

# Brazil's Treaty Policy

**The author, in this article, considers Brazil's treaty policy as it has developed over time, with special reference to the influence of the OECD Model and the UN Model on this policy.**

## 1. The Chronology of Brazil's Tax Treaties

Brazil started concluding tax treaties in the 1960s. The first tax treaty to become effective was the Brazil-Japan Income Tax Treaty (1967).<sup>1</sup> Most of the tax treaties that Brazil had concluded at the time of writing this article, i.e. 21 out of 32 tax treaties, were signed when the OECD Draft (1963)<sup>2</sup> and the OECD Model (1977)<sup>3</sup> applied. Ten tax treaties were also concluded before the UN Model (1980)<sup>4</sup> was issued.

## 2. Why Did Brazil Start Signing Tax Treaties?

Until *Lei* (Law) 9,249/1995,<sup>5</sup> Brazil levied corporate income tax on a territorial basis. Worldwide taxation for legal entities was established for the first time by article 25 of Law 9,249/1995, which became effective on 1 January 1996. Consequently, as noted by De Andrade (2008), most of the concluded tax treaties were signed when Brazil was still a territorial jurisdiction for corporate income taxation purposes.<sup>6</sup>

Given this history, it is fair to ask what was Brazil's motivation to start negotiating and concluding tax treaties before 1996, as tax treaties would only limit Brazil's source taxation. In this respect, it can be argued that the avoidance of double taxation is only one of the objectives of tax treaties. Tax treaties are, however, also intended to promote trans-

parency by way of the exchange of information, to deal with international tax evasion and aggressive tax planning, etc.<sup>7</sup> It is, therefore, possible to counter the initial argument advanced by stating that these additional objectives of tax treaties have become more important recently than they were in the 1960s, 1970s and 1980s.

Schoueri (2002) refers to the apparent paradox of a territorial state concluding tax treaties in stating that:

The signing of a double tax convention would only be justified – considering the perspective of pure territoriality – if it brought any advantage to the country where the investments were located [Brazil].<sup>8</sup>

As Schoueri (2002) correctly concluded, the primary justification for Brazil concluding tax treaties when it was a territorial jurisdiction was to incentivize foreign investment into the country.<sup>9</sup>

This opinion, i.e. that Brazil's objective in concluding tax treaties was to incentivize foreign investment, is corroborated by Dornelles (1978), according to whom:

It is not possible to guarantee that such conventions will channel more investments from these countries [Brazil's treaty partners] to Brazil. However, it is possible to affirm with all certainty that without the conventions, residents of these countries would not invest in Brazil.<sup>10</sup>

The reason behind the conclusion of Dornelles (1978) was that many countries did not have domestic regulations permitting the offset of foreign tax credits in the absence of a tax treaty. As a result, in such circumstances, double taxation would arise and would have a very negative effect on foreign direct investment.

The opinion of Dornelles (1978) is firsthand testimony regarding the history of Brazil's first tax treaties, as he was the President of the Commission on International

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1. *Convention between Japan and the Federative Republic of Brazil for the Avoidance of Double Taxation with Respect to Taxes on Income* (24 Jan. 1967), Treaties IBFD [hereinafter: the *Braz.-Jap. Income Tax Treaty* (1967)]. As a matter of historical fact, the first tax treaty that Brazil signed was the *Agreement between Sweden and Brazil for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital* (17 Sept. 1965) [hereinafter: the *Braz.-Swe. Income and Capital Tax Treaty* (1965)]. However, the *Braz.-Swe. Income and Capital Tax Treaty* (1965) never entered into force and was replaced entirely by the *Convention between Sweden and Brazil for the Avoidance of Double Taxation with Respect to Taxes on Income* (25 Apr. 1975), Treaties IBFD. With regard to the *Braz.-Swe. Income and Capital Tax Treaty* (1965), see G. de Ulhôa Canto & S.F.W. Bille, *The Tax Convention between Brazil and Sweden with Brazilian and Swedish Commentaries* (IBFD 1968).
2. *OECD Draft Tax Convention on Income and on Capital* (30 July 1963), Models IBFD.
3. *OECD Model Tax Convention on Income and on Capital* (11 Apr. 1977), Models IBFD.
4. *UN Income and Capital Model Convention* (1 Jan. 1980), Models IBFD.
5. BR: *Lei* (Law) 9,249/1995 of 26 December 1995.
6. A.M. de Andrade, *A Tributação Universal da Renda Empresarial: Uma Proposta de Sistematização e uma Alternativa Inovadora* pp. 188-189 (Editora Fórum 2008).

7. S.A. Rocha, *Interpretation of Double Tax Conventions: General Theory and Brazilian Perspective* pp. 6-18 (Kluwer L. Intl. 2009).
8. L.E. Schoueri, *Contribuição à História dos Acordos de Bitributação: a Experiência Brasileira*, 22 *Revista Direito Tributário Atual*, p. 268 (2002). This and all subsequent translations of Portuguese into English are the author's free and/or unofficial translations. See also K. Brooks, *International Tax Policy: The Counter-Story Presented by the BRICS*, in *BRICS and the Emergence of International Tax Coordination* sec. 16.2 p. 451. (Y. Brauner & P. Pistone eds., IBFD 2015), Online Books IBFD.
9. F. Barthel et al., *The Relationship between Double Taxation Treaties and Foreign Direct Investment*, in *Tax Treaties: Building Bridges between Law and Economics* sec. 2.1. (M. Lang et al. eds., IBFD 2010), Online Books IBFD further argue that, in general, the main reason for capital-importing countries to conclude tax treaties, regardless of their system being territorial or based on worldwide taxation, is because "[t]hey believe entering into treaties will make them a more attractive jurisdiction for inward FDI". See also W. Ngantung, *Tax Treaties and Developing Countries, Tax Policy Challenges in the 21st Century* p. 539 (R. Petruzzi & K. Spies eds., Linde 2014).
10. F.N. Dornelles, *Acordos para Eliminar a Dupla Tributação da Renda*, 3 *Revista de Direito Tributário*, p. 254 (1978). See also A. de Moura Borges, *Convenções Sobre Dupla Tributação Internacional* p. 146 (EDUFPI 1992).

Tax Studies of the Ministry of Finance from 1972 to 1980. In this role, Dornelles was the chief negotiator in respect of the tax treaties that Brazil concluded with Austria, Belgium, Canada, Denmark, Finland, France, Japan, Luxembourg, Norway and Spain. He was also a member of the group of experts that drafted the UN Model (1980).

Consequently, the major objective of the tax treaties that Brazil has concluded in the era of territorial taxation, and, perhaps, even to date, was to incentivize foreign investment.<sup>11</sup> This is one of the reasons for the inclusion of tax sparing provisions in all of the tax treaties concluded by Brazil with developed countries in this period. In this regard, Dornelles (1978) stated that:

Double tax conventions between developed and developing countries must include clauses destined to incentivize investment and to create conditions that will lead developed countries to allow their residents' income earned from developing countries to have lower taxation than income earned within their territory. This is the purpose of tax exemption and tax sparing.<sup>12</sup>

The use of tax sparing provisions was an instrument to counter the situation whereby the limitation of Brazil's source taxation, as a consequence of a tax treaty, could be nullified by residence state taxation.

The comments of Dornelles (1978) and Schoueri (2002) are confirmed by the justification of the Brazil-Japan Income Tax Treaty (1967) as presented to Brazilian President of the Republic by the Minister of Foreign Affairs on 5 May 1967, from which the following paragraphs are extracted:

In line with the measures that the Government has been taking to create more favourable conditions in Brazil to attract foreign investments and discipline the taxation of income from such investments, negotiations were conducted with the Japanese Government aiming to conclude an agreement between Brazil and Japan to avoid double taxation of income.

Double tax conventions are among the international instruments of finance and economic character of great importance. As recognized by the United Nations Conference on Commerce and Development, they are effective instruments to remove or reduce fiscal barriers that are impediments to the international flow of investments.

On the Brazilian side, the national economic scenario, free from the distortions of past periods, translate proper conditions for the country's balanced and harmonic economic development. In this context, the Brazilian Government has become aware that – to obtain a volume of investment compatible with its needs for growth – foreign investments, public or private, are indispensable. Such investment could come as direct investment per se or via know-how and technical assistance...<sup>13</sup>

11. Writing many decades ago regarding tax treaties between developed and developing countries, K. Vogel, *A Importância do Direito Tributário Internacional para os Países em Desenvolvimento*, in *Princípios Tributários no Direito Brasileiro e Comparado* p. 487 (A. Toffoli Tavoraro, B. Machado & I.G. da Silva Martins eds., Forense 1988) noted that, despite the fact that international investment decisions are not driven exclusively by tax reasons, the concluding of a tax treaty could have a positive effects in this respect.

12. Dornelles, *supra* n. 10, at p. 251.

13. BR: *Exposição de Motivos do Ministro das Relações Exterior ao Presidente da República* (Justification from the Foreign Affairs Minister to the President of the Republic Regarding Brazil-Japan Treaty) pp. 1-2 (1967).

These paragraphs reinforce the concept that Brazil's major objective in concluding tax treaties was, then, to encourage foreign investment.

This article focuses on Brazil's international treaty policy. However, it cannot really be said that Brazil has a tax policy that is completely disconnected from a larger economic policy.<sup>14</sup> Consequently, it is instructive to note how Brazil's treaty policy in this period was guided by the broader economic policies of the ruling military regime.<sup>15</sup>

In fact, the *Programa de Ação Econômica do Governo* (Government Programme of Economic Action, PAEG) was enacted under President Castelo Branco, who was the first president of the military dictatorship that ruled Brazil between 1964 and 1985. One of the objectives of the PAEG was to provide:

stimulus to the inflow of foreign capital and active technical and financial cooperation with international agencies, governments, and in particular the multilateral system Alliance for Progress, aiming at accelerating the economic development.<sup>16</sup>

From 1967 to 1974, Brazil enjoyed a period known as "an economic miracle", during which the country experienced years of high growth. One of the reasons for this was foreign direct investment, which significantly increased.<sup>17</sup> Consequently, according to Hermann (2011):

The strong economic growth in Brazil between 1968 and 1973 also reflected a strong inflow of capital to the country. Foreign direct investment – directly applied to the production of goods and services – and foreign loans increased significantly in this period.<sup>18</sup>

The pursuit of foreign direct investment by concluding tax treaties was not an isolated effort. It was part of a larger policy objective for Brazil.

This could explain why the first tax treaties that Brazil concluded were approved so quickly. A review of the chronology of Brazil's tax treaties reveals that, until the end of the military dictatorship in 1985, tax treaties were usually approved within one year of being signed.

Such a situation could be explained by the fact that, as previously noted in this section, concluding tax treaties was an integral part of Brazil's economic policy during this period and by the fact that, in a dictatorship, the priorities of Congress were established by the executive.<sup>19</sup>

14. In this context, reference should be made to R.G. de Souza, *As Modernas Tendências do Direito Tributário*, 74 *Revista de Direito Administrativo*, p. 2 (1963), who was one of Brazil's first tax scholars, when he stated that there is no such a thing as "tax policy". In De Souza's view, there is only economic policy that translates into tax initiatives.

15. L.E. Schoueri, *Brazil*, in Brauner & Pistone eds., *supra* n. 8, at sec. 4.2.1.2.1. p. 43.

16. BR: BRASIL, *Programa de Ação Econômica do Governo* (Government Programme of Economic Action, PAEG), *Ministério do Planejamento e Coordenação Econômica* p. 16 (1964).

17. L.A. Correa do Lago, *A Retomada do Crescimento e as Distorções do "Milagre", 1967-1974*, in *A Ordem do Progresso: Dois Séculos de Política Econômica no Brasil* p. 233 (M. de Paiva Abreu ed., Elsevier 2014).

18. J. Hermann, *Reformas, Endividamento Externo e o "Milagre" Econômico*, in *Economia Brasileira Contemporânea* 2nd edn., p. 67 (F. Giambiagi et. al. eds., Elsevier 2011).

19. This situation has changed, and currently it takes a long time for Brazil to finally approve its tax treaties, as noted in OECD, *Brazil: Peer Review Reports, Phase 1, Legal and Regulatory Framework* p. 82 (OECD 2012).

The fact that most of Brazil's tax treaties were signed before Brazil had a worldwide income taxation regime reinforces the well-established concept, at least from the perspective of the Brazilian tax authorities, that Brazil should attempt to secure more extensive taxing powers as a source state.<sup>20</sup> The defence of source taxation has long been supported by capital-importing countries.<sup>21</sup> It is also a Latin American tradition.<sup>22</sup> And this was reflected in the Mexico League of Nations Model (1943).

In view of these brief comments, it is possible to conclude that:

- (1) Most of the tax treaties concluded by Brazil were signed when the OECD Draft (1963) and the OECD Model (1977) applied and some before the UN Model (1980) was issued. Considering the very significant changes made to the OECD Model<sup>23</sup> in past decades, this alone provides an important hint regarding the source for Brazil's tax treaties.
- (2) Brazil has followed the long-lasting tradition of Latin American countries, which argues for more taxing powers for source states.
- (3) Brazil's primary objective in concluding its first tax treaties, which entered into force in the 1960s, 1970s and 1980s, was to attract foreign direct investment.
- (4) The objective noted in (3) was in line with the economic policy of the military regime that then ruled Brazil in that period.

### 3. The Effect of the OECD Model and the UN Model on Brazil's Treaty Policy

#### 3.1. The structure of the OECD Model and the UN Model

It is well known that the UN Model<sup>24</sup> is intended to secure more taxing powers for source states.<sup>25</sup> In this context, the introduction to the UN Model states that:

20. De Moura Borges, *supra* n. 10, at p. 146.

21. A. Schindel & A. Atchabahian, *General Report*, in *Source And Residence: A New Configuration Of Their Principles*, International Fiscal Association (IFA) *Cahiers de Droit Fiscal International*, vol. 90a, sec. 1.2.1. (IFA 2005), Online Books IBFD.

22. J.M. Albacete & N. Juan, *Fuente y Domicilio: Nueva Configuración de sus Principios*, 187 *Revista Tributaria*, p. 467 note that, on several occasions, the *Instituto Latinoamericano de Derecho Tributario* (Latin American Tax Law Institute, ILADT) has issued resolutions stating that the source principle should be adopted by Latin American countries. See also R. Valdes Costa, *Problemas Tributarios entre Países Desarrollados y Países en Desarrollo* pp. 42-45 (Instituto Uruguayo de Derecho Tributario 1970); V. Uckmar, *Los Tratados Internacionales en Materia Tributaria*, in *Curso de Derecho Tributario Internacional* vol. 1, p. 104 (V. Uckmar ed., Themis 2003); K. Vogel, *Introduction*, in *Vogel on Double Taxation Conventions* 3rd edn., p. 11 (K. Vogel ed., Kluwer L. Intl. 1998); and K. Brooks & R. Krever, *The Troubling Role of Tax Treaties*, in *Tax Design Issues Worldwide* p. 163 (G.M.M. Michielse & V. Thuronyi eds., Kluwer L. Intl. 2015).

23. Most recently, *OECD Model Tax Convention on Income and on Capital* (26 July 2014), Models IBFD.

24. *UN Model Double Taxation Convention between Developed and Developing Countries* (1 Jan. 2011), Models IBFD.

25. M. Pires, *International Juridical Double Taxation of Income* p. 260 (Kluwer, 1989) and M. Lennard, *The Purpose and Current Status of the United Nations Tax Work*, 14 *Asia-Pac. Tax Bull.* 1, sec. 3. (2008), Journals IBFD.

the United Nations Model Convention generally favours retention of greater so called 'source country' taxing rights under a tax treaty – the taxation rights of the host country of the investment – as compared to those of the 'residence country' of the investor. This has long been regarded as an issue of special significance to developing countries, although it is a position that some developing countries also seek in their bilateral treaties.<sup>26</sup>

In the opinion of Rohatgi (2005), the differences between the OECD Model and the UN Model:

are significant. The UN MC puts more emphasis on source-based taxation, in contrast to the largely residence-based taxation under the OECD MC. It also stresses the role of tax treaties to promote the flow of foreign investment to developing countries.<sup>27</sup>

However, according to Dornelles (1988):

Despite the declared intent to favour developing countries, the United Nations' Model is not based on the source principle, as it would be expected, but on the residence principle.<sup>28</sup>

According to Dornelles (1988), this was due to the decision to use the OECD Model as the basis for the UN Model.<sup>29</sup> Baker (2005) corroborates this, when he states that:

The 1980 UN Model consists, in essence, of the OECD Model with 27 specific adaptations, several of which did not prove popular with developing countries.<sup>30</sup>

The structures of the OECD Model and the UN Model are very similar. The major differences between the OECD Model (2014) and the UN Model (2011) are the absence of article 14 (Independent personal services) from the OECD Model (2000)<sup>31</sup> onwards and, as noted by Lang (2010), some specific differences in:

Art. 5 (permanent establishment), Art. 7 (business profits), Art. 9 (associated enterprises), Art. 10 (dividends), Art. 11 (interest), Art. 12 (royalties), Art. 13 (capital gains) and Art. 21 (other income).<sup>32</sup>

In section 3.2., Brazil's treaty policy is considered with regard to some relevant treaty provisions.

#### 3.2. Brazil's tax treaties and the OECD Model and the UN Model

##### 3.2.1. Opening comments

In general, the tax treaties that Brazil has concluded follow the UN Model. Sections 3.2.2. to 3.2.6. comment on Brazil's positions with regard to relevant treaty articles.

26. United Nations, *Model Double Tax Convention Between Developed and Developing Countries* p. vi (United Nations 2011).

27. Roy Rohatgi, *Basic International Taxation* 2nd edn., p. 104 (Richmond Law & Tax 2005). See also H. Törres, *Plurtributação Internacional sobre as Rendas de Empresas* pp. 497-498 (Revista dos Tribunais 2001).

28. F.N. Dornelles, *O Modelo da ONU para Eliminar a Dupla Tributação da Renda e os Países em Desenvolvimento*, in Toffoli Tavoraro, Machado & Da Silva Martins eds., *supra* n. 11, at pp. 195-232.

29. A. Miraulo, *Doppia Imposizione Internazionale* pp. 161-163 (Giuffrè Editore 1990) and Törres, *supra* n. 27, at pp. 547-548.

30. P. Baker, *Double Taxation Conventions* p. A-7 (Thomson 2005). See also A. Ribes, *Convenios para Evitar la Doble Imposición Internacional: Interpretación, Procedimiento Amistoso y Arbitraje* pp. 211-212 (Editoriales de Derecho Reunidas 2003).

31. *OECD Model Tax Convention on Income and on Capital* (29 Apr. 2000), Models IBFD.

32. M. Lang, *Introduction to the Law of Double Taxation Conventions* p. 27 (Linde, 2010). For a detailed table listing the main differences between the *OECD Model* and the *UN Model*, see Lennard, *supra* n. 25.

### 3.2.2. Article 5 (Permanent establishment)

In general, the tax treaties that Brazil has concluded, with very small differences, follow article 5(1) and (2) of the OECD Model and the UN Model, which have the same wording.<sup>33</sup> One significant difference in Brazil's tax treaties is, however, whether construction sites are listed in article 5(2) of the OECD Model or are referred to separately in article 5(3). The tax treaties concluded with the following states have a separate article 5(3) that deals with construction sites: Chile, China, Finland, Israel, Korea (Rep.), Mexico, the Netherlands, Peru, Portugal, South Africa, Turkey and Ukraine.

Of the 32 tax treaties concluded by Brazil, only those with Turkey and Ukraine adopt a 12-month period in recognizing the existence of a permanent establishment (PE), in accordance with the OECD Model. The tax treaties with Israel and Portugal use a nine-month period. Lastly, the Brazil-Ecuador Income Tax Treaty (1983)<sup>34</sup> does not contain any time requirement. The remaining tax treaties adopt a six-month period, which is in line with the UN Model.

The tax treaties that Brazil has concluded generally follow the UN Model, or its rationale, in trying to secure greater taxing powers for the source state. This is realized by extending the rules with regard to the recognition of a PE.

Considering the alignment between the tax treaties that Brazil has concluded and the UN Model in respect of construction sites, it is to be expected that Brazil's tax treaties would incorporate the provisions regarding the service PE of the UN Model. In this context, the Brazilian tax authorities have long argued for a limited application of the business profits provision, thereby taxing services at source. Consequently, the provisions regarding service PEs should be attractive for Brazil's treaty negotiators. However, surprisingly, only the Brazil-China Income Tax Treaty (1991)<sup>35</sup> includes such a provision.

Brazil's treaty practice regarding the application of article 7 of the OECD Model is examined in section 3.2.3. However, a preliminary assessment of the lack of provisions regarding service PEs in the tax treaties that Brazil has concluded is possible.

Brazil's tax treaties contain other mechanisms to avoid the application of the equivalent of article 7 of the OECD Model, such as the characterization of technical services as royalties in most of its tax treaties. Consequently, if

source taxation is secured, there is apparently no need for a specific rule regarding service PEs.<sup>36</sup>

Only two of the tax treaties concluded by Brazil include the provision in the UN Model that extends the rule regarding agency PEs to situations in which an agent has no power to sign contracts, despite the fact that a stock of goods or merchandise is maintained in one of the contracting states. This is the case with the tax treaties with Trinidad and Tobago, and Ukraine.

Finally, one notable characteristic of Brazil's tax treaties is that a significant number include the UN Model provision regarding the characterization of a PE where a company from one contracting state collects premiums or insures risks situated in the territory of the other state through an agent who is not an independent agent. Fifteen out of the thirty-two tax treaties that Brazil has concluded include some form of insurance PE.<sup>37</sup> However, only four of these fifteen tax treaties explicitly refer to reinsurance, i.e. the tax treaties with Mexico, the Netherlands, Peru and Philippines.<sup>38</sup>

The analysis of article 5 of the OECD Model and the UN Model is revealing, as it demonstrates that, to some extent, the UN Model exerts an influence on Brazil's treaty policy, even though it cannot be said that the tax treaties that Brazil has concluded are entirely based on the UN Model. In fact, there are a considerable number of Brazil's tax treaties that do not include the typical differences evident in the UN Model.

### 3.2.3. Article 7 (Business profits)

There are four main categories of income that fall within the scope of article 7. These are: (1) equipment rentals; (2) the provision of services; (3) insurance; and (4) the sale of goods.<sup>39</sup>

With regard to the first category, as demonstrated in section 3.2.6., the tax treaties that Brazil has concluded follow article 12 of the UN Model, in that these include the right to use any industrial, commercial, or scientific equipment in the definition of royalties. Consequently, payments for the rental of equipment by non-residents are generally treated as royalties and fall outside the scope of article 7.

With regard to the provision of technical services, most of the tax treaties that Brazil has concluded include a specific provision in their protocols establishing that such services

33. L.E. Schoueri & N.M. Silva, *Brazil*, in *The Impact of OECD and UN Model Conventions on Bilateral Tax Treaties* p. 177 (M. Lang et al. eds., Cambridge U. Press 2012) and J. Barros Vita, *As Convenções para evitar a Dupla Tributação Brasileiras: Técnicas de Negociação e Análise Estrutural Segundo os Modelos OCDE e ONU*, 24 *Revista Direito Tributário Atual*, p. 308 (2010).

34. *Convention between the Federative Republic of Brazil and the Republic of Ecuador for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* [unofficial translation] (26 May 1983), Treaties IBFD.

35. *Agreement between the Government of the Federative Republic of Brazil and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (5 Aug. 1991), Treaties IBFD.

36. S.A. Rocha, *Caso COPESUL: Tributação pelo IRRF da Prestação de Serviços, Antes e Depois do ADI RFB n. 5/14*, in *Tributação Internacional, Análise de Casos* vol. 3, pp. 211-238 (L.F. de Moraes e Castro ed., MP Editora 2015).

37. This is the case with the tax treaties with Argentina, Austria, Belgium, Canada, Denmark, Ecuador, France, Italy, Luxembourg, Mexico, the Netherlands, Peru, the Philippines, Spain and Sweden.

38. S.A. Rocha et al., *Tributação e Aplicação dos Tratados Sobre a Tributação da Renda e do Capital às Atividades de Resseguro*, in *Tributação das Seguradoras: Questões Pontuais* p. 53 (M. Magalhães Peixoto et al. eds., MP Editora 2014).

39. See B.J. Arnold, *Defining the Term "Business" for Purposes of Tax Treaties*, in *Tax Polymath: A Life in International Taxation* p. 133 (P. Baker & C. Bobbett eds., IBFD 2010) for a summary of the different types of "businesses" in respect of which profits are taxable under article 7.

are to be taxed as royalties. The exceptions are the tax treaties with Austria, Finland, France, Japan and Sweden. In the opinion of the tax authorities, these provisions permit taxation at source in Brazil.<sup>40,41</sup> In this respect, it should be noted that Brazil's tax legislation contains a very broad definition of technical services, which essentially includes any service that requires specialized skills.

With regard to insurance, it has already been stated in section 3.2.2. that Brazil follows the UN Model in that many of its tax treaties consider the payment of premiums or the insurance of risks in Brazil as characterization as a PE, thereby permitting taxation at source.<sup>42</sup>

Finally, with regard to the sale of goods, as these are not subject to withholding taxation in Brazil, this is not a concern of Brazil's treaty policy.

Given the foregoing comments, it is reasonable to conclude that, from a treaty-making perspective, Brazil is not very concerned with the exclusive taxing powers of the residence state in relation to article 7. This is the case, as special provisions in Brazil's tax treaties limit, if not nullify, the scope and effect of article 7.

### 3.2.4. Article 10 (Dividends)

None of the tax treaties that Brazil has concluded uses the wording of article 10 of the OECD Model. In defending the position of many developing countries, Brazil seeks to secure greater taxing powers over dividends compared to those guaranteed by the OECD Model. Most of Brazil's recent tax treaties permit Brazil to impose a withholding tax on dividends of up to 10%, where the non-resident holds at least a 25% participation in the capital of the Brazilian company, and allows the imposition of a withholding tax of up to 15% in all other cases. This is the case of the tax treaties with Chile, Israel, Portugal, South Africa, Trinidad and Tobago, Turkey and Ukraine. The tax treaties with Peru and Venezuela also provide for withholding tax rates of 10% or 15%, but require a 20% shareholding participation.

The rates of withholding tax in the Brazil-Mexico Income Tax Treaty (2003)<sup>43</sup> are 10% and 20%, but application of the 10% rate requires a 15% participation in the capital of the Brazilian company. The Brazil-Luxembourg Income

and Capital Tax Treaty (1978)<sup>44</sup> permits the source state to impose a withholding tax on dividends at a rate of 15%, where the participation is at least 10%, and 25% in all other cases. The Brazil-Belgium Income Tax Treaty (1972)<sup>45</sup> also requires a 10% participation for taxation at source at 10% and applies a 25% rate in all other cases. Under the Brazil-Canada Income Tax Treaty (1984),<sup>46</sup> there are no limits to dividend taxation at source, unless the non-resident holds at least 10% of the capital of the paying company. In these circumstances, dividend taxation at source is capped at 15%. Most of the tax treaties that Brazil has concluded only contain one withholding tax rate limiting dividend taxation to 10%,<sup>47</sup> 12.5%,<sup>48</sup> 15%<sup>49</sup> or 25%.<sup>50</sup> Finally, the Argentina-Brazil Income Tax Treaty (1980)<sup>51</sup> does not establish any limit for dividend taxation at source.

As noted by Schoueri and Silva (2012), most of the tax treaties that Brazil has concluded were signed when Brazil imposed a withholding tax on dividends of 25%.<sup>52</sup> Consequently, in its first tax treaties, there were important revenue-driven considerations for Brazil in pursuing greater source state taxing powers. From 1996 onwards,<sup>53</sup> Brazil has ceased taxing the payment of dividends. As a result, the withholding tax limits in tax treaties have become less important.

Consequently, the equivalent of article 10 in the tax treaties that Brazil has concluded has moved away from the influence of the OECD Model. Instead, Brazil has used the leeway in the UN Model to impose higher withholding tax rates on dividends.

### 3.2.5. Article 11 (Interest)

It should be noted that most of the tax treaties concluded by Brazil contain the provisions in respect of article 11 as set out in the OECD Draft (1963). In this respect, it should be noted that Schoueri and Silva (2012) state that:

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44. *Convention between the Federative Republic of Brazil and the Grand Duchy of Luxembourg for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital* [unofficial translation] (8 Nov. 1978), Treaties IBFD.
  45. *Convention between the Kingdom of Belgium and the Federal Republic of Brazil for the Avoidance of Double Taxation and the Settlement of Certain Other Questions with Respect to Taxes on Income* [unofficial translation] (23 June 1972) (as amended through 2002), Treaties IBFD.
  46. *Convention between the Government of Canada and the Federative Republic of Brazil for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (4 June 1984), Treaties IBFD.
  47. *Agreement between the Republic of Finland and the Federative Republic of Brazil for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (2 Apr. 1996), Treaties IBFD.
  48. *Braz.-Jap. Income Tax Treaty* (1967).
  49. The tax treaties with Austria, China, the Czech Republic, Ecuador, France, Hungary, India, Italy, Korea (Rep.), the Netherlands, Norway, the Slovak Republic and Spain.
  50. *Convention between the Government of the Kingdom of Denmark and the Government of the Federative Republic of Brazil for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (27 Aug. 1974), Treaties IBFD.
  51. *Convention between the Argentine Republic and the Federative Republic of Brazil for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* [unofficial translation] (17 May 1980), Treaties IBFD.
  52. Schoueri & Silva, *supra* n. 33, at p. 182.
  53. Art. 10 Law 9,249/1995.

- .....
40. BR: *Ato Declaratório Interpretativo* (Interpretative Act) 5 of 16 June 2014.
  41. Taxpayers have challenged the interpretation of the tax authorities regarding article 7 for almost two decades. Most recent decisions have been favourable to the taxpayer's position to the effect that article 7 of Brazil's tax treaties prevents the taxation of technical services at source. See the decision of the *Superior Tribunal de Justiça* (Superior Court of Justice, STJ) in BR: STJ, 17 May 2012, Case RE 1.161.467 – RS, Tax Treaty Case Law IBFD and BR: STJ, 12 December 2015, Case RE 1.272.897.
  42. For an analysis on how Brazil's tax treaties deal with the taxation of insurance companies, see S.A. Rocha, M.A. Sampaio & M.S. Vianna, *Tributação e Aplicação dos Tratados sobre a Tributação da Renda e do Capital às Atividades de Resseguro*, in Magalhães Peixoto et. al. eds., *supra* n. 38, at pp. 35-56.
  43. *Convention between the Governments of the United Mexican States and the Federative Republic of Brazil for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [unofficial translation] (25 Sept. 2003), Treaties IBFD.

The relevance of such provision is due to a particularity of the Brazilian tax system, which, according to Law 9,249/1995, stipulates that type of interest paid as remuneration on the company's equity ("*juros sobre o capital próprio*").<sup>54</sup>

The only tax treaties that Brazil has concluded that do not include this provision are those with China, Finland and Ukraine.

The OECD Model does not include this provision from the OECD Model (1977) onwards. As a result, the fact that Brazil includes this provision in the tax treaties argues against the influence of the OECD Model on Brazil's treaty policy. This appears to be more a consequence of Brazil's policy of seeking greater taxing powers for the source state.

### 3.2.6. Article 12 (Royalties)

The fundamental difference between article 12 of the OECD Model and that of the UN Model is that the OECD Model establishes that royalties can only be taxed by the residence state, while the UN Model permits taxation in the source state. In his review of reports from 37 countries, Pistone (2012) states that:

Bilateral treaties around the world undoubtedly show that the influence of the OECD Model royalties clause is more the exception than the rule. The UN royalties clause is instead the main point of reference for bilateral tax treaty clauses on royalties, which are often accompanied by additional dedicated provisions.<sup>55</sup>

As an example of what he terms "dedicated provisions", Pistone (2012) refers to the case of India, in stating that:

Indian tax treaties usually include a separate clause on fees for technical services, which more closely reflects the tax treaty policy of that country concerning the narrowing down of the business profits provision.<sup>56</sup>

Pistone (2012) also argues that:

Technical services are otherwise frequently included in the royalties article (in particular with developing countries: see reports from Colombia, Finland, Germany, Slovenia and Spain).<sup>57</sup>

The tax treaties concluded by Brazil follow this trend. As already stated in section 3.2.3., 27 out of Brazil's 32 tax treaties include a provision in their protocols establishing that technical services and technical assistance services should be included in the definition of royalties.<sup>58</sup>

54. Schoueri & Silva, *supra* n. 33, at p. 185. On the other hand, A. Xavier, *Direito Tributário Internacional do Brasil*, 7th edn. pp. 607-608 (Forense 2010) argues that interest on net equity should be characterized under article 10, as dividends, except in those cases when the tax treaty in question expressly establishes that such payments should fall under the interest article. See also Sergio André Rocha and Marcio Seixas Vianna, *Tributação e Aplicação das Convenções sobre a Tributação da Renda e do Capital ao Pagamento de Juros sobre Capital Próprio*, in *Mercado Financeiro e de Capitais: Regulação e Tributação* (L.F. de Moraes e Castro ed., Quartier Latin 2015).

55. P. Pistone, *General Report*, in Lang et al. eds., *supra* n. 33, at p. 21.

56. *Id.*

57. *Id.* See also K. Holmes, *International Tax Policy and Double Tax Treaties* p. 271 (IBFD, 2007). J. Schwarz, *Schwarz on Tax Treaties* 2nd edn., p. 171 (CCH 2011) also refers to the trend of developing countries in pursuing the taxation of technical services, sometimes even including them within the scope of article 14.

58. Xavier, *supra* n. 54, at pp. 625-627 and Schoueri & Silva, *supra* n. 33, at p. 188.

The only tax treaties that do not have this provision are those with Austria, Finland, France, Japan and Sweden. This does not exactly represent the influence of the UN Model but rather the influence of the tradition of developing countries in trying to ensure greater taxing powers for the source state.

With regard to the royalty article, Brazil follows the UN Model in establishing that royalties should be taxed at source. In most of the tax treaties concluded by Brazil, the general maximum for source taxation is 15%.

Another important difference between the OECD Model and the UN Model relates to the taxation of payments for the use of, or the right to use, industrial, commercial or scientific equipment. Prior to the OECD Model (1992),<sup>59</sup> the OECD Model included such payments in the definition of royalties. However, in the OECD Model (1992) this reference was removed.<sup>60</sup> The exclusion of the reference to these types of rental payments from article 12 of the OECD Model (1992) was, therefore, intended to ensure that such payments would be subject to taxation exclusively by the residence state, in accordance with the PE principle.<sup>61</sup> In contrast, the UN Model retains payments for the use of, or the right to use, industrial, commercial, or scientific equipment in its definition of royalties in article 12.

Only the Brazil-Finland Income Tax Treaty (1996) does not include this provision in its article 12. Consequently, once again, the influence of the UN Model is apparent or, at least, the rationale behind the UN Model, in the tax treaties concluded by Brazil.

In this respect, it should be noted that, as referred to in section 3.2.3., Brazil's treaty policy reduces the importance of article 7. The royalty article has special importance in respect of this policy, as it includes income derived from the provision of services and from the rental of industrial, commercial and scientific equipment.<sup>62</sup>

## 4. Conclusions: Does the OECD Model or the UN Model Most Influence Brazil's Treaty Policy?

After contending that the OECD Model has been turned "into the expression of the internationally accepted tax treaty practice and the main source of tax treaty law around the world", Pistone (2010) further states that:

59. *OECD Model Tax Convention on Income and on Capital* (1 Sept. 1992), Models IBFD.

60. A. Mehta, *International Taxation of Cross-Border Leasing* sec. 6.2.1. pp. 133-134 (IBFD 2005), Online Books IBFD.

61. Baker, *supra* n. 30, at pp. 12-14. Despite the change introduced in the *OECD Model* (1992), K. Szűcs-Hidvégi, *Royalties, in History of Tax Treaties: The Relevance of the OECD Documents for the Interpretation of Tax Treaties* p. 487b (T. Ecker & G. Ressler eds., Linde 2011) noted that: "Many treaties concluded before 1992 still retained this item as royalty income".

62. Xavier, *supra* n. 54, at p. 619.

The opposite trend may be recorded in respect to the UN Model Tax Convention (hereinafter: UN MTC). Conceived to reflect the tax policy needs of developing countries, the UN MTC has gradually lost its importance for and influence on bilateral tax treaties over the past decades and is now, possibly also as a consequence of the stronger negotiating powers of OECD member countries, rarely used as a pattern for bilateral tax treaties around the world.<sup>63</sup>

Considering the comment of Dornelles (1988) to the effect that the UN Model stopped short in distancing itself from the OECD Model,<sup>64</sup> this remark of Pistone (2010) is correct. In general, the OECD Model provides the framework for all the other Models, including the UN Model.<sup>65</sup>

However, in considering Brazil's treaty policy, the effect of the author's previous comments is that Brazil's tax treaties distance themselves from the OECD Model with regard to all of the issues involving source state taxing powers. As noted by Schoueri (2002), "Brazil might be considered a country that has been successful in the defence of its own treaty policy".<sup>66</sup>

The author, therefore, does not agree with the opinion of Baistrocchi (2013) that Brazil is converging with what he terms the "International Tax Regime", as Brazil has its own agenda with regard to international taxation. Brazil is not entirely isolated, but there is no identifiable concern with convergence with the OECD Model,<sup>67</sup> which is the basis of Baistrocchi's "International Tax Regime".<sup>68</sup>

Ultimately, Brazil's position with regard to most of the distributive rules established in tax treaties is much closer to the UN Model than the OECD Model. However, this does not mean that the tax treaties that Brazil has concluded entirely differ from the OECD Model, as the OECD Model was the basis for the UN Model.<sup>69</sup> It is also fair to say that, in many articles, Brazil's treaty policy goes beyond the UN Model, in even more favouring source state taxation.

63. P. Pistone, *Tax Treaties with Developing Countries: A Plea for New Allocation Rules and a Combined Legal and Economic Approach*, in Lang et al. eds., *supra* n. 9, at sec. 1.

64. Dornelles, *supra* n. 28.

65. As stated by B.J. Arnold, *Tax Treaty News: An Overview of the UN Model (2011)*, 66 Bull. Intl. Taxn. 10, sec. 1. (2012), Journals IBFD, "Despite some significant differences, however, the UN Model and the OECD Model share many common provisions. Indeed, the similarities between the two Models are more important than the differences".

66. Schoueri, *supra* n. 8, at p. 280.

67. As noted by Schoueri, *supra* n. 15, at sec. 4.2.2.1., who states that: "when it comes to international tax matters, the influence of the OECD on Brazilian tax policy remains limited".

68. E.A. Baistrocchi, *The International Tax Regime and the BRIC World: Elements for a Theory*, 33 Oxford J. Leg. Stud. 4 (2013).

69. According to D.P. Sengupta, *India*, in Brauner & Pistone eds., *supra* n. 8, at sec. 6.2.2.2.1., the same can be said of Indian treaty policy. In his words, "The Indian model is based on an amalgam of the OECD Model and the UN Model, and considering that the UN Model Convention itself is based on the OECD Model, India can be said to follow the OECD Model in certain respects. However, India is still a capital-importing country and places emphasis on source country taxing rights. As the UN Model gives more taxing rights to source countries, it is obvious that Indian treaties are closer to the UN Model, particularly those signed after the coming into existence of the UN Model." See also L.E. Schoueri, *Arm's Length: Beyond the Guidelines of the OECD: "It is better to be roughly right than precisely wrong."* (John Maynard Keynes), 69 Bull. Intl. Taxn. 12, sec. 5.2.1. (2015), Journals IBFD.