

The UN Model & Commentary

*Its increasing relevance in general
and its 2021 (2022) update in particular*

**National University of Singapore
& Loyens & Loeff**

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Kees van Raad
of counsel, Loyens & Loeff

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Model treaties

- **League of Nations** *1927-1946*
OECD *1963*
United Nations *1980*
- **How are they prepared?**
- **Status of Models & Commentaries**

The UN M&C 2021 (2022) update

with focus on

- **Art. 12A** Fees for technical services *(update 2017)*
- **Art. 12B** Income from automated digital services
- **Art. 13, para.s 4 – 7** Capital gains

The UN M&C 2021 (2022) update

Art. 13

Capital gains

Structure of distributive rules OECD/UN Models

Whereas Arts 6-8 and 11-21 address income items,
Art. 13 addresses instances where the income is produced by capital assets, such assets are alienated and produce a capital gain.

Art. 6: Income from immov prop >> *Art. 13.1*

Art. 7: Business profits >> *Art. 13.2 (only: PE mov. prop.)*

Art. 8: Int'l transport profits : ships & aircraft (not: land)
>> *Art. 13.3*

Art. 10: Income from shares

Art. 11: Income from claims

Art. 12: Income from IP & know-how

Art. 12A-12B, 14-20: Income from services (indep./dep.)

OVERVIEW Art. 13 OECD/UN Models - 1

- *para. 1*: immovable property: OECD 1963 + UN 1980
- *para. 2*: movable/personal business property eff conn w PE:
OECD 1963 + UN 1980
- *para. 3*: ships/aircraft operated in intl'l traffic:
OECD 1963 + UN 1980
 - >> but 2017 change: from State where eff man of enterprise
to Source State

UN 1980 + OECD 2003: *para. 4*

- shares in company (wherever resident)
whose value > 50% based (dir/indir) on immov prop in State S

OECD 1963 *para. 5* + UN 1980 *para. 8*

- *other* capital gains: R State only

OVERVIEW Art. 13 OECD/UN Models - 2

UN 1980: *para. 5*

- *shares* in (any) company resident in State S if (dir/indir) interest > .. %

UN 2021: *para. 6*

- right to the use of *natural resources* in State S

UN 2021: *para. 7*

- *share* interest (dir/indir) of > .. % in (any) company if value of these shares derive > 50% of their value from property that is covered by any preceding paragraph if held directly

Art. 13.4 UN Model 1980 + OECD 2003

shares in a company (wherever resident)

whose value > 50% based (dir/indir) on immov prop in
State S

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 6, situated in that other State.

Art. 13.5 UN Model 1980

shares in a company resident in State S
if (dir/indir) interest > .. %

Gains, other than those to which paragraph 4 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 during the 365 days preceding such alienation, held directly or indirectly at least ___ per cent [the percentage is to be established through bilateral negotiations] of the capital of that company or entity.

Art. 13.6 UN Model 2021

Right to the use of natural resources in State S

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.

Art. 13.7 UN Model 2021

share interest (dir/indir) of > .. % in (any) company if value of these shares derive > 50% of their value from property that, if held directly, would be covered by a preceding paragraph

Subject to paragraphs 4 and 5, 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 ___ per cent [the percentage is to be established through bilateral negotiations] 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

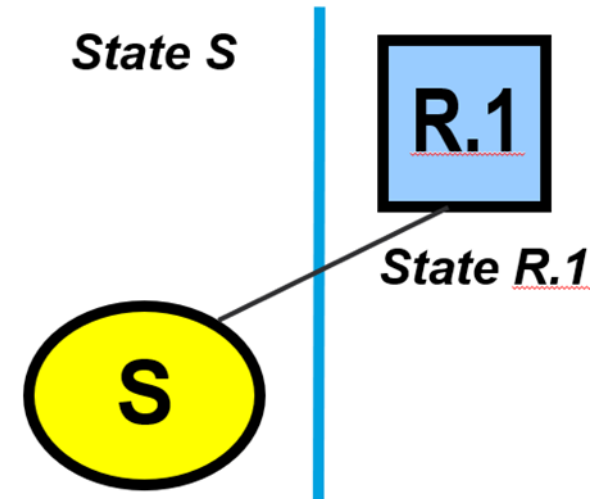
(ii) any combination of property referred to in subdivision (i).

UN Model Art. 13.4 + 13.5 1980

Scenario A

Object S in State S: immovable property OR company:

- purchased in year 1 by R.1 (resident of State R.1) for 80
- and sold by R.1 in year 2 for 100: cap gain of $100 - 80 = 20$



S is immovable property

Art. 13.1 OECD/UN: cap gain may be taxed in State S (State R provides relief)

S is a company

Art. 13.5 OECD: cap gain may be taxed *only in State R*

Art. 13.5 UN: cap gain may be taxed in State S (State R provides relief)

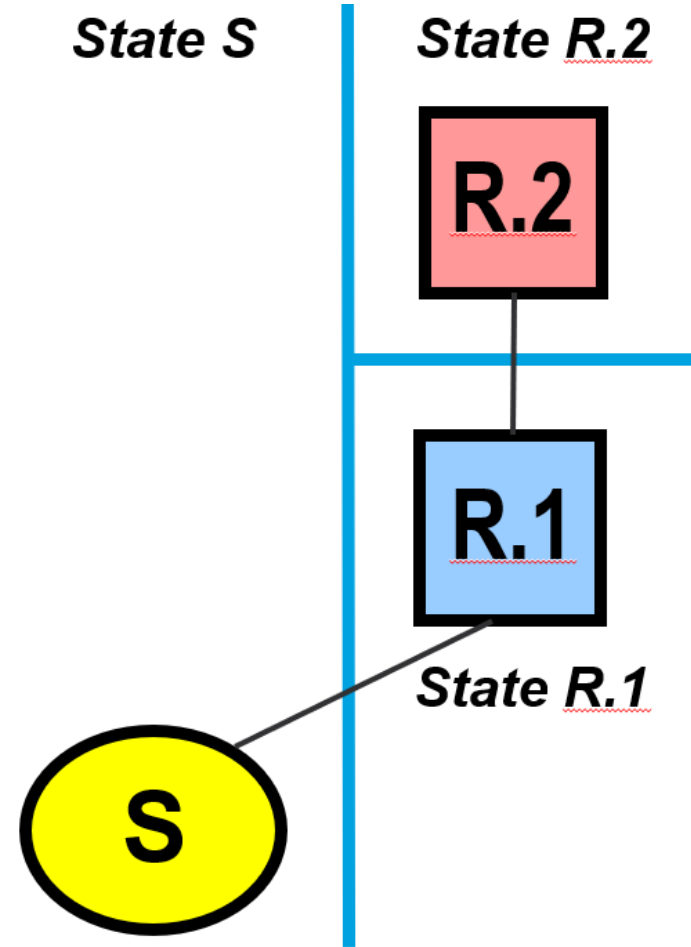
UN Model Art. 13.4 1980 + 13.7

Scenario B

Same as Scenario A, but now R.1 is 100% held by R.2, resident of State R.2.

- Value of R.1 shares held by R.2 (in Year 1: 80) is in Year 2: 100.
- In Year 2, first R.2 sells its interest in R.1 (cap. gain of $100 - 80 = 20$), followed by R.1 selling its interest in S (cap. gain also: 20)

>> *2x realization of underlying increase in value*



UN Model Art. 13.4 1980 + 13.7

Scenario B

S is immovable property

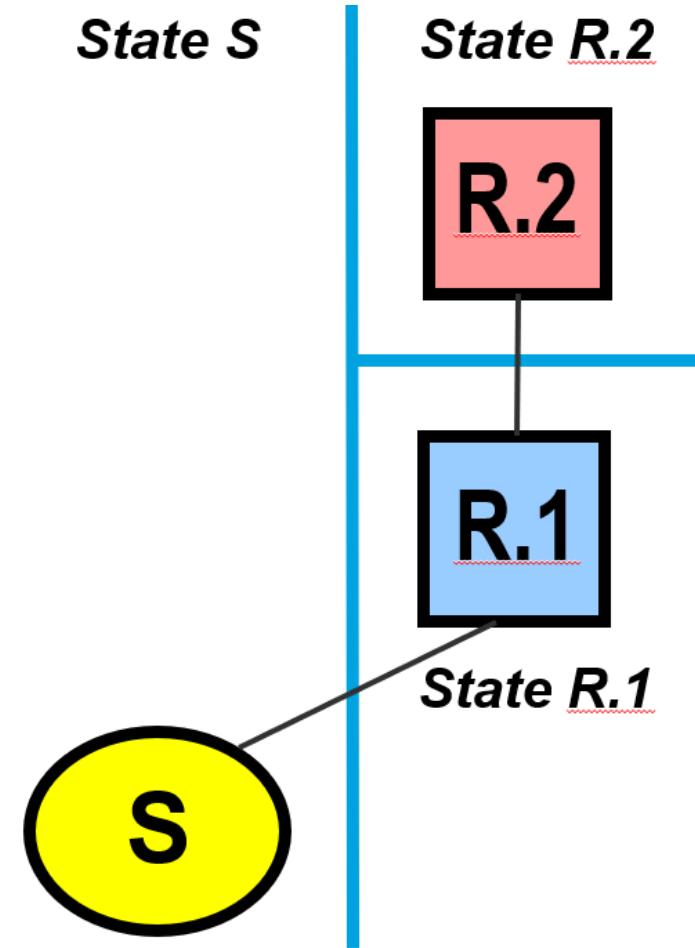
*R.2 sells R.1 shares: under R.2-S treaty**

> OECD + UN Art. 13.4: State S may tax (State R provides relief)

R.1 sells S: under R.1-S treaty

> OECD + UN Art. 13.1: State S may tax (State R provides relief)

* *What about the R.2-R1 treaty?*



UN Model Art. 13.4 1980 + 13.7

Scenario B

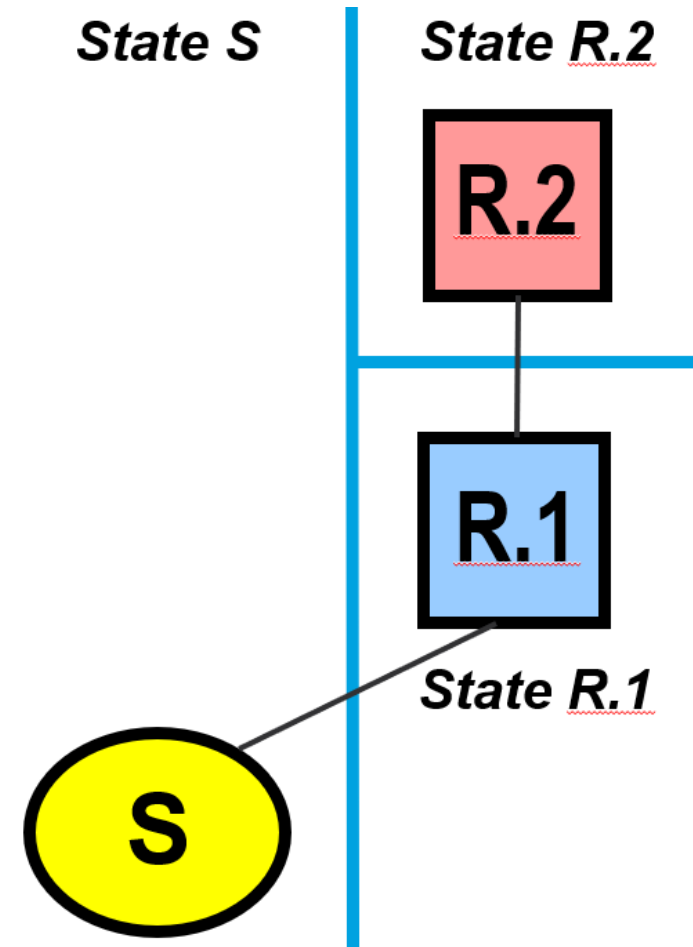
S is a company

*R.2 sells R.1 shares: under R.2-S treaty**

- OECD Art. 13.5 (*other cap. gains*) R.2-S treaty: only State R
- UN Art. 13.7: State S may tax (State R provides relief)

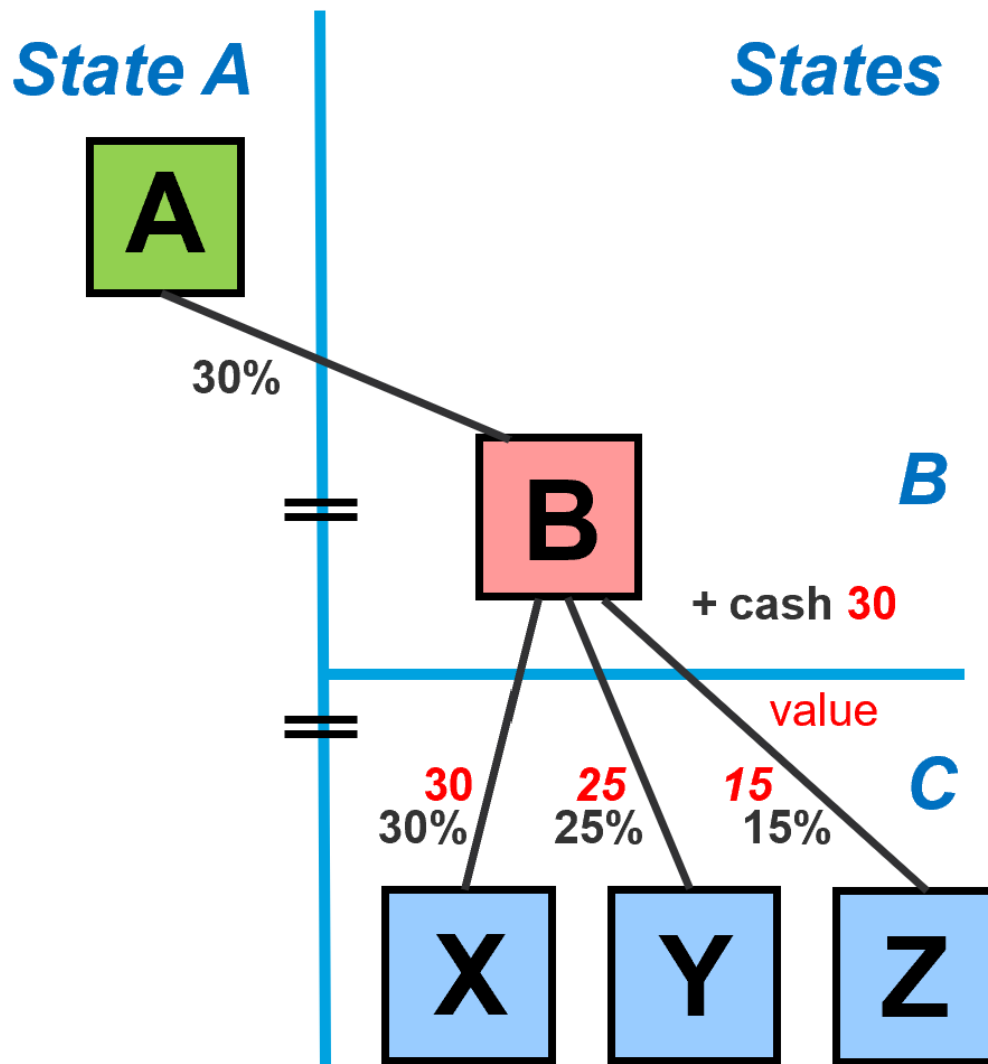
R.1 sells S: under R.1-S treaty:

- > OECD Art. 13.5 (*other cap. gains*): only State R may tax
- . > UN Art. 13.5: State S may tax (State R provides relief)

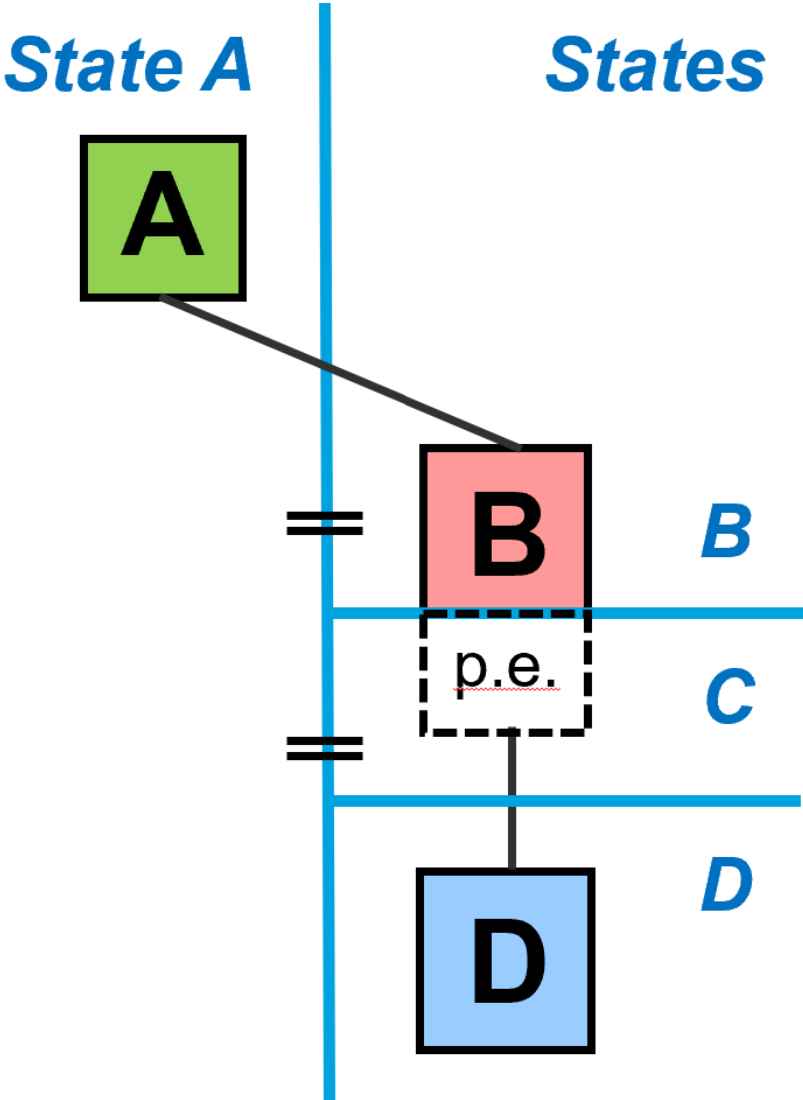


** What about the R.2-R1 treaty?*

Sec. 37 UN Comm Art. 13 *Example*



Sec. 39 UN Comm Art. 13



The UN M&C 2021 (2022) update

Art. 12A

Fees for technical services

Art. 12A – 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 14 and subject to the provisions of Articles 8, 16 and 17, 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 ___ percent of the gross amount of the fees *[the percentage to be established through bilateral negotiations]*.

Art. 12A – Fees for technical services

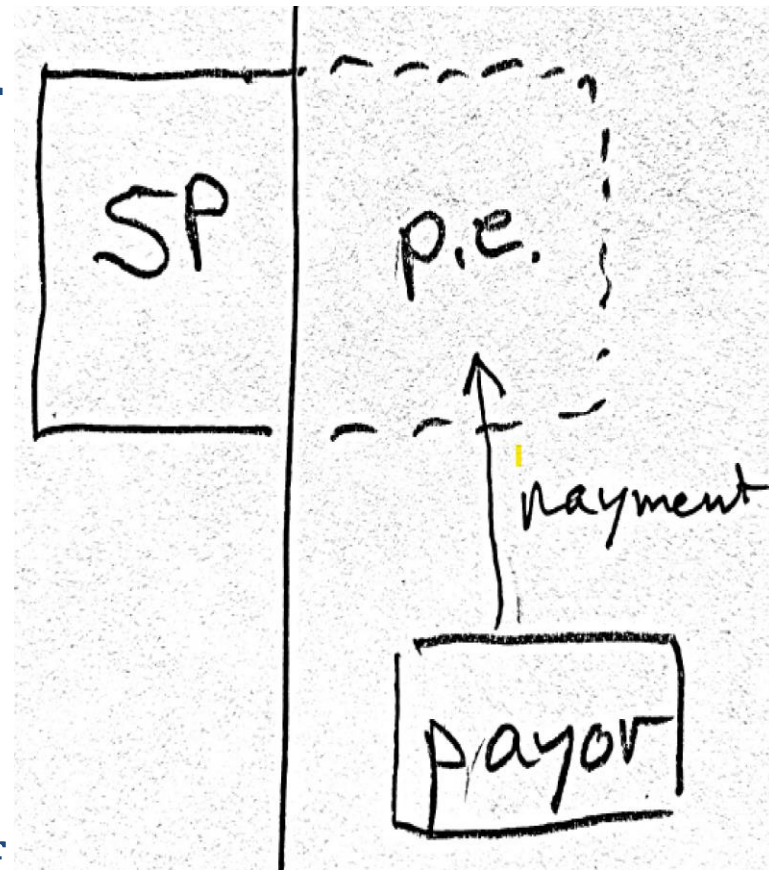
3. The term “fees for technical services” as used in this Article means any payment in consideration for any service of a *managerial, technical or consultancy* nature,

unless the payment is made:

- 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.

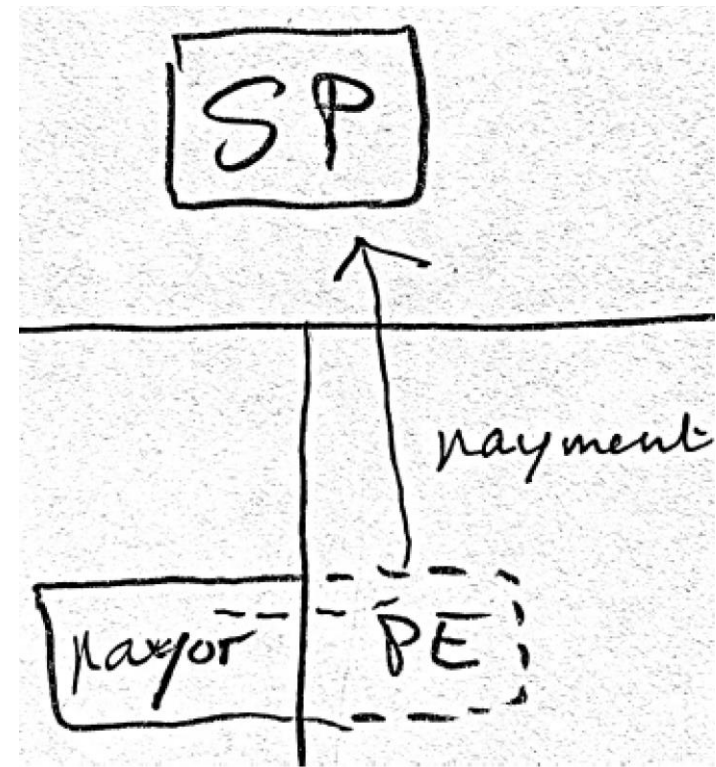
Art. 12A – Fees for technical services

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 ... and *the fees for technical services are effectively connected with ... such permanent establishment or fixed base ...* In such cases the provisions of Article 7 or Article 14, as the case may be, shall apply.



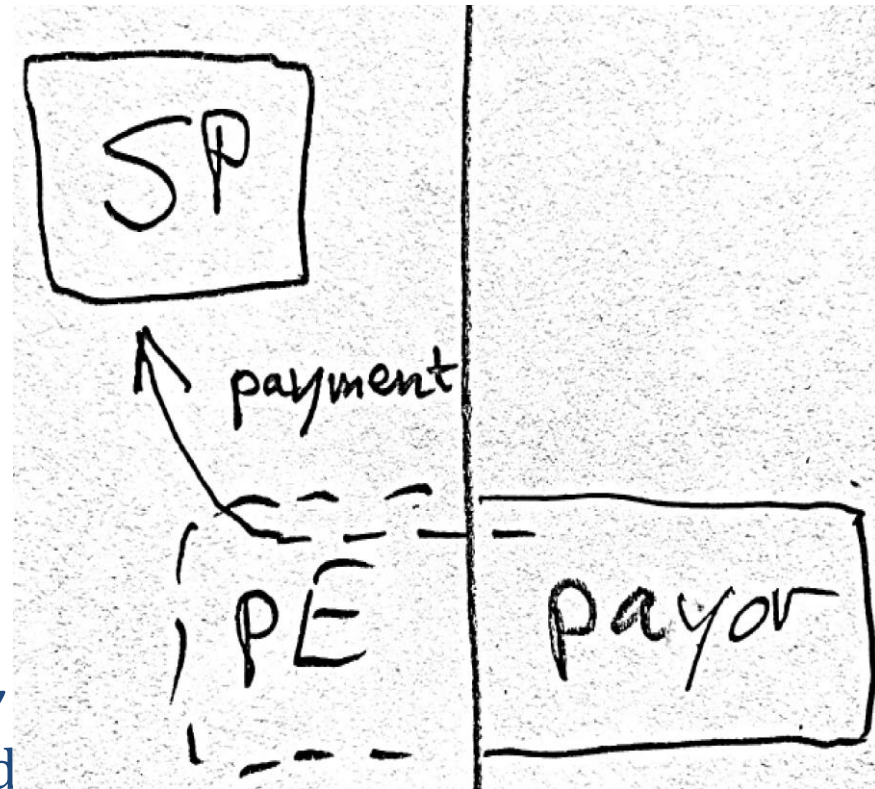
Art. 12A – Fees for technical services

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.*



Art. 12A – Fees for technical services

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.*



The UN M&C 2021 (2022) update

Art. 12B

Income from automated digital services

Art. 12B – Income from automated digital services

Para. 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.

- like Art. 10 – *Dividends* : State R may tax
- *but here*: reference not to ‘payment’, but: ‘income from automated digital services, underlying payments for which are made to a resident of R State’

Art. 12B – Income from automated digital services

Para. 2

But State S (where income is ‘arising’) may also tax the payment (ie the gross amount) at a [open] percentage (Comm suggest 3-4%).

Para. 3

State R recipient has option to request State S to tax the amount of the ‘*qualified profits*’ (QP) from the ADS at State S’ domestic tax rate.

□ QP: 30% of the amount that is computed by applying the ADS-provider’s *ADS profitability ratio* (ie of his ADS ‘business segment’) to the gross revenue the provider derives from its ADS in State S.

>> *additional rules:*

□ if no separate accounts for ADS in State S: profitability ratio of ADS-provider’s entire business in State S

□ if ADS part of an MNE: MNE’s ADS profitability ratio should be applied

Art. 12B – Income from automated digital services

Para. 5 and 6

5. ADS: any service provided on the internet ... requiring [no or] minimal human involvement from the service provider.

6. (possible) examples: online advertising services, supply of user data, online search engines, online intermediation platform services, social media platforms, digital content services, online gaming, cloud computing services and standardized online teaching services.

Para. 7

If an ADS payment is also an Art. 12 royalty or an Art. 12A technical service fee: those articles have priority

Art. 12B – Income from automated digital services

Para. 8

If the ADS income is effectively connected to a PE through which the recipient carries on business in State S: then net-basis (Art. 7) taxation

Para. 9 and 10

9. When is income ‘arising’ in State S: either payment by State S resident, or payment borne by a PE in State S

10. And *not* arising in State S: when payor carries on business in State R through a PE which bears the cost of the ADS payment