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Item 3(i) of the provisional agenda
Taxation issues related to the digitalized and globalized economy

Co-Coordinators' Report

Summary

This paper addresses the three workstreams approved for consideration by the Subcommittee on Taxation Issues Related to the Digitalized and Globalized Economy, as follows:

- ***Workstream* A** – options for a more multilateralized form of implementing specific provisions of the UN Model Tax Convention;
- ***Workstream B*** – the function and relevance or otherwise of physical presence tests in the context of an increasingly digitalized and globalized economy; and
- ***Workstream C*** – cross-border taxation issues involving remote workers.

The Subcommittee ***seeks the Committee's comments and guidance on the issues raised in this note, including in the following Annexes****:*

a. **Annex A – Multilateralized Instrument (pp. 9-42):** The latest draft of a multilateralised instrument implementing specific provisions of the UN Model Tax Convention relevant to Workstream A, including schedules addressing particular provisions of the UN Model Tax Convention ***The Subcommittee submits the Annex A texts for a second consideration by the Committee at this Session, with a view to finalization as soon as possible; and***

b. **Annex B – Proposed Article xx on Services (pp. 43-63):** A new Article combining Articles 5(3)(b), 12A and 14 into a new provision (provisionally referred to as Article xx) with cross-border business services - relevant to Workstream B. The Subcommittee seeks (i) ***approval of the text of the proposed Article xx as provided at Annex B1 (pp. 43-44) at this Session (it was first considered at the Twenty-seventh Session) and (ii) a first consideration of the proposed Commentary text at Annex B2 (pp.45-63)***.

Because of its concentration on Workstreams A and B issues since the Twenty-seventh Session, ***no text is put forward for consideration at this Session on Workstream C (Remote workers).*** The Subcommittee proposes to revisit that Workstream at the Twenty-ninth Session.

Background and Subcommittee Mandate

1. At the Twenty-third Session of the Committee in October 2021, the secretariat provided a paper on taxation in a digitalized and globalized economy (E/C.18/2021/CRP.28). That paper provided an outline of the work of the previous Subcommittee on Tax Challenges Related to the Digitalization of the Economy, including with regard to Article 12B on automated digital services and its Commentary, which now form part of the 2021 United Nations Model Tax Convention.

2. As noted in the Report of the Twenty-third Session, the Committee established a Subcommittee on Taxation Issues Related to the Digitalized and Globalized Economy, with Mathew Gbonjubola and Liselott Kana as Co-Coordinators. The Subcommittee is mandated:

- To identify priority taxation issues related to the digitalized and globalized economy where the Committee may most usefully assist developing countries in differing situations, in particular;
- To initially report to the Committee on such issues no later than its Twenty-fourth Session, in 2022, with recommendations for consideration and a proposed general programme of work.

The Subcommittee may consult broadly, taking into account relevant work by other bodies.

Nineteen Committee Members are currently participating in the Subcommittee.

Subcommittee Workstreams

3. At the Twenty-sixth Session of the Committee, in March 2023, the workstreams undertaken by the Subcommittee were expressed as:

(a) Workstream A, which explores a more multilateralized implementation of specific Model Convention provisions, where States seek to implement them across a number of treaties;

(b) Workstream B, which addresses the function and relevance of physical presence tests; and

(c) Workstream C, approved at that Session, which addresses cross-border taxation issues involving remote workers.

4. At the Twenty-sixth and Twenty-seventh Sessions, the Committee decided that the Subcommittee would continue to consider the issues raised by all three workstreams. The discussion at the Committee's Twenty-seventh Session and the outcomes are as reflected in the report of that Session:

> 63. The Co-Coordinator of the Subcommittee on Taxation Issues related to the Digitalized and Globalized Economy, Liselott Kana, presented the Co-Coordinators' report outlining the Subcommittee's progress in fulfilling its mandate (E/C.18/2023/CRP.40). The Subcommittee was considering the following three workstreams:
>
> (a) Workstream A, on a more multilateralized implementation of specific United Nations Model Convention provisions;
>
> (b) Workstream B, on the function and relevance of physical presence tests;
>
> (c) Workstream C, on cross-border taxation issues involving remote workers.
>
> 64. She noted that the Subcommittee had worked very closely with Philip Baker and Brian Arnold, who had produced the papers submitted for the present session as part of a productive dialogue with the Subcommittee – which was formally putting those papers forward for consideration as part of its report – and she thanked them for a job well done. The Subcommittee was now submitting the papers for first consideration by the Committee. She noted that, although the paper had provided a projected timetable for finalizing that and other texts at the twenty-eighth session, whether that was feasible would become clearer in the further work to be performed before that session, including the Subcommittee meetings. In essence, decisions on whether final approval should be sought at the next session were not being sought or assumed at the present session.

65. Ms. Kana highlighted that workstream A entailed the development of a multilateral instrument for the implementation of specific Model Convention provisions. The proposed provisions included those dealing with pension funds, offshore indirect capital gains, fees for technical services, automated digital services, arbitration, the subject-to-tax rule, capital gains from the value of immovable property and services permanent establishments.

66. Furthermore, the fast-track instrument developed for consideration was a draft that would need to go through an intergovernmental process once the Committee had finalized its proposed text. The Secretariat would consult with the Office of Legal Affairs to address the legal issues surrounding the form of such an instrument.

67. Mr. Baker presented a brief overview of the structure of the fast-track instrument, which comprised (a) the instrument itself, (b) protocols containing individual amendments and alternative wording and (c) amending agreements between States containing the basic information needed to give effect to the changes outlined in the specified protocol. A timeline for implementation by each State was also presented, outlining the steps that States would need to take to implement the instrument.

68. Several members congratulated the Subcommittee on the work done and thanked Mr. Baker for his work. They expressed support for the work and noted that the resulting document appeared to achieve the objective set out and was flexible enough to accommodate various positions. Members were informed that there would be a draft explanatory statement on the fast-track instrument.

69. Some members questioned the practicality of the fast-track instrument. They noted that the process and the legal structure were complicated, that having a separate agreement for each amendment exacerbated the complexity and that it was important to simplify the process. One member stressed that, for a significant number of Member States, it was not possible under their constitutional and legal systems to modify their treaty network by means of protocols and amending agreements that did not require ratification. Another member suggested that developing model protocols for bilateral treaties would significantly simplify the process and supported that approach as a stand-alone option instead of including a provision in the fast-track instrument. On the issues highlighted in annex 1 to the Co-Coordinators' report, it was suggested that the corresponding procedure in article 5 of the Model Convention should be mandatory for those participating in the process. It was also noted that there was a need to consider the possible constitutional and legal constraints for Member States in following the proposed process. One member questioned the reason for provisions in the fast-track instrument that set out a role for the Committee in reviewing future protocols and that provided that the instrument could be amended by a simple majority of the parties.

70. Some observers noted that the work of the Subcommittee was very timely and useful, in particular because a major part of the Committee's work involved making proposals that were treaty-based: a process that led to the incorporation of those proposals into bilateral treaties, without the onerous process of separate bilateral negotiations, would likely increase the uptake of the Committee's recommendations and outcomes. The Subcommittee would consider the comments received and would present a version of the instrument at the twenty-eighth session, with a view to final approval at that session, if possible.

71. On workstream B, Ms. Kana indicated that, after discussing the relevance of the physical presence test in various Subcommittee meetings, the majority of the members of the Subcommittee were proposing that articles dealing with services be combined into a single article. The specific articles to be considered were articles 5 (3) (b), 12A and 14. Members expressed their support and appreciation

for the work done, noting that that provision streamlined the services provisions and was important in ensuring the fairer allocation of taxing rights between residence and source States. Some argued that the physical presence proxy for establishing taxable nexus might have been relevant when international trade consisted primarily of goods. However, that proxy was no longer relevant for trade in services. The elimination of time thresholds was said to be appropriate, since the current time thresholds were easy to manipulate, in particular where technology was involved. One member noted that a withholding tax was preferable at the present time.

72. Some members noted that more discussion was needed to better analyse the types of services that were not covered by current provisions and the impact of their inclusion in the proposed provision. It was also noted that the commentary to article 12A cited the fact that developing countries were disproportionately importers of technical services as one of the justifications for article 12A. It was suggested that a similar analysis should be undertaken for all services to determine the impact on developing countries of such an expanded provision. Some members also observed that there was still a place for physical presence and that it should play an important role in the allocation of taxing rights. Concerns were also raised about the gross basis of taxation, as that might lead to overtaxation (in particular because the costs related to different services might vary widely), and it was proposed that a net basis be considered, as is included in article 12B. Some considered that article 12B should also be incorporated into any new article. Some members stressed that over- or undertaxation depended not on the gross or net basis but on the tax rate. For example, a 3 per cent gross tax on revenue would yield less tax than a 40 per cent tax on a net profit of 8 per cent. Furthermore, with regard to services, it would be difficult to apportion costs incurred in other jurisdictions and challenging to tax the administration of the source State to verify the correctness of those claims. The only feasible way in which net profit could be considered was through a formulary apportionment that required agreement on factors and ratios.

73. It was suggested that insurance services should be omitted from that provision, as there were already efforts in the Subcommittee on Updating the Model Convention towards creating a new provision specifically addressing insurance. Members also noted that there was a need for coordination with the Subcommittee, which was addressing some aspects of services, in order to ensure consistency.

74. With regard to workstream C, some members considered that there was a need for further consideration of the matter. It was suggested that the provision was quite broad and that it would add considerable complexity to deal with relief from double taxation in particular. It was also suggested that it might be worthwhile to restrict it to untaxed income. The question was raised as to whether the issue was a major challenge for developing countries and whether more scoping would be useful to identify the magnitude of the problem (and whether it would even be beneficial to developing countries). It was observed that the proposal to engage more with States as outlined in annex 4 of the Co-Coordinators' report was a useful way to proceed.

75. It was concluded that the Subcommittee would continue to consider those issues and report back to the Committee at the twenty-eighth session. The Subcommittee invited technical input on the papers presented, undertaking to take all comments into consideration.

5. Following the Twenty-seventh Session, the Subcommittee met virtually on 20 November and 27 December 2023 as well as 12 January and 15 February 2024, to further develop the Subcommittee's proposals on the various workstreams, and to discuss with the consultants the further development of the texts annexed to this report.

6 This paper reflects the outcomes of, and direction taken, in the Subcommittee meetings. It should not necessarily be taken as reflecting unanimous views. The Annexes are intended to assist Committee discussion on the various workstreams and seek to incorporate comments by Subcommittee participants; they should not be taken as necessarily representing concluded views of all Subcommittee participants.

Workstream A (Fast-track Instrument – "FTI")

7. The initial **Workstream A** focus of the Subcommittee has been largely on the substantive requirements for any proposed instrument. The Subcommittee has remained focused on suggesting an approach and text for any proposed instrument. **Annex A is the latest draft FTI text – including potential schedules** The assistance of Philip Baker (as a UNDESA consultant) in preparing this draft text is noted.

8. Once the Committee concluded its work as an expert, but not intergovernmental, body and transmitted a text to ECOSOC for consideration, it would then depend on UN Member States as to whether, and in what form, such approach was taken forward, such as through an *ad hoc* working group set up to finalize the text of any instrument. It will need to be picked up by supporting countries in an intergovernmental process (whether through ECOSOC or otherwise) before it becomes a treaty, but the aim is to have a draft from the Committee that is as "treaty-ready" as possible to facilitate that second, intergovernmental, stage.

9. An important consequence of this is that is not necessary (or a productive use of Committee time) for the Committee as an expert group to seek to foresee, or to reach a conclusion, on the many treaty procedural and public international law issues that may arise in any intergovernmental setting that would be needed to transform the proposed text into a treaty-level agreement. While an attempt has been made to address likely issues, especially more systemic ones, drawing upon the expertise of Committee Members and other experts, it is important to note that the treaty negotiation phase would only come at a later stage, at the instance of Member States, and cannot be pre-empted by a non-governmental body.

10. It is not contemplated by the Subcommittee as a whole that anything approaching universal participation would be needed for the Instrument to be successful, assisting a number of developing countries to update their treaty networks, even with other developing countries, could be a significant contribution.

11. **Annex A to this paper gives a draft of an FTI and some examples of how some of these topics might be addressed in specific schedules to such an instrument**. Whatever schedules are attached to the Instrument initially, it is presumed that new schedules will be added over time, by the agreement of participating states, to update the Instrument in response to what are seen as important new provisions of the UN Model.

12. The main changes since the version presented at the Twenty-seventh Session are:

- The "output" from the process is in the form of Amending Protocols (the terms of which are contained in Schedules to the FTI) as opposed to the previous "output" which consisted of the wording of each Protocol supplemented by an Amending Agreement concluded by the Parties to a DTC. This simplifies the process in that there is now a single document, as opposed to two documents (that had to be read together) to see the changes being made. This also means that the "output" is much closer to the traditional output from negotiations to amend a DTC by concluding an amending protocol. This should in principle help those countries that can only amend their existing treaties by amending protocols. It should also mean that existing domestic implementation procedures and rules that apply to amending protocols can apply to this new form of output from the FTI. The change in output is more in the form than in the substance. In effect, the choices to be made by States have been moved into the Amending Protocols rather than being in the Amending Agreements. The same choices have to be made, but are included in a different document;

- There has been a change of usage in the draft to avoid confusion – the text of the amendments

to the UN Model that are covered by the FTI are contained in what-are-now-called Schedules to the FTI (previously these were called "protocols") and the actual agreements reached between two or more countries to implement the amendments to their bilateral tax treaties are given the more usual titles of "Amending Protocols";

- The provision for an intergovernmental setting to discuss the conclusion of amending protocols in the form of the Conference of the Patries to meet at least once a year;
- A secretariat to assist the process (and the tasks of the Secretariat are now spelt out more clearly in this draft);
- An enhanced procedure for those States that wish to have an automatic process for updating their treaties;
- A structure that is flexible and is designed to automatically take on board at an intergovernmental level all future changes to the UN Model and to speed up implementation of those changes;
- Pre-drafted amending protocols which ensure that a) there is uniformity of language employed in tax treaties; and b) negotiations to amend existing DTCs are restricted to the terms of the Schedules and to the options offered and do not spread out to embrace wider re-negotiations of treaties;
- Clarification in the draft that only the Committee of Experts can amend the UN Model and that the Conference of Parties cannot reopen the discussion of the Committee or amend what the Committee has agreed;
- Maintenance of the various options that are contained in the Commentary to the UN Model. In most cases this is reflected in optional alternative wording to the Amending Protocol so that Parties can select if they wish to adopt the alternative formulations; and
- A point raised for discussion in footnote 3 concerning the adoption of Additional Schedules and whether it requires a majority of Parties. Given that no Schedules are binding of themselves, one option for adopting a new Additional Schedule is that a number of Parties (Mr. Baker has suggested 5) supports that inclusion.

13. ***Views from Committee Members are sought on this Annex, with a view to final approval as soon as possible].***

Workstream B (Options relating to the function and relevance of physical presence tests)

14. In relation to **Workstream B**, the Subcommittee has previously identified a lack of consistency of physical presence tests in the UN Model and noted some possible options for change in the short term and the longer term while prioritizing each option. **Annex B provides a draft of Article and Commentary text for a new article combining Articles 5(3)(b), 12A and 14 into a new provision** dealing with cross-border business services. **(provisionally referred to as Article xx).** The reason for this would be simplification and increased coherence. The assistance of Brian Arnold (as a UNDESA consultant) in preparing these texts is noted.

15. The draft version of the Commentary on Article xx at Annex B2 is based on the draft version of Article xx set out in Annex B1. This version of the Commentary assumes, as a working hypothesis, that Article 5(3)(b), Article 12A and Article 14 will be removed from the UN Model but that Article 5(3)(a) will be retained (although Article xx may be numbered as Article 12A). The following aspects of draft Article xx and the Commentary have not yet been resolved by the Subcommittee:

- The relationship between Article 8 and Article xx. The alternatives are:
    i. Article xx could be "subject to" Article 8, in which case Article 8 would take precedence over Article xx in any situation where both Article 8 and Article xx apply to the same item of income; however, Article xx could apply to any fees for international shipping and air transport services not covered by Article 8; or

ii. fees for international shipping and air transport services could be expressly excluded from definition of fees for services in paragraph 3 of Article xx in which case such fees would be taxable exclusively in accordance with Article 8.

- The treatment of fees for insurance services. Under the current draft of Article xx fees for insurance services are expressly excluded from Article xx by paragraph 3(d). However, in the interests of certainty, this exclusion should include a reference to the definition of such services in Article 5(6) or a new article dealing with such services.

16. The draft version of the Commentary at Annex B2 refers in several places to other provisions of the Commentary and where those provisions include references to the OECD Model Tax Convention Commentary, this draft refers to those provisions for the convenience of readers of this draft, without suggesting a final view of the appropriateness or otherwise of such references in particular cases.

17. Finally, in several places the draft Commentary describes alternative provisions that some countries may prefer to include in their treaties. The Subcommittee has not taken a final view on the appropriateness or otherwise of these alternative provisions.

18. Work in this area will continue to involve consultation with the Subcommittee on the Update of the United Nations Model Tax Convention.

19. The Subcommittee seeks ***approval of the text of the proposed Article xx as provided at Annex B1 and (ii) a first consideration of the proposed Commentary text in the same Annex***.

Workstream C (Remote Workers)

20. Because of its concentration on Workstreams A and B since the Twenty-seventh Session, no text is put forward for consideration at this Session on Workstream C (Remote workers). The Subcommittee proposes to revisit that Workstream in its report to the Twenty-ninth Session.

Relationship to the Sustainable Development Goals

21. As noted in the Report of the Committee's Twenty-third Session, held in October 2021, the Committee agreed:

(a) To continue to discuss taxation and the Sustainable Development Goals regularly during sessions, as a permanent agenda item;

(b) To request the secretariat to provide regular updates on taxation and the Sustainable Development Goals, at each session:

(i) To preserve the focus of the Committee's work in the area;

(ii) To identify any gaps in guidance;

(iii) To establish priorities for technical work to be carried out by the secretariat; and

(c) To have subcommittees reflect on the link between their work and the Goals.

22. In addressing paragraph (c) of that conclusion, the Subcommittee recognizes that, by promoting fair and effective tax systems, which support both revenue and trade and investment for development, through guidance products and through advising UN DESA on capacity building activities, the Committee's work contributes to achieving the interlinked SDGs as a totality. More specifically, in relation to the work of the Subcommittee, an effective guidance effort in this area will promote the balance of revenue needs and the development-focused investment climate which many countries seek, by promoting whole-of-government, informed and practical real-world approaches to the issues involved. This builds greater certainty for all stakeholders in tax systems.

23. While contributing to achieving all the interlinked SDGs, this work will particularly contribute to SDG 16 (Peace, Justice and Strong Institutions) in terms of helping develop effective, accountable

and transparent institutions at all levels and SDG 17 (Global Partnerships for the Goals), in terms of strengthening domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection.

Proposed Next Steps

24. The Subcommittee intends to continue to work on Workstreams A, B and C after this Twenty-eighth Session of the Committee, drawing upon the guidance of the Committee on general approaches and specific comments on the issues raised in this paper and its Annexes.

25. In particular, the Subcommittee proposes the following, subject to Committee guidance:

- In relation to **Workstream A** – consideration and decision with a view to finalizing the work on this workstream as soon as possible.
- In relation to **Workstream B** – consideration of the proposed draft article combining Articles 5(3)(b), 12A and 14 into a new provision dealing with cross-border business services and the current draft Commentary. Final approval of the text of the Article is sought at this Session and the Subcommittee will update the draft commentary taking into account the decision by the Committee, with a view to second and final presentation of the draft commentary at the Twenty-ninth Session.
- In relation to **Workstream C**, the Subcommittee will continue its consideration, taking into account inputs received, and will report back on these issues at the Twenty-ninth Session.

26. Work in areas involving possible updates to the UN Model will include consultation with the Subcommittee on the Update of the United Nations Model Tax Convention.

ANNEX A

DRAFT INSTRUMENT AND SCHEDULES

(REVISED DRAFT OF 22 FEBRUARY 2024)

Title of instrument: Fast Track Instrument to Provide for the Streamlined Amendment of Bilateral Double Taxation Treaties

Preamble

The Parties to this Fast-Track Instrument

Desiring to establish a procedure for facilitating the amendment of existing bilateral double taxation treaties by Parties wishing to make such amendments in a fast and effective manner.

Intending that this procedure will be established to give effect to the provisions of the UN Model Double Taxation Convention between Developed and Developing Countries, including amendments made to the UN Model after the date that this Instrument is opened for signature, in double taxation treaties concluded between the Parties to this Instrument.

Seeking to achieve a greater degree of standardisation and uniformity in the double taxation treaties concluded between Parties to this Instrument in respect of both the wording and the contents of those treaties.

Have agreed as follows:

Part I: Definitions and Purpose

Article 1: Definitions

[[This Article will contain a number of definitions, including the following]]

For the purposes of this Instrument, the Schedules, and any Amending Protocol concluded pursuant to it, the following definitions apply:

a) the term "Amending Protocol" means an agreement concluded by two or more Parties to this Instrument in accordance with the terms of a Schedule to this Instrument [and includes an Amending Protocol concluded under the enhanced procedure in Article [6]];

b) the term "Committee of Experts" means the United Nations Committee of Experts on International Cooperation in Tax Matters and any successor body tasked by the United Nations with updating the UN Model;

c) the term "Covered Tax Treaties" means the Double Taxation Treaties contained in the lists prepared in accordance with Article [4] (Standard Procedure for Matching Parties);

d) the term "Depository" means the Secretary-General of the United Nations;

e) the term "Double Taxation Treaty" means a bilateral treaty for the elimination of double taxation whether concluded before the date of entry into force of this Instrument or on or after that date;

f) the term "Party" means:

(i) Any State for which this Instrument is in force pursuant to Article [14] (Entry into Force); or

(ii) Any jurisdiction in respect of which a declaration has been made in accordance with Article [8] (Territorial Application);[1]

g) the term "Secretariat" means the Secretariat established for the implementation of this Instrument in accordance with Article [12] (Conference of the Parties and Secretariat);

h) the term "Schedule" means a Schedule to this Instrument, and includes a Schedule added after the entry into force of this Instrument in accordance with Article [13] (Additional Schedules to this Instrument);

i) the term "Signatory" means a State or jurisdiction which has signed this Instrument but for which the Instrument is not yet in force;

j) the term "UN Model" means the United Nations Model Double Taxation Convention between Developed and Developing Countries as amended from time to time.

Article 2 : Purpose

(1) The purpose of this Instrument is to facilitate the amendment of bilateral Double Taxation Treaties (whether concluded before the date of entry into force of this Instrument or on or after that date) in force between Parties to this Instrument.

(2) The amendments to be facilitated by this Instrument reflect amendments to the UN Model that are made from time to time by the Committee of Experts.

Part II: The Procedure and its Operation

Article 3: The Procedure established by this Instrument

(i) The procedure established by this Instrument for the amendment of Double Taxation Treaties consists of the following elements:

a) The framework for the facilitation of amendments to Double Taxation Treaties, as provided for in this Instrument;

b) The specific amendments provided for in each of the Schedules; and

c) The Amending Protocols concluded between two or more Parties in the form prescribed by any such Schedule.

(ii) For the purposes of the procedure established by this Instrument:

a) Participation (whether by signature, ratification or in any other way) as a Signatory or Party to this Instrument indicates the willingness of that Signatory Party to participate in the

[1] This definition of "Parties" follows the approach taken in the Multilateral Instrument to implement the BEPS changes. The issue of Parties to the Instrument that are not independent states will need further discussion in light of any established UN approach to the participation in international agreements of taxing jurisdictions that are not independent states in international law. The current text is a "place-holder" pending advice on this issue.

procedure set out in this Instrument but does not impose on that Signatory or Party any binding obligation to make any of the amendments provided for in any of the Schedules in respect of any of that Party's Double Taxation Treaties. Signature, ratification, [acceptance or approval] of this Instrument pursuant to Article [7] does not in any way restrict a Signatory or Party from amending any Double Taxation Treaty to which it is a party through other means or procedures agreed between the parties to that Treaty.

b) The amendment of a Double Taxation Treaty provided for in a Schedule shall only take effect after an Amending Protocol has entered into force between the parties to that Double Taxation Treaty.

Article 4: Standard Procedure for Matching Parties

(i) A Party shall as soon as possible (and in any event within two years) after signing this Instrument deposit with the Depository a list of its existing Double Taxation Treaties in respect of which it is willing to consider applying the provisions of one or more Schedules (referred to as its list of "Covered Tax Treaties"). This list shall, for each listed Double Taxation Treaty, identify the Schedules that Party is willing to consider applying to that Treaty. A Party may at any time amend its list of Covered Tax Treaties and shall within six months after the addition of any additional Schedule amend its list (or confirm to the Secretariat that it does not intend to amend its list). The Secretariat may if requested to do so by a Party assist that Party in the preparation of its list of Covered Tax Treaties. Where a Party fails to provide a list of Covered Tax Treaties in accordance with this paragraph, the Secretariat may assist by preparing a draft list which it may propose to that Party for amendment, acceptance or rejection as that Party's list of Covered Tax Treaties.

(ii) Where a Schedule contains an amendment that requires any terms or rates of tax to be agreed in the Amending Protocol, the list of Covered Tax Treaties shall also indicate the terms or rates of taxes on the basis of which that Party would be willing to conclude an Amending Protocol with the other party to its Double Taxation Treaties. The terms or rate of tax may include alternative terms or a range of rates of tax within which that Party may be willing to conclude an Amending Protocol.

(iii) A Party may if it so wishes, but shall not be required to, include in its list of Covered Tax Treaties any additional conditions that it would require to be satisfied before it would agree to apply the provisions of a particular Schedule to any one or more of its Covered Tax Treaties. These additional conditions may include, for example, a requirement that the other party to that Double Taxation Treaty agrees to also apply the provisions of another Schedule to that Double Taxation Treaty.

(iv) Within three months of a Party depositing a list of its Covered Tax Treaties (or amending such a list), the Secretariat shall compare that list with the lists of Covered Tax Treaties deposited by other Parties. Where the lists of two Parties match as respects identified Schedules in respect of a Double Taxation Treaty, the Secretariat shall inform those Parties and shall provide all assistance to those Parties to conclude an Amending Protocol between them. In particular, the Secretariat may, or where requested by one or both Parties, shall, prepare a draft Amending Protocol and submit it to the two Parties with a view to assisting agreement between them. In matching the lists of Covered Tax Treaties the Secretariat shall take account of any additional conditions specified by a Party in accordance with paragraph (iii) above.

Article 5: Multiple Amendments in an Amending Protocol

(i) Where two Parties agree that the amendments made by two or more Schedules shall apply to the Double Taxation Treaty between those Parties, they may conclude a single Amending Protocol giving effect to the amendments made by all those Schedules. The Secretariat may, or where

requested by one or both Parties, shall, assist in preparing a single Amending Protocol in accordance with this paragraph.

(ii) Where more than two Parties agree that the same amendment or amendments contained in one or more Schedules shall apply to all the Double Taxation Treaties between all those Parties, they may conclude a multilateral Amending Protocol giving effect to that amendment or those amendments. The Secretariat may, or where requested by one or more Parties, shall, assist in preparing a multilateral Amending Protocol in accordance with this paragraph.

Article 6: Enhanced Procedure for Automatic Matching and Conclusion of an Amending Protocol

(i) When a Party deposits a list of Covered Tax Treaties in accordance with Article [4] (Standard Procedure for Matching Parties) above, that Party may indicate on the list that it is willing for the enhanced procedure in this Article to apply to one or more of its Double Taxation Treaties on that list. That Party shall, in addition to identifying the Double Taxation Treaty, also include in the list all the information that would be required from that Party to complete an Amending Protocol giving effect to that Schedule in respect of that Double Taxation Treaty.

(ii) When the Secretariat carries out the comparison process in Article [4] (Standard Procedure for Matching Parties) above, and identifies that two Parties have both indicated that they are willing to apply the enhanced procedure in this Article, the Secretariat shall also compare the information specified by each Party in respect of that Schedule. If the information supplied by both Parties matches (as defined in paragraph (iii) below), then the Secretariat shall within one month from completion of the comparison by the Secretariat notify the two Parties of that matching and at the same time shall provide the Parties with a draft Amending Protocol completed in accordance with the information supplied by the Parties.

(iii) For the purposes of this Article information "matches" if both Parties have supplied such information that would allow the completion of a binding Amending Protocol between those Parties. Where one or both Parties has indicated a range of rates or percentages at which they would be willing to agree an Amending Protocol, the rate or percentage shall be regarded as matched at the highest common level acceptable to both Parties.[2]

(iv) Where the Secretariat has notified both Parties that the information they have supplied in their list of Covered Tax Agreements has been matched in accordance with the procedure in this Article, then, subject to paragraph (v) below, the Parties shall be regarded as having concluded an Amending Protocol in the terms of the draft provided by the Secretariat which shall have binding effect two months from the date on which the Secretariat notifies the Parties in accordance with paragraph (ii) above.

(v) Where the Secretariat has notified two Parties that the information they have supplied has been matched in accordance with this Article, then either Party may, within one month of being so notified, serve notice on the Secretariat and the other Party that it has decided not to conclude an Amending Protocol on those terms with the other Party.

(vi) Where the Secretariat has notified two Parties that the information they have supplied has been matched, and neither party has served a notice in accordance with paragraph (v), then the Secretariat shall inform the Depository that an Amending Protocol has been concluded between the Parties.

[2] For example, if State A has indicated it would agree to include Article 12A of the Model at a rate in the range 3%-5%, and State B has indicated a range of 4%-7%, the information would be matched at 5%, being the highest common percentage acceptable to both States.

The Depository shall then issue a public notice containing the Amending Protocol concluded between the Parties.

(vii) Where the Secretariat carries out the comparison process in accordance with this Article, and the information provided by the two Parties does not match or some information is missing, the Secretariat shall notify both Parties and shall then use its best endeavours to assist the Parties to amend the information they have supplied or to provide the missing information with a view to concluding an Amending Protocol.

Part III: Final provisions

Article 7: Signature and Ratification, Acceptance or Approval

(i) As of the [ ] day of [ ], this Instrument shall be open for signature [at the Offices of the United Nations in Geneva] by all States.

(ii) This Instrument is subject to ratification, [acceptance or approval].

Article 8: Territorial application of this Instrument

Any State may, at the time of signature, when depositing its instrument of ratification, [acceptance, or approval], or at any later date, deposit a declaration specifying a jurisdiction for whose international relations it is responsible and to which this Instrument shall apply. This Instrument shall enter into force in respect of such a jurisdiction on the later of the date of entry into force of this Instrument for the State and the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit of the declaration.

Article 9: Reservations

Reservations to this Instrument are not permitted.

Article 10: Notifications

(i) Instruments of ratification, [acceptance or approval] shall be deposited with the Depository.

(ii) Except where the enhanced procedure in Article [6] applies, two or more Parties concluding an Amending Protocol shall each promptly deposit a signed copy of the Amending Protocol with the Depository.

Article 11: Domestic procedure to give effect to this Instrument and Amending Protocols

Each Signatory or Party to this Instrument shall undertake such procedure (if any) under its domestic or constitutional law as is required to give effect to this Instrument and to any Amending Protocol concluded by that Party (including any Amending Protocol concluded under the enhanced procedure in Article [6]).

Article 12: Conference of the Parties and Secretariat

(i) The Parties shall convene a Conference of the Parties for the purpose of taking any decisions or exercising any functions as may be required or appropriate under the provisions of this Instrument.

(ii) The Conference of the Parties shall within six months of the entry into force of this Instrument establish a Secretariat to administer this Instrument. The Secretariat shall consist of such number of Parties (being not less than five Parties) and such members of staff of the United Nations as the Conference of Parties shall from time to time specify.

(iii) A meeting of the Conference of the Parties shall be convened at least once a year at such time and place as is notified to the Parties by the Secretariat. At each meeting of the Conference of the Parties the Secretariat shall ensure that the agenda includes adequate time for Parties to discuss and complete the terms of Amending Protocols, in particular where the possibility of such an Amending Protocol has been identified by the matching procedure in Article [4].

(iv) The Conference of the Parties shall be served by the Depository.

(v) Any Party may request a meeting of the Conference of the Parties by communicating a request to the Depository. The Depository shall inform all Parties of any such request. Thereafter, the Secretariat shall convene a meeting of the Conference of the Parties, provided that the request is supported by one third of the Parties within six calendar months of the communication by the Depository of the request.

Article 13: Additional Schedules to this Instrument

(i) If the Committee of Experts adopts a substantive amendment to the UN Model after the date that this Instrument is opened for signature, the Secretariat shall prepare a draft additional schedule to this Instrument accurately reflecting that amendment and shall submit such draft additional schedule to a meeting of the Conference of Parties within one year of the adoption of the amendment by the Committee of Experts. The period of time shall commence from the date when the report of the Committee of Experts containing that amendment is adopted (and not only from the publication of a revised edition of the UN Model).

(ii) If a majority of Parties[3] present at a meeting of the Conference of Parties approve the draft additional schedule, then that draft additional schedule shall immediately become a Schedule to this Instrument.

(iv) Subject to Article [11] and the requirements of the domestic or constitutional law of a Signatory or Party to this Instrument, the adoption of an additional Schedule shall not require ratification.

Article 14: Amendment

(i) Any Party may propose an amendment to this Instrument (including an amendment to this Article 14 other than paragraph (ii)), or (subject to paragraph (ii)) to a Schedule by submitting the proposed amendment to the Depository.

(ii) A substantive amendment to a Schedule as respects a provision of the UN Model contained therein may not be made unless the Committee of Experts has previously made an amendment to that provision, and the amendment to the Schedule shall accurately reflect the amendment made by the Committee of Experts.

(iii) A meeting of the Conference of the Parties shall be convened to consider the proposed amendment in accordance with Article [12] (Conference of the Parties and Secretariat).

(iv) An amendment to this Instrument shall be adopted by a vote of two thirds of the Parties present and voting at the meeting convened for the purpose of considering that amendment.

(v) An amendment shall enter into force for those Parties that have ratified it ninety days after a majority of Parties have deposited instruments of ratification of the amendment, and , if later, for any Party ninety days after that Party has deposited its instrument of ratification of the amendment

[3] It is open for discussion whether this should be decided by a majority or whether it should be sufficient if, say, five or more Parties agree to the additional schedule. As the addition of a schedule has, as such, no binding effect, the support of five or more Parties may be sufficient to add a schedule following an amendment by the Committee of Experts.

(but shall not enter into force for any Party to the original Instrument that has not ratified the amendment).

(vi) Any Party that ratifies the Instrument after an amendment has been adopted in accordance with paragraph (iv) above shall, failing an expression of a different intention by that State, (a) be considered as a party to the Instrument as amended, and (b) be considered as a party to the unamended Instrument in relation to any Party to the Instrument not bound by the amendment.

Article 15: Entry into force

(i) This Instrument shall enter into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of deposit of the [fifth] instrument of ratification, [acceptance or approval].

(ii) For each Signatory ratifying, [accepting or approving] this Instrument after the deposit of the fifth instrument of ratification, acceptance or approval, the Instrument shall enter into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by such Signatory of its instrument of ratification, [acceptance or approval].

Article 16: Entry into effect of an Amending Protocol

An amendment to a Double Taxation Treaty which is made by an Amending Protocol [(including any Amending Protocol concluded under the enhanced procedure in Article [5])] shall have effect in each Party that has concluded that Amending Protocol on the dates specified therein.

Article 17: Withdrawal and Termination

(i) Any Party may, at any time, withdraw from this Instrument by means of a notification addressed to the Depository.

(ii) Withdrawal pursuant to paragraph (i) shall become effective on the date of the receipt of the notification by the Depository.

(iii) Where this Instrument has entered into force with respect to all parties to a Double Taxation Treaty and an Amending Protocol has been concluded between those Parties before the date on which a Party's withdrawal becomes effective, that Double Taxation Treaty shall remain as amended by that Amending Protocol notwithstanding the withdrawal of that Party.

(iv) Where this Instrument has entered into force but as a result of the withdrawal of Parties pursuant to this Article there are five or fewer Parties, this Instrument shall cease to have effect and terminate from the first day of the calendar year immediately following the withdrawal of the Party that results in the number of remaining Parties being five or fewer. Where this Instrument has entered into force with respect to all parties to a Double Taxation Treaty and an Amending Protocol has been concluded between those Parties before the date on which this Instrument terminates, that Double Taxation Treaty shall remain as amended by that Amending Protocol notwithstanding the termination of this Instrument.

Article 18: Depository

(i) The Depository shall be the depository of this Instrument and any amendments thereto.

(ii) The Depository shall notify the Parties and Signatories within one calendar month of:

a) Any signature pursuant to Article [7] (Signature and Ratification, [Acceptance or Approval]);

b) The deposit of any instrument of ratification, [acceptance or approval] pursuant to Article [7] (Signature and Ratification, [Acceptance or Approval]);

c) Any notification pursuant to Article [10] (Notifications);

d) Any proposed amendment to this Instrument or its Schedules pursuant to Article [14] (Amendment) and the adoption of any such amendment;

e) Any withdrawal from this Instrument pursuant to Article [17] (Withdrawal); and

f) Any other communication related to this Instrument.

(iii) The Depository shall maintain publicly available lists of Parties and notifications made by Parties.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed this Instrument.

Done at [ ], the day of , in [all official languages of the United Nations], all texts being equally authentic, in a single copy which shall be deposited in the archives of the United Nations.

Schedule 1 to the Fast-Track Instrument: Pension Funds

1. This Schedule makes provision for giving effect to the amendments to the UN Model to expressly include pension funds within the scope of Double Taxation Treaties
2. In accordance with the provisions of the Fast-Track Instrument, the following Draft Amending Protocol makes provision for the express inclusion of pension funds within the scope of Double Taxation Treaties:

Protocol Amending the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ]

The Government of [ ] and the Government of [ ]

Desiring to amend the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ] (hereinafter referred to as "the Convention") and

Desiring to give effect to the provisions of Schedule 1 of the United Nations Fast-Track Instrument

Have agreed as follows:

ARTICLE 1: Definition of a "Recognised Pension Fund"

In Article [ ] (General Definitions) of the Convention, the following wording shall be included in the list of defined terms:

"[[4]] the term "recognized pension fund" of a Contracting State means an entity or arrangement established in that State that is treated as a separate person under the taxation laws of that State and:

(i) that is established and operated exclusively or almost exclusively to administer or provide retirement benefits and ancillary or incidental benefits to individuals and that is regulated as such by that State or one of its political subdivisions or local authorities, or

(ii) that is established and operated exclusively or almost exclusively to invest funds for the benefit of entities or arrangements to which subdivision (i) applies."

[5][ARTICLE 2: [Modification of the Definition of a Person]

Article [ ] of the Convention (Definition of a Person) shall be modified by the inclusion of the words "and a recognised pension fund of that State".]

ARTICLE 3: Modification of the Definition of a Resident

Article [ ] of the Convention (Definition of a Resident) shall be modified by the inclusion of the words "and a recognised pension fund of that State".

ARTICLE 4: Modification of the Provisions on Entitlement to Benefits

[4] Number or letter to be an accordance with the numbering or lettering of the paragraph into which this wording is inserted.

[5] This is an optional provision. If the two Parties decide not to include it, the subsequent Articles should be renumbered accordingly.

Article [ ] of the Convention (Entitlement to Benefits) shall be modified by the inclusion in the definition of "qualified persons" of "a recognised pension fund".

ARTICLE 5: Entry into Force and Effect

Each of the Parties shall notify the other, through diplomatic channels, of the completion of the procedures required by its law for the bringing into force of this Protocol. The protocol shall enter into force on the date of the later of these notifications and shall thereupon have effect:

(a) in [ ] on the [ ]
(b) in [ ] on the [ ]

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Amending Protocol.

Done at [ ], the [ ] day of [ ], in [ ] in two original copies in the English language [in the English and [ ] languages (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic.] [In case of divergence between the two texts, the English text shall be the operative one].

For the Government of [ ]

……..

For the Government of [ ]

……..

[ARTICLE 5: Entry into Force and Effect [Alternative Text where the Automated Procedure Applies]

Where both of the Parties have indicated that Article [6] of the Fast-Track Instrument (Enhanced Procedure) shall apply, this Protocol shall enter into force two months after the date on which the Secretariat notifies the Parties in accordance with that Article (unless within one month either Party notifies the Secretariat and the other Party that it does not accept to be bound by this Protocol). This Protocol shall thereupon have effect:

(a) in [ ] on the [ ]
(b) in [ ] on the [ ]

This Protocol is concluded in the English language. [in the English and [ ] language (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic. In case of divergence between the two texts, the English / [ ] language text shall be the operative one][6].

[6] This is alternative wording where the Amending Protocol is concluded in two (or more) languages.

Schedule 2 to the Fast-Track Instrument: Gains in relation to Natural Resources and Offshore Indirect Capital Gains

1. This Schedule makes provision for giving effect to the amendments to the UN Model relating to the taxation of gains in relation to natural resources and offshore indirect capital gains.
2. In accordance with the provisions of the Fast-Track Instrument, the following Draft Amending Protocol contains amendments relating to the taxation of gains in relation to natural resources and offshore indirect capital gains:

Protocol Amending the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ]

The Government of [ ] and the Government of [ ]

Desiring to amend the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ] (hereinafter referred to as "the Convention") and

Desiring to give effect to the provisions of Schedule 2 of the United Nations Fast-Track Instrument

Have agreed as follows:

ARTICLE 1: Amendment of the Capital Gains Article of the Relevant Double Taxation Treaty in respect of the Taxation of Natural Resources

Article [ ] of the Convention shall be amended by inserting the following wording (and the subsequent paragraphs shall be renumbered accordingly):

"([7]). Gains derived by a resident of a Contracting State from the alienation of a right granted under the law of the other Contracting State which allows the use of resources that are naturally present in that other State and that are under the jurisdiction of that other State, may be taxed in that other State."

ARTICLE 2: Amendment of the Capital Gains Article of the Relevant Double Taxation Treaty in respect of the Taxation of Indirect Disposals

Article [ ] of the Convention shall be amended by inserting the following wording [in place of paragraph [ ] of that Article[8]] (and the subsequent paragraphs shall be renumbered accordingly):

[7] Number or letter to be an accordance with the numbering or lettering of the paragraph into which this wording is inserted.

[8] This additional wording to be used where the wording of the amendment replaces an existing paragraph of the Convention.

"([9]). Subject to paragraphs [[10]] and [[11]], gains derived by a resident of a Contracting State from the alienation of shares of a company, or comparable interests of an entity, such as interests in a partnership or trust, may be taxed in the other Contracting State if

(*a*) the alienator, at any time during the 365 days preceding such alienation, held directly or indirectly at least [[12]] per cent of the capital of that company or entity; and

(*b*) at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from

(i) a property any gain from which would have been taxable in that other State in accordance with the preceding provisions of this Article if that gain had been derived by a resident of the first-mentioned State from the alienation of that property at that time, or

(ii) any combination of property referred to in subdivision (i).

ARTICLE 3: Adjustment to the Paragraphs Referred to in the Capital Gains Article

Paragraph [ ] of Article [ ] of the Convention (which applies to gains other than those referred to in specified paragraphs of the Article) shall be amended by the inclusion in the list of specified paragraphs of references to the paragraphs inserted by Article 2 and 3 above.

ARTICLE 4: Entry into Force and Effect

Each of the Parties shall notify the other, through diplomatic channels, of the completion of the procedures required by its law for the bringing into force of this Protocol. The protocol shall enter into force on the date of the later of these notifications and shall thereupon have effect:

(c) in [ ] on the [ ]
(d) in [ ] on the [ ]

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Amending Protocol.

Done at [ ], the [ ] day of [ ], in [ ] in two original copies in the English language [in the English and [ ] languages (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic.] [In case of divergence between the two texts, the English text shall be the operative one].

For the Government of [ ]

……..

For the Government of [ ]

[9] Number or letter to be an accordance with the numbering or lettering of the paragraph into which this wording is inserted.
[10] Number to be agreed between the parties to the Amending Protocol.
[11] Number to be agreed between the parties to the Amending Protocol.
[12] Percentage to be agreed between the parties to the Amending Protocol.

……..

[ARTICLE 4: Entry into Force and Effect [Alternative Text where the Automated Procedure Applies]

Where both of the Parties have indicated that Article [6] of the Fast-Track Instrument (Enhanced Procedure) shall apply, this Protocol shall enter into force two months after the date on which the Secretariat notifies the Parties in accordance with that Article (unless within one month either Party notifies the Secretariat and the other Party that it does not accept to be bound by this Protocol). This Protocol shall thereupon have effect:

(c) in [ ] on the [ ]
(d) in [ ] on the [ ]

This Protocol is concluded in the English language. [in the English and [ ] language (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic. In case of divergence between the two texts, the English / [ ] language text shall be the operative one][13].

[13] This is alternative wording where the Amending Protocol is concluded in two (or more) languages.

Schedule 3 to the Fast-Track Instrument: Fees for Technical Services

1. This Schedule makes provision for giving effect to the amendments to the UN Model relating to the taxation of fees for technical services.
2. In accordance with the provisions of the Fast-Track Instrument, the following Draft Amending Protocol contains amendments relating to the taxation of fees for technical services:

Protocol Amending the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ]

The Government of [ ] and the Government of [ ]

Desiring to amend the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ] (hereinafter referred to as "the Convention") and

Desiring to give effect to the provisions of Schedule 3 of the United Nations Fast-Track Instrument

Have agreed as follows:

ARTICLE 1A: Amendment of the Relevant Double Taxation Treaty in respect of Fees for Technical Services[14]

The following Article shall be inserted into the Convention after existing Article [ ] :

"Article [ ]

FEES FOR TECHNICAL SERVICES

1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, notwithstanding the provisions of Article [[15]] and subject to the provisions of Articles [[16]], fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed [[17]] per cent of the gross amount of the fees.

3. The term "fees for technical services" as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:

[14] Article 1B contains an alternative form of wording. Parties should indicate in their List of Covered Tax Agreements whether they propose to include Article 1A or Article 1B

[15] Number to be agreed between the parties to the Amending Protocol.

[16] Number to be agreed between the parties to the Amending Protocol.

[17] Percentage to be included in the list of Covered Tax Agreements and to be agreed between the two parties to the Amending Protocol

(a) to an employee of the person making the payment;

(b) for teaching in an educational institution or for teaching by an educational institution; or

(c) by an individual for services for the personal use of an individual.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State, [or performs in the other Contracting State independent personal services from a fixed base situated in that other State,[18]] and the fees for technical services are effectively connected with:

(*a*) such permanent establishment [or fixed base], or

(*b*) business activities referred to in (*c*) of paragraph 1 of Article [[19]] .

In such cases the provisions of Article [[20]] or Article [[21]], as the case may be, shall apply.

5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment [or a fixed base] in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment [or fixed base].

6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State through a permanent establishment situated in that other State [or performs independent personal services through a fixed base situated in that other State] and such fees are borne by that permanent establishment [or fixed base].

7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

ARTICLE 1B: (Alternative wording): Amendment of the Relevant Double Taxation Treaty in respect of "Fees for Services"[22]

The following Article shall be inserted into the Convention after existing Article [ ] :

"Article [ ]

FEES FOR SERVICES

1. Fees for services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, notwithstanding the provisions of Article [[23]] and subject to the provisions of Articles [[24]], fees for services arising in a Contracting State may also be taxed in the Contracting State in which they arise

[18] This wording, and other wording in square brackets referring to a "fixed base", to be deleted where the Convention makes no reference to fixed base.
[19] Number to be agreed between the parties to the Amending Protocol.
[20] Number to be agreed between the parties to the Amending Protocol.
[21] Number to be agreed between the parties to the Amending Protocol.
[22] This reflects the provisions of paragraph 26 of the Commentary to Article 12A of the UN Model.
[23] Number to be agreed between the parties to the Amending Protocol.
[24] Number to be agreed between the parties to the Amending Protocol.

and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed [[25]] per cent of the gross amount of the fees.

3. The term "fees for services" as used in this Article means any payment in consideration for any service, unless the payment is made:

(*a*) to an employee of the person making the payment;

(*b*) for teaching in an educational institution or for teaching by an educational institution; or

(*c*) by an individual for services for the personal use of an individual.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for services arise through a permanent establishment situated in that other State, [or performs in the other Contracting State independent personal services from a fixed base situated in that other State,] and the fees for services are effectively connected with:

(*a*) such permanent establishment [or fixed base], or

(*b*) business activities referred to in (*c*) of paragraph 1 of Article [[26]] .

In such cases the provisions of Article [[27]] or Article [[28]], as the case may be, shall apply.

5. For the purposes of this Article, fees for services shall be deemed to arise in a Contracting State if:

(*a*) the services are performed in that State; or

(*b*) the payer is a resident of that State and the fees are paid to a closely related enterprise or person unless the payer carries on business in the other Contracting State through a permanent establishment situated in that State[, or performs independent personal services through a fixed base situated in the other Contracting State] and such fees are borne by that permanent establishment [or fixed base]; or

(*c*) the payer has in that State a permanent establishment [or a fixed base] in connection with which the obligation to pay the fees for services was incurred, and such fees are borne by such permanent establishment [or fixed base], and are paid to a closely related enterprise or person.

6. For the purposes of this Article, a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise. For the purposes of this Article, an individual shall be a closely related person with respect to another individual if the individual is related to that other individual by blood relationship, marriage or adoption.

7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

[25] Percentage to be included in the list of Covered Tax Agreements and to be agreed between the two parties to the Amending Protocol

[26] Number to be agreed between the parties to the Amending Protocol.

[27] Number to be agreed between the parties to the Amending Protocol.

[28] Number to be agreed between the parties to the Amending Protocol.

ARTICLE 2: Consequential Amendments

The Convention shall be further amended (as a consequence of the insertion effected by Article 1) as follows:

(a) In Article [ ] (Elimination of Double Taxation by Exemption),[29] the number of the Article inserted by this Amending Protocol shall be added to the numerical list of Articles in paragraphs (2) and (4);
(b) In Article [ ] (Non-Discrimination,[30]) the wording "or paragraph 7 of Article [[31]]" and "fees for [technical] services" shall be inserted into the paragraph relating to deductions[32];
(c) In Article [ ] (Entitlement to Benefits,[33]) the number of the Article inserted by this Amending Protocol shall be added to the numerical list of Articles in the definition of "equivalent beneficiary"[34].

ARTICLE 3: Entry into Force and Effect

Each of the Parties shall notify the other, through diplomatic channels, of the completion of the procedures required by its law for the bringing into force of this Protocol. The protocol shall enter into force on the date of the later of these notifications and shall thereupon have effect:

(a) in [ ] on the [ ]
(b) in [ ] on the [ ]

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Amending Protocol.

Done at [ ], the [ ] day of [ ], in [ ] in two original copies in the English language [in the English and [ ] languages (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic.] [In case of divergence between the two texts, the English text shall be the operative one].

For the Government of [ ]

……..

For the Government of [ ]

……..

[29] The equivalent of Article 23A of the UN Model.
[30] The equivalent of Article 24 of the UN Model.
[31] The number of the Article inserted by this Protocol.
[32] The equivalent of Article 24(4) of the UN Model; the additional wording shall be inserted in the equivalent positions to that paragraph in the UN Model.
[33] The equivalent of Article 29 of the UN Model.
[34] The equivalent of Article 29(7)(e)(1)(B)(1) of the UN Model.

[ARTICLE 3: Entry into Force and Effect [Alternative Text where the Automated Procedure Applies]

Where both of the Parties have indicated that Article [6] of the Fast-Track Instrument (Enhanced Procedure) shall apply, this Protocol shall enter into force two months after the date on which the Secretariat notifies the Parties in accordance with that Article (unless within one month either Party notifies the Secretariat and the other Party that it does not accept to be bound by this Protocol). This Protocol shall thereupon have effect:

(a) in [ ] on the [ ]
(b) in [ ] on the [ ]

This Protocol is concluded in the English language. [in the English and [ ] language (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic. In case of divergence between the two texts, the English / [ ] language text shall be the operative one][35].

[35] This is alternative wording where the Amending Protocol is concluded in two (or more) languages.

Schedule 4 to the Fast-Track Instrument: Income from Automated Digital Services

1. This Schedule makes provision for giving effect to the amendments to the UN Model relating to the taxation of income from automated digital services.
2. In accordance with the provisions of the Fast-Track Instrument, the following Draft Amending Protocol contains amendments relating to the taxation of income from automated digital services:

Protocol Amending the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ]

The Government of [ ] and the Government of [ ]

Desiring to amend the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ] (hereinafter referred to as "the Convention") and

Desiring to give effect to the provisions of Schedule 4 of the United Nations Fast-Track Instrument

Have agreed as follows:

ARTICLE 1: Amendment of the Relevant Double Taxation Treaty in respect of the Taxation of Automated Digital Services

The following Article shall be inserted into the Convention after existing Article [ ] :

"Article [ ]

INCOME FROM AUTOMATED DIGITAL SERVICES

1. Income from automated digital services arising in a Contracting State, underlying payments for which are made to a resident of the other Contracting State, may be taxed in that other State.[36]

[36] Alternative Wording: (This reflects the provisions of paragraph 26 of the Commentary to Article 12B of the UN Model)
Where both Parties so specify in their list of Covered Tax Treaties, the following wording shall apply in place of the wording in paragraph 2:
"2. However, subject to the provisions of Article 8 and notwithstanding the provisions of Article 14, income from automated digital services arising in a Contracting State may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the income is a resident of the other Contracting State, the income from automated digital services arising in a Contracting State may be taxed in the Contracting State in which it arises only if:
(*a*) the worldwide revenue derived by the beneficial owner of the income during the fiscal year concerned is an amount exceeding [ ]; and
(*b*) the revenue from automated digital services derived by the beneficial owner from the Contracting State during the fiscal year concerned is an amount exceeding [ ];
and the tax so charged shall not exceed [ ] per cent of the gross amount of the income from automated digital services arising in the first-mentioned State."

2. However, subject to the provisions of Article [[37]] and notwithstanding the provisions of Article [[38]], income from automated digital services arising in a Contracting State may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the income is a resident of the other Contracting State, the tax so charged shall not exceed [[39]] per cent of the gross amount of the payments underlying the income from automated digital services.]

[[40]3. The provisions of paragraph 2 shall not apply if the beneficial owner of the income from automated digital services, being a resident of a Contracting State, requests the other Contracting State where such income arises, to subject its qualified profits from automated digital services for the fiscal year concerned to taxation at the tax rate provided for in the domestic laws of that State. If the beneficial owner so requests, subject to the provisions of Article [[41]] and notwithstanding the provisions of Article [[42]], the taxation by that Contracting State shall be carried out accordingly. For the purposes of this paragraph, the qualified profits shall be 30 per cent of the amount resulting from applying the profitability ratio of that beneficial owner's automated digital services business segment to the gross annual revenue from automated digital services derived from the Contracting State where such income arises. Where segmental accounts are not maintained by the beneficial owner, the overall profitability ratio of the beneficial owner will be applied to determine qualified profits. However, where the beneficial owner belongs to a multinational enterprise group, the profitability ratio to be applied shall be that of the business segment of the group relating to the income covered by this Article, or of the group as a whole in case segmental accounts are not maintained by the group, provided such profitability ratio of the multinational enterprise group is higher than the aforesaid profitability ratio of the beneficial owner. Where the segmental profitability ratio or, as the case may be, the overall profitability ratio of the multinational enterprise group to which the beneficial owner belongs is not available to the Contracting State in which the income from automated digital services arises, the provisions of this paragraph shall not apply; in such a case, the provisions of paragraph 2 shall apply.]

4. For the purposes of paragraph 3, "multinational enterprise group" means any "group" that includes two or more enterprises, the tax residence for which is in different jurisdictions. Further, for the purposes of paragraph 3, the term "group" means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public stock exchange.

5. The term "automated digital services" as used in this Article means any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider.

6. The term "automated digital services" includes especially:

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[37] Number to be agreed between the parties in the Amending Protocol.
[38] Number to be agreed between the parties in the Amending Protocol.
[39] Percentage to be agreed between the parties in the Amending Protocol.
[40] Alternative Wording (This reflects the provisions of paragraph 48 of the Commentary to Article 12B of the UN Model)
Where both Parties so specify in their list of Covered Tax Treaties, the following wording shall apply in place of the wording in paragraph 3:
"3. The provisions of paragraph 2 shall not apply if the beneficial owner of the income from automated digital services, being a resident of a Contracting State, requests the other Contracting State where such income arises to subject its qualified profits from automated digital services for the fiscal year concerned to taxation at the tax rate provided for in the domestic laws of that State. If the beneficial owner so requests, subject to the provisions of Article 8 and notwithstanding the provisions of Article 14, the taxation by that Contracting State shall be carried out accordingly. For the purposes of this paragraph, the qualified profits shall be [ ] per cent of the amount resulting from applying to the gross annual revenue from automated digital services derived from the Contracting State where such income arises:
(*a*) the automated digital services business segment profitability ratio of the beneficial owner where segmental accounts are maintained;
(*b*) the overall profitability ratio of the beneficial owner where segmental accounts are not maintained;
deducted by [ ] per cent deemed return on routine functions for providing the automated digital services.
[41] Number to be agreed between the parties in the Amending Protocol.
[42] Number to be agreed between the parties in the Amending Protocol.

(*a*) online advertising services;

(*b*) supply of user data;

(*c*) online search engines;

(*d*) online intermediation platform services;

(*e*) social media platforms;

(*f*) digital content services;

(*g*) online gaming;

(*h*) cloud computing services; and

(*i*) standardized online teaching services.

7. The provisions of this Article shall not apply if the payments underlying the income from automated digital services qualify as "royalties" [or "fees for technical services"[43]] under Article [[44]] or Article [[45]] as the case may be.

8. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the income from automated digital services, being a resident of a Contracting State, carries on business in the other Contracting State in which the income from automated digital services arises through a permanent establishment situated in that other State, [or performs in the other Contracting State independent personal services from a fixed base situated in that other State,[46]] and the income from automated digital services is effectively connected with:

(*a*) such permanent establishment[or fixed base], or

(*b*) business activities referred to in subparagraph (*c*) of paragraph 1 of Article [[47]].

In such cases the provisions of Article [[48]] or Article [[49]], as the case may be, shall apply.

9. For the purposes of this Article and subject to paragraph 10, income from automated digital services shall be deemed to arise in a Contracting State if the underlying payments for the income from automated digital services are made by a resident of that State or if the person making the underlying payments for the automated digital services, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment [or a fixed base] in connection with which the obligation to make the payments was incurred, and such payments are borne by the permanent establishment[or fixed base].

10. For the purposes of this Article, income from automated digital services shall be deemed not to arise in a Contracting State if the underlying payments for the income from automated digital services are made by a resident of that State which carries on business in the other Contracting State through a permanent establishment situated in that other State [or performs independent personal services through a fixed base situated in that other State] and such underlying payments towards automated digital services are borne by that permanent establishment [or fixed base].

11. Where, by reason of a special relationship between the payer and the beneficial owner of the income from automated digital services or between both of them and some other person, the amount of the payments underlying such income, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the

[43] This wording, and other wording in square brackets referring to "fees for technical", to be deleted where the Convention contains no provision relating to fees for technical services.
[44] Number to be agreed between the parties in the Amending Protocol.
[45] Number to be agreed between the parties in the Amending Protocol.
[46] This wording, and other wording in square brackets referring to a "fixed base", to be deleted where the Convention makes no reference to fixed base.
[47] Number to be agreed between the parties in the Amending Protocol.
[48] Number to be agreed between the parties in the Amending Protocol.
[49] Number to be agreed between the parties in the Amending Protocol.

provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments underlying such income from automated digital services shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

ARTICLE 2: Consequential Amendments

The Convention shall be further amended (as a consequence of the insertion effected by Article 1) as follows:

(a) In Article [ ] (Elimination of Double Taxation by Exemption),[50] the number of the Article inserted by this Amending Protocol shall be added to the numerical list of Articles in paragraphs (2) and (4);
(b) In Article [ ] (Non-Discrimination,[51]) the wording "or paragraph 11 of Article [[52]]" and "payments underlying income from automated digital services" shall be inserted into the paragraph relating to deductions[53];
(c) In Article [ ] (Entitlement to Benefits,[54]) the number of the Article inserted by this Amending Protocol shall be added to the numerical list of Articles in the definition of "equivalent beneficiary"[55].

ARTICLE 3: Entry into Force and Effect

Each of the Parties shall notify the other, through diplomatic channels, of the completion of the procedures required by its law for the bringing into force of this Protocol. The protocol shall enter into force on the date of the later of these notifications and shall thereupon have effect:

(a) in [ ] on the [ ]
(b) in [ ] on the [ ]

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Amending Protocol.

Done at [ ], the [ ] day of [ ], in [ ] in two original copies in the English language [in the English and [ ] languages (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic.] [In case of divergence between the two texts, the English text shall be the operative one].

For the Government of [ ]

……..

For the Government of [ ]

……..

[50] The equivalent of Article 23A of the UN Model.
[51] The equivalent of Article 24 of the UN Model.
[52] The number of the Article inserted by this Protocol.
[53] The equivalent of Article 24(4) of the UN Model; the additional wording shall be inserted in the equivalent positions to that paragraph in the UN Model.
[54] The equivalent of Article 29 of the UN Model.
[55] The equivalent of Article 29(7)(e)(1)(B)(1) of the UN Model.

[ARTICLE 3: Entry into Force and Effect [Alternative Text where the Automated Procedure Applies]

Where both of the Parties have indicated that Article [6] of the Fast-Track Instrument (Enhanced Procedure) shall apply, this Protocol shall enter into force two months after the date on which the Secretariat notifies the Parties in accordance with that Article (unless within one month either Party notifies the Secretariat and the other Party that it does not accept to be bound by this Protocol). This Protocol shall thereupon have effect:

(a) in [ ] on the [ ]
(b) in [ ] on the [ ]

This Protocol is concluded in the English language. [in the English and [ ] language (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic. In case of divergence between the two texts, the English / [ ] language text shall be the operative one][56].

[56] This is alternative wording where the Amending Protocol is concluded in two (or more) languages.

Schedule 5 to the Multilateral Fast-Track Instrument: Arbitration

1. This Schedule makes provision for giving effect to the amendments to the UN Model relating to arbitration of disputes.
2. In accordance with the provisions of the Fast-Track Instrument, the following Draft Amending Protocol contains amendments relating to the arbitration of disputes:

Protocol Amending the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ]

The Government of [ ] and the Government of [ ]

Desiring to amend the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ] (hereinafter referred to as "the Convention") and

Desiring to give effect to the provisions of Schedule 5 of the United Nations Fast-Track Instrument

Have agreed as follows:

ARTICLE 1A[57]: Inclusion of Provision for Arbitration of Disputes Within the Relevant Double Taxation Treaty

The following paragraph shall be inserted into the Convention at the end of Article [ ] :

"([58]). Where,

(*a*) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and
(*b*) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within three years from the presentation of the case to the competent authority of the other Contracting State, any unresolved issues arising from the case shall be submitted to arbitration if either competent authority so requests. The person who has presented the case shall be notified of the request. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. The arbitration decision shall be binding on both States and shall be implemented notwithstanding any time limits in the domestic laws of these States unless both competent authorities agree on a different solution within six months after the decision has been communicated to them or unless person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph."

[57] Article 1B contains an alternative form of wording. Parties should indicate in their List of Covered Tax Agreements whether they propose to include Article 1A or Article 1B
[58] Number to be inserted according to the consecutive numbering of the paragraphs of this Article.

ARTICLE 1B: (Alternative wording) Inclusion of Provision for Arbitration of Disputes Within the Relevant Double Taxation Treaty – Voluntary Arbitration

The following paragraph shall be inserted into the Convention at the end of Article [ ] :

"([59]). If the competent authorities are unable to resolve by mutual agreement a case pursuant to paragraph 2, the case, may, if both competent authorities and the person who has presented the case pursuant to paragraph 1 agree, be submitted for arbitration, provided any person directly affected by the case agrees in writing to be bound by the decision of the arbitration board. If the competent authorities are unable to resolve by mutual agreement a difficulty or a doubt pursuant to paragraph 3, the difficulty or doubt may also, if both competent authorities agree, be submitted for arbitration. The decision of the arbitration board in a particular case shall be binding on the Contracting States with respect to that case. Where a general difficulty of interpretation or application is submitted to arbitration, the decision of the arbitration board shall be binding on the Contracting States as long as the competent authorities do not agree to modify or rescind the decision. The competent authorities shall by mutual agreement settle the procedures for such an arbitration board."

ARTICLE 2: Entry into Force and Effect

Each of the Parties shall notify the other, through diplomatic channels, of the completion of the procedures required by its law for the bringing into force of this Protocol. The protocol shall enter into force on the date of the later of these notifications and shall thereupon have effect:

(a) in [ ] on the [ ]
(b) in [ ] on the [ ]

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Amending Protocol.

Done at [ ], the [ ] day of [ ], in [ ] in two original copies in the English language [in the English and [ ] languages (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic.] [In case of divergence between the two texts, the English text shall be the operative one].

For the Government of [ ]

……..

For the Government of [ ]

……..

[59] Number to be inserted according to the consecutive numbering of the paragraphs of this Article.

[ARTICLE 2: Entry into Force and Effect [Alternative Text where the Automated Procedure Applies]

Where both of the Parties have indicated that Article [6] of the Fast-Track Instrument (Enhanced Procedure) shall apply, this Protocol shall enter into force two months after the date on which the Secretariat notifies the Parties in accordance with that Article (unless within one month either Party notifies the Secretariat and the other Party that it does not accept to be bound by this Protocol). This Protocol shall thereupon have effect:

(a) in [ ] on the [ ]
(b) in [ ] on the [ ]

This Protocol is concluded in the English language. [in the English and [ ] language (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic. In case of divergence between the two texts, the English / [ ] language text shall be the operative one][60].

[60] This is alternative wording where the Amending Protocol is concluded in two (or more) languages.

Schedule 6 to the Multilateral Fast-Track Instrument: Subject to Tax Rule

1. This Schedule makes provision for giving effect to the amendments to the UN Model to provide for a subject to tax rule.
2. In accordance with the provisions of the Fast-Track Instrument, the following Draft Amending Protocol contains an amendment to provide for a subject to tax rule:

Protocol Amending the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ]

The Government of [ ] and the Government of [ ]

Desiring to amend the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ] (hereinafter referred to as "the Convention") and

Desiring to give effect to the provisions of Schedule 6 of the United Nations Fast-Track Instrument

Have agreed as follows:

ARTICLE 1: Inclusion of a Subject to Tax Rule

The following paragraph shall be inserted into the Convention at the end of Article [ ] :

"[[61]]. (a) This Convention shall not affect the taxation by a Contracting State of any income arising in that State and derived by a resident of the other Contracting State if that income is subject to a low level of taxation in that other State within the meaning of subparagraph (b).

(b) Income is subject to a low level of taxation in that other State if:

(i) it is subject to a statutory tax rate of [[62]] per cent or less; or

(ii) it is subject to a statutory tax rate higher than the rate set out in subdivision (i) but the beneficial owner of the income is entitled to a special exemption, exclusion or reduction that is linked directly to the income or the entity receiving it so that the amount of tax paid in that other State with respect to such income is less than the amount of tax that would be imposed if the tax rate set out in (i) were applied to such income without regard to such exemption, exclusion or reduction.

(c) Subparagraph (a) will not apply to income that:

(i) [[63]]."

[61] Number to be inserted according to the consecutive numbering of the paragraphs of this Article.
[62] Percentage to be agreed between the parties to the Amending Protocol.
[63] Exceptions to the operation of the Subject to Tax Rule are to be agreed between the parties to the Amending Protocol.

ARTICLE 2: Entry into Force and Effect

Each of the Parties shall notify the other, through diplomatic channels, of the completion of the procedures required by its law for the bringing into force of this Protocol. The protocol shall enter into force on the date of the later of these notifications and shall thereupon have effect:

(a) in [ ] on the [ ]
(b) in [ ] on the [ ]

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Amending Protocol.

Done at [ ], the [ ] day of [ ], in [ ] in two original copies in the English language [in the English and [ ] languages (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic.] [In case of divergence between the two texts, the English text shall be the operative one].

For the Government of [ ]

……..

For the Government of [ ]

……..

[ARTICLE 2: Entry into Force and Effect [Alternative Text where the Automated Procedure Applies]

Where both of the Parties have indicated that Article [6] of the Fast-Track Instrument (Enhanced Procedure) shall apply, this Protocol shall enter into force two months after the date on which the Secretariat notifies the Parties in accordance with that Article (unless within one month either Party notifies the Secretariat and the other Party that it does not accept to be bound by this Protocol). This Protocol shall thereupon have effect:

(a) in [ ] on the [ ]
(b) in [ ] on the [ ]

This Protocol is concluded in the English language. [in the English and [ ] language (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic. In case of divergence between the two texts, the English / [ ] language text shall be the operative one][64].

[64] This is alternative wording where the Amending Protocol is concluded in two (or more) languages.

Schedule 7 to the Multilateral Fast-Track Instrument: Capital Gains Deriving from the Value of Immoveable Property

1. This Schedule makes provision for giving effect to the amendments to the UN Model to provide for the taxation of capital gains deriving from the value of immoveable property.
2. In accordance with the provisions of the Fast-Track Instrument, the following Draft Amending Protocol contains an amendment to provide for the taxation of capital gains deriving from the value of immoveable property:

Protocol Amending the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ]

The Government of [ ] and the Government of [ ]

Desiring to amend the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ] (hereinafter referred to as "the Convention") and

Desiring to give effect to the provisions of Schedule 7 of the United Nations Fast-Track Instrument

Have agreed as follows:

ARTICLE 1: Inclusion of a Provision on Gains Deriving from the Value of Immoveable Property

Article [ ] of the Convention shall be amended by the inclusion of the following paragraphs [[65]in place of paragraphs [( ) and ( )] [after paragraph [( )] (and the subsequent paragraphs shall be renumbered accordingly)]:

"([[66]]). Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article [ ], situated in that other State.

([[67]]). Gains, other than those to which paragraph [( )] applies, derived by a resident of a Contracting State from the alienation of shares of a company, or comparable interests, such as interests in a partnership or trust, which is a resident of the other Contracting State, may be taxed in that other State if the alienator, at any time

[65] This contains alternative wording for situations where this paragraph replaces an existing paragraph or is entirely new.
[66] Number to be inserted according to the consecutive numbering of the paragraphs of this Article.
[67] Number to be inserted according to the consecutive numbering of the paragraphs of this Article.

during the 365 days preceding such alienation, held directly or indirectly at least [[68]] per cent of the capital of that company or entity."

ARTICLE 2: Adjustment to the Paragraphs Referred to in the Capital Gains Article

Paragraph [ ] of Article [ ] of the Convention (which applies to gains other than those referred to in specified paragraphs of the Article) shall be amended by the inclusion in the list of specified paragraphs of references to the paragraphs inserted by Article 2 above.

ARTICLE 3: Entry into Force and Effect

Each of the Parties shall notify the other, through diplomatic channels, of the completion of the procedures required by its law for the bringing into force of this Protocol. The protocol shall enter into force on the date of the later of these notifications and shall thereupon have effect:

a) in [ ] on the [ ]

b) in [ ] on the [ ]

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Amending Protocol.

Done at [ ], the [ ] day of [ ], in [ ] in two original copies in the English language [in the English and [ ] languages (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic.] [In case of divergence between the two texts, the English text shall be the operative one].

For the Government of [ ]

……..

For the Government of [ ]

……..

[ARTICLE 3: Entry into Force and Effect [Alternative Text where the Automated Procedure Applies]

Where both of the Parties have indicated that Article [6] of the Fast-Track Instrument (Enhanced Procedure) shall apply, this Protocol shall enter into force two months after the date on which the Secretariat notifies the Parties in accordance with that Article (unless within one month either Party notifies the Secretariat and the other Party that it does not accept to be bound by this Protocol). This Protocol shall thereupon have effect:

[68] Percentage to be agreed between the parties to the Amending Protocol.

a) in [ ] on the [ ]

b) in [ ] on the [ ]

This Protocol is concluded in the English language. [in the English and [ ] language (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic. In case of divergence between the two texts, the English / [ ] language text shall be the operative one][69].

[69] This is alternative wording where the Amending Protocol is concluded in two (or more) languages.

Schedule 8 to the Multilateral Fast-Track Instrument: Services Permanent Establishments

1. This Schedule makes provision for giving effect to the amendments to the UN Model relating to services permanent establishments.
2. In accordance with the provisions of the Fast-Track Instrument, the following Draft Amending Protocol contains an amendment relating to services permanent establishments:

Protocol Amending the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ]

The Government of [ ] and the Government of [ ]

Desiring to amend the Convention between the Government of [ ] and the Government of [ ] [for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital] signed at [ ] on [ ] (hereinafter referred to as "the Convention") and

Desiring to give effect to the provisions of Schedule 8 of the United Nations Fast-Track Instrument

Have agreed as follows:

ARTICLE 1A[70]: Inclusion of a Provision on Services Permanent Establishments

Article [ ] of the Convention shall be amended by the inclusion of the following paragraph [[71]in place of paragraph [( )] [after paragraph [( )] (and the subsequent paragraphs shall be renumbered accordingly)]:

"([[72]]). The term "permanent establishment" also encompasses:

(a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than [[73]] months;

(b) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned."

ARTICLE 1B: (Alternative Wording) Inclusion of a Provision on Services Permanent Establishments

[70] Article 1B contains an alternative form of wording. Parties should indicate in their List of Covered Tax Agreements whether they propose to include Article 1A or Article 1B.
[71] This contains alternative wording for situations where this paragraph replaces an existing paragraph or is entirely new.
[72] Number to be inserted according to the consecutive numbering of the paragraphs of this Article.
[73] The number of months to be agreed by the Parties to the Amending Protocol.

Article [ ] of the Convention shall be amended by the inclusion of the following paragraph [[74]in place of paragraph [( )] [after paragraph [( )] (and the subsequent paragraphs shall be renumbered accordingly)]:

"([[75]]). The term "permanent establishment" also encompasses:

(a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than [[76]] months;

(b) the furnishing of services by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days within any twelve-month period commencing or ending in the fiscal year concerned;

(c) for an individual, the performing of services in a Contracting State by that individual, but only if the individual's stay in that State is for a period or periods aggregating more than 183 days within any twelve-month period commencing or ending in the fiscal year concerned."

ARTICLE 2: Entry into Force and Effect

Each of the Parties shall notify the other, through diplomatic channels, of the completion of the procedures required by its law for the bringing into force of this Protocol. The protocol shall enter into force on the date of the later of these notifications and shall thereupon have effect:

a) in [ ] on the [ ]

b) in [ ] on the [ ]

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Amending Protocol.

Done at [ ], the [ ] day of [ ], in [ ] in two original copies in the English language [in the English and [ ] languages (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic.] [In case of divergence between the two texts, the English text shall be the operative one].

For the Government of [ ]

……..

For the Government of [ ]

……..

[74] This contains alternative wording for situations where this paragraph replaces an existing paragraph or is entirely new.

[75] Number to be inserted according to the consecutive numbering of the paragraphs of this Article.

[76] The number of months to be agreed by the Parties to the Amending Protocol.

[ARTICLE 2: Entry into Force and Effect [Alternative Text where the Automated Procedure Applies]

Where both of the Parties have indicated that Article [6] of the Fast-Track Instrument (Enhanced Procedure) shall apply, this Protocol shall enter into force two months after the date on which the Secretariat notifies the Parties in accordance with that Article (unless within one month either Party notifies the Secretariat and the other Party that it does not accept to be bound by this Protocol). This Protocol shall thereupon have effect:

a) in [ ] on the [ ]

b) in [ ] on the [ ]

This Protocol is concluded in the English language. [in the English and [ ] language (a copy of the text in the [ ] language to be agreed between the Parties), both texts being equally authentic. In case of divergence between the two texts, the English / [ ] language text shall be the operative one][77].

[77] This is alternative wording where the Amending Protocol is concluded in two (or more) languages.

ANNEX B

ANNEX B1:

DRAFT ARTICLE XX ON DEALING WITH CROSS-BORDER BUSINESS SERVICES

(REVISED DRAFT OF FEBRUARY 2024)

Article xx

FEES FOR SERVICES

1. Fees for services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, subject to the provisions of Articles 8, 16 and 17, fees for services arising in a Contracting State may also be taxed in that Contracting State and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed ___ per cent [the percentage is to be established through bilateral negotiations] of the gross amount of the fees.

3. The term "fees for services" as used in this Article means any payment in consideration for any service, unless the payment is made:

(a) to an employee of the person making the payment; [alternative: "in consideration of the current or past employment of the recipient of the payment by the person making the payment" or "to an employee or former employee"]

[(b) by an individual for services for the personal use of an individual;]

(c) for automated digital services as defined in paragraphs 5 and 6 of Article 12B; or

(d) to an insurance enterprise for insurance.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for services arise through a permanent establishment situated in that other State, and the fees for services are effectively connected with:

(a) such permanent establishment, or

(b) business activities referred to in (c) of paragraph 1 of Article 7.

In such cases the provisions of Article 7 or Article 14 shall apply.

5. For the purposes of this Article, subject to paragraph 6, fees for services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment.

6. For the purposes of this Article, fees for services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the

other Contracting State through a permanent establishment situated in that other State and such fees are borne by that permanent establishment.

7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

ANNEX B2:

DRAFT ARTICLE XX COMMENTARY

(REVISED DRAFT OF FEBRUARY 2024)

Article xx

FEES FOR SERVICES

A. General considerations

1. Article xx was added to the United Nations Model Tax Convention in 202_ to allow a Contracting State to tax fees for services paid to a resident of the other Contracting State on a gross basis at a rate to be negotiated by the Contracting States. Under this Article, a Contracting State is entitled to tax fees for services where the fees are paid by a resident of that State or are borne by a non-resident with a permanent establishment in that State; it is not necessary for the services to be provided in that State. Fees for services are defined broadly to mean "*any payment in consideration for any service,*" although certain payments are expressly excluded.

2. Until the addition of Article xx, income from cross-border services derived by an enterprise of a Contracting State was taxable in accordance with a wide range of provisions of the United Nations Model Tax Convention, including Article 7 (Business Profits), Article 8 (International Shipping and Air Transportation), Article 12A (Fees for Technical Services), Article 12B (Income from Automated Digital Services), and Article 14 (Independent Personal Services). Where fees for services were not covered by one of the specific provisions dealing with services, fees for services were taxable exclusively by the State in which the enterprise was resident in accordance with Article 7 (Business Profits) unless the enterprise carried on business through a permanent establishment in the other State (the source State) and the fees for services were attributable to the permanent establishment. Special rules in Article 5, paragraph (3) deemed a resident of a Contracting State to have a permanent establishment in the other State where (a) the resident provided construction and related services in the other State for more than 6 months, or (b) the resident performed services in the other State for more than 183 days in any 12-month period.

3. With the rapid changes in modern economies, particularly with respect to the development of new digital business models, it became possible for an enterprise resident in one State to be substantially involved in another State's economy without a permanent establishment or fixed base in that State and without any substantial physical presence in that State. In particular, with the advances in communications and information technology, an enterprise of one Contracting State can provide substantial services to customers in the other Contracting State, and therefore maintain a significant economic presence in that State, without having any fixed place of business in that State and without being present in that State for any substantial period.

4. In response to the increasing ability of multinational enterprises to provide a wide range of cross-border services remotely, the United Nations Model Tax Convention was amended in 2017 to add Article 12A (Fees for Technical Services), allowing a State to impose tax at an agreed rate on the gross amount of fees for consultancy, management and technical services. The Convention was amended again in 2021 to add Article 12B (Income from Automated Digital Services), allowing a State to impose tax at an agreed rate on the gross amount of a broad range of payments for automated digital services.

5. Before the introduction of Article xx, more restrictive rules applied with respect to the taxation of cross-border services. In general, under Article 7, together with Article 5, and Article 14, of the United Nations

Model Tax Convention, countries were given limited scope to tax income from such services, in particular, where a service provider resident in another country did not have a significant physical presence (usually in the form of a fixed base or permanent establishment) in the source country. Moreover, even where the significance of physical presence was reduced in treaties that included Article 12A and Article 12B, countries and taxpayers still faced difficult issues in distinguishing between different types of services in order to determine whether Article 7, Article 12A, or Article 14 applied.

6. The uncertainty concerning the treatment of fees for services under the provisions of the United Nations Model Tax Convention as it read before 202_ was undesirable for both taxpayers and tax authorities. It may also have resulted in difficult disputes, between taxpayers and administrations, consuming scarce resources, as well as causing unrelieved double taxation or double non-taxation.

7. Fees for services may have also resulted in the reduction of the tax base of countries that were prevented from taxing such fees by the provisions of the United Nations Model Tax Convention, as it read before 202_. Fees for services are usually deductible against a country's tax base if the payer is a resident of the country or a non-resident with a permanent establishment or fixed base in the country. The reduction of a country's tax base by deductible fees for services is not generally objectionable. If the payer is an enterprise, the payments may often be legitimate expenses incurred by the payer for the purpose of earning income and should be deductible (assuming, of course, that the amount of the payments is reasonable). However, in some circumstances, intercompany services may be used inappropriately to shift profits from one country to another country. Under Article xx, the country in which payments for services arise is entitled to tax the non-resident service provider with respect to the fees earned from providing the services, with the result that the reduction of the country's tax base by the deductible payments is offset by the country's tax on those fees.

8. Base erosion and profit shifting through the use of cross border services raises serious concerns for both developed and developing countries. However, the problem is especially serious from the perspective of developing countries, because they are disproportionately importers of services and often lack the administrative capacity to control or limit such base erosion and profit shifting through anti-avoidance rules in their domestic law and tax treaties.

9. The inability of countries to tax fees for services provided by non-resident service providers under the provisions of the United Nations Model Tax Convention before the addition of Article 12B and Article xx (and its predecessor Article 12A) may have given non-resident service providers, in certain circumstances, a tax advantage over domestic service providers. Fees for services provided by domestic service providers are generally subject to domestic tax at the ordinary rate applicable to business profits. In contrast, as indicated above, non-resident service providers would not have been subject to any domestic tax if they did not have a permanent establishment or fixed base in that country, and they might have been subject only to low taxes (or no tax at all) on the fees earned in their country of residence.

10. As a result of these considerations, the Committee identified fees for cross-border services as a matter of priority to be dealt with in the context of reducing the significance of physical presence as a condition for the taxation of cross-border services by countries in which the fees for those services arise. In 202_ the Committee decided to add Article xx to the United Nations Model Tax Convention expanding and simplifying the taxation of fees for services by States in which those fees arise.

11. The addition of Article xx to the United Nations Model Tax Convention is accompanied by the deletion of subparagraph *(b)* of paragraph 3 of Article 5, Article 12A, and Article 14. In effect, Article xx replaces these three provisions, with the result that most fees for business services are taxable by the Contracting State in which the fees arise at a rate to be agreed through the negotiations of the Contracting States applied to the gross amount of the fees. If, however, a service provider resident in the other Contracting State has a permanent establishment in the State in which the fees for services arise and the fees are effectively connected with that permanent establishment, the fees are taxable in accordance with Article 7 of the Convention. Under paragraph 5 of Article xx, fees for services arise in a Contracting State where the payer of the fees for services is a resident of that state or where a non-resident payer has a permanent establishment in that State that bears the fees. The term "fees for services" is broadly defined to mean any payment in consideration for services, subject to certain excluded services.

12. As discussed in the preceding paragraphs, there has been a gradual shift in the provisions of the United Nations Model Tax Convention away from reliance on physical presence (the performance of services by a service provider who is present and providing the services in a country) and relatively high thresholds as conditions for the allocation of taxing rights to source countries with respect to cross-border services. The adoption of Article xx is consistent with this shift. Previously, under Articles 7 and 14, a source country was entitled to tax income from cross-border services only where the service provider had a permanent establishment or a fixed base in the source country through which the services were provided (or where the service provider stayed in the source country for 183 days or more in a 12-month period). These threshold and physical presence requirements are inappropriate conditions for source country taxation of cross-border services in light of new business models for delivering services. As a result, these threshold requirements have been eliminated from Article xx under which most fees for cross-border services are taxable by a country if the fees are paid by a resident of that country or a non-resident with a permanent establishment in that country.

13.The elimination of threshold requirements based on physical presence for source country taxation of cross-border services is the fundamental goal of Article xx. In this regard, Article xx can be considered to be an extension of the rationale for the adoption in 2017 of Article 12A with respect to fees for technical services and in 2021 of Article 12B with respect to income from automated digital services both of which eliminated physical presence as a condition for source country taxation of services. As a result of the elimination of threshold requirements based on physical presence, source countries have expanded taxing rights under Article xx with respect to most business services.

14. The fundamental goal of Article xx is also supported by an additional objective: to rationalize and simplify the provisions of the United Nations Model Tax Convention dealing with business services. Combining subparagraph *(b)* of paragraph 3 of Article 5, Article 12A and Article 14 into a single provision is intended to simplify the United Nations Model Tax Convention. After the adoption of Article xx, it is no longer necessary for taxpayers and tax officials to distinguish between fees for technical services taxable in accordance with former Article 12A and other services, between professional and other independent services taxable in accordance with Article 14 and other services, or between business services provided for 183 days or more in any 12-month period and those provided for shorter periods. In addition, income derived from most business services, including income currently dealt with under Article 7 (except construction and related services and insurance services), Article 12A and Article 14, is taxable in accordance with the same rules. Further, the simplification achieved through the adoption of Article xx does not involve the introduction of any new complexities. Some source countries may need to amend their domestic law to impose tax on non-resident service providers, including perhaps an obligation on residents and others to withhold tax from payments for services to non-resident service providers.

15. Article xx has the effect of expanding the taxing rights of Contracting States with respect to fees for cross-border services. Previously, under former subparagraph *(b)* of paragraph 3 of Article 5, income from business services provided by a resident of one Contracting State for a client in the other State was taxable by the other State only if the service provider provided those services through employees or other personnel who were present and working in the other State for more than 183 days in any 12-month period. Under former Article 14, a resident of one Contracting State providing professional or other independent services in the other State was subject to tax by the other State only if the service provider had a fixed base in the other State that was regularly available to the service provider or was present in the other State for 183 days or more in any 12-month period. Under former Article 12A, fees for consulting, management and technical services provided by a resident of one State to a resident of the other State (or to a non-resident with a permanent establishment in the other Contracting State to which the services are effectively connected) were taxable by the other State; however, the scope of the meaning of "fees for technical services" was unclear. In contrast, under Article xx, a service provider resident in one Contracting State is subject to tax on fees for services, received from payers resident in the other state (and from non-residents with a permanent establishment in that state), irrespective of the nature of those services (whether independent personal services, technical services or most other business services), irrespective of the place where services are performed, and irrespective of whether they are provided through a permanent establishment or fixed base, subject to certain limited exclusions.

16. A majority of the members of the Subcommittee rejected the position that a State should be entitled to tax income from services derived by a resident of the other Contracting State only if the services are provided in the first State. In addition, the majority rejected the argument that a State should be entitled to tax income from services only if the service provider's physical presence in the State meets a threshold requirement, usually a permanent establishment or fixed base.

17. Article xx allows fees for services to be taxed by a Contracting State on a gross basis. Many developing countries have limited administrative capacity and need a simple, reliable and efficient method to enforce tax imposed on income from services derived by non-residents. A withholding tax imposed on the gross amount of payments made by residents of a country, or by non-residents with a permanent establishment in the country, is well established as an effective and efficient method of collecting tax imposed on non-residents. Such a method of taxation may also simplify compliance for enterprises providing services in another State since they would not be required to compute their net profits or file tax returns.

18. Article xx may result in some non-resident service providers requiring the grossing-up of the cost of services provided to residents of a Contracting State. Countries should be aware of this possibility, in the same way that they should be aware of the possibility of similar grossing-up with respect to interest and royalties under Articles 11 and 12, respectively. The possibility that fees for services may be grossed up is a factor to be taken into account in considering the inclusion of Article xx in a bilateral tax treaty, along with many other factors. It is also a factor to be taken into account in establishing the maximum rate of tax imposed by a Contracting State on fees for services under paragraph 2 of Article xx.

19. It is argued that the taxation of fees for services on a gross basis under Article xx may result in excessive or double taxation. However, the possibility of excessive or double taxation is reduced or eliminated under Article 23 (Methods for the elimination of double taxation). In addition, the possibility of excessive or double taxation can be taken into account in establishing the maximum rate of tax imposed by a Contracting State on fees for services under paragraph 2 of Article xx and, depending on the negotiated rate, the risk of excessive tax may be completely eliminated.

20. A [significant] minority of the members of the Committee disagree with the policy justifications for Article xx, as discussed in paragraphs 13 to 19 above. Fundamentally, these members did not agree that the rapid changes in modern economies, particularly with respect to cross-border services, enable non-resident service providers to be substantially involved in another State's economy without a physical presence. Rather, these members were of the view that in cases of payments for services that are not provided in the payer's State, there is not sufficient nexus to that State that warrants taxation by that State on the payment.

21. These members of the Committee contend that, as a policy matter, taxation of fees for services by a State is justified only where a service provider resident in one State provides services in the other State through a permanent establishment or fixed base in that other State or stays in that other State for 183 days or more in any 12-month period.

22. These members were also concerned that the inclusion of Article xx would lead to trade distortions because goods and services would be taxed differently: the profits of an exporter of goods are taxable only in its State of residence, whereas, under Article xx, what is in effect an import tariff will be applied to fees for services. It is recognised however that goods are subject to a tax, an import duty levied on the importer.

23. In summary, these members did not accept the analysis in paragraphs 13 to 19 above, and regarded any expanded taxing jurisdiction with respect to fees for services as an unjustified shift of the balance of taxation from the place where services are provided to the place where services are consumed. Countries sharing these concerns may wish not to include Article xx in their bilateral tax treaties.

24. Countries concerned about the broad scope of Article xx might consider an alternative version of Article xx (similar to the alternative version of former Article 12A provided in paragraphs 26 to 31 of the Commentary on former Article 12A). Under this alternative, Article xx would potentially apply to all fees for services provided in a Contracting State, and also to fees for services provided outside that State by closely related persons, other than payments expressly excluded from the definition of "fees for services."

Under this alternative provision, paragraphs 1, 2, 3, 4, and 7 of Article xx would remain unchanged. However, paragraphs 5 and 6 would be replaced by the following paragraphs:

> 5. For the purposes of this Article, fees for services shall be deemed to arise in a Contracting State if:
>
> (*a*) the services are performed in that State; or
>
> (*b*) the payer is a resident of that State and the fees are paid to a closely related enterprise or person unless the payer carries on business in the other Contracting State through a permanent establishment situated in that State, and such fees are borne by that permanent establishment; or
>
> (*c*) the payer has in that State a permanent establishment in connection with which the obligation to pay the fees for services was incurred, and such fees are borne by such permanent establishment and are paid to a closely related enterprise or person.
>
> 6. For the purposes of this Article, paragraph 9 of Article 5 applies to determine if a person is closely related to an enterprise.

25. Under this alternative, a country would be entitled to impose tax under paragraph 2 of Article xx up to the maximum agreed rate on fees for services paid by a resident of that country or by a non-resident with a permanent establishment in that country to a resident of the other Contracting State if the fees for services arise in the first State. Fees for services would be deemed to arise in a country in accordance with paragraph 5 if:

1. the services are provided in that country or
2. the services are provided outside that country by a person who is closely related to the payer of the fees.

Thus, like Article xx, this alternative provision would apply to all fees for services as defined in paragraph 3; it would not provide different treatment for different types of services with the exception of fees for construction and related services and for insurance. However, under this alternative provision, a Contracting State would not be entitled to tax fees for services paid to service providers resident in the other Contracting State that are not closely related to the payer for services performed outside the first State. In contrast, under Article xx, fees for services paid by residents of one Contracting State (or non-residents with a permanent establishment in that State) to any service providers resident in the other Contracting State – whether or not they are closely related to the payer – for services provided outside the first-mentioned State would be taxable by that State. However, under the alternative provision, a Contracting State would be entitled to tax fees for services provided outside that State only if the services are provided by persons closely related to the payer.

26. Where fees for services are dealt with in both Article xx and Article 7, paragraph 6 of Article 7 provides that the provisions of Article xx prevail. However, this priority for the application of Article xx does not apply if the beneficial owner of the fees for services carries on business through a permanent establishment in the Contracting State in which the fees for services arise and those services are effectively connected with the permanent establishment or business activities referred to in subparagraph (c), paragraph 1 of Article 7. In this situation, paragraph 4 of Article xx provides that the provisions of Article 7 apply instead of Article xx.

27. Unlike subparagraph *(b)* of paragraph 3 of Article 5, which was deleted from the United Nations Model Tax Convention upon the adoption of Article xx in 20__, subparagraph *(a)* dealing with construction and related activities, was retained in the United Nations Model Tax Convention. As a result, an enterprise of one Contracting State that performs construction, assembly, installation or supervisory activities in the other State for 6 months or more in any 12-month period is deemed to have a permanent establishment in the other State and the profits attributable to the permanent establishment are taxable by that other State in accordance with Article 7 as a result of paragraph 4 of Article xx. However, Article xx applies to any fees for construction and related activities received by a resident of one Contracting State from a resident of the other State or from a non-

resident where the fees are borne by a permanent establishment of the non-resident in the other State to the extent that the fees are not covered by Article 7. Thus, fees derived by a service provider resident in one Contracting State from construction or related activities that are performed in the other State for less than 6 months or that are performed outside the other State on behalf of a resident of the other State or on behalf of a non-resident of the other State with a permanent establishment in the other State that bears the fees for such services are taxable by the other State in accordance with Article xx.

28. There is no overlap between Article xx and Articles 15, 18 and 19 dealing with income from employment, pensions and government services, respectively, because the definition of "fees for services" in paragraph 3 of Article xx expressly excludes payments, including pension payments, to employees of the person making the payment. [*revise if alternative wording of Article xx(3)(a) is adopted. Perhaps add cross-reference to paragraph 60 below, which states that pensions are excluded.]* Thus, for example, payments received by an employee from an employer resident in a country for employment services exercised outside that country would not be taxable by that country under paragraph 2 of Article xx.

29. Since paragraph 2 of Article xx is subject to the provisions of Articles 8 (International shipping and air transport), 16 (Directors' fees and remuneration of top-level managerial officials) and 17 (Artistes and sportspersons), Article xx does not apply to fees for services to which the provisions of those Articles apply. In general, the taxing rights of a country under Articles 8, 16 or 17 are unlimited, whereas the taxing rights under paragraph 2 of Article xx are limited to the maximum percentage of the gross fees for services agreed to in that provision. The relationship between paragraph 2 of Article xx and Articles 8, 16 and 17 is discussed further in the Commentary on paragraph 2.

B. Commentary on the paragraphs of Article xx

Paragraph 1

30. This paragraph establishes that fees for services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in the other Contracting State. It does not, however, provide that such fees are taxable exclusively by the State of residence.

31. In most cases, the person who provides services will receive fees for those services. If the person who receives fees for services is not the person who provides those services, it is a matter of domestic law as to who is the proper taxpayer with respect to those fees. If fees for services are paid to a person, other than the person who provides the services, Article xx applies to the fees as long as the recipient is a resident of the other Contracting State.

32. The expression "fees for services" is defined in paragraph 3 to mean any "payment" for any services. The term "payment" has a broad meaning consistent with the meaning of the related term "paid" in Articles 10 and 11. As indicated in paragraph 3 of the Commentary on Article 10 and paragraph 6 of the Commentary on Article 11, the concept of payment means the fulfilment of the obligation to put funds at the disposal of the service provider in the manner required by contract or custom.

33. Article xx deals only with fees for services arising in a Contracting State and paid to a resident of the other Contracting State. It does not, therefore, apply to fees for services arising in a third State. Paragraph 5 and paragraph 6 specify when fees for services are deemed to arise in a Contracting State and deemed not to arise in a Contracting State, respectively. Under paragraph 5, fees for services are considered to arise in a Contracting State if they are paid by a resident of that State or if they are borne by a permanent establishment in that State of a person resident in another State. However, under paragraph 6, fees for services paid by a resident of a Contracting State are deemed not to arise in that State if they are borne by a permanent establishment that the resident has in the other Contracting State.

Paragraph 2

34. This paragraph lays down the principle that the Contracting State in which fees for services arise may tax those payments in accordance with the provisions of its domestic law. However, if the beneficial owner of the fees is a resident of the other Contracting State, the amount of tax imposed by the State in which the

fees for services arise may not exceed a maximum percentage, to be established through bilateral negotiations, of the gross amount of the fees.

35. When considered in conjunction with Article 23 (Methods for the elimination of double taxation), paragraph 2 establishes the primary right of the country in which fees for services arise to tax those payments in accordance with its domestic law (subject to the limitation on the maximum rate of tax if the beneficial owner of the fees is a resident of the other Contracting State). Accordingly, the country in which the recipient of the fees is resident is obligated to prevent double taxation of those fees.

36. Under Article 23 A or 23 B, the residence country is required to provide relief from double taxation through the exemption from tax of the fees for services or the granting of a credit against tax payable to the residence country on the fees for services for any tax imposed on those fees by the other Contracting State in accordance with Article xx. In this regard, where a country applies the exemption method under Article 23 A, it is entitled to apply the credit method under paragraph 2 of Article 23 A with respect to items of income taxable under Article 10, 11, 12, xx or 12B.

37. The decision not to recommend a maximum rate of tax on fees for services is consistent with Articles 10, 11, 12 and 12B of the United Nations Model Tax Convention dealing with dividends, interest, royalties, and income from automated digital services, respectively. This decision can be justified under current treaty practice. The tax rate on fees for services adopted in bilateral tax treaties between developed and developing countries may vary widely. Thus, the maximum rate of tax on fees for services is to be established through the bilateral negotiations of the Contracting States.

38. In determining the maximum rate of tax on fees for services, the Contracting States should take into account several factors, including the following:

- The possibility that a high rate of tax imposed by a country might cause non-resident service providers to pass on the cost of the tax to customers in the country, which would mean that the country would increase its revenue at the expense of its own residents rather than the non-resident service providers.
- The possibility that a tax rate higher than the foreign tax credit limit in the residence country might deter investment.
- The possibility that some non-resident service providers may incur high costs in providing services, so that a high rate of tax on the gross fees may result in an excessive tax rate on the net income derived from the services.
- The potential benefit of applying the same rate of tax both to royalties under Article 12 and to fees for services under Article xx (see example 6 in paragraphs __ and __ below).
- The fact that a reduction of the tax rate has revenue and foreign-exchange consequences for the country imposing tax.
- The relative flows of fees for cross-border services between the Contracting States (e.g., from developing to developed countries).

39. Paragraph 2 of Article xx applies in priority to Article 7 as a result of paragraph 6 of Article 7 of the United Nations Model Tax Convention. Thus, the conditions for the taxation of the business profits of an enterprise under Article 7 do not apply to fees for services covered by paragraph 2 of Article xx. Fees for services are taxable by a Contracting State under paragraph 2 if the fees arise in that State irrespective of whether the enterprise providing the services has a permanent establishment in that State, provides services that are similar to those effected through the permanent establishment or provides the services in that State. However, by virtue of paragraph 4 of Article xx, if an enterprise of a Contracting State provides services through a permanent establishment in the other Contracting State and receives fees for those services within the meaning of paragraph 3, Article 7 will apply to those payments in priority to paragraph 2 of Article xx.

40. The application of paragraph 2 is expressly subject to the provisions of Article 8. Certain payments for international shipping and air transport under Article 8 could be within the definition of “fees for services” in paragraph 3. This might be the case with respect to auxiliary activities that are closely connected to the

direct operation of ships and aircraft, as discussed in paragraph 13 of the Commentary on Article 8 of this Model. To eliminate any uncertainty in this regard, paragraph 2 explicitly provides that in any situation in which both Article xx and Article 8 apply to the same services, the provisions of Article 8 prevail. However, any fees for international shipping and air transport services that are not taxable under Article 8 may be subject to tax under Article xx by the State in which the fees arise.

41. Paragraph 2 is subject to the provisions of Article 16 dealing with directors' fees and the remuneration of top-level managerial officials. Therefore, where directors' fees or remuneration of top-level managerial officials are taxable under Article 16 by the Contracting State in which the company paying the fees or remuneration is resident, Article xx does not apply to the fees or remuneration because paragraph 2 is expressly subject to the provisions of Article 16. The taxing rights of a Contracting State under Article 16 are unlimited, whereas the taxing rights under Article xx are limited to the maximum rate of tax agreed to by the Contracting States in paragraph 2. If, however, the payments are outside the scope of Article 16 (because, for example, the payments are made with respect to services provided by the individual in a capacity other than that of a director or top-level managerial official of the company, such as an independent contractor), the other State is entitled to tax those payments in accordance with paragraph 2.

42. Similarly, paragraph 2 is expressly subject to the provisions of Article 17 dealing with entertainment or sports activities. Where fees payable for such activities are within the definition of "fees for services" in paragraph 3, there may be an overlap between the provisions of paragraph 2 and Article 17. To provide certainty in such cases, paragraph 2 provides that Article 17 takes precedence over Article xx in cases where both provisions apply. If, however, an artiste or sportsperson resident in one Contracting State receives fees for services from a person resident in the other Contracting State and those fees are outside the scope of Article 17 (because, for example, although the fees are in consideration for personal activities as an artiste or sportsperson, those activities take place outside the country in which the payer is resident), the first Contracting State would be entitled to tax the fees under paragraph 2 of Article xx.

43. The requirement of beneficial owner is included in paragraph 2 to clarify the meaning of the words "paid to a resident" as they are used in paragraph 1 of the Article. It clarifies that a Contracting State is not obliged to give up taxing rights over fees for services merely because those fees were paid directly to a resident of another State with which the first State had concluded a convention.

44. Since the term "beneficial owner" is included in paragraph 2 to address potential difficulties arising from the use of the words "paid to a resident" in paragraph 1, it is 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. 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)57 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.

45. For example, where the trustees of a discretionary trust do not distribute fees for services 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 fees for the purposes of Article xx even if they are not the beneficial owners under the relevant trust law.

46. Relief or exemption in respect of an item of income is granted by a State 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 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 a State to grant relief or exemption merely on account of the status of the direct recipient of the income as a resident of the other Contracting State. The direct recipient of the income 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.

47. It would be equally inconsistent with the object and purpose of the Convention for a State 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 OECD's Committee on Fiscal Affairs entitled "Double

Taxation Conventions and the Use of Conduit Companies" 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.

48. In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the fees for services is not the "beneficial owner" because that recipient's right to use and enjoy the fees is constrained by a contractual or legal obligation to pass on the fees 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 fees unconstrained by a contractual or legal obligation to pass on the fees received to another person. This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the fees by the direct recipient such as an obligation that is not dependent on the receipt of the fees and which the direct recipient has as a debtor or as a party to financial transactions. Where the recipient of fees for services does have the right to use and enjoy the fees unconstrained by a contractual or legal obligation to pass on the fees received to another person, the recipient is the "beneficial owner" of those fees.

49. The fact that the recipient of fees for services is considered to be the beneficial owner of those fees 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. 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 structures and, more generally, treaty shopping situations. These include specific anti-abuse provisions in domestic law and treaties, general anti-abuse rules in domestic law and tax treaties, judicial doctrines, such as substance-over-form or economic substance approaches, and the interpretation of tax treaty provisions. 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 fees for services 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.

50. 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 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 paragraph 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, 11, 12, xx and 12B, the term "beneficial owner" is intended to address difficulties arising from the use of the words "paid to" in relation to dividends, interest, royalties and fees for services rather than difficulties related to the ownership of the underlying property or rights in respect of which the amounts 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".

51. The paragraph lays down nothing about the mode of taxation in the State in which fees for services arise. Therefore, it leaves that State free to apply its own laws and, in particular, to levy the tax either by deduction at source or by individual assessment. As with other provisions of the United Nations Model Tax Convention, procedural questions are not dealt with in the Article. Each State is able to apply the procedure provided in domestic law.

Paragraph 3

52. This paragraph specifies the meaning of the phrase "fees for services" for purposes of Article xx. The definition of "fees for services" in paragraph 3 is intended to be exhaustive. "Fees for services" are limited to the payments described in paragraph 3; (see the examples in paragraphs __ to __ below).

53. Article xx applies to all fees for services except those fees for services expressly excluded from the definition of "fees for services" in paragraph 3 and fees for services within the scope of Articles 8, 16, and

17 to which paragraph 2 is subject. Paragraph 3 defines "fees for services" broadly as "any payment in consideration for any service" other than certain payments expressly excluded from the definition.

54. The definition of "fees for services" does not include a reference to the domestic law of a Contracting State. The lack of any reference to domestic law is justified because:

(*a*) the definition in paragraph 3 generally covers most payments that are regarded as payments for services under the domestic law of most countries;

(*b*) such a reference could introduce a large element of uncertainty;

(*c*) otherwise, future changes in a country's domestic law with respect to the taxation of fees for services could have an effect on the Convention; and

(*d*) in the United Nations Model Tax Convention, reference to domestic laws should be avoided as far as possible.

55. Although paragraph 3 defines the phrase "fees for services," it does not provide a definition of the term "services." Similarly, the provisions of the United Nations Model Tax Convention, which Article xx replaced, did not contain any definition of the term "services." Neither Article 12B, which deals with automated digital services, nor Article 19, which deals with services rendered to the government of a Contracting State, provides a definition of the term "services."[78]

56. Although the term "services" in the phrase "fees for services" is undefined in the context of Article xx, the term "services" should be understood to have a broad meaning in accordance with ordinary usage to include activities carried on by one person for the benefit of another person in consideration for a fee. Such activities can be carried out in a wide variety of ways and the manner in which such services are provided does not alter their character for the purpose of Article xx, to the extent that such services fall within the definition of "fees for services" in paragraph 3.

57. Paragraph 2 of Article 3 of the United Nations Model Tax Convention provides that the meaning of an undefined term in the Convention should be determined from time to time under the domestic law of the Contracting State applying the Convention. Since the term "services" in Article xx is not defined, paragraph 2 of Article 3 may suggest that the meaning of services should be determined in accordance with the domestic law of the State applying the Convention. However, the determination of the meaning of undefined terms in accordance with domestic law is expressly subject to the caveat "unless the context requires otherwise." Thus, a domestic law meaning of services that is limited to certain types of services would be inconsistent with the purpose of Article xx, and the context of Article xx and the Convention as a whole would require a broader meaning.

58. Although the term "services" is intended to have a broad meaning, it is not intended to include payments of rent or royalties for the use of immovable, tangible or intangible property or payments of interest for the use of money. Payments of rent or royalties for the use of property do not usually involve the furnishing of services by the owner of the property or, where the owner of the property does provide services, those services are usually ancillary to the use of the property. Where the owner of property provides extensive services to the lessee that go beyond ancillary services, it may be necessary to apportion the payments by the lessee between the consideration for the use of the property and the consideration for the services. See paragraph __ of the Commentary on Article 12 for more guidance on such mixed contracts.

59. Similarly, payments of interest do not involve the lender providing any services to the borrower; the lender simply provides the use of the funds to the borrower for a period of time. However, fees for other financial services, such as guarantee fees, may be fees for services subject to Article xx.

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[78] Further, the General Agreement on Trade in Services does not contain any definition of the term "services."

60. As expressly provided in subparagraph (*a*) of paragraph 3, fees for services for purposes of Article xx do not include payments of salary, wages or other remuneration to an employee of the payer. Where such payments are made by an employer resident in one Contracting State to an employee resident in the other Contracting State, they are covered by Article 15 or Article 19 (Government service) of the Convention. In addition, since pensions arise in respect of prior employment, they are excluded from Article xx and are dealt with by Article 18 (Pensions and social security payments) even though the employment involved the provision of services to the employer.

61. The definition of fees for services does not exclude payments for teaching in an educational institution or teaching by an educational institution, although the definition of "fees for technical services" in paragraph 3 of former Article 12A (Fees for technical services) did exclude fees for such services. Thus, if an educational institution established in one Contracting State pays for teaching services provided by an individual, other than an employee, or by an enterprise resident in the other Contracting State, the payments made by the educational institution for those teaching services are subject to tax by the first State in accordance with paragraph 2. Similarly, if an educational institution established in one Contracting State receives payments from an enterprise resident in the other Contracting State for teaching services provided by that institution to some of the enterprise's employees, the payments received by the educational institution for those teaching services are fees for services subject to tax under paragraph 2 of Article xx. However, payments (such as tuition fees) by an individual to an educational institution for services provided by that institution to an individual are not subject to Article xx because of the exclusion in subparagraph (b) of paragraph 3 of Article xx.

62. Some countries may be concerned about taxing educational institutions on fees for teaching services provided by such institutions or about taxing fees for teaching services paid by such institutions. These countries may wish to include a provision in paragraph 3 to exclude "fees paid by an educational institution for teaching in an educational institution and/or fees received for teaching by an educational institution", similar to the exclusion in paragraph 3 of the former Article 12A.

63. As expressly provided in subparagraph (*b*) of paragraph 3, the definition of "fees for services" does not include payments by individuals for services for the personal use of an individual. Where such payments are not deductible by those individuals for tax purposes, they would not cause any reduction of the tax base of the State in which the fees for services arise. Moreover, the imposition of withholding tax obligations on such payments by individuals under domestic law may be difficult to enforce and might cause serious compliance problems for individuals utilizing services supplied remotely by non-residents.

64. Countries that wish to extend Article xx to include payments by individuals for services consumed by an individual may choose to omit subparagraph (*b*) of paragraph 3. The inclusion of payments by individuals for services for the personal use of an individual within the scope of Article xx would be consistent with Article 12B, which applies to payments for automated digital services by individuals.

[Alternatively, if the Committee decides that the scope of article XX in the Model should not include payments by individuals for services for the personal use of an individual, we could draft a paragraph that includes the payment in the commentary.]

65. The definition of "fees for services" in paragraph 3 does not exclude [profits from international shipping and air transport,] directors' fees and remuneration of top-level managerial officials, and income from entertainment and sports activities. However, such income (even if it is within the definition of "fees for services" in paragraph 3) is not subject to tax by a country under paragraph 2 if it is subject to tax under Article 8 (International shipping and air transport), 16 (Directors' fees and remuneration of top-level managerial officials) or 17 (Artistes and sportspersons), as the case might be, because paragraph 2 is expressly subject to the provisions of Articles 8, 16 and 17.

[__. Subparagraph (*e*) of the definition of "fees for services" in paragraph 3 excludes fees for international shipping and air transport services as defined in Article 3. As a result, fees for such services paid by a resident of one Contracting State (or borne by a permanent establishment of a non-resident in that State) to an enterprise of the other Contracting State are taxable exclusively by that other State in accordance with the provisions of Article 8.] [alternative depending on the Committee's decision]

66. The definition of "fees for services" in paragraph 3 excludes any income from automated digital services as defined in paragraphs 5 and 6 of Article 12B. As a result, income from automated digital services is taxable exclusively in accordance with Article 12B and any overlap between Articles 12B and Article xx with respect to such services is avoided. [Given that Article 12B did not apply to any fees for technical services covered by former Article 12A, some countries may prefer for Article xx to have priority over Article 12B in the event that both provisions apply to the same fees for services. These countries should ensure that Article 12B contains an exclusion worded along the following lines:

"The provisions of this Article shall not apply if the payments underlying the income from automated digital services qualify as ["royalties" or] "fees for services" under [Article 12 or] Article xx as the case may be."]

67. Subparagraph (*d*) of paragraph 3 of the definition of "fees for services" excludes payments to an insurance enterprise for insurance. As a result, fees paid by a resident of one Contracting State (or fees borne by a permanent establishment in that State of a non-resident) to an insurance enterprise resident in the other Contracting State are taxable exclusively by that other State in accordance with the provisions of Article __.

68. Although the addition of Article xx to the United Nations Model Tax Convention was accompanied by the deletion of subparagraph (*b*) of paragraph 3 of Article 5, subparagraph (*a*) of paragraph 3 of Article 5 dealing with construction and related services was retained (and renumbered as paragraph 3). Where construction, assembly, installation and supervisory activities performed by a resident of one Contracting State in connection with a construction project in the other Contracting State lasts for at least 6 months, the service provider is deemed to have a permanent establishment in the other State. As a result, the profits attributable to the permanent establishment would be taxable in accordance with Article 7 rather than Article xx by virtue of the application of Article xx(4). However, any construction services not covered by paragraph 3 of Article 5 (i.e. construction services performed in the other State for less than 6 months and such services performed outside the other State), would be taxable by the Contracting State in which the fees for services arise in accordance with Article xx. Countries that wish to avoid this result may consider either deleting subparagraph (a) of paragraph 3 of Article 5 (as well as subparagraph (b)) or adding an exclusion for all construction, assembly, installation and supervisory activities to paragraph 3 of Article xx. Deleting subparagraph (*a*) would result in fees for construction, assembly, installation and supervisory activities being taxable by the state in which the fees arise in accordance with Article xx, except where the fees are effectively connected with a permanent establishment that the service provider has in that State in which case Article 7 would apply. In contrast, where fees for construction, assembly, installation and supervisory activities are excluded from the definition of fees for services, they would be taxable exclusively by the State in which the service provider is resident in accordance with Article 7 unless the service provider has a permanent establishment in the other State and the fees are effectively connected with the permanent establishment.

69. The treatment of reimbursements of expenses for purposes of the definition of "fees for services" in paragraph 3 poses special difficulties. As an initial matter, it is important to distinguish between an allowance for expenses and the reimbursement of expenses. An allowance is an amount usually established in advance for which the recipient of the allowance is not obligated to account; a per diem allowance for meals and accommodation is an example of a typical allowance. Since the recipient of an allowance does not have to account for the actual expenses incurred, any allowance received by a person for services performed by that person is included within the meaning of "fees for services" under paragraph 3.

70. The reimbursement of expenses is different from an allowance because the person must account for the actual expenses incurred, and only those actual expenses qualify for reimbursement. The issue is whether payments received in reimbursement of actual expenses incurred in connection with the provision of services should be included in the definition of "fees for services" for purposes of Article xx.

71. First, a person may be reimbursed for expenses incurred in connection with providing services, but may not receive any fee for those services. For example, an individual resident in one Contracting State might be invited to speak at a conference or participate in a meeting in the other Contracting State and might be reimbursed for his or her travel expenses, but not receive any fee. In these circumstances, it seems difficult

to justify the application of tax to the reimbursement. However, unless reimbursements are explicitly excluded from the definition of "fees for services", paragraph 2 would permit the State in which the fees arise to impose tax on the reimbursement at the rate specified in the treaty.

72. Second, a non-resident service provider may be paid a fee and separately reimbursed for all the expenses incurred in providing the services. In these circumstances, if reimbursements are excluded from the definition of fees for services, the tax imposed by the State in which the fees arise would be limited to the amount of the fee. On these facts, the fee represents the non-resident's entire net profit from the performance of the services. However, the maximum limit on the tax imposed under paragraph 2 is based on the gross amount of the payments, and the rate of tax specified in Article xx may have been established on the assumption that the fees represent the non-resident's gross revenue. As a result, if reimbursements are excluded from the definition of fees for services, the rate of tax agreed to by the Contracting States may be too low. Moreover, the exclusion of reimbursements from the definition of fees for services might lead to abuses. For example, in order to reduce the source country's tax, non-resident service providers might receive payments labeled as reimbursements that are actually fees, or might be reimbursed for expenses for which they would not ordinarily be reimbursed. Preventing these types of abuses would impose a significant administrative burden on the tax authorities.

73. Third, a non-resident service provider might not be reimbursed for any of the expenses incurred in providing the services. In this case, the amount of the payment received by the non-resident service provider may be greater than the amount of the service provider's net profit. The maximum rate of tax in paragraph 2 may have been agreed to on the assumption that some of a non-resident's expenses would be reimbursed. On this assumption, the maximum rate of tax may be established at a higher rate than it otherwise would be in order to approximate the amount of tax on a service provider's net profit. Therefore, if reimbursements are excluded from the definition of "fees for services", the rate established in the treaty might be too high for a non-resident service provider that receives no reimbursement for expenses.

74. The issues discussed in paragraphs 69 to 73 above are illustrated in the example in paragraph 75 below, which shows that the effect of a gross-based tax on fees for services depends, in part, on whether payments in reimbursement of expenses are subject to tax and the extent to which service providers are reimbursed for their expenses.

75. Example: X, a resident of Country A, is a management consultant who provides advice to companies concerning best practices for corporate governance. X enters into a contract to provide services to BCo, a public company resident in Country B, for a period of 60 days for fees of 5,000 per day plus the reimbursement of all reasonable expenses incurred in providing the services. X receives fees of 300,000 from BCo and a payment of 250,000 in reimbursement for expenses. Thus, in this situation, X's net profit from the services provided to BCo is 300,000. Assume that Country A and Country B have entered into a tax treaty with provisions identical to those of Article xx of the United Nations Model Tax Convention, which allows the imposition of withholding tax on fees for services at a maximum rate of 5 per cent. On these facts, assuming that the payment in reimbursement for X's expenses is not considered to be fees for services, Country B would be entitled to impose tax of 15,000 of the fees received by X, which represents a relatively low tax rate of 5 percent on X's net profit. Alternatively, assuming that the payment of 250,000 in reimbursement of X's expenses is also considered to be part of X's fees for services subject to withholding tax under Article xx, Country B would be entitled to impose tax of 27,500, which represents a tax rate of over 9 per cent on X's net profit. If X did not receive any reimbursement for expenses, Country B's tax would be 15,000, representing a tax rate of 30 percent on X's net profit of 50,000 irrespective of whether payments in reimbursement of expenses are subject to tax under Article xx as fees for services.

76. It appears to be extremely difficult to predict to what extent, on average, non-resident service providers are reimbursed for their expenses. As a result, any single rule for the treatment of reimbursements is likely to operate improperly in some situations. On the one hand, if reimbursements are excluded from the definition of "fees for services", the rate of tax agreed to in the treaty might be too low where most or all of a non-resident's expenses are reimbursed, but too high where none of the expenses are reimbursed. Also, if reimbursements are excluded, taxpayers might try to disguise part of their fees as reimbursements of expenses and it might be difficult for the tax authorities to detect such abuses. On the other hand, if

reimbursements are not excluded, the rate of tax agreed to in the treaty might be too high where a non-resident's expenses are reimbursed, but too low where they are not reimbursed.

77. As a result of the difficulties described in the foregoing paragraphs, the solution that has been adopted is to omit any reference to the reimbursement of expenses in the definition of "fees for services" in paragraph 3 of Article xx. However, countries are encouraged to deal with the problem in their domestic laws and to take the issue into account in establishing the maximum rate of tax under paragraph 2 of Article xx.

78. It is often necessary to distinguish between fees for services, especially fees for technical services, and royalties in order to determine whether Article 12 or Article xx of the Convention is applicable. The distinction between fees for services and royalties is clear in principle. Under paragraph 3 of Article 12, royalties are payments for the use, or the right to use, certain types of property or for information concerning industrial, commercial or scientific experience (so-called know-how). In contrast, the performance of services does not involve any transfer of the use of, or the right to use, property. However, in practice, it is often difficult to distinguish between royalties and fees for services, including technical services, especially with respect to so-called mixed contracts. Guidance with respect to the distinction between fees for services and royalties is provided in paragraph 13 of the Commentary on Article 12 of this Model, which reproduces para- graphs 11.2–11.6 of the Commentary on Article 12 of the 2017 OECD Model Tax Convention (see also paragraphs __ to __ below).

79. The following examples illustrate the application of the definition of "fees for services" in paragraph 3.

80. Example 1: X is a resident of State R and a heart surgeon. X's practice is carried on primarily in State R, although X occasionally travels to other countries to perform heart surgery. X performs surgery in State R on an individual resident of State S. The tax treaty between State R and State S contains a provision identical to Article xx of the United Nations Model Tax Convention. Although the payments made by the patient, a resident of State S, to X would be considered to be fees for services that arise in State S, they are explicitly excluded from the definition by subparagraph (*b*) of paragraph 3 because the payer is an individual. As a result, the payments would not be taxable by State S in accordance with paragraph 2 of Article xx.

81. The result in Example 1 would be the same if X travelled to State S and performed the surgery in State S unless X provided the services through a permanent establishment in State S through which X carried on business, in which case Article 7 would apply by virtue of paragraph 4 of Article xx.

82. Example 2: X is a resident of State R and a heart surgeon. X's practice is carried on primarily in State R, although X occasionally travels to other countries to perform heart surgery. X enters into a contract with a health services company resident of State S under which X agrees to perform heart surgery on patients referred to him by the health services corporation. X is not an employee of the health services company. The surgeries are performed both in State S and in State R. The tax treaty between State R and State S contains a provision identical to Article xx of the United Nations Model Tax Convention. Under paragraph 3 of Article xx, the payments made by the health services company, a resident of State S, to X would be considered to be fees for services that arise in State S, irrespective of whether the surgery is provided in State S, State R or a third State. As a result, the payments would be taxable by State S in accordance with paragraph 2 of Article xx. If, however, X were an employee of the health services company, the payments to X would be excluded from the definition of "fees for services" by subparagraph (*a*) of paragraph 3.

83. Example 3: R Company is a financial institution resident of State R. R Company provides a wide variety of financial services to its customers, including acceptance of deposits, extension of credit, credit and debit cards, payment and transmission services, banker's drafts, guarantees, foreign exchange, negotiable instruments, derivative products, investment research and advisory services. R Company's business is conducted primarily in State R, but it also has clients in other countries, including State S. State R and State S have a tax treaty that is identical to the United Nations Model Tax Convention, including Article xx.

84. The payments received for services provided by a financial institution are clearly fees for services within the meaning of paragraph 3 of Article xx. If, however, R Company provides the services through a

permanent establishment located in State S, the fees received for those services would be taxable by State S in accordance with Article 7 rather than Article xx by virtue of paragraph 4 of Article xx.

85. However, where a financial institution receives interest in consideration for lending funds to a client, the interest is not considered to be fees for services because the financial institution has simply allowed its client to use its property for a period; it has not performed any services for the client. This result would also apply where an enterprise resident of one State receives rent for allowing a client resident in another State to use property owned or leased by the enterprise for a period.

86. Example 4: S Company, a resident of State S, enters into a contractual arrangement with R Company, a resident of State R, for the right to use a patented chemical formula owned by R Company for the production of an industrial substance. The contract also requires R Company to use its specialized knowledge and expertise to assist S Company in producing the industrial substance in accordance with specifications set out in the contract. In particular, R Company will provide the following services to S Company:

— provide the production procedures and assist S Company in carrying out those procedures and

— provide specifications concerning the necessary materials, tools, and containers used in the production process.

R Company also agrees to use its best efforts to ensure that S Company is able to produce the industrial substance in the quantities and with the characteristics that S Company expects. State S and State R have entered into a tax treaty with provisions identical to those of the United Nations Model Tax Convention, including those of Article xx.

87. In Example 4, the payments by S Company to R Company for the right to use the patented formula would be royalties within the meaning of paragraph 3 of Article 12, and not fees for services. However, the payments for the services provided by R Company to S Company would not be royalties because R Company is not transferring the use of or the right to use property to S Company. On the facts of Example 5, R Company is using its specialized knowledge, skill and experience on behalf of S Company and guaranteeing the result of S Company's use of the patented chemical formula. Consequently, the payments made by S Company to R Company are fees for services provided by R Company within the meaning of paragraph 3 of Article xx. State S would be entitled to impose tax on those fees under paragraph 2 of Article xx.

88. Example 5: S Company, a resident of Country S, enters into a contractual arrangement with R Company, a resident of Country R, to acquire the use of a secret formula or process developed by R Company. The contract requires R Company to provide the information to S Company subject to strict confidentiality conditions and to use its specialized knowledge and expertise to train employees of S Company with respect to the use of the secret formula or process. State R and State S have entered into a tax treaty with provisions identical to those of the United Nations Model Tax Convention, including those of Articles 12 and xx.

89. In Example 5, the payments made by S Company to R Company for the right to use the secret formula or process would be payments for "information concerning industrial, commercial or scientific experience" within the meaning of the definition of "royalty" in paragraph 3 of Article 12. This would be the case even if the information represents know-how that is not patented or otherwise protected by intellectual property laws. Similarly, the payments made by S Company to R Company for the training of S Company's employees would also be payments for "information concerning industrial, commercial or scientific experience" within the meaning of the definition of "royalty" in paragraph 3 of Article 12, since the training is necessary to transfer R Company's know-how to S Company. Therefore, irrespective of whether the payments for the training are provided separately from the payments for the secret formula or process or whether the contract provides for a single payment for both, the payments for the training would be considered to be royalties under Article 12 rather than fees for services under Article xx. However, if the training provided by R Company was not necessary to transfer the secret formula or process to S Company and S Company could obtain such training from other sources, the training would not be considered to be a

transfer of know-how and the payments for the services would be considered fees for services within the definition in paragraph 3 of Article xx.

Paragraph 4

90. This paragraph provides that paragraphs 1 and 2 do not apply to fees for services if the person who provides the services has a permanent establishment in the State in which the fees arise and the fees are effectively connected with that permanent establishment. In this regard, paragraph 4 of Article xx is similar to paragraph 4 of Article 10, paragraph 4 of Article 11, paragraph 4 of Article 12, and paragraph 8 of Article 12B. Thus, if a resident of one Contracting State provides services through a permanent establishment located in the other Contracting State, the fees received for those services are taxable by the State in which the permanent establishment is located in accordance with Article 7, rather than in accordance with Article xx.

91. Since Article 7 of the United Nations Model Tax Convention adopts a limited force-of-attraction rule, which expands the range of income that may be taxed as business profits, paragraph 4 also makes paragraphs 1 and 2 inapplicable if the fees for services are effectively connected with business activities in the State in which the fees arise that are of the same or similar kind as those effected through the permanent establishment.

92. Paragraph 4 of Article xx does not define the meaning of the expression "effectively connected." As a result, whether fees for services are effectively connected with a permanent establishment or business activities similar to those carried on through a permanent establishment must be determined on the basis of all the relevant facts and circumstances of each case. In general, fees for services would be considered to be effectively connected with a permanent establishment if the services are closely related to or connected with the permanent establishment. Also, fees for services would be effectively connected with business activities referred to in paragraph 1(*c*) of Article 7 where the services are provided by an enterprise as part of that enterprise's business activities carried on in a Contracting State where a permanent establishment of that enterprise is situated, and these activities are of the same or similar kind as the business activities performed through that permanent establishment.

93. Where paragraph 4 applies, fees for services are taxable by the State in which the fees arise as part of the profits attributable to the permanent establishment in accordance with Article 7. Thus, paragraph 4 relieves the State in which the fees for services arise from the limitations on its taxing rights imposed by Article xx. Where Article 7 applies as a result of the application of paragraph 4, most countries consider that the State in which the permanent establishment is located is limited to taxing only the net profits from the services attributable to the permanent establishment, although the rate of tax on those profits is not limited. Article 7 does not preclude taxation of business profits attributable to a permanent establishment on a gross basis, but a Contracting State must not discriminate against residents of the other State in violation of paragraph 3 of Article 24 (Non-discrimination).

Paragraphs 5 and 6

94. Paragraph 5 lays down the principle that the State in which fees for services arise for purposes of Article xx is the State of which the payer of the fees is a resident or the State in which the payer has a permanent establishment if the fees for services are borne by the permanent establishment. It is not necessary for the services to be provided in the Contracting State in which the payer is resident or has a permanent establishment. Whether a person is a resident of a Contracting State for purposes of Article xx is determined in accordance with the provisions of Article 4 of the Convention.

95. Where there is an obvious economic link between services being provided and the permanent establishment of the payer to which the services are provided, the fees for services are considered to arise in the Contracting State in which the permanent establishment is situated. This result applies irrespective of the residence of the person to which the permanent establishment belongs, even where that person resides in a third State.

96. Where there is no economic link between the services and the permanent establishment, the payments for services are considered to arise in the Contracting State in which the payer is resident. If the payer of fees for services is not a resident of a Contracting State, Article xx does not apply to the fees for services

unless the payer has a permanent establishment in the Contracting State and there is a clear economic link between the services and the permanent establishment. Otherwise, there would be, in effect, a force-of-attraction principle for fees for services, which would be inconsistent with other provisions of the United Nations Model Tax Convention.

97. Paragraph 5 is subject to paragraph 6, which provides an exception to the source rule in paragraph 5. Paragraph 6 deems fees for services paid by a resident of a Contracting State not to arise in that State if that resident (the payer) carries on business through a permanent establishment in the other Contracting State and the fees for services are borne by that permanent establishment. As a result, in these circumstances, the Contracting State in which the payer is resident is not allowed to tax the payments for services under paragraph 2 of Article xx.

98. The phrase "borne by" must be interpreted in the light of the underlying purpose of paragraphs 5 and 6, which is to provide source rules for fees for services. A Contracting State is entitled to tax fees for services under paragraph 2 only if the fees arise in that State. The basic source rule in paragraph 5 is that fees for services arise in a Contracting State where the payer is a resident of that State or the payer has a permanent establishment in that State and the fees for services are borne by that permanent establishment. However, the basic rule is limited by the deeming rule in paragraph 6 where the payer is a resident of a Contracting State but the fees for services are borne by a permanent establishment that the payer has in the other Contracting State.

99. Where fees for services are incurred for the purpose of a business carried on through a permanent establishment, those fees will usually qualify for deduction in computing the profits attributable to the permanent establishment under Article 7. The deductibility of the fees for services provides an objective standard for determining that the payments have a close economic connection to the State in which the permanent establishment is situated.

100. The fact that the payer has, or has not, actually claimed a deduction for the fees for services in computing the profits of the permanent establishment is not necessarily conclusive, since the proper test is whether any deduction available for those fees should be taken into account in determining the profits attributable to the permanent establishment. For example, that test would be met even if no amount were actually deducted as a result of the permanent establishment being exempt from tax or as a result of the payer simply deciding not to claim a deduction to which it was entitled. The test would also be met where the fees for services are not deductible for some reason other than the fact that the fees for services should not be allocated to the permanent establishment.

101. The application of paragraphs 5 and 6 can be illustrated by the following examples.

102. Example 6: R Enterprise is carried on by a resident of State R. R Enterprise provides services to S Company, a resident of State S. The tax treaty between State R and State S is identical to the United Nations Model Tax Convention, including Article xx. S Company carries on business in State S and in State R through a permanent establishment situated in State R. However, the services provided by R Enterprise to S Company are related to S Company's business carried on in State S, not to the business carried on through S Company's permanent establishment in State R.

103. In Example 6, since the payments are made by S Company, a resident of State S, and are not borne by a permanent establishment of S Company in State R, the fees for services would be considered to arise in State S in accordance with paragraph 5. Therefore, State S would be entitled to tax the fees for services under paragraph 2 of Article xx.

104. Example 7: The facts are the same as in Example 7, except that the fees for services are borne by S Company's permanent establishment in State R.

105. In Example 7, since the fees for services are borne by a permanent establishment of S Company situated in State R, paragraph 6 applies to deem the fees for services not to arise in State S. Consequently, the fees for services are not taxable by State S under paragraph 2 of Article xx but are taxable exclusively by State R under paragraph 1.

106. In Example 7, Article xx of the Convention denies State S the right to tax the fees for services despite the fact that the fees are paid by a resident of State S. This result is justified because the fees relate to a business carried on by a resident of State S through a permanent establishment in State R. In such a situation, where fees for services are deductible in computing the profits of a business attributable to a permanent establishment situated in the other Contracting State, those payments have a closer economic connection to the activities carried on in that other State than to State S.

107. Example 8: T Enterprise is carried on by a resident of State T. T Enterprise carries on business through a permanent establishment situated in State S. T Enterprise pays R Company, a resident of State R, for services provided by R Company for T Enterprise in connection with its income-earning activities carried on in State S. The payments made by T Enterprise to R Company for the services are deductible in computing the profits attributable to the permanent establishment of T Enterprise in State S. The tax treaty between State S and State T is identical to the United Nations Model Tax Convention including as regards the contents of Article xx.

108. In Example 8, although the fees for services are not paid by a resident of State S, the fees are borne by the permanent establishment that T Enterprise has in State S. In these circumstances, the fees for services have a close economic connection to the income-earning activities of T Enterprise carried on in State S. Thus, the fees are deemed to arise in State S in accordance with paragraph 5 and State S is entitled to tax the payments in accordance with paragraph 2 of Article xx.

109. In the case of interest and royalties, paragraph 21 of the Commentary on Article 11 and paragraph 19 of the Commentary on Article 12 of the United Nations Model Tax Convention indicate that countries might substitute a rule that would identify the source of interest or royalties as the State in which the loan giving rise to the interest or the property or right giving rise to the royalties was used. A similar source rule might be substituted for purposes of Article xx. Similarly, as suggested in the Commentary on Articles 11 and 12, where, in bilateral negotiations, the parties differ on the appropriate rule, a possible solution would be a rule that, in general, would accept the payer's place of residence as the source of fees for services, but where the services are used or consumed in a State having a place-of-use rule, the payment would be deemed to arise in that State.

110. Paragraph 6 provides no solution for the case where the beneficiary and the payer are residents of the Contracting States, but the fees for services were incurred for the benefit of a permanent establishment of the payer situated in a third State and the fees for services are borne by that permanent establishment. In such a case, the fees for services are deemed to arise in the Contracting State of which the payer is a resident under paragraph 5 and not in the third State in which the permanent establishment is situated. Thus, the fees for services will be taxed both in the Contracting State of which the payer is a resident and in the Contracting State of which the beneficiary is a resident. Although double taxation will be avoided between these two States, it will not be avoided between them and the third State if the third State taxes the fees for services because they are borne by the permanent establishment in its territory. Paragraph 6 is consistent in this regard with paragraph 5 of Article 11 and paragraph 5 of Article 12.

111. As explained in paragraph 27 of the Commentary on Article 11 (quoting paragraphs 29 and 30 of the Commentary on Article 11 of the 2017 OECD Model Tax Convention), if the third State did not subject the fees for services to tax and the relevant Treaty treated those fees as arising in that third State, there could be attempts to avoid taxation in the Contracting State of which the payer is a resident through the use of a permanent establishment situated in such a third State (see the Commentary on paragraph 8 of Article 29). States for which this is not a concern and that wish to address the issue described in paragraph 116 above may do so by agreeing, in their bilateral conventions, to the alternative formulation of paragraph 6 suggested in paragraph 112 below.

112. As mentioned in paragraph 111, the State of which the beneficiary is a resident and the State of which the payer of fees for services is a resident may avoid the double taxation described in paragraph 110 above by agreeing to the following wording of paragraph 6:

> 6. For the purposes of this Article, fees for services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State or

a third State through a permanent establishment situated in that other State or the third State and such fees are borne by that permanent establishment.

This wording would have the effect of ensuring that paragraphs 1 and 2 would not apply to such fees for services because they would not arise in a Contracting State. As a result, such fees for services would typically fall under Article 7.

Paragraph 7

113. The purpose of paragraph 7 is to restrict the operation of the provisions concerning the taxation of fees for services in cases where, by reason of a special relationship between the payer and the beneficial owner of the fees or between both of them and some other person, the amount of the fees paid exceeds the amount that would have been agreed upon by the payer and the beneficial owner if they had stipulated at arm's length. Paragraph 7 provides that in such a case the provisions of the Article apply only to the last-mentioned amount and the excess part of the fees for services would remain taxable according to the laws of the two Contracting States, due regard being had to the other provisions of the Convention.

114. It is clear from the text that in order for this paragraph to apply the fees for services held to be excessive must be due to a special relationship between the payer and the beneficial owner of the fees or between both of them and some other person. There may be cited as examples of such a special relationship cases where fees for services are paid to an individual or legal person who directly or indirectly controls the payer, or who is directly or indirectly controlled by the payer or is subordinate to a group having common interest with the payer. These examples, moreover, are similar or analogous to the cases contemplated by Article 9.

115. However, the concept of special relationship also covers relationship by blood or marriage and, in general, any community of interests as distinct from the legal relationships giving rise to the fees for services.

116. With regard to the taxation treatment to be applied to the excess part of the fees for services, the exact nature of such excess must be ascertained according to the circumstances of each case, in order to determine the category of income into which it should be classified for the purposes of applying the provisions of the tax laws of the States concerned and the provisions of the Convention. Unlike paragraph 6 of Article 11, which, because of the limiting phrase "having regard to the debt claim for which it is paid," permits only the adjustment of the rate at which interest is charged, paragraph 7 permits the reclassification of the fees for services in such a way as to give them a different character. This paragraph can affect not only the recipient of the fees, but also the payer of excessive fees for services; if the law of the State where the payer is resident or has a permanent establishment permits, the excess amount can be disallowed as a deduction, due regard being had to other applicable provisions of the Convention. If two Contracting States have difficulty in determining the other provisions of the Convention applicable, as cases require, to the excess part of the fees for services, there would be nothing to prevent them from introducing additional clarifications in the last sentence of paragraph 7, as long as they do not alter its general purport.

117. Where the principles and rules of their respective laws oblige the two Contracting States to apply different Articles of the Convention for the purpose of taxing the excess part of fees for services, it will be necessary to resort to the mutual agreement procedure provided by the Convention in order to resolve the difficulty.