

THE REMUNERATION OF TEACHERS AND RESEARCHERS UNDER ART. 21 OF THE BRAZIL-POLAND DOUBLE TAXATION CONVENTION OF 2022 IN THE LIGHT OF THE POLISH TREATY PRACTICE

Summary. The aim of this paper is to analyze an exemption addressed to visiting teachers and researchers included in Art. 21 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 signed in New York on 20 September 2022. The Brazil-Poland provision is compared with its equivalents included in agreements concluded by Poland with other countries. Clauses limiting or extending the application of the exemption, present or missing in Art. 21 of the Brazil-Poland DTC, are discussed. The said provision is also assessed against content and/or quality criteria that such a special provision should fulfill.

Keywords: teachers, researchers, double taxation, double non-taxation, exemption, tax treaty, double taxation convention, Poland, Brazil

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1. INTRODUCTORY REMARKS

Cross-border mobility of teachers and researchers (hereinafter also referred to as “academics”) has become an essential element of academic development. Temporary teaching and/or research stays abroad are beneficial not only to academics themselves, but also to both home and host countries, and to humanity in general. By facilitating an international exchange of ideas, such mobility contributes to the advancement and dissemination of human knowledge and to the growth of understanding between nations and cultures. What begins as a personal development experience of a visiting teacher/researcher, very often becomes a foundation of an enhanced, long-term cooperation between home and host institutions, including joint research projects. It is thus crucial to remove bureaucratic and financial barriers to such mobility, including tax barriers.

Double taxation of income of a visiting academic is not the only thing that could pose a significant barrier. Given the temporary nature of the visit, also the mere necessity to become familiar with and fulfil tax obligations in the host country could hinder mobility. Tax formalities, uncertainties, and risks (real or just subjectively perceived) have the potential to distract the academic from his/her core activities (teaching and/or research) or even to discourage him/her from the mobility itself. To remove such potential barriers to mobility, the host country may unilaterally opt to introduce into its national legislation a tax exemption for the income of an academic derived from teaching and/or research in its territory during a temporary stay. Alternatively, both countries, the host and the home one, may agree to enrich their bilateral international agreement on the elimination of double taxation of income, with a provision explicitly addressed to visiting academics and providing them with a limited exemption in the host country. To truly facilitate or at least not to hinder mobility, such an exemption, included either in domestic legislation or in a treaty, must be drafted with the utmost care so that it does not become a source of uncertainty/risk itself, hence an additional barrier. If needed, official (advance) guidance on the exemption should be provided to the academics and host institutions by the tax administration. The host institutions’ legal or tax departments should also be ready to assist.

The aim of this paper is to analyze the exemption addressed to visiting teachers and researchers included in Art. 21 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 signed in New York on 20th September, 2022 (hereinafter: “the Brazil-Poland DTC”)¹. The Brazil-Poland provision is compared with its equivalents included in agreements concluded by Poland with other countries². Clauses limiting or extending the application of the exemption, present or missing in Art. 21 of the Brazil-Poland DTC, are discussed. The said provision is also assessed against contents and/or quality criteria that such a special provision should fulfil.

2. THE *TEACHERS AND RESEARCHERS* ARTICLE IN THE OECD AND THE UN MODELS, AND COMMENTARIES THEREON

The OECD³ and the UN⁴ Model Conventions on the elimination of double taxation of income and capital, which are commonly used as blueprints during negotiations of bilateral conventions to be concluded between countries, do not include a separate *Teachers and Researchers* provision. As discussed below, the official commentaries to these models

¹ Available in English at <https://www.podatki.gov.pl/media/8591/brazylia-en-kopia-kopia.pdf> (access: 4.08.2023). See also 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 Rzeczpospolitą 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.*), Official Gazette (Dziennik Ustaw) 2023, item 704. To date, the Brazil-Poland DTC has only been ratified by Poland. For the purposes of this paper, the English version of the said treaty is analysed.

² All agreements on the elimination of double taxation of income concluded by Poland are available at: <https://www.podatki.gov.pl/podatkowa-wspolpraca-miedzynarodowa/wykaz-umow-o-unikaniu-podwojnego-opodatkowania/> (access: 4.08.2023). For the purposes of this paper, the English version is analyzed, if available, otherwise – the Polish one. In individual cases, the English version is compared with the Polish one.

³ See OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing, Paris 2017 (hereinafter: “OECD Model 2017”).

⁴ See UN, *Model Double Taxation Convention between Developed and Developing Countries 2017 Update*, United Nations, New York 2017 (hereinafter: “UN Model 2017”), as well as the most recent UN, *Model Double Taxation Convention between Developed and Developing Countries 2021 Update*, United Nations, New York 2021 (hereinafter: “UN Model 2021”).

acknowledge that many treaties contain such special provisions, the aim of which is to facilitate cultural relations or the exchange of knowledge by exempting income in the host state. It is further explained in the commentaries that the absence of a specific provision in the models should not prevent contracting states from including such a provision in a treaty if they deem it appropriate (“desirable”). However, no exact wording is suggested in the commentaries. As a result, the wording adopted by contracting states worldwide is very diverse. Moreover, specific provisions are either included in a separate *Teachers* (and *Researchers*) article or added to the article generally devoted to students⁵.

During the drafting of the OECD and the UN Models and commentaries thereon, initiatives to add an article devoted to teachers occurred, but after thorough consideration, they resulted only in clarifying additions to the commentaries⁶.

The commentary on Art. 15 of the OECD Model 2017 concerning *Income from Employment* (para. 11) only remarks that no special provision has been made in the Model regarding the remuneration of visiting professors, although many treaties contain such rules, with the main purpose of facilitating cultural relations by introducing a limited tax exemption. It is further explained that the absence of specific rules in the Model should not be interpreted as an obstacle to the inclusion of such rules in double taxation conventions. Interestingly, among positions on Art. 20 of the OECD Model 2017 concerning *Students* and its commentary,

⁵ Commenting on Art. 20 of the OECD Model 2017 dedicated to *Students*, H. Litwińczuk remarks that in their bilateral treaties contracting states may extend the scope of this article to address the specific situation of teachers and researchers (H. Litwińczuk, *Artykuł 20. Studenci (Students)*, [in:] H. Litwińczuk, *Międzynarodowe prawo podatkowe*, Wolters Kluwer, Warszawa 2020, Lex/el). M. Herm notes that many countries include a provision dealing with teaching and research staff in the same article as students (M. Herm, *Student Article in Model Conventions and in Tax Treaties*, “Intertax” 2004, no. 2, p. 69). X. Zhu argues that the *Teachers and Researchers* article evolved from the *Students* article (X. Zhu, *The “Teachers and Researchers” Article in Tax Treaties*, “Asia-Pacific Tax Bulletin” 2019, no. 2, IBFD Tax Research Platform/el). Both articles, instead of distributing taxing powers between the source and the residence state, provide an exemption in the host state (H. Zhu, *The “Teachers and Researchers” ...*).

⁶ For a brief discussion of the historic context and arguments voiced in favor and against, see P.N. Csoklich, O.Ch. Günther, *Visiting Academics in Double Tax Treaties*, “Intertax” 2011, no. 11, p. 587; Commentary on Art. 20 UN Model 2017, paras. 10–12; Commentary on Art. 20 UN Model 2021, paras. 11–13.

Brazil, similarly to several other countries, explicitly reserved “the right to add an article which addresses the situation of teachers, professors and researchers, subject to various conditions and to make a corresponding modification to para. 1 of Article 15”. Poland did not express its position on the issue.

The UN Model 2017 commentary (also 2021) deals more extensively with the specific situation of teachers and researchers. The commentary on Art. 15 concerning *Income from Dependent Personal Services* remarks that Art. 15, as well as Arts. 14 (*Independent personal services*), 19 (*Government service*), and 23 (*Methods for elimination of double taxation*) are generally adequate to prevent double taxation of visiting teachers, but “some countries may wish to include a visiting teachers article in their treaties”⁷. More detailed coverage is provided in paras. 10 to 12 of the 2017 commentary on Article 20 concerning *Students* (similarly to paras. 11 to 13 of the 2021 commentary). It is explained that under the UN Model 2017 (also 2021) “visiting teachers are subject to Art. 14, if the services are performed in an independent capacity, Art. 15, if the services are dependent, or Art. 19, if the remuneration is paid by a contracting state”⁸, but Arts. 14 and 15 normally do not exempt a visiting teacher’s income from taxation at source, because, generally, they allow source taxation if the individual providing independent or dependent services is present in the host country for more than 183 days, and many teaching assignments last longer⁹. It follows that many treaties include “an additional article or paragraph dealing specifically with teachers and, sometimes, researchers, typically exempting them from taxation in the host country if their stay does not exceed a prescribed length”. It is also noted that a tax exemption included in domestic legislation is an alternative preferred “by many”. The diversity of national approaches is then indicated

⁷ See Commentary on Art. 15 UN Model 2017, para. 3; Commentary on Art. 15 UN Model 2021, para. 7.

⁸ For a detailed discussion on the problems of qualification of income of visiting teachers and researchers under Art. 7, Art. 15 or Art. 19 of the OECD Model, see P.N. Csoklich, O.Ch. Günther, *Visiting ...*, pp. 579–587.

⁹ A “temporary” teaching and/or research visit in the host country is often long enough for the academic to become a tax resident under the domestic legislation of the host country. Depending on individual circumstances, the academic will keep or lose his/her resident status in the home country. Hence, dual residence is possible, which may be solved on the basis of tie-breaker rules, as included in Art. 4(2) of the OECD Model 2017 and the UN Model 2017 (2021).

as an impediment to the inclusion of a specific provision in the UN Model. However, the problem is not neglected. On the contrary, para. 12 of the commentary on Art. 20 (*Students*) of the UN Model 2017 (likewise para. 13 of the 2021 commentary) provides valuable guidance for contracting states wishing to include in their treaty a special provision relating to visiting teachers. Firstly, double non-taxation of teachers is “not desirable”. Secondly, the benefit (i.e. the exemption in the host country) should be limited to visits of a set maximum duration. Normally, the limit should be set at two years. An extension of the time limit should be possible in individual cases by a mutual agreement between competent authorities of the contracting states. Above all, the consequences of visits exceeding the time limit should be determined: whether income is “taxable as of the beginning of the visit or merely from the date beyond the expiration of the time limit”. Thirdly, it should be decided “whether the benefits should be limited to teaching services performed at certain institutions «recognized» by the Contracting States in which the services are performed”. Fourthly, in the case of researchers, it should be stated whether the benefit (exemption) is only applicable to “remuneration for research performed in the public (vs. private) interest”. Finally, it should be determined “whether an individual may be entitled to the benefits of the article more than once.” Article 21 of the Brazil-Poland DTC on *Teachers and Researchers* is tested against these requirements in the subsequent parts of this paper.

3. THE *TEACHERS AND RESEARCHERS* ARTICLE IN THE POLISH TAX TREATY PRACTICE

The *Teachers and Researchers* article is a very characteristic element of the Polish treaty practice, included in double taxation conventions (comprehensive and selective) with 66 out of 91 (73%) countries¹⁰. Usually, a separate article is included, while only several DTCs include a joint article with paragraphs dedicated to *Teachers* (and *Researchers*) and *Students* (Croatia,

¹⁰ Interestingly, in a few cases, the *Teachers and Researchers* provision is included in the “old”, yet still applicable DTC, and not included in the new, not yet applicable DTC (Georgia 1999 vs. 2021, Malaysia 1977 vs. 2013, the USA 1974 vs. 2003). The “old”, still applicable DTCs are analyzed in this paper. Additionally, several signed DTCs that never entered into force due to the lack of bilateral ratification are taken into account (Algeria, Nigeria, Uruguay, and Zambia). Currently, the status of the Brazil-Poland DTC is similar, as it has not been ratified by Brazil yet.

France, Indonesia, Iran, Kazakhstan, Kyrgyzstan, Russia, Spain). Both teaching and research are covered, even if the title of the provision refers to “teachers” and/or “professors”, omitting “researchers” (Australia, Bangladesh, Belgium, Croatia, Estonia, Hungary, Iran, Ireland, Japan, Macedonia, Malaysia 1997 (still applicable), Malta, Montenegro, the Netherlands, Pakistan, Serbia, South Korea, Spain, Uruguay, the USA 1974 (still applicable)).

The lack of a model provision may be one of the reasons for the very diverse wording of the *Teachers and Researchers* provision included in Polish treaties. The most common, but not overly prevailing wording thereof includes two paragraphs and reads as follows:

Article ... Professors /Teachers and Researchers. 1) An individual who visits a Contracting State for the purpose of teaching or carrying out research at an university, college or other recognized educational institution in that Contracting State, and who is or was immediately before that visit a resident of the other Contracting State, shall be exempted from taxation by the first mentioned Contracting State on any remuneration for such teaching or research for a period not exceeding two years. 2) The provisions of paragraph 1 of this Article shall not apply to income from research if such research is undertaken not in the public interest but primarily for the private benefit of a specific person or persons.

These conclusions generally correspond with the findings included in the most extensive analysis of the Polish treaty practice published by Z. Kukulski¹¹, in which not the exact typical wording is provided, but a set of conditions and consequences which may be used to build the hypothesis and disposition of the article.

According to Z. Kukulski, the three most common divergences from the above include: 1) the lack of limitation of the exemption only to research carried in the public interest and not primarily for the private benefit (Algeria, Austria, Bangladesh, China, Germany, Kuwait, Malaysia 1997, Morocco, Mongolia, Pakistan, Saudi Arabia, Slovenia, South Korea, Vietnam, the United Arab Emirates); 2) the limitation of the exemption only to income arising from sources outside the host country (Algeria, Indonesia, Iran, Kyrgyzstan, Macedonia, Montenegro, Morocco, Serbia, Zambia, Zimbabwe); 3) the modification (shortening, extension or omission¹²) of the

¹¹ See Z. Kukulski, *Inne postanowienia szczególne w polskiej praktyce traktatowej*, [in:] Z. Kukulski, *Konwencja modelowa OECD i konwencja modelowa ONZ w polskiej praktyce traktatowej*, Wolters Kluwer, Warszawa 2015, Lex/el.

¹² Interestingly, the English version of the DTC with Zambia does not contain any time limit, while the Polish version refers to a stay not exceeding two years. The DTC with Uruguay does not contain any time limitation.

time limit (China (five years), Egypt (one year), Kuwait (five years), Qatar (three years), Russia (three years), United Arab Emirates (three years), Uruguay (none))¹³.

Several other recurring differences may also be listed.

Most treaties provide that the income is exempted for a period not exceeding a certain threshold. Thereby, the temporal limitation is an element of the disposition of the norm. However, in many treaties, a stay not exceeding a certain time limit is a condition for the application of the exemption, thus being an element of the hypothesis of the norm¹⁴ (Algeria, Australia, Bangladesh, Belgium, Croatia, Georgia 1999 (still applicable); Indonesia, Iran, Italy, Japan, Kazakhstan, Lebanon, Luxembourg, Macedonia, Malaysia 1977 (still applicable), Malta, Morocco, the Netherlands, South Korea, Pakistan, Portugal, Qatar, Spain, Ukraine, Zimbabwe). The consequences of exceeding the threshold differ substantially. In the first case, income becomes taxable only from the date beyond the expiration of the time limit (i.e. non-retrospective taxation), while in the latter case, a longer stay makes the income taxable as of the very beginning of the visit (i.e. retrospective taxation). Some treaties (Hungary, Ireland, South Africa, the United Arab Emirates) refer to the time limit twice, providing that the stay should not exceed X years and that the exemption is applicable for a period not exceeding X years. Regardless which of the above versions is adopted, often an addition is made concerning the calculation of the time limit – from the date of “*first* visit [or less frequently – arrival] for that purpose” (Albania, Austria, Bulgaria, Cyprus, Egypt, Estonia, Germany, Greece, Hungary, Ireland, Israel, Kazakhstan, Latvia, Lithuania, Mexico, Montenegro, the Netherlands, Nigeria, Philippines, Romania, Russia, Serbia, Slovakia, Slovenia, Ukraine, the United Kingdom), “*first* arrival” (China, Kuwait, Lebanon, Mongolia, Vietnam), or merely “arrival” (Ethiopia, India, Sri Lanka, Thailand, the USA 1974).

Some treaties include the requirement of teaching and/or research being the “sole” purpose of the visit (Algeria, Armenia, Austria, Bangladesh, Georgia 1999, Indonesia, Ireland, Qatar, South Korea, Lebanon, Malaysia 1977, Morocco, Thailand, the United Kingdom, the United Arab Emirates) or – the “primary” purpose (China, Iran, Kyrgyzstan, Kuwait, Macedonia, Mongolia,

¹³ Z. Kukulski, *Inne...*

¹⁴ On the distinction between the time limit being an element of the legal requirements for the application of the exemption and an element of the legal consequences, see also P.N. Csoklich, O.Ch. Günther, *Visiting...*, pp. 593–594.

the USA 1974, Vietnam). Several treaties provide that the visit or the teaching and/or research should take place “at the invitation” of the host institution or (rarely) the host state (Armenia, Bangladesh, Indonesia, Lebanon, Malaysia 1977, South Korea, Qatar, Thailand, the United Arab Emirates, the USA 1974), or, additionally, under an official programme of cultural exchange (Indonesia, Qatar). As regards the host institutions, several treaties go beyond the standard list (including universities, colleges, or other recognized educational institutions) by adding schools (Australia, Bangladesh, China, Croatia, India, Indonesia, Italy, Japan, Kuwait, Lebanon, Malaysia 1977, Malta, Mongolia, Montenegro, Qatar, Serbia, Slovenia, South Korea, Spain, Thailand, the United Arab Emirates, the United Kingdom, Vietnam), and just two (Indonesia, Qatar) – by adding museums, and one (Indonesia) – by adding other cultural institutions. On the contrary, few treaties seem to limit the coverage to institutions of “higher education” (Greece, Ireland, Pakistan, Uruguay). Some treaties include “other educational (or research) institutions” without requiring them to be “recognized” or “accredited” (Italy, Kazakhstan, Malta, the Netherlands, Pakistan, Portugal, Russia, Spain, Ukraine, the United Arab Emirates, Zimbabwe). Few treaties do not indicate types of covered host institutions at all (France, Iran, Kyrgyzstan, Macedonia, Zambia). Few treaties do not expressly reserve that only remuneration for teaching or research is exempted, referring to “remuneration of teachers and researchers” (Belgium, Croatia¹⁵, Georgia 1999, Kyrgyzstan, Luxembourg) or “remuneration received for his [teacher’s or researcher’s] activities” (France).

While under most treaties being a resident of the other contracting state “immediately before” visiting the host state is sufficient for the exemption to be applicable, the wording of some treaties is more restrictive, requiring the academic to “be” a resident of the other contracting state, i.e. to keep his/her resident status in the home country for the duration of the temporary teaching/research visit (Australia, Belgium, Croatia, France, Kyrgyzstan, Luxembourg, Malta, the Netherlands, Russia, the USA, Zambia, Zimbabwe). The adverb “immediately” is missing in few treaties (Bangladesh, Saudi Arabia). Two treaties (Iran, Macedonia) refer to being a national of the other contracting state and one (Pakistan) to being “from one of the contracting states”.

¹⁵ The English version of the DTC with Croatia does not include such a restriction, while it is present in the Polish version.

Moreover, variations of the subject to tax clause may be found in several Polish treaties, whereby the exemption in the host country is conditional upon the taxation of the income in the other country (Austria, Australia, Germany, Malta, Malaysia 1977; the United Kingdom, the United Arab Emirates). On the contrary, under the DTC with Portugal, double non-taxation seems to be the intended result, as the exemption in the host country applies “provided that the income is not taxed in the other State”. Strangely, the English version of the DTC with Pakistan expressly states that the income “should not be taxed in either of the contracting states” (which clearly leads to double non-taxation), while the Polish version provides that the income is not to be taxed in the host country.

As has been shown, the wording of the *Teachers and Researchers* article in DTCs concluded by Poland is diverse, although it is possible to identify the most common clauses as well as the ones being less common or very rare.

4. THE *TEACHERS AND RESEARCHERS* ARTICLE IN THE BRAZIL-POLAND 2022 DTC

Article 21 of the Brazil-Poland 2022 DTC, entitled *Teachers and Researchers*, includes one paragraph and provides that:

An individual who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who, at the invitation of the Government of the first-mentioned State or of a university, college, school or museum in that first-mentioned State, or under an official programme of cultural exchange, is present in that State for a period not exceeding two consecutive years solely for the purpose of teaching, giving lectures or carrying out research at such institutions shall be exempt from tax in that State on the remuneration for such activity, provided that such remuneration arises from sources outside that State.

The wording included in the Brazil-Poland 2022 DTC is rather distinctive, with only one other treaty concluded by Poland bearing close resemblance, namely the DTC with Indonesia of 1992, which addresses the situation of teachers and researchers in the first paragraph of its Article 21¹⁶. Despite minor differences in expressing the conditions and consequences of application, the normative content of both provisions is almost the same. However, the adjective “consecutive”, referring to the two years of stay, is

¹⁶ Art. 21 para. 2 of the DTC with Indonesia concerns students, apprentices, and business trainees.

not included in the treaty with Indonesia, while “other cultural institutions” are added to the list of institutions at which teaching or research may be done. Similarities in wording may also be identified in the DTC with Qatar of 2008, though there are more differences in normative content: the period of stay is set at three years, the adjective “consecutive” is not included, “other similar educational, scientific or research institutions” are added, and the condition of research in public interest is present.

When comparing Art. 21 of the Brazil-Poland DTC with the most common wording included in Polish treaties, the requirement of “remuneration arising from sources outside that State” seems to be the most distinctive and simultaneously the most limiting element of the Brazilian-Polish provision. The visit should take place at the invitation of the government or a listed institution of the host state, or under an official programme of cultural exchange, and yet the remuneration should be of foreign origin. It is a possible, but not that common situation, with financing provided by the home country or institution, a third country or its institution, an international organization or even a multinational enterprise. A similar clause referring to “sources outside the host state” is included in the *Students* article and explained in para. 4 of the Commentary to Art. 20 of the OECD Model which may be helpful in interpreting the *Teachers and Researchers* provision¹⁷. Thus, “sources outside the host state” are payments which are not made by or on behalf of a resident of the host state, or which are not borne by a permanent establishment which a person has in the host state.

The requirement of foreign-origin sources may in some cases be helpful in preventing double non-taxation¹⁸, which may occur if both the host country (due to the exemption) and the home – or better – departure country (due to the academic’s loss of resident status) do not have the competence to tax the income of the visiting academic. On the one hand, it is sensible to address the exemption also to academics who were residents of the country of departure “immediately before visiting the host state”. By including such a clause, it is acknowledged that, depending

¹⁷ P.N. Csoklich, O.Ch. Günther, *Visiting...*, p. 596.

¹⁸ It may also be connected with the fact that a foreign payer is not entitled to the deduction of the remuneration paid to the academic from his/her taxable income. However, there is a discussion if it is justifiable that an academic is taxed or exempted depending on where the funds originate from. See P.N. Csoklich, O.Ch. Günther, *Visiting...*, p. 595, 599.

on individual circumstances, a temporary visit may lead to the loss of tax resident status in the home country. Under the domestic legislation of the host state, the academic may often become its resident, e.g. after meeting the 183 days criteria. However, such an “immediately before” clause may result in double non-taxation, if the host country applies the exemption, while the country of departure is no longer entitled to tax the income of its former resident. Then, the country of financing (often coinciding with the country of departure – the former country of residence) may be entitled to tax under its domestic legislation, e.g. on the basis of source principle, but not necessarily. Nonetheless, double non-taxation may be better prevented by including a subject to tax clause present in several other treaties and missing from the DTC with Brazil¹⁹. Such a clause would definitely better fulfil the UN Commentary guidance that “double exemption of teachers is not desirable”.

The inclusion of the word “immediately”, as in the Brazil-Poland DTC, may be helpful in the proper addressing of the exemption so that the benefit is not provided to an academic who in the past used to be a resident of the other state and before coming to the host state became a resident of a third country and during his/her temporary visit to the host state became its resident. Such a person is generally entitled to treaty benefits and the restriction “immediately” is needed to exclude him/her from the scope of the *Teachers and Researchers* exemption. The basic condition for the application of the treaty and entitlement to the exemption as one of the treaty benefits, as set in Art. 1(1), is that the person is a resident of one or both of the contracting states, hence newly acquired residence of the host state seems sufficient to benefit from the exemption. Then, the “immediately before” clause becomes crucial.

The “sole purpose” clause, present in the Brazilian-Polish provision, may be seriously limiting. For example, it may prevent a medical researcher and practicing physician who is invited to the host country to carry out research at an university under full-time employment from undertaking a part-time medical practice at a local hospital, which could be of a great benefit to the patients and medical staff of the host state. Given the present wording, such a researcher-practitioner is not entitled to the exemption

¹⁹ Alternatively, the requirement that the academic remains a resident in his/her home country during the whole duration of his/her temporary stay may be introduced to avoid the risk of double non-taxation. However, such an approach seriously limits the applicability of the exemption.

at all. A better solution would be to exempt solely his/her income from research²⁰ and to tax under general rules the income from medical practice. On the other hand, the “primary purpose” clause, which could be a part of this alternative, is more prone to interpretative doubts and diverging application, as compared with the “sole purpose” criterion.

At the same time, there is no requirement in Art. 21 of the Brazil-Poland DTC that research is undertaken “in the public interest and not primarily for the private benefit of a specific person or persons”. Teaching and research as part of the basic mission of universities, colleges, schools, and museums generally serves the public interest. However, if teaching or research is a part of a business-like activity of the educational/research institution (e.g. a course, a training, or a laboratory analysis offered similarly to commercial entities), private interests/benefits may be at stake. Under the Brazil-Poland DTC, such a distinction, often difficult to make, is irrelevant, as the exemption may be equally applied to commercial teaching and research. This omission (or policy decision) is to some extent mitigated by the above-mentioned requirement of an invitation, combined with an exhaustive list of eligible host institutions which tend to focus on their “basic mission”, with commercial operations (usually) being only an addition. However, it is easy to imagine an academic invited by a university to carry out research as part of a new medicine development programme in cooperation with a foreign, multinational pharmaceutical company, with remuneration of the academic funded by the company. If the patent rights to the newly developed drug are solely or primarily awarded to the company, the research is “for the private benefit of a specific person or persons”. On the contrary, research results openly published in scientific journals – even with financing by such a company – point to “public benefit”. Both cases are covered by the Brazilian-Polish exemption.

A peculiarity of the Brazil-Poland DTC is that host institutions are listed exhaustively, without reference to other “recognized” educational and/or research institutions. This seems to fulfil the UN Model commentary recommendation that a decision is needed as to “whether the benefits should be limited to teaching services performed at certain institutions «recognized» by the Contracting States in which the services are performed”. There is no requirement for the institutions to be “recognized”

²⁰ Art. 21 of the Brazil-Poland DTC already provides that only remuneration from teaching and research is exempted.

or “accredited”, but the exhaustive list only includes universities, colleges, schools, or museums which (typically) are certified by the authorities when established and supervised when operating.

Regarding the “invitation” requirement, it is crucial that the academic comes to the host state after receiving an invitation, and on the basis of this invitation at the indicated institution carries out exactly the type of activities that are included in the said invitation²¹. If the academic first arrives to the host state and only afterwards gets a teaching or research job at a proper institution, the exemption will not apply.

As with all treaties containing a *Teachers and Researchers* provision, it is open to interpretation who should be considered a teacher or a researcher. National approaches may vary, especially regarding practitioners and M.A. or Ph.D. students, thus people with limited or none teaching and/or research experience. If the treaty does not provide a hint, the (legal) definitions of the host country should prevail. The wording of the Brazil-Poland DTC refers to “an individual who is present in that [the host] state ... solely for the purpose of teaching, giving lectures or carrying out research”. Thus, the activity undertaken by the invited person during the stay seems to matter more than his/her formal qualifications or prior engagement in teaching and/or research in the home country. In contrast, some other Polish treaties, when shaping the personal scope of the exemption, refer not to the activity, but to a person who is a teacher, a professor, or a researcher, which could point to having such status even before the mobility.

Article 21 of the Brazil-Poland treaty does not provide that only a presence of two years “from the date of first visit for the purpose of teaching or research” is covered, which can be an argument in favor of the possibility of reusing the exemption in the case of a new visit (with a new limit of two years). Instead, the unique phrase “[being] present for a period not exceeding two consecutive years” is used. The combination of these may lead to interpretative doubts, with a slight preference towards the recurring entitlement to the exemption. The requirement of clarity on this issue, put by the UN commentary, seems not to be fully met. The exemption should only be granted again after an academic left the host country in due time, actually returning to his/her home country for a reasonable period, without

²¹ It has been suggested in international literature that an academic who got employed after responding to an advertisement posted by an eligible institution meets the “invitation” requirement (T.H. Teck, *The “Teachers and Researchers” Article in Singapore’s Tax Treaties*, “Bulletin for International Taxation” 2006, no. 3, p. 120).

immediate intention of visiting the host country again for the purpose of teaching and/or research. In other words, there must be a reasonable break between the visits²² and the visits should be genuinely separate²³, preferably the new one not yet planned when leaving the host state.

Last but not least, as required by the UN Model commentary, the consequences of exceeding the time limit are stated in the Brazil-Poland DTC. However, it is done indirectly, i.e. by referring to the period of presence for the purpose of teaching and/or research²⁴ (resulting in retrospectivity) and not to the period of application of the exemption (not resulting in retrospectivity), which may be unclear for a person without a background in international tax law. Contrary to the UN guidance, there is no option for individual extensions upon agreement of the competent authorities of contracting states. Meanwhile, an experiment, especially in the field of bioscience, may need to be continued beyond the time limit, with no intention of misusing the exemption²⁵. Thus, academics, especially researchers, may be discouraged from accepting the invitation to visit the host state because of the possibility of retrospective taxation if the actual period of stay exceeds “two consecutive years”.

5. CONCLUDING REMARKS

The wording of the *Teachers and Researchers* article in the Brazil-Poland DTC is very different from the one most commonly present in Polish treaties. It is difficult to clearly assess whether the Brazilian-Polish provision is more restrictive than its equivalents. On the one

²² Leaving the host state for a (relatively) short period, while maintaining housing arrangements there, suggests continuity of stay (T.H. Teck, *The “Teachers and Researchers”...*, p. 122).

²³ A different source of financing or a different host institution may also be arguments in favor of considering two stays separate (P.N. Csoklich, O.Ch. Günther, *Visiting...*, p. 595), provided the visits are separated by a reasonable period of absence.

²⁴ Visits for other purposes (e.g. touristic, medical, family) should not be included in the calculation. On this issue see P.N. Csoklich, O.Ch. Günther, *Visiting...*, pp. 592–593.

²⁵ As has been rightly pointed out in the literature, if states intend to attract visiting academics, they should refrain from retrospective taxation, especially if the prolongation of stay beyond the limit is caused by the need to complete a research project, which is in the interest of the host institution. In addition short extensions for reasons of illness, injury and the like should not lead to the denial of the exemption. See P.N. Csoklich, O.Ch. Günther, *Visiting...*, pp. 593–594.

hand, it includes clauses seriously limiting the scope of its applicability (e.g. “sources outside the host state”, “sole purpose”, “invitation”), while on the other hand, important safeguarding clauses, present in many treaties, are missing (e.g. “public benefit”, “subject to tax”). The inclusion of academics who were residents of the country of departure “immediately before” the visit is definitely sensible, but may result in double non-taxation. The possibility of retrospective taxation may pose a serious problem, especially for researchers. Interpretative doubts may also be a risk factor. However, the inclusion of the said provision in the Brazil-Poland DTC mitigates problems with the qualification of academics’ income as derived from independent personal services, employment, or government services. Certainly, the analyzed provision has the potential of facilitating academic exchange. It will be interesting to analyze emerging practice and verify how the Brazilian and the Polish tax authorities and courts approach the identified issues.

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WYNAGRODZENIE NAUCZYCIELI I PRACOWNIKÓW NAUKOWYCH
W ARTYKULE 21 POLSKO-BRAZYLIJSKIEJ UMOWY
O UNIKANIU PODWÓJNEGO OPODATKOWANIA Z 2022 R.
W ŚWIELE POLSKIEJ PRAKTYKI TRAKTATOWEJ

Streszczenie. Celem artykułu jest analiza zwolnienia skierowanego do wizytujących nauczycieli i pracowników naukowych przewidzianego w art. 21 umowy między Rzeczpospolitą Polską a Federacyjną Republiką Brazylii w sprawie eliminowania podwójnego opodatkowania w zakresie podatków od dochodu oraz zapobiegania uchylaniu się i unikaniu opodatkowania podpisanej w Nowym Jorku dnia 20 września 2022 r. Postanowienie polsko-brazylijskiej umowy zostało porównane z jego odpowiednikami w umowach zawartych przez Polskę z innymi państwami. Przeanalizowano klauzule ograniczające lub rozszerzające stosowanie zwolnienia, obecne lub brakujące w art. 21 umowy polsko-brazylijskiej. Przepis oceniono również w świetle kryteriów pożądanej zawartości i/lub jakościowych, jakie taki przepis szczególnie powinien spełniać.

Słowa kluczowe: nauczyciele, pracownicy naukowcy, podwójne opodatkowanie, podwójne nieopodatkowanie, zwolnienie, traktat podatkowy, umowa o unikaniu podwójnego opodatkowania, Polska, Brazylia