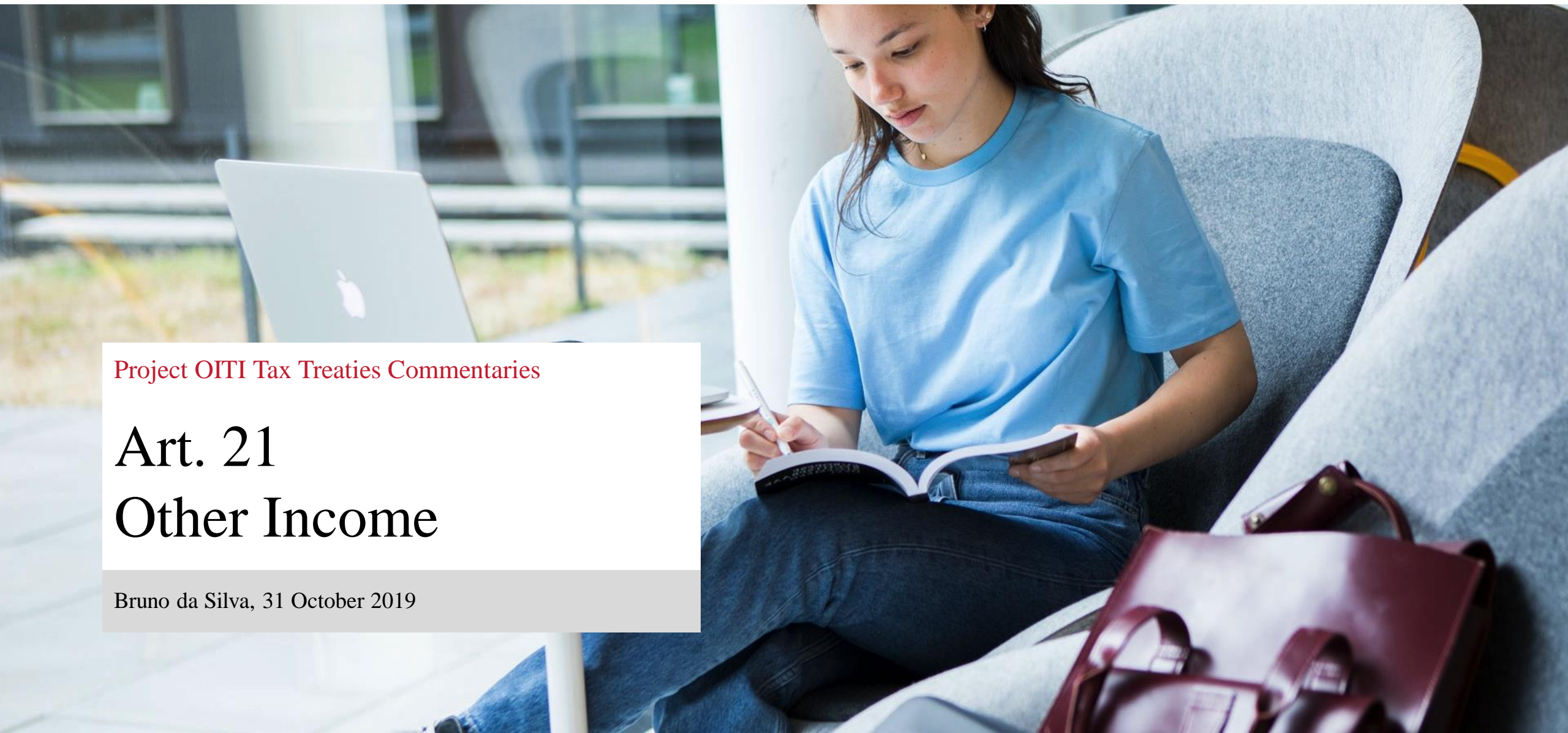




Project OITI Tax Treaties Commentaries

Art. 21 Other Income

Bruno da Silva, 31 October 2019





Introduction



Synopsis

“[...] examined the texts of the “Other income” provisions in the treaties [...] and made an inventory of the deviations from the Article’s standard text in the OECD and UN Model Conventions. The outcomes of these inventories was striking. Not only did the number of deviations with respect to the “other income” article seem larger than occurs with other treaty provisions. But more often than incidentally, the text of the distributive rule on “other income” in those treaties was found defective in one or more respects.”

Kees van Raad

“Four Suggestions to Improve the Consistency and Efficiency of the OECD Model’s Distributive Rules”



Art. 21 (overview)

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.
2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein [or performs in that other State independent personal services from a fixed base situated therein,] and the right or property in respect of which the income is paid is effectively connected with such permanent establishment [or fixed base]. In such case the provisions of Article 7 [or Article 14, as the case may be,] shall apply.
- [3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Convention and arising in the other Contracting State may also be taxed in that other State.]



Overview

- Para. 1: residual provision (scope determined by exclusion: income not dealt or not covered by the other distributive rules)
- Para. 2: Exception to para. 1 for income attributable to PE (other than immovable property) which is taxed under Art. 7
- Para. 3 [UN MTC]: primary right to tax for income arising in the other Contracting State to that other Contracting State



Evolution



1963 Version

Article 21

Income not expressly mentioned

Items of income of a resident of a Contracting State **which are not expressly mentioned** in the foregoing Articles of this Convention shall be taxable only in that State.

1977 Amendments

Art. 21

Other income ~~Income not expressly mentioned~~

Items of income of a resident of a Contracting State, ~~which are not expressly mentioned~~ **wherever arising, not dealt with** in the foregoing Articles of this Convention shall be taxable only in that State.

The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

2000 Amendments

Art. 21

Other income

Items of income of a resident of a Contracting State, ~~which are not expressly mentioned~~ wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.

The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, ~~or performs in that other State independent personal services from a fixed base situated therein~~, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment ~~or fixed base~~. In such case the provisions of Article 7 ~~or Article 14, as the case may be~~, shall apply.

Reservations



1977

Portugal and Spain reserve their positions on this Article and wish to maintain the right to tax income arising from sources in their own country



1992

Portugal ~~and Spain~~ reserve their positions on this Article and wish to maintain the right to tax income arising from sources in their own country



1995

[...] Mexico [...] reserve their positions on this Article and wish to maintain the right to tax income arising from sources in their own country

Reservations (cont.)



2010

[...] Chile [...] reserve their positions on this Article and wish to maintain the right to tax income arising from sources in their own country



2017

[...] Chile, Mexico, ~~Portugal~~ [...] reserve their positions on this Article and wish to maintain the right to tax income arising from sources in their own country

Positions (non-OECD)



2010

Argentina and Brazil reserve their positions on this Article and wish to maintain the right to tax income arising from sources in their own country



2014

[...] Colombia [...] reserve their positions on this Article and wish to maintain the right to tax income arising from sources in their own country



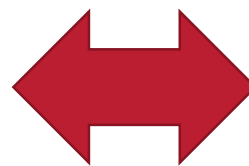
Scope & Role of Art. 21

Scope of Art. 21(1)

Para. 1 of the Commentary to Art. 21

This Article provides a general rule relating to income not dealt with in the foregoing Articles of the Convention. The income concerned is not only income of a class not expressly dealt with but also income from sources not expressly mentioned.

“Type” of income
(not dealt with under Arts 6-20)
Catch-all clause



Geographical scope
(bilateral reach of certain provisions:
Arts. 6, 10, 11, 12, ~~16, 17~~)



Scope of Art. 21: types of income

- Lottery prizes
- Gambling winnings
- Awards from general artistic and scientific achievements
- Annuities (if not covered by Art. 18)
- Alimony
- Contributions by foundations
- Income from certain types of financial instruments
- Guarantee fees
- Fictitious income (HR NL)
- (...)

Art. 23 DTT Mexico/US Tech Expl: lottery winnings, punitive damages, cancellation of indebtedness income [income from financial products such as swaps and forward and future contracts]

Scope of Art. 21: bilateral reach limitation

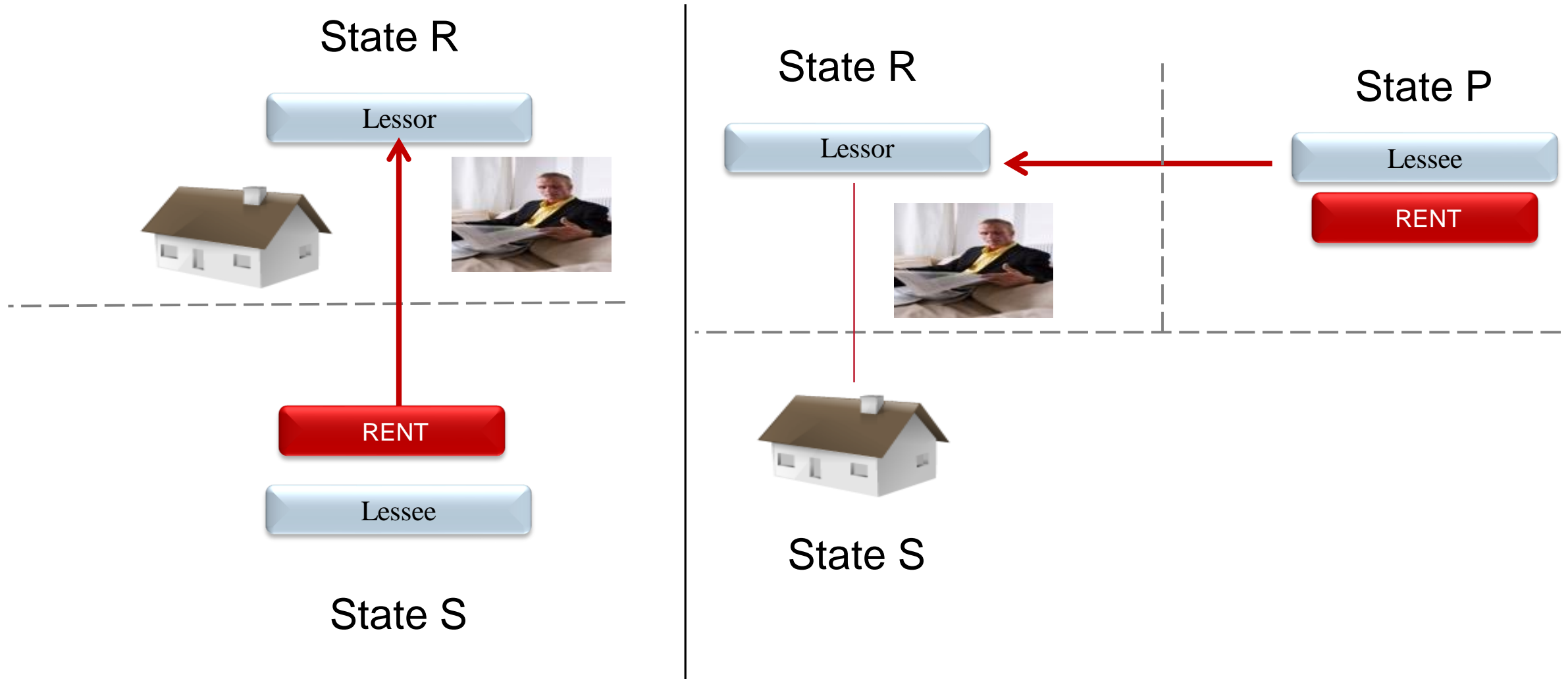
Art. 6 Income derived by a resident of a Contracting State from immovable property [...] situated in the other Contracting State [...]

Art. 10 Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State [...]

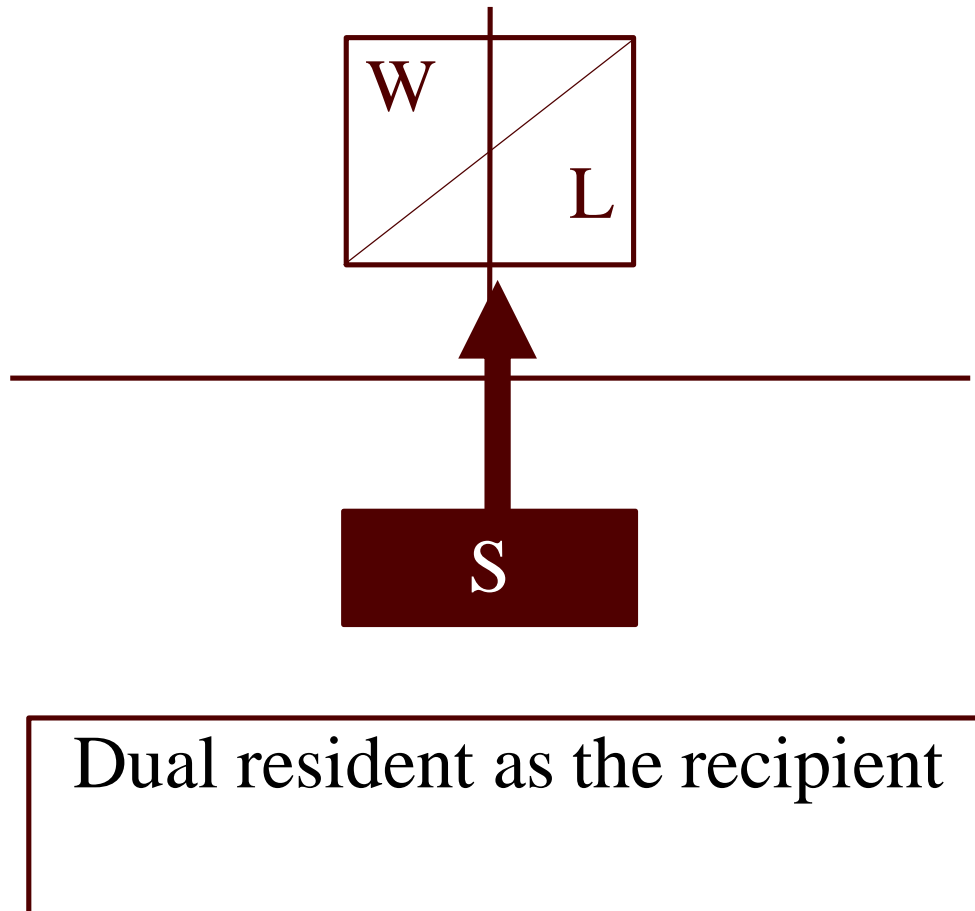
Art. 11 Interest arising in a Contracting State and paid to a resident of the other Contracting State [...]

Art. 12 Royalties arising in a Contracting State and paid to a resident of the other Contracting State [...]

Scope of Art. 21: bilateral reach limitation



Scope of Art. 21



The scope of the Article is not confined to income arising in a Contracting State; it extends also to income from third States. Where, for instance, a person who would be a resident of two Contracting States under the provisions of paragraph 1 of Article 4 is deemed to be a resident of only one of these States pursuant to the provisions of paragraph 2 or 3 of that Article, this Article will prevent the other State from taxing the person on income arising in third states even if the person is resident of this other State for domestic law purposes

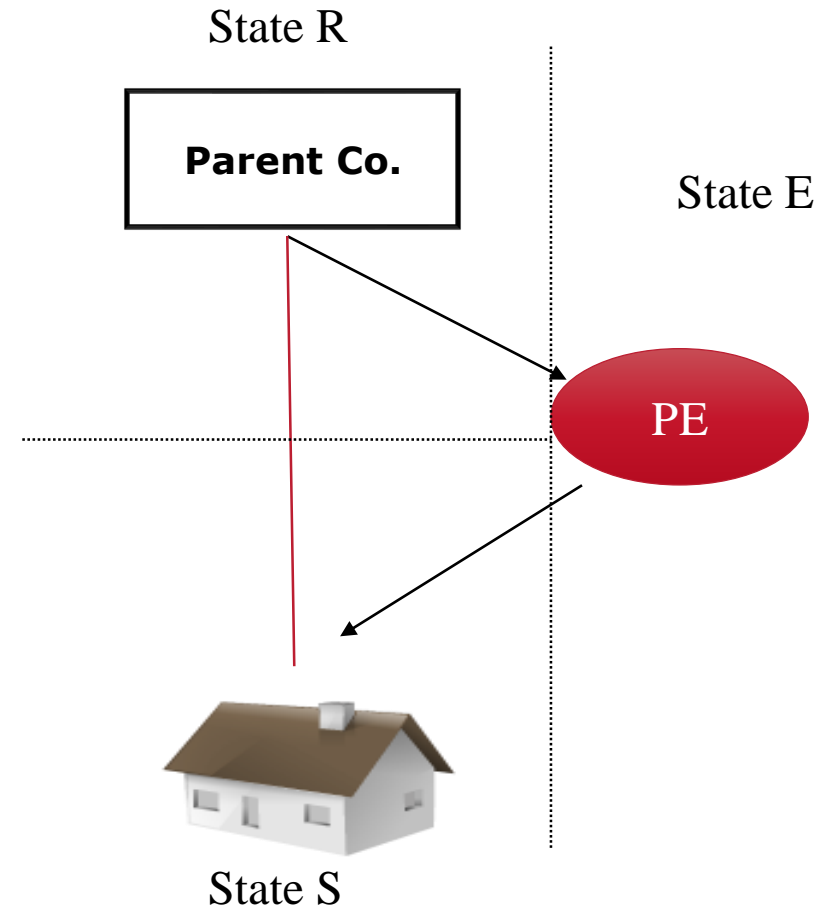
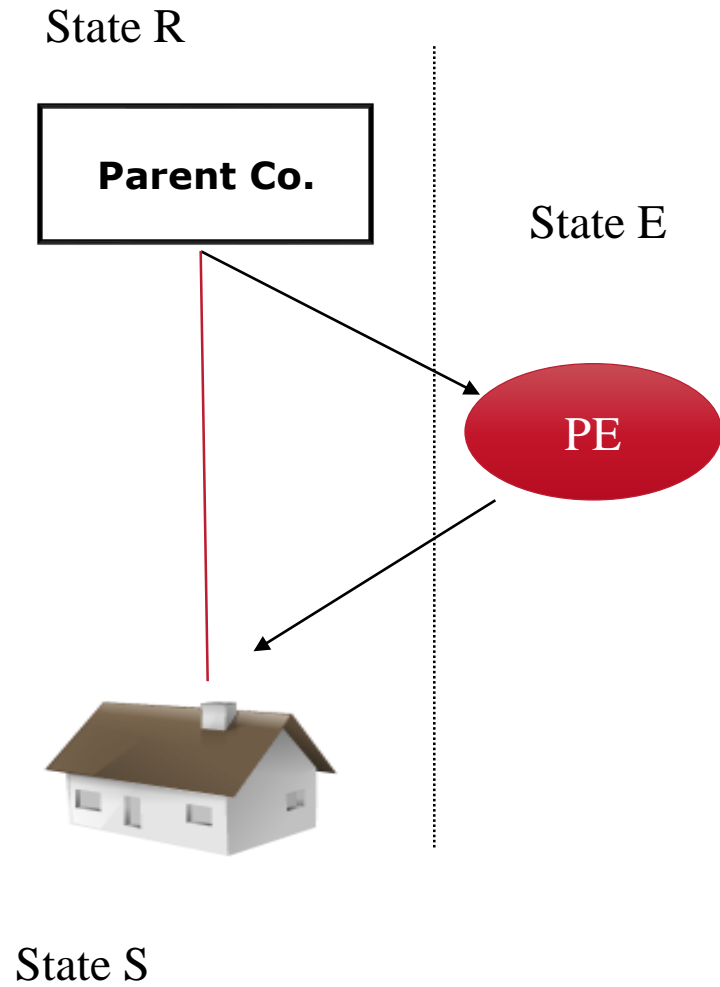


Scope of Art. 21(2)

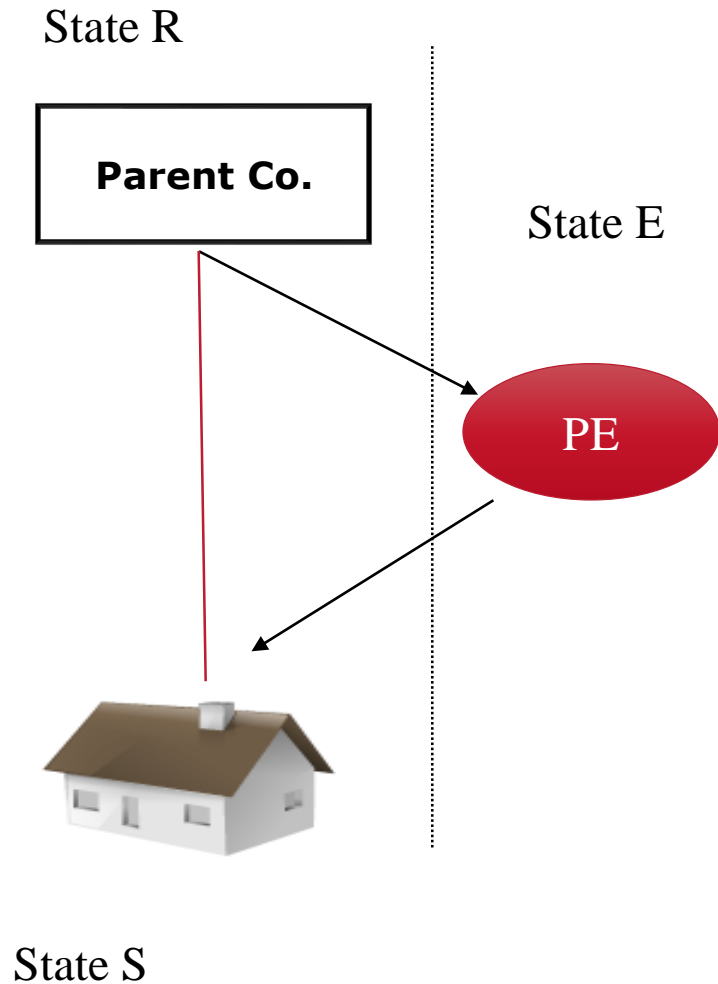
Para. 4 of the Commentary to Art. 21

This paragraph provides for an exception from the provisions of paragraph 1 where the income is associated with the activity of a permanent establishment which a resident of a Contracting State has in the other Contracting State. The paragraph includes income from third States. In such a case, a right to tax is given to the Contracting State in which the permanent establishment is situated. Paragraph 2 does not apply to immovable property

Scope of Art. 21 (2) ?



Scope of Art. 21 (2) ?

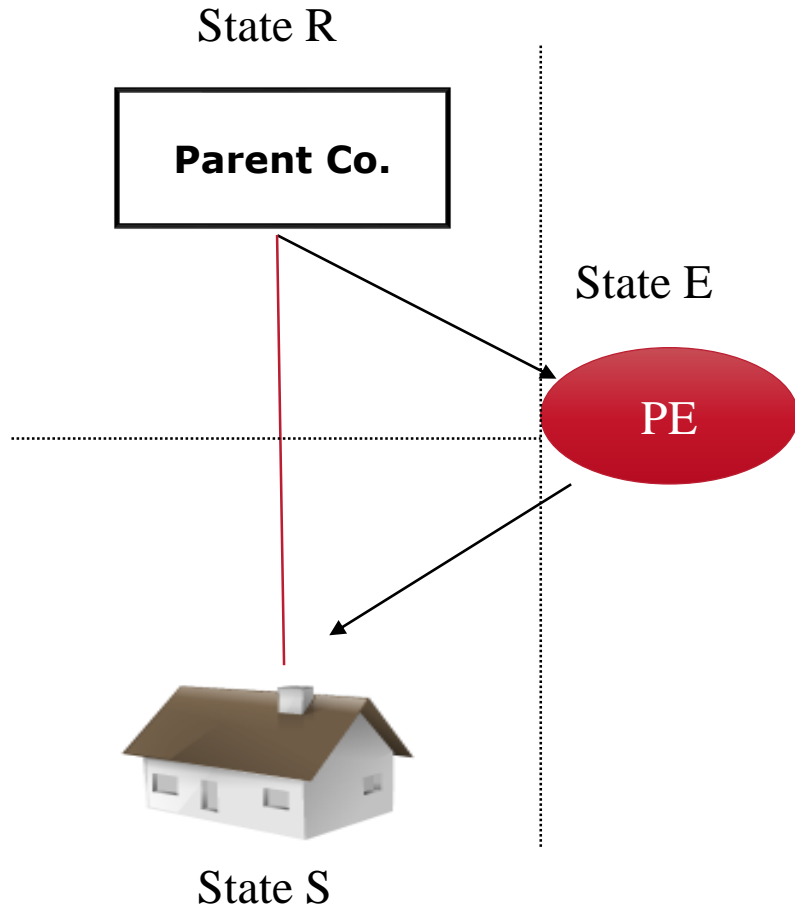


para. 9 of Comm. to Art. 21

9. Where a resident of the Contracting State R derives income from the same State R through a permanent establishment which he has in the other Contracting State E, State E may tax such income (except income from immovable property situated in State R) if it is attributable to the said permanent establishment (paragraph 1 of Article 7 and paragraph 2 of Article 21).

*Exclusion from immovable property
under para. 2 – para. 1 applicable*

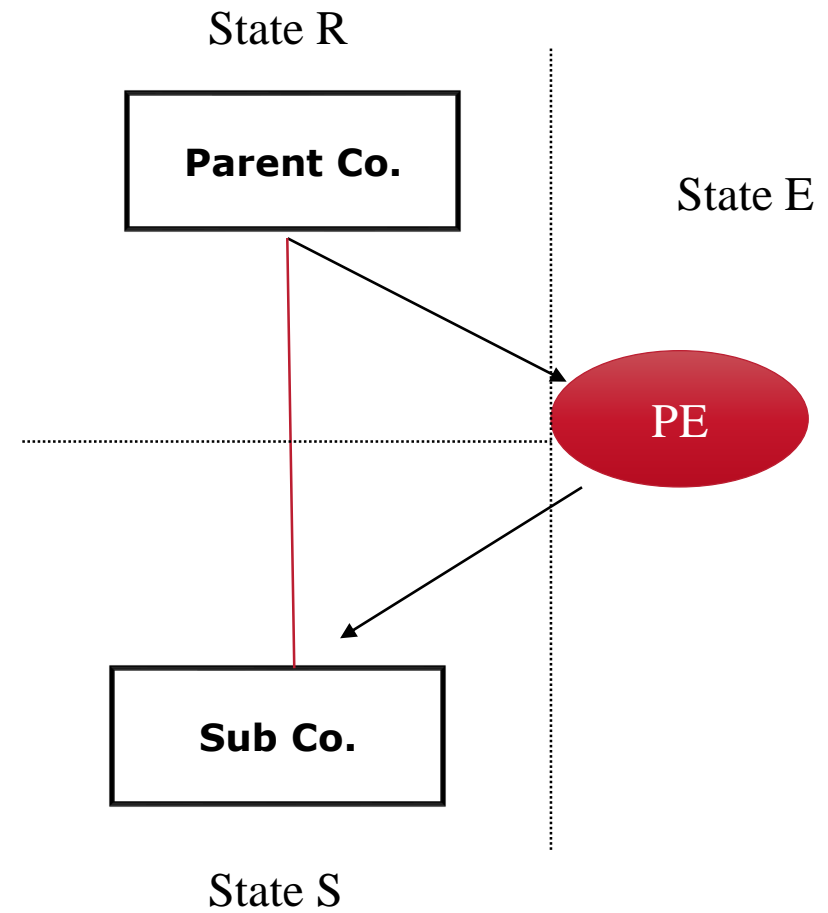
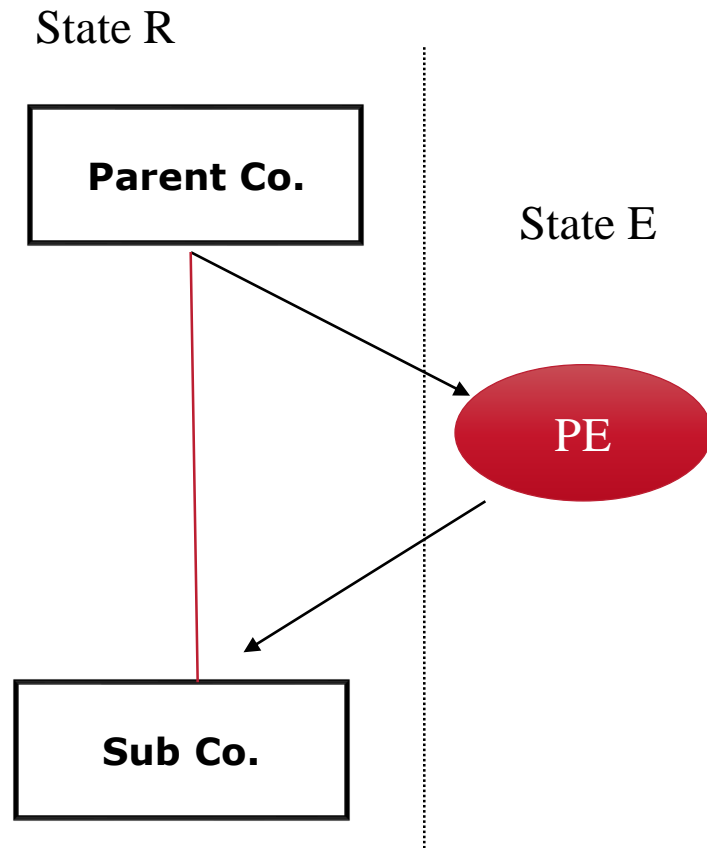
Scope of Art. 21?



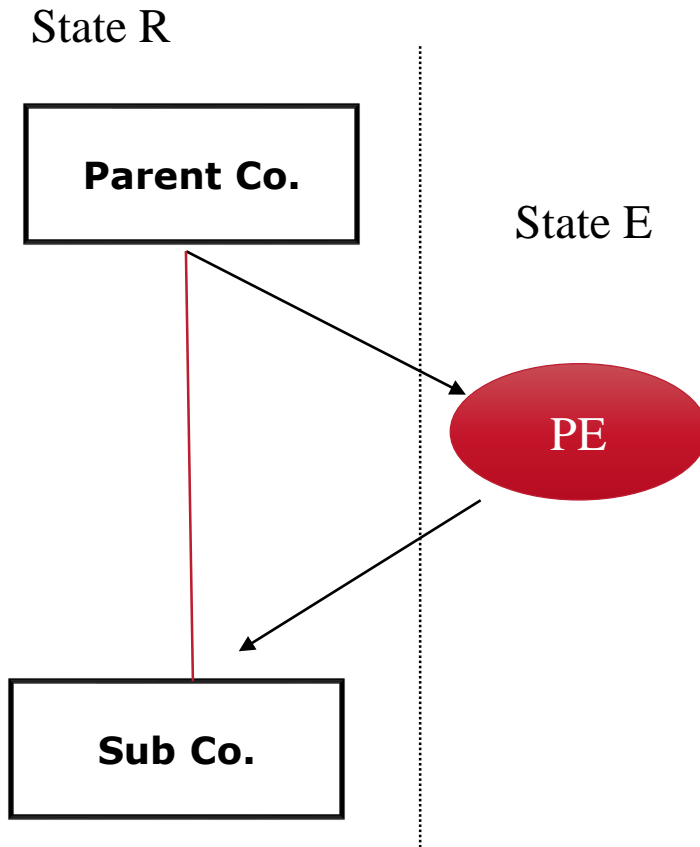
para. 10 of Comm. to Art. 21

10. Where a resident of State R derives income from a third State through a permanent establishment which he has in State E, such State E may tax such income (except income from immovable property situated in the third State) if it is attributable to such permanent establishment (paragraph 1 of Article 7 and paragraph 2 of Article 21). State R must give relief under Article 23 A or Article 23 B in respect of income attributable to the permanent establishment in State E.

Scope of Art. 21 (2) ?



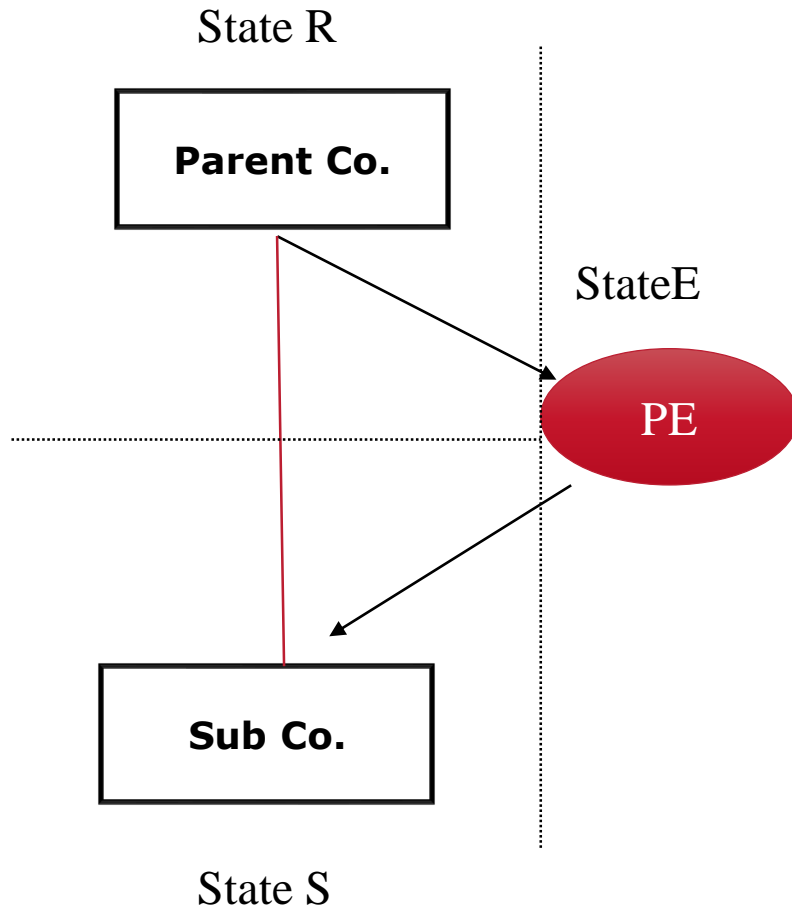
Scope of Art. 21 (2)?



para. 9 of Comm. to Art. 21

9. Where a resident of the Contracting State R derives income from the same State R through a permanent establishment which he has in the other Contracting State E, State E may tax such income (except income from immovable property situated in State R) if it is attributable to the said permanent establishment (paragraph 1 of Article 7 and paragraph 2 of Article 21). In this instance too, State R must give relief under Article 23 A or Article 23 B for income attributable to the permanent establishment situated in State E, notwithstanding the fact that the income in question originally arises in State R

Scope of Art. 21 (2)?



para. 10 of Comm. to Art. 21

10. Where a resident of State R derives income from a third State through a permanent establishment which he has in State E, such State E may tax such income (except income from immovable property situated in the third State) if it is attributable to such permanent establishment (paragraph 1 of Article 7 and paragraph 2 of Article 21). State R must give relief under Article 23 A or Article 23 B in respect of income attributable to the permanent establishment in State E.



Scope of Art. 21(3)

Para. 5 of the Commentary to Art. 21 UN MTC

This paragraph constitutes an addition to Article 21 of the OECD Model Convention. It allows the State in which the income arises to tax such income

Applicable to income not dealt with in the foregoing Articles and *arising* in the other Contracting State



Tax Treaty Practice (Other Models & Deviations)



(Other) Double Tax Treaty Models



- Introduces an “explicit” BO requirement
- 2016 amendment with new para. 2: inclusion of STR exception regarding guarantee fees characterized as other income



- No provision of “Other income”
- General clause Art. 4 (Tax Jurisdiction): *income of any kind* : exclusive taxing right to the MC where it has its *source of production*



Tax Treaty Practice (Deviations)

- **No inclusion of “Other income” provision**

DTT Argentina/Bolivia; DTT Brazil-France; DTT Brazil-Japan; DTT Chile-Switzerland; DTT Mexico-France; DTT Mexico-Switzerland; DTT Peru/Switzerland

Tax Treaty Practice (Deviations)

- **Inclusion of beneficial ownership requirement**

DTT Chile/Japan; DTT Portugal/US; DTT Uruguay/Japan; DTT Uruguay/UK; DTT Spain/US;

- **No inclusion of para. 2 (PE exception)**

DTT Bolivia/Chile, DTT Bolivia/Germany; DTT Brazil/Chile; DTT Brazil-Peru; DTT Chile/Czech Republic; DTT Chile/Denmark; DTT Chile/Ecuador; DTT Peru/Canada;

- **No inclusion of para. 3 (source taxation)**

DTT Spain/US; DTT Spain/Peru; DTT Uruguay/Germany; DTT Bolivia/France; DTT Bolivia/Germany; DTT Uruguay/Luxembourg; DTT Uruguay/Romania;



Tax Treaty Practice (Deviations)

- **1963 wording**

Items of income of a resident of a Contracting State, which are not expressly mentioned in the foregoing Articles of this Convention, shall be taxable only in that State.

DTT Bolivia/France (Art. 21 (1)); DTT Bolivia/Germany (Art. 21 (1)); DTT Brazil/Italy;



Tax Treaty Practice (Deviations)

- **Single provision for shared taxing rights (Variation A)**

Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State, *unless they arise in the other Contracting State, in which case they may be taxed* in that other Contracting State

DTT Portugal-East Timor; DTT Portugal/US

Tax Treaty Practice (Deviations)

- **Single provision for shared taxing rights (Variation B)**

Items of income of a resident of a Contracting State, *not dealt with in the foregoing Articles* of this Convention and arising in the other Contracting State, may *[also] be taxed in that other Contracting State*

DTT Argentina-Brazil; DTT-Brazil-Chile, DTT Chile-Colombia; DTT Chile-Ecuador; DTT Chile-New Zealand; DTT Chile-Russia; DTT Chile-Norway, DTT Chile-Paraguay, DTT Chile-Peru, DTT Colombia-Mexico; DTT Mexico-Czech Republic; DTT Mexico-Peru, DTT Mexico-US; DTT Portugal-Uruguay

DTT Mexico-US Tech Expl: *Such income may be taxed in the State in which it arises. Income arising in a third State is not dealt with in this Article. These domestic laws apply...*

Tax Treaty Practice (Deviations)

- **Single provision for shared taxing rights (Variation C)**

Items of income of a resident of a Contracting State, *not dealt with in the foregoing Articles* of this Convention and *derived from* the other Contracting State, may [also] be taxed in that other Contracting State

DTT Brazil-Peru

- **Single provision for shared taxing rights (Variation D)**

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

DTT Chile-Malaysia



Tax Treaty Practice (Deviations)

- **Single provision for shared taxing rights (Variation E)**

Items of income not dealt with in the foregoing Articles of this Convention may be taxed in both Contracting States

DTT Chile-Canada* ; DTT Chile-Denmark DTT Chile-Mexico



Tax Treaty Practice (Deviations)

- **Single provision for shared taxing rights (Variation F)**

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

DTT Russia-Venezuela (2003)



Tax Treaty Practice (Deviations)

- Exclusive taxing rights to source state (single provision)

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

DTT Uruguay/Ecuador

Tax Treaty Practice (Deviations)

■ Shared taxing rights (Variation A)

1. Subject to the provisions of paragraph 2, items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State
2. However if such income is *derived by* a resident of a Contracting State *from sources* in the other Contracting State, such income may also be taxed in the State in which arises and according to the the law of that State.

Tax Treaty Practice (Deviations)

- **Shared taxing rights with withholding tax limitation (Variation B)**

Notwithstanding the provisions of paragraph 1, items of income of a resident of a Contracting State not dealt with in the foregoing articles of the Convention and arising in the other Contracting State may also be taxed in that other State, but the tax so charged shall not exceed 10 per cent of the gross amount of such income

DTT Peru/Korea (Art. 21 (4)); DTT Chile

Tax Treaty Practice (Deviations)

- Shared taxing rights for certain types of income (Variation C)

Notwithstanding the provisions of paragraph 1, if a resident of a Contracting State *derives income from sources within the other Contracting State in the form of lotteries, crossword puzzles, races including horse races, card games and other games of any sort or gambling or betting of any form or nature whatsoever, such income may be taxed in the other Contracting State.*

DTT India/Portugal

Tax Treaty Practice (Deviations)

■ Shared taxing rights (Variation D)

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

[...]

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

DTT Spain-Russia

Tax Treaty Practice (Deviations)

▪ Special provisions for Estates and Trusts: limited source taxation

[...] However, where such income is income *from an estate or a trust, other than a trust to which contributions were deductible, the tax so charged in Canada shall, if that income is taxable in Chile, not exceed 15 per cent of the gross amount of the income.*

DTT Chile/Canada; Peru/Canada [Canada Reservation]

▪ Special provisions for Estates and Trusts: exclusion from Art. 21

[...] Items of income *beneficially owned* by a resident of a Contracting State, wherever arising, which are not dealt with in the foregoing Articles of this Convention, *other than income paid out of trusts or the estates of deceased persons in the course of administration,* shall be taxable only in that State.

DTT Bolivia/UK, DTT Uruguay/UK

Tax Treaty Practice (Deviations)

■ Inclusion of subject to tax requirement (Variation A)

Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing articles of the Convention and arising in the other Contracting State *may be taxed in that other State if such items of income are not effectively taxed in the first-mentioned State.*

PROTOCOL: an item of income is effectively taxed in a Contracting State where such item of income is subjected to tax in that Contracting State and does not benefit as such from an exemption from tax therein.

Para. 3 of the Commentary to Art. 21: limit Art. 21 to income that is taxed

DTT Portugal/Finland; DTT Portugal/France; DTT Portugal/Germany; DTT Portugal/Luxembourg; DTT Portugal/UK; DTT Belgium/Spain; **DTT Uruguay/Belgium**; DTT Uruguay/Italy

Tax Treaty Practice (Deviations)

▪ Inclusion of subject to tax requirement (Variation B)

Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State, provided that they are subjected to taxation therein.

DTT Portugal/Luxembourg;

▪ Inclusion of subject to tax requirement (Variation C)

Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State. However, if those items of income are not subject to tax in that State they may be taxed in the other Contracting State.

DTT Portugal/Germany;

Tax Treaty Practice (Deviations)

▪ Special relationship provision

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

Commentary para. 7 OECD/UN MTC

DTT Chile/Italy; DTT Chile/France; DTT Peru/Korea; DTT Portugal/Japan; DTT Portugal/Qatar; DTT Portugal/UAE; DTT/Uruguay/UK



Tax Treaty Practice (Deviations)

- (other) Anti-abuse provisions

The provisions of paragraph 2 shall not apply to cases where the arrangement between the parents and the permanent establishments are primarily made for the purpose of taking advantage of this provision of paragraph 2.

DTT Uruguay/Vietnam



Tax Treaty Interpretation and Application (Judiciary and Administration)



Case-law



Several decisions on the interpretation of DTTs concerning the scope of Art. 7 v Art. 21 on taxation of technical service fees



Decisions on the interpretation of DTTs concerning the scope of Art. 7 v Art. 21



Administrative Practice



Opinions COSIT on taxation of technical services fees



Tax Ruling (technical opinion) PE has credit and aims to transfer to HO.
Position: no interest (Art. 11). Either Capital Gains or Other Income



Thank you!

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