

# 2014 UPDATE TO THE OECD MODEL TAX CONVENTION

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15 July 2014

## THE 2014 UPDATE TO THE OECD MODEL TAX CONVENTION

### *Introduction*

This note includes the contents of the 2014 Update to the OECD Model Tax Convention (the 2014 Update). The 2014 Update was approved by the Committee on Fiscal Affairs on 26 June 2014 and by the OECD Council on 15 July 2014.

The 2014 Update includes the changes to Article 26 (Exchange of Information) and its Commentary that were approved by the OECD Council on 17 July 2012 (see [Changes to Article 26 and its Commentary](#)). It also includes the final version of changes that were previously released for comments through the following discussion drafts:

- [The application of Article 17 \(Artistes and Sportsmen\) of the OECD Model Tax Convention](#) (released on 23 April 2010)
- [Revised proposals concerning the meaning of “beneficial owner”](#) (released on 19 October 2012)
- [Revised discussion draft on tax treaty issues related to emissions permits and credits](#) (released on 19 October 2012)
- [Tax treaty treatment of termination payments](#) (released on 25 June 2013)
- [Technical changes to be included in the next Update to the Model Tax Convention](#) (released on 15 November 2013).

The 2014 Update also includes a number of changes to OECD countries’ reservations and observations and to non-OECD economies’ positions. These observations, reservations and positions identify the areas where the jurisdictions that make them disagree with the contents of the Articles or the Commentary of the OECD Model Tax Convention.

As part of the 2014 Update, the reports on “Tax treaty issues related to emissions permits/credits” and “Issues related to Article 17 of the OECD Model Tax Convention” will be added to the section of the full version of the Model Tax Convention that includes previous reports. Also, Appendix I of the full version, which lists the status of tax conventions between OECD countries, will be replaced as a result of the revision and conclusion of new treaties since 2010.

The following provides additional details on some of the changes made through the 2014 Update.

### *Issues related to Article 17 of the OECD Model Tax Convention*

The Update includes a number of changes to Article 17 and its Commentary. The background for these changes is provided in the attached report on “Issues related to Article 17 of the OECD Model Tax Convention”. That report indicates how the comments received on the April 2010 discussion draft on these issues have been dealt with.

### *Revised proposals concerning the meaning of “beneficial owner”*

On 29 April 2011, the OECD released a public discussion draft entitled “Clarification of the meaning of

‘beneficial owner’ in the OECD Model Tax Convention”. In light of the comments received on that first discussion draft, the Committee, through Working Party 1, made a number of changes to the proposals included in that first discussion draft and on 19 October 2012, released the revised proposals for further comment (see <http://www.oecd.org/ctp/treaties/Beneficialownership.pdf>) together with a summary of the comments received and an explanation of the changes made.

The comments on the revised discussion draft were examined by Working Party 1 at its February and September 2013 meetings and the following reflects the conclusions reached on a few key issues raised in the comments.

*Autonomous versus domestic law meaning of the concept of “beneficial owner”*

Whilst commentators generally supported the deletion of the sentence referring to domestic law which was included in paragraph 12.1 of the first discussion draft, some suggested that the draft should more clearly address the issue of the applicability of the domestic law meaning of the term “beneficial owner”. The Working Party, however, did not consider that further explanations were necessary given that the changes were simply intended to clarify the phrase “[t]he term ‘beneficial owner’ is not used in a narrow technical sense” currently found in the Commentary.

*Drafting of paragraph 12.4*

The majority of comments related to the drafting of paragraph 12.4 and, in particular, the references to “related” and “unrelated” obligations and the sentence referring to obligations that “may also be found to exist on the basis of facts and circumstances”.

The Working Party agreed that a clarification was needed with respect to the references to “related” and “unrelated” obligations and paragraph 12.4 (as well as the equivalent paragraphs 10.2 of the Commentary on Article 11 and 4.3 of the Commentary on Article 12) was amended accordingly.

As regards the sentence referring to obligations that “may also be found to exist on the basis of facts and circumstances”, the Working Party concluded that the sentence was appropriate because contracts and formal legal obligations may not always reflect reality and this was therefore an area where it was appropriate to look at facts and circumstances.

It should be noted that the changes related to the meaning of “beneficial owner” that are included in the 2014 Update do not prejudice in any way the outcome of the work on Action 6 (Prevent Treaty Abuse) of the Action Plan on Base Erosion and Profit Shifting (see <http://www.oecd.org/ctp/BEPSActionPlan.pdf>).

*Tax treaty issues related to emissions permits/credits*

The background for the changes made to the Commentary in relation to tax treaty issues related to emissions permits/credits is provided in the attached report on this topic. That report is almost identical to the revised discussion draft that was released on 19 October 2012 (see <http://www.oecd.org/ctp/treaties/Emissionspermitsandcredits.pdf>). The few comments received on that revised discussion draft (see <http://www.oecd.org/ctp/treaties/publiccommentsreceivedonthereviseddiscussiondraftontaxtreatyissuesrelatedtoemissionspermitsandcredits.htm>) were generally supportive of its contents. The few concerns and suggestions that were included in these comments were discussed at the February 2013 meeting of Working Party 1 and resulted in a few minor drafting changes.

### ***Tax treaty treatment of termination payments***

On 25 June 2013, the Committee on Fiscal Affairs released for public comment a discussion draft on the tax treaty treatment of various payments that may be made following the termination of an employment (see <http://www.oecd.org/tax/treaties/terminationpayments.htm>). The comments received on that discussion draft (see <http://www.oecd.org/ctp/treaties/oecd-publishes-public-comments-on-tax-treaty-treatment-of-termination-payments.htm>) were examined by Working Party 1 at its September 2013 and February 2014 meetings. Based on these comments, the Working Party decided to make a number of changes to the proposals included in the discussion draft and these changes are reflected in the revised version of the changes included in the Update.

### ***Technical changes to be included in the next Update to the Model Tax Convention***

On 15 November 2013, the Committee on Fiscal Affairs invited interested parties to send comments on a discussion draft on technical changes to be included in the next update to the OECD Model Tax Convention (see <http://www.oecd.org/ctp/treaties/oecd-invites-public-comments-on-discussion-draft-on-technical-changes.htm>). Only three commentators sent comments on that discussion draft (see <http://www.oecd.org/ctp/treaties/oecd-publishes-comments-on-technical-changes-proposed-for-inclusion-in-2014-update-to-oecd-model-tax-convention.htm>) and these comments were generally supportive of the changes proposed. The few concerns and suggestions that were included in these comments were discussed at the February 2014 meeting of Working Party 1, when the Working Party concluded that no changes should be made to the proposals.

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## CHANGES TO THE OECD MODEL TAX CONVENTION

[The changes to the existing text of the Model Tax Convention appear in ~~strike through~~ for deletions and ***bold italics*** for additions]

### A. INTRODUCTION

1. Replace the first part of paragraph 21 of the Introduction by the following:

21. The following are the classes of income and capital that may be taxed without any limitation in the State of source or situs:

- income from immovable property situated in that State (including income from agriculture or forestry), gains from the alienation of such property, and capital representing it (Article 6 and paragraph 1 of Articles 13 and 22) ***as well as gains from the alienation of shares deriving more than 50 per cent of their value from such property (paragraph 4 of Article 13)***;

*[the rest of paragraph 21 remains unchanged]*

2. Replace paragraph 23 of the Introduction by the following:

23. Other items of income or capital may not be taxed in the State of source or situs; as a rule they are taxable only in the State of residence of the taxpayer. This applies, for example, to royalties (Article 12), gains from the alienation of shares or securities (paragraph 5 of Article 13, ***subject to the exception of paragraph 4 of Article 13***), private sector pensions (Article 18), payments received by a student for the purposes of his education or training (Article 20), and capital represented by shares or securities (paragraph 4 of Article 22). Profits from the operation of ships or aircraft in international traffic or of boats engaged in inland waterways transport, gains from the alienation of such ships, boats, or aircraft, and capital represented by them, are taxable only in the State in which the place of effective management of the enterprise is situated (Article 8 and paragraph 3 of Articles 13 and 22). Business profits that are not attributable to a permanent establishment in the State of source are taxable only in the State of residence (paragraph 1 of Article 7).

3. Add the following new paragraph immediately after paragraph 25 of the Introduction:

***25.1 It follows from the preceding explanations that, throughout the Convention, the words “may be taxed in” a Contracting State mean that that State is granted the right to tax the income to which the relevant provision applies and that these words do not affect the right to tax of the other Contracting State, except through the application of Article 23 A or 23 B when that other State is the State of residence.***

### B. ARTICLES

#### ***Article 3***

4. Replace the French version of subparagraph 1 *h*) of Article 3 by the following:

- h*) les termes « activité », par rapport à une entreprise, et « affaires » comprennent l'exercice de professions libérales ~~ou ainsi que l'exercice~~ d'autres activités de caractère indépendant.

#### Article 10

5. Replace the first part of paragraph 2 of Article 10 by the following:

2. However, ~~such~~ dividends ***paid by a company which is a resident of a Contracting State*** may also be taxed in ***that State*** ~~the Contracting State of which the company paying the dividends is a resident and~~ according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed: ...

#### Article 11

6. Replace paragraph 2 of Article 11 by the following:

2. However, ~~such~~ interest ***arising in a Contracting State*** may also be taxed in ***that State*** ~~the Contracting State in which it arises and~~ according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

#### Article 17

7. Replace Article 17 by the following:

#### ARTICLE 17

#### ~~ARTISTES AND SPORTSMEN~~ ENTERTAINERS AND SPORTSPERSONS

1. Notwithstanding the provisions of Articles ~~7 and~~ 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a ~~sportsman~~ ***sportsperson***, from ***that resident's*** ~~his~~ personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a ~~sportsman~~ ***sportsperson acting as such*** ~~in his capacity as such~~ accrues not to the entertainer or ~~sportsman~~ ***sportsperson himself*** but to another person, that income may, notwithstanding the provisions of Articles ~~7 and~~ 15, be taxed in the Contracting State in which the activities of the entertainer or ~~sportsman~~ ***sportsperson*** are exercised.

#### Article 26

8. Replace paragraph 2 of Article 26 by the following [*these changes were approved by the OECD Council on 17 July 2012*]:

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. ***Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be***



*used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.*

## C. COMMENTARY

### *Commentary on Article 3*

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

3. The term “company” means in the first place any body corporate. In addition, the term covers any other taxable unit that is treated as a body corporate ***for the purposes of the tax law of the Contracting State of which it is a resident*** according to the tax laws of the Contracting State in which it is organised. The definition is drafted with special regard to the Article on dividends. The term “company” has a bearing only on that Article, paragraph 7 of Article 5, and Article 16.

10. Add the following new paragraph 16 to the Commentary on Article 3:

***16. Israel reserves the right to include a trust within the definition of a “person”.***

### *Commentary on Article 4*

11. Delete the following paragraph 27 of the Commentary on Article 4:

~~27.— Canada reserves the right to use as the test for paragraph 3 the place of incorporation or organisation with respect to a company and, failing that, to deny dual resident companies the benefits under the Convention.~~

12. Delete the following paragraph 32 of the Commentary on Article 4:

~~32.— Germany reserves the right to include a provision under which a partnership that is not a resident of a Contracting State according to the provisions of paragraph 1 is deemed to be a resident of the Contracting State where the place of its effective management is situated, but only to the extent that the income derived from the other Contracting State or the capital situated in that other State is liable to tax in the first mentioned State.~~

13. Add the following new paragraph 33 to the Commentary on Article 4:

***33. Israel reserves the right to include a separate provision regarding a trust that is a resident of both Contracting States.***

14. Add the following new paragraph 34 to the Commentary on Article 4:

***34. Estonia reserves the right to include the place of incorporation or similar criterion in paragraph 1.***

### *Commentary on Article 5*

15. Add the following new paragraph 45.1 to the Commentary on Article 5:

***45.1 Germany, as regards sentence 3 of paragraph 17, takes the view that business activities limited to on-site planning and supervision over a construction project can only constitute a permanent establishment if they meet the requirements specified in paragraph 1 of Article 5.***

16. Replace paragraph 52 of the Commentary on Article 5 by the following:

52. *Estonia and Mexico* reserves the right to tax individuals performing professional services or other activities of an independent character if they are present *in these States*~~Mexico~~ for a period or periods exceeding in the aggregate 183 days in any twelve month period.

17. Replace paragraph 55 of the Commentary on Article 5 by the following:

55. *Canada, ~~and Chile~~ and Israel* reserve the right in subparagraph 2 f) to replace the words “of extraction” with the words “relating to the exploration for or the exploitation”.

18. Replace paragraph 68 of the Commentary on Article 5 by the following:

68. *Estonia and Slovenia* reserves the right to amend paragraph 6 to make clear that an agent whose activities are conducted wholly or almost wholly on behalf of a single enterprise will not be considered an agent of an independent status.

#### **Commentary on Article 6**

19. Add the following new paragraph 2.1 to the Commentary on Article 6:

*2.1 The phrase “including income from agriculture or forestry” in paragraph 1 extends the scope of Article 6 to include not only income derived from immovable property as defined in paragraph 2 but also income from activities that constitute agriculture or forestry. Income from agriculture and forestry includes not only the income that an enterprise engaged in agriculture or forestry derives from selling its agricultural and forestry production but also income that is an integral part of the carrying on of agriculture or forestry activities – for instance, income derived from the acquisition or trading of emissions permits (the nature of these permits is explained in paragraph 75.1 of the Commentary on Article 7) where such acquisition or trading is an integral part of the carrying on of agriculture or forestry activities, e.g. where the permits are acquired for the purpose of carrying on these activities or where permits acquired for that purpose are subsequently traded when it is realised that they will not be needed.*

20. Add the following new paragraph 13 to the Commentary on Article 6:

*13. Estonia reserves the right to include in the definition of the term “immovable property” any right of claim in respect of immovable property because such right of claim may not be included in its domestic law meaning of the term.*

21. Add the following new paragraph 14 to the Commentary on Article 6:

*14. Israel reserves the right to include in paragraph 2 “any option or similar right to acquire immovable property”.*

#### **Commentary on Article 7**

22. Replace paragraphs 35 and 36 of the Commentary on Article 7 by the following:

35. Paragraph 3 of Article 5 sets forth a special rule for a fixed place of business that is a building site or a construction or installation project. Such a fixed place of business is a permanent establishment only if it lasts more than twelve months. Experience has shown that these types of

permanent establishments can give rise to special problems in attributing *profits* ~~income~~ to them under Article 7.

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

23. Replace paragraph 68 of the Commentary on Article 7 by the following:

68. Some States may prefer that the cases covered by paragraph 3 be resolved through the mutual agreement procedure (a failure to do so triggering the application of the arbitration provision of paragraph 5 of Article 25) if a State does not unilaterally agree to make a corresponding adjustment, without any deference being given to the adjusting State's preferred position as to the arm's length price or method. These States would therefore prefer a provision that would always give the possibility for a State to negotiate with the adjusting State over the arm's length price or method to be applied. States that share that view may prefer to use the following alternative version of paragraph 3:

Where, in accordance with paragraph 2, a Contracting State adjusts the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States and taxes accordingly profits of the enterprise that have been charged to tax in the other State, the other Contracting State shall, to the extent necessary to eliminate double taxation *on these profits*, make an appropriate adjustment if it agrees with the adjustment made by the first-mentioned State; if the other Contracting State does not so agree, the Contracting States shall eliminate any double taxation resulting therefrom by mutual agreement.

24. Add the following new paragraph 75.1 to the Commentary on Article 7:

*75.1 Emissions trading programmes have been implemented in a number of countries as part of an international strategy for addressing global warming. Under such programmes, emissions permits may be required in order to perform certain economic activities that generate greenhouse gases and credits issued with respect to emission-reduction or emissions removal projects in other countries may be recognised. Given the multinational character of certain emissions trading programmes (such as the European Union Emissions Trading System), these programmes present specific issues under the Model Tax Convention, most notably the treatment of income from the issuance and trading of emissions permits and credits. These issues are examined in the Committee's report "Tax treaty issues related to emissions permits/credits". As explained in that report, income derived from the issuance or trading of emissions permits and credits is generally covered by Article 7 and Article 13. Under certain circumstances, however, such income may be covered by Articles 6, 8 or 21 (see paragraph 2.1 of the Commentary on Article 6 and paragraph 14.1 of the Commentary on Article 8).*

25. Replace paragraph 88 of the Commentary on Article 7 by the following:

88. *Italy, ~~and Portugal~~ and Turkey* 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 in 2000. *In the case of Turkey, the question of whether persons other than individuals should be included in that article shall be determined by bilateral negotiations.*

26. Replace paragraph 96 of the Commentary on Article 7 by the following:

96. *Chile, Greece, Mexico, the Slovak Republic and Turkey* reserve the right to use the previous version of Article 7, *i.e.* the version that was included in the Model Tax Convention immediately before the 2010 update of the Model Tax Convention. They do not, therefore, endorse the changes to the Commentary on the Article made through that update.

#### **Commentary on Article 8**

27. Add the following new paragraph 14.1 to the Commentary on Article 8:

**14.1** *Enterprises engaged in the operation of ships or aircraft in international traffic may be required to acquire and use emissions permits and credits for that purpose (the nature of these permits and credits is explained in paragraph 75.1 of the Commentary on Article 7). Paragraph 1 applies to income derived by such enterprises with respect to such permits and credits where such income is an integral part of carrying on the business of operating ships or aircraft in international traffic, e.g. where permits are acquired for the purpose of operating ships or aircraft or where permits acquired for that purpose are subsequently traded when it is realised that they will not be needed.*

28. Replace paragraph 16.1 of the Commentary on Article 8 by the following:

16.1 Paragraphs 4 to ~~14.114~~ above provide guidance with respect to the profits that may be considered to be derived from the operation of ships or aircraft in international traffic. The principles and examples included in these paragraphs are applicable, with the necessary adaptations, for purposes of determining which profits may be considered to be derived from the operation of boats engaged in inland waterways transport.

29. Replace paragraph 42 of the Commentary on Article 8 by the following:

42. ~~Turkey reserves the right in exceptional cases to apply the permanent establishment rule in taxation of profit from international transport. Turkey also reserves the right to broaden the scope of the Article to cover transport by road vehicle and to make a corresponding change to the definition of “international traffic” in Article 3.~~

30. Replace paragraph 43 of the Commentary on Article 8 by the following:

43. *Chile, Estonia and Slovenia* reserve the right not to extend the scope of the Article to cover inland transportation in bilateral conventions and to make corresponding modifications to paragraph 3 of Articles 13, 15 and 22.

#### **Commentary on Article 9**

31. Replace paragraph 16 of the Commentary on Article 9 by the following:

16. The *Czech Republic and Hungary* reserves the right not to insert paragraph 2 in ~~their~~*its* conventions but ~~are~~*is* prepared in the course of negotiations to accept this paragraph and at the same time to add a third paragraph limiting the potential corresponding adjustment to *bona fide* cases.

32. Delete the following paragraph 17 of the Commentary on Article 9:

~~17. Germany reserves the right not to insert paragraph 2 in its conventions but is prepared in the course of negotiations to accept this paragraph based on Germany's long-standing and unaltered understanding that the other Contracting State is only obliged to make an adjustment to the amount of tax to the extent that it agrees, unilaterally or in a mutual agreement procedure, with the adjustment of profits by the first mentioned State.~~

33. Replace paragraph 19 of the Commentary on Article 9 by the following:

19. **Hungary and** Slovenia reserves the right to specify in paragraph 2 that a correlative adjustment will be made only if ~~it~~**they** considers that the primary adjustment is justified.

### **Commentary on Article 10**

34. Replace paragraphs 12 to 12.2 of the Commentary on Article 10 by the following:

12. The requirement of beneficial owner was introduced in paragraph 2 of Article 10 to clarify the meaning of the words "paid ... to a resident" as they are used in paragraph 1 of the Article. It makes plain that the State of source is not obliged to give up taxing rights over dividend income merely because that income was ~~immediately received by~~**paid direct to** a resident of a State with which the State of source had concluded a convention. [*the rest of the paragraph has been moved to new paragraph 12.1*]

**12.1** *Since the term "beneficial owner" was added to address potential difficulties arising from the use of the words "paid to ... a resident" in paragraph 1, it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country (in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries).* The term "beneficial owner" is *therefore* not used in a narrow technical sense (*such as the meaning that it has under the trust law of many common law countries*<sup>1</sup>), rather, it should be understood in its context, *in particular in relation to the words "paid ... to a resident"*, and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.

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[Footnote to paragraph 12.1]

1. **For example, where the trustees of a discretionary trust do not distribute dividends earned during a given period, these trustees, acting in their capacity as such (or the trust, if recognised as a separate taxpayer), could constitute the beneficial owners of such income for the purposes of Article 10 even if they are not the beneficial owners under the relevant trust law.**

~~12.42~~ Where an item of income is ~~received by~~**paid to** a resident of a Contracting State acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the ~~immediate direct~~ recipient of the income as a resident of the other Contracting State. The ~~immediate-direct~~ recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a consequence of that status since the recipient is not treated as the owner of the income for tax purposes in the State of residence. [*the rest of the paragraph has been moved to new paragraph 12.3*]

**12.3** It would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through

an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned. For these reasons, the report from the Committee on Fiscal Affairs entitled “Double Taxation Conventions and the Use of Conduit Companies”<sup>1</sup> concludes that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.

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[Footnote to paragraph 12.3]

1. Reproduced at page R(6)-1 of Volume II of the *full-length loose-leaf* version of the OECD Model Tax Convention.

*12.4 In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the dividend is not the “beneficial owner” because that recipient’s right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person. This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 6.8 to 6.34 of the Commentary on Article 1. Where the recipient of a dividend does have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the “beneficial owner” of that dividend. It should also be noted that Article 10 refers to the beneficial owner of a dividend as opposed to the owner of the shares, which may be different in some cases.*

*12.5 The fact that the recipient of a dividend is considered to be the beneficial owner of that dividend does not mean, however, that the limitation of tax provided for by paragraph 2 must automatically be granted. This limitation of tax should not be granted in cases of abuse of this provision (see also paragraphs 17 and 22 below). As explained in the section on “Improper use of the Convention” in the Commentary on Article 1, there are many ways of addressing conduit company and, more generally, treaty shopping situations. These include specific anti-abuse provisions in treaties, general anti-abuse rules and substance-over-form or economic substance approaches. Whilst the concept of “beneficial owner” deals with some forms of tax avoidance (i.e. those involving the interposition of a recipient who is obliged to pass on the dividend to someone else), it does not deal with other cases of treaty shopping and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.*

*12.6 The above explanations concerning the meaning of “beneficial owner” make it clear that the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments<sup>1</sup> that concern the determination of the persons (typically the individuals) that exercise ultimate control over entities or assets. That different meaning of “beneficial owner” cannot be applied in the context of the Article. Indeed, that meaning, which refers to natural persons (i.e. individuals), cannot be reconciled with the express wording of subparagraph 2 a), which refers to the situation where a company is the beneficial owner of a dividend. In the context of Article 10, the term “beneficial owner” is intended to address difficulties arising from the use of the words “paid to”*

*in relation to dividends rather than difficulties related to the ownership of the shares of the company paying these dividends. For that reason, it would be inappropriate, in the context of that Article, to consider a meaning developed in order to refer to the individuals who exercise “ultimate effective control over a legal person or arrangement.”<sup>2</sup>*

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[Footnotes to paragraph 12.6]

1. *See, for example, Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations (OECD-FATF, Paris, 2012), which sets forth in detail the international anti-money laundering standard and which includes the following definition of beneficial owner (at page 110): “the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.” Similarly, the 2001 report of the OECD Steering Group on Corporate Governance, “Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes” (OECD, Paris, 2001), defines beneficial ownership as follows (at page 14):*

*In this Report, “beneficial ownership” refers to ultimate beneficial ownership or interest by a natural person. In some situations, uncovering the beneficial owner may involve piercing through various intermediary entities and/or individuals until the true owner who is a natural person is found. With respect to corporations, ownership is held by shareholders or members. In partnerships, interests are held by general and limited partners. In trusts and foundations, beneficial ownership refers to beneficiaries, which may also include the settlor or founder.*

2. *See the Financial Action Task Force’s definition quoted in the previous note.*

12.72 Subject to other conditions imposed by the Article, the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State (the text of the Model was amended in 1995 *and in 2014* to clarify this point, which has been the consistent position of all Member countries). ~~States which wish to make this more explicit are free to do so during bilateral negotiations.~~

35. Replace paragraph 28 of the Commentary on Article 10 by the following:

28. Payments regarded as dividends may include not only distributions of profits decided by annual general meetings of shareholders, but also other benefits in money or money’s worth, such as bonus shares, bonuses, profits on a liquidation *or redemption of shares (see paragraph 31 of the Commentary on Article 13)* and disguised distributions of profits. The reliefs provided in the Article apply so long as the State of which the paying company is a resident taxes such benefits as dividends. It is immaterial whether any such benefits are paid out of current profits made by the company or are derived, for example, from reserves, *i.e.* profits of previous financial years. Normally, distributions by a company which have the effect of reducing the membership rights, for instance, payments constituting a reimbursement of capital in any form whatever, are not regarded as dividends.

36. Replace paragraph 75 of the Commentary on Article 10 by the following:

75. *Israel, Mexico, Portugal and Turkey reserve their positions on the rates of tax in paragraph 2.*

37. Add the following new paragraph 76 to the Commentary on Article 10:

76. *Estonia reserves the right not to include the requirement for the competent authorities to settle by mutual agreement the mode of application of paragraph 2.*

38. Add the following new paragraph 82 to the Commentary on Article 10:

82. *Israel reserves the right to exclude payments made by a Real Estate Investment Trust which is a resident of Israel from the definition of dividends in paragraph 3 and to tax those payments according to its domestic law.*

39. Add the following new paragraph 82.1 to the Commentary on Article 10:

82.1 *Estonia reserves the right to replace, in paragraph 3, the words “income from other corporate rights” by “income from other rights”.*

#### **Commentary on Article 11**

40. Replace paragraph 7.7 of the Commentary on Article 11 by the following:

7.7 The problem described in paragraph 7.1, which essentially arises because taxation by the State of source is typically levied on the gross amount of the interest and therefore ignores the real amount of income derived from the transaction for which the interest is paid, is particularly important in the case of financial institutions. For instance, a bank generally finances the loan which it grants with funds lent to it and, in particular, funds accepted on deposit. Since the State of source, in determining the amount of tax payable on the interest, will usually ignore the cost of funds for the bank, the amount of tax may prevent the transaction from occurring unless the amount of that tax is borne by the debtor. For that reason, many States provide that interest paid to a financial institution such as a bank will be exempt from any tax at source. States wishing to do so may agree to include the following ~~interest~~ in a paragraph providing ~~for from~~ exemption of certain interest from taxation in the State of source:

d) is a financial institution;

41. Replace paragraphs 9 to 11 of the Commentary on Article 11 by the following:

9. The requirement of beneficial ownership~~ship~~ was introduced in paragraph 2 of Article 11 to clarify the meaning of the words “paid to a resident” as they are used in paragraph 1 of the Article. It makes plain that the State of source is not obliged to give up taxing rights over interest income merely because that income was ~~immediately received~~ **paid direct to** a resident of a State with which the State of source had concluded a convention. [*the rest of the paragraph has been moved to new paragraph 9.1*]

9.1 *Since the term “beneficial owner” was added to address potential difficulties arising from the use of the words “paid to a resident” in paragraph 1, it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country (in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries). The term “beneficial owner” is therefore not used in a*



narrow technical sense (*such as the meaning that it has under the trust law of many common law countries<sup>1</sup>*), rather, it should be understood in its context, *in particular in relation to the words “paid to a resident”*, and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.

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[Footnote to paragraph 9.1]

1. ***For example, where the trustees of a discretionary trust do not distribute interest earned during a given period, these trustees, acting in their capacity as such (or the trust, if recognised as a separate taxpayer) could constitute the beneficial owners of such income for the purposes of Article 11 even if they are not the beneficial owners under the relevant trust law.***

10. Relief or exemption in respect of an item of income is granted by the State of source to a resident of the other Contracting State to avoid in whole or in part the double taxation that would otherwise arise from the concurrent taxation of that income by the State of residence. Where an item of income is ~~received by~~ **paid to** a resident of a Contracting State acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the ~~immediate~~ **direct** recipient of the income as a resident of the other Contracting State. The ~~immediate~~ **direct** recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a consequence of that status since the recipient is not treated as the owner of the income for tax purposes in the State of residence. [*the rest of the paragraph has been moved to new paragraph 10.1*]

**10.1** It would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned. For these reasons, the report from the Committee on Fiscal Affairs entitled “Double Taxation Conventions and the Use of Conduit Companies”<sup>1</sup> concludes that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.

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[Footnote to paragraph 10.1]

1. Reproduced at page R(6)-1 of Volume II of the ~~full-length loose-leaf~~ **full-length** version of the OECD Model Tax Convention.

**10.2** *In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the interest is not the “beneficial owner” because that recipient’s right to use and enjoy the interest is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person. This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or typical distribution obligations of pension schemes and of*

*collective investment vehicles entitled to treaty benefits under the principles of paragraphs 6.8 to 6.34 of the Commentary on Article 1. Where the recipient of interest does have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the “beneficial owner” of that interest. It should also be noted that Article 11 refers to the beneficial owner of interest as opposed to the owner of the debt-claim with respect to which the interest is paid, which may be different in some cases.*

*10.3 The fact that the recipient of an interest payment is considered to be the beneficial owner of that interest does not mean, however, that the limitation of tax provided for by paragraph 2 must automatically be granted. This limitation of tax should not be granted in cases of abuse of this provision (see also paragraph 8 above). As explained in the section on “Improper use of the Convention” in the Commentary on Article 1, there are many ways of addressing conduit company and, more generally, treaty shopping situations. These include specific anti-abuse provisions in treaties, general anti-abuse rules and substance-over-form or economic substance approaches. Whilst the concept of “beneficial owner” deals with some forms of tax avoidance (i.e. those involving the interposition of a recipient who is obliged to pass on the interest to someone else), it does not deal with other cases of treaty shopping and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.*

*10.4 The above explanations concerning the meaning of “beneficial owner” make it clear that the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments<sup>1</sup> that concern the determination of the persons (typically the individuals) that exercise ultimate control over entities or assets. That different meaning of “beneficial owner” cannot be applied in the context of the Convention. Indeed, that meaning, which refers to natural persons (i.e. individuals), cannot be reconciled with the express wording of subparagraph 2 a) of Article 10, which refers to the situation where a company is the beneficial owner of a dividend. In the context of Articles 10 and 11, the term “beneficial owner” is intended to address difficulties arising from the use of the words “paid to” in relation to dividends and interest rather than difficulties related to the ownership of the shares or debt-claims on which dividends or interest are paid. For that reason, it would be inappropriate, in the context of these articles, to consider a meaning developed in order to refer to the individuals who exercise “ultimate effective control over a legal person or arrangement”.<sup>2</sup>*

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[Footnotes to paragraph 10.4]

- 1. See, for example, Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations (OECD-FATF, Paris, 2012), which sets forth in detail the international anti-money laundering standard and which includes the following definition of beneficial owner (at page 110): “the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.” Similarly, the 2001 report of the OECD Steering Group on Corporate Governance, “Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes” (OECD, Paris, 2001), defines beneficial ownership as follows (at page 14):*

*In this Report, “beneficial ownership” refers to ultimate beneficial ownership or interest by a natural person. In some situations, uncovering the beneficial owner may involve piercing through various intermediary*

*entities and/or individuals until the true owner who is a natural person is found. With respect to corporations, ownership is held by shareholders or members. In partnerships, interests are held by general and limited partners. In trusts and foundations, beneficial ownership refers to beneficiaries, which may also include the settlor or founder.*

2. *See the Financial Action Task Force's definition quoted in the previous note.*

11. Subject to other conditions imposed by the Article, the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State (the text of the Model was amended in 1995 **and in 2014** to clarify this point, which has been the consistent position of all member countries). ~~States which wish to make this more explicit are free to do so during bilateral negotiations.~~

42. Replace paragraph 20 of the Commentary on Article 11 by the following:

20. As regards, more particularly, government securities, and bonds and debentures, the text specifies that premiums or prizes attaching thereto constitute interest. Generally speaking, what constitutes interest yielded by a loan security, and may properly be taxed as such in the State of source, is all that the institution issuing the loan pays over and above the amount paid by the subscriber, that is to say, the interest accruing plus any premium paid at redemption or at issue. It follows that when a bond or debenture has been issued at a premium, the excess of the amount paid by the subscriber over that repaid to him may constitute negative interest which should be deducted from *the stated interest in determining* the interest that is taxable. On the other hand, *the definition of interest does not cover* any profit or loss *that cannot be attributed to a difference between what the issuer received and paid (e.g. a profit or loss, not representing accrued interest or original issue discount or premium,* which a holder of such a security *such as a bond or debenture* realises by the sale thereof to another person *or by the repayment of the principal of a security that he has acquired from a previous holder for an amount that is different from the amount received by the issuer of the security).* ~~does not enter into the concept of interest.~~ Such profit or loss may, depending on the case, constitute either a business profit or a loss, a capital gain or a loss, or income falling under Article 21.

*20.1 The amount that the seller of a bond will receive will typically include the interest that has accrued, but has not yet become payable, at the time of the sale of the bond. In most cases, the State of source will not attempt to tax such accrued interest at the time of the alienation and will only tax the acquirer of the bond or debenture on the full amount of the interest subsequently paid (it is generally assumed that in such a case, the price that the acquirer pays for the bond takes account of the future tax liability of the acquirer on the interest accrued for the benefit of the seller at the time of the alienation). In certain circumstances, however, some States tax the seller of a bond on interest that has accrued at the time of the alienation (e.g. when a bond is sold to a tax-exempt entity). Such accrued interest is covered by the definition of interest and may therefore be taxed by the State of source. In that case, that State should not again tax the same amount in the hands of the acquirer of the bond when the interest subsequently becomes payable.*

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

38. *Chile, Hungary, Israel, Mexico, Portugal, the Slovak Republic and Turkey* reserve their positions on the rates of tax in paragraph 2.

44. Add the following new paragraph 39 to the Commentary on Article 11:

39. *Israel reserves the right to include a provision that would allow a resident of a Contracting State to be taxed on its interest income as if that income were business profits and were taxable under Article 7.*

45. Add the following new paragraph 40.1 to the Commentary on Article 11:

**40.1** *Estonia reserves the right not to include the requirement for the competent authorities to settle by mutual agreement the mode of application of paragraph 2.*

46. Replace paragraph 42 of the Commentary on Article 11 by the following:

42. *Belgium, Canada, Estonia and Ireland reserve the right to amend the definition of interest so as to secure that interest payments treated as distributions under their domestic law fall within Article 10.*

47. Replace paragraph 44 of the Commentary on Article 11 by the following:

44. *Chile, Greece, Portugal and Spain reserve the right to widen the definition of interest by including a reference to their domestic law in line with the definition contained in the 1963 Draft Convention.*

### **Commentary on Article 12**

48. Replace paragraphs 4 to 4.2 of the Commentary on Article 12 by the following:

4. The requirement of beneficial ownership was introduced in paragraph 1 of Article 12 to clarify how the Article applies in relation to payments made to intermediaries. It makes plain that the State of source is not obliged to give up taxing rights over royalty income merely because that income was ~~immediately received by~~ **paid direct to** a resident of a State with which the State of source had concluded a convention. The term “beneficial owner” is **therefore** not used in a narrow technical sense (*such as the meaning that it has under the trust law of many common law countries<sup>1</sup>*), rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.

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[Footnote to paragraph 4]

1. *For example, where the trustees of a discretionary trust do not distribute royalties earned during a given period, these trustees, acting in their capacity as such (or the trust, if recognised as a separate taxpayer) could constitute the beneficial owners of such income for the purposes of Article 12 even if they are not the beneficial owners under the relevant trust law.*

4.1 Relief or exemption in respect of an item of income is granted by the State of source to a resident of the other Contracting State to avoid in whole or in part the double taxation that would otherwise arise from the concurrent taxation of that income by the State of residence. Where an item of income is ~~received by~~ **paid to** a resident of a Contracting State acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the ~~immediate~~ **direct** recipient of the income as a resident of the other Contracting State. The ~~immediate~~ **direct** recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a

consequence of that status since the recipient is not treated as the owner of the income for tax purposes in the State of residence. [*the rest of the paragraph has been moved to new paragraph 4.2*]

**4.2** It would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned. For these reasons, the report from the Committee on Fiscal Affairs entitled “Double Taxation Conventions and the Use of Conduit Companies”<sup>1</sup> concludes that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.

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[Footnote to paragraph 4.2]

1. Reproduced at page R(6)-1 of Volume II of the *full-length* ~~loose-leaf~~ version of the OECD Model Tax Convention.

**4.3** *In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the royalties is not the “beneficial owner” because that recipient’s right to use and enjoy the royalties is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the royalties unconstrained by a contractual or legal obligation to pass on the payment received to another person. This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or as a party to financial transactions or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 6.8 to 6.34 of the Commentary on Article 1. Where the recipient of royalties does have the right to use and enjoy the royalties unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the “beneficial owner” of these royalties. It should also be noted that Article 12 refers to the beneficial owner of royalties as opposed to the owner of the right or property in respect of which the royalties are paid, which may be different in some cases.*

**4.4** *The fact that the recipient of royalties is considered to be the beneficial owner of these royalties does not mean, however, that the provisions of paragraph 1 must automatically be applied. The benefit of these provisions should not be granted in cases of abuse (see also paragraph 7 below). As explained in the section on “Improper use of the Convention” in the Commentary on Article 1, there are many ways of addressing conduit company and, more generally, treaty shopping situations. These include specific anti-abuse provisions in treaties, general anti-abuse rules and substance-over-form or economic substance approaches. Whilst the concept of “beneficial owner” deals with some forms of tax avoidance (i.e. those involving the interposition of a recipient who is obliged to pass on the royalties to someone else), it does not deal with other cases of treaty shopping and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.*

**4.5** *The above explanations concerning the meaning of “beneficial owner” make it clear that the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments<sup>1</sup> that*

*concern the determination of the persons (typically the individuals) that exercise ultimate control over entities or assets. That different meaning of “beneficial owner” cannot be applied in the context of the Convention. Indeed, that meaning, which refers to natural persons (i.e. individuals), cannot be reconciled with the express wording of subparagraph 2 a) of Article 10, which refers to the situation where a company is the beneficial owner of a dividend. The term beneficial owner was intended to address difficulties arising from the use of the words “paid to”, which are found in paragraph 1 of Articles 10 and 11 and were similarly used in paragraph 1 of Article 12 of the 1977 Model Double Taxation Convention, in relation to dividends, interest and royalties rather than difficulties related to the ownership of the shares, debt-claims, property or rights with respect these dividends, interest or royalties are paid. For that reason, it would be inappropriate, in the context of these articles, to consider a meaning developed in order to refer to the individuals who exercise “ultimate effective control over a legal person or arrangement”.<sup>2</sup>*

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[Footnotes to paragraph 4.5]

1. *See, for example, Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations (OECD-FATF, Paris, 2012), which sets forth in detail the international anti-money laundering standard and which includes the following definition of beneficial owner (at page 110): “the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.” Similarly, the 2001 report of the OECD Steering Group on Corporate Governance, “Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes” (OECD, Paris, 2001), defines beneficial ownership as follows (at page 14):*

*In this Report, “beneficial ownership” refers to ultimate beneficial ownership or interest by a natural person. In some situations, uncovering the beneficial owner may involve piercing through various intermediary entities and/or individuals until the true owner who is a natural person is found. With respect to corporations, ownership is held by shareholders or members. In partnerships, interests are held by general and limited partners. In trusts and foundations, beneficial ownership refers to beneficiaries, which may also include the settlor or founder.*

2. *See the Financial Action Task Force’s definition quoted in the previous note.*

4.62 Subject to other conditions imposed by the Article, the *exemption from taxation* in the State of source remains available when an intermediary, such as an agent or nominee *located in a Contracting State or in a third State*, is interposed between the beneficiary and the payer, in those cases where the beneficial owner is a resident of the other Contracting State (the text of the Model was amended in 1995–1997 to clarify this point, which has been the consistent position of all member countries). ~~States which wish to make this more explicit are free to do so during bilateral negotiations.~~

49. Renumber paragraph 32 of the Commentary on Article 12 as follows:

~~32.~~**31.3** Concerning paragraph 9.1, *Germany* reserves its position on whether and under which circumstances payments made for the acquisition of the right of disposal over the transport capacity of pipelines or the capacity of technical installations, lines or cables for the transmission of electrical

power or communications (including the distribution of radio and television programs) could be regarded as payments made for the leasing of industrial, commercial or scientific equipment.

50. Renumber paragraph 32.1 of the Commentary on Article 12 as follows:

~~32.138.~~ *Greece* reserves the right to include the payments referred to in paragraphs 9.1, 9.2 and 9.3 in the definition of royalties.

51. 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 add the words “for the use of, or the right to use, industrial, commercial or scientific equipment” to paragraph 2.

52. Delete the following paragraph 45 of the Commentary on Article 12:

~~45. *Spain* reserves its right to continue to adhere in its conventions to a definition of royalties which includes income from the leasing of industrial, commercial or scientific equipment and of containers.~~

53. Renumber paragraphs 46.2 and 46.3 of the Commentary on Article 12 as follows:

~~46.231.4~~ *Greece* does not adhere to the interpretation in the sixth dash of paragraph 11.4 and takes the view that all concerning payments are falling within the scope of the Article.

~~46.331.5~~ *Greece* does not adhere to the interpretation in paragraphs 17.2 and 17.3 because the payments related to downloading of computer software ought to be considered as royalties even if those products are acquired for the personal or business use of the purchaser.

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

48. *Australia, Belgium, Canada, Chile, the Czech Republic, Estonia, France, Israel, Mexico, the Slovak Republic* and *Slovenia* reserve the right, in order to fill what they consider as a gap in the Article, to propose a provision defining the source of royalties by analogy with the provisions of paragraph 5 of Article 11, which deals with the same problem in the case of interest.

### ***Commentary on Article 13***

55. Replace paragraph 3 of the Commentary on Article 13 by the following:

3. The Article does not deal with the above-mentioned questions. It is left to the domestic law of each Contracting State to decide whether capital gains should be taxed and, if they are taxable, how they are to be taxed. The Article can in no way be construed as giving a State the right to tax capital gains if such right is not provided for in its domestic law. [*the rest of the paragraph is moved to new paragraph 3.1*]

**3.1** The Article does not specify to what kind of tax it applies. It is understood that the Article must apply to all kinds of taxes levied by a Contracting State on capital gains. The wording of Article 2 is large enough to achieve this aim and to include also special taxes on capital gains. ***Also, where the Article allows a Contracting State to tax a capital gain, this right applies to the entire gain and not only to the part thereof that has accrued after the entry into force of a treaty (subject to contrary***

*provisions that could be agreed to during bilateral negotiations), even in the case of a new treaty that replaces a previous one that did not allow such taxation.*

56. Replace paragraph 24 of the Commentary on Article 13 by the following:

24. Paragraph 2 deals with movable property forming part of the business property of a permanent establishment of an enterprise. The term “movable property” means all property other than immovable property which is dealt with in paragraph 1. It includes also incorporeal property, such as goodwill, licences, *emissions permits* etc. Gains from the alienation of such assets may be taxed in the State in which the permanent establishment is situated, which corresponds to the rules for business profits (Article 7).

57. Replace paragraph 31 of the Commentary on Article 13 by the following:

31. If shares are ~~sold~~ *alienated* by a shareholder ~~to the issuing company~~ in connection with the liquidation of *the issuing* ~~such~~ company or the *redemption of shares or* reduction of its paid-up capital *of that company*, the difference between the ~~selling price~~ *proceeds obtained by the shareholder* and the par value of the shares may be treated in the State of which the company is a resident as a distribution of accumulated profits and not as a capital gain. The Article does not prevent the State of residence of the company from taxing such distributions at the rates provided for in Article 10: such taxation is permitted because such difference is covered by the definition of the term “dividends” contained in paragraph 3 of Article 10 and interpreted in paragraph 28 of the Commentary relating thereto, *to the extent that the domestic law of that State treats that difference as income from shares. As explained in paragraphs 32.1 to 32.7 of the Commentary on Articles 23 A and 23 B, where the State of the issuing company treats the difference as a dividend, the State of residence of the shareholder is required to provide relief of double taxation even though such a difference constitutes a capital gain under its own domestic law.* The same interpretation may apply if bonds or debentures are redeemed by the debtor at a price which is higher than the par value or the value at which the bonds or debentures have been issued; in such a case, the difference may represent interest and, therefore, be subjected to a limited tax in the State of source of the interest in accordance with Article 11 (see also paragraphs 20 and 21 of the Commentary on Article 11).

58. Add the following heading and new paragraph 32.1 to the Commentary on Article 13:

#### *Observation on the Commentary*

*32.1 With respect to paragraph 3.1, Austria and Germany hold the view that when a new tax treaty enters into force, these countries cannot be deprived of the right to tax the capital appreciation which was generated in these countries before the date when the new tax treaty became applicable.*

#### *Commentary on Article 15*

59. Add the following new paragraphs 2.3 to 2.16 to the Commentary on Article 15:

*2.3 In some cases, it may be difficult to determine which part of salaries, wages and other similar remuneration paid to an individual is derived from the exercise of employment in a given State. Paragraphs 12.6 to 12.13 below address this issue with respect to the granting of stock options to an employee who exercises his employment in different States. The issue may also arise in the case of payments made after the termination of employment. Such payments may raise tax treaty issues in different cross-border situations, including cases where such payments are made*



*to cross-border workers, to employees who have worked in a number of different countries during their career or to employees who have been sent to work abroad and are repatriated shortly before their employment is terminated. Regardless of the terminology used to describe these payments, it is essential to identify the real consideration for each such payment on the basis of the facts and circumstances of each case in order to determine whether the payment constitutes “salaries, wages or other similar remuneration” and the extent to which the payment, or part thereof, may be considered to derive from the exercise of employment in a given State. The following paragraphs discuss these questions with respect to different types of payments that are often made following the termination of employment.*

*2.4 Any remuneration paid after the termination of employment for work done before the employment was terminated (e.g. a salary or bonus for the last period of work or commissions for sales made during that period) will be considered to be derived from the State in which the relevant employment activities were exercised.*

*2.5 A payment made with respect to unused holidays / sick days that accrued during the last year of employment is part of the remuneration for the period of work that generated the holiday or sick leave entitlement. An employee may also be entitled, at the end of employment, to the payment for holidays and sick days related to a number of previous years that were unused during these years. Absent facts and circumstances showing otherwise, a payment received after termination of employment as compensation for holidays and sick days related to previous years that were unused during these years should be considered to have been a benefit for which the employee was entitled for the last 12 months of employment, allocated on a pro-rated basis to where the employment was exercised during that period. One situation where a different conclusion would be justified would be where it would be established, on the basis of the taxpayer’s employment records, that these holidays and sick days clearly relate to specific periods of past employment and that the payment constitutes remuneration for these periods of employment. States should take account, however, of the fact that the former employee may have been previously taxed on these holidays and sick days at the time of their accrual. Assume, for instance, that under a State’s domestic tax law, holidays and sick days granted with respect to periods of work performed on the territory of that State are treated as a benefit taxable during the fiscal year during which the relevant work was performed and are taxed accordingly. In such a case, the State of residence of the former employee at the time of the subsequent payment with respect to the holidays / sick days would need to provide relief of double taxation for such tax and any State in which the former employee may have worked during his last year of employment should similarly consider that any payment for previous years’ unused holiday / sick days that were already taxed on an accrual basis did not relate to employment activities exercised during the last year.*

*2.6 In some cases, the employer is required (by law or by contract) to provide an employee with a period of notice before terminating employment. If the employee is told not to work during the notice period and is simply paid the remuneration for that period, such remuneration is clearly received by virtue of the employment and therefore constitutes remuneration “derived therefrom” for the purposes of paragraph 1. The remuneration received in such a case should be considered to be derived from the State where it is reasonable to assume that the employee would have worked during the period of notice. The determination of where it is reasonable to assume that the employee would have worked during the period of notice should be based on all facts and circumstances. In most cases it will be the last location where the employee worked for a substantial period of time before the employment was terminated; also, it would clearly be inappropriate to take account of a prospective employment period in a State where the employee*

*might have been expected to work but did not, in fact, perform his employment for a substantial period of time.*

*2.7 A different situation is that of a severance payment (also referred to as a “redundancy payment”) which an employer is required (by law or by contract) to make to an employee whose employment has been terminated. Such a payment is often, but not always, calculated by reference to the period of past employment with the employer. Absent facts and circumstances indicating otherwise, such a severance payment should be considered to be remuneration covered by the Article for the last 12 months of employment, allocated on a pro-rated basis to where the employment was exercised during that period; as such it constitutes remuneration derived from that employment for the purposes of the last sentence of paragraph 1.*

*2.8 An individual whose employment is terminated may have legal grounds to claim that the employment was terminated in violation of the contract of employment, the law or a collective agreement; there may also be other legal grounds for claiming damages depending on the circumstances of the termination. This individual may receive a judicial award or settlement as damages for breach of the relevant contractual or legal obligations. The tax treaty treatment will depend on what the damage award seeks to compensate. For instance, damages granted because an insufficient period of notice was given or because a severance payment required by law or contract was not made should be treated like the remuneration that these damages replace. Punitive damages or damages awarded on grounds such as discriminatory treatment or injury to one’s reputation should, however, be treated differently; these payments would typically fall under Article 21.*

*2.9 Under the provisions of an employment contract or of a settlement following the termination of an employment, a previous employee may receive a payment in consideration for an obligation not to work for a competitor of his ex-employer. This obligation is almost always time-limited and often geographically-limited. Whilst such a payment is directly related to the employment and is therefore “remuneration ... derived in respect of an employment”, it would not, in most circumstances, constitute remuneration derived from employment activities performed before the termination of the employment. For that reason, it will usually be taxable only in the State where the recipient resides at the time the payment is received. Where, however, such a payment made after the termination of employment is in substance remuneration for activities performed during the employment (which might be the case where, for example, the obligation not to compete has little or no value for the ex-employer), the payment should be treated in the same way as remuneration received for the work performed during the relevant period of employment. Also, in some States, part of an employee’s monthly salary during employment constitutes consideration for an obligation not to work for a competitor during a certain period of time after termination of the employment so that no separate payment for non-competition is made after the termination of the employment; in such a case, the guidance in the first part of this paragraph is not applicable and the part of the remuneration received during the employment that is attributable to that obligation should be treated in the same way as the rest of that remuneration.*

*2.10 As explained in paragraphs 4 to 6 of the Commentary on Article 18, various payments may be made after the termination of an employment with respect to pension contributions or pension entitlements of the former employee. According to paragraph 6 of that Commentary, “[w]hether a particular payment is to be considered as other remuneration similar to a pension or as final remuneration for work performed falling under Article 15 is a question of fact”. The paragraph gives the example of a “[r]eimbursement of pension contributions (e.g. after temporary employment)” as a payment that would not be covered by Article 18. To the extent that such a*

*reimbursement of contributions would constitute additional remuneration for previous employment that results from the termination of the employment, it would be covered by Article 15 and should be viewed as deriving from the State where the employment was exercised when the employment was terminated.*

*2.11 Payments may be made after the termination of employment pursuant to various deferred remuneration arrangements. Such a payment should be treated as remuneration covered by Article 15 and, to the extent that it can be associated to a specific period of past employment in a given State, it should be considered to be derived from the employment activities exercised in that State. Since many States would not allow the deferral of tax on employment remuneration even if the payment of that remuneration is deferred, it will be important for States that will tax deferred remuneration payments received after the termination of employment to ensure that double taxation is relieved.*

*2.12 Various payments may be made after the termination of an employment on account of incentive compensation in general and stock-options in particular. Whilst the treaty treatment of each such payment will depend on its own characteristics, the principles put forward in paragraphs 12 to 12.15, which deal specifically with stock-options, will assist in dealing with other forms of incentive compensation.*

*2.13 An employee may be entitled to medical or life insurance coverage for a certain period after termination of his/her employment. He/she may also be entitled to other benefits, such as the services of an employment consultant or agency. Absent facts and circumstances indicating otherwise, such benefits should be considered to be remuneration covered by the Article which is derived from the State where the employment was exercised when the employment was terminated (and when, therefore, the obligation to pay these benefits arose).*

*2.14 Another type of payment that could be made on or after termination of an employment is a compensation payment for loss of future earnings following injury or disability suffered during the course of employment. The tax treaty treatment of such a payment would depend on the legal context in which it was made. For instance, payments under a social security system such as a worker's compensation fund could fall under Articles 18, 19 or 21 (see paragraph 24 of the Commentary on Article 18). A payment that would constitute a pension payment would be covered by Article 18. A payment made because the employee has legal grounds for claiming damages from his employer with respect to a work-related sickness or injury would typically fall under Article 21. A payment made by the employer pursuant to the terms of the employment contract even though the sickness or injury is not work-related or the employer is not responsible for that sickness or injury should be dealt with in the same way as a severance payment: absent facts and circumstances indicating otherwise, such a payment should be considered to be remuneration covered by the Article for the last 12 months of employment, allocated on a pro-rated basis to where the employment was exercised during that period. A short-term disability payment made in the course of employment, however, should be treated in the same way as the payment of sick days during the course of employment; such a payment would be covered by Article 15 (Article 17 in the case of entertainers and sportspersons) and taxable in the State in which the employee normally exercised the employment before becoming sick or being injured.*

*2.15 After termination of employment, a salesperson may receive a payment in relation to the loss of future commissions. The tax treaty treatment of such a payment will depend on the legal context in which the payment is made. Depending on the circumstances, this payment could constitute deferred remuneration to which the salesperson was entitled in relation to previous sales or could be made pursuant to a provision of the employment contract according to which the*

*salesperson has a right to commissions on any future sales to a client that the salesperson brought to the employer; in both cases, the payment should be dealt with as remuneration for the employment services that gave rise to the entitlement to the commissions. A payment that would constitute a compensation for future commissions that the salesperson would likely have earned if she had continued to work for the same employer may also constitute a compensation for unlawful dismissal or a form of severance payment; where that is the case, the payment should be dealt with accordingly.*

*2.16 As part of a transitional arrangement leading to the termination of employment, an employee may receive a full or reduced salary for a period during which that employee will not work. Where the salary is paid by the employer for a period during which the employee is not required to work even though the employment has not been terminated, the salary is still received by virtue of the employment and therefore constitutes remuneration “derived therefrom” for the purposes of paragraph 1. The remuneration received in such a case should be considered to be derived from the State where it is reasonable to assume that the employee would have worked during that period, which will most often be the State where the employment activities were performed before the cessation of work.*

60. Add the following new paragraph 4.1 to the Commentary on Article 15:

*4.1 The reference to the “fiscal year concerned” must be interpreted as a reference to a fiscal year of the Contracting State in which a resident of the other Contracting State has exercised his employment and during which the relevant employment services have been rendered. Assume, for example, that the fiscal year of State S runs from 1 January to 31 December and that a resident of State R is present and performs employment services in State S between 1 August 00 and 28 February 01. For the purposes of subparagraph 2 a), any twelve month period that begins between 1 January and 31 December 00 or ends between 1 January and 31 December 01 and that includes any part of the period of employment services would be relevant. For instance, the twelve month period of 1 August 00 to 31 July 01, which begins in the fiscal year 00 and during which the person was present in State S for more than 183 days, would include the employment services rendered in that State between 1 August and 31 December 00; similarly, the twelve month period of 1 March 00 to 28 February 01, which ends in the fiscal year 01 and during which the person was present in State S for more than 183 days, would include the employment services rendered in that State between 1 January and 28 February 01. The taxation of the remuneration for the relevant services need not take place in the fiscal year concerned: as explained in paragraph 2.2 above and 12.1 below, the Article allows a State to tax the remuneration derived from employment exercised in that State in a particular year even if the remuneration for these employment services is acquired, or the tax is levied, in a different year.*

61. Replace paragraph 13.1 of the Commentary on Article 15 by the following:

*13.1 With respect to paragraph 6.2, Germany holds the view that a partnership as such should be considered as the employer (as under the national law of most OECD member States even if these States do not tax the partnership as such). The residence of the partnership would then have to be determined hypothetically as if the partnership were liable to tax by reason of one of the criteria mentioned in paragraph 1 of Article 4.*

62. Replace paragraph 16 of the Commentary on Article 15 by the following:

*16. ~~Germany and Norway~~ reserves the right to include an express reference in paragraph 2 to income earned by hired-out personnel of one Contracting State working in the other Contracting*

State, in order to clarify the understanding that the exception in paragraph 2 does not apply in situations of “international hiring-out of labour” (see paragraph 8 above).

### *Commentary on Article 16*

63. Add the following new paragraph 4 to the Commentary on Article 16:

**4. Estonia reserves the right to tax under this Article any remuneration of a member of a board of directors or any other similar organ of a resident company.**

### *Commentary on Article 17*

64. Replace the title and paragraphs 1 to 14 of the Commentary on Article 17 by the following:

## **COMMENTARY ON ARTICLE 17 CONCERNING THE TAXATION OF ~~ARTISTES AND SPORTSMEN~~ ENTERTAINERS AND SPORTSPERSONS**

### *Paragraph 1*

1. Paragraph 1 provides that ~~entertainers~~ ~~artistes~~ and ~~sportsmen~~ **sportspersons** who are residents of a Contracting State may be taxed in the other Contracting State in which their personal activities as such are performed, whether these are of a business or employment nature. This provision is an exception to the rules in Article 7 (***over which it prevails by virtue of paragraph 4 of that Article***) and to that in paragraph 2 of Article 15, respectively.

2. This provision makes it possible to avoid the practical difficulties which often arise in taxing ~~entertainers~~ ~~artistes~~ and ~~sportsmen~~ **sportspersons** performing abroad. Moreover, too strict provisions might in certain cases impede cultural exchanges. In order to overcome this disadvantage, the States concerned may, by common agreement, limit the application of paragraph 1 to business activities. To achieve this it would be sufficient to ~~amend the text of the Article so that an exception is made only to the provisions of Article 7~~ **replace the words “notwithstanding the provisions of Article 15” by “subject to the provisions of Article 15” in paragraphs 1 and 2.** In such a case, ~~entertainers~~ ~~artistes~~ and ~~sportsmen~~ **sportspersons** performing in the course of an employment would automatically come within Article 15 and thus be entitled to the exemptions provided for in paragraph 2 of that Article.

3. Paragraph 1 refers to ~~entertainers~~ ~~artistes~~ and ~~sportsmen~~ **sportspersons**. It is not possible to give a precise definition of “~~entertainer~~ ~~artiste~~”, but paragraph 1 includes examples of persons who would be regarded as such. These examples should not be considered as exhaustive. On the one hand, the term “~~entertainer~~ ~~artiste~~” clearly includes the stage performer, film actor, **or** actor (including for instance a former ~~sportsman~~ **sportsperson**) in a television commercial. The Article may also apply to income received from activities which involve a political, social, religious or charitable nature, if an entertainment character is present. On the other hand, it does not extend to a visiting conference speaker (***e.g. a former politician who receives a fee for a speaking engagement***), **to a model performing as such (e.g. a model presenting clothes during a fashion show or photo session) rather than as an entertainer** or to administrative or support staff (***e.g. cameramen for a film, producers, film directors, choreographers, technical staff, road crew for a pop group, etc.***). In between there is a grey area where it is necessary to review the overall balance of the activities of the person concerned.

4. An individual may both direct a show and act in it, or may direct and produce a television programme or film and take a role in it. In such cases it is necessary to look at what the individual actually does in the State where the performance takes place. If his activities in that State are

predominantly of a performing nature, the Article will apply to all the resulting income he derives in that State. If, however, the performing element is a negligible part of what he does in that State, the whole of the income will fall outside the Article. In other cases an apportionment should be necessary.

5. Whilst no precise definition is given of the term “~~sportsmen~~ **sportspersons**” it is not restricted to participants in traditional athletic events (*e.g.* runners, jumpers, swimmers). It also covers, for example, golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers.

6. The Article also applies to income from other activities which are usually regarded as of an entertainment character, such as those deriving from billiards and snooker, chess and bridge tournaments.

7. Income received by impresarios, etc. for arranging the appearance of an ~~entertainer~~ **artiste** or ~~sportsman~~ **sportsperson** is outside the scope of the Article, but any income they receive on behalf of the ~~entertainer~~ **artiste** or ~~sportsman~~ **sportsperson** is of course covered by it.

8. Paragraph 1 applies to income derived directly and indirectly **from a performance** by an individual ~~entertainer~~ **artiste** or ~~sportsman~~ **sportsperson**. In some cases the income will not be paid ~~directly~~ to the individual, or his impresario or agent, **directly with respect to a specific performance**. For instance, a member of an orchestra may be paid a salary rather than receive payment for each separate performance: a Contracting State where a performance takes place is entitled, under paragraph 1, to tax the proportion of the musician’s salary which corresponds to such a performance. Similarly, where an ~~entertainer~~ **artiste** or ~~sportsman~~ **sportsperson** is employed by *e.g.* a one person company, the State where the performance takes place may tax an appropriate proportion of any remuneration paid to the individual. In addition, where a State’s domestic laws “look through” such entities and treat the income as accruing directly to the individual, paragraph 1 enables that State to tax income derived from ~~performances~~ **appearances** in its territory and accruing in the entity for the individual's benefit, even if the income is not actually paid as remuneration to the individual.

**8.1 The paragraph applies regardless of who pays the income. For example, it covers prizes and awards paid by a national federation, association or league which a team or an individual may receive in relation to a particular sports event.**

9. Besides fees for their actual ~~performances~~ **appearances**, ~~entertainers~~ **artistes** and ~~sportsmen~~ **sportspersons** often receive income in the form of royalties or of sponsorship or advertising fees. In general, other Articles would apply whenever there ~~was~~ **is** no ~~direct link~~ **close connection** between the income and ~~the performance of activities~~ **a public exhibition** by the ~~performer~~ in the country concerned. **Such a close connection will generally be found to exist where it cannot reasonably be considered that the income would have been derived in the absence of the performance of these activities. This connection may be related to the timing of the income-generating event (e.g. a payment received by a professional golfer for an interview given during a tournament in which she participates) or to the nature of the consideration for the payment of the income (e.g. a payment made to a star tennis player for the use of his picture on posters advertising a tournament in which he will participate).** Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17 (see paragraph 18 of the Commentary on Article 12), but in general advertising and sponsorship fees will fall outside the scope of Article 12. Article 17 will apply to advertising or sponsorship income, etc. which ~~is related directly or indirectly to~~ **has a close connection with a performance or appearance** in a given State (*e.g.* **payments made to a tennis player for wearing a sponsor’s logo, trade mark or trade name on his**

tennis shirt during a match). Such a close connection may be evident from contractual arrangements which relate to participation in named events or a number of unspecified events; in the latter case, a Contracting State in which one or more of these events take place may tax a proportion of the relevant advertising or sponsorship income (as it would do, for example, in the case of remuneration covering a number of unspecified performances; see paragraphs 9.2 and 9.3). Similar income which could not be attributed to such performances ~~or appearances~~ would fall under the standard rules of Article 7 or Article 15, as appropriate. Payments received in the event of the cancellation of a performance are also outside the scope of Article 17, and fall under Articles 7 or 15, as the case may be. *Various payments may be made as regards merchandising; whilst the payment to an entertainer or sportsperson of a share of the merchandising income closely connected with a public performance but not constituting royalties would normally fall under Article 17, merchandising payments derived from sales in a country that are not closely connected with performances in that country and that do not constitute royalties would normally be covered by Article 7 (or Article 15, in the case of an employee receiving such income).*

**9.1** *Apart from the above examples, there are a number of cases where it may be difficult to determine whether a particular item of income is derived by a person as an entertainer or sportsperson from that person's personal activities as such. The following principles may be useful to deal with such cases:*

- *The reference to an “entertainer or sportsperson” includes anyone who acts as such, even for a single event. Thus, Article 17 can apply to an amateur who wins a monetary sports prize or a person who is not an actor but who gets a fee for a once-in-a-lifetime appearance in a television commercial or movie.*
- *As noted in the previous paragraphs, the activities of an entertainer or sportsperson do not include only the appearance in an entertainment or sports event in a given State but also, for example, advertising or interviews in that State that are closely connected with such an appearance.*
- *Merely reporting or commenting on an entertainment or sports event in which the reporter does not himself participate is not an activity of an entertainer or sportsperson acting as such. Thus, for instance, the fee that a former or injured sportsperson would earn for offering comments during the broadcast of a sports event in which that person does not participate would not be covered by Article 17.*
- *Preparation, such as rehearsal and training, is part of the normal activities of entertainers and sportspersons. If an entertainer or sportsperson is remunerated for time spent on rehearsal, training or similar preparation in a State (which would be fairly common for employed entertainers and sportspersons but could also happen for a self-employed individual, such as an opera singer whose contract would require participation in a certain number of rehearsals), the relevant remuneration, as well as remuneration for time spent travelling in that State for the purposes of performances, rehearsal and training (or similar preparation), would be covered by the Article. This would apply regardless of whether or not such rehearsal, training or similar preparation is related to specific public performances taking place in that State (e.g. remuneration that would be paid with respect to the participation in a pre-season training camp would be covered).*

**9.2** *Entertainers and sportspersons often perform their activities in different States making it necessary to determine which part of their income is derived from activities exercised in each State. Whilst such determination must be based on the facts and circumstances of each case, the following general principles will be relevant for that purpose:*

- *An element of income that is closely connected with specific activities exercised by the entertainer or sportsperson in a State (e.g. a prize paid to the winner of a sports competition taking place in that State; a daily allowance paid with respect to participation in a tournament or training stage taking place in that State; a payment made to a musician for a concert given in a State) will be considered to be derived from the activities exercised in that State.*
- *As indicated in paragraph 1 of the Commentary on Article 15, employment is exercised where the employee is physically present when performing the activities for which the employment remuneration is paid. Where the remuneration received by an entertainer or sportsperson employed by a team, troupe or orchestra covers various activities to be performed during a period of time (e.g. an annual salary covering various activities such as training or rehearsing; travelling with the team, troupe or orchestra; participating in a match or public performance, etc.), it will therefore be appropriate, absent any indication that the remuneration or part thereof should be allocated differently, to allocate that salary or remuneration on the basis of the working days spent in each State in which the entertainer or sportsperson has been required, under his or her employment contract, to perform these activities.*

### 9.3 *The following examples illustrate these principles:*

- *Example 1: A self-employed singer is paid a fixed amount for a number of concerts to be performed in different states plus 5 per cent of the ticket sales for each concert. In that case, it would be appropriate to allocate the fixed amount on the basis of the number of concerts performed in each State but to allocate the payments based on ticket sales on the basis of where the concerts that generated each such payment took place.*
- *Example 2: A cyclist is employed by a team. Under his employment contract, he is required to travel with the team, appear in some public press conferences organised by the team and participate in training activities and races that take place in different countries. He is paid a fixed annual salary plus bonuses based on his results in particular races. In that case, it would be reasonable to allocate the salary on the basis of the number of working days during which he is present in each State where his employment-related activities (e.g. travel, training, races, public appearances) are performed and to allocate the bonuses to where the relevant races took place.*

9.4 *Payments for the simultaneous broadcasting of a performance by an entertainer or sportsperson made directly to the performer or for his or her benefit (e.g. a payment made to the star-company of the performer) fall within the scope of Article 17 (see paragraph 18 of the Commentary on Article 12, which also deals with payments for the subsequent sales or public playing of recordings of the performance). Where, however, the payment is made to a third party (e.g. the owner of the broadcasting rights) and that payment does not benefit the performer, the payment is not related to the personal activities of the performer and therefore does not constitute income derived by a person as an entertainer or sportsperson from that person's personal activities as such. For example, where the organiser of a football tournament holds all intellectual property rights in the event and, as such, receives payments for broadcasting rights related to the event, Article 17 does not apply to these payments; similarly, Article 17 will not apply to any share of these payments that will be distributed to the participating teams and will not be re-distributed to the players and that is not otherwise paid for the benefit of the players. Whether such payments will constitute royalties covered by Article 12 will depend, among other things, on the legal nature of such broadcasting rights, in particular under the relevant copyright law.*



**9.5** *It is frequent for entertainers and sportspersons to derive, directly or indirectly (e.g. through a payment made to the star-company of the entertainer or sportsperson), a substantial part of their income in the form of payments for the use of, or the right to use, their “image rights”, e.g. the use of their name, signature or personal image. Where such uses of the entertainer’s or sportsperson’s image rights are not closely connected with the entertainer’s or sportsperson’s performance in a given State, the relevant payments would generally not be covered by Article 17 (see paragraph 9 above). There are cases, however, where payments made to an entertainer or sportsperson who is a resident of a Contracting State, or to another person, for the use of, or right to use, that entertainer’s or sportsperson’s image rights constitute in substance remuneration for activities of the entertainer or sportsperson that are covered by Article 17 and that take place in the other Contracting State. In such cases, the provisions of paragraph 1 or 2, depending on the circumstances, will be applicable.*

10. The Article says nothing about how the income in question is to be computed. It is for a Contracting State’s domestic law to determine the extent of any deductions for expenses. Domestic laws differ in this area, and some provide for taxation at source, at a low rate based on the gross amount paid to ~~entertainers~~ ~~artists~~ and ~~sportsmen~~ **sportspersons**. Such rules may also apply to income paid to groups or incorporated teams, troupes, etc. Some States, however, may consider that the taxation of the gross amount may be inappropriate in some circumstances even if the applicable rate is low. These States may want to give the option to the taxpayer to be taxed on a net basis. This could be done through the inclusion of a paragraph drafted along the following lines:

Where a resident of a Contracting State derives income referred to in paragraph 1 or 2 and such income is taxable in the other Contracting State on a gross basis, that person may, within [period to be determined by the Contracting States] request the other State in writing that the income be taxable on a net basis in that other State. Such request shall be allowed by that other State. In determining the taxable income of such resident in the other State, there shall be allowed as deductions those expenses deductible under the domestic laws of the other State which are incurred for the purposes of the activities exercised in the other State and which are available to a resident of the other State exercising the same or similar activities under the same or similar conditions.

**10.1** *Some States may also consider that it would be inappropriate to apply Article 17 to a non-resident entertainer or sportsperson who would not otherwise be taxable in a Contracting State (e.g. under the provisions of Article 7 or 15) and who, during a given taxation year, derives only low amounts of income from activities performed in that State. States wishing to exclude such situations from the application of Article 17 may do so by using an alternative version of paragraph 1 drafted along the following lines:*

*Notwithstanding the provisions of Article 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio, or television artiste, or a musician, or as a sportsperson, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State, except where the gross amount of such income derived by that resident from these activities exercised during a taxation year of the other Contracting State does not exceed an amount equivalent to [15 000 IMF Special Drawing Rights] expressed in the currency of that other State at the beginning of that taxation year or any other amount agreed to by the competent authorities before, and with respect to, that taxation year.*

**10.2** *The amount referred to in the above provision is purely illustrative. The reference to “IMF Special Drawing Rights” avoids the reference to the currency of one of the two Contracting States and is intended to provide an amount that remains relatively constant in value regardless of*

*currency fluctuations in each State (the IMF Special Drawing Rights (SDRs) are based on a basket of currencies revised periodically and are easily expressed in most convertible currencies). Also, for ease of administration, the proposed provision provides that the limit applicable in a State for a given taxation year is the amount converted in the currency of that State at the beginning of that year. The proposed provision also allows competent authorities to modify the amount when they consider it appropriate; instead of adopting a static amount, however, some States may prefer to adopt an objective mechanism that would allow periodic changes (this could be done, for example, by replacing the amount by a formula such as “50 per cent of the average GDP per capita for OECD countries, as determined by the OECD”).*

**10.3** *The proposed provision would not prevent Contracting States from collecting tax at the time the relevant income is earned and refunding it after the end of the year once it is established that the minimum amount has not been exceeded.*

**10.4** *The proposed provision only applies with respect to paragraph 1 (applying the rule with respect to other persons covered by paragraph 2 could encourage a fragmentation of contracts among many related entities in order to multiply the benefit of the exception). Also, the provision only restricts the additional taxing right recognised by Article 17 and does not affect the source taxing rights otherwise available under Articles 7 and 15. It would therefore not prevent taxation to the extent that the entertainer has a permanent establishment in the State of source or is present in that State for more than 183 days (or is employed by an employer who is a resident of that State or has permanent establishment in that State).*

#### **Paragraph 2**

11. Paragraph 1 of the Article deals with income derived by individual ~~entertainers~~<sup>artists</sup> and ~~sportsmen~~<sup>sportspersons</sup> from their personal activities. Paragraph 2 deals with situations where income from their activities accrues to other persons. If the income of an entertainer or ~~sportsman~~<sup>sportsperson</sup> accrues to another person, and the State of source does not have the statutory right to look through the person receiving the income to tax it as income of the performer, paragraph 2 provides that the portion of the income which cannot be taxed in the hands of the performer may be taxed in the hands of the person receiving the remuneration. If the person receiving the income carries on business activities, tax may be applied by the source country even if the income is not attributable to a permanent establishment there. But it will not always be so. There are three main situations of this kind:

- a) The first is the management company which receives income for the appearance of e.g. a group of ~~sportsmen~~<sup>sportspersons</sup> (which is not itself constituted as a legal entity).
- b) The second is the team, troupe, orchestra, etc. which is constituted as a legal entity. Income for performances may be paid to the entity. Individual members of the team, orchestra, etc. will be liable to tax under paragraph 1, in the State in which *they perform their activities as entertainers or sportspersons* a performance is given, on any remuneration (or income accruing for their benefit) as a counterpart to *derived from* the performance of *these activities* (see, however, paragraph 14.1 below).; however, if the members are paid a fixed periodic remuneration and it would be difficult to allocate a portion of that income to particular performances, Member countries may decide, unilaterally or bilaterally, not to tax it. The profit element accruing from a performance to the legal entity would be liable to tax under paragraph 2.
- c) The third situation involves certain tax avoidance devices in cases where remuneration for the performance of an ~~entertainer~~<sup>artiste</sup> or ~~sportsman~~<sup>sportsperson</sup> is not paid to the ~~entertainer~~<sup>artiste</sup> or ~~sportsman~~<sup>sportsperson</sup> himself but to another person, e.g. a so-called

~~artiste~~ *star*-company, in such a way that the income is taxed in the State where the activity is performed neither as personal service income to the ~~entertainer~~~~artiste~~ or ~~sportsman~~*sportsperson* nor as profits of the enterprise, in the absence of a permanent establishment. Some countries “look through” such arrangements under their domestic law and deem the income to be derived by the ~~entertainer~~~~artiste~~ or ~~sportsman~~*sportsperson*; where this is so, paragraph 1 enables them to tax income resulting from activities in their territory. Other countries cannot do this. Where a performance takes place in such a country, paragraph 2 permits it to impose a tax on the profits diverted from the income of the ~~entertainer~~~~artiste~~ or ~~sportsman~~*sportsperson* to the enterprise. It may be, however, that the domestic laws of some States do not enable them to apply such a provision. Such States are free to agree to other solutions or to leave paragraph 2 out of their bilateral conventions.

11.1 The application of paragraph 2 is not restricted to situations where both the entertainer or ~~sportsman~~*sportsperson* and the other person to whom the income accrues, e.g. a star-company, are residents of the same Contracting State. The paragraph allows the State in which the activities of an entertainer or ~~sportsman~~*sportsperson* are exercised to tax the income derived from these activities and accruing to another person regardless of other provisions of the Convention that may otherwise be applicable. Thus, notwithstanding the provisions of Article 7, the paragraph allows that State to tax the income derived by a star-company resident of the other Contracting State even where the entertainer or ~~sportsman~~*sportsperson* is not a resident of that other State. Conversely, where the income of an entertainer resident in one of the Contracting States accrues to a person, e.g. a star-company, who is a resident of a third State with which the State of source does not have a tax convention, nothing will prevent the Contracting State from taxing that person in accordance with its domestic laws.

*11.2 Paragraph 2 does not apply, however, to prize money that the owner of a horse or the team to which a race car belongs derives from the results of the horse or car during a race or during races taking place during a certain period. In such a case, the prize money is not paid in consideration for the personal activities of the jockey or race car driver but in consideration for the activities related to the ownership and training of the horse or the design, construction, ownership and maintenance of the car. Such prize money is not derived from the personal activities of the jockey or race car driver and is not covered by Article 17. Clearly, however, if the owner or team receives a payment in consideration for the personal activities of the jockey or race car driver, that income may be taxed in the hands of the jockey or race car driver under paragraph 1 (see paragraph 7 above).*

11.3~~2~~ As a general rule it should be noted, however, that, regardless of Article 17, the Convention would not prevent the application of general anti-avoidance rules of the domestic law of the State of source which would allow that State to tax either the entertainer/~~sportsman~~*sportsperson* or the star-company in abusive cases, as is recognised in paragraphs ~~22 to 22.1~~ ~~24~~ of the Commentary on Article 1.

*11.4 Paragraph 2 covers income that may be considered to be derived in respect of the personal activities of an entertainer or sportsperson. Whilst that covers income that is received by an enterprise that is paid for performing such activities (such as a sports team or orchestra), it clearly does not cover the income of all enterprises that are involved in the production of entertainment or sports events. For example, the income derived by the independent promoter of a concert from the sale of tickets and allocation of advertising space is not covered by paragraph 2.*

*11.5 Whilst the Article does not provide how the income covered by paragraphs 1 and 2 is to be computed and leaves it to the domestic law of a Contracting State to determine the extent of any*

*deductions (see paragraph 10 above), the income derived in respect of the personal activities of a sportsperson or entertainer should not be taxed twice through the application of these two paragraphs. This will be an important consideration where, for example, paragraph 2 allows a Contracting State to tax the star-company of an entertainer on a payment received by that company with respect to activities performed by the entertainer in that State and paragraph 1 also allows that State to tax the part of the remuneration paid by that company to the entertainer that can reasonably be attributed to these activities. In that case, the Contracting State may, depending on its domestic law, either tax only the company or the entertainer on the whole income attributable to these activities or tax each of them on part of the income, e.g. by taxing the income received by the company but allowing a deduction for the relevant part of the remuneration paid to the entertainer and taxing that part in the hands of the entertainer.*

#### *Additional considerations relating to paragraphs 1 and 2*

12. Where, in the cases dealt with in paragraphs 1 and 2, the exemption method for relieving double taxation is used by the State of residence of the person receiving the income, that State would be precluded from taxing such income even if the State where the activities were performed could not make use of its right to tax. It is therefore understood that the credit method should be used in such cases. The same result could be achieved by stipulating a subsidiary right to tax for the State of residence of the person receiving the income, if the State where the activities are performed cannot make use of the right conferred on it by paragraphs 1 and 2. Contracting States are free to choose any of these methods in order to ensure that the income does not escape taxation.

13. Article 17 will ordinarily apply when the ~~entertainer~~<sup>artiste</sup> or ~~sportsman~~<sup>sportsperson</sup> is employed by a Government and derives income from that Government; see paragraph 6 of the Commentary on Article 19. Certain conventions contain provisions excluding ~~entertainers~~<sup>artistes</sup> and ~~sportsmen~~<sup>sportspersons</sup> employed in organisations which are subsidised out of public funds from the application of Article 17.

14. Some countries may consider it appropriate to exclude from the scope of the Article events supported from public funds. Such countries are free to include a provision to achieve this but the exemptions should be based on clearly definable and objective criteria to ensure that they are given only where intended. Such a provision might read as follows:

The provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a Contracting State by ~~entertainers~~<sup>artistes</sup> or ~~sportsmen~~<sup>sportspersons</sup> if the visit to that State is wholly or mainly supported by public funds of one or both of the Contracting States or political subdivisions or local authorities thereof. In such a case, the income is taxable only in the Contracting State in which the ~~entertainer~~<sup>artiste</sup> or the ~~sportsman~~<sup>sportsperson</sup> is a resident.

*14.1 Also, given the administrative difficulties involved in allocating to specific activities taking place in a State the overall employment remuneration of individual members of a foreign team, troupe or orchestra, and in taxing the relevant part of that remuneration, some States may consider it appropriate not to tax such remuneration. Whilst a State could unilaterally decide to exempt such remuneration, such a unilateral solution would not be reciprocal and would give rise to the problem described in paragraph 12 above where the exemption method is used by the State of residence of the person deriving such income. These States may therefore consider it appropriate to exclude such remuneration from the scope of the Article. Whilst paragraph 2 above indicates that one solution would be to amend the text of the Article so that it does not apply with respect to income from employment, some States may prefer a narrower exception dealing with*

*cases that they frequently encounter in practice. The following is an example of a provision applicable to members of a sports team that could be used for that purpose:*

*The provisions of Article 17 shall not apply to income derived by a resident of a Contracting State in respect of personal activities of an individual exercised in the other Contracting State as a sportsperson member of a team of the first-mentioned State that takes part in a match organised in the other State by a league to which that team belongs.*

65. Replace paragraph 15 of the Commentary on Article 17 by the following:

*15. With respect to the examples given in paragraph 3, Turkey considers that the activity of a model performing as such (e.g. a model presenting clothes during a fashion show or photo session) falls within the scope of this Article regarding the performance and appearance nature of this activity. Concerning paragraphs 8 and 9, Germany, considering paragraph 18 of the Commentary on Article 12, takes the view that payments made as remuneration for live broadcasting rights of an event are income of the performing or appearing sportspersons or artistes under paragraph 1 of Article 17. This income may be taxed in accordance with paragraph 2 of Article 17 in the case of payments made to any other third party in the context of an economic exploitation of the live broadcasting rights.*

66. Add the following new paragraph 15.2 to the Commentary on Article 17:

*15.2 Switzerland does not share the view expressed in paragraph 9 of the Commentary which provides that Article 17 will apply to advertising or sponsorship income, which has a close connection with a performance in a given State. Switzerland considers that advertising or sponsorship income falls under the standard rules of Article 7 or Article 15, as appropriate, even if such income has a close connection with a performance in a given State. Additionally, Switzerland takes the view that merchandising income and income in the form of payments for the use of, or the right to use, image rights (paragraph 9.5 of the Commentary) are not covered by Article 17.*

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

*17. Germany reserves its right to insert a provision according to which income derived by a person for the transfer of live broadcasting rights or other commercial exploitations of personal activities of entertainers or sportspersons may be taxed in the State where the entertainer or sportsperson exercises the personal activities.*

68. Add the following new paragraph 18 to the Commentary on Article 17:

*18. According to France's doctrine and treaty practice, income that a sportsperson or entertainer derives from the use of that person's image is inseparable from that person's professional activities and must therefore be taxed in the State in which such income arises. France therefore reserves the right to include in its bilateral conventions an additional paragraph allowing the source taxation of income from activities that cannot be disassociated from professional notoriety.*

### *Commentary on Article 18*

69. Replace paragraph 4 of the Commentary on Article 18 by the following:

4. Various payments may be made to an employee following cessation of employment. Whether or not such payments fall under the Article will be determined by the nature of the payments, having regard to the facts and circumstances in which they are made, as explained in the following two paragraphs (*see also paragraphs 2.3 to 2.16 of the Commentary on Article 15, which deal with the application of the Convention to a number of these payments*).

70. Add the following new paragraph 71 to the Commentary on Article 18:

**71. *Regarding paragraph 24, Germany considers that where the amount of a social security pension is determined on the basis of contributions to the scheme by the employee, that pension cannot be viewed as being covered by Article 18.***

### *Commentary on Article 19*

71. Add the following new paragraph 8 to the Commentary on Article 19:

**8. *Germany reserves the right to include a provision that covers services rendered to special private law institutions serving public purposes and financed from public budgets, e.g. the Goethe Institute or the German Academic Exchange Service, as well as remuneration paid to a specialist or volunteer seconded to the other Contracting State under a development assistance program, as government services under Article 19.***

### *Commentary on Article 20*

72. Replace paragraph 4 of the Commentary on Article 20 by the following:

4. *The Article only applies to payments arising from sources outside the State where the student or business apprentice is present solely for the purposes of education or training. Payments arising from sources within that State are covered by other Articles of the Convention: for instance, if, during his presence in the first-mentioned State, the student or business apprentice remains a resident of the other State according to Article 4, payments such as grants or scholarships that are not covered by other provisions of the Convention (such as Article 15) will be taxable only in his State of residence under paragraph 1 of Article 21.* For the purpose of the Article, payments that are made by or on behalf of a resident of a Contracting State or that are borne by a permanent establishment which a person has in that State are not considered to arise from sources outside that State.

73. Add the following new heading and paragraph 5 to the Commentary on Article 20:

#### ***Reservation on the Article***

**5. *Estonia reserves the right to amend the Article to refer to any apprentice or trainee.***

### *Commentary on Article 21*

74. Delete the following paragraph 16 of the Commentary on Article 21:

~~16. In order to avoid non-taxation, Belgium reserves the right to allow the State in which income arises to tax that income where the State of residence, which would otherwise have the exclusive right to tax that income, does not effectively exercise that right.~~

#### **Commentary on Articles 23 A and 23 B**

75. Replace paragraph 48 of the Commentary on Articles 23 A and 23 B by the following:

48. In the cases referred to in the previous paragraph, certain maximum percentages are laid down for tax reserved to the State of source. In such cases, the rate of tax in the State of residence will very often be higher than the rate in the State of source. The limitation of the deduction which is laid down in the second sentence of paragraph 2 and which is in accordance with the ordinary credit method is therefore of consequence only in a limited number of cases. If, in such cases, the Contracting States prefer to waive the limitation and to apply the full credit method, they can do so by deleting the second sentence of paragraph 2 (see also paragraph 63 below).

76. Replace paragraph 63 of the Commentary on Articles 23 A and 23 B by the following:

63. The maximum deduction is normally computed as the tax on net income, i.e. on the income from State E (or S) less allowable deductions (specified or proportional) connected with such income (see paragraph 40 above). For such reason, the maximum deduction in many cases may be lower than the tax effectively paid in State E (or S). This may especially be true in the case where, for instance, a resident of State R deriving interest from State S has borrowed funds from a third person to finance the interest-producing loan. As the interest due on such borrowed money may be offset against the interest derived from State S, the amount of net income subject to tax in State R may be very small, or there may even be no net income at all. ***As explained in paragraph 7.1 of the Commentary on Article 11, the problem, in that case, cannot be solved by State R, since little or no tax will be levied in that State. One solution would be to exempt such interest from tax in State S, as is proposed in paragraphs 7 to 7.12 of the Commentary on Article 11.*** ~~This problem could be solved by using the full credit method in State R as mentioned in paragraph 48 above. Another solution would be to exempt such income from tax in State S, as it is proposed in the Commentary in respect of interest on credit sales and on loans granted by banks (cf. paragraph 15 of the Commentary on Article 11).~~

77. Replace paragraph 81 of the Commentary on Articles 23 A and 23 B by the following:

81. *Switzerland* reserves its right not to apply the rules laid down in paragraph 32.3 in cases where a conflict of qualification results from a modification to the internal law of the State of source subsequent to the conclusion of a Convention.

#### **Commentary on Article 24**

78. Replace paragraph 31 of the Commentary on Article 24 by the following:

31. ~~It is possible that in the future certain~~ ***Some States will take exception to may consider that*** the provisions of paragraph 2 ~~as being~~ ***are*** too liberal insofar as they entitle stateless persons who are residents of one State to claim equality of treatment not only in the other State but also in their State of residence and thus benefit in particular in the latter from the provisions of double taxation conventions concluded by it with third States. ~~If such States wished~~ ***ing*** to avoid this latter consequence, ~~they would have~~ ***are free*** to modify paragraph 2 as follows:

Stateless persons who are residents of a Contracting State shall 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 that other State in the same circumstances, in particular with respect to residence, are or may be subjected.

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

72. In addition to the typical triangular case considered here, other triangular cases arise, particularly that in which the State of the enterprise is also the State from which the income ~~ascribable~~ **attributed** to the permanent establishment in the other State originates (see also paragraph 5 of the Commentary on Article 21).

80. Delete the following paragraph 82 of the Commentary on Article 24:

~~82. The interpretation given in paragraphs 57 and 58 above is not endorsed by Germany, the tax laws of which require the application of a minimum rate on exclusively inbound sources with respect to non-residents; the minimum rate is close to the lower end of the progressive tax scale.~~

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

90. *Chile, Estonia* and *Switzerland* reserve the right not to insert paragraph 2 in their conventions.

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

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

### **Commentary on Article 25**

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

98. *Chile, Greece, Italy, Mexico, Poland, Portugal, the Slovak Republic* and *Switzerland* reserve their positions on the second sentence of paragraph 2. These countries consider that the implementation of reliefs and refunds following a mutual agreement ought to remain linked to time limits prescribed by their domestic laws.

84. Replace paragraph 100 of the Commentary on Article 25 by the following:

100. *Canada* reserves the right to include a provision **similar to a provision**, as referred to in paragraph 10 of the Commentary on Article 9, which effectively sets a time limit within which a Contracting State **can make an adjustment to the profits of an enterprise** ~~is under an obligation to make an appropriate adjustment following an upward adjustment of the profits of an enterprise in the other Contracting State.~~

### **Commentary on Article 26**

85. Replace the Commentary on Article 26 by the following [*these changes were approved by the OECD Council on 17 July 2012*]:

#### **I. Preliminary remarks**



1. There are good grounds for including in a convention for the avoidance of double taxation provisions concerning co-operation between the tax administrations of the two Contracting States. In the first place it appears to be desirable to give administrative assistance for the purpose of ascertaining facts in relation to which the rules of the convention are to be applied. Moreover, in view of the increasing internationalisation of economic relations, the Contracting States have a growing interest in the reciprocal supply of information on the basis of which domestic taxation laws have to be administered, even if there is no question of the application of any particular article of the Convention.

2. Therefore the present Article embodies the rules under which information may be exchanged to the widest possible extent, with a view to laying the proper basis for the implementation of the domestic tax laws of the Contracting States and for the application of specific provisions of the Convention. The text of the Article makes it clear that the exchange of information is not restricted by Articles 1 and 2, so that the information may include particulars about non-residents and may relate to the administration or enforcement of taxes not referred to in Article 2.

3. The matter of administrative assistance for the purpose of tax collection is dealt with in Article 27, *but exchanges of information for the purpose of tax collection are governed by Article 26 (see paragraph 5 of the Commentary on Article 27). Similarly, mutual agreement procedures are dealt with in Article 25, but exchanges of information for the purposes of a mutual agreement procedure are governed by Article 26 (see paragraph 4 of the Commentary on Article 25).*

4. In 2002, the Committee on Fiscal Affairs undertook a comprehensive review of Article 26 to ensure that it reflects current country practices. That review also took into account recent developments such as the Model Agreement on Exchange of Information on Tax Matters<sup>1</sup> developed by the OECD Global Forum Working Group on Effective Exchange of Information and the ideal standard of access to bank information as described in the report “Improving Access to Bank Information for Tax Purposes”.<sup>2</sup> As a result, several changes to both the text of the Article and the Commentary were made in 2005.

4.1 Many of the changes that were then made to the Article were not intended to alter its substance, but instead were made to remove doubts as to its proper interpretation. For instance, the change from “necessary” to “foreseeably relevant” and the insertion of the words “to the administration or enforcement” in paragraph 1 were made to achieve consistency with the Model Agreement on Exchange of Information on Tax Matters and were not intended to alter the effect of the provision. ~~New p~~Paragraph 4 was added to incorporate into the text of the Article the general understanding previously expressed in the Commentary (cf. ~~see~~ paragraph 19.6). ~~New p~~Paragraph 5 was added to reflect ~~current~~ practices among the vast majority of OECD member countries (cf. ~~see~~ paragraph 19.10). The insertion of the words “or the oversight of the above” into ~~new~~ paragraph 2, on the other hand, constituted a reversal of the previous rule.

4.2 The Commentary ~~was~~ also ~~has been~~ expanded considerably. This expansion in part reflected the addition of ~~new~~ paragraphs 4 and 5 to the Article. Other changes were made to the Commentary to take into account ~~recent~~ developments and ~~current~~ country practices and more generally to remove doubts as to the proper interpretation of the Article.

**4.3 *The Article and the Commentary were further modified in 2012 to take into account recent developments and to further elaborate on the interpretation of certain provisions of this***

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1. ~~Available on [www.oecd.org/taxation](http://www.oecd.org/taxation).~~

2. OECD, Paris, 2000. ~~Available on [www.oecd.org/taxation](http://www.oecd.org/taxation).~~

*Article. Paragraph 2 of the Article was amended to allow the competent authorities to use information received for other purposes provided such use is allowed under the laws of both States and the competent authority of the supplying State authorises such use. This was previously included as an optional provision in paragraph 12.3 of the Commentary.*

*4.4 The Commentary was expanded to develop the interpretation of the standard of “foreseeable relevance” and the term “fishing expeditions” through the addition of: general clarifications (see paragraph 5), language in respect of the identification of the taxpayer under examination or investigation (see paragraph 5.1), language in respect of requests in relation to a group of taxpayers (see paragraph 5.2) and new examples (see subparagraphs e) to h) of paragraph 8 and paragraph 8.1). The Commentary further provides for an optional default standard of time limits within which the information is required to be provided unless a different agreement has been made by the competent authorities (see paragraphs 10.4 to 10.6) and that in accordance with the principle of reciprocity, if a Contracting State applies under paragraph 5 measures not normally foreseen in its domestic law or practice, such as to access and exchange bank information, that State is equally entitled to request similar information from the other Contracting State (see paragraph 15). Other clarifications were added in paragraphs 3, 5.3, 6, 11, 12, 12.3, 12.4, 16, 16.1 and 19.7.*

## **II. Commentary on the provisions of the Article**

### *Paragraph 1*

5. The main rule concerning the exchange of information is contained in the first sentence of the paragraph. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes of every kind and description imposed in these States even if, in the latter case, a particular Article of the Convention need not be applied. The standard of “foreseeable relevance” is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. *In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information. The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information are not clear to the requested State. However, once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination. Where the requested State becomes aware of facts that call into question whether part of the information requested is foreseeably relevant, the competent authorities should consult and the requested State may ask the requesting State to clarify foreseeable relevance in the light of those facts. At the same time, paragraph 1 does not obligate the requested State to provide information in response to requests that are “fishing expeditions”, i.e. speculative requests that have no apparent nexus to an open inquiry or investigation.*

**5.1** *As is the case under the Model Agreement on Exchange of Information on Tax Matters<sup>3</sup> a request for information does not constitute a fishing expedition solely because it does not provide the name or address (or both) of the taxpayer under examination or investigation. The same holds true where names are spelt differently or information on names and addresses is presented using a different format. However, in cases in which the requesting State does not provide the name or address (or both) of the taxpayer under examination or investigation, the requesting State must include other information sufficient to identify the taxpayer. Similarly, paragraph 1 does not necessarily require the request to include the name and/or address of the person believed to be in possession of the information. In fact, the question of how specific a request has to be with respect to such person is typically an issue falling within the scope of subparagraphs a) and b) of paragraph 3 of Article 26.*

**5.2** *The standard of “foreseeable relevance” can be met both in cases dealing with one taxpayer (whether identified by name or otherwise) or several taxpayers (whether identified by name or otherwise). Where a Contracting State undertakes an investigation into a particular group of taxpayers in accordance with its laws, any request related to the investigation will typically serve “the administration or enforcement” of its domestic tax laws and thus comply with the requirements of paragraph 1, provided it meets the standard of “foreseeable relevance”. However, where the request relates to a group of taxpayers not individually identified, it will often be more difficult to establish that the request is not a fishing expedition, as the requesting State cannot point to an ongoing investigation into the affairs of a particular taxpayer which in most cases would by itself dispel the notion of the request being random or speculative. In such cases it is therefore necessary that the requesting State provide a detailed description of the group and the specific facts and circumstances that have led to the request, an explanation of the applicable law and why there is reason to believe that the taxpayers in the group for whom information is requested have been non-compliant with that law supported by a clear factual basis. It further requires a showing that the requested information would assist in determining compliance by the taxpayers in the group. As illustrated in the example in subparagraph h) of paragraph 8, in the case of a group request a third party will usually, although not necessarily, have actively contributed to the non-compliance of the taxpayers in the group, in which case such circumstance should also be described in the request. Furthermore, and as illustrated in the example in subparagraph a) of paragraph 8.1, a group request that merely describes the provision of financial services to non-residents and mentions the possibility of non-compliance by the non-resident customers does not meet the standard of foreseeable relevance.*

**5.3** Contracting States may agree to an alternative formulation of ~~this~~ *the standard of foreseeable relevance* that is consistent with the scope of the Article *and is therefore understood to require an effective exchange of information* (e.g. by replacing, “is foreseeably relevant” with “is necessary”, or “is relevant” or “may be relevant”). The scope of exchange of information covers all tax matters without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in judicial proceedings. Exchange of information for criminal tax matters can also be based on bilateral or multilateral treaties on mutual legal assistance (to the extent they also apply to tax crimes). In order to keep the exchange of information within the framework of the Convention, a limitation to the exchange of information is set so that information should be given only insofar as the taxation under the domestic taxation laws concerned is not contrary to the Convention.

**5.14** The information covered by paragraph 1 is not limited to taxpayer-specific information. The competent authorities may also exchange other sensitive information related to tax administration and compliance improvement, for example risk analysis techniques or tax avoidance or evasion schemes.

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3. *See paragraph 58 of its Commentary.*

5.2-5 The possibilities of assistance provided by the Article do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the Contracting States which relate to co-operation in tax matters. Since the exchange of information concerning the application of custom duties has a legal basis in other international instruments, the provisions of these more specialised instruments will generally prevail and the exchange of information concerning custom duties will not, in practice, be governed by the Article.

6. The following examples ~~may~~ *seek to* clarify the principles dealt with in paragraphs 5, *5.1 and 5.2* above. ~~In the all such cases~~ *examples mentioned in paragraphs 7 and 8* information can be exchanged under paragraph 1 *of Article 26*. *In the examples mentioned in paragraph 8.1, and assuming no further information is provided, the Contracting States are not obligated to provide information in response to a request for information. The examples are for illustrative purposes only. They should be read in the light of the overarching purpose of Article 26 not to restrict the scope of exchange of information but to allow information exchange “to the widest possible extent”.*

7. Application of the Convention

- a) When applying Article 12, State A where the beneficiary is resident asks State B where the payer is resident, for information concerning the amount of royalty transmitted.
- b) Conversely, in order to grant the exemption provided for in Article 12, State B asks State A whether the recipient of the amounts paid is in fact a resident of the last-mentioned State and the beneficial owner of the royalties.
- c) Similarly, information may be needed with a view to the proper allocation of taxable profits between associated companies in different States or the adjustment of the profits shown in the accounts of a permanent establishment in one State and in the accounts of the head office in the other State (Articles 7, 9, 23 A and 23 B).
- d) Information may be needed for the purposes of applying Article 25.
- e) When applying Articles 15 and 23 A, State A, where the employee is resident, informs State B, where the employment is exercised for more than 183 days, of the amount exempted from taxation in State A.

8. Implementation of the domestic laws

- a) A company in State A supplies goods to an independent company in State B. State A wishes to know from State B what price the company in State B paid for the goods with a view to a correct application of the provisions of its domestic laws.
- b) A company in State A sells goods through a company in State C (possibly a low-tax country) to a company in State B. The companies may or may not be associated. There is no convention between State A and State C, nor between State B and State C. Under the convention between A and B, State A, with a view to ensuring the correct application of the provisions of its domestic laws to the profits made by the company situated in its territory, asks State B what price the company in State B paid for the goods.
- c) State A, for the purpose of taxing a company situated in its territory, asks State B, under the convention between A and B, for information about the prices charged by a company in State B, or a group of companies in State B with which the company in State A has no business contacts in order to enable it to check the prices charged by the company in State A by direct comparison (e.g. prices charged by a company or a group of companies in a dominant position). It should be borne in mind that the exchange of information in this

case might be a difficult and delicate matter owing in particular to the provisions of subparagraph c) of paragraph 3 relating to business and other secrets.

- d) State A, for the purpose of verifying VAT input tax credits claimed by a company situated in its territory for services performed by a company resident in State B, requests confirmation that the cost of services was properly entered into the books and records of the company in State B.
- e) *The tax authorities of State A conduct a tax investigation into the affairs of Mr. X. Based on this investigation the tax authorities have indications that Mr. X holds one or several undeclared bank accounts with Bank B in State B. However, State A has experienced that, in order to avoid detection, it is not unlikely that the bank accounts may be held in the name of relatives of the beneficial owner. State A therefore requests information on all accounts with Bank B of which Mr. X is the beneficial owner and all accounts held in the names of his spouse E and his children K and L.*
- f) *State A has obtained information on all transactions involving foreign credit cards carried out in its territory in a certain year. State A has processed the data and launched an investigation that identified all credit card numbers where the frequency and pattern of transactions and the type of use over the course of that year suggest that the cardholders were tax residents of State A. State A cannot obtain the names by using regular sources of information available under its internal taxation procedure, as the pertinent information is not in the possession or control of persons within its jurisdiction. The credit card numbers identify an issuer of such cards to be Bank B in State B. Based on an open inquiry or investigation, State A sends a request for information to State B, asking for the name, address and date of birth of the holders of the particular cards identified during its investigation and any other person that has signatory authority over those cards. State A supplies the relevant individual credit card numbers and further provides the above information to demonstrate the foreseeable relevance of the requested information to its investigation and more generally to the administration and enforcement of its tax law.*
- g) *Company A, resident of State A, is owned by foreign unlisted Company B, resident of State B. The tax authorities of State A suspect that managers X, Y and Z of Company A directly or indirectly own Company B. If that were the case, the dividends received by Company B from Company A would be taxable in their hands as resident shareholders under State A's controlled foreign company rules. The suspicion is based on information provided to State A's tax authorities by a former employee of Company A. When confronted with the allegations, the three managers of Company A deny having any ownership interest in Company B. The State A tax authorities have exhausted all domestic means of obtaining ownership information on Company B. State A now requests from State B information on whether X, Y and Z are shareholders of Company B. Furthermore, considering that ownership in such cases is often held through, for example, shell companies and nominee shareholders it requests information from State B on whether X, Y and Z indirectly hold an ownership interest in Company B. If State B is unable to determine whether X, Y or Z holds such an indirect interest, information is requested on the shareholder(s) so that it can continue its investigations.<sup>4</sup>*

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4. *For cases where State B becomes aware of facts that call into question whether part of the shareholder information is foreseeably relevant, the competent authorities should consult and State B may ask State A to clarify foreseeable relevance in light of those facts, as discussed in paragraph 5.*

- h) Financial service provider B is established in State B. The tax authorities of State A have discovered that B is marketing a financial product to State A residents using misleading information suggesting that the product eliminates the State A income tax liability on the income accumulated within the product. The product requires that an account be opened with B through which the investment is made. State A's tax authorities have issued a taxpayer alert, warning all taxpayers about the product and clarifying that it does not achieve the suggested tax effect and that income generated by the product must be reported. Nevertheless, B continues to market the product on its website, and State A has evidence that it also markets the product through a network of advisors. State A has already discovered several resident taxpayers that have invested in the product, all of whom had failed to report the income generated by their investments. State A has exhausted its domestic means of obtaining information on the identity of its residents that have invested in the product. State A requests information from the competent authority of State B on all State A residents that (i) have an account with B and (ii) have invested in the financial product. In the request, State A provides the above information, including details of the financial product and the status of its investigation.*

**8.1 Situations where Contracting States are not obligated to provide information in response to a request for information, assuming no further information is provided**

- a) Bank B is a bank established in State B. State A taxes its residents on the basis of their worldwide income. The competent authority of State A requests that the competent authority of State B provide the names, date and place of birth, and account balances (including information on any financial assets held in such accounts) of residents of State A that have an account with, hold signatory authority over, or a beneficial interest in an account with Bank B in State B. The request states that Bank B is known to have a large group of foreign account holders but does not contain any additional information.*
- b) Company B is a company established in State B. State A requests the names of all shareholders in Company B resident of State A and information on all dividend payments made to such shareholders. The requesting State A points out that Company B has significant business activity in State A and is therefore likely to have shareholders resident of State A. The request further states that it is well known that taxpayers often fail to disclose foreign source income or assets.*

**9. The rule laid down in paragraph 1 allows information to be exchanged in three different ways:**

- a) on request, with a special case in mind, it being understood that the regular sources of information available under the internal taxation procedure should be relied upon in the first place before a request for information is made to the other State;*
- b) automatically, for example when information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State; see (cf. the ~~OECD Council Recommendations of the OECD Council C(81)39, dated 5 May 1981, entitled "Recommendation of the Council concerning a standardised form for automatic exchanges of information under international tax agreements", the OECD Council Recommendation C(97)29/FINAL, dated 13 March 1997 (Recommendation on the use of Tax Identification Numbers in an international context) C(97)29/FINAL, dated 13 March 1997, the OECD Council Recommendation, -and C(2001)28/FINAL, dated 22 March 2001 (Recommendation on the use of the OECD Model Memorandum of~~*

*Understanding on Automatic Exchange of Information for Tax Purposes C(2001)28/FINAL*),<sup>5</sup>

- c) spontaneously, for example in the case of a State having acquired through certain investigations, information which it supposes to be of interest to the other State.

9.1 These three forms of exchange (on request, automatic and spontaneous) may also be combined. It should also be stressed that the Article does not restrict the possibilities of exchanging information to these methods and that the Contracting States may use other techniques to obtain information which may be relevant to both Contracting States such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information. These techniques are fully described in the publication “Tax Information Exchange between OECD Member Countries: A Survey of Current Practices”<sup>6</sup> and can be summarised as follows:

- a simultaneous examination is an arrangement between two or more parties to examine simultaneously each in its own territory, the tax affairs of (a) taxpayer(s) in which they have a common or related interest, with a view of exchanging any relevant information which they so obtain (see the OECD Council Recommendation C(92)81, dated 23 July 1992, on an OECD Model agreement for the undertaking of simultaneous examinations);
- a tax examination abroad allows for the possibility to obtain information through the presence of representatives of the competent authority of the requesting Contracting State. To the extent allowed by its domestic law, a Contracting State may permit authorised representatives of the other Contracting State to enter the first Contracting State to interview individuals or examine a person’s books and records — or to be present at such interviews or examinations carried out by the tax authorities of the first Contracting State — in accordance with procedures mutually agreed upon by the competent authorities. Such a request might arise, for example, where the taxpayer in a Contracting State is permitted to keep records in the other Contracting State. This type of assistance is granted on a reciprocal basis. Countries’ laws and practices differ as to the scope of rights granted to foreign tax officials. For instance, there are States where a foreign tax official will be prevented from any active participation in an investigation or examination on the territory of a country; there are also States where such participation is only possible with the taxpayer’s consent. The Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters specifically addresses tax examinations abroad in its Article 9;
- an industry-wide exchange of information is the exchange of tax information especially concerning a whole economic sector (*e.g.* the oil or pharmaceutical industry, the banking sector, etc.) and not taxpayers in particular.

10. The manner in which the exchange of information agreed to in the Convention will finally be effected can be decided upon by the competent authorities of the Contracting States. For example, Contracting States may wish to use electronic or other communication and information technologies, including appropriate security systems, to improve the timeliness and quality of exchanges of information. Contracting States which are required, according to their law, to observe data protection laws, may wish to include provisions in their bilateral conventions concerning the protection of personal data exchanged. Data protection concerns the rights and fundamental freedoms of an individual, and in particular, the right to privacy, with regard to automatic processing of personal data.

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5. ~~OECD Recommendations are available on [www.oecd.org/taxation](http://www.oecd.org/taxation).~~

6. OECD, Paris, 1994.

See, for example, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.<sup>7</sup>

10.1 Before 2000, the paragraph only authorised the exchange of information, and the use of the information exchanged, in relation to the taxes covered by the Convention under the general rules of Article 2. As drafted, the paragraph did not oblige the requested State to comply with a request for information concerning the imposition of a sales tax as such a tax was not covered by the Convention. The paragraph was then amended so as to apply to the exchange of information concerning any tax imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, and to allow the use of the information exchanged for purposes of the application of all such taxes. Some Contracting States may not, however, be in a position to exchange information, or to use the information obtained from a treaty partner, in relation to taxes that are not covered by the Convention under the general rules of Article 2. Such States are free to restrict the scope of paragraph 1 of the Article to the taxes covered by the Convention.

10.2 In some cases, a Contracting State may need to receive information in a particular form to satisfy its evidentiary or other legal requirements. Such forms may include depositions of witnesses and authenticated copies of original records. Contracting States should endeavour as far as possible to accommodate such requests. Under paragraph 3, the requested State may decline to provide the information in the specific form requested if, for instance, the requested form is not known or permitted under its law or administrative practice. A refusal to provide the information in the form requested does not affect the obligation to provide the information.

10.3 Nothing in the Convention prevents the application of the provisions of the Article to the exchange of information that existed prior to the entry into force of the Convention, as long as the assistance with respect to this information is provided after the Convention has entered into force and the provisions of the Article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such information, in particular when the provisions of that convention will have effect with respect to taxes arising or levied from a certain time.

**10.4 *Contracting States may wish to improve the speediness and timeliness of exchange of information under this Article by agreeing on time limits for the provision of information. Contracting States may do so by adding the following language to the Article:***

**6. *The competent authorities of the Contracting States may agree on time limits for the provision of information under this Article. In the absence of such an agreement, the information shall be supplied as quickly as possible and, except where the delay is due to legal impediments, within the following time limits:***

- (a) *Where the tax authorities of the requested Contracting State are already in possession of the requested information, such information shall be supplied to the competent authority of the other Contracting State within two months of the receipt of the information request;***
- (b) *Where the tax authorities of the requested Contracting State are not already in the possession of the requested information, such information shall be supplied to the competent authority of the other Contracting State within six months of the receipt of the information request.***

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7. See <http://conventions.coe.int>.



*Provided that the other conditions of this Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits.*

*10.5 The provisions in subparagraphs a) and b) of optional paragraph 6, referenced in paragraph 10.4, set a default standard for time limits that would apply where the competent authorities have not made a different agreement on longer or shorter time limits. The default standard time limits are two months from the receipt of the information request if the requested information is already in the possession of the tax authorities of the requested Contracting State and six months in all other cases. Notwithstanding the default standard time limits or time limits otherwise agreed, competent authorities may come to different agreements on a case-by-case basis, for example, when they both agree more time is appropriate. This may arise where the request is complex in nature. In such a case, the competent authority of a requesting Contracting State should not unreasonably deny a request by the competent authority of a requested Contracting State for more time. If a requested Contracting State is unable to supply the requested information within the prescribed time limit because of legal impediments (for example, because of ongoing litigation regarding a taxpayer's challenge to the validity of the request or ongoing litigation regarding a domestic notification procedure of the type described in paragraph 14.1), it would not be in violation of the time limits.*

*10.6 The last sentence in optional paragraph 6, referenced in paragraph 10.4, which provides, "Provided that the other conditions of this Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits." makes it clear that no objection to the use or admissibility of information exchanged under this Article can be based on the fact that the information was exchanged after the time limits agreed to by the competent authorities or the default time limits provided for in the paragraph.*

#### *Paragraph 2*

11. Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their co-operation. The confidentiality rules of paragraph 2 apply to all types of information received under paragraph 1, including both information provided in a request and information transmitted in response to a request. *Hence, the confidentiality rules cover, for instance, competent authority letters, including the letter requesting information. At the same time, it is understood that the requested State can disclose the minimum information contained in a competent authority letter (but not the letter itself) necessary for the requested State to be able to obtain or provide the requested information to the requesting State, without frustrating the efforts of the requesting State. If, however, court proceedings or the like under the domestic laws of the requested State necessitate the disclosure of the competent authority letter itself, the competent authority of the requested State may disclose such a letter unless the requesting State otherwise specifies.* The maintenance of secrecy in the receiving Contracting State is a matter of domestic laws. It is therefore provided in paragraph 2 that information communicated under the provisions of the Convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State. *In situations in which the requested State determines that the requesting State does not comply with its duties regarding the confidentiality of the information exchanged under this Article, the requested State may suspend assistance under this Article until such time as proper assurance is given by the requesting State that those duties will indeed be respected. If necessary, the competent authorities may enter into specific*

*arrangements or memoranda of understanding regarding the confidentiality of the information exchanged under this Article.*

12. *Subject to paragraphs 12.3 and 12.4*, the information obtained may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes with respect to which information may be exchanged according to the first sentence of paragraph 1, or the oversight of the above. This means that the information may also be communicated to the taxpayer, his proxy or to the witnesses. This also means that information can be disclosed to governmental or judicial authorities charged with deciding whether such information should be released to the taxpayer, his proxy or to the witnesses. The information received by a Contracting State may be used by such persons or authorities only for the purposes mentioned in paragraph 2. Furthermore, information covered by paragraph 1, whether taxpayer-specific or not, should not be disclosed to persons or authorities not mentioned in paragraph 2, regardless of domestic information disclosure laws such as freedom of information or other legislation that allows greater access to governmental documents.

12.1 Information can also be disclosed to oversight bodies. Such oversight bodies include authorities that supervise tax administration and enforcement authorities as part of the general administration of the Government of a Contracting State. In their bilateral negotiations, however, Contracting States may depart from this principle and agree to exclude the disclosure of information to such supervisory bodies.

12.2 The information received by a Contracting State may not be disclosed to a third country unless there is an express provision in the bilateral treaty between the Contracting States allowing such disclosure.

12.3 ~~Similarly, if the information appears to be of value to the receiving State for other purposes than those referred to in paragraph 12, that State may not use the information for such other purposes but it must resort to means specifically designed for those purposes (e.g. in case of a non-fiscal crime, to a treaty concerning judicial assistance).~~ ***Information exchanged for tax purposes may be of value to the receiving State for purposes in addition to those referred to in the first and second sentences of paragraph 2 of Article 26. The last sentence of paragraph 2 therefore allows the Contracting States to share information received for tax purposes provided two conditions are met: first, the information may be used for other purposes under the laws of both States and, second, the competent authority of the supplying State authorises such use.*** ~~However, Contracting States may wish to~~ ***It allows the sharing of tax information by the tax authorities of the receiving State with other law enforcement agencies and judicial authorities in that State on certain high priority matters (e.g., to combat money laundering, corruption, terrorism financing). When a receiving State desires to use the information for an additional purpose (i.e. non-tax purpose), the receiving State should specify to the supplying State the other purpose for which it wishes to use the information and confirm that the receiving State can use the information for such other purpose under its laws. Where the supplying State is in a position to do so, having regard to, amongst others, international agreements or other arrangements between the Contracting States relating to mutual assistance between other law enforcement agencies and judicial authorities, the competent authority of the supplying State would generally be expected to authorise such use for other purposes if the information can be used for similar purposes in the supplying State. Law enforcement agencies and judicial authorities receiving information under the last sentence of paragraph 2 must treat that information as confidential consistent with the principles of paragraph 2. Contracting States wishing to broaden the purposes for which they may use information exchanged under this Article may do so by adding the following text to the end of paragraph 2:***

~~Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.~~

**12.4** *It is recognised that Contracting States may wish to achieve the overall objective inherent in the last sentence of paragraph 2 in other ways and they may do so by replacing the last sentence of paragraph 2 with the following text:*

*The competent authority of the Contracting State that receives information under the provisions of this Article may, with the written consent of the Contracting State that provided the information, also make available that information to be used for other purposes allowed under the provisions of a mutual legal assistance treaty in force between the Contracting States that allows for the exchange of tax information.*

13. As stated in paragraph 12, the information obtained can be communicated to the persons and authorities mentioned and on the basis of the ~~last~~**third** sentence of paragraph 2 of the Article can be disclosed by them in court sessions held in public or in decisions which reveal the name of the taxpayer. Once information is used in public court proceedings or in court decisions and thus rendered public, it is clear that from that moment such information can be quoted from the court files or decisions for other purposes even as possible evidence. But this does not mean that the persons and authorities mentioned in paragraph 2 are allowed to provide on request additional information received. If either or both of the Contracting States object to the information being made public by courts in this way, or, once the information has been made public in this way, to the information being used for other purposes, because this is not the normal procedure under their domestic laws, they should state this expressly in their convention.

### *Paragraph 3*

14. This paragraph contains certain limitations to the main rule in favour of the requested State. In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. However, internal provisions concerning tax secrecy should not be interpreted as constituting an obstacle to the exchange of information under the present Article. As mentioned above, the authorities of the requesting State are obliged to observe secrecy with regard to information received under this Article.

14.1 Some countries' laws include procedures for notifying the person who provided the information and/or the taxpayer that is subject to the enquiry prior to the supply of information. Such notification procedures may be an important aspect of the rights provided under domestic law. They can help prevent mistakes (e.g. in cases of mistaken identity) and facilitate exchange (by allowing taxpayers who are notified to co-operate voluntarily with the tax authorities in the requesting State). Notification procedures should not, however, be applied in a manner that, in the particular circumstances of the request, would frustrate the efforts of the requesting State. In other words, they should not prevent or unduly delay effective exchange of information. For instance, notification procedures should permit exceptions from prior notification, e.g. in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting State. A Contracting State that under its domestic law is required to notify the person who provided the information and/or the taxpayer that an exchange of information is proposed should inform its treaty partners in writing that it has this requirement and what the consequences are for its obligations in relation to mutual assistance. Such information should be provided to the other Contracting State when a convention is concluded and thereafter whenever the relevant rules are modified.

15. Furthermore, the requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. It follows that a Contracting State cannot take advantage of the information system of the other Contracting State if it is wider than its own system. Thus, a State may refuse to provide information where the requesting State would be precluded by law from obtaining or providing the information or where the requesting State's administrative practices (e.g. failure to provide sufficient administrative resources) result in a lack of reciprocity. However, it is recognised that too rigorous an application of the principle of reciprocity could frustrate effective exchange of information and that reciprocity should be interpreted in a broad and pragmatic manner. Different countries will necessarily have different mechanisms for obtaining and providing information. Variations in practices and procedures should not be used as a basis for denying a request unless the effect of these variations would be to limit in a significant way the requesting State's overall ability to obtain and provide the information if the requesting State itself received a legitimate request from the requested State. ***It is worth noting that if a Contracting State applies, under paragraph 5, measures not normally foreseen in its domestic law or practice, such as to access and exchange bank information, that State is equally entitled to request similar information from the other Contracting State. This would be fully in line with the principle of reciprocity which underlies subparagraphs a) and b) of paragraph 3.***

15.1 The principle of reciprocity has no application where the legal system or administrative practice of only one country provides for a specific procedure. For instance, a country requested to provide information could not point to the absence of a ruling regime in the country requesting information and decline to provide information on a ruling it has granted, based on a reciprocity argument. Of course, where the requested information itself is not obtainable under the laws or in the normal course of the administrative practice of the requesting State, a requested State may decline such a request.

15.2 Most countries recognise under their domestic laws that information cannot be obtained from a person to the extent that such person can claim the privilege against self-incrimination. A requested State may, therefore, decline to provide information if the requesting State would have been precluded by its own self-incrimination rules from obtaining the information under similar circumstances. In practice, however, the privilege against self-incrimination should have little, if any, application in connection with most information requests. The privilege against self-incrimination is personal and cannot be claimed by an individual who himself is not at risk of criminal prosecution. The overwhelming majority of information requests seek to obtain information from third parties such as banks, intermediaries or the other party to a contract and not from the individual under investigation. Furthermore, the privilege against self-incrimination generally does not attach to persons other than natural persons.

16. Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examinations for their own purposes. ***The paragraph assumes, of course, that tax authorities have the powers and resources necessary to facilitate effective information exchange. For instance, assume that a Contracting State requests information in connection with an investigation into the tax affairs of a particular taxpayer and specifies in the request that the information might be held by one of a few service providers identified in the request and established in the other Contracting State. In this case, the requested State would be expected to be able to obtain and provide such information to the extent that such information is held by one of the service***

*providers identified in the request. In responding to a request the requested State should be guided by the overarching purpose of Article 26 which is to permit information exchange “to the widest possible extent” and may consider the importance of the requested information to the requesting State in relation to the administrative burden for the requested State.*

*16.1 Subparagraphs a) and b) of paragraph 3 do not permit the requested State to decline a request where paragraph 4 or 5 applies. Paragraph 5 would apply, for instance, in situations in which the requested State’s inability to obtain the information was specifically related to the fact that the requested information was believed to be held by a bank or other financial institution. Thus, the application of paragraph 5 includes situations in which the tax authorities’ information gathering powers with respect to information held by banks and other financial institutions are subject to different requirements than those that are generally applicable with respect to information held by persons other than banks or other financial institutions. This would, for example, be the case where the tax authorities can only exercise their information gathering powers with respect to information held by banks and other financial institutions in instances where specific information on the taxpayer under examination or investigation is available. This would also be the case where, for example, the use of information gathering measures with respect to information held by banks and other financial institutions requires a higher probability that the information requested is held by the person believed to be in possession of the requested information than the degree of probability required for the use of information gathering measures with respect to information believed to be held by persons other than banks or financial institutions.*

17. The requested State is at liberty to refuse to give information in the cases referred to in the paragraphs above. However if it does give the requested information, it remains within the framework of the agreement on the exchange of information which is laid down in the Convention; consequently it cannot be objected that this State has failed to observe the obligation to secrecy.

18. If the structure of the information systems of two Contracting States is very different, the conditions under subparagraphs a) and b) of paragraph 3 will lead to the result that the Contracting States exchange very little information or perhaps none at all. In such a case, the Contracting States may find it appropriate to broaden the scope of the exchange of information.

18.1 Unless otherwise agreed to by the Contracting States, it can be assumed that the requested information could be obtained by the requesting State in a similar situation if that State has not indicated to the contrary.

19. In addition to the limitations referred to above, subparagraph c) of paragraph 3 contains a reservation concerning the disclosure of certain secret information. Secrets mentioned in this subparagraph should not be taken in too wide a sense. Before invoking this provision, a Contracting State should carefully weigh if the interests of the taxpayer really justify its application. Otherwise it is clear that too wide an interpretation would in many cases render ineffective the exchange of information provided for in the Convention. The observations made in paragraph 17 above apply here as well. The requested State in protecting the interests of its taxpayers is given a certain discretion to refuse the requested information, but if it does supply the information deliberately the taxpayer cannot allege an infraction of the rules of secrecy.

19.1 In its deliberations regarding the application of secrecy rules, the Contracting State should also take into account the confidentiality rules of paragraph 2 of the Article. The domestic laws and practices of the requesting State together with the obligations imposed under paragraph 2, may ensure that the information cannot be used for the types of unauthorised purposes against which the trade or other secrecy rules are intended to protect. Thus, a Contracting State may decide to supply the

information where it finds that there is no reasonable basis for assuming that a taxpayer involved may suffer any adverse consequences incompatible with information exchange.

19.2 In most cases of information exchange no issue of trade, business or other secret will arise. A trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage (e.g. may lead to severe financial hardship). The determination, assessment or collection of taxes as such could not be considered to result in serious damage. Financial information, including books and records, does not by its nature constitute a trade, business or other secret. In certain limited cases, however, the disclosure of financial information might reveal a trade, business or other secret. For instance, a request for information on certain purchase records may raise such an issue if the disclosure of such information revealed the proprietary formula used in the manufacture of a product. The protection of such information may also extend to information in the possession of third persons. For instance, a bank might hold a pending patent application for safe keeping or a secret trade process or formula might be described in a loan application or in a contract held by a bank. In such circumstances, details of the trade, business or other secret should be excised from the documents and the remaining financial information exchanged accordingly.

19.3 A requested State may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law. However, the scope of protection afforded to such confidential communications should be narrowly defined. Such protection does not attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law. Also, information on the identity of a person such as a director or beneficial owner of a company is typically not protected as a confidential communication. Whilst the scope of protection afforded to confidential communications might differ among states, it should not be overly broad so as to hamper effective exchange of information. Communications between attorneys, solicitors or other admitted legal representatives and their clients are only confidential if, and to the extent that, such representatives act in their capacity as attorneys, solicitors or other admitted legal representatives and not in a different capacity, such as nominee shareholders, trustees, settlors, company directors or under a power of attorney to represent a company in its business affairs. An assertion that information is protected as a confidential communication between an attorney, solicitor or other admitted legal representative and its client should be adjudicated exclusively in the Contracting State under the laws of which it arises. Thus, it is not intended that the courts of the requested State should adjudicate claims based on the laws of the requesting State.

19.4 Contracting States wishing to refer expressly to the protection afforded to confidential communications between a client and an attorney, solicitor or other admitted legal representative may do so by adding the following text at the end of paragraph 3:

- d) to obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:
  - (i) produced for the purposes of seeking or providing legal advice or
  - (ii) produced for the purposes of use in existing or contemplated legal proceedings.”

19.5 Paragraph 3 also includes a limitation with regard to information which concerns the vital interests of the State itself. To this end, it is stipulated that Contracting States do not have to supply information the disclosure of which would be contrary to public policy (*ordre public*). However, this

limitation should only become relevant in extreme cases. For instance, such a case could arise if a tax investigation in the requesting State were motivated by political, racial, or religious persecution. The limitation may also be invoked where the information constitutes a state secret, for instance sensitive information held by secret services the disclosure of which would be contrary to the vital interests of the requested State. Thus, issues of public policy (*ordre public*) rarely arise in the context of information exchange between treaty partners.

#### *Paragraph 4*

19.6 Paragraph 4 was added in 2005 to deal explicitly with the obligation to exchange information in situations where the requested information is not needed by the requested State for domestic tax purposes. Prior to the addition of paragraph 4 this obligation was not expressly stated in the Article, but was clearly evidenced by the practices followed by member countries which showed that, when collecting information requested by a treaty partner, Contracting States often use the special examining or investigative powers provided by their laws for purposes of levying their domestic taxes even though they do not themselves need the information for these purposes. This principle is also stated in the report “Improving Access to Bank Information for Tax Purposes”.<sup>8</sup>

19.7 According to paragraph 4, Contracting States must use their information gathering measures, even though invoked solely to provide information to the other Contracting State *and irrespective of whether the information could still be gathered or used for domestic tax purposes in the requested Contracting State. Thus, for instance, any restrictions on the ability of a requested Contracting State to obtain information from a person for domestic tax purposes at the time of a request (for example, because of the expiration of a statute of limitations under the requested State’s domestic law or the prior completion of an audit) must not restrict its ability to use its information gathering measures for information exchange purposes.* The term “information gathering measures” means laws and administrative or judicial procedures that enable a Contracting State to obtain and provide the requested information. *Paragraph 4 does not oblige a requested Contracting State to provide information in circumstances where it has attempted to obtain the requested information but finds that the information no longer exists following the expiration of a domestic record retention period. However, where the requested information is still available notwithstanding the expiration of such retention period, the requested State cannot decline to exchange the information available. Contracting States should ensure that reliable accounting records are kept for five years or more.*

19.8 The second sentence of paragraph 4 makes clear that the obligation contained in paragraph 4 is subject to the limitations of paragraph 3 but also provides that such limitations cannot be construed to form the basis for declining to supply information where a country’s laws or practices include a domestic tax interest requirement. Thus, whilst a requested State cannot invoke paragraph 3 and argue that under its domestic laws or practices it only supplies information in which it has an interest for its own tax purposes, it may, for instance, decline to supply the information to the extent that the provision of the information would disclose a trade secret.

19.9 For many countries the combination of paragraph 4 and their domestic law provide a sufficient basis for using their information gathering measures to obtain the requested information even in the absence of a domestic tax interest in the information. Other countries, however, may wish to clarify expressly in the convention that Contracting States must ensure that their competent authorities have the necessary powers to do so. Contracting States wishing to clarify this point may replace paragraph 4 with the following text:

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8. OECD, Paris, 2000 (at paragraph 21 b).

4. In order to effectuate the exchange of information as provided in paragraph 1, each Contracting State shall take the necessary measures, including legislation, rule-making, or administrative arrangements, to ensure that its competent authority has sufficient powers under its domestic law to obtain information for the exchange of information regardless of whether that Contracting State may need such information for its own tax purposes.

#### *Paragraph 5*

19.10 Paragraph 1 imposes a positive obligation on a Contracting State to exchange all types of information. Paragraph 5 is intended to ensure that the limitations of paragraph 3 cannot be used to prevent the exchange of information held by banks, other financial institutions, nominees, agents and fiduciaries as well as ownership information. Whilst paragraph 5, which was added in 2005, represents a change in the structure of the Article, it should not be interpreted as suggesting that the previous version of the Article did not authorise the exchange of such information. The vast majority of OECD member countries already exchanged such information under the previous version of the Article and the addition of paragraph 5 merely reflects current practice.

19.11 Paragraph 5 stipulates that a Contracting State shall not decline to supply information to a treaty partner solely because the information is held by a bank or other financial institution. Thus, paragraph 5 overrides paragraph 3 to the extent that paragraph 3 would otherwise permit a requested Contracting State to decline to supply information on grounds of bank secrecy. The addition of this paragraph to the Article reflects the international trend in this area as reflected in the Model Agreement on Exchange of Information on Tax Matters<sup>9</sup> and as described in the report “Improving Access to Bank Information for Tax Purposes”.<sup>10</sup> In accordance with that report, access to information held by banks or other financial institutions may be by direct means or indirectly through a judicial or administrative process. The procedure for indirect access should not be so burdensome and time-consuming as to act as an impediment to access to bank information.

19.12 Paragraph 5 also provides that a Contracting State shall not decline to supply information solely because the information is held by persons acting in an agency or fiduciary capacity. For instance, if a Contracting State had a law under which all information held by a fiduciary was treated as a “professional secret” merely because it was held by a fiduciary, such State could not use such law as a basis for declining to provide the information to the other Contracting State. A person is generally said to act in a “fiduciary capacity” when the business which the person transacts, or the money or property which the person handles, is not its own or for its own benefit, but for the benefit of another person as to whom the fiduciary stands in a relation implying and necessitating confidence and trust on the one part and good faith on the other part, such as a trustee. The term “agency” is very broad and includes all forms of corporate service providers (e.g. company formation agents, trust companies, registered agents, lawyers).

19.13 Finally, paragraph 5 states that a Contracting State shall not decline to supply information solely because it relates to an ownership interest in a person, including companies and partnerships, foundations or similar organisational structures. Information requests cannot be declined merely because domestic laws or practices may treat ownership information as a trade or other secret.

19.14 Paragraph 5 does not preclude a Contracting State from invoking paragraph 3 to refuse to supply information held by a bank, financial institution, a person acting in an agency or fiduciary capacity or information relating to ownership interests. However, such refusal must be based on

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9. Available on [www.oecd.org/taxation](http://www.oecd.org/taxation)

10. OECD, Paris, 2000.



reasons unrelated to the person's status as a bank, financial institution, agent, fiduciary or nominee, or the fact that the information relates to ownership interests. For instance, a legal representative acting for a client may be acting in an agency capacity but for any information protected as a confidential communication between attorneys, solicitors or other admitted legal representatives and their clients, paragraph 3 continues to provide a possible basis for declining to supply the information.

19.15 The following examples illustrate the application of paragraph 5:

- a) Company X owns a majority of the stock in a subsidiary company Y, and both companies are incorporated under the laws of State A. State B is conducting a tax examination of business operations of company Y in State B. In the course of this examination the question of both direct and indirect ownership in company Y becomes relevant and State B makes a request to State A for ownership information of any person in company Y's chain of ownership. In its reply State A should provide to State B ownership information for both company X and Y.
- b) An individual subject to tax in State A maintains a bank account with Bank B in State B. State A is examining the income tax return of the individual and makes a request to State B for all bank account income and asset information held by Bank B in order to determine whether there were deposits of untaxed earned income. State B should provide the requested bank information to State A.

#### **Observation on the Commentary**

20. [Deleted]

21. In connection with paragraph 15.1, *Greece* wishes to clarify that according to Article 28 of the Greek Constitution international tax treaties are applied under the terms of reciprocity.

#### ***Commentary on Article 27***

86. Replace paragraph 12 of the Commentary on Article 27 by the following:

12. Similarly, some Contracting States may wish to limit the types of tax to which the provisions of the Article will apply or to clarify the scope of application of these provisions by including in the definition a detailed list of the taxes. States wishing to do so are free to adopt bilaterally the following definition:

The term "revenue claim" as used in this Article means any amount owed in respect of the following taxes imposed by the Contracting States, *insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the Contracting States are parties, as well as together with* interest, administrative penalties and costs of collection or conservancy related to such amount:

- a) (in State A): ...
- b) (in State B): ...

#### **D. POSITIONS OF NON-MEMBER ECONOMIES**

##### ***Introduction***

87. Replace paragraph 4 of the Introduction to the section on Positions of non-member economies by the following:

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

Albania	Argentina	Armenia	<i>Azerbaijan</i>
Belarus	Brazil	Bulgaria	<i>Colombia</i>
Croatia	Democratic Republic of the Congo	<del>Estonia</del>	
Gabon	<i>Georgia</i>	Hong Kong, China	India
Indonesia	<del>Israel</del>	Ivory Coast	Kazakhstan
Latvia	Lithuania	Malaysia	Morocco
People's Republic of China		Philippines	Romania
Russia	Serbia	<i>Singapore</i>	South Africa
Thailand	Tunisia	Ukraine	United Arab Emirates
Vietnam			

### *Positions on Article 1*

88. Add the following new paragraph 4 to the Positions on Article 1:

***4. Argentina considers that the conclusions on the application of the Convention to partnerships incorporated in the Commentary on Article 1 and in the Commentaries on the relevant provisions of the Model Tax Convention shall only be taken into account to the extent that it is explicitly so confirmed in a specific tax treaty, or as a result of mutual agreement between the competent authorities as provided for under paragraph 3 of Article 25.***

### *Positions on Article 2*

89. Add the following new paragraph 2.1 to the Positions on Article 2:

***2.1 Argentina and Colombia reserve the right not to include in paragraph 1 taxes imposed on behalf of political subdivisions or local authorities.***

90. Replace paragraph 3 of the Positions on Article 2 by the following:

***3. Since they have no tax on capital, Brazil, ~~and Indonesia~~, Malaysia and Singapore reserve the right not to include any reference to such tax in paragraph 1.***

91. Add the following new paragraph 5.1 to the Positions on Article 2:

***5.1 Georgia reserves the right to include taxes imposed on behalf of administrative-territorial units and local self-governing authorities.***

92. Add the following new paragraph 5.2 to the Positions on Article 2:

***5.2 Colombia reserves the right to limit the application of the Convention to taxes on capital to the extent that during the fiscal year concerned both Contracting States impose taxes on the same capital or on the same elements of capital.***

### *Positions on Article 3*

93. Delete the following paragraph 2 of the Positions on Article 3:

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

94. Replace paragraph 4 of the Positions on Article 3 by the following:

4. *Bulgaria* reserves the right to propose in bilateral negotiations **the insertion of the word “also” between the words “business” and “includes” in paragraph 1, subparagraph h) of the Article** ~~to include a definition of the term “business profits”, which covers both profits of a company and income of an individual, derived from carrying on of a business through a permanent establishment. This inclusion is a consequence of the deletion of Article 14 and results in the possibility of applying Article 7 in conformity with Bulgarian internal legislation as regards income, derived by individuals.~~

95. Replace paragraph 4.1 of the Positions on Article 3 by the following:

4.1 *Argentina, Azerbaijan, Brazil, Lithuania and Singapore* reserves the right not to include the definitions of “enterprise” and “business” in paragraph 1 of Article 3 because ~~it~~ **they** reserves the right to include an article concerning the taxation of independent personal services.

96. Replace paragraph 8 of the Positions on Article 3 by the following:

8. *India and South Africa* reserves the right to include in the definition of “person” only those entities which are treated as taxable units under the taxation laws in force in the respective Contracting States.

97. Replace paragraph 10 of the Positions on Article 3 by the following:

10. *Colombia and Hong Kong, China* reserves the right to omit the phrase “operated by an enterprise that has its place of effective management in a Contracting State” from the definition of “international traffic” in subparagraph *e)* of paragraph 1.

#### **Positions on Article 4**

98. Replace paragraph 1 of the Positions on Article 4 by the following:

1. *Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Colombia, Estonia, Indonesia, Latvia, Lithuania, Russia, Thailand, Ukraine and Vietnam* reserve the right to include the place of incorporation or a similar criterion (registration for Belarus and Vietnam) in paragraph 1.

99. Add the following new paragraph 3.1 to the Positions on Article 4:

**3.1 *Malaysia and Singapore* reserve the right not to include the second sentence of paragraph 1 in their agreements.**

100. Add the following new paragraph 6 to the Positions on Article 4:

**6. *Azerbaijan* reserves the right to use either “registration (incorporation)” or “place of effective management” as the criterion for determining the residence of a person in paragraph 3.**

101. Replace paragraph 7 of the Positions on Article 4 by the following:

7. *Argentina* reserves the right to use a place of incorporation test for determining the residence of a company and, failing that, to deny dual resident companies benefits under the Convention ~~*Israel* reserves the right to include a separate provision regarding a trust that is a resident of both Contracting States.~~

102. Replace paragraph 8 of the Positions on Article 4 by the following:

8. *India, ~~and Kazakhstan~~ and Singapore* reserve the right to include a provision that will refer to a mutual agreement procedure for determination of the country of residence in case of a dual resident person other than an individual if the State in which its effective place of management is situated cannot be determined.

103. Add the following new paragraph 8.2 to the Positions on Article 4:

**8.2** *Colombia reserves the right to deny benefits under the Convention to dual resident persons other than individuals.*

104. Add the following new paragraph 9.4 to the Positions on Article 4:

**9.4** *Singapore reserves the right to replace subparagraph d) by: “d) in any other case, the competent authorities of the Contracting States shall settle the question by mutual agreement.”*

105. Replace paragraph 10 of the Positions on Article 4 by the following:

10. The interpretation by *Argentina, Armenia, Bulgaria, Russia, Ukraine* and *Vietnam* of the term “place of effective management” is practical day to day management, irrespective of where the overriding control is exercised

#### ***Positions on Article 5***

106. Replace paragraph 1 of the Positions on Article 5 by the following:

1. Considering the special problems in applying the provisions of the Model Convention to activities carried on offshore in a Contracting State in connection with the exploration or exploitation of the sea bed, its subsoil and their natural resources, *Latvia and Lithuania* reserves the right to insert in a special Article provisions relating to such activities.

107. Add the following new paragraph 2.2 to the Positions on Article 5:

**2.2** *Colombia reserves the right to replace the words “of extraction” with the words “relating to the exploration for or the exploitation” in subparagraph 2 f).*

108. Add the following new paragraph 6.3 to the Positions on Article 5:

**6.3** *Azerbaijan reserves the right to add to paragraph 2 an additional subparagraph covering an installation, structure or vessel used for the exploration of natural resources.*

109. Replace paragraph 8 of the Positions on Article 5 by the following:

8. *Armenia, Brazil, Colombia, Georgia, Thailand* and *Vietnam* reserve their position on paragraph 3 as they consider that any building site or construction, assembly or installation project which lasts more than six months should be regarded as a permanent establishment.

110. Replace paragraph 9 of the Positions on Article 5 by the following:

9. *Albania, the Democratic Republic of the Congo, Lithuania* and *Hong Kong, China* reserve their position on paragraph 3 and consider that any building site, construction, assembly or

installation project or a supervisory or consultancy activity connected therewith constitutes a permanent establishment if such site, project or activity lasts for a period of more than six months.

111. Replace paragraph 11 of the Positions on Article 5 by the following:

11. *Argentina, Malaysia, the People's Republic of China, Singapore, South Africa, Thailand and Vietnam* reserve the right to treat an enterprise as having a permanent establishment if the enterprise carries on supervisory activities in connection with a building site or a construction, assembly, or installation project that constitute a permanent establishment under paragraph 3 (in the case of Malaysia, the period for this permanent establishment is negotiated separately).

112. Replace paragraph 12 of the Positions on Article 5 by the following:

12. *Argentina* reserves the right to treat an enterprise as having a permanent establishment if the enterprise furnishes services, including consultancy services, through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue ~~(for the same or a connected project)~~ within the country for a period or periods aggregating more than three months *in any twelve month period commencing or ending in the fiscal year concerned*.

113. Add the following new paragraph 13.1 to the Positions on Article 5:

**13.1** *Singapore reserves the right to treat an enterprise as having a permanent establishment if the enterprise furnishes services through employees or other personnel engaged by the enterprise for such purpose but only where the employees or other personnel are present in the State for the same project or a connected project for a period or periods aggregating more than a period to be negotiated.*

114. Replace paragraph 14 of the Positions on Article 5 by the following:

14. *Albania, Armenia, Azerbaijan, Lithuania, Serbia, South Africa, Thailand, Vietnam and Hong Kong, China* reserve the right to treat an enterprise as having a permanent establishment if the enterprise furnishes services, including consultancy services, through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project [other than in the case of Armenia]), within the country for a period or periods aggregating more than six months within any twelve month period.

115. Replace paragraph 14.2 of the Positions on Article 5 by the following:

14.2 *Lithuania reserves the right to insert special provisions regarding a permanent establishment relating to activities carried on in a Contracting State in connection with the exploration or exploitation of natural resources.* ~~*Bulgaria and Estonia* reserves the right to deem an individual performing professional services or other services of an independent character to have a permanent establishment for the purposes of the Convention if they are present in the other State for a period or periods exceeding in the aggregate 183 days in any twelve month period.~~

116. Replace paragraph 14.3 of the Positions on Article 5 by the following:

14.3 *Argentina reserves the right to treat an enterprise as having a permanent establishment if the enterprise carries on activities in that State related to the exploitation or extraction of natural resources, including fishing activities, without a fixed place of business during a period exceeding three months in any twelve month period commencing or ending in the fiscal year concerned.* ~~*Bulgaria* reserves the right to treat an enterprise as having a permanent establishment if~~

~~the enterprise furnishes services, including consultancy services, through employees or other personnel engaged by the enterprise for such purpose, where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than six months within any twelve month period.~~

117. Replace paragraph 14.4 of the Positions on Article 5 by the following:

14.4 ~~Bulgaria and Indonesia~~ reserves the right to insert a provision that deems a permanent establishment to exist if, for more than a negotiated period, an installation, drilling rig or ship is used for the exploration of natural resources.

118. Add the following new paragraph 14.8 to the Positions on Article 5:

***14.8 Colombia reserves the right to deem an enterprise to have a permanent establishment whenever it carries on activities in the other Contracting State in connection with the exploration for or the exploitation of natural resources, as well as in certain circumstances where services are performed.***

119. Replace paragraph 15 of the Positions on Article 5 by the following:

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

120. Add the following new paragraph 16.1 to the Positions on Article 5:

***16.1 Colombia reserves the right to provide that the activities mentioned in subparagraphs a) to d) are subject to the requirement that, on a case-by-case basis, they have a preparatory or auxiliary character.***

121. Replace paragraph 17 of the Positions on Article 5 by the following:

17. *Albania, Argentina, Armenia, Azerbaijan, Gabon, India, Indonesia, Ivory Coast, Morocco, Russia, Thailand, Tunisia, Ukraine and Vietnam* 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 regularly delivers goods or merchandise on behalf of the enterprise.

122. Replace paragraph 18 of the Positions on Article 5 by the following:

18. *Albania, Argentina, Azerbaijan, Gabon, Estonia, Ivory Coast, Lithuania, Morocco, Serbia, Thailand, 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 an agent of an independent status.

123. Replace paragraph 19 of the Positions on Article 5 by the following:

19. *Colombia, Gabon, India, Indonesia, Ivory Coast, Morocco, Russia, Thailand, Tunisia and Vietnam* reserve the right to provide that an insurance enterprise of a Contracting State shall, except with 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 of that other state

or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 6 applies.

124. Replace paragraph 20 of the Positions on Article 5 by the following:

20. *Argentina, India, Morocco and Vietnam* do not agree with the words “The twelve month test applies to each individual site or project” found in paragraph 18 of the Commentary. They consider that a series of consecutive short term sites or projects operated by a contractor would give rise to the existence of a permanent establishment in the country concerned.

125. Replace paragraph 21 of the Positions on Article 5 by the following:

21. *Bulgaria, and Serbia and Singapore* would add to paragraph 33 of the Commentary on Article 5 their views that a person, who is authorised to negotiate the essential elements of the contract, and not necessarily all the elements and details of the contract, on behalf of a foreign resident, can be said to exercise the authority to conclude contracts.

126. Replace paragraph 22 of the Positions on Article 5 by the following:

22. *Bulgaria* does not adhere to the interpretation, given in paragraph 17 of the Commentary on Article 5, and is of the opinion that ~~on-site planning and~~ supervision of **a building site or a construction project** ~~the erection of a building~~, where carried on by another person, are not covered by paragraph 3 of the Article, if not expressly provided for.

127. Replace paragraph 25 of the Positions on Article 5 by the following:

25. *Azerbaijan, India and Malaysia* do not agree with the interpretation given in paragraph 5.3 (first part of the paragraph) and 5.4 (first part of the paragraph); they are of the view that these examples could also be regarded as constituting permanent establishments.

128. Add the following new paragraph 25.1 to the Positions on Article 5:

**25.1** *Argentina does not agree with the interpretation given in paragraph 5.3.*

129. Add the following new paragraph 25.2 to the Positions on Article 5:

**25.2** *Singapore does not agree with the interpretation given in paragraph 5.4 (first part of the paragraph) and is of the view that the example could constitute a permanent establishment.*

130. Add the following new paragraph 26.1 to the Positions on Article 5:

**26.1** *Argentina does not agree with the interpretation given in paragraph 8; it is of the view that the letting or leasing of tangible or intangible property by themselves may constitute a permanent establishment of the lessor in certain circumstances, particularly where the lessor supplies personnel after installation to operate the equipment.*

131. Replace paragraph 31 of the Commentary on Article 5 by the following:

31. *Argentina and India* does not agree with the interpretation given in paragraph 33; ~~it is~~*they* are of the view that the mere fact that a person has attended or participated in negotiations in a State between an enterprise and a client, can in certain circumstances, be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the

enterprise. *Argentina and India* ~~are~~ is also of the view that a person, who is authorised to negotiate the essential elements of the contract, and not necessarily all the elements and details of the contract, on behalf of a foreign resident, can be said to exercise the authority to conclude contracts.

132. Add the following new paragraph 34.1 to the Positions on Article 5:

**34.1** *Argentina does not agree with the statement given in paragraph 42.13, that the taxation by a State of profits from services performed in its territory does not necessarily represent optimal tax treaty policy.*

133. Add the following new paragraph 38.1 to the Positions on Article 5:

**38.1** *Argentina does not fully agree with the interpretation given in paragraphs 42.18, 42.19 and 42.22.*

134. Add the following new paragraph 46 to the Positions on Article 5:

**46** *Regarding paragraph 38, Colombia believes that the arm's length principle should also be considered in determining whether or not an agent is of an independent status for purposes of paragraph 6 of the Article and wishes, when necessary, to add wording to its conventions to clarify that this is how the paragraph should be interpreted.*

#### **Positions on Article 6**

135. Replace paragraph 2.2 of the Positions on Article 6 by the following:

**2.2** *Colombia reserves the right to include rights relating to all natural resources under this Article. Colombia also reserves the right to amend the definition of "immovable property" to include expressly other property. Estonia reserves the right to include in the definition of the term "immovable property" any right of claim in respect of immovable property because such right of claim may not be included in its domestic law's meaning of the term.*

#### **Positions on Article 7**

136. Replace paragraph 1 of the Positions on Article 7 by the following:

1. *Argentina, Azerbaijan, Brazil, Bulgaria, Indonesia, Latvia, Malaysia, Romania, Russia, Serbia, Singapore, South Africa, Thailand and Hong Kong, China* reserve the right to use the previous version of Article 7, i.e. the version that was included in the Model Tax Convention immediately before the 2010 Update, subject to their positions on that previous version (see annex below).

137. Replace paragraph 1.2 of the Positions on Article 7 by the following:

1.2 *Argentina and Indonesia* reserve the right to include a special provision in the Convention that will permit them to apply their domestic law in relation to the taxation of the profits of an insurance and re-insurance enterprise, ***even in the absence of a permanent establishment.***

138. Add the following new paragraph 1.4 to the Positions on Article 7:



**1.4** *Colombia reserves the right to use the previous version of Article 7, i.e. the version that was included in the Model Tax Convention immediately before the 2010 Update, and to disregard the changes to the Commentary on the Article made through that update.*

139. Replace paragraph 2.1 of the Positions on Article 7 by the following:

2.1 *Albania, Argentina, Azerbaijan, Brazil, Croatia, Gabon, Indonesia, Ivory Coast, Lithuania, Malaysia, Morocco, the People's Republic of China, Russia, Serbia, Singapore, Thailand, Tunisia and Vietnam reserve the right to maintain in their conventions a specific article dealing with the taxation of "independent personal services". Accordingly, reservation is also made with respect to all the corresponding modifications in the Articles and the Commentaries, which have been modified as a result of the elimination of Article 14.*

140. Delete the following paragraph 2.2 of the Positions on Article 7:

~~2.2 *Bulgaria reserves the right to propose in bilateral negotiations the replacement, in this Article, of the term "profits" with the term "business profits", provided that it is defined in Article 3.*~~

141. Add the following new paragraph 6 to the Positions on Article 7:

**6.** *Azerbaijan and Singapore reserve the right to add a paragraph to clarify that expenses that will be allowed as deductions by a Contracting State shall include only expenses that would be deductible if the permanent establishment were a separate enterprise of that Contracting State.*

142. Add the following new paragraph 9 to the Positions on Article 7:

**9.** *Colombia reserves the right to amend Article 7 to provide that, in applying paragraphs 1 and 2 of the Article, profits 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.*

143. Replace paragraph 12 of the Positions on Article 7 by the following:

12. *Argentina, Brazil, Bulgaria, Indonesia, Latvia, Malaysia, Romania, Russia, Serbia, Singapore, South Africa, Thailand and Hong Kong, China will interpret Article 7 as it read before the 2010 Update in line with the relevant Commentary as it stood prior to that update.*

144. Add the following new paragraph 13 to the Positions on Article 7:

**13.** *Argentina considers that the "separate entity approach" and the arm's length principle should be applied symmetrically to dealings between the permanent establishment and the head office of the enterprise – both to determine the correct attribution of profits (deduction of expenses) to the permanent establishment and the taxation of profits of the head office from those dealings, according to the fiction that the permanent establishment is a separate enterprise and that such an enterprise is independent from the rest of the enterprise of which it is a part.*

145. Add the following new paragraph 14 to the Positions on Article 7:

**14.** *India disagrees with the last sentence of paragraph 75.1 to the extent that income from issuance and trading of emission permits and credits will not be covered by Article 8 even under circumstances stated in paragraph 14.1 of the commentary on Article 8.*

### *Positions on Article 8*

146. Replace paragraph 3 of the Positions on Article 8 by the following:

3. *Albania, Argentina and Bulgaria* reserve the right to tax profits from the carriage of passengers or cargo taken on board at one place in a respective country for discharge at another place in the same country.

147. Add the following new paragraph 4.1 to the Positions on Article 8:

**4.1** *Azerbaijan reserves the right to include a provision which provides for taxation of the profits from the leasing of containers in the same way as the profits from international transportation when such profits are supplementary or incidental to international transportation.*

148. Replace paragraph 6 of the Positions on Article 8 by the following:

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

149. Replace paragraph 7 of the Positions on Article 8 by the following:

7. *Albania, Argentina, Azerbaijan, Brazil, ~~Estonia~~, Colombia, Gabon, Georgia, India, Latvia, Malaysia, Morocco, the People's Republic of China, South Africa and Hong Kong, China* reserve the right not to extend the scope of the Article to cover inland waterways transportation in bilateral conventions and are free to make corresponding modifications to paragraph 3 of Articles 13, 15 and 22.

150. Add the following new paragraph 11 to the Positions on Article 8:

**11.** *Singapore reserves its position on the application of this Article to income from ancillary activities. It takes the view that Article 8 does not cover any ancillary activities that are not expressly mentioned in Singapore's tax conventions.*

151. Add the following new paragraph 12 to the Positions on Article 8:

**12.** *India does not agree with the view that income derived by an enterprise from trading of emission permits and credits in the example given in paragraph 14.1 would be covered by Article 8.*

### *Positions on Article 9*

152. Replace paragraph 1 of the Positions on Article 9 by the following:

1. *Brazil, ~~Russia~~, Thailand and Vietnam* reserve the right not to insert paragraph 2 in their conventions.

153. Replace paragraph 3 of the Positions on Article 9 by the following:

3. *Azerbaijan, Malaysia and Serbia* reserve the right to specify in paragraph 2 that a correlative adjustment will be made if the adjustment is considered to be justified.

154. Replace paragraph 5 of the Positions on Article 9 by the following:

5. ~~*Israel* reserves its right to insert a provision according to which any appropriate adjustment to the amount of the tax charged therein on those profits shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States, except such limitations as apply to claims made in pursuance of such an agreement.~~ ***Russia reserves the right not to insert paragraph 2 in its conventions but is prepared in the course of negotiations to accept this paragraph based on the understanding that the other Contracting State is only obliged to make an adjustment to the amount of tax to the extent that it agrees, unilaterally or in a mutual agreement procedure, with the adjustment of profits by the first-mentioned State.***

155. Add the following new paragraph 6 to the Positions on Article 9:

6. ***Argentina reserves its right to insert a provision according to which any appropriate adjustment to the amount of the tax charged therein on those profits shall be implemented only within the time limits, or other procedural limitations, provided for in its domestic laws, and that the commitment to make an adjustment does not apply in the case of fraud, wilful default or neglect.***

#### ***Positions on Article 10***

156. Replace paragraph 1 of the Positions on Article 10 by the following:

1. ~~*Argentina and Thailand* reserves the right to apply a 10 per cent rate of tax at source in the case referred to in subparagraph a).~~

157. Replace paragraph 3 of the Positions on Article 10 by the following:

3. ~~*Bulgaria, Estonia, India, Latvia, Lithuania, Malaysia, Russia, and Serbia and Singapore* reserve the right not to include the requirement for the competent authorities to settle by mutual agreement the mode of application of paragraph 2.~~

158. Add the following new paragraph 3.1 to the Positions on Article 10:

***3.1 Azerbaijan reserves the right not to include in its bilateral conventions the sentence stating that the competent authorities shall settle the mode of application of paragraph 2 by mutual agreement as it uses uniform regulations for the implementation of all its bilateral conventions.***

159. Replace paragraph 4 of the Positions on Article 10 by the following:

4. ~~*Israel*~~***Latvia*** reserves its position on the rates provided for in paragraph 2.

160. Replace paragraph 5 of the Positions on Article 10 by the following:

5. ***Azerbaijan and Romania* reserves the right to tax at a uniform rate to be negotiated all dividends referred to in this paragraph.**

161. Replace paragraph 7 of the Positions on Article 10 by the following:

7. ***Colombia, Serbia and Vietnam* reserve the right to tax, at a uniform rate of not less than 10 per cent, all dividends referred to in paragraph 2.**

162. Replace paragraph 7.1 of the Positions on Article 10 by the following:

7.1 ~~Latvia reserves the right to reduce to 10 per cent the minimum percentage for the holding in subparagraph a) and to apply a 10 per cent rate of tax at source in the case referred to in subparagraph b)~~ **Argentina reserves the right to include a provision in its bilateral treaties to provide that the taxation rate provided in paragraph 2 shall not be applicable where a local company distributes profits exceeding the total amount of aggregate tax profits at the end of the fiscal year immediately before the date of distribution, taking into account that the taxation on the dividends that exceed the aggregate profits is considered to be a taxation at the level of the company.**

163. Replace paragraph 7.2 of the Positions on Article 10 by the following:

7.2 **Argentina and India** reserves the right to settle the rate of tax in bilateral negotiations.

164. Replace paragraph 9 of the Positions on Article 10 by the following:

9. As their legislation does not provide for such concepts as “jouissance” shares, “jouissance” rights, mining shares and founders’ shares, *Albania, Armenia, Bulgaria, Belarus, Malaysia* and *Serbia* reserve the right to omit them from paragraph 3.

165. Replace paragraph 10 of the Positions on Article 10 by the following:

10. ~~Bulgaria and Estonia, Latvia and Lithuania~~ reserve the right to replace, in paragraph 3, the words “income from other corporate rights” by “income from other rights”.

166. Replace paragraph 10.3 of the Positions on Article 10 by the following:

10.3 ~~Israel reserves the right to exclude payments made by a Real Estate Investment Trust which is a resident of Israel from the definition of dividends in paragraph 3 and to tax those payments according to its domestic law~~ **Argentina reserves the right to expand the definition of dividends in paragraph 3 to cover certain payments that are treated as distributions of dividends according to its domestic law.**

167. Add the following new paragraph 10.4 to the Positions on Article 10:

**10.4 Bulgaria reserves the right to propose in bilateral negotiations the inclusion of a clause according to which a dividend which is treated as a hidden distribution of profits under its laws would remain taxable according to its laws, notwithstanding the relief under paragraph 2 of the Article.**

168. Add the following new paragraph 14.1 to the Positions on Article 10:

**14.1 Colombia reserves the right to apply its domestic rules on the taxation of dividends distributed from profits that have not been subject to tax at the level of the company, and to impose its tax on the transfer of profits attributable to permanent establishments that have not been subject to tax in Colombia.**

#### **Positions on Article 11**

169. Replace paragraph 2 of the Positions on Article 11 by the following:

2. *Argentina, Brazil, India, ~~Israel~~, Ivory Coast, Latvia, the Philippines, Romania, Thailand and Ukraine* reserve their positions on the rate provided for in paragraph 2.

170. Replace paragraph 4 of the Positions on Article 11 by the following:

4. *Bulgaria, ~~Estonia~~, India, Latvia, Lithuania, Malaysia, Russia, ~~and~~ Serbia and Singapore* reserve the right not to include the requirement for the competent authorities to settle by mutual agreement the mode of application of paragraph 2.

171. Add the following new paragraph 4.1 to the Positions on Article 11:

**4.1** *Azerbaijan reserves the right not to include in its bilateral conventions the sentence stating that the competent authorities shall settle the mode of application of paragraph 2 by mutual agreement as it uses uniform regulations for the implementation of all its bilateral conventions.*

172. Replace paragraph 7.1 of the Positions on Article 11 by the following:

7.1 *Bulgaria, ~~Estonia~~, Latvia, ~~Lithuania~~, Morocco and Tunisia* reserve the right to amend the definition of interest to clarify that interest payments treated as distributions under its domestic law fall within Article 10.

173. Delete the following paragraph 8.2 of the Positions on Article 11:

~~8.2 — *Israel* reserves the right to include a provision that would allow interest income to be taxed under Article 7 if the taxpayer so elects.~~

### **Positions on Article 12**

174. Replace paragraph 3 of the Positions on Article 12 by the following:

3. *Albania, Argentina, Armenia, Azerbaijan, Belarus, Brazil, Bulgaria, Colombia, Croatia, the Democratic Republic of the Congo, Gabon, Indonesia, Ivory Coast, Kazakhstan, ~~Latvia~~, Lithuania, Malaysia, Morocco, the People's Republic of China, the Philippines, Romania, Russia, Serbia, Singapore, South Africa, Thailand, Tunisia, Ukraine, Vietnam and Hong Kong, China* reserve the right to tax royalties at source.

175. Add the following new paragraph 3.1 to the Positions on Article 12:

**3.1** *Latvia reserves the right to tax royalties at source if the recipient of the income is an individual who is resident of the other Contracting State.*

176. Replace paragraph 6 of the Positions on Article 12 by the following:

6. *Argentina, ~~the Philippines, Thailand and Vietnam~~* reserve the right to include fees for technical services in the definition of royalties.

177. Replace paragraph 7 of the Positions on Article 12 by the following:

7. *Argentina, Brazil, Gabon, Ivory Coast and Tunisia* reserve the right to include fees for technical assistance and technical services in the definition of “royalties”.

178. Add the following new paragraph 7.2 to the Positions on Article 11:

**7.2 Colombia reserves the right to include payments received for the furnishing of technical assistance, technical services and consulting services within the definition of royalties.**

179. Replace paragraph 8 of the Positions on Article 12 by the following:

8. *Albania, Armenia, Azerbaijan, Belarus, Brazil, Bulgaria, Colombia, India, Indonesia, Kazakhstan, Latvia, Lithuania, Malaysia, the People's Republic of China, the Philippines, Romania, Russia, Serbia, Thailand and Vietnam* reserve the right to include in the definition of royalties payments for the use of, or the right to use, industrial, commercial or scientific equipment. ~~Bulgaria intends 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 royalty payments.~~

180. Replace paragraph 10 of the Positions on Article 12 by the following:

10. *Argentina, Brazil, Bulgaria, Morocco and Romania* reserve the right to include in the definition of the royalties payments for transmissions by satellite, cable, optic fibre or similar technology.

181. Replace paragraph 10.1 of the Positions on Article 12 by the following:

10.1 *Argentina and Vietnam* reserves the right to include in the definition of royalties, payments for the use of or the right to use of "films, tapes or digital media used for radio or television broadcasting".

182. Replace paragraph 12 of the Positions on Article 12 by the following:

12. *Albania, Argentina, Armenia, Azerbaijan, Belarus, Brazil, Bulgaria, Colombia, Croatia, Estonia, Gabon, Indonesia, Ivory Coast, Kazakhstan, Latvia, Lithuania, Malaysia, Morocco, the People's Republic of China, the Philippines, Romania, Serbia, Singapore, South Africa, Thailand, Tunisia, Ukraine, Vietnam and Hong Kong, China* reserve the right, in order to fill what they consider as a gap in the Article, to add a provision defining the source of royalties by analogy with the provisions of paragraph 5 of Article 11, which deals with the same issue in the case of interest.

183. Add the following new paragraph 17.1 to the Positions on Article 12:

**17.1 Colombia does not adhere to the interpretations provided in paragraphs 8.2, 13.1, 14, 14.1, 14.2, 14.4, 15, 16 and 17.3; under its tax laws some of the payments referred to may constitute royalties.**

184. Replace paragraph 23 of the Positions on Article 12 by the following:

23. *Azerbaijan and the People's Republic of China* does not adhere to the interpretation in paragraph 10.1 because ~~it~~they takes the view that some payments for the exclusive distribution rights of a product or a service in a given territory may be treated as royalties.

185. Add the following new paragraph 24 to the Positions on Article 12:

**24. Bulgaria does not adhere to the interpretation, given in paragraph 14.4 of the Commentary on Article 12, and is of the opinion that a distribution intermediary who distributes software to clients and with relation to these clients requests from the software copyright holder or**

*from another person who has the right to copy the software, to provide software copies, irrespective whether on a tangible media or electronically, uses the copyright in the software product.*

### **Positions on Article 13**

186. Replace paragraph 3 of the Positions on Article 13 by the following:

3. ~~Latvia and Lithuania~~ reserves the right to insert in a special Article provisions regarding capital gains relating to activities carried on offshore in a Contracting State in connection with the exploration or exploitation of the sea bed, its subsoil and their natural resources.

187. Add the following new paragraph 3.1 to the Positions on Article 13:

**3.1 Lithuania reserves the right to insert special provisions regarding capital gains relating to activities carried on in a Contracting State in connection with the exploration or exploitation of natural resources.**

188. Replace paragraph 4 of the Positions on Article 13 by the following:

4. ~~Estonia and Lithuania~~ reserves the right to limit the application of paragraph 3 to enterprises operating ships and aircraft in international traffic.

189. Replace paragraph 5 of the Positions on Article 13 by the following:

5. **Colombia, India and Vietnam** reserve the right to tax gains from the alienation of shares or rights in a company that is a resident of their respective country.

190. Replace paragraph 11 of the Positions on Article 13 by the following:

11. ~~Israel reserves its right to insert a provision according to which where a person, who was a resident of a Contracting State, has become a resident of the other Contracting State, this Article shall not prevent the first mentioned State from taxing under its domestic law the capital gains on the property of that person at the time of change of residence. In the case of the alienation of property dealt with in paragraphs 1, 2, 3 and 4 made after the change of residence, double taxation will be eliminated by the first mentioned Contracting State. In the case of the alienation of property dealt with in paragraph 5 made after the change of residence, double taxation will be eliminated by the other Contracting State.~~ **Lithuania reserves the right not to include paragraph 4 in its conventions.**

### **Positions on Article 15**

191. Delete the following paragraph 1 of the Positions on Article 15:

1. ~~Argentina reserves its position on subparagraph a) of paragraph 2 and wishes to insert in its conventions the words “in the fiscal year concerned” instead of the words “in any twelve month period commencing or ending in the fiscal year concerned”.~~

192. Replace paragraph 2 of the Positions on Article 15 by the following:

2. ~~Latvia and Lithuania~~ reserves the right to insert in a special Article provisions regarding income derived from dependent personal services relating to activities carried on offshore in a

Contracting State in connection with the exploration or exploitation of the sea bed, its subsoil and their natural resources.

193. Add the following new paragraph 2.1 to the Positions on Article 15:

**2.1** *Lithuania reserves the right to insert special provisions regarding income derived from dependent personal services relating to activities carried on in a Contracting State in connection with the exploration or exploitation of natural resources.*

194. Delete the following paragraph 3 of the Positions on Article 15:

~~3. — Argentina reserves the right to insert in a special article provisions regarding income derived from dependent personal services relating to offshore hydrocarbon exploration and exploitation and related activities.~~

195. Add the following new paragraph 5.2 to the Positions on Article 15:

**5.2** *Azerbaijan reserves the right to provide that the remuneration derived in respect of an employment exercised aboard such ships or aircraft will be taxable only in the State of residence of their operator.*

196. Add the following new paragraph 5.3 to the Positions on Article 15:

**5.3** *Colombia reserves the right to modify paragraph 3 and make corresponding changes to the definition of the term “international traffic” to cover the situation of income derived by residents of a Contracting State in respect of employment exercised aboard a ship or aircraft of an enterprise of a third State, operated in international traffic.*

197. Add the following new paragraph 7 to the Positions on Article 15:

**7.** *The People’s Republic of China does not adhere to the interpretation set out in paragraph 2.9, because it takes the view that the payment that an employee receives in consideration for an obligation not to work for a competitor of his ex-employer constitutes remuneration derived from employment activities performed before the termination of the employment, and that such payment may be taxed in the Contracting State where the employment activities are performed before such termination.*

198. Add the following new paragraph 8 to the Positions on Article 15:

**8.** *India does not adhere to the interpretation set out in paragraph 2.9, because it takes the view that the payment that an employee receives in consideration for an obligation not to work for a competitor of his ex-employer constitutes remuneration derived from employment activities performed before the termination of the employment, and that such payment may be taxed in the Contracting State where the employment activities are performed before such termination.*

#### **Positions on Article 16**

199. Replace paragraph 1 of the Positions on Article 16 by the following:

1. *Albania, Azerbaijan, Bulgaria, the Democratic Republic of the Congo, ~~Estonia~~, Indonesia, Latvia, Lithuania and Serbia reserve the right to tax under this Article any remuneration of a member of a board of directors or any other similar organ of a resident company.*



*Positions on Article 17*

200. Replace paragraph 2 of the Positions on Article 17 by the following:

2. ***India reserves the right to include performing as well as non-performing artists in the scope of the term “entertainers”. India and Thailand reserve the right to exclude from the application of paragraphs 1 and 2 the income from activities performed in a Contracting State by entertainers or sportspersons if the activities are substantially supported by public funds and to provide for residence based taxation of such income.***

201. Add the following new heading and paragraph 4 to the Positions on Article 17:

*Positions on the Commentary*

4. ***Argentina, Brazil and Malaysia do not agree with the interpretation in paragraph 3, according to which Article 17 should not be extended to a model performing as such and presenting clothes during a fashion show. They consider that, under some circumstances, a fashion show may be regarded as of an entertainment nature. Thus, the income derived by a model from the participation in such a fashion show may be included in Article 17 (as opposed to the income derived by a model from other activities, i.e. the photo session, where the activity performed is clearly not of an entertainment nature).***

202. Add the following new paragraph 5 to the Positions on Article 17:

5. ***Brazil, Malaysia and the People’s Republic of China do not adhere to the interpretation set out in paragraph 3, because they take the view that visiting conference speakers, including especially former politicians, could be covered by Article 17 if an entertainment character is present in their speeches.***

203. Add the following new paragraph 6 to the Positions on Article 17:

6. ***Argentina does not share the interpretation in paragraph 9.1 because it considers that, in some cases, the fee that a former or injured sportsperson would earn for offering comments during a broadcast of a sports event in which that person does not participate, may be received for personal activities of that person of an entertainment nature. In such cases, he/she is offered the job (and the relevant income) because of his/her fame as a sportsperson and not for his/her reputation as a commentator, and therefore such income is covered by Article 17.***

204. Add the following new paragraph 7 to the Positions on Article 17:

7. ***India does not agree with the interpretation in paragraph 3, according to which Article 17 should not be extended to a model performing as such and presenting clothes during a fashion show. India considers that, under some circumstances, a fashion show may be regarded as of an entertainment nature and accordingly covered by Article 17.***

205. Add the following new paragraph 8 to the Positions on Article 17:

8. ***India does not agree with the interpretation given in paragraph 9 restricting the scope of Article 17 only to personal activities that have a close connection with performance. India considers that any consideration received by an entertainer or a sportsperson for any personal activity, including appearance is covered by Article 17.***

206. Add the following new paragraph 9 to the Positions on Article 17:

**9. India does not agree with the third example in paragraph 9.1, related to reporting or commenting activities during the broadcasting of an entertainment or sports event, as it considers that such activities are covered by Article 17.**

207. Add the following new paragraph 10 to the Positions on Article 17:

**10. Brazil and India do not adhere to the interpretation set out in paragraph 11.2. They take the view that prize money in such races is paid in consideration for personal activities of the jockey and race car driver and is covered by Article 17.**

208. Add the following new paragraph 11 to the Positions on Article 17:

**11. With respect to paragraph 14 of the Commentary, India considers that the phrase "personal activities as such" in paragraph 1 of article 17 would not include activities financed by public funds and that the alternative provision included in paragraph 14 simply confirms that view.**

#### **Positions on Article 19**

209. Add the following new heading and paragraph 1 to the Positions on Article 19:

##### **Position on the Article**

**1. Argentina reserves the right to tax at source pensions covered by subparagraph 2 b).**

210. Renumber paragraph 1 of the Positions on Article 19 and move the heading that precedes that paragraph as follows:

##### **Position on the Commentary**

**12. India does not agree that public bodies like State Railways and Post Offices are performing business activities.**

#### **Positions on Article 20**

211. Replace paragraph 2 of the Positions on Article 20 by the following:

**2. ~~Estonia~~, Latvia, Lithuania and Morocco reserve the right to refer to any apprentice and to a trainee in this Article.**

212. Add the following new paragraph 12 to the Positions on Article 20:

**12. Georgia reserves the right to propose a separate paragraph which provides that remuneration which a student or business apprentice who is or was immediately before visiting a Contracting State a resident of the other Contracting State derives from an employment which he exercises in the first-mentioned State for a period or periods not exceeding two years shall not be taxed in the first-mentioned State if the employment is directly related to his studies or apprenticeship carried out in the first-mentioned State.**

### ***Positions on Article 21***

213. Replace paragraph 1 of the Positions on Article 21 by the following:

1. *Albania, Argentina, Azerbaijan, Belarus, Brazil, ~~Bulgaria, Colombia~~, Gabon, India, Indonesia, Ivory Coast, Malaysia, Morocco, Russia, Serbia, Singapore, South Africa, Thailand and Vietnam* reserve their positions on this Article as they wish to maintain the right to tax income arising from sources in their own country.

### ***Positions on Article 22***

214. Replace paragraph 2 of the Positions on Article 22 by the following:

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

### ***Positions on Articles 23 A and 23 B***

215. Replace paragraph 5 of the Positions on Articles 23 A and 23 B by the following:

5. ~~*Argentina and Brazil*~~ reserves ~~their~~its position on paragraph 4 of Article 23 A.

### ***Positions on Article 24***

216. Replace paragraph 2 of the Positions on Article 24 by the following:

2. *Brazil, Colombia, Romania, Russia, Singapore, Thailand and Vietnam* reserve their position on the second sentence of paragraph 1.

217. Add the following new paragraph 2.3 to the Positions on Article 24:

- 2.3 Singapore reserves the right to add a provision to state that the granting of tax incentives to its nationals designed to promote economic or social developments shall not be construed as discriminatory.***

218. Replace paragraph 4 of the Positions on Article 24 by the following:

4. *Albania, Bulgaria, ~~Estonia~~, India, Malaysia, the Philippines, Russia, Serbia, Singapore and Vietnam* reserve the right not to insert paragraph 2 in their conventions.

219. Replace paragraph 7.2 of the Positions on Article 24 by the following:

- 7.2 Argentina reserves the right to provide in paragraph 3 that no exemptions or concession provided for in its internal laws shall be granted as long as that would result in a transfer of taxes to foreign tax administrations. South Africa reserves the right to add a paragraph stating that nothing in the Article will prevent South Africa from imposing on the profits attributable to a permanent establishment in South Africa of a company that is not a resident, a tax at a rate that does not exceed the rate of normal tax on companies by more than five percentage points.***

220. Add the following new paragraph 7.3 to the Positions on Article 24:

**7.3 Colombia reserves the right to impose its tax on the transfer of profits attributable to permanent establishments.**

221. Add the following new paragraph 8.2 to the Positions on Article 24:

**8.2 Singapore reserves its position on this paragraph in the case of interest paid to non-residents where withholding tax has not been deducted.**

222. Add the following new paragraph 8.3 to the Positions on Article 24:

**8.3 Argentina reserves the right not to include paragraph 4 of Article 24.**

223. Replace paragraph 10 of the Positions on Article 24 by the following:

10. *Albania, Argentina, Brazil, Bulgaria, Colombia, Malaysia, the Philippines, Romania, Serbia, Singapore, Thailand, Tunisia, Vietnam and Ukraine* reserve the right to restrict the scope of the Article to the taxes covered by the Convention.

224. Replace paragraph 11 of the Positions on Article 24 by the following:

11. *India, ~~and~~ Malaysia and Singapore* reserve their position on the interpretation set out in paragraph 44.

225. Add the following new paragraph 11.1 to the Positions on Article 24:

**11.1 Argentina does not agree with the interpretation in paragraph 44 because Argentina considers that paragraph 3 of Article 24 does not preclude a State to establish, on any ground, a preferential tax regime that only residents are able to apply for.**

#### **Positions on Article 25**

226. Replace paragraph 2 of the Positions on Article 25 by the following:

2. *Argentina, Brazil, Bulgaria, the Philippines and Thailand* reserve their positions on the second sentence of paragraph 2. These countries consider that the implementation of reliefs and refunds following a mutual agreement ought to remain linked to time limits prescribed by their domestic laws.

227. Replace paragraph 4 of the Positions on Article 25 by the following:

4. *Brazil, Malaysia, the People's Republic of China, the Philippines, Singapore, Thailand and Ukraine* reserve the right to omit the words "including through a joint commission consisting of themselves or their representatives".

228. Replace paragraph 6 of the Positions on Article 25 by the following:

6. *Argentina considers that paragraph 1 of the Article does not bind the competent authorities to commence or accept a mutual agreement procedure case where the taxpayer alleges that taxation is not in accordance with the Convention in respect of a hypothetical case, rather than an actual case.* ~~Concerning paragraph 14, Argentina reserves its right not to commence or accept a mutual agreement procedure case if taxation not in accordance with the Convention has not been charged or notified to the taxpayer.~~

***Positions on Article 29***

229. Replace paragraph 1 of the Positions on Article 29 by the following:

1. *Indonesia, Malaysia, the People's Republic of China, Singapore and Thailand* reserve their position on this Article.