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Questionnaire

THE IMPACT OF THE OECD AND THE UN MODEL CONVENTIONS ON BILATERAL TAX TREATIES

Institute for Austrian and International Tax Law

Vienna, Austria

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A – INTRODUCTION

The main purpose of this research project is to assess the impact produced by both OECD and UN models in the bilateral tax treaties concluded by the different States. Particularly, this study will focus on determining in which extent and why bilateral treaties deviate from those models.

When drafting your national report we would kindly ask you to stick to the eight basic chapters, outlined in this questionnaire. However, within these chapters please feel free to structure your article according to your own considerations to ensure a consistent report.

Regarding each one of the chapters you are kindly asked to address not only the basic questions, but also the selected topics presented thereof. Our questions and remarks are intended to draw your attention to some interesting issues but are not meant to be answered one by one. We would appreciate it if you would particularly focus on the questions and issues that are most relevant from your country's perspective. The final report will be published in a book and therefore it should be a fluently readable article (of approx. 12.500 words), independent from this Questionnaire.

Please take into consideration not only the texts of the DTC's provisions but also your country's case law, administrative practices and scholarly opinions. Personal opinions are welcomed, especially in cases where there is insufficient case law, administrative practices or doctrine.

B – CHAPTERS

I. THE RELEVANCE OF THE OECD AND UN MODEL CONVENTION AND THEIR COMMENTARIES FOR THE INTERPRETATION OF TAX TREATIES

I.1 Questions

There might be general trends regarding the relevance of the OECD and UN Model Conventions and their Commentaries for the interpretation of the bilateral tax treaties concluded by your country. If so, please describe them. In case of peculiarities regarding specific treaty provisions, please deal with them under the following chapters.

- Is there any case law, administrative practice or scholarly opinion on how the OECD and UN Model Convention and their Commentaries fit into the rules on treaty interpretation?
- Is there any case law, administrative practice or scholarly opinion on the relevance of the OECD and UN Model Commentary if certain provisions in bilateral tax treaties deviate from the respective model?
- Is there any case law, administrative practice or scholarly opinion on the relevance of reservations and observations entered on provisions of the OECD Model Convention in the interpretation process?
- Is there any case law, administrative practice or scholarly opinion on the question whether subsequent changes to the OECD and UN Model Commentary can be considered for the interpretation of previously concluded tax treaties?

II. PERSONAL AND MATERIAL SCOPE OF THE TAX TREATIES

II.1 Questions

- Does your country follow, regarding the personal and material scope of bilateral tax treaties, the OECD or the UN Model Convention? If so, which one? Could you state the reasons for that option?
- Concerning those Articles, does your country always follow the latest version of the OECD or UN Model Convention when concluding or adapting bilateral tax treaties? If not, does it follow an older version of the OECD or UN Model Convention? Could you describe the reasons?
- Do the bilateral tax treaty provisions deviate from the model/version which is generally followed? Could you briefly describe the differences? Is there a

reason for those deviations? Are they reflected in a reservation on the respective Article?

- Are there any observations regarding the bilateral tax treaty provisions? Could you briefly describe them? Is there a reason for those observations? Do case law and/or administrative practices deviate from the interpretation of the provision proposed in the Commentaries in any other relevant respect which is not covered by any observations? Could you briefly describe these deviations?

II.2 Please consider the differences between the Models:

- With respect to the personal and material scope of the treaty, the OECD and the UN Models are nearly identical. The only difference regards the residence provision for companies, which in the UN Model also includes the criterion "place of incorporation".
- The Commentaries to the Models differ in several ways. The most important difference regarding residence is that the UN has not adopted the OECD partnership report. Furthermore, the OECD Commentary on Art 1 includes a more thorough description of anti-abuse measures than the UN Commentary on Art 1.

II.3 Other interesting issues

PERSONAL SCOPE - ART 1 AND 4

- Which criteria are generally used in the tax treaties concluded by your country for the purpose of determining where companies are resident? Where individuals are resident? Are there any additional criteria to those contained in the OECD and UN Models? Do they stem from national law?
- Generally, persons, which are subject to very low taxation or which are even tax exempt or whose income is tax exempt under domestic law, are regarded as being "liable to tax" and therefore are entitled to invoke the application of tax treaties (see para. 8.5 OECD Commentary on Art 1). Does your country follow this interpretation and if not, is this reflected in your bilateral agreements?
- Does your country follow the OECD partnership report? If not, are there any provisions regarding the treatment of partnerships, trusts, funds and similar entities? Or any rules concerning the attribution of income?

- The OECD Commentary contains several suggestions for combating the abuse of tax treaties. Does your country make use of any of the provisions proposed? Is treaty shopping dealt with at all in your tax treaties?
- According to the 2008 Commentary on Art 4, the tie-breaker rules may have an influence on other DTCs concluded by the respective contracting states ("once a losing state, always a losing state"). Does your country follow this line of reasoning brought forward by the OECD or do you see no influence exercised by one DTC on another DTC signed by your country?
- The para 24.1 OECD Commentary on Art 4 suggests an alternative tie-breaker rule for companies according to which residence shall be determined by mutual agreement. Do any of your DTCs include such a provision? Why?
- The para. 11 UN Commentary on Art 4 raises the issue of "triangular cases" and the possibility of abuse in this connection. Are there any provisions (with respect to residence) in your country's tax treaties which address this problem?
- Does your country include in its tax treaties any additional provisions which are not included in the Models/Commentaries; such as rules concerning the change in residence?

MATERIAL SCOPE - ART 2

- Does your country usually include taxes on income and on capital in the tax treaties? Are inheritance and gift taxes also included? Do the tax treaties of your country include only taxes levied on a national level or also those levied by political subdivisions? Which taxes are enumerated in the list of taxes, to which the tax treaties of your country apply?
- What about taxes not included in the list; are there any taxes considered being covered by the treaty due to falling under Art 2(2) or (4) OECD/UN Model? Are there any taxes not listed in Art 2(3) which by virtue of Art 2(2) or (4) would fall within the scope of the convention but were deliberately excluded from the treaty?
- Does your country regularly include in its tax treaties a general definition of taxes covered like the one in Art 2(2) OECD/UN Models or is rather made use of the alternative version suggested in para. 6.1 OECD Commentary on Art 2?
- Are exit taxes considered being covered by Art 2? Are church taxes, social security contributions and alike considered as "taxes" within the meaning of Art 2? How does your country treat interest and penalties in connection with the taxes covered?

III. BUSINESS PROFITS AND OTHER INDEPENDENT ACTIVITIES

III.1 Questions

- Does your country follow, regarding the bilateral tax treaty provisions (Arts. 5, 7, 8, 9, [14], 16 and 17 OECD and UN Models), the OECD or the UN Model Convention? If so, which one? Could you state the reasons for that option?
- Does your country always follow the latest version of the OECD or UN Model Convention when concluding or adapting bilateral tax treaties? If not, does it follow an older version of the OECD or UN Model Convention? Could you describe the reasons?
- Do the bilateral tax treaty provisions (Arts. 5, 7, 8, 9, [14], 16 and 17 OECD and UN Models) deviate from the model which is generally followed? Could you briefly describe the differences? Is there a reason for those deviations? Are these deviations reflected in a reservation on this Article?
- Are there any observations regarding the bilateral tax treaty provisions (Arts. 5, 7, 8, 9, [14], 16 and 17 OECD and UN Models)? Could you briefly describe them? Is there a reason for those observations? Does case law, administrative practices or scholarly opinions deviate from the interpretation of the provision proposed in the Commentaries in any other relevant respect which is not covered by any observations? Could you briefly describe these deviations?

III.2 Please consider the differences between the Models:

- Regarding building sites or construction or installation projects, Art. 5(3) OECD Model provides for a twelve months, whereas Art. 5(3)(a) UN Model provides for a six months threshold period of time.
- Art. 5(3)(a) UN Model expressly includes an "assembly project" as well as "supervisory activities" in connection with a building site, a construction, installation or assembly project to constitute a permanent establishment (According to para. 17 of the OECD Commentary on Art. 5, "(o)n-site planning and supervision of the erection of a building are covered by paragraph 3. States wishing to modify the text of the paragraph to provide expressly for that result are free to do so in their bilateral conventions.").
- Art. 5(3)(b) UN Model includes a provision according to which an enterprise is deemed to have a permanent establishment in the other Contracting State due to the performance of services exceeding a certain threshold period of time (hereinafter referred to as "Service-PE"; compare the new alternative rule on taxation of services in para. 42.23 of the 2008 OECD Commentary on Art. 5).
- Art. 5(6) UN Model additionally includes a provision on permanent establishments of insurance companies.

- According to the second sentence of Art. 5(7) UN Model, an agent will not be considered to be of an independent status when the activities of such an agent are devoted wholly or almost wholly on behalf of one enterprise, and conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises.
- Art. 7(1)(b) and (c) UN Model provides for the "limited force of attraction principle", which permits the enterprise, once it carries out business through a permanent establishment in the source country, to be taxed on business profits in that country arising from transactions of the same or similar kind outside the permanent establishment.
- Art. 7(3) UN Model provides that no deduction shall be allowed in respect of amounts paid (otherwise than towards reimbursement of actual expenses) by the head office to the permanent establishment (or *vice versa*) by way of royalties, fees or similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of banking enterprises, by way of interest on money lent.
- Art. 8 (alternative B) UN Model deals separately with profits from the operation of ships.
- Art. 9(3) UN Model provides that Art. 9(2) UN Model ("matching adjustment") shall not apply, where judicial, administrative or other legal proceedings have resulted in a final ruling that, by actions giving rise to an adjustment of profits under Art. 9(1) UN Model, one of the enterprises is liable to penalty with respect to fraud, gross negligence or willful default.
- Art. 14 OECD Model was deleted in 2000. In contrast, Art. 14 still forms part of the UN Model.
- Art. 16 UN Model has a second paragraph that extends Art. 16(1) UN Model to remuneration paid to top-level managerial positions of companies.

III.3 Other interesting issues

- If a bilateral tax treaty of your country includes a provision on Service-PEs, does the relevant threshold period of time for Service-PEs deviate from the threshold period of time relevant for building sites or construction or installation projects – Art. 5(3) OECD Model or 5(3)(b) UN Model)?
- Where a dependent agent PE is found to exist under a provision following Art. 5(5) OECD or UN Model, do courts, tax authorities and scholarly opinion follow the "single taxpayer" approach or the "two taxpayer" approach (see OECD Report on the Attribution of profits to Permanent

Establishments, 17 July 2008, pp. 66 *et seq.*), when attributing the profit to the dependent agent PE?

- Is there any case law, administrative practice or scholarly opinion on the opinion stated in para. 32.1 OECD Commentary on Art. 5, according to which the phrase "authority to conclude contracts in the name of the enterprise" does not confine the application of the paragraph to an agent who enters into contracts literally in the name of the enterprise? Is there any case law, administrative practice or scholarly opinion on the position stated in para. 33 OECD Commentary on Art. 5, according to which a person who is authorized to negotiate all elements and details of a contract in a way binding on the enterprise can be said to exercise the authority to conclude contracts in one State (and, therefore, qualifies as a "dependent agent"), even if the contract is signed by another person in another State or if the first person has not formally been given a power of representation? Is there any case law, administrative practice or scholarly opinion on para. 38.6 OECD Commentary on Art. 5, according to which the independent status of an agent is less likely if the activities of the agent are performed wholly or almost wholly on behalf of only one enterprise over the lifetime of the business or a long period of time?
- Which transactional methods are used by courts or tax authorities in order to apply the arm's length principle? Are the traditional transaction methods (CUP method, resale price method and the cost plus method) – according to courts/tax authorities – preferable to other methods (profit split, TNMM) or are they considered to be equal?
- Is there any case law, administrative practices or scholarly opinion on how location savings due to business restructurings should be attributed among the parties?
- Is there any case law, administrative practice or scholarly opinion on calculating the arm's length price in relation to intra-group services?
- Is there any case law, administrative practice or scholarly opinion on the difference between the concept of permanent establishment and fixed base? What kinds of activities fall under Art. 14 as opposed to Art. 7 (OECD and) UN Model?
- Para. 12 2008 OECD Commentary on Art. 17 recommends the credit method, when applying Art. 17 OECD Model. In the case that the exemption method is used in a bilateral tax treaty, the conclusion of a subject-to-tax clause is recommended. Does your country apply the credit or the exemption method? Do subject-to-tax clauses form part of the bilateral tax treaties?
- The OECD Commentary states that some countries may consider it appropriate to exclude from the scope of Art. 17 OECD Model events supported from public funds. In addition, the OECD Commentary offers an example provision (para. 14 of the 2008 OECD Commentary on Art. 17). Does your country include a similar provision in bilateral tax treaties?

- Art. 17(2) contains the "look-through approach". The former version of the OECD Commentary on Art. 17 assumed that this rule should only apply in cases of abuse, but since 1992, the OECD Commentary opines that Art. 17(2) OECD Model should apply independently from the existence of abuse. How does your country apply Art. 17(2) OECD Model?

IV. DIVIDENDS, INTERESTS AND ROYALTY AND CAPITAL GAINS

IV.1 Questions

- Does your country follow, regarding the bilateral tax treaty provisions, the OECD or the UN Model Convention? If so, which one? Could you state the reasons for that option?
- Concerning these Articles, does your country always follow the latest version of the OECD or UN Model Convention when concluding or adapting bilateral tax treaties? If not, does it follow an older version of the OECD or UN Model Convention? Could you describe the reasons?
- Do the bilateral tax treaty provisions deviate from the model which is generally followed? Could you briefly describe the differences? Is there a reason for those deviations? Are these deviations reflected in a reservation on these Articles?
- Are there any observations regarding the bilateral tax treaty provisions? Could you briefly describe them? Is there a reason for those observations? Do case law, administrative practices and/or scholarly opinions deviate from the interpretation of the provision proposed in the Commentaries in any other relevant respect which is not covered by any observations? Could you briefly describe these deviations?

IV.2 Please consider the differences between the Models

- The OECD Model provides for withholding tax rates for portfolio investments (15%) and direct investments (5%) as well as for interest (10%). If the withholding tax rates in bilateral tax treaties are not in line with the ones in the Models, para. 13 OECD Commentary on Art 10 or respectively para. 7 OECD Commentary Art 11 might be relevant. There it is clarified that the withholding tax rates of Art 10 and Art 11 are maximum rates and therefore the contracting States can agree (only) on lower tax rates. In case of Art 11 the withholding tax rate can be changed either for all kinds of interest or para. 7.11 OECD Commentary on Art 11 can be followed. The UN Model does not provide for withholding tax rates in this respect but there are explanatory notes in para. 8 et seq. UN Commentary on Art 10.

- The UN Model, contrary to the OECD Model, provides for a source State taxing right with respect to royalties. However, it does not provide for a withholding tax rate. Also, the UN Model differs from the OECD Model as it includes a special provision in Art 12 (5).
- The OECD and UN Models differ in respect of the threshold to differentiate between direct and portfolio investments in Art 10 OECD (25%) and UN (10%) Models.
- The OECD and UN Models provide for a definition of the term "royalties" in form of an exemplary list which might be enhanced or reduced in bilateral tax treaties.
- Art 13 (4) OECD Model only covers gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting state. Para. 28.5 OECD Commentary on Art 13 offers an alternative wording for Art 13 (4) OECD Model. Para. 28.6 et seq. OECD Commentary on Art 13 provides for some exceptions. In any case, the UN Model also include gains from the alienation of interests in other entities, such as partnerships or trusts, that do not issue shares, as long as the property of which consists directly or indirectly principally of immovable property situated in a Contracting State. Art 13 (4) UN Model applies regardless of whether the company is a resident of the Contracting state in which the immovable property is situated or a resident of another state. Para. 8 UN Commentary on Art 13 clarifies that such entities whose property consists directly or indirectly principally of immovable property used by them in their business activities are excluded from the scope of Art 13 (4) UN Model. However, this exclusion will not apply to an immovable property management company, partnership, trust or estate. According to para. 8 UN Commentary on Art 13 Contracting States may agree in bilateral negotiations on paragraph 4 also applying to gains from the alienation of other corporate interests or rights forming part of a substantial participation in a company.
- Art 13 (5) UN Model lays down a concessional tax rate on gains arising on alienation of shares, other than the shares referred to in paragraph 4, that is, not being shares of principally immovable property owning companies. The determination of what is a substantial participation was left to bilateral negotiations, in the course of which an agreed percentage can be determined. Para. 11 UN Commentary on Art. 13 clarifies that paragraph 5 is fully optional and left to bilateral negotiations.

IV.3 Other interesting issues

- Are there any bilateral tax treaties concluded by your country which contain a provision following para. 11 OECD Commentary on Art 10 or para. 14 UN Commentary on Art. 10 which says that if a partnership is treated as a body

corporate under the domestic laws applying to it, the two Contracting States may agree to modify sub-paragraph *a*) of paragraph 2 in a way to give the benefits of the reduced rate provided for parent companies also to such partnership? If yes, do the relevant bilateral tax treaties differ from the OECD or UN Model because partnerships are treated as a body corporate under *your* domestic tax law? If yes, is Art 10 of your bilateral tax treaties *always* amended following para 11 OECD Commentary on Art 10 or para. 14 UN Commentary Art 10? If not, what is the reason for that and how does your country deal with qualification conflicts in this respect?
- Art 12 (2) OECD Model was amended by deleting the words "or the use of, or the right to use, industrial, commercial or scientific equipment" in 1992. Has your country made a reservation on this point? If your country in general follows the OECD Model: Do tax treaties still include this wording? Could you describe the reasons?

V. Employment and Other Independent Activities

V.1 Questions

- Does your country follow, regarding the bilateral tax treaty provisions, the OECD or the UN Model Convention? If so, which one? Could you state the reasons for that option?
- Does your country always follow the latest version of the OECD or UN Model Convention when concluding or adapting bilateral tax treaties? If not, does it follow an older version of the OECD or UN Model Convention? Could you describe the reasons?
- Do the bilateral tax treaty provisions deviate from the model/version which is generally followed? Could you briefly describe the differences? Is there a reason for that deviation? Are these deviations reflected in a reservation on this Article?
- Are there any observations regarding the bilateral tax treaty provisions? Could you briefly describe them? Is there a reason for those observations? Do case law and/or administrative practices deviate from the interpretation of the provision proposed in the Commentaries in any other relevant respect which is not covered by any observations? Could you briefly describe these deviations?

V.2 Please consider the differences between the Models:

- Art. 18 UN Model provides for two alternatives (A and B) in relation to the taxation of pensions and other similar payments. Art. 18 (2) of alternative B

UN Model states that pensions and other similar remuneration may also be taxed in the source state if the payment is made by a resident of the source state or a permanent establishment situated therein.

- Art. 18 (2) UN Model (in both alternatives A and B) refers to pensions paid and other payments made under a public scheme which is part of the social security system of a Contracting State or a political subdivision or a local authority. The OECD Model does not include such a provision.
- Art. 21 (3) UN Model also provides for the possibility that other income is taxed in the source state instead of the residence state.
- Art. 21 (2) OECD /UN Model provides for an exception to Art. 21 (1) OECD/UN Model. In the UN Model reference is made to a fixed base besides the reference to the permanent establishment.

V.3 Other interesting issues

- How is the exception to the place of work principle in Art 15 (2) OECD/UN Model implemented in your bilateral tax treaties? Does the wording of Art 15 (2) follow the latest version of the OECD/UN Models? If not, why? Which version does it follow?
- Which reference period (calendar year/twelve-month period) is used in your country and why?
- Is there any case law/administrative practice/scholarly opinion in relation to this exception to the place of work principle and its implementation in your bilateral tax treaties?
- Is there any case law/administrative practice/scholarly opinion concerning the term “employer” as used in Art. 15 (2) OECD/UN Model?
- The commentary to the OECD Model provides for definition of the days of residence that are decisive for the application of the exception to the place of work principle (Art. 15 (2) OECD/UN Model). Besides, the commentary defines which days have to be taken into account and it also provides for a method of calculating the days of residence Does your country follow this definition/way of calculation? If not, why? Which definition/way of calculation is used in your country? Is there any case law/administrative practice/scholarly opinion in relation to this?
- Is there a provision in relation to frontier workers implemented in your bilateral tax treaties? Why/Why not? If yes, how are the taxing rights allocated in relation to frontier workers? Can you give examples? Is there any case law/administrative practice/scholarly opinion referring to provisions for frontier workers in your country?
- Does Art 18 in your bilateral tax treaties only cover pensions/other similar remuneration in consideration of past employment? If not, which remuneration is also covered by this article?

- What criteria are decisive in your country for allocating remuneration to Art 15 instead of Art 18 OECD/UN Models? Is there any case law/administrative practice/scholarly opinion in relation to this question?
- Which payments are covered by Art 20 according to your bilateral tax treaties? Are there any differences compared to the OECD/UN Models? If yes, why? Is there any case law/administrative practice/scholarly opinion in your country relating to this?

VI. METHODS TO AVOID DOUBLE TAXATION

VI.1 Questions

- Does your country follow, regarding the methods to avoid double taxation, the OECD and the UN Model Convention or do the bilateral tax treaty provisions deviate from the Models? If there are any differences, could you briefly describe them? Is there a reason for those deviations? Are they reflected in a reservation on the respective Article?
- Are there any observations regarding the bilateral tax treaty provisions? Could you briefly describe them? Is there a reason for those observations? Do case law and/or administrative practices deviate from the interpretation of the provision proposed in the Commentaries in any other relevant respect which is not covered by any observations? Could you briefly describe these deviations?

VI.2 Please consider the differences between the Models

- With respect to the methods to avoid double taxation, the OECD and the UN Model are nearly identical. Two minor differences concern the additional credit for source taxes levied in accordance with Art 12 under Art 23 A (2) of the UN Model and Art 23 (4) of the OECD Model, which has not been included in the UN Model.
- The Commentaries to the Models differ in some points. Generally, the UN Commentary has not adopted the changes of the OECD Commentary over the previous years. Furthermore, the UN Commentary on Art 23 refers to the interests of developing countries as well as suggests certain restrictions to the exemption method.

VI.3 Other interesting issues

- Which method to avoid double taxation does your country use in its tax treaties for which type of income? Please describe your country's policy. Is the policy based on reciprocity? Has the policy changed over time?
- Please describe the main characteristics of the methods to avoid double taxation used by your country. In which areas do the methods deviate from the methods as laid down in Art 23 of the OECD and UN Model?
- Does your country provide for special features regarding the method to avoid double taxation in its tax treaties, which deviate from the OECD and UN Models, such as an indirect credit for underlying taxes, participation exemptions or a credit for notional tax (tax sparing credit, matching credit)? If yes, please describe the policy. Has the policy changed over time?
- Are there aspects connected with the methods to avoid double taxation used by your country which are subject to activity provisos, subject-to-tax clauses, anti-abuse provisions or the like? If yes, please describe your country's policy. Has the policy changed over time?
- Does your country have domestic rules to implement Art 23? How do the treaty and the domestic rules interact? Do domestic rules comply with the treaty rules? Does your country also provide for unilateral measures to eliminate double taxation?

VII. NON-DISCRIMINATION

VII.1 Questions

- Does your country follow, regarding the bilateral tax treaty provisions, the OECD or the UN Model Convention?
- Does your country always follow the latest version of the OECD or UN Model Convention when concluding or adapting bilateral tax treaties? If not, does it follow an older version of the OECD or UN Model Convention? Could you describe the reasons?
- Do the bilateral tax treaty provisions deviate from the model/version which is generally followed? Could you briefly describe the differences? Is there a reason for that deviation? Are these deviations reflected in a reservation on this Article?

- Are there any observations regarding the bilateral tax treaty provisions? Could you briefly describe them? Is there a reason for those observations? Do case law, administrative practices and/or scholarly opinions deviate from the interpretation of the provision proposed in the Commentaries in any other relevant respect which is not covered by any observations? Could you briefly describe these deviations?

VII.2 Please consider the differences between the Models:

- Currently, Art. 24 of the OECD and the UN Model are identical in wording.
- The 1963 OECD Draft Model Convention did not contain the current paragraph 4 of the OECD Model.
- Until 1992 Art. 24 of the OECD Model had an additional paragraph (then par. 2) which included the definition of "national" which was then moved to Art. 3(1). Until 1992 Art. 24(1) did not contain the expression "in particular with respect to residence".
- The Commentary on Art. 24 of the OECD and the UN Models are largely the same except that the Commentary on the UN Model has not (yet) adopted the 2008 changes introduced in the OECD Commentary. In addition, the Commentary on Art. 24(4) and 24(5) of the UN Model includes some additional paragraphs that cannot be found in the OECD Commentary (see para. 6 and paras. 8-10 UN Commentary on Art. 24).

VII.3 Other interesting issues

NATIONALITY CLAUSE – ART. 24(1)

- Does Art. 24(1) of your country's tax treaties apply to both individuals and companies or is it limited to individuals?
- Do your country's tax treaties contain the expression "in particular with respect to residence"? If not does it make a difference in their interpretation? In particular, are the treaties which do not contain the expression interpreted to cover only overt nationality-based discrimination or also covert discrimination based on residence?

PERMANENT ESTABLISHMENT CLAUSE - ART. 24(3)

- Does your country apply a branch profit tax? If yes, are there specific provisions in your country's tax treaties preserving the application of the branch profit tax? Are these provisions under Art. 24 of your county's

treaties or elsewhere (eg. Art. 10)? If a tax treaty does not include a specific provision maintaining the right to levy the branch profit tax, is Art. 24(3) interpreted as preventing the application of such tax? The 2008 changes to the OECD Commentary make a distinction between regular "branch tax" and "branch level interest tax" with the consequence that only the former is contrary to Art. 24(3) [par. 60-61 OECD Commentary on Art. 24]. Is this reflected in the case law/administrative practice in your country?

- The OECD Commentary is not unequivocal on the issue whether or not domestic economic double taxation relieves must be extended to dividends received by permanent establishments of non-resident enterprises on the basis of Art. 24(3) – see paras. 48-54 OECD Commentary on Art. 24. How is the provision interpreted in your country in this respect?

- The OECD Commentary is also not clear on the point whether or not a credit for foreign tax paid on dividends, interest and royalties in a third State must be extended to permanent establishments of non-residents on the basis of Art. 24(3) - vg paras. 64-72 of the OECD Commentary on Art. 24.Does your country grant such a credit? (*i.e.* if your country is State PE where the permanent establishment of a resident of State R is situated, does it grant a credit to the permanent establishment for the tax levied by State S on income sourced there on the basis of Art. 24(3) of the State R – State PE treaty)? Does it matter whether the credit is provided for by the domestic tax law of your country or by the tax treaty concluded with State S? Does your country in the position of State PE also grant a tax sparing credit included in a tax treaty with a third State on the basis of Art. 24(3)?

- According to the 2008 changes to the OECD Commentary Art. 24(3) affects only the taxation of the permanent establishment's own activities, thus it does not extend to group taxation measures (*eg.* consolidation, transfer of losses or tax-free transfers of property between group members) - para. 41 of the OECD Commentary on Art. 24. Is this interpretation followed by your country's case law or administrative practice?

DEDUCTION CLAUSE - ART. 24(4)

- Does your country's tax treaties include this provision? If not or not all of the treaties, is it because they follow the 1963 Draft OECD Model? Or is it for another reason (eg. the UN Model Commentary mentions that this provision may not be acceptable for some developing countries in treaties concluded with developed countries)?

- According to the OECD Commentary Art. 24(4) does not prevent the application of domestic thin capitalization rules that are compatible with Art. 9 and 11 of the OECD Model - para. 74 of the OECD Commentary. Is this interpretation followed in your country's case law and/or administrative practice? Are domestic thin capitalization rules affected by paragraph 5 in the interpretation of the courts or administration?

FOREIGN OWNERSHIP CLAUSE - ART. 24(5)

- Does the wording of your country's tax treaties include an indication what should be the comparator in applying this provision, i.e. a resident company owned by a resident parent or a resident company owned by a third-country parent? For example, the UN Model Commentary mentions that some treaties require non-discriminatory treatment only in comparison with a third-country parented group. If there is not specific reference in the wording of the treaty on this point, which comparator is used in applying the provision?

- According to the 2008 changes to the OECD Commentary, this paragraph does not extend the benefits of group taxation measures to non-resident companies owning or controlling a resident company - para. 77 of the OECD Commentary. Is this interpretation followed by the courts and administration of your country?

VIII. MUTUAL AGREEMENT, EXCHANGE OF INFORMATION AND MUTUAL ASSISTANCE IN THE COLLECTION OF TAXES

VIII.1 Questions

- Does your country follow, regarding the aforementioned bilateral tax treaty provisions, the OECD or the UN Model Convention? If so, which one? Could you state the reasons for that option?
- Does your country always follow the latest version of the OECD or UN Model Convention when concluding or adapting bilateral tax treaties? If not, does it follow an older version of the OECD or UN Model Convention? Could you describe the reasons?
- Do the bilateral tax treaty provisions deviate from the model which is generally followed? Could you briefly describe the differences? Is there a reason for those deviations? Are these deviations reflected in a reservation on this Article?
- Are there any observations regarding the bilateral tax treaty provisions? Could you briefly describe them? Is there a reason for those observations? Does case law, administrative practices or scholarly opinions deviate from the interpretation of the provision proposed in the Commentaries in any

other relevant respect which is not covered by any observations? Could you briefly describe these deviations?

VIII.2 Please consider the differences between the Models:

- That the reference to the "joint commission" on art. 22(4) OECD Model was added in 1995. At same time, the existing reference to the "oral exchange of opinions" was deleted; That the UN Model does not include arbitration, as provided by art. 25 (5) OECD Model. Moreover (and in differently from the current OECD Model) proposes the development of methodologies to implement the mutual agreement procedure, in the last two sentences of art. 25(4) UN Model.
- That the 2005 Model changed art. 25 (1), modifying in the first sentence "necessary" for "foreseeably relevant" and by adding the expression "to the administration or enforcement" of the domestic tax laws;
- That the 2000 Model had already modified that provision - art. 25(1): i) eliminating the restriction to the domestic laws "of the Contracting States" and the restriction to the taxes "covered by the convention"; ii) adding that the information could regard taxes "of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities"; iii) specifying that the provision was also not limited by art. 2.; The separation and modifications on art. 25 (2) OECD MC; That the UN model still aggregates in para. (1): i) what is now separated in art. 26 (2) OECD Model (although not including the most recent changes); iii) including a mention to the development of adequate methodologies of exchange of information (last sentence of art. 25 (1) of the UN Model);
- That the 2005 OECD Model introduced art. 25 (4) and 25 (5) - which might not be present in most of the existing DTC's. Similar provisions do not exist in the UN Model.
- That the provision regarding the assistance on the collection of taxes was introduced in 2003 in the OECD Model; The UN Model is still absent on this topic.

VIII.3 Other interesting issues

MUTUAL AGREEMENT CLAUSE

- Are there any national law, policy or administrative considerations that may not allow or justify the solution of disputes as proposed by art. 25 (5) OECD Model (please take in consideration para. 65 OECD Commentary on

Art. 25)? Is it possible to define a trend regarding the cases where this provision is or not included?

- Could you verify ff, the second sentence of art. 25(5) is normally present. In case it is absent, is it due to the fact that your internal system allows authorities to deviate from a court decision in particular cases? (as stated in para. 74 of the OECD Commentary on Art. 25)?
- Is mutual agreement is accepted outside the substantive scope of the Convention? If arbitration is admitted: which model is followed? Is the binding effect accepted? Which "previous decisions" prevent the procedure? Which "certain essential guarantees" (as described in the commentary) are granted directly in the DTC's?

EXCHANGE OF INFORMATION CLAUSE

- What types of methods are normally incorporated in the DTC's (namely: i) automatic exchange of information, ii) spontaneous exchange of information; iii) joint tax examinations; iv) examinations in other contraction State.
- Are there exceptions other than those state in the models or if according with existing case law or doctrine? Is it usual to interpret the exceptions in a sense which is not in line with the commentaries?
- Does your country includes a mention to "tax avoidance" (as in the final sentence of art. 26(1) UN Model)? What relevance does it assume internally?
- Are there any recent agreements on exchange of information (following recent OECD and G-20 guidelines on "tax havens"?

ASSISTANCE ON THE COLLECTION OF TAXES CLAUSE

- Which conditions are normally required for the assistance to take place; Are conservancy measures are also included? If so, which measures?
- Are there any national law, policy or administrative considerations that may not allow the assistance proposed on the OECD Model or that may require that this type of assistance is restricted (namely to similar tax systems or similar taxes)?