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TAXING CROSS-BORDER SERVICES: TWO LATAM EXPERIENCES AND A COUPLE OF CONCLUSIONS FOR THE (DEVELOPING) WORLD

by

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ABSTRACT

Many developing countries have been trying to expand in the last decades their taxing powers on cross-border services rendered by non-residents beyond the rigid framework of the current international tax regime. However, this expansion has been carried on unilaterally and sometimes in an unplanned manner. This contribution describes the Brazilian and Argentinian experiences and tries to extract some policy lessons therefrom.

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I. Introduction

Taxation of cross-border services has been a hot topic for developing countries during the last decade. Whatever the reasons for this concern, the truth is that developing countries have doubled their efforts to negotiate double tax conventions, which deviate from the traditional paradigm in the taxation of business income when it comes to taxing cross-border services at source. Beyond the details, the endeavor is always to attribute taxing rights to the source State in the absence of a Permanent Establishment and irrespective of physical presence of the service provider in said State. International organizations in charge of the international tax regime appear to have taken this shift seriously and either tried to bring order to the uncoordinated expansion of these "special distributive rules"[1] or have simply taken note of the phenomenon.[2]

The countries of the Latin American region are no exception amongst developing jurisdictions with regard to their international tax policy demands and particularly their wish to expand taxation of

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1. Such is the case of the U.N. Committee of Experts on International Cooperation in Tax Matters (the Committee), which introduced a new article 12A concerning Fees for Technical Services in the U.N. Model Double Taxation Convention Between Developed and Developing Countries (2017), un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf [hereinafter U.N. Model (2017)]. *See also* U.N. Dep't Econ. & Soc. Aff.: Fin., https://www.un.org/development/desa/financing/ (last visited Oct. 18, 2020).

2. The Organisation for Economic Co-operation and Development (OECD) also considered tax treatment of cross-border services more than ten years ago. OECD, *The Tax Treatment of Services: Proposed Commentary Changes: Public Discussion Draft* (2006), oecd.org/ctp/treaties/37811491.pdf. However, no direct consequences resulted from this study beyond the introduction of a Service-Permanent Establishment rule as an alternative provision in the Commentaries to article 5 of the OECD Model. OECD, *Commentaries on the Articles of the Model Tax Convention*, art. 5, at 92 (2010), https://www.oecd.org/berlin/publikationen/43324465.pdf [hereinafter OECD, *Commentaries*]. More recently the OECD has recognized that excessive or unwarranted payments to MNE affiliates—eroding the tax base of developing countries (by, inter alia, fees for (management) services)—are high priority BEPS Action items for developing countries. OECD, *Two-Part Report to G20 Developing Working Group on the Impact of BEPS in Low Income Countries* 19–20 (2014), http://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf.

cross-border services beyond the current—extremely limited—framework of the (OECD) international tax regime.[3] Indeed, most countries in the region tax income obtained by non-resident service providers in the absence of a Permanent Establishment (PE) located in the Source State and even in the absence of other thresholds.[4] In line with this, many of these countries try to preserve their domestic taxing rights at a Double Taxation Convention (DTC) level, negotiating treaty rules allowing source taxation of cross-border services in the absence of a traditional (physical or agency) or a specific Services-PE.[5] Clear though these rules may seem at first, it is worth noting that both, domestic and treaty rules referring to cross-border services, pose challenging interpretative problems in practice. In this respect, the Argentinian and Brazilian experiences highlight these difficulties and, at the same time, may serve as a guidance for those (LATAM) countries wishing to expand their taxing rights to cross-border services rendered by non-residents.

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3. Although not always clear, taxation of cross-border services seems to be on the agenda of several Latin-American countries. *See* Rodrigo Barrios Correa, *Uruguay's Treaty Policy*, 71 Bull. Int'l Tax'n, no. 3/4, 2017, ¶ 3.9.5; Irma Johanna Mosquera Valderrama, *The International Tax Treaty Policy of Colombia*, 67 Bull. Int'l Tax'n, no. 4/5, 2013, at 238, 242–43; Luís Eduardo Schoueri, *Brazil*, *in* BRICS and the Emergence of International Tax Coordination at ch. 4 (Yariv Brauner & Pasquale Pistone eds., 2015).

4. Most comparative work shows this trend even if it is neither comprehensive nor particularly focused on the LATAM region. *See* Arianne Pickering, *General Report*, 97A Cahiers de Droit Fiscal Int'l 17, 30–31 (2012) (included in issue on Enterprise Services).

5. In fact, 80 out of 279 signed, ratified or effectuated DTCs in the LATAM region (including Mexico, Central America, South America, and the Spanish-speaking Caribbean countries) include provisions, normally under article 12 or 14 of the treaty, attributing taxing rights to the source state in relation to cross-border services in the absence of a PE. More revealingly, 10 out of the 16 DTCs signed by a LATAM country during 2017, 2018, and 2019 include a provision, under article 12 of the treaty or in a separate provision dealing with fees for technical services, attributing taxing rights to the source State in relation to cross-border services in the absence of a PE. The introduction of a new provision in the U.N. Model (2017), *supra* note 1, art. 12A, attributing taxing rights to the source State in relation to fees for technical services has almost certainly led to an increase in the bilateral tax treaties that incorporate these kind of rules.

The rest of this contribution is organized as follows: Part II critically analyzes the Brazilian case law on cross-border services and the application of special treaty rules regarding income derived by nonresident service providers from these services; Part III does the same in relation to Argentina but with emphasis on domestic sourcing rules on cross-border services. Both paragraphs are followed by a description of the policy and interpretative lessons these and other countries may extract from these experiences. Part IV contains a brief conclusion and a general reflection on the importance of cross-border taxation of services for the taxation of the digital economy.

This contribution does not address the issue of the appropriateness, in terms of policy, of taxing cross-border services in the absence of a PE or, more generally, in the absence of physical presence of the service provider in the Source State.[6]

II. The Brazilian Experience: Back from Other Income (Mistakenly) to Business Profits, or "You Should Know What Your Treaties Let You Do"

The Brazilian Federal Revenue Office surprised the (tax) world in 2000 when, by issuing the Declaratory Act COSIT 01/2000, it announced that remittances under contracts for the provision of technical assistance and technical services without the transfer of technology were subject to taxation according to its domestic law even, and this is the surprise, in a treaty context,[7] inasmuch as this income could be classified under the Other Income article of Brazilian treaties, which normally grants unlimited taxing rights to the source State by significantly deviating from article 21 of the OECD Model Tax Convention.[8] It is not worth wasting

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6. I have dealt with that issue in a previous publication: Andrés Báez Moreno, *The Taxation of Technical Services Under the United Nations Model Double Taxation Convention: A Rushed—Yet Appropriate—Proposal for (Developing) Countries?*, 7 World Tax J., no. 3, 2015, at 267.

7. For an English translation of this 2000 Act, see Leonardo Freitas de Moraes e Castro & Alexandre Luiz Moraes do Rêgo Monteiro, *Qualification of Services Under Double Tax Treaties in Brazil: Open Issues after* Iberdrola *Case*, 45 Intertax 54, 59 (2017).

8. OECD, Model Tax Convention on Income and on Capital: Condensed Version 2017, art. 21 (2017), https://doi.org/10.1787/mtc_cond-2017-en.

time on the nuances of this strongly criticized position,[9] as it was later on revoked by the tax authorities through Interpretative Declaratory Act 5/2014, stating that amounts remitted abroad as compensation for the provision of technical services without transfer of technology could in no circumstances be classified as Other Income for tax treaty purposes.[10]

However, the end of the "Other Income versus Business Profits" controversy would not bring peace to taxation of cross-border services in Brazil. Indeed, as predicted by scholars and practitioners,[11] the end of this polemic gave way to a discussion, which by the way was not new in Brazil, on whether income originated by the provision of technical services without transfer of technology could be classified for tax treaty purposes as royalties (article 12), or professional or independent personal services (article 14) and thereby preserve Brazilian taxing rights on these services in tax treaty situations. Should Brazilian Tax Treaties follow the treatment of cross-border services under the OECD Model Tax Convention, there would be no cause for controversy: cross-border services would qualify as Business Income (article 7) and be not taxable in Brazil in the absence of a PE. This is however not the case; indeed most Brazilian Treaties[12] include a particular provision in their

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9. *See* Vanessa Arruda Ferreira, *Service Income Under Brazilian Tax Treaties: The Possible End of the Article 7 v. Article 21 Battle, but the Start of a New Old One*?, 42 Intertax 427 (2014); *id.* at 428 n.10 (referencing literature).

10. Freitas de Moraes e Castro & Moraes do Rêgo Monteiro, *supra* note 7, at 59–60 (for an English translation of the 2014 Act).

11. *See* Vanessa Arruda Ferreira, *The New Brazilian Position on Service Income Under Tax Treaties: If You Can't Beat'em, Join'em*, 43 Intertax 255 (2015) [hereinafter Arruda Ferreira, *The New Brazilian Position*]; Arruda Ferreira, *supra* note 9; Luís Eduardo Schoueri & Mateus Calicchio Barbosa, *Technical Services and the Application of Article 7 Under Brazilian Treaty Practice: A Case Study*, *in* Tax Treaty Case Law Around the Globe 2013, at 103 (Michael Lang et al. eds., 2013) (after the *Copesul* case).

12. All Brazilian treaties, with the exception of those with Austria, Finland, France, Japan and Sweden. In the Protocol to the 1975 Treaty between Brazil and Sweden that concluded March 19, 2019, a new provision has been included in relation to this issue which reads as follows: "It is understood that the provisions of paragraph 3 of Article 12 shall also apply to payments of any kind received as consideration for the rendering of technical services and technical assistance." Protocol Amending the Convention

Protocol's qualifying income derived from the rendering of technical assistance and technical services as royalties,[13] and therefore potentially taxable at source. Furthermore, most Brazilian Treaties[14] attribute unlimited taxing rights to the source State in relation to Independent Personal Services if the remuneration for such services or activities is paid by a resident of the source State or the income is borne by a PE or fixed base situated in that State. Additionally, most of these treaties enable the application of article 14 to independent personal services rendered by Companies.

Interpretative Declaratory Act 5/2014 concluded that the rendering of technical services or technical assistance without transfer of technology should be classified:

(i) under article 12 of the corresponding treaty if it contained a reference in the protocol to technical services or technical assistance along the lines described before;

(ii) under article 14 (or the corresponding *Independent Profession* article) if those technical services or technical

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Between Brazil and Sweden for the Avoidance of Double Taxation with Respect to Taxes on Income art. 12(5), Braz.-Swed., Mar. 19, 2019, Tax Analysts Doc. 2019-30068.

13. The new treaties with Singapore (concluded May 7, 2018) and Switzerland (concluded May 3, 2018) contain a new article 13 on Fees for Technical Services along the lines of article 12A of U.N. Model (2017), *supra* note 1. Agreement Between the Republic of Singapore and the Federative Republic of Brazil for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance art. 13, Sing.-Braz., May 7, 2018, Tax Analysts Doc. 2018-19384 [hereinafter Sing.-Braz. Treaty]; Convention Between the Swiss Confederation and the Federative Republic of Brazil for Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance art. 13, Switz.-Braz., May 3, 2018, Tax Analysts Doc. 2018-19169 [hereinafter Switz.-Braz. Treaty]. We will later come back to this kind of provision.

14. With the only exception of the treaty with Japan, which only allows the source State to tax according to article 13 (not 14 in that particular treaty) of the treaty if the service provider has a fixed base in the source State. *See* Convention Between Japan and the Federative Republic of Brazil for the Avoidance of Double Taxation with Respect to Taxes on Income, Japan-Braz., Jan. 24, 1967, 682 U.N.T.S. 195.

assistance are related to the technical qualification of a person or group of persons may the treaty of course allow for that taxation at source; and

(iii) under article 7 in circumstances different from (i) and (ii).[15]

However, case law in Brazil prior and subsequent to Interpretative Declaratory Act 5/2014, has been arguing that services performed by non-resident service providers were not subject to withholding tax in Brazil even if treaties containing Protocols extending the concept of royalty to also embrace technical services and technical assistance would apply.[16] None of these decisions mentioned the possibility of applying article 12 and/or article 14 of the corresponding treaties in order to preserve Brazilian sourcing rights. The straight application of article 7 prevented taxation at source.[17] A significant number of Brazilian scholars have also defended that only technical services with transfer of technology must be classified under article 12 as royalties according to the Protocols aforementioned.[18]

Current case law in Brazil and also the position of preeminent scholars demonstrates a clear underuse of treaty instruments to tax cross-border services; this statement merits further analysis.

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15. I use the English translation of the Act made by Freitas de Moraes e Castro & Moraes do Rêgo Monteiro, *supra* note 7, at 59–60.

16. Treaties with Germany (later revoked by the German authorities; see Ann M. Miller, *Brazil, Germany to Negotiate Tax Treaty*, 2015 World Tax Daily 160-5 (Aug. 19, 2015) (describing termination effective January 1, 2006, of Brazil-Germany Tax Treaty)) and Canada in the *Copesul* case decided by the Brazilian Superior Court of Justice on May 17, 2012 (Brazil–Case RE 1.161.467–RS, 17 May 2012 (Decision)) and the Treaty with Spain in the *Iberdrola* case decided by the Brazilian Superior Court of Justice on November 19, 2015 (Brazil–Case 1.272.897–PE, 19 Nov 2015 (Decision)).

17. A description of other more remote precedents among the same lines is in Freitas de Moraes e Castro & Moraes do Rêgo Monteiro, *supra* note 7, at 62–63.

18. *See id.* at 61 n.30.

A. Technical Services or Technical Assistance with Transfer of Technology

The idea according to which only technical services or technical assistance with transfer of technology must be considered royalties, for treaty purposes, even in those treaties containing the special protocols aforementioned is, in my view, simply wrong. First of all, it should be perhaps clarified what is meant by technical services or technical assistance with transfer of technology as the expression is rather imprecise and confusing. For years both the OECD and the U.N. Model Commentaries have made a distinction between "know-how"—transfer of information that has not been patented and does not generally fall within other categories of intellectual property rights or, in short, transfer of technology[19]—and pure services—in which one of the parties undertakes to use the customary skills of his calling to execute work for the other party.[20] Therefore, payments are made either as a consideration for a transfer of information (*know-how* or transfer of technology) or for the direct execution of work by the service provider. In this context referring to technical services with transfer of technology seems fuzzy at best.

One could think about a laboratory case in which a service provider by executing his work also transfers information (*show-how*). However, in practice, these services would be ancillary to a transfer of technology/know-how, and it does not seem possible for them to exist without this transfer. This is in fact acknowledged by both the OECD and the U.N. Model Commentaries when stating that "in most cases involving the supply of know-how, there would generally be very little more which needs to be done by the supplier under the contract other than to supply existing information or reproduce existing material."[21] Be that as it may, there is a widespread consensus on the fact that payments as a consideration for the transfer of technology (*know-how*) are already covered by the reference in article 12(2) of both the OECD and

19. U.N. Model (2017), *supra* note 1, art. 12, para. 11; OECD, *Commentaries*, *supra* note 2, art. 12, para. 11.

20. U.N. Model (2017), *supra* note 1, art. 12, para. 11.2; OECD, *Commentaries*, *supra* note 2, art. 12, para. 11.2.

21. U.N. Model (2017), *supra* note 1, art. 12, para. 11.3; OECD, *Commentaries*, *supra* note 2, art. 12, para. 11.3.

the U.N. Model Tax Conventions[22] to "payments received as a consideration for (. . .) information concerning industrial, commercial or scientific experience."[23] In this context, the interpretative question may be what do Brazilian Protocols qualifying income derived from the rendering of technical assistance and technical services as royalties add if payments as a consideration for transfers of know-how are already covered by article 12 of the treaties.

Some Brazilian authors have interpreted the expression *technical assistance* and *technical services* as referring exclusively to services ancillary to transfers of technology,[24] which implies that pure (non-ancillary) technical services would be covered by article 7 and remain untaxed at the source in the absence of a PE. The arguments supporting that restrictive interpretation of the Protocols revolve around the ancillary nature of the expression "technical assistance"[25] and certain provisions of Brazilian domestic law requiring mandatory registration for technical services ancillary to transfers of technology.[26] Without prejudice here to those arguments, there is a clear indication that this restrictive approach might be wrong. Both the U.N. and the OECD Model Commentaries refer to mixed contracts that cover both know-how and the provision of technical assistance.[27]

According to the Commentary, the appropriate course to take would be to break down the whole amount of the stipulated consideration and to apply to each part the taxation treatment proper thereto, but

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22. All Brazilian treaties contain this language in their respective article 12(3).

23. U.N. Model (2017), *supra* note 1, art. 12, para. 11; OECD, *Commentaries*, *supra* note 2, art. 12, para. 11. This identification between the expression "information concerning industrial, commercial or scientific experience" and the concept of "know-how" is in the OECD Model Commentaries from 1977 even if the very concept of know-how has been evolving ever since. Adolfo Martín Jiménez, *Article 12: Royalties*, *in* Global Tax Treaty Commentaries, at 5.1.5.2.2.1 (2017).

24. Alberto Xavier, *O Imposto de Renda na Fonte e os Serviços Internacionais—Análise de um Caso de Equivocada Interpretação dos arts. 7 e 21 dos Tratados*, 49 Revista Dialética de Direito Tributário 7, 14–16 (1999).

25. *Id.* at 14.

26. *Id.* at 15.

27. Technical assistance is a contested term, but we think in this context it actually equals technical services.

if one part constitutes by far the principal purpose of the contract and the other parts are only ancillary, the treatment applicable to the principal part should be applied to the whole amount of the consideration.[28] It should not be forgotten that these commentaries refer to Model Tax Conventions that do not contain a provision similar to that contained in Brazilian Protocols.[29] The question then would be: does it make any sense to introduce a specific provision in the Protocols attributing taxing rights to the source state in relation to technical assistance and technical services (ancillary to transfers of technology) even when the source State is already entitled to tax these services according to article 12 of the corresponding treaty? Indeed, unless the purpose behind the Protocols is the elevation from the Commentaries to the very treaty, the quasi-systematic deviation of Brazilian treaties in relation to technical services would add nothing relevant.

An interpretation that totally devoids the content of a provision—such as that restricting the scope of Brazilian Protocols to ancillary technical assistance and technical services—cannot be correct. Additionally, the exact wording of Brazilian Protocols should be taken into account inasmuch as none of them refer to the ancillary character of the technical assistance/services as a precondition for the attribution of taxing rights to the source State.[30] The mere fact that technical services and technical assistance are contemplated in Brazilian treaties as an expansion of the "normal" content of royalties in article 12 does not allow or impose the interpreter to attach additional contents to the letter of the treaty in pursuit of a hidden connection with the original concept of royalty.

The legislator—in this case, the negotiators of the treaty—are free to include whatever contents in the concept of royalty related or not to the original "industrial property royalties" as described in articles 12(2) and 12(3) of the OECD and U.N. Models. The mistaken position of this restrictive interpretation becomes more evident if the language of Brazilian Protocols is contrasted with other expansions of the concept

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28. U.N. Model (2017), *supra* note 1, art. 12, para. 11.6; OECD, *Commentaries*, *supra* note 2, art. 12, para. 11.6.

29. This might be partially inaccurate in relation to the U.N. Model (2017), *supra* note 1, counting on a specific provision on fees for technical services.

30. Arruda Ferreira, *The New Brazilian Position*, *supra* note 11, at 258 (referencing these literal arguments).

of royalty contained in other treaties. The "so-called" included services clause of some Indian Treaties is a case in point. By way of example, article 12(4) of the U.S.-India DTC allows source taxation of "included services" if such services:

> (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or
>
> (b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.[31]

In these clauses, unlike in the Brazilian Protocols, the ancillary character of technical services labelled as royalties appear clearly.[32]

B. Brazilian Case Law and Brazilian Protocols

The reluctance of Brazilian case law to understand Brazilian Protocols as also covering technical assistance/services in the absence of transfer of technology or, to be more nuanced, the mechanical application of article 7, has hindered the emergence of new interpretative problems regarding taxation of cross-border services. In my view, these are the more prominent:

> (1) What services can be considered "technical" and taxed at the source according to the Brazilian Protocols? This problem, which has not gone unnoticed for some Brazilian authors,[33]

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31. Convention Between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income art. 12(4), U.S.-India, U.S.-India, Sept. 12, 1989, Treaty Doc. 101-5.

32. A similar argument in relation to similar provisions in other treaties in: Arruda Ferreira, *The New Brazilian Position*, *supra* note 11, at 257–58.

33. *Id.* at 258; Freitas de Moraes e Castro & Moraes do Rêgo Monteiro, *supra* note 7, at 64.

may interfere with the normal operation of whatever treaty provision trying to expand taxing rights of the source State in relation to cross-border services. In previous publications, I have advocated for the suppression of any adjective—such as technical or any other—in provisions trying to expand taxing rights of the source State in relation to cross-border services or, given the existence of the expression in existing treaties like in the Brazilian Protocols, to minimize its relevance assuming that all services might be reputed technical.[34] This interpretation would avoid recourse to the domestic law of the Contracting States through article 3(2) of the DTC[35]—and therefore litigation and significant risk of unrelieved double taxation[36]—and at the same time would curb the construction of "international accepted meanings," which normally tend to a meaningful reduction of the scope covered by these provisions.[37]

(2) Declaratory Act 5/2014 concluded that the rendering of technical services or technical assistance without transfer of technology should be classified:

(a) under article 12—in treaties containing special Brazilian Protocols;

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34. Báez Moreno, *supra* note 6, at 298–303.

35. Proposed by Brazilian authors: Freitas de Moraes e Castro & Moraes do Rêgo Monteiro, *supra* note 7, at 64.

36. However it must be warned that the domestic concept of technical service in Brazil seems rather restrictive seeing it is defined as: "the provision of service that depends on specialized technical knowledge or the involves administrative assistance or consultancy, carried out by independent professionals or employees or by automatic structures with a clear technological content." Normative Ruling 1455/2014. The reference and the translation is taken from Arruda Ferreira, *The New Brazilian Position*, *supra* note 11, at 258. The reference to *a clear technological content* reduces the scope of covered services significantly.

37. This is what is happening in my view with the interpretation—contained in the U.N. Model (2017), *supra* note 1, art. 12A, paras. 61–104 (showing the concept of *Fees for Technical Services* in article 12A of the U.N. Model). For a critical analysis of this interpretation: Báez Moreno, *supra* note 6, at 300–03.

(b) under article 14 (or equivalent in the treaty) except when item i applies.

The Act suggested a precedence of article 12 over 14 in those treaties containing special Brazilian Protocols.[38] However, in a recent decision, Brazilian Tax Authorities have defended the application of article 14 of the Brazil-Mexico DTC to engineering services provided by a Mexican Company to a Brazilian Resident. According to the decision *Solução de Consulta nº 135—Cosit* of March 28, 2019,[39] article 14 in the treaty referring to professional services or other independent activities should be considered *lex specialis* in relation to the habitual Protocol to article 12.

Even if the fees were finally not subject to source taxation—due to peculiarities of Brazilian law in relation to the payer—this interpretation may have far-reaching implications as most Brazilian Treaties attribute unlimited taxing rights to the source State in relation to Independent Personal Services if the remuneration for such services or activities is paid by a resident of the source State or the income is borne by a PE or fixed base situated in that State normally irrespective of the legal nature (individual, partnership, company) of the service provider. Obviously, the qualification under one or the other distributive rule might

38. That is, in my view, the literal content of the Act and also the interpretation of Brazilian authors: Arruda Ferreira, *The New Brazilian Position*, *supra* note 11, at 256. Freitas de Moraes e Castro & Moraes do Rêgo Monteiro, *supra* note 7, at 64. Nevertheless, as regarding treaties with Spain (concluded 14 November 1974) and Israel (concluded 12 December 2002), Ato Declaratório Interpretativo SRF nº4, of March 17, 2006, http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=5583, suggests both impose the application of article 14 to technical services related to the technical qualification of a person or group of persons. *See also* Convention Between the Federative Republic of Brazil and the Spanish State for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Braz.-Spain, Nov. 14, 1974, 1031 U.N.T.S. 7; Convention Between the Government of the Federative Republic of Brazil and the Government of the State of Israel for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Braz.-Isr., Dec. 12, 2002, Tax Analysts Doc. 2005-15217.

39. *Assunto: Imposto Sobre a Renda Retido na Fonte—IRRF*, Receita Fed. (Mar. 28, 2019), http://normas.receita.fazenda.gov.br/sijut2consulta/anexoOutros.action?idArquivoBinario=51841.

not be trivial, due to different tax rate limits under both articles 12 and 14 or methods of taxation (gross vs. net basis).[40] In any event the respective scopes of articles 12 and 14 (i.e., Protocols regarding technical services) depend to a large extent on the very interpretation of the word technical accompanying the substantive services in Brazilian treaties. Indeed, a restrictive interpretation of the term technical would make clear that article 14 cannot be *lex specialis* in relation to the Protocols; however, a broad interpretation of the expression *technical services*—as I have always advocated—could change this relation of *lex generalis* and *specialis* in favor of the application of article 14. The problem is that whatever interpretation leads to the systematic non-application of the contending distributive rule something that seems to make little sense. In any case, the experience in other countries with similar treaty situation shows a rather erratic qualification of services under articles 12 or 14 of the corresponding treaty.[41]

C. Lessons

In my opinion there are two important lessons to be learned from the Brazilian experience during the last 20 years in relation to cross-border taxation of services:

> (1) Brazil or any other (developing) country that disagrees with the current "OECD status quo" on taxation of cross-border services must carefully delineate the "non-Model-patterned" provisions to be incorporated to its treaty network. It is important to know and properly interpret the deviations of the country´s treaty network from the OECD/U.N. Model Tax Conventions; and
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> (2) Even if in my opinion those Brazilian Treaties containing expansions of the royalty concept in their Protocols allow source taxation of pure technical services, this could be clarified in future treaty negotiations decoupling (technical) services from

40. However differences in method might be immaterial according to Brazilian Law: Sergio André Rocha, *Brazil*, 97A Cahiers de Droit Fiscal Int'l 160 (2012).

41. For India, see D.P. Sengupta, *Article 14: Independent Personal Services*, *in* Global Tax Treaty Commentaries, at 6.1.4.4 (2017).

royalties and, incidentally, clearing up the relationship between article 14 and the distributive rule referred to technical services and the very scope of covered services. In fact, Brazilian negotiators seem to have seriously taken account of these necessities by incorporating in new or renegotiated treaties provisions regarding services[42] along the lines of the new article 12A of U.N. Model Tax Convention on fees for technical services.[43] These new provisions solve the above-mentioned problems with the exception of the scope of services covered, which is in my view the major technical difficulty in article 12A of the U.N. Model Tax Convention.[44]

III. The Argentinian Experience: Unintelligible Domestic Sourcing Rules or "Your Treaties Count For Nothing If Your Domestic Law Is Not In Order"

Concerning cross-border services, the Argentinian treaty network is much less uniform than the Brazilian one. Even though most Argentinian DTCs expand the modelled concept of royalties to also embrace *rendering of technical assistance*, the disparities between specific treaty language are relevant:

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42. Sing.-Braz. Treaty, *supra* note 13, art. 13; Switz.-Braz. Treaty, *supra* note 13, art. 13; Convenção Entre a República Federativa do Brasil e a República Oriental Douruguai para Eliminar a Dupla Tributação em Relação aos Tributos Sobre Arenda e Sobre o Capital e Prevenir a Evasão e a Elisão Fiscais art. 13, Uru.-Braz., June 7, 2019, Tax Analysts Doc. 2019-29309. The 2017 Protocol to the DTC between Brazil and Argentina (concluded 21 July 2017) does not incorporate a new provision on technical services. Protocol Amending the Convention Between the Argentine Republic and the Federative Republic of Brazil for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Arg.-Braz., July 21, 2017, Tax Analysts Doc. 2017-4658 [hereinafter Arg.-Braz. Protocol Amendment]. However, point 7.b of the Protocol clearly unites technical services and royalties whereas point 9.b resolves the potential conflicts between article 14 and taxation of technical services under article 12.

43. U.N. Model (2017), *supra* note 1, art. 12A.

44. *See* Báez Moreno, *supra* note 6, at 298–303.

(1) Some of these treaties do not define what is meant by technical assistance[45] but, in other cases, the concept is described in

45. This is the case of the treaties between Argentina and Australia, Belgium, Canada, China, Denmark, and Finland (referring to technical, scientific, administrative or similar assistance). Agreement Between the Government of Australia and the Government of the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income art. 12, Austl.-Arg., Aug. 27, 1999, Tax Analysts Doc. 1999-31445 [hereinafter Austl.-Arg. DTC]; Convention Between the Argentine Republic and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital art. 12, Arg.-Belg., June 12, 1996, Tax Analysts Doc. 1999-3944; Convention Between Canada and the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital art. 12 & protocol, Can.-Arg., Apr. 29, 1993, Tax Analysts Doc. 93-31570; Agreement Between the Argentine Republic and the People's Republic of China for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Tax Evasion and Avoidance art. 12 & protocol, Arg.-China, Dec. 2, 2018, Tax Analysts Doc. 2018-48067; Convention Between the Government of the Kingdom of Denmark and the Government of the Republic of Argentina for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital art. 12 & protocol, Den.-Arg., Dec. 12, 1995, Tax Analysts Doc. 96-31248; Agreement Between the Republic of Finland and the Argentine Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital art. 12, Fin.-Arg., Dec. 13, 1994, Tax Analysts Doc. 96-2267 [hereinafter Fin.-Arg. DTC].

See also treaties between Argentina and the Netherlands, Norway, Qatar, Russia, Sweden, Switzerland, Turkey, United Arab Emirates, and the United Kingdom. Convention Between the Kingdom of the Netherlands and the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital art. 13 & protocol, Neth.-Arg., Dec. 27, 1996, Tax Analysts Doc. 98-4044; Convention Between the Kingdom of Norway and the Republic of Argentina for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, art. 12 & protocol, Nor.-Arg., Oct. 8, 1997, Tax Analysts Doc. 98-4932 [hereinafter Nor.-Arg. DTC]; Agreement Between the Government of the State of Qatar and the Government of the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital art. 12, art. 14 & protocol, Qatar-Arg., Apr. 19, 2018, Tax Analysts Doc. 2018-39354

the Protocols referring to the "rendering of customized services involving the application by the provider of any non-patentable specialized knowledge, ability or experience, and not necessarily requiring the transmission of such knowledge to the client."[46]

[hereinafter Qatar-Arg. DTC]; Convention Between the Government of the Argentine Republic and the Government of the Russian Federation for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital ar. 12, Arg.-Russ., Oct. 10, 2001, Tax Analysts Doc. 2007-2310; Convention Between the Kingdom of Sweden and the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. 12 & art. 22, May 31, 1995, Tax Analysts Doc. 95-30592; Convention Between the Swiss Confederation and the Argentine Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital art. 12, Switz.-Arg., Mar. 20, 2014, Tax Analysts Doc. 2014-6762; Convention Between the Argentine Republic and the Republic of Turkey for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance art. 12 & art. 14, Arg.-Turk., Dec. 1, 2018, Tax Analysts Doc. 2019-5286; Convention Between the Government of the Argentine Republic and the Government of the United Arab Emirates for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital art. 12 & art. 14, Arg.-U.A.E., Nov. 3, 2016, Tax Analysts Doc. 2016-23178; Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital art. 12 & protocol, U.K.-Arg., Jan. 3, 1996, Tax Analysts Doc. 96-31575.

46. This is the case of the treaties between Argentina and Chile (signed 15 May 2015); Argentina and Luxembourg (concluded 13 April 2019, but not yet ratified); and Argentina and Mexico (concluded 4 November 2015). Convenio Entre la República Argentina y la República de Chile para Eliminar la Doble Imposición en Relación a los Impuestos Sobre la Renta y Sobre el Patrimonio y para Prevenir la Evasión y Elusión Fiscal protocol 13(c), Arg.-Chile, May 15, 2015, Tax Analysts Doc. 2015-11910; Convention Between the Argentine Republic and the Grand Duchy of Luxembourg for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Tax Evasion and Avoidance protocol 4(c), Arg.-Lux., Apr. 13, 2019, Tax Analysts Doc. 2019-17002; Acuerdo Entre los Estados Unidos Mexicanos y la República Argentina para Evitar la Doble Imposición y Prevenir la Evasión Fiscal con Respecto a los Impuestos Sobre la Renta y Sobre el

(2) Some treaties refer explicitly to technical services;[47]

(3) Some treaties refer to service-related concepts which, however, have never appeared in the Models;[48]

(4) The treaty not yet in force with Qatar establishes in its Protocol 4(c) that the competent authorities shall determine, on a case by case basis, through a mutual agreement procedure

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Patrimonio protocol 7(c), Mex.-Arg., Nov. 4, 2015, Tax Analysts Doc. 2015-26646.

47. DTC between Argentina and Brazil and between Argentina and Finland. Convention Between the Federative Republic of Brazil and the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Braz.-Arg., May 17, 1980, 1300 U.N.T.S. 33, as amended by Arg.-Braz. Protocol Amendment, *supra* note 42; Fin.-Arg. DTC, *supra* note 45, art. 12.

48. Such as the concept of survey or research works of a scientific or technical nature concerning industrial, commercial or administrative methods or processes (treaty between Argentina and France, concluded 4 April 1979 and amended by Protocol of 15 August 2001, which entered into force on 1 October 2007), studies or research of a scientific or technical nature and concerning industrial, commercial or administrative methods or processes (DTC between Argentina and Italy, concluded 15 November 1979), and technical assistance services (DTC between Argentina and Spain, concluded 11 March 2013). Convention Between the Government of the French Republic and the Government of the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital art. 12, Fr.-Arg., Apr. 4, 1979, 1264 U.N.T.S. 3 [hereinafter Fr.-Arg. DTC], as amended by Protocol to the Convention Entered into on April 4, 1979 Between the Government of the Argentine Republic and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Arg.-Fr., Aug. 15, 2001, Tax Analysts Doc. 2003-11878; Convention Between the Argentine Republic and the Italian Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital and for the Prevention of Fiscal Evasion art. 12, Arg.-It., Nov. 15, 1979, Tax Analysts Doc. 97-28609-I [hereinafter Arg.-It. DTC]; Convenio Entre el Reino de España y la República Argentina para Evitar la Doble Imposición y Prevenir la Evasión Fiscal en Materia de Impuestos Sobre la Renta y Sobre el Patrimonio art. 12 & protocol 4(c), Spain-Arg., Mar. 11, 2013, Tax Analysts Doc. 2013-6458.

those cases that could be considered as technical assistance;[49] and

(5) Finally, some treaties do not contain a single specific reference to cross-border services.[50]

While one might think that this variety of treaty language has generated significant litigation on the application of Argentinian DTCs to cross-border services, the truth is that the number of Court decisions in Argentina dealing specifically with tax treaty issues of cross-border services is very small.[51] There is an easy explanation for this: the discussion surrounding domestic Argentinian source rules on services has overshadowed any other discussion or conflict on taxation of cross-border services. Indeed, Argentinian sourcing rules eventually applicable to cross-border services are extraordinarily vague.

The general sourcing rule in Argentina, contained in article 5 of the Income Tax Act, *Ley del Impuesto a las Ganancias* (LIG),[52] deems as Argentinian source income that arising from "assets situated, placed or economically used in Argentina, from performance in Argentina of any activity likely to produce benefits or from events taking place in

49. Qatar-Arg. DTC, *supra* note 45, protocol 4(c).

50. Such as the DTCs between Argentina and Germany (concluded 13 July 1978 and amended by a Protocol signed on 16 September 1996 which entered into force on 30 June 2001) and Argentina and Japan (signed 27 June 2019 not yet in force). Convention Between the Federal Republic of Germany and the Argentine Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and Property, Ger.-Arg., July 13, 1978, 1246 U.N.T.S. 241, as amended by Protocol to the Agreement Dated July 13, 1978 Between the Republic of Argentina and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Arg.-Ger., Sept. 16, 1996, Tax Analysts Doc. 98-8917; Convention Between Japan and the Argentine Republic for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance, Jap.-Arg., June 27, 2019, Tax Analysts Doc. 2019-25281.

51. There are however some decisions to which we will make a short reference hereinafter.

52. *Ley de Impuesto a las Ganancias*, InfoLEG, http://servicios.infoleg.gob.ar/infolegInternet/anexos/40000-44999/44911/texact.htm (last visited Oct. 27, 2020) (texto ordenado por Decreto 649/97 (B.O. 06/08/97), Anexo I, con las modificaciones posteriors).

Argentina."[53] Apart from that, article 12 of the LIG deems as Argentinian source income that arising from technical, financial, or whatever assistance rendered from outside Argentina. All the difficulties involved in applying these rules have emerged in the so called *Amadeus Saga,* a series of cases in which Amadeus Marketing SA—a company resident in Spain—entered some complex transactions with Argentinian airline operators, which were allowed to charge their travelling information (flights, fares, or seats) in the database of Amadeus in exchange for the payment of a fee accrued every time Amadeus processed a reservation for the corresponding Argentinian carrier.

In relation to these "simple" facts, there have been as many different solutions as tax and ordinary courts have expressed their views in Argentina.[54] Most of these decisions are very confusing but in any event the most hotly disputed issues were:

> (1) Whether remotely performed services could be sourced in Argentina according to the general sourcing rule contained in article 5 of the LIG. Some of the abovementioned decisions, have interpreted article 5 to also cover services not physically

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53. I partially take this translation from Eduardo O. Meloni, *Taxation of Royalties Under Treaty Law: How Far Can a Source State Go?*, 64 Bull. Int'l Tax'n, no. 6, 2010, ¶ 3.3 (2010).

54. Decision of the Tribunal Fiscal de la Nación, sala D, May 12, 2004 (case *Aerolíneas Argentinas SA*) [hereinafter Tax Court Decision, *Aerolíneas Argentinas*]; Decision of the Cámara Nacional de Apelaciones, sala I, Feb. 5, 2008 (case *Aerolíneas Argentinas SA*) [hereinafter Appeals Decision, *Aerolíneas Argentinas*]; Decision of the Tribunal Fiscal de la Nación, Sala A, Feb. 6, 2007 (case *Austral Líneas Aéreas Cielos del Sur SA*) [hereinafter Tax Court Decision, *Austral*]; Decision of the Cámara Nacional de Apelaciones, Sala V, June 2, 2009 (case *Austral Líneas Aéreas Cielos del Sur SA*) [hereinafter Appeals Decision, *Austral*]; Decision of the Tribunal Fiscal de la Nación, Sala C, Apr. 14, 2010 (case *Líneas Aéreas Privadas Argentina SA (LAPA)*) [hereinafter Tax Court Decision, *LAPA*]; Decision of the Cámara Nacional de Apelaciones, Sala III, Sept. 8, 2011 (case *Líneas Aéreas Privadas Argentina SA (LAPA)*) [hereinafter Appeals Decision, *LAPA*]. For an overview of these cases, see *Los Pagos Realizados en Concepto de Uso de Sistemas Automatizados de Reservas a Beneficiarios del Exterior*, El Cronista (Mar. 12, 2012), https://www.cronista.com/fiscal/Los-pagos-realizados-en-concepto-de-uso-de-sistemasautomatizados-de-reservas-a-beneficiarios-del-exterior-20120312-0013.html.

performed in Argentina but economically used in that country.[55] This would in fact extend the sourcing rule, which merely refers to "performance in Argentina of any activity likely to produce benefits" covering thereby only services physically performed in Argentinian territory. However, it is relatively clear that article 5 of the LIG only refers to assets economically used in Argentina—not services—and there is therefore no support for this interpretation in Argentinian Law.[56]

(2) Whether remotely performed services could be sourced in Argentina according to the special sourcing rule contained in article 12 of the LIG. Some of the abovementioned decisions considered that the services rendered by Amadeus Marketing SA to the Argentinian airline operators could be considered technical assistance and therefore sourced in Argentina even if provided remotely.[57] Whilst extension of article 5 to also cover remotely provided services was easy to be denied, the problem when applying article 12 of the LIG is that technical, financial, or whatever assistance is not defined in Argentinian tax law.[58] This lack of definition has resulted in a wide array of interpretations ranging from the identification of technical assistance

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55. As suggested in the Appeals Decision, *Aerolíneas Argentinas*, *supra* note 54.

56. As suggested by Meloni, *supra* note 53, at 316–17; Miguel A.M. Tesón & Valeria Estathio, *Un nuevo pronunciamiento sobre el Sistema Amadeus. El fallo ´*Austral Líneas Aéreas Cielos del Sur SA*´ (C. Nac. Cont. Adm. Fed, Sala 5°, 2/6/2009*, Revista el Derecho Fiscal, Sept./Oct. 2009, at 65 (Arg.); Axel A. Verstraeten, *Argentina: Source Country Approach: Article 7 Versus Article 12*, *in* Tax Treaty Case Law Around the Globe 305, 309 (Eric C.C.M. Kemmeren et al. eds., 2016).

57. As suggested in Tax Court Decision, *Aerolíneas Argentinas*, *supra* note 54; Appeals Decision, *Austral*, *supra* note 54; Appeals Decision, *LAPA*, *supra* note 54.

58. Carlos M. Giuliani Fonrouge & Susana Camila Navarrine, Impuesto a las Ganancias: Análisis de Doctrina y Jurisprudencia (4th ed. 2007). Some Argentinian scholars and some abovementioned decisions of tax authorities and courts have made a reference to an administrative resolution adjudicated by the *Instituto Nacional de Tecnología Industrial* defining technical assistance. In my opinion the definition is too broad to derive specific conclusions from it.

with pure technical services[59] to the requirement of the transfer of some type of knowledge or advice[60] to, finally, a more or less clear identification with the concept of know-how.[61] Of course just under the first interpretation the fee paid to Amadeus could be sourced in Argentina. For various reasons the Argentinian Supreme Court has not had the chance to make a decision in a case of the Amadeus Saga.

The attention paid by Argentinian scholars and case law to the problem of domestic sourcing rules has hampered an in-depth analysis of other problems regarding cross-border services, namely those referring to their tax treaty treatment:

> (1) The vast majority of Argentinian DTCs refer, under article 12, to *technical assistance.* In some of these treaties, the concept is defined in the Protocol, making it clear that the term covers whatever service—"services involving the application by the provider of any non-patentable specialized knowledge, ability or experience"—not requiring the transmission of such knowledge to the client. In my view these rules have the virtue of, on the one hand, clarifying that technical assistance goes beyond transfer of know-how or even services ancillary to this transfer and, on the other side, not falling into the semantic trap of the terms "technical service" for the Brazilian experience.
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> However, the majority of Argentinian DTCs expanding the concept of royalties to also cover the *rendering of technical assistance* do not define this concept.[62] The problem is, also at a treaty level, that the concept of technical assistance proves also extremely confusing. By all means, there are many who simply identify technical assistance and transfer of know-how or services ancillary to the transfer of technology at least at a

59. In a more or less precise way, those decisions mentioned *supra* note 58.

60. Meloni, *supra* note 53, at 318.

61. Tax Court Decision, *Austral*, *supra* note 54; Tax Court Decision, *LAPA*, *supra* note 54.

62. *See supra* note 45.

pure treaty level.[63] Unlike in Brazilian treaties—which refer to technical assistance *and technical services*—under these Argentinian Treaties this would mean exclusive taxation in the residence State of whatever services rendered in Argentina without a PE.

Moreover, this interpretation is far from unanimous and the very Commentaries of both the OECD and the U.N. Model Tax Conventions explicitly indicate that payments for pure technical assistance should not be considered to be received as a consideration for the provision of know-how but rather for the provision of services.[64] In this context, article 3(2) of these treaties and the search for a domestic law meaning does not help either then, as stated before, the vagueness of the concept is the same or worse in Argentinian domestic law. However, in my view this is one of those (rare) cases in which, according to article 3(2) of the corresponding treaty, the context requires not to resort to the domestic law of the Contracting State applying the treaty.

Indeed, some of these treaties clarify in their context that the expression *technical assistance* actually refers to (technical) services and not to the transfer of know-how or to services ancillary to that transfer. For example, in the treaty between Argentina and Australia article 12(3) of the treaty indicates that the term royalties covers "the supply of scientific, technical, or industrial, knowledge or information" (i.e., know-how); "the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of . . . any such knowledge or information as is mentioned in subparagraph (c)" (i.e., services ancillary and subsidiary to the transfer of know-how); and "the rendering of any technical assistance not included in subparagraph 3(d)" (i.e., not included under services ancillary and subsidiary to the transfer of know-how).[65] In this context it is difficult to

63. Martín Jiménez, *supra* note 23, at 5.1.5.1. & 5.1.5.2.2.5 (explaining the history).

64. U.N. Model (2017), *supra* note 1, art. 12 para. 11.4; OECD, *Commentaries*, *supra* note 2, art. 12, para 11.4. Nevertheless none of the Commentaries define pure technical assistance or even technical assistance.

65. Austl.-Arg. DTC, *supra* note 45, art. 12(3).

claim that the term technical assistance refers just to know-how and services ancillary and subsidiary to the transfer of know-how.

Other treaties, despite using the expression "technical assistance" without defining it, clarify in other provisions of the very treaty the intention to cover also pure technical services under the former expression; this is the case for instance of the treaty between Argentina and Norway where article 14(1) of the treaty refers to "professional services or other activities of an independent character performed in the other Contracting State excluding technical services as dealt with in Article 12."[66] Finally, other treaties seem to have oddly merged the concepts of technical assistance and technical services referring to the rendering of technical assistance services (article 12(3) of the DTC between Argentina and Spain). In addition to the logical argument already exposed in relation to Brazilian treaties—it makes no sense to deviate from the Models to cover the tax that you were already entitled to tax under the Model—there are good contextual reasons to defend that in these treaties the expression technical assistance goes beyond know-how and services ancillary and subsidiary to the transfer of know-how.

Of course, the interpretation problem persists in those treaties, which do not contain a definition of technical assistance or enough context to deduce the meaning of this expression.

(2) Two relevant Argentinian treaties extend the concept of royalty to also cover payments of any kind received as consideration "for studies or research of a scientific or technical nature concerning industrial, commercial or administrative methods or processes"[67] or payments "for studies or research of a scientific or technical nature and concerning industrial, commercial or administrative methods or processes."[68] In the

66. Nor.-Arg. DTC, *supra* note 45, art. 14(1). Article 12(3) of the treaty refers to the rendering of technical assistance so it might be easily deduced that the negotiators believed the expressions technical assistance and technical services to be equivalent.

67. Fr.-Arg. DTC, *supra* note 48, art. 12(3)(c).

68. Arg.-It. DTC, *supra* note 48, art. 12(3).

absence of a specific definition of this concept in the treaties it becomes difficult to understand the meaning of this extension and whether or not it covers pure services not ancillary to the transfer of know-how.

The reference to research, studies, or surveys could be seen as a synonym for know-how inasmuch as the researcher merely imparts his special knowledge without executing work himself for the other party. However, it must also be acknowledged that this interpretation might make little sense from a strict contextual point-of-view as the provisions in both treaties refer separately to "information concerning industrial, commercial or scientific experience," an expression which—as we have already said—is usually identified with the transfer of know-how. Again, the treaty would be including futile language.

In my opinion, there is no satisfactory interpretation for this expression in the referred treaties.[69]

(3) Some of the interpretative problems previously spotted under Brazilian treaties could also appear in the Argentinian tax treaty network such as the very concept of "technical" services[70] or the relationship between articles 12 and 14 regarding cross-border services.

I also believe, there are two important lessons to be learned from the Argentinian experience during the last 20 years in relation to cross-border taxation of services:

(1) It makes no sense for a jurisdiction trying to extend its taxing powers regarding cross-border services to negotiate treaty provisions deviating from the current OECD standards (i.e.,

69. In fact, even if both treaties are relatively old—both were concluded in 1979—the OECD Commentaries, *supra* note 2, at 222–23, identify the expression *information concerning industrial, commercial or scientific experience* with the transfer of know-how since 1977. So the negotiators must have been aware of this, arguably attributing a different and wider meaning to the expression "for studies or research of a scientific or technical nature concerning industrial, commercial or administrative methods or processes."

70. A concept also used in some Argentinian treaties. *See supra* note 47.

attributing whatever taxing rights to the source State in the absence of a PE). If, on the other hand, domestic sourcing rules on these services are not clear, there are, of course, many ways to design these rules as shown by the variety of domestic source approaches regarding cross-border services.[71]

However, particularly for developing countries trying to expand taxing rights on cross-border services, simplicity should act as a guiding principle. For this purpose, domestic sourcing rules should avoid, just like at a treaty level, any adjective qualifying services covered. Besides that, despite the criticism made by several authors,[72] these rules should ideally source cross-border services if the corresponding payment is made by a resident or borne by a PE situated in the jurisdiction.

(2) A jurisdiction, like Argentina, trying to expand its taxing rights on cross-border services should avoid confusing and non-uniform language at a treaty level.

Unlike Brazil, Argentina does not seem to use the new article 12A of the U.N. Model Tax Convention as a starting point in its new treaties. Instead, in those treaties negotiated since 2015, Argentina stubbornly clings to the untelling concept of technical assistance seeking, in the best case, to unravel ambiguities by means of non-uniform definitions in the corresponding Protocols.[73] This approach predicts future controversies regarding taxation of cross-border services; in fact, it should not be forgotten that article 12A of the U.N. Model was essentially incorporated into the Model in order to avoid misguiding rules on cross-border services in treaties.[74]

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71. Pickering, *supra* note 4, at 30–31.

72. Criticism we have rebutted in previous publications: Andrés Báez Moreno, *Debate: A Note on Some Radical Alternatives to the Existing International Corporate Tax and Their Implications for the Digital(ized) Economy*, 46 Intertax 560, 564 (2018).

73. *See supra* note 46.

74. Jan de Goede, *The Treatment of Services in Tax Treaties* 2 (IBFD White Papers Series, 2013), https://www.ibfd.org/sites/ibfd.org/files/content/pdf/White%20Paper_Treatment_of_Services_in_Tax_Treaties_v050312.pdf.

IV. Conclusions and Epilogue

This contribution would not really require a specific paragraph with conclusions. Indeed, lessons learnt from the Brazilian and Argentinian experiences could serve as such. In essence, (developing) countries looking for an extension of their taxing powers on cross-border services beyond the current framework in the international tax regime (PE principle) should allow themselves to be led by simplicity both when designing domestic source rules and negotiating treaty provisions.

However, beyond these basics there is another, perhaps more far-reaching, advantage of an orderly taxation of cross-border services. Indeed, even when the OECD/G20 Inclusive Framework on BEPS seems determined to take different approaches,[75] it should not be forgotten that a withholding tax on services could be a simple and effective way to address the tax challenges of the digital economy.[76] It goes without saying that simple, predictable, and neutral domestic and treaty rules are the pre-condition upon which this tax liability must be based.

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75. *See* OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Inclusive Framework on BEPS* 40 (2019), https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf.

76. As we have tried to demonstrate in previous publications: Báez Moreno, *supra* note 6, at 300–03; Andrés Báez Moreno & Yariv Brauner, *Tax Policy for the Digitalized Economy Under Benjamin Franklin's Rule for Decision-Making*, *in* Tax and the Digital Economy: Challenges and Proposals for Reform 67 (Werner Haslehner et al. eds., 2019); Yariv Brauner & Andrés Báez Moreno, *Withholding Taxes in the Service of BEPS Action 1: Address the Tax Challenges of the Digital Economy* 33 (IBFD White Papers Series, 2015), https://www.ibfd.org/sites/ibfd.org/files/content/WithholdingTaxesintheServiceofBEPSAction1-whitepaper.pdf.