防止税收协定优惠的不当授予
第6项行动计划
TABLE OF CONTENTS

Executive summary ...........................................................................................................................................1

Introduction ..................................................................................................................................................6

A. Treaty provisions and/or domestic rules to prevent the granting of treaty benefits
   in inappropriate circumstances .................................................................................................................12
   1. Cases where a person tries to circumvent limitations provided by the treaty itself ..................14
      a) Treaty shopping ..............................................................................................................................14
         i) Limitation-on-benefits rule ........................................................................................................20
         ii) Rules aimed at arrangements one of the principal purposes of which is to obtain treaty benefits .................................................................78
      b) Other situations where a person seeks to circumvent treaty limitations ..............................102
         i) Splitting-up of contracts .............................................................................................................102
         ii) Hiring-out of labour cases ........................................................................................................102
         iii) Transactions intended to avoid dividend characterisation ....................................................102
         iv) Dividend transfer transactions .................................................................................................104
         v) Transactions that circumvent the application of Article 13(4) .................................................106
         vi) Tie-breaker rule for determining the treaty residence of dual-resident persons
             other than individuals ..................................................................................................................108
         vii) Anti-abuse rule for permanent establishments situated in third States ..............................112
   2. Cases where a person tries to abuse the provisions of domestic tax law using treaty benefits .....118
      a) Application of tax treaties to restrict a Contracting State’s right to tax its own residents ..........132
      b) Departure or exit taxes ..................................................................................................................140

B. Clarification that tax treaties are not intended to be used to generate double non-taxation .........140

C. Tax policy considerations that, in general, countries should consider
   before deciding to enter into a tax treaty with another country ..............................................................146
目录

概要 ..................................................................................................................... 1

介绍 ..................................................................................................................... 7

第 1 章. 防止税收协定优惠不当授予的协定条款和（或）国内规则 ...................... 13

1. 试图规避协定本身的限制的情形 ................................................................... 15
   1.1.1 其他方式规避协定限制的情形 ............................................................... 15
   1.1.2 针对一般税收协定优惠为主要目的之一的安排的规则 ......................... 21

2. 试图利用协定以适用国内税法规定的情形 .................................................. 103
   2.1.1 其他方式试图冻结协定限制的情形 ....................................................... 103
   2.1.2. 针对一般税收协定优惠为主要目的之一的安排的规则 ......................... 105

第 2 章. 关于导致双重征税并非税收协定意图的澄清 ................................... 119

第 3 章. 与他国缔结税收协定前通常应进行的税收政策考量 ............................... 141
EXECUTIVE SUMMARY

Action 6 of the OECD/G20 BEPS Project identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns.

Taxpayers engaged in treaty shopping and other treaty abuse strategies undermine tax sovereignty by claiming treaty benefits in situations where these benefits were not intended to be granted, thereby depriving countries of tax revenues. Countries have therefore agreed to include anti-abuse provisions in their tax treaties, including a minimum standard to counter treaty shopping. They also agree that some flexibility in the implementation of the minimum standard is required as these provisions need to be adapted to each country’s specificities and to the circumstances of the negotiation of bilateral conventions.

Section A of this report includes new treaty anti-abuse rules that provide safeguards against the abuse of treaty provisions and offer a certain degree of flexibility regarding how to do so.

These new treaty anti-abuse rules first address treaty shopping, which involves strategies through which a person who is not a resident of a State attempts to obtain benefits that a tax treaty concluded by that State grants to residents of that State, for example by establishing a letterbox company in that State. The following approach is recommended to deal with these strategies:

- First, a clear statement that the States that enter into a tax treaty intend to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements will be included in tax treaties (this recommendation is included in Section B of the report).

- Second, a specific anti-abuse rule, the limitation-on-benefits ("LOB") rule, that limits the availability of treaty benefits to entities that meet certain conditions will be included in the OECD Model Tax Convention. These conditions, which are based on the legal nature, ownership in, and general activities of the entity, seek to ensure that there is a sufficient link between the entity and its State of residence. Such limitation-on-benefits provisions are currently found in treaties concluded by a few countries and have proven to be effective in preventing many forms of treaty shopping strategies.

- Third, in order to address other forms of treaty abuse, including treaty shopping situations that would not be covered by the LOB rule described above, a more general anti-abuse rule based on the principal purposes of transactions or arrangements (the principal purposes test or "PPT" rule) will be included in the OECD Model Tax Convention. Under that rule, if one of the principal purposes of transactions or arrangements is to obtain treaty benefits, these benefits would be denied unless it is established that granting these benefits would be in accordance with the object and purpose of the provisions of the treaty.

The report recognises that each of the LOB and PPT rules has strengths and weaknesses and may not be appropriate for, or accord with the treaty policy of, all countries. Also, the domestic law of some countries may include provisions that make it unnecessary to combine these two rules to prevent treaty shopping.
概要

OECD/G20 的 BEPS 项目的第 6 项行动计划认为协定滥用，尤其是滥用协定是产生税基侵蚀和利润转移问题最重要的原因之一。

采取避税手段或其他滥用协定策略的纳税人，利用这些策略获取正常情况下无法获取的税收优惠，削弱了税收主权从而剥夺了国家税收收入。因此各国同意在税收协定中写入反协定条款，包括应对协定滥用的最低标准。同时各国也同意，考虑到这些条款需要适应各国的特殊性及双边协定的协商环境，需要在执行最低标准时给予一定的灵活性。

本报告第 1 章包括新的协定反滥用规则，此规则可以防止对协定条款的滥用，并对具体操作提供一定的灵活性。

这些新的协定反滥用规则首先将应对协定滥用，包括非某国居民试图利用各协定安排来谋取该国居民才有的权利获取的税收优惠，例如在该国设立一个邮箱公司（a letterbox company）。

建议以下列方法应对这种滥用。

第一，缔约国双方在签订税收协定时，应在协定中明确规定：双方同意在防止通过偷税手段所造成的不征税行为或其他行为作为创造条件，包括协定滥用安排（该建议在本报告第 2 章有所阐述）。

第二，在税收协定中纳入一项特别协定反滥用规则——利益限制（"LOB"）规则，这将协定优惠限定在满足特定条件的实体中。依据缔约国居民实体的法律性质、所有权及经常活动而制定的这些条件，旨在确保该实体与其所在国有足够的联系。目前少数国家的税收协定中包含了上述 LOB 条款，且证明该规则在应对协定滥用的情形是有效的。

第三，为了应对其他形式的协定滥用，包括上文所述 LOB 规则没有涉及的协定滥用情况，以交易或安排的主要目的为基础的更为概括性的协定滥用规则（即"PPT"规则）将会被加入到 OECD 税收协定框架中。在该规则下，若交易或安排的主要目的是获取税收协定优惠，除非能够证明该事项与协定规则的目标及目的密切相关，否则优惠将不会被授予。

本报告承认 LOB 以及 PPT 规则都有自己的优势和劣势，且可能无法适用于所有国家。另外，某些国家的国内法可能已经包含特定条款，使得无须再加入上述两项规则来防止协定滥用。

鉴于协定滥用对收入造成的风险，各国承诺将确保采取防止协定滥用的最低限度措施（"最低标准"）。该承诺要求各国在税收协定中明确阐述各国共同的愿景是在不为偷漏税和
Given the risk to revenues posed by treaty shopping, countries have committed to ensure a minimum level of protection against treaty shopping (the "minimum standard"). That commitment will require countries to include in their tax treaties an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. Countries will implement this common intention by including in their treaties: (i) the combined approach of an LOB and PPT rule described above, (ii) the PPT rule alone, or (iii) the LOB rule supplemented by a mechanism that would deal with conduit financing arrangements not already dealt with in tax treaties.

Section A also includes new rules to be included in tax treaties in order to address other forms of treaty abuse. These targeted rules address (1) certain dividend transfer transactions that are intended to lower artificially withholding taxes payable on dividends; (2) transactions that circumvent the application of the treaty rule that allows source taxation of shares of companies that derive their value primarily from immovable property; (3) situations where an entity is resident of two Contracting States, and (4) situations where the State of residence exempts the income of permanent establishments situated in third States and where shares, debt-claims, rights or property are transferred to permanent establishments set up in countries that do not tax such income or offer preferential treatment to that income.

The report recognises that the adoption of anti-abuse rules in tax treaties is not sufficient to address tax avoidance strategies that seek to circumvent provisions of domestic tax laws; these must be addressed through domestic anti-abuse rules, including through rules that will result from the work on other parts of the Action Plan. The report includes changes to the OECD Model Tax Convention aimed at ensuring that treaties do not inadvertently prevent the application of such domestic anti-abuse rules. This is done by expanding the parts of the Commentary of the OECD Model Tax Convention that already deal with this issue and by explaining that the inclusion of the PPT rule in treaties, which will incorporate the principle already included in the Commentary of the OECD Model Tax Convention, will provide a clear statement that the Contracting States intend to deny the application of the provisions of their treaties when transactions or arrangements are entered into in order to obtain the benefits of these provisions in inappropriate circumstances.

The report also addresses two specific issues related to the interaction between treaties and domestic anti-abuse rules. The first issue relates to the application of tax treaties to restrict a Contracting State's right to tax its own residents. A new rule will codify the principle that treaties do not restrict a State's right to tax its own residents (subject to certain exceptions). The second issue deals with so-called "departure" or "exit" taxes, under which liability to tax on some types of income that has accrued for the benefit of a resident (whether an individual or a legal person) is triggered in the event that the resident ceases to be a resident of that State. Changes to the Commentary of the OECD Model Tax Convention will clarify that treaties do not prevent the application of these taxes.

Section B of the report addresses the part of Action 6 that asked for clarification "that tax treaties are not intended to be used to generate double non-taxation". This clarification is provided through a reformulation of the title and preamble of the Model Tax Convention that will clearly state that the joint intention of the parties to a tax treaty is to eliminate double taxation without creating opportunities for tax evasion and avoidance, in particular through treaty shopping arrangements.

Section C of the report addresses the third part of the work mandated by Action 6, which was "to identify the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country". The policy considerations described in that section should help countries explain their decisions not to enter into tax treaties with certain low or no-tax jurisdictions; these policy considerations will also be relevant for countries that need to consider whether they should modify (or,
避税创造机会的前提下消除双重征税。各国为实现这一愿景，将在税收协定中包含（1）上述 LOB 及 PPT 规则；（2）PPT 规则；（3）LOB 规则，辅以能够应对协定尚无法解决的融资导致安排的机制。

第一章中还包含有针对其他协定滥用的规则。这些规则旨在应对下述几种情形：（1）意在为降低股息预提税额的部分股息转移交易；（2）规避根据协定来源国应对主要价值来源于不动产的公司的股权交易征税的规则的交易；（3）一个实体为两个缔约国居民的情况以及（4）在居住国不对设在第三国的常设机构征税的情形下，将股权、债权、权利或财产转移到不对此种所得征税或提供优惠待遇的国家中设立的常设机构中。

本报告同意税收协定中的反滥用规则不足以应对试图规避国内法规定的避税策略，只能通过包括其他行动计划所制定的规则在内的国内法反滥用规则来应对。报告中亦包含了 OECD 税收协定范本的修改，旨在确保协定不会无意间阻止国内反滥用规则的应用。具体的欺诈及扩充延期 OECD 税收协定范本中已有的针对这一问题的注释，并阐明在税收协定中包含的 PPT 规则（此规则包含了已在 OECD 税收协定范本注释中体现的原则）会明确定义交易或安排的目的是在不适当情况下获取协定条款的优惠时，缔约国将否定该条款的应用。

本报告也阐述了关于协定和国内反滥用规则相互作用的两个问题。第一个问题是关于运用税收协定限制缔约国一方对其居民征税问题。新的规则将被用于明确协定不应限制缔约国对其居民的征税权的这一规则（某些情况例外）。第二个问题涉及所谓的“离境税”或是“退出税”（departure or exit taxes），此类税额根据一国居民的部分所得所享受的特定义项会估计，该居民不再是本国居民的情况下将会引发其纳税义务。税收协定范本注释的修改将澄清协定并不会妨碍此类税收的应用。

本报告第 2 章阐明了第 6 项行动计划中“消除导致双重征税的协定”的部分。通过修改税收协定中的条款和程序，明确声明税收协定双方的共同目标是在不为偷税和逃税创造机会的前提下消除双重征税，特别是防止避税和导致的逃税或偷税。

本报告第 3 章阐明了第 6 项行动计划所要求的第三部分工作，即“确定各国与其他国家在税收协定基础上进行的税收政策考量”。第 3 章阐述的政策考量应能帮助各国解释其不与某些低税或无税司法辖区签订税收协定的原因。当缔约国因情况变化（如协定对方国内法发生变
ultimately, terminate) a treaty previously concluded in the event that a change of circumstances (such as changes to the domestic law of a treaty partner) raises BEPS concerns related to that treaty.

This final version of the report supersedes the interim version issued in September 2014. A number of changes have been made to the rules proposed in the September 2014 report. As noted at the beginning of the report, however, additional work will be required in order to fully consider proposals recently released by the United States concerning the LOB rule and other provisions included in the report. Since the United States does not anticipate finalising its new model tax treaty until the end of 2015, the relevant provisions included in this report will need to be reviewed afterwards and will therefore be finalised in the first part of 2016. An examination of the issues related to the treaty entitlement of certain types of investment funds will also continue after September 2015 with a similar deadline.

The various anti-abuse rules that are included in this report will be among the changes proposed for inclusion in the multilateral instrument that will implement the results of the work on treaty issues mandated by the OECD/G20 BEPS Project.
动）带来与协定相关的 BEPS 风险而考虑是否应修改（或终止）某个之前达成的协定时，这些政策考量也会有所帮助。

本报告为最终版，取代 2014 年 9 月发布的版本。对 2014 年 9 月发布的版本中的规则做了许多修正。在本报告的开篇处我们需要提醒的是，考虑到美国最近披露的针对 LOB 和其他规则的修改提议，后续还需要进一步工作。由于美国预计对其新协定范本的修订需要到 2015 年底才能完成，本报告中的条款需要在该后进一步被审阅并预计在 2016 年上半年完成修订。对于特定类型投资参与的协定内容授予相关事项将在 2015 年 9 月后继续进行，预计完成日期同上。

本报告中的众多反滥用规则将包含在对多边工具的修改建议中，多边工具被用于执行 OECD / G20 税基侵蚀和利润转移项目的工作成果。
ACTION 6: PREVENTING THE GRANTING OF TREATY BENEFITS IN INAPPROPRIATE CIRCUMSTANCES

Introduction

1. At the request of the G20, the OECD published its Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan) in July 2013. The BEPS Action Plan includes 15 actions to address BEPS in a comprehensive manner and sets deadlines to implement these actions.

2. The BEPS Action Plan identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns. Action 6 (Prevent Treaty Abuse) describes the work to be undertaken in this area. The relevant part of the Action Plan reads as follows:

Existing domestic and international tax rules should be modified in order to more closely align the allocation of income with the economic activity that generates that income:

_Treaty abuse is one of the most important sources of BEPS concerns._ The Commentary on Article 1 of the OECD Model Tax Convention already includes a number of examples of provisions that could be used to address treaty-shopping situations as well as other cases of treaty abuse, which may give rise to double non-taxation. Tight treaty anti-abuse clauses coupled with the exercise of taxing rights under domestic laws will contribute to restore source taxation in a number of cases.

**Action 6 - Prevent treaty abuse.**

*Develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances. Work will also be done to clarify that tax treaties are not intended to be used to generate double non-taxation and to identify the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country. The work will be co-ordinated with the work on hybrids.*

3. This report is the result of the work carried on in the three different areas identified by Action 6:

A. Develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances.

B. Clarify that tax treaties are not intended to be used to generate double non-taxation.

C. Identify the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country.

4. The conclusions of the work in these three different areas of work correspond respectively to Sections A, B and C of this report. These conclusions take the form of changes to the OECD Model Tax Convention (in this report, all changes that are proposed to the existing text of the Model Tax Convention appear in _bold italics_ for additions and _strikethrough_ for deletions).

第 6 项行动计划——防止税收协定优惠的不当授予

介绍

1. 按照 20 国集团的要求，OECD 于 2013 年 3 月发布了针对税基侵蚀和利润转移的行动计划（BEPS 行动计划）。BEPS 行动计划包括 15 项行动，以全面综合的方式应对税基侵蚀和利润转移，并且为各行动的实施设定了期限。

2. BEPS 行动计划将协定滥用，特别是税务避税作为产生税基侵蚀和利润转移问题最重要的原因之一。第 6 项行动计划（防止协定滥用）阐述了在该领域中有待完成的工作。行动计划的相关部分如下：
   
   修改现有国内及国际税务规则，使所得的分配与产生该所得的经济活动更加匹配；

协定滥用是 BEPS 问题最重要的原因之一。OECD 协定范本第 1 条的注释已经包含了无数条款的定义，可以利用这些条款来应对协定避税以及其他可能引起双重不征税的协定滥用情形。严格的反协定滥用条款，辅以国内法下征税权的实施，在很多情况下对恢复从源头税有有所帮助。

第 6 项行动计划——防止协定滥用

针对国内法规的设计，制定范本协定条款和建议，以防止税收协定优惠的不当授予；开展工作澄清导致双重不征税及非税政策的意图；确定各国与他国缔结税收协定前通常应进行的税收政策考量。这些工作将与混合模式工作相整合。

3. 本报告是在第 6 项行动计划确定的三个不同领域所完成的工作成果：
   
   A. 针对国内法规的设计，制定范本协定条款和建议，以防止税收协定优惠的不当授予；
   B. 避免导致双重不征税及非税政策的意图；
   C. 确定各国与他国缔结税收协定前通常应进行的税收政策考量。

4. 在这三方面所完成的工作成果分别对应本报告的三章。这些结论以修改 OECD 税收协定范本的形式呈现（在报告中，对现行税收协定范本的增补内容用仿宋体表示，删除内容用删除线表示）。

*可至 http://www.oecd.orgctp/BEPSActionPlan.pdf 获取*
5. These changes reflect the agreement that the OECD Model should be amended to include the minimum level of protection against treaty abuse, including treaty shopping, described in the Executive summary and paragraph 22 below, as this minimum level of protection is necessary to effectively address BEPS.

6. When examining the model treaty provisions included in this report, it is also important to note that these are model provisions that need to be adapted to the specificities of individual States and the circumstances of the negotiation of bilateral conventions. For example:

- Some countries may have constitutional restrictions or concerns based on EU law that prevent them from adopting the exact wording of the model provisions that are recommended in this report.

- Some countries may have domestic anti-abuse rules that effectively prevent some of the treaty abuses described in this report and, to the extent that these rules conform with the principles set out in this report (and, in particular, in Section A.2) and offer the minimum protection referred to in paragraph 22 below, may not need some of the rules proposed in this report.

- Similarly, the courts of some countries have developed various interpretative tools (e.g. economic substance, substance-over-form) that effectively address various forms of domestic law and treaty abuses and these countries might not require the general treaty-abuse provision included in subsection A.1(a)(ii) below or might prefer a more restricted form of that provision.

- The administrative capacity of some countries might prevent them from applying certain detailed treaty rules and might require them to opt for more general anti-abuse provisions.

For these reasons, a number of the model provisions included in this report offer alternatives and a certain degree of flexibility. There is agreement, however, that these alternatives aim to reach a common goal, i.e. to ensure that States incorporate in their treaties sufficient safeguards to prevent treaty abuse, in particular as regards treaty shopping. For that reason, the report recommends a minimum level of protection that should be implemented (see paragraph 22 below).

Further work to be done

7. Additional work needs to be done on certain issues related to the contents of this report.

8. First, at the end of May 2015, the United States released, for public comments to be sent by 15 September 2015, a new version of its limitation-on-benefits (LOB) rule and of other provisions of its model tax treaty that are similar to provisions included in this report. When these new United States provisions were discussed, it was agreed that they should be further examined once finalised by the United States in the light of the comments that will be received on them. For that reason, the parts of this report that include the LOB rule, its Commentary and provisions similar to those that were released by the United States in May 2015 will need to be reviewed after the adoption of this report. The work on those provisions and the relevant part of the Commentary will be finalised in the first part of 2016, which will allow them to be considered as part of the negotiation of the multilateral instrument that will implement the results of the work on treaty issues mandated by the BEPS Action Plan.

9. Second, paragraph 5 of the previous version of this report indicated that further work was needed with respect to the policy considerations relevant to the treaty entitlement of collective investment

---

5. 这些修改反映了对一个共识的肯定：即基于最低标准的保护在应对 BEPS 问题上的必要性。需要修改 OECD 协定范本，将在本文摘要和本报告第 22 段中所描述的最低标准保护纳入其中，以便包括在协定范本中的协定选项。

6. 在审议本报告的协定范本条款时，一个值得注意的要点是：这些协定条款需要适应单个国家的特殊性以及双边协定的协商环境。举例而言：

- 部分国家可能因为本国宪法或基于欧盟法律的限制而无法逐字逐句采用本报告推荐的条款范例。
- 某些国家可能已有国内反滥用规则，能有效防范本报告中所描述的反滥用漏洞。如果这些规则与本报告中规定的条款保持一致（特别是第 1 章第 2 节），并能提供下文第 22 段提及的最低标准的保护，则这些国家可能不需要本报告建议的条款。
- 类似的，某些国家的法规已建立其他国内反滥用规则（例如，经济实质、实质重于形式），这些工具已能够有效防止国内法规的滥用。这些国家可能不需要在下文第 1 章第 1.1.2 节中包含的一般反滥用条款，或更倾向于采用其他条款制定较为严格的形式。
- 部分国家的行政管理能力限制其采用部分具体的反滥用规则，只能采用较一般的反滥用条款。

由于这些原因，本报告推荐的许多协定条款均提供了多种选择和一定的灵活性。不过，这些不同选择均是为达成一个共同目标，即确保各国在协定中加入足够的防范措施来防止协定滥用，特别是针对协定规避的措施。为此，本报告倡导至少应执行最低标准（参见下文第 22 段）。

有待完成的进一步工作

7. 本报告中一些特定事项需要进行进一步研究。

8. 首先，在 2015 年 5 月底，美国发布了最新的利益限制（LOB）规则及其他协定范本中的条款（与本报告中的条款类似），公开征集公众意见。截止日期为 2015 年 9 月。在对这些美国的新条款进行讨论时，各方同意应在美国根据征求到的意见将这些条款制定后，再次对这些协定条款进行审议。因此，本报告中包含的与美国 2015 年 5 月发布的规则类似的 LOB 规则，注释和条款在本报告被采用后仍然需要进行再次审议。相关条款及意见的修订预计于 2016 年上半年完成，从而允许这项工作所带来变化作为多边工具谈判的一部分被考虑。多边工具将执行 BEPS 行动计划范围的关于税收协定事项的工作。

vehicles (CIVs) and non-CIV funds. As a result of the follow-up work on these issues and of the comments received from stakeholders, it was concluded that there was general support for the conclusions included in the 2010 OECD Report “The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles” and that since subparagraph 2f) of the LOB rule included in this report dealt with the application of the LOB to CIVs in a way that reflected the conclusions of the 2010 CIV Report, there was no need for additional changes to the report on Action 6 in order to address issues related to collective investment vehicles, even though it was also agreed that the implementation of the recommendations of the TRACE project were important for the practical application of these conclusions.

10. The same conclusion could not be reached, however, as regards the policy considerations relevant to the treaty entitlement of non-CIV funds and further work is needed in that area.

11. That work will first confirm the conclusions of the 2008 OECD report “Tax Treaty Issues Related to REITs”, which deals with the treaty entitlement of Real Estate Investment Trusts (REITs). Whilst the conclusions of the 2010 CIV Report have been confirmed as part of the work on Action 6, this has not been done with respect to the 2008 REIT Report. It is therefore agreed to make the following change in the final version of the Commentary of the LOB rule to be produced in 2016:

Add the following footnote to the first part of paragraph 31 of the Commentary on subparagraph 2f) of the LOB rule included in paragraph 16 of the Report on Action 6 (the additional footnote appears in bold italics):

31. As indicated in the footnote to subparagraph f), whether a specific rule concerning collective investment vehicles (CIVs) should be included in paragraph 2, and, if so, how that rule should be drafted, will depend on how the Convention applies to CIVs and on the treatment and use of CIVs in each Contracting State. [Whisth no such rule will be needed with respect to an entity that would otherwise constitute a "qualified person" under other parts of paragraph 2, Such a specific rule will frequently be needed since a CIV may not be a qualified person entitled to treaty benefits under either the other provisions of paragraph 2 or under paragraph 3, because, in many cases ...]

[Footnote 1] See also paragraph 67.1 to 67.7 of the Commentary on Article 10 and the report “Tax Treaty Issues Related to REITs” which deal with the treaty entitlement of Real Estate Investment Trusts (REITs). With respect to the application of the definition of “resident of a Contracting State” to REITs, see paragraphs 89 of the report “Tax Treaty Issues Related to REITs”.

12. Additional work will also ensure that a pension fund should be considered to be a resident of the State in which it is constituted regardless of whether that pension fund benefits from a limited or complete exemption from taxation in that State. This will be done through changes to the OECD Model Tax Convention, to be also finalised in the first part of 2016, that will ensure that outcome for funds that will meet a definition of “recognised pension fund” which will likely include the following elements:

- the definition will refer to entities or arrangement established in a State and constituted and operated exclusively or almost exclusively to administer or provide retirement or similar benefits to individuals;
- the entities or arrangements to which the definition will apply will need to be treated as separate persons under the taxation laws of that State;
- in order to cover only funds that the tax law recognises as pension funds, these entities will need to be regulated as pensions funds by the State in which they are established;
9. 本报告上一版本中第 8 段表明与集中投资工具（CIV）以及非 CIV 基金享受相关优惠待遇相关的政策考量仍有很多工作有待完成，作这一问题的后续跟进并综合从利益相关者处获取的意见建议。本报告得出下述结论：各方普遍支持 2010 年 OECD 报告“CIV 基金收入相关的税费协定授予”中的结论，既反报告 LOB 规则部分第 2 f) 条涉及 LOB 规则在 CIV 基金收入方面的应用，且反映了 2010 年 OECD 报告的结论。因此尽管各方认同执行 TRAE 项目的重要对这些结论的实际应用十分重要，报告不再因 CIV 相关问题对第 6 条行动做进一步的修改。

10. 但是针对非 CIV 基金的税收协定授予问题尚未形成一致的结论，工作仍然有待完成。


在关于第 8 条行动计划各报告的第 8 段包含的 LOB 规则的 2 f) 条的注释第 31 段第 1 部分加上以下的脚注（增加的脚注以斜体显示）

31. 正如第 1 项的脚注显示，第 2 段是否应该包含有关于 CIV 的规则，如果应包含规则如何规定，都取决于协定如何应用于 CIV 及缔约各国各方如何对待和使用 CIV。若一个实体可以通过第 2 段的其他条款成为一个“有资格的人”，则此规则并非必要。然而，由于 CIV 可能无法符合第 2 段的其他条款第 3 段的要求，这样一个特殊规则很有可能会经常使用到，因为，很多情况下...

注 1| 参见第 10 条注释第 67.1 至 67.7 段，以及针对房地产行业投资信托（REITS）基金的税收协定授予的相关事宜。2008 年 OECD 报告“与 REITS 相关的税费协定事宜”。关于“缔约国居民”的概念如何用于 REITS，参见“与 REITs 相关的税费协定事宜”报告的第 5-6 段。

12. 未来更多的工作将会确保养老基金将会被看作其成立所在国的居民，不论该养老基金是否在该国豁免部分或全部税收。将通过修改 OECD 协定范本以确保符合包含下列要素的“认可养老基金”定义的基金享受同样待遇。

—— 定义是指在一个国家成立的实体或安排，该实体或安排的组建和运营全部或几乎全部为个人管理或提供退休金或类似福利；
—— 符合定义的实体或安排需在本国税法体系中被视为单独的人；
—— 为确保不仅包括在税法上认可为养老金基金，这些实体在所在国应享受养老金管理条例的监管；
the definition will also need to cover entities and arrangements that are constituted and operated exclusively or almost exclusively to invest funds for the benefit of entities or arrangements that will themselves qualify as "recognised pension funds".

13. That definition will need to be accompanied by detailed Commentary that will explain some of these requirements, in particular the requirement that a pension fund "be regulated as such". Consultation with stakeholders will be necessary to ensure that the definition and its Commentary cover the main forms of pension funds that currently exist.

14. As regards the broader question of the treaty entitlement of non-CIV funds, the OECD recognises the economic importance of these funds and the need to ensure that treaty benefits be granted where appropriate. The new treaty provision on transparent entities that is included in Part 2 of the Report on Action 2 (Neutralising the effects of hybrid mismatch arrangements) will be beneficial for non-CIV funds that use entities that one or the two Contracting States treat as fisically transparent since income derived through such entities that will be taxed in the hands of the investors in these entities will generally receive treaty entitlement at the level of the investors even if these investors are residents of third States. Also, the possible inclusion of a derivative benefits provision in the LOB rule to be finalised in the first part of 2016 will likely also address some of the concerns regarding the treaty entitlement of non-CIV funds in which there are non-resident investors. Notwithstanding this, however, there is a need to continue to examine issues related to the treaty entitlement of non-CIV funds to ensure that the new treaty provisions that are being considered adequately address the treaty entitlement of non-CIVs. The continued examination of these issues would also address two general concerns that governments have about granting treaty benefits with respect to non-CIVs: that non-CIVs may be used to provide treaty benefits to investors that are not themselves entitled to treaty benefits and that investors may defer recognition of income on which treaty benefits have been granted. This work, which will also benefit from consultation with stakeholders, will need to be completed in the first part of 2016 in order to be relevant for the negotiation of the multilateral instrument.

A. Treaty provisions and/or domestic rules to prevent the granting of treaty benefits in inappropriate circumstances

15. In order to determine the best way to prevent the granting of treaty benefits in inappropriate circumstances, it was found useful to distinguish two types of cases:

1. Cases where a person tries to circumvent limitations provided by the treaty itself.

2. Cases where a person tries to circumvent the provisions of domestic tax law using treaty benefits.

16. Since the first category of cases involve situations where a person seeks to circumvent rules that are specific to tax treaties, it is unlikely that these cases will be addressed by specific anti-abuse rules found in domestic law. Although a domestic general anti-abuse rule could prevent the granting of treaty benefits in these cases, a more direct approach involves the drafting of anti-abuse rules to be included in treaties. The situation is different in the second category of cases: since these cases involve the avoidance of domestic law, they cannot be addressed exclusively through treaty provisions and require domestic anti-abuse rules, which raises the issue of the interaction between tax treaties and these domestic rules.
定义需同时包含其组建和运营全部或几乎全部是为了满足自身符合“受认可养老基金”的实体或安排的利益而投资基金的实体和安排。

13. 该定义需要有详细的注释来解释某些要求，特别是基金应“受监管”这一要求。考虑到需确保定义和注释覆盖现有的基金，需要利益相关者的咨询很有必要。

14. 关于非 CIV 基金协定待遇授予这一范围更广的问题，OECD 意识到此类基金对经济的重要性，因而需要确保当地授予其协定优惠。第 2.2 行动计划（消除混合错配安排的影响）第 2 章中所提到的透明度的协定条款对于非 CIV 基金而言尚属初步的。这些基金由于其所获的收入将在投资者层面征税，投资者对filem经济是透明的。但其可以与投资者层面获得协定优惠。如基金的投资者是第三国居民。此外，将在 2016 年上半年完成的 LOB 规则可能包含衍生优惠条款。这些条款将解决对基金为非居民的协定待遇授予问题的进一步担忧。但是，为确保新协定条款能够解决对 CIV 基金的协定待遇授予问题，有必要对非 CIV 基金协定待遇授予问题进行进一步的研究。对此问题的研究也将在协定待遇授予问题上的两个通常担忧：非 CIV 基金有可能被用来为原本不符合协定待遇授予条件的投资者获取协定优惠，以及投资者可能会通过确认已经授予协定待遇的收入。这项工作，将从与利益相关人士征求意见的活动中受益，同时为了确保能够作为多边工具的讨论部分，也将在 2016 年上半年完成。

第 1 章 防止税收协定优惠不当授予的协定条款（或）国内规则

15. 为确定防止税收协定优惠不当授予的最佳方法，区分两种情形会有所帮助：

- 人试图规避协定本身的限制的情形；
- 人试图利用协定优惠来规避国内税法规定的情形。

16. 由于第一情形包括了人企图规避税收协定中特定条款的情形。在国内税法中将不适用这种情况。尽管一般性国内反滥用规则能够阻止此种情形下协定优惠的授予，一个更为直接的方式是起草反滥用规则以纳入协定中。第二种情况则有所不同：由于这种情况下涉及其他国内税法，仅通过协定条款无法规范，从而需要制定国内反滥用规则。而这有可能造成国内税法和税收协定条款的相互影响问题。
1. **Cases where a person tries to circumvent limitations provided by the treaty itself**

   a) **Treaty shopping**

   17. The first requirement that must be met by a person who seeks to obtain benefits under a tax treaty is that the person must be "a resident of a Contracting State", as defined in Article 4 of the OECD Model Tax Convention. There are a number of arrangements through which a person who is not a resident of a Contracting State may attempt to obtain benefits that a tax treaty grants to a resident of that State. These arrangements are generally referred to as "treaty shopping". Treaty shopping cases typically involve persons who are residents of third States attempting to access indirectly the benefits of a treaty between two Contracting States.³

   18. The OECD has previously examined the issue of treaty shopping in different contexts:

   - The concept of "beneficial owner" was introduced in the Model Tax Convention in 1977 in order to deal with simple treaty shopping situations where income is paid to an intermediary resident of a treaty country who is not treated as the owner of that income for tax purposes (such as an agent or nominee). At the same time, a short new section on "Improper Use of the Convention" (which included two examples of treaty shopping) was added to the Commentary on Article 1 and the Committee indicated that it intended "to make an in-depth study of such problems and of other ways of dealing with them".
   - That in-depth study resulted in the 1986 reports on Double Taxation and the Use of Base companies and Double Taxation and the Use of Conduit Companies, the issue of treaty shopping being primarily dealt with in the latter report.
   - In 1992, as a result of the report on Double Taxation and the Use of Conduit Companies, various examples of provisions dealing with different aspects of treaty shopping were added to the section on "Improper Use of the Convention" in the Commentary on Article 1. These included the alternative provisions currently found in paragraphs 13 to 19 of the Commentary on Article 1 under the heading "Conduit company cases".
   - In 2003, as a result of the report Restricting the Entitlement to Treaty Benefits⁴ (which was prepared as a follow-up to the 1998 Report Harmful Tax Competition: an Emerging Global Issue), paragraphs intended to clarify the meaning of "beneficial owner" in some conduit situations were added to the Commentary on Articles 10, 11 and 12 and the section on "Improper Use of the Convention" was substantially extended to include additional examples of anti-abuse rules, including a comprehensive limitation-on-benefits provision based on the provision found in

---

³ Cases where a resident of the Contracting State in which income originates seeks to obtain treaty benefits (e.g. through a transfer of residence to the other Contracting State or through the use of an entity established in that other State) could also be considered to constitute a form of treaty shopping and are addressed by the recommendations included in this report.

⁴ Reproduced at page R(5)-1 and R(6)-1 of the full version of the Model.

⁵ Reproduced at page R(17)-1 of the full version of the Model.

⁶ See, in particular, Recommendation 9 of the Report:

   "that countries consider including in their tax conventions provisions aimed at restricting the entitlement to treaty benefits for entities and income covered by measures constituting harmful tax practices and consider how the existing provisions of their tax conventions can be applied for the same purpose, that the Model Tax Convention be modified to include such provisions or clarifications as are needed in that respect."
1. 人试图规避协定本身的限制的情形

1.1 择选避税

17. 当一个人在寻求获取税收协定优惠时所须满足的首要条件是：此人必须是 OECD 税收协定三角第四条定义的“缔约国一方居民”。不是缔约国一方居民的人有可能通过多种安排，试图获取相关税收协定给予该缔约国居民的优惠。这些安排通常被称为“择选避税”。择选避税通常会涉及身为第三国公民但试图间接获得缔约国双方签订的协定优惠的人。

18. 综合组织曾审视过不同情况下择选避税的问题:

— "受益所有人"的概念在 1977 年被纳入协定范本，以解决简单的择选避税情形，即由于税收目的将所得支付给不是该所得真正拥有者的缔约国一方的中间居民（如代理人或指定人）。与此同时，关于“协定范本的不当使用”的新部分（包含了两个择选避税的例子）被加入到协定范本第 1 条注释第 1 条注释当中，且委员会指出，“会对该问题及其他解决方法进行深入的研究”。

— 上述深入研究的结果在 1986 年发表的《关于双重征税和避免公司的使用》以及《双重征税和导管公司的使用》的报告。择选避税的问题主要在后者中进行了探讨。

— 1992 年，作为报告《双重征税和导管公司的使用》的影响结果。许多涉及的择选避税不同方面的条款版本被添加到协定范本第 1 条注释中的"协定的不当利用"部分，其中包括了目前能在协定范本第 1 条注释第 13 段以及第 19 段中找到的"导管公司案例"相关问题的可选条款。

— 2003 年，作为报告《限制协定优惠的授予》 (该报告是作为 1988 年的报告《有 效的税务竞争：一个新兴全球问题》的一个后续报告的)，"协定的不当利用"部分的第 10、11 及 12 条注释中。"协定的不当利用"部分得到了实质 性扩展，纳入了更多条件。
the 1996 US Model as well as a purpose-based anti-abuse provision based on UK practice and applicable to Articles 10, 11, 12 and 21.8

Finally, additional work on the clarification of the "beneficial owner" concept, which resulted in changes to the Commentary on Articles 10, 11 and 12 that were included in the Model Tax Convention through the 2014 Update, has allowed the OECD to examine the limits of using that concept as a tool to address various treaty-shopping situations. As indicated in paragraph 12.5 of the Commentary on Article 10, "[w]hile 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 the dividend 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."9

19. A review of the treaty practices of OECD and non-OECD countries shows that countries use different approaches to try to address treaty shopping cases not already dealt with by the provisions of the Model Tax Convention. Based on the advantages and limitations of these approaches, it is recommended that the following three-pronged approach be used to address treaty shopping situations:

- First, a clear statement that the Contracting States, when entering into a treaty, wish to prevent tax avoidance and, in particular, intend to avoid creating opportunities for treaty shopping will be included in tax treaties (see Section B of this report).

- Second, a specific anti-abuse rule based on the limitation-on-benefits provisions included in treaties concluded by the United States and a few other countries (the "LOB rule") will be included in the OECD Model. Such a specific rule will address a large number of treaty shopping situations based on the legal nature, ownership in, and general activities of, residents of a Contracting State (see subsection A.1(a)(i) below).

- Third, in order to address other forms of treaty abuse, including treaty shopping situations that would not be covered by the LOB rule described in the preceding bullet point (such as certain conduit financing arrangements), a more general anti-abuse rule based on the principal purposes of transactions or arrangements (the principal purposes test or "PPT" rule) will be included in the OECD Model. That rule will incorporate the principles already reflected in paragraphs 9.5, 22, 22.1 and 22.2 of the Commentary on Article 1, according to which the benefits of a tax treaty should not be available where one of the principal purposes of arrangements or transactions is to secure a benefit under a tax treaty and obtaining that benefit in these circumstances would be contrary to the object and purpose of the relevant provisions of the tax treaty (see subsection A.1(a)(ii) below).

20. The combination of the LOB and the PPT rules described above recognises that each rule has strengths and weaknesses. For instance, the various provisions of the LOB rule are based on objective criteria that provide more certainty than the PPT rule, which requires a case-by-case analysis based on what can reasonably be considered to be one of the principal purposes of transactions or arrangements. For that reason, the LOB rule is useful as a specific anti-abuse rule aimed at treaty shopping situations that can be identified on the basis of criteria based on the legal nature, ownership in, and general activities of, certain entities. The LOB rule, however, only focuses on treaty shopping and does not address other forms of treaty abuses; it also does not address certain forms of treaty shopping, such as conduit financing arrangements, through which a resident of Contracting State that would otherwise qualify for treaty benefits is used as an intermediary by persons who are not entitled to these benefits.

反滥用规则的例子，其中包括一项基于1996年《美国范本》的全面利益限制条款，以及一项基于英国实践的适用于第10、11、12以及21条的指导目的的反滥用条款。

最后，对于“受益所有人”概念的澄清对防止滥用第10、11及12条注释的变动，这些变动在2014年的更新中被纳入到协定范本中。同时，这些附加工作也使得经济组织能够审慎使用此概念来应对不同税务避税问题的局限性。如对范本第10条注释的第12.5段所述，“虽然‘受益所有人’概念应用于某些形式的避税（例如，收入在无法完全转给其他人的接收人），但是它无法应用于外汇避税的其他情形。因此，不能以任何方式限制其他可以应用于这些情形的方式的应用。

19. 对OECD成员国及非OECD成员国协定实践的调查显示，各国使用不同的方法来应对协定范本中没有涉及的相关问题。考虑这些方法的优势及局限性，本报告推荐使用三种方法来应对协定编译情况：

—— 第一，在协定协定中将明确阐明：缔约国在签订一项协定时，希望防止避税行为，特别是要避免为协定编译创造条件（参见本报告第2章中）。

—— 第二，在OECD税务协定范本中将纳入基于美国和其他一些国家所签订协定中包含的利益限制条款所制定的特别反滥用规则（“LOB规则”）。该规则将依据缔约国居民的权利性质、所有权及日常生活，应对许多协定编译情形（参见下文第1章第1.1.1段中）。该规则也会在协定协定中加入一项具体，该原则在协定第1条注释的第9.5、22.21.22.22段中有所反映，即是否安排或交易的一个主要目的是获得税收协定的优惠，且在此情况下获取优惠是否有悖于税收协定相关条款的宗旨与目的时，该税收协定优惠不应被授予（参见第1章第1.1.2段中）。

20. 本报告中的结合LOB以及PPT规则的方案承认每一个规则有自己的优势和劣势。举例而言，LOB规则的不同条款基于客观的标准之上，比PPT规则能提供更大的确定性，后者则需要通过合理判断什么是交易或安排的主要目的来进行具体具体分析。因此，作为一项特别反滥用规则，LOB规则能够有效应对依据特定法律性质、所有权及日常生活这些标准可识别的协定编译情形。然而，LOB规则只关注协定编译，无法应对外其他形式的协定编译。
21. The combination of an LOB rule and a PPT rule may not be appropriate or necessary for all countries. For instance, as mentioned in paragraph 6 above, some countries may have domestic anti-abuse rules, or the courts of some countries may have developed various interpretative tools (e.g., economic substance or substance-over-form), that effectively address various forms of domestic law and treaty abuses and these countries might not require the general treaty anti-abuse provision included in subsection A.1(a)(ii) below or might prefer a more restricted form of that provision. It is also recognised that the LOB rule will need to be adapted to reflect certain constraints or policy choices concerning other aspects of a bilateral tax treaty between two Contracting States (e.g., constitutional restrictions or concerns based on EU law or policy choices concerning the treatment of collective investment vehicles).

22. As long as the approach that countries adopt effectively addresses treaty abuses along the lines of this report, some flexibility is therefore possible. At a minimum, however, countries should agree to include in their tax treaties an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements (see Section B); they should also implement that common intention through either the combined approach described in paragraph 19 (subject to the necessary adaptations referred to in paragraph 6 above), the inclusion of the PPT rule or the inclusion of the LOB rule supplemented by a mechanism (such as a treaty rule that might take the form of a PPT rule restricted to conduit arrangements or domestic anti-abuse rules or judicial doctrines that would achieve a similar result) that would deal with conduit arrangements not already dealt with in tax treaties.

23. Countries commit to adopt in their bilateral treaties measures that implement the minimum standard described in the preceding paragraph if requested to do so by other countries that have made the same commitment and that will request the inclusion of these measures. Whilst the way in which this minimum standard will be implemented in each bilateral treaty will need to be agreed to between the Contracting States, this commitment applies to existing and future treaties. Since the conclusion of a new treaty and the modification of an existing treaty depend on the overall balance of the provisions of a treaty, however, this commitment should not be interpreted as a commitment to conclude new treaties or amend existing treaties within a specified period of time. Also, if a country is not itself concerned by the effect of treaty-shopping on its own taxation rights as a State of source, it will not be obliged to apply provisions such as the LOB or the PPT as long as it agrees to include in a treaty provisions that its treaty partner will be able to use for that purpose. Whilst the minimum standard will be included in the multilateral instrument that will be negotiated pursuant to Action 15 of the BEPS Action Plan, which will provide an effective way to implement it swiftly, this may not be sufficient to ensure its implementation since participation in the multilateral instrument is not mandatory and two countries that are parties to an existing treaty may have different preferences as to how the minimum standard should be met; monitoring of the implementation of the minimum standard will therefore be necessary.

24. Other changes included in this report will also assist in preventing treaty shopping. For instance, the new specific treaty anti-abuse rules included in subsection A.1(b) will deal with some specific forms of treaty shopping, such as strategies aimed at using a permanent establishment located in a low-tax jurisdiction in order to take advantage of the exemption method applicable by a Contracting State. Section C, which includes tax policy considerations that, in general, States should consider before deciding to enter into a tax treaty with another country, may also contribute to the reduction of treaty shopping opportunities. Conversely, the approach described in paragraph 19 above is not restricted to treaty shopping cases and will also contribute to preventing the granting of treaty benefits in other inappropriate circumstances, this being particularly the case of the general treaty anti-abuse provision referred to at the end of that paragraph.
滥用，而且它也无法应对特定形式的协管避税，如监管税务安排。在此安排中，一个没有资格获得优惠的人将原本可获得协定优惠的缔约国居民视为中间方。

21. LOB 规则和 FTT 规则结合的方案不一定对所有国家都适用或都有必要。如上文第 6 段所述，有的国家可能有国内反滥用规则，或有的国家的法律已经开发了各种解决性工具（例如，经济实质、实质重于形式）能够有效地应对各种针对国内法或协定的滥用。这些国家可能不需要在下文第 1 章第 1.1.2 节中包含一致性协定滥用条款，或者倾向于采用比条款更为严格的格式。本报告也认识到需修改 LOB 规则以反映两个缔约国之间双边税收协定其他方式的某些政策选择（例如，针对集合投资工具的基于经济法律或政策选择的宪法限制）。

22. 只要各国所采取的方法能够遵循本报告的指导方针有效地应对协定滥用，一定程度上的灵活性是被允许的。然而，最低限度的要求是，各国应同意其在他们的税收协定中加入一项明确声明，阐明各国的共同目标是，避免双重征税，同时防止为包括规避税收安排在内的偷税行为（见第 2 章）创造条件达成征税或少征税；各国也应通过采用在第 19 段（根据上文第 6 段所必要的修正）中描述的结合方式，或采用 FTT 规则，或采用 LOB 规则辅以能够应对在税收协定中尚未解决的主管安排的机制（例如，在协定中加入仅针对主管安排的 FTT 规则，或国内反滥用规则或能够达到类似效果的司法原则）。

23. 各国承诺，当其他承诺执行最低标准的国家要求在协定中加入这些条款时，本国应在其双边协定中加入执行上述所列最低标准的条款。虽然在执行每个最低标准时，应获取缔约国双方的同意，但该承诺对现有及未来签订的协定均适用。考虑到签订一个新税收协定及对现有税收协定进行修订应根据协定条款的整体综合平衡来决定，该承诺不应被理解为承诺在未来的某时间或内签订新的税收协定或修订目前有的协定。而且，若缔约国一方或受益来源国的税收损失并未受到协定的影响，缔约国一方并无义务采用类似 LOB 规则或 FTT 规则的条款；只要该缔约国一方同意在协定条款中包含缔约对方可以用于应对协定税收的条款。尽管在协商 BEPS 第 15 号行动计划的多边工具（将提供快速执行计划的有取）时，最低标准将作为其中一个重要的工具，但由于 15 号计划并非强制性计划，现有的协定的缔约国双方对于最低标准的执行也有不同偏好，因此未来很有可能监督最低标准的执行。

24. 本报告中的其他变化也可帮助防止税收协定。例如，在第 1 章第 1.2 节中的特别反协定滥用的新规则，将规范某些特定形式的避税行为。例如通过设立在低税的管辖区的常设机构来获取适用于缔约国一方免税办法的策略。第 3 章包含的通常情况下各国在与他国签订税收协定之前应考虑的税收政策考量，也可能有助于避免协定的滥用。反之，在上文第 19 段中提到的方法不仅限于协定避税案件，也用于防止在其他情况下给予税收协定优惠。在该条款结尾提及的例外反滥用条款就是这种情况的典型。
i) **Limitation-on-benefits rule**

25. As indicated in paragraph 19, a specific anti-abuse rule aimed at treaty shopping, the LOB rule, will be included in the OECD Model. That rule will be based on provisions already found in a number of tax treaties, including primarily treaties concluded by the United States but also some treaties concluded by Japan and India. The detailed LOB provisions and related Commentary included below reflect the detailed provision that was included in the first version of this report released in September 2014 as modified as a result of subsequent work on various aspects of that provision, including the addition of a simplified version of the rule released in May 2015. At the end of May 2015, however, the United States released a new version of the LOB rule included in its model treaty for public comments to be sent by 15 September 2015. When that new version was discussed, it was agreed that it should be further examined once finalized by the United States in the light of the comments that will be received on it. For that reason, the detailed LOB provisions below and the Commentary on those provisions will need to be reviewed. The simplified LOB provisions will also require further work and Commentary on those provisions will be drafted. The final version of the provisions and the Commentary will be produced in the first part of 2016, which will allow the new provisions to be considered as part of the negotiation of the multilateral instrument that will implement the results of the work on treaty issues mandated by the BEPS Action Plan. The following should therefore be considered as a draft subject to changes:

**ARTICLE X**

**ENTITLEMENT TO BENEFITS**

[1.11] [Provision that would deny treaty benefits to a resident of a Contracting State who is not a “qualified person” as defined in paragraph 2]

2. [Definition of situations where a resident would be a qualified person, which would cover

a) an individual;

b) a Contracting State, its political subdivisions and entities that it wholly owns;

c) certain publicly-listed entities and their affiliates

d) certain charities and pension funds

e) other entities that meet certain ownership requirements

f) certain collective investment vehicles]

3. [Provision that would provide 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

---


10. The drafting of this Article will depend on how the Contracting States decide to implement their common intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. This could be done either through the adoption of paragraph 7 only, through the adoption of the detailed version of paragraphs 1 to 6 that is described in the commentary to Article [X] together with the implementation of an anti-conduit mechanism as described in paragraph [X] of that Commentary, or through the adoption of paragraph 7 together with any variation of paragraphs 1 to 6 described in the Commentary to Article [X].

11. Paragraphs 1 to 6 and the Commentary thereon are in square brackets pending their finalisation.
1.1.1 利益限制条款

25. 正如在 19 段中所述，针对缔约国税款的反滥用条款—LOB 规则—将被包含在 OECD 协定范本中。该条款是基于大量税收协定中的条款的基础上制定的，其中主要包括了美国签订的协定，也包括日本及印度签订的部分协定。上述详尽的 LOB 规则及相关注释包含了 2014 年 9 月发布的第 1 版报告的中的详细版 LOB 规则及后续的修订，其中包括 2015 年 5 月发布的简化版条款。尽管如此，2015 年 5 月美国发布了包含最新 LOB 规则在内的协定范本并向社会征求意见，截止日期为 2015 年 9 月 15 日。在对这些美国的新条款进行讨论时，各方同意应在 2015 年 12 月 15 日完成相关的讨论，以确保协定的条款得到各方的充分讨论。”

第 X 条

享受协定优惠”

1. [本条款将否定期约一方居民享受协定优惠，如该居民不符合第 2 款的“有资格的人”的定义。]

2. [定义居民为“有资格的人”的情形，包括：

a) 个人;

b) 约约一方的公司或地方当局，或由该缔约国、行政区或地方当局完全拥有的机构;

c) 国际组织及其附属机构;

d) 其他金融机构及养老基金;

e) 实行特税制度的其他机构;

f) 特定集合投资工具。]

注2：本条款的起源取决于缔约国决定如何执行某共同条款。即在不为包括排除反滥用条款在内的税收协定的其它条款和反滥用条款的情况下，该排除条款将通过某段落的第 7 款第 7 款。
State of residence and the income is derived in connection with, or is incidental to, that business].

4. [Provision that would provide 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 would allow the competent authority of a Contracting State to grant certain treaty benefits to a person where benefits would otherwise be denied under paragraphs 1 to 4]

6. [Definitions applicable for the purposes of paragraphs 1 to 5]

Add the following new Commentary on Article [X] to the Commentary of the OECD Model Tax Convention:

[COMMENTSARY ON ARTICLE [X]]
CONCERNING THE ENTITLEMENT TO TREATY BENEFITS

Preliminary remarks

1. As explained in the footnote to the Article, Article [X] reflects the intention of the Contracting States to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. The drafting of this Article will depend on how the Contracting States decide to do so. Depending on their own circumstances, States may wish to adopt only the general anti-abuse rule of paragraph 7 of the Article, may prefer instead to adopt the detailed version of paragraphs 1 to 6 that is described below, which they would supplement by a mechanism that would address specific conduit arrangements, or may prefer to include in their treaty the general anti-abuse rule of paragraph 7 together with any variation of paragraphs 1 to 6 described below.

2. A State may prefer the last approach described above because it combines the flexibility of a general rule that can prevent a large number of abusive transactions with the certainty of a more "automatic" rule that prevent transactions that are known to cause treaty shopping concerns and that can be easily described by reference to certain features (such as the foreign ownership of an entity). That last approach is reflected in the "simplified version" of paragraphs 1 to 6 reproduced below, which should only be used in combination with the general rule of paragraph 7. Such a combination should not be construed in any way as restricting the scope of the general anti-abuse rule of paragraph 7: a transaction or arrangement should not be considered to be outside the scope of paragraph 7 simply because the specific anti-abuse rules of paragraphs 1 to 6, which only deal with certain cases of treaty shopping that can be easily identified by certain of their features, are not applicable.

3. A State may, however, prefer to deal with treaty-shopping without the general anti-abuse rule of paragraph 7, relying instead on the specific anti-abuse rules of paragraphs 1 to 6, together with a mechanism that will address conduit arrangements that would escape the application of these paragraphs. This may be the case of a State whose domestic law includes strong anti-abuse rules that are sufficient to deal with other forms of treaty abuses. States that adopt that approach will need to ensure that the version of paragraph 1 to 6 that they include in their bilateral conventions is sufficiently robust to prevent most forms of treaty shopping. For this reason, the paragraphs below provide different versions of the provisions of paragraphs 1 to 6, the more robust version of these paragraphs mentioned above being referred to as the
3. [本条款授予一个非有资格的人所获取的特定收入协定优惠，前提是该人在其居住国从事营业活动，且这些收人关联于或附属于前述营业活动。]

4. [本条款授予一个非有资格的人的协定优惠，前提是拥有该人占大某一个一致认比例的其他人有资格被授予同等的优惠。]

5. [本条款允许缔约国一方的主管部门授予原本根据第 1 至 4 款应被否定协定优惠的人协定优惠。]

6. [定义适用于第 1 至 5 款]

在 OECD 协定范本中增加了关于第(6)条的注释：

第(6)条的注释

关于享受协定待遇

序言

1. 正如在条款[6]的脚注中所示，该条款反映了缔约国在为包括避免双重征税在内的一系列协定创造机会的前提下消除双重征税这一共同愿景。本条款的起草将取决于缔约国如何达成此愿景。根据各国情况不同，缔约国可能希望单独采取本条约第 7 款的一般反避税规则，或采取下文所述的第 1-6 款详细条款，辅以能够应对特定导管安排的机制，或同时采纳第 7 款一般反避税规则加上下述第 1-6 款的任何变化版本。

2. 缔约国一方或许倾向于采纳以上所述的最后一种方式，原因是这种方式将一般规则的灵活性与一项更为“自动”的规则的确定性相结合，前者能够阻止大量的避税交易，而后者可以阻止已知的有悖协定避免情形的交易，并且可以很容易地用特定的特征描述出来（例如一家实体的外国所有权），但必须和第 7 款一般反避税规则共同使用。这种联合使用在任何情况下不应认为是对第 7 款一般反避税规则范围的禁止；某项交易或安排不应仅由于不适用第 1-6 款特殊反避税规则（这些规则仅能识别具有非常易识别特征的协定避免案例），就排除在第 7 款的适用范围外。

3. 缔约国一方或许不想采纳第 7 款，而依赖于第 1-6 款中特定的反避税规则辅以可以应对前述条款无法规范的导管安排的机制。选择这种方式的缔约国可能是那些国内法中已经强大的反避税规则能够处理大部分协定避免形式的国家。对于这些国家而言，将在其双边协定中包含的第 1-6 款必须足够有力从而可以阻止绝大多数形式的协定避免交易，上述提到的这些条款的更为有力的版本


"detailed version". States that do not wish to include paragraph 7 for the reasons explained in this paragraph should adopt the detailed version, as opposed to the “simplified” version, subject to any adaptations referred to in the Commentary below.

3.1 This Article contains provisions that are intended to prevent various forms of treaty shopping through which persons who are not residents of a Contracting State might establish an entity that would be a resident of that State in order to reduce or eliminate taxation in the other Contracting State through the benefits of the tax treaty concluded between these two States. Allowing persons who are not directly entitled to treaty benefits (such as the reduction or elimination of withholding taxes on dividends, interest or royalties) to obtain these benefits indirectly through treaty shopping would frustrate the bilateral and reciprocal nature of tax treaties. If, for instance, a State knows that its residents can indirectly access the benefits of treaties concluded by another State, it may have little interest in granting reciprocal benefits to residents of that other State through the conclusion of a tax treaty. Also, in such a case, the benefits that would be indirectly obtained may not be appropriate given the nature of the tax system of the former State; if, for instance, that State does not levy an income tax on a certain type of income, it would be inappropriate for its residents to benefit from the provisions of a tax treaty concluded between two other States that grant a reduction or elimination of source taxation for that type of income and that were designed on the assumption that the two Contracting States would tax such income.

3.2 The provisions of the Article seek to deny treaty benefits in the case of structures that typically result in the indirect granting of treaty benefits to persons that are not directly entitled to these benefits whilst recognising that in some cases, persons who are not residents of a Contracting State may establish an entity in that State for legitimate business reasons. Although these provisions apply regardless of whether or not a particular structure was adopted for treaty-shopping purposes, the Article allows the competent authority of a Contracting State to grant treaty benefits where the other provisions of the Article would otherwise deny these benefits but the competent authority determines that the structure did not have as one of its principal purposes the obtaining of benefits under the Convention.

3.3 The Article restricts the general scope of Article 1, according to which the Convention applies to persons who are residents of a Contracting State. Paragraph 1 of the Article provides that a resident of a Contracting State shall not be entitled to the benefits of the Convention unless it constitutes a “qualified person” under paragraph 2 or unless benefits are granted under the provisions of paragraphs 3, 4 or 5. Paragraph 2 determines who constitutes a “qualified person” by reference to the nature or attributes of various categories of persons; any person to which that paragraph applies is entitled to all the benefits of the Convention. Under paragraph 3, a person is entitled to the benefits of the Convention with respect to an item of income even if it does not constitute a “qualified person” under paragraph 2 as long as that item of income is derived in connection with the active conduct of a trade or business in that person’s State of residence (subject to certain exceptions). Paragraph 4 is a “derivative benefits” rule that allows certain entities owned by residents of third States to obtain treaty benefits provided that these residents would have been entitled to equivalent benefits if they had invested directly. Paragraph 5 includes the provisions that allow the competent authority of a Contracting State to grant treaty benefits where the other provisions of the Article would otherwise deny these benefits. Paragraph 6 includes a number of definitions that apply for the purposes of the Article.

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

Simplified version

1. Except as otherwise provided in this Article, a resident of a Contracting State shall be entitled to the benefits that would otherwise be accorded by this Convention only if such resident is a qualified person.
被称为“详细版”。不同采取第 7 款的国家应当采用详细版而非简化版。该详细版可以根据上述的定义进行编译。

3.1 本条包含了采取防止不同形式的用协定税的条款。通过协定税，不是缔约国一方居民的人，可能会建立一个适当缔约国一方居民的实体，以利用缔约国双方订立的税收协定所提供的优惠，未达到减少或消除在缔约国另一方的税负的目的。允许没有资格直接享受协定优惠（例如对于股息、利息以及支付权使用费的预提所得税的减免）的人通过协定税间接获得优惠，会损害税收协定双边和互惠的性质。举例而言，如果一个国家知道其居民能够间接地获取另一国签署的协定的优惠，该国不可能通过协定税协定给予另一国居民优选的优惠。同时，在此情况下，结合考虑另一国家的税收系统，被间接获取的优惠很可能就是不当的。例如，如果这个国家对于某类所得不征收所得税，而缔约国一方的税收协定是在对这类所得征税的基础上设计的，则其居民获得该税收协定中给予的减免税优惠可能是不恰当的。

3.2 如果无法通过某些直接享受协定优惠的人通过架构设计间接获得该优惠，则本条条款将试图阻止此类优惠授予。但是，本条条款也承认在某些情况下，非缔约国一方的居民可能会出于合理的商业理由在该缔约国建立实体。尽管这些条款的适用不考虑一个特殊架构的采用是否是为了协定避税的目的，本条仍然允许缔约国一方的主管当局在决定该架构的主要目的并非为了取得协定优惠的情况下授予协定优惠，而这些优惠的授予在本条其他条款下原本会被拒绝。

3.3 本条限制了第 1 条的适用范围，即本协定适用于缔约国一方的居民。本条第 1 款规定，缔约国一方的居民不能享受协定优惠，除非此人成为在第 2 款中定义的“有资格的人”。协定优惠是根据第 3、4 或 5 款授予的。第 2 款根据人的性质或根据不同属性确定谁可以被视作“有资格的人”。任何符合此款的人均可享受协定中的所有优惠。第 3 款中，即使用人成为第 2 款中不能被界定为“有资格的人”，只要能够符合协定的获得与该人在居住国的积极贸易或经营行为有关，该人就能够在协定范围内享受协定中的所有优惠。第 4 款是一个“衍生收益”条款，此条款允许第三国居民持有的部分实体获得协定优惠，前提是第三国居民直接投资的情况下也可以获得同等优惠。第 5 款包含的内容使得缔约国一方的主管当局在本条其他条款原本拒绝这些优惠时，有权给予协定优惠。第 6 款包含了与本条相关规定的定义。

否定非“有资格的人”的缔约国一方居民的协定优惠的条款

简化版

1. 除非本条另有规定外，当且仅当缔约国一方的居民是“有资格的人”时，该居民应被授予享受本协定协定原定的优惠。
Detailed version

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.

Commentary on the detailed version

4. Paragraph 1 provides that a resident of a Contracting State, as defined under Article 4, will be entitled to the benefits otherwise accorded to residents of a Contracting State under the Convention only if it constitutes a "qualified person" under paragraph 2 or unless benefits are otherwise granted under paragraphs 3, 4 or 5. The benefits otherwise accorded to a resident of a Contracting State under the Convention include all limitations to the Contracting States' taxing rights under Articles 6 through 21, the elimination of double taxation provided by Article 23 and the protection afforded to residents of a Contracting State under Article 24. The Article does not, however, restrict the availability of treaty benefits under paragraph 3 of Article 4, paragraph 2 of Article 9 or Article 25 or under the few provisions of the Convention that do not require that a person be a resident of Contracting State in order to enjoy the benefits of those provisions (e.g. the provisions of paragraph 1 of Article 24, to the extent that they apply to nationals who are not residents of either Contracting State).

5. Paragraph 1 does not extend in any way the scope of the benefits granted by the Convention. Thus, a resident of a Contracting State who constitutes a "qualified person" under paragraph 2 must still meet the conditions of the other provisions of the Convention in order to obtain these benefits (e.g. that resident must be the beneficial owner of dividends in order to benefit from the provisions of paragraph 2 of Article 10) and these benefits may be denied or restricted under applicable anti-abuse rules.

6. Paragraph 1 applies at any time when the Convention would otherwise provide a benefit to a resident of a Contracting State. Thus, for example, it applies at the time when income to which Article 6 applies is derived by a resident of a Contracting State, at the time that dividends to which Article 10 applies are paid to a resident of a Contracting State or at any time when profits to which Article 7 applies are made. The paragraph requires that, in order to be entitled to the benefit provided by the relevant provision of the Convention, the resident of the Contracting State must be a "qualified person", within the meaning of paragraph 2, at the relevant time. In some cases, however, the definition of "qualified person" requires that a resident of a Contracting State must satisfy certain conditions over a period of time in order to constitute a "qualified person" at a given time.

Situations where a resident is a qualified person

Simplified version

2. For the purposes of this Article, a resident of a Contracting State shall be a qualified person if the resident is either:

Detailed version

2. A resident of a Contracting State shall be a qualified person at a time when a benefit would otherwise be accorded by the Convention if, at that time, the resident is:

Commentary on the detailed version

28
详细版

2. 除本条另有规定外，缔约国一方的居民不应被授予本协定原本授予的优惠（第4条第（3）款、第9条第2款或第25条的优惠除外），除非该居民在优惠被授予时，是第2款中定义的“有资格的人”。

详细版注释

4. 第1项规定，符合第4条定义的缔约国一方居民，只有在成为在第2款中定义的“有资格的人”，即或优惠是根据第3、4或5款授予时，才有资格享受本协定原本会给予缔约国一方居民的优惠。协定原本会给予缔约国一方居民的优惠包括第6至21条中对缔约各国征税权的所有限制，第23条消除双重征税税，以及第24条中提供给缔约国一方居民的保护。但是，本条不会限制第4条第（3）款、第9条第2款或第25条所提供的协定优惠的享受，也不会限制其他不以为缔约国一方居民纳税人为享受优惠的前提条件的少量条款（如第24条第1款，以其适用不以缔约国居民的国民身份）所提供的协定优惠的享受。

5. 第1款没有以任何方式扩大协定的优惠范围。因此，符合第2款“有资格的人”的缔约国一方居民仍然需要符合协定其他条款的要求才能获取优惠（如，居民必须是股息的受益所有人，方可根据第10条第2款的优惠），并且这些优惠可能会因为反滥用的应用而被拒绝或受到限制。

6. 当协定原本会向缔约国一方居民提供一项优惠时，第1款无论何时都适用。因此，举例而言，当缔约国一方居民获得适用第6条的所得，当适用第10条的股息被支付给缔约国一方的居民时，或是在适用第7条的利息的任何时段，第1款均可适用。此款要求，为了能够享受本协定相关条款提供的优惠，缔约国的居民必须在相关的时点是第2款中定义的“有资格的人”。但是在某些情况下，“有资格的人”的定义要求，缔约国一方的居民必须在一段时间内满足某些特定条件才能在特定时间内成为“有资格的人”。

一国居民为有资格人的情形

简化版

根据本条，缔约国一方居民若满足以下任一条件，将被认定为有资格的人；

详细版

缔约国一方居民在被授予协定优惠时应为有资格的人，如果当时该居民是；

详细版注释
7. Paragraph 2 has six subparagraphs, each of which describes a category of residents that are qualified persons.

8. It is intended that the provisions of paragraph 2 will be self-executing. Unlike the provisions of paragraph 5, discussed below, claiming benefits under paragraph 2 does not require advance competent authority ruling or approval. The tax authorities may, of course, on review, determine that the taxpayer has improperly interpreted the paragraph and is not entitled to the benefits claimed.

Individuals:

a) an individual;

9. Subparagraph 2 a) provides that any individual who is a resident of a Contracting State will be a qualified person. As explained in paragraph 35 below, under some treaty provisions, a collective investment vehicle must be treated as an individual for the purposes of applying the relevant treaty; where that is the case, such a collective investment vehicle will therefore constitute a qualified person by virtue of subparagraph a).

Governments

Simplified version

b) that Contracting State, any political subdivision or local authority thereof, the central bank thereof or a person that is wholly owned, directly or indirectly, by that State or any political subdivision or local authority thereof;

Detailed version

b) a Contracting State, or a political subdivision or local authority thereof, or a person that is wholly-owned by such State, political subdivision or local authority;

Commentary on the detailed version

10. Subparagraph 2 b) provides that the Contracting States and any political subdivision or local authority thereof constitute qualified persons. The subparagraph applies to any part of a State, such as an agency or instrumentality that does not constitute a separate person. The last part of the subparagraph provides that a separate legal person which constitutes a resident of a Contracting State and is wholly-owned by a Contracting State, or a political subdivision or local authority thereof, will also be a qualified person and, therefore, will be entitled to all the benefits of the Convention whilst it qualifies as such. The wording of the subparagraph may need to be adapted to reflect the different legal nature that State-owned entities, such as sovereign wealth funds, may have in the Contracting States as well as the different views that these States may have concerning the application of Article 4 to these entities (see paragraphs 6.35 to 6.39 of the Commentary on Article 1 and paragraphs 8.5 to 8.7 of the Commentary on Article 4).

Publicly-traded companies and entities

Simplified version

c) a company, if the principal class of its shares is regularly traded on one or more recognised stock exchanges;

d) a person other than a company, if its beneficial interests are regularly traded on one or more recognised stock exchanges;

Detailed version
7. 第2款下有6项，每一项均描述了有资格的人的一种种类。
8. 第2款下的各项都是自动生效的。与下面讨论的第5款不同，在第2款下请求优惠无须主管当局事先裁定或批准。当然，税务机关也可能在审阅后认为的税人不恰当地解读了本款，因而不能被授予请求的优惠。

个人

a) 个人

9. 2a) 项规定是缔约国一方居民的任何个人都是一个有资格的人，如下面第35段的注释，在某些协定条款下，一个集合投资工具，为了能够适用相关协定必须被视作个人。在这种情况下，这样的集合投资工具可以根据a) 项成为一个有资格的人。

政府

简化版

b) 缔约国一方、行政当局或其所属行政区或地方当局和中央银行，或由缔约国一方、行政当局或其所属行政区或地方当局所直接或间接完全拥有的人；

详细版

b) 缔约国一方、其所属行政区或地方当局，或由该缔约国、其所属行政区或地方当局完全拥有的人；

详细版注释

10. 2b) 项规定，缔约国和其中的任何所属行政区或地方当局都是有资格的人。本项适用于一个国家的分部，例如不是一个单独的人的办事处或执行机关。本项的最后部分规定，一个能够成为缔约国一方居民且由缔约国一方或其所属行政区或地方当局完全拥有的独立法人，也是一个有资格的人，因此当其有资格时也可以享受协定规定的所有优惠。本项的措辞可能需要被修改，以反映在缔约国的国有企业及主权财富基金的不同法律性质，以及反映这些国家可能有的关于第4条应如何应用于这些企业的不同观点（见第1条注释的第6.35—6.39段，以及第4条注释的第8.5—8.7段）。

公开上市的公司及实体

简化版

c) 公司，若其主要种类的股份被经常地在一个或多个被认可的证券交易所进行交易；

d) 除公司以外的人，若其主要种类的股份被经常地在一个或多个被认可的证券交易所进行交易；

详细版
c) a company or other entity, if, throughout the taxable period that includes that time

i) the principal class of its shares (and any disproportionate class of shares) is regularly traded on one or more recognised stock exchanges, and either:

A) its principal class of shares is primarily traded on one or more recognised stock exchanges located in the Contracting State of which the company or entity is a resident; or

B) the company’s or entity’s primary place of management and control is in the Contracting State of which it is a resident; or

ii) at least 50 per cent of the aggregate voting power and value of the shares (and at least 50 per cent of any disproportionate class of shares) in the company or entity is owned directly or indirectly by five or fewer companies or entities entitled to benefits under subdivision i) of this subparagraph, [provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State];

Commentary on the detailed version

11. Subparagraph c) recognises that, as a general rule, because the shares of publicly-traded companies and of some entities are generally widely-held, these companies and entities are unlikely to be established for treaty shopping. The provisions of subdivision i) apply to publicly-traded companies and entities and the provisions of subdivision ii) apply to subsidiaries of publicly-traded companies and entities. As indicated in subparagraph h) of paragraph 6, for the purposes of subparagraph c), the term “shares” covers comparable interests in entities, other than companies, to which the subparagraph applies; this includes, for example, publicly-traded units of a trust.

12. Subdivision i) provides that a company or entity resident in a Contracting State constitutes a qualified person at a time when a benefit is provided by the Convention if, throughout the taxable period that includes that time, the principal class of its shares, and any disproportionate class of shares, is regularly traded on one or more recognised stock exchanges, provided that the company or entity also satisfies at least one of the following additional requirements: first, the company’s or entity’s principal class of shares is primarily traded on one or more recognised stock exchanges located in the Contracting State of which the company or entity is a resident or, second, the company’s or entity’s primary place of management and control is in its State of residence. These additional requirements take account of the fact that whilst a publicly-traded company or entity may be technically resident in a given State, it may not have a sufficient relationship with that State to justify allowing such a company or entity to obtain the benefits of treaties concluded by that State. Such a sufficient relationship may be established by the fact that the shares of the publicly-traded company or entity are primarily traded in recognised stock exchanges situated in the State of residence of the company or entity; given the fact that the globalisation of financial markets means that shares of publicly-listed companies that are residents of some States are often traded on foreign stock exchanges, the alternative test provides that this sufficient relationship may also be established by the fact that the company or entity is primarily managed and controlled in its State of residence.

13. A company or entity whose principal class of shares is regularly traded on a recognised stock exchange will nevertheless not qualify for benefits under subparagraph c) of paragraph 2 if it has a disproportionate class of shares that is not regularly traded on a recognised stock exchange.
c) 公司或其他实体，如果在包含该时点的纳税期间：

1) 其主要种类的股份（以及任意不成比例种类的股份）被经常地在一个或多个被认可的证券交易所进行交易，且满足下述两个条件中的一个：

A) 其主要种类的股份主要在位于该公司或实体为其居民的缔约国一方的一个或多个被认可的证券交易所进行交易；或

B) 该公司或实体的主要管理和控制地位于该公司或实体为其居民的缔约国一方；或

2) 该公司或实体至少 50%的表决权和股份价值（以及至少 50%的任意不成比例种类的股份）直接或间接地由 5 个或更少的依据本项 i) 目规定有资格享受协定优惠的公司或实体拥有，[但在间接持有的情况下，每个中间持有人都必须是缔约国任何一方的居民]

详细版注释：

11. c) 项认识到，由于公开交易公司和一些其他实体的股份通常被广泛持有，这些公司和实体都不太可能是为了避免课税而建立的。i) 目适用于公开交易公司及实体，ii) 目适用于公开交易公司及实体的子公司。如第 6 款 h) 项所述，适用 c) 项时，"股份"一语包括了除公司以外实体中的类似利益，例如公开交易的信托单位。

12. i) 目规定，缔约国一方的居民公司或实体，在被授予本协定优惠的时点时是有资格的人，如果在包括该时点的纳税期间其主要种类的股份，以及任何不成比例种类的股份经常地在一个或多个被认可的证券交易所交易，且该公司或实体至少需满足以下要求中的一个：第一，其主要种类的股份主要位于该公司或实体为其居民的缔约国一方的一个或多个被认可的证券交易所进行交易，或第二，该公司或实体的主要管理和控制地位于该公司或实体为其居民的缔约国一方。这些额外的要求考虑到了一个事实，即虽然有时一家被公开交易的公司或实体可能技术上是一个国家的居民，但其可能与该国没有足够的关联关系可以证明允许这样一个公司或实体获得该国签订的税收协定的优惠是合理的。这样的一个足够的关联关系能够用这样的事实来建立：即公开交易公司或其实体的股份主要在位于该公司或实体的居住国的被认可的证券交易所进行交易。另外，考虑到金融市场的全球化使得某些国家居民的公开上市公司的股份经常会在外国的证券交易所交易，替代测试规定这样的足够的关联关系也可以用该公司或实体的主要管理和控制地位于其居住国的这一事实来建立。

13. 即使一个公司或实体的主要种类的股份经常地在一个被认可的证券交易所交易，如果其有不成比例种类的股份没有经常地在一个被认可的交易所交易，该公司或实体就不能享受第 2 款 c) 项下的优惠。
14. The terms “recognised stock exchange”, “principal class of shares” and “disproportionate class of shares” are defined in paragraph 6 (see below). As indicated in these definitions, the principal class of shares of a company must be determined after excluding special voting shares which are issued as a means of establishing a “dual listed company arrangement”, which is also defined in paragraph 6.

15. The regular trading requirement can be met by trading of issued shares on any recognised exchange or exchanges located in either State. Trading on one or more recognised stock exchanges may be aggregated for purposes of this requirement; a company or entity could therefore satisfy this requirement if its shares are regularly traded, in whole or in part, on a recognised stock exchange located in the other Contracting State.

16. Subdivision (iA) includes the additional requirement that the shares of the company or entity be primarily traded in one or more recognised stock exchanges located in the State of residence of the company or entity. In general, the principal class of shares of a company or entity are “primarily traded” on one or more recognised stock exchanges located in the State of residence of that company or entity if, during the relevant taxation year, the number of shares in the company’s or entity’s principal class of shares that are traded on these stock exchanges exceeds the number of shares in the company’s or entity’s principal class of shares that are traded on established securities markets in any other State. Some States, however, consider that the fact that shares of a company or entity resident in a Contracting State are primarily traded on recognised stock exchanges situated in other States (e.g. in a State that is part of the European Economic Area within which rules relating to stock exchanges and securities create a single market for securities trading) constitutes a sufficient safeguard against the use of that company or entity for treaty-shopping purposes; States that share that view may modify subdivision (iA) accordingly.

17. Subdivision (iB) provides the alternative requirement applicable to a company or entity whose principal class of shares is regularly traded on recognised stock exchanges but not primarily traded on recognised stock exchanges situated in the State of residence of the company or entity. Such a company or entity may claim treaty benefits if its “primary place of management and control” (as defined in subparagraph d) of paragraph 6) is in its State of residence.

18. The conditions of subparagraph e) must be satisfied throughout the taxable period of the company or entity. This does not require that the shares of the company or entity be traded on the relevant stock exchanges each day of the relevant period. For shares to be considered as regularly traded on one or more stock exchanges throughout the taxable period, it is necessary that more than a very small percentage of the shares be actively traded during a sufficiently large number of days included in that period. The test would be met, for example, if 10 per cent of the average number of outstanding shares of a given class of shares of a company were traded during 60 days of trading taking place in the taxable period of the company. The phrase “taxable period” in subparagraphs c) and e) refers to the period for which an annual tax return must be filed in the State of residence of the company or entity. If the Contracting States have a concept corresponding to “taxable period” in their domestic law, such as “taxable year”, they are free to replace the reference to taxable period by that other concept.

19. A company resident in a Contracting State is entitled to all the benefits of the Convention under subdivision ii) of subparagraph c) of paragraph 2 if five or fewer publicly-traded companies described in subdivision i) are the direct or indirect owners of at least 50 per cent of the aggregate vote and value of the company’s shares (and at least 50 per cent of any disproportionate class of shares). If the publicly-traded companies are indirect owners, however, each of the intermediate companies must be a resident of one of the Contracting States. Some States, however, consider that this last requirement is unduly restrictive and prefer to omit it.
14. "被认可的证券交易所以"主要种类的股份"以及"不成比例种类的股份"在第 6 款中被定义（见下文）。如这些定义指出的，一个公司的主要种类的股份需要在除斥发行目的外设立"双重上市公司安排"的特殊表决权股份后决定。"双重上市公司安排"在第 6 款中也有所定义。

15. 经营性交易要求可以通过在位于两国中任意一国的任何被认可的证券交易所以发行股份来满足。为满足此要求，在一个或多个被认可的证券交易所的交易可以累计。因此，如果一个公司或者实体的股份的一部分或全部经常地在缔约国另一方的一个被认可的证券交易所交易，该要求也可被满足。

16. (i) 目 A 包含了一个额外要求，即该公司或者实体的股份主要在其居民国家中的一个或者多个被认可的证券交易所进行交易。通常而言，在这些交易所中交易的该公司或实体的主要种类的股份的数量超过了该公司或实体在任何其他国家的有价证券交易市场中交易的主要种类的股份的数量，该则公司或实体的主要种类的股份在该国家的居民国家中在一个或者多个被认可的证券交易所以"主要交易"。然而，有的国家认为，缔约国一方的一个公司或实体居民的股份只要有位于该国或其他国家（例如位于作为欧洲经济共同体的国家，在该区域中股份和证券交易的规则创造了一个证券交易的单一市场）的被认可的证券交易所"主要交易"，就足以防止使用此公司或实体进行避税；持这种观点的国家可以相应地修改 (i) 目 A 部分。

17. (i) 目 B 规定了替代要求，该替代要求适用于主要种类的股份经常地在被认可的证券交易所交易，但不主要在位于该公司或实体的居住国被认可的证券交易所以发行的公司或实体。这样的公司如果其"主要管理和控制地"（如第 6 款 d）项所定义）在其居住国，则也可申请享受优惠。

18. (i) 项中的条件必须在该公司或实体的纳税期间被满足。这并不要求该公司或实体的股份在纳税期间内的每一天都在被认可的证券交易所交易。只要股 份被视为在该期间内获得在多于一个或者多个被认可的证券交易所以发行，必须让多于非常少或者比例的股份在该期间内足够地交易。举例而 言，如果一个公司特定种类股份的流通股平均数的 10% 在该公司的纳税期间内达到交易的 60 天都被交易的情况下，该条件视为被满足。c）项和 c）项中的"纳税期间"一语指在该公司或实体的居住国中必须提交年度纳税申报表的期间。如果在缔约国的国内法中对应于"纳税期间"的概念，如"纳税年度"，则这些国家能够用另外的概念替换纳税期间。

19. 缔约国一方的公司居民能够享受在本协定第 2 款 e）项 ii）目下的所有优惠，如果该公司或实体至少 50%的表决权和股份价值（以及至少 50%的任何不成比例种类的股份）直接或间接地由 5 个或更少的本项 i）目中提到的公开交易公司或实体拥有。但是，如果公开交易公司是间接持有人，每一个中间公司都必须是缔约国任一方的居民。然而，有的国家认为该项最后的要求过于严格而选择忽略它。
20. Thus, for example, a company that is a resident of a Contracting State, all the shares of which are owned by another company that is a resident of the same State, would qualify for benefits under the Convention if the principal class of shares (and any disproportionate classes of shares) of the parent company are regularly and primarily traded on a recognised stock exchange in that Contracting State. Such a subsidiary would not qualify for benefits under subdivision ii), however, if the publicly-traded parent company were a resident of a third State, for example, and not a resident of one of the Contracting States. Furthermore, if a parent company in one of the Contracting States indirectly owned the bottom-tier company through a chain of subsidiaries, each such subsidiary in the chain, as an intermediate owner, must be a resident of either Contracting State in order for the subsidiary to meet the test in subdivision ii).

As explained in the previous paragraph, however, some States consider that, in the case of publicly-listed companies, the condition that each subsidiary in the chain must be a resident of either Contracting State is not necessary in order to prevent treaty shopping; these States therefore prefer to omit that additional condition.

Charitable organisations and pension funds

**Detailed version**

d) a person, other than an individual, that

i) is a list of the relevant non-profit organisations found in each Contracting State;

ii) is a recognised pension fund, provided that more than 50 per cent of the beneficial interests in that person are owned by individuals resident of either Contracting State, or more than 1 per cent of the beneficial interests in that person are owned by individuals resident of either Contracting State or of any other State with respect to which the following conditions are met:

A) individuals who are residents of that other State are entitled to the benefits of a comprehensive convention for the avoidance of double taxation between that other State and the State from which the benefits of this Convention are claimed, and

B) with respect to income referred to in Articles 10 and 11 of this Convention, if the person were a resident of that other State entitled to all the benefits of that other convention, the person would be entitled, under such convention, to a rate of tax with respect to the particular class of income for which benefits are being claimed under this Convention that is at least as low as the rate applicable under this Convention; or

iii) was constituted and is operated to invest funds for the benefit of persons referred to in subdivision ii), provided that substantially all the income of that person is derived from investments made for the benefit of these persons;

**Commentary on the detailed version**

21. Subparagraph 2 d) provides rules under which certain non-profit organisations and pension funds that qualify as resident of a Contracting State (see paragraphs 8.6 and 8.7 of the Commentary on Article 4) will be entitled to all the benefits of the Convention.

22. Entities listed in subdivision i) automatically qualify for treaty benefits without regard to the residence of their beneficiaries or members. These entities would generally correspond to
20. 因此，例如，一个公司是缔约国一方的居民，其所有股权都被同一居住国的另一居民公司拥有，如果该母公司的主要种类的股份（以及任何不成比例种类的股份）都经常地为主要在位于该缔约国的一个被认可的证券交易所交易，则该公司可以获得协定下的优惠。然而，如果子公司的公开发行母公司是一个第三国而不是缔约国一方的居民，则该子公司在 ii）目下不能享受到优惠。此外，如果缔约国一方的母公司通过一系列的子公司间接持有最底层的公司，这些作为中间持股人的链条中的每一个子公司，都必须是缔约国任意一方的居民，以使得这些子公司满足 ii）目的测试。但是如上一段的注释，有的国家则认为，在上市公司的情况下，要求每个在链条上的子公司必须都是缔约国任意一方的居民对于防止避税而言并不是必需的，因此这些国家选择忽略此额外条件。

慈善机构以及养老基金

详细版

d）除自然人以外的人，如果：

i）是一个[在缔约国任何一方成立的非营利组织名单]，

ii）是一个被认可的养老基金，其 50%以上的权益是由缔约国任何一方的个人居民所拥有，或 [ ]%以上的权益是由缔约国任何一方的个人居民所拥有或由能够满足以下条件的任其他国家居民所拥有：

A）作为其他国家居民的个人有资格享受该其他国家与收到协定优惠申请的国家所签定的避免双重征税的全面协定所提供的优惠；和

B）关于本协定第 10、11 条中所提到的所得，如果此个人是其他国家有权享受上述协定所有优惠的居民，此个人在其他协定下有权就申请享受本协定优惠的特定所得类型享受至少和本协定中的适用税率一样低的税率；或

iii）为 ii）目中提及的人的利益投资基金而设立和运营的，且实质上该人所有的所得均来源于为这些人的利益而进行的投资所获得的收益；

详细版注释

21. 2d）项规定了一些规则，在这些规则下某些符合缔约国一方居民条件（见第 4 条注释的第 8.6 和 8.7 段）的非营利组织以及养老基金有资格享受本协定的所有优惠。

22. 在 i）目下列出的实体无须考虑其受益所有人或成员的居住国，即可自动具有获取协定优惠的资格。这些实体通常是指那些在它们居住国免税以及
those that are exempt from tax in their State of residence and that are constituted and operated exclusively to fulfill certain social functions (e.g. charitable, scientific, artistic, cultural, or educational).

23. Under subdivision ii), a resident pension fund will qualify for treaty benefits if more than 50 per cent of the beneficial interests in that person are owned by individuals resident of either Contracting State or if more than a certain percentage of these beneficial interests, to be determined during bilateral negotiations, are owned by such residents or by individuals who are residents of third States provided that, in the latter case, two additional conditions are met: first, these individuals are entitled to the benefits of a comprehensive tax convention concluded between that third State and the State of source and, second, that convention provides for a similar or greater reduction of source taxes on interest and dividends derived by pension funds of that third State. For purposes of this provision, the term “beneficial interests in that person” should be understood to refer to the interests held by persons entitled to receive pension benefits from the fund. Some States, however, consider that the risk of treaty shopping by recognized pension funds does not warrant the costs of compliance inherent in requiring funds to identify the treaty residence and entitlement of the individuals entitled to receive pension benefits. States that share that view may modify subdivision (ii) accordingly.

24. Subdivision iii) constitutes an extension of the rule of subdivision ii) applicable to pension funds. It applies to so-called “funds of funds”, which are funds which do not directly provide pension benefits to residents of either Contracting State but are constituted and operated to invest funds of pension funds that are themselves pension funds qualifying for benefits under subdivision ii). Subdivision iii) only applies, however, if substantially all the income of such a “fund of funds” is derived from investments made for the benefit of pension funds qualifying for benefits under subdivision ii).

Ownership / Base Erosion

Simplified version

e) a person other than an individual, provided that persons who are residents of that Contracting State and are qualified persons by reason of subparagraphs a) to d) own, directly or indirectly, more than 50 per cent of the beneficial interests of the person

Detailed version

e) a person other than an individual, if

i) on at least half the days of the taxable period, persons who are residents of that Contracting State and that are entitled to the benefits of this Convention under subparagraph a), b) or d), or subdivision i) of subparagraph c), of this paragraph own, directly or indirectly, shares representing at least 50 per cent of the aggregate voting power and value (and at least 50 per cent of any disproportionate class of shares) of the person, provided that, in the case of indirect ownership, each intermediate owner is a resident of that Contracting State, and

ii) less than 50 per cent of the person’s gross income for the taxable period, as determined in the person’s Contracting State of residence, is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State entitled to the benefits of this Convention under subparagraph a), b) or d), or subdivision i) of subparagraph c), of this paragraph in the form of payments that are deductible for purposes of the taxes covered by this Convention in the
为了完成某些社会功能（例如，慈善、科学、艺术、文化的或者教育）而被专门建立和运营的实体。

23. 在 ii) 目下，一个居民养老金基金具有获取协定优惠的资格，如果 50% 以上在该人的受益所有人是由缔约国任何一方的个人居民所拥有，或大于或特定比例（由两国协商决定）的受益所有权由缔约国任何一方的个人居民或由第三国居民所拥有。当由第三国居民所拥有时，需要满足两个额外的条件：第一，此第三国居民有权享受第三国与收人来源国之间的全面税收协定；第二，此协定为此第三国养老金基金获得的利息和股息在来源国需缴纳的税收提供更大的优惠。在本款中，“在该人的受益所有人”需要被理解为指的时有资格从基金中获得退休金收入的人所持有的权益。然而，有些国家认为，被认可养老金基金的代缴纳税主义无法平衡要求基金确定协定居民和基金受益个人享受协定资格所需的合规成本，持此观点的国家可以修正 ii) 目。

24. iii) 目扩展了适用养老金基金的 ii) 目的准则，它适用于所谓的“基金的基金”。“基金的基金”不直接为缔约国一方的居民提供退休金收益，但是其被建立和运作用于投资养老金基金，而这些养老金基金本身可以在 ii) 目下有资格享受协定优惠的。但是，只有在实质上这样的“基金的基金”的所有所得都来源于为 ii) 目下有资格享受协定优惠的养老金基金的利益所做出的投资，iii) 目方可适用。

所有权 / 税基侵蚀

简化版

a) 除自然人以外的人，作为缔约国居民且根据本协定 a) 至 d) 项是有资格的人直接或间接地持有该人至少 50% 的受益权；

详细版

a) 除自然人以外的人，如果:

i) 在包含该时点的纳税期间内至少一半的天数中，在本协定 a)、b) 或 d) 项或者 c) 项 i) 目下有资格享受协定优惠的该人所在缔约国的居民，直接或间接地持有该人至少 50% 的表决权及价值（以及至少 50% 任意不成比例种类的股份）（在间接持有的情况下，每个中间持有人必须是该人所在缔约国的居民）；

ii) 在包含该时点的纳税期间内，少于 50% 的该人总所得——由该人的居住国确定——以该人的居住国允许在本协定涵盖的税种的税前扣除的支付方式，直接或间接地支付或计指给非有资格在本协定 a)、b) 或 d) 项或者 c)
person's Contracting State of residence (but not including arm's length payments in the ordinary course of business for services or tangible property).

Commentary on the detailed version

25. Subparagraph 2 e) provides an additional method to qualify for treaty benefits that applies to any form of legal entity that is a resident of a Contracting State. The test provided in subparagraph e), the so-called ownership and base erosion test, is a two-part test; both parts must be satisfied for the resident to be entitled to treaty benefits under subparagraph 2 e).

26. Under subdivision i), which is the ownership part of the test, 50 per cent or more of each class of shares in the person must be owned, directly or indirectly, on at least half the days of the person's taxable period, by persons who are residents of the Contracting State of which that person is a resident and that are themselves entitled to treaty benefits under subparagraphs a), b) or c), or subdivision i) of subparagraph c). In the case of indirect owners, however, each of the intermediate owners must be a resident of that Contracting State. Some States, however, consider that this last requirement is unduly restrictive and prefer to omit it.

27. Whilst subdivision i) will typically be relevant in the case of private companies, it may also apply to an entity such as a trust that is a resident of a Contracting State and that otherwise satisfies the requirements of this subdivision. According to subparagraph b) of paragraph 6, the reference to "shares", in the case of entities that are not companies, means interests that are comparable to shares; this would generally be the case of the beneficial interests in a trust. For the purposes of subdivision i), the beneficial interests in a trust will be considered to be owned by its beneficiaries in proportion to each beneficiary's actuarial interest in the trust. The interest of a beneficiary entitled to the remaining part of a trust will be equal to 100 per cent less the aggregate percentages held by income beneficiaries. A beneficiary's interest in a trust will not be considered to be owned by a person entitled to benefits under the other provisions of paragraph 2 if it is not possible to determine the beneficiary's actuarial interest. Consequently, if it is not possible to determine the actuarial interest of the beneficiaries in a trust, the ownership test under subdivision i) cannot be satisfied, unless all possible beneficiaries are persons entitled to benefits under the other subparagraphs of paragraph 2.

28. Subdivision ii), which constitutes the base erosion part of the test, is satisfied with respect to a person if less than 50 per cent of the person's gross income for the taxable period, as determined under the tax law in the person's State of residence, is paid or accrued to persons who are not residents of other Contracting States entitled to benefits under subparagraphs a), b) or c), or subdivision i) of subparagraph c), in the form of payments deductible for tax purposes in the payer's State of residence.

29. For the purposes of the test in subdivision ii), deductible (i.e. base-eroding) payments do not include arm's-length payments in the ordinary course of business for services or tangible property. To the extent they are deductible from the taxable base under the tax law in the person's State of residence, trust distributions constitute such base-eroding payments. Depreciation and amortisation deductions, which do not represent payments or accruals to other persons, are not taken into account for the purposes of subdivision ii). Income that is subject to full taxation in the State of source should not be considered to be a base-eroding payment even if it is deductible by the payer. For example, the payment of a "group contribution" that may be made by a company that is a resident of a Contracting State to the permanent establishment, situated in the same State, of a non-resident company that is part of the same group should not be taken into account as such a payment would be taxable in the same State where it would be deducted.

30. The ownership and base erosion tests included in subparagraph e) require a determination for each taxable period of the entity; when these tests are met for a given taxable
项 i ) 目下享受优 惠的缔约国任何一方居民（不包括按照常规经营为服务或有形财产支付的公平交易款项）；

详细注释

25. 2a) 项提供了一个额外的方法，该方法使得缔约国一方任意法律形式的 实体居民有资格获得协定优惠。e) 项提供的测试，是一个包含两部分的测试， 即所谓的 所有权测试和税基侵蚀测试。这两个部分都必须被满足才能使得该居民在 2e) 项下获得协定优惠的资格。

26. 在 i ) 目即所有权测试部分下，该人每种股份的至少 50%的表决权及价格，在该人纳税期内至少一半的天数中，由在本条款 a) 、 b) 项下或者 c) 项 i ) 目下有资格享受协定优惠的该人在缔约国居民直接或间接持有。但 是，如间接持有的情况下，每个中间持有人都必须是该缔约国的居民。然而， 有的国家认为该最后的要求过于严格而放弃忽略它。

27. 虽然 i ) 目通常与私人公司相关，它也可能适用于如信托这类是缔约国一方居民 且原本可以满足该目的要求的实体。根据第 6 款 h) 项，在实体不是公司的 情况下，提及的“股份”，是指与股份类似的利益，而在一个信托中通常是指 受益所有人。在 i ) 目中，受益所有人是受益人由每一受益所有人根据其在信托中的利益所分得。一个受益所有人在一个信托中可享有 与受益人的利益，货物 100%减去由收入受益人持有的累积百分比。如果不可能确 定受益所有人的利益，则该受益 所有权在一个人一个受益人中利益将不会可享有，由于第 2 款其他项下有资格享受优惠的人 所拥有。因此，如果不可能确定受益所有人在一个信托中的利益，在 i ) 目下的所有权测试无法被满足，除非所有 可能的受益所有人都在第 2 款其他项下有资格享受优惠的人。

28. ii ) 目为税基侵蚀部分的测试。如果一个人少于 50%的总所得——根据该人居 住的法律确定——他/她作为居民国在税种的税前扣除的支付方式， 直接或间接地支付或者课征非有形资产的本款 a) 、 b) 项下或者 c) 项 i ) 目下享受优惠的缔约国任何一方居民的人，则该人可以通过该测试。

29. 进行 ii ) 目中的测试时，可扣除的（如可侵蚀税基的）支付不包括按照常规经营为服务或有形财产支付的公平交易款项。信托的分配构成税基侵蚀 的支付的一部分，但以该人居民国的法律规定为从其税基中扣除的部分为限。折旧及摊销扣除因为 不涉及对其他人的支付或计提，未被 ii ) 目考虑在内。在 来源国被全额征税的所得不 应被视为侵蚀税基的支付，即使付款方可在税前扣除。例如由缔约国一方居民公司 将同一集团下的非居民公司设立在同一国中的 常设机构支付的“集团贡献”不 应被考虑在内，因为这样的支付也在其被扣除 的同一国家中被征税。

30. 在 e) 项中包含的所有权及税基侵蚀测试需要对具体实体的每一个纳税期间作 决定。当这些测试在一个特定的纳税期间内被通过时，则意味着该实体
period, the entity constitutes a qualified person at any time within that taxable period. The 
taxable period to which subparagraph e) refers is determined by the taxation law of the State of 
residence of the entity.

**Collective investment vehicles** – sub-paragraph 2 f)

**Detailed version**

f) [possible provision on collective investment vehicles]

[Footnote 2. This subparagraph should be drafted (or omitted) based on how collective 
investment vehicles are treated in the Convention and are used and treated in each 
Contracting State: see the Commentary on the sub-paragraph and paragraphs 6.4 to 6.38 
of the Commentary on Article 1.]

**Commentary on the detailed version**

31. As indicated in the footnote to sub-paragraph f), whether a specific rule concerning 
collective investment vehicles (CIVs) should be included in paragraph 2, and, if so, how that 
rule should be drafted, will depend on how the Convention applies to CIVs and on the treatment 
and use of CIVs in each Contracting State. Such a specific rule will frequently be needed since a 
CIV may not be a qualified person under either the other provisions of paragraph 2 or 3, 
because, in many cases

- the interests in the CIV are not publicly-traded (even though these interests are widely 
distributed);
- these interests are held by residents of third States;
- the distributions made by the CIV are deductible payments, and
- the CIV is used for investment purposes rather than for the "active conduct of a business"
  within the meaning of paragraph 3.

32. Paragraphs 6.8 to 6.34 of the Commentary on Article 1 discuss various factors that 
should be considered for the purpose of determining the treaty entitlement of CIVs and these 
paragraphs are therefore relevant when determining whether a provision on CIVs should be 
included in paragraph 2 and how it should be drafted. These paragraphs include alternative 
provisions that may be used to deal adequately with the CIVs that are found in each Contracting 
State. As explained below, the use of these provisions may make it unnecessary to include a 
specific rule on CIVs in paragraph 2, although it will be important to make sure that, in such a 
case, the definition of "equivalent beneficiary", if the term is used for the purposes of one of 
these alternative provisions, is adapted to reflect the definition included in paragraph 6.

33. If it is included, subparagraph f) will address cases where a Contracting State agrees that 
CIVs established in the other Contracting State constitute residents of that other State under the 
analyses in paragraphs 6.9 to 6.12 of the Commentary on Article 1 (such agreement may be 
evidenced by a mutual agreement as envisaged in paragraph 6.16 of the Commentary on 
Article 1 or may result from judicial or administrative pronouncements). The provisions of the 
Article, including subparagraph f), are not relevant with respect to a CIV that does not qualify 
as a resident of a Contracting State under the analysis in paragraphs 6.9 to 6.12 of the 
Commentary on Article 1. Also, the provisions of subparagraph f) are not relevant where the 
treaty entitlement of a CIV is dealt with under a treaty provision similar to one of the alternative 
provisions in paragraphs 6.17, 6.21, 6.26, 6.27 and 6.32 of the Commentary on Article 1.

34. As explained in paragraphs 6.19 and 6.20 of the Commentary on Article 1, Contracting 
States wishing to address the issue of CIVs' entitlement to treaty benefits may want to consider
在该纳税期间内的任何时点都是一个有资格的人。e）项涉及哪个纳税期间是由该实体居住国的税法决定的。

集合投资工具

仅详细版

f）集合投资工具可能的条款

[脚注 1] 本项应该基于集合投资工具在本协定中的处理方式，以及在缔约国各方的使用及处理方式起草（或省略）：见本项注释和协定第1条注释第6.4—6.38段。

详细版注释

31. 如f）项脚注中所述，一个CIV的具体规则是否需要纳入到第2款中，以及如需要该规则应如何起草，需基于CIV在本协定中的处理方式以及在缔约国各方的使用及处理方式来确定。一个CIV可能在第2或第3款的其他条款下均不是一个有资格的人，类似这样的一个特殊规则会经常被需要，因为在许多情况下：

- 在CIV的权益不是公开交易的（即使这些权益被广泛持有）；这些权益被第三国居民持有；
- CIV发放的收益是可扣税的支付项，以及
- CIV被用于投资目的，而不是被用于第3款定义的“积极经营活动”。

32. 第1条注释中的第6.8—6.34段讨论了决定CIV协定权利时需要考虑的各种因素。因而这些段落与决定是否应将一个CIV条款纳入第2款以及应如何起草该条款是相关的。这些段落包含了可选条款，足以被用来处理在每一个缔约国中可找到的CIV。如下文所解释的，这些条款的使用可能会在第2款中加入一个关于CIVs的特殊规则显得没有必要。尽管如此，在此情况下，如果将“同等受益人”的概念适用于这些可选条款，非常重要的一点是要确保这一概念反映了其在第6款中所包含的定义。

33. 如第f）款（第2款）所示，f）款能够规范的情形是：缔约国一方根据第1条注释中的第6.9—6.12段的分析同意在缔约国另一方设立的CIV构成缔约国另一方的居民（这样的同意可通过第1条注释第6.16段所设想的相互协定来达成，或者通过司法或行政公告来达成）。本条的条款，包括f）项，并不适用于根据第1条注释中的第6.9—6.12段的分析不构成缔约国一方的居民的CIV。同时，当一个CIV的协定权利是由一个类似于第1条注释的第6.17、6.21、6.25和6.32段中提供的可选条款之一的条款规定时，f）项是不相关的。

34. 如第1条注释中的第6.19和6.20段所解释的，希望处理CIV的协定优惠权利问题的国家，可能需要考虑在缔约各国中使用的不同种类的CIV的经济特征，包括其规避税的潜
the economic characteristics, including the potential for treaty shopping, of the different types of CIVs that are used in each Contracting State.

35. As a result of that analysis, they may conclude that the tax treatment of CIVs established in the two States does not give rise to treaty-shopping concerns and decide to include in their bilateral treaty the alternative provision in paragraph 6.17 of the Commentary on Article 1, which would expressly provide for the treaty entitlement of CIVs established in each State and, at the same time, would ensure that they constitute qualified persons under subparagraph a) of paragraph 2 of the Article (because a CIV to which that alternative provision would apply would be treated as an individual). In such a case, subparagraph f) should be omitted. States that share the view that CIVs established in the two States do not give rise to treaty shopping concerns but that do not include in their treaty the alternative provision in paragraph 6.17 of the Commentary on Article 1 should ensure that any CIV that is a resident of a Contracting State should constitute a qualified person. In that case, subparagraph f) should be drafted as follows:

f) a CIV (a definition of CIV would be included in subparagraph f) of paragraph 6);

36. The Contracting States could, however, conclude that CIVs present the opportunity for residents of third States to receive treaty benefits that would not have been available if these residents had invested directly and, for that reason, might prefer to draft subparagraph f) in a way that will ensure that a CIV that is a resident of a Contracting State will constitute a qualified person but only to the extent that the beneficial interests in the CIV are owned by equivalent beneficiaries. In that case, subparagraph f) should be drafted as follows:

f) a collective investment vehicle, but only to the extent that, at that time, the beneficial interests in the CIV are owned by residents of the Contracting State in which the collective investment vehicle is established or by equivalent beneficiaries.

37. That treatment corresponds to the treatment that would result from the inclusion in a tax treaty of a provision similar to the alternative provision in paragraph 6.21 of the Commentary on Article 1. As explained in paragraphs 6.18 to 6.24 of the Commentary on Article 1, the inclusion of such an alternative provision would provide a more comprehensive solution to treaty issues arising in connection with CIVs because it would address treaty-shopping concerns whilst, at the same time, clarifying the tax treaty treatment of CIVs in both Contracting States. If that alternative provision is included in a tax treaty, subparagraph f) would not be necessary as regards the CIVs to which that alternative provision would apply: since that alternative provision provides that a CIV to which it applies shall be treated as an individual (to the extent that the beneficial interests in that CIV are owned by equivalent beneficiaries), that CIV will constitute a qualified person under subparagraph a) of paragraph 2 of the Article.

38. The approach described in the preceding two paragraphs, like the approach in paragraphs 6.21, 6.26 and 6.28 of the Commentary on Article 1, makes it necessary for the CIV to make a determination, when a benefit is claimed as regards a specific item of income, regarding the proportion of holders of interests who would have been entitled to benefits had they invested directly. As indicated in paragraph 6.29 of the Commentary on Article 1, however, the ownership of interests in CIVs changes regularly, and such interests frequently are held through intermediaries. For that reason, the CIV and its managers often do not themselves know the names and treaty status of the beneficial owners of interests. It would therefore be impractical for the CIV to collect such information from the relevant intermediaries each time the CIV receives income. Accordingly, Contracting States should be willing to accept practical and reliable approaches that do not require such daily tracing. As indicated in paragraph 6.31 of the Commentary on Article 1, the proportion of investors in the CIV is likely to change relatively slowly even though the identity of individual investors will change daily. For that reason, the determination of the extent to which the beneficial interests in a CIV are owned by equivalent beneficiaries should be made at regular intervals, the determination made at a given time being
在风险。
35. 作为分析的结果，这些国家可能会得出结论：即在两个国家中建立的 CIV 的税务处理
并不会导致税费问题，并决定在其双边协定中加入第 1 条注释 第 6.17 段中的可选条款。该条款将明确规定在每个国家建立的 CIV 的协定权利，同时可以保证这些 CIV 是本条第 2 款
a）项下的有资格的人（因一个可适用可选条款的 CIV 会被视为一个个人）。在此情况下，
f）项需要被忽略。同意在两个国家中建立的 CIV 并不会导致税费问题的国家，如果没有在他们的协定中加
入第 1 条注释第 6.17 段中的可选条款的，应确保为缔约国一方居民的任一 CIV 应该
构成一个有资格的人。在这种情况下，f）项应该按照以下方式起草：

f）一个 CIV（CIV 的定义应被纳入第 5 款 f）项）中）
36. 然而，缔约国可能也会得出结论：即 CIV 为第三国居民带来了获取协定优 惠的机会，
而当这些居民直接投资时是无法享受这些优惠的。因此，缔约国可能更倾向于采用另一种
方式来起草 f）项，这种方式能够保证作为缔约国一方居民的 CIV，只有在其受益所有权是
由同等受益人拥有的情况下，才能够成为一个有资格的人。在这种情况下，f）项应该按照以
下方式起草：

f）一个集合投资工具，但是以在当时，该集合投资工具中的受益 所有权由该集合投
资工具所在的缔约国一方的居民拥有，或由同等受益人拥有的情况为限。
37. 此处理与在协定中纳入一条与第 1 条注释第 6.21 段中可选条款类似的条 款所带来的
效果相同。如第 1 条注释第 6.18—6.24 项所解释的，这样一个可选条 款的纳入能够提供一个
针对由 CIV 产生的协定问题的更全面的解决方案，因为不 仅能够规范协议税问题，同时还可
以澄清对缔约国双方的 CIV 的税收协定待遇 问题。如果该可选条款被纳入到税收协定中，
因为该可选条款可以适用于 CIV，f）项就没有必要了。因为可选条款规定，适用于此条款的
CIV 应被视为一个个人（以 CIV 中的受益所有权由同等受益人拥有程度为限），且 CIV 在
本条第 2 款 a）项下构成一个有资格的人。
38. 上两段中所述的方法，如在第 1 条注释中第 6.21、6.26 及 6.28 段中的方法，使得当
处 CIV 的某项所得申请优惠时，有必要确定如果直接投资也可享受优惠的利益持有者的比例。然
而，正如第 1 条注释第 6.29 段所述，CIV 的受益所有权 经常改变，而且这些权益通常由中
间机构持有。为此，应 CIV 及其经理人都通 常不知道权益所有人的名称及协定情况，因此
让 CIV 在每次获取所得时向相关中 间机构获取这类信息是不具有可行性的。相应的，缔约国
应愿意接受无须每天 追踪信息的较为可行和可靠的方法。如第 1 条注释第 6.31 段所指出的，
虽然个人 投资者的身份将会每日改变，CIV 中投资者的比例可能变化较慢。因此，对于确定
一个 CIV 中由同等受益人所拥有的受益所有权程度的工作应有规律地间歇执行。 在一个特定时

43
applicable to payments received until the following determination. This corresponds to the approach described in paragraph 6.31 of the Commentary on Article 1, according to which:

... it would be a reasonable approach to require the CIV to collect from other intermediaries, on specified dates, information enabling the CIV to determine the proportion of investors that are treaty-entitled. This information could be required at the end of a calendar or fiscal year or, if market conditions suggest that turnover in ownership is high, it could be required more frequently, although no more often than the end of each calendar quarter. The CIV could then make a claim on the basis of an average of those amounts over an agreed-upon time period. In adopting such procedures, care would have to be taken in choosing the measurement dates to ensure that the CIV would have enough time to update the information that it provides to other payers so that the correct amount is withheld at the beginning of each relevant period.

39. Another view that Contracting States may adopt regarding CIV's is that expressed in paragraph 6.26 of the Commentary on Article 1. Contracting States that adopt that view may wish to draft subparagraph f) so that a CIV that is a resident of a Contracting State would only constitute a qualified person to the extent that the beneficial interests in that CIV are owned by residents of the Contracting State in which the CIV is established. In that case, subparagraph f) should be drafted as follows:

f) a collective investment vehicle, but only to the extent that, at that time, the beneficial interests in the collective investment vehicle are owned by residents of the Contracting State in which the collective investment vehicle is established.

Since the inclusion of the alternative provision in paragraph 6.26 of the Commentary on Article 1 would achieve the same result with respect to the CIVs to which it would apply, subparagraph f) would not be necessary, if that alternative provision is included in a treaty, as regards the CIVs to which that provision would apply.

40. A variation on the preceding approach would be to consider that a CIV that is a resident of a Contracting State should constitute a qualified person if the majority of the beneficial interests in that CIV are owned by individuals who are residents of the Contracting State in which the CIV is established. This result could be achieved by omitting subparagraph f) and simply relying on the application of subparagraph 2) e) (the so-called ownership and base erosion test).

41. Another possible view that the Contracting States could adopt would be to conclude that the fact that a substantial proportion of the CIV's investors are treaty-eligible is adequate protection against treaty shopping, and thus that it is appropriate to provide an ownership threshold above which benefits would be provided with respect to all income received by a CIV. An alternative provision that would ensure that result is included in paragraph 6.27 of the Commentary on Article 1 and subparagraph f) would not be necessary, if the Contracting States include that provision in their bilateral treaty, with respect to the CIVs to which the provision would apply. If that provision is not included in the treaty, the scope of subparagraph f) could be broadened in order to achieve a similar result by referring to "a collective investment vehicle, but only if 1 per cent of the beneficial interests in the collective investment vehicle are owned by residents of the Contracting State in which the collective investment vehicle is established and equivalent beneficiaries".

42. Similarly, the Contracting States may use the alternative provision in paragraph 6.32 of the Commentary on Article 1 where they consider "that a publicly-traded collective investment vehicle cannot be used effectively for treaty shopping because the shareholders or unit holders of such a collective investment vehicle cannot individually exercise control over it". In such case,
同做出的决定适用于在下一个决策做出前收到的支付。该方法与第1条注释第6.31段描述的方法相同，相关描述如下：

……要求CIV在规定的日期向其中间机构提供信息，以使其能够决定拥有固定权利的投资者的比例的方法，是一个合理的方法。可以在一个历史年度或者财政年度结束后要求此类信息，或者如果市场状况表明所有权的流动性很高，可以更频繁地采集此类信息，但是采集的频率要超过每个会计年度一次。CIV即可在经同意的期间内基于这些数据的平均数计算结果。如果采用此种方法，需要谨慎选择衡量日期来保证CIV有足够的数据来更新它提供给其他付款方的信息，从而使得在每个相关期间的开始就可以提出正确的数据。

39. 缔约国可采用的另外一种情况是CIVs的观点，在第1条注释第6.26段中有所阐述。采用该观点的缔约国可能希望通过制定f)项，以使是缔约国一方居民的CIV只能在该受益所有权由CIV所在国的居民拥有或控制的情况下，才可以构成一个有益的资格的人。在这种情况下，f)项应该按照以下来起草：

f) 一个集合投资工具，但是以在当时，该集合投资工具的受益所有权由该集合投资工具所在的缔约国一方的居民拥有/控制。

由于第1条注释第6.26段中的可选条款可以针对CIV获得相同的效果，因此如果适用于CIV的可选条款被纳入到评注中，f)项就没有必要了。

40. 前述方法的一个变化方法是：如果CIV中受益所有权的绝大多数由该缔约国一方居民的居民个人所拥有，则该缔约国一方居民的CIV应构成一个有资格的人。这个结果可以通过忽略f)项并仅依靠2)和3)项的应用（所谓的所有权和利益的丧失）来达成。

41. 缔约国可采纳的另一种可能的意见是，只要一个CIV有足够多比例的投资者可以满足协定适用条件，即可避免协商避税。因此，可以针对CIV的全部所得是否享受优惠待遇问题设定一个所有权门槛。另一个可以带来同样效果的可选条款是第1条第6.27段。如果缔约国将该条条款纳入其双边协定，则无需加入f)项。如果该条款未被纳入协定，则可以考虑将f)项放宽成“集合投资工具，只有当集合投资工具中百分之[ ]的受益权是由设立集合投资工具的国家的居民或者同等受益人所拥有时”，从而达到类似的效果。

42. 同样地，如果缔约国认为“公开交易的集合投资工具不能有效地用于避税，因为CIV的所有人或单位持有人无法实施单独控制”，则可以考虑采用第1条注释的6.32段作为可选条款。在这种情况下，因为可选条款可以适用于CIV，则无
subparagraph f) would not be necessary with respect to the CIVs to which the alternative provision would apply. States that share that view but that have not included the alternative provision in their treaty could draft subparagraph f) to read:

f) a collective investment vehicle if the principal class of shares in the collective investment vehicle is listed and regularly traded on a recognised stock exchange.

43. Finally, as explained in paragraph 6.25 of the Commentary on Article 1, States that share the concern described in that paragraph about the potential deferral of taxation that could arise with respect to a CIV that is subject to no or low taxation and that may accumulate its income rather than distributing it on a current basis may wish to negotiate provisions that extend benefits only to those CIVs that are required to distribute earnings currently. Depending on their drafting, such provisions may render subparagraph f) unnecessary.

Active conduct of a business

Simplified version

4. a) A resident of a Contracting State that is neither a qualified person nor entitled under paragraph 3 to a benefit that would otherwise be accorded by this Convention with respect to an item of income shall nevertheless be entitled to such benefit if the resident is carrying on a business in the first-mentioned Contracting State (other than the business of making or managing investments for the resident's own account, unless the business is carried on by a bank, an insurance company, a registered securities dealer or any other institution agreed upon by the Contracting States) and that item of income is derived in connection with, or is incidental to, that business.

b) If a resident of a Contracting State derives an item of income from a business carried on by that resident in the other Contracting State, or derives an item of income arising in the other Contracting State from a related enterprise of the resident, the conditions described in subparagraph a) shall be considered to be satisfied with respect to such item of income only if the business carried on by the resident in the first-mentioned Contracting State is substantial in relation to the business carried on by the resident or related enterprise in the other Contracting State. Whether a business is substantial for the purpose of this subparagraph shall be determined on the basis of all the facts and circumstances.

c) For the purposes of this paragraph, the business carried on by a partnership in which a person is a partner and the business carried on by related enterprises of a person shall be deemed to be carried on by such person.

Detailed version

3. a) A resident of a Contracting State will be entitled to benefits of this Convention with respect to an item of income derived from the other Contracting State, regardless of whether the resident is a qualified person, if the resident is engaged in the active conduct of a business in the first-mentioned Contracting State (other than the business of making or managing investments for the resident's own account, unless these activities are banking, insurance or securities activities carried on by a bank or [list financial institutions similar to banks that the Contracting States agree to treat as such], insurance enterprise or registered securities dealer respectively), and the income derived from the other Contracting State is derived in connection with, or is incidental to, that business.

b) If a resident of a Contracting State derives an item of income from a business activity conducted by that resident in the other Contracting State, or derives an item of income
需加入第1项。持相同观点但未将可选条款纳入协定中的缔约国则可以将第1项规定为：

f) 集合投资工具，如其股份主要种类在受认可的股份交易所上市并被定期交易。

43. 最后，如在本第1条解释的6.25段中所述，一个适用免税或低税的CIV可会倾向于积累收益而非将收益在当期分配出去，这将会带来税收递延的潜在问题。如果缔约国有关这样的顾虑，可能会希望通过协商将优惠仅授予被要求当期分配收益的CIV。在这种情况下，相关条款可能使得第f项不再有必要。

积极营业活动

简化版

4. a) 缔约国一方居民可就来源于缔约国另一方的所得享受本协定的优惠待遇，即使此居民既非有资格的人，也无法根据第3款享受优惠，前提是该居民在首次提及的缔约国进行积极营业活动（但为居民本人利益的投资或管理投资业务除外，除非此营业活动是由银行、保险公司、注册证券交易商或其他由缔约国双方同意的机构所进行的），且此来源于缔约国另一方的所得与该项营业活动相关或附属于该项营业活动。

b) 如果缔约国一方居民的所得来源于在缔约国另一方进行的营业活动，或来源于位于缔约国另一方关联企业的营业活动，仅当该居民在第一次提及的缔约国的营业活动与该居民或其关联企业在缔约国另一方的营业活动相比有实质性时，a) 项所述条件才可被视为满足。某项营业活动是否符合本项的实质性条件将基于所有事实和情况予以判定。

c) 为实施本款，由一人所拥有的合伙企业所进行的活动，以及一人所拥有的合伙企业所进行的活动将被视为该人所为。

详细版

3. a) 缔约国一方居民可就来源于缔约国另一方的所得享受本协定的优惠待遇，无论此居民是否为有资格的人，前提是该居民在第一次提及的缔约国进行积极营业活动（但为居民本人利益的投资或管理投资业务除外，除非是银行或金融机构如缔约国另一方的银行或金融机构与缔约国另一方的银行或金融机构有类似的关系，或缔约国另一方的银行或金融机构与缔约国另一方的银行或金融机构有类似的关系），且此来源于缔约国另一方的所得与该项营业活动相关或附属于该项营业活动。

b) 如果缔约国一方居民的所得来源于在缔约国另一方进行的营业活动，或来源于位于缔约国另一方关联企业的营业活动，仅当该居民在第一次提及的缔约国的营业活
arising in the other Contracting State from an associated enterprise, the conditions described in subparagraph a) shall be considered to be satisfied with respect to such item only if the business activity carried on by the resident in the first-mentioned Contracting State is substantial in relation to the business activity carried on by the resident or associated enterprise in the other Contracting State. Whether a business activity is substantial for the purposes of this paragraph will be determined based on all the facts and circumstances.

c) For purposes of applying this paragraph, activities conducted by persons connected to a person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 per cent of the beneficial interest in the other (or, in the case of a company, at least 50 per cent of the aggregate voting power and value of the company’s shares or of the beneficial equity interest in the company) or another person possesses at least 50 per cent of the beneficial interest (or, in the case of a company, at least 50 per cent of the aggregate voting power and value of the company’s shares or of the beneficial equity interest in the company) in each person.

In any case, a person shall be considered to be connected to another if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons.

Commentary on the detailed version

44. Paragraph 3 sets forth an alternative test under which a resident of a Contracting State may receive treaty benefits with respect to certain items of income that are connected to an active business conducted in its State of residence. This paragraph recognizes that where an entity resident of a Contracting State actively carries on business activities in that State, including activities conducted by connected persons, and derives income from the other Contracting State in connection with, or incidental to, such business activities, granting treaty benefits with respect to such income does not give rise to treaty-shopping concerns regardless of the nature and ownership of the entity. The paragraph will provide treaty benefits in a large number of situations where benefits would otherwise be denied under paragraph 1 because the entity is not a “qualified person” under paragraph 2.

45. A resident of a Contracting State may qualify for benefits under paragraph 3 whether or not it also qualifies under paragraph 2. Under the active-conduct test of paragraph 3, a person (typically a company) will be eligible for treaty benefits if it satisfies two conditions: (1) it is engaged in the active conduct of a business in its State of residence; and (2) the payment for which benefits are sought is related to the business. In certain cases, an additional requirement that the business be substantial in size relative to the activity in the source State generating the income must be met.

46. Subparagraph a) sets forth the general rule that a resident of a Contracting State engaged in the active conduct of a business in that State may obtain the benefits of the Convention with respect to an item of income derived from the other Contracting State. The item of income, however, must be derived in connection with, or be incidental to, that business.

47. The term “business” is not defined and, under the general rule of paragraph 2 of Article 3, must therefore be given the meaning that it has under domestic law. An entity generally will be considered to be engaged in the active conduct of a business only if persons through whom the entity is acting (such as officers or employees of a company) conduct substantial managerial and operational activities.

48. The business of making or managing investments for the resident’s own account will be considered to be a business only when the relevant activities are part of banking, insurance or
动与该居民或其关联企业在缔约国另一方的营业活动相比有实质性时，a）项所述条件可被视为满足。某项营业活动是否符合本项的实质性条件将基于所有事实和情况予以判定。

b）为实施本款，由关联于一人的多人所进行的活动将被视为该人所为。如一人在另一人处持有至少 50%的权益（或，在公司的情况下，至少 50%的表决权或股份，或至少 30%的受益权）或两人在另一人处持有至少 50%的权益（或，在公司的情况下，至少 50%的表决权或股份，或至少 50%的受益权），一人被认为与他人关联。若其基于所有相关事实与情况，一人控制另一人或两人都受控于相同的一人或多人，则在任何情况下该一人都被视为关联于另一人。

详细注释

44. 针对缔约国一方居民取得的与其在居住国进行的积极营业活动相关的所得能否享受协定优惠待遇这一问题，第 3 款提供了一个替代测试。此款认为，当缔约国一方居民居住国从事积极营业活动，也包括由其关联方进行的活动，并从缔约国另一方取得关联或附属于该营业活动的所得，授予该所得协定优惠待遇并不会引起缔约国的担忧，且无须考虑该实体的性质及所有权。该条款在更多情况下为本来根据第一款因为不符合第 3 款所定义的“有资格的人”而被拒绝协定优惠待遇的实体提供优惠待遇。

45. 缔约国居民可以适当地按照第 3 款而享受协定待遇，而无须考虑该居民是否符合第 3 款。根据第 3 款积极营业活动测试，个人（通常为公司）如果符合以下两个条件则可享受协定优惠：（1）在居住国进行积极营业活动；（2）优惠相关的支付款项与该营业活动相关。在特定情况下，企业需要满足一个额外条件，即该企业要是在与所得来源国的活动相比具有实质性。

46. a）该条款规定了一个一般规则，即当缔约国一方居民进行积极营业活动时，其从缔约国另一方取得的所得可以享受协定规定的优惠，但前提是该所得必须与该项营业活动相关或附属于该营业活动。

47. “营业”并未被定义，因此其在第 3 条第 2 款中的含义遵循缔约国本国法规中的定义。只有当实际的人员（如办事人员或公司雇员）进行了实质性的管理和经营活动，该实体才被视为进行积极营业活动。

48. 关于居民为自身投资的开展或管理业务，只有当其是银行或与缔约国认定的类似银行的金融机构（如信用合作社或建筑互助协会）、保险公司或注册证券交易商所
securities activities conducted by a bank or financial institution that the Contracting States would consider to be similar to a bank (such as a credit union or building society), an insurance enterprise or a registered securities dealer respectively. Such activities conducted by a person other than a bank (or financial institution agreed to by the Contracting States), insurance enterprise or registered securities dealer will not be considered to be the active conduct of a business, nor would they be considered to be the active conduct of a business if conducted by a bank (or financial institution agreed to by the Contracting States), insurance enterprise or registered securities dealer but not as part of the enterprise's banking, insurance or dealer business. Since a headquarters operation is in the business of managing investments, a company that functions solely as a headquarters company will not be considered to be engaged in the active conduct of a business for purposes of paragraph 3.

49. An item of income is derived in connection with a business if the income-producing activity in the State of source is a line of business that “forms a part of” or is “complementary to” the business conducted in the State of residence by the income recipient.

50. A business activity generally will be considered to form part of a business activity conducted in the State of source if the two activities involve the design, manufacture or sale of the same products or type of products, or the provision of similar services. The line of business in the State of residence may be upstream, downstream, or parallel to the activity conducted in the State of source. Thus, the line of business may provide inputs for a manufacturing process that occurs in the State of source, may sell the output of that manufacturing process, or simply may sell the same sorts of products that are being sold by the business carried on in the State of source. The following examples illustrate these principles:

- Example 1: ACO is a company resident of State A and is engaged in an active manufacturing business in that State. ACO owns 100 per cent of the shares of BCO, a company resident of State B. BCO distributes ACO’s products in State B. Since the business activities conducted by the two companies involve the same products, BCO’s distribution business is considered to form a part of ACO’s manufacturing business.

- Example 2: The facts are the same as in Example 1, except that ACO does not manufacture products. Rather, ACO operates a large research and development facility in State A that licenses intellectual property to affiliates worldwide, including BCO. BCO and other affiliates then manufacture and market the ACO-designed products in their respective markets. Since the activities conducted by ACO and BCO involve the same product lines, these activities are considered to form a part of the same business.

51. For two activities to be considered to be “complementary,” the activities need not relate to the same types of products or services, but they should be part of the same overall industry and be related in the sense that the success or failure of one activity will tend to result in success or failure for the other. Where more than one business is conducted in the State of source and only one of the businesses forms a part of or is complementary to a business conducted in the State of residence, it is necessary to identify the business to which an item of income is attributable. Royalties generally will be considered to be derived in connection with the business to which the underlying intangible property is attributable. Dividends will be deemed to be derived first out of profits of the treaty-benefited business, and then out of other profits. Interest income may be allocated under any reasonable method consistently applied.

- Example 3: CCO is a company resident of State C that operates an international airline. DCO is a wholly-owned subsidiary of CCO resident of State D. DCO operates a chain of hotels in State D that are located near airports served by flights operated by CCO. CCO frequently sells tour packages that include air travel to State D and lodging at DCO’s hotels. Although both companies are engaged in the active conduct of a business, the
各自从事的银行、保险或证券交易的一部分的情况下，才会被视为是一项营业活动。若该活动是由银行（或其他金融机构）、保险企业或证券交易商以外的人进行的，则不能被视为是一项营业活动。或虽由银行（或其他金融机构）、保险企业或证券交易商进行但并不属于企业的银行、保险或证券交易的一部分，则也不能被视为一项营业活动。由于总部的经营职能为管理投资，一个职责仅为公司总部的公司不能被视为符合第三款中的积极营业活动要求。

49. 如果在来源国产生某项所得的业务是所得接驳方在居住国所经营业务的一个“组成部分”或一项“补充”，则该所得被认定来源于营业活动。

50. 一个营业活动通常会被视为是来源国营业活动的一部分，如果这两个活动都包括了设计、制造或销售相同或同类产品，或提供类似服务。居住国的营业活动可视为来源国营业活动的上游或下游，也可以与之平行。因此，该营业活动可能为来源国的生产流程提供投人，也可能销售该生产流程的产出，或仅销售在来源国销售的相同产品。

下面的例子可解释说明该原则：

例 1：ACO 为 A 国的居民公司，并在该国进行积极的经营活动。ACO 拥有 BCO 公司 100%的股份，而 BCO 为 B 国的居民公司。BCO 在 B 国分销 ACO 的产品。由于两个公司的积极经营活动涉及同一产品，BCO 分销活动被视为是 ACO 生产经营活动的一部分。

例 2：事实与例 1 相同，但 ACO 并不生产产品，而是在 A 国运营一个大规模的研发基地，并将知识产权许可给世界各地的关联方，包括 BCO。BCO 与其他关联方则分别在各自的市场上生产及销售 ACO 所设计的产品。由于 ACO 和 BCO 所进行的活动涉及同一产品，这些活动都被视为组成相同营业活动的一部分。

51. 若两个活动被视为“互补”，则这些活动无需关联于同类产品或服务，但需构成同一整体的一部分，并且关联性需要达到一个活动的成败会引起另一个活动的成败的程度。当来源国的业务超过一项业务为居住国进行的营业活动的一部分或补充时，则需要判断所得归属于哪项业务。特许权使用费一般被视为来源于基础无形资产对应的营业活动。股息红利一般应被视为来源于享受协定优惠的营业活动，其次来源于其他权利。利息所得则可以根据任何被一贯应用的合理方法来进行分配。

例 3：DCO 为 C 国经营国航线的居民公司。DCO 是一家位于 D 国的由 CCO 全资控股的子公司。DCO 在 D 国经营坐落在 CCO 所经营航线的机场附近的一系列连锁酒店。CCO 经常性地出售包括至 D 国航班和 DCO 酒店住宿在内的旅游套餐。虽然两家公司都进行了积极营业活动，但经营连锁酒店和经营航线是两种完全不同的业务。因此 DCO 的营业额不构成 CCO 营业的一部分。但是，DCO 的营业活动可视为 CCO 营业活动的补充，因为这两种营业活动是同一整体行业（旅游业）的一部分，并且它们之间的关联性使得其相互依唆。
businesses of operating a chain of hotels and operating an airline are distinct businesses. Therefore DCO's business does not form a part of CCO's business. DCO's business, however, is considered to be complementary to CCO's business because these two businesses are part of the same overall industry (travel) and the links between these activities tend to make them interdependent.

- Example 4. The facts are the same as in Example 3, except that DCO owns an office building in the other Contracting State instead of a hotel chain. No part of CCO's business is conducted through the office building. DCO's business is not considered to form a part of or to be complementary to CCO's business. They are engaged in distinct businesses in separate industries, and there is no economic dependence between the two operations.

- Example 5. ECO is a company resident of State E. ECO produces and sells flowers in State E and other countries. ECO owns all the shares of FCO, a company resident of State F. FCO is a holding company that is not engaged in a business. FCO owns all the shares of three companies that are resident of State F: GCO, HCO, and ICO. GCO distributes ECO's flowers under the ECO trademark in State F. HCO markets a line of lawn care products in State F under the ECO trademark. In addition to being sold under the same trademark, GCO's and HCO's products are sold in the same stores and sales of each company's products tend to generate increased sales of the other's products. ICO imports fish from State E and distributes it to fish wholesalers in State F. For purposes of paragraph 3, the business of GCO forms a part of the business of ECO, the business of HCO is complementary to the business of ECO, and the business of ICO is neither part of nor complementary to that of ECO.

- Example 6. JCO is a company resident of State J. JCO produces and sells baby food in State J and other countries. JCO acquires all the shares of KCO, a company resident of State K that produces and distributes jam and similar food products. JCO and KCO are both involved in the food industry, the products resulting from the businesses activities carried on by these companies are sold in the same stores and sales of each company's products would be affected by any incident related to the quality of any of their products. For purposes of paragraph 3, the business of KCO is complementary to the business of JCO.

52. An item of income derived from the State of source is "incidental to" the business carried on in the State of residence if production of the item facilitates the conduct of the business in the State of residence. An example of incidental income is income derived from the temporary investment of working capital of a resident of one Contracting State.

53. Subparagraph b) of paragraph 3 states a further condition to the general rule in subparagraph a) in cases where the business generating the item of income in question is carried on by either the person deriving the income or by any associated enterprises. Subparagraph b) states that the business carried on in the State of residence, under these circumstances, must be substantial in relation to the activity in the State of source. The substantiality requirement is intended to prevent a narrow case of treaty-shopping abuses in which a company attempts to qualify for benefits by engaging in de minimis connected business activities in the treaty State of which it is resident (i.e. activities that have little economic cost or effect with respect to the company's business as a whole).

54. The determination of substantiality is made based upon all the facts and circumstances and takes into account the comparative sizes of the businesses in each Contracting State, the nature of the activities performed in each Contracting State, and the relative contributions made to that business in each Contracting State. In any case, in making each determination or
例 4：事实与例 3 相同，但 DOCG 在缔约国另一方拥有一个办公楼而非连锁酒店。ECO 没有任何业务活动是通过该办公楼进行的。则，DOC 的营业不被视为ECG 的营业的一部分或补充。它们在不同的行业中从事完全不同的业务，且两个经营间无相互的经济依赖。

例 5：ECO 为 E 国的居民公司。ECO 在 E 国和其他国家生产和销售花卉。ECO 拥有 F 国居民公司 FCO 的全部股份。FCO 是一家未参与营业的控股公司。拥有 F 国三家居民公司 GCO、HCO 和 ICO 的全部股份。GCO 在 F 国销售 ECO 商标的花卉，HCO 在 F 国销售 ECO 商标的草坪维护产品，GCO 与 HCO 的产品不但使用同样的商标，在同样的商店销售，且一家公司产品的销售会带来另一家公司产品销售的增长。ICO 从 E 国进口鱼类，并将其分销至 F 国的鱼品批发商。根据第 3 款，GCO 的营业为 ECO 营业的一部分，HCO 的营业为 ECO 营业的补充，而 ICO 的营业既非 ECO 营业的一部分也非其补充。

例 6：JCO 为 J 国的居民公司。JCO 在 J 国和其他国家生产和销售婴儿食品。JCO 收购了 KCO——一家生产饮料果酱及相似食品的 K 国居民公司——的全部股份。JCO 和 KCO 都属于食品工业，两家公司生产的产品在同样的商店销售，且各自产品的销量都会受到其中任一公司任一产品质量事件的影响。根据第 3 款，KCO 的营业的 JCO 营业的补充。

52. 如果所得相关生产支持了在居住国的业务经营，从来源国取得的一项所得会被视作“附属”于在居住国经营的业务。一个附属所得的例子为来自缔约国一方居民营运资本临时投资的所得。

53. 在某些情况下，讨论中的带来所得的营业活动可能是由取得所得的人进行的，也可能是由任意关联企业进行的，第 3 款 b) 项为第 1 款 a) 项的一般原则提供了一个进一步的规定。b) 项指出：在某些情况下，在居住国的营业活动必须与在来源国的活动有任何实质性关联。实质性要求是为了防止一种狭义的榨取避税滥用行为，即企业试图通过在来源国最低限度地参与营业活动来满足授予优惠的要求（也就是说企业整体经济的以不以有利益的活动）。

54. 实质性的判定需要基于所有的事实与情况，并且考虑在各缔约国经营的相对规模、在各缔约国进行的行为的性质及对在各缔约国的业务的相对贡献。在任何情况下，
comparison, due regard will be given to the relative sizes of the economies and the markets in the two Contracting States.

Example 7. LCO is a pharmaceutical company resident of State L. LCO is engaged in an active manufacturing business in State L and also conducts research and development in State L. All the shares of LCO are owned by OCO, a company resident of State O. LCO has developed different anti-malaria drugs which are produced, under LCO’s patents and trademarks, by MCO, a subsidiary of LCO which is a resident of State M. LCO sells these drugs, along with the other drugs that it manufactures, in State L and other States where malaria is almost non-existent. MCO pays a royalty to LCO for the use of the IP. Taking into account the nature of the business activities performed in State L and State M and the relative contribution made to the trade or business in each state, the royalty payment is entitled to treaty benefits. Due regard is also given to the relative small size of the market of anti-malaria drugs in State L (where the drugs are primarily sold to people who travel to parts of the world where malaria is widespread) compared to the market for such products in State M. Given the nature of the market for the drug in each country as well as all the other facts and circumstances, the business activity carried on by LCO in State L may be considered substantial in relation to the business activity carried on by MCO in State M.

Example 8: PCO, a company resident of State P, a developing country, has developed a line of luxury cosmetics that incorporate ingredients from plants that are primarily found in State P. PCO is the owner of patents, trade names and trademarks for these cosmetics. PCO’s shares are held in equal proportion by three shareholders: a company that is a resident of State Q, another company that is a resident of State R and a third company that is a resident of State S. PCO harvests and conditions the plants in State P. The plants are then shipped to State S (a large affluent country where there is an important demand for luxury cosmetics) where they are transformed into cosmetics by SCO, a subsidiary of PCO that is a resident of State S. The cosmetics are distributed in State S by another subsidiary, TCO, which is also a resident of State S, under trade names and trademarks licensed to TCO by PCO. The cosmetics are labelled “made in State S”. Due to the relatively small size of the economy of State P compared to the size of the economy of State S, the business activity carried on by PCO in State P is substantial in relation to the business activity carried on by SCO and TCO in State S.

55. The determination in subparagraph b) also is made separately for each item of income derived from the State of source. It is therefore possible that a person would be entitled to the benefits of the Convention with respect to one item of income but not with respect to another. If a resident of a Contracting State is entitled to treaty benefits with respect to a particular item of income under paragraph 3, the resident is entitled to all benefits of the Convention insofar as they affect the taxation of that item of income in the State of source.

56. The application of the substantiality requirement only to income from associated enterprises focuses only on potential abuse cases, and does not hamper certain other kinds of non-abusive activities, even though the income recipient resident in a Contracting State may be very small in relation to the entity generating income in the other Contracting State. For example, if a small research firm in one State develops a process that it licenses to a very large, unrelated, pharmaceutical manufacturer in another State, the size of the research firm in the first State would not have to be tested against the size of the manufacturer. Similarly, a small bank of one State that makes a loan to a very large unrelated company operating a business in the other State would not have to pass a substantiality test to receive treaty benefits under paragraph 3.
做每一个判定或比较时，都要对缔约国双方的经济与市场的相对规模予以适当考量。

- 例 7：LCO 为 L 国的一家居民制药公司，LCO 在 L 国进行积极生产经营活动和研发活动。LCO 所有的股权都由 O 国的居民公司 MCO 拥有。LCO 研发出不同的抗生素药，有其在 M 国的居民子公司 MCO 使用 LCO 的专利和商标进行生产。LCO 在 L 国以及其它并无疟疾的国家销售此药和它自己生产的其他药品。MCO 为其 IP 的使用向 LCO 支付特许权使用费。在考虑了在 L 国与 M 国的营业活动的性质和对在各国的贸易或业务的相对贡献后，此特许权使用费可以享受协定优惠。而且 L 国抗疟疾药市场（此药主要出售给前往疟疾流行的国家的人）较之 M 国市场规模较小这一情况也被予以了适当的考量。考虑到各国该药的市场性质及其他事实与情况，LCO 在 L 国所进行的营业行为可以被认为与 MCO 在 M 国所进行的营业行为有实质性关联。

- 例 8：发展中国家 P 国的 PCO 居民公司研发了一系列化妆品产品，其中含了一项植物成分，而该植物通常主要生长在 P 国。PCO 是这些化妆品专利、品牌名称及商标的拥有者。PCO 的股份由三家股东平均持有：一家 P 国居民公司、一家 Q 国居民公司和一家 R 国居民公司。PCO 在 P 国收购及养护这些植物。此后这些植物被送到 S 国（一个对奢侈品有重大需求的富裕国家），由 PCO 在 S 国的居民子公司 SCO 加工成化妆品。这些化妆品会由 PCO 在 S 国的另一个居民子公司 TCO 使用由 PCO 许可的品牌名称及商标在 S 国销售。这些化妆品会标注“S 国制造”。由于 P 国相对于 S 国经济规模较小，由 PCO 在 P 国所进行的营业行为被认为与 SCO 和 TCO 在 S 国所进行的营业行为有实质性联系。

55. b) 可以被用来针对来源国的每项所得进行单独判定。因此可能会出现一人的某一所得有权享受协定优惠而另一项所得却不能享受的情况。如果缔约国一方的居民根据第 3 款有权就其某一项所得享受协定优惠，则该居民有权享受可以影响该项所得在来源国被征税的所有协定优惠。

56. 实质性要求的应用，仅针对来源于关联企业的所得。即使作为缔约国一方居民的所得接收方与在缔约国另一方产生所得的实体相比规模很小，该所得也仅关注潜在的滥用情形，其不会妨害他部分其他非滥用行为。例如，如果一国的一家大型制药商研发出了一个工艺流程并将此工艺授权给另一国的一个大型非关联的医药制造商，则无须对该研发企业的规模与该制造商的规模进行比较测试。同样，一国的一家小型银行在另一国营业的一家大型非关联企业发放贷款，则无须通过第 3 款中的实质性测试即可享受协定优惠。
57. Subparagraph c) of paragraph 3 provides special attribution rules for purposes of applying the substantive rules of subparagraphs a) and b). Thus, these rules apply for purposes of determining whether a person meets the requirements in subparagraph a) that it be engaged in the active conduct of a business and that the item of income is derived in connection with that active business, and for making the comparison required by the “substantiality” requirement in subparagraph b). Subparagraph c) attributes to a person activities conducted by persons “connected” to such person. A person (“X”) is connected to another person (“Y”) if X possesses 50 per cent or more of the beneficial interest in Y (or if Y possesses 50 per cent or more of the beneficial interest in X). For this purpose, X is connected to a company if X owns shares representing 50 per cent or more of the aggregate voting power and value of the company or 50 per cent or more of the beneficial equity interest in the company. X also is connected to Y if a third person possesses 50 per cent or more of the beneficial interest in both X and Y. For this purpose, if X or Y is a company, the threshold relationship with respect to such company or companies is 50 per cent or more of the aggregate voting power and value or 50 per cent or more of the beneficial equity interest. Finally, X is connected to Y if, based upon all the facts and circumstances, X controls Y, Y controls X, or X and Y are controlled by the same person or persons.

Derivative benefits

Simplified version

3. A resident of a Contracting State that is not a qualified person shall nevertheless be entitled to a benefit that would otherwise be accorded by this Convention with respect to an item of income if persons that are equivalent beneficiaries own, directly or indirectly, more than 75 per cent of the beneficial interests of the resident.

Detailed version

4. A company that is a resident of a Contracting State shall also be entitled to a benefit that would otherwise be accorded by this Convention if, at the time when that benefit would be accorded:

a) at least 95 per cent of the aggregate voting power and value of its shares (and at least 50 percent of any disproportionate class of shares) is owned, directly or indirectly, by seven or fewer persons that are equivalent beneficiaries, provided that in the case of indirect ownership, each intermediate owner is itself an equivalent beneficiary, and

b) less than 50 per cent of the company’s gross income, as determined in the company’s State of residence, for the taxable period that includes that time, is paid or accrued, directly or indirectly, to persons who are not equivalent beneficiaries, in the form of payments (but not including arm’s length payments in the ordinary course of business for services or tangible property) that are deductible for the purposes of the taxes covered by this Convention in the company’s State of residence.[12]

Commentary on the detailed version

[12] One assumption that led to the inclusion of paragraph 4 was that Action 5 (Counter harmful tax practices more effectively, taking into account transparency and substance) and Action 8 (Intangibles) of the BEPS Action Plan will address BEPS concerns that may arise from a derivative benefits provision that would apply not only to dividends but also to base-eroding payments such as royalties. The inclusion of paragraph 4 will therefore need to be examined based on the outcome of the work on these Action items and on alternative means of addressing those BEPS concerns such as the measure on “special tax regimes” described in Section C of this Report.
第 3 款 c) 项为实施 a) 项和 b) 项中的实质性的要求的应用提供了特殊的归责原则。这些原则可以用于判定一人是否满足 a) 项中是否进行积极营业活动以及此项所得是否与该活动有关的要求，也可以用于进行 b) 项中的实质性要求的比较。c) 项将关联于一人的多人所进行的活动归属于此人。如果一人 ("X") 拥有另一人 ("Y") 的 50％或更多的受益权（或如果 Y 拥有 50％或更多的在 X 处的受益权），则 X 关联于 Y。因此，如果 X 拥有一家公司的 50％或以上的表决权和财产价值或拥有该公司 50％或以上的受益权益，则 X 关联于该公司。如果第三人在 X 和 Y 之外拥有 50％或以上的受益权益，则 X 也关联于 Y。所以，如果 X 或 Y 为公司，则相对于该公司或多公司关联的门槛为 50％或以上的表决权和财产价值或 50％或以上的受益权益。最后，如果基于所有的事实和情况，X 控制 Y、Y 控制 X，或 X 和 Y 共同受控于同一人或多人，X 关联于 Y。

衍生优惠

简述版

3. 绑约国一方居民虽不是有资格的人，但如果此人 75%以上的受益权由同一位受益人所直接或间接拥有，此人仍然有资格享受本协定原原本将授予的优惠。

详细版

(4. 作为缔约国一方居民的公司也可有资格享受本协定原本将授予的优惠，如果在该优惠被授予时：

a) 至少 95%的表决权和股份（和至少 50%任意不成比例种类的股份）是直接或间接由一个或更少的同一受益人持有者，如果在间接持有的情况下，每—个中介持有者本身也是一个同一受益人，且

b) 在包含该时点的纳税期间，少于 50%的公司的总所得——由公司的居住国确定——以该公司的居住国允许在本协定涵盖的税种的税前扣除的支付方式，直接或间接地支付，或计提出非同等受益人（不包括按照常规经营为服务或有形财产支付的公平交易条款）。

详细版注释

**注释**
58. Paragraph 4 sets forth a derivative benefits test that is potentially applicable to all treaty benefits, although the test is applied to individual items of income. In general, this derivative benefits test entitles certain companies that are residents of a Contracting State to treaty benefits if the owner of the company would have been entitled to at least the same benefit had the income in question flowed directly to that owner. To qualify under this paragraph, the company must meet an ownership test and a base erosion test.

59. Subparagraph a) sets forth the ownership test. Under this test, seven or fewer equivalent beneficiaries must own shares representing at least 95 percent of the aggregate voting power and value of the company and at least 50 percent of any disproportionate class of shares. Ownership may be direct or indirect. The term "equivalent beneficiary" is defined in subparagraph f) of paragraph 6.

60. Subparagraph b) sets forth the base erosion test. A company meets this base erosion test if less than 50 percent of its gross income (as determined in the company's State of residence) for the taxable period that includes the time when the benefit would be accorded is paid or accrued, directly or indirectly, to a person or persons who are not equivalent beneficiaries in the form of payments deductible for tax purposes in the company's State of residence. These amounts do not include arm's length payments in the ordinary course of business for services or tangible property. This test is the same as the base erosion test in subparagraph e)(ii) of paragraph 2, except that the test in subparagraph b) focuses on base eroding payments to persons who are not equivalent beneficiaries.

61. Some States consider that the provisions of paragraph 4 create unacceptable risks of treaty shopping with respect to payments that are deductible in the State of source. These States prefer to restrict the scope of paragraph 4 to dividends, which are typically not deductible. States that share that view are free to amend the first part of the paragraph so that it reads as follows:

4. A company that is a resident of a Contracting State shall also be entitled to a benefit that would otherwise be accorded under Article 10 of this Convention if, at the time when that benefit would be accorded:

Discretionary relief

Simplified version

5. A resident of a Contracting State that is neither a qualified person nor entitled under paragraph 3 or 4 to a benefit that would otherwise be accorded by this Convention with respect to an item of income shall nevertheless be entitled to such benefit if the competent authority of the Contracting State from which the benefit is being claimed, upon request from that resident, determines, in accordance with its domestic law or administrative practice, that the establishment, acquisition or maintenance of the resident and the conduct of its operations are considered as not having as one of its principal purposes the obtaining of such benefit. The competent authority of the Contracting State to which such request has been made by a resident of the other Contracting State shall consult with the competent authority of that other State before rejecting the request.

Detailed version

5. If a resident of a Contracting State is not entitled, under the preceding provisions of this Article, to all benefits provided under this Convention, the competent authority of the Contracting State that would otherwise have granted benefits to which that resident is not entitled shall nevertheless treat that resident as being entitled to these benefits, or benefits with respect to a specific item of income or capital, if such competent authority, upon
58. 第 4 款提出了可能适用于所有协定优惠的衍生优惠测试，虽然该测试针对单项所得。通常情况下，此衍生优惠测试可给予为缔约国一方居民的公司协定优惠待遇，如果这些公司的拥有者在直接取得上述提到的所得时有权享有至少同样的优惠。要符合该款要求，公司至少要满足所有权测试及税基侵蚀测试。

59. a）项阐述了所有权测试。在这个测试下，7 个或更多同等受益人必须拥有代表至少 95% 的表决权和公司价值以及至少 50% 的任意不成比例种类的股份。所有权可以为直接或间接。"同等受益人"一语在第 6 款中予以定义。

60. b）项阐述了税基侵蚀测试。如果一个公司将至少 50% 的公司总所得（由公司的居住国确定）在包含优惠被给予的时点的纳税期间，以该公司的居住国允许的可税前扣除的支付方式，直接或间接地支付或分配给非同等受益人，则该公司可通过税基侵蚀测试。而款项的数额不包括按照常规经营为服务或有形财产支付的公平交易款项。本测试将第 2 款（a）项（v）目中的税基测试相同，除了 b）项测试侧重于向非同等受益人所支付的侵蚀税基的款项上。

61. 有些国家认为第 4 款带来了与可来自来源国扣除的支付款项相关的令人无法接受的协定避税风险。这些国家欲将第 4 款的应用范围限制在通常无法扣除的股息红利上。有相同看法的国家可以根据其意愿将该款的第二部分改至如下：

4. 作为缔约国一方居民的公司应也可有资格享受本协定第 10 条 本将给予的优惠，如果在该优惠被给予时。

篇幅宽免

简化版

5. 缔约国一方居民可就来源于缔约国另一方的所得享受本协定的优惠待遇，即使此居民既非有资格的人，也无法根据第 3 款或第 4 款享受优惠。前提是缔约国一方的主管当局依据该居民的请求，根据其国内法及相关征管实践，认定该居民的设立、收购或维持以及经营行为的主要目的之一并非是取得协定优惠。如果缔约国一方主管当局接到缔约国另一方居民所提出的请求，应在拒绝之前与缔约国另一方的主管当局进行商议。

详细版

5. 如果缔约国一方的居民在本条上述条款下无资格享受本协定下的所有优惠，而在缔约国一方的主管当局在依据该居民的请求，考虑相关事实与情况，认定该居民的设立、收购或维持以及经营行为的主要目的之一并非是取得本协定的优惠，原本应授予该居
request from that resident and after consideration of the relevant facts and circumstances, determines that the establishment, acquisition or maintenance of the resident and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under this Convention. 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.

Commentary on the detailed version

62. Paragraph 5 provides that where, under paragraphs 1 to 4 of the Article, a resident of one of the Contracting States is not entitled to all benefits of the Convention in a Contracting State, that resident may request the competent authority of that State to grant these benefits. In such a case, the competent authority will grant these benefits if, after considering the relevant facts and circumstances, it determines that neither the establishment, acquisition, or maintenance of the resident, nor the conduct of its operations, had as one of its principal purposes the obtaining of benefits under the Convention.

63. Through this paragraph, a resident that is not entitled to the benefits of the Convention under paragraphs 1 through 4 but who has a substantial relationship to its State of residence, taking into account considerations in addition to those addressed through the objective tests in paragraphs 1 through 4, may be able to obtain treaty benefits where the allowance of benefits would not otherwise be contrary to the purposes of the Convention. In the case of a resident subsidiary company with a parent in a third State, whilst the fact that the relevant withholding rate provided in the Convention is not lower than the corresponding withholding rate in the tax treaty between the State of source and the third State would be a relevant factor, that fact would not, in itself, be sufficient to establish that the conditions for granting the discretionary relief are met. Similarly, where a foreign company is engaged in a mobile business such as financing, or where the domestic law of a Contracting State provides a special tax treatment for certain activities conducted in special zones or offshore (e.g., licensing intangibles) those factors will not be evidence of a non-tax business reason for locating in that State. In such cases, additional favourable business factors must be present to establish a substantial relationship to that State. Paragraph 5 also provides that the competent authority of the State to which the request is made will consult with the competent authority of the other State before refusing to exercise its discretion to grant benefits to a resident of that other State.

64. In order to be granted benefits under paragraph 5, the person must establish, to the satisfaction of the competent authority of the State from which benefits are being sought, that there were clear non-tax business reasons for its formation, acquisition, or maintenance and for the conduct of its operation in the other Contracting State. What the purposes are for the establishment, acquisition or maintenance of a person and the conduct of its operations are questions of fact which can only be answered by considering all relevant circumstances on a case by case basis. It is not necessary to find conclusive proof of intent, but the competent authority must be able to conclude, after an objective analysis of the relevant facts and circumstances, that none of the principal purposes for the establishment, acquisition or maintenance of the person and the conduct of its operations was to obtain benefits under the Convention. Whilst it should not be lightly assumed that obtaining benefits under a convention was one of these principal purposes, a person should not expect to obtain relief under paragraph 5 by merely asserting that its establishment, acquisition or maintenance and the conduct of its operations were not undertaken to obtain the benefits of the Convention. All of the evidence must be provided to the competent authority in order to enable it to determine whether this is the case.
民无资格享受的优惠的情况下，该缔约国一方的主管当局，应将该居民视作无资格享受这些优惠，或允许其针对特定项目所得或财产享受优惠。如果缔约国一方主管当局在接到缔约国另一方居民根据本款所提出的请求，应在其拒绝之前与缔约国另一方的主管当局进行商议。

详细版注释

62. 第5条规定，当缔约国一方的居民根据本条第1-4款在缔约国一方无资格享受本协定中的所有优惠时，该居民可向主管当局请求被授予这些优惠。在这种情况下，如果缔约国一方的主管当局在考虑了相关事实与情况，认为该居民的设立、收购或维护，以及其他行为的主要目的之一并非是取得本协定的优惠，则该主管当局应授予这些优惠。

63. 通过该条款，本协定根据第1-4款享受协定优惠但与其居民国有充分关联的居民，在增加进行第1-4款中的客观测试以外的考量后，在其它的授予与协定的目的不冲突的情况下，可能可以取得协定优惠。当一家居民于公司的母公司在第三国居民时，本协定与来源国和第三国之间的协定相比相互预提所得税的税率并不低这一因素可以作为考虑因素，但该因素本身并不能足以满足给予酌情宽免的条件。与此类似，当一个外国公司参与了如金融等可移动经营业务，或当缔约国一方的国内法为在特定区域或海外进行的特定行为（如无形资产许可）提供了特殊税务处理时，这些因素可能成为其在该国设立的非税务经营理由。在这种情况下，则必须提供额外的有利证据来证明其与该国有实质联系。第5款也规定了接到请求的一方国家主管当局应在行使其主权拒绝给予优惠之前与另一国的主管当局进行商议。

64. 为获得第5款中的优惠，该人必须提供让收到优惠申请的主管当局满意的证明，证明其有明确进行设立、收购或维护之目的，并在缔约国另一方经营的非税理由。在缔约国另一方设立、收购或维护及经营的目的只能够根据具体案例分析所要求的相关情况而得出结论。虽然对图提供结果性的证据并非必要，但缔约国主管当局在对案例的事实和情况进行客观分析后，应能够得出该人在缔约国另一方设立、收购或维护及经营的主要目的并非是为获取协定优惠这一结论。虽然我们不能轻易假定主要目的之一是为了获取协定优惠，但一个人也不应期望仅通过主张其设立、收购或维护及经营的目的并非是为了获取协定优惠，就可以根据第5款获得宽免。
65. The reference to “one of the principal purposes” in paragraph 5 means that obtaining benefits under a tax treaty need not be the sole or dominant purpose for the establishment, acquisition or maintenance of the person and the conduct of its operations. It is sufficient that at least one of the principal purposes was to obtain treaty benefits. Where the competent authority determines, having regard to all relevant facts and circumstances, that obtaining benefits under the Convention was not a principal consideration and would not have justified the establishment, acquisition or maintenance of the person and the conduct of its operations, it shall treat that person as being entitled to these benefits, or benefits with respect to a specific item of income or capital. Where, however, the establishment, acquisition or maintenance of the person and the conduct of its operations is carried on for the purpose of obtaining similar benefits under a number of treaties, it should not be considered that obtaining benefits under other treaties will prevent the obtaining of benefits under one treaty from being considered a principal purpose for these operations.

65.1 The competent authority that receives a request for relief under paragraph 5 should process that request expeditiously.

66. Although such a request will usually be made by a resident of a Contracting State to the competent authority of the other Contracting State, there may be cases in which a resident of a Contracting State may request the competent authority of its own State of residence to grant relief under paragraph 5. This would be the case if the treaty benefits that are requested are provided by the State of residence, such as the benefits of the provisions of Articles 23A and 23B concerning the elimination of double taxation. In such cases, the paragraph does not require the competent authority to consult the competent authority of the other State before denying the request.

67. The paragraph grants broad discretion to the competent authority and, as long as the competent authority has exercised that discretion in accordance with the requirements of the paragraph, it cannot be considered that the decision of the competent authority is an action that results in taxation not in accordance with the provisions of the Convention (see paragraph 1 of Article 25). The paragraph does not require, however, that the competent authority must consider the relevant facts and circumstances before reaching a decision and must consult the competent authority of the other Contracting State before rejecting a request to grant benefits. The first requirement seeks to ensure that the competent authority will consider each request on its own merits whilst the requirement that the competent authority of the other Contracting State be consulted should ensure that Contracting States treat similar cases in a consistent manner and can justify their decision on the basis of the facts and circumstances of the particular case. This consultation process does not, however, require that the competent authority to which the request has been presented obtain the agreement of the competent authority that is consulted. The determination that neither the establishment, acquisition or maintenance of the resident making the request, nor the conduct of its operations, had as one of its principal purposes the obtaining of benefits under the Convention is a matter that is left to the discretion of the competent authority to which the request is made. Once it has determined that this is the case, the competent authority is required to grant benefits but it may then grant all of the benefits of the Convention to the taxpayer making the request, or it may grant only certain benefits. For instance, it may grant benefits only with respect to a particular item of income in a manner similar to paragraph 3. Further, the competent authority may establish conditions, such as setting time limits on the duration of any relief granted.

68. The request for a determination under paragraph 5 may be presented before (e.g. through a ruling request) or after the establishment, acquisition or maintenance of the person for whom the request is made. Where the request is made after such establishment, acquisition or maintenance, any benefits granted by the competent authority may be allowed retroactively.
65. 第 5 款中所提到的“主要目的之一”并不要求获取税收协定优惠是一个人在缔约国另一方设立、收购或维护及经营的唯一或主要目的。只要其中一个主要原因是获取税收协定优惠已足够作为要求。当缔约国主管当局在综合考虑了所有相关的事宜后，判定获取协定优惠并非一个主要目的，也无需一个在缔约国另一方设立、收购或维护及经营行为合理化，就应认定该人有资格享受协定优惠，或有资格就某项所得和财产享受优惠。但是，当在缔约国另一方设立、收购或维护及经营的目的是为了寻求获取多个协定下的优惠时，寻求其他协定下的优惠这一理由不能说明这些行为的主要目的不是为了获取某一特定协定下的优惠。

65.1 收到根据第 5 款提交的附带容许申请的缔约国主管当局应迅速受理。

66. 虽然第 5 款中的请求通常由缔约国一方居民向缔约国另一方的主管当局申请，但也可能会有缔约国居民向自己的居住国主管当局申请授予第 5 款中宽免的情形。如果所申请的协定优惠是由居住国所给予的，如第 23 条 A 和第 23 条 B 关于消除双重征税条款中的优惠，则就会出现这种情况。在这种情形下，本条款不要求主管当局在拒绝申请前与缔约国另一方主管当局商议。

67. 该款授予了主管当局宽泛的自由裁量权，且只要主管当局根据本款要求进行了自由裁量权，则不应认为主管当局的行为会导致不符合协定条款的征税（详见第 25 条第 1 款）。但是，此款确实要求主管当局在作出决定前必须考量相关事实与情况，并且要求其在拒绝一项优惠申请前必须与缔约国另一方主管当局商议。第一个要求是保证主管当局以事实本身是否明确为依据来考量每一请求，而与缔约国另一方主管当局商议的要求是保证缔约国双方以一个公平和同样方式对待类似的案例，并且可以在受特案的特殊事实及情况证明主管当局决议的合理性。但是，该商议并不要求收到请求的主管当局取得其所咨询的另一方主管当局的同意。关于是否提出请求的设立的设立、收购或维护，以及其经营行为的主要目的之一并不是为了取得本协定的优惠这一问题，是由收到申请的主管当局自主判断。一旦主管当局作出了是的决定，则应授予优惠，但其可以授予提出申请的纳税人协定全部的优惠，也可仅授予其部分优惠。例如，主管当局可以以类似于第 3 款的方式仅针对特定所得授予优惠。而且，相关主管当局可以设置条件，如为授予的任何减免的期间设置时间限制。

68. 第 5 款中的判定请求可以在请求目的人的设立、收购或维护行为前或后提交（例如通过裁定申请）。若请求是在设立、收购或维护行为之后作出的，则由主管当局授予的任何减免都是可追溯的。
69. Whilst it is impossible to provide a detailed list of all the facts and circumstances that would be relevant to the determination referred to in paragraph 5, examples of such facts and circumstances include the history, structure, ownership and operations of the resident that makes the request, whether that resident is a long-standing entity that was recently acquired by non-residents for non-tax reasons, whether the resident carries on substantial business activities, whether the resident's income for which the benefits are requested is subject to double taxation and whether the establishment or use of the resident gives rise to non-taxation or reduced taxation of the income.

69.1 To reduce the resource implications of having to consider requests for discretionary relief, and to discourage vexatious requests, Contracting States may find it useful to publish guidelines on the types of cases that it considers will and will not qualify for discretionary relief. However, any administrative conditions that a Contracting State imposes on applicants should not deter persons making requests where they consider that they have a reasonable prospect of satisfying a competent authority that benefits should be granted.

Definitions

Simplified version

6. For the purposes of this Article:

Detailed version

6. For purposes of the preceding provisions of this Article:

69.2 Paragraph 6 includes a number of definitions that apply for the purposes of the Article. These definitions supplement the definitions included in Articles 3, 4 and 5 of the Convention, which apply throughout the Convention.

The term “recognised stock exchange”

Simplified version

b) the term “recognised stock exchange” means:

i) any stock exchange established and regulated as such under the laws of either Contracting State; and

ii) any other stock exchange agreed upon by the competent authorities of the Contracting States;

Detailed version

a) the term “recognised stock exchange” means:

i) [list of stock exchanges agreed to at the time of signature]; and

ii) any other stock exchange agreed upon by the competent authorities of the Contracting States;

Commentary on the detailed version

70. The definition of “recognised stock exchange” first includes stock exchanges that both Contracting States agree to identify at the time of the signature of the Convention. Although this would typically include stock exchanges established in the Contracting States on which shares of publicly listed companies and entities that are residents of these States are actively traded, the stock exchanges to be identified in the definition need not be established in one of the
尽管不可能提供一份详尽的与第 5 款中的决定相关的所有事实与情况的清单，但是相关事实与情况的例子应包括申请居民的历史背景、架构、所有权和经营情况。该居民是否是一个近期由非居民因非税原因收购的长期存在的实体、该居民是否参与实质性经营活动、该居民所申请的优惠相关的所得是否被双重征税，以及该居民的设立与利用是否会导致所得税的免除或减少。

69.1 为降低考量酌情宽免申请造成的资源影响，并阻止无理申请，缔约国双方可能会发现发布关于其认为满足或不满足酌情宽免的不同案例的指导准则会有一定帮助。但是，缔约各国所设置的任何行政类条件都不得阻碍合理预期其可满足主管当局要求从而可被授予优惠的申请人提交申请。

定义

简化版
6. 本条款中，
详细版
6. 在本条款款项中：
69.2 第 6 款包含了本条款款项中的一系列定义。这些定义作为范本第 3.4 和 5 条中定义的补充，适用于范本全文。

"被认可的证券交易所"—语

简化版
b) "被认可的证券交易所"—语是指：
   i) [根据缔约国任意一方法律成立并受其规范的任何证券交易所]；以及
   i) [缔约国双方主管当局所同意的任何其他证券交易所]；

详细版
a) "被认可的证券交易所"—语是指：
   i) [协定签署时的证券交易所名单]；以及
   i) [缔约国双方主管当局所同意的任何其他证券交易所]；

详细版注释

70. "被认可的证券交易所"的定义首先包含了在签署协定时缔约国双方均同意认可的证券交易所。尽管这通常意味着被包含在内的证券交易所大多是在缔约国设立、并且缔约国的居民上市公司在该企业的股份被经常地在这些交易所交易，但这不代表得到双方同意的证券交易所必须在缔约国某方成立。因此，
Contracting States. This recognises that the globalisation of financial markets and the prominence of some large financial centres have resulted in the shares of many public companies being actively traded on more than one stock exchange and on stock exchanges situated outside the State of residence of those companies.

71. The definition also allows the competent authorities of the Contracting States to supplement, through a subsequent agreement, the list of stock exchanges identified in the definition at the time of signature of the Convention.

71.1 The stock exchanges to be included in the definition should impose listing requirements that ensure that shares of entities listed on that stock exchange are genuinely publicly traded. The following factors should be considered when determining whether a stock exchange should be listed in the definition or subsequently added to that list through the competent authority agreement referred to in the preceding paragraph:

- What are the requirements/standards with respect to listing a company on the stock exchange?
- What are the requirements/standards in order to continue to be listed on the stock exchange, including minimum financial standards?
- What are the annual/interim disclosure and/or filing requirements for companies whose shares are traded on the stock exchange?
- What is the volume of shares traded on the stock exchange in a calendar year?
- Do the rules governing the stock exchange ensure active trading of listed stocks? If so, how?
- Are the companies listed on the stock exchange required to disclose on an ongoing basis financial information and information on events that may have a material impact on their financial situations?
- Is information on the trading volume and overall shareholding of the companies listed on the stock exchange publicly available?
- Does the stock exchange impose any minimum size requirements, such as minimum capitalisation or number of employees, for companies whose shares are traded on the exchange?
- Does the stock exchange impose a required minimum percentage of public ownership? If so, what is the minimum amount?
- For a company to trade on the stock exchange, are the shares of companies required to be freely negotiable and fully paid for?
- Is the stock exchange required to disclose the share prices of its listed companies within a certain timeframe?
- Is the stock exchange regulated or supervised by a government authority of the country in which it is located?
- [In the case of a new stock exchange to be added to an existing list:] Why would a company prefer to list on the new exchange rather than on another exchange, including those exchanges that are already “recognised stock exchanges” in the tax treaty? For example, are there lesser corporate governance and financial disclosure requirements?
- [In the case of a new stock exchange to be added to an existing list:] Does the new stock exchange provide a more efficient vehicle for raising capital and, if so, why?
由于金融市场全球化和一些大型金融机构的声名鹊起，很多上市公司股份在不止一家证券交易所或在其驻在国以外的证券交易所被经常地交易，这种情况也得到了认可。

71. 该定义允许各国主管当局通过后该协议来补充协定，签署时被认可的证券交易所及名单。

71.1 定义中所包含的证券交易所应强制进行公开交易要求，以此确保在该交易所上市的公司确实是公开上市交易的。在考量某证券交易所是否应被加入定义中的名单或是被加到上述条款中提到的“双方主管当局所同意的名单中时，应考虑以下因素：

- 一家公司在该证券交易所上市的要求/标准是什么?
- 在该证券交易所持续上市的要求（包括最低财务标准）是什么?
- 股份在该证券交易所被交易的公司的年度/半年度披露和/或申报要求是什么?
- 该证券交易所一个历年内交易的量如何?
- 该证券交易所的监管规则是否能够确保股票交易的活跃性？如果是，如何确保?
- 在该证券交易所上市的公司是否被要求在持续经营的假设前提下披露财务信息，以及可能会对公司财务状况造成重大影响的事件?
- 上市公司的成交量及公司整体股权状况是否对公众公开?
- 该证券交易所是否对在其上市的公司有最低规模要求，例如最低注册资本，或员工人数?
- 该证券交易所是否有最低公众持股比例要求？如有，最低比例为多少?
- 该证券交易所是否要求上市公司的股份为可自由协商并已完全支付的?
- 证券交易所是否必须每隔一段时间公布在其上市的公司的股价?
- 该证券交易所是否受其所在国政府主管部门规范和监督?

[当新的证券交易所被加入到既存名单中时：] 公司偏向于在此新证券交易所上市，而不是在其他交易所例如税收协定中的“被认可的证券交易所”上市的原因？例如，是否因为公司管理及财务披露要求更低？

[当新的证券交易所被加入到既存名单中时：] 新的证券交易所是否提供了更有效的融资方式？若是，为何?
The term "principal class of shares"

Simplified version

a) the term "principal class of shares" means the class or classes of shares of a company which represents in the aggregate a majority of the voting power of the company;

Detailed version

b) the term "principal class of shares" means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the "principal class of shares" are those classes that in the aggregate represent a majority of the aggregate voting power and value of the company. In the case of a company participating in a dual listed company arrangement, the principal class of shares will be determined after excluding the special voting shares which were issued as a means of establishing that dual listed company arrangement.

Commentary on the detailed version

72. The definition of the term "principal class of shares" refers to the ordinary or common shares of a company but only if these shares represent the majority of the voting rights as well as the value of the company. If a company has only one class of shares, it will naturally constitute its "principal class of shares". If a company has more than one class of shares, it is necessary to determine which class or classes constitute the "principal class of shares", which will be the class of shares, or any combination of classes of shares, that represent, in the aggregate, a majority of the voting power and value of the company. Although in a particular case involving a company with several classes of shares it is conceivable that more than one group of classes could be identified that would represent the majority of the voting power and value of the company, it is only necessary to identify one such group that meets the conditions of subparagraph c) of paragraph 2 in order for the company to be entitled to treaty benefits under that provision (benefits will not be denied to the company even if a second group of shares representing the majority of the voting power and value of the company, but not satisfying the conditions of subparagraph c) of paragraph 2, could be identified).

73. The last part of the definition provides an exception applicable to companies that participate in a dual listed company arrangement, as defined in paragraph g). In the case of these companies, special voting shares issued for the purposes of implementing that dual listed company arrangement must not be taken into account for the purposes of determining the principal class of shares of these companies.

The term "disproportionate class of shares"

Detailed version only

c) the term "disproportionate class of shares" means any class of shares of a company resident in one of the Contracting States that entitles the shareholder to disproportionately larger participation, through dividends, redemption payments or otherwise, in the earnings generated in the other Contracting State by particular assets or activities of the company;

74. Under the definition of the term "disproportionate class of shares", which is relevant for the purposes of paragraph 4 and subparagraphs c) and e) of paragraph 2, a company has a disproportionate class of shares if it has outstanding shares that are subject to terms or other
"主要种类的股份" -- 语

简版

b）"主要种类的股份" -- 语是指一家公司的累计代表了该公司大部分投票权的一种或多种股票。

详细版

b）"主要种类的股份" -- 语是指公司的普通股，但仅当此类证券代表了该公司的大部分表决权以及公司价值时。如果没有某一类的普通股代表该公司大部分的表决权与公司价值，则"主要种类的股份"应为合计可代表该公司大部分表决权与公司价值的股份种类。在一家公司有双重上市公司安排的情况下，应按发行目的为设立双重上市公司安排的特殊表决权股份后，来判定股份主要种类。

详细版注释

72. "主要种类的股份"的定义是指公司的普通股，前提是此类型股份代表了该公司绝大部分表决权与价值，如果一家公司仅拥有单一类型的股份，那么该类股份自然就构成了其主要种类的股份。如果一家公司拥有超过一种类型的股份，则有必要判断哪类或哪些类型的组合合计构成了可以代表该公司绝大部分表决权与价值的主要种类的股份。尽管，在涉及一个拥有不同类型股份公司的特定情况下，可以预见到会有超过一组类型的股份能够被认定为代表公司绝大部分表决权与公司价值。但是为了使公司能够被授予该条款下的协定优惠，仅辨别人一组能够满足第 2c）款条件的股份即可（即另一组可以代表公司绝大部分表决权与公司价值的股份不能够满足第 2c）款的条件，其优惠也不会被否定）。

73. 正如在 e）款中所规定的，定义的最后一部分列举了一个参与双重上市公司安排的公司的例外情况。在此类公司的情况下，为执行双重上市公司安排而发行的特殊表决权股份在判断主要种类的股份时不被纳入考虑范围之内。

"不成比例种类的股份" -- 语

仅详细版

c）"不成比例种类的股份" -- 语是指在缔约国一方的居民公司股份的任意种类，该股份允许股东通过股息、赎回款或其他方式，不按比例而有程度地参与到缔约国另一方通过特别资产或公司活动赚取的收益中。

74. 在与第 4 款和第 2 款的 c）款与 e）款的目的相关的"不成比例种类的股份" -- 语的定义下，如果公司应根据流通股条款或其他安排，相比不存在该
arrangements that entitle the holder of these shares to a larger portion of the company's income derived from the other Contracting State than that to which the holder would be entitled in the absence of such terms or arrangements. Thus, for example, a company resident in one Contracting State has a "disproportionate class of shares" if some of the outstanding shares of that company are "tracking shares" that pay dividends based upon a formula that approximates the company's return on its assets employed in the other Contracting State. This is illustrated by the following example:

Example: ACO is a company resident of State A. ACO has issued common shares and preferred shares. The common shares are listed and regularly traded on the principal stock exchange of State A. The preferred shares have no voting rights and entitle their holders to receive dividends equal in amount to interest payments that ACO receives from unrelated borrowers in State B. The preferred shares are owned entirely by a single shareholder who is a resident of a third State with which State B does not have a tax treaty. The common shares account for more than 50 per cent of the value of ACO and for 100 per cent of the voting power. Since the owner of the preferred shares is entitled to receive payments corresponding to ACO's interest income arising in State B, the preferred shares constitute a "disproportionate class of shares" and because these shares are not regularly traded on a recognised stock exchange, ACO will not qualify for benefits under subparagraph c) of paragraph 2.

The term "primary place of management and control"

Detailed version only

d) a company's "primary place of management and control" will be in the Contracting State of which it is a resident only if executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial and operational policy decision making for the company (including its direct and indirect subsidiaries) in that Contracting State than in any other State and the staff of such persons conduct more of the day-to-day activities necessary for preparing and making those decisions in that Contracting State than in any other State;

75. The term "primary place of management and control" is relevant for the purposes of subparagraph c) of paragraph 2. This term must be distinguished from the concept of "place of effective management", which was used, before [date of the next update], in paragraph 3 of Article 4 and in various provisions, including Article 8, applicable to the operation of ships and aircraft. The concept of "place of effective management" was interpreted by some States as being ordinarily the place where the most senior person or group of persons (for example a board of directors) made the key management and commercial decisions necessary for the conduct of the company's business. The concept of the primary place of management and control, by contrast, refers to the place where the day-to-day responsibility for the management of the company (and its subsidiaries) is exercised. A company's primary place of management and control will be situated in the State of residence of that company only if the executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial and operational policy decision making for the company (including direct and indirect subsidiaries) in that State than in the other State or any third State, and the staff that support the management in making those decisions are also based in that State. Thus, the test looks to the overall activities of the relevant persons to see where those activities are conducted. In most cases, it will be a necessary, but not a sufficient, condition that the headquarters of the company (that is, the place at which the chief executive officer and other top-level executives normally are based) be located in the Contracting State of which the company is a resident.
条款或安排的情况下，赋予持股人取得公司来源于缔约国另一方更大比例所得的权利，则该部分流通股构成不成比例种类的股份。例如，如果缔约国一方的居民公司的一部分流通股为“跟踪股”即，基于该公司在缔约国另一方所使用资产和计算回报的公式而支付股息的股份，则该公司将被视为拥有不成比例种类的股份，下述例子可用来说明此情况。

例如，ACO为A国的居民公司。ACO发行了普通股和优先股。
普通股在A国主要证券交易所上市并定期交易。优先股没有表决权，并且授予了其持有者收取等于ACO从B国非关联借款人所获利息数额的股息的权利。这些优先股被由作为第三方国家居民的一位股东持有，且该国与B国没有税收协定。普通股占有的超过ACO50%的价值以及代表其100%的表决权。由于优先股的持有者有权收取等于ACO在B国利息所得的股息，该优先股构成了不成比例种类的股份，并且由于这些股份未定期在受认可的证券交易所进行交易，ACO因此不得享受第2款c)项下的优惠。

"主要管理和控制地"一语

仅详细版
d) 一家公司的"主要管理和控制地"只有当该公司的执行人员和高级管理人员在其为居民的缔约国行使公司（包括其直接或间接子公司）战略、财务和经营决策的日常管理职责多于任何其他国家，且其下属职员也在该缔约国进行决策准备及制定所需要的日常活动多于任何其他国家时，才被视为位于该缔约国。

75. "主要管理和控制地"一语与第2款c)项的目的相关的。该条必须与"实际管理机构所在地"的概念区分开来。在下次更新日期前，"实际管理机构所在地"曾在第4条第(3)款以及其他条款如适用于船舶和飞机运营的第8条中使用。"实际管理机构所在地"的概念在一些国家常被理解为最高级别的管理人员或一组人员（如董事会）制定公司运作所必需的关键管理和商业决策的地方。而相反的，主要管理和控制地的概念是指公司（包括其子公司）行使日常管理职责所在。只有当公司的执行人员和高级管理人员在其居住国内，相比于其他任何国家，为其公司（包括其直接或间接子公司）行使更多关于战略、财务和经营决策的日常职责，且其下属职员也在该缔约国，则此公司的主要管理和控制地才可被视为位于该居住国。因此，该测试着重于相关人员总体的活动以判断这些活动是否在该国
76. In order to determine a company's primary place of management and control, it is necessary to determine which persons are to be considered "executive officers and senior management employees". In some countries, it will not be necessary to look beyond the executives who are members of the board of directors (i.e. the so-called "inside directors"). That will not always be the case, however; in fact, the relevant persons may be employees of subsidiaries if those persons make the strategic, financial and operational policy decisions. Moreover, it would be necessary to take into account any special voting arrangements that result in certain persons making certain decisions without the participation of other persons.

The term "collective investment vehicle"

Detailed version only:

e) [possible definition of "collective investment vehicle"; ]

[Footnote 1: A definition of the term "collective investment vehicle" should be added if a provision on collective investment vehicles is included in paragraph 2 (see subparagraph 2 f)].

77. As indicated in the footnote to subparagraph e), a definition of "collective investment vehicle" should be included if a provision dealing with collective investment vehicles is included in subparagraph f) of paragraph 2. That definition should identify the collective investment vehicles of each Contracting State to which that provision is applicable and could be drafted as follows:

the term "collective investment vehicle" means, in the case of [State A], a [ ] and, in the case of [State B], a [ ] as well as any other investment fund, arrangement or entity established in either Contracting State which the competent authorities of the Contracting States agree to regard as a collective investment vehicle for purposes of this paragraph;

78. As explained in paragraph 6.22 of the Commentary on Article 1, it is intended that the open parts of that definition would include cross-references to relevant tax or securities law provisions of each State that would identify the CIVs to which subparagraph f) of paragraph 2 should apply.

The term "equivalent beneficiary"

Simplified version

c) the term "equivalent beneficiary" means any person who would be entitled to an equivalent or more favourable benefit with respect to an item of income accorded by a Contracting State under the domestic law of that Contracting State, this Convention or any other international instrument as the benefit to be accorded to that item of income under this Convention, provided that, if that person is a resident of neither of the Contracting States, the first-mentioned Contracting State has a convention for the effective and comprehensive exchange of information relating to tax matters in effect with the state of which that person is a resident. For the purposes of determining whether a person is an equivalent beneficiary with respect to dividends, the person shall be deemed to hold the same capital, shares or voting powers, as the case may be, of the company paying the dividends as the company claiming the benefit with respect to the dividends holds those of the company paying the dividends.

Detailed version

[f) the term "equivalent beneficiary" means a resident of any other State, but only if that resident]
的。在大多数情况下，公司总部（即首席执行官和其他高层管理人员一般所在的场所）坐落在其为居民的缔约国是一个必要但非充分的条件。

76. 为了判定一家公司的主要管理和控制地，则有必要判定哪些被视为“执行人员和高级管理人员”。在一些国家，必须考虑董事会成员（即所谓的“内部董事”）以及公司其他高级管理人员。但情况并非总是如此，在某些情况下，相关人员可能是子公司的职员，如果这些人制定了政策、财务和运营决策。而且，还应考虑存在特殊表决安排的情形，即允许特定人员可以在无其他人员参与时也可制定特定决策的情况。

*集合投资工具* — 语

仅详细版

e) [“集合投资工具”的可能定义]

77. 如 e) 款注释中所表明，如果第二款 f) 款中包含了涉及集合投资工具的 条款，则应包括对“集合投资工具”的定义。该定义应可识别该条文的适用范围。集合投资工具的在缔约国任一方设立的投资基金、安排或实体；

"集合投资工具"—语是指，在[A 国]的情况下，一个 [ ] 和，在[B 国] 情况下，一个 [ ]，以及缔约国有关主管当局认定可视为此条款下的 集合投资工具的在缔约国任一方设立的投资基金、安排或实体；

78. 如在本条注释第 6.22 段中所说明的，应开放集合投资工具的定义，以便在适用第二款 f) 项时，能够参照按照各缔约国税法或证券法中可识别 CIV 的条款。

*同等受益人* — 语

简化版

e) "同等受益人"—语是指有资格根据缔约国一方国内法、本协定或其他任何国际法律文件，就某项所得享受与本协定赋予此项所得的优惠同等或更为优惠的待遇的任何人。如果该人不是缔约国任何一方的居民，则本条首次提到的缔约国一方与该人所在的居民国之间签署了有效且广泛的税收协议信息交换协定。为确定一个人是否为股息的同等受益人，该人将被视为与申请股息协定优惠待遇的公司持有发放股息的公司同等的资本、股份或投票权。

详细版

[1] "同等受益人"—语是指其他国家居民，但仅当该居民；
i) A) would be entitled to all the benefits of a comprehensive convention for the avoidance of double taxation between that other State and the State from which the benefits of this Convention are claimed under provisions analogous to subparagraph a), b) or d), or subdivision i) of subparagraph c), of paragraph 2 of this Article, provided that if such convention does not contain a comprehensive limitation on benefits article, the person would be entitled to the benefits of this Convention by reason of subparagraph a), b), subdivision i) of subparagraph c), or subparagraph d) of paragraph 2 of this Article if such person were a resident of one of the Contracting States under Article 4 of this Convention; and

B) with respect to income referred to in Articles 10, 11 and 12 of this Convention, would be entitled under such convention to a rate of tax with respect to the particular class of income for which benefits are being claimed under this Convention that is at least as low as the rate applicable under this Convention; or

ii) is a resident of a Contracting State that is entitled to the benefits of this Convention by reason of subparagraph a), b) or d), or subdivision i) of subparagraph c), of paragraph 2 of this Article,

[Footnote 1: The inclusion of a definition of “equivalent beneficiary” will depend on whether paragraph 4 is included and whether that phrase is used in subparagraph f) of paragraph 2 dealing with collective investment vehicles.]

Commentary on the detailed version.

79. The definition of “equivalent beneficiary” is relevant for the purposes of the derivative benefits test in paragraph 4 but may also be relevant for the purposes of subparagraph f) of paragraph 2 depending on how that rule is drafted.

80. Under the definition, a person may qualify as an “equivalent beneficiary” in two alternative ways.

81. Under the first alternative, a person may be an equivalent beneficiary because it is entitled to equivalent benefits under a tax treaty between the State of source and a third State in which the person is a resident. This alternative has two requirements. Under the first requirement in subdivision i)A), the person must be entitled to equivalent benefits under an applicable tax treaty. To satisfy that requirement, the person must be entitled to all the benefits of a comprehensive tax treaty between the Contracting State from which benefits of the Convention are claimed and a third State under provisions that are analogous to the rules in subparagraphs a), b) or d), or subdivision i) of subparagraph c), of paragraph 2. If the treaty in question does not have a comprehensive limitation on benefits article, this requirement is met only if the person would be entitled to treaty benefits under the tests in subparagraphs a), b) or d), or subdivision i) of subparagraph c), of paragraph 2 if that person were a resident of one of the Contracting States.

82. The second requirement in subdivision i)B) applies only with respect to benefits applicable to dividends, interest and royalties. Under that additional requirement, the person must be entitled to a rate of tax that is at least as low as the tax rate that would apply under the Convention to such income. Thus, the rates to be compared are: (1) the rate of tax that the source State would have imposed if a resident of the other Contracting State who is a qualified person were the beneficial owner of the income; and (2) the rate of tax that the source State would have imposed if the third State resident received the income directly from the source State.
j)  能够享受在一个完整的防止双重征税协定下的所有优惠，这个协定由其他国家和优惠申请所在国缔结；且该优惠在类似于本协定第 2 款 a)、b)、c)、d) 或者 e) 项 i) 目的条款项下申请；如果这个协定没有包含全面的利益限制条款，则若此人在本协定第 4 条定义下的缔约国中的一方的居，可以根据本协定第 2 款 a)、b)、d) 项或 e) 项 i) 目享受优惠；且

B） 针对本协定第 10、11、和 12 条提及的所得，将有资格在这个协定下享受针对在本协定下申请优惠待遇的特定种类所得的税率为，且该税率至少有与本协定中适用的税率一致；或

ii） 有资格根据本协定第 2 款 a)、b) 或 d) 项或 e) 项 i) 目享受协定优惠的缔约国一方的居民。]

详细注释

79. "同等受益人"定义与第 4 款中衍生优惠测试的目的相关，但也可能会与第 2 款 i) 项的目的相关，取决于该规定如何起草。

80. 在此定义下，一个人可能会通过两种不同的方式被认定为"同等受益人"。

81. 第一种方式下，一个人可能因为其可享受来源国与该人的所属第三方居住国之间的税收协定所含的优惠，而被界定为是同等受益人。此方式有两个条件：在 i) 目 A) 部分的第一个条件下，此人在第 2 款 a)、b) 或 d) 项或 e) 项 i) 目的条款，享有相关优惠申请所在国与三方居住国之间完整的税收协定下的全部优惠。如果上述有关协定没有包含全面的利益限制条款，则只有假定当此人是缔约国一方居民且其能够通过第 2 款 a)、b) 或 d) 项或 e) 项 i) 目的测试而享有协定优惠时，才能满足此条件。

82. 在 i) 目 B) 部分中的第二个条件仅适用于股息、利息以及某些使用权相关的税收优惠。在此条件下，一个人应有权适用至少与本协定下此类所得适用税率相同的低的税率。因此，相比较的税率为：（1）当缔约国另一方居民是本协定意义上的资格的人而且是该项所得的受益所有人时，来源国应征的税率；与（2）当第三方国家居民直接从来源国收取该项所得时，来源国应征的税率。
83. The requirement in subdivision (a) that a person be entitled to "all the benefits" of a comprehensive tax treaty eliminates those persons that qualify for benefits with respect to only certain types of income. Assume, for example, that company CCO, a resident of State C, is the parent of ACO, a company resident of State A. CCO is engaged in the active conduct of a business in State C and, for that reason, would be entitled to the benefits of a treaty between State C and State B if it received dividends directly from a State B subsidiary of ACO. This, however, is not sufficient for the purposes of the application of subdivision (b) of the treaty between State A and State B. Also, CCO cannot be an equivalent beneficiary if it qualifies for benefits only with respect to certain income as a result of a "derivative benefits" provision in the treaty between State A and State C. However, it would be possible to look through CCO to its own parent company in order to determine whether that parent company is an equivalent beneficiary.

84. The second alternative for satisfying the "equivalent beneficiary" test in subdivision (b) is available only to residents of one of the Contracting States. These residents are equivalent beneficiaries if they are eligible for treaty benefits by reason of subparagraphs (a), (b) or (d), or subdivision (b) of subparagraph (c), of paragraph 2. Thus, an individual resident of one Contracting State will be an equivalent beneficiary without regard to whether the individual would have been entitled to receive the same benefits if he had received the income directly. This second alternative clarifies that ownership by certain residents of a Contracting State would not disqualify a company from qualifying for treaty benefits under paragraph 4. Thus, for example, if 90 per cent of a company resident of State A is owned by five companies that are resident in State C and that satisfy the requirements of subdivision (b) of the definition, and 10 per cent of the company is owned by an individual resident of State A or State B, then the company still can satisfy the requirements of subparagraph (b) of paragraph 4.

The term "dual listed company arrangement"

Detailed version only

g) the term "dual listed company arrangement" means an arrangement pursuant to which two publicly listed companies, while maintaining their separate legal entity status, shareholdings and listings, align their strategic directions and the economic interests of their respective shareholders through:

i) the appointment of common (or almost identical) boards of directors, except where relevant regulatory requirements prevent this;

ii) management of the operations of the two companies on a unified basis;

iii) equalised distributions to shareholders in accordance with an equalisation ratio applying between the two companies, including in the event of a winding up of one or both of the companies;

iv) the shareholders of both companies voting in effect as a single decision-making body on substantial issues affecting their combined interests; and

v) cross-guarantees or similar financial support or, each other's material obligations or operations except where the effect of the relevant regulatory requirements prevents such guarantees or financial support;

85. The term "dual listed company arrangement" is relevant for the purposes of the definition of the term "principal class of shares", which itself is relevant for the purposes of the provisions of subparagraph (c) of paragraph 2 under which certain publicly-listed companies are "qualified persons".
83. i) 仅 A) 部分的条件中所说的被授予完整税收协定中"所有优惠"的纳税人应包括现有资格针对特定所得享受优惠的纳税人。例如，假设 C 国居民公司 CCO 为 A 国居民公司 ACO 的母公司。ACO 在 C 国进行积极经营活动。鉴于此，如果 CCO 直接从 ACO 在 B 国的子公司收取股息红利，则可享受 C 国与 B 国之间的相关协定优惠。但是，这对于 A、B 两国协定中的 i) 项目 B) 部分的适用来讲，理由并不充分。并且，如果 CCO 仅有某些特定所得享有 A、C 两国之间协定的衍生优惠条款，CCO 不能被视作同等受益人。但是，可以通过对 CCO 对 ACO 母公司是否是同等受益人进行判定。

84. 第二种满足 i) 项"同等受益人"测试的方式适用于缔约国居民。如果该居民根据第 2 款 a)、b) 或 d) 项或 c) 项 i) 项目规定拥有享受协定优惠的资格，则该居民可被视为同等受益人。因此，缔约国一方的居民个人可被视为同等受益人。而无需考虑在其直接收取所得的情况下，该个人居民可否享受同样的协定优惠。此第二种方式明确缔约国居民的所有权不会使企业丧失享受第 4 款协定优惠的资格。因此，举例而言，如果 A 国居企业的 90%股权是由 C 国的五家居民企业拥有，而且他们满足定义中 i) 项中所列的条件，并且该公司的 10%是由 A 国或 B 国的个人居民所拥有的，则该企业仍然可以满足第 4 款 a) 项的条件。

"双重上市公司安排"

仅详细版

g) "双重上市公司安排"—语指两个上市公司在分别维持他们的法律实体状态、股权，以及公司名录的情况下，通过以下方式统一其各自股东的战略决策和经济利益的一种安排：

i.) 任命共同（或者几乎相同）的董事会，除非相关法规要求不允许；
ii.) 在统一基础上管理两个公司的运营；
iii.) 两个公司都使用同样的比率向股东平均分配，包括在一个或者两个公司被清算的情况下；
iv.) 对于会对两个公司共同利益造成影响的决策，两个公司的股东事实上可以作为单一个体进行投票；
v.) 对于重要的义务，经营提供交叉担保或类似的财务支持，除非相关法规禁止这样的交叉担保或财务支持。

85. "双重上市公司安排"与"主要种类的股份"的定义相关。比如第 2 款 c) 项相关，在第 2 款 c) 项下特定上市公司被视为"有资格的人"。
86. The definition refers to an arrangement, adopted by certain publicly-listed companies, that reflect a commonality of management, operations, shareholders' rights, purpose and mission through a series of agreements between two parent companies, each with its own stock exchange listing, together with special provisions in their respective articles of association including in some cases, for example, the creation of special voting shares. Under these structures, the position of the parent company shareholders is, as far as possible, the same as if they held shares in a single company, with the same dividend entitlement and same rights to participate in the assets of the dual listed companies in the event of a winding up. The various parts of the definition refer to the various features that identify these arrangements.

The term “shares”

Detailed version only

8). with respect to entities that are not companies, the term “shares” means interests that are comparable to shares.

87. The Article does not contain an exhaustive definition of the term “shares”, which, under paragraph 2 of Article 3, should generally have the meaning which it has under the domestic law of the State that applies the Article. Subparagraph b), however, provides that the term “shares”, when used in the Article with respect to entities that do not issue shares (e.g. trusts), refers to interests that are comparable to shares. These will typically be beneficial interests that entitle their holders to a share of the income or assets of the entity.

The term “related enterprise”

Simplified version only

b) A person shall be a related enterprise of another if, on the basis of all the facts and circumstances, one has control of the other or both are under the control of the same person or persons.

Mode of application to be determined by the competent authorities

Simplified version only

7. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

ii) Rules aimed at arrangements one of the principal purposes of which is to obtain treaty benefits

26. As previously indicated, the following rule, which incorporates principles already recognised in the Commentary on Article 1 of the OECD Model Tax Convention, provides a more general way to address treaty avoidance cases, including treaty-shopping situations, such as certain conduit financing arrangements, that are not covered by the specific anti-abuse rule in subsection A.1(a)(i) above (the Commentary on the new rule includes a number of changes that were made to the Commentary included in the first version of this Report released in September 2014):

ARTICLE X
ENTITLEMENT TO BENEFITS

[Paragraphs 1 to 6: see subsection A.1(a)(i) above]

7. 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
86. “双重上市公司安排”定义为某些上市公司所采用的，通过两家母公司之间的一系列协议，统一两家公司的管理、运营、股东权利、目的以及使命的安排。两家公司各自分别上市，在各自的章程中设立特殊条款，如设立特别表决权股份。此种安排下尽力使得股东们似只持有单一一家公司一样，享有相同的对双重上市公司股息红利与清算对公司财产的受益权利。该定义包含的不同部分定义了这些安排的不同特点。

"股份"一语
仅详细版

h) 对于法律形式非公司的实体，"股份"一语指与股份类似的利益。

87. 此条款中没有包含"股份"一语的详尽定义，根据第 3 条第 2 款可使用第 3 条内及第 4 条内对"股份"的一般定义。但是，h) 项规定，对于不发行股份的实体（如信托）时，"股份"是指与股份类似的利益，即通常为授予其持有者对相关实体的所得或资产的受益权。

"关联企业"一语
仅简化版

g) 一人应该作为另一人的关联企业，前提是基于所有事实和情况，该人对该另一人或该另一人对该人有控制权，或双方都被同一个人或相同多人控制。

适用方式将由主管当局确定
仅简化版

合约国双方主管当局可根据双边协议确定本条所适用的方式。

1.1.2 针对以获取税收协定优惠为主要目的之一的安排的规则

25. 如前述所述，下列规定已包含了 OECD 协定范本第 1 条的注释中所认可的原则，提供了更详细的签订安排的方法，例如管辖权范围安排，包括上述特别反滥用条款第 1 条第 1.1.1 节未涵盖的择一原则的情形（新规则的注释包含大量对 2014 年 9 月发布的第 1 版报告中注释的修订）。

第 X 条
享受协定优惠

[第 1-6 项：请见前文第 1 章第 1.1.1 节]

7. 虽有本协定中其他条款的规定，如果在考虑了所有相关事实与情况后，可以合理地认为获取某项协定优惠是直接或间接产生该优惠的任何安排或交易的主要目的
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.

Commentary

1. Paragraph 7 mirrors the guidance in paragraphs 9.5, 22, 22.1 and 22.2 of the Commentary on Article 1. According to that guidance, the benefits of a tax convention should not be available where one of the principal purposes of certain transactions or arrangements is to secure a benefit under a tax treaty and obtaining that benefit in these circumstances would be contrary to the object and purpose of the relevant provisions of the tax convention. Paragraph 7 incorporates the principles underlying these paragraphs into the Convention itself in order to allow States to address cases of improper use of the Convention even if their domestic law does not allow them to do so in accordance with paragraphs 22 and 22.1 of the Commentary on Article 1; it also confirms the application of these principles for States whose domestic law already allows them to address such cases.

2. The provisions of paragraph 7 have the effect of denying a benefit under a tax convention where one of the principal purposes of an arrangement or transaction that has been entered into is to obtain a benefit under the convention. Where this is the case, however, the last part of the paragraph allows the person to whom the benefit would otherwise be denied the possibility of establishing that obtaining the benefit in those circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.

3. Paragraph 7 supplements and does not restrict in any way the scope or application of the provisions of paragraphs 1 to 6 (the limitation-on-benefits rule): a benefit that is denied in accordance with these paragraphs is not a “benefit under the Convention” that paragraph 7 would also deny. Moreover, the guidance provided in the Commentary on paragraph 7 should not be used to interpret paragraphs 1 to 6 and vice-versa.

4. Conversely, the fact that a person is entitled to benefits under paragraphs 1 to 6 does not mean that these benefits cannot be denied under paragraph 7. Paragraphs 1 to 6 are rules that focus primarily on the legal nature, ownership, and general activities of residents of a Contracting State. As illustrated by the example in the next paragraph, these rules do not imply that a transaction or arrangement entered into by such a resident cannot constitute an improper use of a treaty provision.

5. Paragraph 7 must be read in the context of paragraphs 1 to 6 and of the rest of the Convention, including its preamble. This is particularly important for the purposes of determining the object and purpose of the relevant provisions of the Convention. Assume, for instance, that a public company whose shares are regularly traded on a recognized stock exchange in the Contracting State of which the company is a resident derives income from the other Contracting State. As long as that company is a “qualified person” as defined in paragraph 2, it is clear that the benefits of the Convention should not be denied solely on the basis of the ownership structure of that company, e.g. because a majority of the shareholders in that company are not residents of the same State. The object and purpose of subparagraph 2 c) is to establish a threshold for the treaty entitlement of public companies whose shares are held by residents of different States. The fact that such a company is a qualified person does not mean, however, that benefits could not be denied under paragraph 7 for reasons that are unrelated to the ownership of the shares of that company. Assume, for instance, that such a public company is a bank that enters into a conduit financing arrangement intended to provide indirectly to a resident of a third State the benefit of lower source taxation under a tax treaty. In that case, paragraph 7 would apply to deny that benefit because subparagraph 2 c), when read in the context of the rest of the Convention and, in particular, its preamble, cannot be
注释

1. 第 7 款反映了对注释第 1 条注释中第 9.5. 22. 22.1 和 22.2 款的指导意 义。根据该指导意见建议，当特定交易或安排的主要目的之一是取得税收协定优惠，并且在这种情况下取得该优惠有悖于协定相关条款的宗旨与目标时，协定优惠则不应再适用。第 7 款将这些条款原则纳人协定范本，旨在使缔约国在其国内法规定下不能如协定注释第 22.22.1 和 22.2 款所述对不当利用税收协定的情形进 行处理时，仍可按照第 7 款进行处理，此外，在那些国内法规定下可以从上 述情形的国家，这些原则可以适用。

2. 当安排或交易的达成的主要目的之一是取得税收协定优惠时，第 7 款的规定能够否决优惠的适用。但与此同时根据本款最后一部分的规定，纳税人可 以去证实其 在这些情况下取得协定优惠符合协定相关条款的宗旨与目的。

3. 第 7 款是对第 1 款（利益限制条款）的补充，且不会限制第 1（利润的 适用）被第 1 款所否定的相关优惠并不一定会被第 7 款否定。而且，注释所提供的关于第 7 款的指导不应被用于解释第 1 — 6 款，反之亦然。

4. 相反，纳税人若被第 1 款授予了优惠，并不代表该项优惠不会被第 7 款否定。第 1 定义款主要着重缔约国居民的法律实质、所有权以及一般活动。如 下段所说明，这些规定并不意味着该居民纳税人所参与的交易或安排不构 成协定条款的不当使用。

5. 第 7 款必须结合第 1 款必须款和协定其他部分包括序言的内容来进行解读。这 对于确定协定相关条款的宗旨与目的尤为重要。举例而言，假设某上市公司是 缔约国一方的居民企业，其股票在该缔约国内证券交易所定期交易，该公司从 缔约国另一方取得所得。只要该公司符合第 2 款定义下的“有资格的人”，就 不能仅因为该公司的所有权架构——如该公司大部分股东并非该缔约国居民——公司的原因，而否定该公司享受协定待遇。第 2 款 c) 项的宗旨与目的是给股份由不 同国家居民持有的上市公司享受协定待遇设置一个门槛。但即使该公司是协定 意义上“有资格的人”，也并不代表相关协定待遇不会被第 7 款除所有权架 构之外的原因而予以否定。再举例而言，假设某家上市银行参与了导致融资安 排，意图向第三方国家居民间接提供相关税收协定下较低的预提税优惠。在此情况下，
considered as having the purpose, shared by the two Contracting States, of authorizing treaty-shopping transactions entered into by public companies.

6. The provisions of paragraph 7 establish that a Contracting State may deny the benefits of a tax convention where it is reasonable to conclude, having considered all the relevant facts and circumstances, that one of the principal purposes of an arrangement or transaction was for a benefit under a tax treaty to be obtained. 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 favourable tax treatment.

7. The term “benefit” includes all limitations (e.g. a tax reduction, exemption, deferral or refund) on taxation imposed on the State of source under Articles 6 through 22 of the Convention, the relief from double taxation provided by Article 23, and the protection afforded to residents and nationals of a Contracting State under Article 24 or any other similar limitations. This includes, for example, limitations on the taxing rights of a Contracting State in respect of dividends, interest or royalties arising in that State, and paid to a resident of the other State (who is the beneficial owner) under Article 10, 11 or 12. It also includes limitations on the taxing rights of a Contracting State over a capital gain derived from the alienation of movable property located in that State by a resident of the other State under Article 13. When a tax convention includes other limitations (such as a tax sparing provision), the provisions of this Article also apply to that benefit.

8. The phrase “that resulted directly or indirectly in that benefit” is deliberately broad and is intended to include situations where the person who claims the application of the benefits under a tax treaty 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. This is illustrated by the following example:

TCO, a company resident of State T, has acquired all the shares and debts of SCo, a company resident of State S, that were previously held by SCo’s parent company. These include a loan made to SCo at 4 per cent interest payable on demand. State T does not have a tax convention with State S and, therefore, any interest paid by SCo to TCo is subject to a withholding tax on interest at a rate of 25 per cent in accordance with the domestic law of State S. Under the State R-State S tax convention, however, there is no withholding tax on interest paid by a company resident of a Contracting State and beneficially owned by a company resident of the other State; also, that treaty does not include provisions similar to paragraphs 1 to 6. TCo decides to transfer the loan to RCo, a subsidiary resident of State R, in exchange for three promissory notes payable on demand on which interest is payable at 3.9 per cent.

In this example, whilst RCo is claiming the benefits of the State R-State S treaty with respect to a loan that was entered into for valid commercial reasons, if the facts of the case show that one of the principal purposes of TCo in transferring its loan to RCo was for RCo to obtain the benefit of the State R-State S treaty, then the provision would apply to deny that benefit as that benefit would result indirectly from the transfer of the loan.

9. The terms “arrangement or transaction” should be interpreted broadly and include 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. These terms also encompass 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
第 7 条则可否定上述优惠的适用。因为结合协定其他部分——特别是序言——来解读第 2 条 e）项的内容，该项不能被视为缔约国双方允许上市公司参与协定优惠的交易。
6. 第 7 条明确缔约国一方在考虑了所有相关事实与情况后，如可以合理推断出某安排或交易所的主要目的之一是为了取得税收协定下的优惠，则该缔约国一方可以否定协定优惠的适用。该条款的设立是为了确保税收协定的适用符合签署税收协定的目的，即为真实的商品和服务交易以及资本和人员流通提供优惠，而不应适用于以取得有利税收待遇为主要目的的安排。
7. "优惠"一语包含了协定第 6—22 条下所有对来源国征税权的限制（如税、减免、免征、递延或退还），第 23 条下消除双重征税以及第 24 条下对缔约国居民和国民提供的保护，以及其他类似的限制。举例而言，这包括第 10、11 和 12 条下对缔约国针对来源国支付给缔约国另一方居民（亦即受益所有人）的股息红利、利息和特许权使用费征税权的限制，还包括第 13 条下对缔约国另一方居民转让其境内的动产取得的资本利得征税权的限制。如某协定包括了其他限制（如税收饶让条款），该类条款也属于协定优惠。
8. "直接或间接产生该优惠"应作宽泛理解，其应包括申请人就某项贸易（而未单独以取得协定优惠为主要目的之一的交易）申请税收协定优惠的情况。该情况可由如下示意说明：

T 国的居民公司 TC\text{O} 从 S 国居民公司 SC\text{O} 的母公司处取得了 SC\text{O} 的所有股份和债券。其中包括一笔利率为 4% 的短期支付的借款。T 国与 S 国没有税收协定，因此，根据 S 国国内法，SC\text{O} 向 TC\text{O} 支付的所有利息应代扣代缴 25% 的预提所得税。但是，根据 R 国与 S 国的税收协定，由缔约国一方居民公司向缔约国另一方居民公司（亦即受益所有人）所支付的利息不需要代扣代缴预提所得税，并且该协定未设立类似于第 1—6 条的条款。TC\text{O} 决定以三证利率为 3.9% 的短期支付的本票作为交换条件，将该笔借款转让给其位于 R 国的居民子公司 RC\text{O}。

在这个例子中，RC\text{O} 该笔享有合理商业目的的借款申请适用 R-S 两国协定优惠待遇时，如果相关事实证明 TC\text{O} 将其借款转让给 RC\text{O} 的主要目的之一是为了让 RC\text{O} 取得 R 国与 S 国的协定优惠，则该条款可用来否定该优惠的适用，因为该项借款的转让间接地导致了协定优惠的适用。
9. "安排或交易"应作广泛的理解，应包括合同、协议、方案、交易或一系列交易，而不论其是否可以在法律上具有可执行性。它们特别包含了所得或所得得以产生的财产或权利的产生、分配、取得或转让，其还涉及取得所得的人的设立、收购或维持的安排，如使人拥有缔约一方居民资格的安排，还包括为证明其居民身份所采取的步骤。一个"安排"的例子是，例如为了申请公司身份改变的认定而安排公司董事会
establish residence. An example of an "arrangement" would be where steps are taken to ensure that meetings of the board of directors of a company are held in a different country in order to claim that the company has changed its 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. In both cases the provisions of paragraph 7 may apply.

10. To determine whether or not one of the principal purposes of any person concerned with an arrangement or transaction is to obtain benefits under the Convention, it is important to undertake an objective analysis of the aims and objects of all persons involved in putting that arrangement or transaction in place or being a party to it. What are the purposes of an arrangement or transaction is a question of fact which can only be answered by considering all circumstances surrounding the arrangement or event on a case by case basis. It is not necessary to find conclusive proof of the intent of a person concerned with an arrangement or transaction, but it must be reasonable to conclude, after an objective analysis of the relevant facts and circumstances, that one of the principal purposes of the arrangement or transaction was to obtain the benefits of the tax convention. It should not be lightly assumed, however, that obtaining a benefit under a tax treaty was one of the principal purposes of an arrangement or transaction and 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.

11. A person cannot avoid the application of this paragraph by merely asserting that the arrangement or transaction was not undertaken or arranged to obtain the benefits of the Convention. All of the evidence must be weighed to determine whether it is reasonable to conclude that an arrangement or transaction was undertaken or arranged for such purpose. The determination requires reasonableness, suggesting that the possibility of different interpretations of the events must be objectively considered.

12. The reference to "one of the principal purposes" in paragraph 7 means that obtaining the benefit under a tax convention need not be the sole or dominant purpose of a particular arrangement or transaction. It is sufficient that at least one of the principal purposes was to obtain the benefit. For example, a person may sell a property for various reasons, but if before the sale, that person becomes a resident of one of the Contracting States and one of the principal purposes for doing so is to obtain a benefit under a tax convention, paragraph 7 could apply notwithstanding the fact that there may also be other principal purposes for changing the residence, such as facilitating the sale of the property or the re-investment of the proceeds of the alienation.

13. A purpose will not be a principal purpose when it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining the benefit was not a principal consideration and would not have justified entering into any arrangement or transaction that has, alone or together with other transactions, resulted in the benefit. In particular, where an arrangement is inextricably linked to a core commercial activity, and its form has not been driven by considerations of obtaining a benefit, it is unlikely that its principal purpose will be considered to be to obtain that benefit. Where, however, an arrangement is entered into for the purpose of obtaining similar benefits under a number of treaties, it should not be considered that obtaining benefits under other treaties will prevent obtaining one benefit under one treaty from being considered a principal purpose for that arrangement. Assume, for example, that a taxpayer resident of State A enters into a conduit arrangement with a financial institution resident of State B in order for that financial institution to invest, for the ultimate benefit of that taxpayer, in bonds issued in a large number of States with which State B, but not State A, has tax treaties. If the facts and circumstances reveal that the arrangement has been entered into for
在不同国家举行。在单一交易导致协定优惠的取得，或此交易与其他一系列精心安排的交易共同导致协定优惠的取得的情况下，第7条条款皆适用。

10. 为判定某项安排或交易的主要目的之—是取得协定优惠，对筹划或参与该安排或交易的各方的目的进行客观的分析则尤为重要。一个安排或交易目的的判定只有基于对所有围绕该安排或事件的情况进行具体分析后才能进行。虽并不必须针对某项安排或交易参与方的目的进行结论性地的，但是要对相关事实与情况进行客观分析后，应当合理地推断出该安排或交易的主要目的之—是取得协定优惠。但是，不应当轻易地对取得协定优惠是某项安排和交易的主要目的之一下结论，且仅根据某项安排的结果通常不能得出关于其目的的结论。但是，当只有以享受相关协定优惠为目的的才能合理地解释一个安排时，则可以得出该安排的主要目的之一是取得协定优惠的这种结论。

11. 不能仅凭对某项安排或交易非以取得协定优惠为目的的声明，就可以避免本条款的适用。在判定某项安排或交易的主要目的之—是取得协定优惠为主要目的这项结论是否合理的，所有的证据都应被考虑在内。对目的的判定要求合理性时，即所有可能的不同解释都应被公正地考虑。

12. 第7款“主要目的之一”是指取得协定优惠并不必须是一个特定安排或交易的唯一目的。只要至少主要目的之一是为了取得优惠即可。举例而言，一个人可以因为不同的原因出售一项财产，如：在某一时期，此人因缔约国一方的居民并且这项行为的主要目的之一是为了取得税收协定优惠，不管是否存在其他主要目的如促进该财产的出售或转让所得的再投资，第7款应适用。

13. 如果在考虑了所有相关事实与情况后可以合理地认为，取得优惠不是一个主要的考量，而且取得优惠不能合理地解释进行这种安排或交易的原因，那么尽管该安排或交易单独或与其他交易一起导致税收协定优惠的产生，也不能将取得协定优惠视为主要目的。尤其是当一个安排与一个核心商业行为密不可分，并且其形式也并非为取得协定优惠而设计形成，该安排的主要目的则不太可能被视为取得协定优惠。但是，当参与一种安排的目的是为了取得一系列协定下的相似优惠时，取得其他协定下的优惠不是判定该安排非以取得一个特定协定下的某个优惠为主要目的的理由。举例而言，假设A国的居民纳税人与B国的居民金融机构达成了安排，以使得该金融机构能够最大限度地为该纳税人利益在许多与B国（而非A国）有税收协定的国家进行债券投资。如果事实和情况反映出该安排的主要目的是取得这些税收协定的优惠，则取得一个特定税收协定下的优惠不能被视为非此安排的目的。同样，如果某安排或交易
the principal purpose of obtaining the benefits of these tax treaties, it should not be considered that obtaining a benefit under one specific treaty was not one of the principal purposes for that arrangement. Similarly, purposes related to the avoidance of domestic law should not be used to argue that obtaining a treaty benefit was merely accessory to such purposes.

14. The following examples illustrate the application of the paragraph (the examples included in paragraph 19 below should also be considered when determining whether and when the paragraph would apply in the case of conduit arrangements):

- Example A: TC, a company resident of State T, owns shares of SC, a company listed on the stock exchange of State S. State T does not have a tax convention with State S and, therefore, any dividend paid by SC to TC is subject to a withholding tax on dividends of 25 per cent in accordance with the domestic law of State S. Under the tax convention, however, there is no withholding tax on dividends paid by a company resident of a Contracting State and beneficially owned by a company resident of the other State. TC enters into an agreement with RC, an independent financial institution resident of State R, pursuant to which TC assigns to RC the right to the payment of dividends that have been declared but have not yet been paid by SC.

In this example, in the absence of other facts and circumstances showing otherwise, it would be reasonable to conclude that one of the principal purposes for the arrangement under which TC assigned the right to the payment of dividends to RC was for RC to obtain the benefit of the exemption from source taxation of dividends provided for by the tax convention and it would be contrary to the object and purpose of the tax convention to grant the benefit of that exemption under this agreement.

- Example B: SC, a company resident of State S, is the subsidiary of TC, a company resident of State T. State T does not have a tax convention with State S and, therefore, any dividend paid by SC to TC is subject to a withholding tax on dividends of 25 per cent in accordance with the domestic law of State S. Under the tax convention, however, the applicable rate of withholding tax on dividends paid by a company resident of State S to a resident of State T is 5 per cent. TC therefore enters into an agreement with RC, a financial institution resident of State R and a qualified person under subparagraph 3 a) of this Article, pursuant to which RC acquires the usufruct of newly issued non-voting preferred shares of SC for a period of three years. TC is the bare owner of these shares. The usufruct gives RC the right to receive the dividends attached to these preferred shares. The amount paid by RC to acquire the usufruct corresponds to the present value of the dividends to be paid on the preferred shares over the period of three years (discounted at the rate at which TC could borrow from RC).

In this example, in the absence of other facts and circumstances showing otherwise, it would be reasonable to conclude that one of the principal purposes for the agreement under which RC acquired the usufruct of the preferred shares issued by SC was to obtain the benefit of the 5 per cent limitation applicable to the source taxation of dividends provided for by the tax convention and it would be contrary to the object and purpose of the tax convention to grant the benefit of that limitation under this agreement.

- Example C: RC, a company resident of State R, is in the business of producing electronic devices and its business is expanding rapidly. It is now considering establishing a manufacturing plant in a developing country in order to benefit from lower manufacturing costs. After a preliminary review, possible locations in three different countries are identified. All three countries provide similar economic and political
的目的与规避国内法有关，这一点不能作为取得税收协定优惠的主要目的而是附属\1\9于上述目的的理由。

14. 下列示例说明了该条款的应用 （在决定以下段落是否以及何时适用于导管融资安排时，请同时参考下文第 19 段中所包含的条文）

- 例 A：T 国居民公司 TC0 拥有在 S 国证券交易所上市的 SC0 公司的股份。T 国与 S 国没有税收协定，因此根据 S 国国内法，SC0 支付给 TC0 的股息需代扣代缴 25% 的预提所得税。而在 R 国与 S 国的税收协定中，由缔约国一方居民公司向 缔约国另一方居民公司，亦即受益所有人，所支付的股息不需代扣代缴预提所得税。TC0 与 R 国的独立金融结构 RCo 达成一项约定，即 TC0 将得 SC0 已缴但尚未支付的股息款项的权益转移给 RCo。

在本例中，在无相反的事实证据的情况下，认为 TC0 将获得股息款项的权益转移给 RCo 这一安排的主要目的之一是为了让 RCo 取得 R 与 S 国税收协定所规定的免税股息红利预提税的优惠，这一结论是合理的。如果对这种纳税筹划安排给予协定优惠，则背离了该协定的宗旨和目的。

- 例 B：S 国居民公司 SC0 是 T 国居民公司 TC0 的子公司，T 国与 S 国没有税收协定，因此根据 S 国国内法，SC0 支付给 TC0 的股息需代扣代缴 25% 的所得税。但是，在 R 国与 S 国的税收协定下，S 国居民向 R 国居民企业所支付的股息的所得税适用税率为 5%。TC0 因此与 R 国的居民金融机构 RCo，其同时也是本协定第 31 款下的有资格的人，达成了一项约定，即 RCo 取得 SC0 新发行的无投票权优先股的三年用益权。TC0 为这些股份的指定持有人。RCo 有权获得与该优先股相关的股息。RCo 为取得用益权所支付的金额为该优先股三年期间对应的股息红利的现值（以 TC0 可从 RCo 得到的股 息税率为折现率）。

在本例中，在无相反的事实证据的情况下，可以合理地认为 RCo 取得 SC0 优先股用益权这项安排的主要目的之一是为了取得 R 国与 S 国的税收协定所规定的股息来源国所适用的 5% 低税率的优惠，并且对这种纳税筹划安排给予协定优惠违背了该协定的宗旨与目的。

- 例 C：R 国居民公司 RCo 是一家生产电子设备的公司，其业务正在迅速扩张。该公司现在考虑在一个发展中国家设立一个制造基地以受益于较低的生产成本。在初步审核后，该公司确认了三个不同国家的选择。这三个国家有相似的经济发展水平。考虑到 S 国是这些国家中唯一一个与 R 国有税收协定的国家，该公司做出了在该国建厂的决定。
environments. After considering the fact that State S is the only one of these countries with which State R has a tax convention, the decision is made to build the plant in that State.

In this example, whilst the decision to invest in State S is taken in the light of the benefits provided by the State R-State S tax convention, it is clear that the principal purposes for making that investment and building the plant are related to the expansion of RCo's business and the lower manufacturing costs of that country. In this example, it cannot reasonably be considered that one of the principal purposes for building the plant is to obtain treaty benefits. In addition, given that a general objective of tax conventions is to encourage cross-border investment, obtaining the benefits of the State R-State S convention for the investment in the plant built in State S is in accordance with the object and purpose of the provisions of that convention.

Example D: RCo, a collective investment vehicle resident of State R, manages a diversified portfolio of investments in the international financial market. RCo currently holds 15 per cent of its portfolio in shares of companies resident of State S, in respect of which it receives annual dividends. Under the tax convention between State R and State S, the withholding tax rate on dividends is reduced from 30 per cent to 10 per cent.

RCo's investment decisions take into account the existence of tax benefits provided under State R's extensive tax convention network. A majority of investors in RCo are residents of State R, but a number of investors (the minority investors) are residents of States with which State S does not have a tax convention. Investors' decisions to invest in RCo are not driven by any particular investment made by RCo, and RCo's investment strategy is not driven by the tax position of its investors. RCo annually distributes almost all of its income to its investors and pays taxes in State R on income not distributed during the year.

In making its decision to invest in shares of companies resident of State S, RCo considered the existence of a benefit under the State R-State S tax convention with respect to dividends, but this alone would not be sufficient to trigger the application of paragraph 7. The intent of tax treaties is to provide benefits to encourage cross-border investment and, therefore, to determine whether or not paragraph 7 applies to an investment, it is necessary to consider the context in which the investment was made. In this example, unless RCo's investment is part of an arrangement or relates to another transaction undertaken for a principal purpose of obtaining the benefit of the Convention, it would not be reasonable to deny the benefit of the State R-State S tax treaty to RCo.

Example E: RCo is a company resident of State R and, for the last 5 years, has held 24 per cent of the shares of company SCo, a resident of State S. Following the entry-into-force of a tax treaty between States R and S (Article 10 of which is identical to Article 10 of this Model), RCo decides to increase to 25 per cent its ownership of the shares of SCo. The facts and circumstances reveal that the decision to acquire these additional shares has been made primarily in order to obtain the benefit of the lower rate of tax provided by Article 10(2)(a) of the treaty.

In that case, although one of the principal purposes for the transaction through which the additional shares are acquired is clearly to obtain the benefit of Article 10(2)(a), paragraph 7 would not apply because it may be established that granting that benefit in these circumstances would be in accordance with the object and purpose of Article 10(2)(a). That subparagraph uses an arbitrary threshold of 25 per cent for the purposes of determining which shareholders are entitled to the benefit of the lower rate of tax on dividends and it is consistent with this approach to grant the benefits of the subparagraph to a taxpayer who genuinely increases its participation in a company in order to satisfy this requirement.
在本例中，虽然该在S国投资的决定基于R国与S国的税收协定所提供的优惠而作出，但是，显然该公司作出该投资和建厂的主要目的是与RCo的经营活动扩张以及该国较低的生产成本有关。在案例中并不存在合理地认为建厂的主要目的之一是为了取得协定优惠。此外，考虑到税收协定的一个宗旨即为鼓励双边跨境投资，RCo就其在S国投资建设工厂获得R国与S国的税收协定优惠符合该协定条款的宗旨与目的。

例D：集合投资工具RCo是R国的税收居民，管理国际金融市场上的多元投资组合，RCo现持有该组合中S国居民企业股份的15%，并收取年度分红。根据R国与S国的税收协定，股息分红的预提所得税率由30%降到了10%。

RCo的投资者考虑了R国签订的广泛的税收协定下的税收优惠。RCo的大多数投资者为R国居民，但是一部分投资者（少数投资者）是与S国无税收协定的国家的居民。投资人投资RCo并非是通过RCo某项特定投资所得利，其RCo的投资策略也不是受其投资者税务情况所影响。RCo每年将几乎其所有的收入分配给它的投资者并且就其未分配的收入在R国缴税。

在投资R国居民公司股票时，RCo考虑到了R国-S国的税收协定下股息优惠的存在，因此要根据此列举第7款。理由并不充分。税收协定的意图是为了通过提供优惠来鼓励跨境投资，因此，判断是否对一项投资应用第7款时，有必要考虑该投资的背景。在例子中，除非RCo的投资是某项以取得协定优惠为主要目的的安排的一部分或关联于另一个主要目的是取得协定优惠的交易，否定RCo适用R国-S国税收协定的优惠是不合逻辑的。

例E：R国居民公司RCo在过去3年间，持有S国居民公司SCo 25%的股份。随着S、R两国之间税收协定的生效（该税收协定的第10条与范本第10条内容相当），RC决定增加其对SCo股份的持有至25%。事实显示取得额外利润率主要是为了取得该协定第10条（2）款a）项下的低税率优惠。

在这种情况下，虽然取得额外股份的交易的主要目的之一明显是为了取得第10条（2）款a）项的优惠，第7款在此并不适用，因为这里可以证明这种情况下授予该优惠符合第10条（2）款a）项的宗旨与目的。该条文使用25%作为股东可享受较低股息税率的门槛，纳税人就其单纯为了满足条件而增加一家公司的持股适用该款下的优惠与此并不矛盾。
Example F: TCO is a publicly-traded company resident of State T. TCO’s information technology business, which was developed in State T, has grown considerably over the last few years as a result of an aggressive merger and acquisition policy pursued by TCO’s management. RCO, a company resident of State R (a State that has concluded many tax treaties providing for no or low source taxation of dividends and royalties), is the family-owned holding company of a group that is also active in the information technology sector. Almost all the shares of RCO are owned by residents of State R who are relatives of the entrepreneur who launched and developed the business of the RCO group. RCO’s main assets are shares of subsidiaries located in neighbouring States, including SCO, a company resident of State S, as well as patents developed in State R and licensed to these subsidiaries. TCO, which has long been interested in acquiring the business of the RCO group and its portfolio of patents, has made an offer to acquire all the shares of RCO.

In this example, in the absence of other facts and circumstances showing otherwise, it would be reasonable to conclude that the principal purposes for the acquisition of RCO are related to the expansion of the business of the TCO group and do not include the obtaining of benefits under the treaty between States R and S. The fact that RCO acts primarily as a holding company does not change that result. It might well be that, after the acquisition of the shares of RCO, TCO’s management will consider the benefits of the tax treaty concluded between State R and State S before deciding to keep in RCO the shares of SCO and the patents licensed to SCO. This, however, would not be a purpose related to the relevant transaction, which is the acquisition of the shares of RCO.

Example G: TCO, a company resident of State T, is a publicly-traded company resident of State T. It owns directly or indirectly a number of subsidiaries in different countries. Most of these companies carry on the business activities of the TCO group in local markets. In one region, TCO owns the shares of five such companies, each located in different neighbouring States. TCO is considering establishing a regional company for the purpose of providing group services to these companies, including management services such as accounting, legal advice and human resources; financing and treasury services such as managing currency risks and arranging hedging transactions, as well as some other non-financing related services. After a review of possible locations, TCO decides to establish the regional company, RCO, in State R. This decision is mainly driven by the skilled labour force, reliable legal system, business friendly environment, political stability, membership of a regional grouping, sophisticated banking industry and the comprehensive double taxation treaty network of State R, including its tax treaties with the five States in which TCO owns subsidiaries, which all provide low withholding tax rates.

In this example, merely reviewing the effects of the treaties on future payments by the subsidiaries to the regional company would not enable a conclusion to be drawn about the purposes for the establishment of RCO by TCO. Assuming that the intra-group services to be provided by RCO, including the making of decisions necessary for the conduct of its business, constitute a real business through which RCO exercises substantive economic functions, using real assets and assuming real risks, and that business is carried on by RCO through its own personnel located in State R, it would not be reasonable to deny the benefits of the treaties concluded between State R and the five States where the subsidiaries operate unless other facts would indicate that RCO has been established for other tax purposes or unless RCO enters into specific transactions in which paragraph 7 would otherwise apply (see also example F in paragraph 15 below with respect to the interest and other remuneration that RCO might derive from its group financing activities).

Example H: TCO is a company resident of State T that is listed on the stock exchange of State T. It is the parent company of a multinational enterprise that conducts a variety of
例F: TCo是T国的上市公司。在过去的几年内，TCo在T国发展起来的信息技术业务由于TCo管理层激进的并购政策而得到迅速壮大。RCo，一个R国的居民企业（根据R国缔结的许多税收协定，既不和等同于其他R国的税收协定，并不适用R国的税负为零或很低），是一个在信息技术领域同样十分活跃的家族企业。RCo的所有股份几乎都由RCo创始人亲属（均为R国民）所持有。RCo的主要资产是其在R国和T国的子公司（其中包括C国的SCo），以及在R国开发的授权给TCo集团的业务。

本例中，在不考虑其他尚未显现的事实和情况的条件下，认为TCo收购RCo的主要原因是扩大TCo的业务，而非获取R国和T国之间的协定优惠，应当是合理的。RCo主要以控股公司身份活动，所以事实上并不影响上述结论。收购RCo后，TCo管理层决定RCo是否继续持有SCo的股份，虽然有利可图，但可能会考虑R国与T国之间的税收协定优惠。不过，这一情形对相关交易目的的影响，仍然是为了购买RCo的股份。

例G: TCo是T国的上市企业，也是一家在T国上市的公司。该公司直接或间接拥有大量位于不同国家的子公司。大多数公司在本地从事TCo集团的经营业务。在某一地区，TCo拥有五个这样的公司，有大量或位于不同的国家。

TCo正考虑建立一个区域性的公司来为这些子公司提供集团服务，包括会计、法律、税务、人力资源等管理类服务，贷款风险管理、对冲交易安排等金融类服务，及其他非金融类服务。在考虑多个可能的选择之后，TCo决定在R国建立其区域公司RCo，这个决定主要是考虑到当地职业技能的劳动性、可靠的法律体系、友好的商业环境、稳定的经济环境。

TCo与其他国家的子公司在R国设立的税收协定优惠，并不适用于R国的子公司。如果RCo在R国设立了独立的业务，除了其他条件外，RCo可能会从集团业务中获取利益和其他补给。

例H: TCo是T国的居民企业，且在T国的证券交易市场上交易。该公司是某一个在全球范围内经营广泛业务（批发、零售、制造、投资、金融等）的
business activities globally (wholesaling, retailing, manufacturing, investment, finance, etc.). Issues related to transportation, time differences, limited availability of personnel fluent in foreign languages and the foreign location of business partners make it difficult for TCO to manage its foreign activities from State T. TCO therefore establishes RCO, a subsidiary resident of State R (a country where there are developed international trade and financial markets as well as an abundance of highly-qualified human resources), as a base for developing its foreign business activities. RCO carries on diverse business activities such as wholesaling, retailing, manufacturing, financing and domestic and international investment. RCO possesses the human and financial resources (in various areas such as legal, financial, accounting, taxation, risk management, auditing and internal control) that are necessary to perform these activities. It is clear that RCO’s activities constitute the active conduct of a business in State R.

As part of its activities, RCO also undertakes the development of new manufacturing facilities in State S. For that purpose, RCO contributes equity capital and makes loans to SCO, a subsidiary resident of State S that RCO established for the purposes of owning these facilities. RCO will receive dividends and interest from SCO.

In this example, RCO has been established for business efficiency reasons and its financing of SCO through equity and loans is part of RCO’s active conduct of a business in State R. Based on these facts and in the absence of other facts that would indicate that one of the principal purposes for the establishment of RCO or the financing of SCO was the obtaining of the benefits of the treaty between States R and S, paragraph 7 would not apply to these transactions.

- **Example 1:** RCO, a company resident of State R, is one of a number of collective management organisations that grant licenses on behalf of neighbouring right and copyright holders for playing music in public or for broadcasting that music on radio, television or the internet. SCO, a company resident of State S, carries on similar activities in State S. Performers and copyright holders from various countries appoint RCO or SCO as their agent to grant licenses and to receive royalties with respect to the copyrights and neighbouring rights that they hold; RCO and SCO distribute to each right holder the amount of royalties that they receive on behalf of that holder minus a commission (in most cases, the amount distributed to each holder is relatively small). RCO has an agreement with SCO through which SCO grants licenses to users in State S and distributes royalties to RCO with respect to the rights that RCO manages; RCO does the same in State R with respect to the rights that SCO manages. SCO has agreed with the tax administration of State S that it will process the royalty withholding tax on the payments that it makes to RCO based on the applicable treaties between State S and the State of residence of each right holder represented by RCO based on information provided by RCO since these right holders are the beneficial owners of the royalties paid by SCO to RCO.

In this example, it is clear that the arrangements between the right holders and RCO and SCO, and between SCO and RCO, have been put in place for the efficient management of the granting of licenses and collection of royalties with respect to a large number of small transactions. Whilst one of the purposes for entering into these arrangements may well be to ensure that withholding tax is collected at the correct treaty rate without the need for each individual right holder to apply for a refund on small payments, which would be cumbersome and expensive, it is clear that such purpose, which serves to promote the correct and efficient application of tax treaties, would be in accordance with the object and purpose of the relevant provisions of the applicable treaties.

- **Example 2:** RCO is a company resident of State R. It has successfully submitted a bid for the construction of a power plant for SCO, an independent company resident of State S.
跨国公司的母公司。由于交通、时差、语言员工的短缺以及业务伙伴位于不同国家使得RCo在R国对其子公司进行管理十分困难，因此RCo在R国建立了一家当地的子公司RCo（R国的子公司）公司的国际贸易和金融，有丰富的高效率人力资源，作为其发展海外业务的基础。RCo从事多样的经营业务，包括批发、零售、制造、金融和国内贸易。RCo拥有执行这些活动必要的人力和财力（例如法律、金融、会计、税务、风险管理、审计及内控等多领域）。很明显，RCo的行为构成了其在R国的积极宣传活动。

作为RCo的业务之一，其在S国开发新的生产设备。因此，RCo向SCo投入了资金，同时给予其贷款，SCo是RCo为拥有这些生产设备而成立的S国居民企业。

本案例中，RCo是为提高商业效率而成立的，该公司对SCo的注资和贷款是其在R国积极宣传活动的一部分。基于以上事实，如果其他事实表明RCo的成立及对SCo贷款的主要目的系为了享受S国和R国之间的协定优惠，则第7款不适用于上述交易。

- 例1: RCo，R国的居民企业，是大量管理组织中的成员，这些管理组织代表版权和类似权利所有者，许可在公共场合播放音乐和通过广播、电视或网络播放音乐的权利。SCo是S国的居民企业，在S国进行类似的宣传活动。许多国家的参与者和版权所有者都会指定RCo或者SCo作为管理许可权限并收取关于版权和其他类似权利的许可权使用费。RCo及SCo收取特许权使用费之后，从中提取一定的佣金，再向版权所有人发放特许权使用费（大多数情况下，会向所有人支付的金额相对较少）。RCo与SCo之间签订有协议，根据此协议，SCo向S国的用户提供并行，并与RCO拥有的相关权利的特许权使用费支付给RCO。同样的，RCO对SCo所管理的权利采取相同的处理方式。SCo与S国的主管税局达成协定，当SCo向RCO支付特许权使用费时，鉴于版权所有人是SCo向RCO支付的特许权使用费的受益所有人，故按照RCo提供的信息，根据S国与版权所有权所在国之间的协定代替特许权使用费相关的预提税。

本案例中，版权所有人与RCO和SCO之间的安排，及SCO和RCO之间的安排，是为了对大量小额交易的许可授予及特许权使用费的收取进行高效地管理。此类安排的其中一个是确保预提税能够根据准确的协定税率被代扣代缴，且无须每个个人权利所有人为了小额的金额通过冗长和昂贵的程序申请退税。显然，此类安排提高了税收协定待遇申请的准确性和效率，与申请税收协定的相关条款的意图及目的相符。

- 例2: RC0是R国的居民企业。该公司成功获得S国独立居民企业SC0发电站
That construction project is expected to last 22 months. During the negotiation of the contract, the project is divided into two different contracts, each lasting 11 months. The first contract is concluded with RCO and the second contract is concluded with SUBCO, a recently incorporated wholly-owned subsidiary of RCO resident of State R. At the request of SCO, which wanted to ensure that RCO would be contractually liable for the performance of the two contracts, the contractual arrangements are such that RCO is jointly and severally liable with SUBCO for the performance of SUBCO’s contractual obligations under the SUBCO-SCO contract.

In this example, in the absence of other facts and circumstances showing otherwise, it would be reasonable to conclude that one of the principal purposes for the conclusion of the separate contract under which SUBCO agreed to perform part of the construction project was for RCO and SUBCO to each obtain the benefit of the rule in paragraph 3 of Article 5 of the State R-State S tax convention. Granting the benefit of that rule in these circumstances would be contrary to the object and purpose of that paragraph as the time limitation of that paragraph would otherwise be meaningless.

15. In a number of States, the application of the general anti-abuse rule found in domestic law is subject to some form of approval process. In some cases, the process provides for an internal acceleration of disputes on such provisions to senior officials in the administration. In other cases, the process allows for advisory panels to provide their views to the administration on the application of the rule. These types of approval processes reflect the serious nature of disputes in this area and promote overall consistency in the application of the rule. States may wish to establish a similar form of administrative process that would ensure that paragraph 7 is only applied after approval at a senior level within the administration.

16. Also, some States consider that where a person is denied a treaty benefit in accordance with paragraph 7, the competent authority of the Contracting State that would otherwise have granted this benefit should have the possibility of treating that person as being entitled to this benefit, or to different benefits with respect to the relevant item of income or capital, if such benefits would have been granted to that person in the absence of the transaction or arrangement that triggered the application of paragraph 7. In order to allow that possibility, such States are free to include the following additional paragraph in their bilateral treaties:

8. Where a benefit under this Convention is denied to a person under paragraph 7, 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 7. 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.

17. For the purpose of this alternative provision, the determination that benefits would have been granted in the absence of the transaction or arrangement referred to in paragraph 7 and the determination of the benefits that should be granted are left to the discretion of the competent authority to which the request is made. The alternative provision grants broad discretion to the competent authority for the purposes of these determinations. The provision does require, however, that the competent authority consider the relevant facts and circumstances before reaching a decision and must consult the competent authority of the other Contracting State before rejecting a request to grant benefits if that request was made by a resident of that other State. The first requirement seeks to ensure that the competent authority
建设的考点。该建设项目预计持续时间为22个月。在合同讨论期间，该合同被划分为两个合同，每个合同持续时间为11个月。第一个合同是由RCa签订，第二个合同则由SUB公司签订，SUB公司是近期刚成立的RCa的全资子公司，为R国居民公司。由于SCc要求确保RCa承担两个合同的执行责任，合同安排为RCa为SUB公司履行SUB公司与SCc签订的合同承担连带责任。

本案例中，在不考虑其他尚未显现的事实和情况的条件下，可以合理地认为由SUB公司单独签订合同执行部分建设工程的主要目的之一，是为了使RCa和SUB公司能够获取R国和S国协定下第3条及第5款所授予的税收协定优惠。

在这种情况下，授予协定优惠将被认为不符合该款的意图和目的，否则在合同设定时间限制上显得毫无意义了。

15. 在很多国家，国内法中的一般反避税规则的应用需经过审批程序。在一些例子中，这些程序为当局完成相关条款争议加速程序。而在此一案中，这些程序允许顾问团能够就法规应用的监控提供看法。这些审批程序反映了在该领域争议通常较为严重的特性，并可以提升此法规适用的一致性。缔约国可能希望建立类似的通知程序，以便确保获取监管高层的审批后，第7款方可适用。

16. 而且，当一个人由于第7款被拒绝授予协定优惠时，本将授予此优惠的缔约国主管当局可能希望保留授予第三人前述被拒绝的优惠或针对其他相关所得或资本利得的不同优惠的可能性，前提是如果能够触发第7款的交易或安排的情形下，上述优惠将授予此人。为允许前述可能性，缔约国可以在双边协定中包括以下条款：

8. 当根据协定第7款拒绝向某人授予协定优惠时，本将授予此优惠的缔约国主管当局应当将此人视为有资格享受此优惠或其他针对一项特定所得或资本利得的优惠，前提是该主管当局根据此人的请求并考虑了相关的事件和情况后决定，在这种情况下能够触发第7款的交易或安排的情形下此优惠应授予此人。收到请求的缔约国一方主管当局在拒绝缔约国另一方居民根据本款提出的请求前，应与缔约国另一方主管当局进行协商。

17. 对于本可选条款而言，决定在没有能够触发第7款的交易或安排的情形下协定优惠是否应授予授予的权力，以及决定哪些优惠应当被授予的权力，都落在收到请求的缔约国一方。可选条款在做决定方面为缔约国主管当局提供了广泛的权力。尽管如此，该条款要求主管当局在做出决定之前应综合考虑相关的事实和情况，并且如果享受协定优惠的请求是缔约国另一方的居民所提出时，在拒绝该请求前必须征求缔约国另一方主管当局的意见。第一个要求是为了确保主管当局在考虑每个申请时都根据事实本身来判断，而第二个则是为缔约国另一方居民提出的请求而咨询缔约国另一方的意见。这一要求是为了确保缔约国双方对类似案件的处理方式保持一致，并能根据特定案件的事实及情况证明其
will consider each request on its own merits whilst the requirement that the competent authority of the other Contracting State be consulted if the request is made by a resident of that other State should ensure that Contracting States treat similar cases in a consistent manner and can justify their decision on the basis of the facts and circumstances of the particular case. This consultation process does not, however, require that the competent authority to which the request was presented obtain the agreement of the competent authority that is consulted.

18. The following example illustrates the application of this alternative provision. Assume that an individual who is a resident of State R and who owns shares in a company resident of State S assigns the right to receive dividends declared by that company to another company resident of State R which owns more than 10 per cent of the capital of the paying company for the principal purpose of obtaining the reduced rate of source taxation provided for in subparagraph a) of paragraph 2 of Article 10. In such a case, if it is determined that the benefit of that subparagraph should be denied pursuant to paragraph 7, the alternative provision would allow the competent authority of State S to grant the benefit of the reduced rate provided for in subparagraph b) of paragraph 2 of Article 10 if that competent authority determined that such benefit would have been granted in the absence of the assignment to another company of the right to receive dividends.

19. For various reasons, some States may be unable to accept the rule included in paragraph 7. In order to effectively address all forms of treaty-shopping, however, these States will need to supplement the limitation-on-benefits rule of paragraphs 1 to 6 by rules that will address treaty-shopping strategies commonly referred to as "conduit arrangements" that would not be caught by these paragraphs. These rules would deal with such conduit arrangements by denying the benefits of the provisions of the Convention, or of some of them (e.g. those of Articles 7, 10, 11, 12 and 21) in respect of any income obtained under, or as part of, a conduit arrangement. They could take the form of domestic anti-abuse rules or judicial doctrines that would achieve a similar result. The following are examples of conduit arrangements that need to be addressed by such rules as well as examples of transactions that should not be considered to be conduit arrangements for that purpose:

- **Example A:** RCO, a publicly-traded company resident of State R, owns all of the shares of SCO, a company resident of State S. TCO, a company resident of State T, which does not have a tax treaty with State S, would like to purchase a minority interest in SCO but believes that the domestic withholding tax on dividends levied by State S would make the investment uneconomic. RCO proposes that SCO instead issue to RCO preferred shares paying a fixed return of 4 per cent plus a contingent return of 20 per cent of SCO's net profits. The maturity of the preferred shares is 20 years. TCO will enter into a separate contract with RCO pursuant to which it will pay to RCO an amount equal to the issue price of the preferred shares and will receive from RCO after 20 years the redemption price of the shares. During the 20 years, RCO will pay to TCO an amount equal to 3.75 per cent of the issue price plus 20 per cent of SCO's net profits. This arrangement constitutes a conduit arrangement that should be addressed by the rules referred to above because one of the principal purposes for RCO participating in the transaction was to achieve a reduction of the withholding tax for TCO.

- **Example B:** SCO, a company resident of State S, has issued only one class of shares that is 100 per cent owned by RCO, a company resident of State R. RCO also has only one class of shares outstanding, all of which is owned by TCO, a company resident of State T, which does not have a tax treaty with State S. RCO is engaged in the manufacture of electronics products, and SCO serves as RCO's exclusive distributor in State S. Under paragraph 3 of the limitation-of-benefits rule, RCO will be entitled
决定的合理性。但是，该咨询程序并不要求收到请求的主管当局必须获得被咨询的另一方主管当局的同意。

18. 以下案例展示了此可选条款的应用。假设作为 R 国的居民个人且拥有一个 S国的居民公司，该人将其在该 S国居民公司股份的权益指定给另一家 R 国的居民企业，该 R国居民企业拥有分配股息企业超过 10%的股权。其主要目的是为了享受第 10 条第 2款 a)项下来源国较低的税率。这种情况，若根据第 7 款拒绝授予此项下的优惠，可选条款将允许 S国主管当局授予第 10 条第 2 款 a)项下所列的较低税率优惠，前提是该主管当局决定，即使在不存在将获取股息的权利指定给另一家公司，该项优惠仍然将被授予。

19. 由于不同的原因，一些国家可能无法接受第 7 款的规定。为确保应对所有形式的缔结避税，这些国家将需要一些规则对第 1 至 6 款的优惠限制条款进行补充，以用来应对不会被这些条款涵盖的通常被称为“导管安排”的纳税避税策略。这些规则将会否定由导管安排所获取的所得或部分所得享受协定下的优惠或部分优惠（如第 7、10、11、12 和21 条），以此来应对导管安排。这些国家也可以利用国内反避税规则或者司法原则来达到类似效果。以下是一些规则需要处理的导管安排的例子，以及不应被认为是导管安排的例子：

- 例 A：RCO是一个在R国证券交易所交易的上市公司，拥有S国居民企业SCO全部的股份。T国在R和S之间没有税收协定。R国的居民企业TCO，希望购买SCO少量的股份，但认为S国国内对股息代扣代缴的预提税将会使该投资不具有经济效益。RCO提议 SCO向RCO发行优先股，以4%的固定收益加上相当于SCO利润的20%的或有收益作为回报。有效期 20年。TCO会与RCO单独签订合同，根据此合同，TCO将支付SCO一笔相当于优先股发行价的3.75%，外加相当于SCO利润的20%的款项作为回报。

这种安排可能是导管安排，应当根据上述规则处理，因为RCO参与交易的主要原因之一就是为了降低SCO承担额外的税款。

- 例 B：S国居民企业SCO，只发行过一种股份，该股份的100%被R国居民企业RCO所持有。RCO也只有一种类型的主要股份，全部由T国居民企业TCO持有。T国与S国之间没有税收协定。SCO制造电子产品，SCO是RCO在S国唯一的经销商。根据LOB规则的第 3 款，关于从SCO获取的股息收入，虽然RCO的股份由第三国居民企业所拥有，RCO从SCO获得的股息仍然有权获取协定优惠。

本案例涉及的是一项正常的商业架构，RCO和SCO在R国和S国进行的是真实的经济活动，由像SCO这样的子公司支付的股息属于正常的商业交易。
to benefits with respect to dividends received from SCO, even though the shares of RCO are owned by a resident of a third country. This example refers to a normal commercial structure where RCO and SCO carry on real economic activities in States R and S. The payment of dividends by subsidiaries such as SCO is a normal business transaction. In the absence of evidence showing that one of the principal purposes for setting up that structure was to flow-through dividends from SCO to TCO, this structure would not constitute a conduit arrangement.

- Example C: TCO, a company resident of State T, which does not have a tax treaty with State S, loans 1000000 to SCO, a company resident of State S that is a wholly-owned subsidiary of TCO, in exchange for a note issued by SCO. TCO later realises that it can avoid the withholding tax on interest levied by State S by assigning the note to its wholly-owned subsidiary RCO, a resident of State R (the treaty between States R and S does not allow source taxation of interest in certain circumstances). TCO therefore assigns the note to RCO in exchange for a note issued by RCO to TCO. The note issued by SCO pays interest at 7 per cent and the note issued by RCO pays interest at 6 per cent.

The transaction through which RCO acquired the note issued by SCO constitutes a conduit arrangement because it was structured to eliminate the withholding tax that TCO would otherwise have paid to State S.

- Example D: TCO, a company resident of State T, which does not have a tax treaty with State S, owns all of the shares of SCO, a company resident of State S. TCO has for a long time done all of its banking with RCO, a bank resident of State R which is unrelated to TCO and SCO, because the banking system in State T is relatively unsophisticated. As a result, TCO tends to maintain a large deposit with RCO. When SCO needs a loan to fund an acquisition, TCO suggests that SCO deal with RCO, which is already familiar with the business conducted by TCO and SCO. SCO discusses the loan with several different banks, all on terms similar to those offered by RCO, but eventually enters into the loan with RCO, in part because interest paid to RCO would not be subject to withholding tax in State S pursuant to the treaty between States S and R, whilst interest paid to banks resident of State T would be subject to tax in State S.

The fact that benefits of the treaty between State R and S are available if SCO borrows from RCO, and that similar benefits might not be available if it borrowed elsewhere, is clearly a factor in SCO's decision (which may be influenced by advice given to it by TCO, its 100 per cent shareholder). It may even be a decisive factor, in the sense that, all else being equal, the availability of treaty benefits may swing the balance in favour of borrowing from RCO rather than from another lender. However, whether the obtaining of treaty benefits was one of the principal purposes of the transaction would have to be determined by reference to the particular facts and circumstances. In the facts presented above, RCO is unrelated to TCO and SCO and there is no indication that the interest paid by SCO flows through to TCO one way or another. The fact that TCO has historically maintained large deposits with RCO is also a factor that indicates that the loan to SCO is not matched by a specific deposit from TCO. On the specific facts as presented, the transaction would therefore likely not constitute a conduit arrangement.

If, however, RCO's decision to lend to SCO was dependent on TCO providing a matching collateral deposit to secure the loan so that RCO would not have entered into the transaction on substantially the same terms in the absence of that deposit, the
在没有证据显示建立此架构的主要目的之一是将股息从SCo转移至TCo的情况下，此架构不会被认为是导管安排。

- 例A：TCo是T国的居民企业，T国与S国之间不存在税收协定。TCo向其位于S国的全资子公司SCo提供了1 000 000的贷款，换取了SCo发行的债券。TCo随后意识到可以通过将SCo发行的债券指定给自己位于R国的全资子公司RCo来规避针对利息的预提税（R国和S国之间的税收协定在特定情况下不允许来自该国对利息征收）。因此TCo将债券指定给RCo，以换取RCo对其发行的债券。SCo发行的债券支付7%的利息，RCo发行的债券支付6%的利息。

RCo购买SCo债券的交易构成了导管安排，因为该架构的搭建目的是为了降低TCo本该支付的预提税。

- 例B：T国的居民企业TCo，拥有S国居民企业SCo的全部股份，T国与S国之间没有税收协定。由于T国的银行系统相对不成熟，长期以来TCo通过一家位于S国的居民银行RCo来处理其所有的银行业务（RCo与TCo和SCo为非关联公司），因此，TCo倾向于在RCo保留大笔存款。当SCo需要借款时，TCo建议SCo通过RCo处理，因为RCo熟知SCo的业务。RCo与几家不同的银行讨论过借款事宜，相关条件都与RCO提供的类似。SCo最终选择了RCO，部分原因是考虑到支付给RCO的利息根据S国与R国的协定可免预提所得税，而支付给T国居民银行的利息则需要在S国征税。如果SCo从RCO借款可以享受S国和R国之间的协定优惠，而如果SCo从别处借款则可能无法享受类似的优惠，协定优惠显然是SCo在做决定时的一项考虑因素（也可能受其全资子公司TCo的意见所影响）。假设其他条件都相同的情况下，这甚至可能是一项决定性因素，协定优惠的存在导致SCo倾向于向RCO而不是其他借款方借款。但是，取税优惠政策是否是这项交易的主要目的之一，应基于特定的事实和情况进行分析。根据以上案例情况，RCO与TCo和SCO并非关联公司，且没有迹象表明SCO支付的利息通过这种或其他方式流向TCo。TCo历史上就在RCO保留大量存款的事实也可以表明给SCO提供的贷款并非来自TCo的特别存款。考虑到上述认定的事实，本案例因此不太可能构成导管安排。

但是，若RCO向SCO借款的决定是因为TCo提供了担保存款来确保借款的安全，如果没有此担保存款，RCO将不会进行条件基本相同的交易。这些事实将表明，TCo是通过R国的银行间接借款给SCo，这种情况下，该交易构成了导管安排。
facts would indicate that TCO was indirectly lending to SCO by routing the loan through a bank of State R and, in that case, the transaction would constitute a conduit arrangement.

Example E: RCO, a publicly-traded company resident of State R, is the holding company for a manufacturing group in a highly competitive technological field. The manufacturing group conducts research in subsidiaries located around the world. Any patents developed in a subsidiary are licensed by the subsidiary to RCO, which then licenses the technology to its subsidiaries that need it. RCO keeps only a small spread with respect to the royalties it receives, so that most of the profit goes to the subsidiary that incurred the risk with respect to developing the technology. TCO, a company located in a State with which State S does not have a tax treaty, has developed a process that will substantially increase the profitability of all of RCO's subsidiaries, including SCO, a company resident of State S. According to its usual practice, RCO licenses the technology and sub-licenses the technology to its subsidiaries. SCO pays a royalty to RCO, substantially all of which is paid to TCO.

In this example, there is no indication that RCO established its licensing business in order to reduce the withholding tax payable in State S. Because RCOs conforming to the standard commercial organisation and behaviour of the group in the way that it structures its licensing and sub-licensing activities and assuming the same structure is employed with respect to other subsidiaries carrying out similar activities in countries which have treaties which offer similar or more favourable benefits, the arrangement between SCO, RCO and TCO does not constitute a conduit arrangement.

Example F: TCO is a publicly-traded company resident of State T, which does not have a tax treaty with State S. TCO is the parent of a worldwide group of companies, including RCO, a company resident of State R, and SCO, a company resident of State S. SCO is engaged in the active conduct of a trade or business in State S. RCO is responsible for coordinating the financing of all of the subsidiaries of TCO. RCO maintains a centralised cash management accounting system for TCO and its subsidiaries in which it records all intercompany payables and receivables. RCO is responsible for disbursing or receiving any cash payments required by transactions between its affiliates and unrelated parties. RCO enters into interest rate and foreign exchange contracts as necessary to manage the risks arising from mismatches in incoming and outgoing cash flows. The activities of RCO are intended (and reasonably can be expected) to reduce transaction costs and overhead and other fixed costs. RCO has 50 employees, including clerical and other back office personnel, located in State S; this number of employees reflects the size of the business activities of RCO. TCO lends to RCO 15 million in currency A (worth 10 million in currency B) in exchange for a 10-year note that pays 5 per cent interest annually. On the same day, RCO lends 10 million in currency B to SCO in exchange for a 10-year note that pays 5 per cent interest annually. RCO does not enter into a long-term hedging transaction with respect to these financing transactions, but manages the interest rate and currency risk arising from the transactions on a daily, weekly or quarterly basis by entering into forward currency contracts.

In this example, RCO appears to be carrying on a real business performing substantive economic functions, using real assets and assuming real risks; it is also performing significant activities with respect to the transactions with TCO and SCO, which appear to be typical of RCO's normal treasury business. RCO also appears to be bearing the interest rate and currency risk. Based on these facts and in the
例E：R国的上市公司RCo，是竞争激烈的科技领域的一个制造集团的持股公司。该制造集团通过其全球子公司进行研究活动，子公司所研制的所有专利都由子公司许可给RCo，然后再由RCo将专利许可给需要使用的子公司。RCo只留存其收到的特许权使用费的很小一部分，因此大部分收益都流向了承担开发相关技术的风险的子公司。TCo位于与R国没有税收协定的国家，开发了一个能够大大提高所有RCo子公司盈利能力的流程，包括S国居民企业SCo。根据一般操作，RCo会获取专利权并再许可给需要的子公司。SCo向RCo支付特许权使用费，最终几乎全部支付给TCo。

本案例中，并没有证据表明RCo建立其专利权的目的是为了降低在S国支付的税负，因为RCo已将其许可和再许可活动的架构遵守了其集团标准的商业组织和行为规范，且在位于拥有同样或更优惠的税收协定的国家从事类似活动的子公司采用了同样的架构，因此SCo、RCo及TCo之间的安排不被认定为逃税安排。

例F：T国居民企业TCo是一家上市公司。T国与R国之间不存在税收协定。TCo是一家全球性集团的母公司。R国居民企业RCo和S国居民企业SCo。SCo在S国进行积极的商业经营活动。RCo向TCo支付所有子公司的贷款。RCo为TCo及其子公司维护一套集中现金管理会计体系，记录了集团内所有的应收账款和应付交易。TCo负责集团子公司与非关联方之间的现金收支。为降低不相配的现金流流入和流出，RCo签订净额合同和外汇合同。TCo的行为旨在（且合理地预测）降低交易成本、管理费用及其他固定成本。RCo在R国拥有50名员工，包括办公室人员和后勤人员。员工人数反映了RCo的经营规模。TCo向RCo支付1500万现金货币A（等于1000万B货币），以获取年利率为5%的10年期债券。同一天，RCo以1000万现金货币B，换取年利率为5%的10年期债券。RCo并未就这些金融交易进行长期对冲交易，但通过远期外汇合同来管理每日、每周以及每季度交易的利率和货币风险。

在本例中，TCo看起来进行了真正的经营，承担了实质的经济功能，使用了真实的资产且承担了真实的经济；该公司在与TCo及SCo的交易中执行了重要活动，这些活动看起来也是TCo的正常资金工作。TCo看起来也承担利率和货币风险。在其他显示这些借款的主要目的之一是为了避免在S国缴纳预提税的事例证据缺失的情况下，根据以上事实可以认为，TCo给RCo的借款及RCo给SCo的借款不构成一项避税安排。
absence of other facts that would indicate that one of the principal purposes for these loans was the avoidance of withholding tax in State S, the loan from TCO to RCO and the loan from RCO to SCO do not constitute a conduit arrangement.

b) Other situations where a person seeks to circumvent treaty limitations

27. Apart from the requirement that a person be a resident of a Contracting State, other conditions must be satisfied in order to obtain the benefit of certain provisions of tax treaties. In certain cases, it may be possible to enter into transactions for the purposes of satisfying these conditions in circumstances where it would be inappropriate to grant the relevant treaty benefits. Although the general anti-abuse rule in subsection A.1(a)(ii) above will be useful in addressing such situations, targeted specific treaty anti-abuse rules generally provide greater certainty for both taxpayers and tax administrations. Such rules are already found in some Articles of the Model Tax Convention (see, for example, Articles 13(4) and 17(2)). In addition, the Commentary suggests the inclusion of other anti-abuse provisions in certain circumstances (see, for example, paragraphs 16 and 17 of the Commentary on Article 10). Other anti-abuse provisions are found in bilateral treaties concluded by OECD and non-OECD countries.

28. The following are examples of situations with respect to which specific treaty anti-abuse rules may be helpful and proposals for changes intended to address some of these situations.

i) Splitting-up of contracts

29. Paragraph 18 of the Commentary on Article 5 indicates that “[t]he twelve-month threshold [of Article 5(3)] has given rise to abuses; it has sometimes been found that enterprises (mainly contractors or subcontractors working on the continental shelf or engaged in activities connected with the exploration and exploitation of the continental shelf) divided their contracts up into several parts, each covering a period less than twelve months and attributed to a different company which was, however, owned by the same group.”

30. The addition to the OECD Model of the PPT rule included in this Report will help address this issue, as shown by example J of the Commentary on that rule. In addition, the Report on Action 7 (“Prevent the Artificial Avoidance of PE Status”) puts forward changes to the Commentary on Article 5 that will also deal with the issue.

ii) Hiring-out of labour cases

31. Hiring-out of labour cases, where the taxpayer attempts to obtain inappropriately the benefits of the exemption from source taxation provided for in Article 15(2), are dealt with in paragraphs 8.1 to 8.28 of the Commentary on Article 15. It was concluded that the guidance already found in these paragraphs, and in particular the alternative provision found in paragraph 8.3 of that Commentary, dealt adequately with this type of treaty abuse.

iii) Transactions intended to avoid dividend characterisation

32. In some cases, transactions may be entered into for the purpose of avoiding domestic law rules that characterise a certain item of income as a dividend and to benefit from a treaty characterisation of that income (e.g. as capital gain) that prevents source taxation.

1.2 其他试图规避协定限制的情形

27. 除了要求一个人必须为缔约国一方居民这个条件以外，若想取得税收协定下特定条款的优惠，还必须要满足其他条件。有时可能通过参与某些交易来满足协定的适用条件。在这种情况下授予相关税收协定优惠是不恰当的。尽管前述第1章第1.1.2节的一般反滥用条款可以帮助应对这些情形，有些针对性的反滥用协定的规定通常可以为纳税人和税务机关提供更多的确定性。这些规定可以在税收协定文本中的一些条款中找到（如第13条第（4）款和第17条第（2）款）。并且，本注释亦建议了包含其他特定情况的反滥用条款（如第10条的注释的第16、17段）。其他反滥用条款可以在OECD成员国和非OECD成员国的双边协定中找到。

28. 如何为特定协定反滥用规则可能可以适用的案例示例，和其他为应对此类情况的修订建议。

1.2.1 合同分割

29. 本注释第5条第18段表明了"12个月的门槛(第5条第(3)款)容易导致协定滥用。企业（主要在大陆架工作的或者参与大陆架勘探与开采的承包商或分包商）将其合同分成几个部分，每一部分的持续时间都小于12个月，且被分给不同的却由同一集团所拥有的公司。"

30. 在OECD文本中加入本报告中的PPT规则将帮助应对此问题，正如案例1中所示。此外，第7项行动计划的报告（"防止人为避免形成常设机构"）对第5条注释部分的修订亦可以应对此问题。

1.2.2 劳务外包案例

31. 在劳务外包案例中，纳税人试图适当地取得第15条第（2）款所规定的来源地税收的优惠，而文本对第15条注释的第8.1至第8.28段已经提出了应对措施。最后得出的结论是上述指导造成已经足够。尤其是该注释中第8.3段中的替代条款，可以充分应对这一类型的协定滥用。

1.2.3 试图避免被定义为股息的交易

32. 在一些情况下，纳税人会为了避免按照国内法的规定将某项收入定义为股息而做出某种安排，这种安排还可以利用协定对此项收入的定义（如定义为资本利用）而避免来源国征税从而获利。

33. 在研究混合错配安排的问题时，第一工作组曾考虑是否某些国家所做的那样，修订协定文本中股息和利息的定义，以允许适用国内法对某项收入定义的规定。尽管这种修订对混

---

**注释**

103页第16段
33. As part of its work on hybrid mismatch arrangements, Working Party 1 has examined whether the treaty definitions of dividends and interest could be amended, as is done in some treaties, in order to permit the application of domestic law rules that characterise an item of income as such. Although it was concluded that such a change would have a very limited impact with respect to hybrid mismatch arrangements, it was decided to further examine the possibility of making such changes after the completion of the work on the BEPS Action Plan.

iv) **Dividend transfer transactions**

34. In these transactions, a taxpayer entitled to the 15 per cent portfolio rate of Article 10(2)b) seeks to obtain the 5 per cent direct dividend rate of Article 10(2)a) or the 0 per cent rate that some bilateral conventions provide for dividends paid to pension funds (see paragraph 69 of the Commentary on Article 18).

35. Paragraphs 16 and 17 of the Commentary on Article 10 deal with transactions through which a taxpayer tries to access the lower rate of 5 per cent applicable to dividends:

16. Subparagraph a) of paragraph 2 does not require that the company receiving the dividends must have owned at least 25 per cent of the capital for a relatively long time before the date of the distribution. This means that all that counts regarding the holding is the situation prevailing at the time material for the coming into existence of the liability to the tax to which paragraph 2 applies, i.e. in most cases the situation existing at the time when the dividends become legally available to the shareholders. The primary reason for this resides in the desire to have a provision which is applicable as broadly as possible. To require the parent company to have possessed the minimum holding for a certain time before the distribution of the profits could involve extensive inquiries. Internal laws of certain OECD member countries provide for a minimum period during which the recipient company must have held the shares to qualify for exemption or relief in respect of dividends received. In view of this, Contracting States may include a similar condition in their conventions.

17. The reduction envisaged in subparagraph a) of paragraph 2 should not be granted in cases of abuse of this provision, for example, where a company with a holding of less than 25 per cent has, shortly before the dividends become payable, increased its holding primarily for the purpose of securing the benefits of the above-mentioned provision, or otherwise, where the qualifying holding was arranged primarily in order to obtain the reduction. To counteract such manoeuvres Contracting States may find it appropriate to add to subparagraph a) a provision along the following lines:

provided that this holding was not acquired primarily for the purpose of taking advantage of this provision.

36. It was concluded that in order to deal with such transactions, a minimum shareholding period should be included in subparagraph a) of Article 10(2), which should therefore be amended to read as follows:

a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividend);
合税负安排的影响可能十分有限，我们还是决定在 BEPS 其他行动计划的进展情况下进一步考虑
这些修订的可能性。

12.4 股息转移交易

34. 在这类交易中，适用范本协定第 10 条（2）款 b）项中 15%组合税率的纳税人，企 图
取得第 10 条（2）款 a）项中 5%的直接股息税率，或某些双边协定规定的适用于支付给 退休
基金的股息的 0%的税率（如第 18 条注释的第 69 段）。

35. 范本对第 10 条注释的第 16, 17 段用于应对纳税人尝试通过交易获取较低的 5%的股
息适用税率的情形。

16. 第 2 款 a）项没有要求接受股息的公司必须在股息分配前的相对长的一段时间内至少拥有 25%以上的资本。这意味着在实现第 2 款所述负有纳税义务时的股东的持有状况才
是关键，大多数情况下即指股东合法获得股息持股状况。这主要是为了使制定的条款能够更
广泛地被适用。如果要求母公司分配前一段时间内拥有最低限额的股份，则可能涉及大的调
查工作。某些 OECD 成员国国内法规定股息接收公司必须持有股份的最低期限，才能获得股
息上的免税或减税待遇。有鉴于此，缔约国双方在其协定中可加入类似条件。

17. 在适用本款规定的情形下不应给予第 2 款 a）项所规定的减税待遇。例如，主要
为了获得上述条款所给予的优惠，持股在 25%以下的公司在股息分配前的一段时间内
增加它在分配股息公司中的持股份额，或主要为了获得减税而安排好符合要求的股份
持有份额。为防止此类情形发生，缔约国可在 a）项中增加以下规定：

"以持股份额的取得的主要目的不是为了利用本项规定的优惠为限"。

36. 为了应对这样的交易，协定第 10 条（2）款 a）项中应包括一个最低持股期限，修
改后的文本表述如下：

a）如果受益所有人是一家在股息支付日之前的 365 天内（含股息支付日当天）直接持
有支付股息的公司至少 25%资本的公司（合伙企业除外），不应超过股息总额的 5%。
（为计算该时间段，不考 虑由企业重组，如并购或分立，直接导致的持有股权的公司
或支付股息的公司的所有权变更。）
37. It was also concluded that additional anti-abuse rules should be included in Article 10 to deal with cases where certain intermediary entities established in the State of source are used to take advantage of the treaty provisions that lower the source taxation of dividends.

38. For example, paragraph 67.4 of the Commentary on Article 10 includes an alternative provision that may be included to prevent access to

- the 5 per cent rate in the case of dividends paid by a domestic REIT to a non-resident portfolio investor, and
- both the 5 per cent and the 15 per cent rates in the case of dividends paid by a domestic REIT to a non-resident investor who holds directly or indirectly more than 10 per cent of the REIT's capital.

39. Another example, found in U.S. treaty practice, is a provision that denies the application of the 5 per cent rate in the case of dividends paid to a non-resident company by a U.S. Regulated Investment Company (RIC) even if that non-resident company holds more than 10 per cent of the shares of the RIC.

40. Based on these examples, where the domestic law of a Contracting State allows the possibility that portfolio investments in shares of companies of that State be made through certain collective investment vehicles which are established in that State and which do not pay tax on their investment income so that a non-resident investor in such a vehicle is able to access the lower treaty rate applicable to dividends with respect to distributions made by that collective investment vehicle, it is recommended that a specific anti-abuse rule be included in Article 10. Such a rule might be drafted along the following lines:

Subparagraph 2 a) shall not apply to dividends paid by a resident of [name of the State] that is a [description of the type of collective investment vehicle to which that rule should apply]

v) Transactions that circumvent the application of Article 13(4)

41. Article 13(4) allows the Contracting State in which immovable property is situated to tax capital gains realized by a resident of the other State on shares of companies that derive more than 50 per cent of their value from such immovable property.

42. Paragraph 28.5 of the Commentary on Article 13 already provides that States may want to consider extending the provision to cover not only gains from shares but also gains from the alienation of interests in other entities, such as partnerships or trusts, which would address one form of abuse. It was agreed that Article 13(4) should be amended to include such wording.

43. There might also be cases, however, where assets are contributed to an entity shortly before the sale of the shares or other interests in that entity in order to dilute the proportion of the value of these shares or interests that is derived from immovable property situated in one Contracting State. In order to address such cases, it was agreed that Article 13(4) should be amended to refer to situations where shares or similar interest derive their value primarily from immovable property at any time during a certain period as opposed to at the time of the alienation only.

44. The following revised version of paragraph 4 of Article 13 incorporates these changes:

4. 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 directly or
37. 为应对利用在收入来源国设立中间实体来降低股息预提税的情形，应在第 10 条中加入额外的反滥用规则。
38. 举例而言，协定范本第 10 条注释的第 67.4 段包含一个可选条款，可被加入以防止情形：
   在由一个国内房地产投资信托（Real Estate Investment Trust，REIT）向一个非居民证券投资人直接支付股息的情况下，适用 5%的税率，和
   在由一个国内房地产投资信托向一个直接或间接持有 10%以上房地产投资信托资本的非居民投资人支付股息的情况下，5%和 15%的税率均可适用。
39. 另一个在美国实践上找到的实例为，在由美国的受监管投资公司（Regulated Investment Company，RIC）向非居民投资人支付股息时，即使该非居民投资人持有该 RIC 超过 10%的股份，相关条款仍会拒绝适用 5%的税率。
40. 在缔约国内法允许的情况下，非居民投资人可以通过特定的建立在该缔约国的集合投资工具对该国公司的股份进行证券投资，从而非居民投资人所获取的由集合投资工具分配的股息就可以享受一个较低的协定税率，而这些集合投资工具无须在该国就其投资所得纳税。为了应对这些情况，建议在协定第 10 条中加入一项特殊的反滥用规则。此规则可根据如下起草：
   第 2 款 a) 项不应适用于由 [国家名称] [该规则适用的集合投资工具类型的描述] 非居民所支付的股息。
1.2.5 规避第 13 条第（4）款应用的交易
41. 如果缔约国一方居民转让其持有的公司股份获得了资本利得，而该公司超过 50%的股份价值来源位于缔约国另一方的不动产，则协定第 13 条第（4）款允许不动产所在地的缔约国另一方对该项资本利得征税。
42. 按照协定第 13 条注释的第 28.5 段已经提到，缔约国可能希望扩大条款所涵盖的范围，使其不仅限于股份转让的资本利得，还包括转让在其他实体中的权益的利得，如合伙企业的权益。这应是相关的具体的和明确的，目前一致同意对协定第 13 条第（4）款作出包含此类措施的修改。
43. 但是，还可能存在这样一种情形，即在实体的股份或其他权益被出售之前，将资产投入其中以稀释这些股份或权益来源位于缔约国一方的不动产价值的份额。为了应对这种情况，经过一致同意，协定第 13 条第（4）款应被修改为：在一段期间内的任意时点，而非仅在转让时，股份或类似权益的价值主要来源于不动产。
44. 下述第 13 条第（4）款的修订版本包含了这些变更：
   1. 转让一个公司股份或在—个合伙企业或其他实体权益取得的收益，如果在转让后的 365 天中的任意时点，该股份或类似权益超过 50%的价 值直接或间接地来源于于第 6
indirectly from immovable property, as defined in Article 6, situated in that other State may be taxed in that other State.

vi) Tie-breaker rule for determining the treaty residence of dual-resident persons other than individuals

45. One of the key limitations on the granting of treaty benefits is the requirement that a person be a resident of a Contracting State for the purposes of the relevant tax treaty. Under Article 4(1) of the OECD Model Tax Convention, the treaty residence of a person is dependent on the domestic tax laws of each Contracting State, which may result in a person being resident of both States. In such cases, Article 4(2) determines a single treaty residence in the case of individuals. Article 4(3), which does the same for persons other than individuals, provides that the dual-resident person "shall be deemed to be a resident only of the State in which its place of effective management is situated".

46. When this rule was originally included in the 1963 Draft Convention, the OECD Fiscal Committee expressed the view that "it may be rare in practice for a company, etc., to be subject to tax as a resident in more than one State" but because that was possible, "special rules as to the preference" were needed.

47. The 2008 Update to the OECD Model Tax Convention introduced an alternative version of Article 4(3) (see paragraphs 24 and 24.1 of the Commentary on Article 4) according to which the competent authorities of the Contracting States shall, having regard to a number of relevant factors, endeavour to determine by mutual agreement the State of which the person is a resident for the purposes of the Convention. When that alternative was discussed, the view of many countries was that cases where a company is a dual-resident often involve tax avoidance arrangements. For that reason, the current rule found in Article 4(3) should be replaced by the alternative found in the Commentary, which allows a case-by-case solution of these cases.

48. The following are the changes that will be made to the OECD Model Tax Convention in order to implement that decision (these changes take account of modifications that were made to the Commentary included in the first version of this Report released in September 2014):

Replace paragraph 3 of Article 4 of the Model Tax Convention by the following:

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated. The competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States.

Replace paragraphs 21 to 24.1 of the Commentary on Article 4 by the following:

21. This paragraph concerns companies and other bodies of persons, irrespective of whether they are or not legal persons. Cases where a company, etc. is subject to tax as a resident in more than one State may occur if, for instance, one State attaches importance to the registration and

条定义的位于缔约国另一方的不动产，可以在缔约国另一方征税或许可以在缔约国另一方征税。

1.2.6 确定双重居民身份拥有者（非个人）协定居民身份的加权规则

45. 享受协定优惠的主要限制之一是申请者必须是相关税收协定缔约国一方的居民。根据 OECD 税收协定范本第 4 条第（1）款，一个人的居民身份取决于各缔约国的国内税法，而各国的国内税法可能导致一个人同时成为两国的居民。在这种情况下，第 4 条第（2）款可用于确认个人在缔约下的居民身份，而第 4 条第（3）款，针对除个人以外的人，规定拥有双重居民身份的人"应被认为仅是实际管理机构所在地缔约国一方的居民"。

46. 该条规定最初被包含在 1963 年的协定范本草案中时，OECD 财政委员会认为："虽然在实践中一个公司等被作为一国以上的居住或征税的情况很少见"，但因之此情况可能发生的，关于优先性的特殊规定也是必要的。

47. OECD 税收协定范本 2008 年更新时提出了一个第 4 条第（3）款的可选版本（详见第 4 条注释的第 24.24.1 段）。根据该版本，缔约国双方主管当局，在考虑了一系列相关因素后，应尽力通过双边协商确定在协定目的下该人是哪个国家的居民。在讨论该可选条款时，很多国家认为出现有双重居民身份的公司通常会涉及避税安排。因此，有人提议，应启用范本注释中的允许具体情况具体分析的可选条款替代目前协定范本中的第 4 条第（3）款。

48. 下述修订将会加入 OECD 协定范本，以执行此决定（这些修订考虑了本报告 2014 年 9 月发布的第 1 版中对协定注释进行的修订）

将税收协定范本第 4 条第（3）款由如下取代：

3. 由于第 1 款的规定，除了个人以外，同时为缔约国双方居民的人，应被视为仅是实际管理机构所在地的缔约国一方的居民缔约国双方的主管当局，在考虑其实际管理场所以、其注册地或者成立地以及其他相关因素后，尽力通过双边协商确定该人在协定目的下是哪个缔约国的居民。若没有此类约定，则该人不应当被授予任何本协定所规定的企业减免或免负，除非经由缔约国双方主管当局同意。

将第 4 条注释的第 21—24.1 段由如下取代：

21. 此款适用于公司和其他团体，无论其是否为法人。举例而言，当缔约国一方注重注册登记而缔约国另一方注重实际管理场所，一个公司等被作为一国以上的居民征税

注：参见 1963 年的协定范本草案第 4 条注释的第 23 段。
the other State to the place of effective management. So, in the case of companies, etc., also, special rules as to the preference must be established.

22. When paragraph 3 was first drafted, it was considered that it would not be an adequate solution to attach importance to a purely formal criterion like registration and preference was given to a rule based on the place of effective management, which was intended to be based on where the company, etc., was actually managed.

23. The formulation of the preference criterion in the case of persons other than individuals was considered in particular in connection with the taxation of income from shipping, inland waterways transport and air transport. A number of conventions for the avoidance of double taxation on such income accord the taxing power to the State in which the "place of management" of the enterprise is situated; other conventions attach importance to its "place of effective management"; others again to the "fiscal domicile of the operator". In [2014], however, the Committee on Fiscal Affairs recognised that although situations of double residence of entities other than individuals were relatively rare, there had been a number of tax avoidance cases involving dual resident companies. It therefore concluded that a better solution to the issue of dual residence of entities other than individuals was to deal with such situations on a case-by-case basis.

24. As a result of these considerations, the current version of paragraph 3 provides that the competent authorities of the Contracting States shall endeavour to resolve by mutual agreement cases of dual residence of a person other than an individual, the "place of effective management" has been adopted as the preference criterion for persons other than individuals. The "place of effective management" is the place where key management and commercial decisions are necessary for the conduct of the entity's business as a whole and in substance made. All relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time.

24.1 Some countries, however, consider that cases of dual residence of persons who are not individuals are relatively rare and should be dealt with on a case-by-case basis. Some countries also consider that such a case-by-case approach is the best way to deal with the difficulties in determining the place of effective management of a legal person that may arise from the use of new communication technologies. These countries are free to leave the question of the residence of these persons to be settled by the competent authorities, which can be done by replacing the paragraph by the following provision:

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting State.

Competent authorities having to apply paragraph 3 such a provision to determine the residence of a legal person for purposes of the Convention would be expected to take account of various factors, such as the meetings of the person's board of directors or equivalent body are usually held, where the chief executive officer and other senior executives usually carry on their activities, where the senior day-to-day management of the person is carried on, where the
的情形就有可能出现。因此，在这些情况下，有必要建立关于优先权的特殊规定。

22. 最初起草第3款时，考虑到重视登记注册这样繁琐形式上的标准，不是解决冲突的适当方案。因此实际管理机构的标准，即基于第三款较注重公司等的管理管理的地点的地点的标准，获得了青睐。

23. 在规定适用于除个人以外的人的优先标准方面，特别考虑到对航运、内河运输以及运输的所得税，以及相当多的避免双重征税协定把这项所得的所得税给予企业“实际管理机构所在地”国家，其他一些协定倾向于企业的“实际管理机构所在地”。一些协定倾向于“经常性的财产所在地”，但是在[2014年]，税务委员会意识到虽然个人以外的实体具有双重居民身份的情况相对较少，但仍有大量的避税案例涉及双重居民身份问题。因此，得出结论认为，一个针对除个人以外的双重居民身份问题的更好解决办法是以具体情形具体分析为基础的进行处理。

24. 基于这些考量，第3款现行的版本规定：缔约国双方的主管当局可通过双边协定确认适用于个人以外的人的双重居民身份问题。实际管理机构所在地是指企业实体的营业实施必不可少的关键性管理与商业决策的实质性地点。所有相关事实与情况都必须被考虑以决定实际管理机构所在地。一个实体可能有多个管理机构所在地，但在任何时候只可能有实际管理机构所在地。

24.1 但是，一些国家认为个人以外的人出现双重居民身份的情况相对较少，应以具体情形具体分析的方法来处理。一些国家认为，这种具体情形具体分析的方法应是解决国使用新型通信技术而带来的判断一个法人实际管理机构所在地的困难的最好方式，这些国家可选择将这些人的居民身份问题留给主管当局来解决。

--通过上述可选条款--

由于第一条的规定，除了个人以外，同时为缔约国双方居民的人，应被认为其实际管理机构所在地的缔约国一方的居民。缔约国双方的主管当局应在考虑其实际管理场所、其注册地或成立地以及其他相关因素后，决定通过双边协定确认的人在协定目的下是哪个缔约国的居民。若没有此类协定，纳税人不应被授予任何协定所规定的税收减免或免除。除非：缔约国双方主管当局同意一定程度和形式的优惠。

主管当局应用第3款此条款以决定本协定目的下法人的居民身份无需考虑不同点：比如该人其董事会或类似机构经常在哪里举行会议，其首席执行官和其他高级管理人员通常在那里履行职责，其日常高层管理在哪里进行，其总部位于哪里，哪个国家的法律管辖其法律状态，其会计记录保存在哪里，以及是否判定该法人为协定目的
person's headquarters are located, which country's laws govern the legal status of the person, where its accounting records are kept, whether determining that the legal person is a resident of one of the Contracting States but not of the other for the purpose of the Convention would carry the risk of an improper use of the provisions of the Convention etc. Countries that consider that the competent authorities should not be given the discretion to solve such cases of dual residence without an indication of the factors to be used for that purpose may want to supplement the provision to refer to these or other factors that they consider relevant. [The next sentence has been moved to new paragraph 24.2: the last sentence of the paragraph has been moved to new paragraph 24.3.]

24.2 Also, since the A determination under paragraph 3 application of the provision would normally be requested by the person concerned through the mechanism provided for under paragraph 1 of Article 25, the Such a request may be made as soon as it is probable that the person will be considered a resident of each Contracting State under paragraph 1. Due to the notification requirement in paragraph 1 of Article 25, it should in any event be made within three years from the first notification to that person of taxation measures taken by one or both States that indicate that reliefs or exemptions have been denied to that person because of its dual-residence status without the competent authorities having previously endeavoured to determine a single State of residence under paragraph 3. The competent authorities to which a request for determination of residence is made under paragraph 3 should deal with it expeditiously and should communicate their response to the taxpayer as soon as possible.

24.3 Since the facts on which a decision will be based may change over time, the competent authorities that reach a decision under that provision should clarify which period of time is covered by that decision.

24.4 The last sentence of paragraph 3 provides that in the absence of a determination by the competent authorities, the dual-resident person shall not be entitled to any relief or exemption under the Convention except to the extent and in such manner as may be agreed upon by the competent authorities. This will not, however, prevent the taxpayer from being considered a resident of each Contracting State for purposes other than granting treaty reliefs or exemptions to that person. This will mean, for example, that the condition in subparagraph b) of paragraph 2 of Article 15 will not be met with respect to an employee of that person who is a resident of either Contracting State exercising employment activities in the other State. Similarly, if the person is a company, it will be considered to be a resident of each State for the purposes of the application of Article 10 to dividends that it will pay.

24.52 Some States, however, consider that it is preferable to deal with cases of dual residence of entities through the rule based on the "place of effective management" that was included in the Convention before [next update]. These States also consider that this rule can be interpreted in a way that prevents it from being abused. States that share that view and that agree on how the concept of "place of effective management" should be interpreted are free to include in their bilateral treaty the following version of paragraph 3:

Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, it shall be deemed to be a resident of the State in which its place of effective management is situated.

vii) Anti-abuse rule for permanent establishments situated in third States

49. Paragraph 32 of the Commentary on Article 10, paragraph 25 of the Commentary on Article 11 and paragraph 21 of the Commentary on Article 12 refer to potential abuses that may result from the transfer of shares, debt-claims, rights or property to permanent establishments set up solely for that purpose in countries that offer preferential treatment to the income from such assets. Where the State of residence
下缔约国一方而非另一方的居民带来协定等条款不适用的风险等。如有国家认为主管当局在缺乏判断因素指引的情况下，不应被赋予裁量权来解决双重居民身份问题，则这些国家可以将上述这些或其他其认为相关的因素补充至该条款中。[下一句话被移到新的24.2段中；本段最后一句话被移动至新的24.3段中]

24.2 同时，由于基于第3款的条款应用做出的决定将要求当事人通过第25条第1段所提的机制来提交请求。只要该人根据第1款有可能被认定为是缔约国一方的居民，该请求就有可能被提交。此外，由于第25条第1款中的通知要求，在无特定情况下，此人在第一次收到缔约国一方或双方的表明由于其同时被视为缔约国双方居民且此前没有主管当局尽力根据第3款确定其居民国从而致使其无法享受税收减免或免除的通知的三年内，提出上述请求。

24.3 由于决定所基于的事实会随着时间而变化，根据该条款做出决定的主管当局应澄清此决定所覆盖的时间范围。

24.4 第3款最后一句话规定了当缔约国主管当局未做出决定的情况下，双重居民身份的人不应享受任何协定所规定的减免或免除，除非获得主管当局的同意。但是这不会阻止此人在协定下作出除授予协定减免或免除之外的目的被认定为缔约国一方的税收居民。这意味着第15条第2款b)项的要求无法被一个雇佣可以是缔约国任意一方居民的人且在缔约国另一方开展雇佣活动的雇主所满足。同样，若该公司为该公司将支付的股息申请协定第10条待遇时，此公司将被认为是缔约国任意一方的居民。

24.5 但是，一些国家更倾向于利用基于包含在2014年前的协定范围的“实际管理机构所在地”的规定，来处理实体双重居民身份问题。这些国家还认为可以利用该规定的一种解释方式来防止其被滥用。持此观点的国家实行“实际管理机构所在地”的概念解释达成共识的国家可以选择将如下版本的第3款包含在其双边协定中：

由于第一款的规定，除个人以外，同时为缔约国双方居民的人，应被认为是实际管理机构所在地缔约国一方的居民。

1.2.7 针对位于第三国的常设机构的反滥用规则

49. 第10条注释第32段、第11条注释第25段、以及第12条注释第21段涉及了潜在的滥用，这些滥用可能由将股份、债权、权利或财产转让给一个常设机构，而该常设机构
exempts, or taxes at low rates, profits of such permanent establishments situated in third States, the State of source should not be expected to grant treaty benefits with respect to that income.

50. The last part of paragraph 71 of the Commentary on Article 24 deals with that situation and suggests that an anti-abuse provision could be included in bilateral conventions to protect the State of source from having to grant treaty benefits where income obtained by a permanent establishment situated in a third State is not taxed normally in that State:

71. ... Another question that arises with triangular cases is that of abuses. If the Contracting State of which the enterprise is a resident exempts from tax the profits of the permanent establishment located in the other Contracting State, there is a danger that the enterprise will transfer assets such as shares, bonds or patents to permanent establishments in States that offer very favourable tax treatment, and in certain circumstances the resulting income may not be taxed in any of the three States. To prevent such practices, which may be regarded as abusive, a provision can be included in the convention between the State of which the enterprise is a resident and the third State (the State of source) stating that an enterprise can claim the benefits of the convention only if the income obtained by the permanent establishment situated in the other State is taxed normally in the State of the permanent establishment.

51. It was concluded that a specific anti-abuse provision should be included in the Model Tax Convention to deal with that and similar triangular cases where income attributable to the permanent establishment in a third State is subject to low taxation.

52. Of the provision and related Commentary included below, which were intended to be used for that purpose, were included in the first version of this Report that was released in September 2014. Subsequent work, however, revealed that changes were required with respect to different aspects of that provision. At the end of May 2015, the United States released a new version of a similar provision for public comments to be sent by 15 September 2015. When that new version was discussed, it was agreed that it should be further examined once finalised by the United States in the light of the comments that will be received on it. For that reason, the provision below and its Commentary will need to be reviewed and the final version of the provision and its Commentary will therefore be produced in the first part of 2016, which will allow the new provision to be considered as part of the negotiation of the multilateral instrument that will implement the results of the work on treaty issues mandated by the BEPS Action Plan. The following should therefore be considered as a draft subject to changes:

<table>
<thead>
<tr>
<th>Where</th>
</tr>
</thead>
</table>
a) an enterprise of a Contracting State derives income from the other Contracting State and such income is attributable to a permanent establishment of the enterprise situated in a third jurisdiction, and
b) the profits attributable to that permanent establishment are exempt from tax in the first-mentioned State
the tax benefits that would otherwise apply under the other provisions of the Convention will not apply to any item of income on which the tax in the third jurisdiction is less than 60 per cent of the tax that would be imposed in the first-mentioned State if the income were earned or received in that State by the enterprise and were not attributable to the permanent establishment in the third jurisdiction. In such a case

仅为获得其所在国家对此类财产所提供的优惠待遇而设立。如果居民国免除或以低税率征收位于第三国的此类常设机构的所得，来源国不应再对该所得授予协定优惠。

50. 第 24 条注释的第 71 段的最后部分涉及了该情况并建议在双边协定中包含一个反滥用条款，用以防止所得来源国不得不给予位于第三国且通常无须在第三国纳税的常设机构协定优惠的情况。

71. ……在三角情形中产生的另一个问题为滥用。如果企业为其居民的缔约国对位于缔约国另一方的常设机构的所得不征税，存在着一个危险情况是：企业会将其资产如股份、债券或专利转移至位于提供非常有利的税收待遇的国家的常设机构，并且在特定情况下，所产生的收入可能不会在一个国家中的任何一个国家被征税。为了防止这种被视为滥用的做法，企业所在的居住国与第三国（所得来源国）的协定中可以包含一个条款，要求只在一个企业位于另一国家的常设机构所取得的所得在常设机构所在国被正常征税的情况下，该企业才申请协定优惠。

51. 得出结论认为应在税收协定成本中加入一个特殊的反滥用条款，以应对此种归属于第三国常设机构的所得适用低税率的三角和类似情形。

82. 以下条款及后附注释即为上述目的所起草。在报告 2014 年 9 月所发布的第 1 版中已经有包含。但是，后续的工作显示，需要对此条款的不同方面进行修订。在 2015 年 5 月底，美国发布了类似条款的新规则，该公开征求公众意见，截止日期为 2015 年 9 月 15 日。在对这些美国的新条款进行讨论时，各方同意在美国根据对征求意见的意见将这些条款定稿后，应对这些条款进行进一步审议。因此，上述条款及后附注释需要被进一步审阅，最终版预计于 2016 年上半年完成，从而允许新条款作为多边工具谈判的一部分被考虑。多边工具将执行 BEPS 行动计划批准的关于税收协定事项的工作。下列部分应被视为草案，后续将有改动。

[当]

a)缔约国一方的企业从缔约国另一方取得所得，且该所得归属于位于第三国的常设机构，同时

b)归属于该常设机构的利润在上述第一个提到的缔约国一方不征税在缔约国一方企业在该缔约国获取或收取任何所得且该所得不归属于位于第三国的常设机构的情况下，在该所得在第三国应纳税额小于第一个缔约国应征税收额的 60%时，协定范本中可适用的其他条款下的税收优惠待遇将不再适用。这样的情形下，

---

c) any dividends, interest, or royalties to which the provisions of this paragraph apply shall remain taxable according to the domestic law of the other State but the tax charged in that State shall not exceed [rate to be determined] per cent of the gross amount thereof, and

d) any other income to which the provisions of this paragraph apply shall remain taxable according to the domestic law of the other State, notwithstanding any other provision of the Convention.

The preceding provisions of this paragraph shall not apply if the income derived from the other State is

e) derived in connection with or is incidental to the active conduct of a business carried on through the permanent establishment (other than the business of making, managing or simply holding investments for the enterprise's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance enterprise or registered securities dealer, respectively), or

f) royalties that are received as compensation for the use of, or the right to use, intangible property produced or developed by the enterprise through the permanent establishment.

Commentary on the provision

1. As mentioned in paragraph 32 of the Commentary on Article 10, paragraph 25 of the Commentary on Article 11 and paragraph 21 of the Commentary on Article 12, potential abuses may result from the transfer of shares, debt-claims, rights or property to permanent establishments set up solely for that purpose in countries that do not tax such investment income or offer preferential treatment to the income from such assets. Where the State of residence exempts the investment income of such permanent establishments situated in third States, the State of source should not be expected to grant treaty benefits with respect to such income. The proposed paragraph, which applies where a Contracting State exempts the investment income of enterprises of that State that are attributable to permanent establishments situated in a third State, provides that treaty benefits will not be granted in such cases. That rule does not apply to profits that are derived in connection with, or that are incidental to, the active conduct of a business through the permanent establishment, excluding an investment business that is not carried on by a bank, insurance enterprise or securities dealer; it also does not apply if the income received from the State of source constitutes royalties received as compensation for the use of, or the right to use, intangible property produced or developed by the enterprise through the permanent establishment.

2. In any case where benefits are denied under this paragraph, the enterprise that derives the relevant income should have access to the discretionary relief provision of paragraph 5 of Article [X] in order to ensure that benefits may be granted where the establishment, acquisition or maintenance of the permanent establishment and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under this Convention. This result could be achieved by including this provision into Article [X].

3. Some States may prefer a more comprehensive solution that would not be restricted to situations where an enterprise of a Contracting State is exempt, in that State, on the profits attributable to a permanent establishment situated in a third State. In such a case, the provision would be applicable in any case where income derived from one Contracting State that is attributable to a permanent establishment situated in a third State is subject to combined taxation, in the State of the enterprise and the State of the permanent establishment, at an effective rate that is less than the 60 per cent threshold. The following is an example of a provision that could be used for that purpose:
c)任何适用本条款的股息、利息或股息权使用费仍需根据缔约国另一方的国内法征税，但是在缔约国另一方缴纳的税款不超过所得的百分之[税率待定]。

d)适用本条款的其他类型的所得，虽有本协定其他条款，仍应根据缔约国另一方的国内法征税。

从缔约国另一方取得的所得符合以下情况的，上述条款不再适用：

e)企业在缔约国另一方设立的常设机构，其取得的所得与该常设机构在该缔约国另一方进行的营业活动有关或附属于该营业活动（不包括企业自身投资的开展、管理以及持有的情况，除非这些活动是银行、保险公司或证券经纪商分别从事的银行业务、保险业务或证券业务），或

f)为了使用或有权使用企业通过常设机构生产或开发的无形资产所支付的作为报酬的特许权使用费。

条款注释

1. 如第10条注释第22段、第11条注释第25段、第12条注释第21段所述，将股息、债务、权利或财产转移给为滥用协定目的设立在对相关投资所得不征税或给予税收优惠的国家的常设机构，可能会产生潜在的协定滥用的情况。在居住国对位于第三国的常设机构的投资收益免于征税时，所得来源国不应对该笔收益给予税收优惠。此条款规定，当缔约国一方的居民企业获得投资收益，此收益归属于位于第三方国家的常设机构，且缔约国对此收益不征税的情况，税收协定待遇不应在此适用。此规则适用于与常设机构直接利益活动相关或附属于该营业活动取得的所得，非银行、保险或证券类企业从事的投资活动除外，该规则也不适用于从所得来源国获得的所得构成使用或有权使用企业通过常设机构生产或开发的无形资产所支付的作为报酬的特许权使用费。


3. 一些国家可能倾向于更全面的解决方式，而不只限于当缔约国一方的企业获得归属于其位于第三国的常设机构的所得时在该缔约国一方免于征税的情况。因此，本条款同样适用于从缔约国一方取得的归属于其位于第三国的常设机构的所得被企业所在国和常设机构所在国征税，但合并的实际税率低于60%限额。下列是可被采用的示范规定：
Notwithstanding the other provisions of this Convention, where an enterprise of a Contracting State derives income from the other Contracting State and that income is attributable to a permanent establishment of that enterprise that is situated in a third State, the tax benefits that would otherwise apply under the other provisions of this Convention will not apply to that income if the profits of that permanent establishment are subject to a combined aggregate effective rate of tax in the first-mentioned Contracting State and third State that is less than 60 percent of the general rate of company tax applicable in the first-mentioned Contracting State. Any dividends, interest or royalties to which the provisions of this paragraph apply shall remain taxable in the other Contracting State at a rate that shall not exceed 15 percent of the gross amount thereof. Any other income to which the provisions of this paragraph apply shall remain taxable according to the laws of the other Contracting State notwithstanding any other provision of this Convention. The provisions of this paragraph shall not apply if:

a) in the case of royalties, the royalties are received as compensation for the use of, or the right to use, intangible property produced or developed by the enterprise through the permanent establishment; or

b) in the case of any other income, the income derived from the other Contracting State is derived in connection with, or is incidental to, the active conduct of a business carried on in the third State through the permanent establishment (other than the business of making, managing or simply holding investments for the enterprise's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance enterprise or registered securities dealer, respectively).

2. Cases where a person tries to abuse the provisions of domestic tax law using treaty benefits

Many tax avoidance risks that threaten the tax base are not caused by tax treaties but may be facilitated by treaties. In these cases, it is not sufficient to address the treaty issues: changes to domestic law are also required. Avoidance strategies that fall into this category include:

- Thin capitalisation and other financing transactions that use tax deductions to lower borrowing costs;
- Dual residence strategies (e.g., a company is resident for domestic tax purposes but non-resident for treaty purposes);
- Transfer mispricing;
- Arbitrage transactions that take advantage of mismatches found in the domestic law of one State and that are
  - related to the characterization of income (e.g., by transforming business profits into capital gain) or payments (e.g., by transforming dividends into interest);
  - related to the treatment of taxpayers (e.g., by transferring income to tax-exempt entities or entities that have accumulated tax losses; by transferring income from non-residents to residents);
  - related to timing differences (e.g., by delaying taxation or advancing deductions).
- Arbitrage transactions that take advantage of mismatches between the domestic laws of two States and that are
  - related to the characterization of income;
  - related to the characterization of entities;
虽然本协定其他条款的规定，当位于缔约国一方的企业从缔约国另一方取得所得，且该所得归属于其位于第三方国家的常设机构的情况下，若该所得在缔约国一方和第三方国家的累计实际税率低于缔约国一方适用的一般企业所得税税率的60%，原本基于其他条款可以适用的税收协定待遇将不再适用。任何适用本款规定的股息、利息或特许权使用费仍然需要根据缔约国另一方的国内法征税，但是应缴纳的税款不应超过所得总额的15%。适用本款规定的其他类型的所得，虽有本协定其他条款的规定，仍然需要根据缔约国另一方的国内法征税。以下情况不适用本款规定：

A. 特许权使用费——为了使用或有偿使用企业通过常设机构生产或开发的无形资产所支付的作为报酬的特许权使用费，或者

B. 其他所得——企业在缔约国另一方设有的常设机构，其取得的所得与该常设机构在该缔约国另一方进行的积极经营活动相关或附属于该经营活动（不包括企业自身投资的开展，管理以及持有的情况，除非这些活动是银行、保险公司或注册证券交易商分别从事的银行业务、保险业务或证券交易）。

2. 试图利用协定以滥用国内税法规定的情形

1. 许多导致税基的逃税风险并不是直接由税收协定导致的，而是税收协定可能起了辅助作用。在这些情况下，仅解决税收协定问题是不够的：对国内法的修订也是必要的。避税策略包括：

   - 资本避税和其他利用税前扣除降低融资成本的融资交易；
   - 双重居民身份安排（比如，一个公司属于国内税法规定的税收居民，但不是税收协定意义上的税收居民）；
   - 不合理的转让定价；
   - 利用下述一国国内法内不匹配的规定进行套利交易：
     - 关于所得或支付类型的规定（例如，将商业利润转换为资本利得或将股息转换为利息）；
     - 关于纳税人的待遇的规定（例如，将所得转移给免税的实体或有累计亏损的实体；将所得从非居民企业转移给居民企业）；
     - 关于时间性差异的规定（例如，递延付款或加速扣除）。
   - 利用下述两国国内法之间规定不匹配的情况进行套利交易：
     - 关于所得或支付类型的规定；
     - 关于实体类型的规定；
related to timing differences.

- Transactions that abuse relief of double taxation mechanisms (by producing income that is not taxable in the State of source but must be exempted by the State of residence or by abusing foreign tax credit mechanisms).

54. The work on other aspects of the Action Plan, in particular Action 2 (Neutralise the effects of hybrid mismatch arrangements), Action 3 (Strengthen CFC rules), Action 4 (Limit base erosion via interest deductions and other financial payments) and Actions 8, 9 and 10 dealing with Transfer Pricing has addressed many of these transactions. The main objective of the work aimed at preventing the granting of treaty benefits with respect to these transactions is to ensure that treaties do not prevent the application of specific domestic law provisions that would prevent these transactions. Granting the benefits of these treaty provisions in such cases would be inappropriate to the extent that the result would be the avoidance of domestic tax. Such cases include situations where it is argued that

- Provisions of a tax treaty prevent the application of a domestic GAAR;
- Article 24(4) and Article 24(5) prevent the application of domestic thin-capitalisation rules;
- Article 7 and/or Article 10(5) prevent the application of CFC rules;
- Article 13(5) prevents the application of exit or departure taxes;
- Article 24(5) prevents the application of domestic rules that restrict tax consolidation to resident entities;
- Article 13(5) prevents the application of dividend stripping rules targeted at transactions designed to transform dividends into treaty-exempt capital gains;
- Article 13(5) prevents the application of domestic assignment of income rules (such as grantor trust rules).

55. The Commentary on the Articles of the OECD Model already addresses a number of these issues. For instance, it deals expressly with CFC rules (paragraph 23 of the Commentary on Article 1 provides that treaties do not prevent the application of such rules). It also refers to thin capitalisation rules (paragraph 3 of the Commentary on Article 9 suggests that treaties do not prevent the application of such rules "insofar as their effect is to assimilate the profits of the borrower to an amount corresponding to the profits which would have accrued in an arm's-length situation"). It does not, however, address a number of other specific domestic anti-abuse rules.

56. Paragraphs 22 and 22.1 of the Commentary on Article 1 provide a more general discussion of the interaction between tax treaties and domestic anti-abuse rules. These paragraphs conclude that a conflict would not occur in the case of the application of certain domestic anti-abuse rules to a transaction that constitutes an abuse of the tax treaty:

22. Other forms of abuse of tax treaties (e.g. the use of a base company) and possible ways to deal with them, including "substance-over-form", "economic substance" and general anti-abuse rules have also been analysed, particularly as concerns the question of whether these rules conflict with tax treaties […]

16. Under the principles of public international law, as codified in Articles 26 and 27 of the Vienna Convention on the Law of Treaties (VCLT), if the application of a domestic anti-abuse rule has the effect of allowing a State that is party to a tax treaty to tax an item of income that that State is not allowed to tax under the provisions of the treaty, the application of the domestic anti-abuse rule would conflict with the provisions of the treaty and these treaty provisions should prevail.
关于时间性差异的规定。

滥用双重征税减免制度的交易（取得在所得来源国不征税且可在居住国免于征税的所有或滥用境外税收抵免制度）。

2. 许多这类交易已通过行动计划的其他方面来解决，特别是第 2 项行动计划（消除混合错配安排的影响）、第 3 项行动计划（加强受控外国企业类型）、第 4 项行动计划（限制通过利息扣除和其他财务支付而进行的税务侵蚀）、以及处理转让定价问题的第 8、9、10 项行动计划。防止此类交易中授予税收协定优惠待遇的主要目标是，保证税收协定不会妨碍国内法下阻止此类交易的相关规定的适用。在一些情形下，如将税收协定优惠待遇不恰当地授予时，将会导致国内税收的规避。部分观点认为此类情形包括：

- 税收协定条款导致国内 GAAR 相关规则的不适用；
- 第 24 条第（4）款和第 24 条第（5）款导致国内资本弱化规则的不适用；
- 第 7 条第（2）款第 10 条第（5）款导致受控外国企业规则的不适用；
- 第 13 条第（5）款导致退出或离境税的不适用；
- 第 24 条第（5）款导致限制税收居民实体合并纳税的国内法规定的不适用；
- 第 13 条第（5）款导致针对旨在避免将股息转成协定下予以免税的资本利得的股息剥离规则的不适用；
- 第 13 条第（5）款导致国内所得分配规则的不适用（如委托人信托规则）。

OEC 税收协定范本注释已经解决了一些问题。比如，注释明确定了受控外国企业的规则（协定范本第 1 条注释第 23 段规定，税收协定并不排除该规则的适用）。其他包括了资本弱化规则（协定范本第 9 条注释第 3 段规定，"只要债权人的收益符合独立交易原则"，税收协定并不排除该规则的适用）。但是，仍有很多国内法下其他反避税规则未被提及。

4. 第 1 条注释的第 22 段和第 22.1 段对税收协定和国内反避税规则之间的相互作用关系进行了一般性讨论。这些段落得出结论，当在构成税收协定适用的交易中适用特定国内反避税条款时，将不会产生冲突。

22. 其他滥用税收协定的形式（比如基础公司的使用）以及可能的针对性的解决方式，包括“实质重于形式”、“经济实质”以及一般反避税规则。也已进行分析，特别是关于这些规则与税收协定是否冲突的问题。

在国际公法原则下，按照维也纳条约法公约（VCLT）第 26 条和第 27 条的定义，若国内反避税条款的适用会导致税收协定的缔约国对一项根据税收协定在协定国无征税权的收入征税，国内法的反避税条款将与税收协定的条款相冲突，税收协定的条款应优先适用。
22.1 Such rules are part of the basic domestic rules set by domestic tax laws for determining which facts give rise to a tax liability; these rules are not addressed in tax treaties and are therefore not affected by them. Thus, as a general rule and having regard to paragraph 9.5, there will be no conflict. [...] 

57. Paragraph 9.5 of the Commentary on Article 1 offers the following guidance as to what constitutes an abuse of the provisions of a tax treaty:

A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions.

58. As indicated in subsection A.1, a new general anti-abuse rule that will incorporate the principle already recognised in paragraph 9.5 of the Commentary on Article 1 will be included in the OECD Model. The incorporation of this principle into tax treaties will provide a clear statement that the Contracting States want to deny the application of the provisions of their treaty when transactions or arrangements are entered into in order to obtain the benefits of these provisions in inappropriate circumstances. The incorporation of this principle into a specific treaty provision does not modify, however, the conclusions already reflected in the Commentary on Article 1 concerning the interaction between treaties and domestic anti-abuse rules; such conclusions remain applicable, in particular with respect to treaties that do not incorporate the new general anti-abuse rule.

59. The following revised version of the section on “Improper use of the Convention” currently found in the Commentary on Article 1 will reflect that conclusion and will better articulate the relationship between domestic anti-abuse rules and tax treaties:

**Improper use of the Convention**

7. The principal purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons. As confirmed in the preamble of the Convention, it is also part of the purposes of tax conventions to prevent tax avoidance and evasion.

8. The extension of the network of tax conventions increases the risk of abuse by facilitating the use of arrangements aimed at securing the benefits of both the tax advantages available under certain domestic laws and the reliefs from tax provided for in these conventions.

9. This would be the case, for example, if a person (whether or not a resident of a Contracting State), acts through a legal entity created in a State essentially to obtain treaty benefits that would not be available directly. Another case would be an individual who has in a Contracting State both his permanent home and all his economic interests, including a substantial shareholding in a company of that State, and who, essentially in order to sell the shares and escape taxation in that State on the capital gains from the alienation (by virtue of paragraph 5 of Article 13), transfers his permanent home to the other Contracting State, where such gains are subject to little or no tax.

**Addressing tax avoidance through tax conventions**

10. Paragraph 7 of Article [X] (the PPT rule) and the specific treaty anti-abuse rules included in tax conventions are aimed at these and other transactions and arrangements entered into for the purpose of obtaining treaty benefits in inappropriate circumstances. (rest of previous paragraph 1 has been moved to paragraph 19) Where, however, a tax convention does not include such rules, the question may arise whether the benefits of the tax convention should be
22.1 这些规则是国内法下基本规则的一部分，旨在确保产生纳税义务的事实；这些规则并未包含在税收协定中，从而并不被税收协定影响。因此，作为一项基本规则且考虑到9.5段相关规定，将不会出现冲突。[……]

5. 范本第1条注释第9.5段就何为构成税收协定条款的滥用提供了以下指引:

指导意见是，若一项交易或安排的主要目的是获得更优惠的税收待遇，且获得该优惠待遇与相关条款的宗旨与目的相违背，则双边税收协定的优惠待遇不应适用。

6. 如第1章第1节所述，在OECD范本中会设立一条新的特殊性反滥用条款，该条款将融合范本第1条注释第9.5段中说明的原则。将该原则纳入税收协定将会清晰地表明，当交易或安排是为了以不恰当的方式享受税收协定优惠待遇的情况下，缔约国希望否定税收协定的适用。然而，将该原则引入具体的税收协定条款中，并不会改变范本第1条注释关于税收协定和国内反滥用条款之间关系的结论，即税收协定中未引入该新的一种性反滥用条款的情况下，这项结论依然适用。

7. 目前在第1条注释中对“滥用滥用”的修订将反映这一结论，并且更好地阐明国内反滥用规则和税收协定的关系。

协定滥用

7. 税收协定的主要目的是通过消除国际双重征税，促进商品服务交易以及资本和人员的流动，正如协定前言中确认的，防止偷税税也是协定的部分目的。

8. 税收协定网络的扩张增加了滥用风险，这种扩张给利用旨在取得国内法律和税收协定下的税收优惠的安排带来了便利。

9. 比如下列情况，个人（无论是否为缔约国的居民纳税人）通过在一国设立法律主体以获得其不能直接享受的协定优惠。另一种情况是在缔约国拥有永久住所和全部经济收益，包括持有该公司大量股份的个人，为了逃避其在该国出售股份需缴纳的资本利得税（根据第13条第5款），将其永久住所转移到对这类收益征轻税甚至不征税的国家。

通过税收协定解决避税问题

10. 第X条第7款[关于规则]及在税收协定中防止税收协定滥用特殊规则，针对的是旨在在不适当环境下取得税收协定优惠的此类及其他交易。[过去的第1段中的剩余部分已被移至第19段] 然而当税收协定不包含此类规则时，可能出现交易构成滥用协定条款时是否应给予税收协定优惠的问题。
granted when transactions that constitute an abuse of the provisions of that convention are entered into.

11. Many States address that question by taking account of the fact that taxes are ultimately imposed through the provisions of domestic law, as restricted (and in some rare cases, broadened) by the provisions of tax conventions. Thus, any abuse of the provisions of a tax convention could also be characterised as an abuse of the provisions of domestic law under which tax will be levied. For these States, the issue then becomes whether the provisions of tax conventions may prevent the application of the anti-abuse provisions of domestic law, which is the question addressed in paragraphs 19 to 26.8 below. As explained in these paragraphs, as a general rule, there will be no conflict between such rules and the provisions of tax conventions.

12. Other States prefer to view some abuses as being abuses of the convention itself, as opposed to abuses of domestic law. These States, however, then consider that a proper construction of tax conventions allows them to disregard abusive transactions, such as those entered into with the view to obtaining unintended benefits under the provisions of these conventions. This interpretation results from the object and purpose of tax conventions as well as the obligation to interpret them in good faith (see Article 31 of the Vienna Convention on the Law of Treaties).

13. Under both approaches, therefore, it is agreed that States do not have to grant the benefits of a double taxation convention where arrangements that constitute an abuse of the provisions of the convention have been entered into.

14. It is important to note, however, that it should not be lightly assumed that a taxpayer is entering into the type of abusive transactions referred to above. A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions. That principle applies independently from the provisions of paragraph 7 of Article [X] [the PPT rule], which merely confirm it.

15. The potential application of these principles or of paragraph 7 of Article [X] does not mean that there is no need for the inclusion, in tax conventions, of specific provisions aimed at preventing particular forms of tax avoidance. Where specific avoidance techniques have been identified or where the use of such techniques is especially problematic, it will often be useful to add to the Convention provisions that focus directly on the relevant avoidance strategy. Also, this will be necessary where a State which adopts the view described in paragraph 11 above believes that its domestic law lacks the anti-avoidance rules or principles necessary to properly address such strategy.

16. For instance, some forms of tax avoidance have already been expressly dealt with in the Convention, e.g. by the introduction of the concept of “beneficial owner” (in Articles 10, 11, and 12) and of special provisions such as paragraph 2 of Article 17 dealing with so-called ‘artiste-companies. Such problems are also mentioned in the Commentaries on Article 10 (paragraphs 17 and 22), Article 11 (paragraph 12) and Article 12 (paragraph 7).

17. Also, in some cases, claims to treaty benefits by subsidiary companies, in particular companies established in tax havens or benefiting from harmful preferential regimes, may be refused where careful consideration of the facts and circumstances of a case shows that the place of effective management of a subsidiary does not lie in its alleged state of residence but, rather, lies in the state of residence of the parent company so as to make it a resident of that latter state for domestic law purposes (this will be relevant where the domestic law of a state uses the place of management of a legal person, or a similar criterion, to determine its residence).
11. 由于受税收协定条款限制（以及在极少数情况下放宽），许多国家最终是通过国内法征收来解决此问题。因此，任何对税收协定条款的滥用也会被认定为对国内税法条款的滥用从而被征税。对于上述国家，这个问题变为税收协定条款界限可能阻止国内法中反滥用条款的应用，后文的第19至28段对该问题予以了说明。正如这些段落中所解释的。作为一个一般性规则，其与税收协定条款间将不存在冲突。

12. 其他国家倾向于将部分滥用视为对协定本身的滥用，而非对国内法的滥用。但这些国家认为通过合理制定税收协定可允许其无须担忧滥用交易，例如那些获取违背协定初衷的协定条款优惠的交易。这一说法是根据税收协定的目标和对其诚实履行的义务（详见维也纳条约法公约第13条）。

13. 因此两种方法都认同当交易构成协定条款的滥用时，国家不必给予协定优惠。

14. 然而值得注意的是，不能轻易假定纳税人在进行上述滥用交易。一个指导原则是当进行特定交易的主要目的是在与其他协定条款的目标和目的发生冲突的情况下获得一个更有利于税收地位和更优惠的税务处理时，此项交易不能获得税收协定优惠。这一原则独立于第X条PPT规则第7款适用，后者只是确认了此原则。

15. 上述原则或第X条第7款的潜在应用代表在税收协定中所不需要防止特定形式避税的条款。当特定避税技术或采用该国技术或 otherwise 对相关避税策略的条款加到协定中会有所帮助，此外对采用上述第11段观点的国家，其相信本国法律有关解决此类策略的反避税规则或条件，此类条款将是必要的。

16. 举例而言，部分形式的避税方法已经在协定中明确加以处理，如引人“受益所有人”的概念（第10、11、12条）和引人如第17条第2款解决法令或公司问题的特殊条款。这些问题也由于针对第10条（第17和22段）、第11条（第12段）和第12条（第7段）的注释中提及。

17. 此外，在某些情况下，由子公司（特别是设立于避税港或受益于其他优惠税制的子公司）所提出的税收协定申请，当仔细考察事实和环境后显示该子公司实际管理地并非在其所谓的居住地而在母公司居住地，从而是母公司所在地国内法律约束下的居民企业，这些申请可能被拒绝（当一个国家的法律用法人实际管理地或类似标准来确定其居民时，此情形可能出现）。
18. Careful consideration of the facts and circumstances of a case may also show that a subsidiary was managed in the state of residence of its parent in such a way that the subsidiary had a permanent establishment (e.g. by having a place of management) in that state to which all or a substantial part of its profits were properly attributable.

Addressing tax avoidance through domestic anti-abuse rules and judicial doctrines

19. Domestic anti-abuse rules and judicial doctrines may also be used to address transactions and arrangements entered into for the purpose of obtaining treaty benefits in inappropriate circumstances. These rules and doctrines may also address situations where transactions or arrangements are entered into for the purpose of abusing both domestic laws and tax conventions.

20. For these reasons, domestic anti-abuse rules and judicial doctrines play an important role in preventing treaty benefits from being granted in inappropriate circumstances. The application of such domestic anti-abuse rules and doctrines, however, raises the issue of possible conflicts with treaty provisions, in particular where treaty provisions are relied upon in order to facilitate the abuse of domestic law provisions (e.g. where it is claimed that treaty provisions protect the taxpayer from the application of certain domestic anti-abuse rules). This issue is discussed below in relation to specific legislative anti-abuse rules, general legislative anti-abuse rules and judicial doctrines.

Specific legislative anti-abuse rules

21. Tax authorities seeking to address the improper use of a tax treaty may first consider the application of specific anti-abuse rules included in their domestic tax law.

22. Many specific anti-abuse rules found in domestic law apply primarily in cross-border situations and may be relevant for the application of tax treaties. For instance, thin capitalisation rules may apply to restrict the deduction of base-eroding interest payments to residents of treaty countries; transfer pricing rules (even if not designed primarily as anti-abuse rules) may prevent the artificial shifting of income from a resident enterprise to an enterprise that is resident of a treaty country; exit or departure tax rules may prevent the avoidance of capital gains tax through a change of residence before the realisation of a treaty-exempt capital gain; dividend stripping rules may prevent the avoidance of domestic dividend withholding taxes through transactions designed to transform dividends into treaty-exempt capital gains; and anti- conduit rules may prevent certain avoidance transactions involving the use of conduit arrangements.

23. Generally, where the application of provisions of domestic law and of those of tax treaties produces conflicting results, the provisions of tax treaties are intended to prevail. This is a logical consequence of the principle of “pacta sunt servanda” which is incorporated in Article 26 of the Vienna Convention on the Law of Treaties. Thus, if the application of specific anti-abuse rules found in domestic law were to result in a tax treatment that is not in accordance with the provisions of a tax treaty, this would conflict with the provisions of that treaty and the provisions of the treaty should prevail under public international law.

[Footnote to paragraph 23:] 1. Under Article 60 of the Vienna Convention on the Law of Treaties “[a] material breach of a bilateral treaty by one of the parties entitled the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part”.

24. As explained below, however, such conflicts will often be avoided and each case must be analysed based on its own circumstances.
18. 仔细考察情况的事实和环境后也可能表明该子公司由其母公司所在地所管理从而在母公司所在地形成了常设机构（例如管理场所），故其全部或大部分利润应被适当归属至该国。

通过利用反滥用规则和司法解释来解决避税问题

19. 国内反滥用规则和司法解释也可能还被用于应对在不当环境下获取协定优惠的交易。这些规则和解释同样可以对应以同时滥用国内法律和税收协定为目的的交易。

20. 由于上述原因，国内反滥用规则和司法解释对防止不正当环境下取得协定优惠起到重要作用。但是，上述国内反滥用规则和司法解释的应用可能与税收协定产生潜在冲突，特别是当税收协定条款被用于帮助国内法律条款的滥用时（例如认为协定条款可保护纳税人免于某些国内反滥用规则的约束）。这一问题将在下文结合特定法律反滥用规则、一般法律反滥用规则和司法解释进行讨论。

具体立法反滥用规则

21. 税务机关想要解决不正当使用税收协定问题，其首选可能会考虑应用国内税法下包含具体反滥用规则。

22. 国内税下一些具体反滥用规则主要适用于跨境交易，可能与税收协定的适用相关。例如，资本弱化规定可用于限制扣除支付给缔约国居民的利息。转让定价规定（即使并非主要作为反滥用规则制定）可以防止人为地将利润从居民企业转移到税收协定下缔约国另一方的居民企业；退出或高税率规定能够防止改变居民身份以享受税收协定下的资本利得免税待遇来逃避资本利得税的情况；股息剥离规定将防止将股息转化为协定下免税的资本利得来源规避国内股息预提所得税的情况；以及反转让定价规定防止一些利用转让定价的避税交易。

25. 总的来说，当国内法和税收协定的适用产生冲突时，税收协定规定应当优先适用，这是缔约国税收协定第 26 条“税收必须遵循”原则下的合理结果。因此，如果适用国内法的反滥用规则将产生与税收协定规定不一致的税务处理，与税收协定的规定相冲突，根据国际公法，税收协定条款应优先适用。

[23] 说明: 1. 维也纳条约法公约第 60 条“[a] 双边条约当事国一方有重大违约情况下，他方有权援引违约为理由终止该条约，或全部或部分停止其履行”。

24. 但是，如下解释的类似冲突通常能够避免，且不同案例要根据个案情况进行具体分析。
25. First, a treaty may specifically allow the application of certain types of specific domestic anti-abuse rules. For example, Article 9 specifically authorises the application of domestic rules in the circumstances defined by that Article. Also, many treaties include specific provisions clarifying that there is no conflict or, even if there is a conflict, allowing the application of the domestic rules. This would be the case, for example, for a treaty rule that expressly allows the application of a thin capitalisation rule found in the domestic law of one or both Contracting States.

26. Second, many provisions of the Convention depend on the application of domestic law. This is the case, for instance, for the determination of the residence of a person (see paragraph 1 of Article 4), the determination of what is immovable property (see paragraph 2 of Article 6) and the determination of when income from corporate rights might be treated as a dividend (see paragraph 3 of Article 10). More generally, paragraph 2 of Article 3 makes domestic rules relevant for the purposes of determining the meaning of terms that are not defined in the Convention. In many cases, therefore, the application of specific anti-abuse rules found in domestic law will have an impact on how the treaty provisions are applied rather than produce conflicting results. This would be the case, for example, if a domestic law provision treats the profits realised by a shareholder when a company redeems some of its shares as dividends; although such a redemption could be considered to constitute an alienation for the purposes of paragraph 5 of Article 13, paragraph 28 of the Commentary on Article 10 recognises that such profits will constitute dividends for the purposes of Article 10 if the profits are treated as dividends under domestic law.

26.1 Third, the application of tax treaty provisions in a case that involves an abuse of these provisions may be denied under paragraph 7 of Article [X] the PPT rule or, in the case of a treaty that does not include that paragraph, under the principles put forward in paragraphs 13 and 14 above. In such a case, there will be no conflict with the treaty provisions if the benefits of the treaty are denied under both paragraph 7 of Article [X] (or the principles in paragraphs 13 and 14 above) and the relevant domestic specific anti-abuse rules. Domestic specific anti-abuse rules, however, are often drafted with reference to objective facts, such as the existence of a certain level of shareholding or a certain debt-equity ratio. Whilst this facilitates their application and provides greater certainty, it may sometimes result in the application of such a rule in a case where the rule conflicts with a provision of the Convention and where paragraph 7 does not apply to deny the benefits of that provision (and where the principles of paragraphs 13-14 above also do not apply). In such a case, the Convention will not allow the application of the domestic rule to the extent of the conflict. An example of such a case would be where a domestic law rule that State A adopted to prevent temporary changes of residence for tax purposes would provide for the taxation of an individual who is a resident of State B on gains from the alienation of property situated in a third State if that individual was a resident of State A when the property was acquired and was a resident of State A for at least seven of the 10 years preceding the alienation. In such a case, to the extent that paragraph 5 of Article 13 would prevent the taxation of that individual by State A upon the alienation of the property, the Convention would prevent the application of the specific anti-abuse rules of paragraph 5 of Article 13 could be denied, in that specific case, under paragraph 7 or the principles in paragraphs 13-14 above.

26.2 Fourth, the application of tax treaty provisions may be denied under judicial doctrines or principles applicable to the interpretation of the treaty (see paragraph 26.5 below). In such a case, there will be no conflict with the treaty provisions if the benefits of the treaty are denied under both a proper interpretation of the treaty and as result of the application of domestic specific anti-abuse rules. Assume, for example, that the domestic law of State A provides for the taxation of gains derived from the alienation of shares of a domestic company in which the alienator holds more than 25 per cent of the capital if that alienator was a resident of State A for
25. 首先，协定可能特别说明允许具体的国内反滥用规则的适用。例如，第9条授予国内规则在该条规则情形下适用。此外，许多税收协定包含具体条款明确说明没有冲突，或者，存在冲突的情况下，允许国内法的适用。例如，协议条款中明确允许缔约方一方国内法的资本弱化规则。

26. 其次，许多协定范本的条款依赖于国内法的适用。例如，居民身份的判定（详见第4条第1款），不动产出的界定（详见第2条第6款）以及判断什么情况下公司取得所得属于股息所得（详见第10条第3款）。更普遍的是，第3条第2款中规定对于协定范本中未定义的条款可参照国内法进行解释。因此，许多情况下，适用国内法中具体的反滥用规则将会影响税收协定条款适用的方式而不是导致相互冲突的结果。举例来说，在国内法规定下，一个公司向自己的股东支付给股东的利润应被视作股息所得。虽然这项所得可能符合协定范本第13条第5款规定的财产转让，协定第10条注释第28段认为如果有国内法上被当作股息所得处理，那么它构成协定范本第10条下的股息所得。


26.2 第四，司法原则或者税收协定解释原则（详见下段第26.5段）可能会否定税收协定条款的适用。如果税收协定规定基于对税收协定的合理解释以及国内具体反滥用规则的适用而被否定，即不存在国内法与税收协定条款相冲突的情况。例如，假设 A 国的国内法规定，持有国内公司 25%以上股权的股东转让该股权取得所得，若该股东在股权转让前 10 年中至少 7 年是 A 国的税收居民，则该股权转让所得将在 A 国
at least seven of the 10 years preceding the alienation. In year 2, an individual who was a resident of State A for the previous 10 years becomes a resident of State B. Shortly after becoming a resident of State B, the individual sells the totality of the shares of a small company that he previously established in State A. The facts reveal, however, that all the elements of the sale were finalised in year 1, that an interest-free “loan” corresponding to the sale price was made by the purchaser to the seller at that time, that the purchaser cancelled the loan when the shares were sold to the purchaser in year 2 and that the purchaser exercised de facto control of the company from year 1. Although the gain from the sale of the shares might otherwise fall under paragraph 5 of Article 13 of the State A-State B treaty, the circumstances of the transfer of the shares are such that the alienation in year 2 constitutes a sham within the meaning given to that term by the courts of State A. In that case, to the extent that the sham transaction doctrine developed by the courts of State A does not conflict with the rules of interpretation of treaties, it will be possible to apply that doctrine when interpreting paragraph 5 of Article 13 of the State A-State B treaty, which will allow State A to tax the relevant gain under its domestic law rule.

General legislative anti-abuse rules

26.3 Many countries have included in their domestic law a legislative anti-abuse rule of general application intended to prevent abusive arrangements that are not adequately dealt with through specific anti-abuse rules or judicial doctrines.

26.4 The application of such general anti-abuse rules also raises the question of a possible conflict with the provisions of a tax treaty. In the vast majority of cases, however, no such conflict will arise. Conflicts will first be avoided for reasons similar to those presented in paragraphs 25 and 26 above. In addition, where the main aspects of these domestic general anti-abuse rules are in conformity with the principle of paragraph 14 above and are therefore similar to the main aspects of paragraph 7 of Article [X], which incorporates this guiding principle, it is clear that no conflict will be possible since the relevant domestic general anti-abuse rule will apply in the same circumstances in which the benefits of the Convention would be denied under paragraph 7, or, in the case of a treaty that does not include that paragraph, to the guiding principle in paragraph 14 above.

Judicial doctrines that are part of domestic law

26.5 In the process of interpreting tax legislation in cases dealing with tax avoidance, the courts of many countries have developed a number of judicial doctrines or principles of interpretation. These include doctrines such as substance over form, economic substance, sham, business purpose, step-transaction, abuse of law and fraud legis. These doctrines and principles of interpretation, which vary from country to country and evolve over time based on refinements or changes resulting from subsequent court decisions, are essentially views expressed by courts as to how tax legislation should be interpreted. Whilst the interpretation of tax treaties is governed by general rules that have been codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, these general rules do not prevent the application of similar judicial doctrines and principles to the interpretation of the provisions of tax treaties. If, for example, the courts of one country have determined that, as a matter of legal interpretation, domestic tax provisions should apply on the basis of the economic substance of certain transactions, there is nothing that prevents a similar approach from being adopted with respect to the application of the provisions of a tax treaty to similar transactions. This is illustrated by the example in paragraph 26.2 above.

26.6 As a general rule and having regard to paragraph 14, therefore, the preceding analysis leads to the conclusion that there will be no conflict between tax conventions and judicial anti-abuse doctrines or general domestic anti-abuse rules. For example, to the extent that the
在第二年，一个在此前 10 年都是 A 国的税收居民的个人变成 B 国的税收居民。在变为 B 国的税防止税收协定优惠的不当授予第 6 项行动计划的居民之后，立即出售其在 A 国设立的小公司的所有股权。然而，事实显示该笔交易相关的要素在第一年时已经达成一致，同时买方同意提供与售价等值的免息“借款”。买方在第二年买入股权时将这笔“借款”，卖方在第一年时即对目标公司已达成事实上的控制。即使该股权转让所得可能落入 A 国和 B 国之间的税收协定第 13 条第（5）款规定的范畴，A 国的法院仍应该情况下第二年的转让行为属于虚假交易行为。在本案例中，A 国法院提出的虚假交易规则在与税收协定解释规定不冲突的情况下，也可以用于解释 A、B 国之间的税收协定第 13 条第（5）款，这样将允许 A 国基于其国内法的规定对相关所得征税。

一般立法反滥用规则

26.3 一些国家在其国内法中引入普遍适用的立法反滥用规则，旨在防止具体反滥用规则或司法解释不足以应对的滥用安排。

26.4 该一般反滥用条款的适用仍会导致与税收协定条款冲突的可能性，但是在绝大多数情况下冲突不会发生。这些冲突首先可以因类似上述第 25 和 26 段落中提到的原因被避免。此外，这些一般立法反滥用规则与上述第 14 段规定的原则基本一致，因此与上述原则的第 X 条第 7 款的主要内容类似，不可能出现冲突。当协定的优惠待遇基于第 7 款（或协定中未包含该条款时基于上述第 14 段的原则）被否定时，国内法中的一般立法反滥用规则同样适用。

作为国内法一部分的司法原则

26.5 在解释与反避税规定相关的国内税收立法的过程中，许多国家的法院发展出了一些司法原则或法律解释原则。其中包括实质重于形式原则、经济实质原则、虚假交易原则、商业目的原则、分步交易原则、法规滥用原则、法律解释原则。各个国家拥有不同的司法原则或法律解释原则。这类型会随着时间因后续法院判决的改或变化而演变，体现了法院对税收立法在司法解释上的主要观点。税收协定应根据维也纳条约法公约第 31 条和第 33 条中规定的一般原则来进行解释，这些一般条款并不会排除类似司法原则和规则的应用到税收协定条款的解释中。例如，一国的法院在司法决定中引用以上条款来解释税收协定的条款。例如，一国的法院在司法决定中引用以上条款来解释税收协定的条款。上述第 26.2 段中的案例就是具体例子。

26.6 因此作为一般规则并考虑到第 14 段，上述分析得出的结论是税收协定与司法反滥用解释或一般国内反滥用规则并不存在冲突。例如，在一定程度上，一般国内反滥用
application of a general domestic anti-abuse rule or a judicial doctrine such as "substance over form" or "economic substance" results in a recharacterisation of income or in a redetermination of the taxpayer who is considered to derive such income, the provisions of the Convention will be applied taking into account these changes.

26.7 Whilst these rules do not conflict with tax conventions, there is agreement that member countries should carefully observe the specific obligations enshrined in tax treaties to relieve double taxation as long as there is no clear evidence that the treaties are being abused.

Controlled foreign company provisions

26.8 A significant number of countries have adopted controlled foreign company provisions to address issues related to the use of foreign base companies. Whilst the design of this type of legislation varies considerably among countries, a common feature of these rules, which are now internationally recognised as a legitimate instrument to protect the domestic tax base, is that they result in a Contracting State taxing its residents on income attributable to their participation in certain foreign entities. It has sometimes been argued, based on a certain interpretation of provisions of the Convention such as paragraph 1 of Article 7 and paragraph 3 of Article 10, that this common feature of controlled foreign company legislation conflicted with these provisions. Since such legislation results in a State taxing its own residents, paragraph 3 of Article 1 confirms that it does not conflict with tax conventions. The same conclusion must be reached in the case of conventions that do not include a provision similar to paragraph 3 of Article 1; for the reasons explained in paragraph 13 of the Commentary on Article 7 and paragraph 37 of the Commentary on Article 10, the interpretation according to which these Articles would prevent the application of controlled foreign company provisions does not accord with the text of paragraph 1 of Article 7 and paragraph 3 of Article 10. It also does not hold when these provisions are read in their context. Thus, whilst some countries have felt it useful to expressly clarify, in their conventions, that controlled foreign companies legislation did not conflict with the Convention, such clarification is not necessary. It is recognised that controlled foreign company legislation structured in this way is not contrary to the provisions of the Convention.

60. Two specific issues related to the interaction between treaties and specific domestic anti-abuse rules are discussed below. The first issue deals with domestic anti-abuse rules found in the domestic law of one State that are aimed at preventing avoidance arrangements entered into by residents of that State. The second issue, which is indirectly related to the first one, deals with the application of tax treaties to so-called departure or exit taxes.

a) Application of tax treaties to restrict a Contracting State’s right to tax its own residents

61. The majority of the provisions included in tax treaties are intended to restrict the right of a Contracting State to tax the residents of the other Contracting State. In some limited cases, however, it has been argued that some provisions that are aimed at the taxation of non-residents could be interpreted as limiting a Contracting State’s right to tax its own residents. Such interpretations have been rejected in paragraph 6.1 of the Commentary on Article 1, which deals with a Contracting State’s right to tax partners who are its own residents on their share of the income of a partnership that is treated as a resident of the other Contracting State, as well as in paragraph 23 of the same Commentary, which addresses the case of controlled foreign companies rules (see also paragraph 14 of the Commentary on Article 7, which deals with the same issue).

62. It was concluded that the principle reflected in paragraph 6.1 of the Commentary on Article 1 should be applicable to the vast majority of the provisions of the Model Tax Convention in order to prevent interpretations intended to circumvent the application of a Contracting State’s domestic anti-abuse rules (as
规则或司法解释（如“实质重于形式”或“经济实质”）的应用会导致对收入的重新定性和应税纳税人的重新确定，那么税务条款的应用将考虑这些变化。

26.7 虽然这些规则不会与税收协定产生冲突，一项共识是只要没有明显证据表明协定被滥用，协议成员国应该仔细考虑税收协定中规定的具体义务以减少双重征税问题。

受控外国公司条款

26.8 相当多国家已采用受控外国公司条款，以减轻利用外国企业所涉及的问题。虽然这类条款的设计在不同国家之间有很大差异，但共同特点是导致缔约国对其居民参与的某些外国实体取得的可归属收入征税。这在国际上被视为保护国内税收的正当方法。基于某些对协定条款如第 7 条第 1 款、第 10 条第 5 款等的解释，这一共同特点常常被认为是与上述条款相互矛盾。由于这些法规导致的是国家对其公民在其居住国征税，第 1 条第 3 款确认这些规定与税收协定并不冲突。当协定不包含类似于第 1 条第 3 款的条款时，也必须得出同样的结论。因为根据第 7 条注释的第 14 款、第 10 条注释的第 37 段所解释的原因，协定条款必须防止受控外国公司条款的应用与第 7 条第 1 款、第 10 条第 5 款不一致。当条款与上下文结合时也不应产生冲突。因此，尽管一些国家认为在协定中引用受控外国公司条款与协定相冲突的方法是有用的，但这并非是必需的。通过这种方式构建的受控外国公司条款并不会违反协定条款的内容。

8. 以下就是税收协定和国内法具体反滥用规则间相互关系的两个议题进行讨论。第一个议题讨论一国国内法中旨在防止该国的税收居民之间达成逃避纳税的反滥用条款，第二个议题与第一个议题间接相关，其讨论税收协定条款在退出或高税率方面的适用问题。

2.1 适用税收协定来限制缔约国对其公民的征税权

9. 税收协定中的大部分条款旨在限制缔约国对缔约国另一方居民的征税权。但是，在有限的情况下，部分观点认为，一些关于非居民征税权的条款也可能解释为缔约国对其自己国家居民的征税权的限制。此类解释被范本第 1 条注释第 6.1 段和范本第 1 条注释第 23 段所否定。范本第 1 条注释第 6.1 段是关于缔约国对被视为缔约国另一方居民的合伙企业中归属于缔约国居民合伙人的所得的征税权的规定，范本第 1 条注释第 23 段是关于受控外国公司规则的规定（范本第 7 条注释第 14 段对同一个问题进行了规定）。

10. 可以得出结论，范本第 1 条注释第 6.1 段中规定的分则应能够适用于税收协定的范本中绝大多数的条款，以防止故意曲解税收协定造成阻碍缔约国国内反滥用规则的适用（如受控外国企业的例子）。这与美国在税收协定方面长期坚持的实践是一致，即使有税收协定的规
illustrated by the example of controlled foreign companies rules). This corresponds to the practice long followed by the United States in its tax treaties, where a so-called "saving clause"\textsuperscript{17} confirms the Contracting States' right to tax their residents (and citizens, in the case, of the United States) notwithstanding the provisions of the treaty except those, such as the rules on relief of double taxation, that are clearly intended to apply to residents.

63. The following changes will be made to the Model Tax Convention as a result of that decision:

Add the following paragraph 3 to Article 1:

3. This Convention shall not affect the taxation, by a Contracting State, of its residents except with respect to the benefits granted under paragraph 3 of Article 7, paragraph 2 of Article 9 and Articles 19, 20, 23 A [23 B], 24 and 25 and 28.

Add the following paragraphs 26.17 to 26.21 to the Commentary on Article 1 (other consequential changes to the Commentary would be required):

26.17 Whilst some provisions of the Convention (e.g. Articles 23 A and 23 B) are clearly intended to affect how a Contracting State taxes its own residents, the object of the majority of the provisions of the Convention is to restrict the right of a Contracting State to tax the residents of the other Contracting State. In some limited cases, however, it has been argued that some provisions could be interpreted as limiting a Contracting State's right to tax its own residents in cases where this was not intended (see, for example, paragraph 23 above, which addresses the case of controlled foreign companies provisions).

26.18 Paragraph 3 confirms the general principle that the Convention does not restrict a Contracting State's right to tax its own residents except where this is intended and lists the provisions with respect to which that principle is not applicable.

26.19 The exceptions so listed are intended to cover all cases where it is envisaged in the Convention that a Contracting State may have to provide treaty benefits to its own residents (whether or not these or similar benefits are provided under the domestic law of that State). These provisions are:

\textsuperscript{17} The saving clause and its exceptions read as follows in the US Model:

4. Except to the extent provided in paragraph 5, this Convention shall not affect the taxation by a Contracting State of its residents (as determined under Article 4 (Resident)) and its citizens. Notwithstanding the other provisions of this Convention, a former citizen or former long-term resident of a Contracting State may be taxed in accordance with the laws of that Contracting State.

5. The provisions of paragraph 4 shall not affect:

a) the benefits conferred by a Contracting State under paragraph 2 of Article 9 (Associated Enterprises), paragraph 7 of Article 13 (Gains), subparagraph b) of paragraph 1, paragraphs 2, 3 and 6 of Article 17 (Pensions, Social Security, Annuities, Alimony, and Child Support), paragraph 3 of Article 18 (Pension Funds), and Articles 23 (Relief from Double Taxation), 24 (Non-Discrimination), and 25 (Mutual Agreement Procedure); and

b) the benefits conferred by a Contracting State under paragraph 1 of Article 18 (Pension Funds), Articles 19 (Government Service), 20 (Students and Trainees), and 27 (Members of Diplomatic Missions and Consular Posts), upon individuals who are neither citizens of nor have been admitted for permanent residence in, that State.
定（除了协定中明显适用于居民的条款如避免双重征税的减免规定以外），其所谓的“保留条款”确认缔约国对其居民（和美国的公民）的征税权。”

11. 根据上述决定，以下的修订将被写入税收协定范本中：

在第1条中加入第1款：

3. 本协定不影响缔约国对其税收居民的征税权，除非根据第7条第5款，第9条
   第2款，第19，20，23A(23B)，24，25和28条的规定可享受税收协定优惠待遇。

在不注释的第1条中加入下列第26.17到26.21段（同时对有关注释做出相应修改）：

26.17 虽然协定范本中的一些条款（如第23A和23B条）明确旨在规定缔约国如何对其居民进行征税，协定范本的主要目的依然是限制缔约国对缔约国另一方的税收居民的征税权。但是，在有限的情况下，部分观点认为即使并非其本意所然，一些条款仍然可能被理解为在缔约国实行税收协定优惠的不当授予第6项行动计划本意的情况下该缔约国对自己国家居民征税权的限制（例如，详见上述23段中受控外国企业相关条款情况进行列示）。

26.18 第3款确认了协定不限制缔约国对其税收居民的征税权的一般原则，除非有意进行限制且对该原则不适用的情况进行列示。

26.19 此处列明的例外情况旨在涵盖协定确认缔约国一方会授予其税收协定待遇的情况（无论该国国内法是否规定了同一或类似的税收优惠），这些条款如下：

（1）美国范本的保留条款及例外情况节录如下：

4. 除了第5条规定外，本协定不影响缔约国对非居民（根据第4条（税收居民）定义）以及公民的
   私权。无论条款为其他条件如何规定，缔约国对于属于该缔约国的非居民或非永久居民的公民可以
   根据该缔约国的国内法律进行征税。

5. 第4款的规定不应影响：

a) 根据第9条第2款（集团公司）、第13条第7款（企业和第17条第10)、2、3、6款（退休金、
   社会保障、年金、退休金和子女抚养金）；第18条第3款（退休金）、第23条（消除双重
   征税）、第24条（非政府组织）以及第25条（相互协商程序），缔约国给予的优惠待遇；

b) 根据第18条第1款（退休金）、第19条（政府服务）、第20条（学生和学习人员）以及第27
   条（外交代表和领事官员），缔约国给予的非该国税收居民及非该国驻居民的个人的优惠待遇。
Paragraph 3 of Article 7, which requires a Contracting State to grant to an enterprise of that State a correlative adjustment following an initial adjustment made by the other Contracting State, in accordance with paragraph 2 of Article 7, to the amount of tax charged on the profits of a permanent establishment of the enterprise.

Paragraph 2 of Article 9, which requires a Contracting State to grant to an enterprise of that State a corresponding adjustment following an initial adjustment made by the other Contracting State, in accordance with paragraph 1 of Article 9, to the amount of tax charged on the profits of an associated enterprise.

Article 19, which may affect how a Contracting State taxes an individual who is resident of that State if that individual derives income in respect of services rendered to the other Contracting State or a political subdivision or local authority thereof.

Article 20, which may affect how a Contracting State taxes an individual who is resident of that State if that individual is also a student who meets the conditions of that Article.

Articles 23 A and 23 B, which require a Contracting State to provide relief of double taxation to its residents with respect to the income that the other State may tax in accordance with the Convention (including profits that are attributable to a permanent establishment situated in the other Contracting State in accordance with paragraph 2 of Article 7).

Article 24, which protects residents of a Contracting State against certain discriminatory taxation practices by that State (such as rules that discriminate between two persons based on their nationality).

Article 25, which allows residents of a Contracting State to request that the competent authority of that State consider cases of taxation not in accordance with the Convention.

Article 28, which may affect how a Contracting State taxes an individual who is resident of that State when that individual is a member of the diplomatic mission or consular post of the other Contracting State.

26.20 The list of exceptions included in paragraph 3 should include any other provision that the Contracting States may agree to include in their bilateral convention where it is intended that this provision should affect the taxation, by a Contracting State, of its own residents. For instance, if the Contracting States agree, in accordance with paragraph 27 of the Commentary on Article 18, to include in their bilateral convention a provision according to which pensions and other payments made under the social security legislation of a Contracting State shall be taxable only in that State, they should include a reference to that provision in the list of exceptions included in paragraph 3.

26.21 The term "resident", as used in paragraph 3 and throughout the Convention, is defined in Article 4. Where, under paragraph 1 of Article 4, a person is considered to be a resident of both Contracting States based on the domestic laws of these States, paragraphs 2 and 3 of that Article determine a single State of residence for the purposes of the Convention. Thus, paragraph 3 does not apply to an individual or legal person who is a resident of one of the Contracting States under the laws of that State but who, for the purposes of the Convention, is deemed to be a resident only of the other Contracting State.
第 7 条第 (3) 款规定要求缔约国在缔约国另一方根据第 7 条第 (2) 款，对缔约国企业构成的常设机构取得利润所缴纳的税款金额做出初步调整后，同意其居民企业进行相关调整。

第 9 条第 (2) 款规定要求缔约国在缔约国另一方根据第 9 条第 1 款，对缔约国居民企业的联属企业利润所缴纳的税款做出初步调整后，同意其居民企业进行相关调整。

在缔约国的居民个人为缔约国另一方或当地的政府分支结构或当地政府提供劳务取得所得的情况下，第 19 条可能影响缔约国对该个人取得的所得如何征税。

在缔约国的居民个人符合第 20 条款下学生的条件时，第 20 条规定可能影响该缔约国对该个人取得的所得如何征税。

第 23 条 A 和 B 要求缔约国就其居民的某项所得（包括第 7 条第 (2) 款规定的归属于位于缔约国另一方的常设机构取得的利润），在根据协定规定该项所得会被缔约国另一方征税的情况下，提供税收减免以避免双重征税。

第 24 条防止缔约国居民受到缔约国的特定征税歧视待遇（比如同一条款对不同人根据其国籍而区分适用）。

第 25 条允许缔约国的居民要求该国的主管当局处理未根据协定规定进行处理的税务案例。

在缔约国的居民个人同时是缔约国另一方的外交代表或领事官员的情况下，第 28 条规定可能影响缔约国对该个人如何征税。

26.20 第 3 条中列示的例外情况应当包括其他经缔约国双方在双边协议中同意的影响缔约国对其居民征税权的条款。例如，若缔约国之间同意，根据第 18 条注释第 27 段规定，在其达成的双边协议中增加条款用于规定根据缔约国一方社会保障法律而支付的退休金及其他报酬仅在该缔约国征税，两国应在第 3 条列明的例外情况中引用该规定。

26.21 第 4 条对上述第 3 条以及整个协议中使用的“居民”进行定义。若根据第 4 条第 1 款，按照缔约国国内法律同时为双方居民的人，适用该条第 2、3 款来确定在税收协定下其应被认定为缔约国一方的居民。因此，上述第 3 条并不适用于某个人或法人在国内缔约国内法下是该缔约国的居民，但基于适用协定的目的，被认定为仅是缔约国另一方的居民的情况。
64. During the work on the above new provision, a number of issues related to relief of double taxation were discussed. It was agreed that, as a matter of principle, Articles 23 A and 23 B of the OECD Model only required a Contracting State to relieve double taxation when income was taxable in the other State under treaty provisions allowing that other State to tax the relevant income as the State of source or as a State where there is a permanent establishment to which that income is attributable. The following draft proposal for changes to Articles 23 A and 23 B was put forward during the last stages of that work in order to confirm that principle. It is intended to finalise the work on that draft proposal in the first part of 2016, which will allow changes that could result from that work to be considered as part of the negotiation of the multilateral instrument that will implement the results of the work on treaty issues mandated by the BEPS Action Plan:

Replace paragraph 1 of Article 23 A as follows:

1. Where a resident of a Contracting State derives income or owns capital which may be taxed in the other Contracting State in accordance with the provisions of this Convention (except to the extent that these provisions allow taxation by that other State solely because the income is also income derived by a resident of that State), may be taxed in the other Contracting State, the first-mentioned State shall, subject to the provisions of paragraphs 2 and 3, exempt such income or capital from tax.

Replace paragraph 1 of Article 23 B as follows:

1. Where a resident of a Contracting State derives income or owns capital which may be taxed in the other Contracting State in accordance with the provisions of this Convention (except to the extent that these provisions allow taxation by that other State solely because the income is also income derived by a resident of that State), may be taxed in the other Contracting State, the first-mentioned State shall allow:

   a) as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in that other State;

   b) as a deduction from the tax on the capital of that resident, an amount equal to the capital tax paid in that other State.

Such deduction in either case shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the capital which may be taxed in that other State.

Add the following paragraph 11.1 to the Commentary on Articles 23 A and 23 B (other consequential changes to the Commentary may be required):

11.1 In some cases, the same income or capital may be taxed by each Contracting State as income or capital of one of its residents. This may happen where, for example, one of the Contracting States taxes the worldwide income of an entity that is a resident of that State whereas the other State views that entity as fiscally transparent and taxes the members of that entity who are residents of that other State on their respective share of the income. The phrase "(except to the extent that these provisions allow taxation by that other State solely because the income is also income derived by a resident of that State)" clarifies that in such cases, both States are not reciprocally obliged to provide relief for each other's tax levied exclusively on the basis of the residence of the taxpayer and that each State is therefore only obliged to provide relief of double taxation to the extent that taxation by the other State is in accordance with provisions of the Convention that allow taxation of the relevant income as the State of source or as a State where there is a permanent establishment to which that
12. 在制定上述条款的过程中，针对与减轻双重征税有关的一系列问题进行了探讨。达成的共识是，作为一项基本原则，OECD 范本的第 23 条 A 和 23 条 B 仅要求缔约国一方根据协定允许缔约国另一方作为收人的来源国或收入所归属的常设机构所在国对此收入进行征税时，对双重征税予以避免。在该项工作的最后阶段，提出了 23 条 A 和 23 条 B 的修改草案以便确定原则。预计于 2016 年上半年完成该草案，从而允许这项工作所带来的变化作为多边工具谈判的一部分被考虑，多边工具将执行 BEPS 行动计划批准的关于税收协定事项的工作。

第 23 条 A 第 1 款规定如下:

1. 缔约国一方居民取得的所得或拥有的财产，按照本协定的规定可以在缔约国另一方征税，但这些规定允许该缔约国另一方征税仅是因为这些收入或这些财产的居民所取得的收入的性质除外，可以在缔约国另一方征税。应允许该国家应根据第 2 款和第 3 款的规定对该项所得或财产给予免税。

第 23 条 B 第 1 款规定如下:

1. 缔约国一方居民取得的所得或拥有的财产，按照本协定的规定可以在缔约国另一方征税，但这些规定允许该缔约国另一方征税仅是因为这些收入或这些财产的居民所取得的收入的性质除外，可以在缔约国另一方征税。应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允许该国家应允
income is attributable, thereby excluding taxation that would solely be in accordance with paragraph 3 of Article 1. Whilst this result would logically follow from the wording of Articles 23 A and 23 B even in the absence of that phrase, the addition of the phrase removes any doubt in this respect.

b). Departure or exit taxes

65. In a number of States, liability to tax on some types of income that have accrued for the benefit of a resident (whether an individual or a legal person) is triggered in the event that the resident ceases to be a resident of that State. Taxes levied in these circumstances are generally referred to as “departure taxes” or “exit taxes” and may apply, for example, to accrued pension rights and accrued capital gains.

66. To the extent that the liability to such a tax arises when a person is still a resident of the State that applies the tax and does not extend to income accruing after the cessation of residence, nothing in the Convention, and in particular in Articles 13 and 18, prevents the application of that form of taxation. Thus, tax treaties do not prevent the application of domestic tax rules according to which a person is considered to have realised pension income, or to have acquired property for capital gain tax purposes, immediately before ceasing to be a resident. The provisions of tax treaties do not govern when income is realised for domestic tax purposes (see, for example, paragraphs 3 and 7 to 9 of the Commentary on Article 13); also, since the provisions of tax treaties apply regardless of when tax is actually paid (see, for example, paragraph 12.1 of the Commentary on Article 15), it does not matter when such taxes become payable. The application of such taxes, however, creates risks of double taxation where the relevant person becomes a resident of another State which seeks to tax the same income at a different time, e.g. when pension income is actually received or when assets are sold to third parties. This problem, which is the result of that person being a resident of two States at different times and of those States levying tax upon the realisation of different events, is discussed in paragraphs 4.1 to 4.3 of the Commentary on Article 23 A and 23 B. As indicated in paragraph 4.3 of that Commentary, which addresses a similar example where two States of residence tax the benefit arising from an employee stock-option at different times:

The mutual agreement procedure could be used to deal with such a case. One possible basis to solve the case would be for the competent authorities of the two States to agree that each State should provide relief as regards the residence-based tax that was levied by the other State on the part of the benefit that relates to services rendered during the period while the employee was a resident of that other State.

67. Based on that approach, a possible basis for solving double taxation situations arising from the application of departure taxes would be for the competent authorities of the two States involved to agree, through the mutual agreement procedure, that each State should provide relief as regards the residence-based tax that was levied by the other State on the part of the income that accrued while the person was a resident of that other State. This would mean that the new State of residence would provide relief for the departure tax levied by the previous State of residence on income that accrued whilst the person was a resident of that other State, except to the extent that the new State of residence would have had source taxation rights at the time that income was taxed (i.e. as a result of paragraphs 2 or 4 of Article 13). States wishing to provide expressly for that result in their tax treaties are free to include provisions to that effect.

B. Clarification that tax treaties are not intended to be used to generate double non-taxation

68. The second part of the work mandated by Action 6 was to “clarify that tax treaties are not intended to be used to generate double non-taxation”.

69. The existing provisions of tax treaties were developed with the prime objective of preventing double-taxation. This was reflected in the title proposed in both the 1963 Draft Double Taxation
收排除在外。即便没有这句话这一结果逻辑上也与第 23 条 A、第 23 条 B 相符，加入这句话将消除这方面的任何疑问。

2.2 退出或离境税

13. 许多国家中，若一个居民（个人或法人）将不再是该国税收居民时，其预计将会取得的某项所得可能会在该国产生纳税义务。在这种情况下，征收的税款一般称为“离境税”或“退出税”，适用范围包括预计退休金、资本利得的情况。

14. 要求相关纳税义务仅产生于该国居民在该国居住身份的期间内，且不会扩大到要求对其停止该国的居民身份后产生的所得进行征税。在协定中，特别是第 13 条和第 18 条，并未禁止此种征税方式。因此，一个人在停止某国税收居民身份前被国内视为已实现退休金所得或转让财产的资本利得的情况下，税收协定并未排除国内法的适用。税收协定条款并未对国内税法下所得的实现时点进行规定（例如，见具体第 13 条注释第 3、7、9 段）；另外，由于税收协定条款的适用与税款的申报及实际缴纳无关（例如，见具体第 15 条注释第 12.1 段）。因此，这些征税方式具有双重征税的风险。当一个人在外国去世时，死亡时另一方所得在不同的时点，即实际取得退休金时或当该资产实际出售等第三方向取得时，再次征税。这是由于同一人在不同时期分别是不同国家的税收居民，且不同国家对不同的税收活动实现时点的规定而产生的。具体第 23A 和 23B 条注释的第 4.1 段和第 4.3 段就这个问题进行了讨论。具体注释第 4.3 段分析了这样一个例子，即两个居住国对员工股份期权所得在不同的时点进行征税。

可利用双边协商程序来处理此类情况。一种可能的解决方式是：两国的主管当局达成一致，针对该居民是缔约国一方居民对其所提供的服务的所得，缔约国另一方基于良好管理征税，缔约国一方对提供服务所得应提供税收减免。

15. 基于上述原理，由于离境税的适用产生的双重征税的可能的解决方法是：两国的主管当局利用双边协商程序达成一致。在这种情况中是缔约国一方居民的期间内预计取得的相应所得，缔约国另一方基于良好管理征税，缔约国一方应对该预计所得提供税收减免。这意味着，在前居住国在该人仍然是前居住国税收居民期间内预计取得上述 11 条中所提到的一部分或全部应确认的税款并有相应的税收协定规定征税权，只要纳税义务发生于该人是前居住国税收居民的时点。在这种情况中，支付的所得来源于其他国家（即根据第 13 条第 2 款或第 4 款规定）应征收税。希望在税收协定中明确作出此类规定的缔约国可以在协定中加入类似条款。

第 2 章 关于导致双重征税并非税收协定意图的澄清

16. 第六项行动要求的第二部分工作是“澄清税收协定的意图并非导致双重征税”。

17. 现行税收协定的条款规定的目的是为了防止双重征税。这在 1963 年所得和财产双重征税公约草案以及 1977 年所得和财产双重征税协定范本提议的条款中就能反映出来，即：
Convention on Income and Capital and the 1977 Model Double Taxation Convention on Income and Capital, which was:

Conventon between (State A) and (State B) for the avoidance of double taxation with respect to taxes on income and on capital.

70. In 1977, however, the Commentary on Article 1 was modified to provide expressly that tax treaties were not intended to encourage tax avoidance or evasion. The relevant part of paragraph 7 of the Commentary read as follows:

The purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons; they should not, however, help tax avoidance or evasion.

71. In 2003, that paragraph was amended to clarify that the prevention of tax avoidance was also a purpose of tax treaties. Paragraph 7 now reads as follows:

The principal purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons. It is also a purpose of tax conventions to prevent tax avoidance and evasion.

72. In order to provide the clarification required by Action 6, it has been decided to state clearly, in the title recommended by the OECD Model Tax Convention, that the prevention of tax evasion and avoidance is a purpose of tax treaties. It has also been decided that the OECD Model Tax Convention should recommend a preamble that provides expressly that States that enter into a tax treaty intend to eliminate double taxation without creating opportunities for tax evasion and avoidance. Given the particular concerns arising from treaty shopping arrangements, it has also been decided to refer expressly to such arrangements as one example of tax avoidance that should not result from tax treaties. The following are the changes that will be made to the OECD Model Tax Convention as a result of the work on this aspect of Action 6:

Replace the Title of the Convention (including its footnote) by the following:

Convention between (State A) and (State B) for the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance.

Convention between (State A) and (State B) with respect to taxes on income and on capital.

1. States wishing to do so may follow the widespread practice of including in the title a reference to either the avoidance of double taxation or to both the avoidance of double taxation and the prevention of fiscal evasion.

Replace the heading “Preamble to the Convention” (including its footnote) by the following:

PREAMBLE TO THE CONVENTION

1. The Preamble of the Convention shall be drafted in accordance with the constitutional procedure of both Contracting States.

PREAMBLE TO THE CONVENTION

(State A) and (State B),

Desiring to further develop their economic relationship and to enhance their cooperation in tax matters,
（A 国）和（B 国）关于对所得和财产避免双重征税的协定

18. 但是，在 1977 年修正案的第 1 条修正后明确税款协定的意图并非鼓励避税或偷税。根据修正案第 7 段部分规定如下：

双边税收协定的目的在于通过消除国际双重征税促进货物与服务交换，以及资本和人员的流动，协定不应协助逃避税或避税行为。

19. 2003 年，上述段落被修改以澄清防止避税也是税收协定的目的。现在第 7 段的规定如下：

双边税收协定的主要目的在于通过消除国际双重征税促进货物与服务交换，以及资本和人员的流动，防止偷税或避税也是协定的目的之一。

20. 为了按照第 6 项行动计划的要求做出澄清，已决定在 OECD 税收协定范本的协定标题中明确写出防止偷税是税收协定的目的。且决定在 OECD 税收协定范本中推荐一篇序言，以明确说明税收协定的签订目标是在消除双重征税的同时避免为偷税创造机会。鉴于对于避税带来一些特别关注的消除双重征税的同时问题，有必要明确阐述协商税安排属于避税范围且不应产生于税收协定。作为第 6 项行动计划的工作成果，下述修改意见将被加入 OECD 税收协定范本中：

用下列内容取代协定范本的原有标题（包括其注释）：

（A 国）和（B 国）关于对所得和财产避免双重征税以及防止偷税和避税的协定
(A 国) 和 (B 国) 关于对所得和财产避免双重征税的协定

1. 希望根据新的条约可以参考有关避免在协定标题用词中包含避免双重征税或避免双重征税和防止偷税。

用以下内容取代协定范本的“前言”（包括其注释）

前言

1. 前言的起草应符合缔约国双方宪法规定的程序要求。

前言

（A 国）和（B 国），

希望进一步发展彼此间的经济合作关系且加强彼此间税务事务上的合作。
Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining relief provided in this Convention for the indirect benefit of residents of third States)

Have agreed as follows:

73. The clear statement of the intention of the signatories to a tax treaty that appears in the above preamble will be relevant to the interpretation and application of the provisions of that treaty. According to the basic rule of interpretation of treaties in Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" [emphasis added]. Article 31(2) VCLT confirms that, for the purpose of this basic rule, the context of the treaty includes its preamble. 19

74. The above changes to the Title and Preamble will be supplemented by the following changes to the Introduction to the OECD Model Tax Convention:

Replace paragraphs 2 and 3 of the Introduction by the following:

2. It has long been recognized among the member countries of the Organisation for Economic Co-operation and Development that it is desirable to clarify, standardize, and confirm the fiscal situation of taxpayers who are engaged in commercial, industrial, financial, or any other activities in other countries through the application by all countries of common solutions to identical cases of double taxation. These countries have also long recognized the need to improve administrative cooperation in tax matters, notably through exchange of information and assistance in collection of taxes, for the purpose of preventing tax evasion and avoidance.

3. These are the main purposes of the OECD Model Tax Convention on Income and on Capital, which provides a means of settling on a uniform basis the most common problems that arise in the field of international juridical double taxation. As recommended by the Council of the OECD, member countries, when concluding or revising bilateral conventions, should conform to this Model Convention as interpreted by the Commentaries thereon and having regard to the reservations contained therein and their tax authorities should follow these Commentaries, as modified from time to time and subject to their observations thereon, when applying and interpreting the provisions of their bilateral tax conventions that are based on the Model Convention.


Replace paragraph 16 of the Introduction by the following:

18. "2. The context for the purpose of the interpretation of a treaty shall comprise: in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

愿意缔结一项协定以避免对所得和财产的双重征税，同时防止偷漏税或避税行为造成 的不征税或少征税（包括通过缔结避税的安排利用本协定下的税收减免为第三国 居民取得间接利益）

达成协定如下：

21. 在上述内容中，税收协定的签字方对于协定目的的明确声明，将与该协定条款的 解释紧密相关。根据《经合组织条约法公约》（VCLT）第 31 条第（1）款对条约解释的基本 规则，"条约应依其用语按其上下文并参照条约之目的及宗旨所具有之通常意义，善意解释之。"[注：宋体字加黑。] VCLT 第 31 条第（2）款"确认，上述基本规则所指的上下文包括协定的前言部分。"

22. OECD 协议范本的引言应当补充以下这些话以及对上述对于标题和前言的修订进行补充：

以下条款取代引言中的第 2 段和第 4 段：

2. 经济合作与发展组织的成员国早已意识到，通过所有国家针对同样的 双重征税 情况应用统一的方法，以便清晰了解、标准化和确定在其他国家 从事商业、工业、金融或其他活动的纳税人的财务状况，这非常有价值。多国也已意识到，为了 防止偷漏税和避税，加强彼此间征税管理合作（特别是情报交换和协助征收）的重要性。

3. 这些规定是—OECD 关于所得和财产的税收协定范本的主要目的。范本在 国际司法 领域最常用的双重征税问题方面提供了一系列统一的解决方案。如 OECD 委员会的，成 议会建议的，成员国在达成或修订双边条约时，应确认符合协定范 本及其注释，并考虑到其 他的保留条款。但主管当局在适用及解释基于范本 制定的双边税收协定条款时，应 当遵从范本注释，范本注释会适时进行更新 且会根据注释的适用范围报告作出修正。

[第三段注1] 参见附件
16. In both the 1963 Draft Convention and the 1977 Model Convention, the title of the Model Convention included a reference to the elimination of double taxation. In recognition of the fact that the Model Convention does not deal exclusively with the elimination of double taxation but also addresses other issues, such as the prevention of tax evasion and avoidance as well as non-discrimination, it was subsequently decided, in 1992, to use a shorter title which did not include this reference. This change has been made both on the cover page of this publication and in the Model Convention itself. However, it is understood that the practice of many member countries is still to include in the title a reference to either the elimination of double taxation or to both the elimination of double taxation and the prevention of fiscal evasion since both approaches emphasized these important purposes of the Convention.

16.1 As a result of work undertaken as part of the OECD Action Plan on Base Erosion and Profit Shifting, in [year] the Committee decided to amend the title of the Convention and to include a preamble. The changes made expressly recognise that the purposes of the Convention are not limited to the elimination of double taxation and that the Contracting States do not intend the provisions of the Convention to create opportunities for non-taxation or reduced taxation through tax evasion and avoidance. Given the particular base erosion and profit shifting concerns arising from treaty-shopping arrangements, it was also decided to refer expressly to such arrangements as one example of tax avoidance that should not result from tax treaties, it being understood that this was only one example of tax avoidance that the Contracting States intend to prevent.

16.2 Since the title and preamble form part of the context of the Convention and constitute a general statement of the object and purpose of the Convention, they should play an important role in the interpretation of the provisions of the Convention. According to the general rule of treaty interpretation contained in Article 31(1) of the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[Footnote to paragraph 16.2:] 1. See Art. 31(2) VCLT.

C. Tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country

75. The third part of the work mandated by Action 6 was "to identify the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country."

76. It was agreed that having a clearer articulation of the policy considerations that, in general, countries should consider before deciding to enter into a tax treaty could make it easier for countries to justify their decisions not to enter into tax treaties with certain low or no-tax jurisdictions. It was also recognized, however, that there are also many non-tax factors that can lead to the conclusion of a tax treaty and that each country has a sovereign right to decide to enter into tax treaties with any jurisdiction with which it decides to do so.

77. In the course of the work on this aspect of Action 6, it was decided that the results of that work should reflect the fact that many of the tax policy considerations relevant to the conclusion of a tax treaty are also relevant to the question of whether to modify (or, ultimately, terminate) a treaty previously concluded in the event that a change of circumstances (such as changes to the domestic law of a treaty partner) raises BEPS concerns related to that treaty.

78. The following changes will be made to the Introduction of the OECD Model Tax Convention as a result of the work on this aspect of Action 6:
以下条款替代引言中的第 16 段:

但是，许多成员国仍然在协定标题里包含了避免双重征税或避免双重征税和防止偷漏税是可以理解的，因为两种方式都强调了协定本的重要目的。

16.1 根据 OECD 税基侵蚀和利润转移行动计划工作，在具体评估年委员会决定修订协定本的标题及前言部分。修订部分明确指出协定本的目的是消除双重征税，且缔约国不希望协定条款为偷漏税和避税创造机会进而导致不征税或少征税。鉴于该协定本安排导致了税基侵蚀和利润转移问题，已决定明确阐述此安排属于避税范畴，不应产生于税收协定。据拟仅是缔约国希望避免的一中一个避税安排。

16.2鉴于标题和前言构成协定本上下文的一部分且构成协定本宗旨与目的的总体声明，其在协定具体条款的解释中起着重要作用。根据维也纳条约法公约 (VCLT) 第 31 条第 (1) 款对条约解释的基本规则第 5a，条约应依其用语按其上下文并参照条约之宗旨及目的所具有之通常意义，善意解释之。

[第 16.2 段落注] 1. 参阅 VCLT 第 31 条第 (2) 款。

第3章. 与其缔结税收协定前通常应进行的税收政策考量

23. 第 6 项行动计划第三部分的工作目的是“指出与他国缔结税收协定前通常应进行的税收政策考量”

24. 一般认为，更清楚地阐述一个国家在缔结税收协定前通常应实施的税收政策考量，将会促使各国更容易证明其不征税或少征税的税收条约缔结税收协定的决定的合理性。然而一般认为，许多非税要素导致了税收协定的签订，且各缔约国拥有与任何税收辖区缔结税收协定的自主权。

25. 在第 6 项行动计划实施的过程中作出决定，工作的成果反映出，与缔结税收协定相关的税收政策考量与导致协定相关的税基侵蚀和利润转移问题出现某些变化发生的情况下是否在某些变化（如修改缔约国一方的国内法）修订（或，最终，终止）原税收协定相关。
Insert the following paragraphs and new heading immediately after paragraph 15 in the Introduction to the OECD Model Convention (existing section C of the Introduction would become section D):

C. Tax policy considerations that are relevant to the decision of whether to enter into a tax treaty or amend an existing treaty

15.1 In 1997, the OECD Council adopted a recommendation that the Governments of member countries pursue their efforts to conclude bilateral tax treaties with those member countries, and where appropriate with non-member countries, with which they had not yet entered into such conventions. Whilst the question of whether or not to enter into a tax treaty with another country is for each State to decide on the basis of different factors, which include both tax and non-tax considerations, tax policy considerations will generally play a key role in that decision. The following paragraphs describe some of these tax policy considerations, which are relevant not only to the question of whether a treaty should be concluded with a State but also to the question of whether a State should seek to modify or replace an existing treaty or even, as a last resort, terminate a treaty (taking into account the fact that termination of a treaty often has a negative impact on large number of taxpayers who are not concerned by the situations that result in the termination of the treaty).

15.2 Since a main objective of tax treaties is the avoidance of double taxation in order to reduce tax obstacles to cross-border services, trade and investment, the existence of risks of double taxation resulting from the interaction of the tax systems of the two States involved will be the primary tax policy concern. Such risks of double taxation will generally be more important where there is a significant level of existing or projected cross-border trade and investment between two States. Most of the provisions of tax treaties seek to alleviate double taxation by allocating taxing rights between the two States and it is assumed that where a State accepts treaty provisions that restrict its right to tax elements of income, it generally does so on the understanding that these elements of income are taxable in the other State. Where a State levies no or low income taxes, other States should consider whether there are risks of double taxation that would justify, by themselves, a tax treaty. States should also consider whether there are elements of another State’s tax system that could increase the risk of non-taxation, which may include tax advantages that are ring-fenced from the domestic economy.

15.3 Accordingly, two States that consider entering into a tax treaty should evaluate the extent to which the risk of double taxation actually exists in cross-border situations involving their residents. A large number of cases of residence-source juridical double taxation can be eliminated through domestic provisions for the relief of double taxation (ordinarily in the form of either the exemption or credit method) which operate without the need for tax treaties. Whilst these domestic provisions will likely address most forms of residence-source juridical double taxation, they will not cover all cases of double taxation, especially if there are significant differences in the source rules of the two States or if the domestic law of these States does not allow for unilateral relief of economic double taxation (e.g. in the case of a transfer pricing adjustment made in another State).

15.4 Another tax policy consideration that is relevant to the conclusion of a tax treaty is the risk of excessive taxation that may result from high withholding taxes in the source State. Whilst mechanisms for the relief of double taxation will normally ensure that such high withholding taxes do not result in double taxation, to the extent that such taxes levied in the State of source exceed the amount of tax normally levied on profits in the State of residence, they may have a detrimental effect on cross-border trade and investment.
作为第6项行动计划的工作成果，下列修改将被加入OECF协定草本的引言部分：

在OECF协定草本引言部分的第15段后插入以下段落和标题（引言的第3章改为第4章）：

C. 与是否签订税收协定和修改现有协定相关的税收政策考量

15.1 经合组织理事会于1997年通过了一项提案，成员国政府应尽力与其他成员国签订双边税收协定，并在恰当的与尚未达成协定期限内。协定

虽然是否和其他国家签订税收协定的问题，应由各国根据各自利益来决定，包括税和非税等因素。税收政策考量一般都在决策过程中扮演重要角色。以下段落将具体列出一些税收政策考量，其不仅关系到是否与一国签订协定，还关系到一个国家是否愿意考虑签订或替换现有协定，或甚至，在不得已的情况下，终止协定（应考虑到协定的终止会和税未签订到协定终止情形的纳税人带来负面影响）。

15.2 由于税收协定其中一个主要目的在避免双重征税，以减少跨境服务、交易和投资产生的税收障碍。因此，双方国家税收体系间的相互作用所带来的双重征税风险，将会是首要的税收政策考量。双重征税的风险，在两国间现已进行或拟计划进行的跨境贸易与投资的交易下，通常更为重要。税收协定的大部分条款将通过双国间的征税权进行分配，缓解双重征税。15.3 由于税收协定一个主要目的在避免双重征税，以减少跨境服务、交易和投资产生的税收障碍。因此，双方国家税收体系间的相互作用所带来的双重征税风险，将会是首要的税收政策考量。双重征税的风险，在两国间现已进行或拟计划进行的跨境贸易与投资的交易下，通常更为重要。税收协定的大部分条款将通过双国间的征税权进行分配，缓解双重征税。
15.5 Further tax considerations that should be taken into account when considering entering into a tax treaty include the various features of tax treaties that encourage and foster economic ties between countries, such as the protection from discriminatory tax treatment of foreign investment that is offered by the non-discrimination rules of Article 24, the greater certainty of tax treatment for taxpayers who are entitled to benefit from the treaty and the fact that tax treaties provide, through the mutual agreement procedure, together with the possibility for Contracting States of moving to arbitration, a mechanism for the resolution of cross-border tax disputes.

15.6 An important objective of tax treaties being the prevention of tax avoidance and evasion, States should also consider whether their prospective treaty partners are willing and able to implement effectively the provisions of tax treaties concerning administrative assistance, such as the ability to exchange tax information, this being a key aspect that should be taken into account when deciding whether or not to enter into a tax treaty. The ability and willingness of a State to provide assistance in the collection of taxes would also be a relevant factor to take into account. It should be noted, however, that in the absence of any actual risk of double taxation, these administrative provisions would not, by themselves, provide a sufficient tax policy basis for the existence of a tax treaty because such administrative assistance could be secured through more targeted agreements, such as the conclusion of a tax information exchange agreement or the participation in the multilateral Convention on Mutual Administrative Assistance in Tax Matters.1


79. As already mentioned, many of the tax policy considerations relevant to the conclusion of a tax treaty are also relevant to the question of whether to modify (or, ultimately, terminate) a treaty previously concluded and certain changes to the domestic law of a treaty partner that are made after the conclusion of a tax treaty may raise BEPS concerns in relation to that treaty. In addition, when negotiating a tax treaty, a State may be concerned that certain features of the domestic law of the State with which it is negotiating may raise BEPS concerns even if these concerns may not be sufficient to justify not entering into a tax treaty with that State.

80. A State that has such BEPS concerns with respect to certain features of the domestic law of a prospective treaty partner or with respect to changes that might be made after the conclusion of a tax treaty may want to protect its tax base against such risks and may therefore find it useful to include in its treaties provisions that would restrict treaty benefits with respect to taxpayers that benefit from certain preferential tax rules or with respect to certain drastic changes that could be made to a country’s domestic law after the conclusion of a treaty.

81. The following two proposals seek to achieve this objective. These proposals were first released for comments in May 2015. At about the same time, however, the United States released new versions of similar proposals20 for public comments to be sent by 15 September 2015. When these new versions of the United States proposals were discussed, it was agreed that they should be further examined once finalised by the United States in the light of the comments that will be received on them. For that reason, the proposals below will need to be reviewed and, if necessary, finalised in the first part of 2016, which will allow any decision reached on these proposals to be taken into account as part of the negotiation of the

会造成双重征税，但如果所得税国征收的税额超过居住国通常会征收的税额，可能对跨境交易和投资产生不利影响。

15.5 其他应被考虑的与税收协定的缔结相关的税收政策考量，包括税收协定鼓励和促进国际间建立经济纽带。例如第 24 条非歧视待遇条款，以外国投资不受到歧视性税收待遇，还包括可享受协定优惠待遇的税收。取得税收优惠的确定性，以及税收协定为解决跨境税务争端提供相互协商程序，以及促使缔约国采取仲裁的可行性。

15.6 税收协定是一个重要的目标是防止避税和偷漏税的发生，缔约国也应考量相对国是否愿意并且能够有效实施行政解决相关的条款。

比如税务情报交换的能力，这在决定是否缔结税收协定时应予以重点考量。相对国是否愿意并能够提供税收征管协助，也是一个重要考量因素。然而值得一提的是，若不存在任何实际的双重征税风险，这些行政条款本身不是签订税收协定的充分的税收政策基础，因为这些行政协助可以通过签订更具针对性的替代协议来保障，比如税收情报交换协议，或多边税收征管互助公约。


27. 正如已经提到的，许多与缔结税收协定相关的税收政策考量也与是否修改（或最终终止）税收协定相挂钩。契税协定后缔约国国内法律的变化可能引起与协定相关的 BEPS 问题。除此之外，当进行税收协定谈判时，国家可能担心谈判对方国家国内法的一些特点可能会引起 BEPS 问题，即便这些担忧不足以使得不与对方国家签署税收协定。

28. 一个国家出于对潜在在协定缔约对方国的国内法律的特点或税收协定缔结后可能产生的变通会引发 BEPS 问题的担忧，会希望保护其税基免于这些风险。因而这些国家可能发现一个有效的方法是在协定中加入特定的条款，这些条款将限制纳税人从特定的税收优惠规则中获益或从协议缔结后国内法可能产生的实质变化中受损。

29. 以上两点建议力求实现这个目标。这些建议在 2015 年 5 月首次发表寻求公众意见。与此同时美国发布了新的类似建议，公开征求意见至 2015 年 9 月 15 日。对美国发布的最新版本建议进行讨论后，一致同意一旦美国根据相关评论决定最终版后，需要进行进一步的检查。因此，以下建议需要被重新审阅，如有必要，需于 2016 年上半年完成，这将使该建议下的任

multilateral instrument that will implement the results of the work on treaty issues mandated by the BEPS Action Plan. The following should therefore be considered as draft proposals to be further discussed:

**Proposal 1 – New treaty provisions on “special tax regimes”**

**New definition of “special tax regime” to be included in Article 3 (General Definitions)**

X) ... the term “special tax regime” with respect to an item of income or profit means any legislation, regulation or administrative practice that provides a preferential effective rate of taxation to such income or profit, including through reductions in the tax rate or the tax base. With regard to financing income, the term special tax regime includes notional interest deductions that are allowed without regard to liabilities for such interest. However, the term shall not include any legislation, regulation or administrative practice:

i) the application of which does not disproportionately benefit interest, royalties or other income, or any combination thereof;

ii) except with regard to financing income, that satisfies a substantial activity requirement;

iii) that is designed to prevent double taxation;

iv) that implements the principles of Article 7 (Business Profits) or Article 9 (Associated Enterprises);

v) that applies to persons which exclusively promote religious, charitable, scientific, artistic, cultural or educational activities;

vi) that applies to persons substantially all of the activity of which is to provide or administer pension or retirement benefits;

vii) that facilitates investment in widely-held entities that hold real property (immovable property), a diversified portfolio of securities, or any combination thereof, and that are subject to investor-protection regulation in the Contracting State in which the investment entity is established; or

viii) that the Contracting States have agreed shall not constitute a special tax regime because it does not result in a low effective rate of taxation;*

**Protocol provisions**

With reference to subparagraph X) of paragraph 1 of Article 3 (General Definitions):

The term “special tax regime” shall include:

a) in the case of ________:

i) [list relevant specific legislation, regulations and/or administrative practices in the Contracting State];

b) in the case of ________:

i) [list relevant specific legislation, regulations and/or administrative practices in the Contracting State].

With reference to subdivision viii) of subparagraph (X) of paragraph 1 of Article 3 (General Definitions):

The term “special tax regime” shall not include:

a) in the case of ________:
何决定作为多边工具文书谈判的一部分被考虑，多边工具将执行 BEPS 行动计划批准的关于税收协定事项的工作。因此以下建议应被视为草案，需要进一步讨论：

[建议 1 – 关于“特别税收制度”的新协定条款]

“特别税收制度”的新定义将被纳人第 3 条（一般定义）：

X) ... 关于一项所得或利润的“特别税收制度”一语是指向该所得或利润提供优惠有效税率的任何法律、法规或行政实践，包括降低税率或税基。关于融资所得，特别税收制度一语是指允许不考虑利息的相应责任的名义利息扣除。然而，不包含以下任何法律、法规或行政实践：

a) 其应用不会使利息、特许权使用费或其他所得或前述项目组合不成比例地受益；

b) 除金融所得外，满足实质性活动要求；

c) 制定用以防止双重征税；

d) 执行第 7 条（营业利润）或第 9 条（联属企业）的原则；

e) 适用于专门从事促进宗教、慈善、科学、艺术、文化或教育活动的人；

f) 适用于实质上所有活动为提供或管理养老金、退休金的人；

g) 促进对被广泛持有的实体的投资，这些实体持有房地产（不动产）、多样化证券投资组合或其中的任何资产组合，且受制于投资主体所在缔约国的投资人保护条例；或

h) 缔约双方同意不会构成一项特别税收制度，因为其不会导致低有效税率。

协定条款

关于第 3 条第 1 款第 X) 项（一般定义）：

“特别税收制度”应该包括：

a) 在 的情况下：

i) [列出缔约国相关的特别法律、法规和/或行政实践]

b) 在 的情况下：

i) [列出缔约国相关的特别法律、法规和/或行政实践]

关于第 3 条第 1 款第 X) 项第 viii) 目（一般定义）：
i) [list relevant specific legislation, regulations and/or administrative practices in the Contracting State];

b) in the case of ________:

i) [list relevant specific legislation, regulations and/or administrative practices in the Contracting State].

New Provisions for Articles 11, 12 and 21

New provision for Article 11 (Interest)

Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed in the first-mentioned Contracting State in accordance with domestic law if such resident is subject to a special tax regime with respect to interest in its Contracting State of residence at any time during the taxable period in which the interest is paid.

New provision for Article 12 (Royalties)

Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed in the first-mentioned Contracting State in accordance with domestic law if such resident is subject to a special tax regime with respect to royalties in its Contracting State of residence at any time during the taxable period in which the royalties are paid.

New provision for Article 21 (Other income)

Other income arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed in the first-mentioned Contracting State in accordance with domestic law if such resident is subject to a special tax regime with respect to other income in its Contracting State of residence at any time during the taxable period in which the other income is paid.

[Proposal 2 – New general treaty rule intended to make a tax treaty responsive to certain future changes in a country’s domestic tax laws]

1. If at any time after the signing of this Convention, either Contracting State provides an exemption from taxation to resident companies for substantially all foreign source income (including interest and royalties), the provisions of Articles 10 (Dividends), 11 (Interest), 12 (Royalties) and 21 (Other Income) may cease to have effect pursuant to paragraph 3 of this Article for payments to companies resident of either Contracting State.

2. If at any time after the signing of this Convention, either Contracting State provides an exemption from taxation to resident individuals for substantially all foreign source income (including interest and royalties), the provisions of Articles 10, 11, 12 and 21 may cease to have effect pursuant to paragraph 3 of this Article for payments to individuals resident of either Contracting State.

3. If the provisions of either paragraph 1 or paragraph 2 of this Article are satisfied, a Contracting State may notify the other Contracting State through diplomatic channels that it will cease to apply the provisions of Articles 10, 11, 12 and 21. In such case, the provisions of such Articles shall cease to have effect in both Contracting States with respect to payments to resident individuals or companies, as appropriate, six months after the date of such written
“特别税收制度”不包括以下情况：

a) 在情况下：

i) [列出缔约国有关的特别法律、法规或行政实践]

b) 在情况下：

i) [列出缔约国有关的特别法律、法规或行政实践]

第11条、第12条和第21条新条款

第11条新条款（利息）

发生在缔约国一方的由缔约国另一方居民受益所有的利息收入，若在利息支付所属的纳税期内的任意时点在居民所在缔约国适用与利息相关的特别税收制度，可以在首次提到的缔约国依照该缔约国的国内法律征税。

第12条新条款（特许权使用费）

发生在缔约国一方的由缔约国另一方居民受益所有的特许权使用费，若在特许权使用费支付所属的纳税期内的任意时点，在居民所在缔约国适用与特许权使用费相关的特别税收制度，可以在首次提到的缔约国依照该缔约国的国内法律征税。

第21条新条款（其他收入）

发生在缔约国一方的由缔约国另一方居民受益所有的其他收入，若在其他收入支付所属的纳税期内的任意时点，在居民所在缔约国适用与其他收入相关的特别税收制度，可以在首次提到的缔约国依照该缔约国的国内法律征税。]

[建议2 – 旨在使税收协定应对一个国家国内法律将来的特定变化的新税收协定规则]

1. 如果在签订协定后的情况时，缔约国的任意一方对其居民企业全部实质上来源于国外的所得（包括利息和特许权使用费）给予免税，根据本条第3款，针对向缔约国任意一方居民企业的支付，第10条（股息）、第11条（利息）、第12条（特许权使用费）和第21条（其他收入）的效力可以终止。

2. 如果在签订协定后的情况时，缔约国的任意一方对其居民企业全部实质上来源于国外的所得（包括利息和特许权使用费）给予免税，根据本条第3款，针对向缔约国任意一方居民个人的支付，第10条、第11条、第12条和第21条的效力可以终止。
notification, and the Contracting States shall consult with a view to concluding amendments to this Convention to restore the balance of benefits provided.]
3. 如果本条第 1 款或第 2 款的任一情况被满足，缔约国可以通过外交途径通知
缔约国另一方停止执行第 10 条、第 11 条、第 12 条和第 21 条相关条款。在此情
形下，如适当，在书面通知发出后的六个月内，上述条款将不再对居民个人或企
业的支付在任一缔约国具有效力。缔约国双方应就修订本协定的修订文本进行商
商，以恢复本协定所提供的利益平衡。}