

ORGANIZAÇÃO PARA COOPERAÇÃO

A actualização de 2010 PARA Modelo de Convenção Fiscal

22 de julho de 2010

CENTRO DE POLÍTICA E ADMINISTRAÇÃO DO IMPOSTO

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A actualização de 2010 PARA Modelo de Convenção Fiscal

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2. Para efeitos do presente artigo e no artigo [23 A] [23B], os lucros em cada Estado Contratante a esse estabelecimento permanente referido no artigo 7º poderiam ser esperados, nomeadamente nas suas relações empresariais, se tal fosse uma empresa independente e separada que exercesse as mesmas ou semelhantes actividades similares nas mesmas condições, tendo em conta as funções desempenhadas pela empresa através do estabelecimento permanente da empresa.

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3. Quando, em conformidade com o n.º 2, um Estado Contratante imputar lucros a um estabelecimento estável de uma empresa de um dos Estados Contratantes, os lucros da empresa que tenham sido tributados no Estado Contratante necessário para eliminar a dupla tributação dos lucros e o montante do imposto cobrado sobre os lucros. Os Estados Contratantes competentes dos Estados Contratantes deverão considerar-se necessário

4. Quando os lucros compreenderem elementos de rendimentos desta natureza, as disposições desse artigo não serão afetadas pelas disposições do artigo.

C. COMENTÁRIO

Artigo 1º

3. Adicione o novo seguintes títulos e parágrafos 6,8-6,34 o comentário ao artigo

Cross-border questões relativas aos veículos de investimento colectivo

6.8 A maioria dos países têm lidado com as questões fiscais internas investidores que concedem os seus investimentos em instrumentos de investimento colectivo (civilizações) e em instrumentos de investimento directo. O investimento colectivo sucederá quando os investidores, o CIV eo investimento localizado no mesmo país, para as questões surgem frequentemente em

defenda a aplicação das disposições fiscais intitulado "O Tratado de
 Questões de Benefícios de investimento colectivo, 1 as principais
 foram incorporadas abaixo. Para efeitos do relatório e para conclusões
 discussões, os seguintes termos são amplamente sustentadas, deter uma carteira
 diversificada de títulos e valores mobiliários no país em que estão estabelecidos.

Aplicação da Convenção para civis

6.9 A principal questão que se coloca no contexto de cross-border é se
 qualificar CIV a pessoa beneficiária da Convenção em seu próprio direito. A fim
 de fixar a competência de cada Estado, a disposição específica tratando
 de qualificação CIV tem a pessoa que é ||, um residente de um Estado
 Contratante, ou não, e se a pessoa é ||-proprietário da renda que
 recebe.

6.10 A determinação da existência de uma CIV deve ser tratado como
 forma jurídica de uma pessoa que difere substancialmente de país para país e
 entre tipos de veículos. Em muitos países, a maioria das civilizações
 CIV é formada de uma empresa ou entidade. Em outros, ainda,
 muitas civilizações são simplesmente pessoas. Na maioria dos casos, o CIV
 será tratado como uma pessoa || para os fins da legislação tributária do
 Estado em que está estabelecido. CIV é geralmente constituída sob a
 forma de uma pessoa ||, ou os administradores agindo colectivamente na sua
 capacidade como tal, é tratado como um

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 Convenção Fiscal da OCDE na página

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contribuinte ou uma pessoa para o direito fiscal nacional. Tendo em conta
 a aplicação da legislação fiscal do país onde tal CIV é
 estabelecida como um contribuinte seria indicativo de que o CIV-|| é uma
 pessoa para os fins de que desejem expressamente esclarecer que, nestas
 circunstâncias, as civilizações podem acordar bilateralmente para
 resolver a questão de

6.11 Se um CIV é-|| residente de um Estado Contratante não depende do
 desde que a pessoa || (ou uma pessoa), mas no seu tratamento fiscal no
 Estado em que está estabelecida. A CIV regimes nacionais é garantir que
 fiscal, um nível CIV ou do nível dos investidores, há

que teria recebido o rendimento nas mesmas circunstâncias, não teria sido considerado o beneficiário efectivo dos mesmos).

6.15 Como esses princípios são necessariamente gerais, a sua aplicação da CIV pode variar para o CIV, investidores e intermediários. Qualquer situação que seja especialmente problemática para uma CIV, que devesse ser corrigida, incluindo qualquer imposto retido na fonte os benefícios por retenção dos Estados (ver o Anexo I). O NAV, que normalmente é baseado na disponibilidade dos dados para subscrições e resgates. Se os benefícios impostos retidos pela CIV não correspondem às suas suposições sobre o voluntariedade de benefícios fiscais a essa retenção, haverá uma diferença entre o NAV realdo por investidores que tenham adquirido, vendidas ou exercido os seus interesses em

6.16 A fim de proporcionar mais segurança ao abrigo dos tratados chegar a um acordo de administração de fundos para alguns tipos de investimentos. Não se trata de respeitar alguns tipos de civilizações, como um acordo de mútuo de simples investimentos confirmados e, portanto, tem o benefício em sua própria direita. Em outros casos, o contrato de mútuo pode ser uma via viável de fazer reivindicações em relação ao tratado de investimento coletivo. Tratado com Respeito ao Investimento Colectivo para um debate sobre esta questão). No entanto, a vontade para trás sobre os benefícios que de outra forma estariam disponíveis para a CIV, nos termos do

As questões políticas levantadas pelo atual tratamento de veículos de investimento colectivo

6.17 As mesmas considerações que sugerem que os negociadores do tratado de investimento expressamente que pareça que civis em cada um dos Estados Contratantes que apropriado para confirmar essa posição pública de exemplo, a fim de proporcionar segurança. Também pode ser apropriado o direito tratado de civilizações, incluindo, por exemplo, a seguinte disposição

[] Não obstante as outras disposições da presente Convenção, um investidor estabelecido num Estado Contratante e que recebe o Estado Contratante é considerado, para fins da aplicação da legislação para indivíduo que é residente do Estado Contratante estabelecida e como o beneficiário efectivo dos rendimentos que teria recebido se esse indivíduo tinha sido considerado o beneficiário do mesmo). Para os fins deste parágrafo, o veículo de investimento colectivo Estado [A], a [] e, no caso do Estado [B], a [], bem como o veículo de investimento, o arranjo ou entidade estabelecida que qualquer Estado Contratante dos Estados Contratantes veículo de investimento colectivo parágrafo.

6.18 No entanto, na negociação de Estado Contratante e o Estado Contratante

~~Estados Contratantes não podem variar os resultados na~~
~~disposições. Os Estados Contratantes não podem variar os resultados na~~
~~objeto do presente tratado bilateral,~~
~~poderulante em caso de realização em um dos Estados Contratantes de~~
~~qualificação para os benefícios, enquanto ciys~~
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no Estado Contratante outros não podem. Isso pode tornar o tratado
 por esse desequilíbrio em favor das circunstâncias específicas. Se for, então
 Os Estados devem tentar chegar a uma solução equitativa. Se o resultado
 Os Estados Contratantes é que a maioria civis não pagar imposto na
 realidade de super Estados Contratantes de uma legal que poderiam fazer com
 qualificação em os benefícios para os dos outros para ser negado benefícios.
 Diferenças na forma jurídica e um tratamento fiscal dos dois Estados
 Contratantes podem ser diferentes. Na comparação
 entre os Estados de civilização e o de origem e ao nível do investidor
 de uma civilização de CIV em si. O objetivo é alcançar a neutralidade
 entre os Estados de origem e a CIV no mercado internacional, o contexto
 das disposições objetivas de uma abordagem o tratamento de civilizações é atingir essa
 neutralidade no contexto doméstico.

6.19 Um Estado Contratante pode também querer considerar se as
 disposições existentes de uma maneira potencialmente
 CIV pode ser possível que todos os requisitos para reivindicar benefícios do
 tratado em si mesmo está sujeito ao imposto, se houver, tanto na prática.
 De acordo com o CIV pode ser possível que os países terceiros para receber os
 benefícios de investimento tratado. Assim, pode ser adequado para
 permitir este benefício para tal CIV, seja através de aplicação geral
 anti-abuso regras de compras (como discutido sub-utilização imprópria
 da Convenção de disposição específica tratando civilizações.

6.20 Para decidir se uma tal disposição é necessária, os Estados
 Contratantes devem considerar as características económicas, incluindo o potencial de compras
 do tratado e as disposições que são predominantes em cada um dos
 Estados Contratantes e a tributação no Estado em que está
 estabelecido o potencial de comércio em que o CIV em si é sujeito a
 um nível de imposto que os investidores não-residentes estão sujeitas a
 retenção na fonte.
 disposições possíveis modificando o tratamento de civilizações

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http://translate.googleusercontent.com/translate_c?hl=pt-PT&langpair=en%7Cpt&u=... 12-10-2010

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Estados Contribuintes e, por isso, justificam a diferenciação no tratamento tributário. Nas disposições desta seção podem ser incluídas no tratado.

6.23 O efeito de permitir que os benefícios para o CIV na medida em que os benefícios são devidos ao investidor seja distribuídos de acordo com a subdivisão (b) (ii) é assegurar que os investidores não sejam penalizados pelo fato de terem investido em uma situação pior, investindo por meio de uma CIV, em comparação com a situação de investir diretamente em uma empresa estrangeira. Ele também diminui o risco de dupla tributação de dividendos para o investidor, na medida em que existe um tratado fiscal entre o país de origem do investidor e o país do país da empresa. É benéfico para os investidores, particularmente aqueles de países em desenvolvimento, desfrutar de uma maior escolha de instrumentos de investimento. Também beneficia os investidores que desejam investir através de veículos de investimento coletivo, como fundos de investimento, ao reduzir a carga tributária sobre os dividendos. A simplificação dos procedimentos de distribuição de dividendos também beneficia os investidores que desejam investir através de veículos de investimento coletivo, como fundos de investimento, ao reduzir a carga tributária sobre os dividendos. Em muitos casos, os benefícios da extensão da cobertura dos tratados tributários a esses tratados são quase sempre 10-15 por cento sobre os dividendos da carteira.

6.24 Ao mesmo tempo, a disposição impede uma CIV de ser usado por um investidor residente no Estado B para obter uma vantagem fiscal. A comparação da taxa na definição equivalente do benefício de isenção de imposto de renda entre a taxa é reivindicada pela CIV e da taxa de imposto de renda que o investidor poderia ter direito se ele recebeu a renda diretamente. Por exemplo, se um residente no Estado B recebe dividendos de uma sociedade residente no Estado A, os dividendos na CIV são pessoas singulares residentes no Estado B e 25 por cento são pessoas singulares residentes do Estado B. Os dividendos estão sujeitos a uma taxa de imposto de renda de 10 por cento, os fundos de pensões estão sujeitos a uma taxa de imposto de renda de 15 por cento. Em relação a estes fatos, 75 por cento dos investidores na CIV Estado B e os beneficiários de pensões estabelecidos no Estado C - são beneficiários equivalente.

6.25 Um Estado de origem pode também estar preocupado com o *possa supor a perda de uma importante fonte de receita que*
sujeito a uma redução ou perda de receita de uma

~~pode pretender que os Estados possam ser tratados como se fossem sujeitos de direito internacional público, e, portanto, esta abordagem provou ser difícil de aplicar na prática. Os países que estão preocupados com a possibilidade de qualquer negociação de cláusulas que estendem benefícios operacionais para aqueles que estão em uma situação de preocupação com o adiamento, no entanto. Eles podem ter a visão de que, mesmo se o investidor não é tributado pelos CIV, será tributado, distribuído ou seja qualquer mais-valias se vende sua participação na CIV antes de sua distribuição. Os Estados podem querer negociar disposições que concedem benefícios para aqueles que distribuir a sua renda em uma base atual. Além disso, e em relação aos rendimentos de investimento não são significativos em comparação com os dividendos tratado, portanto, não seria necessário para qualquer país de residência fiscal desses rendimentos através de um fundo de investimento. No entanto, países já tomaram medidas para garantir a tributação do investimento gerado por seus moradores, através de fundos de investimento, independentemente de ainda mais o potencial para o desenvolvimento. Quando de civilizações que não são obrigadas a distribuir renda, atualmente, whether these or other factors address the concerns described here might not in fact be necessary.~~

6.26 Some States believe that taking all treaty-eligible investors, States, including those which have the bilateral nature of tax treaties. The States may prefer to a CIV only to the extent that the investors in the CIV are resident in the State in which the CIV is established. In that case, the draft may follow be

- ~~a) Notwithstanding the other provisions of this Convention, a resident of a Contracting State and which is a resident of another Contracting State shall be treated for purposes of applying the Convention as an individual who is a resident of the Contracting State in which the CIV is established and as the beneficial owner of the income provided that, if an individual who is a resident of the Contracting State in which the CIV is established, such individual shall be the beneficial owner thereof, but only to the extent of the interests in the collective investment vehicle established in the Contracting State in which the collective investment vehicle is established.~~
- ~~b) For purposes of this paragraph, the term —collective investment vehicle— shall mean, in the case of [State B], a [], as established by the competent authorities of the Contracting States in which the collective investment vehicle for purposes of this paragraph.~~

6.27 Although the purely proportionate approach set out in paragraphs 6.24 and 6.25 by shopping, it may also impose substantial limitations on the treaty entitlement of every single investor. A Contracting State may determine the fact that a substantial proportion of the CIV's investors is adequate protection against treaty shopping, and thus that it is appropriate to provide an

ownership threshold above which benefits would be provided with respect to activities under the CIV. Including such a threshold would also mitigate some of the procedural issues otherwise might arise. If desired, therefore, the following sentence of subparagraph a):

However, if at least [] percent of the beneficial interests in the investment vehicle are owned by [equivalent beneficiaries] residing in the State in which the collective investment vehicle is established, the investment vehicle shall be treated as an individual resident in the State in which it is established and as the beneficial owner of all the income (provided that, if an individual who is a resident of the State had received the income in the same individual circumstances, such individual would have been considered to be the beneficial owner thereof).

6.28 In some cases, the Contracting States might wish to take a different approach from 6.17, 6.21 and 6.26 with respect to certain types of CIVs as making claims on behalf of the investors rather than in its own name. This might be true, for example, if a large percentage of the owners of interests in the CIV is a class of interests in the CIV, are pension funds that are exempt from tax under the terms of the relevant treaty similar to those described in paragraph 6.9 of Article 18. To ensure that the investors would not lose preferential status to which they would have been entitled had they invested directly, the States might agree to a provision along the following lines (in respect of fully adopting one of the approaches of paragraph 6.17, 6.21 or 6.26 with respect to the types of CIVs):

- a) A collective investment vehicle described in subparagraph c) which is established in and which receives income arising in the Contracting State shall not be treated as a resident of the Contracting State for the purpose of making a claim, on behalf of the owners of the beneficial interests in the vehicle, the tax reductions, exemptions or other benefits available under this Convention to such owners if such income directly
- b) A collective investment vehicle may not make a claim under subparagraph b) for any owner of the beneficial interests in such vehicle if the owner has itself made an individual claim for benefits received by the collective investment vehicle.
- c) This paragraph shall apply with respect to, in the case of [State] of [State B] in [State A] or [State B] in [State A], and to such other

~~Contracting States agree to apply this paragraph.~~
~~State, or which bank or~~
~~competent authorities~~
 This provision would, however, limit the CIV to making claims on behalf of residents of the State in which the CIV is established. If, for the reasons paragraph 6.23, the Contracting States deemed it desirable to allow the CIV to make claims on behalf of residents of third States, that could be accomplished in conjunction with —any Convention to which the other Contracting States is a party. If, as anticipated, the Contracting States would agree that the provision provided in this paragraph would apply only to specific types of CIVs, it would be necessary to ensure that the types of CIVs listed in subparagraph c) did not include any CIV listed in a more general provision such as that in paragraph 6.27. The treatment of a specific type of CIV would be fixed, rather than elective. Países

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wishing to allow individual CIVs to elect their treatment, either with respect to the CIV as a whole or to one or more classes of interests in the CIV, are free to apply the law.

6.29 Under either the approach in paragraphs 6.21 and 6.26 or in necessary for the CIV to make determination regarding the proportion of holders of interests entitled to benefits had they invested directly. Because interests in CIVs change regularly, and such interests frequently are held through intermediaries, the CIV and its managers often do not themselves know the names of the beneficial owners of interests. It would be impractical for the CIV to call on such the relevant intermediaries on a daily basis. Accordingly, Contracting States to accept practical and reliable approaches that do not require such daily

6.30 For example, in many countries the CIV industry is largely owned by domestic investors resident in the country in which the CIV is established. rules discourage foreign investment by imposing a withholding tax on securities laws may severely restrict offerings to non-residents. Consider whether these or other circumstances provide adequate protection against non-treaty-eligible residents of third countries. It may be appropriate to assume that a CIV is owned by residents of the State in which this CIV is established or to other States that provide for similar benefits in their treaties with the source

6.31 In other cases, interests in the CIV are offered to investors in many Although the identity of individual investors will change daily, the proportion of interests in the CIV is likely to change relatively slowly. Accordingly, it would be appropriate to require the CIV to collect from other investors information specifying the CIV to determine the proportion of interests in the CIV. This information could be required at the end of a calendar or fiscal year. If the turnover in ownership is high, it could be required more frequently than the end of each calendar quarter. The CIV could then publish an average of those amounts over an agreed-upon time period. If procedures, care would have to be taken in choosing the measure used. The CIV would have enough time to update the information that is provided. The other amount is withheld at the beginning of each relevant period.

6.32 An alternative approach would provide that a CIV that is publicly traded in the State in which it is established will be entitled to treaty benefits in the same manner as individual investors. This provision has been justified on the basis that a publicly traded CIV cannot be used effectively for treaty shopping because the shareholders of such a CIV cannot individually exercise control over it. Such a provision could

- a) Notwithstanding the other provisions of this Convention, a collective investment vehicle established in a Contracting State and which receives income from another Contracting State shall be treated for purposes of applying the Convention as an individual who is a resident of the Contracting State in which it is established and as the beneficial owner of the income. Provided that, if an individual who is a resident of the Contracting State in which the income is received in the same circumstances, such individual would

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have been considered to be the beneficial owner thereof), if the principal asset of the collective investment vehicle is listed and regularly traded on a stock exchange in that State.

- b) For purposes of this paragraph, the term —collective investment vehicle— means an entity established in either Contracting State, or an arrangement or entity established in either Contracting State, the authorities of the Contracting States agree to treat the vehicle for purposes of this paragraph.

6.33 Each of the provisions in paragraph 2 of Article 26 of the Convention to the CIV is one, which has the simplicity of providing for wideholding with respect to each type of income. These provisions should not be construed in any way the right of the State of source from taking its investor resident in the CIV. Clearly, these provisions are intended to deal with the CIV's income and not the residence taxation of its investors (this conclusion is put forward in paragraph 6.1 above as regards partnership). It is thus clear that in the text of the provisions are free to amend the provisions which could be done by adding the following sentence: —This provision shall not restrict in any way a Contracting State's right to tax the residents of that State.

6.34 Also, each of these provisions is intended only to provide that the specific characteristics of the CIV will not cause it to be treated as other than the beneficial owner. Therefore, a CIV will be treated as the beneficial owner of the income of the CIV. The provision is not intended, however, to put a CIV in a different or better position with respect to aspects of the beneficial ownership requirements of the CIV's status as such. Accordingly, where an individual receiving that income in the same circumstances would not be considered as the beneficial owner of the income. This result is confirmed by the application of the provision to situations in which an individual in the same circumstances would have been treated as the beneficial owner of the income.

4. Add the following new heading and paragraphs 6.35 to 6.39 immediately after 6.34 of the Commentary on Article 1:

Application of the Convention to States, their subdivisions and their wholly-owned entities

6.35 Paragraph 1 of Article 4 provides that the Contracting States subdivisions and local authorities are included in the definition of a Contracting State and are therefore entitled to the benefits of the Convention (paragraph 4.4 explains that the inclusion of these words in the Convention is confirmed by the understanding of most member States).

6.36 Issues may arise, however, in the case of entities set up and wholly-owned by a State or its subdivisions or local authorities. Some of these entities may derive income from other countries and it may therefore be important to determine to which treaties apply to them (this would be the case, for instance, of foreign entities). Paragraph 8.5 of the Commentary on Article 4). In many cases, these entities are exempt from tax and the question may arise as to whether they are entitled to the

benefits of the tax treaties concluded by the State in which they are set up. The States may modify the definition of —resident of a Contracting State— to include in that definition a —statutory body, an —agency or instrumentality of public law [personne morale de droit public] of a State, a political authority, which would therefore cover wholly-owned entities that are a part of the State or its political subdivisions or local authorities.

6.37 In addition, many States include specific provisions in their grant arbitration conventions, and to some State-owned entities such as enterprises certain items of income such as interest (see paragraph 13.2 of the Commentary on Article 11). Treaty provisions that exemption with respect to the income of pension funds (see paragraph 6 of Article 18) may similarly apply to pension funds that are wholly-owned by the State.

6.38 The application of the Convention to each Contracting State, its and local authorities (including their statutory bodies, agencies or instrumentalities in the case of such entities) should not be interpreted, however, the possible application by each State of the customary international law principle of sovereign immunity. According to this principle, a sovereign State (including its activities) is, as a general rule, immune from the jurisdiction of the courts of a foreign State. There is no international consensus, however, on the precise definition of the principle. Most States, for example, would not apply the principle to business activities and many States do not recognise its application to taxation. There are therefore considerable differences between States as to which that principle applies to taxation. Even where States do not apply its possible application in tax matters, some apply it only to the extent it is incorporated into domestic law and others apply it as customary international law with limitations. The Convention does not prejudice the issue of whether the principle of sovereign immunity applies with respect to the persons covered by the taxes covered under Article 2 and each Contracting State is free to make its own interpretation of that principle as long as the resulting taxation is in conformity with the provisions of its bilateral tax conventions.

6.39 States often take account of various factors when considering extent to which the principle of sovereign immunity should be granted, through specific treaty or domestic law provisions of the sovereign immunity doctrine, with respect to the other States, their political subdivisions, local authorities, or their instrumentalities. These factors would include, for example, whether the income is derived on a reciprocal basis, whether the income is derived from government activities of a commercial nature as opposed to activities of a commercial nature, whether the income of the entity are used for public purposes, whether there is any possibility that the benefit of a non-governmental person and whether the income is a portfolio or from a direct investment.

5. Replace paragraph 23 of the Commentary on Article 1 by the following:

While the design of these types of legislation now varies considerably year on year, a number of

6. Add the following new paragraph 27 to the Commentary on Article 1:

7. Replace paragraph 27.4 of the Commentary on Article 1 by the following:

[illegible]

8. Delete the following paragraph 27.8 of the Commentary on Article 1:

27.8 Whenever the prevailing hierarchy of tax conventions regarding inter-
respected, *Portugal* will not adhere to the conclusions on the clarification of
does not incorporate in the Commentary on Article 1.

Article 2

9. Replace paragraph 10 of the Commentary on Article 2 by the following:

10. *Canada*, ***Chile*** and the *United States* reserve their positions on that
which states of paragraph 10 should apply to taxes of political subdivision
autoridades.

Artigo 3 °

10. Replace paragraph 15 of the Commentary on Article 3 by the following:

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15. ***Chile***, *Mexico* and the *United States* reserve the right to omit the
enterprise that has been replaced by effective management in a Contracting State of
of —international traffic in subparagraph e) of paragraph 1.

Artigo 4 °

11. Add the following new paragraph 8.5 immediately after paragraph 8.4 of the
Article 4 (and renumber the existing paragraphs 8.5 to 8.7 as paragraphs 8.6 to 8.8):

**8.5 This raises the issue of the application of paragraph 1 to sovereign
are special funds in which
subdivision for macroeconomic purposes. These funds hold, manage or
achieve financial objectives, and employ a set of investment strategies
in foreign financial assets. They are commonly established out of balance
of private official foreign currency operations, the proceeds of
privatization resulting from commodity exports. ¹ Whether
resident of a Contracting State depends on the**

—resident of a Contracting State— depends on the facts and circumstances of each case. Para an integral of the State, it will depend on the expression —[the] State and any political subdivision or thereof— Article 4. In other cases, paragraphs 8.6 and 8.7 below will be relevant to assess the issue in the course of bilateral negotiations, particularly in relation to the fund qualifies as a —person— and is —liable to the— for purposes of (see also paragraphs 6.35 to 6.39 of the Commentary on Article 1).

Artigo 5 °

12. Add the following new paragraph 5.5 immediately after paragraph 5.4 of the Article 5:

5.5 Clearly, a permanent establishment may only be considered to be Contracting State if the relevant place of business is situated in the territory of the State. A satellite in geostationary orbit could constitute a permanent establishment for the satellite operator relates in part to how far the territory of a State extends. A country would agree that the location of these satellites may not be a Contracting State under the applicable rules of international law. A permanent establishment situated therein. Also, the particular satellite's signals may be received (the satellite's equipment) and under the disposal of the operator of the satellite so as to make business of the satellite's operator.

13. Add the following new paragraph 9.1 immediately after paragraph 9 of the Article 5:

9.1 Another example where an enterprise cannot be considered to wholly own its business place of business is that of a telecommunications operator if a —roaming— agreement with a foreign operator in order to connect to the foreign operator's telecommunications network under such who is outside the geographical coverage of that user's home network

1. This definition is drawn from: International Working Group of Sovereign Wealth Funds, *Accepted Principles and Practices – A Santiago Principles*, October 2008,

can automatically make and receive voice calls,

~~that, in the case of the foreign network, the foreign operator is not responsible for the payment of the roaming charges. After a typical roaming agreement, the home network transfers calls to the foreign operator's network and does not pay for the use of that network. For these reasons, any place where the foreign network is considered to be at the disposal of the home network operator does not constitute a permanent establishment of that operator.~~

14. Replace paragraph 16 of the Commentary on Article 5 by the following:

16. The paragraph provides expressly that a building site or construction project constitutes a permanent establishment only if it lasts more than twelve months. ~~Qualquer coisa que não~~ does not meet this condition does not of itself constitute a permanent establishment, even if there is within it an installation, for instance an office or workshop, within the meaning of paragraph 2, associated with the construction activity. If such an office or workshop is used for a number of construction projects and the functions performed therein go beyond those mentioned in paragraph 4, it will be considered a permanent establishment if the conditions of the Article are otherwise met even if none of the functions involve a building site or construction or installation project that lasts more than twelve months. In that case, the situation of the workshop or office will therefore be different from that of sites or projects, none of which will constitute a permanent establishment, and it is important to ensure that only the profits properly attributable to the functions performed ~~through the office or workshop, taking into account the assets used and the risks assumed through the office or workshop,~~ are attributed to the permanent establishment. This is only if the profits attributable to functions performed and risks assumed in relation to the various construction projects but only to the extent that these functions and risks are properly attributable to the permanent establishment.

15. Replace paragraph 26.1 of the Commentary on Article 5 by the following:

26.1 Another example is that of facilities such as cables or pipelines that cross the territory of a country. Apart from the fact that income derived by the owner or operator of such facilities is taxable under paragraph 2 of Article 6, the question may arise as to whether paragraph 2 of Article 6 applies. Where these facilities are used to transport property belonging to other enterprises, the provisions of paragraph 2 a), which is restricted to delivery of goods or merchandise belonging to the enterprise, will not be applicable as concerns the owner or operator of these facilities. Subparagraph e) also will not be applicable as concerns that enterprise since the cable or pipeline is not for the enterprise and its use is not of preparatory or auxiliary nature for the nature of the business of that enterprise. The situation is different, however, if the enterprise owns and operates a cable or pipeline that crosses the territory of a country for the purposes of transporting its own property and such transport is merely incidental to the business of that enterprise, as in the case of an enterprise that is in the business of refining oil and owns and operates a pipeline that crosses the territory of a country solely to transport oil to its refinery located in another country. In such case, subparagraph a) of paragraph 2 of Article 6 will be applicable. ~~Whether the cable or pipeline could also constitute a permanent establishment for the customer of the operator of the cable or pipeline, i.e. the enterprise whose property is transmitted or transported from one place to another, is a matter for the competent authorities to decide. In any case, the cable or pipeline cannot be considered to be a permanent establishment of the operator.~~

16. Delete the following footnote to the heading —Observations‡ in the Comment

1. At the time of approval of paragraphs 42.11 to 42.13 above by the Co Spain, Sweden, Switzerland and the United States, which among othe Committee's conclusions set out in these paragraphs and do not share States expressed in paragraphs 42.14 to 42.17, have asked that their p be expressly stated in the OECD Model Tax Convention.

17. Replace paragraph 43 of the Commentary on Article 5 by the following:

43. *Italy* does not adhere to the interpretation given in paragraph 12 above examples concerning the 12. In its opinion, these examples can always be regarded a permanent establishments. **Concerning paragraph 26.1, Germany reserves its position on whether the circumstances the acquisition of a right of disposal over the pipelines or the capacity of technical installations, lines and cables for the transmission of or communications (including the distribution of radio and television programmes) by a third party could result in disposal over the pipeline, fixed plant or business.**

18. Replace paragraph 45.6 of the Commentary on Article 5 by the following:

45.6 *Spain* has expressed a number of reservations on the Report —Clarification of the permanent definition in e-commerce‡. *Greece* and *Spain* have some doubts concerning the introducing paragraphs 42.1 to 42.10 of the Commentary in the M Since the OECD continues the study of e-commerce taxation, these States will nc consideration the aforementioned paragraphs until the OECD has come to a final **and Greece do not adhere to all the interpretations in paragraphs 42.1 to 42.10.**

19. Replace paragraphs 46 to 65 of the Commentary on Article 5 by the following

Paragraph 1

46. *Australia* reserves the right to treat an enterprise as having a permanent if it carries on activities relating to natural resources or operates substantial equip with a certain degree of continuity, or a person — acting in that State on behalf o manufactures or processes in that State goods or merchandise belonging to the er

47 52. Considering the special problems in applying the

provisions of taxation on exploration and exploitation and related activities, ~~Canada, Denmark, Ireland, the United Kingdom~~ reserve the right to insert in a special article provisions related to such

48. Chile reserves the right to deem an enterprise to have a permanent establishment where it exercises provided.

49 60. The *Czech Republic* and the *Slovak Republic* , whilst agreeing with the revised place of business¹¹, reserve the right to propose in bilateral negotiations : clarifying the application of this principle to arrangements for the performance of substantial period of time.

50. *Greece* reserves the right to treat an enterprise as having a permanent establishment in Greece if the enterprise carries on planning, supervisory or consultancy activities in connec

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site or construction or installation project lasting more than six months, if scientific machinery is used in Greece for more than three months by the enterprise in the extraction of natural resources or if the enterprise carries out more than one separate lasting less than six months, in the same period of time (ie within a calendar year

51 57. *Greece* reserves the right to insert special provisions relating to offshore activities.

52 64. *Mexico* reserves the right to tax individuals performing professional services of independent character if they are present in Mexico for a period or periods aggregate 183 days in any twelve month period.

53 56. *New Zealand* reserves the right to insert provisions that deem a permanent establishment to exist if, for a period of more than six months, an enterprise conducts activities relating to the exploitation of natural resources or uses or leases substantial equipment.

54 55. *Turkey* reserves the right to treat a person as having a permanent establishment in Turkey if the person performs services and other activities of independent character, supervisory or consultancy activities, with a certain degree of continuity either directly or through employees of a separate enterprise.

Paragraph 2

55 63. *Chile and Canada* reserves the right in

with paragraph 2 of Article 5 as it was in the 1963 Draft.

56 51. *Greece* reserves the right to include paragraph 2 of Article 5 as it was in the 1963 Draft.

Paragraph 3

57 47. *Australia, Chile, Greece, Korea, New Zealand, Portugal and Turkey* paragraph 3, and consider that any building site or construction or installation project lasting more than six months should be regarded as a permanent establishment.

58. *Australia reserves the right to treat an enterprise as having a State if it carries out supervisory or consultancy activities for more than 180 days in a period in connection with a building site or construction or installation project.*

59 62. *Korea* reserves its position so as to be able to tax an enterprise which carries out supervisory or consultancy activities for more than six months in connection with a building site or construction or installation project lasting more than six months.

60 53. *Slovenia Norway* reserves the right to include connected supervisory or consultancy activities in paragraph 3 of the Article.

61 59. *Mexico and the Slovak Republic* reserve the right to tax an enterprise that carries out supervisory or consultancy activities for more than six months in connection with a building site or a construction or installation project.

62 58. *Mexico and the Slovak Republic* reserve their position on paragraph 3 and building site or construction, assembly, or installation project that lasts more than six months should be regarded as a permanent establishment.

63 61. *Poland and Slovenia* reserves the right to replace —construction or installation project or assembly, or installation project.

64 54. *Portugal* reserves the right to treat an enterprise

~~As having a permanent establishment in~~ activity consisting of planning, supervising, auxiliary work or any other activity in connection with a building site or construction project lasting more than six months, if such activities or work also last more than

49. *Spain reserves its position on paragraph 3 so as to be able to tax an enterprise establishing in Spain, even if the site of the construction or installation last for more than twelve months, where the activity of this enterprise in Spain proves of permanency within the meaning of paragraphs 1 and 2. Spain also reserves its position as having a permanent establishment in Spain when such an enterprise carries out activities in Spain for more than 12 months in connection with a building site or construction project also lasting more than 12 months.*

65 48. *The United States reserves the right to add —a drilling rig or ship used for the exploration of the activities covered by the 12 twelve month threshold test in paragraph 3.*

Paragraph 4

66. *Chile reserves the right to amend paragraph 4 by eliminating subparagraph f) and replacing text of the 1963 Draft Model Tax Convention.*

67 65. *Mexico reserves the right to exclude subparagraph f) of paragraph 4 of that Article to consider that a permanent establishment could exist where a fixed place of business is maintained in a combination of activities mentioned in subparagraphs a) to e) of paragraph 4.*

Paragraph 6

68. *Slovenia reserves the right to amend paragraph 6 to make clear that an enterprise is not to be considered wholly or almost wholly on behalf of a single enterprise if it is of an independent status.*

Artigo 7 °

20. Replace the existing Commentary on Article 7, together with the sections on I. Observations, by the following new Commentary, including the new sections on Reserve Observations and the Annex:

I. Preliminary remarks

1. *This Article allocates taxing rights with respect to the business profits of an enterprise that these profits are not subject to taxation in the State of origin. It incorporates the basic principle that unless the enterprise has a permanent establishment situated in the other State, the business profits be taxed by that other State unless these profits fall into special*

categories of income for which other Articles of the Convention give taxing rights to that other

2. Article 5, which includes the definition of the concept of permanent establishment, is the basis for the determination of whether the business profits of an enterprise of one State may be taxed in the other State. That Article, however, does not itself allocate the profits of an enterprise of a Contracting State which carries on business in another State through a permanent establishment situated therein, it is necessary to determine what, if any, are the profits that the other State may tax. Article 7 provides the basis for determining that the other State may tax the profits that are attributable to the permanent establishment.

3. The principles underlying Article 7, and in particular paragraph 2, have long been the subject of discussion. When the OECD first examined what criteria should be used in attributing profits to a permanent establishment, this question had previously been addressed in a number of models developed by the League of Nations. The entity and arm's length principles, on which paragraph 2 is based, had been incorporated in these conventions and models and the OECD considered that it was sufficient to make some slight amendments and modifications for their application.

4. Practical experience has shown, however, that there was considerable variation in the interpretation of the principles and of other provisions of earlier versions of Article 7. This variation created problems of double taxation. Over the years, the Committee on Fiscal Affairs spent considerable time and effort in trying to achieve a consistent interpretation and application of the rules of the Article. A number of changes to the Article were made. The Model Tax Convention was adopted. A report that specifically dealt with the question was published in 1984.¹ In 1987, noting that the attribution of profits to a permanent establishment could be determined by the application of the arm's length principle, the Committee undertook the question which led to the adoption, in 1993, of the Report of the Committee on Permanent Establishments² and to subsequent changes to the Commentary.

5. Despite that work, the practices of OECD and non-OECD countries in the attribution of profits to permanent establishments and these countries' interpretation of Article 7 have varied considerably. The Committee acknowledged the need to provide a more uniform approach: in its report Transfer Pricing Guidelines for Multinational Enterprises³ (the —OECD Transfer Pricing Guidelines—), it indicated that further work would address the application of the arm's length principle to permanent establishments.

1. — The Taxation of Multinational Banking Enterprises — Three Factors and

2. *Multinational Enterprises and Tax Administrations*, OECD, Paris, 1984.
3. *Attribution of Income to Permanent Establishments, Issues in International Taxation*, 1994, reproduced in *OECD, II of the loose-leaf version of the OECD Model Tax Convention*.
4. *The original version of that report was approved by the Council of the OECD on 27 June 1995 and has been revised several times since then. Published by the OECD as *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*.*

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That work resulted, in 2008, in a report entitled *Attribution of Profits to Permanent Establishments*¹ (the —2008 Report—).

6. The approach developed in the 2008 Report was not constrained by intent or by the original practice and interpretation of Article 7. Instead, the approach was the most preferable approach to attributing profits to a permanent establishment in modern-day multinational operations and trade. The 2008 Report, which the Committee considered that the guidance included therein represented a better approach to attributing profits to permanent establishments than had previously been also recognised, however, that there were differences between the approach of the 2008 Report and the interpretation of Article 7 previously given in this

7. In order to provide maximum certainty on how profits should be attributed to permanent establishments, the Committee therefore decided that the 2008 Report should be reflected in a new version of Article 7, together with a Commentary to be used in the negotiation of future treaties and the amendment of existing treaties. In order to provide improved certainty for the interpretation of treaties concluded on the basis of the previous wording of Article 7, the Committee decided that a revised Commentary for that previous version of Article 7 should take into account those aspects of the report that did not conflict with the approach before the adoption of the 2008 Report.

8. The new version of the Article, which now appears in the Model Tax Convention, was adopted at the same time, the Committee adopted a revised version of the 2008 Report that the conclusions of that report could be read horizontally and vertically with the new wording of this new version of the Article. Whilst the conclusions included in the revised report that was thus adopted in 2010 referred to as —the Report— are identical to those of the 2008 Report, the revised American text was

~~foundations (the change to this wording of Article 7 and~~
~~Contravistado, as they read before the adoption of the current version of the~~
~~Article).~~

9. The current version of the Article therefore reflects the approach
 Report developed and interpreted in light of the guidance contained in it. The
 Report attributes profits both to permanent establishments in general (Part
 I of the Report), to permanent establishments of businesses operating in
 the financial sector through a permanent establishment is widespread (Part II of
 the Report), permanent establishments of banks, Part III, which deals with
 permanent establishments of enterprises carrying on global trading and Part IV,
 permanent establishments of enterprises carrying on insurance activities).

1. Available at <http://www.oecd.org/dataoecd/20/36/41031455.pdf>

2. Attribution of Profits to Permanent Establishments, OECD, Paris, 2010.

II. Commentary on the provisions of the Article

Paragraph 1

10. Paragraph 1 incorporates the rules for the allocation of taxing
 profits of enterprises of such Contracting State. First, it states that unless
 the enterprise has a permanent establishment situated in the other
 State, the enterprise's profits be taxed by that other State. Second, it provides
 that if the enterprise carries on business in the other State through a permanent
 establishment, the profits that are attributable to the permanent establishment, as
 determined in paragraph 2, may be taxed by that other State. As
 explained below, however, application of these rules by providing that
 application of not affect the of the Convention that provide special rules
 for profits (e.g. those derived from the operation
 of ships and aircraft in international also

undulphne for us as puppies (again considering any entertainer or sportsman).
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11. The first principle underlying paragraph 1, is that the profits of an enterprise of one State should not be taxed in the other State unless the enterprise carries on business through a permanent establishment situated therein, has a legal presence and a real and substantial connection with the other State, and there is an international consensus that, as a general rule, until an enterprise of one State has in another State, it should not properly be regarded as participating in the economic life of the other State to such an extent that the other State should have profits.

12. The second principle, which is reflected in the second sentence of the first paragraph of Article 11, is that where the permanent establishment is situated in a State, the profits of the enterprise may derive from that State but that are not attributable to the establishment. This is a question on which there have been differences of opinion. At one time ago pursued a principle of general attribution of income such as other business profits, dividends, interest from immovables in their territory was fully taxable by them if the beneficiary had a permanent establishment therein even though such income was clearly not attributable to the establishment. Whilst some bilateral tax conventions include a limited source or wide-spread force of attraction approach that only applies to business profits, activities similar to those carried on by a permanent establishment, the approach described above has now been rejected in international practice that is now generally accepted in double taxation conventions is based on the profits that a foreign enterprise derives from a particular source in the country should look at the separate sources of profit that the enterprise has in the country and should apply to each the permanent establishment principle of other Articles of the Convention. This solution allows simpler tax administration and compliance, and is more closely adapted to the system commonly carried on. The organisation of modern business is highly complex, a number of companies each of which is engaged in a wide diversity of business extensively in many countries. A permanent establishment in another country through which it carries on a different part of the same company sells different goods through independent agents. That company may have perfectly valid commercial reasons for based, for example, on the historical pattern of its business and convenience. If the country in which the permanent establishment is situated wished

to go so far as to try to determine, and tax, the profit element of each of the transactions of independent agents, with a view to aggregating that profit with the profits of the establishment, that approach would interfere seriously with activities and would be contrary to the aims of the Convention.

13. As indicated in the second sentence of paragraph 1, the profits that the permanent establishment are determined in accordance with the provisions of paragraph 2 of the phrase —profits that are attributable to the establishment found in paragraph 1. Since paragraph 1 grants taxing rights to the State in which the permanent establishment is situated only with respect to the profits attributable to that permanent establishment, the paragraph therefore prevents the application of other Articles of the Convention, from taxing the enterprise of the State on profits that are not attributable to the permanent establishment.

14. The purpose of paragraph 1 is to limit the right of one Contracting State to tax the profits of the enterprises of the other Contracting State. The purpose of paragraph 2 is to allow the Contracting State to tax its own residents under controlled provisions of its domestic law even though such tax imposed on the profits of the enterprise to the part of the profits of an enterprise that is resident in the State that is attributable to these residents' participation in the enterprise. Tax on the profits of the enterprise of the State does not reduce the profits of the enterprise of the other Contracting State. Therefore, be said to have been levied on such profits (see the Commentary on Article 1 and paragraphs 37 to 39 of the Commentary on Article 10).

Paragraph 2

15. Paragraph 2 provides the basic rule for the determination of the profits that are attributable to the permanent establishment. According to the paragraph, the profits of the permanent establishment might be expected to make if it were a separate enterprise engaged in the same or similar activities under the same conditions, taking into account the functions performed, assets used and risks assumed by the permanent establishment and through other parts of the enterprise. It should be noted that this rule applies with respect to the dealings between the permanent establishment and the other parts of the enterprise.

16. The basic approach incorporated in the paragraph for the purposes of determining the profits that are attributable to the permanent establishment is the application of the profits under the fiction that the permanent establishment is a separate enterprise and that such an enterprise is independent from the enterprise as a whole as from any other person. The second part of that fiction corresponds to the principle which is also applicable, under the provisions of Article 9, of adjusting the profits of associated enterprises (see paragraph 1 of the Commentary on Article 9).

17. Paragraph 2 does not seek to allocate the overall profits of the permanent establishment to its other parts but, instead, requires that the profits attributable to the permanent establishment be determined as if it were a separate enterprise. Profits may be allocated to a permanent establishment even though the enterprise as a whole has made a loss. Conversely, paragraph 2 may result in no profits being attributed to the permanent establishment even though the enterprise as a whole has made profits.

18. Clearly, however, where an enterprise of a Contracting State has a permanent establishment in the other Contracting State, the first State has an interest in the profits being correctly applied by the State where the permanent establishment is located. If the State of the enterprise, with either Article 23 A or 23 B, eliminate double taxation on the profits properly attributable to the permanent establishment (see paragraph 27 below). In other words, if the permanent establishment is located attempts to tax profits that are attributable to the permanent establishment under Article 7, this may result in double taxation. If profits should properly be taxed only in the State of the enterprise.

19. As indicated in paragraphs 8 and 9 above, Article 7, as currently approached reflects the Report adopted by the Committee on Fiscal Affairs in 2010 primarily with the application of the separate and independent enterprise fiction in paragraph 2 and the main purpose of the changes made to paragraph 2 upon adoption of the Report was to ensure that the determination of profits for a permanent establishment followed the approach put forward in the Report. The Report therefore provides a detailed guide as to how the profits attributable to a permanent establishment should be determined under the provisions of paragraph 2.

20. As explained in the Report, the attribution of profits to a particular entity for the purpose of the calculation of the profits (or losses) from its activities, transactions with independent enterprises, transactions with associated enterprises (as defined in paragraph 1 of the OECD Transfer Pricing Guidelines) and dealings with other parties, this analysis involves two steps which are described in the following. The order of the each of these two steps is not meant to be prescriptive, but rather to reflect the logical sequence of the analysis. The first step is to identify the risks initially attributed to a permanent establishment or person relevant to the assumption of that risk but the characteristics of a subsequent dealing between the permanent establishment or person and another party to the risk may lead to a transfer of the risk to the other party (e.g. the other enterprise).

21. Under the first step, a functional and factual analysis is undertaken, which will lead to:

- the attribution to the permanent establishment, as appropriate, of rights arising out of transactions between the enterprise of which the permanent establishment is a part and separate enterprises;
- the identification of

~~the identification of significant people functions, and the attribution of economic importance to the establishment;~~

- ~~the identification of significant people functions relevant to the assumption of risks of risks to the permanent establishment;~~
- ~~the identification of other functions of the permanent establishment;~~
- ~~the recognition and determination of the nature of those dealings between the permanent establishment and other parts of the same enterprise that should be recognised, having passed the threshold test referred to in paragraph 20;~~
- ~~the attribution of capital based on the assets and risks attributable to the permanent establishment.~~

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22. Under the second step, any transactions with associated enterprises permanently established in the OECD Guidelines and these Guidelines are applied by analogy to dealings between the establishment and the other parts of the enterprise of which it is involved. On the basis of an arm's length basis of these recognised dealings through:

- ~~the determination of comparability between the dealings and uncontrolled dealings established by applying the Guidelines' comparability factors directly or by analogy (functional analysis, contractual analysis) in light of the circumstances of the permanent establishment; and~~
- ~~the application by analogy of one of the Guidelines' methods to length compensation for the dealings between the permanent establishment and the other parts of the enterprise, taking into account the functions performed by each and the risks attributable to the permanent establishment and the other parts of the enterprise.~~

23. Each of these operations is discussed in greater detail in the regards ~~the attribution of profits to permanent establishments of businesses operating in the~~ where trading through a permanent establishment is of the ~~Report (see Part II deals with permanent establishments, of which Part II deals with dealings~~

permanent establishments of enterprises carrying on with the trading subsidiary which carries on insurance activities).

24. Paragraph 2 refers specifically to the dealings between the permanent establishment of which the permanent establishment is a part and the separate and independent enterprise fiction of the permanent establishment. That specific reference to dealings between the permanent establishment and other parts of the enterprise does not, however, restrict the application of the enterprise fiction to dealings between the permanent establishment and other parts of the enterprise. Where a transaction that takes place between the enterprise and the permanent establishment directly affects the determination of the profits attributable to the permanent establishment (eg the acquisition by the permanent establishment from an enterprise of goods that will be sold through the permanent establishment), paragraph 2 is for the purpose of computing the profits attributable to the permanent establishment, the conditions of the transaction be adjusted, if necessary, to reflect those of a similar transaction between independent enterprises. This is the case, for instance, where the permanent establishment of an enterprise of State R acquires property from an enterprise of State T. If the price provided for in the contract exceeds what would have been agreed to between independent enterprises, paragraph 2 of Article 7 of the treaty between State R and State S will adjust the profits attributable to the permanent establishment to reflect what an independent enterprise would have paid for that property. In such a case, State R will adjust the profits of the enterprise of State R under paragraph 1 of Article 7 of the treaty between State R and State T, which will trigger the application of the corresponding adjustment mechanism of paragraph 2 of Article 9 of that treaty.

25. Dealings between the permanent establishment and other parts of the enterprise have legal consequences for the enterprise as a whole. This implies a greater scrutiny of these dealings than of transactions between two associated enterprises.

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This also implies a greater scrutiny of documentation (in the inevitable case of the permanent establishment) that might otherwise exist.

26. It is generally not intended that more burdensome documentation imposed on the permanent establishment with such dealings than apply to transactions between independent enterprises, as in the case of transfer pricing.

~~resulting in disproportionate gains to the taxpayer's enterprise, the requirements should not be applied unless disproportionate to the circumstances. Nevertheless, of the nature of a dealing, countries would misplace their requirements clearly that it would be appropriate to recognise the dealing. As such, accounting record and contemporaneous documentation showing economically significant risks, responsibilities and benefits would be required for the purposes of attributing profits. Taxpayers are encouraged to prepare, as it may reduce substantially the potential for opportunities for gaming. Tax administrations would give effect to such documentation, if it has legal effect, to the extent that:~~

- ~~the documentation is consistent with the economic substance of the activities taking place in the enterprise as revealed by the functional and factual analysis;~~
- ~~the arrangements documented in relation to the dealing, viewed in the light of the facts, are those which would have been adopted by an enterprise acting in a commercially rational manner, or if the documentation does not reflect the substance of the dealing, the taxpayer's documentation does not reflect the substance of the dealing;~~
- ~~the dealing presented in the taxpayer's documentation does not violate the principle set forward in the Report by, for example, picking out parts of the dealing and segregating them from functions.~~

27. ~~The opening words of paragraph 2 and the phrase —in each case that paragraph 2 applies— indicate for the purposes of determining the profits attributable to the permanent establishment in which the permanent establishment is situated may tax in the State of residence of paragraph 1 but also for the application of Article 23 of the Convention. Where an enterprise of one State carries on business through a permanent establishment situated in the other State, the first-mentioned State may tax the profits that are attributable to the permanent establishment (Article 23 A) tax given by the other State on these profits (Article 23 B). Article 23 B must therefore determine the profits attributable to the permanent establishment in order to provide relief from double taxation and is provided in paragraph 2 for that purpose.~~

28. ~~The separate and independent enterprise fiction that is mandated by paragraph 2 is a fiction of the profits that are attributable to a permanent establishment. The notional income for the enterprise which a State could claim by domestic law by arguing that such income is covered by the Convention which, in accordance with paragraph 4 of Article 7, allows a State to tax the profits of paragraph 1 of Article 7. Assume, for example, that the circumstances justify considering that the economic ownership of a building used by the permanent establishment should be attributed to the head office (see the Report). In such a case, paragraph 2 could require the deduction of a notional amount from the profits of the permanent establishment. That fiction, however, would not be income from immovable property for the purposes of Article 6. Indeed,~~

the fiction mandated by paragraph 2 does not change the nature of the ~~unconsidered~~ applies to determine the profits attributable to the ~~establishment~~ for the purposes of Articles 7, 23 A and 23 B. Similarly, the ~~fact that~~ a notional interest charge could be deducted in determining the ~~profits~~ to a permanent establishment does not mean that any interest ~~base~~ paid within the permanent establishment is a part for the purposes ~~of Article 11~~. The separate and independent enterprise fiction does ~~not~~ for the purposes of that Article, one part of an enterprise cannot be ~~considered~~ to make payment to another part of the same enterprise. Clearly, ~~paid by~~ interest to a different person is paid on indebtedness incurred ~~in connection with~~ establishment of the enterprise and is borne by that ~~permanent establishment~~. Under paragraph 2 of Article 11, be taxed by the ~~State in which~~ establishment is located. Also, where a transfer of assets ~~between parts~~ and the rest of the enterprise is treated as a dealing for the ~~purposes~~ of Article 7, Article 13 does not prevent States from taxing ~~profits~~ dealings ~~as long as~~ such taxation is in accordance with Article 7 (see ~~paragraph 4~~, Commentary on Article 13).

29. Some States consider that, as a matter of policy, the separate and enterprise ~~fiction~~ that is mandated by paragraph 2 should not be restricted ~~to the application of~~ 23 B but should also extend to the interpretation and ~~application of~~ the Convention, so as to ensure that permanent establishments ~~possibly~~ treated in the same way as subsidiaries. These States may ~~that~~ for dealings which, pursuant to paragraph 2, are ~~paid~~ in ~~connection with~~ establishment should be treated, for the purposes of ~~Article 11~~ in the same way as payments that would be made by a ~~subsidiary~~. These States may therefore wish to include in their tax treaties ~~provisions~~ for internal dealings should be recognised for the ~~purpose~~ of Article 11, and, however, that tax will be levied in accordance with ~~such provisions~~ only for under domestic law). Alternatively, these States ~~may~~ interpret dealings will be recognised in circumstances where an ~~equivalent~~ enterprise would give rise to income covered by ~~Article 6~~, it will be important to ensure that an appropriate share of ~~the expenses~~ dealt with have been recognised as a dealing be attributed to ~~the enterprise~~. States considering these alternatives should, however, take ~~account of~~ the fiscal considerations applicable to internal interest charges ~~between~~ of different enterprise (eg a bank), dealings resulting in such ~~charges~~, even before the adoption of the present version of the Article.

30. Paragraph 2 determines the profits that are attributable to a ~~purpose of~~ establishment paragraph 1 that allocates taxing rights on ~~these profits~~ that are attributable to a permanent establishment have been ~~determined~~ with paragraph 2 of Article 7, it is for

~~the domestic law of each Contracting State should be taken as long as they are in conformity with the provisions of the Convention. Whether expenses are deductible when computing the taxable profits of either Contracting State. The conditions for the deductibility of expenses are determined by domestic law, subject to the provisions of the Convention and paragraph 3 of Article 24 (see paragraphs 33 and 34 below).~~

31. Thus, for example, whilst domestic law rules that would ignore the dealings that would be recognised for the purposes of determining the profits attributable to the permanent establishment under paragraph 2 or that would deny the deduction of losses for the benefit of the permanent establishment would clearly be in conflict with paragraph 2, rules that prevent the deduction of certain categories of expenses or that provide when a particular expense should be deducted by paragraph 2. In making that distinction, however, some difficult questions arise in the case of domestic law restrictions based on when an expense is incurred or paid. Since, for instance, an internal dealing will not involve a payment between two different persons, the application of such domestic law restrictions should generally take into account the nature of the dealing that, if it were a payment as if it had been made between two different persons.

32. Variations between the domestic laws of the two States concerning depreciation rates, the timing of the recognition of income and restrictions on the deduction of losses will normally result in a different amount of taxable income for each State. Even if the States are both Parties to the Convention, the amount of profits attributable to the permanent establishment will have been computed on the basis of paragraph 2 in both States (see also paragraph 43 of the Commentary on Articles 23 A and 23 B). Thus, even if the permanent establishment is situated in one Contracting State in which the permanent establishment is situated (for the purposes of Article 23 B) and to the other Contracting State (for the purposes of Article 23 A), it is likely that the amount of taxable income on which an enterprise is taxed in each State where the enterprise has a permanent establishment will be different from the amount of taxable income with respect to which each State would provide relief pursuant to Articles 23 A or 23 B. Such differences will arise from domestic law variations concerning the types of depreciation allowed, as opposed to timing differences in the recognition of these expenses, or the difference

33. *In taxing the profits attributable to a permanent establishment Contracting State will, however, have to take account of the provisions of paragraph 3 of Article 24 which requires, among other things, that expenses be deductible in the State of origin whether they are incurred for the purposes of a permanent establishment in that State or for the purposes of an enterprise of that State.* *As stated in the Commentary on Article 24:*

Permanent establishments must be accorded the same right as resident enterprises to deduct expenses that are, in general, authorised by the taxation laws of the State of origin from taxable profits. Such deductions should be allowed without restriction other than those also imposed on resident enterprises.

34. *The requirement imposed by paragraph 3 of Article 24 is the same as that imposed on an enterprise for the benefit of a permanent establishment in paragraph 2 of Article 7. In some cases, it will not be appropriate dealing has taken place between different parts of the enterprise. Expenses incurred by an enterprise for the purposes of the activities performed by the permanent establishment will be directly deducted in determining the profits of the enterprise. For example, the salary of a local construction worker hired and paid by the enterprise to work on a construction site that constitutes a permanent establishment in the foreign State, expenses incurred by the enterprise will be deducted in determining the profits of the enterprise wholly or partly for the benefit of the permanent establishment and an appropriate charge will be deducted in determining the profits.*

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attributable to the permanent establishment (eg overhead expenses related to administration performed by the head office for the benefit of the permanent establishment). Paragraph 3 of Article 24 will require that, as regards the permanent establishment, expenses be deductible under the same conditions as those applicable to an enterprise of that State. If an expense incurred by the enterprise directly or indirectly for the benefit of the permanent establishment must not, for tax purposes, be treated less favourably than a similar expense incurred by an enterprise of that State. That rule will apply regardless of whether the expense is deductible under paragraph 2 of this Article 7, the expense is directly attributable to the permanent establishment (first example) or is attributed to another part of the enterprise but is a direct charge to the permanent establishment (second example).

35. *Paragraph 3 of Article 5 sets forth a special rule for a fixed place of business consisting of a building or other immovable property or installation.*

~~project. Such a fixed place of business is a~~
~~these types of permanent establishments can give rise to special problems~~
~~in determining Article 7.~~

36. These problems arise chiefly where goods are provided, or services other ~~parts of the enterprise~~ or a related party in connection with the ~~building site or~~ installation project. Whilst these problems can arise with ~~establishment~~ they are particularly acute for building sites and ~~projects for installation~~ instances, it is necessary to pay close attention to the ~~general principle~~ attributable to a permanent establishment only when it ~~results from the activities~~ enterprise through that permanent establishment.

37. For example, where such goods are supplied by the other parts of ~~profits arising from the supply~~ do not result from the activities carried on ~~through the~~ establishment and are not attributable to it. Similarly, profits ~~provision for services~~ (such as planning, designing, drawing blueprints, or ~~rendering technical~~ of the enterprise operating outside the State where the ~~establishment~~ is located do not result from the activities carried on through ~~the establishment~~ and are not attributable to it.

38. Article 7, as it read before 2010, included the following paragraph ³:

~~In determining the profits of a permanent establishment, there shall~~
~~be deducted expenses which are incurred for the purposes of the~~
~~permanent establishment and general administrative expenses so~~
~~incurred, whether in the State in which the permanent establishment is situated or~~
~~elsewhere.~~

Whilst that paragraph was originally intended to clarify that paragraph 2 ~~required expenses~~ or indirectly for the benefit of a permanent establishment ~~to be taken~~ determining the profits of the permanent establishment even if ~~these expenses~~ outside the State in which the permanent establishment was ~~located~~ it has been read as limiting the deduction of expenses that indirectly ~~benefited the~~ establishment to the actual amount of the expenses.

39. This was especially the case of general and administrative ~~expenses mentioned in that~~ paragraph. Under the previous version of ~~interpreted in the Commentary, this was generally a problem since a~~
~~share of the general expenses of the enterprise could usually only be~~
~~attributed to a permanent basis.~~

40. As now worded, however, paragraph 2 requires the recognition and pricing of the lengths through which one part of the enterprise performs functions of the permanent establishment (eg through the provision of assistance) and the deduction of an arm's length charge for these dealings, deduced limited to the amount of the expenses, is required by paragraph 2. The provision has therefore been deleted to prevent it from being construed as limiting the expenses themselves. That deletion does not affect the intent, under paragraph 2, that in determining the profits attributable to a permanent establishment, a relevant expenses of the enterprise, wherever incurred, be taken into account. Depending on the circumstances, this will be done through the deduction of expenses or through the deduction of an arm's length charge in dealings between the permanent establishment and another part of the enterprise.

41. Article 7, as it read before 2010, also included a provision that of profits to be attributed to a permanent establishment to be done on the basis of an apportionment of the total profits of the enterprise to its various parts. That method, however, was only to be applied if application had been customary in a Contracting State and that it was in accordance with the principles of Article 7. For the Committee, the method of apportionment of profits of an enterprise can be applied even in the most difficult cases. Therefore decided to delete that provision because its application had been difficult because of concerns that it was extremely difficult to ensure that the application would be in accordance with the arm's length principle.

42. At the same time, the Committee also decided to eliminate another found in the previous version of the Article and according to which the profits of a permanent establishment were to be —determined by the same method as that used by the enterprise and sufficient reason to the contrary. That provision, which was intended to ensure consistent treatment, was appropriate as long as the profits of a permanent establishment could be determined through direct methods or even on the basis of an apportionment of the total profits of the enterprise. The new approach developed by the Committee, for the application of such fundamentally different methods and therefore should be used for

43. A final provision that was deleted from the Article at the same time profits attributable to a permanent establishment by reason of the purchase of goods or merchandise for the enterprise. That provision provided that where an enterprise of a Contracting State maintains a place of business exclusively for the purpose of purchasing goods for its own use, that place of business should not be considered to have reached a level that justifies taxation. Here, however, subparagraph 4 d) is not applicable because the activities carried on by the enterprise through that place of business, which constitute a permanent establishment, it is appropriate to attribute profits to the permanent establishment. Indeed, if the purchasing activities were performed by the enterprise, the purchaser would be remunerated on an arm's length basis. For instance a tax exemption restricted to purchasing activities undertaken for the enterprise would require that expenses incurred for the purposes of performing those activities be taken into account in determining the profits of the permanent establishment, which would create administrative problems. The Committee therefore decided to delete that provision.

attributed to a permanent establishment by reason of

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the mere purchase of goods or merchandise for the enterprise was not consistent with the principle and should not be included in the Article.

Paragraph 3

44. The combination of Articles 7 (which restricts the taxing rights of the State in which the permanent establishment is situated) and 23 A and 23 B (which oblige the States to avoid double taxation) ensures that there is no unrelieved double taxation of profits attributable to the permanent establishment. This paragraph and mechanisms be available to resolve all such differences to the extent necessary to eliminate double taxation.

45. As already indicated, the need for the two Contracting States to understand and agree on the application of paragraph 2 in order to eliminate risks of double taxation is reflected in the Report, which draws on the OECD's Transfer Pricing Guidelines.

46. Risks of double taxation will usually be avoided because the profits attributable to the permanent establishment in the same manner in each Contracting State and in accordance with paragraph 2 as interpreted by the Report, which result for the purposes of Articles 7 and 23 A or 23 B (see, paragraph 66). Insofar as each State agrees that the taxpayer has done so, it should adjust its profits in order to reach a different result under paragraph 2 in the following example.

47. Example. A manufacturing plant located in State R of an enterprise has a permanent establishment of the enterprise situated in State S of determining the profits attributable to the permanent establishment. The Report provides that a dealing must be recognised and a profit must be determined for that dealing. The enterprise's documentation, the judicial and factual analysis and which has been the basis for the taxpayer's computation of its taxable income in each State, shows that the plant in State R is the one that is selling the goods by the plant in

~~State B to the predominant establishment's length price of 100 has been used for profits attributable to the permanent establishment. Both States agree that the recognition of the price used by the taxpayer are in conformity with the principles of the OECD Transfer Pricing Guidelines. In this case, both States should agree on profits on the basis that a different arm's length price should have been there is agreement that the taxpayer has conformed with the principles of both States cannot substitute their judgment for that of the taxpayer as to its length conditions. In this example, the fact that the price has been agreed in both States and that both States will recognise that price for the application of the Convention will ensure that any double taxation related to be eliminated under Article 23 A or 23 B.~~

48. In the previous example, both States agreed that the recognition of price used by the taxpayer were in conformity with the principles of the OECD Transfer Pricing Guidelines. The Contracting States, however, may not always agree. In some cases, the Report and the OECD Transfer Pricing Guidelines may

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allow different interpretations of paragraph 2 and, to the extent that double taxation results from these different interpretations, it is essential to ensure that the result which paragraph 3 provides the mechanism that guarantees that outcome.

49. For example, as explained in paragraphs 105-171 of Part I of the Report, paragraph 2 for determining, on the basis of the attribution of fixed capital, the interest expense attributable to that permanent establishment. The Committee recognised that this could create problems, in particular, if the States have interpreted paragraph 2 differently and it is not possible to interpret it either in accordance with paragraph 2, it is important to ensure that any double taxation otherwise result from that difference will be eliminated.

50. Paragraph 3 will ensure that this result is achieved. It is important that the cases where it will be necessary to have recourse to that paragraph are fairly limited.

51. First, as explained in paragraph 46 above, where the taxpayer has profits attributable to the permanent establishment in the same manner in both Contracting States agree that the taxpayer has not been taxed by one of the States and that the other State should

different to the profits paragraph 2 each a

52. Second, paragraph 3 is not intended to limit in any way the to ensure each Contracting State conforms with its obligations under Article 23. For example, if the determination, by a Contracting State, of the profits attributable to a permanent establishment situated in that State is not in conformity with paragraph 2, the taxpayer will be able to use the available domestic legal remedies and the procedures provided for by Article 25 to address the fact that the taxpayer has been taxed in accordance with the Convention. Similarly, these remedies will also be available, for the purposes of Article 23 A or 23 B, to determine the profits of a permanent establishment in conformity with paragraph 2 and the provisions of this Article.

53. Where, however, the taxpayer has not determined the profits attributable to the permanent establishment in conformity with paragraph 2, each State is obliged to make order to ensure conformity with that paragraph. Where one State is in conformity with paragraph 2, that paragraph certainly permits the other State to make a determination so as to avoid any double taxation through the combined application of paragraph 2 and of Article 23 A or 23 B (see paragraph 65 below). It may be that the domestic law of that other State (eg the State where the permanent establishment is located) may not allow it to make such a change or that that State may have in its own law if the effect is to reduce the amount of profits attributable to that State. It may also be that, as indicated above, the two Contracting States will have different interpretations of paragraph 2 and it is not possible to reach a common interpretation either in accordance with paragraph 2.

54. Such concerns are addressed by paragraph 3. The following application of paragraph 3 is given as an example.

55. Example. A manufacturing plant located in State R of an enterprise of State R has a permanent establishment of the enterprise situated in State S.

For the purpose of determining the profits attributable to the permanent establishment, the following must be recognised and a notional arm's length price must be determined for that dealing. The enterprise's documentation, which is consistent with the actual analysis and which has been used by the enterprise in its business in the State.

showed by the example in paragraph 55, paragraph 3 addresses the situation in which the Contracting States adopt different interpretations of paragraph 2 of Article 9. Paragraph 3 ensures that relief of double taxation will be provided in such a manner that is consistent with the overall objectives of the Convention.

56. If State S, however, does not agree that the adjustment by State R paragraph 2 will be considered that it has to make the adjustment. In such a case, State S should make the adjustment under paragraph 3 (if the adjustment is justified under paragraph 2) or whether State R should refrain from making the adjustment (if it is not justified under paragraph 2) will be solved under a mutual agreement to paragraph 1 of Article 25 using, if necessary, the arbitration procedure of Article 25 (since it involves the question of whether the Convention has been interpreted or will result for the taxpayer in taxation not in the Convention). Through that procedure, the two States will be able to agree on the length price, which may be one of the prices put forward by the States or a different one.

57. As shown by the example in paragraph 55, paragraph 3 addresses the situation in which the Contracting States adopt different interpretations of paragraph 2 of Article 9. Paragraph 3 ensures that relief of double taxation will be provided in such a manner that is consistent with the overall objectives of the Convention.

58. Paragraph 3 shares the main features of paragraph 2 of Article 9. Each State will apply to an adjustment made by the other State. It therefore applies whether the initial adjustment has been made by the State where the permanent establishment is situated or by the other State. Also, it does not apply if the adjustment is one of the States.

59. As is the case for paragraph 2 of Article 9, a corresponding automatic adjustment is not required under paragraph 3 simply because the profits attributable to the permanent establishment have been adjusted by one of the Contracting States. A corresponding adjustment is required only if the other State considers that the adjustment is not justified under paragraph 2. In other words, paragraph 3 may not be applied when the profits attributable to the permanent establishment are adjusted differently from what they would have been if they had been correctly computed in

accordance with the principles of paragraph 2. Regardless of which State makes the adjustment, the other State is obliged to make an appropriate corresponding adjustment so that the profits correctly reflect what the profits would have been if the establishment's dealings had been transactions at arm's length. The other State is obliged to make such a corresponding adjustment only if it considers that this is justified both in principle and as regards the amount.

60. Paragraph 3 does not specify the method by which a corresponding adjustment is made. Whether this adjustment is made by the State in which the permanent establishment provided for by paragraph 3 could be granted in the other State or adjustment of the amount of income that must be exempted under Article 23 A must be granted under Article 23 B. Where the initial adjustment is made by the State in which the permanent establishment is situated by re-opening the assessment of the enterprise, to reduce the taxable income by an appropriate amount.

61. The issue of so-called —secondary adjustments—, which is the Condensed in paragraph 3 of not arise in the case of an adjustment under paragraph 3 above, the determination of the profits attributable to the establishment is only relevant for the purposes of Articles 7 and 23 A and 23 B and the application of other Articles of the Convention.

62. Like paragraph 2 of Article 9, paragraph 3 leaves open the question as to whether, after the expiration of which a State would not be obliged to make an adjustment to the profits attributable to a permanent establishment, following these profits in the other State. Some States consider that the adjustment should be open-ended — in other words, that however many years after the initial adjustment has gone back, the enterprise should in any event be subject to tax in the other State. Other States consider that an open-ended adjustment of this sort is unreasonable as a matter of practical administration. This problem is dealt with in the text of either paragraph 2 of Article 9 or paragraph 3. States are left free in bilateral conventions to include, if they wish, provisions as to the length of time during which a State should be obliged to make an appropriate adjustment at this point paragraphs 39, 40 and 41 of the Commentary on Article 25).

63. There may be cases where the initial adjustment made by one State immediately requires a corresponding adjustment to the amount of tax payable in the other State (as, for example, in the case of the initial adjustment by one State of the profits attributable to the establishment will affect the determination of the amount of a loss attributable to the enterprise in the other State). The competent authorities may, in the second sentence of paragraph 3, determine the future income that the enterprise

~~may, however, require the competent authorities of the other State to be consulted in advance of the adjustment.~~
~~payable in the other State before the adjustment described in the preceding paragraph, competent to use the mutual agreement procedure at the earliest opportunity to determine to what extent a corresponding adjustment may be required in the other State.~~

64. If there is a dispute between the parties concerned over the amount the appropriate adjustment, the mutual agreement procedure provided for in Article 25, as is the case for an adjustment under paragraph 2 of Article 9, as shown in the example in paragraph 55 above, if one of the two Contracting States

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adjusts the profits attributable to a permanent establishment without the other State granting an adjustment to the extent needed to avoid double taxation, the competent authorities of the other State may, in accordance with the mutual agreement procedure of paragraph 1 of Article 25, and in accordance with paragraph 5 of Article 25, to require the competent authorities of the other State to make an adjustment by one State or the failure by the other State to make an adjustment is not in accordance with the provisions of the Convention. The provision of paragraph 5 of Article 25 will play a critical role in cases where the competent authorities would otherwise be unable to agree as it will ensure that the issues are resolved through arbitration).

65. Paragraph 3 only applies to the extent necessary to eliminate the profits that result from the adjustment. Assume, for instance, that the State permanent establishment is situated adjusts the profits that the taxpayer attributed to the establishment to reflect the fact that the price of a dealing established the permanent establishment of the enterprise did not conform with the arm's length principle. other State also agrees that the price used by the taxpayer was not at arm's length. In this case, the combined application of paragraph 2 and of Article 23 of the Convention will be relevant to the permanent establishment, for the purposes of relief of double taxation, adjusted profits that would reflect an arm's length price. Paragraph 3 will only be relevant to the extent that States are in disagreement of what the correct arm's length price should be.

66. Paragraph 3 only applies with respect to differences in the attributed profits of the permanent establishment that result in the same part of the profits being attributed to different parts of the enterprise in conformity with the Article. As pointed out (see paragraphs 30 and 31 above), the provision of paragraph 3 of Article 23 does not deal with the determination of

profits, rights, or powers of the allocating States. The Article therefore only serves as to allocate for the purposes of allocating taxing rights and does not prejudge the issues as to which expenses are deductible, which is a matter of law as there is conformity with paragraph 2. Where the profits attributable to the establishment are the same in each State, the amount that will be attributed in each State for a given taxpayer will be the same, despite differences in domestic law rules, eg for the recognition of incurred and the expenses. Since these different domestic law rules only apply to the profits each State, they do not, by themselves, result in double taxation for the purposes

67. Also, paragraph 3 does not apply to affect the computation of the under Article 23 A or 23 B except for the purposes of providing what would otherwise be double taxation relief for the tax paid to the Contracting State in which the establishment is situated on the profits that have been attributed to that permanent establishment in that State. This paragraph will therefore not apply where these profits exempted by the other State or where the tax paid in the first-mentioned State has been jointly levied against the other State's tax under the domestic law of that other State with Article 23 A or 23 B.

68. Some States may prefer that the cases covered by paragraph 3 be mutual agreement through the (a failure to do so triggering the application of this prohibition paragraph 5 of Article 25) if a State does not unilaterally agree to an adjustment, without any deference being given to the adjusting State's preferred

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position as to the arm's length price or method. These States would prefer a proposal that would always give the possibility for a State to negotiate with the adjusting State length price or method to be applied. States that share that view would also prefer an alternative version of paragraph 3:

Where, in accordance with paragraph 2, a Contracting State adjusts the profits of a permanent establishment of an enterprise of one of the Contracting States accordingly profits of the enterprise that have been chargeable in the Contracting State shall, to the extent necessary to eliminate a double appropriate adjustment if it agrees with the adjustment made by the other Contracting State does not so agree, shall Contracting any double

taxation resulting therefrom by

69. ~~This alternative version is intended to ensure that the State being~~
~~corresponding to a given~~
~~through the procedure. This version differs significantly from paragraph 3~~
~~in that it does not obligate on that State to agree to give a corresponding~~
~~adjustment, the adjustment made by the other State to have been made in~~
~~paragraph 2.~~ The provision would always give the possibility for a State to
~~negotiate with the~~ that is the most appropriate arm's length price or method.
~~Where the State in~~ unilaterally agree to make the corresponding adjustment,
~~this version~~ could ensure that the taxpayer has the right to access the
~~procedural agreement~~ the case resolved. Moreover, where the mutual
~~agreement procedure~~ is used, the provision imposes a reciprocal legal obligation
~~on the Contracting States~~ to eliminate the double taxation by mutual agreement even though it
~~is not a standard~~ to govern which State has the obligation to
~~achieve the agreement.~~ If the two Contracting States do not reach
~~an agreement~~ to eliminate double taxation, they will both be in violation of their treaty
~~obligation.~~ to eliminate such cases of double taxation by mutual agreement
~~is therefore~~ the standard of paragraph 2 of Article 25, which merely
~~requires the competent~~ to resolve a case by mutual agreement.

70. If Contracting States agree bilaterally to replace paragraph 3 by
~~the content made in paragraphs 66 and 67 as regards paragraph 3 will~~
~~also apply with~~ provision.

Paragraph 4

71. Although it has not been found necessary in the Convention to
~~it should define the term —profits—~~ that the term when used in this Article
~~Code has the broad meaning including all income derived in carrying~~
~~such a broad meaning corresponds to the use of the term made in the tax~~
~~Memorandum of Understanding~~

72. Absent paragraph 4, this interpretation of the term —profits‖ could
~~some uncertainty in the application of the Convention.~~ If the profits of
~~an enterprise include~~ which are dealt with separately in other Articles of
~~the Convention,~~ question would have arisen as to which Article should apply
~~to these categories of~~ dividends, this Article or Article 10.

73. To the extent that the application of this Article and of the relevant
~~result in the Article would~~ there is little practical significance to this
~~question.~~ Also, other

Articles of the Convention deal specifically with this question with respect to income (paragraph 4 of Article 6, paragraph 4 of Articles 10 and 11, paragraph 1 of Article 12 and paragraphs 1 and 2 of Article 17 and paragraph 2 of Article 21).

74. The question, however, could arise with respect to other types of income which do not include a rule of interpretation that ensures that Articles applicable to income will have priority over Article 7. It follows from this applicable Article business profits which do not belong to categories of income set out in Articles 10, 11, 12 and 17, and, in addition, to income which under paragraph 4 of Article 12 and paragraph 2 of Article 21, fall within Article 7. However, the manner in which the income will be classified for the purposes of a Contracting State may tax an item of income pursuant to Article 7. A Contracting State may, for its own domestic tax purposes, characterise income (as business profits or as a specific category of income) provided that this characterisation is in accordance with the provisions of the Convention. Where income of a Contracting State derives from immovable property, that other States may tax it in accordance with the provisions of the Convention (see paragraph 4 of the Commentary on Article 21 and paragraphs 9 and 10 of the Commentary on Articles 23 A and 23 B).

75. It is open to Contracting States to agree bilaterally upon special definitions of the term —profits— with a view to clarifying the distinction between dividends. It may in particular be found appropriate to negotiate a deviation has been made from the definition of dividends, the residual royalties.

76. Finally, it should be noted that two categories of profits that were not covered by the Convention are now covered by Article 7. First, whilst the definition in paragraph 2 of Article 12 of the 1963 Draft Convention and the 1977 Model Convention included payments —for the use of, or the right to use, industrial equipment— the reference to these payments was subsequently deleted in order to ensure that income from the leasing of industrial, commercial equipment, including the income from the leasing of containers, falls within Article 7 or Article 8 (see paragraph 9 of the Commentary on these Articles), rather than under those of Article 12, a result that the Commission considers appropriate given the nature of such income.

77. Second, before 2000, income from professional services and other independent activities was dealt with under a separate Article, ie Article 14. The provisions similar to those applicable to business profits but Article 14 did not have the concept of that of permanent establishment since it had originally been thought to be reserved to commercial and industrial activities. However, activities fell within Article 14 as opposed to Article 7. This change in 2000 reflected the fact that there were no intended differences between permanent establishment, as used in Article 7, and fixed base, as used in Article 14. How profits were computed and tax was calculated according to Article 14. The effect of the deletion of Article 14 is

~~that the coincidences of tax in the professional services profits, which will be confirmed by the solution in Article 3, of a definition of the term —business~~

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which expressly provides that this term includes professional services or independent contractor.

Observations on the Commentary

78 65. Italy and Portugal deem as essential to take into consideration that ? irrespective of the fourth sentence of paragraph 77 8 ? as far as the methods concerned, international systems are not affected by the new wording of the definition of Article 14.

79 66. Belgium cannot share the views expressed in paragraph 14 13 of the Commentary. Belgium considers that the application of controlled foreign companies legislation of the provisions of paragraph 1 of Article 7. This is especially the case where a State taxes one of its residents on income derived by a foreign entity by using a fictitious resident, in proportion to his participation in the capital of the foreign entity derived by that entity. By doing so, that State increases the tax base of its resident income which has not been derived by that resident but by a foreign entity visible in that State in accordance with paragraph 1 of Article 7. That Contracting State respects the legal personality of the foreign entity and acts contrary to paragraph 1 of Article 7.

80 67. Luxembourg does not share the interpretation in paragraph 14 13 of the Commentary which provides that paragraph 1 of Article 7 does not restrict a Contracting State's right to tax its controlled foreign companies provisions found in its domestic law as this interpretation challenges the fundamental principle contained in paragraph 1 of Article 7.

81 68. With reference to paragraph 14 13, Ireland notes its general observation in paragraph 27 15 of the Commentary.

82. Sweden wishes to clarify that it does not consider that the different attribution of profits and capital that are included in the Report on Attribution of Profits to Permanent Establishments will necessarily lead to a result in accordance with the Convention. On the contrary, Sweden would, when looking at the facts and circumstances of each case, not consider that the

~~application of interest deduction resulting from the arm's length principle. If the capital will lead to double taxation, the mutual agreement procedure provided for in Article 25 will have to be used.~~

83. ~~With reference to paragraphs 27 and 65, the United States wishes to relieve double taxation arising due to the application of paragraph 2 of the article. It will demonstrate to the competent authority of the United States that it has been left unrelieved after the application of mechanisms under the United States' utilisation of foreign tax credit limitation created by such actions, the United States will relieve such additional double taxation.~~

84. ~~Turkey does not share the views expressed in paragraph 28 of the Article Commentary on~~

69. With regard to paragraph 45, Greece notes that the Greek internal law does not provide for any rules or methods for attributing —freel capital to permanent establishment contracted by an enterprise that relate in whole or in part to the activities of the establishment, Greece allows as deduction the part of the interest which corre

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amount of a loan contracted by the head office and actually remitted to the pe
estabelecimento.

70. ~~Portugal wishes to reserve its right not to follow the position of the Commentary on paragraph 45, except whenever there are specific domestic foreseeing certain levels of —freel capital for permanent establishments.~~

71. With regard to paragraph 46, Sweden wishes to clarify that it does not consider that the different approaches to attributing —freel capital that the paragraph refers to —acceptable will necessarily lead to a result in accordance with the arm's length principle. Consequently, when looking at the facts and circumstances of each case in order to determine whether the amount of interest deduction resulting from the application of the arm's length principle conforms to the arm's length principle, Sweden in many cases would not consider that its approach conforms to the arm's length principle. Sweden is of the opinion that double taxation will therefore often occur, requiring the use of the mutual agreement procedure.

72. Portugal wishes to reserve its right not to follow the —symmetry principle in paragraph 48 of the Commentary on Article 7, insofar as the Portuguese internal law does not provide for any rules or methods for attributing —freel capital to permanent establishment contracted by an enterprise that relate in whole or in part to the activities of the establishment, Greece allows as deduction the part of the interest which corre

foresee any rules or methods for attributing —freel capital to permanent estab
Eliminating double taxation according to Article 23, Portugal, as the home co
the amount of profits attributable to a permanent establishment according to tl

73. *Germany, Japan and the United States* , whilst agreeing to the
in paragraph 48, wish to clarify how this agreement will be implemented. Nei
Japan, nor the United States can automatically accept for all purposes all calci
in which the permanent establishment is located. In cases involving Germany
second condition described in paragraph 48 has to be satisfied through a mutu
procedure under Article 25. In the case of Japan and the United States, a taxp
obtain additional foreign tax credit limitation must do so through a mutual agi
in which the taxpayer would have to prove to the Japanese or the United State
authority, as the case may be, that double taxation of the permanent establishr
resulted from the conflicting domestic law choices of capital attribution meth
unrelieved after applying mechanisms under their respective domestic tax law
of foreign tax credit limitation created by other transactions.

74. With reference to paragraphs 6 and 7, *New Zealand* notes that it does
approach not agree with the attribution of profits to permanent establishment:
reflected in Part I of the Report *Attribution of Profits to Permanent*
Establishments .

Reservations on the Article

85 75. *Australia and New Zealand* reserve s the right to include a provision
that will domestic law to apply in relation to the taxation of profits from any
form of insurance.

86 76. *Australia and New Zealand* reserve s the right to include a provision
clarifying the share of business profits to which a resident of the other Contrac
beneficially entitled where those profits are derived by a trustee of a trust esta
certain unit trusts that are treated as companies for Australian and New Zealai
from the carrying on of a business in Australia or New Zealand, as the case m
permanent establishment.

87 77. *Korea and Portugal* reserve the right to tax persons performing
professional services or independent character if they are present on their territor

periods exceeding in the aggregate 183 days in any twelve month period, even a permanent establishment (or a fixed base) available to them for the purpose services or activities.

88 78. *Italy and Portugal* reserve the right to tax persons performing independent personal services under a separate article which corresponds to Article 14 as it stood before 2000.

89 79. The *United States* reserves the right to amend Article 7 to provide that, in applying paragraph 2 of the Article, any income or gain attributable to a permanent establishment during its existence may be taxable by the Contracting State in which the permanent establishment exists even if the payments are deferred until after the permanent establishment has ceased to exist. The United States also wishes to note that it reserves the right to the rule, as well, under Articles 11, 12, 13 and 21.

90 80. *Turkey* reserves the right to subject income from the leasing of immovable property to tax at source in all cases. In case of the application of Articles 5 and 13, income, Turkey would like to apply the permanent establishment rule to the same cases as in depot-agency and operational branches cases.

91 81. *Norway and the United States* reserve the right to treat income from the use of aircraft, ships or other means of transport used in international traffic under Article 8 in the same manner as income from shipping and air transport.

92 82. *Australia and Portugal* reserve the right to propose in bilateral negotiations that, where information available to the competent authority of a Contracting State is inadequate to determine the profits to be attributed to the permanent establishment of an enterprise, the competent authority may apply to that enterprise for that purpose the taxation law of that State, subject to the qualification that such law will be applied only if the information available to the competent authority permits, in accordance with the present article.

93 83. *Mexico* reserves the right to tax in the State where the permanent establishment is situated profits derived from the sale of goods or merchandise carried out directly by an office situated in the other Contracting State, provided that those goods and merchandise are of the same or similar kind as the ones sold through that permanent establishment in Mexico. Mexico will apply this rule only as a safeguard against abuse and not as a general principle; thus, the rule will not apply when the enterprise proves that the sale has been carried out for reasons other than obtaining a benefit under the Convention.

94. *The Czech Republic reserves the right to add to paragraph 3 a provision excluding adjustments to bona fide cases.*

95. *New Zealand reserves the right to use the previous version of Article 7, taking into account its own reservations on that version (ie the version included in the Model Tax Convention) immediately before the 2010 update of the Model Tax Convention, and to use the approach reflected in Part I of the 2010 Report on the Attribution of*

Profits to Permanent Establishments. It does not, therefore, endorse the changes to the Article made through that update.

96. *Chile, Greece, Mexico and Turkey reserve the right to use the Article in its previous version if it was included in the Model Tax Convention in 2010 or before the Model Tax Convention. They do not, therefore, endorse the changes to the Article made through that update.*

97. *Portugal reserves its right to continue to adopt in its conventions as it reads before 2010 Article 7 as its domestic law is adapted in order to apply the new approach.*

98. *Slovenia reserves the right to specify that a potential adjustment paragraph 3 might be considered justified.*

ANEXO

PREVIOUS VERSION OF ARTICLE 7 AND ITS COMMENTARY

[The following is the text of Article 7 and its Commentary as it read of the Article and Commentary is provided for historical reference as it application and interpretation of bilateral tax conventions that use the previous wording of the Article.]

Artigo 7 °

LUCROS

1. The profits of an enterprise of a Contracting State shall be taxable only on business in the other Contracting State through a permanent establishment business as aforesaid, the profits of the enterprise may be taxed in the other State imputáveis a esse estabelecimento permanente.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State is carried on in the other Contracting State through a permanent establishment situated therein, the profits attributable to that permanent establishment shall be the profits which it might be expected to earn if it carried on the same or similar activities under the same or similar conditions with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be included all income derived from the permanent establishment, including executive salaries, whether in the State in which the permanent establishment is situated or elsewhere.

4. Insofar as it has been customary in a Contracting State to determine the profits of an enterprise on the basis of an apportionment of the total profits of the enterprise, the other Contracting State shall not object to such determination.

paragraph 2 shall preclude that Contracting State from determining the profits may be customary; the method of apportionment adopted shall, however, be s with the principles contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attribut determined by the same method year by year unless there is good and suffice

7. Where profits include items of income which are dealt with separately the provisions of those Articles shall not be affected by the provisions of this

COMMENTARY ON ARTICLE 7 CONCERNING THE TAXATION OF BUSINESS PROFITS

I. Preliminary remarks

1. This Article is in many respects a continuation of, and a corollary to, of permanent establishment. The permanent establishment criterion is common conventions to determine whether a particular kind of income shall or shall not originates but the criterion does not of itself provide a complete solution to the business profits; in order to prevent such double taxation it is necessary to sup establishment by adding to it an agreed set of rules by reference to which the establishment are to be calculated. To put the matter in a slightly different way State carries on business in the other Contracting State the authorities of that State questions before they levy tax on the profits of the enterprise: the first question permanent establishment in their country; if the answer is in the affirmative the profits on which that permanent establishment should pay tax. It is with the rule to this second question that Article 7 is concerned. Rules for ascertaining the State which is trading with an enterprise of the other Contracting State when l with in Article 9.

2. Articles 7 and 9 are not particularly detailed and were not strikingly new OECD. The question of what criteria should be used in attributing profits to a allocate profits from transactions between associated enterprises, has had to be taxation conventions and in various models developed by the League of Nations and the solutions adopted have generally conformed to a standard pattern.

3. It is generally recognised that the essential principles on which this study founded, and, when the OECD first examined that question, it was thought suitable amendments and modifications primarily aimed at producing greater clarity. 7 directivas

...
 They do not, even in the nature of things, mandate what is expected to be done. A commerce organises itself in an infinite variety of ways, and it would be quite limits of an Article in a double taxation convention to specify an exhaustive s problem that may arise.

4. It must be acknowledged, however, that there has been considerable v general directives of Article 7 and of the provisions of earlier conventions and Article is based. This lack of a common interpretation of Article 7 can lead to tributação.

For that reason, it is important for appropriate treaties to be agreed mutually between

5. Over the years, the Committee on Fiscal Affairs has therefore spent c ensure a more consistent interpretation and application of the rules of the Arti Article and a number of changes to the Commentary were made when the 197 Report that addressed that question in the specific case of banks was published determination of profits attributable to a permanent establishment could give 1 undertook a review of the question which led to the adoption, in 1993, of the 1 *Attribution of Profits to Permanent Establishments* and to subsequent changes to the Commentary.

6. Despite that work, the practices of OECD and non-OECD countries r permanent establishments and these countries' interpretation of Article 7 conti Committee acknowledged the need to provide more certainty to taxpayers: in *Multinational Enterprises and Tax Administrations*, adopted in 1995, it application of the arm's length principle to permanent establishments. That w *Attribution of Profits to Permanent Establishments*. The approach developed either the original intent or by the historical practice and interpretation of Arti

1. — The Taxation of Multinational Banking Enterprises¹, in *Transfer Pricing and Multinational Enterprises - Three Taxation Issues*,

2.
 Reproduced in Volume II of the loose-leaf version of the OECD Model Tax C

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formulating the most preferable approach to attributing profits to a permanent modern-day multinational operations and trade.

7. The approach put forward in that Report deals with the attribution of j in general (Part I of the Report) and, in particular, to permanent establishment sector, where trading through a permanent establishment is widespread (Part I permanent establishments of banks, Part III, which deals with permanent estal global trading and Part IV, which deals with permanent establishments of ent The Committee considers that the guidance included in the Report represents permanent establishments than has previously been available. It does recognis between some of the conclusions of the Report and the interpretation of the A Commentary. For that reason, this Commentary has been amended to incorpo

Report that did not conflict with the previous version of this Commentary, with some areas and left considerable leeway in others. The Report therefore represents, to the extent that it does not conflict with this Commentary, a guiding principle incorporated in the Article.

8. Before 2000, income from professional services and other activities was dealt with under a separate Article, *ie* Article 14. The provisions of that Article were similar to those applicable to business rather than that of permanent establishment. It was thought that the latter concept should be reserved to commercial and industrial activities. It was not clear which activities fell within Article 14 as opposed to Article 7. The elimination of Article 14 is a fact that there were no intended differences between the concepts of permanent establishment, as used in Article 14, or between how profits were computed and how Article 7 or 14 applied. The effect of the deletion of Article 14 is that income from other activities of an independent character is now dealt with under Article 7; by the addition of a definition of the term —business— which expressly provides for services or other activities of an independent character.

II. Commentary on the provisions of the Article

Paragraph 1

9. This paragraph is concerned with two questions. First, it restates the general principle of taxation conventions that an enterprise of one State shall not be taxed in the other State through a permanent establishment situated therein. It is hardly a new principle. It is perhaps sufficient to say that it has come to be accepted in international tax law that an enterprise of one State sets up a permanent establishment in another State if it is participating in the economic life of that other State to such an extent that it is exercising that State's taxing rights.

10. The second principle, which is reflected in the second sentence of the paragraph, is that the State where the permanent establishment is situated does not extend to profits of that enterprise that are not attributable to the permanent establishment. This is a question of principle, and there have been differences of view, a few countries having some time ago pursued a principle according to which income such as other business profits, dividends, interest, etc., derived from a territory was fully taxable by them if the beneficiary had a permanent establishment in that territory, even if the income was clearly not attributable to that permanent establishment. Whilst some bilateral tax treaties have embodied an anti-avoidance rule based on a restricted force of attraction approach that only activities similar to those carried on by a permanent establishment, the general principle stated above has now been rejected in international tax treaty practice. The principle of taxation conventions is based on the view that in taxing the profits of an enterprise of one country, the tax authorities of that country should look at the separate sources of income in that country and should apply to each the permanent establishment test, subject to the provisions of Articles of the Convention. This solution allows simpler and more efficient taxation and is more closely adapted to the way in which business is commonly carried on. It is not highly complex. There are a considerable number of companies each of which carries on business in many countries and is carrying on business extensively in many countries. A company may carry on business in another country through which it carries on manufacturing activities whilst it sells different goods or manufactures in that other country through independent agents. There are perfectly valid commercial reasons for doing so: these may be based, for example, on business or on commercial convenience. If the country in which the permanent establishment is situated is to tax the profits of the company, it should tax only the profits attributable to that permanent establishment.

so far as to try to determine, and tax, the profit element of each of the transactions, with a view to aggregating that profit with the profits of the permanent establishment, would interfere seriously with ordinary commercial activities and would be contrary to the object and purpose of the Convention.

11. When referring to the part of the profits of an enterprise that is attributable to the permanent establishment, paragraph 1 refers directly to paragraph 2, which provides that the profits should be attributed to a permanent establishment. As paragraph 2 is part of the same Article, that sentence should not be interpreted in a way that could contradict paragraph 1. The amount of profits that can be attributed to a permanent establishment is determined by reference to the profits of the enterprise as a whole. Thus, whilst paragraph 1 provides that a Contracting State may tax the profits of an enterprise of the other Contracting State to the extent that they are attributable to a permanent establishment, it is paragraph 2 that determines the meaning of the phrase —profits attributable to the permanent establishment—. In other words, the directive of paragraph 2 may result in profits being attributed to the enterprise as a whole has never made profits; profits being attributed to a permanent establishment even though the enterprise as a whole has never made profits.

12. Clearly, however, the Contracting State of the enterprise has an interest in the profits correctly applied by the State where the permanent establishment is located. In the absence of the Convention, the State of the enterprise must, in accordance with Article 11, tax the profits properly attributable to the permanent establishment. In other words, if the permanent establishment is located attempts to tax profits that are not attributable to the permanent establishment, this may result in double taxation of profits that should properly be taxed only once.

13. The purpose of paragraph 1 is to provide limits to the right of one Contracting State to tax the profits of enterprises of the other Contracting State. The paragraph does not limit the right of a Contracting State to tax its own residents under controlled foreign companies provisions found in its domestic law. The profits imposed on these residents may be computed by reference to the part of the profits of the enterprise of the other Contracting State that is attributable to these residents' participation in the enterprise. The fact that a Contracting State on its own residents does not reduce the profits of the enterprise of the other Contracting State to have been levied on such profits (see also paragraph 23 of the Commentary on Article 10).

Paragraph 2

14. This paragraph contains the central directive on which the attribution of profits to the permanent establishment is intended to be based. The paragraph incorporates the view that the profits of an enterprise are those which that permanent establishment would have made if it had been dealing with an entirely separate enterprise under conditions of the ordinary market. This corresponds to the —arm's length principle— discussed in paragraph 10. Normally, the profits so determined would be the same profits that one would determine in the processes of good business accountancy.

15. The paragraph requires that this principle be applied in each Contracting State. The amount on which the enterprise will be taxed in the source State will, therefore, be the same as the amount of income with respect to which the other State will have a right to tax. Variations between the domestic laws of the two States concerning the timing of the recognition of income and restrictions on the deductibility of certain expenses under paragraph 3 of this Article will normally result in a different amount of taxable income being determined in the two States.

16. In the great majority of cases, trading accounts of the permanent establishment are available if only because a well-run business organisation is normally concerned to keep accurate accounts of its various branches — will be used to ascertain the profit properly attributable to the permanent establishment. There may be no separate accounts (cf. paragraphs 51 to 55 below). But where there are no separate accounts, they form the starting point for any processes of adjustment in case adjustment is required. The fact that the profits are properly attributable to the permanent establishment under the directive of paragraph 2 may perhaps be emphasized that this directive is no justification to construct hypothetical profits.

18. The first step of that approach requires the identification of the activities that constitute the permanent establishment of the taxpayer. This should be done through a functional analysis of the taxpayer's activities. In the first step, the economically significant activities and responsibilities of the permanent establishment will be identified. This analysis should, to the extent relevant, be undertaken through the permanent establishment in the context of the activities of the enterprise as a whole, particularly those parts of the enterprise that engage in the permanent establishment.

19. In the second step, the principles developed for the application of the arm's length principle to the permanent establishment will be applied to the taxpayer's permanent establishment and through the rest of the enterprise.

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concerned was nothing more than an intermediary or agent (incurring limited limited share of the resulting income) or, conversely, were given the role of it was a principal.

20. It may therefore be concluded that accounting records and contemporaneous above-mentioned requirements constitute a useful starting point for the purpose of establishing the permanent establishment.

~~for tax purposes, Section 2 of the Law of 1994, as amended, provides that the profits of a permanent establishment are determined on the basis of the accounting records and contemporaneous above-mentioned requirements.~~

21. There may be a realisation of a taxable profit when an asset, whether business property of a permanent establishment situated within a State's territory or the head office of the same enterprise situated in another State, is transferred. Such profits may be deemed to arise in connection with such a transfer. Such profits may be realised where such transfer takes place, whether or not it is a permanent one, the question is whether the asset has a substantial market value and is transferred to the permanent establishment or other part of the enterprise after the transfer occurred, the realisation of the taxable profits will not, so far as the enterprise is concerned, necessarily take place in the taxation year of the transfer under consideration.

1. *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, OECD, Paris, 1995.

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leaves the purview of a tax jurisdiction may trigger the taxation of the accrued concept of realisation depends on each country's domestic law.

22. Where the countries in which the permanent establishments operate are different, the profits of an internal transfer as soon as it is made, even when these profits are not actually realised in the year, there will be inevitably a time lag between the moment when tax is paid into account in the country where the enterprise's head office is located. A serious problem arises especially when a permanent establishment transfers fixed assets or — in the case of operating equipment stock, to some other part of the enterprise of which it for office country to seek, on a case by case basis, a bilateral solution with the other country to avoid overtaxation.

23. Paragraph 3 of Article 5 sets forth a special rule for a fixed place of business in connection with construction or installation project. Such a fixed place of business is a permanent establishment if it exists for more than twelve months. Experience has shown that these types of permanent establishments create problems in attributing income to them under Article 7.

24. These problems arise chiefly where goods are provided, or services provided, by an enterprise or a related party in connection with the building site or construction project. Problems also arise with any permanent establishment that they are particularly acute

Paragraphs 25 and 26. Paragraph 25 states that, in the case of installation projects, it is necessary to pay close attention to the fact that the profits attributable to a permanent establishment only when it results from activities of the permanent establishment.

25. For example, where such goods are supplied by the other parts of the supply do not result from the activities carried on through the permanent establishment. Similarly, profits resulting from the provision of services (such as planning, design and rendering technical advice) by the parts of the enterprise operating outside the permanent establishment do not result from the activities carried on through the permanent establishment.

26. Where, under paragraph 5 of Article 5, a permanent establishment of an enterprise is deemed to exist in the other Contracting State by reason of the activities of a dependent agent (see paragraph 32 of the Commentary on Article 5), the same principles used to attribute profits to a permanent establishment will apply to attribute profits to that deemed permanent establishment. The dependent agent undertakes for the enterprise will be identified through a determination of the functions undertaken by the dependent agent both on its own account and on behalf of the enterprise on behalf of which it is acting constitute the permanent establishment. On the one hand, the dependent agent will derive its own income or profits from its activities on account for the enterprise; if the agent is itself a resident of either Contracting State (including Article 9 if that agent is an enterprise associated to the enterprise or otherwise relevant to the taxation of such income or profits. On the other hand, the deemed permanent establishment will be attributed the assets and risks of the enterprise relating to the agent on behalf of that enterprise (i.e. the activities that the dependent agent undertakes for the enterprise) together with sufficient capital to support those assets and risks. Profits will then be attributed to the permanent establishment on the basis of those assets, risks and capital; these profits will be income or profits that are properly attributable to the dependent agent itself (see *Attribution of Profits to Permanent Establishments*).

Paragraph 3

27. This paragraph clarifies, in relation to the expenses of a permanent establishment, the deduction allowance in paragraph 2. The paragraph specifically recognises that in calculating the deduction allowance is to be made for expenses, wherever incurred, that were incurred for the permanent establishment.

Clearly, in some cases it will be necessary to estimate the amount of general administrative expenses to be taken into account. In the case of a permanent establishment, it may be appropriate to take into account a proportion of the permanent establishment's turnover (or perhaps gross profits) bears to that of the enterprise. It is considered that the amount of expenses to be taken into account as incurred by the permanent establishment should be the actual amount so incurred. The deduction allowance for any of the expenses of the enterprise attributed to it does not depend upon the amount of expenses incurred by the permanent establishment.

28. It has sometimes been suggested that the need to reconcile paragraphs 2 and 3 required that prices between the permanent establishment and the enterprise be set at arm's length.

arm's length basis, giving to the transferring entity the type of profit which it is dealing with an independent enterprise, whilst the wording of paragraph 3 is that the profits incurred for the purposes of permanent establishments should be the actual costs adding any profit element.

29. In fact, whilst the application of paragraph 3 may raise some practical questions as to the separate enterprise and arm's length principles underlying paragraph 2, there are no contradictions between the two paragraphs. Paragraph 3 indicates that in determining the profits of a permanent establishment, only the costs and expenses incurred by it must be allowed as deductions whilst paragraph 2 provides that the profits determined must be those that would have been earned by the permanent establishment if it had been engaged in the same or similar activities under the same or similar conditions. Paragraph 3 provides a rule applicable for the determination of the profits of a permanent establishment which requires that the profits so determined correspond to the profits that a separate enterprise would have made.

30. Also, paragraph 3 only determines which expenses should be attributed to the permanent establishment for the purposes of determining the profits attributable to that permanent establishment. Whether those expenses, once attributed, are deductible when computing the taxable profits of the permanent establishment since the conditions for the deductibility of expenses are a matter for the law of the State subject to the rules of Article 24 on Non-discrimination (in particular, paragraph 1).

31. In applying these principles to the practical determination of the profits of a permanent establishment, a question may arise as to whether a particular cost incurred by an enterprise can be allocated to the permanent establishment, keeping in mind the principles of paragraph 2. Whilst in general independent enterprises in their own right would realise a profit and, when transferring property or providing services to each other, the market would bear, nevertheless, there are also circumstances where it cannot be said that the cost or service would have been obtainable from an independent enterprise or where the cost or service is shared between them. In such circumstances, it may be appropriate to treat any relevant costs incurred by the permanent establishment as an expense of the enterprise. The difficulty arises in making a distinction between those costs which should be considered as an expense of the permanent establishment and those which should be considered as an expense of the enterprise. Where a cost incurred by an enterprise should not be considered as an expense of the permanent establishment, relevant property or service should be considered, on the basis of the separate enterprise, to have been transferred between the head office and the permanent establishment.

32. On the one hand, the answer to that question will be in the affirmative where the cost or service is incurred by the enterprise in the normal course of its business. For example, the cost of the arm's length price, i.e. by normally including in the sale price an appropriate profit.

33. Where goods are supplied for resale whether in a finished state or as raw materials, it will normally be appropriate for the provisions of paragraph 2 to apply and for a profit to be allocated to the permanent establishment, measured by reference to arm's length principles. But there may be circumstances where goods are not supplied for resale but for temporary use. For example, the parts of the enterprise which share the use of the material and the depreciation costs that relate to its use. In such circumstances, the cost of the purchase of goods does not constitute a permanent establishment (Article 5) so that no question of attribution of profit arises in such circumstances.

34. In the case of intangible rights, the rules concerning the relations between the permanent establishment and the enterprise (in particular, paragraph 2) cannot be applied in respect of the same enterprise. Indeed, it may be extremely difficult to allocate — ownership of the intangible right to the permanent establishment or to the enterprise. The rules concerning the relations between the permanent establishment and the enterprise (in particular, paragraph 2) cannot be applied in respect of the same enterprise. Indeed, it may be extremely difficult to allocate — ownership of the intangible right to the permanent establishment or to the enterprise.

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1. which have been dealt with in Parts II and III of the Report *Attribution of Profits to Permanent Establishments*.

of the enterprise and to argue that this part of the enterprise should receive royalties as if it were an independent enterprise. Since there is only one legal entity it is not possible to allocate a particular part of the enterprise and in practical terms it will often be difficult to allocate exclusively to one part of the enterprise. It may therefore be preferable for the costs to be regarded as attributable to all parts of the enterprise which will make use of the services of various parts of the enterprise to which they are relevant accordingly. In such a case, the costs allocated between the various parts of the enterprise should be based on the actual costs of the creation of the rights, as well as the costs subsequently incurred with respect to these intangible assets or royalty. In so doing, tax authorities must be aware of the fact that the possible allocation of any research and development activity (eg the responsibility related to the development of products and damages to the environment) of the enterprise, therefore giving rise to a heavy burden.

35. The area of services is the one in which difficulties may arise in determining how a service should be charged between the various parts of a single enterprise at a certain mark-up to represent a profit to the part of the enterprise providing the service. The service may consist of the provision of such services and there may be a standard charge for such services which will usually be appropriate to charge a service at the same rate as is charged to other parts of the enterprise.

36. Where the main activity of a permanent establishment is to provide services, the host country in which it belongs and where these services provide a real advantage to the enterprise, a significant part of the expenses of the enterprise, the host country may require the enterprise to bear a certain amount of the costs. As far as possible, the host country should then try to allocate a fair value of these services in the given circumstances of each case.

37. However, more commonly the provision of services is merely part of the general management of a company taken as a whole as where, for example, the enterprise conducts a certain activity of each part of the enterprise benefit from it. In such a case it would usually be appropriate to provide the service as being part of the general administrative expenses of the enterprise and allocated on an actual cost basis to the various parts of the enterprise to the extent of the purposes of that part of the enterprise, without any mark-up to represent profit.

38. The treatment of services performed in the course of the general management of a company is a question whether any part of the total profits of an enterprise should be deemed to be attributable to the head office.

Consider the case of a company that has its head office in one country but carries on its business in another. If the directors' meetings were held at the head office and that all other activities of the company, including legal activities, were carried on in the permanent establishment. In such a case, it would be reasonable to view that at least part of the profits of the whole enterprise arose from the skill and experience of the directors and that part of the profits of the enterprise ought, therefore, to be allocated to the head office was situated. If the company had been managed by a managing agent, the agent would have charged a fee for its services and the fee might well have been a simple percentage of the profits of the company.

But where even the theoretical expenses of such management, practical considerations may require that the permanent establishment in accordance with the provisions of paragraph 3, but when the host country has thought that it would not be right to go further by deducting and taking into account the expenses of the permanent establishment.

managementl. In cases identical to the extreme case mentioned above, no acc determining taxable profits of the permanent establishment of any notional fig

39. It may be, of course, that countries where it has been customary to all profits of an enterprise to the head office of the enterprise to represent the pro continue to make such an allocation. Nothing in the Article is designed to pre what is said in paragraph 38 above that a country in which a permanent establ to deduct when calculating the profits attributable to that permanent establish proportionate part of the profits of management attributable to the head office

40. It might well be that if the country in which the head office of an ente office some percentage of the profits of the enterprise only in respect of good the permanent establishment is situated does not, the resulting total of the am would be greater than it should be. In any such case the country in which the l should take the initiative in arranging for such adjustments to be made in com country as may be necessary to ensure that any double taxation is eliminated.

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41. The treatment of interest charges raises particular issues. First, there n of interest, are charged by a head office to its permanent establishment with r o último.

reconhecidas. This is because:

- Except for financial enterprises such as banks, it is generally agreed that such
- From the legal standpoint, the transfer of capital against payment of i full at the due date is really a formal act incompatible with the true le,
- From the economic standpoint, internal debts and receivables may pr enterprise is solely or predominantly equity-funded it ought not to be it has manifestly not had to pay. Whilst, admittedly, symmetrical cha enterprise's overall profits, partial results may well be arbitrarily chan

42. For these reasons, the ban on deductions for internal debts and receive subject to the special situation of banks, as mentioned below.

43. A different issue, however, is that of the deduction of interest on debt. Such debts may relate in whole or in part to the activities of the permanent est an enterprise will serve either the head office, the permanent establishment or to these debts is how to determine the part of the interest that should be deduc to the permanent establishment.

44. The approach suggested in this Commentary before 1994, namely the actual debt charges, did not prove to be a practical solution, notably since it w maneira.

interest that remains after certain direct allocations comes up against practica direct apportionment of total interest expense may not accurately reflect the c establishment because the taxpayer may be able to control where loans are bo made to reflect economic reality in particular the fact that an indenendent ent

made to reflect economic reality, in particular the fact that an independent enterprise has a certain level of —free capital.

45. Consequently, the majority of Member countries consider that it would be a solution that would take into account a capital structure appropriate to both the functions performed. This appropriate capital structure will take account of the activities, the permanent establishment requires a certain amount of funding and interest-bearing debt. The objective is therefore to attribute an arm's length amount of —free capital to the permanent establishment after attributing an appropriate amount of —free capital in order to support the functions it undertakes, the assets it economically owns and the risks inherent in the business crystallise into financial loss. Capital provides a risk in non-financial sectors.

46. As explained in Section D-2 (v) b) of Part I of the Report, there are different acceptable approaches for attributing —free capital that are consistent with the arm's length principle. Each approach has its own strengths and weaknesses, which become more or less apparent in different circumstances of particular cases. Different methods adopt different starting points for —free capital attributable to a permanent establishment, which either put more emphasis on the enterprise of which the permanent establishment is a part or alternatively, on the independent enterprises. The key to attributing —free capital is to recognise:

- the existence of strengths and weaknesses in any approach and when they arise;
- that there is no single arm's length amount of —free capital, but a range of amounts within which it is possible to find an amount of —free capital that can be attributed.

47. It is recognised, however, that the existence of different acceptable approaches to a permanent establishment which are capable of giving an arm's length result is not a problem.

State where the permanent establishment is located and of the State of the enterprise. The approaches for attributing an arm's length amount of free capital to the permanent establishment calculated by the State of the permanent establishment may be higher than the amount of the enterprise for purposes of relief of double taxation.

48. Given the importance of that issue, the Committee has looked for a practical solution. Member countries have therefore agreed to accept, for the purposes of determining the amount of capital to be used in computing double taxation relief, the attribution of capital derived from the State in which the permanent establishment is located if the following two conditions are met: first, if the capital attribution methods, and second, if there is agreement that the State in which the permanent establishment is located has used an authorised approach to the attribution of capital and there produces a result consistent with the arm's length principle in the particular case. It is recognised that they are able to achieve that result either under their domestic law, through the mutual agreement procedure of Article 25 and, in particular, the joint

resolve any issues concerning the application or interpretation of their tax treat

49. As already mentioned, special considerations apply to internal interest parts of a financial enterprise (eg a bank), in view of the fact that making the ordinary business of such enterprise. This problem, as well as other problems 7 to the permanent establishments of banks and enterprises carrying on global the Report *Attribution of Profits to Permanent Establishments* .

50. The determination of the investment assets attributable to a permanent activities are carried on also raises particular issues, which are discussed in Pa

51. It is usually found that there are, or there can be constructed, adequate enterprise so that profits and expenses, adjusted as may be necessary, can be a prise with a considerable degree of precision. This method of allocation is, it is wherever it is reasonably practicable to adopt it. There are, however, circumstances and paragraphs 2 and 3 are in no way intended to imply that other methods can be appropriate in order to arrive at the profits of a permanent establishment on a basis, for example, that profits of insurance enterprises can most conveniently be computed, eg by applying appropriate co-efficients to gross premiums received from policy holders in the country. In some countries, there may be no proper accounts for the permanent establishment of a company, too, be other cases where the affairs of the permanent establishment are run from head office that it would be impossible to disentangle them on any strict basis. It is customary in such cases to estimate the arm's length profit of a permanent establishment on the basis of criteria, it may well be reasonable that that method should continue to be followed. Thus made may not achieve as high a degree of accurate measurement of the profits as a method which has not been customary, it may, exceptionally, be necessary for the arm's length profits based on other methods.

Paragraph 4

52. It has in some cases been the practice to determine the profits to be attributed to a permanent establishment not on the basis of separate accounts or by making an estimate of arm's length total profits of the enterprise by reference to various formulae. Such a method is not contemplated in paragraph 2, since it contemplates not an attribution of profits on a separate basis but a determination of total profits; and indeed it might produce a result in figures which would differ from those which would be obtained by a computation based on separate accounts. Paragraph 4 makes it clear that such a method may be used by a Contracting State if it has been customary in that State to adopt it, even if the results may differ to some extent from that which would be obtained from separate accounts. It is said to be in accordance with the principles contained in the Article. It is emphasized that the profits to be attributed to a permanent establishment should be determined by reference to the facts. It is considered that a method of allocation which is not generally not as appropriate as a method which has regard only to the activities of the permanent establishment should be used only where, exceptionally, it has as a matter of history been customary in the country concerned both by the taxation authorities and taxpayers generally that paragraph 4 may be deleted where neither State uses such a method. Where a State is able to use a method which has not been customary in the past the paragraph should be deleted in the negotiations to make this clear.

53. It would not, it is thought, be appropriate within the framework of this Article to require length the many various methods involving apportionment of total profits that have been used for allocating profits. These methods have been well documented in treatises on i

54. The essential character of a method involving apportionment of total profits of the whole enterprise is allocated to a part thereof, all parts of the enterprise contributed on the basis of the criterion or criteria adopted to the profitability such method and another arises for the most part from the varying criteria used proportion of the total profits. It is fair to say that the criteria commonly used categories, namely those which are based on the receipts of the enterprise, its turnover covers allocation methods based on turnover or on commission, the proportion of the total working capital of the enterprise allocated to each branch say in vacuo that any of these methods is intrinsically more accurate than the particular method will depend on the circumstances to which it is applied. In services or producing proprietary articles with a high profit margin, net profit insurance enterprises it may be appropriate to make an apportionment of total received from policy holders in each of the countries concerned. In the case of a high cost raw material or labour content, profits may be found to be related banking and financial concerns the proportion of total working capital may be considered that the general aim of any method involving apportionment of tot of taxable profit that approximate as closely as possible to the figures that would accounts basis, and that it would not be desirable to attempt in this connection than that it should be the responsibility of the taxation authority, in consultation concerned, to use the method which in the light of all the known facts seems

Paragraph 5

57. Paragraph 5 is not, of course, concerned with the organisation established in the United Kingdom. The organisation is not a permanent establishment and the profits allocation provisions do not come into play. The paragraph is concerned with a permanent establishment in the United Kingdom which carries on business, also carries on purchasing for its head office. In such a case the paragraph provides that the permanent establishment shall not be increased by adding to them a notional permanent establishment. It follows, of course, that any expenses that arise from the purchasing activities are deductible from the taxable profits of the permanent establishment.

58. This paragraph is intended to lay down clearly that a method of allocation is not to be chosen merely because in a particular year some other method produces more favourable results. The purpose of the double taxation convention is to give an enterprise of a Contracting State the same treatment that will be accorded to its permanent establishment in the other Contracting State.

in its home State which is dealing with the permanent establishment; for this is continuous and consistent tax treatment.

Paragraph 7

59. Although it has not been found necessary in the Convention to define nevertheless be understood that the term when used in this Article and elsewhere

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meaning including all income derived in carrying on an enterprise. Such a broad term made in the tax laws of most OECD member countries.

60. This interpretation of the term —profits—, however, may give rise to some difficulties. The Convention, as dividends, it may be asked whether the term —profits— of an enterprise include categories of income which are treated specially in the Convention, such as dividends, interest, etc. The provisions of this Article.

61. To the extent that an application of this Article and the special Article treatment, there is little practical significance to this question. Further, it should be noted that the Convention contains specific provisions giving priority to a specific Article (cf. paragraphs 10 and 11, paragraph 3 of Article 12, and paragraph 2 of Article 21).

62. It has seemed desirable, however, to lay down a rule of interpretation for the application of this Article in relation to the other Articles dealing with a specific item of income. With the formula generally adhered to in existing bilateral conventions, paragraphs 10 and 11, paragraph 3 of Article 12 and Article 13 (cf. paragraphs 12 to 18 of the Commentary on Article 12 which discuss the particular case of computer software, payments should be classified as business profits within Article 13 on the one hand or as royalties within Article 12 on the other hand, if they are items of income covered by the special Articles may, subject to the provisions of the Convention, be treated as business profits, in conformity with the tax laws of the Contracting State.

63. It is open to Contracting States to agree bilaterally upon special explanations of the term —profits— with a view to clarifying the distinction between this term and the term —royalties—. It may be found appropriate to do so where in a convention under negotiation the definitions in the special Articles on dividends, interest and royalties. It may be noted that Contracting States wish to place on notice, that, in agreement with the domestic law of the Contracting State, the term —profits— includes special classes of receipts such as income from the sale of movable property used in a business. In this connection it may have to be considered whether it should include also additional rules for the allocation of such special profits.

64. It should also be noted that, whilst the definition of —royalties— in paragraph 12 of the 1963 Convention and 1977 Model Convention included payments —for the use of, or scientific equipment—, the reference to these payments was subsequently deleted.

of scientific equipment, the reference to these payments was subsequently de- ensure that income from the leasing of industrial, commercial or scientific equ leasing of containers, falls under the provisions of Article 7 rather than those on Fiscal Affairs considers to be appropriate given the nature of such income.

Observations on the Commentary

65. *Italy and Portugal* deem as essential to take into consideration that ? fourth sentence of paragraph 8 ? as given to the method for computing taxes is affected by the new wording of the model, ie by the elimination of Article 14. ~~intense if paragraph 8 ? as given to the~~ ~~concerned, national systems are not~~

66. *Belgium* cannot share the views expressed in paragraph 13 of the application of controlled foreign companies legis ~~Commentary. Belgium considers that the~~ ~~Especially the case where a contracting State taxes one of its residents on inco~~ ~~fiction attributing to that resident, in proportion to his participation in the capi~~ ~~derived by that entity. By doing so, that State increases the tax base of its resi~~ ~~not been derived by that resident but by a foreign entity which is not taxable i~~ ~~paragraph 1 of Article 7. That Contracting State thus disregards the legal pers~~ ~~contrary to paragraph 1 of Article 7.~~

67. *Luxembourg* does not share the interpretation in paragraph 13 which does not ~~provides a Contracting State's right to~~ ~~tax its own residents under cont~~ ~~found in its domestic law as this interpretation challenges the fundamental pri~~ ~~Article 7.~~

68. With reference to paragraph 13, *Ireland* notes its general observation on Article 1 ~~in paragraph 27.5 of the Commentary~~

69. With regard to paragraph 45, *Greece* notes that the Greek internal ~~law does not consider in permanent establishments.~~ ~~Concerning loans~~ ~~whole or in part to the activities of the permanent establishment, Greece allow~~ ~~which corresponds to the amount of a loan contracted by the head office and a~~ ~~estabelecimento.~~

70. *Portugal* wishes to reserve its right not to follow the position on Article 7 ~~expressed in paragraph 45 of the Commentary~~ ~~provisions foresee in~~ ~~permanent establishments.~~

71. With regard to paragraph 46, *Sweden* wishes to clarify that it does ~~not consider that the different approaches~~ ~~for attributing free capital that the paragraph refers to as being —acceptable~~ ~~accordance with the arm's length principle. Consequently, when looking at th~~ ~~order to determine whether the amount of interest deduction resulting from th~~ ~~conforms to the arm's length principle, Sweden in many cases would not cons~~

conforms to the arm's length principle. Sweden is of the opinion that double taxation requiring the use of the mutual agreement procedure.

72. *Portugal* wishes to reserve its right not to follow the —symmetry— approach described in paragraph 7, insofar as the Portuguese internal law does not force —free— capital to permanent establishments. In eliminating double taxation at home country, determines the amount of profits attributable to a permanent establishment.

73. *Germany, Japan* and the *United States*, whilst agreeing to the wish to clarify how this agreement will be implemented. Neither Germany, nor automatically accept for all purposes all calculations by the State in which the cases involving Germany or Japan, the second condition described in paragraph agreement procedure under Article 25. In the case of Japan and the United States additional foreign tax credit limitation must do so through a mutual agreement have to prove to the Japanese or the United States competent authority, as the permanent establishment profits which resulted from the conflicting domestic methods has been left unrelieved after applying mechanisms under their respective foreign tax credit limitation created by other transactions.

74. With reference to paragraphs 6 and 7, *New Zealand* notes that it does not agree with the approach put forward in the *Attribution of Profits to Permanent Establishments*.

Reservations on the Article

75. *Australia, Chile* and *New Zealand* reserve the right to include a provision to apply in relation to the taxation of profits from any form of insurance.

76. *Australia* and *New Zealand* reserve the right to include a provision business profits which a resident of the other Contracting State is beneficially derived by a trustee of a trust estate (other than certain unit trusts that are treated as permanent establishments for New Zealand tax purposes) from the carrying on of a business in Australia or New Zealand permanent establishment.

77. *Korea* and *Portugal* reserve the right to tax persons performing independent personal services if they are present in their territory for a period or periods in any twelve month period, even if they do not have a permanent establishment for the purpose of performing such services or activities.

78. *Chile, Italy* and *Portugal* reserve the right to tax persons performing independent personal services under a separate article which corresponds to Article 14 as it stood before its elimination.

83. *Mexico reserves the right to tax in the State where the permanent establishment is situated business profits derived from the sale of goods or merchandise carried out directly by its home State, provided that those goods and merchandise are of the same or similar kind to those sold by the permanent establishment. The Government of Mexico will apply this rule only on a general —force of attraction— principle; thus, the rule will not apply when the sale has been carried out for reasons other than obtaining a benefit under the Convention.*

22. Replace paragraph 21 of the Commentary on Article 8 by the following:

21. Where ships or aircraft are operated in international traffic, the application to the profits arising from such operation will not be affected by the fact that they are operated by a permanent establishment which is not the place of effective management of the enterprise ; ***thus, even if such profits could be attributed to the permanent establishment only be taxable in the State in which the place of effective management of the enterprise is situated (a result that is confirmed by paragraph 4 of Article 8)*** (for example, ships or aircraft put into service by the permanent establishment on the balance sheet of the permanent establishment).

23. Replace paragraph 38 of the Commentary on Article 8 by the following:

38. *Australia reserves the right to tax profits from the carriage of passengers or cargo on board a ship or aircraft for discharge in Australia. Australia also reserves the right to tax profits from other coastal and continental shelf activities.*

24. Add the following new paragraph 43 to the Commentary on Article 8:

43. ***Chile and Slovenia reserve the right not to extend the scope of the inland waterway transportation in bilateral conventions and to make no reference to paragraph 3 of Articles 13, 15 and 22.***

Artigo 9 °

25. Delete the following paragraph 14 of the Commentary on Article 9:

14. *Germany does not agree with the use of the term —arm's length above. profits in paragraph 2*

26. Add the following new paragraph 19 to the Commentary on Article 9:

19. ***Slovenia reserves the right to specify in paragraph 2 that a primary adjustment is justified only if it is consistent with the primary adjustment is justified.***

Artigo 10

27. Add the following new paragraph 13.2 immediately after paragraph 13.1 of the Commentary on Article 10:

Notwithstanding the provisions of paragraph 2, dividends referred to in paragraph 1 are taxable only in the Contracting State of which the recipient has been a resident if the condition is that that State or a political subdivision or local authority

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28. Replace paragraph 32 of the Commentary on Article 10 by the following:
32. It has been suggested that the paragraph could give rise to abuses through shares to permanent establishments set up solely for that purpose in countries offering preferential treatment to dividend income. Apart from the fact that such abuse might trigger the application of domestic anti-abuse rules, it must be recognised that a location can only constitute a permanent establishment if a business is carried also *as explained below*, that the requirement that a shareholding be such a location requires that the shareholding be genuinely connected to that location. *It requires not merely recording the shareholding in the books of the permanent establishment for*
- 32.1 A holding in respect of which dividends are paid will be a permanent establishment if it is allocated to that permanent establishment and if the holding is developed in accordance with the principles set out in the committee's report entitled Attribution of Profits to Permanent Establishments¹ (see in particular paragraphs 72-97 of Part I of the report). In the context of that report, a holding means the equivalent of ownership for income tax purposes, with the attendant benefits and burdens (eg the right to the dividends, the ownership of the holding and the potential exposure to gains or losses from*

depreciation of the

~~holding). In the case of the permanent establishment of an enterprise activities, the determination of whether a holding is effectively connected with the permanent establishment shall be made by giving due regard to the guidance set forth in Part IV of the Report with respect to whether the income on or gain from that holding is determining the permanent establishment's yield on the assets it has invested in (see in particular paragraphs 165-170 of Part IV). That guidance being, authorities should consider applying a flexible and pragmatic approach to account an enterprise's reasonable and consistent application of the purposes of identifying the specific assets that are effectively connected with the permanent establishment.~~

29. Replace paragraph 59 of the Commentary on Article 10 by the following:

59. Comments above relating to dividends paid to individuals are general dividends paid to companies which hold less than 25 per cent of the capital of paying the dividends. Moreover, the Committee on Fiscal Affairs has not covered in the Commentary the special problem of dividends paid to collective investment in (investment companies or investment funds) *The treatment of dividends paid to collectibles raises particular issues which are addressed in paragraph 69 of the Commentary on Article 10.*

30. Delete the following paragraph 69 of the Commentary on Article 10:

69. *New Zealand* reserves the right to tax, at a rate of 15 per cent, dividends paid by a company which is resident in New Zealand.

1. *Attribution of Profits to Permanent Establishments, OECD, Paris, 2010.*

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31. Delete the following paragraph 73 of the Commentary on Article 10:

73. *Italy* reserves its position concerning the percentage envisaged for (cent) and the holding (25 per cent) and the holding (25 per cento) a rate of tax of 5 per cent for a direct holding of m cento.

32. Add the following new paragraph 74 to the Commentary on Article 10:

74. In view of its particular taxation system, Chile retains its freedom to the provisions in the Convention relating to the rate and form of distribution of profits by

33. Delete the following paragraph 76 of the Commentary on Article 10:

76. Spain reserves its position on the rate of tax of 5 per cent and the minimum determination of the holding.

34. Replace paragraph 81 of the Commentary on Article 10 by the following:

81. Canada, and Germany and Spain reserve the right to amplify the definition of dividends in paragraph 81.2 to cover certain interest payments which are treated as dividends under their domestic law.

35. Replace paragraph 81.2 of the Commentary on Article 10 by the following:

81.2 Chile and Luxembourg reserves the right to expand the definition of dividends in paragraph 81.2 to cover certain payments which are treated as distributions under its *their* domestic law.

36. Delete paragraph 82 and the preceding heading of the Commentary on Article 10

Paragraph 4

82. Italy reserves the right to subject dividends to the taxes imposed by its law, whenever the recipient thereof has a permanent establishment in Italy, even if the holding of dividends are paid is not effectively connected with such permanent establishment.

Artigo 11

37. Replace paragraph 7.4 of the Commentary on Article 11 by the following:

7.4 Some States refrain from levying tax on income derived by other States from *their wholly-owned entities (eg a central bank established as a separate entity)* that has to the extent that such income is derived from activities of a governmental nature. ~~Some States have an exemption under their interpretation of the sovereign immunity principle (see paragraph 6.3 of the Commentary on Article 1); others may do so in accordance with their domestic law.~~ In their bilateral conventions, many States wish to extend the scope of these exemptions with respect to interest **or to grant such an exemption if not otherwise be available. States wishing to do so may include the following category of interest in a paragraph providing for exemption from taxation in the State of source:**

a) is that State or the central bank, a political subdivision or local authority thereof;

38. Replace paragraph 25 of the Commentary on Article 11 by the following:

25. It has been suggested that the paragraph could give rise to abuses through loans to permanent establishments set up solely for that purpose in countries to obtain preferential treatment to interest income. Apart from the fact that such abuses trigger the application of domestic anti-abuse rules, it must be recognised that a location can only constitute a permanent establishment if a business is carried on there also *as explained below*, that the requirement that a debt-claim be ~~effectively connected to the business~~ *effectively connected to the business* ~~requires more~~ *requires more* ~~recording the debt-claims in the books of the permanent establishment for purposes~~.

25.1 A debt-claim in respect of which interest is paid will be effectively connected with the permanent establishment, and will therefore form part of its business assets, if the debt-claim is allocated to that permanent establishment developed in the Committee's report entitled Attribution of Profits to Permanent Establishments¹ (see in particular paragraphs 72-97 of Part I of the application of the principle of attribution of profits to permanent establishments). In the context of that principle, a debt-claim means the equivalent of ownership for income tax purposes, with the attendant benefits and burdens (eg the right to participate in the ownership of the debt-claim and the potential exposure to gain or loss or depreciation of the debt-claim).

25.2 In the case of the permanent establishment of an enterprise, the determination of whether a debt-claim is effectively connected with the permanent establishment shall be made by giving due regard to the guidance contained in the Committee's Report with respect to whether the income on or gain from the debt-claim is taken into account in determining the permanent establishment's yield or the income attributed to it (see in particular paragraphs 165-170 of the Committee's Report). In general, tax authorities should consider applying a flexible approach which would take into account an enterprise's need for assistance for purposes of identifying the specific assets that are effectively connected with the permanent establishment.

39. Replace paragraph 38 of the Commentary on Article 11 by the following:

38. *Chile, Hungary, Mexico, Portugal, the Slovak Republic and Turkey* ~~on the basis of their positions~~ *on the basis of their positions* paragraph 2.

40. Replace paragraph 43 of the Commentary on Article 11 by the following:

43. *Canada, Chile and Norway reserve the right to participate in the distribution of profits.*
claims carrying

41. Delete paragraph 45 and the preceding heading of the Commentary on Article

1. *Attribution of Profits to Permanent Establishments, OECD, Paris, 2010.*

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Paragraph 4

45. *Italy reserves the right to subject interest to the taxes imposed by its recipient where the permanent establishment in Italy, even if the indebted party is not effectively connected with such permanent establishment.*

Artigo 12

42. Add the following new paragraphs 9.1 to 9.3 immediately after paragraph 9 on Article 12:

9.1 *Satellite operators and their customers (including broadcasting and enterprises) frequently enter into —transponder leasing agreements under which the satellite customer to utilise the capacity of a satellite transponder in a particular area. Payments made by customers under typical agreements for the use of the transponder transmitting capacity and will not be royalties under the definition of paragraph 2: these payments are made for the use of, or right to use, property, or for information, that is, for the use of the transponder, for instance, as payments for information or for the use of the transponder process since the satellite technology is not a transponder. As regards treaties that include the leasing of industrial, (BOS) equipment in the definition of royalties, the characterisation of the payments will depend on the relevant contractual arrangements. Whilst the reference to the lease of a transponder, in most cases the customer does not possess the transponder but simply its transmission capacity: the satellite operator has no access to the transponder that has been assigned to it by the customer. The payments made by the customers would therefore be in the nature of payments for the use of the transponder, rather than payments for the use of the transponder itself.*

~~franchise agreements, and other arrangements~~
~~franchise agreements, and other arrangements~~ may operate it and either
~~offer its offer~~ its data transmission capacity to third parties. In such a
~~case the payment~~ the satellite operator to the satellite owner could well be
~~considered of industrial, commercial or scientific equipment. Similar~~
~~payments could apply to~~ or purchase the capacity of cables for the
~~transmission of electrical~~ (eg through a contract granting an indefeasible
~~right of use of~~) or pipelines (eg for the transportation of gas or oil).

9.2 Also, payments made by a telecommunications network operator to
operator ~~under a typical~~ —roaming agreement (see paragraph 9.1 of the
~~Commentary will not~~ constitute royalties under the definition of paragraph 2
~~since these payments~~ consideration for the use of, or right to use, property, or
~~for information~~ the definition (they cannot be viewed, for instance, as
~~payments for the use of~~ since no secret technology is used or
~~rights for the use of~~ even in the case of treaties that include the
~~leasing of industrial~~ (ICS) equipment in the definition of royalties
~~since the operator~~ that roaming agreement is not paying for the use, or the
~~right to use~~, to which it does not have physical access, but rather for
the telecommunications services provided by the foreign network operator.

9.3 Payments for the use of, or the right to use, some or all of part of
spectrum ~~in a radio frequency~~ so-called —spectrum license that allows the
holder to transmit

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media content over designated frequency ranges of the electromagnetic
spectrum ~~payments~~ for the use of, or the right to use, property, or for
~~information~~ the definition of royalties in paragraph 2. This conclusion holds
~~true even in the~~ that include the leasing of industrial, commercial or
~~scientific (ICS) equipment~~ since the payment is not for the use, or the
~~right to use~~ any

43. Replace paragraph 21 of the Commentary on Article 12 by the following:

21. It has been suggested that the paragraph could give rise to abuses through
rights or property to permanent establishments set up solely for that purpose in
offer preferential treatment to royalty income. Apart from the fact that such a
might trigger the application of domestic anti-abuse rules, it must be recognised
location can only constitute a permanent establishment if a business is carried

location can only constitute a permanent establishment if a business is carried also *as explained below*, that the requirement that a right or property be to ~~effectively connected~~ requires that the debt-claim be genuinely connected to that ~~requirement~~ *merely recording the right or property in the books of the permanent establishment*.

21.1 A right or property in respect of which royalties are paid will be ~~effectively connected~~ establishment, and will therefore form part of its ~~business~~ *ownership of that right or property is allocated to that permanent establishment* under the principles developed in the Committee's report entitled *Attribution of Profits* 1 (see in particular paragraphs 72-97 of Part I purposes of the application of ~~of the paragraph~~ for Article 7. In the context of the ~~ownership~~ *ownership of a right or property means the equivalent of ownership for income tax purposes by a separate enterprise, with the attendant benefits and the royalties attributable to the ownership of the right or property, the right to the potential exposure to gains or losses from the depreciation of that right or property).*

21.2 In the case of the permanent establishment of an enterprise ~~activities, the determination of whether a right or property is effectively connected with the establishment shall be made by giving due regard to the~~ *Guidance Committee's Report with respect to whether the income on or gain from that right or property is taken into account in determining the permanent establishment's profits* ~~attributed to it (see in particular paragraphs 72-97 of Part I)~~ *being general in nature, tax authorities should consider applying a flexible and which would take into account an enterprise's reputation of the assistance for purposes of identifying the specific assets that are effectively the permanent establishment.*

44. Add the following new paragraphs 32 and 32.1 to the Commentary on Article

32. Concerning paragraph 9.1, Germany reserves its position on ~~circumstances under which the acquisition of the right of disposal of the right of disposal or the capacity of technical installations, lines or cables for the~~ *distribution of radio and*

1. *Attribution of Profits to Permanent Establishments, OECD, Paris, 2010.*

television programs) could be regarded as payments made for the leasing of industrial or scientific equipment.

32.1 *Greece reserves the right to include the payments referred to in 9.3 in the definition of royalties.*

45. Replace paragraph 36 of the Commentary on Article 12 by the following:

36. *Australia, **Chile** Japan, Korea, Mexico, New Zealand, Poland, Republic of Slovenia, Spain and Turkey reserve the right to tax royalties at source.*

46. Replace paragraph 40 of the Commentary on Article 12 by the following:

40. *Canada, **Chile**, the Czech Republic, Hungary, Korea and the Slovak Republic reserve the right to tax royalties for the use of, or the right to use, industrial, commercial or scientific equipment* to paragraph 2.

47. Replace paragraph 44 of the Commentary on Article 12 by the following:

44. *Portugal and Spain reserve s the right to tax at source as royalties technical assistance arising from the use of, or right to use, rights or information referred to in paragraph 2 of the Article.*

48. Delete the following paragraph 47 and preceding heading of the Commentary

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47. *Italy reserves the right to subject royalties and profits from the property arising out of royalties to the taxes imposed by its law whenever the taxpayer has a permanent establishment in Italy, even if the rights or property in respect of which the royalties are paid is not effectively connected with such permanent establishment*

49. Add the heading — *Other reservations* ¶ immediately before paragraph 48 of the Commentary on Article 12.

50. Replace paragraph 48 of the Commentary on Article 12 by the following:

48. *Australia, Belgium, Canada , **Chile**, the Czech Republic, France, Germany, India, Israel, Japan, Korea, Mexico, New Zealand, Norway, Poland, Republic of Slovenia, Spain and the Slovak Republic reserve the right, in order to fill what they consider as a gap in the provision defining the source of royalties by analogy with the paragraph 5 of Article 11, which deals with the same problem in the case of if*

Artigo 13

51. Add the following new paragraphs 27.1 and 27.2 to the Commentary on Article 13

27.1 *For the purposes of the paragraph, property will form part of the business property of a permanent establishment if the —economic ownership of the property is exercised by the permanent establishment under the principles developed in the Commentary of paragraph 1 (see in*

1.	<i>Attribution of Profits to Permanent Establishments, OECD, Paris, 2010.</i>	61	paragraphs 72 - 97 of
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Part I of the report) for the purposes of the application of paragraph 2 of Article 7 of that paragraph, the —economic ownership of property means the relationship for income tax purposes by a separate enterprise, with the intention (despite the fact that no income attributable to the ownership of that property is liable for taxation and the potential exposure to gains or losses from the depreciation of that property). The mere fact that the property has been recorded for purposes, on a balance sheet prepared for the permanent establishment, is insufficient to conclude that it is effectively connected with the establishment.

27.2 In the case of the permanent establishment of an enterprise activities, ~~the yield from the income of~~ whether property will form part of the business property of that enterprise shall be made by giving due regard to the guidance contained in the Report with respect to whether the income on or gain from the property is attributable to it in determining the permanent establishment's yield from the business. ~~the income on or gain from the property is attributable to it~~ (see in particular paragraphs 165-170 of Part IV). Being general in nature, tax authorities should consider applying a flexible approach which would take into account an enterprise's application of its assets for purposes of identifying the specific assets that form part of the permanent establishment.

52. Add the following new paragraph 33 to the Commentary on Article 13:

33. Spain reserves its right to tax gains from the alienation of shares the ownership of which is held by or rights entitles, directly or indirectly, to the enjoyment of property situated in Spain.

53. Delete paragraph 37 of the Commentary on Article 13:

37. Italy reserves the right to subject capital gains from Italian sources to by its law where the alienator has a permanent establishment in Italy, even assets alienated did not form part of the business property employed in such establishment.

54. Replace paragraph 39 of the Commentary on Article 13 by the following:

39. **Chile and Sweden** wants to reserve the right to tax gains from the alienation of shares in Swedish companies.

55. Replace paragraph 42 of the Commentary on Article 13 by the following:

42. *Japan* wishes to retain the right to tax gains from the alienation of corporate rights which are part of a substantial participation in a Japanese company **reserves the gains from the alienation of a Japanese financial institution's shares if they were previously acquired by the alienator from the Government of Japan or if they were previously acquired by the alienator from the financial institution due to its**

56. Replace paragraph 45 of the Commentary on Article 13 by the following:

45. *Korea and Spain* reserve s the right to tax gains from the alienation of shares or other rights forming part of a substantial participation in a company which is a resident of a Contracting State.

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57. Replace paragraph 51 of the Commentary on Article 13 by the following:

51. *Belgium, Luxembourg , and the Netherlands and Switzerland* include paragraph 41 in their conventions.

Artigo 15

58. Replace paragraph 1 of the Commentary on Article 15 by the following:

1. Paragraph 1 establishes the general rule as to the taxation of income from employment (other than pensions), namely, that such income is taxable in the State where it is actually exercised. **The issue of whether or not services are provided in the employment may sometimes give rise to difficulties which are discussed in paragraph 61 of the Commentary.** Paragraph 61 of the Commentary states that if the activities for which the employment income is paid are exercised in the place where the employee is physically present, the activities for which the employment income is paid. One consequence of this is that a resident of a Contracting State who derived remuneration, in respect of an employment, from sources in the other State could not be taxed in that other State in respect of the income merely because the results of this work were exploited in that other State.

59. Replace paragraph 7 of the Commentary on Article 15 by the following:

7. Under the third condition, if the employer has a permanent establishment in the State in which the employment is exercised, the exemption is given on condition that the remuneration is not borne by that permanent establishment. The phrase —borne by— must be interpreted in the light of the underlying purpose of subparagraph c) of the Article, which is to ensure that the exemption provided for in paragraph 2 does not apply to remuneration that could be deducted, having regard to the principles of Article 7 and the nature of the remuneration in computing the profits of a permanent establishment situated in the State in which the employment is exercised.

7.1 In this regard, it must be noted that the fact that the employer has, in the State in which the employment is exercised, a permanent establishment to which the remuneration is allocated is not necessarily conclusive since the proper test is whether an otherwise available deduction *with respect to* that remuneration *should be taken into account in computing the profits attributable to the permanent establishment* would be available. That test would be met, for instance, even if no amount was deducted as a result of the permanent establishment being exempt from tax in the State in which the employment is exercised or of the employer simply deciding not to claim a deduction to which he was entitled. It would also be met where the remuneration is not deductible merely because of the nature of the remuneration (where the State takes the view that the issuing of shares pursuant to an employment does not give rise to a deduction) rather than because it should not be allocated to the permanent establishment.

7.2 For the purpose of determining the profits attributable to a permanent establishment in the State in which the employment is exercised, the remuneration paid to an employee acting in the State in which the employment is exercised for the permanent establishment of the enterprise situated in that other State may, given the circumstances, either give rise to a direct deduction or give rise to the deduction of a notional charge. In the latter case, since the notional charge required by the legal fiction of the independent enterprise that is applicable under paragraph 2 of Article 7 is merely

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a mechanism provided for by that paragraph for the sole purpose of determining the profits attributable to the permanent establishment, this fiction does not affect the determination of the remuneration is borne by the permanent establishment.

60. Replace existing paragraph 8 of the Commentary on Article 15 by the following

8. Paragraph 2 has given rise to numerous cases of abuse through adopti known as —international hiring-out of labour. In this system, a local employ foreign labour for one or more periods of less than 183 days recruits through established abroad who purports to be the employer and hires the labour out to a worker thus fulfils *prima facie* the three conditions laid down by paragraph 2 and employment taxation in the country where he is temporarily working. To situations of this type, the term —employer should be interpreted in the context. In this respect, it should be noted that the term —employer is not defined in the understood that the employer is the person having rights on the work produce relative responsibility and risks. In cases of international hiring-out of labour, a large extent exercised by the user. In this context, substance should prevail (case should be examined to see whether the functions of employer were exerc intermediary or by the user. It is therefore up to the Contracting States to agree which the intermediary does not fulfil the conditions required for him to be cc employer within the meaning of paragraph 2. In settling this question, the con may refer not only to the above-mentioned indications but to a number of circ them to establish that the real employer is the user of the labour (and not the f

- the hirer does not bear the responsibility or risk for the results produced trabalho;
- the authority to instruct the worker lies with the user;
- the work is performed at a place which is under the control and respons
- the remuneration to the hirer is calculated on the basis of the time utilis ways a connection between this remuneration and wages received by th
- tools and materials are essentially put at the employee's disposal by the
- the number and qualifications of the employees are not solely determin

8. *There is a direct relationship between the principles underlying the paragraph 2 of Article 7. Article 7 is based on the principle that an Enterprise of a State should not be subjected to tax in the other State unless its business there has reached a level sufficient to constitute a permanent establishment. Paragraph 2 of Article 15 extends that principle to the situation of the employee where the activities of these employees are carried on for the other State for a short period. Subparagraphs b) and c) make it clear that the exception is apply where the employment services are rendered to an enterprise the profits of tax in a State either because it is carried on by a resident in that State or because it has a permanent establishment therein to which the services are attributable.*

8.1 *It may be difficult, in certain cases, to determine whether the State by an individual resident of another State, and provided to an enterprise of the first State establishment in that State), constitute employment services, or which is rendered by a separate enterprise, to which Article 7 applies, whether the exception applies. While the Commentary previously dealt with*

cases where arrangements were structured for the main purpose of obtaining the benefits of paragraph 2 of Article 15, it was found that similar issues could arise in and do not involve tax-motivated transactions and the Commission may not be able to provide a comprehensive discussion of these questions.

8.2 In some States, a formal contractual relationship would not be required. In some States, there is some evidence of manipulation and these States may consider that employment services are only rendered for a formal employment relationship.

8.3 If States where this is the case are concerned that such approach granting the benefits of the exception provided for in paragraph 2 in (originally intended for cases), they are free to adopt the following lines:

Paragraph 2 of this Article shall not apply to remuneration derived by a resident of a State in respect of an employment exercised in the other State on behalf of, an employer who is not a resident of that other State if:

a) the recipient renders services in the course of that employment to a person employed by that person, directly or indirectly, supervises, directs or controls those services are performed; and

b) those services constitute an integral part of the business activities carried on by that person.

8.4 In many States, however, various legislative or jurisprudential rules and criteria have been developed for the purpose of distinguishing between an individual to an enterprise should be considered to be employed in an employment relationship (contract of service) from cases where such services are rendered under a contract for the provision of services between enterprises (contract for services). That distinction keeps its importance in applying Article 15, in particular those of subparagraphs 2 b) and c). Subject to the provisions of paragraph 8.11 and unless the context of a particular case requires, the matter of domestic law of the State of source to determine whether an individual in that State are provided in an employment relationship and to govern how that State applies the convention.

8.5 In some cases, services rendered by an individual to an enterprise be employment services for purposes of domestic tax law even though these services are rendered under a formal contract for services between, on the one hand, the enterprise and, on the other hand, either the individual himself or the enterprise by which the individual is formally employed and with which the individual has

~~corporation or other entity, the individual has~~
formal contract for

~~8.6~~ *In such cases, the relevant domestic law may ignore the way in which the services are rendered. It may prefer to focus primarily on the nature of the services by the individual and their integration into the business enterprise that requires the services to conclude that there is an employment relationship and that enterprise.*

8.7 Since the concept of employment to which Article 15 refers is to be according to domestic law of the State that applies the convention (subject to the limit

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~~described in paragraph 8.11 and unless the context of a particular~~
~~otherwise, it follows that a State which considers such services to be~~
~~employment services will~~ *It will, therefore, logically conclude that the*
~~the enterprise to which~~ *individual is in an employment relationship with the*
~~individual his employer for purposes of subparagraph 2 b) and c). That~~
~~with this object and purpose of paragraph 2 of Article 15 since, in that case,~~
~~the employment is said to be rendered to a resident of the State where the~~
~~services are performed.~~

8.8 As mentioned in paragraph 8.2, even where the domestic law of the State does not offer the possibility of questioning a formal and therefore relationship allow the State to consider that services rendered to a local enterprise by formally employed by a non-resident are rendered in a relationship (contract of service) with that local enterprise, it is possible for that State to deny the exception of paragraph 2 in abusive cases.

8.9 The various approaches that are available to States that want to cases are discussed in this section Improper use of the Convention in the ~~Commentary~~ explained in paragraph 9.4 of that Commentary, it is agreed that States do not the benefits of a tax convention where arrangements that the State has entered into. As noted in paragraphs 9.5 of that ~~Commentary~~ should not be lightly assumed that this is the case (see also ~~paragraph 2.2~~ of that

8.10 The approach described in the previous paragraphs therefore the activities in the State in which the application of paragraph 2 in abusive cases, and in that State's domestic law concept of employment, for an enterprise by an individual who is

~~for employment relationship (resident of service) with that local enterprise. The relief of double taxation will be provided in the State of residence if that State, under its own domestic law, considers that there is a relationship between the individual and the enterprise to which the services are provided as long as the State of residence acknowledges that the concept of employment in that State of source or the existence of arrangements that constitute employment allows that State to tax the employment income of an individual with the Convention, it must grant relief for double taxation obligations incorporated in Articles 23A and 23B (see paragraphs 32.1 to 32.10 of the Commentary on these articles). The mutual agreement procedure provided in Article 25 will be available to address cases where the State of residence does not have the same approach applied the approach described above and, therefore, the other State has taxed the relevant income in accordance with the Convention.~~

8.11 The conclusion that, under domestic law, a formal contractual disregard of relationships ~~should be~~ arrived at on the basis of objective criteria. For that purpose, State services are deemed, under its domestic law, to constitute employment when the relevant facts and circumstances, it clearly appears that the individual is engaged under a contract for the provision of services concluded with the enterprise. The relief provided under paragraph 2 of Article 15 must be given if States were allowed to deem services to constitute employment is clearly in an employment relationship or to deny the quality of employment carried on by a non-resident where it is clear that that enterprise provides its services to an enterprise carried on by a resident. Conversely, where

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services rendered by an individual may properly be regarded by a State as employment relationship rather than as under a contract for services concluded between two enterprises. States should logically also consider that the individual is an employee of the enterprise that constitutes that individual's formal employer for the purposes of determining whether that enterprise is established in the place where the individual performs his activities.

8.12 It will not always be clear, however, whether services rendered by properly an individual by a State as rendered in an employment relationship rather than as a contract for services concluded between two enterprises. Any disagreement between this is the case should be solved having regard to the following principles

appropriate, the mutual agreement

~~provided by the nature of the services rendered by the individual will be an important factor since employee provides services which are an integral part of the carried on by his employer. It will therefore be important to determine the services rendered by the individual constitute an integral part of the enterprise of which these services are provided. For that purpose, a key consideration will be bears the responsibility or risk for the results produced by the individual; however, this analysis will only be relevant if the services of an individual relate to an enterprise. Where, for example, an individual provides services to or to an enterprise to which business is outsourced, the services are not rendered to enterprises that will obtain the products or services in question.~~

8.14 Where a comparison of the nature of the services rendered by the business individual with that on by his formal employer and by the enterprise to which the provided points to an employment relationship that is different from the formal relationship, the following additional factors may be relevant in determining whether:

- ☐ who has the authority to instruct the individual regarding the work to be performed;
- ☐ who controls and has responsibility for the place at which the work is performed;
- ☐ the remuneration of the individual is directly charged by the enterprise in which the services are provided (see paragraph 8.15 below);
- ☐ who puts the tools and materials necessary for the work at the individual's disposal;
- ☐ who determines the number and qualifications of the individuals performing the work;
- ☐ who has the right to select the individual who will perform the work and to terminate the contract entered into with that individual for that purpose;
- ☐ who has the right to impose disciplinary sanctions related to the individual's work;
- ☐ who determines the holidays and work schedule of that individual.

8.15 Where an individual who is formally an employee of one enterprise provides services to another enterprise, the financial arrangements made between the two enterprises, while highly not necessarily conclusive, for the purposes of determining whether the individual is directly charged by the formal employer to the enterprise to are provided. For instance, if the fees charged by the enterprise that

formally employs the individual represent the remuneration, employment benefits and other of that individual for the services that he provided to the enterprise, or with a profit element that is computed as a percentage of the benefits and other employment costs, this would be indicative that the individual is directly charged by the formal employer to which the services are provided. That should not be considered to be the case where the remuneration for the services bears no relationship to the remuneration of that individual if it is only one of many factors taken into account in the fee charged for the services (eg where a consulting firm charges a client hourly fee for the time spent by one of its employee to perform a particular task) and that of the various costs of the enterprise), provided that this is in conformity with principle if the two enterprises are associated. It is important to note the question of whether the remuneration of the individual is directly attributable to the enterprise to which the services are provided is only one of the factors that are relevant in determining whether services are rendered by the individual by a State as rendered in an employment relationship that is concluded between two enterprises.

8.16 Example 1: Aco, a company resident of State A, concludes a contract with Bco, resident of State B, for the provision of training services. Aco is specialised in the use of various computer software and Bco wishes to train its personnel in the use of that software. X, an employee of Aco who is a resident of State A, is sent to State B to provide training courses as part of the contract.

8.17 In that case, State B could not argue that X is in an employment relationship with Bco as employer of X for purposes of the convention because X is an employee of Aco whose own services, when viewed in light of the facts of 8.16 and 8.14, form an integral part of the business activities of Aco. The services Bco are rendered on behalf of Aco under the contract concluded between them. It is provided that X is not present in State B for more than 183 days during the period and that Aco does not have in State B a permanent establishment which bears the cost of X's remuneration, the exception of paragraph 2 will apply to X's remuneration.

8.18 Example 2: Cco, a company resident of State C, is the parent company of a group of companies that includes Dco, a company resident of State D. Cco has developed the strategy for the products of the group. In order to ensure that the strategy is followed by Dco, which sells the group's products, Cco sends X, one of its employees, to work in Dco's headquarters in order to advise Dco with respect to its marketing and to ensure that Dco's department understands and complies with the worldwide marketing strategy.

8.19 In that case, Cco's business includes the management of the worldwide marketing group and X's own services are an integral part of that business. Even if X could have been easily hired by Dco to perform the advising the company with respect to its marketing, it is clear that such a service is not performed by a consultant, especially where specialised knowledge is required for a long time. Also, the function of X is not to perform the services as to the

~~group company, the hiring strategy belongs to the
the intent of exception of paragraph 2 of Article 15 should therefore apply
conditions for the reception are satisfied.~~

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~~8.20 Example 3: A multinational owns and operates hotels worldwide
through its subsidiaries. One of these subsidiaries, is a resident of State E where it
owns and operates a hotel. Eco, another subsidiary of the group, is a resident of State F where there is a shortage of
employees with the required skills. For that reason, X is sent to work for 5 months at the
reception desk of the hotel in State F. Eco pays the travel expenses of X, who remains formally employed
by Eco and pays a fee based on X's remuneration, social
contributions and other employment benefits for the relevant period.~~

~~8.21 In that case, working at the reception desk of the hotel in State F,
light of the facts in paragraphs 8.13 and 8.14, may be viewed as forming
an integral part of operating that hotel rather than of Eco's business. Under
the approach above, if, under the domestic law of State F, the services of X are
considered to be those of Eco in an employment relationship, State F could then
logically consider that X and the exception of paragraph 2 of Article 15
would not apply.~~

~~8.22 Example 4: Gco is a company resident of State G. It carries on the
business of fulfilling needs for highly specialised personnel. Hco is a
company resident of State H, which provides engineering services on building sites. In order to
complete a project, Hco needs an engineer for a period of 5 months. It
contacts Gco for this purpose. Gco, for this purpose, hires X, an engineer resident of State X, and hires him
under a separate contract between Gco and Hco, for the services of X to be provided by Hco during that period. Under these contracts, Gco will
pay X's remuneration, social contributions, travel expenses and other employment
benefits.~~

~~8.23 In that case, X provides engineering services while Gco is in the
business of fulfilling needs. By their nature the services rendered by X are
an integral part of the activities of his formal employer. These services are,
however, an integral part of Hco, an engineering firm. In light of the
facts in paragraph 8.14, it should therefore be considered that, under the approach
described in paragraph 2 of Article 15 would not apply with respect to the
services that will be rendered in that State.~~

8.24 *Example 5: Ico is a company resident of State I specialised in services providing engineering of engineers on a full time basis. Jco, a smaller company of State J, needs the temporary services of an engineer to complete a contract in State J. Ico agrees with Jco that one of Ico's engineers, who is not assigned to any contract concluded by Ico, will work for Jco for a period of one month under the direct supervision and control of one of Jco's senior engineers. Jco will pay Ico an amount equal to the remuneration, social and other employment benefits of that engineer for the relevant period, together with mission. Jco also agrees to indemnify Ico for any eventual claims related to the hiring that period of time.*

8.25 *In that case, even if Ico is in the business of providing engineering that the service is performed by the engineer on the construction site in State J on behalf of Jco rather than Ico. The direct supervision and control exercised by Jco over the engineer, the fact that Jco takes over the responsibility for that work and that of the remuneration of the engineer for the relevant period support the conclusion that the engineer is in an employment relationship with Jco. Under the*

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approach described above, State J could therefore consider that the exception of paragraph apply with respect to the remuneration for the services of the engineer that State.

8.26 *Example 6: Kco, a company resident of State K, and Lco, a company resident of State L, are part of the same multinational group of companies. A large part of the group's activities are performed along function lines, which requires employees of different companies of the group to work under the supervision of managers who are based in different countries. X is a resident of State K employed by a manager in charge of supervising human resources functions within the group. Since X is employed by Kco, Kco acts as a cost centre for the group; periodically, these costs are charged out to other companies of the group on the basis of a formula that takes account of various factors such as the number of employees of each company. X is required to travel frequently to other countries where the group have their offices. During the last year, X spent a significant amount of time in State B in order to deal with human resources issues at Lco.*

8.27 *In that case, the work performed by X is part of the activities of the group and not of Kco.*

~~management group-engage managers, and other activities such as corporate, information management and legal support activities in a large group of companies. The work that X performs is of an integral part of the business of Kco. The exception of paragraph 2 of Article 15 should therefore apply to X for her work in State L provided that the exceptions are satisfied.~~

8.28 Where, in accordance with the above principles and examples, a State properly that the services rendered on its territory by an individual have been rendered under a relationship rather than under a contract for services, it should be a risk that the enterprises would be required to withhold tax on the remuneration of that individual even though should taxation be avoided (see paragraph 8.10 above). This compliance difficulty may be tax administrations making sure that their domestic employment rules are clear and well understood by employers and are easily. Also, the problem can be alleviated if the State of residence allows enterprises to amount of tax to be withheld to take account of any relief for tax likely be available to the employee.

61. Replace paragraph 13 of the Commentary on Article 15 by the following:

13. Switzerland is of the opinion that the comments in paragraph 8 above to situations of only apply to hiring-out of labour in case of abusive arrangements. ~~Consider~~ **Consider** that paragraph 8.13 should not be interpreted as being sufficient in itself to question relationship. If, with respect to paragraph 8.13, the services rendered by an enterprise constitute an integral part of the business of the enterprise to which they are provided, the situation should then be analysed in accordance with the provisions of paragraph 8.13.

62. Add the following new paragraph 14 to the Commentary on Article 15:

14. Slovenia reserves the right to add an article which addresses the situation of teachers, subject to various conditions and to make a modification to paragraph 1 of Article 15.

Artigo 17

63. Add the following new paragraph 15 to the Commentary on Article 17:

15. Concerning paragraphs 8 and 9, Germany, considering paragraph 1 of Article 12, takes the view that payments made as remuneration for live broadcasting of an event are income of the performing or appearing artist pursuant to paragraph 1 of Article 17. This income may be taxed in accordance with Article 17 in the case of payments made to any other third party in the context of the exploitation of the live broadcasting rights.

Artigo 21

64. Add new paragraphs 5.1 and 5.2 and replace paragraph 6 of the Commentary seguinte forma:

5.1 For the purposes of the paragraph, a right or property in respect of which income is derived from a permanent establishment if the right or property is allocated to that permanent establishment under the principles of the Committee's report entitled Attribution of Profits to Permanent Establishments¹ (see in particular paragraphs 72-97 of Part I of the application of paragraph 1 of Article 21). In the context of that paragraph, a right or property means the equivalent of ownership for income tax purposes, with the attendant benefits and burdens (eg the right to use the right or property, the right to any income derived from the right or property, and the potential exposure to gains or losses from the appreciation or depreciation of that right).

5.2 In the case of the permanent establishment of an enterprise, the determination of whether a right or property is effectively connected with the permanent establishment shall be made by giving due regard to the guidance contained in the Committee's report with respect to whether the income on or gain from the right or property is attributable to the permanent establishment of the enterprise. In applying this guidance, tax authorities should consider applying a flexible and consistent approach for purposes of identifying the specific assets that are effectively connected with the permanent establishment.

6. Some States which apply the exemption method (Article 23 A) may suspect that the treatment accorded in paragraph 2 may provide an inducement to a Contracting State to attach assets such as shares, bonds or patents, to a permanent establishment situated in the other Contracting State in order to obtain more favourable treatment there. To counteract such arrangements which they consider would be abusive, some States might take the view that the transaction is artificial and, for this reason, should not be taken into account.

1. *Attribution of Profits to Permanent Establishments, OECD, Paris, 2010.*

regard the assets as not effectively connected with the permanent establishment. States may strengthen their position by adding in paragraph 2 a condition paragraph shall not apply to cases where the arrangements were primarily made of taking advantage of this provision. *Also, the requirement that a right or property effectively connected with such a location requires more than merely recording the right or property in the books of the permanent establishment for accounting purposes.*

65. Replace paragraph 13 of the Commentary on Article 21 by the following:

13. *Australia, Canada, **Chile**, Mexico, New Zealand, Portugal and the Slovak Republic* reserve their position on this Article and would wish to maintain the right to tax from sources in their own country.

Artigo 22

66. Add the following new paragraphs 3.1 and 3.2 to the Commentary on Article

3.1 *For the purposes of paragraph 2, property will form part of the permanent establishment of the —economic ownership of the property is placed in the permanent establishment under the principles developed in the Introduction of paragraph 2 of the permanent establishments¹ (see in particular Part I of the report) for the purposes of the application of paragraph 2 of Article 7 of that paragraph, the —economic ownership of property means the ownership for income tax purposes by a separate enterprise, with the intention (or the right) to do any income attributable to the ownership of that property, taking into account the potential exposure to gains or losses from the operation of that property). The mere fact that the property has been recorded for purposes, on a balance sheet prepared for the permanent establishment, is insufficient to conclude that it is effectively connected with the permanent establishment.*

3.2 *In the case of the permanent establishment of an enterprise activities, the determination of whether property will form part of the business property of that enterprise shall be made by giving due regard to the guidance contained in the report with respect to whether the income on or gain from that property is attributable to the permanent establishment's yield in the manner of attributed to it (see in particular paragraphs 165-170 of the report). Being general in nature, tax authorities should consider applying a flexible approach which would take into account an enterprise's application of the guidance for purposes of identifying the assets that form part of the*

~~business property, immovables and form part of the~~
permanent establishment.

Articles 23 A and 23 B

67. Replace paragraph 38 of the Commentary on Articles 23 A and 23 B by the following:

38. Article 23 A contains the principle that the State of residence has to give effect to the exemption. It does not give detailed rules on how the exemption has to be implemented. The general principle of the Convention. Articles 6 to 22 also lay down rules attributable to the general principle of the Convention.

1. ***Attribution of Profits to Permanent Establishments, OECD, Paris, 2010.***

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tax in respect of the various types of income or capital without dealing, as a rule, with the determination of taxable income or capital, deductions, rate of tax, etc. (*cf.*, ~~how Article 23 A and 23 B~~ paragraph 14). Experience has shown that many problems may arise. Especially true with respect to Article 23 A. Some of them are dealt with in the following paragraphs.

~~On the other hand, a specific provision in the Convention on the domestic laws of the Contracting State as applicable to income derived from the other Contracting State is not applicable.~~
 laws but of course this would not help where the exemption method is not used.

~~Application of Article 23 A States which, after this problem should be established by the other Contracting State (paragraph 3 of Article 25).~~

Article 24

68. Replace paragraph 14 of the Commentary on Article 24 by the following:

14. Furthermore, paragraph 1 has been deliberately framed in a negative form so that the nationals of a Contracting State may not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of the other Contracting State are or may be subjected, this paragraph has the same mandatory character. Since the principal object of this clause is to forbid discrimination in one State against the nationals of the other, there is nothing to prevent the first State from granting foreign nationality, for special reasons of its own, or in order to comply with its obligations in a double taxation convention, such as, notably, the requirement that profits of a permanent establishment are to be taxed on the basis of separate accounts.

establishments are to be taxed on the basis of separate accounts ~~in accordance with Article 7,~~ which are not available to its own nationals. A paragraph 1 would not prohibit this.

69. Replace paragraph 34 of the Commentary on Article 24 by the following:

34. It appears necessary first to make it clear that the wording of the first paragraph 3 must be interpreted in the sense that it does not constitute discrimination resident persons differently, for practical reasons, from resident persons, as to result in more burdensome taxation for the former than for the latter. In the new provision which the provision concerned has been framed, it is the result alone which can be permissible to adapt the mode of taxation to the particular circumstances in which it is levied. *For example, paragraph 3 does not prevent the application of special methods of determining the profits that are attributable to a permanent establishment. The paragraph must be read in the context of the principle of paragraph 2 of Article 7, which provides that the profits attributable to a permanent establishment are those that a separate and independent enterprise engaged in the same or the same or similar conditions would have been expected to make. Administrative practices that seek to determine the profits that are attributable to a permanent establishment on the basis required by paragraph 2 of Article 7 cannot be applied. Paragraph 3, which is based on the same principle as paragraph 2, requires that the taxation of a permanent establishment be not less favourable than that levied on an enterprise carrying on similar activities.*

70. Replace subparagraphs 40 a) and c) of the Commentary on Article 24 by the following

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40. With regard to the basis of assessment of tax, the principle of equal treatment has the following implications:

a) Permanent establishments must be accorded the same right as resident enterprises to deduct the trading expenses that are, in general, authorised by the tax law to be deducted from taxable profits in addition to the right to attribute to the permanent establishment a proportion of the overheads of the head office of the enterprise. Deductions should be allowed without any restrictions other than those applicable to resident enterprises (*see also paragraphs 33 and 34 of the Commentary on Article 7*).
[...]

c) Permanent establishments should also have the option that is available in most countries of carrying forward or backward a loss brought in an accounting period within a certain period of time (eg 5 years). It is to specify that in the case of permanent establishments it is the loss or activities, as shown in the separate accounts for these activities, which such carry-forward.

71. Replace paragraph 58 of the Commentary on Article 24 by the following:

58. However, even if the profits of the whole enterprise to which the permanent establishment belongs are taken into account when applying either a progress a minimum rate, this should not conflict with the principle of the distinct and **independent** enterprise, according to which the profits of the permanent establishment must be determined under paragraph 2 of Article 7. The minimum amount of the tax where the permanent establishment is situated is, therefore, the amount which would be a distinct and separate **and independent** enterprise, without reference to the profits of the whole enterprise to which it belongs. The State where the permanent establishment is situated is therefore, justified in applying the progressive scale applicable to resident enterprises on the profits of the permanent establishment, leaving aside the profits of the whole enterprise where the latter are less than those of the permanent establishment. This State may limit the profits of the permanent establishment at a minimum rate, provided that the same also to resident enterprises, even if taking into account the profits of the whole enterprise to which it belongs would result in a lower amount of tax, or no tax at all.

72. Replace paragraph 62 of the Commentary on Article 24 by the following:

62. When permanent establishments receive dividends, interest, or royalties in virtue of paragraph 4 of Articles 10 and 11 and paragraph 3 of Article 12, respectively, under the provisions of Article 7 and consequently — subject to the observations in paragraph 53 above as regards dividends received on holdings of permanent establishments — falls to be included in the taxable profits of such permanent establishments (cf paragraph 62 of the Commentary on Article 7).

73. Replace paragraph 89 of the Commentary on Article 24 by the following:

89. **Chile and the United Kingdom** reserves its **their** position on the second sentence of

74. Replace paragraph 90 of the Commentary on Article 24 by the following:

90. **Chile and Switzerland** reserves the right not to insert paragraph 2 in its **their** conventions.

75. Add the following new heading and paragraph 90.1 to the Commentary on Article 24:

Paragraph 3

90.1 In view of its particular taxation system, Chile retains its freedom of action with respect to the Convention relating to the rate and form of distribution of profits.

76. Replace paragraph 92 of the Commentary on Article 24 by the following:

92. **Chile, Greece, Ireland, Luxembourg and the United Kingdom** reserve the application of the Article to the taxes covered by the Convention.

Artigo 25

77. Replace the first bullet of paragraph 9 of the Commentary on Article 25 as follows:

9. In practice, the procedure applies to cases — by far the most numerous — in which the measure in question leads to double taxation which it is the specific purpose of the Convention to avoid. Among the most common cases, mention must be made of the following: — the questions relating to attribution to a permanent establishment of a profit, and the questions relating to the allocation of executive and general administrative expenses incurred by the enterprise of Article 7 **questions relating to the attribution of profits to a permanent establishment of Article 7 ;** [...]

78. Replace paragraph 98 of the Commentary on Article 25 by the following:

98. **Chile, Greece, Italy, Mexico, Poland, Portugal, the Slovak Republic, Switzerland and Spain** reserve their positions on the second sentence of paragraph 2. These countries do not oppose the implementation of reliefs and refunds following a mutual agreement, provided that they remain linked to time-limits prescribed by their domestic laws.

79. Replace paragraph 14 of the Sample Mutual Agreement on Arbitration which is in Annex to the Commentary on Article 25 by the following:

14. Applicable Legal Principles

The arbitrators shall decide the issues submitted to arbitration in accordance with the provisions of the treaty and, subject to these provisions, of those of the domestic law of the Estados contratantes.

Issues of treaty interpretation will be decided by the arbitrators in the light of the *Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women* (1979) and the *Convention on the Rights of the Child* (1989). The arbitrators shall have regard to the Commentaries of the *OECD Model Tax Convention* as explained in paragraphs 28 to 36.1 of the Introduction to the *OECD Tax Convention*. Issues related to the application of the arm's length principle shall be decided having regard to the *OECD Transfer Pricing Guidelines for Multinational Enterprises*. The

arbitrators will also consider any other sources which

80. Replace paragraph 33 of the explanations on the Sample Mutual Agreement o appears in the Annex to the Commentary on Article 25 by the following:

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33. An examination of the issues on which competent authorities have ha reaching an agreement shows that these are typically matters of treaty interpre applying the arm's length principle underlying Article 9 and paragraph 2 of A Provided in paragraph 14 of the sample agreement, matters of treaty interpre decided by the arbitrators in the light of the principles of interpretation incorp 31 to 33 34 of the *Vienna Convention on the Law of Treaties* , having regard the *OECD Commentary of Convention* as periodically amended, as explained in paragraph 28 to 36 of the *Model Tax Convention* . Issues related to the application of the should similarly be decided in the light of the *OECD Guidelines for Multinational Enterprises and Tax Administrations* . Since Article 32 of the *Vienna of Treaties* permits a wide access to supplementary means of interpretation, arbitrators will, in practice, have considerable latitude in deterr sources for the interpretation of treaty provisions.

Artigo 26

81. Replace subparagraph 7 c) of the Commentary on Article 26 by the following:

7. Application of the Convention

...

c) Similarly, information may be needed with a view to the proper allocation of profits between associated **enterprises** companies in different States or **the preparation of the profits attributable to a permanent establishment in the other State** the adjustment of the profits shown in the permanent establishment in one State and in the accounts in the other State (Articles 7, 9, 23 A and 23 B).

82. Delete the following paragraph 20 of the Commentary on Article 26:

20. *Japan* wishes to indicate that with respect to paragraph 11 above, it Japan, in view of its domestic laws and administrative practice as to the public the information obtained under the domestic laws, to provide informati

a requesting State has comparable domestic laws and administrative practice :

83. Delete the following paragraphs 23 to 26 and the heading preceding paragraph 23:
Commentary on Article 26:

Reservations on the Article

23. *Austria* reserves the right not to include paragraph 5 in its conditions of exchange of information. However, Austria held by a bank or other financial institution information is requested within the framework of a criminal investigation which concerns the requesting State concerning the commitment of tax fraud.

24. *Switzerland* reserves its position on paragraphs 1 and 5. It will not include paragraph 5 in its conditions of exchange of information. The reservation shall not apply in cases involving acts of fraud subject to imprisonment under the laws of both Contracting States.

25. *Luxembourg* reserves the right not to include paragraph 5 in its conditions of exchange of information.

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26. *Belgium* reserves the right not to include paragraph 5 in its conditions of exchange of information. Where paragraph 5 is included in its conditions of exchange of information, the exchange of information held by a financial institution is restricted to the exchange on request of information concerning a specific taxpayer and a specific financial institution.

D. POSITIONS OF NON-MEMBER ECONOMIES

Title and Introduction

84. Replace the title of the section on Positions of non-member economies by the

NON- *OECD* MEMBER COUNTRIES' *ECONOMIES*' POSITIONS ON THE *OECD* TAX CONVENTION

85. Replace paragraphs 1, 2, 3, 4 and 5 of the Introduction to the section on Positions of non-member economies by the following:

1. When, in 1991, the Committee on Fiscal Affairs adopted the concept Model Tax Convention, it also decided that because the influence of the Model had extended far beyond the OECD Member countries, the ongoing process of the Model Tax Convention would be updated should be opened up to benefit from **OECD economies** Member countries.

2. Pursuant to that decision, the Committee on Fiscal Affairs decided, in annual meetings that would allow experts of Member countries and some non **OECD economies** Member countries to discuss issues related to the negotiation, application and of tax conventions. Recognising that non- **OECD economies** Member countries could associate themselves to the development of the Model Tax Convention, the Committee also decided that countries should, like Member countries, have the possibility to identify the areas where they are unable to agree with the text of an Article or with an interpretation given in the

3. This has led to the inclusion in the Model Tax Convention of this section of positions of a number of non- **OECD economies** Member countries on the Articles of the Model Tax Convention. It is intended that this document will be periodically updated, of the Model Tax Convention, to reflect changes in the views of participating **economies** countries.

4. This section reflects the following **non-OECD economies'** countries' positions on the Model Tax Convention.

Albânia	Argentina	Arménia	Bielorrússia
Brasil	Bulgária	Chile	Croácia
Estónia	Gabão	Hong Kong, China	Índia
Indonésia	Israel	Costa do Marfim	Cazaquistão
Letónia	Lituânia	Malásia	Marrocos
People's Republic of China	Philippines	Romania	Rússia
Sérvia	Eslovénia	África do Sul	Tailândia
Tunísia	Ucrânia	United Arab Emirates	Vietnam

5. Whilst these **economies** countries generally agree with the text of the Convention, in some Articles of the Model Tax Convention, there are areas of disagreement. For each Article of the Model Tax Convention, the

positions that are presented in this **section** document indicate where a country disagrees with the text of an Article or with an interpretation given in the Commentary.

Article.¹ As is the case with the observations and reservations of Member countries made to cases where *an economy* a country would like to supplement the provisions of the Article with provisions that do not conflict with the Article, especially if these provisions are in the Commentary, or would like to put forward an interpretation that does not conflict with the Commentary.

[Footnote to paragraph 5]

1. *Indonesia and the People's Republic of China* wishes to clarify negotiations with other countries, they will not be bound by their statements as they appear in this document.

Positions on Article 1

86. Delete the following paragraph 4 of the Positions on Article 1 and its Commentary:

4. *Chile* considers that some of the solutions put forward in the report of the OECD Model Tax Convention to Partnerships and incorporated in the Commentary only be applicable when especially included in tax conventions. For instance, the treatment and legal form between States makes the solution of the treatment of partnerships that are fiscally transparent very difficult to administer and should be dealt with by treaty partners.

Positions on Article 2

87. Replace paragraph 3 of the Positions on Article 2 and its Commentary by the following:

3. Since *they have* it has no tax on capital, Brazil *and Indonesia* include a reservation to the right to tax in paragraph 1.

88. Delete the following paragraph 5.1 of the Positions on Article 2 and its Commentary:

5.1 *Chile* reserves its position on that part of paragraph 1 which states that the taxes of political subdivisions or local authorities.

Positions on Article 3

89. Replace paragraph 10 of the Positions on Article 3 and its Commentary by the following:

10. *Chile Hong Kong, China* reserves the right to omit the phrase that has its place of effective management in a Contracting State from the definition of international traffic in subparagraph e) of paragraph 1.

90. Delete the following paragraph 11 and the heading that precedes that paragraph on Article 3 and its Commentary:

Position on the Commentary

11. With respect to paragraph 11, *Chile* is of the view that the Model Commentary to the OECD Convention should not be a reference for the Chilean Tax authority which

Chilean treaties with equal or similar wording to the Model. When interpreting however, the view held by the Tax authority is that only that edition of the Co was applicable at the time of the treaty's completion can be used as guidance. Commentary that is merely clarifying what had been the correctly understood this context be distinguished from wording that attempts to alter the previous Commentary.

91. Add the following new paragraphs 2, 4.1, 7 and 11 to the Positions on Article Comentário:

2. *Israel reserves the right to include a trust within the definition of a —person*.

4.1 *Brazil reserves the right not to include the definitions of ~~enterprise~~ and ~~business~~ in paragraph 1 of Article 3 because it reserves the right to include an article concerning the personal services.*

7. *Thailand reserves the right to include in the definition of ~~person~~ any entity treated as a taxable unit under the taxation laws in force in either Contracting State.*

11. *Hong Kong, China reserves its position with respect to the ~~definition of paragraph 1~~ because Hong Kong, China is not a ~~the term national~~ appears in Articles 4, 19, 24 and 25, Hong Kong, China reserves the right to ~~constituted or~~*

Positions on Article 4

92. Replace paragraphs 1, 5 and 7 of the Positions on Article 4 and its Commenta

1. *Armenia , Albania , Belarus , Estonia , **Indonesia**, Latvia , Ukraine and ~~Indonesia~~ reserve the right to include the place of incorporation (or registration for Belarus and Vietnam) in paragraph 1.*

5. *Armenia , Belarus , Bulgaria , Russia , Thailand and Vietnam place of incorporation (or registration for Belarus and Vietnam) as the test for p*

7. *Israel reserves the right to include a separate provision regarding a resident of the Contracting States Belarus reserves the right to replace paragraph 6 of the other Contracting States do not agree to the use of the place of registration in this 1*

provision that will refer to the mutual agreement procedure for the determination of residence in the case of a dual resident person other than an individual.

93. Delete the following paragraphs 4.2 and 6 and the heading preceding paragraph 5 of the Positions on Article 4 and its Commentary:

§ 2^o

4.2 *Israel* reserves the right to reorder the hierarchy of the residence tie-individuals by placing for centre of vital interests before the permanent home available in the country.

6. The *People's Republic of China* reserves its position on the articles of the Convention and other provisions that refer directly or indirectly to the place of effective management.

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Instead of the term —place of effective management, the People's Republic of China uses in its conventions the term —head office.

94. Add the following new paragraphs 2, 2.1 and 9.3 to the Positions on Article 4 and its Commentary:

2. *The United Arab Emirates reserves the right to adopt its own definition of residence in its bilateral agreements, which do not necessarily follow Article 4.*

2.1 *Hong Kong, China reserves the right to modify the definition of bilateral agreements because it is not a sovereign state and it taxes on a territorial basis.*

9.3 *Indonesia is of the opinion that in considering the dual residence economic relations shall have priority over personal relations.*

Positions on Article 5

95. Replace paragraphs 2, 3, 4, 8, 9, 9.1, 11.1, 13, 14, 14.1, 14.4, 14.5, 14.7, 15, 16 and 25 of the Positions on Article 5 and its Commentary by the following:

2. In paragraph 2, in addition to —the extraction of natural resources, *Chile, Argentina, Brazil, Cuba, Guyana, Ivory Coast, Morocco, the Philippines, Russia, Thailand, and Viet Nam* shall reserve the right to refer to the —exploration for such resources.

3. *India and Indonesia*

reserves the right to add to that would cover the right to add to a farm, plantation or other place where agricultural or related activities are carried on. paragraph 2 additional subparagraphs

4. *India , Indonesia, Thailand and Vietnam* reserve the right to add to additional paragraph that would cover a warehouse in relation to a person facilities for others.

8. *Armenia , Brazil , Chile , Thailand and Vietnam* reserve their position on paragraph 3 site or construction, assembly or installation p more than six months should be regarded as a permanent establishment.

9. *Albania , the Democratic Republic of the Congo , Latvia and China reserve the right to add to paragraph 3 and consider that any building site, assembly or installation project or a supervisory or consultancy activity connected therewith constitutes a permanent establishment if such site, project or activity lasts for more than six months.*

9.1 *Serbia and Slovenia* reserve s the right to treat any building site, installation, project or assembly or supervisory or consultancy activity connected therewith permanent establishment only if such site, project or activity lasts for a period twelve months.

11.1 *India and Indonesia* reserves the right to replace —construction or with —installation project or assembly project or supervisory activities therewith and reserves its *their* right to negotiate the period of time for which they should be regarded as permanent establishment.

13. *Gabon , India , Indonesia, Ivory Coast , Morocco , and Tunisia* reserve the right to treat an enterprise as a permanent establishment if the enterprise furnishes services, through employees or other personnel engaged by the enterprise for such where such activities continue for the same project or a contract period or periods aggregating more than a period to be negotiated.

14. *Albania , Armenia , Lithuania , Serbia , South Africa , Thailand , and China reserve the right to treat an enterprise as a permanent establishment if it furnishes services, through employees, through employees and other personnel, for such where such activities continue for the same project or a contract period or periods aggregating more than a period to be negotiated.*

the personnel engaged by the enterprise for such purpose, but only where activities continue (for the same or a connected project (other than in the case of Armenia) in the country for a period or periods aggregating more than six months within any

14.1 *Chile, the Democratic Republic of the Congo, Gabon, Ivory Coast, and Tunisia* reserves the right to deem any person performing professional services as having an independent character to have a permanent establishment present in the State for a period or periods exceeding in the aggregate 183 day month period.

14.4 *Bulgaria and Indonesia* reserves the right to insert a provision that establishments used for more than a negotiated period, an installation, dried used for the exploration of natural resources.

14.5 *Indonesia, the United Arab Emirates and Vietnam* reserves the right to tax income derived from activities relating to exploration and exploitation of natural resources.

14.7 *Israel* reserves the right to insert a provision according to which an drilling installation used for activities connected with the exploration of natural resources shall be treated as constituting a permanent establishment in a Contracting State if it is engaged in activities more than 365 days in that State in any two-year period. *Israel* reserves the right to treat a person as having a permanent establishment if the person performs services and other activities of independent character, including planning, supervisory and consultancy activities, with a certain degree of continuity.

15. *Albania, Argentina, Armenia, Gabon, India, Indonesia, Ivory Coast, Russia, Thailand, Tunisia, Morocco, and Vietnam* reserve their position on paragraph 4 as they consider that the term —delivery— should be deleted from subparagraphs a) and b).

17. *Albania, Armenia, Gabon, India, Indonesia, Ivory Coast, Thailand, Malaysia, Ukraine and Russia* reserve the right to treat an enterprise as having a permanent establishment if a person acting on behalf of the enterprise habitually maintains a stock of goods or merchandise in a Contracting State from which the person receives orders or goods or merchandise (in the case of Malaysia fills orders) on behalf of the enterprise.

17.1 *India, Malaysia and Thailand* reserves the right to treat an enterprise of a Contracting State as having a permanent establishment in the other Contracting State if a person acting on behalf of the enterprise secures orders in the other Contracting State wholly or almost wholly for the enterprise.

18. *Albania, Gabon, Estonia, Ivory Coast, Lithuania, Morocco, Serbia, Tunisia and Vietnam* reserve the right to make clear that an agent whose activities are conducted

wholly or almost wholly on behalf of a single enterprise will not be considered independent status.

19. *Gabon, India, **Indonesia**, Ivory Coast, Morocco, Russia,* reserve the right to provide and re-insurance enterprise of a Contracting State respect to re-insurance (other than in the case of India), be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory or insures risks situated therein through a person other than an agent of a status to whom paragraph 6 applies.

25. *India and **Malaysia*** does not agree with the interpretation given in part of paragraph 5.4 (first part of the paragraph); they are of the view examples could also be regarded as constituting permanent establishments.

96. Delete the following paragraphs 16.1, 18.1 and 23.1 of the Positions on Article 16.1
Comentário:

16.1 *Chile* reserves the right to amend paragraph 4 by eliminating replacing subparagraph (b) with the corresponding text of the 1963 Draft Model Convention.

18.1 *Chile* believes that the arm's length principle should also be considered whether or not an agent is of an independent status for purposes of paragraph 18.1. *Chile* wishes to add such wording to its conventions to clarify that this is how the principle is interpreted.

23.1 *Chile* will not necessarily take into consideration paragraphs 42.1 to 42.4 until further action has taken place.

97. Add the following new paragraphs 2.1, 17.2, 43, 44 and 45 to the Positions on Article 2.1
Comentário:

2.1 *Indonesia reserves the right to add to paragraph 2 the exploration and exploitation of filling rig or working ship used for exploration and exploitation of*

17.2 *Indonesia reserves the right to treat an enterprise as having a permanent establishment if a person acting on behalf of the enterprise, other than an independent agent, exercises functions of the enterprise goods or merchandise belonging to the enterprise.*

43. *India does not agree with the interpretation in paragraph 5.5 of the Article 5 according to which a satellite's footprint in the space of a source country is a permanent establishment. India is of the view that in such a case, the country is its customer base but also provides infrastructure for satellite network or telecommunication process. India is also of the view footprint exists both in the international and national territories. The footprint has a defined location*

profits of an insurance and re-insurance enterprise.

100. Replace paragraphs 2.1, 4.2, 5, 7, 8 and 12 of the Positions on Article 7 and its subsequent:

2.1 *Albania, Argentina, Brazil, Chile, Croatia, Gabon, India, Malaysia, Indonesia, Colombia, the People's Republic of China, Russia, Serbia, Thailand, Timor-Leste and Vietnam* shall have the right to maintain in their conventions a specific article dealing with the independent personal services. Accordingly, reservation is also to all the corresponding modifications in the Articles and the Commentaries, modified as a result of the elimination of Article 14.

4.2 *The United Arab Emirates reserves the right to include a special convention provision which will permit its domestic law to apply to all activities that exploration, extraction or exploitation of natural resources, including petroleum and mining activities in connection with these activities, when these activities are carried out in the territory of* Chile and India reserve the right to amend Article 7 to provide that, in applying the Article, any income or gain attributable to a permanent establishment during its existence may be taxable by the Contracting State in which the permanent establishment exists even if the payments are deferred until after the permanent establishment ceases to exist. Furthermore, India also reserves the right to apply such a rule under Articles 1

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5. With respect to paragraph 3, *Argentina* reserves the right to provide that all Contracting States shall not allow the deduction of expenses incurred abroad which are attributable to the activity carried on by the permanent establishment, taking into account the general principles contained in its domestic legislation concerning executive and administrative services.

7. *Armenia, India, Lithuania and Serbia* Slovenia reserve the right to clarify that the paragraph 3 to be allowed as deductions by a Contracting State expenses that are deductible under the domestic laws of that State.

8. *Serbia reserves the right to specify that a potential adjustment will be considered as justified if it is* and *Vietnam* reserve the right to add to paragraph 3 that the paragraph refers to actual expenses incurred by the enterprise in the case of a banking enterprise).

12 *Argentina, Brazil, Indonesia*

12. *Argentina, Brazil, Indonesia, Laos, Cambodia, China, Hong Kong, Macao, and Mongolia will interpret Article 7 as it read before the 2010 Update. Ethiopia is a state prior to that update India does not agree with the interpretation.*

101. Delete the following paragraphs 6, 7.1, 9, 10, 11 and 13, and the headings pre 3, 5, 9, 10 and 11 of the Positions on Article 7 and its Commentary:

Paragraphs 1 and 2

§ 3 °

6. *Brazil* reserves its position on the words —whether in the State in which the permanent establishment is situated or elsewhere— found in paragraph 3.

7.1 *Latvia and Estonia* reserve the right to add to paragraph 3 a condition that a Contracting State shall include only expenses that are deductible if the permanent establishment were a separate enterprise of that C

Paragraph 4

9. *Brazil* reserves the right not to adopt paragraph 4.

Paragraph 5

10. *Vietnam* reserves the right not to adopt paragraph 5.

Paragraph 6

11 *Brazil* reserves the right not to adopt paragraph 6.

13. As regards paragraphs 41-50 of the Commentary on Article 7, *Chile* does not advocate the specific methods provided in the rules on the amount of profit attributable to an establishment; these must be established in and follow domestic law (including legislation).

103. Add the following Annex immediately after paragraph 12 of the Positions on Comentário:

3.1 Indonesia reserves the right to tax in the State where the situated business profits derived from the sale of goods or merchandise which is of the same kind to the ones sold through that permanent establishment or from activities carried on in that State of the same or similar kind as those of that permanent establishment.

POSITIONS ON THE PREVIOUS VERSION OF ARTICLE 7 AND ITS COMMENTARY

Positions on the Article

1. *Argentina and Chile* reserve the right to include a special provision to apply their domestic law in relation to the taxation of the profits of an insurer in the Convention that will permit them
2. *Malaysia , Thailand and Ukraine* reserve the right to add a provision available to the competent authority of a Contracting State is inadequate to deal with a permanent establishment of an enterprise, the competent authority may apply taxation law of that State, subject to the qualification that such law will be applied to the competent authority permits, in accordance with the principles of this A

2.1 *Albania , Argentina , Brazil , Chile , Croatia , Gabon , India , Ivory Republic of China , Russia , Serbia , Tunisia and Vietnam* reserve the right to maintain in their conventions a specific article dealing with the taxation of independent personal services¹. According to all the corresponding modifications in the Articles and the Commentaries, the elimination of Article 14.

2.2 *Bulgaria* reserves the right to propose in bilateral negotiations the —profits with the term —business profits—, provided that it is defined in Article 7, in replacement, in this Article, of the term

2.3 *Tunisia* reserves the right to propose in bilateral negotiations to add a State of the independent personal services, under the former Article 14, based criterion for the taxation in the source (bilateral negotiations) of the remuneration paid.

Paragraphs 1 and 2

3. *Argentina , Morocco and Thailand* reserve the right to tax in the situated business profits derived from the sale of goods or merchandise which the ones sold through a permanent establishment situated in that State or from that State of the same or similar kind as those effected through that permanent only as a safeguard against abuse and not as a general —force of attraction principle—, provided that the enterprise proves that the sales or activities have been carried out for reasons of the Convention.

4. *Albania and Vietnam* reserve the right to tax in the State where the business profits derived from the sale of goods or merchandise which are the permanent establishment is situated sold through a permanent establishment situated in that State or from other but the same or similar kind as those effected through that permanent establishment.

4.1 *Morocco and the Philippines* reserve the right to adopt a length of whether any individual rendering personal services is taxable.

4.2 *Chile and India* reserve the right to amend Article 7 to provide that, Article, in applying paragraph 1, but not of the permanent establishment during its Contracting State in which the permanent establishment exists even if the pay permanent establishment has ceased to exist. Furthermore, India also reserves Articles 11, 12, 13 and 21.

§ 3 °

5. With respect to paragraph 3, *Argentina* reserves the right to provide obliged that all the Contracting State expenses incurred abroad which are not reasonable by the permanent establishment, taking into account the general principles concerning executive and administrative expenses for assistance services.

6. *Brazil* reserves its position on the

which the permanent

7.1 *Latvia and Estonia* reserve the right to add to paragraph 3 a clarification that expenses shall include only expenses that would be deductible if the taxpayer were a separate enterprise of that Contracting State.

Paragraph 4

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Paragraph 5

Paragraph 6

Positions on the Commentary

13. As regards paragraphs 41-50 of the Commentary on Article 7, *Chile* provided that the rules on the amount of profit attributable to a permanent establishment do not adhere to the specific methods and follow domestic law (including foreign exchange legislation).

104. Replace paragraphs 6 and 7 of the Positions on Article 8 and its Commentary

6. *Bulgaria, Latvia, South Africa and Ukraine* reserve the right to ensure that profits from the leasing of ships or aircraft on a bare boat basis and *Bulgaria, Latvia* and Ukraine, from the leasing of containers, will be treated in the same way as paragraph 1 when such profits are incidental to international

7. ~~Albania, Argentina, Brazil, Chile, Estonia, Gabon, India, People's Republic of China, Malaysia, Morocco, and South Africa~~ **and Hong Kong, China** reserve the right not to extend the scope of the Article to cover inland waterways transportation conventions and are free to make corresponding modifications to paragraph 3 22.

105. Add the following new paragraphs 2.1 and 6.6 to the Positions on Article 8 ar

2.1 Indonesia reserves the right to allow the State of source to tax operation of its ships in the international traffic provided that the shipping activities arising from State are more than casual and subject to certain limits.

6.6 The United Arab Emirates reserves the right to include in its provision of bilateral conventions some from selling tickets on behalf of other States, income from bank deposits and, other as bonds, shares and other debentures, are covered by Article 8 provided that the operation of air transport enterprises operating in international

Positions on Article 9

106. Replace paragraph 3 of the Positions on Article 9 and its Commentary by the

3. ~~Malaysia, and Serbia and Slovenia~~ reserve the right to specify in paragraph 2 that will be made if the adjustment is considered to be just

107. Add the following new paragraph 5 to the Positions on Article 9 and its Comr

5. ~~Israel reserves its right to insert a provision according to which any adjustment of the tax charged therein on those profits shall be implemented at any time limits or other procedural limitations in the Domestic Law, except such limitations as apply to claims made in pursuance of such an~~

Positions on Article 10

108. Replace paragraphs 4, 10.3, 13 and 14 of the Positions on Article 10 and its C seguinte:

4. *Israel* reserves its position on the rates provided for in paragraph 2, respect to dividends which are distributed out of the profits of an —approved to its law for the encouragement of investment.

10.3 *Israel reserves the right to exclude payments made by a Real Estate which is investment of Israel from the definition of dividends in paragraph 2, and to tax according to its domestic law* Chile reserves the right to amplify the definition of paragraph 3 so as to cover all income subjected to the taxation tr distributions.

13. *Thailand* reserves the right to levy tax on distributions by non-arising with its companies a **profit remittance tax on a permanent establishment for the subparagraph 2 a)** .

14. *Indonesia reserves the right to apply a branch profits tax, but that shall not affect provisions contained in any production sharing contracts relating to other mining sectors.* In view of its particular tax system, *Chile* retains its freedom of action with regard to the provisions in the Convention relating to the distribution of profits by permanent establishments.

109. Delete the following paragraphs 2 and 9.1 of the Positions on Article 10 and i

2. In view of its particular taxation system, *Chile* retains its freedom of the provisions in the Convention relating to the rate and form of distribution c empresas.

9.1 *Slovenia* reserves the right to omit —jouissance shares, shares as —in this legislation, does not provide for such concepts.

Positions on Article 11

110. Replace paragraphs 2 and 7 of the Positions on Article 11 and its Commentar

2. *Argentina , Brazil , Chile , India , Israel, Ivory Coast , the Philippines, Romania, Thailand and Ukraine* reserve their positions, of the and provided for in paragraph 2.

7. *Brazil and Thailand* reserves the right to consider as interest any to income from money lent by the tax law of the Contracting State in which tl

111. Delete the following paragraph 7.2 of the Positions on Article 11 and its Com

7.2 *Chile* reserves the right to delete the reference to debt-claims participating in the right to profits.

Positions on Article 12

112. Replace paragraphs 3, 8, 11, 12 and 12.2 of the Positions on Article 12 and its o seguinte:

3. *Albania , Argentina , Armenia , Belarus , Brazil , Bulgaria , Chile , Republic of the Congo , the Democratic Republic of the Congo , **Indonesia** Israel , Ivory Coast , Kazakhstan , Latvia , Lithuania , the People's Republic of China , the Philippines , Romania , Russia , Serbia , Thailand , Tunisia , Ukraine , and Vietnam **and Hong Kong, China*** reserve the right to use, industrial, commercial or scientific equipment to propose in bilateral negotiations **the** source taxation of royalties on industrial, commercial or scientific equipment at a lower rate than the rate applied to the rest of the royalties.

8. *Albania , Armenia , Belarus , Brazil , Bulgaria , Chile , India , Latvia , **Indonesia**, Kazakhstan , the People's Republic of China , the Philippines , Thailand and Vietnam* reserve the right to include in the definition of royalties payment the right to use, industrial, commercial or scientific equipment to propose in bilateral negotiations **the** source taxation of royalties on industrial, commercial or scientific equipment at a lower rate than the rate applied to the rest of the royalties.

11. *Albania , Malaysia , **Serbia** Russia and Vietnam* reserve the right to deal with fees for technical services for a separate Article similar to Article 12.

12. *Albania , Argentina , Armenia , Belarus , Brazil , Bulgaria , Chile , **Indonesia**, Latvia , Estonia , Kazakhstan , Lithuania , Malaysia , Romania , the People's Republic of China , the Philippines , Romania , Serbia , Slovenia , South Africa , Thailand , Tunisia , **Hong Kong, China*** reserve the right, in order to fill what they gap in the Article, to add a provision defining the source of royalties with the provisions of paragraph 5 of Article 11, which deals with the same is juros.

12.2 *The Democratic Republic of the Congo **and Malaysia*** reserves its treatment **their position** on the

113. Delete the following paragraph 2 of the Positions on Article 12 and its Comm

2. *Romania* reserves the right to include an additional article dealing article with the same structure as Article 11 on interest.

114. Add the following new paragraphs 20 to 22 to the Positions on Article 12 and

20. *India does not agree with the interpretation in paragraph 9.1 of the Article **Concerning** to which a payment for*

uninsponder is a category of income that constitutes royalty.
position then income from the above is under India's domestic law and its
business activities contrary to India's position that a payment for the use of a
payment for the use of a process resulting in a royalty under Article 12.
India also does not conclusion included in the paragraph concerning undersea
cables and pipelines undersea cables and pipelines are industrial,
equipment and scientific instruments made for their use constitute equipment
royalties.

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21. India does not agree with the interpretation in paragraph 9.2 of the Article 10 Comments that a roaming call constitutes the use of a process. Accordingly, the use of that process constitutes a royalty for the purposes of Article 12 of India that a payment for a roaming call constitutes a payment for the use of industrial, commercial or scientific equipment.

22. India does not agree with the interpretation in paragraph 9.3 of the *Artigo 10* *Colmuns* on that a payment for spectrum license constitutes a *monopoly* *Indian* *domestic law* and its treaties with many countries.

Positions on Article 13

115. Replace paragraphs 4 and 5 of the Positions on Article 13 and its Commentar

4. *Estonia, Latvia and Lithuania* reserve the right to limit the enterprise application of paragraph 3 to aircraft in international traffic.

5. Chile, *India* and Vietnam reserve the right to tax gains from the rights in allocation of shares are resident of their respective country.

116. Add the following new paragraph 11 to the Positions on Article 13 and its Co

11. Israel reserves its right to insert a provision according to which was a resident of a Contracting State, has become a resident of the other Contracting State, shall not prevent the first-mentioned State from taxing under its laws on the property of that person at the time of change of residence, on the portion of property dealt with in paragraphs 1, 2, 3 and 4 made after the change of residence, if taxation will be eliminated by the first-mentioned Contracting State. No portion of property dealt with in

~~paragraph 5.1 after the will be eliminated
by the other Contracting State.~~

Positions on Article 15

117. Add the following new paragraph 5.1 to the Positions on Article 15 and its Co

~~5.1 The United Arab Emirates reserves the right to modify paragraph 3
remuneration provided in respect of an employment exercised in connection
with an international traffic (including the crew of the aircraft and
ground staff) who in the country of residence of the operator of that
aircraft.~~

Positions on Article 16

118. Replace paragraphs 1 and 4 of the Positions on Article 16 and its Commentar

1. ~~Albania , Bulgaria , the Democratic Republic of the Congo ,
Lithuania, Estonia, Indonesia, Slovenia, reserve the right to tax under this Article
any member of a board~~ of directors or any other similar organ of a resident comp

4. **Indonesia, Malaysia and Vietnam** reserve the right to extend the
remuneration to cover the managerial officials.

119. Delete the following paragraph 2 of the Positions on Article 16 and its Comm

2. ~~Thailand~~ reserves the right to extend the Article to cover the
employment remuneration of senior

Positions on Article 17

120. Replace paragraph 2 of the Positions on Article 17 and its Commentary by the

2. **India and Thailand** reserves the right to exclude from the
the application of paragraph 1 and 2 of a Contracting State by entertainers or
activities are substantially supported by public funds and to provide for reside
such income.

Positions on Article 20

121. Replace paragraphs 6 and 9 of the Positions on Article 20 and its Commentary:

6. *Brazil , Bulgaria , India , Ivory Coast , Morocco , the People's Republic of China , the Philippines , Romania , Serbia , Slovenia , Thailand , Tunisia and Vietnam* reserve the right to address the situation of teachers, professors and researchers in the light of the conditions and are free to make a corresponding modification to paragraph 1 of the Article.

9. *India and Hong Kong, China* reserves the right to exclude presentee business apprentices from the Article.

122. Delete the following paragraph 3 of the Positions on Article 20 and its Commentary:

3. *Romania* reserves the right to limit to a period of 7 years (the maximum period of studies for students) the exemption provided for in the Article.

Positions on Article 21

123. Replace paragraph 1 of the Positions on Article 21 and its Commentary by the following:

1. *Albania , Argentina , Belarus , Brazil , Bulgaria , Chile , Gabon , India , Indonesia , Malaysia , Morocco , Russia , Serbia , Slovenia , South Africa , Thailand and Vietnam* reserve their position on this Article as they wish to maintain the right to tax income arising in their own country.

Positions on Article 22

124. Replace paragraph 2 of the Positions on Article 22 and its Commentary by the following:

2. *Brazil , Bulgaria , Indonesia , Malaysia , the People's Republic of China , Thailand and Vietnam* reserve their position on the Article if and when they impose taxes on capital.

Positions on Article 24

125. Replace paragraphs 2, 2.2, 4, 10, 11 and 12 of the Positions on Article 24 and its Commentary by the following:

2. *Brazil , Chile , Romania , Russia , Thailand and Vietnam* reserve their position on the second sentence of paragraph 2 of the Article.

2.2 **Indonesia, Malaysia and Tunisia** reserve the right to restrict the residents of the Contracting States.

4. **Albania, Bulgaria, Chile, Estonia, India, Malaysia, the Philippines, Romania, Russia, Serbia and Vietnam** reserve the right to restrict paragraph 2 in their conventions.

10. **Albania, Brazil, Bulgaria, Chile, Malaysia, the Philippines, Tunisia, Romania, Serbia, Thailand and Vietnam** reserve the right to restrict the scope of the covered by the Convention.

11. **India and Malaysia** reserves its **their** position on the interpretation set out in paragraph 44.

12. **India** reserves the right to add a paragraph to clarify that this provision shall not be construed as preventing either the Contracting State from charging the profits of a person which a company of the other Contracting State has in the first mentioned State which is higher than that imposed on the profits of a similar company of the first Contracting State, nor as being in conflict with the provisions of paragraph 3 (~~before the 2010 update to the Model Tax Convention~~) .

Positions on Article 25

126. Replace paragraph 2 of the Positions on Article 25 and its Commentary by the

2. **Brazil, Chile, the Philippines and Thailand** reserve their positions on paragraph 2. These countries consider that the implementation of relief provisions and refunds following at to remain linked to time-limits prescribed by their domestic law.

Positions on Article 26

127. Delete the following paragraphs 1, 2.2, 2.3, 2.4 and 4 of the Positions on Article 26 and its Commentary:

1. **Brazil** reserves the right not to include the word —public in the last sentence of paragraph 2 in its convention.

2.2 **Malaysia and Thailand** reserve the right not to include paragraph 4 in their conventions.

2.3 **Brazil, Malaysia, Romania, Serbia and Thailand** reserve the right not to include paragraph 5 in their conventions.

2.4 **Chile** can generally supply information held by banks and other financial institutions but reserves the right to supply certain information for civil tax purposes, such as regarding transfer of funds, transactions carried out on checking accounts and which are confidential under Chilean law.

4. **Malaysia** wishes to indicate that with respect to paragraph 11 of the Commentary, in view of its strict domestic laws and administrative procedure to make public certain information obtained under the domestic law information requested.

128. Add the following new paragraph 3 to the Positions on Article 26 and its Commentary:

3. *As regards paragraph 10.3 of the Commentary, Hong Kong, China position in the tax treaty of information that existed prior to the entry into force of the agreement. In view of its domestic law requirements, Hong Kong, China will inform relating to taxable periods after the agreement came into operation.*

Positions on Article 28

129. Add the following new section on the Positions on Article 28 and its Commer

**POSITIONS ON ARTICLE 28
(MEMBERS OF DIPLOMATIC MISSIONS AND
CONSULAR POSTS) AND ITS COMMENTARY**

1. *Considering that Hong Kong, China is not a sovereign state but a administrative region of the People's Republic of China, Hong Kong, China reserve diplomatic missions by —government missions in this Article.*

Positions on Article 29

130. Replace paragraph 1 of the Positions on Article 29 and its Commentary by the

1. *Indonesia, t The People's Republic of China and Thailand reserve Article. their position on this*

