 2013, p. 32.

<sup>29</sup> C. West, Emerging Treaty Policies in Africa – Evidence from the African Tax Administration Forum Models, 75 Bull. Intl. Taxn. 1 (2021), Journal Articles & Opinion Pieces IBFD, p. 11.

<sup>30</sup> The full text of the model, in Dutch, is available at: [https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt\\_nl\\_02\\_dut\\_1987\\_mo\\_td1.html](https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt_nl_02_dut_1987_mo_td1.html)

<sup>31</sup> This memoranda can be retrieved at the Parliamentary Papers II 1987/88, 20 365, n. 2.

<sup>32</sup> For an excellent overview of the different tax treaty policy memoranda see: F.P.G. Pötgens & P.I.M. Geerse, Memorandum on Tax Treaty Policy 2020: Looking Ahead and Back at Netherlands Policy on Negotiating and Signing Tax Treaties, 62 Eur. Taxn. 2/3 (2022), Journal Articles & Opinion Pieces IBFD.

other income provision. In any case, as early as 1987, there is evidence that the Netherlands (even without any reservation to the model) explicitly rejected the OECD recommendation and preferred shared taxing rights. Such an option is visible in many Netherlands tax treaty network treaties.

### 2.3.3 The South African Model (2010)<sup>33</sup>

South Africa adopted a model tax treaty, which was frequently for negotiations. This was a self-standing model, but included references to the OECD Model.<sup>34</sup> It stopped being used in 2006.<sup>35</sup> In general terms, South Africa converted its deviations from the OECD model into Positions to the OECD Model.<sup>36</sup>

This model included the other income clause in its Art. 20 which was mostly a textual reproduction of the UN model. The only deviation is the sole reference to business profits in paragraph 2, since the model does not have a separate provision for independent personal services. This recommendation is followed in treaty practice, and “seems to largely be the default position in South Africa’s later treaties”.<sup>37</sup>

### 2.3.4 The Russian Model (2010)<sup>38</sup>

The Russian “Model Agreement between the Russian Federation and foreign countries on the avoidance of double taxation and the prevention of tax evasion on income and property” (hereinafter, Russian model) was adopted by Resolution n.º 84 of 24 February 2010 of the government of the Russian Federation. According to the resolution, the model should serve “as a basis for negotiations by the Ministry of Finance of the Russian Federation”.

Other income is foreseen in Art. 21 of the model, which states:

“Items of income of a resident of a Contracting State which arise in a Contracting State and which are not covered by the preceding Agreement may be also taxed in that other Contracting State”.<sup>39</sup>

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<sup>33</sup> The full text of the model, compared with the text of the OECD model and with the treaty negotiated with Malaysia is available here: <https://static.pmg.org.za/docs/2005/050817oecdmalaysia.pdf>.

<sup>34</sup> P.J. Hattingh, Chapter 8: South Africa in BRICS and the Emergence of International Tax Coordination (Y. Brauner & P. Pistone eds., IBFD 2015), Books IBFD, fn. 20.

<sup>35</sup> West, Craig, Status Quo of South African Tax Treaty Policy (August 5, 2016). Status Quo of South African Tax Treaty Policy (南非现行税收协定政策考察), International Taxation in China, Issue 11 (ISSN: 2095-6126), 2016.

<sup>36</sup> At present, South Africa has inscribed a Position by which it expresses the wish of allowing the other contracting state to tax income arising from sources in its own territory.

<sup>37</sup> C. West & L. Mvovo, South Africa - Global Tax Treaty Commentaries – Country Policy & Practice, Country Tax Guides IBFD, sec. 22.1 and particularly footnote 145.

<sup>38</sup> The full text of the model, in Russian, is available at: [https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt\\_ru\\_02\\_rus\\_2010\\_mo\\_td1.html](https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt_ru_02_rus_2010_mo_td1.html).

<sup>39</sup> The translation was made with an automatic translator, from the original in Russian

The wording is quite similar to Art. 21(3) of the UN model, even if not reproducing it entirely. According to the Russian model, items of income arising in the source state may also be taxed in that state. Nothing is said regarding residency, which, not being limited by the convention, will be able to exercise its taxing rights over other income. In case of double taxation, the taxpayer would be entitled, according to art. 23 of the model, to claim relief which would be made available in the form of an ordinary tax credit. Some recent Russian treaties deviate from this model,<sup>40</sup> granting exclusive taxing rights to the residency state although the reasons for such deviation are not quite clear.<sup>41</sup>

### 2.3.5 Belgian model (2010, revising the 2007 one)<sup>42</sup>

The “Income and Capital Model Convention” (hereinafter Belgian Model) was released in June 2010, replacing a prior model released in June 2007.<sup>43</sup>

Other income provision is included in Art. 20 of the model, which is almost a reproduction of the UN model provision, apart from two deviations.

The first refers to the absence of a reference to income connected with a fixed base, resulting from the lack of a separate provision for independent personal services.

The second refers to the third paragraph of the provision, which introduces a sort of “subject to tax” clause.<sup>44</sup> The 2007 and 2010 versions have slightly different wordings for this condition:

- 2007: other income “may be taxed in that other State if these items are not taxed in the first-mentioned State”;
- 2010: other income “may be taxed in that other State if such items of income are not effectively taxed in the first-mentioned State”.

The difference between versions appears to indicate that taxation by the other contracting state would depend on something more than mere “subjection to tax”.

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<sup>40</sup> See Art. 21(1) of the China-Russia Tax Treaty of 2014, and Art. 21(1) of the Hong-Kong Tax Treaty of 2016.

<sup>41</sup> Savitskiy notes that this is “presumably due to economic and political relationship” with these countries. See A. Savitskiy, *Russia - Global Tax Treaty Commentaries – Country Policy & Practice*, Country Tax Guides IBFD, sec. 22.1.

<sup>42</sup> The full text of the 2010 model is available at: [https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt\\_be\\_02\\_eng\\_2010\\_mo\\_td1.html](https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt_be_02_eng_2010_mo_td1.html). The previous text, of 2007, is available at: [https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt\\_be\\_02\\_eng\\_2007\\_mo\\_td1.html](https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt_be_02_eng_2007_mo_td1.html).

<sup>43</sup> On this prior version see L. de Broe, *Belgium’s tax treaty policy and the Draft Belgian Model Convention*, 62 *Bulletin for International Taxation* 8, 2008. For a comprehensive analysis of the current model see B. Michel & B. (Bernard) Peeters, *Belgium - Global Tax Treaty Commentaries – Country Policy & Practice*, Country Tax Guides IBFD and F. Debelva and P. van Belle, *Belgium*, in G. Maisto (ed.) *Other Income in Tax Treaties*, IBFD (forthcoming).

<sup>44</sup> Following the recommendation enshrined in para. 3 of the OECD Model: *Commentary on Article 21* (2017).

However, the Protocol to the 2010 model clarifies that an item of income is “effectively taxed” whenever it “is subject to tax in that Contracting State and does not benefit as such from an exemption from tax therein”.<sup>45</sup> Therefore, and according to the author, even an insignificant level of taxation (for instance, 0,1%) at residence would be enough to prevent the other contracting state from exercising taxing rights over the other income.

### 2.3.6 The German model (2013)<sup>46</sup>

The Deutsche Verhandlungsgrundlage (DE-VG), which could be more precisely translated as the German basis for negotiation [of tax treaties], was released on 22 April 2013 (hereinafter, the German model). This model is (still) influential in tax treaty practice.<sup>47</sup>

The model includes a provision for other income, which is a textual reproduction of the OECD model convention. However, it includes a reference to other income in the definition of dividends:

“The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, founders' shares or other income which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident, as well as distributions on certificates of an investment fund.”<sup>48</sup>

This deeming provision carves out from the concept of other income (and from other allocation clauses) any income that, at source, receives the same treatment as dividends. It does not deviate significantly from the OECD model, which refers alternatively to “income from other corporate rights”.<sup>49</sup>

### 2.3.7 The US model (2016)<sup>50</sup>

The “US Model Income Tax Convention” (hereinafter the US model) was released by the United States Treasury Department on 17 February 2006. It is already the third model released, with prior versions published in 2006, 1996 and 1981.

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<sup>45</sup> See Protocol, ad Article 20, paragraph 3 and Article 22, paragraph 2, a of the Belgian model.

<sup>46</sup> The full text is available at: [https://research.ibfd.org/#/doc?url=/linkresolver/static/tt\\_de\\_02\\_eng\\_2013\\_mo\\_td1%23tt\\_de\\_02\\_eng\\_2013\\_mo\\_td1](https://research.ibfd.org/#/doc?url=/linkresolver/static/tt_de_02_eng_2013_mo_td1%23tt_de_02_eng_2013_mo_td1).

<sup>47</sup> See S. Lampert & B. Schewe, Germany - Global Tax Treaty Commentaries – Country Policy & Practice, Country Tax Guides IBFD.

<sup>48</sup> See Art. 10(3) of the German model.

<sup>49</sup> OECD Model Tax Convention on Income and on Capital, art. 10(3) (21 Nov. 2017), Treaties & Models IBFD.

<sup>50</sup> The full text is available at: [https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt\\_us\\_01\\_eng\\_2016\\_mo\\_td1.html](https://research.ibfd.org/#/doc?url=/collections/ttmodel/html/tt_us_01_eng_2016_mo_td1.html).

Other income is addressed by Art. 22 of the model, which comprises three paragraphs.

The first paragraph reproduces the global models but adds a beneficial ownership requirement. Accordingly, the benefits of the provision will not be granted to all recipients but be restricted to beneficial owners of the other income.

The third paragraph is the usual permanent exception provision, which is almost a textual reproduction of the OECD apart from adding a beneficial ownership requirement to the permanent establishment. Accordingly, the exception created by this paragraph will not apply to all income but to income beneficially owned by the permanent establishment.

The second paragraph has no correspondence in the OECD and UN models. It states:

2. Notwithstanding paragraph 1 of this Article:

a) a guarantee fee arising in a Contracting State and characterized as other income by that Contracting State and beneficially owned by a resident of the other Contracting State that is a connected person with respect to the payor of the guarantee fee may be taxed in the first-mentioned Contracting State in accordance with domestic law if such resident benefits from a special tax regime with respect to the guarantee fee in its Contracting State of residence; and

b) in the case of the United States, a guarantee fee characterized as other income paid by an expatriated entity and beneficially owned by a company resident in \_\_\_\_\_ that is a connected person with respect to such expatriated entity may be taxed in accordance with the law of the United States for a period of ten years beginning on the date on which the acquisition of the domestic entity is completed. For purposes of applying this paragraph:

(i) no effect shall be given to any amendment to section 7874 of the Internal Revenue Code after the date of signature of this Convention; and

(ii) no entity shall be treated as an expatriated entity that:

(A) is a connected person with respect to the domestic entity immediately after the date on which the acquisition of the domestic entity is completed; and

(B) prior to that date, was never a connected person with respect to the domestic entity.

However, an entity described in the preceding sentence shall become an expatriated entity if, subsequent to the date on which the acquisition of the domestic entity is completed, the entity joins in filing a U.S. consolidated return with either the domestic entity or another entity that was a connected person

with respect to the domestic entity immediately prior to the date on which the acquisition of the domestic entity was completed.”

This provision was introduced in the 2016 model. It applies to guarantee fees paid within related parties (group members), i.e. charges resulting from one company ensuring financial obligations or risks associated with a transaction of another group member. It serves for allocating and managing risks within a group and is, accordingly, susceptible of manipulation. These fees, which may constitute other income whenever not provided in the framework of a business, may be taxed by the other contracting state in which it arises, provided that they are paid by a related party (and the beneficiary benefits from a special tax regime) or by an expatriated company (provided that the other listed conditions are met).

### **3. Multilateral treaties**

#### **3.1 Introduction**

Globalisation and digitalization require regional or global approaches to certain topics, namely concerning the fight against improper use of tax treaties, dispute resolution or mutual assistance between competent authorities. Moreover, multilateralism allows for overcoming known limitations of tax treaties, namely those emerging from triangular situations. Therefore, one could assume that multilateral treaties were the preferred option for solving instances of double taxation. Moreover, attempts to solve double tax issues on a multilateral basis exist since at least the work of the League of Nations.<sup>51</sup> And multilateral income tax treaties are not something new, with the first one being signed shortly after the end of the first world war.<sup>52</sup> Nevertheless, and due to several reasons, bilateral tax treaties are still the rule. Several scholarly articles deal with multilateral treaties, their advantages and inconveniences.<sup>53</sup>

Multilateral treaties allow for specific answers that bilateral models are unable. This is the case of triangular situations and, in what concerns the other income provision, income arising outside of the residence state or other income connected with a permanent establishment. This study also aims at understanding whether this opportunity is effectively explored, in multilateral treaty practice.

The 1963 Draft model was designed as both a bilateral and a multilateral model, which explains how some of its provisions were drafted. The 1977 OECD model could

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<sup>51</sup> M. Lang, M. and J. Schuch, Europe on its way to a Multilateral Tax Treaty, 9 EC Tax Review 1 (2000), p. 39.

<sup>52</sup> The treaty was concluded between Hungary, Italy, Poland, Romania, and the former Yugoslavia.

<sup>53</sup> See, for instance, Loukota, H., Multilateral Tax Treaty versus Bilateral Treaty Network in Lang, M et al. (eds), *Multilateral Tax Treaties: New Developments in International Tax Law*, Series on International Taxation, vol. 18, pp. 86-103, K. Brooks, *The Potential of Multilateral Tax Treaties in Tax Treaties: Building Bridges between Law and Economics* (M. Lang et al. eds., IBFD 2010), Books IBFD, P. Baker, *Multilateral Tax Treaties*, 75 Bull. Intl. Taxn. 11/12 (2021), Journal Articles & Opinion Pieces IBFD, and C. West, *Regional Double Tax Treaty Models*, in F. Haase and G. Kofler (eds), *The Oxford Handbook of International Tax Law*, Oxford University Press, 2023.

still be used as a template for the negotiation of multilateral tax treaties.<sup>54</sup> However, and since then, the multilateral alternative has not made its way in the design of models. In fact, there are currently no multilateral models from international organisations and, as a consequence, “multilateral treaties are, of course, not all cast in the same mould”.<sup>55</sup>

In the framework of the Latin-American Institute of Tax Law,<sup>56</sup> a federation of tax professionals’ associations, there was an initiative to draft a multilateral treaty model: the ILADT multilateral model.<sup>57</sup> Regarding other income, the main distinctive feature of this model is the inclusion of a definition of “other income” in the definitions’ provision. Such a definition appears to broaden the scope of the provisions since it refers to revenue (“ingreso” in the original) and not to income (“renta” in the original), even if the authors decided to continue to label the provision (and the definition) as “other income” and not “other revenue”.

The other income provision appears in Art. 11 and does not recover the concept of revenue, applying solely to income. In any case, this clause does not deviate significantly from the OECD model, apart from: i) referring to income arising in the contracting states instead of covering income “wherever arising”; ii) the permanent establishment exception includes immovable property income, allowing the state where such permanent establishment is located to tax such income; this is consistent with the general approach to the taxation of permanent establishments, which lacks the limitation of Art. 7(4) of the OECD model; accordingly, items of income effectively connected with a PE, even if addressed by other allocation rules, are taxable as income attributable to the PE.

The commentaries of this article clarify that this should be understood as a residual clause applicable for items of income not covered by the remaining allocation rules. It also clarifies that it should be autonomously interpreted, bearing no relation with eventual other income classifications under each country’s domestic law.

Anyhow, this model – not originated from intergovernmental or international organisations – is outside this study's scope.

In the following segments, we will address multinational treaties, covering both those in force and those that are not yet in force but waiting for ratification or other formality. Terminated treaties or those no longer expected to enter in force are excluded from the scope.

### **3.2 Multilateral treaties**

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<sup>54</sup> R. Vann, A Model Tax Treaty for the Asia-Pacific Region, Legal Studies Research Paper, n. 10/122, Sydney Law School, 2010, p. 26.

<sup>55</sup> N. Mattsson, “Multilateral Tax Treaties – A Model for The Future?” 28 Intertax 8/9, 2000, p. 301.

<sup>56</sup> In the original, Instituto Latino Americano de Derecho Tributário.

<sup>57</sup> Available at: [https://research.ibfd.org/collections/ttmodel/pdf/tt\\_iladt\\_02\\_eng\\_2012\\_mo.pdf](https://research.ibfd.org/collections/ttmodel/pdf/tt_iladt_02_eng_2012_mo.pdf).

### 3.2.1 Arab Economic Union Council multilateral treaty (1973)

The Council of Arab Economic Unity was constituted by the “Economic Unity Agreement”, signed on 3 June 1957 and is formed by Egypt, Iraq, Jordan, Kuwait, Libya, Mauritania, Palestine, Saudi Arabia, Sudan, Tunisia, Syria, United Arab Emirates and Yemen.

The Arab Economic Union Council Income and Capital Tax Treaty (hereinafter Arab Union multilateral treaty) was concluded on 3 December 1973, and entered into force on 13 July 1975.

Despite adopting a structure similar to the 1963 draft OECD Convention,<sup>58</sup> this treaty does not include a other income clause (nor a clause with a similar function). In fact, Art. 2 contains an exhaustive list of the “sources” of income to which the convention applies,<sup>59</sup> which leaves out certain types of (usually specifically addressed) items of income. Accordingly, other (and non-covered) income falls outside the convention's scope and may be unrestrictedly taxed by any of the contracting states.

### 3.2.2 COMECON income and Capital Tax Treaty for individuals (1977)<sup>60</sup> and companies (1978)<sup>61</sup>

COMECON stands for Council for Mutual Economic Assistance, which was constituted in January 1949 to facilitate and coordinate the development of the Eastern European countries forming part of the Soviet block. This organisation developed two multilateral treaties, one for income derived from individuals in 1977 and another for income derived by companies in 1978. In both cases, the original parties of these treaties were Bulgaria, Czechoslovakia, Hungary, German Democratic Republic, Mongolia, Poland, Romania, and the USSR. Both are still in force between certain states (and successors of those states).<sup>62</sup>

The COMECON Income and capital tax treaty applicable to individuals (hereinafter COMECON multilateral treaty for individuals) was concluded on 27 May 1977 and entered into force on 1 January 1979.

The COMECON Income and Capital Tax Treaty applicable to companies (hereinafter COMECON multilateral treaty for companies) was concluded on 19 May and

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<sup>58</sup> OECD Draft Tax Convention on Income and on Capital (30 July 1963), Treaties & Models IBFD.

<sup>59</sup> Covering agricultural land, built-up property, industrial and commercial profits, interest on capital (debts, deposits, bonds, etc), dividends, profits of liberal professions, salaries and wages of various types and capital taxation on estates, wills and grants.

<sup>60</sup> The full text of the treaty is available at: [https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt\\_c2\\_02\\_eng\\_1977\\_tt\\_td1.html](https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_c2_02_eng_1977_tt_td1.html).

<sup>61</sup>

<sup>62</sup> For an updated overview of the states to which each one of the multilateral treaty applies, see the IBFD tax research platform (links provided supra in n. and ).

entered into force on the same date as the treaty applicable to individuals, i.e. 1 January 1979.

Both conventions were designed to be applicable on a subsidiary basis, without repealing or overriding existing or future bilateral agreements between the signatories.<sup>63</sup> They only apply to specific items of income, such as employment income (in the case of individuals) and business profits and income from immovable property (in the case of companies). Accordingly, some items of income are not covered, and intentionally, no other income clause is included. Contracting states may freely exercise their taxing rights regarding all income not covered in the (few) treaties' allocation rules.

### 3.2.3 Arab Maghreb Union Income Tax Convention (1990)<sup>64</sup>

The Arab Maghreb Union was instituted by the Treaty of Marrakesh, signed on 17 February 1989. It is formed by Algeria, Libya, Mauritania, Morocco and Tunisia.<sup>65</sup>

The "Convention for the Avoidance of Double Taxation and Mutual Assistance with respect to Taxes on Income between the States of the Arab Maghreb Union" (hereinafter Arab Maghreb Multilateral treaty), was concluded on 23 July 1990 and entered into force on 14 July 1993. All members forming part of the Union signed this multilateral treaty.

Other income is addressed explicitly in Art. 22, stating:

"Items of income of a resident of a Contracting State not expressly dealt in the foregoing Articles of this Agreement shall be taxed only in that State unless such items relate to the business of a permanent establishment that the beneficiary has in the other Contracting State. In the later case, those items of income are subject to tax in the other Contracting State."

This clause blends the two paragraphs of the OECD model convention with some deviations: i) does not include the expression "wherever arising"; ii) does not clarify whether the permanent establishment income is taxable under the provisions for business profits or under the domestic law; iii) does not exclude immovable property income from the income attributable to the PE.

In conclusion, this treaty allows for source taxation but is limited to the income of a permanent establishment located in the jurisdiction.

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<sup>63</sup> See Art. VII of the COMECON multilateral treaty of individual, and Art. IX of the COMECON multilateral treaty for companies

<sup>64</sup> The full text in Arabic is available at: [https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt\\_a3\\_01\\_ara\\_1990\\_tt\\_td1.html](https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_a3_01_ara_1990_tt_td1.html).

<sup>65</sup> One should note that the Union may not be fully functioning since there is no public information about any high-level meeting taking place after 2008.

### 3.2.4 CARICOM Multilateral treaty (1994)<sup>66</sup>

The CARICOM, the Caribbean Community and Common Market, was established by the Treaty of Chaguaramas in 1973. It was concluded by the following countries: Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Christopher (St Kitts) and Nevis, St Lucia, St Vincent and Grenadines, Trinidad and Tobago.

The “Agreement Among the Governments of the Member States of the Caribbean Community for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income, profits or gains and capital gains and for the encouragement of regional trade and investment” (hereinafter CARICOM multilateral treaty), was concluded on 6 July 1994 and entered into force on 30 November 1994 between all members of the Community.

There is no other income provision. However, Article 5 on “Tax Jurisdiction” performs a similar function. According to the provision:

“Irrespective of the nationality or State of residence of a person, income of whatever nature accruing to or derived by such person shall be taxable only by the Member State in which the income arises, except for the cases specified in this Agreement.”

At odds with the OECD model convention, this treaty affirms the source state's primacy in taxing income, which will necessarily cover income not covered by specific treaty provisions. Residency may only tax when a specific provision in the convention allows for it. This exclusive source taxation of other income prevents double taxation without needing to apply the treaty relief clause.

This option coincides with Art. 4 of the Andean Community Multilateral Treaty of 1971, which was replaced by another multilateral treaty in 2004<sup>67</sup> (addressed in the following section). It is quite interesting to note since it represents a radical deviation from the global models (which do neither include a “tax jurisdiction” clause nor grant exclusive taxing rights to source, in what concerns other income).

### 3.2.5 Andean Community multilateral treaty (2004, replacing the 1971 treaty)<sup>68</sup>

The Andean Community was already addressed supra when covering its bilateral model.

The “Regime for the avoidance of Double Taxation and the prevention of fiscal evasion” (hereinafter Andean Community Multilateral Treaty), was adopted by decision

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<sup>66</sup> The full text is available at: [https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt\\_c1\\_01\\_eng\\_1994\\_tt\\_td1.html](https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_c1_01_eng_1994_tt_td1.html).

<sup>67</sup> Which kept the same wording, now in Art.

<sup>68</sup> The full text is available at: [https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt\\_bo-co-ec-pe\\_02\\_eng\\_2004\\_tt\\_td1.htm.l](https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_bo-co-ec-pe_02_eng_2004_tt_td1.htm.l)

578 of the Commission of the Andean Community of 4 May 2004. It replaced the previous treaty, adopted by the supra-mentioned Decision 40 of the Commission of the Cartagena Agreement of 16 November 1971.<sup>69</sup> The treaty applies to the members of the Community.<sup>70</sup>

Both the 1971 and the 2004 multilateral treaties are devoid of a specific other income clause. However, they include a tax jurisdiction clause in Art. 3,<sup>71</sup> identical to the one included in the model bilateral treaty, referred supra. The provision has the following wording:

“Irrespective of the nationality or residence of the persons, such income of any kind as they may obtain shall be taxable only in the Contracting State where the source of production of that income is located, save in the exceptional cases provided for in this agreement.”

Source of production is (also similarly to the bilateral model) defined as referring to “the activity, right or good that produces or that could produce income.”.

This treaty grants, by default, exclusive taxing rights to source. Residency is only allowed to tax whenever a specific treaty provision foresees it. Double taxation is prevented from the offset, which concerns other income, only source can exercise taxing rights.

### 3.2.6 SAARC treaty (2005)<sup>72</sup>

The South Asian Association for Regional Cooperation (hereinafter SAARC) was established on 8 December 1985 and comprises eight member countries: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.

The “South Asian Association for Regional Cooperation Limited Multilateral Agreement on Avoidance of Double Taxation and Mutual Administrative Assistance in Tax Matters” (hereinafter SAARC multilateral treaty) was concluded on 13 November 2005. The agreement applies to all member states apart from Afghanistan.<sup>73</sup> This agreement is not aimed at being applied subsidiarily. In fact, and according to the Protocol of the same date in case of conflict between the multilateral treaty and another treaty, “the provisions of the Agreement signed or amended at a later date shall prevail.”.

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<sup>69</sup> See supra n. 10. The previous multilateral convention of 1971, no longer in force, is available at: [https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt\\_bo-co-ec-pe\\_02\\_eng\\_1971\\_tt\\_td1.html](https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_bo-co-ec-pe_02_eng_1971_tt_td1.html).

<sup>70</sup> At the moment of the adoption of the decision, Venezuela was a member of the Andean Community. It withdrew from the Community two years later, in 2006.

<sup>71</sup> Art. 4 in what concerns the 1971 version.

<sup>72</sup> The full text of the treaty is available at: [https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt\\_saa\\_13\\_eng\\_2005\\_tt\\_td1.html](https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_saa_13_eng_2005_tt_td1.html).

<sup>73</sup> Despite joining the Association in 2005 as likely it had not participated in the negotiation and drafting of this multilateral treaty.

Despite including some allocation rules<sup>74</sup>, the treaty mostly focuses on mutual assistance between competent authorities.<sup>75</sup> Unsurprisingly, it does not include an other income provision. Therefore, all signatories may tax any item of income not covered by the treaty without any restriction, and the treaty will never affect any other (bilateral or multilateral) other income provision included in a treaty since it will never conflict with it.

### **3.2.7 West African Economic and Monetary Union Income Tax Agreement (2008)<sup>76</sup>**

The West African Economic and Monetary Union was established by a Treaty signed in Dakar, Senegal, on 10 January 1994. It comprises eight West African states: Benin, Burkina Faso, Ivory Coast, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

The “Rules for the avoidance of double taxation within the West African Economic and Monetary Union” (hereinafter West African Multilateral Rules) were adopted by Regulation 08/2008/COM/WAEMU of 26 September 2008.

There is a specific provision on other income, in Art. 22. The first paragraph merely reproduces the first paragraph of the 1963 draft OECD model<sup>77</sup> and sets the exclusive residency rule. The second paragraph is the PE exception. It closely follows the global models (OECD and UN) but is closer to the UN since it exceptions from that exception both income attributable to a permanent establishment and to a fixed base. The state of the location of the permanent establishment or fixed base may tax income attributable to them insofar as located in their jurisdiction. In case of double taxation, relief in the form of an ordinary tax credit is available.<sup>78</sup>

### **3.2.8 The East African Community Income Tax Treaty (2010, replacing the 1997 one)<sup>79</sup>**

The East African Community was mentioned supra when addressing its bilateral model.

The “Agreement between the Governments of the Republics of Kenya, Uganda, Burundi, Rwanda and the United Republic of Tanzania for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to income” (hereinafter East

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<sup>74</sup> Namely regarding income of Professors, teachers, research scholars and students.

<sup>75</sup> The title of the convention indicates that it is a “Limited Multilateral Agreement”.

<sup>76</sup> The full text of the treaty is available at: [https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt\\_w1\\_04\\_eng\\_2008\\_tt\\_td1.html](https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_w1_04_eng_2008_tt_td1.html).

<sup>77</sup> And, comparing to the current version of such model, there is no reference to income “wherever arising”.

<sup>78</sup> See Art. 23 of the Rules.

<sup>79</sup> The 2010 version of the treaty is available at: [https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt\\_e4\\_01\\_eng\\_2010\\_tt\\_td1.html](https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_e4_01_eng_2010_tt_td1.html). The prior version, of 1997, which also never entered into force is available at: [https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt\\_e4\\_01\\_eng\\_1997\\_tt\\_td1.html%23tt\\_e4\\_01\\_eng\\_1997\\_tt\\_td1\\_a29](https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_e4_01_eng_1997_tt_td1.html%23tt_e4_01_eng_1997_tt_td1_a29).

African Community Multilateral Treaty) was concluded on 30 November 2010 by the countries mentioned in the title of the convention. It has been only ratified by two countries,<sup>80</sup> not yet entered into force. It replaces a multilateral treaty between the same countries, concluded on 28 April 1997, which also never entered into force.

The 2010 multilateral treaty includes an other income provision which mainly reproduces the UN model convention. The most significant deviation is the inclusion of a subject-to-tax clause in paragraph one. Accordingly, the benefits of exclusive residency taxation are only available to taxpayers subject to tax on that item of income at residency. In any case, income sourced in the other state may always be taxed in this state. Double taxation emerging from the cumulative exercise of taxing rights may be relieved by claiming the treaty's relief provision.<sup>81</sup>

It should be noted that the convention's drafters radically changed their views between 1997 and 2010. The first version (1997) mostly reproduced the OECD model, with exclusive residency taxation giving place to shared taxing rights for income attributable to permanent establishments.

### **3.2.9 Pacific Alliance Convention (2017)**

The Pacific Alliance is an intergovernmental organisation constituted by the Lima Declaration, signed on 28 April 2011. The founding members were Chile, Colombia, Peru, and Mexico. It aims at promoting regional integration, economic cooperation and political dialogue.

The "Convention for the homologation of the tax treatment foreseen in the conventions to avoid double taxation subscribed between the states forming part of the Framework Agreement of the Pacific Alliance"<sup>82</sup> (hereinafter Pacific Alliance Multilateral Treaty) was signed on 14 October 2017 and entered into force on 2 July 2023.

It is designed to amend the listed covered agreement on a multilateral basis and regarding specific clauses without repealing such treaties. Accordingly, and unsurprisingly, this treaty does not count with an other income clause.

### **3.2.10 The Nordic tax convention (2018 amending the 1983, 1987, and the 1997 one)**

The Nordic Council was created as a consultative parliamentary body on 15-16 March 1952 by Denmark, Iceland, Norway, and Sweden. It now also comprises another

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<sup>80</sup> By Rwanda on 7 June 2012 and by Kenya on 10 October 2014.

<sup>81</sup> Art. 24 of the Convention, which provides for an ordinary tax credit.

<sup>82</sup> Translation from the original: "Convención para homologar el tratamiento impositivo previsto en los convenios para evitar la doble imposición suscritos entre los Estados parte del acuerdo marco de la Alianza del Pacífico".

state (Finland), two autonomous territories (Faroe Islands and Greenland) and one autonomous region (Åland).

Denmark, Faroe Islands, Finland, Iceland, Norway and Sweden Income and Capital Tax Convention (hereinafter Nordic Multilateral Convention) was concluded on 23 September 1996 and amended in 2018. It applies to the jurisdictions mentioned in the name of the convention.<sup>83</sup>

The treaty includes an other income convention in its Art. 22, which is mainly a reproduction of the other income provision of the OECD model. The main deviation is the extension of the Permanent Establishment exception to fixed bases as the treaty continues to include a personal independent services provision.

#### 4. Conclusions

A careful analysis of the models and multilateral treaties allows the extraction of several interesting conclusions.

As noted by West, “regional tax treaty models are not as pervasive as one may anticipate”.<sup>84</sup> The lack of periodic revision may deem them as outdated by treaty negotiators. Most regional models simply incorporate the UN Model provision or adopt a wording leading to a similar interpretative result. The most noticeable deviation is the Andean Community bilateral model which proposes a “tax jurisdiction” provision. Notwithstanding, such rule is not incorporated in bilateral treaties signed by those jurisdictions.<sup>85</sup>

A reduced number of treaties opts for adopting (or publishing) their own models. This is somehow surprising since, in the words of Pickering, “all countries would find it beneficial to develop a tax treaty policy framework and a model treaty before entering into negotiations. You have to ‘know what you want’”.<sup>86</sup> Each country includes, in such model, the policy option that it considers generally the most appropriate even if one cannot exclude that the model is deviated taking into account the macro-economic position or the domestic law of the other contracting state. It is interesting to note that countries include policy options that are not registered as reservations or positions to

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<sup>83</sup> For an analysis of prior versions of the Nordic Convention see N. Mattsson, “Multilateral Tax Treaties – A Model for The Future?” 28 *Intertax* 8/9, 2000, M. Helminen, *The Nordic Multilateral Tax Treaty as a Model for a Multilateral EU Tax Treaty* (IBFD 2014), Books IBFD, and O. Hengsle, *The Nordic Multilateral Tax Treaties – For the Avoidance of Double Taxation and on Mutual Assistance*, 56 *Bulletin for International Taxation* 8,.

<sup>84</sup> C. West, *Regional Double Tax Treaty Models*, in F. Haase and G. Kofler (eds), *The Oxford Handbook of International Tax Law*, Oxford University Press, 2023, p. 469.

<sup>85</sup> One should note that, among these countries, such rule applies but due to adoption of the Andean Community Multilateral Treaty.

<sup>86</sup> See A. Pickering, *Tax Treaty Policy Framework and Country Model*, *Papers on Selected Topics in Negotiation of Tax Treaties for Developing Countries*, Paper n.º 2-N, United Nations – Department of Economic and Social Affairs, May 2013, p. 3.

the OECD Model Convention (even if, as in the case of The Netherlands, countries are part of the OECD).

Multilateral treaties are advantageous since, with a single instrument,<sup>87</sup> jurisdictions are able to regulate the allocation of taxing rights between several countries. Notwithstanding, and unlike other normative areas, they are still not prevalent for the allocation of taxing rights or, more broadly, in international tax matters.<sup>88</sup> Multilateral treaties solve many issues that the coexistence of several bilateral treaties create, in practice.<sup>89</sup>

However, they are not exempt of risks. Among others, the risk of overlaps: i) with other bilateral treaties, subscribed by parties to that multilateral treaty; ii) with other multilateral treaty. The research evidence *supra* shows that two multilateral instruments overlap. Both the Arabic Economic Union Multilateral treaty and the Arab Maghreb Union Multilateral treaty cover Libya, Mauritania and Tunisia. In what concerns other income, no interpretative issues arise since the first treaty does not include any provision on such item. It is beyond the scope of this research to deal with the overlap in what concerns other items of income or, more in general, the relationship between two public international law instruments, of different dates. In any case, this example provides a good illustration of the challenges brought by multilateral instruments, if coordination is not adequate.

As evidenced, the multilateral treaties have two alternatives to allocate “other income”. The first, is to allocate it through a catch-all clause, such as proposed by the OECD model. The other, is to establish a fundamental principle or right to tax, allocated to a Contracting State, which would be then overridden by the specific allocation rules.<sup>90</sup> These two fundamental ways of addressing income not included in specific allocation rules was already discussed in the working groups responsible for the 1963 Draft.<sup>91</sup> If the provisions are comprehensively drafted (i.e. do not include any exclusions), then the two clauses may lead to the same result.<sup>92</sup> Differences may arise (and do arise) when the “other income” article is subject to any restriction: that being the case, items of income will not be considered as taxed in accordance with the provisions of the Convention and, accordingly, treaty relief will not be available. Besides those two alternatives, a significant number of multilateral treaties do not include the other income provision.

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<sup>87</sup> And a single negotiation process.

<sup>88</sup> K. Brooks, *The Potential of Multilateral Tax Treaties in Tax Treaties: Building Bridges between Law and Economics* (M. Lang et al. eds., IBFD 2010), Books IBFD, sec. 1.

<sup>89</sup> On the advantages of multilateralism see G. Sanchez-Archidona Hidalgo, “Reflections on Multilateral Tax Solutions in a Post-BEPS Context” (2017) 45 *Intertax* 11, p. 741.

<sup>90</sup> For an historical assessment of these alternatives see D.A. Ward et al., *The Other Income Article of Income Tax Treaties*, *Brit. Tax Rev.*, at 352, 382 (1990).

<sup>91</sup> 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.

<sup>92</sup> Even if differences may arise depending on whether treaties may be considered as applicable to income “wherever arising”.

As regards other income, there are clear regional preferences.

Latin America, and more particularly the Andean Community, has a clear preference for exclusive source taxation (Andean community model and the Andean community multilateral treaty). The Pacific Alliance treaty does not include the other income provision. This preference is also visible in this region's bilateral tax treaty practice. It is not uncommon that the full tax treaty network of countries from this region provide source state taxing rights.<sup>93</sup>

Africa (if we exclude Arabic countries) has a clear preference for the UN version,<sup>94</sup> allowing source taxing rights. The sole exception is the West Africa Multilateral Treaty, which adopts the exclusive residency taxation rule but is limited to the cases in which the income is effectively taxed at residency, with the sole PE exception). Thus, the rule cannot be exploited for instances of double non-taxation. It is interesting to note that Mauritius had formulated a reservation to draft 2019 ATAF model, expressing its preference for an OECD-patterned other income provision. Nevertheless, such reservation was removed in the final version of the 2019 ATAF model.<sup>95</sup>

Regarding Asian countries, the other income clause is only found in the ASEAN model, which also follows the UN provision, allowing source taxing rights.

A trend concerning Arabic countries is difficult to identify since the clause was only identified in the Arab Maghreb multilateral treaty, which opts for the exclusive residency model, with the PE exception (as in the OECD Model).

In North America, we could only find the US model, which mostly follows the OECD approach, apart from a deviation mainly for expatriated entities. Further down, in the Caribbean region, exclusive residency taxation is preferred for other income,

In Europe, it is not possible to identify a clear trend. The only multilateral treaty in force is the Nordic Convention, which follows the OECD model, an approach which Germany also follows. However, three national models from developed countries (namely Belgian, the Netherlands and Russia) prefer shared taxing rights. Which is somehow surprising since two of those countries are members of the OECD and have not formulated observations or reservations regarding the other income provision. One wonders why an OECD member state strongly prefers a certain rule that does not match the OECD provision and, even so, does not include any observation to the commentaries or reservation to the model.

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<sup>93</sup> This is, for instance, the case of Panama. See K. Bieberach Schriebl & J. Galindez, Panama - Global Tax Treaty Commentaries: Country Policy & Practice, Country Tax Guides IBFD, sec. 22.1.

<sup>94</sup> Or, in the expressive words of West, "the African regional models universally utilize the wording of the UN MC". See C. West, Regional Double Tax Treaty Models, in F. Haase and G. Kofler (eds), The Oxford Handbook of International Tax Law, Oxford University Press, 2023, p.466.

<sup>95</sup> C. West, Emerging Treaty Policies in Africa – Evidence from the African Tax Administration Forum Models, 75 Bull. Intl. Taxn. 1 (2021), Journal Articles & Opinion Pieces IBFD, p. 21.

The analysis of both models and multilateral treaties clearly shows the global models' impact.<sup>96</sup> Despite not being obliged to follow any of the global models, the regional models and multilateral treaties typically follow one of them. As noted by West, “there remains no obvious coordination in respect of treaty policy in economic regional groupings”.<sup>97</sup> This may have several explanations: i) the limited choices that countries have in what concerns other income; ii) the limited relevance of the income falling within that residual allocation rule (which can be seen as a residual amount); iii) a conscient choice for using a wording for which there are commentaries and case law, which provides support for tax authorities and courts in interpreting the provision (avoiding the added hidden costs of interpreting non-normalised provisions).

In a different contribution, the author has performed an empirical analysis of bilateral treaties in force and identified several normative profiles used in practice. One could assume that those (deviating) normative profiles used in treaty practice would resurface in regional and country models. However, as the previous chapters show, this is not the case, with the global model provisions being adopted in the overwhelming majority of models and multilateral treaties.

Interestingly, none of the models put forward formulas allowing for a strengthening the application of the other income provision, namely: i) requiring the recipient to be the beneficial owner of the income (even when the income is received by a permanent establishment or fixed base); ii) disregarding payments from transparent entities; iii) subjecting the treaty benefits to a subject to tax clause, avoiding double non-taxation; iv) not including a main purposes test (even if, most of the models do not include a general provision against avoidance).

Regional and country models are less frequently updated than global models. This may explain why countries of a certain region (or specific countries) at a certain point decide to stop following their model (as evidenced for the Netherlands) and decided to follow other models. In practice, treaty negotiators of a certain country may adopt an informal version of their country's model, even if that version is never (officially) published.

The conclusions presented offer an opportunity for follow-up research. One could assess the effective impact of a model (either from an international organisation or a country), empirically assessing whether the recommendations are effectively followed in treaty networks, including those countries. It would also be interesting to evaluate if there is a noticeable change in treaty practice as of the moment that a model is released. In any case, the unsurprising empirical conclusion of the divorce between models and practice shouldn't discourage regional or domestic models. On the contrary, one should stress the importance of further aligning models with practice (and

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<sup>96</sup> Global models understood as the OECD and the EU one.

<sup>97</sup> C. West, *Emerging Treaty Policies in Africa – Evidence from the African Tax Administration Forum Models*, 75 *Bull. Intl. Taxn.* 1 (2021), *Journal Articles & Opinion Pieces IBFD*, p. 24.

interests) of the countries that form part of such regions / organisations, allowing for a more streamlined negotiation and interpretation of tax treaties.