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OF INCOME TAX TREATIES

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A rarely studied provision of tax treaties, the «Other Income» Article, often lies almost dormant at the end of the provisions dividing the jurisdiction to tax various kinds of income of various sources between the two Contracting States. Because the Article has not often been the subject of commentary, it seemed an appropriate subject to trace its historical development, its application and its importance to tax treaties. This task seemed particularly important because a surprising number of treaties have been and are still being negotiated and brought into force without any such article being included, apparently without much thought to the consequences of the omission.

The OECD Models

Article 21 of the OECD Model Double Convention on Income and Capital, 1977 (1), provides:

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

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

The first appearance of an Other Income Article in its modern form (2) in a Model Treaty is found in the third report of the Fi-

(2) Early Model Treaties reflected the principle that income was taxable in the State of residence or domicile while taxation by the State of
source was an exception. Framed in this way, income not taxable by the State of source remained taxable by the State of residence and no express «Other Income Article» was therefore necessary. This pattern was reflected in Article 1(A) of Draft League of Nations Convention n. 1b which was intended to apply between States in which taxation by reference to domicile predominated (October, 1928, Document C. 562 M. 178. 1928. II.) (This and early League of Nations and OEEC Conventions and Commentary cited herein are reproduced in «Legislative History of United States Tax Conventions», (U.S. Government Printing Office, Washington, 1962) Vol. 4.):

«In principle, income shall be taxable by the State in which the taxpayer has his fiscal domicile, i.e., his normal residence, the term ‘residence’ being understood to mean a permanent home».

This basic principle was stated at the beginning of this League of Nations Draft Convention, and the statement of principle effectively applied to taxation of all income, unless the treaty expressly provided otherwise. The Commentary stated: «Article 1 provides, in principle, the State of domicile shall levy its taxes on all kinds of income». Article 2 then dealt with classes of income taxable «by priority» at their respective sources. The wording of the Article and the Commentary was not as clear, however, as the later OECD wording became, that source taxation was limited only to items mentioned in Article 2. A comment in the Report and Resolutions of the League of Nations Technical Experts in their earlier Report of February 7, 1925 (Document F.212 at p. 32) is helpful in clarifying what was intended: «The general income-tax ... charged upon the whole income of a taxpayer, from whatever source derived, should, in principle, be imposed only by the State of domicile».

This early reflection of an Other Income Article continued with the Mexico Draft Model and the London Draft Model (Document C.88.M.88 1946 IIA) as Article XIII of each Model affirming the right of the residence State to tax income on a world-wide basis, but again did not exclude source State taxation.

Article 9 of the League of Nations Draft Convention of 1927, Document C, 216. M.85 1927 II) copied as Articles 8 of the League of Nations Draft Convention 1c of 1928 (October, 1928, Document C.562 M.178 1928 II) also may reflect an early attempt at an Other Income Article but it is not clear how broad these Articles were intended to be. They provide:

«Annuities or income from other claims not referred to in the previous paragraphs shall be taxable in the State of fiscal domicile of the creditor of such income».

Article 9 of the League of Nations Draft Convention 1a of 1928 (October, 1928, Document C.562. M.178. 1928 II) however makes an important linguistic change using the word «sources» instead of the word «claims» and would seem to indicate that all other income was intended to be covered. However, the Commentary on this Article 9 of Convention 1a again uses the word «claims» instead of «sources» so that it is not clear whether any change in meaning was intended. The Commentary states:
the following as Article XVII:

«The items of income not expressly mentioned in the foregoing Articles of the Convention shall be taxable only in the Contracting State of which the recipient is a resident» (3).

The Fiscal Committee commented on this Article, saying that it «formulates [the rule] in a form acceptable to all the member countries» (4). The member countries were Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Italy, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom. The Commentary noted that the Article, as proposed, was in use at that time in the same or similar form

«Contrary to the above-mentioned provisions, annuities or income from other claims not referred to in the previous paragraphs shall be taxable in the State of fiscal domicile of the creditor of such income. The exception which is thus made for annuities is justified by the special nature of this form of income, since the recipient is free to select the country which is to be liable for the payment».

This Commentary therefore would seem to indicate that all these early Articles were intended to have some limited effect, which perhaps is confirmed by the following resolution published in the February 7, 1925 Report and Resolutions of the Technical Experts of the Financial Committee of the League of Nations (F. 212) at p. 32:

«H Various Credits and Annuities As regards interest on credits other than those already considered, and on annuities, the State in which the creditor is domiciled shall have the right to impose the schedular tax».

However, there is evidence that a broader coverage may have been intended. A League of Nations study by the late Mitchell B. Carroll, «Methods of Allocating Taxable Income», published in Volume IV of «Taxation of Foreign and National Enterprises», (League of Nations, Geneva, 1933) (not republished by the U.S. Government Printing Office) at page 172 says with reference to 1928 Draft Convention 1c that it «... contains a basket clause allocating all items of income not specifically mentioned to the country of domicile».

(3) Prof. K. Vogel, Doppelbesteuerungsabkommen, (Beck, Munich, 1983) annotation 12 to Article 21, (hereinafter cited as «Vogel») expresses the view that wording could be understood to refer only to classes of income not previously mentioned, and not to sources of income. We believe, however, that this was not the intended meaning and that existing treaties using this wording would not be so interpreted. See footnote 8.

(4) Most German treaties, many Italian and French treaties and at least one Dutch and one Swiss Treaty that predated the OEEC Report of 1960 included an Other Income Article, the earliest of which appears to be the Germany-Czechoslovakia Treaty (1921). The old German treaties with Austria (1922), Hungary (1923) and Sweden (1928) also contained an Other Income Article. The early treaty made by Italy with Austria, Hungary, Poland, Romania and the Kingdom of the Serbs, Croats and Slovenes (1922) also reflected this early trend as Article 6(2) provided that «in the case of any other income, taxation shall be levied in the State in which the taxpayer has his residence». The same pattern was followed in the Italian treaties with Czechoslovakia (1924), Germany (1925, and still in force) and Hungary (1925). The Germany-Italy Treaty uses the equiva-
in most Conventions for the avoidance of double taxation. The Committee also noted that the application of the Article was not limited to income which is subject to tax in the residence State but that Contracting States were free, when entering into bilateral Conventions, to limit the scope of the Article to income taxed in the residence State (5).

The Article was repeated, in a slightly different form, but with no change in apparent meaning, in the OECD Draft Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital of 1963 (6). Canada and the United States, of course, had by then joined as members of the OECD and the
cent of the English word «only» to make it clear that only the residence state may tax other income as did France-Switzerland Treaty (1953, no longer in force). Other early French treaties with an Other Income Article were Netherlands (1949), Luxembourg (1958), and Germany (1959). The early Belgian treaties adopted a different formulation in dealing with other income, providing that the competent authorities should settle the method of taxation of such income having regard to the spirit of the treaty: Belgium-Luxembourg (1931); but later Belgium adopted a rule paralleling the OECD formulation: Belgium-Sweden (1953) and Belgium-Finland (1954). In contrast to this continental European history, Canada did not use an Other Income Article until it first appeared in its 1957 treaty with the Netherlands (since superseded). Of 18 comprehensive tax treaties signed by Canada prior to 1975, only the Netherlands Treaty contained an Other Income Article. The U.K. was even later than Canada, first using the Article in 1961 in its treaty with Sweden, Japan was also later, having first used the Article in its U.K. Treaty in 1964 (since superseded), and U.S.A. still later, the earliest ratified treaty containing such an Article (but following the UN formula) being that signed with Belgium in 1970. Some early U.S. treaties, however, included a provision which barred a Contracting State from taxing a resident of the other Contracting State on income other than income arising from sources in that State: for example, U.S.-France (1976), U.S.-Finland (1970) and U.S.-Trinidad & Tobago (1970). Such a provision has one of the characteristics of an Other Income Article, but does not clearly deal with the issue of dual resident and the application of Article 4, discussed, infra. With minor modifications Article 21 in the OECD form appeared in the 1977 U.S. Model Treaty and the 1981 proposed U.S. Model.

(5) France has two, Germany has eight, Belgium has seven and the U.K. has fifteen treaties in which such a condition appears. The Commentary does not indicate the form or wording of such a limitation. It is arguable that such a limitation, where the residence State is an exemption State, should permit the source State to tax only if internal law of the residence State exempts the income from tax; otherwise the very fact that the other income is taxed by the source State would mean it cannot be taxed by the residence State – and thereby, in a somewhat circular way, justifies the source State in taxing the income. The Belgium-Denmark (1969), Belgium-Greece (1968), Belgium-Luxembourg (1970) and France-Portugal (1971) Treaties reflect this wording by referring to the internal law of the State of residence.

OEEC had changed its name. The Commentary on the 1963 Draft Model noted only one reservation, namely, that of Canada who reserved her position on the Article because the Canadian authorities, in negotiating Conventions with other member countries, wished to maintain the right to tax income paid by residents of Canada to non-residents of Canada in the form of income from a trust or estate, alimony and payments from a registered retirement savings plan (privately funded retirement plans for individuals), as well as certain lump sum payments to former employees in Canada in respect of their employment in Canada, all as provided for in the Income Tax Act (Canada) (7).

The Other Article was reworded and expanded in the OECD Model Convention of 1977 with the following significant changes:

a) It was made clear that items of Other Income «wherever arising» would be taxable only in the State of residence (8);

b) it was made clear that such items of income consisted of income «not dealt with in the foregoing Articles»; and

c) paragraph 2 was added to Article 21 to make it clear that if the taxpayer resident in one State carried on business in the other through a permanent establishment or performed independent personal services in the other from a fixed base, and if the right or property in respect of which the other income was paid was ef-

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

(7) When Canada first incorporated an Other Income Article in its treaty with the Netherlands (1957), interestingly, Canada did not preserve its right to tax Canadian-sourced other income. However, in a treaty negotiated with Belgium in 1958 (and never brought into force) each State preserved its right to tax other income sourced in its State.

(8) The 1965 OECD Draft Model and its predecessor OEEC Model had attempted to describe the other income as «items of income not expressly mentioned in the foregoing Articles». Some commentators (e.g. Vogel at annotation 12 to Article 21) suggest that the 1963 Draft Model's wording of the Other Income Article could have been interpreted as dealing only with classes of income not dealt with. It is suggested that this would not be the better interpretation because the Article applies to «items of income», and this would mean it applies on a case by case basis, and if a particular item of income is «not expressly mentioned» (the 1963 wording) or «not dealt with» (the 1977 wording) because of its character or because of its source, then in either case it must fall within the Other Income Article. The Swiss authors, Locher, Meyer, von Siebenthal, Doppelbesteuerungs-abkommen Schweiz-Deutschland 1971 und 1978, Band 3, (Bale 1985), B.21(1) (hereinafter cited as «Locher») also are of the same view that the old wording covers both classes and sources of income not mentioned. If the older wording «not expressly mentioned» is not understood in this way, the Other Income Article would fail to achieve its obvious purpose of providing for the jurisdiction to tax items of income whe-
fectively connected with the permanent establishment or the fixed base, then other Contracting State is entitled to tax the income under the provisions of Article 7 or Article 14. Paragraph 2 did not, however, extend to income from immovable property (9).

The 1977 Commentary was substantially expanded, and clarified, from that of 1963. Paragraph 1 of the Commentary states that the income covered in Article 21 concerns not only income of a class not expressly dealt with but also income from sources (whether from the taxpayer’s residence State or a third State) not ex-

re the jurisdiction is not fixed by other Articles of the treaty. The wording change therefore merely clarified that the Other Income Article applied also to categories of income mentioned, but arising in a State not mentioned, that is the State of residence of the taxpayer or in a third State in cases where the Model Treaty had referred in the preceding Articles only to such income sourced in the non-residence State. Commencing with the treaty made with Sweden in 1981, except for the treaty with China (1988), Australia has always used the older language, «items of income not expressly mentioned». In the former Belgium-Italy (1970) and Belgium-U.K. (1967) Treaties and the Belgium-Spain (1970), Belgium-Portugal (1969) and Belgium-Denmark (1969) Treaties, language even clearer than that used in the 1977 Model is used which describes as other income, items of income «qui sont d’une nature ou proviennent de sources non mentionnées» in the foregoing Articles. These clarifications were combined in the U.K.-Egypt Treaty (1977) which describes other income as: «Items of income ... wherever arising, being income of a class or from sources not expressly mentioned ...». The Belgium-Netherlands Treaty (1970) refers to «items of income ... to which the foregoing Articles of the present Convention do not apply ...».

(9) Paragraph 21/51 of the Belgian Tax Administration Commentaries, makes the point that, even in the absence of paragraph 2, «other income attributable to a permanent establishment or to a fixed base is included in the profits of an enterprise or in the income of independent services and as such is taxable in the State of the permanent establishment or fixed base». [Our translation.] The United States Model Treaty proposed by the Treasury Department on June 16, 1981, refers to income attributable to a permanent establishment or fixed base rather than to property effectively connected with the permanent establishment or fixed base. This difference in wording is also found in comparing Articles 10(4), 11(4) and 12(4) of the OECD Model with Articles 10(4), and 12(4) of the proposed U.S. Model. However, the OECD in Article 7 uses the verb «attributed» to describe the income arising from property which is described as «effectively connected». The U.S. Model does not draw this linguistic distinction, but it is clear there is no difference in meaning intended. See: W. Burke, «Report on Proposed United States Model Income Tax Treaty», 23 Harvard International Law J. 219 (1983) at 259-60 where the author did not comment on the point that the OECD «attributes» income from «effectively connected» property while the U.S. Model «attributes» income without
pressly mentioned (10). The Commentary explains that the scope of the Article is not confined to income arising in a Contracting States; it extends also to income from third States.

The Commentary continues to explain, as had the 1963 Commentary, that the rule set out in paragraph 1 of Article 21 applies whether the right to tax is in fact exercised by the State of residence or not. It also notes that when income arises in a third State and the recipient of the income is considered to be a resident of both Contracting States under their respective domestic laws, the application of Article 4 will result in the recipient being treated as a resident of one States only and being liable to comprehensive taxation only in that State. In this case the other State may not impose tax on the income arising from the third State even if the recipient of the income is not taxed by the State of which he is considered to be a resident by virtue of Article 4. The Commentary, however, continues to note that in order to avoid non-taxation, Contracting States may agree to limit the scope of the Article to income which is taxed in the Contracting States of which the recipient is a resident (11).

By 1977 the number of countries filing reservations surprisingly had considerably expanded. Australia, Canada, New Zealand, Portugal and Spain all generally reserved their positions, noting that they wished to maintain the right to tax income arising from sources in their own countries (12). Sweden also reserved, stating that it wished to retain the right to tax certain annuities and similar payments to non-residents where the payments are made on ac-

using the concept of effectively connected property. We have also noted that Article 21(2) of the 1977 Model excludes income from all effectively connected immovable property, whereas Article 6 deals only with the income of a taxpayer from immovable property situate in the other State. The exclusion may, therefore, be too broad.

(10) This is clear also from the Belgian Tax Administration Commentaries, paragraph 21/41.

(11) See footnote 5 and accompanying text.

(12) Portugal and Spain had been members of the OECD in 1963 and filed no reservation to Article 21 at that time. In 1977, however, both Portugal and Spain were in the process of restructuring their tax systems and they filed reservations as a precautionary measure to avoid making a specific commitment not to impose source taxation on other income. They may also have reserved in order to preserve their bargaining positions on future treaty negotiations. However, in their treaties signed subsequent to 1977, Portugal and Spain have often adopted the OECD formula despite the reservations each filed against it. See, for example, the treaties between Portugal and Italy (1980), Germany (1980), Czechoslovakia (1978) and the treaties between Spain and Czechoslovakia (1980), Hungary
count of a pension insurance issued in Sweden (13). The United Kingdom also reserved, noting that it wished to maintain the right to tax income paid by residents of the U.K. to non-residents in the form of income from a trust (14).

The UN Model

The United Nations Model Taxation Convention Between Developed and Developing Countries (15), which was adopted by the ad hoc UN Group of Experts (16) in December, 1979, added a third paragraph to Article 21 as formulated by the 1977 OECD Model: «Notwithstanding the provisions of paragraphs 1 and 2 items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Convention and arising in the other Contracting State may also be taxed in that other State».

The change indicated by paragraph 3 was, of course, consistent with the thrust of the other changes made to the OECD Model by the UN Group of Experts who objected to the prior «unbalanced» principle that taxation by the State of residence was the rule and source taxation was an exception, and were concerned with enlarging the right of the States of the source of income to levy tax. It was also consistent with the reservations previously filed to the OECD Model.

This enlarging of the right of the State of source to impose taxation has, however, two notable gaps.

First, the UN Model (like the OECD Model) contains only limited rules to determine the State within which income can be said to «arise». In dealing with interest, Articles 11 (5) of both the


(13) Sweden, also a member in 1963, had filed no reservation at that time. However, Sweden passed legislation in 1975 (Kommunalskattelagen 53§, mom. 1) to make non-residents liable to tax on amounts paid because of pension insurances issued in an insurance business carried on in Sweden.

(14) The U.K. had also filed no reservation in 1963. Legislation passed in 1973 (Finance Act, 1973, s. 17, now Taxes Act 1988, s.687) made discretionary and accumulating trusts non-transparent so that the income from such trusts became a separate source of income and thus fell within the Other Income Article. The change in the U.K. position noted in the Commentary to the 1977 Model was made to preserve her right to tax such income paid to non-residents. It is arguable that even before this legislative change, a distribution from a trust was an «annual payment», and therefore other income (see footnote 59).

(15) United Nations publication, Sales n. E. 80 XVI.3.

(16) The ad hoc Group of Experts consisted of tax officials and experts from Argentina, Chile, France, West Germany, Ghana, India, Israel, Japan, the Netherlands, Norway, Pakistan, the Philippines, the Sudan, Switzerland, Tunisia, Turkey, the United Kingdom and the United States.
OECD and UN Models provide exhaustive rules dealing with the place where interest is deemed to arise (17). No similar rules are provided in the OECD Model for royalties (and rents for certain equipment included in the royalty article) (18) but Article 12(5) of the UN Model does provide «arising» rules for this kind of income (19). Article 10 refers to dividends paid by a company which is resident of a Contracting States, and therefore one may be infer dividends «arise» for purposes of Article 21 in the State where the company paying the dividend is resident. Because source taxation is prohibited for Other Income under the OECD Model, the absence of general source rules in this Model is not so significant. However, the same is not the case under the UN Model where source taxation, at unlimited rates, is permitted.

Where the treaty does not have its own source or «arising» rules, it is our view that the State that claims that the income arises in that State has the right to apply its own source rules, unless the context otherwise provides, to determine where the income arises, applying Article 3(2) of the Models. The residence State, it is suggested, must accept that the source State has this right, and must relieve double taxation under Article 23 of the Models, «where a resident [of that State] derives income ... which, in accordance with the provisions of [the] Convention, may be taxed in the other Contracting State ...». We believe that this is required under treaties following the UN Model permitting source State taxation of other income even though the residence State, in applying its own source rules, would not have found the source to be in the other Contracting State. This is because Article 3(2) is designed to permit the gaps in the definition of terms used in the treaty to be filled, unless the context otherwise requires, by reference to internal law where the treaty is applied by a Contracting State. The residence State must then recognize that the State that applied its internal law to establish the source of an item of income has imposed tax «in accordance with the provision of the Convention», requiring the residence State under Article 23 to grant a credit or exempt the same item of income from tax. Similarly, if the non-residence State, applying its internal law source rules, determines that the item of income does not arise in that State, and the income is

(17) See paragraph 19 of the Commentary to Article 11 of the OECD Model which makes this clear.

(18) This has been noted in the Belgium Tax Administration Commentaries, para. 12/31.

(19) See Paragraph 5 of the Commentary to Article 12 of the UN Model. Because no tax is imposed by the State in which royalties arise under the OECD Model, it was unnecessary under that Model to define the source of royalties. The UN Model, on the other hand, contemplates source taxation and therefore an «arising» rule became appropriate, and added. We have noted that Australia usually departs from the UN formulation of the source of royalties to deem royalties also to arise in third states if they are borne by a permanent establishment in a third state.
thereby not subjected to source taxation under a treaty in the UN Model form, the State of residence should recognize the correctness of this conclusion and need not relieve against any taxation by way of credit or exemption under Article 23.

Interpreted in this way, the problems of double taxation, or non-taxation by virtue of inconsistent internal law source rules, does not arise under treaties (20). Questions may legitimately be raised whether the place where income «arises», in cases where the treaty does not provide its own rules, is the same as the «source» of income which is found in the internal law of some states, such as the USA, where source rules have become highly developed by both statute and jurisprudence (21). On a narrow construction it might be argued that Article 3(2) cannot be applied unless the precise word used in the Treaty in also used in internal law. This, in the authors’ view, is not a correct interpretation of Article 3(2) because «term» (in English) and «expression» (in French) have a

(20) See J. F. Avery Jones et al, «The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model-I», [1984] Br. Tax Rev. 14 at 48 et seq. for a discussion of the application of Article 3(2) where characterization of an item of income is an issue which can also arise in considering whether the Other Income Article applies. The same reasoning applies where the source of an item of income is in issue. For a dissent from the views expressed by the authors in this earlier article see K. Vogel, «Double Tax Treaties and Their Interpretation», [1986] vol. 4 Inter. Tax & Bus. Lawyer, 1 at 49 et seq. We have noted that paragraph 13 of the Protocol to the Canada-Germany Treaty (1981) provides that Germany (as the residence State) may eliminate double taxation of income sourced, and taxed, in Canada caused through inconsistent characterization or attribution by granting credit for Canadian tax, and may eliminate non-taxation by denying its residents the treaty exemption from tax. We have also noted that paragraph 21 of the Protocol to the proposed new U.S.-Germany Treaty (1989) has a somewhat similar provision which permits the U.S.A. to characterize the income item in question consistently with the German characterization to avoid double taxation or non-taxation.

(21) See, for example, M. J. McIntyre, The International Income Tax Rules of the United States (Butterworth Legal Publishers) p. 3-5 et seq. and M. M. Levey, Foreign Investment in the United States (John Wiley & Sons, New York) at §5.3 et seq. The source rules in sections 861-5 of the U.S. Internal Revenue Code cover substantially all items of income, and those not expressly mentioned have their source determined by finding the closest analogy to items expressly dealt with by the Code (see: J. Isenbergh, International Taxation, United States Taxation of Foreign Taxpayers and Foreign Income (1989) ¶4.34 et seq.) considering the nature of the item, the nature of the economic activity to generate it and the location of the property to which it is related (see: S. Roberts & W. Warren, U.S. Taxation of Foreign Corporations and Non-resident Aliens, ¶VI/4D, (1968), and Rev. Rul. 73-252, 1973 – Cumulative Bulletin 337). Other countries represented by the authors do not have such elaborate internal law source rules, and manage to deal with the issues without them. Many treaties cover the apparent deficiency in the internal law rules, in part, by
wider meaning than «word» and embrace a notion or concept (22). Therefore, although different English words are used («arising» and «source») because the concepts or notions appear to be the same, by virtue of Article 3(2) of the Model treaty, the State that claims that the income arises there can, under a UN form of treaty, apply its internal law, including its «source» rules and tax the income found to arise, as other income, if it is not otherwise dealt with (23).

The second notable gap in the UN Model is that there is no attempt to limit the rate of tax that may be imposed on the other income in the country of source. The UN Model, in dealing with dividends, interest and royalties contemplates that the treaty negotiators, in their bilateral negotiation, will fix the rate of tax which can be imposed by the source State (24) but does not indicate any intended limitation on the rate of tax in the State of source on other income (25).

including a provision to the effect that income, profits or gains of a resident of a resident of one of the Contracting States may be taxed in the other State in accordance with the treaty, such income, profits or gains are deemed to arise from sources in the other State.

(22) The Oxford English Dictionary defines «term», inter alia, as: «13b. In wider application: any word or group of words expressing a notion or conception, or denoting an object of thought; an expression (for something)». We have noted that Article 3(1) of the French version of the OECD Model uses the word «terme» in reference to the definition of a single word, and the word «expression» when the definition involves two or more words whereas in all cases the English version uses the same word «term».

(23) In paragraph 1 of the Commentary to Article 21 of the 1977 Model, the English words «... but also income from sources ...» read in French «... mais aussi qui proviennent de sources». Thus, the English «sources» corresponds with the French «sources» and the French «qui proviennent de» corresponds with the English «from». Also, the English «... income arising in ...» corresponds with «... revenus qui ont leur source dans ...», thus «arising» [to arise] stands for «ont leur source» [avoir son source]. We have noted that Article 21(3) of the Australia-Denmark Treaty (1981) uses the words «source» and «arises» interchangeably, «... if such income is derived ... from sources in the other contracting State, such income may also be taxed in the Contracting State in which it arises».

(24) This contrasts with the OECD Model which itself prescribes the rates of source taxation.

(25) In practice, however, where treaty negotiators often depart from the Model treaties and include separate articles dealing with items of income which would otherwise be other income, often the source State will agree to limit its rate of taxation on these particular items of income thereby reducing the ambit of what may be taxed at an unlimited rate.
The Articles preceding the Other Income Article of the particular treaty must, of course, be reviewed to determine for that treaty what items of income are otherwise dealt with in order to determine what items of income would fall within the Other Income Article. In the 1977 OECD Model, items of income dealt with in the preceding Articles are limited to:

1) income derived by a resident of one State from immovable property situate in the other States (26).

2) All profits of an enterprise carried on by a resident of a Contracting State (27).

3) Profits from the operation of ships or aircrafts in international traffic (28).

4) Profits from the operation of boats engaged in inland waterways transport (29).

5) Adjustments to the profits of related or associated enterprises made or imposed because the two enterprises do not, in their commercial and financial relations, deal on an arm’s length basis (30).

6) Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State (31).

(26) Article 6(1). It is noted that income from immovable property situate in the residence country or in a third country is not dealt with by Article 6. Such income is dealt with by Article 21: Paragraph 1 of the OECD Commentary to Article 6.

(27) Article 7(1). Also mentioned are, of course, profits of an enterprise of one Contracting State attributable to a permanent establishment situate in the other Contracting State but these profits would presumably be only a portion of the total profits of the enterprise.

(28) Article 8(1). Profits from the operation of a ship or aircraft in international traffic include profits from the participation in a pool, a joint business or an international operating agency: Article 8(4).

(29) Article 8(2).

(30) Article 9.

(31) Article 10(1). The term «dividends» is defined, for the purposes of Article 10, by Article 10(3). The definition is not intended to be exhaustive and refers back to the laws of the State of residence of the company making the distribution. See paragraph 23 of the Commentary to Article 10. Dividends paid by a company which is resident of a Contracting State to a resident of the same State are not dealt with in Article 10 nor are dividends paid by a company resident of a third State. There is, however, a German decision under the Germany-Switzerland Treaty (1971) that the profit share of a Swiss resident in a German limited partnership
7) Interest arising in a Contracting State and paid to a resident of the other Contracting State (32).

8) Royalties arising in a Contracting State and paid to a resident of the other Contracting State (33).

9) Gains derived by a resident of a Contracting State from the alienation of immovable property situate in the other Contracting State (34).

10) Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting

was a dividend despite the fact that the partnership did not come within the treaty definition of a company: decision of BFH, January 27, 1982. In the U.K., unit trust which comply with the conditions for European Undertaking for Collective Investment in Transferable Securities are taxable as corporations, but at a reduced rate. A U.K. resident corporation holding units in such a unit trust is treated as receiving «annual payments» and not dividends, thereby potentially becoming subject to full corporation tax on such income. However, s.468C of the Income and Corporation Taxes Act, 1988, preserves dividend treatment for dual resident corporations, which by treaty are considered to be resident outside the U.K., thereby avoiding other income treatment.

(32) Article 11(1). Interest is defined exhaustively by Article 11(3) leaving no room for a reference to internal law. See paragraphs 18 and 19 of the OECD Commentary to Article 11. Article 11(5) provides rules to determine when interest is deemed to arise in a Contracting State, namely, when the payer is the State itself, a political subdivision, a local authority or a resident of that State and where the person paying the interest (whether he is a resident of a Contracting State or not) has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest was paid was incurred and the interest is borne by the permanent establishment or the fixed base. Where excessive interest is paid by virtue of a «special relationship», Article 11(6) provides that Article applies only to the amount which would have been paid if the payer and the recipient had been dealing in the absence of such special relationship. The excess part of the payment, however, still remains an item income which is dealt with by virtue of the last sentence of Article 11(6).

(33) Article 12(1). Royalties are defined specifically for these purposes by Article 12(2). Even if the royalties exceed the arm's length amount when paid between parties who deal with a «special relationship», the excess remains an item of income that is dealt with because of the last sentence of Article 12(4). Source rules are provided for royalties in the UN Model, but not in the OECD Model.

(34) Article 13(1). Gains derived by a resident of a Contracting State from the alienation of immovable property situate in the same State or situate in a third State do not, however, constitute other income because these gains are dealt with by Article 13(4).
State or of movable property pertaining to a fixed base available to a resident of a Contracting States in the other Contracting State for the purpose of performing independent personal services (35).

11) Gains from the alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to the operation of such ships, aircraft or boats (36).

12) Gains from the alienation of property other than those referred to in items (9), (10) and (11) (37).

13) Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character (38).

14) Salary, wages and similar remuneration derived by a resident of a Contracting State in respect of an employment (39).

(35) Article 13(2). Included are gains from the alienation of the permanent establishment or the fixed base itself.

(36) Article 13(3).

(37) Article 13(4). This being a catch-all clause, gains from the alienation of property cannot be other income except, perhaps, in exceptional cases. An exceptional case arose in the Australian Federal Court in *Thiel*, 89 A.T.C. 4015 (currently on appeal to the High Court) where it was held under the Australia-Switzerland Treaty (1980) that a gain on the sale of units in a unit trust:

a) was not included in Article 7 as business profits because although there was an enterprise, the enterprise was not «carried on», because the transaction of purchase and sale was isolated; and

b) was not included in Article 13(3) because it did not involve income from the alienation of a *capital* asset of an enterprise.

It should noted, however, that the Australia-Switzerland Treaty uses the word «capital» in Article 13, thereby, in the text of the Treaty, narrowing the ambit of Article 13. The OECD Model, however, uses the expression «capital gains» in the heading to the Article and throughout the Commentary which leads to the conclusion that it also applies only to capital properties.

(38) Article 14(1). This seems to apply to any source of such income. Professional services is given an «inclusive» definition by Article 14(2).

(39) Article 15(1). This seems to apply to any source of salary, wages or similar remuneration, including third country source. It is interesting to note that the second sentence of Article 15(1) shortens the reference to «such remuneration» while Article 15(2) shortens the reference even further to «remuneration». It is therefore not clear what meaning is left for the adjective «similar». Also mentioned specifically in Article 15(3) is «remuneration» derived in respect of employment exercised aboard a ship or aircraft operated in international traffic or aboard a boat engaged in international waterways transport.
15) Directors’ fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the Board of Directors of a company which is a resident of the other Contracting State (40).

16) Income derived by a resident of a Contracting States as an entertainer, a musician or an athlete from his personal activities as such exercised in the other Contracting State (41).

17) Pension and other similar remuneration paid to a resident of a Contracting State in consideration of past employment (42).

(40) Article 16. Directors’ fees derived by a resident of a Contracting State as a member of the Board of a Company which is resident of the same State or of a third State would constitute other income unless they are considered to fall within Article 15 as salary, wages or other remuneration. In the Netherlands, such income of a «supervisory» (i.e. non-managing) director is considered to fall within Article 14 (Independent Personal Services) because under Netherlands law a supervisory director is not employed by the company he supervises. For Netherlands internal wages and individual income tax purposes, however, he is deemed to be employed. There may be a question whether this deeming provision applies for treaty purposes because of Article 3(2), or whether Article 14 is applicable.

(41) Article 17(1). Article 17(2) deals with income of an entertainer or athlete accruing to another person which arises in a Contracting State because of the exercise by the entertainer or athlete of his activities in that State. Article 17(2) may deal with income from sources in the State of residence of the entertainer or athlete.

(42) Article 18. There is no definition of pensions or similar remuneration. If payments received by a taxpayer who rendered dependent personal services in the past are not classified as pensions or other similar remuneration, they may come within Article 15 (Dependent Personal Services) or Article 16 (Directors’ Fees). See, for example, the Dutch case decided by the Hoge Raad, July 22, 1988, BNB 1989/2. The issue whether Article 15 rather than Article 18 applies particularly arises when lump sums are paid on the surrender of pension rights: Hoge Raad, July 11, 1989, BNB 1989/287. This problem of dealing with what are pensions and other similar remuneration, and what are not, is also referred to in the Belgian Tax Administration Commentaries to Articles 18 and 21. According to the Belgian Tax Administration (questions and answers in Parliament, Sleekx, April 15, 1986, p. 1430) lump sum payments to a Belgian resident to satisfy pension liabilities before the normal maturity date, even when received in consideration of past employment in the other Contracting State, are taxable under the Other Income Article and, therefore, only in the residence State under a treaty in the OECD form. However, it would follow that such payments could be taxed in the source State if the followed the UN form (or the permitted variation to the OECD form, if the residence State does not impose taxation), even though Article 18 permits only the residence State to tax pensions and other remuneration. For a contrary view, see «Fiscologue International», April 15, 1984, n. 86.04.194.
18) Remuneration (other than a pension) paid by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State, subdivision or authority (43).

19) Any pension paid by or out of funds created by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority (44).

20) Certain payments to students or business apprentices who are or were resident of one Contracting State and who visit the other Contracting State solely for the purpose of education or training where such payments are received for the purpose of maintenance, education or training provided the payments are from sources outside that State (45).

As is stated above, items of income not dealt with include not only classes of income not dealt with, but also, in respect of classes of income dealt with, income of such from not dealt with (46). In a treaty modelled in the OECD or UN form, the Other Income Article would therefore apply to income derived from immovable property situate in the State of residence of the taxpayer, or in a third State (47), and dividends, interest and royalties that in the State of residence of the recipient or in a third State (48). The Other Income Article may also apply to income from estates or trusts (49). Also included are prizes and awards (50), grants from

(43) Article 19(1) (a) and (b).
(44) Article 19(2) (a) and (b).
(45) Article 20.
(46) See Vogel, annotation 11 to Article 21.
(47) The reference to income from immovable property in paragraph 2 of the Other Income Article confirm this conclusion.
(48) The French Conseil d’Etat has held that, where certain French distributions are presumed to be «secret» under Articles 109 and 111 of the Code Général des Impôts (i.e. distributions made by a company, but not in its interest, where the identity of the recipient is not revealed), they are not dividends and become other income: Conseil d’Etat, 7th and 9th sous-sections, 10 June, 1983, requête n. 27391 (France-Italy Treaty); Conseil d’Etat, 27 July, 1984, requête n. 16649 (France-Belgium Treaty); Conseil d’Etat, 26 November, 1982, requête n. 28177 (France-Germany Treaty); Conseil d’Etat, 14 October, 1985, requêtes n. 37585, 37585 and 42516-42564 (France-Netherlands Treaty); and Conseil d’Etat, 30 March, 1987, requête n. 52754 (France-Switzerland Treaty).
(49) In Canada, this income from estates and trust is considered to be a separate source of income because of sections 108(5) and 212(11) of the Income Tax Act. See Canada’s reservation in the Commentary to the 1963 Draft Model Treaty. The U.K. interpretation is that the income distributed by the trust, the income interests in which are vested, retains its original character in the hands of the beneficiary: Baker v. Archer-Shee, [1927] A.C. 844 (H. of L.) However, as mentioned in footnote 14, 1973 amend-
foundations (51), gambling winnings (52), alimony payments (53), distribution from individual retirement accounts (54), annuity pay-

ments to the U.K. legislation provide that distributions from a discretionary or accumulating trust are a separate source of income. The usual wording of the Other Income Article in U.K. treaties is that it does not apply to income paid out of trust. In such a case this could mean that no treaty provision applies to it with the result that, under internal law, the trustees would be liable for 35% tax on it. However, Extra-Statutory Concession B18 preserves transparency and the income is not so taxed. The determination of what would otherwise be other income is not clear where there is a transparent trust to which the Baker v. Archer-Shee rule applies if the treaty includes an exception in the Other Income Article for income paid out of trust. On one view the exception would not apply because the income is not income paid out of the trust, but belongs to the beneficiary as it arises. If this is not the case, however, the normal U.K. tax rate of 25% would apply. In the U.S.A. and Australia, income from estates and trust generally retains both its original character and its original source. Generally, in countries where estate or trust income does not lose its original character when payable to the beneficiary, the determination whether such income falls in the Other Income Article will depend on the classification of the underlying trust income.

(50) See the U.S. legislative history of the U.S. Malta Treaty, Technical Explanation of the Agreement between the U.S. and the Republic of Malta, in Hearing before the Senate Foreing Relations Committee on Various Treaties, 97th Congress, 1st Session (September 24, 1981) 347 at p. 378, the Belgian Tax Administration Commentaries, paragraph 21/26 and the Japanese author Y. Komatsu, The Study of Tax Treaties (Sozei Jōyaku no Kenyū) (Yūhikaku) (hereafter cited as «Komatsu») p. 108. Vogel also mentions scholarships and awards for general artistic or scientific achievement: annotation 10 to Article 21.

(51) Decision of the German Tax Court, Muenster, EFG 1970, 580. The case concerned recurrent distributions by a Dutch foundation to a German resident.

(52) This is implicit from U.S. Letter Ruling 8714055, January 7, 1987, under the U.S.-Canada Treaty. A full time gambler may, however, be engaged in a business and his earnings would be subject to Article 7. See the U.S. Supreme Court case: Commr. v. Groetzinger, 87-1 U.S.T.C. ¶9191 (1987).

(53) See the U.S. legislative history of the treaties with Malta (1980) (see footnote 50) and New Zealand (1982), Joint Committee on Taxation, Explanation of Proposed Income Tax Treaty between U.S. and New Zealand (May 24, 1983), 14 at p. 35, the Canadian reservation to the 1965 Draft Model Treaty, Swiss rulings ESt.V29.6.1976 and ESt.V9.8.1979, Locher B21(9) and (11) and the Belgian Tax Administration Commentaries, paragraph 21/27.

ments (55), child support payments (56), certain life insurance income (57), social security payments (58), some swap payments (59),

(55) See the U.S. legislative history of the U.S.-Hungary Treaty (1979), Joint Committee on Taxation, Explanation of Proposed Income Tax Convention Between the United States and the Hungarian Peoples' Republic (June 4, 1979), Hungary at p. 12. Although many U.S. treaties generally define and deal expressly with annuities, the U.S.-Hungary Treaty does not (nor does the OECD or the UN Model), hence the statement made in the U.S. legislative history of that treaty that annuities are covered by the Other Income Article. See also Komatsu, p. 108. Annuity payments made to satisfy the purchase price of a business are considered to be other income in Switzerland: Locher, B21(7). (However, to the extent the business or its assets are sold to realize a capital gain, Article 13 should apply to the gain). Annuity payments by an estate or trust should be other income under German treaties: BFH decision of July 20, 1971, BStBl, 1972 II 170. It is believed that the same result will obtain in other countries represented here. Questions may arise whether the interest element of a purchased annuity is taxed as interest under Article 11. Paragraph 21 of the Commentary to Article 11 states, however, that annuities ought not to be assimilated as interest. The Belgian Tax Administration Commentaries, paragraph 21/24, however, state that the income element in annuities which is subject to tax by Article 11(6) of the Belgian Income Tax Code is treated as interest for treaty purposes when the annuities are set up «without the transfer of capital», i.e. if the capital transferred by the beneficiary of the annuity is refunded either to him or to his «ayants droit». On the other hand, income from annuities set up with the transfer of capital is other income. See also Vogel, annotation 10 to Article 21. In Germany, under internal law, the interest element in annuities is taxed as pensions or annuities and not as interest income, so the interest Article becomes inapplicable also on this ground. In the U.K. annuities would also be included as other income because the element representing the return of original capital in certain purchased life annuities is tax-free (Taxes Act, 1988, s. 656) but the interest element is taxed as an annuity and not as interest and therefore becomes other income.


(57) See Belgium Tax Administration Commentaries, paragraph 21/25.

(58) See the U.S. legislative history of the treaties with Malta (1980) (see footnote 50) and the U.K. (1975) (see footnote 56), Swiss rulings EStV 28.10.1974 and EStV 8.4.1980, Locher, B21(4), the Belgian Tax Administration Commentaries, paragraph 21/23 and Vogel, annotation 10 to Article 21.

(59) Swap payments would, it is believed, be properly regarded, in ma-
penalty charges (60), currency exchange gains and losses (61), proceeds of disposition of income interests in trusts (62) damage awards which do not relate to items of income covered by the treaty (63), golden handshakes awards (64) and gains realized on repayment of debis denominated in foreign currencies (65). Many cases, as business receipts, and thus be covered by Article 7 if they are made or received in respect of an enterprise carried on by a resident of a Contracting State. If the swap contract relates to a non-business asset or activity, the authors are of the view that they fall under the Other Income Article. In Australia the Commissioner of Taxation has ruled in IT-2050 that swap payments are not interest. The U.S. position would seem to be the same. See U.S. Revenue Ruling 87-5, 1987-1 Cumulative Bulletin 180. In the U.K., a Consultative Document issued by the Revenue in 1989 suggests that it may be a concession of the Inland Revenue that swaps are treated as annual payments. The Document tentatively proposes to treat swap payments as interest. In treaties following the OECD or UN form, «interest» is a defined term (Article 11(3)) leaving no room to apply Article 3(2). Such a change in internal law, as proposed by the U.K., therefore, should not alter the application of such treaties if they are in the OECD Model form. However, most modern U.K. treaties define interest to include income assimilated to income from money lent, and under such treaties a change of internal law might bring swap payments within Article 11.

(60) Penalty charges are excluded from Article 11 (Interest). See the last sentence of paragraph 3 of Article 11 of the 1977 OECD Model Treaty. If they are not included in business profits (Article 7) they would become other income. See also Belgian Tax Administration Commentaries, paragraph 21/28 and the instruction of the French Tax Authority to its agents dated January 21, 1987: Bulletin Officiel de la Direction Général des Impôts 14 B-1-87 under the France U.S.A. Treaty.

(61) These are discussed in «Tax Consequences of Foreign Exchange Gains and Losses» (OECD, Paris, 1988) at p. 35 et seq. These gains and losses could be part of business profits (Article 7) or part of capital gains (Article 13) but cases may arise where they would be other income. See further discussion of foreign currency gains or losses below.

(62) The gross amount of such payments is included in income in Canada, not just the «gain». If only the gain is included in income, Article 13(4) would apply and the gain would not be Other Income.

(63) See Vogel, annotation 10 to Article 21.

(64) In Australia such amounts received by an employee would not be considered to be salary, wages or other similar remuneration derived in respect of employment and therefore not covered by Article 15. Because of the broad definition of income from an office or employment contained in section 6 of the Canadian Income Tax Act, this view would not likely prevail in Canada. The view would also not likely prevail in the U.K.

(65) See Komatsu, p. 108, where profits on redemption of bonds are mentioned as other income. Gains on repayment of debt, if realized in respect of the operation of a business, may fall within Article 7. Although s. 39(2) of the Canadian Income Tax Act deems a capital gain on the repayment of debt denominated in a foreign currency to be from the disposition of currency (i.e. property), no such currency or property exists and Article 13 would not apply. In the U.K., no gain accrues to the original creditor in these circumstances: s. 134, Capital Gains Tax Act, 1979.
Depending upon the wording of the royalty Article and the definition of «royalties», rentals for tangible personal property might also constitute other income (66) and royalties paid to an entertainer from his sales of recordings if he is not the composer (67).

Technical assistance which are not royalties may be business profits (dealt with in Article 7) or income from independant personal services (dealt with in Article 14). If, however, none of these Articles apply in the particular circumstances, then such payments would be other income (68). In Belgium it has been held that remuneration of a non-resident working partner in a Belgian corporate partnership is other income (69). In France, remunerations of the managing director («gerant») who held a majority in a German limited liability company was held not be income from independent professional services nor income from employment and became oth-

(66) See the U.S. legislative history of the U.S.-Hungary Treaty (1979) (see footnote 56), Komatsu, p. 108, the decision of the Court of Appeal of Gent, January 29, 1982 (F.J.F. 82/25), a decision under the Belgium-Netherlands Treaty (1970), and the Belgian Tax Administration Commentaries, para. 21/28. However, under the 1977 OECD Model, rentals for the use of or right to use industrial, commercial or scientific equipment are not other income: Article 12(2) and paragraph 9 of the Commentary to Article 12.


(68) Malaysia, after it introduced a sort of withholding tax on such payments, adopted the view that this was a «new» type of income and fell within Article 21, allowing Malaysia to tax on a source basis where its treaties followed the UN Model: See Dr. Michael Krause, «Tax Treatment of the Provision of Technical Services», paper presented to the International Fiscal Association Seminar on International Taxation of Services, September, 1989. In Italy business profits of non-residents are taxable under internal law (art. 20, 1 para. lett. e) only if derived from activities conducted through a permanent establishment. A different provision (art. 20, 2 para., lett. d) states, by way of exception, that business profits having an artistic or professional character are taxable regardless of the existence of a permanent establishment. Italian ruling n. 12/366 of 7 July, 1979 found these artistic or professional business profits to be other income under the Italy-France Treaty (1958) but that ruling may have limited effect because the Treaty departed from the OECD Model’s wording in the «business» profits Article.

(69) Court of Appeal, Brussels, 19 September, 1989, Freens, F.J.F. 89/164, commented on in Fiscolologue International, 22 October, 1989, nr. 71, p. 1. The court held that a Dutch working partner of a Belgian corporate partnership that carried on business in Belgium could not be said to have a permanent establishment in Belgium for purposes of Article 7, and because the Belgian Tax Administration did not seek to tax under Article 16 (Directors’ Fees), the partner’s income became other income.
er income under the France-Germany Treaty (70). Also the benefit of the lack of interest on a non-interest bearing loan from a French company ("S.A.R.L.") to sister German company ("G.m.b.H.") which was considered to be distributed income under Article 109 of the French Code Général des Impôts became other income under the France-Germany Treaty (71).

An interesting question can arise as to how foreign currency gains and losses are treated which accrue to a dual resident company, for the purposes of the treaty between the two residence States involved when according to Article 4(3) of the treaty the company is a resident of State R. If all the business of the company is carried on in State R, the other will have no right to tax by virtue of Article 7. The question is whether the gain or loss in terms of R State currency viewed by the other State is (i) allocated by Article 7 to the State R (72), (ii) allocated under Article 21 to State R; or (iii) not covered by the Treaty, with the consequence that if the other State can tax it under its internal law, it will be able to do so (73).

Problems Relating to Fiscally Transparent Organizations

a) Payments by and to Partnerships

Although dividends, interest and royalties are expressly mentioned in the Model treaties, the relevant articles are limited to such payments made to a resident of the other Contracting State. While it is often debatable whether or not a partnership is a person (74), a partnership cannot be a resident of a Contracting State unless the partnership is liable to tax therein by reason of domicile, residence, place of management or other criterion of a similar nature (75). Therefore, where a partnership is treated as fiscally tran-

(71) Conseil d'État, 7th and 8th sous-sections, 19 December, 1986, requête n. 54101. Komatsu, at p. 108 mentions distributions from an anonymous partnership as other income.
(72) Because this gain or loss by definition cannot be perceived by State R, the question arises whether it is (at all) within the scope of Article 7.
(73) This third alternative is the view of the Dutch government as states in its reply to question 20 asked in Parliament in relation to the December, 1987 Memorandum on Tax Treaty Policy: Tweede Kamer, vergaderjaar 1987-88, 20 365, nrs. 3 (Question 20) and 5 (Reply 20).
(74) As defined by Article 3(1) (a) of the OECD Model, a person includes a "body of persons." In Padmore v. IRC, [1989] S.T.C. 493, the U.K. Court of Appeal agreed that a partnership was "a body of persons."
(75) See Article 4(1) of the OECD Model.
sparent and the partners, and not the partnership itself, are liable to pay tax on the income of the partnership, the partnership does not meet the criterion for residence (76). In these circumstances, payments of dividends, interest or royalties to a partnership are not dealt with by Articles 10, 11 and 12 of the OECD Model unless such payments are considered as having been made to the partners (77) and they are resident the other Contracting State. If the payments are not considered as having been made to the part-

(76) The Swiss view, however, is that although a partnership is treated under Swiss law as fiscally transparent, because the partners are liable for tax, the partnership can meet the criterion for residence under a tax treaty if it is registered and managed there, even if some partners reside outside Switzerland: J. J. Rivier, Droit fiscal suisse, Le droit fiscal international, (1983) p. 118; W. Ryser, Introduction au droit fiscal international de la Suisse, (Berne 1980) p. 70 and K. Alig, Personengesellschaften in internationalen Steuerrecht, in: Handbuch des internationalen Steuerrecht der Schweiz, (Berne 1984), p. 249. There are exceptions to this rule based on (a) Swiss internal rules preventing treaty shopping contained in Article 2 of the Federal Decree of December 14, 1962, and (b) specific provisions in the treaties with Germany (1972) and Austria (1974). The Protocol of June 18, 1971 and Articles 10 to 12 of the former treaty and Article 28 of the latter provide that a partnership is only resident in a State if at least three-quarters of the partners are resident there.

Article 4(1) (b) of the proposed U.S.-Germany Treaty (1989) suggests that a partnership may qualify as a resident of a Contracting State, even if it is not taxable as such, but only to the extent that the partners who are resident of the Contracting State are taxable on its income. A Letter of Understanding to this Treaty, however, clarifies this by suggesting that the States do not view a partnership as resident, but rather grants the treaty benefits to the resident partner. Read in light of the Letter of Understanding, Article 4(1) (b) may imply that, to the extent that the income of a partnership is taxable in the hands of a partner who is a resident of a Contracting State, the transparency concept applies which would treat the partner as engaged in the trade or business of the partnership, would treat the partner as having a permanent establishment wherever the partnership has one (see, too, Unger v. Commissioner, 58 Tax Court Memorandum Decision 1990-15 (1990), under the Canada-U.S. Treaty (1942)), and would treat payments made to or by the partnership as having been made to or by the partner.

In France, various forms of «sociétés de personnes et assimilées» do exist which are not all transparent. Some have the option of not paying corporate tax on their income, but rather the income is taxed in the hands of the partners («associés»). The French view is that it is not clear that such sociétés de personnes, which are not taxed but are subject to complying with certain tax formalities (calculation of income, paying penalties if no return is filed), are not residents for the purposes of its treaties.

(77) For a further discussion of a Canadian view, see D. A. Ward, «Foreign Investment in Canadian Real Estate», 1989 Corporate Management Tax Conference Report (Canadian Tax Foundation, 1989) 10.1 at p. 10.39 et seq. Under art. 87 of the Italian Consolidated Tax Act, a foreign partnership is an entity for tax purposes, and consequently a payment to a
ners, these amounts, because they are not items of income of a resident of a Contracting State are even beyond the ambit of the Other Income Article, whether in the OECD or UN Model form. Therefore, the widely-used Other Income Articles may not completely cover all items of other income, unless by internal law, or by treaty provisions, or both, a partnership is properly considered to be a resident of a Contracting State, or the payment made to it are considered to be payments to the partners in whatever proportions.

Payments of interest and royalties by a partnership also raise difficult problems. Both the OECD and UN Models have their own exhaustive "arising" rules relating to interest payments, and the UN Model has its "arising" rule relating to royalties. These rules apply where the payer of the interest or royalty is a resident of a Contracting State, or if not a resident, the interest or royalty is borne by a permanent establishment or fixed base to the payer in that State (78). If a partnership is not a resident of either State (because it is not subject to tax, as such) and does not have, in either State, a permanent establishment or fixed base in either State which bears the interest or royalty (79), then the interest or royalty could become other income unless it is considered to be paid by the partners who are residents of one of the States. In these circumstances, where the partnership is considered to be the payer, source taxation would not be permitted to either State even if the treaty had an Other Income Article in the UN form because the interest or royalty would not "arise" in either State (80).

b) Payments by and to a European Economic Interest Grouping

On July 25, 1985, the Council of the European Communities passed Regulation n. 2137/85 providing for the creation of European Economic Interest Groupings ("EEIG") which are to be en-

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foreign partnership cannot, for Italian purposes, be considered to be a payment to the partners. In contrast, Australian Revenue ruling IT-2540 treated a capital gain on the disposition of partnership assets as gains on assets owned by the respective partners, in proportion to their interests.

(78) Article 11(5) of the OECD and UN Models and Article 12(5) of the UN Model.

(79) It might be questioned whether a partnership can have a permanent establishment, which is a fixed place of business of an "enterprise", presumably "carried on by a resident of a Contracting State". See Article 3(1) (c) and Article 5(1) of the 1977 OECD Model.

(80) In Italy a partnership is not liable for corporation tax (irpegi) but it is liable for local income tax (ilor) and therefore a payment by a partnership may fall within Article 11 (Interest) or Article 12 (Royalty) for ilor purposes but fall within Article 21, or completely outside the treaty for irpegi purposes. The situation is made more complex because under Italian internal law, interest and royalties are subject to a withholding tax in lieu of both local tax ilor and corporation tax.
dowed with legal capacity and are to be «organs», legally separate from their members (81), who may be natural persons, companies, firms or other legal bodies (82), and the members are jointly and severally liable for debts and other liabilities of the EEIG (83). The Regulation provides that profits or losses of an EEIG are to be taxable only in the hands of its members (84).

If, as all of the countries of the Community other than Germany and Italy do, the domestic law of the place of registration makes the EEIG a «body corporate», the EEIG will be a company and a person for purposes of the 1977 OECD Model (85), although it is not itself taxable and, therefore, like a partnership which is not itself taxable, it cannot be a resident of a Contracting

(81) A grouping is to have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued: Article 1(2) of the Regulation. The member States are to determine whether or not groupings registered at their registries have legal personality: Article 1(3). The U.K. European Economic Interest Grouping Regulations, 1989 (Statutory Instrument 1989 n. 638), which implements this Regulation in the U.K., provides that from the date of its registration in Great Britain an EEIG shall be a body corporate: Regulation 3. In the Netherlands the «Act for the Implementation of Regulation n. 2137/85 of the Council of the European Communities of July 25, 1985 Providing for the Creation of European Economic Interest Groupings» became law on June 28, 1989, Stb. 245 and entered into force on July 3, 1989. Germany implemented the Directive on April 22, 1988: «EWIV-Ausführungsgesetz». Under the German law an EEIG is not a legal entity but, like a partnership, it has legal capacity to act, contract, sue and be sued in its own name. France has also adopted legislation (Law of June 13, 1989, n. 89-377; J.O. 15 June, 1989) to implement the Directive which provides that an EEIG has moral personality as soon as it is registered in the Registre du Commerce et des Sociétés. Denmark (Lov n. 217 of April 5, 1989), Ireland (EEIG Regulations 1989; Statutory Instruments n. 191) and Belgium (Law of 12 July, 1989) have also implemented the Directive and legislation to do so is pending in Spain, Italy, Greece, Luxembourg and Portugal. Apart from Germany, Italy appears to be the only EEC country where the EEIG will not be a legal entity. Both Germany and Italy chose not to give the EEIG legal personality because to do so would have conflicted with their respective internal laws which deny fiscal transparency to legal person: Prof. Koen Geens, «Le Groupement Européen d’Interêt Economique», p. 12, a paper delivered to a seminar «Harmonization of Company Law in Europe», November 2, 1989, Brussels.

(82) Membership is a minimum of 2 and maximum of 20: Article 4(2) and (3).

(83) Article 24(21).

(84) Article 40.

(85) Article 3(1) (a) and (b). If, however, by the law of the place of registration, the EEIG is not a body corporate, it would not be a company because it would not be «an entity which is treated as a body corporate for tax purposes» because its profits are taxed to its members. It might, however, still be a «person» if it is considered to be a «body of persons».
State in the EEC. Further, such an EEIG is unlikely to be resident in any Contracting State outside the EEC (86).

As an EEIG is not a resident of a Contracting State, virtually none of the provisions of Articles 6 to 20 of the OECD Model will apply to income which it earns or receives. Article 1 of the 1977 OECD Model clarifies that the Model cannot apply to it (87). Further, quite apart from Article 1, even the Other Income Article cannot apply in respect of the taxation of an EEIG on such income because it deals only with items of income of a resident of a Contracting State (88). Therefore, in non-EEC States where an EEIG may be taxable by internal law on income as a body corporate, taxation seems to be unaffected by the provisions of any treaty in the OECD form.

Where the taxing State is a member of the EEC, it is bound to follow the Regulation of the Council of the EEC and, we believe,

(86) See Article 4(1) of the Model. Although Article 40 of the Regulation of the Council of the EEC provides that the members of an EEIG are taxable on its profits or losses, this would only appear to bind member States of the EEC. If a Contracting State, not a member of the EEC, recognizes an EEIG as a body corporate, and under its internal law it taxes bodies corporate, then notwithstanding Article 40 of the EEC Council's Regulation, the EEIG could be subject to tax on its profits or income derived in such a State except where limited by a treaty. However, because an EEIG is created under laws of member States of the Community and only by members who are (a) companies or firms formed in accordance with the laws of member States with registred or statutory offices and central administration within the Community, and (b) natural persons who carry on business or provide services in the Community, it is highly unlikely that an EEIG could be liable for unlimited taxation in a State outside the Community by virtue of its domicile, residence, place of management or other criterion of a similar nature. Therefore, although an EEIG may be subject to source taxation in a State outside the Community, it is unlikely to be a resident of any State as provided in Article 4(1) of the 1977 OECD Model.

(87) Article 1 provides that the Model Convention applies to persons who are resident of one or both of the Contracting States. Even Article 8 (Shipping, Inland Waterways, Transport and Air Transport) probably does not apply even though it does not expressly refer to a «resident» because it refers to an «enterprise» (but not an «enterprise of a Contracting State») which, by virtue of Article 3(1) (c), may imply the concept of a resident.

(88) Prof. Dr. S. Van Crombrugge, in «Het Fiscaal Statuut van de Economische Samenwerkingsverbanden», published in De Europese en Belgische Economische Samenwerkingsverbanden (EESV en ESV), Kalmthout, Biblo, 1989 III, (hereinafter cited as «Van Crombrugge») at p. 18 expresses the view that because the treaty articles do not apply to payments received by an EEIG, Belgian internal law applies to permit withholding taxes on dividends, interest and royalties paid to an EEIG, notwithstanding the EEC Directive that it should be treated as fiscally transparent. In other words, he is of the view that the fiscally transparent provision applies only to taxes on profits of an EEIG, not to taxes which a payer of an item of income must withhold.
can tax only the members of the EEIG. Where the taxing State is the source State, if the EEIG is considered by it to be a body corporate, odd results occur in applying the treaty in the source State in respect of taxation to be imposed on the members of the EEIG because:

a) in dealing with business profits, the enterprise carried on by the EEIG is not an «enterprise of a Contracting State» and Article 7 would not seem to deal with taxation of the members on their respective shares of business profits even though the members do not have a permanent establishment in the source State but the EEIG does, or would have, if it were a resident (89); and

b) in dealing with dividends, interest and royalties received by

(89) See footnote 79. Van Crombrugge, p. 20 and 27, expresses the other view, but seems to base his opinion on an analogy to a partnership where the partners are generally considered to have a permanent establishment whenever the partnership does. In Belgium this is also true of partnerships which are, in Belgian law, legal entities, but which prior to 1986 could elect to be treated as fiscally transparent. His view is that because the EEIG is fiscally transparent, its permanent establishment should be considered to be that of its members even though the EEIG is a separate legal entity in law. However, the Belgian author, Malherbe, expresses the view that the permanent establishment of the EEIG cannot be considered to be that of its members when the EEIG has legal personality: Jacques Malherbe, «Régime Fiscal du Groupe d'Entreprise Européen en Belgique», published in Fiscalité Approfondie des Sociétés, (De Boeck Professional Publishing, 1989) (hereinafter cited as «Malherbe»), at p. 192. It should be noted that Article 34 of the Law of 12 July, 1989 (M.B. 22.08.89) which implements EEC Regulation n. 2137/85 in Belgium provides that Belgian incorporated EEIG's are deemed not to have legal personality for purposes of liability for income tax. Such a deeming provision might be broad enough to attribute to members of a Belgian EEIG (but not a non-Belgium EEIG) the permanent establishment of the EEIG, making Article 7 of the OECD Model Treaty applicable.

There are two published views as to whether (a) the treaty between the source State of incorporation of an EEIG applies to business profits of an EEIG attributed to a permanent establishment or (b) the treaty between the source State and the State of residence of the member of the EEIG applies. Malherbe, p. 195, expresses the view that treaty with the State of incorporation of the EEIG applies, whereas Gert Sass, «Tax Aspects of the European Economic Grouping», (1986) n. 1 Tax Planning International 3 at p. 4 is of the view that the treaties with the various States of residence of each member of the EEIG apply.

It is difficult to apply either treaty because, in the first place, the EEIG is not a resident of any State and, in the second place, if the EEIG is a body corporate, the permanent establishment is not a permanent establishment of its members and the members do not seem to constitute an «enterprise of a Contracting State» because they do not carry on the enterprise carried on by the EEIG.

A U.K. Inland Revenue Consultative Document advances an interesting legislative solution by proposing to amend the internal tax legislation to deem an EEIG, whether formed in the U.K. or elsewhere in the EEC, for tax purposes to be acting solely as an agent of its members whose activities
an EEIG, Articles 10, 11 and 12 could not apply because the person who receives the payment is the EEIG and it is not a resident of either State.

Such items of income received or earned by an EEIG would appear, however, to be other income, that is, «an item of income of a resident of a Contracting State ... not dealt with» in Articles 6 to 20 of the OECD Model from the perspective of a member State of the Community that may tax the profits or losses of the EEIG only in the hands of its members who are persons, and who will be residents of some State for treaty purposes. This seems, therefore, to prohibit source taxation in a treaty modelled on the OECD form and taxation at unlimited rates in the State in which it arises modelled on the UN form. Both results, although apparently legally sound, appear to be unacceptable, and contrary to the underlying intent of the treaties. Where an EEIG pays interest to a resident of the other Contracting State, Article 11 would not apply unless the interest is borne by a permanent establishment or fixed base of the EEIG in a Contracting State (assuming an EEIG can have a permanent establishment or a fixed base), so that the interest will «arise» in a Contracting State (90). If it is received by a resident of the other States, it is then dealt with by Article 11 and does not become other income. As no «arising rule» in respect of royalties appears in the 1977 OECD Model Treaty (91), internal law source rules would have to be applied to determine whether royalties paid by an EEIG and received by a resident of the other Contracting State arise in the Contracting State for purposes of Article 12 (92). Dividends or other distributions to its members made by an EEIG which is a body corporate do not seem to fit Article 10 because the EEIG is not a resident. Therefore, if a member of an EEIG receiving such a distribution is a resident of a Contracting State, only the State of his residence can tax the income if the relevant treaty is in the OECD form. If it is accepted that such a distribution to members «arises» only in the State where the EEIG is resident, because it would not be resident anywhere, source taxation would appear to be precluded under Article 21 even under a treaty in the UN form.

As these results are contrary to the general pattern of income

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(90) Van Crombrugge, p. 24, agrees.

(91) A rule, similar to that dealing with interest, appears in the UN Model as Article 12(5).

(92) If the royalty does not «arise» in the Contracting State for purposes of Article 12, it would be taxable only by the State of residence of the recipient by virtue of Article 21.
taxation under treaties, special treaty provisions seem necessary to deal with EEIG's.

The Permanent Establishment or Fixed Base Exception

An obvious question is why did the OECD, in the 1977 Model Treaty, add paragraph 2 to Article 21 dealing with the permanent establishment or fixed base exception? Specifically, the question can be asked whether this exception is implicit in any event because all business income of a resident of a Contracting State is dealt with in Article 7(1) and therefore cannot be other income and income (other than income from immovable property) of a resident of one Contracting State who carries on business in the other through a permanent establishment or performs independent personal service in the other from a fixed base, is dealt with in Article 7 or Article 14 and includes income from a right or property which is effectively connected with a permanent establishment or fixed base. This conclusion is implicit, of course, in Article 10(4) in respect of dividends, Article 11(4) in respect of interest and Article 12(3) in respect of royalties. The answer appears to be that the specific paragraphs dealing with effectively connected shareholdings, debt claims or rights or property in respect of which the dividends, interest and royalties are paid are limited only to dividends, interest or royalties in one Contracting State and paid to a resident of the other Contracting State but do not deal with dividends, interest or royalties arising in a third State or arising in the State of residence. It is suggested, therefore, that this is the reason why the OECD Committee on Fiscal Affairs chose specifically to clarify the Other Income Article so that it would not include income arising in a third State or arising in the State of residence from property effectively connected with a permanent establishment or a fixed base in the State in which the permanent establishment or fixed base is situate (93). It should also be noted that Article 6, in dealing with

(93) See paragraph 5 of the OECD Commentary to Article 21. Vogel, at annotation 25 to Article 21, makes the same point. The U.S. legislative history of the U.S.-Belgium Treaty (1970) (Technical Explanation of the U.S.-Belgium Income Tax Convention, signed July 9, 1970, in Hearings before the U.S. Senate Foreign Relations Committee, 91st Congress, 2d Session (October 6 and November 19, 1970, at p. 69) indicates, however, that the negotiators of that Treaty thought that the permanent establishment exception was implicit. The negotiators of the U.S.-Hungary Treaty (1979) (see footnote 56) also presumably felt the same way and left an explicit rule out of the Other Income Article but covered the rule by an exchange of notes. It is interesting to note, however, that the U.S. Model Treaty (1981) does not consider the permanent establishment exception to be implicit as it provides for an explicit permanent establishment exception in wording that approximates the OECD Model (1977).
income from immovable property, makes no reference to the case of such property being effectively connected with a permanent establishment or a fixed base. Therefore, all income of a taxpayer from immovable property situate in the other State is taxable in the other State by virtue of Article 6, not Articles 7 or 14, and income from immovable property situate in the State of residence or a third State is other income, even if the immovable property is effectively connected with the permanent establishment in the other State (94). Because of the permanent establishment exception, if dividends or interest are paid by a resident of State A to a taxpayer resident of State A but they are paid in respect of property which is effectively connected with a permanent establishment of the taxpayer in State B, then State A is required to give relief for such tax either by Article 23A (exemption) or 23B (credit). If State A is an exemption State, then it cannot tax, even though it would had a right to tax if the dividends or interest had been paid to a taxpayer resident in State B. Paragraph 5 of the OECD Commentary to Article 21 recognizes this problem and states that Contracting States who find this result to be unacceptable may make provisions in conventions authorizing them to impose taxation in these circumstances at rates consistent with Articles 10 and 11, with the State in which the permanent establishment is situate giving a credit (95).

Various Forms of the Other Income Article

The countries represented by the writers of this Article display quite a varied practice in adopting or not adopting Other Income Articles in particular treaties. In eleven of its treaties (96) Canada

(94) If, however, the other State, by applying Article 3(2) and the meaning of business profits in its internal law would characterize income from immovable property as part of the business profits of the enterprise, such income might fall in the Business Profits Article, not the Other Income Article. In this respect, the «context» of the Treaty is not as strong in displacing the internal law characterization as might be the case when other more specific Articles of the Treaty (Articles 6 to 20) are in issue.

(95) The Belgian Tax Administration Commentary at 21/51 refers to the settlement, presumably by mutual agreement, of the right of the State of residence, in limited cases, to impose tax on dividends and interest paid in these circumstances under the Belgium-France Treaty (1964).

has omitted any Other Income Article (97). The United States has signed twenty-two treaties with no Other Income Article (98). The Netherlands has signed eleven such treaties (99), the UK has signed nineteen such treaties (100), (in addition to many old colonial treaties), France has signed eight such treaties (101), Germany has signed nine such treaties (102), Japan twelve such treaties (103), Switzerland eight such treaties (104), Italy seven such treaties (105), Australia signed only one such treaty (106), and Belgium three (107). Where Canada does include an Other Income Article in its treaties, it invariably follows the UN position, reserving to itself (and usually the other treaty partner) the right to tax other income arising in Canada (or the other State), but often providing for a 15% limitation of such tax on income from estates and trusts (108). Canada and Australia have no treaties in force with an

(97) In the treaties with Ireland (1966) and Norway (1966), Canada, however, limited the rate of tax on unearned income and on estate and trust income respectively to 15%.


(107) India (1974), Morocco (1972) and Tunisia (1975).

(108) Australia (1980), Austria (1976), Bangladesh (1982), Barbados (1980), Belgium (1975), Brazil (1984) (the Brazilian Treaty is unusual in that it does not provide that the resident State only may tax other income), Cameroon (1982), China (1986), Cyprus (1984), Dominican Republic
Other Income Article in the OECD form, i.e. in which the State of source is precluded from taxing other income. Other countries represented here do not have the same propensity to follow the UN Model and usually do so only when dealing with less developed countries but with some remarkable exceptions. The United States has adopted the UN approach which permits source taxation in eleven of its treaties (109) and The Netherlands once (110), Japan three times (111), France seven times (112), Belgium seven times (113), Germany five times (114), Australia thirteen times (115), Italy twice (116), and Switzerland only once (117). The UK has no treaties adopting the UN Model form (118).

By far the largest number of treaties made by counties represented by the authors are those that follow either the 1963 or the 1977 OECD form, albeit perhaps with some different wording but with the same effect of giving the residence country the exclusive right to tax other income — with or without an express permanent establishment exception. The United States has signed eleven such


(110) China (1987).

(111) China (1963), Canada (1986), and Sweden (1983).


(117) New Zealand (1980).

(118) The U.K.-Lesotho Treaty (1949) provides, however, «Subject to the provisions of paragraph 3(3) [which deals with permanent establishments] of this Arrangement, a resident of the U.K. whether carrying on business in Lesotho or not, shall be exempt from Lesotho tax in respect of any income received or accruing from any country outside Lesotho in respect of which he is subject to U.K. tax». This provides the same result as the UN Model for U.K. residents but for Lesotho residents.
treaties (119), The Netherlands thirty-one (120-121), and the United Kingdom forty-two such treaties, some of which do not extend to income paid out of trust and some of which have a proviso that the country of residence must impose tax on the income before the country of source is excluded (122). Japan has signed nineteen such treaties (123), France forty-seven (124), Switzerland


twenty (125), Germany thirty-four (126), and Belgium eighteen (127). In addition, Belgium has seven treaties in force in which a condition is inserted in the Other Income Article that the State of residence imposes tax on such income (128).

There are also some examples of treaties which depart from all of the Models and give each of the Contracting States an unlimited right to tax all Other Income, regardless where it arises (129). Two treaties provide that other income is taxable only in the State


(129) Australia-Singapore (1969), Italy-Argentina (1979), Italy-Brazil (1978), Italy-India (1981), Italy-Malaysia (1984), Italy-New Zealand (1979), Italy-Pakistan (1984), Italy-Singapore (1977), U.K.-Trinidad (1982), Japan-Brazil (1967), Japan-Singapore (1971), France-Egypt (1980), France-Sri Lanka (1981), France-Trinidad & Tobago (1983), Belgium-Brazil (1972), Belgium-Malaysia (1973), Belgium-Singapore (1972) and Germany-Brazil (1975). In the U.K. Treaty with Faroe Islands (1950) the non-resident State is entitled to tax income from sources in that State but is not excluded from taxing income from source in third States. The treaties between Italy and Tanzania (1973) and Egypt (1979) give each State the unlimited right to tax management fees as other income.
in which it arises and give neither State the right to tax third
(1971), Belgium-Ivory Cost (1977), Belgium-Sweden (1965) and
Belgium-Ireland (1970) Treaties adopt a different formulation, limit-
ing the Other Income Article to income from sources in the non-
resident State and providing that the resident is not liable in that
State to tax on other income from sources in that State. However,
there is no mention of income arising in third States or arising in
the State of residence of the taxpayer. In the Germany-Trinidad
Treaty (1973), the Other Income Articles is limited in its operation
to income from sources in a third State.

Importance of the Other Income Articles

As the previous discussion has shown, it is not unusual for Sta-
tes to conclude tax treaties without an Other Income Article. Per-
haps this results from a lack of appreciation of the consequences
of its absence. For example, the Memorandum on General Tax
Treaty Policy submitted by the Netherlands Finance Minister to
Parliament on December 3, 1987, in dealing with other other in-
come, states (our translation):
«[I]n the tax treaties the various categories of income are so
extensively covered that the importance of the Other Income Arti-
cle is generally restricted. This is particularly true if a separate rule
is included in the preceding treaty articles for annuities and social
insurance benefits ... Whether the Netherlands is prepared to con-
sider the UN approach depends on the degree of completeness
with which the various sources of income have been covered by
the preceding articles. To the extent the importance of the Other
Income Articles is smaller, our country has less objection to follow-
ing the UN Model in this respect. In cases where the sources of
income have been practically fully covered, it is sometimes decided
not to take up the Other Income Article at all» (131).

Although specific articles can be, and often are, inserted to deal
with important categories of income not dealt with in the Models


(131) A similar comment about the unimportance of the Other In-
come Article was made in the Netherlands Parliament during debates of
2. Here the importance of such an Article is heightened by the absence,
in that Treaty, of a corporate residence tie-breaker clause.

This position has been criticized. See M. J. Ellis, «Het Nederlands
100 et seq.:
«These ease with which an item, which should be a cornerstone of
treaty policy, is disposed of, is emphasized by the recent treaties: of the
which are of specific interest to the negotiating States, there will still may remain, uncovered, the problems of taxing income of categories not mentioned, and certainly problems of income (particularly dividends, interest and royalties) not mentioned arising in the State of residence and in third States. Clearly, therefore, a tax treaty without such an article is incomplete as it will not effectively deal with items of income not dealt with expressly by virtue of the character of the income, or its source or both. However, the Article in the usual OECD or UN form may remain ineffective in dealing with payments to (and in some cases, payments by) partnerships and EEIG's if the partnership or the EEIG is a person but cannot be considered to be resident of either State.

Where a treaty does not include an Other Income Article in any form, unfortunate effects can also occur for taxpayers who, under internal law, are resident of both treaty States for tax purposes. Although the dual resident Article (132) will provide a series of rules by which the taxpayer will be considered as resident of only one of the two States for purposes of the treaty, the absence of the Other Income Article means that the treaty does not extend to this other income, and for purposes of taxing this other income the taxpayer continues to be a resident of both States and may be liable to full double taxation on all such income, including that arising in each State and in third States.

Interestingly, Australia in several of its treaties (133) seems to recognize this problem as the Other Income Article in those treaties is limited to cases where there would, in the absence of the treaty, be a dual resident taxpayer who, however, is deemed by virtue of the treaty to be resident of only one State. In these treaties the Other Income Article (usually called the «Income of a Dual

eleven treaties signed in the eighties, four do not contain an «other income» article. Although the article's position in the treaty is that of a tail-piece, it contains in fact the main rules, [Our translation].

In the same publication, at p. 91 et seq. F.W.G.M. van Brunschot wrote:

«The reasoning that the Other Income Article may be left out because the categories of income to be dealt with have virtually completely been dealt with, is fallacious. If indeed all categories have been dealt with, no reasonable argument can be made against the inclusion of an Other Income Article, regardless of its contents. For that reason alone, a respectable treaty negotiator is unlikely to leave out an Other Income Article». [Our translation].

(132) Usually Article 4(2) and (3).
(133) U.K. (1967), Singapore (1969), New Zealand (1972), Germany (1972), Netherlands (1976), France (1976), Belgium (1977), Philippines (1979), Switzerland (1980), Malaysia (1980), Italy (1982) and Norway (1982). Germany, in its treaties with Liberia (1970) and Argentina (1978) has also used a similar provision but in the latter treaty there is also a provision allowing the non-resident State to tax income sources in third States if the residence State does not tax it.
Resident Article») provides that such taxpayer is taxable only in the State of his treaty residence in respect of other income from sources in that State or from third States and grants the source State a concurrent right to tax.

Where a treaty includes an Other Income Article in the UN form, the non-residence State will be able to tax other income by applying its own source rules only where the treaty does not provide its source or arising rules for such items of income. This, therefore, can cut down taxation that would otherwise be imposed by the non-residence State if the treaty had no Other Income Article as it limits, to some extent, the application of internal law source rules and, perhaps more importantly, limits taxation imposed by internal law where such taxation is not based on source of income rules.

Although it might appear that an Other Income Article giving both States an unlimited right to tax such income regardless of its source (134) may have the same result as if the treaty had omitted the Article entirely, this is not the case. Where a taxpayer is a dual resident and Article 4 resolves his residence for treaty purposes to one of the States, and also where a taxpayer is in any event resident of only one of the States, that State is required by Article 23 to grant relief against double taxation by way of exemption or credit. In the absence of any Other Income Article, it would be doubtful whether other income is taxed in the source State «in accordance with the provisions of the Convention». If this cannot be established, Article 23 would not apply and double taxation relief by credit or exemption would be available only if such relief is provided by internal law (135).

Where a treaty includes an Other Article in a form which en-

(134) See footnote 129 for a list of such treaties.

(135) Vogel agrees with this conclusion. See annotation 15 to Article 21. It could be argued, however, that taxation at source of a resident of a Contracting State by the other Contracting State in accordance with its internal law is also «in accordance with» the provisions of the Convention if there is no Other Income Article because nothing in the Convention prohibits such taxation and such taxation is not therefore in violation of the Convention. This argument is not, however, as strong as it would appear because of the phrase «conformément à» in the French version of the OECD Model, a phrase with more force than the equivalent English phrase. In attempting to clarify this point, another expression is sometimes used, as in Article 23(1) of the Switzerland-Denmark Treaty (1973): «conformément aux disposition des articles précédents». The U.S.-Switzerland treaty (1951) (which has no Other Income Article) provides relief in Article XV(1) (b) for Swiss residents, corporations and other entities in respect of U.S. taxation by exempting from Swiss tax «such items of income as are dealt with in this Convention, derived from United States and not exempt from, and not entitled to the reduced rate of, United States tax under this Convention ...». The Swiss Federal Tax Administration by decision dated March 18, 1955 held that the exemption related only to items of income mentioned in the treaty, and not to other items of income. Because of the
titles each Contracting State to tax other income in accordance with its own law (136), it can be argued that the treaty is not applicable to the taxation of these items of income so that the treaty source rules (if any) (137) and even the residence tie-breaker rules may not be applicable.

Some Problems in the Application of the Other Income Article

Although in most cases only two States, the States of source or the State of residence of the taxpayer, would attempt to tax any particular item of income this is not always the case. It is possible that two States may claim, in the absence of treaty, a right to tax income on the basis of source or on some other basis. However, problems can arise even though there are tax treaties in existence between them and the residence State which contain the Other Income Article in one form or another because of the possibility of differing source rules. For example, assume that a taxpayer is resident for tax purposes only in State A and that there are tax treaties between State A and State B and between State A and State C. State B and C both claim the right to tax an item of income on the basis of source under their internal laws. Under the A-B tax treaty, other income is taxable only in State A provided that such income is subjected to tax in State A, otherwise State B is entitled to impose tax on such income (138). The A-C treaty follows the UN form and State C has a right to tax income from sources in State C, either under specific Articles or under the Other Income Article and by virtue of doing so the income does not bear tax in State A (either because State A grants a credit or exempts the income from tax under Article 23). The result would be that both State B and State C would impose tax on the same income and, because the taxpayer is resident in neither State, neither State would exempt nor grant credit for the other State's taxes. If there is a tax treaty between States B and C, because the taxpayer resides in neither State he cannot claim any rights under the Other Income Article of that treaty because the items of income in ques-

(136) Such treaties do exist in the United States, for example the U.S.-Finland (1970) and the U.S.-Trinidad & Tobago (1970) Treaties.

(137) For example, the U.S.-Cyprus Treaty (1984) and the U.S.-France Treaty (1967) do not follow the OECD or the UN Models but contain a provision with effect somewhat similar to the UN Model by stating that a resident of a Contracting State may be taxed by the other State only on income from sources in that State, and the source rules apply to determine the source of income.

(138) This treaty would be in accord with a permissible variation of the OECD Model. See paragraph 3 of the Commentary on Article 21.
tion are not «of a resident of a Contracting State», nor for the same reason can he claim any benefits under the exemption or credit Article (139).

The problems of payments by and to transparent partnerships and EEIG's, which have already been mentioned, are also not dealt with by the Other Income Article.

**Conclusion**

The authors do not know the reasons why so many tax treaties have been brought into force without the inclusion therein of an Other Income Article, whether in the OECD, the UN, or some other form. Early history of tax treaties shows that the principle of including an article in a treaty defining the right of the two States to tax income not expressly dealt with was so fundamental that it was the first clause in one of the 1928 League of Nations Models, but became a «tail-end» Article in the Mexico and London Draft Models. With the resumption of the work on Model treaties by the OEEC and its successor OECD, the Other Income Article again became the last, or some believe, a catch-all Article, having lost its apparent connection with a basic principle of international taxation that clearly excluded source taxation. The work of the UN ad hoc committee of experts has, of course, changed the conception that the State of residence has the primary right to tax, with source taxation the exception, and this is reflected in the Other Income Article in the UN Model.

One reason why the Other Income Article may be left out of a treaty is because the negotiators believe that they have covered virtually all income by specific Articles. This certainly is the view of the Dutch Minister of Finance, and, as we have noted, has been rightly criticized.

The authors suspect that the absence of an Other Income Article may more usually result from the refusal of some States to recognize the legitimacy of the UN views, and the views of those States that filed reservations with the OECD, that source taxation of other income is reasonable. We suspect that many treaties have omitted the Article because one State insisted on the UN approach whereas the other State insisted on the OECD approach, and with neither State being prepared to alter its position, no Article was agreed to be included in the treaty. To leave the treaty unfinished by refusing to include an Other Income Article permitting source taxation does, effectively, grant the State that insists on this right the power to levy such tax and would be the equivalent, for

(139) If there is a permanent establishment in State B or C and the income is from property which is effectively connected, then a credit or exemption should be available in the State where the permanent establishment exists. See paragraph 51 of the Commentary to Article 24.
treaty negotiating purposes, of agreeing to the inclusion of the Other Income Article in the UN form. However, when the Article is omitted entirely, the power of the non-residence State to tax is not restricted to source taxation as it would be under the UN Model that State can also tax certain third State-sourced or resident State-sourced other income without restriction, whether by applying internal law source rules or by virtue of any other principle of its internal law.

Where a treaty does not contain an Other Income Article, there are serious questions whether the State of residence must afford, under the treaty whether by credit or exemption, relief for double taxation where the so-called source State imposes tax on other income. It is also doubtful if such double taxation could be relieved by mutual agreement procedures because such double taxation may, in fact, be «in accordance with the provisions of [the] Convention» (140). If this is the case relief would appear to be available only through a so-called «legislative» mutual agreement procedure with the competent authorities «consult[ing] together for the elimination of double taxation in cases not provided for in [the] Convention» (141). Because such legislative competent authority procedures are rarely undertaken, and some States believe that treaties cannot effectively be amended in this way by the competent authority, this remedy is usually not practical (142). Treaties following the OECD form do not permit source taxation of other income except in circumstances where the treaty may permit it where such income would escape tax in the State of residence. Treaties following the UN form do permit source taxation. However, in neither case does the Model contemplate any limitation to the rate of taxation in the State of source, notwithstanding that the OECD prescribes rates of source taxation for dividends, interest and royalties and the UN Model indicates that these rates are to be settled by negotiation. It is the view of the authors that whenever source taxation is permitted, a rate of tax should be provided, consistent with the rates or range of rates of source taxation provided in the dividend, interest or royalty Articles. If treaty negotiators believe that particular kinds of other income should be taxed at different rates, then particular treaties should so provide (thereby narrowing the scope of the residuary Other Income Article) but the Other Income Article should also provide a limitation of the rate of source taxation of whatever income comes within it.

It is view of the authors that the Other Income Article is important to the full functioning of the treaty to achieve its objective of eliminating double taxation. It is to be hoped therefore that ne-

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(140) Article 25(1).
(141) Article 25(5). The U.K. does not use this provision.
gotiators, in the future, will be able to agree on the inclusion of such an Article, in whatever form, and that taxpayers will see fewer treaties where, to their detriment, this gap has been left open.

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