

Proposed Written Comments on CRP11 Capital Gains on OITs

1. We thank the UN Secretariat for the note on capital gains on OITs. In general, we continue to have reservations about including any clause that provides for the taxation of gains from certain OITs, primarily because this could result in multiple taxation of the same gain by different source states and may create difficulties for the residence state in eliminating multiple taxation. In this regard, if the Committee comes to a decision to include the alternative position, we would prefer for the alternative provision to be included only in the Commentary to Article 13 of the UN Model, instead of inserting it in the UN Model itself. However, we note that some changes to the existing Commentary on Article 13 of the UN Model Tax Convention would be useful in clarifying a few issues. Our detailed comments on these areas are as follows:

Draft changes to paragraph 18 of the Commentary

2. We agree with the proposed changes set out in paragraph 9 of the Secretariat's note. These changes seek to clarify that the alternative provision would not override the other provisions in Article 13 and would also encourage contracting states to clarify what source rules would be used if the alternative provision is adopted.

Draft provision for the source taxation of gains from certain OITs

3. We note that the concern with multiple taxation was duly recognised in paragraph 22 of the proposed Commentary to the alternative provision being contemplated here. Paragraph 23 of the proposed Commentary to the alternative provision suggests resorting to the mutual agreement procedure ("MAP") under Article 25(3) of the UN Model to resolve the issue of unrelieved double taxation. However, there is uncertainty that double taxation would be eliminated if the B-C treaty did not have the provision akin to the alternative provision and if State B did not agree with the underlying rationale of the alternative provision. This also seems to suggest that there may be multiple MAPs just for one OIT, an outcome which would frustrate taxpayer's desire to obtain tax certainty and for disputes to be resolved efficiently.

Draft provision for the taxation of gains from the direct transfer of certain property

4. We agree not to include a provision that would allow the taxation of gains on the direct alienation of derivatives and securities issued by resident companies.
5. As regards a draft provision to allow the taxation of gains on the direct alienation of certain rights granted under the law of the other State, we agree that further work needs to be done, for example, clarifications on what the rights to be covered by this draft provision. We would also like to seek clarifications on what would constitute "naturally present" in the draft provision proposed under paragraph 17 of the Secretariat's note. While paragraph 18 covers some examples, the concept of a right being "inextricably linked" to a State would require further clarity.