

Tax treaties: anti-abuse provisions

**OECD-MTC Austria
6-8 July, 2021**

**Session B: The beneficial ownership
concept**

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BENEFICIAL OWNERSHIP

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Beneficial Ownership: Introduction

Principle: The treaty rate of tax on dividends, interests and royalties should only be available if the beneficial owner of the income is a resident of the other State.

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Meaning of “Beneficial Owner”

- Not defined in the Model
- Commentary on Article 10 (¶¶12 and 12.1):
 - Introduced “to clarify the meaning of the words “paid ... to a resident” as they are used in paragraph 1 of the Article”.
 - Not an agent or nominee.
 - Not used in a narrow technical sense, should be understood in its context and in light of the object and purpose of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.
- Person simply acting as “conduit” for another person who in fact receives the benefit of the income not a beneficial owner

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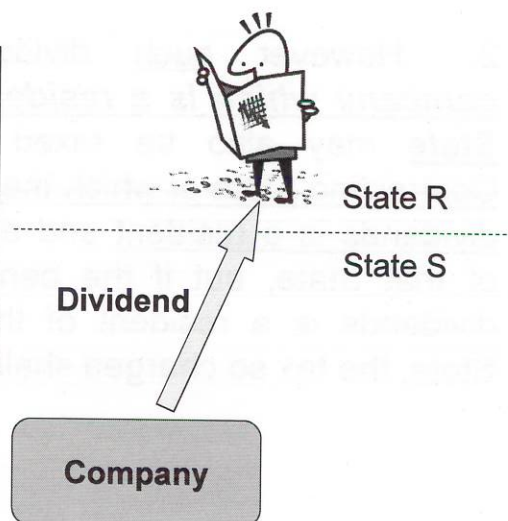
2014 Update changes to the Commentary on Articles 10, 11 and 12

- Similar changes to Commentary on Articles 10, 11 and 12
- Primarily clarifications
- Summary of main changes:
 - Reminder why the term “beneficial owner” was added to the Model – to address potential difficulties arising from the words “paid ... to a resident” (¶12.1 of the Commentary on Article 10)
 - The context in which the concept was intended to be interpreted (¶12.1 of the Commentary on Article 10)
 - Further explanation of the term by reference to agents and nominees (¶12.4 of the Commentary on Article 10)
 - Confirmation that a beneficial owner may be denied treaty benefits if other measures, such as anti-abuse measures, apply (¶12.5 of the Commentary on Article 10)
 - Meaning given in the context of treaties must be distinguished from the meaning that it has in other instruments (¶12.6 of the Commentary on Article 10)
- Revision of paragraph 2 of Article 10

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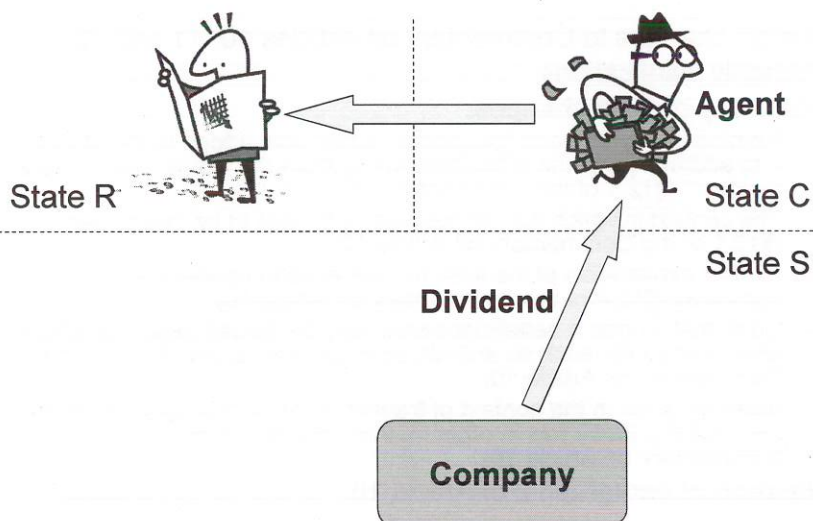
Paragraph 1 of Article 10

“Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State ...”



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Paragraph 2 of Article 10:
"such dividends"?



2014 Update changes to Article 10(2)

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

Beneficial ownership: a word of caution

- Condition for obtaining benefits of Articles 10, 11 and 12
- Never intended to be a general anti-abuse rule – denied benefits to agents and nominees
- Court cases (*Indofood*, *Prevost Car*, *Velcro*) highlighted its limitations
- New schemes, such as the total return swap arrangement may be even further beyond its reach
- Changes to the OECD Commentary on Articles 10 – 12 in 2010 confirm its narrow application and limitations

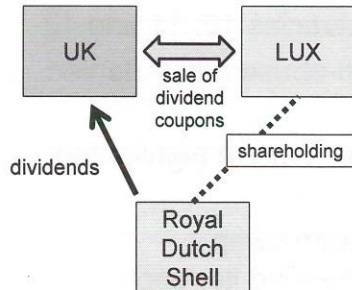
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Court cases: beneficial ownership

- Royal Dutch Shell (Netherlands)
- Indofood (UK)
- Prévost Car (Canada)

Royal Dutch Shell

Netherlands Supreme Court (*Hoge Raad*) (1994)



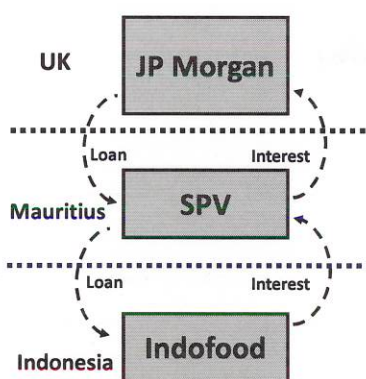
- UK resident stockbroker bought dividend coupons from Luxembourg company after dividends declared but before dividends payable
- UK taxpayer did not own or acquire underlying shares
- paying agent withheld at 25%
- taxpayer requested refund (UK-Netherlands treaty rate = 15%)

- **decision: UK taxpayer was the beneficial owner of the dividends**
 - UK taxpayer had free right of disposal of the dividend coupons and their proceeds
 - UK taxpayer not an agent or nominee for other persons
 - irrelevant that refund form required ownership of underlying shares (no basis in treaty for such a requirement)
 - beneficial ownership tested at time of payment of the dividend

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Indofood

United Kingdom (2006)

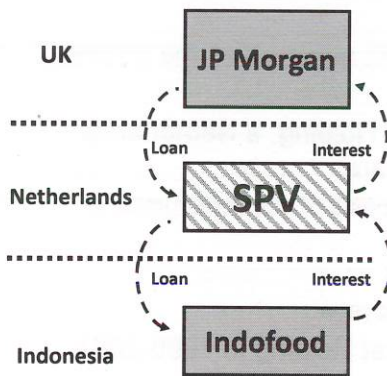


- Indofood wished to raise capital by the issuance of loan notes on the international market
- Indonesia domestic withholding = 20%
- Mauritius-Indonesia treaty withholding = 10%
- loan notes issued using Mauritius SPV in 2002; capital raised by SPV loaned to Indofood on substantially same terms
- terms of note issue provided that if Indonesian withholding tax went above 10% and no "reasonable measure" could be found to avoid the increase, then the SPV could redeem the notes
- Indonesia-Mauritius treaty was terminated in 2004
- pursuant to the note terms, Indofood sought to redeem the notes (no longer commercially favorable to Indofood in light of exchange rate and interest rate movements)

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Indofood

United Kingdom (2006)



- JP Morgan (trustee/paying agent for bondholders) opposed redemption: proposed restructuring to take advantage of Indonesia-Netherlands treaty (*i.e.* to interpose a new Netherlands company between Indofood and SPV, or to assign the benefit of the loan agreement to a new Netherlands company)

ISSUE: Would the new Netherlands company be the beneficial owner of the interest paid by Indofood?

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Indofood

United Kingdom (2006)

- UK Court of Appeal: **NLCO would not be the beneficial owner** of the interest paid by Indofood.
- NLCO earned a small spread on the loan to its parent and satisfied the substance and risk requirements for finance companies provided for under Dutch tax law **BUT had only limited powers over the interest income.**
- NLCO **did not derive any direct benefit** from interest received; obliged to use the interest received from Indofood to pay the interest due to the noteholders.
- The court referred to the “**international fiscal meaning**” of the term beneficial ownership, as it appears from the Commentary on the OECD Model Tax Convention.

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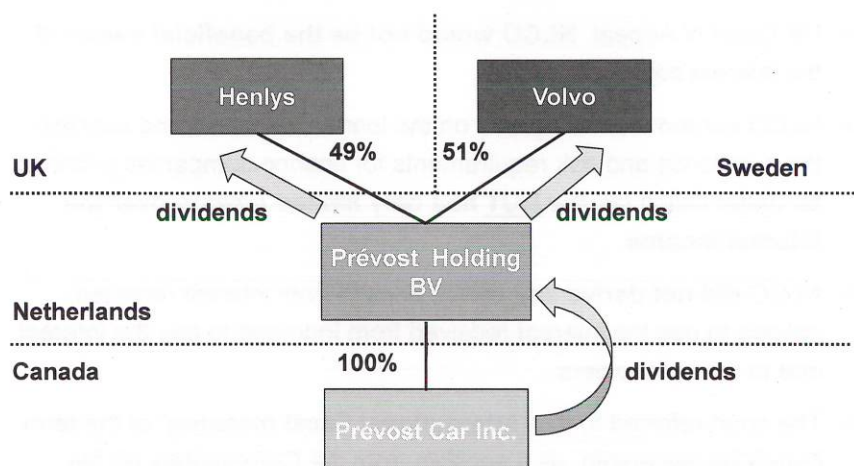
Prévost Car v. The Queen Canada (2009)

Facts:

- Volvo Bus (Sweden) and Henlys (UK) acquired all the shares of Prévost Car (Canada) in 1995
- transaction structured using Prévost Holding, a Netherlands holding company, to directly hold shares
 - both acquirers involved in different aspects of bus construction and seeking to expand markets
 - sought “neutral” jurisdiction in Europe
 - Prévost Holding had no office or employees
- Prévost Car paid dividends to Prévost Holding in 1996-2001
- shareholder’s agreement required Prévost Holding to distribute 80% of dividends received

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Prévost Car v. The Queen Canada (2009)



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Prévost Car v. The Queen Canada (2009)

Issue:

- What rate of withholding applies?
 - 25% Canadian statutory rate
 - 5% Canada-Netherlands treaty
 - 10% Canada-United Kingdom treaty
 - 15% Canada-Sweden treaty

Who is the beneficial owner of the dividends?

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Tax Court Decision

“beneficial owner” is:

“the person who receives the dividends for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received”

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Tax Court Decision

- shareholders are not beneficial owners of income of a corporation
- corporation is a conduit and not beneficial owner if it “has ***absolutely no discretion*** as to the use or application of funds put through it as conduit, or has ***agreed to act on someone else’s behalf pursuant to that person’s instructions without any right to do other than what that person instructs it***”

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Tax Court Decision

four elements considered in the attribution of beneficial ownership:

1. **possession;**
2. **use;**
3. **risk; and**
4. **control**

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Tax Court Decision

- no evidence Dutch Holdco was conduit
- no predetermined flow of funds to shareholders
- Prévost Holding was the beneficial owner of the dividends
- Federal Court of Appeal affirmed Tax Court decision, endorsing Tax Court meaning of beneficial owner and approving Tax Court's application of beneficial owner test to the facts

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Conclusions

- threshold for beneficial ownership, as interpreted by some jurisdictions' courts, may be very low
- four elements in considering the attribution of beneficial ownership:
 - (a) **possession**;
 - (b) **use**;
 - (c) **risk**; and
 - (d) **control**
- concept of beneficial owner may have limited effectiveness as an anti-treaty shopping rule

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Beneficial Ownership

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Meaning of “Beneficial Owner”

- Not defined in the Model
- Commentary (Art 10, paragraphs 12 - 12.4):
 - Included to “clarify the meaning of the words “paid to ... a resident” as they are used in paragraph 1 of the Article.”
 - Not used in a narrow technical sense, should be understood in its context and in light of the object and purpose of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.

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Commentary (Art 10, paragraphs 12 - 12.4) cont.

- A beneficial owner is a recipient who has the right to use and enjoy the [dividend, interest or royalty], unconstrained by an obligation to pass the payment received to another person.
- A BO is not a conduit company if it “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”
- Not an agent or nominee or a conduit company acting as a fiduciary or administrator because that recipient’s right to use and enjoy the [dividend, interest or royalty] is constrained by a contractual or legal obligation to pass on the payment received to another person.

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Meaning of “Beneficial Owner” - other

- A person who ultimately enjoys the benefit of an asset, as opposed to the legal owner who may only be a nominee.
- A beneficial owner is one who is free to decide:
 - Whether or not the capital or other asset should be used or made available for use by others
 - On how the yields therefrom should be used

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Changes to the Commentary on Articles 10, 11 and 12 in the 2014 Update

- Primarily clarifications
- Summary of main changes:
 - Reminder; why the term “beneficial owner” was added (to address potential difficulties arising from the words “paid to ... a resident”) [para 12.1]
 - The context in which it was intended to be interpreted [para 12.1]
 - Further explanation of the term by reference to agents and nominees [para 12.4]
 - Confirms that a beneficial owner may be denied treaty benefits if other measures, such as anti-abuse measures, apply [para 12.5]
 - Meaning given in the context of treaties must be distinguished from the meaning that it has in other instruments [para 12.6]
 - Revised drafting of Article 10(2).

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12.4 In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the dividend is not the “beneficial owner” because that recipient’s right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person. [continued on next slide]

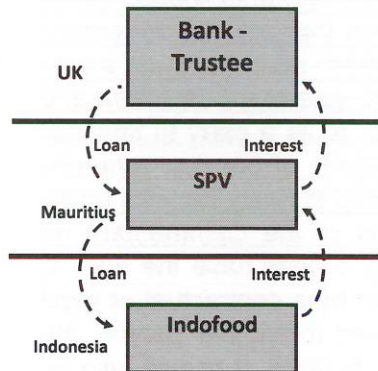
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12.4 [continued from previous slide] This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 6.8 to 6.34 of the Commentary on Article 1. Where the recipient of a dividend does have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the “beneficial owner” of that dividend. It should also be noted that Article 10 refers to the beneficial owner of a dividend as opposed to the owner of the shares, which may be different in some cases.

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COMPLEMENTARY MATERIAL:
Selected court cases and developments on
beneficial ownership

Case 1 – *Indofood International v JP Morgan Chase* (2006) STC 115 (United Kingdom)



- Indonesia domestic WHT 20%
- Mau-Indo DTT WHT: 10%
- Indonesia/Mauritius treaty was terminated in 2004
 - Indofood wanted to redeem the Notes because of an adverse movement in interest rates and the increased “gross up” requirement following termination of the treaty.
 - The treaty termination allowed Indofood to redeem the Notes, unless it could avoid the additional tax by “taking reasonable measures available to it”.
- Bank proposal to migrate SPV to NL or sell credit to new NLCO

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Extract from Court of Appeal judgment of the Chancellor

“...[Indofood Indonesia] is obliged to pay the interest two business days before the due date to the credit of an account nominated for the purpose by [Indofood Mauritius]. [Indofood Mauritius] is obliged to pay the interest due to the noteholders one business day before the due date to the account specified by the Principal Paying Agent. The Principal Paying Agent is bound to pay the noteholders on the due date. [Indofood Mauritius] is bound to pay on to the Principal Paying Agent that which it received from [Indofood Indonesia] because it is precluded from finding the money from any other source by the Note Conditions...”
(underlining added)

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Indofood

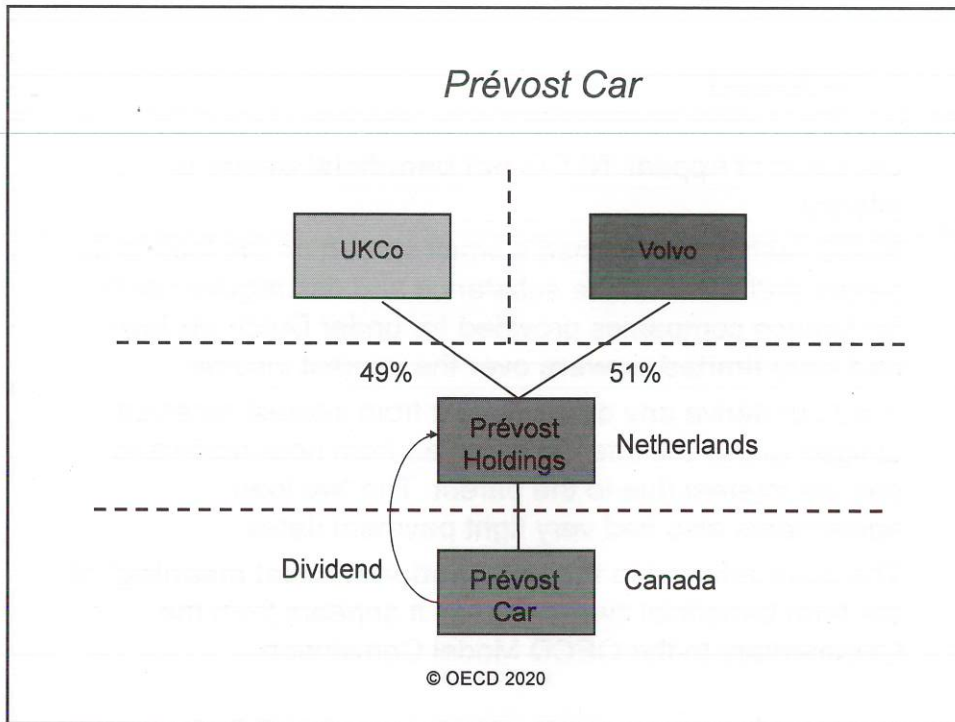
- UK Court of Appeal: NLCO **not beneficial owner** of interest
- NLCO (although it earned a small spread on the loan to its parent and satisfied the substance and risk requirements for finance companies provided for under Dutch tax law) **had only limited powers** over the interest income.
- It did not derive any direct benefit from interest received; obliged to use the interest received from note-holders to pay the interest due to the parent. The two loan agreements also had very tight payment dates.
- The court referred to the “**international fiscal meaning**” of the term beneficial ownership, as it appears from the Commentary to the OECD Model Convention.

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Case 2 - *Prévost Car v. The Queen* [2009] FCA 57 (Canada)

- Volvo Bus (Sweden) acquires all shares of Prévost Car (Canada) in 1995
- Prévost Car is incorporated in the province of Quebec
- Shares of Prévost Car transferred to Prévost Holdings (Netherlands)
- 49% of Prévost Holdings transferred to UKCo
- Prévost Car pays dividends to Prévost Holdings in 1996-2001
- Shareholder's agreement required Prévost Holdings to distribute 80% of dividends received

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- Prévost Car*
- Prévost Holdings had no office or employees
 - Management provided by management company
 - Prévost Holdings was not party to the shareholders' agreement
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Prévost Car; Tax Court Decision

- beneficial owner is:
“the person who receives the dividends for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received”

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Prévost Car; Tax Court Decision

- PH was the BO. It had discretion as to the application of the dividends; it was not legally bound to distribute them
- Corporation is a conduit and not beneficial owner if it “has absolutely no discretion as to the use or application of funds put through it as conduit, or has agreed to act on someone else’s behalf pursuant to that person’s instructions without any right to do other than what that person instructs it”
- Four elements in considering the attribution of beneficial ownership and those are: (a) possession; (b) use; (c) risk; and (d) control.

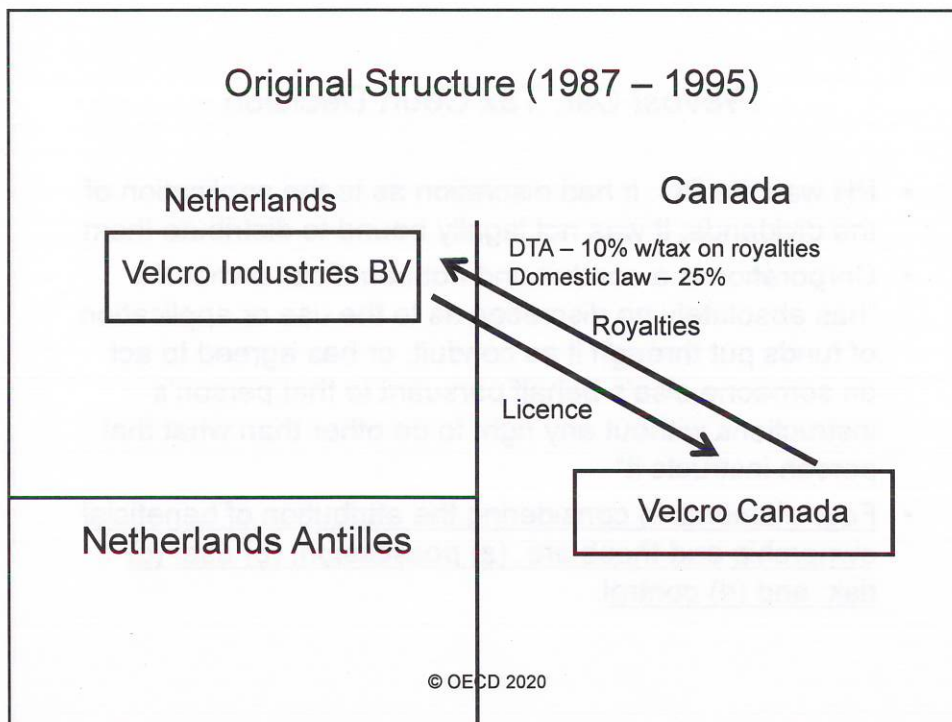
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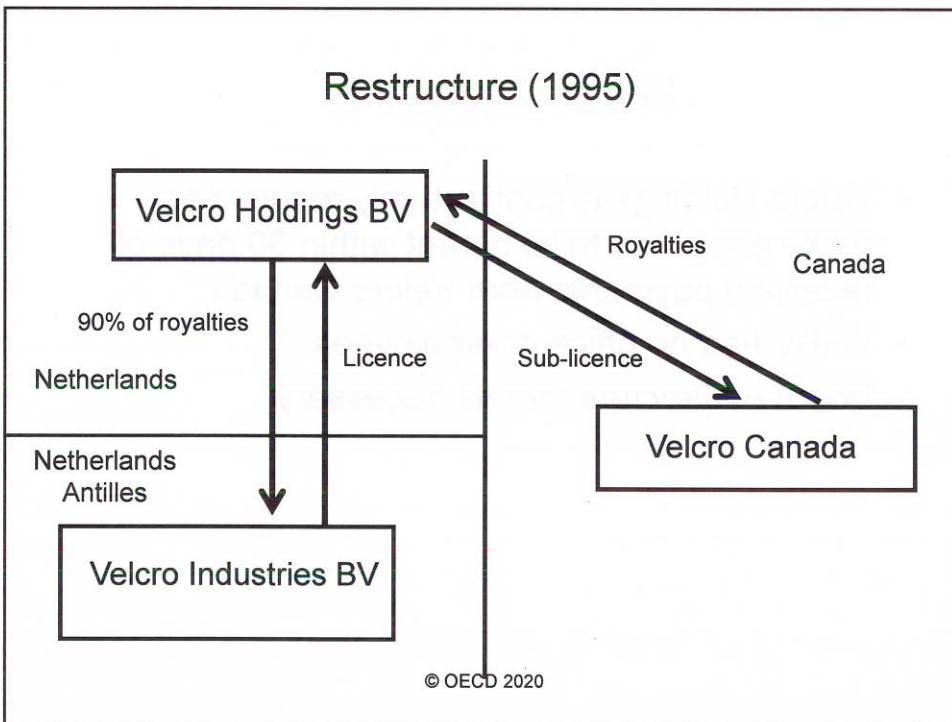
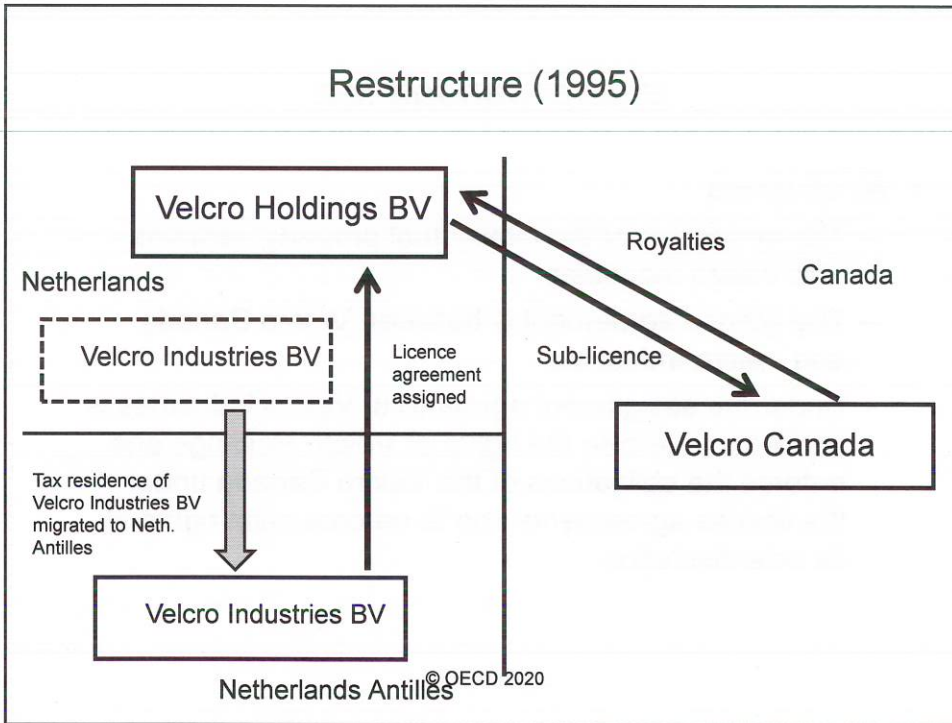
Case 3 - *Velcro Canada Inc. v The Queen* (2012 TCC 57) (Canada)

- Payment of royalties from Canada to Dutch subsidiary of Netherlands Antilles company
- Dutch subsidiary pays back 90% of the royalties to its parent
- Is the Dutch subsidiary the beneficial owner?

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Original Structure (1987 – 1995)





Velcro Canada Inc.

- At all times
 - The ownership of the intellectual property, remains with Velcro Industries
 - The license agreement is between Velcro Canada and Velcro Industries
 - Under the assignment agreement, Velcro Industries is entitled to exercise the rights of Velcro Holdings and enforce the obligations of the Velcro Canada under the license agreements and to enforce such rights at its sole discretion.

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Velcro Canada Inc.

- Velcro Holdings is contractually required to make payments to its parent within 30 days of receiving payments from Velcro Canada
- VHBV had no office or employees
- Board of directors met as necessary

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Velcro Canada Inc.

- Three main activities of Velcro Holdings
 - holding shares in subsidiaries
 - providing lending services to subsidiaries
 - managing royalty streams, with the royalties being the largest income and expense items
- Management provided by Amaco Management Services B.V., “an arm’s length corporation”, conducted in large part the management of Velcro Holdings, including financial services

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Velcro Canada Inc.; Tax Court Decision

- Tax Court: Velcro Holdings BV (the Dutch subsidiary) is the beneficial owner
- “From *Prévost*, there are really four elements in considering the attribution of beneficial ownership and those are: (a) possession; (b) use; (c) risk; and (d) control.”

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Velcro Canada Inc.; Tax Court
Decision

- (a) Possession: “upon receipt, these royalty payments were intermingled into other accounts and used for a variety of ... purposes, at [Velcro Holdings] sole discretion. The funds were not segregated and then paid directly to [Velcro Industries]”
- (b) Use: “Nothing in the License Agreement ...prevents [Velcro Holding] from using the royalties... There were no restrictions on the use of the funds”

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Velcro Canada Inc.; Tax Court
Decision

- (c) Risk: “...There was currency risk in that the monies were received by [Velcro Holdings] in Canadian funds.... The royalties were the assets of VHBV. They were available to creditors and were shown as such on their financial statements.”
- (d) Control: “[Velcro Holdings] exercised its control, subjecting the funds to increases or decreases by virtue of earning interest or losing value because of the risk of currency exchange and using the funds, in part, to pay other outstanding obligations of VHBV”

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Beneficial ownership; other cases

- *Ministre de l'Economie, des Finances et de Industrie v Société Bank of Scotland*, case 283314 (France)
- *Aiken Industries v Commissioner of Internal Revenue* 56 TC 925(1971) (United States)
- *Royal Dutch Shell* (6 April 1994) Case no 28 638, BNB 1994/217 (Netherlands)
- *Tiger Securitisation Specialty Co Ltd v Chief of Yeoksam District Tax Office* [2013] 18 ITLR 540 (Korea)
- Swiss-Denmark Treaty case - A. __ A/S v. Swiss Federal Tax Administration (Total Return Swap)

Tax treaties: anti-abuse provisions

**OECD-MTC Austria
6-8 July, 2021**

Session C: The Principal Purpose Test

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Principal Purpose Test

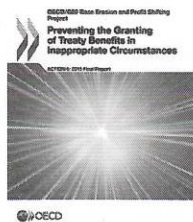
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Art. 29(9) OECD Model, Art. 7(1) MLI: Principal Purpose Test (PPT)

“Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.”

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Background: Action 6 Report

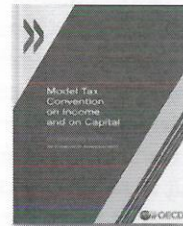


- The PPT gives effect to principles that were already in the Commentary on Article 1 of the OECD Model that remain applicable [p. 61, 76-80]

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Updated 2017 OECD Model

- New Commentary on Article 1 discusses more specifically the interaction between treaties and:
 - Specific legislative anti-abuse rules
 - General legislative anti-abuse rules
 - Judicial doctrines that are part of domestic law
- More guidance on PPT: paragraphs 169 to 187 of the Commentary on Article 29 (9)



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GUIDANCE ON THE APPLICATION OF THE PPT IN THE COMMENTARY

Art. 29(9) OECD Model, Art. 7(1) MLI: Principal Purpose Test (PPT)

“Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.”

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Commentary: relationship with other measures and context

- The PPT would apply even in cases where the domestic GAAR does not allow treaty benefits to be denied [p. 169]
- The PPT supplements and does not restrict the application of the LOB or the “PE in third jurisdiction” provision [pp. 171 and 172]
-
- The PPT needs to be read in the context of other provisions, including the preamble [p. 173]

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General intention of the PPT
[p. 6, Report / p.174 Commentary]

- The provision is intended to ensure that tax conventions apply in accordance with the purpose for which they were entered into,
 - i.e. to provide benefits in respect of bona fide exchanges of goods and services, and movements of capital and persons as opposed to arrangements whose principal objective is to secure a more favorable tax treatment

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The term “a benefits (...) shall not be granted”
[p. 7 Report / p.175 Commentary]

- **Broad range.** The term “benefit” includes:
 - all limitations (e.g. a tax reduction, exemption, deferral or refund) on source taxation under Art. 6-22 of the Convention,
 - the relief from double taxation provided by Article 23,
 - the protection afforded to residents and nationals of a Contracting State under Article 24 (non-discrimination) or
 - any other similar limitations.

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The terms “arrangement or transaction” [p. 9 Report / p.177 Commentary]

- Broad interpretation: any agreement, understanding, scheme, transaction or series of transactions, whether or not they are legally enforceable.
 - In particular they include the creation, assignment, acquisition or transfer of the income itself, or of the property or right in respect of which the income accrues.
 - arrangements concerning the establishment, acquisition or maintenance of a person who derives the income, including the qualification of that person as a resident of one of the Contracting States, and include steps that persons may take themselves in order to establish residence.
- One transaction alone may result in a benefit, or it may operate in conjunction with a more elaborate series of transactions that together result in the benefit.

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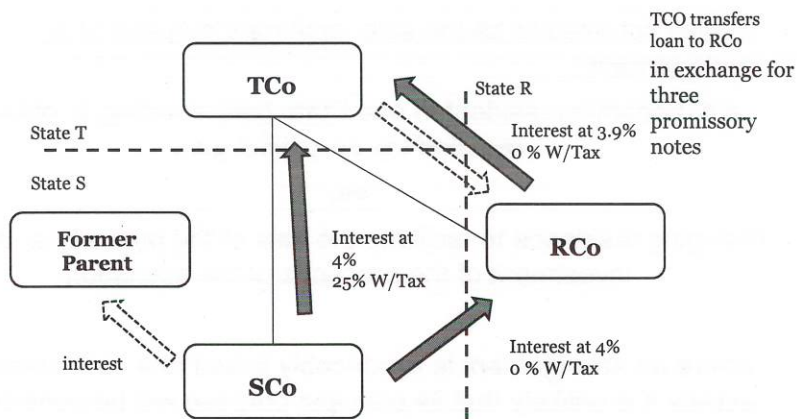
The phrase “that resulted directly or indirectly in that benefit” [p. 8 Report / p. 176 Commentary]

- Is deliberately broad
- intended to include situations where the person who claims the treaty benefits may do so with respect to a transaction that is not the one that was undertaken for one of the principal purposes of obtaining that treaty benefit.

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Example: paragraph 176 Commentary on Article 29



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Determining “one of the principal purposes” [pp. 10-11 Report / pp. 178-179 Commentary]

- It is not necessary to find conclusive proof of the intent of a person concerned with an arrangement,
- but it must be reasonable to conclude after an objective analysis of the relevant facts/ circumstances surrounding the arrangement or event on a case by case basis.
- It should not be lightly assumed: merely reviewing the effects of an arrangement will not usually enable a conclusion to be drawn about its purposes.
- where, however, an arrangement can only be reasonably explained by a benefit that arises under a treaty, it may be concluded that one of the principal purposes of that arrangement was to obtain the benefit.

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**“one of the principal purposes” [pp. 12-13
Report / pp. 180-181 Commentary]**

- It does not need to be the sole/ dominant purpose of an arrangement.
e.g. becoming resident in one State before selling to obtain a reduced tax on capital gain

vs.

changing residence to facilitate the sale of the property or the re-investment of the proceeds of the alienation

- where an arrangement is inextricably linked to a core commercial activity it is unlikely that its principal purpose will be considered to be to obtain that benefit.

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**Involvement of Competent Authority:
PPT panels**

- **Paragraph 183 Commentary [p. 15 Report]:** Notes practice of approval by senior officials or advisory panels to apply domestic GAAR – this reflects the serious nature of application of a GAAR and the need for consistency.

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Involvement of Competent Authority: scope for manoeuvre

- **Paragraph 184 [p. 16 Report]:** Sets out an additional provision that confirms that the Competent Authority of the Contracting State that applies the PPT may reinstate or provide different benefits (for example, lesser benefits); the competent authority to which a request is made must consult the other competent authority before rejecting a request.
 - What happens if the additional provision is not included?

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Involvement of Competent Authority: scope for manoeuvre

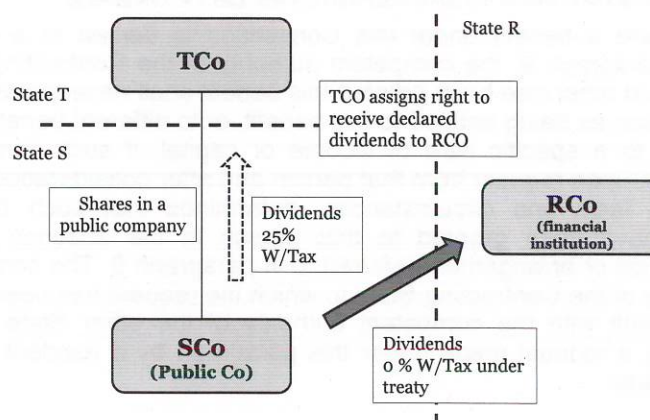
Additional provision in paragraph 184 [p.16 Report]:

10. Where a benefit under this Convention is denied to a person under paragraph 9, the competent authority of the Contracting State that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement referred to in paragraph 9. The competent authority of the Contracting State to which the request has been made will consult with the competent authority of the other State before rejecting a request made under this paragraph by a resident of that other State.

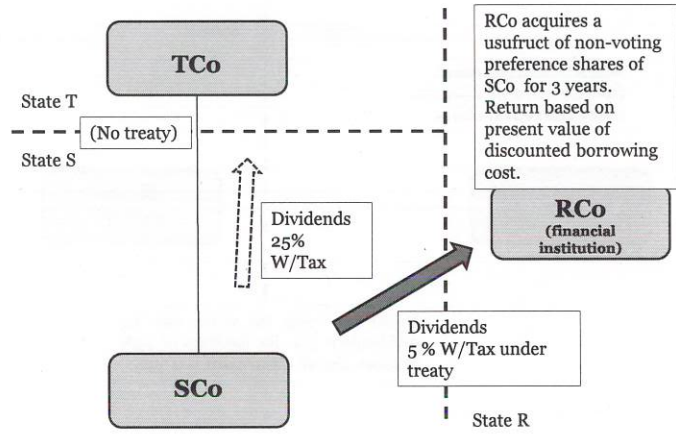
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EXAMPLES A TO M THAT ILLUSTRATE THE APPLICATION OF THE PPT [P. 182 COMMENTARY]

Example A: Dividend assignment

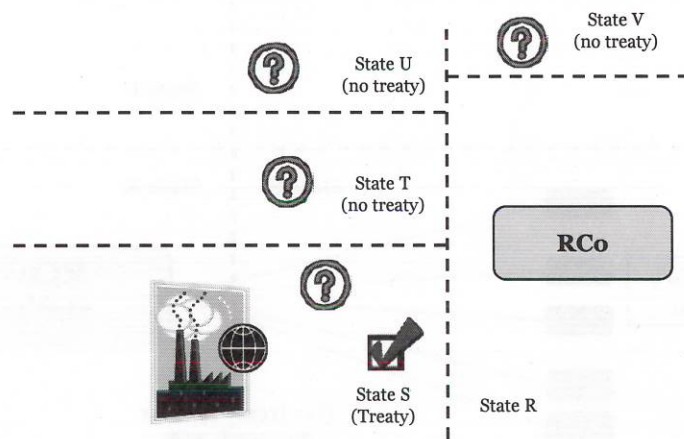


Example B: Dividend usufruct



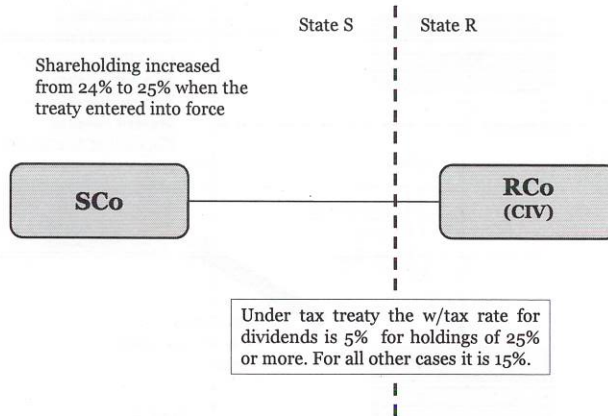
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Example C: Choice of location



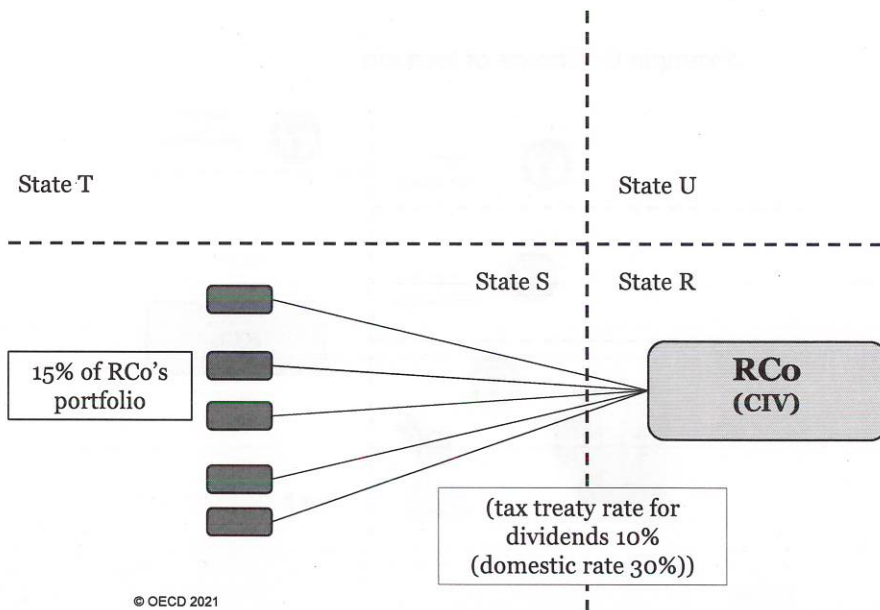
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Example E: Satisfying a threshold



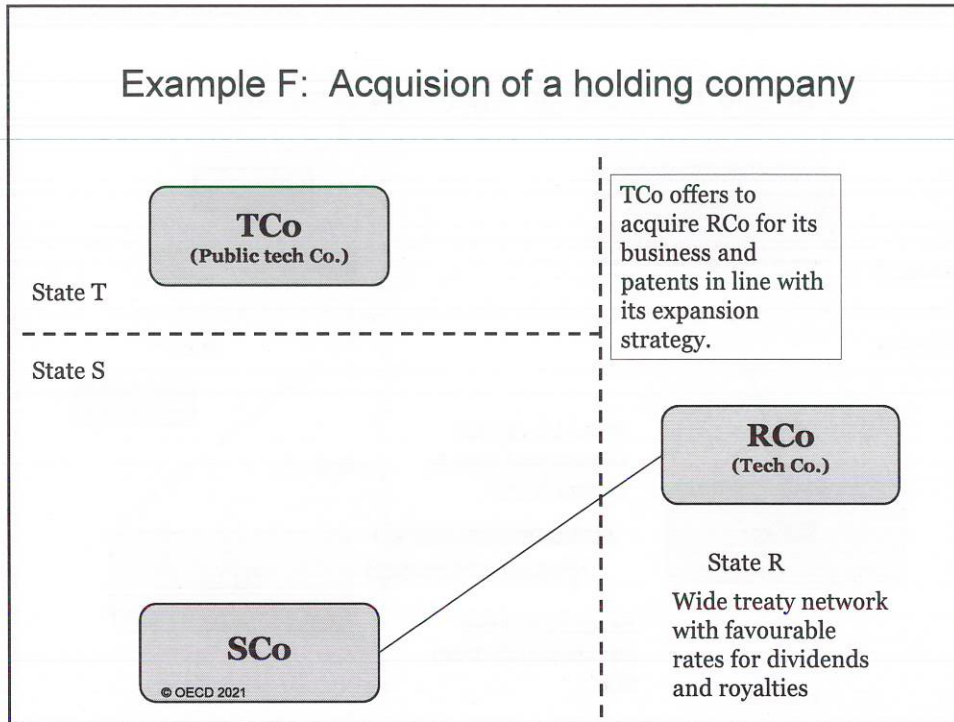
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Example D: Choice of investment destination

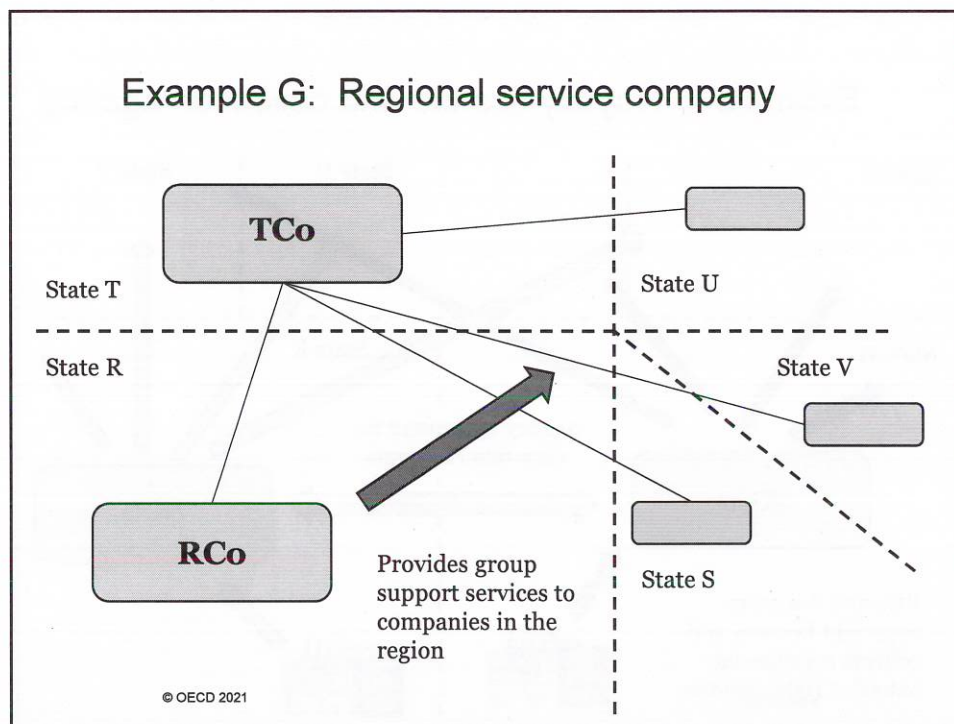


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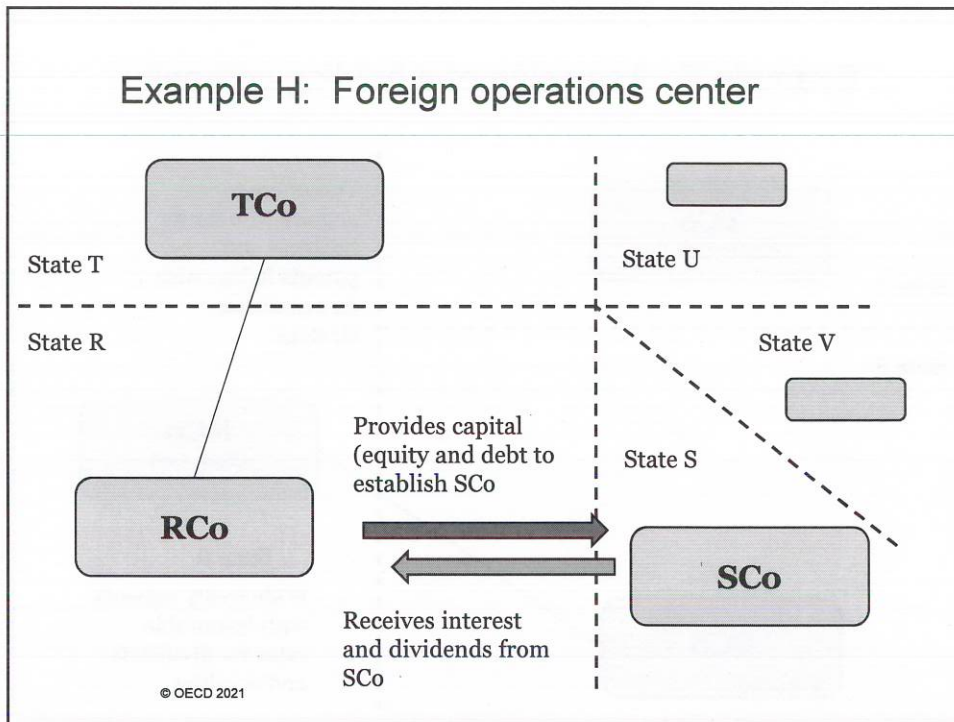
Example F: Acquisition of a holding company



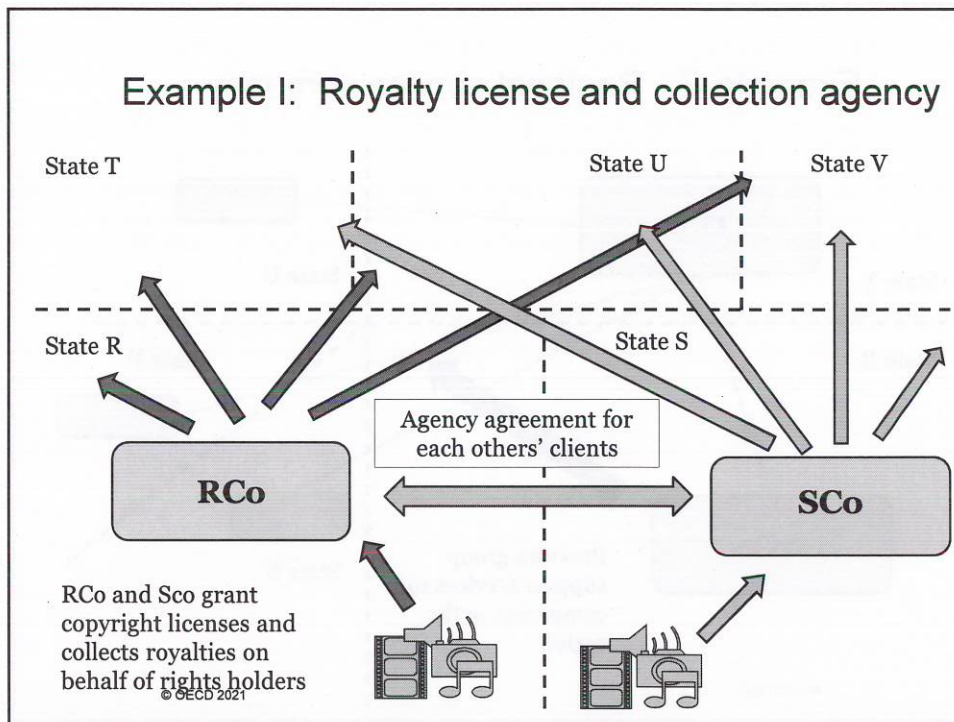
Example G: Regional service company



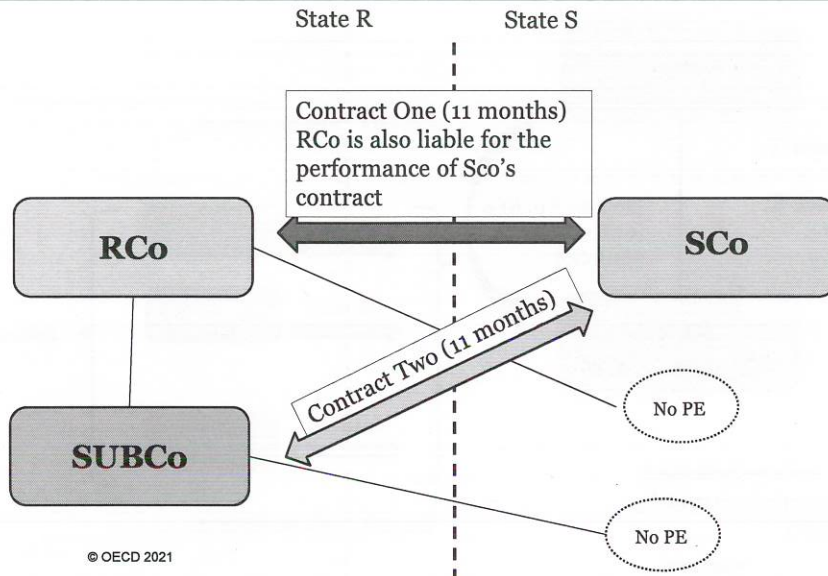
Example H: Foreign operations center



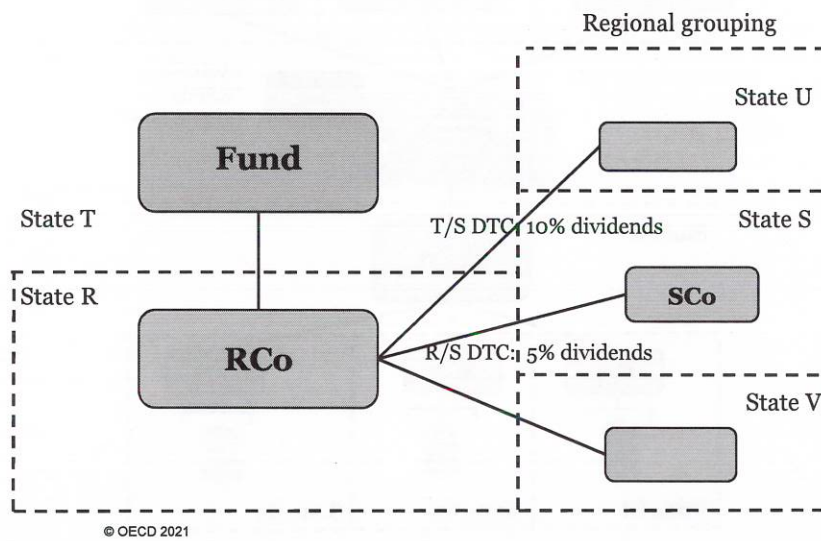
Example I: Royalty license and collection agency



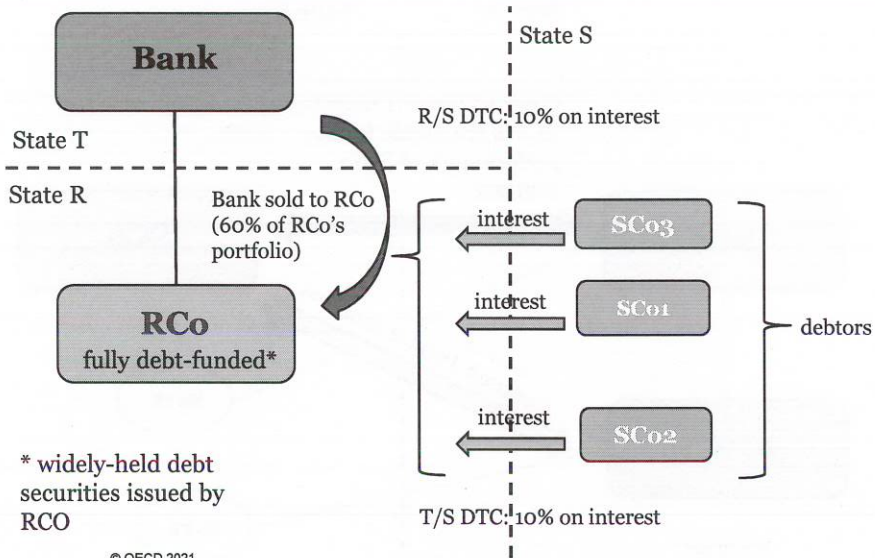
Example J: Split construction contract



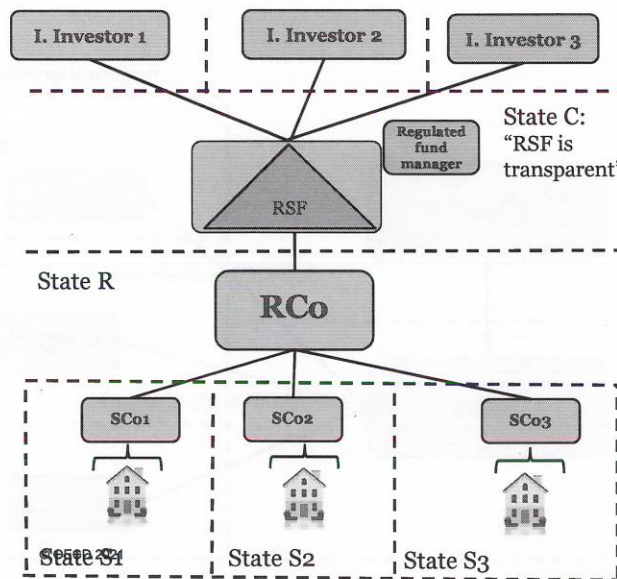
Example K: Regional investment platform



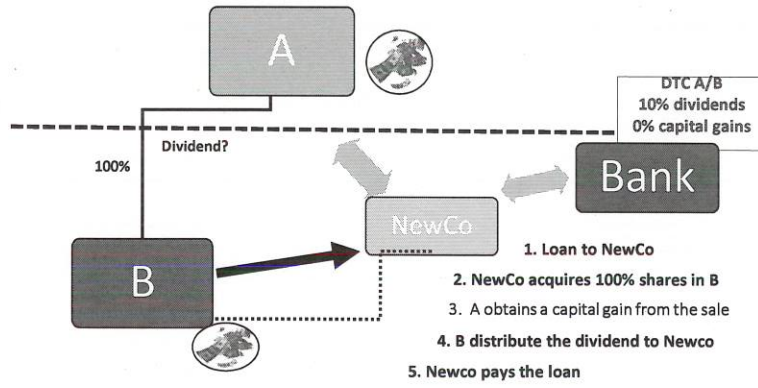
Example L: Securitisation company



Example M: Real Estate Fund



BONUS: Dividends disguised as capital gains



Tax treaties: anti-abuse provisions

OECD-MTC Austria
6-8 July, 2021

Session D: Overview of the LOB provision

1

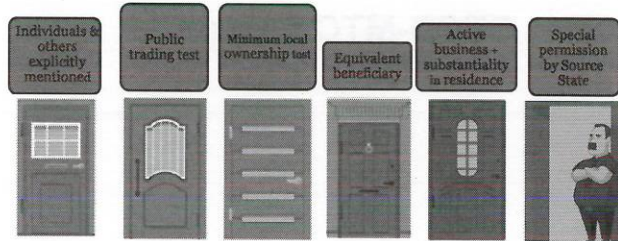


Limitation of Benefits



Art. 29(1)-(7) 2017 OECD Model, Art.7(8)-(13) MLI: Limitation of Benefits

LOB provision: “residence” is not enough



MLI Art. 7 S-LOB: P. (9)(a),(b) & (d)

P. (9)(c)

P. (9)(e)

P. (11)

P. (10)(a)-(c)

P. (12)

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The LOB rule: “skeleton”

1. [Provision that, subject to paragraphs 3 to 5, restricts treaty benefits to a resident of a Contracting State who is a “qualified person” as defined in paragraph 2].
2. [Definition of situations where a resident is a qualified person, which covers
 - an individual;
 - a Contracting State, its political subdivisions and their agencies and instrumentalities;
 - certain publicly-traded companies and entities;
 - certain affiliates of publicly-listed companies and entities;
 - certain non-profit organisations and recognised pension funds;
 - other entities that meet certain ownership and base erosion requirements;
 - certain collective investment vehicles.]
3. [Provision that provides treaty benefits to certain income derived by a person that is not a qualified person if the person is engaged in the active conduct of a business in its State of residence and the income emanates from, or is incidental to, that business].
4. [Provision that provides treaty benefits to a person that is not a qualified person if at least more than an agreed proportion of that entity is owned by certain persons entitled to equivalent benefits].
5. [Provision that provides treaty benefits to a person that qualifies as a “headquarters company”].
6. [Provision that allows the competent authority of a Contracting State to grant certain treaty benefits to a person where benefits would otherwise be denied under paragraph 1].
7. [Definitions applicable for the purposes of paragraphs 1 to 7].

Simplified LOB rule

Provision denying treaty benefits to a resident of a Contracting State who is not a “qualified person” (¶1)

1 . Except as otherwise provided in this Article, a resident of a Contracting State shall not be entitled to a benefit that would otherwise be accorded by this Convention (other than a benefit under paragraph 3 of Article 4, paragraph 2 of Article 9 or Article 25), unless such resident is a “qualified person”, as defined in paragraph 2, at the time that the benefit would be accorded.

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Simplified LOB rule

Situations where a resident is a “qualified person” (¶2)

Paragraph 2 defines a “qualified person” as:

- an individual;
- a Contracting State, or a political subdivision or local authority thereof, or an agency or instrumentality of that Contracting State, political subdivision or local authority;
- a company or other entity, if its “principal class of shares” is “regularly traded” on one or more “recognised stock exchanges”
- a non-profit organisation
- a pension fund
- an entity that is at least 50% owned by residents of the same Contracting State who are themselves “qualified persons”

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Simplified LOB rule

Active conduct of a business (¶3)

Paragraph 3 provides that a resident of a Contracting State will be entitled to treaty benefits with respect to an item of income, regardless of whether the resident is a “qualified person”, if –

- the resident is engaged in the active conduct of a business in its State of residence; and
- the income derived from the other Contracting State emanates from, or is incidental to, that business

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Simplified LOB rule

Active conduct of a business (¶3)

- “active conduct of a business” is defined not to include:
 - operating as a holding company;
 - providing overall supervision or administration of a group of companies;
 - providing group financing (including cash pooling); or
 - making or managing investments, unless these activities are carried on by a bank, insurance company or registered securities dealer in the ordinary course of its business as such.
- active conduct of a business test includes a substantiality requirement and provides that activities conducted by “connected persons” will be deemed to be carried on by the resident for purposes of applying the test

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Simplified LOB rule

Derivative benefits (¶4)

Paragraph 4 is a derivative benefits provision which grants treaty benefits to a resident of a Contracting State who is not a “qualified person” if it is at least 75 per cent owned by persons who are “**equivalent beneficiaries**”, *i.e.* –

- persons who would be entitled to equivalent (or more favourable) benefits with respect to an item of income (had they received the item of income directly)

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Simplified LOB rule

Discretionary relief (¶5)

Paragraph 5 is a discretionary relief provision that allows the competent authority of a Contracting State to grant treaty benefits to a resident of the other Contracting State that does not otherwise satisfy the LOB rule if that competent authority determines that neither the establishment, acquisition or maintenance of that resident, nor the conduct of that resident’s operations, had as one of its principal purposes the obtaining of treaty benefits

- bilateral consultation required before granting or denying a request under paragraph 5

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Simplified LOB rule

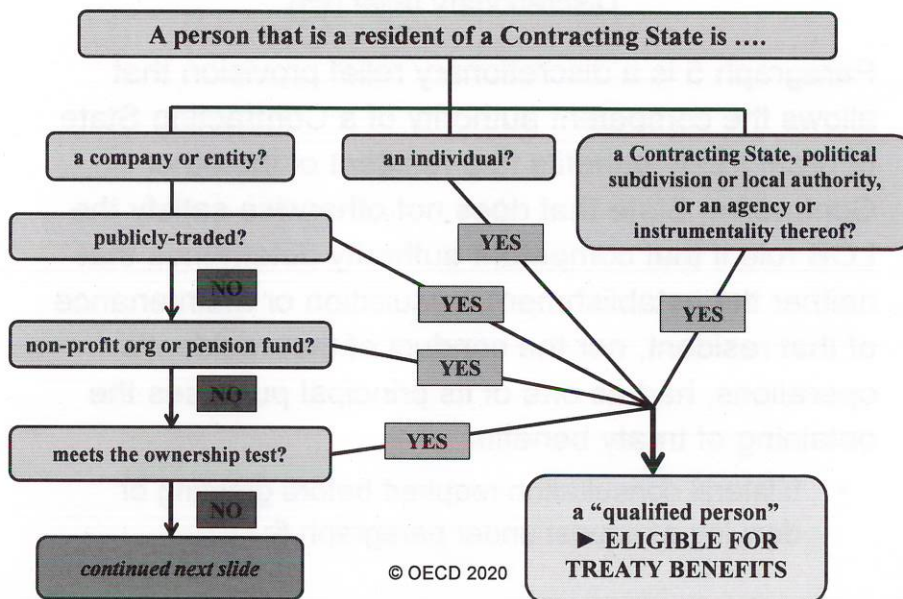
Definitions (¶6)

Paragraph 6 includes the definitions of various terms found in the LOB rule:

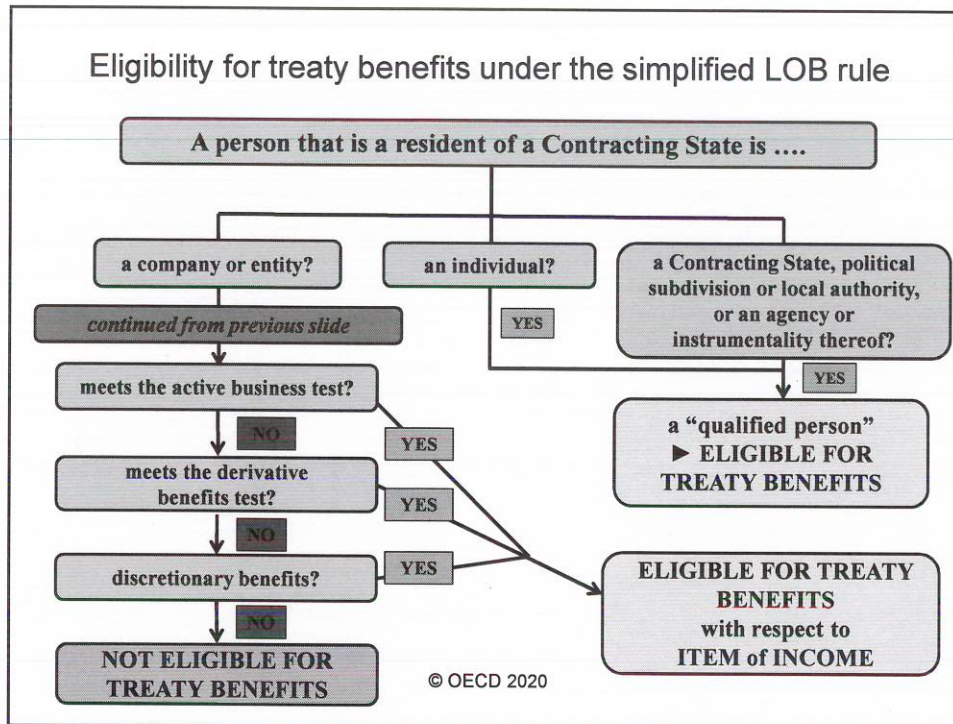
- “recognised stock exchange”
- “principal class of shares”
- “equivalent beneficiary”
- “shares”
- “connected persons”

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Eligibility for treaty benefits under the simplified LOB rule



Eligibility for treaty benefits under the simplified LOB rule



Commentary on the simplified LOB rule

- The 2015 Action 6 Report contains commentary to provide guidance on the interpretation and application of the simplified and detailed LOB rules.
- That commentary was incorporated in the OECD Model Tax Convention with the 2017 update.
- Like the BEPS measures implemented by the MLI, the simplified LOB rule contained in the MLI should be interpreted in the light of the commentary on that rule (see ¶12 of the Explanatory Statement).

Tax treaties: anti-abuse provisions

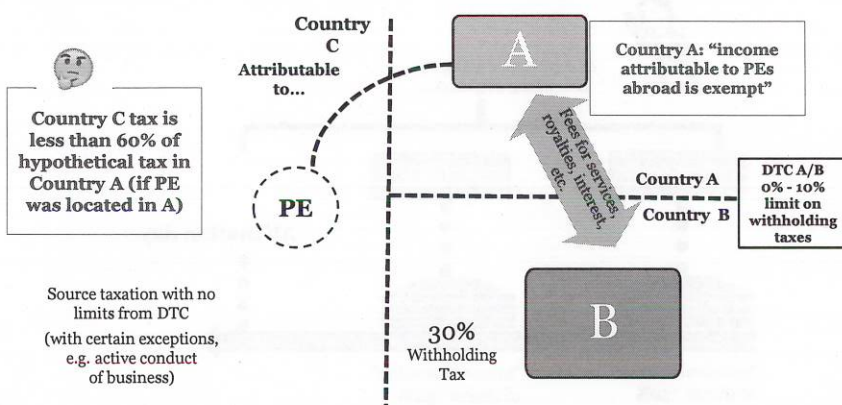
OECD-MTC Austria
6-8 July 2021

Session E: other provisions to ensure a proper use of tax treaties

1



Art 29(8) 2017 OECD Model, Art. 10 MLI: PE in a third jurisdiction





Art. 10(2)(a) 2017 OECD Model & Art. 8 MLI: minimum shareholding period

Context:

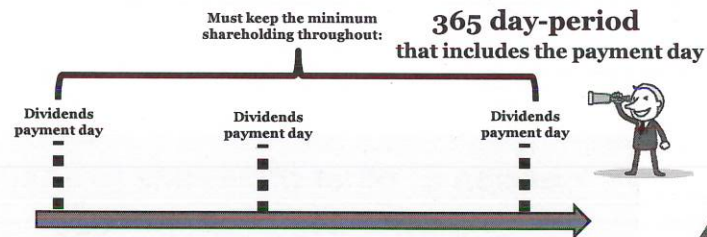
If your DTC has a provisions that:

- (1) **exempt or limit** source taxation of dividends...
- (2) **obtained by a company...**
- (3) subject to a **minimum shareholding/ownership condition (significant shareholder)**

A Co.

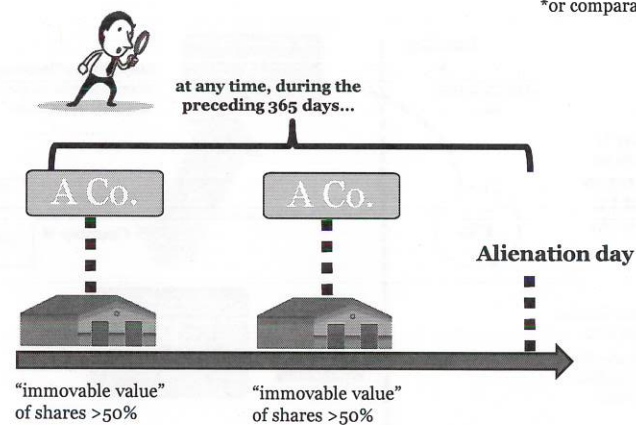
Example limits to source taxation:
a) 5% for significant shareholders or:
b) 10% residual cases

A Sub Co.



Art. 13(4) 2017 OECD Model & Art. 9 MLI: extended testing period to determine immovable value of shares*.

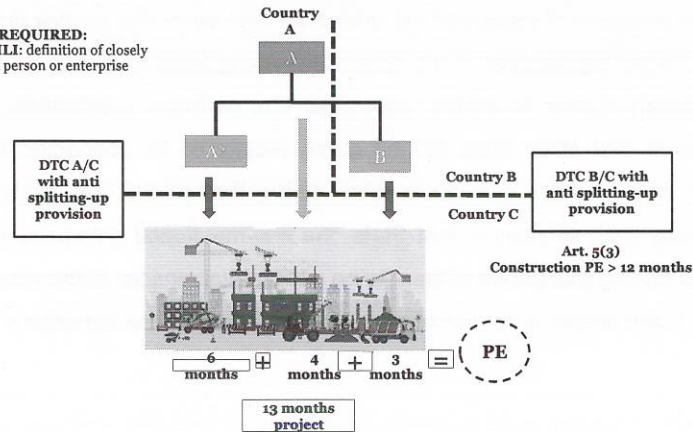
*or comparable interests





Paragraph 52 Commentary Art. 5 2017 OECD Model & Art. 14 MLI: Splitting-up of contracts

REQUIRED:
Art. 15 MLI: definition of closely
related person or enterprise



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Anti-splitting up of contracts rule for construction PEs [p. 52 Commentary].

“For the sole purpose of determining whether the twelve-month period referred to in paragraph 3 has been exceeded,

- where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days without exceeding twelve months, and
- connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise,

these different periods of time shall be added to the period of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project.”

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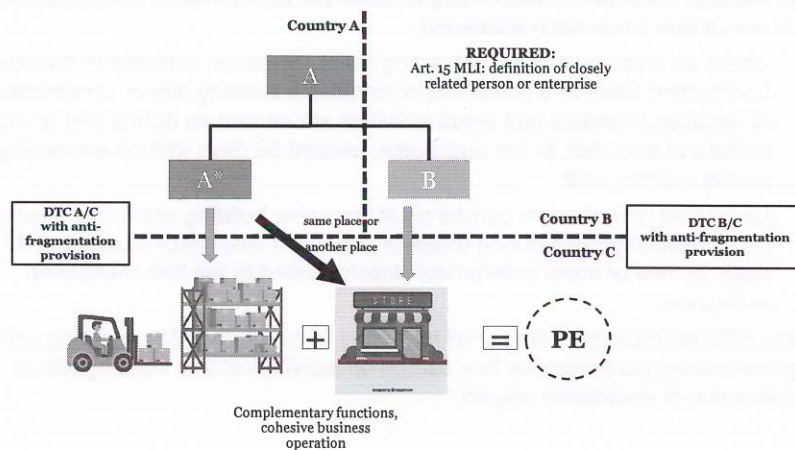
Anti-splitting up of contracts rule for service PEs [p. 166 Commentary].

“For the purposes of paragraph [x], where an enterprise of a Contracting State that is performing services in the other Contracting State is, during a period of time, closely related to another enterprise that performs substantially similar services in that other State for the same project or for connected projects through one or more individuals who, during that period, are present and performing such services in that State, the first-mentioned enterprise shall be deemed, during that period of time, to be performing services in the other State for that same project or for connected projects through these individuals.”

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Art. 5(4.1) 2017 OECD Model & Art. 13 (4) MLI: anti-fragmentation



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New Article 5(4.1)

Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and

- a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or
- b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.



New Article 5(4.1) – Effect

- It may switch off the Article 5(4) exemption if the conditions are met (“Paragraph 4 shall not apply ... if ...”).
- you must first have a traditional PE (p.1) to which p.4 exclusion applies.
- The closely related test is as defined in paragraph 8 of Article 5.



Art. 5(8) 2017 OECD Model & Art. 15 MLI: Person Closely Related to an Enterprise

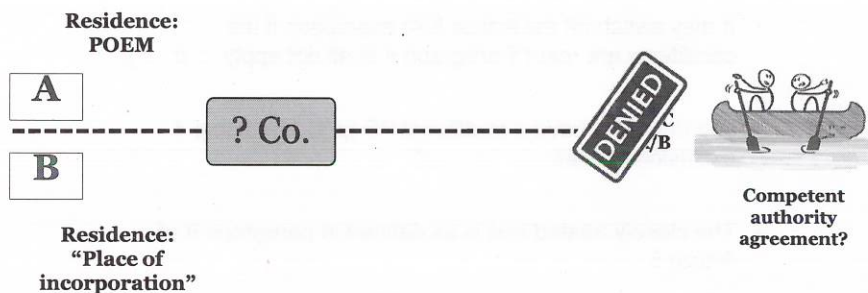
Paragraph 1

- Describes the conditions under which a person will be considered to be “closely related” to an enterprise for the purposes of Articles 12, 13 and 14 of the MLI.
- The definition is essentially the same as Article 5(8) of the OECD Model (2017 update).

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Art. 4(3) 2017 OECD Model & Art. 4 MLI: tie-breaker for dual resident entities



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