Member since 2022
JM17111

https://doi.org/10.18778/1509-877X.2023.04.02

Articles

Ziemowit Kukulski*

The Brazil-Poland Double Tax Convention in the Context of the Countries' Contemporary Tax Treaty Policy and Practice

Summary. This paper deals with the Brazil-Poland double tax convention for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance, signed on 20th September, 2022, in the context of contemporary Brazil's and Poland's tax treaty policy and practice. The Author analyses its main features in comparison to Brazil's and Poland's positions to the MLI and changes introduced to the OECD and UN Models in 2017. Tax treaty provisions relevant to both countries' tax treaty policies and practices are also examined. The study concentrates around the research question whether the BR-PL DTC fits into the countries' contemporary tax treaty policy and practice or whether it is a unique bilateral tax treaty with specific features creating a *sui generis* pattern for tax treaties: for Brazil – with other OECD Member States and for Poland – with other South American states.

Keywords: Brazil, Poland, bilateral comprehensive tax treaty, Multilateral Convention (the MLI), OECD Model, UN Model, tax treaty policy and practice

* PhD, Professor of the University of Lodz, Head of the Tax Law Department, Head of the Centre of Tax Documentation and Studies, University of Lodz, Faculty of Law and Administration, e-mail: zkukulski@wpia.uni.lodz.pl, https://orcid.org/0000-0003-2843-8170

Received: 15.08.2023. Verified: 26.08.2023. Accepted: 23.10.2023.

1. Introduction

On 20th September, 2022, Brazil and Poland signed the double tax convention for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance (hereafter: BR-PL DTC)[1]. The BR-PL DTC is the first comprehensive tax treaty ever concluded between Brazil and Poland. At the same time, it is one of the latest bilateral tax treaties in Poland's tax treaty practice finally filling the gap in its tax treaty network with the BRICS countries[2]. The BR-PL DTC has been already ratified by Poland on 12th April, 2023, and still waits for the approval by the Brazilian National Congress[3].

The BR-PL DTC is not Covered Tax Agreement (hereafter: the CTA) within the meaning of Art. 2 (1)(a) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereafter: the MLI)[4]. Contrary to Poland, Brazil did not sign the MLI and does not intend to do so in the foreseeable future. Brazil decided to renegotiate/conclude each of its bilateral tax treaties with its treaty partners on an individual basis. This approach is driven by the fact

[1] The English text of the BR-PL DTC https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 7.08.2023).

[2] Z. Kukulski, *Praktyka traktatowa państw BRICS a bilateralne umowy podatkowe z Polską,* "Kwartalnik Prawa Podatkowego" 2015, no. 3, p. 9 et seq.

[3] The Act of 9th March, 2023, on the ratification of the Agreement between the Republic of Poland and the Federative Republic of Brazil for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance, and the Protocol to this Agreement, signed in New York on 20th September, 2022 (*Ustawa z dnia 9 marca 2023 r. o ratyfikacji Umowy między Rzecząpospolitą Polską a Federacyjną Republiką Brazylii w sprawie eliminowania podwójnego opodatkowania w zakresie podatków od dochodu oraz zapobiegania uchylaniu się i unikaniu opodatkowania oraz Protokołu do tej Umowy, podpisanych w Nowym Jorku dnia 20 września 2022 r.*), Journal of Law (Dziennik Ustaw) 2023, item 704) See also: https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-pl_01_eng_2022_tt__td1.html (access: 8.08.2023). See: https://concordia.itamaraty.gov.br/detalhamento-acordo/12613?TituloAcordo=Polonia&tipoPesquisa=1&TipoAcordo=BL,TL,ML (access: 8.08.2023).

[4] Multilateral Convention Implementing Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, done at Paris on 24th November, 2016 (*Konwencja Wielostronna implementująca środki traktatowego prawa podatkowego mające na celu zapobieżenie erozji podstawy opodatkowania i przenoszeniu zysków sporzadzona w Paryżu dnia 24 listopada 20216 r.*), Journal of Laws (*Dziennk Ustaw*) 2018, item 1369. See also: https://read.oecd-ilibrary.org/taxation/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-action-15-2015-final-report_9789264241688-en#page1 (access: 8.08.2023).

that Brazil's tax treaty network is – compared to Poland's – not extensive[5]. It does not mean that the MLI has no impact at all on Brazil's tax treaty policy. Similarities and differences between Brazil's and Poland's approaches to the MLI's anti-BEPS provisions will be further discussed in Sec. 3 of this paper.

Brazil's DTCs with Argentina and the UK, and Poland's DTCs with Georgia and the Netherlands illustrate both countries' contemporary tax treaty policy and practice. They were selected for this research study for the following reasons: 1) neither of them is CTA within the meaning of Art. 2 (1)(a) of the MLI and, therefore, solutions adopted therein result from bilateral negotiations; 2) they reflect Brazil's and Poland's tax treaty policies with the OECD MS (the UK in the case of Brazil and the Netherlands in the case of Poland), as well as with non-OECD MS (Argentina in the case of Brazil and Georgia in the case of Poland); and, finally, 3) they were amended and/or concluded in the post-BEPS era.

The aim of this paper is to analyse the provisions of the BR-PL DTC in the context of countries' different approaches to the MLI. The impact of 2017 updates of the OECD Model Convention on Income and Capital (hereafter: the OECD Model)[6] and the UN Model Double Taxation Convention between Developed and Developing Countries (hereafter: the UN Model)[7] on the BR-PL DTC is also discussed. All these changes raise the question whether the BR-PL DTC fits to Brazil's and Poland's tax treaty network in the post-BEPS era or if it is a unique bilateral tax treaty, therefore crating a *sui generis* pattern: for Brazil – with other OECD Member States (hereafter OECD MS), and for Poland – with non-OECD Member States (hereafter: non-OECD MS), especially with other South American states[8]. Moreover, the paper examines

[5] J.F. Bianco, *Principal Purpose Test in Brazilian Tax Treaties,* https://www.ibdt.org.br/RDTIA/n-7-2020/principal-purpose-test-in-brazilian-tax-treaties/ (access: 8.08.2023), pp. 249–250.

[6] *OECD Model Tax Convention on Income and on Capital. Condensed version – 2017 and Key Features of Member Countries 2018*, A. Cracea (ed.), IBFD Publications, Amsterdam 2018, p. 11; See also: https://www.oecd.org/tax/treaties/oecd-approves-2017-update-model-tax-convention.htm (access: 8.08.2023).

[7] *United Nations Model Double Taxation Convention Between Developed and Developing Countries 2017 Update*, Department of Economic and Social Affairs, New York 2017, pp. XIII–XIV, https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (access: 8.08.2023).

[8] A. Trindade Marinho, *Transformation of Tax System in Brazil – 25 years of experience and future challenges,* [in:] *Transformation of Tax Systems in the CEE and BRICS Countries*

non-OECD and non-UN Models-based provisions present in the BR-PL DTC relevant to both states' tax policies and practices.

Therefore, the anti-BEPS measures in the BR-PL DTC will be discussed following the structure of the 2017 versions of the OECD and the UN Models. The same pattern is used in the analysis of non-anti-BEPS provisions contained in both Models.

2. The Current status of Brazil's and Poland's tax treaty policy and practice

Brazil's tax treaty network has been recently growing impressively. Up to now, Brazil has been party to 37 comprehensive bilateral tax treaties already in force. Brazil's tax treaty list includes DTCs with European, Asian, and South and North American states[9]. Africa, except for the DTC with Republic of South Africa, is underrepresented in Brazil's tax treaty network. Several of the above-mentioned tax treaties – e.g. DTCs with Chile, China (People's Rep. of China), India, Singapore, and Sweden – have been changed via amending protocols not in force yet[10]. Moreover, Brazil signed between 2020 and 2022 several more comprehensive bilateral tax treaties with the new tax treaty partners such as: Columbia, Norway, Paraguay, the United Kingdom, and Poland[11]. None of these new DTCs have been approved by the Brazilian National Congress. Besides that, the two more DTCs with Lithuania and Malaysia are now under negotiations. Brazil is also a party to several bilateral tax information exchange agreements (hereafter: TIEAs)[12].

– *25 years of experience and future challenges,* W. Nykiel, Z. Kukulski (eds.), Fundacja CDSP, Łódź 2018, pp. 337–339; Z. Kukulski, *Konwencja Modelowa OECD i Konwencja Modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, p. 18.

[9] List of Brazil's comprehensive bilateral tax treaties in force includes DTCs with: Argentina, Austria, Belgium, Canada, Chile, China (People's Rep. of China), the Czech Rep., Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Korea (Rep.), Luxembourg, Mexico, the Netherlands, Norway, Peru, Philippines, Portugal, Russia, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Türkiye, Ukraine, the UAE, Uruguay, and Venezuela – is available at: https://research.ibfd.org/#/doc?url=/collections/ita/html/ita_br_s_007.html%23ita_br_s_7.4.1.3 (access: 8.08.2023).

[10] https://research.ibfd.org/#/doc?url=/collections/ita/html/ita_br_s_007.html%23ita_br_s_7.4.1.3 (access: 8.08.2023).

[11] Ibidem.

[12] Ibidem.

Brazil is not the OECD Member State. However, on 25th January, 2022, the OECD Council decided to open accession discussions with Brazil. As a result, the Roadmap for the OECD Accession Process of Brazil was adopted on 10th June, 2022[13]. Hopefully it will also translate into an increase in the importance of the OECD Model in the Brazilian treaty policy, which until now has been mainly based on the UN Model[14]. Even now, the growing impact of the OECD Model as updated in 2017 is clearly visible in all of the recently signed/amended tax treaties with the OECD Member States, including the BR-PL DTC[15]. One of the prominent exceptions still following the UN Model as updated in 2017 is, *inter alia*, a separate provision dealing with the elimination of the double taxation of fees for technical services (hereafter: FTS), which will be further discussed in Sec. 4 of this paper.

Poland joined the OECD in 1996 and the European Union in 2004. Undoubtedly, these two events shaped Poland's tax treaty policy and practice after the collapse of communism in Central and Eastern Europe, and still have a great impact on it[16]. Today, Poland is a party to 90 comprehensive bilateral tax treaties[17]. Besides that, several other types of bilateral tax treaties are also present in the Polish tax treaty network, i.e. treaties for the elimination of selected types of income of individuals, treaties for the elimination of double taxation of enterprises exploring ships and aircrafts in international traffic, treaties for the elimination of double taxation with respect to inheritance taxes, and, finally, TIEAs[18]. However,

[13] https://www.oecd.org/latin-america/Roadmap-OECD-Accession-Process-brazil-EN.pdf (access: 8.08.2022).

[14] Z. Kukulski, *Praktyka traktatowa*…, pp. 13–15.

[15] R. Tomaleza, *Brazil's absence from the Multilateral BEPS Convention and the new amending protocol signed between Brazil and Argentina,* http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 8.08.2023).

[16] A. Nowak-Piechota, A. Barwaniec, *Transformation of Tax System in Poland – 25 years of experience and future challenges*, [in:] *Transformation of Tax Systems in the CEE and BRICS Countries – 25 years of experience and future challenges,* W. Nykiel, Z. Kukulski (eds.), Fundacja CDSP, Łódź 2018, pp. 209 et seq.

[17] For the list of Poland's tax treaty network see: https://www.podatki.gov.pl/podatkowa-wspolpraca-miedzynarodowa/wykaz-umow-o-unikaniu-podwojnego-opodatkowania/ (access: 9.08.2023).

[18] Z. Kukulski, *Rozdział V Polskie umowy podatkowe*, [in:] *Konwencja modelowa OECD i konwencja modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, https://sip.lex.pl/#/monograph/369332190/285378?pit=2023-08-11&keyword=Kukulski%20&tocHit=1&cm=SREST (access: 14.08.2023).

their role is limited in comparison to the importance of comprehensive DTCs for Poland's modern economy. Moreover, the signing and relatively rapid ratification of the MLI marks yet another milestone for the Polish contemporary tax treaty policy and practice. This topic will be further discussed in Sec. 3 of this paper.

Poland's comprehensive bilateral tax treaty network covers all Europe, except for the Europe's microstates such as Andorra, Lichtenstein, Monaco, and San Marino, and almost all Asia, except for the following states: Afghanistan, Bahrain, Bhutan, Brunei, Cambodia, East Timor, Iraq, Laos, the Maldives, Myanmar, Nepal, North Korea, Oman, Turkmenistan, and Yemen. In North America, the list of comprehensive bilateral tax treaties includes DTCs with Canada, Mexico, and the USA (the "old" DTC of 1974 still being in force). Moreover, Poland concluded DTCs with Australia and New Zealand.

Africa and South America are underrepresented in the Polish tax treaty network. In Africa, Poland is party to several DTCs with Algeria, Egypt, Ethiopia, Morocco, Niger, South Africa, Tunisia, Zambia, and Zimbabwe. On the other hand, in South America, Poland concluded DTCs only with Brazil, Chile, and Uruguay.

Only few comprehensive bilateral tax treaties that Poland is party to are not in force. This includes DTCs with Algeria, Nigeria, the USA (the new DTC of 2013 not being effective yet), Uruguay, and Zambia.

Generally, in its tax policy and practice, Poland follows the OECD Model. However, there are some provisions present in Polish tax treaties – with both OECD and non-OECD Member States – clearly based on the UN Model's recommendations, e.g. source-state taxation of royalties, provisions extending the P.E. concept on supervisory activity over a building site, the furnishing of services provision, shorter than 12-month threshold for a building site to constitute the P.E, independent professional services provision (183-day threshold), exclusive or rarely shared source-state taxation of pensions paid from public social security schemes, source-state taxation of other income, and, recently, also a separate FTS provision[19]. In these areas, the Polish tax treaty practice seems to be similar to that of Brazil's.

[19] Z. Kukulski, *Rozdział VII Wpływ Konwencji Modelowej ONZ na polską praktykę traktatową*, [in:] *Konwencja modelowa OECD i konwencja modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, https://sip.lex.pl/#/monograph/369332190/42?pit=2023-08-11&keyword=Kukulski%20&tocHit=1&cm=SRES (access: 14.08.2023).

3. Brazil's and Poland's approaches to the MLI anti-BEPS measures

As already mentioned, Brazil's absence at the signing ceremony of the MLI that took place on 7th June, 2017, in Paris, was above all justified by the complexity of the MLI[20]. Instead, Brazil decided to amend and update its DTCs through bilateral negotiations. Therefore, many of the MLI anti-BEPS measures were introduced to the recently amended or newly concluded DTCs. The DTC with Argentina changed via the amending protocol signed in 2017, as well as the new 2022 DTC with the UK, representing both OECD and non-OECD Member States, which illustrates Brazil's general approach to the tax-treaty-related anti-BEPS measures regulated in the MLI[21].

The following of the MLI anti-BEPS measures constituting both minimum standards and non-minimum standards of the MLI were incorporated into the above-mentioned tax treaties: 1) transparent entities provision (Art. 3 MLI), 2) dual resident entities provision (Art. 4 MLI), 3) rule adopting the credit method for the elimination of double taxation (Art. 5 MLI – Option C), 4) the preamble to the DTC (Art. 6 MLI), 5) PPT-Rule combined with an ownership clause worded negatively, along with a type of activity clause inspired by the Limitation of Benefits Clause (hereafter: LoB Clause) and an anti-abuse rule for permanent establishments situated in third jurisdictions (Art. 7 MLI and Art. 10 MLI), 6) dividend transfer transaction provision (Art. 8 MLI), 7) a rule against artificial avoidance of the P.E. status through *commissionaire* arrangements and similar strategies (Art. 12 MLI), 8) a rule against the artificial avoidance of the P.E. status through the specific activity exemptions (Art. 13 MLI), and, finally, 9) the definition of a person closely related to an enterprise

[20] R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 9.08.2023).

[21] F. Colucci, *Brazil's Responses to BEPS – Implementation Through the Double Taxation Agreement with Argentina*, https://www.machadomeyer.com.br/en/recent-publications/publications/tax/brazil-s-responses-to-beps-implementation-through-the-double-taxation-agreement-with-argentina (access: 9.08.2023). See also: https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_ar-br_02_eng_1980_tt__ad1.html (access: 9.08.2023) and https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-uk_02_eng_2022_tt__td1.html (access: 9.08.2023).

(Art. 15 MLI)[22]. Regarding the mutual agreement procedure (hereafter: MAP), Brazil's post-MLI DTCs usually replace the old provision in order to follow the wording of Art. 16 MLI aimed at the improvement of dispute resolutions[23].

In recently amended or newly-concluded DTCs, Brazil did not decide to include the immovable property clause (Art. 9 MLI) and anti-splitting up contracts provision (Art. 14 MLI). Brazil also maintained its current tax treaty practice against corresponding transfer pricing adjustment (Art. 17 MLI). However, in general, Brazil will provide access to MAP in transfer-pricing cases in the absence of such treaty provision in its DTCs[24]. Moreover, Brazil did also not include mandatory binding arbitration provisions (Arts. 18–26 MLI) into its contemporary tax treaties.

Poland is one of the signatories of the MLI. The country ratified the MLI on 8th November, 2016, as the fourth tax jurisdiction in the world just after Austria, the Isle of Man, and Jersey, and deposited the instrument of ratification to the OECD on 23rd January, 2018[25]. Poland listed 78 out of its 89 DTCs as CTAs[26]. Only a few DTCs that Poland is party to – namely non-ratified comprehensive DTCs with Algeria, Nigeria, Uruguay, and Zambia – were not listed by Poland as CTAs. Poland did not notify as CTAs also non-comprehensive DTCs with Guernsey, the Isle of Man, and Jersey. Moreover, DTCs in force with Germany, Georgia[27], and Montenegro were,

[22] R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 9.08.2023). See also: F. Colucci, *Brazil's Responses…*, https://www.machadomeyer.com.br/en/recent-publications/publications/tax/brazil-s-responses-to-beps-implementation-through-the-double-taxation-agreement-with-argentina (access: 9.08.2023).

[23] R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 9.08.2023).

[24] R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 9.08.2023).

[25] OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (access: 10.08.2023).

[26] Republic of Poland: Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification, https://www.oecd.org/tax/treaties/beps-mli-position-poland-instrument-deposit.pdf (access: 10.08.2023).

[27] The new DTC of between Georgia and Poland implementing the MLI's selected ant-BEPS measures has been already ratified and will be in force since 1st January, 2024.

according to Poland's position, also not listed as CTAs. Poland wishes to modify those DTCs through bilateral negotiations[28]. Therefore, the 1999 DTC between Poland and Georgia was replaced by the new tax treaty concluded in 2021. Besides that, the 2002 DTC between the Netherlands and Poland has also recently been bilaterally changed via the amending protocol singed in 2020, because this tax treaty was notified only by Poland and not by the Netherlands as CTA[29].

Poland assumed a wide implementation of the MLI[30]. The following MLI's anti-BEPS measures were adopted by Poland with no reservations: 1) transparent entities provision (Art. 3 MLI), 2) dual resident entities provision (Art. 4 MLI), 3) a rule adopting the credit method for the elimination of double taxation (Art. 5 MLI – Option C)[31], 4) the preamble to the DTC (Art. 6 MLI), 5) PPT-Rule as an *interim* measure (Art. 7 MLI – Option 1), 6) dividend transfer transaction provision (Art. 8 MLI),

See: Z. Kukulski, *Nowa bilateralna umowa podatkowa Polski z Gruzją w świetle stanowiska Polski i Gruzji wobec Konwencji Wielostronnej oraz aktualizacji Konwencji Modelowej OECD i Konwencji Modelowej ONZ z 2017 r.*, "Kwartalnik Prawa Podatkowego" 2021, no. 4, pp. 37 et seq.

[28] Justification to the Act ratifying the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, done at in Paris on 24th November, 2016, the Sejm paper no. 1776, Warsaw, 18th July, 2017 (*Uzasadnienie do projektu ustawy ratyfikującej Konwencję wielostronną implementującą środki prawa traktatowego mające na celu zapobieganie erozji podstawy opodatkowania i przenoszenia zysku, sporządzonej w Paryżu 24 listopada 2016 r., druk sejmowy nr 1776, Warszawa, 18 lipca 2017 r.*), pp. 45–47, 56–57, https://orka.sejm.gov.pl/Druki8ka.nsf/0/39B2431FBC225D03C12581670038E84D/%24File/1776.pdf (access: 10.08.2021).

[29] The amending protocol signed on 29th October, 2020, to the 2002 DTC the Netherlands and Poland entered into force on 1st January, 2023. See: Z. Kukulski, *Protokół zmieniający bilateralną umowę podatkową Polski z Holandią w świetle stanowiska Polski do Konwencji Wielostronnej (MLI) oraz aktualizacji Konwencji Modelowej OECD w sprawie podatku od dochodu i majątku z 2017 r.*, "Kwartalnik Prawa Podatkowego" 2020, no. 1, pp. 55 et seq.

[30] A. Franczak, *Multilateral Convention (MLI) – The Evolution or Revolution?*, "Studia Iuridica Lublinensia" 2018, vol. 27, no. 2, pp. 9 et seq., https://doi.org/10.17951/sil.2018.27.2.9. See also: M. Raińczuk, M. Leconte, *Konwencja Wielostronna – wpływ na umowy o unikaniu podwójnego opodatkowania zawarte przez Polskę*, "Przegląd Podatkowy" 2018, no. 1, pp. 20–21.

[31] M. Jamroży, *Metody unikania podwójnego opodatkowania w świetle wielostronnej konwencji implementującej środki traktatowego prawa podatkowego*, "Studia Prawno-Ekonomiczne" 2018, vol. 107, pp. 11–32; H. Litwińczuk, *Międzynarodowe prawo podatkowe,* Wolters Kluwer, Warszawa 2020, p. 379.

7) immovable property clause (Art. 9 MLI), and, finally, 8) corresponding transfer pricing adjustment (Art. 17 MLI)[32]. The question whether and to which extent the CTAs will be modified through the MLI depends on the position of Poland's tax treaty partner[33].

Regarding the mechanisms improving dispute resolutions (Art. 16 MLI), Poland reserved the right not to apply Art. 16(1)(1) of the MLI, arguing that the country is currently not able to meet the minimum standard in this area[34]. Ultimately, Poland intends to introduce into its DTCs a system of bilateral notifications or another system of consultations with tax treaty partner's competent authorities aimed at improving the effectiveness of the MAP. Regarding other provisions of Art. 16 of the MLI, Poland did not raise any objections and adopted the regulations indicated therein.

On the other hand, Poland opted out only few provisions of the MLI, namely the anti-abuse clause for P.Es. located in third jurisdictions (Art. 10 MLI), rules against artificial avoidance of the P.E. status (Arts. 12–15), and arbitration provisions (Arts. 18–26 MLI). It means that in all these areas, despite the position of Poland's tax treaty partner, the CTAs will not be modified via the MLI.

In summary, when putting side by side Brazilian and Polish approaches to the MLI anti-BEPS measures, many common areas can be identified, e.g. measures against treaty abuse (Art. 6 and Art. 7 MLI) and majority of other anti-BEPS provisions not constituting the MLI minimum standards. Of course, there are also several important points where the positions of the two countries differ, e.g. immovable property clause (Art. 9 MLI), rules against artificial avoidance of the P.E. status (Arts. 12–15 MLI) as well as the corresponding transfer pricing adjustment (Art. 17 MLI). It raises the

[32] Government Declaration of 6th June, 2018, on the binding force of the Multilateral Convention implementing tax treaty measures aimed at preventing base erosion and profit shifting, done at Paris on 24th November, 2016, Journal of Laws (*Dziennik Ustaw*) 2018, item 1370. (*Oświadczenie rządowe z dnia 6 czerwca 2018 r. w sprawie mocy obowiązującej Konwencji wielostronnej implementującej środki traktatowego prawa podatkowego mające na celu zapobieganie erozji podstawy opodatkowania i przenoszeniu zysku, sporządzonej w Paryżu dnia 24 listopada 2016 r., Dz.U. z 2018 r., poz. 1370*).

[33] It is worth mentioning that Polish Ministry of Finance publishes explanations regarding the impact of the MLI on a given DTC (the so-called synthetic text) as it enters into force. Synthetic texts of the DTCs modified by the MLI – both in Polish and in English are available at: https://www.podatki.gov.pl/podatkowa-wspolpraca-miedzynarodowa/wykaz-umow-o-unikaniu-podwojnego-opodatkowania/ (access: 10.08.2023).

[34] Z. Kukulski, *Protokół…*, p. 59.

question whether – and, if so, to what extent – the BR-PL DTC is consistent with Brazil's and Poland's approaches to the MLI anti-BEPS measures, and if there are any other factors influencing solutions adopted in this tax treaty.

4. The impact of the MLI anti-BEPS measures and the latest OECD and UN Models updates in this area on the BR-PL DTC

The BR-PL DTC follows the structure of the 2017 OECD Model with some exceptions in favour of the 2017 UN Model. The impact of the latest update of the UN Model in 2021 is meaningless[35]. Moreover, the treaty contains also specific non-OECD and non-UN Models-based provisions frequently present in the Brazilian and the Polish tax treaties.

The title of the BR-PL DTC corresponds with the 2017 OECD and the UN Models updates introducing the objective of preventing tax avoidance simultaneously alongside the elimination of doble taxation and prevention against tax evasion as a goal of tax treaty. Also, the preamble to the BR-PL DTC expressing both states' intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax avoidance and tax evasion follows the 2017 OECD and the UN Models, and, therefore, is fully compliant with Art. 6(1) of the MLI (*Purpose of the Covered Tax Agreement*)[36]. The preamble also asserts, as provided in Art. 6(3) of the MLI, that Brazil and Poland desire to further develop their economic relationship and to enhance their cooperation in tax matters. Similar solution is adopted in recently amended and/or concluded by Brazil DTCs with Argentina and the UK, as well in Poland's DTCs with the Netherlands and Georgia.

The BR-PL DTC contains a provision dealing with fiscal transparent entities based on Art. 3(1) of the MLI. Similar solution was also adopted in updated versions of Art. 1(2) of the OECD and the UN Models in 2017[37].

[35] *United Nations…*, pp. XII–XVI, https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf (access: 10.08.2023).

[36] Z. Kukulski, *Art. 6 Konwencji Wielostronnej jako dyrektywa wykładni umów o unikaniu podwójnego opodatkowania*, [in:] *Prawo podatkowe w systemie prawa. Międzygałęziowe związki norm i instytucji prawnych*, A. Kaźmierczyk, A. Franczak (eds.), Warszawa 2019, p. 510 et seq.

[37] See: H. Litwińczuk, *Rozdział 5 Charakterystyka treści poszczególnych artykułów Modelu Konwencji OECD*, [in:] *Międzynarodowe prawo podatkowe*, Warszawa 2020, https://sip.lex.pl/#/monograph/369464442/31?keyword=litwińczuk&tocHit=1&cm=STOP (access: 11.08.2023).

Also, savings clause confirming the general rule of international tax law according to which the DTC should not affect the right of contracting states to tax their own residents, except where intended, and listing the provisions of the DTC to which this rule is not applicable – is also present in the BR-PL DTC[38]. Such rules were also adopted in currently amended and/or concluded DTCs by both states, except for Brazil's DTC with Argentina[39] and for Poland's DTC with Georgia[40]. In addition the *tie-breaker rules* in the BR-PL DTC, especially the treaty's dual resident entities provision, are structured on the 2017 OECD and the UN Models, and, therefore, are in line with Art. 4(1) of the MLI[41]. In the analysed group of DTCs, only the treaty between Brazil and Argentina predates the 2017 updates of the OECD and the UN Models, providing the place of effective management as the only decisive criterion solving the cases of dual residence for persons other than individuals[42].

The concept of P.E. in the BR-PL DTC adopts all anti-BEPS measures against artificial avoidance of the P.E. status recommended by Arts. 12–15 of the MLI as well as by Art. 5 of the 2017 OECD and UN Models. These include: 1) a rule against artificial avoidance of the P.E. status through *commissionaire* arrangements and similar strategies[43], 2) the rule against the artificial avoidance of the P.E. status though the specific activity exemptions[44],

[38] See: Art. 1(3) of the BR-PL DTC available at: https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 11.08.2023).

[39] R. Tomaleza, *Brazil's absence…,* http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (dostęp: 11.08.2023).

[40] See: Art. 1 of the BR-AR DTC, available at: https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Personal-Scope_ARTICLE-I (access: 11.08.2023), and Art. 1 of the GE-PL DTC available at: https://www.podatki.gov.pl/media/7167/gruzja-tekst-en-2021.pdf (dostęp: 11.08.2023).

[41] See: Art. 4(3) of the BR-PL DTC available at: https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 11.08.2023).

[42] See: Art. 4(3) of the BR-AR DTC, available at: https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023).

[43] See: Art 5(7) of the BR-PL DTC, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023).

[44] See: Art. 5(5) of the BR-PL DTC, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023). https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/

3) the splitting-up of contracts provision[45], and 4) the concept of person closely related to an enterprise[46]. Moreover, the BR-PL DTC contains the anti-fragmentation rule recommended by Art. 5(4.1.) of the OECD and the UN Models following the OECD/G20 Final Report on Action 7 of the BEPS (*Preventing the Artificial Avoidance of Permanent Establishment Status*)[47], The purpose of this provision is to prevent an enterprise from fragmenting its activities – either within the enterprise or between closely related enterprises – to qualify for the specific activity exemptions in Art. 5(4) of the OECD and the UN Models.

Such a wide absorption of all anti-BEPS measures with respect to the artificial avoidance of the P.E. is present only in the DTC between the Netherlands and Poland[48]. None of such measures is included in the DTC between Poland and Georgia[49]. In the case of Brazil, only some of them were adopted in DTCs with Argentina and the UK, e.g. the concept of a person closely related to an enterprise, a rule against the artificial avoidance of the P.E. status through the specific activity exemption[50], and the anti-fragmentation

Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023).

[45] See: Art. 5(4) of the BR-PL DTC, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023).

[46] See: Art. 5(11) of the BR-PL DTC, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Resident_ARTICLE-IV (access: 11.08.2023).

[47] *OECD/G20 Base Erosion and Profit Shifting Project: Preventing the Artificial Avoidance of the Permanent Establishment Status. Action 7 – 2015 Final Report*, pp. 39 et seq., https://www.oecd-ilibrary.org/docserver/9789264241220-en.pdf?expires=1691758966&id=id&accname=guest&checksum=DD1F02F7E9EA60784EB131A740357EB8 (access: 11.08.2023).

[48] See: Art. 5 of the Protocol between the Republic of Poland and the Kingdom of the Netherlands amending the Convention between the Republic of Poland and the Kingdom of the Netherlands for the elimination of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Warsaw on 13th February, 2002, and the Protocol, signed at Warsaw on 13th February, 2002, https://www.podatki.gov.pl/media/6445/protokół-teskt-angielski.pdf (access: 11.08.2023).

[49] Art. 5 of the GE-PL DTC, https://www.podatki.gov.pl/media/7167/gruzja-tekst-en-2021.pdf (access: 11.08.2023).

[50] See: Art. 5 of the BR-AR DTC only, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Permanent-Establishment_ARTICLE-V (access: 11.08.2023).

rule recommended by Art. 5(4.1.) of the OECD and the UN Models, as well as the concept of a person closely related to a company[51].

One of Poland's tax treaty policy goals is the implementation of corresponding transfer pricing adjustment provision to its all-modern tax treaties. No surprise then that such a rule based on Art. 9(2) of the OECD and the UN Models, and, therefore, on Art. 17 of the MLI is also present in Poland's DTCs with the Netherlands and Georgia. Brazil, however, stands in a position against Art. 9(2) of the OECD and the UN Models. Brazil's DTC with Argentina confirms this policy and practice, while DTCs with the UK and Poland contradict it.

However, the corresponding transfer pricing adjustment provision is directly part of the text of Art. 9 of the Brazil's DTC with the UK only. In the case of Poland, such a rule is missed. The provision being equivalent of Art. 9(2) of the OECD and the UN Models is to be found in the final protocol to the BR-PL DTC. According to it, Poland reserves the right to provide corresponding transfer pricing adjustment, while Brazil gives Poland the most favoured nation treatment (hereafter: MFN). Thus, if after the signing of the DTC, any convention or agreement concluded by Brazil with a third State includes provisions which have an equal result to correspondent transfer pricing adjustment, Brazil shall also apply such provisions to BR-PL DTC as soon as such provisions take effect between Brazil and that third State. Moreover, Brazil shall inform Poland of any such provisions which would take effect between Brazil and a third State.

Furthermore, the final protocol contains yet another provision, clearly inspired by Art. 9(3) of the UN Model. It gives Poland right not to provide the corresponding transfer pricing adjustment where judicial, administrative, or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under Article 9, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence, or wilful default. Similar solutions are exceptional in the Polish tax treaty practice[52]. In the case of Brazil, provision excluding

[51] See: Art. 5 of the BR-UK DTC, https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-uk_02_eng_2022_tt__td1.html (access: 11.08.2023).

[52] Z. Kukulski, *Eliminacja podwójnego opodatkowania w sensie prawnym i ekonomicznym dochodów z działalności gospodarczej na gruncie Konwencji Modelowej ONZ – odstępstwa od Konwencji Modelowej OECD*, [in:] *Konwencja modelowa OECD i konwencja modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, https://sip.lex.pl/#/monograph/369332190/27?pit=2023-08-11&keyword=Kukulski%20&tocHit=1&cm=SREST (access: 14.08.2023).

the application of correspondent transfer pricing adjustment in the case of fraudulent or negligent conduct is included in the DTC with the UK[53].

The BR-PL DTC also introduces a minimum shareholding threshold of 365 days for the application of the reduced WHT rate provided in Art. 10(2)(a) (*Dividends*) in order to avoid dividend stripping tax avoidance schemes[54]. Similar restriction is present in all tax treaties discussed in this paper, except for Poland's DTC with Georgia[55].

Contrary to Brazil's contemporary tax treaty policy and practice, the BR-PL DTC includes the post-BEPS wording of the immovable property clause. Thus, gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, as well as certificates or participating units of an investment fund, may be taxed in the company's *situs* state if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50% of their value directly or indirectly from immovable property situated in that state. Such clause compatible with Art. 9 of the MLI and the modern version of Art. 13(4) in both Model Conventions is also provided in Poland's DTC with the Netherlands and is missing in the DTC with Georgia.

In their post-BEPS tax treaties, both countries try to replace previously used exemption as a method for the elimination of double taxation. Thus, the BR-PL DTC also adopts the ordinary tax credit method instead of the exemption. That is yet another significant change in comparison to Brazil's and Poland's pre-BEPS tax treaty policy and practice.

The MAP provision in BR-DTC is designed to fit Brazil's and Poland's positions towards the improvement of dispute resolution as discussed in Sec. 3 of this paper[56]. Moreover, Brazil and Poland did not include in their tax treaty the mandatory binding arbitration provided in Arts. 18–26 of the

[53] See: Art. 9(4) of the BR-UK DTC., https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-uk_02_eng_2022_tt__td1.html%23tt_br-uk_02_eng_2022_tt__td1_a9 (access: 12.08.2023).

[54] See: Art. 10 of the BR-PL DTC, (access: 11.08.2023); See also: R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 11.09.2023).

[55] See: Art. 10 of GE-PL DTC, https://www.podatki.gov.pl/media/7167/gruzja-tekst-en-2021.pdf (access: 11.08.2023).

[56] See: Art. 26 of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 12.08.2023).

MLI. Similar approach is present in all DTCs currently amended and/or concluded both by Brazil and Poland.

Regarding Art. 7 of the MLI, Poland opted for PPT-Rule. The PPT-Rule is also introduced in Poland's DTCs with the Netherlands and with Georgia, even though both treaties are not CTAs. In BR-PL DTC, however, Brazil's approach towards the prevention of treaty abuse was adopted[57]. Thus, the PPT-Rule provided in the BR-PL DTC[58] is combined with some provisions inspired by the LoB clause, similar to those discussed in Sec. 3 of this paper[59]. Moreover, the BR-PL DTC contains also a specific anti-abuse provision aimed at limiting tax treaty benefits if the Brazilian or Polish legislation contains provisions, or introduces such provisions after the signing of the DTC, whereby offshore income derived by a resident company form: 1) shipping; 2) banking, financing, insurance investment or similar activities; or 3) operating as a holding company, co-ordination centre or similar entity providing administrative services or other support to a group of companies which carry on business primarily in third states is not taxed in that state or is taxed at a rate of tax which is lower than 75% of the rate of tax which is applied to income from similar onshore activities[60]. Brazil's DTCs with Argentina and the UK also contain a similar rule.

5. Non-anti-BEPS provisions in the BR-PL DTC

The BR-PL contains non-anti-BEPS provisions based on 2017 updates of the OECD and the UN Models. It also includes some solutions reflecting specific tax treaty policy and practice of both states. This approach is typical of all tax treaties amended and/or concluded by Brazil and Poland in the post-BEPS era.

[57] See: Art. 28 of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 12.08.2023).

[58] See: Art. 28(6) of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 12.08.2023).

[59] See: Art. 28(2) and (3) of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 12.08.2023). See also: J.F. Bianco, *Principal Purpose Test in Brazilian Tax Treaties*, https://www.ibdt.org.br/RDTIA/n-7-2020/principal-purpose-test-in-brazilian-tax-treaties/ (access: 12.08.2022).

[60] See: Art. 28(1) of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 12.08.2023).

The OECD and the UN Models share many similarities. The number of differences between them was a bit mellowed due to the 2017 updates. Despite that, the UN Model still contains many inbred provisions supporting fiscal interests of emerging economies such as Brazil[61]. Some of them are also attractive for the OECD MS, including for Poland.

The BR-PL DTCs follows the 2017 OECD and UN Models in relation to their recommendations dealing with: taxes covered, general definitions, tie-breaker rules for individuals, the concept of actual P.E.[62], a positive list of places constituting a P.E., the agency of P.E., and the status of a subsidiary as a P.E. The same applies to some rules allocating taxing rights in cases of income from immovable property, international shipping and air transport, dividends, interests, capital gains, employment income, directors' fees, entertainers and sportspersons, government service, students, and other income. Also, non-discrimination clauses, the exchange of information provisions, as well as members of diplomatic missions and consular posts provision are in line with the OECD and the UN Models.

Less significant deviations from both Models can be identified in some of the above-mentioned provisions. However, if so, they do not change Brazil's and Poland's approach towards the 2017 updates of the OECD and the UN Models, e.g. different from the OECD's WHT rates for dividends and interest. Moreover, the BR-PL DTC does not contain distributive rule dealing with the elimination of the double taxation of capital (Art. 22 of the OECD/UN Models), because taxes on capital are not covered by this treaty. Also, the assistance in collection of taxes provision (Art. 28 of the OECD/UN Model) is omitted.

The UN Model deviates from the OECD as of the concept of P.E. Provision of Art. 5(3)(a) of the first mentioned Model, provide 6-month (or 183-day instead) threshold after which a building site, a construction, assembly, or installation project is to constitute the P.E. This typical UN Model recommendation is present in tax treaties between Brazil and both Argentina and the UK, while the BR-PL DTC follows the OECD Model threshold of 12 months. The exact same solution is adopted in the tax treaty between Poland and the Netherlands, but not in the DTCs with Georgia, where the threshold is 9 months.

[61] Ibidem, pp.

[62] H. Litwińczuk, *Rozdział 9 ZAKŁAD*, [in:] *Międzynarodowe prawo podatkowe*, Warszawa 2020, https://sip.lex.pl/#/monograph/369464442/93?keyword=litwińczuk&tocHit=1&cm=STOP (access: 12.08.2023).

The shorter threshold for a building site etc. to constitute a P.E. is not the only difference between the UN and the OECD Models. Also, the supervisory activities in connection therewith lead to the existence of a P.E. in the *situs* state. This typical UN Model provision is not included into the BR-PL DTC, and neither in Poland's DTC with the Netherlands nor Georgia. It is present in Brazil's DTCs with Argentina and the UK instead. Moreover, contrary to Brazil's DTC with the UK, Poland's DTCs with the Netherlands and Georgia do not include one more typical UN Model provision dealing with the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose – the so-called services P.E.[63] According to Art. 5(3)(b) of the UN Model, such services lead to the existence of a P.E., but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.

The concept of P.E. in the BR-PL DTC also contains yet another typical UN Model provision dealing with insurance agents (Art. 5(6) of the UN Model). Insurance companies are deemed to have a P.E. in other contracting state if they collect premiums or insure risks in that territory through a person who is not an agent of an independent status[64]. A similar rule is present in Brazil's tax treaties with Argentina[65] and the UK[66], but not in Poland's DTCs with the Netherlands and Georgia.

Regarding business income, the BR-PL DTC follows the pre-2010 version of the OECD Model[67]. It means that rules dealing with profits

[63] W. Wijen, J. de Goede, A. Alessi, *The Treatment of Services in Tax Treaties*, "Bulletin for International Taxation" 2012, no. 1, pp. 29–30.

[64] Z. Kukulski, *Koncepcja zakładu oraz definicja należności licencyjnych na gruncie Konwencji Modelowej ONZ*, [in:] *Konwencja modelowa OECD i konwencja modelowa ONZ w polskiej praktyce traktatowej*, Warszawa 2015, https://sip.lex.pl/#/monograph/369332190/26?pit=2023-08-11&keyword=Kukulski%20&tocHit=1&cm=SREST (access: 14.08.2023).

[65] See: Art. 5(6) of the BR-AR DTC, https://www.orbitax.com/taxhub/taxtreaties/BR/Brazil/AR/Argentina/7b2669bb-aa3c-4062-81a4-b7b81afd884d/-Permanent-Establishment_ARTICLE-V (access: 11.08.2023).

[66] Art. 5(6) of the BR-UK DTC, https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-uk_02_eng_2022_tt__td1.html (access: 11.08.2023).

[67] H. Litwińczuk, *Model Konwencji OECD z 2010 r. i wersje późniejsze*, [in:] *Międzynarodowe prawo podatkowe*, Warszawa 2020, https://sip.lex.pl/#/monograph/369464442/111?keyword=litwińczuk&tocHit=1&cm=STOP (access: 12.08.2023).

attribution to the P.E. are not based on the *Authorised OECD Approach* (hereafter: AOA) and are thus in line with the 2017 UN Model[68]. Poland's DTC with the Netherlands and Poland is the only example among the examined tax treaties containing the AOA. Moreover, none of them contains the *limited force of attraction* provision as recommended in Art. 7(1)(b) and (c) of the UN Model.

The majority of modern tax treaties that Poland is party to, except for the DTC with the Netherlands, treat income form independent professional services (former Art. 14 deleted from the OECD Model in 2000) as part of business income. Separate provision dealing with this type of income is not only still present in the UN Model but also has wider scope in comparison to its OECD equivalent. According to Art. 14(2) of the UN Model, the source-state taxation is reserved also when a person providing independent professional services in the other contracting state, regardless of having a fixed base there, is present in that state for a period or periods amounting to or exceeding in the aggregate 183 days in any 12-month period commencing or ending in the fiscal year concerned. If the 183-day threshold of presence is fulfilled, the source state is entitled to tax only income as is derived from a person's activity performed in that state. The same provision is present in Art. 15 of the BR-PL DTC, but also in its tax treaty with Argentina and the UK, and, therefore, seems to be one of the features of modern Brazilian tax treaty practice. Contemporary Polish tax treaty practice in this area is different, e.g. the 1999 DTC between Poland and Georgia provided, contrary to the tax treaty now in force, a separate provision dealing with income from independent professional services.

Brazil and Poland follow the UN Model with respect to the elimination of the double taxation of royalties in their tax treaty policy and practice. The UN Model attributes taxing rights over royalties to both contracting states. The source state, however, is obliged to limit the WHT imposed therein. The UN Model does not contain recommendations for the level of maximum WHT rate applicable in the source state. Thus, the WHT rate is determined by contracting states during the DTC's negotiations. The BR-PL DTC, as well as the other DTCs currently amended and/or concluded by Brazil and Poland, replicates this pattern[69]. The majority of tax treaties concluded by Brazil and Poland, including Brazil's DTCs with Argentina and the UK as

[68] Ibidem.

[69] See: Art. 12(1) and (2) of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 13.08.2023).

well as Poland's DTCs with the Netherlands and Georgia, provide single reduced WHT rate for royalties. In the BR-PL DTCs, however, there are two WHT rates: 15% applicable to royalties arising from the use or the right to use trademarks, and 10% applicable to the royalties in all other cases.

Another common similarity between Brazil's and Poland's tax treaty policy and practice lies in the scope of definition of royalties which is based on Art. 12(3) of the UN Model. In the UN Model, the term "royalties" also means payments of any kind receiver as a consideration for the use of, or the right to use, cinematograph films and recordings for television or radio broadcasting, and for the use of, or the right to use, any industrial, commercial (the so-called leasing) equipment[70]. A similar approach is adopted in the BR-PL DTs as well as in Brazil's DTC with the UK and Poland's DTCs with the Netherlands and Georgia.

In 2017, a new provision for FTS was introduced to the UN Model in Art. 12A[71]. The lack of a separate rule dealing with the elimination of the double taxation of such fees – especially the lack of a precise definition of this term allowing distinguishing FTS from fees for "ordinary services" – generated inconsistent tax treaty policy and practice in DTCs concluded by Poland. In the majority of Poland's tax treaties FTS of an auxiliary, complementary or instrumental nature to a know-how or technology transfer agreements are treated as royalty payments, while fees from "ordinary services" – as business income[72]. Therefore, a separate FTS provision is quite rare in Poland's tax treaty practice[73]. Brazil tends to go

[70] *United Nations Model…*, p. 14, https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf (access: 13.08.2023).

[71] J. Martin, *UN releases updated model tax treaty adding new technical services fees article*, https://mnetax.com/un-releases-updated-model-tax-treaty-adding-new-technical-service-fees-article-27765 (access: 13.08.2023). A. Báez Moreno, *The Taxation of Technical Services under the United Nations Model Double Taxation Convention: A Rushed – Yet Appropriate – Proposal for (Developing) Countries?*, "World Tax Journal" 2015, vol. 7, no. 3, pp. 267–328, https://edisciplinas.usp.br/pluginfile.php/5503651/mod_resource/content/0/Andres%20Baez%20-%20wtj_2015_03_int_2.pdf (access: 13.08.2023).

[72] W. Wijnen, J. de Goede, A. Alessi, *The Treatment…*, pp. 32–34. See also: R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 13.08.2023); Z. Kukulski, *Eliminacja podwójnego opodatkowania opłat za usługi techniczne w świetle art. 12A Konwencji Modelowej ONZ – rozwiązanie problemu czy źródło nowych sporów interpretacyjnych?* "Przegląd Prawa Publicznego" 2022, no. 4, pp. 84–87.

[73] Z. Kukulski, *Eliminacja podwójnego…*, p. 87.

in the opposite direction[74]. Thus, an express definition for FTS along with a distributive rule for such fees is often present in the Brazilian tax treaty practice, including Brazil's DTCs with Argentina, the UK, and Poland. Pursuant to it, FTS are considered as payments in consideration for any service of a managerial, technical, or consultancy nature, unless the payment is made to an employee of the person making it, or for teaching in an educational institution as well as for teaching by an educational institution, and, finally, by an individual for licenses for their personal use[75]. This approach follows the 2017 UN Model definition of FTS[76].

In Brazil's DTC with Argentina, however, a more inclusive concept of technical services and technical assistance was adopted that can change the current case-law favouring the position of the Brazilian tax administration[77]. Thus, the FTS provision under this treaty applies to fees from services that depend on specialized technical knowledge or that involve administrative assistance or consultancy services, carried out by independent professionals or under an employment relationship, or even as a result of automated structures with clear technological content. It also covers fees from permanent advice rendered by the assignor of a secret process or formula to the assignee by means of technicians, designs, studies, instructions, or other similar services which enable the effective use of the assigned process or formula. The solution adopted in Brazil's DTC with Argentina solves many qualification conflicts that may arise when

[74] R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 13.08.2023).

[75] See: Art. 13(3) of the BR-UK DTC, https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_br-uk_02_eng_2022_tt__td1.html%23tt_br-uk_02_eng_2022_tt__td1_a13 (access: 13.08.2023), Art. 13(3) of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 13.08.2023).

[76] See: Sec. 5 of the final protocol to the BR-PL DTC, according to which treaty FTS provisions also apply to payments of any kind received as consideration for the rendering of technical assistance, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 13.08.2023).

[77] See: Art. 12 of the BR-AR DTC, https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_ar-br_02_eng_1980_tt__ad1.html%23tt_ar-br_02_eng_1980_tt__ad1_a9 (access: 13.08.2023). R. Tomaleza, *Brazil's absence…*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 13.08.2023).

interpreting the narrow concept of FTS recommended by the UN Model[78]. If a similar approach were adopted in Poland's tax treaty practice, it might also help to clarify certain doubts raised in the Polish judicature[79].

Likewise, the UN Model, the BR-PL DTC, pensions, and other similar remuneration in consideration of past employment and annuities arising in a Contracting State may be taxed in the residence state of their beneficiary[80]. Moreover, the exclusive right to tax pensions and other similar payments in attributed to the source state thereof only if they are made under a public scheme which is part of the social security system of that state or its political subdivision or a local authority. A similar approach is used in Poland's DTC with the Netherlands. It was also present in the 1999 DTC with Georgia, replaced by the new treaty signed in 2021, which fully follows the OECD pattern granting the exclusive right to tax pensions to the recipient's residence state. Brazil's treaty policy and practice is similarly inconsistent in this area. For example, the DTC with the UK follows the OECD Model, while the DTC with Argentina goes even further than the UN Model and attributes the exclusive right to tax pensions and annuities regardless of the fact whether they are made under a public scheme which is part of the social security system or not. Moreover, Brazil's DTC with Argentina provides definitions for pensions and annuities and similar income, while in Poland's DTC with the Netherlands, only the definition for annuities can be found. A similar solution is rather rare in both countries' tax treaty practice.

Finally, the BR-DTC follows the UN Model regarding the taxation of other income. Pursuant to Art. 23(3) of that treaty, which is an equivalent of Art. 21(3) of the UN Model, items of income, wherever arising, not dealt with in the foregoing articles of that treaty may also be taxed in the source state. No such rule is present in Poland's DTCs with the Netherlands and Georgia. A unique solution is adopted in Brazil's DTC with Argentina. Art. 22 of that treaty simply states that other income shall be taxable only

[78] A. Báez Moreno, *Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services,* "World Tax Journal" 2021, no. 11, pp. 531 et seq.

[79] E.g., (PL) Judgment of the Supreme Administrative Court of 8th July, 2016, II FSK 885/15, LEX 2118181.

[80] See: Art. 19 of the BR-PL DTC, https://research.ibfd.org/#/doc?url=/data/treaty/docs/html/tt_ar-br_02_eng_1980_tt__ad1.html%23tt_ar-br_02_eng_1980_tt__ad1_a9 (access: 13.08.2023).

in the source state[81]. On the other hand, Brazil's DTC with the UK contains identical provision to the BR-PL DTC. Moreover, it includes a special non-BEPS-based anti-profit shifting clause. Identical clauses are typically parts of treaty provisions dealing with interests (as recommended in Art. 11(6) of the OECD and UN Models), royalties (as recommended in Art. 12(6) of the OECD and UN Models), and FTS 9 (as recommended in Art. 12A(7) of the UN Model), but not with other income.

6. Provisions reflecting country-specific tax treaty policies and practices in the BR-PL DTC

The BR-PL DTC contains several provisions specific for Brazilian and Polish tax treaty policy and practice. These include interest source-state exemption clause, separate distributive rule for teachers and researchers, and the MFN clauses.

The interest source-state exemption clause is a typical non-OECD and non-UN Models-based provision present in all tax treaties Brazil and Poland are parties to, analyzed in this research study. Such clauses provide exemption from WHT in the source state for interest arising there and derived and beneficiary owned by the Government of the other Contracting State, a political subdivision thereof or any agency (including the Central Bank or a financial institution) wholly owned by that Government or a political subdivision thereof[82]. In some tax treaties, e.g. in the DTC between Poland and the Netherlands, the list of exempt state owned or controlled beneficiaries is longer. It includes, *inter alia*, interest paid on a loan of whatever kind granted, insured or guaranteed by an institution for purposes of promoting export, interest paid in connection with the sale on credit of any industrial, commercial, or scientific equipment, or from a loan of whatever kind granted by a bank, or in respect of a bond, debenture and other similar obligation of the government of a contracting state, or of a political subdivision, or a local authority thereof, and, finally, interest paid to a recognized pension fund of a contracting state which is generally exempt from taxation thereof.

[81] See: Art. 22 of the BR-AR DTC, http://www.planalto.gov.br/CCIVil_03/Atos/decretos/1982/D87976.html (access: 13.08.2023).

[82] Commentary on Article 11, [in:] *United Nations*…, p. 334 et seq., https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (access: 13.08.2023).

Brazil DTCs with Argentina and the UK, and Poland's DTC with the Netherlands contain a separate distributive rule for teachers and researchers. Similar provision is present in the BR-PL DTC[83]. The analysis of the Polish contemporary tax treaty policy and practice leads to the conclusion that such a rule is rather disappearing in Poland's tax treaties, e.g. the DTC with Georgia, while it seems to be a constant feature of Brazil's approach towards it.

Lastly, even though Brazil and Poland are not closely related economies, the BR-PL DTC includes the MFN clause in the final protocol. The MFN clause in BR-PL DTC crates an automatic entitlement to better terms, providing that if after the date of signing the DTC, Brazil enters into a tax treaty with any OECD MS, excluding any state in Latin America (e.g. Chile) pursuant to which the applicable WHT rates on interest and royalties are lower (including any exemption) than the ones provided in the BR-PL DTC, then WHT rates applicable to such interest and royalties will be replaced by the rate of 10%, from the time on which such lower rates (or exemptions) enter into force and for as long as such rates are applicable. Similar MFN clauses with wider scope covering also WHT rates on dividends and FTS are included in Brazil's DTCs with Argentina and the UK. Thus, the presence of such clauses seems to be a feature of the Brazilian contemporary tax treaty policy and practice.

7. Conclusions

The BR-PL DTC follows both countries' approach to the post-BEPS international tax treaty regime. The impact of the MLI anti-BEPS measures on it is clearly visible. The treaty provisions also incorporate changes in the OECD and the UN Models. Moreover, it also reflects countries' specific tax treaty policies and practices.

From Brazil's perspective, the BR-PL DTC is in line with its recently amended and concluded DTCs with both OECD and non-OECD MS. The treaty also follows Brazil's approach to the MLI's anti-BEPS measures.

Also from Poland's perspective, the treaty with Brazil fits in Poland's contemporary tax treaty policy and practice, which is now heavily dependent on Poland's tax treaty partners' positions to the MLI. It results

[83] See: Art. 21 of the BR-PL DTC, https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf (access: 14.08.2023).

in a range of differences in implementation of the MLI anti-BEPS measures regardless of whether a given DTC is a CTA or not. Poland's DTCs with the Netherlands and Georgia are the examples illustrating these issues. Comparing the Dutch approach to the MLI[84], Georgia's position to it is restrictive[85]. Except for minimum standards of the MLI, Georgia opted-out all other anti-BEPS measures. Not surprisingly, this affects the solutions adopted in Poland's DTC with that state. The same applies to the DTC with the Netherlands.

Brazil is not only the largest country in South America. The country is also one of the world's emerging economies aspiring to membership in the OECD. Brazil is also a member state of BRICS[86] and the South American trade bloc established by the Treaty of Asunción in 1991 as well as the Protocol of Ouro Preto in 1994, the so-called MERCOSUL[87]. Thus, its tax treaty policy and practice is undoubtedly observed and followed by other South American states. Having a DTC, such a BR-PL DTC, reflecting countries' position to the treaty related anti-BEPS measures and balancing the taxing rights between the residence and source state, might be a pattern for Poland during the negotiations of DTCs with other South American countries, as well for Brazil in relation to other OECD and EU Member States.

The BR-PL DTC is an important tool that might, according to its preamble, not only further develop the economic relationship and enhance their bilateral cooperation in tax matters between these two in the future. Having in mind that Brazil's Southern Federal States, especially Paraná, are inhabited by a large percentage of population with Polish

[84] The Netherlands (submitted by the Kingdom of the Netherlands in respect of the Netherlands) – Status of List of Reservations and Notifications upon Deposit of the Instrument of Acceptance, deposited on 29th March, 2019, https://www.oecd.org/tax/treaties/beps-mli-position-netherlands-instrument-deposit.pdf (access: 14.08.2023).

[85] Reservations and notifications under the Multilateral Convention to Implement Tax Treaty Related Measures io Prevent Base Erosion and Profit Shifting – Georgia, deposited on 29th March, 2019, https://www.oecd.org/tax/treaties/beps-mli-position-georgia-instrument-deposit.pdf (access: 14.08.2023).

[86] See: http://infobrics.org (access: 14.08.2023).

[87] The full member states of the MERCOSUL include Argentina, Brazil, Paraguay, and Uruguay. Venezuela is a full MS but has been suspended since 1st December, 2016. Moreover, Bolivia, Chile, Colombia, Ecuador, Guyana, Peru and Suriname have the status of associates. See: https://www.mercosur.int/quienes-somos/paises-del-mercosur/ (access: 14.08.2023).

roots, it might also create new or strengthen the existing interpersonal ties between residents of both Contracting States, leading to economic growth as well as cultural, scientific, and social exchange.

Bibliography

Báez Moreno A., *Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services*, "World Tax Journal" 2021, no. 11.

Báez Moreno A., *The Taxation of Technical Services under the United Nations Model Double Taxation Convention: A Rushed – Yet Appropriate – Proposal for (Developing) Countries?*, "World Tax Journal" 2015, vol. 7, no. 3, https://edisciplinas.usp.br/pluginfile.php/5503651/mod_resource/content/0/Andres%20Baez%20-%20wtj_2015_03_int_2.pdf (access: 13.08.2023).

Bianco J.F., *Principal Purpose Test in Brazilian Tax Treaties,* https://www.ibdt.org.br/RDTIA/n-7-2020/principal-purpose-test-in-brazilian-tax-treaties/ (access: 8.08.2023).

Colucci F., *Brazil's Responses to BEPS – Implementation Through the Double Taxation Agreement with Argentina,* https://www.machadomeyer.com.br/en/recent-publications/publications/tax/brazil-s-responses-to-beps-implementation-through-the-double-taxation-agreement-with-argentina (access: 9.08.2023).

Franczak A., *Multilateral Convention (MLI) – The Evolution or Revolution?*, "Studia Iuridica Lublinensia" 2018, vol. 27, no. 2, pp. 9 et seq., https://doi.org/10.17951/sil.2018.27.2.9

Jamroży M., *Metody unikania podwójnego opodatkowania w świetle wielostronnej konwencji implementującej środki traktatowego prawa podatkowego*, "Studia Prawno-Ekonomiczne" 2018, vol. 107.

Justification to the Act ratifying the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, done at in Paris on 24 November 2016, the Sejm paper no. 1776, Warsaw, 18 July 2017 (*Uzasadnienie do projektu ustawy ratyfikującej Konwencję wielostronną implementującą środki prawa traktatowego mające na celu zapobieganie erozji podstawy opodatkowania i przenoszenia zysku, sporządzonej w Paryżu 24 listopada 2016 r., druk sejmowy nr 1776, Warszawa, 18 lipca 2017 r.*), pp. 45–47, 56–57, https://orka.sejm.gov.pl/Druki8ka.nsf/0/39B2431FBC225D03C12581670038E84D/%24File/1776.pdf (access: 10.08.2021).

Kukulski Z., *Art. 6 Konwencji Wielostronnej jako dyrektywa wykładni umów o unikaniu podwójnego opodatkowania*, [w:] *Prawo podatkowe w systemie prawa. Międzygałęziowe związki norm i instytucji prawnych*, A. Kaźmierczyk, A. Franczak (eds.), Warszawa 2019.

Kukulski Z., *Eliminacja podwójnego opodatkowania opłat za usługi techniczne w świetle art. 12A Konwencji Modelowej ONZ – rozwiązanie problemu czy źródło nowych sporów interpretacyjnych?* "Przegląd Prawa Publicznego" 2022, no. 4.

Kukulski Z., *Konwencja Modelowa OECD i Konwencja Modelowa ONZ w polskiej praktyce traktatowej*, Wolters Kluwer a business, Warszawa 2015.

Kukulski Z., *Nowa bilateralna umowa podatkowa Polski z Gruzją w świetle stanowiska Polski i Gruzji wobec Konwencji Wielostronnej oraz aktualizacji Konwencji Modelowej OECD i Konwencji Modelowej ONZ z 2017 r.*, "Kwartalnik Prawa Podatkowego" 2021, no. 4.

Kukulski Z., *Praktyka traktatowa państw BRICS a bilateralne umowy podatkowe z Polską*, "Kwartalnik Prawa Podatkowego" 2015, no. 3.

Kukulski Z., *Protokół zmieniający bilateralną umowę podatkową Polski z Holandią w świetle stanowiska Polski do Konwencji Wielostronnej (MLI) oraz aktualizacji Konwencji Modelowej OECD w sprawie podatku od dochodu i majątku z 2017 r.*, "Kwartalnik Prawa Podatkowego" 2020, no. 1.

Litwińczuk H., *Międzynarodowe prawo podatkowe*, Wolters Kluwer, Warszawa 2020.

Martin J., *UN releases updated model tax treaty adding new technical services fees article*, https://mnetax.com/un-releases-updated-model-tax-treaty-adding-new-technical-service-fees-article-27765 (access: 13.08.2023).

Nowak-Piechota A., Barwaniec A., *Transformation of Tax System in Poland – 25 years of experience and future challenges*, [in:] *Transformation of Tax Systems in the CEE and BRICS Countries – 25 years of experience and future challenges*, W. Nykiel, Z. Kukulski (eds.), Fundacja CDSP, Łódź 2018.

OECD/G20 Base Erosion and Profit Shifting Project: Preventing the Artificial Avoidance of the Permanent Establishment Status. Action 7 – 2015 Final Report, https://www.oecd-ilibrary.org/docserver/9789264241220-en.pdf?expires=1691758966&id=id&accname=guest&checksum=DD1F02F7E9EA60784EB131A740357EB8 (access: 11.08.2023).

OECD Model Tax Convention on Income and on Capital. Condensed version – 2017 and Key Features of Member Countries 2018, A. Cracea (ed.), IBFD Publications, Amsterdam 2018, https://www.oecd.org/tax/treaties/oecd-approves-2017-update-model-tax-convention.htm (access: 8.08.2023).

OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (access: 10.08.2023).

Raińczuk M., Leconte M., *Konwencja Wielostronna – wpływ na umowy o unikaniu podwójnego opodatkowania zawarte przez Polskę*, "Przegląd Podatkowy" 2018, no. 1.

Republic of Poland: Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification, https://www.oecd.org/tax/treaties/beps-mli-position-poland-instrument-deposit.pdf (access: 10.08.2023).

Reservations and notifications under the Multilateral Convention to Implement Tax Treaty Related Measures io Prevent Base Erosion and Profit Shifting – Georgia, deposited on 29 March 2019, https://www.oecd.org/tax/treaties/beps-mli-position-georgia-instrument-deposit.pdf (access: 14.08.2023).

The Netherlands (submitted by the Kingdom of the Netherlands in respect of the Netherlands) – Status of List of Reservations and Notifications upon Deposit of the Instrument of Acceptance, deposited on 29 March 2019, https://www.oecd.org/tax/treaties/beps-mli-position-netherlands-instrument-deposit.pdf (access: 14.08.2023).

Tomaleza R., *Brazil's absence from the Multilateral BEPS Convention and the new amending protocol signed between Brazil and Argentina*, http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/ (access: 7.08.2023).

Trindade Marinho A., *Transformation of Tax System in Brazil – 25 years of experience and future challenges*, [in:] *Transformation of Tax Systems in the CEE and BRICS Countries – 25 years of experience and future challenges*, W. Nykiel, Z. Kukulski (eds.), Fundacja CDSP, Łódź 2018.

United Nations Model Double Taxation Convention Between Developed and Developing Countries 2017 Update, Department of Economic and Social Affairs, New York 2017, pp. XIII–XIV, https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (access: 8.08.2023).

Wijen W., de Goede J., Alessi A., *The Treatment of Services in Tax Treaties*, "Bulletin for International Taxation" 2012, no. 1.

Umowa o unikaniu podwójnego opodatkowania Brazylii z Polską w świetle ich aktualnej polityki i praktyki traktatowej

Streszczenie. Artykuł dotyczy umowy o unikaniu podwójnego opodatkowania w zakresie podatków od dochodu oraz zapobiegania uchylaniu się od opodatkowania i unikania opodatkowania między Brazylią i Polską, podpisanej 20 września 2022 r. w kontekście współczesnej polityki i praktyki umów podatkowych Brazylii i Polski. Autor analizuje jej główne cechy w porównaniu ze stanowiskiem Brazylii i Polski wobec Konwencji Wielostronnej implementującej środki prawa traktatowego mające na celu zapobieganie erozji podstawy opodatkowania i przenoszenia zysku oraz zmian wprowadzonych do Konwencji Modelowej OECD i Konwencji Modelowej ONZ w 2017 r., a także inne regulacje w niej zawarte, które mają istotne znaczenie w polityce i praktyce traktatowej obu państw. Badania koncentrują się wokół tezy, czy i w jakim stopniu umowa Brazylii z Polską stanowi przykład unikalnej bilateralnej umowy podatkowej o specyficznych cechach, czy też może stanowić swoisty wzorzec dla bilateralnych umów podatkowych: Brazylii – z innymi państwami członkowskimi OECD oraz Polski – z innymi państwami Ameryki Południowej.

Słowa kluczowe: Brazylia, Polska, bilateralna umowa podatkowa, Konwencja Wielostronna (MLI), Konwencja Modelowa OECD, Konwencja Modelowa ONZ, polityka traktatowa, praktyka traktatowa