COMMENTARY ON ARTICLE 13
CONCERNING THE TAXATION OF CAPITAL GAINS

I. Preliminary remarks

1. A comparison of the tax laws of the OECD member countries shows that the taxation of capital gains varies considerably from country to country:

— in some countries capital gains are not deemed to be taxable income;

— in other countries capital gains accrued to an enterprise are taxed, but capital gains made by an individual outside the course of his trade or business are not taxed;

— even where capital gains made by an individual outside the course of his trade or business are taxed, such taxation often applies only in specified cases, *e.g.* profits from the sale of immovable property or speculative gains (where an asset was bought to be resold).

(Added on 30 July 1963; see HISTORY)

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2. Moreover, the taxes on capital gains vary from country to country. In some OECD member countries, capital gains are taxed as ordinary income and therefore added to the income from other sources. This applies especially to the capital gains made by the alienation of assets of an enterprise. In a number of OECD member countries, however, capital gains are subjected to special taxes, such as taxes on profits from the alienation of immovable property, or general capital gains taxes, or taxes on capital appreciation (increment taxes). Such taxes are levied on each capital gain or on the sum of the capital gains accrued during a year, mostly at special rates, which do not take into account the other income (or losses) of the taxpayer. It does not seem necessary to describe all those taxes.

(Amended on 11 April 1977; see HISTORY)

3. The Article does not deal with the above-mentioned questions. It is left to the domestic law of each Contracting State to decide whether capital gains should be taxed and, if they are taxable, how they are to be taxed. The Article can in no way be construed as giving a State the right to tax capital gains if such right is not provided for in its domestic law.

(Amended on 15 July 2014; see HISTORY)

3.1 The Article does not specify to what kind of tax it applies. It is understood that the Article must apply to all kinds of taxes levied by a Contracting State on capital gains. The wording of Article 2 is large enough to achieve this aim and to include also special taxes on capital gains. Also, where the Article allows a Contracting State to tax a capital gain, this right applies to the entire gain and not only to the part thereof that has accrued after the entry into force of a treaty (subject to contrary provisions that could be agreed to during bilateral negotiations), even in the case of a new treaty that replaces a previous one that did not allow such taxation.

(Added on 15 July 2014; see HISTORY)

II. Commentary on the provisions of the Article

General remarks

4. It is normal to give the right to tax capital gains on a property of a given kind to the State which under the Convention is entitled to tax both the property and the income derived therefrom. The right to tax a gain from the alienation of a business asset must be given to the same State without regard to the question whether such gain is a capital gain or a business profit. Accordingly, no distinction between capital gains and commercial profits is made nor is it necessary to have special provisions as to whether the Article on capital gains or Article 7 on the taxation of business profits should apply. It is however left to the domestic law of the taxing State to decide whether a tax on capital gains or on ordinary income must be levied. The Convention does not prejudge this question.

(Amended on 11 April 1977; see HISTORY)

5. The Article does not give a detailed definition of capital gains. This is not necessary for the reasons mentioned above. The words "alienation of property" are used to cover in particular capital gains resulting from the sale or exchange of property and also from a partial alienation, the expropriation, the transfer to a company in exchange for stock, the sale of a right, the gift and even the passing of property on death.

(Amended on 11 April 1977; see HISTORY)

6. Most States taxing capital gains do so when an alienation of capital assets takes place. Some of them, however, tax only so-called realised capital gains. Under certain circumstances, though there is an alienation no realised capital gain is recognised for tax purposes (*e.g.* when the alienation proceeds are used for acquiring new assets). Whether or not there is a realisation has to be determined according to the applicable domestic tax law. No particular problems arise when the State which has the right to tax does not exercise it at the time the alienation takes place.

(Amended on 11 April 1977; see HISTORY)

7. As a rule, appreciation in value not associated with the alienation of a capital asset is not taxed, since, as long as the owner still holds the asset in question, the capital gain exists only on paper. There are, however, tax laws

under which capital appreciation and revaluation of business assets are taxed even if there is no alienation.

(Added on 30 July 1963; see HISTORY)

8. Special circumstances may lead to the taxation of the capital appreciation of an asset that has not been alienated. This may be the case if the value of a capital asset has increased in such a manner that the owner proceeds to the revaluation of this asset in his books. Such revaluation of assets in the books may also occur in the case of a depreciation of the national currency. A number of States levy special taxes on such book profits, amounts put into reserve, an increase in the paid-up capital and other revaluations resulting from the adjustment of the book-value to the intrinsic value of a capital asset. These taxes on capital appreciation (increment taxes) are covered by the Convention according to Article 2.

(Amended on 11 April 1977; see HISTORY)

9. Where capital appreciation and revaluation of business assets are taxed, the same principle should, as a rule, apply as in the case of the alienation of such assets. It has not been found necessary to mention such cases expressly in the Article or to lay down special rules. The provisions of the Article as well as those of Articles 6, 7 and and 21, seem to be sufficient. As a rule, the right to tax is conferred by the above-mentioned provisions on the State of which the alienator is a resident, except that in the cases of immovable property or of movable property forming part of the business property of a permanent establishment, the prior right to tax belongs to the State where such property is situated. Special attention must be drawn, however, to the cases dealt with in paragraphs 13 to 17 below.

(Amended on 29 April 2000; see HISTORY)

10. In some States the transfer of an asset from a permanent establishment situated in the territory of such State to a permanent establishment or the head office of the same enterprise situated in another State is assimilated to an alienation of property. The Article does not prevent these States from taxing profits or gains deemed to arise in connection with such a transfer, provided, however, that such taxation is in accordance with Article 7.

(Amended on 11 April 1977; see HISTORY)

11. The Article does not distinguish as to the origin of the capital gain. Therefore all capital gains, those accruing over a long term, parallel to a steady improvement in economic conditions, as well as those accruing in a very short period (speculative gains) are covered. Also capital gains which are due to

depreciation of the national currency are covered. It is, of course, left to each State to decide whether or not such gains should be taxed.

(Amended on 11 April 1977; see HISTORY)

12. The Article does not specify how to compute a capital gain, this being left to the domestic law applicable. As a rule, capital gains are calculated by deducting the cost from the selling price. To arrive at cost all expenses incidental to the purchase and all expenditure for improvements are added to the purchase price. In some cases the cost after deduction of the depreciation allowances already given is taken into account. Some tax laws prescribe another base instead of cost, *e.g.* the value previously reported by the alienator of the asset for capital tax purposes.

(Amended on 11 April 1977; see HISTORY)

13. Special problems may arise when the basis for the taxation of capital gains is not uniform in the two Contracting States. The capital gain from the alienation of an asset computed in one State according to the rules mentioned in paragraph 12 above, may not necessarily coincide with the capital gain computed in the other State under the accounting rules used there. This may occur when one State has the right to tax capital gains because it is the State of situs while the other State has the right to tax because the enterprise is a resident of that other State.

(Amended on 11 April 1977; see HISTORY)

14. The following example may illustrate this problem: an enterprise of State A bought immovable property situated in State B. The enterprise may have entered depreciation allowances in the books kept in State A. If such immovable property is sold at a price which is above cost, a capital gain may be realised and, in addition, the depreciation allowances granted earlier may be recovered. State B, in which the immovable property is situated and where no books are kept, does not have to take into account, when taxing the income from the immovable property, the depreciation allowances booked in State A. Neither can State B substitute the value of the immovable property shown in the books kept in State A for the cost at the time of the alienation. State B cannot, therefore, tax the depreciation allowances realised in addition to the capital gain as mentioned in paragraph 12 above.

(Amended on 11 April 1977; see HISTORY)

15. On the other hand, State A of which the alienator is a resident, cannot be obliged in all cases to exempt such book profits fully from its taxes under paragraph 1 of the Article and Article 23 A (there will be hardly any problems for States applying the tax credit method). To the extent that such book profits are due to the realisation of the depreciation allowances previously claimed in

State A and which had reduced the income or profits taxable in such State A, that State cannot be prevented from taxing such book profits. The situation corresponds to that dealt with in paragraph 44 of the Commentary on Article 23 A.

(Amended on 11 April 1977; see HISTORY)

16. Further problems may arise in connection with profits due to changes of the rate of exchange between the currencies of State A and State B. After the devaluation of the currency of State A, enterprises of such State A may, or may have to, increase the book value of the assets situated outside the territory of State A. Apart from any devaluation of the currency of a State, the usual fluctuations of the rate of exchange may give rise to so-called currency gains or losses. Take for example an enterprise of State A having bought and sold immovable property situated in State B. If the cost and the selling price, both expressed in the currency of State B, are equal, there will be no capital gain in State B. When the value of the currency of State B has risen between the purchase and the sale of the asset in relation to the currency of State A, in the currency of that State a profit will accrue to such enterprise. If the value of the currency of State B has fallen in the meantime, the alienator will sustain a loss which will not be recognised in State B. Such currency gains or losses may also arise in connection with claims and debts contracted in a foreign currency. If the balance sheet of a permanent establishment situated in State B of an enterprise of State A shows claims and debts expressed in the currency of State B, the books of the permanent establishment do not show any gain or loss when repayments are made. Changes of the rate of exchange may be reflected, however, in the accounts of the head office. If the value of the currency of State B has risen (fallen) between the time the claim has originated and its repayment, the enterprise, as a whole, will realise a gain (sustain a loss). This is true also with respect to debts if between the time they have originated and their repayment, the currency of State B has fallen (risen) in value.

(Amended on 11 April 1977; see HISTORY)

17. The provisions of the Article do not settle all questions regarding the taxation of such currency gains. Such gains are in most cases not connected with an alienation of the asset; they may often not even be determined in the State on which the right to tax capital gains is conferred by the Article. Accordingly, the question, as a rule, is not whether the State in which a permanent establishment is situated has a right to tax, but whether the State of which the taxpayer is a resident must, if applying the exemption method, refrain from taxing such currency gains which, in many cases, cannot be shown but in the books kept in the head office. The answer to that latter question depends not only on the Article but also on Article 7 and on

Article 23 A. If in a given case differing opinions of two States should result in an actual double taxation, the case should be settled under the mutual agreement procedure provided for by Article 25.

(Amended on 11 April 1977; see HISTORY)

18. Moreover the question arises which Article should apply when there is paid for property sold an annuity during the lifetime of the alienator and not a fixed price. Are such annuity payments, as far as they exceed costs, to be dealt with as a gain from the alienation of the property or as "income not dealt with" according to Article 21? Both opinions may be supported by arguments of equivalent weight, and it seems difficult to give one rule on the matter. In addition such problems are rare in practice, so it therefore seems unnecessary to establish a rule for insertion in the Convention. It may be left to Contracting States who may be involved in such a question to adopt a solution in the mutual agreement procedure provided for by Article 25.

(Replaced on 11 April 1977; see HISTORY)

19. The Article is not intended to apply to prizes in a lottery or to premiums and prizes attaching to bonds or debentures.

(Renumbered and amended on 11 April 1977; see HISTORY)

20. The Article deals first with the gains which may be taxed in the State where the alienated property is situated. For all other capital gains, paragraph 5 gives the right to tax to the State of which the alienator is a resident.

(Amended on 28 January 2003; see HISTORY)

21. As capital gains are not taxed by all States, it may be considered reasonable to avoid only actual double taxation of capital gains. Therefore, Contracting States are free to supplement their bilateral convention in such a way that a State has to forego its right to tax conferred on it by the domestic laws only if the other State on which the right to tax is conferred by the Convention makes use thereof. In such a case, paragraph 5 of the Article should be supplemented accordingly. Besides, a modification of Article 23 A as suggested in paragraph 35 of the Commentary on Article 23 A is needed.

(Amended on 28 January 2003; see HISTORY)

Paragraph 1

22. Paragraph 1 states that gains from the alienation of immovable property may be taxed in the State in which it is situated. This rule corresponds to the provisions of Article 6 and of paragraph 1 of Article 22. It applies also to immovable property forming part of the assets of an enterprise. For the definition of immovable property paragraph 1 refers to Article 6. Paragraph 1

of Article 13 deals only with gains which a resident of a Contracting State derives from the alienation of immovable property situated in the other Contracting State. It does not, therefore, apply to gains derived from the alienation of immovable property situated in the Contracting State of which the alienator is a resident in the meaning of Article 4 or situated in a third State; the provisions of paragraph 5 shall apply to such gains (and not, as was mentioned in this Commentary before 2002, those of paragraph 1 of Article 21).

(Amended on 28 January 2003; see HISTORY)

23. The rules of paragraph 1 are supplemented by those of paragraph 4, which applies to gains from the alienation of all or part of the shares in a company holding immovable property (see paragraphs 28.3 to 28.8 below).

(Replaced on 28 January 2003; see HISTORY)

Paragraph 2

24. Paragraph 2 deals with movable property forming part of the business property of a permanent establishment of an enterprise. The term "movable property" means all property other than immovable property which is dealt with in paragraph 1. It includes also incorporeal property, such as goodwill, licences, emissions permits etc. Gains from the alienation of such assets may be taxed in the State in which the permanent establishment is situated, which corresponds to the rules for business profits (Article 7).

(Amended on 15 July 2014; see HISTORY)

25. The paragraph makes clear that its rules apply when movable property of a permanent establishment is alienated as well as when the permanent establishment as such (alone or with the whole enterprise) is alienated. If the whole enterprise is alienated, then the rule applies to such gains which are deemed to result from the alienation of movable property forming part of the business property of the permanent establishment. The rules of Article 7 should then apply *mutatis mutandis* without express reference thereto. For the transfer of an asset from a permanent establishment in one State to a permanent establishment (or the head office) in another State, see paragraph 10 above.

(Amended on 29 April 2000; see HISTORY)

26. On the other hand, paragraph 2 may not always be applicable to capital gains from the alienation of a participation in an enterprise. The provision applies only to property which was owned by the alienator, either wholly or jointly with another person. Under the laws of some countries, capital assets of a partnership are considered to be owned by the partners. Under some other laws, however, partnerships and other associations are treated as body

corporate for tax purposes, distinct from their partners (members), which means that participations in such entities are dealt with in the same way as shares in a company. Capital gains from the alienation of such participations, like capital gains from the alienation of shares, are therefore taxable only in the State of residence of the alienator. Contracting States may agree bilaterally on special rules governing the taxation of capital gains from the alienation of a participation in a partnership.

(Renumbered and amended on 11 April 1977; see HISTORY)

27. Certain States consider that all capital gains arising from sources in their territory should be subject to their taxes according to their domestic laws, if the alienator has a permanent establishment within their territory. Paragraph 2 is not based on such a conception which is sometimes referred to as "the force of attraction of the permanent establishment". The paragraph merely provides that gains from the alienation of movable property forming part of the business property of a permanent establishment may be taxed in the State where the permanent establishment is situated. The gains from the alienation of all other movable property are taxable only in the State of residence of the alienator as provided in paragraph 5. The foregoing explanations accord with those in the Commentary on Article 7.

(Added on 22 July 2010; see HISTORY)

27.1 For the purposes of the paragraph, property will form part of the business property of a permanent establishment if the "economic" ownership of the property is allocated to that permanent establishment under the principles developed in the Committee's report entitled *Attribution of Profits to Permanent Establishments*[1] (see in particular paragraphs 72 to 97 of Part I of the report) for the purposes of the application of paragraph 2 of Article 7. In the context of that paragraph, the "economic" ownership of property means the equivalent of ownership for income tax purposes by a separate enterprise, with the attendant benefits and burdens (*e.g.* the right to any income attributable to the ownership of that property, the right to any available depreciation and the potential exposure to gains or losses from the appreciation or depreciation of that property). The mere fact that the property has been recorded, for accounting purposes, on a balance sheet prepared for the permanent establishment will therefore not be sufficient to conclude that it is effectively connected with that permanent establishment.

(Added on 22 July 2010; see HISTORY)

27.2 In the case of the permanent establishment of an enterprise carrying on insurance activities, the determination of whether property will form part of

1 *Attribution of Profits to Permanent Establishments*, OECD, Paris, 2010.

the business property of the permanent establishment shall be made by giving due regard to the guidance set forth in Part IV of the Committee's report with respect to whether the income on or gain from that property is taken into account in determining the permanent establishment's yield on the amount of investment assets attributed to it (see in particular paragraphs 165 to 170 of Part IV). That guidance being general in nature, tax authorities should consider applying a flexible and pragmatic approach which would take into account an enterprise's reasonable and consistent application of that guidance for purposes of identifying the specific assets that form part of the business property of the permanent establishment.

(Added on 22 July 2010; see HISTORY)

Paragraph 3

28. An exception from the rule of paragraph 2 is provided for ships and aircraft operated in international traffic and for boats engaged in inland waterways transport and movable property pertaining to the operation of such ships, aircraft and boats. Normally, gains from the alienation of such assets are taxable only in the State in which the place of effective management of the enterprise operating such ships, aircraft and boats is situated. This rule corresponds to the provisions of Article 8 and of paragraph 3 of Article 22. It is understood that paragraph 3 of Article 8 is applicable if the place of effective management of such enterprise is aboard a ship or a boat. Contracting States which would prefer to confer the exclusive taxing right on the State of residence or to use a combination of the residence criterion and the place of effective management criterion are free, in bilateral conventions, to substitute for paragraph 3 a provision corresponding to those proposed in paragraphs 2 and 3 of the Commentary on Article 8.

(Amended on 28 January 2003; see HISTORY)

28.1 Paragraph 3 applies where the enterprise that alienates the property operates itself the boats, ships or aircraft referred to in the paragraph, whether for its own transportation activities or when leasing the boats, ships or aircraft on charter fully equipped, manned and supplied. It does not apply, however, where the enterprise owning the boats, ships or aircraft does not operate them (for example, where the enterprise leases the property to another person, other than in the case of an occasional bare boat lease as referred to in paragraph 5 of the Commentary on Article 8). In such a case, the gains accruing to the true owner of the property, or connected moveable property, will be covered by paragraph 2 or 5.

(Added on 28 January 2003; see HISTORY)

28.2 In their bilateral conventions, member countries are free to clarify further the application of Article 13 in this situation. They might adopt the following alternative version of paragraph 3 of the Article (see also paragraphs 4.1 and 4.2 of the Commentary on Article 22):

> 3. Gains from the alienation of property forming part of the business property of an enterprise and consisting of ships or aircraft operated by that enterprise in international traffic or movable property pertaining to the operation of such ships or aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

(Added on 28 January 2003; see HISTORY)

Paragraph 4

28.3 By providing that gains from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in a Contracting State may be taxed in that State, paragraph 4 provides that gains from the alienation of such shares and gains from the alienation of the underlying immovable property, which are covered by paragraph 1, are equally taxable in that State.

(Added on 28 January 2003; see HISTORY)

28.4 Paragraph 4 allows the taxation of the entire gain attributable to the shares to which it applies even where part of the value of the share is derived from property other than immovable property located in the source State. The determination of whether shares of a company derive more than 50 per cent of their value directly or indirectly from immovable property situated in a Contracting State will normally be done by comparing the value of such immovable property to the value of all the property owned by the company without taking into account debts or other liabilities of the company (whether or not secured by mortgages on the relevant immovable property).

(Added on 28 January 2003; see HISTORY)

28.5 In their bilateral conventions, many States either broaden or narrow the scope of the paragraph. For instance, some States consider that the provision should not only cover gains from shares but also gains from the alienation of interests in other entities, such as partnerships or trusts, that do not issue shares, as long as the value of these interests is similarly derived principally from immovable property. States wishing to extend the scope of the paragraph to cover such interests are free to amend the paragraph as follows:

> 4. Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests deriving more than 50 per cent of their

value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.

(Added on 28 January 2003; see HISTORY)

28.6 It is also possible for States to increase or reduce the percentage of the value of the shares that must be derived directly or indirectly from immovable property for the provision to apply. This would simply be done by replacing "50 per cent" by the percentage that these States would agree to. Another change that some States may agree to make is to restrict the application of the provision to cases where the alienator holds a certain level of participation in the entity.

(Added on 28 January 2003; see HISTORY)

28.7 Also, some States consider that the paragraph should not apply to gains derived from the alienation of shares of companies that are listed on an approved stock exchange of one of the States, to gains derived from the alienation of shares in the course of a corporate reorganisation or where the immovable property from which the shares derive their value is immovable property (such as a mine or a hotel) in which a business is carried on. States wishing to provide for one or more of these exceptions are free to do so.

(Added on 28 January 2003; see HISTORY)

28.8 Another possible exception relates to shares held by pension funds and similar entities. Under the domestic laws of many States, pension funds and similar entities are generally exempt from tax on their investment income. In order to achieve neutrality of treatment as regards domestic and foreign investments by these entities, some States provide bilaterally that income derived by such an entity resident of the other State, which would include capital gains on shares referred to in paragraph 4, shall be exempt from source taxation. States wishing to do so may agree bilaterally on a provision drafted along the lines of the provision found in paragraph 69 of the Commentary on Article 18.

(Replaced on 15 July 2005; see HISTORY)

28.9 Finally, a further possible exception relates to shares and similar interests in a Real Estate Investment Trust (see paragraphs 67.1 to 67.7 of the Commentary on Article 10 for background information on REITs). Whilst it would not seem appropriate to make an exception to paragraph 4 in the case of the alienation of a large investor's interests in a REIT, which could be considered to be the alienation of a substitute for a direct investment in immovable property, an exception to paragraph 4 for the alienation of a small investor's interest in a REIT may be considered to be appropriate.

(Replaced on 17 July 2008; see HISTORY)

28.10 As discussed in paragraph 67.3 of the Commentary on Article 10, it may be appropriate to consider a small investor's interest in a REIT as a security rather than as an indirect holding in immovable property. In this regard, in practice it would be very difficult to administer the application of source taxation of gains on small interests in a widely held REIT. Moreover, since REITs, unlike other entities deriving their value primarily from immovable property, are required to distribute most of their profits, it is unlikely that there would be significant residual profits to which the capital gain tax would apply (as compared to other companies). States that share this view may agree bilaterally to add, before the phrase "may be taxed in that other State", words such as "except shares held by a person who holds, directly or indirectly, interests representing less than 10 per cent of all the interests in a company if that company is a REIT". (If paragraph 4 is amended along the lines of paragraph 28.5 above to cover interests similar to shares, these words should be amended accordingly.)

(Added on 17 July 2008; see HISTORY)

28.11 Some States, however, consider that paragraph 4 was intended to apply to any gain on the alienation of shares in a company that derives its value primarily from immovable property and that there would be no reason to distinguish between a REIT and a publicly held company with respect to the application of that paragraph, especially since a REIT is not taxed on its income. These States consider that as long as there is no exception for the alienation of shares in companies quoted on a stock exchange (see paragraph 28.7 above), there should not be a special exception for interests in a REIT.

(Added on 17 July 2008; see HISTORY)

28.12 Since the domestic laws of some States do not allow them to tax the gains covered by paragraph 4, States that adopt the exemption method should be careful to ensure that the inclusion of the paragraph does not result in a double exemption of these gains. These States may wish to exclude these gains from exemption and apply the credit method, as suggested by paragraph 35 of the Commentary on Articles 23 A and 23 B.

(Renumbered on 17 July 2008; see HISTORY)

Paragraph 5

29. As regards gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4, paragraph 5 provides that they are taxable only in the State of which the alienator is a resident. This corresponds to the rules laid down in Article 22.

(Amended on 28 January 2003; see HISTORY)

30. The Article does not contain special rules for gains from the alienation of shares in a company (other than shares of a company dealt with in paragraph 4) or of securities, bonds, debentures and the like. Such gains are, therefore, taxable only in the State of which the alienator is a resident.

(Amended on 28 January 2003; see HISTORY)

31. If shares are alienated by a shareholder in connection with the liquidation of the issuing company or the redemption of shares or reduction of paid-up capital of that company, the difference between the proceeds obtained by the shareholder and the par value of the shares may be treated in the State of which the company is a resident as a distribution of accumulated profits and not as a capital gain. The Article does not prevent the State of residence of the company from taxing such distributions at the rates provided for in Article 10: such taxation is permitted because such difference is covered by the definition of the term "dividends" contained in paragraph 3 of Article 10 and interpreted in paragraph 28 of the Commentary relating thereto, to the extent that the domestic law of that State treats that difference as income from shares. As explained in paragraphs 32.1 to 32.7 of the Commentary on Articles 23 A and 23 B, where the State of the issuing company treats the difference as a dividend, the State of residence of the shareholder is required to provide relief of double taxation even though such a difference constitutes a capital gain under its own domestic law. The same interpretation may apply if bonds or debentures are redeemed by the debtor at a price which is higher than the par value or the value at which the bonds or debentures have been issued; in such a case, the difference may represent interest and, therefore, be subjected to a limited tax in the State of source of the interest in accordance with Article 11 (see also paragraphs 20 and 21 of the Commentary on Article 11).

(Amended on 15 July 2014; see HISTORY)

32. There is a need to distinguish the capital gain that may be derived from the alienation of shares acquired upon the exercise of a stock-option granted to an employee or member of a board of directors from the benefit derived from the stock-option that is covered by Article 15 or 16. The principles on which that distinction is based are discussed in paragraphs 12.2 to 12.5 of the Commentary on Article 15 and paragraph 3 of the Commentary on Article 16.

(Added on 15 July 2005; see HISTORY)

Observation on the Commentary

32.1 With respect to paragraph 3.1, *Austria* and *Germany* hold the view that when a new tax treaty enters into force, these countries cannot be deprived of the right to tax the capital appreciation which was generated in these countries before the date when the new tax treaty became applicable.

(Added on 15 July 2014; see HISTORY)

Reservations on the Article

33. *Spain* reserves its right to tax gains from the alienation of shares or other rights where the ownership of such shares or rights entitles, directly or indirectly, to the enjoyment of immovable property situated in Spain.

(Added on 22 July 2010; see HISTORY)

34. *(Deleted on 28 January 2003; see HISTORY)*

35. *Finland* reserves the right to tax gains from the alienation of shares or other corporate rights in Finnish companies, where the ownership of such shares or other corporate rights entitles to the enjoyment of immovable property situated in Finland and held by the company.

(Amended on 23 July 1992; see HISTORY)

36. *France* can accept the provisions of paragraph 5, but wishes to retain the possibility of applying the provisions in its laws relative to the taxation of gains from the alienation of shares or rights which are part of a substantial participation in a company which is a resident of France.

(Amended on 28 January 2003; see HISTORY)

37. *(Deleted on 22 July 2010; see HISTORY)*

38. *New Zealand* reserves its position on paragraphs 3 and 5.

(Amended on 28 January 2003; see HISTORY)

39. *Chile* and *Sweden* reserve the right to tax gains from the alienation of shares or other corporate rights in their companies.

(Amended on 22 July 2010; see HISTORY)

40. *Turkey* reserves the right, in accordance with its legislation, to tax capital gains from the alienation, within its territory, of movable capital and any property other than those mentioned in paragraph 2 if the delay between their acquisition and their alienation is less than two years.

(Added on 11 April 1977; see HISTORY)

41. Notwithstanding paragraph 5 of this Article, where the selling price of shares is considered to be dividends under Danish legislation, *Denmark* reserves the right to tax this selling price as dividends in accordance with paragraph 2 of Article 10.

(Amended on 28 January 2003; see HISTORY)

42. *Japan* reserves the right to tax gains from the alienation of a Japanese financial institution's shares if these shares were previously acquired by the alienator from the Government of Japan which had itself previously acquired the shares as part of the bail-out of the financial institution due to its insolvency.

(Amended on 22 July 2010; see HISTORY)

43. *Denmark*, *Ireland*, *Norway* and the *United Kingdom* reserve the right to insert in a special article provisions regarding capital gains relating to offshore hydrocarbon exploration and exploitation and related activities.

(Amended on 28 January 2003; see HISTORY)

43.1 *Greece* reserves the right to insert in a special article provisions regarding capital gains relating to offshore exploration and exploitation and related activities.

(Added on 28 January 2003; see HISTORY)

44. *Denmark*, *Norway* and *Sweden* reserve the right to insert special provisions regarding capital gains derived by the air transport consortium Scandinavian Airlines System (SAS).

(Added on 23 July 1992; see HISTORY)

45. *Korea* reserves the right to tax gains from the alienation of shares or other rights forming part of a substantial participation in a company which is a resident.

(Amended on 22 July 2010; see HISTORY)

46. The *United States* wants to reserve its right to apply its tax on certain real estate gains under the Foreign Investment in Real Property Tax Act.

(Added on 23 July 1992; see HISTORY)

47. In view of its particular situation in relation to shipping, *Greece* will retain its freedom of action with regard to the provisions in the Convention relating to capital gains from the alienation of ships in international traffic and movable property pertaining to the operation of such ships.

(Renumbered and amended on 31 March 1994; see HISTORY)

48. *Ireland* reserves the right to tax gains from the alienation of property by an individual who was a resident of Ireland at any time during the five years preceding such alienation.

(Amended on 17 July 2008; see HISTORY)

49. *Mexico* reserves its position to retain the possibility of applying the provisions in its laws relative to the taxation of gains from the alienation of shares or similar rights in a company that is a resident of Mexico.

(Amended on 28 January 2003; see HISTORY)

50. The *United States* reserves the right to include gains from the alienation of containers within the scope of paragraph 3 of the Article.

(Added on 29 April 2000; see HISTORY)

51. *Belgium*, *Luxembourg*, the *Netherlands* and *Switzerland* reserve the right not to include paragraph 4 in their conventions.

(Amended on 22 July 2010; see HISTORY)

HISTORY

Paragraph 1: Unchanged since the adoption of the 1963 Draft Convention by the OECD Council on 30 July 1963.

Paragraph 2: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 2 read as follows:

> "2. Moreover, the taxes applicable to capital gains vary from country to country. In some States capital gains are taxed as ordinary income and therefore added to the income from other sources. This applies especially to the capital gains made by the alienation of assets of an enterprise. In a number of States, however, capital gains are subjected to special taxes, such as taxes on profits from the alienation of immovable property, or capital gains taxes, or taxes on capital appreciation (increment taxes). Such taxes are levied on each capital gain or on the sum of the capital gains accrued during a year, mostly at special rates, which do not take into account the other income (or losses) of the taxpayer. It does not seem necessary to describe all those taxes."

Paragraph 3: Amended on 15 July 2014, by removing the last three sentences, which were incorporated into a new paragraph 3.1, by the Report entitled "The 2014 Update to the Model Tax Convention", adopted by the Council of the OECD on 15 July 2014. In the 1977 Model Convention and until 15 July 2014, paragraph 3 read as follows:

> "3. The Article does not deal with the above-mentioned questions. It is left to the domestic law of each Contracting State to decide whether capital gains should be taxed and, if they are taxable, how they are to be taxed. The Article can in no way be construed as giving a State the right to tax capital gains if such right is not provided for in its domestic law. The Article does not specify to what kind of tax it applies. It is understood that the Article must apply to all kinds of taxes levied by a Contracting State on capital gains. The wording of Article 2 is large enough to achieve this aim and to include also special taxes on capital gains."

Paragraph 3 was previously amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 3 read as follows:

> "3. Article 13 does not deal with the above mentioned questions. It is left to the domestic law of each Contracting State to decide whether capital gains should be

taxed and, if they are taxable, how they are to be taxed. The Article can in no way be construed as giving a State the right to tax capital gains if such right is not provided for in its domestic law. The Article does not prescribe what kind of tax may be levied. It should be understood that the Article must apply to all kind of taxes levied by a Contracting State on capital gains. The wording of Article 2 on taxes covered by the Convention is large enough to achieve this aim and to include also special taxes on capital gains."

Paragraph 3.1: Added on 15 July 2014 by the report entitled "The 2014 Update to the Model Tax Convention" adopted by the Council on 15 July 2014. Paragraph 3.1 includes the last three sentences of paragraph 3 as they read before 15 July 2014 (see history of paragraph 3).

Paragraph 4: Amended, together with the section heading preceding it, when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 4 and the section heading read as follows:

"II. COMMENTARY ON THE ARTICLE

4. It is justified to give the right to tax capital gains to the State which is entitled to tax both the property and the income derived therefrom before such property was alienated. A gain from the alienation of an asset must be taxable in the same State without regard to the question whether such gain is a capital gain or a business profit. Accordingly, no distinction between capital gains and commercial profits is made nor is it necessary to have special provisions as to whether the Article on capital gains or Article 7 in the taxation of business profits should apply. It is however left to the domestic law of the taxing State to decide whether a tax on capital gains or on ordinary income must be levied. The Convention does not prejudice this question."

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Paragraph 5: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 5 read as follows:

"5. The Article does not give a detailed definition of capital gains. This is not necessary for the reasons mentioned above. The words "alienation of property" are used to cover in particular capital gains resulting from the sale or exchange of property and also from a partial alienation, the expropriation, the transfer to a company in exchange for stock, the sale of a right, the alienation free of charge and even the passing of property on death."

Paragraph 6: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 6 read as follows:

"6. Most States taxing capital gains do so when an alienation of capital assets takes place. Some of them, however, tax only so-called realised capital gains. Under certain circumstances, though there is an alienation no realised capital gains is recognised for tax purposes (*e.g.* replacement of equipment). Whether or not there is a realisation has to be determined according to the applicable domestic tax law. No particular problems arise when the State which has the right to tax does not exercise it at the time the alienation takes places."

Paragraph 7: Unchanged since the adoption of the 1963 Draft Convention by the OECD Council on 30 July 1963.

Paragraph 8: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 8 read as follows:

> "8. Special circumstances may lead to the taxation of the capital appreciation of an asset that has not been alienated. Such taxation may occur of the value of a capital asset has increased in such a manner that the owner proceeds to the revaluation of this asset in his books. Such revaluation of assets in the books may also occur in the case of a devaluation of the national currency. A number of States levy special taxes on book profits, amounts put into reserve, an increase in the paid-up capital and other revaluations resulting from the adjustment of the book-value to the intrinsic value of a capital asset. These taxes on capital appreciation (increment taxes) are covered by the Convention according to Article 2 on taxes covered by the Convention."

Paragraph 9: Amended on 29 April 2000, by deleting the words "or pertaining to a fixed base", by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled "Issues Related to Article 14 of the OECD Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). In the 1977 Model Convention and until 29 April 2000, paragraph 9 read as follows:

> "9. Where capital appreciation and revaluation of business assets are taxed, the same principle should, as a rule, apply as in the case of the alienation of such assets. It has not been found necessary to mention such cases expressly in the Article or to lay down special rules. The provisions of the Article as well as those of Articles 6, 7 and 21, seem to be sufficient. As a rule, the right to tax is conferred by the above-mentioned provisions on the State of which the alienator is a resident, except that in the cases of immovable property or of movable property forming part of the business property of a permanent establishment or pertaining to a fixed base, the prior right to tax belongs to the State where such property is situated. Special attention must be drawn, however, to the cases dealt with in paragraphs 13 to 17 below."

Paragraph 9 was previously amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 9 read as follows:

> "9. Where capital appreciation and revaluation of business assets are taxed, the same principle should, as a rule, apply as in the case of the alienation of such assets. It is not found necessary to mention such cases expressly in the present Article or to lay down special rules. The rules of the present Article on the taxation of capital gains as well as the provisions of Article 6 on the taxation of income from immovable property. Article 7 on the taxation of business profits and Article 21 on the taxation of income not expressly mentioned in the Convention seem to be sufficient. As a rule, the right to tax is conferred by the aforementioned provisions to the State of which the taxpayer is a resident, except that in the cases of immovable property or of movable property employed in a permanent establishment or pertaining to a fixed base, the prior right to tax belongs to the State where such property is situated. Special attention must be drawn, however, to the cases dealt with in paragraph 13 to 17 below."

Paragraph 10: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 10 read as follows:

"10. In some States the transfer of property from a permanent establishment situated in the territory of such State to a permanent establishment or the head office of the same enterprise situated in another State is assimilated to an alienation of property. The present Article does not prevent these States from taxing profits or gains deemed to arise in connection with such a transfer, it being assumed, however, that such taxation is in accordance with Article 7 concerning the taxation of business profits."

Paragraph 11: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 11 read as follows:

"11. The Article does not discriminate as to the reason instrumental in producing the capital gain. Therefore all capital gains, those accruing over a long term, parallel to a steady improvement in economic conditions, as well as those accruing in a very short of the national currency are covered. It is, of course, left to each State to decide whether or not such gains should be taxed."

Paragraph 12: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 12 read as follows:

"12. The Article does not determine how to compute a capital gain, this being left to the domestic law applicable. As a rule, capital gains are calculated by deducting the cost from the selling price. To arrive at cost all expenses incidental to the purchase and all expenditure for improvements are added to the purchase price. In some cases the cost after deduction of the depreciation allowances already granted by the tax authorities is taken into account. Some tax laws prescribe another base instead of cost, *e.g.* the value previously reported by the alienator of the asset for property tax purposes."

Paragraph 13: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 13 read as follows:

"13. Special problems may arise when the basis for the taxation of capital gains is not uniform in the two Contracting States. The capital gain from the alienation of an asset computed in one State according to the rules mentioned in paragraph 12 above, may not necessarily coincide with the capital gain computed by the other State under the accounting rules used there. This may occur when one State has the right to tax capital gains because they pertain to property situated therein, while the other State has the right to tax because the enterprise is resident there."

Paragraph 14: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 14 read as follows:

"14. The following example may illustrate this problem; an enterprise of State A has bought immovable property situated in State B. The enterprise may have entered depreciation allowances in the books kept in State A. If such immovable property is sold at a price which is above cost, a capital gain may be realised and, in addition, the depreciation allowances granted earlier may be recovered. State B in which the immovable property is situated and where no books are kept does not have to take into account, when taxing the income from the immovable property, the depreciation allowances booked in State A. Neither can State B substitute the value of the immovable property shown in the books kept in State A for the cost at the time of the alienation. State B cannot, therefore, tax the depreciation allowances realised in addition to the capital gain as mentioned above."

Paragraph 15: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 15 read as follows:

"15. On the other hand, State A of which the alienator is a resident, cannot be obliged in all cases to exempt such book profits fully from its taxes under paragraph 1 of the present Article and Article 23(A) on the exemption method (there will be hardly any problems for States applying the tax credit method). As far as such book profits are due to the realisation of the depreciation allowances which State A had granted previously and which had reduced the income or profits taxable in such State A that State cannot be prevented from taxing such book profits. The situation corresponds to that dealt with in paragraph 38 of the commentary to Article 23(A)."

Paragraph 16: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 16 read as follows:

"16. Further problems may arise in connection with profits due to changes of the rate of exchange between the currencies of State A and State B. After the devaluation of the national currency of State A, enterprises of such State A may, or may have to, increase the book value of the assets, including assets situated outside the State A. Besides, and apart from any devaluation of the national currency of a State, the usual fluctuations of the rate of exchange may give rise to so-called monetary gains of losses. Take for example an enterprise of State A having bought and sold immovable property situated in State B. If the cost and the selling price, both expressed in the currency of State B, are equal, there will be no capital gain in State B. When the value of the currency of State B has risen between the purchase and the sale of the asset in relation to the currency of State A, a profit will accrue to such enterprise expressed in the currency of State A. If the value of the currency of State B has fallen in the meantime, the alienator will sustain a loss which will not be recognised by State B. Such currency gains or losses may also arise in connection with claims and debts contracted in a foreign currency. If the balance-sheet of a permanent establishment situated in State B of an enterprise of State A shows claims and debts expressed in the currency of State B, the books of the permanent establishment do not show any gain of loss when repayments are made. Changes of the rate of exchange may be reflected, however, in the accounts of the head office. If the value of the currency of State B has risen (fallen) between the time the claim has originated and its repayment, the enterprise, as a whole, will realise a gain (sustain a loss). This is true also with respect to debts if between the time they have originated and their repayment, the currency of State B has fallen (risen) in value."

Paragraph 17: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 17 read as follows:

"17. The provisions of the present Article on the taxation of capital gains do not answer all questions regarding the taxation of such currency gains. Such gains are in most cases not connected with an alienation of the asset; they may often not even be determined by the State on which, for instance, according to the situation of the permanent establishment, the right to tax capital gains is conferred by the present Article. Accordingly, the question, as a rule, is not, whether the State in which the permanent establishment is situated has a right to tax, but whether the State of which the taxpayer is a resident must, if applying the exemption method, refrain from taxing such currency gains which, in many cases, cannot be shown but in the books kept in the head office. The answer to that latter question depends not only on the present Article but also on Article 7 on the taxation of business profits and on Article 23(A) on the exemption method. It seems difficult to give one definite answer to all possible cases. The Fiscal Committee will examine the matter in a more detailed manner at a later stage. If in a given case different opinions of two States should result in an actual double taxation, the case could be settled under the mutual agreement procedure provided for by Article 25."

Paragraph 18: Replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 18 of the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963), was amended and renumbered as paragraph 19 (see history of paragraph 19) and a new paragraph 18 was added.

Paragraph 19: Corresponds to paragraph 18 of the 1963 Draft Convention. Paragraph 19 of the 1963 Draft Convention was amended and renumbered as paragraph 20 (see history of paragraph 20) when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 18 of the 1963 Draft Convention was amended and renumbered as paragraph 19 of the 1977 Model Convention. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 18 read as follows:

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"18. The Article is not intended to apply to prizes in a lottery or to bonuses on premium bonds."

Paragraph 20: Amended on 28 January 2003, by changing the reference to "paragraph 4" in the second sentence to "paragraph 5", as a consequence of the renumbering of paragraph 4 of Article 13, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. In the 1977 Model Convention and until 28 January 2003, paragraph 20 read as follows:

"20. The Article deals first with the gains which may be taxed in the State where the alienated property is situated. For all other capital gains, paragraph 4 gives the right to tax to the State of which the alienator is a resident."

Paragraph 20 of the 1977 Model Convention corresponded to paragraph 19 of the 1963 Draft Convention. Paragraph 20 of the 1963 Draft Convention was amended and renumbered as paragraph 21 (see history of paragraph 21) when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 19 of the 1963 Draft Convention was amended and renumbered as paragraph 20 of the 1977 Model Convention. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 19 read as follows:

"19. The Article deals first with the gains from the alienation of property which may be taxed in the State where such property is situated (paragraph 1 and first sentence of paragraph 2). For all other capital gains paragraph 3 gives the right to tax to the State of which the alienator is a resident."

Paragraph 21: Amended on 28 January 2003, by changing the reference to "paragraph 4" in the third sentence to "paragraph 5" as a consequence of the renumbering of paragraph 4 of Article 13, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. In the 1977 Model Convention and until 28 January 2003, paragraph 21 read as follows:

"21. As capital gains are not taxed by all States, it may be considered reasonable to avoid only actual double taxation of capital gains. Therefore, Contracting States are free to supplement their bilateral convention in such a way that a State has to forego its right to tax conferred on it by the domestic laws only if the other State on which the right to tax is conferred by the Convention makes use thereof. In such a case, paragraph 4 of the Article should be supplemented accordingly. Besides, a modification of Article 23 A as suggested in paragraph 35 of the Commentary on Article 23 A is needed."

Paragraph 21 of the 1977 Model Convention corresponded to paragraph 20 of the 1963 Draft Convention. Paragraph 21 of the 1963 Draft Convention was amended and renumbered as paragraph 22 (see history of paragraph 22) and the preceding heading was moved with it when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 20 of the 1963 Draft Convention was amended and renumbered as paragraph 21 of the 1977 Model Convention. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 20 read as follows:

"20. As capital gains are not taxed by all States, two States may find it reasonable to avoid only any actual double taxation of capital gains. The negotiating States are free to supplement their bilateral agreement in such a way that a State has to forego its right to tax conferred on it by the domestic law only if the State on which the right to tax is conferred by the Convention makes use thereof. In such a case, paragraph 3 of the Article should be supplemented accordingly. Besides, a modification of Article 23(A) on the exemption method as suggested in paragraph 33 of the Commentary to Articles 23(A) is needed."

Paragraph 22: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 29 April 2000 and until 28 January 2003, paragraph 22 read as follows:

"22. Paragraph 1 states that gains from the alienation of immovable property may be taxed in the State in which it is situated. This rule corresponds to the provisions of Article 6 and of paragraph 1 of Article 22. It applies also to immovable property forming part of the assets of an enterprise. For the definition of immovable property paragraph 1 refers to Article 6. Paragraph 1 of Article 13 deals only with gains which a resident of a Contracting State derives from the alienation of immovable property situated in the other Contracting State. It does not, therefore, apply to gains derived from the alienation of immovable property situated in the Contracting State of which the alienator is a resident in the meaning of Article 4 or situated in a third State; the provisions of paragraph 1 of Article 21 shall apply to such gains."

Paragraph 22 was previously amended on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled "Issues Related to Article 14 of the OECD Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). In the 1977 Model Convention and until 29 April 2000, paragraph 22 read as follows:

"22. Paragraph 1 states that gains from the alienation of immovable property may be taxed in the State in which it is situated. This rule corresponds to the provisions of Article 6 and of paragraph 1 of Article 22. It applies also to immovable property forming part of the assets of an enterprise or used for performing independent personal services. For the definition of immovable property paragraph 1 refers to Article 6. Paragraph 1 of Article 13 deals only with gains which a resident of a Contracting State derives from the alienation of immovable property situated in the other Contracting State. It does not, therefore, apply to gains derived from the alienation of immovable property situated in the Contracting State of which the alienator is a resident in the meaning of Article 4 or situated in a third State; the provisions of paragraph 1 of Article 21 shall apply to such gains."

Paragraph 22 of the 1977 Model Convention corresponded to paragraph 21 of the 1963 Draft Convention. Paragraph 22 of the 1963 Draft Convention was amended and renumbered as paragraph 24 (see history of paragraph 24) and the preceding heading was moved with it when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 21 of the 1963 Draft Convention was amended and renumbered as paragraph 22 of the 1977 Model Convention and the footnote off paragraph 21 was deleted. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 21 read as follows:

"21. Paragraph 1 states that gains from the alienation of immovable property may be taxed in the State in which it is situated. This rule is in accordance with the provisions of Article 6 on the taxation of income from immovable property and paragraph 1 of Article 22 on the taxation of capital. The rule applies also to immovable property forming part of the assets of an enterprise or used for performing professional services. For the definition of immovable property paragraph 1 refers to paragraph 2 of Article 6[1].

1 Attention is drawn to the fact that for capital gains tax purposes (as well as for the purposes of other taxes such as taxes on the transfer of property) it is the practice in some countries to assimilate the alienation of all shares in a company, the exclusive or main aim of which is to hold immovable property, to the alienation of such immovable property. This point of view is not shared by all States; some of them could object to the disregard of a distinct legal subject and therefore not apply paragraph 2 of Article 6. The State of which the shareholder is a resident may contend that the shares come within the scope of paragraph 3 of the Article which would mean that a capital gain realised from the sale of these shares would be taxable only in the State of the residence of the alienator. The different qualification of the same fact could result in a double taxation.

The same situation may prevail in other cases: in some countries (e.g. Norway) it is the practice to assimilate the sale of the shares in a company to the sale of the enterprise carried on by such company. Moreover, the tax law of some countries provide for the taxation of gains from the alienation of shares in a company which is a resident in the taxing State, if the alienator of the shares, even if not residing in the State, had a predominant position (material interest) therein. In such cases, each state could invoke paragraph 2 of Article 3 on definitions to justify its taxation.

Similar problems arise in connection with other provisions of a double taxation convention. They cannot be avoided as long as the terms used therein have not the same meaning in both States or are not defined by the convention. The Draft Convention of O.E.C. D., like the existing bilateral Conventions does not provide for a solution of such a conflict which is due to different qualifications of facts by two States as long as they are not defined. In conformity with Article 25 on mutual agreement procedure, however, the competent authorities have the possibility to avoid actual double taxation. Besides, negotiating States are free to agree on special provisions dealing with such cases in their bilateral Conventions. They may for instance expressly exclude certain practices mentioned above. But they may also bilaterally agree to treat the sale of all shares in a company holding exclusively immovable property as the sale of the unmovable property itself. Moreover, they could arrange for a special clause dealing with capital gains from the alienation of shares in a company in which the alienator had a predominant position. But in such cases at least an actual double taxation should be avoided (see paragraph 20 above)."

Paragraph 23: Replaced on 28 January 2003 when paragraph 23 of the 1977 Model Convention was deleted and a new paragraph was added by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. In the 1977 Model Convention and until 28 January 2003, paragraph 23 read as follows:

"23. Certain tax laws assimilate the alienation of all or part of the shares in a company, the exclusive or main aim of which is to hold immovable property, to the

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alienation of such immovable property. In itself paragraph 1 does not allow that practice: a special provision in the bilateral convention can alone provide for such an assimilation. Contracting States are of course free either to include in their bilateral conventions such special provision, or to confirm expressly that the alienation of shares cannot be assimilated to the alienation of the immovable property."

Paragraph 23 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 23 of the 1963 Draft Convention was amended and renumbered as paragraph 28 (see history of paragraph 28) and a new paragraph 23 was added.

Paragraph 24: Amended on 15 July 2014, by adding the words "emissions permits" in the third sentence, by the Report entitled "The 2014 Update to the Model Tax Convention", adopted by the Council of the OECD on 15 July 2014, on the basis of another report entitled "Tax treaty issues related to emissions permits/credits" (adopted by the OECD Committee on Fiscal Affairs on 26 June 2014). After 29 April 2000 and until 15 July 2014, paragraph 24 read as follows:

"24. Paragraph 2 deals with movable property forming part of the business property of a permanent establishment of an enterprise. The term "movable property" means all property other than immovable property which is dealt with in paragraph 1. It includes also incorporeal property, such as goodwill, licences, etc. Gains from the alienation of such assets may be taxed in the State in which the permanent establishment is situated, which corresponds to the rules for business profits (Article 7)."

Paragraph 24 was previously amended on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled "Issues Related to Article 14 of the OECD Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). In the 1977 Model Convention and until 29 April 2000, paragraph 24 read as follows:

"24. Paragraph 2 deals with movable property forming part of the business property of a permanent establishment of an enterprise or pertaining to a fixed base used for performing independent personal services. The term "movable property" means all property other than immovable property which is dealt with in paragraph 1. It includes also incorporeal property, such as goodwill, licences, etc. Gains from the alienation of such assets may be taxed in the State in which the permanent establishment or fixed base is situated, which corresponds to the rules for business profits and for income from independent personal services (Articles 7 and 14)."

Paragraph 24 of the 1977 Model Convention corresponded to paragraph 22 of the 1963 Draft Convention. Paragraph 24 of the 1963 Draft Convention was amended and renumbered as paragraph 25 (see history of paragraph 25) when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 22 of the 1963 Draft Convention was amended and renumbered as paragraph 24 of the 1977 Model Convention and the heading preceding paragraph 22 was moved with it. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 22 read as follows:

"22. Paragraph 2 deals with movable property forming part of the business assets employed in a permanent establishment of the enterprise or pertaining to a fixed base used for performing professional services. The term "movable property" means all property other than immovable property which is dealt with in paragraph 1. It includes also incorporeal property, such as goodwill, licences etc.

Gains from the alienation of such assets may be taxed in the State in which the permanent establishment or fixed base is situated, which is in accordance with the rules for business or professional income (Article 7 and 14)."

Paragraph 25: Amended on 29 April 2000, by deleting the references to "fixed base", by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled "Issues Related to Article 14 of the OECD Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). In the 1977 Model Convention and until 29 April 2000, paragraph 25 read as follows:

"25. The paragraph makes clear that its rules apply when movable property of a permanent establishment or fixed base is alienated as well as when the permanent establishment as such (alone or with the whole enterprise) or the fixed base as such is alienated. If the whole enterprise is alienated, then the rule applies to such gains which are deemed to result from the alienation of movable property forming part of the business property of the permanent establishment. The rules of Article 7 should then apply *mutatis mutandis* without express reference thereto. For the transfer of an asset from a permanent establishment in one State to a permanent establishment (or the head office) in another State, see paragraph 10 above."

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Paragraph 25 of the 1977 Model Convention corresponded to paragraph 24 of the 1963 Draft Convention. Paragraph 25 of the 1963 Draft Convention was amended and renumbered as paragraph 26 (see history of paragraph 26) when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 24 of the 1963 Draft Convention was amended and renumbered as paragraph 25 of the 1977 Model Convention. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 24 read as follows:

"24. The paragraph makes clear that its rules apply when movable property of a permanent establishment or fixed base is alienated as well as when the permanent establishment as such (alone or together with the whole enterprise) or the fixed base as such is alienated. If the whole enterprise is alienated, then the rule applies to such gains which are deemed to result from the alienation of movable property employed in the permanent establishment. The rules of Article 7 should then apply mutatis mutandis without express reference thereto. For the transfer of property from a permanent establishment in one State to a permanent establishment (or the head office) in another State, see paragraph 10 above."

Paragraph 26: Corresponds to paragraph 25 of the 1963 Draft Convention. Paragraph 26 of the 1963 Draft Convention was amended and renumbered as paragraph 27 (see history of paragraph 27) when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 25 of the 1963 Draft Convention was amended and renumbered as paragraph 26 of the 1977 Model Convention. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 25 read as follows:

"25. On the other hand, the first sentence of paragraph 2 may not always be applicable to capital gains from the alienation of a participation in an enterprise. The provision applies only to property which was owned by the alienator, either wholly or jointly with another person. Under the laws of some countries, capital assets of a partnership are considered to be owned by the partners. Under some other laws, however, partnerships and other associations are treated as legal entities, distinct from their partners (members), which means that participation in such entities are dealt with in the same way as shares in a company. Capital gains from the alienation of such participations, like capital gains from the alienation of shares, are therefore only taxable in the State of residence of the alienator. Negotiating States may agree bilaterally on special rules governing the taxation of capital gains from the alienation of a participation in a partnership[1].

1 As regards the special provisions relating to capital gains from the alienation of shares in a company, see footnote relating to paragraph 21 above."

Paragraph 27: Amended on 28 January 2003, by changing the reference to "paragraph 4" in the fourth sentence to "paragraph 5" as a consequence of the renumbering of paragraph 4 of Article 13, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 29 April 2000 and until 28 January 2003, paragraph 27 read as follows:

"27. Certain States consider that all capital gains arising from sources in their territory should be subject to their taxes according to their domestic laws, if the alienator has a permanent establishment within their territory. Paragraph 2 is not based on such a conception which is sometimes referred to as "the force of attraction of the permanent establishment". The paragraph merely provides that gains from the alienation of movable property forming part of the business property of a permanent establishment may be taxed in the State where the permanent establishment is situated. The gains from the alienation of all other movable property are taxable only in the State of residence of the alienator as provided in paragraph 4. The foregoing explanations accord with those in the Commentary on Article 7."

Paragraph 27 was previously amended on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled "Issues Related to Article 14 of the OECD Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000). In the 1977 Model Convention and until 29 April 2000, paragraph 27 read as follows:

"27. Certain States consider that all capital gains arising from sources in their territory should be subject to their taxes according to their domestic laws, if the alienator has a permanent establishment within their territory. Paragraph 2 is not based on such a conception which is sometimes referred to as "the force of attraction of the permanent establishment". The paragraph merely provides that gains from the alienation of movable property forming part of the business property of a permanent establishment or of movable property pertaining to a fixed base used for performing independent personal services may be taxed in the State where the permanent establishment or the fixed base is situated. The gains from the alienation of all other movable property are taxable only in the State of residence of the alienator as provided in paragraph 4. The foregoing explanations accord with those in the Commentary on Article 7."

Paragraph 27 of the 1977 Model Convention corresponded to paragraph 26 of the 1963 Draft Convention. Paragraph 27 of the 1963 Draft Convention was amended and renumbered as paragraph 29 (see history of paragraph 29) and the preceding heading was moved immediately before paragraph 28 when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 26 of the 1963 Draft Convention was amended and renumbered as paragraph 27 of the 1977 Model Convention. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 26 read as follows:

"26. Certain States consider that all capital gains arising from sources in their territory should be subject to their taxes according to their domestic law, if the alienator has a permanent establishment within their territory. Paragraph 2 is not based on such a conception which is sometimes referred to as "the force of attraction of the permanent establishment". The paragraph merely provides that gains from the alienation of assets forming part of the business property employed in a permanent establishment or of assets pertaining to a fixed base used for performing professional services may be taxed in the State of source. All other assets or property is taxable in the State of residence of the alienator under paragraph 3 of the Article. The foregoing explanations are in accordance with those in the Commentaries on Article 7 on the taxation of business profits."

Paragraph 27.1: Added on 22 July 2010 by the report entitled the "2010 Update to the Model Tax Convention" adopted by the OECD Council on 22 July 2010.

Paragraph 27.2: Added on 22 July 2010 by the report entitled the "2010 Update to the Model Tax Convention" adopted by the OECD Council on 22 July 2010.

Paragraph 28: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. In the 1977 Model Convention and until 28 January 2003, paragraph 28 read as follows:

"28. An exception from the rule of paragraph 2 is provided for ships and aircraft operated in international traffic and for boats engaged in inland waterways transport and movable property pertaining to the operation of such ships, aircraft and boats. Gains from the alienation of such assets are taxable only in the State in which the place of effective management of the enterprise operating such ships, aircraft and boats is situated. This rule corresponds to the provisions of Article 8 and of paragraph 3 of Article 22. It is understood that paragraph 3 of Article 8 is applicable if the place of effective management of such enterprise is aboard a ship or a boat. Contracting States which would prefer to confer the exclusive taxing right on the State of residence or to use a combination of the residence criterion and the place of effective management criterion are free, in bilateral conventions, to substitute to paragraph 3 a provision corresponding to those proposed in paragraphs 2 and 3 of the Commentary on Article 8."

Paragraph 28 of the 1977 Model Convention corresponded to paragraph 23 of the 1963 Draft Convention. Paragraph 28 of the 1963 Draft Convention was amended and renumbered as paragraph 30 (see history of paragraph 30) when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 23 of the 1963 Draft Convention was amended and renumbered as paragraph 28 of the 1977 Model Convention and the heading preceding paragraph 27 was moved immediately before paragraph 28. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 23 read as follows:

"23. An exception from the above mentioned general rule is provided for ships and aircraft operated in international traffic and for boats engaged in inland waterways transport and movable property pertaining to the operation of such ships, aircraft and boats. Gains from the alienation of such assets are taxable only in the State in which the effective place of management of the enterprise operating such ships, aircraft and boats is situated. This rule is in accordance with Article 8 on the taxation of income from shipping, inland waterways transport and air transport and with paragraph 3 of Article 22 on taxation of capital to which the second sentence of paragraph 2 of the present Article refers."

Paragraph 28.1: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 28.2: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 28.3: Added together with the heading preceding it on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 28.4: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 28.5: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 28.6: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 28.7: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 28.8: Replaced on 29 July 2005 when paragraph 28.8 was renumbered as paragraph 28.9 (see history of paragraph 28.12) and a new paragraph 28.8 was added by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005.

Paragraph 28.9: Replaced on 17 July 2008 when paragraph 28.9 was renumbered as paragraph 28.12 (see history of paragraph 28.12) and a new paragraph 28.9 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Tax Treaty Issues Related to REITs" (adopted by the OECD Committee on Fiscal Affairs on 20 June 2008).

Paragraph 28.10: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Tax Treaty Issues Relating to REITs" (adopted by the OECD Committee on Fiscal Affairs on 20 June 2008).

Paragraph 28.11: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Tax Treaty Issues Relating to REITs" (adopted by the OECD Committee on Fiscal Affairs on 20 June 2008).

Paragraph 28.12: Corresponds to paragraph 28.9 as it read before 17 July 2008. On that date paragraph 28.9 was renumbered as paragraph 28.12 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 28.9 as it read after 15 July 2005 corresponded to paragraph 28.8. On 15 July 2005 paragraph 28.8 was renumbered as paragraph 28.9 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005.

Paragraph 28.8 was added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 29: Amended together with the preceding heading, by replacing the number "4" with "5", on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. In the 1977 Model Convention and until 28 January 2003, paragraph 29 and the preceding heading read as follows:

> "*Paragraph 4*
>
> 29. As regards gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3, paragraph 4 provides that they are taxable only in the State of which the alienator is a resident. This corresponds to the rules laid down in Article 22."

Paragraph 29 of the 1977 Model Convention corresponded to paragraph 27 of the 1963 Draft Convention. Paragraph 29 of the 1963 Draft Convention was amended and renumbered as paragraph 31 (see history of paragraph 31) when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 27 of the 1963 Draft Convention was amended and renumbered as paragraph 29 of the 1977 Model Convention and the preceding heading was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 27 read as follows:

> "27. As regards gains from the alienation of capital assets other than those listed in paragraphs 1 and 2, paragraph 3 of the Article provides that they are taxable only in the State of which the alienator of such assets is a resident. This is in accordance with the rules laid down in Article 22 on the taxation of capital."

Paragraph 30: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. In the 1977 Model Convention and until 28 January 2003, paragraph 30 read as follows:

> "30. The Article does not contain special rules for gains from the alienation of shares in a company or of securities, bonds, debentures and the like. Such gains are, therefore, taxable only in the State of which the alienator is a resident."

Paragraph 30 of the 1977 Model Convention corresponded to paragraph 28 of the 1963 Draft Convention. Paragraph 30 of the 1963 Draft Convention was amended and renumbered as paragraph 37 (see history of paragraph 37) and the preceding heading was moved with it when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 28 of the 1963 Draft Convention was amended and renumbered as paragraph 30 of the 1977 Model Convention. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 28 read as follows:

> "28. The present Article does not provide for special rules for gains from the alienation of shares in a company or of securities, bonds, debentures and the like. Such gains are therefore, taxable only in the state of which the alienator is a resident[1].
>
> 1 As regards the special provisions relating to capital gains from the alienation of shares in a company, see footnote relating to paragraph 21 above."

Paragraph 31: Amended on 15 July 2014 by the Report entitled "The 2014 Update to the Model Tax Convention", adopted by the Council of the OECD on 15 July 2014. After 23 July 1992 and until 15 July 2014, paragraph 31 read as follows:

> "31. If shares are sold by a shareholder to the issuing company in connection with the liquidation of such company or the reduction of its paid-up capital, the difference between the selling price and the par value of the shares may be treated in the State of which the company is a resident as a distribution of accumulated profits and not as a capital gain. The Article does not prevent the State of residence of the company from taxing such distributions at the rates provided for in Article 10: such taxation is permitted because such difference is covered by the definition of the term "dividends" contained in paragraph 3 of Article 10 and interpreted in paragraph 28 of the Commentary relating thereto. The same interpretation may apply if bonds or debentures are redeemed by the debtor at a price which is higher than the par value or the value at which the bonds or debentures have been issued; in such a case, the difference may represent interest and, therefore, be subjected to a limited tax in the State of source of the interest in accordance with Article 11 (see also paragraphs 20 and 21 of the Commentary on Article 11)."

Paragraph 31 was previously amended on 23 July 1992 by replacing the reference therein to paragraph 27 of the Commentary on Article 10 and to paragraphs 18 and 19 of the Commentary on Article 11 by a reference to paragraph 28 and to paragraphs 20 and 21 respectively, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 31 read as follows:

> "31. If shares are sold by a shareholder to the issuing company in connection with the liquidation of such company or the reduction of its paid-up capital, the difference between the selling price and the par value of the shares may be treated in the State of which the company is a resident as a distribution of accumulated profits and not as a capital gain. The Article does not prevent the State of residence of the company from taxing such distributions at the rates provided for in Article 10: such taxation is permitted because such difference is covered by the definition of the term "dividends" contained in paragraph 3 of Article 10 and interpreted in paragraph 27 of the Commentary relating thereto. The same interpretation may apply if bonds or debentures are redeemed by the debtor at a price which is higher than the par value or the value at which the bonds or debentures have been issued; in such a case, the difference may represent interest and, therefore, be subjected to a limited tax in the State of source of the interest in accordance with Article 11 (cf. also paragraphs 18 and 19 of the Commentary on Article 11)."

Paragraph 31 of the 1977 Model Convention corresponded to paragraph 29 of the 1963 Draft Convention. Paragraph 31 of the 1963 Draft Convention was deleted when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 29 of the 1963 Draft Convention was amended and renumbered as paragraph 31. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 29 read as follows:

> "29. If shares are sold by a shareholder to the issuing company in connection with the liquidation of such company or the reduction of its paid-up capital, the difference between the selling price and the par-value of the shares may be treated by the State of which the company is a resident as a distribution of accumulated profits and not as a capital gain. The present Article is not intended to prevent the State of the residence of the company from taxing such distributions at the rates provided for in Article 10 on the taxation of dividends: such taxation is in accordance with the definition contained in paragraph 3 of Article 10 and with the interpretation given to this provision in paragraph 39 of the Commentary relating thereto. The same interpretation may apply if bonds or debentures are redeemed by the debtor at a price which is higher than the par-value or the value at which the bonds or debentures have been issued; in such a case, the difference may represent interest and, therefore, be subjected to a limited tax in the State of source of the interest in accordance with Article II on the taxation of interest (cf. also paragraphs 24 and 25 of the Commentary to Article 11)."

Paragraph 31 of the 1963 Draft Convention was deleted when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 31 read as follows:

> "31. The *United States*, in accordance with its basic position, reserves the right to tax its citizens and corporations on gains from the alienation of property, whenever they may be resident or the property situated. In accordance with its law, the United States also reserves the right to tax non-resident aliens on the capital gains derived from the sale in the United States of personal (movable) property if such sale occurs while the nonresident is in the United States (or under certain other circumstances described in its law). Because "movable property" and "immovable property" are terms not used in the United States law, the United

States reserves the right to employ the terms "personal property" and "real property" in its bilateral negotiations."

Paragraph 32: Added on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005, on the basis of another report entitled "Cross-Border Income Tax Issues Arising From Employee Stock Option Plans" (adopted by the OECD Committee on Fiscal Affairs on 16 June 2004).

Paragraph 32 as it read before 31 March 1994 was amended and renumbered as paragraph 47 by the report entitled "1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994. At the same time, the heading preceding paragraph 32 was deleted (see history of paragraph 47).

Paragraph 32.1: Added together with the preceding heading on 15 July 2014 by the report entitled "The 2014 Update to the Model Tax Convention" adopted by the Council on 15 July 2014.

Paragraph 33: Added on 22 July 2010 by the report entitled the "2010 Update to the Model Tax Convention" adopted by the OECD Council on 22 July 2010.

Paragraph 33 as it read before 17 July 2008 was deleted by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008. After 15 July 2005 and until 17 July 2008, paragraph 33 read as follows:

"33. *Australia* reserves the right to tax gains from the alienation of property connected with Australia other than property mentioned in the first four paragraphs of this Article."

Paragraph 33 was amended on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005. After 23 July 1992 and until 15 July 2005, paragraph 33 read as follows:

"33. *Australia* reserves the right to tax gains from the alienation of property other than property mentioned in the first three paragraphs of this Article. It also reserves the right to propose changes to reflect the fact that the terms "movable property" and "immovable property" are terms not used in Australian law."

Paragraph 33 was previously amended on 23 July 1992 by the report entitled "The Revision of the Model Convention" adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 33 read as follows:

"33. *Australia* reserves the right to propose changes to reflect the facts that Australia does not levy a capital gains tax and that the terms "movable property" and "immovable property" are terms not used in Australian law."

Paragraph 33 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 33 of the 1963 Draft Convention was deleted and a new paragraph 33 was added, together with the heading preceding it. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 33 read as follows:

"33. With respect to paragraph 3 of the Article, *Belgium*, in view of the income tax reform law of 20th November, 1962, reserves its position as regards:

a) the special levy imposed by the new law in the case of the redemption of their shares or stock by companies limited by shares and limited partnerships with share capital or by any companies, associations, establishments or bodies constituted in Belgium otherwise than in one of the forms specified in the Commercial Code;

b) the special levy imposed by the same law in the case of the division of the assets of such legal persons as are mentioned in sub-paragraph a) above or of partnerships of individuals not opting for their profits to be charged to personal income tax in the name of the partners.

This reservation is dictated by the consideration that these special levies on the company, etc., are really in the nature of a composition satisfying all personal taxes that would be due from the shareholders or partners on the capital gains or distributions of profits in question here. Belgium considers that the limitations provided for in the case of distribution taxes on dividends do not apply to these special levies."

Paragraph 34: Deleted on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003. After 23 July 1992 and until 28 January 2003, paragraph 34 read as follows:

"34. *Canada* reserves its position on paragraph 4 in order to keep the right to tax gains from the alienation of shares of a company, or of interests in a partnership or trust, the value of which is derived principally from immovable property situated in Canada and in order to keep the right to tax gains of an individual who was a resident of Canada at any time during the 6 years preceding the alienation of a particular property."

Paragraph 34 was previously amended on 23 July 1992 by the report entitled "The Revision of the Model Convention" adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 34 read as follows:

"34. *Canada* reserves its position on paragraph 4 of the Article, in order to reserve the right to tax gains from the alienation of property, other than those mentioned in the first three paragraphs."

Paragraph 34 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 35: Amended on 23 July 1992, by substituting the word "held" for the word "owned", by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 35 read as follows:

"35. *Finland* reserves the right to tax gains from the alienation of shares or other corporate rights in Finnish companies, where the ownership of such shares or other corporate rights entitles to the enjoyment of immovable property situated in Finland and owned by the company."

Paragraph 35 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 36: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. In the 1977 Model Convention and until 28 January 2003, paragraph 36 read as follows:

"36. *France* can accept the provisions of paragraph 4, but wishes to retain the possibility of applying the provisions in its laws relative to the taxation of gains from the alienation of shares or rights which are part of a substantial participation in a company which is a resident of France, or of shares or rights of companies the assets of which consist mainly of immovable property situated in France."

Paragraph 36 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 37: Deleted on 22 July 2010 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. In the 1977 Model Convention and until 22 July 2010, paragraph 37 read as follows:

"37. *Italy* reserves the right to subject capital gains from Italian sources to the taxes imposed by its law whenever the alienator has a permanent establishment in Italy, even if the property or assets alienated did not form part of the business property employed in such permanent establishment"

Paragraph 37 of the 1977 Model Convention corresponded to paragraph 30 of the 1963 Draft Convention, adopted by the OECD Council on 30 July 1963. Paragraph 30 of the 1963 Draft Convention was renumbered as paragraph 37 and the preceding heading was moved immediately before paragraph 33 when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 38: Amended on 28 January 2003, by changing the reference to "paragraph 4" in the reservation to "paragraph 5" as a consequence of the renumbering of paragraph 4 of Article 13, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. In the 1977 Model Convention and until 28 January 2003, paragraph 38 read as follows:

"38. *New Zealand* reserves its position on paragraphs 3 and 4."

Paragraph 38 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 39: Amended on 22 July 2010, by adding Chile as a country making the reservation, by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 23 July 1992 and until 22 July 2010, paragraph 39 read as follows:

"39. *Sweden* wants to reserve the right to tax gains from the alienation of shares or other corporate rights in Swedish companies."

Paragraph 39 of the 1977 Model Convention was replaced on 23 July 1992 when it was deleted a new paragraph was added by the report entitled "The Revision of the Model Convention" adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 39 read as follows:

"39. *Portugal* reserves the right to tax gains from the increase in capital of companies with a head office or place of effective management in Portugal, when the increase results from the capitalisation of reserves or the issue of shares."

Paragraph 39 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 40: Added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 41: Amended on 28 January 2003 by changing the reference to "paragraph 4" in the reservation to "paragraph 5" as a consequence of the renumbering of paragraph 4 of Article 13 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 23 July 1992 and until 28 January 2003, paragraph 41 read as follows:

"41. Notwithstanding paragraph 4 of this Article, where the selling price of shares is considered to be dividends under Danish legislation, *Denmark* reserves the right to tax this selling price as dividends in accordance with paragraph 2 of Article 10."

Paragraph 41 was added on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 42: Amended on 22 July 2010 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 23 July 1992 and until 22 July 2010, paragraph 42 read as follows:

"42. *Japan* wishes to retain the right to tax gains from the alienation of shares or other corporate rights which are part of a substantial participation in a Japanese company."

Paragraph 42 was added on 23 July 1992 by the report entitled “The Revision of the Model Convention”, adopted by the OECD Council on 23 July 1992.

Paragraph 43: Amended on 28 January 2003, by adding Ireland to the list of countries making the reservation, by the report entitled “The 2002 Update to the Model Tax Convention”, adopted by the OECD Council on 28 January 2003. After 31 March 1984 and until 28 January 2003, paragraph 43 read as follows:

> “43. *Denmark*, *Norway* and the *United Kingdom* reserve the right to insert in a special article provisions regarding capital gains relating to offshore hydrocarbon exploration and exploitation and related activities.”

Paragraph 43 was previously amended on 31 March 1994, by adding the United Kingdom to the list of countries making the reservation, by the report entitled “1994 Update to the Model Tax Convention”, adopted by the OECD Council on 31 March 1994. After 23 July 1992 and until 31 March 1994, paragraph 43 read as follows:

> “43. *Denmark* and *Norway* reserve the right to insert in a special article provisions regarding capital gains relating to offshore hydrocarbon exploration and exploitation and related activities.”

Paragraph 43 was added on 23 July 1992 by the report entitled “The Revision of the Model Convention”, adopted by the OECD Council on 23 July 1992.

Paragraph 43.1: Added on 28 January 2003 by the report entitled “The 2002 Update to the Model Tax Convention”, adopted by the OECD Council on 28 January 2003.

Paragraph 44: Added on 23 July 1992 by the report entitled “The Revision of the Model Convention”, adopted by the OECD Council on 23 July 1992.

Paragraph 45: Amended on 22 July 2010, by deleting Spain from the list of countries making the reservation, by the report entitled “The 2010 Update to the Model Tax Convention”, adopted by the OECD Council on 22 July 2010. After 28 January 2003 and until 22 July 2010, paragraph 45 read as follows:

> “45. *Korea* and *Spain* reserve the right to tax gains from the alienation of shares or other rights forming part of a substantial participation in a company which is a resident.”

Paragraph 45 was previously amended on 28 January 2003 by the report entitled “The 2002 Update to the Model Tax Convention” adopted by the OECD Council on 28 January 2003. After 23 October 1997 and until 28 January 2003, paragraph 45 read as follows:

> “45. *Korea* and *Spain* reserve the right to tax gains from the alienation of shares or other rights in a company whose assets consist mainly of immovable property situated on their territory. They also reserve the right to tax gains from the alienation of shares or other rights forming part of a substantial participation in a company which is a resident.”

Paragraph 45 was previously amended on 23 October 1997, by adding Korea as a country making the reservation, by the report entitled “The 1997 Update to the Model Tax Convention”, adopted by the OECD Council on 23 October 1997. After 23 July 1992 and until 23 October 1997, paragraph 45 read as follows:

> “45. *Spain* reserves its right to tax gains from the alienation of shares or other rights in a company whose assets consist mainly of immovable property situated in Spain. It also reserves its right to tax gains from the alienation of shares or other rights forming part of a substantial participation in a company which is a resident of Spain.”

Paragraph 45 was added on 23 July 1992 by the report entitled “The Revision of the Model Convention”, adopted by the OECD Council on 23 July 1992.

Paragraph 46: Added on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 47: Corresponds to paragraph 32, as it read before 31 March 1994. On that date paragraph 32 was amended and renumbered as paragraph 47 and the heading preceding paragraph 32 was deleted by the report entitled "The 1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994. In the 1977 Model Convention and until 31 March 1994, paragraph 32 and the heading preceding it read as follows:

> "*Special Derogation*
>
> 32. In view of its particular situation in relation to shipping, *Greece* will retain its freedom of action with regard to the provisions in the Convention relating to profits from the operation of ships in international traffic, to remuneration of crews of such ships, to capital represented by ships in international traffic and by movable property pertaining to the operation of such ships, and to capital gains from the alienation of such ships and assets."

Paragraph 32 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 32 of the 1963 Draft Convention was deleted and a new paragraph 32 and preceding heading were added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 32 read as follows:

> "32. *Spain* reserves the right to tax capital gains from the alienation of movable capital within its territory. This reserve takes into account that the Spanish exchange control regulations are far more liberal with regard to the repatriation of foreign capital or profits derived therefrom than with regard to investments of Spanish residents abroad. Moreover Spain should not be deprived of the right to tax capital gains as long as such taxation can be used as an instrument of economic policy."

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Paragraph 48: Amended on 17 July 2008, by replacing the duration of "three years" with "five years", by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008. After 28 January 2003 and until 17 July 2008, paragraph 48 read as follows:

> "48. *Ireland* reserves the right to tax gains from the alienation of property by an individual who was a resident of Ireland at any time during the three years preceding such alienation."

Paragraph 48 was replaced on 28 January 2003 when it was deleted and a new paragraph was added by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 21 September 1995 and until 28 January 2003, paragraph 48 read as follows:

> "48. *Ireland* reserves the right to subject to tax gains from the alienation of shares, rights, or an interest in a company the assets of which consist primarily of immovable property."

Paragraph 48 was added on 21 September 1995 by the report entitled "The 1995 Update to the Model Tax Convention" adopted by the OECD Council on 21 September 1995.

Paragraph 49: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 21 September 1995 and until 28 January 2003, paragraph 49 read as follows:

> "49. *Mexico* reserves its position to retain the possibility of applying the provisions in its laws relative to the taxation of gains from the alienation of shares or rights

that are part of a substantial participation in a company that is a resident of Mexico, or of shares or rights of companies the assets of which consist mainly of immovable property situated in Mexico."

Paragraph 49 was added on 21 September 1995 by the Report by entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995.

Paragraph 50: Added on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000.

Paragraph 51: Amended on 22 July 2010, by adding Switzerland to the list of countries making the reservation, by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 17 July 2008 and until 22 July 2010, paragraph 51 read as follows:

"51. *Belgium*, *Luxembourg* and the *Netherlands* reserve the right not to include paragraph 4 in their conventions."

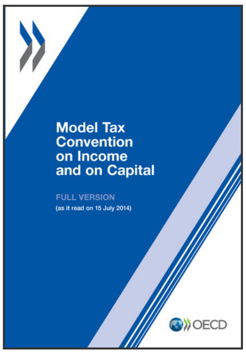
Paragraph 51 was previously amended on 17 July 2008, by adding the Netherlands to the list of countries making the reservation, by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008. After 15 July 2005 and until 17 July 2008, paragraph 51 read as follows:

"51. *Belgium* and *Luxembourg* reserve the right not to include paragraph 4 in their conventions."

Paragraph 51 was previously amended on 15 July 2005, by adding Belgium as a country making the reservation, by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005. After 28 January 2003 and until 15 July 2005, paragraph 51 read as follows:

"51. *Luxembourg* reserves the right not to include paragraph 4 in its conventions."

Paragraph 51 was added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.



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