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1.7 One of the major difficulties in deciding on the structure of a new Article is that the key elements of the Article are inextricably interrelated. For example, if the definition of the services to which the new Article applies is very broad, it may be considered necessary or appropriate to adopt a threshold for source-country taxation of in

Under Article 14, income from professional and independent services is taxable by the source country only if a resident of the other contracting state:

- a) has a fixed base that is regularly available to the resident and the income is attributable to the fixed base, or
- b) stays in the source country for 183 days or more.

2.3 Under the current provisions of the UN Model, it is relatively easy for an enterprise resident in one contracting state to earn income

problem is how to define such services to be covered by the new Article. The breadth of the services covered by the new Article will have an impact on other key features of the Article.

3.5 Perhaps the most important single issue to be decided is whether the new Article should apply only to income from technical services performed in the source country or to any payment made by a resident of the source country (or a nonresident with a PE or a fixed base in the source country) to a resident of the other contracting state in respect of technical services. If the new Article applies to allow source-country taxation of any payments for technical services irrespective of where the services are performed, the payments for technical services are treated, in effect, similarly to royalties under Article 12. On the other hand, if the new Article is limited to payments for services performed in the source country, the payments are treated, in effect, similarly to payments by an employer resident in the source country to an employee resident in the other contracting state under Article 15.

3.6 It must be decided whether the source country's right to tax should be subject to a threshold requirement and if so, what that threshold requirement should be. If the new Article applies to all payments for technical services made by residents of the source country (or nonresidents with a PE or fixed base in the source country) irrespective of where the services are performed, it must be decided whether the source country should be entitled to tax all such payments or whether there should be a minimum threshold for source-country taxation. For example, a threshold might limit source-country taxation to payments by residents of the source country in excess of a monetary amount during any 12-month period.

to show the wide range of different views and the need for compromise in order for sufficient

1. Payments for technical services arising in a Contracting State and paid to a resident of the other Contracting State who provides those services may be taxed in that other State.
2. However, such payments may also be taxed in the Contracting State in which the payments arise, and according to the laws of that State, but the tax so charged shall not exceed ___ percent of the gross amount of the payment (the percentage to be established through bilateral negotiations).
3. The term “payments for technical services” as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is the reimbursement of actual expenses incurred by the person providing the service or is made to an employee of the person making the payments.
4. Paragraph 2 shall not apply if a resident of a Contracting State carries on business in the other Contracting State through a permanent establishment or a fixed base situated therein and the technical services are effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.
5. Payments for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the technical fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the technical fees was incurred, and such technical fees are borne by the permanent establishment or fixed base.
- [6. Where, by reason of a special relationship between the payer and the person providing the services or between both of them and some other person, the amount of the technical fees paid exceeds the amount that would have been agreed upon by the payer and that person in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.]

**Article 12A – Alternative A
Explanatory Notes**

Draft Article 12A – Alternative A is modeled on the treatment of royalties under Article 12. Thus, the source country is entitled to tax payments made by a resident of the source country or borne by a PE or fixed base situated in the source country. The source country is entitled to tax payments for technical services on a gross basis at a rate to be agreed on through bilateral negotiations by the Contracting States.

The key feature of Article 12A – Alternative A is the definition of “payments for technical services.” The definition in paragraph 3 of Article 12A – Alternative A is broad and general. Importantly, however, this definition establishes that the meaning of technical services is not determined under the domestic law of the Contracting State applying the treaty, and the Commentary can make this point explicitly. Guidance concerning the proper interpretation and application of the treaty definition of technical services would be provided in the Commentary through the use of examples.

The scope of Article 12A – Alternative A is limited by the specific exclusion of any payments for technical services covered by Articles 7, 14, and payments to employees.

Article 12A – Alternative A applies to payments for technical services irrespective of whether the services are performed inside or outside the source country. This aspect of the Article may cause difficulties. First, if services are provided to consumers in the source country who are

4. The provisions of paragraph 2 shall not apply if the enterprise carries on business in the Contracting State in which the income arises through a permanent establishment or fixed base situated therein, and the income from technical services is effectively connected with such permanent establishment or fixed base or with business activities referred to in (c) of paragraph 1 of Article 7. In such case, the provisions of Article 7 or 14, as the case may be, shall apply.
5. Income from technical services shall be deemed to arise in a Contracting State if the services are performed in that State by the enterprise through employees or other individuals acting on behalf of the enterprise who are present in that State.

Article 12A - Alternative B
Explanatory Notes

The only significant difference between Alternative A and Alternative B is that under Alternative B the source country (the country in which the income from technical services arises) is entitled to tax the income only if the technical services are performed in the source country. Thus, under Alternative B, a source country is not entitled to tax payments for technical services made by residents of the source country (or nonresidents with a PE or fixed base in the source country) to residents of the other state if the services are performed outside

2. Income derived by a resident of a Contracting State from technical services arising in the other Contracting State may also be taxed in the Contracting State in which the income arises and according to the laws of that State if the services continue for more than ____ days in any 12-month period beginning or ending in the year.
3. The term “technical services” means services of a managerial, technical or consulting nature.
4. For the purposes of paragraph 2, in determining the income from technical services arising in a Contracting State, there shall be allowed as deductions any expenses incurred for the purpose of earning such income whether such expenses are incurred in the Contracting State in which the income arises or elsewhere.
5. Income from technical services shall be deemed to arise in a Contracting State if the services are performed in that State by the enterprise through employees or other individuals acting on behalf of the enterprise who are present in that State.
6. The provisions of paragraph 2 shall not apply if the enterprise carries on business in the Contracting State in which the income arises through a permanent establishment or fixed base situated therein, and the income from technical services is effectively connected with such permanent establishment or fixed base or with business activities referred to in (c) of paragraph 1 of Article 7. In such case, the provisions of Article 7 or 14, as the case may be, shall apply.

Article 12A – Alternative C
Explanatory Notes

There are two major differences between Alternative C and Alternative B. First, under Alternative C the source country is entitled to tax income from technical services only if the technical services are performed in the source country for a minimum period of days in any 12-month period. Thus, a source country is not entitled to tax income from technical services performed in the source country by a resident of the other state on a temporary or isolated basis.

The threshold for source-country tax under Alternative C is the performance of services in the source country for a minimum period of days. The minimum period could be set at a variety of levels. However, a number of days ranging between 30 and 120 would be reasonable. If a 30-day threshold is considered to be too high, then it would probably make sense to eliminate any threshold requirement entirely (i.e., adopt Alternative B). Any threshold in excess of 120 days would mean that the additional source-country taxing rights provided by Alternative C would be minimal compared with source-country taxing rights under Articles 7 and 14.

Under Article 5(3)(b) and Article 7, the source country is entitled to tax income from any services if they are provided in the source country for 183 days or more with respect to the same or a connected project. Under Article 14(1)(b), the source country is entitled to tax income from professional and other independent services if the taxpayer is present in the source country for more than 183 days.

THE DEFINITION OF TECHNICAL SERVICES

- 1) The Commentary should clarify that the meaning of management, technical and consulting services is not to be determined under domestic law.
- 2) The new Article would not apply to:
 - income from services provided through a PE or fixed base in the country in which the services arise
 - income from employment (i.e., payments by an employer to an employee providing technical services) whether or not subject to source-country tax under Article 15
 - amounts paid in reimbursement of a service provider's expenses
 - directors' fees and remuneration of top-level managerial officials under Article 16
 - income of artistes and sportspersons

- it might be possible, for example, to clarify that income derived from manual labour is not within the meaning of technical services
 - it might be possible to clarify that technical services require the service provider to have and use specialized skills, education or training
- 8) Consulting services
- the Commentary should provide a general description of what types of services are considered to be consulting services

**STRUCTURE OF THE DRAFT COMMENTARY ON ARTICLE 12A – INCOME
FROM TECHNICAL SERVICES**

Introduction/General considerations

The rationale for a separate Article dealing with payments for or income from technical services

A description of the basic features of the new Article

The relationship with other Articles, especially Articles 7 and 14

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- income from services provided through a PE or fixed base in the country in which the services arise
 - income from employment (i.e., payments by an employer to an employee providing technical services) whether or not subject to source-country tax under Article 15
 - amounts paid in reimbursement of a service provider's expenses
 - directors' fees and remuneration of top-level managerial officials under Article 16
 - income of artistes and sportspersons whether or not subject to Article 17.
- 3) However, the new Article would apply to:
- income from technical services not subject to source-country tax under Articles 7 or 14
 - income from technical services provided by persons other than artistes and sportspersons in connection with sports and entertainment activities (e.g., income derived by coaches, directors, special-effects personnel, etc.) [Alternatively, such technical services could be expressly excluded from the new Article.]
- 4) The relationship between the new Article and Article 14
- some professional and independent services would be within the definition of technical services
 - should these services be excluded from the new Article even if they are not subject to source-country tax under Article 14? For example, if a dentist performs services for residents of the source country (but not through a fixed base in the source country) should the income be subject to source-country tax?
- 5) The relationship between the new Article and Article 12
- the Commentary should clarify the relationship between the taxation of royalties under Article 12 and the taxation of income from technical services under new Article 12A
 - The Commentary should explain the difference between payments for the use of or the right to use property or information and payments for services
 - where an enterprise provides both the use of property or information and services pursuant to a single contract (so-called mixed contracts) the Commentary should clarify how the payments should be treated
- 6) Management services
- the Commentary should provide a general description of what types of services are considered to be management services
 - what types of services are considered to be management services should be illustrated with a series of examples
- 7) Technical services
- the Commentary should provide a general description of what services are considered to be technical services
 - the distinction between technical services and other services should be illustrated with a series of examples
 - it might be possible, for example, to clarify that income derived from manual labour is not within the meaning of technical services
 - it might be possible to clarify that technical services require the service provider to have and use specialized skills, education or training
- 8) Consulting services

