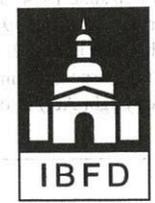


The Non-Discrimination Provision  
in the OECD Model

# The Non-Discrimination Provision in the OECD Model

edited by  
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### 14.10. Article 24 of the OECD Model and investment treaties

The provisions granting national and/or most favoured nation treatment in the investment agreements concluded by Belgium generally do not apply to tax matters.

In most cases, these provisions simply state that they do not apply in matters of taxation, but some investment treaties contain the more specific statement that these provisions “shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of any international agreement or arrangement relating wholly or mainly to taxation”. This is, for instance, the case in the bilateral investment treaties between BLEU (Belgium-Luxembourg Economic Union) and China (2005), BLEU and Korea (2006) and BLEU and Thailand (2002). Certain bilateral investment treaties, on the other hand, do not refer to taxes at all. This is, for instance, the case in the bilateral investment treaty between BLEU and Ivory Coast (1999), BLEU and Egypt (1999), BLEU and Uzbekistan (1998) and BLEU and Burundi (1989).

None of the bilateral investment treaties concluded by Belgium refer to article 24 of the OECD Model or provide that contracting states are permitted to distinguish between persons who are not in the same situation.

## Chapter 15

### Brazil

Luís Eduardo Schoueri  
Ricardo André Galendi Júnior

### 15.1. Discrimination based on nationality (article 24(1) of the OECD Model)

When encountering double tax conventions (DTCs) for the first time, one immediately notices a seemingly specific purpose in their title. Generally, they are titled “Convention for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance”. However, their provisions reveal that their purpose extends beyond the declared objectives. In fact, the conclusion of tax treaties primarily aims to promote investments between the signatory countries.

It should not be concluded, therefore, that tax treaties lack a constitutive unity. The contrast between, on one hand, the allocation rules, which sometimes limit the taxing rights of the source state, combined with the provisions on Methods for the Elimination of Double Taxation (article 23), which establish a normative cycle, and, on the other hand, the remaining provisions of double taxation agreements, might lead us to believe that the latter are included only incidentally. However, while it is true that the rules in the second group extend beyond cases of double taxation, they undeniably serve to reinforce the effectiveness of the first group.

This is the case with non-discrimination rules. After all, limitations on source taxation would be of little value if the contracting state faced no restrictions in creating discriminatory measures against nationals or residents of the other contracting state. From an economic perspective, there is no difference between source taxation of a payment's recipient and the non-deductibility of that payment. In both cases, the source state collects the same amount.<sup>1</sup>

The non-discrimination clause imposes various restrictions on discriminatory tax policies. For this reason, it prohibits discriminatory treatment based

<sup>1</sup> See, on the topic, K. Dziurdź, *Non-discrimination in Tax Treaty Law and World Trade Law* p. 205 (Wolters Kluwer 2019).

on nationality, the maintenance of a permanent establishment in the territory by a non-resident, the payment of interest, royalties and other amounts to persons residing abroad or participation in local companies owned by persons residing abroad. Although these aspects are grouped into a single article, their diversity stems directly from autonomous constructs.

### 15.1.1. The meaning of “same circumstances”

Article 24(1) explicitly rejects more burdensome taxation based solely on nationality. Being a national of another contracting state is not sufficient grounds to justify a higher tax burden. At the same time, the provision also clarifies that nationals of another contracting state who cannot be discriminated against are those who find themselves in the same circumstances. The expression “in the same circumstances” also requires residency in the same country. Diverse or more burdensome taxation in relation to non-residents is generally considered to be legitimate, considering that they are in a different situation.

In relation to article 24(1), Brazil has initially adopted a policy very close to the 1963 OECD Draft Model. The changes made to the 1977 OECD Model and the 1992 OECD Model were not, however, fully incorporated. The last sentence inserted by the 1977 OECD Model was adopted only in a few Brazilian DTCs.<sup>2</sup> All DTCs that include this sentence were signed after 2002, but, still, the majority of the DTCs signed after 2002 do not include the sentence.<sup>3</sup> Accordingly, Brazil reserves its position in the OECD Model on the second sentence of paragraph 1.<sup>4</sup>

The reference to “same circumstances” concerning residency was not explicitly included in the text of the 1963 OECD Model. The Brazilian DTCs signed before 1977 do not contain the expression. Some of the DTCs signed after 1977 included the expression,<sup>5</sup> which remained, however, absent from the majority of the DTCs. However, the OECD’s guidance indicates that residency has always been a legitimate criterion for discrimination under

2. Including the sentence, *see* Brazil’s tax treaties with Israel (2002); Ukraine (2002); Mexico (2003); Türkiye (2010); and Switzerland (2021).

3. Not including the sentence, even after 2002, *see* Brazil’s tax treaties with South Africa (2003); Russia (2004); Venezuela (2005); Peru (2006); Trinidad and Tobago (2008); the United Arab Emirates (2018); Uruguay (2019); and Singapore (2022).

4. Para. 2 *Positions on Article 24 of the OECD Model* (2017).

5. Including the expression, *see* Brazil’s tax treaties with the Netherlands (1990); Ukraine (2002); South Africa (2003); Russia (2004); Türkiye (2010); the United Arab Emirates (2018); Uruguay (2019); Switzerland (2021); and Singapore (2022).

article 24(1), and the subsequent textual change merely serves an interpretive purpose. Despite the clarity of the provision, the issue has been subject to significant problems under Brazilian case law, which struggled to deal with this very basic element of DTCs:

### 15.1.2. The *Volvo* case

#### 15.1.2.1. The legal issue

The main example of this struggle is the *Volvo* case, which concerns the fiscal year of 1993.<sup>6</sup> At that time, dividends paid by Brazilian companies to non-residents in Brazil were subject to a 15% withholding tax,<sup>7</sup> while Brazilian residents were exempted.<sup>8</sup> Since 1995, the regime has been changed, and dividends paid by Brazilian companies are exempt irrespective of the beneficiary.

*Volvo* Brazil brought a lawsuit claiming its right to extend to its investors resident in Sweden the same beneficial treatment conferred to investors residing in Brazil regarding dividends distributed by that company. The claim was grounded on the principle of equality and the prohibition of discriminatory treatment between national and non-national taxpayers.

#### 15.1.2.2. The decisions of the lower courts

At first instance, the claim of *Volvo* Brazil was rejected. The judge held that the criterion adopted by Brazilian legislation was residence, not nationality. As a consequence, both Brazilian and Swedish citizens would be subject to a 15% withholding tax provided that they were resident in Sweden. According to the judge, the Brazilian legislation had not imposed any prohibited discriminatory treatment under article 24(1) of the Brazil-Sweden DTC.

Additionally, according to the first instance judgment, the Brazilian state is able to intervene in the Brazilian economy, thereby being allowed to set such differentiated treatment between residents and non-residents with a view to discouraging the harmful remittance to foreign states of Brazilian

6. On the topic, *see* L.E. Schoueri & R. Baleeiro, *Brazil: Tax Treaty Issues under the Volvo Case*, in *Tax Treaty Case Law Around the Globe 2021* pp. 253-270 (G. Kofler et al. eds, Linde 2022).

7. Art. 77 Law no. 8,383/1991, combined with art. 97 Decree-Law no. 5,844/1943.

8. Art. 75 Law no. 8,383/1991.

companies' profits. In any case, this argument was not necessary, since it would be enough to say that residents and non-residents are not comparable.

Volvo Brazil appealed against the first instance decision, but its claim was again rejected by the Court of Appeals (*Tribunal Regional Federal da 4ª Região* – TRF). The TRF ruled that no hierarchical relationship existed between international conventions and domestic law. Accordingly, Law no. 8,383/1991 would prevail over the non-discrimination clause of the Brazil-Sweden DTC due to the *lex posteriori* criterion. Following the opinion of the Court, the principle of equality in taxation was not breached since resident and non-resident investors are not placed in comparable situations.<sup>9</sup>

Volvo Brazil appealed to a Superior Court, bringing the case before the Brazilian Superior Court of Justice (STJ). The STJ overruled the TRF's decision, ruling in favour of the taxpayer.<sup>10</sup> Although not unanimously,<sup>11</sup> the STJ held that foreign and domestic investments should be treated equally. Furthermore, international relations should be given valuable consideration, especially due to the need of avoiding double taxation.

As a result, the STJ ruled that article 24(1) of the Brazil-Sweden DTC would forbid discrimination between residents and non-residents regarding dividends taxation. The Federal Union appealed to the STF.

#### 15.1.2.3. The decision of the Supreme Court

STF decided, at the end of the day, in favour of Volvo Brazil. Some justices, including Reporting Justice Gilmar Mendes, partially upheld the arguments brought by the tax authorities. Other justices,<sup>12</sup> however, ruled that the STF was not able to judge the appeal, since it required the appreciation of the facts of the case and of ordinary legislation, which is not within the competence of the STF. Accordingly, the STF's competence is limited to

9. BR: TRF4, 11 Dec. 2000, AC 97.04.26084-9, *Volvo Brazil v. Federal Union*.

10. BR: STJ, 22 June 2004, Extraordinary Appeal No. 426.945, *Volvo Brazil v. Federal Union*.

11. The dissenting view, represented by Justice Teori Zavaski, ruled against the taxpayer based on the permission for source taxation of dividends under article 10 of tax treaties and the restricted applicability of article 24(1) (i.e. only to discrimination based on nationality, not residence). See BR: STJ, 22 June 2004, Extraordinary Appeal No. 426.945, *Volvo Brazil v. Federal Union*.

12. This position was headed by Justice Dias Toffoli. See BR: STF, 5 Aug. 2020, Extraordinary Appeal No. 460.320, *Volvo Brazil v. Federal Union*.

deciding on constitutional matters; the interpretation of a DTC, therefore, is not within this field, meaning that the final opinion on the content of a DTC shall be given by the STJ. As a result, the judgment finished in a 5-5 draw.<sup>13</sup> The internal regulation of the STF provides that, in case of a draw, the case shall be decided contrarily to the applicant – and tax authorities were the appealing party. The STF's final ruling thus favoured Volvo Brazil.

Regarding the non-discrimination issue and the equality issue, the justices who accepted the examination of the case unanimously sustained that neither article 24(1) of the Brazil-Sweden DTC nor the equality principle under the Brazilian Constitution (article 150, item II) require equal treatment of residents and non-residents.

The justices observed that nationality, on the one hand, and residence, on the other, should not be confused. They pointed out that the STJ (which had ruled in favour of Volvo Brazil) had taken one factor for the other when interpreting article 24(1) of the DTC with Sweden. As this provision would only refer to nationals of the contracting states (not to residents), no discrimination concern would arise from the fact that Brazilian legislation treats Brazilian residents differently from Brazilian non-residents. However, the majority understood that the STF has no competence to overrule the STJ's interpretation of DTCs, since this is not a constitutional issue; therefore, the STJ's decision extending article 24 to discrimination based on residence could not be changed.

Furthermore, as argued by Reporting Justice Gilmar Mendes, the decision issued by the STJ would have unduly extended beneficial tax treatment to all Swedish nationals (either resident in Brazil or not) to which Brazilian nationals were entitled only if they were resident in Brazil. In this sense, the extension of the tax exemption on dividends to Swedish nationals, instead of promoting equality between Brazilian and Swedish citizens, would have violated the equality principle. In the end, the STJ's position resulted in different treatment between Brazilian nationals (right to exemption only if resident in Brazil) and Swedish nationals (right to exemption regardless of residence). In any case, as already mentioned, the STF ruled against the tax authorities, since a draw in a judgment should be solved by ruling against the applicant's position.

13. The STF is formed by 11 Justices, but one of them was impeded to vote.

## 15.1.2.4. Critical considerations of the decision

It is widely recognized that residence constitutes a justifiable criterion for the existence of different tax regimes between residents and non-residents. DTCs themselves are structured having regard to a state of residence on the one hand and a state of source (the other state) on the other. Since the very application of conventions is based on the distinction between a state of residence and a state of source, it is quite natural that discrimination on the basis of residence should not be seen as contrary to the non-discrimination clause inserted in article 24(1).<sup>14</sup> Furthermore, domestic tax legislation is usually forced to adopt different treatment for residents and non-residents due to practicability concerns. For instance, withholding taxes are usually imposed on payments made to non-residents on a gross basis, which may lead to heavier taxation of non-residents in comparison to that of residents. Nevertheless, withholding taxes are usually the sole feasible mechanism governments possess to collect taxes from non-residents.<sup>15</sup> In this sense, the Commentary on the 2017 OECD Model Convention (OECD-MC) states that “the different treatment of residents and non-residents is a crucial feature of domestic tax systems and of tax treaties.”<sup>16</sup>

However, disputes may arise as to so-called disguised or covert discrimination, in which the residence criterion functions as an indirect means to discriminate between nationals.<sup>17</sup> As repeatedly pointed out by the European Court of Justice (ECJ),<sup>18</sup> it is possible that discrimination by a state on the basis of residence constitutes disguised discrimination against nationals of other states, since non-residents of the first-mentioned state, as one could intuitively assume, would generally also be non-nationals of it as well. In this sense, the ECJ has stated that, even though legislation does not

14. See L.E. Schoueri & M.O. Castelon, *Tributação subjetiva na fonte de artistas e esportistas não-residentes e conceito de não-discriminação: Análise dos artigos 17 e 24 da Convenção Modelo OCDE à luz da recente jurisprudência europeia, dos acordos brasileiros de tributação e da Convenção Modelo OCDE de 2008*, 10 *Revista de Direito Tributário Internacional* 4, pp. 139-140 (Quartier Latin, 2008).

15. See A.J. Cockfield & B.J. Arnold, *What Can Trade Teach Tax? Examining Reform Options for Art. 24 (Non-Discrimination) of the OECD Model*, 2 *Word Tax J.* 2, sec. 3.1. (2010), *Journal Articles & Opinion Pieces* IBFD.

16. See para. 17 *OECD Model: Commentary on Article 24* (2017).

17. See W.C. Haslechner, *Nationality, Non-Discrimination and Article 24 OECD Model: Perennial Issues, Recent Trends and New Approaches*, in *Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective* sec. 1.2.2.1. (D. (Dennis) Weber & P. Pistone eds., IBFD 2016), *Books* IBFD.

18. See LU: ECJ, 8 May 1990, Case C-175/88, *Klaus Biehl v. Administration des Contributions du Grand-Duché de Luxembourg*, Case Law IBFD; and BE: ECJ, 28 Jan. 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State*, Case Law IBFD.

distinguish on the basis of nationality but rather on residence, that legislation might “operate mainly to the detriment of nationals of other Member States”, since “[n]on-residents are in the majority of cases foreigners”. Therefore, beneficial tax treatments granted only to residents “may constitute indirect discrimination by reason of nationality”.<sup>19</sup>

Whatever approach one follows towards interpreting article 24(1), the fact is that the legislation involved in the judgement of the *Volvo* case does not seem to constitute “covert” discrimination against nationals of other states. The tax regime applicable to residents might naturally differ from that of non-residents due to a range of factors (e.g. countries usually tax residents on a worldwide basis; taxpayers usually earn the major part of their income in their residence states; etc.). The residence status usually enables tax authorities to consider personal and familial conditions of taxpayers for the calculation of taxes, thereby allowing for personal-based taxation. Legal entities are entitled to deduct business expenses from their taxable income. As a result, the taxation of resident taxpayers ordinarily involves a wide set of variables not applicable to non-residents, such as the consideration of non-taxable income ranges, progressive tax rates and deductible expenses.<sup>20</sup>

A restrictive approach towards article 24(1) of the Brazil-Sweden DTC was endorsed by the part of the Court that addressed the substantial legal issues of the case. Some justices held that nationality and residence could not be mixed up. According to Reporting Justice Gilmar Mendes, while “the prevailing connecting factor in article 24 of the Brazil-Sweden DTC [...] is nationality”, the internal law provision would “deal with another connecting factor, the residence”. As a result, the application of article 24(1) in the case would not only be conceptually incorrect but would also generate further equality concerns, since it would extend to Swedish nationals (regardless of residence) beneficial treatment, to which only residents in Brazil were granted.<sup>21</sup>

19. DE: ECJ, 14 Feb. 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker*, paras. 28-29 (the second and third questions), Case Law IBFD.

20. However, in certain situations, a personal approach might also be required for the taxation of non-residents. See L.E. Schoueri & M.O. Castelon, *Tributação subjetiva na fonte de artistas e esportistas não-residentes e conceito de não-discriminação: Análise dos artigos 17 e 24 da Convenção Modelo OCDE à luz da recente jurisprudência europeia, dos acordos brasileiros de tributação e da Convenção Modelo OCDE de 2008*, 10 *Revista de Direito Tributário Internacional* 4, pp. 139-140 (Quartier Latin, 2008).

21. See BR: STF, 5 Aug. 2020, Extraordinary Appeal No. 460.320, *Volvo Brazil v. Federal Union*, available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=754018698> (pp. 42-44).

It is also important to mention a feature of Brazilian domestic legislation that could have led the STF to a different approach towards the non-discrimination issue. On the one hand, the Brazilian National Tax Code provides that legal entities are domiciled where their seat is located (article 127, II). On the other hand, Decree-Law no. 2,627/1940 defines “national” companies as those “structured in accordance with Brazilian law and having their business seat located in Brazil” (article 60). It is thus debatable whether any legal entity that is non-resident in Brazil can possibly be a Brazilian national. If one concludes that non-resident legal entities are necessarily also non-nationals under Brazilian domestic law (i.e. that residence and nationality necessarily overlap), such a conclusion could have led the STF justices addressing the substantial legal issues to a different opinion. It could have led them to sustain that the restriction of the dividends’ exemption to Brazilian residents would have automatically discriminated on the basis of nationality (at least regarding legal entities).

In any case, the majority’s view was that the STF may not overrule the STJ’s interpretation of tax treaties. Thus, since the STJ had ruled that article 24 (1) of the Brazil-Sweden DTC would have been violated, this understanding would not be subject to review by the STF. It is important to remember that Brazil currently exempts dividends paid by Brazilian companies wherever shareholders are resident.

### 15.2. Non-discrimination and stateless persons under article 24(2) of the OECD Model

Article 24(2), which deals with stateless persons, is not a common provision in the Brazilian treaty network. The provision is not commonly found in the older treaties, signed during the 1960s and the 1970s. The slight treaty policy changes in the subsequent decades did not affect the policy on this provision. In the post-BEPS DTCs, the provision is not found either. The reasons for the exclusion of the provision are not spelled out by the Brazilian authorities. In the OECD Model, Albania, Bulgaria, India, Malaysia, the Philippines, Russia, Serbia, Singapore and Vietnam reserve the right not to insert paragraph 2 in their conventions, but Brazil has not added an express position. The exclusion is problematic, since it may be interpreted as a lower level of protection of stateless persons under DTCs.

### 15.3. Non-discrimination and permanent establishment under article 24(3) of the OECD Model

Brazil commonly adopts an equivalent to article 24(3) in its DTCs, but it reserves its position on paragraph 3, since royalties paid by a PE situated in Brazil to its head office abroad are not deductible under its law.<sup>22</sup> However, considering that Brazil does not have a domestic concept of permanent establishment, the issue has not raised significant problems to be dealt with by domestic courts. With the convergence with the OECD Transfer Pricing Guidelines in 2023, it is also expected that Brazil will at some point reform its policy on permanent establishments. However, the extent of such reform is still rather unclear, as taxation of technical services at source plays a central role in Brazilian international tax policy.

### 15.4. Deduction non-discrimination under article 24(4) of the OECD Model

Restrictions to deductions have traditionally played a significant role in Brazilian international tax policy. Such restrictions may, however, conflict with the content of article 24(4) of the OECD-MC. Correspondingly, Brazil commonly negotiates exceptions to the application of article 24(4) in relation to certain items of income, either in the wording of the provision or by means of protocols. One common wording for the equivalent to article 24(4) is article 24(3) of the DTC recently signed with the United Kingdom:

3. Except where the provisions of paragraph 1 of Article 9, paragraph 6 of Article 11, paragraph 6 of Article 12, paragraph 7 of Article 13 or paragraph 4 of Article 23 apply, interest, royalties, fees for technical services and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.

Similar provisions have been present since the early stages of the Brazilian DTC policy, even if with more modest contours. Although an equivalent provision was not present in the DTCs with Japan (1967), France (1971), Denmark (1974),<sup>23</sup> Austria (1975), Luxemburg (1978), Argentina (1982)

<sup>22</sup> Para. 3 *Positions on Article 24 of the OECD Model* (2017).

<sup>23</sup> In the case of Denmark, a protocol was signed in 2018, including a carve-out in relation to royalties.

and Ecuador (1983),<sup>24</sup> the DTC with Belgium (1972) already included a similar provision carving out the application of article 24(4) of the OECD Model in relation to interests. The DTC with Spain (1974) was the first to include the carve-out (for royalties) in the protocol, which has become a common technique in the Brazilian policy.<sup>25</sup>

Other DTCs, however, include the carve-out in the text of the provisions equivalent to article 24(4).<sup>26</sup> In such cases, the carve-out tends to be broader than the reference in the protocol, including indication of the relevant items of income of the DTC, whereas the reference in the protocol mentions specific provisions of the Brazilian legislation. For this reason, it is also common that the DTCs will include the carve-out both in the provision, referring to the relevant items of income, and in the protocol, mentioning provisions of the Brazilian legislation.

## 15.5. Ownership non-discrimination under article 24(5) of the OECD Model

Article 24(5) contains a unique provision: it prohibits companies operating in the same jurisdiction, under similar conditions, from being subject to different tax treatment that is not due to any intrinsic differences but solely due to distinguishing factors related to their shareholders. Discrimination based on ownership or control, whether total or partial, direct or indirect, by individuals residing in the other contracting state is thus expressly forbidden.

It is noteworthy that the non-discrimination rule may provide even greater protection to taxpayers when compared to the principle of equality. One might assume that the latter, being constitutional in nature, would offer stronger protection. However, this is not the case.

While the principle of equality allows for justifications for discrimination as a means of realizing other constitutional values (e.g. environmental protection or the reduction of regional inequalities), article 24(5) establishes

24. In the case of Argentina, a protocol was signed in 2018, including a carve-out in relation to royalties.

25. See also Brazil's tax treaties with Sweden (1975); Italy (1979); Norway (1980); the Philippines (1983); Canada (1984); Hungary (1986); the Czech Republic (1986); the Slovak Republic (1986); India (1988); and the Netherlands (1990).

26. See, for example, Brazil's tax treaties with China (People's Rep.) (1991) (art. 24(3)); Korea (People's Rep.) (1991) (art. 24(3)); Portugal (2000) (art. 24(3)); Chile (2001) (art. 23(4)); Israel (2002) (art. 24(3)); Ukraine (2002) (art. 24(4)); Mexico (2003) (art. 24(3)); South Africa (2003) (art. 24(3)); Russia (2004) (art. 24(3)); and Venezuela (2005), (art. 24(3)).

an absolute rule: the ownership of capital can never serve as a basis for discriminatory treatment of the companies it covers.

In the presence of other differentiating factors, discrimination is allowed (as these companies would no longer be considered "similar"); however, under no circumstances (and in this respect, the rule is absolute) can the residence of their direct or indirect controllers justify such differential treatment.

### 15.5.1. The relationship with double taxation

Article 24(5) reinforces the notion of the constitutive unity of tax treaties. Its primary objective is to prevent a contracting state from compensating revenue losses through measures that promote the economic double taxation of income.<sup>27</sup>

The non-deductibility of an expense, as previously stated, results in the economic double taxation of income. While allocation rules primarily focus on juridical double taxation, the Non-Discrimination Rule ensures that economic double taxation does not recreate barriers to the flow of investments.

### 15.5.2. The meaning of "owned" and "controlled"

A detailed analysis of the provision reveals aspects that might go unnoticed from a broader perspective. For this reason, when reading the first part of the provision, one notices the reference to cases where the capital of a company (a "company of a Contracting State") is "wholly or partly owned or controlled, directly or indirectly" by a resident of the other state.

From this, it follows that "control" and "ownership" are not synonymous terms; in other words, the presence of either element is sufficient to satisfy the requirement. Even if the shareholder residing in the other contracting state is not the controller, the mere ownership (whether total or partial) of the company's capital appears to be sufficient.

It is important to determine the role of the reference to control. One might ask: does the provision contemplate non-equity-based control, such as that exercised by suppliers or other stakeholders who have the capacity to

27. K. Dziurdź, *Non-discrimination in Tax Treaty Law and World Trade Law* p. 204 (Wolters Kluwer 2019).

influence the company's decision-making, even without holding capital? Or is this merely redundant, making it unnecessary to inquire about the existence of control, since mere ownership would suffice? Clearly, considering control without any ownership is extremely difficult to assess. For this reason, it does not seem appropriate to adopt an interpretation that, due to its high level of abstraction, would lead to legal uncertainty.

As noted, one of the key functions of the non-discrimination rule is to prevent economic double taxation, an assertion that aligns the consideration of capital ownership with the enterprise doctrine. Therefore, the conclusion that the provision is redundant seems more appropriate, meaning that mere ownership, even in the absence of control, would be sufficient for its application.

However, while there may be redundancy, there is also a lack of reference to a minimum threshold of participation; i.e. in the absence of a reference to significant ownership or similar criteria, it is conceivable, at the extreme, that protection could extend to a Brazilian company with a single share owned by a resident of the other contracting state.

### 15.5.3. The residence rules

In the Brazilian literature, it has been claimed that article 4, which contains the tiebreaker rule, does not apply to the determination of residence in this context.<sup>28</sup> This provision, when defining the concept of residence, addresses situations where a person is considered a resident in both contracting states and then outlines various criteria for resolving ties between the states. Indeed, given that the convention lists numerous allocation rules referring to the state of residence or the "other State", resolving the tie is mandatory. In other words, distributive rules can only be applied when a single state qualifies as the residence. In cases where both qualify, double taxation cannot be avoided under the agreement.

However, the scope of article 4 is not limited, at least literally, to allocation rules. On the contrary, it explicitly states that it applies "for the purposes of the Convention". In Brazil, it has been argued that the residence criterion for shareholders holding capital is broad and not tied to the residence criterion

28. G. Bez-Batti, *A Regra de Não Discriminação em Função da Residência dos Titulares do Capital nos Acordos para Evitar a Bitributação* p. 90 (IBDT 2024).

established in article 4 of the OECD Model Tax Convention.<sup>29</sup> Thus, if the tiebreaker rule of the double taxation agreement between States A and B determines that the residence of the capital-holding company is in State A, it is argued that the fact that it is also considered a fiscal resident in State B is sufficient to ensure that the companies it controls – residents of State A – are not treated unfavourably. However, this assertion contradicts the text of the convention itself.

### 15.5.4. The meaning of "other or more burdensome"

From another perspective, an interesting discussion refers to the expression "other or more burdensome". From the outset, it is clear that the wording of the provision is unfortunate, as taxation that is "other or more burdensome" could occur in a scenario where a company owned by a non-resident receives more favourable treatment compared to a company whose capital is fully owned by residents.

Is such a form of "reverse discrimination" also prohibited? Historical arguments pointing to the relationship between the provision in question and article 24(1) can be employed to conclude, with support from the OECD's position, that reverse discrimination is not prohibited. Without the need to resort to the Commentaries, this conclusion can, however, be expressed as a mere reiteration of an outcome that can be already identified by means of systematic interpretation: economic double taxation cannot result from reverse discrimination, placing it outside the scope of the provision.

On the other hand, the revision of the preamble of double taxation agreements to include the goal of avoiding "double non-taxation", as required by the minimum standard adopted by the OECD Inclusive Framework, supports the conclusion that reverse discrimination, by economically benefiting a group owned by non-residents, could lead to double non-taxation. In such cases, there would be an argument against any "different" taxation, even if less burdensome.

Regarding the criterion of prohibited discrimination, i.e. ownership or control of capital by a non-resident, one can refer to an example where it is not evident that discrimination occurs due to capital ownership. A specific state's rule grants benefits to its residents owned or controlled by residents

29. G. Bez-Batti, *A Regra de Não Discriminação em Função da Residência dos Titulares do Capital nos Acordos para Evitar a Bitributação* p. 90 (IBDT 2024).

and its residents owned or controlled by non-residents, but only if, in the latter case, the control or ownership is exercised through a permanent establishment located in that state.<sup>30</sup>

In this scenario, the rule does not directly discriminate against non-residents but rather against non-residents without an establishment in the country. In the absence of the non-resident's activity in that contracting state, no discrimination occurs. Based on the literal interpretation of the provision, it would not apply. However, this case could be resolved by recognizing that residents are not required to hold participation through their local establishment. If the resident in the country has an establishment in the other state and, from abroad, holds participation in a local company, they could enjoy the benefit. The illustrated context does indeed demonstrate discrimination against non-residents, as only they are required to hold participation through a local permanent establishment.

#### 15.5.5. Interaction with thin-capitalization rules

Some DTCs will also make clear in the protocol that thin-capitalization and CFC rules are not in conflict with the non-discrimination clause.<sup>31</sup> In practice, the most relevant case involves thin capitalization rules that render payments made to non-residents in the position of shareholders of the paying company non-deductible. Even though the rule provides another requirement for its application (that the interest recipient must be a non-resident), capital control by the non-resident is the relevant criterion for discrimination.<sup>32</sup>

However, when this issue is analysed in the Brazilian context, it is argued that the scope of the thin capitalization rules is broader, as they also apply to situations where there is no capital participation, such as in cases of remittances to countries with favourable tax regimes. The criterion for distinction under Brazilian thin capitalization rules is not the control or ownership of the Brazilian company's capital by a non-resident. Thin capitalization rules also apply in the following relationships: (a) exclusivity; (b) kinship; and (c) consortiums or joint ventures.

<sup>30</sup> See J.A. Jones et al., *Art. 24(5) of the OECD Model in Relation to Intra-Group Transfers of Assets and Profits and Losses*, 3 World Tax J. 2, p. 224 (2011), Journal Articles & Opinion Pieces IBFD.

<sup>31</sup> See, for example, Brazil's tax treaties with Portugal (2000); Chile (2001); Israel (2002); South Africa (2003); Russia (2004); Venezuela (2005); Peru (2006); and Türkiye (2010).

<sup>32</sup> See, on the topic, J.A. Jones et al., *Art. 24(5) of the OECD Model in Relation to Intra-Group Transfers of Assets and Profits and Losses*, 3 World Tax J. 2, p. 224 (2011).

The rules also apply in the case of remittances to subsidiaries abroad of the Brazilian company. Hence, it is possible to assert that Brazilian thin capitalization rules do not violate article 24(5) of the OECD Model Convention, as they are not applicable solely to situations where the controller or owner located abroad participates in the capital of the Brazilian company.<sup>33</sup>

This reasoning, however, is not free from criticism. The inapplicability of article 24(5) in the face of a second criterion for discrimination, applied alongside capital participation, is undisputed. However, in the thin-capitalization rules, there are not two discrimination criteria applied concurrently; rather, the application is alternative.

In other words, the mere presence of a controller abroad triggers the application of the thin capitalization rule. One may object that the same treatment (thin capitalization rules) is applied in cases where such control abroad does not even exist, as with subsidiaries of foreign companies. This raises a question: does discrimination exist when the only case in which differentiated treatment occurs is that prohibited by the treaty? Put differently: if a law provides discriminatory treatment both to companies meeting criterion A and those meeting criterion B, can it be concluded that no discrimination exists? If a law prohibits both women (gender discrimination) and black individuals (racial discrimination) from entering public service, can we say there is no discrimination? Certainly not. In the same sense, a Brazilian company can pay interest to its domestic parent company without restrictions, but it cannot pay the same interest under identical conditions if the parent company is located abroad.

Therefore, the restrictions in Law No. 12,249/2010, concerning "interest paid or credited by a source in Brazil to a related party", are applicable to payments made to individuals who control the paying company, without requiring any additional condition. This is indeed discrimination, regardless of the existence of other discriminatory elements in the law. A similar discussion could, in principle, apply to transfer pricing rules. In this case, article 9 allows such discrimination, thereby excluding the application of article 24. After all, if the tax treaty itself does not prohibit a particular form of discrimination, there is no reason to prohibit it based on another provision within the same instrument.

<sup>33</sup> G. Bez-Batti, *A Regra de Não Discriminação em Função da Residência dos Titulares do Capital nos Acordos para Evitar a Bitributação* p. 150 (IBDT 2024).

### 15.5.6. Limitations to royalty deduction

Another noteworthy aspect of Brazilian legislation concerns the restrictions on the deductibility of royalties. In its position on the OECD-MC, Brazil reserves the right to include, after the words “other similar enterprises of the first-mentioned State”, the words “whose capital is totally or partially, directly or indirectly, held or controlled by one or several residents of a third State”.<sup>34</sup> This issue was addressed in several agreements signed with Brazil, which is why the protocols of treaties concluded with Denmark (1974), Argentina (1982), Ecuador (1983), the Philippines (1983), Slovakia (1986), the Czech Republic (1986) and South Korea (1991) include provisions stating that article 24(5) of the OECD Model Convention does not conflict with the rule provided in article 363 of the Corporate Income Tax Regulations (article 71 of Law No. 4,506/1964).

The provision in question is no longer in effect, as it was replaced by article 50 of Law No. 8,383/1991. Under this article, royalties paid by a Brazilian-based company to a person domiciled abroad who, directly or indirectly, controls its voting capital can be deducted, provided that the contracts are registered with the INPI and the Central Bank of Brazil. Although it regulates the same subject matter, the 1991 provision is not identical to the one it replaced, making the immediate application of the protocols to subsequent legislation impracticable. Even in the case of remittances to such countries, this form of discrimination could still be subject to challenge.

Finally, after Brazil’s alignment with the OECD Guidelines on transfer pricing in 2023, article 50 of Law No. 8,383/1991 was also repealed. In Brazil, there are no longer any limitations on royalty payments based on fixed percentages, as was the case under the previous regime. However, the issue may still be raised concerning past transactions, meaning that it has not entirely lost its legal relevance.

### 15.6. Extension to every kind of tax under article 24(6) of the OECD Model

Brazil does not commonly adopt a provision equivalent to article 24(6) of the OECD-MC. In fact, its position on the OECD Model is to reserve the right to restrict the scope of the article to the taxes covered by the

34. Para. 5 *Positions on Article 24 of the OECD Model* (2017).

Convention.<sup>35</sup> Even though an equivalent may be found in the first Brazilian DTCs,<sup>36</sup> the most common provision states exactly the opposite of what is set forth under article 24(6) of the OECD-MC.<sup>37</sup> In the DTC recently signed with the United Kingdom, article 24(5) states that “[t]he provisions of this Article shall apply only to the taxes covered by this Convention.” This is the most common wording adopted by Brazil, and after 1977, it was adopted in all DTCs, with only minor deviations, with only three exceptions.

The DTC with Finland (1996) does not contain a provision clarifying the taxes to which article 24 applies. The DTC with Portugal (2000) contains a provision that is similar to article 24(6), extending the application of article 24 to all taxes, even if not covered by the DTC. The DTC with Mexico (2003) contains an interesting deviation, according to which article 24 applies to all federal taxes of any kind or denomination.

### 15.7. Non-discrimination in light of EU law and/or arising from belonging to regional organizations

Nothing to report on this topic.

### 15.8. Interactions between non-discrimination provisions and Pillar Two

Brazil recently enacted a qualified domestic minimum top-up tax (QDMTT). The enactment was carried out by means of a provisional measure, which is expected to be converted into law in the next few months. In the context of these legislative debates, alternatives to make the QDMTT less burdensome have been discussed, which include allowing for differentiations between entities that are part of multinational enterprise groups that are subject to the Global Anti-Base Erosion (GloBE) Model Rules and those that are not. For example, it has been argued that the transformation of an income-based incentive into a qualified refundable tax credit could be set as an option for entities subject to the Brazilian QDMTT.

35. Para. 2 *Positions on Article 2 of the OECD Model* (2017).

36. See Brazil’s tax treaties signed with Japan (1967); France (1971); Belgium (1972); Denmark (1974); Spain (1974); Sweden (1975); and Luxembourg (1978).

37. See Brazil’s tax treaties signed with Italy (1978); Norway (1980); Argentina (1982); the Philippines (1983); Ecuador (1983); and Canada (1984), along with all other subsequent treaties, except for the three exceptions provided.

While the discriminatory nature of such a measure can be discussed at a constitutional level, the differentiation would hardly be in breach of article 24. This is because the differentiation is grounded on the very distinction that is used for establishing whether the constituent entity is subject to the QDMTT. Entities subject to the QDMTT are not “in the same circumstances” as those that are not. As a consequence, they are not comparable for the purposes of article 24, and no discrimination arises. In any case, one must acknowledge that, even at the constitutional level, claiming that such a distinction would be an unjustified discrimination would be the same as sustaining that the QDMTT as a whole is discriminatory. Hence, even though important discussions related to the convenience of adopting such measures may arise at the policy debate level, this issue would not be a problem of discrimination for the purposes of article 24.

### 15.9. The crossroads between article 24 of the OECD Model and investment treaties

The signature of bilateral investment treaties (BITs) followed nationalization waves observed in developing countries.<sup>38</sup> Before the rise of BITs, customary international law did not set rules for investment relations<sup>39</sup> and did not provide foreign investors with effective enforcement mechanisms against target states.<sup>40</sup> Beginning in the 1970s, the disagreement between developed countries and (newly decolonized) developing nations led capital-exporting countries to increasingly require protection against expropriations carried out by host countries.<sup>41</sup> Therefore, BITs are generally considered an attempt to create better conditions for investments through liberalization measures.<sup>42</sup>

38. W. Dan, *Acordos Bilaterais de Promoção e Protecção de Investimentos: práticas do Brasil e da China (Bilateral Investment Treaties: Brazil and China cases)*, 125 *Nação e Defesa*, p. 159 (2010).

39. J.W. Salacuse & N.P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *Harvard International Law Journal*, p. 68 (2005).

40. See, on the Brazilian policy, L.E. Schoueri & R.A. Galendi Jr, *Brazil*, in M. Lang, et al. (eds.), *The Impact of Bilateral Investment Treaties on Taxation* pp. 149-176 (IBFD 2017), Books IBFD.

41. J.W. Salacuse & N.P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *Harvard International Law Journal*, p. 69 (2005).

42. See J.A.F. Costa, *Direito Internacional do Investimento Estrangeiro (International Law of Investment Protection)*, Habilitation Thesis, University of São Paulo (2008), p. 127; W. Dan, *Acordos Bilaterais de Promoção e Protecção de Investimentos: práticas do Brasil e da China (Bilateral Investment Treaties: Brazil and China cases)*, 125 *Nação e Defesa*, p. 160 (2010); and J.W. Salacuse & N.P. Sullivan, *Do BITs Really Work?: An Evaluation*

#### 15.9.1. The rejection of BITs

Although, in the case of DTCs, Brazil has a half-century tradition on the negotiation and application of treaties, the same may not be concluded with respect to BITs. Brazil is not a part to the International Centre for Settlement of Investment Disputes (ICSID) Convention and has never ratified a BIT. Neither has Brazil ratified any other convention providing for investor-state arbitration as a method of dispute resolution. Brazil also has concerns with indirect expropriation and the use of the Hull Formula for compensations, which has led to the refusal to ratify BITs. Nevertheless, the ability of the country to attract investments prevents one from concluding that Brazil has failed to protect foreign investors and calls into question the primacy of the BIT model.

During the 1990s, Brazil signed 14 BITs,<sup>43</sup> but not a single one of them has been ratified. This statement does not mean that Brazil is not serious about its commitments but rather implies that, if during the 1990s the executive branch was engaged in the adoption of liberalizing instruments in order to attract investments, such a perspective was not shared by the National Congress. Accordingly, there was not a clear perception that BITs would have a significant economic impact. In addition, many were the possible incompatibilities between the treaties and the Constitution, and there were serious concerns with respect to state-investor arbitration.

The Brazilian Constitution grants the right of property (article 5 XXII), equal treatment for foreign and domestic individuals (article 5 *caput*), as well as the right of compensation in case of expropriation (article 5 XXIV).

With respect to non-discrimination, it is often deemed that the signature of BITs would entail more favourable treatment of international investors, to the detriment of Brazilian nationals. When one considers the differences between the provisions of the treaty and the regime applied to national investors, mostly due to investor-state arbitration, as addressed below,<sup>44</sup> the

*of Bilateral Investment Treaties and Their Grand Bargain*, 46 *Harvard International Law Journal*, p. 76 (2005).

43. Namely with Portugal (9 Feb. 1994); Chile (22 Mar. 1994); the United Kingdom (19 July 1994); Switzerland (11 Nov. 1994); Finland (28 Mar. 1995); Italy (3 Apr. 1995); Denmark (4 May 1995); France (21 May 1995); Venezuela (4 July 1995); Korea (People's Rep.) (1 Sept. 1995); Germany (21 Sept. 1995); Cuba (26 June 1997); the Netherlands (25 Nov. 1998); and the Belgo-Luxembourg Economic Union (6 Jan. 1999).

44. The state arbitration issue is addressed in section 15.9.

violation to the Constitution becomes evident.<sup>45</sup> In other words, where investor-state arbitration is not available for national investors, treaty provisions would create a legal regime for foreign investors to which Brazilian nationals are not entitled.

### 15.9.2. The adoption of cooperation and facilitation investment agreements

Given the internationalization of Brazilian companies, there has been increasing pressure for Brazil to adhere to investment protection instruments.<sup>46</sup> In 2006, Brazilian investments abroad exceeded the amount of foreign direct investment (FDI) inflows.<sup>47</sup> The trend towards internationalization of Brazilian companies has been confirmed in recent years, mainly in the mining, agriculture and construction sectors. Also, recent conflicts involving Brazilian investments suggested that perhaps Brazil should consider investment protection not only as means of attracting FDI, but also as tools to safeguard Brazilian companies' projects abroad. Important Brazilian investments are located in countries that have recently adopted restrictive measures on the grounds of "national security".<sup>48</sup>

At the conference Reforming the International Investment Agreements Regime, held during the 2014 World Investment Forum of the United Nations Conference on Trade and Development (UNCTAD), Mr. Daniel Godinho, the Brazilian Secretary of Foreign Trade, briefly addressed the reasons why Brazil had not entered into international investment agreements. He regarded that "[p]rovisions on indirect expropriation and Investor-State Dispute Settlement were considered as non-compliant with the Brazilian Constitution" and would "impose restrictions on the adoption of public policies critical to the country's development".<sup>49</sup>

45. See, in this sense, W. Dan, *Acordos Bilaterais de Promoção e Protecção de Investimentos: práticas do Brasil e da China (Bilateral Investment Treaties: Brazil and China cases)*, 125 Nação e Defesa, p. 173 (2010).

46. See I. Monnerat, *To ratify or not the ICSID Convention: Brazil's new role as an investment exporter*, 16 Young Arbitration Review (Oct. 2014).

47. UNCTAD, *World Investment Report 2007: transnational corporations, extractive industries and development* p. 20 (UN 2007). These numbers were mainly due to the acquisition of Inco by Vale.

48. I. Monnerat, *To ratify or not the ICSID Convention: Brazil's new role as an investment exporter*, 16 Young Arbitration Review, p. 18 (Oct. 2014).

49. See UNCTAD, *Reforming the International Investment Agreements Regime*, World Investment Forum, Statement of Mr Daniel Godinho, 16 Oct. 2014. Most statements of the conference are available at <http://unctad-worldinvestmentforum.org/programme/sessions/reforming-the-international-investment-agreements-regime/> (accessed 20 Apr. 2015).

The secretary further reported that the Brazilian government had recently intensified the work to define a new model agreement for forthcoming negotiations, which would include

expropriation restricted to direct expropriation (as provided in the Federal Constitution); State-to-State dispute settlement modality; free transfer of funds with balance of payments safeguard; definition of investment focused on foreign direct investment; admission and establishment restricted to "post-establishment"; and preservation of the regulatory autonomy of the state.<sup>50</sup>

Accordingly, the drafting of the new model took into account international benchmarks as well as suggestions of the private sector. The result of this process was the elaboration of the Cooperation and Facilitation Investment Agreement (*Acordo de Cooperação e Facilitação de Investimentos – CFIA*), which allegedly circumvented the limitations pointed out by the Brazilian Congress by the time of the rejection of the former BITs. In other words, treaties inspired by the CFIA model were "passable" according to the understanding of the Brazilian Executive branch.

As part of this initiative, Brazil initially signed two treaties based on the CFIA model, with two other Portuguese-speaking countries,<sup>51</sup> Mozambique and Angola. The treaty signed with Mozambique is deemed to be "the first treaty signed on the grounds of the new Brazilian model of investment treaty, drafted by the Itamaraty [i.e. the Ministry of Foreign Affairs], the Ministry of Development, Industry and Foreign Trade and the Ministry of Finance, with consultations to the private sector".<sup>52</sup> The reference to a "new Brazilian investment treaty model" is also present in the Itamaraty's official note with respect to the signature of the treaty with Angola.<sup>53</sup> Brazil subsequently negotiated similar treaties with many other countries, including South Africa, Algeria, Malawi, Morocco and Tunisia, as well as other South American countries.<sup>54</sup>

50. UNCTAD, *Reforming the International Investment Agreements Regime*, World Investment Forum, Statement of Mr Daniel Godinho, 16 Oct. 2014. Most statements of the conference are available at <http://unctad-worldinvestmentforum.org/programme/sessions/reforming-the-international-investment-agreements-regime/> (accessed 20 Apr. 2015).

51. As a consequence, there is still no version of the model available in English.

52. Itamaraty Official Note No. 99, of 30 March 2015, on the Cooperation and Facilitation Investment Agreement (CFIA) between Brazil and Mozambique (*Acordo Brasil-Moçambique de Cooperação e Facilitação de Investimentos (ACFI) – Maputo, 30 de março de 2015*).

53. See Itamaraty Official Note No. 104, of April 1<sup>st</sup>, 2015, on the Cooperation and Facilitation Investment Agreement (CFIA) between Brazil and Angola (*Acordo Brasil-Angola de Cooperação e Facilitação de Investimentos (ACFI) – Luanda, 1º de abril de 2015*).

54. The information is repeated in Itamaraty's Official Notes nos. 99 and 104.

The new model of investment treaty deviates significantly from the traditional approach to the protection of investments. According to the Secretary of Foreign Trade, the "main pillars" of the CFIA are: "i) enhanced institutional governance; ii) thematic agendas for investment cooperation and facilitation; and iii) mechanisms for risk mitigation and disputes prevention".<sup>55</sup>

With respect to the "enhanced institutional governance", the CFIA Model determines the creation of "Focal Points (Ombudsmen)",<sup>56</sup> which serve as communication and support channels between investors and the host country and of a "Joint Committee",<sup>57</sup> composed of representatives of both contracting parties, which is responsible for enhancing mutual investments, monitoring the implementation of the CFIA, preventing disputes and resolving disputes via mutual agreement procedures. It is expected that these governance structures will engender continuous negotiation between states, giving rise to written commitments in additional protocols for the CFIA.<sup>58</sup>

The CFIA, despite including compensation clauses, does not provide for the Hull Formula and is not applicable to indirect expropriation. Neither does it set forth state-investor arbitration as a mechanism of dispute resolution.

The mechanism of dispute resolution of the CFIA is unassertive.<sup>59</sup> The CFIA has enthroned diplomatic solutions rather than adjudication. Apparently, the Brazilian experience has led to the conclusion that the payment of compensations to investors should not be the central aim of investment protection. The plea for "risk mitigation" implies that the events that lead to expropriations may be avoided by the enhancement of the relationship between governments. Instead of directly protecting investments, the CFIA focuses on cooperation, in which states should play a central role. Distinct from BITs, CFIA is far from being considered a liberalizing alternative to the protection of investments but rather stress the role of the state in the internationalization of economic activity.

### 15.9.3. Non-discrimination in BITs and CFIA

BITs signed during the 1990s generally include a provision whereby, in case the legislation of the contracting parties granted a more favourable treatment

55. UNCTAD, *Reforming the International Investment Agreements Regime*.

56. Art. 5 of the treaties with Angola and Mozambique.

57. Art. 4 of the treaties with Angola and Mozambique.

58. UNCTAD, *Reforming the International Investment Agreements Regime*.

59. Such mechanisms are described in detail in sec. 15.9.

to the investment than the one put forth in the BIT, the most beneficial treatment should prevail.<sup>60</sup> Clearly, in case of a conflict with a DTC, it shall be examined which is the most beneficial treatment for the investor, which will then become applicable.

Similarly, the CFIA model does not provide for the priority of the DTC in case of conflict but expressly forbids that the application of the investment treaty lead to a restriction of the investor's rights. According to the first two CFIA that were signed,<sup>61</sup> "the present agreement shall in no case restrict the rights or benefits to which an investor is entitled under the national or international laws of the other contracting party's territory." In this sense, if the DTC eliminates double taxation in a given situation, in no case shall the interpretation of the CFIA lead to a situation where a more onerous treatment is attributed to the investor.

It is doubtful to what extent taxes are covered by the 1990s BITs. There are no carve-out clauses leaving taxation outside the scope of BITs, and as a consequence, taxation should be interpreted to be within the scope of these treaties. This was clearly the concern with respect to indirect expropriation, which was one of the reasons evoked not to ratify the treaties. Perhaps a broad carve-out clause would make a BIT more palatable to the Brazilian Congress, but it would in no case completely eliminate Brazilian reluctance.

The only express reference to taxation is commonly found in the non-discrimination clauses, which expressly exclude DTCs signed with third countries from the treatment that should be granted under the BIT.<sup>62</sup> As per the treaties signed, the contracting states are not obliged to grant to investors of a given country the same treatment that is available to investors of countries with which the contracting state has a DTC. The same provision is included in both CFIA.<sup>63</sup>

60. See, for example, Brazil's tax treaties with Finland (art. 11); Germany (art. 7(1)); Italy (art. 10(1)); and Korea (Rep.) (art. 10(2)). A similar provision is not found in the treaties with Cuba, Denmark and Venezuela.

61. Art. 16(2) of the treaty with Angola; and art. 17(2) of the treaty with Mozambique.

62. See, for example, Brazil's tax treaties with Cuba (art. 3); Denmark (art. 4); Finland (art. 4); Germany (art. 3); Italy (art. 3); and Venezuela (art. 3).

63. Angola (art. 11(4a)); and Mozambique (art. 11(5)).

#### 15.9.4. National treatment and most-favoured nation treatment

Brazilian Federal Law No. 4,131/62, which deals specifically with foreign capital, ensures equal treatment for both foreign and domestic investors. Pursuant to article 2, foreign capital invested in the country shall be treated under the same conditions as national capital, with discrimination between national and foreign investors expressly forbidden. National treatment (NT) and most-favoured nation (MFN) status are generally present in the BITs and CFIA's already signed.

Interesting arguments can thus be made by those who question under which conditions a BIT would be really desirable in terms of the certainty they provide. The common notion that such treaties are important for investors' decision-making due to the stability they provide may convincingly be challenged by the argument that, despite the fact that the several BITs concluded by Brazil were never approved by the Parliament, relevant inbound investments did not cease. On the contrary, this seems to indicate that investors do not necessarily depend on a BIT when they find a legal environment that protects them. This is the Brazilian case. Accordingly, a Brazilian statute providing for foreign investments has been in force since 1962, and since then, not one amendment has been proposed by the different governments (which have varied from a military regime to the present democracy). Stability represents a stronger incentive for foreign investments when compared to any legal change, even if derived from international treaties. A long-standing and successful internal regulation is able to provide more stability than any treaty.

#### 15.9.5. Taxation and free transfer of capital

Brazil does not have any form of exit taxes. Both the BITs and the CFIA's signed by Brazil include a provision whereby each party shall allow the free transfer of capital related to the investment, as well as of profits, interest, or any income deriving from the investments.

As described above, as a consequence of the non-discrimination granted by the Constitution, Brazil provides equal treatment for foreign and national capital. However, the law provides for an important regulatory exception under article 28 of Law No. 4,131/62, which allows restrictions to foreign investments, as well as to the remittance of capital to foreign countries, for a

limited time, in case of serious instability in the balance of payments, which was not contemplated by the treaties signed in the 1990s.

The CFIA Model includes a specific provision dealing with this issue. According to article 14 of both treaties concluded, no provision of the convention shall prejudice the right of the contracting states to enact regulatory measures related to instabilities in the balance of payments. The provisions of the treaty shall not affect the rights and obligations of the members of the International Monetary Fund (IMF) provided for in its Articles of Agreement, mainly with respect to the adoption of exchange policy measures that are in accordance with the IMF Agreement. The treaties also set forth that the adoption of restrictive measures shall be non-discriminatory and consistent with the Articles of Agreement of the IMF.